

# Assessing a Late Truth Commission: Challenges and Achievements of the Brazilian National Truth Commission

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## ABSTRACT<sup>∞</sup>

Mobilizing the literature, official documents, press materials and field notes, this article discusses the Brazilian National Truth Commission (NTC) timing, process and results. It argues that Brazil's transitional justice evolved differently from that of its neighbouring countries and that establishing the truth was just one of the NTC's goals. Created when much of the truth was known, the Brazilian NTC had to address two competing expectations: first, the promotion of an account of the past that supported the previously established conciliatory narrative (the status quo expectation); and second, to challenge that path by mobilizing society against impunity (the victims' expectation). This tension influenced the NTC's agenda and its results. Despite the modest outcomes in truth seeking, the NTC achieved three main goals: improving historical accountability; promoting international human rights norms; and challenging the veto power that the military still holds. This constitutes a step forward.

**KEYWORDS:** Brazil, truth commission, military rule, human rights violations, civil-military relations

## INTRODUCTION

The recent literature regarding truth commissions has focused on qualitatively and quantitatively assessing their impacts, which go far beyond 'truth seeking.' While a first wave of studies in the field questioned whether truth or justice should be chosen in postauthoritarian transitions, current studies try to understand how transitional justice mechanisms interact and improve human rights and when they should be used.<sup>1</sup> Whereas large-scale, quantitative research has emphasized the overall impact

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∞ The author would like to thank Cath Collins, James N. Green and Nina Schneider for their comments on and critiques of drafts of this article. The views and conclusions reflected in this article are solely those of the author and are in no way intended to reflect the views of the institutions with which the author is affiliated.

1 See, Robert Rotberg and Dennis Thompson, eds., *Truth v. Justice: The Morality of Truth Commissions* (Princeton, NJ: Princeton University Press, 2000); Tricia Olsen, Leigh Payne and Andrew Reiter, 'When Truth Commissions Improve Human Rights,' *International Journal of Transitional Justice* 4(3) (2010): 457–476; Geoff Dancy, Hunjoon Kim and Eric Wiebelhaus-Brahm, 'The Turn to Truth: Trends in Truth Commission Experimentation,' *Journal of Human Rights* 9(1) (2010): 45–64.

of macro transformations on human rights indicators, case studies and qualitative research have tried to assess how specific domestic features are affected. Due to its distinctive features, the Brazilian case emerges as an interesting example for the qualitative assessment of the contributions of a truth commission that was late in coming.

After a long transitional period that lasted from the 1979 amnesty law through the 1985 return to civil government and to the enactment of the new constitution in 1988, Brazil became the last country in Latin America to create a truth commission, waiting until 2011 to address the atrocities committed under military rule. While most countries establish a truth commission within two years of a transition,<sup>2</sup> Brazil took almost three decades. By that time, most of the truth was already known through the work of civil society and two official reparation commissions.<sup>3</sup> Brazil is also one of the few countries in the region that resists overturning impunity measures for human rights violations.<sup>4</sup>

Considering this context, this article mobilizes the existing literature, official documents, press information and field notes taken by the author over seven years while serving as an official for transitional justice issues in the Brazilian ministry of justice, to analyze the process that led to the establishment of the National Truth Commission (NTC) and the challenges faced by a latecomer investigative body. It also highlights the results of the NTC beyond its truth-seeking function.

Assessing the work of the NTC without revisiting the history of military rule itself, the article fills a gap in the existing literature regarding recent developments in transitional justice in Brazil. It also mobilizes native-language sources unavailable to most English speakers to offer circumstantial information, constructing a broad narrative that contextualizes the NTC within the larger framework of transitional justice efforts. This article advocates the idea that despite the NTC's shortcomings regarding truth seeking, the commission allowed advancement in at least three main areas, thus supporting the overall struggle for justice and improved democratic governance: *accountability*, even if only in historical terms; *norm promotion*, pressuring the justice system to comply with international law and to encompass the concept of crimes against humanity; and, most importantly, *civil-military relations*, challenging the informal veto power still exercised by the military, breaking new ground and improving democratic governance. In this last sense, the work of the NTC can be

- 2 Eric Brahm, 'Uncovering the Truth: Examining Truth Commission Success and Impact,' *International Studies Perspectives* 8(1) (2007): 16–35; Dancy, Kim and Wiebelhaus-Brahm, supra n 1; Onur Bakiner, 'Truth Commission Impact: An Assessment of How Commissions Influence Politics and Society,' *International Journal of Transitional Justice* 8(1) (2013): 6–30.
- 3 Comissão de Familiares de Mortos e Desaparecidos Políticos, *Dossiê dos Mortos e Desaparecidos Políticos a partir de 1964* (Recife: Companhia Editora de Pernambuco, 1995). See also, Marcelo Torelly, 'Das comissões de reparação à comissão da verdade. As contribuições dos acervos da Comissão Especial sobre Mortos e Desaparecidos Políticos e da Comissão de Anistia para a Comissão Nacional da Verdade brasileira,' in *Justiça de Transição: das Anistias às Comissões da Verdade*, ed. Ana Sabadell, Jan-Michael Simon and Dimitri Dimoulis (São Paulo: RT/Thomson Reuters, 2013).
- 4 Paulo Abrão and Marcelo Torelly, 'Resistance to Change: Brazil's Persistent Amnesty and Its Alternatives for Truth and Justice,' in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, ed. Francesca Lessa and Leigh Payne (New York: Cambridge University Press, 2012).

considered the largest rupture with the ‘transition by transformation’ model that has prevailed in most Brazilian transitional efforts.<sup>5</sup>

### THE CONTEXT: A TRANSITION BY TRANSFORMATION AND ITS BOUNDARIES

Compared to its neighbours, Argentina and Chile, accountability efforts in Brazil were delayed.<sup>6</sup> Despite having a similar Cold War repressive context, with the military taking office as a ‘preventive’ effort against the alleged communist threat, these three countries adopted distinctive patterns of repression and followed different pathways to address atrocity. At least three key differences may be noted.

First, Brazil had the most ‘legalized’ form of military rule. In his ground-breaking book, Anthony Pereira defines this as ‘authoritarian legality,’ opposing ‘rule of law’ with ‘rule by law.’<sup>7</sup> Whereas the regime in Argentina radically antagonized the rule of law and the one in Chile carried out mixed legal and illegal repressive strategies, the judicial branch of government in Brazil strongly supported the coup d’état, courts applied authoritarian legality with very few restrictions and broad cooperation was established between civil and military justice. Moreover, the Brazilian regime managed to control the political system instead of breaking with it. Congress functioned during most of the military’s rule, and elections ran on a regular basis despite the introduction of several reforms related to the electoral process.<sup>8</sup>

Second, because of this authoritarian legality, Brazil followed a different repressive strategy that led to the lowest number of capital victims in the region. The judicial branch’s adherence to authoritarianism allowed political enemies to be prosecuted, imprisoned and expelled from the country in formal ways. In Argentina, courts were largely uninvolved in repression; therefore, clandestine practices such as forced disappearances became routine. In Brazil, the legal system helped to persecute political opponents judicially. As a result, there was less need for clandestine practices to ‘deal’ with the opposition. This legal strategy affected the number of people killed by the regime. In Argentina, figures vary between the officially recognized 8,000 victims to nongovernmental organizations’ (NGOs) claim of 30,000.<sup>9</sup> Chile has 3,216 recognized victims, but civil society claims as many as 9,000.<sup>10</sup> In Brazil, the official figure is 434.<sup>11</sup>

5 Samuel Huntington, *The Third Wave: Democratization in the Late 20th Century* (Norman, OK: University of Oklahoma Press, 1993).

6 Marie-Claude Jean-Baptist, ‘The Unfinished Business of Transitional Justice in Brazil: The Hopes and Promises of the Brazilian National Truth Commission,’ *RE-VISTA Verdade, Justiça e Memória* 8 (2014).

7 Anthony Pereira, *Political (In)Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (Pittsburgh, PA: Pittsburgh University Press, 2005).

8 Leonardo Barbosa, ‘The Ballot under the Bayonet: Election Law in the First Years of the Brazilian Civil–Military Regime (1964–1967),’ *Revista Direito GV* 13(1) (2017): 145–170.

9 Comisión Nacional sobre la Desaparición de Personas, *Nunca Más*, 8th ed. (Buenos Aires: Universidad de Buenos Aires, 2011), 20.

10 Cath Collins and Boris Hau, ‘Chile: Incremental Truth, Late Justice,’ in *Transitional Justice in Latin America: The Uneven Road from Impunity towards Accountability*, ed. Elin Skaar, Jemima García-Godos and Cath Collins (London: Routledge, 2016), 127.

11 National Truth Commission, *Final Report* (Brasília, 2014), vol. I, 963. For further analysis, see, Bruno Boti Bernardi, ‘Silence, Hindrances and Omissions: The Inter-American Commission on Human Rights

Finally, the Brazilian military was able to exercise substantial control over the transition to democracy. In Argentina, the regime ended with high disapproval ratings after a military defeat in the Malvinas/Falklands War against Britain.<sup>12</sup> In Augusto Pinochet's Chile, a more divisive scenario occurred: a national referendum in 1988 led to the end of military rule, with 56 percent of the population voting for free elections against 44 percent who supported retaining the general in office.<sup>13</sup> In Brazil, the military managed an 'exit strategy,' including passing an amnesty law in 1979 that would later be considered illegal by the Inter-American Court of Human Rights (IACHR),<sup>14</sup> and holding indirect presidential elections through which a regime supporter, José Sarney, became the first postauthoritarian civil president. This set the stage for a controlled transition and has led scholars to argue that the armed forces maintained 'veto power' even after the return to democratic rule,<sup>15</sup> classifying the democratization process as a 'transition by transformation' rather than by rupture.<sup>16</sup>

As argued by Samuel Huntington, transitions by transformation occur in well-established authoritarian regimes 'where governments clearly controlled the ultimate means of coercion.'<sup>17</sup> This ensures substantial continuity between the late authoritarian regime and the newborn democracy. This continuity poses additional challenges to transitional justice measures and helps explain why Brazil took so long to address its authoritarian past.

The adherence of the judicial branch to authoritarian legality had at least two consequences. First, it reinforced a legal system highly supportive of the regime and inherited by the new democracy. During 21 years of military rule, the government was able to appoint judges and prosecutors, mainly excluding those critical of authoritarianism; depuration never occurred following the end of the authoritarian regime. Even several years after the return to democracy, most of the legal actors continued to be those appointed by the military. Renewal only occurred as old employees retired and new ones took office via democratic public competition (as required by the 1988 democratic constitution). To exemplify the reach of authoritarian influence, the last military-appointed Supreme Court judge to retire was José Carlos Moreira Alves in 2003 – 18 years after the regime ended.

Moreover, the existence of an elected Congress during military rule legitimized the 1979 amnesty. In the 1970s, especially after 1975, mobilizations calling for a 'broad, general, and unrestricted' amnesty for *political prisoners* erupted in

and the Brazilian Military Dictatorship,' *International Journal of Human Rights* (2017), doi.org/10.1080/13642987.2017.1299915.

12 Par Engstrom and Gabriel Pereira, 'From Amnesty to Accountability: The Ebb and Flow in the Search for Justice in Argentina,' in *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, ed. Francesca Lessa and Leigh Payne (New York: Cambridge University Press, 2012).

13 Alfred Stepan, 'Paths toward Redemocratization: Theoretical and Comparative Considerations,' in *Transitions from Authoritarian Rule: Comparative Perspectives*, Vol. 3, ed. Guillermo O'Donnell, Philippe C. Schmitter and Laurence Whitehead (Baltimore, MD: Johns Hopkins University Press, 1986), 81.

14 IACHR, *Julia Gomes Lund vs. Brazil*, Judgment (24 November 2010), Series C 219.

15 Maria Celina D'Araujo, 'O estável poder de veto Forças Armadas sobre o tema da anistia política no Brasil,' *Varia Historia* 28(48) (2012): 573–597.

16 Huntington, *supra* n 5 at 124–125.

17 *Ibid.*, 125.

Brazilian streets.<sup>18</sup> The opposition party, the Brazilian Democratic Movement (*Movimento Democrático Brasileiro*), embraced this struggle and proposed an amnesty bill in the National Congress. Despite its initial resistance to any kind of amnesty, on 28 August 1979, the military government finally conceded by granting amnesty for all ‘political crimes’ of the opposition as well as those ‘connected’ to them,<sup>19</sup> which was understood as bilateral amnesty for ‘both sides.’<sup>20</sup> The amnesty became part of the controlled transitional strategy, granting impunity to the repressive state personnel. The opposition’s crimes were very well known, especially the kidnapping of foreign officials and the armed robberies used to finance those actions, but due to regime censorship, very little was known regarding the practice of torture and forced disappearances by the government.

Second, the regime’s repressive legal strategy had a significant impact on the struggle for accountability. The broader use of courts and trials instead of clandestine operations and forced disappearances is the main reason why the figures regarding Brazilian capital victims pale in comparison to those of Argentina and Chile. The figures in Argentina and Chile made the topic unavoidable after the return to democracy. In Brazil, it was simply not as large an issue after democratization. Fewer deaths translated into fewer relatives engaged in denouncing the gross human rights violations and calling for justice, resulting in less social mobilization for justice. Moreover, judges and prosecutors that supported the regime were the ones in charge of prosecuting the perpetrators.

In response to social mobilization, truth commissions were established in the very first year of the return to civilian rule in Argentina and Chile, in 1983 and 1990, respectively.<sup>21</sup> Conversely, Brazil’s postauthoritarian Constitutional Assembly set provisions for reparations in 1987/88 (two years after the regime ended in 1985) but remained silent on issues concerning either truth or justice.<sup>22</sup>

Only 10 years after military rule ended did the democratic government begin recognizing the dictatorship’s human rights violations. Two special commissions were established in Brazil during Fernando Henrique Cardoso’s administration (1995–2002). In 1995, the Special Commission on Political Deaths and Disappearances (*Comissão Especial sobre Mortos e Desaparecidos Políticos*, or CEMDP) received a mandate to pay compensation to relatives and to coordinate efforts to locate the victims’ mortal remains.<sup>23</sup> In 2001, the Amnesty Commission was established to issue reparations, both economic and moral, to the victims of other kinds of violations.<sup>24</sup>

Military representatives had a seat on both commissions, and as a result of pressure from the armed forces, the commissions had a limited mandate: investigate violations but do not indict those responsible for the crimes. Though military power

18 Abrão and Torelly, *supra* n 4 at 172.

19 Law 6.683 (28 August 1979), art. 1.

20 Carlos Fico, ‘A Negociação Parlamentar da Anistia de 1979 e o Chamado “Perdão aos Torturadores”’, *Revista Anistia Política e Justiça de Transição* 4 (2009): 318.

21 Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed. (Abingdon: Routledge, 2011).

22 Act of Transitional Constitutional Measures, art. 8.

23 Law 9.145 (4 December 1995).

24 Law 10.559 (13 November 2002).

diminished under democratic rule, these examples show how military leaders maintained control and influenced decision-making processes, particularly by exercising a veto power that allowed them to control access to information and, by limiting access to information, partially control the official narrative regarding the past by keeping some inconvenient truths from public scrutiny.

Regardless of former regime members' use of their influence to limit transitional justice efforts, the commissions ended up playing an unexpected role. To promote reparations and despite their limited truth-seeking mandate, they investigated and recognized several violations the military regime had used to disavow putting an end to the so-called 'state of denial'.<sup>25</sup>

Prior to the commissions' work, human rights activists, victims and the relatives of people who were killed or disappeared mounted large-scale investigative efforts, producing the *Brazil: Never Again* report,<sup>26</sup> which registered violations and named several repressive personnel involved in torture and killings, and the *Report of the Families of Dead and Disappeared Persons*.<sup>27</sup> The two official commissions relied heavily on those documents, recognizing that most of the violations indeed occurred. Therefore, during their two decades of operation, the reparatory commissions' work catalyzed the struggle for truth and justice, accelerating social mobilization and helping to erode military control.

### ACCELERATING TRANSITIONAL JUSTICE AND LIFTING THE MILITARY VETO POWER

During the late 2000s, a confluence of initiatives strengthened the struggle for truth and justice in Brazil. In addition to the traditional civil society actors (mainly victims and relatives), new players began attempting to reverse the 1979 impunity measures. The official commissions' long-running work helped establish a new political scenario in which violations such as murder, disappearances, torture and kidnappings were no longer 'alleged' but were recognized by the state.

According to Paulo Abrão and Marcelo Torelly, two facts are key to understanding how the reparatory commissions helped to change the political scenario.<sup>28</sup> In 2007, the CEMDP published its final report, in which it stated that the dictatorship's repressive apparatus had killed 363 victims.<sup>29</sup> By that time, the Amnesty Commission had already recognized 24,560 victims of other kinds of human rights violations, including torture, ill treatment, imprisonment for political reasons, and due process violations.<sup>30</sup> That figure continues to grow, as the work is ongoing (more than 45,000 at the time of writing). The number of violations recognized far exceeds what public opinion previously believed were 'isolated episodes' of excessive use of force by the regime.

25 Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Cambridge: Polity, 2001).

26 Arquidiocese de São Paulo, *Brasil: Nunca Mais* (Petrópolis: Vozes, 1985).

27 Comissão de Familiares de Mortos e Desaparecidos Políticos, *Dossiê dos Mortos e Desaparecidos Políticos a partir de 1964* (São Paulo: Imprensa Oficial, 1996).

28 Paulo Abrão and Marcelo Torelly, 'The Reparations Program as the Lynchpin of Transitional Justice in Brazil,' in *Transitional Justice: Handbook for Latin America*, ed. Félix Reátegui (New York and Brasília: ICTJ and Brazilian Ministry of Justice, 2011).

29 CEMDP, *Direito à Memória e à Verdade* (Brasília, 2007).

30 Comissão de Anistia do Ministério da Justiça, *Relatório 2010* (Brasília, 2010), 60.



The Amnesty Commission called a public hearing to debate the scope of the 1979 amnesty law with other social and legal actors. To do so, the commission took stock of its vast documentation on violations while broadly understanding its role not solely as an archive and a reparations agency but ‘rather [as a] space where different actors can continue to reinterpret the past and re-image the future.’<sup>31</sup> The hearing occurred at the Palace of Justice in Brasília on 31 July 2008. For the first time, sitting federal authorities at the higher level of the administration publicly acknowledged the possibility of accountability for gross human rights violations, challenging the prevailing status quo.<sup>32</sup>

This hearing put the accountability debate back on the public agenda more than 25 years after military rule had ended. Continual debate was held in all the major newspapers and on all the major TV channels. In the subsequent days, the minister of defence, opposing the demand for broader accountability, insisted that the amnesty law was a ‘closed chapter’ in Brazilian history, but controversy continued to grow.<sup>33</sup>

Political input from within the government reinforced the activities of independent organizations that had been struggling for justice. Federal prosecutors and international NGOs pushed their agendas in domestic and international courts, claiming that amnesty was partially illegal and should be maintained only for victims and former political prisoners, for two reasons: first, the ‘bilateral’ amnesty granted by the regime was a form of self-amnesty; and second, some of the military crimes constituted crimes against humanity that cannot be subjected to a statute of limitation.

Three new political movements supporting accountability gained ground after the public hearing. First, the chairperson of the National Bar Association (*Ordem dos Advogados do Brasil*) questioned the amnesty law’s scope in a challenge to its constitutionality in the Supreme Court.<sup>34</sup> Second, the IACHR accepted a case against Brazil’s amnesty law regarding the military campaign known as Araguaia Guerrilla. Finally, the proposition for an NTC was included in the agenda of the National Conference on Human Rights. These three movements must always be assessed in conjunction, as much of the NTC process occurred under this truth versus justice trade-off.

The legal controversy in the Supreme Court mobilized public opinion. Despite a negative outcome when the court upheld the amnesty law in April 2010 by a vote of seven to two, the justices emphasized that the amnesty law’s provisions should not affect the right to truth.<sup>35</sup> Less than six months after this decision, the IACHR ruled

31 Herein I appropriate the Jones and Oliveira definition of truth commission archives as new democratic spaces. Briony Jones and Ingrid Oliveira, ‘Truth Commission Archives as “New Democratic Spaces”,’ *Journal of Human Rights Practice* 8(1) (2016): 17.

32 ‘Militares chamam discussão de Tarso sobre Lei da Anistia de desserviço ao país,’ *Folha de S.Paulo*, 7 August 2008.

33 Eliane Catanhêde, ‘Assunto Encerado? Non tropo,’ *Folha de S.Paulo*, 13 August 2008.

34 For a general overview, see, Nina Schneider, ‘Impunity in Post-Authoritarian Brazil: The Supreme Court’s Recent Verdict on the Amnesty Law,’ *European Review of Latin American and Caribbean Studies* 90 (2011): 39–54.

35 Marcelo Torelly, *Justiça de Transição e Estado Constitucional de Direito: Perspectiva teórico-comparativa e análise do caso brasileiro* (Belo Horizonte: Forum, 2012).

against Brazil in the *Julia Gomes Lund* case – also known as Araguaia Guerrilla.<sup>36</sup> The court determined that the amnesty law should not constitute an obstacle to investigating and prosecuting gross human rights violations and recommended that Brazil create a truth commission.

The international decision further leveraged social mobilization for accountability and caused the federal prosecutors to change their original position regarding the amnesty law,<sup>37</sup> which in turn allowed 190 investigations to be opened.<sup>38</sup> Answering the growing calls for truth and justice, the Ministry of Human Rights included the ‘right to truth and memory’ as a thematic axis of the National Conference on Human Rights, opening an avenue to the creation of the NTC.

National conferences are participatory tools for public policy making. They typically consist of a series of public meetings that begin at the municipal level with the election of delegates from civil society and state agencies. Successive steps then occur at the regional level, and, finally, a national meeting is held involving representatives in charge of drafting national policy plans for thematic areas such as health, education, women’s rights, security and human rights.

In December 2008, 1,500 delegates from around the country met in Brasília for the 11th National Conference on Human Rights. They approved the creation of a truth *and justice* commission to investigate and prosecute human rights violations that occurred during military rule. The conference results were the basis of the III National Plan on Human Rights (PNDH-3) that was launched one year later, on 21 December 2009, and included a truth commission proposal, though without a reference to justice.<sup>39</sup>

The high commanders of the army and of the air force threatened to resign if the plan’s proposal to investigate ‘political repression’ was maintained, and the Ministry of Defence asked President Luiz Inácio Lula da Silva to withdraw this provision.<sup>40</sup> Historian Nina Schneider classified this bold exercise of informal veto power simply as ‘blackmail.’<sup>41</sup> Lula da Silva chose to compromise, maintaining the proposal to create an NTC but removing the reference to ‘political repression.’ This allowed for an interpretation such as the one made by Brazil’s major newspaper, *Folha de S.Paulo*, that both sides would be investigated by the NTC.<sup>42</sup>

On 26 January 2010, the government created a working group to draft a bill establishing a national truth commission.<sup>43</sup> Continuing tradition, the Ministry of Defence

36 *Julia Gomes Lund*, supra n 14. See also, Marcelo Torelly, ‘Gomes Lund vs Brasil Cinco Anos Depois: histórico, impacto, evolução jurisprudencial e críticas,’ in *Impacto das Decisões da Corte Interamericana de Direitos Humanos no STF*, ed. Flávia Piovesan and Ines Virginia Soares (Salvador: Juspodium, 2016).

37 Ministério Público Federal, *Doc. 02/2011 2ªCCC* (Brasília, 3 October 2011).

38 Ministério Público Federal, *Relatório Grupo de Trabalho Justiça de Transição* (Brasília, 2014). For a general overview, see, Yi Shin Tang, ‘International Justice through Domestic Courts: Challenges in Brazil’s Judicial Review of the Amnesty Law,’ *International Journal of Transitional Justice* 9(2) (2015): 259–277.

39 Brazil, 3º *Programa Nacional de Direitos Humanos* (Brasília, 2010).

40 ‘Lula nega pressão de militares e diz que programa não derrubaria a República,’ *Folha de S.Paulo*, 13 January 2010.

41 Nina Schneider, “‘Too Little Too Late’ or ‘Premature’? The Brazilian Truth Commission and the Question of ‘Best Timing’,” *Journal of Iberian and Latin American Research* 19(1) (2013): 153.

42 ‘Lula “enquadrou todos” para ajustar plano, diz Tarso,’ *Folha de S.Paulo*, 27 January 2010.

43 Casa Civil da Presidência, *Portaria 54* (Brasília, 26 January 2010).



appointed one of the seven members.<sup>44</sup> The group faced several of the internal divisions that are usually associated with the establishment of truth commissions. Would the commission exclusively focus on military rule (1964–1985), or would it include previous episodes of institutional instability concealed by the 1988 constitution's reparatory amnesty (1946–1988)? How would members be appointed? Would the members include representatives of victims and the military? How much time should the commission spend conducting its work? Finally, would the commission be independent of the executive branch?

On 20 May 2010, the bill was sent to the National Congress. It proposed a two-year investigation that would focus on the same time period identified in the constitutional amnesty. Commissioners were to be appointed by the president without specific provisions regarding the representation of victims or the military, and the commission was to be independent. Moreover, each commissioner was to receive an honorarium to ensure the dedication demanded by this work. The Chamber of Deputies approved the bill with minor modifications on 21 September 2010; the Senate approved it on 26 October 2010. One year later, on 18 November 2011, President Dilma Rousseff signed the bill, which became Law 12.528.

The law granted the NTC prerogatives and structure that none of the previous commissions had had. [Table 1](#) compares some of the features of the NTC and previous commissions.

The seven members of the NTC, most of whom had legal training, were only appointed six months later, on 10 May 2012. The absence of historians from the NTC has been noted and criticized by some, including conservative legal scholar Ives Gandra Martins Filho.<sup>45</sup>

Since 1979, all transitional justice mechanisms established in Brazil have included military officials in their governing bodies. The NTC's independence from the executive office, together with the remarkable fact that no member of the military or supporter of the former regime was appointed to the group, constituted a major split from the 'controlled transition' tradition and an important step towards eliminating the armed forces' informal veto power, which had long haunted Brazilian postauthoritarian human rights efforts.

### DEALING WITH CONFLICT: DEFINING THE NTC'S MAIN GOAL

Unlike most truth commissions, the one in Brazil emerged three decades after the regime ended and was preceded by two other official commissions and substantial unofficial work. In this context, defining the NTC's goal created a conflict between competing expectations: one that supported the status quo (conservatives' expectations) and another that challenged it (victims' expectations).

Whereas conservatives and supporters of military rule understood the NTC to be a concession to those defeated during authoritarian rule that served to recognize some isolated episodes of state-sponsored violence, victims and human rights groups considered the commission to be a way to amplify their claims for truth and justice – a key

<sup>44</sup> Ibid.

<sup>45</sup> Ives Gandra Martins Filho, 'A Comissão da Verdade e a verdade histórica,' *O Estado de S.Paulo*, 26 May 2012.

**Table 1 Comparatives features: CEMDP, Amnesty Commission, National Truth Commission**

	CEMDP	Amnesty Commission	National Truth Commission
Years of work	1995–2007	2001–Present	2012–2014
Number of members	7	At least 20	7
Military representative	Yes	Yes	No
Kind of facts recognized	Deaths and disappearances	Political persecution of any kind	Human rights violations in general
Power to request public and private documents	Yes	Yes	Yes
Power to request classified documents	No	No	Yes
Power to convene witness and testimonies	No	No	Yes
Prerogative to hold secret hearings	No	No	Yes
Prerogative to promote public hearings	No	Yes	Yes
Prerogative to request technical exams and memorandums	No	No	Yes
Power to ask for witness protection	No	No	Yes
Prerogative to name individuals and institutions responsible for human rights violations	No	No	Yes
Prerogative to make official recommendations	No	No	Yes
Victims recognized after works ended	363	+45,000	431
Perpetrators recognized after works ended	None	None	377
Recommendations made	None	None	29

Sources: Laws 9.145, 10.559 and 12.528; CEMDP, *supra* n 29; Comissão de Anistia do Ministério da Justiça, *supra* n 30; National Truth Commission, *supra* n 11.

move towards accountability. The first group wanted to insert the NTC's work into the path established by the military-controlled exit strategy and thereby reinforce the conciliatory tone of the 1979 amnesty law. The second wanted to use the NTC to break that path by mobilizing forces to overturn impunity measures.

In other words, there was a conservative status quo expectation that fit the previously established transitional path and narrative and that wanted to use the NTC to finally 'close the books.' Growing civil society mobilization against impunity, looking for a rupture, challenged this expectation.

From day one, NTC members immediately began debating whether they should focus on producing a final report systematizing existing information and following judicial-like procedures and limitations, including the amnesty law (the status quo expectation regarding the commission's goal), or, alternatively, mobilize society to call for broader historical and legal accountability using the flexibility allowed by their mandate to further the human rights agenda (the expectation of victims and civil society organizations). This controversy would lead to a major political crisis, the resignation of one of the NTC members and the informal leave of another.

During the debates, military officials and conservative politicians insisted that the NTC be the 'end point' of Brazil's transitional justice process. The three most prominent national newspapers, *Folha de S.Paulo*, *Estado de São Paulo* and *O Globo*, which had traditionally opposed any transitional justice measures, published editorials emphasizing that the NTC's work should reveal the truth and 'close the books.' This position protected the foundation of the controlled transition.

Conversely, social activists insisted that the commission must officially recommend changes in the interpretation of the amnesty law and acknowledge that crimes against humanity had happened and are not subject to any statute of limitation. Moreover, the activists believed that the NTC should use all available means to expose the truth to the public to increase pressure for accountability (even using 'naming and shaming' instead of judicial-like procedures), producing a rupture with the conciliatory style that had prevailed since the late 1970s regarding the prevention of justice.

None of the commissioners were former explicit regime supporters, but there was a clear division between those who agreed with the status quo-driven conciliatory narrative and civil society's aim of rupture. The status quo position was represented by commissioners José Paulo Cavalcanti, a lawyer who was once in the Cabinet of President Sarney (1985–1990), and José Carlos Dias, President Cardoso's (1995–2002) former minister of justice. Supporting the rupture were commissioners Claudio Fonteles, who had previously been the General Attorney under President Lula da Silva (2003–2010), and Rosa Cardoso, who worked as a lawyer for political prisoners during the dictatorship (sitting president Rousseff was her most notable client).

The divergent opinions concerning the main goal led to methodological disagreements. The first group argued that the NTC should operate discreetly, with closed meetings and little contact with the media, and follow courtroom-like procedures to at once get information and protect the witnesses.<sup>46</sup> The second group wanted public hearings and activities that would engage society in the commission's ongoing

46 Accatino and Collins successfully capture the difference between judicial and nonjudicial procedures, stating that, "The judge is certainly required to establish the facts of a case, with every possible regard for truthfulness. . . These may justify rules of evidence which, for example, . . . set particularly high standards of proof if conviction is to result. . . These norms may prevent otherwise widely or even universally acknowledged truths from being considered judicially proven." Daniela Accatino and Cath Collins, "Truth,

tasks, exposing perpetrators ('naming names') and publicly addressing violations in the media. Fonteles himself started publishing his own written preliminary reports on the NTC webpage on a regular basis.

The commission's internal conflict escalated during its first year of operation to the point that in April 2013, commissioner Gilson Dipp (a judge with a lifetime seat in the second highest Brazilian court, the Superior Court of Justice) announced he was leaving the commission after 11 months of work.<sup>47</sup> Two months later, another NTC member, Fonteles, completed his term as coordinator and resigned at the height of the crisis, criticizing the work that had been done up to that point.<sup>48</sup>

During its first year of operation, the NTC drifted. It was locked between institutional pressure from conservatives and the military to promote a conciliatory story-ending report and pressure from the victims and social movements calling for popular mobilization and justice.

Eventually, a third approach, mainly represented by Cardoso's former secretary for human rights and sitting chairperson for the UN independent international commission of inquiry on the Syrian Arab republic, Paulo Sérgio Pinheiro, emerged and won over the supporters of the conservative position. This approach emphasized that regardless of the importance of the NTC in challenging impunity, the final report, not the work of the commission itself, should be the tool for such a task.

Bringing together a heterogeneous majority, this led to a model that recognized that the NTC should somehow question the status quo while refraining from doing so via public debate. All claims for legal and political change should be a byproduct of the final report, made behind closed doors.

This approach was heavily criticized. While conservative right-wingers complained that the NTC was biased,<sup>49</sup> human rights scholars protested the secrecy of the procedures and the results.<sup>50</sup> Even Rousseff, who rarely directly intervened in transitional justice topics, demanded a more participatory approach and better communication of the results from the NTC.<sup>51</sup>

Another important topic that produced division during the NTC's first year of work was the question of whether to recommend that the 1979 amnesty law be reviewed. Four commissioners made public statements in favour of overruling the impunity provisions for human rights violations,<sup>52</sup> and three opposed this

Evidence, Truth: The Deployment of Testimony, Archives and Technical Data in Domestic Human Rights Trials,' *Journal of Human Rights Practice* 8(1) (2016): 86.

47 'Ministro Gilson Dipp vai deixar a Comissão Nacional da Verdade,' 29 April 2013, <http://noticias.ne10.uol.com.br/politica/noticia/2013/04/29/ministro-gilson-dipp-vai-deixar-a-comissao-nacional-da-verdade-415701.php> (accessed 14 January 2018).

48 'Cláudio Fonteles deixa Comissão da Verdade por divergências internas,' *O Globo*, 18 June 2013.

49 Reinaldo Azevedo, 'A Comissão da Verdade Ignora a Lei que a Criou,' Blog do Reinaldo, posted 16 May 2013, <http://veja.abril.com.br/blog/reinaldo/geral/a-comissao-da-verdade-ignora-a-lei-que-a-criou-ou-nao-vao-exumar-tambem-o-corpo-de-carlos-lacerda/> (accessed 15 January 2018).

50 'Comparado critica regime de Sigilo da Comissão da Verdade,' *Agencia Universitária de Notícias-USP*, 24 April 2013.

51 'Dilma cobra mais resultados da Comissão da Verdade,' *O Globo*, 28 March 2013, <https://oglobo.globo.com/brasil/dilma-cobra-mais-resultados-do-trabalho-da-comissao-da-verdade-7977685> (accessed 15 January 2018).

52 Claudio Fonteles, Maria Kita Kehl, Paulo Sérgio Pinheiro and Rosa Cardoso.

suggestion.<sup>53</sup> The topic attracted substantial attention as a legal controversy preexisted the formation of the commission: the Brazilian Supreme Court and the IACHR had issued opposing rulings on the question.<sup>54</sup> In agreement with the prevailing approach not to publicize the commission's work, the final decision to recommend the lifting of the amnesty would only be made known when the final report was issued.

However, at least one major consensus was reached in this initial year: not to investigate the 'other side.' The military's informal veto power during the transition to democracy consistently promoted a 'both sides' narrative, which was done to justify state-sponsored violations as a byproduct of left-wingers' armed resistance. This changed on 20 August 2012, when the NTC issued a resolution challenging this approach and stating that because people involved in armed resistance had been prosecuted and punished during military rule, reinvestigating those matters was outside the commission's scope. Therefore, the work would only focus on state-sponsored human rights violations.<sup>55</sup> In a year marked by controversy and dissent within the commission, this measure was strongly supported by the human rights activists.

To summarize, during its first year, the NTC drifted into controversy. Due to its difficulty in taking a clear side, defining its practical purposes was impossible, leading to civil society disappointment. Widespread fear of a total failure spread, hitting the headlines of national magazines.<sup>56</sup> Would the commission be able to break with the controlled transition tradition to contribute to human rights promotion? Or would it simply reinforce the previous regime's historical narrative and impunity measures?

#### 'GRASSROOTING': THE DISSEMINATION OF LOCAL INITIATIVES

The long delay between the law's approval by the National Congress and the commissioners' nominations generated substantial social expectation. Together with the NTC's failure to deliver, something unexpected occurred: civil society organizations and local branches of government created truth commissions all around the country. By the end of 2012, more than 50 local truth commissions were operating in Brazil.

While the work of the NTC was still progressing at a slow pace, some of the local commissions were already organizing public hearings, collecting evidence and issuing reports. Topics including the fate of the children of regime opponents; persecutions against minorities such as indigenous populations and the lesbian, gay, bisexual and transgender community; gender issues; and economic complicity with the military rule were leveraged by those local and sectoral initiatives.

Of course, not all the local commissions performed well. To understand the impact of these initiatives, the question of whether they had a budget, structure and official powers must be addressed. On the one hand, state and municipal commissions hosted by local governments had the needed money, personnel and some legal

53 José Paulo Cavalcanti, Gilson Dipp and José Carlos Dias.

54 Schneider, *supra* n 34; Tang, *supra* n 38.

55 Comissão Nacional da Verdade, *Resolução n.º 02* (Brasília, 20 August 2012).

56 The NTC crisis was so severe that the weekly magazine *Carta Capital*, a major publication in Brazil, published a front-page feature article called 'Threatened Truth,' reporting widespread fear that the commission might not be able to actually produce a final report. *Carta Capital* 243, 10 April 2013.

prerogatives granted by law. On the other hand, civil society initiatives primarily played the traditional NGO role of advocating their own positions and criticizing state-sponsored institutions.

What is indisputable is that all those initiatives strengthened and expanded the truth and justice agenda, something the NTC alone would not have been able to achieve, especially considering the lack of internal agreement regarding its main goals.

Taking stock of this outstanding, self-organized grassroots work, the NTC issued a resolution on 17 September 2012, to coordinate its work with that of local initiatives.<sup>57</sup> Thereafter, the NTC signed 27 letters of cooperation with local commissions.<sup>58</sup> This decision helped to reduce the tension between the NTC and the human rights movement. As will be seen, a substantial amount of what became the NTC's final report pays tribute to the local commissions' work.

### MOVING FORWARD: A FRAGMENTED APPROACH AND CONFLICT WITH THE MILITARY

After a year of crisis and the loss of two members, the NTC finally decided to focus on existing data, allowing limited mobilization but not prioritizing social actions as a main goal. Despite maintaining the much-criticized choice of performing most of its work behind closed doors, the NTC set up an agenda of public activities and allowed its individual members to engage with the local commissions in an almost official manner. By allowing individual outreach, it balanced the conservative aim for a generally discrete endeavour while granting some room for human rights activism.

As conflicts regarding the commission's main goal led to insurmountable divisions regarding the kind of work that was to be carried out, a fragmented approach emerged, leading to the organization of 14 thematic working groups.<sup>59</sup> Each group was composed of at least one of the commissioners and support staff, had the prerogative to invite external experts and worked with significant independence. In practical terms, some of the working groups' members liaised with grassroots civil society initiatives, allowing activism to infiltrate the otherwise closed work of the NTC.

The internal crisis also deescalated. Commissioner Dipp was never replaced, but in September 2013, Rousseff appointed Pedro Dallari, a law professor from the University of São Paulo, as a substitute for Fonteles.

The combination of largely independent working groups with stable but somewhat weak central coordination balanced the internal conflict, allowing the commission to cover most of the pressing issues identified by the victims and civil society. Although it is reasonable to assume that internal disputes persisted, the strategy prevented these issues from being leaked to the press and in national political circles,

57 Comissão Nacional da Verdade, *Resolução n.º 07* (Brasília, 17 September 2012).

58 National Truth Commission, *supra* n 11 at 10.

59 These thematic groups addressed the following topics: the reasons for the 1964 coup d'état, the Araguaia Guerrilla (which had been the object of the IACHR ruling against Brazil), the role of the justice system, the repression of unionized workers, deaths and disappearances, the structure of the repression, gross human rights violations against indigenous populations and peasants, Operation Condor (the repressive alliance among South American countries), the structure of the dictatorial state, the role of the churches, persecution of military personnel, and persecution of foreigners in Brazil and Brazilians abroad.



which consequently prevented the NTC's work from being delegitimized by its opponents.

In May 2014, the National Congress extended the NTC's deadline for issuing a report by seven months,<sup>60</sup> granting it much-needed time to compensate for the early problems that had stalled its work. With its house in order, the NTC finally started working.

Tensions with the Ministry of Defence were part of the daily routine of the NTC. The first major battle regarded the military's claim that all the documents that the NTC wanted to investigate had been destroyed years before. According to the Ministry of Defence, 19,000 files had been destroyed during the 1980s following 'regular archive procedures.'<sup>61</sup> However, several of these documents were actually stolen by military personnel before leaving office and eventually came to light.<sup>62</sup>

In at least one case, the death of a former member of the military regime allowed relevant documents, the existence of which had been denied, to come to public attention and be incorporated into the NTC investigation. Documentation proving that the forced disappearance of the left-wing congressman Rubens Paiva was the result of a repressive operation was found in November 2012 after Colonel Júlio Miguel Molina Dias was killed in an ordinary robbery in the southern city of Porto Alegre.<sup>63</sup>

In February 2014, the NTC requested that the Ministry of Defence investigate the substantial evidence that military bases had been used for the violation of human rights.<sup>64</sup> Again, the military failed to cooperate. On 17 June, the ministry replied by informing the NTC that allegations of violations perpetrated at seven military bases had been investigated via internal procedures but that the data available did not allow the military to corroborate the hypothesis that any irregular activity had taken place.<sup>65</sup>

The evidence that the military sabotaged the NTC's work is overwhelming. In August 2014, Sérgio Suiama, a federal prosecutor in Rio de Janeiro, sent the newspaper *O Globo* a copy of a memorandum circulated in early February in which the army's highest commander requested all military employees not to cooperate with the investigations.<sup>66</sup>

This was a misunderstanding, according to the army's official explanation. They claimed that the memorandum's only aim was to 'centralize' the investigation at the Brasília headquarters, not to obstruct it. Human rights groups immediately called

60 'Senado aprova prorrogação até Dezembro da Comissão da Verdade,' *G1-Política*, 28 May 2014, <http://g1.globo.com/politica/noticia/2014/05/senado-aprova-prorrogacao-ate-dezembro-da-comissao-da-verdade.html> (accessed 15 January 2018).

61 'Ditadura destruiu mais de 19 mil documentos secretos,' *Folha de S.Paulo*, 2 July 2012.

62 'Curió abre arquivo e releva que Exército executou 41 no Araguaia,' *O Estado de S. Paulo*, 20 June 2009.

63 'Documento que comprova prisão de Rubens Paiva é encontrado no RS,' *G1-Rio Grande do Sul*, 22 November 2012, <http://g1.globo.com/rs/rio-grande-do-sul/noticia/2012/11/documento-que-comprova-prisao-de-rubens-paiva-e-encontrado-no-rs.html> (accessed 17 January 2018).

64 Comissão Nacional da Verdade, *Ofício n.º 124* (Brasília, 18 February 2014), À Sua Excelência, Sr. Ministro da Defesa Celso Amorim.

65 'Forças Armadas negam "desvio de finalidade" em instalações onde houve tortura,' *Carta Capital Online*, 18 June 2014.

66 'Anos de chumbo: comandante impõe silêncio ao Exército,' *O Globo*, 22 August 2014.

on Rousseff to use her position as commander-in-chief to punish the general,<sup>67</sup> but no action occurred, probably due to Rousseff's fear of the possible effects on her campaign for reelection.

Investigations and preliminary reports also captured substantial public attention. The NTC opened a proceeding to inquire into whether former president Juscelino Kubitschek (1956–1961) and deposed president João Goulart (1961–1964) had been killed by the military regime's secret operations. In November 2013, Goulart's body was exhumed and brought to Brasília in a public ceremony, during which it was reburied with state honours.<sup>68</sup>

This was essentially a bold political act, as Goulart died in exile as a *persona non grata* of the military. However, neither of the investigations can be considered conclusive. In the first case, the NTC declared that Kubitschek died due to a car accident and not sabotage, but the report showed little investigative effort to arrive at that conclusion.<sup>69</sup> Regarding Goulart, the NTC experts found no evidence of poisoning, which had been speculated to be the cause of his death, but because a long time had passed, they could not be certain.<sup>70</sup> Altogether, eight preliminary reports were issued by the NTC in 2014.

### THE RECEPTION OF THE FINAL REPORT AND THE COMMISSION'S ACHIEVEMENTS

The NTC's final report was issued on 10 December 2014, and it was reasonably well received. For example, São Paulo-based international human rights NGO Conectas consulted several scholars and practitioners and finally declared the final report 'a historical step.'<sup>71</sup>

Divided into 18 chapters, the main report recounts the NTC's institutional history, addresses the nature and content of military rule, investigates repressive methods and practices, and focuses on emblematic cases to indicate the institutions and individuals responsible for violations. It concludes by offering recommendations.

The retired military personnel that supported the regime reacted as expected as they tried to delegitimize the report by claiming it was a byproduct of a 'terrorist' occupying the presidential office, referring to Rousseff's former involvement in the armed resistance.<sup>72</sup> Human Rights Watch's executive director for the Americas, José Miguel Vivanco, acknowledged the importance of the report but claimed that it

67 'Dilema Urgente de Dilma: ou demite o General ou extingue a CNV,' *Brasil 247*, 22 August 2014, <https://www.brasil247.com/pt/247/artigos/151040/Dilema-urgente-de-Dilma-ou-demite-o-general-ou-extingue-a-CNV.htm> (accessed 15 January 2018).

68 'Após mais de 18 horas, termina a exumação do corpo de Jango no RS,' *G1-Rio Grande do Sul*, 14 November 2013, <http://g1.globo.com/rs/rio-grande-do-sul/noticia/2013/11/apos-mais-de-18-horas-termina-exumacao-do-corpo-de-jango-no-rs.html> (accessed 15 January 2018).

69 'Morte de JK foi causada por acidente de trânsito, conclui Comissão da Verdade,' *O Estado de S.Paulo*, 22 April 2014.

70 'Exame em Jango não encontra veneno, mas investigação prossegue,' *BBC Brasil*, 1 December 2014, [http://www.bbc.co.uk/portuguese/noticias/2014/12/141201\\_jango\\_exame\\_pai\\_ms](http://www.bbc.co.uk/portuguese/noticias/2014/12/141201_jango_exame_pai_ms) (accessed 15 January 2018).

71 'Truth Commission's Final Report Could Pave the Way to Tackle Current Human Rights Abuses,' *Conectas*, 12 December 2014.

72 'General questiona relatório: "É a terrorista que é presidente do país?,"' *Folha de S.Paulo*, 10 December 2014.

would have been stronger if it had also included references to the violent activities engaged in by sectors of the opposition against the dictatorship.<sup>73</sup>

The report's conclusions directly address the three key factors that differentiate Brazil's transitional justice process from that of its neighbours: authoritarian legality, the repressive strategy, and military control over the transition. By doing so, it challenges the distinctive outcome of the country's transitional process, namely, the resilience of impunity, proving that a late truth commission with little room for new truth discoveries may also be useful for the purposes of transitional justice.

The report explicitly states that authoritarian legality was a cover for gross human rights violations and that the justice system supported an illegitimate government, using the law to grant an aura of legality to unjustified abuses and violations. It also clearly states that despite the lower number of deaths among opponents of the regime, Brazilian military rule was far from being a *dictablanda* (a mild dictatorship).

The term *dictablanda*, originally introduced in the academic literature by Guillermo O'Donnell and Philippe Schmitter's seminal study as meaning a 'liberalized autocracy',<sup>74</sup> had been more recently appropriated by the conservative media to downplay the regime's human rights violations in comparison to those of other South American authoritarian regimes, as in a controversial 2009 editorial note by *Folha de S.Paulo* comparing the 'mild' military rule in Brazil with the 'harsh' rule in Hugo Chávez's Venezuela.<sup>75</sup>

Finally, the work of the commission without military oversight or influence was the largest rupture with the formal and informal veto power that the armed forces used in all of Brazil's official transitional justice measures, representing an impressive break with the controlled transition model.

The fact that the NTC confronted the military's versions of the past in its final report made that last achievement even more important. It set a new standard by preventing the military from stopping or managing a transitional justice effort for the first time. Though the military refused to cooperate, this refusal led to stronger condemnation in the report rather than the suppression of topics or a conciliatory approach (as usually occurred). The NTC openly refuted the Ministry of Defence's theory that there was no evidence that human rights violations occurred in its facilities or had been coordinated and performed by its personnel.

As expected, due to the NTC's timing and strategic decisions, the first volume of the report added very little to what was already known. The NTC updated the total number of deaths and disappearances from 363 to 431, recognizing some cases that the previous commission had been unable to because of investigative and time limitations. Assessing the broader picture, historians Carlos Fico and Luiz Carlos Dias

73 'Brasil precisa julgar crimes dos dois lados na ditadura, diz diretor de ONG,' *Folha de S.Paulo*, 15 December 2014. Similarly, Furtado argues that, by presenting a depoliticized and victimized idea of the leftist militants, the NTC has also contributed to promoting silence regarding the truth it aims to uncover. See, Henrique Furtado, 'On Demons and Dreamers: Violence, Silence and the Politics of Impunity in the Brazilian Truth Commission,' *Security Dialogue* 48(4) (2017): 316–333.

74 Guillermo O'Donnell and Philippe Schmitter, 'Defining Some Scopes (and Exposing Some Assumptions),' in *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, by Guillermo O'Donnell and Philippe Schmitter (Baltimore, MD: Johns Hopkins University Press, 1986), 13–14.

75 'Limites a Chavez,' *Folha de S.Paulo*, 17 February 2009.

agree that the report was mostly accurate, but they underline its exaggerated focus on previously known facts.<sup>76</sup>

After almost three decades of democratic rule, tireless investigation by victims and relatives, the promotion of major unofficial reports, the work of two official commissions, and the publication of hundreds of scholarly works, no relevant new information appeared in the report. Indeed, the NTC strongly relied on consolidated sources to build a bruising narrative of the military's abuses.

Unlike the Argentine and Chilean cases, in which truth commissions were formed soon after democratization, the Brazilian NTC played a different role in a different scenario. Its first main accomplishment was not to report new facts but to assemble everything that was already known in a systematic way, thickening the narrative with testimonial evidence and legitimizing an account of violence that the regime had mostly tried to cover up.

The NTC report clearly belies the regime's official narrative regarding human rights violations, but it also goes a step further by recognizing that those violations were systematic and that because they were systematic and targeted a specific sector of the population, they constitute crimes against humanity. By introducing this category in the classification of torture and forced disappearances, the report has a positive impact on promoting the global norm of individual accountability that Brazilian courts consistently refused to apply.<sup>77</sup>

Before the report, the IACHR had already stated something similar, describing the state repression of the Araguaia Guerrilla members as a 'serious human rights violation.'<sup>78</sup> Now, domestic courts in Brazil were forced to face not only an international conviction regarding impunity for gross human rights violations but also a robust investigation classifying the systematic practice of torture, illegal detention, and sometimes executions and forced disappearances as not being subject to any statute of limitation.

Even though the facts were mostly already known, the NTC report created an indisputable case that they did not occur in an isolated way without the knowledge of high-ranking officials, including the generals occupying the presidential office. Indeed, the NTC report proves otherwise through overwhelming evidence.

The report's first conclusion states that gross human rights violations occurred.<sup>79</sup> The second conclusion states that they occurred in a generalized and systematic way, and the third classifies these violations as crimes against humanity.

In this regard, the NTC report goes beyond previous official commissions. Taking advantage of the stronger powers and prerogatives granted the NTC by law (see Table 1), the NTC report lists 337 state officials responsible for gross human

76 'Especialista critica foco excessivo da CNV em casos já sabidos,' *Carta Capital Online*, 12 December 2014.

77 See, Abrão and Torelly, *supra* n 4; Tang, *supra* n 38. See also, Emilio Peluso Neder Meyer, 'Criminal Responsibility in Brazilian Transitional Justice: A Constitutional Interpretative Process under the Paradigm of International Human Rights Law,' *Indonesian Journal of International and Comparative Law* 4 (2017): 41–72.

78 Julia Gomes Lund, *supra* n 14 at para. 325(3).

79 National Truth Commission, *supra* n 11.

rights violations.<sup>80</sup> This is a second major accomplishment. In a context in which Brazil continued to resist ending impunity in criminal courts, the NTC report promoted relevant historical accountability by naming those responsible for more than 400 deaths and 45,000 officially recognized victims of torture and other gross violations. Moreover, the report may now be used as legal evidence in new prosecutions, avoiding one of the major practical obstacles for accountability after a mass atrocity: the collection of reliable evidence.

A third major accomplishment relates to the recommendations section. If it is fair to criticize the NTC's decision not to add the weight of its work to social mobilization and its missed opportunity to catalyze diffused social movements to demand accountability, it is also true that the recommendations section can be used to fuel key social struggles in the future. The report's recommendations can be classified into two subsets.

The first subset directly addresses *past wrongdoings*. These include, among others, the recommendation that the armed forces acknowledge their institutional involvement in gross human rights violations, which may lead to an official apology; the prosecution of crimes against humanity perpetrated during military rule; the promotion of truth and memory; and the maintenance and institution of new public policies favouring access to public archives. Finally, the NTC recommended new efforts to locate and identify the mortal remains of those victims still missing.

The second subset of recommendations addresses *improvements in the current democratic order* by facing the authoritarian legacies inherited by the new democracy. These improvements include prohibiting events that defend the military coup, proposing the reform of the selection process of police and military personnel, and recommending changes in the educational curriculum of public security forces. In the same vein, the commission recommended the demilitarization of police forces, the exclusion of civilians from the jurisdiction of military courts and the removal of any discriminatory restrictions against homosexuals, including in the armed forces. The NTC also recommended that the prison system be reformed to preserve the dignity of the detainees and that the system of public defenders be strengthened.

Looking forward to both the prosecution of past atrocities and the establishment of mechanisms to avoid their recurrence, the report recommends that Brazil improve its legal structure for addressing crimes against humanity.

If the first volume of the report will be remembered as a relevant consolidation of information followed by a strong set of recommendations that look both backward and forward, Volume II presents several interesting approaches and novelties.

A byproduct of the fragmented investigatory process of the working groups that encompasses much of local commissions' work, the second volume of the report addresses thematic issues. Each chapter was written by different researchers (mostly independent from the NTC main staff) under the supervision of a commissioner, generally in coordination with the local commission's staff. Even though the main report sometimes ignores the fact-finding processes described in this volume, the chapters present relevant contributions to building a general picture of the repression in Brazil.

80 Ibid., vol. 1, 873–931.

A good example of such contributions is the thematic chapter related to the human rights violations of indigenous populations. Notwithstanding the fact that the official number of deaths presented in Volume I is 434, the thematic report reckons that at least 8,350 people from indigenous communities were killed during military rule.<sup>81</sup> Considering the findings, the thematic report recommends the creation of another truth commission specifically to address how the authoritarian government violated indigenous human rights, reporting possible genocidal measures perpetrated against the Pataxó-Hãhãhãe, Xetá and Tapayuma populations. This was an invisible side of authoritarianism in Brazil revealed by the report.

Despite a legal disclaimer in the opening of Volume II stating that those chapters do not reflect agreement among the commissioners (a byproduct of overall disagreement and fragmented methodology), the thematic sections open relevant and previously little-explored fields of investigation for further initiatives, constituting another relevant accomplishment of the NTC.

### CONCLUSIONS

Was the late Brazilian truth commission useful? The answer clearly depends on how it is viewed. Drawing broad comparisons between the NTC and a 'classic' immediately postconflict investigative body, it is difficult to understand why a truth commission was ever established in Brazil. Assuming a truth commission's main goal is to improve stability or to establish the truth, the Brazilian case does not align with this aim. Brazil was already a democracy when the commission was established, and, as facts show, it had little room for new historical discoveries.

From a traditional perspective, the Brazilian NTC was a failure. Victims' expectations were probably frustrated. Nothing relevant has been achieved regarding the location of the remains of those disappeared, and no criminal convictions took place. If judicial cases are considered, the NTC was indeed followed by the opening of another international case regarding impunity for human rights violations during military rule (the Herzog case, hearings for which took place on 24 May 2017 in the IACHR). Those who expected the commission to follow recent trends of investigation by focusing on economic complicity and conflicting structural causes were also probably disappointed.<sup>82</sup> Despite collecting substantial information, the NTC issued a report that mainly systematizes previously existing information.

However, considering the context and bearing in mind what makes Brazil's transitional justice distinct, an alternative conclusion emerges. The NTC was a huge step towards breaking the military's veto power and affirming human rights.

81 Ibid., vol. 2, 197–255.

82 Regarding Brazil, see, Juan Pablo Bohoslavsky and Marcelo Torelly, 'Financial Complicity: The Brazilian Dictatorship under the "Macroscopic"', in *Justice and Economic Violence in Transition*, ed. Dustin Sharp (New York: Springer, 2014). For a comparative approach, see the Argentinian case: Horacio Verbitsky and Juan Pablo Bohoslavsky, eds., *The Economic Accomplices to the Argentine Dictatorship: Outstanding Debts* (New York: Cambridge University Press, 2015).



The commission's role in improving accountability is undeniable. Not only did it recognize the violations in a systematized way and qualify them as crimes against humanity, it also named names – something none of the previous official initiatives was able to do. That effort allowed the establishment of new memory policies, such as those of the City of São Paulo, which removed homage to perpetrators in public venues.<sup>83</sup> Even if criminal accountability never occurs, some relevant historical accountability has been achieved. This was the NTC's first major achievement.

The NTC had a second major achievement in the promotion of international human rights norms. In a country that has largely resisted applying international law, the NTC made a clear statement regarding the nature of crimes during military rule, classifying them as crimes against humanity and recognizing the need to comply with international law. The fact that the Brazilian courts resisted complying only reinforces the NTC's claim that processes of human rights education and overall depuration are indeed necessary in the judicial system.

Regardless of the shortcomings that may lead some analysts to classify the Brazilian NTC process as a failure or at least a disappointment – or using Schneider's metaphor, 'too little, too late'<sup>84</sup> – this article has argued that at least in one specific regard the outcome was very positive: the challenge to the military's veto power. While it is arguable that the other achievements listed, accountability and norm promotion, may have little or no practical effect – something only time will tell – it is undeniable that the NTC broke with tradition regarding military involvement in transitional justice issues in Brazil. That is a major achievement.

These achievements contrast with classical truth-seeking expectations and illustrate the distinctive roles a late truth commission may perform, especially in a 'transition by transformation' scenario in which the old regime members remain powerful throughout the democratization process. Not only does a commission find the truth, but it also improves democratic governance by promoting human rights norms, reinforcing civil governance and emphasizing what must still be done to overturn the inherited authoritarian legacies.

On the one hand, even in a convulsive social moment such as the one following Rousseff's impeachment in 2015, no one seriously considered the return of a military government as a feasible alternative in Brazil. This is a democratic achievement, and the long democratization course, crowned by the truth commission's process, contributed to this new political and institutional scenario.

On the other hand, after Rousseff's impeachment and the formation of a right-wing government, expectations regarding the implementation of NTC recommendations dropped substantially. The creation of a post-NTC independent monitoring body was cancelled. Growing politicization in the judicial branch is again a challenge. Furthermore, some major human rights setbacks took place, such as the transfer of the jurisdiction over crimes committed by the military against civilians from civil to

83 'SP quer mudar nomes da ditadura militar em ruas da cidade; veja lista,' *G1 São Paulo*, 13 August 2015, <http://g1.globo.com/sao-paulo/noticia/2015/08/ruas-de-sp-com-nomes-da-ditadura-militar-serao-reomeadas-veja-lista.html> (accessed 15 January 2018).

84 Schneider, *supra* n 41.

military courts – a reform the UN and the Organization of American States ‘categorically reject.’<sup>85</sup>

All these events lead to an overall feeling that the relevant but limited achievements thus far may be all that will occur until a new political cycle begins in Brazilian democracy.

85 ‘UN Human Rights and IACHR Categorically Reject Bill Expanding Jurisdiction of Military Courts in Brazil,’ 13 October 2017, [http://www.oas.org/en/iachr/media\\_center/PReleases/2017/160.asp](http://www.oas.org/en/iachr/media_center/PReleases/2017/160.asp) (accessed 15 January 2018).