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LEGAL GROUNDS FOR OVERCOMING THE FALSE DICHOTOMY BETWEEN INTERNATIONAL HUMAN RIGHTS LAW AND BRAZILIAN DOMESTIC LAW FROM THE INTER-AMERICAN NORMATIVE AND JURISPRUDENTIAL EXPERIENCE

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ABSTRACT: Based on the norms and jurisprudence of the Inter-American System of Human Rights this article aims to address the duty to enforce the norms deriving from international human rights treaties and organizations in the domestic sphere, confronting the main arguments that hinder their observance, especially when placed in the perspective of state sovereignty. Primarily, it will first consider issues related to the incorporation of treaties in Brazil, seeking to clarify some distinctions and present the connections between domestic and international responsibility arising from this incorporation. In a second moment, the article will address the enforcement of these international norms, considering decisions and guidelines issued by the Inter-American System of Human Rights. This analysis is intended to qualify not only the studies and theses that seek a way to strengthen international cooperation for the solution of global problems that go beyond the limits of the borders of national states, in the exercise of international human rights institutions, but also to qualify the criticisms that often start from doctrines written before the structuring of international mechanisms or without consideration of facts that have implications for their functioning and their purposes.

KEYWORDS: Human rights. International Cooperation. International treaties. International jurisprudence. National application.

FUNDAMENTOS JURÍDICOS DE SUPERAÇÃO DA FALSA DICOTOMIA ENTRE DIREITO INTERNACIONAL DOS DIREITOS HUMANOS E DIREITO INTERNO NO BRASIL A PARTIR DA EXPERIÊNCIA NORMATIVA E JURISPRUDENCIAL INTERAMERICANA

RESUMO: O presente artigo tem por objetivo, a partir das normas e da jurisprudência do Sistema Interamericano de Direitos Humanos, trabalhar o dever de efetivação das normas emanadas de tratados e órgãos internacionais de direitos humanos em âmbito interno, enfrentando os principais argumentos que dificultam sua observância, sobretudo quando colocados à luz da soberania estatal. Para isso, serão consideradas, em um primeiro momento, questões relacionadas à incorporação de tratados no Brasil, buscando esclarecer algumas distinções e apresentar as conexões entre responsabilidade interna e internacional decorrente dessa incorporação. Em um segundo momento, será abordada a efetivação dessas normas internacionais, considerando decisões e orientações emanadas do Sistema Interamericano de Direitos Humanos. Essa análise tem o propósito de qualificar não apenas os estudos e teses que buscam no exercício das organizações internacionais de direitos humanos uma forma de fortalecimento da cooperação internacional para a solução de problemas globais que extrapolam os limites das fronteiras dos Estados nacionais, como também para qualificar as críticas que, muitas vezes, partem de doutrinas redigidas antes

da estruturação dos mecanismos internacionais ou sem consideração de fatos que têm implicação no seu funcionamento e nos seus propósitos.

PALAVRAS-CHAVE: Direitos Humanos. Cooperação Internacional. Tratados internacionais. Jurisprudência internacional. Aplicação nacional.

INTRODUCTION

Although it may seem an outdated subject, the relevance of the debate on the duty to enforce international human rights law within the Brazilian national sphere is current, because, despite the clear rules of the 1988 Federal Constitution and international norms and jurisprudence, the reality of the Brazilian internal jurisdiction exposes a lack of knowledge on the subject[3]. For example, the National Council of Justice edited, in 2022, Recommendation no. 123, reinforcing the need to apply and enforce the norms foreseen in international human rights treaties and in the jurisprudence of the Inter-American Court.

Although there are important discussions and still no clear theoretical and practical outline of international guidelines and declarations that do not go through a legislative process of incorporation into the legal system (*soft law*), this paper will consider especially those documents that have been incorporated according to the procedure provided by the Constitution and the case-law of the Federal Supreme Court (STF), as well as taking into account the guidelines and decisions of international organizations whose competence have been recognized by Brazil, to demonstrate that the fulfillment of these commitments, instead of attacking national sovereignty, is only the clearest expression of its exercise.

The 20th century, especially as of the second half, was the stage for the movement towards the universalization and multiplication of human rights, which

[3] On the application of the Convention on the Rights of Persons with Disabilities by the Federal Regional Courts, see PERUZZO, Pedro Pulzatto; FLORES, Enrique P. L. The repercussion of the Convention on the Rights of Persons with Disabilities in Brazilian Federal Courts. **Revista Direito e Práxis**, v. 12, p. 2601-2627, 2021. Avaliable at: https://www.e-publicacoes.uerj.br/index.php/revistaceaju/article/view/47403/35807. Accessed on: 03 march 2022.

had its fountainhead in the approval of the Universal Declaration of Human Rights by the United Nations (UN), reinforced by the parallel action of regional human rights systems, especially the inter-American, European and African systems. The understanding of the universal propagation of human rights has, on the one hand, the purpose of overcoming the perspective of incommensurability and the impossibility of dialogue between socially and culturally differentiated groups. On the other hand, it has the purpose of leaving the keys of reciprocity and bilateralism focused on agreements between national states to advance towards the objective responsibility of the international community, which begins to recognize individuals as subjects of international law.

Environmental disasters, health emergencies, wars, and other situations that lead to serious human rights violations generate challenges, not only for nation-states, but for the entire international community, that require coordinated responses by all the actors who share the same geographical and political space, which is not that of a fiefdom, a burg or a state, but the entire world. As became clear in the course of the COVID-19 pandemic, the boundaries that have marked the construction of the modern state and also of modern International Law, require a new place in the discussion on international cooperation and human rights, because humanity feels, in all its dimensions, the effects of a burning that starts local, of a war that starts local, but overflows the locality to resonate everywhere, despite borders, walls, and our epistemological chains.

In fact, the International Human Rights Law (IHRL) has failed to provide a definitive answer to these global demands. Nevertheless, it has launched, in a scenario of fantasy and belief in the possibility of an oneiric peace assured by a bourgeois state, a significant degree of realism, to the extent that it has come to consider that in cases of omissions and actions violating human rights by the state, recourse to the state itself might be insufficient to solve the problems. In other words, the IHRL does not rupture with the structure of essentially state-based law, but offers alternatives to the fatality (or exclusivity) of submission to a historically omnipresent and omnipotent entity, which has been granted a so-called legitimate use of force. This is what the IHRL does, either by questioning the limits of this force or by opening up to greater participation by social

movements and other non-institutionalized actors, as we will demonstrate in this work.

This paper aims, based on the norms and jurisprudence of the Inter-American System of Human Rights, to address the duty to enforce the norms deriving from international human rights treaties and organizations in the domestic sphere, confronting the main arguments that hinder their observance, especially when placed in the light of state sovereignty. Thus, we will first consider issues related to the incorporation of treaties in Brazil, seeking to clarify some distinctions and present the connections between domestic and international responsibility arising from this incorporation. In a second moment, we will address the enforcement of these international norms, considering decisions and guidelines issued by the Inter-American System of Human Rights. In this context, this study intends to contribute to the understanding of the obligation to enforce international human rights norms, especially by agents of the Brazilian state and private individuals, for a very simple reason: in addition to a clear demand to think of common solutions for problems shared by all human beings in Brazil, the Constitution and the Supreme Federal Court itself attribute normative force to these documents and to international decisions about them.

1 INTERNATIONAL HUMAN RIGHTS LAW AS A HISTORICAL, POLITICAL, AND JURIDICAL CONSTRUCTION BINDING ON STATE INSTITUTIONS

Regarding international systems for the protection of human rights, it must be clear that their political and juridical position have influenced and still cyclically influence each other, driven by episodes of human catastrophes resulting from the acts of the man himself. The construction of the current international systems for the protection of human rights has its crucial point in the Second World War. After the world scenario of the rise of fascism, Nazism, two atomic bombs in a row, and, in the Latin American context, bloody dictatorships and genocide of indigenous peoples, the need to think about humanity's problems in a global way

became clear, considering the integration of rights, including the so-called "new rights", such as peace[4]. This demand remains and is deepened today, especially given the emergence of conservative and ultranationalist governments and the COVID-19 pandemic scenario.

The Second World War is, for this very reason, the dividing spot of two moments, called by Carvalho Ramos internationalization in the broad sense and internationalization in the strict sense[5]. The internationalization in the broad sense of the theme of human rights presented itself in an incipient and fragmented way, from the 19th century until the mid-20th century, in the form of international norms that were not accompanied by mechanisms to verify compliance and sanctions in cases of violation. Inaugurated with the creation of the UN and the subsequent approval of the Universal Declaration of Human Rights, internationalization in the strict sense began to be consolidated, as of 1945, through the creation of systematized and coherent organizations of norms, agencies, and special procedures, with their own principles, object, and methodology in the field of human rights, unlike what had been presented before.

In this line of development, it is worth mentioning the *jus cogens* norms (or imperative norms in the strict sense), which have a qualitative distinction in relation to other international norms since they contain essential values of the international community as a whole. This is what is stated in article 53 of the 1969 Vienna Convention on the Law of Treaties (ratified by Brazil in 2009 - Decree No. 7.030/09). The concept of *jus cogens* breaks with the static relationship traditionally seen between international norms and state sovereignty, according to which the safeguarding of the latter requires that the application of those norms is admitted only to the state that has formally adhered to them, through the manifestation of individual consent, resulting in a mistaken (because reductionist) correspondence between international norms and international treaties. The

[4] Cf. PERUZZO, Pedro Pulzatto; SPADA, Arthur Ciciliati. Novos direitos fundamentais no âmbito da UNASUL: análise das agendas de Brasil e Venezuela à luz do direito à paz. **Revista de Direito Internacional**, Brasília, v. 15, n. 2, 2018 p. 338-352. Avaliable at: https://www.publicacoes.uniceub.br/rdi/article/view/5060. Accessed on: 5 mar. 2022.

[5] RAMOS, André de Carvalho. **Teoria geral dos direitos humanos na ordem internacional**. 4. ed. São Paulo: Saraiva, 2014, p. 54-60.

question of the re-signification of state sovereignty underlies this new scenario inaugurated by the IHRL and its protection mechanisms.

Dealing more precisely with the post-French Revolution period, Ferrajoli recalls that in the Liberal Era, while internal state sovereignty experienced progress in its limitation, notably through the establishment of the notions of the rule of law and popular sovereignty, external state sovereignty (states in their mutual relations) expanded its absolute bias, relying on the idea of national sovereignty at the international level. The State, thus, embraces the search for internal peace concomitantly with the willingness to assert itself internationally through war[6].

Consequently, this so-called Liberal Era faced, internal state sovereignty self-limiting through submission to national constitutions and to the fundamental rights provided for therein. On the other hand, in the period between the mid-nineteenth and mid-twentieth centuries, at the international level, external state sovereignty resulted in an exacerbation of the state of wild nature and, therefore, in more wars and fewer limits. In other words, there was a fertile ground for external state sovereignty of hegemonic powers with a strong nationalist-expansionist trait, a framework that culminated in the two world wars of the 20th century, indelible marks of the crisis of state sovereignty as conceived until then.

This explains why Cançado Trindade advocates for a profound adjustment in the traditional static way of looking at the subject of the formal sources of IHRL, by revisiting the idea of consensus, notably to realize that the evolution of international law leads to a change of emphasis in its formulation: from individual consent to consensual balance, with contributions not only from individual states, but also from international organizations, whose normative production is overlooked by the classical theory of sources, based on the article 38 of the ICJ Statute[7].

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[6] FERRAJOLI, Luigi. **A soberania no mundo moderno: nascimento e crise do Estado nacional**. Trad. Carlo Coccioli; Márcio Lauria Filho. São Paulo: Martins Fontes, 2002, p. 27-28.

[7] CANÇADO TRINDADE, Antonio Augusto. **A humanização do direito internacional**. 2. ed. Belo Horizonte: Del Rey, 2015, p. 79-96.

The most recent consequence of this engagement is the fact that the Brazilian State, supported by its internal sovereignty and the exercise of its international sovereignty, has joined two of the most important international systems for the protection of human rights, i.e., the Universal (or Global) System and the Inter-American System. Thus, the establishment of a legal framework for the protection of human rights based on international instruments is verified, with the essential role of international cooperation, aimed at consolidating a global culture of respect for rights in a transnational public space[8].

Within this context, the awakening of a universal legal conscience is recognizable, detached from the classic jurisdictional and territorial parameters and instrumentalizing the notion of solidarity and cooperation. Along with the acceleration of the global movement for the affirmation of human rights and the importance and emergence of defining mechanisms for the solution of problems that go beyond the borders of national states, the Brazilian Constitution of 1988 was not limited to the declaration of fundamental rights and their protection by way of a permanent clause. It also guided the Brazilian State to align itself, on the international level, with the safeguarding of these rights, determining that Brazil conducted itself, in its international relations, by the principle of the prevalence of human rights (article 4, II)[9].

In addition, the Constitution also foresaw the normative force of international human rights treaties (article 5, paragraphs 2 and 3), jurisdictional competencies for internal monitoring of the effectiveness of these norms, including the creation of the incident of displacement of competence (article 105, clause III, line "a", article 109, clause III and paragraph 5) and the recognition of the competence of an international criminal court (article 5, paragraph 4). However, the reality of the facts does not allow us to forget that recourse to the

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[8] BERNARDES, Marcia Nina. Sistema Interamericano de Direitos Humanos como esfera pública transnacional: aspectos jurídicos e políticos da implementação de decisões internacionais. **SUR – Revista Internacional de Direitos Humanos**, v. 15, p. 135-156, 2011, p. 135-156, p. 150. Available at: https://core.ac.uk/download/pdf/16033946.pdf. Accessed on: 28 Mar. 2022.

[9] Art. 4, II, of CF/88 gives rise, as CELSO LAFER warns, to political control of Brazilian foreign policy - conducted by the Executive Branch - by the National Congress and public opinion, also opening space for the Judiciary Branch to control the constitutionality of normative acts related to that policy, with regard to human rights (LAFER, Celso. **A internacionalização dos direitos humanos: constituição, racismo e relações internacionais**. Barueri : Manole, 2005, p. 19).

State that violates human rights does not always result in the expected response for the protection of these rights and the reparation of the concrete situations of their violation, most often due to economic, cultural, religious or natural factors influenced by the logic disseminated by the multidimensional phenomenon of globalization.

The American Convention on Human Rights, enacted in Brazil by Decree 678/1992, has the notion of the duty to respect, protect and promote human rights incorporated right from its opening provisions (articles 1 and 2) when it mentions the "duty to respect and guarantee". Along the same lines, within the scope of the UN, are article 2 of the International Covenant on Civil and Political Rights, incorporated in Brazil by Decree 592/1992, and article 2 of the International Covenant on Economic, Social, and Cultural Rights, incorporated in Brazil by Decree 591/1992[10].

The Principle of Good Faith in international law contemplates the understanding widely consecrated by the international customary practice and by articles 26 and 27 of the 1969 International Convention on the Law of Treaties (ratified by Brazil and enacted by Decree No. 7.030/2009), in the sense that formal adherence to an international treaty manifests the good faith intention of its fulfillment. Thus, any incompatibilities between national norms and international treaties must be anticipated at the time of the exercise of free consent to the latter, which, once employed, binds the State, under penalty of affront to good faith. That being said, once a state freely consents to an international treaty in effect, its compliance becomes legally binding, as a consequence of the *pacta sunt servanda* rule.

Regarding the density and extent of the state obligation in the face of the duty of protection, the Inter-American Court of Human Rights (IACHR), in Advisory Opinion OC-18/03, of September 17, 2003, requested by Mexico on the

[10] About the scope of this triple duty, the Inter-American Court of Human Rights has already positioned itself in different judgments, among them: Constitutional Court Case Vs. Peru. Merits, Reparations, and Costs. Judgment of January 31, 2001. Series C. No. 71; Case of Bámaca Velásquez vs. Guatemala. Merits. Judgment of November 25, 2000. Series C. No. 70; Case of Albán Cornejo et al. vs. Ecuador. Merits, Reparations, and Costs. Judgment of November 22, 2007. Series C. No. 171 (Excerpts compiled from GARCÍA, Fernando Silva. **Jurisprudencia interamericana sobre derechos humanos: criterios essenciales**. México: Dirección General de Comunicación del Consejo de la Judicatura, 2011).

legal status and rights of undocumented migrants, interpreting article 2 of the American Convention on Human Rights, established that the States Parties "must adopt positive measures, avoid taking initiatives that restrict or violate a fundamental right, and abolish measures and practices that restrict or violate a fundamental right"[11].

Every type of measure of domestic law adopted under the pretext of fulfilling the duty of protection must be effective, consequently, in observance of the so-called Principle of *Effet Utile*, consolidated by customary international law and also accepted at the Inter-American level[12]. In this sense, the mere provision in national law, an act of the Executive Branch, or even a judicial decision providing for resources and instruments alluding to the fulfillment of the obligations of respect, promotion, and protection of rights, is not sufficient for the observance of the Principle of Effet Utile, as elucidated in the Advisory Opinion OC-09/87 on Judicial Guarantees in States of Emergency, issued by the Inter-American Court:

> Article 25.1 incorporates the principle, recognized in international human rights law, of the effectiveness of procedural instruments or means, intended to guarantee these rights. (...) According to this principle, the absence of an effective solution against violations of the rights recognized by the Convention constitutes a transgression of those rights by the State Party in which such a situation occurs. In this sense, it should be emphasized that, for such a solution to exist, it is not sufficient it be provided by the Constitution or in law or that it be formally admissible, but that it must be truly adequate to establish whether a human rights violation has been committed and to provide whatever is necessary to solve it.

The scenario does not change when the analysis of the duty of internal compliance with the norms of international law begins to occur from the point of the Brazilian legal system determines itself. The 1988 Constitution expressly

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[11] INTER-AMERICAN COURT OF HUMAN RIGHTS. **Advisory Opinion OC-18/03** of September 17, 2003, Requested by the United Mexican States: Juridical Condition and Rights of Undocumented Migrants. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf. Accessed on: 28 Mar. 2022.

[12] This was the case in "The Last Temptation of Christ" (Case Olmedo Bustos et al. vs. Chile), judged by the Inter-American Court of Human Rights and examined in more detail below.

regulated the process of incorporation of international treaties, and the STF has taken this regulation to its ultimate consequences. Article 84, item VIII of the Constitution states that it is the exclusive competence of the President of the Republic to join international treaties, conventions, and acts, depending on a referendum of the National Congress. Article 49, clause I, on the other hand, says that it is the exclusive competence of the National Congress to decide definitively on international treaties, agreements or acts that result in burdens or commitments that are onerous to the national patrimony.

In a decision issued by the Federal Supreme Court in the Interlocutory Appeal on Letter Rogatory 8.279-4 (Republic of Argentina), on June 17, 1998, and reported by Justice Celso de Mello, it was established that the incorporation of a treaty or international convention first requires the signature of the national Chief Executive. After that, it requires a referendum of the National Congress, the deposit of the ratification document with the respective international organization by the Chief Executive (which starts the effectiveness and consequent international responsibility of the State), and, finally, the enaction and publication of the text in the Official Gazette, when the text then becomes effective and binds the State and individuals internally. Article 5, paragraph 3 of the Federal Constitution states that international treaties and conventions on human rights that are approved in each house of the National Congress, in two rounds, by three-fifths of the votes of the respective members, will be equivalent to constitutional amendments. Finally, in Extraordinary Appeal 466.343-1/SP, December 3, 2008, reported by Justice Cezar Peluso, the STF attributed supralegal status to human rights treaties and conventions not incorporated as amendments.

Despite the clarity of the Constitution and the position of the STF, it is important to reinforce that, to the extent that the international treaty, to be internally enforceable, needs to be incorporated into the Brazilian legal system, once there is such incorporation, the treaty will also be binding on individuals. This is due to the fact that, in Brazil, the international document that, in this condition, generates international responsibility of the State before the international community is also a document of internal law, which entails internal

responsibility before the organs and powers of the State and also before society. It is, in fact, a logical corollary of the State's duty to protect human rights.

In the Latin American context, various constitutions, especially the more recent ones that succeeded dictatorial regimes, have made a point of explicitly consigning the prominent nature of IHRL norms in relation to the other laws of the national system and/or the obligation to comply with the decisions of international courts of human rights. These provisions are found, with textual variations, in the constitutional charters of Bolivia, Colombia, Ecuador, Guatemala, Mexico, the Dominican Republic, and Venezuela. Other constitutions specifically name, although not in the form of a closed list, which international conventions they recognize as norms of constitutional importance, as do Argentina, Nicaragua, and Paraguay. Without a doubt, the existence of a constitutional provision of this magnitude constitutes an important tool for clarifying the global understanding of the importance of IHRL as an instrument of international cooperation for the common solution to common problems of humanity.

It must be noted: the IHRL does not describe or impose how the state must implement the obligations it has assumed - because each state has its own mechanisms for "internalizing" international norms and implementing them. In comparison with the legal obligation of respect, protection, and promotion of the IHRL norms, the concept of acts of *de jure* organs[13], for the purposes of international responsibility, implies the conclusion that the state cannot try to exempt itself from its responsibility by arguing the personal conduct of its agent and. Actually, the state agent is legally impeded from acting in a way that violates the IHRL.

This is why, in Brazil, where there is still a procedure that relies on a complex act involving the Legislative and Executive branches to incorporate

[13] Standards compiled, since 2001, in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (or ILC-Draft Articles), drawn up in the scope of the International Law Commission ("ILC"), from a compilation of the international customs in force on the subject (UNITED NATIONS. INTERNATIONAL LAW COMMISSION. **Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)**. New York, 2008. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. Accessed on: 05 Jan. 2022).

international treaties, criticisms, and questionings that intend to delegitimize the involvement of all State agencies to the terms of these treaties[14] are sterile reflections or, at most, provide subsidies for a critique of legality from what could be better or worse, comparing to other legal systems. This is because such criticism disregards the inarguable legal consequence of the act of incorporation by the State of an international treaty into its legal system, according to custom and international jurisprudence and, as we have seen, also the Federal Constitution: the honest compliance with the strict terms of the IHRL documents.

This understanding, in the case of Brazil, also extends to private individuals. First, following the principles of the state duty to protect human rights and the subsidiarity of the international process (exhaustion of domestic remedies), taken together, the state will always be held responsible for an illicit act when acting through the action or omission of any of its competent agents. In this situation, the State has failed to prevent or respond and adequately repair the violation committed by a public agent (in or out of office) and by a private agent (natural or legal person), according to the parameters of the IHRL[15]. Second, the treaties and conventions are incorporated into the Brazilian legal system as manifestations of recognition of the competence of courts and other international organizations, such as the International Labor Organization (ILO) and the Committee on the Rights of Persons with Disabilities, also made through normative acts that follow the procedure provided for in the Constitution and by the STF for incorporation[16].

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[14] Cf. for example: DULITZKY, Ariel. An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights. **Texas International Law Journal**. V. 50. p. 45-93, 2015.

[15] In this sense, the Inter-American Court of Human Rights has established the following understanding: " The assumptions of the State's liability can be generated when a body or state authority or a public institution, can affect unlawfully, either by acts or omissions,111 some of the legal interests protected by the American Convention. It also may by generated from actions carried out by private parties, such as when a State excludes to prevent conducts of third parties from impairing those legal interests". (INTER-AMERICAN COURT OF HUMAN RIGHTS. **Case of Albán-Cornejo et al. v. Ecuador**. Judgment of November 22, 2007. Availeble at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_171_ing.pdf. Accessed on: 28 Mar. 2022.).

[16] On the national and international responsibility of individuals concerning the ILHR, see RODRIGUES, Mônica Nogueira. Responsabilidade internacional de empresas e responsabilidade social corporativa no investimento internacional por violação do trabalho decente. Master's Dissertation. Campinas: PUC-Campinas, 2020. Available at: http://tede.bibliotecadigital.puc-campinas.edu.br:8080/jspui/handle/tede/1399. Accessed on: 28 Mar. 2022; and SAK, Lais Barbosa. **Inclusão de pessoas com deficiência (PCD) em empresas:** uma leitura das práticas de inclusão a partir

In this sense, considering that the same international treaty, once incorporated, generates international responsibility and internal responsibility for the Brazilian State, understanding the dynamics of this process is important if we are to move forward and discuss the normative force of the decisions, which we will do later with due attention. For now, and under this inspiration, it is necessary to overcome the classic debate between the monist and dualist currents, which refers back to an old notion that took place, in the past, as part of the "reflections of scientific positivism and the need to establish the law as a category that can be apprehended through the scientific methodology of the natural sciences"[17].

It is time to recognize that the centrality experienced by international human rights norms, in response to the historic requirement of limiting state sovereignty (internal and external), has given rise to the transformative process that Cançado Trindade called the "humanization of international law"[18]. Therefore, the maximum integration between IHRL and the national legal system, with the consequent national application of international human rights norms, imposes itself as an indelible result of the fulfillment of the duty assumed internationally, in the full exercise of the sovereignty of these entities, which recognized the existence of common problems.

2 INTERNATIONAL HUMAN RIGHTS PROTECTION MECHANISMS AND THE NATIONAL LEGISLATIVE AND JUDICIAL APPARATUS: AN INTERACTIVE RELATIONSHIP

das considerações finais do comitê sobre os direitos da pessoa com deficiência da ONU sobre o Brasil. Master's thesis. Campinas: PUC-Campinas, 2020. Available at: http://tede.bibliotecadigital.puc-campinas.edu.br:8080/jspui/handle/tede/1408. Access on: 5 March. 2022.

[17] MAGALHÃES, Breno Baía. O sincretismo teórico na apropriação das teorias monista e dualista e sua questionável utilidade como critério para a classificação do modelo brasileiro de incorporação de normas internacionais. **Revista de Direito Internacional**, v. 12, n. 2, p. 77–96, 31 dez. 2015. Avaliable at: https://www.publicacoesacademicas.uniceub.br/rdi/article/view/3604. Accessed on: 05 mar. 2022.

[18] CANÇADO TRINDADE, Antonio Augusto. **A humanização do direito internacional**. 2. ed. Belo Horizonte: Del Rey, 2015.

The movement towards the internationalization of human rights, which began in the post-World War II period, took place within the framework of international inter-state organizations of global and regional scope. This endeavor, despite its initial focus on regulatory activity, has not been limited to the creation of general and specific *standards* on human rights, but has also gradually established means for monitoring compliance with the resulting obligations, especially by the states, which have bound themselves to this end by virtue of their individual consent or by virtue of their membership in the aforementioned international organizations and the international community as a whole.

International human rights systems have been established within the framework of international inter-state organizations. An international system for the protection of human rights can be recognized from the observation of three correlated components: a set of specific norms, which may be conventional or unconventional; organisms with previously defined competencies and specifically responsible for monitoring (following up or supervising) compliance by the obligated states and for investigating violations in concrete cases; and previously established and known procedures for the specific activity of monitoring and investigating violations by the aforementioned organizations. A corollary of this model is the fact that the actions of these organizations will always be legitimately based, immediately, on individual consent directed to the specific organizations or, in a mediated manner, on the general rules resulting from membership in the international organization.

At the international level, there are currently human rights protection systems with different geographical scopes. The first of these is the Global or Universal System of protection, headed by the UN. Alongside this, there are regional protection systems, more specifically the European (under the Council of Europe), Inter-American (under the OAS), and African (under the African Union) systems. Along these lines, just as is considered in relation to declared human rights, the procedures aimed at their protection must be taken in the sense

of cumulation[19]. Carvalho Ramos has adopted an elucidative classification according to distinct criteria, which allows for a more precise visualization of the types of organs and procedures that make up the different mechanisms for the international protection of human rights[20]. Some of these criteria are of closer interest to the objectives of this paper. By nature, the mechanisms can be political or judicial. Political mechanisms conduct investigations through evaluators who act in accordance with the political orientation of the states to which they are linked. It is, therefore, an examination of a political nature. The UN General Assembly, the UN Human Rights Council, and the OAS General Assembly are examples of international organizations with the competence to operate political mechanisms. On the other hand, judicial mechanisms are conducted by impartial agents, who undertake independent technical-legal analysis, that is, not compromised with the political interests of their states of origin (or of any other international actor) and with observance of the canons of ample defense and adversarial proceedings.

It is important to note that the term "judiciary", in the sense used here, is not denoted only by international courts. There are international organizations that do not have a judicial nature, but are called "judicial", in the terms of the classification presented, because their members act in an impartial and independent manner. Hence, the judicial mechanisms include judicial organizations (international courts and tribunals) and quasi-judicial organizations (impartial and independent organizations that do not have the nature of an international court or tribunal, such as the Committees established by the UN human rights conventions, the ILO's Freedom of Association Committee, and the Inter-American Commission on Human Rights - IACHR).

Depending on the purpose, there are mechanisms whose actions may result in a recommendation or a decision. Through recommendations, dialogue, and a promotional strategy is sought to change the state's conduct that is not in conformity with human rights. Decisions, on the other hand, are binding

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[19] ALVES, J. A. Lindgren. **Os Direitos Humanos como Tema Global**. São Paulo: Editora Perspectiva; Funag, 1994, p. 75.
[20] RAMOS, André de Carvalho. **Processo internacional dos direitos humanos**. 6. ed. São Paulo: Saraiva, 2019, p. 34-36.

determinations, from which an eventual non-compliance can lead to sanctions for the violating state. It should be noted that there are both political and judicial mechanisms with the power to issue recommendations and binding decisions. It is not correct to associate the latter only with judicial mechanisms, as seen regarding the UN Security Council or the General Assembly of the OAS, both political organizations that have the power to adopt binding decisions. What determines the binding nature is the manifestation of the State in the sense of recognizing this competence to the organs and mechanisms.

In the practice of the functioning of collective mechanisms, all the classifications presented are intertwined. There are mechanisms dedicated only to monitoring the enforcement of human rights and to issuing recommendations, such as the UN Universal Periodic Review (UPR). There are mechanisms that combine monitoring functions and the investigation of human rights violations in specific cases - the so-called "contentious cases".

In the field of contentious cases, it is also worth noting the existence and importance of the Special Procedures, which originated in Resolution 1235 (1967) of the UN Economic and Social Council. The UN Rapporteurships are nominated by the Human Rights Council and are operationalized with the support of the UN Secretary-General, through the Office of the UN High Commissioner. The Human Rights Council (attached to the General Assembly) appoints and decides on the mandates of the Special Rapporteurs and asks the Secretary-General to provide the Special Rapporteur with the necessary support to carry out his mandate.

Another common activity of collective mechanisms, related to the monitoring and investigation of violations, is the clarification (interpretation) of the meaning of normative statements in human rights treaties, declarations, and resolutions. Often, this activity occurs through thematic studies developed by experts (special rapporteurs) or commissions of *experts* appointed for this purpose by international organizations, as well as through the issuance of opinions by the organizations themselves, with the participation of civil society organizations. By way of illustration, the Committees of the UN human rights conventions do so in their "General Comments" or "General Observations", while

the Inter-American Court of Human Rights issues opinions in "Advisory Opinions (CO)".

Currently, the Brazilian State recognizes the competence of various organizations, besides those foreseen in the Constitution, to supervise the enforcement of human rights norms, as well as to investigate reports of violations. This is not a reality for all mechanisms, since Brazil does not admit the competence of some or reserves the right to establish limits to the competence of many other organizations, such as is the case of the reservation made when ratifying the American Convention on Human Rights, in the sense of denying the ACHR the automatic prerogative of visits and inspections in Brazilian territory. However, despite this reservation, Brazil recognized the competence of the Inter-American Court of Human Rights (Decree No. 4.463/2002).

The perspective of a Brazilian jurisdiction that enforces IHRL and all its normative sources - including, but not limited to, conventional ones -, while allowing an adequate guarantee of the protective provisions of human rights at the national level (duty of protection), also sets in motion the exercise of international cooperation for the joint and harmonic interpretation/application of norms. To understand this discussion, we need to be clear that we are not dealing with norms that apply in different instances, according to exclusive interpretations. This dichotomy leads to a degenerated integration.

It is not, therefore, a situation in which one set of institutions gives the meaning of human rights to a group of individuals at the domestic level and another set of institutions establishes the meaning of these same rights at the international level as if a human being could have his case evaluated according to certain national normative and hermeneutic *standards* that do not coincide with the international standards. It should be understood: distinct, although equally competent, are the institutions (national and international) that apply the IHRL.

What leads to the overcoming of this false dichotomy is, first of all, the figure of the common addressee: the human being. Then, it is important to point out the assumption that some international agendas can guide, in a process of cooperation, domestic decisions, just as the domestic experiences of some states

can guide international agendas. These are public spaces for the construction of solutions to problems shared by people who share the same geographic and political space, which is not only a national State, but, as we are sustaining, the entire planet, since pandemics, environmental disasters, and wars cannot be limited by customs or migratory barriers.

In this sense, it is not a matter of simply stating that, in the international order, a document is a "treaty" or a "convention" and, in the internal Brazilian plan, the same document is a "supralegal norm" or a "constitutional amendment". It is a matter of recognizing that, whether in one plan or the other, it is a matter of a cogent norm, emanating from its elaboration process, which counted on procedures, actors (especially States), and objectives that had a global (or regional) order as perspective, and not only local problems or societies.

Specifically, international human rights treaties are multilateral agreements whereby States Parties undertake obligations aimed at protecting one or more dimensions of human dignity. Despite this characteristic, it is very important to understand that the international obligation emanating from these conventions is not reduced to a bilateral or multilateral obligation within the perspective of reciprocity, which only makes sense when a state commits to another state or several other states, as in a treaty that defines common rules for customs duties. In the case of human rights treaties and international and regional human rights organizations, since we have human dignity as the focus and the consideration of individuals as subjects of IHRL, with ample participation in the elaboration of these texts, it would not make sense to reduce this obligation to mere "reciprocity"[21].

[21] Within the scope of OAS activities, non-state participation is evident in several documents. In 1999, Resolution No. 759, called "Guidelines for the Participation of Civil Society Organizations in OAS Activities,"was approved, which formally recognized the importance of civil society participation in the functioning of the organization. Following these guidelines, several other resolutions were issued making a commitment to civil society participation, namely: "Increasing and Strengthening Civil Society Participation in OAS Activities" (AG/RES. 1852 (XXXII-O/02)); "Specific Fund to Finance the Participation of Civil Society Organizations in OAS Activities and in the Summits of the Americas Process" (CP/RES. 864 (1413/04); "Strategies for Increasing and Strengthening the Participation of Civil Society Organizations in OAS Activities" (CP/RES. 840 (1361/03). At the UN level, we can cite the participation of multiple actors in the construction of the UN Convention on the Right of Persons with Disabilities, a reference that is repeated in the formulation of the general recommendations of the respective Committee, such as the General Guidance on Article 12 of the Convention, issued in 2014 (CRPD/C/11/4), which notes

What changes, therefore, is precisely what one or another organization, national or international, has at its disposal to enforce the commitments made as a result of these normative documents. In other words, when article 109, III, of the Constitution, says that it is up to the federal judges to process and judge cases based on international treaties, or still when article 105, III, "a", says that it is up to the Superior Court of Justice (STJ) to judge, on special appeal, cases decided in a single or final instance, by the Federal Regional Courts or by the courts of the States, the Federal District, and the Territories, in the event that the decision appealed against is contrary to an international treaty or denies its validity, the Constitution does not exclude any other competence of any other organizations or organ. It would be a contradiction to sustain this understanding in a legal system that, while recognizing these competencies for federal judges and the STJ, also recognizes, by constitutional statute, the competence of the UN Committee on the Rights of Persons with Disabilities to interpret, process and judge individual claims based on the respective Convention.

The subject of the formal sources of the IHRL is the scene of intense debate, for it opposes, on the one hand, the interest of the States to show their commitment to the cause, but without actually being susceptible to punishment (it is a matter, in short, of a commitment that is most often only rhetorical), and, on the other hand, the objective of the effectiveness of t international norms that are concerned with the preservation of human dignity. For this reason, the statement that the duty to comply with international treaties and decisions of international courts and organizations whose competence has been recognized by Brazil would be purposeless sounds strange. In fact, the discussion, in our understanding, should start from the fact that the Brazilian legal system recognizes the normative force of treaties and that the compliance with the decisions of courts and other international human rights organizations whose

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the participation of: "Experts, States Parties, Organizations of persons with disabilities, non-governmental organizations, treaty bodies, national human rights institutions, and United Nations agencies" (PERUZZO, Pedro Pulzatto; FLORES, Enrique P. L. . The repercussion of the Convention on the Rights of Persons with Disabilities in Brazilian Federal Courts. **Revista Direito e Práxis**, v. 12, p. 2601-2627, 2021. Avaliable at: https://www.e-publicacoes.uerj.br/index.php/revistaceaju/article/view/47403/35807. Accessed on: 03 march 2022).

competence has been recognized by Brazil is a duty that derives exactly from the normative force of these documents.

3 THE EFFECTIVENESS OF THE DECISIONS OF INTERNATIONAL HUMAN RIGHTS INSTITUTIONS THROUGH THE NATIONAL INSTITUTIONAL FRAMEWORK AND NOT IN SPITE OF IT

The normative provisions of IHRL are of immediate application (*self-executing*)[22] and impose duties to respect, promote and protect human rights, which include guaranteeing, satisfying, and legislating, making it clear that the State is, legally, the entity called upon to implement the international system of human rights protection[23].

A central prerequisite for the effectiveness of international human rights protection systems is the degree to which the addressed State complies with the recommendations and decisions emanating from their organs. In the case of Brazil, this issue is even more sensitive, since, despite the existence of specific regulations in each treaty signed and incorporated concerning compliance with what has emanated from those organizations, the internal jurisdiction sometimes fails to comply with what is stated in the treaties, and sometimes resorts to theories that start from non-normative assumptions to question the duty to comply. Moreover, when it does comply, the internal jurisdiction does not express, in the case of the STF, with general repercussion and once and for all, this duty to comply to enforce the legislation for a justice system that "does what it wants" with the IHRL[24].

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[22] The Human Rights Committee of the UN International Covenant on Civil and Political Rights (General Comment no. 31, 2004) and the Inter-American Court of Human Rights have already expressed their opinion in this regard (Consultative Opinion OC-7/86 and cases Cantos vs. Argentina, Olmedo Bustos and Others vs. Chile and Hilaire, Constantine y Benjamin and Others vs. Trinidad and Tobago).

[23] NIKKEN, Pedro. El Derecho Internacional de los Derechos Humanos en el derecho interno. **Journal of the Inter-American Institute of Human Rights**, v. 57, p. 11-68, 2013. Available at: https://www.corteidh.or.cr/tablas/r32270.pdf. Accessed on: 28 Mar. 2022.

[24] On December 15, 2020, on the occasion of the 323rd Ordinary Session, the Plenary of the National Council of Justice (CNJ) approved the creation of a unit to monitor and supervise sentences, precautionary

Although it is not rare to see episodes of redirection of conduct in the administrative and legislative spheres, promoted by recommendations or decisions issued by international mechanisms for monitoring and investigating violations of human rights, notably the Inter-American system[25], the situation is more chaotic in the judicial and doctrinal spheres.

Some interesting examples of countries that have established interpretative reservations to the American Convention on Human Rights when recognizing the jurisdiction of the Inter-American Court of Human Rights or even of confusion between the meaning of an international judgment that recommends something instead of determining it can be cited to elucidate the erroneous way in which state sovereignty has been placed in dichotomy facing the duty to comply with international treaties and decisions.

In the Chilean case, for example, in conferring jurisdiction on the IACHR and the Inter-American Court of Human Rights, it was declared that these organizations, in applying the provisions of article 21, paragraph 2, of the American Convention on Human Rights, could not pronounce on the reasons of public utility or social order that had been considered in the deprivation of a person's property by the Chilean state[26]. In 2001, in the case of Olmedo Bustos and Others v. Chile ("The Last Temptation of Christ"), the Inter-American Court found a violation of the American Convention on Human Rights by the Chilean State for having prevented the exhibition of a film that supposedly damaged the honor and image of Jesus Christ. Even though the initial prohibition was authorized by the Chilean constitutional norms, the Inter-American Court

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decisions, and advisory opinions of the Inter-American Court of Human Rights. Although the measure is very important, the fact is that Brazil does not recognize only the competence of the Inter-American Court.

[25] Three paradigmatic cases can be highlighted, in a synthetic way, namely: the José Pereira case, about reduction to a condition analogous to slavery, which included a friendly solution, in 2003, before the CIDH; the Maria da Penha case, from 2001, with the internal approval of Law no. 11.340, of August 7, 2006, the intensification of the installation of Women's Police Stations throughout the country, and the conclusion of the aggressor's trial; and the Ximenes Lopes case, whose condemnatory sentence pronounced in 2006 by the Inter-American Court of Human Rights provoked alterations in the attendance protocol to people suffering from mental illnesses throughout the credentialed network of the Unified Health System.

[26] ORGANIZATION OF AMERICAN STATES. **Multilateral treaties. American Convention On Human Rights "Pact Of San Jose, Costa Rica". Signatories and Ratifications.** Available at: https://www.cidh.oas.org/basicos/portugues/d.Convencao_Americana_Ratif..htm. Accessed on 28 Mar. 2022.

declared that it constituted prior censorship, incompatible with the freedom of expression foreseen in the American Convention.

Any allegation that the decision of the Inter-American Court of Human Rights violates Chile's sovereignty[27], concerning both the recognition of international responsibility for violation of the American Convention on Human Rights and concerning the consequent reparations imposed, cannot be made without taking into account the Chilean State's declaration recognizing the competence of the Inter-American Court, which obviously includes the prerogative to formulate, within the framework of article 63 of this same Convention, a binding interpretation of the inter-American norms applied to the concrete case sub judice.

Article 63 of the American Convention states that the Inter-American Court shall order that (i) the consequences of the measure or situation that has led to the violation of these rights be remedied; and (ii) just compensation be paid to the injured party. Now, reparation for the consequences of the violation - which, according to international custom historically forged and widely accepted by states and international human rights organizations[28], is not always reparable with a sum of money - precedes the provision for monetary compensation in the conventional text, so that the former, from a logical-grammatical point of view, is not reduced to the latter or limited by it. Moreover, the text allows us to glimpse that the first attention should be given to possible forms of reparation that are not merely compensatory, thus ruling out the idea that the Inter-American Court should act with a predominantly pecuniary purpose.

In other words, article 63 is unequivocal when it states that the Inter-American Court will seek effective reparations, not limited to a patrimonial conception, opening itself, in this sense, to symbolic acts and obligations to do,

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[27] Cf, in this sense, the criticism contained in FERREIRA, Felipe Grizotto; CABRAL, Guilherme Perez; LAURENTIIS, Lucas Catib de. O exercício da jurisdição interamericana de direitos humanos: legitimidade, problemas e possíveis soluções. **Revista de Direito Internacional**, v. 16, n. 2, 14 nov. 2019. Avaliable at: https://www.publicacoes.uniceub.br/rdi/article/view/5985. Accessed on: 3 mar. 2022.

[28] Cf. Draft Articles on Responsibility of States for Internationally Wrongful Acts" and Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly, through Resolution No. 60/147, of December 16, 2005, and which enshrines numerous forms of reparation for victims beyond personal compensation.

not to do, to give, to remember and truth[29], or even a recommendation to change an article of a Constitution. In this regard, if, on the one hand, it is true that the Inter-American Court analyzed, in this case involving Chile, the compatibility of original constitutional norms with the international commitments assumed by the States - which seems not only reasonable but also logical to us, insofar as the assumption of these commitments is made based on the constitutions themselves - it is not true that by determining that a State review its original constitutional norm, the Inter-American Court is, in practice, forcing the State to purely and simply succumb to the Court's interpretation of the IHRL. The fact that the Inter-American Court, as a form of reparation, indicates the alteration of an article of the Constitution of a State that has recognized its competence should be taken as a logical-legal consequence of this recognition, which is undeniably broad and comprehensive. Such duty emerges from a recognition of competence made explicit by the figure of the State, which presupposes, in its very essence, the conjugation of sovereignty, territory, people, and, obviously, the Constitution.

Thus, it is important to point out the Advisory Opinion OC-14 of the Inter-American Court on the enactment of national laws that do not conform to international human rights norms[30], in which the Court held that the entry into effect of a law that is manifestly contrary to human rights is sufficient to constitute a breach of the duty of protection.[31]

This debate that opposes the state sovereignty to the decisions of international organizations for the protection of human rights has motivated some scholars to propose the adoption of the so-called Doctrine of the Margin of National Appreciation, echoed by the European Court of Human Rights as a

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[29] PERUZZO, Pedro P.; COSTA, Ana Clara R. Executoriedade no Brasil das obrigações extrapecuniárias das sentenças da Corte Interamericana de Direitos Humanos. **Revista da Faculdade de Direito do Sul de Minas**, v. 35, p. 285-310, 2019. Avaliable at: https://www.fdsm.edu.br/conteudo/artigos/d463ab16c26ce53549ef4143dcfae3bc.pdf. Accessed on: 5 mar. 2022.

[30] INTER-AMERICAN COURT OF HUMAN RIGHTS. **Advisory Opinion Oc-14/94** of december 9, 1994. International responsibility for the promulgation and enforcement of laws in violation of the convention (arts. 1 and 2 of the American Convention On Human Rights. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_14_esp.pdf. Accessed on: 28 Mar. 2022.

[31] As Cançado Trindade states, "International supervisory bodies are not obliged to know the internal law of States, but rather to take cognizance of it as an element of proof, in the process of verifying the conformity of internal acts (judicial, legislative, administrative) of States with the conventional obligations imposed on them" (Free translation of CANÇADO TRINDADE, Antônio Augusto. **Tratado de Direito Internacional dos Direitos Humanos** – Vol. I. 2. ed. Porto Alegre: Sérgio Antonio Fabris Editor, 2003, p. 518).

dogmatically consistent solution to equalize the uniformity of meaning of human rights with a certain respect for the central position that European states have for the promotion and enforcement of these rights[32]. Regarding the case of Olmedo Bustos and Others v. Chile, the defense of the application of the "margin of appreciation" is problematic, since Chile was one of the few countries that, upon recognizing the competence of the Inter-American Court, established limits on the interpretive competence of this court, reserving to the national jurisdiction a "margin of interpretation" of the Convention. Although this reservation of interpretation is not exactly a "margin of appreciation" for a judgment, the practical effects for criticism of the decision of the Inter-American Court are just as relevant. It is not a matter, therefore, of whether or not there is a margin of national appreciation, but, in truth, it is a matter of thinking about the possible international consequences for the State that does not comply with an international decision to which it has sovereignly committed itself to respect and implement.

The discussion seems to confront the complexity of the theme of the enforcement of international human rights norms in the internal sphere and the compliance with the decisions of international organizations. The subject must be addressed with more objectivity and less nationalistic rhetoric. Considering the Brazilian reality in face of the decisions of the Inter-American Court, it is believed that three questions must be faced: Does the Brazilian State have a legal duty to comply with decisions of the Inter-American Court that affect Brazil? Can the Brazilian State use, internally, decisions from the Inter-American Court on other countries as precedent or orientation for a jurisdictional organ? Does the Brazilian

[32] Position contemplated also in FERREIRA, Felipe Grizotto; CABRAL, Guilherme Perez; LAURENTIIS, Lucas Catib de. O exercício da jurisdição interamericana de direitos humanos: legitimidade, problemas e possíveis soluções. **Revista de Direito Internacional**, v. 16, n. 2, 14 nov. 2019. Avaliable at: https://www.publicacoes.uniceub.br/rdi/article/view/5985. Accessed on: 3 Mar. 2022. It is necessary to clarify that the national margin of appreciation is not adopted, generically, by the European Court, but only for cases in which it verifies the inexistence of a "European consensus" on the interpretation and application of the rule in question to the case analyzed, hypothesis in which it grants a greater space of discretion to the State for the definition of undetermined normative aspects that are relevant to specify the fulfillment or non-fulfillment of the State's obligations. What can be seen in the jurisprudence of the European Court is that the national margin of appreciation is present in disputes in which there are clear differences of moral implication between European countries, as seen, for example, in cases involving religious freedom (ROJAS, Claudio N. La doctrina del margen de apreciación y su nula recepción en la jurisprudencia de la Corte Interamericana de Derechos Humanos. **Anuario Colombiano de Derecho Internacional**, v. 11, 2018, p. 71-100. Avaliable at: https://dialnet.unirioja.es/servlet/articulo?codigo=6344859. Accessed on: 5 mar. 2022).

State have the duty to follow consolidated jurisprudence of the Inter-American Court involving other countries?

These questions, if answered coherently, under the assumptions of the Principle of International Good Faith and *pacta sunt servanda*, as well as the normative force of the treaties and based on concrete data, have the power to clarify many things still obscured in the debate in question. To this end, the diction of articles 62 and 68 of the American Convention is important[33].

This leads to the conclusion, on the one hand, that article 62 states may declare the "jurisdiction of the Court in all cases concerning the interpretation or application of this Convention" and, on the other hand, article 68 states that "The States Parties to the Convention undertake to comply with the decision of the Court in any case to which they are a party. Far from being a contradiction, the two articles are complementary in their objects. This is because recognizing the competence of the Inter-American Court in all cases concerning the interpretation or application of the Convention does not imply accepting the imposition of a decision in default of the State. As pointed out, international decisions must be complied with by the domestic institutional apparatus, by force of assumed obligations, and under penalty of international sanctions.

In the case of Brazil, which recognized, without any reservations, the competence of the Inter-American Court of Human Rights, if the Court establishes an interpretation for the American Convention on Human Rights,

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[33] Article 62
(1) Each State Party may, at the time of deposit of its instrument of ratification of or accession to this Convention[33] or at any time thereafter[33], declare that it recognizes the jurisdiction of the Court in all cases concerning the interpretation or application of this Convention as compulsory as of right and without special agreement[33].
2. The declaration may be made unconditionally or on condition of reciprocity, for a specified period or for specific cases. It shall be submitted to the Secretary General of the Organization who shall transmit copies thereof to the other Member States of the Organization and to the Secretary of the Court.
3. The Court shall have jurisdiction, in any case, concerning the interpretation and application of the provisions of this Convention which is brought before it, provided that the States Parties to the case have recognized or acknowledge such jurisdiction, whether by special declaration as provided in the preceding paragraphs or by special agreement.
Article 68 (Jurisdiction)
1. The States Parties to the Convention undertake to comply with the decision of the Court in any case to which they are parties[33].
2. The part of the judgment awarding compensatory damages may be enforced in the respective country by the domestic procedure in force for the enforcement of judgments against the State.

such as, for example, the understanding that the right to traditional indigenous land derives from the interpretation of article 21 of the Convention, the internal jurisdiction, if it wishes to apply the Convention, cannot deviate from this understanding.

Accordingly, if there is a line of decision from the Inter-American Court on the meaning of an article - and not on measures to be implemented specifically by a State - the application of this article by the Judiciary of any country that recognizes its competence should be aligned with this understanding. This situation, in Brazil, stems from the fact that, by Decree 4.463/2020, the competence of the Inter-American Court was recognized as mandatory, by operation of law and for an indefinite period, in all cases related to the interpretation or application of the American Convention on Human Rights. In other words, Brazil admitted broad jurisdiction in all cases (and not just in some, as the Brazilian State might have chosen) and, in doing so, exercised its sovereignty and committed itself to one of the most basic principles of law, namely *pacta sunt servanda*[34].

Based on what has been discussed so far, the conclusion concerning the interpretation or manner of application of the Convention does not present any relation of limitation or contradiction with article 68 of the American Convention, which, in turn, is clear in the sense that if there is an interpretation and subsequent application of the Convention in a specific case about Brazil, this application, expressed in the form of a judgment/decision, must be complied with by the Brazilian State, given that it is a party to the case. Therefore, in response to the four questions posed, it can be stated: Brazil has the duty to comply with the decisions of the Court in cases to which it is a party; it can use, domestically, decisions of the Inter-American Court on other countries as precedent or guidance for judicial organizations and, in cases in which it wishes to apply the American Convention on Human Rights domestically for disputes concerning themes in which it has not been sued before the Inter-American Court, it has the

[34] Although the discussion in this author's work is from another perspective, KELSEN's statement applies to what is stated in this paper, i.e. that by becoming a signatory to and incorporating an international convention into the domestic legal system, the state party is exercising its sovereignty to negotiate and sign an agreement based on *pacta sunt servanda* (KELSEN, Hans. **Teoria Pura do Direito**. Trad. João Baptista. Machado. 6. ed. São Paulo: Martins Fontes, 1999).

duty to follow the interpretative guidelines of this court, even in relation to other countries.

Besides, the STF has held this position. As examples, we can cite the reference to a case on Argentina (Mohamed vs. Argentina) to support a decision on the application of the limitation of the double degree of the jurisdiction of the European Convention within the Inter-American System (AP 937 QO/RJ). He also used the cases Palamara Iribarne vs. Chile and Kimel vs. Argentina in cases of contempt discussed in the scope of HC 141949/DF. Furthermore, he cited the case of Atala Riffo and children vs. Chile in ADI 4275/DF, recognizing the right to substitution of name and sex directly in the civil register to transgender persons who so desire, regardless of transgenitalization surgery, or hormone or pathologizing treatments, in addition to citing Advisory Opinions from the Inter-American Court, which do not deal only with Brazil, as in the cases of ADI 4275/DF, ADI 5617/DF, and RE 511961 ED/SP.

Thus, if there is an interpretation of the Inter-American Court on some matter, the internal jurisdiction has the duty to comply, which is not to be confused with the duty to comply with a sentence contemplating a specific condemnation and not a jurisprudential orientation or an Inter-American agenda. For this very reason, it is of utmost importance that the efforts (or lack thereof) of the Inter-American Court to align its jurisprudence and the stance of national judges who, in some situations, rely on decisions of the Inter-American Court and, in others, use the argument of sovereignty to rule out the incidence of these cases in decisions that diverge from the understanding of the Inter-American Court itself, be brought to the same discussion table.

4 FURTHER REFLECTIONS IN THE LIGHT OF THE CONVENTIONALITY CONTROL

With respect to the legislative activity that is not in compliance with the IHRL, the Inter-American Court, when consulted on the matter, concluded that

the enactment of a law that is manifestly contrary to the obligations assumed by a State upon ratifying or acceding to the Convention constitutes a violation of the Convention and that, in the event that such a violation affects the protected rights and freedoms of certain individuals, it generates international responsibility of the State[35].

Despite the clarity of this orientation, the international human rights process has established a solid premise, founded on the institute of state sovereignty and the self-determination of peoples, which concerns its subsidiary aspect. According to the assumption of subsidiarity, it is the primary duty of States, in their domestic sphere, to adopt measures for the protection and promotion of human rights and, in the event of a violation, to provide reparation for the resulting damage, as contemplated in international law.

In Brazil, to the extent that we have adopted the system of incorporation of treaties and conventions, subsidiarity applies only in relation to international resources, organizations, or courts, and in relation to the guidelines that do not go through the incorporation process. Procedurally, the assumption of subsidiarity translates into the necessary exhaustion of domestic remedies as an admissibility requirement for an international claim, foreseen in practically all violation investigation procedures.

Despite the controversial nature of the theme, the debates often suffer from a misplacement of the issue. Recurrently, those who oppose the manifestation of international courts in relation to internal rules also classify the hypothesis as aggression to sovereignty and usurpation of the competence of the local Judiciary to constitutionality control. The fact is that the international courts do not examine the compatibility of a national rule with the Constitution of the state in which it was produced. This is not in question. At the international level,

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[35] The aforementioned position of the Inter-American Court, adopted in Advisory Opinion 14/94, has been reaffirmed in its litigation activities on various occasions, with emphasis on the cases in which the Court has vigorously denied legal effects to the amnesty laws approved in Latin American countries (including Brazil) by dictatorial military regimes that intended to make agents of the dictatorship immune from investigation, processing, and conviction for crimes supposedly committed in the name of maintaining national order. (INTER-AMERICAN COURT OF HUMAN RIGHTS. **Advisory Opinion Oc-14/94** of december 9, 1994. International responsibility for the promulgation and enforcement of laws in violation of the convention (arts. 1 and 2 of the American Convention On Human Rights. Available at: https://www.corteidh.or.cr/docs/opiniones/seriea_14_esp.pdf. Accessed on: 28 march 2022.)

the compatibility between the national norm and the international human rights norms is examined. In addition, the national norm placed under the scrutiny of the convention or treaty can be of any stature, because the evaluation, as we are insisting, is not only of compatibility with a convention but of compatibility with a commitment assumed with the entire international community.

From this perspective, the determination of reparation alluding to the alteration of a national norm pronounced by the Inter-American Court of Human Rights (and by other international human rights organizations) does not imply constitutionality control of internal law, but rather the so-called conventionality control, which, if not performed by the competent instances of the State, will bring about the international legal consequences of political embarrassment typical of the power of embarrassment that inspires the international protection of human rights. It is not, therefore, an evaluation of the validity of a national norm, but only of the effects and consequences, at the international level, of its validity, within the field of international responsibility for the violation of a conventional obligation.

The conventionality control comes from the understanding that the production of laws is one of several state instruments that can serve both to promote and protect human rights, and to violate them. From this perspective, as anticipated, the national act of legislating presents itself to international organizations as a fact (an act of the State) that must be analyzed, like any other, in light of international human rights norms. In the same way, national judges also have the important and strategic mission of enforcing international commands for the protection of human rights[36], especially those emanating from the interpretations of competent international organizations (read: not only treaties but also custom and international jurisprudence).[37]

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[36] BELTRAMELLI NETO, Silvio; MARQUES, Mariele Torres. Controle de convencionalidade na Justiça do Trabalho brasileira: análise jurisprudencial quantitativa e qualitativa. **Revista Opinião Jurídica (Fortaleza)**, v. 18, n. 27, p. 45–70, 19 fev. 2020. Avaliable at: http://dx.doi.org/10.12662/2447-6641oj.v18i27.p45-70.2020. Accessed on: 5 mar. 2022; BELTRAMELLI NETO, Silvio; KLUGE, Cesar Henrique. Controle de convencionalidade difuso e concentrado em matéria trabalhista nas perspectivas da OIT e do sistema interamericano de proteção dos direitos humanos. **Revista Direito e Justiça: Reflexões Sociojurídicas**, v. 17, n. 28, p. 105–132, 2 jun. 2017. Avaliable at: https://doi.org/10.31512/rdj.v17i28.2059. Accessed on: 5 mar. 2022.

[37] In the case of Almonacid Arellano vs. Chile the Inter-American Court said: "In other words, the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has

FINAL CONSIDERATIONS

The quest for the internal realization of IHRL holds within it the essence of the central problem of human rights: to stop being discourse and become a fact. From this perspective, in addition to the important affirmation of human rights as a language atavistic to democracy, on the one hand, the normative, jurisprudential, and doctrinal advances regarding IHRL and its enforcement are noteworthy, and on the other, the lack of its structured and stable domestic implementation is highly reprehensible. It is conceivable that cases involving the collision of human rights and the need to use the techniques of weighting and proportionality admit, with less concern, certain hermeneutic freedom on the part of national judicial organizations, however, without ever surpassing the requirement of grounds compatible with the *Pro Persona* Principle (the rule most favorable to the individual), under penalty of revision by international organisms.

Finally, in light of the concrete nature of the litigation under examination, the legal adequacy of the prevailing interpretation in relation to such human rights norm is the argumentative requirement that the decision must demonstrate, in a reasoned and unequivocal manner, that the decisional path chosen best satisfies the imperative of the most intense protection of the human being, within the factual and legal possibilities of the real conflict submitted to the jurisdiction. Moreover, in this scenario, legal possibilities are understood to mean the consideration of the international and national norms applicable to the case,

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to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention." (INTER-AMERICAN COURT OF HUMAN RIGHTS. **Case of Almonacid-Arellano et al v. Chile.** Judgment of September 26, 2006. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf. Accessed on 28 Mar. 2022.) In Aguado Alfaro and Others v. Peru, the Court further stated: "When a State has ratified an international treaty such as the American Convention, the judges are also subject to it; this obliges them to ensure that the effet util of the Convention is not reduced or annulled by the application of laws contrary to its provisions, object and purpose. In other words, the organs of the Judiciary should exercise not only a constitutionality control, but also of 'conventionality' ex officio between domestic norms and the American Convention; evidently within the framework of their respective jurisdictions and the corresponding procedural regulations." (INTER-AMERICAN COURT OF HUMAN RIGHTS. **Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru** Judgment of November 24, 2006. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_158_ing.pdf. Accessed on 28 Mar. 2022).

including in light of interpretations that may have been given to them by international jurisprudence.

An indisputable consequence of this hermeneutic behavior is the requirement that the rejection of international norms and jurisprudence that are clearly and precisely addressed to the conflict under examination must be explicitly founded from the point of view of the *Pro Persona* Principle, in concrete terms, rejecting the old perspective of the aprioristic prevalence of state sovereignty over any of the sources of international law. Furthermore, the ideal situation that arises presupposes that those who apply the Law have knowledge on the IHRL, which means knowing about conventional and non-conventional norms, as well as about contentious and non-contentious international jurisprudence and its foundations (not just resolutive provisions), since only then will it be possible to carry out an adequate interpretative activity that, in fact, places the national and international normative sources side by side so that one may have

The explanation for the deficit in the production of effects of the norms of IHRL within the Brazilian limits passes, necessarily (although not exclusively), through a question of concept and preparation. Of concept, because it remains, sometimes explicitly, sometimes implicitly, a mistaken understanding of qualitative preference of the national norm over the international norm, the latter is often considered a supplementary source of Law destined to fill gaps. At least when it comes to the protection of human rights, always inspired by an expansionist bias, this understanding is ethically and legally unsustainable. It is also a matter of preparation, because legal professionals, the drivers of its application, are still trained in such a way to reproduce this deficit, which is already present at the time of professional legal education, despite the recent advances in academia that must be recognized with regard to the subject of human rights, in curricular terms.

At this point, the fact is that, whether the impulse is exogenous (international) or, preferably, endogenous (internal), the enforcement of international human rights norms is a task that depends, in the first place, on the

interest and will of national agents with the power to conduct their implementation, within their respective areas of competence.

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