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Conventionality Control (American Convention on Human Rights)[1]

1.

It is important, within the jurisdiction of the contemporary State, to investigate the possibility of jurisdictional control of legislation under the treaties or international conventions on human rights. It is clear that such investigation requires previous analyses of the normative *status* of the treaties on human rights inside the Brazilian juridical order. If the international law of human rights is equated with ordinary law, obviously there is no possibility to raise it to the parameter level for judicial review. Notwithstanding, especially after the decision taken by the Brazilian Supreme Court in Extraordinary Appeal No. 466.343[2], in which the legitimacy of civil imprisonment for unfaithful trustees was discussed confronting the International Pact of Human and Political Rights and the American Convention on Human Rights (Pact of San José), it is important to consider two positions that raise international law on human rights onto a higher level, providing it with the condition of a law that authorizes the legitimacy control of ordinary legislation. The position that gained majority at the

[1] I am grateful to Luiz Henrique Krassuski Fortes, LL.M candidate under my supervision at Federal University of Parana's Law School, for reviewing and helping with the translation of this paper into English.

[2] "Civil Arrest. Deposit. Unfaithful trustee. Chattel mortgage. Declaration of coercive measure. Absolute inadmissibility. Insubsistence of constitutional provision and subordinate norms. Interpretation of article 5,, LXVII, and 1st, 2nd e 3rd paragraphs of the Federal Constitution, in the light of article 7, 7th paragraph, of the American Convention on Human Rights (Pact of San José of Costa Rica). Appeal not granted. Joint judgment of Extraordinary Appeal No. 349.703 and Habeas Corpus No. 87.585 and No. 92.566. It is illicit the civil arrest of unfaithful trustee, regardless of the sort of deposit". (extraordinary Appeal No. 466.343, Plenary, Min. Cezar Peluso, DJe 05.06.09, available in Portuguese at Supreme Court's website: www.redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=595444).

trial of the Extraordinary Appeal, led by Justice[3] Gilmar Mendes, attributed to the international treaties on human rights a *supralegal* normative *status,* while the position led by Justice Celso de Mello gave them constitutional stature. Alongside these positions, also worthy of note the position that sustains the supraconstitutionality of these international treaties[4].

Attribute to the international treaties on human rights the *status* of ordinary legislation not only authorize the signatory State to unilaterally disobey international agreements but also confronts the concept of a Cooperative Constitutional State, making the safeguard of human rights impossible on a supranational level. Moreover, the Brazilian Constitution itself makes it clear the superiority of the international treaties over the infraconstitutional legislation. According to the Constitution "the Federative Republic of Brazil will seek the economic, political, social and cultural integration of the Latin American peoples, aimed at the formation of a Latin-American community of nations" (article 4, sole paragraph); "the rights and interests expressed in this Constitution do not exclude others from this regime and from principles by it adopted, or the international treaties in which the Federative Republic of Brazil take part" (article 5, 2nd paragraph); "the international treaties and conventions on human rights of which are approved, in each National Congress House, in two sessions, by three fifths of their respective members' votes, will be equivalent to the constitutional amendments" (article 5, 3rd paragraph); and "Brazil submits to the jurisdiction of the International Criminal Court whose creation it has manifested adhesion to" (article 5, 4th paragraph). Thus, the Constitution itself stresses the dignity of the international treaties on human rights, recognizing its prevalence over ordinary law. It must be noted that the 3rd paragraph of article 5 – just like its 4th paragraph – was inserted by the constitutional amendment No. 45 (2004), keeping it clear that the attribution of the quality of constitutional amendment to the treaties requires approval "in each National Congress House, in two sessions, by three fifths of their respective members' votes". In such a way that the Constitution itself provided the specific condition for the international treaties on human rights to assume the stature of constitutional norm.

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[3] Brazilian Supreme Court's judges are denominated Ministros ("Ministers") according to Brazilian law. In order to favor comprehension, in this article they are referred as *Justices*, like their counterparts of the United States Supreme Court.

[4] See: N. Pedro Sagués, *El "control de convencionalidad" como instrumento para la elaboración de un ius commune interamericano.* In: A. Von Bogdandy, E. F. Mac-Gregor, M. M. Antoniazzi, (Coord.), *La Justicia Constitucional y su internacionalización*, Hacia un *ius contitutionale commune* en América Latina, Tomo 2, p. 449 e ss.

Nevertheless, it was argued, within the trial of the referred Extraordinary Appeal No. 466.343, that international treaties on human rights would have constitutional *status*, despite having been approved before the constitutional amendment No. 45 (2004). Justice Celso de Mello concluded, in his opinion, that the international conventions on human rights, incorporated into Brazilian law before the enactment of the constitutional amendment No. 45 (2004), like the Pact of San José of Costa Rica, are invested with a materially constitutional nature, composing, under such a perspective, the conceptual notion of *constitutionality block*. The thesis of treaties' constitutionality is based on the 2nd paragraph of article 5 of the Constitution. The logic is that this norm incorporates the rights established in the international treaties on human rights ratified by the country. Affirming that the rights and interests expressed in the Constitution do not exclude the rights established by international treaties to which Brazil has taken part, the 2nd paragraph would confer the *status* of constitutional norm to them. The 2nd paragraph, thus, would be an open clause, admitting the incorporation of international treaties on human rights at the same hierarchical condition of the constitutional norms and not with another normative *status*[5].

However, the thesis that prevailed in the trial of the Extraordinary Appeal No. 466.343, as previously mentioned, was that of the supralegality of the international law on human rights. The holding of the Court, in summary, is that the reference, on behalf of the Constitution, to international treaties on human rights, despite not being casual nor neutral from a juridical-normative point of view, did not attributed to these treaties the hierarchy of constitutional norm. Justice Gilmar Mendes, in his opinion, noted that the thesis of supralegality "advocates in favor of the argument that the treaties on human rights would be infraconstitutional, however, due to their special character in relation to other international normative acts, they would also bear a supralegal attribute. In other words, the treaties on human rights would not be able to confront the supremacy of the Constitution, but would have a special place reserved in the juridical order. To equate them to the ordinary legislation would be to underestimate its special value in the context of the system of protection of human rights"[6].

[5] See: A. A. Cançado Trindade, *Tratado de direito internacional dos direitos humanos*, v. 1, Porto Alegre 2003.

[6] In portuguese: "pugna pelo argumento de que os tratados sobre direitos humanos seriam infraconstitucionais, porém, diante de seu caráter especial em relação aos demais atos normativos internacionais, também seriam dotados de um atributo de supralegalidade. Em outros termos, os tratados sobre direitos humanos não poderiam afrontar a supremacia da Constituição, mas teriam lugar especial reservado no ordenamento jurídico. Equipará-los à legislação ordinária seria subestimar o seu valor especial no contexto do sistema de proteção dos direitos da

In this regard, the international treaties on human rights approved in conformity with the dictates of the 3rd paragraph of article 5 of the Federal Constitution are equivalent to the constitutional amendments; the other international treaties on human rights subscribed by Brazil constitute supralegal law; and the international treaties that do not deal with human rights have legal value.

2.

International treaties, when qualified as *supralegal* law, are obviously set on a degree of normative hierarchy superior to that of the infraconstitutional legislation, yet inferior to the Constitution. The holding of the Extraordinary Appeal No. 466.343, by recognizing the illegitimacy of the infraconstitutional legislation that regulates civil imprisonment of unfaithful trustees confronted with the International Pact of Civil and Political Rights and the American Convention on Human Rights (Pact of San José of Costa Rica), stressed that, because the unequivocal special character of the international treaties that ensure the protection of human rights, it is not difficult to understand that the incorporation to the internal juridical order, through the ratification procedure provided by the Constitution, has the power to paralyze the efficacy of every conflicting normative infraconstitutional discipline[7].

Note that the infraconstitutional legislation, in order to produce effect, must not only be in consonance with the Federal Constitution, but also with the international treaties on human rights. Thus, there are two control's parameters and two validation programs for the ordinary legislation. In addition to the Constitution, the *supralegal* law is to condition and control the validity of the legislation.

Accordingly, this means that the legislation is submitted to new material limits, placed in the human rights encompassed in the international treaties, which reveals that the contemporary State – which relates collaboratively with other constitutional States inserted in a community, has the ability to control the legitimacy of the legislation confronted with human rights protected in the country and in the Latin-American community.

pessoa humana" (STF, Extraordinary Appeal No. 466.343, Plenary, Min. Cezar Peluso, DJe 05.06.09).

[7] See: Justice Gilmar Mendes opinion in the Extraordinary Appeal No. 466.343.

3.

The control of legislation's compatibility with international treaties on human rights may be done through *direct unconstitutionality suit*[8], before the Brazilian Supreme Court, when the treaty was approved according to the 3rd paragraph of article 5 of the Federal Constitution. Obviously, these treaties also authorize the diffuse and concrete *judicial review*.

In the current Brazilian normative system, treaties that hold normative *supralegal status* only create opportunity to the diffuse control. The compatibility control of internal legislation with the conventional norms is a national judge's duty , either by request of the interested party or by its own motion. Keep in mind, in this sense, the decision given by the Inter-American Court in the *Dismissed Congressional Employees* (Aguado–Alfaro et al.) *v. Peru* case: "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 control of constitutionality, but also of "conventionality" ex officio between domestic norms and the American Convention; evidently in the context of their respective spheres of competence and the corresponding procedural regulations. This function should not be limited exclusively to the statements or actions of the plaintiffs in each specific case, although neither does it imply that this control must always be exercised, without considering other procedural and substantive criteria regarding the admissibility and legitimacy of these types of action"[9].

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[8] As explained by Supreme Court Justice, Gilmar Mendes, "the Brazilian system of judicial review combines features from both abstract review and concrete review systems. As in the American concrete review system, Brazilian judges are conferred ample powers to analyze the constitutionality of governmental acts, allowing any judge or court to declare that a law or regulatory act is unconstitutional and, just as in the European abstract system, the Brazilian Constitutional model concentrates at the Supreme Court the competence to prosecute and adjudicate independent actions concerning the constitutionality "in abstract" of a law. In this way, the Brazilian system of Judicial Review displays original and diverse procedural instruments for both verifying the constitutionality of legislation and protecting fundamental rights. These include the habeas corpus, habeas data, writ of mandamus, injunctive writ, public civil action and popular action. This diversity, so typical of the diffuse model, is complemented by a variety of instruments enabling the Supreme Court to exercise abstract review such as direct unconstitutionality suits, declaratory actions of constitutionality, direct unconstitutionality suits due to omission (ADO) and claims for non-compliance of a fundamental precept". See: Framework of the Brazilian Judiciary and Judicial Review, available at www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfAgenda_pt_br/anexo/Framework_of_the_Brazilian_Judiciary__Inglaterra_Final.10.20091.pdf.

[9] I/A Court H.R., Case of the *Dismissed Congressional Employees (Aguado–Alfaro et al.) v. Peru.*

An interesting question concerns the opportunity of the Brazilian Supreme Court to carry out diffuse control confronting supralegal law through Extraordinary Appeal. For it may be argued, initially, that a treaty does not constitute a constitutional norm and, therefore, violation of the supralegal law does not create opportunity to bringing an Extraordinary Appeal (based on article 102 of the Constitution). It is obvious that a treaty is not mistaken for a constitutional norm, in spite of being able to assume that status when approved through the qualified *quorum* of 3rd paragraph to the article 5 of the Federal Constitution. Thus, certainly does not equate, in the quality of supralegal law, to the federal law, whose claim of violation opens opportunity to the Special Appeal before Brazilian Superior Court of Justice (article 105 of the Constitution). It is important to remind, though, that the Supreme Court admitted and ruled the Extraordinary Appeal in which was alleged the violation of law recognized as supralegal exactly when it faced the matter of legitimacy of civil imprisonment of unfaithful trustees. (Extraordinary Appeal No.466.343).

4.

There are those who sustain the supraconstitutionality of the Convention, i.e. the invalidity of the constitutional norm that conflicts with the Convention. It is claimed, as seen before, that the Convention could "paralyze"[10] the efficacy of infraconstitutional norms that are in conflict with it. One should remember that in the Extraordinary Appeal No. 466.343 trial it was decided that the constitutional provision of civil imprisonment for unfaithful trustees (article 5, LXVIII), due the supremacy of the Constitution over international normative acts, could not be repealed by the adhesion of Brazil to the International Pact of Civil and Political Rights (article 11) and to the American Convention on Human Rights – Pact of San José (article 7, 7), having ceased "to have applicability due the *paralyzing effect* of these treaties in relation to the infraconstitutional legislation that dictate the matter"[11]. However, it would be possible to argue that when the norm needs to be controlled by Convention, it has already been through the filter of constitutionality control, in a way that the conventionality control implies the denial of constitutionality control. In fact, this problem – supraconstitutionality of the

Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158, available at www.corteidh.or.cr/docs/casos/articulos/seriec_158_ing.doc.

[10] The expression is used by F. Sudre, *A propos du "dialogue de juges" et du controle de conventionnalite*, Paris 2004.

[11] Justice Gilmar Mendes opinion in the Extraordinary Appeal No. 466.343.

Convention – becomes clearer when a constitutional provision itself conflicts with the Convention[12].

It is possible to argue that if the State must comply with the Convention and could not invoke its own Constitution to disobey international treaties on human rights this means, as a final concrete result, that the treaty is above the Constitution. Thus, the consequence of the conventionality control would be that the constitutional norm that violates the treaty must not be applied. In this sense, it is the constitutional norm itself, and not the infraconstitutional statute, that remains "paralyzed". If, according to the conventionality control, the Constitution cannot validly violate the treaty or the Convention, this would be sufficient to display the superiority of the Convention over the Constitution[13].

Notice that it is possible to suppose the existence of legislation that is unconstitutional, and yet in conformity with the Convention. Sagués makes reference to a hypothetical constitutional norm that denies the right of reply, rectification or response, explicitly guaranteed in the Convention (article 14)[14]. He argues that a statute that regulate this norm of the Pact would be unconstitutional, though conventional. The constitutional norm, by denying the right made explicit by the Pact of San José, would be unconventional, whereas the regulating legislation would be valid – and not unconstitutional or null, "by the superiority of the Pact over the Constitution, according to the doctrine of the *conventionality control*"[15].

The question of conventionality control of constitutional norms was debated in the "Last Temptation of Christ" case, in which the Inter-American Court declared that Chile would have to reform its Constitution. Here is what was said on the occasion: "This Court understands that the international responsibility of the State may be engaged by acts or omissions of any power or organ of the State, whatsoever its rank, that violate the American Convention. That is, any act or omission that may be attributed to the State,

[12] Certainly to justify such control by the Convention, it is invoked the *pro homine* principle, that prioritizes the norm that best protects a right or freedom.

[13] N. Pedro Sagués, *op. cit.*, p. 465 e ss.

[14] "Article 14. Right of Reply: 1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish. 2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred. 3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges".

[15] In Spanish: "por la superioridad del Pacto sobre la Constitución, conforme la doctrina del controle de convencionalidad". Néstor Pedro Sagués, El "control de convencionalidad" en particular sobre las constituciones nacionales, La Ley, Doctrina, p. 1, 19.02.2009.

in violation of the norms of international human rights law engages the international responsibility of the State. In this case, it was engaged because article 19(12) of the Constitution establishes prior censorship of cinematographic films and, therefore, determines the acts of the Executive, the Legislature and the Judiciary. [...] The Court has indicated that the general obligations of the State, established in Article 2 of the Convention, include the adoption of measures to suppress laws and practices of any kind that imply a violation of the guarantees established in the Convention, and also the adoption of laws and the implementation of practices leading to the effective observance of the said guarantees. [...] In this case, by maintaining cinematographic censorship in the Chilean legal system (article 19(12) of the Constitution and Decree Law 679), the State is failing to comply with the obligation to adapt its domestic law to the Convention in order to make effective the rights embodied in it, as established in Articles 2 and 1(1) of the Convention".[16]

5.

As can be seen, national judges have the duty to carry out the conventionality control[17]. Nevertheless, the Inter-American Court also carries out the control of internal norms confronting the Pact. According to the Convention, the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights are held competent to acknowledge issues related to the fulfill-

[16] I/A Court H.R., Case of *"The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile*. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73, available at www.corteidh.or.cr/docs/casos /articulos/seriec_73_ing.doc) In this case, Judge Augusto Cançado Trindade argued: "If any doubt were still to persist as to this point, i.e., that the very existence and applicability of a norm of domestic law (be it infraconstitutional or constitutional) can per se engage the responsibility of the State under a human rights treaty, the facts of the present case of "The Last Temptation of Christ" contribute, in my view decisively, to dissipate such doubt. From the facts in this case of "The Last Temptation of Christ" it is rather inferred that, in circumstances such as those of the cas d'espèce, the attempt to distinguish between the existence and the effective application of a norm of domestic law, for the purpose of determining the configuration or otherwise of the international responsibility of the State, becomes irrelevant, and discloses an extremely formalist outlook of Law, devoid of any sense. [...] the Court correctly determines that, in the circumstances of the cas d'espèce, the modifications in the domestic legal order required to harmonize this latter with the norms of protection of the American Convention constitute a form of non-pecuniary reparation under the Convention". See Judge Augusto Cançado Trindade concurring opinion I/A Court H.R., Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. available at: www.corteidh.or.cr/docs/casos/votos/vsc_cancado_73_ing.doc.

[17] The Inter-American Court of Human Rights used the expression conventionality control for the first time at the trial of *Myrna Mack Chang v. Guatemala* Case. Merits, Reparations and Costs. Judgment of November 25, 2003. Series C No. 101, available at: www.corteidh.or.cr/docs/casos/articulos/seriec_101_ing.doc.

ment of the commitments made by the States Parties to the Convention (article 33). The Commission holds the function, among others, to act when petitions and communications are presented to it, in conformity with articles 44 to 51 of the Convention. Article 44 establishes that any one person or group, or legally recognized non-governmental entity in one or more member States of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of the Convention by a signatory State Party. Except emergencies[18], the Commission, by recognizing the admissibility of the petition or communication of violation of rights, will request information to the Government of the State to which the accused authority responsible for the violation serves. On receiving the data or after the expired deadline without manifestation, the Commission will verify whether the grounds for the petition or communication still exist, being able to determine its filing, inadmissibility or dismissal. If it is not the case, the Commission will carry out the examination of the facts, the parties being awere of it It may request the interested State for any relevant information, placing itself at the disposal of the interested parties so as to reach an amicable solution (article 48). In the absence of a consensual solution, the Commission will issue a report in which facts and conclusions are displayed, adding to it the verbal or written exposures made by the interested parties. In its report, the Commission could formulate propositions and recommendations that judges adequate (article 50). If within three months the matter is not resolved or submitted to the decision of the Court by the Commission or by the interested State, the Commission may issue, by the absolute majority of the votes of its members, its opinion and conclusions on the matter ubmitted matter to its analysis. The Commission will make relevant recommendations and will set a deadline within which the State must take incumbent measures in order to remedy the examined situation. Expired the deadline, the Commission will decide, by the absolute majority of the votes of its members, whether the State has taken or not the adequate measures and whether it publishes or not its reports (article 51).

In the meanwhile, the Inter-American Court may only be provoked by the States Parties and by the Commission itself and, besides this, it may only know of any case after having elapsed the preliminary phase of admissibility, the instruction of the case and the attempt of amicable solution before the Commission, with the dispatch of its report according to article 50 of the Convention.

[18] Article 48: "2. However, in serious and urgent cases, only the presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly been committed".

The Court has the understanding, at first, that it could only carry out control on the norm already submitted to a determined case. It claimed to not have competence to carry out control in abstract, associating this with an advisory role. Accordingly, the Court decided: "With regard to the Government's failure to comply with Article 2 of the American Convention with the application of Decrees 591 and 600, this Court found that the military courts did not *per se* violate the Convention (supra 84), and regarding the alleged application of some of the provisions of those decrees that could contravene the Convention, it has already been determined that they were not enforced in the instant Case (supra 72). Consequently, the Court does not express an opinion on the compatibility of these articles with the Convention; to act otherwise would be to make an abstract analysis, which lies outside the purview of this Court"[19].

This understanding was overcome in the *Suárez Rosero v. Equador* case, in which the Court acknowledged its competence to declare the unconventionality of a norm that had violated the article 2 of the Convention, despite the fact that such norm has not been applied in a concrete case or has caused any damage. The decision has the following basis: "As the Court has maintained, the States Parties to the Convention may not order measures that violate the rights and freedoms recognized therein [...]. Whereas the first two provisions of Article 114 bis of the Ecuadorian Criminal Code accord detained persons the right to be released when the conditions indicated exist, the last paragraph of the same article contains an exception to that law. The Court considers that this exception deprives a part of the prison population of a fundamental right, on the basis of the crime of which it is accused and, hence, intrinsically injures everyone in that category. This rule has been applied in the specific case of Mr. Suárez-Rosero and has caused him undue harm. The Court further observes that, in its opinion, this law violates per se Article 2 of the American Convention, whether or not it was enforced in the instant case"[20].

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[19] I/A Court H.R., Case of Genie Lacayo v. Nicaragua. Merits, Reparations and Costs. Judgment of January 29, 1997. Series C No. 30, available at www.corteidh.or.cr/docs/casos/articulos/seriec_30_ing.doc.

[20] I/A Court H.R., Case of Suárez Rosero v. Ecuador. Merits. Judgment of November 12, 1997. Series C No. 35, available at www.corteidh.or.cr/docs/casos/articulos/seriec_35_ing.doc. Worth noting that this argument already has been sustained by Judge Antônio Augusto Cançado Trindade in previous cases by dissenting votes, in which he has argued that violation of conventional norms can happen per se, by the mere existence of internal norms violating conventional human rights' standards, despite the fact they have never been enforced, i.e.: I/A Court H.R., Case of Caballero Delgado and Santana v. Colombia. Reparations and Costs. Judgment of January 29, 1997. Series C No. 31.

To illustrate the performance of both the Commission and the Court in the control of conventionality of internal legislation is timely to consider the "Barrios Altos" case. In Peru, a statute gave amnesty to the military, police officials and civilians who had violated human rights. This legislation was enacted after a complaint against people of a paramilitary group – called "Grupo Colina", who had assassinated fifteen people in the place named "Bairros Altos", in Lima. The judge who had received the complaint decided that article 1 of the Amnesty Law violated constitutional guarantees and obligations of the State before the Inter-American System. After a few procedural issues, a new legislation was passed on, that declared that the first law would not be able to be an object of review by the Judiciary. On 14th July 1995, the Supreme Court of Justice of Lima decided to definitely close the case. Thus, the "Barrios Altos" case was taken, through petition, to the Inter-American Commission of Human Rights, where it was conducted from 1995 to 2000, when it was submitted to the Court. The Commission requested that the Court, in addition to the pertaining arrangements to the continuity of the investigation and to the remedy of damages, to repeal or make the amnesty law void. In his vote, the Brazilian Judge Cançado Trindade affirmed that the auto-amnesty laws are incompatible with the International Law of Human Rights, therefore regarding them as deprived of validity on the level of International Law of Human Rights. The Court concluded that the Amnesty Law was incompatible with the Convention – since the legislation excluded the liability and allowed the prevented the investigation and punishment of people responsible for violations of human rights -, culminating in the decision of its "unconventionality", declaring the non-application of the internal norm with *erga omnes* effect for all public authorities[21].

The non-compliance with the Inter-American Court decision generates international liability for the State. Nevertheless, some States still do not comply with decisions of the Court, as exemplified in the recent decision of the Supreme Court of Justice of Venezuela, which simply declared to be unenforceable sentence of the *López Mendoza v. Venezuela*[22] case. In this trial, the Court determined the repeal of the resolutions that revoked the political rights of López Mendoza, opponent of Hugo Chavéz in the presidential elections of 2012, considering the Venezuelan State responsible for the violation of the of defense and to motivated reasons in the administrative procedures that resulted in the sanctions of disqualification, as well responsible for the

[21] I/A Court H.R., Case of Barrios Altos v. Peru. Merits. Judgment March 14, 2001. Series C No. 75.

[22] I/A Court H.R., Case of López Mendoza v. Venezuela. Merits, Reparations, and Costs. Judgment of September 1, 2011. Series C No. 233.

violation of the rights to judicial protection and to be elected, all guaranteed in the Convention.

Therefore, the question that naturally emerges is the one of the legitimacy of the Inter-American Court to interfere on decisions of the States. The problem of democratic legitimacy deficit of the judges is even more severe in the transnational justice scenario. Note that, if the autonomy of the human rights bears importance for the consolidation of a State under rule of law, it also interferes in the ordinary proceedings of collective self-determination. In this vein, Owen Fiss argues that the consensual element inherent to the proceeding of elaboration of the treaties does not offer the international courts a democratic basis. The internal proceedings of ratification of a treaty are not necessarily democratic. Would the ratification of a treaty by China represent an act of consent among its citizens? Even in the United States the ratification of treaties lies in the hands of the Senate, which is not constituted according to the democratic principles, being therefore the form of consent peculiar to this Legislative House inadequate according to democratic politics[23]. As a result, Fiss goes on, the international courts recently set to protect the human rights remain without accountability to the citizens of the world organized according to democratic principles and, thus, must be seen as a great loss for democracy, though important for justice[24].

Worth of consideration are the Court's pronouncements that can affect the self-determination of the State Party's people, as has occurred in the *"Gelman v. Uruguai"*[25] case, in which the validity of the Uruguayan Amnesty Law (lei de caducidad) was denied, even though legitimated, through direct participation, on two occasions. The Court stated that "the fact that the Expiry Law of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct democracy, does not automatically or by itself grant legitimacy under International Law. The participation of the public in relation with the law, using methods of direct exercise of democracy, referendum (paragraph 2 of

[23] O. Fiss, *The Autonomy of Law*, "Yale Journal of International Law" 2001, v. 26, p. 517 e ss.

[24] *Ibidem*, p. 524 e ss.

[25] The Inter-American Commission on Human Rights presented, pursuant to Articles 51 and 61 of the Convention, an application against the Republic of Uruguay in relation to the enforced disappearance of María Claudia García Iruretagoyena de Gelman since late 1976, and the the suppression of identity and nationality of María Macarena Gelman García Iruretagoyena, daughter of María Claudia García de Gelman and Marcelo Gelman. It was alleged the denial of justice, impunity, and in general, the suffering caused to Juan Gelman, his family, María Macarena Gelman, and the next of kin of María Claudia García, as a consequence of the failure to investigate the facts, prosecute, and punish those responsible under Law No. 15.848 or the Expiry Law (hereinafter "the Expiry Law"), promulgated in 1986.

Article 79 of the Constitution of Uruguay) in 1989 and "plebiscite (letter A of Article 331 of the Constitution of Uruguay) regarding a referendum that declared as null Articles 1 and 4 of the Law – therefore, October 25, 2009, should be considered, as an act attributable to the State that give rise to its international responsibility. The bare existence of a democratic regime does not guarantee, per se, the permanent respect of International Law, including International Law of Human Rights, and which has also been considered by the Inter-American Democratic Charter. [...] the protection of human rights constitutes an impassable limit to the rule of the majority, that is, to the forum of the "possible to be decided" by the majorities in the democratic instance, those who should also prioritize "control of conformity with the Convention".[26]

The acts committed by military dictatorships against human rights are reprehensible and worthy of severe condemnation. It is a matter of obviousness. The problem is that the Court, without questioning the democratic quality of the forms of direct participation that set the basis for the Uruguayan law, claimed them to be insufficient to legitimize the legislation under the International Law. The Court, in order to decide, simply stated that "the protection of human rights constitutes an impassable limit to the rule of the majority". It was argued that the unconventionality of the Amnesty Law does not comes from the illegibility of the proceeding that made it emerge or from the authority that enected it, but from the circumstance of leaving the acts of human rights' violation unpunished. The unconventionality, stated the Court, results from a material aspect, and not from a "formal matter, as its source".

The idea that the direct popular participation constitutes a "formal matter", without any importance – under the undeniable indispensability of human rights protection -, requires meditation[27]. Human rights are not incompatible with democracy[28]. Both coexist and, that is why, this relation must be mediated by a democratic interpretation[29]. The Court is not dispensed from legitimizing its decisions, opposing human rights with the majority of a country's will. Facing this question, it will have to show when it is not possible to deliberate and, especially, when a majority decision, though for-

[26] I/A Court H.R., Case Gelman v. Uruguay. Merits and Reparations. Judgment of February 24, 2011 Series C No. 221, available at www.corteidh.or.cr/docs/casos/articulos/seriec_221_ing.doc.

[27] C. Santiago Nino, *La constituición de la democracia deliberativa*, Barcelona 1997, p. 21 e ss.

[28] C. Santiago Nino, *Ética y derechos humanos*, Buenos Aires 1989, p. 32 e ss.

[29] C. F. Zurn, *Deliberative Democracy and the Institutions of Judicial Review*. New York 2007, p. 89 e ss.

mally taken, does not express the true will of a people, for beeing elaborated without adequate discussion or with real or virtual exclusion of part of the population[30]. Thus, it would be up to the Court to show, in a rational manner, that either the will of the people is incompatible with the extinction of punishment for crimes against human rights or the majority decision lacks democratic basis.

Thus, the demonstration of incompatibility between democracy and human rights is not simply done with a rethorical phrase, in which what must be shown is simply affirmed. To say that the will of the majority is not compatible with human rights means nothing. Demonstration is needed by rational arguments – that in certain cases human rights are irreconcilable with democracy[31]. Is not being said that the extinction of punishment is irreconcilable – because that is not the aspect of the decision that matters here, but that the Court failed to legitimize its decision, making the reasons for that conclusion clear. The point, as previously stated, does not concern the perverse essence of the acts committed by military dictatorships, but the matter of legitimacy of a Court, composed by men of remarkable knowledge, to negate the legitimacy of a majority decision without consideration as to the democratic quality, to express the will of a people.

6.

As previously seen, the Inter-American Court understands that the conventionality control is not restricted to the infraconstitutional norms, falling upon all the internal law, in which the constitutional norms are set. In these terms, any internal normative act, be it infraconstitutional – statute, ordinance, regulation, resolution - or of constitutional nature, are subject to conventionality control by the Court.

In the meantime, also according to the Inter-American Court, the normative material of control, the so called "conventionality block"[32], is integrated by the Convention, by other human rights treaties or conventions under responsibility of the Court, as well as its precedents.[33]

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[30] R. Gargarella, *La justicia frente al gobierno (sobre el carácter contramayoritario del poder judicial)*, Barcelona 1996, p. 33 e ss.

[31] C. Santiago Nino, *Ética y derechos humanos*..., p. 55 e ss.

[32] Humberto Nogueira Alcalá, Dignidad de la persona, derechos fundamentales y bloque constitucional de derechos: una aproximación desde Chile y América Latina, *Revista de Derecho (Universidad Católica del Uruguay)*, n. 10, p. 131 e ss.

[33] In the *Gómez Palomino v. Peru* case, the Inter-American Court has carried out conventionality control based on a distinct international instrument to the American Convention on Human Rights, adopting the Inter-American Convention on Forced Disappearance of Persons as con-

7.

The decision of the Court determines the modification of the judicial order of the State Party, in order to make it compatible with the American Convention. The decision of unconventionality is mandatory to the State Party, in the terms of articles 62.3 e 68.1 of the Convention, imposing it the reform of its legislation or even its Constitution, as occurred in the "Last Temptation of Christ" and "Caesar v. Trinidad y Tobago" cases. The non-compliance with Court's decisions generates international liability (articles 1.1 and 2 of the Convention).

Therefore, the decision of the Court does not annul or derogate the internal norms by itself. However, in cases regarding crimes against humanity, the Court has declared to the non-application of the internal norms with *erga omnes* effects for all the public authorities. This is what occurred in the Barrios Altos[34], Constitutional Court of Peru[35] and La Cantuta[36] cases.

On the other hand, the Inter-American Court has been claiming mandatory force for its precedents[37], that is, the binding effect of the reasons of its decisions. In 2004, in judging "Tibi v. Ecuador", the Court warned that "an international human rights court does not have the aspiration – and has it even less so than the national body – of solving a large number of contentious cases that reproduce violations previously brought before it, and on whose essential themes it has already issued judgments that express its criterion as the natural interpreter of the legal standards that it has the responsibility of applying, that is, the provisions of the international treaty invoked by the litigants. This design, which clearly expresses a function of the Court, also suggests the characteristics that matters brought before it may have"[38]. In 2006, in the "Almonacid Arellano and others v. Chile"

trol parameter. I/A Court H.R., Case of Gómez Palomino v. Peru. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 136, available at: www.corteidh.or.cr/docs/casos/articulos/seriec_136_ing.doc.

[34] I/A Court H.R., Case of Barrios Altos v. Peru. Merits. Judgment March 14, 2001. Series C No. 75, available at www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.doc.

[35] I/A Court H.R., Case of the Constitutional Court v. Peru. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 71, available at www.corteidh.or.cr/docs/casos/articulos/seriec_71_ing.doc.

[36] I/A Court H.R., Case of La Cantuta v. Peru. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, available at www.corteidh.or.cr/docs/casos/articulos/seriec_162_ing.doc.

[37] See: L.G. Marinoni, *Curso de Direito Constitucional*. 2nd. ed. São Paulo 2013, p. 1274 e ss; L.G. Marinoni, *Precedentes Obrigatórios*. 3rd. ed. São Paulo 2013.

[38] I/A Court H.R., Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No. 114, available at www.corteidh.or.cr/docs/casos/articulos/seriec_114_ing.doc.

case, the Inter-American Court stressed again the mandatory force of its decisions reminding that, when a State ratifies a treaty, its judges are also submitted to it, so "this forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. [...] To perform this task, the Judiciary has 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"[39].

The Argentinian Supreme Court, in the Mazzeo case, in acknowledging the legitimacy of the conventionality control, stated that "when a State has ratified an international treaty such as the American Convention, its judges are also submitted to it, which demands them to ensure that the useful effect of the Convention is not diminished or invalidated by the application of legislation contrary to its provisions, object and purpose, and from the beginning lacking juridical effects. In other words, the juridical authorities must carry out a sort of conventionality control within the internal norms that apply to the concrete cases and to the American Convention on Human Rights"[40]. In this case, in addition to admitting the necessity of the conventionality control, the Argentine Supreme Court claimed to be submitted to the interpretation given to the conventional law by the Inter-American Court. This means that the Court kept it clear that, in carrying out the conventionality control, the direction granted to the Convention by the Inter-American Court must be observed: "Therefore, the Supreme Court of Argentina applies the guidelines of interpretation according to the American Convention as a minimum standard of respect of human rights, as well as the respect and safeguard of the jurisprudence of the Inter-American Court of Human Rights"[41].

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[39] I/A Court H.R., Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, available at www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.doc

[40] In Spanish: "cuando un Estado ha ratificado un tratado internacional como la Convención Americana, sus jueces, como parte del aparato del Estado, también están sometidos a ella, lo que les obliga a velar porque los efectos de las disposiciones de la Convención no se vean mermadas por la aplicación de leyes contrarias a su objeto y fin, y que desde un inicio carecen de efectos jurídicos. En otras palabras, el Poder Judicial, debe ejercer una especie de 'control de convencionalidad' entre las normas jurídicas internas que aplican en los casos concretos y la Convención Americana sobre Derechos Humanos". Argentine Supreme Court, Mazzeo, Julio Lilo et al; appeal in cassation and unconstitutionality control, M 2333.XLII, 13.07.2007.

[41] In Spanish: "Así, a Corte Suprema de Argentina aplica la pauta de interpretación que del mismo ha hecho la Corte interamericana, interpretación conforme a la Convención Americana como estándar mínimo de respeto de derechos humanos, como asi mismo el respeto y resguardo de la jurisprudencia de la Corte Interamericana de Derechos Humanos". Argentine Supreme Court, Mazzeo, Julio Lilo et al; appeal in cassation and unconstitutionality control, M 2333.XLII, 13.07.2007.

The Constitutional Court of Bolivia has also declared its binding to the precedents of the Inter-American Court: "Compliance with these requirements that constitute natural justice, ensures the correct determination of rights and obligations of persons, hence the Inter-American Court of Human Rights, *whose jurisprudence is binding to internal jurisdiction*, in its judgement of January 31, 2001 (Case of the Constitutional Court, 77 paragraph) has established that any person subject to any trial vedore any organ of the State must have the assurance that this organ is competent, independent, and impartial"[42].

Although the matter has not been properly examined by the Inter-American Court and by the national courts, it is understood, from previous decisions, that there is an attempt to assign binding effect to the *ratio decidendi* or the reasons of the decisions, in such a way as to force the national courts to adopt the meaning assigned to the conventional norm by the Inter-American Court.

It would be possible to argue that the Convention says that only the States Parties "undertake to comply with the decisions of the Court *in every case in which it takes part*" (article 68), which would mean solely obligation to respect the decisions taken in proceedings in which the State has participated as a party, something like *res judicata* or *claim preclusion* in order to prevent the denial of the decision and the review of the case.

Nevertheless, the obligation to respect the reasons of a decision has nothing to do with the participation as a party in a proceeding in which it emerged. The party, obviously, is subject to the operative part of the decision, unable to withdrawal. What follows is that the reasons or *ratio decidendi* express a juridical thesis or the meaning given to a norm according to a certain factual reality. This thesis or meaning, by revealing the understanding of the Court on how the Convention must be comprehended in certain situations, must certainly be observed by all those obliged to the Convention.

It is evident that, the binding effect of the reasons of Court's decisions only reinforces its authority, strengthening the precepts of the Convention. In such a way that the true problem lies in the necessity to elaborate and use of a dogmatic that allows an adequate operation with precedents, avoiding its equivocal perpetuation, as well as their misguided application to substantially distinct cases.

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[42] In Spanish: "El cumplimiento de estos requisitos que hacen al Juez natural, permite garantizar la correcta determinación de los derechos y obligaciones de las personas; de ahí que la Corte Interamericana de Derechos Humanos, cuya jurisprudencia es vinculante para la jurisdicción interna, en su Sentencia de 31 de enero de 2001 (Caso Tribunal Constitucional de Perú, párrafo 77), ha estabelecido que toda persona sujeta a juicio de cualquier naturaleza ante un órgano del Estado deberá contar con la garantia de que dicho órgano sea competente, independiente e imparcial". Constitutional Court of Bolivia, Sentencia 0664/2004-R, 06.05.2004.

Nonetheless, following the understanding of the Brazilian Supreme Court that confers supralegal law nature to the conventional norms, the conventional precedent contrary to the constitutional norm does not detain authority over the Brazilian Judiciary power.

The *distinguishing* technique, which allows the distinction of the case under trial for the non-adoption of precedent, has an application quite more difficult than the concrete particularities that involve the case to be judged. As commonly known, allegation has been made that the theory of the binding precedents might hinder not only the development of the law, but also its adequacy to the different social facts and values. Such an allegation is obviously unfounded, once a theory of precedents cannot disregard the reasons which demand the repeal of the precedent and the reasons that prevent the application of a precedent to a certain concrete case. This means that the modification of the social facts and values, as well as the alteration of the general conception about the law, lead to the repeal of the precedent, in the same way that they may bring about another precedent in addition to one that already exists. In other words, to regulate the submitted case to *other* circumstances and social values requires *another* precedent. Basically, the problem is not the *repeal* of the precedent and in the elaboration of a *new one,* but in the *preservation* of precedent and the edition of *another.* The distinction is subtle but holds great practical and theoretical relevance. It shows that, for the development of the law, the sole repeal of the precedent is insufficient, being indispensable, when facing *equally valid* facts and values, the elaboration of *another* precedent for the regulation of the law.

Therefore, the application of binding precedents in a supranational dimension is much more complicated than in the scope of internal law. On the supranational level, there are notable differences between the political contingencies and the social realities of each country, many times raising the impossibility to define an equally legitimate regulation for them all. In a way that the application of the *distinguishing* technique, in the dimension of conventional law, is particularly made legitimate by the difference between the realities of each country, which makes its adoption – in the perspective of the difference between the social realities and values – more frequent than in the scope of internal jurisdictions.

It is interesting to note that the same way the Inter-American Court's decisions have a difficult relation with the ordinary proceedings of collective self-determination, the application of binding precedents requires much more caution under conventionality control than under constitutionality control.

Abstrakt

Artykuł omawia decyzję brazylijskiego Sądu Najwyższego w sprawie hierarchii międzynarodowych traktatów dotyczących praw człowieka w prawie brazylijskim. Wyjaśniono nadrzędność tychże traktatów i sposób działania kontroli zgodności prawnej w prawie brazylijskim. Przedstawiono również teorie kontroli nadkonstytucyjności i zgodności prawnej autorstwa Międzyamerykańskiego Trybunału Praw Człowieka oraz uwagi dotyczące przedmiotu i parametrów narzędzia conventionality control w Sądzie Międzyamerykańskim. Zinterpretowano i omówiono precedensy dotyczące kontroli zgodności prawnej.

Słowa kluczowe: Amerykańska Konwencja Praw Człowieka, conventionality control, prawo brazylijskie