

THE INTER-AMERICAN HUMAN RIGHTS PROTECTION SYSTEM: STRUCTURE, FUNCTIONING AND EFFECTIVENESS IN BRAZILIAN LAW*

EL SISTEMA DE PROTECCIÓN INTERAMERICANO DE DERECHOS HUMANOS: ESTRUCTURA, FUNCIONAMIENTO Y EFECTIVIDAD EN EL DERECHO BRASILEÑO

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RESUMEN: Este ensayo tiene como objetivo estudiar la sistemática de juicio contra el Estado en el sistema interamericano de derechos humanos, lo que se puede llamar de proceso civil internacional en el sistema interamericano. Se dará especial énfasis a la eficacia interna de condenas dictadas por la Corte Interamericana de Derechos Humanos contra Brasil.

Palabras clave: proceso civil internacional, sistema interamericano de derechos humanos, Comisión Interamericana de Derechos Humanos, Corte Interamericana de Derechos Humanos, ejecución de sentencias internacionales en Brasil.

ABSTRACT: *This essay aims to study the Inter-American system of human rights and its monitoring organs, the Inter-American Commission and the Inter-American Court of Human Rights, as well as the effectiveness of their condemnatory sentences in what concerns the Brazilian Law.*

Descriptors: *international civil process, Inter-American system of human rights, Inter-American Commission on Human Rights, Inter-American Court of Human Rights, enforcement of international judgments in Brazil.*

RÉSUMÉ: *Cet essai vise à étudier le traitement systématique de poursuite contre l'État au système interaméricain des droits de l'homme, qui peut aussi être appelé le procès civil international dans le système interaméricain. Une attention particulière sera donnée sur l'efficacité interne des condamnations prononcées par la Cour Interaméricaine des Droits de l'Homme contre le Brésil.*

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SUMMARY: I. *Introduction*. II. *The Inter-American System of Human Rights*. III. *The Inter-American Convention on Human Rights*. IV. *The Inter-American Commission on Human Rights*. V. *The Inter-American Court of Human Rights*. VI. *Processing of the State before the Court*. VII. *Internal effectiveness of sentences passed by the ICHR – the case of Brazil*. VIII. *The problem of the Court's judgments in Brazil*. IX. *Concluding remarks*. X. *Bibliography*.

I. INTRODUCTION

This essay aims to study the Inter-American system of protection of human rights, with special focus on its reflection on the Brazilian law.¹ Therefore, it is meant, at first, to provide understanding on the genesis of the Inter-American system, its creation and its organs (the Inter-American Commission and Court). Then it will survey the procedural *iter* of the processing of a State in the Inter-American system, the internal effectiveness of judgments passed by the Inter-American Court, as well as the (always complicated) issue of the enforcement of the sentences of that Court in Brazil.

Among the existing regional systems of protection, the first and oldest one is the European system (its original treaty, called the European Convention on Human Rights, dates back to 1950). It has dealt with the largest number of cases of human rights violation so far. The Inter-American regional system is the second one. It was established by the American Convention on Human Rights, in 1969. The third and most recent one is the African regional system, still very incipient, established by the African Charter on Human and Peoples' Rights, in 1981.

The creation of all these systems is in accordance with the Charter of the United Nations of 1945, which expressly states (in its Article 1, 3, *in fine*) that one of the goals of the UN is "to achieve international cooperation" in order to promote and stimulate "respect for human rights and fundamental freedoms for all, without distinction of race, sex, language or religion".²

¹ See Mazzuoli, Valerio de Oliveira, *Curso de direito internacional público*, 4a. ed., São Paulo, Revista dos Tribunais Publishing, 2010, pp. 824-842.

² For the text in Portuguese, see Mazzuoli, Valerio de Oliveira, *Coletânea de direito internacional*, 8a. ed., São Paulo, Revista dos Tribunais Publishing, 2010, p. 233.

We focus here on the study of the Inter-American regional system of human rights, which is the system that directly affects Brazil (as well as all the States of the American Continents). This should not lead us to think, however, that the Inter-American system of human rights protection concerns only the so-called “Latin American countries”, since it also affects the United States of America, as well as the Caribbean States that have already become parties of the Organization of American States (OAS) or will in the future.

A complete study of the Inter-American system of human rights can be found in the book *Comments on the American Convention on Human Rights* that this author has written in collaboration with Luiz Flávio Gomes, and was published in Brazil by the *Revista dos Tribunais Publishing* (2nd edition, 2009),³ to which we refer the interested reader.

II. THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

Parallel to the *global system* of protection of human rights, there are also *regional systems* of protection (e.g., the European⁴ and the Afri-

³ See Gomes, Luiz Flávio & Mazzuoli, Valerio de Oliveira, *Comentários à Convenção Americana sobre Direitos Humanos (Pacto de San Jose da Costa Rica)*, 2a., São Paulo, Revista dos Tribunais Publishing, 2009, p. 349.

⁴ For a study on the European system of human rights protection, see Fawcett, James E. S., *The application of the European Convention on Human Rights*, Oxford, Clarendon Press, 1987; Flauss, Jean-François, “Le droit de recours individuel devant la Cour européenne des droits de l’homme: le Protocole n° 9 à la Convention Européenne des Droits de l’Homme”, in *Annuaire Français de Droit International*, vol. 36, Paris, 1990, pp. 507-519; Mahoney Paul & Prebensen, Søren, “The European Court of Human Rights”, in MacDonald, R. St. J. et al. (eds.), *The European system for the protection of human rights* The Hague, Martinus Nijhoff Publishing, 1993, pp. 621-643; Harris, David and Janssen-Pevtschin, Geneviève, “Le Protocole n° 11 à la Convention Européenne des Droits de l’Homme”, *Revue Trimestrielle des Droits de l’Homme*, n° 20, out. 1994, pp. 483-500; O’Boyle, Michael & Warbrick, Colin, *Law of the European Convention on Human Rights*, London, Butterworths Publishing, 1995; Gomien, Donna; Harris, David & Zwaak, Leo, *Law and practice of the European Convention on Human Rights and the European Social Charter*, Strasbourg: Council of Europe Publishing, 1996; Rideau, Joël, “Le rôle de l’Union Européenne en matière de protection des droits de l’homme”, *Recueil des Cours*, vol. 265 (1997), pp. 9-480; Matscher, Franz, “Quarante ans d’activités de la Cour Européenne des Droits de l’Homme”, *Recueil des Cours*, vol. 270 (1997), pp. 237-398; and Lambert, Elisabeth, *Les effets des arrêts de la Cour Européenne des Droits de l’Homme: contribution à une approche pluraliste du droit européen des droits de l’homme*, Bruxelles, Bruylant Publishing, 1999.

can⁵ ones). Among them stands the Inter-American system,⁶ composed of four main instruments: the Charter of the Organization of American States (1948); the American Declaration of the Rights and Duties of Man (1948), which, although not being technically a treaty, outlines the rights mentioned in the Charter of the OAS; the American Convention on Human Rights (1969), known as the *Pact of San Jose of Costa Rica*; and the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights, dubbed the *Protocol of San Salvador* (1988).⁷

Throughout this Inter-American set of rules, there dwells the general obligation of protecting the “fundamental rights of the individual without distinction as to race, nationality, creed or sex”⁸ (Article 3, I, of the OAS Charter).⁹ In relation to the international responsibility of the American States for violation of human rights, we should highlight the system proposed by the American Convention on Human Rights, in which the Mem-

⁵ About the African regional system, see Ngom, Benoît Saaliu, *Les droits de l'homme et l'Afrique*, Paris, Silex Publishing, 1984; Bello, Emmanuel G., “The African Charter on Human and Peoples’ Rights: a legal analysis”, *Recueil des Cours*, vol. 194 (1985-V), pp. 9-268; Mbaye, Kéba, *Les droits de l'homme en Afrique*, Paris, A. Pedone Publishing, 1992; Ougurgouz, Fatsah, *La Charte Africaine des Droits de l'Homme et des Peuples: une approche juridique des droits de l'homme entre tradition et modernité*, Paris, PUF, 1993; Umozurike, U. Oji, *The African Charter on Human and Peoples’ Rights*, The Hague, Martinus Nijhoff Publishing, 1997; and Evans, Malcolm & Murray, Rachel (eds.), *The African Charter on Human and Peoples’ Rights: the system in practice*, 1986-2006, 2nd ed., Cambridge, Cambridge University Press, 2008.

⁶ See Faúndez Ledezma, Héctor, *El sistema interamericano de protección de los derechos humanos: aspectos institucionales y procesales*, San José, IIDH Publishing, 1999, 786p.

⁷ See Hitters, Juan Carlos, *Derecho internacional de los derechos humanos, t. II. Sistema Interamericano*, Buenos Aires, Ediar, 1993; Nieto Navia, Rafael, *Introducción al sistema interamericano de protección a los derechos humanos*, Bogotá, Temis Publishing, 1993; Dulitzky, Ariel, “Una mirada al sistema interamericano de derechos humanos”, *América Latina Hoy*, Salamanca, núm. 20, 1998, pp. 9-19; and Andreu-Guzmán, Federico, “30 años de la Convención Americana sobre Derechos Humanos: todavía hay mucho camino por recorrer”, en *El sistema interamericano de protección de los derechos humanos en el umbral del siglo XXI*, t.1, San José, Corte IDH, 2001, pp. 301-307.

⁸ For the text in Portuguese, see Mazzuoli, Valerio de Oliveira, *Coletânea de direito internacional, cit.*, p. 261.

⁹ For a study on the precedents of human rights protection in the OAS Charter, see Gros Espiell, Héctor, *Le système interaméricain comme régime régional de protection internationale des droits de l'homme, cit.*, pp. 13-20.

ber States of the OAS take part. This system does not exclude the subsidiary application of the system introduced by the OAS Charter itself, as detailed by Article 29(b) of the American Convention (entitled *Rules of Interpretation*). It says that none of its provisions can be interpreted as “restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of Conventions to which one of the said States may be a party”.¹⁰

The American human rights protection system historically originated with the proclamation of the Charter of the Organization of American States (Charter of Bogotá),¹¹ in 1948, adopted at the 9th Inter-American Conference, which also celebrated the Declaration of the Rights and Duties of Man.¹² The latter formed the basis of regulatory protection in the American system before the conclusion of the Convention (in 1969) and still remains the instrument of regional expression in this area, mainly to the non-parties to the American Convention.¹³

After the adoption of these two instruments, a gradual process of maturation of the mechanisms of human rights protection in the American system occurred, whose first step was the creation of a specialized body to promote and protect human rights within the OAS: the Inter-American Commission on Human Rights, a proposal adopted at the 5th Meeting of Foreign Ministers, held in Santiago, Chile in 1959. As initially proposed, the Commission should work temporarily until the establishment of an

¹⁰ For the text in Portuguese, see Mazzuoli, Valerio de Oliveira, *Coletânea de direito internacional*, cit., p. 1006. For a study on the interpretation of this kind of international clause, see Mazzuoli, Valerio de Oliveira, *Tratados internacionais de direitos humanos e direito interno*, São Paulo, Saraiva Publishing, 2010, pp. 116-128.

¹¹ See Márquez, Edith, “Documentos internacionales sobre los derechos humanos: la Carta de la OEA”, in *México y las declaraciones de derechos humanos*, México, UNAM, Instituto de Investigaciones Jurídicas, pp. 217-232.

¹² See Buergethal, Thomas & Cassel, Douglas, “The future of the Inter-American human rights system”, *El futuro del sistema interamericano de protección de los derechos humanos*, San José, IIDH Publishing, 1998, pp. 539-572; Ayala Corao, Carlos, “El sistema interamericano de promoción y protección de los derechos humanos”, en *México y las declaraciones de derechos humanos*, México, UNAM, Instituto de Investigaciones Jurídicas, 1999, pp. 99-118; and Ayala Corao, Carlos, “Reflexiones sobre el futuro del sistema interamericano de derechos humanos”, *Revista IIDH*, vol. 30/31 (edición especial), San José, IIDH Publishing, 2001, pp. 91-128.

¹³ See Cançado Trindade, Antônio Augusto, *Tratado de direito internacional dos direitos humanos*, vol. III, Porto Alegre, Sergio Antonio Fabris Publishing, 2003, pp. 33 y 34.

Inter-American Convention on Human Rights, which eventually took place in San Jose, Costa Rica, in 1969.¹⁴

III. THE AMERICAN CONVENTION ON HUMAN RIGHTS

The American Convention on Human Rights,¹⁵ which is the key instrument of the Inter-American system of human rights, was signed in 1969 and entered into force on July 18, 1978, after having obtained the minimum of 11 ratifications. Only the Member States of the Organization of American States (OAS) have the right to become part of it. Its creation has strengthened the human rights system established by the Charter of the OAS and made explicit by the American Declaration, thus making the Commission on Human Rights more effective. Until then, this Commission was only an organ of the OAS. Despite its importance in consolidating the system of individual liberty and social justice in the Americas, some countries like the United States of America, which has just signed it, and Canada have not ratified the American Convention and, apparently, are not willing to do so. Brazil did not ratify it before 1992. It was internally promulgated by the Decree 678 of November 6, in that year.

The protection of human rights in the American Convention *brings reinforcement to or complements* the protection provided by the internal laws of its States Parties (see the *Preamble* of the Convention). This means that it does not withdraw from the States the primary competence to nurture and protect the rights of persons within their jurisdiction. However, in cases of *lack* of shelter, or protection *shorter* than needed, the Inter-American system can interact, contributing to the common goal of protecting a certain right that the State has not guaranteed or preserved as it should.

The Convention, in Part I, lists an array of civil and political rights similar to the International Covenant on Civil and Political Rights of 1966. Among

¹⁴ See Gros Espiell, Héctor, *Le système interaméricain comme régime régional de protection internationale des droits de l'homme*, cit., pp. 35-37; and Ramos, André de Carvalho, *Direitos humanos em juízo: comentários aos casos contenciosos e consultivos da Corte Interamericana de Direitos Humanos*, São Paulo, Max Limonad Publishing, 2001, pp. 57 y 58.

¹⁵ The official Brazilian version of the American Convention on Human Rights can be found published in Mazzuoli, Valerio de Oliveira, *Coletânea de direito internacional*, cit., pp. 998-1015.

many others we find the right to life, the right to liberty, the right to be entitled to a fair and public hearing and an impartial trial, the right not to be held in slavery or servitude, the right to freedom of conscience and belief, the right to freedom of thought and expression, and the right to name and nationality. In Part II the treaty sets out the means to achieve the protection of the rights listed in Part I.

The basis of the Convention is found in its two first articles.¹⁶ According to Article 1, entitled *Obligation to Respect Rights*, the States Parties to the Convention “undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”. In turn, Article 2 establishes that, “Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms”.¹⁷

It is important to observe that the American Convention does not specifically establish any social, economic or cultural right. It contains only a general prediction of such rights, which appears in Article 26, which declares that “The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of economic and technical nature, with a view to progressively achieving, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, to the extent of available resources, by statute or other appropriate means”.¹⁸ In 1988, aiming at guaranteeing such rights, the General Assembly of the OAS adopted the Additional Protocol to the American Convention – the ESC Protocol, known as the

¹⁶ See Gros Espiell, Héctor, *Le système interaméricain comme régime régional de protection internationale des droits de l'homme*, cit., pp. 38 and 39.

¹⁷ For the text in Portuguese, see Mazzuoli, Valerio de Oliveira, *Coletânea de direito internacional*, cit., p. 999.

¹⁸ For the text in Portuguese, see *ibidem*, p. 1005.

Protocol of San Salvador, which entered into force in November 1999, when the 11th instrument of ratification was deposited, in accordance with Article 21 of the Protocol.¹⁹ Brazil ratified the Protocol in 1999. It was internally promulgated by Decree 3321 of December 30, in that year. The ESC Protocol is notable for its inclusion of a “right to a healthy environment” in Article 11, as follows: “1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation and improvement of the environment”.²⁰

As to the other international instruments that compose the Inter-American system, these are also noteworthy: the Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990);²¹ the Inter-American Convention to Prevent and Punish Torture (1985); the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994), known as the *Convention of Belem do Para*; the Inter-American Convention on International Traffic in Minors (1994); and the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999). Unfortunately, these instruments have not been ratified by many of the States Parties to the OAS, the only exception being the *Convention of Belem do Para*, which so far has been ratified by the expressive number of 31 out of 35 Member States of the Organization.

For the protection and monitoring of the established rights, the American Convention is composed of two bodies: the *Inter-American Commission on Human Rights* and the *Inter-American Court of Human Rights*, as follows.

¹⁹ See Piovesan, Flávia, *Direitos humanos e o direito constitucional internacional*, 7a. ed., São Paulo, Saraiva Publishing, 2006, p. 228.

²⁰ For the text in Portuguese, see Mazzuoli, Valerio de Oliveira, *Coletânea de direito internacional*, cit., p. 1025. About this theme in the ESC Protocol, see Shelton, Dinah, “Environmental rights and Brazil’s obligations in the Inter-American human rights system”, *The George Washington International Law Review*, vol. 40, 2009, pp. 733-777.

²¹ Brazil made the following statement at the signing of the Protocol: “In ratifying the Protocol to Abolish the Death Penalty, adopted in Asunción on June 8, 1990, I declare that, due to constitutional obligations, I make a reservation in terms set out in Article 2 of the Protocol in question, which guarantees to the States Parties the right to apply death penalty in wartime in accordance with the international law, for extremely serious crimes of a military nature”.

IV. THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The origin of the Inter-American Commission on Human Rights was a resolution and not a treaty. This was Resolution VIII of the Fifth Meeting of Consultation of Foreign Ministers, held in Santiago (Chile) in 1959.²² However, the Commission began to operate in the next year, following what had been set by its first statute, under which its function would be to promote the rights established both in the OAS Charter, and in the Declaration of the Rights and Duties of Man.

According to the Charter of the OAS, the Inter-American Commission on Human Rights is not only an organ of the Organization of American States, but also an organ of the American Convention on Human Rights, and thus has a double function. The Inter-American Court of Human Rights, in turn, is only an organ of the American Convention. While all States Parties of the American Convention must be members of the OAS, the converse is not true, since not all the members of the OAS are parties to the American Convention.²³

In this topic we will consider the Inter-American Commission more as an organ of the American Convention than as an organ of the OAS.²⁴

The Commission consists of seven members who shall be persons of high moral authority and recognized competence in the field of human rights. These members are elected individually by the General Assembly of the OAS, from a list of candidates proposed by the governments of the Member States. Each of these governments may propose up to three candidates, nationals of the proposing States, or of any other Member of the organization. Whenever a list of three candidates is offered, at least one of them shall be a national of a Member State other than the applicant. The commissioners are elected for four years and may be reelected only once, but the terms of the three members appointed at the first election shall expire after two years. Soon after such election, the names of these

²² See Gros Espiell, Héctor, *Le système interaméricain comme régime régional de protection internationale des droits de l'homme*, cit., p. 23; Cançado Trindade, Antônio Augusto, *Tratado de direito internacional dos direitos humanos*, vol. III, cit., pp. 34 y 35.

²³ See Arrighi, Jean Michel, *OEA: Organização dos Estados Americanos*, transl. by Sérgio Bath, Barueri, Manole Publishing, 2004, p. 52.

²⁴ See Gros Espiell, Héctor, *Le système interaméricain comme régime régional de protection internationale des droits de l'homme*, cit., pp. 23-34.

three members shall be drawn by lot in the General Assembly. No more than one national of each country can take part in the Commission.

The Commission represents all the Member States of the OAS and has as its main function to promote the observance and protection of human rights. In exercising its mandate, the commission has the following functions (Article 41):

- a) to develop an awareness of human rights among the peoples of America;
- b) to make recommendations to the governments of the Member States, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their internal law and constitutional provisions, as well as appropriate measures to further the observance of those rights;
- c) to prepare such studies or reports as it considers advisable in the performance of its duties;
- d) to request the governments of the Member States to supply it with information on the measures adopted by them in matters of human rights;
- e) to respond, through the General Secretariat of the Organization of American States, to inquiries made by the Member States on matters related to human rights and, within the limits of its possibilities, to provide those States with the advisory services they request;
- f) to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of the Convention; and
- g) to submit an annual report to the General Assembly of the Organization of American States.²⁵

One of the main competences of the Commission is to consider claims from individuals or groups of individuals, or from non-governmental entities legally recognized in one or more Member States of the OAS, related to infringements of the human rights contained in the American Convention by a State Party (Article 41, f).²⁶ Thus, individuals, despite

²⁵ For the text in Portuguese, see Mazzuoli, Valerio de Oliveira, *Coletânea de direito internacional*, cit., p. 1008.

²⁶ See Gros Espiell, Héctor, *Le système interaméricain comme régime régional de protection internationale des droits de l'homme*, cit., pp. 27-30; Ramos, André de Carvalho, *Processo internacional de direitos humanos: análise dos sistemas de apuração de violações dos direitos humanos e a implementação das decisões no Brasil*, Rio de Janeiro, Renovar Publishing, 2002, pp. 229-238; and Piovesan, Flávia, *Direitos humanos e o direito constitucional internacional*, cit., pp. 232 y 233. For an overview of the cases against Brasil in the Inter-American Commission until 2005, see Gomes, Luiz Flávio

not having direct access to the Court, may also initiate the procedure for the processing of the State, by presenting a petition to the Commission. Under Article 44 of the Convention it is stated that: "Any person or group of persons, or any non-governmental entity legally recognized in one or more Member States of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party".²⁷ This is an exception to the so-called *optional clause* (which allows the State Party to manifest on whether or not it accepts this mechanism), since the Convention provides that any person or group of persons (whether national or not) can make use of the Inter-American Commission, independently of the State's express declaration recognizing this systematic. Hence Hélio Bicudo's observation that the Inter-American Commission "has a *quasi-jurisdictional* function, since it receives the denunciations presented by the victims of violation of fundamental rights by the States, or by any person or non-governmental organizations, or any that has not found recognition or protection by these same States" [emphasis added].²⁸

Notwithstanding, for the acceptance of a petition on violation of the Convention and the human rights recognized by it, such petition should fulfill the requirements of Article 46(1) of the American Convention, namely: *a*) that the remedies under internal law have been pursued and exhausted in accordance with generally recognized principles of International Law (the principle of prior exhaustion of internal remedies); *b*) that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment; *c*) that the subject of the petition or communication is not pending in another international process for settlement (i.e. no international *lis pendens* or *res judicata*). However, for the first and second conditions, one must observe the provisions of paragraph 2 of the same Article 46, according to which the provisions of subparagraphs

& Mazzuoli, Valerio de Oliveira, "O Brasil e o sistema interamericano de proteção dos direitos humanos", in Schmidt, Andrei Zenkner (coord.), *Novos rumos do direito penal contemporâneo: livro em homenagem ao Prof. Dr. Cezar Roberto Bitencourt*, Rio de Janeiro, Lumen Júris Publishing, 2006, pp. 427-437.

²⁷ For the text in Portuguese, see Mazzuoli, Valerio de Oliveira, *Coletânea de direito internacional*, cit., p. 1008.

²⁸ Bicudo, Hélio, "Defesa dos direitos humanos: sistemas regionais", *Estudos Avançados*, São Paulo, vol. 17, núm. 47, 2003, p. 231.

a and *b* mentioned above do not apply when: *a*) the internal legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; *b*) the party alleging violation of his rights has been denied access to the remedies under internal law or has been prevented from exhausting them; and *c*) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.²⁹

In the practice of the Inter-American system, the rule of prior exhaustion of internal remedies has been (with absolute consistency) interpreted restrictively, thus mitigating its scope when the victim of the human rights violation does not have the necessary means and conditions to assuredly exhaust internal legal action before triggering the Inter-American Commission procedures.³⁰ The Commission, in accordance with such conventional arrangement, has thus made it easier for claimants to establish the admissibility of their petitions or communications when at least one of these factors is present.³¹ In this case the State may even be liable internationally, exactly for not having provided the claimant with legal means to repair the damage caused by the violation of human rights.

The procedure before the Commission is governed by the Articles 48 to 51 of the Convention. According to Article 48(1), when the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows:

a) if it considers the petition or communication admissible, it shall request information from the government of the State indicated as being responsible for the alleged violations, and shall furnish that government a transcript of the pertinent portions of the petition or communication. This information shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case;

²⁹ For the text in Portuguese, see Mazzuoli, Valerio de Oliveira, *Coletânea de direito internacional*, cit., p. 1009. About this theme, see Gros Espiell, Héctor, *Le système interaméricain comme régime régional de protection internationale des droits de l'homme*, cit., p. 45.

³⁰ About this theme, see the classic work by Cançado Trindade, Antônio Augusto, *O esgotamento de recursos internos no direito internacional*, 2a. ed., Brasília, Universidade de Brasília Publishing, 1997, p. 327.

³¹ See Cançado Trindade, Antônio Augusto, *Tratado de direito internacional dos direitos humanos*, vol. III, cit., pp. 39 y 40.

b) after the information has been received, or after the period established has elapsed and the information has not been received, the Commission shall ascertain whether the grounds for the petition or communication still exist. If they do not, the Commission shall order the closing of the record;

c) the Commission may also declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received;

d) if the record has not been closed, the Commission shall, with the knowledge of the parties, examine the matter set forth in the petition or communication in order to verify the facts. If necessary and advisable, the Commission shall carry out an investigation, for the effective conduct of which it shall request, and the States concerned shall furnish to it all necessary facilities;

e) the Commission may request the States concerned to furnish any pertinent information and, if so requested, shall hear oral statements or receive written statements from the Parties concerned; and

f) the Commission shall place itself at the disposal of the Parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention [*conciliatory phase*].³²

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

According to Article 49, if a friendly settlement has been reached in accordance with paragraph 1(f) of Article 48, the Commission shall draw up a report, which shall be transmitted to the petitioner and to the States Parties to the Convention, and shall then be communicated to the Secretary General of the Organization of American States for publication. This report shall contain a brief statement of the facts and the solution found. If any party in the case so requests, the fullest possible information shall be provided to it. If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report (*first report*) setting forth the facts and stating its conclusions. If the report,

³² For the text in Portuguese, see Mazzuoli, Valerio de Oliveira, *Coletânea de direito internacional*, cit., pp. 1009 y 1010.

in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1(e) of Article 48 shall also be attached to the report. The report shall be transmitted to the States concerned, which shall not be at liberty to publish it. In transmitting the report, the Commission may make such proposals and recommendations as it sees fit (Article 50, 1 to 3). If the State does not meet these recommendations, and if the petitioner is in agreement, the case is then submitted to the Court by the Commission.³³

If, within a period of three months from the sending of the Commission report to the States concerned, the matter has not either been settled or submitted by the Commission or the State concerned to the Court, and its jurisdiction accepted, the Commission – now in the *phase of the second report* – may, by the vote of an absolute majority of its members, set forth its own opinion and conclusions concerning the question submitted to its consideration.³⁴ This phase of the *second report*, as noted, will only occur when “the matter has not been resolved or [has not been] submitted to the Court’s decision [in general, because the State is not Party to the American Convention or, if is, has not yet recognized the contentious jurisdiction of the Court] by the Commission or the State concerned” (Article 51, 1).³⁵ Note that the term “has not been” also binds to the last phrase “submitted to the Court decision”, which leads us to conclude that only if the case was not submitted to the Court’s decision would the Commission *continue* to its internal procedure of (non-judicially) processing the State, thus editing its *second report*.³⁶ At this stage, the Commission shall make pertinent recommendations and shall prescribe a period within which the State is to take the measures that are incumbent upon it to remedy the situation examined. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its

³³ See Arrighi, Jean Michel, *OEA: Organização dos Estados Americanos*, cit., p. 108.

³⁴ See Piovesan, Flávia, *Direitos humanos e o direito constitucional internacional*, cit., p. 236.

³⁵ For the text in Portuguese, see Mazzuoli, Valerio de Oliveira, *Coletânea de direito internacional*, cit., p. 1010.

³⁶ See Mazzuoli, Valerio de Oliveira. *Comentários à Convenção Americana sobre Direitos Humanos*, cit., p. 255.

members whether the State has taken adequate measures and whether to publish its report (Article 51, 2 and 3).

The States that have not ratified the American Convention are not relieved from their obligations under the OAS Charter and the Declaration of the Rights and Duties of Man, of 1948. They may normally trigger the American Commission, which will make recommendations to governments with respect to the human rights violated in the State concerned. As mentioned before, this happens because the Inter-American Commission, besides being an organ of the American Convention, is also (originally) an organ of the OAS. In case of not-respecting what has been established by the Commission, this could trigger the General Assembly of the OAS to impose further sanctions against the State.³⁷ Although the imposing of international sanctions on human rights violators is not expressly mentioned among the powers of the General Assembly (under Article 54 of the Charter of the OAS), the fact is that, while a political body, it is responsible for ensuring compliance with the provisions of the OAS Charter, which, in this case, would be a violation of human rights.³⁸ This subsidiary system of the OAS will only be extinguished from the day when all American States have ratified the American Convention and accepted the contentious jurisdiction of the Inter-American Court.

Notice, therefore, that there is a *functional split* as to the duties of the Commission, which can act both as an *organ of the OAS*, or an *organ of the American Convention* (in the latter case, assuming that the States Parties to the Convention have already accepted the contentious jurisdiction of the Inter-American Court). The Commission, then, is at the same time an Inter-American system organ of “general vocation” (when it acts as an OAS organ), and a “procedural organ” of that same system (in the functions assigned by the Convention).³⁹ This is the ambivalent or two-faced aspect of the Commission, to which we referred above. There is no doubt, however, that the system of the American Convention is superior to the OAS system. First of all, it covers many more rights than those

³⁷ See Gros Espiell, Héctor, *Le système interaméricain comme régime régional de protection internationale des droits de l'homme*, cit., pp. 30 y 31.

³⁸ See Ramos, André de Carvalho, *Direitos humanos em juízo...*, cit., pp. 68 y 69; and also his *Processo internacional de direitos humanos...*, cit., pp. 221-224 (in these two works, for obvious typo, the author refers to the Art. 53 of the OAS Charter, when the device which addresses the powers of the General Assembly is the Art. 54 of the Charter).

³⁹ See Bicudo, Hélio, *Defesa dos direitos humanos: sistemas regionais*, cit., p. 231.

mentioned in both the OAS Charter and the American Declaration; second, because the judgments of the Inter-American Court are binding on the States Parties to the Convention, which is not the case with the recommendations of the quasi-judicial system of the OAS Charter.⁴⁰

To finish this study on the Commission, let us remember that three Brazilians have already chaired the Inter-American Commission on Human Rights: the jurist Carlos Alberto Dunshee de Abranches (1969-1970), Professor Gilda Maciel Correa Meyer Russomano (1989-1990), and the lawyer Hélio Bicudo (1999-2000). More recently Mr. Paulo Sérgio Pinheiro, also a Brazilian, participated in the Commission (not as President). His mandate expired on December 31, 2007.

V. THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-American Court of Human Rights – which is the second organ of the American Convention – is the jurisdictional organ of the American system that addresses the cases of human rights violations alleged to have been committed by the States Parties of the OAS that have ratified the American Convention.⁴¹ This is a supranational tribunal able to condemn the States Parties to the American Convention for human rights violations. The Court does not belong to the OAS, but to the American Convention, having the nature of an international judicial body. This is the second court of human rights established in regional contexts (the first was the European Court of Human Rights, based in Strasbourg, responsible for implementing the 1950 Convention⁴²). Its birth was in 1978, on the entry into force of the American Convention, but its operation was

⁴⁰ See Ramos, André de Carvalho, *Direitos humanos em juízo...*, cit., p. 71.

⁴¹ For details, see Dunshee de Abranches, Carlos Alberto, “The Inter-American Court of Human Rights”, *American University Law Review*, vol. 30 (1980), pp. 79-125; Buerghenthal, Thomas, “The Inter-American Court of Human Rights”, *American Journal of International Law*, n° 76, april/1982, pp. 1-27; and Dwyer, Amy S., “The Inter-American Court of Human Rights: towards establishing an effective regional contentious jurisdiction”, *Boston College International and Comparative Law Review*, vol. 13, 1990, pp. 127-166.

⁴² For a detailed comparison between the two systems, see Gros Espiell, Héctor, “La Convention Américaine et la Convention Européenne des Droits de l’Homme: analyse comparative”, *Recueil des Cours*, vol. 218, 1989-VI, pp. 167-412.

effective only in 1980 when it issued its first advisory opinion, and seven years later, when it issued its first ruling.⁴³

The Inter-American Court—which is based in San Jose, Costa Rica—is composed of seven judges (always of different nationalities) from the Member States of the OAS. They are elected on account of their individual capacity from among jurists of the highest moral authority and recognized competence in questions of human rights, who meet the conditions required for the exercise of the highest judicial functions, in accordance with the law of the State of which they are nationals or the State that proposes them as candidates (section 52). The judges of the Court are elected for a period of six years and may be reelected only once. They must remain in office until the expiration of their term. The *quorum* for the deliberations of the Court is of five judges (Article 56).

The Court has an *advisory jurisdiction* (on the interpretation of the provisions of the Convention as well as the provisions of treaties concerning the protection of human rights in the American States),⁴⁴ as well as a *contentious jurisdiction*, suitable for the trial of concrete cases, when one some of the States Parties of the American Convention is alleged to have violated any of its precepts.⁴⁵ However, the contentious jurisdiction of the Inter-American Court is limited to States Parties to the Convention that explicitly recognize its jurisdiction. This means that a State Party to the American Convention cannot be sued in Court if he does not accept its contentious jurisdiction. In ratifying the American Convention, the States Parties automatically accept the *advisory* jurisdiction of the Court. However, as to the *contentious* jurisdiction, this is optional and may be accepted later.

⁴³ See Buergenthal, Thomas, “Recordando los inicios de la Corte Interamericana de Derechos Humanos”, *Revista IIDH*, San José, vol. 39, 2004, pp. 11-31; and Arrighi, Jean Michel, *OEA: Organização dos Estados Americanos*, cit., pp. 105-107.

⁴⁴ See Buergenthal, Thomas, “The advisory practice of the Inter-American Human Rights Court”, *American Journal of International Law*, vol. 79, 1985, pp. 1-27; and Miguel, Carlos Ruiz, “La función consultiva en el sistema interamericano de derechos humanos: ¿crisálida de una jurisdicción supra-constitucional?”, *Liber amicorum: Héctor Fix Zamudio*, vol. II, San José, CIDH, 1998, pp. 1345-1363.

⁴⁵ See Gros Espiell, Héctor, “El procedimiento contencioso ante la Corte Interamericana de Derechos Humanos”, *Boletín Mexicano de Derecho Comparado*, vol. 19, 1986, pp. 511-548.

This was the way found by the American Convention to make the States ratify the Convention, without fear of becoming immediately defendants. It was an international policy strategy that paid off. Brazil adhered to the contentious jurisdiction of the Court in 1998, through the Legislative Decree 89, on December 3. According to this Decree only the allegations of human rights violations that occurred after the recognition can be submitted to the Court (note the *temporal clause* of Brazil in accepting the contentious jurisdiction of the Inter-American Court: Brazil is only liable to be sued before the Court *from this recognition on*). It must be pointed out that there was no need of an Executive decree for the promulgation of the recognition of the Court's contentious jurisdiction, beyond that Legislative Decree 89/98, since it has only *authorized* the Executive to accept the jurisdiction of the Court, not having innovated the Brazilian legal order (thus dispensing the enactment of the same by means of a *new presidential decree*).⁴⁶

It is noteworthy that both individuals and private institutions are prevented from entering directly to the Court (Article 61), unlike what occurs in the European Court of Human Rights.⁴⁷ The *Commission*—which in this case acts as a primary instance to the jurisdiction of the Court—is the one that will refer the case to the Court. This can also be done by *another Member State*, provided that the country accused has previously accepted the Court's jurisdiction to act in such a context—i.e. to deal in interstate cases involving human rights—either requiring or not the reciprocity condition.⁴⁸ It must be stressed also that the Commission (in the cases triggered by individuals) can not act as a *party* in such a case, since it has already acted as to the admissibility of the case.

The Court neither reports cases nor makes any recommendation in exercising its contentious jurisdiction, but gives sentences that, according to the Pact of San Jose are final and binding. In other words, the Court's judgments are binding in those States that recognize its jurisdiction over

⁴⁶ See Ramos, André de Carvalho, *Direitos humanos em juízo...*, cit., p. 61.

⁴⁷ See, about this theme, Cançado Trindade, Antônio Augusto, *Evolution du droit international au droit des gens: l'accès des individus à la justice internationale (le regard d'un juge)*, Paris, A. Pedone Publishing, 2008, p. 188.

⁴⁸ See Rezek, Jose Francisco, *Direito internacional público: curso elementar*, 9a. ed., São Paulo, Saraiva Publishing, 2002, p. 215.

litigation.⁴⁹ When the Court declares the occurrence of violations of right safeguarded by the Convention, it demands the immediate repair of the damage and requires, if applicable, the payment of just compensation to the injured party. Under Article 68 of the Convention it is said that the States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. The part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with its internal procedures governing the execution of judgments against the State.

VI. PROCESSING OF THE STATE BEFORE THE COURT

If the State concerned refuses to accept the conclusions established by the Inter-American Commission in its *first report* (or *preliminary report*), it can refer the case to the Inter-American Court, provided that the State has recognized its compulsory jurisdiction. This drive of the Court by the Commission is done by means of *judicial proceedings*, just like the bringing of any action into court under the rules of civil process. Beyond the Commission, however, other States (which also have expressly recognized the contentious jurisdiction of the Court) may also process a State before the Court, since the human rights guarantee is an objective requirement of interest to all States Parties to the American Convention.⁵⁰ This last case, being a denunciation of one State against another, has never occurred in the Inter-American system (for obvious reasons).

The rite of the processing of the State before the Inter-American Court is stated in the Rule of Court. The version currently in force, is dated of November 24, 2009. It was approved by the Court in its LXXXV Ordinary Period of Sessions. This is the fifth Regulation of the Inter-American Court since its establishment.

The action of the Commission shall be brought before the Secretariat of the Court (in San Jose, Costa Rica), through the docket of the application of demand in the working languages (which are Spanish, English,

⁴⁹ See Cançado Trindade, Antônio Augusto, *Tratado de direito internacional dos direitos humanos*, vol. III, *cit.*, p. 52. About the authority of international judgments, see Brant, Leonardo Nemer Caldeira, *L'autorité de la chose jugée en droit international public*, Paris, LGDJ Publishing, 2003, 396 p.

⁵⁰ See Ramos, André de Carvalho, *Direitos humanos em juízo...*, *cit.*, pp. 88-99.

Portuguese and French). The petition must give the claims (including those relating to reparations and costs); the parties in the case; the statement of the facts; the resolutions to initiate the procedure and the admissibility of the complaint by the Commission; the supporting evidence, stating the facts on which they will deal; the individualization of the witnesses and experts and the object of their statements; the ground laws and the relevant conclusions.

Moreover, to examine the case the Court must receive the following information from the Commission: *a*) the names of the Delegates; *b*) the names, address, telephone numbers, electronic addresses and facsimile number of the representatives of the alleged victims, if applicable; *c*) the reasons leading the Commission to submit the case before the Court and its observations on the answer of the respondent State to the recommendations of the report to which Article 50 of the Convention refers (*v. its content infra*); *d*) a copy of the entire case file before the Commission, including all communication following the issue of the report to which the Article 50 of the Convention refers; *e*) the evidence received, including the audio and the transcription, with an indication of the alleged facts and arguments on which they bear (the evidence received in an adversarial proceeding will be indicated); *f*) when the Inter-American public order of human rights is affected in a significant manner, the possible appointment of expert witnesses, the object of their statements, and their *curricula vitae*; and *g*) the claims, including those related to reparations. When it has not been possible to identify one or more of the alleged victims who figure in the facts of the case because it concerns massive or collective violations, the Tribunal shall decide whether to consider those individuals as victims (*v. Article 35 of the Rule of Court*). As the Inter-American Commission is the plaintiff, the complaint must be accompanied by the report referred to in the quoted Article 50(1) of the Convention (*in verbis*: "If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions"⁵¹). After the suit is proposed, the President of the Court will preliminarily examine the demand by checking whether or not all the requirements necessary for its commencement were met, and may

⁵¹ For the text in Portuguese, see Mazzuoli, Valerio de Oliveira, *Coletânea de direito internacional*, *cit.*, p. 1010.

require the applicant to remedy deficiencies within twenty days (Article 38 of the Rules of Court).⁵²

It is interesting to remark that the new Rules of the Court (2009) now provide for the figure of an “Inter-American Defender”, who will act, by the Court’s designation, in the cases where the alleged victims don’t have a duly accredited legal representation (v. Article 37).

According to Article 28(1) of the Rules of the Inter-American Court, the demand, its defense, the written pleadings, motions, other evidences and petitions to the Court may be submitted in person, via courier, facsimile, telex, mail and other means generally used. In case of submission by electronic means, the original documents, as well as the proof that follows, should be submitted within 21 days (and this is a non-extendable deadline) from the written documents last submission day. In the previous Regulation (of 2000) the time limit was of only seven days (under Article 26, 1), considered too exiguous.

The preliminary stage of the demand will be followed by the citation of the State defendant and the subpoena of the Inter-American Commission when it is not the plaintiff (the Commission will act in this case as *custos legis*). The adversary system procedures are then begun, in which the State defendant may submit preliminary objections within two months of its citation. If the Brazilian State is the defendant, it should act through the international office of the Solicitor-General of the Union, with operational support from the Ministry of Foreign Affairs. It has to be mentioned that nothing prevents the applicant from quitting the process. If the State defendant has not yet been cited, the withdrawal must necessarily be accepted. After the defendant is cited, the Court may accept or refuse the withdrawal of the applicant (to make this decision, representatives of the victims or their relatives etc., should be heard). It may also occur that the State defendant accepts, by notifying the Court, the claims of the plaintiff (which, obviously, occurs infrequently), in which case the Court will decide on the merits of compliance and its legal effects, setting—in case of observance—repairs and compensation due.⁵³

Nothing prevents the parties from reaching an amicable settlement for the dispute, by informing the Court of the solution found. In this case,

⁵² See Mazzuoli, Valerio de Oliveira, *Comentários à Convenção Americana sobre Direitos Humanos*, cit., pp. 279 y 280.

⁵³ See Ramos, André de Carvalho, *Direitos humanos em juízo...*, cit., pp. 90 y 91.

the Court approves the conciliation, acting now as a supervisor of the human rights standards protected by the American Convention. Nothing also prevents the Court from not approving the conciliation of the parties, taking into account some aspects of the cooperative agreement between them (Articles 63 and 64 of the Rules of Court).

The defendant, within the fixed period of four months following the notification of the case, has the right to present his defense, when he should gather the necessary documents to prove his arguments as well as call witnesses and experts. Such defense shall be communicated by the Secretary to the persons mentioned in Article 39(1), *a*, *c* and *d*, of the Rules of the Court which are: the President and the Court judges; the Commission, provided it is not the plaintiff; and the alleged victim, his/her representatives, or the Inter-American Defender, if this is the case.

Preliminary exceptions may only be invoked *in the contestation* of the demand. Together with their filing, the facts concerned them should be exposed, as well as the grounds of law, the conclusions, the supporting documents with the indication of evidence that the author of the exception may intend to enforce. The presentation of preliminary exceptions shall have no suspensive effect on the proceedings as for merits, deadlines and terms thereof. The parties interested in presenting written responses to the preliminary exceptions may do so within a period of thirty days from the receipt of the notice. When considered indispensable by the Court, it may convene a special hearing for the preliminary exceptions, after which it will decide on them. However, the Court may also decide in a just a single sentence the preliminary exceptions and merits of the case, according to the principle of economy of procedure (Article 42 of the Rules of the Court).

Next step, the President of the Court shall fix the date of the opening of the oral procedure and set the necessary hearings (Article 45 of the Rules).

After concluding the discovery process (with the discussions, the questions during the debates etc.⁵⁴) the Court shall proceed to the deliberation and delivery of the judgment of merits. This shall contain: *a*) the names of the person who presides in the Court, Judges who rendered the decision,

⁵⁴ On the probative question in the Inter-American Court, see Bovino, Alberto, "A atividade probatória perante a Corte Interamericana de Direitos Humanos", *SUR – Revista Internacional de Direitos Humanos*, São Paulo, año 2, núm. 3, 2005, pp. 61-83.

the Secretary and the Deputy Secretary; *b*) the identity of those who participate in the proceedings and their representatives; *c*) a description of the proceedings; *d*) the facts in the case; *e*) the submissions of the Commission, the victims or their representatives, the respondent State, and, if applicable, the petitioning State; *f*) the legal arguments; *g*) the ruling on the case; *h*) the decisions on reparation and costs, if applicable; *i*) the result of the voting; and *j*) a statement indicating which text of the judgment is authentic (Article 65 of the Rules of the Court).

When the sentence on the merit of the case does not rule specifically on reparations, the Court will set the opportunity for a posterior decision and indicate the procedure.⁵⁵ If the Court is informed that the parties to the proceedings came to an agreement on enforcement of the judgment of merits, it will verify whether the agreement is consistent with the Convention and will decide what it sees fit in the matter (Article 66, 1 and 2).

Notification of the award to the parties is made by the Court Secretariat. Until the parties are notified of the sentence, the texts, the arguments and votes will remain secret. The sentences will be signed by all the judges who participated in the vote and by the Secretary. However, the sentence shall be valid when signed by a majority of the judges and the Secretary. The originals of judgments shall be deposited in the archives of the Court. The Secretary shall deliver certified copies to the States Parties, to the parties concerned, to the Permanent Council through its President, to the Secretary General of the OAS and all other interested persons who so requests.

VII. INTERNAL EFFECTIVENESS OF SENTENCES PASSED BY THE ICHR – THE CASE OF BRAZIL

A complex legal issue that arises in relation to decisions made by the Inter-American Court—a discussion that is also extensive to the judgments of any of the international courts known today—relates to the alleged need for such decisions to be subject to homologation by the Supe-

⁵⁵ See Rodríguez Rescia, Víctor Manuel, “Las reparaciones en el sistema interamericano de protección de los derechos humanos”, *Revista IIDH*, San José, vol. 23, 1996, pp. 129-150.

rior Court of Justice (*STJ - Superior Tribunal de Justiça*) to be internally effective in Brazil.⁵⁶

An observation to be made here is that we are not dealing with a problem regarding the homologation of *foreign* judgments by the STJ, but of *international* judgments, which is a different issue, for the reasons discussed below.

The subject is regulated in Brazil by the Federal Constitution of 1988 (Article 105, I(i), introduced by the Constitutional Amendment 45/2004), the Law of Introduction to the Civil Code (Articles 15 and 17), the Code of Civil Procedure (Articles 483 and 484) and the Internal Rules of the Supreme Court (Articles 215 to 224). On an international level, there are rules for this matter in the Bustamante Code of 1928, still in force in Brazil (Article 423 *et seq.*)

In our view, the sentences handed down by international courts do not require homologation by the STJ. In the specific case of judgments of the Inter-American Court, the rule contained in Article 105, inc. I, point *i*, introduced by Constitutional Amendment 45/2004 and repeated by Article 483 of the Code of Civil Procedure, which states that “the sentence pronounced by a *foreign court* will not be effective in Brazil unless after passing through homologation by the Supreme Court, is not applicable”⁵⁷ [presently, after the Constitutional Amendment 45/2004, the competent court is the *Superior Court of Justice*]. Judgments handed down by “international courts” do not fit in the guise of *foreign judgments* referred to by the instruments mentioned. “Foreign judgments” should be understood as ones pronounced by a court under the sovereignty of any State, and not emanating from an international tribunal which has jurisdiction over its own States Parties.

One might think that a foreign judgment is any that is not national and, therefore, is an award either made by the judiciary of any State, or issued by an international court. Both should then be subject to homologation before they accomplish their internal purposes in Brazil. However, this

⁵⁶ Before the entry into force of the Constitutional Amendment 45/2004, the jurisdiction for homologation of foreign judgments was subjected to the Supreme Court. *See*, about this theme, Mazzuoli, Valerio de Oliveira, “Sentenças internacionais no Supremo Tribunal Federal”, *Jornal Correio Braziliense*, supplement “Law & Justice”, Brasília, 14 de octubre de 2002, p. 3.

⁵⁷ For the text in Portuguese, *see* Mazzuoli, Valerio de Oliveira, *Coletânea de direito internacional*, cit., p. 1562.

argument does not seem to find solid legal basis, when differentiating the legal status and procedure of foreign judgments from that of international courts.

It is known that *international law* is not to be confused with the so-called *foreign law*. This has to do with the international legal regulations, in most cases done by international standards. International law, therefore, disciplines the performance of the States, international organizations, and also individuals in the international scenario. The foreign law, however, is the one subject to the jurisdiction of a certain State, such as the Italian, French or German Law, and so on. It is any law subject to the jurisdiction of another country other than Brazil. A verdict pronounced in Argentina will always be foreign. But how about another made by the Inter-American Court of Human Rights, will it be foreign, too? There is no way to answer the question but negatively. Every court "that knows legal issues not likely to be decided by a national court is considered an international court",⁵⁸ and the sentence it pronounces will also be qualified accordantly. The sentences handed down by "international courts" will be *international judgments* in the same proportion that the sentences handed down by "foreign courts" will be *foreign judgments*, not to be confused with each other.

There is, therefore, clear distinction between *foreign judgments* (subject to the sovereignty of any State) to which Article 483 of the Code refers, and the *international judgments* rendered by international courts that do not bind to the sovereignty of any State, but, on the contrary, have jurisdiction over the State itself.

One of the Brazilian internationalists who have expressly indicated such discernment is José Carlos de Magalhães, who teaches:

It should be stressed that an international judgement, although it can have the character of a foreign judgment, for not coming from a national judicial authority, is not always the same thing. An international sentence consists of a judicial act emanating from an international judiciary organ of which the State is a Party, either because it accepted the compulsory jurisdiction, such as the Inter-American Court of Human Rights, or because, in special agreement, agreed to submit the solution of a particular dispute to an international body such as the International Court of Justice. The same

⁵⁸ Brownlie, Ian, *Princípios de direito internacional público*. Transl. by Maria Manuela Farrajota (*et al.*), Lisboa, Fundação Calouste Gulbenkian Publishing, 1997, p. 603.

can be said of submitting a dispute to an international arbitration court, giving specific jurisdiction for the designated authority to decide the dispute. In both cases, the submission of the State to the jurisdiction of the International Court, or to the arbitrators, is optional. One can accept it or not. However, if accepted by a formal declaration, as is authorized by the Legislative Decree 89 of 1998, the State is obliged to comply with the decision that will be given. If it does not, it will not be complying with an obligation of international character and thus subject to sanctions that the international community has the right to apply.

And the same professor concluded:

One such sentence is, therefore, not dependent on homologation by the Supreme Court [the Superior Court of Justice], even as it itself may have been the Power that violated the human rights for which the compensation was determined. It is not, in this case, an *inter alios* sentence strange to the country. Being part of it, it needs to be complied with, as one would comply with the decision of its own courts.⁵⁹

This will lead us to the conclusion that the STJ has neither constitutional, nor legal authority to provide the homologation of judgments pronounced by international courts, which decide over the alleged sovereign State power, and have jurisdiction over the State itself. To think otherwise is subversive to the international principles that seek to govern the community of States as a whole, with a view to the perfect coordination of the powers of the States in this international scenario of rights protection.

In short, the judgments of the Court, by the wording of Article 68(1) of the American Convention, have *immediate* effect on domestic law, and should be enforced (*sponte sua*) by the authorities of the condemned State.

⁵⁹ Magalhães, Jose Carlos de, *O Supremo Tribunal Federal e o direito internacional: uma análise crítica*, Porto Alegre, Livraria do Advogado Publishing, 2000, p. 102. In this same sense, see Ramos, André de Carvalho, *Direitos humanos em juízo...*, *cit.*, pp. 496 y 497; and his *Processo internacional de direitos humanos...*, *cit.*, pp. 331-336.

VIII. THE PROBLEM OF ENFORCEMENT OF THE COURT JUDGMENTS IN BRAZIL

Unfortunately, the Inter-American system of human rights still lacks an effective system of enforcement of the Court judgments under the internal legislation of the States condemned, in spite of Article 68(1) of the American Convention, which expressly provides for the commitment of States Parties in “accepting the decision of the Court in any case in which they are parties”.⁶⁰ Also Article 65, *in fine*, determines that the Court shall inform the General Assembly of the organization of the “cases where a State has not complied with its judgments”.⁶¹

The first international condemnation of Brazil for violation of rights protected under the American Convention was related to the *Case of Damião Ximenes Lopes*, which came from Demand 12.237, referred by the Inter-American Commission on Human Rights (which is based in Washington, in the United States) to the Inter-American Court of Human Rights (located in San Jose, Costa Rica) on October 1st, 2004. The case concerned the death of Mr. Damião Ximenes Lopes (who suffered from mental retardation) in a health center called Guararapes Nursing Home, located in Sobral, in the State of Ceará, which is part of the Brazilian Unified Health System. While in the hospital for psychiatric treatment, the victim suffered torture and ill-treatments by the attendants of the said Nursing Home. The failure to investigate and punish those responsible, and the lack of judicial guarantees, we considered to violate the Convention in four main articles: 4 (right to life), 5 (right to physical integrity), 8 (right to judicial guarantees) and 25 (right to judicial protection). In its decision of July 4, 2006—which was the first judgment in the Inter-American system concerning human rights violations of persons with a disability—the Inter-American Court determined, among other things, the

⁶⁰ For the text in Portuguese, see Mazzuoli, Valerio de Oliveira, *Coletânea de direito internacional*, cit., p. 1013.

⁶¹ For the text in Portuguese, see Mazzuoli, Valerio de Oliveira, *ibidem*, p. 1012. About this theme, see Arrighi, Jean Michel, *OEA: Organização dos Estados Americanos*, cit., p. 108; Rodríguez Rescia, Víctor Manuel, “La ejecución de sentencias de la Corte”, in Méndez, Juan E. & Cox, Francisco (coords.), *El futuro del sistema interamericano de protección de los derechos humanos*, San José, IIDH Publishing, 1998, pp. 449-490; and Mazzuoli, Valerio de Oliveira, *Comentários à Convenção Americana sobre Direitos Humanos*, cit., pp. 308-310.

obligation of the Brazilian State to investigate those responsible for the death of the victim, to conduct training programs for professionals in psychiatric care, and to pay compensation (within one year) to the victim's family for material and immaterial damage, totaling US\$146 thousand (equivalent to R\$ 280.532,85 at that time).

The Brazilian government, in this case, decided to pay immediately, *sponte sua*, the amount ordered by the Inter-American Court, in deference to the rule of Article 68(1) of the Pact of San Jose, which provides that "States Parties to the Convention undertake to comply with the decision of the Court in any case in which they are parties". Through the Decree 6185 of August 13, 2007, the President authorized the Special Secretariat for Human Rights of the Presidency to "promote the necessary steps to comply with the decision of the Inter-American Court of Human Rights, issued on July 4, 2006, regarding the *case Damião Ximenes Lopes*, especially the compensation for the violations of human rights to the family" (Article 1st).

In another case tried by the Inter-American Court (the second case against Brazil before the Court), the Brazilian State was victorious, winning an acquittal. This was the case *Nogueira Carvalho vs. Brazil*, submitted to the Court on January 13, 2005, by the Inter-American Commission. The demand proposed by the Commission aimed to hold the Brazilian State responsible for violating the rights provided for under Articles 8 (Judicial Guarantees) and 25 (Judicial Protection) of the American Convention, to the detriment of Jaurídice Nogueira de Carvalho and Geraldo Cruz de Carvalho, for the alleged lack of due diligence in the process of investigating the facts and punishing those responsible for the death of their son Francisco Gilson Nogueira de Carvalho, and lack of provision of an effective remedy in this case. Mr. Gilson Nogueira de Carvalho was a lawyer, a human rights activist, and devoted part of his professional work to denounce the crimes committed by the "Golden Boys" (an alleged death squad in which civil police officers and other government officials took part) and to support prosecutions initiated as a result of these crimes. On account of this he was murdered on October 20, 1996, in the city of Macaíba, in the State of Rio Grande do Norte. The Commission stressed that the poor performance of State officials, viewed as a whole, led to the lack of investigation, persecution, arrest, trial and conviction of those responsible for the murder of Mr. Gilson Nogueira de Carvalho, and that, after more than 10 years these persons had still not been identi-

fied and condemned. The Inter-American Court, in a sentence of 28 November 2006, emphasized that although it is a State duty to facilitate the necessary means to ensure that human rights defenders carry out their activities freely, as well as to protect them from threats incurred as a means to prevent injuries to their lives and integrity, there were not, in this case, elements that might prove themselves offensive to any rights provided for in the Convention. The acquittal was due to the fact that the Brazilian police opened an investigation on 20 October 1996 to elucidate the death of Gilson Nogueira de Carvalho, in which different assumptions about the authorship of the murder were considered, among them one that related his death to public denunciations filed by him against an alleged death squad known as “Golden Boys”. On this basis, the Court found that it was not established that the State violated the rights to judicial protection and guarantees enshrined in Articles 8 and 25 of the Convention.⁶²

The major problem concerning the full compliance with the obligations imposed on the State by the Inter-American Court is not related to the payment of indemnity (which should be fulfilled by the State *sponte sua*, as did the Brazilian government in the case of *Damião Ximenes Lopes*, cited above), but the difficulty of performing the duties of *investigating* and *punishing* those who are responsible for violations of human rights. Although it is not expressly written in the Convention that the States have such duties (investigation and punishment of the guilty), its best interpretation is that these duties are implied there. Therefore, three obligations of the States convicted by the Court could be abstracted, when so stated in the due sentence: *a*) the duty to indemnify the victim or his family; *b*) the duty to investigate the facts in order to prevent new similar events from happening again; and *c*) the duty to punish those responsible for the human rights violations occurred.

Here we must emphasize that, if the State fails to observe Article 68(1) of the American Convention (which ordains that the States accept, *sponte sua*, the Court’s decisions), it incurs in *further violation* of the Convention, thus activating in the Inter-American system the possibility of a new contentious procedure against such State.⁶³

⁶² See the sentence in http://www.corteidh.or.cr/docs/casos/articulos/seriec_161_por.pdf.

⁶³ See Cançado Trindade, Antônio Augusto, *O direito internacional em um mundo em transformação*, Rio de Janeiro, Renovar Publishing, 2002, pp. 612 y 613.

If the State fails to comply with the Court sentence *sponte sua*, the victim him/herself or the Federal Prosecutor (on the basis of Article 109, III, of the Constitution, which states that “federal judges are the ones to process and decide cases based on a treaty or contract between the Union and a foreign State or international organization”⁶⁴) are to trigger a suit to ensure the effective enforcement of the sentence, since it also serves as a valid enforceable in Brazil, with immediate application, and must merely comply with internal procedures regarding the implementation of decision unfavorable to the State.⁶⁵

Also, in case of failure by the State to comply with the sentence *sponte sua*, the Inter-American Court (according to Article 65 of the Convention) should so inform the General Assembly of the OAS, in the annual report to be submitted to the organization, making proper recommendations. The General Assembly of the OAS, unfortunately, has done nothing in practice to require that the States condemned by the Court comply with the reparation or compensation sentences.⁶⁶

In the opinion of some authors, in case of default by the State on an international decision, the well-known order of preference pursuant to Article 100 of the Brazilian Constitution of 1988, should be excluded from the procedure of enforcement of the Court order, for causing too much delay to the financial compensation due to the victim.⁶⁷ Thus, pur-

⁶⁴ For the text in Portuguese, see Mazzuoli, Valerio de Oliveira, *Coletânea de direito internacional*, cit., p. 93.

⁶⁵ See Piovesan, Flávia, *Direitos humanos e o direito constitucional internacional*, cit., p. 241.

⁶⁶ For criticism of the OAS work in these cases, see Mazzuoli, Valerio de Oliveira, *Comentários à Convenção Americana sobre Direitos Humanos*, cit., pp. 309 y 310.

⁶⁷ Thus states the Article 100 of the Constitution (changed by the Constitutional Amendment 62 of December 9, 2009): “The payments owed by the Federal, State, District and Municipal Public Treasuries, by virtue of a court decision, are to be issued solely in chronological order of submission of the judicial requests, and to the respective credits account, being it prohibited the designation of cases or people in budgetary appropriations and additional credits opened for this purpose. § 1 The debts of alimony include those derived from salaries, wages, pensions and their complements, pension benefits and compensation for death or disability, based on civil liability due to force of *res judicata*, and shall be paid with precedence over all other debts, except those referred to in § 2 of this article. § 2 The debts of alimony whose holders are sixty (60) years old, or even older, on the date of issuance of the judicial request, or are patients of serious disease, defined according to the law, shall be paid with precedence over all other debts, even to the triple

suant to this understanding, one should match the Court condemnatory sentence with *support obligation* and thereby create a proper order for its payment, certainly faster and more attuned to the spirit of the Pact of San Jose.⁶⁸ In this case, the problem is that, when Article 100, paragraph 1, of the Constitution defines what “alimony debts” are, it makes no reference, however remote, to the possibility of matching an international condemnatory sentence with support obligation. It refers only to “compensation for *death* or *disability*, based on civil liability due to force of *res judicata*”, which may not be the case before the Inter-American Court (for example, a Court condemnation in case of civil arrest for debt of an unfaithful trustee, not allowed by Article 7, 7, of the Convention, which is neither a *death* nor a *disability* case, among many others).

The truth is that there is no provision in Brazilian law to obligate the preferred payment of compensation ordered by the Inter-American Court. In this sense there is only the Bill 4667/2004 pending before the Congress. If approved, it will mandate the Union to pay the due compensation to the victim. Thus, pursuant to Article 1 of the Bill, the “decisions and recommendations of the international organs of human rights protection stated by treaties that have been ratified by Brazil, bring forth immediate legal effects and have binding legal force under the Brazilian legal system”. It further states that “The Union, in view of the enforceable character of the decisions of the Inter-American Court of Human Rights provided for in the Legislative Decree 89 of December 3, 1998, and the quasi-jurisdictional importance of the Inter-American Commission on Human Rights provided for in the Legislative Decree 678, of November 6, 1992, will adopt all necessary measures to fully comply with the international decisions and recommendations, giving them absolute priority”. According to Article 2 of that Bill, when “the decisions and recommendations of the international human rights protection organs involve compliance with the obligation to pay, the Union will be in charge of the payment of the economic compensation to the victims”. The paragraph 1 of this Bill also requires the Union to make the payment of economic reparations to

value of the equivalent set by law for the purposes of the provision of § 3 of this article, admitted the fractioning for this purpose, while the remainder will be paid in chronological order of submission of the judicial request”. For the text in Portuguese, see Mazzuoli, Valerio de Oliveira, *Coletânea de direito internacional*, cit., pp. 84 y 85.

⁶⁸ See, in this sense, Ramos, André de Carvalho, *Direitos humanos em juízo...*, cit., p. 499.

the victims within 60 (sixty) days of notification of the decision or recommendation of an international human rights protection organ.

In Brazil, the accountability for the payment of the compensation amount belongs to the Union, which is (internally) responsible for the acts of the Republic (internationally convicted). However, the loss suffered by the Federal Treasury due to the obligation to indemnify will be joined by a suit to recover such amount from the immediately responsible party for the violation of human rights that caused the international conviction of the State.

IX. CONCLUDING REMARKS

The Inter-American system of human rights is still scarcely known in Brazil, although well-articulated and fully operational. Today, our jurists (much to our regret) do not have much knowledge of the exact operation of the international judiciary system, able to condemn the State (and require damages) for infringement of a right provided for in the American Convention.

Our country has been several years behind in adapting to the *third wave* of the State, Law and Justice, called *internationalism*. Only after the *leading case* tried by the STF (the Brazilian Supreme Court) in the Extraordinary Appeal 466.343-1/SP (through which, in December 2008, this Court has phased out the institute of civil imprisonment for debt of an unfaithful trustee) does Brazil seem to have entered (actually, *just stepped into...*) the “wave” of internationalist law, which is the trend in the most advanced countries in the world.⁶⁹ Similarly, even long after it joined the major international covenants and conventions on human rights of the global and the Inter-American systems, the *conventionality* control of laws is not yet mentioned in Brazil.⁷⁰

So far we have been surrounded by *legalistic* law operators, who neither care to consult the Constitution nor hold it as a paradigm. What could

⁶⁹ About this subject, see Mazzuoli, Valerio de Oliveira, *Curso de direito internacional público*, cit., pp. 334-346; and Mazzuoli, Valerio de Oliveira, *Tratados internacionais de direitos humanos e direito interno*, cit., pp. 125 y 126.

⁷⁰ For a pioneer study on this theme in Brazil, see Mazzuoli, Valerio de Oliveira, *O controle jurisdicional da convencionalidade das leis*, São Paulo: Revista dos Tribunais Publishing, 2009, 143p.

we say then of the application of human rights *treaties* by those operators, which always sound to them like something distant and foreign to our Brazilian core?

Therefore, to know the functioning of the judicial mechanism of the Inter-American system of human rights is an obligation of everyone, and especially of the third millennium jurist.

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