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State crimes and neutralization: state responsibility for cruel sentences in Brazil[1]

Crímenes de estado y neutralización: responsabilidad estatal por penas crueles en Brasil

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Sumario: 1. Introduction. 2. State crimes and violations of rights. 3. Techniques of neutralization and state crimes. 4. Neutralization and cruel sentences in Brazil. 5. State responsibility in the face of illicit sentence. 6. Considerations. References

Abstract: This Article explores techniques of neutralization in the context of State crimes, in order to expose the State responsibility for cruel sentence. Neutralization is a mechanism to absolve or justify one's illicit actions. The techniques of neutralization were first identified by Gresham Sykes and David Matza and developed by Eugenio Raúl Zaffaroni on the subject of State crimes. The analysis falls on Brazil's human rights violations in the penitentiary system. The aim is to investigate if the

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Brazilian State's can be held accountable at the international level, as a way of responding to and preventing State crimes and their massive harms. This Article provides a reflection on the State's responsibility for the protection of human rights in the global system and in the American system to demonstrate that Brazil's neutralizing criminal policy results in the application of cruel sentence and, consequently, in State crime.

Keywords: State Crimes, Techniques of Neutralization, Cruel Sentence, State Responsibility, Brazil.

Resumen: El artículo analiza las técnicas de neutralización en el contexto de los Crímenes de Estado, con el fin de exponer la responsabilidad estatal por penas crueles. La neutralización es un mecanismo para absolver o justificar actos ilícitos cometidos. Las técnicas de neutralización fueron identificadas por primera vez por Gresham Sykes y David Matza, y desarrolladas por Eugenio Raúl Zaffaroni en relación con los Crímenes de Estado. El análisis se centra en las violaciones de derechos humanos cometidas en el sistema penitenciario brasileño. El objetivo es investigar si Brasil puede ser considerado responsable en el contexto internacional por estas violaciones, como una forma de responder a estos Crímenes de Estado y prevenirlos, evitando sus daños masivos. El artículo promueve una reflexión sobre la responsabilidad estatal en la protección de los derechos humanos en el sistema global y en el sistema americano, con el objetivo de demostrar que la política criminal neutralizadora implementada por Brasil resulta en la aplicación de penas crueles y, en consecuencia, en crímenes de Estado.

Palabras clave: Crímenes de Estado, Técnicas de Neutralización, Penas crueles, Responsabilidad del Estado, Brasil.

1. Introduction

State crimes consist of massive violations of fundamental and human rights perpetrated by agents occupying high public positions, who use the state structure to commit crimes with the help–or at least with the connivance–of the States. These are highly harmful crimes, but they are governed by a scenario of great moral and scientific indifference, as criminology (by adopting a simply individual, local perspective, and focused on specific crimes) has not bothered to study crimes that, under the guise of legality, affect a large number of people and cause significant social harm.

The objective of this article is to study the techniques of neutralization in the context of State crimes and the neutralizing criminal policy in Brazil, especially in the penitentiary sphere, in order to investigate what state accountability is possible at the international level. To achieve this objective, a bibliographical study is carried out using the hypothetical-deductive approach method.

Initially, it discusses the concept of State crimes and the importance of a study focused on their characteristics, especially those that favor social indifference and impunity. Next, the origin and concept of the neutralization techniques are discussed from the perspective of State crimes, as well as an explanation of the neutralizing criminal policy developed by Brazil in the penitentiary sphere, with the consequent violation of human rights and the imposition of cruel sentence. Finally, the possibility of state accountability at the international level is studied, as a way of responding and preventing States crimes and their massive harms.

2. State crimes and violations of rights

The concept of State crimes is based on the idea of massive violations of fundamental and human rights committed by state agents who use the state structure to commit crimes either with the help or at least with the connivance of States. Penny Green and Tony Ward[5] affirm that modern states kill and pillage on a scale that no criminal organization could imitate: The authors estimate that from 1900 to 1987 more than 169 million people were murdered by governments. The pretexts for the criminal activity of states are varied, ranging from wars to colonization, but always in contexts of repression and social control.

Eugenio Raúl Zaffaroni[6] expressly states that the massive murders, a recurring phenomenon in the last century, are practiced by the punitive power (the State), and that, when it loses control, the Rule of Law gives way to the Police State. Furthermore, he also mentions that the massive crimes happen precisely when the punitive state force operates without restraint.

Despite being highly harmful, State crimes are governed by a scenario of great moral indifference. At this point, Stanley Cohen[7] mentions the so-called social amnesia, a phenomenon from which society separates and forgets its past, either through a conscious desire not to remember or due to cultural slippage that makes information disappear, and cites examples. In this way, the author deals with the rhetoric developed to ensure the impunity of State crimes, which in his view have three determining elements. The first consists of the discourse preached by governments that "nothing happened", "there was no massacre, no one was tortured, people like us do not do that kind of thing". The second, from the response to the official discourse given by journalists, human rights organizations and victims, who denounce the occurrence of State crimes. Finally, when total denial is no longer accepted, the third presents itself as the excuse that "what happened was justified" for noble reasons: National security, fight against terrorism, in the name of revolution, in the name of democracy, by religious orientations (Islam, for example), among others.

Still on the negligence of both public opinion and scientific knowledge, Eugenio Raúl Zaffaroni[8] suggests reasons that in his opinion contribute to the phenomenon. These are crimes that generally occur in non-central States, as well as they consist of crimes that challenge the sense of security we have in trusting the State and understanding Criminology (and the concept of crime) within epistemological boundaries already well delimited.

Penny Green and Tony Ward[9] provide one more reason for the phenomenon: They claim that, as the States determine what is criminal, a State would only fit into this concept in the rare occasions when it recognizes the breach of its own laws. This is why, for the authors, despite notable considerations relating to individual criminality, criminology has never fully turned to the study of State crimes.

Aiming to denounce indifference at least in the scientific field, Wayne Morrison[10], in the book Criminology, Civilization and the New World Order, focuses his analysis on the epistemological bases of Criminology in order to adapt them to

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[5] GREEN, P.; WARD, T. *State Crime: Governments, Violence and Corruption*, Pluto Press, London, 2004, p. 1.

[6] ZAFFARONI, E. R. *Crímenes de masa*, Ediciones Madres de Plaza de Mayo, Buenos Aires, 2012a, p. 31.

[7] COHEN, S. "Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past", *Law & Social Inquiry*, vol. 20, n. 1. 1995, p. 13-16.

[8] ZAFFARONI, E. R. *El crimen de estado como objeto de la criminología*, UNAM, 2006, p. 20-21.

[9] GREEN, P.; WARD, T. *State Crime: Governments, Violence and Corruption*, Pluto Press, London, 2004, p. 1.

[10] MORRISON, W. *Criminología, civilización y nuevo orden mundial*, Anthropos Editorial, Barcelona, 2012.

the complexity and importance of massive crimes. The criminologist cites examples ranging from Auschwitz to Congo.

Thus, in the same sense as Penny Green and Tony Ward, Wayne Morrison[11] criticizes the fact that, throughout its history, criminology has adopted a simply individual and local perspective, focused on determined and specific crimes. Wayne Morrison understands that criminology has not bothered to study crimes that transcend the domestic borders of countries, affect a large number of people and cause significant social harm.

Eugenio Raúl Zaffaroni[12], when dealing with the work of Wayne Morrison, concludes that a global criminology that does not encompass State crimes is inconceivable; and these, in turn, can only be duly challenged from the confrontation of the techniques of neutralization that are used by criminal agents. For that, the author concludes that it is necessary for criminology to exercise a function of clear ideological criticism, as well as of constant self-criticism.

And it is precisely from Wayne Morrison that in the view of Iñaki Riveira Beiras et al.[13], a new epistemological space emerges in Criminology, aimed at overcoming the negationist aspect that it presented (negative of State crimes, the death of thousands of people by genocide, hunger, lack of medicine, environmental damage, immigration problems, among others). In the absence of self-criticism, the authors also state that Criminology has developed itself selective and discriminatory, contributing to naturalization, banalization and perpetuation of violence and social harm. The authors conclude that this is a knowledge built not from natural selectivity, but politically decided. In the same direction, Eugenio Raúl Zaffaroni[14] corroborates the idea of selectivity of punitive power.

Regarding characteristics of our current society that favor the commission of State crimes, Eugenio Raúl[15] highlights the importance of being aware of the state capacity to commit massive crimes especially in the current times of terrorism. Indeed, the author argues that we live under the domain of fear, so that the search for security at any cost is legitimized.

Thus, in the name of preventive and repressive measures against terrorism–an expression that does not encompass a well-defined concept, which in itself already allows for abuses–techniques of mass destruction are popularized, facilitating the occurrence of massive violations to human rights. Moreover, he summarizes two characteristics of State crimes that favor indifference and contribute to its impunity. At first, no State crime is committed without a justifying discourse; and, finally, that state agents who commit State crimes do not contradict the governing values of society, but on the contrary reinforce them. Thus, State crimes even occur with the help of legislation, using legitimizing discourses that manifest themselves in order to reinforce the current values of society and, not infrequently, are accepted by segments of the civil population, which makes the issue even more complex.

That said, Eugenio Raúl Zaffaroni[16] argues that it is essential to build a criminological about the crime that "sacrifices more human lives". To the indifference of the effects resulting from these crimes was given the name banalization of evil,

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[11] MORRISON, W. *Criminología, civilización y nuevo orden mundial*, Anthropos Editorial, Barcelona, 2012, p. 04-06.

[12] ZAFFARONI, E. R. "Introducción a Criminología, Civilización y Nuevo Orden Mundial de Wayne Morrison", *Revista Crítica Penal y Poder*, n. 2., Barcelona, Mar., 2012b, p. 16.

[13] RIVERA BEIRAS, I.; BERNAL SARMIENTO, C. E.; CABEZAS CHAMORRO, S.; FORERO CUELLAR, A.; VIDAL TAMAYO, I. "Más allá de la criminología. Un debate epistemológico sobre el daño social, los crímenes internacionales y los delitos de los mercados". In: RIVEIRA BEIRAS, I. (Coord.). *Criminología, daño social y crímenes de los estados y los mercados. Temas, debates y diálogos*, Anthropos Editorial, Barcelona, 2013, p. 24.

[14] ZAFFARONI, E. R. *Crímenes de masa*, Ediciones Madres de Plaza de Mayo, Buenos Aires, 2012a.

[15] ZAFFARONI, E. R. *El crimen de estado como objeto de la criminología*, UNAM, 2006.

[16] ZAFFARONI, E. R. *El crimen de estado como objeto de la criminología*, UNAM, 2006, p. 21.

given the indifference of human beings with the loss of countless lives due to violent acts. To combat massive State crimes, Eugenio Raúl Zaffaroni[17] is dedicated to the study of the techniques of neutralization developed by Gresham Sykes and David Matza[18].

3. Techniques of neutralization and state crimes

The techniques of neutralization were first identified by Gresham Sykes and David Matza, consisting of tools to legitimize criminal acts. The authors studied the phenomenon of juvenile delinquency and published the article Techniques of Neutralization: A Theory of Delinquency in 1957. They challenged the theory of delinquent subculture of Albert Cohen– presented in Delinquent boys: The culture of the gang of 1955 – and asserted that most of the time the offender experiences feelings of guilt and generally values the respect for the laws[19]. They understood that juvenile criminality is best explained by what they called techniques of neutralization[20].

They adopted the theory of differential association of Edwin Sutherland as a premise, however, they stated that neutralizing techniques are justifications built prior to the practice of crime and that they make it possible, and not later as traditionally analyzed (called rationalizations). They serve to neutralize, return or deviate in advance social disapproval. The agent thus qualifies his conduct as acceptable, if not correct. It is in learning the techniques of neutralization that the individual becomes a delinquent, according to Sykes and Matza[21].

The authors observed the presence of behaviors that they categorized into five techniques[22]. They asserted that the techniques of neutralization are tools to reduce the effectiveness of social controls and that they have been verified in a large portion of delinquent behavior.

Although initially designed to understand juvenile criminality, the application of the techniques of neutralization has been worked on by other criminologists, extending them to new areas of crime. As mentioned, Eugenio Raúl Zaffaroni[23], analyzing them from the perspective of massive State crimes, emphasizes that no State crime is committed without the support of a justifying discourse and that the flag of combating terrorism has been used disproportionately and abusively, serving as a justification for the massive harm and deaths of countless civilians. For this reason, he argues that the protection of human rights and the prevention of harm are urgently needed.

State criminals admit unwanted excesses or consequences as part of the process, considering them unavoidable. It can be considered that it is the most organized form of criminality, whose neutralizing discourse is built in advance and in line with the values of society (generally classical values, such as security, honor, protection of the family). The victimizing selectivity of State crimes is even more profound, affecting the less favored social strata. The magnitude of these crimes demands the exaltation of the image of the leader, promoting him as a hero or martyr. The denial arising from the practice of the techniques of neutralization is

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[17] ZAFFARONI, E. R. *El crimen de estado como objeto de la criminología*, UNAM, 2006.
[18] SYKES, G.; MATZA, D. "Techniques of Neutralization: A Theory of Delinquency", *American Sociological Review*, v. 22, n. 6, Chicago, Dec., 1957.
[19] SYKES, G.; MATZA, D. "Techniques of Neutralization: A Theory of Delinquency", *American Sociological Review*, v. 22, n. 6, Chicago, Dec., 1957, p. 664.
[20] SYKES, G.; MATZA, D. "Techniques of Neutralization: A Theory of Delinquency", *American Sociological Review*, v. 22, n. 6, Chicago, Dec., 1957.
[21] SYKES, G.; MATZA, D. "Techniques of Neutralization: A Theory of Delinquency", *American Sociological Review*, v. 22, n. 6, Chicago, Dec., 1957, p. 666.
[22] SYKES, G.; MATZA, D. "Techniques of Neutralization: A Theory of Delinquency", *American Sociological Review*, v. 22, n. 6, Chicago, Dec., 1957, p. 667..
[23] ZAFFARONI, E. R. *El crimen de estado como objeto de la criminología*, UNAM, 2006.

generally irreversible and alienates the agent from the guilt of the acts performed[24], as well as serving as a shield for the evils arising from these acts.

Eugenio Raúl Zaffaroni[25] analyzes the five techniques of neutralization described by Gresham Sykes and David Matza from the perspective of State crimes. As for the first, the denial of the responsibility, consists in denying the facts as if they had not occurred or that they did not take place as described, being led to the commission of the act by external factors. It is a simple defensive tactic, which often coexists with the true technique of neutralization. It states that neutralization by denial of responsibility occurs through the affirmation of lack of intention, with the effects of the act being inevitable consequences. For example, that in every war there are deaths and that innocent people are always and will be affected. It is justified by the extraordinary circumstances in which they acted and which were caused by third parties.

Regarding the second, the denial of injury, given the massive characteristic of the damage, is used to minimize the effects as far as possible and to the argument of self-defense. It is used in conjunction with the first and with the denial of the victim. Responsibility is reduced, the victim is denied and, thereby, the damage is reduced or denied.

The denial of the victim is the most common technique of neutralization when it comes to State crimes. The victims are the criminals, the State acting to defend the nation. Eugenio Raúl Zaffaroni highlights a vicious cycle of violence: Stigmatized groups react violently and, as a result, the response of the oppressors is violent to the same extent or even more intense. He cites the use of torture as a tool and emphasizes that victims are always inferiorized by state agents. Stigmatizing labels are used, such as a terrorist and enemy of the homeland. Giorgio Agamben[26] highlights the process of inferiorization and degradation of the victim when he talks about the medical experiments carried out by the Reich and also imposed on detainees and those condemned to the death penalty (particularly in the United States). These people due to their personal conditions were projected to an exception zone without the guarantee of rights, which is why the activities practiced were justified. That is, because they are not eligible as victims, there is no illegal act for the State.

The condemnation of the condemners stands out as a technique commonly used in State crimes, especially when they are directed against pacifists, dissidents of the system or political opponents. In trial courts, they morally disqualify judges, using the moment as a political scenario. It is used both in exceptional regimes and in democracies, with a strong criminalization of social movements that seek to denounce criminal practices[27].

Regarding the appeal to higher loyalties, Eugenio Raúl Zaffaroni[28] maintains that this is the technique of neutralization par excellence of State crimes. Duties of conscience or loyalty to idols or myths are invoked. According to him, all the superior values worshiped are mythical; some by nature itself (such as the utopia of a superior race) and others by the distortion of values (nation, culture, democracy, republicanism, religion, human rights, etc.). He points to security as the most evident currently.

The policies of Law and Order, Zero Tolerance (USA) and the Doctrine of National Security (used by Latin American dictatorships) stand out as legitimizing discourses, disseminated by governments as techniques of neutralization of public

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[24] ZAFFARONI, E. R. *El crimen de estado como objeto de la criminología*, UNAM, 2006, p. 25.
[25] ZAFFARONI, E. R. *El crimen de estado como objeto de la criminología*, UNAM, 2006, p. 27.
[26] AGAMBEN, G. *Homo Sacer: o poder soberano e a vida nua*, UFMG, Belo Horizonte, 2007, p. 151.
[27] SILVA FILHO, J. C. M. da. "Crimes de Estado e Justiça de Transição", *Sistema Penal & Violência*, v. 2, n. 2, Porto Alegre, July/Dec. 2010, p. 28.
[28] ZAFFARONI, E. R. *El crimen de estado como objeto de la criminología*, UNAM, 2006, p. 30.

opinion and legitimization of the atrocities carried out, accourding to José Carlos Moreira da Silva Filho[29]. It can be said that the Criminal Law of the Enemy, theorized by Günther Jakobs[30], is also a technique of neutralization, given that the enemy is treated as a being without rights. Eugenio Raúl Zaffaroni[31] protests against the treatment of the human being as an enemy–initially designed to occur in a State of Exception–, but which is also verified in Democratic States of Law. The author understands that this treatment is incompatible with a democratic legal order.

The techniques of neutralization disseminated by the state criminals are much more elaborate and profound than those used by the juvenile delinquents studied by Gresham Sykes and David Matza, even relying in academic credibility, a scenario in which many are developed. Eugenio Raúl Zaffaroni[32] indicates the need for Criminology in a critical way to focus on its own criminological discourses in order to avoid that they serve as a neutralizing support. He proposes, therefore, to seek to neutralize the neutralization.

Although they are never philosophically rational and irrationality is often manifest, as in the case of the Aryan race, the techniques of neutralization present themselves as a criminal ideology, creating a very elaborate system, external to the criminal. In medieval Europe, the phenomenon related to the war on witches can be observed, which caused the death of thousands of women and the reaffirmation of patriarchy.

These justification techniques are used in the context of State crimes not only as a way to legitimize destructive behavior, but also to camouflage the resulting social harm. The death of civilians and the destruction of cities, leaving many citizens without housing and minimal structures, are seen as inevitable or even necessary to achieve the objective of collective peace and security, for example, in the fight against drug trafficking or the terrorism. The treatment of actions as real wars is invoked.

In the national scene, the National Security Doctrine stands out as a technique of neutralization. José Carlos Moreira da Silva Filho[33] points out that the term legitimate for violence carried out by the State can lead to atrocities, which by holding the monopoly on violence is liable to provide the most disastrous results. Violence resulting from the Military Dictatorship in Brazil is characterized as a State crime of illegality masked by justifying techniques.

The practices of violence and torture employed in the dictatorial regime are perpetuated and can be seen in police actions to combat drug trafficking and in the prison units of the country. And they go back to Brazilian colonization and the empire, a period in which penal policy was intended to control the undisciplined and immoral masses. The prison has been used as a deposit of unwanted people–maintaining this characteristic to this day. At the end of the 19th century, new discourses were disseminated, aimed at reforming, correcting, cleaning and regenerating the deviant[34].

Despite the publication of international documents protecting human rights and fundamental rights guaranteed by the Brazilian Federal Constitution of 1988, the rates of imprisonment rise every year in Brazil, accelerating punishment through imprisonment. Notoriously, as neutralization of criminality–in fact, control of certain classes of individuals. It is noticed, in the opposite sense of the constitutional and

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[29] SILVA FILHO, J. C. M. da. "Crimes de Estado e Justiça de Transição", *Sistema Penal & Violência*, v. 2, n. 2, Porto Alegre, July/Dec. 2010, p. 26.

[30] JAKOBS, G.; MELIÁ, M. C. *Direito Penal do Inimigo: noções e críticas*, Livraria do Advogado, Porto Alegre, 2015.

[31] ZAFFARONI, E. R. *O inimigo no Direito Penal*, Revan, Rio de Janeiro, 2014.

[32] ZAFFARONI, E. R. *El crimen de estado como objeto de la criminología*, UNAM, 2006, p. 34.

[33] SILVA FILHO, J. C. M. da. "Crimes de Estado e Justiça de Transição", *Sistema Penal & Violência*, v. 2, n. 2, Porto Alegre, July/Dec. 2010, p. 22.

[34] ALMEIDA, B. R. "Humanidades inumanas: dinâmicas e persistências históricas em torno do cárcere no Brasil", *Revista do Instituto Histórico e Geographico Brazileiro*, v. 179, 2018, p. 169.

legal precepts, an arbitrary penal policy that aggravates inequalities and inhumanity. This initial finding is verified by the selection of the prison population, consisting of marginalized social groups and by the reiteration of violations of fundamental rights[35].

Cruel penalties are illegal both nationally and internationally[36]. The institutional violence against the population deprived of liberty offends human dignity and the distribution of policies committed to respect rights and assistance, particularly those regarding health and right to life, can be observed in the selectivity of the penal and penitentiary system. According to Eugenio Raúl Zaffaroni[37], prisons with degrading conditions become institutions that not only disrespect the norms, or disregard health care, but also cause decline in prisoners' self-esteem, putting their life at risk.

The mass violations of human rights in prison also present themselves as social harm and allow us to conclude that they result in cruel sentence. From this observation, it is intended to analyze in sequence the neutralizing criminal policy present in the national scenario and the illegality of the imposed sentences in order to demonstrate that they are characterized as a State crime.

4. Neutralization and cruel sentence in Brazil

The prison population in Brazil grows every year, aggravating the precarious conditions of the system. The policy of mass imprisonment as a form of social control has led the country to historic rates. Overcrowding far exceeds the acceptable level established by the United Nations (UN). According to the National Penitentiary Information Survey of June 2017 by Departamento Penitenciário Nacional (National Penitentiary Department), from 90 thousand inmates in 1990 it has risen to more than 726 thousand in 2017.

In 2019, the prison population was almost 750 thousand according to National Penitentiary Department and 812 thousand according to the Conselho Nacional de Justiça (National Council of Justice); in 2021, according to the National Council of Justice, the mark of 905 thousand people deprived of liberty has already been exceeded. Data show that in 30 years the prison population has increased tenfold. In this perspective, the current rate of imprisonment is more than 426 prisoners per 100 thousand inhabitants, while in 2017 it was almost 350. Brazil has the third largest prison population in the world[38] and occupies the sixth position in the ranking of the most populous countries, accourding to Instituto Brasileiro de Geografia e Estatística (Brazilian Institute of Geography and Statistics).

The increase in the female rate of imprisonment also deserves attention, with drug trafficking being the crime most committed by women. In 2008, there were 21,604 female inmates and in 2020, it has already reached the mark of 36,999 women imprisoned, accourding to Anuário Brasileiro de Segurança Pública de 2021 (Brazilian Yearbook of Public Security of 2021). The percentage of arrests for drug trafficking was 64.48 % in 2017, says National Penitentiary Department[39].

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[35] ALMEIDA, B. R. "Humanidades inumanas: dinâmicas e persistências históricas em torno do cárcere no Brasil", *Revista do Instituto Histórico e Geographico Brazileiro*, v. 179, 2018, p. 175.

[36] ZAFFARONI, E. R. "Las penas crueles y la doble punición". In: ZAFFARONI, E. R. (dir.). *La medida del castigo: el deber de compensación por penas ilegales,* Ediar, Ciudad Autónoma de Buenos Aires, 2012.

[37] ZAFFARONI, E. R. *Penas ilícitas. Un desafio para la dogmática penal,* Editores del Sur, Buenos Aires, 2020.

[38] INSTITUTE FOR CRIME & JUSTICE POLICY RESEARCH. *World Prison Brief* [WPB]. Prison Population Total. Londres: WPB, 2021. Available at: https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All

[39] BRASIL. Departamento Penitenciário Nacional [DEPEN]. Levantamento Nacional

Data provided by the Brazilian National Penitentiary Department[40], show that there are currently 837,443 people deprived of liberty in the country. Among these, 654,704 inmates are in penitentiary units, 6,729 in police stations or other custody units, 175,528 under house arrest, and 482 in units of the federal penitentiary system. It is the third largest prison population in the world.

In 2000, 232,755 individuals were arrested. In 2016, the number of inmates exceeded 700,000, reaching its peak in 2019 with 755,274 incarcerated individuals. In 2022, there were 661,915 individuals in prison. Between 2000 and 2022, the number of incarcerated individuals increased significantly by approximately 184.4%[41].

In Brazil, the incarceration rate is 310 people per every 100,000 inhabitants. In 2000, the rate was 137 people. Between 2000 and 2022, the prison population increased by 126.2%. In 2019, the country's incarceration rate was 359, 4 prisoners per every 100,000 inhabitants. Mass incarceration demonstrates social consequences associated with numerous features including overcrowding, degradation of structural conditions, and shortage of vacancies. Regarding the number of vacancies in the year 2022, there was a total deficit of more than 190,000 vacancies and an average occupancy rate of almost 140.8% in the country[42].

The National Penitentiary Department reports show the selectivity of the prison system, made up mostly of young, black, poorly educated and poor people, whose vulnerability is aggravated in prison. Iñaki Rivera Beiras[43] criticizes the conduction of purely quantitative research, which does not analyze qualitative issues related to the living conditions of people deprived of liberty, emphasizing that the diffuse and widespread social harm caused by imprisonment is far greater than the harm it purports to contain.

The use of punitive power as a form of containment and social control is noticeable in the history of Brazil, present since colonization, when indians and Africans were subjected to slavery. During the period of the empire, the criminalization of behaviors such as vagrancy denotes the repression of stereotyped lifestyles in the scope of controlling social strata, accourding to Bruno Rotta Almeida[44]. The author concludes that the execution of the sentence in Brazil is a reflection of authoritarianism, violence, repression, bureaucracy, patronage, violation of fundamental rights, selectivity and social inequality. He also indicates that deaths in prison custody resulting from torture, violence, suicides and lack of health care show significant rates. The number of deaths in 2019 was 1,069, rising to 1,309 in 2020, with the main highlight being factors indicated as natural or health (752); there were also 136 deaths from criminal causes, 104 from suicide, 5 indicated as accidental and 312 from unknown causes, accourding to Anuário Brasileiro de Segurança Pública de 2021[45]. In this regard, it is important to mention that up to 21

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de Informações Penitenciárias: Infopen. Atualização junho de 2017. Brasília: Ministério da Justiça, 2019. Available at: http://antigo.depen.gov.br/DEPEN/depen/sisdepen/infopen/relatorios-sinteticos/infopen-jun-2017-rev-12072019-0721.pdf

[40] SISDEPEN. Sistema de acompanhamento da execução das penas, da prisão cautelar e da medida de segurança, 2022. Available at: https://www.gov.br/depen/pt-br/servicos/sisdepen

[41] SISDEPEN. Sistema de acompanhamento da execução das penas, da prisão cautelar e da medida de segurança, 2022. Available at: https://www.gov.br/depen/pt-br/servicos/sisdepen

[42] SISDEPEN. Sistema de acompanhamento da execução das penas, da prisão cautelar e da medida de segurança, 2022. Available at: https://www.gov.br/depen/pt-br/servicos/sisdepen

[43] RIVERA BEIRAS, I. *Desencarceramento: por uma política de redução da prisão a partir de um garantismo radical*, Tirant lo Blanch, São Paulo, 2019, p. 53.

[44] ALMEIDA, B. R. "Humanidades inumanas: dinâmicas e persistências históricas em torno do cárcere no Brasil", *Revista do Instituto Histórico e Geographico Brazileiro*, v. 179, 2018.

[45] FÓRUM BRASILEIRO DE SEGURANÇA PÚBLICA. Anuário Brasileiro de Segurança Pública 2021. São Paulo: Fundação Ford, Open Society Foundations, Federação Nacional das Empresas de Segurança e Transporte de Valores, 2021. Available at: https://forumseguranca.org.br/anuario-brasileiro-seguranca-publica/

December 2020, 222 deaths were recorded by Covid-19 in the prison system, of which 129 were inmates and 93 were civil servants[46], and it is possible that the actual number is even higher.

The number of deaths in prisons continues to rise. Most recently data revealed a 42% increase in deaths between 2014 and 2019 caused by the coronavirus pandemic. In that same period, the annual average of deaths was 1.849. Conversely, the incarcerated population increased more than 20%. Between 2019 and 2022, the number of deaths increased by 13%.

In 2020, the National Penitentiary Department (DEPEN) reported a total of 2,443 deaths in physical cells and under house arrest[47]. Taking into account the information on mortality in the year 2020, it is possible to observe a persistent increase in deaths by natural causes. Likewise, there was a significant increase in deaths by unknown causes. In 2021, there were 2,005 deaths in physical cells in the country, and another 423 deaths under house arrest.

In the year 2022, there were 2,453 deaths in the country's prison system (physical cells and house arrest). Increased mortality rate per 10,000 inmates revealed a continuous pattern prior to the coronavirus pandemic. The death rate peaked in 2020, dropping below the 2019 rate in the following years.

Diseases account for the majority of deaths cases recorded in the country. According to reports, deaths due to illnesses accounted for 59% of deaths that occurred from 2014 to 2019. Criminal deaths accounted for 21%, suicides 8%, deaths by unknown causes 8%, and accidental deaths accounted for 2% of all deaths in correctional institutions. Between 2020 and 2022, the percentage of deaths due to illness remained steady (58.4%). Criminal deaths, suicides, and accidental deaths decreased to 16%, 7.3%, and 1.8 %, respectively. In contrast, the proportion of deaths by unknown causes more than doubled, totaling 16.3% in those years.

The data highlight the inhumanity of Brazilian prisons and the state omission to dignify the ergastulum. They also point to the use of the punishment apparatus for social control and the neutralization of individuals, legitimized by justifying discourses. The neutralizing criminal policy is at the base of governmentality and accentuates inequalities, meaning not only immobilization, but also exclusion. Imprisonment implies other types of sentence in addition to deprivation of liberty, such as overcrowding, poor sanitation and food conditions and difficulty in accessing social rights such as health care, education and work[48].

The institutional violence rooted in the Brazilian prison leads the prison sentence to a sphere of non-law, meaning suffering intentionally caused with the purpose of degradation. Victimization, which begins with the organization of rules and discipline, in an exercise of domination, is accentuated by the degrading conditions of prison[49].

From this perspective, the imposition of a sentence in Brazil implies disproportionate suffering, characterized as a cruel sentence and covered with torture, and sanctions are expressly prohibited by the constitutional legal system. Eugenio Raúl Zaffaroni[50] points to the illegality of the prison sentence and states that in Latin America the punitive power is only exercised within the legal limits at the

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[46] BRASIL. Conselho Nacional de Justiça [CNJ]. Registros de Contágios e Óbitos. Boletim de 23 de dezembro. Brasília: CNJ, 2020. Available at: https://www.cnj.jus.br/sistema-carcerario/covid-19/registros-de-contagios-obitos/

[47] SISDEPEN. Sistema de acompanhamento da execução das penas, da prisão cautelar e da medida de segurança, 2022. Available at: https://www.gov.br/depen/pt-br/servicos/sisdepen.

[48] ALMEIDA, B. R.; MASSAÚ, G. C. "A arte de governar o mal e a gramática do desumano no sistema penitenciário brasileiro", *Revista Crítica Penal y Poder*, núm. 13, 2017.

[49] ALMEIDA, B. R. "Prisão e desumanidade no Brasil: uma crítica baseada na história do presente", *Revista da Faculdade de Direito - Universidade Federal de Minas Gerais*, v. 74, 2019.

[50] ZAFFARONI, E. R. *Penas ilícitas: un desafío a la dogmática penal*, Editores del Sur, Ciudad Autónoma de Buenos Aires, 2020.

normative level. He criticizes the absence of punishment for unlawful actions and the lack of legal provision for many harmful conducts, falling back as atypical. Police violence and torture, which he indicates as police lethality figures, are common illicit practices that rely on the omission of third parties (who act unlawfully through inertia). The precarious conditions of the system with massive violations of human rights also lead to the illegality of sentence.

The author demonstrates that punishment served in illegal situations, such as overcrowding, mean cruel, inhuman and degrading penaltie prohibited by the American Convention on Human Rights and by all the Constitutions of Latin American countries. Furthermore, it emphasizes that the judicial stance in imposing sentences under these conditions also entails an illicit action and would be a new form of banalization of evil. Eugenio Raúl Zaffaroni[51] states that imposing degrading penalties violates the principle of proportionality and proposes a compensatory measure for the excruciating sentence. The proposal consists of reducing the prison time (or extinguishing it) in view of the cruel conditions endured by the individual, as well as restricting provisional arrests, giving judges the task of complying with national and international law in order to restore the lawfulness of the sentence.

The Inter-American Court of Human Rights (I/A Court H.R.) issued a Resolution on 22 November 2018 applying provisional measures with respect to Brazil in the case of the Instituto Penal Plácido de Sá Carvalho (Plácido de Sá Carvalho Penal Institute), a prison that makes up the Bangu complex in Rio de Janeiro. In the decision, the I/A Court H.R. prohibited the entry of new detainees and determined the double counting of each day of deprivation of liberty served in the place in a degrading manner (except for crimes against life or physical integrity and sexual crimes). In the same sense, the Resolution of November 28, 2018 was issued by I/A Court H.R., regarding the Curado Penitentiary Complex, in Pernambuco.

In June 2021, the Fifth Panel of the Superior Tribunal de Justiça (Superior Court of Justice), when judging the Internal Interlocutory Appeal in Habeas Corpus No. 136,961/RJ, referring to the person arrested in the Plácido de Sá Carvalho Penal Institute, applied the I/A Court H.R. Resolution in compensation for the inhumanity of the sentence. Since the precedent of the Superior Court of Justice, judicial decisions are applying the Resolutions of the I/A Court H.R. to people imprisoned in these two penitentiary complexes.

Roberto Gargarella[52] criticizes the adoption of compensatory measures to the imposition of degrading punishment, stating that this response ends up legitimizing the existence of unlawful punishment. The author opposes the retributive and consequentialist (or utilitarian) theories of punishment, presenting a proposal that seeks to effect proportionality away from the imposition of sentence through democratic and egalitarian participation in a republican philosophy. He affirms that the dominant penal responses make use of reintegrating discourses, but act in such a way as to promote exclusion and isolation, which proves to be nonsense. The Argentine jurist exposes the mistake in confusing democracy with penal populism, this being the propellant of hyperpunitivism. He also points to the use of criminal law by dominant sectors of an unequal society as a means of controlling and maintaining the apparatus of power. Therefore, in the conception of Roberto Gargarella compensating for cruel sentence results in maintaining the structures of power and legitimizing punishment instead of extirpating it.

Thus, the imposition of imprisonment in Brazil is a violation of human rights and causes massive damages, characterizing torture and, therefore, a cruel sentence. Based on this observation, the study of state accountability is carried out in view of the definition of such an act as a State crime.

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[51] ZAFFARONI, E. R. *Penas ilícitas: un desafío a la dogmática penal*, Editores del Sur, Ciudad Autónoma de Buenos Aires, 2020.

[52] GARGARELLA, R. *Castigar al prójimo: por una refundación democrática del derecho penal*, Siglo Veintiuno, Buenos Aires, 2016.

5. State responsibility in the face of illicit sentence

The imposition of disproportionate suffering, the precarious conditions of the prison system and the massive violation of human rights that took place in the Brazilian prison sphere, as mentioned above, characterize a real kind of torture to detainees and, consequently, constitute a cruel sentence. Cruelty is understood as the characteristic of sentences capable of causing unbearable physical or psychological embarrassment to a human being.

The Constitution of the Federative Republic of Brazil, in its Article 5, item XLVII, expressly prohibits the imposition of atrocious sentences either by referring generically to the prohibition of cruel sentence or by specifically prohibiting the cruelty generated by the death penalty, of a perpetual nature, forced labor and banishment[53].

At the infraconstitutional level, Law No. 9,455/1997 complies with the criminalization warrant expressed in the Constitution and expressly provides as a crime of torture, among others, the submission of a person imprisoned to physical or mental suffering through the practice of an act not provided for by law or not resulting from a legal measure, as well as the submission of the person under its custody, power or authority to intense physical or mental suffering arising from violence or serious threat, as a way of applying personal sentence[54]. Despite being prohibited at the legislative level, the non-compliance with the rules related to criminal execution, by itself, undeniably generates fatally cruel sentence, which consist of real torture of the detainees.

Internally, the existence of cruel sentence within the Brazilian prison system encounters little judicial reprisal. With emphasis, one can mention the Arguição de Descumprimento de Preceito Fundamental (Allegation of Non-Compliance with Fundamental Precept) No. 347, in which the Supremo Tribunal Federal (Federal Supreme Court) declared the existence of an Unconstitutional State of Affairs in the Brazilian prison system, in order to compel the Political Powers to take measures to overcome the existing chaotic scenario. Since the preliminary injunction (from 2015), the Court had already imposed measures to overcome, or at least alleviate, the situation, for example, the holding of custody hearings and the release of contingent amounts from the Fundo Peninteciário Nacional (National Penitentiary Fund). Finally in October 2023, the Supreme Court concluded the trial and fully recognized the massive violation of fundamental rights in the Brazilian prison system. The Court gave six months for the federal government to draw up an intervention plan to resolve the situation, with guidelines to reduce prison overcrowding, the number provisional prisoners and stay in a more severe regime or for a period longer than the sentence[55]. This plan, called “National Plan for Combating the Unconstitutional State of Affairs in Brazilian Prisons”, has been under development by Conselho Nacional de Justiça (National Council of Justice) since March 2024 and is far from being finalized[56]. So, despite the progress represented by the Allegation No. 347, there is still a long way to go.

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[53] BRASIL. *Constituição da República Federativa do Brasil de 1988* Promulgada em 5 de outubro de 1988. Brasília: D.O.U, 05.10.1988. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.

[54] BRASIL. *Lei nº 9.455, de 7 de abril de 1997. Define os crimes de tortura e dá outras providências.* Brasília: D.O.U., 08.04.1997. Available at: https://www.planalto.gov.br/ccivil_03/leis/l9455.htm

[55] BRASIL. Supremo Tribunal Federal [STF]. *Arguição de Descumprimento de Preceito Fundamental* [ADPF] nº 347. Brasília: D.J.E., 11.09.2015. Available at: https://portal.stf.jus.br/processos/detalhe.asp?incidente=4783560.

[56] BRASIL. Conselho Nacional de Justiça [CNJ]. *Plano Nacional para o Enfrentamento do Estado de Coisas Inconstitucional nas Prisões Brasileiras – ADPF 347*. Brasília: CNJ, 2024. Available at: https://www.cnj.jus.br/poder-judiciario/consultas-publicas/plano-nacional-para-o-enfrentamento-do-estado-de-coisas-inconstitucional-nas-prisoes-brasileiras-adpf-347/

Therefore, it is at the international level that the neutralizing policy of the Brazilian prison system, identified as torture and as cruel sentence, can find an adequate accountability for State crimes. Caio Paiva and Thimotie Aragon Heemann[57] state that the prohibition of cruel and degrading sentence is part of the corpus juris for the protection of human rights, with corporal sentence being considered a form of torture and inhumane treatment by the International Law of the Human Rights. They also point out that the American Convention on Human Rights adopted in Article 56 the theory of positive special prevention as the purpose of the sentence. Thus, they emphasize that the competence of the Inter-American Court of Human Rights to rule on human rights violations remains perfectly established[58].

In fact, Brazil is a signatory to both the American Convention on Human Rights (known as Pact of San José from Costa Rica) and the Inter-American Convention to Prevent and Punish Torture. Both international documents–from the scope of the American system of Human Rights–affirm the Brazilian commitment to not allow the occurrence of torture and to oppose the imposition of cruel sentence. Important protection is provided for in Article 5 of the American Convention.

In cases where this commitment is not fulfilled, the competence of the I/A Court H.R. to decide on human rights violations is established with emphasis on the case of torture and cruel sentence. In addition, in this regard, it is the jurisprudence of the I/A Court H.R. itself that, when judging a case involving the Brazilian State, did not accept a preliminary of incompetence and stated that "the special declaration of acceptance of the contentious jurisdiction of the Court according to the American Convention (...) allows the Court is aware of both violations of the Convention and other Inter-American instruments that grant jurisdiction to it"[59].

The I/A Court H.R. has already commented on the continuous or permanent violations that occurred in the Brazilian case of the detention facility known as Carandiru, "as a failure to comply with the obligation to investigate and punish the perpetrators of serious crimes against human rights, as well as the absence of full and effective reparation to the victims or their families", says Caio Paiva and Thimotie Aragon Heemann[60]. In this way, the competence of the I/A Court H.R. is unequivocally characterized and, consequently, the possibility of holding the Brazilian State responsible at the international level for the State crimes related to the prison context.

It is important to consider that Brazil submits to the Committee against Torture (CAT), the body responsible for monitoring the implementation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Sentences, a treaty signed within the scope of the global Human Rights system and to which Brazil is also a signatory. The aforementioned Committee has four protection mechanisms, namely periodic reports, inquiry procedure, interstate petitions and individual petitions, and since 2006 Brazil has accepted the competence of the Committee to receive and analyze these individual petitions, according to Caio Paiva and Thimotie Aragon Heemann[61].

In 2023, the Committee against Torture published a report on Brazil, presenting conclusions on rights violations that characterize torture and issuing recommendations. These include improvements in prison conditions, overcrowding,

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[57] PAIVA, C.; HEEMANN, T. A. *Jurisprudência Internacional dos Direitos Humanos*, Editora Cei, Belo Horizonte, 2020, p. 139.

[58] PAIVA, C.; HEEMANN, T. A. *Jurisprudência Internacional dos Direitos Humanos*, Editora Cei, Belo Horizonte, 2020, p. 405.

[59] CORTE INTERAMERICANA DE DIREITOS HUMANOS [CORTEIDH]. Resolução de 22 de novembro de 2018. Medidas Provisórias a Respeito do Brasil. Assunto do Instituto Penal Plácido de Sá Carvalho. Available at: https://www.corteidh.or.cr/docs/medidas/placido_se_03_por.pdf

[60] PAIVA, C.; HEEMANN, T. A. *Jurisprudência Internacional dos Direitos Humanos*, Editora Cei, Belo Horizonte, 2020, p. 548.

[61] PAIVA, C.; HEEMANN, T. A. *Jurisprudência Internacional dos Direitos Humanos*, Editora Cei, Belo Horizonte, 2020, p. 618.

mass incarceration and the existence of structural racism. Declared the need of a national system for recording cases of torture, with continually updating and compiling and publishing statistical data on the number of complaints of acts of torture and ill-treatment registered in all bodies[62].

In the same year, the first case relating to Brazil was admitted by the CAT. The request was submitted by the Public Defender's Office of the State of São Paulo and Conectas Human Rights regarding the events that occurred in 2015 involving offenses against human rights by criminal police officers from the Rapid Intervention Group against people arrested in Presidente Prudente, São Paulo[63].

In addition, Brazil is still subject to the universal jurisdiction of the International Court of Justice, the supreme jurisdictional body of the UN, in which Brazil participates. It is the most important forum for international settlement today, which has already expressly expressed for the accountability of countries that disrespect the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Sentences.

By the way, in the case Belgium vs. Senegal (Habré Case), the International Court of Justice held that the foundation that grants validity to universal jurisdiction over the practice of torture are the very precepts of the UN Convention against Torture, especially considering that "the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)"[64]. Indeed, the case in question makes it clear. Former president Hissène Habré ruled Chad from 1982 to 1990 and became known for establishing a dictatorship in the country that ignored human rights, torturing and killing all those who opposed his regime (in other words, State crimes). When he lost office, he flew to Senegal, where he was granted asylum. Years later, Chad asked for the former president's repatriation so that he could answer for his crimes. Belgium entered the fray when victims of Habré's regime, with dual citizenship, decided to sue the Belgian judiciary. Belgium then took the case to the Hague, where the International Court of Justice ruled that Senegal was obliged to try Habré, in compliance with the UN Convention Against Torture. The judges explained that the investigation was not an option, but a real obligation of the country where the accused of torture crimes is located.

This is because, as Iñaki Rivera Beiras points out, it is essential that one understands torture from a juridical-political culture committed to the essential values of the rule of law: torture is a State crime and therefore can no longer be taken, by the juridical-criminal culture, as just another ordinary crime. In fact, the legal concept of human dignity, by virtue of its strength and its indefiniteness, has managed to give a "strong jolt" to criminal systems - and this shock has come from international bodies, such as the European Court of Human Rights and the European Committee for the Prevention of Torture, less involved in domestic debates and more attuned to the notion of dignity[65]. The same logic can be applied to South America an, more specifically, to Brazil.

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[62] COMMITTEE AGAINST TORTUTE [CAT]. Concluding observations on the second periodic report of Brazil. Seventy-sixth session (17 April–12 May 2023). CAT/C/BRA/CO/2, 2023, p. 16. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=2627&Lang=en

[63] DEFENSORIA PÚBLICA DO ESTADO DE SÃO PAULO. ONU admite denúncia de DPE-SP e Conectas contra Brasil por tortura e outras violações. São Paulo, 2023. Available at: https://www.defensoria.sp.def.br/noticias/-/noticia/4885957

[64] INTERNATIONAL COURT OF JUSTICE [ICJ]. Reports of judgments, advisory opinions and orders. Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422. Available at: https://www.icj-cij.org/sites/default/files/case-related/144/144-20120720-JUD-01-00-BI.pdf

[65] RIVEIRA BEIRAS, I. "Cuerpo, espacio y tiempo: vectores de la privación de libertad", *Revista Eletrônica da Faculdade de Direito da Universidade Federal de Pelotas*, Dossiê Extensão

In these terms, the possibility of international accountability of the Brazilian State for the cruel sentence verified in the practice of the national prison system (identified as torture and, consequently, state crimes) is perfectly conceivable. So much so that the Inter-American Court of Human Rights has already ruled in several cases involving the violation of human rights within prisons in Brazil, including granting provisional measures.

For example, we can mention the cases of Penitenciária de Urso Branco (Porto Velho, Rondônia) (Urso Branco Penitentiary in Porto Velho, Rondônia), Complexo do Tatuapé da FEBEM em São Paulo (Taubaté Complex of FEBEM in São Paulo), Penitenciária Dr. Sebastião Martins Silveira (Araraquara, São Paulo) (Dr. Sebastião Martins Silveira Penitentiary in Araraquara, São Paulo), Unidade de Internação Socioeducativa de Cariacica (Espírito Santo) (Cariacica Socio-educational Internment Unit at Espírito Santo), Complexo Penitenciário de Curado (Recife, Pernambuco) (Penitentiary Complex of Curado in Recife, Pernambuco), Complexo Penitenciário de Pedrinhas (São Luís, Maranhão) (Penitentiary Complex of Pedrinhas in São Luís, Maranhão) and Instituto Penal Plácido de Sá Carvalho (Rio de Janeiro, Rio de Janeiro) (Plácido de Sá Carvalho Penal Institute in Rio de Janeiro, Rio de Janeiro)[66].

Among these, the aforementioned manifestation of the Inter-American Court on the Plácido de Sá Carvalho Penal Institute[67] stands out. In this case, it was understood that prison overcrowding is one of the main criminal factors in the prison environment, contributing directly to the brutalization and dehumanization of the prisoner, as well as providing the necessary conditions for the creation and expansion of criminal organizations[68].

Alejandro Forero-Cuéllar, in the same vein, argues that prison over crowding can be equated with ill-treatment or torture under international law. Faced with such a broad phenomenon, the author highlights two elements that can help assess this circumstance: the existence of a minimum standard with regard to living space and the use of instruments to establish the existence of damage caused by inhumane conditions of imprisonment[69].

Forero-Cuéllar, about the Plácido de Sá Carvalho Penal Institute case, mentions the I/A Court H.R decision (that echos a doctrine of unlawful punishment) and exemplifies ways to compensate such inhumane conditions. The punishment becomes illegal due to deteriorate conditions of the establishment when the suffer is over than that inherent and expected to the deprivation of liberty. The time of imprisonment is reduced by a reasonable calculation. Each day of actual deprivation of liberty in degrading conditions is computed at the rate of two days of lawful punishment[70].

The most important thing, however, is the attempt to overcome the degrading structural and operational conditions of the Brazilian prison system, as well as

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universitária e sistema penal-penitenciário: aportes teóricos e experiências de luta, projetos e ações, v. 04, n. 1, 2018.

[66] CORTE INTERAMERICANA DE DIREITOS HUMANOS [CORTEIDH]. *Caderno de Jurisprudência da Corte Interamericana de Direitos Humanos No. 36*: Jurisprudência sobre o Brasil. San José, C.R.: Corte IDH, 2022, p. 255. Available at: https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo36_2022_port1.pdf

[67] CORTE INTERAMERICANA DE DIREITOS HUMANOS [CORTEIDH]. Resolução de 22 de novembro de 2018. Medidas Provisórias a Respeito do Brasil. Assunto do Instituto Penal Plácido de Sá Carvalho. Available at: https://www.corteidh.or.cr/docs/medidas/placido_se_03_por.pdf

[68] PAIVA, C.; HEEMANN, T. A. *Jurisprudência Internacional dos Direitos Humanos*, Editora Cei, Belo Horizonte, 2020, p. 429.

[69] FORERO-CUÉLLAR, A, "Prison overcrowding and ill-treatment: sentence reduction as a reparation measure. A view from Latin America and Europe", *Torture Journal*: journal on rehabilitation of torture victms ands prevention of torture, Vol. 33, n. 3, 2023.

[70] FORERO-CUÉLLAR, A, "Prison overcrowding and ill-treatment: sentence reduction as a reparation measure. A view from Latin America and Europe", *Torture Journal*: journal on rehabilitation of torture victms ands prevention of torture, Vol. 33, n. 3, 2023.

overcome the recorded cases of torture and violation of the physical and bodily integrity of persons deprived of liberty (which, as already mentioned, represents violence and absence of the State in the security and control of these units). In other words, is essential to fight against the facts: there is for sure a serious depreciation of rights and, despite numerous supposedly protective norms, the invisibility regarding incarceration, deaths in prison custody and lives that are ignored remain[71]. Accountability at the international level exists precisely to combat the scenario where the "prison is a privileged place for the violation of human rights",[72] as expressed by Alessandro Baratta.

Therefore, since the reality of the Brazilian prison system makes the commission of torture and the configuration of cruel sentences notorious, it is imperative to recognize the commission of State crimes and the use of techniques of neutralization in the Brazilian context. Consequently, it is imperative to recognize the possibility of State accountability at the international level, notably as an attempt to protect fundamental and human rights.

6. Considerations

State crimes must be faced as one of the worst possible forms of criminality, especially considering that they consist of massive violations of fundamental and human rights (so that they generate immense widespread social damage), as well as considering that they are committed under the apparent aegis of legality, through the exercise of the monopoly of force by the State. In addition, the great moral and scientific indifference that governs the scenario of State crimes contributes even more to the perpetuation of the social damages generated by the crime, which is why an attempt to change this reality is necessary.

The analysis of the Brazilian prison environment allows us to conclude that there is a neutralizing criminal policy in Brazil, through which the existence of cruel sentence (which constitute real torture for detainees) is masked by labels of legality and inevitability.

The omission of the State combined with the responsibility for the ineffectiveness of the adopted measures, leads to the vulnerability of people deprived of liberty and their families, and indicates institutional violence characterized by the degradation of the prison structure, potentiating mortality. It is about the actual application of neutralizing techniques to the prison context and, ultimately, the actual commission of massive violations of human rights carried out by state agents with the connivance of the State–that is, it is about the very concept of State crimes envisioned in practice.

It is concluded that the reality of the Brazilian prison system makes the commission of torture and the configuration of cruel sentence notorious, so it is imperative to recognize the commission of State crimes and the use of techniques of neutralization in the Brazilian context. Consequently, there is the possibility of holding the State responsible at the international level, given the violation of commitments made both in the global system and in the American system for the protection of human rights. Finally, it is about to fight Baratta's conclusion: prison may no longer be a synonymus with human rights violations.

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[71] ALMEIDA, B. R. "Letalidad carcelaria en Brasil: reconfiguraciones y tendencias", In: RIVEIRA BEIRAS, I. ANITUA, G. I. (orgs.). *Muertes evitables*: *Violencia institucional y masacres en cárceles sudamericanas*, Editorial Universitaria, Buenos Aires, 2023.

[72] BARATTA, A. "Derechos humanos: entre violencia estructural y violencia penal. Por la pacificación de los conflictos violentos", *Revista IIDH – Instituto Interamericano de Derechos Humanos*, n. 11, Jan./Jun., 1990, p. 20.

References

AGAMBEN, G. *Homo Sacer: o poder soberano e a vida nua*, UFMG, Belo Horizonte, 2007.

ALMEIDA, B. R. "Humanidades inumanas: dinâmicas e persistências históricas em torno do cárcere no Brasil", *Revista do Instituto Histórico e Geographico Brazileiro*, v. 179, 2018.

ALMEIDA, B. R. "Prisão e desumanidade no Brasil: uma crítica baseada na história do presente", *Revista da Faculdade de Direito - Universidade Federal de Minas Gerais*, v. 74, 2019.

ALMEIDA, B. R.; MASSAÚ, G. C. "A arte de governar o mal e a gramática do desumano no sistema penitenciário brasileiro", *Revista Crítica Penal y Poder*, núm. 13, 2017.

ALMEIDA, B. R. "Letalidad carcelaria en Brasil: reconfiguraciones y tendencias", In: RIVEIRA BEIRAS, I. ANITUA, G. I. (orgs.). *Muertes evitables: Violencia institucional y masacres en cárceles sudamericanas*, Editorial Universitaria, Buenos Aires, 2023.

BARATTA, A. "Derechos humanos: entre violencia estructural y violencia penal. Por la pacificación de los conflictos violentos", *Revista IIDH – Instituto Interamericano de Derechos Humanos*, n. 11, Jan./Jun., 1990.

BRASIL. Conselho Nacional de Justiça [CNJ]. Registros de Contágios e Óbitos. Boletim de 23 de dezembro. Brasília: CNJ, 2020. Available at: https://www.cnj.jus.br/sistema-carcerario/covid-19/registros-de-contagios-obitos/

BRASIL. Conselho Nacional de Justiça [CNJ]. Banco Nacional de Monitoramento de Prisões. Brasília: CNJ, 2021. Available at: https://portalbnmp.cnj.jus.br/#/estatisticas

BRASIL. Conselho Nacional de Justiça [CNJ]. Plano Nacional para o Enfrentamento do Estado de Coisas Inconstitucional nas Prisões Brasileiras – ADPF 347. Brasília: CNJ, 2024. Available at: https://www.cnj.jus.br/poder-judiciario/consultas-publicas/plano-nacional-para-o-enfrentamento-do-estado-de-coisas-inconstitucional-nas-prisoes-brasileiras-adpf-347/

BRASIL. Constituição da República Federativa do Brasil. Promulgada em 5 de outubro de 1988. Brasília: D.O.U, 1988. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm

BRASIL. Decreto nº 40, de 15 de fevereiro de 1991. Promulga a Convenção Contra a Tortura e Outros Tratamentos ou Penas Cruéis, Desumanos ou Degradantes. Brasília: D.O.U, 18.02.1991. Available at: http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0040.htm

BRASIL. Decreto nº 678, de 6 de novembro de 1992. Promulga a Convenção Americana sobre Direitos Humanos (Pacto de São José da Costa Rica), de 22 de novembro de 1969. Brasília: D.O.U, 09.11.1992. Available at: http://www.planalto.gov.br/ccivil_03/decreto/d0678.htm

BRASIL. Decreto nº. 98. 386, de 9 de dezembro de 1989. Promulga a Convenção Interamericana para Prevenir e Punir a Tortura. Brasília: D.O.U, 13.11.1989. Available at: http://www.planalto.gov.br/ccivil_03/decreto/1980-1989/d98386.htm

BRASIL. Lei nº 9.455, de 7 de abril de 1997. Define os crimes de tortura e dá outras providências. Brasília: D.O.U, 08.04.1997. Available at: http://www.planalto.gov.br/ccivil_03/leis/l9455.htm

BRASIL. Departamento Penitenciário Nacional [DEPEN]. Levantamento Nacional de Informações Penitenciárias: Infopen. Atualização junho de 2017. Brasília: Ministério da Justiça, 2019. Available at: http://antigo.depen.gov.br/DEPEN/depen/sisdepen/infopen/relatorios-sinteticos/infopen-jun-2017-rev-12072019-0721.pdf

BRASIL. Instituto Brasileiro de Geografia e Estatística [IBGE]. Estatísticas. Rio de Janeiro: IBGE, 2021. Available at: https://paises.ibge.gov.br/#/mapa/ranking/brasil?indicador=77849&tema=5&ano=2020

BRASIL, Supremo Tribunal Federal [STF]. Arguição de Descumprimento de Preceito Fundamental [ADPF] nº 347. Brasília: DJE, 27.08.2015. Available at: http://portal.stf.jus.br/processos/detalhe.asp?incidente=4783560

BRASIL. Superior Tribunal de Justiça [STJ]. Agravo Regimental no Recurso em Habeas Corpus nº 136.961/RJ. Brasília: DJE, 21.06.2021. Available at: https://processo.stj.jus.br/processo/pesquisa/?aplicacao=processos.ea&tipoPesquisa=tipoPesquisaGenerica&termo=RHC%20136961

COHEN, S. "Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past", *Law & Social Inquiry*, vol. 20, n. 1. 1995.

COMMITTEE AGAINST TORTUTE [CAT]. Concluding observations on the second periodic report of Brazil. Seventy-sixth session (17 April–12 May 2023). CAT/C/BRA/CO/2, 2023, p. 16. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=2627&Lang=en

CORTE INTERAMERICANA DE DIREITOS HUMANOS [CORTEIDH]. Resolução de 22 de novembro de 2018. Medidas Provisórias a Respeito do Brasil. Assunto do Instituto Penal Plácido de Sá Carvalho. Available at: https://www.corteidh.or.cr/docs/medidas/placido_se_03_por.pdf

CORTE INTERAMERICANA DE DIREITOS HUMANOS [CORTEIDH]. Resolução de 28 de novembro de 2018. Medidas Provisórias a Respeito do Brasil. Assunto do Complexo Penitenciário de Curado. Available at: https://www.corteidh.or.cr/docs/medidas/curado_se_06_por.pdf

CORTE INTERAMERICANA DE DIREITOS HUMANOS [CORTEIDH]. Caso Favela Nova Brasília vs. Brasil. 16 fev. 2017. Available at:
https://www.corteidh.or.cr/docs/casos/articulos/seriec_333_por.pdf

CORTE INTERAMERICANA DE DIREITOS HUMANOS [CORTEIDH]. *Caderno de Jurisprudência da Corte Interamericana de Direitos Humanos No. 36*: Jurisprudência sobre o Brasil. San José, C.R.: Corte IDH, 2022, p. 255. Available at: https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo36_2022_port1.pdf

DEFENSORIA PÚBLICA DO ESTADO DE SÃO PAULO. ONU admite denúncia de DPE-SP e Conectas contra Brasil por tortura e outras violações. São Paulo, 2023. Available at: https://www.defensoria.sp.def.br/noticias/-/noticia/4885957

FORERO-CUÉLLAR, A, "Prison overcrowding and ill-treatment: sentence reduction as a reparation measure. A view from Latin America and Europe", *Torture Journal*: journal on rehabilitation of torture victms ands prevention of torture, Vol. 33, n. 3, 2023.

FÓRUM BRASILEIRO DE SEGURANÇA PÚBLICA. Anuário Brasileiro de Segurança Pública 2021. São Paulo: Fundação Ford, Open Society Foundations, Federação Nacional das Empresas de Segurança e Transporte de Valores, 2021. Available at: https://forumseguranca.org.br/anuario-brasileiro-seguranca-publica/

GARGARELLA, R. *Castigar al prójimo: por una refundación democrática del derecho penal*, Siglo Veintiuno, Buenos Aires, 2016.

GREEN, P.; WARD, T. *State Crime: Governments, Violence and Corruption*, Pluto Press, London, 2004.

INSTITUTE FOR CRIME & JUSTICE POLICY RESEARCH. *World Prison Brief* [WPB]. Prison Population Total. Londres: WPB, 2021. Available at: https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All

INTERNATIONAL COURT OF JUSTICE [ICJ]. Reports of judgments, advisory opinions and orders. Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422. Available at: https://www.icj-cij.org/sites/default/files/case-related/144/144-20120720-JUD-01-00-BI.pdf

JAKOBS, G.; MELIÁ, M. C. *Direito Penal do Inimigo: noções e críticas*, Livraria do Advogado, Porto Alegre, 2015.

MORRISON, W. *Criminología, civilización y nuevo orden mundial*, Anthropos Editorial, Barcelona, 2012.

PAIVA, C.; HEEMANN, T. A. *Jurisprudência Internacional dos Direitos Humanos*, Editora Cei, Belo Horizonte, 2020.

RIVEIRA BEIRAS, I. "Cuerpo, espacio y tiempo: vectores de la privación de libertad", *Revista Eletrônica da Faculdade de Direito da Universidade Federal de Pelotas*, Dossiê Extensão universitária e sistema penal-penitenciário: aportes teóricos e experiências de luta, projetos e ações, v. 04, n. 1, 2018.

RIVERA BEIRAS, I. *Desencarceramento: por uma política de redução da prisão a partir de um garantismo radical*, Tirant lo Blanch, São Paulo, 2019.

RIVERA BEIRAS, I.; BERNAL SARMIENTO, C. E.; CABEZAS CHAMORRO, S.; FORERO CUELLAR, A.; VIDAL TAMAYO, I. "Más allá de la criminología. Un debate epistemológico sobre el daño social, los crímenes internacionales y los delitos de los mercados". In: RIVEIRA BEIRAS, I. (Coord.). *Criminología, daño social y crímenes de los estados y los mercados. Temas, debates y diálogos*, Anthropos Editorial, Barcelona, 2013.

SILVA FILHO, J. C. M. da. "Crimes de Estado e Justiça de Transição", *Sistema Penal & Violência*, v. 2, n. 2, Porto Alegre, July/Dec. 2010.

SISDEPEN. Sistema de acompanhamento da execução das penas, da prisão cautelar e da medida de segurança, 2022. Available at: https://www.gov.br/depen/pt-br/servicos/sisdepen

SYKES, G.; MATZA, D. "Techniques of Neutralization: A Theory of Delinquency", *American Sociological Review*, v. 22, n. 6, Chicago, Dec. 1957.

ZAFFARONI, E. R. *El crimen de estado como objeto de la criminología*, UNAM, 2006.

ZAFFARONI, E. R. *Crímenes de masa*, Ediciones Madres de Plaza de Mayo, Buenos Aires, 2012a.

ZAFFARONI, E. R. "Introducción a Criminología, Civilización y Nuevo Orden Mundial de Wayne Morrison", *Revista Crítica Penal y Poder*, n. 2., Barcelona, Mar./2012b.

ZAFFARONI, E. R. "Las penas crueles y la doble punición". In: ZAFFARONI, E. R. (dir.). *La medida del castigo: el deber de compensación por penas ilegales,* Ediar, Ciudad Autónoma de Buenos Aires, 2012.

ZAFFARONI, E. R. *O inimigo no Direito Penal*, Revan, Rio de Janeiro, 2014.

ZAFFARONI, E. R. *Penas ilícitas: un desafío a la dogmática penal*, Editores del Sur, Ciudad Autónoma de Buenos Aires, 2020.