UNIVERSIDADE FEDERAL DE MINAS GERAIS

FACULDADE DE DIREITO

PROGRAMA DE PÓS-GRADUAÇÃO EM DIREITO

FELIPE GUIMARÃES ASSIS TIRADO

HUMAN RIGHTS, TRANSITIONAL JUSTICE AND TRANSNATIONAL LAW: towards accountability for crimes against humanity in Brazil

Belo Horizonte

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Dissertação apresentada ao Programa de Pós-Graduação em Direito da Faculdade de Direito da Universidade Federal de Minas Gerais como requisito parcial para a obtenção do título de Mestre em Direito.

Linha de Pesquisa: História, Poder e Liberdade.

Área de estudo: Internacionalização do Direito, Justiça de Transição e Jurisdição Constitucional na consolidação da Democracia.

Orientador: Prof. Dr. Emilio Peluso Neder Meyer

Coorientador: Prof. Dr. Marcelo Andrade Cattoni de Oliveira

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Felipe Guimarães Assis Tirado

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No podemos cambiar nuestro pasado,
solo nos queda aprender de lo vivido,
esta es nuestra responsabilidad y nuestro desafío.
Michelle Bachelet

AGRADECIMENTOS

Primeiramente, agradeço ao Prof. Dr. Emilio Peluso, pela inestimável orientação e pela amizade. Agradeço à coorientação do Prof. Dr. Marcelo Cattoni, com quem iniciei minha vida acadêmica e a quem serei eternamente grato. Gostaria de agradecer, ainda, aos membros da minha Banca de Qualificação, Professores Dr. Carlos Haddad e Dr. David Gomes, pela atenção e pelas valiosas contribuições.

Agradeço aos amigos da Faculdade de Direito da UFMG, Gustavo, Helena, Igor, Jessica, Loni, Lucas, Thiago, e muitos outros aos quais, apesar de não ter mencionado, serei sempre grato. Aos colegas do CJT e da RLAJT, bem como aos amigos e membros do PPGD e às colegas de Representação Discente devo minha gratidão, em especial Jessica Holl e Raquel Possolo, pelo constante diálogo e inúmeras oportunidades de aprendizado. Igualmente, agradeço aos alunos da graduação com quem tive contato, em especial Gabriela e Marisa, por todo o suporte prestado, espero ter retribuído de alguma forma.

Nesta ocasião, agradeço aos Drs. Gustavo Melo, Maria Christina Neves e Maria Helena Nolasco pelo incalculável incentivo e pelas inúmeras oportunidades de aprendizado.

Agradeço aos que estão comigo desde o início. Em especial, agradeço aos amigos Gustavo, Lucas, Mateus, Rodrigo e Tiago, e aos primos Pedro e Sérgio, obrigado pelo permanente suporte. Agradeço também aos amigos de São Paulo, Adam, Felipe e Gabriel, e aos amigos da Inglaterra, Arthur, João e Hannah, Ariane, e Erica, mesmo que à distância, extremamente presentes. Ainda em relação à Inglaterra, sou grato pelas oportunidades que tive em Birkbeck, LSE e King‘s, e às pessoas que lá conheci, em especial David e Thiago.

Enfim, meus mais profundos agradecimentos à minha família. Sem vocês nada disso seria possível. Aos meus avós e minha mãe, Marcella, pelo suporte ilimitado e pelo exemplo que constituem. Por fim, agradeço à minha irmã, Isabela, a pessoa mais sensacional que tive o prazer de conhecer nessa vida. A todos vocês dedico esta dissertação.

ABSTRACT

This dissertation aims to analyse the conditions of possibility for criminal accountability for the crimes against humanity perpetrated during the dictatorship in Brazil. More specifically, this research intends to ascertain how the Federal Courts utters decisions for criminal accountability of the agents of the authoritarian regime. It departs from the comprehension that decisions towards accountability are grounded in International Human Rights Law in a transnational perspective. This comprehension is due to the fact that the majority of the Brazilian Judiciary's rulings regarding accountability reject such claims as they reject a transnational approach to human rights. Therefore, this dissertation intends to determine which factors are relevant for the occurrence of such rulings towards accountability. Moreover, this research aims to discern what the foundations of such rulings are. Finally, by performing such analysis, it seeks to present some of the challenges accountability faces in Brazil, due to the resistance of a transnational comprehension of human rights, and possible routes to overcome them.

RESUMO

A presente dissertação tem como objeto uma análise das condições de possibilidade da responsabilização criminal pelos crimes contra a humanidade perpetrados durante a ditadura brasileira. Esta pesquisa se propõe, especificamente, a investigar como a Justiça Federal decide em favor da responsabilização de agentes do regime autoritário. A investigação parte do entendimento que sentenças que decidam pela responsabilização sejam fundamentadas com base no Direito Internacional dos Direitos Humanos, em perspectiva transnacional. Tal entendimento se deve ao fato de que a maioria das decisões prolatadas pelo Judiciário se opõe à responsabilização, assim como se opõe a uma perspectiva transnacional em relação aos direitos humanos. Desta forma, esta dissertação pretende determinar quais fatores seriam relevantes para que decisões em favor da responsabilização ocorram. Ademais, esta empreitada busca identificar quais as fundamentações de tais decisões. Por fim, efetuando tal análise, esta investigação visa apresentar alguns dos desafios em relação à responsabilização no Brasil, em razão da resistência a interpretações transnacionais de direitos humanos, e possíveis rotas para superar tais obstáculos.

LIST OF ABREVIATIONS

2CCR – 2ª Câmara de Coordenação e Revisão

ADCT – Ato das Disposições Constitucionais Transitórias

ADPF – Arguição de Descumprimento de Preceito Fundamental

CA-MJ – Comissão de Anistia do Ministério da Justiça

CIE – Centro de Informações do Exército

CNV – Comissão Nacional da Verdade

CPP – Código de Processo Penal

CPP – Código Penal

IHRL – International Human Rights Law

DEOPS – Departamento Estadual de Ordem Política e Social

DOI-CODI – Destacamento de Operações de Informação - Centro de Operações de Defesa Interna

DOPS – Departamento de Ordem Política e Social

DSN – Doutrina da Segurança Nacional

ESG – Escola Superior de Guerra

GTJT – Grupo de Trabalho Justiça de Transição

HC – Habeas Corpus

IACHR – Inter American Commission of Human Rights

IACtHR – Inter American Court of Human Rights

IHRL – International Human Rights Law

IMT – International Military Tribunal

MPF – Ministério Público Federal

OAB – Ordem dos Advogados do Brasil

PC do B – Partido Comunista do Brasil

PCB – Partido Comunista Brasileiro

PGR – Procurador Geral da República

PIC – Procedimento Investigatório Criminal

PIDE – Polícia Internacional e de Defesa do

QG – Quartel General

RESE – Recurso em Sentido Estrito

REsp – Recurso Especial

RE – Recurso Extraordinário

SNI – Serviço Nacional de Informações

STF – Supremo Tribunal Federal

STM – Superior Tribunal Militar

STJ – Superior Tribunal de Justiça

TRF – Tribunal Regional Federal

TSE – Tribunal Superior Eleitoral

UN – United Nations

UNE – União Nacional dos Estudantes

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INTRODUCTION

Rubens Beyrodt Paiva was born on 26 September 1929, in the city of Santos, in the state of São Paulo.[1] In 1962, he was elected Congressman for São Paulo, by the Brazilian Labour Party (*Partido Trabalhista Brasileiro - PTB*).[2] Rubens Paiva was married to Maria Eunice Facciola Paiva, with whom he had five children.

In the early days of the 1964 *coup*, the 1st Institutional Act suspended[3] his mandate as a Congressman. The former Congressmen went in exile to the Yugoslav Embassy. Later on, he left Brazil for France, and then England. He returned to Brazil in early 1965, going through São Paulo and settling in Rio de Janeiro. On 20 January 1971, the former Congressman was taken by military personnel to give testimony, for he was the addressee of a letter apprehended by agents of the dictatorship. This letter was sent to him by a political dissident of the authoritarian regime.[4]

Rubens Paiva accompanied the military personnel without resistance. The former Congressman left his house to follow the soldiers driving his own car. He took with him fourteen books and four writing pads. He could not expect the sudden turn in the events that would follow. It was 20 January 1971, and Rubens Paiva was being taken to the General Headquarters (HQ) of the 3rd Air Force Zone (*Quartel General – QG – da 3ª Zona Aérea*). Within the next two days, the victim would be illegally arrested and kept in custody of military personnel. During those days, he was referred to the Department of Operations of

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[1] This narrative is a digest of information disposed in the National Truth Commission (*Comissão Nacional da Verdade*) Final Report and the Federal Prosecution Service Investigative Report. Respectively: (BRASIL, CNV, 2014c, p. 519 *et seq*) and (BRASIL, MPF, 2017). When a direct reference is made, the source will be stated.

[2] The PTB was also the party of the elected President João Goulart.
As vice-leader of the PTB in the House of Representatives (Câmara dos Deputados), he served as vice-president of a Parliamentary Inquiry Commission (Comissão Parlamentar de Inquérito – CPI), installed to investigate complaints against activities of the Institute for Social Research and Study (Instituto de Pesquisas e Estudos Sociais - IPES) and the Brazilian Institute of Democratic Action (Instituto Brasileiro de Ação Democrática - IBAD). Those institutions were accused, in 1963, of receiving international resources to destabilize Goulart's government (BRASIL, CNV, 2014c, p. 519).

[3] "'Institutional or Complementary Acts' were statutes approved by the so-called 'Revolution Command' in order to give a semblance of legality to the regime. Of course, they were in all aspects illegitimate, since they were simply imposed by those responsible for the coup of 1964 and were not approved by any legislative institution. So, the legislative procedure required by, the Constitutions of 1946 and 1967, as well as the Constitutional Amendment n. 1 of 1969 (an imposed Constitution, as the one of 1967, in fact) was not accomplished in the cases of institutional and complementary acts" (MEYER, 2017, p. 47).
Furthermore, the term used in Portuguese for the act of suspension of an electoral mandate is *cassar o mandato*.

[4] "In the early hours of January 20 of 1971, after the detention of Cecília de Barros Correia Viveiros de Castro and Marilene de Lima Corona, by agents of the Air Force Center of Information (Centro de Informações da Aeronáutica - CISA) at Galeão airport, there were found letters from exiled political militants in Chile. Given that Rubens Paiva was one of the recipients of the letters, in that same day six agents armed with machine guns invaded the house of the suspended Congressman." (BRASIL, CNV, 2014c, p. 520)

Information - Internal Defence Operations Centre (*Destacamento de Operações de Informação - Centro de Operações de Defesa Interna* - henceforth DOI-CODI) of the city of Rio de Janeiro. There he would be tortured. This former procedure would lead to the death of the victim, according to testimony given by eyewitnesses to the National Truth Commission (*Comissão Nacional da Verdade* – henceforth CNV*)*:[5]

> (...) when I used the expression unconventional interrogation in these statements, I meant the pressure made by Lieutenant Hughes on the mister, which I would come to know was Rubens Paiva, against the wall. On occasion, in view of the physical conditions of the mister himself, I had the feeling that he could not resist. I cannot say, however, whether Mr Rubens Paiva's physical condition had other medical backgrounds, or whether this fact led to his death (...) (sic) (BRASIL, CNV, 2014c, p. 523).[6]

In order to conceal the circumstances of the death, agents of the regime simulated the escape of the former Congressman. Further on, they disappeared with the body of the victim.[7] Around forty years after the crime, the circumstances of the murder and disappearance of the Congressman Rubens Beyrodt Paiva were investigated by both the CNV and the Federal Prosecution Service (*Ministério Público Federal* – henceforth MPF).[8] The conclusions of both investigations were quite similar: the former Congressman had been killed and disappeared "(...) when he was under the custody of the Brazilian state, in the context of systematic human rights violations promoted by the military dictatorship, implemented in April of 1964" (BRASIL, CNV, 2014c, p. 528).

Roughly 40 years after the facts narrated above, the MPF[9] would lodge a criminal complaint[10] regarding the death and criminal disposal of the corpse of Mr Paiva. The

[5] The Commission functioned during the years of 2012 – 2014, investigating the violations of human rights from 1946 to 1988, in Brazil. The Commission was instituted by the Law nº 12.528/2011.
[6] All the translations herein were performed by the author, thus they are of his sole responsibility.
[7] As a conclusion of both reports (CNV and MPF) the practice of simulating the escape of victims of the regime or even their deaths was common during that period. Among those, it is noteworthy the weak attempt that was made regarding a simulation of suicide by Vladimir Herzog, while under custody of the state authority. For more information: http://vladimirherzog.org/biografia/ access on 19 June 2018.
[8] Respectively: (BRASIL, CNV, 2014, P. 519 et seq.) (BRASIL, MPF, 2017, p.194 et seq.).
"The MPF investigations lasted about three years and involved the analysis of 13 volumes of documents. Testimony was taken from 27 people (witnesses and investigated) in six different cities, for a total of 41.3 hours of video or printed records. 33 subpoenas and 16 offices were issued requesting information. The investigations identified the involvement of the five denounced, as well as nine others involved, already deceased" (BRASIL, MPF, 2017, p. 212)
[9] The translations regarding the Federal Prosecution Service (*Ministério Público Federal* – henceforth MPF) follow the established by the Office. Available at:
http://www.mpf.mp.br/atuacao-tematica/sci/dados-da-atuacao/links-tematicos/traducoes-oficiais-do-mpf, access on 19 June 2018.
[10] This dissertation follows the standard designated by the Black's Law Dictionary (GARNER ed., 2009).
Examples on the terms above:
Lodge (verb) (British English): "1. To deliver a legal document to the court clerk or record custodian for placement into the official record."

complaint is part of an initiative of the MPF, aiming at criminal accountability of the agents of the 1964-1985 dictatorship. Such initiative of the MPF refers to the year 2008.[11] It was further strengthened as an unfolding of the decision of the Inter-American Court of Human Rights (henceforth IACtHR) in the *Gomes Lund* case, in 2010. In the ruling, the regional court uttered that the Brazilian state had been responsible for the gross violation of a series of human rights during the dictatorship. For this reason, the state had failed to comply with the American Convention on Human Rights (henceforth ACHR). Beyond that, the Court uttered that the Brazilian Amnesty Law[12] was null and void in those provisions that prevent the investigation and accountability of perpetrators of crimes against humanity (IACtHR, 2010).

In a perspective opposite to that of the IACtHR, the Brazilian Federal Supreme Court (*Supremo Tribunal Federal* – henceforward STF) had decided[13] in favour of the constitutionality of the Amnesty Law (Statute Law 6.683/1979). The 1979 law and the subsequent decision would prevent the pursuit for criminal accountability of the members of the authoritarian regime (MEYER, 2012).[14] Nevertheless, the MPF remained faithful to the goal of holding accountable the agents of the dictatorship. The prosecutors followed the interpretation that there was no incompatibility between the IACtHR's sentence and that proclaimed by the STF.[15] Thus, in 2011, the MPF would assume this objective as an

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Complaint: "2.Criminal law: a formal charge accusing a person of an offense."

[11] Initiatives aimed both at civil and administrative acts regarding accountability of the state, and initiatives of the Federal Prosecution Service towards criminal accountability of members of the regime. They were of great importance to keeping the debate of accountability alive, and some of them even achieved some level of success, such as a civil claim lodged regarding the death of Vladimir Herzog. Nevertheless, the first initiatives that could be understood as a systematic, institutional, answer to the crimes of the 1964-1985 dictatorship are those herein stated after 2010.

[12] The Amnesty Law of 1979 would add the term connected crimes (*crimes conexos*), through a manoeuvre of the authoritarian government. Such crimes were perpetrated by the members of the regime "in connection" to the political acts of resistance. Such term would grant the possibility of an interpretation for the amnesty of members of the regime, a self-amnesty or blanket amnesty. The interpretation that was intended by the dictatorship was then embodied by several institutional actors, thus creating a barrier for the accountability of perpetrators of crimes against humanity after the end of the regime.

[13] In a Constitutional Action that argued for the unconstitutionality of the Amnesty Law towards the 1988 Constitution - *Arguição de Descumprimento de Preceito Fundamental – ADPF 153.*

[14] This is an ADPF lodged by the Federal Council of the Brazilian Bar Association (*Ordem dos Advogados do Brasil* – henceforth OAB) before the STF, seeking to verify the constitutionality of Law 6,683/1979, on face of the Federal Constitution of 1988. The decision by the constitutionality of the Amnesty Law created a deterrent to the accountability of agents of the dictatorship, since the *erga omnes* and binding effect of the decision provoke an obstacle to cases that attempt such accountability. "Amnesty" and "prescription" are the most invoked reasons by judges in decisions contrary to actions of such nature.
Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=612960 access on 19 June 2018.
For an in-depth approach to the subject, it is recommended to check: MEYER, Emílio Peluso Neder. Ditadura e Responsabilização – elementos para uma justiça de transição no Brasil, 2012.

[15] Document 1/2011 - 2nd Chamber of Coordination and Review: "2CCR reiterated the duty of the MPF, as the exclusive holder of a public criminal action, to comply, to the maximum extent possible, with the duties imposed

institutional policy[16] and create the Transitional Justice Working Group (*Grupo de Trabalho Justiça de Transição* – henceforth GTJT). This GTJT has the aim of implementing the IACtHR's sentence in the domestic sphere.[17] From then on, the MPF began to establish criminal investigative procedures (*Procedimento Investigatório Criminal* – henceforth PIC) to investigate the circumstances of the cases contained in the report of the National Truth Commission. Among these, the investigation concerning the Rubens Paiva case.

Through the course of the abovementioned investigation, further facts regarding the matter would be unveiled. Among these, the simulation performed by the agents of the state to conceal the exact circumstances of the victim's death.[18] After extensive investigations, the MPF would lodge a criminal complaint on the lower Federal Courts, on 19 May 2014. The complaint lodged by the MPF charged the defendants[19] with the crimes of first-degree murder, criminal disposal of a corpse, criminal organization, and criminal fraud.[20]

The criminal complaint would be admitted by the Federal Judge of the 4th Federal Criminal Court (4ª *Vara Federal – VF – Criminal*) of Rio de Janeiro on 26 May 2014. In his ruling, the judge of the 4th Criminal Court would declare that the acts perpetrated against Rubens Paiva were qualified as crimes against humanity: "the quality of crimes against

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on the Brazilian state related to criminal prosecution of the gross violations of human rights perpetrated in the context of the political repression of dissidents of the military regime" (BRASIL, MPF, 2017, p. 43).

[16] Document 2/2011 – 2nd Chamber of Coordination and Review: "a) the MPF must initiate criminal investigation to hold the agents responsible for violations of human rights in episodes covered by the Court's decision and to identify their victims; b) to do so, it is necessary to establish a criminal action plan that defines the activities and the work to be done " (BRASIL, MPF, 2017, p.44)

[17] "We renew the commitment to report the work of colleagues from various generations and localities of our country to comply with the decision of the IACtHR in the case known as *Gomes Lund*, 2010" (BRASIL, MPF, 2017, p. 15)

It is worth mentioning that this project is part of the activities of the Centre for Study on Transitional Justice (Centro de Estudos sobre Justiça de Transição - CJT), a fundamental endeavour for the development of this research. In September of 2015, the CJT signed a cooperation agreement with the GTJT aiming at collecting and systematizing data on civil and criminal procedures that seek the accountability of the agents who acted on behalf of the state from 1964 to 1985, committing gross violations of human rights. "Furthermore, the work plan foresees the analysis of the legal feasibility of insertion, in Brazil, of tools used in transitional justice in Latin American countries. It is also planned to organize events such as lectures and conferences with the objective of disseminating the results of the research carried out under the project."

Available at: https://cjt.ufmg.br/2015/09/24/cjt-celebra-term-of-cooperation-with-gtjt-of-mpf access on 19 June 2018.

[18] Worth noting that such facts would only be revealed forty-three years after the facts, in a testimony collected by the Prosecutors during the MPF's investigation

[19] The indicted are: José Antônio Nogueira Belham, Rubens Paim Sampaio, Raymundo Ronaldo Campos, Jurandyr Ochsendorf e Souza e Jacy Ochsendorf (BRASIL, MPF, 2017, p. 194).

[20] This latter claim was a result of the acts practiced to induce the forensics experts to error, impairing the initial attempt of Rubens Paiva's family to obtain answers regarding his whereabouts.

Furthermore, on that matter: "The manoeuvre also undermined the attempt by the family of Rubens Paiva to obtain an answer on the whereabouts of the former Congressman, since at the Superior Military Court (*Superior Tribunal Militar – STM*) trial on 2 August 1971, the court considered that the prisoner had escaped, therefore, was not under the tutelage of the State" (BRASIL, MPF, 2017, p. 211).

humanity of the object of the criminal action prevents the incidence of prescription" (highlighted) (BRASIL, 2014, p. 8).[21] Against the decision of that Court, the defendants lodged a writ of *habeas corpus* (henceforth HC).[22] The writ would result in a decision issued by the 2nd Specialized Chamber of the Federal Court of Appeals (*Tribunal Regional Federal* – henceforth TRF) of the 2nd Region in favour of the prosecution of the criminal complaint. The ruling maintained the interpretation that the acts committed were crimes against humanity. Furthermore, yet another relevant aspect of the latter decision was that it reproduced a part of the aforementioned IACtHR's decision:

> VII - "The provisions of the Brazilian Amnesty Law that prevent the investigation and punishment of serious human rights violations are incompatible with the American Convention, lack legal effects and cannot continue to present an obstacle to the investigation of the facts of this case, nor to the identification and punishment of those responsible, neither can they have the same or similar impact in relation to other cases of serious human rights violations enshrined in the American Convention, which occurred in Brazil. "(Excerpt from the Inter-American Court of Human Rights in Gomes Lund and Others v. Brazil – 24 November 2010) (BRAZIL, TRF-2, 2014)

The relevance of the abovementioned decisions rests in the fact that they are among the first to recognize the practice of crimes against humanity by the military dictatorship in Brazil. Furthermore, the judgment on the case of Rubens Paiva[23] is among the six criminal actions which were admitted by a Federal Court, from thirty four criminal complaints that were lodged.[24] Beyond that, it is the only criminal complaint that obtained a decision favourable both by a Federal Judge and a Court of Appeals. Finally, it is one of the few of

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[21] Also noteworthy that the Federal Judge would follow a settled understanding in International Human Rights Law, which states that such crimes are not encompassed by prescription (statutes of limitations). Furthermore they cannot be object of amnesties or other pardons.

[22] The HC nº 0104222-36.2014.4.02.0000, lodged by the defendants aiming at the filing of the criminal action nº 0023005-91.2014.4.02.510, in which the petitioners argue: (a) the lack of competence of the Federal Court to process and judge the deed; (b) the jurisdiction of the Military Justice for the case; (c) the recognition of the lack of punishability as a result of prescription – statutes of limitations – and amnesty. Therefore, requesting an injunction and, subsequently, granting the order to file the criminal action (BRASIL, TRF2, 2014, pp. 422, 423).

[23] Currently the action is suspended, due to a Complaint (Reclamação) lodged before the STF. Available at: http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=4640253 access on 19 June 2018. This project resumes the narrative regarding the Criminal Action in a specific topic, on Chapter 5. Any further exposition would extrapolate the purpose of this introduction.

[24] Thirty four is the most recent number of complaints seen in the course of this research. On such count there were seven criminal complaints admitted. Nevertheless, this analysis does not encompass the latest criminal case. Such is due to the fact that there was not enough time to analyse the latter decision, since it was uttered three days previously to the final review of this dissertation. Therefore, although the number of complaints will be stated as thirty four, the number of criminal complaints admitted will remain six. In the conclusions there will be some preliminary assertions regarding the seventh admitted complaint. Further information is available at: http://www.mpf.mp.br/rj/sala-de-imprensa/noticias-rj/justica-federal-recebe-denuncia-contra-medico-que-participou-de-tortura-durante-a-ditadura, access on 19 June 2018.
It is known that the criminal complaints concerning crimes against humanity during the Brazilian dictatorship may exceed this value. New complaints might have been lodged and others are not accounted for.
For further information see the CJT database, for more: https://cjt.ufmg.br/ access on 19 June 2018.

those criminal actions in which a witness was heard in court. Marilene Corona Franco was heard at the 4th Federal Criminal Court of the state of Rio de Janeiro on 26 November 2015.[25] For all of these reasons this ruling is extremely relevant; however there is yet one aspect of further significance to this research.

The main object of this dissertation is an aspect of the decisions of singular relevance for the comprehension of how these decisions were uttered. This is a feature of these rulings with which this research is especially interested, which is the *posture* of these decisions *towards the transnational framework of protection of human rights*. It is possible to assume that such decisions have adopted such *postures towards the transnational* in order to overcome barriers to admitting the criminal complaints. Obstacles which will be further developed herein, and which deem decisions such as those limited in the Brazilian legal order. Most of the thirty four abovementioned decisions manifest *postures of resistance towards the transnational*, and do not admit the complaints based on the aforementioned obstacles (GONÇALVES, 2017; TORELLY, 2013, 2016). Therefore, it seems that decisions that admit the criminal complaints for accountability might have *postures of engagement or convergence* towards International Human Rights Law (henceforth IHRL) in a *transnational perspective*.

Conversely to the restricted manifestation of the aforementioned *postures of engagement or convergence*, this research is based on the understanding that *postures* such as those are necessary. A necessity that derives from the comprehension of human rights of the constitutional project started in 1988. This research considers that such a project is inserted in the *international system of human rights*. In addition, this research believes that such decisions allow the continuity of the debate on the comprehension of the violations perpetrated by members of the authoritarian regime. Further on, it follows the comprehension that such decisions contribute to an adequate interpretation of the Brazilian transition to democracy. They do so through means of diffuse constitutional review. A strategy that might have been more appropriate than that of the OAB in the ADPF 153, according to Meyer:

> (…) the route, even if slower, of diffuse review could encourage dissent and enable judicial decisions that would recognise the unconstitutionality per the 1988

[25] Marilene maintained the statements made in the testimony to the MPF before the Federal Court. She asserted that had been under torture and had witnessed that the victim had also been tortured. Finally, she stated that she believed that the victim died due to the torture proceedings performed by military personnel, between the 20th and the 21st of January of 1971.The full deposition is available at the Term of Declarations of Marilene Corona Franco – PIC nº 1.30.011.001040/2011-16 (MPF) - Available at: http://comissaodaverdade.al.sp.gov.br/upload/013%20-%20Termo%20de%20Declaracoes%20de%20Marilene%20Corona%20Franco%20a%20MPF.PDF, access on 19 June 2018.

> constitutional order of the Amnesty Law" in what it aimed to produce an auto-amnesty for crimes against humanity (MEYER, 2012, p. 21).[26]

Therefore, in order to understand the dynamics that involve such *interpretative postures towards transnational norms of human rights*, this dissertation will analyse the decisions on the six abovementioned criminal complaints. Rulings which seem to have a posture of *engagement*, or a more binding posture of *convergence*, *towards the transnational*. And, for this reason, such rulings seem to be an appropriate route through which analyse the conditions of possibility of the aforementioned *interpretative postures*. With such objective in mind, the dissertation is organised as it follows.

Therefore, the Part I of this dissertation aims at providing the theoretical basis of the aforementioned analysis. Chapter I provides an account of the development of the field of International Human Rights Law, with focus on the concept of crimes against humanity, and accountability for such crimes. Afterwards, Chapter II exposes how the autonomous field of transitional justice was conceived in the late twentieth century, and how it reshaped human rights. Subsequently, Chapter III relates the previous accounts with the perspective of transnational law, which deeply permeates the aforementioned fields. At last, based on the theoretical framework developed, Part II moves on to the analysis of the *interpretative posture towards the transnational* itself. It begins, in Chapter IV, with a brief narrative of the Brazilian transitional process, which gave origin to the initiatives of accountability for the crimes perpetrated during the dictatorship. Then, in Chapter V, it will focus on the analysis of the six decisions of the Federal Courts admitting the criminal complaints lodged by the MPF.[27] Finally, there will be an endeavour to develop some conclusions regarding the *postures towards the transnational* manifested by such decisions. An endeavour which will be followed by an attempt to present some of the challenges a transnational comprehension of human rights faces in Brazil, and possible routes to overcome them.

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[26] As will be further developed below, and in a manner which supports this statement by Meyer, such diffuse constitutional review would prove largely successful in countries such as Argentina and Chile, regarding individual criminal accountability for crimes against humanity.

[27] It is worth of note that GONÇALVES (2017) developed a previous analysis of the decisions, which are studied herein (with the sole exception of '*Rosa* case' – the first decision to be uttered for accountability). Gonçalves makes a compelling argument, especially regarding the '*Divino Souza* case', and presents an interesting approach to the matter on the bases of Dworkin's Theory of International Law, as well as to Conventionality Control regarding the decision of the IACtHR. Although both studies depart from the same cases (for the sole reason that they are the only cases for accountability which were admitted), the analysis depart from completely different hypothesis, widely distinct approaches and reach diverse conclusions. Exactly for these contrasts, it is recommended to inspect the mentioned study for further reference.

PART I - INTERNATIONAL HUMAN RIGHTS LAW – A TRANSNATIONAL APPROACH

This first part of the dissertation aims at providing the theoretical basis that will ground the analysis of the decisions on the six criminal complaints lodged by the MPF. In that sense, the overall focus of the account henceforth developed will be on the concept of crimes against humanity and accountability for such crimes.

This dissertation will attempt to provide, in Chapter I, a brief narrative of the development of the field of International Human Rights Law, especially through the concept of crimes against humanity. The narrative starts from the roots of the concept in public statements, conventions and treaties that date back to the years previous to the First World War. After this initial account, it follows to the primary developments of what would come to be the contemporary system of international human rights, after the Second World War.

In addition, Chapter I advances to the unfolding of the abovementioned system of international human rights with a brief account of its mechanisms. Finally, this initial chapter presents an account of the contemporary understanding of the concept of crimes against humanity.

In Chapter II, this research will expose an account on how the autonomous field of transitional justice was conceived. How the field developed through the late twentieth century and how it reshaped the comprehension of human rights through practice and theory. Once more, with special focus on crimes against humanity.

At last, in Chapter III, the study will relate the previous accounts with the perspective of transnational law.

CHAPTER I - INTERNATIONAL HUMAN RIGHTS LAW AND THE CONCEPT OF CRIMES AGAINST HUMANITY

It is possible to trace the norms that gave origin to the current framework of IHRL to as far as the nineteenth century and to reactions to the First World War. Nevertheless, the most profound shift towards the establishment of such system was an unfolding of the Second World War. The years after the conflict broadly developed a system that would come to encompass the majority of democracies around the globe. Such unfolding would happen in the course of the second half of the last century. This system would come to function as a beacon for the limits of domestic constitutional design.

It is also possible to trace the roots of concerns towards universal protection of human rights even beyond the aforementioned periods. Such preoccupations regarding to attaining protection to individuals' rights began much before human's history major conflicts. The normative origins of the concepts that contributed to shaping the contemporary comprehension of IHRL can be found in the beginning of modernism. They can be traced to movements such as the American and French Revolutions.[28] Already in these movements, universal rights for men had legal normative recognition. Such recognition was supported through the writings of philosophers and politicians. A paramount example of that is the work of Thomas Paine who, in his 1791 *oeuvre* "Rights of Man", dialogued with both former mentioned revolutions and pointed out their universal character.[29] However, although such movements are extremely relevant, it is not the goal of this research to analyse the philosophical origins of human rights. Neither its long roots, which date to the beginning of modernism. The aim of this research is to present the development of the normative legal basis of the concepts that shaped the existing *international system of human rights*.

[28] "Acceptance of the need for enforceable human rights guarantee is, however, of more recent vintage. The first real breakthrough occurred with the adoption of human rights declarations in the late eighteenth century and their subsequent inclusion in the constitutions of France and the United States" (O'BOYLE, LAFFERTY *In* SHELTON, 2013, p. 194-195).

[29] On this regard, the book "Rights of Man" asserts:

"I present you a small Treatise in defence of those Principles of Freedom which your exemplary Virtue hath so eminently contributed to establish. – That the Rights of Man may become as universal as your Benevolence can wish, and that you may enjoy the Happiness of seeing the New World regenerate the Old (…)" (highlighted) (PAYNE, 2008, p. 85).

Further on that note, and following Payne's presentation, it is possible to glimpse at how domestic movements helped shaping the understanding for a universal set of rights. Debates around the extension of the reach of rights were further advanced: in a first moment, by theorists such as Locke, Montesquieu, Rousseau, and movements such as the Glorious Revolution in England. All of these debates preceded the American Revolution and the establishment of American constitutionalism and, in the other side of the Atlantic, the French Revolution and subsequent Declaration of the Rights of Man and of the Citizen.

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Therefore, this topic of the research will focus mostly on international and some regional aspects of IHRL, especially regarding the concept of crimes against humanity. The latter being a concept that shares a common root with the former regarding their positivation in International Law. Thus, this chapter will advance through the following manner. Initially, it will make an attempt to develop a brief account of the origins of the concept of crimes against humanity briefly before World War I. Afterwards it will present the failure of post-World War I initiatives regarding such accountability. Then, it will offer an account of the paradigm shift in the post-Second World War, regarding crimes against humanity and broader human rights protections. In parallel to this narrative, it will present the regulation of accountability for the gross human rights violations committed during the conflict. Finally, it will endeavour in a brief account of the stabilisation of the *international system of human rights*.

This research supports that such stabilisation was achieved through the development of a series of international instruments and multiple institutions to advance and protect human rights. All of this narrative will be developed parallel to an account of *the cycle of life of the norm of individual accountability of perpetrators of crimes against humanity* (LUTZ, SIKKINK, 2001; SIKKINK 2011, TORELLY, 2013). Therefore, this research will broadly present the movements of *acceptance, normative cascade,* and possible *internalization* (at least in international and regional human rights institutional bodies) (FINNEMORE, SIKKINK, 1988, p. 895 *et seq.*) of such *norm*.[30]

After laying the object in sight and making some advertences regarding the proposed narrative, it seems relevant to lay down the theory that will be followed to accomplish part of the proposed analysis. In that sense, this narrative will follow the theory of *norm dynamics* set by Martha Finnemore and Kathryn Sikkink (1998). Finnemore and Sikkink's theory aims to explain how a norm develops and becomes influential, especially in the international context. A movement to which the authors have agreed upon calling *the cycle of life of the norm*

[30] The account regarding the development of the *norm of individual accountability for crimes against humanity* owes a great deal to the following work. It owes especially to Kathryn Sikkink (2011) and her previous work along with Ellen Lutz (2002) and to Marcelo Torelly's accounts on the subject (2011, 2013, and 2016). These texts will be broadly referred to herein. Nevertheless, the proposal endeavours to trace a different narrative the aforementioned texts inasmuch as it follows a broader movement (*international system of human rights*) and a different perspective in regard to the transnational approach.

(1998, p. 895).[31] In that sense, it is relevant to present some of the concepts of the authors, and qualify their uses in this research. The authors comprehend "norm" generally as a standard of behaviour, holding the quality of "oughtness" (FINNEMORE, SIKKINK, 1988, p. 891). Due to the aim of this narrative, following the authors' scholarship, this research will use the term "norm" to describe a more isolated standard (e.g. *global norm of individual accountability*). On the other hand, the term "system" will be used to encompass institutions and other related norms that structure together in an interrelated manner different behaviour patterns (*e.g. international system of human rights*). With such concepts in mind, the authors observe the following three-stage process for the *cycle of life of the norm*:

(a) The *emergence of the norm*: a phase in which the *norm's entrepreneurs* (agents and movements) launch the initial moment of construction of the norm. Later, the mobilization of *organizational platforms* (broader networks and institutions, mostly of international or transnational profile) ensures the support of actors to endorse their standards. In this way, they reach the institutionalization of the norm in certain normative sets and international institutions (idem, pp. 895-900);

Between points (a) and (b) there is what the authors call a *tipping point* - moment at which "a critical mass of state actors adopts the norm" (FINNEMORE, SIKKINK, 1998, p. 895);

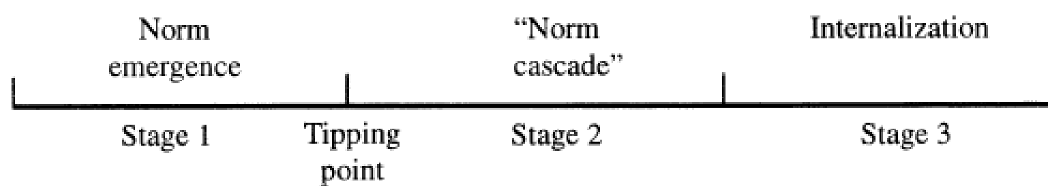
(b) Then, there is the *normative cascade*, which involves a broad acceptance of the norm. After the *tipping point*, more and more actors accept the existence of the norm, adopting it domestically. In national perspective, the relevance of adopting the norm may become more important than domestic policies, due to an international or even regional effect generated by institutionalization and systematic adoption of the norm. This latter movement is described by the authors as an effect of *contagion* (FINNEMORE, SIKKINK, 1988, p. 902-903). Such event does not ensure actual behavioural adaptation to the norm, but institutional assertion of the standards:

> (…) There are not yet precise definitions or standard ways of showing the operation of a norms cascade. (…) We suggest that norms cascades are collections of norm-affirming events. These events are discursive-they are verbal or written statements asserting the norm. We are careful to define a norms cascade as something different

[31] To this end, the authors use two examples in "two major areas: women's rights, especially in relation to voting, and the Laws of War" (FINNEMORE, SIKKINK, 1988, p.889). The authors explain their choice: "The formal political participation of half the world population (...) seems to be worthy of study," and "the Laws of War allow us to discuss the impact of norms, where we least expect it - the traditional field of security (...)" (FINNEMORE, SIKKINK, 1988, p. 894 – 895).

> <u>from changes in actual behaviour</u> (…) (highlighted) (SIKKINK, LUTZ, 2001, p. 3-4)

(c) Finally, the *internalization*: the extreme point of the *normative cascade*. In this latter moment, the norms are widely accepted and internalized by the actors, reaching a practically automatic conformation on the part of the addressees (FINNEMORE, SIKKINK, 1998, p. 904 *et. seq*). The *life cycle of the norm* can be visualized in the scheme below (FINNEMORE, SIKKINK, 1998, p. 889), exposed to illustrate the route a norm follows from its *emergence* to the point where it reaches *internalization*:



As stated, the present research proposes to apply the theory developed by Finnemore and Sikkink in the development of the *norm of individual accountability for crimes against humanity* (PAYNE, ABRÃO, TORELLY, 2011, TORELLY, 2013). Such norm unfolds parallel to the contemporary system of International Human Rights Law. Since the main focus will be on crimes against humanity it seems relevant to present some of the first recognisable – public – uses of the term, as follows.

1.1 - Crimes against humanity and the failure of accountability post-World War I

"We will not have Armenians anywhere in Anatolia. They can live in the desert, but nowhere else."

Mehmed Talaat 'Talaat Pasha', Ottoman Minister of Interior Affairs, regarding the 'matter of the Armenians'

The first public registered use of the term crimes against humanity by institutional actors is in the context of the First World War, regarding the Armenian Genocide. Nevertheless, it seems noteworthy to recede in order to present a less known use of the concept. In that sense, an initial reference to the concept was employed in a letter from the religious minister George Washington Williams, in 1890, addressed to the US Secretary of State referring to the slave trade in Congo under Belgian rule: "(…) The Congo is in no sense worthy of its trust and support. He is actively engaged in the slave trade and is guilty of many crimes against humanity" (highlighted) (CLAPHAM, 2015, p. 39). The relevance of this first use of the term rests in the fact that it allows one initial glimpse at an aspect of that category of crimes that will permeate its later employment: the widespread and systematic character that must encompass the practice – in the case, the practice of slavery by the colony of Congo and the Belgian metropolis.[32]

Following that comprehension of a widespread – systematic – crime, roughly 25 years after that first account, the term was recorded much more widely and publicly for the first time during World War I. According to Kévorkian (2011) and Dadrian (1995), the term was used in an official statement published on 24 May 1915, in which members of the Triple Entente "denounced the first massacres carried out in the rural areas of Vilayet de Van" (KÉVORKIAN, 2011, p.763). The statement classified the violations as "this new crime against humanity and civilization committed by Turkey" (highlighted) (DADRIAN, 1995, p 216). It is worth mentioning that the statement follows with a warning of the Entente to the Sublime Door – the government of the Ottoman Empire: "all members of the Turkish government as well as civil officials who participated in the massacres of the Armenians [will] be held personally liable" (KÉVORKIAN, 2011, p. 763). Such statement manifests the clear aim of holding accountable those individuals that committed the said violations, yet in the year of 1915.

[32] As will be seen, later on, the practice of slavery would be encompassed by the legal definitions of crimes against humanity until the contemporary definition of such concept.

After the end of the conflict, the winning forces failed to keep their promises to survivors of holding perpetrators accountable, through "proper laws and judgments" (KÉVORKIAN, 2011, p. 773). In spite of the warnings given in 1915, and the massacres that killed hundreds of thousands of Armenians, the responsible were not held accountable.[33] On the contrary, during the signing of the Lausanne Declaration of Peace, in 1923, the parties agreed upon an Amnesty Declaration that stated the following:

> The Powers signatory of the Treaty of Peace signed this day being equally desirous to cause the events which have troubled the peace in the East to be forgotten (…) the following [Amnesty] Declaration (FRANCE, 1923).

The declaration guaranteed that the citizens who belonged to the bellicose nations would not be disturbed by events that occurred between August 1914 and November 1922, "as a result of military or political actions" (FRANCE, 1923). It further stated that "all sentences pronounced for [the same reasons] would be annulled, and any procedure already instituted would be closed" (FRANCE, 1923). Furthermore, it provided that the prisoners of war would be restored to their respective nations. The provisions were directed in particular to the Turkish citizens, and especially among them, those individuals who had committed the aforementioned atrocities. Finally, the Treaty and the Declaration reserved to the Turkish government the right to hold accountable officials who took part in military or political actions that led to the violations. These provisions were not enforced by the Turkish government, deeming void any promises to the Armenians. Such actions would vanquish any hopes for accountability of the perpetrators of the first major accounted genocide – a crime against humanity – of the twentieth century.

Similarly to the provision that granted the accountability of Turkish citizens to their own government, the administration of justice in Germany after WWI had been left to national courts (TEITEL, 2003, p. 72). Such an institutional design eventually ensured that the German war criminals remained unpunished, as it had happened in Turkey. Thus, it is possible to affirm that "[t]he initial history of post-World War I policies" led to the perception that national justice would be "hopelessly political", a view that generated "apparent repercussions during the century" (TEITEL, 2000, p. 33). Furthermore, according to the

[33] The accounts tend to vary from around 700.000 - 800.000 to roughly 1.5 million, both according to Kévorkian (2011) and Dadrian (1995). In that sense, more recently (2016), Ronald Suny stated in the Keynote address for Genocide Awareness and Action Week: "By the end of the war ninety per cent of the Armenians of the Ottoman Empire were gone, a culture and civilization wiped out never to return. It is conservatively estimated that between 600,000 to over 1,000,000 were slaughtered or died on the marches. Other tens of thousands fled to the north, to the relative safety of the Russian Caucasus" (SUNY, 2016).

author, the perception that domestic judgments were political judgments was one of the main reasons for the paradigm shift in the post WWII.[34]

Also regarding the abovementioned facts, it is worth noting that they reassert the character of systematicity of crimes against humanity, already encompassed by the concept. They also asserted the necessity of knowledge of the acts that are perpetrated, along with their objectives, by the actors in order for the actions to constitute a crime against humanity. In that sense, while the already seen initial manifestation of the concept, endowed of such characteristics, dealt with the practice of slavery, it now manifested in the form of the Turkish government's acts that led to the Armenian Genocide.[35]

Finally it is necessary to reinforce the fact that the events following the WWI inaugurated a controversy that would follow the endeavours of those seeking accountability for crimes against humanity throughout the twentieth century. Following the way in which the *successor justice* was conducted,[36] there were allegations that such measures were arbitrary, due to the abovementioned claim that they were fundamentally political. Such allegations were further aggravated due to the fact that prosecutions usually take place after conflicts or periods of political transition, thus being liable to decisions taken by the regime that followed such transition (*e.g.* pardons and amnesties). These controversies would be faced by the development of the field of IHRL, following the post-Second World War trials. Afterwards, such allegations would be opposed among the endeavours for accountability during transitional processes that took place in the late twentieth century.

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[34] In addition to this perspective, Teitel (2003) exposes that collective sanctions led to economic frustration and resentment, launching Germany again into the War. So, after the conflict, the critical response would be the "liberal focus on individual judgment and accountability" (TEITEL, 2003, p. 72-73).

[35] Both slavery, and the series of acts that lead to genocide – extermination of a population, forced transfer and deportation, persecution of a group – would be encompassed, later on, by the legal regulation of crimes against humanity (respectively Art. 7 – 1. c and 1. b, d, h, of the Rome Statute) (UN, 1998).

[36] The term *successor justice* refers to the mechanisms of judgment that follow a given event. The option to use this terminology employed by Teitel, 2000, in this case, is due to the search for a distinction between the mechanisms used after the First World War and other models of judgments later used in the twentieth century – in the context of transitional justice.

1.2 - The paradigm shift towards human rights and the *emergence* of the norm of individual accountability in the post-World War II

> "From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made."
>
> - Circuit Judge Irving R. Kaufman, in *Filartiga v. Peña-Irala*, 630 F.2d 876 (1980)

The perception that national justice would be "hopelessly political" – and inefficient – set forth above by the *successor justice* of World War I was coupled with the atrocities committed during World War II. This movement led to the establishment of *ad hoc* international courts for the trial of the perpetrators responsible for the crimes committed during the latter conflict. Thus, the courts established by the Allies in the post-World War II gave rise to the aspects of internationality and extraordinariness in relation to *succession* trials. In addition, the London Conference of 1945, which established the procedures for the post-war courts, formally defined for the first time individual accountability for violations of international law (TEITEL, 2000, p. 34, 2003, p. 72 *et seq.*). Furthermore, it provisioned the concept of crimes against humanity, respectively in its Article 6 and Article 6, (c). These Articles are object of the analysis below:

> Article 6.
>
> Art. 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (…)
>
> (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan. (highlighted) (UK, 1945).

Through this Article, the Charter of the International Military Tribunal (IMT) addressed the criticism towards the political nature of endeavours for accountability. It does

so, by establishing direct legal provisions for the suppression of such crimes, in the context of the Second World War. The Charter that resulted from the 1945 Conference, and guided the constitution of the IMT, would later on be codified by the International Law Commission of the United Nations, as the Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, in 1950 (UN, 1950).[37] Later on, these Principles would be adopted by the Commission and submitted to the General Assembly. Thus, they can be recognized as the initial guideline for a broader comprehension of the limits and reach of the norms previously stated by the IMT Charter.

Both the Charter, then the Principles, by foreseeing "individual responsibility" derogated prerogatives of immunity arising from national sovereignty and individual's immunity resulting of "due obedience" to superior orders. The latter were commonly adopted defences in relation to crimes committed during periods of conflict. Thus, it is possible to affirm that, by eliminating defences based on "state acts" and "orders of superiors", "the Nuremberg Principles pierce the veil of the diffuse responsibility characterizing the wrongdoing perpetrated under totalitarian regimes" (TEITEL, 2000, p. 34). In view of the innovations brought about by the Nuremberg Principles, it is possible to identify in this context the *emergence* (FINNEMORE, SIKKIN 1998, 896) of the contemporary understanding of individual accountability for a specific category of gross violations of human rights: crimes against humanity.[38] At this stage, a series of victims of the atrocities and other actors can be considered as *entrepreneurs of the norm*. [39] Furthermore, the post- War

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[37] "Principle I - Any person who commits an act that constitutes a crime under international law is responsible and therefore subject to punishment" (UN, 1950).
"Principle VI - The crimes hereinafter set out are punishable as crimes under international law:
(c) Crimes against humanity: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime" (UN, 1950).

[38] While the term "gross violations of human rights" usually contemplate a broader conception of violations, "crimes against humanity" is currently understood as a specific manifestation of acts. Such conception was due to a series of developments of the concept reaching its contemporary boundaries, which are presented bellow in the text of the Rome Statute of the International Criminal Court.
In that sense, this project will use the term "crimes against humanity" to specifically address such contemporary boundaries that will be further presented, and "gross violations of human rights" in a broader sense, encompassing the former concept and other acts that are understood as such.

[39] Regarding human rights, *norm entrepreneurs* usually are the surviving victims of gross violations of human rights, the relatives of the passed victims, lawyers and lawmakers, and other such actors. More recently, human rights advocates, NGOs, and many other members of the civil society, such as social movements have a fundamental role in such aspect.
In that first moment, it is notorious the involvement of the victims of the Holocaust and their relatives as *norm entrepreneurs,* as well as politicians, members of the accusation in Nuremberg and Tokyo and many other actors (*see*: Teitel, 2000, and Tomuschat, 2006, for more information on the matter).

courts can be recognized as the initial *organizational platform* for the institutionalization of the norm.[40]

In a second note, specifically on the Article 6, (c), of the Charter, translated to Principle VI (c), further innovations are brought. While the Charter laid the foundations for accountability of individuals which perpetrated crimes under international law, during the war, the Principles derived from the Charter were broader. The latter instrument omitted aspects relating the violations to the context of "the war", widening the concept to encompass also crimes that were perpetrated in connection to "any crimes against peace" (UN, 1950). As previously pointed out, it was the first legally established provision encompassing all the acts that constituted "crimes against humanity". Although there were precedents both for such violations under International Law and for the use of the concept of crimes against humanity, there was not a legal definition of the acts that constituted it. In that sense, the content of the term was not really determinate, and these norms are the initial endeavour to provide such determination.

Furthermore, it is worth noticing that the initial disposition of the crime requested that it occurred "in execution of or in connection with any crime within the jurisdiction of the Tribunal" (UK, 1945). It also requested that it were "carried on in execution of or in connection with any crime against peace or any war crime" (UN, 1950). Such was a relevant point in the first positive definition of the crime, for aspects related to the nature of the Nazi crimes. Alston and Goodman point out that it is presumable that "paragraph (c) might have been read to include the entire programme of the Nazi government to exterminate Jews and other civilian groups, in and outside Germany, whether 'before or during the war'," (ALSTON, GOODMAN, 2012, p. 123). Thus, the provision encompassed the Holocaust, its planning and other earlier persecutions of Jews, on the context of the War. As seen by the latter formulation, that comprehension was then broadened by the Principles of the UN Commission to embrace other violations of similar nature to those perpetrated by the Nazis. It is also noteworthy that the provision for a connection with other crimes would not be sustained in further developments of the concept, although maintained in these first framings.

Regarding the second highlighted aspect – the reach of the crimes – yet another innovation is relevant. The provisions covered responsibility for what states, and its officials,

[40] The *organizational platform,* in this first moment, can be understood as the War Trials – Nuremberg, Tokyo, and the Council n. 10 - further on, the *platforms* are broadened. Permanent institutions such as the United Nations will start "ensuring the support of state (and other) actors to endorse their standards".

did to other people and to its own nationals. In that sense, some other relevant dispositions are stated. The act perpetrated can constitute a crime against humanity "whether or not in violation of the domestic law of the country where perpetrated" and both planners and executors are to be held accountable (UK, 1945). Therefore, if a violation that is encompassed by such category of crimes is committed by a state, and its officials, against its own population, even if it's considered legal by domestic law, it can be reputed as a crime against humanity. Thus, the provision deemed the perpetrators individually accountable to International Law.

Moreover, as yet another example of the development of the concept of crimes against humanity, it is worth of note that the Control Council Law nº 10 defined crimes against humanity without the requisite connection to war crimes. This definition shifted the burden of the violations committed to Germany's civilian elite, as well as the military (TEITEL, 2000, p. 74). As already mentioned, such understanding would be encompassed by the International Law Commission of the United Nations during the formulation of the Nuremberg Principles. In that sense, the concept of crimes against humanity had brought yet another relevant development for International Law. The previous international crimes covered by International Law are linked to combatants' actions, either isolated or systematic, in what was considered a war crime.[41] Crimes against humanity, on its turn, are directed at planned conducts, systematic conducts, in a more general sense and in each of its frameworks less related to any other crimes (*i.e.* crimes against peace, war crimes).

Notwithstanding the legal provisions established by the Charter, and other such post-war military tribunals' regulations, it is relevant to point out that the Allied Powers strived to keep the prosecution inside the boundaries of existing customary international law (ALSTON, GOODMAN, 2012, p. 123). Regarding these pre-existing customary international law, Hans Kelsen, although critical of the war judgements, answered to those who objected to the

[41] Provisions on war crimes, or crimes related to war, and the conditions of combatants had been foreseen since half of the XIX century, *see:* Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864 (SWITZERLAND, 1864). Further on, direct dispositions regarding the "Laws of War" were provided for in two different opportunities, respectively in 1899 and 1907: Laws of War: Laws and Customs of War on Land (Hague II); 29 July 1899. (HOLAND, 1899) and Laws of War : Laws and Customs of War on Land (Hague IV); 18 October 1907 (HOLAND, 1907).
Such provisions, applied "not only to armies, but also to militia and volunteer corps" and prisoners, and even provided for humane treatment for the latter. At last, it is relevant to add that the latter treaties also established the limits of acts conducted against "individuals belonging to the hostile nation" with provisions banning unnecessary suffering and treacherous means of attack, and even prohibiting the abolishment of suspension of rights of nationals of the belligerent party in a court of law (HOLAND, 1899, 1907).

proceedings of the post-war courts, people who alleged that they were retroactive criminal punishment – *ex post facto* law:

> The objection most frequently put forward - although not the weightiest one - is that the law applied by the judgment of Nuremberg is an *ex post facto* law. There can be little doubt that the London Agreement provides individual punishment for acts which, at the time they were performed were not punishable, either under international law or under any national law (...)
>
> A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed seems also to be an exception to the rule against *ex post facto* laws. The London Agreement is such a law. It is retroactive only in so far as it established individual criminal responsibility for acts which at the time they were committed constituted violations of existing international law, but for which this law has provided only collective responsibility (...) Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice (highlighted) (KELSEN, 1947, p. 164)

Kelsen was not alone in his views regarding the fact that those acts constituted not only morally reprehensible acts, but also violations of International Law, although not individually punishable in a first moment.[42] As formerly stated, the prosecutors strived to maintain the charges into those boundaries. In that sense, most of the convictions at the Nuremberg Trials were both towards crimes of war and crimes against humanity. This was due to the objective of providing strong grounds for the conviction, through encompassing the scale of the atrocities committed by the *Führer*'s regime (ALSTON, GOODMAN, 2012, p. 126).

Therefore, it is possible to notice that the war courts statutes and judgements, and the period during the post-World War II, had resulted in a number of advancements in the accountability of individuals for violations of International Law. Furthermore, it has led to extensive international normative output in relation to the protection of human rights in a broader sense (HENKIN, 1990, p. 42, ALSTON, GOODMAN, 2012, p. 120 *et seq.*). After the end of the conflict, the action of a series of actors and institutions (*norm entrepreneurs and organizational platforms*) would mobilize state actors, giving rise to permanent institutions and normative instruments. These institutions and instruments constitute the basis of what would be considered the *international system of human rights*.

[42] Also, on that note, Hannah Arendt in her account of Eichmann's trial, for the *New Yorker* in the beginning of the 1960's, also points out that such crimes, and legal provisions against them, were not unprecedented but to the scale they were committed (ARENDT, 1999, p. 291 *et seq.*).

On June 26, 1945, the signature of the Charter of the United Nations would give rise to the creation of the United Nations (henceforth UN). Subsequently, in 1948, the Universal Declaration of Human Rights would be adopted by the General Assembly of that organization. In that same year, there would be the adoption of the Convention for the Prevention and Punishment of the Crime of Genocide, which would provide that genocide was a crime under International Law "whether committed in time of peace". Furthermore, it set forth accountability "whether [the perpetrators] are constitutionally responsible rulers, public officials or private individuals" (UN, 1948b), yet another pace towards individual accountability for gross violations of human rights.

The set of principles established after the Global Conflict promoted a paradigm shift in the accountability of perpetrators of crimes against humanity. This shift was further broadened by the later development of institutions and norms regarding the protection of human rights which followed the conflict. From a norm that granted the limitation of state accountability for international crimes and immunity to individuals for violations of International Law, there was a shift towards a *norm of individual accountability for human rights violations*. Thus, it is possible to understand that the *emergence of the individual accountability norm* have its origins in this period. The same can be said about a somewhat effective accountability of perpetrators of crimes against humanity.[43] Finally, it is possible to say that the broad regulation and institutionalization of human rights on international level also gave birth to the current system of International Human Rights Law. From this perspective, the following observation by O'Boyle and Lafferty is pertinent: the advances in relation to the protection of human rights prior to World War II are minimized if one considers the sharp increase in institutions, instruments and jurisprudence of rights following the end of the conflict (O'BOYLE, LAFFERTY, 2013, p. 195).[44]

[43] On that matter the possibility of stating that there was effective accountability during WWI, once more supporting the posture that was thoroughly stated above, it is relevant to note that: "While critics point to such judgments as "winners' courts", it is broadly understood that such courts not only fulfilled an effective legal role in prosecuting the crimes of the Nazis and their allies, as they have also established a set of standards for future trials" (TORELLY, 2013, p.497).

[44] In that sense, it is possible to cite initiatives previous to World War Two such as the League of Nations (1920 – 1946) and abovementioned conventions and treaties that encompassed, at some level, human rights, even if from the perspective of the Laws of War and Humanitarian International Law.

1.3 - The *tipping point* of the norm of individual accountability and the international *normative cascade*

Recapitulating, at an initial moment, post-World War II, there was the *emergence* of the concept of crimes against humanity and the norm of individual accountability for such violations. Parallel to that movement, there was the development of the structures and norms of the IHRL. From this emergence it became possible to effectively hold perpetrators of crimes against humanity during that conflict individually accountable. The further developments in the next years would then allow the same pattern of accountability in other such events. Crimes against humanity would be perpetrated in contexts of war and peace, regarding violations committed by state actors against its own nationals or other peoples, and endeavours for accountability would follow.

Thus, as stated, as a reaction to the savagery and systemic annihilations of the Second World War, a significant development of human rights mechanisms began after 1945 (HENKIN, 1990, p. 42, ALSTON, GOODMAN, 2012, pp. 120- 121). These mechanisms aimed at an ever more effective extension of the scope and reach of human rights guarantees. At this stage in the development of IHRL, more and more states would join the international system and other developing regional systems. These states would adopt a wide range of mechanisms to promote human rights, such as the UN Charter, the Universal Declaration of Human Rights adopted by the UN General Assembly, and numerous covenants and conventions derived from it (HENKIN, 1990, 42).

In parallel to these dynamics, the already existing concept of crimes against humanity and the norm of individual accountability are accepted in a broader range. This development would follow the same pattern of widening individual guarantees, regardless of national affiliation through the adoption of mechanisms of human rights protection. In that sense, Teitel argues in what she regards as a “humanity’s law”, that the “framework is extended to even broader populations — populations that are often caught up in conflict, or otherwise displaced” (2011, p. 34). This change is demonstrable both in discourse and in the international legal framework and its applications (TEITEL, 2011, p. 34):

> Indeed, more and more, the contemporary rule of law is being equated with the assurance of humanitarian norms regulating violence within a coercive scheme. This is illustrated by the tribunals addressing the conflicts in the former Yugoslavia and Rwanda, and the Rome Treaty establishing the permanent ICC. It is also evident in a related explosion of transnational developments in the enforcement of “crimes against humanity”. (TEITEL, 2011, p. 32)

In order to illustrate this development of instruments and institutions of human rights after the Second World War, reaching the above stated contemporary framework, it is relevant to present a brief developed of such mechanisms between the end of the War and the 1970's.[45] Initially, those aforementioned instruments: the UN Charter and the Universal Declaration of Human Rights, followed by the adoption of the Convention for the Prevention and Punishment of the Crime of Genocide. Further on, on an international perspective, also closely related to the events of the World War, the four Geneva Conventions of 1949. The Conventions were respectively concerned with protection of wounded during war, at land and sea; prisoners of war and the protection of civilians in occupied territory; and the shift from the previous document's addressees, concerned only with military personnel, to also encompass the protection of civilians in its provisions (ICRC, 2010).[46]

Also, in order to illustrate this development of international instruments until the 1970's, it is worth citing the signature of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, in 1968. Another major agreement that is noteworthy is the International Covenant on Civil and Political Rights,[47] drafted in 1954, and effective from 1976 onwards. Yet another instrument regarding the promotion of human rights is the International Covenant on Economic, Social and Cultural Rights,[48] also drafted in 1954 and effective from 1976. Those latter two instruments, the first more concerned with negative rights, and the second with positive rights, along with the

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[45] The cited international documents follow the abovementioned pattern of improvement, initially set forth by *norm's entrepreneurs* (agents and movements) who launched the movement of construction of the norm. Afterwards, through the mobilization of *organizational platforms* (broader networks and institutions, mostly of international or transnational profile), which provide the dissipation of the norm to a broader set of countries and supranational bodies – the process of *contagion* of the norm.

[46] "The Geneva Conventions entered into force on 21 October 1950.

Ratification grew steadily through the decades: 74 States ratified the Conventions during the 1950s, 48 States did so during the 1960s, 20 States signed on during the 1970s, and another 20 States did so during the 1980s. Twenty-six countries ratified the Conventions in the early 1990s, largely in the aftermath of the break-up of the Soviet Union, Czechoslovakia and the former Yugoslavia.

Seven new ratifications since 2000 have brought the total number of States Party to 194, making the Geneva Conventions universally applicable" (ICRC, 2010).

[47] The International Covenant on Civil and Political Rights regarded, more specifically, the protection of negative rights. In this sense, it had a broader support by western capitalist states in its ratification processes. The drafting of the document and the time it took for its effectiveness, are due, in large, to that international dynamics of the time.

[48] The International Covenant on Economic, Social and Cultural Rights, on another hand regarded the protection of positive rights. In this sense, it had a broader support by socialist states in its ratification processes. The enforcement of such Covenant was affected by the same abovementioned dynamics.

Universal Declaration of Human Rights, are considered to form the International Bill of Human Rights.[49]

Subsequently, it is relevant to highlight instruments and institutions regarding a regional protection and enforcement of human rights that also emerged until the 1970's.[50] In 1949, amidst the rebuilding of after war Europe, the creation of the Council of Europe through the Statute of the Council of Europe. This was followed by the adoption of the European Convention on Human Rights, in 1950. Simultaneously, on the other side of the Atlantic, the Organization of American States was created during the Ninth International Conference of American States, held in Bogota in 1948. In that same conference the American Declaration of the Rights and Duties of Man would be adopted. Later on, the Inter-American Commission on Human Rights was established at the Fifth Meeting of Consultation of Ministers of Foreign Affairs in Santiago, Chile, in 1959. Finally, it is worth citing in the aforementioned period, the adoption of the American Convention on Human Rights, in 1969. The Convention was adopted in San José, Costa Rica, and came into force in 1978. In the subsequent year, the IACtHR was founded, due to foregoing provisions of the latter Convention.[51]

These instruments and institutions illustrate the expansion of human rights since the end of World War II to the 1970's. This can be considered a first phase of development of IHRL in the second half of the twentieth century. Subsequently, after the so-called *third wave of democratization* (HUNTINGTON, 1993),[52] these mechanisms made possible a framework that would allow the beginning of movements for the domestic prosecution of human rights

[49] "Together with the Declaration, the Covenants form the International Bill of Human Rights, which now stands at the core of the universal human rights system - universal in the sense that membership is open to states from all parts of the world." (ALSTON, GOODMAN, 2012, 139).

[50] The instruments followed the same pattern regarding *norm's entrepreneurs* and *organizational platforms* as the former, in a regional level.

[51] The African Charter on Human and Peoples' Rights is also noteworthy in the abovementioned sense (not enrolled for the sole fact that it was set up only in 1987).

Furthermore, in that sense of a broader international system of protection of human rights:

"The central institutional participants in the human rights regime also include other intergovernmental bodies such as the International Labour Organization, national governments and human rights agencies, nongovernmental human rights organizations, and a range of nongovernmental (and often international) organizations such as labour unions and churches" (ALSTON, GOODMAN, 2012, p. 139).

[52] According to Huntington, the "third wave" included transitions occurred in Europe, Latin America, Asia and Africa. As reasons for the transitions, Huntington cites the end of the Soviet Union, modernization of the affected countries, in late twentieth century, external pressures, such as those regarding democracy and human rights by Europe and the US, regional factors, and other internal aspects, for instance, as grassroots movements for democracy, and other factors, such as the shift of understanding regarding authoritarian regimes by the Catholic Church (HUNTINGTON, 1993).

It is interesting to note the dual aspect of human rights in such movement, at the same time posing as a cause of the third wave, and then widened as a result of the same, due to transitional movements in those countries.

violators of the former authoritarian regimes. Such prosecution would occur in the context of the transitions that happened in the 1970's and 1980's (SIKKINK, 2011).[53] These movements paved the way for the *second phase of the life cycle of the norm* of responsibility to begin in the 1990s - the *normative cascade* (FINNEMORE, SIKKINK, 1998, p. 895 *et seq*, 902, LUTZ, SIKKINK, 2001; TORELLY, 2013, p. 498 *et seq*). Among these movements, the trials of the agents involved in the gross violations of human rights in the authoritarian regimes in Greece (1967-1974), Portugal (1933 - 1974) and Argentina (1976 - 1983) are notorious (SIKKINK, 2011).

Regarding Greece, the military defeats in colonial wars and a disastrous war policy led to the overthrow of the *junta* that commanded the Greek regime and "Greece performed unprecedented trials of military personnel for crimes during the regime and imposed severe penalties (...) even in relation to the leaders of the *juntas*" (SIKKINK, 2011). In Portugal, after the *Revolução dos Cravos*, members of the State International Defence Police (Polícia Internacional e de Defesa do Estado - PIDE) and their informants were arrested and brought to trial for their participation in repression during the *Estado Novo* regime (SIKKINK, 2011). Finally, in Argentina, the transition "furthered the idea of criminal responsibility when judging nine former members of the *juntas* for human rights crimes during the 1976-83 dictatorship" (SIKKINK, LUTZ, 2001, p. 15). In addition to these examples of accountability of perpetrators of crimes against humanity, it is worth pointing out another case that occurred in the 1970's. Such case generated relevant unfolding of the development of the concept of crimes against humanity and to the comprehension of the *norm of individual accountability*.

In 1979, in the United States, a group of lawyers from the New York Constitutional Law Centre made use of the Alien Tort Claims Act (ATCA)[54] to achieve accountability – through civil liability – for crimes perpetrated during the Paraguayan dictatorship. These lawyers lodged a lawsuit against Americo Norberto Peña-Irala, former Asuncion police inspector, for the crimes he perpetrated during that authoritarian regime. In the complaint, members of the Filartiga family alleged that Peña-Irala had kidnapped and killed Joelito Filartiga, so that his father, Joel Filartiga, abandoned his political activities. The decision of

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[53] It is possible to argue that the *third wave* itself was deeply influenced by the development of such human rights system. As an example of that statement, Huntington points out the shift towards US policy on human rights regarding the Latin American dictatorships, leading to less support and even reprobation, by the US, of the violations committed by these regimes.

[54] In what concerns the present case, the Act provides: "The district courts shall have the original jurisdiction of any civil action by a foreigner for a criminal offense committed in violation of the law of nations or the treaty of the United States" 28 USC 1350 (1994) (Legislation originally published in 1789) (highlighted) (SIKKINK, LUTZ, 2001, p.8).

the Court of Appeals of the Second Circuit was for the conviction of the former inspector. The ruling was innovative for making use of international customs and IHRL to justify the decision (USA, 1980). Furthermore, the decision broke barriers by stating that: "the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind" (USA, 1980, p. 19). In that sense, the relevance of the *Filartiga v Peña-Irala* case for the present study is based on:

(a) The Court's innovative approach to the individual accountability of perpetrators of crimes against humanity. For the first time, a US court convicted a foreign national for crimes in a foreign country against foreign nationals, on the basis of the law of nations (customs and general principles of international law). Furthermore, in the operative part of the sentence, it stated that torturers committed crimes against humanity and should be tried wherever they may be.

> "By so saying, the Second Circuit reaffirmed the Nuremburg ideal: that torture (like genocide) is never a legitimate instrument of state power. Thus, official torturers may not invoke comity or cloak themselves in state sovereignty to avoid individual responsibility (...)" (KOH, 1991, p. 2367).

(b) Its contribution as a precedent to a broader acceptance of these concepts *vis-à-vis* the United States and Latin America. The decision set the stage for the *normative cascade* of the norm of individual accountability in the region.

(c) The valuable example it poses to illustrate a transnational legal process, and the relationships between human rights and transnational law. This is due to the fact that, in a transnational perspective, the court used IHRL to provide the basis for the conviction, on one hand. On the other hand, it helped developing the concept of *universal jurisdiction*.[55] Furthermore, as stated above in (b), the ruling was used as precedent by other courts in the United States and elsewhere to substantiate decisions regarding crimes against humanity.

For all of those reasons, it is possible to say, that the Second Circuit Court innovation turned to be a landmark case "which inaugurated the era of transnational public law litigation in which we now live" (KOH, 1991, p. 2366). Such was due to the abovementioned reasons

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[55] To follow the understanding of that country on the concept of 'universal jurisdiction', it seems useful to present the American Law Institute Restatement (Third) on Foreign Relations Law of the United States of 1987, section 404 - Universal Jurisdiction: "A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism (...)" (USA, 1987).
The concept would be further developed (especially through by jurisprudence, in transnational manner) to encompass further, as already seen, torture (e.g. the Filartiga precedent), and other crimes against humanity (*e.g.* Pinochet's Case).

and, paramount among them, the boost it offered to the development of the doctrine of *universal jurisdiction*.

After this brief account of the developments of IHRL[56] and its enforcement, it is possible to assert that the *international system of human rights* became largely settled. Furthermore, the comprehension and application of the *norm for individual accountability for crimes against humanity* reached a broad acceptance. Therefore, during the 1990's, the concept of crimes against humanity was encrusted in the statutes of the *ad hoc* international courts. Such as those courts responsible for judging the crimes perpetrated in the former Republic of Yugoslavia and in Rwanda. Later on, it was encrusted to the Rome Statute of the International Criminal Court (henceforth ICC). Thus, along with the regulation of the concept in the statute of the abovementioned courts, there was the establishment of the contemporary legal comprehension of the violations that constitute a crime against humanity. This last conformation of the crime in the Statute of the ICC followed the half century of international norms and precedents regarding crimes against humanity.[57]

Parallel to the international developments, it is possible to see this pattern of regulation of the concept of crimes against humanity in the development of domestic legislation.[58] For instance, following this pattern, Belgium instituted the "Law on the punishment of serious breaches of the international Genève conventions, and its protocols", in 1993. This legislation was modified to the "repression of gross violations of international humanitarian law", in 1999, after the advent of the Rome Statute. Later on, in 2003, that same law was once again

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[56] It is worth highlighting that, underlying those developments, there is the restless work of academics, lawyers, activists, families and victims of human rights violations, regarding litigation methods, strategies, and other routs of generating policy and legislative change domestically and internationally.
These actors can be reputed as *norm entrepreneurs* in regard to their roles developing the norms in transnational perspective. While promoting norms both domestically and internationally, and between such orders, those actors make use of international and foreign comprehensions to enforce norms domestically, while also promoting domestic comprehensions internationally.

[57] The ICC conformation determines a series of acts that are considered crimes against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Among those, the Rome Statute refers to aforementioned acts such as murder, enslavement, torture, forced disappearance, a series of persecutions among others (UN, 1998). Available at: https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf, access 19 June 2018.

[58] International endeavours were made in order to achieve such regulation in domestic legal orders. The Report 3047 of the UN on the "Principles of international operation in the detection arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity" pushed states' responsibility regarding the persecution of such crimes.
This Report supported the advancement of domestic norms regarding the persecution of crimes against humanity, the persecution of such crimes by domestic legal orders, and, further, cooperation between states in order to prevent and persecution of such crimes. It is also recognizable the support for the abolishment of measures which might be prejudicial to the accountability of such crimes (UN, 1973).

modified to encompass exactly the comprehension of crimes against humanity of the ICC. Therefore, acts which were then considered as a crime under international law could be "repressed in accordance with the provisions of [the Belgian] law". The legislation currently establishes the same hypothesis for such crime as the ICC, and the repression of such conducts by the Belgium government. Thus, it grants jurisdiction to the Belgium Courts if the deed is committed in "in the territory of the Kingdom, of the state of the nationality of the alleged offender or of the state in whose territory the alleged offender is located" (BELGIUM, 2003).

This latter process of regulation of the concept and provision of its hypothesis in those statutes crowns the legal standardization of a norm that was already understood as customary international law. As described, it was a norm that had its roots in the Laws of War and Humanitarian International Law, long before the Second World War. Such norm had been consolidated throughout the second half of the twentieth century through international, regional and domestic legislation. It was further broadened by the courts practices and legal theory. All in all, it was a norm that, due to its nature, and the way in which it had been enforced through those years, was already considered during that period of time a peremptory norm - *jus cogens*.

1.3.1 – Crimes against humanity as *jus cogens*

Following the development previously set, it is possible to recognize that there were provisions regarding gross violations of human rights since before the Second World War. This assertion follows the proposed by the Nuremberg prosecutors, and advocated by Kelsen (1947) and Arendt (1995). This comprehension stated that these violations were regarded as of responsibility of the sovereign states and shifted to individual accountability after the mentioned global conflict. As aforementioned, the concept of crimes against humanity itself also had its roots in events previous to the abovementioned World War. At last, the shift of paradigm and *acceptance* of that norm, and of the individual accountability for its violation, has been legally established since after the Second World War.

Thus, it is possible to assert that committing a violation of that sort was more than "morally most objectionable". It was possible to recognize, even before the regulation of the concept of crimes against humanity, that such acts were established as violations of the Laws of War and Humanitarian International Law.[59] Therefore, it is possible to say that such a norm was part of the customary international law. That status would surely be consolidated after the Second World War, through the abovementioned development. Nevertheless, it is possible to recognize a crime against humanity at least from the 1940's, as a core norm to be protected in International Law. Further on, after broad regulation since the Second World War, such protection could be considered a peremptory norm of International Law. Peremptory norms would later be defined by the Vienna Convention under *jus cogens:*[60]

> The notion of peremptory norms in international law is reminiscent of the distinction of Roman law between *jus strictum* and *jus dispositivum*, as well as the rationalization in natural law of the seventeenth and eighteenth centuries, according to which certain rules existed independently of the will of states and legislators. [The notion] found its way to positive international law through the Vienna Convention on the Law of Treaties of 1969 (DE WETT, *in* SHELTON, p.541).

[59] Along with the abovementioned Conventions of Geneva and Hague, it is noteworthy to refer to the provisions of the Geneva Convention of 1929, and the General Treaty for the Renunciation of War of 1927 (which brought forward the legal concept of crimes against peace). Those acts contained provisions against war (*jus ad bellum)* and regarding war (*jus in bello*), and were ratified by the states involved in the International Conflict.
For more information on the latter, see: http://avalon.law.yale.edu/20th_century/kbpact.asp access 19 June 2018.

[60] In that sense, for the purpose of further clarification, the Vienna Convention on the Law of Treaties of 1969 states on *jus cogens*:
"Article 53 - Treaties conflicting with a peremptory norm of general international law ("jus cogens")
A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" (UN, 1969).

Jus cogens are, unlike other customary international law, norms that cannot be derogated or altered by states. They are the central core of International Law, norms that must be upheld and enforced in relation to states and, following the abovementioned paradigmatic shift of accountability, towards individuals. Thus, it is possible to comprehend that they share the utmost level of protection given to rights in International Law. Therefore, following the development of the origins of the concept in the previous pages, it is possible to say that there is a broad consensus on the status of crimes against humanity as *jus cogens*, and for individual accountability to be held on such cases (BASSIOUNI, 1996, p. 63 *et seq.,* MAY, 2005, p. 24-25 et seq., SHAW, 2008, p. 511; DE WET, 2013, p. 543).[61]

Finally, it is worth pointing out that the compliance with *jus cogens* is owed to the whole international community, and encompasses each and every state and individual. Such norms regarded as *jus cogens* are considered to be under the legal concept of an *erga omnes* obligation – a juridical concept, advanced by the jurisprudence of the International Court of Justice (ICJ). Such concept regards the utmost importance of universal compliance and enforcement of peremptory norms, by both states and individuals. In this sense:[62]

> Obligations which are regarded as owed to the whole international community, with the practical consequence that the right to react to any violation of the norm is not confined to the state or states directly injured or affected by the violation, but appertain to every State (THIRLWAY, OKOWA *in* Evans, 2003, p. 142).

Therefore, it is possible to say that there is an *international system of human rights,* and further, it could be said that there is such a thing as an *international humanitarian regime*. That is, there is an international system of provisions and protection of human rights for every human, notwithstanding nationality or any other affiliation. Encompassed in this system there are guarantees regarding non-violation of *jus cogens*, which constitute an ultimate beacon of constitutional limits (CANOTILHO, 1998). In that sense, following Teitel's 2011 account, it is possible to say that, in the course of the last century, the focus have changed from states, and their relations, to the protection of individuals, and their relations, in what she calls a *Humanity's Law:*

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[61] Other acts that are usually considered *jus cogens* by the referenced scholarship are, in the chronological order in which they are presented: piracy, slavery, wars of aggression, genocide, and torture.

[62] Although different levels of obligations regarding enforcement of international norms were defined previously to the abovementioned decision of the ICJ (for more on that *see* THIRLWAY, OKOWA *in* EVANS, 2003; ALSTON, GOODMAN, 2012), the decision of the ICJ is reputed to have enunciated such obligations in a manner where it established "essential distinctions" between them.
For the whole decision that advanced the concept of *erga omnes* in the international community, see: Barcelona Traction Case (Barcelona Traction, Light and Power Company, Limited, Belgium v Spain (New Application, 1962), Belgium v Spain, Preliminary Objections, Judgment, [1964] ICJ Rep 6, ICGJ 151 (ICJ 1964), 24th July 1964, International Court of Justice [ICJ]).

> This history has created the context for a transformation in the relationship of law to violence in global politics. The normative foundations of the international legal order have shifted from an emphasis on state security— that is, security as defined by borders, statehood, territory, and so on—to a focus on human security: the security of persons and peoples. In an unstable and insecure world, the law of humanity—a framework that spans the law of war, international human rights law, and international criminal justice—reshapes the discourse of international relations. (TEITEL, 2011, p. 4)

These crimes against humanity are in the centre of that protection provided by this *international system of human rights*, this *Humanity's Law*. It is a *jus cogens* norm*,* a peremptory, non-derogable norm, which has *erga omnes* character. Thus, it must be observed and enforced by both states and individuals. These interpretations permeate the development of contemporary constitutionalism and constitutional interpretation, as the current paradigm of protection of human rights. This latter movement of propagation of such norm can be comprehended as amidst the *normative cascade*. It can also be comprehended, in certain context, as inserted in the *internalization* of such norms in a global scale. Such shifts, this *normative cascade* and the subsequent *internalization,* will be further exposed in the following chapter.

CHAPTER II - TRANSITIONAL JUSTICE

To understand the abovementioned shift in human rights, the *normative cascade* and the subsequent process of *internalization* of those standards, it is necessary to comprehend the field of *transitional justice*. The transitions to democracy and to states of peace in the late twentieth century, and the autonomous field of transitional justice, that arose from the former, reformed the perspective of various aspects of human rights (ARTHUR, 2009). Among these aspects, the matter of accountability for crimes against humanity was especially affected by the emergence of this field. In addition, the comprehension of aspects of the field assists directly in the context of this research, regarding the unfolding of human rights brought forward by the field of transitional justice in the Latin America.

Thus, the track of this topic of the project begins with a general presentation of broad contemporary readings of the field of transitional justice and its mechanisms. Afterwards, it moves on to a narrative of the conceptual history of transitional justice, from the perspective of accountability for crimes against humanity. Finally, it presents the development of concepts of IHRL, of crimes against humanity and the norm of individual accountability, in the aforementioned context. After laying the preliminary basis to understand the development of transitional justice, the chapter resumes the development of the *life cycle* of the norm of accountability. In that sense, it advances from the *emergency* of the norm to the *normative cascade,* concluding with the *internalization* of such norm.[63]

During the 1990's, it was agreed to denominate transitional justice the set of mechanisms and practices implemented during periods of radical political transformation (ARTHUR, 2009, 324; TEITEL, 2000, p. 11). The field of study that contemplates such mechanisms arises in this same context, after "a set of interactions between [a series of actors] engaged with human rights and the dynamics of 'transitions to democracy', beginning in the late 1980's" (ARTHUR, 2009, p. 324). At first, the acceptance of the field was notably boosted by the work of Ruti Teitel and Neil Kritz, in particular, in addition to the efforts of various actors and institutions engaged in human rights (ARTHUR, 2009, p. 329-330). Despite the uncertainty regarding the exact origins of the term, its acceptance and

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[63] The *tipping point* of the norm and the following *normative cascade* were already presented, in some extent, in an international perspective. This chapter focus on the phenomena of the *normative cascade* in transitional contexts, more specifically in Latin-America. Such movement for the *normative cascade of the norm of individual criminal accountability* is considered by Sikkink and Lutz (2001) as the movement of *justice cascade*. Further on, this chapter will present how the norm was *internalized* in different levels, with the persecution and accountability of many actors that committed crimes against humanity in the proposed context.

development in the following years increased steadily. Through the analysis of Kritz's work, which can be considered a canon for transitional justice, three areas of special interest are identified: "sometimes distinct, others overlapping: human rights, Law, and comparative political science" (ARTHUR, 2009, 333). This framework made possible a relevant role of political analysis compared to what would be considered a human rights agenda. Thus, the term refers simultaneously to mechanisms that aim at overcoming an authoritarian regime or a period of conflict (TEITEL, 2003, p. 74); and the field of knowledge, of a transdisciplinary nature, which studies the effectiveness of these mechanisms.

In order to lay the foundations for a genealogy of the field, it is pertinent to present how the transitional justice and the mechanisms that comprise it are currently understood. Transitional justice contemplates a set of mechanisms and practices that are carried out during periods of radical political transformations (ARTHUR, 2009, TEITEL, 2000, p. 11). As stated, the purpose of transitional justice is to overcome an authoritarian regime or a period of conflict to make possible the development of a democratic order and a state of peace (TEITEL, 2003, p. 74). Furthermore, according to the UN, transitional justice consists of a set of mechanisms aimed at overcoming a legacy of systematic violations of human rights (UN, 2004). In general, it is possible to divide the mechanisms that compose transitional justice into four main pillars: justice, reparations, memory and truth, and institutional reforms (VAN ZYL, *In* REÁTEGUI, 2011, p. 49). Still according to the UN, the implementation of transitional justice mechanisms is a "fundamental building block" in the construction of a sustainable peace (UN, 2012). The institution also stresses that the approach to such a process should be comprehensive, "incorporating the full range of judicial and non-judicial measures" aimed ultimately at re-establishing trust in state institutions and promoting the rule of law (UN, 2012).[64]

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[64] It is worth mentioning that this project shares the UN's understanding of the need for a holistic application regarding the implementation of transitional mechanisms. This is justified because "in the case of transitional moments, [the rule of law] is more concerned with the past and with the future, retrospective and prospective (...) as Teitel will emphasize in 2001 (p. 215)" (Meyer, 2015, 214). Thus, only through a holistic application of transitional justice mechanisms it is possible to achieve the effective construction of a rule of law committed to compliance with norms and the consolidation of a democratic order, without neglecting the violations that constituted the past history of the state in which the mechanisms are implemented.
Such holistic perspective, supported by this research, foresees that the isolated enforcement of transitional justice mechanisms is not enough to approach transitional contexts; thus promoting an approach that involves multiple mechanisms (OLSEN *et al.*, 2010a, p. 24-25, 2010b, p. 983, 990 *et seq.*).
Following the understanding initially set by the International Centre of Transitional Justice, the authors qualify: “Advocates of the holistic approach hope to avoid the pitfalls of promoting a single approach—by combining mechanisms—to address a range of experiences and contemporary realities” (OLSEN *et al.*, 2010b, p. 990).

Given the contemporary contours of transitional justice, this research sets out to trace the roots of the field, which may contribute to the intended narrative towards human rights. Following the advertences of Arthur (2009), the option made for the development of this narrative converges to the genealogical approach of Teitel (2003). Thus, the first phase of the genealogy of the field corresponds to the beginning of the development of the IHRL, and the *emergence* of that system and the *norm of individual accountability*, with the courts established by the Allies in the post-World War II (TEITEL, 2003, p. 69 *et seq.*). According to the author, and as previously exposed, these courts are at the origin of the aspects of internationality and extraordinariness of transitional justice.

With the outbreak of the Cold War, the internationality characteristic of transitional justice is suppressed. This period is identified by the author as the second phase of the genealogy of transitional justice. During the conflict a balance of powers was established between the global powers of the period, leading to a political balance and a stalemate on transitional justice issues. Thus, during the conflict, the mechanisms that would give rise to the field began to operate more locally, focusing on memory and truth mechanisms (*e.g.* truth commissions). This focus would be in detriment of justice mechanisms (such as individual accountability of the agents of the authoritarian regime), due to the tension with the global perception of justice associated with the level of transnational politics (TEITEL, 2003, 71).

Finally, in the last decades of the twentieth century the third phase of the genealogy of transitional justice takes place. This phase is characterized by the normalization of the field. Mainly marked by the expansion and normalization of transitional justice, the third phase aims to resolve typical conflicts of contemporaneity (*e.g.* peacetime wars, political fragmentation, permanent conflicts) (TEITEL, 2003). The aforementioned reformulation of the comprehension of human rights is inserted at these latter stages. It is especially supported through the innovations carried out by Latin America. From the perspective of the *life cycle of the norm of individual responsibility*, the norm passes from the *emergency* phase, after the Second World War, to the *normative cascade* in the 1970's and 1980's. This latter phase is recognized as the *justice cascade* (LUTZ, SIKKINK, 2001; SIKKINK, 2011) which began at the end of the 20th century and lasts, along with the *internalization* process, until the present days.

It is also possible to recognize, in cases in which states did not act seeking to enforce transitional justice measures, the central role that private actors played (especially regarding

demands for accountability). Such movement was deemed by Collins as *post-transitional justice*. In this movement "the centre of gravity for judicial accountability (…) shifted to the private sphere and, additionally, to the legal setting" (COLLINS, 2010, p. 35). This view is supported by González-Ocantos, who asserts the importance of "organized victim groups and their lawyers [in] guaranteeing stable and consistent jurisprudential outcomes" (GONZALEZ-OCANTOS, 2017, p. 71). The author points out the importance of such groups in promoting shifts in judicial understanding regarding impunity towards criminal accountability. These movements of advocacy for human rights, social movements, groups of victims, are fundamental to achieve accountability by developing litigation techniques and innovative approaches to the subject. Due to these actors capacity of shifting legal preferences it is possible to say that, even in regimes unresponsive to such demands, "magistrates and prosecutors have become more attuned to finding ways to implement human rights, (…) by applying constitutional and international law standards" (MÉNDEZ, CONE *in* SHELTON, 2013, p. 979).

2.1 - The *justice cascade* – individual accountability for crimes against humanity within the context of transitional justice in Latin America

As previously mentioned, the *justice cascade* is the *normative cascade phase* of the norm of individual accountability for crimes against humanity. During this phase occurs the event of *contagion*[65]. Later on, this phase is followed by a wider acceptance of the norm in domestic and international perspectives. This dissertation argues, based on the work of Lutz and Sikkink (2001) and Sikkink (2011), that this wide acceptance of the norm of individual accountability – *the justice cascade* – has been in effect since the late twentieth century. The subsequent process of *internalization* of such norm has been achieved in some levels, and is underway in other spheres at the present moment: more and more countries have adhered to that norm, and Latin America is at the forefront of this phenomenon.[66]

There are examples of manifestation of such processes of *contagion* beyond Latin America, as previously presented in the Portuguese and Greek transitions, and also the *Filartiga Case*. Nevertheless, it was in Latin America that the broader advances were achieved. The major progresses in the region were a result of the tireless demands for justice of thousands of survivors and families of the victims of authoritarian regimes, in the 1970's and 1980's. Furthermore, this Latin American protagonism is due to the work of human rights activists, lawyers, academics, journalists, politicians, social movements, and a various other individual and collective actors.[67] Following such demands, and theoretical advancements, there was a marked increase in the prosecution of perpetrators of crimes against humanity in the late 1980's and throughout the 1990's. This phenomenon had been triggered by the series

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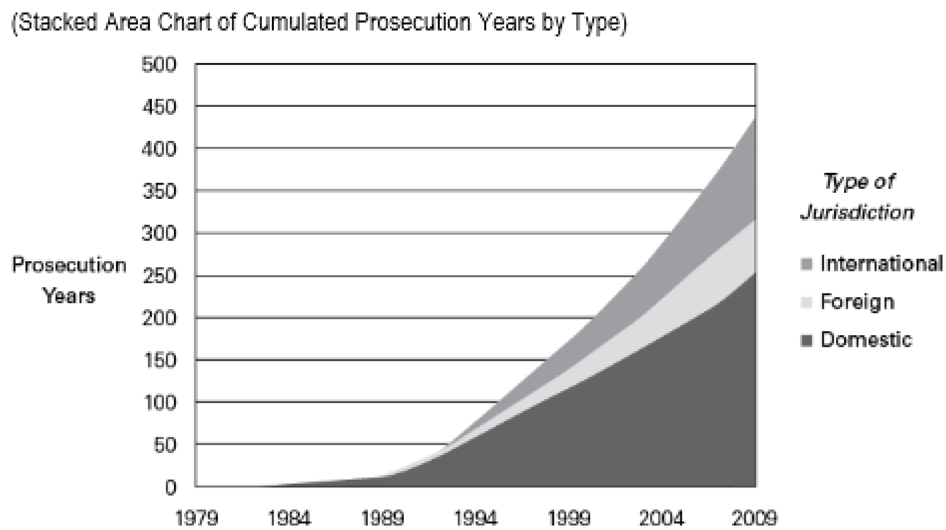
[65] The process in which adopting the norm may become more important than the domestic policies of a country, due to an international or regional effect generated by institutionalization and systematic adoption of the norm.

[66] It is possible to affirm, with Torelly (2012, 2016), that the norm of individual accountability is already *internalized* in relation to certain contexts. The author points out the regional human rights law in Latin America as an example, in an account broadly followed by this study. However, it is still impossible to speak of an *internalization* of this norm far beyond the example cited (even in relation to domestic legal systems of the mentioned region), since for a *de facto internalization* the norm must be widely accepted and *internalized* by the state actors – even if it does not impose a throughout compliance with the norm – reaching an almost automatic conformation on the part of its recipients, at least in a normative level. Thus, the present work argues that in a level it is possible to talk about *internalization* of the norm of individual criminal accountability for crimes against humanity (i.e. regional human rights law), and in other levels the *normative cascade* – or *justice cascade* – is still unfolding.

[67] Such actors can be understood both as *norm entrepreneurs* and *platforms* of the *norms* depending on the roles they played in their endeavours for advancing human rights.
Here, it is possible to advance two aspects. First, assuming these movements were transnational, as pointed by Collins (2010), the transitional justice networks developed in several different countries, something that was fundamental to the current phase of the field and was necessary to obtain some of its achievements. Second, the essential role played by both activists and human rights lawyers regarding the shift of institutional-judicial comprehensions of human rights and accountability (GONZÁLES-OCANTOS, 2017).

of previously described factors. Initially, it was possible due to the development of instruments for the promotion and guarantee of human rights. It was also possible due to the context set forth by the *third wave of democratization*. Further on, it was feasible due to the mobilization of *entrepreneurs of the norm* and *organizational platforms* that ensured the endorsement of the norm. Finally, the norm of individual accountability was accepted by a growing share of state actors and international and regional organizations. In order to illustrate the aforementioned marked increase through the movement of the *justice cascade* it is worth presenting the following graph developed by Sikkink (2011):



Furthermore, it is worth noting that the response to the demands for accountability in Latin America took place in a transnational perspective. Domestic courts and the regional system for the protection of human rights, especially through the work of the IACtHR, had a great part in this process. Beyond those actors, a number of foreign courts, through mechanisms that allowed denunciation, prosecution and condemnation of the agents of repression[68] were decisive for the individual accountability of perpetrators. Regarding such transnational enforcement of accountability:

> In the last twenty years, the [regional] Court has already decided on the State's obligation to investigate crimes of its agents during periods of transitions to democratic normality in Peru, Paraguay, Colombia, Guatemala and El Salvador, making the perpetrators accountable. In a similar sense there were several decisions

[68] *e.g.* the aforementioned use of ATCA in the United States; the institute of *universal jurisdiction* in the investigations of the Pinochet case in Spain; the conviction *in absentia* by a French court in 1990 of Alfredo Astiz because of the murder of two French nuns.

> of national constitutional courts of the Americas, among them Argentina, Chile, El Salvador, Panama and Peru (ABRÃO, 2009, p. 14).

It is possible to understand, thus, how judicial jurisprudence on the subsequent transitional periods (in a transnational perspective) was fundamental to the process of addressing gross violations of human rights. In order to illustrate how such jurisprudence on human rights was relevant, this research draws from an example of a precedent of the IACtHR. An extremely relevant example to the context, for both its unprecedented approach to the matter and due to the innovations it offered. The 1988 IACtHR's condemnation of the State of Honduras for the illegal detention, torture and disappearance of Ángel Manfredo Velásquez Rodríguez is a fundamental case law of the regional court.[69]

Manfredo Velásquez was detained without a warrant by members of the *Departamento Nacional de Investigaciones* (the National Office of Ingestigations), in 1981. On custody, he was submitted to harsh interrogation and torture. He was then moved to a battalion of the Honduran army, where further torture was perpetrated. The state forces denied the detention of Manfredo Velásquez, and there was no further acknowledgement of his whereabouts. Manfredo's was not an isolated case: the same pattern of disappearances was deemed to have happened to 100 to 150 persons in Honduras, during the period between 1981 and 1984 "in a systematic manner" (IACtHR, 1988, par 147, d, i). Finally, the Court stated that "[i]nternational practice and doctrine have often categorized disappearances as a crime against humanity, although there is no treaty in force which is applicable to the States Parties to the Convention and which uses this terminology " (IACtHR, 1988, par 153). Thus, the Court convicted the state of Honduras for a series of violations of human rights protected by the American Convention, such as human treatment (Art 5), personal liberty (Art 7), and the right to life itself (Art 4). Therefore, the IACtHR advanced both the grounds for future convictions of perpetrators of forced disappearance, and for the development of instruments regarding such crime.

The IACtHR uttered many rulings which broadened the scope of human rights in the region, by the interpretation and application of international and regional human rights norms. In the case Manfredo Velásquez, it was possible to comprehend such role played by the Court regarding the crime of forced disappearance.[70] A clear concept of the crime was not available at the time, which forced the Court to sentence on basis of violations to the ACHR.

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[69] Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf access on 19 June 2018.
[70] For more information on forced disappearance, *see*: VARGAS, 2016.

Nevertheless, the Court also supported its decision on the previously existing account that forced disappearances were crimes against humanity. Therefore, the Court contributed to the enforcement of the persecution of such crime in the region through jurisprudence, until a Convention on such violation was passed in 1994.[71] It is possible to say that, through the process of interpreting the ACHR, the IACtHR has played a leading role in guaranteeing rights and developing more restricted obligations in relation to the states parties (MEDINA *in* SHELTON, 2013, p. 668).

Among these obligations, the IACtHR has also innovated by developing the account that those normative provisions that constituted obstacles to the investigation and accountability of perpetrators of crimes against humanity are considered null.[72] Furthermore, the jurisprudence of the Court improved through the end of the twentieth century. Initially, the IACtHR uttered that "amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible" (par. 41), in the *Barrios Altos* case, in 2001.[73] Further on, following the growing enforcement of IHRL, the Court maintained the pattern in rulings such as *Almonacid Arellano vs. Chile* (2006)[74] and *La Cantuta vs. Perú* (2006).[75] In these cases the IACtHR ruled that such norms were null and void since the moment of its issue.[76] Therefore, it is possible to assert that the Court was

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[71] The Inter-American Convention on Forced Disappearance of Persons, approved in June of 1994, and enforceable from March, 1996.

[72] Regarding the matter of impunity of perpetrators of human rights violations, Joinet states that there were already international provisions on such matter: "The World Conference on Human Rights (June 1993) supported that line of thinking in its final document, entitled "Vienna Declaration and Program of Action" (A/CONF.157/24, Part II, para. 91)." (UN, 1997, par. 5)
In full: "91. The World Conference on Human Rights views with concern the issue of impunity of perpetrators of human rights violations, and supports the efforts of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine all aspects of the issue" (UN, 1993).
Along with those, through the analysis of the jurisprudence of the IACtHR, it is possible to comprehend that the IACHR was already advancing some opinions on such regard throughout the 1990's.

[73] Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf access on 19 June 2018.

[74] Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf access on 19 June 2018.

[75] Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_162_esp.pdf access on 19 June 2018.

[76] Regarding the non-applicability of statutes of limitations and amnesties, it seems relevant to present an international advancement contemporary to these latter decisions of the court: the UN General Assembly, following the mentioned developments of the field, adopted, in 2005, the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law".
Amidst such principles (in IV – Statutes of limitations), the document provides that:
"6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.
7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive." (UN, 2005)

fundamental in the promotion of jurisprudence on the matter of impunity regarding gross violations of human rights. Such assertion is supported by the following 1997 UN Report:[77]

> This was when the international community realized the importance of combating impunity. The Inter-American Court of Human Rights, for example, in a ground-breaking ruling, found that amnesty for the perpetrators of serious human rights violations was incompatible with the right of every individual to a fair hearing before an impartial and independent court. (UN, 1997, par. 5)

The initial achievements of the IACtHR and domestic courts were further propagated due to the networks of human rights movements, victims, lawyers and such other actors that were concerned with the matter in Latin America. These transitional (transnational) networks provided the background for a movement that reached beyond Latin America. This increase in relation to the aforementioned individual criminal accountability for crimes against humanity is what Sikkink calls the *justice cascade* (2011). Such movement started in the abovementioned examples. It was propagated due to the Latin American protagonism. Further on, it reached European states and, afterwards, it could be recognized in endeavours for accountability regarding crimes perpetrated in African states (LUTZ, SIKKINK, 2001, p. 32).[78]

Finally, as abovementioned, the developments were disseminated by the restless work of victims, families, human rights activists, lawyers and other social actors. These actors achieved a shift of institutional comprehensions in a series of countries in Latin America, reaching effective prosecution for gross human rights violations.[79] This shift was also possible due to the developments carried out by the region itself. By interpreting and ruling on human rights cases, the Latin American courts developed comprehensions that provided further mechanisms and arguments to seek prosecution of perpetrators for crimes against humanity.

Thus, once more, it is possible to ascertain, through the scope of such provision, the consolidated restrictive understanding towards statutes of limitation, when regarding to gross violations of human rights that constitute crimes under international law (e.g. crimes against humanity) in IHRL.

[77] The principles stated by Louis Joinet regarding Impunity would be recognized as the Joinet Principles, a series of principles, developed in the context of transitional justice, aimed at preventing the impunity of perpetrators of human rights violations. Regarding amnesties they would dispose that: such mechanisms cannot be accorded until victims have obtained justice (UN, 1997, par. 32), and (Principle 28 – Restrictions on the Practice of Amnesty) even if they are implemented, they cannot reach perpetrators "of serious crimes under international law and the perpetrators of gross and systematic violations", unless accountability has been previously enforced (UN, 1997).

[78] "In Latin America during the last two decades of the twentieth century there has been a rapid change in relation to the recognition of the legitimacy of human rights norms and an expansion in international and regional actions aimed at the effective fulfilment of these norms (...) the consequences [of this change] were not limited to Latin America." (LUTZ, SIKKINK, 2001, p.4)

[79] Criminal individual persecution for gross violations of human rights in the region was enforced in some countries (most notably Argentina, Chile and Peru), however, some others did not achieve much in regard to that matter (also notably Brazil, Mexico and Uruguay) (GONZALEZ-OCANTOS, 2017, p. 276) also in Sikkink (2011) and Roht-Arriaza (1995).

Thus, the process of *justice cascade* of the norm of criminal accountability was accompanied with developments of the concepts that contributed for such processes. The encompassing of forced disappearance to the concept of crimes against humanity and the deflation of value of blanket amnesties or self-amnesties are paradigmatic examples of such assertion.[80]

[80] Arguably the developments in such fields affected the understanding and comprehension in a global scale. Other regional courts started being concerned with such matters, and legal dispositives were developed to deal with such subjects. Regarding forced disappearance: the already mentioned Inter-American Convention on Forced Disappearance of Persons, adopted in 1994. Further on, it is possible to cite its adoption by the Rome Statute, in 1998, as a crime against humanity. More recently, it is possible to refer to the CED - Convention for the Protection of All Persons from Enforced Disappearance, adopted in 2006. Those are all examples of the normative developments of holding forced disappearance to a higher stance of protection.
Regarding self-amnesties and blanket amnesties, the IACtHR has a broad jurisprudence reaffirming the lack of validity of such provisions regarding gross violations of human rights.
Furthermore, reaffirming such understanding, the United Nations policy on the matter was summarized in 2000, by a UN Secretary General report in the following manner: "While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law" (UN, 2000, p. 5). Such, is an UN institutional position that traces back to the 1990's, especially through the Joinet Principles, previously exposed: "Amnesty cannot be accorded to perpetrators before the victims have obtained justice by means of an effective remedy" (UN, 1997, par. 32).

2.2 - The reshaping of the norm of accountability for crimes against humanity through transitional justice

The innovations achieved by the supported comprehension of transitional justice allow one to conclude that it has contributed to reshaping human rights. As illustrated by Sikkink (2011), the amount of cases lodged regarding accountability for gross violations of human rights grew in an accelerated rate in the region. Furthermore, through those cases the comprehension regarding the *norm of accountability* cross-developed, affecting domestic prosecution (TORELLY, 2016, p. 163; SIKKINK, 2011). Developments such as the abovementioned allow a glimpse into the possibilities that have arisen in transitional contexts. Therefore, this topic aims to further support the claim that accountability was reshaped through transitional perspectives in Latin America. Such endeavour will be grounded both by transitional justice practice and theory. Thus, this research returns to an example previously mentioned, the case of Argentina. As stated, such a case "furthered the idea of criminal responsibility when judging nine former members of the *juntas* for human rights crimes during the 1976-83 dictatorship" (SIKKINK, LUTZ, 2001, p.15).

After the end of the military regime in Argentina there were a series of measures addressing the injustices perpetrated by the dictatorship. Such measures could be identified among those later established by the field of transitional justice. They were initially implemented during the government of Raúl Alfonsín. The government implemented measures for institutional reforms concerning the military. It enforced initiatives regarding memory and truth, such as the National Commission on the Disappearance of Persons, created in 1983. And it also implemented measures regarding justice, such as the Trials of the *Juntas* (MALAMUD-GOTI *In* ROHT-ARRIAZA, 1995, p. 160 *et seq.*). All of that was a result of the restless demands of organized groups of victims of the regime, parents, grandparents (most notably grandmothers) and other relatives of the victims, human rights advocates, lawyers and other social movements for justice and truth. In Argentina, such movements are reputed to have been highly successful. Among other reasons, they were early in comprehending the importance of developing litigation strategies in courts, and being cohesive in their struggle for truth and justice (GONZALEZ-OCANTOS, 2017, p. 71 *et seq,* SIKKINK, 2011).

On a backslash, following the pressure of military personnel hostile to the trials for the abuses committed during the regime, Alfonsín’s administration was forced to approve two

amnesty laws. They were respectively the laws of *punto final*[81] and *obediencia debida*[82] (LUTZ, SIKKINK, 2001, p. 21, GONZALEZ-OCANTOS, 2017, p. 75). Although members of the *juntas* were convicted, criminal proceedings suffered a setback when members of the armed forces remained restless. Therefore, during Menem's administration, further pardons were granted to military officers who remained indicted or convicted of human rights violations, respectively in 1989 and 1990 (LUTZ, SIKKINK, 2001, p. 21; MALAMUD-GOTI *In* ROHT-ARRIAZA, 1995, p. 161 *et seq.*). Regardless of such setbacks, movements for accountability remained active both in Argentina and overseas. Thereafter, a group of human rights activists and victim's family members achieved in 1987, in the United States, the conviction of Carlos Suarez Mason, regarding the disappearance of Argentine citizens during the dictatorship. Other results appeared in 1990, in France, with the conviction of Alfredo Astiz, for the torture and murder of two French nuns in Argentina. At last, movements for accountability reached a favourable ruling in Spain. In 1996, the Spanish judge Baltazar Garzón asserted jurisdiction over the violations perpetrated in Argentina (LUTZ, SIKKINK, 2001, p. 12), the most renowned example of the use of *universal jurisdiction*.[83]

Movements for accountability remained in Argentina, while those convictions and further proceedings were achieved overseas. Thereafter, in 2001, Argentine Judge Gabriel Cavallo declared null and void the statute laws of *punto final* and *obediencia debida* (ROHT-ARRIAZA, 2005, p. 114). In his ruling, the Argentinian judge brought a series of international precedents. Among those, the case law under the ATCA and the decision of the House of Lords in the *Pinochet case*. Furthermore, it analysed the proceedings under the jurisdiction of his Spanish counterpart, Baltazar Garzón, and the records of the Chamber of Criminal Appeal of the *Audiencia Nacional*. Thus, he concluded that "in judging and condemning those responsible for these acts, the State acts in the interest of the entire international community" (ROHT-ARRIAZA, 2005, p. 114). Therefore, the restless demands for accountability were successful in achieving the annulment of the amnesty laws in Argentina. Such demands were supported by a series of transitional and transnational

[81] For more information, *see*: https://www.legal-tools.org/en/doc/d464a5/ access 19 June 2018.
[82] For more information, *see*: https://www.legal-tools.org/en/doc/a4be3b/ access 19 June 2018.
[83] For a throughout account of the proceeding in Spain and Europe, regarding specifically the Pinochet's case, but also the Argentina persecutions overseas by Spanish Judges, *see* ROHT-ARRIAZA (2005).
It is relevant to note that the arrest of Pinochet in England, due to an order of arrest issued by a Spanish judge related to an investigation on crimes perpetrated in Chile was the most notorious case of use of *universal jurisdiction.* Although Pinochet was not finally arrested based on the crimes he committed, the Spanish decision and its enforcement by the British judiciary and police are reputed to have unfolded a series of criminal complaints against the dictator and other members of the dictatorship, thus stimulating the debate for criminal accountability in Chile (ROHT-ARRIAZA, 2005).

networks, with a cohesive and strategic posture towards the judicial proceedings. The overcoming of the aforementioned laws allowed prosecutions of members of the dictatorship.[84]

It is possible to glimpse, with that brief account, at how a transitional (and transnational) approach was fundamental to the concretization of persecutions for crimes against humanity. Further than the aspects mentioned in the topic above, the Argentinean case provides some other relevant elements. The case provides an empirical suggestion that it is possible to combine a series of transitional mechanisms achieving more positive results towards human rights (OLSEN *et al.,* 2010; SIKKINK, 2011). It also allows noticing the relevance of international precedent, further than international norms, to achieve accountability in transitional contexts (ROHT-ARRIAZA, 2005). Finally, it gives an opportunity to understand the fundamental role of civil society and transitional-networks to the effective enforcement of individual accountability for crimes against humanity (COLLINS, 2010; SIKKINK, 2011; LESSA *et al.,* 2014; GONZALEZ-OCANTOS, 2017, p. 71 *et seq.*).

Therefore, it is possible to conclude that the practice of transitional justice has provided a great field for effectiveness of human rights. The paradigm of transitional justice supported by this research contributed to the enforcement of accountability for crimes against humanity. The comprehension of the enforcement of transitional measures showed that its enforcement is not a matter of choices between truth and justice. Instead, it is a requirement of throughout enforcement of the different pillars of the field, in order to help securing the abovementioned goals (SIKKINK, 2011; SIKKINK, WALLING, 2007, p. 443). This

[84] Although beyond the objective of this analysis, it is relevant to point out some further developments of the Argentine context regarding transitional justice, amnesty and accountability for crimes against humanity.
In 2005, following Cavallos' previous understanding regarding the Argentine amnesties, the Argentine Supreme Court decided to strike down these laws. In that sense:
"Judge Cavallo's ruling was upheld in 2001 by the Federal Court of Buenos Aires. But the possibility of real progress in the trials of "dirty war" crimes has awaited the Supreme Court ruling on the laws' constitutionality" (HRW, 2005).
That result was achieved by a ruling of a majority of 7-1, confirming the lower-courts decisions. For more, *see*: https://www.hrw.org/news/2005/06/14/argentina-amnesty-laws-struck-down, access 19 June 2018.
Later on, in 2017, another decision by the Argentinian Supreme Court defined a precedent that could free a series of agents of the dictatorship, perpetrators of gross human rights violations. By making reference to a procedural criminal law, the judges decided that time served in prison before conviction should count double towards the final sentence – such interpretation of that norm had not been applied to human rights violators, and could be an obstacle to adequate accountability. For more information, *see*:
https://www.theguardian.com/world/2017/may/04/argentina-supreme-court-human-rights, access 19 June 2018.
In a backlash, the Argentinean National Congress overrode the Supreme Court ruling:
https://www.clarin.com/politica/senado-debate-restriccion-aplicacion-2x1-represores_0_BJFZJsll-.html, access 19 June 2018.

comprehension was further advanced by research on data that supported the understanding towards a *holistic* approach, with the implementation of trials among them (OLSEN *et al.*, 2010a, 2010b) or, at least, supporting the fundamental role of accountability in transitional process (SIKKINK, WALLING, 2007, SIKKINK, 2001).

Therefore, the previous comprehension of crimes against humanity was broadened by the field. The achievements due to its enforcement could be reported and analysed, almost as soon as they were implemented. Beyond that, through transitional justice theory it was possible to conclude that there was no need to choose between truth and justice, reconciliation and accountability. In that sense, arguments of achieving stability by reconciliation granting continuity to “a culture of impunity” that has a tendency to be “conducive to violence” (ORENTLICHER, 2007, p. 21) could not be sustained anymore. From this assertion follows the comprehension that accountability for the violations during the authoritarian periods has to be enforced. Individual criminal accountability for gross violations of human rights overcame barriers, and achieved, if not global *internalization,* at least broad *acceptance*. As widely asserted, for such developments to be achieved, the previously advanced concepts were enhanced domestically, regionally, and internationally through the restless work of a series of actors. Such developments, and the dynamics around them, happened in constant dialogue between different legal orders – in a *transnational* manner.

CHAPTER III – TRANSNATIONAL LAW

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"

- Justice Horace Gray, in *Hilton v. Guyot*, 159 U.S. 113 (1895)[85]

Chapter I presented the development of an *international system of human rights* through the second half of the twentieth century. Chapter II, on its turn, advanced the concept of transitional justice, and how it (re)shaped human rights. Such endeavours attempted by these chapters were focused on the concept of crimes against humanity and the norm of individual accountability.

Towards these topics, it was possible to glimpse at how relations between actors and institutions brought to the development of norms of IHRL, on the one hand. And, on another hand, how such norms contributed to shaping institutions and understandings. Along those chapters there were already some assertions regarding relations between networks, states, supranational institutions and how they *penetrated* and then conformed each other. Such relations were manifest with the development of the *global norm of individual accountability,* as presented through Sikkink's theory (2011). Furthermore, according to Teitel, they were evident regarding the developments in the enforcement of crimes against humanity (TEITEL, 2011, p. 32).

The whole process of development of that *international system of human rights*, as well as the comprehension of *international humanitarian regime*, was shaped by such relations. Transitional justice was also affected by these relations, as seen in the crossed-development of accountability for crimes against humanity in Latin America (TORELLY,

[85] *Hilton v. Guyot*, 159 U.S. 113 (1895), concerns an appeal by two American citizens who were prosecuted and condemned in France by a French court. The plaintiffs lodged a complaint in an American court to the execution of the French sentence. They were convicted by an American court to pay the debts, on the grounds that the judgements were enforceable without retrial, so they appealed on this sentence to the Supreme Court. The Supreme Court decided against the enforceability of the French decision, nevertheless held it as valid evidence of the initial claim (USA, 1895).
It is illustrative of a somewhat early American judicial procedure regarding international – foreign in the case – judicial orders, in what, later on, Harold Koh would repute as a *transnational legal process* (KOH, 1991, 2004). The full proclamation by Justice Gray, in 1985, develops as follows: "International law, in its widest and most comprehensive sense-including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation-is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination" (USA, 1895).

2016, p. 163). Also in this regard, the transitional networks, which demanded judicial accountability when states did not act to enforce transitional measures, also shared this same characteristic in the so called *post-transitional justice* (COLLINS, 2010 p. 35). These are all examples of *transnational relations,* and it is possible to say that it is through these transnational processes that compliance regarding human rights comes about (KOH, 2004, p. 56). Therefore, this chapter proposes to put forward the research understanding of the aforementioned relations, encompassed in the concept of *transnational law*. Further on, it will present a theory of how such *transnational relations* comes about regarding its comprehension by domestic legal orders.[86] Finally, it will advance to the *interpretative posture towards the transnational* on matters concerning human rights advocated by this research.

The concept of *transnational law* was "developed and popularized" (SCHACHTER, 1986, p. 893) by Philip Jessup (1956). The author had the intention of suggesting a solution to "avoid rationalization exclusively on the basis of a particular *forum*" (JESSUP, 1956, p. 3) in relation to national and international law. Jessup defines the field as encompassing "any law that regulates actions or events that transcend national borders" (JESSUP, 1956, p. 2). In other words, the definition navigates between different legal systems and encompasses in itself the relations between these systems. It comprehends the way in which domestic norms can lead to the development of international norms and principles to the way in which these can *penetrate* the domestic level, conforming it. In this sense, Schachter concludes that Jessup's intention would be to expose the legal complexity of an interdependent world (SCHACHTER, 1986, p. 893), and follows to ascertain that:

[86] An approach regarding transnational law based on Vicki Jackson's theory (2010) to analyse the Brazilian comprehension of human rights had already been developed by other researchers.
Torelly (2013, 2016) presents such approach regarding the overall comprehension of the Brazilian domestic legal system towards accountability for crimes against humanity. Torelly's account asserted that the Brazilian judiciary manifests a *posture of resistance towards* such norm.
Patrus (2015) also endeavoured in such approach regarding an analysis of the ADPF 320 and the possibility of *engagement* towards IHRL, more specifically with the *Gomes Lund* case, decided by the IACtHR.
Finally, such approach was also adopted by Oliveira (2017) on her analysis of the ADPF 153. Her account asserted both a *posture of resistance towards the transnational* in the STF's decision, and regarding the judiciary in general.
This dissertation distinguishes of these three researches for various reasons. First and foremost it adopts such approach to analyse *interpretative postures towards the transnational* of lower courts. Furthermore, it analyses individual decisions of those courts, instead of a general *posture* of the judiciary or a *posture* manifested by the STF. Additionally, it seeks to analyse *postures* which may present *engagement or convergence to a transnational* comprehension of IHRL. Finally, this dissertation proposes a distinct comprehension of Jackson's theory in respect to crimes against humanity.
Ultimately, although it grounds in some assertions from these researches and concur with some of their conclusions (such as the general *posture* of the Brazilian judiciary); this dissertation achieves a different set of results in respect to the decisions analysed herein.

> (...) The domain of international law could no longer be compartmentalized in its two classic divisions of public international law, applicable only in relations between states, and private international law, governing the choice of law and its application in national judgments in cases involving nationals of two or more States. The legal rules and procedures applicable in situations that cross national borders must now be faced in both public and private international law and, to a significant extent, in new bodies of law that do not fit in the traditional divisions (...) (SCHACHTER, 1986, p. 893-894).

The concept popularized by Jessup manifests through a number of fields. The author drew attention, initially, to maritime legislation, European Community legislation, War Crimes and the relations among multinational corporations. However, during the second half of the last century, there was an unfolding of the concept in other fields and the expansion of its use to other areas of law. In such a manner in which is possible to say that:

> (...) there were no substantive changes in the lines suggested in 1956. However, there have been, and still are, a multiplicity of cases, situations and legal activities that offer new and complementary examples of the subjects dealt with in the work [of 1956] (JESSUP, 1973, p. 340).

Thus, although the concept has not undergone significant changes, manifestations of transnational situations are increasingly common in an increasingly interconnected world. Therefore, the need for comprehend these interactions between forms of domestic (constitutional) interpretation and transnational law becomes more relevant. For this reason, the present study draws on work developed by Vicki C. Jackson to analyse such relations. It starts from exposing the author's conception of the transnational. Afterwards it follows to her understanding of the aforementioned relations. In that sense, it seems that Jackson's notion of *transnational law* is an important starting point:

> The term "transnational" includes not only international law as it is traditionally understood (…) but also regional and bilateral agreements, as well as domestic law of foreign nations when considering, depending on, or distinguishing it from other courts or legislative bodies. Transnational law may also include the domestic law of particular countries seeking to regulate a transnational phenomenon, such as migration, "trafficking", or citizenship (JACKSON, 2010, p. 287).

3.1 – Three postures towards the transnational

As abovementioned, in order to better understand such transnational dynamics, the present study draws on Vicki Jackson's theory regarding *interpretative postures in relation to the transnational*: *resistance, convergence and engagement*. First and foremost, it is necessary to comprehend that these *postures* constitute means of both giving effect and interpreting norms, while drawing (or not) insights from *transnational sources* (JACKSON, 2010, p. 8 *et seq.*). Furthermore, it is relevant to highlight that such *postures* must be understood as arranged along of a *continuum* (JACKSON, 2010, p. 9). This means that: a weak *posture* of *convergence* borders a strong (*relational*) posture of *engagement*; and a weak *posture* of *engagement* borders a weak posture of *resistance*. Ultimately, it is necessary to highlight an aspect that should already be dimly understood above: the three different *postures* can be displayed simultaneously "by members of the same court in the same country" (JACKSON, 2010, p. 9). Thus, it is possible to recognize in a same country different *postures regarding the transnational*; or even further, different approaches can be found in a same court or even regarding a same ruling.

Resistance

Jackson's exposition starts from the conceptualization of the *posture of resistance* - differentiation or indifference. According to this perspective, there is scepticism on considering foreign and international legislation as a form of improving constitutional interpretation (JACKSON, 2010, p. 8). Therefore, the interpretation is guided by norms adopted internally to that "particular national juridical community" (JACKSON, 2010, p. 8). In that sense, the author asserts that domestic legal systems in which broad and continuous commitments to *resist or maintain indifference* to the transnational are rare. Furthermore, she asserts that what is sometimes reputed as being a *posture of resistance* is actually a *posture engagement*, inasmuch as there is an effort at differentiation (JACKSON, 2010, p. 33).

The author also recognizes differences between an *active position of resistance* and a *deliberate position of indifference* (*silent resistance*). The first manifests when there is acknowledgement of other systems and a refusal on making use of them, the latter is present when, although transnational sources are available, there is not even acknowledgement of the possibility of dealing with them (JACKSON, 2010, p. 32 *et seq.*). Other possible *postures* or manifestations of *resistance* are presented by the author, but those herein are that which are of

most relevance for this study.[87] It is also relevant to say that these *postures of resistance* may flow from the understanding regarding the domestic constitutional interpretation. In that sense, they may derive from an *originalist* comprehension of constitutional interpretation, or due to a *national historicism* (*exceptionalism*), postures which might regard International Law irrelevant to domestic interpretation. Finally, a *posture of resistance* may be a manifestation of a *constitutional formalism*, in the sense of “a restraint on judicial discretion by limiting the sources considered and questions to be answered to resolve cases”,[88] which might also exclude “nonbinding forms of transnational law”. The author asserts that, regarding binding international treaties and conventions, this “model of resistance might also be associated with functionally “dualist” approaches under which international treaties require further legislation to have domestic legal effect” (JACKSON, 2010, p. 32). In conclusion, it is relevant to highlight one last note made by the author:

> For some, *considering* foreign or international law in constitutional interpretation is permissible but *referring* to it is not; for others, the judge should attempt to ignore beliefs, assumptions, and knowledge about foreign law and focus only on domestic legal sources. For some resisters, “decorative” references to foreign law are relatively unproblematic, and for others, references to foreign law to *uphold* the validity of legislation is more acceptable than references in cases striking down domestic legislation (JACKSON, 2010, p. 38).

Convergence

"On [the other] side of the spectrum of *postures* lies that of national identification with transnational and international legal norms" (JACKSON, 2010, p. 8): these are *postures of convergence*. This perspective inserts the domestic legal system in the midst of a universalist vision of rights. This *posture* can be manifested through the guarantee of constitutional status to international treaties, through interpretations that favour cosmopolitan approaches to transnational norms and other approaches that will be described below. In that sense, regarding manifest constitutional guarantees of observation and enforcement of human rights the following aspects are worth of note. Many constitutions after the Second World War have internalized international human rights norms or rely on international human rights

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[87] In order to illustrate such assertion: Jackson recognizes specific *postures of resistance* towards some particular settings, such as “Foreign investment, control of natural resources, and supranational regimes”, in that sense, the author states that:
“[…] constitutions and their interpreters may resist the transnational in other settings: for example, where foreign business interests seek to make investments or acquire control of resources under terms that differ from those provided in national constitutions. Here, the arguments by proponents of a transnational (free trade or investor protection) norm are primarily economic, and resistance may be primarily focused on the intrusion of foreign economic activity in violation of domestic norms.” (JACKSON, 2010, p. 36)

[88] Interestingly enough, a manifestation of such posture, which ends up to take into account a transnational understanding, while promoting a legal analysis exclusively on basis of domestic precedents, will be presented in the analysed cases.

instruments “leading to parallel rights-protecting provisions”. More recently, such pattern was further advanced “as a marker for regime shift from authoritarianism or military rule to democracy” (JACKSON, 2010, p. 40). *Convergence* might also flow from seeking for membership in regional or international organizations, such as the European Union, the Council of Europe and regional systems of human rights protection such as those of Latin America and Africa. Finally, they may also flow from the policies of international bodies, from NGO’s to the UN and World Bank provisions, which have deep potential impact on domestic constitutions.

Convergence can also manifest through less binding (or non-binding) forms, using a normative interpretive perspective, in a manner of conforming domestic legal interpretation to a transnational legal consensus. This can be due, for instance, to transformational purposes towards domestic legislation, and the understanding of a universal character of certain international rights. Therefore, in a more binding sense, a *posture of convergence* might manifest through internalization and commitment to international instruments. It can also manifest through the direct incorporation of rights “drawn from international human rights instruments” to the provisions of national constitutions (as broadly done in Latin American transitional context) (JACKSON, 2010, p. 43). However it might also function for transformational purposes: in countries that do not have explicit mandates in the constitutional text, courts can argue for a presumption in favour of *convergence* with International Law or IHRL, aiming at adequate domestic provisions with the international commitments made by such state (JACKSON, 2010, p. 44-45).

In conclusion, one assertion made by the author, regarding *convergence*, is most relevant for this work: “While explicit constitutional incorporation of international human rights instruments is growing, it is less common to find incorporation of international economic treaties” (JACKSON, 2010, p. 39). In that sense, while dealing with other subjects, such as the referred economic matters, might not bring as much consideration in a transnational basis, human rights analysis do so.[89]

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[89] This assertion will be further developed in “3.2 - Transnational law and human rights”.

Engagement

To conclude, the third *posture* identified by Jackson, which is in the "middle ground" of the aforementioned *continuum*, is *the posture of engagement with the transnational*.[90] This *posture* assumes that:

> (...) interpretation of the fundamental legislation of the nation can be improved by engaging with transnational norms, at times in which lawyers or jurists have some relevant knowledge and where issues are relatively "open" within the domestic discourse (JACKSON, 2010, p.9).

The *posture of engagement* also allows for the possibility of understanding domestic law in the face of transnational norms, expanding the scope of cases and issues addressed through this stance. In this way, accessing the understanding of different legal orders and courts is possible, even if without the need for reciprocity. The approach takes into account transnational and international standards, but it does not necessarily presuppose acquiescence in relation to them.

> If the posture of resistance is primarily concerned with national particularity, and the posture of convergence with creating or adhering to a harmonized transnational legal order, this third stance is primarily concerned with the self-reflective elements of constitutional adjudication. Engagement is founded on commitments to judicial deliberation and is open to the possibilities of either harmony or dissonance between national self-understanding and transnational norms (...) (JACKSON, 2010, p. 71).

Thus, the *posture of engagement* can be observed in *harmony* or *dissonance* with the comprehensions it works with. In that sense, there can be a manifestation of what Jackson reputes as *negative* uses of foreign precedents (*i.e. aversive* rather than *persuasive* authority), and other references that are distinguishable from the domestic setting of that given country. Although not *negative*, these references allow for means of reflection without the affiliation to its assumptions. Further on, as well as the previously presented *postures*, a *posture of engagement* can be observed in different forms, the main manifestations being *deliberative* and *relational*. The *deliberative* form is a more permissive form of *engagement*, which takes into account other legal comprehensions in order to better understand and develop the domestic legal comprehension (in a *positive or negative* manner). The *relational* form, on its turn, embraces the deliberative benefits and includes presumptions in favour of wider shared norms, in a manner closely related to a weak form of *convergence.* Thus, a *relational engagement* can also be understood as a way of "following or departing from transnational

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[90] The author choses the term *engagement* rather than *dialogue* for there are no expectations of response between the courts and legal orders that engage in such endeavour and the courts or legal orders with which they are engaging (JACKSON, 2010, p. 71).

norms [in] a means to enhance the normative legitimacy of legal decisions" (JACKSON, 2010, p. 80).

Due to the abovementioned aspects it is possible to infer that a *posture of engagement* is the one elected by Jackson as the more adequate to advance *transnational relations*. It is such inasmuch as it "is founded on commitments to judicial deliberation and is open to the possibilities of either harmony or dissonance between national self-understanding and transnational norms (…)" (JACKSON, 2010, p. 71). Nevertheless, there is a strong argument in favour of *convergence* that has to be observed by this research, due to the fact that it deals with human rights. More specifically, due to the nature of the aspect of human rights which constitute the main focus of this research – crimes against humanity:

> The idea of international law as a "backstop" resonates with the argument that interpretive presumptions in favour of international law can prevent serious abuses within domestic systems (…) (JACKSON, 2010, p. 49).

3.2 – Transnational law and human rights

A *transnational* approach might not be "available or relevant" to all rulings.[91] Furthermore, it might also be used as a manner of *differentiation* of that domestic legal order (through *engagement*); or even not faced at all (through an *active posture of resistance* or a *deliberate position of indifference*). Nevertheless, following the comprehension supported by this dissertation, a transnational approach seems to be more than relevant regarding human rights. Such approach seems to be necessary regarding this matter. The transnational dynamics was fundamental to the development of IHRL. Thus, due to the influence of these different systems in the development and enforcement of the IHRL, one cannot understand this field if not from a transnational perspective. It is through this transnational process that norms of domestic and international law develop and it is through this process that compliance comes about (KOH, 1999, 2004).

Moreover, a transnational approach seems even more necessary regarding the aspects of human rights with which this research is concerned, crimes against humanity. Certainly there are divergences regarding some aspects of human rights.[92] However, following the comprehension supported by this research, these divergences were partially overcome regarding crimes against humanity. Crimes against humanity are comprehended by this research as *jus cogens* - peremptory, non-derogable norm, with *erga omnes* character.[93] Furthermore, they are broadly recognized as a paramount standard to be observed. Thus, as supported, they retain a more binding effect regarding their enforcement.[94]

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[91] "While foreign or international law is neither available nor relevant in every constitutional case, the dramatic increase in these sources now requires a more thoughtful approach to their use lest courts and litigants be overwhelmed, or misled by inapposite comparisons" (JACKSON, 2010, p. 162).

[92] "There are relatively few areas of human rights law where a strong transnational consensus has developed; it is clearly lacking in such areas as regulation of religious garb in the public sphere, of abortions, of access to information and many others. The nature and scope of protection of private property (including compensation for takings) remains contested and largely unaddressed by the two major international human rights conventions" (JACKSON, 2010, p. 66).

[93] See above Chapter I and II, especially on 1.3, 1.3.1 and 2.2 for the arguments regarding the standardization of crimes against humanity, followed by a broad *contagion* of the norm, and possible *internalization* in many spheres. These topics also advanced this research's comprehension of those crimes as *jus cogens* - a peremptory, non-derogable norm, which has *erga omnes* character, thus must be observed and enforced by both states and individuals.

[94] It seems that such assertion finds support in the author's work: "All states have an interest in how their members are treated when in other states (or at least the great majority of states that allow their citizens to exit) and thus to support some minimal core of international human rights, as well as to respect international rules against aggressive use of force—for all states have, or should have, an interest in avoiding wars and genocides" (JACKSON, 2010, p. 51).

Therefore, it seems plausible that norms regarding crimes against humanity could be considered at least as a higher presumption to be overcome. This can be comprehended as a *relational* form of *engagement*, embracing the deliberative benefits of *engagement* and including presumptions in favour of wider shared norms. Conversely, this could be considered a weak form of *convergence.* Such would be a less binding (or non-binding) form of the *posture*, in which an interpretative perspective aims at conforming domestic legal interpretation to a transnational legal consensus. In the comprehension supported by this research, both aforementioned *postures* would be adequate.

Nevertheless, yet another aspect should be taken into account. The aforesaid *postures* regard domestic legal orders in which there are not necessarily commitments to IHRL. These *postures* can manifest in countries which are not bound by the ratification of human rights treaties, nor explicit mandates in their constitutional text. These *postures* can be reached, for instance, due to an authority's aspiration of conforming domestic provisions with the IHRL. However, a *posture* yet more binding than *relational engagement* or a weak form of *convergence* could manifest in other circumstances.

Provided that there are commitments to the *international system of human rights*, a more binding *posture* could be admitted. As abovementioned, constitutions which were promulgated after the Second World War may manifest such commitments. Furthermore, such aspects are also recognizable in constitutions which inaugurate democracies, after authoritarian regimes. These constitutional projects usually support guarantees of observation and enforcement of human rights. Yet another context in which a more binding *posture* is admissible is when there is an endeavour to adequate a domestic legal order to regional or international organizations. Finally, such *posture* may result from policies of international bodies, such as the UN. Therefore, it is possible to say that a *posture of convergence* is adequate to states that share the features presented herein.

In conclusion, this dissertation supports that a transnational approach is beyond available or relevant regarding human rights. A transnational approach should be taken into account regarding such field. Such approach should be undertaken even if through a *posture of engagement* that *differentiates* a domestic legal order of the IHRL comprehension. However, regarding norms on crimes against humanity, there should be a higher standard. The nature of such norms requires at least that they pose a higher presumption to overcome in the decisional process. In that sense, when taken into account, those norms should require at

least an *interpretative posture of relational engagement* or a weak form of *convergence*. Furthermore, if a domestic legal order poses commitments towards IHRL, there could be a requirement for a more binding *posture towards the transnational.* If a state expresses the desire to promote the development of the international legal system, further considerations of *convergence* appear to be necessary.

This research supports that Brazil is inserted in this latter comprehension, and will provide arguments towards this interpretation in the next pages. If there is evidence enough for supporting such assertion, the object of this research acquires a broader outline. In that sense, *postures of engagement and convergence towards a transnational* comprehension of human rights seem adequate. Therefore, provided that the Brazilian constitution is committed to human rights, not only *engagement* but *convergence towards the transnational* seem adequate *postures* for the analysed decisions to have.

PART II – THE CONSTITUTIONAL ENGAGEMENT TOWARDS A TRANSNATIONAL UNDERSTANDING OF CRIMES AGAINST HUMANITY IN BRAZIL

Based on the theoretical framework developed above, Part II focuses on the central matter of this dissertation, the analysis of the Federal Courts' decisions regarding accountability for the crimes against humanity perpetrated during the dictatorship in Brazil.

Chapter IV recapitulates some aspects of the Brazilian transitional process. This account begins with a brief presentation of features of the 1964-1985 dictatorship. Then, it follows to some aspects of the Brazilian transition. Such endeavour aims at introducing the movements that gave origin to the MPF's initiative regarding accountability for the crimes of the dictatorship.

Chapter V focuses on the analysis of the decisions of the Federal Courts. First, it will provide a broad contextualization of the MPF's initiative that led to the lodging of the criminal complaints. Thereafter, it will describe some procedural aspects of the analysed cases and recapitulate the hypothesis of this research. Afterwards, it will advance to the analysis of the decisions that admitted the criminal complaints lodged by the MPF.

Ultimately, there will be an attempt to develop some conclusions regarding the *postures* presented by those decisions. Such endeavour aims at exposing conditions of possibility of the rulings that present *postures towards a transnational comprehension* of human rights. Additionally, the conclusion will also attempt to present some barriers to a transnational comprehension of law in Brazil, and possible routes to be taken to face such *resistance*.

CHAPTER IV – THE BRAZILIAN TRANSITIONAL PROCESS

The Brazilian dictatorship was the second most lasting dictatorship of the twentieth century in Latin America, lasting almost 21 years, from 1964 to 1985. During these years the militaries stood in power there were five dictators, all of them from the Army military branch. The first was Humberto Castello Branco (1964–1967), followed by Artur da Costa e Silva (1967–1969), Emílio Garrastazu Médici (1969–1974), Ernesto Geisel (1974–1979) and, finally, João Baptista de Oliveira Figueiredo (1979–1985). However, although the militaries held the ultimate executive power throughout the regime, it is worth pointing out that it was not exclusively a military dictatorship. The military had broad support of civilians, since the *coup* in 1964. Thus, it is possible to say that it was a civilian-military dictatorship.[95] Such a conformation broadened a kind of "legitimation" to the regime, which further contributed to the mechanisms of repression and political persecution.[96]

Since the *coup*, the dictatorship began implementing an institutional apparatus to ensure the suppression of any opposition. Its main objective, in the words of the regime, was to "combat the subversion and corruption". In the first years following the takeover, a series of acts were issued in order to operationalize the "revolutionary will" *(vontade revolucionária*) – the objectives of the operators of the *coup*. Among those, the most notorious are the institutional acts (*Atos Institucionais – AI*) and complementary acts (*Atos Complementares – AC*).[97] The first AI made use of manifest constitutional language and was aimed at restricting political liberties, suspending political mandates, and determining indirect

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[95] On this relationship, and the "legitimation" of the regime, *see* SCHNEIDER (2014).

[96] An example of the civilian participation in the *coup* and, later on, in the "legitimation" of the regime rests in the civilian think-tanks Brazilian Institute of Democratic Action - IBAD (*Instituto Brasileiro de Ação Democrática*) and Institute of Social Research and Study - IPES (*Instituto de Pesquisa e Estudos Sociais*). Founded, respectively, in 1959 and 1962, they were strong supporters of the *coup* through propaganda against Goulart's government and measures. The first was dissolved in late 1963, the latter as deactivated in the 1970's, after receiving recognition by the regime of its role. For more information, see the CPDOC entry on Goulart: http://cpdoc.fgv.br/producao/dossies/Jango/artigos access 19 jun. 2018.

Yet another example is illustrated through the works of Anthony Pereira and Vanessa Schinke regarding the Brazilian judiciary. The authors assert, respectively that the cooperation between the military and judiciary elites lasted throughout the regime, its institutional expression resting in the Military Courts (PEREIRA, 2010, p. 143 *et seq.*); and that the judiciary institutional aspects of independency and impartiality, protection of human rights and constitutional review were advanced according to the demands of the authoritarian regime (SCHINKE, 2016, p. 202).

[97] Throughout the regime 17 institutional acts and 104 complementary acts would be issued, deepening the authoritarian character of the regime. The mentioned in this brief narrative have the sole objective of illustrating their patently illegality and deep authoritarian nature. For access to the Acts, see:
http://www.planalto.gov.br/ccivil_03/AIT/_AITs_CF1967.htm access 19 jun. 2018.
http://www.fgv.br/cpdoc/acervo/dicionarios/verbete-tematico/atos-institucionais access 19 jun. 2018.

For more on the methods regarding the implementation of institutional and normative systems aimed at repression by the authoritarian regime in Brazil and its functioning, *see*: PEREIRA, 2005.

elections to the presidency, among other dispositions. The AI-2, on its turn, established the aforementioned means of elections, dissolved the political parties, and altered institutional design of the STF (broadening the authoritarian control over it), also among other dispositions. Later on, in 1967 the regime would impose a new constitution, which would be broadly amended in 1969. The Constitutional Amendment nº 1 of 1969 reaffirmed the validity of the institutional acts, subverting the logic of the previous ones, which used to reaffirm the validity of the Constitution of 1946, during which they were issued (BARBOSA, 2012, p. 140). Along with the AI-5,[98] and other authoritarian legislation regarding matters of "national security", those acts led to a deepening into authoritarianism.[99]

Yet another relevant institutional aspect of the dictatorship was the Doctrine of National Security. The Doctrine of National Security was developed in the USA, and had been introduced in Brazil since before the military *coup*. It provided justification for the *coup* and for the respective repression, on basis of national security and economic development. Such doctrine was also based on nationalist, capitalist and profoundly anti-communist ideals. It is also noteworthy that it was broadly discussed among the members of the Superior War College (*Escola Superior de Guerra – ESG*). The College was created in 1949 by the Statute Law nº 785 of 1949, and had as its main objective to "develop and consolidate the knowledge necessary for the exercise of management functions and for the planning of national security" (BRAZIL, 1949).

There were laws regarding the Doctrine of National Security before the dictatorship. However, further norms regarding the subject were issued during the regime. Such issuing took place since the Castello Branco government, with the Decree nº 314 of 1967, which "establishes the crimes against national security, the political and social order (…)" (BRAZIL, 1967).[100] Afterwards, facing resistance from the legislative branch and civil society, the government Costa e Silva strengthened once more the Doctrine aiming at "reactivate the Revolution". The regime argued that there was a duty by "the nation, and

[98] The AI-5 is reputed to be a mark of the dictatorship further descent into authoritarianism. The Act was a response to resistances faced by the regime in the National Congress. The Act authorized the President (read dictator) to decree the suspension of the National Congress, among other legislative bodies; to intervene in the states and municipalities; to suspend (*cassar*) parliamentary mandates and political rights; and the suspension of the *habeas corpus*.

[99] For more on the Brazilian constitutional history of this period and, afterwards the democratic constitutionalism, *see*: BARBOSA, 2012.

[100] There were laws regarding the Doctrine of National Security before the *coup* of 1964. Nevertheless, this research exposes this legislation to illustrate the relationship between the regime and such Doctrine, which was enforced since the beginning of the dictatorship. For more information on National Security in Brazil, *see*: SANTOS (2017).

ultimately the military" to protect the country from both internal and external enemies. Thus, "the doctrine was now invoked to the limit as Brazil descended deeper into authoritarianism" (SKIDMORE, 1988, p. 84).[101]

This further descent into authoritarianism began with the issuing of the abovementioned AI-5 and the strengthening of the Doctrine of National Security. It then developed through the Constitutional Amendment nº 1/1969. Finally, it was followed by a violent persecution of those considered "subversive". This movement took to the darkest hour of the regime, the "Years of Lead" (*Anos de Chumbo*), roughly from 1969 to 1974-1975. During that period took place the military raids against the Araguaia guerrilla and the development of *Operação Bandeirante*. This latter was established with cooperation between the regime and private parties, leading to the development of the DOI-CODIs.[102] Furthermore, in 1975, the journalist Vladimir Herzog was murdered by the regime, while detained in a DOI-CODI. This event led to a series social manifestations and demands for justice – the inter-religious act in the *Catedral da Sé* is illustrative of the beginning of this latter movement.[103]

Therefore, on a diametrically opposed manner to what the authoritarian regime wanted to make believe, the illegalities perpetrated were not an exceptional practice of the forces of repression. They were a policy of the regime, broadly implemented, not only in the cases mentioned above, but in a series of actions against the political dissidents of the regime.[104] It is possible to observe such assertion through an excerpt of an interrogation manual, produced by the Army Centre of Information (*Centro de Informações do Exército – CIE*), in 1971. The

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[101] It is evident that amidst all those illegalities committed by the authoritarian regimes, there was a halt in the ratification of international instruments of protection of human rights. An example contemporary to these facts is the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Such convention was developed in November of 1968, it entered into force in November of 1970, it already has 9 signatory parties and 55 ratifying parties.
For more information: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&lang=en access 19 jun. 2018.

[102] DOI-CODIs were created in the context of the *Operação Bandeirante* with the aim of fighting the opposition of the regime, thus granting the "internal defence". While the Centres (CODI) were institutions that planned the repressive operations, the Departments (DOI) were the unities that enforced the planning of the former. Available at: http://www.fgv.br/cpdoc/acervo/dicionarios/verbete-tematico/destacamento-de-operacoes-e-informacoes-centro-de-operacoes-e-defesa-interna-doi-codi, access on 19 June 2018.

[103] More on the Vladimir Herzog's case will be developed below.

[104] A recently declassified memorandum from the Director of Central Intelligence to the US Secretary of State Henry Kissinger supports such claim. The memorandum exposes that Ernesto Geisel, João Baptista Figueiredo and other members of the military command of the dictatorship knew about the acts that were being perpetrated. Furthermore, they supported the "policy and urged its continuance".
Available at: https://history.state.gov/historicaldocuments/frus1969-76ve11p2/d99, access on 19 June 2018.

manual was distributed to DOI-CODI's, and it contained guidelines on the main objectives and methods of a counter-information agency or interrogation centre:

> A counter-information agency is not a Court of Law. It exists to gain insight into the possibilities, methods and intentions of hostile or subversive groups in order to protect the state against its attacks. From this it is concluded that the purpose of an interrogation of subversives is not to provide data for the Criminal Justice, to process them; your real goal is to get as much information as possible. To achieve this, it will often be necessary to resort to methods of interrogation that legally constitute violence. It is very important that this be well understood by all those who deal with the problem, so that the interrogator will not be disturbed to observe the strict rules of law (CIE, 1971 *In* MAGALHÃES, 2004, p. 217).

On one hand, illegalities such as those were designed, as well as implemented, even before the *coup*. On the other hand, demands for the end of the regime, for broad and direct elections, amnesties to the political dissidents, and for democracy had also started as soon as the *coup* was performed. An illustration of such claim can be taken from the records of a clandestine meeting of the Brazilian Communist Party (PCB). The party was illegal since 1947, due to the cancellation of its registration by the Superior Electoral Court (TSE). In the meeting, already in December of 1967, the Party approved, between several other aspects, demands for "the abolition of the exceptional laws implemented by the military that took power in 1964, the establishment of democratic liberties, the realization of elections, the adoption of a democratic Constitution and the amnesty to political prisoners" (BARBOSA, 2012, p. 150).

These demands were initially brought up by members of the civil society, such as those abovementioned, and through labour strikes and student's movements. They were also supported by some sectors of the church. Following such movements, other institutions of the Brazilian public sphere also started openly campaigning for the restitution of democratic liberties and for amnesties. In that sense, the Brazilian BAR Association (OAB) chose as the theme of the V National Conference of the BAR Association (*V Conferência Nacional da OAB*), in Rio de Janeiro, 'The Lawyer and the Rights of Man' (*O Advogado e os Direitos dos Homem*). In the Conference, the Association declared its open effort for the abrogation of the AI-5, the restoration of the *habeas corpus*, and for the issue of an amnesty. Furthermore, it endeavoured to "convince the public that the post-1964 military governments were illegitimate because their constitution was not a product of a popularly elected Constituent Assembly […]" (SKIDMORE, 1988, p. 186).

During Dictator Ernesto Geisel government, following the deep dissatisfaction of a series of sectors of the society, and broad demands for democratization, a series of measures

were undertaken to ensure a “safe” transition to democracy. Among advances and setbacks, in 1979, the complementary and institutional acts were revoked, and the multiparty electoral system was re-established. In that same year, from the distortion of the claims of a series of actors,[105] an Amnesty Law was issued that would not embody the demands for a "broad, general and unrestricted amnesty". Conversely, it would allow for an interpretation that would grant a self-amnesty to the agents of the dictatorship – perpetrators of gross violations of human rights (PAIXÃO, CATTONI DE OLIVEIRA *et al.,* 2014). The series of demands and movements that led to the amnesty were sustained towards the end of the dictatorship.

Furthermore, during the process of democratization, it is relevant to highlight that counter-initiatives were executed by conservative militaries, unsatisfied with the process. Among them, it is noteworthy a series of bombings in the city of Rio de Janeiro, the most notorious being the *Riocentro* case,[106] in April of 1981. In this occasion, unsatisfied militaries planned and executed a terrorist attack against civilians that were celebrating the Labour Day, in the complex of Riocentro.[107] Afterwards, the movement for democratization gained support and in the years of 1983-1984 the movement *Diretas Já* was instituted. This latter movement aimed at achieving direct elections for the Presidency. Unfortunately, although it had broad popular support and helped advancing demands for redemocratization, the movement did not achieve direct elections. Thereafter, in 1985 indirect elections were conducted and Tancredo Neves, member of the opposition to the regime was elected. Nevertheless, due to Tancredo’s health related matters, his Vice-President, José Sarney, took office in 15 March 1985. The military ruling in Brazil was finally over. In this regard, making an overall balance of the violations perpetrated by the authoritarian regime, Meyer, based on the CNV’s Final Report, points out that:

> The civil-military dictatorship ended in 1985, with a final attempt to control the transition to democracy. The balance left—at least, as far as it is possible to know, since the Armed Forces resisted opening up their archives—indicates 434 dead people and disappeared ones. This number could in reality be much higher, as the NTC was not able to show the exact number of indigenous people killed – the report mentions an average of 8.341 victims, a number, by anybody’s standards, extremely high. 6,491 military officers were persecuted; in the first months of the dictatorship, something like 50,000 were detained, 10,000 were forced into exile, 7,367 were

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[105] *E.g.* institutional actors as the abovementioned (political parties, the Bar association, sectors the church), political dissidents of the regime, social movements, victims of the dictatorship and exiles, and their relatives.

[106] For more information on the case see topic 5.1.5 – The *Riocentro* case.

[107] The *Riocentro* case, along with the kidnaping of Edgar Aquino, Rubens Paiva and Vladimir Herzog, as well as the overall balance of the violations perpetrated by the Regime, brought with Meyer’s analysis of the CNV’s Final Report (2017), can all be used to illustrate how the authoritarian regime’s repression mechanisms did not restrain themselves to actions against “armed movements” and guerrillas, but was a wide and systematic set of violations against the population in general.

> prosecuted in military tribunals (with severe restrictions on the due process of law), 130 were banished, and 4,862 had their political rights or terms suspended ('cassados') (MEYER, 2017, p. 48).[108]

In 1987, a Constituent Assembly was convened, consisting of the members of the recently elected National Congress. This constitutional process is reputed to be "the constituent process of greater popular participation in the history of Brazil" (CATTONI DE OLIVEIRA, 2010). Although there are claims of continuity between the regimes due to the manner in which the Assembly was convened, during the constituent process there was a clear rupture with the previous authoritarian order (BARBOSA, 2012, p. 365). As a result, the dispositions of the Federal Constitution of 1988 regarding the amnesty were diverse to the provisions of the Amnesty Law of 1979. In the Act of Transitory Constitutional Dispositions (*Ato das Disposições Constitucionais Transitórias* – henceforth ADCT) the amnesty was reserved to the victims of the regime, affected by the authoritarian acts as a result of their political motivations (BRAZIL, 1988; PAIXÃO, CATTONI DE OLIVEIRA *et al.,* 2014).

Therefore, it is possible to conclude that the authoritarian regime perpetrated a series of "systematic human rights violations", following the final account of the CNV. Furthermore, the demands for amnesty that led to the issuing of the Amnesty Law of 1979 were distorted by the authoritarian government, in order to achieve a self-amnesty; which is null and void since its promulgation, according to IHRL. Moreover, the dispositions of the Federal Constitution of 1988 did not follow the provisions of the 1979 Amnesty, restraining the amnesty to the victims of the regime.

Finally, it is possible to recognize that the Brazilian state had already contracted a series of international obligations towards human rights, even before the promulgation of the 1988 Constitution. Regarding this last assertion, it seems relevant to illustrate such claim, by exposing some of the commitments made through the ratification of international documents. Previous to the advent of the UN the Brazilian had already made commitments towards International Humanitarian Law. Among the ratified humanitarian instruments it is possible to cite, at least, the nineteenth century and beginning of twentieth century Conventions of Geneva and Hague, and the Geneva Convention of 1929. Afterwards, regarding IHRL, it is possible to cite the signature of the UN Charter, in 1945, followed by the ratification of the Universal Declaration of Human Rights, and the signature of the Charter of the Organization of American States, both in 1948. Afterwards, it is worthy of note the signature and

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[108] For a broader account of this balance, and other aspects of the dictatorship, as well as of the Brazilian transitional process, *see* MEYER (2017).

ratification of the four Geneva Conventions of 1949, respectively, in 1949 and 1957. At last, the signature of the Convention on the Prevention and Punishment of the Crime of Genocide in December 1948, and further deposit in April 1952. Along with all of these documents, it is relevant to highlight that Brazil was under the legal framework established by the UN provisions against crimes against humanity. Among these provisions is the International Law Commission formulation of the Nuremberg Principles.

Therefore, it is possible to say that there was already some evidence of commitment with IHRL even before the transition to democracy.[109] After the promulgation of the Constitution of 1988, such commitment to human rights became unequivocal. This commitment can be observed in domestic norms and in the way Brazil conducts its international relations. The starting point of such commitment rests in the text of the Federal Constitution of 1988 itself. Among other dispositions stating the significance of human rights to the new constitutional order, the following stand out in the aforementioned sense. The Constitution provides that Brazil must conduct its international relations under the guidance of human rights. Furthermore, in the ADCT, it advocates for Brazil's support in the creation of an international human rights court.[110]

Furthermore, as mentioned, the posture supported above of the Brazilian state can be observed in the manner the country conducts its international relations. As an illustration of such, it is possible to present the on-going process of ratification of several international documents concerning human rights. The initial framework of the process of incorporation of international human rights treaties into Brazilian law, post-1985, was the signing, in 1985, and the ratification, in 1989, of the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment. Also in the year of 1989, Brazil ratified the Inter-American Convention to Prevent and Punish Torture. Further on, regarding the ratification of treaties which deal with gross violations of human rights it is also worth citing the following. The International Covenant on Civil and Political Rights, in 1992; and the American

[109] Although, for all of the aforementioned reasons, it is evident that such commitments were exclusively in a formal level, with utmost disrespect for those norms in practice.
[110] A series of other constitutional dispositions provide for the commitments towards human rights, through directly establishing or granting broader protection to them, beyond the mentioned article 4, II. Such as article 5, §§ 1, 2 and 3; article 109 V-A; article 109, § 5 (these latter after the Amendment 45/2004), article 134 (regarding the role of the Public Legal Aid Office in promoting human rights). At last, it is worth mentioned the cited article 7 of the Acts of Transitory Constitutional Dispositions (ADCT), foreseeing the Brazilian commitment to support the formation of an international court of human rights.

Convention on Human Rights, in that same year.[111] Thereafter, the Rome Statute establishing the International Criminal Court in 2002. The ratification of the Optional Protocol to the Convention against Torture, in 2007, is also noteworthy. Furthermore, the Optional Protocols to the ICCPR, in 2009, and the Convention for the Protection of All Persons from Enforced Disappearance, in 2010. Finally, it is worth citing the ratification of the Inter-American Convention on Forced Disappearance of Persons, in 2013.[112]

The aforementioned posture of the Brazilian state can be also recognized through the reforms made in the Constitution and through the STF's jurisprudence. For instance, the Constitutional Amendment 45 of 2004 added a series of human rights related procedures to the 1988 Constitution. Among the reforms provided by the Amendment were the procedures regarding human rights treaties ratified by Brazil. A special procedure for approval of human rights treaties was included in the Constitution. Treaties that were approved through such special procedure were raised to the status of a Constitutional Amendment.[113] The STF's jurisprudence regarding the status of other human rights treaties, which were not approved by the abovementioned procedure, states that they are above the ordinary law – holding legal status inferior only to the Constitution and its Amendments.[114]

The aforementioned binding aspect of the IHRL towards the Brazilian domestic legal order seems to point in a more binding *posture towards the transnational.* This dissertation recognizes such *posture* in commitments such as the recognition of binding competence of the IACtHR to interpret and apply the ACHR and the special procedures for ratifying human rights treaties. Further than a possible *posture of (relational) engagement* brought along by other dispositions of the 1988 Constitution, the latter aspects point in more binding aspect of IHRL. Thus, it seems that there is a requirement for *convergence* in certain subjects or at least regarding such decisions. It might not be an absolute *convergence,* but a less binding manifestation of such *posture*. It seems at least that the Brazilian domestic legal order

[111] It is also noteworthy state's recognition of the binding competence of the IACtHR to interpret and apply the ACHR, through the issuing of the *Decreto nº 4.463, 2002* (BRAZIL, 2002).

[112] The data of the Office of the High Commissioner for Human Rights of the UN, show that Brazil is among the countries which ratified most of the major 18 International Human Rights Treaties, having ratified 16 of them. See: http://indicators.ohchr.org/ access 19 June 2018.

[113] The only treaty that has already acquired such status is the 2007 Convention on the Rights of Persons with Disabilities.

[114] For further information on the subject see rulings on lawsuits RE 466.343-SP and ADI 5.240. Furthermore, *see*: http://www.stf.jus.br/portal/jurisprudencia/menuSumario.asp?sumula=1268, access 19 June 2018.

provides that some human rights norms should be regarded as higher presumptions to be overcome in the decisional processes.[115]

As aforementioned, since before the 1988 Constitution the country had made commitments towards the *international system of human rights*. Such commitments were remarkably augmented after the transition to democracy. However, some of those commitments to human rights were not being enforced due to the abovementioned lack of accountability. Brazil was amidst a global wave of transitions to democracy. In parallel to that, a movement towards criminal accountability for gross violations of human rights. Such endeavours for accountability were carried out among several neighbour Latin American countries. Some of those neighbouring countries achieved recognizable success in respect to these endeavours (*e.g.* Argentina and Chile). That process also happened in the perspective of regional institutions of IHRL, under the innovative rulings of the IACtHR. However, Brazil did not follow this pattern.

On that note, barriers to accountability in Brazil began with the 1979 Amnesty Law. Such obstacles persisted due to a prevailing interpretation that the self-amnesty was valid and was suitable to the Federal Constitution of 1988. These barriers to accountability constituted by such comprehension deemed the Amnesty Law an *obstinate amnesty*.[116] Initially, it was not possible to persecute the crimes of the dictatorship due to such reasons. Afterwards, yet another barrier was constituted due to the applicability of statutes of limitation.[117] Therefore, it is needless to say that the issue of not enforcing the commitments to human rights goes beyond the legal normative provisions of human rights protection. Such matter is also related to the understanding and practice of a series of actors regarding such commitments.[118] In that sense, with Torelly:

[115] See topics 3.1 and 3.2 for the general context in which this assertion regarding the Brazilian domestic legal order is inserted.

[116] It is possible to comprehend Brazil's accountability context as what Lessa, Olsen and Payne describe as an *obstinate amnesty* (LESSA et al., 2014) a scenario in which an amnesty "block accountability efforts" (LESSA et al., 2014, p. 85). The authors consider Brazil as "the best example in Latin America of this scenario" (LESSA et al., 2014, p. 85). It is possible to point out some of the aspects that contribute to the said obstinate amnesty Brazilian scenario, such as: (a) strong veto players, (b) weak judicial leadership, (c) weak international pressure (LESSA et al., 2014, p. 87). Therefore: "In light of these factors, Brazil's amnesty law seems firmly intact and obstinate. All pathways for pursuing justice seem closed" (LESSA et al., 2014, p. 87-88).

[117] This interpretation will be further discussed below.

[118] "A brief look at the judicialization process in Brazil (...) suggests that, in line with the argument here presented, traditional legal preferences constitute important blockages on the road to truth and justice. Judicial actors in both countries lack the technical capabilities and the professional values to commit themselves to highly demanding and complex cases" (GONZALEZ-OCANTOS, 2017, p. 277).

> The cases analysed, applying the global norm of individual accountability, have demonstrated that, in spite of the greater hierarchy favouring the use of international human rights law by domestic courts, issues of juridical culture manifested in judicial interpretation are also crucial for good relations between orders and regimes. Consequently, they are also fundamental to the application of human rights as part of the genre of fundamental rights by domestic courts. (Highlighted) (TORELLY, 2016, p. 302)

Nevertheless, although criminal accountability faced barriers, in spite of the Brazilian commitments towards human rights, it is important to highlight that exceptions to this rule were found. Some of those initiatives date back to the authoritarian regime. Still while amidst the dictatorial government, families of the victims brought lawsuits to the Courts, aiming at having acknowledgement of the acts perpetrated against their relatives. Some of those endeavours, seeking both answers and reparation achieved certain level of success. In order to illustrate such assertion, it seems relevant to expose the aforementioned Vladimir Herzog case.

As stated, a notorious outcome of such initiatives was the ruling recognizing the responsibility of the Brazilian Federal Union in the death of the journalist Vladimir Herzog (BARBOSA, 2013). The decision was uttered in 27 October 1978, by the Federal Judge Márcio José de Moraes. The judgement was pronounced a few months before the issuance of the Constitutional Amendment n. 11,[119] and roughly a year before the Amnesty Law. Vladimir Herzog was a journalist that was unlawfully taken into custody by the Brazilian dictatorship to a DOI-CODI. There, he was tortured and executed, and his captors simulated that Herzog had committed suicide in custody. A picture of the manifest simulation was depicted in major newspapers of the time. The picture portrayed the victim hanged without suspension and its legs still touching the ground. In face of the series of injustices perpetrated against the deceased, Herzog's family lodged a civil claim for recognition of the state's acts that led to the victim's death. In his ruling, Judge Moraes recognized that the Brazilian Federal Union performed an illegal arrest. He uttered that Herzog was tortured and that the forensic report on Herzog's body was null. Therefore, and since there was no proof of suicide, the judge deemed the Union accountable for the death of the journalist (CIDH, 2015, par. 110).

After the downfall of the authoritarian regime, a series of measures followed in order to address the injustices perpetrated by the regime. Those measures followed the framework

[119] Among other dispositions, the Constitutional Amendment n. 11, in its article 3, revoked the institutional and complementary acts, nevertheless maintaining the 'legal' validity of their effects and excluding these effects from judicial analysis (BRAZIL, 1978).

of transitional justice. The first mechanisms to be enforced were towards truth and memory. They meant to shed light on the facts that were obscured by the lack of transparency and active censure carried out by the regime. The first major initiative for memory and truth was the project *Brasil: Nunca Mais*. The project was conducted during the authoritarian regime, by members of various religious congregations, lawyers and activists between the years 1979 and 1985. It consists of the compilation of Superior Military Tribunal (*Superior Tribunal Militar* - henceforth STM) cases between the years 1961 and 1979. The compilation encompasses more than one million pages of information about repression of resistance by agents of the military dictatorship.[120] It is also worth citing among major initiatives of civil society developed during the regime, the group *Tortura Nunca Mais* and the Commission of Families of the Dead and Forcibly Disappeared (*Comissão de Familiares de Mortos e Desaparecidos Políticos*). It is noteworthy the Federal Government's Especial Commission for People Killed and Forcibly Disappeared for Political Reasons (*Comissão especial sobre mortos e desaparecidos politicos*), set up in 1995.

Finally, still regarding memory and truth related initiatives it is relevant to mention the truth commissions. There have been a series of truth commissions in Brazil, some of them are run by the government and others are initiatives from classes or universities. These commissions might be concerned with specific subjects or with general aspects of the dictatorship. The one which was responsible for the broadest analysis was the abovementioned National Truth Commission (CNV). The CNV was capable to reach a broad set of results in the years it was active, between the years of 2012 and 2014. Its main objective was investigating the violations of human rights from 1946 to 1988 in Brazil. It is possible to say that it reached some breakthroughs regarding the dictatorship, among those the unveiling of a series of violations perpetrated by the regime and their systemic character.

Regarding the reparations, it is worth mentioning a broad initiative for reparation of the victims that began in the year of 2001. This initiative followed demands for enforcing article 8 of the ADCT. The demands came from a series of political persecuted individuals and other social actors that held a "posture of constant demands for their rights". Due to such demands, the Amnesty Commission of the Ministry of Justice (*Comissão de Anistia do Ministério da Justiça* – henceforth CA) was implemented. The initiative is considered the "central line of transitional justice in Brazil" (ABRÃO, TORELLY, *In* REÁTEGUI, 2011).

[120] For more information, see: http://bnmdigital.mpf.mp.br/pt-br/, access 19 June 2018.

This "line of action" would be composed of four categories: compensation, rehabilitation, satisfaction and guarantees of non-repetition. The categories, in turn, manifest themselves through the implementation of the policies and initiatives with economic and moral character. In that sense, reparation was also understood as recognition, through the Amnesty Caravans, the Amnesty Memorial and the project *Marcas da Memória* (ABRÃO, TORELLY, *In* REÁTEGUI, 2011). Moreover, the Brazilian reparations program would be one of the most successful in addressing economic reparations in contemporaneity.[121] In addition to its key role, the CA began to develop efforts in order to guarantee visibility to other initiatives carried out in the field of transitional justice (ABRÃO, 2009, p. 14). These actions were carried out with a number of actors and institutions engaged in human rights and transitional justice. In 2008, as a result of the public meetings and debates promoted by the Commission:

> (...) broad sectors of society and the national press began to express their views on the issue [of limits and possibilities for prosecution of crimes against humanity during the State of Exception in Brazil], leading to the proposition of an ADPF by the Brazilian Bar Association before the Federal Supreme Court, in order to express its opinion on the legality of the interpretation given by some sectors to the amnesty granted in 1979, as contemplating crimes against humanity committed by state agents in evident deviation from their official roles (ABRÃO, 2009, p.14)

In the constitutional action, ADPF 153, the Federal Council of the OAB required that the STF established an interpretation of the Amnesty Law appropriate to the 1988 Constitution. Such request demanded the restriction of the effects of the law to political and related crimes. Therefore, allowing prosecution of the perpetrators of human rights violations during the dictatorship. Deciding against all international normative previously presented, the STF ruled in favour of the constitutional reception of the Amnesty Law. In the decision, the Court stated that the law was the result of a "political agreement" of the Brazilian society of the time. The STF's ruling was against the previously exposed comprehension of norms and jurisprudence of IHRL – in a clear *posture of resistance*.[122] In this regard, it is worth of note that "the vote of Minister Celso de Mello [which] was the one that further distanced the STF's decision from the International Human Rights Law, at the same time, paradoxically, he approached it" (MEYER, 2012, p. 175 *et seq.*, p. 279-278). Therefore, the STF's decision constituted a further barrier to pursuing criminal complaints.[123] Due to such decision a *posture of resistance* was initially recognized as the overall posture of the Brazilian judiciary

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[121] For further information, *see*: ABRÃO, TORELLY, *In*: REÁTEGUI, 2011.

[122] It is worth noting that the Prosecutor General of the Republic (*Procurador Geral da República* – henceforth PGR) Roberto Monteiro Gurgel Santos opposed the understanding of the OAB against the Amnesty Law.

[123] The decision of the STF on the ADPF 153 had binding effects to lower courts, thus precluding, at least in a initial moment, the debate regarding concrete cases dealing with the matter ruled upon. Means of overcoming such understanding are exposed below, in the analysis of the cases.

(TORELLY, 2013, p. 506; 2016, p. 192).[124] Finally, still regarding the decision's approach to a transnational understanding on the norms related to the Brazilian transitional context:[125]

> (…) it is impossible to decide on the legitimacy of an amnesty law in the current context, ignoring the vast international norms regarding crimes against humanity, whether they appear under the treaties, or under the binding character of *jus cogens*. There is no way to refute the need for punishment in these cases, as the Inter-American Court of Human Rights has argued in the Almocinad Arellano case, just as it cannot be ignored how such norms of international law permeate our legal system. The STF itself, in the judgment of Extraordinary Appeal No. 466,343/DF, acknowledged, albeit in part, the effect of the principle of the international norm more favourable to human rights or *pro homine* (MEYER, 2012, p. 274).

That same year of 2010, the IACtHR would rule on a diametrically opposite manner of that of the STF regarding the Brazilian transitional process. This latter decision would utter the obligation of the Brazilian state to develop investigations, and punish the perpetrators of the murder and disappearance of the members of the Araguaia guerrilla.[126] The ruling of the IACtHR in the *Gomes Lund* case also stated that the Brazilian state had been responsible for the gross violation of a series of human rights during the dictatorship. Furthermore, the state had failed to comply with the American Convention on Human Rights. Moreover, the Brazilian Amnesty Law was null and void in those provisions that prevented the investigation and accountability of perpetrators of crimes against humanity (IACtHR, 2010).[127] In that

[124] "As in Mexico, no human rights trials have been held in Brazil and the investigations that began in 2008 have made little progress. Although a few courts have shown some receptiveness to the innovative arguments put forward by a specialized group of prosecutors, the Supreme Court still holds the upper hand in the appeals process and is yet to issue a definitive ruling on the validity of the 1979 amnesty law" (GONZALEZ-OCANTOS, 2017, p. 277).

[125] For a thorough analysis of the STF's decision on the APDF 153, and the need of overcoming such decision based on IHRL framework – among it, the decision of the IACtHR *see* MEYER (2012).

For a transconstitutional analysis of the decision of the ADPF 153, in an analysis that shares some of the comprehensions towards the transnational of this dissertation *see* OLIVEIRA (2017).

In a conclusion consistent with that found by Meyer, and making use of a theoretical instrumental compatible with the one used in this dissertation, Oliveira states that:

"The Justices' opinions express a posture strongly marked by the dualist theory which, as mentioned earlier, argues that the opposition between international law and domestic law is also an opposition between sources of law, reason why any conflict between the two legal orders would be only apparent. In addition, like most of the votes cast in the ADPF 153, this positioning exemplifies the model of *resistance* as defined by Jackson. By admitting the *a priori* superiority of domestic law or its exclusive legitimacy to support constitutional interpretation, the STF refuses to *engage* with international normativity and assumes the *posture of resistance* that is typical of systems still focused on absolute state sovereignty and which only recognizes the status of approved standards under its national legislative procedure" (highlighted) (OLIVEIRA, 2017, p. 113).

[126] In the ruling, the Court followed a series of precedents it set since the initial 1988 Velásquez Rodríguez case; and the subsequent developments it made towards "more restricted obligations in relation to the states parties", especially regarding amnesty laws and statutes of limitation, previously described. In that sense, it is undeniable that the decision of the Court in the Gomes Lund case aligned with the IHRL framework in which it is inserted.

[127] After the decision of the IACtHR on the Gomes Lund Case the OAB interposed an appeal (*embargos de declaração*) against the decision of the ADPF 153, indicating contradictions between the STF's decision and that of the regional court. Furthermore, as abovementioned, yet another possibility of discussing the case was posed by the ADPF 320 proposed by PSOL; in which the political party brought the decision of the IACtHR to the analysis of the STF, requesting the fulfilment of its dispositions, *see*: PATRUS (2016).

sense, the Court's decision pointed out the abovementioned tensions between the 1988 constitutional project, inserted in the IHRL framework regarding accountability, and the impunity sustained in the Brazilian transitional context.[128]

Therefore, it is possible to recognize a tension between two comprehensions of accountability for the crimes against humanity perpetrated during the dictatorship. Such tension is also manifested through different *postures towards the transnational*. On one side of this tension, there are the obstructions to accountability and a *posture of resistance to IHRL in transnational perspective.* Such aspects are recognized in a comprehension of the Brazilian transition and the Amnesty Law which is illustrated by the ruling laid by the STF on the ADPF 153 (followed by a large part of the judiciary).

On the other side of this tension is the comprehension for accountability of the agents of the authoritarian regime. Along with this comprehension are *a posture of engagement and a posture convergence to IHRL in transnational perspective*. As aforementioned, such *postures* are recognizable in the dispositions regarding human rights of the 1988 constitutional project. Furthermore, they can be observed in the IHRL instruments ratified by Brazil. Finally, they are also distinguished in the decisions of the IACtHR regarding such matter in a regional perspective of IHRL and the *international system of human rights* protections itself (and *jus cogens* norms in its centre).

In that sense, in order to achieve the accountability required by a socially adequate international law (TORELLY, 2016, p.141) and set the respective debt regarding the effective fulfilment of human rights in Brazil (MEYER, 2012, p. 13), it is necessary to establish an *adequate constitutional interpretation* (JACKSON, 2010). Such *interpretation* towards the abovementioned *international system of human rights* in a transnational perspective is necessary to implementing the commitments set by the democratic constitutional project of 1988. A comprehension that follows a conclusion previously stated by Torelly: "in spite of institutional openness, judicial practice remains a relevant element for an effective

[128] Regarding the enforcement of the decision, the Brazilian Government produced a report in 2015, in which it stated that (at the conclusion par. 335, 336 and 337): the state is committed in advancing the measures established by the court in the Gomes Lund case; the state does so, not only due to the international obligations to which it has submitted, but also due to a will to pay the "the historical debt of the country in relation to the abuses perpetrated by the military regime"; and, finally, that "various organs of the Federal Government, the Federal Prosecution Service and the Judiciary" are mobilized in order to accomplish the obligations established. Available at: http://www.consultaesic.cgu.gov.br/busca/dados/Lists/Pedido/Attachments/526449/RESPOSTA_PEDIDO_BRASIL%20-%20Corte%20IDH%20-%20Gomes%20Lund%20e%20outros%20-%20Relatrio%20-%20Cumprimento%20de%20sentena%20-%20maro%20de%202015%20-%20FINAL.pdf access 19 jun. 2018.

transconstitutionalisation of fundamental rights" (TORELLY, 2016, p. 215). Thus, in order to investigate the conditions of possibility for accountability for the crimes of the dictatorship, it seems extremely relevant to investigate the manifestation of such an *adequate constitutional interpretation*. In that sense it is necessary to investigate decisions that may have presented such *postures*. In that sense, this dissertation advances to its final topics in which it analyses the decisions of the Federal Courts that admitted the criminal complaints lodged by the MPF.

CHAPTER V – A TRANSNATIONAL APPROACH TO THE CRIMES OF THE DICTATORSHIP

As previously exposed, initiatives for accountability for the crimes perpetrated by the dictatorship had been endeavoured since during the regime. The lodging of criminal complaints against the acts of the repressive government, on its turn, had only begun more recently,[129] due to an initiative of the MPF.[130] These latter initiatives for accountability began in the years of 2008 and 2009, and constituted of lodging lawsuits in the Federal Courts.[131] Such lawsuits were initially an answer to the relentless demands of social actors. Furthermore, they were led by other initiatives performed by the state, such as the Especial Commission for People Killed and Forcibly Disappeared for Political Reasons and the CA (MEYER, 2017, p. 54). Finally, these lawsuits were due to the work of Federal Prosecutors who reached out to society to debate themes of transitional justice, among them "The impunity for crimes against human rights in Latin America", in 2007.[132]

The first initiatives of this latter movement towards accountability were due to the work of the Federal Prosecutors Marlon Weichert and Eugênia Gonzaga. These Prosecutors lodged eight crime-reports requesting investigations on agents of the dictatorship (BRAZIL, 2017, p. 18). This pattern of lodging of crime-reports in a scattered manner, most of them due to the individual effort of those Prosecutors, continued for some years. Some of those investigations were filed by the Prosecutors that were responsible for them, in the years of

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[129] Although some initiatives were put forth during the regime and afterwards, such as the *Riocentro* case, which was lodged on Military Courts, this research focuses on the criminal complaints lodged in this more recent endeavour for accountability, on Federal Courts.

[130] For an analysis of the initial MPF's endeavours regarding accountability for crimes perpetrated during the dictatorship, both civil and criminal, *see:* MORAIS (2013).

[131] Initiatives were conducted regarding the accountability of the state and agents of the regime: they aimed both at civil and administrative acts regarding accountability of the state, and initiatives of the Federal Prosecution Service towards criminal accountability of members of the regime. It is also relevant to highlight the significance that initiatives of other Brazilian government had on the MPF's initiative; such as the publication of the book "Direito à Memória e à Verdade" by Especial Secretariat of Human Rights – Especial Commission for People Killed and Forcibly Disappeared for Political Reasons, of the Federal Government, in 2007. The book lays among the groundings for the lodging of a complaint, in 2008, by the Federal Prosecution Service, regarding the death and disappearance of a series of victims of the dictatorship in the DOI-CODI of the state of São Paulo between the years of 1971 and 1976. For more information, *see:* http://memoria.ebc.com.br/agenciabrasil/noticia/2010-05-11/justica-arquiva-acao-declaratoria-de-tortura-contra-militares-da-epoca-da-ditadura access 19 June 2018.
Furthermore: http://memoriasdaditadura.org.br/biografias-da-ditadura/audir-santos-maciel/index.html access 19 June 2018.

[132] The *Debate Sul-Americano sobre Verdade e Responsabilidade em Crimes Contra os Direitos Humanos* was an initiative of the MPF, along with the International Center for Transitional Justice – ICTJ, and the Secretariat of Human Rights of the Presidency of the Republic. The event took place in May 2007, and debated a series of subjects regarding the theme of transitional justice in Latin America (such as accountability for crimes against human rights). For more information, see: http://www.mpf.mp.br/sp/sala-de-imprensa/noticias-sp/mpf-debate-verdade-e-responsabilidade-em-crimes-contra-os-direitos-humanos

2008 to 2010.[133] Other investigations were filed by the request of attorneys of the defendants and due to the interpretation of Federal Judges that subjected those crimes to statutes of limitations and the Amnesty Law.[134]

After the abovementioned *Gomes Lund* ruling by the IACtHR, the 2nd Chamber of Coordination and Review (*2ª Câmara de Coordenação e Revisão* - henceforth 2CCR) of the MPF analysed a request for filing the Palhano and Araújo cases.[135] The Associate Federal Prosecutor Generals Mônica Garcia and Raquel Dodge,[136] which analysed the request, mentioned the decision of the IACtHR as grounds to reject it. "In that same decision, the 2CCR also affirmed the competence of the MPF and the Federal Courts to promote the criminal persecution of the responsible for the gross violations of human rights perpetrated during the military regime" (BRAZIL, 2017, p. 19).

The obligations imposed on the Brazilian state by the ICtHR's ruling on the *Gomes Lund* case, and the interpretation of the 2CCR in the two abovementioned cases led to further initiatives by the MPF. An internal meeting was held along with two international workshops, in partnership with the National Justice Secretariat, the International Centre for Transitional Justice, the Federal Prosecutor's Office of Citizens' Rights, and the 2CCR itself (BRAZIL, 2017, p. 19). The aforementioned GTJT was created as a result of the debates conducted in those meeting. The GTJT was responsible for the development of the institutional thesis of the MPF, the litigation strategies and the investigation of the cases regarding the Brazilian dictatorship.

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[133] Among the Criminal Investigation Procedures filed there was the Herzog Case. And due to this filing the exhaustion of domestic legal measures was fulfilled, thus taking to the petition by the Herzog family to the IACHR to investigate the case. The IACHR, thereafter, lodged an application to be appraised by the IACtHR.
In its Merits Report, the Commission recommended the State of Brazil to determine the criminal responsibility for the arbitrary detention, torture and death of Vladimir Herzog. Pursuant to this recommendation, the IACHR requested the State of Brazil to take into account that these crimes against humanity are not subject to amnesties or statutes of limitations. Finally, the Commission requested Brazil to grant adequate reparation for human rights violations, both materially and morally (OAS, 2016).
For more information, *see*:
http://www.oas.org/en/iachr/media_center/preleases/2016/061.asp access in 19 jun. 2018.
[134] Among other reasons for not granting continuity to the criminal complaints lodged are: "the lack of positive legal provisions regarding crimes against humanity in Brazilian law; the impossibility of immediate implementation of international conventions of human rights; the lack of an international customary law recognized by Brazil that determines the prosecution of these crimes at any time, therefore the inadmissibility of non-application of statutes of limitations to such crimes in Brazilian law at the time of the facts (…)" (BREGA FILHO, SANTOS, *In* BRAZIL, MJ, 2009, p. 168).
[135] The 2CCR of the MPF has the institutional attribution of coordinating, integrating and reviewing the functional exercise of members of the Federal Public Ministry in the criminal area.
See: http://www.mpf.mp.br/atuacao-tematica/ccr2 access in 19 jun. 2018.
[136] Raquel Dodge currently occupies the position of Prosecutor General of the Republic – the head of the Federal Prosecution Service. In this position, she has broadly supported criminal investigations and accountability of the agents of the dictatorship.

Along with the he GTJT, the MPF created specific investigative groups in São Paulo and Rio de Janeiro, and a taskforce focused on the Araguaia case. These initiatives dating back to the years of 2011 and 2012 led to the lodging of criminal complaints against various agents of the dictatorship. The first complaint to be lodged was against Sebastião Rodrigues de Moura, Major "Curió", for his actions on the Araguaia guerrilla, in 23 February 2012. This was also the first case to be admitted and given continuity by a Federal Court.[137] Other five cases would follow that same pattern, thus being granted pursuance by the Federal Courts. Those cases are the object of this dissertation.

Before entering the main endeavour of this research, it is relevant to make some notes on the criminal procedure regarding the complaints related to the violations of human rights committed by agents of the dictatorship. As stated, the crimes under analysis are crimes which the complaints are of public initiative. Therefore, it is sole competence of the MPF to lodge the criminal complaints. Furthermore, most of the analysed cases involve former members of the Brazilian Army, which performed the criminal acts while still in active duty (BRAZIL, 2017, p. 17). Therefore, following the Military Criminal Code, the crimes committed against civilians by military in service or acting regarding its functions if intentionally against life are of competence of the regular courts (BRAZIL, 1969b; BRAZIL, 1996). Finally, since the crimes were committed by members of the Armed Forces the jurisdiction is of the Federal Courts (BRAZIL, 1988). Thus, it is undeniable that the competence to rule on such cases is of the Federal Courts, and the competence to lodge such criminal complaints is of the MPF. These competences are a consolidated jurisprudence and had not yet been countered by any decision regarding those cases.[138]

The investigations (PIC) were performed either by the GTJT or by Prosecutors assigned to the specific areas and cases (such as the Araguaia taskforce). If the PIC was developed by the GTJT, it was sent to the Prosecutor responsible for the area where the crime

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[137] Since the first lodged complaints the Federal Prosecution Service developed reports regarding its institutional position towards the matter, its activities and the current state of the criminal procedures. The first reports date from 2013 and 2014. They were an initiative of the abovementioned *2ª Câmara de Coordenação e Revisão*, and were developed by the Coordinator of such institution, the Associate Federal Prosecutor General Raquel Elias Ferreira Dodge, currently the Prosecutor General of the Republic. These initial versions, CCR2 Report of 2013, CCR2 Report of 2014, are respectively available at: http://files.comunidades.net/massacres-e-genocidios/MPF__Relatorio__Crimes_da_Ditatura.pdf access 19 jun. 2018. http://www.mpf.mp.br/atuacao-tematica/ccr2/coordenacao/comissoes-e-grupos-de-trabalho/justica-transicao/relatorios-1/Relatorio%20Justica%20de%20Transicao%20-%20Novo.pdf/view access 19 jun. 2018.

[138] For more information regarding the jurisprudence on that matter of the Superior Courts, see the decision of the Superior Court of Justice (*Superior Tribunal de Justiça)* in the Appeal regarding the HC 25384 (*Recurso Ordinário em Habeas Corpus – RHC 25384 ES*).

happened. The investigation was sent along with a material explaining the institutional thesis regarding such procedures. Thereafter, the Prosecutor lodged the complaints at the Federal Court which had territorial jurisprudence over the case. In the cases where the investigation was produced by the area taskforce, the Prosecutors followed the MPF's institutional thesis in their complaints. In both cases the initial criminal complaint lodged on the Federal Court would be sent along with a memorial. In this document, there would be a description of the institutional thesis followed by the MPF and further information regarding the context in which the crimes were committed.

The MPF's institutional thesis, broadly encompassed by the prosecutors, and presented to the Courts, consisted of the following aspects. Initially, the recognition of the positive obligations of the Brazilian state regarding the crimes perpetrated during the dictatorship. This recognition was presented especially through the ruling in the *Gomes Lund* case and, more broadly, regarding IHRL. To further emphasize these obligations, the MPF grounded their claims on a narrative regarding the development of IHRL. The MPF then presented the operative paragraphs of the judgment regarding the criminal prosecution of gross violations of human rights committed during the dictatorship. Among those, the obligations specifically addressed to the MPF. Finally, it supported the absence of conflict between the STF's ruling on the ADPF 153 and the IACtHR's decision on the *Gomes Lund* case.

On another hand, the MPF presented the context in which Brazil was inserted. It initially described how the crimes of the Brazilian dictatorship were crimes against humanity, due to the systematic and widespread nature of the attacks.[139] The presentation was followed by a description of the structure and functioning methods of the political repression in the urban environment at the beginning of the 1970's. Later on, it presented aspects of the institutional impunity of members of the regime. Afterwards, it developed some aspects on the contextual element required for the understanding of such crimes as international crimes. Finally, the MPF advanced to the legal consequences of understanding the acts committed by agents of state as crimes against humanity. Such consequences were the non-applicability of statutes of limitation and insusceptibility of amnesty (BRAZIL, MPF, 2017).[140]

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[139] Such a nature was recognized by the IACtHR, by the Final Report of the CNV, and the investigations of the Federal Prosecution Service itself.

[140] A thoroughly analysis of the institutional thesis of the Federal Prosecution Service can be found in the Office's report "Crimes da Ditadura Militar": http://www.mpf.mp.br/atuacao-tematica/ccr2/publicacoes/roteiro-atuacoes/005_17_crimes_da_ditadura_militar_digital_paginas_unicas.pdf, access 19 June 2018.
As previously stated, the Office develops such reports, in which the thesis is presented, since the year of 2013.

After the MPF developed the investigations regarding the acts of the agents of the dictatorship, if enough evidence were found, the Prosecutors would lodge criminal complaints. Such complaints were lodged on the Federal Courts, following the abovementioned procedures. Only six of the thirty four criminal complaints already lodged had decisions for admissibility by the Federal Courts. Once more, the main barriers for accountability, which are stated as reasons for dismissing the complaints, are statutes of limitations and, following the STF's ruling on the ADPF 153, the 1979's Amnesty Law (BRAZIL, 2017, p. 29 *et seq.*). In order to overcome such barriers, the rulings admitting the complaints could have been grounded in IHRL in transnational perspective. For this reason they were chosen to be analysed by this research, in order to ascertain how the domestic courts perceive such transnational understanding.

Therefore, the next step of this research is to analyse those rulings in order to determine the following aspects. Initially, analyse which *posture towards a transnational* comprehension of IHRL the ruling manifested. Afterwards, identify what was the nature of such *posture* and how it was achieved by the analysed decision. In the sense previously stated, this research reputes that *postures of convergence and engagement towards the transnational* are more adequate *postures* regarding the criminal accountability for crimes against humanity. Furthermore, they seem more adequate when dealing with some aspects of human rights with which this dissertation is concerned. Finally, as asserted, they also appear more adequate to the framework set forth by the 1988 Constitution.

In conclusion, it seems relevant to recapitulate the hypothesis laid by the research project that would take to this investigation. The initial hypothesis was that the analysed decisions would have considered, in some extent, a transnational legal perspective. In that sense, it was expected that the rulings would either follow a *posture of convergence or engagement towards the transnational*. Such hypothesis was deemed possible due to the fact that these decisions have ruled on the pursuance of the criminal procedures.[141] Thus, it was very possible that they made use of human rights law, in a transnational perspective, in order to overcome the barriers for admitting the criminal complaints. It can be stated, preliminarily,

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Furthermore, regarding the "legal consequences" of the encompassed understanding, the Federal Prosecution Service deals specifically with: the forced disappearance of political dissidents as a permanent crime; the lack of possibility of punishment during the regime as obstacle to the beginning of the statutory period; rape as a crime against humanity; and related crimes – the criminal actions against the coroners that contributed to the abovementioned violations – as crimes against humanity.

[141] Once more, it is relevant to highlight that the main reasons for dismissing the complaints are: statutes of limitations and the 1979's Amnesty Law, following the STF's understanding on the ADPF 153 (BRAZIL, 2017, p. 29 *et seq.*).

that such hypothesis would stand for most of the six analysed rulings, but not for all of them. The hypothesis would not be fully validated due to the lack of an initial recognition of *postures of resistance* among those decisions, which, unexpectedly, would be identified. Thus, after this recovering of this dissertation's hypothesis, it is possible to advance to the analysis of each of the six decisions of the Federal Courts – the main object of this research.

5.1 – The analysis of the Federal Courts' rulings[142]

5.1.1 – **The *Rosa e outros case (Guerrilha do Araguaia)***[143]

Maria Célia Corrêa studied Social Sciences at the National College of Philosophy (Faculdade Nacional de Filosofia). She was member of the Brazil's Communist Party (Partido Comunista do Brasil – PC do B). Later on, in 1971, she went to the Araguaia region to take part on the resistance against the dictatorship. Hélio Navarro was the son of a Commander of the Navy, having studied both Chemistry and Piano at the Federal University of Rio the Janeiro (Universidade Federal do Rio de Janeiro – UFRJ), where he took part in the student's movement. Later on, with the hardening of the regime, he left for the Araguaia region to join the armed resistance. Daniel Callado was a Sargent of the Brazilian Army, which later on joined PC do B, in 1962. Due to political persecution, he left Brazil going to China, and upon return he joined the armed resistance at Araguaia. Antônio de Pádua studied Astronomy at the UFRJ, where he joined the student's movement. He was then arrested in the 30th National Students Association Congress (*30º Congresso da União Nacional dos Estudantes – UNE)*. Afterwards, he started being followed by the institutions of the dictatorship. Later on, in 1970,

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[142] It is worth mentioning that the access to the documents of the procedures was made by two main routes:
(a) The compilation of documents available at the website of the Centre for Study of Transitional Justice – CJT/UFMG, at: https://cjt.ufmg.br/, access 19 June 2018;
(b) And, through access to the websites of the judiciary institutions in which the proceedings were underway (TRF-1, TRF-2, TRF-3, STJ and STF).
Furthermore, it is noteworthy that the exposition herein is based on data analysed in a series of Attachments to this dissertation. On the Attachments there is a description of the arguments of each of the rulings (Attachment 1 to 6) and a Comparative Analyses of those (Attachment 7). This procedure was elected by the researcher and his advisor as a more adequate means to expose the arguments, instead of inserting them in the dissertation itself. This procedure is intended to make both the arguments and the text more accessible to the reader. Therefore, for more information on the arguments which ground the decisions, one can make direct reference to the Attachments.

[143] The initial number of the criminal procedure in the TRF-1:0001162-79.2012.4.01.3901; the number of the procedure after the retraction judgment: 0006231-92.2012.4.01.3901. The procedure was lodged in the 2nd Court of Marabá, in Brazilian state of Pará.

he moved to Araguaia to join the resistance against the regime. Telma Cordeiro was a Geography student at the Fluminense Federal University (Universidade Federal Fluminense - UFF). She was expelled of the university due to connections with the student's movement.[144] Thereafter, she moved to the Araguaia region with her husband to join the resistance against the dictatorship, in 1971. Their codenames were, respectively, Rosa, Edinho, Doca, Piauí, and Lia. All of them were captured, tortured and disappeared by the forces of the dictatorship at Araguaia.

> "Maria Célia, Hélio, Daniel, Antônio and Telma were kidnapped by agents in the context of repression of the Araguaia Guerrilla, and subjected to serious physical and moral violence. Kidnappings and later "Disappearances" were committed by agents of the Armed Forces. At the beginning of the execution of the crimes, the defendant Sebastião Rodrigues de Moura, then Major Curió, was the operational coordinator of combat actions and repression of the guerrillas." (BRAZIL, 2017, p. 131)

There was a broad investigation, which heard 121 witnesses on the alleged facts. Later on, based on the evidence collected, the complaint was lodged in 16 March 2012, on the 2nd Court of Marabá - PA, under the jurisdiction of the Federal Judge João César Otoni de Matos (the substitute judge of the 2nd Court). The complaint attributed to the defendant, Sebastião Curió, five counts of the crime of aggravated kidnapping (kidnapping accompanied by torture). The judge ruled against the criminal complaint arguing on the basis of prescription of the crimes (stating that they did not figure as aggravated kidnapping, but murder). The decision was also grounded on the argument that the 1979 amnesty encompassed. It made reference to STF's decision on ADPF 153.

The MPF appealed of the decision through a RESE (*Recurso em Sentido Estrito)*,[145] on the basis that the enrolled documents were not correctly analysed on the ruling. In that case, such appeal is reanalysed on a first basis by the same Court that gave the initial sentence – the 2nd Court of Marabá. The RESE was then analysed by Federal Judge Nair Cristina Corado Pimenta de Castro (the main judge of the 2nd Court, who was previously on vacation). The judge then decided that there were sufficient arguments and enough proof to admit the complaint. Thus, by admitting the criminal complaint the Federal Judge granted the possibility of the further analysis of the merits of the case.

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[144] The expulsion was ordered under the penalty imposed by the Law nº 477, of February, 26, 1969: Art. 1º, § 1º, II – "The infractions defined in this article will be punished: (…) If it is a student, with the penalty of expulsion, and the prohibition of enrolling in any other educational institution for a term of three (3) years" (BRAZIL, 1969a).

[145] *Recurso em Sentido Estrito*: a specific appeal that can be lodged under article 581 of the Criminal Procedure Code, which establishes that this is the adequate appeal if a Court's decision rules against receiving a complaint.

Thereafter, the defendant lodged a HC against that decision in the Federal Court of Appeals of the 1st Region (TRF-1) aiming at the discontinuance of the criminal complaint. In spite of the decision of the 2nd Court of Marabá, and also opposing a favourable opinion of the Regional Prosecutor, the TRF-1 decided against the complaint on 18 November 2013.

The MPF appealed of this decision in various levels of jurisdiction, on the TRF-1 itself, on the Superior Court of Justice (*Superior Tribunal de Justiça* – henceforward STJ) and the STF. On 19 October 2015, the MPF's appeal to the STJ was admitted to be further analysed by that court, and then registered (REsp - nº 1.562.053/PA)[146] under the 5th Chamber. Following the registering of the MPF's appeal, the Associate Federal Prosecutor General Maria de Mercês Aras (responsible for the case in the STJ) lodged an opinion in favour of the continuity of the criminal action. The appeal is waiting for judgement since April of 2016 (BRAZIL, MPF, 2017, p. 132-140).

Thus, after the narrative of the proceedings, the research advances to the analysis of the decisions issued. The analysis will be based on both the Comparative Board (Attachment 7)[147] and the analysis of the arguments (Attachment 1).[148] The decision provided a thorough analysis of the preliminary formal aspects of the procedure and the juridical conditions necessary to its development. In that sense, it ruled for an *a priori* plausibility of the case based on the formal aspects of the procedure. The juridical conditions of the pursuance of the complaint were found and there was enough evidence, in this preliminary analysis, to admit the complaint. Regarding the amnesty, the only aspect reputed by the decision as controversial, the ruling preliminarily overcame that barrier. It did so, based on the precedents set by the STF, as developed below. Finally, it stated that a thorough analysis of such institute was not fit for this preliminary phase of the procedure, but concerned the merits of the case.

International Human Rights Law norms and decisions were available and thoroughly presented, in both an annex of the complaint lodged by the MPF and the complaint itself. However, the only reference to International Law in the court's decision was through the precedent set by the STF in the Extradition processes nº 974 and 1.150. Both of them regarded the extradition of Argentinian military personnel involved in the kidnapping (forced disappearance, in IHRL terms) of Argentinian nationals during their authoritarian regime. The

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[146] *REsp – Recurso Especial* – a possible appeal of decisions of the Federal Court of Appeals to the STJ.

[147] The option of displaying the whole arguments of the decision aimed at producing a

[148] As stated, the focus of this research is on the decisions that ruled for the admission of the complaint lodged by the MPF, thus, the RESE's decision by Federal Judge Nair Cristina Corado Pimenta de Castro is the only, of the abovementioned, that will be analysed.

STF's rulings, respectively from 2009 and 2011, took into account in their rationale the fact that the victims never appeared, therefore making it impossible to apply statutes of limitations to the case. This was the argument encompassed by the analysed decision. The sentence made reference to such cases in order to present the perspective of the domestic legal order regarding the permanent nature of the crimes attributed to the defendants, thus preliminarily overcoming the Amnesty Law.

Moreover, although it cited the abovementioned national precedents, the decision stated that it would not take into account IHRL, at least in this initial phase of the proceedings. It also stated that the adequate *forum* for analysis of the IACtHR's 2010 decision regarding the *Gomes Lund* case would be the STF, and not a Federal Court. Such posture towards the transnational human rights framework presents what Jackson regards as an *active position of resistance* (JACKSON, 2010, p. 32 *et seq.*). It could also be inferred that it was a *deliberate position of indifference*. Nevertheless, in acknowledging the existence of the norms that were brought before court, and stating that their analysis would not be necessary, it resembles more the former *posture*. If the matter was not even addressed in the ruling, then it would be possible to consider the manifestation as the latter (*see* JACKSON, 2010, p. 32 and 34).

In conclusion, it is noteworthy that the decision was ground-breaking in admitting the complaint for criminal accountability of agents of the dictatorship in Brazil – it was the first one of the analysed here to do so. Furthermore, it is relevant to highlight that it was grounded in a thorough analysis of both the formal aspects of the procedure and the evidence presented by the Prosecutors. However, the decision did not take into account IHRL, let alone in a transnational perspective. Furthermore, it is possible to support that it also was not silent regarding IHRL in the extent that it both cited national precedents regarding the matter, and identified the existence of normative instruments and international decisions on the subject. Therefore, as abovementioned, it presented an *active posture of resistance* (JACKSON, 2010, p. 33) which was also recognized by the fact that it supported that the adequate *locus* for a debate that took into account IHRL would be the STF.

The decision, in order to overcome the barrier imposed by the Amnesty Law could also be interpreted as what Jackson would repute as a *formalist posture of constitutional*

interpretation (JACKSON, 2010, p. 33 and 141), due to the use of the STF's precedents.[149] Nevertheless, it is worth noting that the ruling was thoroughly founded regarding the procedural aspects of the criminal complaint, thus admitting it. In that sense, at least two conclusions are attainable. It is possible for a decision to admit a criminal complaint by the Federal Prosecution Service with a *posture of resistance to the transnational,* thus based exclusively on the domestic legal order. Following the course of the criminal proceedings, *postures of convergence or engagement towards the transnational* could be a possible, due to a need of a more meticulous analysis of the merits of the case.

5.1.2 – **The *Divino Ferreira de Souza case***[150]

Divino Ferreira de Souza was the son of a small family that lived in the city of Caldas Novas, in the countryside of the state of Goiás. He moved to Goiânia still very young, and there he started working, at the age of 8, selling newspapers. He joined the student's movement and, later on, took part in the resistance against the authoritarian regime. In 1966, he went to China to receive political and military training; then he came back to Brazil, moving to the Araguaia region. His codename was Nunes. At Araguaia, Nunes was ambushed by the military forces while hunting with other members of the resistance. His fellows were killed in the confrontation with the forces of repression. Divino was then taken to a military base in the region, injured but alive. The base "Casa Azul" was commanded by the military Lício Augusto Maciel. Since the capture of Nunes, there is no further information of his whereabouts.

As long as this case also concerned facts that happened in the Araguaia region, the MPF made use of the testimony of those same 121 witnesses. Along with this evidence, the Prosecutors went through a series of official historic documents, and testimonies given to other institutions regarding those facts. By the end of the investigation, Lício Maciel was indicted by the MPF for the crime of aggravated kidnapping (kidnapping accompanied by torture). As abovementioned, in the *Rosa e outros* case, such a crime is of a permanent nature.

[149] "Formalists might favour limits on the sources to be considered in interpretation, on different grounds. A formalist approach might place substantial weight on settlement and favour relatively strong adherence to *stare decisis*, which would diminish the importance of sources other than the Court's own precedents;" (JACKSON, 2010, p. 141).
[150] The initial number of the Criminal Procedure in the TRF-1: 0004334- 29.2012.4.01.3901. The procedure was lodged in the 2nd Court of Marabá-PA.

The complaint was lodged in 16 June 2012 and, once more, admitted by the judge of the 2nd Court of Marabá-PA, Federal Judge Nair Cristina Corado Pimenta de Castro, in 29 August of that same year. As regarding the *Rosa e outros* case previously exposed, the Federal Judge admitted the criminal complaint, on the same basis, thus granting the possibility of the further analysis of the merits of the case.

Again, the defendant lodged a HC against that decision in the TRF-1, aiming at the discontinuance of the criminal complaint. The Appeal Federal Judge that analysed the HC gave an injunction for the suspension of the case, in November 2013, until the final ruling by the Court of Appeal. The final ruling of the TRF-1 came on 28 October 2014, determining the suspension of the criminal procedure. Against that decision, the MPF appealed in various levels of jurisdiction (to the TRF itself, to the STJ and to the STF).

On 29 September 2015, the MPF's appeal to the STJ was admitted to be further analysed by that court (REsp - nº 1.557.916/PA). As had happened to the previous appeal to the STJ (REsp - nº 1.562.053/PA), it was registered under the 5th Chamber. Another opinion in favour of the pursuit of this criminal complaint was lodged. This time it was uttered by the Associate Federal Prosecutor General Zélia Oliveira Gomes. However, since November 2016, the STJ's 5th Chamber has not yet uttered a decision regarding the case (BRAZIL, MPF, 2017, p. 141-144).

Thus, after the narrative of the proceedings, the research advances to the analysis of the decisions issued. It does so based on both the Comparative Board (Attachment 7) and the analysis of the arguments (Attachment 2).[151] As in the former ruling, the decision of the Federal Judge Nair Cristina Corado Pimenta de Castro provided a thorough analysis of the preliminary formal aspects of the procedure. Recognizing the satisfaction of these preliminary aspects, as well as of evidence enough for giving continuity to the criminal complaint, the Federal Judge decided for its pursuance. Once again, the only reference to International Law in the Court's decision was through domestic precedent, set by the STF in the Extradition processes nº 974 and 1.150. Again, these rulings were cited in order to overcome the barrier of the Amnesty Law, by presenting the comprehension of the domestic legal order regarding the permanent nature of the crimes attributed to the defendants.

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[151] As stated, the focus of this research is on the decisions that ruled for the admission of the complaint lodged by the MPF, thus the RESE's decision by Federal Judge Nair Cristina Corado Pimenta de Castro is the only, of the abovementioned, that will be analysed.

As in the *Rosa e outros* case, although the decision made reference to the abovementioned national precedents, it stated that it was not going to take IHRL into account in this initial phase of the proceedings. Furthermore, it asserted that the STF was the adequate *forum* for analysis of the IACtHR's 2010 decision regarding the *Gomes Lund* case. Once more, such posture manifests what Jackson regards as an *active position of resistance* (JACKSON, 2010, p. 32 *et seq.*).

In that way, it is relevant to highlight that the ruling was grounded in a full analysis of both the formal aspects of the procedure and the juridical conditions necessary to the development of the procedure. However, as the ruling above, this decision did not take into account IHRL in a transnational perspective. In the extent that it both cited national precedents regarding the matter, and identified the existence of normative instruments and international decisions on the subject, it presented an *active position of resistance* (JACKSON, 2010, p. 33). A posture which was also recognized due to the fact that the ruling supported that the adequate *locus* for a debate that took into account IHRL would be the STF. Again, the decision manifested what Jackson reputes as a *formalist posture of constitutional interpretation* (JACKSON, 2010, p. 33 and 141) to overcome the barrier posed by the Amnesty Law. The same two conclusions are attainable: a decision may admit the criminal complaint with a posture of *resistance to the transnational,* based exclusively on the domestic legal order. Further analysis, which encompasses a *posture of convergence or engagement towards the transnational,* is not to be discarded.

5.1.3 – **The *Edgar de Aquino case***[152]

Edgar de Aquino Duarte was born in the countryside of Pernambuco. In 1941, he joined the Navy, where he became Corporal of the Marine Corps. In 1964, he was a member of the Association of Sailors and Marines of Brazil and opposed the *coup* against President João Goulart. In 1964, he was exiled, traveling to Mexico and Cuba, and coming back to Brazil illegally in 1968. He was arrested in June 1971, and taken to the DOI-CODI/SP. The victim was held under custody of that institution from that day on, without formal charges against him or any other communication to the competent legal authority. From there, he was taken to the State Department of Political and Social Order (*Departamento Estadual de*

[152] The initial number of the Criminal Procedure in the TRF-3: 0011580- 69.2012.4.03.6181. The procedure was lodged in the 9th Criminal Court of São Paulo-SP.

Ordem Política e Social de São Paulo - DEOPS-SP). Until this day, there is no further information of his whereabouts.

The investigative procedure (PIC) was comprehensively developed, with the testimony of individuals that shared prison cells with Edgar both in the DOI-CODI/SP and the DEOPS-SP. Furthermore, the investigation encompassed a series of documentary evidence regarding the arrest itself. It also contained requirements of information by judicial authorities and the allocation of the victim inside the institutions of repression. Among the documents there was also reference to the “brutal torture” Edgar faced.

Based on the investigation, the MPF lodged a complaint against Carlos Alberto Brilhante Ustra, Carlos Alberto Augusto and Alcides Singillo, once more, for the crime of aggravated kidnapping. As abovementioned, such a crime is of a permanent nature. The complaint lodged in the 9th Criminal Court of São Paulo, under the jurisdiction of Federal Judge Hélio Egydio de Matos Nogueira, was admitted in 23 October 2012. The defendants were regularly convened by the Court. The hearings of the witnesses for the applicant and the defendants were conducted, concluding the preliminary phase of material analysis.[153]

On 3 March 2015, the defendant Carlos Alberto Brilhante Ustra lodged an appeal (*Reclamação nº 19.760*) on the STF,[154] claiming the noncompliance of the criminal complaint’s holdings with the decision of the STF in the ADPF 153. The Justice Rapporteur Rosa Weber granted an injunction to paralyze the proceedings on the lower Federal Court, following the precedent of the Supreme Court.[155] The criminal procedure is still suspended, waiting for a decision of the Supreme Court. Following Ustra’s passing, the appeal to the STF was extinguished in 16 November 2015 (BRAZIL, MPF, 2017, p. 238-249).

Another appeal was lodged (*Reclamação nº 22.616*), this time by the defendant Alcides Singillo, and yet another injunction was granted in 9 March 2016. The appeal to the STF is being analysed since April 2016.[156] Parallel to it, a HC was lodged by the defendant Carlos Alberto Augusto, in order to extinguish the criminal procedure in the TRF-3. The order

[153] “Os réus foram regularmente citados. Houve oitiva das testemunhas de acusação e de defesa, estando a instrução encerrada” (BRAZIL, MPF, 2017, p. 249).
[154] *Reclamação 19.760* (filed), available at:
http://portal.stf.jus.br/processos/detalhe.asp?incidente=4722973 access 19 jun. 2018.
[155] *See* below the decision of Justice Teori Zavascki in the *Rubens Paiva* case.
[156] Also noteworthy is the fact that this complaint has a favourable opinion regarding the pursuance of the procedure by the Associate Federal Prosecutor General Deborah Duprat. *Reclamação 22.616* (waiting decision since April 2016), available at:
http://portal.stf.jus.br/processos/detalhe.asp?incidente=4896235 access 19 jun. 2018.

was denied in September 2017, on the grounds that such writ was not the adequate procedural instrument to appeal of the decision that received the criminal complaint.[157] However, due to the lack of a decision regarding the second appeal lodged on the STF, the original criminal procedure remains suspended since 28 February 2018.

Thus, after the narrative of the proceedings, the research advances to the analysis of the decisions granted. Once more, such endeavour is based on the Comparative Board (Attachment 7) and the analysis of the arguments (Attachment 3).[158] The ruling begins by differentiating the Brazilian transitional context to the rest of the continental experiences, due to the "absence of punishment of the state agents involved in the excesses perpetrated during the period of political repression". It follows by making reference to the Amnesty Law, and the STF's ruling upholding it. In this stage of the analysis the judge asserts that, although Brazil has ratified the Inter-American Convention on Forced Disappearance of Persons, the concept of the crime does not yet exist in the domestic legal order. Therefore, based on the rulings of the Extradition processes nº 974 and 1.150, it provides domestic precedent for the conclusion that the crimes attributed to the defendants could be related to the concept of forced disappearance, furthermore, that they had permanent nature. For this reason, the Amnesty Law could not be applied in such case.

After overcoming the barrier imposed by such institutes, the decision advanced for the matter of the insusceptibility of prescription regarding the facts (statutes of limitation). It then develops its argumentation based in IHRL, as follows. It starts by mentioning the ratification of the San José of Costa Rica Pact, and the following recognition of the mandatory jurisdiction of the IACtHR by the Brazilian state. Then, it follows a brief recapitulation of the historic origins of the regulation of the crime of forced disappearance (once more, making reference to the IACtHR's innovative precedent). Also noteworthy, in this regard, is that the decision makes reference to the operational definition of the phenomenon elaborated by the Working Group on Forced and Involuntary Disappearances of People of the UN in the

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[157] The full decision can be accessed in the site of the TRF-3: 0030530-11.2013.4.03.0000/SP
The decision was based exclusively in the grounds that the hypotheses of a HC were not recognized (due to the fact that there was no danger of threat of the defendant's liberty, since the procedure was suspended), and that such was not the adequate procedural instrument to appeal of the decision. Such are the reasons why, although it was a decision granting the pursuance of the criminal complaint, it was not among the analysed by this research. More information regarding such decision is available at: https://trf-3.jusbrasil.com.br/noticias/503112277/trf3-nega-habeas-corpus-a-acusado-de-sequestro-durante-ditadura-militar access 19 jun. 2018.

[158] As stated, the focus of this research is on the decisions that ruled for the admission of the complaint lodged by the MPF, thus, the initial decision by Federal Judge Hélio Egydio de Matos Nogueira is the only, of the abovementioned, that will be analysed.

1980's. Thereafter, it addressed the matter of the permanent character of crimes corresponding to forced disappearance – once more through the pioneering jurisprudence of the IACtHR.

Still regarding the permanent character of crimes corresponding to forced disappearance, the decision draws on the standardization of the concept by the Inter-American Convention on Forced Disappearance of Persons. Finally, the ruling recognized that the practice of enforced disappearance is, more than a violation of the Inter-American Human Rights System, a violation of a norm recognized as a crime under the concept of *jus cogens*. In that sense, it is susceptible to a broader protection regarding the enforcement of such obligation due to both the latter aspect, and the obligations rising to guarantees of rights to personal liberty, personal integrity, life and legal personality, due to the aforementioned Convention ratification. Finally, the judge points out to a general state obligation of guaranteeing *ex officio* investigation whenever there are reasonable grounds to suspect that the crime of forced disappearance has been perpetrated. It then concludes to the non-applicability of statutory limitations towards crimes due to their character of crimes against humanity, following all abovementioned reasons. The decision then grants pursuance to the criminal procedures, overcoming the barriers posed by statutes of limitation and the Amnesty Law.

Finally, it is possible to assert that the ruling of the 9th Criminal Court of São Paulo presents both a *posture of convergence and a posture of engagement,* as follows:

A *posture of convergence*, in a more binding sense, can be distinguished inasmuch as the ruling makes reference to conventions which Brazil has ratified (*e.g.* Inter-American Convention on Forced Disappearance of Persons, San José of Costa Rica Pact), and the recognition of the mandatory jurisdiction of the IACtHR, thus their decisions regarding Brazil. This ruling also presents such a *posture* when it utters towards the recognition of the analysed violation as a crime against humanity, under the concept of *jus cogens* obligation.

A *posture of engagement*, on its turn, is recognizable on the development of the comprehension of the origins of the institutes of *international system of human rights*. Furthermore, it is observable through a series of non-binding instruments, as well as international doctrine. In that sense, the decision makes reference to other precedents of the IACtHR's (innovative regarding forced disappearance). Finally on this regard, it also makes reference to the operational definition of the phenomenon elaborated by the Working Group

on Forced and Involuntary Disappearances of People of the UN in the 1980's. The manifestation of such *postures* corroborate with the hypothesis of the research.

5.1.4 – **The *Hirohaki Torigoe case***[159]

Hirohaki Torigoe was a student of Medicine at the College of Medical Sciences of the Santa Casa, in São Paulo. He was a militant of the National Liberation Action (*Ação Libertadora Nacional - ALN*), when he had to go live underground. Thereafter he went to the Movement of Popular Liberation (*Movimento de Libertação Popular - Molipo*). He died under torture, in January 1972, after being taken to the DOI-CODI of the II Army in São Paulo. Until this day, his remains were not located. [160]

The investigation was based on a series of documents from the Brazilian National Archives,[161] documents from a Parliamentary Investigatory Commission on the Cemetery of Perus.[162] They were also based on testimony of a series of individuals, among them, former members of the Army, that took part in the authoritarian repression. The MPF found enough evidence to lodge a criminal complaint. Unlike the other complaints, which were lodged on the grounds of kidnapping, the Federal Prosecution Service attributed the act of criminal disposal of a corpse to the defendants Carlos Alberto Brilhante Ustra and Alcides Singillo. The complaint was lodged in the 5th Criminal Court of São Paulo, under the jurisdiction of the Federal Judge Adriana Freisleben de Zanetti. It was initially admitted by the Federal Judge of the 5th Criminal Court, on the basis that the crime was permanent, and there was enough evidence to support the allegations. However, after the defendants answered to the accusations (in which they alleged that the facts were encompassed by statutes of limitations and the Amnesty Law), the Federal Judge recognized that the crime actually did not had

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[159] The initial number of the Criminal Procedure in the TRF-3: 0004823-25.2013.4.03.6181. The procedure was lodged in the 5th Criminal Court of São Paulo-SP.
[160] The last reports on his remains were that he was buried under a fake name. His grave was then transferred in an unexplained and unaccounted reform of the cemetery in which he was buried (Cemetery of Perus). No records of the transfer were kept. The MPF also endeavoured accountability regarding the facts surrounding the deaths of political dissidents and their burying in the said cemetery, on grounds of civil responsibility. The procedure develops in the TRF-3. The full terms of the complaint, and subsequent procedural acts, can be accessed in: http://www.dedihc.pr.gov.br/arquivos/File/Caso_Ossadas_de_Perus.pdf, access 20 June 2018.
[161] *Arquivo Nacional.*
[162] *Comissão Parlamentar de Inquérito (CPI) da Vala Clandestina de Perus.* A Parliamentary Investigatory Commission regarding the abovementioned case of the Cemetery of Perus. The Cemetery of Perus was a burial ground for indigents, which was also used to bury political dissidents victims of the dictatorship.

permanent nature. Therefore, according to the Criminal Procedure Code, there was no possibility of holding the defendants accountable for such crimes.

The Federal Prosecution Service appealed of such ruling through a RESE, which was analysed by the 5th Chamber of the TRF-3. In December 1st 2014, the majority of the Court, following the opinion uttered by the Federal Judge Paulo Gustavo Guedes Fontes ruled on favour of the appeal, thus granting continuity to the criminal complaint lodged in the 5th Criminal Court. There had been no further advances in the initial procedure; it is halted in the 5th Court since May 2015. On another hand, the procedure is active on the 5th Chamber of the TRF-3 and there is the expectancy of a ruling on an internal appeal (*Embargos Infringentes*), aimed at solving the lack of unanimity of the abovementioned decision on the RESE. The issue is under reanalysis by the Federal Judge Paulo Fontes since May 25th 2018.

Thus, after the narrative of the proceedings, the research advances to the analysis of the decisions issued, based on the Comparative Board (Attachment 7) and the analysis of the arguments (Attachment 4).[163] The decision starts with the analysis of the evidence of the crime (part one), in which it considers that there is evidence enough to rule on the pursuance of the criminal complaint. Then, it asserts, based on domestic legal precedents, the permanent nature of the crime of criminal disposal of a corpse (part two). Such a nature has recognition both by domestic precedent and by regional jurisprudence, in the account of the IACtHR, which is the object of the third part of the decision.

The third section of the ruling deals specifically with the decision of the IACtHR in the *Gomes Lund* case. It begins by making a brief introduction on IHRL, thus presenting the paradigmatic shift towards the protection of human rights in the twentieth century. It draws on international and regional instruments (*e.g.*, the European Convention and the American Convention) to carry out such endeavour. It is noteworthy in this first phase of the section that the decision also makes reference to the transformations observed in the Constitutional Law of several countries. The ruling states that such a movement followed the unfolding of fundamental rights and the propagation of the constitutional review of the laws. Further on, after recognizing the jurisdiction of the IACtHR, the decision advances to the judgment issued by the regional court in the *Gomes Lund* case, as a direct regional precedent to be referred to. The ruling highlights the aspects of the IACtHR's decision regarding the impossibility of

[163] As stated, the focus of this research is on the decisions that ruled for the admission of the complaint lodged by the MPF, thus, the opinion of the Federal Judge Paulo Gustavo Guedes Fontes is the only, of the abovementioned, that will be analysed.

applying the Amnesty Law to prevent the accountability for gross violations of human rights in Brazil. Thereafter, the decision moves to the support of the preponderance of the IACtHR's holding in the case, in relation to decision uttered by the STF in the ADPF 153. Thus, it concludes for the necessity to make the latter one compatible with the ACHR, which is assessed in the last instance by the IACtHR. Also in this regard, it highlights domestic legal understanding regarding human rights treaties as having a supra-legal status, as abovementioned.

Finally, the ruling draws on international legal theory to assert the double genesis of the Brazilian obligation towards IACtHR's understanding. Such comprehension rests both in the understandings of *judgements* directly regarding Brazil and the *interpretation* of the Convention in its general jurisprudence – other decisions regarding the same subject. Therefore, it concludes that there is an obligation to comply with the Court's decision, something that calls for implementation of the concepts delineated by the jurisprudence of the IACtHR. In that way, the decision overcomes the applicability of statutes of limitation and the Amnesty Law due to the permanent nature of the crime of forced disappearance. Thus, based on the evidence provided to support the case and the non-applicability of statutes of limitation, the decision grants the appeal.

The ruling uttered by the 5th Chamber of the TRF-3 also presents a *posture of convergence and a posture of engagement,* for the following reasons. A *posture of convergence* can be asserted by the recognition of the jurisdiction of the IACtHR in the context. Thereafter, due to the binding force of the *Gomes Lund* case, as well as to the binding effect of other interpretation uttered by the Court, regarding the American Convention. Furthermore, in yet another manifestation of *convergence*, the decision moves to the support of the preponderance of the IACtHR's interpretation in the case, in relation to that uttered by the STF in the ADPF 153. This latter argument would lead to the conclusion in favour of the necessity to make the latter compatible with the ACHR, which is interpreted, in final stage, by the IACtHR. A *posture of engagement*, on its turn, can be observed through the brief introduction to IHRL made by the decision. The decision presented the paradigmatic shift towards the protection of human rights in the twentieth century and some international and regional instruments. Finally, it is also noteworthy that it makes references to the transformations observed in the Constitutional Law of several countries towards the protection of human rights. Thus, by manifesting such *postures,* this decision corroborates with the hypothesis laid by this research.

5.1.5 – **The *Riocentro* case**[164]

As abovementioned, during the final years of the dictatorship, militaries unsatisfied with the process of democratization planned and executed a series of terrorist attacks. The most notorious was against civilians that were celebrating the Labour Day, on April 30th 1981, in the complex of Riocentro. The initial plan was to terrorize the audience of a show that was happening in the premises, and attribute the authorship of the crime to the resistance movements. Therefore generating panic in the population and justifying the strengthening of the repression. Two bombs would be planted, one in the show and another one at the Riocentro station of energy, aiming at cutting the energy, in order to cause even more panic. The plan did not follow as expected, and the bombs planted at the energy station blew up far from the energy devices they were supposed to destroy. The other bomb, which would be launched at the crowd of the show, blew up inside a car killing the Army's sergeant that was holding it.

The first investigation regarding the case occurred in that same year, 1981. The deeply corrupted investigation suffered a series of interferences. The army colonel responsible for the procedure, after distorting documents and coercing witnesses, achieved the conclusion that the act had been perpetrated by political dissidents of the regime (BREGA FILHO, SANTOS, *In* BRAZIL, MJ, 2009, p. 167; BRAZIL, MPF, 2017, 162). A second attempt of opening the case was made in 1988. This time, the STM declared that the facts were encompassed by the period foreseen by the Amnesty Law, in a decision that contradicted the law itself (BREGA FILHO, SANTOS, *In* BRAZIL, MJ, 2009, p. 167). Yet another attempt of opening an investigation was made in the 1990's, based on new evidence that had emerged, and reputing the 1988's decision was a mistake of procedure. Federal Public Prosecutor Gilda Berger lodged a request for opening an investigation in the STM. Based on the 1988's decision, the STM ruled against this new procedure, arguing again that the facts were reached by the Amnesty Law.

Therefore, this criminal complaint is the result of the third endeavour to investigate the crime that was perpetrated in 1981 (since the second application for an investigation was overruled in 1988). The reasons for opening this third investigation are the following. New evidence regarding the case emerged: documents and testimony that broadened even more the

[164] The initial number of the Criminal Procedure in the TRF-2: 0017766-09.2014.4.02.5101. The procedure was lodged in the 6th Criminal Court of Rio de Janeiro-RJ.

evidences of the crime, between those, a diary of one of the involved and testimony of one of the later defendants. A new general context was presented: the ruling of the IACtHR, determining that the Brazilian state investigate the violations perpetrated by the dictatorship, and the annulment of the STM's filing of the procedures regarding the case by the 2CCR[165] (BRAZIL, MPF, 2017, p. 162 *et seq.*). Thereafter, during the investigation, the Office obtained a broad set of evidence leading to lodging of the complaint.[166] However, it is noteworthy that the Office faced strong resistance of the Armed Forces in providing the required documents. But even more striking, as noted by the Prosecutor of the case, was the resistance of the STM in providing the material it already possessed, due to the former investigations on the case.[167]

Finally, based on the evidence found regarding the planning and execution of the aforementioned acts, the Federal Prosecution Service offered a criminal complaint against Wilson Luiz Chaves Machado, Claudio Antonio Guerra, Nilton de Albuquerque Cerqueira, Newton Araujo de Oliveira e Cruz, Edson Sá Rocha and Divany Carvalho Barros.[168] The complaint was lodged on counts of attempted first-degree murder, carrying explosive, criminal organization, criminal fraud, and acting as a criminal protector.[169] While the first crimes were connected with the action itself, the latter ones were connected, respectively, with adulteration of the evidence in order to avert accountability and helping those who committed the crime to evade from persecution. The criminal complaint was lodged in the 6th Federal Criminal Court of Rio de Janeiro-RJ, under the jurisdiction of the Federal Judge Ana Paula Vieira de Carvalho.

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[165] The prosecutors of this case recognize the fundamental support of the 2CCR MPF, through the help provided by then Associate Federal Prosecutor General Raquel Dodge; and the support of the Federal Prosecutor's Office of Rio de Janeiro, especially the the Federal Prosecutor Guilherme Raposo; which would support both institutionally and logistically. (BRAZIL, MPF, 2017, p. 163).

[166] Among it, the MPF heard 42 witnesses, in 5 different cities, and compiled 38 volumes of documents corroborating the facts (BRAZIL, MPF, 2017, p. 164).

[167] On that note, the Prosecutor asserts that: "(…) [The] source of greatest sorrow was the lack of collaboration by the STM. For two years, [the Office] through the PGR officially required proof and documentation that were available to them regarding the *Riocentro* case. At first, the Court reported that the files were taken by fungus, and should be sanitized; afterwards, after telephone contact, they forwarded only about a hundred pages of two lateral representations. The records of the IPMs were not sent. Only after lodging the complaint and with the public embarrassment of a request to the Federal Court to order that the material was to be sent, under penalty of issuance of a warrant of search and seizure, the STM forwarded all of the filed investigations. Afterwards, the press revealed that the STM had audio records of testimony, records revealing some facts that had already been verified in [the Office's] investigation (including some attached to the complaint), such as the knowledge of President Figueiredo regarding the [bombing] attempt. Such recordings were not forwarded to the MPF or the Federal Court (…)."

[168] There were found, beyond these six indicted, that other nine individuals were involved in the case, which were not in the complaint lodged for they had already passed (BRAZIL, MPF, 2017, p. 164).

[169] "Criminal protector (1978) an accessory after the fact to a felony; one who aids or harbours a wrongdoer after the commission of a crime" (GARNER, 2009, p. 431).

The Federal Judge admitted the criminal complaint integrally in May 2014. Subsequently, the defendants lodged a HC regarding the 6th Criminal Court decision. The HC was directed to the 1st Chamber of the TRF-2, which granted an injunction to suspend the procedure. Thereafter, in the judgement of the HC, two aspects are noteworthy. First, there was dissidence among the three Federal Judges that ruled the case. Therefore, the decision was uttered by a majority and not by the totality of the members of the Chamber.[170] Furthermore, it is noteworthy a manifest *posture of resistance* by the Federal Judge Ivan Athié, which ruled against the argument brought by the decision of the 6th Criminal Court, in the following terms:

> It is worth of note the total impertinence of the thesis handled by the decision that received the complaint, based on the understanding of the Nuremberg Court. One does not apply here in Brazil decision of [an] alien court, as a binding norm. It serves, of course, as a conclusion to be thought about, meditated upon, but not with the amplitude seen by s. judge. (BRAZIL, TRF-2, 2014, HC)[171]

Following the decision of the TRF, the members of the MPF appealed in various levels of jurisdiction (the TRF, the STJ and the STF), in December 2014. The appeals were not admitted by the TRF, in the beginning of 2015, which took to yet another appeal (*Agravo em Recurso Especial 818.592/RJ*) in order to achieve a decision regarding the possibility of discussing the matters in the STJ. The *Agravo* was distributed in November 2015 to the Superior Court Judge Rogério Schietti, of the 6th Chamber of the STJ. Until this date it had not yet been analysed. The criminal case, therefore, is suspended pending the judgment of the appeals (BRAZIL, MPF, 2017, p. -193). The Associate Federal Prosecutor General lodged an opinion for the granting of the appeal, thus the pursuance of the criminal complaint, in December 2015. Nevertheless, the appeal was not judged since that date. More recently, in June 2018, the procedure was suspended by the STJ, so that an appeal could be analysed by the STF.[172]

Thus, after the narrative of the proceedings, the research advances to the analysis of the decisions issued. Once more, it does so based on the Comparative Board (Attachment 7)

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[170] The Federal Judges Abel Gomes and Ivan Athié voted for the suspension, the dissent came from the Federal Judge Paulo Espírito Santo.
[171] HC 0005684-20.2014.4.02.0000
Available at: http://portal.trf2.jus.br/portal/consulta/resconsproc.asp - HC 0005684-20.2014.4.02.0000
[172] The STJ decided for suspending an appeal (*Agravo em Recurso Especial)*, so that the procedure could be analysed by the STF (*Agravo em Recurso Extraordinário*). Available at:
https://ww2.stj.jus.br/processo/pesquisa/?tipoPesquisa=tipoPesquisaNumeroRegistro&termo=201502567234&totalRegistrosPorPagina=40&aplicacao=processos.ea

and the analysis of the arguments (Attachment 5).[173] Initially, the Federal Judge asserts the jurisdiction of a Federal Court towards the crimes committed. Thereafter, she advances to the matter of prescription (application of statutes of limitation), entering the aspects relevant to this research. The magistrate begins by developing a narrative of the paradigmatic shift towards the protection of human rights and crimes against humanity in the twentieth century, through norms and mechanisms of protection. Further on, the judge frames the acts committed by agents of the dictatorship to the concept of crimes against humanity. Following such development, the decision advances to a conceptualization of crimes against humanity from general principle of international law to customary international law. In this phase, the judge asserts the role of customary law as a source of international law, grounding the analysis on reputed scholarly research, through the work of Malcolm N. Shaw. Based on the previously mentioned grounds, the decision advances to make remarks on the particularly relevant role played by customary law in international law.

Based on the abovementioned foundations, the decision then advances to an assertion of the non-applicability of statutes of limitation to crimes against humanity, as a general principle of international law (international customary law). It also points out the jurisprudence of the IACtHR, through the *Almonacid Arellano* case. Then, it states that the non-applicability of statutes of limitation regarding crimes against humanity is recognized as *jus cogens*. Finally, the ruling reasserts the normative force of IHRL. Further on, it affirms the recognition of its enforceability on the Brazilian domestic legal order before the analysed facts and even before the Principles laid down by the Nuremberg Tribunal. For these reasons, and based on the evidence supporting the case, the judge of the 6th Federal Criminal Court of Rio de Janeiro overcame the barrier posed statutes of limitations and admitted the complaint.

The decision of the 6th Federal Criminal Court of Rio de Janeiro once again presents *postures of convergence and engagement towards a transnational comprehension.* A *posture of convergence* can be asserted through the jurisprudence of the IACtHR (*e.g. Almonacid Arellano* case); as well as by the conclusion for the non-applicability of statutes of limitation regarding crimes against humanity, also stating their status as *jus cogens*. Finally, by the reassertion of the normative force of IHRL regarding the domestic legal order.

[173] As stated, the focus of this research is on the decisions that ruled for the admission of the complaint lodged by the MPF, thus, the initial decision by Federal Judge Ana Paula Vieira de Carvalho is the only, of the abovementioned, that will be analysed.

A *posture of engagement*, on its turn, can be observed through, initially, the narrative of the paradigmatic shift towards the protection of human rights and crimes against humanity in the twentieth century; further on, through the conceptualization of crimes against humanity, principles of international law, customary international law, grounding the analysis on scholarly research. Finally, such *posture* is based on the assertion of the recognition of the enforceability of such norms on the Brazilian domestic legal order, before the analysed facts and even before the Nuremberg Tribunal. Thus, by manifesting such *postures,* this decision corroborates with the hypothesis laid by this research.

5.1.6 – **The *Rubens Paiva* case**[174]

As stated in the introduction, Rubens Beyrodt Paiva was taken to give testimony, on January 20th 1971, and then illegally held by the forces of repression. Rubens Paiva would die as a result of torture during his captivity. Further on, the agents of repression would simulate his escape and disappear with his body.

In May 2014, after more than forty years of the facts, the MPF would lodge a complaint charging the accused of the crimes of first-degree murder, criminal disposal of a corpse, criminal organization, and criminal fraud. The complaint would be fully received by the Federal Judge of the 4th Federal Criminal Court of Rio de Janeiro, Caio Márcio Gutterres Taranto, on May 26th 2014. The defendants would lodge a HC appealing to the TRF-2. The writ would then be denied by the 2nd Specialized Chamber of TRF-2, ruling on the pursuance of the procedures.

The defence would then lodge an appeal in the STF through the *Reclamação* 18.686-RJ, arguing that the matter had already been object of decision by that Court on the ADPF 153. A preliminary injunction would be granted to paralyze the proceedings on the lower Federal Court. Subsequently, the Prosecutor General of the Republic (as note above - PGR)[175] would submit an opinion in this procedure expressing its view on the continuation of the criminal action, following the institutional thesis of the MPF. Among its arguments, the PGR cited the binding nature of the decision of the IACtHR in the *Gomes Lund* case, the

[174] The initial number of the Criminal Procedure in the TRF-2: 0023005- 91.2014.4.025101. The procedure was lodged in the 4th Criminal Court of Rio de Janeiro-RJ.
[175] At the time the Prosecutor General of the Republic was Rodrigo Janot Monteiro de Barros.

imprescriptibility of crimes against humanity committed during the period of the dictatorship and the permanent nature of the crime of criminal disposal of a corpse.

The case was suspended due to the appeal to the STF. Further on, it was filed successive times, due to lack of activity on the lawsuit. Later on, it was filed after the passing of the Justice Rapporteur Teori Zavascki. On February 1st 2018, the current PGR Raquel Elias Ferreira Dodge requested that the case be redistributed, prosecuted and ruled as unfounded, enabling the pursuance of the criminal action in the lower courts. The Presidency of the court, in accordance with the requirements of the PGR, determined the redistribution of the case to Justice Alexandre de Moraes, successor of Justice Teori Zavascki, on February 8th 2018. The redistribution happened on February 16th 2018. Until the date of conclusion of the present text, there were no further procedural acts in this action or in the lower court proceedings.

After the narrative of the proceedings, the research advances, once more, to the analysis of the decisions issued. It does so based on both the Comparative Board (Attachment 7) and the analysis of the arguments (Attachment 6).[176] The decision rendered by Federal Judge Caio Marcio Gutterres Taranto starts dealing with the object of this dissertation in the topic four of its rationale: "The non-extinction of punishability due to the prescription of the punitive pretension in accordance to the quality of crimes against humanity". The magistrate begins by explaining that during the dictatorship, the Brazilian state already presented a position of recognition of principles of international law. Among these, the principle of imprescriptibility of crimes against humanity already recognized at the time by IHRL.

Subsequently, the magistrate of the 4th Criminal Court delimits the acts committed in the case in the framework established by the concept of crime against humanity, based on the Statute of the Nuremberg Tribunal. From this initial delimitation, the Federal Judge advances to an exposition about the character of *jus cogens* of the norm of accountability of perpetrators of crimes against humanity. He would conclude that there is no prescription, being the case interpreted in a wide and systematic manner in accordance with IHRL. The same was true in a regional level of protection of human rights, due to the jurisprudence of the IACtHR on the subject. It is also relevant to highlight that the Federal Judge makes reference to a horizontal precedent in his decision, by making reference to the abovementioned *Riocentro* case. Through such reference, the Federal Judge further grounds his arguments on those previously

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[176] As stated, the focus of this research is on the decisions that ruled for the admission of the complaint lodged by the MPF, thus, the initial decision by Federal Judge Caio Márcio Gutterres Taranto and the opinion of the Appeal Federal Judge Messod Azulay Neto are the only, of the abovementioned, that will be analysed.

laid by Federal Judge Ana Paula Vieira de Carvalho in her rationale. Finally, in a specific topic, the judge of the 4th Criminal Court presents the obligations that Brazil has agreed on fulfilling, due to the Inter American Convention Against Torture, which further strengthen the normative basis against the applicability of statutes of limitation. For the aforementioned reasons, and based on the broad evidence presented by the MPF, the judge admitted the complaint.

The decision of the Federal Judge Messod Azulay Neto, regarding the HC, faces the allegation that the facts were subject to amnesty exclusively on grounds of domestic norms. More specifically, it supports its arguments on the diverse comprehensions regarding the Amnesty Law since its issuing, in 1979. Furthermore, it grounds its arguments against the extinction of punishment due to statutes of limitations based on a comprehension of the IHRL in transnational perspective.

The TRF's ruling follows this initial view assumed by the lower Federal Court, and adds further arguments in the topic "Amnesty and statutes of limitation - absence of extinction of punishability". Initially, as stated, the Federal Judge refers to the argument that the acts were amnestied on basis of domestic norms. Then, the rationale advances to a brief narrative of the creation of IACtHR, inserted in the Inter-American System of Human Rights. Subsequently, it advances to the recognition of the contentious jurisdiction of this Court by the Brazilian government in 1998. Further on, the reasoning advances to the assessment, by the IACtHR, of the *Gomes Lund* case. Parallel to that, it supports the recognition of the temporal jurisdiction on the part of the regional court to decide on facts that occurred between 1972 and 1975. The latter recognition is due to the permanent nature of the acts practiced by the agents of the regime regarding the criminal disposal of a corpse of Rubens Paiva.

Additionally, the vote also sets out the operative part of ICtHR's ruling, arguing that the court's decision allows the case to be analysed under a "new interpretive light" in relation to the obstacle represented by the amnesty. In this sense, it also makes reference to the ADPF 320. Furthermore, the opinion also makes reference to a domestic precedent in the Extradition nº 1.299, highlighting the very comprehension of the STF regarding the recognition of the imprescriptibility of crimes that have a permanent nature. Finally, the Federal Judge affirms that "prescription should be removed not only regarding permanent crimes", but also in relation to those that constitute a crime against humanity. Thus, such as the lower Federal Court's decision had previously done, this ruling briefly presents the IHRL contemporary

comprehension of crimes against humanity, and relates those to the crimes committed by the Brazilian dictatorship. Thus, the magistrate votes for the denial of the HC, guaranteeing the pursuance of the procedures.

Finally, both the decisions of the 4th Criminal Court and of the 2nd Specialized Chamber of TRF-2 manifest *postures of convergence and engagement towards a transnational comprehension*.

A *posture of convergence* is observable in the decisions of the 4th Criminal Court. This happens through the assertion that there were principles already recognized at the time, through recognizing the international framework of protection of human rights, the imprescriptibility of crimes against humanity and the assertion of the character of *jus cogens* of the norm of accountability of perpetrators of crimes against humanity; and finally in regard to the Brazilian obligations toward the Inter American Convention Against Torture. Such a *posture of convergence* is also recognizable in the ruling of the 2nd Specialized Chamber of TRF-2. It follows the arguments against the extinction of punishability due to statutes of limitation based on an understanding towards IHRL in transnational perspective. It recognizes the jurisdiction of the IACtHR by the Brazilian government in 1998, and the Court's decision on the *Gomes Lund* case (asserting the recognition of the competence on the part of the regional court to decide upon it, due to the permanent nature of the acts).

A *posture of engagement* is observable in the decisions of the 4th Criminal Court: drawing from initial delimitations of the concept (based on the Statute of the Nuremberg Tribunal). Furthermore, it is recognizable when it makes reference to the jurisprudence of the IACtHR on the subject. Finally, it is noteworthy the reference to horizontal precedent – the *Riocentro* case – and the further grounding of the decision on *transnational* aspects previously laid by the precedent. The 2nd Specialized Chamber of TRF-2 also manifests a *posture of engagement.* It advances such *posture* through a brief narrative of the Inter-American System of Human Rights and a brief presentation of the contemporary comprehension of IHRL on crimes against humanity. Thus, by manifesting such *postures,* these decisions corroborate with the initial hypothesis laid by this research.

5.1.7 – **Conclusion – the structure and arguments of the sentences towards a transnational comprehension of crimes against humanity in Brazil**

The analysis of the decisions allows one to observe at least two main aspects of a transnational comprehension of crimes against humanity in Brazil, from the lenses of this research. The first regards (a) the movements and mechanisms that led to the MPF's initiative. Furthermore, the strategy and comprehension developed by the MPF in the criminal complaints lodged, which were a result of the said initiatives. The other observable aspect regards the (b) *interpretative postures* of the Federal Courts on these complaints lodged by the MPF, which is the main object of this study and which unfolded as follows. Initially, (b.1) the manifestation of *postures* of both *convergence and engagement towards the transnational* by four of the six analysed decisions, a result foreseen by the hypothesis.[177] Finally, the unexpected recognition of (b.2) *postures of resistance towards the transnational* by two of the six analysed decisions.[178]

In that sense, and regarding those observable aspects, it is possible to conclude in the following sense.

Regarding (a): it is possible to argue that the demands of actors of the civil society had a fundamental role in the enforcement of transitional measures in Brazil. A result of such demands was, undeniably, the creation of the CA. This latter institution associated with other institutions of the Brazilian government[179] and the former civil society actors had a substantial role in the initial debates for accountability. These debates took to the first endeavours for accountability by members of the MPF. Thereafter, the MPF sought for the support of institutions concerned with the promotion of human rights in order to advance its endeavour and develop an institutional thesis seeking to reach accountability.[180] Therefore, it is possible to say that the demands of the civil society and the support offered by it were highly

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[177] As abovementioned, such result could be preliminarily foreseen for the fact that it was possible to recognize the need for reference to the transnational, through a *posture of engagement or convergence,* or even both of them, in order to overcome barriers to criminal accountability for crimes against humanity in Brazil – namely statutes of limitation and the Amnesty Law (and also the decision on the ADPTF 153).

[178] As previously stated, such a posture was not foreseen by the hypothesis, due to an initial understanding that, in order to surpass the barriers imposed to criminal accountability, there must be reference (either in a *posture of engagement or convergence*) to the international human rights framework, in transnational perspective.

[179] Through, for instance, the development by the Especial Secretariat of Human Rights – Especial Commission for People Killed and Forcibly Disappeared for Political Reasons of the abovementioned book "Direito à Memória e à Verdade", in 2007.

[180] In 2007, the *Debate Sul-Americano sobre Verdade e Responsabilidade em Crimes Contra os Direitos Humanos*, of which took part the International Center for Transitional Justice – ICTJ and the Secretariat of Human Rights of the Presidency of the Republic illustrates such dynamics.

influential on the MPF's initiative. Later on, they were also relevant in supporting the development of its institutional thesis.[181]

On its turn, the strategy and comprehension developed by the MPF in the criminal complaints lodged, supported by its institutional thesis,[182] achieved considerable rate of success. This success can be observed in the fact that some of the arguments put forward by the Prosecutors were broadly recognized in the decisions.[183] Among those arguments, the precedents of the IACtHR, specially the decision of the Court on the Gomes Lund case, could be recognized in all of those ruling that had *postures (b.1).* Furthermore, many of the said rulings *(b.1)* asserted matters related to the Brazilian dictatorial context, in a manner much similar to that put forward by the Federal Prosecutors. Finally, narratives of the development of IHRL were also broadly brought up by the Federal Court's *(b.1)* decisions. If these arguments were not put forward in such a broad manner, or were advanced in largely different forms, it could be stated that it was merely a consequence of the *postures* manifested by these decisions. On the other hand, it could be stated that the decisions presented a somewhat remarkable concurrence of events without connection.[184] However, the manifestation of such arguments suggests the opposite: the thesis was indeed effective.[185] Finally, regarding the

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[181] It is worth noting that the publications of reports by the MPF, since the year of 2013 constitute yet another relevant action regarding the dissemination of information on the accountability of the agents who acted on behalf of the state from 1964 to 1985, perpetrating crimes against humanity. Such initiatives also grant the possibility of producing academic work on the subject, such as this and other cited herein, further disseminating the MPF's endeavours, and the Judiciary's answers.
Also on that note, cooperation agreement as those signed between the GTJT and the CJT, on collecting and systematizing data on civil and criminal procedures that seek the accountability for gross violations of human rights in Brazil, are also relevant in this context.
[182] Brief recapitulation of the main aspects of the aforementioned thesis: exposing (a) the positive obligations of the Brazilian State regarding criminal matters – especially through the ruling in the Gomes Lund and IHRL; presenting (b) the context in which Brazil was inserted. Finally, stating (c) the legal consequences of the understanding of the acts committed by agents of state as crimes against humanity: the non-applicability of statutes of limitation (prescription) and insusceptibility of amnesty.
[183] A diametrically opposed conclusion was achieved by Oliveira, in his abovementioned 2013 research regarding the endeavours of the MPF. The researcher found that there was virtually no institutional response regarding the crimes of the dictatorship, and that there were contradictions inside the Federal Prosecution Service (OLIVEIRA, 2013). A initial reason for the assertions of the dissertation rests in the fact that there were few successful initiatives by that time regarding criminal accountability. The only lodged complaint that was admitted in the scope of the analysis was the one regarding to the *Rosa e outros* case. Yet another reason for such conclusions is due to the fact that, in this first phase, there was not the same amount of support that could be recognized afterwards by members of the Office regarding such actions. Finally, due to the lack of broad, unified, institutional information in those days, regarding the subject; although the dissertation presented a broad analysis of civil and criminal cases, it did not infiltrate in the institutional thesis of the Office. Furthermore, no references were made to the GTJT, nor the 2CCR, pointing to a gap which could corroborate to the conclusions achieved regarding the contradictions observed in the institution's strategy.
[184] Yet another relevant aspect is the citation of Prosecutors' works on the decisions. In order to illustrate such claim, it is possible to notice three direct references to the work of the Federal Public Prosecutor Marlon Weichert in the decision regarding the *Riocentro* case.
[185] For more, see Attachment 7.

institutional posture of the MPF in the cases, it is noteworthy the development of the support of the members of the Office during the period of investigations and complaints.

Initially, during the individual efforts of the Federal Prosecutors Marlon Weichert and Eugênia Gonzaga, the MPF was somewhat resistant to the thesis put forward. Such assertion can be recognized through the posture of Federal Prosecutors which requested the filing of the investigations in 2008 to 2010. Furthermore, it is noticeable in the opposition of the PGR Roberto Monteiro Gurgel Santos to the ADPF 153. Later on, it is possible to notice a shift in the posture of the MPF. A broad share of the Office adopted the institutional thesis regarding accountability for crimes perpetrated during the dictatorship. Such shift can be perceived in the postures of the 2CCR. Further on, by the creation of the GTJT. It also can be noticed in the shift of the PGR's posture, with the opinion uttered by Rodrigo Janot Monteiro de Barros in the ADPF 320 and the *Reclamação* lodged in the STF regarding the Rubens Paiva case. Finally and most notoriously, such shift can be recognized in the lasting posture of the current PGR Raquel Elias Ferreira Dodge, which supported the aforementioned accountability since the early days.

On its turn, regarding (b) - the *interpretative postures* of the Federal Courts towards the complaints lodged by the MPF.

Initially, on (b.1) it was possible to identify the *postures of engagement and convergence,* which this research foresaw as viable, for the following reasons.

(1) As exposed in this dissertation, the human rights nature of the cases – crimes against humanity – opens a broad possibility of transnational dynamics (topic 3.2). Such possibility is due to the universal project endeavoured by human rights. Furthermore, the possible binding nature of IHRL instruments as well as the binding force of *jus cogens* norms. Finally, such dynamic is possible due to the transitional context in which this research is inserted, as well as the context of constitutionalization in which Brazil is inserted. All of those are aspects that Jackson enrols as being related to the manifestation of *postures of convergence*. On another hand, the broad development of the field of IHRL allied with the expanding domestic debates on human rights provide a wide transnational range of sources to *postures of engagement*.

(2) Furthermore, as exposed, the Brazilian Constitution, and the project it inaugurates, in accordance with the context it was inserted, expressly foresees a commitment with IHRL,

in a *posture of convergence*.[186] Such *posture* is manifest in domestic norms and in the way Brazil conducts its international relations. This *posture of convergence* was enforced by the Federal Courts. This enforcement took to the propagation of such *posture* through domestic precedents. Such *posture of convergence* could be recognized in references to: the binding nature of international and regional human rights instruments, as well as courts decisions, with recognized jurisprudence over Brazil. Furthermore, this *posture* can also be asserted in the recognition of the crimes committed during the dictatorship as crimes against humanity – their *jus cogens* character and *erga omnes* enforceability.

(3) On another hand, the *posture of engagement* was possible due to more specific contexts in which these judges are inserted – the *legal preferences and commitments* of the judges, which departed from the *traditional legal preferences* of the Brazilian Judiciary. This *posture*, which is founded in a commitment to judicial deliberation, could be recognized in references to: non-binding international and regional IHRL instruments and decisions, as well as to resolutions of international and regional bodies. This *posture of engagement* can also be distinguished in reference to the presentation of reputed international and national scholarly research on the subject. Finally, it is manifest in the judges' endeavours to expose a broad comprehension of the origins and development of the *international system of human rights*.

Also, it is possible to recognize a pattern in which latter decisions draw on previous decisions to broaden (and reinforce) their arguments. Some of the rulings make direct reference to them, such as the decision of the 4th Federal Criminal Court of Rio de Janeiro. The aforementioned decision made a reference to the horizontal precedent set by the 6th Criminal Court of Rio de Janeiro. This pattern can also be recognized in the decision of the 2nd Specialized Chamber making reference to the vote of another Federal Judge of that same Court.[187] In other decisions, or in other parts of the abovementioned rulings, the reference is made indirectly, nevertheless it is recognizable. Such recognition is due to the content and disposition of the argument in the rulings. In this regard, it is possible to conclude that former *postures of convergence* and *engagement* enhance the possibility of furthering such *postures* (which also seems to happen regarding *resistance*).[188]

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[186] This is asserted in Chapter III (especially 3.2) and Chapter IV, above.

[187] The reference was made to the dissenting vote uttered by the Federal Judge Paulo Espírito Santo in the *Riocentro* case.

[188] For more, see Attachment 7.

On this regard, a reference has to be made to the decision of the 8th Federal Criminal Court of Rio de Janeiro – RJ (TRF-2), on 11 June 2018. The ruling, uttered by Federal Judge Valéria Caldi Magalhães, admitted the most recent complaint lodged by the MPF. The complaint was against the Army Doctor Ricardo Agnese Fayad for having tortured the political dissident Espedito de Freitas, in 1970. Due to a matter of time, it was not possible to analyse such procedure. However, in a preliminary analysis of the decision, it was possible to detect both *postures of convergence and engagement towards a transnational* comprehension of IHRL. An innovative aspect of that decision was the use of international and regional norms and precedents in order to ascertain the Federal Court's competence to analyse the case (*e.g.* the American Convention on Human Rights, and the IACtHR on the case *Radilla Pacheco* and on the *Gomes Lund* case). The decision also presents some interesting grounds on supporting that the crimes committed by the Army Doctor are encompassed in the concept of crime against humanity (while asserting the binding nature of the IACtHR ruling on the Gomes Lund case). Finally, it advanced argumentation regarding the inexistence of violation of the STF's decision on the ADPF 153, topic in which the judge also took the *Gomes Lund* decision into account (as well as the lodging of the APDF 320, by PSOL) (BRAZIL, 2018).[189] For all of those facts, it is possible both to recognize the aforementioned advancement of arguments towards continuity of the criminal complaints, as well as an adequate *postures towards the transnational*, thus, deeming further analysis of this decision extremely relevant.

Although the possibility of a *posture* of (b.2) *resistance* was not preliminarily asserted by this research's hypothesis there was the manifestation of such posture. Furthermore, albeit a *posture of resistance* still does not seem adequate to the constitutional paradigm in which Brazil is inserted, it was able to achieve the admissibility of a criminal complaint for accountability. Such result raises some possible conclusions and further questions, as follows.

The *active position of resistance* recognized in the cases 5.1.1 and 5.1.2 might have followed from a *formalist posture of constitutional interpretation*.[190] On this regard, such *formalist posture* was necessary for a decision (b.2) to overcome the barriers to admitting the complaint – namely the Amnesty Law. Such was due to the fact that the analysed decision

[189] For more information on the decision of the 8th Federal Criminal Court of Rio de Janeiro, see:
(a) MPF news report: http://www.mpf.mp.br/rj/sala-de-imprensa/noticias-rj/justica-federal-recebe-denuncia-contra-medico-que-participou-de-tortura-durante-a-ditadura
(b) the decision: http://www.mpf.mp.br/rj/sala-de-imprensa/docs/pr-rj/decisao_medico_ditadura.pdf
[190] Regarding such *formalist posture of constitutional interpretation* there is a point worth of noting. Jackson considers that such *approach* is broadly steered by the precedents of a court: "A formalist approach might place substantial weight on settlement and favour relatively strong adherence to *stare decisis*, which would diminish the importance of sources other than the Court's own precedents" (JACKSON, 2010, p. 141).

was grounded on the precedents of the Federal Supreme Court, the Extraditions 974 and 1.150, in order to ascertain the permanent character of the crimes analysed. Thus overcoming the period encompassed by the Amnesty law, due to the fact that the perpetration of the crimes under analysis is still in progress.[191]

Furthermore (b.1) *postures* of *convergence* and *engagement* found in these decisions had a relevant role in order to overcome barriers to accountability for crimes against humanity. However, they were not necessarily the only way to achieve a decision for the pursuance of the criminal complaints lodged by the MPF. *Postures of resistance* (b.2) were also able to reach such outcome. Such is due to the abovementioned reason regarding a *formalist posture of constitutional interpretation*. The decisions that presented such a *posture of resistance* (5.1.1 and 5.1.2) overcame this preliminary phase of the procedure exclusively on the grounds of preliminary formal aspects. Among those, the juridical conditions necessary to the development of the procedure (a preliminary overcoming of the barrier imposed by the Amnesty Law) and the fact that there was enough evidence to admit the complaint.

This raises questions regarding the lack of observation of such preliminary formal aspects of the procedure by the other Federal Courts that manifested *postures of resistance.* Courts that, on such *posture*, rejected the majority of the complaints lodged by the MPF (GONÇALVES, 2017; TORELLY, 2013, 2016). In that sense, arguments based on statutes of limitation, the Amnesty Law, and, finally, the binding force of the STF's ruling in the ADPF 153, are possible to be surpassed on the sole ground of domestic norms (among them, a precedent laid by the STF itself). In that sense, it is relevant to question what other (underlying) reasons are there for the rejection of most of the complaints on such grounds. This is a question that should be pursued by further research.

In order to specifically ascertain which reasons led to overcoming the *traditional legal preferences and commitments* that constituted *blockages on the road to truth and justice* (GONZALEZ-OCANTOS, 2017),[192] further research should be developed. Nevertheless, in an initial attempt to advance some patterns regarding the magistrates that uttered the analysed

[191] It seems necessary, once more, to highlight that this research is concerned with preliminary analysis of the criminal complaints. Therefore, it is possible that, following the course of the criminal proceedings, on the merits of the case, there are manifestations of postures of engagement and convergence towards the transnational, in a broader analysis of IHRL.

[192] Gonzáles-Ocantos, based on an interview given by a judge that worked on the Brazilian cases, reasserts the importance of transforming skills and the way Brazilian judges read the law. Specifically how it is important to change the professional routine and legal knowledge in order to better analyse violations of human rights in Brazil (GONZALEZ-OCANTOS, 2017, p. 286)

rulings – *highly demanding and complex cases* – it is possible to notice the following. All of the judges that ruled in the analysed cases speak one or more languages (overcoming an initial barrier identified by most theorists of the fields of transnational law and comparative law).[193] Furthermore, regarding *technical capabilities*, the research allowed to comprehend that the magistrates of the analysed cases have developed some kind of extension of their studies, some of them have graduate degrees *lato sensu,* others *stricto sensu.*[194] Yet on that note, it was possible to notice that all of the judges, but one, obtained their Baccalaureate in Law after the promulgation of the Constitution of 1988. The exception to that rule was the Federal Judge Messod Azulay Neto, which graduated in 1986 at the Faculdade Nacional de Direito da Universidade Federal do Rio de Janeiro.[195] Finally, all of the judges that worked on the analysed cases have been tenured after the end of the authoritarian regime, under the validity of the Constitution of 1988.[196]

To conclude, this dissertation expects to have demonstrated that an *interpretative posture* which surpasses a solely *sovereignist* understanding towards a *transnational* understanding of law is more adequate to the current paradigm in which Brazil is inserted. Such assertion is especially true in regard to human rights matters. This research understands that these decisions that dialogue with the IHRL, in a transnational perspective, demonstrate such an adequate *posture*, regarding the constitutional project of 1988. These decisions are also more compatible to a socially adequate international law, which is necessarily incompatible with impunity (TORELLY, 2016, p.141). In that sense, as seen, actors that take *postures* of this nature make it possible to advance the debate about the accountability of agents of the dictatorship, perpetrators of crimes against humanity, which is, further than a right of the victims, a right of the whole society (PAIXÃO, CATTONI DE OLIVEIRA et al., 2014). Therefore, such *postures* constitute a main route to the continuity of the collective

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[193] It is relevant in this regard, on the opposite direction of being able to speak other languages, the possibility of translating foreign (in a broader sense) decisions. On that note, it is relevant to highlight the initiative of the National Council of Justice (*Conselho Nacional de Justiça – CNJ)*, regarding the translation of decisions of the IACtHR, available at: http://www.cnj.jus.br/poder-judiciario/relacoes-internacionais/corte-interamericana-de-direitos-humanos-corte-idh access on 19 June 2018.

[194] While most of the judges have continued their formal academic studies, it is noteworthy that one of the judges, the Federal Judge Paulo Gustavo Guedes Fontes has a Master of Laws degree from an international university.

[195] However, it is worth pointing out that none of the analysed Law Schools had a subject for Human Rights in the curriculum, until this day. Most of them had only one semester of international public law, and only two of them had two semesters of the subject.

[196] Nevertheless, it is also worth pointing out that subjects or courses on International Law and IHRL are not that often seen at Magistrate's Schools, as well as in Law Schools.

construction of a democratic constitutional project.[197] Thus, this research hopes to have demonstrated some of the advantages of the advocated transnational perspective, even if only regarding human rights. Furthermore it aspires to have achieved some compelling conclusions regarding the analysis, and to have advanced some further hypothesis to other researches – contributing to the on-going academic debate on the respective fields of investigation.

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[197] Although it was observed that *postures of resistance towards the transnational* may also be able to reach this latter goal, it is needless to point out that they are the absolute minority; as they constitute a minority even among those which achieved the abovementioned goal, as follows:
There are, according to the latest information obtained, 34 decisions regarding the criminal complaints of the Federal Prosecution Service on crimes of the dictatorship. Of those, 7 (latest information as well) have been admitted by the Federal Courts.
In that sense, not taking into account the various decisions, and its *postures towards the transnational,* of each case, but only the final ruling (admit or refuse of the complaint), it is possible to say that at least 24 decisions which refused the criminal complaints, presented a *posture of resistance*.
Again, not taking appeals into account, it is possible to say that only 2 decisions that presented *postures of resistance* admitted the complaints. In that sense, less than 8% of the decisions that manifested *postures of resistance* (and less than 6% of all the decisions) constituted such mentioned route to the continuity of the collective construction of a democratic constitutional project.

ADDITIONAL CONCLUSIONS

Beyond the conclusions regarding the structure and arguments of the sentences towards a transnational comprehension of crimes against humanity in Brazil (5.1.7) this research also achieved some collateral conclusions. Through the examination of the subjects it worked with, this dissertation developed some further notes that could also pose as a relevant contribution. In that sense, in an attempt to structure such further conclusions, this research presents the following considerations.

Based on the previously presented work of Sikkink and Walling (2007),[198] and Sikkink (2011),[199] it is possible to sustain the relevance of accountability for crimes against humanity in Brazil, due to current unfolding of such. A brief comparison of the data analysed by these authors allows one to glimpse at a possible contribution brought by the enforcement of the transitional mechanism of justice, even if only regarding the avoidance of a general sense of impunity in Brazil (MEYER, 2017, p. 44). Also in this regard, on the relationship that the authors note between an increase in the Political Terror Scale (PTS)[200] and the absence of individual criminal accountability for gross violations of human rights, it is possible to ascertain the following. Brazil sustained a PTS rate of 3 to 4 from 1976 to 1985.[201]

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[198] "If we look at Brazil before and after transition to democracy in 1985, we see that Brazil's average score on the Political Terror Scale was 3.2 in the five years before transition and worsened to an average of 4.1 for the ten years after transition. Brazil experienced a greater decline in its human rights practices than any other transitional country in the region. The Brazil case suggests that transition to democracy, in and of itself, does not guarantee an improvement in basic human rights practices. (SIKKINK, WALLING, 2007, p. 437).

[199] "Brazil, however, which is the only major transitional country in the region not to hold prosecutions for past violations, presents an interesting outlier among the Latin American cases. For example, Brazil's level of democracy is considered relatively high, and similar to that of Argentina, Peru, and Mexico, but its human rights record is not as strong as this would seem to suggest. I believe that Brazil's failure to hold state officials accountable may help explain why its human rights situation has not improved as much as some other countries in the region" (SIKKINK, 2011).

"The Brazil case suggests that transition to democracy, in and of itself, does not guarantee an improvement in basic human rights practices. But it is still possible that some as yet unknown factors that prevent trials also cause the continuing rights abuses" (SIKKINK, 2011).

[200] "The PTS seeks to measure political terror. We define political terror as violations of basic human rights to the physical integrity of the person by agents of the state within the territorial boundaries of the state in question. It is important to note that political terror as defined by the PTS is not synonymous with terrorism or the use of violence and intimidation in pursuit of political aims. The concept is also distinguishable from terrorism as a tactic or from criminal acts" (HASCHKE, 2018).

Violations of physical integrity rights include acts such as: (a) torture and cruel and unusual treatment and punishment; (b) beatings, excessive use of force, brutality; (c) rape and sexual violence; (d) killings and unlawful use of deadly force; (e) summary or extra-judicial executions; (f) political assassinations and murder; and others.

Examples of state agents or actors acting on the behest of the state, include: (a) police, law enforcement, guards, and security personnel; (b) military and paramilitary organizations; (c) executives and members of executive agencies and bureaucracies; (d) members of the criminal justice and penal systems (e.g., prison guards); (e) intelligence agents; (f) militias, and other. (HASCHKE, 2018)

For more information: http://www.politicalterrorscale.org/Data/ access on 19 June 2018.

[201] From the beginning of the available data, after the end of the repression on the Araguaia Guerrilla, to the end of the dictatorship in 1985

With no accountability for the crimes of the dictatorship, that same level was sustained, almost stable in a rate of 4 during the last 2 decades. Argentina, on its turn, sustained a PTS rate of 5 from 1976-81 and a PTS rate of 3 from 1982-1983. After the end of the regime and the Trials of the *juntas*, Argentina lowered it to a PTS rate of around 2 to 3. Furthermore, it achieved a PTS rate of 1 during 2 years amidst the last 2 decades. Chile, on the other hand, had a stable PTS of 1 to 2 in the last 2 decades (from 1998 onwards), while it had sustained a 3 to 5 points in the years of 1976 (beginning of the available data) to 1990 (end of the dictatorship).[202]

Although this research understands that the abovementioned investigation is somewhat inconclusive in this regard (as seems to be the same understanding of the researcher herself), it is possible to agree with Sikkink and Meyer, at least in the extent that there might be "factors that prevent trials [which] also cause the continuing rights abuses" (SIKKINK, 2011) and trials could at least contribute to the avoidance of a general sense of impunity in Brazil (MEYER, 2017, p. 44).

Also regarding accountability, it is relevant to make some notes on the role of the STM, due to the posture it displayed, at least on the *Riocentro* case. On that note, two initial ascertains could be made. Initially, as concluded by Torelly and Abrão, there is a large possibility that a somewhat conservative mentality was sustained in the Brazilian Courts after the dictatorship, due to a lack of institutional reforms (TORELLY, ABRÃO *in* PAYNE *et al.*, 2011, p. 236). This seems to be true, and even more relevant in regard to Military Courts (*e.g.* the recurrent posture of the STM regarding the *Riocentro* case).[203] On a second note, it is worth mentioning that Military Courts designed as the Brazilian's may not meet the standards of independence and impartiality required by IHRL on judging cases concerning civilians.[204]

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[202] This brief comparative analysis was developed based in the data compiled by GIBNEY *et al.*, PTS, 2017.

[203] As exposed on the topic above (5.1.5 – The *Riocentro* case).

[204] An illustrative ruling on that note, and also a paradigmatic precedent of the IACtHR, can be found in the Loayza-Tamayo case, already in 1997, as follows: "While it is true that, in the present case, those tribunals did absolve Ms. Loayza-Tamayo, we are of the opinion that special military tribunals composed of military personnel appointed by the Executive Power and subject to the dictates of military discipline, assuming a function which belongs to the Judicial Power, endowed with jurisdiction to judge not only the military but civilians as well, and - as in the present case - rendering judgments for which no reasons are given, do not meet the standards of independence and impartiality imposed by Article 8(1) of the American Convention, as an essential element of the concept of due process" (IACtHR, 1997).

Also regarding the role of Military Courts, in Brazil, on the Vladimir Herzog case, the Inter American Commission asserts that: "In that sense, the Commission has constantly stated that: "[t]he military criminal justice system has certain peculiar characteristics that impede access to an effective and impartial remedy in this jurisdiction. One of these is that the military jurisdiction cannot be considered a real judicial system, as it is not part of the judicial branch, but is organized instead under the Executive. Another aspect is that the judges in the military judicial system are generally active-duty members of the Army, which means that they are in the

In this regard, it seems that a Military Court was not the most adequate to judge the *Riocentro* case, even after the end of the authoritarian regime. Furthermore, it seems to this research that the provisions of the *Lei nº 13.491, 2017* (BRAZIL, 2017), which broaden the jurisdiction of the Military Courts to encompass some crimes perpetrated against civilians, are setbacks.[205]

Further on that note, an analysis of the composition of the STM raises some questions on the understanding of human rights, at least regarding the military judges. The Court is composed of 15 judges, of those 5 are civilian and 10 are military. The military judges only have the legal background offered by the curricular legal subjects of the preparatory military schools: Naval School (*Escola Naval – EN*) Military Academy of the 'Agulhas Negras' (*Academia Militar das Agulhas Negras – AMAN*) and Air Force Academy (*Academia da Força Aérea – AFA*).[206] Until 2011 preparatory military legal learning did not encompass human rights.[207] Therefore, it seems possible to assert that the Court did not dispose of the necessary knowledge to deal with human rights cases. Finally, regarding the military legal learning, in a recently published article, a retired Air Force Colonel argues for a more human rights directed military education. The study points out the Argentinian model as one to be followed. In the Argentinian a model the military libraries have *oeuvres* of the former political prisoners and guerrilla members, as well as curriculum related to human rights and the history of the dictatorship (LIMA, 2012, p. 212 – 213).[208]

Yet regarding legal learning, in a broader aspect, it is relevant to talk about the legal education in general. Due to material analysed, it is possible to say that there is not a broad

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position of sitting in judgment of their comrades-in-arms, rendering illusory the requirement of impartiality, since the members of the Army often feel compelled to protect those who fight alongside them in a difficult and dangerous context"" (IACHR, 2015).

[205] On this regard, it is relevant to make another reference Anthony Pereira work on authoritarianism and the rule of law: among his conclusions, the author states that in a democratic environment, internal conflicts between the Judiciary and the Armed Forces, as well as disagreements between them (instead of cooperation) will offer more protection to the rights of those individuals that are targeted by laws aimed at national security (2010, p. 292).

[206] Available at: https://www.stm.jus.br/o-stm-stm/composicao-corte-2 access on 19 June 2018.

[207] The current curriculum (after implementation of the 2011 Ministry of Defence normative) approaches human rights in a "transversal and interdisciplinary manner" according to the 2012 Ministry of Defence Report on the Analysis of the curriculum of the Military Academies. Human rights are approached between a series of subjects, taking from 40 hours at the Air Force Academy, to 100 hours in the Navy, and 160 hours in the Army Academy (BRAZIL, MD, 2012).

Requirements on the capacitation on human rights in the Armed Forces were made in the Gomes Lund sentence, as follows: par. 14. "The State should continue with the actions developed regarding the capacitation implementing, within a reasonable period of time, a permanent program or course on human rights, directed at all hierarchical level of the Armed Forces, in accordance with the provisions of paragraph 283 of this Judgment" (IACtHR, 2010).

[208] All of the conclusions above support the holistic approach to transitional justice advocated by this dissertation, asserting the need for a broader enforcement of mechanisms of justice (accountability) and institutional reforms, which were virtually non-existent in the Brazilian transition.

scholarship regarding IHRL in Brazil, although it has been developing since the promulgation of the 1988 Constitution and the human rights commitments made by the Brazilian state.[209] It is possible to recognize a broad scholarship in Constitutional Law and International Law in that same period, nevertheless this assertion does not apply to IHRL (which as argued has aspects of both of the former). Beyond the restrictions in the literature, it is possible to say that courses on the subject are also rare in Law Schools (taking for instance the ones analysed in this research, none had the subject as a mandatory subject, although most of them are among the most qualified Law Schools in Brazil).[210] The same fact is true for Federal Magistrates' Schools, none of which have IHRL in their curriculum, some of them offering courses on the subject, or providing opportunities of exchange to study the subject (again, none of those are mandatory).[211] It is also relevant that, although initiatives of such kind are observable on Federal Magistrates' Schools, they are much less occurring in State Magistrates' Schools. Finally, it is worth mentioning that there are initiatives on human rights education of international bodies. Organizations such as the UN, the IACtHR and the International Labour Organization – ILO have been offering courses on human rights, some of which are directed exclusively to members of the judiciary branches, more specifically the magistrates.[212]

From the assertions regarding the study of human rights in Brazil follows the practice of human rights in the country. In that sense, it is relevant to argue that making use of *the decentralized and overlapping jurisdictions* is of the utmost relevance when one endeavours

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[209] The relation between the development of the aforementioned scholarship and the end of the authoritarian regime is manifest. However, despite this, it is still possible to say that it did not advance as much as other legal fields. This assertion is based solely on the Brazilian human rights scholarship analysed in this research, in comparison to foreign bibliography on the subject.

[210] This claim is made solely on the basis of the researched institutions and some others that came to knowledge of this researcher in the course of this work, therefore further investigations are necessary.
Nevertheless, in this sense, regarding the most recent curriculum of USP, UFMG, UFRJ, UFF, UERJ, UFS and UFAM, none of them have a subject of human rights or IHRL, and only two have more than one semester of International Public Law (USP, UFF).
It is also noteworthy that UFMG, UFRJ and USP are respectively considered the 1st, 2nd and 5th in the ranking of best Law Schools in Brazil, and all of the cited Law School are among the top hundred in the country: https://ruf.folha.uol.com.br/2017/ranking-de-cursos/direito/ access on 19 June 2018.

[211] The information regarding the subjects and the courses can be accessed through the site of the National School of Training and Improvement of Magistrates (*Escola Nacional de Formação e Aperfeiçoamento de Magistrados – ENFAM*), and on the site of each of the Magistrates' Schools that exists on the Brazilian Federal Courts.
Available at: https://www.enfam.jus.br/ensino/escolas-de-magistratura/escolas-federais/ access 19 jun. 2018.

[212] Further conclusions regarding the role of the Law Schools towards the reproduction of anti-democratic practices can also be found in Vanessa Schinke's work (2016).
As previously stated, these results are also compatible with Gonzáles-Ocantos's conclusion regarding Brazil, which also asserted the relevance of change in the professional routine and legal knowledge of magistrates in order to better analyse violations of human rights in Brazil (GONZALEZ-OCANTOS, 2017, p. 286).

to enforce IHRL in transnational perspective. Such happens for, as stated by Jackson (2010), based on Professor Resnik, courts provide “multiple ports of entry” for the diffusion and testing of legal ideas (JACKSON, 2010, p. 192). If such conclusion can be achieved in a transnational order, in a domestic order a similar conclusion can be reached, both by the examples of neighbouring countries in Latin America, as from a conclusion achieved by Meyer, in his research on the decision of the ADPF 153: "the route, even if slower, of diffuse control could encourage dissent and enable judicial decisions that would recognise the non-reception by the 1988 constitutional order of the Amnesty Law" (MEYER, 2012, p. 21). As seen throughout the research, these *multiple ports of entry* which provide diffusion and testing of legal ideas, and also the possibility of encouraging dissent, are of utmost relevance when dealing with new strategies and trying to achieve further developments in this field of law. Nevertheless, a limitation to such benefit seems relevant of note: routine consideration of cases in the manner here advocated, on transnational bases adds to the costs of litigation. This might possibly increase the impact of imbalances regarding wealth, the risks of error to courts that are not used to such approach (JACKSON, 2010, p. 192-193) and, as a consequence, an increase of slowness of the courts to judge cases, as noticed by Meyer.

In that sense, a relevant aspect that must be taken into account when talking about an effective *transnational enforcement and interpretation of law*, regards the access to jurisdiction, which is restricted by the matter of the cramming of judicial systems (which is also a reality in Brazil). Overflowing judiciaries – or the matter of the “crowded dockets” as it is known in the US – can be understood as a result of a multitude of factors. These factors range from the phenomena of *rights inflation* – an increase of interest protected as *prima facie* rights – to the mere lack of efficient methods of Court management. As abovementioned, with Jackson, a “routine consideration of cases” from a transnational legal perspective is both hard amidst such context, and could contribute to its aggravation.

If taken into account some data of the report *Justiça em Números* (Justice in Numbers) 2017,[213] it is possible to understand that this is not an easy matter. For instance, regarding the criminal actions (for such is the nature of the cases analysed by this research) lodged in the year of 2016. There were 3 million new criminal cases in that year. Of those, 1,9 million (62,9%) were distributed in the first degree of jurisdiction and the cases pending on a sentence

[213] *Justiça em Números* is a report of the National Council of Justice regarding the available data of the Judiciary system in Brazil.

are 2.7 times that demand.[214] Therefore, although the amount of cases tends to grow in the last years (even in a case of percentage reduction regarding the previous year, such as happened in 2015 and 2016) the amount of sentences do not follow such pattern. In that sense, it is easily inferred that a procedure that would take more examination by the judge, would not be helpful to improve such data. Therefore, access to justice seems to be yet another obstacle to a *transnational legal analysis* in Brazilian courts.

However, it is useless to talk about a *transnational legal analysis* without comprehending the *legal preferences* and *judicial behaviour* in Brazil. It is manifest that the latter (*legal preferences* and *judicial behaviour*) are a product of the abovementioned (legal education). Such assertion leads to an understanding that remodelling the legal education in Brazil is fundamental. Nevertheless, yet another action seems to have fundamental role, which was brought up by this research: those qualified to take cases to the court need to mind the utmost relevance of an organized legal strategy when litigating human rights.

In this regard, a *sovereignist* and *formalist postures of constitutional interpretation* are prevailing in Brazil, although constitutional dispositions foresee a *posture towards convergence with the transnational*, regarding the interpretation of law. This perspective is not a Brazilian particularity, on the contrary. As broadly explained by Prof. Jackson, such posture can be encountered in many countries and courts, and through the ruling of as many judges. Perspectives of *exceptionalism*, of cultural or national elitism and of the superiority of domestic legal orders in general towards others are observable in many contexts – most notably the United States (e.g. the *articulated resistance* of the late Supreme Court Justice Antonin Scalia and the former United States Circuit Judge and Professor of the Chicago University Law School, Richard A. Posner) (JACKSON, 2010, p. 17 et seq.).

Therefore, similar strategies of those used in countries which also presented such *sovereignist* and *formalist postures of constitutional interpretation* seem to be necessary in Brazil. In that sense, as presented by the scholarship in which this research was based, the role of the victims of human rights violations, their families, prosecutors, lawyers, activists, civil society and other such actors in making demands for rights and operationalizing such demands on courts is fundamental to their implementation by the Judiciary.

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[214] All of that, available in the report: *Justiça em Números* 2017(BRAZIL, CNJ, 2017).
Available at: http://www.cnj.jus.br/files/conteudo/arquivo/2017/12/9d7f990a5ea5e55f6d32e64c96f0645d.pdf access on 19 June 2018.

In conclusion, through this study, it is possible to say that, although there are setbacks, there have been incalculable advances in legal practice and theory regarding the aspects of human rights studied in this dissertation, in the last half century. In addition, more recently, at least during the last decades, there were also broad developments in a transnational enforcement of those rights. These advancements were a product of unrelenting agency of a series of individuals demanding for recognition of their rights. Rights which, on their turn, were carried on to the judicial sphere by the work of engaged attorneys and prosecutors. Finally, these matters could be confronted by members of the judiciary, which were committed to address, in a proper form, even the most complex cases. Therefore, it is possible to say that the endeavour for human rights analysed here was fundamentally a collective undertaking. An undertaking aimed at addressing past violations and repairing injustices, which, although perpetrated long ago, continue to cast their shadows in the present.

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HUMAN RIGHTS, TRANSITIONAL JUSTICE AND TRANSNATIONAL LAW:
towards accountability for crimes against humanity in Brazil

ATTATCHMENTS:

Attachment 1 - Rosa e outros - Guerrilha do Araguaia

Attachment 2 - Divino Ferreira de Souza

Attachment 3 - Edgar de Aquino Duarte

Attachment 4 - Hirohaki Torigoe

Attachment 5 – 'O caso Riocentro'

Attachment 6 - Rubens Beyrodt Paiva

Attachment 7 - Comparative Table

Attachment 1 - Rosa e outros (Guerrilha do Araguaia): 0001162-79.2012.4.01.3901 / 0006231-92.2012.4.01.3901

TRF 1

SEÇÃO JUDICIÁRIA DO PARÁ

SUBSEÇÃO JUDICIÁRIA DE MARABÁ

2ª VARA FEDERAL

RESE

Juíza Federal Nair Cristina C. P. de Castro

1- INTRODUCTION OF THE DECISION:

"O Ministério Público Federal ofertou denúncia em face de Sebastião Curió Rodrigues de Moura, em 14/3/2012, imputando a este a prática do delito tipificado no art. 148 *caput* e parágrafo 2º do CPB, tencionando seja aquela recebida e processado o feito, a fim de, apurada a responsabilidade penal daquele no ilícito que lhe imputa, sejam impostas as penas cominadas legalmente à prática do delito."

2 - RATIONALE REGARDING THE RE-ANALYSIS OF THE CASE:

"Os autos retornaram à análise deste Juízo, a fim de que, em face da interposição de recurso em sentido estrito pelo MPF, houvesse manifestação quanto à manutenção ou não da decisão de fls. 55/60, no exercício da faculdade de retratação prevista no art. 589 do CPP, pelo que o juiz "reformará ou sustentará" o despacho (...)

Feito o registro, necessário a sublinhar a prerrogativa de reapreciar a questão, para o fim de posicionamento fundamentado quanto à reforma ou à sustentação do que fora decidido nas fls. 55/60, e tendo em mira o que dispõe textualmente o CPP, urge atentar que "a denúncia ou

queixa conterá a exposição do fato criminoso, com todas as suas circunstâncias, a qualificação do acusado ou esclarecimento pelos quais se possa identificá-lo, a classificação do crime e, quando necessário, o rol das testemunhas" (art. 41), devendo o juízo, ao receber a peça de acusação, pronunciar-se quanto à observância de tais aspectos, prevendo, então, o legislador, que a "denúncia ou queixa será rejeitada quando for manifestamente inepta; faltar pressuposto processual ou condição para o exercício da ação penal; ou faltar justa causa para o exercício da ação penal" (art. 395).

Dessa premissa, pontua-se, de logo, que a manifestação em casos tais é estritamente técnico-jurídica e, nesta linha, sem digressões outras de cunho ideológico sobre o pujante tema que orbita os acontecimentos relatados na denúncia, sob a perspectiva histórica e política.

Quanto à observância dos requisitos do artigo 41 do CPP, constata-se que a denúncia, em si, não é inepta; encontra-se vazada em termos claros e concatenados de forma objetiva, racional e lógica, a partir dos quais se compreende a exposição fática (*imputatio facti*), a indicação do envolvido a quem se imputa a infração, a tipificação abstrata do tipo penal correspondente àquela e as circunstâncias pelas quais entende o órgão de acusação estarem preenchidos os elementos do tipo penal e precisada a sua autoria, indicando as testemunhas que chancelariam o que afirmou na denúncia, além de acervo investigativo no qual se assentariam as conclusões de formação da *opinio delicti*.

Não obstante a isso, tem-se que não basta, todavia, ao processamento do feito, com a admissão da peça de ingresso, estar ela *formalmente* apta a iniciar o processo-crime; é necessário, ainda, que estejam reunidos os pressupostos processuais e as condição da ação penal, além de haver justa causa para o exercício desta.

Na esteira, então, do segundo aspecto, hão de estar reunidos, por devidamente observados, as condições da ação (gerais e específicas – condições de procedibilidade) e os pressupostos processuais (de existência e validade), sob cuja presença poderia validamente ser processada a pretensão acusatória externada pelo MPF.

Acerca das condições de ação, não se constata a inobservância dessas pelo *parquet*. Com efeito, versam elas sobre a legitimidade das partes, o interesse processual na dedução da pretensão punitiva e a possibilidade jurídica do pedido, sendo em relação a esta última a principal dúvida que poderia surgir, em face do que dispõem as leis que tangenciam o tema objeto da denúncia." (Lei 6.683/79 e Lei 9.140/95)

3 - ASPECTS OF THE DECISION REGARDING INTENATIONAL LAW – IN TRANSNATIONAL PERSPECTIVE:

"Registre-se, inicialmente, que todas as regras e decisões do Direito Internacional utilizadas pelo MPF, para o fim de subsidiar a acuação e abrir ensanchas ao recebimento da denúncia, não são suficientes, e nem teriam o condão de afastar a apreciação das questões antes declinadas, inarredáveis pressupostos à admissão da ação penal pelo seu titular. É dizer, embora se saiba da existência, validade e vigência das normas de Direito Internacional, as quais, em tese, estariam a amparar o que pretende o parquet – sejam aquelas do direito posto, sejam as encerradas em decisão vinculante de tribunal internacional – tudo quanto foi dito a esse respeito na peça de ingresso não impediria o órgão de jurisdição pátria, de empreender verificação quanto à viabilidade e à adequação processual daquilo que se veio buscar, valendo dizer, então, que a busca de responsabilização criminal de quem quer que seja não pode e não deve ser feita a qualquer custo, sem a observância da garantia augusta do devido processo legal, substancial e formal, não tendo, certamente, as regras de direito internacional tal pretensão.	**Although International Law was available and thoroughly presented in the complaint filed, there was manifest opposition to those norms, in either an active position of resistance or a deliberate position of indifference (JACKSON, 2010 p. 32 *et seq.*). The justification of such posture is that the appropriate *forum* of such analysis would be the STF, and not a Federal Justice Court – in a *formalist* posture towards the enforcement of transnational law (p. 33).**

Todas as demais questões atinentes à constitucionalidade (ou convencionalidade) da Lei de Anistia ou ao aparente conflito entre a higidez de tais regras e as decisões da Corte Interamericana de Direitos Humanos são matéria que tem sede própria de acertamento, não sendo, precisamente, esta a via mais adequada para tal intento. (...) Ao Supremo Tribunal Federal são reservadas questões deste jaez, sendo estranho aos fins da presente ação penal qualquer posicionamento que venha a esvaziar o conteúdo específico da r. decisão prolatada no bojo da ADPF 153.”	

Attachment 2 - Divino Ferreira de Souza: 0004334- 29.2012.4.01.3901

TRF 1

SEÇÃO JUDICIÁRIA DO PARÁ

SUBSEÇÃO JUDICIÁRIA DE MARABÁ

2ª VARA FEDERAL

RESE

Juíza Federal Nair Cristina C. P. de Castro

1- INTRODUCTION OF THE DECISION:

"O Ministério Público Federal ofertou denúncia em face de Lício Augusto Maciel, em 16/07/2012, imputando a este a prática do delito tipificado no art. 148 *caput* e parágrafo 2º do CPB, tencionando seja aquela recebida e processado o feito, a fim de, apurada a responsabilidade penal daquele no ilícito que lhe imputa, sejam impostas as penas cominadas legalmente à prática do delito."

2 - RATIONALE REGARDING THE RE-ANALYSIS OF THE CASE:

"Os autos retornaram à análise deste Juízo, a fim de que, em face da interposição de recurso em sentido estrito pelo MPF, houvesse manifestação quanto à manutenção ou não da decisão de fls. 55/60, no exercício da faculdade de retratação prevista no art. 589 do CPP, pelo que o juiz "reformará ou sustentará" o despacho (...)

Feito o registro, necessário a sublinhar a prerrogativa de reapreciar a questão, para o fim de posicionamento fundamentado quanto à reforma ou à sustentação do que fora decidido nas fls. 55/60, e tendo em mira o que dispõe textualmente o CPP, urge atentar que "a denúncia ou queixa conterá a exposição do fato criminoso, com todas as suas circunstâncias, a qualificação

do acusado ou esclarecimento pelos quais se possa identificá-lo, a classificação do crime e, quando necessário, o rol das testemunhas" (art. 41), devendo o juízo, ao receber a peça de acusação, pronunciar-se quanto à observância de tais aspectos, prevendo, então, o legislador, que a "denúncia ou queixa será rejeitada quando for manifestamente inepta; faltar pressuposto processual ou condição para o exercício da ação penal; ou faltar justa causa para o exercício da ação penal" (art. 395).

Dessa premissa, pontua-se, de logo, que a manifestação em casos tais é estritamente técnico-jurídica e, nesta linha, sem digressões outras de cunho ideológico sobre o pujante tema que orbita os acontecimentos relatados na denúncia, sob a perspectiva histórica e política.

Quanto à observância dos requisitos do artigo 41 do CPP, constata-se que a denúncia, em si, não é inepta; encontra-se vazada em termos claros e concatenados de forma objetiva, racional e lógica, a partir dos quais se compreende a exposição fática (*imputatio facti*), a indicação do envolvido a quem se imputa a infração, a tipificação abstrata do tipo penal correspondente àquela e as circunstâncias pelas quais entende o órgão de acusação estarem preenchidos os elementos do tipo penal e precisada a sua autoria, indicando as testemunhas que chancelariam o que afirmou na denúncia, além de acervo investigativo no qual se assentariam as conclusões de formação da *opinio delicti*.

Não obstante a isso, tem-se que não basta, todavia, ao processamento do feito, com a admissão da peça de ingresso, estar ela *formalmente* apta a iniciar o processo-crime; é necessário, ainda, que estejam reunidos os pressupostos processuais e as condição da ação penal, além de haver justa causa para o exercício desta.

Na esteira, então, do segundo aspecto, hão de estar reunidos, por devidamente observados, as condições da ação (gerais e específicas – condições de procedibilidade) e os pressupostos processuais (de existência e validade), sob cuja presença poderia validamente ser processada a pretensão acusatória externada pelo MPF.

Acerca das condições de ação, não se constata a inobservância dessas pelo *parquet*. Com efeito, versam elas sobre a legitimidade das partes, o interesse processual na dedução da pretensão punitiva e a possibilidade jurídica do pedido, sendo em relação a esta última a principal dúvida que poderia surgir, em face do que dispõem as leis que tangenciam o tema objeto da denúncia." (Lei 6.683/79 e Lei 9.140/95)

3 - ASPECTS OF THE DECISION REGARDING INTENATIONAL LAW – IN TRANSNATIONAL PERSPECTIVE:

"Registre-se, inicialmente, que todas as regras e decisões do Direito Internacional utilizadas pelo MPF, para o fim de subsidiar a acuação e abrir ensanchas ao recebimento da denúncia, não são suficientes, e nem teriam o condão de afastar a apreciação das questões antes declinadas, inarredáveis pressupostos à admissão da ação penal pelo seu titular. É dizer, embora se saiba da existência, validade e vigência das normas de Direito Internacional, as quais, em tese, estariam a amparar o que pretende o parquet – sejam aquelas do direito posto, sejam as encerradas em decisão vinculante de tribunal internacional – tudo quanto foi dito a esse respeito na peça de ingresso não impediria o órgão de jurisdição pátria, de empreender verificação quanto à viabilidade e à adequação processual daquilo que se veio buscar, valendo dizer, então, que a busca de responsabilização criminal de quem quer que seja não pode e não deve ser feita a qualquer custo, sem a observância da garantia augusta do devido processo legal, substancial e formal, não tendo, certamente, as regras de direito internacional tal pretensão. Todas as demais questões atinentes à	**Although International Law was available and thoroughly presented in the complaint filed, there was manifest opposition to those norms, in either an active position of resistance or a deliberate position of indifference (JACKSON, 2010 p. 32 et seq.). The justification of such posture is that the appropriate forum of such analysis would be the STF, and not a Federal Justice Court – in a formalist posture towards the enforcement of transnational law (p. 33).**

constitucionalidade (ou convencionalidade) da Lei de Anistia ou ao aparente conflito entre a higidez de tais regras e as decisões da Corte Interamericana de Direitos Humanos são matéria que tem sede própria de acertamento, não sendo, precisamente, esta a via mais adequada para tal intento. (...) Ao Supremo Tribunal Federal são reservadas questões deste jaez, sendo estranho aos fins da presente ação penal qualquer posicionamento que venha a esvaziar o conteúdo específico da r. decisão prolatada no bojo da ADPF 153.”	

Attachment 3 - Edgar de Aquino Duarte: 0011580- 69.2012.4.03.6181

TRF3

9ª VARA CRIMINAL DA COMARCA DE SÃO PAULO

Juiz Federal Hélio Egídio de Matos Nogueira

1- INTRODUCTION OF THE DECISION:

"I - Trata-se de denúncia ofertada pelo Ministério Público Federal em face de CARLOS ALBERTO BRILHANTE USTRA, ALCIDES SINGILLO e CARLOS ALBERTO AUGUSTO, por suposta prática do crime previsto no artigo 148, 2º do Código Penal, porque, desde o dia 13/06/1971 até a presente data, nesta Capital, previamente ajustados e com unidades de desígnios entre si e com outros agentes não identificados privaram ilegalmente a vítima EDGAR DE AQUINO DUARTE (que utilizava também o nome Ivan Marques Lemos) de sua liberdade, mediante sequestro cometido no contexto de ataque estatal sistemático e generalizado contra a população, tendo eles pleno conhecimento das circunstâncias deste ataque. Consta, também, da denúncia, que a vítima, em razão dos maus-tratos provocados ilegalmente pelos denunciados padeceu de gravíssimo sofrimento físico e moral (fls. 1101/1142)."

2 - ASPECTS OF THE DECISION REGARDING INTENATIONAL LAW – IN TRANSNATIONAL PERSPECTIVE:

Destaco, ainda, que o Brasil ratificou o Pacto de São Jose da Costa Rica, que ingressou no ordenamento jurídico por força do Decreto n.º 678/92. E o Brasil, desde a edição do Decreto n.º 4.463/02, passo a reconhecer a jurisdição obrigatória	**Ratification of Pact of San José of Costa Rica and recognition of the mandatory jurisdiction of the Inter-American Court of Human Rights.**

da Corte Interamericana de Direitos Humanos (CIDH), órgão que investiga, interpreta e aplica o citado Pacto da São José da Costa Rica. Embora não diga respeito diretamente ao caso em questão, mas cujos fundamentos podem ser ora utilizados, após o julgamento da ADPF n.º 153 pelo STF em 04/11/2010, a CIDH considerou culpado o Estado Brasileiro pelas mortes e desaparecimentos de militante políticos na chamada "Guerrilha do Araguaia" (caso Gomes Lund vs. Brasil). Em especial, no que tange ao desaparecimento forçado, o entendeu a Corte Internacional como grave violação múltipla e continuada de direitos humanos de caráter permanente, praticados por agentes estatais que se nem a revelar a sorte e o paradeiro da vítima, ressaltando ser imperiosa uma investigação sempre que hajam fundadas suspeitas que uma pessoa foi submetida a desaparecimento forçado, cabendo uma apuração séria, imparcial e efetiva, alvitrando que os Estados tipifiquem em suas legislações tais condutas ilícitas, levantando-se obstáculos normativos que impeçam a investigação e, eventualmente, a punição de tais atos, conforme 101 a 111 da sentença, que, por ser oportuno e conveniente, transcrevo, sem as correspondentes notas de rodapé: "101. Este Tribunal considera adequado reiterar	

o fundamento jurídico que sustenta uma perspectiva integral sobre o desaparecimento forçado de pessoas, em virtude da pluralidade de condutas que, unidas por um único fim, violam de maneira permanente, enquanto subsistam, bens jurídicos protegidos pela Convenção.	
A Corte nota que não é recente a atenção da comunidade internacional ao fenômeno do desaparecimento forçado de pessoas. O Grupo de Trabalho sobre Desaparecimentos Forçados e Involuntários de Pessoas das Nações Unidas elaborou, desde a década de 80, uma definição operacional do fenômeno, nela destacando a detenção ilegal por agentes, dependência governamental, ou grupo organizado de particulares atuando em nome do Estado, ou contando com seu apoio, autorização ou consentimento.	**The historic origins of the normalization of the crime of forced disappearance (brought by IACtHR's decision) - operational definition of the phenomenon elaborated by the Working Group on Forced and Involuntary Disappearances of People of the United Nations since 1980.**
Adicionalmente, no Direito Internacional, a jurisprudência deste Tribunal foi precursora da consolidação de uma perspectiva abrangente da gravidade e do caráter continuado ou permanente da figura do desaparecimento forçado de pessoas, na qual o ato de desaparecimento e sua execução se iniciam com a privação da liberdade da pessoa e a subsequente falta de informação sobre seu destino, e permanece enquanto não se conheça o paradeiro da pessoa desaparecida e se determine com certeza sua identidade. Em	**Permanent character of crimes corresponding to the disappearance – pioneering jurisprudence of the Inter-American Court.**

conformidade com todo o exposto, a Corte reiterou que o desaparecimento forçado constitui uma violação múltipla de vários direitos protegidos pela Convenção Americana, que coloca a vítima em um estado de completa desproteção e acarreta outras violações conexas, sendo especialmente grave quando faz parte de um padrão sistemático ou prática aplicada ou tolerada pelo Estado.	
A caracterização pluriofensiva, quanto aos direitos afetados, e continuada ou permanente do desaparecimento forçado se desprende da jurisprudência deste Tribunal, de maneira constante, desde seu primeiro caso contencioso há mais de vinte anos, inclusive com anterioridade à definição contida da Convenção Interamericana sobre Desaparecimento Forçado de Pessoas. Essa caracterização resulta consistente com outras definições contidas em diferentes instrumentos internacionais, que salientam como elementos simultâneos e constitutivos do desaparecimento forçado: a) a privação da liberdade; b) a intervenção direta de agentes estatais ou sua aquiescência, e c) a negativa de reconhecer a detenção e revelar a sorte ou o paradeiro da pessoa implicada. Em ocasiões anteriores, este Tribunal já salientou que, ademais, a jurisprudência da Corte Europeia de Direitos Humanos, as decisões de	**Permanent character of crimes corresponding to disappearance - standardization of the concept in the Inter-American Convention on Forced Disappearance of Persons.**

diferentes instâncias das Nações Unidas, bem como de vários tribunais constitucionais e outros altos tribunais nacionais dos Estados americanos, coincidem com a caracterização indicada.	
A prática de desaparecimentos forçados implica um crasso abandono dos princípios essenciais em que se fundamenta o Sistema Interamericano de Direitos Humanos e sua proibição alcançou o caráter de jus cogens. O dever de prevenção do Estado abrange todas as medidas de caráter jurídico, político, administrativo e cultural que promovam a salvaguarda dos direitos humanos. Desse modo, a privação de liberdade em centros legalmente reconhecidos, bem como a existência de registros de detidos, constituem salvaguardas fundamentais, inter alia, contra o desaparecimento forçado. A contrario sensu, a implantação e a manutenção de centros clandestinos de detenção configuram per se uma falta à obrigação de garantia, por atentar diretamente contra os direitos à liberdade pessoal, à integridade pessoal, à vida e à personalidade jurídica.	**The practice of enforced disappearance as a violation of the Inter-American Human Rights System and *jus cogens* - a broad protection obligation of the signatory state to guarantee the rights to personal liberty, personal integrity, life and legal personality.**
(...)sempre que haja motivos razoáveis para suspeitar que uma pessoa foi submetida a desaparecimento forçado deve iniciar-se uma investigação. Essa obrigação independe da apresentação de	**General state obligation of guaranteeing *ex officio* investigation whenever there are reasonable grounds to suspect forced disappearance.**

uma denúncia, pois, em casos de desaparecimento forçado, o Direito Internacional e o dever geral de garantia impõem a obrigação de investigar o caso ex officio, sem dilação, e de maneira séria, imparcial e efetiva.	
A alegação de incompetência ratione temporis, argüida pelo Brasil, não pode ser acolhida em relação ao delito de seqüestro, em virtude de sua natureza perma somente ter reconhecido a jurisdição da Corte em 10/12/1998 não afastaria a sua competência para o conhecimento e julgamento dos ilícitos cuja execução teve continuidade para além daquela data. Nesse posto, a CIDH manteve-se absolutamente fiel aos seus precedentes (casos Blake vs Guatemala, Radilla Pacheco vs México, Ibsen Cardinos vs Bolívia e Velásquez Rodrigues vs Honduras), reafirmando que o início da execução do desaparecimento forçado coincide com a privação de liberdade da vítima, prosseguindo a execução com a ausência de fornecimento de qualquer informação sobre seu paradeiro. Dessa forma, o comportamento somente cessaria no momento em que as informações sobre o paradeiro da vítima ou o seu destino viesse à tona." Feitas essas colocações iniciais, passo a verificar a existência de justa causa para a deflagração da ação penal	**Non-application of statutory limitations towards crimes for their character as crimes against humanity**

Attachment 4 - Hirohaki Torigoe: 0004823-25.2013.4.03.6181

TRF 3

5ª TURMA

RESE

RELATOR – Desembargador Federal Andre Nekatschalow

VOTO CONDUTOR - Desembargador Federal Paulo Fontes

1- INTRODUCTION OF THE DECISION (DISSENT):

“Ressalto inicialmente meu profundo respeito e admiração pelo E. Des. Fed. André Nekatschalow, a quem peço vênia para divergir, observando, contudo, que o voto de Sua Excelência no presente caso, como em tantos outros, é fruto de reflexão pessoal autêntica e profunda, sempre em busca da resposta judicial mais correta e adequada. Divido o meu pensamento em três partes para enfrentar o presente recurso:

i) Elementos fáticos - indícios de materialidade e autoria;
ii) Da natureza permanente do crime de ocultação de cadáver;
iii) Decisão da Corte Interamericana de Direitos Humanos no caso "Gomes Lund e outros vs. Brasil": observância necessária.”

2 - RATIONALE REGARDING THE PERMANENT NATURE OF THE CRIME:

ii) Da natureza permanente do crime de ocultação de cadáver;

Precedente do Supremo Tribunal Federal tratou a matéria da seguinte maneira:

EMENTA: HABEAS-CORPUS. HOMICÍDIO QUALIFICADO PRATICADO CONTRA MENOR, COM QUATRO ANOS DE IDADE, E OCULTAÇÃO DE CADÁVER.

ALEGAÇÕES DE ATIPICIDADE DO CRIME DE OCULTAÇÃO DE CADÁVER, FALTA DE FUNDAMENTAÇÃO DA SENTENÇA DE PRONÚNCIA E INCOMPATIBILIDADE ENTRE QUALIFICADORAS E AGRAVANTES. 1. Retirar o cadáver do local onde deveria permanecer e conduzi-lo para outro em que não será normalmente reconhecido caracteriza, em tese, crime de ocultação de cadáver. A conduta visou evitar que o homicídio fosse descoberto e, de forma manifesta, destruir a prova do delito. Trata-se de crime permanente que subsiste até o instante em que o cadáver é descoberto, pois ocultar é esconder, e não simplesmente remover, sendo irrelevante o tempo em que o cadáver esteve escondido. Crime consumado, que pode ser apenado em concurso com o de homicídio. 2. Sentença de pronúncia que atende às exigências mínimas do artigo 408 do CPP e suficientemente fundamentada. A pronúncia, sentença processual que é, deve conter apenas sucinto juízo de probabilidade, pois, se for além, incidirá em excesso de fundamentação, o que pode prejudicar a defesa do paciente. 3. Os crimes imputados e as qualificadoras constam da denúncia e seus aditamentos. Na pronúncia o Juiz não deve excluir as qualificadoras, salvo as manifestamente improcedentes, levando em conta que não é de rigor nem recomendável cuidar de circunstâncias agravantes ou atenuantes, que permanecerão no libelo crime acusatório a fim de serem submetidas ao soberano Tribunal do Júri. 4. Habeas-corpus conhecido, mas indeferido.

(HC 76678, Relator(a): Min. MAURÍCIO CORRÊA, Segunda Turma, julgado em 29/06/1998, DJ 08-09-2000 PP-00005 EMENT VOL-02003-03 PP-00434)

Ora, no presente caso, como descrito no item anterior, as condutas objetivaram não a simples remoção do cadáver, mas, nos exatos termos do precedente supracitado, consistiram na adoção de procedimentos capazes propriamente de ocultá-lo. Não encontrados até hoje os restos mortais de Hirohaki Torigoe, **não há que se falar na prescrição do delito, nem na aplicação da Lei de Anistia (Lei 6.683/79)**, que no seu artigo primeiro abrange delitos cometidos no lapso temporal compreendido entre 02 de setembro de 1961 e 15 de agosto de 1979.

A natureza permanente desse delito está igualmente reconhecida na decisão Gomes Lund da Corte Interamericana de Direitos Humanos, que é tratada abaixo.

3 - ASPECTS OF THE DECISION REGARDING INTENATIONAL LAW – IN TRANSNATIONAL PERSPECTIVE:

iii) Decisão da Corte Interamericana de Direitos Humanos no caso "Gomes Lund e outros vs. Brasil": observância necessária.

“É sabido que, após as assombrosas práticas verificadas na Segunda Guerra Mundial, consolidou-se no cenário internacional uma maior preocupação com a proteção dos direitos humanos, sobrevindo a adoção de normas como a Declaração Universal dos Direitos do Homem de 1948 e de mecanismos de proteção dotados de maior eficácia. Atribuem-se a esse contexto, igualmente, as transformações observadas no Direito Constitucional de diversos países, com a explicitação dos direitos fundamentais e a propagação do controle de constitucionalidade das leis. O Direito Internacional, por sua vez, postulará maior amplitude e força frente à outrora intocável soberania dos Estados; são criados sistemas regionais de proteção dos direitos humanos, como a Convenção Europeia dos Direitos do Homem de 1953, que criou a Corte Europeia dos Direitos do Homem, sediada em Estrasburgo, na França, com jurisdição sobre todos os países membros do tratado.	**A paradigmatic shift towards the protection of human rights: norms and mechanisms of protection. Examples: Universal Declaration of Human Rights of 1948, European Convention on Human Rights, American Convention on Human Rights – Pact.** **Note: Transformations observed in the Constitutional Law of several countries, with the unfolding of fundamental rights and the propagation of the constitutionality control of the laws.**

Seguindo a lógica dos sistemas regionais de proteção dos direitos humanos, em 1969 foi adotada a Convenção Americana sobre Direitos Humanos - Pacto de São José da Costa Rica. O Brasil ratificou a referida Convenção em 25/09/1992, tendo ela sido promulgada através do Decreto 678, de 06/11/1992. Posteriormente, após aprovação do Congresso Nacional, foi reconhecida como obrigatória a competência da Corte Interamericana de Direitos Humanos, nos termos do Decreto 4463, de 08/11/2002:". "Art. 1o É reconhecida como obrigatória, de pleno direito e por prazo indeterminado, a competência da Corte Interamericana de Direitos Humanos em todos os casos relativos à interpretação ou aplicação da Convenção Americana de Direitos Humanos (Pacto de São José), de 22 de novembro de 1969, de acordo com art. 62 da citada Convenção, sob reserva de reciprocidade e para fatos posteriores a 10 de dezembro de 1998."	
"Nessa decisão, que trata do desaparecimento de militantes envolvidos na Guerrilha do Araguaia, no seu parágrafo de nº 256, consta que "este Tribunal dispõe que o Estado deve conduzir eficazmente a investigação penal dos fatos do presente caso, a fim de	**Judgment issued by the Inter-American Court in the "Gomes Lund et al. (Guerrilla of Araguaia) v. Brazil" case, in which it was stated that it was impossible to apply the amnesty law to gross violations of human rights.**

esclarecê-los, determinar as correspondentes responsabilidades penais e aplicar efetivamente as sanções e consequências que a lei disponha." Obriga, ainda, a: b) determinar os autores materiais e intelectuais do desaparecimento forçado das vítimas e da execução extrajudicial. Ademais, por se tratar de violações graves de direitos humanos, e considerando a natureza dos fatos e o caráter continuado ou permanente do desaparecimento forçado, o Estado não poderá aplicar a Lei de Anistia em benefício dos autores, bem como nenhuma outra disposição análoga, prescrição, irretroatividade da lei penal, coisa julgada, *ne bis in idem* ou qualquer excludente similar da responsabilidade para eximir-se dessa obrigação, nos termos dos parágrafos 171 a 179 desta Sentença,(...)" Nos parágrafos a que remete, a Corte Interamericana aplicou sua jurisprudência, afirmada em relação a outros países latino-americanos que também enfrentaram regimes de exceção, no sentido da invalidade das leis de anistia, nos contextos analisados, perante o Direito Internacional.	
"entendo que a decisão do STF na ADPF 153, que considerou ter sido a Lei de Anistia recepcionada pela Constituição de	**The preponderance between IACtHR's understanding and that of STF, the need to make the latter compatible with**

1988, não representa óbice ao cumprimento da decisão da Corte Interamericana (...) Isso porque cabe precipuamente à Corte Interamericana o chamado "controle de convencionalidade" das leis e atos normativos que se mostrem incompatíveis com a Convenção Americana, controle este que também pode e deve ser exercido pela jurisdição nacional; A necessidade de compatibilidade normativa tanto com a Constituição Federal quanto com a Convenção Interamericana fica muito clara com a decisão do STF no HC 90172/SP, que culminou na Súmula Vinculante nº 25, que veda a prisão civil do depositário infiel. Tal modalidade de prisão foi considerada incompatível com o Pacto de São José da Costa Rica, embora seja permitida pela Constituição brasileira. Assim sendo, a Lei de Anistia pode igualmente mostrar-se compatível com a Constituição e incompatível com a Convenção."	**the ACHR, which is assessed in the last instance by the Inter-American Court of Human Rights.**
"Supremo Tribunal Federal reconhece aos tratados sobre direitos humanos, mesmo àqueles previstos no art. 5º, §2º, da Constituição, hierarquia supralegal"	**Domestic recognition of Human Rights Treaties as having a Supra-legal Status.**
"os autores mais abalizados do Direito Internacional afirmam que a obrigatoriedade de observância pelo Brasil	**Double genesis of the obligation of observance by Brazil of the IACtHR's understanding: judgements and**

ocorre tanto diante da coisa julgada quanto da "coisa interpretada", ou seja, o país deve aplicar o entendimento consagrado pela Corte a outros casos que envolvam a mesma matéria”	**interpretation - decisions regarding other cases.**
“Fixada a obrigatoriedade de dar cumprimento à decisão da Corte, de forma genérica, faz-se necessário esclarecer alguns aspectos pertinentes ao presente feito. Apesar da diferença de nomenclatura – pois não temos no nosso direito interno as figuras legais do "desaparecimento forçado" e da "execução extrajudicial" - é certo que podemos associá-las aos delitos de ocultação de cadáver e homicídio. No caso dos autos, como o cadáver e os restos mortais de Hirohaki Torigoe não foram ainda encontrados, aplicam-se as considerações da Corte sobre a permanência e continuidade do ilícito consistente no desaparecimento forçado, acima explicitadas, sendo necessário dar cumprimento à decisão que determina a investigação, processamento e julgamento das infrações. Restam afastadas, assim, de acordo com o entendimento da Corte Interamericana, tanto a prescrição do delito quanto a eventual aplicação ao caso da Lei de Anistia.”	**Obligation to comply with the Court's decision: adherence and compatibility of concepts used by IACtHR, as well as distance from the theory of prescribing the crime and application of the Amnesty Law, following the court's understanding of the permanent nature of the crime.**

Attachment 5 – 'O caso Riocentro': 0017766-09.2014.4.02.5101

TRF 2

6ª Vara Federal Criminal do Rio de Janeiro

Juíza Ana Paula Vieira de Carvalho

1- INTRODUCTION OF THE DECISION:

"1. Trata-se de denúncia oferecida pelo MPF em desfavor de WILSON LUIZ CHAVES MACHADO, CLAUDIO ANTONIO GUERRA, NILTON DE ALBUQUERQUE CERQUEIRA, NEWTON ARAUJO DE OLIVEIRA E CRUZ, EDSON SA ROCHA e DIVANY CARVALHO BARROS, imputando-lhes os crimes de tentativa de homicídio doloso, associação em organização criminosa, transporte de explosivos, favorecimento pessoal e fraude processual, em razão de participação no episódio conhecido como o atentado a bomba no Riocentro.

Algumas questões jurídicas, entretanto, precisam ser enfrentadas antes de se analisar a existência de suporte probatório mínimo para recebimento da exordial. Passo, pois, ao seu exame sucinto."

2 - RATIONALE REGARDING STATUTES OF LIMITATION:

3. Da prescrição

"Os fatos narrados na denúncia ocorreram em 30 de abril de 1981: há exatos 33 anos, portanto. Tenho, porém, que a prescrição não ocorreu. Para tanto, parto de duas premissas importantes: (i) os crimes de tortura, homicídio e desaparecimento de pessoas, cometidos por agentes do Estado, como forma de perseguição política, no período da ditadura militar brasileira configuram crimes contra a humanidade; (ii) segundo princípio geral de direito

internacional, acolhido como costume pela prática dos Estados e posteriormente por Resoluções da ONU, os crimes contra a humanidade são imprescritíveis."

3 - ASPECTS OF THE DECISION REGARDING INTENATIONAL LAW – IN TRANSNATIONAL PERSPECTIVE:

O conceito de crime contra a humanidade foi previsto inicialmente no art. 6º. do Estatuto do Tribunal de Nuremberg, e depois ratificado pela Organização das Nações Unidas em dezembro de 1946. Nele estão previstas as condutas de homicídio, deportação, extermínio e outros atos desumanos cometidos "dentro de um padrão amplo e repetitivo de perseguição a determinado grupo (ou grupos) da sociedade civil, por qualquer razão (política, religiosa, racial ou étnica). Como fixado pelas Nações Unidas – ao aprovar os princípios ditados pelo Tribunal de Nuremberg-, o crime de lesa-humanidade é qualquer ato desumano cometido contra a população civil, no bojo de uma perseguição por motivos políticos, raciais ou religiosos. Note-se que não há necessidade de consumação de um genocídio, mas apenas que determinado segmento social seja alvo de repressão específica." A isto acrescente-se que estas práticas	**A paradigmatic shift towards the protection of human rights and crimes against humanity: norms and mechanisms of protection.** **The acts committed by agents of the dictatorship as crimes against humanity.**

devem ser parte de uma política de governo ou de uma prática sistemática e frequente de atrocidades que são toleradas, perdoadas ou incentivadas por um governante ou pela autoridade de fato. Passados 50 anos do golpe militar de 1964, já não se ignora mais que a prática de tortura e homicídios contra dissidentes políticos naquele período fazia parte de uma política de Estado, conhecida, desejada e coordenada pela mais alta cúpula governamental. (...) Admitida a tese de que se está diante de um crime contra a humanidade, deve-se reconhecer, também, a imprescritibilidade destes fatos. Vejamos.	
Muito embora o Brasil não tenha ratificado a Convenção sobre Imprescritibilidade dos Crimes de Guerra e dos Crimes contra a Humanidade, aprovada pela Assembléia Geral da ONU em 1968 - pois estava no auge da ditadura militar nesta época -, entende a doutrina estarmos diante, na verdade, de verdadeiro princípio geral de direito internacional, incorporado aos costumes internacionais. Inicialmente, parece importante deixar claro o papel dos costumes internacionais como fonte do Direito Internacional.	**Crimes against humanity - General principle of international law, then its development into customary law.** **The role of customary law as a source of international law.**

Valho-me, aqui, das lições de MALCOM SHAW: "As "fontes" são os dispositivos que operam dentro do sistema jurídico num nível técnico; excluem-se assim as fontes últimas ou mediatas, como a razão ou a moral, bem como as fontes secundárias e funcionais, como as bibliotecas e revistas jurídicas. O que pretendemos fazer é descrever o processo pelo qual as normas do direito internacional efetivamente surgem [3]. O artigo 38(1) do Estatuto da Corte Internacional de Justiça é amplamente reconhecido como a formulação mais autorizada a respeito das fontes do direito internacional [4]. Diz ele: A Corte, cuja função é decidir em conformidade com o direito internacional as controvérsias que lhe forem submetidas, aplicará: (a) As convenções internacionais, quer gerais, quer especiais, que estabeleçam normas expressamente reconhecidas pelos Estados litigantes; (b) o costume internacional, como prova de uma prática geral aceita como direito; (c) os princípios gerais do direito, reconhecidos pelas nações civilizadas; (d) com a ressalva das disposições do artigo 59, as decisões judiciais e a doutrina dos publicistas mais qualificados das	

diferentes nações, como meio auxiliar para a determinação das normas de direito. Embora tal formulação, tecnicamente, trate apenas das fontes de direito internacional que podem ser aplicadas pela Corte Internacional, a verdade é que, uma vez que a função da Corte é decidir "em conformidade com o direito internacional" as controvérsias que lhe forem submetidas, e uma vez que todos os Estados-membros da ONU são ipso facto signatários do Estatuto em virtude do artigo 93 da Carta das Nações Unidas (os Estados que não são membros da ONU podem aceitar especificamente o Estatuto da Corte: a Suíça era o exemplo mais conhecido antes de filiar-se à ONU, em 2002), ninguém duvida de que esse dispositivo expressa a opinião geral acerca da enumeração das fontes do direito internacional." (SHAW, Malcolm N. Direito Internacional. Tradução de Marcelo Brandão Cipolla, Lenita Ananias do Nascimento, Antônio de Oliveira Sette-Câmara. São Paulo: Martins Fontes, 2010. p.56)	
"Dentro dos sistemas jurídicos contemporâneos, particularmente nos países desenvolvidos, o costume é relativamente pouco ágil e sem importância; com frequência, seu valor é	**Remarks on the particularly relevant role played by customary law in international law.**

puramente nostálgico. No direito internacional, por outro lado, o costume é uma fonte dinâmica do direito. Isso se deve à natureza do sistema internacional, ao qual faltam órgãos centralizados de governo" (SHAW, Malcolm N. Direito Internacional. Tradução de Marcelo Brandão Cipolla, Lenita Ananias do Nascimento, Antônio de Oliveira Sette Câmara. São Paulo: Martins Fontes, 2010. p.58) Em sede de direito internacional, podem se "detectar dois elementos básicos na constituição de um costume. O primeiro são os fatos materiais, ou seja, o comportamento propriamente dito dos Estados; o segundo é a crença psicológica ou subjetiva de que tal comportamento é "segundo a lei". Como observou a Corte Internacional no caso Líbia/Malta, a substância do direito costumeiro deve ser "procurada em primeiro lugar na prática efetiva e na opinio juris dos Estados"	
Na Resolução da ONU nº 95, de 1946, a Assembleia Geral acolheu integralmente os princípios de direito internacional reconhecidos pelo Estatuto do Tribunal de Nuremberg e as sentenças do referido Tribunal. Relembre-se que aquele Tribunal havia procedido à definição de crimes contra a humanidade, bem como	**Non-applicability of statutes of limitation regarding crimes against humanity as a general principle of international law - international customary law.**

reconhecido a sua imprescritibilidade. Posteriormente, a imprescritibilidade dos crimes contra a humanidade foi expressamente tratada na Resolução da ONU nº 3074, de 3 de dezembro de 1973, nos seguintes termos: “1. Os crimes de guerra e os crimes de lesa-humanidade, onde for ou qualquer que seja a data em que tenham sido cometidos, serão objeto de uma investigação, e as pessoas contra as que existam provas de culpabilidade na execução de tais crimes serão procuradas, detidas, processadas e, em caso de serem consideradas culpadas, castigadas. (...) 8. Os Estados não adotarão disposições legislativas nem tomarão medidas de outra espécie que possam menosprezar as obrigações internacionais que tenham acordado no tocante à identificação, à prisão, à extradição e ao castigo dos culpáveis de crimes de guerra ou de crimes contra a humanidade”7 8 A força deste princípio, absorvido como verdadeiro costume internacional, permitiu fosse inserido em novos instrumentos internacionais, sendo de destacar-se sua previsão no Estatuto de Roma, que trata do Tribunal Penal	

Internacional.	
O reconhecimento da imprescritibilidade de crimes de lesa-humanidade como um princípio geral de direito internacional, incorporado aos costumes internacionais, foi explicitamente realizado pela Corte Interamericana de Direitos, no "Caso Almonacid Arellano": "El Estado no podrá argüir ninguna ley ni disposición de derecho interno para eximirse de la orden de la Corte de investigar y sancionar penalmente a los responsables de la muerte del Sr. Almonacid Arellano. Chile no podrá volver a aplicar el Decreto Ley n. 2.191, por todas las consideraciones dadas en la presente Sentencia, puesto que el Estado está en la obligación de dejar sin efecto el citado Decreto Ley (supra, párr. 144). Pero además, el Estado no podrá argumentar prescripción, irretroactividad de la ley penal, ni el principio non bis in idem, así como cualquier excluyente similar de responsabilidad, para excusarse de su deber de investigar y sancionar a los responsables" (párr. 150)." (Voto razonado del Juez A.A. Cançado Trindade)	**Non-applicability of statutes of limitation regarding crimes against humanity as a general principle of international law in the jurisprudence of the Inter-American Court of Human Rights - "Almonacid Arellano Case"**
Valho-me aqui, ainda uma vez, dos	**Non-applicability of statutes of limitation**

ensinamentos de SHAW: “No caso Barcelona Traction, a Corte Internacional declarou que existe uma diferença essencial entre as obrigações de um Estado perante a comunidade internacional como um todo e as obrigações que o vinculam a outro Estado no campo específico da proteção diplomática. Por sua própria natureza, as primeiras dizem respeito a todos os Estados, e “pode-se considerar que todos os Estados têm um interesse legal em que elas sejam protegidas; são obrigações erga omnes”. Como exemplos de obrigações desse tipo, foram mencionadas a proibição da agressão e do genocídio e a proteção contra a escravização e a discriminação racial. A elas poderíamos acrescentar a proibição da tortura. Além disso, no caso Timor Leste, a Corte Internacional insistiu em que o direito dos povos à autodeterminação “tem caráter erga omnes”, do mesmo modo, no caso Genocídio na Bósnia (objeções processuais), reiterou que “os direitos e obrigações consagrados na Convenção são direitos e obrigações erga omnes. (...) O artigo 53 da Convenção sobre o Direito dos Tratados, de 1969, prevê que um tratado será nulo se, “no momento de sua conclusão, conflitar com uma norma imperativa do direito internacional	**regarding crimes against humanity as *jus cogens*.**

geral". Esse princípio (jus cogens) também aplicar-se-ia no contexto do direito consuetudinário, de tal modo que não seria permitida a derrogação dessas normas pelo costume local ou especial." (SHAW, Malcolm N. Direito Internacional. Tradução de Marcelo Brandão Cipolla, Lenita Ananias do Nascimento, Antônio de Oliveira Sette-Câmara. São Paulo: Martins Fontes, 2010. p.97-98). Trata-se, pois, a imprescritibilidade, de verdadeiro ius cogens, a ser respeitado pelos Estados.	
Acrescento, ainda, que o Brasil, já em 1914 ratificou a Convenção Concernente às Leis e Usos da Guerra Terrestre, firmada em Haia em 1907, na qual reconhece "o caráter normativo dos princípios jus gentium preconizados pelos usos estabelecidos entre as nações civilizadas, pelas leis da humanidade e pelas exigências da consciência pública" [9]. Desde o início do sec. XX, pois, reconhece a força normativa destes princípios. Finalmente, é necessário deixar consignado que a força deste costume internacional remonta às decisões do Tribunal de Nuremberg, portanto em muito anteriores aos fatos ora em julgamento.	**Recognition of the normative force of IHRL; recognition of its enforceability on the Brazilian domestic legal order (before the facts and even before the Principles laid down by the Nuremberg Tribunal)**

Attachment 6 - Rubens Beyrodt Paiva: 0023005- 91.2014.4.025101

TRF 2

4ª VARA FEDERAL CRIMINAL DO RIO DE JANEIRO

Juiz Federal Caio Márcio Gutterres Taranto

1- INTRODUCTION OF THE DECISION:

MINISTÉRIO PÚBLICO FEDERAL oferece denúncia em desfavor de JOSÉ ANTÔNIO NOGUEIRA BELHAM, RUBENS PAIM SAMPAIO, RAYMUNDO RONALDO CAMPOS, JURANDYR OCHSENDORF E SOUZA E JACY OCHSENDORF E SOUZA pela prática, em tese, das condutas tipificadas nos artigos 121, § 2º, incisos I, III e IV, 211, 288, parágrafo único, e 347, parágrafo único, todos do Código Penal e em concurso de agentes.

2 - RATIONALE REGARDING STATUTES OF LIMITATION:

4. Da não extinção da punibilidade pela prescrição da pretensão punitiva pela qualidade de crimes contra a humanidade

A qualidade de crimes contra a humanidade do objeto da presente Ação Penal obsta a incidência do decurso do prazo prescricional como hipótese de extinção da punibilidade. O homicídio qualificado pela prática de tortura, a ocultação do cadáver (após tortura), a fraude processual para a impunidade (da prática de tortura) e a formação de quadrilha armada foram cometidos por agentes do Estado, como forma de perseguição política, no período da Ditadura Militar como atos de repressão à liberdade política da vítima.

3 - ASPECTS OF THE DECISION REGARDING INTENATIONAL LAW – IN TRANSNATIONAL PERSPECTIVE:

A Ordem Constitucional em vigor à época também contemplava a incidência da normatização dos princípios de direito internacional, razão pela qual consagrava a competência da União em celebrar tratados (artigo 8º, I, da Emenda Constitucional nº 01/69). Dessa forma, já incidia o princípio geral de direito internacional, acolhido como costume pela prática dos Estados e posteriormente por Resoluções da ONU, de que os crimes contra a humanidade são imprescritíveis. A esse fato, acrescenta-se que o Brasil, pela edição do Decreto nº 10.719 de 1914, ratificou a Convenção Concernente às Leis e Usos da Guerra Terrestre, firmada em Haia em 1907, na qual reconhece o caráter normativo dos princípios jus gentium preconizados pelos usos estabelecidos entre as nações civilizadas, pelas leis da humanidade e pelas exigências da consciência pública. Na lição de Cançado Trindade, o jus gentium possui caráter de universalidade emanado da consciência jurídica universal.	**Recognition of the normative force of the IHRL and precedence of its regarding the facts.**
O conceito de crime contra a humanidade foi previsto inicialmente no art. 6º. do Estatuto do Tribunal de Nuremberg, e depois ratificado pela Organização das	**The acts committed by agents of the dictatorship as crimes against humanity.**

Nações Unidas em dezembro de 1946. Nele estão previstas as condutas de homicídio, deportação, extermínio e outros atos desumanos cometidos “dentro de um padrão amplo e repetitivo de perseguição a determinado grupo (ou grupos) da sociedade civil, por razão política.” Nesse contexto, o sentido e conteúdo de crime contra a humanidade deve ser extraído ponderando-se o histórico de militância política da vítima, inclusive sua atuação na qualidade de Deputado cassado pelo Movimento de 1964. Como fixado pelas Nações Unidas – ao aprovar os princípios ditados pelo Tribunal de Nuremberg-, o crime de lesa-humanidade constitui qualquer ato desumano cometido contra a população civil, no bojo de uma perseguição por motivos políticos, raciais ou religiosos. Note-se que não há necessidade de consumação de um genocídio, mas apenas que determinado segmento social seja alvo de repressão específica. Narra, pois, a denúncia crimes contra a humanidade em contexto com demais fatos igualmente ilícitos, a exemplo de outros casos de tortura. Dessa forma, não se admite a prescrição da pretensão punitiva. Muito embora o Brasil não tenha ratificado a Convenção sobre Imprescritibilidade dos Crimes de Guerra	

e dos Crimes contra a Humanidade, aprovada pela Assembleia Geral da ONU em 1968, incide o verdadeiro princípio geral de direito internacional, incorporado aos costumes internacionais, que obsta a extinção da punibilidade a partir de força derrogatória do artigo 107 do Código Penal.	
O artigo 38(1) do Estatuto da Corte Internacional de Justiça é amplamente reconhecido como a formulação mais autorizada a respeito das fontes do direito internacional e expressamente contempla o costume internacional como uma prova de prática geral aceita como direito. O costume como fonte do direito internacional apto a orientar juízos de supralegalidade exige fatos materiais, ou seja, o comportamento propriamente dito dos Estados e a crença de que é segundo o ordenamento jurídico (internacional). Há, assim, a crença e a coerência com o ordenamento jurídico de que os crimes contra a humanidade aceitos pelos Estados devem ser punidos, não se submetendo a impedimentos de incidência da lei penal, a exemplo das hipóteses de extinção da punibilidade, como a prescrição.	**The role of international customary law as the source of International Law - and crimes against humanity in this context.**
Na Resolução da ONU nº 95, de 1946, a Assembleia Geral acolheu integralmente os princípios de direito internacional reconhecidos pelo Estatuto do Tribunal de Nuremberg e as sentenças do referido	**Recognition of the character of crimes against humanity in the international legal order.**

Tribunal. Relembre-se que aquele Tribunal havia procedido à definição de crimes contra a humanidade, bem como reconhecido a sua imprescritibilidade. Posteriormente, a imprescritibilidade dos crimes contra a humanidade foi expressamente tratada na Resolução da ONU nº 3074, de 3 de dezembro de 1973, nos seguintes termos: “1. Os crimes de guerra e os crimes de lesa-humanidade, onde for ou qualquer que seja a data em que tenham sido cometidos, serão objeto de uma investigação, e as pessoas contra as que existam provas de culpabilidade na execução de tais crimes serão procuradas, detidas, processadas e, em caso de serem consideradas culpadas, castigadas. (...) 8. Os Estados não adotarão disposições legislativas nem tomarão medidas de outra espécie que possam menosprezar as obrigações internacionais que tenham acordado no tocante à identificação, à prisão, à extradição e ao castigo dos culpáveis de crimes de guerra ou de crimes contra a humanidade” A força deste princípio, que se comunica como verdadeiro costume internacional, permitiu que fosse inserido em novos instrumentos internacionais, sendo de destacar-se sua previsão no Estatuto de Roma, que trata do Tribunal Penal	

Internacional.	
O pensamento doutrinário contempla que tanto os atos dos Estados quanto os das organizações internacionais são aptos para criar a repetição necessária à formação do costume como norma de direito internacional. A repetição pelos julgamentos das Cortes Internacionais insere a punição à tortura em outras fontes do direito, que se comunicam com o costume, que são os precedentes. O reconhecimento da imprescritibilidade de crimes de lesa-humanidade como um princípio geral de direito internacional, incorporado aos costumes internacionais, foi explicitamente realizado pela Corte Interamericana de Direitos, no “Caso Almonacid Arellano”: "El Estado no podrá argüir ninguna ley ni disposición de derecho interno para eximirse de la orden de la Corte de investigar y sancionar penalmente a los responsables de la muerte del Sr. Almonacid Arellano. Chile no podrá volver a aplicar el Decreto Ley n. 2.191, por todas las consideraciones dadas en la presente Sentencia, puesto que el Estado está en la obligación de dejar sin efecto el citado Decreto Ley (supra, párr. 144). Pero además, el Estado no podrá argumentar prescripción, irretroactividad de la ley penal, ni el principio non bis in idem, así como cualquier excluyente	**Restriction to obstacles to the prosecution of crimes against humanity as a general principle of international law in the Inter-American Court of Human Rights - "Almonacid Arellano Case"**

similar de responsabilidad, para excusarse de su deber de investigar y sancionar a los responsables" (párr. 150).” (Voto razonado del Juez A.A. Cançado Trindade)	
Não bastasse a natureza de costume internacional conferida à imprescritibilidade destes crimes, considero estarmos diante de verdadeiro ius cogens, que não pode ser ignorado pelos Estados. Historicamente, desde a 2ª Grande Guerra, a desconsideração de crimes contra a humanidade justificou a autorização internacional de invasão de um Estado, contemplando a força normativa do costume. E é nesse contexto que se orienta a Corte Interamericana de Direitos Humanos, cujo Estatuto remonta à 1979, anterior, portanto ao decurso de 20 anos do homicídio qualificado pela tortura objeto da presente ação penal, em como Gomes Lund vs. Brasil e Velásquez Rodíguez vs. Honduras. No mesmo sentido, em importante precedente horizontal, o Juízo da 6ª Vara Federal Criminal do Rio de Janeiro, decisão prolatada pela Eminente Magistrada Ana Paula Vieira de Carvalho, recebeu a denúncia da Ação Penal que tem por objeto o “atentado do Rio Centro” (Processo 2014.5101017766-5).	**Non-application of statutory limitations towards crimes for their character of *jus cogens*.**

4.1 da não extinção da punibilidade pela prescrição da pretensão punitiva do homicídio qualificado por tortura por força da convenção interamericana contra a tortura

Tendo-se em vista a primeira conclusão de não incidência de anistia para os crimes imputados em desfavor dos denunciados nessa ação penal, conclui-se que não está extinta a punibilidade pela prescrição da pretensão punitiva da imputação de homicídio qualifica pela tortura, mesmo se desconsiderasse a qualidade de crime contra a humanidade. Ora, na medida em que o fato aconteceu entre os dias 20/21 de janeiro de 1971, em 05/10/1988, não havia decorrido o prazo de 20 anos necessários para a extinção da punibilidade (artigo 109, I, do Código Penal).

A Carta de 1988 consagrou que os direitos e garantias nela expressos não excluem outros decorrentes do regime de tratados internacionais em que a República Federativa seja parte (artigo 5º, § 2º). Esse dispositivo superou a disposição normativa do artigo 153, § 36, da Ordem Constitucional anterior, de alcance mais restrito. Por outro lado, a Constituição atribui reprovabilidade à tortura, em especial por consagrá-la como inafiançável e insuscetível de graça ou anistia (art. 5º, inciso XLIII). Há, pois, o direito fundamental na punibilidade dessa prática, sobretudo quando a disposição normativa do inciso XLIII é compreendida perante o inciso XLI do artigo 5º, ao estabelecer que "a lei punirá qualquer discriminação atentatória dos direitos e liberdades fundamentais".	**Imperativeness of the effective compliance of human rights instruments by Brazil - especially regarding torture.** **Express provision in 1998 Constitution about the condemnation of the conduct now imputed to the accused.**

O Decreto nº 98.386/89, publicado no Diário Oficial em 13/11/1989, promulga a Convenção Interamericana para Prevenir e Punir a Tortura. Esse Tratado Internacional contempla que os Estados Partes, no caso a República Federativa do Brasil, "tomarão medidas efetivas a fim de prevenir e punir a tortura no âmbito de sua jurisdição." Dessa forma, além da impossibilidade de graça e anistia, foram derrogadas para os tipos penais que punem a tortura, a exemplo do artigo 121, §2º, inciso III, do Código Penal, todas as demais hipóteses de extinção de punibilidade a exemplo do indulto, da abolitio criminis e da prescrição. Ora, quando em vigor a Convenção Interamericana para Prevenir e Punir a Tortura, ainda não havia ocorrido extinção da punibilidade pela prescrição da pretensão punitiva do homicídio objeto da presente ação penal. A partir de então, tornou-se imprescritível. A Convenção Interamericana da Tortura atua em um plano de supralegalidade perante o direito interno, obrigando-o a previsão de punição da tortura, a instrumentalização de meios estatais para tanto e impedindo medidas despenalizadoras ou extintivas de punibilidade. Por outro lado, a impossibilidade de direitos absolutos permite a construção da imprescritibilidade perante o homicídio	**Non-extinction of the punitive pretension due to the provisions of the Inter-American Convention to Prevent and Punish Torture.**

qualificado por tortura praticado em 1971. O compromisso firmado pela punição da prática de tortura (o que inclui o homicídio qualificado por tortura) a partir da internalização da Convenção Interamericana da Tortura amplia o rol de direitos fundamentais, razão pela qual se aplica à hipótese do homicídio praticado mediante tortura em 1971 e ainda não prescrito quando da internalização. Trata-se de efeito da amplitude do âmbito de proteção da punição da tortura pelo tratado internacional ao colidir com demais direitos fundamentais. A supralegalidade possui é acolhida pela Jurisprudência do Supremo Tribunal Federal, a exemplo das decisões prolatadas no HC 87585 e no RE 466.343. No presente caso, é necessário distinguishing perante a ADPF 153, que apreciou questões do movimento de 1964 apenas “em tese” e não constituiu seu objeto a prescrição do delito de homicídio de Rubens Paiva perante a Convenção Interamericana.	

TRF 2 2ª TURMA ESPECIALIZADA HABEAS CORPUS RELATOR Desembargador Federal Messod Azulay Neto

1- INTRODUCTION OF THE DECISION:

"HABEAS CORPUS - TRANCAMENTO AÇÃO PENAL - HOMICÍDIO - OCULTAÇÃO DE CADÁVER – FRAUDE PROCESSUAL - QUADRILHA ARMADA - SUJEITO ATIVO MILITAR -COMPETÊNCIA DA JUSTIÇA FEDERAL - ART. 109 DA CF/88 ART. 82 DO CÓDIGO DE PROCESSO PENAL MILITAR - ANISTIA - PRESCRIÇÃO - INOCORRÊNCIA – CRIMES PERMANENTES - CRIMES CONTRA A HUMANIDADE.

I - Hipótese em que a denúncia narra conjunto de fatos que compreendem sequestro, tortura, morte e ocultação de cadáver do Deputado Federal RUBENS BEYRODT PAIVA, praticado por militares em 1971, com o intuito de reprimir opositores ao regime então em vigor;"

2 - ASPECTS OF THE DECISION REGARDING INTENATIONAL LAW – IN TRANSNATIONAL PERSPECTIVE:

Anistia e prescrição - ausência de extinção da punibilidade

Ressalta-se, preliminarmente, quanto ao caráter permanente de crimes correspondentes ao desaparecimento, a referência efetivada à Extradição nº 1.299. "Ocorre, ainda, que não só em relação aos crimes permanentes deve ser afastada a prescrição":

Tais crimes, evidentemente, se enquadram na descrição de crimes contra a	**Recognition of the normative force of the IHRL and precedence of its**

humanidade e o dever do Brasil de processar e punir seus agentes deriva do caráter cogente do Direito Internacional ao qual o Brasil se encontrava sujeito desde a época dos fatos, eis que a ordem constitucional então vigente já contemplava a possibilidade de o Brasil celebrar tratados e convenções em suas relações com Estados estrangeiros (art.8º, I da EC/69).	**application in relation to the facts – even in the previous constitutional order.**
Tais delitos foram praticados por agentes do Estado como forma de repressão política, caracterizando verdadeiro extermínio a seus opositores, impondo-lhes graves violações ao direito de integridade física e de personalidade, tendo em vista a manutenção no cárcere e os desaparecimentos.	**Permanent character of crimes corresponding to the disappearance - the acts committed by agents of the dictatorship as crimes against humanity.**
Descritos inicialmente pelo Tribunal de Nuremberg, Tribunal Militar Internacional formado ao término da 2ª Guerra Mundial Posteriormente, o Estatuto de Roma, inserido no ordenamento jurídico pátrio pelo Decreto 4.388/2002.	**Non-applicability of statutes of limitation regarding crimes against humanity as *jus cogens*.**
"VII - ""As disposições da Lei de Anistia Brasileira que impedem a investigação e sanção de graves violações de direitos humanos são incompatíveis com a Convenção Americana, carecem de efeitos jurídicos e não podem seguir representando um obstáculo para a investigação dos fatos do presente caso, nem para a identificação e punição dos	**Judgment issued by the Inter-American Court in the "Gomes Lund et al. (Guerrilla of Araguaia) vs. Brazil" case - impossibility of applying the Amnesty Law.**

responsáveis, e tampouco podem ter igual ou semelhante impacto a respeito de outros casos de graves violações de direitos humanos consagrados na Convenção Americana, ocorridos no Brasil!. (Trecho de sentença proferida pela Corte IDH no caso Gomes Lund e Outros vs. Brasil - 24 de novembro de 2010)"	
Parte integrante do Sistema Interamericano de Proteção aos Diretos Humanos, que teve sua origem a partir da Declaração dos Direitos e Deveres do Homem, em 1948, a Corte Internacional de Direitos Humanos foi criada pela Convenção Americana de Direitos Humanos da qual o Brasil é signatário desde 1992 (Pacto de San José da Costa Rica, promulgado pelo Decreto 678/92), e teve reconhecida sua competência contenciosa pelo Brasil em 10 de dezembro de 1998, indicando que o Tribunal teria competência para fatos posteriores a esse reconhecimento.	**Obligation to comply with the IACtHR's decision**
A este respeito, releva notar que enquanto a Lei 6.683/79 dispõe que a anistia é concedida a todos que cometeram crimes políticos ou conexos com estes, considerando conexos os crimes de qualquer natureza relacionados com crimes políticos ou praticados por motivação política, a EC 26/85, ao convocar a Assembleia Nacional	**Interpretation about the Amnesty Law in the Brazilian transitional context.**

Constituinte e integrar a anistia à nova ordem constitucional, excluiu a expressão "de qualquer natureza" referente aos crimes conexos aos crimes políticos anistiados, em clara referência ao fato de que os crimes comuns se encontravam excluídos da anistia. Mesmo a anistia prevista no art. 8º do ADCT, não alcança a legislação ordinária, consoante consagrado na Súmula 674 do STF. "A anistia prevista no art. 8º do Ato das Disposições Constitucionais Transitórias não alcança os militares expulsos com base em legislação disciplinar ordinária, ainda que em razão de atos praticados por motivação política." É evidente, portanto, que a anistia contemplou somente os crimes praticados com fundamento em atos de exceção (Atos Institucionais e complementares) e não aqueles regrados pela legislação comum. Outra evidência do alcance restrito da anistia prevista na Lei 6.683/79 é a disposição contida no § 2º de seu art. 1º, que afirma excetuarem-se dos benefícios da anistia "os que foram condenados pela prática de crimes de terrorismo, assalto, sequestro e atentado pessoal". Excetuaram-se da anistia, portanto, os militantes que se insurgiram contra o governo militar "pegando em armas", em	

clara demonstração de que a anistia não foi tão ampla quanto se pretendia. Ora, se a Lei de Anistia não alcançou os militantes armados não pode ser interpretada favoravelmente aqueles que sequestraram, torturaram, mataram e ocultaram corpos pelo simples fato de terem agido em nome da manutenção do regime.	

Attachment 7 - Comparative Table

		Attachment 1 - Rosa e outros	Attachment 2 - Divino de Souza	Attachment 3 - Edgar de Aquino	Attachment 4 - Hirohaki Torigoe	Attachment 5 - Riocentro	Attachment 6 - Rubens Paiva	Attachment 6 - Rubens Paiva (2ª Instância)
International Law / International Human Rights Law	**The development of International Law / International Human Rights Law and its enforceability**				Pós-Segunda Guerra Mundial. Declaração Universal dos Direitos do Homem de 1948. Convenção Europeia dos Direitos do Homem. Convenção Americana sobre Direitos Humanos. Ratificação da convenção pelo Brasil - 1992. As transformações observadas no Direito Constitucional de diversos países, com a explicitação dos direitos fundamentais e a propagação do controle de constitucionalidade das leis.	Acrescento, ainda, que o Brasil, já em 1914 ratificou a Convenção Concernente às Leis e Usos da Guerra Terrestre, Haia em 1907 - "o caráter normativo dos princípios jus gentium preconizados pelos usos estabelecidos entre as nações civilizadas, pelas leis da humanidade e pelas exigências da consciência pública" - Desde o início do sec. XX, pois, reconhece a força normativa destes princípios. A força deste costume internacional remonta às decisões do Tribunal de Nuremberg, muito anteriores aos fatos em julgamento.	A Ordem Constitucional em vigor à época também contemplava a incidência da normatização dos princípios de direito internacional, razão pela qual consagrava a competência da União em celebrar tratados (artigo 8º, I, da Emenda Constitucional nº 01/69). A esse fato, acrescenta-se que o Brasil, pela edição do Decreto nº 10.719 de 1914, ratificou a Convenção Concernente às Leis e Usos da Guerra Terrestre, firmada em Haia em 1907.	Tais crimes, evidentemente, se enquadram na descrição de crimes contra a humanidade e o dever do Brasil de processar e punir seus agentes deriva do caráter cogente do Direito Internacional ao qual o Brasil se encontrava sujeito desde a época dos fatos, eis que a ordem constitucional então vigente já contemplava a possibilidade de o Brasil celebrar tratados e convenções em suas relações com Estados estrangeiros (art.8º, I da EC/69).
	Non- application of statutory limitations to Crimes against humanity (IL/IHRL)			o Direito Internacional e o dever geral de garantia impõem a obrigação de investigar o caso ex officio, sem dilação, e de maneira séria, imparcial e efetiva. A definição operacional do fenômeno elaborada pelo Grupo de Trabalho sobre Desaparecimentos Forçados e Involuntários de Pessoas das Nações Unidas desde 1980.		Embora o Brasil não tenha ratificado a Convenção sobre Imprescritibilidade dos Crimes de Guerra e dos Crimes contra a Humanidade, de 1968 - por estar no auge da ditadura militar nesta época -, entende-se princípio geral de direito internacional, incorporado aos costumes internacionais - o papel dos costumes internacionais como fonte do Direito Internacional como fonte de DI. Específica importância dos costumes no Direito Internacional - ressaltada com Shaw, M. (ii) segundo princípio geral de direito internacional, acolhido como costume pela prática dos Estados e posteriormente por Resoluções da ONU, os crimes contra a humanidade são imprescritíveis.	O artigo 38(1) do Estatuto da Corte Internacional de Justiça expressamente contempla o costume internacional como prática geral aceita como direito - os crimes contra a humanidade praticados pelos Estados devem ser punidos. Na Resolução da ONU nº 95, de 1946, a Assembleia Geral acolheu os princípios reconhecidos pelo Estatuto do Tribunal de Nuremberg. Posteriormente, a imprescritibilidade dos crimes contra a humanidade foi expressamente tratada na Resolução da ONU nº 3074, de 3 de dezembro de 1973	
	Crimes against humanity as *jus cogens*.			A prática de desaparecimentos forçados implica um crasso abandono dos princípios essenciais em que se fundamenta o Sistema Interamericano de Direitos Humanos e sua proibição alcançou o caráter de jus cogens.		Historicamente, desde a 2ª Grande Guerra, a desconsideração de crimes contra a humanidade. Resolução da ONU nº 3074, de 3 de dezembro de 1973. A força deste princípio, absorvido como verdadeiro costume internacional, permitiu fosse inserido em novos instrumentos internacionais: Estatuto de Roma - TPI. "Esse princípio (jus cogens) também aplicar-se-ia no contexto do direito consuetudinário, de tal modo que não seria permitida a derrogação dessas normas pelo costume local ou especial." Aplicação erga omnes.	Historicamente, desde a 2ª Grande Guerra, a desconsideração de crimes contra a humanidade. Corte Interamericana de Direitos Humanos. **Precedente horizontal - Caso Riocentro.**	Descritos inicialmente pelo Tribunal de Nuremberg, Tribunal Militar Internacional formado ao término da 2ª Guerra Mundial Posteriormente, o Estatuto de Roma, inserido no ordenamento jurídico pátrio pelo Decreto 4.388/2002.
Inter American System of Protection of Human Rights	**Inter American System of Human Rights (Norms and Court's Jurisprudence)**			A caracterização pluriofensiva, quanto aos direitos afetados, e continuada ou permanente do desaparecimento forçado se desprende da jurisprudência deste Tribunal, de maneira constante, desde seu primeiro caso contencioso há mais de vinte anos. Normativação na Convenção Interamericana sobre Desaparecimento Forçado de Pessoas. CIDH precedentes desaparecimento forçado: casos Blake vs Guatemala, Radilla Pacheco vs México, Ibsen Cardinos vs Bolívia e Velásquez Rodrigues vs Honduras.	obrigatoriedade de observância pelo Brasil ocorre tanto diante da coisa julgada quanto da "coisa interpretada", ou seja, o país deve aplicar o entendimento consagrado pela Corte a outros casos que envolvam a mesma matéria. Ocultação de cadáver ainda em curso que se mostra equivalente ao conceito de desaparecimento forçado utilizado pela Corte.	"El Estado no podrá argüir ninguna ley ni disposición de derecho interno para eximirse de la orden de la Corte de investigar y sancionar penalmente a los responsables (no poderá ...) aplicar el Decreto Ley n. 2.191. (...) No podrá argumentar prescripción, irretroactividad de la ley penal, ni el principio non bis in idem, así como cualquier excluyente similar de responsabilidad."	E é nesse contexto que se orienta a Corte Interamericana de Direitos Humanos em Gomes Lund vs. Brasil e Velásquez Rodíguez vs. Honduras. Vedação a óbices à persecução penal de crimes de lesa-humanidade como um princípio geral de direito internacional na Corte Interamericana de Direitos - "Caso Almonacid Arellano".	Parte integrante do Sistema Interamericano de Proteção aos Diretos Humanos, que teve sua origem a partir da Declaração dos Direitos e Deveres do Homem, em 1948, a Corte Internacional de Direitos Humanos foi criada pela Convenção Americana de Direitos Humanos da qual o Brasil é signatário desde 1992 (Pacto de San José da Costa Rica, promulgado pelo Decreto 678/92), e teve reconhecida sua competência contenciosa pelo Brasil em 10 de dezembro de 1998, indicando que o Tribunal teria competência para fatos posteriores a esse reconhecimento.
	Interamerican Court and the Gomes Lund precedent (Guerrilha do Araguaia vs. Brasil)			Destaco, ainda, que o Brasil ratificou o Pacto de São Jose da Costa Rica, que ingressou no ordenamento jurídico por força do Decreto n.º 678/92. E o Brasil, desde a edição do Decreto n.º 4.463/02, jurisdição obrigatória da Corte Interamericana de Direitos Humanos (CIDH), interpreta e aplica o citado Pacto da São José da Costa Rica. Embora não diga respeito diretamente ao caso em questão, após o julgamento da ADPF n.º 153 pelo STF em 04/11/2010, a CIDH considerou culpado o Estado Brasileiro pelas mortes e desaparecimentos de militante políticos na chamada "Guerrilha do Araguaia".	"este Tribunal dispõe que o Estado deve conduzir eficazmente a investigação penal dos fatos do presente caso, a fim de esclarecê-los, determinar as correspondentes responsabilidades penais e aplicar efetivamente as sanções e consequências que a lei disponha." Isso porque cabe precipuamente à Corte Interamericana o chamado "controle de convencionalidade" das leis e atos normativos que se mostrem incompatíveis com a Convenção Americana - HC 90172/SP, que culminou na Súmula Vinculante nº 25	Âmbito internacional: a natureza permanente desse delito está igualmente reconhecida na decisão Gomes Lund da Corte Interamericana de Direitos Humanos.	E é nesse contexto que se orienta a Corte Interamericana de Direitos Humanos, cujo Estatuto remonta à 1979, anterior, portanto ao decurso de 20 anos do homicídio qualificado pela tortura objeto da presente ação penal, em como Gomes Lund vs. Brasil.	VII - "As disposições da Lei de Anistia Brasileira que impedem a investigação e sanção de graves violações de direitos humanos são incompatíveis com a Convenção Americana, carecem de efeitos jurídicos e não podem seguir representando um obstáculo para a investigação dos fatos do presente caso, nem para a identificação e punição dos responsáveis, e tampouco podem ter igual ou semelhante impacto a respeito de outros casos de graves violações de direitos humanos consagrados na Convenção Americana, ocorridos no Brasil!. (Trecho de sentença proferida pela Corte IDH no caso Gomes Lund e Outros vs. Brasil - 24 de novembro de 2010)
Brazilian context and domestic legal order	**Norms and Precedents regarding IHRL**	Extradição 974-0 Extradição 1.150	Extradição 974-0 Extradição 1.150	Extradição 974-0 Extradição 1.150	"Supremo Tribunal Federal reconhece aos tratados sobre direitos humanos, mesmo àqueles previstos no art. 5º, §2º, da Constituição, hierarquia supralegal"	CF/88 - não exclusão de direitos decorrentes do regime de tratados internacionais em que a República Federativa seja parte (artigo 5º, § 2º). (Especialmente art. 5º, inciso XLIII). CF/88 - O Decreto nº 98.386/89, publicado no Diário Oficial em 13/11/1989, promulga a Convenção Interamericana para Prevenir e Punir a Tortura. Âmbito doméstico: HC 76678 - STF(Rel. Maurício Corrêa,1998).	Extradição nº 1.299 (Ocorre, ainda, que não só em relação ao crimes permanentes deve ser afastada a prescrição.)	Extradição nº 1.299 (Ocorre, ainda, que não só em relação ao crimes permanentes deve ser afastada a prescrição.)
	Transitional Justice and the Amnesty Law				Observância necessária - equivalência do tipo penal com o crime contra a humanidade de forma que: "Restam afastadas, assim, de acordo com o entendimento da Corte Interamericana, tanto a prescrição do delito quanto a eventual aplicação ao caso da Lei de Anistia."	(i) os crimes de tortura, homicídio e desaparecimento de pessoas, cometidos por agentes do Estado, como forma de perseguição política, no período da ditadura militar brasileira configuram crimes contra a humanidade;	A motivação política, por si só, não determina a incidência da anistia perante a Lei nº 6.683/79, a Emenda Constitucional nº 26/85 e o artigo 8º do ADCT. Por outro lado, a anistia, na qualidade de hipótese de extinção da punibilidade, deve ser interpretada restritivamente, até pela excepcionalidade que representa, sobretudo quando colide com a proteção de direitos fundamentais protegidos à égide da ordem constitucional anterior. Dessa forma, em relação aos fatos narrados na denúncia, não há o que se falar em extinção de punibilidade pela anistia.	A Lei 6.683/79: anistia é concedida a todos que cometeram crimes políticos ou conexos com estes. EC 26/85 excluiu a expressão "de qualquer natureza", em clara referência ao fato de que os crimes comuns se encontravam excluídos da anistia. Art. 8º do ADCT, não alcança a legislação ordinária - Súmula 674 do STF. Anistia contemplou somente os crimes praticados com fundamento em atos de exceção e não aqueles regrados pela legislação comum. § 2º de seu art. 1º - Lei 6.683/79: Excetuaram-se da anistia os militantes que se insurgiram contra o governo militar. **Ora, se a Lei de Anistia não alcançou os militantes armados não pode ser interpretada favoravelmente aqueles que sequestraram, torturaram, mataram e ocultaram corpos pelo simples fato de terem agido em nome da manutenção do regime.**
	Brazilian Dictatorship					Passados 50 anos do golpe militar de 1964, já não se ignora mais que a prática de tortura e homicídios contra dissidentes políticos naquele período fazia parte de uma política de Estado, conhecida, desejada e coordenada pela mais alta cúpula governamental.	Nesse contexto, o sentido e conteúdo de crime contra a humanidade deve ser extraído ponderando-se o histórico de militância política da vítima, inclusive sua atuação na qualidade de Deputado cassado pelo Movimento de 1964.	Tais delitos foram praticados por agentes do Estado como forma de repressão política, caracterizando verdadeiro extermínio a seus opositores, impondo-lhes graves violações ao direito de integridade física e de personalidade, tendo em vista a manutenção no cárcere e os desaparecimentos.