INTER-AMERICAN HUMAN RIGHTS SYSTEM AS A TRANSNATIONAL PUBLIC SPHERE: LEGAL AND POLITICAL ASPECTS OF THE IMPLEMENTATION OF INTERNATIONAL DECISIONS

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1 Introduction

Among the many achievements made by Brazil since the democratic transition, we can highlight the country's increasing participation in the international regime of human rights, ratifying and adhering to treaties, both in the context of the United Nations (UN) and in the context of the Organization of American States (OAS). Regionally, the country ratified the American Convention on Human Rights (ACHR) in 1992 and recognized the compulsory jurisdiction of the Inter-American Court of Human Rights (IACHR) in 1998. Since 1989, Brazil has ratified or adhered to many other regional instruments of human rights protection, such as the Inter-American Convention to Prevent and Punish Torture (in 1989), the Convention on the Prevention, Punishment and Eradication of Violence against Women (in 1995), the Protocol of San Salvador and the Protocol of the American Convention on Human Rights to Abolish the Death Penalty (in 1996) and the Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (in 2001).

At the same time that the process of ratification of and adherence to international treaties on human rights is a foreign policy decision, implementing the principle of the primacy of human rights in international relations as established by Article 4, Section II of the Constitution of 1988, a deeper understanding of what these international commitments mean domestically is still a challenge. On the one

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hand, there is a formal consensus in Brazil around the idea of human rights, made evident by the enactment of our constitution and the ratification of international treaties. On the other hand, routine practices of state agents and private individuals, both domestically and internationally, contradict this consensus.

This article will discuss progress and obstacles in Brazil regarding the implementation of our international human rights obligations, focusing mainly on the Inter-American System of Human Rights (ISHR). Such obstacles are political-legal and are rooted in a vision of a nationalist and parochial state, associated with privatist non-inclusive political practices that remain in both the state and civil society. The advances, in turn, concern the efficient use of the Inter-American system by democratic sectors of the state and civil society as a space for the deconstruction of these practices and strengthening of a democratic and inclusive culture.

We make, therefore, two main arguments, one primarily political in nature and another primarily legal. The first argument is that the ISHR provides the institutional basis for the construction of a transnational public sphere that can contribute to the expansion of Brazilian democracy. We preliminarily understand the concept of the public sphere as non-state *loci* of deliberation, where it is possible to attain the formation of collective will, the justification of previously agreed-upon decisions, and the forging of new identities. This discursively formed political will may influence the formal processes of state decision making, contributing to public policies that are beneficial to vulnerable social groups. However, sometimes national structures do not allow certain items to reach the public sphere, or if they do, they are not transformed into official public policies, because they reach out to invisible social groups, challenge powerful economic interests, among other reasons. In these moments, transnational public spheres can be decisive. Issues that gain no traction on the national political agenda can be addressed in these transnational spaces and, later, be included on the domestic political agenda in a more powerful position. However, for the ISHR as a transnational public sphere to produce the aforementioned political effects, it is necessary that its organs have credibility and that its orders be followed by the states.

The second argument we intend to advance is that a major challenge to the effectiveness of the decisions of the organs of the ISHR in Brazil is the opposition of the national legal community to incorporating international human rights law in its practices. We refer here to both the implementation of the decisions against Brazil issued by international bodies and, especially, so-called "conventionality control" that must be exercised by the Brazilian authorities, along with the known safeguards ensuring legality and constitutionality, avoiding the violation of international human rights conventions. There is a legal duty to conform domestic conduct to international standards of human rights protection, which has been neglected by national legal actors. This reality threatens the legitimacy of Inter-American system.

In section 2 of this article, we discuss some relevant issues in Brazil that have arisen after its transition to democracy and also recent international developments that are essential for understanding the institutional basis for the ISHR as a transnational public sphere. Unfortunately, within the narrow scope of this article, we cannot have a conceptual discussion about the transnational public sphere, and we focus on processes that encourage the formation of transnational public spheres, as well

as the inclusion of Brazil in these processes. In section 3, we continue to develop this argument through an analysis of the increasingly intense participation of Brazil in the ISHR, highlighting the major obstacles that still need to be overcome. The concept of reparation in international human rights law is broad and international decisions, as we will see, provide for measures for compensatory damages, symbolic measures and measures of non-repetition of the violation found. Among these last measures, we highlight the obligation to diligently investigate the alleged crime, prosecute, and possibly punish those responsible for rights violations. In section 4, we will affirm that complying with a sentence is an international legal obligation of the Brazilian authorities. In section 5, we will focus on the analysis of the obligation of due diligence, which deals directly with the jurisdiction of traditional legal actors, and where we address Brazil's non-compliance with most judgments against it.

2 The inclusion of Brazil in the international human rights regime and the formation of transnational public spheres

Brazil today is a party to the main human rights treaties. However, there is much skepticism regarding the effectiveness of these legal instruments. Indeed, the question about the power of law to shape conduct, invoked at every turn by those who are interested in law as an instrument of social change, is even more acute in the case of international law than in other areas of law. What is the relevance of an international standard that creates obligations for the state since, ultimately, the capacity to honor international obligations depends on the state itself, given that there is no superior body to enforce its mandates? How can the gradual process of Brazil's inclusion in international human rights regime be understood within the international and Brazilian context during the end of the 20th century and the beginning of the present century?

According to the realist hegemonic school in international relations theory, associated with the Hobbesian model of Westphalia,[1] states conform to international standards when they realize, through a strategic calculation, that it would be consistent with national interests. The motive of a state's action is always to maximize its interest and to struggle for power. Likewise, they violate international standards for strategic reasons, under a guise of legal reasoning to justify their actions. National sovereignty would be the legal concept that would explain this political vision focused on the state's interests.

As a matter concerning the *raison d'État*, the Brazilian foreign policy organs recgonized that adherence to international human rights law was connected to multilateralism and the expansion of Brazilian international autonomy, which were Brazilian foreign policy priorities during the 1990s.[2] Indeed, the government wanted Brazil to have credibility, showing the international community that Brazil had completed the transition from dictatorship to democracy and that it had entered a new stage in its economic, social and political history. Ratification of human rights treaties was considered an eloquent sign of this new phase.[3] Similarly, in the post-Cold War world, multilateralism was seen as giving a more active role, which otherwise would have been out of reach, to countries on the periphery of global relevance. It was thought that Brazilian participation in international regulatory structures would

preserve and increase its autonomy. Again, stronger international systems of human rights protections were an important step in this direction (PINHEIRO, 2004, p. 58-62).

But this realist explanation can explain neither the entire international scene of the post-Cold War era nor that of the national context of democratic transition. According to Anne-Marie Slaughter, the realist "challenge" to international law and the coercive capacity of international legal norms can be met if we change the lens of absolute sovereignty, which has been used for two hundred years to understand international relations, to a different lens, of the liberal-constructive perspective, which sees new relevant international actors, in addition to the state (SLAUGHTER, 1993).

According to this view, state sovereignty, which was absolute and unitary in the Westphalian view, was disrupted due to the forces of globalization and multiculturalism. "Above" and "below," such processes have imploded the principle of territoriality as a defining criterion of domestic affairs, the exclusive domain of sovereign states, and international affairs, the subject of negotiation between states (GOMEZ, 1998). The breakdown of sovereignty gives insight into the role of new actors in international relations that are articulated in transnational networks around different issues, superseding the old dichotomy mentioned above. In fact, the most relevant contemporary issues such as the environment, health, human rights, security and the economy compel structures that underlie different levels of governance, from local to global.[4] Thus, sovereignty in the context of the contemporary world is neither absolute nor flexible, but broken.

Slaughter argues that networks of civil society organizations and social movements, as well as networks of state agents (international associations of mayors, judges, and legislators, among others), brought about a dynamic in international relations that cannot be explained exclusively from the realist perspective of the balance of power between nations (SLAUGHTER, 1993). Margaret Keck and Kathryn Sikkink point out networks involving international human rights organizations, from grassroots organizations to bureaucratic branches of international organizations (such as the Inter-American Commission on Human Rights, for example) and states (such as the Special Secretariat for Human Rights of the Presidency of the Republic), to international NGOs (KECK, SIKKINK, 1998). These networks have been effective in creating soft law, such as reports, codes of conduct, guidelines, and declarations of principles. They also have been effective in pressuring states and international organizations to adopt practices and standards closer to the codes they create.

The liberal-constructivist perspective emphasizes the importance of international organizations that were formed after the Second World War, such as the United Nations, the Organization of American States, the European Union and, more recently, the World Trade Organization. Such organizations, as well as subjects of international law with their own legal personality, are also spaces for deliberation and negotiation. In this sense, they are certainly arenas of struggle for power, as the realist school would say, but are also *loci* where values are constructed and disseminated, rooted traditional practices are challenged and given new meaning and repertoires of action are built and expanded. These institutions provide the basis for deliberative forums where interests and viewpoints are presented and perhaps changed during the course of negotiation: "States may not know what they want when they begin to

negotiate complex issues within a complex institutional framework, or may change their ideas during the process leading to changes in how they understand their national interests." (HURRELL, 2001, p. 37).

According to Andrew Hurrell, to illustrate this point, "international institutions can be the place where state officials in Brazil and Argentina, for example, are exposed to new standards" (HURRELL, 2001).

These organizations constitute international regimes that can impact the balance of power between nations and between the state and groups of individuals as they create a kind of international law. International actors considered weaker can increase their chances of participation, in accordance with their "ability to use international platforms and to take advantage of established arguments to promote new and more inclusive rules and institutions" (HURRELL, 2001, p.38).

These new lenses of weakened sovereignty and of thematic networks allow us a more adequate assessment of the dynamics of the international human rights regime. Returning to the example of Brazil, in fact, the "prevalence of human rights" in international relations, as mentioned in the Constitution, was a policy that was gradually implemented over a long period of time, involving not only the state but also civil society. Such involvement has intensified since 1993 when the then Ministry of Foreign Affairs sponsored a national meeting on human rights to produce an assessment of Brazil's record, to be presented at the United Nations Conference of Human Rights in Vienna. After the conference, a series of meetings was held in Brazilian state capitals, where the push for the ratification of human rights treaties was consistent and decisive. From these meetings, the first National Plan for Human Rights in 1996 was developed, setting forth the top human rights goals to be prioritized by the Executive in all its areas of activity.[5]

The affirmation of the domestic commitment to human rights and adherence to international treaties allowed for appeals to international monitoring bodies as an additional tool for strengthening the culture of respect for rights. As we shall see, different organizations of civil society and different social networks gradually formed around the Inter-American System of Human Rights (ISHR) and other supranational forums and, therefore, on several occasions managed to make the Brazilian government give a more appropriate response to allegations of human rights violations, which previously would have been ignored.

Indeed, the involvement of Brazilian actors with the Inter-American System Human Rights created an interesting dynamic involving the State, civil society organizations and organs of the system. The relationship between these entities is not generally peaceful and harmonious, but it can still spur advances in the promotion of human rights, depending on how power is configured at that moment. Cavallaro and Schaffer explain the dialectical character of this relationship:

> *Civil society can seek the enforcement of individual rights through the use of human rights protection mechanisms at the Inter-American System of Human Rights; in turn, the System needs the support of civil society to bolster its legitimacy. Governments provide the resources necessary to keep the Inter-American System functioning and elect individuals who will serve as commissioners or judges in their monitoring bodies, but these institutions also*

> *depend on the voluntary acceptance of their authority and good-faith participation in the established rules of engagement to be effective. And those institutions that constitute the system have the authority to settle claims and issue decisions requiring the action of both governments and civil society actors, but that authority depends on the perception of the latter group that the authority is exercised in a reasonable and appropriate.*
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> (CAVALLARO, SCHAFFER 2004, p. 220-221).

There is no doubt among those who defend the ISHR that it has already established itself as an important tool for promoting human rights. So much so that several civil society organizations are incorporating litigation at the ISHR as part of their strategy and others specialize in bringing cases to supranational bodies. The input of these actors, in turn, affects how these international organs work and force states to negotiate with those to whom they did not previously want to listen. Throughout the litigation and the many international exchanges between state actors and civil society from different countries, certain practices are criticized, new repertoires of action are acquired and the asymmetry of power between state and individual can be mitigated. Such effects may result from genuine learning processes and democratic consolidation, which we call processes of developing consciousness (*raising awareness*) or strategies of political pressure, creating awkward situations for states that call themselves democratic (*embarrassment power*).

However, much progress is still needed in order to give effect to the determinations of the legal organs of the system, whether regarding compliance with the decisions of international bodies like the Inter-American Commission on Human Rights (IACHR) and, especially, the Inter-American Court of Human Rights (ICHR), or through the direct use of these parameters by the national judiciary. Indeed, national authorities do not comply fully and willingly with international obligations and repeated failure to comply can cause a loss of legitimacy and credibility of the ISHR with respect to the victims of human violations and the civil society organizations that represent them. The positive effects of the processes described above for the construction of a democratic culture could be lost. Let us consider the case of Brazil before the ISHR.

3 Brazil at the Inter-American System of Human Rights: advances and obstacles

The Brazilian state, subsequent to the ratification of major international human rights treaties, was slow to incorporate the international human rights regime, giving little importance to supranational litigation. Especially in the first decade after the transition to democracy, the state failed to adequately respond to the requests of the IACHR, ignored deadlines and responded to petitions that described in detail serious human rights violations with a few generic paragraphs (CAVALLARO, 2002, p. 482). Recommendations of the ISHR organs were often disregarded by authorities, especially at the state level, who considered the judgments to be infringements upon national sovereignty. Even today, the Brazilian government appears to be resistant to the scrutiny of its public policies by international bodies, as seen from the recent

reaction of the Brazilian State to the IACHR decision ordering provisional measures to suspend the construction of the hydroelectric plant of Belo Monte, due to alleged deficiencies in the licensing process that would result in the violation of the rights of indigenous peoples of that region.[6]

The Brazilian civil society organizations, in turn, were also initially reluctant to make use of international organs. Perhaps because of the delay in Brazil's full participation in the international human rights regime, supranational litigation was not part of the repertoire of actions of Brazilian human rights activists over the past decade. International NGOs have adopted as part of its mission the dissemination of the ISHR as a resource for domestic promotion of human rights. They knew that:

> *Introducing civil society to the system would undermine the attempts of the Brazilian state to classify the dispute as a kind of imperialist intervention against the system. Finally, expanding the range of litigants necessarily expanded the requirement for greater state involvement in the Inter-American system.*
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> (CAVALLARO, 2002, p. 484).

The task of involving Brazilian organizations in this strategy was difficult. In fact, until May 1994, among the hundreds of cases pending in the IACHR and the thousands of petitions forwarded by activists in South America, only ten referred to Brazil (CAVALLARO, 2002, p. 483). This is partly explained by the Brazilian delay in ratifying the American Convention of Human Rights, in 1992, and in recognizing the jurisdiction of the ICHR, in 1998, finally implementing Article 7 of the Temporary Constitutional Provisions Act. In 1998, moreover, only about 3% of the pending cases before the IACHR were against Brazil (CAVALLARO, 2002, p. 483).

However, and despite some difficulty, the efforts of a few pioneer international and national NGOs in Brazil using the mechanism of individual petitioning began to bear fruit. In 2005, the number of cases against Brazil in the IACHR reached 90, and in the IACHR 2004 report, Brazil ranked third amongst countries in number of complaints against it and cases pending (COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS, 2004, cap. III, seção A).[7] Today, according to the 2010 report of the IACHR, 97 cases are pending against Brazil, which ranked fifth in the number of cases, after Peru (349 cases), Argentina (209 cases), Colombia (183 cases) and Ecuador (133 cases).[8]

The number of prosecuted cases against Brazil by the IACHR remains low compared to other Latin American countries such as Peru, Mexico or Honduras. To date, five cases have been judged against Brazil, in which four sentences have held the country liable and established recommendations whose implementation are still being monitored (CORTE INTERAMERICANA DE DIREITOS HUMANOS, Ximenes Lopes v. Brasil, 2006; Escher e outros v. Brasil, 2009a;Garibaldi v. Brasil, 2009b;Julia Gomes Lund e outros v. Brasil, 2011b), and in which one has been closed (CORTE INTERAMERICANA DE DIREITOS HUMANOS, Nogueira de Carvalho e outro v. Brasil, 2006c). In addition to the sentences, various provisional measures were issued against Brazil in five cases (CORTE INTERAMERICANA DE DIREITOS HUMANOS, Penitenciária Urso Branco, 2002;Unidade de Internação Sócio-Educativa, 2011a;Penitenciária Dr. Sebastião Martins,

2006b; Complexo do Tatuapé da Febem, 2005) and in one case there was the rejection of a provisional measure (CORTE INTERAMERICANA DE DIREITOS HUMANOS, Julia Gomes Lund e outros v. Brasil, 2011b). There is no case against Brazil set to go to trial on the Court's docket at the moment.

In response to the growing number of petitions sent to the IACHR, the Brazilian state has also demonstrated a greater commitment to human rights during the litigation. In 1995, it established a Human Rights Secretariat in the Ministry of Foreign Affairs, specializing in systems of the United Nations and Organization of American States, which is the body that formally represents Brazil regarding human rights issues, receiving all communications originating from those international organizations. The Department of Human Rights, which in 2003 achieved the status of Ministry and had direct ties to the presidency, is also part of the delegation responsible for the communications of the Brazilian state before the IACHR and the Court. Although it was established in 1977, it was only in the 1990s that the Secretariat assumed a more active role in international human rights litigation, both in regard to the litigation itself, and to the negotiations with the other domestic organs with jurisdiction to deal with the topics being discussed internationally. Recently, the Attorney General's Office has also played a role in representing Brazil, being responsible for responding to the arguments concerning the admissibility of cases, specifically questions relating to the exhaustion of domestic remedies.

We can thus see an evolution in the federal executive branch with respect to the Brazilian response to international human rights demands. We went from a stage of great ignorance about the ISHR, to the creation of a specialized team that has begun to respond more adequately to requests. Since 2000, the state has adopted a more proactive stance and instead of merely reacting to requests for legal and political action, has sought to create conditions to apply Article 48 (b) of the ACHR to close the case when the grounds for pursuing it cease to exist. This movement, however, is not linear. The example mentioned above, regarding the rejected precautionary measures prescribed by the IACHR in the Belo Monte case, seems to be a return to Brazil's prior dynamic with the ISHR.

For this strategy to succeed, the organs responsible for representing Brazil must negotiate with the Brazilian state and municipal authorities, which are generally those that have constitutional authority to examine and resolve most of the alleged human rights violations. In fact, our federative pact, when confronted with Articles 2 (the duty to adopt domestic legislation consistent with the treaty), 28 (federal clause) and 681 (requiring the State party to comply with the ruling of the court in any case to which it is a party) of the ACHR, creates a paradoxical situation: the federal government responds internationally for acts over which it has limited control and cannot argue this fact to exempt itself from international liability.

Besides dealing with the state and local authorities, these agencies of the federal executive branch face the challenge of engaging the legislative and judicial branches with the ISHR. Many of the recommendations of the IACHR and the Court's judgments require legislative changes whose approval encounters resistance. Likewise, the Brazilian judiciary has not exercised the forementioned "control of conventionality" and does not tailor their decisions to the standards developed by

the ISHR, although the ACHR has been formally incorporated in domestic law through Decree No. 678 of November 6, 1992.

There has been no resolution regarding the need for a special internal procedure to ensure the execution of the Court's judgments, especially with respect to the payment of damages. Article 63.1 of the American Convention authorizes the court to determine "reparatory measures that tend to nullify the effects of violations. This article guarantees the right, and if applicable, provides the necessary reparations as well as establishing the compensatory damages to the injured party" (KRSTICEVIC, 2007, p. 24). With respect to compensation, Article 68.2 of the ACHR sets forth that the payment must be made in accordance with internal procedures in force. In Brazil, the issue is still pending and the need for ratification of the Court's ruling and the compulsory system requiring writs for such payments is being discussed, in light of the system's slowness, and the fact that the victim has gone through a long domestic and international ordeal until the Court's decision is handed down and deadlines for compliance with the judgment are set. According to bill No. 4.667/2004, presented by then Deputy José Eduardo Cardozo, the payment of compensation mandated by decisions of international bodies is the responsibility of the Union - except for the right to seek compensation from the person or entity, in the public or private sphere, who caused the human rights violation - and the sentence is enforceable without any further action, unlike the foreign judgments that need to be ratified. The project has been amended to substantially alter the system of payment proposed in the original version (AFFONSO, LAMY, 2005).

With respect to compliance with the measures of non-repetition and the obligation to investigate, the situation is also serious. Part of the problem stems from the fact that the majority of the judges, ministers, prosecutors and lawyers have little familiarity with international law, and in particular international human rights law. Using this branch of law has not been part of their repertoire of actions and needs to be developed, as was the case with human rights activists in the 1990s.

Jose Ricardo Cunha conducted an interesting study at the Rio de Janeiro State Court regarding the level of education and interest in human rights of magistrate judges responsible for 225 of the 244 judgments of the Judicial District. Some of their responses corroborate the argument made above: 84% of judges surveyed had no formal education in human rights, 40% had never studied anything about human rights, even informally, 93% had never engaged in any type of social service or public service. With regard to the mechanisms of international human rights protection, 59% had only a superficial knowledge of the systems of the UN and OAS, 20% admitted having no knowledge about these systems, and only 13% said they read the decisions of international courts with regularity (CUNHA, 2011, p. 27-40). Meanwhile, the courts of other countries, such as Argentina and Colombia, have routinely applied the decisions of the organs of the system, in cases that dealt with violations in other countries, and have recognized the constitutional hierarchy of these decisions (DI CORLETO, 2007; UPRIMNY, 2007).

Ignorance at different levels of government about the obligations arising from membership in the ISHR presents two problems: it increases the chances that there is a violation of the ACHR, generating new reports sent to the IACHR, and also

greatly complicates the implementation of the judgments and recommendations issued in the cases that have reached the System.

Given this reality, civil society organizations, the Secretariat for Human Rights and academia have been trying, and succeeding to a great extent, to change the current situation by promoting seminars and workshops on this issue and by including international human rights law in the curricula of law schools. Since 2004, international law came to be part of the minimum curriculum guidelines in law schools (BRAZIL, 2004), and international law issues have appeared on the bar examination.

Despite real progress, the translation of this growing awareness of the legitimacy of the ISHR in effecting social change and universal rights is still sporadic and the question of compliance with judgments remains a challenge. This problem is not exclusive to Brazil, according to research by Fernando Basch, Leonardo Filippini, Ana Laya, Mariano Nino, Felicitas Rossi and Barbara Schreiber. Among the 462 protective measures issued by both the IACHR and the Inter-American Court between 2001 and 2006, 50% were complied with, 14% were partially complied with and 36% were not complied with at all. The measures determined by the ISHR organs were classified into four broad categories: compensation to victims, measures of non-repetition, duty to investigate and punish violations of rights and measures protecting victims and witnesses. Of these, the measures with the highest degree of compliance are those involving compensation (economic or symbolic) and those with the lowest degree are those involving non-repetition and the requirement to investigate and punish. Also according to the study, during this period the IACHR issued 42 measures against Brazil in 6 cases, with a 41% compliance rate, 24% partial compliance rate, and 36% non-compliance rate (BASCH et al., 2010).

Complying with the System's recommendations depends on a number of factors and is "significantly increased when the cases are accompanied by social pressure on the domestic authorities through several channels" (CAVALLARO, SCHAFFER, 2004, p. 235) capable of mobilizing the public. Organizations that specialize in litigating cases before supranational courts must take into account the domestic political agenda when selecting their cases, if indeed they desire social change:

> *Potential litigants at the international level should be careful not to set their own agenda, based solely on legal criteria. Experience shows that international disputes that are not accompanied by campaigns organized by social movements and/or the media rarely produce useful results. As a result, we emphasize the need for supranational litigants to avoid taking the lead in strategic decision-making on how best to use the Inter-American System.*
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> (CAVALLARO, SCHAFFER, 2004, p. 235).

Indeed, civil society organizations specializing in this type of litigation do not merely refer any case to the IACHR and have developed a kind of strategy that has been called impact advocacy. In general, petitions sent to the IACHR are based on three main criteria: (a) cases that fully reflect systematic patterns of domestic human rights violations, (b) cases that raise issues on which the IACHR has not spoken clearly, aimed at building new international standards of human rights protection, and (c) humanitarian cases, in which the extreme vulnerability of the victim justifies the

litigation, even though they produce none of the other aforementioned effects. Thus, before sending the petition to the IACHR, there is a strategic assessment in light of the legal and political context of that country and of the ISHR with respect to the objectives of the litigation and the chances of success in attaining, more or less, those objectives. "Success," in this context, does not mean a purely procedural victory. It means, above all, improving the landscape of human rights violations, which sometimes can be even partially achieved, in the proceedings, in the negotiations, in lobbying for human rights in the context of international litigation, independently of the final result of the litigation.

In addition to these obstacles, there are the internal deficiencies of the ISHR, which are vulnerable to the actions of states dissatisfied with the criticisms made by both the IACHR and the Court. These two bodies constantly undergo political pressure when countries withhold funding, attempt to prevent publication of the IACHR's reports with findings that the ACHR has been violated, and attempt to intervene in the appointment of Commissioners to the IACHR and judges to the Court. These deficiencies eventually cause the ISHR to replicate problems in the domestic sphere, which itself is a reason to seek a remedy at the supranational level, namely for the undue delay in issuing decisions (THEREIN; GOSSELIN, 1997, p.213).

In the next section, we examine to what extent the legal duty to investigate, prosecute and punish is being properly implemented by the Brazilian authorities.

4 The legal obligation to wholly comply with international decisions

With regard to Brazilian legal actors, ignorance about our international obligations discussed above is responsible for most of the convictions against Brazil and the difficulties in fulfilling the decisions of the organs of the Inter-American System. This is due to the fact that the main cause of the international declarations of Brazil's liability are violations of Article 1.1 (general duty to guarantee) combined with Article 8 (procedural safeguards) and Article 25 (judicial protection) of the ACHR. This situation could be reversed or mitigated if our legal actors routinely applied international standards of human rights protection.

Before considering the Articles mentioned above, some legal and policy points should be clarified. First, although the Commission and the Court are organs of the OAS, which, in turn, is an international organization subject to foreign policy pressures on State-members, the operating logic of the ISHR is supranational, not intergovernmental or "inter-national." Unlike those individuals who work in other organs of the OAS, such as the General Assembly, judges and commissioners act in their own names, as human rights experts with all the guarantees of exercising their functions with independence, and do not represent the interest of any State, although by necessity they are nominated for the position necessarily by a member state. Of course, this feature does not immunize the ISHR from political pressures, as mentioned above, but significantly reduces the potential for this kind of embarrassment.

Secondly, in accordance with Article 62.1 of the ACHR, the so-called optional clause of compulsory jurisdiction, states in the region decide independently whether or

not they recognize the jurisdiction of the Court. This decision is a state act of sovereignty. However, once the jurisdiction of the Court has been recognized, it becomes binding and irrevocable, except in cases provided for in the Pact of San José. Pursuant to Article 68.1 and Article 2 of the American Convention, States agree to fully comply with the decision issued by the Inter-American Court, and no argument based on domestic law, such as the statute of limitations, can be used to remove this obligation. Failure to comply with the court decision, *per se*, gives rise to international liability. Even if a State decides to denounce the American Convention to avoid the obligation to implement a given sentence, the possible violations that have come before the ICHR before the State's denunciation will be examined and the international liability of the State could be declared.[9]

With respect to decisions of the IACHR, controversy exists as to its mandatory nature.[10] As mere recommendations, the reports of noncompliance do not give rise to international liability, even if they are issued after a procedure that follows the minimum requirements of due process, such as the right to confront hostile witnesses and present a full defense, and they are similar to a judgment, with a statement of facts, legal reasoning and the order (NAGADO; SEIXAS, 2009, p. 295-299). Nevertheless, the Court declared in the *Loyaza Tamayo* case that states should make every effort to comply with the decisions of the IACHR as a requirement of the rule of good faith in the interpretation of treaties, codified in the Vienna Convention on the Law of Treaties, in 1969:

> *Under the principle of good faith, enshrined in Article 31.1 of the Vienna Convention, if a State signs or ratifies an international treaty, especially one dealing with human rights, such as the American Convention, it has the obligation to make its best effort to implement the recommendations of an organ whose mandate is to protect, such as the Inter-American Commission, which is, moreover, one of the major organs of the Organization of American States, and whose function is to "promote the observance and defense of human rights" in the hemisphere*
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> (Letter OAS, articles 52 and 111)
> (CORTE INTERAMERICANA DE DIREITOS HUMANOS, Loayza Tamayo v. Perú, 1997a, para. 80).11

We must note that the obligation to comply with the provisions of the ACHR stems from ratification of or accession to the treaty, and not through recognition of the compulsory jurisdiction of the Inter-American Court. The IACHR is the body authorized by the relevant treaties to interpret the ACHR. Moreover, the ACHR, in Article 2, establishes the duty to adopt domestic laws necessary to honor the obligations set out in that instrument, and the Vienna Convention on the Law of Treaties, Article 27 provides that a State "may not invoke the provisions of national law to justify its failure to execute its obligations under a treaty."

There are plans for a system to ensure compliance with the collective decisions of the organs of the ISHR. According to the IACHR, the Inter-American Court must submit annual reports to the OAS General Assembly stating, among other things, breach of its decisions by State-parties. The IACHR proceeds in the same way, even without express authority under the ACHR. The goal is to shame the state in violation in a strategy known as "naming and shaming," to facilitate diplomatic initiatives encouraging the state to comply with the decision in question. Among the powers

of the General Assembly, although this feature has not yet been used, it is possible to issue resolution (as such, not binding) recommending to the other State-parties of the OAS to impose economic sanctions on the violating state until the decision from the ISHR organ in question is implemented (KRSTICEVIC, 2007, p. 34-37).

Thirdly, the concept of reparations in international law is broader than in domestic law. In addition to the obligation to monetarily compensate victims and their relatives, these international judgments imposing liability include symbolic reparations, a finding that domestic authorities are responsible for the violations and the so-called "measures of non-repetition," which could involve changes in public policy, domestic legislation and the jurisprudence of that country's highest court. The Court imposed measures of non-repetition in the recent case of *Julia Gomes Lund et al vs. Brazil* (Araguaia Guerrilla case), requiring that the state eliminate all legal and political obstacles to investigate and prosecute the perpetrators of the crime of forced disappearance and other crimes against humanity (including torture) (CORTE INTERAMERICANA DE DIREITOS HUMANOS, Julia Gomes Lund e outros v. Brasil, 2011, para. 65). Thus, although there are doubts about the execution of the economic aspects of an international sentence, as noted above, several aspects of the measures of non-repetition usually imposed against Brazil could be implemented without the need for a law establishing special procedures.

Fourth, specifically with regard to Brazil, there is the position taken by the Brazilian Supreme Court in the case of RE 466.343 on December 3, 2008, which looked specifically at the ACHR and consecrated the supra-legal character in the Brazilian legal system of human rights treaties that were ratified before Constitutional Amendment No. 45, denying, as a consequence, the applicability of domestic laws in conflict with the treaty's provisions. The result of the decision was the issuance of binding precedent No. 25 of the Brazilian Supreme Court in 2009, deeming illegal the imprisonment of a trustee in breach of trust, in any form, despite the constitutional provision of Article 5, LXVII of the Federal Constitution. We conclude that any other constitutional provisions that conflict with the ACHR, in addition to those regulating the imprisonment of a trustee in breach of trust, also lose their applicability.

Also with respect to Brazil, in addition to the provisions in Article 4, Section 2, and Article 5, paragraphs 2 and 3, Article 7 of the Temporary Constitutional Provisions Act announces that the Brazilian State shall strive for the formation of an international court of human rights. The systematic interpretation of the Constitution supports the view that international human rights treaties will have constitutional status, or at least supra-legal status, and the international bodies, whose contentious jurisdiction is recognized by Brazil through a specific act, shall have authority domestically as interpreters of the Constitution. The thesis that the decisions that such bodies have generated are of a political nature and that therefore would not be subject to mandatory compliance is not consistent with this interpretation.

Thus, it is clear that the ACHR imposes legal obligations upon the Brazilian state authorities, as it is not merely a political document which sets forth aspirations to be pursued in the long term. This Convention, as well as international human rights treaties ratified by Brazil, creates legal obligations for the country. As a legal instrument that becomes part of the domestic legal system, the monitoring of compliance with these obligations should not be performed only by supranational bodies, but also by those

who carry out the essential functions of domestic justice, in addition to the Judiciary. In fact, next to the control of legality and constitutionality, it is imperative to achieving conventionality control.[12] Understanding how articles of the ACHR are interpreted by the Inter-American Court and also by the IACHR is included in this obligation.

Achieving this control is even more indispensable to the extent that a significant part of the international recommendations made to Brazil refer directly to actions that impact the jurisdiction of executive branch agencies responsible for public safety and the prison system, as well as organs of the judiciary, prosecutors, attorneys and the public defender. These actions relate to the duty of due diligence and the obligation to prevent, investigate and punish, as discussed below.

5 Challenges for legal actors in Brazil: the duty of due diligence and the need of achieving control of conventionality

In accordance with the stipulations provided by the IACHR in the sentence of *Velásquez Rodríguez v. Honduras*, the first case to be decided by that body, the interpretation of Article 1.1, which brings the so-called general guarantee clause, combined with the other articles that spell out individual rights, leads to the conclusion that the state's duty to promote human rights is not confined to mere abstention from violations of human rights. According to the Court, the State is internationally liable for violation of the Articles of the ACHR, even if perpetrated by individuals, and not by agents of the State, if the latter did not act with "due diligence" to prevent such violations. The duty of due diligence, in turn, was interpreted by the Court as including the obligation to "prevent, investigate and punish" the relevant human rights crimes (CORTE INTERAMERICANA DE DIREITOS HUMANOS, *Velazquez Rodríguez v. Honduras*, 1988, para. 162, 172-174). Thus, even if there has been a violation of rights as codified in the American Convention, if the State acted with due diligence in the investigation of crime, preventing impunity, no international liability will be imposed.

Noteworthy within this triple obligation of the States is the duty to "investigate" that results from the settled interpretation of Article 1.1, in relation to other rights listed in the ACHR, as stated above, and which also ends up involving the analysis of possible violation of Articles 8 (fair trial) and 25 (judicial protection) of the ACHR. Regarding the State's liability on acts and omissions that are linked to human rights violations, the Inter-American Court emphasizes in the first sentence in which it holds Brazilian liable:

> *The Court considers it appropriate to remember that it is a basic principle of the law of international liability of the state, supported by International Human Rights Law, that every state is internationally liable for acts or omissions of any of its powers or organs in violation of internationally recognized rights, under Article 1.1 of the American Convention.*
> *Articles 8 and 25 specify, regarding the acts and omissions of domestic judicial organs, the scope of the forementioned principle of the imposition of any liability for the acts of State organs.*
>
> (CORTE INTERAMERICANA DE DIREITOS HUMANOS, *Ximenes Lopes v. Brazil*, 2006, para. 172-173).

To meet these obligations, the investigation must be "performed by all legal means available and geared towards uncovering the truth and to the investigation, prosecution and punishment of those responsible for the violations, especially when state agents are, or could be, involved" (CORTE INTERAMERICANA DE DIREITOS HUMANOS, *Ximenes Lopes v. Brazil*, 2006 to. 148). The obligation to investigate, prosecute and punish, the Court points out, is an obligation of the means, not of the end result, but to be fully satisfied, even if punishment is not feasible, the process should be serious, impartial and effective.

According to a survey conducted by Bartira Nagado, in all cases in which Brazil was declared internationally liable for violations of the ACHR, whether in the reports of the IACHR, or in the judgments of the Inter-American Court, the country failed to adequately comply with its obligations to investigate, prosecute and punish those responsible for human rights violations. According to her:

> *Breach of the duty to investigate, prosecute and punish could have as its factual cause: (1) the lack of a police investigation to investigate the alleged crime, (2) failures in the investigative procedures, intentional or not, that end up harming the result of the investigations, (3) undue delay in the carrying out the investigations, (4) defects in the judicial proceedings, intentional or not, (5) undue delay in prosecuting the crime, at all levels, (6) lack of diligence in locating the at-large defendant, prejudicing the progress of the case or the execution of the sentence, (7) flawed judicial decision. These assumptions do not necessarily exhaust the possible problems that can be measured in relation to criminal prosecution, but covers most of the problems in Brazil's cases.*
>
> (NAGADO, 2010).

With respect to these violations, Nagado (2010) asserts that "State agents are responsible, whether police, prosecutors or the judiciary, since these agents have the power to move the criminal prosecution along, at its various stages."

Not even the lawyers and public defenders are immune. In the case *Roberto Moreno Ramos v. United States*, where the petitioner had been sentenced to death, the IACHR stated that the State failed to comply with its duty to ensure a fair trial and due process with respect to the victim, under Articles XVIII and XXVI, respectively, of the American Declaration of Human Rights, to the extent that the lawyer appointed by the American court did not exhaust the defense possibilities nor argue the mitigating circumstances that could have prevented the application of the death penalty. The IACHR also stated that the mere absence of a public defender who could act in any U.S. state in death penalty cases violated the above provisions (COMISSÃO INTERAMERICANA SOBRE DIREITOS HUMANOS, Roberto Moreno Ramos (Estados Unidos) 2005, para. 52-59).[13]

We arrive at a conclusion that contradicts the self-perception of the group: legal actors, who carry out the functions essential to justice, can be perpetrators of violations of internationally recognized human rights. The arguments commonly put forward to justify the unintentional breach of the duty to investigate, prosecute and punish those responsible for human rights violations, such as overcrowded court dockets, lack of adequate infrastructure, or lack of sufficient personnel, cannot be

used to prevent the country's being held internationally liable; if this were the case, the commitment to safeguarding and promoting human rights would become very fragile, as set forth in the aforementioned Article 27 of the Vienna Convention on the Law of Treaties.

6 Final thoughts

We argue in this article that international human rights litigation has the potential to strengthen, through political means, the culture of rights in Brazil and we specifically examine the example of the ISHR. Such potential emerges from an understanding of the political dynamics underlying the dispute as typical of a transnational public sphere. In these arenas, practices and interests can (or not) be transformed through strategies of enlightenment and education, as well as through strategies exposing systematic routine violations, shaming and pressuring states that present themselves before the international community as guarantors of human rights. As the public sphere, use of the ISHR allows for the reconfiguration of power, empowering groups that previously were invisible, although this is not always the case.

However, such political potential only exists if the political organs of the ISHR are considered legitimate by the state, and especially by civil society organizations. Accordingly, the full implementation of the provisions of these bodies is critical. Among the types of measures issued from international organs, the most routinely disregarded by Brazil concern the duty of due diligence, which includes the obligation to investigate, prosecute and punish perpetrators of human rights violations. Such obligations directly speak to the work of legal actors who, although they perform functions essential to justice, themselves become human rights violators.

This article aims to draw attention to the importance of conventionality control by national authorities, in particular the judiciary. As a precaution, use of international standards of protection by prosecutors, politicians, lawyers, advocates, and especially judges would decrease the number of cases sent to the IACHR, preventing a case backlog, increasing its agility and promoting human rights more effectively. Ideally, only very emblematic cases would be sent to the ISHR, enhancing the impact of its decisions.

With regard to cases that led to decisions against Brazil, the measures that have been disregarded are again those related to the duty of due diligence. Therefore, the full implementation of these decisions will also require that legal actors recognize the obligation imposed by international human rights laws.

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NOTES

1. The so-called Peace of Westphalia, signed in 1648, after the end of the Thirty-Years' War in Europe, is considered the starting point for the modern international system, based, on the one hand, on the affirmation of the sovereign territorial state, which emerged as an important political unit, and, secondly, the horizontality of international relations. According to this paradigm, sovereign states coordinate their actions without recognizing any supranational authority that can exercise any kind of vertical coercion.

2. For a defense of a democratic world order and multilateralism as a principle of international relations, see the article by Fernando Henrique Cardoso, *Política Externa: fatos e perspectivas* (CARDOSO, 1993, p. 8-9).

3. Regarding Brazil's policies relating to human rights treaties, see Cançado-Trindade (2002).

4. Regarding weakend sovereignty, see: Anne-Marie Slaughter (2004). Sovereignty and Power in a Networked World Order. Regarding levels of governance, see: David Held (1995).

5. Regarding the preparations for the Vienna Conference on Human Rights and the legacy of this conference, see the book by José Augusto Lindgren Alves, *Human Rights as a Global Theme* (2004) and the article by the same author, *The present retrospective of the Vienna Conference on Human Rights* (1993).

6. In an official note No. 142, April 2011, the Foreign Ministry condemns the decision of the IACHR, claiming to have been taken aback by it and not have had sufficient time to defend against the allegations made against it (BRAZIL, 2011). Rather than defend itself using the procedural mechanisms provided for in the system itself, the state threatens the IACHR, withdrawing the candidacy of Paul Vanucchi to the IACHR, suspending the transfer of funds to the organ and calling back to Brazil its ambassador to the OAS. Such a reaction internally was applauded by many as an act of sovereignty, showing ignorance about international commitments taken on by Brazil when it ratified the Pact of San Jose in 1992. In this regard, see Eco Centre: Environmental Law (2011).

7. Flavia Piovesan provides an interesting analysis of the evolution of the cases against Brazil in the Inter-American System of Human Rights in relation to the number of cases, the rights violated and victims' profiles (PIOVESAN, 2011).

8. In 2010, 1,598 petitions were sent to the IACHR, of which 76 were against Brazil, 32 of these were evaluated by the IACHR and 9 were accepted for processing. The IACHR monitors the implementation of the recommendations in 12 cases that had its report on the merits published in the annual report of the IACHR, thus becoming public, pursuant to Article 51 of the ACHR. Many of the 97 pending cases will not go to the Inter-American Court, since they refer to events before the recognition of the jurisdiction of the court in 1998 (INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 2010, ch. III, section B). Information is available on the website of the Inter-American Court: <http://www.corteidh.or.cr/casos.cfm>. Accessed on: July 14, 2011.

9. Regarding the irrevocable nature of voluntary recognition of the compulsory jurisdiction, the Court pronounced its position in the judgment of the case *Constitutional Court vs. Peru*, on September 24, 1999.

10. Remember that the IACHR is an organ of the OAS pursuant to Article 103 of the Charter, unlike the Inter-American Court, which was created by the ACHR. As an organ of the OAS, the IACHR may consider allegations of violations of the OAS Charter and the American Declaration of Human Rights by any member state of the OAS. With respect to State-parties to the ACHR, the Court's mandate is broader and it can examine the possible violation of the long list of rights contained in it, even though the State in question has not recognized screen the jurisdiciton of the Court.

11. And yet, Judge Máximo Pacheco Gomez, the IACHR, in his dissenting opinion in Advisory Opinion 15 (OC-15/97) states that "the nature and object of a judgment of the Court differ from those of a resolution or report of the Commission. It goes without saying that the decision of the Court, although final and not subject to appeal is, pursuant to the American Convention, subject to interpretation (Article 67). The judgment of the Court is also binding and may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state (Article 68(2) of the Convention). At the same time, the report or resolution of the Commission does not have those binding effects. Its intervention is intended to enable it, on the basis of good faith, to obtain the State's cooperation." (INTER-AMERICAN COURT OF HUMAN RIGHTS, 1997b, para. 27-28).

12. The expression "conventionality control" appeared in a vote by Judge Sergio Garcia Ramirez in the case *Miriam Mack Cheng v. Guatemala*, decided in 2003. Regarding the development of the concept of conventionality control in the jurisprudence of the Court, see the monograph by Fernanda Ferreira Pradal "The judiciary and the American Convention on Human Rights: the duty to control conventionality" (2008).

13. Importantly, the U.S. has not ratified the ACHR and, therefore, the IACHR has only the power to examine possible violations of the American Declaration of Human Rights.

RESUMO

Este artigo pretende discutir dois argumentos principais. O primeiro é o de que o Sistema Interamericano de Direitos Humanos (SIDH) proporciona as bases institucionais para a construção de uma esfera pública transnacional que pode contribuir para a democracia brasileira. Assuntos que não encontram espaço na agenda política nacional podem ser tematizados nesses espaços transnacionais. No entanto, para que o SIDH funcione como esfera pública transnacional, é preciso que seus órgãos gozem de credibilidade e que suas determinações sejam atendidas pelos Estados. O segundo argumento deste artigo é o de que um dos desafios à credibilidade do SIDH é a resistência da comunidade jurídica nacional a incorporar o Direito Internacional dos Direitos Humanos em sua prática. Referimo-nos aqui tanto à implementação das decisões internacionais contra o Brasil quanto ao chamado controle de convencionalidade. Existe um dever jurídico de nos conformarmos internamente aos padrões internacionais de proteção aos direitos humanos que vem sendo negligenciado.

PALAVRAS-CHAVE

Sistema Interamericano de Direitos Humanos – Esfera pública transnacional – Devida diligência – Controle de convencionalidade

RESUMEN

Este artículo pretende discutir dos argumentos principales. El primero es que el Sistema Interamericano de Derechos Humanos (SIDH) proporciona las bases institucionales para la construcción de una esfera pública transnacional que puede contribuir a la democracia brasileña. Aquellos temas que no encuentran lugar en la agenda política nacional se pueden plantear en estos espacios transnacionales. Sin embargo, para que el SIDH funcione como una esfera pública transnacional, es necesario que sus organismos tengan credibilidad y que los Estados se avengan a sus determinaciones. El segundo argumento de este artículo es un aspecto que afecta la credibilidad del SIDH, la resistencia de la comunidad jurídica nacional para incorporar el Derecho Internacional de los Derechos Humanos a su práctica. Nos referimos aquí tanto a la implementación de las decisiones internacionales contra Brasil, como al llamado control de convencionalidad. Existe el deber jurídico interno de considerar los patrones internacionales de protección a los derechos humanos que no se respeta.

PALABRAS CLAVE

Sistema Interamericano de Derechos Humanos – Esfera pública transnacional – Debida diligencia – Control de convencionalidad