TRANSITIONAL JUSTICE
RIGHT TO JUSTICE, MEMORY AND TRUTH

REALIZATION

Federal University of Paraíba

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TRANSITIONAL JUSTICE

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SUMMARY

PART II - REPARATION, MEMORY AND TRUTH

RIGHT TO JUSTICE: the question of civilians who acted in the Brazilian dictatorship

Eneá de Stutz e Almeida - UnB

1 INTRODUCTION

It is important to clarify the methodological premises of the construction of the hypothesis of the possibility of immediate prosecution of non-public agents in the Brazilian case. The first premise is that transitional justice is based on four pillars or dimensions: memory and truth; reparation; reform of institutions; and justice. By justice, we mean the need to prosecute the perpetrators of human rights violations.

It is precisely on this dimension that this article focuses. In order to have an effective Transitional Justice, it is necessary that all dimensions are contemplated. Thus, regarding the dimension of memory and truth, an important recent step was the implementation and effective operation of the National Truth Commission, inspiring the creation of several localized and sectored Truth Commissions, in order to investigate and record the facts that occurred during the period of exception.

As for the dimension of reparation, this is perhaps the most advanced in Brazil, since it has already been demonstrated (PIRES JR, 2010) that the structuring axis of amnesty in Brazil is precisely reparation. As for the dimension of institutional reform, at least one important reform should be mentioned, a normative reform, which is the 1988 Constitution itself. The justice dimension is therefore the one that has received the least attention to date. And like the others, it is of the utmost importance, since without it, there is a feeling of impunity, with disastrous consequences.

When the possibility of prosecuting human rights violators is mentioned, considerations about the criminal prosecution of the public officials involved and the impediment to such a claim arising from the Supreme Court's decision in ADPF 153 soon arise. This text does not intend to discuss this possibility, nor the decision of the STF. This is because the second premise is that the dictatorship installed in Brazil after the coup of 1964 was a civil-military dictatorship and thus perpetuated itself, i.e., what is being discussed here is the possibility of prosecution of those who were not public agents,

but who also participated, directly or indirectly, in human rights violations, such as kidnappings, torture, forced disappearances and murders. As for these, non-public agents, there is no obstacle from the decision of the STF in ADPF 153, since there is only reference to public agents.

The third premise is that the legal basis for any debate concerning Transitional Justice is composed of Brazilian legislation from the 1988 Constitution, Law 6683/79, by force of decision of the STF, international treaties concerning human rights to which Brazil has subscribed, and the decisions of the International Courts on the subject of human rights, to which Brazil is bound.

It is important to include international treaties, since the Constitution itself recognizes the constitutional nature of human rights treaties in Article 5, §§ 2 and 3. Equally important are the decisions of international courts, in particular the Inter-American Court of Human Rights.

From the characterization of what is a crime against humanity, the hypothesis of this text is that civilians who participated, directly or indirectly, in human rights violations must be prosecuted and punished, because together with the Brazilian State they are responsible. In the evaluation of state responsibility, it is evident that for this prosecution there is no need to first sue the state, since we are not dealing with public agents. For the same reason, there is no need to oppose the decision of the Ação de Descumprimento de Preceito Fundamental (ADPF) 153, which referred only to public agents.

The conclusion is that the right to justice, as one of the pillars of transitional justice, can begin immediately with civilians, not public agents, who enabled, funded and profited from the human rights violations perpetrated during the Estado de Exceção in Brazil.

2 ON THE CHARACTERIZATION OF CRIMES AGAINST HUMANITY

After the Second World War and the policy of extermination of population groups by the Nazi regime, the need arose to prosecute perpetrators of crimes against humanity. The main idea was that it is necessary to prosecute and punish perpetrators of crimes against humanity so that such acts are not repeated. It is an indispensable measure in the policy of prevention against such practices. Thus, the first formalization of the crimes against

to humanity was in the Statute of the Nuremberg Tribunal, in article 6, c. It was not considered at the time that the institution of the criminal type would have retroactive application, since the concept was already established in international law, and what occurred at that time was only the written formalization.

Inhumane acts committed against the civilian population, persecution for political reasons, murder, extermination and deportation, among others, were qualified as crimes of this nature: Article 6- The Tribunal established by the agreement alluded to in art. 1 of the present for the prosecution and conviction of the main Axis war criminals shall be legitimized to try and convict those persons who, acting in defense of the interests of the Axis countries, have committed the offenses listed below, individually or as members of organizations:

> **Crimes against humanity:** To wit, murder, extermination, enslavement, deportation and other inhumane acts committed against the civilian population before or during war, persecution on political, racial or religious grounds in the execution of those crimes which are within the jurisdiction of the Court or related to them, whether or not they constitute a violation of the domestic legislation of the country where they were perpetrated. [1]

In this sense, any serious crime against human rights can be recognized as a violation of humanity if it is committed within a pattern of persecution of a particular group in civil society for any reason (political, religious, racial or ethnic). The Inter-American Court of Human Rights has stated that crimes against humanity are characterized by the practice of inhumane acts such as homicide, torture, summary, extra-legal or arbitrary executions and forced disappearances, committed in the context of a generalized and systematic attack against a civilian population, in time of war or peace. [2]

1 Free translation of the text. Available at: <http://untreaty.un.org/ilc/texts/instruments/ english/commentaries/7_1_1950.pdf>. Accessed on: 16 jan. 2013.

2 Free translation of part of the sentence issued in the Case "Almonacid Arellano y otros *Vs*. "Excepciones Preliminares, Fondo Reparaciones y Costas. Judgment of September 26, 2006. Series C, No. 154. Paragraphs 95 and 96: "95. El asesinato como crimen de lesa humanidad fue codiicado por primera vez en el artículo 6.c del Estatuto del Tribunal Militar Internacional de Nuremberg, el cual fue anexado al Acuerdo para el establecimiento de un Tribunal Militar Internacional encargado del juicio y castigo de

In the case of Brazil, during the civil-military dictatorship, the thousands of reports of political persecution include all the crimes described. Thus, it was enough that any person who manifested himself in a manner divergent from the oicial ideology to be the target of political persecution, as a "public policy" in the validity of the doctrine of national security. The practices of torture, summary execution, kidnappings, arbitrary arrests and other inhumane acts, which, it should be emphasized, were totally illegal even during the State of Exception, transforms the direct and indirect agents of these same acts into criminals of lesa-humanity.

At no time were such inhumane acts authorized by Brazilian legislation. Even if they were, they would be classified as crimes against humanity, because such legislation could not have its validity recognized, in view of the world consensus on the need to prevent persecution of population groups, as seen since the mid-twentieth century from the experience of Nazism. See that the Nuremberg Statute refers to the practice of acts that "may or may not constitute a violation of the country's internal legislation" (emphasis added). In the Brazilian case there is not even this type of excuse, since there was no legislation that

los principales criminales de guerra del Eje Europeo, irmado en Londres el 8 de agosto de 1945 (el "Acuerdo de Londres"). Poco después, el 20 de diciembre de 1945, la Ley del Consejo de Control No. 10 también consagró al asesinato como un crimen de lesa humanidad en su artículo II.c. De forma similar, el delito de asesinato fue codiicado en el artículo 5.c del Estatuto del Tribunal Militar Internacional para el juzgamiento de los principales criminales de guerra del Lejano Oriente (Estatuto de Tokyo), adoptada el 19 de enero de 1946.

96. La Corte, además, reconoce que la Estatuto de Nuremberg jugó un papel signiicativo en el establecimiento de los elementos que caracterizan a un crimen como de lesa humanidad. This Statute provided the first articulation of the elements of this offence, which were basically maintained in their initial conception at the time of the death of Mr Almonacid Arellano, with the exception that crimes against humanity can be committed in times of peace as well as in times of war. Based on this, the Court recognizes that crimes against humanity include the commission of inhumane acts, such as murder, committed in the context of a generalized or systematic attack against a civilian population. It is sufficient for a single unlawful act such as those mentioned above to be committed within the context described for a crime against humanity to occur. En este sentido se pronunció el Tribunal Internacional para la ex Yugoslavia en el caso Prosecutor v. Dusko Tadic, al considerar que "un solo acto cometido por un perpetrator en el contexto de un ataque generalizado o sistemático contra la población civil trae consigo responsabilidad penal individual, y el perpetrator no necesita cometerosos ofensas para ser considerado responsable". Available at: <http://www.corteidh.or.cr/docs/casos/ articulos/seriec_154_esp.doc>. Accessed on:

16 Jan. 2013.

authorize the torture, or kidnapping, or murder, or enforced disappearance of any citizen.

The crimes committed during the State of Exception in Brazil are, therefore, crimes against humanity and should be considered as such. With all the Brazilian and international legislative and jurisprudential reference, precisely because they are crimes against humanity, they receive the protection of international law.

3 THE PARTICIPATION OF CIVILIANS IN THE CRIMES OF THE CIVIL-MILITARY DICTATORSHIP

Very little is known so far about civilian participation in the Brazilian State of Exception. It is known, however, that there was intense civilian participation throughout the period of repression, not only in the three branches of government, but also in so-called civil society, especially in business sectors. Thus it is that recently the so far called "military dictatorship" gained a new adjective to be called "civil-military dictatorship".

With the installation of the National Truth Commission and a series of national debates around the period of Exception in Brazil provoked by different instruments, such as documentaries, films and texts, some specific information began to emerge. Thus it is that the documentary *Cidadão Boilesen* relates the fundamental participation of a civilian, the businessman Henning Albert Boilesen, in the creation of the Bandeirantes Operation (OBAN), as well as in its operation. OBAN was one of the torture centers in São Paulo (SP), and many times Boilesen was present and active, according to the testimony of public agents who worked there, other businessmen and people tortured there.

The documentary also describes the collection of funds among the São Paulo business sector to finance repression and torture, as well as the use of vehicles from different companies in the kidnapping and murder of citizens opposing the regime. It is noteworthy that after the release of the documentary, there was no denial on the part of the businessmen and/or companies mentioned.

With the same concern, Daniel Aarão Reis (2012) calls attention to the need for greater research into the complex and intimate relationship between civilians and the military in the period:

- It would also be interesting to research the large state and private companies, ministries, advisory committees and councils, graduate courses, universities, scientific and literary academies, the media, the

diplomacy, the courts. Eminent personalities and men of good were there collaborating, some would even be tempted to say that they were above good and evil.

- The civilian leaderships and entities that supported the dictatorship are interested in the current memory. If it was "only" military, they all move into the oppositions' camp. Since always. The civilians who benefited from the dictatorial regime disappear. Those who financed the repressive machine. Those who celebrated the acts of exception. The same can be said of the social segments that, at some point, supported the dictatorship.

A research presented during the IV Symposium Social Struggles in Latin America, September 2010, at the State University of Londrina, states that the civil elites were far from being subordinated to the military:

- It is worth noting that, although these were authoritarian governments, the relations between them and their civilian allies almost always had a much more interdependent than subordinate character. Even in the bloodiest phases of repression, the Brazilian military always claimed a supposed democratization of the country. On one hand, this reflected the influence and dependence on the United States and other capitalist countries. On the other, it meant a deep political instability resulting not only from opposition pressures, but also from the tense negotiations between the various military segments in the presidential successions.

This is a crucial point to explain the relationship between Brazilian civilians and military during the dictatorship. Unable to find the exact point of inlexion between practiced authoritarianism and aspired liberalism, the main support of this autocracy was the articulation with organized civilian political groups in the states of the federation. These lent their political prestige and skills to the military in exchange for resources, positions and other facilities. Therefore, from this perception, we can contest the idea of civilian elites completely subordinated to the military, whether through tutelage, repression or ideological imposition. Evidently, the level of this interdependence varied over the two decades according to the political conjuncture and the resources available. However, they cannot be characterized only as subordinate in one case or another. The Judiciary also had intense participation in the repression. As can be seen from a comparison of the Portuguese Salazar period with Brazilian repression (PEREIRA, 2010, p. 268):

> Salazar's authoritarian legality ended spectacularly with the fall of the regime in 1974 (the dictator had died years earlier). Similarly to Brazil, the staff of the special courts did not undergo major purges, only being transferred to other organs of state administration. Although the Portuguese institutions responsible for the prosecution of political crimes underwent transformations, the intensity and scope of these proceedings increased or decreased according to the political contingencies faced by the regime. Once established, the political justice apparatus remained unchanged, until the regime itself was overthrown by revolution. The Portuguese case illustrates the effect of a relatively high degree of integration and consensus among the military and judicial elites. As occurred in some other cases, repression, over time, became more judicialized and more civilian in nature. For most of the regime, trials for political crimes were presided over by civilian judges in special courts rather than by military officers. While this institutional configuration was different from that of the Brazilian military courts, in both systems civilian judges with legal backgrounds were of fundamental importance in administering a highly legalistic form of repression.

These occasional references to active civilian participation in the period of repression give a brief idea of the still unexplored universe of how many civilians may have played a significant role in the violation of human rights. Some of them, still alive and active, remain completely anonymous, unlike the military who exercised some institutional function.

It is important to reveal them, as well as to determine their degree of participation in the repressive process. Financing crimes against humanity or in any way facilitating such crimes is an indirect perpetration of human rights violations, and, as in the case of public officials, both the civilians and the state that permitted such violence must be held accountable.

Thus, in the case of Velásquez Rodríguez *v.* Honduras, judged by the Inter-American Court of Human Rights on July 29, 1988, it was established that

> In effect, an unlawful act violating human rights that is not initially directly attributable to a person who

> State, for example, because it is the work of a private individual or because the perpetrator of the violation has not been identified, may give rise to the international responsibility of the State, not for the fact itself, but for the lack of due diligence to prevent the violation or to address it in the terms required by the Convention. [3]

The liability of the State does not depend, therefore, on whether the inhumane act was committed by a public agent or not. However, for individual accountability, this difference becomes fundamental, since the obstacles that are currently alleged for the lack of prosecution of public agents cannot be used if the protagonists of the violations are not public agents. If they are identified, they can be prosecuted immediately.

The Truth Commission of the State of São Paulo "Rubens Paiva" presented, on February 18, 2013, in a public hearing, oicial documents of the repressive regime found in the Public Archives of the State of São Paulo. They are six registry books of entry and exit of DOPS (Department of Political and Social Order), an agency created in 1924 and used during the Estado Novo and the military dictatorship to repress political movements and leftist militants opposed to the regime of exception. Like other organs of repression of the dictatorship, DOPS served as a center of torture, disappearance and murder of political prisoners. The books are digitalized and can be accessed through the link http://www.arquivoestado.sp.gov.br/livros_ deops.php. The records range from 1971 to 1979, but with intervals. The six books cover the following time periods:

- March 30, 1971 to October 15, 1971;
- February 1, 1972 to March 21, 1972;

3 Free translation of the inal part of paragraph 172 of the decision: "Es, pues, claro que, en principio, es imputable al Estado toda violación a los derechos reconocidos por la Convención cumplida por un acto del poder público o de personas que actúan prevalidas de los poderes que ostentan por su carácter oicial. No obstante, no se agotan allí las situaciones en las cuales un Estado está obligado a prevenir, investigar y sancionar las violaciones a los derechos humanos, ni los supuestos en que su responsabilidad puede verse comprometida por efecto de una lesión a esos derechos. En efecto, un hecho ilícito violatorio de los derechos humanos que inicialmente no resulte imputable directamente a un Estado, por ejemplo, por ser obra de un particular o por no haberse identiicado al autor de la trasgresión, puede acarrear la responsabilidad internacional del Estado, no por ese hecho en sí mismo, sino por falta de la debida diligencia para prevenir la violación o para tratarla en los términos requeridos por la Convención".

- November 7, 1973 to February 22, 1974;
- February 28, 1974 to June 19, 1974;
- April 25, 1975 to June 14, 1976;
- December 29, 1977 to January 8, 1979.

In the books, where there is a heading with the day of the week and of the month, name of the visitors, position, entrance and exit time, it is strange to find two names: Claris Rowley Halliwell, presented as representative of the US consulate in São Paulo; and Geraldo Resende (or Rezende) de Mattos (or Matos), identified as representative of FIESP (Federation of Industries of São Paulo).

These visitors were among the various delegates, investigators and representatives of the Army. According to the entrance times, it can be concluded that most of their visits took place at night. Halliwell (1918-2006) was an employee of the U.S. State Department and consul in São Paulo between 1971 and 1974. From April to September 1971, Halliwell visited the DOPS building about forty times. The times Mattos entered the building were also mostly during the night. In some cases, the time of his departure is not recorded. Sometimes, Halliwell and Mattos only left the next day. Mattos' visits are marked by several "coincidences," such as the fact that they occurred at the same time as those of other delegados, including Romeu Tuma and Sérgio Fleury, and military personnel. The frequency of Mattos' visits also draws attention, with daily records in some periods. In all the records, Mattos is listed as the representative of FIESP, demonstrating that there was a link between the productive sector and the repression that deserves further investigation.

4 ON THE CONDEMNATION OF BRAZIL TO PROSECUTE HUMAN RIGHTS VIOLATORS

Brazil has already been condemned at the IACHR, among other things, to prosecute the perpetrators of human rights violations, whether they are public agents or not. The case was decided by the Court a few months after the ADPF 153 decision, and for the clarity and richness of its provisions, it is worth reproducing:

- 254. The representatives have requested the Court to order Brazil to investigate the facts, try and punish all those responsible, within a reasonable time, and to provide that the State may not use provisions of domestic law,

as prescription, res judicata, irretroactivity of the penal law and *ne bis in idem*, nor any similar exclusion of liability, to exempt itself from its duty. The State must remove all *de facto* and *de iure* obstacles that maintain the impunity of the facts, such as those related to the Amnesty Law. Additionally, they requested the Court to order the State that: a) all cases that refer to gross human rights violations be judged in the ordinary justice system; b) the families of the victims have full access and legitimacy to act in all procedural stages, in accordance with domestic laws and the American Convention; and c) the results of the investigations be publicized publicly and widely, so that Brazilian society can learn about them.

- 255. The State did not comment in particular on the investigation of the facts and limited itself to pointing out that the analysis of the Amnesty Law cannot be separated from the time when it was drafted or from the basis on which it is based. On the other hand, it recalled that the decision of the Federal Supreme Court in the Argument of Noncompliance with Fundamental Precept No. 153 considered the Amnesty Law fully legitimate in view of the new constitutional order.
- 256. In Chapter VIII of this Judgment, the Court declared the violation of the rights to judicial guarantees and judicial protection, due to the lack of investigation, trial and eventual sanctioning of those responsible for the facts of the present case. Taking the foregoing into consideration, as well as its jurisprudence, this Court holds that the State must conduct an effective criminal investigation into the facts of this case in order to clarify them, determine the corresponding criminal responsibilities and effectively apply the sanctions and consequences provided for by law. This obligation must be fulfilled within a reasonable period of time, considering the criteria determined for investigations in this type of case, *inter alia*:

a) Initiate the relevant investigations regarding the facts of the present case, taking into account the pattern of human rights violations that existed at the time, so that the process and relevant investigations are conducted in accordance with the complexity of these facts and the context in which they occurred, avoiding omissions in the gathering of evidence and in following logical lines of investigation;

b) Determine the material and intellectual authors of the enforced disappearance of the victims and of the extrajudicial execution. Moreover, because these are serious violations of human rights, and considering the nature of the facts and the continuous or permanent nature of the enforced disappearance, the State may not apply the Amnesty Law in favor of the perpetrators, as well as any other analogous provision, prescription, irretroactivity of the criminal law, res judicata, *ne bis in idem* or any similar exclusion of liability to avoid this obligation, in the terms of paragraphs 171 to 179 of this Judgment;

c) Ensure that: (i) the competent authorities carry out, *ex oicio, the* corresponding investigations, and that, to this end, they have within their reach and use all the logistical and scientific resources necessary to collect and process the evidence and, in particular, are provided with access to the relevant documentation and information, to investigate the facts reported and conduct, with promptness, the actions and investigations essential to clarify what occurred to the dead and missing persons in the present case; (ii) the persons participating in the investigation, including the relatives of the victims, witnesses and justice operators, have the appropriate security guarantees; and (iii) the authorities refrain from carrying out acts that would obstruct the progress of the investigative process.

- 257. Specifically, the State must ensure that criminal cases arising from the facts of the present case, against alleged perpetrators who are or have been military officials, are examined in the ordinary jurisdiction and not in the military forum. Finally, the Court considers that, based on its jurisprudence, the State must ensure full access and capacity of action for the families of the victims at all stages of the investigation and trial of those responsible, in accordance with domestic law and the norms of the American Convention. [4]

By force of international custom and, given the very deinition of crime against humanity, it is obligatory to punish, at any time, the

4 Available at :<http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_por. pdf>. Accessed on: 16 Jan. 2013.

perpetrators of such crimes. Thus, the concept of crime against humanity is part of international custom, especially after the principles of the Nüremberg Tribunal were affirmed by the UN General Assembly in 1946 (Resolution No. 95 [I]). These crimes, given their very definition, cannot remain unaccountable, even if the domestic law of a country has legal mechanisms that imply impunity. As consolidated by the UN in Principle II regarding the Nüremberg Tribunal trials: The fact that domestic law does not impose punishment for an act that constitutes a crime under international law does not exempt the person who committed the act from being held accountable under international law.

It follows from this principle that crimes against humanity are ontologically imprescriptible. This attribute is essential because the purpose of qualifying a crime as a crime against humanity is to ensure that it cannot go unpunished by any legal or political factor.

This essential characteristic of the crime against humanity was affirmed by the UN General Assembly in several Resolutions issued between 1967 and 1973, namely:

(a)No. 2.338 (XXII) of 1967;
(b)No 2.391 (XXIII) of 1968;
(c)No 2.583 (XXIV) of 1969;
(d)No 2.712 (XXV) of 1970;
(e)No 2.840 (XXVI) of 1971;
(f)No. 3074 (XXVIII) of 1973.

The first of these, recognizing the nature of the imprescriptibility of crimes against humanity and war crimes, externalizes the decision of the General Assembly to formally establish this principle by means of a specific convention.

In 1968, the UN General Assembly approved the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Its Article 1, item 2 expressly states that crimes against humanity committed in wartime or in peacetime, as defined in the Statute of the Nuremberg International Military Tribunal of 8 August 1945 and confirmed by Resolutions 3 and 95 of the General Assembly of the United Nations of 13 February 1946 and 11 December 1946, are "imprescriptible, irrespective of the date on which they were committed.

Again, the drafting of this Convention did not represent a "new right", but rather the written formalization of a principle already in force at the time,

in a procedure that is absolutely commonplace in international law. As with the Nüremberg Tribunal Statute, the 1968 Convention on the Imprescriptibility of War Crimes and Crimes against Humanity is the formal externalization of a material concept that had been consolidated through international custom. There was no innovation in the international legal system when the Convention dealt with the imprescriptibility of war crimes and crimes against humanity, but rather the codification of a general and compulsory norm arising from international custom.

In 1964, the illegality of torture and other forms of cruel treatment was part of any legal order of a Democratic State of Law. At no time did the Brazilian State of Exception legitimize through its legal system the practice of torture or other inhuman acts. Since the end of World War II, when humanity became widely aware of this type of procedure practiced by the Nazi government against citizens of its own country, the inadmissibility of such conduct has been part of the so-called *jus cogens*.

Therefore, it is reasonably safe to say that there is a general principle of international law that establishes the imprescriptibility of crimes against humanity. This principle is part of international custom, which has been reaffirmed since Resolution 2338 of the UN General Assembly and the Rome Statute (article 29). Thus, it is clear that during the period of the civil-military dictatorship in Brazil, the concept of the imprescriptibility of crimes against humanity was in force in international law. This norm of international law precedes the facts, and there is no risk of retroactive application of a more serious norm for human rights violators.

5 ON THE IMPORTANCE OF THE JUSTICE DIMENSION FOR THE CONSOLIDATION OF DEMOCRACY

It is consensual to conceptualize transitional justice as the set of legal-political mechanisms in times of political change, aiming to address human rights violations perpetrated during the regime of exception. Teitel (REÁTEGUI, 2011, p. 135-170) proposes a genealogy of Transitional Justice, presenting it in 3 Phases, namely: Phase I, post-war transitional justice, at the beginning of the 20th century; Phase II, post-Cold War transitional justice, in the last decades of the 20th century; and Phase III, the steady state of transitional justice.

In Phase I the declared objective was accountability, with the major innovation of using international criminal law to reach beyond the

State, the individual. Teitel argues that "while in Phase I transitional justice initially seemed to assume the unlimited and universal potential of law, the second phase was admittedly more contextual, limited and provisional. (REÁTEGUI, 2011, p. 147-148). The institutional mechanism of *truth commissions*, now associated with the response adopted by South Africa in the 1990s, is part of the so-called restorative model, of Phase II, with the claim of building an alternative history for the abuses committed by the repressive regime. This model ends up creating a dichotomy between truth and justice:

> Whereas the first phase conceived of the Rule of Law in universalising terms, associated with an obligation to account for actions or omissions harmful to humanity as a whole, the Phase II model, by contrast, was concerned with advancing the opposite idea, of a Rule of Law tied to the legitimacy of national jurisdiction and the sovereignty of countries. By narrowing the sphere of inquiry, Phase II revealed the public conception that correlated with this particular form of transitional justice, in that more local actors were implicated than international ones, and more individuals who were at lower scales of power and political responsibility than at higher ones. This showed the constructive strength of the Phase II postulates and also showed the degree to which this model was susceptible to politicization and ultimately dependent on the promotion of alternative values, except universal rights and accountability for the events that occurred, underlying the rule of law. (REÁTEGUI, 2011, p. 163).

Phase III, contemporary, presents a normalization of transitional justice. Teitel argues that

> the expansion of the transitional justice discourse to include the problem of terrorism is made problematic by the inappropriate use of analogies between terrorism and war or political crises. Transitional justice tends to look to the past to respond to the latter conlict and, as a consequence, is not easily adapted to be used as a model for ensuring security in the future. (REÁTEGUI, 2011, p. 167-168).

The ultimate goal of the justice dimension, which is the prevention of new human rights violations, or, as the *slogan of* the

Amnesty Commission, "so it will not be forgotten, so it will never happen again", is in line with the values and foundations of a Democratic State of Law. In the Brazilian case, the human rights paradigm began to prevail after the 1988 Constitution, strengthening the ideas of memory, truth, reparation, but still leaving much to be desired in terms of justice. It is debated whether the justice dimension will strengthen democracy, or prevent national reconciliation from occurring.

Strictly speaking, the possibility of prosecuting the perpetrators of human rights violations, regardless of what the inal decision is in each case, will already signal that there will be no impunity. The sense of impunity that is still evident in Brazil, especially with regard to military, political and economic authorities, many of whom are still protagonists in the Brazilian scenes, increases the distrust of the high fragility of our democracy. And this same supposed fragility is used as an argument to precisely prevent the prosecution of perpetrators of human rights violations, in a vicious circle of false arguments and even more false conclusions.

It is worth here a small digression on the relationship between time and law, based on Ost's reflections (2005, p. 13-14):

> See: time is literally constructed, it "temporalizes" itself. (...) A time that no longer remains outside things, as a formal and empty continent, but that participates of its own nature.
>
> (...) the main function of the legal is to contribute to the institution of the social: more than prohibitions and sanctions, as was previously thought; or calculation and management, as is frequently believed nowadays, law is a performative discourse, a fabric of operative icons that redefine the meaning and value of life in society. Instituting means, here, tying the social bond and offering individuals the marks necessary for their identity and autonomy.
>
> (...) a powerful link is established between social temporalization of time and legal institution of society. More precisely: law directly affects the temporalization of time, while, in return, time determines the instituting force of law. Even more precisely: law temporalizes, while time institutes. It is a matter, then, of a profound dialectic and not of superficial relations that are linked between law and time.

In this sense, failing to investigate those who violated human rights during the years of the State of Exception in Brazil means a "quasi institution" of a Democratic State of Law, since the complete path, which will resignify Brazilian society, passes through the truth and memory of what occurred during the years of repression, through political amnesty and individualised economic reparation, with the consequent individual resigning of those who were resistant to the regime; the version of the victims having an official voice, even after many years of the violence suffered. But the journey will only be complete when the violators leave the shadow of impunity and are revealed to society as a whole, when they are investigated and judged, enabling a social and national debate about the main institutions that acted in favor of the repressive regime, such as the Armed Forces, the Police and the Judiciary itself.

Only when this path has been taken, that is, when, in addition to the dimensions of memory and truth, reparation and the reform of institutions, the dimension of justice is also experienced by Brazilian society, will it be possible to say that the institution of Brazilian democracy is taking place. In these years of the 21st century, Brazil has concentrated Phases I and II of Teitel's chronology, as we have seen. However, it has not gone all the way, because the processes of accountability have not yet passed from the Brazilian state to those who, public agents or not, effectively violated fundamental rights.

The fear that hangs in the air of democratic destabilization or a frontal attack on principles dear to national law, such as the irretroactivity of criminal law, ends up weaving a set of false formal obstacles to the prosecution of perpetrators of human rights violations, and thus, to paraphrase Ost, the Brazilian State, through the Judiciary and the Public Prosecutor's Office, does not contribute to "institute the social", to consolidate Brazilian democracy. On the contrary, the more time passes, the stronger the convictions of impunity, insecurity, lack of transparency and absence of democracy become.

The close relations between the business community and serious human rights violations, including torture, which are beginning to appear in the different reports of the many Truth Commissions instituted in various instances in Brazil, call for more energetic action by the Brazilian State itself, under penalty of the imminent risk of the prevalence of the version that it is perfectly possible to violate human rights in Brazil and go unpunished. It is perfectly possible to challenge democratic relations in Brazilian society and benefit from the results. It is perfectly possible to remain

in the shadows of power, fund the greatest injustices and atrocities, and reap sky-high profits from such investments.

By the way, under this perspective, it is even better not to be a public agent, but to be at the service of the State of Exception, because the verification of responsibilities may generate even more difficulty and controversy than the accountability of public agents.

6 FINAL CONSIDERATIONS

For all these reasons, the Brazilian State is responsible for prosecuting the perpetrators of human rights violations during the civil-military dictatorship, even if they are not public agents. As for the latter, one cannot invoke the obstacle of the decision of ADPF 153, which does not refer to them, or the fact that torture was not defined at the time, since it was, as demonstrated, a crime against humanity. Even to comply with what was determined by the Inter-American Court of Human Rights in the Gomes Lund case and others, it is necessary for Brazil to assert the justice dimension among the foundations of transitional justice.

If at this historical moment there are still arguments that hinder the prosecution of public agents, the same cannot be said of non-public agents, and perhaps it is less complex to initiate the dimension of justice for these, so that the feeling of impunity does not persist in our country with regard to crimes against humanity committed during the authoritarian period.

At any rate, it is imperative that the non-public agents who violated human rights during the Brazilian Exception period be known and prosecuted, because they cannot use their civilian status to escape sanctions for the crimes they committed. It is the duty of the Brazilian democratic rule of law to prevent the atrocities committed during the dictatorial period from being repeated, whether they were promoted by public agents or by private individuals.

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