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RIGHT TO TRUTH AS A RIGHT TO MEMORY: THE CASE OF GOMES LUND AND OTHERS ("GUERRILHA DO ARAGUAIA") VS. BRAZIL

DIREITO À VERDADE COMO DIREITO À MEMÓRIA: O CASO GOMES LUND E OUTROS ("GUERRILHA DO ARAGUAIA") VS. BRASIL

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Abstract: In the discourse of international law, the right to truth emerges as a new legal concept to mobilize a diversity of agendas and interests. The present study seeks to interpret the right to the truth as a right to memory from the analysis of the sentence of condemnation of Brazil by the Inter-American Court of Human Rights in the Gomes Lund et al. Case ("Araguaia Guerrilla"). As an exemplary case of petition before the Inter-American Court of Human Rights, it is sought to demonstrate that the persistent ignorance of the truth amounts to forced institutional amnesia and the persistence of crimes of forgetfulness which seek to erase the traces of past violence against the dignity of human person.

Keywords: Right to truth. Right to memory. Inter-American Court of Human Rights. Araguaia Guerrilla.

Resumo: No discurso do direito internacional, emerge o direito à verdade como um novo conceito jurídico a mobilizar uma diversidade de agendas e interesses. O presente estudo procura interpretar o direito à verdade como direito à memória a partir da análise da sentença de condenação do Brasil pela Corte Interamericana de Direitos Humanos no caso Gomes Lund e outros ("Guerrilha do Araguaia"). Por ser um caso exemplar de demanda perante a Corte Interamericana de Direitos Humanos, procura-se demonstrar que o persistente desconhecimento da verdade equivale à amnésia institucional forçada e a persistência de delitos do esquecimento, que pretendem apagar os traços das violências passadas contra a dignidade da pessoa humana.

Palavras-chave: Direito à verdade. Direito à memória. Corte Interamericana de Direitos Humanos. Guerrilha do Araguaia.

Introduction

In 2010, the Brazilian State was condemned by the Inter-American Court of Human Rights for the forced disappearance of members of the Araguaia Guerrilla War during military operations in the 1970s. The condemnation contradicted the decision of the Federal Supreme Court issued shortly before the Court's rulin[1]. The Court's decision became paradigmatic because it touched on sensitive points concerning to the instruments of transitional justice[2] adopted by Brazil, the culmination of which was the Amnesty Law.

The case known as the "Guerrilha do Araguaia" was the first with individualized victims to be brought against the military dictatorship in Brazil before an international court of justice. Its admission by the Inter-American Court considered, firstly, that the Brazilian State had not yet responded to the requests of the relatives of the forced missing persons in the "Guerrilha do Araguaia", despite the legal actions filed.

The condemnation addresses several issues. In the present study, the attitude of Brazil in not investigating the facts and identifying the aggressors will be analyzed as an affront to the right to memory and truth as required by the dignity of the disappeared victims and their families. Past violence perseveres in the present thanks to the institutional amnesia of the truth contrary to the configuration of individual and collective identities, intrinsically linked to the heritage of the past, to present life, and to the way of projecting our living together in a state of justice and democratic peace. To understand the effects of not-knowing, of the incomplete record about the truths of facts, we resort to the teachings of the philosopher Paul Ricoeur, for whom truth and memory are crucial elements for the (re)configuration of identity and otherness, in the search for the good life with and for others in fair institutions.

When the government relies on the Amnesty Law not to investigate the facts, it ends up contributing to an oblivion of what happened, which is harmful to the whole society. In this

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[1] For an analysis of the sentences condemning Brazil by the Inter-American Court of Human Rights and their internal repercussion, see: UNNEBERG, Flávia Soares; MELO, Álisson José Maia. O Brasil e a Corte Interamericana de Direitos Humanos: as sentenças condenatórias e sua repercussão interna. **Nomos – Revista do Programa de Pós-Graduação em Direito da UFC**, v. 34, n. 1, jan./jun. 2014, p. 65-80. For another more specific approach to the Gomes Lund Case, see: BERNARDI, B. B. Fighting against impunity: the Federal Prosecution and the Gomes Lund Case. **RBPI – Revista Brasileira de Política Internacional**, v. 60, n. 1, 2017, p. 1-21 BERNARDI, B. B. O Sistema Interamericano de Direitos Humanos e o caso da guerrilha do Araguaia. **Revista Brasileira de Ciência Política**, n. 22, 2017, p. 49-92.

[2] On the possible uses of "transitional justice," see: MEZAROBBA, G. De que se fala, quando se diz "justiça de transição"? **BIB – Revista Brasileira de Informação Bibliográfica em Ciências Sociais**, n. 67, 2009, p. 111-122.

light, it takes as a reference the decision of the Inter-American Court in the case of Gomes Lund and Others VS. Brazil regarding the non-discovery of the whereabouts of the forcibly disappeared and the maintenance of the Amnesty Law as a barrier to establishing the truth, entering Ricoeur's theory about memory and the need for its record and also into the discussion about amnesty as an instrument of transitional justice.

1. The Condemnation of Brazil by the Inter-American Court of Human Rights: the Case of Gomes Lund And Others (Araguaia Guerrilla Movement) Vs. Brazil

The Araguaia Guerrilla was a movement formed by militants opposed to the military dictatorship, who settled in southern Pará, on the banks of the Araguaia River, in order to provide training and armed resistance actions to the military dictatorship[3] . The group, composed according to reports by militants and peasants, during the years 1972 to 1974, was the target of about six military operations carried out by the armed forces, with the objective of repressing the movement. By the end of 1974, all Guerrilla members had disappeared and the military government imposed silence about the events in the region.

In March 2009, the Inter-American Commission on Human Rights submitted to the Inter-American Court a lawsuit against Brazil claiming measures about the forced disappearance of 70 people in the context of the Guerrilla War[4]. The case had international repercussions and was paradigmatic in the context of recognition of the right to truth, access to information and guarantee of memory, and for the design of transitional justice in Brazil. The Commission requested the Court to declare the Brazilian State responsible for the violation of the rights established in articles 3 (right to recognition of legal personality), 4 (right to life), 5 (right to personal integrity), 7 (right to personal freedom), 8 (judicial guarantees), 13 (freedom of thought and expression) and 25 (judicial protection), of the American Convention on Human Rights, in connection with the obligations established in articles 1 and 2 of the American Convention on Human Rights:1 (general obligation to respect and guarantee human rights) and 2 (duty to adopt

[3] UNNEBERG, Flávia Soares; MELO, Álisson José Maia. O Brasil e a Corte Interamericana de Direitos Humanos: as sentenças condenatórias e sua repercussão interna. **Nomos - Revista do Programa de Pós-Graduação em Direito da UFC**, v. 34, n. 1, jan./jun. 2014, p. 71.
[4] UNNEBERG, Flávia Soares; MELO, Álisson José Maia. O Brasil e a Corte Interamericana de Direitos Humanos: as sentenças condenatórias e sua repercussão interna. **Nomos - Revista do Programa de Pós-Graduação em Direito da UFC**, v. 34, n. 1, jan./jun. 2014, p. 72-73.

provisions of domestic law) of the same Convention, as well as to order the Brazilian State to adopt certain measures of reparation.

In the judgment, the Inter-American Court of Human Rights pointed out some extremely relevant facts for the delineation of transitional justice in Brazil. As Unnenberg & Melo point out, "the CORTEIDH understands that internal laws of amnesty that prevented the investigation and punishment of serious violations of human rights are incompatible with the CADH, and, therefore, are deprived of legal effects, having so decided not only in the Gomes Lund case"[5]. Next, we will analyze the points that are relevant to the issue of the right to memory and the duty of non-forgetfulness.

1.1 The right to freedom of thought and expression

In this topic, the Court ruled that the way the Brazilian government dealt with the victims (disappeared and their families) unduly restricted the right to information, since it did not provide access to information regarding the episode and did not show interest in seeking data, revealing it and making it available not only to the victims, but also to society, which constitutes an objective, serious and current damage. Current because the State has still not revealed facts concerning to the circumstances of the Guerrilla War and the disappearances.

With respect to the non-availability of information, it is important to emphasize that the Brazilian State affirmed the unfeasibility of complying with the requests, since it was legally and materially impossible to do so, due to the destruction of a large part of the documents referring to the Guerrilla War by the Armed Forces. The Brazilian State evaded its responsibility, filing several appeals without adding any information that could contribute to the location of the remains and to the determination of responsibility for the atrocities. Although it has submitted thousands of pages of documents, those that were really interested in locating the remains and clarifying the circumstances of the enforced disappearances were not included in file.

In this aspect, the Court emphasized that Brazilian State's responsibility for keeping and making available information due to its historical importance, as well as to enable the

[5] UNNEBERG, Flávia Soares; MELO, Álisson José Maia. O Brasil e a Corte Interamericana de Direitos Humanos: as sentenças condenatórias e sua repercussão interna. **Nomos – Revista do Programa de Pós-Graduação em Direito da UFC**, v. 34, n. 1, jan./jun. 2014, p. 73.

investigation of the violations of fundamental rights, which cannot be forgotten or ignored[6]. Furthermore, this lack of access to information for victims and society violates not only the provisions of the Brazilian Constitution (art. 5, clauses XIV, XXXIV "a" and "b", and XXXV), but also the provisions of the Inter-American Convention on Human Rights.

The Court also emphasized that the absence of proof of the existence of information on the Guerrilla War is not a justification capable of removing the duty of the State to diligence and prove the efforts made to obtain this information. Therefore, the allegation that the evidence has been destroyed or simply that there is no more evidence about the facts is not enough.

The Union evaded this responsibility in the records of judicial actions n. 82.00.24682-5 (an ordinary action filed by relatives of the victims and that is in progress in the Federal Court of the Federal District - TRF1) and n. 2001.39.01.000810-5 (Public Civil Action filed by the Federal Public Ministry), filing protracted appeals and causing the ordinary action to extend for more than 35 years[7]. The Court concluded that the Brazilian State was responsible for the violation of the right to seek and receive information, consecrated in the article 13 of the American Convention, in relation to articles 1.1, 8.1 and 25 of the instruments.

This violation hinders the knowledge of the truth about the facts. Both family members and Brazilian society are left without knowing what in fact occurred in the Guerrilla War and what happened to its actors, their fates, the manner of execution, those responsible, and the circumstances. These facts are important for the history and the memory of society and, furthermore, the absence of information prevents the recovery of the mortal remains of the victims, denying, of course, the burial according to the beliefs of the family members.

There are harmful consequences of the non-observance of the fundamental right to information, from which derive other direct offenses, and not only reflexes: offense to the victims' dignity (of those disappeared and of the family members); to the right to personality; to the truth of the facts (linked to information); to memory; to access to justice, once the absence

[6] INTER-AMERICAN COURT OF HUMAN RIGHTS. **Case of Gomes Lund and others ("Guerrilha do Araguaia") v. Brazil**. 2010, §265.

[7] It is noted that the Ordinary Action n. 82.00.24682-5 is still in progress, according to consultation on the website of the TRF of the First Region - Judicial Section of the Federal District, on May 30, 2018 (issued by the website www.trf1.jus.br on 05/30/2018.

of information hinders the substantial access to an adequate and effective jurisdictional provision, causing actions to drag on in time[8].

1.2 Search for the remains and access to information

The Brazilian State claimed that it had undertaken several searches for the remains of those who disappeared during the Guerrilla War and had only succeeded in recognizing the remains of Lucia Petit. In the same vein, at the time of the defense in the case before the Court, it argued that it had taken initiatives to optimize and strengthen the normative framework of the right to freedom of thought and expression, provided for in article 13 of the Convention, in relation to the right of access to public information held by the State.

Regarding this point, Brazil enacted, after the Court's ruling, the Law of n.12.527, dated November 18, 2011, regulating the access to information provided in subsection XXXIII of art. 5, subsection II of paragraph 3 of art. 37, and in paragraph 2 of art. 216, all of 1988 Federal Constitution.

The Court valued the various initiatives of the Brazilian State, asserting that

> the right to public information held by the State is not an absolute right and may be subject to restrictions. [...]. The limitations that may be imposed must be necessary in a democratic society and oriented to satisfy an imperative public interest. This implies that, to the least extent possible, in the effective exercise of the right to seek and receive information. [9]

The ruling reinforces the need to guarantee the full and effective exercise of the right to information, with information in the custody of the state being subject to a limited regime of exceptions:

> any denial of information should be motivated and reasoned, and the State should bear the burden of proof regarding the impossibility of disclosing the information and, in case of doubt or legal vacuum, the right of access to information should prevail. On the other hand, the Court reminds the President of the obligation of state authorities

[8] It should be emphasized that the need for secrecy about the Guerrilla War should not be opposed on the grounds of national security. It is common knowledge in Brazilian doctrine and jurisprudence that fundamental rights are subject to restrictions, provided they are reasonable and justified.

[9] INTER-AMERICAN COURT OF HUMAN RIGHTS. **Case of Gomes Lund and others ("Guerrilha do Araguaia") v. Brazil**. 2010, §273-274.

> not to rely on mechanisms such as state secrecy or confidentiality of information in cases of human rights violations. [10]

It is clear from this passage that there should be no secrecy when the information indicates facts related to human rights violations.

1.3. Right to personal, psychological and moral integrity

The applicants claimed that the violation to the psychological and moral integrity of the victims stems directly from the enforced disappearances and the certainty of the death of the person summarily executed. These damages to the integrity are consequences of the lack of criminal investigation of the facts, impunity, the lack of clarification about the circumstances of the disappearances, the State's negligence in making available documents about what happened and in conducting effective searches to find the remains.

Because of the lack of more accurate information about the events related to the guerrilla war, locating and identifying the remains of the missing persons has become a Herculean task, which is demonstrated by the very few results obtained in the thirteen searches undertaken by family members, the State, and the MPF for this purpose. This scenario of uncertainty and absence of materiality, added to impunity and state omission, gives the family members a state of instability and uneasiness, because they have not been able to bury their loved ones.

The Court presumes damage to the integrity of family members, who are considered the victims of the offenses, because the disappearance of a direct relative causes physical and emotional damage, disruption of the family nucleus, suffering owing to the loss and not knowing, and the impossibility of mourning due to the lack of certainty and burial according to religious beliefs.

The lack of burial is a separate fact, which leads to a serious offense to the dignity of both the direct victim of the offense and the victim's family. The absence of burial alters the mourning process and the reworking of the memory and overcoming the loss, frontally violating the dignity of the family members. Furthermore, the right to a legal personality, to one's own existence, is

[10] INTER-AMERICAN COURT OF HUMAN RIGHTS. **Case of Gomes Lund and others ("Guerrilha do Araguaia") v. Brazil**. 2010, §274.

denied to the forcibly disappeared, insofar as it forces the presumed recognition of their death, for all intents and purposes.

It is worth reflecting on the need to observe rites of passage as way to mark events that relate to individual and collective identity. If the community celebrates birth, baptism, and marriage, the rite also marks the end. The right to a grave has been of paramount importance since classical antiquity. As early as 442 B.C., Sophocles devoted his immortal work Antigone to deal with this issue dear to the Greeks: the deprivation of the grave as a capital, cruel punishment[11]. Burial is not a taboo, but a necessary rite for the reworking of grief, acting as a trigger to overcome the loss, not being an act only for the remaining family members, but also a community act, of recognition of the deceased's departure before the community. As the dignity of the human person is a fundamental right, on which the Democratic Constitutional State is based, it should be guaranteed in all situations of life and even in death.

It is not only the dignity of the forcibly disappeared that is at stake, but also the right to psychological and moral integrity of the family members, which is protected by the Federal Constitution, in art. 5, clauses V and X. The psychological and moral damage caused by the suffering of those who could not bury a family member should be considered by the State, which should contribute to guaranteeing the right to manifest mourning: "to live with the pain of the absence of the dead relative, to be able to wake what was his body, to have a place to go and mourn, stems from the right to life with dignity contemplated in the Constitution," as stressed in the explanatory statement of Bill 558/2017.

As emphasized in the Court's judgment, the impact of the enforced disappearance of the Guerrilla victims in the material, moral and psychological spheres of the relatives was aggravated by the lack of clarification of the circumstances of the disappearance, the final whereabouts, and the impossibility of giving the remains a proper burial.

1.4. Right to moral reparation, to memory and truth

[11] As early as 442 B.C., Sophocles destined the immortal work Antigone to deal with this theme dear to the Greeks: grave deprivation as a cruel, capital punishment.

The "deprivation of access to the truth of the facts about the fate of a disappeared person constitutes a form of cruel and inhumane treatment for close relatives"[12]. In this regard, the Court established that "the clarification of the final whereabouts of the missing victim allows relatives to alleviate the anguish and suffering caused by the uncertainty regarding the fate of the missing relative"[13] .

In the chapter on reparation, the obligation was established to rescue the memory of the facts, such as commemorative dates, memorials, publication of informative and didactic materials about the atrocities that occurred during the military regime, the institution of a truth commission to document the events of the period, information gathering, research, expeditions to the probable places where the bodies could have been buried, among other actions tending to discover the truth about the facts. In this sense, Brazil created the National Truth Commission, which functioned for two years and seven months[14].

The searches undertaken have only provided "certain" knowledge about the facts, the scenario and the operations. This is because much has not been revealed, especially the identity of those responsible for the damage and the whereabouts of the disappeared. Thus, the right to truth and memory is still violated, and it can be claimed that partial accounts, which do not cover the most relevant events - those related to human rights violations - have not been revealed. These points touch on the amnesty granted by the Brazilian government for crimes committed during the military regime, including related ones.

2. The Anhystia

The Inter-American Court touched on a sensitive point when it obliged Brazil to investigate the facts, judge and, if necessary, punish those responsible and determine the whereabouts of the victims. Sensitive because it runs up against Federal Law n. 6683, of August 28, 1979, enacted during the military government. The petitioners requested the Court to order

[12] INTER-AMERICAN COURT OF HUMAN RIGHTS. **Case of Gomes Lund and others ("Guerrilha do Araguaia") v. Brazil**. 2010, §277.
[13] INTER-AMERICAN COURT OF HUMAN RIGHTS. **Case of Gomes Lund and others ("Guerrilha do Araguaia") v. Brazil**. 2010, §240.
[14] Regarding the Araguaia Guerrilla War, the NTC reports that during its two years and seven months of operation, it carried out several activities related to the clarification of human rights violations committed in the context of the Araguaia Guerrilla, which were the subject of a specific chapter in Volume 1 of the NTC Report, entitled "The Araguaia Guerrilla". Cf. Brasil. **Comissão Nacional da Verdade. Vol 1: Memórias Reveladas**, 2014.

Brazil to conduct, through common and not military jurisdiction, a full, effective and impartial investigation to ascertain the circumstances surrounding the enforced disappearances and execution of Ms. Petit da Silva, based on due process of law, in order to identify and punish those intellectually and materially responsible for the human rights transgressions and to punish them criminally.

To this end, the State should consider that these crimes of torture, forced disappearance, deprivation of burial, among other serious violations of human rights and related to the circumstances of the Guerrilla War, are imprescriptible, so that they could not have been subject to amnesty. From this stance, it follows that measures must be promoted to ensure that the Amnesty Law and other impediments provided for in the domestic legal system are not obstacles to the prosecution of serious human rights violations.

The Court granted these requests, ruling that the State could not use provisions of domestic law, such as res judicata, prescription, amnesty, non-retroactivity of the criminal law, lack of typicity (lack of typification of the crime of forced disappearance in Brazilian law), or any other exclusion of punishment or responsibility that would guarantee impunity for the facts. The Court also determined that Brazil should remove any and all obstacles to the investigation of the facts and the punishment of those responsible.

This decision was paradigmatic for this point: it was an unprecedented case of a decision by an international court that collided head-on with a decision by Brazil's highest court, the Supreme Federal Court, and with settled national jurisprudence. The STF, when deciding on the Argument of Noncompliance with a Fundamental Precept (ADPF) No. 153, clashed with the jurisprudence of the Inter-American Court when it failed to observe the *jus cogens, i.e., the* peremptory norms, obligatory for the States contained in the American Convention on Human Rights[15]. And, as the Ad Hoc Judge, Roberto de Figueiredo Caldas, emphasized in his vote, “this is the reason why the country is being condemned in this sentence, for violations of the Convention”[16] .

[15] For a reflection on the “crossroads of truth” and the confusion between the legal perspective and that of the historian on ADPF n. 153, see: : MARQUES, Raphael P. de Paula. Julgar o passado? Verdade histórica e verdade judicial na ADPF 153. **REJUR – Revista Jurídica da UFERSA**, v. 2, n. 3, 2018, p. 70-86.

[16] Reasoned vote of Ad Hoc Judge Roberto de Figueiredo Caldas regarding the sentence of the Inter-American Court of Human Rights in the case of Gomes Lund et al. Brasil.

Impunity represents a chapter apart, since it is directly related to the way Brazil dealt and still deals with the perpetrators: through complete amnesty, which prevents any form of criminal prosecution for the abuses committed against human rights during the dictatorship[17]. When it comes to *amnesty*, which comes from *amnestia*, forgetfulness, it is important to frame it in the broader scenario of transitional justice, since it is one of the mechanisms most used in transitions in South American countries.

Amnesty is part of a range of mechanisms used by post-conflict societies as a way to overcome the violent period, and is, in a way, a pattern of reconciliation without judgments about what is right or wrong. Some societies choose it on the grounds that it contributes to the construction of a sustainable and viable peace process, according to the specifics of the case.

Anastasia Kushleyko[18] presents arguments for using a conditional amnesty, as in post-Apartheid South Africa, as a possibility to achieve reconciliation and a negotiated peace by providing forums where victims and perpetrators have the freedom and encouragement to tell the truth about the offenses, thus creating a potential to positively address the varied needs of society in post-conflict situations. These forums, administered by the Truth and Reconciliation Commission, have made it possible to collect victims' testimonies, hear offenders, review amnesty applications, record testimonies, and learn about human rights abuses and offenses. Anastasia argues that amnesty should only be applied in contexts where prosecution and criminal accountability are impossible.

For her, accountability is recognized as an indispensable component of peace and reconciliation. In the post-conflict context, all states face the process of deciding whether to bury the past, encouraging offenders to commit to the peacemaking process; or to confront the crimes, pursuing the offenders and prosecuting them, while risking the perpetuation of conflict. These are different approaches, to forgive and forget, or to do justice by punishing offenders, each of which has different consequences.

[17] The academic literature in this regard is vast, as can be inferred from reading: RODRIGUES, L. T.; GÓMEZ, J. M. **A condenação do Estado brasileiro pela Corte interamericana de Direitos Humanos no caso da Guerrilha do Araguaia e a interpretação do Supremo Tribunal Federal sobre a Lei de Anistia Brasileira**. Dissertação (mestrado). Pontifícia Universidade Católica do Rio de Janeiro, Departamento de Direito, 2012, 132p

[18] KUSHLEYKO, Anastasia. Accountability v. "Smart Amnesty" in the Transitional Post-conflict Quest for Peace. A South African Case Study. In: Szablewska, Natalia & Bachmann, Sascha-Dominik. **Current issues in transitional justice: Towards a more holistic approach**. London: Springer, 2015, p. 31-53.

In fact, peace and justice are sometimes incompatible goals. The pursuit of justice, in the attitude of prosecuting, trying, and holding accountable wrongdoers, can even perpetuate conflict or spark new controversies, negatively impacting peacebuilding processes. There are transitional justice theorists who support the idea that leaders possibly responsible for war crimes and crimes against humanity should be invited to the negotiating table in order to end an armed conflict[19]. The reference to reparation through criminal processes may in fact prolong the conflict. These were the arguments used by the Brazilian government, and reinforced by ADPF 153, for the adoption of unconditional amnesty.

That is because amnesty often comes on stage, as it refers not only to notions of accountability, but also to reconciliation and peace. History shows that several political leaders of Latin American countries, with the end of the Cold War, justified the use of amnesty as a crucial bridge to peacemaking processes, believing that choosing the path of non-indictment was the price to pay for ending hostilities and authoritarian regimes. At that time, the desire for political stability outweighed that of accountability. Consequently, many countries decided to enact amnesties for perpetrators of human rights violations. It is estimated that "amnesties, in one form or another, have been used to limit the accountability of individuals responsible for gross human rights violations in all major transitions in the 20th century"[20] . In South America, in relation to countries that experienced dictatorial regimes, Brazil was not the only one to issue an Amnesty Law. The option for amnesty marked transitional justice in the South American scenario and had a crucial impact on the concept of transitional justice from the 1980s on, challenging the victims of the dictatorships to face the impunity of the perpetrators. This option for amnesty, based on forgetfulness, is responsible for several condemnations by the Inter-American Court, due to the Convention's provision that crimes against humanity cannot go unpunished.

They are different conceptions: while some theorists defend amnesty in certain contexts, as way that contributes to a closure of the conflict and as an important step in the construction of peace and the reestablishment of democracy, the Inter-American Court understands that

[19] KUSHLEYKO, Anastasia. Accountability v. "Smart Amnesty" in the Transitional Post-conflict Quest for Peace. A South African Case Study. In: Szablewska, Natalia & Bachmann, Sascha-Dominik. **Current issues in transitional justice: Towards a more holistic approach**. London: Springer, 2015, p. 32.

[20] KUSHLEYKO, Anastasia. Accountability v. "Smart Amnesty" in the Transitional Post-conflict Quest for Peace. A South African Case Study. In: Szablewska, Natalia & Bachmann, Sascha-Dominik. **Current issues in transitional justice: Towards a more holistic approach**. London: Springer, 2015, p. 32.

amnesty, in cases such as human rights violations, goes against the need to do justice by punishing the perpetrators. Punishment, for the Court, is fundamental as a retributive and preventive measure against new human rights violations.

Amnesties have been used with the aim of shielding perpetrators, freeing them from criminal prosecution and accountability for their offenses, as a way to deal with violent pasts during armed conflicts, exceptional regimes, and even in democracies. From this perspective, amnesty, in fact, carries with it the idea of injustice and impunity, which is why its use should be very exceptional, i.e., only in cases in which the persecution and punishment of offenders would lead to more violence and conflicts.

Although the amnesty prevents the accountability of the criminals, and many times even their identification, as in the Brazilian case, actions tending to establish the truth of the facts, their registration, and to provide reparations for material and moral damages must be ensured. Truth commissions should be established for this purpose, as well as compensation for material and psychological damages on behalf of the victims.

As Austin Sarat and Hussain Nasser reflect, [21]justice exerts a powerful pull on the human imagination, and at least part of what constitutes a sense of justice is a world of rules and laws, accountability, and just punishment. But there is another component that has been taken into account in democratic and also post-conflict settings, and that is institutional mercy, embodied in this context in the figure of amnesties.

Structural and institutional mercy fulfills an important stabilizing role and, in a way, allows a closure of the previous period as long as it is followed by some ascertainment of the truth, so important to the conformation of the community's identity. In the sense of the role of mercy, the referred authors reflect that

> a world made strictly and exclusively according to the dictates of the law would be a world in which few would want to live and few could truly prosper. A life lived as if the law were the only guiding principle would be as much of a tragedy or a farce as a triumph of good over evil. To humanize the world we live in, to make it possible for people to prosper and survive, the law has the company of other virtues, such as mercy[22].

[21] SARAT, Austin; NASSER, Hussain. **Forgiveness, Mercy, and Clemency**. Stanford University Press, 2006, p. 26.
[22] SARAT, Austin; NASSER, Hussain. **Forgiveness, Mercy, and Clemency**. Stanford University Press, 2006, p. 26.

In the wake of structural mercy, even if without its valorous intent, aimed more at impunity, Brazil granted unconditional amnesty, which seemed more like generalized impunity, without the intention of bringing to light the truth of the facts and without any incentive to unravel what happened in cases of serious human rights offenses, unlike what happened in South Africa in the post-Apartheid regime, in which amnesty was conditional on ascertaining the facts, the truth, and historical record.

The provision has been interpreted by Brazilian Courts in the sense that human rights abuses fall within the scope of the amnesty, which is why the Brazilian State has neither investigated nor punished any human rights violation committed during the military regime. Brazil has not complied with the determination to adapt domestic legislation and thus promote effective investigations into the facts related to the Guerrilla War, forced disappearances and executions, and the accountability of agents, even considering its adherence to the Inter-American Convention since September 25, 1992, with the recognition of the contentious jurisdiction of the Court on December 10, 1998.

These behaviors generate serious consequences, especially in the field of identity formation of the Brazilian society, by impacting the right to truth and memory of the facts. Next, these attitudes of the Brazilian State are described under the prism of Paul Ricoeur's philosophy.

2. The Equation between Truth, Memory and Justice

The idea of a politics of just memory was one of the dear and avowed civic themes of the French philosopher Paul Ricoeur:

> I am disturbed by the disturbing spectacle presented by the excess of memory here, the excess of forgetfulness there, not to mention the influence of commemorations and errors of memory - and of forgetting. The idea of a just memory policy is, in this respect, one of my avowed civic themes. [23]

The reconstruction of democracy involves the equation between truth, memory, and justice. The politics of just memory coincides with the right to memory and truth about the victims of human rights violations.

[23] RICOEUR, Paul. **A memória, a história, o esquecimento**. Campinas, São Paulo: Unicamp Press, 2007, p. 17.

In general, there is a common enigma between imagination and memory, which is precisely the presence of the absent, which, when remembered, is done so under the temporal condition of anteriority[24]. Unlike imagination, memory must be able to faithfully represent the presence of what is presently absent and previously existent. It is in this sense that one can speak of a specific effort of the search for truth as the appanage of memory.

This epistemic dimension of memory, where truth is the very reliability of recollection, is related to the imperative of acknowledging the past, that is, that of making just memory, that of exercising a memory that refuses to live as if things had not happened. One might even say that there is an epistemic deontology in memory, while it must be true by the trait of its reliability.

> This question is that of the reliability of memory and, in this sense, of its truth. This question was formulated in the background of our entire investigation regarding the differential feature that separates memory from imagination. At the end of our investigation and in spite of the snares that the imagination sets for memory, it can be stated that a specific search for truth is implied in the vision of the past "thing," of *what was* previously seen, heard, experienced, learned. This search for truth specifies memory as a cognitive greatness. More precisely, it is at the moment of recognition, where the effort of remembering culminates, that this search for truth declares itself as such. Then we feel and know that something happened, that something took place that involved us as agents, as patients, as witnesses. Let's call this search for truth fidelity. [25]

Truth as fidelity to that to which we are heirs and witnesses is born from the just memory of the past. To the epistemic dimension of memory, true as faithful and reliable representation of the past, one must add the pragmatic dimension of the exercise of memory. In effect, by joining the epistemic dimension to the pragmatic dimension of the uses and abuses of memory, Ricoeur can discuss the three levels of impeded, manipulated, and forced memory, the latter belonging to his critical reflection on amnesty[26] .

Memory corresponds to the power of remembering, to being able to remember, but also to forget. To understand the tension between remembering and forgetting, one can bring the theory of memory closer to that of the promise, as developed in "Path of Recognition"[27] . As he recognizes a duality in personal identity, constituted between mesmity (identity-idem) and ipseity (identity-ipse), Ricoeur proposes two analogies between memory and promise. The first one

[24] RICOEUR, Paul. **A memória, a história, o esquecimento**. Campinas, São Paulo: Unicamp Press, 2007, p. 28.
[25] RICOEUR, Paul. **A memória, a história, o esquecimento**. Campinas, São Paulo: Unicamp Press, 2007, p. 70.
[26] RICOEUR, Paul. **A memória, a história, o esquecimento**. Campinas, São Paulo: Unicamp Press, 2007, p. 82-104; p. 451-466.
[27] RICOEUR, Paul. **O percurso do reconhecimento**. São Paulo: Loyola Publishing House, 2016, p. 123-145.

reveals that memory is to mesmity as the promise is to ipseity. The second, just as the promise has its deepest meaning denied by betrayal, so memory is threatened by the negativity of forgetfulness. Memory flirts with forgetfulness, while the promise flirts with betrayal, both being values and constitutive elements of identity and the recognition of oneself as another[28] .

The denial of the truth and its register for the memory ends up imposing a forgetfulness and a betrayal to the victims and to the society, implying a feeling of complete injustice for the non-punishment of the offenders and a risk of repetition, a reflection that fits perfectly in the context of the Araguaia Guerrilla. The registration of the truth allows the process of rememoration, which is an active work of bringing to consciousness the impressions that were registered in the spirit about what happened. These traces, for Ricoeur, can be explained in more than one way. One, by neuroscience, which has them as cortical traces. Another way, as psychic traces of the impressions that are made on the human senses and on the affectivity about remarkable and even traumatic events.

At this point, what is the meaning that an individual or a collectivity gives to a certain fact? How does it reverberate, psychologically, in the individual or collective sphere? The set of these traces forms the memory. The enigma of the presence in image of a concluded past that produces the idea of trace. All traces are in the present and depend on the thought that interprets them for the trace to be considered a trace and assume the highly paradoxical status of the effect of an initial impulse of which it would be a sign effect of its cause. Such is the enigma of the trace [29].

This is because it is important that the State guarantees the conservation of historical records, through documentation, and that it stimulates debate, remembrance, in order to make possible the critical work of memory and, thus, a possible overcoming of the trauma, which the Brazilian State has not done to its satisfaction. By preventing the truth, the record, and open debates, the State denies the victims and society these important facets for the formation of identity.

The Brazilian amnesty worked with forgetfulness. Forgetfulness can occur in several ways, as Ricoeur reflects. It can occur through erasures, cunning, bad conscience, concealment of what

[28] RICOEUR, Paul. **O percurso do reconhecimento**. São Paulo: Loyola Publishing House, 2016, p. 124.
[29] RICOEUR, Paul. **O percurso do reconhecimento**. São Paulo: Loyola Publishing House, 2016, p. 125.

remains unreadable in the memorial experience, among others. Still, there is the "threat of an irremediable and definitive forgetting that gives the work of memory its dramatic character[30].

Forgetfulness is the enemy of memory, and therefore of history and identity. Memory is sometimes a desperate attempt to salvage some wreckage from the great shipwreck of oblivion [31]. That is the fear of forgetfulness. And the Amnesty Law imposes this forced forgetting, by preventing the truth of the facts, the elucidation of the whereabouts of the victims and the identification of the offenders. Therefore, Ricoeur thinks of this mechanism as exceptionally applicable, and as long as it does not prevent the registration of the facts to the memory. Amnesty, in relation to past crimes, remains as the sword of Damocles over all new generations[32].

The struggle against forgetfulness is not, for Ricoeur, the only motive of the active moment of remembrance, as part of it are the operations of thought, the progressive effort involved in the reconquest of the past. A work of *anámnesis* becomes necessary, which is the action of remembering through arduous effort to remember and peacefully narrate the history of the victims. Therefore, hope emerges where there is reworking of memory, in the form of recognizing oneself and the other as oneself. In other words, the work of retrieving the memory and avoiding forgetfulness presupposes the transposition of the *mneme-memory*, which is the passive aspect, trace, impression to the *anámnesis-reminiscentia,* which is the active aspect, which requires exercise and effort that, for Freud, are possible through a critical work of the memory, of the narration and possible associations from what is told by the analyzed[33]. But this work is only possible if there is a register of the facts as close to reality as possible, which did not occur in the context under examination.

Psychoanalysis is also a tool used for the work of *anámnesis-reminiscentia*, that is, a work of memory, to re-signify the traces and remove some traumatic charge from them. As Ricoeur argues, a work of critical memory, an active moment of remembrance as a struggle against suffering. At this point, to deny memory is also to deny the possibility of treatment by rememory

[30] RICOEUR, Paul. **O percurso do reconhecimento**. São Paulo: Loyola Publishing House, 2016, p. 126.
[31] RICOEUR, Paul. **O percurso do reconhecimento**. São Paulo: Loyola Publishing House, 2016, p. 126.
[32] Unlike amnesty, the faculty to forgive, which is its antithesis, can intertwine the memory of the criminal debt of the past with the promise of another future way of being. C ARENDT, Hannah. **A condição humana**. Rio de Janeiro: Forense Universitária. 2007, p. 248-249; RICOEUR, Paul. Condenação, reabilitação e perdão. In: RICOEUR, Paul. **O Justo 1: a justiça como regra moral e como instituição**. São Paulo: WMF Martins Fontes, 2008, p. 183-198.
[33] RICOEUR, Paul. **O percurso do reconhecimento**. São Paulo: Editora Loyola, 2016, p. 127ff.

and to deny the experience of mourning, as previously analyzed, making cruel for the victims the work of a suspended mourning, for not knowing.

But there is no way to reconquer the past and register it if there are factual objections (absence of registration, of truth, of memory) to the recovery of documents and reports that can bring out the very memory and truth of the events. The Brazilian government, in the field that we are dealing with, denies the citizens and the relatives of the victims, who are also victims, the register of this memory, and, thus, the work of critical memory itself, as a way to overcome the violent past and the aggressions committed.

Therein lies the greatest cruelty of the broad and unconditional amnesty granted by the Brazilian government for human rights abuses committed in the context of the dictatorship. Cruelty because, as proposed by Ricoeur, (re)knowledge of the past constitutes recognition of oneself as another and of another as oneself. Without knowledge of past truth, individuals and society itself are denied the knowledge of realities that conform their identity. This study of remembering is important insofar as it is linked to the conformation of identity and ultimately impacts the (re)configuration not only of individual identity, but also of collective identity.

After analyzing historical representation as an expression of the past, Ricoeur begins to consider memory as a collective capacity, and mnemonic representation as a manifestation of collective identity. He reflects on how traumatic events can affect the development of these capacities and identity and proposes to transpose Freudian metapsychology to the collective field in order to address the problems of traumatic collective memories. Ricoeur's idea is to employ psychoanalytic categories directly to collective reality.

Ricoeur makes this transposition from the individual sphere to the collective sphere, even though he recognizes, as an obstacle, the form of transposition of the first Freudian topography (unconscious, preconscious, and conscious) to the collective. This topography remains connected to the economy of instinct, yet, and is still associated with the individual, which means that it is thematized within an isolated psychism that does not take into account intersubjective relations and that, therefore, could not, in principle, account for collective behavior. But he overcomes

this obstacle mainly by constructing what he calls a narrative identity. In the words of Gláucia Cobelli [34], who reflects on aspects of collective identity based on Ricoeur's philosophy

> Identities are established in a conflictive relationship with time, considering that, if identity is what defines, one can ask how it can be guaranteed over time. Another issue lies in the fragility that identity assumes in confrontation with the other, since it cannot be assumed exclusively by its possessor; instead, it is forged in social relations. We mention the third cause of identity fragility pointed out by Ricoeur (2008, pp. 95): The third fragility is the inheritance of founding violence. It is a fact that there is no historical community that has not been born out of a relationship, which can be called original, with war. What we celebrate under the name of founding events are essentially violent acts legitimized later by a precarious rule of law, legitimized, at the limit, by their very antiquity, by their antiquity. Thus, the same events can mean glory for some and humiliation for others.

One of the theses dear to the French philosopher concerns the essential link and cross-cultural necessity between the activity of narrating a story and the temporal character of human experience[35] . Indeed, “time becomes human time to the extent that it is articulated in a narrative mode, and that narrative attains its full significance when it becomes a condition of temporal existence”[36]. The narrative identity of a person or an existing community is thus intrinsically linked to and brings into play the relationship between temporality and narrativity. Moreover, the history, and with it the narrative identity of each human life is intermingled with that of others so as to generate other histories that are themselves intersections of innumerable histories.

Ricoeur turns here to the dialogue with Wilhelm Schapp who, seeking a phenomenological reflection of history distinct from Heidegger, showed that we are permanently entangled in stories and that we are our stories[37] . Ricoeur adds that “the emphasis here is on 'being-entangled' (*verstricktsein*), a verb whose passive voice stresses that the story 'happens' to someone before someone narrates it”[38] . And it is precisely through the passively and actively lived story(s) that we seek to know ourselves and make ourselves known to others through them. And histories are constructed not only in isolation, but collectively, through the intersection of stories: of victims, perpetrators, direct and indirect testimonies, historians, and the analysis of

[34] COBELLIS, Gláucia. Direito à Memoria no Brasil – Conceitual - Pós Ditadura. In: EILBAUM, L.; LEAL, R.G.; MEYER, S.R. **Justiça de transição: verdade, memória e justiça**. Florianópolis. FUNJAB, p. 11-25, 2012. Available at: http://publicadireito.com.br/artigos/?cod=8909a6e385b0fbc1 . Accessed on: 01 jun. 2018.
[35] RICOEUR, Paul. **Tempo e Narrativa**. São Paulo: Papirus Editora, 1994, tome I, p. 85.
[36] RICOEUR, Paul. **Tempo e Narrativa**. São Paulo: Papirus Editora, 1994, tome I, p. 85.
[37] RICOEUR, Paul. **Tempo e Narrativa**. São Paulo: Papirus Editora, 1994, tome I, p. 115.
[38] RICOEUR, Paul. **Tempo e Narrativa**. São Paulo: Papirus Editora, 1994, tome I, p. 115.

the facts by specialists (political scientists, philosophers, anthropologists, sociologists, etc.). As they are woven, told and retold, they contribute to the formation of the cultural heritage of a given community, they become part of its *ethos* and identity. This is also why knowing the truth of the facts and keeping track of them is so important. Aspects left aside by the Brazilian government.

Identity arises from stories, told, untold, and repressed. Just as important as the search for the past is also to accept responsibility for it, that is, to recognize that there is a right to memory because there is a duty to remember. To form a narrative identity is thus to transform a past that is beyond control into a past for which we are responsible, and to recognize the intersubjective nature of that past over the imperative of justice.

The deontological perspective of memory adds to the work of memory and struggle a double aspect of moral duty: 1) that which imposes itself as contrary to forgetting, whether in the form of desire, manipulation, or repression; 2) that which exerts a coercion felt subjectively as obligation [39].

This double aspect of moral duty is brought together in the idea of justice and, consequently, in that of just memory. In questioning the meaning of just memory as a duty of memory in both its veritative and pragmatic aspects, Ricoeur elaborates three elements indicating the intrinsic relationship between justice and memory:

> The first element of the answer is to remember that, among all the virtues, justice is the one that, by excellence and by constitution, is directed to another. (...) The duty of memory is the duty to do justice, by remembering to someone other than oneself.
> Second element of the answer: the time has come to resort to a new concept, that of debt, which it is important not to confine to that of guilt. The idea of debt is inseparable from that of inheritance. We owe part of what we are to those who came before us. The duty of memory is not limited to keeping the material record, written or otherwise, of the finished facts, but it entertains the feeling of owing others, of whom we will say later that they are no more, but have been. Pay the debt, we will say, but also submit the inheritance to inventory.
> Third element of response: among those others to whom we are indebted, a moral priority lies with the victims. Above, Todorov warned against the propensity to proclaim oneself a victim and incessantly demand reparation. He was right. The victim in question here is the victim other, other than us[40] .

The duty of memory is thus directed at doing justice, through remembrance, to another, to a victim of injustices other than ourselves. The past persists, or exists as having been

[39] RICOEUR, Paul. **A memória, a história, o esquecimento**. Campinas, São Paulo: Unicamp Press, 2007, p. 101.
[40] RICOEUR, Paul. **A memória, a história, o esquecimento**. Campinas, São Paulo: Unicamp Press, 2007, p. 101.

memorialized, allowing us to "work" the past "working through" a debt to its victims. There is a duty to make memory of what has gone before us, of our inheritances, and thus of the debts of the past. Nevertheless, cultural traditions are not a passive acceptance of this heritage. Instead, the passivity and affectivity of memory need to be understood as a response to the otherness of the past and the challenge posed by the memories of other communities.

Memory can make new communities possible by attending to places that demand remembrance. Memory is central to individuality, is a complex phenomenon, and should not be understood as our only access to the past. Each element of memory has significant implications at the level of identity formation, which Ricoeur presents from a pathological-therapeutic perspective, to a social perspective and an ethical-political approach. To show how communities can fall victim to the pathologies that arise from repressed memories, Ricoeur again turns to Freud.

In the case of repressed memories, the traces of the past are not forgotten, but are indirectly manifested through a patient's violent and obsessive actions, attitudes, or acts, i.e., outbursts. These memories displace the horizons that constitute identity in that they unconsciously replace a repeated action with the memory of what actually happened.

That is why the searches for the historical retrieval of memories related to traumatic events, such as those that happened during the military regime, and whose records are denied to the victims, are crucial. Working through traumatic memories requires the work of mourning. If the State itself denies mourning, it directly affronts dignity, allowing an eternization of suffering by the gap established by the absence of truth and, consequently, of memory, which is the substratum of the work of perlaboration.

It is easier to say that the victim or the patient needs to have the courage to face the past. It is also easier to make a symbolic reparation for the loss, such as the pecuniary indemnifications made by the Brazilian government, than to bring to light the violent and dehumanizing past. But this posture should not remove the indispensable nature of the documentary recovery of the past, especially taking into account the condemnation of Brazil by the Inter-American Court.

The Amnesty Law should not constitute an obstacle to the investigation of the facts for registration purposes. This is the most important point to be defended: if there are legal and constitutional obstacles, due to the ADPF 153 decision, to the punishment of those involved in the political crimes and related ones, the same should not occur with the investigations for

establishing the truth of the facts, registration of the memories, and discovery of the remains. Mourning and the work of memories should be brought together in the struggle for the acceptability of these memories: they should not only be understandable, but they have to be acceptable, and it is this acceptance that is at stake in the work of memory and mourning. Both are types of reconciliation[41] .

By bringing repressed and traumatic memories back into the light and stripping them of their power to influence action, the individual participates in the "rewriting" of his or her narrative identity to include these traumatic experiences. And this rewriting, when brought to the attention of society and when society is allowed to participate, contributes to the sedimentation of the collective identity itself. Remembering too clearly the history of suffering or forgetting too quickly the violence perpetuated in the name of a community are "symbolic wounds" in the collective psyche[42]. The excesses of remembering and forgetting leads to the repetition of violence.

Ricoeur suggests that the work of memory and mourning is an "exercise in saying otherwise, and also in letting others contain their own history, especially about the founding events, which are the foundation of a collective memory"[43] . By narrating identity differently, a community can work out its past, have an acceptance and understanding of itself and justice towards others. Ricoeur situates the duty to remember as a relationship between past, present, and future. He writes, "the duty to remember consists not only in having a deep concern for the past, but in transmitting the meaning of the past to the next generation"[44] .

Therefore, the philosopher casts the responsible use of memory in terms of a debt to the past, by virtue of which one recognizes the obligation to preserve them and to accept the unfulfilled hopes and promises that others have made in our name, as well as to accept responsibility for the actions of our ancestors and that resulted in the unredeemed suffering of others.

The narration of past sufferings assists the process of reintegration of each human person, fragmented and traumatized, into the community. If trauma isolates a person capable of being and living from his violent heritages, his narrative capacity helps to reincorporate him into

[41] RICOEUR, Paul. **A memória, a história, o esquecimento**. Campinas, São Paulo: Unicamp Press, 2007, p. 101.
[42] RICOEUR, Paul. **A memória, a história, o esquecimento**. Campinas, São Paulo: Unicamp Press, 2007, p. 82-83.
[43] RICOEUR, Paul. **A memória, a história, o esquecimento**. Campinas, São Paulo: Unicamp Press, 2007, p. 9
[44] RICOEUR, Paul. **A memória, a história, o esquecimento**. Campinas, São Paulo: Unicamp Press, 2007, p. 9.

community life, strengthening the sense of belonging and mutual recognition. To be responsible with memory is to respond to the memories of the violated, marginalized, and oppressed subjects. The fruits of this common work of individual and collective memory are integral parts of the work of justice.

By revealing the sources and causes of injustice, one learns from the past for the future. The works of memory and mourning occur as an exchange of memories. This means that communities depend on contact with other people to complete the process of constituting a narrative and identity memory, because it is impossible to free otherness from identity constitution, and because it would be unfair to try to do so. Thus, the work and the exchange of memory are endless, precisely because everyone inserted in the context can tell the stories. The exchange of memory combats the abuses of memory. This exchange not only establishes what happened, but seeks the importance and significance of certain facts, and places them in relation to each other in order to spread a new, more inclusive and just future: "the unfulfilled future of the past forms perhaps the richest notion of tradition. The liberation of this unfulfilled future from the past is the greatest benefit we can expect from the cross-fertilization of memories and the exchange of narratives[45].

The exchange of memories can occur through performative practices, dialogues and meetings, commemorative ceremonies. These spaces hold the key to understanding society's locus of memory (collective, or communal memory). Commemorations re-enact the past through rituals. But these ritualistic commemorations, re-enactments, storytelling only make sense if they are based on the most faithful record of what happened. If the truth is not unveiled, the performative exchanges become empty and end up in the terrain of simple fiction and as a way to plug a hole left by not knowing. Thus, the investigations and the reports of the National Truth Commission, the instituted commemorations, the historical marks and records only take their place of importance in shaping the history of Brazilian society if they mirror the truth of the facts, if they tend to uncover the whereabouts of the victims, to rescue their mortal remains, to identify the perpetrators. Otherwise, they contribute even more to the manipulation of the collective identity by information gaps and to a forgetfulness of the past of atrocities.

4. Final Considerations

[45] RICOEUR, Paul. **O percurso do reconhecimento**. São Paulo: Loyola Publishing House, 2016, p. 8.

The condemnation of Brazil by the Inter-American Court due to the way the Government conducted the investigations, the availability of information to family members and society, and the results imposed by the Amnesty Law's permanence in force, in the specific context of the Araguaia Guerrilla War, brings about this intertwining of debates: how the denial of the truth and the faithful recording of memories impact the identity formation of individuals and of society itself, and how the denial conduct affronts human rights.

As if the offenses that occurred in the episode of the Araguaia Guerrilla War were not enough, the Government, even with the measures for pecuniary compensation to the families of the victims, institution of the now-defunct National Truth Commission, creation of commemorative dates, memorials, publication of informative and didactic material, reports, etc. it still goes against the current trends of transitional justice, besides not complying with the condemnation pronounced by the Court regarding the non-accountability of the offenders and the disclosure of the truth and recovery of the remains of the forcibly disappeared. It is worth remembering that this is not only about the episode of the Araguaia Guerrilla War, as Unneberg & Melo conclude:

> From the analysis of the performance of the Brazilian State in the face of the judgments of the CORTHTRIDH, it is easy to conclude the lack of engagement of the Powers in the fulfillment of these judgments, especially in the legislative modifications that are imperative for the prevention of new events such as those that victimized the people involved in the cases submitted to the Court. Without this commitment, it will be impossible to fully achieve the objectives of the Inter-American System of Human Rights in Brazilian territory. [46]

It should be noted that the lack of engagement of the constituted powers coexists with a set of efforts, although insufficient in relation to the dimension of the traumas and violence, made to comply with the convictions imposed by the sentence, such as the items dealt with in the present work. However, it is necessary to remember that the State still deviates from the condemnation in relation to the adaptation of the national law to the Inter-American Convention, in what concerns the typification of the crime of forced disappearance, the punishment of the agents, effective measures for the recovery of the mortal remains, if they exist, and the declaration of imprescriptibility of the crimes of lesa-humanity.

[46] UNNEBERG, Flávia Soares; MELO, Álisson José Maia. O Brasil e a Corte Interamericana de Direitos Humanos: as sentenças condenatórias e sua repercussão interna. **Nomos – Revista do Programa de Pós-Graduação em Direito da UFC**, v. 34, n. 1, jan./jun. 2014, p. 73.

This understanding of the Court, of condemning the State for not investigating the facts and consequently punishing the agents, is in line with Ricoeur's thought and with the current strand of transitional justice: establishing the truth of the facts, the record of memory, as contents of the human right to dignity and, in a broader sense, the right to knowledge of the facts that make up the group's own identity.

Brazil collides with these trends. The refusal to review the Brazilian Amnesty Law and, thus, to allow investigations into those responsible for the atrocities and effective measures to unveil the true fate of the disappeared, perpetuates the affront to the dignity of the victims and their families, by preventing them from performing the rites necessary to elaborate the mourning, to overcome the traumas, and to construct narratives that enable the (re)configuration of individual and collective identity. Identity, conceived as an attribute inherent to human beings and groups, is part of dignity.

The unconditioned amnesty makes the offense against dignity endure, even though it was granted under the pretext of a political agreement, as a necessary means for the peaceful transition from the dictatorial to the democratic regime. The arguments of mercy and pacification, and even of the impossibility of punishment, in view of the horizon of intensified violence and conflicts, do not cloud their consequences. And on this point, the present study is aligned with Ricoeur's thought. In fact, the French philosopher recognizes that amnesty is necessary in some exceptional cases for the necessary transition from states of violence to states of peace, as long as it is emphasized that to give amnesty is not to forget, nor is it to forgive. When it is unrestricted, that is, when amnesty is equivalent to the supposed right to forget (and not to remember), justice and forgiveness are avoided, while at the same time social resentment and the wounds of memory are promoted, born of the sense of a justice not yet institutionally realized, often stirring up resentment and revolt against the perpetrators of crimes against the common dignity of human beings.

Social life is always exposed to the excesses of the memory of debts as well as to the risks of their complete oblivion. Between the excess of the unforgivable and the unconditional amnesty, there must be a middle ground, which is the just veritable memory whose exercise or work is that of peaceful remembrance on behalf of the victims of whom we are still heirs. Moreover, the argument that the non-remembering, the avoidance of punishment, and the imposition of forgetfulness are effective fuels for the repetition of the facts is strong. Hence the

importance of truth commissions, in the context of transitional justice, to work for the faithful registration of memories, for the identification of perpetrators, even if they are later benefited by a conditional amnesty. Reparation presupposes just memory. Not only the reparation carried out by the Brazilian government, based on the presumption of disappearances, which formed the basis for pecuniary reparations. This is because these reparations are only symbolic justice, leaving traces of the offenses that remain unpunished, thus perpetuating a sense of injustice, of an open wound that haunts not only the family members, but Brazilian society as a whole.

Recovering memory and truth is part of the Herculean task of the search for justice and social peace, which should neither repeat nor forget the founding violences that are in the assumptions of transitional justice itself, a condition of life in common in a democratic state of law, heir to tragic wars.

References

ARENDT, Hannah. **A condição humana**. Rio de Janeiro: Forense Universitária. 2007

BERNARDI, B. B. Fighting against impunity: the Federal Prosecution and the Gomes Lund Case. **RBPI – Revista Brasileira de Política Internacional**, v. 60, n. 1, 2017, p. 1-21.

BERNARDI, B. B. O Sistema Interamericano de Direitos Humanos e o caso da guerrilha do Araguaia. **Revista Brasileira de Ciência Política**, n. 22, 2017, p. 49-92.

BRASIL. Constituição (1988). **Constituição da República Federativa do Brasil**: Promulgada em 5 de outubro de 1988. Disponível em: http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm . Acesso em: 20 mai. 2018.

BRASIL. Comissão Nacional da Verdade. **Memórias Reveladas,** 2014. http://www.memoriasreveladas.gov.br/administrator/components/com_simplefilemanager/uploads/CNV/relat%C3%B3rio%20cnv%20volume_1_digital.pdf Acesso em 29 de mai. de 2018.

BRASIL. Secretaria Especial dos Direitos Humanos. Comissão Especial sobre Mortos e Desaparecidos Políticos. **Direito à Memória e à Verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos,** 2007. Disponível em: http://www.dhnet.org.br/dados/livros/a_pdf/livro_memoria1_direito_verdade.pdf. Acesso em: 31 mai. 2018.

BRASIL. Ministério da Justiça. Disponível em: http://justica.gov.br/seus-direitos/anistia/sobre-a-comissao . Acesso em 01 de jun. de 2018.

BRASIL. Senado Federal. **Exposição de motivos do Projeto de Lei 558/2007**. Disponível em: https://www25.senado.leg.br/web/atividade/materias/-/materia/82513 . Acesso em: 29 mai. 2018.

BRASIL. Supremo Tribunal Federal. **Arguição de Descumprimento de Preceito Fundamental 153 Distrito Federal.** Disponível em: http://www.stf.jus.br/arquivo/cms/noticianoticiastf/anexo/adpf153.pdf . Acesso em: 20 mai. 2018.

BRASIL. Tribunal Regional Federal da Primeira Região. **Ação Ordinária 82.00.24682-5**. Disponível em: http://www.trf1.jus.br Acesso em: 30 mai. 2018.

COBELLIS, Gláucia. Direito à Memoria no Brasil – Conceitual - Pós Ditadura. In: EILBAUM, L.; LEAL, R.G.; MEYER, S.R. **Justiça de transição: verdade, memória e justiça**. Florianópolis. FUNJAB, p. 11-25, 2012. Disponível em: http://publicadireito.com.br/artigos/?cod=8909a6e385b0fbc1 . Acesso em: 01 jun. 2018.

COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS. **Convenção Americana Sobre Direitos Humanos**. Disponível em: http://www.cidh.oas.org/basicos/portugues/d.Convencao_Americana_Ratif..htm . Acesso em: 20 mai. 2018.

CORTE INTERAMERICANA DE DIREITOS HUMANOS. **Caso Gomes Lund e outros ("Guerrilha do Araguaia") vs. Brasil.** 2010. Disponível em: http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_por.pdf . Acesso em: 19 mai. 2018.

KUSHLEYKO, Anastasia. Accountability v. "Smart Amnesty" in the Transitional Post-conflict Quest for Peace. A South African Case Study. In: Szablewska, Natalia & Bachmann, Sascha-Dominik. **Current issues in transitional justice: Towards a more holistic approach**. London: Springer, 2015, p. 31-53. Disponível em: https://www.thehinducentre.com/multimedia/archive/02677/9783319093895-c1_2677591a.pdf . Acesso em: 21 jul. 2018.

LIMA, José Antonio. **Comissão da Verdade pede a revisão da Lei da Anistia**. Disponível em: https://www.cartacapital.com.br/sociedade/comissao-da-verdade-pede-a-revisao-da-lei-da-anistia-3171.html . Acesso em: 06 jun. 2018.

MARQUES, Raphael P. de Paula. Julgar o passado? Verdade histórica e verdade judicial na ADPF 153. **REJUR – Revista Jurídica da UFERSA**, v. 2, n. 3, 2018, p. 70-86.

MARTINS FILHO, J. R. A guerra da memória: a ditadura militar nos depoimentos de militantes e militares. **Revista Varia História**, nº 28, 2002, p. 178-201. Disponível em: http://historiapolitica.com/datos/biblioteca/brasil_martins.pdf. Acesso em: 06 jun. 2018.

MEZAROBBA, G. De que se fala, quando se diz "justiça de transição"? **BIB – Revista Brasileira de Informação Bibliográfica em Ciências Sociais**, n. 67, 2009, p. 111-122.

NAFTALI, Patricia. Crafting a "Right to Truth" in International Law: Converging Mobilizations, Diverging Agendas? **Champ pénal/Penal field**, v. XIII, 2016, Disponível em: http://journals.openedition.org/champpenal/9245 . Acesso em: 06 jun. 2018.

RICOEUR, Paul. **Tempo e Narrativa**. Campinas, SP: Papirus Editora, 1994.

RICOEUR, Paul. A memória, a história, o esquecimento. Campinas, São Paulo: Editora da Unicamp, 2007.

RICOEUR, Paul. O Justo 1: a justiça como regra moral e como instituição. São Paulo: WMF Martins Fontes, 2008.

RICOEUR, Paul. O percurso do reconhecimento. São Paulo: Editora Loyola, 2016.

RODRIGUES, L. T.; GÓMEZ, J. M. **A condenação do Estado brasileiro pela Corte interamericana de Direitos Humanos no caso da Guerrilha do Araguaia e a interpretação do Supremo Tribunal Federal sobre a Lei de Anistia Brasileira**. Dissertação (mestrado). Pontifícia Universidade Católica do Rio de Janeiro, Departamento de Direito, 2012, 132p.

SARAT, Austin; NASSER, Hussain. Forgiveness, Mercy, and Clemency. Stanford University Press, 2006.

UNNEBERG, Flávia Soares; MELO, Álisson José Maia. O Brasil e a Corte Interamericana de Direitos Humanos: as sentenças condenatórias e sua repercussão interna. **Nomos – Revista do Programa de Pós-Graduação em Direito da UFC**, v. 34, n. 1, jan./jun. 2014, p. 65-80.