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Gustav Wagner: The “Beast of Sobibor” and his extradition by the Brazilian Supreme Court

Introduction

Few studies have addressed the cases of Nazi criminals that lived and were prosecuted in Brazil. So, the aim of the present paper is to present the case of Gustav Wagner, who secretly lived in Brazil and, after being arrested, had extradition processes against him judged by the Brazilian Supreme Court (STF). 1

The analysis of his extradition processes led to the following research question: What were the motives that led the Brazilian Supreme Court to deny the extradition of a criminal who participated actively in the killing of 260,000 individuals? 2

To answer this question, a legal and historical study was conducted, using books, newspapers, the extradition processes, and interviews with some of the few Sobibor survivors. 3

Sobibor was a small and secret extermination camp where Jews were killed. Wagner exercised a great power at the camp, deciding on many occasions who was going to live and who would die immediately. After the end of the war, Wagner escaped from Europe and, after a few years, came to Brazil, where he was discovered only in 1978, due to the efforts put in by Simon Wiesenthal and Brazilian journalist Mario Chimanovitch, the latter of whom was also interviewed and provided a great insight into the strategical plan to capture Wagner. 4

When Wagner was arrested, the Federal Republic of Germany, Austria, Poland and Israel requested his extradition and these processes were judged by the Brazilian Supreme Court. These processes consist of more than 1,000 pages, and are an important source for the understanding of the legal procedures associated with the case. 5

The decision of the Brazilian Supreme Court turned out to be a disrespect for the rules of international law, common sense and justice itself. As the crimes committed by Wagner were subject to the statute of limitations, having become time-barred, and were consequently compared with common crimes, the defendant got away with them and was allowed to keep living in Brazil. 6

The present paper seeks to analyze a complex matter utilizing Law and History in order to understand a peculiar case of the Brazilian criminal history. 7

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1. Gustav Wagner

Gustav Franz Wagner, known as “the beast of Sobibor,” was born on July 18, 1911, in Vienna.¹ His actions gained notoriety due to the numerous statements about his brutal and blood-thirsty nature at the Sobibor extermination camp.²

Stories of Sobibor survivors indicate that Wagner was poorly educated and rude, but intelligent and quick-thinking. Schelvis³ declares that Wagner was transferred to Sobibor as a natural consequence of his work at the Hartheim Euthanasia Center for extermination of physically and mentally disabled individuals.⁴

In Sobibor, Wagner held the position of SS *Oberscharführer*, being only subordinate to the Commandant. His primary role was to select newly arrived Jews and then to oversee camp workers. Philip Bialowitz, a Sobibor survivor, on being asked about Wagner’s work in the camp and about his presence at train arrivals, described him as follows:⁵

Wagner checked on the train arrivals and selected some people to serve as workers, when necessary. Wagner was like a spy. He moved around the camp, with his ears always alert, trying to figure out what people were saying. He was very intelligent. [...] He was seen here and there in the camp. We all feared him because of his extreme brutality. If he saw someone doing anything that he disliked, he would beat them, to death, sometimes, or would take them to camp III and only their clothes would be given back. He loved the sight of blood. That would please him.

Reports on Wagner’s great physical strength and outrageous and boundless sadism are frequent.⁶ See below what Regina Zielinski,⁷ another Sobibor survivor, says:

Wagner was a violent, sadistic and brutal man. Beatings and shooting seemed to be his most basic desire, the only things that quenched his thirst for blood. He appeared to be the most active officer in the camp (...). It was pretty normal to witness or hear about Wagner’s terrible urge to shoot prisoners without any reason and to beat them brutally.

Wagner exercised an almost absolute power at the camp. First, upon the arrival of a transport, he selected those who would work at the camp and those who would be immediately gassed. Also, his control over the workers was extremely violent, and it was impossible to count how many prisoners

¹ SCHELVIS, Jules. *Sobibor : A history of a Nazi death camp*. Translated by Karin Dixon. (New York: Berg Publishers, 2007), 264.

² Sobibor was a small village located in an area surrounded by growing trees, and its name means “forest of the owls” in Polish, Richard. *Escape from Sobibor*. Illinois: University of Illinois Press, 1995. p. 2. The place selected for the extermination camp at which Wagner worked was located to the west of the railway station, along the Wlodawa-Chelm railway line. The Bug River, which forms the border with the General Government (Poland) and Ukraine was only 5 km away (with the aim of taking Jews as far eastwards as possible). It was a swampy, flooded and underpopulated area chosen by the Central Command Office of SS in the district of Lublin. The whole camp was laid out in a 600 x 400 rectangle. Later on, this area was expanded. ARAD, Yitzhak. *Belzec , Sobibor , Treblinka: the Operation Reinhard death camps*. (Bloomington: Indiana University Press, 1999), 30.

³ SCHELVIS, Jules. *Sobibor : A history of a Nazi death camp*. Translated by Karin Dixon. (New York: Berg Publishers, 2007), 264.

⁴ BRASIL. Supremo Tribunal Federal. Extradicação nº359, Brasília, DF, 06 de julho de 1978, V. I, p. 282-303.

⁵ BIALOWITZ, Philip. Interview. [July 26 2010]. Telephone interview given to Felipe Cittolin Abal.

⁶ BIALOWITZ, Philip; BIALOWITZ, Joseph. *A promise at Sobibór*. (Madison: University of Wisconsin Press, 2010), 85-86.

⁷ ZIELINSKY, Regina. Interview. [October 10 2010]. Telephone interview given to Felipe Cittolin Abal.

he killed personally. The atrocities committed by Wagner⁸ were so gruesome, as described by Regina Zielinsky: “I can’t say he was an animal because an animal only attacks when it is hungry or scared. He was worse than an animal.”⁹

Philip Bialowitz recalls that Wagner was also quite greedy. After a transport was “processed”, Wagner would tell Philip to search the sand at the arrival area for jewelry and gold the victims might have hidden.¹⁰ Stanislaw Szmajzner was spared from the gas chambers because he was a goldsmith, selected by Wagner and his protégé to turn the gold Nazis stole from Jews (including gold teeth taken from the dead) into jewels and other adornments for him.¹¹

Wagner also created the so-called “penal brigade,” in which prisoners who had done anything wrong worked for three days. Those prisoners worked 18h a day carrying stones, being allowed to rest for only a few minutes. According to survivor Thomas Blatt, no prisoner survived the work in the penal brigade.¹²

The numerous stories about the atrocities committed by Wagner eventually gave him the nickname of “the beast of Sobibor.” Cold-hearted, cruel, intelligent and inhumane, Wagner took part in the small group of SS officers in Sobibor who killed hundred thousands of people.

2. The escape of Gustav Wagner to Brazil and his arrest

In October 1943, Sobibor was destroyed. Jewish prisoners from Treblinka were used as workforce to remove any traces of its existence, under the command of Wagner. After the camp was destroyed and a farm was built in the area, the prisoners were killed.¹³

After the victory of the allies, Nazis were left with no other alternative but to run away. Wagner, together with Sobibor’s ex-commandant, Franz Stangl, after their failure to find refuge, decided to go to Rome.¹⁴ There, they went to the Santa Maria dell’Anima church and looked for bishop Hudal, who was notorious for helping runaway Nazis.¹⁵

The first thing Hudal did was to have Wagner write an account of his career. The handwritten documents date back to August 20, 1948 and were signed by Wagner. In the account, Wagner introduced himself as a police officer, without any mention of Sobibor or Hartheim.¹⁶ Hudal gave

⁸ For further information, see UNITED STATES HOLOCAUST MEMORIAL MUSEUM. Interview with Esther Raab. Jun. 1990. Available at: <<http://collections.ushmm.org/artifact/image/h00/00/h0000331.pdf>>. Accessed on Dec 18, 2010.

⁹ ZIELINSKY, Regina. Interview. [october 10 2010]. Telephone interview given to Felipe Cittolin Abal.

¹⁰ BIALOWITZ, Philip. Interview. [july 26 2010]. Telephone interview given to Felipe Cittolin Abal.

¹¹ SZMAJZNER, Stanislaw. *Inferno em Sobibor: a tragédia de um adolescente judeu*. 2d ed. (Rio de Janeiro: Bloch Editores, 1968), 117-124.

¹² BLATT, Thomas. *From the ashes of Sobibor: a story of survival*. (Chicago: Northwestern University Press, 1997), 137.

¹³ SCHELVIS, Jules. *Sobibor: A history of a Nazi death camp*. Translated by Karin Dixon. (New York: Berg Publishers, 2007), 189-191.

¹⁴ SERENY, Gitta. *Into that darkness*. (New York: Vintage Books, 1983), 275-276.

¹⁵ SERENY, Gitta. *Into that darkness*. (New York: Vintage Books, 1983), 289.

¹⁶ WALTERS, Guy. *Hunting evil: the Nazi war criminals who escaped and the quest to bring them to justice*. (New York: Broadway Books, 2009), 166-167.

him a Red Cross passport as well as a visa and a job in the Middle East.¹⁷ After that, Wagner left for Brazil.

Gustav Wagner led a secret life in a smallholding in Atibaia, about 67 km from São Paulo. “Mr. Gustavo”, as he was known by his neighbors, was a reserved man and no one suspected of his blood-stained past. 21

Wagner might not have been Simon Wiesenthal’s main target, but after constant references to him in the articles published by Gitta Sereny in the *Daily Telegraph Magazine* in 1967 and after the launch of the book *Into that Darkness*, in 1974, in which the author compiled the interviews given by the ex-commandant of Sobibor and Treblinka, Franz Stangl, Wagner’s whereabouts was discovered. 22

With this information at hand, Wiesenthal had a tell-tale clue that Wagner still lived in São Paulo. It was now a matter of time until he was located and arrested. The issue concerning the methods used for Wagner’s arrest involves Brazilian journalist Mário Chimanovitch, interviewed on October 18, 2010,¹⁸ whose account is used in what follows to describe how Wagner was located and arrested. 23

Mário Chimanovitch was an international correspondent for the *Jornal do Brasil* in the 1970s. In May 1978, he got a call from Simon Wiesenthal, who said they should meet in Vienna. Wiesenthal then told him a very cruel Nazi, Gustav Franz Wagner, known as “the beast of Sobibor,” was living in Brazil. Chimanovitch noticed he had an excellent story in his hands and asked Wiesenthal whether he could give him a picture of Wagner. Wiesenthal only had an old photograph of Wagner in SS uniform. Without a current picture or any strong clue as to the Nazi’s whereabouts, Mário concluded that the euphoria over the news would be short-lived. Something else was necessary to maximize the impact of the story and make it grab the headlines for a longer time. 24

Mário remembered that a story had been published in the *Jornal do Brasil* at the time, entitled “Bringing back the old-time Nazism,”¹⁹ which reported on a meeting of Nazis to celebrate Hitler’s 90th birthday at the Tyll Hotel, in Itatiaia, in the countryside region of São Paulo. It was a party with approximately 30 people, who were members of five Nazi-sympathizing organizations. 25

The journalist had an idea to deepen the impact of the story and achieve Wiesenthal’s goal. He said: “Simon, to mobilize public opinion, the police, the newspaper, why don’t you recognize Wagner in this meeting, take a look at the pictures of the guys here, these old Nazis?” It was an excellent idea. Wiesenthal was then responsible for “recognizing” Wagner among the members of the meeting in the countryside of São Paulo and Chimanovitch could then write about the presence of Wagner in Brazil, showing the picture of one of the meeting participants as if it were Gustav Wagner’s. 26

On May 19, 1978, a story signed by Mário Chimanovitch was published in the *Jornal do Brasil*, which described his encounter with Simon Wiesenthal and the presence of Gustav Wagner in Brazil. 27

¹⁷ WALTERS, Guy. *Hunting evil: the Nazi war criminals who escaped and the quest to bring them to justice*. (New York: Broadway Books, 2009), 168.

¹⁸ CHIMANOVITCH, Mario. Interview. [October, 18, 2010]. Telephone interview given to Felipe Cittolin Abal.

¹⁹ SILVEIRA, Emilia. Nazismo como nos velhos tempos. *Jornal do Brasil*, Rio de Janeiro, 24 abr. 1978. Caderno B, p.1.

The story had an immediate effect on the media and on Brazilian authorities. The DEOPS²⁰ of São Paulo began to hunt down Wagner.

Unexpectedly, Gustav Wagner voluntarily went to DEOPS in the District of Campo Belo, in São Paulo, and turned himself in on May 30, 1978, declaring that he was the true Gustav Wagner, and not that man whose picture had been in the newspapers. However, he denied committing any crime during the war. Given the difference between the traits of the man recognized by Simon Wiesenthal and that who had just surrendered, the police themselves refused to believe that those men were the same person.²¹ **28**

Wagner turned himself in because he was afraid to end up as Eichman, kidnapped by the Mossad and sentenced to death in Israel; or even worse, he could be immediately killed by Israeli agents. If he was arrested, he would not be murdered or kidnapped. **29**

Wagner tried for some time to hide about his past in the extermination camps. The deception lasted until May 31, 1978, when Stanislaw Szmajzner, Sobibor's ex-prisoner, watched a TV story about Wagner's arrest and went to São Paulo to meet face to face with his executioner.²² **30**

With the identification of Wagner by Szmajzner plus the Nazi's personal data provided by the German and Israeli consulates, there was no doubt about Wagner's identity.²³ His preventive custody was ordered by the Brazilian Ministry of Justice, and Germany, Austria, and Israel requested that he be extradited. The "beast of Sobibor" would be brought before the Brazilian court. **31**

3. The extradition processes against Gustav Wagner

3.1 Extradition Request no. 356: The Federal Republic of Germany X Gustav Franz Wagner

On July 5, 1978, the Brazilian Supreme Court (STF) received the official request from Germany for the extradition of Gustav Wagner. Germany agreed to abide by the Brazilian laws of extradition, and appended texts describing the crimes the defendant was charged with, the applicable German laws and two warrants of arrest from the Court of Düsseldorf, of June 7, 1978 and March 31, 1967, with the appointment of an attorney to look after the case.²⁴ A decision of the German Supreme Court, of May 13, 1960, was also attached, in which the competence to deal with claims against former SS members, including Wagner, was transferred to the Court of Düsseldorf.²⁵ **32**

²⁰ Social and Political Order Department, which controlled and repressed social and political movements that rose against the ruling power.

²¹ PRESO, Gustav diz que não é o carrasco. Folha de São Paulo, São Paulo, 31 mai. 1978. p. 8.

²² RASHKE, Richard. *Escape from Sobibor*. (Illinois: University of Illinois Press, 1995), 313.

²³ CONFIRMADO: Wagner é o carrasco. Folha de São Paulo, São Paulo, 01 jun. 1978. p. 7.

²⁴ BRASIL. Supremo Tribunal Federal. Extradicação nº356. Requerente: República Federal da Alemanha. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.I. p. 1 - 53.

²⁵ BRASIL. Supremo Tribunal Federal. Extradicação nº356. Requerente: República Federal da Alemanha. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.I. p. 92 - 94.

On August 21, 1978, Wagner was interrogated by Minister Cunha Peixoto in the emergency room of the psychiatric hospital of Taguatinga, where he had been admitted. Wagner confirmed that he had worked in Sobibor, but alleged that he had never killed anyone, and only had worked in the construction of some buildings at the camp. After that, the defense was allowed some time to make their pronouncement.²⁶ **33**

On August, 1978, the German government mandated that new documents be provided, including the certificate of criminal investigation against Wagner on May 31, 1960 and the certificates of judgment of conviction in 1960 of co-defendants in the crimes committed in Sobibor. Special attention should be paid to the adjudication against Hubert Gomerski, which corroborates Wagner's participation, and was likely to thwart a possible time-barred criminal prosecution.²⁷ **34**

On September 4, 1978, Wagner's attorney presented his client's defense to the request filed by Germany, making only two allegations: the uncertainty about his client's identity and the time-barred prosecution for the crimes he was being accused of.²⁸ **35**

The attorney declared that, as the Sobibor uprising, on October 14, 1943, represented the liquidation of the extermination camps and end of the crimes, the prosecution would be time-barred on October 14, 1963. According to Brazilian laws, murder claims are time-barred after 20 years, and the warrant of arrest against Wagner was issued on May 31, 1967. Therefore, Wagner's extradition²⁹ was no longer possible as the deadline for prosecution had already expired. **36**

On September 25, 1978, Wagner's attorney impugned the other documents. He asserted that there was an error in the translation of the original documents, that is, no criminal investigation against the defendant was ordered in May 1960, but only a preliminary investigation instead, and this procedure could not interrupt the statute of limitations. Because of that, the time for prosecution was not time-barred, since the preliminary investigation, according to Brazilian laws, does not have such power. With respect to the certificates of judgment of the other co-defendants, the attorney said that they were useless, as they were mere certificates rather than notarized copies or originals, as established by the Brazilian laws, and that in some of them there was no reference whatsoever to the crimes committed by Wagner.³⁰ **37**

On October 9, 1978, the formal opinion of attorney general, José Francisco Rezek, was added to the case records. As to the request filed by Germany, the attorney general understood that **38**

²⁶ BRASIL. Supremo Tribunal Federal. Extradicação nº356. Requerente: República Federal da Alemanha. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.I. p. 75 - 76.

²⁷ BRASIL. Supremo Tribunal Federal. Extradicação nº356. Requerente: República Federal da Alemanha. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.I. p. 84 -117.

²⁸ BRASIL. Supremo Tribunal Federal. Extradicação nº356. Requerente: República Federal da Alemanha. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.I. p. 120 - 132.

²⁹ BRASIL. Supremo Tribunal Federal. Extradicação nº356. Requerente: República Federal da Alemanha. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.I. p. 132 - 137.

³⁰ BRASIL. Supremo Tribunal Federal. Extradicação nº356. Requerente: República Federal da Alemanha. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.II. p. 184 - 209.

the defendant's true identity was beyond question and that he did commit crimes in Sobibor.³¹ Concerning the statute of limitations, the most delicate part of the extradition proceedings against Wagner, the attorney general stated that the warrant of arrest issued by the Court of Düsseldorf on May 31, 1967 could not prevent the murder claims from being time-barred, as it was ordered more than 20 years after the end of *actus reus*. However, Hubert Gomerski's conviction by a jury trial on August 25, 1960 for crimes committed in Sobibor, jointly perpetrated by Wagner, prevented the deadline for the statute of limitations from expiring.³² To eliminate any doubt about that, Rezek requested that the German government hand down the purport of the judgment of conviction so that Wagner could be extradited to Germany.

The requested documents were attached to the case records on November 29, 1978.³³ Nonetheless, it should be noted that the first document was a declaration by the German Embassy explaining that Gomerski's judgment, mentioned by the attorney general and which would allow for Wagner's extradition was misdated. It had not been issued on August 25, 1960, but on August 25, 1950.³⁴ Due to this error, the analysis made by the attorney general concerning the request filed by Germany was no longer valid. As Gomerski's court decision was issued in 1950, more than 20 years had passed. And that was the allegation of Wagner's attorney after analyzing the above-mentioned documents, on December 5, 1978.³⁵

On February 23, 1979, given the presentation of these new facts, the case was referred again to the attorney general.³⁶ Rezek, in his second analysis, argued that there was no doubt about the crimes committed by Wagner in Sobibor and that he was indicted as co-perpetrator in the decisions issued by German courts. He also stressed that the procedure regarding the opening of a criminal investigation on July 10, 1963 had the power to toll the statute of limitations of the case therein. Thus, the attorney general was still in favor of Wagner's extradition to Germany.³⁷ After these

³¹ BRASIL. Supremo Tribunal Federal. Extradicação nº356. Requerente: República Federal da Alemanha. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.II p. 216 – 219.

³² Art. 117 of the Criminal Code states that: Art 117. The statute of limitations is tolled: I – upon receipt of the accusation or complaint; II – by indictment; III – by a decision confirming the indictment; IV – by the appealable judgment of conviction; V – by initiation or continuation of the enforcement of the sentence; VI – by recidivism. § 1º Except for VI, the time-barred prosecution produces an effect on all wrongdoers. In related crimes, which are the object of the same proceeding, the time-barred prosecution relative to any of them is extended to the others. (our emphasis)

³³ BRASIL. Supremo Tribunal Federal. Extradicação nº356. Requerente: República Federal da Alemanha. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.II. p. 425.

³⁴ BRASIL. Supremo Tribunal Federal. Extradicação nº356. Requerente: República Federal da Alemanha. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.II. 430.

³⁵ BRASIL. Supremo Tribunal Federal. Extradicação nº356. Requerente: República Federal da Alemanha. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.III. p. 706 – 752.

³⁶ BRASIL. Supremo Tribunal Federal. Extradicação nº356. Requerente: República Federal da Alemanha. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.III. p. 815 – 816.

³⁷ BRASIL. Supremo Tribunal Federal. Extradicação nº356. Requerente: República Federal da Alemanha. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.III. p. 827 – 852.

proceedings, the German request for extradition was ready to be analyzed by the Brazilian Supreme Court.

3.2 Extradition request no. 358: *The State of Israel X Gustav Franz Wagner*

On July 29, 1978, the extradition request against Gustav Wagner by the State of Israel was filed. 41
With the formal extradition request, references to the crimes the defendant was accused of, Israeli legal texts and a warrant of arrest were included. According to the State of Israel, it had the power to judge Wagner since it was allowed to carry out a moral and historical inquiry into the crimes against Jews.³⁸

The first argument by Wagner's attorney was the illegitimacy of the State of Israel and, 42
consequently, of its power to propose the extradition, given that Israel did not exist at the time of the criminal acts, which occurred between 1942 and 1943, and was only formed into a State in 1948. For the same reason, the defendant's attorney affirmed that the Israeli laws mentioned in the extradition request could not be used, following the principle of legality.³⁹ Also, he alleged that the crimes the defendant was charged with were time-barred, as 35 years had gone by since their perpetration.⁴⁰

On October 5, 1978, the attorney general issued a preliminary opinion about the extradition 43
requests against Wagner, in favor of the thesis of defense. This greatly undermined any possibility for Wagner's extradition to Israel.

3.3 Extradition request no. 359: *The Republic of Austria X Gustav Franz Wagner*

The formal extradition request from Austria was sent to the STF on August 7, 1978. The request 44
was accompanied by documents such as warrant of arrest against Wagner for the crimes committed in Sobibor, issued by the Austrian court on March 16, 1966, warrant of arrest of June 16, 1978, the applicable Austrian laws and the description of the crimes committed by Wagner both in Sobibor and in Hartheim.⁴¹

Notwithstanding, the formal extradition request, despite numerous references to Wagner's crimes 45
in Sobibor, was solely and exclusively based on the crimes he committed in Hartheim.⁴²

On September 4, 1978, Wagner's defense made a formal statement about the request from 46
Austria. As with the previous defenses, his attorney alleged the uncertainty over his client's identity. In addition, he argued that the extradition request from Austria was not valid because it was based

³⁸ BRASIL. Supremo Tribunal Federal. Extradicação nº358. Requerente: Estado de Israel. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.I. p. 1 – 50.

³⁹ Nullum crimen, nulla poena sine lege.

⁴⁰ BRASIL. Supremo Tribunal Federal. Extradicação nº358. Requerente: Estado de Israel. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.I. p. 114 – 122.

⁴¹ BRASIL. Supremo Tribunal Federal. Extradicação nº359. Requerente: República Federal da Áustria. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.I. p. 2 - 318.

⁴² BRASIL. Supremo Tribunal Federal. Extradicação nº359. Requerente: República Federal da Áustria. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.I. p. 18 – 20.

solely on the crimes allegedly committed in Hartheim, and the arrest warrant of 1966 referred to Sobibor, as did the other attached documents. The only document that referred to Hartheim was the arrest warrant of June 1978 and, therefore, the crimes were also time-barred.⁴³

Hence, the request issued by Austria, as was also the case of the request from Germany, failed. It referred to crimes perpetrated in two different locations, Hartheim, in Austria, and Sobibor, in Poland, but it requested extradition only for the crimes committed in Hartheim. While Wagner was an Austrian citizen, the Austrian government could request his extradition for the crimes committed in Poland.

Then, when the attorney general issued his opinion on the case, he stated that because the documents compiled by Austria failed to mention Hartheim, there was no reason to toll or delay the statute of limitations. According to Rezek, it was then impossible to accept Wagner's extradition to Austria.⁴⁴

3.4 Extradition request no. 360: The Popular Republic of Poland X Gustav Franz Wagner

The formal extradition request against Gustav Wagner was issued by Poland on July 12, 1978 and sent to the STF by the Ministry of Justice on August 2. Simultaneously, search and arrest warrants were ordered, and Polish legal texts concerning war crimes, genocide and crimes perpetrated by Nazis, and other legal excerpts pertinent to the case, as well as documents and statements that mentioned the crimes committed by Wagner (although these crimes were not specified)⁴⁵ were compiled.

The request from Poland was based on Wagner's crimes committed in Sobibor, and informed that he had participated in the planning and extermination of at least 250,000 people, in addition to other murders in which he was personally involved. Criminal proceedings against Wagner were filed by the Regional Court of Lublin on March 3, 1948, and a criminal investigation of Wagner and other defendants was initiated on August 7, 1965.⁴⁶

On September 4, 1978, Wagner's attorney made a formal statement about the request issued by Poland, and he alleged first that the proceedings filed on May 11, 1948 could not toll or delay the statute of limitations. This way, as the decision for criminal investigation into Wagner was issued only in 1965, 22 years had passed since the criminal acts, and so the crimes were time-barred.⁴⁷

⁴³ BRASIL. Supremo Tribunal Federal. Extradição nº359. Requerente: República Federal da Áustria. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.I. p. 384 – 394.

⁴⁴ BRASIL. Supremo Tribunal Federal. Extradição nº359. Requerente: República Federal da Áustria. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.II. p. 485 – 487.

⁴⁵ BRASIL. Supremo Tribunal Federal. Extradição nº360. Requerente: República Popular da Polônia. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.I. p. 02 – 04.

⁴⁶ BRASIL. Supremo Tribunal Federal. Extradição nº360. Requerente: República Popular da Polônia. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.I. p. 21 – 27.

⁴⁷ BRASIL. Supremo Tribunal Federal. Extradição nº356. Requerente: República Federal da Alemanha. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.I. p. 164 a 168.

In a preliminary analysis of the extradition request filed by Poland, the attorney general revealed that the documents added to the case records were insufficient, especially the temporary arrest warrant of May 11, 1948, which had no power to toll or delay the statute of limitations. As criminal investigation was initiated only in 1965, the crimes were time-barred.⁴⁸ 52

Polish lawyers then provided new documents and argued that, pursuant to the Polish laws, crimes committed at the time of Hitler are not subject to the statute of limitations.⁴⁹ Three months later, on May 17, 1979, the attorney general issued his final statement on the extradition requests against Wagner. Again, he understood that, in addition to the lack of essential Polish legal texts for the filing of the request, there were no proofs that the statute of limitations could be tolled or delayed. Therefore, the extradition request made by Poland could not be granted.⁵⁰ 53

4 The final decision of the Brazilian Supreme Court on the Extradition Requests

On June 20, 1979, the extradition requests against Wagner were analyzed by the Brazilian Supreme Court. The rapporteur and Minister, Cunha Peixoto, issued a report on the crimes the defendant was accused of by the four countries concerning Hartheim (on which the Austrian request was based) and Sobibor (on which the other requests were based). He laid out a brief history of the legal measures proposed by each country against Wagner or his co-perpetrators, in order to systematize the causes for preventing prosecutions from being barred, as well as a summary of the manifestations of the parties regarding the issues under debate and the defense of the defendant.⁵¹ 54

In his vote, Minister Cunha Peixoto addressed the defendant's identity and the information about his criminal acts. For him, there was no doubt about the defendant's true identity.⁵² As to the crimes in Sobibor, there was also no doubt about the material facts and participation of the defendant.⁵³ 55 After this analysis of the characteristics that were common to all extradition requests, the rapporteur analyzed each of the requests separately.

With respect to the request filed by Austria, the rapporteur criticized the government of that country for not wanting to judge the crimes perpetrated in Sobibor, but only those committed in Hartheim, since two of the major documents attached referred exclusively to Sobibor, and could then not be used in the present case. The arrest warrant of 1978, despite the fact that it alluded several times to Hartheim, was flawed and also could not be used to grant the request because, 56

⁴⁸ BRASIL. Supremo Tribunal Federal. Extradução nº360. Requerente: República Popular da Polônia. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.II. p. 219 – 220.

⁴⁹ BRASIL. Supremo Tribunal Federal. Extradução nº360. Requerente: República Popular da Polônia. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.II. p. 376 – 378.

⁵⁰ BRASIL. Supremo Tribunal Federal. Extradução nº360. Requerente: República Popular da Polônia. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.III. p. 807-808.

⁵¹ BRASIL. Supremo Tribunal Federal. Extradução nº360. Requerente: República Popular da Polônia. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.III. p. 842 – 849.

⁵² BRASIL. Supremo Tribunal Federal. Extradução nº360. Requerente: República Popular da Polônia. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.III. p. 880.

⁵³ BRASIL. Supremo Tribunal Federal. Extradução nº360. Requerente: República Popular da Polônia. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.III. 881.

pursuant to the Brazilian laws, the crimes committed in Hartheim were time-barred in 1962, and also because none of the acts performed by the Austrian courts could prevent the prosecution from being time-barred. Therefore, the rapporteur decided to reject the extradition request filed by Austria.⁵⁴

The rapporteur also rejected the extradition request filed by Israel, arguing that neither did the State of Israel exist at the time of the criminal facts, nor were there subjects who could have been victims or perpetrators of any crime and nor was there a territory where illicit acts could have been committed. He did not accept the allegations of the claimant concerning the laws enacted after World War II, as the Brazilian legal system does not allow for the application of laws passed after the criminal facts.⁵⁵

Regarding the request made by Poland, the rapporteur highlighted the prevalence of Poland for the judgment of the case, as the crimes the defendant was charged with took place in that country. However, two were the reasons for rejecting the request from Poland: the fact that the request for Wagner's extradition was based on a law that came into force after the criminal acts and the fact that Poland did not apply any legal action that could prevent the prosecution from being time-barred by Brazilian laws; as a consequence, when the request was filed in 1965, the crimes had already been time-barred. As a result, the request from Poland was also denied.⁵⁶

Finally, Cunha Peixoto analyzed the extradition request sent by Germany. He praised the large provision of documents, which confirmed the competence of Germany to judge the crimes committed by the defendant.⁵⁷ As to the facts, the rapporteur decided that, pursuant to Brazilian laws, the statute of limitations regarding the crimes committed by Wagner was tolled twice: once on August 25, 1950, when Gomerski was convicted; and again on December 20, 1966, when the prosecution against Frenzel and Bolander, in which Wagner was a co-perpetrator, came to an end. Thus, according to the Brazilian legal system, the crimes were not subject to the statute of limitations.⁵⁸

However, in accordance with German laws prevailing at the time of the crime, the claims against Gomerski and Frenzel did not toll the statute of limitations. Hence, because no specific criminal investigation into Wagner had been initiated until 1967, the crimes were time-barred on October 14, 1963. Also, the rapporteur stressed that later laws would have no effect on changing the deadlines

⁵⁴ BRASIL. Supremo Tribunal Federal. Extradução nº360. Requerente: República Popular da Polônia. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.III. p. 882 - 884.

⁵⁵ BRASIL. Supremo Tribunal Federal. Extradução nº360. Requerente: República Popular da Polônia. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.III. p. 885 - 888.

⁵⁶ BRASIL. Supremo Tribunal Federal. Extradução nº360. Requerente: República Popular da Polônia. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.III. p. 888 - 891.

⁵⁷ BRASIL. Supremo Tribunal Federal. Extradução nº360. Requerente: República Popular da Polônia. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.III. p. 892 - 894.

⁵⁸ BRASIL. Supremo Tribunal Federal. Extradução nº360. Requerente: República Popular da Polônia. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.III. p. 894 - 899.

for prosecution of crimes committed by the Nazis or tolling the statute of limitations, as a new law cannot be applied to past events.⁵⁹

In summary, pursuant to the German laws, the statute of limitations is not tolled for all participants in crimes, but only for those who were directly prosecuted. As the first specific claim against Wagner was initiated in 1967, over 20 years had already gone by and the extradition request made by Germany could not be granted on these grounds.⁶⁰

The votes of other Ministers in the Wagner case were succinct, and followed the vote of the rapporteur for the requests filed by Austria, Israel and Poland. There was some debate, however, about Cunha Peixoto's interpretation of the request made by Germany.

Minister Cordeiro Guerra did not agree with the rapporteur's vote, arguing that if the crimes were not time-barred by the Brazilian laws, the analysis of the statute of limitations according to the German laws was not necessary, as the German government itself does not contemplate this hypothesis. Brazil had already ratified the Convention on the Prevention and Punishment of the Crime of Genocide adopted in 1948, having agreed to punish and take action against such crimes and criminals, and, therefore, the refusal to grant the extradition request was at odds with the treaty. Hence, Brazil should extradite Wagner and let the German authorities judge him for his crimes.⁶¹

Minister Leitão de Abreu agreed with the rapporteur's vote, denying the extradition request. Minister Xavier de Albuquerque also disagreed with the rapporteur's decision, as he understood that, according to the German laws, any legal action against an individual was enough to toll the statute of limitations, which should have happened when the competence was extended to the Court of Düsseldorf for the judgment of former SS members, including Wagner. Xavier de Albuquerque's opinion led to a heated debate with Ministers Cunha Peixoto and Moreira Alves, and after voting for the defendant's extradition, he urged Ministers to change their votes and grant the extradition request.⁶²

The last two votes, by Ministers Thompson Flores and Djaci Falcão, were in agreement with the rapporteur's, denying the extradition.⁶³ Thus, on June 20, 1979, after receiving a majority of the votes, the extradition of Wagner to Germany was denied due to the statute of limitations.

⁵⁹ BRASIL. Supremo Tribunal Federal. Extradicação nº360. Requerente: República Popular da Polônia. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.III. p. 899 – 915.

⁶⁰ BRASIL. Supremo Tribunal Federal. Extradicação nº360. Requerente: República Popular da Polônia. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.III. p. 915.

⁶¹ BRASIL. Supremo Tribunal Federal. Extradicação nº356. Requerente: República Federal da Alemanha. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.III. p. 986 – 989.

⁶² BRASIL. Supremo Tribunal Federal. Extradicação nº356. Requerente: República Federal da Alemanha. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.III. p. 990 – 997.

⁶³ BRASIL. Supremo Tribunal Federal. Extradicação nº356. Requerente: República Federal da Alemanha. Extraditando: Gustav Franz Wagner. Relator: Carlos Fulgêncio da Cunha Peixoto. Brasília: 1978. V.III. p. 998 – 1001.

5. Final remarks: situation after the trial

The decision of the STF immediately hit the headlines in newspapers of São Paulo. On the following days, news about the denied extradition was widely published. The Israeli Minister of Justice at the time, Shmuel Tamir, used the case to justify the means adopted by Israel to arrest Eichman, saying that “based on this criterion, if Adolf Eichman were tried, he would also be acquitted if we, Israelis, had not arrested him and brought him here so that justice was done.”⁶⁴ Simon Wiesenthal said he was “astonished” at the court’s verdict, and also declared that if the decision were maintained, “Brazil could wind up as a safe haven for runaway Nazis who still lived in European and South American countries.”⁶⁵ 66

In the meantime, Wagner was an inpatient at the psychiatric hospital of Taguatinga, where he received the news from his attorney and revealed that he wanted to return to Atibaia, where his common-law wife was awaiting him.⁶⁶ Wagner was released and left for São Paulo to an unknown destination, for safety reasons, on June 26, 1979.⁶⁷ The Estado de São Paulo newspaper published that he was staying with a group of German friends, who looked after his safety.⁶⁸ 67

The countries which had issued the extradition requests carried on with a number of protests against the STF’s verdict. Some Israeli Ministers and Parliament members said they felt outraged by the decision and requested that the case be reviewed.⁶⁹ The German press harshly criticized the court decision, and so did the Polish mass media.⁷⁰ Fierce criticism was leveled by the Jewish community in Brazil at Wagner’s right to stay in the country.⁷¹ The pressure that was brought to bear on Brazilian authorities did not come only from the press and from the political bodies of the requesting countries. The day after the STF’s decision, the Brazilian ambassador in Israel, Vasco Mariz, got a phone call in which he was told he would be kidnapped and would only be freed if Brazil agreed to extradite Wagner.⁷² 68

Later on, there were some rumors about a request for case review filed by Germany with the STF, and an appeal requesting clarification of the decision was analyzed by the STF, which was 69

⁶⁴ ACKELRUD, Isaac. Israel lamenta critério do STF ao julgar Wagner. Folha de São Paulo, 22 de junho de 1979. p. 6.

⁶⁵ CHIMANOVITCH, Mario. Wiesenthal contra o “santuário de nazistas”. Jornal do Brasil, Rio de Janeiro, 22 jun. 1979. p. 9.

⁶⁶ WAGNER quer voltar para Atibaia onde a mulher o espera. Jornal do Brasil, Rio de Janeiro, 22 jun. 1979, p. 9.

⁶⁷ WAGNER é libertado em sigilo e some por medida de segurança. Jornal do Brasil, Rio de Janeiro, 27 jun. 1979. p.8.

⁶⁸ ALEMÃES hospedam Wagner e garantem sua segurança. O Estado de São Paulo, São Paulo, 28 jun. 1979. p.10.

⁶⁹ RABINOVICI, Moises. Parlamento israelense pede revisão da medida. O Estado de São Paulo, São Paulo, 26 jun. 1979. p. 11.

⁷⁰ MENDOÇA, Assis. Imprensa alemã critica decisão do STF. O Estado de São Paulo, São Paulo, 23 jun. 1979. p. 10.

⁷¹ Advogado diz que Wagner está numa clínica paulista. Jornal do Brasil, Rio de Janeiro, 28 jun. 1979. p. 17.

⁷² RABINOVICI, Moises. Embaixador ameaçado em Israel. O Estado de São Paulo, São Paulo, 23 jun. 1979. p. 11.

unanimously rejected.⁷³ In the words of the president of the STF at the time, Antônio Neder, “this case has been buried.”⁷⁴

Following the court’s decision not to extradite Wagner, 36 U.S. senators wrote a letter to President João Figueiredo, requesting that Wagner be expelled from the country by a political rather than a legal measure. The letter was handed over to the Brazilian Embassy by Simon Wiesenthal and by two U.S. senators, Jonathan Bingham and Robert Dornan.⁷⁵ The letter was sharply rebuked by the STF, and Neder declared that “the Brazilian judiciary is sovereign” and that the decision could by no means be changed.⁷⁶

On November 7, 1979, Wagner attempted suicide for the fourth time. With a pocket knife, he slashed his left wrist and then stabbed his chest and belly, perforating one lung and the intestine. Rescued by friends, Wagner was admitted to a reserved area of the emergency room of Hospital das Clínicas de São Paulo, and his health status was deemed to be uncertain.⁷⁷ Two months later, he tried to kill himself again by jumping in front of a car, but he did not succeed.⁷⁸ However, a bit less than nine months after this attempt, on October 3, 1980, Wagner committed suicide by stabbing himself in the chest with a knife, in his smallholding in Atibaia, where he had been working as a house sitter.⁷⁹ The hypothesis of homicide was promptly ruled out by the chief of police who investigated the case.⁸⁰ The next day, Wagner was buried at the cemetery of Atibaia, and only two people, who would rather not have their names revealed, were present at the funeral.⁸¹

Conclusion

Gustav Wagner, a deputy commandant in Sobibor, committed terrible crimes against humanity. His violent and brutal nature gave him the nickname of “the beast of Sobibor.” The interviews carried out in the present study were fundamental to characterize Wagner and his acts during World War II.

After the war, Wagner fled to and lived secretly in Brazil until 1978, when he was arrested due to a strategical plan designed by Simon Wiesenthal and Mario Chimanovitch, eventually leading Wagner to turn himself in to avoid being killed or kidnapped by the Mossad.

The Federal Republic of Germany, Austria, Poland and Israel sought to extradite Wagner and prosecute him for his crimes. The extradition processes were judged by the STF.

⁷³ STF rejeita recurso contra Gustav Wagner. Folha de São Paulo, São Paulo, 21 set. 1979. p. 6.

⁷⁴ “CASO Franz Wagner está sepultado”, diz ministro. Folha da Tarde, São Paulo, 29 set. 1979. p. 8.

⁷⁵ REIS, Edgardo Costa. Senadores americanos pedem a expulsão de Wagner. O Globo, Rio de Janeiro, 28 set. 1979. p. 14.

⁷⁶ SUPREMO repele carta de senadores dos EUA. Folha de São Paulo, São Paulo, 29 set. 1979. p. 7.

⁷⁷ WAGNER está em estado delicado após tentar o suicídio pela quarta vez. Folha de São Paulo, São Paulo, 8 nov. 1979. p. 8.

⁷⁸ FRANZ Wagner tenta suicídio pela quinta vez. Folha de São Paulo, São Paulo, 07 jan. 1980. p. 4.

⁷⁹ FRANZ Wagner é encontrado morto em sua casa em Atibaia. Folha de São Paulo, São Paulo, 04 out. 1980. p. 5.

⁸⁰ GUSTAV FRANZ WAGNER. Jornal Nacional. Rio de Janeiro: Rede Globo, 04 out. 1980. Programa de televisão.

⁸¹ APENAS duas pessoas no enterro de Wagner. Folha de São Paulo, São Paulo, 05 out. 1980. p. 9.

The Wagner case constitutes a clear confrontation between what is legal and what is fair. Utilizing of a strictly positive view, most STF Ministers understood that the defendant could not be extradited because his crimes had been time-barred. **75**

The STF never discussed the possibility of applying the international laws for prevention and punishment of those who participated in genocide, based on the principle of legality (*nullum crimen sine lege*). This case is an example that legal procedures, in many circumstances, are not an effective way to do justice. The application of the law should involve the judge's common sense when analyzing the case with its peculiarities, which did not occur in the present case. **76**

Wagner, responsible for many atrocities, was not judged for the crimes he committed due to a series of mistakes from the countries that requested his extradition and also because of the strict interpretation of the law by the STF, resulting in a historical injustice. **77**