The Reception of Human Rights’ Treaties in Brazilian Law after the 45th Constitutional Amendment: an Analysis of the Rome Statute of the International Criminal Court (ICC)

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Abstract

This article aims to analyze the reception of treaties by Brazilian Law. Different position have being trying to explain the juridical status of treaties in the country and non of them became settled by the doctrine or by the judgments of the Supreme Court. The treaties about Human Rights are in the center of this debate, specially after the 45th Constitutional Amendment which equalizes them to Amendments. In this context, the argument concerning the Rome Statute became definitely central because

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it was ratified by Brazil before the 45th Amendment but it counts on a constitutional article that obligates Brazil to accept the jurisdiction of the International Criminal Court. The Statute provides for the ICC to have jurisdiction over some main classes of offenses against Human Rights which are related the life, dignity and integrity. Therefore, the settlement of the exact terms of reception of this treaty by Brazil’s law is significant and became one of the most important cases concerning the receptions of Human Rights Treaties in the country.

1. Introduction

This article is centrally aimed on critically analyzing and contextualizing Brazilian legislation and its Supreme Federal Court jurisprudence concerning the process of treaty incorporation in Brazil and particularly those documents that deal with Human Rights norms. Under this approach, the methodological framework used will pay special attention to the International Criminal Court Rome Statute insertion into the national juridical order.

For this purpose, after theoretically discussing the relations between the internal and the international juridical orders by presenting the monist and the dualist theories, the Supreme Federal Court jurisprudence will be investigated in light of a historical and evolutive perspective since the 1970s until nowadays. Following that, the Rome Statute incorporation into the Brazilian internal system will be specifically debated. At this moment, the debate on the Federal Constitution article 5th, paragraph 4th, which was brought about with the 2004 45th Amendment and deals with the International Criminal Court (ICC) jurisdiction, will be stressed.

2. The Relation Between International and Internal Juridical Orders: Monism and Dualism

The problematic of the existent relations between international and internal juridical orders is put under a double approach, that is, material and formal. Within the material realm, this relation analysis is done from the conceptual division between juridical matters that are typical objects of a given system. It focuses, then, on how the international juridical order and the content and substance of its norms differ or converge from the juridical orders existent norms of States that compose the international society. On the other hand, based on a formal approach, the debate is focused on the existence or not of a hierarchy between norms with international nature and norms with internal nature, and, above all, which one would prevail if

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5 In this sense, see the juridical concept of reserved domain. Based on the idea of a compatibility between international law primacy and state sovereignty, the concept expresses the State simultaneous condition of sometimes be submitted to international norms and others have full freedom to legislate about matters about which international law is limited to supporting principles and competences, without outlining their form and executive parameters.
there would be an eventual conflict that demands these norms application. With the purpose of answering these questions and trying to diminish the existent divergences and deadlocks, many theories have been brought about. In between those, a special position is granted to the Monist Theory (Monism) and the Dualist Theory (Dualism).

2.1 Monist Theory

The monist theory states that international and internal juridical orders must be presented as a unity, that is, they belong to the same juridical system which is unified and indivisible. Inside this system, internal and international law differ solely as distinct branches of the Law. Accordingly, the existent relation between international and internal norms are understood as one of interpenetrative nature, between which the juridical interaction is done by means of an identity of sources and subjects (individuals), since they belong to the same united harmonic and convergent system. Therefore, the international law application inside the national sphere is done directly and automatically, and it is either unnecessary and not mandatory to formally receive it with a specific juridical instrument so this international norm could share of appropriate term and validity within the internal juridical order.

Nevertheless, the theory defenders are divided into two different lines of theoretical argumentation when it comes to deal with the existence or not of an hierarchy between internal and international norms and which one should be preferably applied when there are concrete cases of conflict or normative concurrence on the same matter.

For the internationalist monists, the juridical system unity is based on the international law primacy in comparison with internal law, as the national juridical order finds its validity plea from the foreign norms constructed upon the principle of pacta sunt servanda. Hence, it should be subordinated to it. Accordingly, situations whose legislation is done concurrently by both juridical spheres, international and internal, or that show controversies on the law application must be solved by using the international normative precepts.

Contrarily, for the nationalist monists, the adoption of international law internally is a mere State discretion, that is, the constitutional sovereignty has primacy over the supranational normativity. Thus, when there are divergences and considering that the international norms mandatory compliance exists internally solely due to the previous State consent by manifesting its unequivocal sovereign will, the norm to be applied is undoubtedly the one of internal, State nature.


7 The most relevant authors defending the monism are: Hans Kelsen, Hegel e Lauterpach, internationally, and Celso de Albuquerque Mello, Vicente Marotta Rangel e Cachapuz de Medeiros, inside Brazilian internationalist doctrine.


9 This stream found its maximum exponent in the Austrian scholar Hans Kelsen. He defended the internal law derivative existence in comparison to international law, that is, the national law and the validity of its norms (including the constitutional ones) come from international law, therefore being subordinated to the later. Such explanation is based on the Kelsenian normative pyramid, whose apex is the international law as an expression of the principle pacta sunt servanda.

10 The nationalist monist stream has as its main defender the German philosopher Georg Wilhelm Friedrich Hegel (1770-1831).
2.2 Dualist Theory

On its turn, the dualist conception\(^{11}\) explains completely differently the relation between internal and international juridical orders. It departs from the fact that these two juridical orders are equally valid and on term, therefore they shall not be confused. They are, thus, impenetrable and independent juridical orders, what explain why it is impossible to have conflicts between these norms: the internal norm can only be applied within the State realm, whereas the international norm can only be in the supranational sphere. According to the dualists, an international norm\(^{12}\) that is fruit of foreign affairs and juridical compromises assumed by States in front of one or more international law subjects\(^{13}\) must be previously incorporated into the State juridical order and integrated through its text formal reception using a specific legal diploma so it can generate effects.

In Brazil, by interoperating the jurisprudence of the Supreme Federal Court,\(^{14}\) one can note that it has been chosen the dualist doctrine, although under a mitigated version, denominated moderated dualism. Under this approach, it is not enough that a treaty is internationally ratified for it to be on term in the country. It is demanded as well to be approved by the National Congress\(^{15}\) and promulgated by the President of the Republic with the emission of a presidential decree. Even though this obligation cannot find any juridical support inside the constitutional norms\(^{16}\), the promulgation is seen as fundamentally and crucially important by the Supreme Court, and it is one of the phases that compose a perfect treaty incorporation in the country. Nevertheless, it is relevant to stress that, even under the formal necessity of the presidential decree, there is no obligation of it under Brazilian law to transform the treaty into law itself so it can be internally on term and sharing of full juridical force – the pure dualist theory.

However, to analyze the way treaties are received by Brazilian juridical order has been the topic of a number of studies recently. This is not due only to the undoubted relevance of this, but it is due as well to the imperative necessity to implement in Brazil a coherent system of treaty incorporation, specially those that deal with human rights. Such a debate has been done by the already implemented 2004/45th Constitutional Amendment. In order to do so, it is essential to discuss the way though which the Supreme Court has understood and interpreted it by means of its jurisprudence.

3. Human Rights treaties Inside the Supreme Federal Court Jurisprudence

Until the extraordinary appeal trial number 80.004-SE\(^{17}\) in 1977, the Supreme Court has settled the International Law primacy over the Internal Law. In this appeal, it has been

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\(^{11}\) The most relevant dualism defenders are Verdross, who gave the theory this name in 1914, Triepel, Alf Ross and Anzilotti.

\(^{12}\) In this sense, see the set of international law sources indicated in the International Court of Justice Statute Article 38, attached to the United Nations Charter.


\(^{14}\) ADIn 1480 – DF (Rapporteur Minister Celso de Mello): DJU 13/05/1998

\(^{15}\) 1988 Federal Constitution, Article 49.

\(^{16}\) Both the Constitution Article 84 as all other constitutional devices, there is no exigency towards this executive decree promulgation.

\(^{17}\) The Extraordinary Appeal dealt with the Uniform Law on Bills of Exchange and promissory notes. According to what was depicted by Minister Carlos Mário da Silva Velloso (Os Tratados na Jurisprudência do Supremo Tribunal Federal. Revista de Informação Legislativa,
decided that, in case of conflict between treaty and a later law, the law should prevail according to the principle lex posterior derogat legi priori. Therefore, it can be noted that, from this trial on, the Supreme Court has matched treaties and ordinary laws, a stand that is hotly debated by the doctrine.

The consequent discussion on this Supreme Court stand is based on many relevant reasons. On one hand, this decision is consistent with the political moment in Brazil by that time, which tended to affirm the idea of “national interest” based on the classical notion of sovereignty, that is, the complete non-interference inside the national territory of whatever international instruments. On the other, it can be noted that such a stand focused on the idea that a treaty is equivalent to an ordinary law does not take into account the specificity of International Law and its institutes.

It is believed as an International Law principle that, at the moment the State-parts conclude an agreement internationally, they are doing it based on good-faith. Since then, it is expected that the assumed compromises are going to be unrestrictedly fulfilled by its contractors. Accordingly, the Havana Convention on the Law of the Treaties, that is on term in Brazil since the Decree number 18.956 from October 22nd 1929, states undoubtedly about its continuity despite the State internal legislation.

Furthermore, treaties have specific forms to end their effects, and they are different from the way internal laws are extinct. In general, internally it is used the principle lex posterior derogat legi priori, whereas externally the State must follow some particularities in order to get rid of the assumed compromises. If the State disagrees unilaterally from something contained in the treaty, it should complain or extinct it if it is about a bilateral agreement. Afterwards, the document ceases to produce effects for the part if it is a multilateral agreement.

It can be noted that the Supreme Court stand considering treaties as ordinary laws has left Brazil in a delicate position. Internally, a simple ordinary law can push away the applicability of a biding international treaty, as it has been the tendency from the special appeal number 80.004-SE on. Nevertheless, this could enable the country to be internationally demanded due to the principles of State international responsibility based on the non-fulfillment of a treaty before denouncing it.

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a.41, n. 162 abr./jun. 2004, p.36), the process rapporteur Minister Xavier de Albuquerque supported the primacy of International Law over internal law, topic in which he has been defeated by the major part that supported the thesis of the national law authority when it is promul-gated after a treaty. In between different arguments, Minister Leitão de Abreu stand prevailed. He stated that a law not compatible with a treaty does not repeal it, as one could think in a first moment. It simply removes its application when it is on term. This means that, when a law incompatible with a treaty is repealed, the later can be once again applied.

18 The concept of sovereignty is currently object of a number of analyses and is hotly debated. Since this is not the aim of the present article, this topic will not be deeply analyzed here. For more details on it, see: MATTEUCCI, Nicola. Verboe Soberania. In: Dicionário de política. BOBBO, Norberto; MATTEUCCI, Nicola; PASQUINO, Giampaolo (orgs.) Trad. de Carmen C. Verriatre et al. 5. ed. Brasilia: Universidade de Brasilia, 2000, p. 1.183; Hirst e Thompson; HIRST, Paul e THOMPSON, Graeme. Globalização em questão. Trad. de Wanda Caldeira Brant. Petrópolis: Vozes, 1998.

19 Havana Convention, article 11 - rt. 11 da Convenção de Havana – Treaties shall continue to produce effects, even if they modify the State-parts internal constitutions. If the State organization changes in a way it becomes impossible to execute it, due to territorial division or analogue reasons, the treaties shall be adapted to the new conditions.

20 For a more relevant discussion on this institute, see PELLET, Alain; DAILLIER, Patrick; DINH, Nguyen Quoc. Direito Internacional Público – 2ª ed. Lisboa: Fundação Calouste Gulbenkian, 2003. In its pages 775 until 841, States and International Organizations international responsibility is deeply and critically debated.
From 1988 on, a new debate was initiated with the Republic Federal Constitution promulgation. The constitutional text has brought about the paragraph 2nd of its article 5th, which states that the rights and guarantees contained inside this article shall not exclude the ones fruit of treaties in which Brazil is part. In this context, the extreme complexity of the Human Rights Treaties special situation in the Brazilian juridical order has been demonstrated, since the constitutional text has not clarified which would be the juridical status of their norms, although it has pointed to their importance.

Clearly trying to diminish doubts around this problem, the 2004 45th Constitutional Amendment has inserted the paragraph 3rd into this article 5th. According to it, international treaties and conventions on human rights approved with a constitutional amendment quorum, that is, three fifths of the votes at both Houses, will be considered as constitutional text. Even though this amendment has solved the problem of the juridical status of treaties dealing with human rights from its term on, the debates on important international diplomas that have been incorporated before the amendment continues, specially the Rome Statute, responsible for creating and adopting the Criminal International Court.

A number of different streams are dealing with this question. Minister Gilmar Mendes notes four of them and analyze them inside his vote at the extraordinary appeal number RE 466.343-1: besides the stream favorable to consider the treaty as ordinary law, there is now the ones standing that Human Rights Treaties would be a supraeleral law, the ones defending that these should be part of constitutional law, and, last but not least, those that consider it as a supraconstitutional law. Those that defend Human Rights Treaties norms as equal to ordinary laws are connected to the ancient doctrine, and, according to most part of the current doctrine, this represent a retrograde Supreme Court position when it comes to deal with treaties. It cannot be denied that, from the 1988 Federal Constitution on, this line of thought has became empty by article 5th, paragraph 2nd. However, this thesis continues to be relevant for treaties that contain Human rights norms.


22 In this sense, see the Minister Gilmar Mendes votes in the RE 466.343- SP and in the HC 90.172-SP.

23 Some well-known Brazilian scholars stand in this sense: Sylvia Steiner, Flávia Piovesan, Luis Flávio Gomes, Valério Mazzuoli, Ada Pelegrino Grinover and Antônio Augusto Cançado Trindade.

24 In Brazil, the greatest defender of this stream undoubtly was Celso de Albuquerque Melo.
The idea of Human Rights Treaties as a supralegal law considers that these would be below the Constitution, but above infraconstitutional legislation. This position has been discussed lately by the Supreme Court and has special importance for the situations in which the treaties contradict ordinary legislation, when it shall prevail the earlier.

The stream that defends Human Rights norms incorporated in Brazil through treaties should be part of Constitutional Law has many followers nowadays in the country. According to Luís Flávio Gomes, even though this thesis has never reached a majority support inside the Supreme Court, there are some decisions like this.

If the Human Rights treaty norms are considered supraconstitutional, the central problem should be “a supreme values confluence protected internally and externally on human rights matters.” Nevertheless, the way in which Brazilian juridical order is constructed, with the Constitution standing at the most high level, it is unlikely that the national government could get rid of it when it is acting internationally.

Therefore, it can be noted that the debate on Human Rights Treaties incorporation in Brazil has not been finished by with the paragraph 3rd insertion into the article 5th of the Federal Constitution. This is because there is no settled interpretation concerning the treaties dated before the 45 Amendment. In this context, one of the cases that deserves attention is the Rome Statute, that created the International Criminal Court, inserted inside Brazilian juridical order in 2002. Therefore, this document was received before the Constitutional Amendment. However, what makes this case even more complex is the fact that the Amendment itself has inserted into the article 5th the paragraph 4th, which forecasts Brazilian submission to the International Criminal Court. Accordingly, it will be firstly analyzed the Rome Statute insertion into the national juridical order so we can be able to evaluate this case particularities based on what it is stated by the Amendment.

4. The Rome Statute Incorporation into the Brazilian Juridical Order

Firstly, it is appropriate to widely conceptualize a treaty as a formal agreement celebrated by the States will as international public law subjects and is aimed on producing juridical effects to the contracting parts. Nevertheless, a treaty ratification process implies the respect not only to international norms, but also to the internal juridical order that will incorporate its precepts so it can become effective. Concerning the Brazilian Law, the Executive Chief and the National Congress, though sha-
ring of diverse competences, are aimed on the same end: to conclude and to adopt the treaty based on the national juridical regime.\textsuperscript{30}

In this context, the first Rome Treaty celebration phase was the negotiation between the Plenipotentiaries Conference participants, which formulated a statute to be submitted to the States ratification. Following that, the celebration itself started, which, in the national law, depends upon the Executive and the Legislative.

Accordingly, the Federal Constitution is clear when it states that the President of the Republic has privative competence for celebrating international treaties, conventions and acts,\textsuperscript{31} and the Foreign Affairs Minister has the task to assist him formulating Brazilian foreign policies.\textsuperscript{32} However, it is usual in the Ministry of Foreign Affairs that whatever authority signature is valid on a treaty, since it is based on a Full Power Letter.\textsuperscript{33}

For this reason, on February 7th 2000, the Brazilian representative for United Nations\textsuperscript{34} signed the Rome Treaty, stressing the Court political and juridical relevance for being the first permanent and autonomous International Criminal Jurisdiction created by a multilateral treaty. However, the international act was not concluded yet, since the National Congress is the one responsible for resolving definitively about such an instrument.\textsuperscript{35}

Therefore, the current president Fernando Henrique Cardoso submitted the text for the National Congress appreciation on October 10th 2001. Finally, only on June 6th 2002 the Statute has been approved through the Legislative Decree number 112.\textsuperscript{36} Afterwards, the referendum returned to the Executive Chief, who provides the ratification instrument deposit at the United Nations General-Secretary\textsuperscript{37} on June 20th of the same year, confirming its connection to the Rome Treaty within the international juridical realm.

It is appropriate to stress that, with the ratification act\textsuperscript{38}, the State shows its consent to juridically be connected to the international agreement. Since then, it must fulfill it res-

\begin{itemize}
\item \textsuperscript{30} The formalization of an international act has its onset, in general, with negotiation, conclusion and signature acts. As a rule, this competence is attributed to the Executive Power, depending upon each state order. In Brazil, treaty negotiations must be followed by a diplomatic employee (Decree number 2.246/1997, article 1, III, annex I), and must be approved by Itamaraty Juridical Advising Department and by the International Acts Division. The signature means the mere authentication of the conventional text, that is, it ends the negotiation. Nevertheless, it does not have the power of binding the State to the international instrument. It is important to stress that the ending of the negotiations with the signature only means that the Government wishes to continue with the treaty celebration process, but does not obligate the State that has signed to fulfill the agreement. Contrarily, the ratification means the definitive consent of the norms and obligations included in the Treaty, externalizing its effects in the international juridical sphere. ACCIOLEY, Hildebrando; NASCIMENTO E SILVA, Geraldo Eulálio do. Manual de direito internacional público, p.20. Federal Constitution, Article. 84, VIII.
\item \textsuperscript{31} Federal Constitution, Article 84, VIII.
\item \textsuperscript{32} Decree number 2.246/1997, article 1, single paragraph, annex I.
\item \textsuperscript{33} The Full Power Letter must be signed by the President of the Republic and sanctioned by the Ministry of Foreign Affairs.
\item \textsuperscript{34} Ambassador Gelson Fonseca, member of the Ministry of Foreign Affairs.
\item \textsuperscript{35} Federal Constitution Article 49, I.
\item \textsuperscript{36} Legislative Decree number 112 from 2002: “The National Congress orders: Article 1 It is approved the text of the International Criminal Court Rome Statute, approved on July 17th 1998 and signed by Brazil on February 7th 2000. Single Paragraph. It is subjected to Congress approval whatever acts that could result on the afore mentioned Statute revision, as well whatever complementary adjustments that, based on the Federal Constitution Article 49, I, could bring about serious burdens and commitments to the national heritage. Article 2 This Legislative Decree is put on term on the date of its publication”. It is worthy to register the juridical nature of the legislative decree: it is a law without sanctioning, confirmation or approval by the Executive Chief. Hence, it is an act exclusively done by the National Congress, also from the national legislative process, though without the President of the Republic interference. PONTES DE MIRANDA, Francisco Cavalcanti. Comentários à Constituição de 1967, com a Emenda nº. 1, de 1969, p. 142.
\item \textsuperscript{37} The above mentioned United Nations organ is responsible for receiving ratification, consent and approval instruments. See: Rome Statute Article 125 (2).
\item \textsuperscript{38} The same Convention on Treaties states that ratification can be understood as “the international act like this nominated by which the State establishes in the international plan its consent to be obliged by a treaty”. Article 2 (1), (b). 
\end{itemize}
pecting the pacta sunt servanda and good-faith principles; otherwise it can suffer from the consequences of its responsibility at international level. Another problem that must be dealt with is the internal reception process forecasted inside the countries Constitutions and it is the international document efficacy vector inside each State-part territorial space. For this reason, to finish the internal phase of the Rome Statute insertion into the national juridical order was formalized by the Presidential Decree number 4.388 on September 25th 2002. Once inserted into the Brazilian juridical order, it is appropriate to follow analyzing the impact of the recent paragraph 4th of the Federal Constitution article 4th, introduced by the 45 Constitutional Amendment.

5. Rome treaty and the Paragraph 4th of the Federal Constitution Article 5th, Inserterd by the 2004/45 Constitutional Amendment

Published on December 31st 2004, the 45 Constitutional Amendment innovated by adding a device related to the Brazilian State submission to the International Criminal Court jurisdiction, whose creation it has been added. Firstly, it could be initially concluded that it would be unnecessary to reaffirm the constitutional principle of Human Rights primacy, not to mention the previous reference to a Human Rights court by the article 7th of the ADCT. Given the ICC peculiarity and competence, the referred court could not be another one. Moreover, when the Constitutional Amendment was published, the Rome Statute was already appropriately incorporated to the national order. Under this approach, the constitutional prevision after its insertion into internal law should only be a normative redundancy, since it would not have the task of reach out and reaffirm perfect juridical acts.

However, this device interpretation cannot be done so superficially. Its meaning and effects are deeply complex. Indeed, what is aimed is to remove every discussion concerning the International Criminal Court Statute previsions constitutionality, which was raised by the time of their incorporation. In order to do so, the paragraph 4th of the Constitution article 5th promoted an extension of the Bra-

40 Full Presidential Decree: “The President of the Republic, using the attributions granted to him by the Federal Constitution, Article 84, VIII. Considering that the National Congress has approved the International Criminal Court Rome Statute by means of the Legislative Decree number 112 from June 6th 2002. Considering the afore mentioned International Act that entered into force on July 1st 2002 and started to be on term on September 1st in Brazil according to its article 126. Orders: Article 1 The International Criminal Court Rome Statute, added to this present Decree, will be executed and fulfilled following entirely its contempt. Article 2 Whatever acts that are subject to the National Congress approval and can result as a revision of the afore mentioned agreement, as whatever complementary adjustments that, under article 49, I of the Constitution, can bring about serious burdens or commitments to the national heritage. Article 3. This Decree shall enter into force by the date of its publication”.
41 It is stressed that its promulgation attests the existence and formalization of an international act, indicating its executive capacity inside the national order. “The promulgation effects are: a) to make the treaty executive in the internal sphere and b) to check the regularity of the legislative process, that is, the Executive checks the existence of a obligatory norm (treaty) for the State”; MELLO, Celso D. Albuquerque. Curso de Direito Internacional Público, p. 241. It can be observed that the presidential decree does not find any legal basis, but it is “such an ancient praxis as it is independence and the first conventional exercises of the Empire”. REZEK, José Francisco. Direito Internacional Público, p. 83.
42 It is about the paragraph 4th of the afore mentioned constitutional article that states: “Brazil can submit itself to an International Criminal Court whose creation has shown adherence”.
43 Civil Code Introduction Law, Article 6th: “a law on term will have immediate and general effect, respecting the perfect juridical act, the acquired right and the res judicata. Paragraph 1: The juridical act is taken as perfect if it is consummated according to the law on term by the time it took effect”.

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zilian jurisdiction when it clearly submits it to the International Criminal Court jurisdiction, to whose creation was celebrated its adhesion. That is, it equated such a Court with the Brazilian Juridiciary organs. Hence, it can be observed that this device was not aimed on constitutionally declaring adhesion to the International Criminal Court, but to recognize whatever institution with the same nature as a national jurisdiction, enlarging then the criminal jurisdiction concerning crimes within its competence.  

Nevertheless, the following question can be asked: if the afore mentioned paragraph was intended on enlarging internal jurisdictional power, why it has not been inserted into the devices contained in the Constitution Title IV Chapter III? To answer this, some aspects should be taken into consideration. Firstly, it is stressed that the constitutional diploma does not hinder the national jurisdiction enlargement. Secondly, it is observed that, though it deals with jurisdictional organs in a specific Chapter, nothing can be found that prevents its treatment inside a distinct constitutional domain. Moreover, it has been done so for merely organizational aspects. Thus, it must be concluded that the Derivative Constitutional Power choice for enlarging the set of jurisdictional organs in the Title for fundamental rights and guarantees was deliberated, intentional. This is true because it has qualified this norm as sharing of fundamental character, therefore covered as a petrified clause.  

Petrified clauses are those devices that prevent the reforming legislator from removing given matters from the constitutional text. That is, they are constitutional devices that do not admit changes concerning its form and are not able to be abolished by amendments. Nevertheless, it is known that international treaties and conventions can be extinct by a unilateral act of complaint, for instance, done by the Executive Chief. Hence, there would not be the possibility for the President of the Republic to use its discretionary power according to his convenience and chance, and abolish this petrified clause by denouncing the Rome Treaty? For some authors, it forbids human rights protection treaties complaint, because, once ratified by the State, they would enter into the internal order constitutionally as a petrified clause. However, even if such a stand is not admitted, an eventual complaint would no lead to this fundamental rule removal. This is true due to the fact that the paragraph 4th of the article 5th advocates for the adhesion to a generic International Criminal Court, not to the ICC specifically. Certainly, this is what currently shapes the constitutional device, and what is petrified is the recognition

44 According to the Rome Statute Article 5th, it is up to the Court to judge crimes of genocide, against humanity, war and aggression.  
45 This Chapter is aimed on regulating the devices affected by the Judicial Power, in between them the one of dealing with the jurisdictional organs that compose itself.  
46 Federal Constitution, Article 60, Paragraph 4th: “It will not be object of deliberation the amendment propose that intends to abolish: (…).” IV – fundamental rights and guarantees”. This article refers to the petrified clause, that is, a unchangeable constitutional device that cannot be suppressed not even through constitutional amendment.  
47 The complaint can be conceptualized as: unilateral act by which a State-part in a given treaty express its will to retreat from it.  
48 This debate was further developed in this article.
that, if there is a International Court with criminal nature, its jurisdiction will be assigned to the Brazilian State.

6. Conclusion

The conquests obtained during the history of law and that were made real by human rights international treaties appropriately incorporated into the Brazilian law, find some obstacles in interpretations based on monist and dualist theories. For this reason, in the name of sovereignty and State self-limitation, the national jurisprudence denied constitutional status for these treaties. This position is, indeed, contrary to the Constitutional spirit itself, that has put as its fundamental principal the primacy of human rights.

Accordingly, the paragraphs 3rd and 4th brought about by the 45 Constitutional Amendment show the constitutional derivative legislator intention of granting to these treaties the real reach of its devices. It can be observed, therefore, that the novelty introduced refers to an express normative force of these treaties and conventions, given the allocation of constitutional amendment status to these international acts.

In other words, the Constitutional Amendment condition implies that they must be integrated to the internal order as a formally constitutional norm. Thus, the quality of being a materially constitutional norm granted to these international instruments rights may be concretely put into effect, integrating them definitively into the fundamental rights set covered as a petrified clause.\(^49\) This implies the persistence of the rights contained in the treaty, even though they have ceased to exist or to be fulfilled internationally.

Specially with the Rome Treaty Brazilian legislation reception, though appropriately incorporated even before the 2004 45th Amendment publication that granted them constitutional status by the specific constitutional reference to it in its article 5th paragraph 4th, the Brazilian criminal jurisdiction enlargement has never come true. In this sense, it can be stressed the onset of a change within the national values perception, mainly concerning the national order humanization through the effective will to fulfill constitutional devices with fundamental nature contained in the criminal international cooperation in which Brazil is inserted in. This collaboration is done by States and international organizations that compose the international society and are related to the qualification, investigation, arrestment and punishment of criminals that are perpetrators of crimes that affect humanity universally both by its magnitude or the cruelty level it impinges upon human eyes. Currently, it is presented not only as a reality for the States, but, above all, as a primary universal necessity to fight for an unlimited respect and full concretization of human rights.

\(^{49}\) 1988 Federal Constitution, Article 60, paragraph 4th.
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