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FORGIVENESS AND CRIMES AGAINST HUMANITY: A DIALOGUE BETWEEN HANNAH ARENDT AND JACQUES DERRIDA

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"We know today that killing is far from the worst that man can inflict on man."

" 'All sorrows can be borne if you put them into a story or tell a story about them'. The story reveals the meaning of what otherwise would remain an unbearable sequence of happenings."

Hannah Arendt, *Men in Dark Times*

In this essay I intend to present a dialogue between the ideas proposed by Hannah Arendt and Jacques Derrida about forgiveness and punishment. According to Hannah Arendt, men are not capable of forgiving what they cannot punish, nor of punishing the unforgivable. 2) On the other hand, Jacques Derrida states that we can maintain a legal accusation even when we forgive, or inversely, we are able not to judge but we can forgive. 3) What are the consequences that may be extracted from these ideas when what is at stake in the current debate is the very definition of crimes against humanity, the application of amnesties and the question of the imprescriptibility of those crimes? These discussions are current in Latin America, and this has been the case for some time in Argentina and Chile, and more recently in Brazil.

Perhaps because of professional bias, what intrigued me most in the Arendtian claim was the question of the impossibility of punishment, i.e. the limits of law. What are the cases that we cannot punish? We know that, in her view, the unforgivable refers to the Nazi crimes, a new kind of crime – the administrative massacre, which, based on Kant, she calls the "radical evil". The inadequacy of existing sentences, because of the unprecedented nature of the crimes committed and their extreme cruelty seems to Arendt to constitute the obstacle to punishment. The monstrous and unbelievable scale of the Nazi crimes makes any punishment provided for in law seem inadequate and absurd, says Arendt, in the *Origins of Totalitarianism*. 4)

Besides Arendt, many others who take the same line, such as the philosopher Wladimir Jankélévitch 5), advocate the idea that if no proportional punishment can be found, the crime remains unforgivable. To Arendt *we attempt to classify as criminal the act which, as we all feel, no such category was ever intended to cover. [...] What meaning has the concept of murder, when we are confronted with the mass production of corpses?* 6)

In *Personal Responsibility under Dictatorship*, she says: *at the time, the horror itself, in its naked monstrosity, seemed not only to me but to many others, to transcend all moral categories and explode all standards of jurisdiction; it was something men could neither punish adequately nor forgive.* 7) In the same text, she asserts, further on, that none of the reasons that justify punishment such as the need for society to be

protected against crime, the rehabilitation of a criminal, the dissuasive force of the example or the retributive justice would be valid for the punishment of Nazi criminals. Thus, she says, *here we are, demanding and meting out punishment in accordance with our sense of justice, while, on the other hand, this same sense of justice informs us that all our previous notions about punishment and its justifications have failed us.* 8) Forgiveness died in the death camps, said Jankélévitch.

In *The Human Condition*, Arendt seems to admit a possible combination between forgiveness and punishment, in stating that punishment is the alternative to forgiveness, not its *opposite: both have in common the attempt to put an end to something that without its interference could go on endlessly.* 9)

To Derrida, on the other hand, forgiveness does not belong to the political or legal sphere. Derrida opposes the symmetry between punishing and forgiving; he does not admit that they may be placed side by side. He also opposes the confusion between forgiveness, apology, remorse, amnesty and prescription. Forgiveness is alien to the political or legal. To him, it is only possible to forgive the unforgivable. Forgiveness cannot be trivialized, it should always be exceptional. 10)

To better understand these propositions, it is necessary to consider the context in which Derrida became interested in the theme. His interest in the topic was highlighted by what he called the "globalization [*mondialisation*] of forgiveness". 11) All over the world scenes of repentance, confession, forgiveness and excuses have multiplied since the end of the Second World War, and they have increased in frequency in the last ten years. 12) It is enough to remember the Catholic Church's request for forgiveness for the Second World War crimes, that of the Prime Minister of Japan to the Korean and Chinese, that of the Belgian government for not having acted on the genocide in Rwanda and, recently, the Chilean armed forces' confession of their crimes, and so on.

As Derrida reminds us, it is not people that are asking for forgiveness but entities (governments, churches, etc.), and this in itself, in his view, decharacterizes forgiveness. According to him: *the proliferation of scenes of regret and requests for forgiveness without doubt means a universal urgency of memory, of self-accusation, of repentance, of attendance, it is necessary to take it beyond the judicial instance and the Nation-state instance.* 13) As he reminds us, the "original scene" of what we are now living is made up of what he calls the extraordinary events that occurred during the Second World War that produced the creation of the legal concept of crimes against humanity. 14) Derrida does not believe that the proliferation of scenes of repentance is a bad thing, but what is worrying, according to him, *is the simulacrum, the automatic ritual, the hypocrisy or calculation that those scenes could represent.* 15) Furthermore, the generalization of requests for forgiveness in a movement that sets out to be unanimous may in his view incur the danger of declaring everyone guilty so that nobody is able to stand in the position of judge or arbiter. This statement reminds us of what Arendt says about the existence of collective guilt: if everyone is guilty, nobody is, and therefore nobody can be judged. 16)

With reference to the decharacterization of forgiveness, having in mind the question "who should forgive?", Derrida gives the example of the South African woman whose husband had been imprisoned and tortured, who, before the Commission for Truth and Reconciliation, said: *a commission or a government cannot forgive. Perhaps only I could do it. But I am not ready to forgive.* 17) To Derrida, this statement recalls the fact that the anonymous body of State or of a public institution cannot forgive. The State can judge, but forgiveness has nothing to do with the judgement, nor even with the public or political sphere. Even if it were "fair", forgiveness has nothing to do with

judicial justice or law.

Derrida also suggests a distinction between conditional and unconditional forgiveness. Both hypotheses are present in our Judaic-Christian tradition. In the first case, forgiveness is only meaningful if the one who has done something asks for forgiveness. In this case, the individual is already on his way to be transformed, recognizes his mistake and regrets. There is an exchange in this case. In the second case, which for him is the only one in which one can speak of real forgiveness, it is granted regardless of the attitude of the accused, even if he does not ask for forgiveness and does not regret anything: the guilty person is forgiven as guilty. 18) To forgive the forgivable is very easy, he says. This distinction seems to be a kind of a response he gives to Jankélévitch's statement that the Germans did not ask for forgiveness for what they had done, and therefore there was no way to forgive them. 19)

Derrida's definition of forgiveness is unlike Hannah Arendt's in that the authority to forgive is always divine in its essence, although practised by a human being. Asked by Elisabeth Roudinesco about Arendt's position on this question, Derrida reminds us that, for her, *forgiveness is a purely human experience, even in the case of Christ, whom she always calls Jesus of Nazareth to remind us of his earthly roots, the human place of his birth and word – of action and word.* 20) Regarding Arendt's position on forgiveness, he says: *it seems to me that she simplifies things a little. I am tempted to think that forgiveness would only respond to its pure call, if it can, when it forgives the unforgivable and thus positions itself above the law, beyond all determinable sanction. Forgiveness is, and should remain, heterogeneous to the judicial space. Forgiveness has no symmetry or any relation of complementarity with punishment.* 21)

To Derrida, *when forgiveness is in the service of an end, be it noble or spiritual, such as redemption or reconciliation, i.e. every time it intends to re-establish a social, national, political or psychological normality, through mourning or therapy, it is not pure [...]. Forgiveness should remain exceptional and extraordinary, putting impossibility to the test, as if it interrupted the ordinary course of human temporality.* 22) Derrida and Arendt seem to agree on this aspect: forgiveness has the power to interrupt the flow of events.

Crimes against humanity and the unforgivable.

To Arendt, the unforgivable refers to the totalitarian regimes that unwittingly uncovered the existence of crimes that human beings could not punish or forgive. By making this possible, the impossible became the absolute evil, she says. To Derrida, the theme of forgiveness and the unforgivable emerges on the contemporary scene, i.e. the globalization [*mondalization*] of forgiveness occurs as a consequence of the crimes committed against humanity, a concept initially conceived to characterize Nazi crimes. 23)

The question that follows is: why would crimes against humanity be considered unforgivable? In fact, the most accurate question should be: what distinguishes crimes against humanity from other crimes? This is a question that from the legal point of view has provoked several discussions and still lacks some definition in relation to its foundations. The first time, on the international scene, that we heard of acts that could be defined as crimes against humanity was in 1915, when France, Great Britain and Russia used this concept in a diplomatic note, considering the massacre of the Armenians by the Turks to be crimes against humanity and civilization. But the first properly legal instance of these crimes appeared at the Nuremberg trials, set up to

judge the major Nazi criminals, when it was necessary to create a special category of crimes that did not fit into the conduct classified as war crimes. The need to create a new framework was partly due to the fact that Germany's persecution of its own citizens could not be classified as a war crime. A country's expulsion, deportation and murder of its own citizens was unheard of in the history of war. In addition, the lack of a connection between the war aims and the establishment of concentration and extermination camps, i.e. their apparent uselessness in relation to the conflict, as shown by Arendt, 24) raised a problem: how to fit those conducts into the category of war crimes.

Since Nuremberg, and with the establishment today of the International Criminal Court, crimes against humanity are defined as certain acts – murder, kidnapping, disappearance, etc. – that are committed during a systematic and/or generalized attack against the civilian population. The most important characteristic, from the formal legal point of view, is the existence of an attack against the civilian population. Yet the crime of genocide, classified in Nuremberg as a crime against humanity, has been considered an autonomous crime since the 1948 international convention, as its main characteristic is the intention of the agent to destroy, wholly or in part, a national, ethnic, racial or religious group. Its autonomy in relation to crimes against humanity is also provided for in the statutes of the courts for the former Yugoslavia, Rwanda and International Criminal Court. Thus, to Arendt, the current idea that what characterizes crimes against humanity is the attack on plurality and human diversity can be applied without any problems to the crime of genocide. Arendt's contribution, in this instance, is of capital importance, as shown by Celso Lafer *in Reconstrução dos direitos humanos – um diálogo com Hannah Arendt*. 25)

But Arendt's contribution to the theme of the foundations of crimes against humanity can be explored in a different way, especially on the basis of her analysis of concentration camps, in *The Origins of Totalitarianism*. What really characterizes, or what is the basis of crimes against humanity? If we take their modern legal definition, we may consider that those crimes depend on a certain number of victims. The attack must be of a scale, volume and gravity that justify this classification. However, it is necessary to go further than this. What characterizes the conducts that constitute crimes against humanity?

It is important to remember, in this respect, an Argentinian pronouncement about the crimes of the military regime: conducts that violate rules that protect essential values that humanity has recognized for every human being, such as the right to life, the right not to be submitted to cruel treatment, to torture... In this sense, the victim is the international community or the conscience of humanity. 26) In recent jurisprudence emanating from the court for the former Yugoslavia, in the so-called Erdemovic case, this is stated more clearly: what essentially characterizes crimes against humanity is the concept of humanity as a victim. Crimes against humanity transcend the individual, for when the individual is attacked by inhuman acts, the whole of humanity is attacked and denied. 27)

Hannah Arendt had already collaborated, in *The Origins of Totalitarianism*, to developing the notion of crimes against humanity, when she stated *that total domination, which tries to organize the infinite plurality and differentiation of human beings as if all humanity were only one individual*. 28) In fact, as Martine Leibovici reminds us, this meant manufacturing the human being like an animal species, where every member would be reduced to being a mere living corpse. 29) Arendt observes in the same work that *the experience of concentration camps does show that human*

beings can be transformed into specimens of the human animal, and that man's "nature" is only "human" insofar as it opens up to man the possibility of becoming something highly unnatural, that is, a man. 30)

To Arendt, the great Nazi crime was to remove human spontaneity, to transform human personality into a thing. In being deprived of individuality, with the death first of their legal and then moral existence, humans lost their spontaneity, i.e. their capacity of thinking, acting, beginning something new. Becoming superfluous, humans lost their dignity. What the totalitarian ideologies had in mind was the transformation of human nature. As Leibovici also reminds us, the aim of manipulating the human body in its infinite possibilities of suffering was to destroy human spontaneity, transforming the human being into a merely reactive organism. 31)

In another part of *The Origins*, Arendt says: *The concentration camps are the laboratories where changes in human nature and their shamefulness are tested, and therefore it is not just the business of their inmates and those who run them [...]; it is the concern of all men. Suffering, of which there has been always too much on earth, is not the issue, nor is the number of victims. 32)* What is at stake is human nature, in her view. *Perhaps what is behind it all is only that individual human beings did not kill other individual human beings for human reasons, but that an organized attempt was made to eradicate the concept of the human being. 33)*

The preparation of living corpses, as Arendt reminds us, or their "insane manufacture" with its apparent uselessness, was aimed at transforming human nature itself. Those living corpses or nameless silhouettes belonged to a space situated between life and death. As she observed several times, we thereby learn that there are worse situations than death. The paradigm of this situation, the figure of the "Muslim", the one that in the language used in the camp was so called and was characterized as a mummy - man or a living dead, has been studied by Giorgio Agamben. 34) In literature, this theme is dealt with especially by Primo Levi, in *Se questo é un uomo?* and Robert Antelme in *L'espèce Humaine*. 35)

Forgiveness and its legal "false friends" 36)

According to Derrida, forgiveness is frequently confused with other concepts such as amnesty and prescription.

Crimes against humanity do not admit amnesty. This has been a consensus in international law for some time, and has recently been confirmed in Argentina in an exemplary manner by the judiciary. But what characterizes amnesty? The word "amnesty", like "amnesia", is derived from the Greek "amnestia", which means forgetting. Some people understand that in the political-legal field its meaning goes beyond forgetting, and denotes that the government intends to erase the crime and not simply forget it. In any event, amnesty is considered a "political pardon". Thus it is the nearest concept to forgiveness. However, in this case, going back to Arendt's statement that it is not possible to forgive what cannot be punished, forgiveness is not an alternative to punishment, but an impediment.

It is not by chance that the Argentinian amnesty laws have adopted other nomenclatures: Full Stop Law and Due Obedience Law. 37) These laws, considered unconstitutional nowadays, can no longer impede the investigation and judgment of those accused of crimes against humanity, namely the torture, summary executions and disappearances that occurred in that country. Nevertheless, even when they were in force, these laws were confronted with the so-called "right to truth". The family of

the military regime's victims, especially those of the disappeared, initiated lawsuits on the basis of this right, interpreted as the subjective right of the family and also of society to know their history, with a view to obtaining all the information about the methods and organization of State terrorism. One of the main discussions in those lawsuits revolved around the following: would amnesty impede the establishment of the truth through the lawsuits? Are lawsuits also a means of making the truth about the facts public, or are they only useful for sentencing? The courts' answers were not unanimous. In any case, there would be a clear need to nullify all the "pardons" granted in order to at least try to find out the truth of what occurred. 38) It is worth mentioning here the theme of factual truth as expounded by Arendt in her text "Truth and Politics". The opposite of factual truth, which is political truth, is not just error or illusion, but the lie.39)

As to prescription [statute of limitation], there is also a consensus that crimes against humanity are imprescriptible. Prescription is understood as the period of time taken for a crime to be judged or a sentence to be served. Every right has a given period of time to be exercised. What characterizes prescription is the period of time: after a certain time, the crime must be forgotten. But in the case of crimes against humanity, it is understood that it does not matter when they were committed; they should always be punished. An international convention from 1968 stipulates that war crimes and crimes against humanity can be judged at any time, so that they are not subject to the effects of prescription. According to Derrida, forgiveness should not be confused with the imprescriptible, but, like forgiveness, the imprescriptible refers to a transcendent order of the unconditional, of forgiveness and of the unforgivable, to a kind of a-historicity, of eternity and of final judgment that exceeds the finite time of the right. Forever, eternally and everywhere, a crime against humanity should be judged. To Derrida, it is a certain idea of forgiveness and the unforgivable, of a beyond-the-right, that inspired the production of rules that made these crimes imprescriptible. 40) Humans do not have the right of subtracting the committed crime – nor of subtracting themselves from judgment, regardless of the amount of time that has elapsed since they committed the offence.

Conclusion – between forgiving and punishing

Clearly, many questions have not been examined, remain open or underlie what has just been expounded. One of the most important, in my view, is the question of capital punishment, one of the themes dealt with by Derrida in his seminars, and discussed by Arendt in *Eichmann in Jerusalem*. Another key theme is memory, since, as pointed out by Derrida, every time we ask for forgiveness, we are making an appeal to the memory. It is worth referring here to Paul Ricoeur's text concerning forgiveness in *Memory, History and Forgetting*. 41) As Derrida reminds us, the analysis of forgiveness is interminable. 42)

It seems that Derrida, like Hannah Arendt, was not concerned with educating or convincing, but with understanding. I consider that the two positions I have just expounded concerning the combination between forgiveness and punishment are different but not opposed. Hannah Arendt analyses the question from the political-legal point of view, while Derrida proposes an ethical view very similar to Christian ethics. As the popular proverb goes: "to err is human, to forgive is divine".

We may be living in a time when it is possible to find a place between forgiveness and punishment. The Commissions for Truth and Reconciliation can be understood as spaces where the victims, their families and society have the possibility of reconciling

with the past, understanding what happened and making the individual feel again at ease in the world, in the words of Hannah Arendt. Derrida may have been right when he said that forgiveness is something linked to the divine, because it is difficult to think about forgiving crimes against humanity if we confine ourselves just to "human affairs".

I would like to conclude by bringing this discussion to Brazil. The time has come to open the archives of the military dictatorship in order to find out about our recent past. It is not necessarily a question of forgiving or punishing, but of finding out what happened and trying to understand. Comprehension, says Arendt, *does not mean denying the outrageous, deducing the unprecedented from precedents, or explaining phenomena by such analogies and generalities that the impact of reality and the shock of experience are no longer felt. It means, rather, examining and bearing consciously the burden which our century has placed on us – neither denying its existence nor submitting meekly to its weight. Comprehension, in short, means the unpremeditated, attentive facing up to, and resisting of, reality – whatever it may be.* 43)

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 - 2 The Origins of Totalitarianism, New York, Harvest Book, 1973, and The Human Condition, Chicago U.P., 2nd ed, 1998.
 - 3 Foi et Savoir suivi de le Siècle et le Pardon (entretiens avec Michel Wieviorka), Paris, Seuil, 2000, pp.109 & 128 and Pardonner: l'impardonable et l'imprescriptible, Cahier de L'Herne Derrida, Paris, Éditions de L' Herne, 2004, pp. 544 & ff.
 - 4 Hannah Arendt, op.cit.1973, p. 439.
 - 5 L'Imprescriptible, Paris, Seuil, 1986.
 - 6 Hannah Arendt, op. cit, 1973, p. 441.
 - 7 Hannah Arendt, Responsibility and judgement. Edited with an introduction by Jerome Kohn, New York, Schocken Books, 2003, p.23. In a letter to Karl Jaspers she said : "The nazi crimes, it seems to me, explode the limits of law; and that is precisely what constitutes their monstrousness. For these crimes, no punishment is severe enough." Hannah Arendt and Karl Jaspers- correspondence 1926-1969, New York, HBJ, 1992, p.54
 - 8 Hannah Arendt, op. cit, 2003, p.26.
 - 9 Hannah Arendt, op. cit, 1998, p. 241.
 - 10 Jacques Derrida, op. cit, 2000, pp. 104 & ff.
 - 11 Jacques Derrida, op. cit, 2000, p. 104.
 - 12 " the theater of forgiveness", "great world scenes of repentance", "moving ceremony of guilt ", Jacques Derrida, Negotiations, Stanford, University Press, 2002, p. 382 and 383.
 - 13 Jacques Derrida, op. cit, 2000, p. 104. «The proliferation of these scenes of repentance and asking for forgiveness no doubt signifies, among other things, an il faut of amnesia, an il faut without limit toward the past . Without limit, because the act of memory, which is also the subject of the auto-accusation, of the 'repentance', of the [court] appearance [comparution], must be carried beyond both legal and national state authority », op.cit, 2002, p. 382.
 - 14 " A 'performative' event took place there whose reach is still hard to measure, and

- yet terms like crimes against humanity seem so common and intelligible to everyone today." Jacques Derrida, *op. cit.* 2002, p.382.
- 15 Jacques Derrida, *op. cit.*, 2000, p. 105.
- 16 Hannah Arendt, *op. cit.*, 2004, p.29
- 17 Jacques Derrida, *op. cit.* 2000, p. 118.
- 18 Jacques Derrida, *op. cit.* 2000, p. 119.
- 19 Vladimir Jankélévitch, *op. cit.*, 1985, pp. 47 & ff.
- 20 Jacques Derrida & Elisabeth Roudinesco, *De quoi demain...Dialogue*, Paris, Fayard/Galilée, 2001, p. 264.
- 21 Jacques Derrida & Elisabeth Roudinesco, 2001, p. 265.
- 22 Jacques Derrida, *op. cit.*, 2000, pp.107 & 108.
- 23 Jacques Derrida, *op. cit.*, 2000, p. 105. « the concept of crime against humanity governs the whole geopolitics of forgiveness », Jacques Derrida, *op.cit.*, 2002, p.384
- 24 Hannah Arendt, *op. cit.*, 1973, p. 456. "The uselessness of the camps, their cynically admitted anti-utility, is only apparent. In reality, they are more essential to the preservation of the regime's power than any of its other institutions".
- 25 Celso Lafer, São Paulo, Companhia das Letras, 1988.
- 26 Obediencia debida y punto final – Declaración de nulidad – Camara Nacional en lo Criminal y Correccional Federal, Sala 2, 13 de julho de 2004, in Centro de Estudios Legales y Sociales – CELS, www.cels.org.ar.
- 27 Promotoria vs. Drazen Edermovic – Sentence, 29 November 1996, 2nd. paragraph – www.un.org/icty.
- 28 Hannah Arendt, *op. cit.*, 1973, p. 438.
- 29 Martine Leibovic, Hannah Arendt, une juive- Expérience, politique et histoire, Paris, Desclée de Brouwer, 1998, p. 147.
- 30 Hannah Arendt, *op. cit.*, 1973, p. 455.
- 31 Martine Leibovic, *op. cit.*, 1998, p. 148.
- 32 Hannah Arendt, *op. cit.*, 1973, p. 458.
- 33 Hannah Arendt and Karl Jaspers, *op. cit.*, p.69.
- 34 Giorgio Agamben , *Ce qui reste d' Auschwitz*, Paris, Rivages Poche, 2003, pp. 43 & ff.
- 35 Primo Levi, Turin, Einaudi, 1976 and Robert Antelme, Paris, Gallimard, 1957.
- 36 Derrida calls them "neighbours".
- 37 These laws are also known in Argentina as "leyes del perdón".
- 38 Cláudia Perrone-Moisés, "Leis de anistia face ao direito Internacional: desaparecimentos e direito à verdade" in *Direitos Humanos, Globalização Econômica e Integração Regional*, Flávia Piovesan, (coord.), São Paulo, Max Limonad, 2002, pp. 285/305.
- 39 Hannah Arendt, *Between Past and Future*, New York, Viking Penguin, 1967.
- 40 Jacques Derrida, *op. cit.*, 2000, pp. 109 & 127.
- 41 Paul Ricoeur, *La mémoire, l'histoire, l'oubli*, Paris, Seuil, 2000.
- 42 Jacques Derrida, *op. cit.*, 2004, p. 548.
- 43 Hannah Arendt, *op. cit.*, 1973, p.viii.