

The Inter-American human rights protection system: Structure, functioning and effectiveness in Brazilian law

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Summary

The article provides a brief background to the Inter-American system of human rights and its monitoring organs, the Inter-American Commission and the Inter-American Court of Human Rights. It then focuses on the relationship between the two institutions, looking in particular at how cases are instituted before the Court. Against this background, the process of ensuring effective domestic enforcement of the Court's judgments in Brazil is investigated with reference to two decided cases and a draft Bill pending before Congress.

1 Introduction

This article aims to study the Inter-American system of human rights protection, with a special focus on its implications for Brazilian law.¹ Therefore it is meant, first, to provide an understanding of the origin of the Inter-American system, its creation and its organs (the Inter-American Commission and Court). Second, it surveys the procedural journey of processing a complaint against a state in the Inter-American

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¹ See V de O Mazzuoli *Curso de direito internacional público* (2010) 824-842.

system, the domestic effect of judgments adopted by the Inter-American Court, as well as the (always complicated) issue of the enforcement of the judgments of the Court in Brazil.

Among regional systems of protection, the first and oldest 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 violations so far. The Inter-American regional system is the second oldest. It was established by the American Convention on Human Rights (American Convention) in 1969. The most recent system is the African regional system, still relatively young, established by the African Charter on Human and Peoples' Rights (African Charter) in 1981.

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

We focus here on the Inter-American regional system of human rights protection, 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 and Canada, as well as the Caribbean states that have already become parties of the Organization of American States (OAS) or will do so in the future.³

2 Inter-American system of human rights

As pointed out above, parallel to the global system of protection of human rights, there are also regional systems of protection (for

² For the text in Portuguese, see V de O Mazzuoli *Coletânea de direito internacional* (2010) 233.

³ 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 the author has written in collaboration with Luiz Flávio Gomes, and which was published in Brazil by Revista dos Tribunais Publishing (2009), to which we refer the interested reader. See LF Gomes & V de O Mazzuoli *Comentários à Convenção Americana sobre Direitos Humanos (Pacto de San Jose da Costa Rica)* (2009).

example the European⁴ and the African⁵ systems). Among them is 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 technically a treaty, outlines the rights mentioned in the Charter of the OAS; the American Convention on Human Rights (1969), and the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights, dubbed the Protocol of San Salvador (1988) (ESC Protocol).⁷

Throughout the Inter-American system, there exists the general obligation to protect the 'fundamental rights of the individual without distinction as to race, nationality, creed or sex'⁸ (article 3(1) of the OAS Charter).⁹ In relation to the responsibility of American states for human rights violations, I should highlight the system proposed by the American Convention, of which the member states of the OAS form part.

⁴ For a study on the European system of human rights protection, see JES Fawcett *The application of the European Convention on Human Rights* (1987); J-F Flauss 'Le droit de recours individuel devant la Cour européenne des droits de l'homme: Le Protocole No 9 à la Convention Européenne des Droits de l'Homme' (1990) 36 *Annuaire Français de Droit International* 507-519; P Mahoney & S Prebensen 'The European Court of Human Rights' in R St J MacDonald *et al* (eds) *The European system for the protection of human rights* (1993) 621-643; D Harris & G Janssen-Pevtschin 'Le Protocole No 11 à la Convention Européenne des Droits de l'Homme' (1994) 20 *Revue Trimestrielle des Droits de l'Homme* 483-500; M O'boyle & C Warbrick *Law of the European Convention on Human Rights* (1995); D Gomien *et al* *Law and practice of the European Convention on Human Rights and the European Social Charter* (1996); J Rideau 'Le rôle de l'Union Européenne en matière de protection des droits de l'homme' (1997) 265 *Recueil des Cours* 9-480; F Matscher 'Quarante ans d'activités de la Cour Européenne des Droits de l'Homme' (1997) 270 *Recueil des Cours* 237-398; and E Lambert *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* (1999).

⁵ About the African regional system, see BS Ngom *Les droits de l'homme et l'Afrique* (1984); EG Bello 'The African Charter on Human and Peoples' Rights: A legal analysis' (1985) 194 *Recueil des Cours* 9-268; K M'Baye *Les droits de l'homme en Afrique* (1992); F Ouguerouz *La Charte Africaine des Droits de l'Homme et des Peuples: Une approche juridique des droits de l'homme entre tradition et modernité* (1993); UO Umozurike *The African Charter on Human and Peoples' Rights* (1997); and M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008).

⁶ See HF Ledezma *El sistema interamericano de protección de los derechos humanos: Aspectos institucionales y procesales* (1999).

⁷ See JC Hitters *Derecho internacional de los derechos humanos* (1993); R Nieto Navia *Introducción al sistema interamericano de protección a los derechos humanos* (1993); A Dulitzky 'Una mirada al sistema interamericano de derechos humanos' (1998) 20 *América Latina Hoy* 9-19; and F Andreu-Guzmán '30 años de la Convención Americana sobre Derechos Humanos: todavía hay mucho camino por recorrer' (2001) 1 *El sistema interamericano de protección de los derechos humanos en el umbral del siglo XXI* 301-307.

⁸ For the text in Portuguese, see Mazzuoli (n 2 above) 261.

⁹ For a study on the precedents of human rights protection in the OAS Charter, see H Gros Espiell 'Le système interaméricain comme régime régional de protection internationale des droits de l'homme' (1975) 145 *Recueil des Cours* 13-20.

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 (Rules of Interpretation). It provides that none of its provisions may be interpreted as 'restricting the enjoyment or exercise of any right or freedom recognised 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 originated with the proclamation of the Charter of the Organization of American States (Charter of Bogotá) in 1948,¹¹ at the 9th Inter-American Conference, which also adopted the Declaration of the Rights and Duties of Man.¹² The latter formed the basis of 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 maturation of the mechanisms of human rights protection in the American system occurred, of which the first step was the creation of a specialised 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 had to function until the establishment of an American convention on human rights, which eventually happened in San José, Costa Rica, in 1969.¹⁴

¹⁰ For the text in Portuguese, see Mazzuoli (n 2 above) 1006. For a study on the interpretation of this kind of international provision, see V de O Mazzuoli *Tratados internacionais de direitos humanos e direito interno* (2010) 116-128.

¹¹ See E Márquez 'Documentos internacionales sobre los derechos humanos: La Carta de la OEA' *México y las declaraciones de derechos humanos* México, DF: Instituto de Investigaciones Jurídicas de la UNAM (1999) 217-232.

¹² See T Buergenthal & D Cassel 'The future of the Inter-American human rights system' *El futuro del sistema interamericano de protección de los derechos humanos* (1998) 539-572; C Ayala Corao 'El sistema interamericano de promoción y protección de los derechos humanos' *México y las declaraciones de derechos humanos*, México, DF: Instituto de Investigaciones Jurídicas de la UNAM (1999) 99-118; and C Ayala Corao 'Reflexiones sobre el futuro del sistema interamericano de derechos humanos' (2001) 30/31 *Revista IIDH* 91-128.

¹³ See AA Cançado *Tratado de direito internacional dos direitos humanos* (2003) 33-34.

¹⁴ See Gros Espiell (n 9 above) 35-37; A de C Ramos *Direitos humanos em juízo: comentários aos casos contenciosos e consultivos da Corte Interamericana de Direitos Humanos* (2001) 57-58.

3 American Convention on Human Rights

The American Convention,¹⁵ which is the key instrument of the Inter-American system of human rights, was signed in 1969 and entered into force on 18 July 1978, after having obtained the minimum of 11 ratifications. Only the member states of the Organization of American States may become parties. 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, the Commission was simply an organ of the OAS. Despite its importance in consolidating individual liberty and social justice in the Americas, some countries, like the United States of America (which has only just signed it) and Canada have not ratified the American Convention and, apparently, are not willing to do so. Brazil did not ratify it until 1992. The Convention was internally promulgated by Decree 678 of 6 November in that year.

The protection of human rights under the American Convention brings reinforcement to or complements the protection provided by the domestic laws of state parties (see the Preamble of the Convention). This means that it does not remove from states the primary responsibility to nurture and protect the rights of persons within their jurisdiction. However, in instances of a lack of a defence, or inadequate protection, the Inter-American system may interact, contributing to the common goal of protecting a certain right that the state has failed to guarantee or respect as it should.

In Part I the Convention lists an array of civil and political rights similar to the International Covenant on Civil and Political Rights (ICCPR). These rights include 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 a name and nationality. In Part II, the treaty sets out the means to achieve the protection of the rights listed in Part I.

It is important to observe that the American Convention does not specifically establish any social, economic or cultural rights. It contains only a general reference to such rights.

In 1988, aiming at guaranteeing such rights, the General Assembly of the OAS adopted the Additional Protocol to the American Convention, the ESC Protocol, which entered into force in November 1999, when the 11th instrument of ratification was deposited in accordance with article 21 of the Protocol.¹⁶ Brazil ratified the Protocol in 1999. It

¹⁵ The official Brazilian version of the American Convention on Human Rights can be found published in Mazzuoli (n 2 above) 998-1015.

¹⁶ See F Piovesan *Direitos humanos e o direito constitucional internacional* (2006) 228.

was domestically promulgated by Decree 3321 of 30 December of that year.

As to the other international instruments that compose the Inter-American system, the following are also worth noting: the Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990);¹⁷ 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 state parties to the OAS, the only exception being the Convention of Belem do Para, which so far has been ratified by an impressive number of 31 out of 35 member states.

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.

4 Inter-American Commission on Human Rights

The origin of the Inter-American Commission on Human Rights is a resolution and not a treaty. This was Resolution VIII of the 5th Meeting of Consultation of Foreign Ministers, held in Santiago (Chile) in 1959.¹⁸ However, the Commission began to operate in the following year, in accordance with its founding statute, under which its function is 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 an organ of the American Convention only. While all state parties to 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.¹⁹ We consider the Inter-

¹⁷ 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.'

¹⁸ See Gros Espiell (n 9 above) 23; Cançado Trindade (n 13 above) 34-35.

¹⁹ See JM Arrighi *OEA: Organização dos Estados Americanos* (2004) 52.

American Commission rather as an organ of the American Convention than an organ of the OAS in this article.²⁰

The Commission consists of seven members who must be persons of high moral authority and recognised 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 organisation. Whenever a list of three candidates is offered, at least one of them must be a national of a member state other than the applicant. Commissioners are elected for four years and may be re-elected only once, but the terms of the three members appointed at the first election expire after two years. Soon after such election, the names of these three members are to be drawn by lot in the General Assembly. No more than one national of each country may take part in the Commission.

The Commission represents all the member states of the OAS and has as its main function the promotion of the observance and protection of human rights.

One of the main competencies of the Commission is to consider claims from individuals or groups of individuals, or from non-governmental entities legally recognised 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)).²¹ Thus, individuals, despite 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.

The complaints procedure before the Commission is governed by articles 48 to 51 of the American Convention. Article 49 provides that if a friendly settlement has been reached in accordance with paragraph (1)(f) of article 48, the Commission must draw up a report, which must be transmitted to the petitioner and to the state parties to the Convention, and shall then be communicated for publication to the Secretary-General of the Organization of American States. This report must contain a brief statement of the facts and the finding. If any party in the case so requests, the fullest possible information must be provided to it. If a settlement is not reached, the Commission must, within the time limit established by its statute, draw up a report (first report)

²⁰ See Gros Espiell (n 9 above) 23-34.

²¹ See Gros Espiell (n 9 above) 27-30; A de C Ramos *Processo internacional de direitos humanos: Análise dos sistemas de apuração de violações dos direitos humanos e a implementação das decisões no Brasil* (2002) 229-238; and Piovesan (n 16 above) 232-233. For an overview of the cases against Brazil in the Inter-American Commission until 2005, see LF Gomes & V de O Mazzuoli 'O Brasil e o sistema interamericano de proteção dos direitos humanos' in AZ Schmidt (ed) *Novos rumos do direito penal contemporâneo: livro em homenagem ao Prof Dr Cezar Roberto Bitencourt* (2006) 427-437.

setting forth the facts and stating its conclusions.²² If the report, in whole or in part, does not represent the unanimous decision 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 must also be attached to the report. The report must be transmitted to the states concerned, which is not at liberty to publish it. In transmitting the report, the Commission may make such proposals and recommendations as it sees fit²³ (articles 50(1) to (3)). If the state does not meet these recommendations, and if the petitioner is in agreement, the case is submitted to the Court by the Commission.²⁴

If, within a period of three months from the sending of the Commission's report to the state concerned, the matter has neither been settled nor 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 a vote of an absolute majority of its members, set forth its own opinion and conclusions concerning the question submitted to its consideration.²⁵ This phase of the second report, as noted, will occur only 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 it is, it has not yet recognised the contentious jurisdiction of the Court by the Commission or the state concerned.²⁶ Note that the term 'has not been' is linked to the last phrase 'submitted to the Court's 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.²⁷ At this stage, the Commission must make pertinent recommendations and must 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 must decide by a vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report (articles 51(2) and (3)).

The 12 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. 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

²² Art 50(1) American Convention.

²³ Arts 50(1) to (3).

²⁴ See Arrighi (n 19 above) 108.

²⁵ See Piovesan (n 16 above) 236.

²⁶ Art 51(1) American Convention.

²⁷ See Gomes & Mazzuoli (n 3 above) 255.

Inter-American Commission, besides being an organ of the American Convention, is also (originally) an organ of the OAS Charter. In case of non-compliance with what has been established by the Commission, the General Assembly of the OAS could be triggered to impose sanctions against the state.²⁸ Although the imposing of international sanctions for human rights violators is not expressly mentioned among the powers of the General Assembly (under article 54 of the OAS Charter), the fact is that, as 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.²⁹ This subsidiary system of the OAS will only be extinguished 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 state 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 (with respect to the functions assigned by the Convention).³⁰ This is the ambivalent or two-faced aspect of the Commission which we referred to 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 mentioned in both the OAS Charter and the American Declaration; secondly, because the judgments of the Inter-American Court are binding on the state parties to the Convention, which is not the case with the recommendations of the quasi-judicial system of the OAS Charter.³¹

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, served as member of the Commission. His mandate expired on 31 December 2007.

²⁸ See Gros Espiell (n 9 above) 30-31.

²⁹ See Ramos (n 14 above) 68-69; and also his *Processo internacional de direitos humanos* (n 21 above) 221-224. (In these two works, the author refers to art 53 of the OAS Charter, when he means art 54 of the Charter).

³⁰ H Bicudo 'Defesa dos direitos humanos: sistemas regionais' (2003) 17 *Estudos Avançados* 231.

³¹ See Ramos (n 14 above) 71.

5 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 state parties of the OAS that have ratified the American Convention.³² This is a supranational tribunal able to condemn state 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 context (following the European Court of Human Rights, based in Strasbourg, responsible for implementing the 1950 Convention).³³ Although officially the Inter-American Court's birth was in 1978, upon the entry into force of the American Convention, its operation was effective only in 1980 when it issued its first advisory opinion, and seven years later, when it issued its first ruling.³⁴

The Inter-American Court — which is based in San José, Costa Rica — is composed of seven judges (of different nationalities) from the member states of the OAS. They are elected in their individual capacity from among jurists of the highest moral authority and recognised 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 re-elected only once. They must remain in office until their terms expire. A quorum for the deliberations of the Court is 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),³⁵ as well as a contentious jurisdiction, suitable for the trial of concrete cases, when one of the state parties to the American Convention is

³² For details, see CA Dunshee de Abranches 'The Inter-American Court of Human Rights' (1980) 30 *American University Law Review* 79-125; T Buergenthal 'The Inter-American Court of Human Rights' (1982) 76 *American Journal of International Law* 1-27; AS Dwyer 'The Inter-American Court of Human Rights: Towards establishing an effective regional contentious jurisdiction' (1990) 13 *Boston College International and Comparative Law Review* 127-166.

³³ For a detailed comparison between the two systems, see H Gros Espiell 'La Convention Américaine et la Convention Européenne des Droits de l'Homme: Analyse comparative' (1989) 218 *Recueil des Cours* 167-412.

³⁴ See T Buergenthal 'Recordando los inicios de la Corte Interamericana de Derechos Humanos' (2004) 39 *Revista IIDH* 11-31; Arrighi (n 19 above) 105-107.

³⁵ See T Buergenthal 'The advisory practice of the Inter-American Human Rights Court' (1985) 79 *American Journal of International Law* 1-27; CR Miguel 'La función consultiva en el sistema interamericano de derechos humanos: Crisálida de una jurisdicción supra-constitucional?' (1998) II *Liber amicorum: Héctor Fix Zamudio* 1345-1363.

alleged to have violated any of its provisions.³⁶ However, the contentious jurisdiction of the Inter-American Court is limited to state parties to the Convention that explicitly recognise its jurisdiction. This means that a state party to the American Convention cannot be sued in the Court if it does not accept its contentious jurisdiction. In ratifying the American Convention, state parties automatically accept the advisory jurisdiction of the Court. However, contentious jurisdiction is optional and may be accepted later or on an *ad hoc* basis.

Allowing states to opt into the Court's contentious jurisdiction was a strategy to encourage the states to ratify the Convention, without fear of immediately becoming defendants – and it has paid off. Brazil accepted the contentious jurisdiction of the Court on 3 December 1998, through Legislative Decree 89. According to this Decree, only the allegations of human rights violations that occurred after that date may be submitted to the Court.³⁷

It is worth noting that both individuals and private institutions are barred from approaching the Court directly (article 61), unlike the situation in the European Court of Human Rights.³⁸ The Commission – which in this case acts as a body of first instance – may refer a case to the Court. This can also be done by another member state, provided that the respondent state has previously accepted the Court's jurisdiction to act in such a context – that is, to deal in interstate cases involving human rights – requiring the condition of reciprocity.³⁹ It must also be stressed that the Commission (in cases triggered by individuals) cannot act as a party in such a case, since it has already decided on the admissibility of the case.

The Court neither reports cases nor makes recommendations in exercising its contentious jurisdiction, but issues sentences that, according to the Pact of San José, are final and binding. In other words, the Court's judgments are binding on those states that accept its jurisdiction.⁴⁰ When the Court declares the violation of a right safeguarded by the Convention, it orders the immediate repair of the damage and requires, if applicable, payment of just compensation to the injured party. Under article 68 of the Convention, state 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

³⁶ See H Gros Espiell 'El procedimiento contencioso ante la Corte Interamericana de Derechos Humanos' (1986) 19 *Boletín Mexicano de Derecho Comparado* 511-548.

³⁷ See Ramos (n 14 above) 61.

³⁸ See, in this regard, AA Cançado Trindade *Evolution du droit international au droit des gens: l'accès des individus à la justice internationale (le regard d'un juge)* (2008).

³⁹ See JF Rezek *Direito internacional público: curso elementa* (2002) 215.

⁴⁰ See Cançado Trindade (n 13 above) 52. About the authority of international judgments, see LNC Brant *L'autorité de la chose jugée en droit international public* (2003).

in accordance with its internal procedures governing the execution of judgments against the state.

6 Procedure in bringing a state before the Court

If the state concerned refuses to accept the conclusions established by the Inter-American Commission in its first (or preliminary) report, it may refer the case to the Inter-American Court, provided that the state has recognised the Court's compulsory jurisdiction. The activation of the Court by the Commission is achieved by means of judicial proceedings, comparable to the bringing of an action to court under the rules of civil procedure. Beyond the Commission, however, other states (which have also expressly recognised the contentious jurisdiction of the Court) may bring a case against a state before the Court, since the human rights guarantee is an objective requirement of interest to all state parties to the American Convention.⁴¹ The latter, amounting to a denunciation of one state by another, has not yet occurred (for obvious reasons).

The process of bringing a state before the Inter-American Court is provided for in the Court's Rules of Procedure. The version currently in force, is dated 24 November 2009.⁴² The Commission sends a docket of the application of demand in one of the working languages (which are Spanish, English, Portuguese and French) to the Secretariat of the Court (in San José, Costa Rica). The petition must indicate the claims (including those relating to reparations and costs), the parties to the case, a statement of the facts, the resolution to initiate proceedings and the admissibility of the complaint, and supporting evidence and names of witnesses.

Moreover, to examine the case, the Court must receive the following information from the Commission: (a) the names of the delegates; (b) the names, addresses, telephone numbers, electronic addresses and facsimile numbers 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 (see its contents below); (d) a copy of the entire case file before the Commission, including all communications following the issue of the report to which article 50 of the Convention refers; (e) evidence received, including audio recordings and transcriptions where relevant, with an indication of the alleged facts and arguments on which they rest (the evidence received in an adversarial proceeding will be indicated); (f) when the Inter-American public order of human

⁴¹ See Ramos (n 14 above) 88-99.

⁴² It was approved by the Court in its 85th ordinary period of sessions. This is the 5th regulation of the Inter-American Court since its establishment.

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 must decide whether to consider those individuals as victims (article 35 of the Rules of Court). As the Inter-American Commission is the plaintiff, the complaint must be accompanied by the report referred to in article 50(1) of the Convention:⁴³ '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.' After a suit is initiated, the President of the Court does a preliminary examination of the demand by checking whether or not all the requirements for its commencement were met, and may require the applicant to remedy deficiencies within 20 days (article 38 of the Rules of Court).⁴⁴

It is interesting that the new Rules of the Court (2009) provide for the position of an 'Inter-American Defender' who will act, by the Court's designation, in cases where the alleged victims do not have duly-accredited legal representation (article 37).

According to article 28(1) of the Rules of the Inter-American Court, the demand, its defence, the written pleadings, motions, other evidence and petitions to the Court may be submitted in person, via courier, facsimile, telex, mail and other means generally used. In the case of submissions by electronic means, the original documents, as well as the proof that follows, should be submitted within 21 days from the final date of the written documents. In the previous Regulation (of 2000), the time limit was seven days (under article 26(1)), which was considered too exiguous.

The preliminary stage of the demand is to 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 procedures of the adversarial system are initiated, in which the defendant state 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 should be mentioned that nothing prevents the applicant from withdrawing from the process. If the defendant state has not yet been cited, such a withdrawal must 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).⁴⁵

⁴³ For the text in Portuguese, see Mazzuoli (n 2 above) 1010.

⁴⁴ See Gomes & Mazzuoli (n 3 above) 279-280.

⁴⁵ See Ramos (n 14 above) 90-91.

Nothing prevents the parties from reaching an amicable settlement by informing the Court. In such a case, the Court approves the conciliation, acting now as a supervisor of the human rights standards protected by the American Convention. Nothing prevents the Court from rejecting a friendly settlement in the event it deems the agreement to be contrary to the provisions of the American Convention.

The defendant state, within a period of four months following notification of the case, has the right to present its defence. The state's answer should include the necessary documents to prove its arguments as well as a list of witnesses and experts. Such defence must be communicated by the Secretary to the persons mentioned in articles 39(1)(a), (c) and (d) of the Rules of Court, which are the President and the Court's judges; the Commission, provided it is not the plaintiff; and the alleged victim, his or her representatives, or the Inter-American Defender, if this is the case.

Preliminary exceptions may only be invoked in response to the demand. The response should include the facts alleged by the state, as well as its legal arguments, its conclusions, supporting documents with an indication of evidence that the author of the exception may want to present. The presentation of preliminary exceptions has no suspensive effect on the proceedings as regards the merits or deadlines of the case. The parties interested in presenting written responses to the preliminary exceptions may do so within a period of 30 days from receipt of the notice. When it is deemed necessary by the Court, it may convene a special hearing on preliminary exceptions, after which it must decide on them. However, the Court may also adopt a summary decision on preliminary exceptions and the merits of the case, according to the principle of procedural economy.⁴⁶ Next, the President of the Court must fix the date for hearings and oral argument.⁴⁷

After concluding the discovery process (with discussions, questions during debates, and such⁴⁸), the Court proceeds to deliberations and delivers a judgment on the merits. This judgment contains (a) the names of the person who presides in the Court, the judges who rendered the decision, 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

⁴⁶ Art 42 of the Rules.

⁴⁷ Art 45 of the Rules.

⁴⁸ On the probative question in the Inter-American Court, see A Bovino *A atividade probatória perante a Corte Interamericana de Direitos Humanos, SUR – Revista Internacional de Direitos Humanos* (2005) 61-83.

indicating which text of the judgment is authoritative (article 65 of the Rules of Court).

When a finding on the merits of a case does not rule specifically on reparations, the Court will announce that it intends to issue a finding at a later stage and whether it intends to require additional briefs or hearings on reparations.⁴⁹ If the Court is informed that the parties to the proceedings came to an agreement on the enforcement of the judgment upon merit, it will verify whether the agreement is consistent with the Convention and will decide on the matter (articles 66(1) and (2)).

Notification of the award to the parties is made by the Court Secretariat. Until the parties are notified of the finding, the texts, the arguments and votes all remain confidential. The findings are signed by all the judges who participated in the vote and by the Secretary. However, the finding shall be valid when signed by a majority of the judges and the Secretary. The original copies of judgments must be deposited in the archives of the Court. The Secretary must deliver certified copies to the state parties, the parties concerned, the Permanent Council through its President, and the Secretary-General of the OAS and all other interested persons who so request.

7 Internal effectiveness of judgments passed by the Inter-American Court in Brazil

A complex legal issue that arises in relation to decisions by the Inter-American Court — a discussion that is also relevant to the judgments of any international court — relates to the arguable need for such decisions to be subject to ratification by the Superior Court of Justice (STJ — *Superior Tribunal de Justiça*) to be internally effective in Brazil.⁵⁰ An observation to be made here is that I am not dealing with a problem regarding the ratification 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 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

⁴⁹ See VMR Rescia *Las reparaciones en el sistema interamericano de protección de los derechos humanos*, *Revista IIDH* (1996) 129-150.

⁵⁰ Before the entry into force of Constitutional Amendment 45/2004, the jurisdiction for homologation of foreign judgments was subjected to the Supreme Court. See, in this regard, V de O Mazzuoli 'Sentenças internacionais no Supremo Tribunal Federal' (2002) *Jornal Correio Braziliense*, Supplement 'Law and Justice', Brasília, 3.

are rules for this matter in the Bustamante Code of 1928, still in force in Brazil (article 423 and further).

In my view, the sentences handed down by international courts do not require ratification by the STJ. In the specific case of judgments of the Inter-American Court, the rule contained in article 105(I)(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 ratified by the Supreme Court, is not enforceable.⁵¹ (Presently, after Constitutional Amendment 45/2004, the competent court is the Superior Court of Justice.) Judgments handed down by 'international courts' are not foreign judgments referred to by the instruments mentioned. 'Foreign judgments' should be understood as ones pronounced by a court of a sovereign state, and not emanating from an international tribunal which has jurisdiction over state parties.

One might think that a foreign judgment is any judgment 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 incorporation before they accomplish their internal purposes in Brazil. However, this argument does not seem to hold, when differentiating the legal status and procedure of foreign judgments from that of international courts. International law is not to be confused with foreign law. International law deals with international legal regulations, in most cases done by international standards. International law, therefore, disciplines the performance of states, international organisations, and also individuals. Foreign law, however, is subject to the jurisdiction of a particular state, such as Italian, French or German law. It is any law subject to the jurisdiction of a country other than Brazil. A decision given in Argentina will always be a foreign decision.

A court 'that knows legal issues not likely to be decided by a national court is considered an international court',⁵² and the sentence it pronounces will also be qualified accordingly. The sentences handed down by 'international courts' will be international judgments in the same way that sentences handed down by 'foreign courts' will be foreign judgments, not to be confused with each other.

There is, therefore, a clear distinction between foreign judgments (subject to the sovereignty of any state) to which article 483 of the Code refers, and international judgments rendered by international courts that do not flow from the sovereignty of any individual state but, on the contrary, have jurisdiction over the state itself. A Brazilian

⁵¹ For the text in Portuguese, see Mazzuoli (n 2 above) 1562.

⁵² I Brownlie *Princípios de direito internacional público* (1997) 603.

international law specialist who expressly indicated such a view is José Carlos de Magalhães, who expressed the following view:⁵³

It should be stressed that an international judgment, 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 judicial organ of which the state is a party, either because it accepted compulsory jurisdiction, such as the Inter-American Court of Human Rights, or because, by special agreement, agreed to submit the solution of a particular dispute to an international body such as the International Court of Justice. The same may 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 authorised by 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 be subject to sanctions that the international community has the right to apply.

The same expert concluded:

One such sentence is, therefore, not dependent on incorporation 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 party to it, it needs to be complied with, as one would comply with the decision of its own courts.

This leads us to the conclusion that the STJ has neither constitutional nor legal authority to provide for the incorporation of judgments pronounced by international courts which decide over the alleged sovereign state power, and have jurisdiction over the state itself. To contend otherwise is contrary to the principles that seek to govern the community of states as a whole, with a view to the perfect co-ordination of the powers of states in this scenario of rights protection.

In short, the judgments of the Court, according to the wording of article 68(1) of the American Convention, have immediate effect in domestic law, and should be enforced by the authorities of the state.

8 Problem of enforcement of the Court's judgments in Brazil

Unfortunately, the Inter-American system of human rights still lacks an effective system of enforcement of Court judgments under the domestic legislation of the states found in violation of the Convention, in spite of article 68(1) of the American Convention which expressly provides for

⁵³ JC Magalhães *O Supremo Tribunal Federal e o direito internacional: uma análise crítica* (2000) 102. In this same sense, see Ramos (n 14 above) 496-497; and his *Processo internacional* (n 21 above) 331-336.

the commitment of state parties in 'accepting the decision of the Court in any case in which they are parties'.⁵⁴ Also, article 65 determines that the Court must inform the General Assembly of the Organisation of 'cases where a state has not complied with its judgments'.⁵⁵

The first international finding against Brazil for a violation of rights protected under the American Convention related to the case of *Damião Ximenes Lopes*, in Petition 12.237, referred by the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights on 1 October 2004. The case concerned the death of Mr Damião Ximenes Lopes (who suffered from mental retardation) in a health centre, 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-treatment by the attendants of the nursing home. The state's failure to investigate and punish those responsible and the lack of judicial guarantees were considered to violate four articles of the Convention: articles 4 (life); 5 (physical integrity), 8 (judicial guarantees) and 25 (judicial protection). In its decision of 4 July 2006 – which was the first judgment in the Inter-American system concerning human rights violations of persons with disabilities – the Inter-American Court determined, among other things, the obligation of the Brazilian state to investigate those responsible for the death of the victim, to conduct training programmes for professionals in psychiatric care, and to pay compensation (within one year) to the victim's family for material and emotional damages, totalling US \$146 000 (equivalent to R\$ 280 532,85 at the time).

The Brazilian government decided to pay the amount ordered by the Inter-American Court immediately, in deference to the rule of article 68(1) of the Convention. Through Decree 6185 of 13 August 2007, the President authorised the Special Secretariat for Human Rights of the Presidency to

take 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 1).

In another case tried by the Inter-American Court (the second case against Brazil before the Court), the Brazilian state was found not to have violated the Convention. This was the case of *Nogueira Carvalho v Brazil*, submitted to the Court on 13 January 2005 by the Inter-American Commission. The Commission held the Brazilian state responsible for

⁵⁴ For the text in Portuguese, see Mazzuoli (n 2 above) 1013 on enforcement/implementation.

⁵⁵ For the text in Portuguese, see Mazzuoli (n 2 above) 1012. In this regard, see Arrighi (n 19 above) 108; VMR Rescia 'La ejecución de sentencias de la Corte' in JE Méndez & F Cox (eds) *El futuro del sistema interamericano de protección de los derechos humanos* (1998) 449-490; Gomes & Mazzuoli (n 3 above) 308-310.

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 its 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 the lack 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 20 October 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, arrest, prosecution, 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 identified and prosecuted. The Inter-American Court, in a judgment of 28 November 2006, emphasised that, although it is the duty of a state to facilitate the necessary means to ensure that human rights defenders may 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, infringements of any of the rights provided for in the Convention. This finding was due to the fact that the Brazilian police opened an investigation on 20 October 1996 to investigate the death of Gilson Nogueira de Carvalho, in which different avenues of investigation into persons responsible for the murder were considered, among them one that related to his death due to his prosecution of an alleged death squad known as Golden Boys. Because of this the Court found that it had not been established that the state had violated the rights to judicial protection and guarantees enshrined in articles 8 and 25 of the Convention.⁵⁶

The major problem concerning 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, 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 states have such duties (investigation and punishment of the guilty), its best interpretation is that these duties are implied there. Therefore, three obligations of states convicted by the Court may be abstracted from the finding: (a) duty to indemnify the victim or his family; (b) duty to investigate the

⁵⁶ See the sentence in http://www.corteidh.or.cr/docs/casos/articulos/seriec_161_por.pdf (accessed 30 September 2010).

facts in order to prevent new similar events from happening again; and (c) duty to punish those responsible for the human rights violations.

It should be emphasised that, if the state fails to observe article 68(1) of the American Convention (which provides that states accept, *sponte sua*, the Court's decisions), it incurs a further violation of the Convention, thus activating in the Inter-American system the possibility of a new contentious procedure against such state.⁵⁷

If the state fails to comply with the Court's order, the victim himself or 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 organisation')⁵⁸ may initiate a suit to ensure the effective enforcement of the finding, since it is enforceable in Brazil, with immediate effect, and the state must merely comply with internal procedures regarding the implementation of a decision against a state.⁵⁹

Also, in the case of failure by the state to comply with the sentence, the Inter-American Court (according to article 65 of the Convention) should inform the General Assembly of the OAS in its annual report to be submitted to the organization and make proper recommendations. The General Assembly of the OAS, unfortunately, has done nothing to require that states comply with reparation or compensation awards.⁶⁰

In the opinion of some authors, in case of default by a 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, as it causes too much delay in the payment of compensation to the victim.⁶¹ Thus, pursuant

⁵⁷ See AA Cançado Trindade *O direito internacional em um mundo em transformação* (2002) 612-613.

⁵⁸ For the text in Portuguese, see Mazzuoli (n 2 above) 93.

⁵⁹ See Piovesan (n 16 above) 241.

⁶⁰ For criticism of the OAS work in these cases, see Gomes & Mazzuoli (n 3 above) 309-310.

⁶¹ Thus states art 100 of the Constitution (amended by Constitutional Amendment 62 of 9 December 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 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 (n 2 above) 84-85.

to this, one should match the Court's condemnatory sentence with a support obligation and thereby create a proper order for its payment, certainly faster and more attuned to the spirit of the Convention.⁶² In this case, the problem is that, when article 100(1) of the Constitution defines what 'alimony debts' are, it makes no reference, even remotely, to the possibility of matching an international condemnatory sentence with a 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 under Brazilian law to force the payment of compensation ordered by the Inter-American Court. In this case, there is only Bill 4667/2004 pending before Congress. If approved, it will mandate the Union to pay the due compensation to victims. 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:

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 3 December 1998, and the quasi-jurisdictional importance of the Inter-American Commission on Human Rights provided for in the Legislative Decree 678, of 6 November 1992, will adopt all necessary measures to fully comply with the international decisions and recommendations, giving them absolute priority.

According to article 2 of the 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'. Paragraph 1 of this Bill also requires the Union to make the payment of economic reparations to the victims within 60 days of notification of the decision or recommendation of an international human rights protection organ.

In Brazil, the liability to pay compensation rests with the Union, which is responsible for the acts of the Republic. However, losses suffered by the Federal Treasury due to a duty to indemnify may be recovered from the party responsible for the violation of human rights.

⁶² See, in this regard, Ramos (n 14 above) 499.

9 Concluding remarks

The Inter-American system of human rights is still little-known in Brazil, although well-articulated and fully operational. Today, Brazilian jurists do not have much knowledge about the exact operation of the international judicial system, nor are they able to hold the state accountable for the infringement of a right provided for in the American Convention.

Brazil is several years behind others in adapting to the third wave of state, law and justice, called internationalism. Only after the case tried by the STF in the Extraordinary Appeal 466.343-1/SP does Brazil seem to have entered the 'wave' of international law, a trend far advanced in other countries of the world.⁶³ Similarly, even long after it had joined the major international covenants and conventions on human rights, these treaties are not given much visibility in Brazil.⁶⁴

So far we have been surrounded by lawyers who neither care to consult the Constitution nor regard it as important. What could we say then of the application of human rights treaties by those lawyers who regard such treaties as distant and foreign to Brazil? Therefore, a sound knowledge of the judicial mechanism of the Inter-American system of human rights is necessary for every third millennium jurist.

⁶³ In this regard, see Mazzuoli (n 1 above) 334-346; Mazzuoli (n 10 above) 125-126.

⁶⁴ For a pioneer study on this theme in Brazil, see V de O Mazzuoli *O controle jurisdicional da convencionalidade das leis* (2009).