

Transitional Justice for Reconciliation in Brazil?

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1. Recent Facts and Perceptions

On the eve of a *habeas corpus* hearing before the Brazilian Supreme Court that could set former President Lula free, the Army Commander, General Villas-Boas, released a puzzling tweet about ‘impunity’ that was by many considered a clear act of pressure by the military aimed at influencing the judicial decision. On another occasion, the now Vice-President, General Mourão, speculated about the possibility of the armed forces intervening to re-establish order in case the courts did not wipe certain ‘undesirable elements’ out of politics. In a cabinet meeting, the same Villas-Boas raised his voice to demand a clear legal framework for the military troops in charge of the federal intervention in Rio de Janeiro, because he would not like “to see tomorrow another Truth Commission”. In 2019, President Jair Bolsonaro encouraged celebrations of the *coup d’état* anniversary, and the Minister of Education announced changes in schoolbooks to replace “1964 coup” with “1964 democratic revolution”.

Since the 2013 public demonstrations in Brazil, there has been a growing right-wing authoritarian movement raising its voice in the political arena. In fact, the armed forces in general enjoy great prestige in the population as measured by the opinion polls. The perception is that politicians, besides being corrupt, have brought the country to social and economic chaos, and the military can bring order. Torture is approved of by a considerable portion of the population,¹ even among those with higher education, as a heritage of the long slavery period. It is widely practised by the police, but, it is generally assumed, only applied to criminals who ‘deserve it’.² The perception is that torture was applied only to ‘communists’ or ‘subversives’ during the 21-year-long military dictatorship (1964–85). President Bolsonaro – a military veteran who favours torture and the widespread use of firearms – was elected on the basis of this discourse. Even the President of the Supreme Court, Justice Dias Tóffoli, speaking at a celebration for the thirtieth anniversary of the 1988 Constitution, renamed the 1964 military *coup d’état* as the “1964 movement”, against all

historical findings.³

The public consternation caused by the murder of rural leader and environmentalist Paulo Sergio Almeida Nascimento on 12 March 2018 by hired assassins in the Amazonian State of Pará was soon consigned to oblivion by mainstream media with the news of the spectacular murder of Rio de Janeiro’s city councillor Marielle Franco,⁴ supposedly by militiamen hired by politicians. Never before was the memory of a victim of murder so defamed and vilified by right-wing groups in the social media, including by a former federal judge, now governor of the State of Rio de Janeiro. The perpetrators have not been brought to trial. The same happened with the tragic dam rupture of Brumadinho early in 2019, barely two years after and for similar reasons that led to the rupture of another dam in Mariana. Criminal immunity seems to be endemic for a certain category of crimes and criminals, probably due to the lack of a ‘socio-historical memory’ in Brazil.

2. ‘Ditabranda’ or Dictatorship à la Brasileira

Several features distinguish the Brazilian dictatorship from others that we have seen in South America. With the exception of Paraguay (35 years), it was the longest (21 years), compared to its neighbours Argentina, Chile, Uruguay and Peru. The putsch had a significant civilian and business participation as well as the support of mainstream media, which continued for many years. The designation ‘military’ coup or dictatorship is a convenient way to blame exclusively the military for the atrocities perpetrated during the period, thereby disclaiming the responsibility of those who gave financial and logistical support. It was perceived as ‘milder’ than the regimes of its neighbours, probably because it was more ‘surgical’ and selective in its violence.

It is to this day the only South American dictatorship whose agents were not held accountable for their atrocities (whether civil, disciplinary or criminally) thanks to an amnesty law considered ‘reciprocal’,⁵ and despite two clear decisions by the Inter-American Court of Human Rights. It is now known that even General Ernesto Geisel – widely considered the president who promoted

¹ While a member of the House of Deputies, Bolsonaro ‘dedicated’ his vote in favour of former President Rousseff’s impeachment to the memory of Colonel Brilhante Ustra, a notorious torturer during the dictatorship.

² See Peter Kornbluh (ed.), *Brazil: Torture Techniques Revealed in Declassified U.S. Documents*, National Security Archive, Washington, DC, 8 July 2014 (www.legal-tools.org/doc/6h70uo).

³ Folha de S. Paulo, “Toffoli diz que hoje prefere chamar golpe militar de ‘movimento de 1964’”, 1 October 2018 (available on its web site).

⁴ O Globo, “Vereadora Marielle Franco é assassinada a tiros no Estácio”, 14 March 2018 (available on its web site).

⁵ Brazil, Law no. 6.683, 28 August 1979 (www.legal-tools.org/doc/27bd0b-1).

a reduction in the repression and a liberalization of the regime – personally ordered executions of dissidents.⁶

3. Top-Down Transition and Helpful Myths

‘Peaceful transition’ does not mean that the generals spontaneously handed over power. At a certain point, the regime lost public support and did not resist the widespread opposition and protests from sectors of civil society. Importantly, its continuation was no longer functional for business and finance. Nevertheless, the military was strong enough to impose the conditions of the transition, and democratic forces were not interested in a confrontation with an unforeseeable outcome.

This specific form of transition perpetuated two historical myths in Brazil. First, that political changes have always proceeded peacefully in Brazil, which is only partially true because they were the result of arrangements among the ruling elites aimed at making cosmetic shifts, to preserve the system of domination. Second, that the armed forces have never made mistakes, crediting themselves to be the only national institution entitled to enforce the nation’s ‘permanent’ values.

Episodes like the war on Paraguay (1860–65), the ‘proclamation’ of the Republic, and the 1964 coup are recounted in such manner that the armed forces, whenever they violated the law, always did so to preserve the best interests of the nation. Historical research, however, tells us that the war on Paraguay, for example, was probably a genocide perpetrated by an alliance of Brazil, Uruguay and Argentina, financed by the United Kingdom, that eliminated most male citizens of a prosperous country. In fact, Brazil’s armed forces – most South American armies actually – specialized in unequal persecutions and massacres against their own unarmed citizens (the ‘internal enemy’), instead of conventional wars, an impression widely confirmed during the disastrous 1982 Malvinas War, emblematic for all Latin American armies.

4. Frustrated Truth, Justice and Reconciliation

There was never a genuine and massive pressure for justice or even truth about the atrocities of the Brazilian dictatorship, for several reasons which there is not enough space to discuss in detail here. Only victims and their families, and some voices of the church, journalists, artists, politicians, intellectuals, human rights activists and the Bar, have raised the issue during the civilian rule since 1985.

It took 10 years for there to be an initiative to recognize the status of political disappearances of individuals who fell into State custody and were never seen again. The Special Commission on Dead and Disappeared Persons (CEMDP) was created by Law no. 9.140 in 1995, which required the State to search for their remains. In 2002, Law no. 10.559 created the so-called Amnesty Commission, finally realising a provision of the 1988 Constitution. It stipulated reparation, refund and community rehabilitation policies, public trials for requests for recognition by victims, and public apologies by the State.⁷

The National Truth Commission (CNV)⁸ of 2012 was able to

identify, assess and make public a number of atrocities and their perpetrators by listening to survivors, witnesses, and State officials as well as analysing limited documentary information (the armed forces used all sorts of excuses not to open their files as they had been doing in the face of previous court rulings). The CNV’s final report authoritatively gave names, numbers, locations and addresses. Regardless of the degree of violations that it identified – which were fairly reported by the media – it did not stir consternation in the public opinion. Even the harmless suggestions of vetting or lustration were not undertaken nationwide, but only as limited action by some local administrations. There was no re-education, no *mea culpa*, no change of mentality, no compassion.

In terms of criminal accountability, the results are disappointing. There have been on-going notable efforts by the Federal Prosecution Service to hold some well-known torturers accountable before criminal and civil federal courts.⁹ In most cases, judges refused the indictment on grounds of amnesty, statute of limitation, *res judicata*, the principle of legality, or *ne bis in idem*. In the few cases where an indictment was achieved, a defence appeal before a higher court would stop the proceedings by use of one or more of the above-mentioned grounds. Seeking an interpretation that would declare unconstitutional the amnesty law which admits ‘reciprocal amnesty’, the Federal Council of the Bar filed a constitutional complaint (ADPF no. 153) before the Supreme Court.¹⁰ The Court rejected it by majority with ostensibly non-judicial

doc/319ca5, www.legal-tools.org/doc/da4019 and www.legal-tools.org/doc/775c56). The CNV identified 434 political killings and disappearances and 377 State officials responsible for atrocities: see Emilio Peluso Neder Meyer (co-ord.), *Justiça de transição em perspectiva transnacional*, Centro de Estudos sobre Justiça de Transição da UFMG, Secretaria da Rede Latino Americana de Justiça de Transição and Initia Via, Belo Horizonte, 2017, p. 240 (www.legal-tools.org/doc/5reshf). Different estimates indicate around 25,000 political prisoners (generally submitted to different types of torture) and 10,000 exiles (UOL, “Presos políticos: golpe e repressão no Brasil, na Argentina e no Chile”, 7 March 2014 (www.legal-tools.org/doc/yph79y)). As for the indigenous peoples, the CNV identified 8,350 deaths by State action or omission in the period 1946–88: see “Violações de direitos humanos dos povos indígenas”, in *Relatório da CNV*, vol. 2, Texto 5, p. 205 (www.legal-tools.org/doc/da4019). For the construction of a highway between Manaus and Boa Vista and of a hydroelectric power plant, the findings revealed a genocide of the Waimiri-Atroari Indians: from a population of 3,000 in 1972, they were no more than 350 in 1983, after repeated massacres and poisonings (*ibid.*, p. 234). The fact that the Bolsonaro administration intends to extend a transmission line through their territory, reportedly employing the same ‘persuasion’ methods used during the dictatorship to obtain the consent of the Indians due to the urgency of the work, only shows that the military does not regret or even admit the previous genocide (see Folha de S. Paulo, “Governo Bolsonaro renova temor de conflito em tribo da Amazônia”, 17 March 2019 (www.legal-tools.org/doc/ld7xsv/)).

⁶ The Guardian, “‘Astonishing’ CIA memo shows Brazil’s ex-dictator authorized torture and executions”, 11 May 2018 (www.legal-tools.org/doc/pvfm7l).

⁷ Marlon Alberto Weichert, *Justiça Transicional*, Estúdio Editores, São Paulo, 2015, pp. 31–36.

⁸ Created by Law no. 12.528, 18 November 2011, implemented on 16 May 2012, handed over to President Dilma Rousseff on 10 December 2014: see *Relatório da Comissão Nacional da Verdade* (*Relatório de CNV*), vols. I, II and III (www.legal-tools.org/

⁹ See Brazil, Ministério Público Federal (‘MPF’), 2ª Câmara de Coordenação e Revisão, “Crimes da ditadura militar: Relatório sobre as atividades de persecução penal desenvolvidas pelo MPF em matéria de graves violações de DH cometidas por agentes do Estado durante o regime de exceção”, MPF, Brasília, 2017 (www.legal-tools.org/doc/9gdjok/).

¹⁰ Brazil, Supremo Tribunal Federal, ADPF no. 153 (www.legal-tools.org/doc/8b04f9). [The editorial team thanks Ms. Lígia Lazzarini Monaco and Ms. Alessandra Costa e Silva for their assistance.]

arguments.¹¹ An appeal of this decision was still pending four years later, the Court not daring to initiate the trial. Meanwhile, the Inter-American Court of Human Rights condemned Brazil in two cases of gross human rights violations committed during the dictatorship: the *Gomes-Lund* case, referring to Guerrilha do Araguaia, and the most recent *Herzog* case, referring to the torture and assassination of a journalist in the premises of the Army Command in São Paulo.¹²

No arguments have convinced the Brazilian judiciary yet,¹³ despite the documented awareness that the facts amounted to crimes against humanity at the time of commission and are therefore not subject to amnesties; or that some of the conduct (such as enforced disappearance) is still continuing, as neither the remains nor the person have been found – all accepted by other South American courts where judges changed their views in the face of the same types of crimes and objections.

5. Does Brazil Really Need Transitional Justice 34 Years Later?

Deplorably, transitional justice or reconciliation was not an issue in Brazil's public opinion until 2014, except for the victims, their relatives, and some publicists. It was viewed as more of a moral question. At the time of writing, the majority of Brazil's population is under the age of 40¹⁴ and would rather look ahead instead of awakening ghosts of the past. Apparently, democracy had finally triumphed, and the nation could afford to progress politically, economically and socially without processing its recent past – stability and oblivion at the expense of the memory of the victims and the sorrow of their families. The military had basically withdrawn into its professional functions, adopting a low profile in politics.

However, the distortions of democracy and the decline of its prestige in the eyes of the public (as a civilized way of exercising power) became very visible during and after the 2014 general

elections in Brazil. The controversial impeachment of President Dilma Rousseff in 2016 – considered by many as a putsch¹⁵ – created a legal-political atmosphere in which anything could be possible under constitutional law provided an appropriate and intrinsically coherent narrative would be supplied to drive reality. This includes the ongoing, very efficient and meritorious fight against centuries-old endemic corruption, which is being instrumentalized to criminalize a political party, exclude it from the 2018 general elections, and in the long run to outlaw it if possible.¹⁶

These efforts were successful as they were exercised over a public opinion that has become intoxicated by daily corruption scandals, distrustful of politics and politicians, and with little commitment to democracy. The preference for simple solutions to complex and chronic problems and the lack of social and historical memory attracted voters overwhelmingly to populist and authoritarian solutions in local and national elections. This may have unforeseeable consequences for the rule of law, human rights, and the environment. The most outstanding examples are the governors of Rio de Janeiro and São Paulo, Wilson Witzel and João Doria, as well as President Bolsonaro. The lack of a genuine encounter with the past enabled the return of the same ghosts that determined the 1964–85 dictatorship.

These days Brazilian society faces hatred and intolerance based on political opinion, religion, ethnicity and gender in a manner we could not have imagined a few years ago. President Bolsonaro's statements reveal homophobia, misogyny, hostility to Indians, Afro-Brazilians and North-easterners, denial of climate change, praise for torture – the path from enmity of mankind to enemy of mankind (*hostis humani generis*) is not as far as some may think. He surrounds himself with top aides who are hard-line generals, including some Haiti veterans such as General Augusto Heleno Ribeiro, the first commander of the United Nations Stabilisation Mission in Haiti. Heleno Ribeiro is accused of having carried out a real massacre among the civilian population of Port-au-Prince's slum Cité Soleil. In the so-called 'Iron Fist Operation' (2005), his troops fired 22,000 rounds of ammunition in just seven hours, killing not only the wanted gangster boss Dread Wilme, but also – although never officially confirmed by the United Nations – many women and children who came under fire.¹⁷ By late

¹¹ From the leading opinion of Justice Eros Roberto Grau, citing Karl Marx: "Everyone who knows our history knows that this political agreement existed, resulting in the text of Law no. 6.683/79. [...] 'Men make their own history, but they don't make it as they want it under the circumstances of their choice, but under those with which they are directly confronted, bequeathed and transmitted by the past.'"

¹² Inter-American Court of Human Rights, *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Judgment, 24 November 2010, series C, no. 219 (www.legal-tools.org/doc/a66e9e); *Herzog et al. v. Brazil*, Judgment, 15 March 2018, series C, no. 353 (www.legal-tools.org/doc/ad451a).

¹³ A study developed by experts of Harvard Law School International Human Rights Clinic demonstrated in depth that Chile, Argentina, Peru and Uruguay had identical 'legal' obstacles to criminal accountability for the crimes of their respective dictatorships and yet these were removed by different court rulings, leading to the conclusion that in Brazil only political will is lacking for a genuine transitional justice. See International Human Rights Clinic, *Legal Paths to Accountability for Dictatorship Crimes: Charting the Legal Courses in Latin America and Their Relevance to Brazil*, 1 October 2012 (www.legal-tools.org/doc/ltly165/).

¹⁴ See Glenda Mezarobba, "Brazil: the tortuous path to truth and justice", in Elin Skaar, Memima García-Godos and Cath Collins (eds.), *Transitional Justice in Latin America*, Routledge, New York, 2016, p. 120: "Half of today's Brazilian population is under 30 and has no living memory of, or stake in, the dictatorship. They struggle to survive in a society marked by high rates of violence, where access to justice is still precarious".

¹⁵ See, among many academic interpretations, Jessé Souza, *A radiografia do golpe*, LeYa, Rio de Janeiro, 2016.

¹⁶ See the leaked text messages between former Federal Judge Sergio Moro, now Minister of Justice, and prosecutors of the 'Car-Wash' ('Lava Jato') Task Force, made available to journalist Glenn Greenwald, demonstrating a conspiracy between judge and prosecutors against the defendant, former President Luiz Inácio Lula da Silva, in order to convict him at any cost so as to exclude him from the electoral race at a time when he was the favourite in opinion polls. [Editor's note: Greenwald was charged "with allegedly orchestrating the hacking of communications from senior government officials and prosecutors in the nation's long-running Lava Jato corruption investigation" on 21 January 2020 (see Financial Times, "Brazilian prosecutors charge US journalist Glenn Greenwald", 21 January 2020). A federal judge dismissed the charges against him on 6 February 2020, the day the author passed away (see New York Times, "Brazil Judge Dismisses Charges Against the Journalist Glenn Greenwald", 6 February 2020).]

¹⁷ See Siobhán Wills, "Use of Deadly Force by Peacekeepers Operating Outside of Armed Conflict Situations: What Laws Apply?", in *Human Rights Quarterly*, 2018, vol. 40, no. 3, pp. 663, 666; James Cockayne, "The Futility of Force? Strategic Lessons for Dealing with Unconventional Armed Groups from the UN's War on Haiti's Gangs", in *Journal of Strategic Studies*, 2014, vol. 37, no. 5, pp.

2019, he proposed the use of similar methods in the favelas in Rio de Janeiro as part of the so-called ‘war on drugs’.

Regarding the recent tragedy of the Amazon rainforest that made it to the G-7 agenda – and is discussed in the previous policy brief in this Series – President Bolsonaro loosened instruments of surveillance and control, attacked scientists who warned him about the increase in deforestation, repeatedly made permissive and irresponsible speeches that provided cattle ranchers, loggers and miners with impunity, and rejected any international co-operation, as if sovereignty were an absolute concept.

In hindsight we see that the measures adopted to overcome the dictatorship left the repression apparatus intact. There was nothing similar to an *Entnazifizierung*, a re-education within the armed and security forces, a human rights education for the new generations, or an extinction of these forces as happened to the *Volksarmee* of the former communist Germany. The same culture, the same ideology, and even a certain moral superiority remains in military circles. In other words, the germs for the perpetration of new crimes against humanity are still there.

6. Bringing about Reconciliation in Brazil

The achievement of truth, justice and reconciliation is definitely a task for Brazilian society. More than a task, it is a duty it owes to itself, if it wants to stand up as a nation, to the memory of the victims, and to humanity – and to remain a reliable player in international relations. It is also in the interest of the military institutions as a way to cleanse themselves from a past of atrocities.

It seems clear, however, that this duty will not be fulfilled without adequate support and pressure by the international community. International co-operation stands along solidarity with the Brazilian people and the fulfilment of a universal right to justice. After all, crimes against humanity protect not only the lives and liberties of the victims, but their commission are of concern to all nations and peoples of the earth.

Legal tools and grounds are available to the Brazilian State in abundance. Two Inter-American Court of Human Rights defeats and three domestic commissions offer a roadmap of clear recommendations. The legal literature and jurisprudence of other South American countries that achieved truth and justice show how to overcome the ‘legal’ obstacles normally invoked by Brazilian courts.

What holds Brazil back from pursuing justice for its dark years and from drawing reasonable consequences of historical research? It is simply a lack of political will. The misperception that the price for democracy and political stability is to spare perpetrators of crimes against humanity from criminal accountability has prevailed to this day.

There are no material instruments capable of efficiently compelling the Brazilian State to fulfil its national and international

duty to punish the crimes of the dictatorship. Nor do I see any argument capable of convincing Brazilian society of the importance of this issue for the consolidation of democracy. The only way to bring about a modicum of justice is pressure at the national and international levels – in other words, a strategy of ‘naming and shaming’ perpetrators and the State.

These are some measures of well-established good practice that should be considered:

- prepare and submit as many cases as the evidence allows before the Inter-American Court of Human Rights and other appropriate international human rights fora;
- maintain the Federal Prosecution Service’s strategy of submitting cases and appeals to federal courts as appropriate;
- ‘name and shame’ public officials still working in security forces for their participation in atrocities during the dictatorship;
- pressure mayors and other political leaders to rename public places that presently honour dictatorship agents;
- encourage high-ranking military officers to discuss their views in research institutions dedicated to the study of the dictatorship;
- question Brazilian representatives in international fora about their commitment to human rights whenever they pursue a position in multilateral bodies that isolates Brazil or makes it seem an unreliable international partner in the enforcement of human rights; and
- maintain international denouncement and, whenever possible, economic and political sanctions.

Carlos Vasconcelos was Deputy Federal Prosecutor-General of Brazil. He was a short-listed candidate to serve as the first Prosecutor of the International Criminal Court (but was blocked by Dr. Zeid Ra’ad al-Hussein, then President of the Bureau of the Court’s Assembly of States Parties). His chapter on the Regulations of the Court’s Office of the Prosecutor in the anthology Historical Origins of International Criminal Law: Volume 5 (<https://www.toaep.org/ps-pdf/24-bergsmo-rackwitz-song>) has become the leading authority on the topic. He served as Senior Judicial Affairs Officer in the United Nations Transitional Administration in East Timor, and co-author of the bill of law and member of the commission set up by the Brazilian Government to adapt national legislation to the Statute of the International Criminal Court. He passed away on 6 February 2020.

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736, 748; and Kai Michael Stargardter, “General Augusto Heleno, futuro ministro, liderou missão polêmica no Haiti”, in *Exame*, 29 November 2018 (www.legal-tools.org/doc/ssjff8).