



LEGAL CERTAINTY AND COMPLIANCE WITH DECISIONS OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THE CASE "GOMES LUND AND OTHERS. ('ARAGUAIA GUERRILLA') VS. BRAZIL"

ORIGINAL ARTICLE

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ABSTRACT

The values of national sovereignty and the obligation to comply with international obligations are often shocked. To illustrate this situation, we take the case "Gomes Lund et others ('Araguaia Guerrilla') vs. Brazil", judged in 2010, as an example, considering that, in addition to still pending compliance by the country, has been having its decision contradicted by national courts. Given this panorama, the fundamental question arises about the possibility of the nation state detaching itself from its international obligations under the claim of sovereignty, as well as on the existence of criteria that can guide state conduct and, thus, provide greater predictability, in view of the constitutional requirement of legal certainty. The objective

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is to answer this question from research of the top organs of the national judiciary and specialized doctrine in the fields of Constitutional Law and Human Rights. Along this path, we aim to understand the structure and particularities of the Inter-American System, the coercive force of the decisions of the Inter-American Court of Human Rights and the legal characteristics of the constitutional requirement of legal certainty in the state behavior in this interaction between domestic and international law. This can be concluded about the mandatory enforcement of the decisions of the regional system and the deleterious effects that their non-observance causes for the constitutional principle of legal certainty, as well as it will be possible to seek ways to try to overcome this impasse.

Keywords: legal certainty; Inter-American Court of Human Rights; judicial dialogues; case "Gomes Lund and others"; ADPF no. 153/DF.

1. INTRODUCTION

The present work aims to study the problem in (dis)compliance with the decisions of the Inter-American Court of Human Rights and its repercussions in the field of legal certainty. In fact, on the website of the Inter-American Court of Human Rights (IACHR) there is a list of cases in the process of supervising compliance with the judgment[3], noting that, in relation to the country, there are still nine cases pending compliance with the decision. In this scenario, the values of national sovereignty and the obligation assumed at the international level are opposed, which leads to a situation of constant unpredictability in relation to the behavior of the nation-state in the face of the decisions of the Inter-American Court.

Emblematic example of this is the case "Gomes Lund et others ('Araguaia Guerrilla') vs. Brazil", initiated in 1995, with a petition from non-governmental entities addressed to the Inter-American Commission, and tried by the Court in November 2010. In *deveras*, the Inter-American Court points out the existence of points of its judgment that have not been fulfilled by Brazil. The situation is aggravated before judgments delivered by the Supreme Federal Court of Justice (STF) and the Superior Court of Justice (STJ) in the opposite direction to that indicated by the IACHR. Given this



panorama, the problem of this research emerges about the possibility of the nation state detaching itself from its international obligations under the claim of sovereignty and, if not, on the existence of guidelines that can guide state conduct and, thus, provide greater predictability, in attention to the constitutional requirement of legal certainty.

In this investigative journey, it is necessary to enter the theme of the formation of the international system for the protection of human rights, even making a comparison between the European and American regional systems. At this point, it will be the historical motivation for the internationalization of human rights and the creation of supranational protection mechanisms, taking into account the relevance of regional systems.

Next, it takes specific care of the organization and functioning of the Inter-American human rights system, comprising the functioning of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. In this same topic, Brazil's association with the regional system and its submission to the jurisdiction of the Court are covered.

After, will be made the presentation of the case "Gomes Lund et others (Araguaia Guerrilla) vs. Brazil", whose judgment was concluded by the Inter-American Court in 2010. The rest, as seen, is paradigmatic, because it explains the situation of conflict between the internal jurisdiction and that of the regional system of protection of human rights. To this end, the tension between the understandings signed by the Inter-American Supreme Federal Court of Justice in the judgment of the Court of Non-Compliance with Fundamental Precept No. 153/DF is verified. Then, the attitude of the Superior Court of Justice in the exercise of conventionality control is verified. Furthermore, the problem is addressed from the perspective of mandatory compliance with international commitments and the effectiveness of the decisions of the Inter-American Court.

Finally, it is relevant to understand the repercussion of this movement from the perspective of legal certainty, analyzing the impact that the controversy generates for



the stability and predictability of the legal system and state conduct and, consequently, on the search for effective social pacification.

2. THE CONSTRUCTION OF THE NETWORK OF PROTECTION OF HUMAN RIGHTS IN THE INTERNATIONAL

For the analysis of the impacts and effectiveness of decisions handed down by the IACHR on the Brazilian legal system, it is essential that the proper understanding of the international protection system of the individual in a postmodern paradigm should first be sought. Indeed, a first conception of international law focused solely on interstate relations, so that only states were subjects in the field of international relations. However, the evolution of the human rights protection system has led, as Accioly stressed; Silva and Casella (2008), a postmodern paradigm in which individuals also began to occupy the position of subjects of international law[4].

This evolution of the system of international protection of human rights has in The Second World War (1939-1945) its most impactful historical milestone. In fact, the cruelties and barbarities that guided the nazi regime's actions in the German state during the war period caused great disruption in the international community, being even more appalling because it is institutionalized practices[5]. It became pressing, then, to rebuild international law under the universal value of the dignity of the human person, so that the individual came to occupy a central position, becoming a true subject of international law. It was imperative that the international community organize itself to prevent such terror from being repeated.

The construction of this international system of human rights was aimed at protecting individuals – nod. With this, it seeks to allow them to develop their potentialities, that is: their vocations, talents, attributes, intrinsic qualities, etc. Thus, it is possible to understand naturally the insertion of the individual himself as a subject of international law, including in a prominent position.

In this global process of internationalization of human rights, it is necessary to recognize that, given the social, economic, cultural and geographical particularities,



regional systems have gained a leading role in the defense and protection of human rights. As Piovesan (2011) points out, the European human rights system can be considered the most consolidated and matured of regional systems, being founded on the concepts of protection of human rights, democracy and the rule of law and aiming at the reaffirmation of the founding and essential values of European identity. Its construction is the result of the integration work of European states in an effort to prevent serious human rights violations from being repeated. Unlike other regional systems, the European system is marked by covering a relatively homogeneous region with regard to compliance with the democratic regime and the dictates of the rule of law. In addition, the European system has its own characteristics that identify it: i) greater commitment and cooperation of states in the defense and protection of human rights; (ii) disputes are marked by the theme of civil and political rights, inspired by an individualistic liberal ideal; iii) granting broad access to the European Court of Human Rights (ECHR) for individuals, individuals, groups of individuals and NGOs; and iv) a sharp impact of European court decisions in relation to states (PIOVESAN, 2011).

The European system contrasts with the characteristics of the Inter-American system, which does not, in fact, have the same network of cooperation between states, and there is no high degree of respect for human rights within them. As a consequence, Piovesan (2011) points out that the Inter-American system has weaknesses and shortcomings due to states' lower commitment to human rights. As a result of this lower degree of commitment, cases that reach the Inter-American Court end up with serious violations of civil rights. Moreover, it is worth mentioning that access to the Inter-American Court is more restricted, according to Art. 61.1 of the American Convention on Human Rights (OAS, 2009), as well as its decisions, although increasingly relevant due to the increasing credibility of the body, are still far from the impact of those given by its European congener.

With regard to the Inter-American system, it is relevant to deepen the study of its characteristics and functioning, as well as the analysis of the situation of Brazil in



relation to the regional system, in order to understand the legal configuration of the protection of individuals in this sphere. That's what's going on.

3. THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS AND THE ORGANIZATION OF THE BRAZILIAN STATE TO THE REGIONAL SYSTEM

Shortly after the end of World War II, in April 1948, the American Declaration of the Rights and Duties of Man was drafted within the framework of the Organization of American States (OAS), also noting that it pre-empted itself to the Universal Declaration of Human Rights within the United Nations. Subsequently, the Pact of San Jose de Costa Rica of November 22, 1969, which overcame the American Convention on Human Rights (OAS, 1969), which became the central document of the American regional system for the protection of human rights (PIOVESAN, 2011).

The American Convention (OAS, 1969) entered into force at the international level on July 18, 1978 and has an extensive list of human rights aimed, directly or indirectly, at the protection of human dignity. We are so-called, in the best of charge, the direct to life (art. 4), integrity (Art. 5), freedom (art. 7), judicial guarantees (art. 8), legality (art. 9), honor and dignity (art. 11), name (art. 18), nationality (art. 20), private property (art. 21), political rights (art. 23), among others.

In addition, that international legislation also imposes an obligation on States Parties to respect the rights recognised in the Convention (Art. 1), as well as to adopt "legislative or other measures which are necessary to make such rights and freedoms effective" (Art. 2). It is also worth mentioning the establishment of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights as competent bodies, within the framework of the regional protection system, in order to know the cases concerning the (un)fulfillment of the commitments made by the States Parties (Article 33), also contained in the international diploma, the discipline of organization, functioning, competences and procedures of these bodies (arts. 34 and following).



Given this, it is worth mentioning that, in 1992, Brazil ratified the American Convention on Human Rights, having promulgated and published it internally through Decree No. 678 of November 6, 1992 (BRASIL, 1992). Later, in 1998, Brazil, through Legislative Decree No. 89 of December 30, 1998 (BRASIL, 1998), and Decree No. 4,463 of November 8, 2002 (BRASIL, 2002), declared acceptance of the competence of the Inter-American Court of Human Rights, pursuant to Art. 62 of the Pact of San Jose, Costa Rica (OAS, 1969), from the events that occurred after December 10, 1998[6].

Be warned, however, that the citizen does not have direct access to the Inter-American Court. As set out in Article 61.1 of the American Convention, "Only States Parties and the Commission have the right to submit a case to the Court's decision" (OAS, 1969). Furthermore, it was foreseen that the Court could only act after the procedures under the Inter-American Commission, which are provided for in the arts, were exhausted. 48 to 50 of the Convention. Thus, the individual in a situation of violation of human rights is opened the way of the inter-American protection system against the violating State, and its postulancy should be forwarded to the Inter-American Commission, as available to Art. 44 of the Pact of San Jose, Costa Rica. It should also be noted that the Convention also admitted the postulancy by a legally recognized group of persons or non-governmental entity (OAS, 1969).

It should be noted that, according to the Convention (OAS, 1969), in order for the petition to be known by the Commission, it is essential that the individual has exhausted the resources within the internal jurisdiction of the State[7] Party, and the other procedural, formal and time requirements must also be observed (art. 46 of the American Convention). After an initial examination, the committee may declare the application inadmissible when it does not meet the admissibility requirements (Art. 47). On the other hand, once the petition has been received, Article 48 of the American Convention provides that the Commission shall request information from the Government of the State Party appointed as violating the rights provided for in the treaty and then carry out a prior perfunctory judgment to assee whether the reasons for the petition remain. From this, it may determine the filing of the



application if there is no reason to proceed with it (Art. 48.1.b); declare its inadmissibility (art. 48.1.c); or, if the Commission finds reasons, it will be subject to the examination of the matter, including an investigation, which should count on the cooperation of the States concerned (art. 48.1.d).

It should be highlighted that the Convention (OAS, 1969) stimulates the search for consensual solutions; however, if there is no success in finding a amiable solution, it is for the Commission to issue a report on the facts and their conclusions (art. 50). This report shall be forwarded to the States concerned which will have three months to solve the matter (art. 51). Within this period, both the Commission and the State Party concerned may bring the case to the attention of the Inter-American Court.

It should be reiterated that the submission of cases to the Inter-American Court is a power only granted to the State Party or to the Commission (art. 61). However, it remains to be recognized the right of victims to continue acting in the course of the proceedings before the Court, so that they can present their own arguments and evidence also in this procedural phase, as provided for in art. 25 of the Regulation of the Inter-American Court of Human Rights (IACHR, 2009). It will then be for the Court to decide on the alleged violation and, if the case, will determine the adoption of measures to ensure the enjoyment of the right or freedom impeded by the State, as well as to reparation the consequences arising from the violation, including by paying compensation to the victim, as established by Article 63 of the Convention (OAS, 1969).

It is important to highlight that the Court's decision does not consist of mere admonition or recommendation, but of a mandatory and binding nature, and must be immediately complied with. Even in the case of a conviction for the payment of compensation, Article 68.2 of the Convention (OAS, 1969) provides that the judgment must be executed within the internal scope of the condemned State Party, according to its domestic legislation. As Flávia Piovesan points out: "the Court's decision has binding and binding legal force, and the State is responsible for its immediate compliance", so that "If the Court lays down compensation for the victim, the decision will be valid as an enforcement order, in accordance with the internal



procedures relating to the execution of an unfavorable judgment to the State" (PIOVESAN, 2008, p. 259-260).

It must, therefore, be that by adhering to the American Convention on Human Rights and, according to its own procedures, having incorporated it into domestic law, as well as after and declaring recognition of the mandatory competence of the Inter-American Court of Human Rights, submitting to its jurisdiction, Brazil, in the exercise of its sovereignty, imposed for itself an international obligation. The country was committed, thus, to observe the minimum standard of protection of rights provided for in the Convention, to admit the effective action of the organs that make up the regional system, as well as to comply with its decisions and sanctions[8].

4. THE PROBLEMS SURROUNDING THE EFFECTIVENESS OF THE DECISIONS OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THE CASE "GOMES LUND AND OTHERS (ARAGUAIS GUERRILLA) VS. BRAZIL" AND CONFLICT WITH DOMESTIC LAW (AMNESTY LAW - LAW No. 6,683/1979)

4.1 PRESENTATION OF THE CASE AND JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Despite the normative configuration of the inter-American system of protection of human rights, including its incorporation into Brazilian domestic law, the issues related to (un)compliance with the decisions of the Court repeatedly debate the real effectiveness of this system of protection of the individual. In fact, Article 68 of the American Convention is peremptory in providing for the commitment of states parties to comply with the decisions of the Court (OAS, 1969). Article 65 of the same normative decree provides, in turn, that the Court will oversee compliance with its decisions and indicate, in a report sent to the General Assembly of the OAS, cases that are not complied with by the violating States, including with the relevant recommendations. It is also clear that, on the website of the Inter-American Court of



Human Rights, it is possible to consult the "cases in the process of supervising the fulfillment of judgment"[9].

Among the outstanding arestos de cumprimento is the case "Gomes Lund and others (Araguaia Guerrilla) vs. Brazil", with numerous pending compliance measures by Brazil, for which special analysis will be given. The case "Gomes Lund" was submitted to the Inter-American Commission by petition filed in 1995 by the Center for Justice and International Law (CEJIL) and Human Rights Watch/Americas, both non-governmental entities. As stated in the report, the demand has as object:

responsabilidade [do Estado] pela detenção arbitrária, tortura e desaparecimento forçado de 70 pessoas, entre membros do Partido Comunista do Brasil (...) e camponeses da região, (...) resultado de operações do Exército brasileiro empreendidas entre 1972 e 1975 com o objetivo de erradicar a Guerrilha do Araguaia, no contexto da ditadura militar do Brasil (1964-1985) (CIDH, 2010).

In this scenario, the absence of criminal prosecution for the punishment of those responsible and the lack of effectiveness in internal instruments to obtain information on the disappearance of victims, especially in view of the validity of Federal Law No. 6,683/1979 (known as the "Amnesty Law"), were questions submitted to the Inter-American human rights protection agencies.

In fact, Federal Law No. 6,683/1979 anised the so-called political and related crimes committed during the dictatorial regime in the period from September 2, 1961 to August 15, 1979 (BRASIL, 1979), against the liability of those responsible for the serious violations determined in the case "Araguaia Guerrilla". By the way, it is worth noting that the effect of amnesty is provided for in article 107 of the Penal Code (BRASIL, 1940) as the cause of extinction of punishability. These are cases in which the State, "for reasons of leniency, politics, social etc., forgets a criminal fact, erasing its criminal effects (main and secondary)" (CUNHA, 2021, p. 411). It is not really ignored that the seriousness of the facts practiced in the dictatorial regime generates substantial resistance to the legitimacy of the Amnesty Law, both with regard to the sense of impunity of those responsible for human rights violations, and for the



obstacles to the right to truth of facts that the State chooses to "erase" and not promote accountability.

On the one hand, the scope of the Amnesty Law was precisely to bring a certain degree of social pacification in a troubled context of transition from dictatorial to democratic regime, as a kind of "political agreement" so that the transition to the Democratic Rule of Law could come to fruition. On the other hand, according to the Inter-American Court, the amnesty conduct stumbers were very serious acts, even considered as crimes against humanity[10], due to the serious and systematic violations perpetrated on human rights. Thus, the criticism that is made is that, by not investigating such violations, there would be a perpetuation of impunity and the feeling of injustice, leading to a movement opposite that of the pacification originally intended through amnesty.

In fact, the search for truth and accountability of the facts that violate human rights practiced at the time of the military dictatorship are part of the so-called "transitional justice". The transition from an authoritarian to the democratic regime requires that the memory of the facts be preserved, with the purpose of serious legal, political and social commitment to make a serious commitment to these human rights events never to occur again. The idea of security around ensuring that individuals are finally safe from such abuses and arbitrariness of the previous regime necessarily permeates the effective reparation of victims and accountability of the guilty[11]. Consequently, the Inter-American Court has affirmed an understanding that amnesty granted to human rights violators and impedes transitional justice is in violation of the American Convention[12].

In the Brazilian case of the "Araguaia Guerrilla" (Gomes Lund), the judgment handed down by the Inter-American Court on November 24, 2010, declared the incompatibility of the Amnesty Law with the American Convention, determining that the aforementioned law should no longer prevent the prosecution of the criminal prosecution for the liability of those guilty for the serious crimes reported. He also declared the responsibility of the Brazilian State for the forced disappearance of persons, which represented "violation of the rights to the recognition of legal



personality, life, personal integrity and personal freedom" (IACHR, 2010). The Court also said that Brazil "has failed to comply with the obligation to adapt its domestic law to the American Convention on Human Rights, (...) as a consequence of the interpretation and application that was given to the Amnesty Law regarding serious human rights violations" (IACHR, 2010)[13].

Brazil, then, was condemned to fulfill numerous obligations, among them: to repair the injured; promote effective investigation, trial and, if the case, punish those responsible; as well as make efforts to determine the whereabouts of the victims. The Court also determined that guarantees of non-repetition of the events that occurred, such as the teaching of human rights within the Armed Forces, the typification of the crime of forced disappearance, the wide access and systematization of official documents, as well as the creation of a Truth Commission, should be adopted.

4.2 CONTRAST WITH THE DECISION OF THE SUPREME FEDERAL COURT IN THE INVESTIGATION OF NON-COMPLIANCE WITH FUNDAMENTAL PRECEPT No. 153/DF

It occurs, however, that months before the delivery of the sentence by the Inter-American Court, the Supreme Federal Court, in the judgment of the Court of Non-Compliance with Fundamental Precept No. 153/DF (BRASIL, STF, 2010), based opposite position, that is, declared the validity of the Amnesty Law in the Brazilian legal system. The central argument was to adopt a posture of deference to the historical circumstances in which the Amnesty Law was edited, in the act of formatting a conciliatory pact that would allow the transition from the authoritarian regime to the democratic regime. It was also emphasized the bilateral nature of the amnesty, that is, the fact that it has indistinctly benefited people from any ideological biases (both the repressive agents of the military regime and the opponents of this regime). And, on this pact signed in that historical context, the Judiciary could not analyze from the perspective of the current social and political context, whose *locus* of discussion would be the Legislature.



It is important to emphasize that the bilaterality of the amnesty consisted of the reasoning brought by Minister Celso de Mello to remove the claim that the amnesty in this way would fit in numerous precedents of the Inter-American Court of Human Rights that recognized, in such cases, configured the violation of the American Convention on Human Rights. The Minister argued that it would not be a law of "self-amnesty", it is worth saying: the law in question would not have the intention of institutionalizing the impunity of the agents of the military regime, but rather of promoting a conciliatory agreement for a smooth passage to democracy in what he called amnesty "double-hand" or "double-way".

In an exercise of reflection on the possible variables, it would be appropriate to ask whether the solution of the Supreme Federal Court would be the same if the decision of the Inter-American Court had been handed down earlier. In any case, it has been objectively that the judgment of ADPF No. 153/DF conflicts with the subsequent judgment before the Inter-American Court of Human Rights. Thus, it becomes relevant to question the real implications of the decisions of the Inter-American Court in the Brazilian legal system and whether, in fact, it is possible to glimpse their effectiveness.

4.3 THE PROBLEM OF THE EFFECTIVENESS OF THE DECISION OF THE INTER-AMERICAN COURT AND THE POSTURE OF THE SUPERIOR COURT OF JUSTICE: THE SUPRALEGALITY OF THE AMERICAN CONVENTION AND THE ABSENCE OF CONVENTIONALITY CONTROL

It should be noted that the Superior Court of Justice has been urged to analyze the validity of the Amnesty Law from the perspective of conventionality control. Indeed, it is clear of doubts that the understanding was consolidated in Brazil that the American Convention on Human Rights was incorporated into domestic law with the *status* of supralegal norm, that is, with a hierarchy lower than the Constitution, but superior to ordinary legislation. The Supreme Federal Court dealt with the controversy in the judgment of Extraordinary Appeal No. 466,343/SP, judgment on 12/03/2008



(BRASIL, STF, 2008), basing the understanding of the supralegality of international human rights treaties that are not incorporated under Article 5, § 3, of the Constitution of the Republic (BRASIL, 1988), included by Constitutional Amendment No. 45/2004 (BRASIL, 2004). In fact, the position had already been adopted in *Habeas Corpus* No. 90,172/SP, judged on 06/05/2007 (BRASIL, STF, 2007), in the middle between the beginning and the end of the judgment of the aforementioned Extraordinary Appeal. Thus, from the understanding of the Supreme Federal Court, there are two kinds of human rights treaties: i) the treaties incorporated with observance of the special procedure and quorum provided for in Article 5, § 3, of the Constitution, which will enjoy constitutional hierarchy; and ii) the treaties not incorporated by the rite of Art. 5, § 3, of the Major Law, which will have supralegal stature, but infraconstitutional (BRASIL, STF, 2007).

Despite the thesis that advocates the reception of treaties prior to the reform of Constitutional Amendment No. 45/2004 with constitutional hierarchy, the understanding prevailed in the sense that only the treaties that would be approved after the Amendment and with the special rite and quorum would have constitutional stature. Thus, it was recognized by the Supreme Federal Court that the American Convention on Human Rights, introduced in the country in 1992, would have supralegal hierarchy, so that its terms prevail over the infraconstitutional legislation. As a consequence of this understanding, the way of conventionality control of laws was opened, highlighting that Article 105, III, "a" of the Constitution of the Republic attributed to the Superior Court of Justice a prominent role, in so far as the Court is responsible for the special appeal judgment in cases where the judgment under appeal contradicts international treaty (BRASIL, 1988).

It is rightly found that the STJ is responsible, when the special appeal is due to be combed, to commend the validity of an ordinary law (in the case of the Amnesty Law) with the higher hierarchy rule (American Convention). It occurs that, in recent trials, the Superior Court of Justice has shied away from making the conventional judgment of the Amnesty Law, on the grounds that it is up to the Supreme Federal Court to check the contours of compliance with the decision given by the Inter-American Court



of Human Rights in the case "Araguaia Guerrilla". Moreover, in relying on the need to harmonize the submission to the jurisdiction of the Inter-American Court to the national legal system, in favor of national sovereignty, it considers that this position does not reflect resistance to the exercise of the conventionality or recalcitrance judgment in complying with the decision of the Inter-American Court (BRASIL, STJ, 2021 and 2019)[14].

It should be noted that the statement of reasons of the Superior Court of Justice invokes the fluid term of the need to harmonise the submission of international jurisdiction with the internal order, as well as the preservation of national sovereignty. It is clear that there is a conflict between the internal and international jurisdiction, however the Superior Court of Justice does not bring any objective and clear parameter for this harmonization to occur, claiming that such a task is reserved to the Supreme Federal Court. Thus, the situation of tension between internal and international jurisdiction is maintained and the instability resulting from the non-compliance with the judgment of the Inter-American Court persists.

4.4 THE OBLIGATION TO COMPLY WITH THE AGREEMENTS CONCLUDED AT THE INTERNATIONAL LEVEL AND THE COERCIVE FORCE OF THE DECISIONS OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

It can be seen that the legal system confers criteria for the settlement of that conflict. First, it should be pointed out that Brazil has internalized the American Convention and recognized the jurisdiction of the Inter-American Court, which, logically, implies the obligation to comply with its decisions. Secondly, it is clear that, once the conflict between the internal legal norm and that of the human rights treaty is found, conventionality control imposes the prevalence of the latter's provisions, given its supralegal hierarchy[15]. Third, Article 27 of the Vienna Convention on the Law of Treaties of 23/05/1969, promulgated by Decree No. 7,030/2009 (BRASIL, 2009), is peremptory in the sense that "a party cannot invoke the provisions of its domestic law to justify the non-implementation of a treaty". However, the Superior Court of Justice



has shied away from deepening the debate on the subject and promoting the control of conventionality, pending the definitive position of the Supreme Federal Court on a topic so sensitive to political and social stability, especially in the face of pending judgment of declaration embargoes in ADPF No. 153/DF, as well as the processing of ADPF No. 320/DF, of the same object.

Although there is still a significant degree of tension between domestic law and international law due to the current failure by the Brazilian State to comply with the decision of the Inter-American Court, it seems misplaced to state that, given the absence of coeg power for compliance, the inter-American human rights protection system would be ineffective and subject only to the volunteerism of the State Party involved. This is because, even in cases where compliance problems persist, the judgments of the Inter-American Court produce an important effect of serving as a counterpoint, basing, within an action of argumentative procedural legitimation, postulates before the Judiciary and Legislative Branches in order to achieve compliance with these decisions internally[16].

In this sense, it should be refound that ADPF No. 153/DF is pending judgment of declaration embargoes, with request for infringing effects, an opportunity in which the Supreme Federal Court may revisit the analysis of the subject, starting to have the burden of facing the grounds of the decision of the Inter-American Court and seeking the solution that meets the dictates of the international judgment (the issue, is also the subject of ADPF No. 320/DF[17]).

In any case, it is undeniable that there is a conflicting scenario far from being pacified, with direct effects on legal certainty, when a certain degree of tension is envisaged regarding the upreach of the decisions of the Inter-American Courts by the internal legal system, especially in the light of the jurisprudence of the Supreme Federal Court and Superior Court of Justice analyzed above in relation to the Amnesty Law.

It is imperative, therefore, that compliance with the decisions of the Inter-American Court and compliance with international treaties should also be analyzed from the



perspective of legal certainty, as will be examined in the following topic. It is clear that the debate on legal certainty contributes to recognizing an urgent need for the Brazilian State to comply with the decisions of the Inter-American Court and to carry out the effective judgment of conventionality.

5. LEGAL CERTAINTY AND COMPLIANCE WITH THE DECISIONS OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THE NEED FOR PREDICTABILITY OF STATE BEHAVIOR

The notion of legal certainty carries in itself a plurality of aspects. Although it is possible to analyze this legal institute from numerous perspectives, it is the examination of legal certainty as a value and structural principle norm of the Democratic State of Law, as well as its objective and subjective meanings, its relationship with the dignity of the human person and, finally, its importance for the operability of the Inter-American system of protection of human rights.

Legal certainty is a constitutional principle that conveys the terms of stability and predictability of the legal system. It is a norm of high axiological and semantic content, which is why Carvalho (2003) and Ávila (2021) point out that it is a true overprinciple, whose normative content ends up influencing the interpretation and application of other principles and rules[18]. Still, although it is not a principle expressed in the body of the Constitution, it is effective "by the performance of principles, such as legality, anteriority, equality, irretroactivity, universality of jurisdiction and others" (CARVALHO, 2003).

It is worth mentioning that a traditional view of legal certainty points to the existence of two structuring elements, such as: predictability (which some prefer to treat as certainty) and stability (ÁVILA, 2019). The notion of predictability (or certainty) is related to the possibility of knowing the normative provisions and being able to predict the consequences established for a given conduct. In turn, stability aims to avoid surprise, in such a way that it seeks to prevent facts consolidated in the past from being achieved by rules or understandings that are later in place.



Legal certainty, in this scenario, arises with a structuring axiological burden of the Democratic State of Law itself, because, in this sense, legal-institutional stability and predictability are conceived as values desired by individuals who wish to exercise their human potential in the wake of a free and just society, as well as relevant for strengthening the system of protection of fundamental rights[19]. It is clear that the dignity of the human person revealed by the principle of freedom can only be exercised fully if individuals have confidence in the legal system, either in the sense of the certainty of the law and its application, the guarantee of their legal positions and the protection of their individual sphere, as well as the predictability of the legal consequences of the practice certain acts and stability of the State institutions.

As Ávila (2019) points out, legal certainty as a standard-principle is characterized by a command to the State, in all its branches (Legislative, Executive and Judiciary), to seek to provide reliability, calculation and cognoscibility of the legal order. It also highlights that the dignity of the human person is intrinsically linked to the value of legal certainty. In this sense, Sarlet (2005) points out that there is no talk of dignity in a context of such legal instability that does not grant the individual a minimum of tranquility and security or even that does not allow trust in social and state institutions[20].

Thus, the axiological contours of legal certainty are outlined, it is possible to envision its configuration in the Constitution as a standard-principle, by closing commands to the subjects so that they can realize it to their greatest extent according to certain technical and legal conditions. Moreover, legal certainty can also be examined in its objective and subjective aspects. According to Clève (2005), with regard to the objective aspect, this principle relates to the predictability and certainty of the law and, in relation to the subjective aspect, concerns the protection of citizens' confidence[21].

Having brought these contours of legal certainty, it is necessary to consign that, in the Brazilian constitutional context, the Judiciary was entrusted with the task of protecting fundamental rights against the illegitimate advances of the Legislative and Executive Branches, as well as threats and violations perpetrated by individuals. The



judiciary then assumed the task of acting as the last trench of the citizen, having the mission of safeguarding fundamental rights. Due to its characteristics, the Judiciary acts as an inert and equidistant third party that is brought to the parties to the conflict, and it is up to it to replace the contenders in the solution of the dispute, as well as to apply the legal rule to the specific case, deciding it with the mark of definitivity and, thereby, pacifying social relations.

However, the analysis of the judges of the Supreme Federal Court and the Superior Court of Justice in the case of the validity of the Amnesty Law revealed the lack of concern about the interlocution between the internal order and the American Convention, creating a situation of insecurity regarding the effective application of international standards in the country, putting at risk confidence in the country both in relation to the fulfillment of its international obligations (*pacta sunt servanda*), as well as their commitment to the protection of human rights[22]. It is envisaged, a certain vulneração of legal certainty in the absence of dialogue with the decision of the Inter-American Court in the case of the "Araguaia Guerrilla" as well as the elusive control of conventionality of internal legislation in the face of the Pact of San Jose, Costa Rica(OAS, 1969) in this issue[23].

At this point, it is important to point out that after an intense doctrinal debate about the reason for the obligation of international norms, it is possible to reconcile the currents of voluntarism and objectivism for the correct understanding of the foundation of public international law. In the present case, it is necessary to recognize that the Pact of San Jose, Costa Rica (OAS, 1969) and the jurisdiction of the Inter-American Court are binding, binding and cogent both because of the Brazilian state's free agreement to adhere to the treaty and recognize the jurisdiction of the inter-American body, and because of the very importance of protected legal values and assets of central importance to international relations[24].

However, it is not too much to retread that the Brazilian State voluntarily adhered to the American Convention on Human Rights, in order to confer a minimum level of regional protection on individuals, even recognizing the jurisdiction of the Inter-American Court of Human Rights. Although, in fact, there is no power of external



coercion that induces the forced fulfillment of the international obligations of the Brazilian State, it is ceded that the resistance to effectively comply with the determination of the Inter-American Court generates a certain degree of tension and instability in the internal order itself that goes against the social pacification sought by the principle of legal security in question as sensitive as the accountability and search of truth for crimes against humanity perpetrated during the military dictatorship.

More than that, in a context of legal pluralism, legal systems start to have a reciprocal interaction based on functional coordination. Thus, it seeks to promote approximations and compatibilization (QUEIROZ, 2009), without each system losing its "individualities", thus remaining distinct, although partially independent and overlapping (SANTOS, 2019). In this context, it is necessary that legal pluralism demands a critical engagement, so that the various courts, even if they are not bound by a hierarchical relationship, should at least take into account the various understandings and experiences of the other bodies belonging to the various levels (international, regional, Community or even other nations), especially when it comes to the interpretation of fundamental rights (SARMENTO, 2016).

In this relationship between domestic law and international law, Acosta Alvarado (2016) points out the anachronism of the conflict of the monolist and dualist theories of resolving conflicts between national and international norms. With the proliferation of international normative sources, it becomes increasingly complicated to affirm the existence of a single and articulated legal system, in which internal and international norms would make up watertight compartments and without any kind of interaction or intersection. From the end of this antagonism between the vetoes theories, emerges the notion of constitutional pluralism, in which domestic law and external law are seen as different legal systems, but which share several points of intersection and entertain a relationship of heterarquia (i.e.: absence of hierarchy, lack of subordination). In order to have this "coupling" of internal and international orders, it is necessary to establish principles that discipline it and take into account the objectives of each order (ACOSTA ALVARADO, 2016).



Having these premises, argues Acosta Alvarado that international standards have direct application and their interpretation and application must occur systematically, respecting the principle of subsidiarity, due process and human rights. The application of law, whether domestic or international, should aim at the protection of fundamental values, such as human rights, so that decisions on these matters must always be based on the "greatest and best possible protection of these common values" (ACOSTA ALVARADO, 2016, p. 33). In this relationship between internal and international legal orders, it is up to the interpreter to pay attention to their necessary interaction, harmonizing the normative commands and seeking to give concreteness to the shared purposes. It means, therefore, that nothing prevents a particular normative act from being compatible with the national Constitution, but is in conflict with international standards for the protection of human rights, which must also be understood as a question of a preliminary ruling.

From the moment the Brazilian State adheres to a set of values and undertakes to protect them, the legitimate expectation that its behavior will be based on this commitment is established. There is a just requirement, of even constitutional hue, of predictability of state action when called into question the defense of these incorporated values. Thus, the principle of legal certainty cannot be overlooked in the analysis of the theme, especially by the Upper Courts of homelands, which, as seen, are urged to speak out on the *celeuma* and whose decisions guide the lower bodies.

The imperatives of stability and, in particular, of predictability require States Parties – and notably, national courts, as bodies bound extrinsically to the legal order – to observe international decisions, harmonising the interpretation and application of domestic legislation with international standards and complying with determinations of international courts responsible for interpreting and applying those standards. Without this necessary linkage, it will never be possible to foresee how state behavior will be before decisions of international courts to which the country has voluntarily linked.



6. FINAL CONSIDERATIONS

From the outbreak of the conflict between the jurisdiction exercised by the Inter-American Court and the understanding externalised by the national jurisdiction, notified by the Supreme Federal Court and the Superior Court of Justice, leading to the recognition by the Regional System of pending compliance with the decision, the problem is presented about the possibility of the nation state detaching itself from its international obligations under the claim of sovereignty and, in the negative case, on the existence of guidelines that can guide state conduct and, therefore, provide greater predictability, in view of the constitutional requirement of legal certainty.

In dever, the evolution of the understanding of human rights in the post-World War II years led to the institution of international and regional systems of their protection, whose scope is to prevent the barbarism that occurred in the past can occur again. It is about protecting universal and transnational legal assets and directly or indirectly linked to the notion of dignity of the human person. It happens that, in the face of local peculiarities, regional systems have gained prominence.

Specifically on the American continent, the American Convention on Human Rights came as a central document of the regional system. Incorporated into the Brazilian legal system in 1992, the country was voluntarily obliged to comply with it, adapting its legislation and institutional policies to the precepts established therein. Later, in a new act of sovereignty, Brazil recognized, in 1998, the jurisdiction of the Inter-American Court to judge cases involving violations of the rights provided for in the Convention, committing itself to observe and comply with its decisions.

In fact, even though the decisions of the Inter-American Court are not in all cases ready and spontaneously fully complied with, it is certain that its manifestations have social, political and legal repercussions, basing movements and postulates that translate true force of coercion, aiming to compel the State Party to comply with its international obligations and to adapt its order and its institutions.



In this sense, it is observed that the conflict between jurisdictions, with internal decisions that differ from the position of the Inter-American Court, contributes to a state of instability and unpredictability, to the detriment of the overprinciple of legal certainty and, thus, contrary to the need for social pacification in a theme that, undoubtedly, is so sensitive to society, nodily when perceived as one of the elements of justice of transition from the military regime to democracy. Precisely because of the absence of pacification, the higher courts have again been urged to speak out on the subject.

As a result, it is pressing that the new decisions of the internal jurisdiction address the problem from the perspective of mandatory compliance with the decisions of the Inter-American Court, the prevalence of human rights protection rules and the impossibility of breaching an international commitment based on internal norms. In other words, the Brazilian State is not given, under the pretext of the exercise of sovereignty, to fail to comply with decisions of the Inter-American Court and to fail to observe protective norms of human rights, since these international norms bind the State as much as those pertinent to the internal legal system.

Only through this necessary judicial dialogue and observance of international human rights standards, within this context of legal pluralism and interaction and harmonization between domestic law and international law, will it be possible to bring predictability not only to the screened case, but also to future ones that present themselves. It is necessary that the national authority give direct application to international standards, ensuring that the fundamental values common between the internal and international order are realized, as well as to recognize and comply with the decisions of the Inter-American Court, to which it adhered and recognized. Without this, these decisions of the internal jurisdiction, by ignoring the dialogue with the Inter-American Court, will not effectively resolve the celeumas and will not give the expected and appropriate response, maintaining the crisis between the justice systems.



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APPENDIX - REFERENCE FOOTNOTE

3. Listing of cases in the supervising stage of compliance with the judgment is available on the website of the Inter-American Court of Human Rights. Available in: https://www.corteidh.or.cr/casos_en_supervision_por_pais.cfm. Access on Dec 01. 2021.

4. In this sense, Hildebrando Accioly, Nascimento e Silva, and Paulo Borba Casella point out that: "Two approaches exist in the determination of the subjects of international law: the classical one, which in its original conception attributed the notion of subject of international law only to the states; and the individualist, realistic or postmodern, for which the recipient of international law, as indeed, of all branches of law, can only be the individual. (...) The characterization of the condition of subject of international law has had considerable evolution in recent decades. The central point of this evolution is the condition of the individual at the international level" (ACCIOLY, SILVA and CASELLA, 2008, pp. 229-230).

5. The precise analysis of Marmelstein is found: "Confiscation of property, sterilization, torture, medical experiments with human beings, death penalty, deportation, banishment: all this was practiced regularly by members of the Third Reich, under Hitler's command, as if it were something perfectly normal. This mechanistic practice of acts of cruelty without any questioning about its intrinsic wickedness represents what philosopher Hannah Arendt called the 'banality of evil'. There was, in this case, an entire state apparatus, functioning in a bureaucratic



manner, structured to commit the greatest atrocities on behalf of the state. And the worst is that, in a way, all this was protected by the legal regime in force in Germany (...)" (MARMELESTEIN, 2016, p. 5).

6. The list of ratification scans of the American Convention can be accessed on the OAS website. Available in: https://www.cidh.oas.org/basicos/portugues/d.Convencao_Americana_Ratif.htm. Accessed: 30 Nov. 2021.

7. Exceptions are the need for exhaustion of internal bodies, as well as the limitation period of 06 (six) months: i) absence of domestic legislation that guarantees due process legal for the protection of rights; (ii) negative access to internal jurisdiction; and iii) unjustified delay in giving definitive solution to the question (art. 46.2), as determined by the Convention (OAS, 1969)

8. Paulo Henrique Gonçalves Portela analyzes the issue of the relativeity of state sovereignty in this scenario: "Today, state sovereignty remains one of the pillars of the international order. However, it is limited by the obligation of States to guarantee to individuals who are under their jurisdiction the enjoyment of a catalogue of rights enshrined in treaties. Sovereignty is also restricted by the state duty to accept the supervision of the competent international bodies regarding the conformity of its performance with the international acts of which it is a part. If state sovereignty maintained its absolute character, international standards could not be applied internally and would not have effective external means of monitoring its application, since they would run into the old argument of "intervention in internal affairs". However, with international human rights law, intervention in internal affairs becomes possible when there is a violation of a rule that protects the dignity of the human person. In any case, this does not mean that national sovereignty has not failed to impose obstacles to the application of human rights treaties. In this regard, we recall that international acts are still incorporated into the domestic order of states in accordance with the rule they establish, and that most international bodies can only examine against state entities that accept their jurisdiction to do so, as is the case of the Inter-American Court of Human Rights" (PORTELA, 2019, pp. 981-982)



9. Listing of cases in the supervising stage of compliance with the judgment is available on the website of the Inter-American Court of Human Rights. Available in: https://www.corteidh.or.cr/casos_en_supervision_por_pais.cfm. Access on Dec 01. 2021.

10. In this sense, excerpt from the vote of *ad hoc* judge Roberto de Figueiredo Caldas when classifying the facts as crimes against humanity: "22. The former president of the Court, A. the. Cançado Trindade, in his separate vote in the Almonacid Case, recalled that the configuration of crimes against humanity is a manifestation more of universal legal consciousness, of its prompt reaction to crimes affecting humanity as a whole. He pointed out that over time, the norms that came to define the 'crimes against humanity' originally emanated from customary international law, and developed, conceptually, later, within the framework of international humanitarian law, and, more recently in the field of *jus cogens*, of imperative law (Almonacid, paragraph 28). 23. The crimes of forced disappearance, extrajudicial summary execution and torture systematically perpetrated by the state to suppress the Araguaia Guerrilla are finished examples of crime of injury to humanity. As such they deserve differentiated treatment, that is, their judgment cannot be impeded by the course of time, such as prescription, or by normative amnesty provisions" (IACHR, 2010).

11. It should be noteworthy the thought of Edite Mesquita Hupsel, who points out that: "Transitional justice, or transitional justice — which are measures taken after the end of authoritarian regimes to deal with human rights violations committed in the past — seeks to bring about the re-diagnosis of the events that have occurred, with the presentation of all their truth; seeks reparation for victims; seeks the punishment of its perpetrators and, finally, the reform of institutions, to rule out the repetition of human rights violations" (HUPSEL, 2015, p. 124).

It is also worth bringing the considerations and Flavia Piovesan and Marília Papaléo Gagliardi on the theme: "Transitional justice, in this context, is nothing more than is the diverse set of measures adopted in periods of transition, between authoritarian and repressive regimes for democratic regimes of law. Such actions, which are



intended to combat the legacy of violence and the other consequences left during the previous government, consist in the adoption of a series of mechanisms and approaches (whether judicial or not) so that it is possible not only to hold the perpetrators of such crimes accountable, but also to ensure the right to memory and truth, ensuring a democratic regime. By recognising victims as citizens and human beings endowed with intrinsic and unavailable dignity, it is impossible not to condemn the abuses inflicted at that time. Transitional justice, when considering these aspects, signals the way forward to ensure that everyone is safe in their own countries – protected from abuses and violations committed by their own authorities, and has ensured redress for violations" (PIOVESAN and GAGLIARDI, 2017, p. 16).

12. As Renan Honório Quinalha, Lucia Elena Bastos and Inês Virgínia Soares point out: "The Inter-American Court has adopted the position that international law and domestic practice of states, at certain times, allow, and even in certain cases require, the application of amnesties. However, these amnesties must be analyzed differently from those related to human rights violations and crimes against humanity. On the issue of amnesties, a recent position by the International Committee of the Red Cross on the Geneva Conventions confirmed that the amnesties mentioned in Additional Protocol No. II of 1977 were made to apply only to those who participated in hostilities, and not to those who violated international law. Thus, updating its positions on the subject, what the Inter-American Court proposed to examine in the case was whether the application of the amnesty constituted a violation of the rights enshrined in the American Convention on Human Rights, and to that end, the Inter-American Court divided its assessment as follows: (i) first, classified the murder of Almonacid Arellano as a crime against humanity; (ii) second, he pondered that the same crime could not be the subject of amnesty; and (iii) third, defined that the State had violated the American Convention on Human Rights by maintaining such an amnesty law in force. With this jurisprudence signed, there have been many other tried that have followed the same line since The case La Cantuta vs. Peru, a judgment published in 2006 until the Araguaia Case in 2009" (QUINALHA, BASTOS and SOARES, 2014, p. 120).



13. Although the country's compliance with the regional system occurred only after the facts judged, which motivated the Court's claim of incompetence, it was decided that: "On the contrary, in its constant jurisprudence, this Court established that acts of continuous or permanent character last throughout the time in which the fact continues to maintain its lack of conformity with international obligation" (IACHR, 2010).

14. In this sense, it is worth mentioning the menu of the following judgment of the Superior Court of Justice:

"CRIMINAL AND CRIMINAL PROCEEDINGS. REGIMENTAL INJURY IN THE DAMAGE IN SPECIAL APPEAL. 1. CRIMES COMMITTED DURING THE MILITARY DICTATORSHIP. THEME ALREADY ANALYZED BY the STJ. RESP 1,798,903/RJ. 2. COMPLAINT REJECTED. OFFENSE TO ART. 1st, CAPUT E § 1, OF LAW 6.683/1979 AND FRONT TO ART. 10, § 3, OF LAW 9.982/1999. NO OCCURRENCE. EFFECTIVELY OBSERVED DEVICES. 3. VIOLATION OF THE ARTS. 1.1, 2 and 68 OF THE PACT OF SAN JOSE, COSTA RICA. NO CHECKING. DECISIONS OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS. NEED FOR HARMONISATION WITH INTERNAL JURISPRUDENCE. NATIONAL SOVEREIGNTY. 4. OTHER UNRELATED ALLEGATIONS OF OFFENSE TO LEGAL DEVICE. REAFFIRMATION OF THE CONCLUSIONS OF RESP 1,798,903/RJ. 5. REGIMENTAL AGGRAVATION TO WHICH PROVIMENTO IS DENIED. 1. The theme brought in this special appeal, referring to the serious violations of human rights occurred during the period of the military dictatorship, has already been analyzed by the Third Section of the Superior Court of Justice, on 9/25/2019, in the trial of Special Appeal No. 1,798,903/RJ, which dealt with the so-called 'Riocentro Attack'. 2. In the present case, the applicant points offense to Art. 1, caput and § 1, of Law No. 6,683/1979 and art. 10, § 3, of Law No. 9,882/1999. However, the decisions of the ordinary bodies did not make such legal provisions vulnerable, but rather gave them effective and correct applicability, since the complaint was rejected on the basis of Law No. 6,683/1979, which was considered constitutional by the STF, in the judgment of ADPF 153/DF, effectively against all and binding effect, under Law No.



15. In this sense, Edite Mesquita Hupsel considers that "Internalized the Inter-American Convention on Human Rights in 1992, from then on, there would no longer be accepted the production of effects of the Amnesty Law of 1979, a diploma that, in addition to being incompatible with the national and international legal order already in force, is of flagrant incompatibility with that Convention (...) It is important that when there are conflicts between external and internal norms regarding fundamental rights, which is the case under consideration, those that are more favorable to the subject will prevail. In this sense Fábio Konder Comparato states that: (...) Also the discussions surrounding the criteria that can be used to resolve conflicts between international norm and norm of domestic law — chronological, specialty or the principle of *pacta sunt servanda* — are now no longer of interest, to the extent that a decision of an international court, to which the Brazilian State has submitted to jurisdiction, shall prevail" (HUPSEL, 2015, p. 135).

16. Flávia Cristina Piovesan and Marília Papaléo Gagliardi well summarize the question: "It is concluded, therefore, that the decisions given by the Inter-American Court of Human Rights have a real effect in all member countries that have committed themselves to their jurisdiction, whether or not the States have been condemned by the Court. It is also noticeable that, even in cases where the judgment has not been fully enforced in the country, as in the Brazilian and Chilean cases, its mere existence generates a counterpoint in the judicial and legislative ways of the States. Specifically in the Brazilian case, which demonstrated the greatest inertia regarding the annulment of the effects of amnesty, the importance of the international sentence was highlighted. This is because the award-go sentence continues to provide legal resources and measures over time, always aiming at compliance. It is also noteworthy that the measures related to repair, when they go beyond the material sphere, cannot always be measured, and it is difficult to consider whether there was, in fact, their full compliance. Nevertheless, it is not sufficiently clear whether its implementation was due to judicial imputation or a result of the state's own internal policy. This, however, does not take credit from the strength of international decisions, which sometimes grounded and validated the policies adopted. It is emphasized, finally, that it was possible to ascertain, in the cases



studied, that the decisions of the IACHR Court have real applicability and effectiveness, even if it does not have coercive means to ensure such compliance. It is therefore clear the importance and need of a regional international court for the protection of human rights, since it is, in fact, capable of provoking not only the progress of proceedings to ensure rights, but also of generating real judicial reforms in the member countries" (PIOVESAN and GAGLIARDI, 2017, p. 28).

17. In the same sense, Edite Mesquita Hupsel points out that the ruling of the Inter-American Court opened ways for the accountability of human rights violators during the military regime, pending a rereading of the Supreme Federal Court on the subject. It also highlighted the performance of the Federal Public Prosecutor's Office to comply with the decision given by the Inter-American Court, with its own recursion routes (HUPSEL, 2015). Inês Virgínia Prado Soares, Lucia Elena Arantes Ferreira Bastos and Renan Honório Quinalha, in an interesting analysis, highlight the position of the MPF before the decision of the Inter-American Court, concluding that: "But there remains the need for the application of justice and criminal accountability of the agents who committed the crimes of the dictatorship. This is the valid determination contained in the court's decision in the Araguaia case. The validity of the Amnesty Law is another possible understanding, since it was proclaimed by the Supreme Federal Court. Among the two Courts, among the many bodies charged with dealing with this legal imbroglio, is the Federal Prosecutor's Office, an actor with exclusive legitimacy to propose the appropriate criminal actions. Thus, in the Brazilian legal system, the right to justice, from a criminal perspective, depends on the initiative of the Public Prosecutor's Office and, in this subject of transitional justice, the MPF, which is the holder of criminal prosecution against agents of the authoritarian government who have been involved with human rights violations. Therefore, the 3 and 9 provisions of the Court's decision are directly linked to the attribution of the MPF, the exclusive body for the purpose of public prosecution (art. 129, inc. I, of the Constitution). And the need for the MPF to comply with the points of the conviction that determines the criminal liability of the perpetrators, leading those responsible to trial, is not limited to the mere issue of legal technique (institutes and procedural deadlines). The initiative to deal with the violent past of the dictatorship is linked to



the very constitutional definition of the Public Prosecutor's Office as a permanent institution, essential to the judicial function of the State, with the task of defending the legal order, the democratic regime and social interests (art. 127 CF). In this respect, there is a strict link between the MPF, with no choice but to prosecute agents who have committed common crimes against political prisoners" (QUINALHA, BASTOS and SOARES, 2014, p. 132).

18. According to Ávila, "[o]verprinciples are at the level of the norms subject to application. They act on others, but in the semantic and axiological context and not in the methodical, as with the postulates. This explains the difference between overnorms (semantic and axiologically overlying norms, situated at the level of the object of application) and metanorms (methodically overlying standards, located at the application metalevel)" (ÁVILA, 2021, 167).

19. In this sense, we can see Marmelstein's considerations: "the notion of fundamental rights as legal norms that limit state power arises precisely as a reaction to the absolute state, representing the opposite of Machiavellian and Hobbesian thought. Fundamental rights presuppose a legally limited State (rule of law/separation of powers) and have ethical concerns relating to the common good (fundamental law/democracy). Therefore, one step towards the institutional recognition of fundamental rights was the emergence of the Democratic Rule of Law. (...) The ethical purpose of the State, since then, is no longer the mere satisfaction of the interests of one or a few individuals, but the search for the common good, as Jean-Jacques Rousseau maintained, in his Social Contract (1757/1762). It is the government of the people, by the people and for the people, according to the words immortalized by Abraham Lincoln, uttered in the famous Gettysburg Speech in 1863. This model is what has been called a democratic rule of law, which, despite all defects, is the political model adopted by most of the most advanced countries and is the only institutional framework that allows social change without violence. Therefore, it is a model to be followed" (MARMELESTEIN, 2016, pp. 35-38).

20. As the author points out: "dignity will not be sufficiently respected and protected everywhere where people are being affected by such a level of legal instability that



they are no longer in a position to, with a minimum of security and tranquility, trust social and state institutions (including law) and a certain stability of their own legal positions" (SARLET, 2005, p. 121).

21. In this sense, the lessons of Clèmerson Merlin Clève are given: "The objective dimension of legal certainty implies considering, in particular, certainty and predictability, without overlooking, however, that it operates inextricably reflecting the subjective spirit of citizens, through the idea of protection of trust, initially developed in German doctrine and jurisprudence. There is, therefore, among the effects of security protection in the objective and subjective spheres, a patent relationship of complementarity, without which there is no reason to maintain such dissociation" (CLÈVE, 2005, pp. 194-195).

22. It is worth mentioning the following excerpt of the sentence: "177. In the present case, the Court observes that the control of conventionality has not been exercised by the courts of the State and that, on the contrary, the decision of the Supreme Federal Court confirmed the validity of the interpretation of the Amnesty Law, without considering Brazil's international obligations derived from international law, particularly those laid down in Articles 8 and 25 of the American Convention, articles 1.1 and 2 of the same instrument. The Court considers it appropriate to recall that the obligation to comply with international obligations voluntarily contracted corresponds to a basic principle of law on the international responsibility of States, supported by international and national jurisprudence, according to which they must comply with their international conventional obligations in good faith (*pacta sunt servanda*). As this Court has already pointed out and, as provided for in Article 27 of the Vienna Convention on the Law of Treaties of 1969, States cannot, for internal reasons, fulfil international obligations. The conventional obligations of states parties bind all their powers and bodies, which must ensure compliance with conventional provisions and their own effects (*effet utile*) in the level of their domestic law" (IACHR, 2010).

23. On the theme of the dialogue between courts and between the internal and international order, Marcelo de Oliveira Fausto Figueiredo Santos points out that: "analyzing the jurisprudence of the Supreme Federal Court in Brazil, especially with



regard to international human rights law, we found, at least until the issue of Constitutional Amendment No. 45/2004, we verified the persistence of the preference of that Court the internal norms in relation to those of an international nature" (SANTOS, 2019, p. 121).

24. Paulo Henrique Gonçalves Portela, after exposing the criticisms to the currents of voluntarism and objectivism, points out that, from them, a: "formulation of a theory, elaborated by Dionisio Anzilotti, which bases international law on the *pacta sunt servanda* rule. For this author, international law is mandatory because it contains important norms for the development of international society, but which still depend on the will of the State to exist. Moreover, once states express their consent to comply with certain international standards, they must do so in good faith" (PORTELA, 2019, p. 42).

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