



ASSOCIAÇÃO

JUIZES

PARA

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DEMOCRACIA

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Dear Sirs.,

The **Associação Juizes para a Democracia** is a NGO congregating judges from Brasil. It was founded in 1991, and now is associate to **the Federação das Associações Juizes para a Democracia da América Latina e Caribe**. In 2010 it was also admitted as a NGO before The Organization of American States (OAS), according to the Resolution CP/RES 759.

The present report is aiming to inform the United Nations about the Brazilian Judiciary System's position, related to the impunity of the crimes perpetrated during the 1964 Brazilian military dictatorship and its relations to the other Republican Powers – Legislative and Executive.

Besides that, it highlights the major events that happened after the 2005 United Nations Human Rights Report, from the point of view of the members of a judge's association whose commitment is with the judiciary independence and with the human rights culture. Moreover, the report includes publications of the referred electronic media.

The impunity for the crimes against human rights that took place during the 1964 Brazilian military dictatorship is a severe problem for the Brazilian Judiciary System and a serious obstacle to the consolidation of the Rule of Law.

Since the promulgation of the Amnesty Law in 1979, it has been articulated the idea that the amnesty led to a comprehensive agreement aiming at the country's reconciliation and that it has benefited not only the victims of the military dictatorship but also the agents of the regime and its third parts who practiced torture, kidnapping, sexual abuse, murder and other crimes.

In 2010, the Supreme Court sentenced the "Ação de Arguição de Descumprimento de Preceito Fundamental" (ADPF) no. 153, proposed by the Brazilian Lawyers Association, in which the Court was requested to conciliate the interpretation of the Amnesty Law to the Federal Constitution, in order to prevent the agents of the from benefiting from that law. The Court, by the majority of votes, decided against the request, stating that the Amnesty Law had benefited those criminals.

The trial was preceded by strong pressure coming from the military sectors against any political or legal liability of its agents during the military dictatorship. Those pressures, led by

the former Minister of Defense Nelson Jobim – who had also been a minister of the Supreme Court and its president from 2004 to 2006 – , started at the end of 2010 due to the publication of the 3rd National Plan of Human Rights.

The trial lasted two days. At the end of the first day, the judges were welcomed in a dinner offered by the President of the Republic to honor Minister Cesar Peluso and Minister Gilmar Mendes, members of the Supreme Court who were also participating in the trial (<http://www.conjur.com.br/2010-abr-19/gilmar-mendes-encerra-gestao-recebendo-homenagens-jantar-lula>)

After that, The Inter-American Court of Human Rights – IACHR – judged the Case Gomes Lund, that covered kidnappings and other crimes committed in the so called Araguaia Guerilla. *At the end, their resolutions discussed that a State has to conduct penal and investigations of the facts in an effective way,*] so as to clarify them, determining the respective penal responsible and applying the sanctions and consequences that the law demands.

Following that Court determinations, Minister Cesar Peluso – president of the Supreme Court – stated that those determinations were not a valid and effective rule in the Brazilian Judiciary System and, therefore, they would not be applied by the national judges and tribunals. The president stressed that future investigations would be blocked through the concession of habeas corpus, that is, they would be considered illegal. The Minister Marco Aurelio – another member of that Court – stated likewise.

As below:

Minister (Peluso) rejected the possibility of reversing the decision of the Supreme Court . He said that, at the top of it, the country could be subjected to sanctions established by the Convention ratified by Brazil when it became a member of the Organization of American States – OAS. Peluso also said that in the event of anybody starting a legal process against possible **responsible** the person that felt damaged could request a habeas corpus and the Supreme Court would concede it at once.

For Minister Marco Aurelio Mello, the domestic law, established by the Federal Constitution has to overtake the international law. He also said that the decision of IACHR has just a political effectiveness and it has no grounds as a legal rule. As a matter of fact, it will have no effect at all, it is only a recommendation.

(<http://ultimosegundo.ig.com.br/politica/punicao+da+oea+nao+anula+decisao+sobre+lei+da+anistia+diz+peluso/n1237869044077.html>)

And more,

ConJur – The Supreme Court had a busy year in the legal field. What matters resolved by the Court were the most important ones?

Cesar Peluso – The constitutionality of the Amnesty Law was the most important of them. Socially, it was a relevant contribution of the Supreme Court for the soothing of the souls in the Brazilian society. What would the aim of that legal investigation of accountabilities be if it could

not be useful anymore? All penal and civil deadlines have expired. Why bring that issue back to the legal system? For historical purposes, it is good. But legally, there is no more legitimate interest. It would be inutile. From the practical point of view, the social repercussion was very good and it relieved some disagreeing voices. Besides that, no one could have ever known where that discussion could lead.

ConJur – Would there be the risk of the beginning of a witch-hunt?

Cesar Peluso – Yes.

(<http://www.conjur.com.br/2011-jan-09/entrevista-cezar-peluso-presidente-supremo-tribunal-federal-cnj>)

Those statements with political contents were unusual for members of that court, particularly because of the context of a centralized power structure which is not used to democratic practices and to the human rights culture. The statements were the key signal so that the Judiciary System would remain obstructed for the military dictatorship crimes and unresponsive to the grave violations of the human rights that had taken place in that period.

From that time on, there has not been a single register of enforcement of that IACHR's sentence. The impunity situation related by that Committee in 2005 persists even today. Unlike other Latin American countries, Brazil has not had a sole case of investigation and legal process to find out the accountability of the state agents who *had* practiced such crimes.

IACHR also highlighted that the State must adopt, in a reasonable deadline, the necessary measures to typify the unlawful action of kidnapping in accordance to the inter American parameters, and while doing that, it must adopt all steps to guarantee an effective trial and if necessary, the adequate punishment related to the facts in which the kidnapping took place through the existing mechanisms of the domestic law.

Concerning that, it was proposed the Bill # 245/2011 that has been analysed slowly by the Federal Senate and whose possibilities of approval in short terms are remote. For that, let's take into account that in a determined action of the federal government, it was approved a law that created the Truth Commission. Meanwhile, because of the lack of that determination, the Bill # 573/2011 has already been rejected by an internal commission of the House of Representatives. That Bill regulates the correct interpretation of the Amnesty Law, in order to exclude the crimes from the military dictatorship period.

It is important to notice that this last Bill was inspired by the Supreme Court decision to the ADF 153, because Minister Eros Grau stated that the Legislative had to give the interpretation to the law that was requested to the Court. The Executive Power usually says that the problem is in the hands of the Judiciary.

One notices that , at this point, related to the impunity ,the powers of the republic put the brunt on each other's shoulders and none of them take any effective step, where the highest Court of the country and the Judiciary System in general participate in an inconceivable articulate at the expenses of Justice and Human Rights.

Meanwhile, one waits the typifying of the crime of kidnapping with dismay and disbelief, one notices that the Brazilian Judiciary System due to its clear commitment to the impunity of the military dictatorship crimes as mentioned above, once more breaks the IACHR's sentence and does not take a single action to find the accountability in accordance to the existing rules, a duty it must comply with. No investigation and no criminal process for the crime of kidnapping, regulated by article 148 of the Penal Code, has been started so far.

That being so, the present report takes to the consideration of this United Nations Committee that the Brazilian Judiciary System is one of the pillars for the impunity of the crimes during the military dictatorship and it does not have the expected independence for the performance of its role.

Moreover, the Brazilian Judiciary System does not value the culture and practice of human rights, *which contributes* to the weakness of the Rule of Law and for the persistence of everyday situations of disrespect to the fundamental rights that happens repeatedly nowadays, from what torture is the highest expression.

José Henrique Rodrigues Torres
President of Council