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Challenging the Ineffectiveness of International Judgments in Cases of Crimes Against Humanity Committed by Agents of the Brazilian State During Political Repression: Jus Cogens and the Statute of Limitations

Cuestionando la ineficacia de las sentencias internacionales en el caso de crímenes contra la humanidad cometidos por agentes del estado brasileño en el contexto de la represión política: ius cogens e imprescriptibilidad

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Abstract: This paper explores whether Brazilian state agents can be criminally prosecuted for ordinary crimes committed between 1961 and 1985, classified as serious human rights violations. Despite the 1979 amnesty law upheld by Brazil's Supreme Court, it does not satisfy conventionality requirements. Therefore, the statute of limitations does not apply to these crimes, as they violate *Jus Cogens*, which overrides domestic laws. The main objective here is to override the jurisprudence from the Supreme Court and the Superior Court of Justice. This paper uses the logical-deductive method, relying on a bibliographic review and precedents from the Inter-American Court and Brazilian judgments.

Keywords: Amnesty, crimes against humanity, statute of limitations, repression.

Resumen: Este trabajo afirma que agentes del Estado brasileño pueden ser perseguidos penalmente por delitos comunes, cometidos entre 1961 y 1985, clasificados como graves violaciones de los derechos humanos. La ley de amnistía de 1979, que fue confirmada por el Tribunal Supremo de Brasil, no cumple los requisitos de convencionalidad. La prescripción no se aplica a estos crímenes, ya que violan el *Jus Cogens*, que prevalece sobre las leyes nacionales. Intenta superar la jurisprudencia del Supremo Tribunal y del Superior Tribunal de Justicia. Utiliza

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el método lógico-deductivo, apoyándose en una revisión bibliográfica y en precedentes de la Corte Interamericana y sentencias brasileñas.

Palabras clave: Amnistía, crímenes contra la humanidad, prescripción, represión.

1. Introductory Remarks

This article seeks to analyze the feasibility of criminal prosecution and recognition of the non-application of the statute of limitations for common crimes, considered severe human rights violations, committed during the period of democratic exception from 1964 to 1985. The methodological approach uses the logical-deductive method, based on a bibliographical review of Brazilian and foreign authors and precedents from the Inter-American Court of Human Rights (IACHR), international criminal courts, and Brazilian courts.

It aims not only to offer a legal response to the question of criminal prosecution for crimes against humanity but also to establish their relationship with the Brazilian Amnesty Law and to offer a hermeneutic proposal for overcoming the current obstacles to execute the two judgments against Brazil by the IACHR: Gomes Lund[3] and Vladimir Herzog[4].

In Brazil, the phenomenon of the exception to the Democratic State began in 1964, was exacerbated in 1968, and was only brought to an end with the promulgation of the Federal Constitution of 1988, which included, among its fundamental principles, the Democratic State governed by the Rule of Law.

The breakdown of the democratic order led to the systematic persecution and torture of opponents of the regime, including kidnappings, murders, banishments, forced disappearances, and the concealment of human corpses.

Based on a supposed national conciliation, six years before the end of the exception period, an Amnesty Law[5] was passed, which in theory granted immunity for political and related crimes committed between September 2, 1961, and August 15, 1979.

However, the re-establishment of the democratic State of law has led to significant questions about the scope and compatibility of the amnesty law with the new regime in light of

3 IACHR: *Gomes Lund e outros vs. Brasil,* 2010.

4 IACHR: *Herzog e outros vs. Brasil,* 2018.

5 Law no. 6.683 (1979).

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international law. That is because some common crimes committed by state agents would be considered crimes against humanity insofar as the attacks were not directed at individuals or specific groups but were offenses that affected the whole of society. Between September 2, 1961, and August 15, 1979, these common crimes would be considered crimes against humanity.

The research focused on the prevalence of the Inter-American System rules for the Protection of Human Rights and the precedents of the IACHR, the apex supranational judicial body, regarding the application of International Human Rights Law in Brazil[6]. From another perspective, the research also focused on the rules of international law that Brazil has not ratified but which must be respected by all countries as *Jus Cogens*, in the same way, that there was individual criminal responsibility at Nuremberg[7]. In other words, it must be observed regardless of the State's consent.

It is essential to point out that (a) the Brazilian Supreme Court (STF), in the judgment of two cases (Arguição de Descumprimento de Preceito Fundamental[8]), that have not yet been finalized, with the *erga omnes* application, which allows direct access to the Supreme Court through complaints in case of non-compliance[9], has upheld that the 1979 Amnesty Law is valid in the legal system and covers crimes against people committed in the context of political differences, that the (b) referred law was confirmed by the Constitutional Amendment[10], which started the process for a new Constitution, that (c) the courts have not definitively decided the question which is still being contested nowadays, as we will discuss, and that (d) after the judgment of the ADPF 153[11], Brazil was convicted in two cases by the IACHR, Gomes Lund and Vladimir Herzog, when the Court stated that the amnesty law was incompatible with the Inter-American System for the Protection of Human Rights norms.

The main problem arises from the resistance of some national courts and legal scholars to apply the decisions made by the IACHR against the Brazilian State. To overcome these obstacles, which are of dubious legality, we will discuss their impracticability in light of the argument that crimes against humanity are part of *Jus Cogens* and, therefore, any possibility of using the statute of limitations must be ruled out. It is also necessary to analyze, as proposed

6 Silva (2021), p. 88.

7 Assis (2022), p. 251.

8 STF: *ADPF 153*.
STF: *ADPF 320*.

9 Bossi (2021), p. 119.

10 Constitutional Amendment nº 26 (1985).

11 STF: *ADPF 153*.

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by ADPF 320[12], the compatibility of the 1979 norm with international human rights treaties.

2. Historical Context

Our context begins in the 1960s, more precisely at the beginning of the decade. As portrayed by Elio Gaspari[13], Brazil was experiencing political polarization and tension, which began with Jânio Quadros's resignation as President of the Republic. The resignation brought to power the Vice President, João Goulart, who had a government plan linked more to the progressive sectors of society, which displeased conservative sectors historically aligned with the interests of the United States[14].

However, the contextualization of Brazil's situation cannot be reduced to differences in local politics. The world was experiencing the aftermath of the Second World War, with the arms race between the United States and the Soviet Union. According to a study by Anne Applebaum[15], post-war Europe was divided between the West, under the influence of the United States, and the East, under the influence of the Soviet Union. The 'cold' war was fought through political and economic influence and indirect conflicts. An example of this form of conflict was the war that took place in Afghanistan between 1979 and 1989[16].

In South America, as early as the 1960s, according to Guimarães Gesteira[17], after the Cuban Revolution, the United States created the 'Alliance for Progress', seeking to align all Latin American countries in order to isolate Cuba and the Soviet bloc through social and economic investments.

In this national and international context, March 31, 1964, saw a military coup d'état that would indelibly change Brazil's history and whose consequences are still being felt today, as discussed in this study. The Democratic Rule of Law was broken, and orders issued by those monopolized forces replaced the peaceful, consensual solution proposed by democracy.

The marks of the United States' support, approval, and backing for the democratic disruption of 1964 are undeniable. 'Operation Brother Sam' consisted of a contingency plan drawn up by the United States, which provided for logistical and troop support in the event of diffi-

12 STF: *ADPF 320*.

13 Gaspari (2014a).

14 Gaspari (2014a).

15 Garcia and Nogueira (2017), p. 105.

16 Borer (1999), pp. 200-216.

17 Gaspari (2014a).

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culties in the movement of the Brazilian military, a procedure in line with the actions of the United States during the destabilization of João Goulart's government[18]. Despite the alleged existence of a supposed desire for a rapid return to democracy[19], the fact is that democracy was only really re-established in 1988 with the current Constitution.

In 1968, the regime of exception began the 'Years of Lead', which were portrayed in the work of Elio Gaspari[20] as the most violent period of democratic exception, marked by the publication of Institutional Act Number Five (AI-5)[21]. There were several proven episodes of human rights violations, including torture, kidnappings, murders, concealment of human corpses, disappearances, and ideological falsehoods to erase the records of violence, such as 'Operation Bandeirantes'[22], the Araguaia Guerrilla[23], the DOI-Codi system[24], and 'the house of death'[25].

There are other reports of abuses practiced by agents of the State, according to data collected as part of the Projeto 'Brasil – Nunca Mais'[26] and in the work of Frei Betto[27]. In the report 'Right to Memory and Truth' by the Special Commission on Political Deaths and Disappearances[28], the occurrence of more than 370 acts of violence practiced by state agents against political opponents was demonstrated.

3. The Amnesty Law

The 1979 Law determines, among other provisions, that "amnesty is granted to all those who, in the period between September 2, 1961, and August 15, 1979, committed political crimes or crimes related to political crimes"[29].

This provision was criticized, especially after the 1988 Federal Constitution was enacted.

18 Fico (2008).
19 Gaspari (2014a).
20 Gaspari (2014b).
21 Institutional Act n° 5 (1968).
22 Teles (2011), p. 111.
23 Teles (2011), p. 94.
24 Teles (2011), p. 107.
25 Teles (2011), p. 142.
26 Arns (2014).
27 Betto (2006).
28 Special Commission on Political Deaths and Disappearances (2013).
29 Law nº. 6.683 (1979).

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In 2010, the Brazilian Supreme Court, in the ADPF 153[30] case that has not yet reached the status of *res judicata*, reaffirmed the validity of the rule and its compatibility with the legal regime. The Court affirmed that the statute sought a broad bilateral amnesty, which includes common crimes committed by agents of the State in the context of repression. Finally, it stated that there was no antinomy between the statute and the current legal system since the rule was reaffirmed in the text of the Constitutional Amendment of 1985[31].

Within the Superior Court of Justice[32] and the Federal Regional Court of the 3rd Region (TRF- 3R), which has jurisdiction over the former headquarters of 'Operation Bandeirantes', several criminal actions have been dismissed[33] based on the premises set out in ADPF 153[34]. However, as we will discuss, it is essential to note a recent change of interpretation in a few trial chambers of the TRF-3R that removed the application of the amnesty law and its limitation statute. It was stated that the Amnesty Law does not apply to crimes against humanity, and the statute of limitations cannot be invoked against permanent crimes (in the case of concealment of corpses), which are not included in the period covered by the Amnesty Law (up to 1979)[35].

However, the conflict above was decided in a judicial appeal to reform the new decisions and maintain the application of the Amnesty Law and the impossibility of criminal prosecution. This jurisprudential imbroglio summarizes that, despite the conflict between the TRF-3R chambers, this has not impacted the jurisprudence of the higher courts (Superior Court of Justice and Supreme Court of Justice), which maintain the impossibility of criminal prosecution due to the proper application of the amnesty law.

However, contrary to what might initially have been claimed, the validity of the Amnesty Law in Brazil has yet to be settled. The control of conventionality, respect for the Inter-American *corpus juris*, the conventionalized bloc of constitutionality, and the need to observe *Jus Cogens* have not been the subject of exhaustive analysis.

30 STF: *ADPF 153*.

31 Constitutional Amendment 26 (1985).

32 STJ: *REsp 1.798.903-RJ*, 2019.

33 TRF-3R: *RESE 0015754-19.2015.4.03.6181*, 2016. TRF-3R: *RESE 0016351-22.2014.4.03.6181*, 2017. TRF-3R: *RESE 0001147-74.2010.4.03.6181*, 2019.

34 STF: *ADPF 153*.

35 TRF-3R: *EMDN 0008031-41.2018.4.03.6181*, 2021. TRF-3R: *RESE 5002620-24.2021.4.03.6181*, 2024.

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4. The Inter-American System for The Protection of Human Rights and The Domestic Legal System

Brazilian constitutionalism does not exhaust the protection of human dignity. For the first time in Brazilian constitution history, the fundamental principles of the Federal and Republican Constitution include a commitment to the Brazilian State's international relations that consolidate the prevalence of human rights and the self-determination of peoples, among other things. Its sole paragraph also stipulates that the Brazilian State must foster the creation and inclusion of a Latin American community of nations.

The new constitutional order was prodigal in making rights arising from international treaties legally effective (Art. 5, §1 cc §2). Brazil ratified international treaties signed before the 1988 Constitution and signed and ratified new treaties[36].

In recent decades, this opening up of Brazilian constitutionalism to the international arena has strengthened the Inter-American System for the Protection of Human Rights (IACHR). The truth is that "Constitutions are becoming increasingly open to dialogue. They can no longer be thought of as a center from which everything derives by irradiation, but rather as a center on which everything converges, communicates, and dialogues"[37].

The regional human rights protection systems set up on the American, African, and European continents act in a complementary way[38] to the global system (UN). All of them also act in a complementary way to the domestic law of national states[39]; that is, national states continue to have primacy in human rights enforcement.

The American Convention on Human Rights (ACHR), also known as the 1969 Pact of San José de Costa Rica, is the primary and founding international treaty of the Inter-American Human Rights System[40]. Other international treaties and instruments within the same system also emphasize the protection of the human person in general and in specific circumstances.

This expansion does not restrict the analysis of the validity of national law to ACHR, other binding documents form the bloc of conventionality[41], enabling contact between domestic and international law based on what has been called Control of Conventionality.

36 Piovesan (2011), p. 145.

37 Borges and Piovesan (2019), p. 9

38 Bazan (2011), p. 22.

39 Heyns *et al.* (2006), pp. 161-162.

40 Andreu-Gusman (2003), p. 301.

41 Borges and Piovesan (2019), p. 12

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4.1 The relationship between the Control of Constitutionality and the Control of Conventionality

According to Pedro Ugarte[42], the term 'bloc of constitutionality' was first used by the French Constitutional Council in 1966 to refer to a set of higher rules and principles to which ordinary law was subject. It includes not only constitutional norms but also the norms of treaties that have a constitutional hierarchy at the domestic level. the French case includes other rules such as the preamble to the Constitution of 1958, the 1789 Declaration of the Rights of Man and Citizen, and the preamble to the 1946 Constitution. The model was followed by Spain, which, after the STC 10/1982 decision, saw its Constitutional Court began to develop this tool for the control of constitutionality[43].

The existence of the bloc of constitutionality has become a requirement due to the normative expansion that affects contemporary written constitutions. This is because norms are not expressly part of their text and they have the same normative force[44].

In the Brazilian case, the expression came with the approval of Amendment 45/2004, which changed the approval process for international human rights treaties and expressly allowed them to acquire constitutional status, even if they were not 'within' the constitutional text. In this way, a 'bloc of constitutionality' is formed by norms that are not directly contained in the constitutional text. The expansion of the bloc of constitutionality has been welcomed in Brazilian law as a necessity, mainly due to the requirement to incorporate not only international treaties but also the case law of international courts, forming what has been termed the 'Conventionalized Bloc of Constitutionality'[45].

Anything that goes against the bloc of constitutionality can be deemed not to be law through the judicial bodies qualified to be part of the Brazilian constitutional jurisdiction. Unconstitutionality, therefore, always affects the validity of these rules. In some cases, their effectiveness is also affected[46], as in cases where the judge declares unconstitutional laws to be definitive (concentrated and abstract control or binding precedents in Brazil). That is because the validity of lower-ranking rules, whether material or formal, depends on a relationship of order with those of a higher hierarchy. A mismatch with this ordering relationship leads to the phenomenon of unconstitutionality, which has the Judiciary as an essential voice in the organization of the national legal system[47].

42 Ugarte (2014), p. 36.

43 Lopes and Chehab (2016), p. 83

44 Uprimny (2008).

45 Conci and Faraco (2020), p.103.

46 Neves (1988), p. 52.

47 Hamilton *et al.* (1994), p. 124.

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Thus, any control based on the bloc of constitutionality uses a national rule (even if it comes from an international treaty) to control another national rule. We are talking about control of constitutionality because the structural-hierarchical criterion or even the temporal or particular criterion prevails. These criteria are not suitable for the control of conventionality, which requires material criteria (*pro persona* principle) to resolve any conflicts between human rights provided for intertwined legal orders.

There is an exception, which occurs when national courts include in the bloc of constitutionality the interpretation resulted from the international bodies, authorizing the confrontation with the legal norms resulting from international treaties and making it binding. In this case, we are talking about concomitant control of conventionality and constitutionality[48], given the binding power to the Bloc of conventionality, as Calogero Pizzolo[49] affirms. Unlike the control of constitutionality, for the control of conventionality, it does not matter whether international treaties are superior to laws or constitutions at a domestic or international level, neither according to a structural nor formal perspective[50].

The validity relationship is established based on a material criterion: the greater protection of the human person. In other words, the pro persona criterion is applied.

As a result, a declaration of unconventionality is only possible when the protection derived from international human rights law is more effective or establishes less far-reaching restrictions on the human rights affected by the domestic act. Thus, the mere contradiction between domestic law and international law (treaties and international jurisprudence) does not automatically allow the national Act to be invalidated[51].

Another difference is that the control of conventionality is based on a normative flow that derives from international law[52] and not from domestic law, as is the case with the control of constitutionality. Analyzing the validity derived from this internal normative flow can be called constitutionality or legality control since they are based on the bloc of constitutionality for the former and legality for the latter. Nevertheless, we are not talking about conventionality; even though, in some cases, the decision may be the same given the concomitance of standards for protecting the rights at domestic and international levels.

The result is that the control of conventionality deepens a reality that concerns the need to

48 Conci and Gerber (2016), p. 141.

49 Pizzolo (2008), pp. 189-190.

50 Sagues (2010), p. 124.

51 Conci (2014).

52 IACHR: *Gelman v. Uruguay*, 2013.

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emphasize mechanisms to promote the contact between judges from the same national State and with judges from other national States and international courts, which is known as the 'dialogue between courts'.

This means that, in addition to the issue of judges being bound by binding national judgments, there is not only vertical dialogue between courts of the same national State but also between national courts and international courts, established according to a horizontal logic. Ultimately, it is the judges who stipulate the model of coexistence between the various levels of normativity[53]. Instead of arguments based on the logic of binding precedents, a dialogue is established based on the persuasive force of these judgments[54].

Therefore, the control paradigm differentiates the control of conventionality from the control of constitutionality. The former falls under the competence of the IACHR, which exercises it in both contentious and advisory cases as well as national states and their authorities, especially the judicial ones, as stated, e.g., in Cabrera García y Montiel Flores vs. Mexico[55].

The ACHR, in addition to its protocols and the judgments of the IACHR, forms what is known as the 'Bloc of Conventionality'[56], which is a paradigm for controlling the validity of acts in the broad sense (judgments, laws, administrative acts, constitutions) issued by national states and submitted to the Inter-American Human Rights System.

The term 'control of conventionality' first appeared in the case of Myrna Mack Chang v. Guatemala[57]. In 2006, the IACHR, in Almonacid Arellano v. Chile[58], developed another aspect of this control of conventionality, which concerns about the role of any national judge in applying the law derived from the Inter-American Human Rights System at the national level.

After that, the IACHR began to develop the control of conventionality guidelines, defining the repressive model of control that must also be carried out in the Inter-American System for the Protection of Human Rights by national judges[59], and for the first time, pointing out the need for the interpretation given by the IACHR itself to the ACHR to be binding.

53 Vergotini (2010), pp. 36-37.

54 Slaughter (2003), p. 200. Ramos (2012), p. 252.

55 IACHR: *Cabrera García e Montiel Flores vs. México*, 2010.

56 Ferrer-Mac Gregor (2010).

57 IACHR: *Bulacio vs. Argentina*, 2003.

58 IACHR: *Almonacid Arellano and others vs. Chile*, 2006.

59 Sagues (2010), p. 125.

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In Trabajadores Cesados del Congreso (Aguado Alfaro y otros) Vs. Peru[60], the Court affirmed that national judges should also *ex officio* carry out conventionality control. This control should occur according to the distribution model of competencies affirmed in the national law.

In Radilla Pacheco[61], the Court examines the experiences of national courts using the control of conventionality as a tool, analyzing higher courts examples of Costa Rica, Bolivia, the Dominican Republic, Peru, Colombia, and Mexico, and reaffirms its doctrine of conventionality control.

In this international scenario, judicial decisions, like laws and administrative acts, among other state acts, are seen as mere facts[62] or manifestations of the State's will. If they violate the law based on the regional system for the protection of human rights, they can make the State liable at the international level. Thus, even arguments of respect for national law, contradictions between the Constitution and the IACHR, or *res judicata* do not have the status of reasons that can be considered legally valid.

About the latter, even judicial decisions affected by *res judicata* but contrary to the precedents of the IACHR can lead - if the existing procedures to make national law and its decisions compatible with regional human rights law are exhausted - to the condemnation of the national State, as stated in Acevedo Jaramillo y otros Vs. Peru[63].

4.2 The jurisprudence of the IACHR as part of the Bloc of Constitutionality

In Gelman II[64], the Court, discussing the relationship between the control of constitutionality and the control of conventionality, states that: "the control of constitutionality necessarily implies a control of conventionality, exercised in a complementary manner". This control must analyze the compatibility between the State's internal legal norms and the Bloc of Conventionality and, based on Article 2 of the ACHR which imposes a general duty to adapt their internal law systems to the Inter-American Human Rights System, harmonize them.

This adaptation must be shaped by the national State itself, which makes its choice as to

60 IACHR: *Trabajadores Cesados del Congreso Aguado Alfaro e outros vs. Peru*, 2006.

61 IACHR: *Radilla Pacheco at all vs. México*, 2009.

62 Ramos (2004), p. 136.

63 IACHR: *Acevedo Jaramillo e outros vs. Peru*, 2006.

64 IACHR: *Gelman v. Uruguay*, 2013.

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how it will proceed with this adaptation. It can take place in different ways, such as by repealing a law or other normative act, changing court decisions, approving a new law or other normative act, or even reforming the Constitution, as in the case of 'La Última Tentación de Cristo' (Olmedo Bustos y otros) vs. Chile[65].

A country's passed law means it must not only respect the Constitution but also obey treaties, which allows international courts to analyze domestic norms in the light of international norms.[66] Consequently, national judges have a legal duty to respect international human rights treaties and the precedents created by the IACHR when these national states adhere to the procedures and accept the IACHR's jurisdiction. As stated by Nogueira Alcala[67], the jurisprudence of the IACHR:

> "has a legal and political impact on the States Parties, leading to its reception and the incorporation of the minimum conventional standard in national legal systems, which allows the development of a regional *ius commune*, enabling a harmonizing and transforming effect on national legal systems. This includes reforms of their internal normative systems from the constitutional sphere to their legal and regulatory norms, as well as introducing changes in the behavior of state authorities and officials".

The Inter-American *Corpus Iuris* defines "what is common to the constitutionality and Bloc of Conventionality and, consequently, the common 'minimum standard' to be used by the control of constitutionality and conventionality"[68]. Acts of local authorities and the decisions of local courts cannot prevail if they do not respect the Inter-American *Corpus Juris*.

The ACHR and the jurisprudence of the Inter-American Court are part not only of the Bloc of Conventionality but, when acquiring the status of being legally binding internally, also form what can be called the conventionalized Bloc of Constitutionality stating obligations when judges and other authorities who have legitimacy realize the control of constitutionality[69]. This use of the case law of the IACHR as a binding part of the bloc of constitutionality can be seen in the jurisprudence of (a) the Constitutional Court of Colombia, (b) the Supreme Court of Justice of the Dominican Republic, (c) the Constitutional Chamber of the Supreme Court of Costa Rica, (d) the Constitutional Court of Peru, and the (e) Supreme Court of Argentina[70]. Nowadays, we can also include the (f) Supreme Court and the Constitutional

65 IACHR: *Olmedo Bustos e outros vs. Chile*, 2001.

66 Trindade (1997), p. 412.

67 Alcala (2021), pp. 549-550.

68 Borges and Piovesan (2019), pp. 17-18.

69 Faraco and Conci (2020), p. 103.

70 Corao (2013), p. 78.

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Cout of Chile, (g) Constitutional Plurinational Court of Bolivia, (h) Constitutional Court of Peru and others[71].

The need for the Brazilian Supreme Court to respect the decisions of the IACHR stems from the Inter-American Corpus Juris and the movement seen in other regional courts. The very conventionalized bloc of constitutionality to which the STF is a guardian includes the decisions of the IACHR. Legally, this follows from Presidential Decree No. 4.463 of 2002[72], which expressly recognized the jurisdiction of the IACHR in all cases relating to the interpretation or application of the American Convention on Human Rights (Pact of San José da Costa Rica).

5. The Amnesty Law and The Inter-American System for The Protection of Human Rights

Argentina established amnesty with the 'Final Point' law[73] (23.492) and the 'Due Obedience' law (23.521)[74], which prevented the punishment of crimes committed by state agents between 1975 and 1983. The Supreme Court[75], interpreting these rules in the light of the International Conventions for the Protection of Human Rights and not only in the light of the Constitution, ruled that they were "intolerable".

This decision seems to have been inspired by the IACHR's decision in the Barrios Altos case[76] (referenced in the La Cantuta case)[77], which declared Alberto Fujimori's amnesty laws invalid, stating that "due to the manifest incompatibility of the self-amnesty laws with the American Convention on Human Rights, the norms mentioned above lack of validity".

The IACHR, in the case of Bulacio vs Argentina[78], declared that the domestic legislation in force in Argentina could not be used as a basis for allowing impunity for serious human rights violations. In 2006, in the case of Almonacid Arellano y otros vs. Chile[79], the same Court declared the illegality of the rule that granted amnesty to rulers for crimes committed

71 Corao (2013), p. 78.

72 Decree n° 4.463 (2002).

73 Law n° 23.492 (1986).

74 Law n° 23.521 (1987).

75 CSJNA: *Simón con Julio Héctor y Otros*, 2005.

76 IACHR: *Olmedo Bustos e outros vs. Chile*, 2001.

77 IACHR: *Goiburú e outros vs. Paraguai*, 2006.

78 IACHR: *Bulacio vs. Argentina*, 2003.

79 IACHR: *La Cantuta vs. Peru*, 2006.

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during the military regime.

It must be concluded that domestic norms cannot be invoked to prevent compliance with international norms. This is because, as André de Carvalho Ramos[80] mentions, national control of constitutionality is not enough for the supposed validity of the amnesty law. It also requires control of conventionality as well as conventionalized constitutionality control. It is a consequence of what Cançado Trindade[81] states-a country's legislative norms must respect the Constitution and obey treaties, allowing the International courts to analyze domestic norms concerning international norms.

The research so far makes it possible to affirm that the international order does not support the rules on amnesty in Brazil, which should be considered invalid according to the arguments put forward in the Barrios Altos case[82].

Furthermore, as shown in the cases of Velásquez Rodríguez v. Honduras[83], Goiburú et al. v. Paraguay[84] , Gomes Lund et al. v. Brazil[85], Herzog et al. v. Brazil[86], and Gelman v. Uruguay[87], countries can be held responsible for failing to investigate human rights violations, and it is impossible to oppose international determinations using domestic amnesty rules as a basis.

Looking specifically at the decision in ADPF 153[88], the STF's position would not be in line with the Inter-American *Corpus Iuris*, and its violates the conventionalized bloc of constitutionality formed by three sentences from the IACHR: La Cantuta, Barrios Altos and Almonacid. Additionally, especially in light of the Brazilian cases Gomes Lund and Herzog[89], the Brazilian amnesty law was created to guarantee the impunity of state agents who, under the justification of fighting insurgency, perpetrated severe human rights violations that cannot be understood as valid[90]. However, some courts and legal scholars persist in defending the opposite view.

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80 Ramos (2011), p. 217.

81 Cançado Trindade (1997), p. 412.

82 IACHR: *Barrios Altos* (*Chumbipuma Aguirre e Outros*) *vs. Peru*, 2001.

83 IACHR: *Velásquez Rodríguez vs. Honduras*, 1988.

84 IACHR: *Goiburú e outros vs. Paraguai*, 2006.

85 IACHR: *Gomes Lund e outros vs. Brasil*, 2010.

86 IACHR: *Herzog e outros vs. Brasil*, 2018.

87 IACHR: *Gelman v. Uruguai*, 2011.

88 STF: *ADPF 153*.

89 Nishiyama and Larazi (2022), pp. 450-453.

90 Teles (2011).

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The aim now is to tackle the problem of the ineffectiveness of the two decisions handed down by the IACHR against the Brazilian State, which rely mainly on two arguments: (a) the Brazilian State's accession to the jurisdiction of the Court would only allow it to be convicted of crimes committed after that date; and (b) that the thesis of permanent crimes, because the remains have not been found, does not justify overcoming the rule of no application of limitation statute for crimes committed previously.

Although, as we have seen, the decisions overcome these obstacles, Brazilian courts continue to prevent the execution of these sentences. According to the IACHR case law, there is the possibility of reopening criminal cases involving human rights violations committed by agents of the State during the period of the military dictatorship, as the obstacle of the amnesty law has already been overcome by recognising its incompatibility with the Pact of San José da Costa Rica and the conventionalized constitutionality bloc. However, this is not what has been accepted by some Brazilian judges, particularly those in the superior courts (Superior Court of Justice and Supreme Court).

5.1 Arguments against the criminal trial of State agents

One of the arguments that most hinder the implementation of IACHR jurisprudence concerns the confrontation of limitation statutes and the mitigation of legal certainty. This concept is so important to the Civil Law legal family and is used repeatedly to avoid criminal prosecution of those who have committed crimes in the circumstances protected by the amnesty law. From this perspective, there is the non-retroactivity of international norms with sanctioning effects, making it unfeasible for an international treaty ratified after the amnesty law to enact and generate retroactive effects for punitive purposes. In other words, the control of conventionality (or even conventionalized constitutionality control) could not be carried out in the face of rules issued before Brazil joined the Inter-American System for the Protection of Human Rights, especially to justify criminal sanctions, under penalty of a severe violation of the principle of legal certainty and anteriority in criminal matters.

To justify this argument, it is often said that Article 28 of the Vienna Convention on the Law of Treaties, which was incorporated into Brazilian law by Presidential Decree nº 7.030 of 2009[91], makes the retroactive application of international treaties conditional on a standard agreement between the signatory states. It is inevitable that, in criminal matters, this

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provision could not justify the application of sanctions for past events. In the specific case of the inter-American system, ratification only took place with Presidential Decree N° 678 of 1992[92]. Furthermore, it was only in 2002, with Presidential Decree N°4.463 of 2002[93], that the jurisdiction of IACHR was expressly recognized in all cases relating to the interpretation or application of the American Convention on Human Rights.

Also, within the Inter-American Human Rights System, no application of limitation statute only appeared in the Inter-American Convention on Forced Disappearance of Persons, Article 7[94], which was only internalized in 2016. Therefore, it cannot have a retroactive effect to cover the facts under discussion here.

The Superior Court of Justice[95], when ruling out the recognition of a criminal type directly from an international treaty (analysis of the type of criminal organization in the Treaty of Rome), affirmed the impossibility of retroactive application of punitive international norms. This reaffirms the premise established by the Federal Supreme Court in 2016[96], when it ruled that extradition is possible for crimes that occurred before the Treaty was signed, as it is not a criminal rule.

As stated above, if this study aims to establish an argumentative strategy to give effect to the decisions made by the Inter-American Court against Brazil in the cases of Gomes Lund and Vladimir Herzog, in which it was recognized that the Brazilian amnesty law was contrary to the dictates of the American Convention on Human Rights, we have to contest those interpretations.

That is because, even though these decisions have been taken against the Brazilian State, several authors argue that the need to punish agents who have committed crimes against humanity cannot justify the removal of basic minimum guarantees for any person, especially the anteriority of the penal norm. The unlawful acts committed by state agents date back to the 1960s and 1970s, and it is certain that the various human rights violations that constitute crimes would be covered by the statute of limitations on punitive claims, regulated by Article 109 of the Brazilian Penal Code[97]. For them, and also because of the 1988 Constitution[98], except for racism and offenses by armed groups against the Democratic Rule of Law, the statute

92 Decree n° 678 (1992).

93 Decree n° 4.463 (2002).

94 Decree nº 8.766 (2016).

95 STJ: *REsp 1.798.903-RJ*, 2019.

96 STJ: *PEP 769*, 2016.

97 Penal Code (1941).

98 Constitution of the Federative Republic of Brazil (1988).

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of limitations on punitive claims is declared to be a fundamental right. The option made by the Brazilian Constitution tends towards the binomial reparation and truth/memory[99].

In this sense, Monteconrado's reference to the retroactivity of the non-application of limitation statute, established by the International Tribunal for the former Yugoslavia in the 1998 Furundzija case, stated that amnesty laws are inapplicable to crimes against humanity[100]. The need to punish agents who committed crimes against humanity cannot justify the removal of basic minimum guarantees for any person, especially the anteriority of the penal law.

However, as Parenti[101] states, the Inter-American Court's first statement on the non-application of limitation statute came in 2001, in the Barrios Altos case[102]. The author points out that the Inter-American Court ruled that amnesty and statute of limitations provisions were among those incompatible with the obligation to investigate and punish, making it clear that this incompatibility would apply to any provision made to prevent the investigation and punishment of those responsible for crimes against humanity, including those that set a time limit for the termination of criminal proceedings[103]. It so happens that the IACHR's statements above came into force long after the events in question, which explains the treaties' non-retroactivity.

Therefore, given the impossibility of retroactively applying international treaties and conventions, it is recognized that crimes committed by agents of the State under the regime of democratic exception, even those considered severe violations of human rights, are not covered by the statute of limitations.

Considering only these elements for the sake of argument, Article 2 of the Pact of San José da Costa Rica[104] is, in the face of severe violations of human rights, a sufficient instrument to rule out the statute of limitations. We must consequently recognize the non-application of limitation statute for acts committed after 1992 (the Treaty's ratification date). The IACHR stated in the Fazenda Brasil Verde case[105] that "the application of the statute of limitations, in this case, represented a violation of Article 2 of the American Convention since it was a decisive element in maintaining the impunity of the facts established in 1997". Therefore, to those who think in this sense, the incompatibility of the amnesty law with the conventions

99 Almeida (2021), p. 256.

100 Monteconrado (2013), p. 385.

101 Parenti (2013), p. 214.

102 IACHR: *Olmedo Bustos e outros vs. Chile*, 2001.

103 Parenti (2013), pp. 214.

104 Decree n° 678 (1992).

105 IACHR: *Trabalhadores da Fazenda Brasil Verde vs. Brazil*, 2016, p. 423.

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and international jurisprudence would be resolved exclusively in the context of repairing damages, reconstructing memory, and adopting damage reduction measures, such as psychological support for the families of the politically disappeared and educational programs so that the history of repression is a reminder for current and future generations to pay close attention to the need to preserve human rights.

This statement could, in theory, be countered with the claim that some of the crimes involving state agents during the period of democratic exception are permanent crimes. In other words, these are criminal types whose consummation is prolonged over time, and the statute of limitations would only begin with the end of the illegal action[106]. This is the case, among others, of kidnapping crimes.

However, it is essential to highlight that if we consider the crimes in question involve the concealment of corpses, the thesis of no statute of limitations would be possible to support since concealment is considered a permanent crime.

6. Human Rights Violations as Crimes Against Humanity

It is possible to construct a legal conclusion capable of prosecuting state agents involved in severe human rights violations during political repression to give effect to international jurisprudence, overcoming the obstacles formulated by the judicial and doctrinal current specified in the previous section. This is a hermeneutic strategy to overcome obstacles to implementing decisions handed down by the Inter-American Court against Brazil. For that, it is not necessary to defend the application of the Treaty for the Prevention of Torture, which was only ratified in 1991 by Presidential Decree N° 40 of February 15, 1991[107], or the Rome Statute, which was only ratified in Brazil by Presidential Decree N° 4,388 of 2002[108], or even the Inter-American Convention on Forced Disappearance of Persons, Article 7[109], which was only ratified in 2016 by Presidential Decree N° 8,766 of 2016[110].

However, it must be acknowledged that, at the time of the illegal acts covered by the amnesty, international norms and customs were in place to prevent human rights violations. In other words, during the most recent period of democratic exception in Brazil, as in Chile and Argentina, there were rules of international law prohibiting severe human rights violations.

106 STF: *AP 863/SP*, 2017.

107 Decree n° 40 (1991).

108 Decree nº 4.388 (2002).

109 Decree n° 8.766 (2016).

110 Decree n° 8.766 (2016).

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Norms provided for the non-application of limitation statutes and punishment for crimes against humanity.

This is the same basis used at the Nuremberg Tribunal to analyze and punish crimes committed during the Second World War, i.e., Resolution 95 (I) of 1946, which deals with the Principles of International Law recognized by the Statute of the Nuremberg Tribunal, later reiterated by the UN International Law Commission of 1950.[111] In an international document, these instruments consolidated current international customs on the impossibility of human rights violations.

Beigbeder[112] points out that, at the Nuremberg Tribunal and the Tokyo Tribunal, there were questions about the existence of rules for judging the cases and the non-retroactivity of the United Nations Resolution. The arguments were dismissed, and the judgments were upheld because the international customs in force at the time of the events prohibited human rights violations, and there was no need for a formal legal rule to punish acts contrary to these customs.

The same solution was applied in the German 'Mauerschützen' case about the Berlin Wall shooters[113]. The case involved the killing of people who were trying to escape from East Berlin by jumping over the wall dividing the city.

In 1992, the perpetrators were convicted of the deaths. They filed a petition to the German Federal Constitutional Court, arguing undue retroactivity of criminal law and claiming they had no elements to determine the illegality of the act in their circumstances, especially since they were following superior orders[114]. They acknowledged that the decision was in accordance with the domestic rules in force, particularly the border law. However, they stressed the extreme injustice of the aggressions perpetrated and the notorious contravention of supra-positive law, which has always condemned the killing of human beings without the existence of a state of necessity or legitimate defense[115]. The point is that crimes against humanity stem from international custom, can be punished by any country, and are not subject to statutes of limitations[116].

At the normative plan, the United Nations Convention on the Non-Applicability of Statu-

111 Report of the International Law Commission Covering its Second Session (1950).

112 Beigbeder (1999), pp. 60-63.

113 Gubert (2006), pp. 19-45

114 Gubert (2006), pp. 19-45

115 Gubert (2006), pp. 19-45.

116 Brownlie (1998), p. 235.

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tory Limitations to War Crimes and Crimes Against Humanity[117] removed the criminal statute of limitations system from local legislation in the fight against crimes against humanity. This norm is binding under international law, regardless of state ratification, as it has acquired the character of a norm of General International Law[118]. Furthermore, The Princeton Principles on Universal Jurisdiction[119] consider the non-application of statutory limitations for crimes against humanity a consolidated legal custom, applying regardless of a formal norm.

Therefore, if the severe human rights violations perpetrated by agents of the Brazilian State can be considered crimes against humanity, they are not subject to the statute of limitations. We are dealing with *Jus Cogens*, i.e., rules of international law whose application does not require the state's consent.

Regarding the 'standards' for the configuration of the crime of inhumanity under *Jus Cogens*, if we analyze the case law emanating from international courts for the protection of human rights, such as the Criminal Tribunal for the Former Yugoslavia when judging the Erdemovic case[120], this Court stated that crimes of inhumanity: "are inhumane acts which, due to their dimensions, go beyond the limits tolerable to the international community [...] It is therefore the concept of humanity as a victim that essentially characterizes crimes against humanity."

The same premise was applied in the case of Ratko Mladic[121], with a reaffirmation of the criteria for considering crimes against humanity, confirming the understanding that not only the individual is the victim, but all of humanity. This premise was established in the Akayesu case[122] and in the Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu case[123].

Therefore, the main point here is to state a kind of dogma. When crimes against humanity became part of the international *Jus Cogens*, the discussion of the statute of limitations fell apart. When firmly analyzed, what happened in Brazil, especially after 1968[124], was that the regime that dominated power and the government of the time endorsed the use of serious human rights violations as a form of social control. The truth is that, especially during the

117 Resolution 2391 XXIII (1968).

118 Pastor Ridruejo (1997), pp. 173-185.

119 The Princeton Principles on Universal Jurisdiction (2001).

120 TPIY, *Erdemovic* (1996)

121 ICTY, *Ratko Maldic* (1995).

122 TPIR, *Akayesu* (1998).

123 TESL, *Borbor Kanu* (2007).

124 Institutional Act nº 5 (1968).

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'Years of Lead'[125], the Brazilian government acted in the same way that Nazism worked in Germany. It replaced the 'sentiment of the German people'[126] by maintaining the 'purpose of the Revolution (sic) of 1964'.

That is also the vision affirmed by the IACHR regarding the two Brazilian convictions. It is worth highlighting the opinion of *Ad Hoc* Judge Roberto de Figueiredo Caldas, in the case of Gomes Lund vs Brazil, who stated that the acts carried out by the agents of the Brazilian State are crimes against humanity. The Court, in the case of Herzog v. Brazil, not only pointed out that the acts under review should be considered crimes against humanity but also, as previously made in Almonacid Arellano v. Chile[127], considered them a violation of the *Jus Cogens*. It points to a new hermeneutic scenario for Brazil, where the application of statute limitation must be dismissed, given the apparent relationship between that legal institute and the phenomenon of no application of statute limitation. The IACHR Court defines it this way:

> "242. [...] as defined by international law since at least 1945 (supra paras. 211 to 228). Also, as stated in the judgment in the Almonacid Arellano case, at the time of the facts relevant to the case (October 25 1975), the prohibition of crimes under international law and crimes against humanity had already attained the status of an imperative norm of international law (*jus cogens*), which imposed on the State of Brazil and, in effect, on the entire international community the obligation to investigate, prosecute, and punish those responsible for such conduct, since they constitute a threat to the peace and security of the international community (supra para. 212)".

Having established the premise that we are dealing with crimes against humanity, the allegations of the statute of limitations can be dismissed since *Jus Cogens* regulate the*se crimes*. It should be noted that "the sovereignty of the State is no longer an absolute and savage freedom, but it is legally subordinated to two fundamental norms: the imperative of peace and the protection of human rights"[128]. Thus, "this new panorama of the world community challenges not only the structures of the old state sovereignty but also reorganizes the dynamics of international law[129].

The 'Martens Clause', which has evolved over time (1899, 1907, and 1977), also justifies the punishment of state agents. This principle extends legally recognized protection to civilians and combatants in all situations, even those not covered by conventional norms. It

125 Gaspari (2014b).

126 Zaffaroni (2019).

127 IACHR: *Almonacid Arellano and others vs. Chile*, 2006.

128 Ferrajoli (2002), p. 39.

129 Bedin; Leves (2018), p. 255.

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safeguards the dignity of the human person when they are deprived of the protection of the law[130].

It should be reiterated that the conclusion, although not accepted (a) by the Superior Court of Justice[131], which stated that the rules about limitation statutes and the creation of criminal types must always comply with domestic legislation; and (b) by the Federal Supreme Court[132], in a judgment on an extradition request made by the Republic of Argentina about an accused terrorist. However, due to its definitive legal status, we believe, as did Justice Ricardo Lewandowski's dissenting vote in the aforementioned judgment[133], that *Jus Cogens* should prevail over national law.

To summarize, the limitation statute, as a cause for extinguishing punishability, is provided for and disciplined in domestic legislation and, therefore, cannot stand up to *Jus Cogens*. It is essential to indicate that the doctrine of non-application of the limitation statute for serious crimes is being extended in Brazil to crimes such as slavery[134].

An important point that needs to be highlighted is that if the orientation advocated in this paper were accepted by the Judiciary, Brazil would begin a true process of transitional justice. Furthermore, the criminal trial of State agents who are still alive would demonstrate Brazil's commitment to human rights in the international sphere and provide a response to families who had their loved ones tortured and killed.

7. Final Considerations

This article focused on studying the legal viability of criminal prosecution of state agents involved in severe human rights violations committed in the context of the exception to the Democratic Rule of Law in Brazil, especially from 1964 to 1985. In this sense, it proposes a legal analysis and an argumentative strategy to overcome the existent obstacles to implementing (statute of limitations) the cases that convicted the Brazilian State, i.e., Gomes Lund

130 Trindade (2002), pp. 1031-1032.

131 STJ: *REsp 1.798.903-RJ*, 2019.

132 STF: *EXT 1362*, 2016.

133 STF: *EXT 1362*, 2016.

134 Aguiar (2023), pp. 118-135.

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and Others v. Brazil and Vladimir Herzog v. Brazil at the Inter-American System of Human Rights. Both of them state that (a) the application of the amnesty law is considered contrary to the American Convention on Human Rights, and (b) there were crimes against humanity, but only the latter considered the question as part of international *Jus Cogens*.

Particularly because Brazil was convicted twice by the Inter-American Court of Human Rights (Gomes Lund Case and Vladimir Herzog Case), and in the latter, the Court established that there was a violation of international *Jus Cogens* there is an open discussion about the persecution of state agents.

That's because, during a period of institutional instability in Brazil, political differences triggered persecution sponsored by the Brazilian State. Historical data demonstrated that this persecution involved, within the state apparatus, the illegal arrest, kidnapping, torture, murder, concealment of human corpses, and forced disappearance of several people.

On the other hand, before the two international cases cited were decided, the Brazilian Supreme Court, already in force under the current Constitution, ruled, in a judgment with *erga omnes* effects binding effect (ADPF 153 – *not yet res judicata*), that the Amnesty Law is valid, has no incompatibilities with the country's regime and, therefore, prohibits the criminal prosecution of state agents involved in repression. After that, most of the national courts followed the rule established by the Supreme Court.

Further research has shown that the Brazilian Supreme Court's decision does not end the discussion on the subject.

There is a set of tools, such as the control of conventionality and the control of constitutionality based on the conventionalized bloc of constitutionality, that can achieve the goal of affirming the treaties and international jurisprudence. Even if those obstacles are not yet removed, new arguments, especially the relationship between crimes against humanity and *Jus Cogens*, can be a weapon to combat immobility in legal arguments

Brazil must, therefore, bring to criminal justice state agents involved in severe human rights violations (classified as crimes against humanity) between 1961 and 1985. Indeed, the amnesty law and the decision handed down in ADPF 153 cannot be obstacles to this procedure.

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References

Aguilar Cavallo, Gonzalo; Algarin Herrea, Gloria; Arcaro Conci, Luiz; Bermudez Tapia, Manuel; Garat, Paula and Mendieta, David (2021): *El control de convencionalidad*: *Ius Constitutionale Commune y diálogo judicial multinivel Latinoamericano* (Santiago, Tirant Lo Blanch).

Aguiar, Leonardo Augusto de Almeida (2023): "Imprescritibilidade do crime de redução à condição análoga à de Escravo: a decisão da Corte IDH no direito interno brasileiro", in *Revista CEJ* (Ano XXVII, N.º 85), pp. 118-135.

Alcalá, Humberto Nogueira (2021): "La jurisprudencia en el derecho internacional general y el valor e impacto de la jurisprudencia de la Corte Interamericana de Derechos Humanos y el Tribunal Europeo de Derechos Humanos", in *Revista Brasileira de Políticas Públicas* (Vol. 11, N.º 2), pp. 544-566.

Almeida, Eneá de Stutz (2021): "Justiça de transição reversa", in *Justiça de Transição e democracia* (Salvador, Soffia 10) pp. 230-266.

Andreu-Gusman, Federico (2003): "30 años de la Convención Americana sobre Derechos Humanos – todavía hay mucho camino que recurrir". [Available: https://biblioteca.corteidh.or.cr/documento/46872]. [Accessed: April 10, 2022].

Applebaum, Anne (2017): *Cortina de Ferro. O esfacelamento do Leste Europeu* (São Paulo, Três Estrelas).

Arns, Paulo Evaristo (2014): *Brasil*: *Nunca Mais*, 41ª ed. (São Paulo, Editora Vozes).

Assis, Victor Hugo Siqueira (2022): "Crimes contra a Humanidade e Ditadura Militar: STF, CorteI DH e o fetiche pelo Direito de Errar por Último", in *Revista da AGU* (Vol. 21, N.º 3), pp. 245-268.

Bazan, Victor (2011): "Corte Interamericana de Derechos Humanos y Cortes Supremas o Tribunales Constitucionales latinoamericanos: el control de convencionalidad y la necesidad de un diálogo interjurisdiccional crítico", in *Revista Europea de Derechos Fundamentales* (N.º 16), pp. 15-44.

Bedin, Gilmar Antônio and Leves, Aline Michele Pedron (2018): "A Sociedade Internacional

ISSN 0718-0195 · Vol. 22 · Núm. 2 · 2024 · pp. 36-68 · DOI: 10.4067/S0718-52002024000200036

e a Paz por meio do Direito: O papel da Justiça Penal Internacional", in *Revista de Direitos Fundamentais & Democracia* (Vol. 23, N.º 1), pp. 242-258.

Beigbeder, Yves (1999): *Judging War Criminals*: *the politics of international justice* (London, MacMillan Press).

Betto, Frei (2006): Batismo de sangue: *Guerrilha e morte de Carlos Marighella* (São Paulo, Roco Digital).

Borer, Douglas A. (1999): *Superpowers defeated*: *Vietnam and Afghanistan compared* (London, Cass).

Borges, Bruno Barbosa and Piovesan, Flávia (2019): "O Diálogo Inevitável Interamericano e a Construção do Ius Constitutionale Commune", in *Revista de Direitos Fundamentais & Democracia* (Vol. 24, N.º 3), pp. 5-26.

Bossi, Pedro Pimenta (2021): "Democracia, Justiça de Transição e controle de convencionalidade", in Almeida, Eneá de Stutz, *Justiça de Transição e Democracia* (Salvador, Soffia 10) pp. 90-129.

Brownlie, Ian (1998): *Principles of Public International Law*, 5ª ed. (Oxford, Oxford University Press).

Cappelletti, Mauro (1992): *O controle judicial de constitucionalidade das leis no direito comparado* (Porto Alegre, Sérgio Antônio Fabris Editor).

Conci, Luiz Guilherme Arcaro (2014): "O controle de convencionalidade como parte de um constitucionalismo transnacional fundado na pessoa humana", in *Revista de Processo* (N.º 232), pp. 363-382.

Conci, Luiz Guilherme Arcaro and Gerber, Konstantin (2016): "Diálogo entre la Corte Interamericana de Derechos Humanos y el Supremo Tribunal Federal: ¿El control de convencionalidad actúa conjuntamente al control de constitucionalidad?", en Conci, Luiz Guilherme Arcaro and Mezzetti, Luca, *Diálogo entre as Cortes* (Bogotá, Externado) pp. 109-144.

Conci, Luiz Guilherme Arcaro and Faraco, Marina (2020): "O Bloco de Constitucionalidade Convencionalizado como Paradigma Contemporâneo da Jurisdição Constitucional Brasileira", in Cléve, Clémerson Merlin; Schier, Paulo Ricardo and Lorenzetto, Bruno

ISSN 0718-0195 · Vol. 22 · Núm. 2 · 2024 · pp. 36-68 · DOI: 10.4067/S0718-52002024000200036

Menezes, *Jurisdição Constitucional em Perspectiva* (São Paulo, Revista dos Tribunais) pp. 93-111.

Corao, Carlos Ayala (2013): *Del diálogo jurisprudencial al control de convencionalidad* (Cidade do México, Porrúa).

Estados Unidos da América (2001): *The Princeton Principles on Universal Jurisdiction, Princeton Project on Universal Jurisdiction* (New Jersey, Program in Law and Public Affairs, Princeton University).

Ferrer-Mac Gregor, Eduardo (2010): "Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano". [Available at: http://biblio.juridicas.unam.mx/libros/7/3033/14.pdf]. [Accessed: April 25, 2022].

Ferrajoli, Luigi (2002): *A soberania no mundo moderno*: *nascimento e crise do Estado nacional* (São Paulo, Martins Fontes).

Fico, Carlos (2008): *O grande irmão*: *da operação Brother Sam aos anos de Chumbo. O Governo dos Estados Unidos e a Ditadura Militar Brasileira* (Rio de Janeiro, Civilização Brasileira).

García Roca, Javier and Nogueira Alcalá, Humberto (2017): "El impacto de las sentencias europeas e interamericanas: valor de precedente e interpretación vinculante", in Roca, Francisco Javier and Cuenca, Encarnación Carmona, *¿Hacia una globalización de los derechos? El impacto de las sentencias del Tribunal Europeo y de la Corte Interamericana* (Navarra, Editorial Aranzadi, S.A.U.) pp. 71-132.

Gaspari, Elio (2014a): *A ditadura envergonhada* (São Paulo, Intrínseca), vol. I.

Gaspari, Elio (2014b): *A ditadura escancarada* (São Paulo, Intrínseca), vol. II

Gesteira, Luiz André Maia Guimarães (2014): "A Guerra fria e as ditaduras militares na América do Sul", in *Revista Scientia Plena* (Vol. 10, N° 12), pp. 01-20.

Gonzales, Boris Barrios (2006): "La cosa juzgada nacional y el cumplimiento y ejecución de las sentencias de la Corte Interamericana de los Derechos Humanos en los estados parte", in *Revista Estudios Constitucionales* (Vol. 4, N.º 2), pp. 363-392.

Gubert, Roberta Magalhães (2006): *Mauerschützen* (*o caso dos atiradores do muro*) *e a pretensão de correção do direito na teoria de Robert Alexy*: *aportes hermenêuticos ao debate acerca da relação entre direito e moral* (São Leopoldo, Dissertação de Mestrado Universidade do

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Vale do Rio dos Sinos).

Guzmán Dálbora, José Luis (2005): "Crímenes internacionales y prescripción", in Ambos, Kai; Malarino, Ezequiel and Woischnik, Jan, *Temas actuales del Derecho Penal Internacional. Contribuciones de América Latina, Alemania y España* (Montevideo, Fundación Konrad Adenauer) pp. 69-82.

Hamilton, Alexander; Jay, John and Madison, James (1994): *El Federalista* (Cidade do México, Fondo de Cultura Econômico).

Heyns, Christof; Zwaak, Leo and Padilla, David (2006): "Comparação Esquemática dos Sistemas Regionais de Direitos Humanos: Uma Atualização", in *SUR Revista Internacional de Direitos Humanos* (N.º 4, Ano 3), pp. 161-169.

Lopes, Ana Maria D. Ávila and Chehab, Isabelle Maria Campos Vasconcelos (2016): "Bloco de constitucionalidade e controle de convencionalidade: reforçando a proteção dos direitos humanos no Brasil", in *Revista Brasileira de Direito* (Vol. 12, N.º 2), pp. 82-94.

Martins, Ives Granda da Silva (2000): "Eficácia Provisória e Definitiva dos Tratados Internacionais", in *Revista da EMERJ* (Vol. 3, N.º 12), pp. 199-207.

Monteconrado, Fabíola Girão (2002): "O impacto da regra sobre a imprescritibilidade nos ordenamentos jurídicos dos estados se justifica?". [Available in: http://www.corteidh.or.cr/tablas/r33253.pdf]. [Accessed: April 24, 2022].

Neves, Marcelo (1988): *Teoria da inconstitucionalidade das leis* (São Paulo, Saraiva).

Nishiyama, Adolfo Mamoru and Lazari, Rafel de (2022): "A Corte Interamericana de Direitos Humanos e o caso Herzog vs. Brasil", in *Cuestiones Constitucionales* (N.º 47), pp. 437-454.

Parenti, Pablo F. (2013): "La inaplicabilidad de normas de prescripción en la jurisprudencia de la Corte Interamericana de Derechos Humanos". [Available in: http://www.corteidh.or.cr/tablas/r26835-2.pdf]. [Accessed: October 14, 2020].

Parliamentary Commission of Inquiry of the Municipality of São Paulo (2009): *Final Report* (São Paulo).

ISSN 0718-0195 · Vol. 22 · Núm. 2 · 2024 · pp. 36-68 · DOI: 10.4067/S0718-52002024000200036

Pastor Ridruejo, José Antonio (1997): "Las Naciones Unidas y la codificación del Derecho Internacional: Aspectos Jurídicos y Políticos", in Casadevante, Carlos Fernández de and López, Francisco Javier Quel, *Las Naciones Unidas y el Derecho Internacional* (Barcelona, Ariel) pp. 173-185.

Piovesan, Flávia (2011): *Direitos humanos e o direito constitucional internacional*, 12ª ed. (São Paulo, Saraiva).

Pizzolo, Calogero (2008): "La relación entre la Corte Suprema y la Corte Interamericana a la luz de bloque de constitucionalidad federal", in Albanese, Susana, *El control de convencionalidad* (Buenos Aires, EDIAR) pp. 233-249.

Ramos, André de Carvalho (2012): *Teoria Geral dos Direitos Humanos na ordem internacional*, 2ª ed. (São Paulo, Saraiva).

Ramos, André de Carvalho (2004): *Responsabilidade internacional por violação de direitos humanos – seus elementos, a reparação devida e sanções possíveis. Teoria e prática do Direito Internacional* (Rio de Janeiro, Renovar).

Ramos, André de Carvalho (2011): "A ADPF 153 e a Corte Interamericana de Direitos Humanos", in Gomes, Luiz Flávio and Mazzuoli, Valerio de Oliveira, *Crimes da ditadura militar* (São Paulo, Revista dos Tribunais) pp. 174-225.

Right to Memory and Truth (2013). "Special Commission on Political Deaths and Disappearances". [Available at: https://www.gov.br/mdh/pt-br/centrais-de-conteudo/memoria-e-verdade/direito-a-memoria-e-a-verdade-2013-comissao-especial-sobre-mortos-e-desaparecidos-politicos/view]. [Accessed: September 23, 2021].

Sagüés, Néstor Pedro (2010): "Obligaciones internacionales y control de convencionalidad", in *Estudios Constitucionales* (Vol. 8, N.º 1), pp. 117-136.

Silva, Anderson Santos da (2021): "Supremo Tribunal Federal e Corte Interamericana de Direitos Humanos: em busca de um diálogo permanente, profundo e crítico", in *Revista de Estudos do STJ* (Vol. 2, N.º 2), pp. 63-90.

Slaughter, Anne-Marie (2003): "A Global Community of Courts", in *Harvard International Law Journal* (Vol. 44, N.º 1), pp. 191-219.

ISSN 0718-0195 · Vol. 22 · Núm. 2 · 2024 · pp. 36-68 · DOI: 10.4067/S0718-52002024000200036

Teles, Janaína de Almeida (2011): *Memórias dos cárceres da ditadura*: *os testemunhos e as lutas dos presos políticos no Brasil* (São Paulo, Tese de Doutorado da Faculdade de Filosofia, Letras e Ciências Humanas da Universidade de São Paulo).

Trindade, Antônio Augusto Cançado (1997): *Tratado de Direito Internacional dos Direitos Humanos* (Porto Alegre, Sergio Antonio Fabris), vol. 1.

Trindade, Antônio Augusto Cançado (2002): *O Direito Internacional em um Mundo em Transformação* (Rio de Janeiro, Renovar).

Ugarte, Pedro Salazar (2014): *La Reforma Constitucional sobre Derechos Humanos. Una Guía Conceptual* (México, Instituto Belisario Domínguez).

Uprimny Yepes, Rodrigo (2008): *Bloque de constitucionalidad, derechos humanos y proceso penal* (Colômbia, Consejo Superior de la Judicatura).

Vergottini, Giuseppe de (2010): *Oltre il dialogo tra le corti* (Bolonha, Il Mulino).

Zaffaroni, Eugênio Raul (2019): *Doutrina Penal Nazista*: *A Dogmática Penal Alemã entre 1933 a 1945* (São Paulo, Tirant Lo Blanch).

Legal norms cited

Constitution of the Federative Republic of Brazil. Federal Official Gazette, October 5, 1988.

Constitution of the Federative Republic of Brazil. Federal Official Gazette, September 18, 1946.

Constitutional Amendment No. 26, which convenes the National Constituent Assembly and makes other provisions. Federal Official Gazette, November 27, 1985.

Decree n. 40, on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Federal Official Gazette, February 15, 1991.

Decree n. 678, about Pacto of San Jose da Costa Rica. Federal Official Gazette, November 6, 1992.

ISSN 0718-0195 · Vol. 22 · Núm. 2 · 2024 · pp. 36-68 · DOI: 10.4067/S0718-52002024000200036

Decree n. 4.388, on the Rome Statute. Federal Official Gazette, September 25, 2002.

Decree n. 4.463, on the recognition of the competence of the Inter-American Court for the interpretation of the Pact of San José de Costa Rica. Federal Official Gazette, November 8, 2002.

Decree n. 7.030, on the Vienna Convention on the Law of Treaties. Federal Official Gazette, December 14, 2009.

Decree n. 8.766, on the Inter-American Convention on Forced Disappearance of Persons. Federal Official Gazette, May 11, 2016.

Institutional Act n 5. The President of the Republic may decree intervention in states and municipalities, without the limitations provided for in the Constitution, suspend the political rights of any citizens for 10 years and revoke federal, State and municipal elective mandates, and take other measures. Federal Official Gazette, December 13, 1968.

Law n. 23.521, Delimitation Planned in the Scope of the Duty of Due Obedience, Limits are Set to the Prosecution System Provided by Art. 10 of Law 23,049. Boletín Nacional Argentina, June 09, 1987.

Law n. 23.492, on extinguishing criminal proceedings for participation in offences under Article 10 of Law No. 23.049 and violent political actions. Boletín Nacional Argentina, December 29,1986.

Law No. 6.683, on the Amnesty Law. Federal Official Gazette, August 28, 1979.

Penal Code of Brazil. Decree-Law No. 2.848. Official Gazette. Brazil, December 7, 1940.

Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal. Approved by the United Nations International Law Commission, 1950. Report of the International Law Commission on its second session, June 5-July 29, 1950, Document A/1316, pp. 11-14.

United Nations Convention on the No Application of Limitation Statute for War Crimes and Crimes against Humanity. Approved by the UN General Assembly through Resolution 2391 (XXIII). United Nations, November 26, 1968.

ISSN 0718-0195 · Vol. 22 · Núm. 2 · 2024 · pp. 36-68 · DOI: 10.4067/S0718-52002024000200036

Jurisprudence cited

Inter-American Court of Human Rights: *Opinião Consultiva OC N° 1/82*, Trial on September 24, 1982.

Inter-American Court of Human Rights: *Caso Velásquez Rodríguez vs. Honduras*, Trial on July 29, 1988.

Inter-American Court of Human Rights: *Olmedo Bustos e outros vs. Chile*, Trial on February 5, 2001.

Inter-American Court of Human Rights: *Barrios Altos* (*Chumbipuma Aguirre e Outros*) *vs. Peru*, Trial on March 14, 2001.

Inter-American Court of Human Rights: *Myrna Mack Chang vs. Guatemala*, Trial on November 25, 2003.

Inter-American Court of Human Rights: *Bulacio vs. Argentina*, Trial on September 18, 2003.

Inter-American Court of Human Rights: *Trabajadores Cesados del Congreso* (*Aguado Alfaro e outros vs. Peru*), Trial on November 24, 2006.

Inter-American Court of Human Rights: *Acevedo Jaramillo e others vs. Peru*, Trial on February 7, 2006.

Inter-American Court of Human Rights: *Almonacid Arellano and others vs. Chile*, Trial on September 26, 2006.

Inter-American Court of Human Rights: *La Cantuta vs. Peru*, Trial on November 29, 2006.

Inter-American Court of Human Rights: *Goiburú e outros vs Paraguay*, Trial on September 22, 2006.

Inter-American Court of Human Rights: *Radilla Pacheco vs. México*, Trial on November 23, 2009.

Inter-American Court of Human Rights: *Cabrera García e Montiel Flores vs. México*, Trial on November 26, 2010.

ISSN 0718-0195 · Vol. 22 · Núm. 2 · 2024 · pp. 36-68 · DOI: 10.4067/S0718-52002024000200036

Inter-American Court of Human Rights: *Gomes Lund e outros vs. Brasil*, Trial on November 24, 2010.

Inter-American Court of Human Rights: *Gelman v. Uruguay*, Trial on February 24, 2011.

Inter-American Court of Human Rights: *Gelman v. Uruguay*, resolution of March 20, Supervision of sentence enforcement, 2013.

Inter-American Court of Human Rights: *Trabalhadores da Fazenda Brasil Verde vs. Brasil*, Trial on October 20, 2016.

Inter-American Court of Human Rights: *Herzog e outros vs. Brasil*, Trial on March 15, 2018.

International Criminal Tribunal for the former Yugoslavia: *Prosecutor vs. Drazen Edermovic*, Case IT-96-22-T, Trial on November 29, 1996.

International Criminal Tribunal for the former Yugoslavia: *The Prosecutor of the Tribunal against Radovan Karadzic and Ratko Mladic*, Case N.º IT-95-5-I (Bosnia and Herzegovina), Indictment, July 24, 1995.

International Criminal Tribunal for Rwanda: *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial on Chamber 1, September 2, 1998.

Special Court for Sierra Leone: *The Prosecutor Against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Trial on June 20, 2007.

Supreme Court of Justice of Argentina: *Simón con Julio Héctor y Otros* (privación ilegítima de la libertad), Causa N.º 17.768, Trial on June 14, 2005.

Superior Court of Justice, Brazil. *REsp 1.798.903-RJ*, Rel. Min. Reynaldo Soares da Fonseca, Terceira Seção, by majority, Trial on September 25, 2019.

Supreme Court of Justice, Brazil. *ADPF 153*, Rel. Min. Eros Grau. Pending trial.

Supreme Court of Justice, Brazil. *ADPF 320*, Rel. Min. Dias Toffoli. Pending trial.

Supreme Court of Justice, Brazil. *PEP 769*. Trial on February 18, 2016.

ISSN 0718-0195 · Vol. 22 · Núm. 2 · 2024 · pp. 36-68 · DOI: 10.4067/S0718-52002024000200036

Supreme Court of Justice, Brazil. *EXT 1362.* Trial on November 09, 2016.

Supreme Court of Justice, Brazil. *AP 863/SP*. Trial on May 23, 2017.

Supreme Court of Justice, Brazil. *PET 7848*. Trial on Setempber 13, 2018.

Federal Regional Court 3rd Region, Brasil. *Ação Civil Pública nº 0025169-85.2009.403.6100* – 6ª Vara da Secção Judiciária de São Paulo.

Federal Regional Court 3rd Region, Brazil. *RESE 0015754-19.2015.4.03.6181*, Rel. Des. Federal André Nekatschalow, Trial on December 30, 2016.

Federal Regional Court 3rd Region, Brazil. *RESE 0016351-22.2014.4.03.6181*, Rel. Des. Federal Mauricio Kato, Trial on August 07, 2017.

Federal Regional Court 3rd Region, Brazil. *RESE 0015358-42.2015.4.03.6181*, Rel. Des. Federal Fausto De Sanctis, Rel. p/ acórdão Des. Fed. Nino Toldo, Trial on February 05, 2019.

Federal Regional Court 3rd Region, Brazil. *RESE 0001147-74.2010.4.03.6181*, Rel. Des. Federal José Lunardelli, Trial on February 05, 2019.

Federal Regional Court 3rd Region, Brazil. *EMDN 0008031-41.2018.4.03.6181*, Rel. Des. Federal Mauricio Kato, Trial on December 14, 2021.

Federal Regional Court 3rd Region, Brazil. *RESE 5002620-24.2021.4.03.6181*, Rel. Des. Federal Helio Nogueira, Trial on July 17, 2024.

ISSN 0718-0195 · Vol. 22 · Núm. 2 · 2024 · pp. 36-68 · DOI: 10.4067/S0718-52002024000200036