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# THE PROCESS OF CONSTITUTIONALIZATION OF INTERNATIONAL HUMAN RIGHTS LAW AT THE REGIONAL LEVEL: THE CHALLENGES OF THE EUROPEAN COURT AND THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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## ABSTRACT

Article that discusses the process of constitutionalization of international law, based on the examination of the jurisprudence of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACHR Court). Through a literature review, the objectives were to present the idea of constitutionalization of the international level, based on the examination of the precedents of regional protection systems; then, it is intended to analyze the consolidation of the use of the constitutional perspective by the ECtHR and the Inter-American Court in their judgments. As a hypothesis, it is believed that regional protection systems develop the constitutional approach to international law through their judgments in human rights matters. Filling gaps in international treaty law, resorting to custom to prove its existence, and the possibility of exercising "conventionality control" in cases related to human rights violations are some of the ways in which certain situations are subject to the law and its jurisdiction. As a result, it was found that the hypothesis of the was partially confirmed. By examining the cases, it is verified that each regional system for the protection of human rights has a specific particularity, in which it must act for the constitutional development of international law. In this regard, it can be inferred from the examination of the cases of the ECtHR and the Inter-American Court that the constitutionalization of international law can be constructed from the ascending and descending perspectives, with the use of the sources of international law – customs, the jurisprudence of the regional courts themselves and the general principles of law – to fill the gaps in the international legal system.

**Keywords:** Human rights, European Court and Inter-American Court of Human Rights, Process of constitutionalization of international law, Constitutional approach to international law, Gaps in the international legal system filled by customs, Precedents of regional protection systems and general principles of law.

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## INITIAL CONSIDERATIONS

The reflection on the constitutionalization of international law is inaugurated through several aspects, including the construction of different processes in international law[3]. Through the constitutionalization of international law, it is possible to understand the set of procedures necessary to construct the discourse on human rights, especially with regard to the constitutional compensation of the *deficit* in the protection of human rights, also known as compensatory constitutionalism[4].

The constitutionalization of international law does not exist only in human rights. For this reason, it is necessary to emphasize that this process presents itself in different ways and with different concepts at the international level. From this perspective, it cannot be ignored that the constitutionalization of international law can be verified at different levels, such as the economic level, such as the WTO rules[5]. Nor can one exclude the analysis of the organization of the UN System[6], in view of the arrangement of its functional competences and the expression of its declarations and conventions as normative principles and parameters for the preparation of treaties[7]. This expression also translates into the expectation of the realization of administrative governance[8], the founding intention of global legislation[9] or, even, the judicial perspective[10]. In a material analysis, for example,

[3] PETERS, Anne. Compensatory constitutionalism: The Function and Potential of Fundamental International Norms and Structures. Leiden Journal of International Law, v. 19, p. 579-610, 2006, p. 579.
[4] GONTIJO, André Pires. Compensatory constitutionalism prepared by IDH court as discourse in matter of human rights: consequences for national legal systems. *Foresinc Research & Criminology International Journal*, vol. 2, p. 79-85, 2024.
[5] Sobre o tema, conferir as lições de ARMINGEON, Klaus; MILEWICZ, Karolina; PETER, Simone e PETERS, Anne. The constitutionalisation of international trade law. *In* Constitutionalism and multilayered governance, p. 69-103; PETERSMANN, Ernst-Ulrich. Constitutionalism and international organizations. *Northwestern Journal of International Law & Business*, v. 17, p. 398, 1996 e DUNOFF, Jeffrey L. Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law. *European Journal of International Law*, v. 17, n. 3, p. 647-675, 2006. Em um posicionamento crítico, ver HOWSE, Robert. Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann. *European Journal of International Law*, v. 13, n. 3, p. 651-659, 2002.
[6] Nesse aspecto, apresentam-se como interessantes os apontamentos de KADELBACH, Stefan; KLEINLEIN, Thomas. International Law–a Constitution for Mankind?. *German Yearbook of International Law*, v. 50, n. 2007, 2008 e FASSBENDER, Bardo. The Better Peoples of the United Nations? Europe's Practice and the United Nations. *European Journal of International Law*, v. 15, n. 5, p. 857-884, 2004.
[7] An idea defended by REZEK, Francisco. *Public International Law*. 15. ed. São Paulo: Saraiva, 2014, p. 260.
[8] Confira-se, a esse respeito, a proposta de WET, Erika de. Holding international institutions accountable: the complementary role of non-judicial oversight mechanisms and judicial review. In: *The Exercise of Public Authority by International Institutions*. Springer Berlin Heidelberg, 2010. p. 855-882.
[9] Como exemplo, conferir as lições de PETERSMANN, Ernst-Ulrich. Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration. *European Journal of International Law*, v. 13, n. 3, p. 621-650, 2002 e PAULUS, Andreas L. The international legal system as a constitution. *Ruling the world*, p. 69-109, 2009.
[10] WIENER, Antje. Towards a Transnacional Nomos: The Role of Institutions in the Process of Constitucionalization. Jean Monet Working Paper 9/03. Heidelberg: Max Planck Institute for Comparative Public Law and International Law. 2003; GLENSY, Rex D. Constitutional Interpretation through a Global Lens.

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constitutionalization makes the UN Charter a document endowed with a normative hierarchy, according to the legal content of certain rules, directed to the international community of States[11].

In this regard, there are international norms that attribute functions considered constitutional to different actors. Due to the importance of these norms, in any conflict with the national legal system, international norms with constitutional content are not excluded in the balancing and weighting process. As a result of these characteristics, especially the relevance that the essential content of these international norms presents, there is no way to use the criterion of hierarchy in the approximation of any conflict, which gives rise to the resolution of any conflicts – in this specific case – by balancing the essential contents.

For this reason, the constitutionalization of international law is not exclusively based on criteria of state legitimacy. In the search for normativity and concreteness, it therefore needs other legitimation strategies, arising from the different processes developed in international law, which will define the content and functionality of constitutionalization. In its initial context, compensatory constitutionalism understands that all processes of organization and regulation of issues of public interest are also being exercised by other international actors – such as the regional courts for the protection of human rights. This fact reveals that the exercise of these attributions is carried out beyond the constitutional competences of the States. This occurs due to the direct and immediate influence of globalization12, especially because it provides contributions to human rights.

Thus, this means that the constitutions of the States are not able to reach and regulate all the governance processes that arise in the field of human rights, whose lack of scope affects other processes, such as democracy, security, and the structures of the rule of law. With this impossibility of having full effectiveness in all governance processes, the constitutional plan of the States can be compensated with the constitutionalization of the

*Missouri Law Review*, vol. 75, p. 1171-1241, 2010; ACOSTA ALVARADO, Paola Andrea. *Strasbourg, San José and the constitutionalization of international law*. Texto elaborado em 2011 e disponível em Academia.edu. Acesso em: 09/01/2014; WET, Erika de. The international constitutional order. *International and Comparative Law Quarterly*, v. 55, n. 01, p. 51-76, 2006; SWEET, Alec Stone. Constitutionalism, legal pluralism, and international regimes. *Indiana Journal of Global Legal Studies*, v. 16, n. 2, p. 621-645, 2009 e KLEINLEIN, Thomas. Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law. *Nordic Journal of International Law*, n. 81, p. 79-132, 2012.

[11] DUPUY, Pierre-Marie. A Doctrinal Debate in the Age of Globalization: On the Fragmentation of International Law. *European Journal of Legal Studies*, issue 1.

[12] DELMAS-MARTY, Mireille. *The imaginative forces of law*: the relative and the universal. Paris: SEUIL, 2004, p. 36-52.

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international level, at different levels of interaction, which, together, can promote the increase of constitutional protection[13].

The research is focused on the treatment given by the constitutionalization of international law to human rights14. This approach will be explored from the different processes that the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACHR Court) trigger in the field of international law. However, before assessing these cases, it is necessary to understand the foundations of the constitutionalization of international law, in order to verify the interpretative standards produced and that will be used by the ECtHR and the Inter-American Court, especially in the formation of their cases aimed at the protection of human rights.

## THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW

During the last decades, certain phenomena have shaped and conceived international law. Globalization – and its consequences – have promoted changes in the way States act, a process that has had an impact on the construction of human rights within the scope of national and international legal systems. On the other hand, the emergence of new actors in the international scenario[15] – such as international courts and their specific complex processes[16] – requires evident control and the offer of specialized scenarios for the solution of consistent disputes between different issues of international law, without losing their unity[17].

[13] PETERS, Anne. Ob. cit., p. 580. In a critical sense, of the absence of cogency at the domestic level, see KUMM, Mattias. The Legitimacy of International Law: A Constitutionalist Framework of Analysis. *European Journal of International Law (EJIL)*, vol. 15, n. 5, p. 907-931, 2004. On international law playing the role of constitutional principles at the domestic level, see YOUNG, Ernest A. The Trouble with Global Constitutionalism. *Texas International Law Journal*, vol. 38, p. 527-545, 2003, p. 528.

[14] Alguns dos autores que trabalham a questão constitucional dos direitos humanos: BOGDANDY, Armin von. Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law. *International Journal of Constitutional Law*, v. 6, n. 3-4, p. 397-413, 2008; WET, Erika de. The prohibition of torture as an international norm of *jus cogens* and its implications for national and customary law. *European Journal of International Law*, v. 15, n. 1, p. 97-121, 2004; WESSEL, Ramses A. The UN, the EU and *Jus Cogens*. 2006; WET, Erika de. The role of European courts in the development of a hierarchy of norms within international law: evidence of constitutionalisation?. *European Constitutional Law Review*, v. 5, n. 02, p. 284-306, 2009.

[15] DELMAS-MARTY, Mireille. *The imaginative forces of law (III):* the refoundation of powers. Paris: SEUIL, 2007, p. 139-224.

[16] In this regard, see VARELLA, Marcelo Dias. The growing complexity of the international legal system: some problems of systemic coherence. *Revista de Informação Legislativo,* Brasília, a. 42, n. 167, p. 135-170, jul./set. 2005.

[17] ACOSTA ALVARADO, Paola Andrea. *Strasbourg, San José and the constitutionalization of international law*. Text prepared in 2011 and available at Academia.edu. Accessed on: 01/09/2014, p. 1.

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With the various emerging issues in the field of human rights, the exercise of the decision-making process on the subject requires a new conception of balance and control beyond the state body. The inability of States, national law and general international law to address serious human rights issues requires a way to make up for the *protection deficit* . In this context, it is essential to reconfigure the relationship between the national and international legal spheres, in order to adapt international law to the emergence of these new issues, as well as to maintain its unity and coherence in the[18] face of the phenomenon of fragmentation[19].

The increase in the complexity of international law requires the State to adapt to the level of integration at the international level, with less room for maneuver on the creation of its international law[20]. This is an interesting paradox, since the will of the State was seen as the only source of international law[21]. From the perspective of sovereignty, the State is a legal order recognized by the other state legal orders, which depends on the recognition of other legal orders to exist. Thus, no state has absolute power, and state sovereignty is limited to the international order[22].

This international order denotes its objective nature, insofar as the State must implement the legal construction carried out by other States, under penalty of being retaliated, either with non-recognition, or with the possibility of suffering interference[23] by other States. This shows that the sovereign will of states would no longer be so essential[24].

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[18] DUPUY, Pierre-Marie. *The Unity of the International Legal Order*: General Course in Public International Law (2000). RCADI, 2002, p. 9-489.
[19] Sobre o tema, confira-se CLARK, Ian. *Globalization and Fragmentation:* International Relations in the Twentieth Century. New York: Oxford University Press, 1997. Em uma perspectiva evolutiva, conferir FISCHER-LESCANO, Andreas; TEUBNER, Gunther. *Regime-Collisions*: the vain search for legal unity in the fragmentation of Global Law. Trad. Michelle Everson. *Michigan Journal of International Law*, vol. 25, p. 999-1046, 2004. Em uma perspectiva crítica e comparativa, ver, em especial DUPUY, Pierre-Marie. The Danger of Fragmentation or Unification of The International Legal System and The International Court of Justice. *International Law and Politics*, vol. 31, p. 791-807, 1999 e UNITED NATION. INTERNATIONAL LAW COMISSION. 58th session. *Fragmentation of International Law*: difficulties arising from the diversification and expansion of International Law. Report A/CN.4/L.682 of the Study Group of the International Law Commission, finalized by Martti Koskenniemi. Geneva, 13 April 2006.
[20] VARELLA, Marcelo Dias. *Internationalization of Law* ... Ob. cit., 2013, p. 420.
[21] Esse é o pensamento proposto por TRIEPEL, Carl Heinrich. *The relationship between domestic law and international law*. RCADI, tomo 1, 1923, p. 77-121.
[22] KELSEN, Hans. The system relations between domestic law and public international law. Trad. Marcelo Dias Varella, Geilza Fátima Cavalcanti Diniz, Amábile Pierroti and Luiza Maria Rocha Nogueira. *Journal of International Law*, v. 8, n. 2, jul./dez. 2011.
[23] In this sense, check out THE RESPONSIBILITY TO PROTECT. Report of the International Commission on Intervention and State Sovereignty e BUANI, Christiani Amaral. Transitional justice: the apex of the internationalization of law? *Journal of International Law*, Brasília, v. 9, n. 4, 2012, p. 123-150.
[24] VARELLA, Marcelo Dias. *Internationalization of Law* ... Ob. cit., 2013, p. 420.

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The unity of international law can find its logical foundation on different bases. It can be presented in a static or dynamic way, in a formal or substantial aspect, in a hierarchical or circular perspective, with greater or lesser autonomy in relation to society. In this sense, once the elements that give cohesion to the international order are established, their identification is objective, which allows for variation according to the needs of the actors, in different contexts, as long as they do not affect the criteria established for the identity of the system[25].

Therefore, constitutionalization allows the conformation of a more complex unitary order of international law, in which new material sources and new interpreters are presented, but without a model of coordination, which is still being defined. The obstacle lies in demonstrating the connections related to the sources, actors and systems of interaction and dispute settlement, in a new complexity of international law[26].

There are several ways to enable the relationship between national legal systems – which continue to preserve their identities and pluralities – and the international order. The challenge lies in connecting these different sets of norms, which appear to be fragmented[27]. The objective nature – normative and concrete[28] – of international law would be in the fact that States comply with certain behaviors spontaneously. These behaviors would be considered as international customs, which are externalized in treaties and in the general principles of law[29].

In this context, the general principles of international law can be considered connecting links between the different systems – whether of the national order, or of regional protection systems, or of general international law. Through them, legal content can permeate the entire international legal system, promoting the connection between

[25] VARELLA, Marcelo Dias. *Internationalization of Law* ... Ob. cit., 2013, p. 421-422.
[26] In Varella's words: "in this 'principiological carnival', with different criteria of identity, the unity of the legal system is not logical, but political" (VARELLA, Marcelo Dias. *Internationalization of Law* ... Ob. cit., 2013, p. 422). This perspective of the preponderance of politics with regard to the theoretical foundations of international law is also shared by KOSKENNIEMI, Martti. *From Apology to Utopia*. ... Ob. cit., 2005.
[27] BURKE-WHITE, William W. International Legal Pluralism. *Michigan Journal of International Law*, v. 25, 2004, p. 963-979.
[28] KOSKENNIEMI, Martti. *From Apology to Utopia*. … Ob. cit., 2005.
[29] KELSEN, Hans. The system relations between domestic law and public international law. Ob. cit., 2011, p. 63.

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different systems[30]. The general principles recognized by the international order[31] could be accepted in all themes and would contribute to the organicity and harmony between the different interactions between national orders and international strata. Therefore, the principles recognized as common between the different legal orders would serve as a connection from one system to another. The dignity of the human person, for example, migrated from the constitutional order of the state to the American Convention, constitutionalizing the Inter-American System in this perspective[32].

On the other hand, certain authors[33] consider that the unity of the international legal system is associated with the protection of the human person. For the realization of this hypothesis, the phenomenon of the humanization of international law – together with the emergence and consolidation of international human rights law – forces the legal community to recognize a new axis of the international order. With the humanization of international law, there would be a new way to build, focus and make effective the international legal system. To achieve this scenario, it would be necessary to carry out the process of constitutionalization of the legal system[34].

For this constitutionalization of international law, it is necessary to outline a structure with the most important norms of organization and regulation of social relations and political activity in the context of the international level. This process will count not only on States, but also on important actors of international law[35]. In the case of human rights, international

[30] JOUANNET, Emmanuelle. The influence of general principles in the face of the fragmentation of contemporary international law or The ambivalence of general principles in the face of the strange and complex nature of the international legal order. Disponível em: <http://www.univ-paris1.fr/fileadmin/IREDIES/Contributions_en_ligne/ E._JOUANNET/PG_et_fragmentation-version_CERDIN.pdf>. Acesso em: 24/09/2024.
[31] The principles of reciprocity, good faith, *pacta sunt servanda*, prevention, non-discrimination, sovereign equality, and the peaceful resolution of conflicts are the most recognized by States.
[32] This is what has happened in fact, because Article 29 of the American Convention contemplates this principle. Based on it, the Inter-American Court of Human Rights promoted a new reading of the dignity of the human person, considering it as a *pro homine principle* (PINTO, Mónica. *El principio pro homine*: Criterios de hermenéutica y pautas para la regulación de los derechos humanos. Argentina: UNLP, 2014). This approach will be carried out in the course of the research, when examining in more detail the compensatory constitutionalism promoted by the Inter-American Court.
[33] Por todos, ver a perspectiva de CANÇADO TRINDADE, Antônio Augusto. *International Law for Humankind*: Towards a New *Jus Gentium*. General Course on Public International Law from Hague Academy of International Law, vol. 316, 2005. Leiden/Boston: Martinus Nijhoff Publishers, 2006 e de PETERS, Anne. Humanity as the A and Ω of Sovereignty. *The European Journal of International Law*, v. 20, n. 3, 2009.
[34] ACOSTA ALVARADO, Paola Andrea. Ob.cit., 2011, p. 2.
[35] DELMAS-MARTY, Mireille. *The imaginative forces of law (III):* the refoundation of powers. Paris: SEUIL, 2007, p. 139-224.

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courts are one of the constituent subjects of these constitutional relations in the international sphere[36].

The emergence of constitutional content at the international level reveals that the international level is concerned with the constitutional standards established by the States. This implies the development of intertwining and complementarity between international constitutional law and the constitutional law of States. In this sense, the internationalization of law has allowed the institutions of international law to know the structure and dynamics of the constitutional systems of States. In this process, normative content standards are developed, such as respect for human rights and the organization of more democratic institutions. Given this scenario, both the national and international spheres can no longer be clearly separated, so that there is synergy and complementarity between them[37].

The idea of constitutionalization of international law is open to criticism. One of the main criticisms that hovers over the constitutionalization of international law – in terms of human rights – would be the effectiveness of this process. The validation of norms, their gain of legitimacy or even better conditions for gaining efficacy and effectiveness comes precisely from disobedience of the norm, since the more serious the violation of a given human right, the more strength it would gain. In this context, even for the theme of human rights, the expansion of models with universalizing pretensions, which deal with issues not accepted by the States, require different visions and different arguments for the conceptualization of the essential content of these human rights, as well as the characterization of their hard core[38].

Certain authors of international law consider this process of constitutionalization of international law to be a "utopia". Thus, this utopia contains the embryo of a totalitarian process, given the fascination that there would be no institutionalized separation between the ethical, the legal and the political. That is, the constitutionalization of international law

[36] From a similar perspective, see SHAW, Martin. *Global Society and International Relations*. Cambridge/Oxford: Polity Press/Blackwell Publishers, 1994; ACOSTA ALVARADO, Paola Andrea. Ob. cit., 2011, p. 2 and PETERS, Anne. Ob.cit., 2006, p. 582. It is important to highlight that international courts are one of the constituent subjects because they provide the constitutionalization of international law based on their processes. On the other hand, they can present themselves as legislators, since one of their processes is to advance in the understanding (and, if necessary, in the creation) of human rights.
[37] PETERS, Anne. Compensatory constitutionalism… Ob. cit., 2006, p. 591 e ACOSTA ALVARADO, Paola Andrea. *Strasbourg, San José and the constitutionalization of international law*. Ob. cit., 2011, p. 2.
[38] VARELLA, Marcelo Dias. *Internationalization of Law* ... Ob. cit., 2013, p. 326.

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would produce an anarchic society, in which there would be no convergence between the moral, legal and political systems[39].

In this type of society – with universalizing pretensions – there would be no room for Law, when the utopia of common values is reached. This is because the consequence would be the disappearance of the State and of the Law itself. While in an anarchic society, on the other hand, there would be complete legal anomie. Therefore, the specificity and autonomy of the legal order should be preserved in relation to other social systems of normative genesis – such as the ethical, political, and religious systems.[40]

However, the international level undergoes a process of mutation in which there is no prospect of return. International law reveals itself in a pluralistic aspect, in which in different ways the cogent and binding norms of international law are observed. This cogency can be found in different types of norms – treaties, optional protocols, decisions of individual dispute settlement bodies and with internal repercussions – through which international actors exercise their authority and power[41]. It is, above all, an examination of the verification of how international law behaves in the face of binding and non-binding instruments (such as *soft norms,* for example[42]).

In this context, as a legal concept, sovereignty is decharacterized by the political concept, in order to be molded to other functions required by it[43]. This transition is outlined in such a way that sovereignty, as a phenomenon of power and a structuring element of the figure of the State, gains a new guise beyond the state link. The institute becomes one of the foundations responsible for the attribution of sovereign capacities and competences from the national to the international level, with special importance to international courts in the case of human rights[44].

[39] OST, François; KERCHOVE, Michel van de. *Legal System Between Order and Disorder*. Trad. Iain Stewart. Oxford: Oxford University Press, 1994, p. 131-132.
[40] OST, François; KERCHOVE, Michel van de. *Legal System Between Order and Disorder*. Ob. cit., 1994, p. 132.
[41] GOLDMANN, Matthias. Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority. *German Law Journal*, vol. 09, n. 11, p. 1865-1908, 2008, p. 1865-1868.
[42] Ver, em especial: PETERS, Anne. Soft Law as a New Mode of Governance. In: DIEDRICHS, Udo; REINERS, Wulf; WESSELS, Wolfgang (ed.). The Dynamics of Change in EU Governance. Studies in EU Reform and Enlargement. Cologne, Germany: University of Cologne, Germany, 2011 e SLAUGHTER, Anne-Marie. *A New World Order*. Princeton, New Jersey: Princeton University Press, 2004, p. 168 e 178-181.
[43] The preponderance of the politician is seen in KOSKENNIEMI, Martti. *From Apology to Utopia*. … Ob. cit., 2005, p. 224.
[44] VARELLA, Marcelo Dias. *Internationalization of Law...* Ob. cit., 2013, p. 384.

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Even with the expansion of international law, sovereignty is still associated with the State[45]. The difference is that with the complexity and objectivity conferred on the international level, the will of the State becomes limited by certain institutes contained in international law, such as human rights[46]. Therefore, sovereignty goes through a process of mutation of its content. The process of constitutionalization of international law is the trigger for the emergence of other contents responsible for developing the concept of recognized state sovereignty. This implies the reallocation of attributions to different actors who exercise power within the framework of international law. This relocation has implications for international institutions, especially for the dialogue between courts at the national and international levels. This dialogue, in addition to implying the reciprocal influence between its precedents and the respective concepts developed by them[47], is important in the intensification of the constitutionalization of international law[48].

The current stage of international law reveals a constitutionalization of its different areas. There are constitutional functions directed to certain institutes, which are presented as meta-norms in the sources of international law, including the formation of treaties or international customs, such as human rights at the international level, which restrict the action of States over their nationals. In addition, the essential content of these human rights offers lines of action, promoting the integration of the international community through norms of high symbolic value, with the articulation of different levels[49].

Thus, some properties of constitutional law are present in international law. Typically constitutional functions are fulfilled, and some values provided for in the legal-constitutional systems are identified in international law. Thus, certain international norms and structures can be considered similar to a constitutional system[50]. In this context, it is important to

[45] VISSCHER, Charles de. *General Course of Principles of Public International Law*. RCADI, tomo 86, 1954, p. 445-556.
[46] SALMON, Jean. What Place for the State in Today's International Law? RCADI, tomo 347, 2011, p. 17-77.
[47] DELMAS-MARTY, Mireille. *The imaginative forces of law: the relative and the universal*. Paris: SEUIL, 2004, p. 14-18 e DELMAS-MARTY, Mireille. *The imaginative forces of law (II): ordered pluralism*. Paris: SEUIL, 2006, p. 39-128. Esta metodologia também é verificada em SANDS, Philippe. Treaty, Custom and the Cross-fertilization of International Law. *Yale Human Rights & Development Law Journal*, vol. 1, pp. 85-106, 1998; NEVES, Marcelo. *Transconstitucionalismo*. São Paulo: WMF Martins Fontes, 2009 e PETERS, Anne. Compensatory constitutionalism... Ob. cit., 2006.
[48] PETERS, Anne. Compensatory constitutionalism… Ob. cit., 2006; GLENSY, Rex D. Constitutional Interpretation through a Global Lens. *Missouri Law Review*, vol. 75, p. 1171-1241, 2010; ACOSTA ALVARADO, Paola Andrea. *Strasbourg, San José and the constitutionalization of international law*. Ob. cit., 2011 e KLEINLEIN, Thomas. Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law. *Nordic Journal of International Law*, n. 81, p. 79-132, 2012.
[49] PETERS, Anne. Compensatory constitutionalism… Ob. cit., 2006, p. 599 e ACOSTA ALVARADO, Paola Andrea. *Strasbourg, San José and the constitutionalization of international law*. Ob. cit., 2011, p. 5.
[50] PETERS, Anne. Compensatory constitutionalism: … Ob. cit., 2006, p. 601-606.

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highlight some examples that portray the evolution of the constitutionalization of international law.

## CONSTITUTIONALIZATION OF THE PROTECTION OF HUMAN RIGHTS: THE CONSTITUTIONAL APPROACH PROMOTED BY THE EUROPEAN AND INTER-AMERICAN PROTECTION SYSTEMS

The constitutional elements of the States influence the decision-making process at the international level. This influence can present itself in different ways, from the organization of structures – such as international courts – to peculiar aspects, such as the language and operating model of these courts.

The constitutionalization of international law reaches international courts such as regional systems for the protection of human rights. The regional courts promote their own constitutional approach to international law, based on the constitutionalization of the protection of human rights.

The concreteness attributed to human rights is not only in the constitution of new treaties, but, above all, in the performance of dispute settlement bodies in the field of human rights, such as the Courts belonging to the regional protection systems. Both the European and the inter-American profiles are responsible for the normative proliferation of human rights, interpreting existing Conventions or creating other rights based on them, contributing to the process of constitutionalization of international law.

In this context, the European and Inter-American regional systems[51] play an important role in this construction. In their respective spheres of action, the relevance of human rights and judicial control for the constitutionalization process is evidenced. These regional systems introduce international law and provide a differentiated relationship with national law, so that they are responsible for the construction of interactivity processes involving constitutional values, at different levels of influence[52].

Regional protection systems serve as a cornerstone for the constitutionalization process at different levels. This importance is determined according to the content that is

[51] It is important to highlight – as a thematic delimitation – the failure to address other systems, such as the African System for the Protection of Human Rights. Despite having demonstrated a significant growth, including citing decisions of the Inter-American Court of Human Rights in its judgments, I chose to address in my thesis other courts – such as the ICJ and the ECtHR – that make a greater contribution to the critical examination of the judgments of the Inter-American Court.

[52] WET, Erika de. The emergence of international and regional value systems as a manifestation of the emerging international constitutional order. *Leiden Journal of International Law*, v. 19, n. 03, p. 611-632, 2006.

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worked on and the path that is built for constitutionalization[53]. The Courts of the regional protection systems help to build the foundation of the constitutionalization process. Its creation and consolidation reveal the existence of an international community of common values and interests. This community demonstrates the need to change the functions of the State and its objectives in the international order, especially with regard to the *deficit* in the protection of human rights. In addition, the role played by the Courts makes it possible to make essential changes, both in the general theory of international law, as well as in the relationship with national law, in an evolutionist perspective of the constitutionalization process[54].

These systems contribute to the construction of the operational concepts of the constitutionalization process. Within these concepts, there are issues related to international public order, the international community and the norm of *jus cogens*. In communion with these concepts, there is less centralization in the figure of States and the reformulation of the relationship between international law and national law, with regional protection systems, making new connections between the different levels of protection. With all this, regional systems establish control parameters that allow the irradiation of the essential content of human rights protection not only to the national law of States, but also to other fields of international law, in a perspective of cross-fertilization of the content of their judgments[55].

Through the internationalization of law, it would be feasible to control the process of constitutionalization[56], as well as the direction of the judgments of the regional systems. This control would have the scope to build more precise content for common concepts, achieving coherent connections that would lead to the solution for concrete cases. This is because judges play a central role in controlling the internationalization of law, especially in the field of human rights, as they are open and accessible normative sets for interpretative advancement towards a common law[57].

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[53] ACOSTA ALVARADO, Paola Andrea. Strasbourg, San José and the constitutionalization of international law. Ob. cit., 2011, p. 5.
[54] WET, Erika de. The international constitutional order. *International and Comparative Law Quarterly*, v. 55, n. 01, p. 51-76, 2006.
[55] See, a esse respeito, GROPPI, Tania; COCCO-ORTU, Anna Maria Lecis. The reciprocal references between the European Court and the Inter-American Court of Human Rights: from influence to dialogue? *Revista de Derecho Público*, v. 80, p. 85-120, 2014.
[56] KOSKENNIEMI, Martti. *From Apology to Utopia*. The Structure of International Legal Argument. Cambridge: Cambridge University Press, 2005.
[57] VARELLA, Marcelo Dias. Internationalization of Law: international law, globalization and complexity. Brasília: UniCEUB, 2013, p. 434.

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In this regard, the recognition of the existence of an international community[58] and its common interests is one of the key contributions of international human rights law – in particular regional protection systems – to the promotion of the constitutionalization process. This recognition makes the international community accept the formation of an international public order[59], including the rules of responsibility in the field of human rights.

In fact, the regional Courts have developed the idea of international community based on the common interest and concern for the protection of the individual, which justifies the irradiation of the content of human rights based on their judgments. This concern can be seen in the definition of international community by the Inter-American Court, when dealing with the responsibility of the State for serious violations of the rights of the human person. Therefore, this idea of international community presents itself as an inducing parameter for the eradication of impunity, with the combination of the duty of interstate cooperation[60].

The recognition of the existence of an international public order by regional systems highlights the possibility of overcoming the original will of the States Parties. This is the understanding of the Inter-American Court of Human Rights, which, by recognizing the existence of an international public order, asserts the need for the protection system to verify not only the formal conditions of the acts, but also the nature and gravity of the alleged violations. This procedure takes into account the requirements and interests of justice, the specific circumstances surrounding the case, and the actions and positions of

[58] JOUANNET, Emmanuelle. The idea of the human community at the crossroads of the community of states and the world community. In: Globalization between Illusion and Utopia. *Archives de philosophie du droit*, 2003, tomo 47, p. 191-232.
[59] Sobre o tema, conferir McDOUGAL, Myres S. Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies. *The Virginia Journal of International Law*, v. 14, n. 03, p. 387-419, 1974.
[60] Inter-American Court of Human Rights. *Case of the Ituango Massacres v. Colombia*. Preliminary Excesses, Merit, Reparações e Custas. Judgment of 01/07/2006. Série C n. 148. Voto do Juiz Cançado Trindade, § 27 e Corte Interamericana. *Case of La Cantuta v. Peru*. Merit, Reparations and Costs. Judgment of 29/11/2006, Série C n. 162, § 160: "As has been repeatedly pointed out, the facts of the present case have infringed non-derogable norms of international law (jus cogens). Under the terms of Article 1(1) of the American Convention, States are obliged to investigate human rights violations and to prosecute and punish those responsible. Given the nature and seriousness of the facts, even more so in the context of systematic human rights violations, the need to eradicate impunity is presented to the international community as a duty of inter-State cooperation to this end. Access to justice is a peremptory norm of international law and, as such, generates erga omnes obligations for States to adopt the necessary measures to ensure that such violations do not go unpunished, either by exercising their jurisdiction to apply their domestic law and international law to prosecute and, where appropriate, by exercising their jurisdiction to apply their domestic law and international law to prosecute and, where appropriate, punishing those responsible for such acts, or collaborating with other States that do so or seek to do so. The Court recalls that, under the collective guarantee mechanism established in the American Convention, in conjunction with regional and universal international obligations in this area, the States Parties to the Convention must cooperate with each other in this regard."

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the parties, so that the trial conforms to the purposes that the inter-American system seeks to accomplish[61].

On the other hand, the ECtHR established the concept of public policy at European level as the set of rules considered fundamental for the creation of European society. In this context, European public order is built around common values. These values are revealed by institutional actors, such as the interpretation given by the ECtHR, which recognizes the notion of public order when it takes into account the special character of the European Convention. This conventional text reveals itself as an instrument of public order for the protection of the human person, with the scope of ensuring compliance with the commitments assumed by the States[62].

The Cortes have emphasized the particular nature of the regional system, recognizing their constitutional characteristics, and recalling that they are objective regimes, in which the principle of reciprocity[63] between States at the international level plays a diversified role[64]. Thus, these international tribunals consider that the general rules of

[61] This argument can be verified in the following cases: Inter-American Court of Human Rights. *Case of Kimel v. Argentina*. Merit, Reparations and Costs. Judgment of 02/05/2008, Series C n. 177, § 24 and Inter-American Court. *Case of Ticona Estrada et al. v. Bolívia*. Merit, Reparations and Costs. Judgment of 27/11/2008. Série C n. 191, § 21: "Given that the proceedings before this Court concern the protection of human rights, a matter of international public policy that transcends the will of the parties, the Court must ensure that such acts are acceptable for the purposes sought to be fulfilled by the inter-American system. In this task, the Court does not limit itself only to verifying the formal conditions of the aforementioned acts, but must compare them with the nature and seriousness of the alleged violations, the requirements and interests of justice, the particular circumstances of the specific case and the attitude and position of the parties."

[62] Corte EDH. *Caso Loizidou vs. Turquia.* Petição n. 15318/89. Objeções Preliminares. Sentença de 23/03/1995, § 93: “In addressing this issue the Court must bear in mind the special character of the Convention as an instrument of European public order (ordre public) for the protection of individual human beings and its mission, as set out in Article 19 (art. 19), ‘to ensure the observance of the engagements undertaken by the High Contracting Parties’.”.

[63] At the international level, the principle of reciprocity takes on at least 03 different meanings. The first concerns the outdated idea of a treaty-contract, in which there would be an understanding and the construction of reciprocal obligations, according to the will of the States involved. The second corresponds to the international custom among States, whose practice has transformed it into a general principle of international law, guiding practices between States, especially in diplomatic relations. The third sense corresponds to a semantic variation, in which reciprocity makes a certain norm enforceable on all States.

[64] With the reflection on reciprocity, the Inter-American Court of Human Rights based this understanding on Advisory Opinion No. 02/1982, which provided for the technical criterion regarding the reservations of the American Convention. According to Article 75 of the Convention, reservations to the text can only be made in accordance with the provisions of the Vienna Convention on the Law of Treaties. Thus, the reservations expressly authorized must be compatible with the object and purpose of the Convention, not bowing to the will of the States Parties (Inter-American Court. Advisory Opinion No. 02, dated 09/24/1982. The Effect of the Reservations on the Entry into Force of the American Convention on Human Rights [Articles 74 and 75] requested by the IACHR, § 37: "Having concluded that the reservations expressly authorized by Article 75, esto es, todas las compatibles con o objeto y fim de la Convención, no requieren aceptación de los Estados Parties, the Court opines that the instruments of ratification or adhesion that they contain enter into force, according to article 74, since the moment of its deposit").

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international law should be shaped in the interest of the maximum protection of human rights.

In fact, in a similar sense, the European Convention is not limited to the will of the States Parties, but ensures the protection of the interests of individuals and positive obligations towards the States themselves. This protection occurs not only as a result of their consent, but in the name of common values, represented by the legal content of human rights. With this understanding, as observed by the Inter-American Court, the ECtHR praises the objective character of the European Convention, whose instrument for the protection of the human person is based on common solidarity and, as observed by Consultative Opinion No. 02/1982, revisits the aspects related to the general principle of reciprocity of international law[65].

The international legal order is legitimate before States when it is constituted by formally neutral and objectively verifiable rules, based on a process resulting from democratic deliberation[66]. This pattern of objectivity is verifiable at the European level, especially after the unification reforms of the ECtHR[67]. With this reform, there was a necessary departure from the will of the States and from the aspects of morality related to natural law, so that the European Convention presents itself with a normative and concrete character.

Based on these premises, the European Convention should be read in terms of its specific character as a treaty, presenting itself as a collective guarantee of human rights and fundamental freedoms. This is because its nature as an instrument for safeguarding human rights requires that its provisions be interpreted in such a way as to make them effective. Furthermore, it is important to emphasize that any interpretation of the rights and freedoms guaranteed must be compatible with "the general spirit of the Convention, an instrument designed to maintain and promote the values, ideals and values of a democratic society."[68]

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[65] LIMA, José Antonio Farah Lopes de. *European Convention on Human Rights*. Leme, São Paulo: J. H. Mizuno, 2007, p. 60.
[66] KOSKENNIEMI, Martti. *From Apology to Utopia*. … Ob. cit., 2005, p. 71-72.
[67] Protocol No. 11 was the subject of deliberation by the States Parties and made the assessment of human rights by the European system simpler and with a judicial connotation.
[68] Corte EDH. *Caso Soering vs. Reino Unido.* Petição n. 14038/88. Plenário. Mérito. Sentença de 07/07/1989, § 87: “In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. In addition, any interpretation of the rights and

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By stating that the general spirit of the European Convention is to respect and promote the ideals and values of a democratic society[69], the ECtHR places the democratic society as a central value of European public order[70]. By way of interpretation, the Court enumerates the structural principles of this model of society: (a) the principle of the dignity of the human person[71]; (b) the principle of the preeminence of the right[72]; (c) the principle of pluralism[73] ; and (d) the principle of non-discrimination[74].

In this sense, the ECtHR lists Articles 2 (right to life)[75] and 3 (prohibition of torture)[76] of the European Convention as those containing the most fundamental provisions. Although European public order is not formed by these principles alone, they are carriers of essential common values and constitute the fundamental structure of European public order on human rights. They are the guiding principles of all the activity of the States[77].

For the ECtHR, the right to life is imposed on the State, which exercises this positive obligation through measures necessary to protect its essential content. The consequence of this type of protection is the binding of States to the primary duty of elaborating a legislative and administrative framework, aiming at effective prevention and dissuasion of the possibility of endangering the right to life[78].

Furthermore, the ECtHR is concerned with human dignity and the physical and mental integrity of the person, so that a reading of Article 3 reveals not only a prohibition

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freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society'.".

[69] EDH Cut. *Kjeldsen, Busk Madsen and Pedersen v. Denmark.* Petitions Nos. 5095/71, 5920/72 and 5926/72. Merit. Judgment of 12/07/1976, § 53.

[70] EDH Cut. *Turkish Communist Party vs. Turkey case.* Petition No. 133/1996/752/951. Merit. Judgment of 01/30/1998, § 43.

[71] EDH Cut. *S.W. v. United Kingdom.* Petition n. 20166/92. Merits. Judgment of 11/22/1995, § 44.

[72] Commission for Human Rights. *Golder v. United Kingdom.* Petition no. 4451/70. Report adopted 06/01/1973, § 58.

[73] EDH Cut. *Turkish Communist Party vs. Turkey case.* Petition No. 133/1996/752/951. Judgment of 01/30/1998, § 43.

[74] EDH Cut. *Case "Reporting on certain aspects of law in the use of languages in education in Belgium" v. Belgium.* Petition Nos. 1474/62, 1677/62, 1691/62, 1769/63 and 2126/64. Merit. Judgment of 07/23/1968, § 10.

[75] "Article 2 - Right to life.
1 – The right of every person to life is protected by law. No one may be intentionally deprived of life, except in execution of a capital sentence pronounced by a court, if the crime is punishable by this penalty by law.
2 – There shall be no violation of this article when death results from the use of force, making it absolutely necessary:
To ensure the defence of any person against unlawful violence;
To make a lawful arrest or to prevent the escape of a lawfully detained person;
To suppress, in accordance with the law, an uprising or an insurrection."

[76] "Article 3 - Prohibition of torture.
No one shall be subjected to torture, inhuman or degrading treatment or punishment."

[77] LIMA, José Antonio Farah Lopes de. Ob. cit., p. 61.

[78] EDH Cut. *Öneryildiz v. Turkey.* Petition no. 48939/99. Merit. Judgment of 11/30/2004, § 89.

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that is highlighted as universal in nature, but, above all, a guarantee. This guarantee aims to ensure that torture, degrading treatment and inhuman treatment will not be used – within the European public space protected by the Convention – in response to a public danger, such as terrorism or organised crime[79].

On the other hand, the Inter-American Court of Human Rights also aims to achieve the nature of an objective court, through the normativity[80] and concreteness established by the ECtHR. However, the inter-American system presents not only possibilities, but also limits to the scope of this objectivity. The beginning of this conformation occurs with the States that have accepted its competence and recognize its jurisdiction. With each judgment, the Inter-American Court achieves a portion of respectability, which gradually confers objectivity to the inter-American system through the normativity of its judgments. However, the departure of morality from natural law – or from *the civitas maxima gentium*[81] – is one of the controversial points that can jeopardize this objectivity, given the absence of concreteness in its precedents.

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[79] EDH Cut. *Selmouni v. France.* Petition no. 25803/94. Merit. Judgment of 07/28/1999, § 94.

[80] The concept of normativity is extracted from the critique of Martti Koskenniemi. It concerns the objectivity of international law – the distance that international law creates in relation to the behavior, interest and will of the state. This distance must be balanced. The greater proximity of state interests transforms the norm of international law into a mere sociological description – a non-normative apology. On the other hand, the international norm that is based on principles dissociated from the behavior of States indicates the presence of utopian legal wills or interests, incapable of demonstrating their legal content in a reliable manner. In turn, concreteness refers to the need for the international legal order to move away from the morality defended by the arguments of natural justice. Therefore, for the Inter-American Court of Human Rights to have respectability in its judgments, it needs to demonstrate that its precedents hold a certain degree of reality, that they present – simultaneously – normativity and concreteness. Precedents are connected to states regardless of the behavior, interest or sovereign will of the state. However, the normative content of the precedent cannot be distant from the reality practiced by the behavior of the State (KOSKENNIEMI, Martti. *From Apology to Utopia*. Ob. cit., 2005, p. 17).

[81] From a critical point of view, when examining the cases of the Inter-American Court, it is clear that in the judgments of the late 1990s and early 2000s, it aimed to achieve the *civitas maxima gentium*. The expression comes from the classic writings of international law, led by Vitória, Suárez, Grotius, Gentili and Pufendorf, who argued that this ideal situation would be constituted by human beings socially organized in States, in the prospective construction of the idea of humanity. In *the civitas maxima gentium*, no State could consider itself above the Law. In the words of Cançado Trindade, even though the world is different from the time when the writings of the founders were written, "the human aspiration remains the same, that is, the construction of an international order applicable both to States (and international organizations) and to individuals, according to certain standards of justice" (CANÇADO TRINDADE, Antônio Augusto. International Law for Humankind: Towards a New Jus Gentium. *RCADI,* volume 316, p. 9-439, 2005, p. 14). This reflection reached the ICJ, in its dissenting opinion in the case of Belgium vs. Senegal: "The central dilemma in the matter, which is posed today not only to States but also to jurists, seems to me very clear: they can continue to refer to the traditional forms of criminal jurisdiction (cf. 99 above), regardless of the seriousness of the offences committed, is to recognise that these are crimes that effectively disturb the conscience of humanity, they already command recourse to universal jurisdiction. Either they continue to reason in the logic of a fragmented international legal order and sovereign entities, or they decide to take up the ideal of *the civitas maxima gentium* (ICJ. Belgium v. Senegal, related to the obligation to extradite or prosecute. Decision of 05/28/2009, dissenting opinion of Judge Cançado Trindade, § 103).

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From this scenario, it can be seen that there is a variation in meaning and interpretation among regional protection systems, not only in relation to human rights aspects, but also in relation to the issues dealt with in each jurisdiction, as a result of the formation of each system. That is, the human rights highlighted as being two of the most relevant to the concept of European public order – protection of life and prohibition of torture – are also provided for in the American Convention[82]. However, they assume different roles in relation to the European gender, since the countries of the inter-American system have their regional peculiarities.

The right to life is read from an evolutionary perspective, in the scope of ensuring the protection of a dignified life[83], a dignified death[84] and the project of life[85], while torture

[82] "Article 4 - Right to life.
1. Everyone has the right to have his life respected. This right must be protected by law and, in general, from the moment of conception. No one can be deprived of life arbitrarily.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes, in compliance with the final sentence of competent courts and in accordance with the law establishing such penalty, promulgated before the crime was committed. Nor will it be extended to crimes to which it does not currently apply.
3. The death penalty cannot be re-established in States that have abolished it.
4. In no case may the death penalty be applied to political offences or to common offences connected with political offences.
5. The death penalty shall not be imposed on a person who, at the time of the commission of the crime, is under eighteen years of age or over seventy years of age, nor shall it be applied to a woman in a state of pregnancy.
6. Every person sentenced to death has the right to request amnesty, pardon or commutation of sentence, which may be granted in all cases. The death penalty cannot be carried out while the request is pending a decision before the competent authorities."
"Article 5 - Right to personal integrity
1. Everyone has the right to have his or her physical, psychological and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Every person deprived of liberty must be treated with the respect due to the inherent dignity of the human being.
3. The penalty cannot pass from the person of the offender.
4. Those who are prosecuted must be separated from those convicted, except in exceptional circumstances, and must be subjected to treatment appropriate to their status as non-convicted persons.
5. Minors, when they can be prosecuted, must be separated from adults and taken to a specialized court, as soon as possible, for their treatment.
6. Sentences involving deprivation of liberty must have as their essential purpose the reform and social rehabilitation of convicts."

[83] Specifically, it does not refer to the construction of the idea of human dignity itself, but of the right to life as access to conditions that guarantee a dignified existence. This understanding is dealt with in the Inter-American Court. *"Street Children" case (Villagran-Morales et al.) v. Guatemala*. Merit. Judgment of 11/19/1999. Series C No. 63, § 144.

[84] From the perspective of ensuring the proper treatment of the person's remains, according to the local culture. See, in particular, one of the first cases in which the issue is addressed: Inter-American Court. *Case of Bámaca Velásquez v. Guatemala*. Merit. Judgment of 11/25/2000. Series C n. 70, § 200.

[85] In the conception of the Inter-American Court, the life project is associated both with personal fulfillment and with the options that must be offered to the person, in order for him or her to achieve his or her personal development, in order to structure the essentiality of the life project for the development of a dignified life, with consequences for the recognition of the integrity and dignity of the human person (See, in particular, the Inter-American Court. *Loayza-Tamayo v. Peru case.* Reparations and Costs. Judgment of 11/27/1998. Series C n.

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triggers different interpretative procedures, which reflect on the alteration of the constitutional process of the States[86]. In this regard, the Inter-American Court of Human Rights has taken the position that the essential content of the right to life is connected to the prohibition of acts of torture. When dignity is analyzed as an essential aspect of the right to life, the right not to be tortured becomes part of its essential content, given that a dignified life implies respect for the moral, physical, and mental integrity of the individual, in a true fusion of Articles 4 and 5 of the American Convention[87].

Thus, the Inter-American Court of Human Rights has ruled that the international community and the values it represents constitute the foundation of the highest level of norms of the international order, so that this premise reinforces the protection of the duties of States to safeguard human rights[88].

The criticism to be made of regional systems – especially the Inter-American Court of Human Rights – concerns the way to achieve coherent connections to solve concrete cases. In this sense, through the internationalization of law, it would be feasible to control the speed and direction of the judgments of regional systems, with the aim of constructing more precise contents for common concepts. This is because judges play a central role in controlling the internationalization of law, especially in the field of human rights, as they are open and accessible normative sets for interpretative advancement towards a common law[89].

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42, §§ 147-150 and Inter-American Court. *"Street Children" case (Villagran-Morales et al.) v. Guatemala*. Merit. Judgment of 11/19/1999. Series C n. 63. Separate vote of Judge Cançado Trindade, § 8.

[86] This perspective will be analyzed with greater emphasis in chapter 3. The Inter-American Court of Human Rights inaugurated the debate on torture based on the Cantoral Benavides Case (IACHR Court. *Cantoral Benavides vs. Peru Case*. Merit. Judgment of 08/18/2000. Series C n. 69.

[87] SILVA, Alice Rocha da (et. ali.). Subjectivity in the performance of the Inter-American Human Rights System and the Effectiveness of Fundamental Rights of the First Dimension. Article written as a partial result of research for the Internationalization of Rights group, linked to the Master's and Doctorate Program in Law of the University Center of Brasília (UniCEUB). Restricted communication, dated 01/18/2014.

[88] HDI cut. *Goiburú and others vs. Paraguay*. Merits, Reparations and Costs. Judgment of 09/22/2006, Series C n. 153, §§ 131-132.

[89] Varella considers that the processes of construction of the internationalization of law are carried out by several processes conducted by different actors in addition to the judges. In a first analysis, it presents the possibility for judges – exercising a creative interpretation, changing their role and expanding their importance – to control the speed and direction of the internationalization of law, as bridges of dialogue by virtue of the dynamics of the process itself: "the concepts of 'national margin of appreciation', 'acceptable levels of risk' or similar in other courts would be an excellent solution to regulate the process of internationalization of law, especially in human rights or to find a mechanism of structural coupling between the different normative systems. By attributing the possibility for international and national judges to feel the political sensitivity of the effects of a semantic closure of each legal category, it would be feasible to control the speed and direction of internationalization and the construction of precious content for common concepts, building bridges of coherence that would bring justice to the concrete case. Several authors with different perceptions attribute to judges the central role in controlling the internationalization of law. From Delmas-Marty to Häberle, passing through Neves or Dupuy, there are different views on how such a process has been or can be built on different

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Therefore, the processes initiated by international courts for the protection of human rights are examples of the constitutionalization of international law. In this regard, some of these examples contribute to the formation of compensatory constitutionalism, as part of the understanding of the processes developed by the ECtHR and the Inter-American Court of Human Rights to achieve constitutional compensation for human rights violations.

## PARTIAL CONCLUSIONS

Human rights are presented as a concept in movement, being considered the raw material of compensatory constitutionalism and the process of constitutionalization of international law. The lack of capacity of certain States to deal with serious human rights issues requires a way to compensate for this protection deficit. In this context, the process of constitutionalization allows the adaptation of international law to these new issues.

The concept of human rights receives a new reading with the constitutionalization of international law. International human rights law is also developed by international tribunals – such as the ECtHR and the Inter-American Court of Human Rights – which take a constitutional approach to their judgments. In these courts, the constitutional treatment given to the international issue was observed.

In this context, it is possible to examine the adoption of the set of arguments in the elaboration of the discourse on human rights – at certain times with the community and descending line; in others in an ascending manner and with an emphasis on the autonomy of the States. This constitutional approach has allowed not only the evolution of human

strands, especially in human rights, from normative sets open to change, in processes founded on the ability of judges to read the political, cultural, scientific and other systems and to advance the fragmented legal system towards a common legal system". However, the author takes a critical position on the subject: "judges play a fundamental role, but they cannot be attributed the role of being responsible for reading otherness or of bridges between different normative orders. The idea of a global community of judges from liberal countries, for example, seems to underestimate cultural heterogeneity, not only at the global level, but even among different liberal regimes. As Ost identifies, decisions are as dynamic (creative) as they are static (tautological); as formal (deductive) as substantive (dialectical); as linear (disciplined) as recursive (rebellious). The system that emerges from the judges contains both elements of instability (innovation) and stability (conservatism). It is a tangle of confusing notions such as *ordre public*, good manners, guilt, urgency, normality, with different perceptions among them. As a general rule, judges are unaware of foreign cultural elements. To presuppose an accurate capacity for the political reading of the effects of their decisions at the national level or sufficient criticism to have otherness to know the culture of the other is to ignore the reality of various international courts or, even more acutely, of national judges. In addition, assuming a position equal to that of the other State – even if citing another court – does not necessarily mean that there was influence only from the other court. Often, it is the result of generations of law, which gradually evolve across the planet. The concentration of the assumption of common positions by judges in different countries underestimates the importance of the other actors in the construction of common ideas in different regions." (VARELLA, Marcelo Dias. *Internationalization of Law* ... Ob. cit., 2013, p. 432-436).

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rights, but also the advancement of different processes initiated by these international tribunals.

Among these processes, constitutionalization has brought about the formation of a unitary and complex international legal order, with the emergence of new material sources and new interpreters in the international scenario. However, these different processes have demonstrated the difficulties of managing the related connections between the sources of international law, interpreters, and systems of interaction and dispute settlement.

The difficulty in establishing the objective nature of international law was also verified. The demonstration of normativity and concreteness – the capacity to produce legal regulation and to solve the problems that arise – would be connected to the idea that States comply with certain behaviors spontaneously. These behaviors are linked to international custom, which unfold into treaties and general principles of law.

The sources of international law – especially the general principles of law – promote the connection between national legal systems and the international order. Human dignity is a principle of the national legal order of States and was taken to the international order, being responsible for the constitutionalization of the American Convention. In addition, the emergence of constitutional content at the international level demonstrates the concern of this plan with the constitutional standards established by the States.

The constitutionalization of international law is also criticized, especially with regard to its effectiveness. However, the international level is going through a process of mutation in which there is no prospect of return. The current period of international law presents a constitutionalization of its different areas, in which some properties of constitutional law are present in international law, such as the constitutional approach in the development of regional protection systems. This set of cases presented by the courts – ECtHR and IACHR Court – are responsible for the construction of compensatory constitutionalism as an instrument not only for interpretation, but for imposing a standard of protection of human rights in the national legal system of the States Parties.

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