

Human Rights Challenges in the Contemporary World- Reflections on a Personal Journey of Thought and Action*

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I. The Epistemological Role of Experience in the Field of Human Rights Legal Theory

In what follows, I review my thoughts on human rights and the challenges they face, and my own path in that field, which is the result of an interaction between experience and thought. But let me first justify my choice of this organizing perspective in light of the epistemological role of experience in the reflections of Hannah Arendt and Norberto Bobbio on human rights. These two great thinkers of the twentieth century are my twin points of departure, and have been a basic point of reference in my work on human rights as in so many other matters.

In the preface to her book, *Between Past and Future*, Hannah Arendt's assumption is that, "thought itself arises out of the incidents of living experience and must remain bound to them as the only guideposts by which to take its bearings"¹. Arendt viewed that collection of essays as an exercise in political thought. More specifically, given the gap between past and future, she aimed to highlight the inadequacy of traditional theoretical categories to address the realities of "an era of extremes", as a first step towards their conceptual reconstruction. Hannah Arendt noted that "the actuality of political incidents" that prompted the thoughts in *Between Past and Future*, lay below the surface, was barely "audible", so to speak, and was only sporadically mentioned.

In the dense fifth chapter of her great work of 1951, *The Origins of Totalitarianism*, Arendt examined the shortcomings of legal and political theorizing about human rights (which she dates back to the French Revolution) in light of the new realities brought

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1 Arendt, H., *Between Past and Future*, New York: Viking Press, 1968, 14

about by totalitarian rupture.² In that work, she posited the concept of “the right to have rights”, the starting point of my own book, *The Reconstruction of Human Rights*³, which consists of a dialogue of sorts with Arendt’s thought.

The experience of “the actuality of political incidents” that gave rise to Arendt’s thought is not below the surface or quasi-inaudible when it comes to human rights. Arendt addressed that topic in a text of 1943, *We Refugees*, in which she described the personal experiences of displaced people, and the corrosive and harrowing effects on the integrity of human beings, when their social, political and legal status becomes “completely confused”. Arendt’s displaced people found themselves on the fringes of the law, as a result of the “status of legal outlaws”. As she movingly describes: “We lost our homes, which means the familiarity of daily life... lost our occupation which means the confidence that we are of some use in this world... lost our language, which means the naturalness of reactions, the simplicity of gestures, the unaffected expression of feelings.”⁴ Arendt’s wide-ranging conceptual elaboration on the importance of “the right of have rights” emerged from this context and from her “stopping to think” about her own “living experience”.

Miguel Reale says that “law is not mere experience, but can only be understood bearing experience in mind”, so it is “a basic epistemological issue”⁵. According to his view, “law” is a dynamic and dialectic experience combining facts, values and norms. As he sees it, the knowledge underlying the act of experiencing arises from a blend of subjective experience (the experiencer, or *parte subjecti* experience) and objective experience (what is experienced, or *parte objecti*). For Hannah Arendt, “the incidents of living experience” occur in the plurality of the human condition of *inter homines esse*, in her view a *conditio per quam* for all political life.⁶ The original meaning of experience, notes Reale, is experiencing reality, in which what is experienced is different but not separable from what the person observes and evaluates as positive or negative. In the case of human rights, their absence is experienced as negative, which is what motivates the need to affirm them. And, as Reale emphasizes, it is the experience of that negativity, which produces the power-duty to communicate that knowledge conquered by experience to the world of shared life (*Lebenswelt*).⁷ This is how Hannah Arendt proceeded when elaborating the concept of the “right to have rights”.

This power-duty to impart what one conquers for knowledge as a result of experienced hardships also shapes Norberto Bobbio’s reflections on human rights. Bobbio’s formative years took place during the fascist regime in Italy. Fascism expressed the fury of extremes, focusing its activism on the destruction of reason. This marked much of Europe during the twentieth century, with ripple effects elsewhere. Bobbio opposed Fascism, participated in the Resistance, and lived through the Nazi occupation and the war for Italy’s liberation. As Bobbio recalls in *De Senectute*, this was a densely configurative period in

2 Arendt, H., *The Origins of Totalitarianism*, New York: Schocken Books, 2004, 341-384

3 Lafer, C., *A Reconstrução dos Direitos Humanos: Um diálogo com o pensamento de Hannah Arendt*, São Paulo: Companhia das Letras, 1988

4 Arendt, H., *The Jew as Pariah*, ed. R. Feldman, New York: Grove Press, 1978, 62, 66, 55-56

5 Reale, M., *O direito como experiência*, São Paulo: Saraiva, 1992, xxxviii

6 Arendt, H., *The Human Condition*, second edition, Chicago: University of Chicago Press, 1998, 7-8

7 Reale, M., *Variações*, São Paulo: GRD, 1999, 13-27

existential terms for him, marking a “before” (the limbo-like prehistory of his life as a scholar) and an “after” (which marked the work of his mature years).⁸

As Pier Paolo Portinaro points out,⁹ the search for alternatives that were radically distinct from those that characterised Fascism, was the key trait that marked both Bobbio’s scholarly and militant intellectual activities during the “after” period in re-democratised post-War Italy. Prominent among the traits of Fascism were the annihilation of democracy, the denial of human rights, the dissolution of individuals within the whole of the state, and the belligerence and glorification of violence, as Bobbio points out in his studies of Fascism.¹⁰ It was in response to this experience that Bobbio gradually built up the links between three themes – democracy, human rights and peace – arguing that an integrated view of the three should be the goal of a general theory of law and politics.¹¹ Hence his statement, in the introduction to *L’età di diritti*, that “without democracy and human rights in the internal plane, there will not be, in the external plane, the stable peace resulting from the peaceful settlement of disputes”¹². For both Bobbio and Arendt, then, the “incidents of living experience” were the guideposts in the development of their work on human rights.

The gains that experience accrues for knowledge are particularly important in the field of human rights. As Luigi Ferrajoli notes, in different historical contexts and period, human rights have represented the *ex parte populi* affirmation of the *leggi del piu debole* (the law of the weakest) against *la leggi del piu forte* (the law of the strongest).¹³ The language and values of human rights were part of the emancipatory platform of Soviet dissidents in the struggle against the arbitrariness of the communist regime; of the civil rights movement against the iniquities of racial discrimination in the USA, and of the fight against *Apartheid* in South Africa; of the demand for gender equality of the feminist movement; and of the diplomatic demand of Third World countries for a “right to development” to address the inequalities permeating the international order. In her reflections on the history and memory of human rights over time and space, Danièle Lochak notes that human rights struggles are neither a triumphal march nor an *a priori* lost cause. They result from the experience of and reflection about a struggle that is given density and specificity by reference to context and circumstance, but which is relevant at all times for those who are committed to the value of human dignity.¹⁴

It is with this organizing framework and epistemological basis that I will discuss, explain and evaluate the experience of my own “human rights path”. My hope is that it will be useful to analyse the challenges proposed by the general theme of the XXVI World Congress of Philosophy of Law and Social Philosophy.

8 Bobbio, N., *De Senectute*, Turin: Einaudi, 1996, 122, 164

9 Portinaro, P. P., *Introduzione a Bobbio*, Rome/Bari: Laterza, 2008, 311

10 Bobbio, N., *Del fascismo alla democrazia*, ed. M. Bovero, Milan: Baldino & Castoldi, 1997, *passim*

11 Bobbio (note 8), 164-165

12 Bobbio, N., *L’età dei diritti*, Turin: Einaudi, 1997, vii, viii

13 Ferrajoli, L., *Diritti Fondamentali*, ed. E. Vitale, Rome/Bari: Laterza, 2001, 338

14 Lochak, D., *Les droits de l’homme*, Paris: La Découverte, 2005, 114-116

II. The “Living Experience” of the Brazilian Authoritarian Regime and the Significance of the Human Rights Agenda

I graduated from the University of São Paulo School of Law in 1964, the year when an authoritarian military regime was established in Brazil. This regime was characterised, in the legal-political sphere, by a concentration of power in the hands of the government. By means of various institutional acts (from Institutional Act No. 1 of April 9, 1964 to Institutional Act No. 5 of December 13, 1968), it explicitly broadened the scope for arbitrariness and weakened the rule of law – a situation that only abated in the late 1970s. Arbitrary state action included, *inter alia*, the revocation without trial of the political rights of public personalities, professors and intellectuals who were thought to oppose the regime; the suspension of *habeas corpus* for political crimes against national security; the denial of judicial review as a result of the “regimes of exception” established by institutional acts and their supplementary decrees; and censorship that limited freedom of expression.

At the same time, all this led to the de facto establishment of a *crypto-government*, which operated in the shadows, together with the secret services and the police, which repressed those perceived by government authorities to pose the threat of *arcana seditionis*. At a time when there were no computers, the regime also sought to gather all the information it could to become an *omnis videns* power that could see and control everything.¹⁵

Thus, times were dark in Brazil when I ended law school, during my years of graduate study, and at beginning of my academic life as a professor. The curtailment of liberties and the sombre public arena made political *vita activa* a dubious and precarious proposition, as Hannah Arendt observes in her reflections on *Men in Dark Times*.¹⁶ Such dark times are not a historical exception, she says, and can be sombre even if they do not reach the unprecedented scale of monstrosities of the totalitarian period she studied in *The Origins of Totalitarianism*. The Brazilian regime was authoritarian, not totalitarian, but even so, there was a general atmosphere of unease caused by a highhanded arbitrariness, and by the dangers and realities of repression perpetrated by the operation of a crypto government.

I was not personally a victim of the arbitrariness and repression, but it affected several friends, colleagues, and public personalities whom I admired. Among them was former president Juscelino Kubitschek, whose democratic government and focus on national development I studied for my doctoral dissertation in Political science when at Cornell University in 1970.¹⁷ This experience gave rise to my discontentment with the “dark times” underway, and led me to join others, in particular lawyers and jurists, who used the *leggi del piu debole* of human rights to combat *la leggi del piu forte* of those in power as a means to resist the authoritarian regime in a democratic and peaceful way. Because of this, I felt the foul breath of repression and became aware of the importance of living in a political system that respects civil and political rights. In brief, this was the “living experience” that served as a guidepost for my subsequent focus on human rights and

¹⁵ I draw here on Bobbio’s explanation of the mechanisms of *arcana dominationis*. See Bobbio, N., *Il futuro della democrazia*, Turin: Einaudi, 1995, 108-110

¹⁶ Arendt, H., *Men in Dark Times*, New York: Harvest Books, 1968

¹⁷ Lafer, C., *JK e o Programa de Metas*, Rio de Janeiro: Fundação Getúlio Vargas, 2002

shaped my understanding of how human rights are intertwined with democracy and the rule of law.

On the academic front, my first effort to tackle this topic happened at the University of São Paulo School of Law in the second semester of 1974, in particular through a graduate course entitled “International Law of the Human Person”. Then a young assistant professor, I gave this course with Professor Vicente Marotta Rangel, a respected full professor of international public law, who supported my feat of “academic daring”. This was indeed an audacious move at the time, since the authoritarian regime was at its peak, and the graduate course contrasted Brazilian reality with the broad normative aspirations embodied in the Universal Declaration of Human Rights of 1948 and the international covenants it gave rise to on Civil and Political Rights, and on Economic, Social and Cultural Rights in 1966. I taught this course in a more favourable Brazilian political context, in 1980, 1983 and at other times after re-democratisation, adopting a broader scope and reflecting more deeply on the domestic and international agendas.

I mention the course of 1974 because it was the starting point of my “human rights path”, of analysing and reflecting on those rights and the importance of their international protection, an understanding brought about by the “living experience of the actuality of political incidents” and by the consequent power-duty to publicly impart to others what one conquers to knowledge by experience.

III. Human Rights and Access to the Framework of the Legal Order: “The Right to Have Rights”

In the 1980s, the requirements of university life led me to prepare a thesis to enable me to become a full Professor of Philosophy of Law at the University of São Paulo School of Law. From this thesis resulted my book of 1988, *The Reconstruction of Human Rights*. This work reflected my own dedication to human rights and my permanent dialogue with the thought of Hannah Arendt, whose student I had been privileged to be at Cornell University in 1965, and whose course on “Political Experiences in the Twentieth Century” had an impact on my views.¹⁸

My intention was to develop a legal analysis of the unprecedented rupture brought about by the totalitarian regimes examined in *The Origins of Totalitarianism*, articulating my views with the reflections of Hannah Arendt, and focusing on the challenges involved in the protection of human rights. This approach called for an articulated explanation of the meaning of human rights in Arendt’s work, which had not been attempted at the time and only later attracted the interest of other students of her work.¹⁹

¹⁸ Lafer, C., Experiência, ação e narrativa: sobre um curso de Hannah Arendt, *Estudos Avançados*, 21(60), May-August 2007, 289-304

¹⁹ See, for example, Caloz-Tschopp, Marie-Claire, *Les sans-Etat dans la philosophie and Hannah Arendt*, Lausanne: Payot, 2000; Birmingham, Peg, *Hannah Arendt and Human Rights*, Bloomington: Indiana University Press, 2006

In my book of 1988 and in subsequent studies²⁰ I discussed the heuristic scope of Hannah Arendt's concept of the right to have rights. My starting point was her article, *The Rights of Man: What Are They*²¹, in which Arendt reflected further on the experience of *We Refugees* of 1943, which constitutes the basis of the fifth chapter of the second part of her *Origins of Totalitarianism* of 1951, "The Decline of the Nation-State and the End of the Rights of Man".²²

Human rights emerged and spread with the French Declaration of Rights of 1789. In the French model, said Hannah Arendt, human rights were aligned with the rights of the self-determination of peoples. Indeed, it was the concept of popular sovereignty based on the principle of nationality that undermined the concept of dynastic legitimacy, giving rise in the legal and political spheres – and here I paraphrase Norberto Bobbio²³ – to the move from the duty of subjects to the rights *ex parte populi* of citizens.

The implicit assumption of this paradigm is that the standard of normalcy was the worldwide distribution of human beings among States of which they are nationals. This standard was challenged by the dismantling of multinational empires after the First World War, which also decoupled human rights from the nation-based rights of peoples. This resulted in a massive displacement of people, such that national minorities, refugees and anyone who lost their nationality found themselves expelled from the People-State-Territory trinity. These displaced people became "rightless" because they were stripped of their citizenship and therefore of the protections granted by the principle of legality. For this reason, they were unable to resort to the human rights *leggi del piu debole* against *la leggi del piu forte*. In the words of Hannah Arendt:

The calamity of the rightless is not that they are deprived of life, liberty and the pursuit of happiness, or of equality before the law and freedom of opinion - formulas which are designed to solve problems *within* given communities - but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them.²⁴

The situation of the mass of displaced people was further worsened because there was no haven for them in the world of the twentieth century, a world entirely organised into, and politically occupied by, sovereign states. Thus, displaced people became *erga omnes* undesirables. It was in this context of xenophobia and autocracy that barriers to free circulation of persons were established, along with very restrictive immigration policies, ineffective asylum regimes, inadequate repatriation provisions, and precarious rules of naturalisation.

²⁰See, Lafer, C., *Hannah Arendt: Pensamento, persuasão e poder*, São Paulo: Paz e Terra, 2003; Lafer, C., Direitos Humanos em Hannah Arendt: Considerações sobre as fontes materiais da Declaração Universal, *Justitia* 198(1), 2005, 111-115; Lafer, C., Entrevista com Eduardo Jardim, *O que nos faz pensar?* 29, May 2011, 7-20; Lafer, C., Verbete, "Menschenrechte," in *Arendt Handbuch: Leben, Werk, Wirkung*, eds, W. Heuer, B. Heiter & S. Rosenmüller, Stuttgart: J. B. Metzler, 2011

²¹ Arendt, H., The Rights of Man: What Are They, *Modern Review* 3(1) 1949

²² Arendt, (note 2), 341-384

²³ See Bobbio (note 12), xi-xii, 89-141

²⁴ See Arendt (note 2), 375

This situation was intensified by arbitrary Nazi German and Soviet communist sovereign rule, under which the citizenship rights of human beings were massively revoked, not because of any acts they had committed as nationals, but because they were held, according to the logic of totalitarianism, to be “objective enemies” for racial or political reasons. This had a broad impact because the existence of a mass of persons without citizenship, who lived on the fringes of tangible law as *sans papiers* in different countries, reinforced the arbitrariness of police forces even under constitutional democracies, thus also undermining the effectiveness of democratic rule of law.

All this contributed to the creation of the concentration camps – the material basis of the genocide – where human beings were “disposable” because they had previously been considered “undesirable”. They had become “rightless”, then *sans papiers*, and were thereby divested of legal protection and consequently overlooked by legal systems as being “redundant”.

Making a reflective judgment on the universal reach of these circumstances, Hannah Arendt concluded that equality of dignity and rights, the cornerstone of human rights, is not a “given” as posited by the natural law tradition and by the belief in historical progress. As she noted: “We are not born equal”. Rather, we become equal “as the result of human organisation insofar as it is guided by the principle of justice”²⁵. Equality of dignity and rights is not an element of human existence but rather a political construction of collective coexistence based on the plurality of human beings that share the earth. It was the validity of this construction that the totalitarian regimes strove to extirpate in the twentieth century era of extremes. Thus, the paramount right must be “the right to have rights”. Above all, a person must be given a place in the world through access to a legal and political order that ensures “a framework where one is judged by one’s actions and opinions”; this is what “makes opinions significant and actions effective”.²⁶ This is the framework that gives us the necessary space to affirm *who* we are, not *what* we are, in the web of human relations and histories.²⁷

As Bobbio clearly shows, one of the conditions that make such a framework possible is the preservation of democratic rules.²⁸ The other goes beyond state sovereignty, as the historical experience of totalitarianism has proved. This is why the right of human beings to have rights, which depends on access to a framework built from a legal-political order, requires a *nomos* of the earth “guaranteed by the comity of nations”²⁹. And this is why it is so important to internationalise human rights, a topic I address below along with other facets of the human rights agenda which can be examined in light of Arendt’s thought, including the right to nationality, the rights of refugees, and the rights of immigrants without papers; as well as situations that emerged after the Cold War as a result of a flourishing logic of fragmentation resulting from national, ethnic, cultural and religious identity claims. The sublevation of particularisms, to paraphrase Octavio Paz³⁰, has created new kinds of gaps between human rights and the rights of peoples, which limit

²⁵ See Arendt (note 21), 33; Arendt (note 2), 382

²⁶ Arendt (note 2), 376

²⁷ Arendt, (note 6), 175-207

²⁸ Bobbio (note 15)

²⁹ Arendt, (note 21), 37

³⁰ Paz, O., *Tiempo Nublado*, Barcelona: Seix Barral, 1983, 93-103

the universal reach of international human rights and pose a serious threat to their protection. In this context, it is worth noting the relevance of the current debate in the UN about an international “responsibility to protect”, and the need to take collective action when a state is incapable of protecting its population from genocide, war crimes, ethnic cleansing and crimes against humanity.

IV. The Pluralism and Diversity of the Human Condition as Foundations for the Punishment of the Crime of Genocide

Hannah Arendt noted that injustice and exploitation, loss of freedom and political oppression are crimes that characterise all types of tyranny. These crimes should not be confused with crimes against humanity, which are the hallmark of totalitarian regimes.³¹ It was on the nature of this latter crime and its relation to totalitarianism that Hannah Arendt focused on in *Eichmann in Jerusalem*, her account of the Eichmann case³², in which she develops insights found in *The Origins of Totalitarianism*.

In her report on the Eichmann case, Hannah Arendt had in mind the concept of crimes against humanity set forth in Article 6 of the Nuremberg Charter, and specified in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. As we know, the Rome Statute of the International Criminal Court of 1998 drew a line between the crime of genocide (Article 6) and crimes against humanity (Article 7). There is an affinity between the two. Indeed, the objective elements that result from both types of crime potentially overlap. What differentiates them is *mens rea*, or intent, as Cassese explains.³³ What sets genocide apart as a crime, and makes it a specific sub-category of the broader category of crimes against humanity, is “the intent of destroying, in whole or in part, a national, ethnic, racial or religious group” ,as stated in the Convention of 1948, and now the Rome Statute.

The specificity of the totalitarian rupture resides in this intent, because genocide, the paradigm of which is the Holocaust, was a historically unprecedented crime. As pointed out by Bobbio in 1960, genocide is a crime that cannot be explained by traditional concepts such as economic interest, desire for power, national prestige or social conflicts. It stands out because of the lucid gratuitousness of an organised and premeditated crime the aim of which is extermination *per se*. For this reason, it also falls beyond the scope of “regimes of exception” for reasons of state since the latter follow a means and ends logic that cannot explain the gratuitous aim of extermination.³⁴

In brief, as Hannah Arendt stated, genocide is not a crime “promoted by necessity of one form or another”³⁵. It was his perplexity with this historically unprecedented crime that led Churchill to call it “a crime without a name”.

31 Arendt (note 21), 36-37

32 Arendt, H., *Eichmann in Jerusalem*, New York: Viking Press, 1965

33 Cassese, A., *International Criminal Law*, Oxford: Oxford University Press, 2003, 106

34 Bobbio, N., Quindici anni dopo, *Rassegna mensile di Israel*, 6, June 1974, 1-9; Bobbio, N., *Elogio della mitezza e altri scritti morali*, Milan: Linea d’Ombro, 1994, 105-125; Lafer, C., Bobbio e o Holocausto: Uma aproximação com Hannah Arendt, *Revista USP*, 61, March-May 2004, 223-227

35 Arendt H., *Responsibility and Judgment*, ed. J. Kohn, New York : Schocken Books, 2003, 38-39

It was the jurist Raphael Lemkin who proposed that a treaty should define genocide as an international crime, and promoted the drafting and approval at the United Nations of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. Lemkin also coined the term *genocide*, which derives from the Greek *genos* (tribe, race) and the Latin *cidio*, from the verb *caedere* (to fall, to kill), by analogical approximation with homicide, fratricide. Given his vast knowledge of law and his great legal imagination, Lemkin not only named what Churchill had called a “crime without a name”, but he also defined its specific nature, as actions committed “with the intent of destroying, in whole or in part, a national, ethnic, racial or religious group”, as stipulated in Article 2 of the Convention of 1948.³⁶

If Lemkin coined and typified genocide as an international crime and thus made it possible for international public law to respond to the horrors of the Holocaust, it was Hannah Arendt who established the philosophical foundations of this crime. This is what Seyla Benhabib argues in a recent comparison between Lemkin and Arendt.³⁷ This was also the argument I developed in the fourth chapter of *The Reconstruction of Human Rights*³⁸, in which I review *Eichmann in Jerusalem*.

In her analysis of the Eichmann case, Hannah Arendt criticised the one-sidedness of the prosecutor’s perspective: he focused on the suffering of the victims, on what the Jews had suffered by being punished without guilt, and failed to address the broader scope of Eichmann’s actions. The crime committed by Eichmann, one of the masterminds and perpetrators of the Holocaust, was directed against the Jewish people as a whole. Modern anti-Semitism – an instrument of power of Nazi totalitarianism that differed from traditional anti-Semitism, as Arendt shows in the first part of *The Origins of Totalitarianism* – explains the choice of victims but not the nature of the crime.

For Hannah Arendt, the prosecutor’s view was that the Holocaust had the characteristics of a large-scale *pogrom* and, as such, was part of the long history of persecution of the Jews. In his accusation, the prosecutor did not address the *novel* universal reach of the unprecedented experience of totalitarianism. In my view, the prosecutor also failed to perceive that the Holocaust differed from other the disasters marking the Jewish historical experience because, for the first time ever, it threatened the very existence and survival of all Jews. As Yehuda Bauer explained, in accordance with the ideological view that characterised the exercise of power by the German variant of totalitarianism, the Nazis viewed the Jewish issue as a global problem and the resolute annihilation of the Jews – all Jews in the world – was the *mens rea* of their goal, on which the future of humanity depended.³⁹

For Hannah Arendt, the universal scope of the reason to punish the crime of genocide is that it is a crime against humanity and a deliberate attack on the diversity and plurality of the human condition. Arendt concluded her report on the case by stating that Eichmann and the totalitarian authorities granted themselves the right to determine who should and

³⁶ Beauvallet, O., *Lemkin face au génocide*, 2011, Paris : Michelon, 33 *et passim*

³⁷ Benhabib, S., International Law and Human Plurality in the Shadow of Totalitarianism: Hannah Arendt and Raphael Lemkin, in *Politics in Dark Times: Encounters with Hannah Arendt*, ed. S. Benhabib, Cambridge: Cambridge University Press, 2010

³⁸ Lafer (note 3), 167-186

³⁹ Bauer, Yehuda, *Rethinking the Holocaust*, New Haven: Yale University Press, 2002, 22, 27

should not be allowed to live in the world. Thus, one could not expect any member of the human race to wish share the Earth with Eichmann, and this is why he had to be (and was) executed as an enemy of the human species (*hostis humani generi*).⁴⁰

For Hannah Arendt, the ontological basis for the punishment of the crime of genocide is supported by her earlier reflections of 1958 about the plurality of the human condition⁴¹, and by her view, as expressed in *Lectures on Kant's Political Philosophy*, about the importance of a plural world governed by the Kantian principle of universal hospitality and reciprocal trust.⁴²

Hannah Arendt's reasoning demonstrates why the compulsory repression of genocide is a valid *jus cogens* norm, and central for international public policy. No community on Earth can feel reasonably safe about its survival – and, by extension, at ease and at peace in the world – if genocide remains a conceivable future possibility. The Holocaust was a precedent that should be seen as a warning with a universal reach. As Marrus noted, for Hannah Arendt the importance of this warning resided in the fact that, despite the defeat of Nazism, post-World War II societies retained a latent openness to genocide.⁴³ This is the basis of *Organised Guilt and Universal Responsibility*, an essay of 1945, in which she states that:

In political terms, the idea of humanity, excluding no people, assigning a monopoly of guilt to no one, is the only guarantee that one “superior race” after another may not feel obligated to follow the “natural law” of the powerful and exterminate “inferior races unworthy of survival”.⁴⁴

In German texts dated 1958 and 1959, an English translation of which was posthumously published as *The Promise of Politics*, Hannah Arendt sheds additional light on why the plurality of the human race is the cornerstone of her *amor mundi*:

... human beings in the true sense of the term can exist only where there is a world, and there can be a world in the true sense of the term only where the plurality of the human race is more than a simple multiplication of a single species.⁴⁵

For this reason:

If a people or nation, or even just some specific human group, which offers a unique view of the world arising from its particular position in the world - a position that, however it came about, cannot readily be duplicated - it is not merely that a people or a nation or a given number of individuals perishes, but rather that a portion of our

40Arendt (note 32), 279

41 Arendt, (note 6)

42Arendt, H., *Lectures on Kant's Political Philosophy*, ed. R. Beiner, Chicago: Chicago University Press, 1982.

43Marrus, M. R., Eichmann in Jerusalem: Justice and History, in *Arendt in Jerusalem*, ed. S. A. Ascheim, Berkeley: University of California Press, 2001, 212

44See Arendt (note 4), 235

45Arendt, *The Promise of Politics*, ed. J. Kohn, New York: Schocken Books, 2005, 176

common world is destroyed, an aspect of the world that has revealed itself to us until now but cannot reveal itself again.⁴⁶

For Hannah Arendt, then, the world only comes into existence because there is a plurality of individual and collective perspectives, and from this follows that punishing genocide is necessary to legally protect this order of things in the world.

In my opinion, this reasoning applies to other serious crimes typified in the Rome Statute of the International Criminal Court, considering (as can be inferred from the first *considerandum* of its Preamble) the risks that the “delicate mosaic” of plural perspectives stemming from peoples and their cultures united by common bonds “may be shattered at any time”. Consequently, the grave crimes that put this delicate mosaic at risk must not go unpunished because they affect the international community as a whole (fourth *considerandum*) in that they “threaten the peace, security and *well-being of the world*” (third *considerandum*, emphasis added).

V. Democracy and Human Rights in the Internal National Sphere

There are other less explicit aspects of Hannah Arendt’s work that, because of its focus on totalitarianism and the “actuality of political incidents”, provide scope for other approaches to human rights issues. I discussed this in *The Reconstruction of Human Rights* and other later studies⁴⁷, which also draw significantly on Bobbio and were prompted by my experience of living under the Brazilian authoritarian regime. I will revisit these approaches, taking the *public-private* dichotomy as a starting point. They have to do with transparency in the exercise of power; the right to information; the legal protection that must be accorded to freedom of association and opinion; and the right to intimacy, all of which are instrumental for democracy and the rule of law within states.

In *The Human Condition*, Hannah Arendt explores the meaning of the public-private dichotomy, a classical dichotomy in legal thought since the Romans.⁴⁸ “Private” alludes to what is particular, domestic, familiar and familial, as opposed to “public”, which concerns the common interest and utility of the *res publica* and, as such, outranks the more limited realm of private interests. But “public” also stands for what is visible, what becomes and should become public within the realm of the *vita activa*.⁴⁹ The convergence between what is “common” and “visible” as articulated by Hannah Arendt concurs with Bobbio’s view that one of the characteristics of democracy is the exercise of common power in public, since what is of interest to all must be known to all so that the actions of rulers may be controlled through citizenship.⁵⁰ That is why transparency in the exercise of power, and the adoption of the principle of publicity by state bureaucracies is so important, as a key trait of the democratic rule of law.

A totalitarian regime has the exact opposite traits:

⁴⁶ Ibid, 175

⁴⁷ See Lafer (note 20) 109-123, 134-194; Lafer (note 20), 111-115

⁴⁸ Bobbio, N., *Stato, Governo, Società*, Turin: Einaudi, 1985, 3-22

⁴⁹ Arendt (note 6), 50-58

⁵⁰ Bobbio (note 15), 85-113

The only rule of which everyone in a totalitarian state may be sure is that the more visible government agencies are, the less power they carry, and the less known of the existence of an institution, the more powerful it will ultimately turn out to be.⁵¹

The divide between real and ostensible government is how totalitarian domination takes hold. Its bureaucratic structure is not pyramidal but rather shaped like an onion: government entities are akin to successive layers that have the same formal functions, which cover up the real power that lies at the core. Real power is exercised through the secret police, which permeates all aspects of life in a totalitarian society with fear arising from generalised suspicion that leaves nobody unscathed. Within this context the secrets of domination are covered up and the lies of official “truth” are spread through propaganda, the aim of which is not persuasion but the accumulation of power.⁵²

For Hannah Arendt, the relevance of a shared and visible public realm acts as a counterpoint to the unprecedented negativity of totalitarianism, backed by a full-fledged *omni videns* crypto-government, to borrow from Bobbio.⁵³ But this counterpoint is also necessary to address the dangers of invisible government and credibility gaps that put the public realm at risk in the contemporary world.⁵⁴ The deterioration of the public realm, which results from the opaque exercise of power to safeguard the secrets and lies of rulers, paves the way – not only under authoritarian regimes such as the one Brazil had – for crypto-governments of secret services to act in the shadows and for the *sotto governo* that facilitates the concealment of corrupt practices.

The *right to information* as a human right *ex parte populi* is justified by the need to control the actions of rulers within a democratic rule of law system. The right to information protects the factual truth, which is the truth of politics;⁵⁵ and in a democratic system, it limits the scope for the secrets and lies that thrive when the reasons of state are abused.⁵⁶ In fact, the transparent exercise of power submits government acts to a Kantian public morality, as enunciated in *Perpetual Peace*: “All actions affecting the rights of other human beings are wrong if their maxim is not compatible with their being made public.”⁵⁷ This means making government actions public rather than hiding them from public scrutiny under a veil of secrecy or lies.

In institutional terms, autonomous universities support the framework for the right to information, on the basis of the right to freely pursue intellectual activity and the truth – or, in the words of Kelsen, the “freedom of science in conjunction with the belief in its possible objectivity”⁵⁸; it depends on a judicial system governed by reliable and predictable rules, acting independently from the executive and majority whims within the legis-

51 Arendt (note 2), 524

52 Arendt (note 2), 450-616

53 Bobbio (note 15), 106-110

54 Arendt (note 16), 8

55 Arendt (note 1), 227-264

56 Arendt, H., *Crisis of the Republic*, New York: Harvest Books, 1972, 3-47; Bobbio, N., *Teoria generale della politica*, ed. M. Bovero, Turin: Einaudi, 1999, 352-369; Lafer, C., *Desafios: Ética e política*, São Paulo: Siciliano, 1995, 13-29

57 Kant, I., *Political Writings*, ed. H. S. Reiss, Cambridge: Cambridge University Press, 2010, 126

58 Kelsen, H., *Essays in Legal and Moral Philosophy*, Dordrecht-Holland, Boston: D. Reidel Publishing Company 1973, 102

lative branch; and on uncensored media that are legally protected by freedom of the press and of opinion.

The right to information is one of the ingredients of transitional justice, the means by which re-democratised systems deal with a repressive past (see below for more details). This right has been curbed increasingly in the twenty-first century in the name of the transnational fight against terrorism, which works in secret networks. Thus, the *arcana seditionis* of the “pact of the violent” in terrorism has rekindled the undercover actions of secret service crypto-governments. This has increased the dangers of *omni videns* power, *ex parte principis*, which monitors and controls citizens without the safeguards inherent to a democratic rule of law system.⁵⁹

By contrast, the digital revolution and the exponential accumulation of data that enable the existence of the internet, Facebook, the dynamics of social networks and horizontal interrelations, make the *ex parte populi* right to information both easier and more complex to ensure: easier because research, access and dissemination is easier than ever in contrast with the past, allowing hackers to leak confidential information (as recently demonstrated by the WikiLeaks affair); but also more complex because the overwhelming broadening of information horizons has made it more difficult to process and identify what is really relevant for *ex parte populi* control of rulers.⁶⁰

In her reflections on the public and private realms, Hannah Arendt underscored the importance of *ex parte populi* exercise of the public rights of association and of freedom of opinion within the common realm of citizenship.⁶¹ The importance that Hannah Arendt attaches to these rights is that they counteract all tyrannies, the identifying traits of which are the unrelenting effort to annihilate, by use of force and violence, the free exercise of citizenship within the public realm, allowing rulers to retain exclusive rights and authority over matters of state.⁶² For Hannah Arendt, the need to counteract tyrannical regimes was not just a political stand because of her experience during the “dark times” when liberties were curtailed; her position is ontologically grounded, and is based on the difference she articulated between power as distinct from strength and violence. In articulating this difference, Hannah Arendt pinpointed what is specific to the creation and preservation of power, standing apart from those who, like Max Weber, Bertrand de Jouvenel and Mao Zedong, focused on the efficacy of command that emanates from the use of power. For Arendt, power is inherent to any political community; it emerges from the human ability to act in a concerted manner; and it depends on the consensus reached by many to undertake a common course of action.⁶³ As she states, then: “Power corresponds to the human ability not just to act but to act in concert.” Power cannot be generated top-down, *ex parte principis*; nor can rulers accumulate it. Power originates from its acknowledg-

59 Lafer, C., La democrazia di fronte al terrorismo transnazionale, in *Gli Squilibri del Terrore*, ed. M. Bovero & E. Vitale, Turin: Rosenberg & Sellier, 2006, 127-133

60 Lafer, C., Vazamentos, sigilo, democracia: A propósito do significado do Wikileaks, *Política Externa* 19(4) March-May, 2011, 11-17

61 Arendt, H., *Public Rights and Private Interests: In Response to Charles Frankel*, *Small Comforts for Hard Times*, ed. M. Mooney & F. Stuber, New York: Columbia University Press, 1977, 104

62 Arendt (note 6), 221

63 Lafer (note 56), 50-51; Habermas, Jürgen, *Sociologia*, eds. B. Freitag & S. P. Rouanet, São Paulo: Ática, 1980, 100-118

ment and recognition *ex parte populi*. Hence the maxim: Potestas in populo, i.e. without a people or a group, there is no power.”⁶⁴

Thus:

All political institutions are manifestations and materialisations of power; they petrify and decay as soon as the living power of the people ceases to uphold them.⁶⁵

The rights of association and freedom of opinion within the public realm protect the potential sources of power, which are essential for the existence of a political community:

What first undermines and then kills political communities is loss of power and final impotence, and power cannot be stored up and kept in reserve for emergencies, like the instruments of violence, but exists only in its actualisation.⁶⁶

It is for this reason that tyrannies are the most violent and least powerful forms of government,⁶⁷ because violence undermines power rather than generating it; the greater the decline of *ex parte populi* power, the higher the level of *ex parte principis* violence.

The emergence of power as the result of the concerted action of many explains how the trade union movement in modern societies not only improved the living conditions of workers but also enhanced citizenship by bringing workers into the public realm as emancipated citizens.⁶⁸ The same can be said about borderline situations of resistance to oppression via civil disobedience, as exemplified by Gandhi in India. This dynamic also sheds light on the “Revolution of Carnations” that overthrew the authoritarian Salazar regime in Portugal; the role of the *Diretas Já* campaign in eroding the authoritarian regime in Brazil; the corrosive effect of the Eastern European movements on the foundations of the Soviet Union, the starting point of which was the Hungarian Revolution of 1956. This dynamic was a decisive ingredient of the Arab Spring, which resulted in the overthrow of autocratic regimes in the region, *inter alia* because of the multiplying power of concerted action fostered by the social networks that have emerged with the digital revolution. It also helps to shed light on the dynamics that inform variable coalitions in diplomatic life, especially in the multilateral sphere.⁶⁹

In brief, the rights of association and freedom of opinion are meant to protect the generation of *ex parte populi* power. These rights are a constituent ingredient of the life of the “we” that makes up a democratic political community, and they prevent that community from petrifying and decaying when “the living power of the people” ceases to uphold it. To paraphrase Luigi Ferrajoli⁷⁰, this is the affirmation of human rights as the *leggi del più debole* as an alternative to the *legge del più forte*, which would otherwise prevail.

64 Arendt (note 56), 143

65 Ibid, 140

66 Arendt (note 6), 200

67 Arendt (note 56), 140

68 Arendt (note 6), 216-218

69 Arendt (note 56), 51-52; Schell, Jonathan, Introduction, in Hannah Arendt, *On Revolution*, New York:

Penguin, 2006; Lafer, (note 3), 187-236; Lafer (note 20, *Pensamento, Persuasão e Poder*), 173-194

70 Ferrajoli, L., Per una Teoria dei Diritti fondamentali”, *Diritto Pubblico*, 1-2, 2010, 160

Such a view counters the radical asymmetry between rulers and ruled, which is the cornerstone of autocratic regimes, as Kelsen showed.⁷¹

From the private perspective, the distinction between the public and private realms within the inner limits of a democratic system governed by the rule of law goes beyond the difference between what is common (and should be known to all) and what is private (which is of more limited exposure). For Hannah Arendt, the private realm comprises the part of human existence that should not be exposed to general public view. She is referring to the great forces of intimate life that, in their subjectivity, ought to be preserved and protected from public exposure – a protection the relevance of which Rousseau was one of the first to call our attention to – as a means of resisting the harmful aspects of social conformity.⁷² It is for this reason that, as noted above, the rights to information and of association are human rights of a public nature, whereas the right to intimacy is an *ex parte populi* human right that is grounded in the private realm and extends beyond the inviolability of one's home. It is part of the *direitos de personalidade* (rights pertaining to individual privacy and the inviolability of each individual person), and protects a person's right to be left alone, while also enabling anyone to protect whatever refers only to them from public knowledge. This draws on the principle of exclusivity, and leaves no room for publicity because it does not involve the right of third parties, as argued by Kant.⁷³

One of the reasons why Hannah Arendt attaches so much importance to the right of intimacy stems from her analysis of the operational dynamics of totalitarian domination. Indeed, unlike authoritarian domination, the totalitarian variant does not end with banning *ex parte populi* freedom of participation in the public realm in order to separate and undermine people's capacity for concerted action. Totalitarianism is characterised by making fear ubiquitous, and by the systematic destruction of the private realm and of negative freedoms (the non-impairment of *jouissances privées* as Benjamin Constant puts it). Totalitarian domination imposes an all-encompassing loneliness that affects the whole of human life and, in so doing, nurtures the conditions for the *erga omnes* terror that makes that domination effective.⁷⁴ In brief, neither public nor private subjective rights exist in the rationale of totalitarianism in power. As Danièle Lochak recalls, this is made abundantly clear by the official motto of the Nazi regime: *Du bist nichts, dein Volk ist alles* (You are nothing, your people is everything).⁷⁵

The downfall of totalitarian regimes did not obviate the need to defend the right to intimacy: a shrinking public realm and growing social conformity tend to make public the great forces of intimate life and, by making them visible to all, strip them of their private and individual nature. Indeed, Hannah Arendt once warned that the risks to the right of intimacy were shifting from governments to societies.⁷⁶

In the contemporary world, the dangers to the right to intimacy have multiplied with the emergence of new technologies, the digital revolution, and the increasingly prominent role played by social networks such as Facebook. Thus, we need to focus not only on the

71 Kelsen (note 58), 100-101

72 Arendt (note 6), 50-52, 72

73 Arendt (note 61); Arendt (note 35), 207-208; Lafer (note 3), 237-272

74 Arendt (note 2), 610-616

75 Lochak (note 14), p. 34

76 Arendt (note 61), 108; Arendt (note 6), 50

omni videns power of governments, but also on societies. Paradoxically, while new technologies and the digital revolution have bolstered the potential for the *ex parte populi* exercise of the right to information, they have also shrunk the potential for the *ex parte populi* exercise of the right to intimacy, given how they have supported a tendency to make a “spectacle” of the private realm.

VI. The Right to have Rights and the Internationalisation of Human Rights

Norberto Bobbio distinguishes between three approaches to human rights in his analysis of the practical problems of protecting those rights internationally from a Kantian point of view. The first (historically and otherwise) is the promotion to spread and ensure the *erga omnes* consolidation of the value of the human rights. The second, which in practice came about in 1976 with the entry into force of the two Covenants of 1966, is control. This consists of monitoring—through reports, interstate communications and individual petitions—of state compliance with their international human rights treaty commitments. Both promotion and control are an expression of the *vis directiva* of influence, and it should be mentioned that the monitoring bodies, especially the expert committees established by the major human rights treaties, are independent *third parties* acting *inter-partes* in favour of human rights at the international level. The third approach is to *guarantee* rights, which happens when there is a real legal remedy.⁷⁷ This happens at the regional level in Europe through the European Court of Human Rights operating in accordance with the European Convention on Human Rights; and through the Inter-American Court of Human Rights in the Americas, which operates on the basis of the Convention of San Jose, Costa Rica. And it happens at a global level in the criminal sphere for the crimes listed in the 1998 Rome Statute of the International Criminal Court.⁷⁸

International law is a changing entity, emanating from an international society with specific features, and differs in its dynamics from the law that applies within states. In international law, there is always a troublesome gap between norms and reality, and this applies most particularly to human rights violations. According to Koskeniemi, one can examine the influence of international law norms, including the *jus cosmopolitanum* of human rights, from two perspectives: from the point of view of the doctrine of sovereignty and of the sources of law. According to the first view, international law is held to depend on the self-containment of state sovereignty and is a result of the various factors that explain limits to its scope, which may not be permanent. According to the second view, international legal norms gain life when they become positive law regardless of state sovereignty, and thereafter operate according to the juridical logic of their sources. Sovereignty doctrines make room for what Carl Schmitt called “decisionism” of exception, and therefore have an affinity with realism in the theory of international relations. The doctrine of sources makes room for normativism and the international domestication of power

⁷⁷ Bobbio (note 12), 35-37

⁷⁸ Piovesan, Flávia, *Direitos Humanos e Justiça Internacional*, São Paulo: Saraiva, 2006

through law (Kelsen's "peace through law"), and so has an affinity with the idealistic approach of international relations theory.⁷⁹

The dichotomy between norms and facts, between sources and sovereignty, and between idealism and realism are not mutually exclusive in my view. As Miguel Reale states, they operate in a dialectic of mutual implication and polarity, in which there is a permanent and evolving relationship between the two poles of the dichotomies, which cannot be understood separately in the field of law in general and in the field of international law in particular.⁸⁰ I myself experienced this complementary dialectic when serving as Minister of Foreign Affairs, not least because international law is an integral part of the repertoire and language of diplomatic practice.

Indeed, essential aspects of the international system and states behaviour in today's world are shaped by legal norms and international organisations. This is why international law is "empowering". It can legitimise and legalise some diplomatic practices and, conversely, delegitimises some state actions. That is why it is pragmatic for a country to argue its position using international law in the daily management of international relations and diplomacy. In other words, where international law is concerned, the pragmatic dimension prevails over the syntactic or semantic dimensions of legal discourse, to borrow from Tercio Sampaio Ferraz Jr. The pragmatic approach is concerned with persuasion and the behaviour of those on the receiving end of a decision. It expresses the "taming" of power that results from an objective legal argumentation, of a country's position. It is therefore an element of "soft power" that Brazil must safeguard and protect in the context of the specificities of its global insertion and constitutional provisions.⁸¹

The 1988 Brazilian Constitution is the constitution of a democratic state and as such is open to international law. Article 4 of the Constitution signals that openness, since the principles it enshrines and should guide Brazil's international relations are akin to those that govern the international community under international public law (see Article 2 of the UN Charter). The principle that affirms the pre-eminence of human rights (Article 4.II) is an innovation that also signals the shift in Brazil from an authoritarian to a democratic regime. This tenet affirms a principle that is valid both at home and abroad, namely that the exercise of power cannot be restricted to the standpoint of rulers, but must include the standpoint of those who are governed. In other words, in its conduct abroad Brazil must make an *ex parte populi* and not just an *ex parte principis* reading of international reality.

The principles enunciated in Article 4 of the Constitution provide a normative framework to guide the executive as it conducts Brazil's foreign policy as part of its competences. The day to day application of the principles enshrined in Article 4 is the responsib-

⁷⁹ Koskenniemi, M., *From Apology to Utopia*, Cambridge: Cambridge University Press, 2005, 574-575

⁸⁰ Reale, M., *Fontes e modelos do direito: Para um novo paradigma hermenêutico*, São Paulo: Saraiva, 1994, 85

⁸¹ Crawford, J. & Koskenniemi, M., Introduction, in *The Cambridge Companion to International Law*, eds. Crawford & Koskenniemi, Cambridge: Cambridge University Press, 2012, 1-21; Simpson, Gerry, International Law in Diplomatic History, in *The Cambridge Companion to International Law*, eds. J. Crawford & M. Koskenniemi, Cambridge: Cambridge University Press, 2012, 25-45; Koskenniemi, M., International Law in The World of Ideas, in *The Cambridge Companion to International Law*, eds. Crawford & Koskenniemi, Cambridge: Cambridge University Press, 2012, 47-68; Sampaio Ferraz Jr., Tercio, *Introdução ao Estudo do Direito: Técnica, decisão, dominação*, São Paulo: Editora Atlas, 1994, 309-346

ility of the Minister of Foreign Affairs, who is, *ex officio*, the main collaborator and advisor of the President of the Republic, who is constitutionally mandated to establish foreign policy guidelines (Article 84 and Article 87, sole paragraph of the Federal Constitution).

The role of principles as opposed to rules is to suggest a path, to optimise the values they contain. In the case of Article 4.II, the purpose is to promote the pre-eminence of human rights in the international arena through Brazil's foreign policy.

While serving as Minister of Foreign Affairs in 1992 and 2001-2002, I sought to further develop and deepen the adherence of a re-democratizing Brazil to international and regional human rights conventions, and to ensure that it participated in the negotiation of new agreements and in international and regional human rights bodies.⁸² In this sense, I strove to strengthen, through the legal presence of Brazil, the importance of a human rights *jus cosmopolitanum* in the international sphere.

As already mentioned, Article 28 of the Universal Declaration of Human Rights enunciates the right to a social and international order in which the rights and liberties therein may come to fruition. To what extent, in light of my experience conducting Brazil's foreign policy, does the current international order favour or hinder the pre-eminence of human rights in the international sphere?

Raymond Aron concludes his book, *Paix et Guerre entre Nations*, with a praxeological study of the antinomies faced by those in charge of conducting the foreign policy of states. Such persons confront what Aron calls the Machiavellian and the Kantian problems. The first refers to realism of means in foreign policy, which ultimately allows for the use of force and focuses on preserving the autonomy and independence of states at the international level. The second refers to the search for a "perpetual peace", a principle to govern the whole of humanity that overrides the "morality of battle" underlying the friend-foe relationship.⁸³ Article 4.I of the Brazilian Constitution enunciates the principle of national independence, and thus references Aron's Machiavellian problem. Article 4.II establishes the principle of pre-eminence of human rights and therefore references one of the aspects of the Kantian problem, since one of the facets of a human rights *jus cosmopolitanum* is that their protection ensures freedom, justice and peace in the world and, conversely, that these goals are hindered by disrespect and disregard for the international framework of the right to have rights.

When dealing with the antinomies arising from these perspectives, I believe it is useful (albeit taking some liberties) to resort to another of Aron's distinctions to deal with chance and evolution: the dichotomy between the politics of understanding and the politics of reason. In the politics of understanding, strategy is a tactic that renews always itself; it has the realist nature of a praxeology that helps sovereignty to navigate in the midst of international norms guided by the Machiavellian problem. In the politics of reason, tactics are subordinated to a strategy with a sense of direction of Kantian inspiration, which recognises the regulatory role of a Reason that encompasses all of humanity, helping sov-

82 Lafer, C., *A inserção internacional do Brasil: A gestão do Ministro Celso Lafer no Itamaraty*, Brasília: MRE, 1993, 237-239; Lafer, C., Prefácio a Pedro Dallari, in *Constituição e relações internacionais*, São Paulo: Saraiva, 1994, xv-xxv; Lafer, C., *Mudam-se os Tempos: Diplomacia brasileira 2001-2002*, Brasília: FUNAG/IPRI, 2002, vol. II, 33-47; Lafer, (note 90) 11-28

83 Aron, R., *Paix et Guerre entre les nations* 1962, Paris: Colmann-Levy, 565 *et passim*

ereignty to navigate in the midst of international norms.⁸⁴ Based on the reading of the dichotomy between the politics of understanding and the politics of reason, I am proposing a roadmap for those in charge of foreign policy making, according to which tactics cannot ignore the Machiavellian problem of the existence and actions of *Machtstaat* – power states – in international life, but equally, diplomatic activities must strategically strive to implement and make a reality the *jus cosmopolitanum* that establishes the pre-eminence of human rights.

This sense of purpose and direction is within reach of Brazil's foreign policy and is favoured by the nature of Brazil's international insertion, among them its geographical location in South America, the absence of territorial disputes with its ten neighbours, a historical distance from the most serious poles of tension in international life, the weight of a continental country with a vested interest in the rules and practices of the international system, and the importance of its diplomatic soft power achievements.⁸⁵ All these characteristics favour the exercise of the politics of reason and, consequently what Alexy calls the "optimisation mandate", when reflecting the pre-eminence of human rights in foreign affairs as mandated by Article 4-II of the Constitution.⁸⁶

The politics of reason to ensure the pre-eminence of human rights in foreign policy does not occur in a vacuum or in the abstract. As Portinaro evoking Heidegger suggests, it happens in a real context marked by "resistibility".⁸⁷ Its implementation depends on real diplomatic circumstances, since the *jus cosmopolitanum* is not a *datum* but rather a *construction* that is developed within the international system. This *construction* has its weaknesses and so it is no easy task to create the conditions for the right to an international order that permits the full realisation of rights and liberties, as enunciated by Article 28 of the Universal Declaration of Human Rights.

Indeed, the international system is composed of different governmental and non-governmental players that do not have a univocal view of the structural foundations of the international order and the domestic structuring of societies and states. This establishes persistent political constraints that, in a heterogeneous and fragmented system, may give rise to questions about the legitimacy of the acts of rulers, who are always sensitive, even in democracies, to intrusions on state sovereignty. This is why consensus around a *jus cosmopolitanum* is elusive. And in my view, this is why the Vienna Declaration and Programme of Action emerging from United Nations Conference on Human Rights of 1993, constituted a Kantian moment in international life, and was the fruit of a "thin morality" consensus.⁸⁸ In that Kantian moment, the preamble of the Vienna Declaration reiterated the importance of the Universal Declaration of Human Rights as an inspiration for the development of international human rights law. In the first paragraph it affirmed the "the solemn commitments of all States to fulfil the obligations to promote universal

84 See Lafer, C., *A Identidade internacional do Brasil e a política externa brasileira*, São Paulo: Perspectiva, 2004

85 See Lafer, C., *A Identidade internacional do Brasil e a política externa brasileira*, São Paulo: Perspectiva, 2004

86 Alexy, R., *Teoría de los derechos fundamentales*, Madrid: Centro de Estudios Políticos y Constitucionales, 2002, 86-87

87 Portinaro, P. P., *Il realismo politico*, Rome/Bari: Laterza, 1999, 14

88 Walzer, M., *Thick and Thin: Moral Argument at Home and Abroad*, Notre Dame: University of Notre Dame Press, 1994

respect for, and observance and protection of all human rights”; and paragraph 5 confirmed that “all human rights are universal, indivisible and interdependent and inter-related”.

The world is not experiencing a Kantian moment at this time. This is one of the reasons why the international rule of law is provisional, and in the area of human rights in particular, rules and facts, and sources and sovereignty collide. My view is that the idealism-realism dichotomy in foreign policy cannot address the ontological complexity of international life and thereby weakens the scope of diplomatic judgment.

Given its philosophy of law underpinnings, the English school of international relations, particularly the work of Martin Wight but also of Hedley Bull, holds that international reality can be read in three ways: according to the realism of power tradition inspired by Machiavelli and Hobbes; according to the tradition of rationality, inspired by the potential for interstate sociability as explained by Grotius, from which emerges the *jus voluntarium* that establishes mutually agreed norms and institutions for international life, and produces an international society in which states share an interest in maintaining arrangements for their existence; and according to the Kantian view, inspired by an all embracing “reason of humanity”, which establishes the conditions for the *jus cosmopolitanum* of human rights.⁸⁹

Because of the ontological complexity of international reality, the universal features of the three traditions are elusive and cannot apply to diplomatic life without an analysis of the contextual specifics. This is why diplomatic decisions are based on reflective rather than determinative judgments, when dealing with the interplay between theory and practice. In other words, as per Arendt’s interpretation of Kant, the validity of reflective judgment stems from discerning the universal in a particular and specific situation. This exercise of discernment in diplomatic judgment is more akin to the capacity to differentiate than to organise and systematise regularities such as space, number or resources.⁹⁰

With the attention and diplomatic skills that are common in Brazilian foreign policy it is possible to identify opportunities to promote the global pre-eminence of human rights on the basis of the politics of reason. Brazilian delegate Austregésilo de Athayde did this at the time of the approval by the United Nations of the Universal Declaration of Human Rights of 1948; and so did Gilberto Saboia, in collaboration with J. A. Lindgren Alves, at the 1993 Vienna Conference on Human Rights.⁹¹

In his conclusive essay, in *L’età dei diritti*, Bobbio argues that making human rights real is a long-term process. However, Bobbio reflects on what the historical signs identified by Kant in *The Contest of Faculties* (*signum rememorativum, demonstrativum* and

89 Wight (note 79), 1991; Wight, M., *Four Seminal Thinkers in International Theory*, eds. G. Wight & B. Porter, Oxford: Oxford University Press, 2005; Bull, H., *The Anarchical Society: A Study of War in the World*, London: Macmillan, 1977; Bull, H., *Hedley Bull on International Society*, eds. K. Alderson & A. Hurrell, London: Macmillan, 2000; Lafer, C., *Comércio, Desarmamento e Direitos Humanos*, São Paulo: Paz e Terra, 1999, 15-22, 179-200.

90 Arendt (note 42); Arendt (note 45), 202; Lafer, C., Discurso no recebimento do título de doutor honoris causa da Universidade Nacional de Tres de Febrero, *Política Externa* 20(4) March-May, 2012, 245-254.

91 Sandroni, C. & Sandroni, L. de A., *Austregésilo de Athayde: O século de um liberal*, Rio de Janeiro: Agir, 1998, 458-478; Saboia, G. V., Um improvável consenso: A Conferência Mundial dos Direitos Humanos e o Brasil, *Política Externa* 2(3) 1993, 3-18; Saboia, G. V., O Brasil e o sistema internacional de proteção dos direitos humanos, in *O Cinquentenário da Declaração Universal dos Direitos Humanos*, ed. A. do Amaral Jr. and C. Perrone-Moisés, São Paulo: EDUSP, 1999, 219-238; Lafer (note 56)

prognosticum) may suggest about the direction of human rights.⁹² In my view, the emergence of the *jus cosmopolitanum* of human rights is suggestive of the potential of this trend, which as Bobbio notes evoking Kant, must be made denser through fair concepts, great experience and goodwill.⁹³

VII. Anti-Semitism as Racism: The Brazilian Supreme Court and the Ellwanger Case (2003)

In a famous passage, Oliver Holmes stated that the life of law is experience. It is more related to the “felt necessities of the time”, the “prevalent moral and political theories”, the “intuitions of public policies”, the “story of a nation development” that “the law embodies” than to the logical consistency of a system.⁹⁴ These comments match my comments here regarding the role of experience related to human rights being a *construction* rather than a *datum*, and they are relevant to the analysis of the Ellwanger case. This was a prominent human rights case in Brazil that was decided by the Federal Supreme Court in 2003. I took part as *amicus curiae* in this case, and so was able experience “the living law” when I addressed two important topics in my brief, which relate to my own history as a scholar in human rights law and were reviewed and settled by the Federal Supreme Court judgment (Supremo Tribunal Federal - STF).

The first topic was the scope of the crime of racism, and the dispute was about whether the court should classify anti-Semitism as a form of racism. The second topic, which emerged as a consequence of the first, was the possible conflict between constitutional principles, specifically the Federal Supreme Court deliberation about the potential conflict between freedom of expression and convicting Ellwanger for “hate speech” as a form of racism.

The case may be summarised as follows: Ellwanger, a publisher in the city of Porto Alegre, systematically and deliberately published books known to disseminate anti-Semitic lies, such as the *Protocols of the Wise Men of Zion*, and others denying the Holocaust as a historical fact, including his book, *Jewish or German Holocaust? Behind the Scenes of the Lie of the Twentieth Century (Holocausto judeu ou alemão? Nos bastidores da mentira do século XX)*. He was convicted of the crime of the practice of racism in accordance with Brazilian legislation, which includes the “practice of racism” among the crimes arising from prejudice against race or colour: “To perform, induce or incite, through means of communication or publications of any kind, discrimination, prejudices against race, colour, religion or national or ethnic origin.” (Article 20 of Law 7716 of October 5, 1989, as amended by Law 8011 of August 21, 1990). This legislation implemented Article 5-XLII of the Constitution on the protection of rights and guarantees, which reads as follows: “The practice of racism constitutes a crime for which there is no bail and no statute of limitations and for which the penalty is imprisonment, pursuant to law.” Among other elements of the Brazilian constitution, this text exemplifies the specification of the general

⁹² Bobbio (note 12), 252-253, 264; Kant (note 57), 181

⁹³ Bobbio (note 12), 253, 266

⁹⁴ Holmes, Oliver Wendell, *The Common Law*, Boston: Little, Brown & Co., 1963, 6

principle of equality and non-discrimination that opens the main section of Article 5 in which it is included.

The matter was brought before the Federal Supreme Court because Ellwanger had applied for a writ of habeas corpus – previously denied by the Superior Court of Justice – on the grounds that because Jews were not a race, the crime imputed to him was that of incitement against Jews, not racism. Ellwanger thus sought to avoid the constitutional “no statute of limitations” rule and thus to have the statute of limitations apply to the crime he was accused of.

Justice Moreira Alves who issued the first opinion, accepted Ellwanger’s argument, explaining that he interpreted the crime of “the practice of racism” in a restricted way; expressing his concern that this sort of crime should not be subject to a “no statute of limitations”; and holding that history suggested that racism should be understood as racial prejudice or discrimination against the black race in particular.

I prepared my *amicus curiae* brief after this opinion was issued, in response to the restrictive interpretation of the crime of the practice of racism. In this detailed brief, I discussed, *inter alia*, the concept of race, Brazil’s history of racism – including anti-Semitism – the criteria for interpreting human rights, and the interface between Brazilian and international law as it applied to the issues raised by Ellwanger’s writ of habeas corpus. My starting point was the Constitutional “idea of a work to be achieved” as enunciated in Article 3-IV of the Constitution, which lays out one of basic tenets of the Brazilian republic, namely: “To promote the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination.” My brief also addressed this issue from an international perspective, in light of the statement made on November 21, 2002 by the then United Nation High Commissioner for Human Rights, Sergio Vieira de Mello. In response to multiple incidents of racism worldwide, as listed by a United Nations documents on xenophobia, negrophobia, Islamophobia, and anti-Semitism, Vieira de Mello stated that: “There are international legal obligations a majority of states have accepted that prohibit incitement to racial, religious and ethnic hatred – not least anti-Semitism – and they must be adhered to.”

My brief was extensively discussed by the Federal Supreme Court justices and was included in their deliberations when they ruled on the petition of habeas corpus No. 82.424/RS.⁹⁵

The argument in my brief was that, from a scientific point of view, there are no races but only one human race, the “human family” as stated in the preamble of the Universal Declaration of Human Rights. If, in fact, Jews are not a race, neither are whites, blacks, mulattoes, indigenous peoples, gypsies and any other members of the human species. However, all may be victims of racism, since discriminatory practices are historical and cultural, originate prejudices, and have a negative political impact in a democratic political community on the *construction* of human rights that are based on equality and not on discrimination. It is no accident, therefore, that the Constitution refers to “the *practice* of racism”, a term that is common in international law. I argued that discussing the crime of

⁹⁵ See Lafer, C., *A Internacionalização dos Direitos Humanos: Constituição, Racismo e Relações Internacionais*, São Paulo: Barueri, 2005, 33-88; Federal Supreme Court, *Crime contra o racismo e antissemitismo: Um julgamento histórico do STF - Habeas Corpus nº 82.424/RS*, Brasília: Federal Supreme Court, 2004.

the practice of racism based on the term “race” is tantamount to stripping the constitutional tenet of its legal content. Ultimately, it means converting the crime of practice of racism into an impossible crime for lack of a subject: races.

In this context, I argued that the scope of the crime of the practice of racism contemplated by Brazilian law – which has Law 1390 of July 3, 1951 as its starting point (the Afonso Arinos Law) – is clearly in line with the United Nations International Convention on the Elimination of All Forms of Racial Discrimination of 1965, in the negotiations of which Brazil took part, and the text of which was incorporated into Brazilian law in 1969. In fact, Article 1 of the Convention provides a broad definition of “racial discrimination” as “any distinction, exclusion, restriction or preference based on colour, descent or national or ethnic origin, which has the *purpose* or *effect* of *nullifying or impairing* the recognition, enjoyment or exercise, on an equal footing of human rights and fundamental freedoms in the political, economic, social cultural or any other field of public life” (emphasis added). It is important to note the reference to “purpose” or “effect”, which means that it suffices that intent be present; further, the terms “nullifying and impairing” have a broad meaning and, by the way, are the cornerstone on which the General Agreement on Tariffs and Trade (GATT) built its dispute settlement system.

Article 1 of the Convention is supplemented by Article 4(a), which sets forth the commitment of the States to declare “an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitements to such acts...”

I sustained in my brief that, in light of the international commitments adopted by Brazil and as a result of the internationalisation of human rights, Ellwanger’s acknowledged crime of incitement against Jews was a crime of the practice of racism. The Federal Supreme Court accepted the argument and concluded, by a majority of eight votes, that anti-Semitism is racism. The first and fourth points the summary indictment of September 17, 2003, for which then Chief Justice Maurício Corrêa acted as Reporting Justice, read as follows:

1. To write, publish, promote books that praise biased and discriminatory ideas against the Jewish community (Article 20 of Law 7716/89, as amended by Law 8081/90) constitutes a crime of racism, subject to no bail and no statute of limitations (Article 5, XLII of the Federal Constitution). ...

4. Race and racism. The division of human beings into races results from a process that has a merely political and social content. This presumption gives rise to racism which, in turn, generates discrimination and segregationist prejudice.

Unsurprisingly, the existence (or not) of limits to freedom of expression and, more specifically, the acceptability of “hate speech” and Holocaust-denying “revisionism” were discussed throughout the proceedings. Given the comparative law import of the issue, it is worth mentioning that many democratic states have outlawed hate speech because it affects social inclusion, and several European countries, including France, have laws that criminalise denial of the Holocaust. Also noteworthy is that denial of the Holocaust brings

to the fore the issue of factual truth, or the truth that cannot be changed, as emphasised by Hannah Arendt in her essay on “Truth and Politics” in *Between Past and Future*⁹⁶; further, in a polemic with historian Renzo de Felice in 1996, Bobbio distinguished positive from negative revisionism. Positive historical revisionism is that which uncovers new facts to advance our understanding of the past; negative revisionism is undertaken in a partisan spirit and denies proven facts, as Faurisson did in France when he denied the Holocaust.⁹⁷

Regarding factual truth, the German Constitutional Court ruled that incorrect information does not merit protection, and that the protection of freedom of opinion does not include assertions that known or proven facts are incorrect.⁹⁸

In my brief, I explored the convergence between Brazilian law and international law and how the latter could contribute to elucidate the Ellwanger case. Brazilian law is in line with Article 4 of the Convention on the Elimination of all Forms of Racial Discrimination, in which State Parties commit to making the dissemination of ideas based on racial superiority or hatred punishable by law. Further, Article 4 relies upon the *vis directiva* of Article III(a) of the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide, which Brazil signed and promulgated in 1952, and which defines the direct and public incitement to commit genocide as a punishable act.

Some State Parties objected to Article 4 of the Convention when the text was negotiated, arguing that it would limit freedom of expression, but I stressed that the limitation was considered broadly justified and maintained in the final text because of the historically proven need for “the right to have rights”.

The same objections were raised with regard to Article 28-2 of the more far-reaching International Covenant on Civil and Political Rights, but the view prevailed, as stipulated in the text, that “any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. The International Convention on Civil and Political Rights of 1966 was incorporated into Brazilian law in 1992.

In the regional context, the Convention of San Jose, to which Brazil is also a party, conditions fundamental rights and freedoms of a person to the fundamental rights and freedoms and dignity of others. Like Article 20-2 of the International Covenant on Civil and Political Rights, Article 13-5 of the San Jose Convention establishes that “any propaganda for war and any advocacy of national, racial or religious hatred that constitute incitement to discrimination, hostility or violence shall be prohibited by law”.

I argued that both Brazilian law and the international treaties to which Brazil is a party and which were incorporated into Brazilian law are in keeping with the Brazilian Constitution, since the boundaries for the exercise of liberties can be defined by law. The standard of legitimacy and legality when determining the constitutionality of a law that limits freedom of expression is defined by Article 3 of the Constitution, which establishes that one of Brazil’s fundamental goals is “to promote the well-being of every citizen, without any discrimination on account of origin, race, sex, colour, age or any other condition”.

96 Arendt (note 1), 227-264

97 Bobbio, N., *Il dubbio e la ragione*, Turin: Stampa, 2004, 8.

98 See GE, Decision No. 90241 - Auschwitz-Lüge case, item 1(b)

This is why I argued that Brazilian law, under which Ellwanger was indicted, is consistent with the “idea of a work to be achieved” where human rights are concerned, as expressed by the 1988 Constitution which emerged with the process of re-democratisation, and with the relational concept that the freedoms of one person are limited by the injury that may be caused to the freedoms of others. In brief, Ellwanger’s conduct was a criminal offense because it led to the “nullification and impairment of the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”, as per Article 1 of the Convention on the Elimination of all Forms of Racial Discrimination.

The STF Justices scrutinised the limits on freedom of expression, citing international treaties and “hate speech”. In his opinion, Justice Gilmar Mendes referred to the European Court on Human Rights decision confirming the judgment against another Holocaust denier, Garaudy, who had contested the decision of the French court that ruled against him for violating his freedom of expression.

The STF endorsed the limits on freedom of expression, denying Ellwanger’s habeas corpus writ by eight votes, in the thirteenth and fourteenth paragraphs of the summary indictment:

13. Freedom of expression. Not guaranteed by the Constitution in absolute terms. Moral and legal limits. The right to freedom of expression cannot protect speech that is immoral and implies a criminal offense.

14. Public liberties are not unconditional and should therefore be exercised harmoniously, in keeping with the limits defined by the Federal Constitution (CF, Article 5, paragraph 2, first part). The fundamental tenet of freedom of expression does not cover the *right to incite racism* because an individual right cannot translate into protection of illicit acts, as happens with criminal offenses against honour. Pre-eminence of the principles of human dignity and of equality before the law.

The STF proceedings stretched out on over five long sessions until September 19, 2003, when the STF decision and the full text of the opinions issued by the justices were made public. On that occasion, Justice Mauricio Corrêa, who led the Ellwanger case with great discernment, stressed the landmark nature of the case. He asserted that the majority had adopted a teleological and systematic interpretation of the Constitution, reflecting “the felt necessities of the time, the prevalent moral and political theories, the intuitions of public policy, and the story of a nation’s development, which the law embodies,” which Oliver Holmes referred to.

I concluded my review of the judgment and the opinions issued by the Justices with a citation by Bobbio, whose reflection had inspired my *amicus curiae* brief.⁹⁹ In an address delivered in Turin on January 10, 1960, when swastikas first appeared on European after the end of the Second World War, Bobbio had stated:

⁹⁹ Lafer (note 82), 89-120

Our duty is to affirm that there are no races but rather human beings; that racial hatred is one of the most terrible torments of humanity; that the most violent expression of racial hatred was Hitlerism, supported by most German “good patriots”; that the appearance of a swastika is a shadow of death. In any place it reappears, men of good will must, although split as to their ideologies and interests, cancel it in a pact of solidarity.¹⁰⁰

This was what the STF achieved as a result of the noteworthy opinions issued by – and I cite their names in the order that they cast their opinions – Justices Mauricio Corrêa, Celso de Mello, Gilmar Mendes, Carlos Velloso, Nelson Jobim, Ellen Gracie, Cezar Peluso, Sepúlveda Pertence.

VIII. Transitional Justice: Setting Up the Brazilian National Truth Commission (2011)

Transitional justice refers to the process whereby a re-democratised society deals with the legacy of repression, as Brazil is doing with its authoritarian past.¹⁰¹ My experience of the Brazilian authoritarian regime led me to prioritise human rights in my work on the philosophy of law and on international law. So it seems appropriate to end my already extensive reflections by focusing on the creation of the Brazilian Truth Commission through Law 12528 of November 18, 2011. The seven renowned members of the Commission were appointed by President Dilma Rousseff by a Decree of May 10, 2012, and took office on May 16, 2012 at the Planalto Palace in the presence of former Presidents José Sarney, Fernando Collor, Fernando Henrique Cardoso and Luis Inácio Lula da Silva. This ceremony thus strengthened the state rather than a government or party orientation of the duties and responsibilities of the Commission.

My initial reflections on this matter were made in May 2012 at the International Seminar on *Contemporary History: Memory, Trauma, Reparation (História Contemporânea: Memória, Trauma, Reparação)* held in Rio de Janeiro. Professors Carlos Fico, Maria Paula Araújo and Monica Grin organised the seminar, which adopted a multidisciplinary and comparative approach to the topic. All the papers, including my own revised contribution, were subsequently published. My paper *Justice, History, Memory: Reflections on the Truth Commission* (original title, *Justiça, História, Memória: Reflexões sobre a Comissão da Verdade*), was published as the opening chapter in the book of collected essays, of the Seminar on *Violence in History: Memory, Trauma and Reparation (Violência na história: memória, trauma e reparação)*.¹⁰²

When preparing my reflections for the Rio seminar I recalled Ricoeur’s momentous and deep thoughts on memory, history and forgetting,¹⁰³ and Hannah Arendt’s reflections on the importance of factual truth as truth in politics, and on the redemptive power of narrative. On the latter issue, I also took into account the reflections on Hannah Arendt’s

100 Bobbio (note 34); Lafer (note 90), 120

101 See Teitel, R., *Transitional Justice*, New York/Oxford: Oxford University Press, 2000

102 Lafer, C., *Justiça, História, Memória: Reflexões sobre a Comissão da Verdade*, in *Violência na História: Memória, trauma, reparação*, eds. M. P. Araújo, C. Fico, M. Grin, Rio de Janeiro: Ponteio, 2012, 9-22

103 Ricoeur, P., *A Memória, a história, o esquecimento*, Campinas: Editora da Unicamp, 2007

study of the Eichmann case by Israeli thinker and Professor of Law, Leora Bilsky. I brought these reflections to the conference in which I discussed the contemporary approach to Hannah Arendt's analysis. I delivered that conference paper in Curitiba on September 11, 2011 at the Colloquium Eichmann in Jerusalem, *Fifty Years On: Anti-Semitism and Genocide Between Memory and History (Eichmann em Jerusalém: Cinquenta anos depois: antissemitismo e genocídio entre Memória e História)*, organised by Professor Marion Brepohl.¹⁰⁴

Leora Bilsky notes that Hannah Arendt focused on the unprecedented nature of the crime of genocide perpetrated by Eichmann, and on the justification for punishing him according to a "humanity perspective" as discussed above. As also noted above, Hannah Arendt criticised the "particularism" of the attorney's position in that case, stressing that he focused on the suffering of the victims – on the Jews who were sentenced without guilt – and not on the unprecedented nature of the crime of genocide perpetrated by Nazi rulers. Bilsky adds that the prosecutor's particularism had broader and more far-reaching, albeit unintended, implications that Hannah Arendt did not fully account for.¹⁰⁵ In contrast with the proceedings at Nuremberg, the Eichmann court allowed multiple voices and victim narratives to be heard. In their depositions and testimonies, the latter offered a much clearer picture than documentary evidence would have done of the inhuman experience the victims had suffered. In so doing, the case provided more concrete legal elements concerning the crime of genocide. Thus, the recognition *ex parte populi* of the role that victim testimonies can play became a way of meting out a form of justice that is broader than the judgment against Eichmann *per se*. In the words of Hannah Arendt, it lent dignity to the redemptive power of the narrative about their suffering.

At the Curitiba conference, I stressed that recognizing the role of victim testimonies about arbitrary repression is a significant aspect of transitional justice and truth commissions in particular, which focus on victims. In the back of my mind was Elizabeth Young-Bruehl's discussion of the South African Truth and Reconciliation Commission in light of Arendt's reflections on factual truth, and of the role of narrative and forgiveness as a means to address the irreversible flow of history, not by forgetting past evils but to avoid the creation of a barrier to future coexistence. As we know, the South African Commission did not have prosecutorial powers. It relied on the authority of Nelson Mandela, balanced the specific post-apartheid requirements of justice, accountability, stability, peace and reconciliation, and established procedures for forgiveness and amnesty in the interaction between the perpetrators of a hideous racism and their victims.¹⁰⁶

In Brazil, it was civil society that initiated memory work about the legacy of repression, particularly the Justice and Peace Commission of the Archdiocese of São Paulo, which in those troubled "dark times" was bravely supported by Cardinal D. Paulo Evaristo Arns. The Archdiocese of São Paulo organised the publication in 1985 of *Brazil: Nunca Mais (Brazil: Never More)*, which was based on research initiated in 1979 of Military Justice proceedings (specifically, the documents produced by the authorities legally in charge of

104 Lafer, C., Reflexões sobre a atualidade da análise de Hannah Arendt sobre o processo Eichmann, in *Eichmann em Jerusalém: 50 anos depois*, ed. M. Brepohl, Curitiba: Ed. UFPR, 2013, 17-33.

105 Bilsky, L., *Transformative Justice*, Ann Arbor: University of Michigan Press, 2004

106 Young-Bruehl, E., *Why Arendt Matters*, New Haven: Yale University Press, 2006, 110-122

repressing “subversive activities”). *Brazil: Nunca Mais* played the role of a truth commission *avant la lettre*. It gave an exact account of the modus operandi of the crypto-government and of the repressive system and of the widespread use of torture. It endeavoured to substantiate the truth with documentary evidence, the goal of which was to warn against the recurrence of repression rather than to prepare evidence for a Nuremberg-style trial. The book was published during the period of transition to democracy, and a Constituent Assembly was being set up to rebuild Brazil’s democratic institutions. *Brazil: Nunca Mais* was clearly inspired by the evangelical precept that the pursuit of knowledge is an essential condition for freedom.

In its preface, D. Paulo urged the Brazilian government to sign the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, the preamble to which is based on the provisions of Article 5 of the 1948 Universal Declaration of Human Rights, and on Article 7 of the 1966 International Covenant on Civil and Political Rights. Taking the specific Brazilian context into account, D. Paulo emphasised the importance of the internationalisation of human rights and of *jus cosmopoliticum* in terms of “the right to have rights”.¹⁰⁷

The rules and activities associated with transitional justice raise the classical question about the relationship between law and morality. The values underpinning the norms and activities of transitional justice emerge in response to the repression that gives rise to it. They are also shaped by the features specific to the processes of the political transition from authoritarianism to democracy in the various countries that experienced such dynamics, as well as with the severity of the authoritarian past and its level of radicalism.

Political scientists have reflected extensively on the dynamics involved in transitions to democracy. In Brazil the transition did not take place overnight in contrast to what happened in Portugal with the Carnation Revolution, or in Argentina with the fall of the military regime after the Malvinas war. In Brazil, re-democratisation was a gradual and long-term process.

Indeed, on the one hand, Brazil’s rulers perceived the risks of entropy for the regime, and experimentally initiated a “relaxation” (*dilatação*) and an “opening” (*abertura*) during the Geisel administration; and on the other hand, the opposition to the regime, epitomised by the courageous leadership of Ulysses Guimarães, gradually took advantage of the spaces created by this opening, which included a revitalisation of electoral and Congressional politics. This process benefited from the 1979 amnesty law and the return of those who had been exiled, and from the *glasnost* that increased freedom of the press. The process was marked by uncertainties, advances and setbacks, but was ultimately successful, culminating in the election of Tancredo Neves and in the subsequent Constituent Assembly that drafted the 1988 Constitution.¹⁰⁸

In Brazil, the first institutional steps taken to address the legacy of repression had to do with the affirmation and consolidation of democracy. These culminated in the 1988 Constitution, which dealt politically with the past driven as it was by concern with the future, getting rid of the weight of the juridical and institutional “debris” of authoritarian rule,

¹⁰⁷ Arquidiocese de São Paulo, *Brazil: Nunca Mais*, Petrópolis: Vozes, 1985

¹⁰⁸ Lafer, C., The Brazilian Political System: Trends and Perspectives, *Government and Opposition*, 19(2), Spring 1984; Lamounier, Bolívar, *Da Independência a Lula: dois séculos da política brasileira*, São Paulo: Augurium Editora, 2005, chapters 5 and 6

which suspended the rule of law and promoted to the arbitrariness that gave rise to the violation of human rights.

The Brazilian Congress established the National Truth Commission following the legislative initiative of President Dilma Rousseff. The Commission was preceded by other state institutional initiatives to deal with the legacy of past violence and repression. Senator Aloysio Nunes Ferreira, who was the rapporteur on the matter in Congress, mentioned these prior initiatives, observing that the Commission should bear in mind those precedents. Senator Nunes Ferreira emphasised the work of the Special Commission on the Dead and Missing established by Law 9140 of December 4, 1995, enacted during the Fernando Henrique Cardoso administration. This Commission examined repression during the authoritarian period (1964-1985) and thereby enabled the extension of reparations to the family members of the dead and missing.¹⁰⁹ It was followed by the Amnesty Commission, created by Law 10559 of November 13, 2002, which originated with Provisional Measure of August 24, 2001, also enacted by President Fernando Henrique Cardoso. As a result of these initiatives, several indemnity and reparation measures have been taken since the Luis Inácio Lula da Silva administration, to benefit people affected by arbitrary actions prior to promulgation of the 1988 Constitution.

The Truth Commission is building on the work of these predecessor bodies in order to examine and shed light on gross violations of human rights, with a view to affirming the right to memory and historical truth. The Commission will not have a jurisdictional or punitive nature, so it will neither punish (retributive transition justice) nor indemnify (reparative transitional justice), the latter job having been taken care of by the Special Commission on the Political Dead and Missing and the Amnesty Commission. Under Article 8 of the Act of Transitory Constitutional Dispositions of the 1988 Constitution, the Commission will study the period from September 18, 1946 up to promulgation of the 1988 Federal Constitution, which removed the authoritarian *debris*. However, as Senator Aloysio Nunes Ferreira rightly stated, given the nature of Brazilian political life, the focus of the Commission will be the on the authoritarian regime.

Below, I summarise the important tasks to be undertaken by the Truth Commission and the issues it raises that are germane to the agenda of transitional justice, notably the pursuit of justice, how the activities of the Commission relate to amnesty, the nature of the truth it seeks, and the difference between memory and history.

The Commission can hear the testimony of witnesses in its attempt to administer justice and clarify the facts of and circumstances surrounding the gross violation of human rights. The witness statements taken by a truth commission are usually broader than those heard in judicial proceedings, which is one of the merits of creating such body. If it does its job properly, the Truth Commission will mete out justice by hearing the multiple voices of the suffering of the victims and their families caused by the violation of human rights, regardless of who committed them. It will give back to victims their dignity through the redemptive power of narrative and the difference between describing and listening.

The work of the Commission will not impinge on the limits imposed by amnesty, or on legal discussions about the validity of the Brazilian amnesty law. The word amnesty,

109 Gregori, J., *Os sonhos que alimentam a vida*, São Paulo: Jaboticaba, 2009

which comes from the Greek and means oblivion, has both a phonetic and a semantic similarity with “amnesia.” Amnesties have been instituted since the time of Ancient Greece, when an amnesty was declared, after the victory of Athenian democracy over the bloody oligarchy of the Thirty Tyrants, in the name of reducing social tensions rather than pursuing the truth. This was a legally commanded oblivion with regard to past criminal actions,¹¹⁰ and has nothing to do with forgiveness. Commanded oblivion does not exclude an affirmation of the right of Brazilian citizens to collective ownership of the factual memory about serious human rights violations. In order to guarantee that right, the Commission is *ex lege*, a special locus, not related to the scope of the judiciary and criminal law, set-up to investigate facts and circumstances, the understanding of which is vital for the future of democracy.

What are the nature and role of the truth that it is incumbent on the Commission to ascertain? It is not the juridical truth that characterises the judicialisation of political processes. It is, turning again to the teachings of Hannah Arendt, the factual truth of events, which is the truth of politics. What characterises this truth is the fact that its opposite is not error, illusion or opinion but rather the concealment or manipulation of the facts.¹¹¹ Thus, its modes of assertion are not those of the evidence of rational truth, but rather the unveiling of facts through testimony and access to hidden information, enabled by Law 12527 of November 18, 2011. The duty of the National Truth Commission is, therefore, in the words of Ricoeur, to prevent *forgetting through erasing the marks* of the violation of human rights.¹¹² The Commission is equipped with the necessary powers to achieve these goals. This will allow it to deepen the findings of its final report on the basis of what has been accomplished in Brazil and elsewhere with regard to dealing with the legacy of repression.

This final “circumstantiated” report describing the activities of the Commission, the facts it reviewed, and its conclusions and recommendations, will emphasise the importance of the principle of transparency of power, of the common and visible public arena for the affirmation of democracy. This principle is a constitutive element of a democratic regime based on the public exercise of common power, because what is of interest to all should be known to all. This is why in a democracy publicity is the rule and secrecy the exception. But as Bobbio points out, ensuring the visibility of power is no easy task, even in a democracy, given the difficulties of attaining a *debellatio* of invisible power.¹¹³

The Commission’s report will no doubt reveal the heinous impact on political life of a crypto-power, whether it emerges from the state or society, because it acts in the shadows, hides itself and conceals what it does in secret. In this sense, the broad scope of the Truth Commission will contribute to a key goal of transitional justice, namely defending democracy, since it goes beyond the individual liability and punishment of criminal proceedings.

In addition, the factual truth and its objective and unbiased pursuit by the National Truth Commission will, if properly conducted, contribute to history. Factual truth is not

110 Ricoeur (note 103), 459-462

111 Arendt (note 1), 227-264

112 Ricoeur (note 103), 425 *et seq*

113 Bobbio (note 15), 106-110

history, although the latter depends on the former to the extent that the writing and interpretation of history cannot change actual facts.

Hannah Arendt explains that each generation has the right to write its own history, to rearrange the facts according to its perspective, although this does not mean altering the actual truth itself.¹¹⁴ This is the difference between a historical revision that seeks new facts and elements to develop understanding and reflection, and a partisan *revisionism* that denies manifest facts, such as the negative *revisionism* of the Holocaust denial of the Ellwanger case. Thus, the human rights violations under the authoritarian regime will cease to be an issue of opinion but rather of facts extensively ascertained by the National Truth Commission.

Let me conclude with a final consideration. If successful, the work of the Truth Commission will act as a site of memory, a *lieu de mémoire*, in the terminology of Pierre Nora¹¹⁵, “telling the truth” about the violations of human rights during the period under investigation. This represents the institutionalisation of the will of citizens to build a collective memory of the evils of past human rights violations. In the words of poet Robert Lowell, quoted by Martha Minow in her analysis of truth commissions: “We are poor passing facts” and so we must give “each figure in the photograph his living name.”¹¹⁶ But memory is not history: it chooses, selects, is lived in the present, and concerned with the future.

The memory of repression and the right to the truth about the suffering of the victims is not only proof that one cannot govern with impunity as it is that repression was undoubtedly a constituent element of the authoritarian regime in Brazil. The authoritarian regime has other facets, however. The writing and interpretation of its history requires consideration of other aspects of the period, in a narrative coherence that will emerge from a synthesis of heterogeneous views. By this I mean that historical evaluation of the period involves research and reflection, and is not comparable to the *res judicata* of legal truth in criminal proceedings. To illustrate this point, let us take the example of the New State of President Getúlio Vargas and the presidency of Floriano Peixoto. There were significant violations of human rights that were an integral part of these periods of Brazilian history, but there are other dimensions to those governments that are being examined, explained and evaluated in a more or less positive manner, and they have little to do with the juridical truth of *res judicata*.

In sum, the factuality to which the Truth Commission will contribute is the limit of freedom of interpretation, but historical reality is elusive. As Raymond Aron noted when addressing the limits of historical objectivity, it is elusive and inexhaustible because it is human.

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