Chapter 18

(Im)prescribility of crimes against humanity in the Brazilian Federal Supreme court

https://doi.org/10.56238/methofocusinterv1-018

Ícaro Fellipe Alves Ferreira de Brito
Master's candidate in the Post-graduate Program in Law at Pontifícia Universidade Católica de Minas Gerais (PUC-MG)
Institution: Faculdade de Desenvolvimento do Norte (FADENORTE)
Address: R. Turíbio Mendonça, 550, Jardim Graziela, São Francisco - MG, Brasil, CEP: 39300-000
E-mail: dir.icaro.brito@gmail.com

Maíra Gondim Almeida
Master's candidate in the Post-graduate Program in Law at Pontifícia Universidade Institution: Católica de Minas Gerais (PUC-MG)
Universidade Católica de Minas Gerais
Address: R. Dom José Gaspar, 500, Coração Eucarístico, Belo Horizonte - MG, Brasil, CEP: 30535-901
E-mail: gondimmaira@gmail.com

ABSTRACT
The main purpose of this work is to analyze the standard of judgment of the Brazilian Federal Supreme Court (STF) regarding the imprescriptible nature of crimes against humanity. In this sense, the objective is to answer whether the STF interprets the incorporation of the imprescriptibility, provided in the Convention on the Non-applicability of War Crimes and Crimes against Humanity, in the Brazilian legal system. To this end, it uses a bibliographic and jurisprudential methodology to analyze the outlines of the Argumentation of Breach of Fundamental Precept (ADPF) 153, reported by Minister Eros Grau, as well as Extradition (Ext) 1362, reported by Minister Edson Fachin and conclude that the Supreme Court, although without unanimity, rejects the lack of a statute of limitations, arguing that in addition to Brazil not having subscribed to the above Convention, only domestic law can provide for the state's punitive claim.

Keywords: Crimes Against Humanity, Invalidity, STF.

1 INTRODUCTION

According to the United Nations, transitional justice is considered the combination of strategies, actions, policies, and studies aimed at overcoming and facing a past of serious injuries to human rights, committed in a historical context in the past (UNITED NATIONS ORGANIZATION, 2004).

In this sense, transitional justice represents skillful measures to repair, historically, massive violence against specific social groups. It is considered that Transitional Justice has as general objectives, among others, to judge the perpetrators of human rights violations, investigate the truth of facts that occurred in the past, grant reparations to the victims of crimes, recognize the right to memory, and promote the restructuring of the institutions that, directly or indirectly, contributed to such violations (ACERVO VLADIMIR HERZOG, 2021).

One of the achievements of transitional justice was the creation of the International Criminal Court through the Rome Statute, incorporated into the national legal system after the enactment of Decree No. 4,388/2002. Under Article 7 of the Decree, the following are considered crimes against humanity:

> [...] any of the following acts, when committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack: a) homicide; b) extermination; c) slavery; d) deportation or forcible transfer of a population; e) imprisonment or other form of serious deprivation of physical liberty, in violation of fundamental norms of international law; f) torture; g) sexual assault, sexual slavery, forced prostitution, forced pregnancy, forced sterilization or any other form of violence in the sexual field of comparable gravity; h) persecution of a group or collectivity that can be identified, for political, racial, national, ethnic, cultural, religious or gender reasons, as defined in paragraph 3, or due to other criteria universally recognized as unacceptable under international law , related to any act referred to in this paragraph or to any crime within the jurisdiction of the Court; i) forced disappearance of persons; j) crime of apartheid; k) other inhuman acts of a similar character, which intentionally cause great suffering, or seriously affect physical integrity or physical or mental health (BRASIL, 2002).

Precisely because it constitutes extremely serious crimes, the Convention on the Non-Applicability of Limitations for War Crimes and Crimes Against Humanity, dated 1968, provided for the need for signatory countries to adopt measures to guarantee the non-applicability of crimes against humanity. However, it is imperative to point out that the Brazilian State has not ratified UN Resolution 2391, in which the aforementioned convention was published.

In the Brazilian context, the atrocities that occurred during the military regime materialized very serious violations of human rights and, therefore, embodied a countless number of crimes against humanity. It is noted, in this vein, that throughout the dictatorial period, the framing of what the Rome Statute considers a crime against humanity is undeniable.

In this perspective, under the ideology of “national security” and with the official legitimacy conferred to curb the advance of communism in Brazil, the regime gained support from an apparent sense of normality in political life. The Brazilian democratic opening began in 1974 and represented an agreed trajectory, without there being a sudden rupture of the military regime. The transition started from agreements between the dominant political elites and aimed primarily at the controlled and gradual overcoming of the authoritarian regime marked by the military period (MC ARTHUR, 2021).

Based on the succinct factual description outlined above that, to some extent, permeates the Argumentation of Non-Compliance with a Fundamental Precept (ADPF) 153, which dealt with the reception of the Amnesty Law in Brazil, making it impossible to judge crimes against humanity committed during the period Brazilian dictatorship, as well as permeates the Extradition Action (Ext) 1362, is that the present study brings to light some of the reflexes of each of the analyzed actions, notably regarding the predisposition of crimes against humanity. This is because, based on the joint investigation of both precedents, it is possible to identify a pattern of the decision by the STF, concerning the imprescriptibility of crimes against humanity.

Finally, the purpose of this text is to describe the standard of judgment of the Brazilian Federal Supreme Court (STF) about the imprescriptible nature of crimes against humanity. In this sense, the objective is to answer whether the STF interprets the incorporation of the imprescriptibility, provided in the Convention on the Non-applicability of War Crimes and Crimes against Humanity, in the Brazilian legal system.

For that, bibliographical and jurisprudential research was used, with analysis of the judgment of the Argumentation of Non-compliance with Fundamental Precept 153 (ADPF 153), reported by Minister Eros Grau, as well as the Extradition Action 1362 (Ext 1362), of a report by Minister Edson Fachin.

2 THE PRESCRIBILITY

Before Ext 1362, the Federal Supreme Court judged a request made by the government of Argentina against Salvador Siciliano, a citizen of that country accused of kidnapping and murdering leftist political activists in the 1970s, a member of the terrorist group called Triple A. ministers Edson Fachin (rapporteur) and Luís Roberto Barroso voted to grant the extradition request, under the understanding that the crimes of which the extraditing person is accused cannot be subject to a statute of limitations as they are considered against humanity by Argentina, however, the minister Teori Zavascki asked for a review and presented a dissenting opinion that resulted in the final winner, being designated as the writer for the judgment.

The judgment of Ext 1362, in 2016, intended to be a summary of the winning votes, resulting in the following summary of the judgment published, only, however, in 2018:

> EXTRADITION IS REQUIRED BY THE ARGENTINE REPUBLIC. OFFENSES QUALIFIED BY THE APPLICANT STATE AS AGAINST HUMANITY. PRESCRIPTION OF PUNITIVE PRETENSION UNDER THE PERSPECTIVE OF BRAZILIAN CRIMINAL LAW. FAILURE TO MEET THE REQUIREMENT OF DOUBLE PUNISHMENT (ART. 77, VI, OF LAW 6.815/1980 AND ART. III, C, OF THE EXTRADITION TREATY). DENIAL OF REQUEST.
> 1 . According to the settled jurisprudence of the Federal Supreme Court, "the satisfaction of the requirement concerning double criminality constitutes an essential requirement for granting the extradition request" (Ext 683, Rapporteur: Min. CELSO DE MELLO, Full Court, Dje of 11.21.2008). Along these lines, both the Foreigner's Statute (art. 77, VI) and the extradition treaty signed between Brazil and the requesting State (art. III, c) categorically prohibit extradition when the statute of limitations is extinguished, the light of the Brazilian legal system or the requesting State.
> 2. The requesting State charges the person being extradited with committing a crime equivalent to that of criminal association (art. 288 of the Penal Code), during the years 1973 to 1975, and, in 1974, crimes equivalent to qualified kidnapping (art. 148, § 2, of the Penal Code) and qualified homicide (art. 121, § 2, of the Penal Code). All these crimes are time-barred, since, since their consummation, the time has elapsed much longer than the maximum statute of limitations provided for in the Penal Code, equivalent to 20 (twenty) years (art. 109, I). Furthermore, the case file does not state that any of the interrupting causes of the statute of limitations have been configured.
> 3. The fact that the requesting State classified the crimes imputed to the person being extradited as crimes against humanity does not exclude their prescription, since (a) Brazil has not signed the Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity, nor adhered to it; and (b) only domestic law can provide for the statute of limitations or statute of limitations for the state's claim to punish (cf. ADPF 153, Rapporteur: Justice EROS GRAU, the vote of Justice CELSO DE MELLO, Full Court, Dje of 8.6.2010).
> 4. The denial of extradition based on these grounds does not offend art. 27 of the Vienna Convention on the Law of Treaties (Decree 7.030/2009), since it is not a question, in the present case, of invoking limitations of domestic law to justify the breach of the extradition treaty signed between Brazil and Argentina, but of the simple incidence of limitation conveyed by the treaty itself, which prohibits the granting of extradition “when the action or penalty is already prescribed, according to the laws of the requesting or requested State” (art. III, c). 5. Extradition request rejected (BRASIL, EXT 1362, 2018, p. 1).

This study is particularly interested in dealing with the argument that the fact that Argentina, the State requesting the extradition, has qualified the crimes imputed to the person being extradited as those against humanity does not remove its prescription, since Brazil has not subscribed to the Convention on Non-Prescriptibility of War Crimes and Crimes against Humanity, nor adhered to it; and only internal law can provide for the statute of limitations or the statute of limitations for the state's intention to punish.

It is important to emphasize that the Brazilian Federal Supreme Court did not deal with the qualification of the crimes imputed to the person being extradited as being or not against humanity, the Supreme Court only limited itself to adopting the qualification used by Argentina in its extradition request. As for the qualification of the crimes, the Supreme Court limited itself to identifying the practice of a crime equivalent to that of criminal association, committed during the years 1973 to 1975, and, in 1974, of crimes equivalent to those of aggravated kidnapping and aggravated homicide, so that all these crimes were already prescribed in 2016, the year of the judgment by the Supreme Court, and, according to Brazilian legislation, the maximum statute of limitations is 20 years, so that, regarding the crimes committed, for example, in 1975, 41 years had passed.

The passage of such a long period was certainly one of the important elements to influence the judgment, considering the connection between the passage of time and pardon (here in the common, non-technical-legal sense), which seems to be implicit in the following passage of the vote of Minister Marcus Aurelius:

> What do I see, President? That, after forty-two years, present at the time of the crimes, there are still open wounds in the sister country, Argentina, because, although the Argentines also walked towards forgiveness, through an amnesty law, they ended up fulminating her, contrary to what happened in Brazil, in which the Brazilian Law nº 6.683, of August 28, 1979, was placed, although - I believe - still pending declaratory embargoes, by the majority of the members of the Supreme Court. This is my belief: the passage of time is extremely important for legal certainty. Hence the institutes of prescription, decay, and even forgiveness, are stamped in the Amnesty Law (BRASIL, EXT 1362, 2018, p. 144).

But the main argument for rejecting the extradition, which even seems to occupy most of the rapporteur's vote, is that, in the judgment of ADPF 153, Minister Celso de Mello had already recorded in his vote what should be adopted as the position of the Supreme Court, by way of obiter dictum, regarding the controversy relating to the imprescriptibility of crimes against humanity within the scope of the Brazilian legal system. In short, in this judgment of ADPF 153, according to the vote of Minister Celso de Mello, two arguments stood out for the non-application, in Brazil, of the imprescriptibility of crimes against humanity: (a) Brazil did not subscribe to the Convention on Non-applicability of War Crimes and Crimes against Humanity, nor adhered to it; and (b) only domestic law can provide for the statute of limitations or the statute of limitations for the state's intention to punish (BRASIL, ADPF 153).

3 A NON-PRECRIBILITY

In his vote as rapporteur, on Ext 1362, considering that the case involved peculiarities never before faced by the Federal Supreme Court, Justice Edson Fachin pondered that the Inter-American Court of Human Rights, whose jurisdiction is binding on the Brazilian State, recognized, in more than an opportunity, that statute of limitations are inadmissible, which intend to prevent the investigation and punishment of those responsible for serious violations of human rights, such as torture, summary, extrajudicial or arbitrary executions, and forced disappearances, all of which are prohibited, for violating non-derogable rights recognized by international human rights law. According to judgments by the Court, such prohibition would result from customary norms of international law, from the jurisprudence of international organizations, and also from doctrine (BRASIL, EXT 1362, 2018).

According to Minister Edson Fachin, as examples of this practice that recognizes the imprescriptibility, it is possible to mention the recognition of universal jurisdiction by Spain to try the Argentine citizen Ricardo Cavallo accused of the crimes of terrorism, torture, and genocide. The facts would have occurred in the final years of the 1970s and the request for arrest only occurred in 2000. As the accused was in Mexico, his extradition was requested from that country, which was granted. The decision was later upheld by the Supreme Court of Justice of the Nation. In 2013, the Supreme Court of Chile authorized the extradition of former Argentine federal judge Otilio Romano, accused of being an accomplice in several crimes classified by Argentine law as crimes against humanity. It is important to note, the decisions of Mexico and Chile, that both nations are not parties to the Convention on the non-applicability of the statute of limitations for Crimes against Humanity (BRASIL, EXT 1362, 2018).

As explained in Minister Rosa Weber's vote, it is true that Brazil neither signed nor adhered to the Convention on the non-applicability of war crimes and crimes against humanity, certainly because, when it came to light, in our country, in 1968, it coincided with the year of the granting of Institutional Act nº 5, in the middle of the military dictatorship. However, if, on the one hand, Brazil is not a signatory to the Convention, there is no way to bypass art. 5, item XLIV, of the Federal Constitution of 1988, which establishes: "the action of armed groups, civil or military, against the constitutional order and the Democratic State constitutes a non-bailable and non-exercising crime" (BRASIL, EXT 1362, 2018).

Still, according to Minister Rosa Weber, such reasoning is reinforced by the adequate perception that one is facing a jus cogens norm, in which the imprescriptibility of crimes against humanity is inserted as such, that is, as a super imperative norm of insusceptible international law to be removed by domestic law, especially after the Vienna Convention on the Law of Treaties (1969), internalized in the country through Decree 7030/2009, according to which jus cogens is a norm accepted and recognized by the international community of States as a whole, as a norm from which no derogation is permitted and which can only be modified by a subsequent norm of general international law of the same nature (BRASIL, EXT 1362, 2018).

It is interesting to note that Justice Rosa Weber had given a first vote following the divergence introduced by Justice Teori Zavaski, but at the end of the judgment I present a written vote accompanying the rapporteur, thus noting:

> In other words: the rule that crimes against humanity cannot be subject to a statute of limitations is an imperative rule of general International Law, given its recognition as such by the international community of States, following jurisprudence widely established in that community, exhaustively exemplified in the Rapporteur's vote. [...] In conclusion: I note that crimes against humanity are jus cogens norms, regardless of whether the State has adhered to treaties or has internalized such norms in its legal system, and as such are imprescriptible, giving rise to two types of crimes. extradition:
> (1) extraditions required for committing a crime against humanity, and therefore not subject to a statute of limitations;
> (2) ordinary extraditions, which do not refer to crimes against humanity, and are therefore subject to all other rules, such as double
> typicality and prescriptibility, as this House has been doing until then. Having justified the decision-making reasoning in these premises, and based on the recognition that this is a case of a crime against humanity, the extradition required in this case must be granted, date venia of the respectable contrary understandings. It's my readjusted vote. (BRASIL, EXT 1362, 2018, p. 186-187).

It is also worth noting that the minister took care to clarify the distinction between the object of ADPF 153 and Ext 1362:

> Also, intending to exhaust the analysis of similar legal cases, it is important to note that this is not dealing with or making conclusions about the issue of amnesty, nor is it dealing with something that has a connection, even if remote, with previous judgments, e.g., the case of **ADPF 153**, reported by **Minister Eros Grau, which belongs to another category of fact**. Take care here, I emphasize, of the request for extradition required on account of the commission of a crime against humanity. The case of ADPF 153 inserts a factual and legal circumstance that requires distinction as to the present case, namely, the Brazilian historical and political context, in which the Bilateral Amnesty Law for political and related crimes was enacted, through a majority democratic process (BRASIL, EXT 1362, 2018, p. 118).

Special mention should be made of the consideration given by Minister Rosa Weber, in her vote on Ext 1362, regarding the fact that Brazil did not sign or adhere to the Convention on the non-applicability of war crimes and crimes against humanity, certainly, in her view, as it coincided with the granting of Institutional Act nº 5.

And it is questionable how it is possible that, after so many years since the advent of the Convention on the non-applicability of war crimes and crimes against humanity, and the democratic period, Brazil still has not found favorable political conditions to internalize the Convention in the national legal system.

In 2008, then-President Lula forwarded to the Chamber of Deputies the text of the bill (PL 4038/2008) that deals with the crime of genocide, defines crimes against humanity, war crimes, crimes against the administration of justice of the International Criminal Court, establishes specific procedural norms, and provides for cooperation with the International Criminal Court (BRASIL, CÂMARA DOS DEPUTADOS, 2021).

The existence of this project even served as a foundation in the sense of the need for internal law to provide for the imprescriptibility, as can be seen in the following passage of the vote of Minister Celso de Mello:

> **This means**, therefore, **that only domestic law (and not** an international convention, **much less** the one signed by Brazil) **can qualify**, constitutionally, as the **only direct** formal source, legitimizing normative regulation **concerning** the prescriptibility **or** non-prescriptibility of the state claim to punish**, except**, of course, **constitutional clauses** in a different sense, such as **those** inscribed in items XLII and XLIV of art. 5 of our Basic Law. It is important to recall, at this point, given the absolute pertinence of his observations, the record made by Professor NILO BATISTA, in an Introductory Note in the work "Transition Justice in Brazil: Law, Accountability and Truth" (Saraiva, 2010), written by Dimitri Dimoulis, Lauro Joppert Swensson Júnior, Antonio Martins and Ulfrid Neumann: "(...) the actions of 'agents of state political repression' are 'crimes against humanity', and therefore are imprescriptible and cannot be amnesty'. Swensson Junior's refutation is relentless: firstly, international normative instruments only acquire binding force after the constitutional process of internalization, and Brazil has not subscribed to the 1968 'Convention on the Limitlessness of War Crimes and Crimes against Humanity' or any other document containing a similar clause; second, 'international custom cannot be a source of criminal law' without violating a basic function of the principle of legality; and, thirdly, conjuring up the ghost of condemnation by the Inter-American Court, like the 'Arellano x Chile' precedent, the authority of its provisions was fully recognized by us in 2002 (Dec. n. 4.463, of November 8, 2002) but only 'for events after December 10, 1998'." (emphasis added) Certainly for this reason, of an eminently constitutional nature, the President of the Republic, accepting an inter-ministerial proposal signed by the Minister of Justice, Minister of Foreign Affairs, Minister of Advocate General of the Union, and Chief Minister of the Special Secretariat for Human Rights forwarded to Congress the objective of making feasible the implementation, in the domestic scope, of the Rome Statute, which established the International Criminal Court. With this purpose and purpose, the bill in question not only typifies, among others, crimes against humanity, imposing penalties, but also provides for the imprescriptibility of said crimes, in a rule that, inscribed in art. 11 of that same legislative proposal, has the following normative content: "Art. 11. The crimes of genocide, against humanity and war are imprescriptible and not subject to amnesty, grace, pardon, commutation or provisional release, with or without bail." (emphasis added) It can be seen that the then President of the Republic, aware of the need to respect, in matters of criminal law, the postulate of the constitutional reserve of formal law, acted in a manner that was compatible with the provisions of the Constitution of the Republic (which only admits internal law as the only formal and direct source of criminal law rules), despite Brazil having signed, in 1998, the Rome Statute (subsequently incorporated into our internal order), which already defined, as imprescriptible, the claim state to punish crimes against humanity, war, and genocide (BRASIL, EXT 1362, 2018, p. 159-161).

The aforementioned project brings in its forwarding message considerations in the sense that Brazil signed, in 1998, the Rome Statute that creates the ICC, so it is necessary to regulate the criminal types created by the Rome Statute and not yet foreseen in our domestic legal system. Except for the crime of genocide, already typified in its law, war crimes and crimes against humanity are not yet provided for in our legislation and require legal regulation. The project, however, practically did not progress and there is no current political movement for this (BRASIL, CÂMARA DOS DEPUTADOS, 2021).

4 CONCLUSION

As a conclusion, the Federal Supreme Court, although without unanimity, rejects the lack of a statute of limitations for crimes against humanity, arguing, in particular, that in addition to Brazil not having subscribed to the Convention on the statute of limitations for crimes of War and Crimes against Humanity, only internal law can provide for the state's punitive claim.

In this regard, the pattern of the Federal Supreme Court's judgment decision contributes to the impracticability of an effective transitional justice regarding crimes against humanity, which represents a setback in the adoption of measures capable of overcoming a past of massive violations of human rights. humans.

REFERENCES

ACERVO VLADIMIR HERZOG. Memórias da Ditadura. **O que é justiça de transição**. Disponível em: memoriasdaditadura.org.br. Acesso em: 12 jul. 2021.

ASSEMBLEIA GERAL DA ONU. **Convenção sobre a imprescritibilidade dos crimes de guerra e dos crimes contra a humanidade**. Adotada pela Resolução 2391 da Assembleia Geral em 26 de novembro de 1968. Entrada em vigor: 11 de novembro de 1970. Disponível em: www.direitoshumanos.usp.br/index.php/Sistema-Global.-Declarações-e-Tratados-Internacionais-de-Proteção/convencao-sobre-a-imprescritibilidade-dos-crimes-de-guerra-e-dos-crimes-contra-a-humanidade.html. Acesso em: 12 jul 2021.

BRASIL. **Câmara dos Deputados, Projeto de Lei nº 4038/2008**. 2008. Disponível em: www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=410747. Acesso em: 20 nov. 2021.

BRASIL. **Decreto nº 4.388, de 25 de setembro de 2002.** Promulga o Estatuto de Roma do Tribunal Penal Internacional. Brasília: DF: Presidência da República, 2002. Disponível em: www.planalto.gov.br/ccivil_03/decreto/2002/d4388.htm. Acesso em: 12 jul. 2021.

BRASIL. **Lei nº 6.683, de agosto de 1979.** Concede anistia e dá outras providências. Disponível em: www.planalto.gov.br/ccivil_03/leis/l6683.htm. Acesso em: 13 jul. 2021.

BRASIL. Supremo Tribunal Federal. **Arguição de descumprimento de preceito fundamental - ADPF153/DF.** Relator(a): EROS GRAU, Tribunal Pleno, julgado em 29/04/2010, DJe-145 DIVULG 05-08-2010 PUBLIC 06-08-2010 EMENT VOL-02409-01 PP-00001 RTJ VOL-00216-01 PP-00011.

BRASIL. **Supremo Tribunal Federal, Ação de Extradição - Ext 1362**. Relator(a): EDSON FACHIN, Relator(a) p/ Acórdão: TEORI ZAVASCKI, Tribunal Pleno, julgado em 09/11/2016, ACÓRDÃO ELETRÔNICO DJe-200 DIVULG 04-09-2017 PUBLIC 05-09-2017 REPUBLICAÇÃO: DJe-175 DIVULG 24-08-2018 PUBLIC 27-08-2018.

MC ARTHUR, Fabiana Godinho. **Justiça de transição: o caso brasileiro**. *In:* Anais do Seminário. Disponível em: www.corteidh.or.cr/tablas/r33108.pdf. Acesso em 13 jul. 2021.

ORGANIZAÇÃO DAS NAÇÕES UNIDAS. **The rule of law and transitional justice in conflict and post-conflict societies**. 2004. Disponível em: archive.ipu.org/splz-e/unga07/law.pdf . Acesso em: 12 jul. 2021.