

Herzog et al. v. Brazil

ABSTRACT*

The case is about the arbitrary arrest, torture and murder during the military dictatorship of a Brazilian journalist and member the Brazilian Communist Party. The case gave the Court the chance to examine the question of the legitimacy and legality of blanket amnesty laws and the victims' right to truth.

I. FACTS

A. Chronology of Events

Before 1964: Vladimir Herzog is born on May 27, 1937, in the former Yugoslavia, now Croatia.¹ He arrives in Brazil with his parents, Zigmund and Zora Herzog, in 1946, at the age of nine.² He eventually becomes a Brazilian citizen and studies philosophy at the University of São Paulo.³ In 1959, he begins his journalism career with the *Estado de São Paulo* newspaper.⁴ On February 15, 1964, shortly before the military coup d'état, he marries Clarice Ribeiro Chaves.⁵

April 1, 1964: The military takes over the Brazilian government.⁶

1965: Mr. Herzog and his wife move to London, UK. Mr. Herzog works as a producer and broadcaster for the British Broadcasting Corporation (BBC).⁷

*Cuong “Andy” Cao, Author; Patricia Kim, Editor; Gabrielle Szlachta-McGinn; Chief IACHR Editor; Cesare Romano, Faculty Advisor.

1. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 353 ¶ 1113 (Mar. 15, 2018).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* ¶ 113.

6. *Id.* ¶ 107 (Mar. 15, 2018).

7. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 114.

1968: The Herzogs return to Brazil.⁸ Mr. Herzog works as the cultural editor of *Visão* magazine.⁹

1972: Mr. Herzog moves to *TV Cultura* to work as a news program editor, and, later, becomes Director of the network's journalism department.¹⁰ In addition, Mr. Herzog is also a member of the PCB.¹¹

1973: Faced with the growth of the Communist Party of Brazil (Partido Comunista Brasileiro; PCB) and the realization that it could challenge the government of President Ernesto Gersel, the State military launches Operation Radar (the "Operation") to neutralize the PCB by detaining, abducting, and torturing its members, including journalists of *Voz Operária*, a newspaper close to PCB.¹²

The Operation is carried out under the command of the Army Information Center (Centro de Informações do Exército; CIE) along with the Second Army's Department of Information Operations - Center for Internal Defense Operations (Departamento de Operações de Informações - Centro de Operações de Defesa Interna; DOI-CODI).¹³

1974-1976: The Operation is carried out between March 1974 and January 1976.¹⁴ During this period, dozens of PCB leaders and members are detained and tortured.¹⁵ It is estimated that at least 19 people are murdered, including 11 PCB leaders.¹⁶ In total, between March 1974 and January 1976, 679 PCB members are detained under the Operation.¹⁷

The DOI-CODI is one of the most violent political repression forces during the military dictatorship.¹⁸ During this period, the highest number of torture cases, executions, and disappearances of political opponents is recorded.¹⁹ Overall, the DOI-CODI detains 2,541 people and receives 914 prisoners from other agencies.²⁰ It is also acknowledged that the DOI-CODI executed 54 prisoners and transferred 1,348 prisoners to the State

8. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 114.

9. *Id.*

10. *Id.*

11. *Id.* ¶115.

12. *Id.* ¶ 109.

13. *Id.* ¶ 119.

14. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 109.

15. *Id.* ¶ 112.

16. *Id.*

17. *Id.*

18. *Id.* ¶ 117.

19. *Id.*

20. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 117.

Department of Political and Social Order (Departamento de Ordem Política E Social; DEOPS).²¹

October 24, 1975: Two DOI-CODI agents arrive at the *TV Cultura*'s offices where Mr. Herzog is working and request him to accompany them to the DOI-CODI to give a statement.²² The network director intervenes, and the agents allow Mr. Herzog to appear at DOI-CODI the following morning instead.²³ Eleven other journalists are also arrested on this day.²⁴

October 25, 1975: Upon arriving at the DOI-CODI offices, Mr. Herzog is arrested, interrogated, and tortured.²⁵ In the afternoon, Mr. Herzog is murdered by the agents who held him prisoner.²⁶ The expert opinion provided to the National Truth Commission determines that Mr. Herzog had been strangled.²⁷ Mr. Herzog is 38 years old at the time of his death.²⁸ The Second Army Command issues a press release, affirming Mr. Herzog's membership with the PCB and stating that Mr. Herzog committed suicide by hanging himself.²⁹ The press release further states that Mr. Herzog confessed and made a written statement confirming his membership in the PCB.³⁰

December 9, 1975: Mr. Herzog's death certificate is issued.³¹ The cause of death is stated as mechanical asphyxiation by hanging.³²

April 19, 1976: Mr. Herzog's wife, Clarice Herzog, and his two children, Ivo and André Herzog, bring a case before the São Paulo Federal justice system to hold the State responsible for Mr. Herzog's arbitrary detention, torture, and death.³³

October 27, 1978: A federal court issues a judgment declaring that Mr. Herzog died from unnatural causes when he was detained by the DOI-

21. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 117.

22. *Id.* ¶ 121.

23. *Id.*

24. *Id.* ¶ 111.

25. *Id.* ¶ 122.

26. *Id.* ¶ 123.

27. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 123.

28. *Id.*

29. *Id.* ¶ 124.

30. *Id.*

31. *Id.* ¶ 129.

32. *Id.*

33. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 130.

CODI, and holds the State responsible for his death.³⁴ The court notes that there was no reason for Mr. Herzog to wear a belt since his suit was one-piece.³⁵ The court also mentions the illegality of Mr. Herzog's detention and evidence of torture.³⁶ In addition, the court finds that the death certificate is worthless because it was based on the fabricated autopsy report.³⁷ The court also finds inconsistencies in the State's testimonies.³⁸ Thus, the court concludes that the State is unable to prove its version of Mr. Herzog's suicide.³⁹ The court forwards the case to the Military Jurisdiction to prosecute those responsible for Mr. Herzog's death.⁴⁰

November 17, 1978: The State appeals against the federal court's October 27, 1978 judgment.⁴¹

August 28, 1979: The State enacts the Amnesty Act, Law No. 6683/39 ("Amnesty Law"), which erases all "individual criminal responsibility" for those involved in the dictatorship.⁴² It exonerates those who acted on order of the military government, and pardons those involved in "related crimes," including State officials who committed torture and murder.⁴³

1983: The Federal Court of Appeals affirms the judgment and declares that the State must compensate for the damage caused to Mr. Herzog and his family.⁴⁴ The State files a request for reconsideration of the Federal Court of Appeals' decision.⁴⁵

1985: Brazil returns to democracy.⁴⁶

May 18, 1994: The Federal Regional Court of the Third Region rejects the State's request for reconsideration.⁴⁷

34. *Herzog et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, ¶ 132.

35. *Id.*

36. *Id.*

37. *Id.* ¶ 133.

38. *Id.*

39. *Id.*

40. *Herzog et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, ¶ 134.

41. *Id.* ¶ 135.

42. *Id.* ¶ 136.

43. *Id.*

44. *Id.* ¶ 135.

45. *Id.*

46. *Herzog et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, ¶ 161.

47. *Id.* ¶ 135.

September 27, 1995: The 1983 judgment of the Federal Court of Appeals becomes final.⁴⁸

December 4, 1995: Law No. 9140/1995 is enacted.⁴⁹ The Law acknowledges the murders of political opponents between September 2, 1961 to August 15, 1979.⁵⁰ The law also creates the Special Commission on Political Deaths and Disappearances (in Portuguese, CEMDP).⁵¹ It allows the Special Commission to award pecuniary compensation to the political victims' next of kin.⁵² To that end, the law establishes a mathematical formula to calculate compensation and a floor of (R\$100,000 approximately U.S. \$100,000 in 1997) for compensation.⁵³

April 1996: Ms. Herzog's request for the acknowledgement of the torture and murder of her husband is approved.⁵⁴

1997: Ms. Herzog receives (R\$100,000 approximately U.S. \$100,000 in 1997) as compensation.⁵⁵

2007: The Special Commission publishes a report entitled "Directo à Memória e à Verdade" (The Right to Memory and to Truth), analyzing the context in which the military dictatorship occurred, and mentioning specific victims of the State-sponsored terrorism, including Mr. Herzog.⁵⁶

B. Other Relevant Facts

[None]

II. PROCEDURAL HISTORY

A. Before the Commission

July 10, 2009: The Inter-American Commission of Human Rights (the "Commission") receives the petition lodged by the Center for Justice and International Law (Centro por la Justicia y el Derecho Internacional;

48. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 135.

49. *Id.* ¶ 146.

50. *Id.*

51. *Id.* ¶ 147.

52. *Id.* ¶ 148.

53. *Id.*

54. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 149.

55. *Id.*

56. *Id.* ¶150.

CEJIL), the Inter-American Foundation for the Defense of Human Rights (Federación Internacional de Derechos Humanos; FIDH), the Santos Dias Center of the Archdiocese of São Paulo, and the “No More Torture” Group of São Paulo, as case No. 12.879.⁵⁷ The petition alleges the States responsibility for the violation of Mr. Herzog’s and his next of kin’s human rights.⁵⁸

November 8, 2012: The Commission adopts Admissibility Report No. 80/12.⁵⁹

October 28, 2015: The Commission adopts Merit Report No. 71/15.⁶⁰ It concludes that the State is internationally responsible for the following violations: Articles 1, 4, 7, 18, and 25 of the American Declaration of the Rights and Duties of Man (“American Declaration”); Articles 5(1) (Right to Humane Treatment), 8(1) (Right to a Fair Trial), and 25(1) (Right to Judicial Protection) of the American Convention on Human Rights (“American Convention”), in relation to Articles 1(1) (Obligation of Non-Discrimination) and 2 (Obligation to Give Domestic Legal Effect to Rights) of the same instrument; and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture (“ICPPT”).⁶¹

The Commission recommends that the State: (1) determine criminal responsibility for Mr. Herzog’s detention, torture, and murder, impose criminal sanctions on those responsible, and publish the results of the investigation, all while taking into account that these crimes against humanity are not subject to amnesties or statutes of limitations; (2) take the necessary measures to ensure that the Amnesty Law, along with other principles of criminal law, such as *res judicata* (adjudicated matters by a competent court cannot be further pursued by the same parties), the non-retroactivity principle (the present ruling cannot be allowed to overrule past rulings), statutes of limitations (time limits for filing a criminal charge), and *ne bis in idem* (the prohibition of double jeopardy for the same criminal behavior), do not hinder the prosecution of this case; (3) grant reparation to Mr. Herzog’s next of kin, including psychological and physical treatment, holding symbolic events that guarantee the prevention of the crimes committed, and acknowledge responsibility for the detention, torture, and murder of Mr. Herzog as well as the suffering of his

57. *Herzog et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, ¶ 2(a).

58. *Herzog et al. v. Brazil*, Report on Merits, Report No. 71/15, Inter-Am. Comm’n H.R., Case No. 12.879, ¶ 1 (Oct. 28, 2015).

59. *Herzog et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, ¶ 2(b).

60. *Id.* ¶ 2(c).

61. *Id.*

relatives; and (4) grant adequate pecuniary and non-pecuniary compensation to the victims.⁶²

B. Before the Court

April 22, 2016: The Commission submits the case to the Court after the State failed to adopt its recommendations.⁶³

1. Violations Alleged by Commission⁶⁴

Article 1 (Obligation to Respect Rights)

Article 4 (Right to Life)

Article 5(1) (Right to Humane Treatment)

Article 7 (Right to Personal Liberty)

Article 8(1) (Right to a Fair Trial)

Article 18 (Right to a Name)

Article 22 (Freedom of Movement and Residence)

Article 25(1) (Right to Judicial Protection)

Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture ("ICPPT").⁶⁵

all in relation to:

Article 1(1) (Obligation of Non-Discrimination) and

Article 2 (Obligation to Give Domestic Legal Effect to Rights) of the American Convention.

2. Violations Alleged by Representatives of the Victims⁶⁶

Same Violations Alleged by Commission, plus:

Article 13 (Freedom of Thought and Expression)

all in relation to:

Article 1(1) (Obligation of Non-Discrimination)

Article 8 (Right to a Fair Trial) and

Article 25 (Right to Judicial Protection) of the American Convention

62. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 2(c). 001

63. *Id.* ¶ 4.

64. *Id.* ¶ 2(c).

65. *Id.*

66. The Center for Justice and International Law (CEJIL) represents the presumed victims in this case. *Id.* ¶¶ 7, n.4.

August 16, 2016: The representatives submit a brief to the Court that contains requests, evidence, and arguments in favor of the victims.⁶⁷ Furthermore, the brief requests the Court to find the State internationally responsible and order the State to provide reparations.⁶⁸

November 14, 2016: The State submits its brief in response to observations, arguments, and evidence.⁶⁹ The State files nine preliminary objections regarding: (1) the Court's lack of *ratione temporis* jurisdiction over facts before accepting the Court's jurisdiction; (2) the Court's lack of *ratione temporis* jurisdiction over facts before its adhesion to the American Convention; (3) the Court's lack of subject-matter jurisdiction over facts in relation to alleged violations of Article 1, 6, and 8 of ICPPT; (4) the Court's lack of *ratione temporis* jurisdiction over facts before the ICPPT came into effect in the State; (5) the representatives' late filing of the petition with the Commission with regard to alleged violations of Articles 8(1) and 25 of the American Convention and Article 8 of the ICPPT; (6) failure to exhaust domestic legal remedies in securing pecuniary damages and other reparations for the alleged violations of Article 8, 25, and 5(1) of the American Convention; (7) the Court's lack of subject-matter jurisdiction, to review domestic judgments on possible violations of Article 8 and 25 of the American Convention; (8) the Court's lack of subject-matter jurisdiction to examine facts not submitted by the Commission; and (9) the Commission's failure to comply with the American Convention because the Commission had published the Merits Report on its website before submitting the case to the Court.⁷⁰

Nonetheless, the State assumes responsibility for its agents' violation of Article 5 of the American Convention against Mr. Herzog's family as a result of his detention, torture, and death.⁷¹ The State, however, contested the other alleged violations.⁷²

January 9, 2017: The Commission and the representatives submit their brief on the State's preliminary objections and acknowledgement of responsibility.⁷³

February 23, 2017: The Court granted the representatives' request to access the Victim's Legal Assistance Fund.⁷⁴

67. *Herzog et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, ¶ 7.

68. *Id.*

69. *Id.* ¶ 8.

70. *Id.* ¶ 18.

71. *Herzog et al. v. Brazil*, Report on Merits, ¶ 26.

72. *Id.*

73. *Herzog et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, ¶ 9.

74. *Id.* ¶ 10.

April 7, 2017: The President of the Court calls a public hearing on the merits, preliminary objections, reparations, and costs, and to hear the final oral arguments and observations from the parties.⁷⁵

The following organizations also submit amicus curiae briefs to the Court: (1) the Research Group on Transitional Justice and the Right to Truth and to Remembrance at the Pontificia Universidade Católica do Rio Grande do Sur (PUC-RS); (2) the Human Rights and Environmental Law Clinic of the Universidade do Estado do Amazonas and the Research Group on Human Rights in Amazonia; (3) the Center for Studies on International Human Rights Systems at the Universidade Federal do Paraná (UFPR); (4) the Article 19 Organization; and (5) the National Human Rights Commission of Mexico.⁷⁶

June 26, 2017: The parties and the Commission submit their final arguments and observations.⁷⁷

March 15, 2018: The Court begins deliberations.⁷⁸

III. MERITS

A. *Composition of the Court*⁷⁹

Eduardo Ferrer Mac-Gregor Poisot, President
Eduardo Vio Grossi, Vice-President
Humberto Antonio Sierra Porto, Judge
Elizabeth Odio Benito, Judge
Eugenio Raúl Zaffaroni, Judge
L. Patricio Pazmiño Freire, Judge

Pablo Saavedra Alessandri, Secretary
Emilia Segares Rodríguez, Deputy Secretary

75. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 11; Herzog et al. v. Brazil, Resolution of the President, Call for Hearing, Inter-Am. Ct. H.R. (ser. C) No. 350 (April 7, 2017).

76. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 12.

77. *Id.* ¶¶ 13-14.

78. *Id.* ¶ 16.

79. Judge Roberto F. Caldas, a Brazilian national, did not participate in the deliberation of this Judgment, in pursuant to Articles 19(2) of the Court's Statute and 19(1) of the Court's Rules of Procedure. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, n.1.

B. Decision on the Merits

March 15, 2018: The Court issues its Judgment on Merits, Reparations, and Costs.⁸⁰

The Court found unanimously:

To dismiss six of the State's nine preliminary objections⁸¹, because:

First, the State argued that the Court lacked subject-matter jurisdiction regarding the alleged violations of Articles 1, 6, and 8 of the ICPPT.⁸² Drawing on consistent case law, the Court stated that the State has accepted the Court's contentious jurisdiction and agreed to be bound by the ICPPT.⁸³ Thus, the Court concluded that it had subject-matter jurisdiction to rule on the alleged violations of the ICPPT articles here and rejected the State's argument.⁸⁴

Second, the State argued that not all domestic remedies were exhausted.⁸⁵ The Court rejected the State's argument because the State did not meet the required standards for exhausting domestic remedies, such as stating which remedies were exhausted or in progress, and why those remedies were effective.⁸⁶ The Court also noted that the State did not raise this objection earlier, and it is therefore time-barred.⁸⁷

Third, the State argued that the petition was not filed within the time limit with the Commission.⁸⁸ The Court found that the State's return to democracy, the Special Commission's final report created by law No. 9140/1995, the impact of the Amnesty law on the possible investigation and prosecution Mr. Herzog's death, the 2007 CEMDP report, and the actions by the Federal Public Prosecution Service gave the petitioners reasonable expectations that the State could resolve their case.⁸⁹ Thus,

80. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 1.

81. *Id.* "Decides" ¶¶ 1-2.

82. *Id.* ¶ 18.

83. *Id.* ¶ 38.

84. *Id.*

85. *Id.* ¶ 18.

86. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 52.

87. *Id.*

88. *Id.* ¶ 18.

89. *Id.* ¶ 71.

*the Court found that those facts allowed for a determination that the initial petition was timely filed.*⁹⁰

*Fourth, the State argued that the Court lacked subject-matter jurisdiction to review domestic decisions on the alleged violations of Article 8 and 25 of the American Convention.*⁹¹ *The Court rejected this argument because the Court is not an appellate court to resolve the parties' disagreements regarding evidence and application of domestic law.*⁹² *Moreover, the Court found that neither the representatives nor the Commission have asked for a review of the domestic decisions.*⁹³ *The Court also noted that a review of domestic decisions is a matter to be analyzed at the merits stage, and not at the preliminary stage.*⁹⁴

*Fifth, the State argued that the Commission failed to abide by the American Convention when it published the Merits Report on its website prior to submitting the case to the Court.*⁹⁵ *The Court rejected this argument because the State failed to show that the Merits Report had been published differently than described by the Commission or contradicted the American Convention.*⁹⁶

*Sixth, the State argued that the Court lacked jurisdiction to examine facts lodged by the representatives that are different from the ones the Commission submitted.*⁹⁷ *The Court rejected this argument because the facts introduced by the representatives were related to the alleged violation in the Merits Report.*⁹⁸

To partially dismiss the remaining three of the State's preliminary objections⁹⁹, because:

*The State argued that the Court lacked jurisdiction *ratione temporis* over: (1) facts prior to the State's acceptance of the Court's contentious jurisdiction, (2) facts before the State's adhesion to the American Convention, and (3) facts prior to the State ratifying the ICPPT.*¹⁰⁰ *The Court noted*

90. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 71.

91. *Id.* ¶ 18.

92. *Id.* ¶ 83.

93. *Id.*

94. *Id.*

95. *Id.* ¶ 18.

96. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 88.

97. *Id.* ¶ 18.

98. *Id.* ¶ 98.

99. *Id.* "Decides" ¶ 2.

100. *Id.* ¶ 18.

that even though the State's international obligations were affected when it ratified the ICPPT on July 20, 1989 and the American Convention on September 25, 1992, the State accepted and subjected itself to the Court's jurisdiction on December 10, 1998.¹⁰¹ Thus, the Court concluded that it has jurisdiction to review the facts after December 10, 1998, the date the State accepted the Court's jurisdiction, in relation to the American Convention and to Articles 1, 6, and 8 of the ICPPT.¹⁰²

The Court found unanimously that the State had violated:

Articles 8(1) (Right to a Fair Trial) and 25(1) (Right to Judicial Protection), in relation to Articles 1(1) (Obligation to Respect Rights) and (2) (Domestic Legal Effects) of the American Convention, and in relation to Articles 1, 6, and 8 of the ICPPT, to the detriment of Mrs. Zora Herzog (Mr. Herzog's mother), Mr. Herzog's wife, Clarice, and their two children, André and Ivo,¹⁰³ because:

First, the Court found that applying the statute of limitations in this case would be contrary to the American Convention and international law.¹⁰⁴ Specifically, the Court stated that there is sufficient evidence in international law to affirm that statute of limitations does not apply in cases of crimes against humanity.¹⁰⁵

Second, as to the principles of ne bis in idem (the prohibition of double jeopardy for the same criminal behavior) and substantive res judicata (adjudicated matters by a competent court cannot be further pursued by the same parties), the Court stresses that in cases of serious human rights violations, judicial authorities must determine if the right of access to judicial guarantees eclipse the procedural protections of res judicata.¹⁰⁶ Considering the serious violations of human rights and the consistent international case law, the Court concluded that the principles of substantive res judicata do not apply here.¹⁰⁷

Third, regarding the applicability of the State's Amnesty Law, the Court noted that international humanitarian law justifies the promulgation of Amnesty Law to promote peace in non-international armed conflicts if

101. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 27.

102. *Id.* ¶ 29.

103. *Id.* "Declares" ¶ 3.

104. *Id.* ¶ 269.

105. *Id.*

106. *Id.* ¶ 272.

107. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 274.

*they do not conceal war crimes or crimes against humanity.*¹⁰⁸ *Although the State's Amnesty Law was enacted during non-international armed conflict, the Court found that they were enacted to cover up serious abuses of human rights.*¹⁰⁹ *Therefore, the Amnesty Law and their incorrect application by the domestic courts have no legal force in this case.*¹¹⁰

*Fourth, regarding the principle of universal jurisdiction, the Court stated that, for crimes against humanity, the obligation to implement and establish a system of justice extends beyond the State's boundaries.*¹¹¹ *When exercising universal jurisdiction in cases of human rights violations, the Court noted that states must comply with the following requirements of international law: (1) the crime to be prosecuted is under international law; (2) the state at issue has not shown sufficient effort in its investigation and prosecution; (3) and that the universal jurisdiction is not utilized for any reason other than to seek justice.*¹¹²

*Lastly, regarding the predictability and certainty of legal consequences, the Court found that the perpetrators were aware of the illegality of their crimes against humanity and that they could be held to responsible for those actions.*¹¹³ *The Court also found that the State cannot argue the lack or incompatibility of its domestic laws to escape compliance with international obligations.*¹¹⁴ *Thus, the Court found that the State failed to provide effective judicial guarantees in the investigation, prosecution, and punishment of those responsible for the human rights violations against Mr. Herzog.*¹¹⁵

Article 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection), in relation to Article 1(1) (Obligation to Respect Rights) of the American Convention, to the detriment of Mrs. Zora Herzog, Clarice, André, and Ivo,¹¹⁶ because:

The Court made three separate considerations to determine whether the State violated the victims' right to truth in this case: (1) the State's failure to make a judicial determination to identify and prosecute the

108. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 280.

109. *Id.* ¶ 292.

110. *Id.*

111. *Id.* ¶ 295.

112. *Id.* ¶ 303.

113. *Id.* ¶ 306.

114. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 310.

115. *Id.*

116. *Id.* "Decides" ¶ 4.

perpetrators¹¹⁷; (2) the State's dissemination of false facts as to what happened; and (3) the victims' lack of access to the DOI-CODI files.¹¹⁸

First, despite the creation of the Special Commission on Political Deaths and Disappearances and the National Truth Commission to preserve records and historical truths, the Court found that the State has not made a judicial determination to identify and prosecute the perpetrators.¹¹⁹ The Court noted that although truth commissions can attribute responsibility, they do not determine criminal guilt because they could risk violating fundamental human rights during the process, such as the presumption of innocence or the victims' right to privacy.¹²⁰ Moreover, victims become claimants of rights in a court of law, thus criminal prosecution recognizes the victims' as right holders.¹²¹ Thus, truth commissions are inadequate to replace judicial institutions in recognizing victims' rights.¹²²

Second, the Court noted that, up until 2007, the State institutions maintained a false version of the facts, which had already been found false by the courts in 1978.¹²³ The Court also noted that Mr. Herzog's family did not receive a truthful death certificate of Mr. Herzog until 2013.¹²⁴

Third, the Court found that the Army's refusal to provide the victims' access to its files, alleging that they had been destroyed, hindered the victims' right to truth.¹²⁵ The Court reiterated that the State must ensure the victims' right to truth and access to public files.¹²⁶ The State cannot waive its affirmative obligation to make a substantive effort and provide the necessary resources to provide and to reconstruct lost information.¹²⁷

Article 5(1) (Right to Humane Treatment), in relation to Article 1(1) (Obligation to Respect Rights) of the American Convention, to the detriment of Mrs. Zora Herzog, Clarice, André, and Ivo,¹²⁸ because:

117. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 329.

118. *Id.*

119. *Id.* ¶ 338.

120. *Id.* ¶ 331.

121. *Id.* ¶ 332.

122. *Id.* ¶ 331.

123. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 335.

124. *Id.*

125. *Id.* ¶ 336.

126. *Id.* ¶ 337.

127. *Id.*

128. *Id.* "Decides" ¶ 5.

Although the Court could not apply a juris tantum presumption (rebuttable legal presumption) here due to its lack of temporal competence, it analyzed expert and testimonial evidence and found that the State's dissemination of the false version of Mr. Herzog's detention, torture, and murder harmed the victims' personal integrity.¹²⁹ Moreover, the victims' unsuccessful effort to obtain justice and judicial recognition of their rights in their home country caused them anguish, frustration, and suffering.¹³⁰ The Court also found that the State's failure to investigate Mr. Herzog's death also resulted in extreme anguish, uncertainty, frustration, and suffering to his wife and children.¹³¹ Finally, the Court noted that the State did not provide any evidence to disprove the representatives' evidence.¹³² Thus, the Court concluded that the State had violated the victims' rights to personal integrity established in Article 5(1) (Right to Humane Treatment) of the American Convention, in relation to Article 1(1) (Obligation to Respect Rights).¹³³

C. Dissenting and Concurring Opinions

[None]

IV. REPARATIONS

The Court ruled unanimously that the State had the following obligations:

A. Specific Performance (Measures of Satisfaction and Non-Repetition Guarantee)

1. Judgment as a Form of Reparation

The Court indicated that the Judgment itself should act as a form of reparation.¹³⁴

129. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶¶ 351-352, 354.

130. *Id.* ¶ 354.

131. *Id.* ¶ 355.

132. *Id.* ¶ 356.

133. *Id.* ¶ 358.

134. *Id.* "Decides" ¶ 6.

2. Reopen the Criminal Investigation and Prosecution

The State must reopen the criminal investigation and prosecute, with due diligence and in accordance with international law, to identify and punish those responsible for the detainment, torture, and murder of Mr. Herzog.¹³⁵

3. Adopt Appropriate Measures to Ensure the Imprescriptible Nature of Crimes Against Humanity

The State must adopt the necessary measures to guarantee, without exception, that there are no mechanisms for the State to exclude responsibility and that there are no statutory limitations for crimes against humanity.¹³⁶

4. Publicly Acknowledge International Responsibility

The State must publicly acknowledge international responsibility and the failure to investigate, prosecute, and punish the perpetrators responsible for Mr. Herzog's detainment, torture, and death.¹³⁷

5. Publish the Judgment

The State must publish within six months: 1) the official summary of the Judgment in an official, widely circulated newspaper such as the Official Gazette, and 2) the entire judgment on an official State website accessible by the public, for a period of at least one year.¹³⁸

B. Compensation

The Court awarded the following amounts:

1. Pecuniary Damages

Even though the representatives had not submitted evidence regarding their expenditures involved, the Court found that Mr. Herzog's family

135. *Herzog et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, "Decides" ¶ 7.

136. *Id.* ¶ 376, "Decides" ¶ 8.

137. *Id.* ¶ 380, "Decides" ¶ 9.

138. *Id.* ¶ 383, "Decides" ¶ 10.

naturally incurred expenses in pursuing this case and awarded \$20,000 for pecuniary damages to Clarice Herzog.¹³⁹

2. Non-Pecuniary Damages

The Court awarded \$40,000 in non-pecuniary damages to Clarice, André, Ivo and Zora Herzog each.¹⁴⁰

3. Costs and Expenses

The Court ordered the State to pay \$25,000 to CEJIL for costs and expenses incurred.¹⁴¹ The State must also reimburse the Victim's Legal Assistance Fund \$4,260.95.¹⁴²

4. Total Compensation (including Costs and Expenses ordered):

\$209,260.95

C. Deadlines

The State must publish this Judgment, within six months of the Judgment.¹⁴³

The State must submit a report on the measures adopt to comply with the Judgment within one year.¹⁴⁴

The State must also reimburse the Court's Legal Assistance Fund for Victims within six months of this Judgment.¹⁴⁵

V. INTERPRETATION AND REVISION OF JUDGMENT

[None]

VI. COMPLIANCE AND FOLLOW-UP

[None]

139. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 392, "Decides" ¶ 11.

140. *Id.* ¶ 397, "Decides" ¶ 11.

141. *Id.* ¶ 403, "Decides" ¶ 11.

142. *Id.* ¶ 409.

143. *Id.* ¶ 383, "Decides" ¶ 11.

144. *Id.* "Decides" ¶ 11.

145. Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, ¶ 409. 001

VII. LIST OF DOCUMENTS

A. Inter-American Court

1. Preliminary Objections

[None]

2. Decisions on Merits, Reparations and Costs

Herzog et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 353 (Mar. 15, 2018).

3. Provisional Measures

[None]

4. Compliance Monitoring

[None]

5. Review and Interpretation of Judgment

[None]

B. Inter-American Commission

1. Petition to the Commission

[None]

2. Report on Admissibility

Herzog et al. v. Brazil, Admissibility Report, Report No. 80/12, Inter-Am. Comm'n H.R., No. 859-09 (Nov. 8, 2012).

3. Provisional Measures

Herzog et al. v. Brazil, Resolution of the President, Call for Hearing, Inter-Am. Ct. H.R. (ser. C) No. 353 (April 7, 2017).

4. Report on Merits

Herzog et al. v. Brazil, Report on Merits, Report No. 71/15, Inter-Am. Comm'n H.R., Case No. 12.879 (Oct. 28, 2015).

5. Application to the Court

[None]

VIII. BIBLIOGRAPHY

[None]

