THE EXERCISE OF CONVENTIONALITY CONTROL BY THE NON-SPECIALIZED BRAZILIAN HIGHER COURTS

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RESUMO

Conventionality control is a requirement of the Inter-American Court of Human Rights for States Parties to the American Convention on Human Rights. As for Brazil, the question is: are Supreme Federal Court (SFC) and Superior Court of Justice (SCJ) in harmony with the Inter-American Court on the matter? The purpose is to verify how SFC and SCJ exercise their conventionality control. The result was obtained from the use of qualitative and quantitative analyses, using previously established criteria, on the judgments of the SFC and SCJ found on the websites of the respective courts. The article aims to contribute to the development conventionality control in Brazil.

Palavras-chave: Conventionality Control. Inter-American Court of Human Rights. International Responsibility of the State.

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1 INTRODUCTION

Conventionality control is a mechanism for making international norms ratified by a State compatible with its domestic norms. Although its origin is domestic and European, it has been considerably developed by the Inter-American Court of Human Rights (Inter-American Court) in America.

Behold, after the judgment of the Case Almonacid Arellano and others v. Chile, in 2006, the Inter-American Court recognized and expressly applied the conventionality control, obliging the States Parties to the American Convention on Human Rights (ACHR) to exercise it without, however, establishing a procedure or model for this.

Thus, the following question arises: is the conventionality control applied by the Supreme Federal Court (SFC) and Superior Court of Justice (SCJ) in line with the determinations of the Inter-American Court on the subject? The adopted hypothesis was that Brazil is not alien to the requirement of conventionality control made by the Inter-American Court, but its implementation is precarious, given the apparent unconventional positions of both courts.

Therefore, the general objective of the research is to analyze how the SFC and the SCJ exercise conventionality control. To answer the problem, it will be necessary to identify the main postulates of the general theory of conventionality control, to discuss the development of the theme by Brazilian doctrine, and finally, to analyze the jurisprudence of the SFC and SCJ on the matter.

To meet the listed objectives, qualitative and quantitative analyzes were used, using previously established criteria. In addition, the predominant procedure technique was bibliographical research.

As for the Brazilian judgments, 10 judgments of the SFC and 17 judgments of the SCJ were analyzed, found on the respective websites of the courts, in the jurisprudence search session, both using the search term “controle de convencionalidade”, with a time-lapse until May 22, 2023. The analysis of judgments is based on the following criteria: (i) due exercise of conventionality control, in line with the *pro persona* principle or with Inter-American Court’s manifestations; (ii) undue exercise of conventionality control, in disagreement with the *pro persona* principle or with the Inter-American Court; and, (iii) the exercise of conventionality control was impaired.

The article is structured as follows: the first session will address the control of conventionality within the Inter-American System for the Protection of Human Rights (IASPHR), with emphasis on Latin authors, such as Sergio García Ramiréz, Eduardo Ferrer Mac-Gregor, Juan Carlos Hitters, Néstor Pedro Sagües, Karlos Castilla, Pablo Conteras and Víctor Bazán, and analysis of the most emblematic judgments about the subject, due to the inherent limitations to this paper. The second session will verify how conventionality control was developed by Brazilian authors, highlighting any potentialities and limitations. In the third session, the judgments passed by the SFC and the SCJ on the matter will be commented on according to the aforementioned criteria.

The analysis is justified because the SFC has already diverged from the Inter-American Court on matters of conventionality control, such as, for example, in Arguição de Descumprimento de Preceito Fundamental (ADPF) nº 496, in which it judged that article number 331 of the Brazilian Penal Code, which typifies the crime of contempt, was received by the 1988 Brazilian Federal Constitution; along the same lines, the SCJ established the alleged conventionality of the crime of contempt in *Habeas Corpus* nº 379.269/MS.

In this sense, it is expected to contribute to the development of the theme in Brazilian law, according to the lessons of doctrine and the outlines printed by the Inter-American Court regarding conventionality the control.

2 GENERAL ASPECTS OF THE CONTROL OF CONVENTIONALITY WITHIN THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

Conventionality control has European origins but has undergone an inter-Americanization process (GUERRA, MOREIRA, 2017), as it was considerably developed in America by the Inter-American Court, constituting one of its most recent efforts to promote compliance with the ACHR at the domestic level.

It can be conceptualized as the international obligation that all authorities of the States Parties have to interpret domestic norms in line with the ACHR and, in general, with the inter-American *corpus iuris* or inter-American conventionality block (MAC-GREGOR, 2016). As fundamentals, articles 1.1, 2, and 29 of the ACHR and articles 26 and 27 of the Vienna Convention on the Rights of Treaties (VCRT) are mentioned (MAC-GREGOR, 2016).

Articles 1.1 and 2 of the ACHR assert the obligation to develop appropriate state practices with observance of the rights and freedoms enshrined therein. Thus, it is necessary to create and interpret domestic laws to fulfill the aforementioned obligation of respect and guarantee (MAC-GREGOR, 2016). Article 29 of the ACHR prohibits any kind of interpretation that may limit or frustrate the rights and freedoms guaranteed therein. Therefore, authorities need to interpret the ACHR as broadly and favorably as possible (MAC-GREGOR, 2016).

On a subsidiary and complementary note, the principle of useful effect and *pacta sunt servanda* are listed (MAC-GREGOR, 2016), as well as the duty to fulfill international obligations in good faith and the impossibility of invoking domestic law to justify non-compliance with the treaty, according to articles 26 and 27 of the VCRT (SAGÜÉS, 2010).

Some cite article 25 of the ACHR as a basis since conventionality control can function as a simple, quick and effective remedy, before competent judges or courts to protect rights provided for in the law, in the constitution or in the ACHR itself against violations (MAC-GREGOR, 2016).

From the foregoing, it is concluded that it is the ACHR itself that justifies the conventionality control, even if it does not do so explicitly, without prejudice to the provisions brought by the CVDT.

As for the classifications, the conventionality control includes several. Víctor Bazán, for example, sees conventionality control as verifying the adequacy of domestic legal norms applicable in specific cases to the ACHR and the interpretative standards established by the Inter-American Court (BAZÁN, 2017).

Based on this premise, the author catalogs its classification into conventionality control at the international level, exercised by the Inter-American Court since it began to function, and conventionality control at the internal level, exercised by local judges and other public entities, consisting of the obligation to verify the adequacy of internal legal norms to the ACHR, to other essential international instruments in the area of human rights and to the interpretative standards established by the Inter-American Court (BAZÁN, 2017).

For the mentioned author, if properly used, the conventionality control can collaborate so that the state law is applied in a harmonious and orderly way because it can concatenate its internal and international sources (BAZÁN, 2017).

On the other hand, Eduardo Ferrer Mac-Gregor (2013) settles his classification as conventionality control with a "concentrated" character as the one exercised by the Inter-American Court, in international headquarters, and conventionality control with a "diffuse" character as the one exercised by the national judges, in terms of domestic jurisdiction when, in the specific case, they analyze the compatibility between domestic acts and international treaties and the jurisprudence of the Inter-American Court.

Furthermore, the author understands that conventionality control is the reason for the Inter-American Court's existence, since the body controls the compatibility between the act of violation, in a broad sense, by action or omission, and the ACHR and its additional protocols, with the State being internationally responsible if convicted (MAC-GREGOR, 2013).

Another point raised by Eduardo Ferrer Mac-Gregor is the recognition of the conventional normative force, also extended to the jurisprudential criteria determined by the international body that interpreted them, arising from the jurisprudential evolution of the Inter-American Court (MAC-GREGOR, 2013).

In turn, Juan Carlos Hitters classifies "primary" control as the one carried out at the domestic level, by comparing international and domestic norms and "secondary" control such as the supervision exercised by the Inter-American Court over the entire Judiciary Branch and bodies related to the administration of justice, at any level, on the Legislative Branch and the Executive Branch, based on the entire inter-American *corpus iuris* (HITTERS, 2015).

Furthermore, Karlos A. Castilla Juárez concerned to distinguish inter-American conventionality control from authentic conventionality control, due to the amplitude of the term "control" in the legal bias, going beyond the essence of "application" of international law proposed by the Inter-American Court (CASTILLA JUÁREZ, 2016).

Thus, the author classifies conventionality control as inter-American to refer to the duty of all authorities of States Parties of ACHR to apply the ACHR and the jurisprudence of the Inter-American Court *ex officio* in the respective measures of competence of each one and as authentic conventionality control when it comes to the exclusive competence of international courts to determine whether a State act or omission is incompatible with an international norm and establish its international responsibility, given the State's international obligation for adherence to such norm (CASTILLA JUÁREZ, 2016).

The author comments that if the Inter-American Court limited the exercise of conventionality control to the Judiciary Branch this classification would be unnecessary.

However, in encompassing various authorities to do so, such a distinction remains necessary (CASTILLA JUÁREZ, 2016).

It is also interesting the classification made by Pablo Contreras in strong conventionality control to designate the duty of non-application of invalid domestic norms and weak conventionality control to refer to the duty of conformation of the interpretation of domestic regulations with regional standards (CONTRERAS, 2014). It should be noted that strong conventionality control results in a considerable reduction in the degree of State discretion and weak conventionality control makes an intermediate limitation (CONTRERAS, 2014).

About the effects of conventionality control, the majority of scholars believe that at the international level the Inter-American Court's decisions have binding *erga omnes* effects to all States Parties to the ACHR: directly for the countries held responsible and indirectly as *res interpretata* for the other States Parties (HITTERS, 2013). At the domestic level, the declaration of unconventionality of a norm means depriving it of its effects, that is, declaring it invalid (HITTERS, 2015).

Continuing the study of general aspects, it is necessary to briefly delineate Inter-American Court's manifestations in the matter, punctuating the most emblematic cases due to the limitations inherent to this work.

In 1988, in the Case of Velásquez Rodríguez v. Honduras, the Inter-American Court considered illegal any form of power exercise that violates the rights guaranteed by the ACHR, considering articles 4, 5 and 7 with article 1.1, which demonstrated the compatibility control of domestic norms concerning the ACHR (MOREIRA, 2017).

In its Advisory Opinion OC nº 14 of 1994, requested by the Inter-American Commission on Human Rights (IACHR), the Inter-American Court clarified that the obligation to take necessary measures to enforce rights and freedoms includes abstaining from acts that violate them (MAC-GREGOR, 2013). Therefore, the Inter-American Court affirmed its competence to give advisory opinions on the compatibility between domestic laws, the ACHR and the other treaties of the IASPHR (MOREIRA, 2017), and recognized the competence of IACHR to recommend the derogation or reform of domestic laws that are not yet applied but are incompatible with the IASPHR. However, the Inter-American Court did

not recognize the competence of the IACHR to submit the case for contentious appreciation (MOREIRA, 2017)[111].

Subsequently, in the judgment on reparations and costs in the Case of Castillo-Páez v. Peru, in 1998, the Inter-American Court stated that the amnesty law in Peru undermined investigation and access to justice, in addition to preventing the victims' relatives from knowing the truth and being repaired, being incompatible with the ACHR (MOREIRA, 2017).

In 1999, in the Case of Castillo Petruzzi et al. v. Peru, Juan Carlos Hitters emphasized the change in the jurisprudence of the Inter-American Court, by recognizing that the ACHR can be violated even if the internal normative mechanism has not been applied (HITTERS, 2015). Thiago Oliveira Moreira, along the same lines, explained that the decision revealed the possibility of abstract conventionality control by the Inter-American Court (MOREIRA, 2017).

In 2001, in the Case of The Last Temptation of Christ (Olmedo Bustos et al.) v. Chile, the Inter-American Court goes a long way in examining the compatibility between the Chilean constitution and the ACHR (MAC-GREGOR, 2016), considerably expanding the range of controlled material (MOREIRA, 2017).

However, the Case of Barrios Altos v. Peru, also in 2001, is pointed out as a leading case on the unconventionality of amnesty or self-amnesty laws (MAC-GREGOR, 2016) because the Inter-American Court declared the lack of legal effects of national laws submitted to the compatibility examination since they were manifestly contrary to the ACHR and frustrated the investigation of the facts of the case and the identification of those responsible (MAC-GREGOR, 2016).

Later, in the Case of Trujillo-Oroza v. Bolivia, in 2002, when condemning Bolivia, a signatory to the Inter-American Convention on Forced Disappearance of Persons, for its failure to typify the crime of forced disappearance of persons based on article 2 of the ACHR, the Inter-American Court continues to progress and again expands the controlled material considering the legislative omission (MOREIRA, 2017).

In 2003, in the *Case of Bulacio v. Argentina,* the Inter-American Court reaffirmed the State's need to suppress norms and acts of any nature that violate inter-American human

[111]Juan Carlos Hitters points out that at first, the Inter-American Court considered a supranational review inadmissible if the attacked precept had not been applied (HITTERS, 2015).

rights law and also to issue norms and develop practices to put into effect the guarantees of the IASPHR (MOREIRA, 2017).

According to Víctor Bazán, in the Case of Myrna Mack Chang v. Guatemala, in 2003, the expression "conventionality control" is used by Judge Sergio García Ramírez for the first time, in his concurring vote (BAZÁN, 2017). The Inter-American Court emphasized that the State is fully accountable, attesting to the impossibility of the State section to oblige only one or some of its organs and release others from acting according to a "conventionality control".

In the Case of Tibi v. Ecuador, in 2004, the Inter-American Court demonstrated that, similarly to the constitutionality control exercised by constitutional courts, the international human rights court examines the "conventionality" of domestic acts (MAC-GREGOR, 2016).

Behold, in the Case of Almonacid-Arellano et al v. Chile, in 2006, the Inter-American Court consecrated the expression "conventionality control" (NOSHANG; PIUCCO, 2020). The case addressed, among other points, Chile's international responsibility for the application of Decree-Law Nº 2,191 of 1978, which granted general amnesty to those responsible for crimes committed between 1973 and 1978, violating the ACHR (MAC-GREGOR, 2016). The Inter-American Court declared the said decree null and void *ab initio*, reinforcing the Judiciary Branch's duty to ensure the provisions of the ACHR when the Legislative Branch fails to withdraw the transgressing laws (MAC-GREGOR, 2016). Therefore, national judges are competent to exercise conventionality control at the domestic level, taking into account not only the treaty but also the interpretation made of it (MAC-GREGOR, 2016).

Still in the same year, in the Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru, the Inter-American Court once again progressed by determining that Judiciary Branch's organs must carry out *ex officio*, in addition to the constitutionality control, the conventionality control to the extent of their respective competences and by procedural regulations.

In 2008, in the Case of Heliodoro Portugal v. Panama, the Inter-American Court recalls the need to give useful effect to conventionality control, avoiding its repression or annulment by internal norms or practices contrary to the international standard of protection of human rights (BAZÁN, 2017).

In 2010, in the Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, the Inter-American Court registered the possibility of analyzing internal processes, including

decisions of higher courts, in the examination of conventionality control. On that occasion, the Inter-American Court considered that the provisions of the Brazilian amnesty law were incompatible with the ACHR and lacked legal effects.

Indeed, in the Case Gelman v. Uruguay, in 2011, the Inter-American Court expands the operational borders of conventionality control, including any public authority, and not just the Judiciary Branch, in the duty of carrying out the conventionality control (BAZÁN, 2017).

Later, in 2018, in the Case Herzog et al. v. Brazil, the Inter-American Court considered that the Brazilian amnesty law frustrated the investigation and punishment of serious human rights violations and those responsible for it. More specifically, the Inter-American Court pointed out that the Brazilian amnesty law did not produce effects and was not valid at the domestic level, since Brazilian judges were obliged to conventionality control *ex officio* since 1992 (the year in which the ACHR entered into force in Brazil). In the judgment, the Inter-American Court understood that the SFC confirmed the validity of the Brazilian amnesty law disregarding the international obligations assumed by Brazil at the international level.

Moreover, in Case of the Miskito Divers (Lemoth Morris et al.) v. Honduras, Case of Barbosa de Souza et al v. Brazil and Case of Vera Rojas et al. v. Chile, the Inter-American Court firmly maintained the understanding that all authorities of the States Parties must exercise conventionality control *ex officio*.

For all the above reasons, it can be seen that conventionality control has always been performed by the Inter-American Court, even though it did not receive such nomenclature initially, that can be exercised even abstractly and that can affect constitutional norms, that other inter-American treaties can be taken as a parameter in addition to the ACHR, and, finally, that it is an obligation of all authorities of the States Parties.

After addressing the general aspects of conventionality control within the IASPHR, the contours printed by Brazilian authors on the matter will be verified next.

3 CONVENTIONALITY CONTROL IN BRAZIL: THEORETICAL CONTRIBUTIONS

In Brazil, there are also several conceptualizations and classifications of conventionality control. Domestic conventionality control can be defined as the investigation

of compatibility between state law and the International Human Rights Law (IHRL), implying several developments for the state legal order (GUERRA, 2018).

Another concept pointed out for domestic conventionality control is the examination of material vertical comparison between a domestic legal norm and the provisions stamped in international human rights conventions ratified and in force in the country, carried out by the competent national authority in the three branches (MARQUES, 2021).

The assessment of the validity of a rule by constitutionality control was unsatisfactory due to the limitation of the parameter only to constitutional rules, but conventionality control brought a new normative paradigm, improving the Brazilian system because any authority can perform it (MARQUES, 2021).

In this sense, Micheli Piucco and Patrícia Noschang (2019) explain that the exercise of conventionality control by the States makes their domestic rules compatible with human rights conventions, placing the individual at the center of protection of legal systems and being one of the ways of observing the fulfillment of international obligations assumed at the domestic level.

Among the Brazilian foundations for conventionality control are listed article 1, section III, article 4, sections II and IX, and the sole paragraph of article 5, paragraphs 1 and 2, all of the 1998 Brazilian Federal Constitution, which indicates, respectively, the dignity of the human person, the prevalence of human rights, cooperation between peoples for the progress of humanity, integration between peoples of Latin America, the full and immediate effectiveness precepts of fundamental protection and the applicability of international human rights treaties and, further, article 7 of the Temporary Constitutional Provisions Act, which binds Brazil to international human rights courts (LIRA, 2016).

Like the ACHR itself subsidizing the conventionality control, the 1988 Brazilian Federal Constitution also does so by providing it with the foundations of material validity (LIRA, 2016). This is well highlighted by Valerio Mazzuoli, who claims that the 1988 Brazilian Federal Constitution is the reason for applying the international human rights conventions ratified by Brazil and, in the event of a conflict between conventional norms and constitutional norms, applying the *pro persona* principle, according to article 4, section II of the 1988 Brazilian Federal Constitution of 1988 (MAZZUOLI, 2013).

As to the nature of conventionality control, Thiago Oliveira Moreira and Sidney Guerra understand it as an instrument at the service of the protection of internationally

recognized human rights, that is, in other words, as a guarantee (GUERRA; MOREIRA, 2017).

The authors aforementioned warn that conventionality control does not result in the automatic prevalence of an international norm in the concrete case because if the domestic legal order rights are more favorable to the human person, they must prevail (GUERRA; MOREIRA, 2017). Therefore, this guarantee is disconnected from the hierarchy assigned by the State to international norms in the field of human rights.

In this sense, Thiago Oliveira Moreira and Leonardo Martins point out that the State Constitution is no longer the exclusive norm-parameter of control as a new norm-parameter joins it: the international human rights treaties (MARTINS; MOREIRA, 2011).

So conventionality control results in yet another instrument available to citizens for the protection of their rights, since the scope is precisely the maximum protection of human beings, regardless of jurisdiction and norm-parameter, so that international protective standards of human rights are applied parallelly with domestic norms for the protection of the human being filling their gaps (MARTINS; MOREIRA, 2011).

It is important to note that Constitutional Amendment Nº 45 added the third paragraph to article 5 of 1988 Brazilian Federal Constitution, enabling international human rights treaties approved with a qualified quorum to be equated with constitutional amendments (MAZZUOLI, 2011). However, whether the international norm is materially (article 5, third paragraph) or formally constitutional (article 5, second paragraph), it is definitive that the State's normative production is submitted to it (MAZZUOLI, 2011).

The SFC even maintains recognition of the supra-legal status of international human rights conventions and their paralyzing effect on infra-constitutional legislation (MAGALHÃES; MAUÉS, 2017), but as the *pro persona*[112] principle makes the most beneficial norm prevail, whether domestic or international, the discussion on hierarchy it will only be relevant for understanding the procedural mechanisms that will be applied for normative conformation (LIRA, 2016).

Within the scope of conventionality control, it is irrelevant whether international conventions have supra-legal or supra-constitutional status, as the preference is related to material criterion of better human rights protection (CONCI, 2014). Brazil accepted the jurisdiction of the Inter-American Court, whose decisions consider the hierarchy attributed to

[112]Conventionality control is a tool that can make domestic and international norms compatible and the norm or interpretation more favorable to the human being prevail. (DANTAS; MOREIRA, 2023).

international human rights conventions to be irrelevant concerning the binding nature of its precedents for the States Parties (CONCI, 2014).

The controlled normative material composition includes laws, decrees, provisional measures, constitutional norms, judicial decisions and legislative omissions (GUERRA; MOREIRA, 2017). On the other hand, the controlling normative material or domestic conventionality block is made up of international human rights conventions, *jus cogens* norms, international human rights custom and the interpretation of such acts carried out by international human rights courts (MOREIRA, 2017). In this sense, the domestic conventionality block is larger than the inter-American conventionality block because the United Nations System's norms are included (GUERRA; MOREIRA, 2017).

Regarding conventionality control's classifications, Miguel Ângelo Marques (2021) defines a non-jurisdictional preventive conventionality control, exercised by Legislative and Executive Branches through a prior examination of vertical compliance to restrain the entry of unconventional laws or normative acts, and an internal jurisdictional conventionality control, carried out by the Brazilian judicial authorities through the diffuse or concentrated route.

In addition, Sidney Guerra (2018) understands that if on the one hand judges are subject to the rule of domestic law, on the other hand, they are also bound by international human rights conventions ratified by the State and incorporated into the internal legal order. Therefore, the State must guarantee mechanisms at the domestic level to ensure respect for international norms of human rights protection.

Concentrated conventionality control could be defined as the examination of vertical compliance carried out exclusively before the SFC, through control actions filed by the same legitimate entities mentioned in article 103 of the 1988 Brazilian Federal Constitution, with only the international human rights conventions ratified by the procedure provided in the third paragraph of article 5 of the 1988 Brazilian Federal Constitution being a parameter, since they are equivalent to constitutional amendments (MARQUES, 2021)[113]. However, to make this possible, Thiago Oliveira Moreira and Leonardo Martins (2011) highlight the need for *constitutionone ferenda* to some of the provisions of the 1988 Brazilian Federal Constitution.

[113]The treaties ratified by the aforementioned procedure in Brazil are: Convention On The Rights Of Persons With Disabilities and its Optional Protocol (2007), the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013) and the Inter-American Convention Against Racism, Racial Discrimination And Related Forms Of Intolerance (2021).

Diffuse conventionality control, on the other hand, will be performed by any Brazilian judicial authority, with all other human rights conventions not ratified by the special procedure being the parameter, to rule out the application of an unconventional norm in the concrete case (MARQUES, 2021). Any judge or court can declare the unconventionalily of a norm in diffuse control, even if they are incompetent for the constitutionality control since the Inter-American Court determined the obligation of any jurisdictional body to carry out conventionality control *ex officio* (MARTINS; MOREIRA, 2011).

Furthermore, Thiago Oliveira Moreira classifies as implicit conventionality control when judges compare compatibility without directly mentioning the conventionality block or unify conventionality control with constitutionality control and, in the end, declares the unconstitutionality of the norm; and as explicit conventionality control when there is an express search for compatibility between the domestic norm and the domestic conventionality block, with clear mention of the violated international human rights norm (MOREIRA, 2017).

In addition, Luiz Guilherme Arcaro Conci (2014) emphasizes that for a domestic norm to be declared unconventional it must establish less effective protection or a more severe restriction, otherwise, the mere conflict with the international norm does not make it unconventional.

If the domestic normative device in comparison is previous and incompatible with the ratified international human rights norm, it will be revoked by the rule of *lex posterior derogat priori* (MARTINS; MOREIRA, 2011). If a later domestic normative device is incompatible with the international human rights norm, the declaration of its invalidity prevails in Brazilian doctrine (MARTINS; MOREIRA, 2011).

Regarding the moment when conventionality control can be exercised at the domestic level, it is understood that as soon as the procedural *iter* of internationalization of international human rights treaties is fulfilled, the conventionality control can be exercised (CONCI, 2014).

Although the jurisprudence of the SFC requires, in addition to the international phases of signature, ratification and deposit, that the internal phases of promulgation and publication be awaited, this paper defends the immediate applicability of the rights deriving from human rights treaties as of their ratification, according to article 5, first and second paragraphs of the 1988 Brazilian Federal Constitution (CONCI, 2014).

As for the effects of the declaration of unconventionality in Brazil, these depend on which body proclaimed it: they are *erga omnes* and *ex tunc* in constitutional jurisdiction; if

declared by other bodies endowed with jurisdiction, they have *inter partes* effects; and, if exercised by authorities without jurisdiction, they may collate by removing the incompatible interpretation, but not declaring its invalidity (GUERRA; MOREIRA, 2017).

Concerning the conventionality control's limitations in Brazil, Miguel Ângelo Marques (2021) understands that the guarantee does not reach international human rights treaties not ratified by Brazil, extra-conventional sources of international law and ratified but not incorporated treaties (as a result of the decree of promulgation requirement), all due to the absence of a paradigm. Regarding such limitations, the use of the conventionality block notion as controlling material solves the absence of the paradigm pointed out.

Having verified the development of conventionality control by Brazilian authors, the next chapter will move on to comment on the decisions of the SFC and the SCJ on the matter.

4 ANALYSIS OF THE JURISPRUDENCE OF THE BRAZIL SUPREME COURT AND SUPERIOR COURT OF JUSTICE ON CONVENTIONALITY CONTROL

In this chapter, 10 SFC's judgments and 17 SCJ's judgments, found on their respective websites in the jurisprudence search session, using the search term "conventionality control" will be analyzed, dated until May 22, 2023. At the end of the analysis, the results will be classified as (i) due exercise of conventionality control, in line with the *pro persona* principle or with the Inter-American Court's manifestations; (ii) undue exercise of conventionality control, in disagreement with the *pro persona* principle or with the Inter-American Court's manifestations; and, (iii) the exercise of conventionality control was impaired.

Two rulings of SFC were not analyzed in this research because the term "controle de convencionalidade" was found only in the doctrine section that lists the references used by the justices to support their votes or, in other words, there was no merit analysis[114].

On August 20, 2015, SFC appreciated Ação Direta de Incostitucionalidade (ADI) nº 5.240/SP, which questioned Provimento Conjunto nº 03/2015 of São Paulo Court of Justice, a normative act that determined the presence of the person arrested in flagrant offense to attend a custody hearing within twenty-four hours after the arrest.

[114]There was no merit analysis of conventionality control in RE 1.378.054/MG and RE 1.384.414/MG.

Justice Luiz Fux pointed out data on the Brazilian prison population, provisional detainees, open arrest warrants in the National Bank of Arrest Warrants, the Brazilian prison system deficit and the dire situation of Brazilian public security. In addition, he glimpsed the possibility of abstract and concentrated constitutionality control in cases of formally regular exercise of the Province's Justice Courts' power of self-management. Finally, he sustained the supra-legality of article 7, section 5 of ACHR, the intertwining of the custody hearing with *habeas corpus*, the conventional right to a custody hearing, the legality of presenting the person caught in the act to the judicial authority and the lawful regulatory nature of the challenged provision. Thus, it partially heard the action and, in this part, dismissed it, ruling for the adoption of the hearing practice throughout the country. By majority and under the terms of the rapporteur's vote, SFC heard the action in part and, in the known part, dismissed the request, with Justice Marco Aurélio dissenting. Thus, conventionality control was duly exercised under article 7 of ACHR.

On August 24, 2017, SFC appreciated ADI Nº 3.937/SP, filed by the Confederação Nacional dos Trabalhadores na Indústria, questioning Law nº 12.684, of July 26, 2007, of São Paulo which prohibited the use of any type of asbestos or minerals containing asbestos fibers in any type of products and materials.

In his vote, Justice Marco Aurélio pointed out that, when considering the precautionary request, SFC did not endorse the injunction granted to suspend the effectiveness of Law nº 12.684, of July 26, 2007, of São Paulo, beacuse Federal Law nº 9.055/1995 was potentially unconstitutional for violating article 196 of 1988 Brazilian Federal Constitution and due to its dissonance with International Labor Organization (ILO) Convention Nº 162, incorporated by Decree Nº 126, of May 22, 1991.

Moreover, Justice Marco Aurélio understood that ILO Convention Nº162 aims to protect workers subject to asbestos inhalation in the work environment with rules for replacing the product and some requirements, without requiring the banning of the chemical product; that the worker's health in contact with asbestos would be protected with limits to their exposure by Public Power' inspections and with compensation for possible health damages; the lack of sufficient data on the impact of asbestos on the environment; and that a ban of asbestos would imply the admission of other equally dangerous substances that could also be banned.

The SFC dismissed the ADI, with the incidental declaration of unconstitutionality of article 2 of Law nº 9.055/1995, with the dissonance of Justices Marco Aurélio and Luiz Fux and partial dissonance Justice Alexandre de Moraes[115].

On May 5, 2017, SFC recognized the general repercussions in Recurso Extraordinário (RE) com Agravo Nº 1.054.940/RJ, concerning the admissibility or not of avulsed candidacies in majority elections by the unequivocal political relevance and the plausible invocation of the ACHR.

The appellants Rodrigo Sobrosa Mezzomo and Rodrigo Rocha Barbosa claimed, in summary, that the 1988 Brazilian Federal Constitution did not explicitly prohibit unattached candidacies; that the ACHR rejects eligibility conditions not based on age, nationality, residence, language, education, civil or mental capacity, or conviction, by a competent judge in criminal proceedings; that the judgment under appeal violated the SFC' jurisprudence SFC, which attributes supra-legal status to the ACHR, by requiring political party affiliation as a condition for registering any candidacy; and that article 14, paragraph 3, of the 1988 Brazilian Federal Constitution must be interpreted restrictively.

Currently, the judgment of merit is pending. It should be noted that it has been replaced for trial as a matter of general repercussion by RE Nº 1.238.853/RJ. Even though the trial on the merits has not been held, the case is of utmost importance for taking the ACHR as a parameter for analyzing the possibility of separate candidacies.

On March 13, 2018, the Second Panel of SFC appreciated *Habeas Corpus* (HC) Nº 141.949/DF, which discussed the constitutionality and unconventionality of the crime of contempt within the scope of Justiça Militar da União.

In his vote, Justice Gilmar Mendes stated that in Brazil, in addition to constitutionality control, there is also a conventionality control of domestic norms and, by taking the ACHR as a parameter for the conventionality control, he understood that there was no affront in the typification of the crime of contempt since the supra-legal norm received the criminal norm.

By majority, the Second Panel denied the order under the terms of the vote of Justice Gilmar Mendes, with the dissonance of Justice Edson Fachin. Here, the undue exercise of conventionality control by SFC is verified, because the crime of contempt is incompatible with the right to Freedom of Thought and Expression and manifestly unconventional to the ACHR (RIBEIRO; ROQUE, 2020). The Brazilian criminal type of contempt does not clearly

[115]In the same sense, ADI Nº 4.066/DF and ADI Nº 3.470/RJ.

delineate the scope of the criminal conduct, which can lead to broad and biased interpretations (RIBEIRO; ROQUE, 2020)[116].

On January 12, 2019, the Second Panel of the SFC judged HC Nº 171.118/SP, regarding the possibility of applying the right not to be prosecuted twice for facts already tried in the international sphere, given the factual identity between an ongoing process in Brazil and another trial already occurred in Switzerland.

Taking advantage of the opportunity to interpret the Brazilian Penal Code under the rights guaranteed by the 1988 Brazilian Federal Constitution, by the ACHR and by the International Covenant on Civil and Political Rights, Justice Gilmar Mendes performed a conventionality control also using the jurisprudence of the Inter-American Court, citing the Case of Loayza-Tamayo v. Peru, the Case of Mohamed v. Argentina and the Case of J. v. Peru, concluding that double prosecution is prohibited, even in different countries jurisdictions.

By unanimous vote, the Second Panel of the SFC granted the order of *habeas corpus* to lock the case nº 0003112-82.2013.403.6181 concerning the patient, because the occurrence of double criminal prosecution was recognized based on conventionality control.

On June 22, 2020, the Plenary of SFC appreciated ADPF Nº 496/DF filed by Conselho Federal da Ordem dos Advogados do Brazil, questioning the compatibility of the crime of contempt with the ACHR and the 1988 Brazilian Federal Constitution.

In his vote, Justice Luís Roberto Barroso argued that the trial required a conventionality control, considering the ACHR (supra-legal status), and a constitutionality control, according to the 1988 Brazilian Federal Constitution.

Initially, Justice Luís Roberto Barroso pointed out the inexistence of a decision by the Inter-American Court regarding article 331 of the Brazilian Penal Code and the inapplicability of its precedents to Brazil, because no violation of the ACHR in the matter resulted from the mere abstract typification of crimes against honor or contempt, but from the use of criminal law as an instrument of persecution and suppression of freedom of expression; the compatibility of the crime of contempt with the ACHR; the inexistence of a prohibition, by the ACHR and by the Inter-American Court's jurisprudence, of the use of criminal norms by the States Parties for the protection of honor and the adequate functioning of the Public Administration, in a proportional and justified manner; and, finally, the constitutionality of the

[116]In the same sense: *Habeas Corpus* nº 143.968 AgR/RJ and Agravo em Recurso Extraordinário Nº 1.225.968/SP.

criminal type of contempt, emphasizing that its interpretation must be done restrictively to avoid excesses. Thus, Justice Luís Roberto Barroso voted for the dismissal of the request and the establishment of a thesis affirming the reception of the crime of contempt by the 1988 Brazilian Federal Constitution.

By majority, the SFC dismissed ADPF Nº 496 and established the thesis "the rule of article 331 of the Brazilian Penal Code, which typifies the crime of contempt, was received by the 1988 Brazilian Federal Constitution", according to the vote of Justice Luís Roberto Barroso, with the dissonance of Justice Edson Fachin and Justice Rosa Weber.

However, the established thesis is unconventional and the conventionality control was unduly exercised over the Brazilian penal norm because even if it had been received by the 1988 Brazilian Federal Constitution, this does not guarantee its conventionality (MAZZUOLI, 2021). The absence of adequate conventionality control of the crime of contempt may even result in Brazil being held internationally responsible for violating the ACHR and the Inter-American Court's jurisprudence (MAZZUOLI, 2021).

Examining the 10 judgments of SFC, in 5 the result was the due exercise of conventionality control because they were coherent to article 7 of the ACHR on the custody hearing, for considering the *pro persona* principle regarding *bis in idem* in the international sphere and the use of asbestos; in 4 the result was the undue exercise of conventionality control, as they considered the criminal type of the crime of contempt as conventional, disrespecting Inter-American Court's jurisprudence on the matter; and, finally, in 1 the result was that conventionality control exercise was impaired because no judgment of merit had yet been rendered regarding the separate candidacies[117].

The above shows the inadequacy of the conventionality control exercised by the SFC, which can lead to the international accountability of Brazil in the Inter-American Court for disrespecting the conventionality block. In the next paragraphs, the judgments rendered by the SCJ will be analyzed.

On December 15, 2016, the Fifth Panel of the SCJ appreciated Recurso Especial (REsp) Nº 1.640.084/SP, regarding a conventionality analysis of the crime of contempt. In his vote, Justice Ribeiro Dantas pointed out that the appellant rebelled against the judgment of the São Paulo Court of Justice that condemned him, among others, for the crime of contempt,

[117]It is important to remember that two decisions of SFC were not analyzed in this paper because there was no merit analysis of conventionality control (RE 1.378.054/MG and RE 1.384.414/MG).

based on article 331 of the Brazilian Penal Code, violating article 13 of the ACHR[118]. Furthermore, the appellant pointed out that the IACHR's Special Rapporteur for Freedom of Expression stated that domestic norms that typify the crime of contempt are incompatible with article 13 of the ACHR.

In his vote, Justice Ribeiro Dantas stated that articles 2 and 29 of the ACHR provide the adoption by the State of "legislative or other measures" to resolve normative antinomies that frustrate or limit the effective exercise of fundamental rights and freedoms, emphasizing that the international human rights treaties ratified by Brazil have supra-legal status. Thus, Justice Ribeiro Dantas attested the incompatibility of the crime of contempt of article 331 of the Brazilian Penal Code with article 13 of the ACHR, accepted the appeal and, in that part, partially granted it to this extent to rule out the conviction for the crime of contempt. Unanimously, the Fifth Panel of the SCJ partially accepted the appeal and, in that part, partially granted it, following the vote of Justice Ribeiro Dantas.

However, on May 24, 2017, the Third Session of SCJ appreciated *Habeas Corpus* (HC) Nº 379.269/MS, also related to the conventionality of the crime of contempt.

In his vote, Justice Reynaldo Soares da Fonseca pointed out the unfeasibility of the conviction for contempt based on a domestic rule incompatible with the International Treaty on Human Rights ratified by Brazil, citing the decision of the judgment of REsp Nº 1.640.084/SP. In the end, Justice Reynaldo Soares da Fonseca granted *ex officio* the order to exclude the crime of contempt from the criminal action.

However, the Third Session of the SCJ, by a majority, dissented from Justice Reynaldo Soares da Fonseca and Justice Ribeiro Dantas, not granting the *ex officio* order to exclude the crime of contempt from the criminal action.

Thus, the Third Section of the SCJ, responsible for pacifying the jurisprudence on the matter, overruled the thesis of the Fifth Panel of SCJ, without adequately exercising control of conventionality by manifesting ignorance about the effects of *res interpretata* from the

[118]For further studies on the subject, it is recommended: MOREIRA, Thiago Oliveira. O Exercício do Controle de Convencionalidade pelo Superior Tribunal de Justiça: uma breve análise do voto do Min. Ribeiro Dantas. *In.*: **Revista FIDES**, 15 ed., v. 8, n. 1. Natal: 2017, p. 99-103. Available at: <https://www.academia.edu/33098870/MOREIRA_Thiago_Oliveira_O_Exerc%C3%ADcio_do_Controle_de_Convencionalidade_pelo_Superior_Tribunal_de_Justi%C3%A7a_uma_breve_an%C3%A1lise_do_voto_do_Min_Ribeiro_D antas_In_Revista_FIDES_15_ed_v_8_n_1_Christmas_2017_pg_99_103>. Acessed in May 24, 2023.

Inter-American Court's decisions and defending a quite outdated model of state sovereignty (MAZZUOLI, 2021)[119].

On February 27, 2018, the Fifth Panel of SCJ, unanimously, dismissed the Agravo Regimenttal no Recurso Especial Nº 1.577.745/MG, asserting, however, the possibility of conventionality control through Recurso Especial.

On September 25, 2019, the Third Section of SCJ appreciated REsp Nº 1.798.903/RJ, related to the episode of Bomba no Riocentro, which occurred on April 30, 1981, and its possible configuration as a crime against humanity and, as a result, its imprescriptibility.

In the report, Justice Rogerio Schietti pointed out that the investigated officers worked at the DOI (Destacamento de Operações de Informações) and at the SNI (Serviço Nacional de Informações), and in the early 1980s, they joined forces permanently to commit crimes in "the context of a systematic and generalized attack by State agents against the Brazilian population". The purpose of those investigated would be to forge a terrorist act, attributing it to an organization of militants against the regime of exception to justify a new hardening of the military dictatorship on the "communist threat".

Justice Rogerio Schietti understood that the facts related to Bomba no Riocentro fit the definition of crimes against humanity because they occurred in a scenario of systemic attacks to which the internal rules of extinction of punishment do not apply, following the decisions of the Inter-American Court of Human Rights (XAVIER; SOUZA, 2021).

Justice Reynaldo Soares da Fonseca dissented, arguing that it was impossible for the facts to fit into the Rome Statute of the International Criminal Court (Rome Statute) due to the absence of a formal Brazilian law typifying them; the Non-retroactivity of criminal law, highlighting that Brazil ratified the Rome Statute in 2002; the non-ratification by Brazil of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and also, that if the *jus cogens* thesis was admitted, it would be necessary to make international human rights conventions compatible with the constitutional principles of legality and retroactivity (XAVIER; SOUZA, 2021).

By majority, the Third Section of SCJ heard part of the appeal to dismiss it to the known extent, under the vote of Justice Reynaldo Soares da Fonseca[120]. The undue exercise of

[119]In the same sense: *Habeas Corpus* Nº 402.866/SC, *Habeas Corpus* Nº 395.364/SP, REsp Nº 1.071.275/SC, *Habeas Corpus* nº 399.666/SC, *Habeas Corpus* nº 462.482/SC and Embargos de Declaração no REsp 1.640.084/SP.
[120]In the same sense: Agravo Regimento in AREsp 1.648.236/SP .

conventionality control remains configured, mainly by invoking domestic law provisions to excuse ratified international obligations.

On March 10, 2020, the Second Panel of the SCJ judged the Agravo Interno em Recurso Especial Nº 1.704.452/SC, regarding the violation of ILO Convention Nº 169, among other arguments.

In his vote, Justice Og Fernandes understood that the SCJ could not analyze an affront to the conventional norm relating to human rights, due to its superior nature to ordinary law. Therefore, he understood that the supra-legal convention, ontologically, was closer to a constitutional provision than to federal law, so the conventionality control was closer to the techniques of constitutional hermeneutics than to those of solution of infra-constitutional conflicts. As a result, it would not be appropriate to file Recurso Especial based on a direct offense against a supra-legal treaty, as it is SFC's competence, for which reason Justice Og Fernandes partially recognized the Agravo Interno em REsp and dismissed it in this extension.

Unanimously, the Second Panel of SCJ heard the Agravo Interno em REsp in part and, to the known extent, dismissed it in the terms of the vote of Justice Og Fernandes[121].

On June 15, 2021, unanimously, the Fifth Panel of SCJ denied the Agravo Regimental no Recurso Ordinário em *Habeas Corpus* Nº 136.961/RJ, regarding the double counting of the period served in the Instituto Penal Plácido de Sá Carvalho by the convict.

In the Agravo Regimental, the Prosecutor defended that the Inter-American Court's determination through a resolution would have the nature of a provisional precautionary measure, under the terms of art. 63 of the ACHR. Therefore, such resolution would not produce retroactive effects, but only *ex nunc* effects as of the notification of the obligated party.

In his vote, Justice Reynaldo Soares da Fonseca understood that the urgency of the provisional measure does not bind the effects of the obligation arising from the November 22, 2018 Resolution of the Inter-American Court for the future, but demonstrates the need for celerity in the adoption of the means of its compliance, emphasizing the application of the *pro personae* principle. Thus, he dismissed the Agravo Regimental and upheld the decision that provided the Recurso Ordinário em *Habeas Corpus*, determining the double calculation of the entire period completed by the patient at the Instituto Penal Plácido de Sá Carvalho.

[121]In the same sense: REsp 1.641.107/PA.

On August 25, 2021, the Third Section of SCJ, unanimously, dismissed the Incidente de Deslocamento de Competência Nº 21/RJ, concerning the shifting of jurisdiction to the Federal Justice to conduct police inquiries, criminal investigative procedures and any criminal actions already filed to prosecute and punish police authorities allegedly responsible for the deaths of 26 residents of "Favela Nova Brasília" community in police operations that took place on October 18, 1994, and May 8, 1995, as well as to investigate the sexual violence suffered by 3 women, two of them aged 15 and 16 at the time.

In his vote, Justice Reynaldo Soares da Fonseca pointed out that he did not see the presence of the third requirement related to the Incidente de Deslocamento de Competência, that is, the evidence that the organs of the state system were not capable of continuing to perform the function of investigation, processing and judgment of the case. In addition, he highlighted the prescription under the terms established by the Third Section in REsp Nº 1.798.903/RJ, for which, in the end, he dismissed the request.

Thus, the Third Section of the SCJ, dismissed the Incidente de Descolamento de Competência, under the terms of the vote of Justice Reynaldo Soares da Fonseca.

On September 21, 2021, the Sixth Panel of the SCJ, unanimously, dismissed the Agravo Regimental no Recurso em *Habeas Corpus* Nº 147.174/RJ, related to the violation of the guarantees of the ACHR due to reasoning of decision. On the merits, Justice Olindo Menezes highlighted that the decision that kept the convict in the Federal Penitentiary System had robust and current foundations, including the dangerousness of the agent, considered crime boss of the largest criminal faction in Rio de Janeiro, not configuring illegal constraint on justify the intended concession.

In addition, Justice Olindo Menezes emphasized the supra-legal status of the ACHR and mentioned the precedent of the ruling of REsp Nº 1.798.903/RJ, arguing that the "due harmonization" of the Inter-American Court's decisions with the domestic order would not characterize resistance in the complying with the aforementioned decisions and with the exercise of conventionality control.

Finally, on April 18, 2023, the Sixth Panel of SCJ appreciated the Recurso Ordinário em Mandado de Segurança Nº 70411/RJ. The appellants challenged the decision of Rio de Janeiro Court of Justice, which denied access to the procedures already completed in the police investigation of the death of the victim's relatives.

In his vote, Justice Rogerio Schietti considered the jurisprudence of the Inter-American Court, mainly in the Case of Gomes Lund et al. v. Brazil and Case of Cosme Genoveva et al. v. Brazil, regarding the possibility of victims of human rights violations or their relatives have ample opportunity to be heard and to act in the respective proceedings, also citing other Inter-American Court's precedents on the matter. In the end, Justice Rogerio Schietti granted Recurso Ordinário to guarantee the petitioners' access to the evidence already documented.

The Sixth Panel of the SCJ unanimously granted the Recurso Ordinário, under the terms of Justice Rogerio Schietti's vote.

Of the 17 judgments analyzed, it was found that in only 3 the result was the due conventionality control exercise because initially the contempt was considered unconventional, because the sentence served at the Instituto Penal Plácido de Sá Carvalho was double computed according to November 22, 2018, Resolution issued by the Inter-American Court and because the access of the victim's relatives to the diligences already completed in the police investigation was guaranteed; in 11 the result was the undue conventionality control exercise by invoking provisions of domestic law to evade international obligations and by the understanding later firmed about the conventionality of the crime of contempt; and, finally, in 3, the exercise of conventionality control was impaired due to the competence being imputed to the SFC or due to the deficiency of the appeal.

Given the above, the SCJ also does not take a vanguard position in the implementation of Brazilian conventionality control and, despite the mentions or the recognition of the necessary conventionality control in the judgments, its application was quite precarious.

5 CONCLUSION

After the judgment in the Case of Almonacid Arellano et al v. Chile, in 2006, the Inter-American Court established the obligation of all States Parties to the ACHR to exercise conventionality control, that is, to bring their domestic norms into conformity with ratified international norms.

Since the Inter-American Court did not create any model or procedure for this, this paper sought to answer whether the conventionality control was exercised in Brazil by the

SFC and the SCJ, which are not specialized higher courts, following the manifestations of the Inter-American Court on the matter.

After an analysis of the general aspects of conventionality control within the IASPHR, the foundations, classifications, and effects pointed out by Latin-American authors were verified, and finally, albeit briefly, it was showed how conventionality control was developed over time through the main manifestations of the Inter-American Court.

As for the application of conventionality control in Brazil, considerable development of this guarantee was verified by Brazilian doctrine, which focused on its concepts, foundations, nature, classifications, application mechanisms, the composition of controlling and controlled material and, finally, on possible limitations, all in function of the Brazilian reality.

Regarding the analysis of the jurisprudence of the SFC and the SCJ, 10 and 17 judgments were analyzed, respectively, collected on the courts' websites in the jurisprudence search session, using the term "controle de convencionalidade" published until May 22, 2023. According to the previously established criteria, it was found that the SFC duly exercised the conventionality control in 5 judgments, unduly exercised it in 4 judgments, and the result of conventionality control was impaired in 1 judgment. In turn, the SCJ duly exercised the conventionality control in 3 judgments, unduly exercised it in 11 judgments and the result of conventionality control was impaired in 3 judgments.

The hypothesis that Brazil is not unaware of the requirement of conventionality control was accurate to the extent that the courts themselves recognize the need for it, but its undue exercise was also proven by the unconventional postures of both courts.

It is possible to note that conventionality control was carried out by these Brazilian courts, as the comparison between the norms was made, but it is necessary to take a step forward in the sense of tuning domestic jurisprudence with the international jurisprudence, since its result is still undue, insufficient and inappropriate for the norms of International Human Rights Law.

Therefore, the result of this paper is that the SFC and SCJ performed the conventionality control in a very precarious way and contrary to the provisions of the Inter-American Court on the subject until May 22, 2023. Therefore, the Brazilian superior courts must review their positions, under penalty of international accountability of Brazil for the violation of human rights in its territory.

REFERENCES

BAZÁN, Víctor. **Control de las Omisiones Inconstitucionales e Inconvencionales**: Recorrido por el derecho y la jurisprudencia americanos y europeos. México: Fundación Konrad Adenauer Stiftung, 2017. 1 ed.

CASTILLA JUÁREZ, Karlos A. Control de Convencionalidad Interamericano: una propuesta de orden ante diez años de incertidumbre. **IIDH Magazine**, v. 32, no. 64, p. 87-125, Jul./Dec. 2016.

CONCI, Luiz Guilherme Arcaro. O controle de convencionalidade como parte de um constitucionalismo transnacional fundado na pessoa humana. In: **Revista de Processo**. 2014. p. 363-382.

CONTRERAS, Pablo. Control de convencionalidad, deferencia internacional y discreción nacional en la jurisprudencia de la Corte Interamericana de Derechos Humanos. **Ius et Praxis**, v. 20, n. 2, p. 235-274, 2014.

AUTOR; AUTOR. 2022.

GUERRA, Sidney. Avanços e Retrocessos sobre o controle de convencionalidade na ordem jurídica brasileira: uma análise do posicionamento do Superior Tribunal de Justiça. **Revista de Direito Constitucional Internacional e Comparado**, v. 2, n. 2, p. 72-92, 2018.

GUERRA, Sidney; AUTOR. 2017

HITTERS, Juan Carlos. Control de convencionalidad (adelantos y retrocesos). **Estudios constitucionales**, v. 13, n. 1, p. 123-162, 2015.

HITTERS, Juan Carlos. Un avance en el Control de Convencionalidad (El Efecto "Erga Omnes" de las sentencias de la Corte Interamericana). **Estudios constitucionales**, v. 11, n. 2, p. 695-712, 2013.

LIRA, Yulgan Tenno de Farias. **Controle de Convencionalidade**: a tutela coletiva dos tratados internacionais de direitos humanos. João Pessoa: Ideia, 2016.

MAC-GREGOR, Eduardo Ferrer. El Control de Convencionalidad em la Jurisprudencia de la Corte Interamericana de Derechos Humanos. **Controle de Convencionalidade**. Brasília: Conselho Nacional de Justiça, 2016.

MAC-GREGOR, Eduardo Ferrer. El controle difuso de convencionalidad en el Estado Constitucional. **Urbe et ius: Revista de Opinión Jurídica**. n. 11, 2013. ISSN 1668-4001.

MAGALHÃES, Breno Baía; MAUÉS, Antonio AUTOR. A recepção dos Tratados de Direitos Humanos pelos Tribunais nacionais: sentenças paradigmáticas de Colômbia, Argentina e Brasil. *In*.: LIMA, Martonio Mont'Alverne Barreto; LOPES, Ana Maria D'Ávila (Orgs.). **A internalização de tratados internacionais de direitos humanos na América do Sul**. Porto Alegre: Livraria do Advogado, 2017.

MARQUES, Miguel Ângelo. Controle interno de convencionalidade: uma análise crítica sobre os avanços, limites e desafios à aplicação do instituto no Brasil. **Revista Direito, Estado e Sociedade**, 2021.

MARTINS, Leonardo; AUTOR. 2011.

MAZUOLLI, Valério de Oliveira; FARIA, Marcelle Rodrigues da Costa; OLIVEIRA, Kledson Dionysio de. **Controle de convencionalidade pelo Ministério Público**. Rio de Janeiro: Forense, 2021.

MAZZUOLI, Valerio de Oliveira. **O controle jurisdicional da convencionalidade das leis**. 2. ed. rev., atual. e ampl. São Paulo: Editora Revista dos Tribunais, 2011.

MAZZUOLI, Valério de Oliveira. O controle jurisdicional da convencionalidade das leis: o novo modelo de controle da produção normativa doméstica sob a ótica do "diálogo das fontes". **Argumenta Journal Law**, v. 15, n. 15, p. 77-114, 2011.

MAZZUOLI, Valerio Oliveira. Teoria geral do controle de convencionalidade no direito brasileiro. *In*: MARINONI, Luiz Guilherme; MAZZUOLI, Valerio de Oliveira; PIZZOLO, Calogero. **Controle de convencionalidade: um panorama latino-americano:** Brasil, Argentina, Chile, México, Peru, Uruguai. Gazeta Jurídica, 2013.

AUTOR. 2017.

NOSCHANG, Patricia Grazziotin; PIUCCO, Micheli. O Estado Constitucional cooperativo de Peter Häberle e a teoria do controle de convencionalidade das leis como um modelo de efetivação do direito internacional cooperativo e comum. **Revista Jurídica Cesumar-Mestrado**, v. 19, n. 2, p. 359-375, 2019.

RIBEIRO, Daniela Menengoti; ROQUE, Gabriel Antonio. A efetividade do direito à liberdade de expressão pelo controle de convencionalidade: a (des) criminalização do desacato no brasil e os impactos no direito da personalidade. **Revista de Direito Brasileira**, v. 25, n. 10, p. 221-249, 2020.

SAGÜÉS, Néstor Pedro. Obligaciones internacionales y control de convencionalidad. **Estudios constitucionales**, v. 8, n. 1, p. 117-136, 2010.

XAVIER, Fernando César Costa; DE SOUZA, Líbia Renata Oliveira. A (in) aplicabilidade das normas do Estatuto de Roma no Brasil: uma revisão acerca dos precedentes dos tribunais superiores. **Revista de Direito**, v. 13, n. 03, p. 01-21, 2021.

O EXERCÍCIO DO CONTROLE DE CONVENCIONALIDADE PELOS TRIBUNAIS SUPERIORES BRASILEIROS NÃO ESPECIALIZADOS

RESUMO

O controle de Convencionalidade é uma exigência da Corte Interamericana de Direitos Humanos (Corte IDH) para os Estados Partes da Convenção Americana Sobre Direitos Humanos (CADH). Quanto ao Brasil, indaga-se: o Supremo Tribunal Federal (STF) e o Superior Tribunal de Justiça (STJ) estão em harmonia com a Corte IDH na matéria? Pretende-se verificar como o STF e o STJ exercitam o controle de convencionalidade. O resultado foi obtido a partir do emprego de análises qualitativas e quantitativas, mediante critérios previamente estabelecidos, sobre os acórdãos do STF e do STJ encontrados nos sites dos respectivos tribunais. Espera-se contribuir com o desenvolvimento da matéria no direito brasileiro.

Palavras-chave: Controle de convencionalidade. Corte Interamericana de Direitos Humanos. Responsabilidade Internacional do Estado.