Transitional Justice in South America: The Role of the Inter-American Court of Human Rights

Carolina de Campos Melo[1]

This article examines the case law of the Inter-American Court of Human Rights in terms of the incompatibility between self-amnesty laws and the American Convention on Human Rights within the theoretical and practical framework of transitional or post-conflict justice. In this context, it is argued that the cases *Barrios Altos*, *Almonacid Arellano* and *La Cantuta* represent a new paradigm of international human rights law on the topic of truth and justice. Finally, this paper discusses the main challenges presented by the Brazilian case *Guerrilha do Araguaia* currently under consideration by the Court in relation to the dimensions of the right to the truth.

Keywords: Human rights, transitional justice, Inter-American Court of Human Rights, self-amnesty laws, *Guerrilha do Araguaia* case, Law No. 6683, August 1979, right to the truth.

Transitional justice is a concept associated with periods of political change determined by legal responses.

Introduction

The crisis in Honduras, characterized by the withdrawal of the elected President and the declaration of a state of siege, in addition to the ongoing debate in Obama's government about the treatment of torture committed in prisons in the name of the war on terrorism, are some of the facts that shed light on the current debate on transitional justice in our continent.

Transitional justice is a concept associated with periods of political change determined by legal responses to wrongdoings committed by previous regimes.[2] Initially associated with periods of post-authoritarian regimes, this kind of justice also presents the question of how to deal with post-internal conflicts. There are those who prefer to use the term post-conflict justice[3], assuming that the legacy of human rights violations is an essential element for the prevention of future oppression.

1 PhD candidate in International Law at the Law School of the State University of Rio de Janeiro (UERJ – Universidade do Estado do Rio de Janeiro). Master in Law at the Pontifícia Universidade Católica do Rio de Janeiro (PUC-Rio). Human Rights Professor and Academic Coordinator of the Human Rights Center at the Law Department of PUC-Rio. Federal Attorney. E-mail. cmelo@puc-rio.br.

2 Ruti Teitel, "*Transitional Justice Genealogy*" in Harvard Human Rights Journal 16, 2003, p. 69.

3 M. Cherif Bassiouni, *The Chicago Principles on Post-Conflict Justice* (Chicago: The International Law Institute, 2007), p. 2.

This paper is structured in the following way: in the first section, I briefly argue about the notion of transitional justice in the context of Latin America. Next, I intend to argue the case law of the Inter-American Court of Human Rights on the incompatibility between self-amnesty laws and the American Convention on Human Rights. In the last section, I discuss the challenges presented by the Brazilian case currently being considered by the Court.

The American continent has a special understanding of some of the mechanisms of transitional justice.
The decades following World War II were identified by the polarization of the Cold War. During that period, transitional justice was associated with the democratization movements' post-military dictatorships that occurred in the Southern Cone, post-1989 Eastern Europe, Africa and Central America.

Transitional justice mechanisms give emphasis to the role of law and, in particular, the role of the courts. The first cycle[4] of transitional justice refers to the period after World War II, when the Nuremberg and Tokyo trials demonstrated a movement towards the internationalization of responses to atrocities. However, German courts were unable to prevent the number of deaths which occurred during World War I from multiplying during World War II.[5]

The decades following World War II were identified by the polarization of the Cold War. During that period, transitional justice was associated with the democratization movements' post-military dictatorships that occurred in the Southern Cone, post-1989 Eastern Europe, Africa and Central America. This was a feature of the second cycle, when national justice mechanisms or alternative means of justice were created, such as the truth commissions.

The re-democratization process had led to the introduction of self-amnesty laws, imposed at the time as a precondition for democracy.

Thus, the succession of *ad hoc* tribunals in the Yugoslavia and Rwanda cases by the International Criminal Court in 1998 was momentous for the international acceptance of transitional justice mechanisms. Nevertheless, that same year, Spanish authorities requested the detention of Augusto Pinochet in England to stand trial for murder, torture and forced disappearances. This action demonstrated the enduring fragility of post-conflict impunity agreements. Today, in its third cycle, transitional justice mechanisms are no longer an exception to the norm; rather, they represent a paradigm for a new international rule of law.[6] The American continent has a special understanding of some of the mechanisms of transitional justice. With the disentanglement of the U.S. hegemony on the continent after the Cuban revolution of 1959, the 1960s and 1970s were marked by military dictatorships that used the doctrine of national security as a common strategy to fight against communism. All the countries of the Southern Cone, along with other Latin American countries, experienced periods of serious human rights violations. The re-democratization process had led to the introduction of self-amnesty laws, imposed at the time as a precondition for democracy. In recent research conducted by Kathryn Sikkink and Carrie Booth Walling, it was verified that amnesties were used in sixteen of the nineteen countries that experienced transitions in Latin America, with some countries having ratified more than one law of this type.[7]

In a context where violations of human rights were not openly assumed by the states, demands for the truth began to arise. The creation of the National Commission on the Disappearance of Persons (CONADEP) in Argentina in 1983 as well as the National Commission on Truth and Reconciliation in Chile in 1990 reflected a quite distinctive reality of the Southern Cone where judgments were made impossible by military forces.

4 Ruti Teitel, "*Transitional Justice Genealogy*", p.94. The idea of cycles has the advantage of making relative any perspective of historical progressivity of transitional justice.

5 Carlos Eduardo Japiassu, A *internacionalização da justiça penal* (Rio de Janeiro: Lumen Iuris, 2004), p. 40. The Versailles Treaty established the creation of a court for war crimes committed by nationals. Instead, a German law in 1919 conceded the exceptional competence of its Supreme Court for judgment. Within the thousands accused, only 21 were prosecuted, and 13 condemned to the maximum sentence of 3 years.

6 Ruiti Teitel, "*The law and politics of contemporary transitional justice*," In Cornell International Law Journal 837, 2005, p. 840.

7 Kathryn Sikkink and Walling Carriel Both, "*The impact of human rights trials in Latin America,*" In Journal of Peace Research Vol. 44, n. 04, 2007, p. 430.

The Inter-American Court has faced the dichotomy between justice and truth in the exercise of its contentious jurisdiction during the present century. Self-amnesty laws have been reviewed under the international standards of justice established by the permanent court created in 1969 with the adoption of the American Convention on Human Rights of the Organization of the American States. In response to NGO initiatives, the regional system[8] has shown the complexity at the local, national and international level in the implementation of transitional justice mechanisms.[9]

'The acceptance of conventional norms by States that have published self-amnesty laws has led to questions about their validity before the Court. In 2001, the Inter-American Court became the first human rights court to conduct a trial on self-amnesty laws.'

The Case Law of the Inter-American Court of Human Rights

In ratifying the American Convention, State Parties undertake to respect the rights under the Convention and to ensure the free and full exercise of all those subject to its jurisdiction (art. 1.1). Accordingly, the obligation of States is evident regarding the responsibility to adopt legislative or other measures necessary to give effect to rights under the treaty (art. 2). The acceptance of conventional norms by States that have published self-amnesty laws has led to questions about their validity before the Court. In 2001, the Inter-American Court became the first human rights court to conduct a trial on self-amnesty laws. The *Barrios Altos vs. Peru* case considered the participation of the Colina group, a death squad linked to the Peruvian Army, in the invasion of a meeting which resulted in the execution of fifteen people and the serious injury of four others. These events occurred in 1991 in a neighborhood of Lima. In 1995, when the prosecutor filed a complaint in the criminal justice system in Lima against five officers, the Supreme Court examined the military jurisdiction. In this context, the Congress enacted Law No. 26.479, which discharged the responsibility of members of the military and civilians who committed human rights violations between 1980 and 1995. In light of the *Barrios Altos* decision requesting the non-application of the law to those involved in the events of the case, the Congress of Peru passed a second law, Law No. 26.492, holding that amnesty was not subject to judicial review. As a result, the Peruvian Supreme Court ruled that the Judiciary was not entitled to decide on the removal of the amnesty laws because it would violate the principle of separation of powers.[10]

In deciding the case in 2001 the Inter-American Court held the Peruvian State internationally responsible for the violation of Articles 4 (right to life), 5 (human treatment), 8 (judicial guarantees), 25 (judicial protection), all in connection with 1.1 (obligation to respect rights) and 2 (duty to adopt provisions of domestic law) of the American Convention. The last four violations resulted from the promulgation and application of amnesty laws No. 26.479 and 26.492.[11]

Accordingly, the Court found the following to be unacceptable: the provisions of self-amnesty; the statute of limitations; and the exclusion of liability with the intention of preventing the investigation and punishment of those responsible for serious human rights violations, including torture, summary executions and forced disappearances; as well as:

> 42. The Court, in accordance with the arguments put forward by the Commission and not contested by the State, considers that the amnesty laws adopted by Peru prevented the victims' next of kin and the surviving victims in this case from being heard by a judge, as established in Article 8(1) of the Convention; they violated the right to judicial protection

8 The Inter-American system of human rights is composed by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, both responsible for the setting of international standards on the combat against impunity. Even considering the protagonist role of the Commission in relation to certain countries as Argentina, the paper is based on the study of the Court case law, exclusively.

9 Naomi Roht-Arriaza, "*The new landscape of transitional justice," In Transitional justice n the twenty-first century* (New York: Cambridge University Press, 2006), p.10.

10 Inter-American Court of Human Rights (IACtHR), *Case of Barrios Altos v. Peru. Merits*. Judgement of March 14, 2001, par. 2.

11 IACtHR, *Case Barrios Altos*, Idem, pars. 39 and 40.

> embodied in Article 25 of the Convention; they prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred in Barrios Altos, thus failing to comply with Article 1(1) of the Convention, and they obstructed clarification of the facts of this case. Finally, the adoption of self-amnesty laws that are incompatible with the Convention meant that Peru failed to comply with the obligation to adapt internal legislation that is embodied in Article 2 of the Convention.
>
> 43. The Court considers that it should be emphasized that, in the light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the Convention. Consequently, States Parties to the Convention which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation.12

The Court decided that because of the incompatibility between the American Convention and the amnesty laws the latter had no legal effect.[13] It is precisely due to the State's inability to clarify the facts relating to the violations and the corresponding responsibilities that the Court found a violation of the right to the truth. The understanding of the Inter-American Commission of Human Rights was that there was also a violation of Article 13.1 (freedom of thought and expression). This was in light of the State's failure to collect information essential to the preservation of the rights of the victims, therefore not ensuring transparency of the government's administration – however this assertion did not prevail at the judgment.[14]

In September 2006, the Court decided the case *Almonacid Arellano et al vs. Chile*, which reveals the failure to investigate and punish those responsible for the execution of Mr. Almonacid Arellano in September 1973, days after the military coup. This and other human rights violations were not investigated by an independent authority considering the application of Decree Law No. 2.191/1978, also known as a self-amnesty law. In its defense thesis, not accepted by the Court, Chile recognized the facts described, but alleged the preliminary exemption *ratione temporis* given that the process began before 1990, the year that the Chilean State recognized the contentious jurisdiction of the Court.

By confirming the idea that self-amnesty laws were incompatible with the American Convention, the Court held that the obligations set out in its Articles 1.1, 2, 8 and 25 of the American Convention were neglected by the Chilean State. Moreover, the *Almonacid Arellano* case gave the Court the opportunity to establish the role of the judiciary regarding the application of self-amnesty laws:

> 123. The above mentioned legislative obligation established by Article 2 of the Convention is also aimed at facilitating the work of the Judiciary so that the law enforcement authority may have a clear option in order to solve a particular case. However, when the Legislative Power fails to set aside and / or adopts laws which are contrary to the American Convention, the Judiciary is bound to honor the obligation to respect rights as stated in Article 1(1) of the said Convention, and consequently, it must refrain from enforcing any laws contrary to such Convention. The observance by State agents or officials of a law which violates the Convention gives rise to the international liability of such State, as contemplated in International Human Rights Law, in the sense that every State is internationally responsible for the acts or omissions of any of its powers or bodies for the violation of internationally protected rights, pursuant to Article 1(1) of the American Convention.
>
> 124. The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of "conventionality control" between

12 IACtHR, *Case Barrios Altos*, Idem.
13 IACtHR, *Case Barrios Altos*, Idem, par. 44.
14 IACtHR, *Case Barrios Altos*, Idem, pars. 44 – 49.

> the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.[15]

Considering the case law of the Court on the matter, it is the judge's responsibility to assert the "conventionality control" between national law and the American Convention. The Court's decision was groundbreaking when it explicitly requested that the Chilean State ensure that the amnesty decree would not represent an obstacle in the investigations of the execution of Mr. Almonacid Arellano and others. This decision was received in Chile with a broad debate about the role of judges concerning the international responsibility not to apply this particular law.

It is worth mentioning the Court's observation of the fact that the efforts made by the Chilean government through the work of the National Truth and Reconciliation Commission did not remove the obligation to attain the truth through legal proceedings; thus, disregarding any opposition or choice between truth and justice:

> (...) the Court considers it relevant to remark that the "historical truth" included in the reports of the above mentioned Commissions is no substitute for the duty of the State to reach the truth through judicial proceedings. In this sense, Articles 1(1), 8 and 25 of the Convention protect truth as a whole, and hence, the Chilean State must carry out a judicial investigation of the facts related to Mr. Almonacid-Arellano's death, attribute responsibilities, and punish all those who turn out to be participants.[16]

It was within this context that the Court readdressed the examination of the continuous violations of human rights under the Fujimori regime in the trial of *La Cantuta vs. Peru,* in November 2006. The facts presented to the Court dealt with the disappearance by the Colina group of one teacher and students from the campus of the *Universidad Nacional de Educación Enrique Marino y Valle, at La Cantuta*, in July 1992.

The Court granted the State recognition in the biased standards applied by military judges in the evaluation of *La Cantuta* and reiterated its case law regarding the *non bis in idem* principle which considers the "fictitious" or "fraudulent" grounds for double jeopardy (*res judicata*) that result from a process that is not independent, nor impartial, and lacks adherance to procedural guarantees.[17]

Notwithstanding the absence of any fact or situation that reveals the ruling on the amnesty laws in Peru, the Court emphasized that the incompatibility of the laws of self-amnesty with the American Convention is determined *ab initio* and therefore that the State had incurred violations of Articles 8 and 25 in connection with 1.1 and 2, in the period since the prosecution in 1995 until 2001 when the understanding of the Court in the *Barrios Altos* case was applied:

> 186. Under the domestic law rules and court decisions analyzed, this Court's decisions have immediate and binding force and, therefore, the judgment issued in the case of Barrios Altos is fully incorporated into the domestic legal system. If that Judgment was conclusive that it had general effects, such declaration makes it ipso jure part of Perú's domestic law, which is reflected in the fact that such Judgment has been applied and interpreted by state organs.
> 187. The ab initio incompatibility of the amnesty laws with the Convention has generally materialized in Perú ever since it was pronounced by the Court in the judgment rendered in the case of Barrios Altos; that is, the State has suppressed any effects that such laws could have had. (…)
> 188. In the instant case, the Court notes that the Supreme Final Judgment of June 16, 1995 of the CSJM (Supreme Council of Military Justice) constituted an act of application of the amnesty laws and was effective until the same tribunal declared the nullity of such act through Supreme Final Judgment of October 16, 2001, consistent with domestic laws and the Inter-American Court's decision in the case of Barrios Altos (supra para. 80(60) and 80(63)). Such act of application of the amnesty laws was performed by the CSJM with the aim to leave unpunished those it had initially investigated and convicted in one of the military criminal prosecutions and for some time it obstructed the investigation, trial and punishment of the alleged authors of the events, and it meant that the State breached its guarantee obligations, to the detriment

15 IACtHR, *Case of Almonacid Arellano et al. v. Chile*. Judgement of September 26, 2006. pars 123 –124.
16 IACtHR, *Case Almonacid Arellano et al*. Idem, par. 150.
17 IACtHR, *Case of La Cantuta v. Peru. Merits*, Reparation and Costs. Judgement of November 29, 2006, par. 153.

> of the victims' relatives. In addition, the parties have failed to provide information showing that ever since the passing of the Court's Judgment in the case of Barrios Altos and the CSJM's decision, the amnesty laws have been applied in the criminal investigations and prosecutions opened as from 2001, or that the laws have prevented further investigations or prosecutions from being conducted in relation with the events in the instant case or other cases in Perú.[18]

Hence, in the *La Cantuta* case, the Court asserted that the self-amnesty laws are not effective in the past, the present or the future.

It is important to note that the Court considered the publication of Peru's Truth and Reconciliation Commission report as a significant first step towards reparation, but reaffirmed the State's obligation to establish the truth through court proceedings,

> 224. It is the Court's view that the work undertaken by said Commission constitutes a major effort and has contributed to the search for and establishment of truth for a period of Perú's history. However, and without failing to recognize the foregoing, the Court deems it appropriate to specify that the "historical truth" contained in said report does not complete or substitute the State's obligation to also establish the truth through court proceedings, as acknowledged by the State itself by keeping the investigations open even after the report was issued. In this regard, it is worth noting that, in the framework of Articles 1(1), 8 and 25 of the Convention, the victims' next of kin have a right, and the State has the obligation, to have what happened to the victims effectively investigated by the State's authorities, the parties allegedly responsible for such illegal acts prosecuted, and, if appropriate, appropriately punished.[19]

In his vote *(voto razonado)* in the *La Cantuta* case, which represented the last opportunity he had to address this issue as a judge of the Court, Antônio Augusto Cançado Trindade concluded that the Court's judgments in the cases of *Barrios Altos, Almonacid Arellano* and *La Cantuta* constitute a determinant contribution towards the end of self-amnesties and the supremacy of the Law.[20]

The Court's case law represents a landmark for transitional justice mechanisms, given the following precepts: i) Self-amnesty laws are incompatible with the American Convention for violating the norms contained in Articles 8 (judicial guarantees) and 25 (judicial protection) in connection with 1.1 (obligation to respect rights) and 2 (duty to adopt provisions of domestic law) of the American Convention; ii) Such laws have no effect on the past, present and future; iii) The absence of investigation and trial on the facts and charges leads to the violation of the right to the truth; iv) It is the national court's obligation to perform the "conventionality control" between national law and the American Convention; iv) The Court appreciates the work of truth commissions, but states that these do not exclude the requirement to find the truth through judicial proceedings.

Considering that the Commission issued a petition against the Federal Republic of Brazil before the Court in early 2009, it is time to formulate a new chapter in the Court's case law on the subject matter.

The Brazilian Case

Brazil experienced the first military coup of the Southern Cone in 1964. The elected Vice-President João Goulart was overthrown in a context of widespread popular mobilization in favor of basic reforms.[21] Based on the doctrine of national security, the military regime quickly became institutionalized, having lasted from 1964 to 1985. In December 1968, Institutional Act No. 5 was enacted authorizing unlimited legislative powers for the Executive, and restricting citizens' rights and judicial guarantees such as *habeas corpus*. Additionally, the law excluded the judicial review of any type of conduct established by the Act, whenever the preservation of order and security was necessary.

The "hardening" of the regime after 1968 was

18 IACtHR, *Case of La Cantuta v. Peru.*, Idem, par. 186-187.
19 IACtHR, *Case of La Cantuta v. Peru.*, Idem, par. 223-224.
20 IACtHR, *Case of La Cantuta v. Peru.* Idem, Vote by Judge A.A. Cançado Trindade, par. 32.
21 The elections were held in 1960 with the victory of list Jânio Quadros – João Goulart. Considering the president resignation after months, Goulart assumed the presidency although the resistance from the military. "The institutional crises that followed represented the last act of those preparations to the 1964 rupture." In ARQUIDIOCESE DE SÃO PAULO. *Brasil Nunca Mais. Um relato para a história.* 34. ed. (Petrópolis, RJ: Vozes, 2005), p. 57.

intensified by political debate between those who advocated for the return to democracy by peaceful means and those who argued for the necessity of an armed struggle. Under this political milieu, choosing the second route, members of the Communist Party of Brazil hastened the opposition by sending militants to the Araguaia River region, in the southern part of the State of Pará. As a response, between 1972 and 1974, once the location of the guerrillas was discovered, the Army held three military offensives resulting in about half of the total number of victims of forced disappearance during the military regime.

With the enactment of Law No. 6683 in August 1979, a self-amnesty was adopted which was officially considered to be broad, general, unrestricted, and which disregarded any kind of clarification and/or investigation of deaths, disappearances or torture occurring during that time period. The amnesty to those militants that were being prosecuted by the military regime was enlarged to benefit state officials responsible for human rights violations by the use of the term "related crimes."

Among the sixteen countries that have enacted amnesty laws, fifteen have undertaken human rights trials. Only in Brazil did the Amnesty Act seem to have the desired effect of impeding trials, at least until very recent times.[22] Thus, Brazil would be the only country in which impunity of law and fact could have prevailed.[23]

Family members or sectors of civil society have selected some strategies to challenge the scope of law laid out by the military for the benefit of their agents. In 1995, the Center for Justice and International Law (CEJIL), *Grupo Tortura Nunca Mais do Rio de Janeiro* and the *Comissão de Familiares de Mortos e Desaparecidos Políticos de São Paulo* (Commission of Relatives of Political Death and Disappearances of São Paulo) presented a complaint before the Inter-American Commission on Human Rights. The petition refers to the disappearance of members of the Araguaia Guerrilla between 1972 and 1975 and the lack of investigation of these facts by the Brazilian State. Many were presumably killed in military operations in the region of the Araguaia River. Since 1982, through a case in the Federal

Only in Brazil did the Amnesty Act seem to have the desired effect of impeding trials.
Among the sixteen countries that have enacted amnesty laws, fifteen have undertaken human rights trials

Court, relatives of 22 victims have tried to obtain information about the circumstances of the disappearances, deaths of the guerrilla combatants, and the recovery of their bodies.[24]

By arguing that the Brazilian State is responsible for human rights violations, the Commission referred the case to the Court in March 2009, claiming violations of Articles 3 (right to juridical personality), 4, 5, 8, 13 and 25 in connection with Art. 1.1 and 2 of the American Convention. The case is instrumental since it is the only case that refers to human rights violations that occurred during the Brazilian military dictatorship.[25]

For a better understanding of the challenges faced by the Court in the Brazilian case, some initial clarifications should be made.

The period of democratization had institutional advances such as the adoption of Law No. 9140/95 that recognized the state's liability for deaths and disappearances during the military regime. Additionally, there was the creation of the Special Commission responsible for the recognition of state responsibility, the determination of financial compensation to the families of victims, and the discovery of the location of the remains of the dead. In a ceremony held at the Presidential Palace on August 29, 2007, the book "*The Right to Memory and Truth: Special Commission on Political Deaths and Disappearances*" was launched representing a report that asserts the truth as a necessary step to advance the consolidation of respect for human rights, without neglecting our recent history. This is the first official report[26] regarding the deaths and disappearances by the Brazilian dictatorship which states that,

22 Kathryn Sikkink and Walling Carriel Both, "The impact of human rights trials in Latin America," p. 430.
23 M. Cherif Bassiouni, "Searching for peace and achieving justice: the need for accountability," In *Law and Contemporary Problems* Vol. 59, N. 04, Autumn, 1996, p. 19.
24 Inter-American Commission of Human Rights (IACHR), *Admissibility Report n.33/2001 - Case n. 11.552 Guerrilha da Araguaia*. Available at: www.cidh.oas.org/annualrep/2000port/11552.htm (Last visited: 15/03/2009)
25 IACHR, *Petition under the Inter-American Court of Human Rights on the case Julia Gomes Lund et al (Guerrilha da Araguaia) vs. Federative Republic of Brazil*, April, 2009, par. 5.
26 The *Brasil Nunca Mais* Report produced in 1985 by segments of civil society under supervision of the Church of São Paulo. I is the first initiative to detail the methods used by the repression agents, especially perpetrated torture.

> "[…] enlighten the period of shadows and release the information about human rights violations that occurred in the last cycle of dictatorship is a matter of urgency of a nation that claims, with legitimacy, new status in the international scenario and in the UN system."[27]
>
> It has been estimated that there were 475 deaths and disappearances during the Brazilian military regime as well as an alarmingly high number of people subjected to torture.[28] This report is considered relevant by the Commission in its petition to the Court and is referred to several times in its considerations.
>
> Moreover, the Amnesty Commission was created by Law No. 10.559/2001. Under the supervision of the Ministry of Justice, the commission is responsible to report and conduct reparations for people that were hindered from exercising economic activities for political reasons from 1946 to 1988. The Commission so far has received about 60 thousand requests, many of them with narratives of tortures committed by official agents.

Thirty years have passed since the amnesty law was ratified, which has raised two dimensions of the democratization process in Brazil: the absence of criminal and civil liability of State officials involved in crimes against humanity, and the lack of access to files that describe the military operations and the methods used by these agents. In the words of Roniger and Sznajder, "(a) lack of access to secret files caused a tremendous impact in shaping the political memory of the Brazilians and the internalization of democratic values in relation to human rights."[29]

It is precisely in this context that the *Araguaia Guerrilla* case emerges. Firstly, the case offers the Court the opportunity to consider the amnesty law at the same time as it is being discussed before the Supreme Court, the body responsible for the final interpretation of the constitutionality of the laws of Brazil. In October 2008, the Federal Council of the Bar Association of Brazil presented a claim of breach of fundamental precept - ADPF[30] No. 153 - before the Supreme Court, seeking that it interpret Law No. 6.683 in view of the Constitution. Additionally, that it declare that in light of the constitutional fundamental precepts, that amnesty granted to political crimes or related crimes does not extend to "related crimes" committed by agents of repression against political opponents.[31] There is an expectation, in this sense, that the trials will be simultaneously considered by the Inter-American Court and the Supreme Court in a demonstration of the dialogue between their jurisdictions. Considering that this is the first opportunity for the Supreme Court to decide on the subject, there is an expectation as well that it will take the Inter-American Court's precedents into consideration. [32]

Secondly, the Commission intends that the Court determine the search for the remains of the missing bodies and that those responsible for human rights violations should be investigated, prosecuted and punished in Brazil. As the Court has already ruled in the *Almonacid* case, victims are entitled to know what happened and which agents were responsible.[33] It is precisely this point that the demands under consideration by the Inter-American Court and the Supreme Court have in common.

Finally, this is an important opportunity for the Court to state the (in)compatibility of the Brazilian law on the confidentiality of documents with the American Convention, thus

27 BRAZIL, Secretaria Especial de *Direitos Humanos. Comissão Especial sobre Mortos e Desaparecidos Políticos*. Direito à memória e à verdade: Comissão Especial sobre Mortos e Desaparecidos (Brasília: Secretaria Especial dos Direitos Humanos, 2007), p. 17 (*my translation*)

28 Idem.

29 Luis Roniger and Mario Sznadjder. *O legado das violações dos direitos humanos no cone sul: Argentina, Chile e Uruguai. Trans. Margarida Goldsztajn.* (São Paulo: Perspectiva, 2004), p. XXIV.

30 The *Argüição de Descumprimento de Preceito Fundamental* established by Art 102, § 1º of the Brazilian Constitution was regulated by the Law Nº 9882/1999. It is a mechanism of judicial review by the Supreme Court of federal, state or municipal norms previous to the Constitution, as the 1979 Amnesty Law. The Brazilian case is very particular in the sense that the Supreme Court is about to rule on the extension of the self-amnesty law through a mechanism of an abstract constitutional test. This can be explained, partially, because of the shortage of judicial initiatives over the country on the same direction. We can point out here three relevant civil complaints: i) the Araguaia case (Nº 82.00.24682-5 Distrito Federal) brought by relatives of 22 victims since 1982 before the Federal Court which was not considered by the Supreme Court; ii) two complaints proposed in the aim to declare personal responsibility of officials – without criminal effects -- involved with human rights violations in a famous prison in São Paulo (DOI-CODI); and iii) Public Action (Ação Civil Pública Nº 2008.61.00.011414-5) referred by the Federal Parquet in São Paulo which intends that the Federal Court determine the opening of all information on the activities developed in the DOI-CODI between 1970 – 1989 and that every financial compensation paid on behalf of the application of Law Nº 9140/1995 should be restituted by the those allegedly responsible.

31 ORDEM DOS ADVOGADOS DO BRASIL. Ação de Descumprimento de Preceito Fundamental. Available at: www.oab.org.br/arquivos/pdf/Geral/ADPF_anistia.pdf. Last visited at: 15.03.2009.

32 The Supreme Court recent decision (RE Nº 511.961) on the incompatibility of the Decree - Law Nº 972/1969 -- which demands the diploma on journalism to exercise the activity -- with the constitutional regime expressly took into consideration the terms of the Advisory Opinion OC-5/85 on compulsory membership in an association prescribed by law for the practice of journalism.

promoting the right to truth for Brazilian society.[34] As the Commission proposes, this would be possible taking into account that the restrictions on freedom of information must observe at least three requirements: i) legal provision; ii) the need to ensure respect for rights or the reputation of others or the protection of national security, public order or public health or morale; and that iii) such restrictions shall be absolutely necessary in a democratic society because of a prevailing public interest.[35]

According to the Commission, the approval of Law No. 11.111/2005 and the issue of Decree Nos. 2.134/1997, 4.553/2002 and 5.301/2004 have prevented access to documents relating to military operations of the *Araguaia Guerrilla* case.[36] In fact, reviewing the entire case law of the Court on this subject, arguably the *Araguaia Guerrilla* case portrays a new dimension of the right to the truth that would not be limited by the lack of investigation and punishment of human rights violations. Instead, the *Araguaia Guerrilla* case sheds light on the truth in terms of freedom of information, not only as an individual right of the victims, but also as a collective right of society.[37]

The importance of the *Guerrilha do Araguaia* case decision is clear: on one hand it is the only Brazilian case that refers to the self-amnesty law, and on the other hand, its constitutive elements give the Court a chance to formulate a new chapter in its case law.

Transitional justice is highly relevant in the American continent, especially considering the current institutional crisis or the application of instruments that aim to deal with the past. The traditional opposition between accountability and impunity is replaced by the preponderance of transitional justice mechanisms.

It is in this context that the Inter-American Court of Human Rights has asserted the incompatibility between laws of self-amnesty with the American Convention on Human Rights. Particularly, the *Barrios Altos, Almonacid Arellano and La Cantuta* cases represent a new paradigm for international human rights law on the topics of truth and justice.

'In fact, reviewing the entire caselaw of the Court on this subject, arguably the *Araguaia Guerrilla* case portrays a new dimension of the right to the truth that would not be limited to the lack of investigation and punishment of human rights violations.'

The recent Brazilian case represents a challenge to the Court. Ruti Teitel's diagnosis on transitional justice cycles seems appropriate since it rejects every kind of historical progress aspect. The thirty years of Brazil's amnesty law created the opportunity for national and international spheres to simultaneously decide the limits of military amnesty. We might see that both the second and third cycles of transitional justice, characterized here by the Brazilian Supreme Court and the Inter-American Court, are about to prove the complexity of local, regional and global mechanisms.

Lastly, while many believed that the Court had exhausted the issue of self-amnesty laws, the Brazilian case creates the possibility for the establishment of a new perspective on the right to the truth, beyond the idea of judicial truth, that focuses on the debate of freedom of expression.

The thirty years of Brazil's amnesty law created the opportunity for national and international spheres to simultaneously decide the limits of military amnesty.

33 IACHR, *Petition under the Inter-American Court of Human Rights on the case Julia Gomes Lund et al (Guerrilha da Araguaia) vs. Federative Republic of Brazil*, par. 180. All the comments made on the case were based exclusively on the demand since I had no access to the arguments from the representatives of the victims or the contestation from the Brazilian State.

34 IACHR, Idem, par. 5.

35 IACtHR, *Case of Claude Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgement of September 19, 2006, pars. 89-91.

36 IACHR, *Petition under the Inter-American Court of Human Rights on the case Julia Gomes Lund et al (Guerrilha da Araguaia) vs. Federative Republic of Brazil*, par. 146. Law Nº 11.111/ 2005 introduced the permanent confidentiality of the official records of specific matters. In 1997, the Decree n. 2.134 regulated the classification, reproduction and access to public documents with reservations, which corresponds to documents on the security of society and the State and the intimacy of the individual. The Decree n. 4.553/2002, on the other hand, extended the period of confidentiality of these documents. And finally, the Decree n. 5301 created the Commission for Evaluation and Analisis of the Confidential Information with the role of deciding about the authorization for access of public documents classified with high degree of confidentiality.

37 CEJIL. *A proteção da liberdade de expressão e o Sistema Interamericano*. (San José, Costa Rica: CEJIL, 2005). p. 97.

REFERENCES

Bassiouni, M. Cherif. *The Chicago Principles on Post-Conflict Justice* (Chicago: The International Law Institute, 2007).

_____. "Searching for peace and achieving justice: the need for accountability," *In Law and Contemporary Problems* Vol. 59, N. 04, Autumn, 1996.

CEJIL. *A proteção da liberdade de expressão e o Sistema Interamericano*. (San José, Costa Rica: CEJIL, 2005).

Japiassú, Carlos Eduardo. *A internacionalização da justiça penal* (Rio de Janeiro: Lumen Iuris, 2004).

Roth-Arriaza, Naomi. "The new landscape of transitional justice," In *Transitional justice n the twenty-first century* (New York: Cambridge University Press, 2006).

Roniger, Luis and Mario Sznadjder. *O legado das violações dos direitos humanos no cone sul: Argentina, Chile e Uruguai.* Trans. Margarida Goldsztajn. (São Paulo: Perspectiva, 2004).

Sikkink, Kathryn and Walling Carriel Both, "The impact of human rights trials in Latin America," In *Journal of Peace Research* Vol. 44, n. 04, 2007.

Teitel, Ruti. "Transitional Justice Genealogy," in *Harvard Human Rights Journal* 16, 2003.

_____. "The law and politics of contemporary transitional justice," in *Cornell International Law Journal* 837, 2005.

Reports and Decisions

Arquidiocese de São Paulo. *Brasil Nunca Mais. Um relato para a história*. 34. ed. (Petrópolis, RJ: Vozes, 2005)

Brazil, Secretaria Especial de Direitos Humanos. Comissão Especial sobre Mortos e Desaparecidos Políticos. *Direito à memória e à verdade: Comissão Especial sobre Mortos e Desaparecidos* (Brasília: Secretaria Especial dos Direitos Humanos, 2007).

Inter-American Court of Human Rights (IACtHR), *Case of Barrios Altos v. Peru*. Merits. Judgement of March 14, 2001.

_____. *Case of Claude Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgement of September 19, 2006.

_____. *Case of Almonacid Arellano et al. v. Chile*. Judgement of September 26, 2006.

_____. *Case of La Cantuta v. Peru*. Merits, Reparation and Costs. Judgement of November 29, 2006.

Inter-American Commission of Human Rights (IACHR), *Admissibility Report n.33/2001- Case n. 11.552 Guerrilha da Araguaia*. Available at: www.cidh.oas.org/annualrep/2000port/11552.htm

_____. *Petition under the Inter-American Court of Human Rights on the case Julia Gomes Lund et al (Guerrilha da Araguaia) vs. Federative Republic of Brazil*, April, 2009.

Ordem dos Advogados do Brasil. Ação de Descumprimento de Preceito Fundamental. Available at: www.oab.org.br/arquivos/pdf/Geral/ADPF_anistia.pdf.