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**Brazil Begins to Investigate its Dark Past, But is it Too Little Too
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By Thomas Thompson-Flores

I. Introduction

Brazil, like many of its South American neighbors, was under the control of its own military for many years during the second half of the 20th Century. The reasons why these military dictatorships sprang up across South America during this time vary. However, once in office, these military regimes committed grave human rights violations as a means of consolidating and maintaining their power. They cracked down on political parties; took away many civil liberties; and even committed acts such as kidnapping, torture, and murder. The degree of occurrences of these acts differs from country to country. In comparison with other countries in South America, Brazil experienced fewer human rights abuses during the reign of its military from 1964 to 1985. Nonetheless, many human rights abuses still occurred in Brazil during that time. People were imprisoned, tortured, and even killed because of their political activities against the military dictatorship.

Towards the end of the 20th Century, many of these countries began transitioning to democratic governments. These transitions were each different but in every case the question arose as to how to best deal with past human rights violations committed by the military. Should transitional justice involve the prosecution of those responsible, or should truth commissions be set up to investigate what happened, or should the past be forgotten and amnesties be granted? Every country in South America has taken a different approach to deal with past human rights abuses. Unlike many of its neighbors, including Argentina, Chile, Peru and Uruguay, Brazil has not yet brought to justice those accused of committing gross human rights violations during past periods of military rule.¹ The transitional justice process in Brazil has been very slow. It has been 27 years since the end of the military dictatorship in Brazil and yet the process of transitional justice is still not complete. To this day there is still an ongoing debate in Brazil as to how best to balance the interests of the military versus the interests of human rights groups and the families of the victims.

This article will analyze the history of Brazil, the current legal battle over its Amnesty Law, and compare the transitional justice process chosen in Brazil versus other South American countries. Section II of this article introduces the history of Brazil. An historical background of

¹ “Brazil Court Upholds Law That Protects Torturers” (Amnesty International, April 30, 2010) <<http://www.amnesty.org/en/news-and-updates/brazil-court-upholds-law-protects-torturers-2010-04-30>> accessed September 14, 2011.

Brazil from 1964 to the present is necessary because it helps explain the reasons behind the methods chosen by Brazil to implement transitional justice in the country. This historical summary begins with the military's rise to power in 1964; then discusses the harsh policies implemented by the military in order to maintain its power; the process of democratic transition; and finally the steps taken by Brazil in recent years to deal with its past abuses. Section III analyzes and compares the recent jurisprudence concerning Brazil's 1979 Amnesty Law, which protects members of the military from criminal prosecution. In recent years there have been cases at both the international and domestic level that contradict each other on this issue. This section discusses the effect that these decisions have on each other and what the future might hold. Lastly, Section IV addresses the issue of transitional justice. First, different types of transitional justice mechanisms are analyzed and discussed on more general terms. Second, the transitional justice methods applied by other South American countries are compared to the methods applied in Brazil.

II. A History of Brazil: 1964 – Present

The history of Brazil stretches back hundreds of years since it was discovered by the Portuguese explorer Pedro Álvares Cabral in 1500. Since that time, including the years after Brazil gained independence from Portugal in 1822, violations of human rights have occurred within the country. However, the period of military dictatorship in the second half of the 20th Century was a particularly violent time, in which the rights of many citizens were often violated by the military government with little or no recourse to justice. This was also a period when many human rights treaties were being signed. As a result, the actions taken by the military government during its reign in Brazil have come under a great amount of scrutiny in recent years unlike any other time period in Brazilian history.

a. The Period of Military Dictatorship in Brazil (1964-1985)

The period of military dictatorship in Brazil began in 1964, when the armed forces, along with certain civilian allies, deposed President João Goulart.² It lasted for 21 years. The seeds that lead to the military overthrow of the democratic government were sown years earlier during the rule of then President Getúlio Vargas, from 1930 to 1945, the last eight years as an authoritarian regime. In 1951, he was elected democratically by popular vote. He was a populist president, supported by the “Partido Trabalhista Brasileiro” (Brazilian Labor Party) (hereinafter PTB). The problems began when his nationalist and populist policies, such as proposing a large minimum wage increase, began provoking angry reactions from the anticommunist officers in the military.³ As a result of pressure from the military and the political right, in February 1954 Vargas was forced to fire the Labor Minister who had recommended the wage increase, who at that time was João Goulart.⁴ However, this did not satisfy members of the military. Eventually, they sent an ultimatum demanding that Vargas resign his office as President. Vargas refused to resign, instead choosing to commit suicide on November 24, 1954.⁵ This act actually delayed the military takeover because it turned Vargas into a martyr and rallied public support behind his political party. It took ten years before the military was finally able to take power.

Years after losing his job as Labor Minister, João Goulart was elected Vice-President. Soon after Goulart became President in September 1961, after the resignation of Jânio Quadros, several members of the Brazilian military began drawing up plans to remove him from office. Originally, the military thought about removing President Goulart from office through legal means, such as impeachment.⁶ The military did have the support of the União Democrática Nacional (National Democratic Union) (hereinafter UDN) in Congress. However, the third major political party in Congress was the Partido Social Democrático (Social Democratic Party) (hereinafter PSD), which was a centralist party between the UDN and the PTB, and whose members would mostly likely vote against an impeachment of Goulart.⁷ Therefore, the military began plotting to overthrow the government. Seeing the signs around him, President Goulart

² Wolfgang S. Heinz and Hugo Frühling, *Determinants of gross human rights violations by state and state-sponsored actors in Brazil, Uruguay, Chile, and Argentina 1960-1990*, (Leiden [etc.] : M. Nijhoff Publishers, cop. 1999) p. 9.

³ Thomas E. Skidmore, *The Politics of Military Rule in Brazil, 1964-85*, (New York: Oxford University Press, 1988) p. 5.

⁴ *Idem.*

⁵ *Ibidem*, at p. 6.

⁶ *Ibidem*, at p. 14.

⁷ *Ibidem.*

began holding rallies around the country and making promises to the masses, in an attempt to garner more popular support.⁸ Despite these efforts during the first few days in April 1964 several different army divisions across Brazil began, one by one, to join the rebellion. Eventually Goulart was forced to flee to Uruguay.

There have been several factors/reasons given for the 1964 coup. The main reason given for the overthrow was that the military was concerned that President Goulart was leading the nation towards communism.⁹ During the second half of the 20th Century there was a lot of concern among many Western Countries about communism spreading to their own shores. Several countries took measures to prevent this. In the case of Brazil, the military decided to take control of the country and began instituting measures of repression and investigations against known communists.¹⁰ In addition, the military felt that Goulart was circumventing Congress by appealing directly to the masses, and attempting to place his own people within units of the armed forces.¹¹ Others believe that the middle-class in Brazil gave its support to the military fearing that the radicalized urban masses would threaten their status. The US ambassador to Brazil when the coup took place, Lincoln Gordon, has stated his opinion for the reasons which lead to the coup:

“It had become clear for many months before his deposition that his [Goulart’s] purpose was to put an end to constitutional government in Brazil in the interest of establishing some sort of a personal dictatorship.”¹²

Whatever the reason, the 1964 military coup in Brazil was successful. Soon afterwards the military began taking steps to ensure the transition to a military dictatorship. In its transition the military in some instances respected the rules of the 1946 Constitution of Brazil while at other times completely violated them. Since there was no Vice-President at the time of the military coup, according to the 1946 Constitution the next in line when the presidency is vacant would be the president of the Chamber of Deputies for a maximum period of 30 days until Congress elected a new president. This procedure was followed and Ranieri Mazzilli became the

⁸ Ibidem, at p. 15.

⁹ Wolfgang S. Heinz and Hugo Frühling, *Determinants of ...*, at p. 28.

¹⁰ Idem.

¹¹ Ibidem.

¹² Ibidem, at p. 29.

acting president on April 1, 1964.¹³ However, three military commanders quickly created the Comando Supremo Revolucionario (Supreme Revolutionary Command) to consolidate power. They were then given de facto power by President Mazzilli, when he named the three as military ministers in his new cabinet.¹⁴ Despite resistance from Congress these three military commanders issued Institutional Act No. 1 on April 9, 1964.¹⁵ The act, while maintaining the 1946 Constitution, made several amendments to it. The act granted several powers to the President, including the power “to suspend for ten years the political rights of any citizen [...]”¹⁶ The act further violated the 1946 Constitution when it voided the clause which prohibited military officers from holding elective office, and when it required the election for President and Vice-President to be held within two days.¹⁷ On April 11, 1964, General Castelo Branco was elected as the new President of Brazil.

On 26 October, 1965, Institutional Act No. 2 was passed and carried on many of the provisions that were contained in Institutional Act No. 1, which had expired. As a result, the new military regime had the power to dissolve Congress, state assemblies, and municipal chambers.¹⁸ In addition, acts and decisions based on Institutional Act No. 2 were excluded from any type of appeal or legal recourse by the judiciary.¹⁹ During this time there were other drastic changes to the legislature and to the judiciary. Within the judiciary, the number of Supreme Court justices was increased to sixteen and their appointment would be by the President, civilians accused of crimes involving national security were tried in military courts, and in most cases federal political crimes were also handled by military courts.²⁰ As to the legislature, the military decided to allow only two political parties to exist: the Aliança Renovadora Nacional (National Renewal Alliance Party) (hereinafter ARENA) which would represent the government, and the Movimento Democrático Brasileiro (Brazilian Democratic Movement) (hereinafter MDB) which would represent the opposition.²¹ ARENA was made up of politicians from the UDN and PSD, while the MDB was made up of mostly former PTB members and some PSD.²² While there was

¹³ Thomas E. Skidmore, *The Politics of ...*, at p.19.

¹⁴ *Idem*.

¹⁵ Wolfgang S. Heinz and Hugo Frühling, *Determinants of ...*, at p. 33.

¹⁶ Institutional Act No. 1 (Brazil - 1964), paragraph 4.

¹⁷ Thomas E. Skidmore, *The Politics of ...*, at p. 20-21.

¹⁸ Wolfgang S. Heinz and Hugo Frühling, *Determinants of ...*, at p. 35

¹⁹ *Idem*.

²⁰ *Ibidem*.

²¹ Thomas E. Skidmore, *The Politics of ...*, at p. 48

²² *Idem*.

an official two-party system in Brazil, for all intents and purposes Brazil was, at least in the early years, a one-party state because the MDB did not have much influence to pass or block legislation. In 1974 the MDB finally managed to win a large, if still a minority, number of seats in Congress.²³ In response, the Brazilian military dictatorship took steps in restricting the power of the MDB; passing legislation forbidding campaign use of radio or television except in certain circumstances, and even annulled the mandates of some MDB congressmen claiming that they were involved with communists.²⁴

Before leaving office, President Castelo Branco and his supporters in the military succeeded in passing a new Brazilian Constitution on January 24, 1967, which created a new legal structure in Brazil.²⁵ The 1967 Constitution was different from the 1946 Constitution in several ways. The President would now be elected by an indirect election. The federal government was given more power to combat criminal, political, and social groups whose actions were a threat to the federal government and to national security. It also strengthened the government's control over public expenditures.²⁶

In the following years there were other laws and executive decrees that further repressed the people of Brazil and limited the exercise of their rights. By that time, Brazil was being run by President Arthur da Costa e Silva, a general who was among the group of military hardliners. President Costa's hardliner stance stood in direct conflict with the growing number of political protests (especially student demonstrations) and the rise of several guerrilla movements in Brazil that began to spring up during his tenure. Beginning in the summer of 1968 Márcio Moreira Alves, a MDB congressman began making congressional speeches denouncing the violence used by the police and the torture of political prisoners.²⁷ In response to this, President Costa e Silva demanded that Congress lift Alves' congressional immunity. However, Congress refused to do so. The next day, December 13, 1965, President Costa e Silva issued Institutional Act No. 5, which differed from preceding Institutional Acts in that it had no expiration date.²⁸ As a result of this new act, Congress was suspended (although not abolished). *Habeas corpus* in cases of political crimes against national security was suspended. A state of siege could be introduced

²³ Ibidem, at p. 172

²⁴ Ibidem, at p. 189.

²⁵ Ibidem, at p. 56.

²⁶ Ibidem.

²⁷ Wolfgang S. Heinz and Hugo Frühling, *Determinants of ...*, at p. 47.

²⁸ Idem.

without the limits of the 1967 Constitution.²⁹ Several other rights and legal procedures (some of which were even included in the 1967 Constitution) were curtailed by this new act. All forms of media were now censored. Even the US government, which had originally supported the military regime because it was anti-communist, began to voice its criticism.³⁰

However, the following military presidency of General Emílio Garrastazú Médici was even more repressive and restricted people's civil liberties even more. His period in office, from October of 1969 to March of 1974, was characterized by having the highest economic growth but also the highest degree of political repression during the entire military regime.³¹ During this time, there was a 10 percent annual economic growth rate in Brazil which created many new jobs and increased the salaries of many Brazilians (although mostly for the upper class).³² While this was taking place, in 1969, the first year of Médici's presidency, the military regime passed several institutional acts and laws which limited many civil liberties. One example of that was the National Security Law of September 1969 which gave the government the power to intervene in any level of social activity if it believed that national security interests were violated.³³ During 1969 the government banned or suspended the rights of 4,394 individuals, and arrested another 10,000.³⁴

Restrictions on civil liberties, repression, and torture had begun before 1969, but the frequency increased during the early 1970's. The figures on the total number of victims differ. Amnesty International conducted an inquiry from April to May 1972 into allegations of torture in Brazil, which it published in September 1972. The report confirmed more than 1,000 cases of torture since 1968 in Brazil.³⁵ The most exact figures of torture and enforced disappearance in Brazil during the period of the military regime comes from a book published in 1985, "Brasil: Nunca Mais" (Brazil: Never Again), whose findings resulted from years of research by a group of individuals under auspices of the Archdiocese of São Paulo and the World Council of Churches in Brazil.³⁶ The results of the findings were: 1,843 political prisoners were tortured,

²⁹ Ibidem.

³⁰ Ibidem, at p. 48.

³¹ Ibidem, at p. 49.

³² Thomas E. Skidmore, *The Politics of ...*, at p. 107.

³³ Idem, at p.109.

³⁴ Wolfgang S. Heinz and Hugo Frühling, *Determinants of ...*, at p. 49.

³⁵ Idem.

³⁶ Terence S. Coonan, "Rescuing History: Legal and Theological Reflections on the Task of Making Former Torturers Accountable" (1997) 20 Fordham Int'l L.J. 512, 525-526.

283 types of torture had been employed by the military, there were 242 different torture centers, and 444 known torturers.³⁷ Ultimately, the official lists which have been compiled by several human rights organizations as to the number of deaths that are believed to have occurred at the hands of security forces since the military regime took power in 1964 are: 262 murders, 144 missing, and thousands tortured.³⁸

Many of the bodies of the victims who disappeared at the hands of the military during this period were never found. However, on September 4, 1990, a mass grave, known as Vala de Perus, was discovered in the Dom Bosco Cemetery, in São Paulo. Excavations found the remains of a total of 1,049 people in the clandestine grave.³⁹ The cemetery was used to bury indigents but it was discovered that six political prisoners were also buried at the site as if they were indigents.⁴⁰ After the discovery of this grave site, a Special Commission for the Investigation of the Remains of the Grave of Perus and a Parliamentary Commission of Inquiry were created.⁴¹ Soon afterwards, other mass grave sites were discovered in Rio de Janeiro, São Paulo, and Recife that contained several political activists whose bodies were hidden among the high numbers of indigents at mass burial sites.⁴²

There were too many people who were imprisoned and tortured by the military government to list and discuss one by one. However, a couple of short stories about a few of those individuals would help to illustrate the brutality of the regime during that period. Cecilia Coimbra, now a psychology professor at a federal university in Niteroi, near Rio de Janeiro, was arrested by the police on August 24, 1970, along with her husband and other relatives.⁴³ The police suspected that the family was harboring left-leaning rebels. She endured 3 months of interrogation and daily electric shocks to her genitals and breasts. She was also made to watch

³⁷ Joan Dassin (ed) and Jaime Wright (trs), *Torture in Brazil: A Report by the Archdiocese of Sao Paulo* (New York: Vintage books, 1986) (original in Portuguese Brasil: Nunca Mais) at p. x and xiii.

³⁸ Brandon Hamber, *Transforming Societies After Political Violence: Truth, Reconciliation, and Mental Health*, (Dordrecht ; New York : Springer, c2009) p. 47. These organizations include: Comissão de Familiares de Mortos e Desaparecidos Políticos, Instituto de Estudo da Violência do Estado, & Grupo Tortura Nunca Mais, 1996; Comitê Brasileiro Pela Anistia Seccão do Rio Grande do Sul, 1984).

³⁹ Ignacio Cano and Patrícia Salvão Ferreira, "The Reparations Program in Brazil" in Pablo De Greiff (eds), *The Handbook of Reparations* (The International Center for Transitional Justice, Oxford [etc.]: Oxford Univ. Press, 2006) p. 107.

⁴⁰ Idem.

⁴¹ Ibidem.

⁴² Ibidem.

⁴³ Patrice M. Jones, "Brazil Probes Conspiracy By Dictators To Kill Foes" Chicago Tribune (USA, June 02, 2000) <http://articles.chicagotribune.com/2000-06-02/news/0006020077_1_operation-condor-electric-shocks-latin-america> accessed September 19, 2011.

her husband being tortured.⁴⁴ Another individual who was tortured by the government during this time was a student called Vera Vital Brasil. As a student of the Faculty of Pharmacy, Federal University of Rio de Janeiro, in the late '60s, Vera participated actively in the university student movement, which protested the military regime. Because of her activism, in December 1969, she was arrested and tortured for three months by members of the Brazilian intelligence agency.⁴⁵ After leaving prison, she went into exile for six years before coming back to Brazil. Later she was involved in establishing the Grupo Tortura Nunca Mais (Never More Torture Group) in 1985.⁴⁶

Even religious figures were not completely immune from torture. In 1974, a United Methodist Missionary and part-time correspondent for Time and the Associated Press, named Fred B. Morris, was held for 17 days by military officials in Recife without being charged.⁴⁷ He was arrested at gunpoint and a hood was placed over his head. He was taken to the Fourth Army headquarters where he was subject to beatings and electric shocks.⁴⁸ Electrodes were fastened to his nipples, ears, and genitals. They questioned him about Roman Catholic Archbishop Helder Camara, a vocal critic of the regime and a friend of Mr. Morris. They also questioned him about articles that he had written for Time Magazine and the Associated Press which were unflattering to the military regime. They kept Mr. Morris handcuffed in a small cell with little or no sleep and food.⁴⁹ Fortunately, since Mr. Morris was an American, the US Embassy protested his arrest and detention. As a result Mr. Morris was released and placed on board a flight to New York and ordered never to return to Brazil.⁵⁰ He became the first full U.S. citizen, not of dual nationality, to have been tortured under the military dictatorship in Brazil.⁵¹

Acts of torture, degrading and inhuman treatment were committed by several different armed units in Brazil that were made up of police, army, and intelligence officers. While there were these instances of human rights violations across Brazil by military and police officers, the

⁴⁴ Idem.

⁴⁵ "What do we do with what others have done to us?" (International Rehabilitation Council for Torture Victims, July 9, 2010) <<http://www.irct.org/news-and-media/irct-news/show-news.aspx?PID=13767&NewsID=2697>> accessed September 19, 2011.

⁴⁶ Idem.

⁴⁷ "BRAZIL: Torture, Brazilian Style" Time Magazine (USA, November 18, 1974) <<http://www.time.com/time/magazine/article/0,9171,945115-1,00.htm>> accessed September 19, 2011.

⁴⁸ Idem.

⁴⁹ Ibidem.

⁵⁰ Ibidem.

⁵¹ Thomas E. Skidmore, *The Politics of ...*, at p. 169.

majority of acts of torture, assassination and disappearance were restricted to specific sectors of the armed forces and police.⁵² One of these groups, called Operação Bandeirantes (hereinafter OBAN), combined civilian police with military security officers and was financed by private and corporate entities.⁵³ OBAN was replaced by the Destacamento de Operações de Informações - Centro de Operações de Defesa Interna (Department of Information Operations - Center for Internal Defense Operations) (hereinafter DOI-CODI).⁵⁴ The DOI-CODI continued under the same mandate carrying out investigations and arresting anyone they suspected of either being a communist or who protested against the military regime. In addition, each branch of the armed forces had intelligence units who had the authority to make arrests and initiate investigations: CJEX (for the army), CISA (for the air force), and CENIMAR (for the navy).⁵⁵

During the 1970's the Brazilian military dictatorship worked with other military dictatorships throughout South America in a program called "Operation Condor" which was named after Chile's national bird. It involved cooperation among the intelligence units in several South American dictatorships with the goal of capturing and returning political enemies back to their countries to face torture and death.⁵⁶ The list of countries include: Chile, Argentina, Paraguay, Brazil, Bolivia, and Uruguay. While the numbers of human rights abuses in Brazil were not as widespread as in other South American countries, Brazil was still an active participant in Operation Condor. At least fifteen Brazilians are known to have disappeared in other countries as part of Operation Condor, mostly in Chile and Argentina.⁵⁷ In addition, Brazil provided arms to the Paraguayan military to help it overthrow the civilian government.⁵⁸ In cooperation with Uruguay, Brazil also detained and tortured two Uruguayans and then secretly sent them back to Uruguay.⁵⁹

The military crackdown after its rise to power in 1964 and its restrictions on civil liberties was the proximate cause for the creation of guerrilla groups in Brazil, whose actions against the

⁵² Ignacio Cano and Patrícia Salvão Ferreira, "The Reparations Program in Brazil" in ..., at p. 104.

⁵³ Thomas E. Skidmore, *The Politics of ...*, at p. 127-128.

⁵⁴ *Idem*, at p.128-129.

⁵⁵ *Ibidem*, at p. 128.

⁵⁶ Patrice M. Jones, "Brazil Probes Conspiracy By Dictators To Kill Foes" Chicago Tribune (USA, June 02, 2000) <http://articles.chicagotribune.com/2000-06-02/news/0006020077_1_operation-condor-electric-shocks-latin-america> accessed September 19, 2011.

⁵⁷ Roseann M. Latore, "Coming Out of the Dark: Achieving Justice for Victims of Human Rights Violations by South American Military Regimes" (2002) 25 B.C. Int'l & Comp. L. Rev. 419, 425.

⁵⁸ *Idem*.

⁵⁹ *Ibidem*.

military government resulted in even harsher restrictions and crackdowns. Armed resistance immediately after the 1964 coup was only on a small scale. The tactics employed by these guerrilla groups included bank robberies and bombings.⁶⁰ However, they were best known for kidnapping several foreign diplomats in exchange for the release of political prisoners.⁶¹ In contrast with other South American countries, there were not one or two major guerrilla groups in Brazil, but rather some fifty groups, as a result of frequent fragmentation. The strongest groups were the: Movimento Revolucionário 8 de Outubro (The 8th of October Revolutionary Movement) (hereinafter MR-8), Ação Libertadora Nacional (National Liberation Action) (hereinafter ALN), and Vanguarda Popular Revolucionária (Revolutionary Armed Vanguard) (hereinafter VPR).⁶² Some of the most famous leaders of these movements, such as Carlos Marighela, Joaquim Camara Ferreira, Eduardo Leite, and Carlos Lamarca were hunted down and killed by the government.⁶³ The current President of Brazil, Dilma Rousseff (hereinafter Dilma) was a member of a far-left wing guerrilla group known as the Vanguarda Armada Revolucionária Palmares (Palmares Armed Revolutionary Vanguard), an offshoot of the VPR.⁶⁴ In 1970, she was arrested, tortured, and sent to jail for her involvement in activities against the military regime.⁶⁵ By 1974 the guerrilla movement had been defeated. Their goal had been to bring down the military dictatorship, but because of limited popular support among the population, the infiltration of their ranks, the death of their leaders, and a strong and coordinated military opposition, they were defeated.⁶⁶ Some researchers believe that an indirect and unintended effect of the guerrilla movement in Brazil was that it actually helped to bolster the legitimacy of the military dictatorship and justify the repression.⁶⁷

When General Ernesto Geisel became the President of Brazil in 1974 it marked the beginning of a new stage of the military dictatorship, known as the “distensão” (relaxation).⁶⁸ President Geisel had a difficult task because on the one hand his goal was an eventual return to

⁶⁰ Wolfgang S. Heinz and Hugo Frühling, *Determinants of ...*, at p. 42.

⁶¹ Thomas E. Skidmore, *The Politics of ...*, at p. 117-120.

⁶² Wolfgang S. Heinz and Hugo Frühling, *Determinants of ...*, at p. 39.

⁶³ Idem, at p. 45-46.

⁶⁴ Jaylan Boyle, “Election Coverage: Dilma Rousseff” The Rio Times (Rio de Janeiro, July 28, 2009) <<http://riotimesonline.com/brazil-news/rio-politics/election-coverage-dilma-rousseff/>> accessed September 19, 2011.

⁶⁵ Idem.

⁶⁶ Wolfgang S. Heinz and Hugo Frühling, *Determinants of ...*, at p. 44-45.

⁶⁷ Idem, at p. 46.

⁶⁸ Terence S. Coonan, “Rescuing History: Legal and ...”, at 524.

democracy, while at the same time appeasing the hardliners in the military by not appearing soft against the left.⁶⁹ The idea of re-democratization of Brazil was originally part of former President Castelo Branco's vision. However, he never had the chance to implement it, and the limited period of emergency military government turned out to be more permanent and lasting than President Castelo Branco had hoped. To best navigate this delicate balance the new President, Ernesto Geisel, pursued an incrementalist policy (i.e. taking small steps towards liberalization in order to avoid any conflicts or severe negative response that would set things back).⁷⁰

For every two steps forward, President Geisel took one step back. While his presidency was characterized by a slow process of political relaxation and liberalization, which would continue until the end of the military regime, many human rights violations and civil liberties restrictions were still occurring within Brazil. Besides the torture of the American Methodist Missionary Fred Morris, many other prominent individuals were arrested and tortured, including lawyers and journalists.⁷¹ President Geisel used the powers granted in Institutional Act No. 5 to dismiss several judges and strip the mandates of several state legislators.⁷² In addition, as was mentioned earlier, in response to MDB's surprise showing at the 1974 elections, President Geisel instituted new constitutional changes to ensure ARENA's victory in future elections. President Geisel invoked Institutional Act No. 5 to pass these major constitutional changes, known as the Pacote de Abril (April Package).⁷³ These changes included: state governors and a third of federal senators would be elected indirectly by state electoral colleges, and election candidates' access to radio and television would be strictly limited.⁷⁴

Towards the end of his presidency in 1978, President Geisel began to fulfill on his earlier promises to phase out elements of the authoritarian structure. The list of changes that he introduced include: censorship of both radio and television was relaxed, political banishments started to be revoked, *habeas corpus* for political detainees was re-instituted, the independence of the judiciary was restored, and the power of the National Security Law became more

⁶⁹ Thomas E. Skidmore, *The Politics of ...*, at p. 163-164.

⁷⁰ *Idem*, at p. 165-166.

⁷¹ *Ibidem*, at p. 168-169.

⁷² *Ibidem*, at p. 188-189

⁷³ *Ibidem*, at p. 190-191.

⁷⁴ *Ibidem*.

limited.⁷⁵ The most important change that President Geisel implemented was that after 10 years, Institutional Act No. 5 was finally abolished, which meant that neither President Geisel, nor any future presidents, had the power to declare a congressional recess, remove Congressmen, or take away the political rights of any Brazilian citizens.⁷⁶

The period of “distensão” was followed in 1979 by the period of “abertura,” (the opening) ushered in by the administration of General Joao Figueiredo.⁷⁷ President Figueiredo was the last military president of Brazil. The plan of democratization which had begun during the presidency of Geisel continued under Figueiredo. Repression of the civilian population began to decrease. In 1983, Congress reduced national security crimes from 40 to 22.⁷⁸ In 1984, the last person to have been jailed under national security legislation for subversive propaganda (a journalist) was finally released.⁷⁹

The most important step taken by President Figueiredo and the military regime in the process towards democratization was the passage of Law No. 6683 on August 28, 1979. This law became known as the 1979 Amnesty Law. Originally, demand for this law came from the opposition groups. Many people had been forced to flee Brazil since the start of the military regime in 1964 for fear of being arrested, tortured, or killed because of their actions or remarks against the military. Their families back in Brazil wanted an amnesty law that would protect them from prosecution should they decide to return.⁸⁰ The 1979 Amnesty Law allowed these people to return to Brazil because the law covered all those people who were imprisoned or exiled for political crimes committed between September 2, 1961, and August 15, 1979.⁸¹ However, the Amnesty Law excluded acts of terrorism, assaults, kidnappings, and personal assaults.⁸² The Amnesty Law also provided for the re-integration of state employees and members of the military.⁸³ Another effect of the 1979 Amnesty Law was that it was interpreted as also covering acts of torture and thereby the torturers themselves.⁸⁴ This interpretation comes from the definition of perpetrators which includes those who committed “political crimes” and

⁷⁵ Ibidem, at p. 203.

⁷⁶ Ibidem.

⁷⁷ Terence S. Coonan, “Rescuing History: Legal and ...”, at 524.

⁷⁸ Wolfgang S. Heinz and Hugo Frühling, *Determinants of ...*, at p. 68.

⁷⁹ Idem.

⁸⁰ Thomas E. Skidmore, *The Politics of ...*, at p. 217.

⁸¹ Law No. 6683 of August 28, 1979, Article 1.

⁸² Idem, at Article 1(2).

⁸³ Ibidem, at Article 2.

⁸⁴ Thomas E. Skidmore, *The Politics of ...*, at p. 219.

“connected crimes.”⁸⁵ The inclusion of “connected crimes” has been used to shield torturers ever since. It was a political trade-off, but one which the opposition accepted because they knew that the only way to move toward a democratic society was with the cooperation of the military.⁸⁶ It was an act of conciliation.

The transition to a democratic government in Brazil took place gradually over the years. During the early 1980’s more opposition political parties began to spring up who now had the freedom to criticize and challenge the military dictatorship. These opposition groups garnered a lot of popular support and began to win several elections. The opposition won nine governorships during this time.⁸⁷ Direct elections were restored at the municipality and state levels, but not for the highest position in the government, the presidency. A proposal for an amendment to the Constitution, allowing for direct presidential elections, was defeated in Congress in 1984.⁸⁸ Nonetheless, in January 1985, the Electoral College elected a civilian from the opposition, Tancredo Neves, as the new President of Brazil.⁸⁹ Neves became ill and died before his inauguration, leaving his Vice-President José Sarney to usher in the new era of civilian-led governments. However, it wasn’t until October 5, 1988, when the new Brazilian Constitution was passed, that a direct election for the office of president was finally restored.⁹⁰ Two years later Fernando Collor was elected President and the process of democratization was complete.

b. Steps taken by the Civilian Government of Brazil to Deal with Past Human Rights Violations

In the years since the end of the Brazilian military dictatorship, the new civilian democratically elected government has struggled to maintain a delicate balance within the country. On one side there are human rights organizations, both domestic and international, who demand that the government investigate and prosecute cases of torture, disappearance and death. On the other side, there is the military (and some politicians) who believe that digging up the

⁸⁵ Law No. 6683 of August 28, 1979, Article 1.

⁸⁶ Thomas E. Skidmore, *The Politics of ...*, at p. 219.

⁸⁷ Wolfgang S. Heinz and Hugo Frühling, *Determinants of ...*, at p. 181.

⁸⁸ Ignacio Cano and Patrícia Salvão Ferreira, “The Reparations Program in Brazil” in ..., at p. 106.

⁸⁹ *Idem*.

⁹⁰ *Ibidem*.

past would accomplish nothing and instead cause instability and conflict. In response, the Brazilian government slowly and reluctantly began passing laws to deal with various issues related to what occurred during the military's reign in Brazil. These laws involve: the opening up of records, the granting of amnesty and reparations for victims, and also the investigation of cases of disappearances.

i. The Gradual Opening up of Records Pertaining to Acts of Torture

A side effect of the 1979 Amnesty Law and of the general process of democratization taking place in Brazil during the late 70's and 80's, was the opening up of official records. In a way, the 1979 Amnesty Law provided the opportunity for a kind of truth-telling measure that the law had been designed to preclude. The 1979 Amnesty Law permitted lawyers access to government archives in order to search for records regarding their clients who were imprisoned for political crimes or exiled outside of the country, so that the lawyers could prepare amnesty petitions on their behalf.⁹¹ The archives contained the records of the "Supremo Tribunal Militar" (Supreme Military Tribunal) (hereinafter the STM), which were surprisingly complete and unedited. The records contained testimony given by victims describing acts of torture committed upon them at the hands of the armed forces, which were used to extract confessions.⁹² The problem was that the access to these files was restricted; only individual files could be taken out at a time, and even then for only a 24 hour period.⁹³

Nonetheless, this newly opened door inspired two Brazilian religious leaders who were long-time human rights activists, Cardinal Arns of the Archdiocese of São Paulo, and Presbyterian minister Dr. Jaime Wright, to attempt to classify and document all the incidences of torture that occurred during the Brazilian military regime.⁹⁴ Their project had to be done in secret because the military was still in control of the country. They put together a team of twelve dedicated lawyers who systematically checked out case files, one at a time, from the military

⁹¹ Lawrence Weschler, "A Miracles, A Universe: Settling Accounts with Torturers" in Neil J. Kritz (eds), *Transitional Justice: How Emerging Democracies Reckon With Former Regimes* (foreword by Nelson Mandela, Washington D.C. : United States Institute of Peace Press, 1995) p. 444.

⁹² *Idem.*

⁹³ *Ibidem.*

⁹⁴ Terence S. Coonan, "Rescuing History: Legal and . . .", at 525.

archives.⁹⁵ Every day, for three years, the team checked out files, photocopied them, and returned them the next day. When they were finished they had copied over a million pages of court documents, which accounted for every file in the military archives.⁹⁶ The mere fact of being able to collect all this information without incurring government scrutiny or oversight is remarkable considering the fact that the military was still in power. Dr. Jaime Wright remarked:

“We’d initially hoped to be able to photocopy a scientific sampling of the cases in the archive – we certainly didn’t expect to be able to continue on such a basis without being discovered for long.”⁹⁷

All of the research that was collected by this team was then given to two newspaper journalists who prepared a written summary of the team's finding. By 1984 a manuscript was handed over by Cardinal Arns to the director of Vozes, a Catholic publishing company in Brazil, with the instruction that it was not to be published until the civilian government took power.⁹⁸ On July 15, 1985, “Brasil: Nunca Mais” was finally published and began appearing in bookstores all across Brazil. As was mentioned earlier, the book documented thousands of cases of torture committed by the military regime.⁹⁹ The figures contained within the book were, and still are, irrefutable because they came from official military records. The book would rank as the number one best-selling book in Brazil for twenty-five weeks after its publication.¹⁰⁰

After the civilian government came into power in 1985 the laws pertaining to disclosure, censorship, and access to information were further relaxed. The 1988 Constitution of Brazil finally gave the people the legal rights that they had been seeking for years. The 1988 Constitution enshrines the right of access to information for all persons.¹⁰¹ In addition, the 1988 Constitution not only officially recognized the writ of *habeas corpus* but also created the writ of *habeas data*, which was a legal innovation that gives every Brazilian the right to know what type

⁹⁵ *Idem*, at 525-526.

⁹⁶ *Idem*, at 526.

⁹⁷ Lawrence Weschler, “A Miracles, A Universe: Settling . . .”, at p. 445.

⁹⁸ Terence S. Coonan, “Rescuing History: Legal and . . .”, at 526-527.

⁹⁹ *Idem*, at 527.

¹⁰⁰ *Ibidem*, at 528.

¹⁰¹ 1988 Federal Constitution of Brazil (October 5, 1988), Title II, Article 5, subsection XXXIII, establishes that “all have access to receive, from public institutions, public information of their particular interest or of a collective or general interest, those of which shall be offered in the legal period, under penalty of responsibility, except for those whose confidentiality is necessary for the safety of society and of the State.”

of data is stored on manual and automatic databases about them.¹⁰² However, this new right of access to information and disclosure came with certain restrictions.

Several laws and decrees were issued by the civilian government in the years that followed which regulates and sometimes restricts the right of access to information. The first was Law No. 8.159, passed in 1991, which regulates the access and restrictions to public documents.¹⁰³ For instance, Article 23 of the law orders that access to secret documents relating to the security of society and the state shall be restricted for a maximum period of 30 years, which can be extended for another 30 years.¹⁰⁴ Decree No. 2.134, of 1997, regulates Article 23 of the Law No. 8.159 (i.e. regulates the classification, reproduction and access to these documents).¹⁰⁵ Decree No. 4.553, of 2002, extended the period of confidentiality of “ultra-secret” documents to 50 years, which could be renewed indefinitely, according to the interest of safety of society and the state.¹⁰⁶ This 50 years period of confidentiality for “ultra-secret” documents was later reduced back to 30 years by Decree No. 5.301, of 2004, in order to conform to Article 23 of Law No. 8.159.¹⁰⁷ This decree also created the Commission for the Investigation and Analysis of Confidential Information.¹⁰⁸ The period of confidentiality for “ultra-secret” documents again changed the following year. Law No. 11.111, passed in 2005, introduced the possibility of permanent confidentiality of official records that are classified as being “ultra-secretive.”¹⁰⁹ The degree of secrecy and when a file will be opened is decided by the Commission for the Investigation and Analysis of Confidential Information.¹¹⁰

The creation of an indefinite time for the secrecy of certain public documents made a lot of human rights groups question the constitutionality of the law, since it clearly contradicts Article 5 of the 1988 Constitution, which guarantees the right of access to information. In response, these groups began an advocacy campaign dedicated to the promotion of the right of access to information and the adoption of the respective legislation that would guarantee this

¹⁰² Idem, at Article 5, subsection LXXII, establishes that “*habeas Data* shall be granted: a) to ensure the knowledge of information related to the person of the petitioner, contained in records or databanks of government agencies or of agencies of a public character; b) for the correction of data, when the petitioner does not prefer to do so through a confidential process, either judicial or administrative.”

¹⁰³ Law No. 8.159 of January 8, 1991.

¹⁰⁴ Idem, at Article 23(2).

¹⁰⁵ Decree No. 2.134 of January 24, 1997.

¹⁰⁶ Decree No. 4.553 of December 27, 2002, Article 7.

¹⁰⁷ Decree No. 5.301 of December 9, 2004, Article 7.

¹⁰⁸ Idem, at Article 1.

¹⁰⁹ Law No. 11.111, of May 5, 2005, Article 6(2).

¹¹⁰ Idem.

right and implementation of Article 5 of the 1988 Constitution.¹¹¹ Finally, after many years, these groups managed to persuade then President Luiz Inácio Lula da Silva (hereinafter Lula) to send, on May 13, 2009, a bill called, “Access to Information Bill” to the Brazilian National Congress.¹¹² On April 13, 2010, the Brazilian House of Representatives approved the bill.¹¹³ The final remaining step, Senate approval, has not been easy. The bill was jeopardized by Senators from the Commission for External Relations and National Defense, which is chaired by former President Fernando Collor.¹¹⁴ Even President Dilma’s support for the law has waned.¹¹⁵ The process of approving the bill was delayed as a result of the resistance by some Senators. It took until October 25, 2011, a year and a half later, for the Access to Information Bill to be approved by the Brazilian Senate. President Dilma signed the Access to Information Bill (Law No. 12.527) into law on November 18, 2011, which revoked Law No. 11.111, thereby lifting the indefinite secrecy of public documents, and making them available to the public after a maximum of 50 years.¹¹⁶

Before the Access to Information Bill was signed into law, the Brazilian government had already taken steps to open up its records to the family members of political prisoners who died or disappeared during the military dictatorship. In July 2011, the Justice Minister of Brazil, José Eduardo Martins Cardozo, announced that 12 family members would be granted unrestricted access to all documentation from the military period contained in the National Archives.¹¹⁷ The 12 family members allowed access to the National Archive are members of the Commission of

¹¹¹ “After more than half a decade of society claims, the Brazilian government sends a access information bill to the National Congress” (Fórum de Direito de Acesso a Informações Públicas, May 21, 2009)

<<http://www.informacaopublica.org.br/?q=node/634> > accessed September 24, 2011.

¹¹² “Brazil: Lula Sends Access to Information Bill to Congress” (Article 19, May 13, 2009)

<<http://www.article19.org/data/files/pdfs/press/brazil-lula-sends-access-to-information-bill-to-congress.pdf> > accessed September 24, 2011.

¹¹³ “Brazil: Congress Passes Right to Information Bill” (Article 19, May 14, 2010)

<<http://www.article19.org/resources.php/resource/1547/en/brazil:-congress-passes-right-to-information-bill> > accessed September 24, 2011.

¹¹⁴ “Brazil: Open Governments Must Start at the National Level” (Article 19, September 21, 2011)

<<http://www.article19.org/resources.php/resource/2742/en/brazil:-open-governments-must-start-at-the-national-level>> accessed September 24, 2011.

¹¹⁵ “Brazilian Senate Debates Freedom of Information Law” Latin America News Dispatch (New York, June 21, 2011) < <http://latindispatch.com/2011/06/21/brazilian-senate-debates-freedom-of-information-law/> > accessed September 24, 2011.

¹¹⁶ “Brazil's Dilma Rousseff approves truth commission law” BBC (London, November 11, 2011)

<<http://www.bbc.co.uk/news/world-latin-america-15799705> > accessed April 30, 2012.

¹¹⁷ José Dirceu, “Governo abre Arquivo Nacional a familiares de desaparecidos” Correio do Brasil (Rio de Janeiro, July 25, 2011) < <http://correiodobrasil.com.br/governo-abre-arquivo-nacional-a-familiares-de-desaparecidos/273882/> > accessed September 24, 2011.

Families of Political Victims and the Disappeared, whose goal is to document human rights abuses from the period of military rule and identify those state agents who were responsible for committing those abuses.¹¹⁸ Despite the unprecedented access to official government records, the family members expressed concern that the government had not transferred all the records to the National Archive, and were only allowing access as a publicity strategy.¹¹⁹ Nonetheless, the pressure applied by human rights groups has slowly worn down governmental resistance; and the documents, which were concealed and buried for so many years, are finally being opened up to the public.

ii. The Granting of Amnesty and Reparations for the Victims of Political Persecution

The 1988 Constitution addresses, not only the right of access to information for all Brazilian citizens, but also amnesties. Although, the 1988 Constitution does not mention the 1979 Amnesty law, it expresses the same idea, which is that many crimes are excluded from amnesty protection. The main departure from the 1979 Amnesty Law is that the 1988 Constitution includes torture as one of the crimes that is not subject to amnesty.¹²⁰ The inclusion of torture, along with the liability of those who commit such acts (also mentioned in the 1988 Constitution) would seem to contradict the interpretation of the 1979 Amnesty Law. Despite that, the 1979 Amnesty Law remains alive and applicable in Brazil.

The 1988 Constitution also includes a Transitory Constitutional Provisions Act. As the name suggests this act contains several provisions that are merely temporary, and are effective until such time as the new civilian government passes legislature that regulates the substance contained in those provisions. Article 8 of the Transitory Constitutional Provisions Act grants amnesty to those individuals who were affected, for purely political reasons, by discretionary

¹¹⁸ Taylor Barnes, "Brazil grapples with its violent history: For the first time, Brazil is allowing access to documents that might unmask torturers from the military dictatorship" GlobalPost (Boston, July 29, 2011) <<http://www.globalpost.com/dispatch/news/regions/americas/brazil/110728/military-dictatorship-freedom-information-rousseff> > accessed September 24, 2011.

¹¹⁹ *Idem*.

¹²⁰ 1988 Federal Constitution of Brazil (October 5, 1988), Title II, Article 5, subsection XLIII, establishes that "the practice of torture, the illicit traffic of narcotics and related drugs, as well as terrorism, and crimes defined as heinous crimes shall be considered by law as non-bailable and not subject to grace or amnesty, and their principals, agents and those who omit themselves while being able to avoid such crimes shall be held liable."

acts, institutional or complementary, starting from September 18, 1946, to the promulgation of the Constitution.¹²¹ Several Special Amnesty Commissions were set up across Brazil to process and order the measures specified in Article 8 of the Transitional Constitutional Provisions Act.¹²² The language of Article 8 appears very similar to the original stated goal of the 1979 Amnesty Law, which was to provide amnesty to individuals who committed political crimes so that they would not be prosecuted in Brazil; and to provide them some form of compensation or restoration for any jobs that they lost as a result. Therefore, although the Transitional Constitutional Provisions Act does allow for amnesties, the language does not appear to be as broad as the 1979 Amnesty Law which includes “connected crimes” under the umbrella of acceptable amnesties.

For many years the new civilian government in Brazil did not pass any legislation that regulated Article 8 of the Temporary Constitutional Provisions Act or that addressed the issue of amnesties in general. That changed at the beginning of the 21st Century. On August 28, 2001, the Ministry of Justice, in response to an order contained in a recent provisional measure (No. 2.151) that was adopted by then President Fernando Henrique Cardoso, established an Amnesty Commission.¹²³ Since the original provisional measure was repealed and a new one adopted (No. 65), it was not until 2002 that the Brazilian government finally got around to transforming the President’s provisional measure into law. On November 13, 2002, the Brazilian government passed Law No. 10.559, which regulates Article 8 of the Transitory Constitutional Provisions Act.¹²⁴ Regarding its task of promoting victim recognition, the Amnesty Commission works with the concept of declaring political amnesties; which functions as public apology to the citizens whose fundamental rights were not protected by the States.¹²⁵ As to reparations, the Amnesty Commission was tasked to compensate victims for financial losses suffered for political reasons between the years 1946 and 1988.¹²⁶ Since 2001 the Amnesty Commission has received requests

¹²¹ 1988 Federal Constitution of Brazil (October 5, 1988), Transitory Constitutional Provisions Act, Article 8.

¹²² Human Rights Committee, “Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Second Periodic Report, Brazil” (April 11, 2005) CCPR/C/BRA/2004/2, at 62.

¹²³ “Anistia Política” (Ministério da Justiça)

<<http://portal.mj.gov.br/anistia/data/Pages/MJABFF735EITEMIDDB66A11972EE4432A7654440E32B2B6CPTBR IE.htm>> accessed September 24, 2011.

¹²⁴ Law No. 10.559, of November 13, 2002.

¹²⁵ “Brazil’s Amnesty Commission: Interview with Paulo Abrão” (Latin American Conference on Transitional Justice Brasilia, Brazil, July 8, 2011) <<http://tjbrasil.blogspot.com/2011/07/during-conference-we-asked-national.html>> accessed September 24, 2011.

¹²⁶ Idem.

from 70,000 people seeking amnesties, of which about 32,000 have been granted either economic or symbolic reparations (i.e. a formal apology).¹²⁷

iii. The Investigation of Cases of Disappearances

While the 1988 Constitution of Brazil addresses issues such as amnesty and the right of access to information, it fails to mention whether Brazil has an obligation to investigate and search for the people who disappeared during the military regime. It took years for the Brazilian government to address this issue.

The process began in 1991 when, as a result of political pressure from various human rights groups and the discovery of mass graves, such as Vala de Perus, members of Brazil's House of Representatives decided to create the "Comissão de Representação Externa de Busca dos Desaparecidos Políticos" (External Commission for the Search for the Victims of Political Disappearance).¹²⁸ Despite certain limitations (lack of power to request documents or subpoena witnesses) this commission lasted from December 10, 1991, to December 31, 1994.¹²⁹ In its three years of existence the Commission did well: it organized hearings with victims of torture and relatives, convinced some military officials to provide valuable testimony, and managed to receive some confidential documents from the armed forces concerning missing political activists.¹³⁰

Although some progress had been made, many human rights organizations in Brazil and abroad continued to put pressure on the Brazilian government during the early and mid-90's, lobbying for the government to create a commission that would have the power to conduct investigations into the death and disappearance of political activists during the military regime, and investigate those who was responsible.¹³¹ However, there was fierce opposition, especially from the Brazilian military, to the creation of any type of commission that would investigate events that occurred during the military regime.¹³² The military calmed down once they were

¹²⁷ Ibidem.

¹²⁸ Glenda Mezarobba, *Um Acerto de Contas com o Futuro: A Anistia e Suas Conseqüências: Um Estudo do Caso Brasileiro*, (São Paulo, Humanitas/Fapesp, 2006) p. 80-81.

¹²⁹ Ignacio Cano and Patrícia Salvão Ferreira, "The Reparations Program in Brazil" in ..., at p. 108.

¹³⁰ Idem

¹³¹ Ibidem, at p. 111-112.

¹³² Ibidem, at p. 112.

reassured by the President that compensation would not affect the 1979 Amnesty Law (i.e. they would still be immune from prosecution).¹³³

Finally, on December 4, 1995, President Fernando Henrique Cardoso signed Law No. 9.140, which officially recognized the death of 136 persons who disappeared between September 2, 1961, and August 15, 1979, owing to their participation in political activities.¹³⁴ The reason why the government chose 1961 as the starting date was because it wanted to include cases related to unsuccessful coups d'états that occurred prior to 1964, and because other amnesties covered the years up to 1961.¹³⁵ The closing date was later changed to October 5, 1988, to take into account incidents of disappearances that occurred after the 1979 Amnesty Law was passed.¹³⁶ There is an Annex attached to Law No. 9.140 that contains the names of the 136 individuals who disappeared. Law No. 9.140 also created the “Comissão Especial Sobre Mortos e Desaparecidos” (Special Commission on Deaths and Disappearances) (hereinafter CEMDP), which had several functions: recognition and inclusion of other dead victims who fulfilled the conditions, location of the corpses of missing people, and issuing an opinion as to petitions of reparations from the victim’s families.¹³⁷ Law No. 9.140 also granted economic compensation to the families of the victims who disappeared - 3,000 Reais for every year of life lost, with the total never below 100,000 Reais.¹³⁸

Despite the historic and unprecedented nature of this law, there were still several limitations and inadequacies that upset many people. The law did not involve a determination of the circumstances of the death of these people, nor the identification and sanctioning of the perpetrators.¹³⁹ In addition, while the CEMDP had the power to request documents from public institutions and demand forensic reports and testimonies from witnesses, there was no provision in Law No. 9,140 that made such collaboration legally binding.¹⁴⁰

The passage of Law No. 9,140 and the creation of the CEMDP were but the first steps in a long process. The next step was the passage of Law No. 10,875, on June 1, 2004, which

¹³³ Ibidem.

¹³⁴ Law No. 9.140, of December 4, 1995.

¹³⁵ Ignacio Cano and Patrícia Salvão Ferreira, “The Reparations Program in Brazil” in ..., at p. 114.

¹³⁶ Law No. 10.536, of August 14, 2002, Article 1.

¹³⁷ Law No. 9.140, of December 4, 1995, Article 4

¹³⁸ Idem, at Article 11.

¹³⁹ Inter-American Commission on Human Rights, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Case 11.552, Report No. 33/01 (Admissibility) (March 6, 2001), §25.

¹⁴⁰ Ignacio Cano and Patrícia Salvão Ferreira, “The Reparations Program in Brazil” in ..., at p. 114.

amended certain provisions of Law No. 9,140. It expanded the time frame for which compensation for disappearances connected to the military regime can be granted by the CEMDP; now running from September 2, 1961 to October 5, 1988.¹⁴¹ It also expanded the legal scope (i.e. added other options for how those people disappeared) for extending compensation to the families of individuals who disappeared for their political activities.¹⁴² Lastly, Law No. 10,875 consolidated the role of the CEMDP with the Special Secretariat for Human Rights with respect to the payment of compensations.¹⁴³

In its final report, delivered in 2007, the CEMDP documented 479 cases of forced disappearance;¹⁴⁴ officially recognized the state's responsibility in 356 cases;¹⁴⁵ and created a framework for compensating victims' families.¹⁴⁶ Unfortunately, the CEMDP noted in its report that because of the non-disclosure of several key documents, they were unable to locate remains of the majority of the disappearance cases that it had reviewed.¹⁴⁷

A few years later, in response to litigation (both domestically and internationally), the Ministry of Defense issued Order No. 567 on April 29, 2009, which led to the creation of the Tocantins Working Group.¹⁴⁸ The working group was constituted in order to coordinate and carry out the search and identification of the bodies of both the guerrillas and the soldiers who died during the "Guerrilha do Araguaia" (Araguaia Guerrilla movement).¹⁴⁹ The Tocantins Working Group organized 23 expeditions to search and excavate in the Araguaia region.¹⁵⁰ However, no bodily remains have been found.¹⁵¹

¹⁴¹ Law No. 10875, of June 1, 2004, Article 4.

¹⁴² *Idem*, at Article 4(c), (d).

¹⁴³ *Ibidem*, at Article 5(2) and Article 6.

¹⁴⁴ "The Beginning of Accountability" (International Center for Transitional Justice) < <http://ictj.org/our-work/regions-and-countries/brazil> > accessed September 24, 2011.

¹⁴⁵ "Brazil: Prosecute Dictatorship-Era Abuses: Landmark International Decision Provides Powerful Push for Accountability" (Human Rights Watch, April 14, 2009) < <http://www.hrw.org/en/news/2009/04/14/brazil-prosecute-dictatorship-era-abuses> > accessed September 24, 2011.

¹⁴⁶ "The Beginning of Accountability" (International Center for Transitional Justice) < <http://ictj.org/our-work/regions-and-countries/brazil> > accessed September 24, 2011.

¹⁴⁷ "Brazil: Prosecute Dictatorship-Era Abuses: Landmark International Decision Provides Powerful Push for Accountability" (Human Rights Watch, April 14, 2009) < <http://www.hrw.org/en/news/2009/04/14/brazil-prosecute-dictatorship-era-abuses> > accessed September 24, 2011.

¹⁴⁸ Order No. 567 of the Ministry of Defense, of April 29, 2009.

¹⁴⁹ *Idem*.

¹⁵⁰ Inter-American Court of Human Rights, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219 (Judgment) (November 24, 2010), §100.

¹⁵¹ *Idem*.

On the international level, some progress has been made. On November 29 2010, Brazil ratified the International Convention for the Protection of All Persons from Enforced Disappearance.¹⁵² However, Brazil does not recognize the competence of the Committee on Enforced Disappearances to receive complaints from, or on behalf of, victims or countries when the national authorities fail to fulfill their obligations under the convention.¹⁵³

Lastly, on the domestic level, in the past few years, there has finally been some progress towards finally creating a Truth Commission similar to what exists in other countries. The process began on December 21, 2009, with the issuance of Decree No. 7,037. This decree approved the creation of a “Programa Nacional de Direitos Humanos” (National Human Rights Plan) (hereinafter PNDH-3), which addresses many issues: abortion, same-sex civil union, media regulation, land reform, and lastly the creation of a Truth Commission to investigate torture, killings and disappearances during military rule.¹⁵⁴ The issuance of this decree caused debate in Brazil, mostly involving the section that deals with the creation of a Truth Commission. Marlon Weichert, a prominent human rights advocate and regional prosecutor with the Ministério Público Federal (Federal Public Ministry of Brazil) (hereinafter MP), stated in May of 2011 that he believed that the Brazilian Congress should approve the PNDH-3 and pass a law that would finally create a Truth Commission because:

“By revealing the truth we would have the chance to understand what happened and take a very close look at the reasons why and how the government turned against its own people. We need to confront our past to make right in the present and in the future. This will help us to complete our transition and to fortify human rights.”¹⁵⁵

Not surprisingly, the reaction from human rights groups and advocates was positive to the PNDH-3 and to the plan of creating a Truth Commission. However, there were some criticism and fear from certain segments of the Brazilian government and also from the military about the effect of such a Truth Commission. Nelson Jobim, who at that time was the National Defense

¹⁵² List of Signatures, Ratifications, etc. to the International Convention for the Protection of All Persons from Enforced Disappearance < <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=IV-16&chapter=4&lang=en> > accessed September 25, 2011.

¹⁵³ “Amnesty International Annual Report 2011 – Brazil” (Amnesty International, May 13, 2011) <<http://www.unhcr.org/refworld/docid/4dce157b3c.html> > accessed September 25, 2011.

¹⁵⁴ Decree No. 7037, of December 21, 2009.

¹⁵⁵ “Brazil’s Right to Know: Interview with Marlon Weichert” (International Center for Transitional Justice) <<http://ictj.org/news/brazils-right-know-interview-marlon-weichert>> accessed September 25, 2011.

Minister, and the heads of Brazil's armed forces: Enzo Peri (Commander of the Army), Juniti Saito (Commander of the Air Force), and Julio Moura Neto (Commander of the Navy) threatened to resign if a law were passed that would create a Truth Commission as constituted in Decree No. 7037.¹⁵⁶ Another prominent military figure in Brazil, General Gilberto Figueiredo, president of the Military Club, criticized the law and hoped that the language in the PNDH-3 would be reviewed and adjusted so as to provide peace to society.¹⁵⁷

The unhappiness of the military (and Nelson Jobim) stemmed from the language contained in the PNDH-3 with respect to the Truth Commission. They were particularly unhappy with the term "political repression" because they felt the use of that term implied a one-sided approach to the Truth Commissions' investigations; meaning that there would be no investigation of crimes that were committed by the guerrillas.¹⁵⁸ The military was also upset that the PNDH-3 provided for the investigation of acts committed by state agents during the dictatorship (1964-1985) because they felt that using such language created the possibility for a review of the 1979 Amnesty Law, which might then lead to the conviction of government and military officials.¹⁵⁹ Instead, they preferred the language be changed to include human rights violations that were committed by both sides and covering the period before and after the dictatorship.

Other members in the Brazilian government came out in favor of PNDH-3 and opposed the changes suggested by the military. Paulo Vannuchi, then Minister of the Brazilian government's National Human Rights Secretariat, threatened to resign if any changes were made to PNDH-3.¹⁶⁰ Tarso Genro, then former Minister of Justice, supported Paulo Vannuchi in his

¹⁵⁶ Jailton de Carvalho, Evandro Éboli and Chico de Gois, "Para militares crise envolvendo a criação do Programa Nacional de Direitos Humanos não acabou. Tarso minimiza controvérsia" O Globo (Brazil, December 30, 2009) <http://oglobo.globo.com/pais/mat/2009/12/30/para-militares-criacao-do-programa-nacional-de-direitos-humanos-nao-acabou-tarso-minimiza-controversia-915405055.asp> > accessed September 25, 2011.

¹⁵⁷ Idem.

¹⁵⁸ Pedro Widmar, "The Truth Commission" The Rio Times (Rio de Janeiro, January 19, 2010) <<http://riotimesonline.com/brazil-news/front-page/the-pndh-3-and-the-truth-commission/>> accessed September 25, 2011.

¹⁵⁹ Jailton de Carvalho, Evandro Éboli and Chico de Gois, "Para militares crise envolvendo a criação do Programa Nacional de Direitos Humanos não acabou. Tarso minimiza controvérsia" O Globo (Brazil, December 30, 2009) <http://oglobo.globo.com/pais/mat/2009/12/30/para-militares-criacao-do-programa-nacional-de-direitos-humanos-nao-acabou-tarso-minimiza-controversia-915405055.asp> > accessed September 25, 2011.

¹⁶⁰ Pedro Widmar, "The Truth Commission" The Rio Times (Rio de Janeiro, January 19, 2010) <<http://riotimesonline.com/brazil-news/front-page/the-pndh-3-and-the-truth-commission/>> accessed September 25, 2011.

belief that a Truth Commission should be established.¹⁶¹ All of this created divisions within President Lula's government which Lula was forced to mediate and resolve himself. Eventually an agreement was reached between both factions of Lula's government; the term "political repressions" was taken out and a commission would be created to evaluate the creation of the Truth Commission.¹⁶²

On May 12, 2010, Decree No. 7177 was issued, which included several of the changes that the military had been requesting: both sides (military government and guerrilla rebels) would be investigated for human rights violations, the time period that would be investigated was enlarged from 1964-1985 to 1946-1988.¹⁶³ When President Lula approved this modified version of the PNDH-3 in May 2010 there was a lot of criticism from human rights groups complaining that sections relating to crimes committed during the military regime (1964-85) had been removed.¹⁶⁴ Some even launched the Campaign to Defend the Integrity and Implementation of the National Human Rights Plan and calling for the immediate reversal of Decree No. 7177.¹⁶⁵

Soon after Decree No. 7177 was issued there was a change in the government. Dilma Rousseff was elected as the new President of Brazil. Her position on issues such as: amnesties, truth commissions, and prosecutions has been inconsistent. During her campaign for President, Dilma Rousseff, who in her early twenties was a leftist guerrilla, that was tortured and imprisoned by the military in the early 70's, vowed to bring human rights violators to justice.¹⁶⁶ Once, when asked during her campaign about these issues, her response was that she was not in favor of revenge (prosecution for past crimes), but yet still maintained that Brazil must never again fall into a dictatorship, and that Brazil must always be a democracy with freedom of the

¹⁶¹ Jailton de Carvalho, Evandro Éboli and Chico de Gois, "Para militares crise envolvendo a criação do Programa Nacional de Direitos Humanos não acabou. Tarso minimiza controvérsia" O Globo (Brazil, December 30, 2009) <http://oglobo.globo.com/pais/mat/2009/12/30/para-militares-criacao-do-programa-nacional-de-direitos-humanos-nao-acabou-tarso-minimiza-controversia-915405055.asp> > accessed September 25, 2011.

¹⁶² Pedro Widmar, "The Truth Commission" The Rio Times (Rio de Janeiro, January 19, 2010) <<http://riotimesonline.com/brazil-news/front-page/the-pndh-3-and-the-truth-commission/>> accessed September 25, 2011.

¹⁶³ Decree No. 7177, of May 12, 2010.

¹⁶⁴ "Amnesty International Annual Report 2011 – Brazil" (Amnesty International, May 13, 2011) <<http://www.unhcr.org/refworld/docid/4dce157b3c.html> > accessed September 25, 2011.

¹⁶⁵ Boletina Mujer SaludHable, "Brazil: Urgent Call to Support the Campaign to Defend the Integrity and Implementation of the National Human Rights Plan, PNDH-3" (Mujer Salud-Hable Newsletter, May 5, 2010) <http://www.reddesalud.org/news/act2_int.php?id=58 > accessed September 25, 2011.

¹⁶⁶ Alexei Barrionuevo, "Amnesty for Brazil Dictatorship Is Challenged" The New York Times (New York, December 16, 2010) < <http://www.nytimes.com/2010/12/16/world/americas/16brazil.html> > accessed September 25, 2011.

press, freedom of expression, and freedom of opinion.¹⁶⁷ She has had to balance the long-standing demands from the leftist wing of her Workers' Party, who wish to address past abuses, and the military's rejection of anything that sounds like revenge.¹⁶⁸ To appease both sides President Dilma publicly promised to promote a Truth Commission,¹⁶⁹ while at the same time assuring the military that the 1979 Amnesty Law would be "untouchable".¹⁷⁰

Another major change recently within the Brazilian government occurred in August 2011 when Celso Amorim replaced Nelson Jobim as National Defense Minister. The military became concerned that the new National Defense Minister would impose a left-wing ideological imprint upon the military, and were worried about what effect his selection might have on the future of the 1979 Amnesty Law. General Augusto Heleno stated:

"I would like to remind the minister that the (Brazilian) Armed Forces are State institutions, non-political, non-partisan. Any ideological commitment has a highly negative repercussion in the military."¹⁷¹

In response to the concern expressed by members of the military, Celso Amorim took a middle of the road approach. In an interview shortly after his appointment, he stated that neither he nor anyone else could transform the military into a political party.¹⁷² When asked about the Truth Commission his response was:

¹⁶⁷ Sérgio Roxo, "Dilma diz que não é a favor de revanchismo e afirma que decisão do STF sobre Lei da Anistia deve ser cumprida" O Globo (Brazil, April 30, 2010) < <http://oglobo.globo.com/pais/mat/2010/04/30/dilma-diz-que-nao-a-favor-de-revanchismo-afirma-que-decisao-do-stf-sobre-lei-da-anistia-deve-ser-cumprida-916469013.asp> > accessed September 25, 2011.

¹⁶⁸ "Brazil Truth Commission aims to tackle dark past" Reuters (London, September 13, 2011) < <http://af.reuters.com/article/southAfricaNews/idAFN1E7871NN20110913?pageNumber=3&virtualBrandChannel=0&sp=true> > accessed September 25, 2011.

¹⁶⁹ "Brazil only country that retains 1979 Amnesty law dictated by the military" MercoPress (Montevideo, Uruguay, March 28, 2011) < <http://en.mercopress.com/2011/03/28/brazil-only-country-that-retains-1979-amnesty-law-dictated-by-the-military> > accessed September 25, 2011.

¹⁷⁰ Mauricio Lima, "Brazil Must Scrap Amnesty Law: Rights Groups" AFP News (London, August 26, 2011) < <http://my.news.yahoo.com/brazil-must-scrap-amnesty-law-rights-group-020236968.html> > accessed September 25, 2011.

¹⁷¹ "Brazilian military warn incoming Defence minister forces are non political, non partisan" MercoPress (Montevideo, Uruguay, August 8, 2011) < <http://en.mercopress.com/2011/08/08/brazilian-military-warn-incoming-defence-minister-forces-are-non-political-non-partisan> > accessed September 25, 2011.

¹⁷² Eliane Cantanhêde, "New Minister of Defense Deflects Criticism and Defends General" Folha (São Paulo, August 10, 2011) < <http://www1.folha.uol.com.br/internacional/en/national/957321-new-minister-of-defense-deflects-criticism-and-defends-general.shtml> > accessed September 25, 2011.

“The main goal is to reestablish the truth. We will reach a good conclusion with sensibility and good political articulation -- which is the Minister of Justice's job.”¹⁷³

However, despite the addition of these new actors to the political scene in Brazil, nothing appears to have changed. The weaker and more docile version of the PNDH-3 contained in Decree No. 7177 was chosen as the version to be presented before Congress as part of a draft bill, known as Proposed Law No. 7376.¹⁷⁴ Despite being disappointed by the PNDH-3's small size and toothlessness, several human rights groups representing torture victims in Brazil say that the PNDH-3 is still an important step forward and will eventually open the path for possible future prosecutions.¹⁷⁵ For the PNDH-3 contained in Proposed Law No. 7376 to take effect both houses of Congress, the House of Representatives and the Senate, must approve the draft bill and President Dilma must sign off on it. On September 21, 2011, the draft bill was finally approved by the House of Representatives after a last minute compromise was negotiated between the parties.¹⁷⁶ The following day President Dilma maintained her position that the approval of the PNDH-3 is important for Brazil domestically and even for the country's image abroad.¹⁷⁷ The government's intention was for the draft bill to be approved by the Senate before the end of September 2011.¹⁷⁸ However, it took until October 27, 2011, for the Senate to pass the bill, and even after its passage there was much disagreement among the Brazilian Senators as to future success of the Truth Commission.¹⁷⁹ Finally, on November 18, 2011, President Dilma signed

¹⁷³ Idem.

¹⁷⁴ “Projeto cria a Comissão Nacional da Verdade, sem caráter punitivo” (Câmara Dos Deputados, May 21, 2010) <<http://www2.camara.gov.br/agencia/noticias/DIREITOS-HUMANOS/148111-PROJETO-CRIA-A-COMISSAO-NACIONAL-DA-VERDADE,-SEM-CARATER-PUNITIVO.html> > accessed September 25, 2011.

¹⁷⁵ Brazil Truth Commission aims to tackle dark past” Reuters (London, September 13, 2011) <<http://af.reuters.com/article/southAfricaNews/idAFN1E7871NN20110913?pageNumber=3&virtualBrandChannel=0&sp=true> > accessed September 25, 2011.

¹⁷⁶ Roberto Maltchik, “Câmara dos deputados aprova Comissão da Verdade” O Globo (Brazil, September 21, 2011) <<http://oglobo.globo.com/pais/mat/2011/09/21/camara-dos-deputados-aprova-comissao-da-verdade-925415830.asp#ixzz1YfAE3ezy> > accessed September 25, 2011.

¹⁷⁷ Gerson Camarotti, “Dilma cedeu para aprovar Comissão da Verdade” O Globo (Brazil, September 22, 2011) <<http://oglobo.globo.com/pais/mat/2011/09/22/dilma-cedeu-para-aprovar-comissao-da-verdade-925424284.asp> > accessed September 25, 2011.

¹⁷⁸ Roberto Maltchik, “Câmara dos deputados aprova Comissão da Verdade” O Globo (Brazil, September 21, 2011) <<http://oglobo.globo.com/pais/mat/2011/09/21/camara-dos-deputados-aprova-comissao-da-verdade-925415830.asp#ixzz1YfAE3ezy> > accessed September 25, 2011.

¹⁷⁹ “Brazil creates truth commission to probe rights abuses” BBC (London, October 27, 2011) <<http://www.bbc.co.uk/news/world-latin-america-15473622> > accessed April 30, 2012.

Law No. 12528, which Proposed Law No. 7376 was transformed into, that created the Truth Commission.¹⁸⁰ In signing the bill into law President Dilma stated:

"For generations of Brazilians who died, we honour them today not through a process of revenge, but through a process of building truth and memory."¹⁸¹

On May 16, 2012, President Dilma inaugurated the creation of the Truth Commission.¹⁸² The creation of the Truth Commission has been met with approval and support from members of the government and from international actors, such as the UN High Commissioner for Human Rights, Navi Pillay.¹⁸³ However, there has been criticism from many groups; the victim's relatives believe that the Truth Commission is limited with little power, while the military believes that the Truth Commission will be a one sided investigation.¹⁸⁴ Therefore, several retired officers have decided to create a separate parallel commission to counter any accusations that emerge from the Truth Commission.¹⁸⁵ The military's concerns have not been unfounded. One of the seven members of the Truth Commission, a lawyer named Rosa Cardoso, who defended Rouseff during the dictatorship era, has said recently that the commission wouldn't examine crimes committed by the left-wing resistance because their acts were punished by the military regime at the time, often by torture and murder.¹⁸⁶ Another member of the commission and a former justice minister, Jose Carlos Dias, has contradicted Cardoso and instead has maintained that everything would be analyzed and investigated, including the crimes that were committed by the left.¹⁸⁷

The Truth Commission is designated to operate for two years from the date of its inauguration/establishment¹⁸⁸ and be composed of seven members to be chosen by President

¹⁸⁰ Law No. 12528, of November 18, 2011.

¹⁸¹ "Brazil's Dilma Rouseff approves truth commission law" BBC (London, November 11, 2011) <<http://www.bbc.co.uk/news/world-latin-america-15799705>> accessed April 30, 2012.

¹⁸² "Brazil truth commission begins rights abuse inquiries" BBC (London, May 16, 2011) <<http://www.bbc.co.uk/news/world-latin-america-18087390>> accessed June 16, 2012.

¹⁸³ Idem.

¹⁸⁴ Ibidem.

¹⁸⁵ Ibidem.

¹⁸⁶ Dom Phillips, "Brazil's Truth Commission May Find Inconvenient Answers" Bloomberg (New York, May 18, 2010) <<http://www.bloomberg.com/news/2012-05-18/brazil-s-truth-commission-may-find-inconvenient-answers.html>> accessed June 16, 2012.

¹⁸⁷ Idem.

¹⁸⁸ Law No. 12528, of November 18, 2011, Article 11.

Dilma.¹⁸⁹ The selection of the commission members by Presidential nomination has been met with some criticism by human rights groups who feel that there should be some sort of public participation in the nomination process.¹⁹⁰ However, this proposal was rejected. In its investigations into human rights abuses committed both by the military and the guerrillas, the Truth Commission has several powers; the power to summon witnesses to testify, to request information from government agencies (including secret documentation), to hold public hearings, and to solicit expert opinions.¹⁹¹ However, in order to appease the military and the government hardliners, the proposed Truth Commission will respect the 1979 Amnesty Law, meaning that it will have no power to prosecute suspects.¹⁹²

Despite this apparent drawback, the Truth Commission has a wide range of powers, which no other commission in Brazil has had before. Finally, there will be a commission in Brazil with the power to investigate human rights abuses (e.g. torture, enforced disappearance, death, and hiding of bodies).¹⁹³ The Truth Commission also has the ability to investigate and identify the structures, locations, institutions, and circumstances behind those human rights violations.¹⁹⁴ Such a thing has never before existed in Brazil.

III. Jurisprudence Concerning Brazil's 1979 Amnesty Law

Within the last few years there has been a lot of jurisprudence both internationally and domestically concerning the legality of Brazil's 1979 Amnesty Law. In the past there had been decisions within the Inter-American system concerning the legality of other amnesty laws that had existed in several other countries throughout Latin America, whose goals were similar to that of Brazil's: to protect individuals involved in activities during periods of military rule from possible future criminal prosecution. At the same time that the issue of Brazil's 1979 Amnesty

¹⁸⁹ *Idem*, at Article 2.

¹⁹⁰ "Brazil's Right to Know: Interview with Marlon Weichert" (International Center for Transitional Justice) <<http://ictj.org/news/brazils-right-know-interview-marlon-weichert>> accessed September 25, 2011.

¹⁹¹ "Projeto cria a Comissão Nacional da Verdade, sem caráter punitivo" (Câmara Dos Deputados, May 21, 2010) <<http://www2.camara.gov.br/agencia/noticias/DIREITOS-HUMANOS/148111-PROJETO-CRIA-A-COMISSAO-NACIONAL-DA-VERDADE,-SEM-CARATER-PUNITIVO.html>> accessed September 25, 2011.

¹⁹² "Brazil Truth Commission aims to tackle dark past" Reuters (London, September 13, 2011) <<http://af.reuters.com/article/southAfricaNews/idAFN1E7871NN20110913?pageNumber=3&virtualBrandChannel=0&sp=true>> accessed September 25, 2011.

¹⁹³ Law No. 12528, of November 18, 2011, Article 3(1) and 3(2).

¹⁹⁴ *Idem*, at Article 3(3).

Law was working its way through the Inter-American system, the local courts in Brazil were coming to a final decision on the matter. The recent rulings by the courts at both levels deserve mention and analysis, as do their relationship with each another, and their effect upon Brazilian society.

a. The Inter-American System

The Inter-American system for the promotion and protection of human rights began with the adoption of the Declaration of the Rights and Duties of Man (hereinafter American Declaration), the world's first human rights instrument, in 1948.¹⁹⁵ At the same conference in Bogota, Colombia, the Charter of the Organization of American States (hereinafter OAS) was adopted.¹⁹⁶ However, no supervisory mechanism was created to oversee and protect the human rights set forth in the American Declaration. It was not until 1959 that the Inter-American Commission on Human Rights (hereinafter IACHR) was created to investigate the general human rights situations in OAS member states.¹⁹⁷ The IACHR was explicitly directed to only examine specific complaints that were brought to it and which alleged human rights violations.¹⁹⁸ Later, in 1969, the OAS adopted the American Convention on Human Rights (hereinafter American Convention), which entered into force in 1978.¹⁹⁹ Article 33 of the American Convention establishes the Inter-American Court of Human Rights (hereinafter IACtHR), and Chapter VIII (Articles 52 – 69) lays out the organization, jurisdiction, function, and procedure of the IACtHR.²⁰⁰ The goal of the IACtHR is to enforce and interpret the provisions of the American Convention.

Since that time, several cases have been brought to and heard by the IACtHR with respect to Brazil, but it was not until the fall of 2010 that the IACtHR issued its first decision concerning

¹⁹⁵ American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992).

¹⁹⁶ David John Harris and Stephen Livingstone, *The Inter-American System of Human Rights*, (Oxford : Clarendon Pr., 1998) p. 65.

¹⁹⁷ *Idem*, at p. 65-67.

¹⁹⁸ *Ibidem*, at p. 67.

¹⁹⁹ American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 *entered into force* July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

²⁰⁰ *Idem*.

Brazil's 1979 Amnesty Law.²⁰¹ The case is known as *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil* (hereinafter *Gomes Lund*).²⁰² While this decision of the IACtHR was recent, the history of the case stretches back many years.

The *Gomes Lund* case originated with the Araguaia Guerrilla movement, which was made up of members of the Brazilian Community Party, students, and residents of the Araguaia region of Brazil. This movement was founded by militants of the Communist Party of Brazil (hereinafter CPB) in 1966 with the goal of bringing about the fall of the military dictatorship that had recently come to power.²⁰³ In response, the Brazilian Army, between 1972 and 1975, conducted a series of operations to destroy the movement. In doing so the Brazilian Army is alleged to have detained, tortured, and forcibly made several members of the guerrilla movement disappear.²⁰⁴

After exhausting all available domestic remedies, on August 7, 1995, the Brazilian section of the Center for Justice and International Law (hereinafter CEJIL) and Human Rights Watch/Americas (hereinafter HRWA) filed a petition with the IACHR, against Brazil.²⁰⁵ This petition was brought on behalf of the relatives of 70 individuals who were alleged to have been victims of enforced disappearance by the Brazilian Army during its operations against the Araguaia communist guerrilla movement in the early 1970's.²⁰⁶ One of the individuals who disappeared in those operations was a 26 year old Marxist guerrilla, called Guilherme Gomes Lund. It is believed that he was killed in combat in 1973. The Brazilian military has confirmed his death, but has refused to provide any further details concerning what happened to Guilherme Gomes Lund.²⁰⁷ The case is named for Júlia Gomes Lund, Guilherme's mother.

The petitioners alleged that the State of Brazil was responsible for:

²⁰¹ Alessandra Duarte, "OEA julga caso da Guerrilha do Araguaia" O Globo (Brazil, May 21, 2010) < <http://oglobo.globo.com/pais/noblat/posts/2010/05/21/oea-julga-caso-da-guerrilha-do-araguaia-293452.asp> > accessed September 15, 2011.

²⁰² Inter-American Court of Human Rights, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219 (Judgment) (November 24, 2010).

²⁰³ Inter-American Commission on Human Rights, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Case 11.552, Report No. 33/01 (Admissibility) (March 6, 2001), §21.

²⁰⁴ *Idem*, at §22.

²⁰⁵ *Ibidem*, at §1.

²⁰⁶ "Brazil: Prosecute Dictatorship-Era Abuses: Landmark International Decision Provides Powerful Push for Accountability" (Human Rights Watch, April 14, 2009) < <http://www.hrw.org/en/news/2009/04/14/brazil-prosecute-dictatorship-era-abuses> > accessed September 15, 2011.

²⁰⁷ "Araguaia Case May Challenge Brazilian Amnesty Law" Latin America News Dispatch (New York, June 3, 2010) < <http://latindispatch.com/2010/06/03/araguaia-case-may-challenge-brazilian-amnesty-law/> > accessed September 15, 2011.

“violations of rights guaranteed under Article I (right to life, liberty, and personal security); Article XXV (right of protection from arbitrary arrest); and Article XXVI (right to due process of law) of the American Convention, and of Article 4 (Right to Life); Article 8 (Right to a Fair Trial); Article 12 (Freedom of Conscience and Religion); Article 13 (Freedom of Thought and Expression); and Article 25 (Right to Judicial Protection), as well as Article 1(1) (Obligation to Respect Rights) of the American Convention ...”²⁰⁸

On March 6, 2001, after examining all admissibility requirements (i.e. Competence *ratione personae*, *ratione materiae*, *ratione temporis*, and *ratione loci* of the IACHR; Exhaustion of domestic remedies; Period for lodging the petition; Duplication of proceedings; and Characterization of the facts) the IACHR issued a report in which it declared the case to be admissible with regard to all the alleged violations mentioned above.²⁰⁹ When the IACHR issued its report on March 6, 2001, many years after the action had originally commenced, there had not yet been a final decision on the merits at the domestic level in Brazil. Therefore, the IACHR concluded that the delay in the domestic proceedings could not be considered as reasonable.²¹⁰

However, it took many years for the IACHR to issue a decision on the merits of the case. Finally, on October 31, 2008, the IACHR issued a Report on the Merits in which it found multiple human rights violations committed by Brazil.²¹¹ Brazil was notified about the IACHR’s Report on the Merits on November 21, 2008, and was given a deadline of two months to provide information on any actions undertaken to implement the recommendations of the IACHR.²¹² However, despite two extensions, the IACHR deemed that Brazil had not taken the steps required for a satisfactory implementation of the recommendations.²¹³ Therefore, on March 26, 2009, the IACHR referred the case to the IACtHR, considering it:

²⁰⁸ Inter-American Commission on Human Rights, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Case 11.552, Report No. 33/01 (Admissibility) (March 6, 2001), §2.

²⁰⁹ *Idem*, at §37.

²¹⁰ *Ibidem*, at §50.

²¹¹ Inter-American Commission on Human Rights, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Case 11.552, Report No. 91/08 (Report on the Merits) (October 31, 2008).

²¹² Inter-American Court of Human Rights, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219 (Judgment) (November 24, 2010), §1.

²¹³ *Idem*.

“an important opportunity for the Court to consolidate the Inter-American jurisprudence on amnesty laws in relation to enforced disappearances and extrajudicial executions, and the State’s consequential obligation to provide society with the truth, investigate, prosecute, and punish serious human rights violations.”²¹⁴

The IACtHR conducted two days of hearings on the case on May 20 and 21, 2010.²¹⁵ It made its judgment on November 24, 2010.²¹⁶ The judgment was made available on December 14, 2010.²¹⁷ The IACtHR found that Brazil was responsible for the enforced disappearance of 62 persons identified as victims in the present case.²¹⁸ The IACtHR also found that Brazil was in violation of several articles of the American Convention, specifically Articles 1, 4, and 7 (life, liberty, and personal security), Article 3 (juridical personality), Article 5 (humane treatment), Article 8 (duty to investigate), Article 25 (access to court), and Article 13 (right to information).²¹⁹ For the first time, the IACtHR recognized that the right to the truth is connected with the right to seek and receive information enshrined in Article 13.²²⁰

As to the 1979 Brazilian Amnesty Law the IACtHR ruled that:

“The provisions of the Brazilian Amnesty Law that prevent the investigation and punishment of serious human rights violations are not compatible with the American Convention, lack legal effect, and cannot continue as obstacles for the investigation of the facts of the present case, neither for the identification and punishment of those responsible, nor can they have equal or similar impact regarding other serious violations of human rights enshrined in the American Convention which occurred in Brazil.”²²¹

²¹⁴ Inter-American Commission on Human Rights, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Case 11.552 (Application to the Inter-American Court of Human Rights) (March 26, 2009), §5. The application is only available in Spanish and Portuguese. The above quote was translated from the Portuguese text: “A Comissão observa que o presente caso representa uma oportunidade importante para consolidar a jurisprudência interamericana sobre as leis de anistia em relação aos desaparecimentos forçados e a execução extrajudicial, e a resultante obrigação dos Estados de fazer a sociedade conhecer a verdade, e investigar, processar e sancionar as graves violações de direitos humanos.”

²¹⁵ Inter-American Court of Human Rights, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219 (Judgment) (November 24, 2010), §7.

²¹⁶ *Idem*.

²¹⁷ “Brazil: Human Rights violations committed in the past must finally be investigated” (Amnesty International, December 15, 2010) < <http://www.amnestyusa.org/news/press-releases/brazil-human-rights-violations-committed-in-the-past-must-finally-be-investigated> > accessed September 15, 2011.

²¹⁸ Inter-American Court of Human Rights, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219 (Judgment) (November 24, 2010), §121.

²¹⁹ *Idem*, at §4-6 of the Operative Paragraphs.

²²⁰ “Inter-American Court Issues Groundbreaking Ruling on Right to Truth and Information” (Open Society Foundations, January 13, 2011) < <http://www.soros.org/initiatives/justice/news/araguaia-gomes-lund-ruling-20110113> > accessed September 15, 2011.

²²¹ Inter-American Court of Human Rights, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219 (Judgment) (November 24, 2010), §3 of the Operative Paragraphs.

Although it was not the first case in which the IACtHR invalidated an amnesty law that existed from a period of military dictatorship in Latin America, the *Gomes Lund* case represents a watershed moment for the human rights activists in Brazil and the families of the victims who have been campaigning for years in search of truth and justice for those who were tortured and/or who disappeared during the military dictatorship. Paulo Vannuchi, the former Minister of the Brazilian government's National Human Rights Secretariat, called the IACtHR's decision "very important to continuing to develop human rights" in Brazil.²²² Viviana Krsticevic, the executive director of the CEJIL/Brazil, stated after the IACtHR judgment:

"This is a turning point in the search for truth and justice in Brazil. Brazil, unlike other Latin American countries, has not found a way to investigate or even partially punish those responsible for the most egregious human rights violations committed during its dictatorship."²²³

However, despite success on the international level, human rights activists in Brazil and the victim's families have been met repeatedly with resistance at the domestic level by both the government and the courts. Nelson Jobim, the former Defense Minister of Brazil, has stated that the decision of the IACtHR in condemning Brazil for the disappearance of 62 people in the Araguaia Guerrilla movement is purely political and will have no effect domestically.²²⁴ The case of *Gomes Lund* illustrates the perseverance of the victim's family members and the struggle they encountered in bringing a lawsuit within the Brazilian legal system.

b. Brazilian Legal System

The case of *Gomes Lund* began its path in the Brazilian legal system on February 19, 1982, when 22 family members of 25 disappeared persons of the Araguaia Guerrilla movement initiated a civil lawsuit against the Federal Government of Brazil before the First Federal Court

²²² Alexei Barrionuevo, "Amnesty for Brazil Dictatorship Is Challenged" The New York Times (New York, December 16, 2010) < <http://www.nytimes.com/2010/12/16/world/americas/16brazil.html> > accessed September 15, 2011.

²²³ Idem.

²²⁴ "Jobim nega possibilidade de punição para torturadores da Guerrilha do Araguaia" O Globo (Brazil, December 15, 2010) < <http://oglobo.globo.com/pais/mat/2010/12/15/jobim-nega-possibilidade-de-punicao-para-torturadores-da-guerrilha-do-araguaia-923300521.aspl> > accessed September 15, 2011.

of the Federal District, seeking a declaration of missing persons and identification of their whereabouts and/or remains.²²⁵ On March 27, 1989, the First Federal Court rejected the lawsuit without making an evaluation of the merits of the case, on the basis that the request was “legally and materially impossible to fulfill.”²²⁶ On appeal, a Federal Regional Court, on October 11, 1993, reversed the judgment and ordered the First Federal Court to hear the case.²²⁷ In 1998 the First Federal Court ordered the Government of Brazil to produce a report on the Araguaia Guerrilla movement.²²⁸ The Brazilian government responded in 2000, informing the court that no reports on the military operation conducted against the Araguaia Guerrilla movement had been found in the army archives.²²⁹

Finally, on June 20, 2003, the First Federal Court issued its judgment, which included an order to the Government to declassify all information related to the military operations against the Araguaia Guerrilla movement, to conduct an investigation into the military operations, and to identify the remains of the disappeared.²³⁰ The Brazilian government appealed this decision. The Federal Regional Tribunal rejected the Government’s appeal on December 14, 2004.²³¹ Finally, on October 9, 2007, the “Supremo Tribunal Federal” (the Supreme Federal Court) (hereinafter the STF), Brazil’s highest court, confirmed the decision of the First Federal Court. The Brazilian government complied with this decision by establishing the Tocantins Working Group and releasing various classified documents.²³²

The families of the victims of the Araguaia Guerrilla movement were simply seeking a declaration by the Brazilian government, and identification of the whereabouts and/or remains of the victims. They had not specifically challenged the 1979 Amnesty Law within the Brazilian court system. When they filed an application before the IACtHR in 1995, the IACtHR, in its decision on the merits of the case, was obligated to review the legality of the 1979 Amnesty Law vis a vis Brazil’s international obligations as a signatory to the American Convention. The first

²²⁵ Initial Petition of the Ordinary Action (*Ação Ordinária para Prestação de Fato*), Action No. 82.00.24682-5, of February 19, 1982.

²²⁶ Judgment of First Federal Court of the Federal District of March 27, 1989.

²²⁷ Decision of the First Chamber of the Federal Regional Tribunal of the First Region published on October 11, 1993.

²²⁸ Office of the First Federal Court of the Federal District of October 19, 1998.

²²⁹ Order No. 723/A2 of the Cabinet Chief of the Major of the Army of April 25, 2000.

²³⁰ Judgment of First Federal Court of June 30, 2003.

²³¹ Decision of the Tribunal Regional Federal on the appeal filed by the Union, published on December 14, 2004.

²³² Inter-American Court of Human Rights, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219 (Judgment) (November 24, 2010), §192.

domestic challenge within the Brazilian court system of the Amnesty Law was submitted by the Ordem dos Advogados do Brasil (hereinafter OAB). The OAB (known in English as the Order of Attorneys of Brazil) is the Brazilian Bar association, founded in 1930. It is an organization of lawyers and is responsible for the regulation of the legal profession in the country.²³³

The OAB filed, on October 21, 2008, an Arguição de Descumprimento de Preceito Fundamental (hereinafter ADPF) No. 153 against the Government of Brazil challenging the constitutionality of the 1979 Amnesty Law.²³⁴ ADPF is the name given to the Brazilian legal instrument used to prevent or repair damage resulting from government acts (federal, state, and municipal), including acts prior to the promulgation of the 1988 Brazilian Constitution. ADPF was established by paragraph 1 of Article 102 of the Constitution,²³⁵ and later regulated by Law No. 9.882/99.²³⁶ The reason why an ADPF was not filed by the victim's families earlier is because they are not able to use it, given that the only parties able to legally file such a complaint are specific State officials, institutions and social groups, such as the OAB.²³⁷ The OAB's argument before the STF was that the 1979 Amnesty law should be interpreted in a manner so that former officials accused of human rights abuses during the military regime in Brazil could be prosecuted for their crimes.²³⁸

The government's response to this suit, brought by the OAB challenging the legality of the 1979 Amnesty law, has been uneven. Several government officials: Nelson Jobim (former National Defense Minister) and Celso Amorim (former Minister of Foreign Relations) submitted briefs in which they explained support of a blanket amnesty interpretation of the Amnesty Law, while other government officials: Dilma Rousseff (former Chief of Staff and now President), Tarso Genro (former Minister of Justice) and Paulo Vannuchi (former Minister of the Human

²³³ Ordem dos Advogados do Brasil <<http://www.oab.org.br/>> accessed September 15, 2011.

²³⁴ Ordem dos Advogados do Brasil, Arguição de Descumprimento de Preceito Fundamental (October 21, 2008) <http://www.sbdp.org.br/arquivos/material/586_ADPF%20153%20-%20peticao%20inicial.pdf> accessed September 15, 2011.

²³⁵ 1988 Federal Constitution of Brazil (October 5, 1988), Article 102(1).

²³⁶ Law No. 9.882, of December 3, 1999.

²³⁷ 1988 Federal Constitution of Brazil (October 5, 1988), Article 103 establishes that this action can be presented by: I. the President of the Republic; II. the Directing Board of the Federal Senate; III. the Directing Board of the Chamber of Deputies; IV. the Directing Board of a State Legislative Assembly or of the Federal District Legislative Chamber; V. a State Governor or the Federal District Governor; VI. the Attorney General of the Republic; VII. the Federal Council of the Brazilian Bar Association; VIII. a political party represented in the National Congress; IX. a confederation of labour unions or a professional association of a nationwide nature

²³⁸ Bruce L. Ottley, "Confronting the Past: The Elusive Search for Post-Conflict Justice" (2010) *Irish Jurist* 2010, 45, 107-145, at 143.

Rights Special Secretariat) submitted briefs arguing that the Amnesty Law does not prevent the prosecution of torturers of the military regime.²³⁹

On April 29, 2010, the STF handed down its ruling. By a 7-2 vote, the STF refused to overturn the 1979 Amnesty Law, and instead ruled that the crimes committed by the military during the period of military rule in Brazil were political acts and thus covered by the Amnesty Law.²⁴⁰ The reasoning given by the majority of the judges for why the Amnesty Law should remain intact is because it had been approved by society as a whole, including the bar association, armed forces, and political exiles.²⁴¹

The reporting Justice, Eros Grau, himself a victim of serious mistreatment during the period of military dictatorship, spoke for the majority by holding that the Amnesty Law of 1979 must be interpreted in the context of its enactment. Justice Grau stated that the amnesty law was part of an agreement that served as a bridge towards reconciliation and re-democratization in the country.²⁴² He added that the legality of the Amnesty Law could only be reviewed by the Brazilian Legislature. Presiding Justice Antonio Cezar Peluso concurred in the judgment by explaining that Brazil opted for the “way of concord” and not for the “way of recrimination”.²⁴³ During the hearings Justice Peluso commented:

“If it’s true that every people, according to its own culture, solves its own historical problems in its own manner, then Brazil has chosen the way of harmony.”²⁴⁴

The majority also ruled that the question of the legality of the 1979 Amnesty Law wasn’t a question that could receive interpretation by the IACtHR, because it was outside its temporal

²³⁹ “AGU defende Lei de Anistia em parecer ao Supremo” Consultor Jurídico (Brazil, February 2, 2009) <<http://www.conjur.com.br/2009-fev-02/agu-lei-anistia-perdoou-todos-crimes-tortura-ditadura> > accessed September 15, 2011.

²⁴⁰ Bruce L. Ottley, “Confronting the Past . . .”, at 143.

²⁴¹ “Brazil: No Change to Amnesty Law” The New York Times (New York, April 30, 2010) <<http://www.nytimes.com/2010/05/01/world/americas/01briefs-Brazil.html> > accessed September 15, 2011.

²⁴² Michael Royster, “The Curmudgeon on the 1979 Amnesty Law” The Rio Times (Rio de Janeiro, May 4, 2010) <<http://riotimesonline.com/brazil-news/opinion-editorial/opinion/the-curmudgeon-on-1979-amnesty/> > accessed September 15, 2011.

²⁴³ Idem.

²⁴⁴ Stijntje Blankendaal, “Brazil Won’t Overturn Amnesty” Radio Netherlands Worldwide (The Netherlands, May 18, 2010) <<http://www.rnw.nl/international-justice/article/brazil-won%E2%80%99t-overturn-amnesty>> accessed September 15, 2011.

competence.²⁴⁵ Article 2 of the Statute of the IACtHR states that the adjudicatory jurisdiction of the IACtHR shall be governed by Articles 61, 62 and 63 of the American Convention, while its advisory jurisdiction shall be governed by Article 64 of the American Convention.²⁴⁶ Brazil only recognized the jurisdiction of the IACtHR on December 10, 1998 and only “for matters arising after the time of this declaration.”²⁴⁷ However, the IACtHR responded to this issue by stating in paragraph 179 of its decision in the *Gomes Lund* case that “enforced disappearance is a crime of a continuous and permanent nature” and therefore there would be no retroactive violation because the effects of enforced disappearance are still unresolved today because the bodies have yet to be found.²⁴⁸

Reaction to the decision of the STF from the international community has mostly been negative. UN High Commissioner for Human Rights, Navanethem Pillay, has expressed concern over the STF’s ruling and demands that Brazil put an end to impunity.²⁴⁹ Fernando Marino Menendez, a member of the UN Committee Against Torture, in an interview in 2010 expressed concern that the STF, in its decision, gave priority to the interests of the Brazilian armed forces over purely legal interests.²⁵⁰ Tim Cahill, Amnesty International's lead researcher on Brazil, recently stated:

"The ruling places a judicial stamp of approval on the pardons extended to those in the military government who committed crimes against humanity."²⁵¹

²⁴⁵ “Brazil’s Right to Know: Interview with Marlon Weichert” (International Center for Transitional Justice) <<http://ictj.org/news/brazils-right-know-interview-marlon-weichert>> accessed September 15, 2011.

²⁴⁶ Statute of the Inter-American Court on Human Rights, O.A.S. Res. 448 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 98, Annual Report of the Inter- American Court on Human Rights, OEA/Ser.L/V.III.3 doc. 13 corr. 1 at 16 (1980), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 133 (1992).

²⁴⁷ List of Signatures, Ratifications, etc. to the American Convention <<http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>> accessed September 15, 2011.

²⁴⁸ Inter-American Court of Human Rights, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219 (Judgment) (November 24, 2010), §179.

²⁴⁹ Lula Ahrens, “UN Condemns Brazil’s Decision to Uphold Amnesty Law” Radio Netherlands Worldwide (The Netherlands, May 5, 2010) < <http://www.rnw.nl/international-justice/article/un-condemns-brazil%E2%80%99s-decision-uphold-amnesty-law> > accessed September 15, 2011.

²⁵⁰ Lula Ahrens and Pablo Gamez, “Brazil’s Amnesty Ruling Affront” Radio Netherlands Worldwide (The Netherlands, May 10, 2010) <<http://www.rnw.nl/international-justice/article/brazil-amnesty-ruling-affront> > accessed September 15, 2011.

²⁵¹ “Brazil Court Upholds Law That Protects Torturers” (Amnesty International, April 30, 2010) <<http://www.amnesty.org/en/news-and-updates/brazil-court-upholds-law-protects-torturers-2010-04-30>> accessed September 15, 2011.

However, opinions in Brazil as to the STF's ruling have been varied. Marlon Weichert, a prominent human rights advocate and regional prosecutor with the Ministério Público Federal (Federal Public Ministry of Brazil), in a recent interview, expressed his displeasure with the decision and his belief that the STF should observe the ruling of the IACtHR.²⁵² Fábio Konder Comparato, one of the lawyers who brought the suit challenging the legality of the 1979 Amnesty Law, has stated that the decision of the STF is an "international scandal" and will hurt the chances of the Brazilian Foreign Ministry's plan for Brazil to occupy a permanent seat on the United Nations Security Council.²⁵³ Criméia Alice Schmidt de Almeida, one of the victims of torture committed by former colonel Ustra, was not surprised with the judgment of the STF because the judiciary in Brazil has consistently taken a stance in favor of impunity.²⁵⁴ In contrast, the president of the Military Club, General Gilberto Figueiredo, supports the decision of the STF and has stated that in his opinion it would be difficult and a complete turnaround to review the scope of the 1979 Amnesty Law.²⁵⁵

The prosecution of former military officers both civilly and criminally within the Brazilian judiciary system has only recently begun. A civil court judge in São Paulo, Gustavo Santini Teodoro, issued the first landmark decision. A civil case was brought against Carlos Alberto Brilhante Ustra, a former colonel in the Brazilian Army during the military regime, by five torture survivors, Criméia Alice Schmidt de Almeida, César Augusto Teles, Maria Amélia de Almeida Teles, and César and Maria's children, Janaina de Almeida Teles and Edson Luis de Almeida Teles. On October 7, 2008, Judge Teodoro ruled that Ustra was responsible for acts of torture committed against three of the plaintiffs: Criméia, César, and Maria.²⁵⁶ This marked the first time that a Brazilian court found a military officer responsible for human rights violations committed during the years of military rule in Brazil. The logical next step was to bring criminal charges against those responsible.

²⁵² "Brazil's Right to Know: Interview with Marlon Weichert" (International Center for Transitional Justice) <<http://ictj.org/news/brazils-right-know-interview-marlon-weichert>> accessed September 15, 2011.

²⁵³ "Autor da contestação à Anistia afirma que decisão do STF acaba com chance brasileira na ONU" Zero Hora (Brazil, April 30, 2010) <<http://zerohora.clicrbs.com.br/zerohora/jsp/default.jsp?uf=1&local=1§ion=Pol%C3%ADtica&newsID=a2890238.xml>> accessed September 15, 2011.

²⁵⁴ *Idem.*

²⁵⁵ *Ibidem.*

²⁵⁶ Sentença. Processo No. 583.00.2005.202853-5, 23a Vara Cível do Estado de São Paulo, Poder Judiciário, October 7, 2008.

On March 14, 2012, in the town of Marabá, a town within the northern state of Pará, local federal prosecutors (who are members of the MP) brought criminal charges against Sebastião Curió Rodrigues de Moura for the enforced disappearance of five activists between January and September 1974.²⁵⁷ The rationale of the federal prosecutors in bringing forward these criminal charges and its effect on the 1979 Amnesty Law is best explained by Ronaldo Cramer, the representative of the Rio de Janeiro state chapter of Brazil's bar association who has stated:

“We are trying to break through the amnesty law, which refers to crimes committed until Aug. 15, 1979 ... This is not about revising the law or giving it a different interpretation ... Our argument is that (forced disappearances) are not crimes of the past, but ongoing crimes.”²⁵⁸

Despite the rationale offered by the federal prosecutors, the federal judge in the case, Joao Cesar Matos, dismissed the case on the grounds that the actions of Sebastião Curió Rodrigues de Moura were covered by the 1979 Amnesty Law and that the federal prosecutors in pursuing the matter were merely trying to skirt around the Amnesty Law.²⁵⁹ A little over a month later, on April 24, 2012, federal prosecutors in São Paulo, using the same rationale of a continuing crime, charged retired colonel Carlos Alberto Brilhante Ustra and a civil policeman, Dirceu Gravina, with aggravated kidnapping for their alleged role in the enforced disappearance of Aluizio Palhano Pedreira Ferreira in May 1971.²⁶⁰ This case was also dismissed. However, the federal prosecutors in both São Paulo and Marabá have already appealed both decisions.²⁶¹ A third case was initiated on July 19, 2012, by the federal prosecutors in Marabá against former lieutenant colonel Lício Augusto Maciel for the kidnapping of a guerrilla Divino Ferreira de Souza, who disappeared in October 1973.²⁶² Again the federal prosecutors argued that the crime

²⁵⁷Fabiana Frayssinet, “Brazilian Prosecutors Try to Bypass Amnesty to Try Human Rights Crimes” Inter Press Service (Rio de Janeiro, March 16, 2012) < <http://www.ipsnews.net/2012/03/brazilian-prosecutors-try-to-bypass-amnesty-to-try-human-rights-crimes/> > accessed July 28, 2012.

²⁵⁸ Idem.

²⁵⁹ “Brazilian judge dismisses first dictatorship era case involving an Army officer” MercoPress (Montevideo, Uruguay, March 17, 2012) < <http://en.mercopress.com/2012/03/17/brazilian-judge-dismisses-first-dictatorship-era-case-involving-an-army-officer> > accessed July 28, 2012.

²⁶⁰ “Brazil: Major Step for Military-Rule-Era Justice” (Human Rights Watch, April 24, 2012) <<http://www.hrw.org/news/2012/04/24/brazil-major-step-military-rule-era-justice> > accessed July 28, 2012.

²⁶¹ Aguirre Talento, “Militar da reserva é denunciado sob acusação de sequestro durante ditadura” Folha (São Paulo, July 20, 2012) < <http://www1.folha.uol.com.br/poder/1123367-militar-da-reserva-e-denunciado-sob-acusacao-de-sequestro-durante-ditadura.shtml> > accessed July 28, 2012.

²⁶² Idem.

was a continuing/ongoing crime and therefore not protected by the 1979 Amnesty Law.²⁶³ The legal arguments of the federal prosecutors for why their prosecutions should be allowed are based on two recent STF decisions, in which the court decided to grant extradition requests from Argentina on basis of the continuing nature of enforced disappearances (i.e. until the bodies are found there is no statute of limitations).²⁶⁴ In addition, when Brazil ratified the International Convention for the Protection of All Persons from Enforced Disappearance in November 2010, which obligates it to investigate and prosecute the crime of enforced disappearances, it did not include any reservations regarding the application of the convention to any current outstanding, continuous cases of disappearances.²⁶⁵

In a recent interview with BBC Brazil in July 2012, Marlon Weichert, a federal prosecutor with the MP, discussed the legitimacy of the 1979 Amnesty law and the recent prosecutions of former military officers.²⁶⁶ Mr. Weichert stated that since the prosecutors of the MP are an organ of the State of Brazil with the duty to defend human rights and pursue prosecutions it must follow the decision of the IACtHR because the IACtHR's decision came after the STF decision and because it ruled that amnesty cannot stop the punishment of serious crimes.²⁶⁷ According to Mr. Weichert, including the three prosecutions already initiated, there are about 70 criminal investigations being pursued by the MP.²⁶⁸ In addition, he stated that although the judges have so far not been supportive he expects that to change and that in four or five years the decision of the IACtHR will be fulfilled.²⁶⁹ While it might take more or less than the four or five years that Mr. Weichert predicted for Brazil to criminally prosecute any former military officers for their crimes committed during the military dictatorship what does appear certain is that it will be the up to the Brazilian courts to finally decide the matter. José Miguel Vivanco, Americas director at Human Rights Watch, has commented on these new prosecutions by saying:

²⁶³ Ibidem.

²⁶⁴ "Brazil: Major Step for Military-Rule-Era Justice" (Human Rights Watch, April 24, 2012) <<http://www.hrw.org/news/2012/04/24/brazil-major-step-military-rule-era-justice> > accessed July 28, 2012.

²⁶⁵ Idem.

²⁶⁶ Ruth Costas, "MP investiga 70 casos para abrir processos contra agentes do regime military" BBC Brazil (Brasilia, July 2, 2012) <http://www.bbc.co.uk/portuguese/noticias/2012/07/120630_mp_processos_militares_rc.shtml > accessed July 28, 2012.

²⁶⁷ Idem.

²⁶⁸ Ibidem.

²⁶⁹ Ibidem.

“This could be the beginning of a new era for accountability in Brazil, though it will ultimately be up to the courts to determine whether the country is finally ready to pursue justice for these terrible crimes.”²⁷⁰

c. The Legal Effect of These Judicial Decisions

Since the rulings of the IACtHR and the STF concerning the legality of the 1979 Amnesty Law were completely in contradiction to one another, the question that arises is what effect or weight do these decisions have on each other, if any? There is a debate as to whether the decision of the IACtHR has any binding effect upon the domestic courts in Brazil, or whether the IACtHR’s decision should take precedence.

Roberto Caldas, an “ad hoc” judge at the IACtHR, has stated that its decision does not strictly apply only to the *Gomes Lund* case but to all cases of torture, enforced disappearances and summary executions that occurred during the military dictatorial regime.²⁷¹ Beatriz Affonso, the director of CEJIL, joined in this opinion by stating that Brazil has a duty as a signatory to the American Convention to fulfill its obligations and respect the IACtHR’s ruling.²⁷² The former Minister of the Human Rights Special Secretariat, Paulo Vannuchi, in a press conference in December 2010, stated that the Brazilian authorities understand that the ruling of the IACtHR must be obeyed.²⁷³ In addition, the Brazilian Foreign Ministry has come out and said that Brazil is already complying with several of the IACtHR’s orders handed down in the *Gomes Lund* decision and will endeavor to find means of fulfilling its obligations regarding the remaining orders.²⁷⁴

However, the justices of the STF have disagreed with the opinion that the decision of the IACtHR has any binding effect upon them. Both Justice Peluso and Justice Marco Aurélio Mello of the STF have stated that the decision of the IACtHR does not repeal or annul the decision

²⁷⁰ “Brazil: Major Step for Military-Rule-Era Justice” (Human Rights Watch, April 24, 2012)

<<http://www.hrw.org/news/2012/04/24/brazil-major-step-military-rule-era-justice> > accessed July 28, 2012.

²⁷¹ Bernardo Mello France, Felipe Seligman and Fernando Gallo, “Juiz internacional vê caminho para novas ações contra Anistia” *Folha de São Paulo* (São Paulo, December 16, 2010)

<http://www.aasp.org.br/aasp/imprensa/clipping/cli_noticia.asp?idnot=8987 > accessed September 15, 2011.

²⁷² Juliana Barbassa, “Court: Brazil Must Investigate Human Rights Abuses” *Boston.com* (Boston, December 15, 2010) <http://www.boston.com/news/world/latinamerica/articles/2010/12/15/court_brazil_must_investigate_human_rights_abuses/ > accessed September 15, 2011.

²⁷³ *Idem*.

²⁷⁴ “Jobim nega possibilidade de punição para torturadores da Guerrilha do Araguaia” *O Globo* (Brazil, December 15, 2010) <<http://oglobo.globo.com/pais/mat/2010/12/15/jobim-nega-possibilidade-de-punicao-para-torturadores-da-guerrilha-do-araguaia-923300521.aspl> > accessed September 15, 2011.

taken by the STF because the determination made by the IACtHR is only valid within the international arena, and that although Brazil might be subject to sanctions, the Amnesty Law will remain in effect domestically.²⁷⁵ Before leaving office, former President Lula, in response to the orders handed down by the IACtHR, asked then Defense Minister, Nelson Jobim, for an update on the search for bodies of those who disappeared in the Araguaia.²⁷⁶ However, Nelson Jobim's position has been that the legality of the 1979 Amnesty Law has already been ruled upon by the STF and that the Amnesty Law must never be revised but rather left alone to run out its lifetime.²⁷⁷

The debate as to whether the decision of the IACtHR has any binding effect upon the domestic courts in Brazil was not answered by the IACtHR when it issued its decision in the *Gomes Lund* case.

“The lawsuit brought by the Inter-American Commission does not seek to review the judgment of the Federal Supreme Tribunal, [...] but rather it seeks to establish whether the State violated specific international obligations enshrined in the various rules of the American Convention to the detriment of the alleged victims, [...]”²⁷⁸

A reading of the above paragraph from the IACtHR ruling in *Gomes Lund* would appear to provide an answer to the debate. However, the above paragraph is in contradiction with the orders handed down by the IACtHR in the operative paragraphs of its judgment. The operative paragraphs include language that suggests compliance to orders of the IACtHR is obligatory upon Brazil. This strong language of compliance contained within the operative paragraphs of the *Gomes Lund* judgment is supported by the text of the American Convention itself.²⁷⁹ As to

²⁷⁵ Bernardo Mello France, Felipe Seligman and Fernando Gallo, “Juiz internacional vê caminho para novas ações contra Anistia” *Folha de São Paulo* (São Paulo, December 16, 2010) <http://www.aasp.org.br/aasp/imprensa/clipping/cli_noticia.asp?idnot=8987> accessed September 15, 2011.

²⁷⁶ Juliana Barbassa, “Court: Brazil Must Investigate Human Rights Abuses” *Boston.com* (Boston, December 15, 2010) <http://www.boston.com/news/world/latinamerica/articles/2010/12/15/court_brazil_must_investigate_human_rights_abuses/> accessed September 15, 2011.

²⁷⁷ “Jobim nega possibilidade de punição para torturadores da Guerrilha do Araguaia” *O Globo* (Brazil, December 15, 2010) <<http://oglobo.globo.com/pais/mat/2010/12/15/jobim-nega-possibilidade-de-punicao-para-torturadores-da-guerrilha-do-araguaia-923300521.aspl>> accessed September 15, 2011.

²⁷⁸ Inter-American Court of Human Rights, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219 (Judgment) (November 24, 2010), §48.

²⁷⁹ American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 *entered into force* July 18, 1978, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*,

the operative paragraphs themselves; Paragraph 3, which has already been cited, declares the Brazilian Amnesty Law to lack legal effect, to be incompatible with the American Convention because it prevents the investigation and punishment of serious human rights violations, and finally should not be an obstacle to for investigations.²⁸⁰ In addition, paragraphs 9 and 15 require Brazil to conduct criminal investigations to prosecute and punish those responsible, for acts which include enforced disappearances.²⁸¹ Lastly, the IACtHR concluded by saying:

“The Court will monitor the full compliance with this Judgment, [...] and will conclude the present case once the State has entirely satisfied the dispositions herein. [...]”²⁸²

An analysis of the IACtHR’s *Gomes Lund* decision in its totality suggests that the only way that Brazil could possibly carry out the orders of the IACtHR to investigate and punish those responsible for human rights violations committed during the military regime is by repealing the 1979 Amnesty Law. The IACtHR made it clear in its ruling that it was not seeking to review the judgment of the STF, but the orders it issued to the Brazilian government would, in effect, require the government to repeal the law, otherwise there would be no recourse for Brazilian prosecutors who want to prosecute former military officers but are prevented from doing so because the STF held the Amnesty Law, which protects those officers, constitutional. The problem for Brazilian prosecutors is that there is no evidence that the government is prepared to repeal the Amnesty Law anytime soon. However, as previously mentioned, many Brazilian prosecutors have become creative. By using the rationale offered by the IACtHR in Paragraph 179 of its *Gomes Lund* decision, they have argued that since kidnapping and enforced disappearance (where a body had not yet found) are continuing crimes the offenders are therefore not protected by the Amnesty Law, thereby enabling them to skirt around the decision of the STF. In conclusion, the legal effects of the decisions of the STF and the IACtHR in the *Gomes Lund* case have been profound and are affecting Brazil’s path of transitional justice.

OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), Article 68(1) states that “the States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.

²⁸⁰ Inter-American Court of Human Rights, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219 (Judgment) (November 24, 2010), §3 of the Operative Paragraphs.

²⁸¹ *Idem*, at §3 and 9 of the Operative Paragraphs.

²⁸² *Ibidem*, at §21 of the Operative Paragraphs.

IV. Transitional Justice

Transitional justice is a term used to describe measures, either judicial or non-judicial in nature, that are used by societies undergoing a period of transition to deal with past human rights violations.²⁸³ These measures are implemented by societies in a manner which they believe will be most successful for future stability and security. Transitional justice mechanisms can be implemented either post-conflict or during an ongoing conflict. Whatever the situation or the measure implemented the goal is still the same:

“[...] harms of the past may be repaired in order to produce a future characterized by the non-recurrence of violence, the rule of law, and a culture of human rights.”²⁸⁴

The origins of transitional justice can be traced to the post-World War II period, in particular the Nuremberg and Tokyo Trials. However, the concept of transitional justice as we know it today made its debut in the late 1980's, with the end of communism in Eastern Europe and the fall of dictatorships in Latin America.²⁸⁵ These countries faced many challenges as they transitioned from authoritarian and repressive regimes to democratic governments.²⁸⁶ By the 1990's the term had entered the lexicon of international law and reform.

Transitional justice in international law has best been defined by the IACtHR in the case of *Velásquez Rodríguez v. Honduras* in 1988. The IACtHR found that all States have four fundamental obligations when dealing with allegations of human rights violations: take reasonable steps to prevent human rights violations; conduct a serious investigation of violations committed within its jurisdiction; impose sanctions on those responsible for the violations; and

²⁸³ Kai Ambos, “The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC” in Kai Ambos, Judith Large, and Marieke Wierda (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development: the Nuremberg Declaration on Peace and Justice* (Berlin : Springer, c2009) p. 19.

²⁸⁴ Rosalind Shaw and Lars Waldorf, “Introduction: Localizing Transitional Justice” in Rosalind Shaw and Lars Waldorf, with Pierre Hazan (eds), *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford, Calif.: Stanford University Press, 2010) p. 3.

²⁸⁵ Harvey M. Weinstein and others, “Stay the Hand of Justice: Whose Priorities Take Priority” in Rosalind Shaw and Lars Waldorf, with Pierre Hazan (eds), *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (Stanford, Calif.: Stanford University Press, 2010) p. 32-33.

²⁸⁶ *Idem*.

ensure reparations for the victims of the violations.²⁸⁷ The measures chosen by governments to address these responsibilities, while still maintaining order and peace within the country, have varied.

a. Types of Transitional Justice Mechanisms

Transitional justice can take various forms depending upon what the State considers justice to be (i.e. what form the State thinks justice should take). There are several different models of transitional justice available to States: prosecutions; truth commissions, amnesties; institutional reforms; reparations; and memorializations.²⁸⁸ No one model is correct or more effective than the other. Each model has its benefits and drawbacks. The three most common and controversial models: prosecutions; truth commissions; and amnesties will be addressed and analyzed in this thesis.

The effectiveness of the different transitional justice mechanisms adopted by the States depends a lot on the context (i.e. the particular situation in each State). The problem that often arises is that local customs and ideas for justice often contradict international legal norms.²⁸⁹ Former Secretary General of the United Nations, Kofi Annan, issued a report to the United Nations Security Council in 2004 on “The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies” in which he addresses this problem. Kofi Annan asserts:

“Success will depend on a number of critical factors, among them the need to ensure a common basis in international norms and standards and to mobilize the necessary resources for a sustainable investment in justice. We must learn as well to eschew one-size-fits-all formulas and the importation of foreign models, and instead, base our support on national assessments, national participation and national needs and aspirations.”²⁹⁰

The transitional justice model that most often confronts this problem and causes the most controversies, especially recently in situations across Africa, is prosecutions.

²⁸⁷ Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, Series C No. 4 (Judgment) (July 29, 1988), §174.

²⁸⁸ Bruce L. Ottley, “Confronting the Past ...”, at 112.

²⁸⁹ Rosalind Shaw and Lars Waldorf, “Introduction: Localizing ...”, at p. 4-5.

²⁹⁰ “Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies” U.N. Doc. S/2004/616 (August 3, 2004) Summary.

i. Prosecutions

The idea of prosecutions as a mechanism for transitional justice began after World War II with the advent of the Nuremberg and Tokyo Trials. After winning World War I the Allies never held any trials. However, after witnessing the atrocities of the Holocaust, the Allies decided to create the International Military Tribunal (hereinafter IMT).²⁹¹ The IMT Charter imposed individual criminal responsibility for violations of laws and customs of war (i.e. war crimes and crimes against peace) and crimes against humanity.²⁹² Some have hailed these early trials as an example of justice at work, while others have criticized them, arguing that they are mere show trials, imposed by the victors of the war against the defeated States (i.e. victor's justice).²⁹³

Regardless, these trials constituted a watershed moment in international law. They represented the first time that international law imposed criminal sanctions on individuals within the context of acts perpetrated by a State against its own citizens.²⁹⁴ No longer were individuals immune from prosecution by the principle of State Sovereignty. The feeling was that justice, in the form of prosecutions, must be done in order to prevent future reoccurrences. Two other aspects of the Nuremberg Trials also made them an effective mechanism for confronting human rights crimes and launching the process of post-conflict justice. The first was that these trials occurred soon after the end of the war.²⁹⁵ The second was the symbolism in holding the trials in the same country where the atrocities had been planned and in some cases where they occurred.²⁹⁶

However, the movement towards prosecutions as a mechanism of transitional justice stalled. It wasn't until the late 80's and 90's that the movement returned. While there had been talk for years about creating another international military tribunal, it wasn't until war broke out in the former Yugoslavia and Rwanda that the international community decided to finally act. As a result of the extreme brutality of both wars (instances of rape, torture and genocide), and the

²⁹¹ Gregory H. Fox and Brad R. Roth, *Democratic Governance and International Law*, (Cambridge [etc.]: Cambridge University Press, 2000) p. 453.

²⁹² *Idem*.

²⁹³ David Tolbert, "International Criminal Law: Past and Future" (2009) 30 U. Pa. J. Int'l L. 1281, 1284.

²⁹⁴ Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" (1991) 100 Yale L.J. 2537, 2555.

²⁹⁵ Bruce L. Ottley, "Confronting the Past . . .", at 115.

²⁹⁶ *Idem*.

change in global politics with the end of the Cold War, the United Nations Security Council passed two separate resolutions to deal with the civil wars in both the former Yugoslavia²⁹⁷ and Rwanda.²⁹⁸ Both resolutions created separate ad hoc tribunals to prosecute the perpetrators of atrocities in both countries: the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY); and the International Criminal Tribunal for Rwanda (hereinafter ICTR). The difference between these new ad hoc tribunals and Nuremberg was that the conflicts in the former Yugoslavia and Rwanda were internal civil wars.²⁹⁹ This meant that prosecutions could now be imposed upon States even for conflicts that occurred within their own territorial boundaries. The rationale for this necessity was that neither the former Yugoslavia nor Rwanda had the political ability, the personnel or the institutional resources to conduct their own prosecutions.³⁰⁰

The end result of this movement towards prosecutions as the preferred method of transitional justice was the creation of the International Criminal Court (hereinafter ICC). The Prosecutor of the ICC, Luis Moreno Ocampo, has himself stated that the ICC is “part of the transitional justice project.”³⁰¹ The ICC today plays a major role in prosecuting individuals for crimes within its jurisdiction: war crimes, crimes against humanity, and genocide.³⁰² However, the ICC’s *ratione personae* and *materiae* limitations mean that domestic prosecutions still have an important role to play.³⁰³

The Preamble of the Rome Statute creating the ICC highlights the importance of domestic prosecutions.³⁰⁴ The relationship between domestic prosecutions and ICC prosecutions is defined by the term “complementarity” found in Article 17 of the Rome Statute. The goal of complementarity is to try and strike a balance between a State’s sovereign rights versus the interests of the international community in preventing immunity for those individuals who committed major human rights violations. This is done by giving State Parties priority in

²⁹⁷ S.C. Res. 827, P 3, U.N. Doc. S/RES/508 (May 25, 1993).

²⁹⁸ S.C. Res. 955, P 10, U.N. Doc. S/RES/955 (Nov. 8, 1994).

²⁹⁹ Bruce L. Ottley, “Confronting the Past . . . ,” at 115.

³⁰⁰ *Idem*, at 116.

³⁰¹ Kai Ambos, “The Legal Framework of Transitional Justice . . . ,” at p. 67-68.

³⁰² Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, Article 5(1).

³⁰³ Kai Ambos, “The Legal Framework of Transitional Justice . . . ,” at p. 68.

³⁰⁴ Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, preamble, “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”

prosecuting the matter themselves, and only involving the ICC if the State is unwilling or unable to investigate and prosecute.³⁰⁵

The movement towards prosecutions before international criminal tribunals is supported by several major international human rights treaties, which mention prosecutions as preferred transitional justice mechanism. Several articles (Article I, III, IV, and V) within the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter Genocide Convention) discuss “punishments” and “penalties” for acts of genocide. Since those articles do not mention as to what form these “punishments” and “penalties” must take it is possible, by just reading those articles, that merely something such as public condemnation would suffice. However, Article VI states in clear and precise terms:

“[...] shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”³⁰⁶

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter Convention Against Torture) imposes an unambiguous duty to prosecute those responsible for acts of torture. Article 4 obligates each State Party to ensure that “all acts of torture are offences under their criminal law.”³⁰⁷ Article 7 obligates each State Party to either extradite the accused, or “submit the case to its competent authorities for the purpose of prosecution.”³⁰⁸ The option given in Article 7 is not an alternative to prosecution; it merely obligates the State Party to extradite the individual (so that he or she may be prosecuted in the foreign State) if the State Party is unwilling or unable to prosecute the person themselves. Therefore an analysis of Article 7 illustrates its similarity to the complementarity principle contained within the Rome Statute.

The International Covenant on Civil and Political Rights (hereinafter Covenant) takes a much more flexible approach than the earlier mentioned human rights treaties. Article 2(3) of the

³⁰⁵ *Idem*, at Article 17.

³⁰⁶ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, Article VI.

³⁰⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 1, 4, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, Article 4.

³⁰⁸ *Idem*, at Article 7.

Covenant uses the term “effective remedy” for violations of the Covenant.³⁰⁹ Despite the lack of any binding language in the Covenant, the Human Rights Committee (hereinafter H.R.C.), in its decisions, has implicitly put forth the view that investigation and prosecution are the most effective means when dealing with violations of the Covenant.³¹⁰ Therefore, it seems as though a measure of flexibility is implied when deciding whether or not to prosecute someone for violations under the Covenant.

Since it is a State Party to each of the three separate human rights conventions mentioned above, Brazil is obligated to comply with and fulfill the language in each convention. However, non-State Parties are not bound by the rules in these conventions, unless the norms contained within each convention have reached the level of *jus cogens* or customary international law. Nonetheless, the inclusion of prosecutions in these human rights conventions as a method of dealing with past human rights abuses illustrates the acceptance and legality of this particular transitional justice mechanism.

The important question then becomes whether, even though legal, should prosecutions be used by societies as a transitional justice mechanism? What are the positives and negatives to such an approach? The main argument in favor of prosecutions is the idea of deterrence.³¹¹ As was mentioned earlier, one of the goals of transitional justice is to prevent the reoccurrences of these events. Criminal punishment is seen by many as the most effective means of insurance against future repression by the State or state-sponsored actors.³¹² It is also believed that prosecutions may inspire societies to reexamine their basic values and respect the rule of law, which is integral to democracy itself.³¹³ Another strong argument in favor of prosecutions concerns the consequences that would result if a State failed to punish members of the prior regime for the crimes committed by them on a sweeping scale.³¹⁴ Often this reluctance to prosecute stems from the fear that these new civilian governments have of the military who often continue to occupy a large realm of autonomous power within the State. However, if these new governments were excused from their international responsibilities to punish those members of

³⁰⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 2(3).

³¹⁰ Diane F. Orentlicher, “Settling Accounts: The Duty to Prosecute ...”, at 2575.

³¹¹ *Idem* at 2542-2543.

³¹² *Ibidem*.

³¹³ *Ibidem*.

³¹⁴ *Ibidem*.

the military, international law would effectively be rewarding the military's behavior, and the new civilian government's legitimacy would be undercut.³¹⁵

The arguments against prosecutions center on the fragile nature of many new civilian governments and the destabilizing effects that prosecutions of the military might have on the State's ability to peacefully transition to a civilian and democratic government.³¹⁶ Since the military in many of these countries retain substantial power after relinquishing office, the fear is that efforts to prosecute past violations may provoke violence or rebellions. Therefore, some argue in favor of a policy of reconciliation embodied in an amnesty law that would cover past violations by the military regimes.³¹⁷ The argument against prosecutions boils down to a conflict of peace versus justice. Historically the notion of peace versus justice prevailed. Many States (i.e. Brazil, Argentina, Chile, and South Africa) originally chose peace by declining to initiate prosecutions for the people who committed human rights violations.³¹⁸ The creation of international criminal tribunals, especially the ICC, has brought much attention to this debate. The most commonly cited example is that of Uganda. When the ICC issued arrest warrants against several commanders of the Lord's Resistance Army (hereinafter LRA) there was criticism from both within and outside Uganda. Many felt that the arrest warrants contravened Uganda's Amnesty Act, passed in 2000.³¹⁹ Regardless of any conflict with Ugandan domestic laws, a more fundamental objection to the ICC's arrest warrant against LRA leaders was that it represented a threat to peace.³²⁰ However, others have argued that the ICC's arrest warrants against the LRA leaders may be exactly what is needed to get a stable peace in Uganda.³²¹

ii. Truth Commissions

Another transitional justice mechanism used by States is truth commissions. Since the early 1980s, truth commissions have become another method that countries have used in trying to confront past human rights abuses and to achieve some measure of post-conflict justice. The first truth commissions were set up in Bolivia (1982) and Argentina (1983); since then, they have

³¹⁵ *Ibidem*, at 2611.

³¹⁶ *Ibidem*, at 2544.

³¹⁷ *Ibidem*, at 2544-2545.

³¹⁸ Janine Natalya Clark, "Peace, Justice and the International Criminal Court" (2011) 9 *J. Int'l Crim. Just.* 521, 539.

³¹⁹ *Idem*, at 541.

³²⁰ *Ibidem*.

³²¹ *Ibidem*, at 542.

been established in over 40 other countries.³²² Most truth commissions are set up soon after the end of a repressive regime, although some are only set up years or decades after the human rights abuses occurred. Some truth commissions have been created by national governments, others by NGOs, and others by the United Nations.³²³

Truth commissions function by gathering information about past abuses in order to establish, as objectively as possible, a record of what transpired within the country during the period of armed conflict or during a repressive regime.³²⁴ The information gathering can be done by the opening up of governmental records and the testimonies of witnesses, victims, and, sometimes, even the perpetrators themselves in public proceedings.³²⁵ This process is often used as a method of exposing past human rights abuses, which thereby create closure for the victims and their families, while at the same time calming the fears of the perpetrators who know that they will not be prosecuted for their past crimes.

Other positive aspects of truth commissions include their ability to amass a more comprehensive and diversified record of past human rights abuses than would the prosecution of individuals. This is because truth commissions are often vested with a broader mandate to investigate all human rights abuses committed by the former repressive regime rather than focusing on the facts relevant to a particular case or accused individual.³²⁶ Some have even argued that truth commissions may uncover injustices otherwise silenced or denied because former perpetrators are more likely to be open and candid about past crimes.³²⁷ Truth commissions allow for a formal acknowledgment of past abuses and provide alternative forms of accountability, which can include monetary reparations to public identification of the perpetrators.³²⁸ In addition, another reason why truth commissions are seen by many as a viable alternative to prosecutions is because often justice in the full retributive sense (i.e. criminal prosecutions) is impossible as there may be too many individuals to prosecute.³²⁹

³²² Bruce L. Ottley, "Confronting the Past . . .", at 126.

³²³ *Idem.*

³²⁴ *Ibidem.*, at 128.

³²⁵ *Ibidem.*

³²⁶ Carsten Stahn, "Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor" (2001) 95 *Am. J. Int'l L.* 952, 954.

³²⁷ *Idem.*

³²⁸ *Ibidem.*

³²⁹ Brandon Hamber, *Transforming Societies After ...*, at p. 27.

The most successful and well known truth commission is the Truth and Reconciliation Commission (hereinafter TRC) created by South Africa in July 1995 that focused on the victims of human rights abuses during the apartheid era (1960-1994).³³⁰ The TRC process began in 1995 and ended on November 30, 2001. It produced a report that was just under 4,500 pages long.³³¹ About 22,000 victims gave statements to the TRC.³³² Reparations, in the amount of 30,000 Rands (about 4,000 Dollars), were given to each survivor of apartheid who testified before the TRC.³³³ Lastly, 7,115 individuals applied for amnesty in exchange for giving testimony to the TRC. Of those, 1,973 applications went through the public process, resulting in 1,167 amnesties being granted and 806 denied.³³⁴

South Africa was the first country to offer individual amnesty in return for truth telling.³³⁵ The only requirements for amnesty to be granted by the TRC was that individuals had to make a full accounting of the relevant facts and were able to prove that their actions were politically motivated.³³⁶ The TRC could not be used to grant amnesty as a means of protecting individuals against prosecution for non-political crimes. However, surprisingly, neither an apology nor any sign of remorse was necessary for amnesty to be granted by the TRC.³³⁷ The granting of amnesty to persons who committed human rights abuses in exchange for their full disclosure is the major criticism of the TRC.³³⁸ Although the proportion of applicants who received amnesty was rather small, it was often some of the most heinous political crimes that received amnesty.³³⁹ Amnesties are sometimes granted by a truth commission in order to facilitate open discussion without fear of retribution. However, the inclusion of amnesties within the structure of truth commissions has raised questions about the legalities of amnesties themselves.

iii. Amnesties

³³⁰ *Idem*, at p. 27-28.

³³¹ *Ibidem*, at p. 30.

³³² *Ibidem*.

³³³ *Ibidem*, at p. 33.

³³⁴ *Ibidem*, at p. 34.

³³⁵ Carsten Stahn, "Accommodating Individual Criminal Responsibility and . . .", at 955.

³³⁶ Elizabeth B. Ludwin King, "Amnesties in a Time of Transition" (2010) 41 *Geo. Wash. Int'l L. Rev.* 577, 589.

³³⁷ *Idem*.

³³⁸ Bruce L. Ottley, "Confronting the Past . . .", at 130.

³³⁹ Brandon Hamber, *Transforming Societies After . . .*, at p. 35.

A discussion of amnesties goes back to the earlier debate of peace versus justice. In many situations, the new civilian government faces the task of weighing the peace they believe will result from an amnesty against the justice that results from holding criminal trials.³⁴⁰ Several States believe that granting amnesty is a necessary price for ending a war or removing an authoritarian government. For these States, the interest in maintaining peace and stability outweigh the interest in holding the perpetrators accountable.³⁴¹ However, other States believe that justice cannot be achieved without prosecutions; and that the granting of amnesties would instead lead to an increase in violence as the aggrieved parties would seek revenge upon the perpetrators who were granted amnesties.³⁴² Despite increased scrutiny as to the legality of amnesties as a mechanism of transitional justice and the international community's preference for prosecutions, within the last 10 years several countries (such as Uganda, Colombia, and Algeria) still use amnesties as part of their current conflict resolution plans.³⁴³ Lastly, some States, like Argentina, have gone back and forth on this issue depending upon the current political situation and popular support in the country.

Amnesties typically are executed in one of two ways: blanket amnesties or conditional/limited amnesties. Blanket amnesties cover all crimes, regardless of who committed them, with the goal being to conceal past crimes by prohibiting any investigation at all.³⁴⁴ Conditional amnesties provide immunity for certain crimes or for select groups of perpetrators as long as certain conditions are accepted.³⁴⁵ The first condition is that the armed groups must lay down their weapons. Other conditions include: full disclosure of the facts; acknowledgement of responsibility, and repentance.³⁴⁶ In recent years, international legal practice has clearly shifted from blanket amnesties toward conditional/limited amnesties.³⁴⁷

Regardless of their scope, all amnesties are passed in one of three contexts. The first are self-amnesties, meaning amnesties granted by outgoing governments to protect themselves from future prosecutions.³⁴⁸ When repressive, authoritarian regimes see that their future in power is

³⁴⁰ Elizabeth B. Ludwin King, "Amnesties in a Time of Transition . . .", at 577.

³⁴¹ *Idem*, at 611.

³⁴² *Ibidem*, at 613.

³⁴³ *Ibidem*, at 578-581.

³⁴⁴ Kai Ambos, "The Legal Framework of Transitional Justice . . .", at p. 54.

³⁴⁵ *Idem*.

³⁴⁶ *Ibidem*.

³⁴⁷ Carsten Stahn, "Accommodating Individual Criminal Responsibility and . . .", at 954.

³⁴⁸ Elizabeth B. Ludwin King, "Amnesties in a Time of Transition . . .", at 583.

uncertain and that they might be prosecuted for their past crimes, they decide to act quickly to pass self-amnesties to absolve themselves from the crimes that they committed.³⁴⁹ Several countries within Latin America, including Brazil, passed these types of amnesties. The second are amnesties related to truth commissions. Sometimes, as in the case of South Africa, amnesty was provided in order to induce former government officials to participate in the TRC.³⁵⁰ In other situations, such as in El Salvador, amnesty is granted immediately after a truth commission releases its report in order to prevent the commission's report from having any real effect on accountability.³⁵¹ The last context in which amnesties are used is to end a conflict. The belief behind these amnesties is that peace would have been impossible if not for the granting of amnesties.³⁵² In these situations, the conflict is still ongoing and the warring factions refuse to negotiate without the promise of amnesty. Therefore, in order to ensure peace and save the lives of thousands, amnesty is granted to all perpetrators. Examples include Sierra Leone and Haiti.³⁵³

As mentioned earlier, the legality of amnesties as a mechanism of transitional justice is hotly debated. One argument is that an implied rejection of amnesties can be inferred if international law requires a duty upon States to prosecute individuals for human rights violations. If such a duty to prosecute exists under international law, then it necessarily follows that amnesties, which bar prosecution, are illegal.³⁵⁴ An example of this is the ICC. However, the jurisdiction of the ICC is limited to events that have occurred since its date of entry into force (2002) and in most cases only applies to States that have ratified the Rome Statute.

An analysis of international human rights treaties helps shed light on the question of the legality of amnesties. However, as with the ICC, these international human rights treaties are not binding on all States unless the principles contained within the treaties have attained the level of *jus cogens* or customary international law. As previously mentioned, international human rights treaties like the Genocide Convention and the Torture Convention explicitly require State Parties to prosecute those responsible for committing violations of rights contained within those conventions. The obligation to prosecute contained within these conventions implies the illegality of amnesties covering those particular crimes (similar to the situation of the ICC). This

³⁴⁹ *Idem*.

³⁵⁰ *Ibidem*, at 587.

³⁵¹ *Ibidem*.

³⁵² *Ibidem*, at 591.

³⁵³ *Ibidem*.

³⁵⁴ *Ibidem*, at 595

position has been reinforced by the Committee against Torture (hereinafter C.A.T.), which has found that amnesties that prevent the investigation of acts of torture, as well as the punishment of those responsible, are in violation of the Convention against Torture.³⁵⁵ The Covenant, as previously mentioned, only uses the term “effective remedy” when dealing with violations of the Covenant rather than obligating State Parties to prosecute. However, the H.R.C. in both its general observations and in its jurisprudence, has taken the position that amnesty in regards to serious human rights violations are incompatible with the Covenant because they contribute to an atmosphere of impunity and because perpetrators should not be exempt of their legal responsibilities.³⁵⁶ One of the few international legal documents that actually promotes the use of amnesties is Optional Protocol II of the 1949 Geneva Conventions which calls upon States, after the conclusion of civil wars, to “grant the broadest possible amnesty to persons who have participated in the armed conflict.”³⁵⁷ However, the International Committee of the Red Cross (hereinafter ICRC) has stated that Protocol II’s encouragement of amnesties does not apply to those who violated international humanitarian law.³⁵⁸

The problem of amnesty laws protecting perpetrators of grave human rights violations from criminal prosecution has been particularly prevalent in Latin America. As a result, the IACtHR has been very active in dealing with this issue. The *Velásquez Rodríguez v. Honduras* case in 1988, while not specifically addressing the issue of amnesties, mentioned the duty of States to carry out serious investigations and to impose the appropriate punishment.³⁵⁹ The granting of a blanket amnesty would violate the duties imposed upon by this decision and therefore the American Convention. Thus the *Velásquez Rodríguez v. Honduras* decision can be interpreted as only prohibiting blanket amnesties. It wasn’t until 2001 that the IACtHR made the prohibitions on amnesties explicit. In *Barrios Altos v. Peru* (2001) the IACtHR held:

³⁵⁵ C.A.T., *General Comment 2: Implementation of Article 2 by States Parties*. U.N. Doc. CAT/C/GC/2, of January 24, 2008, para. 5, and C.A.T., *Final observations regarding the test of the reports presented by the State parties regarding Article 19 of the Convention*, in relation to: Benin, U.N. Doc. CAT/C/BEN/CO/2, of February 19, 2008, para. 9, and Ex Republic of Yugoslavia of Macedonia, U.N. Doc. CAT/C/MKD/CO/2, of May 21, 2008, para. 5.

³⁵⁶ H.R.C., *General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*. U.N. Doc. CCPR/C/21/Rev.1/Add.13, of May 26, 2004, para. 18. and H.R.C., *Case of Hugo Rodríguez v. Uruguay*, Communication No. 322/1988, UN Doc. CCPR/C/51/D/322/1988, Report of August 9, 1994, paras. 12.3 and 12.4.

³⁵⁷ Protocol II of the 1949 Geneva Conventions, Article 6(5).

³⁵⁸ Gregory H. Fox and Brad R. Roth, *Democratic Governance...*, at p. 463-464.

³⁵⁹ Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, Series C No. 4 (Judgment) (July 29, 1988), §174.

“[...] that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.”³⁶⁰

As to the specific case, the IACtHR held that Peru’s amnesty law, which was passed in 1995, was incompatible with the American Convention and thus lacked any legal effect.³⁶¹ Instead, the IACtHR found that Peru was obligated to investigate the allegations and prosecute those responsible.³⁶² The inadmissibility of amnesty provisions was repeated again in *La Cantuta v. Peru* on November 29, 2006. In that case, the IACtHR discussed the effects of the Peruvian amnesty law before and after the *Barrios Altos* decision against the background of the massacre in La Cantuta in 1992.³⁶³ Despite the fact that since the *Barrios Altos* decision in 2001 Peruvian Amnesty Law has no legal effect within the country, the IACtHR was not satisfied that Peru had adopted the appropriate measures to eliminate the effects that the amnesty laws might have had.³⁶⁴ Earlier that same year, on September 26, 2006, the IACtHR declared in *Almonacid-Arellano v. Chile* that Chile’s 1978 Amnesty Law violated key provisions of the American Convention and therefore, as in the *Barrios Altos* case, the respective amnesty law had no legal effects.³⁶⁵ In its *Gomes Lund* decision in 2006 the IACtHR came to the same conclusion regarding Brazil’s 1979 Amnesty Law. The most recent IACtHR decision on this issue involves Uruguay. On February 24, 2011, the IACtHR in *Gelman v. Uruguay* found Uruguay’s amnesty law to be inconsistent with its international human rights obligations and thus lacked legal effect.³⁶⁶ The Court then ordered Uruguay to guarantee that its amnesty law will not present an obstacle for investigations into the case and for the identification and, if applicable, the

³⁶⁰ Inter-American Court of Human Rights, *Barrios v. Peru*, Series C No. 75 (Judgment) (March 14, 2001), §41.

³⁶¹ *Idem*, at §4 of the Operative Paragraphs.

³⁶² *Ibidem*, at §5 of the Operative Paragraphs.

³⁶³ Inter-American Court of Human Rights, *La Cantuta v. Peru*, Series C No. 162 (Judgment) (November 29, 2006), §188-189.

³⁶⁴ *Idem*, at §189.

³⁶⁵ Inter-American Court of Human Rights, *Almonacid-Arellano et al. v. Chile*, Series C No. 154 (Judgment) (September 26, 2006), §2-3 of the Operative Paragraphs.

³⁶⁶ Inter-American Court of Human Rights, *Gelman v. Uruguay*, Series C No. 221 (Judgment) (February 24, 2011), §11 of the Operative Paragraphs.

punishment of those responsible.³⁶⁷ Besides the IACtHR, many other international tribunals have ruled that amnesty laws were not applicable in cases involving serious international crimes.³⁶⁸

In conclusion, the texts of the various international human rights treaties and the decisions of international tribunals, specifically the IACtHR, has helped answer the question of the legality of amnesties as a tool to be used in transitional justice. The answer can best be explained by the former Secretary General of the United Nations, Kofi Annan, who issued a report to the United Nations Security Council in 2000 on “Establishment of a Special Court for Sierra Leone” in which he stated:

"While recognizing that amnesty is a legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity, or other serious violations of international humanitarian law."³⁶⁹

In summary, an analysis of all the jurisprudence suggests that amnesties do not violate international law as long two requirements are met: first, amnesties must not be blanket amnesties, which have been strictly forbidden; and second, any amnesty passed by a State must not exempt international crimes, such as genocide, war crimes, and crimes against humanity.³⁷⁰

b. Comparison of Brazil with other States

Brazil, like many of its South American neighbors, suffered through many years of military rule during the second half of the 20th Century. While many of these South American countries share similar experiences, each situation was different, and so was the process by which each country transitioned out of a military dictatorship and into a democratically elected civilian government. The history of each of these countries and their comparison to Brazil helps shed light on what the possible future outcome in Brazil will be.

³⁶⁷ Idem.

³⁶⁸ Inter-American Court of Human Rights, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219 (Judgment) (November 24, 2010), §159. These international tribunals include the International Criminal Tribunal for the former Yugoslavia and the Special Court for Sierra Leone.

³⁶⁹ “Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone” U.N. Doc. S/2000/915 (October 4, 2000), §22.

³⁷⁰ Elizabeth B. Ludwin King, “Amnesties in a Time of Transition ...”, 596.

i. Argentina

Argentina is probably the most well-known South American country in discussing past military regimes and the brutality that they inflicted upon the local population. Although the military regime in Argentina only lasted seven years (1976-1983), as compared to twenty-one in Brazil, the number of disappearances and deaths that occurred during those years, known as the “Dirty War” far outnumbered that of Brazil. Official figures put the number of disappearances or deaths during the military dictatorship somewhere between 9,000 and 11,000, but many human rights groups estimate that the number is actually closer to 30,000.³⁷¹ While some of those who were targeted were members of left-wing guerrilla movements, others were simply regular citizens whom the Argentinean military dictatorship targeted because of their political activities or public criticism of the military.³⁷²

The fall of the military was precipitated by the decision of the Argentinean military in 1982 to invade the Falkland Islands to reclaim the territory from the United Kingdom. Soon after the swift defeat of the Argentinean military in the Falkland Islands the military began to lose power back home.³⁷³ When it appeared that they would lose their power, the military passed Law No. 22924 on September 22, 1983, known as the Law of National Pacification.³⁷⁴ This blanket amnesty law effectively immunized the prior military dictatorship from all crimes its members had committed during its reign.³⁷⁵ However, this blanket amnesty was short lived. Shortly after assuming office, the newly elected president, Raúl Alfonsín, annulled the amnesty law and began prosecuting members of the armed forces. President Alfonsín decided to prosecute only a limited number of officers because he feared another military coup if he went too far in prosecuting all those who committed human rights abuses.³⁷⁶ In 1985, several commanders of the armed forces were convicted. In 1983 President Alfonsín also established the “Comisión Nacional Sobre la Disaparancia de las Personas” (National Commission on the Disappearance of Persons), which was composed of religious, political, and human rights leaders tasked with discovering the

³⁷¹ Roseann M. Latore, “Coming Out of the Dark: Achieving Justice for ...”, at 426.

³⁷² *Idem.*

³⁷³ Elizabeth B. Ludwin King, “Amnesties in a Time of Transition ...”, at 584.

³⁷⁴ Roseann M. Latore, “Coming Out of the Dark: Achieving Justice for ...”, at 427.

³⁷⁵ Elizabeth B. Ludwin King, “Amnesties in a Time of Transition ...”, at 584.

³⁷⁶ Roseann M. Latore, “Coming Out of the Dark: Achieving Justice for ...”, at 428.

events that led to the disappearance and death of an estimated 30,000 people in Argentina during the “Dirty War.”³⁷⁷

However, when trials were scheduled for the lower ranking military officers who followed orders that resulted in human rights abuses, the military strongly objected and so did the public, which forced the civilian government to pull back.³⁷⁸ In order to appease the military, the government passed the Full Stop Law in 1986, which set a deadline for initiating new prosecutions of military officers.³⁷⁹ The following year the government passed the Law of Due Obedience, which granted amnesty for dirty war crimes, except for rape, theft, and falsification of civil status.³⁸⁰ Soon after Carlos Menem was elected President in 1989 he pardoned all those who had been convicted for human rights violations.³⁸¹

In a final twist, at the turn of the century the Supreme Court of Argentina involved itself in the matter, starting a movement back towards accountability and prosecutions. In 2005 the Supreme Court of Argentina in the *Julio Héctor Simón* case ruled that both the Full Stop Law and the Law of Due Obedience were unconstitutional.³⁸² In coming to its conclusion, the Supreme Court relied extensively on the IACtHR’s *Barrios Altos* decision from 2001.³⁸³ In the *Mazzeo Julio Lilo* case in 2007, the Supreme Court of Argentina ruled that the 1989 decree passed by President Menem, which permitted him to pardon former military officers, was unconstitutional.³⁸⁴ These recent decisions by the Supreme Court of Argentina appear to finally have resolved the issue of transitional justice in Argentina that has seen many ups and downs since 1983. Recently in April 2011, Reynaldo Bignone, Argentina's last military ruler was sentenced for life on the grounds that he tortured and murdered his political opponents more than three decades ago during the military dictatorship.³⁸⁵

ii. Chile

³⁷⁷ *Idem*, at 430.

³⁷⁸ *Ibidem*, at 428.

³⁷⁹ *Ibidem*.

³⁸⁰ *Ibidem*.

³⁸¹ *Ibidem*, at 428-429.

³⁸² Christina Binder, “Judicial Lawmaking to Protect the Individual: The IACtHR, the ECtHR, and the ICTY: The Prohibition of Amnesties by the Inter-American Court of Human Rights” (2011) 12 *German L.J.* 1203, 1223.

³⁸³ *Idem*.

³⁸⁴ *Ibidem*.

³⁸⁵ “Brazil to charge army officer over military rule abuses” BBC (London, March 14, 2012) <<http://www.bbc.co.uk/news/world-latin-america-17371865>> accessed April 30, 2012.

Chile, like many other States in South America, was ruled by a military dictatorship for several years during the latter half of the 20th Century. The military dictatorship in Chile lasted 16 years; beginning when General Augusto Pinochet came to power in a bloody coup in 1973, ousting President Salvador Allende.³⁸⁶ The military's reign under General Pinochet was known for committing many acts of torture, enforced disappearances, and murder of political individuals who the military felt were a threat to them and their power.³⁸⁷ In addition, the military instituted strict press censorship, and purged the sectors of public administration and education of anyone for any reason.³⁸⁸ During General Pinochet's rule approximately 3,000 people disappeared or were killed, and many more were tortured by the military.³⁸⁹

On April 18, 1978, Pinochet issued Law No. 2.191 which granted a near-blanket amnesty for the military for crimes committed between September 11, 1973 and March 10, 1978.³⁹⁰ In a plebiscite in 1988 General Pinochet was denied a second 8-year term as president. In December 1989 Patricio Aylwin was voted as the new President of Chile (taking office the following year).³⁹¹ However, because General Pinochet remained as Chief of the Army, President Aylwin was unable to overturn or annul the amnesty law. Therefore, President Aylwin instead established the Chilean Commission on Truth and Reconciliation in 1990, which was charged with the task to investigate and document human rights abuses that occurred during the early years of the military dictatorship. In addition, President Aylwin interpreted Chile's amnesty law in a creative way. In what became known as the "Aylwin Doctrine" the amnesty law was interpreted as requiring a full judicial investigation before an amnesty seeker could benefit from its shield.³⁹² Therefore, the Chilean courts had to conduct an investigation for each person who requested amnesty. The result of this interpretation was that, while no formal punishment of the perpetrators were allowed, the resulting investigation provided public insight into the human rights abuses that were committed during Chile's dark past.

Years later, in 1999, the Supreme Court of Chile ruled that the Chilean Amnesty Law of 1978 did not include immunity for enforced disappearances because the underlying crime was

³⁸⁶ Elizabeth B. Ludwin King, "Amnesties in a Time of Transition . . .", at 585.

³⁸⁷ Roseann M. Latore, "Coming Out of the Dark: Achieving Justice for . . .", at 423.

³⁸⁸ *Idem*.

³⁸⁹ Elizabeth B. Ludwin King, "Amnesties in a Time of Transition . . .", at 585.

³⁹⁰ *Idem*.

³⁹¹ Roseann M. Latore, "Coming Out of the Dark: Achieving Justice for . . .", at 423.

³⁹² Elizabeth B. Ludwin King, "Amnesties in a Time of Transition . . .", at 586.

kidnapping (where a body had not yet found) and not murder, and thus was an ongoing crime that extends beyond Chile's 1978 Amnesty Law.³⁹³ As mentioned earlier, the 2006 *Almonacid-Arellano* decision by the IACtHR found Chile's 1978 Amnesty Law to be in violation of provisions in the American Convention and thus without legal effect. However, the implementation within Chile of the *Almonacid-Arellano* decision has been indirect. In recent years a bill went before Congress in Chile that would, if passed, amend the Chilean criminal code so that serious human rights violations were not subject to amnesties or statutes of limitation.³⁹⁴ The problem is that the bill has stalled before Congress. Nonetheless, the Supreme Court of Chile has continued to chip away at the amnesty law by ruling that it is inapplicable to war crimes or crimes against humanity, both of which have no statute of limitations.³⁹⁵ The Supreme Court has also ruled that domestic legal norms could not be used to block the prosecution of perpetrators who committed gross human rights violations.³⁹⁶ In doing so the Supreme Court cited the *Almonacid-Arellano* decision. Therefore, it appears that although Chile's 1978 Amnesty Law still remains (has not been repealed, annulled, or ruled unconstitutional) it has been stripped of its power by the decisions of the Supreme Court of Chile.

iii. Peru

While Peru experienced several years of military rule during the latter half of the 20th Century, it is the years of civilian democratic rule that were placed under scrutiny in the decisions of the IACtHR. The 1980's and early 1990's were times of economic turbulence in Peru which exacerbated social tensions and contributed to the rise of rebel movements. The Peruvian government's response to the acts of rebel groups often involved acts of repression and violence. The allegations in the *Barrios Altos* case concern acts undertaken by the civilian government. The facts in *Barrios Altos* establish that the acts were executed in reprisal against alleged members of *Sendero Luminoso* (Shining Path), a rebel group in Peru.³⁹⁷ The allegations in the *La Cantuta v. Peru* case involve the abduction, disappearance, and execution of

³⁹³ *Idem.*

³⁹⁴ Christina Binder, "Judicial Lawmaking to Protect . . .", at 1221.

³⁹⁵ *Idem.*

³⁹⁶ *Ibidem.*

³⁹⁷ Inter-American Court of Human Rights, *Barrios v. Peru*, Series C No. 75 (Judgment) (March 14, 2001), §2(d).

individuals on July 18, 1992 as a part of military operations carried out by members of the Peruvian Army.³⁹⁸

On June 14, 1995, the Peruvian Congress passed Law No. 26.479, which granted amnesty to the military, police officers, and to civilians who committed human rights violations between May 1980 and 1995. This law effectively shielded President Fujimori and other human rights violators against possible criminal prosecution for crimes that they had committed against the left wing guerrillas.³⁹⁹ However, as a result of the *Barrios Altos* decision in 2001, Peru began taking steps to follow the IACtHR's determination that the 1995 Amnesty Law was devoid of legal effect. To give effect to the IACtHR's decision, Peru incorporated the American Convention into the domestic legal system and changed national legal provisions making it possible to give effect to international decisions, such as those of the IACtHR.⁴⁰⁰

In addition, in 2001 the new Peruvian government set up the "Comisión de la Verdad y Reconciliación" (Truth and Reconciliation Commission) to investigate past human rights abuses committed during the 1980s and 1990s. The commission operated from June 2001 to August 28, 2003, when it handed in its final report.⁴⁰¹ The final step for Peru along the path of transitional justice occurred in April 2009 when former President Fujimori was convicted and sentenced to twenty five years of imprisonment by a Special Criminal Chamber of the Peruvian Supreme Court for the Barrios Altos and La Cantuta massacres, among other charges.⁴⁰²

iv. Uruguay

The history of Uruguay in many ways mimics the history of Brazil, in terms of its military dictatorship, its amnesty laws, and its response on how best to deal with its past human rights violations. During the 1960's the faltering economy resulted in the rise of guerrilla movements across Uruguay. To respond to this crisis the civilian government invited the military to intervene.⁴⁰³ The Uruguayan military applied violent and repressive measures upon the

³⁹⁸ Inter-American Court of Human Rights, *La Cantuta v. Peru*, Series C No. 162 (Judgment) (November 29, 2006), §2.

³⁹⁹ Christina Binder, "Judicial Lawmaking to Protect ...", at 1207.

⁴⁰⁰ *Idem*, at 1218.

⁴⁰¹ "TRC Final Report was made public on August 28th 2003 at noon" (Comisión de la Verdad y Reconciliación, August 28, 2003) <<http://www.cverdad.org.pe/ingles/pagina01.php>> accessed September 29, 2011

⁴⁰² Christina Binder, "Judicial Lawmaking to Protect ...", at 1219.

⁴⁰³ Roseann M. Latore, "Coming Out of the Dark: Achieving Justice for ...", at 423-424.

population. After the military broke the guerrilla movement in 1973, it decided to take full control; it suspended Congress and reduced the President to a figurehead.⁴⁰⁴ The figures show that between 1970 and 1985, more than 10% of the population of Uruguay went into exile abroad, one person in fifty was detained by the military, and one in five hundred received long prison terms.⁴⁰⁵ In addition, approximately 150 Uruguayans disappeared during the military regime.⁴⁰⁶ General elections were held in November, 1984 and the following year Uruguay returned to a democracy.

The one element in which Uruguay differs from Brazil in its history concerning transitional justice was that its amnesty law was passed after the return to civilian rule. Law No. 15.848, which granted amnesty and effectively ended all trials against military and police officers for human rights abuses committed during the dictatorship, was passed by the Uruguayan Congress on December 22, 1986.⁴⁰⁷

The only transitional justice steps taken by Uruguay to deal with its past can be considered minor at best. Uruguay established a panel to investigate the truth of what happened to those Uruguayans who disappeared during the military regime.⁴⁰⁸ In 2000, President Jorge Batlle established the Commission for Peace, which was composed of individuals from the Catholic Church, the government, human rights groups, and the political opposition, with a mandate to investigate the fate of the disappeared Uruguayans. However, the Commission for Peace's powers was limited by the confines of the 1986 Amnesty Law.⁴⁰⁹ Despite the general lack of progress in terms of transitional justice, some prosecutions have taken place. For example, on October 22, 2009, Gregorio "Goyo" Alvarez, a former dictator during the military regime, was sentenced to 25 years in prison for the death of 37 people who disappeared during his rule.⁴¹⁰ In addition, a marine was recently sentenced to 20 years in prison for murdering 29 people under similar circumstances.⁴¹¹ However, these prosecutions were only possible because

⁴⁰⁴ *Idem*, at 424.

⁴⁰⁵ *Ibidem*.

⁴⁰⁶ *Ibidem*.

⁴⁰⁷ *Ibidem*.

⁴⁰⁸ *Ibidem*, at 432-433.

⁴⁰⁹ *Ibidem*.

⁴¹⁰ "Uruguay: Amnesty Law Vote a Blow to Justice" (Human Rights Watch, May 26, 2011)

<<http://www.hrw.org/news/2011/05/26/uruguay-amnesty-law-vote-blow-justice>> accessed September 29, 2011.

⁴¹¹ *Idem*.

the amnesty law in Uruguay allows the executive the power to decide which cases it should be applied to.⁴¹² The 1986 Amnesty Law still remains in effect.

Uruguay, like Brazil, has recently had its amnesty law declared by the IACtHR to be in violation of the American Convention and thus without legal effect.⁴¹³ Like Brazil, Uruguay, has thus far refused to comply with the decisions of the IACtHR. There has been a movement in Uruguay to annul its amnesty law. However, on May 20, 2011, the Chamber of Deputies upheld the country's 1986 amnesty law.⁴¹⁴ Even the majority of the population of Uruguay prefers not to revise the amnesty law. In two separate plebiscites, the most recent being in 2009, over 50 percent of Uruguayan voters rejected revising the amnesty legislation.⁴¹⁵ Its future, like that of Brazil, remains in doubt.

V. Conclusion

The transitional justice process in Brazil has been very slow. It took Brazil 27 years to inaugurate its first truth commission to look into the crimes that were committed during the military dictatorship. The recent creation of the National Truth Commission is a big step in the right direction for the future of Brazil. However, the recent decision of the IACtHR in the *Gomes Lund* case only highlights how far Brazil still has to go in achieving a successful model of transitional justice.

The IACtHR's decisions have had a tremendous impact on transitional justice throughout several countries in Latin America, as they have highlighted the illegality of blanket amnesty laws and the obligation of States to investigate and prosecute human rights violations. The reactions of several South American States to the decisions of the IACtHR have varied. While some have supported the IACtHR's decisions, others have fought against them, maintaining their State's sovereignty in deciding whether their own amnesty laws are still valid. Brazil's position has been the latter. The history of Brazil shows that change does occur, but it often happens slowly and with much resistance. The varied positions of members of Brazil's government and

⁴¹² Ibidem.

⁴¹³ Inter-American Court of Human Rights, *Gelman v. Uruguay*, Series C No. 221 (Judgment) (February 24, 2011), §11 of the Operative Paragraphs.

⁴¹⁴ "Uruguay: Amnesty Law Vote a Blow to Justice" (Human Rights Watch, May 26, 2011)

<<http://www.hrw.org/news/2011/05/26/uruguay-amnesty-law-vote-blow-justice>> accessed September 29, 2011.

⁴¹⁵ Idem.

judiciary on the issue of which transitional justice method to apply (e.g. prosecutions vs. truth commissions vs. amnesties) highlight the sensitivity of the issue and help explain Brazil's slow progress towards addressing its dark past.

Despite the fact that Brazil has lagged behind its neighbors, a lot has been happening within the country over the past year that helps shed light on what the future of transitional justice in Brazil might be. While many Brazilians hope that the recent creation of the National Truth Commission will be the first step towards having its Amnesty Law abolished, something which has already happened in neighboring Argentina, such an outcome appears unlikely. The current president of Brazil, Dilma Rousseff, who was herself imprisoned by the military regime, has yet to publically call for an annulment of the Amnesty Law. All the evidence suggests that Brazil will most likely follow the path of Chile. As previously mentioned Chile's amnesty law still exists but it has been chipped away and stripped of its power by the decisions of Chile's Supreme Court. The filing of criminal charges within the past few months throughout Brazil suggests a similar tactic by the Brazilian federal prosecutors; since they are unable to convince the government or the courts to overturn the Amnesty Law they must instead find a way around it. By arguing that since kidnapping and enforced disappearance (where a body had not yet found) are ongoing crimes that are therefore not protected by the Amnesty Law, the Brazilian prosecutors are attempting to find a loophole that will enable them to file their criminal charges against several former military officers.

The IACtHR in its *Gomes Lund* decision also found that the continuing nature of certain crimes made them fall outside the scope of the Amnesty Law. While the STF upheld the constitutionality of Brazil's 1979 Amnesty Law it has yet to address whether the loophole now being argued by several Brazilian federal prosecutors really exists. Therefore, the ultimate resolution of the central question of whether former military officers can be prosecuted for their crimes committed during the military regime appears to rest on whether the legal argument put forth by the Brazilian federal prosecutions winds up proving persuasive to the judges of the STF. However, considering that it has taken Brazil 27 years to come this far, by the time that the STF comes to a decision will there be anyone left to prosecute?