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THE BENEFIT OF PAIN: PARADOXES OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS' INTERVENTION IN A PRISON OF RIO DE JANEIRO[1]

Rafael Godoi[2]

Isabella Silva Matosinhos[3]

Abstract

This paper examines the process of development and application of the injunction, issued by the Inter-American Court of Human Rights, which established the differentiated calculation of the penalty for prisoners allocated at the Criminal Institute of Plácido de Sá Carvalho, in Rio de Janeiro, Brazil. According to the determinations of that Court, due to the deteriorating conditions of confinement that prevail in that prison, each day of sentence served must be counted as two. Central to this work is the hypothesis that this exceptional situation can reveal deep and implicit meanings that punishment and imprisonment assume in our context. In addition, the present analysis aims to provide elements that enable the improvement of decarceration policies, as well as those for preventing and combating torture.

Keywords: prison; human rights; overcrowding; torture; Rio de Janeiro; Inter-American Court of Human Rights.

[1] This study is a result of my work as a postdoctoral researcher (PNPD/Capes) at the Graduate Program in Sociology and Anthropology (PPGSA) and at the Research Center on Citizenship, Conflict and Urban Violence (NECVU), both at UFRJ. For its development, I was able to benefit from the dialogue with Thais Duarte, Maria Gorete Marques de Jesus, Ioanara Fernandes and Patrick Cacicedo, among others. My sincere gratitude to all these people, as well as to the editors and reviewers that took part in the journal's double-blind peer review process.

[2] Federal University of Rio de Janeiro (UFRJ), ORCID.

[3] Translator. Master's student in Sociology at the Federal University of Minas Gerais (UFMG), ORCID

> "We shall thus have to admit that the cultural consequences of the Reformation were to a great extent, perhaps in the particular aspects with which we are dealing predominantly, unforeseen and even unwished for results of the labors of the reformers. They were often far removed from or even in contradiction to all that they themselves thought to attain."
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> Weber, in *The Protestant Ethic and the Spirit of Capitalism*

1. INTRODUCTION

On November 22, 2018, the Inter-American Court of Human Rights (also known as the I/A Court H.R or simply the Court) issued an important order. In it, it was determined that the state of Rio de Janeiro, in Brazil, should adopt several measures in order to put an end to a set of serious violations that were taking place at the Criminal Institute of Plácido de Sá Carvalho (CIPSC)[4], a semi-open prison unit located in the Gericinó Penitentiary Complex, in the Bangu district, Rio de Janeiro. Among the measures, there was a particular injunction: the justice system of the state of Rio de Janeiro must count two days of sentence served for each day spent under the degrading conditions of that overcrowded unit. This measure stands out for its innovative character and also for being, among all the Court's ruling, one of the only ones that was effectively applied by the state authorities. In this text I propose to do two things: first, to unravel the social process of development of this particular injunction; then, to cast a critical look at its application.

The questions coming along in a situation like the one we analyze here are multiple and complex. They range from converting the prison institution into a massive torture machine (Mendiola, 2014; Godoi, 2017a; Fernandes, 2021), or extermination, in some situations (Mallart & Godoi, 2017; Stanchi & Dias, 2018; Mallart, 2019), to the limitations and possibilities of institutional mechanisms for

[4] Translator Note (TN): The original name of the institute, in Portuguese, is *Instituto Penal Plácido de Sá Carvalho*.

preventing and combating torture in the way they are conceived nowadays (Zyl Smit, 2010; Daems, 2017; Cliquennois & Snacken, 2018; Malvezzi Filho, 2018; Duarte & Jesus, 2020; Jesus & Duarte, 2020); and also the relevant and active role, albeit contradictory and ambiguous, that human rights defense mechanisms play in shaping the current incarceration framework, with all the violations that this scenario invariably implies (Kaminski, 2002; Chantraine & Kaminski, 2008; Kelly, 2009; Jensena *et al.*, 2017; Marques, 2018).

My first contact with the legal and humanitarian controversy surrounding the CIPSC came from the analysis of inspection reports prepared by the Public Defender's Office of the state of Rio Janeiro as part of its program to monitor the state prison system (Godoi, 2019). Of the many documents I analyzed at that time, the reports on the CIPSC produced by the Specialized Nucleus for Penitentiary Situation (NUSPEN, the Portuguese initials for *Núcleo Especializado de Situação Penitenciária*) and the Nucleus for the Defense of Human Rights (NUDEDH, the portuguese initials for *Núcleo de Defesa dos Direitos Humanos*, in the original term) stood out. They were the only reports prepared with the explicit purpose of informing the Inter-American Court of Human Rights what the prison authorities had done regarding the provisional measures that had already been issued – in February and October 2017. They were also the only reports in which the Public Defender's Office of the state of Rio de Janeiro signed as "representative of the beneficiaries" of the legal case in progress at that international court. When I analyzed this material, the aforementioned 2018 resolution had already been released. However, as with the two previous orders[5], there was not, at the time, the slightest sign of change in the sad scenario of the Criminal Institute of Plácido de Sá Carvalho[6]. This whole situation, due to its extreme nature, seemed to me to be particularly illustrative of the "manifest power of an impassive penitentiary

[5] For a comprehensive analysis of the structure and functioning of the Inter-American Human Rights System, see Hanashiro (2001).

[6] The following description, made by public defenders, is an example of this pitiful picture: "This chaotic grouping of people on the floor of prison cells represents an inhuman condition precisely at the moment of rest. Such a situation obviously leads to arduous difficulties in accessing the bathroom during the night. According to the prisoners' narrative, there are two options for those who feel physiological needs at night: one of them is to walk to the bathroom, stepping over those who are sleeping on the floor and, evidently, involuntarily stepping on their colleagues in misfortune; the other is to get rid of body waste in the very place where one sleeps, using plastic bottles, in the case of urine, to temporarily store what the body needs to expel" (NUSPEN, 2016a, pp. 34-35). [TN: Free translation based on the Portuguese reference consulted in this work].

administration, willing only to small concessions, but not necessarily willing to submit completely to what is prescribed by law", even in the face of "one of the rarest, vast and high groupings of forces that aim to enforce the law inside a prison" (Godoi, 2019, p. 157)[7].

The inability of national and international law agencies to modify the inhumane structure of our prisons or to alter our traditional and authoritarian model of prison management remains the general theme and background of the present analysis. However, it is now known that if the penitentiary administration remained impassive in the face of the Inter-American Court of Human Rights' determinations, the same did not happen with the justice system. As of 2019, it began to apply, under conditions that deserve to be carefully analyzed, the injunction of differentiated calculation of the penalty for convicts who live in or pass through the CIPSC. The central hypothesis of this work is that the absolutely exceptional situation of these prisoners and the criminal proceedings that take care of the execution of their sentences can reveal deep and implicit meanings that the penalty and the prison assume in our context. In addition to exploring this general hypothesis, I also hope that the joint analysis of the processes of construction and application of the determination of differentiated calculation of the penalty can work to impact criminal policies. Specifically, I hope that this analysis provides elements capable of contributing to decarceration policies, aiming to reverse the trend of mass imprisonment, which has prevailed in recent decades, and the cruel, inhuman and degrading provisions that have historically characterized our prisons.

2. THE DOUBLE-EDGED SWORD

It is not new that the degrading prison conditions and basic rights' violations of persons deprived of their liberty are the subject of fierce judicial disputes in several jurisdictions. International treaties such as the Universal Declaration of Human Rights (UDHR), proclaimed on 1948; the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners, launched in 1955 and updated in

[7] Free translation based on the Portuguese reference consulted in this work.

2015 as the Nelson Mandela Rules; the International Covenant on Civil and Political Rights (ICCPR), undertaken in 1966; the American Convention on Human Rights, 1969; the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 1984, among others, form a robust legal framework that has been internalized by countries - albeit in different ways and at different levels. They also have structured a broad and complex international system for the protection of human rights, with its various commissions and courts.

Although the United States (US) is not exactly a good example when it comes to joining the international system for the protection of human rights (Maciel, Ferreira, & Koerner, 2013), there are some analyzes of the American process of judicialization of the conditions for serving sentences that are particularly instructive for the study I develop here. The pioneering author of this discussion is Jacobs (1980). He showed how the strategy of judicial litigation over prison conditions in the United States developed in direct continuity with the civil rights movement. He also explains how both mobilizations were structured through the confrontation of racial inequality, how they were, to a large extent, carried out by the same jurists and how they ended up in the same courts. According to Jacobs, after two decades of dispute, on the one hand it was possible to observe a greater recognition of the rights of persons deprived of liberty – for example, the right of defense, appeal and complaint, as well as the right to certain goods and services. On the other hand, there was a growth of prison bureaucratization, marked by the progressive rationalization, formalization and standardization of its procedures. Thus, at the same time that the conditions of life inside the criminal institutions became better and the arbitrariness and brutality were reduced, the institution was toughened. In this process of hardening, there was a decrease in the margins of negotiation between inmates and staff and an expansion of the formal and real control of the latter over the former. In this scenario with no solution of continuity, the legal disputes seemed to result in substantive advantages for the prisoners as well as for the prison institution itself.

Feeley and Swearingen (2004) noticed that this apparent paradox about the consequences of litigation in order to achieve and preserve the prisoners' rights has intensified over the years. The increasing judicialization of prison conditions marked the decades that followed Jacobs' analysis. This led to a picture of true hypertrophy of the penitentiary bureaucracy. To qualify this ambivalence of the

effects of judicialization, these authors used the metaphor of the "double-edged sword".

It didn't take long for this image to be associated with the process of mass incarceration, which took place in the same period. Heather Schoenfeld (2010) was one of the researchers who first noticed the effects of the judicialization of prison conditions on the expansion of state prisons – and, consequently, on levels of incarceration (cf. Guetzkow & Schoon, 2015). Using the state of Florida, US, from the 1970s and 1990s, as a case study, the author made a detailed analysis of the repercussions of this process. The work she developed is a decisive theoretical and methodological framework for the present study. Schoenfeld demonstrates how ethical and political claims for prisoners' right to health were translated into judicial questions centered on the levels of overcrowding in prisons. Many years later, these questions resulted in judicial injunctions and administrative measures that can be summarized in the expansion of vacancies. Schoenfeld emphasizes the importance of considering the different meanings that may emerge, over time, from the option for judicial litigation, with its various protagonists acting in different environments and contexts. The paradoxical effects would not, therefore, derive directly from the demands formulated at first. The effects are, above all, the result of the process itself, with its multiple and complex displacements[8].

Simon (2013, 2014), when analyzing the case of the state of California, in the United States, shows the open and contingent nature of the judicial litigation on

[8] Schoenfeld proposes an approach to the litigation process and its effects over time. She highlights the importance of two fundamental moments, when elements of the process are translated in the political and juridical arenas. First, the author emphasizes the conversion of ethical and political claims into judicial demands, which is the starting point of litigation; then, she emphasizes the translation of judicial sentences into public policies carried out by sectors of the state administration that would mark the end of a process. According to Schoenfeld, in these two translations it is necessary to recognize the importance of "timing": on the one hand, the term carries a sense of a special moment, a particular occasion or a window of opportunity; on the other hand, it brings the sense of acoustic tuning, of harmony, of harmonizing a specific element with other heterogeneous ones. Thus, Schoenfeld seeks to show how the political or legal result of each moment of translation bears the marks of time and the context in which it takes place. This makes translation something limited, shaped and conditioned by the immediate conjuncture of each decisive stage of a given process. In these terms, if it is possible to identify an unexpected, inadvertent or paradoxical causal nexus between an initial demand and a certain outcome, the explanation for this development, according to the author, is not found exclusively in the very nature of the demand. The understanding of the paradox, therefore, would go through the "medium", in the two strong senses of the term: as a process, as a middle point between extremes; and also in its environmental sense, as the atmosphere that surrounds each of the stages of a process.

prison conditions related to the levels of incarceration. According to the author, at the end of the last century, also in California, legal litigation was an important cause of the expansion and hardening of the local prison system. However, in the 2000s, the judicial route also proved to be efficient in promoting one of the most expressive experiences of decarceration in recent history (cf. Pastoral Carcerária, 2018). Therefore, the achievement of substantive advantages for the prison population through the judicial route remains a possibility; as well as the risks of reinforcing and expanding the punitive machine along the same path. This is the "double-edged sword" that outlines the horizon of the present work.

3. THE ORIGINAL DEMAND

The analysis I carry out in this study - on the process of development of the Inter-American Court's Resolution of November 22, 2018 - was made possible, in large part, due to the dialogue and collaboration established with the State Mechanism on the Prevention and Combating of Torture (MEPCT, the Portuguese initials for *Mecanismo Estadual de Prevenção e Combate à Tortura*, in the original term) of Rio de Janeiro. This body closely followed the entire process that culminated in the resolution. In addition, MEPCT also facilitated my access to the database they built on the subject. It was on this basis that I found practically all the documents analyzed in this first stage of the work. It is worth mentioning that it was also the members of the aforementioned body who warned me about the application of the differentiated calculation of the penalty by the criminal justice system of Rio de Janeiro[9].

As I was able to find out in this collection, on March 14, 2016, the Specialized Nucleus for Penitentiary Situation (NUSPEN) and the Criminal Defense Coordination of the Public Defender's Office of Rio de Janeiro presented a petition to the Inter-American Commission on Human Rights demanding measures to face

[9] It is important to emphasize that, in this work, the exposure of empirical data is not dissociated from sociological analysis. In methodological terms, the present study is characterized as a result of an exploratory research (Stebbins, 2001; Reiter, 2017) strongly inspired by some seminal contributions of anthropology of the state (Ferguson, 1994, Das, 2007, Gupta, 2012) and ethnography of documents (Vianna, 2014; Lowenkron & Ferreira, 2014; Ferreira & Lowenkron, 2020).

the serious situation they had been witnessing at the Criminal Institute of Plácido de Sá Carvalho (CIPSC). In the 88-page document, the defenders summarized information collected in the last three inspections carried out at the unit – on January 19, 2012, on September 16, 2014 and on January 18, 2016. They also reported a significant worsening "in the quantitative and qualitative aspects of the prison indexes[10]" (NUSPEN, 2016a, p.10).

Regarding the quantitative aspects, the defenders pointed out that during the mentioned period the overcrowding at IPPSC became worse in the following terms: in 2012, an entire pavilion was deactivated and the number of prisoners in the unit was 1,542; in 2014, when the unit was already operating with its normal capacity of housing 1,699 inmates, there were 2,850 prisoners; finally, in 2016, there were 3,478 prisoners, and the unit's structure remained the same. The public defenders also referred to the findings of the Public Prosecutor's Office – which in 2014 carried out three inspections at the unit to investigate the complaints that had been forwarded to it by the Specialized Nucleus for Penitentiary Situation. They emphasized that the "big problem of the unit" was in fact overcrowding" (NUSPEN, 2016a, p. 11). Mediated by inspection reports, this association between public defenders and public prosecutors can be considered a first step in the formation of the regimentation[11] that later reached the Inter-American Court of Human Rights.

Regarding the "qualitative aspects of the prison indexes", public defenders detailed the precariousness of the CIPSC's facilities and services. They took photographs to document everything: the deterioration of the prison cells, full of infiltrations and leaks, which forced the inmates to improvise protections with tarpaulins and plastic bags; improvised electrical installations, made with inappropriate materials, which results in an obvious risk of fire; the degradation of the sanitary facilities, with insufficient vases, sinks and showers and without any separation between them; the absence of continuous flow of water, a situation that forces prisoners to store large volumes of water in vats and plastic bottles for their consumption, personal hygiene and cleaning of the place; poor garbage collection

[10] I chose to suppress all the original highlights of the cited case-files. The reason is that the authors of these documents, when writing them, commonly use various graphic resources, such as bold, uppercase, underline and red color, which could overload the reading of this paper.

[11] The idea of regimentation is used here in dialogue with the propositions of Callon & Latour (1981) and Latour (2005).

from prison cells, resulting in a large accumulation of food scraps and, consequently, in the proliferation of rats, cockroaches and various insects; the inadequacy of ventilation and lighting in the cells, both due to the reduced proportions of the "windows" and the amount of things hanging from the walls and ceilings, given the absence of any type of closet or wardrobe for the inmates to store their belongings; the shortage of beds and mattresses, forcing more than half of the prisoners in a cell to sleep on the floor. In addition to all this, public defenders highlighted the inadequacy of medical care services, which was evidenced by the large number of infectious diseases, skin diseases and tuberculosis, all of which were aggravated by the lack of medical care for infected people. They also stressed the bad quality food offered to prisoners. The menu was marked by a lack of nutrients and variety. The food, in its turn, was poorly packaged and, consequently, was often served when it was already rotten, which explains the accumulation of leftovers inside the cells. Another problem was the fact that prisoners of different profiles occupy the same spaces, such as former police officers, prisoners threatened with death, the so-called "*seguros*" (in the Portuguese term) , the "neutral" and also dissidents from different factions[12]. Finally, another problem detected was the shortage of employees per shift, which makes effective control of the prison population unfeasible and, therefore, also impacts on the security of prisoners and servants.

After giving all these details of the situation, public defenders clarified that every inspection carried out was followed by the forwarding of their reports to the authorities of the Penitentiary Administration Secretariat (SAP)[13] and the Criminal Sentence Enforcement Court. They recommended reducing the number of prisoners in the unit, prohibiting the entry of new inmates and urgently improving the unit's basic services and infrastructure. Without any kind of return from these bodies, they resorted to the judicial route, through "special procedures", before the Criminal Sentence Enforcement Court. Nevertheless, the scenario has not changed.

[12] The so-called "*seguros*" are those prisoners whose lives are threatened in a common unit, as in the cases of debtors, whistleblowers/informers, rapists and ex-policemen. "Neutrals", in turn, are those who are not persecuted for a particular reason and who have not joined a prison gang.

Barbosa (2019) has a great and recent reflection on the logic that governs the fragmentation of identities and territories inside and outside prisons in the state of Rio de Janeiro.

[13] TN: The original term of this institution, in Portuguese, is *Secretaria de Estado de Administração Penitenciária*.

Thus, from the defenders' point of view, the exhaustion of the possibilities of rectifying the violations through domestic remedies remained characterized, which is one of the necessary requirements for presenting a petition before the Inter-American Court of Human Rights.

Once the petition had been properly prepared, public defenders presented it to the Inter-American Court requesting the granting of a precautionary measure on the isse. The demand was to cease the ongoing violations and ensure that the prison population was limited to the unit's capacity. They also requested the transfer of the surplus of prisoners to other prisons and the prohibition of new admissions; continuous access to drinking water; the regular provision of medical care services; and the adequate distribution of basic personal hygiene supplies, as well as mattresses, pillows and bedding.

It should be noted that, in this first moment of the entire litigation process concerning the Criminal Institute of Plácido de Sá Carvalho, the problem of overcrowding assumes a prominent position. Still, this problem is not the only, nor the most central, of the petitioners' concerns. Overcrowding figures alongside the extremely precarious conditions of confinement, which are aggravated by overcrowding, but which are not caused by it. It means that both problems demand combined and equally energic interventions. In this regard, public defenders called for both a reduction in overcrowding and improvements in infrastructure and the provision of basic services. In the following sections, I intend to understand the process by which these demands were converted into an injunction to accelerate the flow of convicts who pass through this unit.

4. THE ADMISSION OF THE CASE

Once the reception of the petition occurred, in May 2016, the Inter-American Commission on Human Rights asked the Brazilian State for information on the situation of the CIPSC. The Commission was still awaiting an official response when, on June 29, they received from NUSPEN a six-page document titled “Additional information – deaths at the Criminal Institute of Plácido de Sá Carvalho”. The document is a supplement that, because of its content, made it imperative to

radically rethink the sense of urgency that could be attributed to the case. In it, through tables and graphs, public defenders demonstrated the real dimension of deaths escalation in the unit: six deaths were registered in the establishment in 2013; fifteen in 2014; sixteen in 2015 and, by June 2016, thirteen had already been registered, of which three had occurred in that month alone. Concentrating just over 7% of the prison population of the state of Rio de Janeiro, in the first half of 2016 the Criminal Institute of Plácido de Sá Carvalho was already responsible for about 13% of deaths in the entire state penitentiary system (NUSPEN, 2016b, p.4). In addition to mortality data, the document also contained a letter from a prisoner. In it, the prisoner described the imminent risk of rebellion and the existence of cases of tuberculosis, leprosy, syphilis and other diseases in the cell where he was living. Public defenders also warned about the implications of the state of emergency that had been decreed by the state government not long ago, considering that time. With the decree, all state expenses were restricted in order to hold the Olympic Games[14], which foreshadowed that the degradation of the prison system would become even worse.

With no response from the Brazilian authorities and in view of the new information contained in the supplementary document prepared by NUSPEN, on July 15th, 2016, the Inter-American Commission of Human Rights issued Resolution n. 39. In it, the case was formally admitted and the Commission determined that Brazil is responsible for violating human rights. Because of this, the Resolution established a set of measures for the Brazilian State to put an end to the documented violations[15]. In the first paragraph, the IACHR referred to the deaths mentioned in that supplementary document. The second paragraph brought a summary of the requests to be fulfilled by the Brazilian State:

> (...) the Commission requests that the State of Brazil: a) adopt the necessary measures to preserve the lives, personal integrity and health of the persons

[14] Decree n. 45,692, June 17, 2016.

[15] At this stage of the process, the measures established did not yet have the mandatory character they would acquire later. Even so, it is worth remembering that Brasil, as a signatory to several international human rights treaties and conventions, has committed itself to comply willingly with this type of injunctions.

> deprived of liberty in the Criminal Institute of Plácido de Sá Carvalho; b) adopt immediate actions to substantially reduce overcrowding inside the detention facilities, in accordance to international standards; c) provide adequate hygiene conditions inside the facilities, as well as the access to drinkable water and adequate medical care for the detainees, according to the illnesses they have; d) adopt the necessary measures to have contingency plans in case of an emergency; e) agree with the beneficiaries and their representatives about the measures to be adopted; f) provide information regarding the actions taken in order to investigate the alleged acts that caused the adoptions of the present precautionary measure and, in this way, avoid its repetition. (IACHR, 2016, p.2).[16]

As can be seen, the requests made by IACHR did not differ so much from those made by the Public Defender's Office. Even so, the Commission's requests were not an accurate translation of the original claims, in Schoenfeld's terms (2010); in fact, the IACHR expanded the original demands, giving they much greater weight and adding, according to its prerogatives, imperatives of transparency and collaboration on the part of the Brazilian authorities.

Six months later, in December, 2016, now acting as "representative of the beneficiaries", NUSPEN informed the IACHR that none of the precautionary measures had been implemented by the Rio de Janeiro prison authorities. As a result, the Nucleus requested the referral of the case to the Inter-American Court of Human Rights. In January 2017, NUSPEN reiterated the request, updating the number of deaths recorded in the last few months. Days later, the Commission sent the request for provisional measures to the Inter-American Court (IACHR, 2017). When the Court was already analyzing the case, the Brazilian authorities finally sent the information requested by the IACHR. On February 13th, 2017, the Court issued an order on the matter, considering all those previous elements. At this point, the case had already reached great proportions, mobilizing multiple institutions, bodies, agencies and Brazilian state authorities, as well as the highest levels of the Inter-American Human Rights system.

[16] TN: Free translation based on the Spanish reference consulted in this work.

The order determined the State of Brazil to:

> (...) i) obtain effective control of the penitentiary center in strict accordance to human rights standards for persons deprived of their liberty; ii) adopt immediate actions to substantially reduce overcrowding; iii) provide adequate medical care for the inmates, according to the illnesses they have, specially the ones with serious ones; iv) prevent the spread of contagious diseases among inmates; and v) adopt the necessary measures to ensure conditions of detention compatible with respect for human dignity and also in accordance with international standards in the matter, which take into account indicators referring to infrastructure, sanitation and hygiene facilities, access to drinking water, among others. (I/A Court H.R., 2017a, p. 3).[17]

In general terms, the Court was reiterating the measures already established by the Commission. Nevertheless, there are two points that already indicated some change of perspective: first, the greater concern with the unit's security, with the "effective control of the penitentiary center". Indeed, the original petition, from NUSPEN, had already mentioned the lack of staff in the unit, considering the huge number of prisoners. However, this was only one of the factors, among many others, that reinforced the need for a drastic reduction in overcrowding. In turn, in the order issued by the Inter-American Court on the matter, the control of the prison space seems to gain greater importance. It is possible that such displacement was influenced by the massacres that took place in prisons in the north and northeast of the country in early 2017, with dozens of deaths as a result.

In this decision of the Court, it is also possible to note another shift in perspective that will prove to be decisive for the resolution of the case. It concerns the demand for the formalization of a "Plan for Reducing Overcrowding in the Fluminense Prison System"[18]. Finally, in its response to the Court, the Brazilian State promised to create and institute the plan as a product of the already installed

[17] TN: Free translation based on the Portuguese reference consulted in this work.

[18] TN: Free translation based on the Portuguese reference consulted in this work. The original term, in Portuguese, is "*Plano de Redução da Superlotação do Sistema Carcerário Fluminense*".

"Collegiate Committee", which would have representatives from the State Department of Penitentiary Administration, the Criminal Sentence Enforcement Court, the Public Prosecutor's Office, the Public Defender's Office, the State Court of Rio de Janeiro, the State Penitentiary Council (CEPERJ, the portuguese initials for *Conselho Penintenciário Estadual do Rio de Janeiro*, in the original term) and the Brazilian Bar Association (OAB). The Court required the promised plan to be ready by the end of March. It also demanded information on the escalation of deaths in the unit and on the investigations carried out regarding the probable causes and possible responsibilities of these deaths. It also established the duty of the Brazilian State to prepare and present to the Court, every three months, accountability reports, which would be subject to consideration by the Public Defender's Office and the IACHR.

With this resolution, the Inter-American Court on Human Rights not only took a favorable position on the cause of the CIPSC's prisoners, but also joined the regimentation that pressured the Brazilian State to comply with the law and guarantee rights in that particular prison unit. Proof of this commitment is the promise to carry out an on-site inspection at the unit "in order to obtain from the parties, directly, relevant information to supervise compliance with the provisional measures" (I/A Court H.R., 2017a, p. 9)[19]. These visits will be the culmination of this great mobilization on the part of different groups.

5. THE GREAT REGIMENTATION

The inspection carried out on June 19, 2017, is reported in the second resolution on the matter issued by the Court, on August 31 of the same year (IHR Court, 2017b). The document reports that before the illustrious visit, NUSPEN, in April, and the State Mechanism on the Prevention and Combating of Torture of Rio de Janeiro, in May, carried out an inspection at the Criminal Institute of Plácido de Sá Carvalho. On the occasion, they not only found the inexistence of any concrete

[19] TN: Free translation based on the Spanish reference consulted in this work.

measure to improve the living conditions in the unit, but also observed an increase in the overcrowding levels.

In the Court's report on the diligence carried out at CIPSC, the number and nature of the agents involved are noteworthy. The international delegation was led by the judge Eugenio Raúl Zaffaroni, former minister of the Argentine Supreme Court and an exponent of Latin American critical criminology. His personal engagement in this case proved to be not only a strong support, but a decisive one for the forwarding of the cause, as I will indicate later. He was joined by the Legal Director and a lawyer from the Inter-American Court's Secretariat. During the visit to the unit, this delegation was also accompanied by several local authorities: the SAP holder himself, with his Undersecretary of Penitentiary Treatment; the Secretary of the State Secretariat for Human Rights and Policies for Women and Seniors of the state government (SEDHMI, the Portuguese initials for *Secretaria de Estado de Direitos Humanos e Políticas para Mulheres e Idosos*), with its Superintendent for the Promotion of Human Rights, a Technical Advisor and a Public Policy Specialist; one judge from the State Court of Rio de Janeiro and one from the Criminal Sentence Enforcement Court; prosecutors from the Human Rights Advisory, from the Penitentiary Guardianship and from the Criminal Sentence Enforcement Support Center of the state Public Prosecutor's Office[20]. From the federal government, the advisor of the Department for Human Rights and Citizenship Affairs of the Ministry of Foreign Affairs participated; as well as the head of the International Advisory Board of the Special Secretariat for Human Rights of the Ministry of Women, Family and Human Rights[21]; and the head of the Department of International Affairs of the Attorney General's Office[22]. And as “representative of the beneficiaries", those who attended were the II Assistant Public Defender; the Criminal Defense coordinator of the Public Defender's Office; the coordinator and the sub-coordinator of NUSPEN; and a public defender of the

[20] TN: Free translation based on the Portuguese reference consulted in this work. The original names, in Portuguese, of this three last bodies are, respectively, "*Assessoria de Direitos Humanos*", "*Tutela Penitenciária*" and "*Centro de Apoio à Execução Penal do Ministério Público estadual*".

[21] TN: Free translation based on the Portuguese reference consulted in this work. The original name of the body, in Portuguese, is "*Assessoria Internacional da Secretaria Especial de Direitos Humanos do Ministério de Direitos Humanos*".

[22] TN: Free translation based on the Portuguese reference consulted in this work. The original name of the body, in Portuguese, is "*Departamento de Assuntos Internacionais da Advocacia-Geral da União*".

Nucleus for the Defense of Human Rights (NUDEDH) (IDH Court, 2017b, p. 2). In total, there were 22 authorities involved, from nine relevant institutions of public administration and the justice system. The presence of these people in the CIPSC represents the apex of the great group, which I am calling *regimentation*, that was formed in favor of regularizing the conditions for serving sentences in that particular unit.

As reported in the resolution, the visit was divided into two moments. In the first one, there was a coordination meeting between the authorities. In the second, the inspection of the unit's facilities was carried out. In general, the delegation found the same degrading conditions reported several times by the Public Defender's Office, as well as the absence of any concrete action or any plan of action minimally outlined to reverse the situation of multiple and flagrant violations. In addition, the document compiled updated death data and noted the unacceptability of the increase in deaths over the years 2016 and 2017, the period of validity of the precautionary and provisional measures issued, respectively, by the Commission and the Inter-American Court of Human Rights.

Once the worrying situation was verified, the Court demanded the need for "urgent structural changes" and maintained the already established provisional measures. In addition, the Court reinforced that "within the non-extendable period of three months, the Brazilian State must present to the Court a technical diagnosis and a contingency plan for structural reform and for the reduction of overpopulation and overcrowding at the Criminal Institute of Plácido de Sá Carvalho Penal" (IDH Court, 2017b, p. 21)[23]. It is worth noting that on that occasion the Court did not say a single word about possible changes in the dynamics of criminal enforcement; it only indicated measures related to structural improvements, the protection of inmates' lives and the State's duties of transparency. In other words, up to this point there was still nothing indicating the path of the different computation of the penalty.

6. THE ELABORATION OF A PLAN

[23] TN: Free translation based on the Spanish reference consulted in this work.

In October 2017, NUSPEN and the State Mechanism on the Prevention and Combating of Torture and the Institute of Religious Studies (ISER, the Portuguese initials for *Instituto de Estudos da Religião*) carried out a joint inspection of the Criminal Institute of Plácido de Sá Carvalho. They found high levels of overcrowding, as usual, as well as the total paralysis of the prison authorities in dealing with the problem. In January 2018, the Brazilian State presented an accountability report to the Inter-American Court of Human Rights, which, as planned, was submitted to the Public Defender's Office for observations. These commentaries made by the Public Defender's Office, sent to the Court on March 14, 2018, represent a true turning point in all this mobilization.

In the document, the public defenders highlighted that the Brazilian State had indicated several actions and initiatives - involving SAP, the State Court of Rio de Janeiro, the Public Prosecutor's Office of Rio de Janeiro, the National Prison Department (DEPEN, the Portuguese initials for *Departamento Penitenciário Nacional*), the National Justice Council (CNJ, the Portuguese initials for *Conselho Nacional de Justiça*) and the Brazilian Federal Supreme Court (STF, the Portuguese initials for *Supremo Tribunal Federal*) - which were not directly related to the situation of the Criminal Institute of Plácido de Sá Carvalho. They showed how SAP itself had explicitly stated that any measure isolated in a single prison would be palliative and would overload the rest of the system, which generally operates in very similar conditions to those of the unit under intervention. Afterwards, the public defenders described their efforts to promote the collective construction of a specific contingency plan for the Criminal Institute. According to the report, on February 26, 2018, NUSPEN unsuccessfully convened a meeting of the "Collegiate Committee" to present its proposal for a "Plan for the Quantitative Reduction of Prison Overcrowding at the Criminal Institute of Plácido de Sá Carvalho". It is in this Plan that the discussion about ways of dealing with criminal sentence enforcement (Godoi, 2017b) begins to appear in the horizon of this case. Considering the total incapacity and paralysis of the Penitentiary Administration Secretariat to reduce overcrowding and improve the confinement conditions of the unit, the Public Defender's Office turned to the Judiciary:

> (...) it is a resounding mistake to attribute to the Penitentiary Administration Secretariat (SAP/RJ) the responsibility for the overcrowding of prison units. It is clear that, in fact, the prison administration is a 'victim' of this phenomenon, since this body is a mere depository of people deprived of their liberty. The great responsibility for overcrowding lies with the Judiciary, without any doubt. According to what has already been demonstrated and according to what will still be exposed, the Judicial Branch has a completely alien attitude to the problem, choosing to despise and ignore the provisional measures ordered by the Inter-American Court on Human Rights. (NUSPEN, 2018, pp. 11-12).[24]

Subsequently, the public defenders reported that they met with members of the Prison System Monitoring and Enforcement Group (GMF). On that occasion they were informed of the dissolution of the "Collegiate Committee", to which the Brazilian state had previously committed itself. At that meeting, as "their contribution" to that specific situation, the magistrates proposed the construction of a new pavilion at the CIPSC and the resumption and completion of the stalled works of a new prison unit. With this speech, the Judiciary put the blame for the entire situation on the Executive Branch[25]. In turn, the public defenders' plan, entirely rejected by the judges, was based on the premise that it is necessary to close the "entrance gate" of the unit and widen the"exit door". This could be done from the early granting of freedom to a significant part of the inmates and to those who would be sent there. They proposed holding an emergency task force to assess benefits that, if applicable, could be granted to prisoners, such as conditional release, regime progression, pardon and remission for those who met the legal requirements. Based on various legal grounds, the public defenders also proposed expanding opportunities for early release. First, they advocated the adoption of exceptional measures and criteria not provided for in local legislation, but still in accordance with the recommendations of the Inter-American Court on Human Rights. An example of these measures would be the anticipation, on an emergency basis, of the benefits of those who would serve, during 2018, the fraction of the

[24] TN: Free translation based on the Portuguese reference consulted in this work.

[25] About this attitude of disclaiming responsibility, see Machado (2020).

sentence required for early release[26]. Second, the public defenders demanded the Criminal Sentence Enforcement Court of Rio de Janeiro to adopt some jurisprudential guidelines that had already been established by Brazilian higher courts, but that were still little recognized by state courts. The most eloquent example of this situation is the Binding Precedent n. 56, issued by the Brazilian Federal Supreme Court[27]. It establishes that a convict cannot be subjected to a more severe prison regime than the one originally determined for him/her due to the lack of vacancies in an adequate institution. Thus, in the event of lack of vacancies in semi-open prison institutions, the convict would have the right to wait for a vacancy in the open regime. In other words, strict compliance with this Binding Precedent would, in theory, be enough to eradicate the problem of overcrowding in this type of unit. Finally, the public defenders advocated the need to reverse certain understandings consolidated in the jurisprudence of the Criminal Sentence Enforcement Court, such as setting the base date for calculating the second progression on the day when it was objectively fulfilled and not, as was often the case, on the date when the previous progression was granted. Both the Criminal Sentence Enforcement Court and the State Court of Rio de Janeiro, however, refused to discuss the possibility of applying measures of this nature. Thus, the Public Defender's Office requested the Inter-American Court of Human Rights to fully incorporate the Plan as an explicit provisional measure specifically aimed at the Judiciary of the state of Rio de Janeiro.

Somehow, all these measures intended to accelerate the population flow passing through the Criminal Institute of Plácido de Sá Carvalho. In this sense, they defined the horizon of action in which the strategy of counting each day of sentence served in a differentiated way was formulated. But it is important to recognize that this strategy itself is not yet included in the set of proposals made by the Public Defender's Office. This approach will only be introduced by the Inter-American Court on Human Rights in its next resolution, as a creative reformulation

[26] It is important to note that in February 2018 the Public Defender's Office made a first move in this direction, by formalizing 337 requests for early conditional release. All of them were rejected.

[27] TN: The term Binding Precedent is used here as the translation of the Portuguese term *Súmula Vinculante*. Despite the contextual and semantic differences that can be lost in the translation process, the similarity between the terms that we want to emphasize, for the purposes of this work, is that both refer to precedents with binding effectiveness. Meaning, in other words, that lower courts must follow the precedents set by the decisions of higher courts.

of the public defenders' demand – as a translation, in Schoenfeld's terms (2010). It is also worth mentioning that, in May 2018, the Penitentiary Administration Secretariat presented before the Court a Technical Diagnosis in which the Judiciary's responsibilities for the overcrowding situation were also signed. In this diagnosis, the Secretariat demanded that procedural review should be carried out for the inmates of the Criminal Institute of Plácido de Sá Carvalho, greater use of precautionary measures and alternatives to custodial penalties, as well as speedy procedures on the progression of sentences. About six months later, on November 22nd, 2018, the Inter-American Court issued its third order, reaffirming all the provisional measures previously determined, but adding, in its own terms, the injunction of the differentiated calculation of the penalty.

7. THE DIFFERENTIATED CALCULATION

According to the Inter-American Court of Human Rights, ordinary legal thought would postulate for the “direct release of prisoners, considering that it is intolerable for the rule of law to carry out penalties that are, at the very least, degrading”. However, the Court adopts what it considers a “reality principle”, which recognizes the unwillingness of States to simply release their prisoners. In this sense, the Court postulates the need to create "an alternative that fosters the reduction of the penal population, in general through a way of calculating the time of penalty that makes it possible to shorten the actual time of serving the sentence, taking into account the greater distressing level of the sentence served in a context of penal overpopulation” (I/A Court H.R., 2018, p. 15)[28]. In other words, it is no longer a question of categorically reducing overcrowding and improving confinement conditions. Neither is about putting an end to the documented violations; nor to free the convicts, as soon as possible and by all possible means, from suffering that goes against the law and human rights standards. Rather, it is about trying to reduce overcrowding as it proves to be impossible or unrealistic to promote immediate improvements in the infrastructure and basic services offered. Although all the injunctions for structural improvements remain in the resolution,

[28] TN: Free translation based on the Portuguese reference consulted in this work.

the device of the differentiated calculation of the penalty is anchored, in particular, on the precarious and degrading conditions of confinement. Here, the appalling conditions of confinement are actually incorporated into the dynamics of the enforcement of sentences. The precariousness becomes, then, a factor of acceleration of the population flow that passes through the institution. The strategy conceived is to gradually reduce overcrowding, releasing prisoners from those degrading conditions in a "responsible" way. Thus, a favorable environment would be created for a gradual improvement of prison structures. A double-edged sword is on the table:

> In principle, it is undeniable that the persons deprived of their liberty at the Criminal Institute of Plácido de Sá Carvalho may be suffering a penalty that imposes on them an anti-juridical suffering much greater than that inherent to the mere deprivation of liberty. Thus, it is fair enough to reduce the incarceration time of these prisoners - through the use of reasonable calculation. This reduction must somehow compensate for the penalty that has already been served, in the anti-juridical part of its enforcement. Illicit penalties do not cease to be penalties because of their anti-juridical nature. And to find the solution that is as rational as possible it is essential to consider the penalty that has been served and that causes suffering due to the conditions in which it takes place. Taking this into account is necessary to maintain compliance with the international legal framework and with the Binding Precedent No. 56 of the Brazilian Federal Supreme Court. (...) There is no doubt that the ongoing degradation at the Criminal Institute of Plácido de Sá Carvalho stems from the overpopulation of the unit, whose density is 200%, that is, twice its capacity. From this, it is possible to deduce that if the unit is occupied twice as much as its capacity, the anti-juridical infliction of pain resulting from the sentence served in such an environment is also doubled. This scenario makes it necessary that the amount - in terms of time - of penalty or illegal preventive measure actually served be computed at the

> rate of two days of licit penalty per day of effective deprivation of liberty in degrading conditions. (I/A Court H.R., 2018, p. 23).[29]

It is worth to note that the injunction uncritically reduces the causes of prisoners' suffering and prison degradation to overcrowding. With this, the order equates the occupancy rate with the "anti-juridical surplus" of the penalty. And it is necessary to keep in mind that these questions, by themselves, are subjects that deserve a separate and deep discussion. Even so, it is also important to consider that the injunction is aligned with social and legal claims in favor of decarceration, formulated in the context of a growing transnational mobilization to face mass incarceration (cf. Pastoral Carcerária, 2018; Telles et al., 2020). Furthermore, it must be recognized that this type of injunction - concerning the differentiated calculation of the penalty - blends important lessons about the possible side effects that arise from the demand for better prison conditions, especially with regard to the expansion of prison centers. In order to give reasons for its position, the Inter-American Court cites, for example, the same court decision that, according to Simon (2013, 2014), promoted a significant and unprecedented decarceration process in California, United States. It also refers to a sentence, handed down by the Constitutional Court of Colombia, that ruled out the possibility of building new prisons and affirmed the choice for decarceration in order to combat prison overcrowding. However, according to the Inter-American Court, this Colombian ruling also established that the precariousness of prison conditions is not enough to justify an immediate release of the convicts and that such a thing would undermine the rights of victims and society. For these reasons, they considered that it is desirable to propose “policies that favor freedom and decarceration, even massively” (IDH Court, 2018, p. 17)[30], but not automatically, taking into account the individuality of the cases[31]. This understanding had important consequences at the time of application of the differentiated calculation of the sentence in Rio de Janeiro. According to the resolution:

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[29] TN: Free translation based on the Portuguese reference consulted in this work.

[30] TN: Free translation based on the Portuguese reference consulted in this work.

[31] For an in-depth discussion of the judicialization of prison conditions in Colombia, we recommend seeing Higuera & Gómez (2019).

> (...) it is necessary to draw up a different treatment for cases of prisoners charged with or convicted of crimes against life and physical integrity or crimes of a sexual nature. It is also necessary to take into account that these secondary deviations of conduct do not occur inexorably, which requires a specific approach in each case. Therefore, in these situations - of persons charged with or convicted of crimes against life, physical integrity or crimes of a sexual nature serving time at the Criminal Institue of Plácido de Sá Carvalho - the Court understands that the reduction of the time of compensatory imprisonment due to anti-juridical execution, according to the aforementioned calculation, should be subject, in each case, to a criminological examination or technical expertise. Based on criminal prognosis and, in particular, based on indicators of the person's aggressiveness, this procedure will serve to indicate: whether the reduction of the real time of deprivation of liberty is appropriate, in the aforementioned form of 50%; if this is not advisable, due to a totally negative criminal prognosis; or if it should be abbreviated by less than 50%. (I/A Court H.R., 2018, p. 24).[32]

Later, Zaffaroni himself (2020) formalized the assumptions and developments of this reasoning in the doctrine of “unlawful penalties”[33]. Without being able to assess the displacement that such propositions may mean within the scope of legal dogmatics, from a strictly sociological point of view, I would like to highlight this remarkable transformation: from the original demands of NUSPEN for the reduction of overcrowding and improvements in the conditions of confinement to the injunction of the differentiated calculation of the penalty published by the Inter-American Court of Human Rights, with its horizon of accelerating the population flow passing through the Criminal Institute of Plácido de Sá Carvalho, without excluding the possibility of justifiably retaining a portion of this population under those same degrading conditions. Although all the other

[32] TN: Free translation based on the Portuguese reference consulted in this work.

[33] TN: Free translation based on the Spanish reference consulted in this work.

provisional measures previously established remain in the resolution, imposing the urgent need for reforms in terms of prison infrastructure, services and in the security of the unit, the institute of differentiated computing inscribes this same degradation that is sought to be extirpated - the diffuse and continuous torture of prison (Godoi, 2017a) - as a calculation factor taken into account in the regime for processing criminal sentences. What is denied on the one hand, on the other is not only accepted, but also taken as a basis for calculation, in such a way that overcrowding becomes the principle of its own eradication, a very characteristic cognitive operation of what Foucault (2008) defined as governmentality.

In the next section, I will proceed to the analysis of the application of the measure itself, when this problematic dimension of the differentiated calculation of the sentence becomes even more evident. Before that, however, I would like to point out that the final text of the injunction is not an autonomous creation of the Inter-American Court. Neither is the direct result of the Public Defender's original demands. The injunction of the Court is the result of continuous clashes, of trials and errors, of multiple interactions between different agents that unfold in different spaces and over time, with their large and small displacements – as Schoenfeld (2010) teaches. It is also important to keep in mind that the development of this particular legal institute does not cease with its inscription in the resolution issued by the Inter-American Court; the process continues at the moment of its application, when the injunction of the differentiated calculation of the penalty is translated, once again, by the agencies of the Rio de Janeiro justice system.

8. THE REQUESTS MADE BY THE PUBLIC DEFENDER'S OFFICE

The application of the differentiated calculation of the sentence for prisoners of the Criminal Institute of Plácido de Sá Carvalho will be approached here from the analysis of the 30 case-files of criminal enforcement proceedings. These case-files, until the end of 2019, included, among their various documents, a petition from the Public Defender's Office explicitly requesting the application of the Resolution of

November 22nd, 2018[34]. It is important to emphasize that this sample is not intended to be representative, but rather the object of a qualitative analysis of an exploratory nature. In any case, it is also necessary to highlight that the small number of cases analyzed was enough to map some of the main and most recurrent arguments mobilized by public defenders, prosecutors and judges in their pronouncements in the proceedings. It was also sufficient to map the most likely outcomes of the lawsuits – at least in terms of the first year in which the resolution is in force. A final preliminary observation is necessary: between the formalization of the Inter-American Court of Human Rights' resolution and its application by the Criminal Sentence Enforcement Court of Rio de Janeiro, there is a complex process of assimilation of the injunction by the agencies of the Brazilian and Rio de Janeiro justice systems, a process that would need to be researched in greater detail. Aside from one clue or another of this internalization process, in general terms the analyzed case-files only bring the result of the negotiations and adaptations that were constitutive. Here, therefore, the focus is on the application of the differentiated calculation of the penalty at the "end" of the system, that is, in each criminal enforcement proceedings, considered individually, in which the debates reverberate without being fully revealed. This means that eventually, in this analysis, some intermediate translations may go unnoticed, as I focus my attention on what can be considered the final translation.

In its effort to ensure that the institute of differentiated computation of the penalty is applied, the Public Defender's Office of Rio de Janeiro defined two main models of petition regarding the theme: an extensive one and a synthetic one. In both of them, after identifying the sentenced person, the injunction of the Court is almost always exposed in the following terms:

[34] This sample was built and analyzed within the scope of the project "The meanings of prison: incapacitation and resocialization in the Brazilian prison reality" (free translation from the original name of the project, in Portuguese: *Os sentidos do cárcere: incapacitação e ressocialização na realidade prisional brasileira*), funded by the Brazilian National Council for Scientific and Technological Development (CNPq, the Portuguese initials for *Conselho Nacional de Desenvolvimento Científico e Tecnológico)* (2019-2021) and carried out by the Center for Studies on Citizenship, Conflict and Urban Violence (NECVU, the Portuguese initials for *Núcleo de Estudos da Cidadania, Conflito e Violência Urbana*), from the Federal University of Rio de Janeiro (UFRJ), under the coordination of Michel Misse.

> In an inventive way in relation to the provisional measures already in force – and which have always been disregarded by the responsible administrative and judicial authorities –, the Inter-American Court granted persons deprived of liberty at the CIPSC the right to 'reduction of prison time, which is intended to compensate for the unlawful enforcement of the sentence' (§ 129 of the resolution). According to the Inter-American Court of Human Rights' determination, due to the deteriorating and demeaning material conditions of detention imposed on the inmates of the CIPSC, the deprivation of liberty must be computed 'at the rate of two days of lawful/juridical sentence per day of effective deprivation of liberty in degrading conditions' (§ 121 of the resolution). (Lawsuit 2014.02, p. 204).[35] [36]

In the extensive model of petition, the public defenders compare the prison population allocated in the unit, according to the most recent data, with the ideal capacity of 1,000 inmates for a semi-open regime unit. This is a determination provided by the National Council of Criminal and Penitentiary Policy (CNPCP, the Portuguese initials for *Conselho Nacional de Política Criminal e Penitenciária*)[37]. Public defenders also point out that the intervention of the Inter-American Commission on Human Rights on the Criminal Institute of Plácido de Sá Carvalho has been taking place since 2016. And more than that, that the “domestic bodies” of the executive and judiciary must “obey” the injunctions coming from the Inter-American human rights system. They evoke, then, some of those intermediate decisions that operate the internalization of the injunction in the Brazilian justice system: a legal view of the Nucleus of Controversies of International Law of Human Rights[38], of the Attorney General Office[39] and a "promotion" of the Attorney General

[35] In order to preserve the identity of the sentenced persons and the operators of the law in the analyzed case-files, in the citations and quotations provided here, the lawsuit numbers were replaced by the year in which the lawsuit began, followed by the order in which they were drawn.

[36] TN: Free translation based on the Portuguese reference consulted in this work.

[37] Art. 85 of Resolution no. 09/2011 of the CNPCP.

[38] TN: the original name of the Nucleus, in Portuguese, is *Núcleo de Controvérsias de Direito Internacional dos Direitos Humanos*.

[39] Legal view n. 00041/2019/PGU/AGU.

of the State of Rio de Janeiro Office[40]. They also refer to two important positions of the Brazilian Federal Supreme Court: the Binding Precedent n. 56 and the Claim of Non-Compliance with Fundamental Precept (ADPF, the Portuguese initials for *Arguição de Descumprimento de Preceito Fundamental*) n. 347, which dealt with the unconstitutional state of affairs of the Brazilian prison system[41].

After all these general considerations, the public defenders specify the date of entry of the convict into the Criminal Institute of Plácido de Sá Carvalho and the nature of the crime for which he is serving time. And at this point, the requests can be distinct: if the conviction was not due to a violent or sexual crime, the public defender demands the immediate recognition of the right to a differentiated calculation of the sentence; on the other hand, if the conviction results from these types of crimes – such as homicide and rape, mainly –, the defender requires the performance of the technical expertise provided for in the resolution – which, in theory and as already highlighted, would inform the magistrate about the appropriateness (or not) or the most adequate reason for the differentiated calculation, based on a "criminal prognosis" prepared using "aggressiveness indicators". Such requests are commonly expressed in the following terms:

> It should be noted that the convict joined the CIPSC on March 29, 2019, and remained there until May 24, 2019. On this date, he was transferred to the Criminal Institute Benjamin de Moraes Filho. The prisoner's conviction was not based on crimes committed with violence or crimes of a sexual nature. Considering the foregoing, the Public Defender's Office requires this Criminal Sentence Enforcement Court to comply with the provisions of paragraph no. 4 of the Resolution of November 22, 2018, edited by the Inter-American Court of Human Rights, which prescribes that the time served at the Criminal Institute of Plácido de Sá Carvalho must be computed twice. (Lawsuit 2017.02, p. 69).[42]

[40] Promotion n. 3/2019-BVM do Processo nº E-21/001.050/2019.

[41] For a detailed analysis of ADPF no. 347, see Machado (2020).

[42] TN: Free translation based on the Portuguese reference consulted in this work.

> It should be noted that the convict remains incarcerated at CIPSC because he was convicted of crime against life and physical integrity or sexual crime. For this reason, he must be submitted to the criminological team created by the Penitentiary Administration Secretariat of Rio de Janeiro through Resolution No. 782, of August 9th, 2019 (Lawsuit 2016.01, p. 145).[43]

The synthetic petitions, in turn, merely identify the sentenced person and the nature of the crime, demanding, as the case may be, the application of the differentiated calculation of the sentence or the performance of technical expertise. The basis for these requests is the injunction of the Inter-American Court of Human Rights. Invariably, the petitions contain the full resolution and, sometimes, a copy of an email from the Inter-American Court's Secretariat to the Public Defender's Office attesting to the exact date on which the Brazilian State is notified: December 14, 2018. In addition to the part of the content of the case-file that involves variation, the petitions of the Public Defender's Office are quite uniform, indicating a harmonious strategy of action – unlike what happens with the Public Prosecutor's Office.

9. THE REACTIONS OF THE PUBLIC PROSECUTOR'S OFFICE

In the Public Prosecutor's Office's opinion on the matter, it is possible to identify two well-defined contradictory positions. The fact that the sample analyzed is small and has an exploratory character makes it impossible to infer what would be the majority position of the Public Prosecutor's Office[44]. For the purposes of this work, however, it is enough to indicate that both positions are significantly frequent and do not represent a change in position from one moment to another, since opinions of one type and another occur throughout the entire period studied.

[43] TN: Free translation based on the Portuguese reference consulted in this work.

[44] The available data do not allow us to speculate on the possible structural or conjunctural causes of the divergence – which would demand other expedients of theoretical and empirical research.

Being against the measure of the differentiated calculation of the penalty, public prosecutors commonly argue, among other factors, that the decisions of the Inter-American Court of Human Rights are not mandatory. They claim that these decisions cannot contradict local legal norms or violate the principle of isonomy that would structure our penal system. They also state that there are legitimate legal alternatives to promote the reduction of overcrowding in the CIPSC and other units. One of these alternatives would be the provision of the Binding Precedent n. 56, with no need to create an exceptional device. The lack of an end date for the validity of the measure is also a point frequently raised by this "wing" of the Public Prosecutor's Office, as can be seen in the following passage:

> The Public Prosecutor's Office understands that there are alternatives to reduce the overcrowding of the aforementioned criminal institute, including alternatives provided for within Brazilian legislation. We believe that such alternatives are capable of helping or alleviating the issue of overcrowding at the Criminal Institute of Plácido de Sá Carvalho. So, if our own legislation has sufficient mechanisms to reach the main scope of the determination of the Inter-American Court of Human Rights, then there is no reason to adopt, at first, the specific recommendation of the double computation of the penalty. It should be noted that there is a precedent in force in the national legislation that allows, for example, that the convict be referred to the milder regime in the case of overcrowding and affront to human rights (...). It is also worth noting the possibility of serving the sentence through house arrest with an electronic anklet. This is an alternative measure to incarceration and eventually it could also be applied (...). In addition to the issues already mentioned, the double calculation of the penalty brings up other problems inherent to its applicability. One of them is: when will this measure - which is also a sanction to the Brazilian State - come to an end? Which entity will set the period of its duration? What will be the requirements that will allow the double computation of the penalty to stop being applied? Such issues are of utmost importance, since the application of the sanction in a frantic way will

> generate several violations of the principle of isonomy. (Lawsuit 2019.02, p. 352).[45]

Sometimes, public prosecutors also try to convince the judge that the measure has already been sufficiently applied, making it no longer necessary:

> Although the Federative Republic of Brazil has been sanctioned by the Inter-American Court of Human Rights due to overcrowding in the Criminal Institute of Plácido de Sá Carvalho, at the moment, after numerous measures adopted, that unit has a prison contingent of approximately 1,800 prisoners. The maximum capacity of the unit is 1,696 inmates. This fact was confirmed by the Public Prosecutor's Office itself in the last inspection carried out in the prison unit (...). In this sense, it is important to mention that international bodies and resolutions, including those of the National Council for Criminal and Penitentiary Policy, clarify that when there is only a small percentage of extra prisoners in each unit, there is no need to consider the situation as overcrowding. Thus, due to the absence of a legally sufficient reason (overcrowding) capable of justifying the granting of the benefit of double computation of the prison penalty, the Public Prosecutor's statement is for the denial of the requested benefit. (Lawsuit 2019.01, p. 279-280).[46]

It is interesting to note that these points of views of the Prosecution share, to some extent, the same ambiguity found in the injunction of the Inter-American Court of Human Rights. On the one hand, these positions are included in the case-file as an obstacle to the application of the differentiated calculation of the penalty in the specific case. On the other hand, much of the argument evokes a desincarceration position even more radical than that of the resolution itself. After all, as the public prosecuters suggest, if the Binding Precedent n. 56 is applied and if the opportunity to wait for a place in an adequate institution is granted to all

[45] TN: Free translation based on the Portuguese reference consulted in this work.

[46] TN: Free translation based on the Portuguese reference consulted in this work.

prisoners who are surplus to the semi-open regime, while there are no vacancies in the adequate system these people would serve their sentences in an open regime, via house arrest. That would be the end of overcrowding not only in the CIPSC, but in all units with a similar profile. Curiously, with very few exceptions, such a position is never accompanied by a request for the granting of an open regime for the convict in question, as if it were exclusively up to the Public Defender's Office to ensure the rights of prisoners.

Another significant portion of prosecutors, however, recognizes the mandatory nature of the Inter-American Court's injunctions. The opinion of this group is either by applying the differentiated calculation of the penalty in the appropriate cases - always from the date of notification by the Brazilian State[47] - or by carrying out technical expertise in cases when the person is convicted of violent or sexual crimes. The following statements are examples of these positions:

> First, and as a major premise, it must be recognized that the decision of the Inter-American Court of Human Rights contained in the Resolution of November 22nd, 2018, dealing with the conditions of the CIPSC, is imperative, logical and necessary for the Brazilian State. It is also in this sense the pronouncement of the Head of the Public Prosecutor's Office of Rio de Janeiro, when accepting the opinion of his Legal Counsel on the merits sentence of the same Inter-American Court of Human Rights in the case of Nova Brasília (...). The convict, in turn, served time at the CIPSC in the aforementioned period, so the decision of the Court applies to his case. On the other hand, the crimes of the convict do not attempt against life/physical integrity, nor are they sexual crimes. Thus, the precautionary measure determined by the Court itself and which provides for the prior carrying out of a technical expertise to determine the pertinence and extent of the penalty discount is not applicable in his case. (Lawsuit 2015.03, pp. 251-252).[48]

[47] While concluding this work, the Brazilian Superior Court of Justice retroacted the start date of the differentiated calculation. This happened in the context of the decision rendered for the Appeal in Habeas Corpus n. 136961.

[48] TN: Free translation based on the Portuguese reference consulted in this work.

> Therefore, considering that the convict in question is serving a sentence for committing a sexual crime (rape of a vulnerable person), the Public Prosecutor's Office, based on item 05 of the IACHR resolution, requires the preparation of a technical expertise. Such expertise must be carried out by a criminological team of professionals, especially psychologists and social workers, without prejudice to others. The opinions must be signed by at least three of these professionals, who must evaluate the criminal prognosis based on indicators of aggressiveness of the CIPSC's prisoners who are charged with crimes against life and physical integrity, or sexual crimes, or convicted of because of these types of conduct. According to the result verified in each case, the criminological team, or at least three of its professionals, will advise the convenience or inconvenience of the double calculation of the time of deprivation of liberty, or on its reduction to a lesser extent. (Lawsuit 2014.01, pp. 115 -116).[49]

It is possible that these favorable positions on the part of the Public Prosecutor's Office for the differentiated calculation stem, more than from a frank adherence to the Inter-American system of human rights, from a pragmatic and resigned posture in the face of a very well-established understanding of the Criminal Sentence Enforcement Court on the subject.

10. THE JUDICIAL DECISIONS

Judicial decisions on the differentiated calculation of the sentence deal with the issue in an even more uniform way than the requests from the Public Defender's Office. In all the lawsuits in which the assessment of the claim reached some outcome, the decisions are repeated, almost always in the same terms. First, in the part of the sentence called “report”, the judge identifies the convict and his

[49] TN: Free translation based on the Portuguese reference consulted in this work.

sentence, summarizes the requests made by the defense and describes the position of the Public Prosecutor's Office on the theme[50]. Then, in the part called "reasoning", the judge talks about how compliance with the Inter-American Court's resolutions is mandatory, as Brazil has been a signatory to the American Convention on Human Rights since 1992[51]. In addition, the magistrate refers to "jurisprudential guidance" of the Federal Supreme Court in relation to international human rights treaties, pacts and conventions, explicitly mentioning decisions related to the penitentiary field. Among such decisions there are the aforementioned ADPF n. 347 and the Binding Precedent n. 56. Next – and this is the point that I would like to highlight –, the judge establishes that the injunction of the Inter-American Court of Human Rights will be operationalized by the Criminal Sentence Enforcement Court by analogy with the institute of remission of prison sentence. This specific point can be seen in the following excerpt:

> It is important to emphasize that the measure imposed by the Inter-American Court of Human Rights to reduce the time served, and which must be understood in analogy to the institute of remission of prison sentence through study or work, is not unprecedented in Comparative Law. Such a measure has already been adopted by Italy in compliance with the European Court of Human Rights' determination (Case judged on 09/16/2014), as Rexhepi et al. V. Italy. This case was even brought to light by the distinguished Minister Luís Roberto Barroso in his vote in RE 280.252/MS. On the occasion, the Minister referred to the case as an example, aiming to defend the adoption of this same measure (remission) from the point of view of the State's civil liability. It would be a form of reparation for serving the sentence in degrading and inhumane conditions in penal establishments.

[50] TN: In Brazil, the sentences must contain, in their texts, a first part, called *Relatório* (in the original term in Portuguese) and translated here as "report". This is the section where the authority that makes the decision identifies the case - its parts, elements and main occurrences. The sentence also must contain the "reasoning" (in the original term, in Portuguese, "fundamentação"), which must include the reasons that will support the position of the judge, and, finally, the "decision" (called "dispositivo", in the original term in Portuguese), in which the judge brings the outcome of the demand. At this point, the judge accepts or rejects the request made by the party. This is basically the structure of criminal sentences in Brazil.

[51] Through Legislative Decree no. 678/1992.

> However, this was not the decision adopted by the Federal Supreme Court in the aforementioned RE. (Lawsuit 2019.04, p. 97).[52]

In legal terms, analogy is a method of integrating law. In it, Justice, in the face of a situation with no legal provision, makes use of an already established understanding on a similar matter. In Brazilian criminal law, the institute of remission of prison sentence through work or study is the only recognized form that allows some type of "amortization" of sentences: for every three days of work, one day of the sentence is remitted; as well as 12 hours every three study days[53].

By using the analogy with the institute of remission of prison sentence, the Criminal Sentence Enforcement Court ends up equating the degrading conditions of confinement that prevail in the CIPSC with the opportunities of work and study offered to incarcerated people. Only the calculation ratio is changed in each situation. Thus, while three days of work entail one day of remission, for each day of sentence served under the degrading conditions of the CIPSC, another day of penalty will be remitted. In these terms, the calamitous and subhuman living conditions at the Criminal Institute of Plácido de Sá Carvalho are introduced into the processing regime that organizes the flow of inmates through that prison.

It is worth remembering that the legal institute of remission of prison sentences is one of the few legal provisions that, in Brazil, seek to give some concreteness to the prison resocialization project (Chies, 2006; Campos et al., 2018; Silva & Marques, 2021). The appalling conditions of confinement, in turn, seem to materialize a particular sense of disability (Zimring & Hawkins, 1995), as something that goes beyond mere actuarial segregation (Feeley & Simon, 1992) and tends to a policy of destruction (Mallart, 1992). 2019). The technical solution found by the Brazilian and the Rio de Janeiro justice systems to enable the differentiated

[52] TN: Free translation based on the Portuguese reference consulted in this work.

[53] This is the provision of art. 126, §1, I and II of the Penal Sentence Enforcement Law (LEP, the portuguese initials for *Lei de Execução Penal*).

calculation of sentence converges these two functions of the penalty, confusing both and, in the limit, making it impossible to distinguish one from the other[54].

In these terms, in its absolute exceptionality, the internalization of the Inter-American Court of Human Rights' injunction by the Criminal Sentence Enforcement Court of Rio de Janeiro seems to show something that seems to be characteristic of our prisons as a whole. It is as if, after a deep cut - caused by a double-edged sword -, it was possible to come to light a sense of the prison sentence that remains underlying, but which is structuring of our entire penal system. Such a function would conceive the vilest degradation and the most absolute suffering as plausible means to pursue the recovery of convicts. Perhaps this is why it seems to be"easier" to change the processing regime of the prison flow than the conditions of confinement of our prisons.

In the United States, for decades, the conditions of confinement were changed, to a large extent, due to the maintenance - or the resurgence - of a rigorous logic of application of penalties (Jacobs, 1980, Feeley & Swearingen, 2004; Schoenfeld, 2010; Simon , 2013, 2014). In contemporary Brazil, on the other hand, the basis for the calculation of penal enforcement seems more malleable than the structures and services of a single prison. This scenario, in a way, corroborates the framework of the prison's impassivity before the law, as I have already highlighted on another occasion (Godoi, 2019).

11. THE EXPERTISE IMBROGLIO

After stating the principle of analogy, at the conclusion of the sentence, in the so-called "decision", the judge grants the benefit of differentiated calculation of the prison sentence to all those prisoners who have not been convicted of violent or sexual crime:

[54] In order to have a more comprehensive view of the functions of the penalty and their convergences, see Pires (2004) and Xavier (2010).

> In this case, the convict is serving time for the crime of drug-trafficking and association for the purpose of trafficking. He remained in custody at SEAP-PC from May 25, 2018 to the present date, according to his Disciplinary Record Transcription. Considering all the above and counting on the favorable opinion of the Public Prosecutor's Office, I determine the IACHR Resolution of November 22nd, 2018, to be fulfilled, so that the sentence served by the convict at the Criminal Institute of Plácido de Sá Carvalho between December 14, 2018, and today's date is computed twice. (Lawsuit 2018.01, p.180).[55]

After the judicial decision determining the application of the differentiated calculation of the prison sentence, the responsible sector within the Criminal Sentence Enforcement Court attaches a document to the case-file of the criminal enforcement proceeding. It contains the calculation of how many days the prisoner spent at the CIPSC, as well as a new "Report of the Procedural Situation of Enforcement" (*Relatório da Situação Processual Executória*, in the original term in Portuguese), in which the previously detailed period is incorporated into the calculation as remitted days.

In relation to those cases that fit the requirements set by the resolution, the judge summons the Penitentiary Administration Secretariat (SAP) to carry out the technical expertise, according to the specifications of the Inter-American Court of Human Rights:

> The Penitentiary Administration Secretariat (SAP) is summoned to compose a technical team formed by 3 professionals, two of whom must be a psychologist and a social worker, both trained and experienced in carrying out criminological examinations. These professionals must be specially designated to evaluate the cases contemplated in this IACHR Resolution (regarding CIPSC's prisoners who were convicted of crimes in which life and physical integrity were harmed or of crimes of a sexual nature), in accordance

[55] TN: Free translation based on the Portuguese reference consulted in this work.

> with the terms of the aforementioned decision. The technical expertise must be able to say whether or not the prisoner who finds himself in these situations should have a 50% reduction in the real time of deprivation of liberty in the CIPSC or if such a reduction should be in a proportion of less than 50%. The evaluation must take into account the criminal prognosis of the inmate and his indicators of aggressiveness, within 15 days. (Lawsuit 2016.05, p. 183).

In all case-files analyzed, when there was this type of situation, there was not even a single occurrence in which the differentiated calculation of the penalty was granted. And at this point an intricate and complex imbroglio appears, full of contradictions and ambiguities, which also points to the limits of the Inter-American Court's resolution and its internalization by the judicial and penitentiary apparatus of the state of Rio de Janeiro.

As can be seen in several petitions from the Public Defender's Office, the Penitentiary Administration Secretariat, in response to the reiterated judicial demands, determined the creation of a specific technical team, under the terms established by the Inter-American Court of Human Rights: the team should be composed of at least three members, with necessarily one psychologist and one professional from social service[56]. They would assess the appropriateness or not of the differentiated calculation of penalty for those prisoners sentenced for violent or sexual crimes. If they consider the differentiated calculation is pertinent, they should also assess the most appropriate reason for the calculation – whether two or three days at the CIPSC for each day remitted, for example. This provision brings to light two important points: first, it recognizes and incorporates in the calculation that structure the regime of criminal enforcement proceeding the “extra-juridical surplus” of those extremely degraded conditions of confinement. But not only that. It also admits and justifies this excess of suffering in certain cases, which are selected by the type of crime that motivates the conviction and by a technical expertise. This scenario makes it possible for a subject - depending on the crime for which he was convicted and his performance before the technicians - to have his

[56] SAP Resolution no. 782, of August 9, 2019.

submission to the morbid conditions of incarceration at the CIPSC - admittedly cruel, inhuman and degrading - fully legitimized and justified.

The situation would already be quite problematic if the technical team had been created and had been issuing its opinions. But this is not the case. All the processes that have a request for technical expertise still have not had an outcome regarding the claim for a differentiated calculation of the sentence. These claims have not even been examined yet. Some of the petitions from the Public Defender's Office, filed at the end of 2019, provide further details on this issue. These petitions are informed by three important documents: a statement by the Psychology Coordinator at SAP and one by the Social Service Coordinator, both addressed to the Assistant Undersecretary of Penitentiary Treatment[57]; and a letter from the Secretary's Office addressed to the Criminal Sentence Enforcement Court. This last one summarizes the content of the technical positions:

> (...) According to professional considerations of the Social Service and Psychology Coordination, the Secretariat of Penitentiary Administration is technically unable to comply with the Inter-American Court of Human Rights' recommendation regarding the issuance of opinions on the criminal prognosis based on indicators of aggressiveness of prisoners at the Criminal Institute of Plácido de Sá Carvalho. These opinions should deal with the applicability of the doubled calculation of the penalty, or its reduction to a lesser extent. (Lawsuit 2015.04, p. 418).

As I conclude this work, there is still no news of the position of the Criminal Sentence Enforcement Court and the Inter-American Court of Human Rights in the face of such an obstacle. Public defenders demand that the criminological exams routinely produced by the Technical Classification Commission (CTC, the portuguese initials for *Comissão Técnica de Classificação*, in the original term) to guide judicial decisions on other benefits - such as progression regimes and parole, for example - become valid also to evaluate case by case the appropriateness or not

[57] TN: Free translation based on the name of the original position, in Portuguese, *Subsecretário Adjunto de Tratamento Penitenciário*.

of the differentiated calculation of the penalty. Indeed, although for years psychologists and social workers have taken a stand against the institute of criminological examination (Bandeira, Camuri, & Nascimento, 2011) - and here too -, technical expertise carried out by psychologists, social workers and psychiatrists continue to be elaborated daily in prisons in the state of Rio de Janeiro. In these technical reports, professionals give their opinions on whether or not to grant the most diverse benefits to prisoners (Reishoffer & Bicalho, 2017). But whether they will also be obliged to speak out about the possibility of remission of the penalty through suffering is an open question. In any case, at least until now, the requirement of expertise has proved to be a real impediment to the granting of the differentiated calculation of the sentence to a significant portion of the convicts - even more so when considering the "neutral" or "seguro" profile of the prison population that inhabits and passes through the CIPSC, with a high concentration of convicteds of sexual crimes.

12. FINAL CONSIDERATIONS

The well-known metaphor of the double-edged sword seemed to me to be quite adequate to represent the complexity of the process of development and application of the differentiated computation of the penalty's institute for those prisoners allocated at the Criminal Institute of Plácido de Sá Carvalho. The struggle of public defenders in Rio de Janeiro for the rights of the prison population and the measures adopted by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights appear, at first sight, as mobilizations that are completely aligned with decarceration policies. And such policies are in line with the demands of broad social sectors that are against state violence, exacerbated punitivism and mass incarceration (Telles et al., 2020). On the other hand, when considering some details of the Resolution of November 22nd, 2018, and, above all, considering how it has been implemented by the Rio de Janeiro criminal justice system, it is possible to perceive that the Resolution is absolutely insufficient and limited, and in certain aspects it is even exclusionary and with a punitive character.

One of the problematic separations that the injunction applies to the population that inhabits and passes through the CIPSC is the one I just dealt with: the division that is established between who will have access to the "benefit of pain" and who will have that same pain legally recognized and fully justified – at least for now, hopefully. A second cleavage stems from the very nature of this type of resort to the Inter-American human rights system, which separates those who inhabit and pass through the CIPSC from the rest of the state prison population, which is largely subjected to conditions of confinement that are very similar to those ones existing in the CIPSC, as recognized by the prison administration itself. In such a scenario, the Court's determination has a "magical touch" effect that affects only a single prison. And this situation would only be justified from the strategic point of view of creating a legal precedent, generating a minimal but necessary displacement that seeks to open paths to broader and more significant transformations.

In these terms, overcoming the limits and weaknesses of the injunction of the differentiated calculation of the sentence would paradoxically require the very generalization that we find in the institute. Would not require its abandonment. The critical analysis that this paper brought about the ambiguities and contradictions of the process of development and application of this new legal institute does not aim, therefore, to disqualify it. The goal is, rather, to improve and expand it. Since the "extra-juridical surplus" of the penalty appears, to some extent, in the entire prison system; since predicting human behavior is technically impossible – as sustained by SAP psychologists and social workers themselves; and in order to face the situation of flagrant and serious violations of human rights that occur in the criminal justice system of Rio de Janeiro, it would be appropriate, among other measures, to systematically apply the Binding Precedent n. 56 – as suggested by some prosecutors – and the differentiated calculation of the penalty for all those incarcerated people who have their dignity and the most basic conditions of survival denied by the State. And do it without discarding all the other substantive measures and legal injunctions, formalized by the IACHR and the Court, that the Brazilian State has been solemnly ignoring.

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Rafael Godoi: Postdoctoral researcher (PNPD/Capes) at the Graduate Program in Sociology and Anthropology (PPGSA) and at the Research Center on Citizenship, Conflict and Urban Violence (NECVU), at Federal University of Rio de Janeiro (UFRJ).

Isabella Silva Matosinhos: Translator. Currently she is a Master's student in Sociology at the Federal University of Minas Gerais (UFMG) and a researcher at the Center for the Study of Crime and Public Security (CRISP/UFMG).

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