IV

Anuário Brasileiro de Direito Internacional

VOLUME 1

Brazilian Yearbook of International Law

Annuaire Brésilien de Droit International

CEDIN
CENTRO DE DIREITO INTERNACIONAL

2009

ISSN 19809484

Centro de Direito Internacional - CEDIN

Submissão de artigos para publicação | Articles submissions
Admite-se permuta | Exchanges are accepted
Data limite para entrega dos artigos | Deadline: 04/2010
E-mail | luciana@cedin.com.br / info@cedin.com.br

PROJETO GRÁFICO E EDITORAÇÃO
Alexander Oliveira
Rosana Martins da Costa Diniz

APOIO
Fundação Alexandre de Gusmão - FUNAG (www.funag.gov.br)
Fundação Konrad Adenauer - FKA (www.adenauer.com.br)
Ramo brasileiro da *International Law Association* - ILA (www.ilabrasil.org.br)

Ficha Catalográfica elaborada pela Biblioteca da Pontifícia Universidade Católica de Minas Gerais

A636 Anuário Brasileiro de Direito Internacional = Brazilian Yearbook of International Law = Annuaire Brésilien de Droit International / Coordenador: Leonardo Nemer Caldeira Brant - v.1, n.1, 2006 - Belo Horizonte: CEDIN, 2006

Semestral
1. Direito Internacional. I. Centro de Direito Internacional II. Brant, Leonardo Nemer Caldeira. III. Título: Brazilian Yearbook of International Law. IV. Título: Annuaire Brésilien de Droit International.

CDU: 341.

Treaty Enforcement by Brazilian Courts: Reconciling Ambivalences and Myths?

CLAUDIA LIMA MARQUES[1]
LUCAS LIXINSKI[2]

Resumo

É comum a afirmativa de que o Direito Internacional não conta com papel importante no âmbito interno do Brasil, apesar de ter o país ratificado as mais importantes convenções das Nações Unidas, incluindo aquelas pertinentes ao Direito do Meio Ambiente, Direitos Humanos e Economia. Este artigo demonstra que o Direito Internacional tem uma função mais preponderante do que se alega. Para tal, analisa-se primeiramente a incorporação de tratados na ordem jurídica brasileira, sob uma perspectiva horizontal da separação dos poderes, bem como é analisada a questão a partir de uma perspectiva constitucional; sendo, posteriormente, perquirida a aplicação de provisões de tratados em cortes internas. Chega-se à conclusão de que a aplicação de tratados internacionais em cortes internas é relativamente recente, devido ao processo de democratização do País que há pouco se estabeleceu, e também à persistente concepção conservadora de soberania que ainda predomina nas mentes dos juízes brasileiros. Uma possível solução para fomentar a aplicação de instrumentos internacionais no âmbito interno seria a elevação das normas dos Tratados de Direitos Humanos a um patamar supra-legal, colocando a proteção dos Direito Humanos no centro do ordenamento jurídico.

Abstract

During contemporary conflicts, civilians have been frequently focused within the hostilities, and war prisoners are commonly kept mistreated. These are not rare practices and the International Criminal Court for ex-Yugoslavia and Rwanda (ICTY and ICTR) have provided a detailed jurisprudence on the criminal nature of such activities since their establishment. Both Courts judicial decisions tend to converge, and are enriched by Special Court for Sierra Leona (SCSL) judgments. This article analyses the distinct manners in which civilians and war prisoners were

1 Chair of Private International Law, Federal University of Rio Grande do Sul, Brazil; S.J.D., Heidelberg University, Germany; LL.M., Tübingen University, Germany; LL.B. Federal University of Rio Grande do Sul, Brazi

2 Ph.D. Candidate, European University Institute, Italy; LL.M., Central European University, Hungary; LL.B. Federal University of Rio Grande do Sul, Brazil. We are highly indebted to Fabio Morosini for leading the efforts of the researchers and alumni from the research group CNPq Mercosur and Consumer Law in collecting the relevant case law. These researchers, to whom we are also indebted, are: Ana Blanco de Britto Velho, Ana Gerdau de Borja, Andressa Michel, Carolina Moreira, Carolina Paranhos Coelho, Christian Augusto Slomp de Oliveira Perrone, Daniel Caye, Daniel Vieira, Denise Dias de Castro Bins, Diego Fraga Lerner, Ernesto Nunes, Felipe Rocha dos Santos, Fernanda Scaletscky, Fernando Concílio, Fernando Lusa Bordin, Filipe Scherer Oliveira, Ioulia Dolganova, Iris Russowsky, Joana Zanon, João Francisco Guarisse, Laura Delaloye, Luana Iserhard, Luciana Goulart Quinto, Luis Gustavo Meira Moser, Maitê Schmitz, Maria Luiza Jobim, Marilia Zanchet, Martha Giugno Termignoni, Rafael Pellegrini Ribeiro, Raquel Thais Hunsche, and Tâmara Joana Biolo Soares. All errors remain the authors'.

mistreated and identifies the means by which these violence perpetrators must be individually taken as responsible in the light of International Criminal Law. Specifically, it proposes a legal and factual discussion on the violence suffered by civilians and detainees – deportation, forced dislocation, torture and rape – as well on the civilians situation during a combat – trench diggers, human shields and children acting as soldiers.

Introduction

Some myths are difficult to fight against. It is common to assume that Brazil does not ratify many international treaties, and if it does, that they are only "law on the books", not "law in action", a sort of "symbolic law"[3] with little or no enforceability. Also one of the general assumptions amongst Brazilian litigation lawyers is that international law as a rule does not affect their practice.[4] In other words, there is a feeling abroad that Brazil is not a friendly country for international law and a feeling in Brazil that international law is of no great importance for national litigation.[3]

The fact is that Brazil since 1992 has ratified 25 OAS Conventions[4] (including 15 Inter-American Conventions on Private International Law),[5] the 27 Conventions of MERCOSUR[6] (the "Southern Common Market-MERCOSUR",[7] an imperfect Customs Union between Argentina, Brazil, Uruguay and Paraguay, and in the near future Venezuela, with associates, like Chile and Bolivia),[8] 58 Treaties in Environmental Law[9] and all important recent UN Conventions, especially in human rights[10] and in economic areas.[11]

3 For critics to this ' symbolic use' of the law in Latin America, see Marcelo Neves, La force symbolique des droits de l' homme, 599 DROIT ET SOCIETÉ 58 (2004).

4 See JOSÉ CARLOS DE MAGALHÃES, O SUPREMO TRIBUNAL FEDERAL E O DIREITO INTERNACIONAL – UMA ANÁLISE CRÍTICA 13 (Livraria do Advogado Publishing, 2000).

3 On the Brazilian position regarding the non-ratification of the 1964 Hague Convention and the 1980 United Nations' Vienna Convention on International Sales of Goods, see Monica Egbrari Goular, *A Convenção de Viena e os Incoterms*, 856 Revista dos Tribunais, 67, 70 (2007). Favoring the ratification of these instruments, see Eduardo Grebler, *Convenção das Nações Unidas sobre Contratos de Compra e Venda Internacional de Mercadorias*, 88 Revista de Direito Mercantil, Industrial, Econômico e Financeiro 45 (1992) and more recently, Eduardo Grebler, A *Convenção das Nações Unidas sobre Contratos de Compra e Venda Internacional de Mercadorias e o Comércio Internacional Brtasileiro,* BRAZILIAN YEARBOOK OF INTERNATIONAL LAW, 94 (vol. 1, III, 2008) .

4 *See* Convenções e Protocolos da OEA, *available at* www.mre.gov.br (last accessed December 2, 2008). About the Conventions in civil procedure and cooperation, see Claudia Lima Marques, *Procédure civile internationale et Mercosur : pour un dialogue des règles universelles et régionales*, 8 Revue du Droit Uniforme/Uniform Law Review – UNIDROIT, «Harmonisation Mondiale du Droit Privé et Integration économique régionale» 465 (2003).

5 *See* Integração Jurídica Interamericana – As Convenções Interamericanas de Direito Internacional Privado (CIDIPs) e o Direito Brasileiro 12 (Paulo Borba Casella and Nadia de Araujo eds.) (1998).

6 *See* Ministério da Justiça – Cooperação internacional – Mercosul, *available at* www.mj.gov.br (last accessed December 2, 2008).

7 *See Treaty of Asunción* and Thomas A. O'Keefe, *Latin American Trade Agreements* A5-1 to A5-15, 30 I.L.M. 1041-1063 (1991).

8 In 2006 Bolivia and Chile became associated MERCOSUR Members. On the Complementary Free Trade Agreements ("*Acuerdos de Complementación Económica*") between MERCOSUR and Chile and MERCOSUR and Bolivia, *see* Maria Blanca Noodt Taquela. El Arbitrage en Argentina: Corte de Arbitrage Internacional para el Mercosur 17 (2000). And Maria da Conceição Ramos Rocha. Mercosul 63 (1999). In 2006 a Treaty with Venezuela was signed to full Membership ("*Acta de Adhésion*", 4 July 2006), but not yet ratified by all the Members. *See* Adriana Dreyzin de Klor, *Quo Vadis Mercosur?*, 7/8 DeCITA, 588 (2007).

9 *See* glossary containing 3,000 terms, retrieved from the 58 international agreements signed and promulgated by Brazil in the area of environmental law, Maria da Graça Krieger et al. (with Claudia Lima Marques), Multilingual Glossary of International Environmental Law – Terminology of the Treaties xxxi (Forense, 2004).

10 On Brazil and human rights conventions, *see* Flávia Piovesan, Direitos Humanos e o Direito Constitucional Internacional 272 (2007) .

11 On Brazil and the new conventions for the facilitation of international trade, *see* Claudia Lima Marques, *Some recent developments in Private International Law in Brazil*, 4 Japanese Yearbook of Private International Law 19 (2002). On Brazil and the Hague Conference, *see*

This also contrasts sharply with the fact that Brazil has a marked and almost constant presence in international courts.[12] Is the assertion that international law is not relevant in Brazilian domestic legal practice true, though? This chapter attempts to answer to this question, so as to try to reconcile this ambivalence between what apparently is the Brazilian domestic practice with respect to treaties, and Brazil's rather prominent position in international judicial activity.

Our basic contention is that international law plays a much larger role in Brazilian judicial activity (and consequently legal practice) than it is often assumed.[13] In order to support these claims, it is necessary first to analyze the mechanism for treaty incorporation in Brazilian law, both from the perspective of the horizontal separation of powers, that is, the legislative and executive power's perspective (treaty-making power, ratification and internalization of treaties), as well as from the constitutional perspective (hierarchy of incorporated treaties and their relationship with the constitution and other federal legislation),[14] which necessarily also encompasses the debate on vertical separation of powers, that is, the way in which incorporated treaties interfere with state law, given the fact that Brazil is a federal state.[15] These considerations will, whenever appropriate, be informed by relevant case-law.

After undertaking this analysis, we will look at the judicial practice regarding international treaties, more specifically the uses and interpretation of treaties by Brazilian courts, especially in light of the criteria set out in the two main Conventions on the Law of Treaties. The first one is the 1928 Havana Convention on the Law of Treaties, to which Brazil is a party.[16] The second one is the far better-known Vienna Convention on the Law of Treaties (VCLT).[17] Brazil is not a party to this Convention,[18] but, to the extent that it (at least partly) reflects customary international law,[19] it is an important set of rules to be taken into consideration in our analysis. Another important step related to the analysis of judicial activity with respect to treaties is the inquiry as to whether treaties can be considered in Brazil to confer rights upon individuals (being thus self-executing), and how these rights are enforced.

Carmen Tiburcio, *Uma análise comparativa entre as convenções da CIDIP e as convenções de Haia – O direito uniformizado comparado*, *in* Integração Jurídica Interamericana – As Convenções Interamericanas de Direito Internacional Privado (CIDIPs) e o Direito Brasileiro 46 (Paulo Borba Casella and Nadia de Araujo eds.) (1998).

12 For example, there is a new Brazilian judge in the International Court of Justice ((Judge Antonio Augusto Cançado Trindade), a Brazilian judge in the International Criminal Court (Judge Sylvia Steiner) and in the International Tribunal for the Law of the Sea (Judge Vicente Marotta Rangel). Until recently, there was also another Brazilian judge in the International Court of Justice (Judge Francisco Rezek) and in the Inter-American Court of Human Rights (Judge Antonio Augusto Cançado Trindade), as to the latter, he was an *ad hoc* judge at the International Court of Justice, in a dispute between Costa Rica and Nicaragua (*Dispute regarding Navigational and Related Rights*). There are Brazilian arbitrators in the WTO Panels and also the Director of UNIDROIT is now a Brazilian (José Angelo Estrella Faria, formerly at UNCITRAL).

13 On the importance of Treaties in Brazil, *see* José Francisco Rezek, Direito internacional público: Curso elementar 11 (2002).

14 On the influence of the US Federalism model in Brazil, *see* Jacob Dolinger, *The Influence of American Constitutional Law on the Brazilian Legal System*, 38 Am. J. Comp. L. 803 (1990).

15 Being a federal state, Brazil has different levels of jurisdiction and legislation. For our purposes, the absolute majority of legislation that is the subject of disputes in Brazilian courts is federal, and is applied in disputes before both the state and federal judiciaries.

16 *Convention on Treaties (Convenção sobre Tratados)*, signed in Havana on February 20, 1928. Promulgated in Brazil by Executive Decree 18.956, of October 22, 1929, *available at* <http://www2.mre.gov.br/dai/tratados.htm> (last accessed October 11, 2008) (official Portuguese version).

17 *Vienna Convention on the Law of Treaties*, done at Vienna on May 23, 1969, entered into force on January 27, 1980, 1155 U.N.T.S. 331 (1969) [hereinafter "VCLT"].

18 *See* Mirtô Fraga. Conflito entre Tratado Internacional e norma de Direito Interno xii (1997).

19 *See* Ian Brownlie, Principles of Public International Law 580 (Oxford University Press, 6th ed. 2003). In Brazil, see José Francisco Rezek, Direito dos Tratados 12 (1984), Alberto do Amaral Júnior, Introdução ao Direito Internacional Público (Atlas, 2008); and Welber Barral, Direito Internacional – Normas e Práticas 18 (F. Boiteux, 2006).

Among other things, we will argue that treaties are used by the Brazilian judiciary not only as such, but also as interpretive sources of internal law, and help to shape internal law-making by the legislator, or influence law-making even when the enacted statutes are not the direct result of the incorporation of treaties. Further, treaties are used to fill gaps in internal law, in this sense becoming "narrative norms", to use Erik Jayme's expression.[20] "Narrative norms" are thus considered as norms that lead to the insertion of values as a relevant element to be taken into account in statutory interpretation. This happens especially with regard to human rights cases,[21] in which international treaties are used to give meaning to open-ended provisions of internal federal or even constitutional law.[22] These Treaties ratified or just signed by Brazil, as "narrative norms" bring more light and objectivity to the interpretation,[23] by reinforcing one interpretation in favor to the values present at the Treaty.[24] They can also reinforce the application itself of a prior existing rule of Brazilian municipal Law.[25] Another important instance of use of treaty law is that of international treaties on intellectual property (IP) protection,[26] which have been interpreted by the Brazilian judiciary as directly conferring rights upon private parties to a dispute.[27]

The use of treaties by the judiciary happens more often with regard to human rights,[28] MERCOSUR (the regional economic integration process to which Brazil is a party),[29] as well as international taxation[30] and international trade law (including the GATT and WTO).[31] The first area mentioned, human rights, invites a greater use of

20 Erik Jayme, *Identité culturelle et intégration: le droit international privé postmoderne*, 251 Recueil des Cours 9 (1995).

21 See Flávia Piovesan, Direitos Humanos e o Direito Constitucional Internacional 94-97 (2007), quoting the decision TRF-3, RHC 96.03.060213-2-SP, Judge Sylvia Steiner, DJU 19.3.1997, using Art. 13 of the American Convention on human rights to complete Brazilian law, quoting STJ, RHC 7463/DF, using Art. 8 of the American Convention on human rights to complete Brazilian rights of the "acusado", and quoting STJ RHC 5.329-BA using Art. 7 of the American Convention on human rights to complete Brazilian rights of the accused. *See* in another matter, arguing the use of the New York Convention to interpret and complete the Brazilian Law of Arbitration, Eduardo F. RICCI and Mariulza Franco, *Após ratificação da Convenção de Nova Iorque: Novos Problemas*, 1/2 Revista Brasileira de Arbitragem 91 (2004).

22 On the narrative use of the Bustamante Treaty in favor to the right to divorce by the Federal Supreme Court, *see* Wilson de Souza Batalha and Sílvia Batalha de Rodrigues Netto, O direito internacional privado na Organização dos Estados Americanos- Comentários sobre o Decreto n. 1.979/96 206 (1997) and José Francisco Rezek, Direito internacional público: Curso elementar 12 (2002).

23 *See* Art. 7 of the Brazilian Consumer Code allowing the interpretation in favor to the consumer rights with base in "Treaties signed by Brazil". About this "*dialogue des sources*", *see* Claudia Lima Marques, Contratos no Código de Defesa do Consumidor 237 (2006).

24 *See also* Carla Pinheiro, Direito Internacional e Direitos fundamentais 76 (Atlas, 2001).

25 *See* Flávia Piovesan, Direitos Humanos e o Direito Constitucional Internacional 100 (2007).

26 *See* Denis Borges Barbosa, *Trips e a Experiência brasileira*, *in* Propriedade Intelectual e Desenvolvimento 129 (Marcelo Dias Varella ed.) (Lex-Aduaneiras, 2005).

27 For a collection of decisions about the direct use of the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights) by the Superior Court of Justice, *see* 2/3 Brazilian Yearbook of International Law 210 (2008) .

30 See LUIZ FELIPE SILVEIRA DIFINI, MANUAL DE DIREITO TRIBUTÁRIO 135 (Saraiva, 2003).

29 On the history of Mercosur, *see* Augusto Jaeger Junior, MERCOSUL e a Livre Circulação de Pessoas 17 (2000); Alberto do Amaral Junior, *Mercosul: características e perspectivas*, 146 Revista de Informação Legislativa 305 (2000); Claudia Lima Marques, *O "Direito do Mercosul": Direito oriundo do Mercosul, entre Direito Internacional Clássico e novos caminhos de integração*, 1 Revista "Derecho del Mercosur y de la Integración 61 (2003); Luiz Olavo Baptista, Le Mercosul-Ses instituitions et son ordonnancement juridique (2001); Celso D. de Albuquerque Mello, Direito Internacional da Integração 301 (1996); Carlos Eduardo Caputos Bastos and Gustavo Henrique Caputo Bastos, *Os modelos de integração européia e do Mercosul: exame das formas de produção e incorporação normativa*, 142 Revista de Informação Legislativa 222 (1999); Paulo Roberto de Almeida, *Dilemas da Soberania no Mercosul: Supranacional ou Intergovernamental?* , in Anuário Direito e Globalização - A Soberania I 251 (1999); and Deisy Ventura, Las asimetrías entre el Mercosur y la Unión Europea 9 (2005). On the actual enforcement in Mercosur, *see* Raúl Emilio Vinuesa, *Enforcement of Mercosur Arbitration Awards Within the domestic Legal Orders of Member States*, 40 Texas International Law Journal 425 (2004).

30 *See* Luiz Felipe Silveira Difini, Manual de Direito Tributário 135 (Saraiva, 2003).

31 *See* Roberto Luiz Silva, Direito Econômico Internacional e o Direito Comunitário (1995); Paulo Borba Casella, Contratos Internacionais e Direito Econômico no Mercosul (1996); Gesner Olibeira and João Grandino Rodas, Direito e Economia da Concorrência (2004);

treaty rules by the very international call of the topic, and also because federal and constitutional legislation on the matter is not as detailed as international law, at least if one excludes internal legislation merely incorporating international rules.[32] As to the latter areas, they involve international disputes and transactions, and that is why international treaties are referred to. Another reason why these rules are mentioned more often than others in Brazilian case-law may be related, we suggest, to the fact that human rights treaties and international tax rules[33] (in which international trade law rules are generally included, at least inasmuch as international trade rules mean commitments with regard to liberalization of a sector,[34] or to import and export taxes)[35] have a differentiated hierarchical status as compared to other international treaties, as elaborated below.[36]

We will now analyze the way through which treaties become part of the Brazilian legal system, focusing on the constitutional provisions on the topic and their interpretation by the Brazilian Supreme Federal Court (*Supremo Tribunal Federal – STF*).

Incorporation of Treaties under Brazilian Law

a) Treaty Powers and the Procedure for the Incorporation of Treaties in Brazilian Law

Generally, international treaties to which Brazil is a party, once incorporated, have the status of law. For that incorporation to happen, however, a rather long and complex procedure is required, involving the executive and legislative branches of government.

There are two constitutional provisions that refer to the treaty-making powers in Brazil, and they illustrate the difficulty of the matter. The first one is article 49, I of the 1988 Constitution, which reads: "It is exclusively the competence of the National Congress: I – to decide conclusively on international treaties, agreements or acts which result in charges or commitments that go against the national property; […]."[37] The second one, dealing with Presidential Powers, is article 84, VIII: "The President of the Republic shall have the exclusive power to: […] VIII – conclude international treaties, conventions and acts, *ad referendum* of the National Congress; […]".[38]

This means that an act of the Executive branch in signing a treaty will not be valid unless the National Congress confirms its validity.[39] No Constitution in Brazilian

and Jürgen Samtleben and Calixto Salomão Filho, *O Mercado Comum Sul Americano*, *in* Contratos Internacionais 268 (João Grandino Rodas ed.) (1995).

32 *See* Mônica de Mello and Roberto A. C. Pfeiffer, *Impacto da Convenção de Direito Humanos nos Direitos Civis e Políticos*, *in* O Sistema Interamericano de Proteção dos Direitos Humanos e o Direito Brasileiro 317 (Luiz Flávio Gomes and Flávia Piovesan eds.) (2000).

33 *See* Direito Tributário Internacional Aplicado (Heleno Tôrres ed.) (Quartier Latin, 2003)

34 On the international committement of Brazil to the liberazation of the Telecommunication sector, *see* Jete Jane Fiorati, As Telecomunicações nos Direitos Internos e Internacional: O Direito Brasileiro e as Regras da OMC 107 (2004).

35 *See* Importação e Exportação no Direito Brasileiro (Validimir Passos de Freitas ed.) (2007).

36 Similarly, *see* Heleno Tôrres, Pluritributação Internacional sobre as Rendas de Empresas 552 (2001); and Valério de Oliveira Mazzuoli, *Eficácia e Aplicabilidade dos Tratados em Matéria Tributária no Direito Brasileiro*, 1/3 Brazilian Yearbook of International Law 174 (2008).

37 Translation by the Brazilian Senate, *available at* <http://www.brazil.com/carta88.htm> (last accessed October 11, 2008). Unless otherwise indicated, all quotes of the Brazilian Constitution must be considered extracted from here.

38 *Id.*

39 On the different types of incorporation processes in Brazil, *see* Antônio Paulo Cachapuz de Medeiros, O Poder de Celebrar Tratados 457 (1995) and Luís Ivani de Amorim Araújo, *O direito dos Tratados na Constituição*, *in* A Nova Constituição e o Direito Internacional

constitutional history, except for the Empire Constitution of 1824, has explicitly listed the matters for which Congressional approval is necessary.[40] This has led to a long scholarly debate as to whether all international treaties should be referred to Congress. Part of this debate is explained by the urge to oversee the power of the Executive to conclude international treaties closely, especially if one considers the widening importance and impact of international treaties on the everyday life of citizens.[41]

Some international lawyers have argued that Congressional approval could be dispensed with, depending on the subject matter of the treaty. According to supporters of this position, notably Hildebrando Accioly, the following acts did not require any action from the Legislative branch: (1) acts dealing with matters that fell under the exclusive competence of the Executive branch (as determined by constitutional rules); (2) acts concluded by diplomatic personnel on matters of concern to the places where the said diplomats are stationed; (3) acts related to the interpretation of currently existing treaties; (4) acts that merely complement an existing treaty (as long as they do not constitute a separate instrument requiring independent ratification, that is); (5) the ones that aim exclusively at establishing the grounds for future negotiations; (6) those for extending the temporal validity of a treaty prior to its expiration; and (7) extradition reciprocity statements.[42]

Accioly sought support for his argument in Brazilian and foreign national practice on the matter,[43] and this was the position adopted by the Brazilian Ministry of Foreign Affairs for several years, until the previous uncertainty was settled by changes in the constitutional text with the Constitution of 1967. Therefore, the custom that existed prior to this Constitution was revoked by a subsequent written rule,[44] to the exception of acts dealing with matters that fell under the exclusive competence of the Executive branch and acts concluded by diplomatic personnel on matters of local concern. Also, acts on the interpretation of currently existing treaties and the ones that aim exclusively at establishing the grounds for future negotiations can still be valid without legislative approval, but only if they are entirely reversible and can be fulfilled without financial resources other than those ordinarily allocated to foreign relations (because any act that interferes with the national budget must necessarily be approved by Congress).

As to international acts that merely complement an existing treaty (which would presumably include all protocols to framework conventions), several scholars (nota-

40 (Jacob Dolinger ed.) (1987). See also the historical approaches in Antônio Paulo Cachapuz de Medeiros, *O controle legislative dos atos internacionais*, 85 R. Inf. Legisl. 205 (1985) and João Grandino Rodas, *Os acordos em forma simplificada*, 68 Revista da Faculdade de Direito USP 319 (1973).

40 *See* José Francisco Rezek, *As relações internacionais na Constituição da primeira República*, 30 *Revista* Arquivos do Ministério da Justiça 107 (1973); and Valério de Oliveira Mazzuoli, Curso de Direito Internacional Público 270 (Revista dos Tribunais Publishing, 2007).

41 *See* Antônio Paulo Cachapuz de Medeiros, O Poder de Celebrar Tratados 470 (1995) and Francisco José Marques Sampaio, *A Constituição e o direito internacional*, 373 Revista Forense 69, 71 (May-June 2004), João Grandino Rodas, Publicidade dos Tratados Internacionais 7 (RT, 1980) and João Grandino Rodas, Tratados Internacionais 1 (RT, 1991).

42 *As summarized by* Valério de Oliveira Mazzuoli, Curso de Direito Internacional Público 272 (Revista dos Tribunais Publishing, 2007). *See also* G. E. Nascimento e Silva and Hildebranco Accioly, Manual de Direito Internacional Público 27 (1998). On the importance of Accioly's vision in Brazil, *see* Sylvia H. F. Steiner, A Convenção Americana sobre Direitos Humanos e sua Integração ao Processo Penal Brasileiro 71 (2000),

43 *See* Valério de Oliveira Mazzuoli, Curso de Direito Internacional Público 273 (Revista dos Tribunais Publishing, 2007).

44 *See* Valério de Oliveira Mazzuoli, Curso de Direito Internacional Público 274 (Revista dos Tribunais Publishing, 2007).

bly Francisco Rezek, who later became a judge at the International Court of Justice) argue that the congressional approval in these cases is implied, as it has already been given to the main treaty from which the others derive and to which following acts necessarily conform.[45] This has been confirmed by case-law in Brazil, in a case in which a Regional Federal Court (roughly equivalent to a Court of Appeals of a Federal Circuit in the U.S.) decided that the GATT lists of products for which preferential treatment is granted not only dispenses Congressional approval, but even approval by the Ministry of Foreign Affairs, whose only function is to ensure the authenticity of the list sent by the international organization.[46]

Therefore, there are still loopholes as to the necessity of interference of the Legislative branch in the approval of international treaties. These have been exploited by the Executive branch as a means to expedite the resolution of foreign policy issues, especially if one takes into account the considerable backlog in Congress for the ratification of treaties.[47]

When a treaty is signed, the President (as head of the Executive branch) has the possibility to send the treaty for consideration of the Legislative. As the latter branch is the one that ultimately represents the "national will", a treaty cannot produce effects unless the Legislative approves it (observed the exceptions above). Once the President decides to send a treaty to Congress, it is actually the Ministry of Foreign Affairs that takes care of preparing the necessary documentation, which includes a statement of the reasons behind the decision to sign the treaty in question, along with an analysis of the text. The Legislature, if it approves the treaty, does it by means of a Legislative Decree (*Decreto Legislativo*), which is the type of normative act corresponding to the exercise of exclusive competencies of the Legislative branch.[48]

As the exercise of an exclusive competence, this act does not require presidential approval like other legislative acts, and it is published directly by the Senate. The Decree authorizes the President to ratify the treaty,[49] and it is also the moment for the presentation of reservations to the treaty if the Legislative branch has any.[50] However, this authorization by Congress via the Legislative Decree is still not sufficient to turn the treaty into valid law. A treaty only becomes law once it is ratified (which naturally includes depositing the instrument of ratification) by the Executive and subsequently promulgated via an Executive Decree passed by the President.[51]

45 *See* José Francisco Rezek, Direito dos Tratados 385 (1984); and João Grandino Rodas, A publicidade dos tratados internacionais 200-201 (1980).

46 Federal Court of Appeals of the Second Region, *Ex Officio Request (Remessa Ex Officio) 9002165641/RJ*, judgment of October 1, 1991. See also Federal Court of Appeals of the Second Region, *Appeal on writ of mandamus (Apelação em Mandado de Segurança) 95.02.27342-7/RJ*, judgment of April 30, 1996.

47 *See* Antônio Paulo Cachapuz de Medeiros, O Poder de Celebrar Tratados 470 (1995).

48 *See* the Internal Rules of Procedure (*Regimento Interno*) of both houses of the Brazilian Federal Legislature, *available at* <www.senado.gov.br> and <www.camara.gov.br>, respectively (last accessed October 11, 2008).

49 *See* João Grandino Rodas, A publicidade dos tratados internacionais 200 (1980).

50 *See* Valério de Oliveira Mazzuoli, Curso de Direito Internacional Público 281 (Revista dos Tribunais Publishing, 2007).

51 *See* Saulo José Casali Bahia, Tratados Internacionais no Direito Brasileiro 67 (Forense Publishing, 2000); and Valério de Oliveira Mazzuoli, Curso de Direito Internacional Público 282 (Revista dos Tribunais Publishing, 2007).

It is interesting to notice that, in Brazilian law, it is the deposit of the instrument of ratification that brings the treaty into force internationally, but only the promulgation via Executive Decree that brings the treaty into force internally, and makes it enforceable in Brazilian courts. This distinction has been relevant in one case, in which the Federal Supreme Court has refused to apply a treaty (on civil judicial cooperation in MERCOSUR)[52] using the argument that, even though the instrument of ratification had been deposited, it had not yet been published in the Official Journal (*Diário Oficial da União*).[53] This rather formalistic approach is fragile at best, as it refuses the enforcement of a treaty in an international relationship (even if one of Private International Law).[54] As commentators argue, there is no constitutional provision requiring the internal publication of a treaty for it to be enforceable, especially if its provisions are self-executing.[55] Further, the practice of the Executive branch (responsible for publishing the treaty in a Decree) recognizes the full validity of treaties upon the deposit of the instrument of ratification, even if they are only published several weeks later.[56]

b)Status and Hierarchy of Incorporated Treaties

The Brazilian Constitution does not address the issue of the status or hierarchy of ordinary international treaties.[57] As such, they have been considered since 1977 by the Federal Supreme Court to have the same status as ordinary federal legislation,[58] a position generally accepted by lower courts.[59] As such, statutory law enacted after the ratification of a treaty could make the treaty lose its efficacy ("*perda de eficácia*").[60] The leading case on the matter deals with the clash between a federal statute enacted

52 *See* Nadia de Araújo, *Dispute resolution in Mercosur: The Protocol of Las Leñas and the case law of the Brazilian Supreme Court*, 32 Inter-American Law Review 25 (2001).

53 Supreme Federal Court, *Rogatory Letter (Carta Rogatória) 8.279, from Argentina*, judgment of May 4, 1998. See the decision in Nadia de Araújo, Direito Internacional Privado 497 (Renovar, 2003).

54 About the ordinary application and enforcement in Brazil of Private International Treaties, see a list of leading decisions in Nadia de Araújo, Direito Internacional Privado 498-506 (Renovar, 2003). For a similar list, before the 1988 Constitution, *see* Maristela Basso, Da aplicação do direito estrangeiro pelo juiz nacional: o direito internacional privado à luz da jurisprudência 67 (Saraiva, 1988).

55 *See* José Francisco Rezek, Direito dos Tratados 385 (1984); Antônio Paulo Cachapuz de Medeiros, O Poder de Celebrar Tratados 470 (1995); Valério de Oliveira Mazzuoli, Curso de Direito Internacional Público 294-195 (Revista dos Tribunais Publishing, 2007) and João Grandino Rodas, A publicidade dos tratados internacionais 201 (1980).

56 *See* Valério de Oliveira Mazzuoli, Curso de Direito Internacional Público 296-297 (Revista dos Tribunais Publishing, 2007). For an example of a later use of the Las Leñas Protocol by the Supreme Court (Rogatory Letter 8240), *see* Nadia de Araújo, Direito Internacional Privado 503 (Renovar, 2003).

57 *See*, for all, Luís Roberto Barroso, *Constituição e Tratados internacionais: Alguns aspectos da relação entre direito internacional e direito interno*, *in* Novas Perspectivas do Direito Internacional Contemporâneo 189 (Carlos A. M. Direito, Antonio A. Cançado Trindade and Antonio C. A. Pereira eds.) (Renovar, 2008).

58 *See Extraordinary Appeal (Recurso Extraordinário) 80.004-SE*, published in RTJ 83/809-848. For further commentary on this case *see* Jacob Dolinger, Direito Internacional Privado 88-108 (1996).

59 *See* for instance Federal Court of Appeals of the Fifth Region, *Appeal on writ of mandamus (Apelação em Mandado de Segurança) 2001.84.00.009747-6,* judgment of July 1, 2004. One must take into account that in the Brazilian system the decisions of the Supreme Court are not generally binding on the whole of the judiciary, but rather are only applicable to the case of hand. One exception to this rule is the "*súmula vinculante*" ("binding enunciate", in a literal translation), which is a mechanism through which enunciates laid down by the Supreme Court reflecting consolidated case-law become binding on the whole of the judiciary. Nevertheless, these are still few and apply to rather narrow legal fields. Therefore, it is perfectly acceptable that lower courts repeatedly challenge the case law of the Supreme Court, more often than not in the hope that the Supreme Court will eventually give in and change its orientation. Until recently, the Supreme Court lacked the faculty of selecting the cases that would enter its docket, and it was often flooded with repetitive cases. Recent legislative reforms allow for the Supreme Court to dismiss "repetitive appeals" ("*exame da repercussão*"), or group cases together in some instances.

60 On the conflict between the 1990 Consumer Code and the 1929 Warsaw Convention, *see* the judgment of the Superior Court of Justice, *Special Appeal (Recurso Especial)* 58736/MG, judgment of April 29, 1996, and the judgment of the Superior Court of Justice, *Special Appeal (Recurso Especial) 169.000/RJ*, judgment of April 4, 2000. On former leading cases about the conflict between Treaties on transportation and Brazilian Law, *see* Francisco César Pinheiro Rodrigues and Ivan Francisco Pereira Agostinho, Jurisprudência do Transporte Aéreo, Marítimo e Terrestre 50-56 (1988).

in 1969 and an international treaty, the Geneva Uniform Law on Bills of Exchange and Promissory Notes.[61]

Even though there is no clear majority reasoning in the case, but rather a plurality decision, the reasoning that seems to have prevailed in subsequent case law is as follows: treaties are considered, for the purposes of their application by the Brazilian judiciary, not as international acts, but merely federal legislation, since they depend, for their internal effect, on being promulgated as such. Being federal legislation, they are subject to ordinary principles of conflicts of laws in time, particularly that of *lex posterior derogat priori,*[62] and *lex posterior generalis non derogat legi priori speciali.*

This 1977 decision goes against previous precedent of the Supreme Court, which recognized the overarching hierarchy of international treaties over non-constitutional municipal law,[63] and it has been widely criticized by international legal scholars in Brazil.[64] One of the arguments advanced by critics is that this would imply granting upon the Legislative branch the power to force a state to unilaterally denounce a treaty.[65] The decisions regarding foreign policy (which includes the termination of treaties) are a prerogative of the Executive branch, and legislators should not be entitled to force the country into either denouncing a treaty or breaching international obligations.[66]

There are three exceptions[67] to this "hierarchical parity": international treaties dealing with taxation matters, extradition of non-nationals and international human rights treaties. Regarding taxation treaties, the issue is clearly stated in Article 98 of the Brazilian Tax Code: "Treaties and international conventions revoke or modify municipal tax legislation, and will be observed by subsequent legislation."[68] This is the only provision in Brazilian law to expressly guarantee the supremacy of international law over municipal legislation, and this supremacy

61 *See Extraordinary Appeal* **(***Recurso Extraordinário)* RE. 71.154, published in RTJ 58/744. *See* the decision in Nadia de Araújo, Direito Internacional Privado 498 (Renovar, 2003).

62 *See* Superior Court of Justice, *Special Appeal (Recurso Especial) 74.376/RJ*, judgment of October 9, 1995.

63 *See* Philadelpho Azevedo, *Os tratados e os interesses privados em face do direito brasileiro*, 1 Boletim da Sociedade Brasileira de Direito Internacional 12 (1945). For a historical survey of these precedents, *see* Saulo José Casali Bahia, Tratados Internacionais no Direito Brasileiro 94-101 (Forense Publishing, 2000).

64 *See* Saulo José Casali Bahia, Tratados Internacionais no Direito Brasileiro 94 (Forense Publishing, 2000); Valério de Oliveira Mazzuoli, Curso de Direito Internacional Público 305 (Revista dos Tribunais Publishing, 2007) and Luís Roberto Barroso, *Constituição e Tratados internacionais: Alguns aspectos da relação entre direito internacional e direito interno*, *in* Novas Perspectivas do Direito Internacional Contemporâneo 189 (Carlos A. M. Direito, Antonio A. Cançado Trindade and Antonio C. A. Pereira eds.) (Renovar, 2008). On the use of the idea of "*dialogue des sources*", a theory of Erik Jayme, to criticize the decision, *see* Alberto do Amaral Júnior, Introdução ao Direito Internacional Público 135 (Atlas, 2008). Favorably to this decision, *see* Jacob Dolinger, Direito Internacional Privado (parte geral) 104 (6.ed., Renovar, 2001)

65 In a slightly different context, *see* State Court of Justice of Bahia, *Civil Appeal (Apelação Cível) 45.620-4*, judgment of November 3, 1998 (arguing that treaties cannot be unilaterally denounced by municipal law, but that they must go through the appropriate international procedure, in the specific context of state tax legislation, which is a special case in terms of hierarchy, as we will see below. However, the statement in the judgment is made with respect to treaties generally, regardless of their subject matter).

66 *See* Valério de Oliveira Mazzuoli, Curso de Direito Internacional Público 305-307 (Revista dos Tribunais Publishing, 2007).

67 Cf. Luís Roberto Barroso, *Constituição e Tratados internacionais: Alguns aspectos da relação entre direito internacional e direito interno*, *in* Novas Perspectivas do Direito Internacional Contemporâneo 189 (Carlos A. M. Direito, Antonio A. Cançado Trindade and Antonio C. A. Pereira eds.) (Renovar, 2008).

68 Free translation from the original: "*Os tratados e as convenções internacionais revogam ou modificam a legislação tributária interna, e serão observados pela que lhes sobrevenha.*" For a general overview of this article's interpretation, especially with regard to economic integration processes and MERCOSUR, *see* Carlos Alberto Bronzatto and Márcial Noll Barboza, Os efeitos do artigo 98 do Código Tributário Nacional e o processo de integração do MERCOSUL (Publishing House of the Brazilian Senate, 1996).

has been consistently affirmed by the Brazilian judiciary.[69] The second exception are the bilateral Treaties dealing with extradition of non-nationals, see by the Supreme Federal Court as *lex speciales* vis-à-vis the general law (Ext. 194-Argentina, 1997).[70]

Some authors[71] argue that Treaties dealing with arbitration will be also a new exception, because of the language of Art. 34, Lei 9.307/96, which states that a foreign arbitral award will be enforced in Brazil in conformity with international treaties valid in the internal legal order, and, in their absence, strictly in accordance with the provisions of the Arbitration Act, but there are no decisions on this rule yet.[72] It is also important to highlight that the hierarchy can be even lower, because the Constitutional Amendment number 7 of August 15, 1997, has modified the Constitution by including a mention to reciprocity to guarantee the observation of international treaties on air transport: "*Article 178. The law shall provide for the regulation of aerial, water and land transportation, and it must observe, as to the regulation of international transportation, the agreements signed by the Union, in observance to the principle of reciprocity.*"[73] It is interesting to also note that MERCOSUR treaties receive the same hierarchical treatment as other Treaties, instead of being entitled to a superior status because of the importance of economic integration.[74]

One criticism against this provision is that it is not up to a statute to determine the hierarchy of other norms, but that this is a task reserved to the constitutional text, regardless of the superior hierarchy of this code and tax statutes generally (approved as Supplementary Laws – *Leis Complementares*).[75] This has led lower courts to even argue that this provision is unconstitutional,[76] even though decisions within the same court (but judged by different panels of judges) have not reached a uniform result.[77] However,

69 *See* for instance Federal Court of Appeals of the Third Region, *Appeal on writ of mandamus (Apelação em Mandado de Segurança) 94.03.007036-6/SP*, judgment of November 23, 1994.

70 Supreme Federal Court, *Extradition 194* – Argentinean Republic, commented in Luís Roberto Barroso, *Constituição e Tratados internacionais: Alguns aspectos da relação entre direito internacional e direito interno*, *in* Novas Perspectivas do Direito Internacional Contemporâneo 189 (Carlos A. M. Direito, Antonio A. Cançado Trindade and Antonio C. A. Pereira eds.) (Renovar, 2008).

71 *See* particularly Jacob dolinger and Carmen Tiburcio, Direito Internacional Privado - Parte Especial (Renovar, 2003)

72 Quoting Jacob dolinger and Carmem Tibúrcio, *see* Luís Roberto Barroso, *Constituição e Tratados internacionais: Alguns aspectos da relação entre direito internacional e direito interno*, *in* Novas Perspectivas do Direito Internacional Contemporâneo 189 (Carlos A. M. Direito, Antonio A. Cançado Trindade and Antonio C. A. Pereira eds.) (Renovar, 2008).

73 Cf. Luís Roberto Barroso, *Constituição e Tratados internacionais: Alguns aspectos da relação entre direito internacional e direito interno*, *in* Novas Perspectivas do Direito Internacional Contemporâneo 189 (Carlos A. M. Direito, Antonio A. Cançado Trindade and Antonio C. A. Pereira eds.) (Renovar, 2008).

74 *See* Supreme Federal Court, *Rogatory Letter (Carta Rogatória) 8.279-Argentinean Republic*. See the decision in Nadia de Araújo, Direito Internacional Privado 498 (Renovar, 2003).

75 In the Brazilian legal system, legislation is not all at the same level. Article 59 of the Constitution enunciates the possible types of legislation, and with this enunciation provides their hierarchy, as the acts are listed in order of hierarchy. The text of article 59 is as follows: "*Article 59*. The legislative process comprises the preparation of: I – amendments to the Constitution; II – supplementary laws; III – ordinary laws; IV – delegated laws; V – provisional measures; VI – legislative decrees; Sole paragraph – A supplementary law shall provide for the preparation, drafting, amendment and consolidation of laws."

76 One such example is the decision by the Federal Court of Appeals of the First Region, *Ex Officio Request (Remessa Ex Officio) 9001139191/BA*, judgment of March 25, 1991. In the Brazilian legal system, all courts are entitled to check the constitutionality of any laws and statutes, subject to appeal to the Federal Supreme Court. Another example is Federal Court of Appeals of the Fourth Region, *Appeal on writ of mandamus (Apelação em Mandado de Segurança) 95.04.50314-4*, judgment of September 11, 1996 (arguing that incorporated international treaties can be revoked by subsequent law in accordance with procedures in Brazilian statutory law).

77 *See* for instance Federal Court of Appeals of the First Region, *Ex Officio Request (Remessa Ex Officio) 9001007171/BA*, judgment of March 4, 1991 (affirming that international treaties in matters of taxation are hierarchically above ordinary laws *ex vi* article 98 of the Tax Code, hence presuming the constitutionality of this provision).

precisely because supplementary laws have the role of supplementing the constitutional text, it is possible to argue that the provision of Article 98 of the Tax Code is in fact constitutional.[78] The Constitution, as said before, does not offer any rules as to the status of international treaties once they are internalized, and therefore a law that supplements it can fill this gap, even if only with respect to a certain subject-matter.

This provision has, however, been interpreted rather restrictively by the Brazilian judiciary. The judiciary makes the distinction between "contract treaties" and "normative treaties", arguing that article 98 applies only to the former treaties, as they create sufficiently distinguishable obligations, as opposed to the latter, which have a broader "law-making" function.[79] This position has been severely criticized by international legal scholars,[80] but has so far been kept to a large extent by the judiciary. And, to the extent that even broad, multilateral treaties like the GATT have been considered "contract treaties" by the Superior Court of Justice, most of the controversy that can arise in practice seems to be resolved.[81]

Another relevant issue with regard to this provision is that of the vertical separation of powers, since Brazil is a federal state and each level of the federation is entitled to impose some taxes independently from the federal Union. Since Article 98 is contained in a general code of tax law, it is in principle addressed to all levels of the federation (Union, States and Municipalities). However, the judiciary has interpreted the treaty-making powers as meaning that the entity that enters into a treaty is solely the federal level, and not the state as a whole.[82] This has given rise to several decisions declaring that exemptions from taxes that fall within the exclusive competences of states or municipalities are impermissible in light of the constitutional provision on separation of powers in matters of taxation,[83] even though there are several cases, at least with regard to the GATT, that affirm the legality of the tax exemptions granted by virtue of international agreements.[84]

This is naturally an incorrect interpretation of basic principles of international law. When a treaty is celebrated by the head of the Executive branch, she or he does so as the head of state (external dimension), not as a head of government (internal dimension). The rule of Article 151, III of the Constitution, thus, does not apply to laws enacted by the federal level as a result of international treaties.

The other instance of "differentiated hierarchy" of international treaties refers to international human rights treaties to which Brazil is a party. The most relevant norms

78 *See* Valério de Oliveira Mazzuoli, Curso de Direito Internacional Público 317 (Revista dos Tribunais Publishing, 2007).

79 *See* for instance Federal Court of Appeals of the Fourth Region, *Appeal on writ of mandamus (Apelação em Mandado de Segurança) 95.04.37140-0*, judgment of September 16, 1998; Federal Court of Appeals of the Fourth Region, *Appeal on writ of mandamus (Apelação em Mandado de Segurança) 95.04.50314-4*, judgment of September 11, 1996; and Federal Court of Appeals of the Fourth Region, *Appeal on writ of mandamus (Apelação em Mandado de Segurança) 96.04.13655-0*, judgment of June 05, 1996.

80 *See* Paulo Caliendo, Estabelecimentos permanentes em direito tributário internacional 94 (Revista dos Tribunais Publishing, 2005).

81 *See* Superior Court of Justice, *Internal Interlocutory Appeal (Agravo Regimental) 67.007/RS*, judgment of April 28, 1997. For a commentary to this case, *see* Saulo José Casali Bahia, Tratados Internacionais no Direito Brasileiro 108-109 (Forense Publishing, 2000).

82 *See* for instance Superior Court of Justice, *Special Appeal (Recurso Especial) 90871/PE*, judgment of June 17, 1997.

83 The provision is as follows: "*Article 151***.** It is forbidden for the Union: […] III – to institute exemptions from tributes within the powers of the states, of the Federal District or of the municipalities."

84 *See* Superior Court of Justice, *Special Appeal (Recurso Especial) 1.966/SP*, judgment of March 14, 1990. For a commentary to this case, *see* Saulo José Casali Bahia, Tratados Internacionais no Direito Brasileiro 108-109 (Forense Publishing, 2000).

are paragraphs 2[85] and 3[86] of Article 5 (titled "Individual and collective rights and duties") of the Brazilian Constitution. Paragraph two establishes the possibility of there being rights and guarantees not expressly safeguarded by the Constitution, but which shall be nevertheless enforced regardless of whether they are simply derived from the constitutional system, or come from international treaties. This means that, at least in theory, international human rights treaties are hierarchically equivalent to the constitution.

The judiciary has interpreted this provision differently, however, ultimately refusing to give it the effect that a plain reading of the ordinary meaning of the words contained therein might suggest. The Supreme Court (and along with it the lower courts)[87] has in several occasions stated that international treaties, even human rights treaties, are incorporated as ordinary federal law, and as such cannot amend or modify the Constitution, even if it is an amendment oriented at expanding the list of fundamental rights and guarantees (as any amendment that restricts these rights is expressly forbidden by the very constitutional text – Article 60).[88] The argument, as put elsewhere, is that the Constitution is the point of reference for assessing the validity of international treaties (and the legal order as a whole), and, because of that, the Constitution must be the supreme norm, and not even international human rights treaties must "threaten" this supremacy.[89] In one occasion the Supreme Court has even indicated the desirability of attributing constitutional hierarchy to international human rights treaties, but said that this matter was to be resolved by the legislature by means of a constitutional amendment.[90]

As a means of offering a constitutional solution to the matter, the Constitutional Amendment 45 of 2004[91] inserted paragraph 3 into Article 5, which clearly lays out the conditions through which the approval of an international human rights treaty by the Legislative branch can give such treaty the hierarchical status of a constitutional amendment.[92] By establishing the same majority requirements as a regular constitutional amendment, this new paragraph aimed at resolving the status of international human rights treaties that Brazil would become a party to after this paragraph's entry into force. This created an awkward question for the

85 Paragraph two reads as follows: "Paragraph 2. The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party."

86 This paragraph was inserted by a constitutional amendment in 2004 (Constitutional Amendment 45/04), and a free translation of it reads as follows: "Paragraph 3. The international treaties and conventions on human rights that are approved, in each house of the National Congress, in two turns, by three-fifths of the votes of the respective members, will be equivalent to constitutional amendments."

87 *See* for instance Court of Appeals of the State of Rio de Janeiro, *Criminal Appeal (Apelação Criminal) 2003.050.03785*, judgment of October 30, 2003.

88 The relevant part of article 60 reads as follows: "*Article 60***.** The Constitution may be amended […]. Paragraph 4 - No proposal of amendment shall be considered which is aimed at abolishing: […] IV – *individual rights and guarantees*." [emphasis added].

89 Federal Supreme Court, *Appeal in Habeas Corpus (Recurso em Habeas Corpus) 79785/RJ*, judgment of March 29, 2000; Federal Court of Appeals of the Third Region, *Habeas Corpus 97.03.004349-6*, judgment of November 18, 1997.

90 Federal Supreme Court, *Habeas Corpus 81319/GO*, judgment of April 24, 2002 (referring to the specific context of the unfaithful trustee, which will be explored in detail below).

91 About the impact of the Constitutional Amendment 45 on the judiciary in general, see Maria Angela Jardim de Santa Cruz Oliveira, Reforming the Brazilian Supreme Federal Court: a comparative approach, Washington University Global Studies Law Review, 138 (vol. 5, Number 1, 2006)

92 *See* Pedro Loula, *Breves reflexões sobre a repercussão da Reforma do Judiciário (emenda Constitucional n. 45/04) no Direito Internacional*, *in* O Direito Internacional Contemporâneo 777 (Carmen Tiburcio and Luís Roberto Barroso eds.) (Renovar, 2006).

future, as it may happen that some human rights treaties are passed with the required majority, and others not, creating differences of status between treaties on the same subject matter.[93]

It also left the question of treaties ratified before it (among which are almost all the major international human rights treaties in existence) unresolved. This has led Antonio Augusto Cançado Trindade, one of the drafters of paragraph 2 of Article 5 during the Constitution-making process of the 1980s, to criticize paragraph 3. Cançado Trindade criticized this provision in his separate opinion in the first case ever decided against Brazil before the Inter-American Court of Human Rights, the *Case of Damião Ximenes Lopes v. Brazil*.[94] In his separate opinion, Judge Cançado Trindade characterized this provision as a "step back" in terms of human rights protection in Brazilian constitutional law, which threatened to fragment human rights law in Brazil.[95]

One scholarly construction of paragraph 3 of Article 5 implies that this provision should be interpreted as meaning that human rights treaties incorporated in the way provided for in this paragraph will be *formally* equivalent to constitutional amendments, but that, regardless of that, by virtue of paragraph 2, all human rights treaties already have the status of constitutional norms, regardless of the way through which they have been incorporated.[96] A similar position was defended by a State Court of Appeals, which stated that the approval of paragraph 3 to Article 5 had only the effect of legitimizing a previously existing situation. According to the State Court, any doubts as to the constitutional status of human rights treaties, even those incorporated before Constitutional Amendment 45/04, were dissipated.[97] A more restrained position was adopted by a Federal Court of Appeals, which said that the Supreme Court was to determine the exact hierarchy of treaties incorporated before the Constitutional Amendment, but that it was possible that these treaties would incorporate the "bloc of constitutionality" of fundamental rights protected by the Constitution.[98]

Decisions of the Superior Court have discussed the status of the Pact of San José in light of the new paragraph 3 of Article 5, and originally declared that this provision was not applicable to the Pact of San José, which helped reinforce the claim that it was to be deemed as ordinary federal statutory law.[99] Another decision, by a Federal Court of Appeals, said that Congress should vote again on the approval of international human rights treaties, if their status was to be changed from ordinary infra-constitutional federal legislation to constitutional rules.[100] It

93 *See* Valério de Oliveira Mazzuoli, Curso de Direito Internacional Público 688-689 (Revista dos Tribunais Publishing, 2007).
94 I/A Court H.R., *Case of Ximenes-Lopes v. Brazil***.** Merits, Reparations and Costs. Judgment of July 4, 2006. Series C No. 149.
95 *See* Separate Opinion of Judge Cançado Trindade, para. 31.
96 *See* Valério de Oliveira Mazzuoli, Curso de Direito Internacional Público 693-697 (Revista dos Tribunais Publishing, 2007).
97 State Court of Appeals of the Federal District, *Habeas Corpus 2006002007534*, judgment of August 9, 2006.
98 Federal Court of Appeals of the Fourth Circuit, *Appeal to writ of mandamus (Apelação em Mandado de Segurança) 2005.70.00.008336-7/PR.*
99 Superior Court of Justice, *Habeas Corpus Appeal (Recurso em Habeas Corpus) 19.975/RS*, judgment of October 5, 2006; and Superior Court of Justice, *Habeas Corpus Appeal (Recurso em Habeas Corpus) 19.835/MG*, judgment of September 5, 2006.
100 Federal Court of Appeals of the Third Region, *Habeas Corpus 2005.03.00.026683-4/MS*, judgment of June 27, 2005.

seems that the criticism of Cançado Trindade has been proven true, and that this provision worsened the situation of human rights treaties in the Brazilian legal order.

As appealing as the arguments of scholarship and the judicial decisions listed above aimed at "rescuing" paragraph 3 of Article 5 sound from the perspective of human rights protection, the fact is that their proposed interpretations would render paragraph 3 practically useless. And it is well-known that legal provisions, particularly constitutional ones, must not be interpreted in a way that not only is not the most logical meaning to be attributed to their words, but that also reduces their effect. Unfortunately, the Brazilian legislator has made a mistake in approving paragraph 3 the way it did. Albeit clearly well-intentioned, as it aimed at resolving and improving the status of human rights treaties, the fact is that this provision created a dangerous limbo for international human rights treaties ratified before 2004. A progressive interpretation of this provision by the Supreme Court is still possible, but still pending. A recent decision of the Superior Court of Justice gives some hope to human rights lawyers in Brazil, by affirming the retroactive effect of paragraph 3 of Article 5.[101]

Regarding human rights treaties, one particularly controversial issue is that of the civil arrest of the unfaithful trustee. What happens is that, while the Brazilian Constitution forbids the deprivation of liberty based on the incapacity to fulfill contractual obligations, it opens two exceptions, (1) the non-fulfillment of alimony obligations, and (2) the inability to perform fiduciary duties.[102] The American Convention on Human Rights (Pact of San José of Costa Rica), to which Brazil is a party, allows only one exception, that regarding alimony (article 7.7). Brazil ratified the Pact of San José in 1992,[103] that is, after the approval of the 1988 Constitution and its paragraph 2 to Article 5, and thus one would expect that this international norm which would expand the list of fundamental rights protected by the Constitution would be taken into consideration by the Brazilian judge when deciding upon writs of *habeas corpus* related to civil arrests.

However, what has happened is that the Supreme Court, contrary to multiple precedents from lower courts,[104] has consistently decided that the Pact of San José had the status of ordinary federal law, and as such could not amend the Constitution.[105] The problem gains wider proportions as there is a statute making the inability to perform the obligations of lease contracts equivalent to the trusteeship duties for which civil imprisonment is allowed. This statute has been considered as *lex specialis*, and

101 Superior Court of Justice, *Habeas Corpus Appeal (Recurso em Habeas Corpus) 18.799/RS.*

102 The relevant provision reads as follows: "*Article 5***.** All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: […] LXVII. there shall be no civil imprisonment for indebtedness except in the case of a person responsible for voluntary and inexcusable default of alimony obligation and in the case of an unfaithful trustee; […]"

103 American Convention on Human Rights "Pact of San José, Costa Rica", adopted at San José, Costa Rica on November 22, 1969, entry into force on July 18, 1978. The relevant provision of the Convention reads as follows: "*Article 7. Right to Personal Liberty […]* 7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment [sic] of duties of support." This Convention was ratified by Brazil by the deposit of the instrument of ratification on September 25, 1992. *See* Odete Novais Carneiro Queiroz, Prisão Civil e os Direitos Humanos 121 (RT, 2004)

104 *See* for instance State Court of Appeals of the Federal District, *Habeas Corpus HBC736896 DF*, judgment of October 17, 1996; and State Court of Appeals of Rio de Janeiro, *Habeas Corpus 2006.144.00298*, judgment of September 27, 2006.

105 *See* for instance Supreme Federal Court, *Habeas Corpus 73.044/SP*, judgment of September 20, 1996; Superior Court of Justice, *Habeas Corpus Appeal (Recurso em Habeas Corpus) 19.766/PR*, judgment of October 17, 2006.

its application has not been altered by the ratification of the Pact of San José.[106] It is noteworthy that the Brazilian judiciary has consistently held that this possibility does not extend to financial obligations not deriving from contracts, such as monies owed to the government.[107]

Specifically in this context, but with a broader reach, a recent opinion in a case before the Supreme Court puts human rights treaties in an intermediary category, below the constitution, but above all other laws.[108] This would respect the Brazilian sovereignty and the legitimacy of the judiciary in applying the law, but would still not fully resolve the issue.

It is safe to say that the situation in Brazil with regard to treaty implementation and their hierarchy is far from settled. As the Constitution offers no clear rules on the matter, it is up to the judiciary to give a clear delineation or even create such rules through its practice in enforcing treaties. We will now look at how such enforcement takes place.

3. Interpretation and Enforcement of Treaties

a) The Competence for Application of Treaties

The constitutional provisions outlining the competence of the Brazilian Judiciary with respect to treaties mention treaties alongside federal law, which may be one of the reasons why incorporated treaties are considered to have such a status in Brazil.[109] This makes the whole of the judiciary, state and federal, competent to hear cases based on treaties, inasmuch as these treaties have been incorporated, and for these purposes turned into domestic law. As a matter of fact, hardly ever a treaty is mentioned without explicit reference to the Decree that promulgates it. And, when making a direct application of a treaty rule, more often than not judges will refer to the Article in the *Decree*, which is a domestic norm, instead of the article in the *Treaty*.

The two exceptions to this general, broad competence to interpret and apply treaties is a provision determining the competence of federal judges in cases regarding treaties between the Union and a foreign state or organization, and another one referring to international crimes, but only to the extent that their execution has begun in Brazil, and the result has or should have taken place abroad.[110] International Con-

106 *See* for instance Supreme Federal Court, *Habeas Corpus 73.044/SP*, judgment of September 20, 1996; Superior Court of Justice, *Habeas Corpus Appeal (Recurso em Habeas Corpus) 19.766/PR*, judgment of October 17, 2006.

107 *See* for instance Superior Court of Justice, *Habeas Corpus Appeal (Recurso em Habeas Corpus) 17.115/PR*, judgment of September 1, 2005.

108 Federal Supreme Court, *Extraordinary Appeal (Recurso Extraordinário) 466.343-1/SP*, opinion by Minister Gilmar Mendes of November 22, 2006.

109 Regarding the Supreme Federal Court, the relevant provision is the following: "*Article 102.* The Supreme Federal Court is responsible, essentially, for safeguarding the Constitution, and it is within its competence: III – to judge, on extraordinary appeal, cases decided in a sole or last instance, when the decision appealed: […] b. declares a treaty or a federal law unconstitutional; […]". With regard to the Superior Court of Justice: "*Article 105***.** The Superior Court of Justice has the competence to: […] III – judge, on special appeal, the cases decided, in a sole or last instance. by the Federal Regional Courts or by the courts of the states, of the Federal District and the Territories, when the decision appealed: […] b. considers valid a law or act of a local government contested in the light of a federal law; […]". To quickly differentiate between the two Courts: the Superior Court of Justice is in charge of ensuring the uniform application of federal law, whereas the Supreme Federal Court is in charge of ensuring the uniform application of the Constitution. Both Courts are seated in Brasília, the capital of the country, and the judges of both courts (33 for the Superior Court, 11 for the Supreme Court) enjoy the status and title of Ministers.

110 "*Article 109***.** The federal judges have the competence to institute legal proceeding and trial of: […] II – cases between a foreign state or international organization and a municipality or a person domiciled or residing in the country; III – cases based on a treaty or a contract

ventions have been used to reinforce the latter hypothesis with respect to making the crime "international",[111] as in cases in which the Convention on the Rights of the Child (CRC) has been invoked to reinforce the shift of competence from the state to the federal judiciary over international abduction of children.[112] But even when the crime is not fully "international" in its execution, the sole fact that it is proscribed by an international treaty has been sufficient to shift the competence to the federal judiciary. This has happened in a case of breach of secrecy of communications in a case involving child pornography. Because the propagation of child pornography is forbidden by the CRC, the competence for analyzing the case became federal.[113] The Superior Court of Justice, however, understood that, if the crime of child pornography is committed only between Brazilians and in the Brazilian territory, the state judiciary is competent to analyze the criminal charges.[114]

Moreover, crimes proscribed by international treaties have been deemed to fall under the competence of the state-level judiciary in at least one occasion. In this case, a child was tortured by a member of the military police (which is a state-level institution in Brazil) and, even though the decision highlighted several international instruments that reprehended such act, including the CRC, the Convention Against Torture, the Pact of San José and others, the competence was still the state judiciary's, at least as opposed to the military judiciary. The court never considered the issue of conflict of competence with the federal judiciary, but only with the specialized military judiciary, and decided in favor of the "general", non-specialized judge. The holding indicates that the violation of human rights treaties has the power to pierce through at least some types of immunities or "forum privileges" in Brazil. The fact that the military policeman was a state servant is what attracted jurisdiction to the state courts, and it is unclear whether the jurisdiction would be federal in different circumstances.[115] However, considering the previous case mentioned, in which the proscription of child pornography in the CRC was not sufficient for the Superior Court to shift competence to the federal judiciary, it is unlikely that in ordinary circumstances the case would fall under federal jurisdiction.

Another case, regarding the trafficking of human organs, sheds light on this question. In the case, the court was explicit in affirming that the federal jurisdiction to consider the case only arose from the fact that the crime, initiated in Brazil, would

between the Union and a foreign State or international organization; […] V – crimes covered by an international treaty or convention, when, the indirect administration of the cases within the prosecution having started in the country, the result has taken place or should have taken place abroad, or conversely; […]"

111 For a collection of the Treaties signed by Brazil in criminal law, *see* Denise de Souza and Jacob Dolinger, Direito Internacional Penal 7 (Renovar, 2006).

112 Superior Court of Justice, *Habeas Corpus Appeal (Recurso em Habeas Corpus) 6.322/PB*, judgment of October 21, 1997; Federal Court of Appeals of the Fifth Region, *Criminal Appeal (Apelação Criminal) 2002.05.00.020141-7*, judgment of October 6, 2005; Federal Court of Appeals of the Fifth Region, *Criminal Appeal (Apelação Criminal) 95.05.03859-3*, judgment of November 7, 1996; Federal Court of Appeals of the Fifth Region, *Habeas Corpus 99.05.41269-7*, judgment of March 22, 2001.

113 Federal Court of Appeals of the Third Region, *Criminal Appeal (Recurso Criminal) 2003.61.81.000927-6/SP*, judgment of November 30, 2004.

114 Superior Court of Justice, *Conflict of Competences (Conflito de Competência) 57.411/RJ.*

115 Federal Supreme Court, *Habeas Corpus 70389/SP,* judgment of June 23, 1994. For a commentary to this case, *see* Flávia Piovesan, Direitos Humanos e o Direito Constitucional Internacional 96-100 (2007).

be completed in South Africa, where the organs would be ultimately sold.[116] A decision regarding the competence over crimes against copyright (as proscribed by the 1886 Berne Convention on the Protection of Artistic and Literary Works) also said that crimes perpetrated in Brazil by Brazilians fell under the jurisdiction of the state-level judiciary, regardless of their being proscribed by an international treaty.[117]

Furthermore, this rule has been interpreted to also include the reverse situation, that is, cases in which the execution of the crime has begun abroad, but the result of which has taken place in Brazil (even if not the ultimate result). In a case regarding the international traffic of turtles that had been brought from Paraguay and were kept in Brazil, the Federal Court of Appeals of the Fourth Region has determined that, by virtue of Article 109, V, of the Constitution and of an international treaty on the conservation of aquatic wildlife, the federal judiciary had the competence to analyze the criminal charges brought against the accused who kept 68 Paraguayan turtles in his home.[118]

A very interesting and recent feature of the Brazilian judicial system came along with the Constitutional Amendment 45 of 2004. One of the new provisions inserted in the Constitution by this amendment determines that, in crimes which constitute serious violations of international human rights obligations, the competence can be shifted from the state to the federal judiciary. This is provided for in paragraph 5 to Article 109 of the Brazilian Constitution.[119]

In the first case decided with regard to this newly created tool, the Superior Court of Justice determined the test for determining this shift of competence. The case involved the assassination of Sister Dorothy Stang, a human rights defender in Pará, a state in the northern part of Brazil. The assassination of "Sister Dorothy", as she was known, caused immense public outcry, and hence this was a very high profile case.

The Superior Court, upon analyzing the request, decided that, although the shift can be requested by the Attorney-General, it is not automatically granted, and the competence will only be shifted if the state courts are unable or unwilling to address the case appropriately. It said that, if anything, the shift of competence to the federal judiciary might create obstacles for the criminal process and delay the resolution of the case, which would go against the very purposes for which this tool was created (namely, to combat impunity for human rights violations).

This creates a sort of subsidiarity of the federal judiciary with regard to the state courts, a subsidiarity which reflects the general subsidiarity of the federal level with regards to the state level in Brazilian federalism. In addition to the principle of subsidiarity, the Superior Court also said that a proportionality analysis was required in

116 Superior Court of Justice, *Habeas Corpus 34.614/PE.*

117 Federal Court of Appeals of the Fourth Region, *Criminal Appeal (Apelação Criminal) 2005.04.01.023869-2/PR.*

118 Federal Court of Appeals of the Fourth Region, *Criminal Appeal (Apelação Criminal) 2000.70.02.003077-2*, judgment of August 21, 2002.

119 A free translation of the provision reads: "Paragraph 5. In cases of serious violation of human rights, the Attorney-General of the Republic, aiming at securing the fulfillment of international obligations deriving from international human rights treaties to which Brazil is a party, can bring, before the Superior Court of Justice, in any phase of the investigation or procedure, a request to shift the competence to the Federal Judiciary." In the original: "*§ 5º Nas hipóteses de grave violação de direitos humanos, o Procurador-Geral da República, com a finalidade de assegurar o cumprimento de obrigações decorrentes de tratados internacionais de direitos humanos dos quais o Brasil seja parte, poderá suscitar, perante o Superior Tribunal de Justiça, em qualquer fase do inquérito ou processo, incidente de deslocamento de competência para a Justiça Federal.*"

order to determine whether competence should be shifted. The goal to be pursued by the infringement upon the autonomy of the federated unit was the prevention of the risk of breach of an international human rights obligation by Brazil as a result of the inactivity, negligence unwillingness or lack of capacity of the federated state in addressing the situation. The shift of competence was to be ordered only if it was proven that these conditions were fulfilled, and in the case of Sister Dorothy's assassination such threshold was not met.[120]

Generally, thus, any court is entitled to interpret treaties, to the extent that they are deemed to be federal law in Brazil. There are some exceptions to this rule that draw jurisdiction directly to federal and superior courts, but one would expect that the use of international treaty law would be pervasive in Brazil. In the next section we try to assert the validity of this claim.

b)The Different Uses of Treaties by the Brazilian Judiciary

More often than not, the Brazilian case-law with regard to treaties does not directly apply them, that is, there are relatively few disputes involving the interpretation or application of treaty provisions as the main legal basis for resolving disputes. What usually happens is that treaties are used as a means to give meaning to rules of municipal law, or simply to strengthen the normative appeal of an argument, even if it is only by the symbolic value of the international norm invoked.

The invocation and use of the United Nations Charter and the Universal Declaration of Human Rights (UDHR) are particularly interesting examples of the latter case. For example, in a case deciding on the possibility of forcing a Jehovah's Witness to receive a blood transfusion, an argument was made on the importance of giving precedence to the right to life over freedom of religion, using as a framework of analysis the "general principles of ethics and law" present in the UN Charter. The judge then borrowed "ethical commandments" from a document that was hardly applicable to the case at hand as a means to give further authority to his universalist argument that clashed with the relativist interests of the Jehovah's Witness.[121] Another case in which the UN Charter was mentioned was as a means to give meaning to parental duties in educating their children to respect human rights and the principle of the UN Charter.[122] The UN Charter was also used in conjunction with the UDHR in one case, both documents being analyzed jointly so as to affirm the existence of an international principle of human rights protection in a case involving the import of beef from Europe after the Chernobyl accident in the 1980s.[123]

The Universal Declaration of Human Rights – although not a formally binding instrument – has been used as an extra argument by a Court in stating that essential

120 Superior Court of Justice, *Request to Shift Competence (Incidente de Deslocamento de Competência) 1/PA*, judgment of October 10, 2005.
121 State Court of Appeals of Rio Grande do Sul, *Civil Appeal (Apelação Cível) 595000373*, judgment of March 28, 1995.
122 State Court of Appeals of Santa Catarina, *Civil Appeal (Apelação Cível) 2005.012735-6*, judgment of July 15, 2005.
123 Federal Court of Appeals of the Fourth Region, *Appeal en banc in the Civil Appeal (Embargos Infringentes na Apelação Cível) 90.04.09456-3/RS*, judgment of October 17, 1990.

utility services, such as the provision of water, could not be suspended in case of non-payment, precisely because of their essential character for the realization of human rights and human dignity as protected by the Declaration.[124] The UDHR has also been invoked as the basis for a "principle of humanity" with regard to the treatment of persons deprived of liberty, particularly mental health patients.[125] Another case involves the use of the Universal Declaration as stating a general ethics of human rights protection so as to uphold the right of a transsexual to change name (due to the secrecy of the case as to the involved parties, it is not possible to know the gender of the appellant).[126] Another broad reference to the UDHR was in the sense of saying that the Brazilian constitutional system was inspired by the rules of the Universal Declaration with regard to the protection of fundamental rights and freedoms.[127]

The UDHR has not been used only in this broad fashion. For example, it has been invoked to guarantee the access to medical treatment provided by the state, in light of the right to life protected by the UDHR.[128] Other uses include: to reinforce the right to association and the formation of labor unions;[129] to guarantee the right to housing against eviction;[130] to guarantee the right of access to justice;[131] to have access to independent and impartial courts in the determination of a person's rights and obligations;[132] to protect the right to privacy in its balance with the right to freedom of expression;[133] or to guarantee the secrecy of mail communications.[134]

Another broad use of an international human rights instrument was done by Superior Court of Justice with regards to the American Convention on Human Rights. The Superior Court of Justice used this instrument, and the principle of equality protected by it, as a means to reject a challenge to the participation of a witness in a criminal proceeding based on the sole fact of the witness's homosexuality. Upon proclaiming the principle of equality, the Superior Court of Justice affirmed that no discrimination on the basis of sexual orientation is permissible for the purposes of participating in criminal proceedings as witnesses, and that sexual orientation did not imply a favorable or unfavorable character judgment.[135]

124 State Court of Appeals of Rio de Janeiro, *Interlocutory Appeal (Agravo de Instrumento) 2001.002.11382*, judgment of May 9, 2002.

125 State Court of Appeals of Rio de Janeiro, *Criminal Appeal (Apelação Criminal) 1995.050.00066*, judgment of June 27, 1995.

126 State Court of Appeals of Rio Grande do Sul, *Civil Appeal (Apelação Cível) 70013909874*, judgment of April 5, 2006.

127 Federal Court of Appeals of the Third Region, *Habeas Corpus 94.03.024755-0, judgment of June 24, 1997* (particularly referring to the right to honor and privacy).

128 State Court of Appeals of Rio Grande do Sul, *Interlocutory Appeal (Agravo) 70010356889*, judgment of December 23, 2004.

129 State Court of Appeals of Rio Grande do Sul, *Civil Appeal (Apelação Cível) 595126368*, judgment of November 8, 1995.

130 Federal Supreme Court, *Extraordinary Appeal (Recurso Extraordinário) 407688/SP*, judgment of February 8, 2006.

131 Federal Supreme Court, *Internal Interlocutory Appeal to the Interlocutory Appeal (Agravo Regimental no Agravo de Instrumento) 468178/RJ*, judgment of December 13, 2005; State Court of Appeals of Rio Grande do Sul, *Direct Constitutionality Challenge (Ação Direta de Inconstitucionalidade) 70006053474*, judgment of December 39, 2003 (invoking norms of the UDHR, American and European Convention on Human Rights and International Covenant on Civil and Political Rights as statements of the broader right of access to courts); and State Court of Appeals of Rio Grande do Sul, *Appeal in the Narrow Sense (Recurso em Sentido Estrito) 70004128021*, judgment of May 22, 2005.

132 Superior Court of Justice, *Declaratory Request in Representation (Embargos Declaratórios na Representação) 332/TO*, judgment of September 21, 2005 (dealing with criminal charges against a judge of an appeals court).

133 State Court of Appeals of Rio Grande do Sul, *Civil Appeal (Apelação Cível) 70004905667,* judgment of November 20, 2002 (citing provisions of the UDHR, Declaration on the Rights of Man and Citizen of 1789, American and European Conventions on Human Rights).

134 Federal Court of Appeals of the Third Region, *Criminal Appeal (Apelação Criminal) 2000.61.81.007694-0*, judgment of October 2, 2001.

135 Superior Court of Justice, *Special Appeal (Recurso Especial) 154.857/DF*, judgment of May 26, 1998. On a brief note on the merits of the case, it is surprising and disappointing that this case was decided only ten years ago, because it also means that only ten years ago people

The Supreme Court has also invoked the provisions of a treaty conferring human rights (the UN Convention on the Elimination of All Forms of Discrimination and Violence Against Women) to inquire into the constitutionality of a legal provision restricting the right to maternity leaves (more specifically, the right to full payment during maternity leaves). The challenged norm was an administrative norm (*Portaria*) by the Ministry of Social Security (responsible for the payment of maternity leave benefits) restricting the payment of these benefits to the ceiling of pension payments for retired individuals, leaving the rest of the salary to be paid by the employer. This eventually became a project for a Constitutional Amendment (as the matter of maternity leave is a social right protected by the Constitution), and the Supreme Court said that such provision would lead employers to prefer male employees, as they would never be on maternity leaves for which there would be financial charges to the employer. In the end, the amendment was declared partly unconstitutional, and its interpretation was narrowed by this decision so as to guarantee its constitutionality.[136]

Treaties have been used to give meaning to rules of municipal law, or even to extend the meaning of these rules, in several cases dealing with several areas of law. For instance, in one case on consumer protection, the court took into consideration the fact that the consumer was a child and interpreted the Consumer Code in conjunction with provisions of the Convention on the Rights of the Child, so as to deem abusive (and thus invalid) clauses in a health insurance contract that restricted the access to medical treatment. Because the Convention on the Rights of the Child protects the right of every child to health care, an appropriate application of the Consumer Code in light of these principles required that the right to health be guaranteed.[137] The CRC was also invoked in cases regarding domestic[138] and inter-country adoption proceedings,[139] as well as in a case involving the rights of juvenile defendants in criminal proceedings.[140] Another case on children's rights invoked the Hague Convention on the Civil Aspects of International Abduction of Children as a general landmark that must be taken into account by judges in all cases involving the international abduction of children, and that alternative arguments deviating from the provisions of this Convention were impermissible.[141]

There is also a rich array of cases in which rules of federal legislation have been contrasted with international treaties, to confirm their validity, to rectify or expand their meaning, or even to modify or nullify these rules. This has happened particularly

were still raising such inadmissible discriminatory assumptions over the moral credibility of people based on their sexual orientation. It is praiseworthy that the Superior Court of Justice has taken a strong stand against such prejudice.

136 Federal Supreme Court, *Provisional Measure in Direct Constitutionality Challenge (Medida Cautelar na Ação Direta de Inconstitucionalidade) 939*, judgment of April 29, 1999.

137 State Court of Appeals of Rio de Janeiro, *Civil Appeal (Apelação Cível) 2005.001.33142*, judgment of March 14, 2006.

138 State Court of Appeals of Rio de Janeiro, *Civil Appeal (Apelação Cível) 2001.001.04693*, judgment of September 25, 2001.

139 Federal Court of Appeals of the Fifth Region, *Criminal Appeal (Apelação Criminal) 2000.82.00.005746-9*, judgment of April 14, 2005. The Hague Convention of May 29 1993 had a strong effect on the new inter-country adoption practices in Brazil, since it provides an effective co-operation system followed by the Brazilian administrative and court system. *See* Claudia Lima Marques, Das Subsidiaritätsprinzip in der Neuordnung des internationalen Adoptionsrechts - Eine Analyse des Haager Adoptionsübereinkommens von 1993 im Hinblick auf das deutsche und das brasilianische Recht, 331 (1997). *See also* Superior Court of Justice, *Special Appeal (Recurso Especial) 196.406*, judgment of October 11, 1999.

140 State Court of Appeals of Rio Grande do Sul, *Civil Appeal (Apelação Cível) 70009890310*, judgment of August 18, 2005.

141 Superior Court of Justice, *Declaratory Request in the Special Appeal (Embargos Declaratórios no Recurso Especial) 900.262/RJ,* judgment of May 2, 2007.

with regard to criminal legislation (both substantive and procedural criminal law), in contrast with international human rights instruments. One judgment stresses how the Criminal Procedure Code has been changed to comply with the American Convention on Human Rights.[142]

In an interesting case of modification of the interpretation of criminal law by international treaties, the Superior Court of Justice analyzed the competence for judging the crime of genocide. A massacre perpetrated against an indigenous group (in a dispute against gold-extracting companies who wanted to explore indigenous lands) was being prosecuted before federal courts, and there was an issue as to whether the case should be judged by a single judge or by the jury (which, in Brazilian law, is the only competent organ to judge, in first instance, intentional crimes against life, including homicide). The Superior Court of Justice, in analyzing the provisions of the Genocide Convention and the implementing Brazilian legislation, came to the conclusion that Genocide as such was not a crime that fell under the competence of a jury trial, because it was not solely a crime against life, but more importantly a crime against "the common existence of the group".[143] The Convention Against Torture has also been used to help determine the reach of a criminal provision, with regard to its classification.[144]

International human rights treaties have also been used to determine the limits of the application of criminal law. For instance, there are several decisions drawing inspiration from provisions of the American Convention on Human Rights. For instance, cases regarding the unnecessary length of judicial (criminal) proceedings have jointly interpreted the constitutional right to a reasonable duration of judicial proceedings with the equivalent right in the American Convention, in favor of the accused.[145] The same has happened with regard to the duration of provisional arrests;[146] the right to appeal;[147] the right no to be forced to produce evidence against oneself;[148] the non-retroactivity of criminal law;[149] the presumption of innocence;[150] or the recognition of the same rights to both national and foreign individuals accused of crimes.[151]

142 State Court of Appeals of Rio de Janeiro, *Habeas Corpus 2004.059.06387*, judgment of December 28, 2004.

143 Superior Court of Justice, *Special Appeal (Recurso Especial) 222.653/RR*, judgment of September 12, 2000.

144 State Court of Appeals of Rio de Janeiro, *Criminal Appeal (Apelação Criminal) 2004.050.01372*, judgment of June 3, 2004.

145 Federal Supreme Court, *Habeas Corpus 80379/SP*, judgment of December 18, 2000; Superior Court of Justice, *Habeas Corpus 51.177/SP*, judgment of May 16, 2006; Superior Court of Justice, *Habeas Corpus 43.153/BA*, judgment of December 13, 2005; Superior Court of Justice, *Habeas Corpus 19.473/SP*, judgment of March 26, 2002; State Court of Appeals of Rio de Janeiro, *Habeas Corpus 1998.059.00385,* judgment of June 2, 1998; Federal Court of Appeals of the Third Region, *Habeas Corpus 2000.03.00.020465-0/SP*, judgment of August 8, 2000.

146 Superior Court of Justice, *Habeas Corpus 50.455/PA*, judgment of May 2, 2006; State Court of Appeals of Rio Grande do Sul, *Habeas Corpus 699046777,* judgment of March 24, 1999; State Court of Appeals of Rio Grande do Sul, *Habeas Corpus 699020426*, judgment of April 28, 1999.

147 Superior Court of Justice, *Special Appeal (Recurso Especial) 622.321/SP*, judgment of June 6, 2006.

148 Superior Court of Justice, *Appeal on writ of mandamus (Recurso em Mandado de Segurança) 18.017/SP*, judgment of February 9, 2006 (in the specific context of administrative proceedings against a public servant).

149 Superior Court of Justice, *Special Appeal (Recurso Especial) 499.918/SC*, judgment of August 5, 2003; Federal Court of Appeals of the Third Region, *Conflict of Competences (Conflito de Competência) 2002.03.00.045180-6/SP*, judgment of March 19, 2003.

150 Federal Supreme Court, *Habeas Corpus Appeal (Recurso em Habeas Corpus) 75917/RS*, judgment of April 28, 1998.

151 Federal Court of Appeals of the Third Region, *Criminal Appeal (Apelação Criminal) 97.03.071969-4/SP*, judgment of May 18, 2005. See more about the Brazilian nationality in REZEK, José Francisco, *A nacionalidade à luz da obra de Pontes de Miranda*, in Revista Forense (Rio de Janeiro), julho-agosto-setembro 1978, vol. 263, ano 74, p. 15ss. , about the special treatement to portuguese nationals in Brazil, see REZEK, José Francisco, Aspectos elementares do Estatuto da Igualdade, in *Boletim do Ministério da Justiça* (Portugal), n. 277, junho de 1978, p. 5 a 12 and in general about nationality in international law,see REZEK, José Francisco, Le droit international de la nationalité, in *Recueil des Cours*, tome 198, 1986-III, Martinus Nijhoff, Dordrecht, 1987, p. 341ss.

An international treaty has been used to restrict the application of criminal law in at least two occasions. In these cases, practically identical, a criminal provision of the "Foreigners Statute" ("*Estatuto do Estrangeiro*"), the Brazilian law which regulates the rights and duties of foreigners residing in Brazil, was not applied by the judiciary in favor of a value contained in a human rights instrument (as well as the Constitution). A foreigner charged with the commission of a crime was pending expulsion from the country; however, the fact that he had a Brazilian child with a Brazilian wife compelled the judge, in respect for the best interests of the child (protected by the UN Convention on the Rights of the Child), not to apply the criminal provision determining the expulsion of the father from the country.[152]

It also happens that sometimes the contrasting between treaty provisions and municipal law leans towards giving greater force to municipal law, for a number of reasons, including the statute's status as "special law" as opposed to the "general law" status of most human rights treaties. A general balancing exercise in this sense has been done in a case on the right to appeal in criminal proceedings. According to the appellant in the case, the American Convention on Human Rights protected the rights of the accused of a crime to appeal against his conviction in liberty. The Court, however, said that this rule was to be interpreted in conjunction with the relevant rules of criminal law and the Constitution, ultimately denying the right to appeal in liberty.[153] One case from a state court, however, has come to the point of saying that the relevant provision of the Criminal Procedure Code had been revoked by the American Convention, and that thus the accused had the right to appeal in liberty,[154] even though this is not the position of higher courts, nor is it a firm position within state courts.[155]

The same reasoning, of generally checking the compatibility between criminal procedural law and human rights obligations, has been applied with regard to the right of foreigners to be assisted by interpreters. The case dealt with a foreigner arrested for drug trafficking, and she challenged the validity of the whole procedure because she was not assisted by an interpreter during her interrogation by the police. The Court, however, upon looking at the text of the American Convention, came to the conclusion that the right to an interpreter only existed with regard to the judicial phase of the criminal prosecution. As the interrogation by the police is a separate, prior moment to the judicial phase, the provision of the Convention had not been violated.[156]

Other cases have gone beyond this general assertion of the need for a "compatibility check" between the American Convention and criminal legislation. For instance, several judgments have contrasted the provisions of the American Convention on ri-

152 Superior Court of Justice, *Habeas Corpus 38.946/DF*, judgment of May 11, 2005; and Superior Court of Justice, *Habeas Corpus 31.449/DF*, judgment of May 12, 2004.

153 Superior Court of Justice, *Habeas Corpus 39.335/RJ*, judgment of March 15, 2005. *See* also Superior Court of Justice, *Special Appeal (Recurso Especial) 264.263/SP*, judgment of April 10, 2001; State Court of Appeals of the Federal District, *Habeas Corpus 19990020021538HBC*, judgment of July 30, 1999.

154 State Court of Appeals of the Federal District, *Habeas Corpus HBC722496*, judgment of May 30, 1996.

155 *See* for instance State Court of Appeals of Rio de Janeiro, *Appeal in the Narrow Sense (Recurso in Sentido Estrito) 2003.051.00461*, judgment of April 13, 2004.

156 Federal Court of Appeals of the Third Region, *Criminal Appeal (Apelação Criminal) 1999.03.99.064134-4/SP*, judgment of April 25, 2000.

ghts of the accused with the Brazilian Heinous Crimes Act (*Lei dos Crime Hediondos*). The American Convention was ratified in 1992, while the Heinous Crimes Act is of 1990. Therefore, considering the fact that treaties have the status of ordinary federal law, and that the American Convention became law after the municipal act, it would in principle revoke it, or at least some of its provisions. What the judiciary has said in a series of cases, however, is that this has not happened, because the Heinous Crimes Act is a "special law" with regard to the "general law" status of the American Convention, and thus continued to apply.[157]

In one case, nevertheless, a state court has taken a different view, by looking at the American Convention not as a law that would potentially clash with a federal statute, but as a declaration of ethic commandments of "qualified *ordre public*", and in this sense capable not of revoking the application of provisions in the Heinous Crimes Act, but of more generally interacting with them in the search of the just result in the case at hand.[158] In this sense, not only is the human rights instrument applied as a "narrative norm", but also, to borrow another expression from Erik Jayme, one can see a "dialogue of sources" taking place in the resolution of the instant case.[159]

Another interesting case explores the clash between the rights of the accused in criminal proceedings as guaranteed by international human rights law on the one hand, and the rights of the victims on the other. In this case, the accused challenged the validity of a judgment against him on the grounds that the victims requested his removal from the courtroom during the hearings. He alleged that this violated his right to defense, as guaranteed by the American Convention. The Court, however, analyzed the guarantees for the accused with respect to his right to defense, and said that this specific instance had not amounted to a curtailment of his right.[160]

Municipal criminal law provisions have also had their validity checked against provisions in international human rights treaties that did not deal with criminal law matters, or rights of the accused. In an interesting set of cases, Brazilian courts were faced with the clash between the right to freedom of expression of small, poor communities and statutes regulating the activity of radio broadcasting that criminalize the setting up of radio stations without prior governmental authorization. In all of these cases, courts have said that the open content of the right to freedom of expression as protected by these treaties allowed for governmental interference by means of regulation of a certain activity, and that this regulation was a proportional interference.[161] This reasoning is not far from the reasoning adopted by international human rights

157 *See* for instance Federal Supreme Court, *Habeas Corpus 83669/SP*, judgment of December 2, 2003; Superior Court of Justice, *Habeas Corpus 37.398/SP*, judgment of April 7, 2005; and Federal Court of Appeals of the Third Region, *Habeas Corpus 2005.03.00.063736-8/SP*, judgment of September 27, 2005.

158 State Court of Appeals of Rio Grande do Sul, *Criminal Appeal (Apelação Crime) 699406823*, judgment of August 18, 1999.

159 Erik Jayme, *Identité culturelle et intégration: le droit international privé postmoderne*, 251 Recueil des Cours 9 (1995).

160 State Court of Appeals of Rio Grande do Sul, *Criminal Appeal (Apelação Crime) 70003267614*, judgment of November 7, 2001€.

161 *See* for instance Federal Court of Appeals of the Fifth Region, *Criminal Appeal (Apelação Criminal) 4381/PE*, judgment of March 14, 2006; Federal Court of Appeals of the Fifth Region, *Appeal to writ of mandamus (Apelação em Mandado de Segurança) 87401/RN,* judgment of August 3, 2004; Federal Court of Appeals of the Third Region, *Habeas Corpus 2003.03.00.075227-6/SP*, judgment of May 3, 2004; and Federal Court of Appeals of the Third Region, *Habeas Corpus Appeal (Recurso em Habeas Corpus) 96.03.013212-8/SP*, judgment of April 28, 1998.

tribunals in analyzing cases involving freedom of expression, but this reasoning is also easily found in the very treaty provisions protecting this right.

There is one interesting case on the clash of international treaty obligations resolved by the Brazilian Supreme Court. In the case, the Court considered a request of extradition[162] from Paraguay against an individual sought for participation in public demonstrations that led to riots and the death of several individuals. However, because this was a political crime, Brazil gave prevalence to its human rights obligations under the American Convention, which forbids the extradition to a country where the individual's security is in danger for political reasons.[163]

There are also several cases in which the application of a treaty has been denied against federal law. In some of these cases, the argument was that of the specialty of federal law over treaty rules; in others, the international treaty rule has been disregarded in favor of public policy (*ordre public*) interests. An example of the latter is a case in which the application of the Vienna Convention on Consular Relations was denied in favor of application of specific criminal law charged with *ordre public* values. To be more precise, the Convention was not denied validity, but its scope was restricted, according to its own terms, so as to exclude activities not related to the professional attributions of consular staff from immunity. In the case, a (honorary) consul of Israel was accused of crimes against children (child pornography), and, by virtue of the seriousness of the crime, his preventive arrest was ordered. He challenged such arrest based on the Vienna Convention on Consular relations, but the judge hardly considered the international treaty in depth, preferring to resolve the case by asserting the seriousness of the crime and even its international proscription in international instruments.[164] Had the judge chosen to resolve the issue by focusing on the international legal argument, he probably would have arrived at the same result (that is, of denying *habeas corpus* to the honorary consul, as honorary consuls are not protected by the Vienna Convention). By giving preference to the domestic law argument, this case is an example of a more generalized trend in the Brazilian judiciary, which can probably be explained on grounds of sovereignty.

Another similar case (on the criminal liability of consular staff) was decided with direct application of international law. In the case, immunity from criminal prosecution to a vice-consul was denied on the basis of direct application of the Vienna Convention so as to lift the immunity. The argument of municipal criminal law was only briefly mentioned, and not invoking reasons of public policy.[165] Thus, there are exceptions to the sovereigntist approach of the Brazilian judiciary, albeit, we suggest, there is still a slight preference towards giving preference to the application of national rules in most instances (except for human rights law).

162 About extradition in Brazil, *see* Florisbal de Souza Del'Olmo, A Extradição no Alvorecer do Século XXI (2006); Joelíria V.. Castro, Extradição – Brasil e MERCOSUL (Juruá, 2006); Appio Claudio Acquarone, Tratados de Extradição (Instituto Rio Branco, 2003); Carolina C. G. Lisboa, A Relação Extradicional no Direito Brasileiro (Del Rey, 2001) and Artur de Brito Gueiros Souza, As Novas Tendências do Direito Extradicional (1998).

163 Federal Supreme Court, *Extradition (Extradição) 794/PG – Paraguay*, judgment of December 17, 2001.

164 Federal Supreme Court, *Habeas Corpus 81158/RJ*, judgment of May 14, 2002.

165 Federal Court of Appeals of the First Region, *Habeas Corpus 89.01.01990-6/DF*, judgment of November 10, 1989.

There are other precedents which apply the Vienna Convention on Consular Relations directly to the case. One of these cases does so, however, as a means to support a sovereignty-based argument, more specifically, the refusal of Brazilian authorities in acknowledging a honorary consul. As these are not considered to be consular staff for the purposes of full protection by the Vienna Convention, sovereignty plays a larger role with respect to accepting or not honorary consuls as such. The Brazilian judge used the Vienna Convention to support the sovereignty argument and affirm the decision of the Brazilian authority.[166] This same instrument was also invoked in another case also aimed at protecting a certain aspect of sovereignty in international relations, more specifically, the power of consular staff to certify the authenticity and validity of documents produced by the national authorities of the country where the staff is stationed.[167]

International treaty rules have also been invoked to fill in apparent normative and value gaps in the Brazilian legal order. This has happened with cases challenging the constitutionality of affirmative action programs recently implemented in Brazilian universities for racial minorities and people on worse economic conditions. Specifically with regard to racial quotas, the Federal Court of Appeals of the Fourth Region used the Convention on the Elimination of all Forms of Racial Discrimination, as well as the findings and analysis of the Committee on Racial Discrimination created by the Convention, as a means to give credibility at the constitutional level to the affirmative action programs.[168]

A human rights instrument has also been used as a means to determine the rights of Afro-Brazilian communities (known as *Quilombolas*). These communities, formed originally by slaves who fled slavery and took refuge in small rural communities with their peers, have been recognized under Brazilian law as indigenous communities. In determining their rights to property of land, federal courts have used international instruments, particularly the ILO Convention (No. 169) on Indigenous and Tribal Peoples. These international norms should be observed because of the principle that guarantees the prevalence of human rights in international relations, and idea which must be necessarily reflected in municipal constitutional orders. Further, the Convention provides for the duty of consultation of indigenous communities in matters that affect them, and, even though no internal norm to the same effect was mentioned in the decision, this right is still to be guaranteed.[169]

An interesting hard case (and a high profile one as well, for that matter) in which international treaties have been used extensively is the case of publication of anti-Semitist literature. The Supreme Federal Court analyzed a challenge to the application of criminal laws punishing racism to the matter, as well as the statute of limitations to the crime (racism in Brazil is a crime to which the statute of limitations does not apply). According to the appellant, a rule forbidding racist speech could not be applicable to anti-Semitist literature, as being Jewish did not constitute a "race", and therefore the statute of limitations must have necessarily passed with regards to any

166 Federal Supreme Court, *Writ of Mandamus (Mandado de Segurança) 6.713/DF*, judgment of August 7, 2000.
167 Federal Supreme Court, *Contested Foreign Judgment (Sentença Estrangeira Contestada) 4738/EU*, judgment of November 24, 1994.
168 Federal Court of Appeals of the Fourth Circuit, *Appeal to writ of mandamus (Apelação em Mandado de Segurança) 2005.70.00.008336-7/PR.*
169 Federal Court of Appeals of the Fourth Circuit, *Interlocutory Appeal (Agravo de Instrumento) 2008.04.00.010160-5/PR.*

crime he might have committed. The Supreme Court rebutted this argument based on the UNESCO Declaration on the Human Genome and Human Rights, which affirms that indeed there is no such thing as a separate "race" of human beings, but that races have been created for social and political reasons, one of these being the "Jewish race". After listing numerous international treaties that forbid racial discrimination (including the Genocide Convention, the Convention on the Elimination of All Forms of Racial Discrimination, the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Rome Statute of the International Criminal Court), the Supreme Court decided that the crime of racism is not subject to a statute of limitations, and therefore should be prosecuted.[170]

The issue of statute of limitations for certain crimes has also come up in a case concerning moral damages sought by the family of a person who "disappeared" during the Brazilian military dictatorship (1964-1988). In this case, the Court used the idea of non-application of status of limitations for heinous crimes such as torture and invoked the provisions of the UN Convention Against Torture, the Inter-American Convention Against Torture and the American Convention of Human Rights to reinforce the provisions of federal law. The Court affirmed that, in terms of serious human rights violations, the provisions on statute of limitations for civil damages of the Civil Code cannot be applied, due to the special character of such crimes, as confirmed by their provision in international instruments.[171]

Another remarkable case involves the use of genetically modified organisms, more specifically the planting of genetically modified soya beans.[172] The Brazilian judge had to deal with interests that, albeit philosophically and ethically well-founded, lacked clear legal grounds. In order to take the side of the environmental movement, who argued against the use of GMO seeds on the basis of the precautionary principle, the federal judges in the case looked at how international rules complemented and expanded the open-ended constitutional rules on environmental protection. To this end, reference was made not only to the declaratory importance of soft law instruments such as the Rio Declaration on the Environment of 1992, but also, and more decisively, to the Convention on Biological Diversity of 1992 (CBD), to which Brazil is a party. The judge initially said that the precautionary principle was to be derived precisely from the international commitment of Brazil to the CBD, but then went on to say that, even if this Convention could be excluded from consideration (which it was not), the Brazilian Constitution already offered subsidies for finding the precautionary principle as part of the Brazilian legal order.

Further, international (administrative) regulations by the FAO and OECD were used to evaluate the Brazilian standards in assessing the risks of GMO crop seeds. This is an interesting development, as it points out to a certain influence of "global administrative law"[173] in Brazil, a country which is usually considered to be rather

170 Federal Supreme Court, *Habeas Corpus 82424/RS*, judgment of September 17, 2003.
171 Superior Court of Justice, *Special Appeal (Recurso Especial) 612.108/PR*, judgment of September 2, 2004.
172 Federal Court of Appeals of the First Region, *Civil Appeal (Apelação Cível) 171157*, judgment of June 28, 2004.
173 For a survey of global administrative law, and, more importantly, the importance of international organizations as global law-makers, *see* José E. Alvarez, International Organizations as Law-Makers (Oxford University Press, 2005).

closed off to international law. The findings of these technical international bodies were used as a basis of comparison for the Brazilian standards, and thus as a means to give legitimacy to the technical aspects of the judgment.

Another case in which the technical findings of international bodies was used to interpret Brazilian law also involves environmental protection, this time the Vienna Convention on the Protection of the Ozone Layer (1985) and the Montreal Protocol (1987) thereto. The court said that administrative regulations issued by Brazilian authorities should be read in conformity with international obligations in terms of environmental protection.[174]

However, courts have refused to apply rules of international human rights treaties when these rules are not self-executing. For instance, in a case regarding the application of the International Covenant on Economic, Social and Cultural Rights, the judge refused to give effect to any of the rules of the Covenant based on the fact that they do not impose immediately enforceable obligations, but rather merely the duty of the State to progressively adopt measures aimed at realizing the rights protected thereby.[175]

It is interesting to notice the seeming preference for invoking international legal rules in "hard cases", that is, cases for which there are no clear-cut solutions either in national or international law. It seems that judges have a preference for these rules not only because they lend some sort of rhetorical authority to validate judges' arguments, but also because using international law seems to point towards a more sophisticated argument, which is a welcomed addition in the resolution of a hard case.

The judgment on anti-Semitic literature is one of the few cases that used foreign and international case-law in the application of international treaties, as the Brazilian judge does not often cite precedents for the application of the law. Considering that the use of international treaty rules is more often a means to support an argument than a determining issue, it is understandable that detailed interpretations of international instruments by international courts are not quoted in judgments by Brazilian courts. If Brazilian Courts hardly interpret the provisions of treaties themselves, there is hardly a reason why they should find the need of using someone else's interpretation.

The fact that treaties are used only for "argumentative support", and not really as decisive arguments in the decisions, coupled with the fact that Brazil is not a party to the VCLT, explains why the criteria of interpretation of articles 31 and 32 of the VCLT are not mentioned in Brazilian case law. Further, as treaties are hardly interpreted, it is difficult to know whether Brazilian judges use similar or different criteria in the few instances where they do interpret treaties. What arises from reading the relevant case law is that the Brazilian judge interprets treaty provisions in accordance with the ordinary meaning of the words contained in the provisions, which is one of the criteria set

174 Federal Court of Appeals of the Third Region, *Appeal to writ of mandamus (Apelação em Mandado de Segurança) 2000.61.00.010798-1/SP,* judgment of January 31, 2007.

175 State Court of Appeals of Rio Grande do Sul, *Civil Appeal (Apelação Cível) 70017102161*, judgment of October 26, 2006 (referring to the rights to water and housing).

forth by the VCLT. However, as this is a general canon of interpretation, one cannot assume that the Vienna Convention on the Law of Treaties has any real influence on the way treaties are applied by the Brazilian Judiciary.

c) The Brazilian Judiciary and Foreign / International Subjects

All the cases dealt with until this moment discussed the relationship between the Brazilian judiciary and natural persons, mostly nationals. The decisions regarding diplomatic and consular staff are an intermediary category, but they can still be regarded as addressing individuals. There are, however, multiple decisions in which the Brazilian judged is forced to consider the relationship with foreign or international legal persons, there included states and international organizations.

An interesting decision deals with the representativeness of a diplomatic mission with regard to their state of origin. The case dealt with a request for extradition made by Bulgaria, but, because the crime was punishable by death sentence in Bulgaria at the time, and Brazil does not allow for the extradition of people facing the death penalty. This was the issue in the broader case, but the specific issue of international law was whether a diplomatic mission had the power to fully represent the state in a promise that the person being extradited would not be subject to the death penalty (which was a condition for the extradition being granted). The Supreme Court said that the promise could be validly made by the head of the diplomatic mission of Bulgaria in Brazil at any time prior to the surrender of the accused.[176]

Cases dealing with states invariably deal with the topic of immunity of jurisdiction and enforcement. The jurisdictional immunity of foreign states is the topic of heated debates in the Brazilian judiciary. One paradigmatic decision states that "diplomatic privileges cannot be invoked, in labor law litigation, to validate the unjust enrichment of foreign states, to the unacceptable prejudice of workers resident in Brazil". The strong wording in this judgment is remarkable, and it crystallizes the idea that foreign states are not immune from prosecution with respect to their labor law obligations, particularly as jurisdictional immunity is, in customary international law, only relative.[177]

The same can be said with respect to tax duties, to a certain extent. While foreign states are exempt from paying general taxes, they are still liable to pay fees for public services and utilities, and there is no jurisdictional immunity from lawsuits in which the state tries to recover these monies.[178] The same reasoning applies to fees owed to the state over real estate transactions, which are deemed to fall outside of the concept of "tax".[179] However, courts have understood that the exemption from property taxes only applies when the foreign state owns the building, not extending to rented spaces (situation in which the property owner is liable to pay for the taxes).[180]

176 Federal Supreme Court, *Extradition (Extradição) 744/BU – Bulgaria,* judgment of December 1, 1999.

177 Federal Supreme Court, *Interlocutory Appeal to the Extraordinary Appeal (Agravo Regimental no Recurso Extraordinário) 222368/PE,* judgment of April 30, 2002. *See* also Superior Court of Justice, *Civil Appeal (Apelação Cível) 7/BA*, judgment of April 3, 1990.

178 Superior Court of Justice, *Ordinary Appeal (Recurso Ordinário) 30/RJ*, judgment of October 21, 2004.

179 Superior Court of Justice, *Ordinary Appeal (Recurso Ordinário) 6/RJ*, judgment of March 23, 1999.

180 State Court of Appeals of Santa Catarina, *Interlocutory Appeal (Agravo de Instrumento) 2002.019179-0*, judgment of November 11, 2002.

Even though the Brazilian judiciary does not always grant the immunity of jurisdiction, it fully recognizes the immunity of enforcement against foreign states.[181] This means that, in practice, even though there may be decisions ordering foreign states to perform certain obligations, these orders cannot be enforced. Except for voluntary compliance by foreign states with judgments rendered in Brazil, the end-result of litigation against a foreign state is the same as if immunity had been granted from the beginning of the jurisdictional phase. This recognition of foreign immunity against enforcement is not only in consonance with international customary law, but it is also a necessary step in the maintenance of harmonious foreign relations.

As to the decisions relating to international organizations, they reflect a lot of the same principles that apply to foreign states. For instance, international organizations are also not immune from jurisdiction over labor law disputes, at least if they do not set up their own internal labor law dispute resolution mechanism.[182] Another decision states that servants of international organizations, as well as those of foreign states, are dispensed from paying income taxes, but that this does not extend to people performing the duties of consultants to international organizations.[183]

But the most interesting case involving an international organization is a case concerning *Itaipu Binacional*, an international company created by the governments of Brazil and Paraguay to exploit the hydroelectric potential of the Paraná river, that makes part of the border between the two countries. The Itaipu power plant is one of the largest hydroelectric power plants in the world, and there was a dispute brought before Brazilian courts regarding compliance with internal administrative rules on environmental measures. What the Court said was that the Itaipu enterprise was to be considered an international entity, and as such could not be unilaterally subjected to Brazilian law, or Paraguayan law. As the company could not be compartimentalized into "Brazilian parts" and "Paraguayan parts", the rules to be applicable to the company could not be automatically the national rules of either country. The law applicable should be the product of negotiations between Brazil and Paraguay, because, not being reducible to a state entity, it could not be subjected to the rules governing the conduct of state bodies.[184] This represents a step forward in terms of moving past a strict sovereignty-based approach, but one has to bear in mind the special circumstance of the case that made such result much more probable, namely, the fact that the company was an international entity created by two governments.

181 Federal Supreme Court, *Internal Interlocutory Appeal to Original Civil Suit (Agravo Regimental na Ação Cível Originária) 634/SP,* judgment of September 25, 2002; and Federal Court of Appeals of the Third Region, *Ex Officio Request in Civil Appeal (Remessa Ex Officio em Apelação Cível) 96.03.095558-2/SP, judgment of August 30, 2006.*

182 Regional Labor Court of the Tenth Region, *Ordinary Appeal (Recurso Ordinário) 00067-2006-016-10-00-9*, judgment of October 4, 2006; and Regional Labor Court of the Tenth Region, *Ordinary Appeal (Recurso Ordinário) 00426-2005-004-10-00-7*, judgment of June 21, 2006.

183 Federal Court of Appeals of the First Region, *Civil Appeal (Apelação Cível) 2002.34.00.027370-4/DF, judgment of June 16, 2006.*

184 Federal Court of Appeals of the Fourth Region, *Civil Appeal (Apelação Cível) 2003.04.01.015255-7*, judgment of August 23, 2006.

d. Treaty-Based Remedies and the Enforcement of Treaty Rights by Private Parties

Considering that treaties become ordinary federal law once incorporated into the Brazilian order, it is to be expected that treaties in some instances confer rights directly upon private parties. This, of course, as long as the treaty's provisions are self-executing. A judgment by a federal court, for instance, has considered that the provisions of the Montevideo Treaty on regional economic integration were not self-executing, and as such could not serve to immediately create tax exemptions.[185]

This does not apply to all international economic law treaties, however, The provisions of the GATT, for example, are considered self-executing, and can confer rights upon private parties before Brazilian administrative authorities (who are responsible for authorizing the necessary papers for tax exemption).[186]

The cases on the rights of the accused discussed above are some examples of treaties conferring rights directly upon criminal defendants, but they have been applied not so much as conferring rights to private parties; rather, they have been used as general norms (of higher ethical value, arguably) against which federal criminal law should be checked.

But there are some other, instances in which people can seek the judiciary in cases of violation of treaty rights, and in which these treaties are applied directly. One such case involves the application by a sailor in a merchant ship sought against Brazilian authorities who would not allow him to disembark from the ship onto Brazilian soil for the lack of a visa. By directly applying the relevant ILO Convention (No. 108), the Brazilian judge said that he did not need a visa as long as he was the employee of a merchant ship anchored in Brazilian territorial waters.[187]

Another case is that of recognition of foreign educational credentials. For many year, Brazil was a party to the Regional Convention on the Recognition of Studies, Titles and Diplomas of Higher Education in Latin American and the Caribbean (*Convenção Regional sobre o reconhecimento de Estudos, Títulos e Diplomas de Ensino Superior na América Latina e no Caribe*), a Convention that has presently been denounced by Brazil. However, while this instrument was in force for Brazil, people who started attending academic institutions in the states parties to it have a direct right to a remedy before Brazilian Courts for the recognition of their educational credentials obtained abroad.[188]

The Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air also creates rights that are directly enforceable in Brazilian Courts. There are, however, generally more favorable provisions to consumers in the Brazilian Consumer Protection Code, and therefore the Consumer Code is used more often. One decision, however, considered the Warsaw Convention to be *lex specialis*

185 Federal Court of Appeals of the First Region, *Ex Officio Request in writ of mandamus (Remessa Ex Officio em Mandado de Segurança) 90.01.16972-4/BA*, judgment of April 29, 1991.

186 Federal Court of Appeals of the Second Region, *Appeal in writ of mandamus (Apelação em Mandado de Segurança) 96.02.17384-0/ES,* judgment of June 17, 1997; and Federal Court of Appeals of the Second Region, *Appeal in writ of mandamus (Apelação em Mandado de Segurança) 8902118720/RJ*, judgment of November 21, 1990.

187 Federal Court of Appeals of the Third Region, *Habeas Corpus Appeal in Crime of Lesser Offensive Potential (Recurso em Habeas Corpus de Crime de Menor Potencial Ofensivo) 2005.61.03.004388-7/SP*, judgment of 15/01/2008.

188 Federal Court of Appeals of the Third Region, *Interlocutory Appeal (Agravo de Instrumento) 2007.03.00.018185-0/MS*, judgment of 27/03/2008.

with regard to the Consumer Code in the determination of the amount of damages, and applied the rights conferred by it instead.[189] This case illustrates how treaties that confer rights directly upon individuals do not always create the most favorable scenario.

The domain *par excellence* in which treaties have been used to confer rights to individuals is intellectual property (IP). For instance, when the TRIPS (Trade-Related Aspects of Intellectual Property Rights) agreement was incorporated into Brazilian law (1994), the Brazilian statute on industrial property in force at the time was not fully compatible with the requirements of the TRIPS agreement (and was eventually replaced by another statute, in 1996). Prior to the enactment of this new statute, though, Brazilian courts did not hesitate in affirming that provisions of the Brazilian statute incompatible with the requirements of the TRIPS agreement ceased to apply, and that the TRIPS agreement was directly applicable. This happened with regard, for instance, to the extension of the duration of patent protection from 15 to 20 years (the latter being the TRIPS standard, and also that of the current Brazilian legislation) for patent applicants between 1994 (entry into force of the TRIPS) and 1996 (approval of the new Brazilian statute, which eliminated all doubts as to the duration of protection),[190] as well as the duration of protection for utility models.[191]

The same reasoning has been applied with regard to "patentable matter", that is, the types of products and processes that can be the subject of patents, a list that was expanded by the TRIPS agreement in relation to prior Brazilian legislation.[192] Lastly, the TRIPS agreement has been used to reinforce the interpretation of Brazilian law with regard to the requirement of "novelty" for patents.[193]

The Berne Convention, on the other hand, is far less mentioned than the TRIPS agreement. The only case we found in which the Berne Convention was mentioned was still conferring rights to private parties, but it conferred rights to the potential victims of copyright violation which did not ultimately prevail in the case. The case dealt with the use of photographs of indigenous Brazilian fruits taken by a Brazilian photographer and deposited in a bank of images in the United Kingdom. The Brazilian Postal Company (*Empresa Brasileira de Correios e Telégrafos*) licensed these photographs from the UK company to use them in postal stamps, but the photographer wanted to be paid directly by the use of his copyrighted material. The Brazilian Postal Company challenged the copyright over the images, as they were not original creative work, but merely photographs. The judge interpreted this argument in light of the Berne Convention's requirement of "relative novelty" for copyright protection, and decided that the material was copyrightable.[194]

The case law here shows that private parties can indeed obtain remedies from courts for the violation of treaty rights, both in civil and criminal cases. Remedies for

189 State Court of Appeals of Rio de Janeiro, *Civil Appeal (Apelação Cível) 2006.001.39159*, judgment of September 26, 2006.
190 Federal Court of Appeals of the Second Region, *Civil Appeal (Apelação Cível) 1999510102018 46/RJ*, judgment of May 17, 2005; and Federal Court of Appeals of the Second Region, *Civil Appeal (Apelação Cível) 200002010301508/RJ*, judgment of September 28, 2004.
191 Federal Court of Appeals of the Second Region, *Civil Appeal (Apelação Cível) 200251015009665/RJ*, judgment of May 26, 2004.
192 Federal Court of Appeals of the Second Region, *Civil Appeal (Apelação Cível) 9702009235/RJ*, judgment of May 25, 2004.
193 State Court of Appeals of Rio Grande do Sul, *Civil Appeal (Apelação Cível) 70011644622*, judgment of March 23, 2006.
194 Federal Court of Appeals of the Third Region, *Civil Appeal (Apelação Cível) 2002.61.00.006652-5/SP*, judgment of October 16, 2006.

these violations are often granted in the form of nullifying a challenged governmental act (be it a judicial or an administrative decision), but it can also come in the form of damages, which can be asserted by the international instrument itself (in the case of the Warsaw Convention) or by using the general rules of the Civil Code (as in the case of damages over torture perpetrated during the military regime mentioned above).

Concluding Remarks

Contrary to the common belief amongst international lawyers in Brazil, international law plays a much more prominent role in the Brazilian judiciary than one would intuitively imagine. Even though the use of international instruments by courts as mere "argumentative support" is still the majority of cases, there are many judgments in which treaties have been applied directly.[195]

The fact that sovereignty is still such an imbedded principle in the mind of Brazilian judges (particularly the Supreme Court, where preserving the superiority of the Constitution and therefore of municipal law over international "interference" seems to be a never-ending quest) does not mean that treaties will not be taken into consideration. But this can be considered to be a much more recent trend, which is then reflective of the ever-increasing importance of international law and relations on the everyday lives of citizens. Because Brazil only ratified most of the key international human rights instruments in the 1990s (that is, after the re-establishment of democratic government), it is easy to understand why the internationalization of the judiciary is also very recent.

It is noteworthy that human rights instruments play such an important role in interpreting Brazilian law, and that, even though they are not formally superior to ordinary federal law, they still appeal to the judiciary in ways that other ordinary laws do not. Because of this, there have been many constitutional attempts to elevate the status of human rights law. As these amendments have not fully resolved the issue – in fact, if anything they made it more problematic – the normative hierarchy of human rights is still to be decided by the Supreme Court, and the debate is heated. One is to hope, however, that these treaties will be granted a "supra-legal" overarching position, putting human rights, protected through national or international instruments, again as the centerpiece of the legal order. To the others Treaties, the solution can be the "*dialogue des sources*" (Erik Jayme's expression to overcome the idea of conflict of laws),[196] a coordination of simultaneous application of more than one law (in this case, the national law and the Treaty) following the values and interests accepted by the Brazilian Constitution and the human rights (*pro homine* application).[197]

195 *See* more in Claudia Lima Marques, *Some recent developments in Private International Law in Brazil*, 4 Japanese Yearbook of Private International Law 13 (2002).

196 *See* Claudia Lima Marques, *Procédure civile internationale et Mercosur : pour un dialogue des règles universelles et régionales*, 8 Revue du Droit Uniforme/Uniform Law Review – UNIDROIT, «Harmonisation Mondiale du Droit Privé et Integration économique régionale» 465 (2003).

197 *See also* Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium (II). General Course on Public International Law*, 317 Collected Courses of the Hague Academy of International Law 9 (2005).