"CROSS-FERTILIZATION" AS A NEOCOLONIAL TOOL? IMPRESSIONS DERIVING FROM THE *ARTAVIA MURILO VS. COSTA RICA* CASE BEFORE THE INTERAMERICAN COURT OF HUMAN RIGHTS

"*FERTILIZAÇÃO CRUZADA*" COMO FERRAMENTA COLONIAL? IMPRESSÕES DERIVADAS DO CASO *ARTAVIA MURILO VS. COSTA RICA* PERANTE A CORTE INTERAMERICANA DE DIREITOS HUMANOS

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ABSTRACT

Considering the increase in international courts in recent years, it is natural that the numbers of international precedents enlarge as well. Given this fact, and in the light of art. 38(1)(d) of the Statute of the International Court of Justice, which establishes jurisprudence as a source of international law, there is nothing to prevent the various international courts from using precedents from their peers to support a decision adjudicated before them. Thus, an interesting question is precisely whether this communicative tool could not carry with it colonial standards, maintaining an excluding structure in international (human rights) law. Therefore, this text seeks to debate this issue by taking as an example the discussions in the *Artavia Murilo et al. v. Costa Rica* case judged by the Inter-American Court, concluding that it is necessary to use jurisprudence with parsimony, due to regional particularities and the need to promote *ratios decidendi* duly located. To do so, a research of an applied nature is carried out, based on the deductive method, addressing the questions raised in a descriptive and exploratory manner, based on sources collected qualitatively, primarily, using bibliographical and documentary techniques.

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RESUMO

Considerando o aumento de tribunais internacionais nos últimos anos, é natural que a quantidade de precedentes internacionais aumente. Diante disso, e à luz do art. 38(1)(d) do Estatuto da Corte Internacional de Justiça, o qual prevê a jurisprudência como fonte de Direito Internacional, não há nada que impeça as diversas cortes internacionais de utilizarem os precedentes oriundos de seus pares para corroborar certa decisão que esteja sendo tomada perante si. Outrossim, uma questão interessante é justamente se essa ferramenta comunicativa não poderia carregar consigo padrões colonialistas, mantendo a estrutura excludente então existente no campo do direito internacional (dos direitos humanos). Assim, este texto busca debater essa questão, trazendo como exemplo as discussões havidas no caso *Artavia Murilo et al. v. Costa Rica*, julgado pela Corte Interamericana, concluindo que é necessário utilizar a jurisprudência com parcimônia, em razão das particularidades regionais e da necessidade de promover *ratios decidendi* devidamente localizadas. Para tanto, realiza-se uma pesquisa de natureza aplicada, a partir do método dedutivo, abordando os questionamentos levantados de maneira descritiva e exploratória, com base em fontes coletadas qualitativamente, sobretudo segundo as técnicas bibliográfica e documental.

Palavras-chave: Fertilização cruzada; Jurisprudência; Colonialidade; Corte Interamericana de Direitos Humanos; Artavia Murilo et al. v. Costa Rica.

The use of precedents to corroborate the rationality adopted by a certain magistrate is not an uncommon practice in law. Although widely used in Common Law as a way of establishing the law, the mention of judgments that bear a resemblance to a particular case under judgment has also gained ground in countries with a Civil Law tradition precisely for the logical-argumentative approach that this technique presents for the resolution of disputes.

In the field of International Law, because of article 38(1)(d) of the Statute of the International Court of Justice (ICJ), decisions are an auxiliary source of law, being frequently used in judgments handed down by international courts, although article 59 of the same regulation does not make them formally binding on the international community as a whole – but only the parties to the dispute – so that the courts may disengage from a prior *ratio decidendi* when it comes to a concrete case. In other words, even if the international courts do not have the practice of departing from their previous judgments by issuing a new decision, they could do so.

Nothing, however, is cited under article 38(1)(d) regarding the use of precedents from other courts. It means that the norm does not limit the use of the decisions of certain court to this end, allowing the use of judgments given by other international courts in their awards. This amplitude, which, thanks to the proliferation of international tribunals, has allowed the increase of references to the judgments originated from other tribunals, generating a whole discussion about the limits of these transitional exchanges, as well as the implications they generate – especially as it regards the possible maintenance of coloniality.

In this sense, the present text seeks to explore, firstly, the concept of ‘cross--fertilization’ and the possible criticisms of its use, in order to address, in a second moment, the possibility of maintaining colonial structures by thee usage of such “communicative tool” (i.e. jurisprudence from other tribunals), especially in the Inter-American system, turning, finally, to the discussion of the case *Artavia Murilo et al. v. Costa Rica* from this Court as an example.

Methodologically, it should be stressed that this is as applied research, conducted under the area of juridical social sciences, especially in the area of international and human rights law. For its conduction, a deductive method was used, so that the theory is explained before entering in the specificities of the case used as an example. Besides, for the analysis of the sources, which are mainly bibliographical and documental, and were collected under a qualitative scrutiny, a descriptive and exploratory approach was applied.

CROSS-FERTILIZATION OR UNILATERAL FERTILIZATION?

Cross-fertilization is used to describe the communication between judicial courts of the most diverse levels, regarding the use of a “stagnant” rationality for the solution of controversy that turn around a similar issue. This expression was thus identified by the emeritus professor at Princeton University Anne-Marie Slaughter in a text published in 1994, noting that different courts were talking to each other, notably from the use of foreign precedents that have already addressed a certain theme by their magistrates in order to base the decisions that they made, anchoring themselves in such sentences with the clear intention to justify its positioning[1].

This “trans-judicial communication” carried out using precedents handed down by different courts occurs in the most varied forms[2]. According to the

[1] SLAUGHTER, Anne-Marie. A typology of transjudicial communication. *University of Richmond Law Review*, Richmond, v. 29, 1994. p. 99-137.

[2] SLAUGHTER, Anne-Marie. A typology of transjudicial communication. *University of Richmond Law Review*, Richmond, v. 29, 1994. p. 101.

examples brought by the referred author[3], it can be labeled in three ways, whose denominations are thus classified: (a) "first-degree horizontal communication", which occurs when the domestic court of a given country uses the decision of another domestic court; (B) "second-level horizontal communication", which is manifested by the use of precedents of international courts in other international tribunals; or (c) "vertical communication", which occurs when a case of an international court is cited in the decision of a domestic court.

The first-degree horizontal cross-fertilization is a very common act, especially when using precedents from countries with a higher volume of cases on a specific subject. This is what relates the *Gerard v. La Forest*[4]*, as he brings examples of the use of the United States precedents in Canadian courts over the years:*

> In 1849, the New Brunswick Court of Justice addressed the question of whether there was a public right to float wood logs in navigable rivers. Not surprisingly, no prescription was found in the English common law, since large-scale flotation of wood did not exist in England. "However, in a young country like Canada, the right to float wood logs was an economic need in many regions and some dispositive had to be found to make the activity legal." In order to find such a legal dispositive, the New Brunswick Court went to the United States, specifically to the state of Maine, and adopted the *buoyancy principle* applied in Wadsworth v. Smith. Existing such a need, therefore, the Canadian courts referred to the experiences of Maine to guide themselves. One hundred and thirty-five years later, in 1984, the New Brunswick Court of Justice faced the question of who would own the land that was restored after the removal of a dam on a river. Again, the Maine experience was helpful. Bradley v. Rice indicated the applicability of the property rule [...] and the rule was applied in New Brunswick.

That communicative practice is extremely frequent, especially when involving the American precedents and that is not limited, as it is observed of the example mentioned above, to the citation of cases of the Supreme Court of that country[5]. In addition, it should be noted that besides the use of precedents in

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3 SLAUGHTER, Anne-Marie. A typology of transjudicial communication. *University of Richmond Law Review*, Richmond, v. 29, 1994. p. 99-101; 103-104; SLAUGHTER, Anne-Marie. Judicial globalization. *Virginia Journal of International Law*, Charlottesville, v. 40, 1999-2000. p. 1004-1011, em especial p. 1004; SLAUGHTER, Anne-Marie. The Real World Order. *In*: MINGST, Karen A.; SNYDER, Jack L. (eds.) *Essential readings in world politics*. 2. ed. New York: W. W. Norton & Company, 2004. p. 151-152.

4 LA FOREST, Gerard V. The use of American Precedents in Canadian Courts. *Maine Law Review*, Portland, n. 46, 1994. p. 211.

5 For other examples on the use of US precedents, cf.: MACLNTYRE, James M. The use of American cases in Canadian Courts. *University of British Columbia Law Review*, v. 2, n. 3, mar. 1966. p. 478-490; HARDING, Sarah K. Comparative reasoning and judicial review. *Yale Journal of*

certain cases (termed “tacit horizontal first-level communication”), there is also more direct communication, which involves active dialogue between judgments, in order to ensure compliance of decisions to avoid a positive jurisdictional conflict and the consequent ineffectiveness of them. This subdivision of horizontal communication of the first degree is thus explained by Anne-Marie Slaughter[6]:

> Domestic courts situated below the level of the High Courts may also engage in at least one tacit communication with one another. In addition to cross-referencing, recognition of foreign judgments is a form of horizontal cross-border communication. Such acts are usually considered cases of static deference to a court of original jurisdiction; but in some cases the communication between two courts is direct and active. In Remington Rand Corp. V. Business Systems Inc., a case involving the recognition of a decision of a Dutch bankruptcy court, the Third Circuit ordered the lower court to seek reciprocal guarantees from the Dutch court before delivering the final judgment.

It should therefore be noted that communication between domestic courts is not limited to merely complementing the *ratione decisum* of judges, but there is also a much more dense judicial cooperation between them, which is carried out as a way of guaranteeing the justice beyond the sovereign limits of the State[7].

International Law, New Haven, v. 28, n. 2, 2003. p. 425 [“A good example of this approach to foreign law can be found in the Canadian case *The Queen v. Keegstra*, upholding hate speech legislation. Much has been written about the differences and similarities between this case and *R.A. V. v. City of St. Paul*, which was decided just a few years later by the U.S. Supreme Court, and which found comparable hate speech legislation to be unconstitutional”]; NESSEN, Paul E. The use of American Precedents by the High Court of Australia: 1901-1987. *Adelaide Law Review*, v. 14, n. 2, 1992. p. 181-218; GORNEY, Uriel. American Precedent in the Supreme Court of Israel. *Harvard Law Review*, Boston, v. 68, n. 7, maio 1955. p. 1194-1210. For other examples, cf.: PARSONS, Ross. English Precedents in Australian Courts. *University of Western Australia Annual Law Review*, v. 1, n. 2, Dec. 1949. p. 211-222; LAW, David S.; CHANG, Wen--Chen. The limits of global judicial dialogue. *Washington Law Review Association*, v. 86, 2011. p. 524 e 557-558 [“Taiwan’s precarious diplomatic situation effectively prevents members of its Constitutional Court from participating in international court meetings or visits to foreign courts. However, the Taiwan Constitutional Court (TCT) almost always carries out extensive comparative constitutional analysis, either expressly or implicitly, in making its decisions. (...) The foreign court decisions cited by TCT originated mainly from Germany (206 citations distributed in 173 decisions), the United States (75 citations distributed in more than 65 decisions), Japan (40 citations distributed in 37 decisions)]. Decisions of France, Austria, Turkey, Canada, Hungary, Italy, Switzerland, the Philippines and South Korea were also sometimes quoted.”].

6 SLAUGHTER, Anne-Marie. A typology of transjudicial communication. *University of Richmond Law Review*, Richmond, v. 29, 1994. p. 104.

7 For a more in-depth discussion of this dialogue between “active” jurisdictions, cf.: SQUEFF, Tatiana de A. F. R Cardoso. Para além da cooperação tradicional: a positivação do auxílio direito no Novo Código de Processo Civil. *Revista de Direito Constitucional e Internacional*. São Paulo, ano 25, v. 100, mar.-abr. 2017. p. 263-269.

However, it should be noted that, once this direct and active dialogue depends on internal regulation to take place, it does not always become perfect, being, therefore, horizontal cross-fertilization of tacit first degree the most common cooperative form.

Concerning the second type of cross-fertilization cited, that is, of the "second-degree horizontal communication" around which the discussion presented in this second part of this text revolves, there are several examples. Mostly texts dealing with horizontal cross-fertilization of second degree refer to the use of precedents between the Court of Justice of the European Union and the European Court of Human Rights (ECHR), as reported by Francis G. Jacobs[8], presenting as an example the *Marckx v. Belgium* of 1979 before the ECHR:

> The Marckx case dealt with provisions of the Belgian law that disadvantages single mothers in terms of how to stipulate affiliation, the extent of the child's family relationships, and the children's and mothers' property rights. The Court [accepted the case and] considered that it was not possible to distinguish between the legitimate family and the illegitimate family for the purpose of protecting the right to respect for family life under the article 8 of the [European Human Rights] Convention. The Court (...) cited the Defrenne judgment of the CJEU. (...) In that judgment, in 1976, the Court rejected the general view that the principle of equal pay for men and women... required implementing measures before obtaining legal effect. On the contrary, the Court held that the provision had direct effect, so that victims of discrimination could promptly claim damages [suffered] (...).

The second-degree horizontal fertilization, however, is not limited to the application of precedents among European institutions. There are examples of cross-fertilization between courts beyond the regional scope, such as the use of precedents of various international tribunals, including the example of the ICJ being cited in cases of the International Tribunal for the Law of the Sea (ITLOS)[9], as well as in the ECHR, as noted by Chester Brown[10]:

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[8] JACOBS, Francis G. Judicial dialogue and the cross-fertilization of legal systems: the European Court of Justice. *Texas International Law Review*, Austin, v. 38, 2003. p. 551-552 (tradução nossa).

[9] TRIBUNAL INTERNACIONAL DE DIREITO DO MAR. *Case M/V Saiga – N. 2. (São Vicente e Grenadines v. Guinea)*. Judgment. 1st July 1999, para. 133 (citing the famous case of the ICJ on the construction of a dam on the Danube, between Hungary and Slovakia called the Gabcikovo-Naaymaros Project, tried in 1997, in which the exclusion of illegality "State of Need" was argued. [in the para. 51 e 52]).

[10] BROWN, Chester. The cross-fertilization of principles relating to procedure and remedies in the jurisprudence of international tribunals. *Loyola of Los Angeles International and Comparative Law Review*, Los Angeles, v. 30, 2008. p. 225-226 [ECHR also referred to the practice of the Inter-American Court of Human Rights, the United Nations Human Rights Committee and the Committee against Torture]. Therefore, cf. also: EUROPEAN COURT OF HUMAN

> In Mamatukolov and Abdurasulovic v. Turkey [concerning the extradition of the two individuals to Uzbekistan based on an arrest warrant issued by that State on account of the alleged involvement of both in an attempt to assassinate the President of that country], the ECHR sought to ascertain whether the provisional measures granted under its regulation were binding. In its judgment, the Court made extensive references to the decision of the ICJ in the La Grand case [– case between Germany v. The United States which had dealt with the death penalty applied to two Germans without due notification by their State under the 1963 Vienna Convention on Industrial Relations of which the United States is a member], in which the ICJ considered that its provisional measures were binding. [...] In a decisive passage, the ECHR observed... that in several recent decisions, international tribunals emphasized the importance and purpose of the provisional measures, pointing out that compliance with such measures was necessary to ensure the effectiveness of their decisions on merit.

It must be said, however, that the use of precedents among international tribunals is a recent practice, which has gained space with the proliferation of courts in international law since the second half of the twentieth century. After all, at the end of World War II, the international system underwent several modifications, which not only included a central concern for the human being and his intimacy, but also the stability of the system itself, requiring the maintenance of international relations in a peaceful way, which invariably requires varied mechanisms of controversial solutions that exclude the use of force.

In this sense, not only humanization and institutionalization are central features of today’s international plan, but also encompassing jurisdictionalisation and specialization of the system[11]. If before that conflict the Permanent Court of Arbitration was used, established in 1899, as well as the Permanent Court of International Justice, established in 1921 within the League of Nations; today

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RIGHTS. *Mamatukolov e Abdurasulovic v. Turkey* – Petitions n. 46827/99 e 46951/99. Judgment. 40p. Strasburg, 4th Feb. 2005, p. 9 (citing *Glen Ashby v. Trinidad e Tobago*, appreciated in 1994, and *Dante Piandiong, Jesus Morallos and Archie Bulan v. Filipinas*, appreciated in 2000 – both by the United Nations Human Rights Committee). p. 9-10 (citing *Cecilia Rosana Núñez Chipana v. Venezuela*, appreciated in 1998, and *T.P.S. v. Canada*, appreciated in 2000 – both by the Committee against Torture) and p. 11 (citing *Loayza Tamayo v. Peru*, judged in 1997 by the Inter-American Court of Human Rights). For other examples of horizontal cross-fertilization of second degree, especially for international criminal tribunals, cf.: BURKE-WHITE, William W. International legal pluralism. *Michigan Journal of International Law*, Lansing, v. 24, n. 4, 2001. p. 963-979.

11 Specifically on the specification, Philippe Sands expresses that it “reinforces an image of structure and coherence, suggesting that norms are developed and applied in a coordinated and systematic manner” (SANDS, Philippe. Treaty, custom and the cross-fertilization of international law. *Yale Human Rights & Development Law Journal*, New Haven, v. 1, 1998. p. 88).

there are several international courts[12], which are separated by *ratione materiae, ratione temporis* or *ratione personae* (either in relation to the passive or active pole), providing various mechanisms that diminish the increasing complexity of the international system.

This jurisdictional plurality today involves the mutual jurisprudential exchange. After all, as Jonathan Charney[13], "[n]ot only a dissonance of views on the norms of international law may undermine the perception that there is an international legal system, but if the [problems] are not similarly addressed, the very essence of a normative system will remain lost". Consequently, cross-fertilization ends up being an increasingly frequent act among the international courts, being considered an important mechanism for promoting the very unity of the order and confirmation of its common basic legal repertoire even during this growing specialization/institutional repartition[14].

Lastly, as an example of vertical cross-fertilization, it can be mentioned the one brought by Mirna E. Adjanti[15] regarding use of the precedents of the European Court of Human Rights by the Supreme Court of Zimbabwe:

> In the State v. A. Juvenile, the task of the Zimbabwean President's Minister, Dumbutschena, was to determine whether corporal punishment was less inhuman or degrading than that applied to minors rather than

[12] Examples of existing international courts are: the Permanent Court of Arbitration, the International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, Special Court for Cambodia, European Court of Human Rights, Commission/Inter-American Court of Human Rights, Commission/African Court on Human and Peoples' Rights, World Trade Organization Dispute Settlement Body, Permanent Court of Revision of Mercosur, International Center for Investment Disputes, among others.

[13] CHARNEY, Jonathan I. The impact on the international legal system of the growth of international courts and tribunals. *International Law and Politics*, v. 31, 1999. p. 699.

[14] AMARAL JUNIOR, Alberto do. O diálogo das fontes: fragmentação e coerência no direito internacional contemporâneo. *Anuário Brasileiro de Direito Internacional*, Belo Horizonte, v. 2, 2008. p. 11-33 ["(...) the 'dialogue' of the sources is an instrument of great value because it facilitates the communication of the subsystems among themselves and with the general rules of international law. (...) [It] seeks to bring harmony to the process of application of international law. It consists of a precious hermeneutical resource to understand the complexity and scope of normative relations arising from the regulatory expansion of international law in the last half of the twentieth century and on the threshold of the twenty-first century. The 'dialogue' of sources, which presumption against conflict favors, presupposes understanding of international law as a system, endowed with a repertoire and a structure (...)"].

[15] ADJAMI, Mirna E. African Courts, international law, and comparative case law: chimera or emerging human rights jurisprudence? *Michigan Journal of International Law*. Lansing, v. 21, n. 1, 2002. p. 142; in the same sense, pointing to another Supreme Court case in Zimbabwe (State v. Makwanyane) where a different precedent from the ECHR (Soering v. United Kingdom) was used to support the decision, cf.: SLAUGHTER, Anne-Marie. Judicial globalization. *Virginia Journal of International Law*, Charlottesville, v. 40, 1999-2000. p. 1110.

> adults. Its decision revisited the decision of the European Court in Tyrer v. United Kingdom to further explore the rationale used by this Court in establishing that corporal punishment by nature offends the dignity of the human person. Minister Dumbutschena [also] examined the decision of another case of the European Court, Campbell v. United Kingdom, which expressed the view that the nature of corporal punishment is degrading, under the article 3 of the European [Human Rights] Convention.

This communication also occurs in the Brazilian context regarding the use of precedents of the Inter-American Court of Human Rights by the Federal Supreme Court of Brazil (STF, in Portuguese). In a research conducted by Lucas Martinez Faria[16], since the Brazilian ratification of the Pact of San José of Costa Rica (occurred in November 1992[17]) until July 2014, it was noted that the aforementioned court, in plenary decisions, directly cited in 223 previous judgments of the Inter-American System. However, the aforementioned author noted that the *ratio decidendi* of the Inter-American plan was also tacitly used by the STF, since, according to his analysis, it was possible to note a similar argument on the part of the Brazilian court between 2004 and 2009, not even citing the jurisprudence of the inter-American system.

In this sense, it is noted that cross fertilization promotes the exchange of knowledge among the different magistrates, in order to build a convincing foundation on what is intended to be established, establishing a true common international rationality between jurisdictions. At least that is what expresses Antônio Augusto Cançado Trindade[18] for whom, “through such an interpretative interaction, [the treaties] reinforce each other...”, since this interaction, “in a certain way, contributes to the university of treaties, [especially] on those dealing with the protection of human rights, (...) opening the way for a uniform interpretation of the corpus juris of contemporary international law”.

That is why Anne-Marie Slaughter states that even if “it has no binding force (...) [cross-fertilization] appears to be relevant or because of its intrinsic logic power or because the invoking court seeks to gain legitimacy by attaching itself to a large community of courts examining similar issues”[19]. Therefore, it can be understood as a true face of globalization – “judicial globalization” –

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16 FARIA, Lucas A. Martinez. *O Supremo Tribunal Federal e a Corte Interamericana de Direitos Humanos*: diálogos transjudiciais no duplo grau de jurisdição interpretado. Monografia (Especialização). 79p. Escola de Formação da Sociedade Brasileira de Direito Público – São Paulo, 2014.

17 Cf. BRASIL. *Decreto n. 678,* de 6 de novembro de 1992. Available in: www.planalto.gov.br/ccivil_03/decreto/d0678.htm. Access in: 15th June 2017.

18 CANÇADO TRINDADE, Antônio Augusto. The merits of coordination of International Courts on Human Rights. *International Criminal Justice*, v. 2, 2004. p. 37.

19 SLAUGHTER, Anne-Marie. The Real World Order. *In*: MINGST, Karen A.; SNYDER, Jack L. (eds.) *Essential readings in world politics.* 2. ed. New York: W. W. Norton & Company, 2004. p. 151.

since it not only promotes the approximation/interaction between peers (in the case of judges and their institutions) and “the foundation of a global community of law, as well as denoting the similarity of the problems and (re)actions that society, in general, faces”[20].

Even if the jurisprudential exchange carried out through this interactive communication of the magistrates is beneficial from the point of view of the coordinated and internationalized construction of a common law opinion on a certain subject, it cannot be denied that it hides a burden of coloniality. Not only the very origin of cross-fertilization is based on the application of Commonwealth decisions in the United States during the 19th century even after this country’s political independence from the United Kingdom[21], as well as by the very maintenance of the scientific domination that the countries of the global North end up exerting against the countries of the South. After all, even though there is a contributory tendency among the magistrates, it is not possible to affirm that it is always effectively mutual, existing a tendency of (re)production of the ratio decidendi of the North in the South, with few exceptions.

For example, in the first-degree horizontal communication, there is little use of precedents from other countries in the United States, especially at the level of the American Supreme Court. As stated by Melissa A. Waters[22],

> [s]ome conservative members of the Court have repeatedly stated that the use of foreign sources in the Court’s case-law would be illegal. Moreover, the debate has recently moved from judicial and academic circles to the halls of the Congress. The House of Representatives is considering a resolution that expresses the sense of the [American] Congress that the judicial decisions of the US courts regarding the meaning of the laws of this country should not be based in any way on foreign sources.

This scenario seems more like a monologue than a dialogue between peers. Indeed, the very thought of one of the most prominent Justices of the American Supreme Court, then Minister Antonin G. Scalia, was in the sense that the interpretation offered by him, the American, would be a model to be followed – and not the opposite –, denoting the very limits of cross-fertilization, especially when involving nations of the global North.

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[20] SLAUGHTER, Anne-Marie. Judicial globalization. *Virginia Journal of International Law*, Charlottesville, v. 40, 1999-2000. p. 1104.

[21] SLAUGHTER, Anne-Marie. Judicial globalization. *Virginia Journal of International Law*, Charlottesville, v. 40, 1999-2000. p. 1116; SLAUGHTER, Anne-Marie. A global community of courts. *Harvard International Law Journal,* Boston, v. 44, 2003. p. 195-196.

[22] WATERS, Melissa A. Justice Scalia on the use of foreign law in constitutional interpretation: unidirectional monologue or co-constitutive dialogue. *Tulsa Journal of Comparative and International Law*, v. 12, n. 1, set. 2004. p. 150-151.

> He commented: “The notion that international law, redefined to signify the consensus of States on a given subject, can be used by a citizen to control the treatment of a sovereign entity of its own citizens within its own territory is an XX century invention of the teachers of international law and human rights defenders. [...] The authors of the American Constitution, I am sure, would be dismayed by the proposition that, for example, the democratic adoption of the death penalty by the Americans... could be judicially annulled because of the disapproval of foreign entities. [...] “American law – the law made by the democratically elected representatives of the people – does not recognize a category of activity that is universally frowned upon by other nations that is automatically illegal here [in the United States]. [...] [Foreign legal materials] could never be relevant to interpreting the meaning of the American Constitution[23].

According to the magistrate’s reasoning, the only possibility of performing a first-level horizontal communication would be in the interpretation of treaties, notably “when another party-party has already dealt with the interpretation of the document, so that American courts should adopt the position of such judges, as long as these interpretations be considered reasonable by them”[24]. However, what is absorbed from such positioning is that such precedents would not always be accepted, being necessary an case-by-case analysis[25], what would give scope for discussing one’s own interpretation by another, and thus distancing oneself unilaterally from the dialogue for the imposition of its interpretation, as lined by a rule considered as “more democratic”[26].

Similar criticism can be made in relation to vertical communication, since the central element that the theory of cross-fertilization requires is dialogue. At a time when only the precedents of international tribunals are used domestically, without the same citation of national cases at the international level, there would be no dialogue in itself, but only the prescription of a single *ratio decidendi*. Despite this, a caveat regarding this “monologue”, since it aligns with that

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23 WATERS, Melissa A. Justice Scalia on the use of foreign law in constitutional interpretation: unidirectional monologue or co-constitutive dialogue. *Tulsa Journal of Comparative and International Law*, v. 12, n. 1, set. 2004. p. 152.

24 WATERS, Melissa A. Justice Scalia on the use of foreign law in constitutional interpretation: unidirectional monologue or co-constitutive dialogue. *Tulsa Journal of Comparative and International Law*, v. 12, n. 1, set. 2004. p. 155.

25 Regarding that cf.: DELAHUNTY, Robert J.; YOO, John. Against foreign law. *Harvard Journal of Law & Public Policy,* Boston, v. 29, n. 1, 2005. p. 291-330 [“The use of foreign law enables the Court *to impose the results it wants* in any given case (...). The Court is also less fettered by specifically American traditions of law or social practice, and freer to adopt European models and customs, *if it finds them compelling*” (our griffins)].

26 In the same sense, cf.: HARDING, Sarah K. Comparative reasoning and judicial review. *Yale Journal of International Law*, New Haven, v. 28, n. 2, 2003. p. 411-412; MCFADDEN, Patrick M. Provincialism in United States Courts. *Cornell Law Review*, v. 81, n. 1, nov. 1995. p. 4-65.

prescribed by the article 38(1)(d) of the Statute of the International Court of Justice, in the sense that the jurisprudence to be considered an auxiliary source of international law would be that of international tribunals. Thus, criticism as to the inapplicability of vertical cross-fertilization effectively, that is, as a two-way street, may not properly fall to the courts themselves – but in general international law itself[27].

Moreover, it cannot be denied that the Inter-American System of Human Rights has moved in the opposite direction by using precedents of superior courts of states to guide its reasoning through similar cases[28], which denotes the attempt of a court in the South to establish a vertical dialogue with the courts of the American continent (or not!). On the other hand, one must question whether this is not a "Southern" tendency, since other international courts do not tend to do the same, especially when involving the use of precedents of (higher or of Zimbabwe, which, as seen, recurrently uses the precedents of the European Court of Human Rights), denoting the rootedness of the coloniality of power and knowledge in the international system.

This situation is at the same time very present in the horizontal communication of second degree, since it is unusual the reference of precedents originating from the Inter-American System of Human Rights, for example, by other international tribunals. By all means, this is a practice that has been increasing over the years, since the magistrates of these courts are gradually becoming involved in the construction of a rationality of their own formed "from the opinions of others in order to promote mutual respect and dialogue between jurisdictions"[29]. However, it must be said that trans-judicial dialogue is much more common from the South to the North than the reverse.

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27 This positioning has as its source the understanding that the internal decisions of States, regardless of the courts that proclaim them in the domestic scenario, would be "mere facts that express the will and constitute the activities of the States" [emphasis added] (PERMANENT COURT OF INTERNATIONAL JUSTICE). *Case Concerning Certain German Interests in Polish Upper Silesia*. Series A – n. 7, Judgment. 25th May 1926. p. 19. It should be noted that this precedent was used by ITLOS, in the case cited above, in the para. 120 (see note 79).

28 CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Case Artavia Murilo et al. v. Costa Rica*. Judgment. Nov 28th, 2012, for. 262 (citing the Supreme Court, the Constitutional Court of Colombia, the Argentine Supreme Court and the Supreme Court of Justice of Mexico in the text, and the Brazilian Federal Supreme Court in footnote 424); INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of Hilaire, Constantine and Benjamin et. Al. V. Trinidad and Tobago. Judgment. 21 jun. 2002, for. 103 – footnote n. 110 (citing the Supreme Court of India and the Supreme Court of South Africa), for. 105 – footnote n. 111 (citing the Supreme Court) and for. 167 – footnote n. 140 (citing another case of the Supreme Court); INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case Atala Riffo y Niñas v. Chile*. Judgment. Feb 24th, 2012, for. 92 – footnote n. 114 (citing the Colombian Constitutional Court) and for. 126 (citing the Mexican Supreme Court of Justice in the text).

29 SLAUGHTER, Anne-Marie. A global community of courts. *Harvard International Law Journal*, Boston, v. 44, 2003. p. 196.

In a research on cross-fertilization between the ECHR and the Inter-American Court of Human Rights (IACHR), Angela Di Stasi[30] argues that, because the architecture of this court was later than that, "it was fairly easy to foresee that the ECHR would represent a point of reference for the judges of San José. About half of the total amount of the jurisprudence of the Court of San José includes References to the rules of the ECHR and its protocols and to the (more consolidated) jurisprudence of the ECHR". Regarding this, the author points out that:

> In some cases, the IACHR extols – using expressions such as "in the same way" or "similar to" – that its directions are identical to those issued by the ECHR; In others, on the contrary, it highlights the analogies between the Articles of the European Convention on Human Rights and those of the American Convention on Human Rights. (...) Particularly frequent is the reference to the ECHR's case-law on "moral damage" to the right to a "reasonable hearing" and to the "interpretation of a judgment"[31].

However, the author also states that "the opposite phenomenon appears completely different in terms of size, which is the reference, by the ECHR to the jurisprudence developed by the Court of San José, and content, to the normative sources of the Inter-American Human Rights System"[32]. That is because the citations made by the ECHR refer more generally to the American Convention and its articles than the jurisprudence itself, so that it has been quoted occasionally in more singular cases, such as in bioethics and treatment of minorities[33].

Aside from the international criminal courts[34], other international courts have little progress in this horizontal exchange of second degree, and have applied

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30 DI STASI, Angela. The Inter-American Court of Human Rights and the European Court of Human Rights: towards a "cross fertilization"? *Ordine Internazioanle e Diritti Umani*. Roma, 2014. p. 102.

31 DI STASI, Angela. The Inter-American Court of Human Rights and the European Court of Human Rights: towards a "cross fertilization"? *Ordine Internazioanle e Diritti Umani*. Roma, 2014. p. 102 e 104.

32 DI STASI, Angela. The Inter-American Court of Human Rights and the European Court of Human Rights: towards a "cross fertilization"? *Ordine Internazioanle e Diritti Umani*. Roma, 2014. p. 105; Cf. also, for example: INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of Hilaire, Constantine and Benjamin et. Al. V. Trinidad and Tobago*. Judgment. 21 jun. 2002, for. 167 – footnote n. 140 (citing the Soering case v. United Kingdom of 1989 of the ECHR), and INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case Atala Riffo y Niñas v. Chile*. Judgment 24 Feb. 2012 (quoting the case of M. and C. v. Romania of 2001 of the ECHR and the case of Palau-Martínez v. France of 2003 of the same court).

33 DI STASI, DI STASI, Angela. The Inter-American Court of Human Rights and the European Court of Human Rights: towards a "cross fertilization"? *Ordine Internazioanle e Diritti Umani*. Roma, 2014. p. 103 e 105.

34 BURKE-WHITE, William W. International legal pluralism. *Michigan Journal of International Law*, Lansing, v. 24, n. 4, 2001. p. 963-979; POCAR, Fausto. The proliferation of international criminal courts and tribunals: a necessity in the Current International Community. *Journal of International Criminal Justice*, v. 2, 2004. p. 304-308.

sparingly the precedents of their peers. This, for example, is the case of the ICJ, which uses its own precedents much more to corroborate its decisions than those from other courts[35], so that the IACHR, while also using its own decisions largely to validate the (continuity of) its *ratio decidendi*, really seems to be the most advanced cross-fertilization tribunal at its most diverse levels and beyond its region.

Moreover, even if it is stated that communication between the international courts is not fully carried out in the past, much closer to the monologue mentioned above than a concrete exchange between the magistrates in order to confirm their arguments and support the existence of an international (common) legal system, it must be considered that such exchanges cannot always be carried out. Therefore, spreading the adoption of a vertical and/or horizontal *stare decisis* at the (inter)national level of law can further promote the sustainability of the coloniality of power and knowledge in the international sphere, given the probability of applying the treatment given by one locality to all others.

In other words, it seems risky to advocate for a greater use of decisions made by other regions precisely by the possibility of excluding local questions/learning, in favor of idealized practices in the global North whose standards cannot be considered as the only plausible readings about certain situations, especially with regard to Human Rights[36]. After all, the Eurocentric paradigm does not reflect the reality of human totality, so admitting a communicative tool without any qualifications tends to maintain the marginalization of other foundations and interpretations, which are more appropriate to those locales traditionally excluded from the construction of knowledge[37].

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[35] An example in which he cites the existence of an interpretation already expressed in the ECHR and the ACHR in support of his decision (although he did not specify the specific precedents) is the case Ahmadou Sadio Diallo (INTERNATIONAL COURT OF JUSTICE. *Ahmadou Sadio Diallo (Guinea v. Congo)*, Judgment, 30 Nov. 2010, para. Another more recent example in which the ICJ cites a specific case of the ECHR (Grosz v. France) is that of the "State Jurisdictional Immunity" to attest to the maintenance of the State's immunity from other jurisdictions in cases of crimes committed by armed forces During armed conflicts (INTERNATIONAL COURT OF JUSTICE, *Jurisdictional immunity of the States (Germany v. Italy)*, Judgment, 3 Feb. 2012, para. regarding the decisions of the ICJ, however, it is important to note the note made by Mads Adenas and Johan R. Leiss: "*[n]evertheless, judgments of the ICJ in contentious cases enjoy supremacy according to Article 103 of the Charter, since they create binding obligations for the parties to the dispute under Article 94(1) of the Charter (...)*" (ADENAS, Mads; LEISS, Johan Ruben. *Article 38(1)(d) ICJ Statute and the Principle of Systemic Institution Integration*. University of Oslo Faculty of Law Legal Studies Research Paper Series n. 2016-20. p. 8 – nota 35).

[36] GALINDO, George R. Bandeira. A volta do terceiro mundo ao direito internacional. *Boletim da Sociedade Brasileira de Direito Internacional*, v. 1, ago./dez. 2013. p. 67-96.

[37] ROSILLO MARTÍNEZ, Alejandro. *Fundamentación de los derechos humanos desde América Latina*. México: Editorial Itaca, 2013. p. 39-40.

An example where cross-fertilization, if used, would be extremely harmful to Southern understandings, explicitly within the framework of the Inter-American System for the Protection of Human Rights, would be the use of the “margin of appreciation” in the case involving in vitro fertilization in Costa Rica, which will be explained in the sequence.

THE DANGERS OF THE USE OF EUROPEAN PRECEDENTS IN THE INTER-AMERICAN SYSTEM: THE REFUSAL TO USE THE “MARGIN OF APPRECIATION” IN THE CASE *ARTAVIA MURILO ET AL. V. COSTA RICA*

The case *Artavia Murilo et al. v. Costa Rica* is a fine example of how cross--fertilization, at least as it is used today, may represent a setback in the protection of human rights at the inter-American level. The case deals with the prohibition by Costa Rica to allow in vitro fertilization to be generated for the generation of biological filiation, on the grounds that it would violate the right to life, in view of the possibility of losing embryos during this process.

Such Costa Rican argument arises from the revocation of the Executive Decree of the Ministry of Health no. 24029-S, dated February 3rd 1995, which regulated in vitro fertilization in the country. According to this Decree, fertilization was possible provided that the fertilization of six eggs was limited and that all were transferred to the uterine cavity of the woman, being strictly prohibited the discarding or experimentation of any genetic material[38].

However, on March 15th 2000, the aforementioned Decree was considered unconstitutional by means of an Unconstitutionality Action brought before the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, with a focus on the preservation of human life, that it begins with the fertilization of the embryo, so that “(a) it would be necessary to maintain a meticulous control of the medical practice” for the preservation of life; (b) that this would be a business, not a treatment for disease or life-saving; and (c) that there is a “high percentage of fetal malformation” from in vitro fertilization when compared to the natural process of fertilization, (d) not counting other pre-dispositions to maternal health problems[39].

By virtue of this ruling, several persons who wanted to undergo *in vitro* fertilization in Costa Rica were not able to exercise their right to family (biological filiation), since there is no other method of assisted reproduction permitted in that

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[38] CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Caso Artavia Murilo et al. v. Costa Rica*. Julgamento. 28 nov. 2012, para. 68-69.

[39] CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Caso Artavia Murilo et al. v. Costa Rica*. Julgamento. 28 nov. 2012, para. 71 e 128.

State[40]. Thus, the case begins before the IACHR in 2011, when the Inter-American Commission submitted the same to it for the recommendations suggested to Costa Rica, even after three extensions, not having been complied with by that State[41]. In that instance, the main argument put forward by the Commission was that the general prohibition since the 2000 judgment of in vitro fertilization in Costa Rica would be a clear violation of Articles 11(2), 17(2) and 1(1) Of the American Convention on Human Rights, to which the country had ratified on April 8, 1970[42].

Article 11(2) refers to the Law of Honor and Dignity, stating that "[t] he person may be subjected to arbitrary or abusive interference with his private life, his family, his home or correspondence, nor of illegal offenses to his honor or reputation"[43]. And article 17(2) is tied to family protection, so that "the right of men and women to marry and found a family is recognized, if they are of the age and conditions required by domestic law, insofar as they do not affect the principle of non-discrimination established in the [American] Human Rights Convention"[44]. Lastly, article 1(1) recognizes the obligation of states to "respect the rights and freedoms recognized [in the American Convention on Human Rights] and to guarantee their free and full exercise to every person subject to their jurisdiction, without discrimination some"[45].

The argument was that Costa Rica could not intervene in the private sphere of its citizens, and therefore could not deny in vitro fertilization, since this would hurt the "autonomy and identity of a person both in the individual dimension and [in dimension] as a couple"[46]. At this point, the IACHR stated that:

> Article 11 of the American Convention requires state protection of individuals against the arbitrary sanctions of state institutions that affect private and family life. It prohibits any arbitrary or abusive interference in people's private lives, enunciating various areas of the same as the private life of their families. In this sense, (...) the scope of privacy is characterized by being exempt and immune from invasions or abusive or arbitrary aggression by (...) public authority[47].

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[40] CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Caso Artavia Murilo et al. v. Costa Rica*. Julgamento. 28 nov. 2012, para. 126.

[41] CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Caso Artavia Murilo et al. v. Costa Rica*. Julgamento. 28 nov. 2012, para. 1.

[42] CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Caso Artavia Murilo et al. v. Costa Rica*. Julgamento. 28 nov. 2012, para. 2, 3 e 41 e 285.

[43] BRASIL. Op. cit., art. 11(2).

[44] Id. Ibid., art. 17(2).

[45] Id. Ibid., art. 1(1)

[46] CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Caso Artavia Murilo et al. v. Costa Rica*. Julgamento. 28 nov. 2012, para. 137.

[47] CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Caso Artavia Murilo et al. v. Costa Rica*. Julgamento. 28 nov. 2012, para. 142.

This because “protection of privacy includes a number of factors related to the dignity of the individual, including (...) the ability to develop one’s own aspirations (...) and define their own personal relationships”[48]. It means that, in the eyes of the IACHR, a person cannot see his personal autonomy limited by a state act, so that he has the right to decide on biological paternity/maternity, which is a presupposition of his personality.

In this sense, the IACHR expressly points out that it goes beyond the punctual provision in article 11, since the protection of private life would also be anchored in Articles 17(2) and 1(1) of the American Convention[49]. The Court stated that “Article 17 of the American Convention recognizes the central role of the family and of family life in the existence of a person and in society in general... [should] favor, in a broader manner, the development and strengthening of the family nucleus”.

In addition, it agreed that “the principle of mandatory law of equal and effective protection of law and non-discrimination requires States to refrain from producing regulations... that have discriminatory effects on different groups of a population in the Moment of exercising their rights”, as is the case with the group of people who find it difficult to reproduce – which includes not only those who cannot reproduce for health reasons (physical incapacity, either man or woman), but also the problem of stereotyping of infertile women (gender inferiority) and even those who cannot leave the country to perform the treatment (socioeconomic incapacity)[50].

Based on this, the IACHR concluded that Costa Rica’s decision to prohibit in vitro fertilization would violate the aforementioned articles of the American Convention, since, starting from “absolute protection of the embryo [and] not considering or taking into account The other rights in conflict, [the State would have carried out] an arbitrary and excessive intervention in private and family life, [which makes it] disproportionate” and therefore unacceptable, so that the assisted reproduction in question should be allowed in the country[51]. It is interesting, however, to note Costa Rica’s case for merit[52], considering that the State

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[48] CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Caso Artavia Murilo et al. v. Costa Rica*. Julgamento. 28 nov. 2012, para. 143.

[49] CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Caso Artavia Murilo et al. v. Costa Rica*. Julgamento. 28 nov. 2012, para. 145 e 285.

[50] CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Caso Artavia Murilo et al. v. Costa Rica*. Julgamento. 28 nov. 2012, para. 286, 288-290 e 294-297

[51] CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Caso Artavia Murilo et al. v. Costa Rica*. Julgamento. 28 nov. 2012, para. 316.

[52] Before arguing the merits, it should be noted that Costa Rica had attempted to establish the lack of competence of the IACHR in a preliminary manner, arguing that the victims would not have exhausted domestic remedies in Costa Rica, since the decision taken by the

had attempted to rely on the doctrine of "margin of appreciation", which was highlighted in several precedents of the ECHR[53], in order to defend its position (of banning in vitro fertilization)[54].

The "margin of appreciation" refers to the "space that a government has in assessing factual situations and in applying the provisions enumerated in human rights treaties"[55]. Developed within the scope of international law from the European level, it highlights "the difficulty in identifying common traditions that embrace the diversity of cultural and legal traditions that each [European Convention on Human Rights] State Party presents", allowing That the State, based

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Constitutional Chamber of the Supreme Court of Justice "on March 15, 2000, although final, could be questioned through an administrative measure – which had been completely rejected by the Court, given that the country did not effectively prove the existence of a specific remedy that could adequately satisfy And effective" the claims of the interested parties (INTER-AMERICAN COURT OF HUMAN RIGHTS, Case Artavia Murilo et al., V. Costa Rica, Judgment, November 28, 2012, para.). In addition, two other preliminary objections have been alleged, namely: (a) concerning the petition of two victims, which would have been untimely, and (b) in relation to new facts that would have been brought to the file within the scope of Court, without being argued in the Commission's view – both equally rejected (INTER-AMERICAN COURT OF HUMAN RIGHTS, Case Artavia Murilo et al., V. Costa Rica, Judgment, November 28, 2012, para. 18-28).

53 For a number of cases, see: ARAI-TAKAHASHI, Yukuta. *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR*. Antwerp: Intersentia, 2002. p. 5-8; SPIELMANN, Dean. *Current legal problems lecture:* whither the margin of appreciation? European Court of Human Rights, 20 Mar. 2014. Available in: www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf. Access in 15 Jun. Furthermore, it should be noted that the margin of appreciation is also found in the CJEU, especially in the interpretation and application of European law in state public policies such as those related to the movement of workers, allowing some discretion to the authorities of each State to The application of European law (see HALL, Stephan. The European Convention on Human Rights and public policy exceptions to the free movement of workers under the EEC Treaty. *European Law Review*, v. 16, 1991. p. 474-475; COURT OF JUSTICE. *Roland Rutili v Minister of the Interior (France)* – Case 36/75, Judgment, 28 Oct. 1975. p. 1231).

54 Id. Ibid., para. 140. [The State has argued that "the possibility of procreation through in vitro fertilization techniques... does not constitute a right recognized within the scope of [personal] freedom", and, even if the right to founding a family includes the possibility of procreation, the State should not allow such a possibility at any cost and to. 170 ["the State claimed that 'the doctrine of moral consensus as a factor of discretion... established that, in order to restrict it, the consensus must be clear and evident.' In that regard, it argued that: (i) there is 'no consensus on the legal status of the embryo'; (Ii) 'there is no consensus on the beginning of human life', (iii) there is therefore no need to give a discretion on the regulation of the technique of IVF [in vitro fertilization]; There are other States that, by legislative omission, allow the practice of (IVF), Costa Rica has lost its margin of appreciation'. It considered that '[t] he doctrine of margin of appreciation was extensively developed by the [ECHR]' and that in the jurisprudence of the Inter-American Court there are some precedents which 'contemplate the possibility of the State regulating certain matters in accordance with its discretion'"].

55 ARAI-TAKAHASHI, Yukuta. *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR*. Antwerp: Intersentia, 2002. p. 2

on its sovereignty, finds a middle ground between its vision and that contained in the legal text (regarding individual protection), denoting “the original understanding that said Convention should be considered subsidiary to the national system”[56].

Thus, this doctrine enables the State, in a concrete case, to verify how human rights rules will be applied, especially when in conflict with national interests or other moral convictions, balancing international obligations and fundamental precepts of society in particular and of its domestic law[57]. However, the application of such a thesis should not be unrestricted and should be used in conjunction with the principle of proportionality, in order to achieve a balance “between the means employed [by the State] and the objectives pursued by it not to overburden The rights of people in exchange for the common good”[58]. Also, if the impact on the individual right were evaluated, “the national authorities would have discretion to choose the means of action”[59].

According to the European understanding, therefore, “discretion” would allow Costa Rica, in the exercise of its functions, to adopt measures deemed more appropriate to interpret and/or protect common precepts, given “being in a better position (...) to give an opinion as to the exact content of the rules [which protect individuals]” and stipulate its limits[60]. That would mean a literal interpretation of Article 4(1) of the American Convention on Human Rights, which states that “every person has the right to have his life respected, [and] should [be] protected by law and, generally, from the moment of conception”[61].

Costa Rica defended the position that, depending on the drafters of the Convention in the 1960s, the concept would be the dividing line between the possibility of “disposing” of Article 4(1), in spite of which, procedures such as in vitro fertilization were not even scientifically ventilated[62]. Therefore, according to the Costa Rican argument, any assisted reproduction practice would violate

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56 ARAI-TAKAHASHI, Yukuta. *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR*. Antwerp: Intersentia, 2002. p. 3.

57 TUMAY, Murut. The margin of appreciation doctrine developed by the case law of the European Court of Human Rights. *Ankara Law Review*, v. 5, n. 2, 2008. p. 201.

58 ARAI-TAKAHASHI, Yukuta. *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR*. Antwerp: Intersentia, 2002. p. 14

59 ARAI-TAKAHASHI, Yukuta. *The margin of appreciation doctrine and the principle of proportionality in the jurisprudence of the ECHR*. Antwerp: Intersentia, 2002. p. 17.

60 Cf. EUROPEAN COURT OF HUMAN RIGHTS. *Handyside v. Reino Unido* – Petição n. 5493/72. Julgamento. 33p. Estrasburgo, 7 dez. 1976. p. 17; no mesmo sentido, cf.: EUROPEAN COURT OF HUMAN RIGHTS. *Armani da Silva v. Reino Unido* – Petição n. 55878/08. Julgamento. 70p. Estrasburgo, 30 mar. 2016. p. 63.

61 BRASIL, Op. cit., art. 4(1).

62 CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Caso Artavia Murilo et al. v. Costa Rica*. Julgamento. 28 nov. 2012, para. 179.

the right to life, which is not a peculiarity that falls on the private sphere of the citizens, but on the state public order, so that its decision of 2000 would be aligned to their convictions.

In reason of this view, if the cross-fertilization sought by Costa Rica were to be pursued in the present case, using the "margin of appreciation", there would be a notable disregard not only of the American Convention on Human Rights, but also with the American particularities. After all, on the European level, the right to life is guaranteed in Article 2(1), the statute of which guarantees it to any person, since it is protected by law, although the right to respect for private and family life, provided for in Article 8 of the same document, prescribe that "interference by the public authority in the exercise of this right [may occur], except where such interference is provided for by law and constitutes a measure which, in a democratic society, Public security, ... for the protection of health or morals, or the protection of the rights and freedoms of others"[63].

And as the IACHR rightly reasoned, human rights cannot be understood as isolated rules, since the interpretation of these rights must occur in a systematic and evolutionary way[64], which does not find support only in the European paradigm (here, in the sense of allowing the State to formulate unilateral prescriptions as to its understanding of a given rule[65]), so that its reading should occur from the moment and place where the reader is. This means that if the reader is on the Inter-American level, it is necessary to observe the context and peculiarities of the society in which the interpretative problem is

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63 CONSELHO DA EUROPA. *Convenção Europeia de Direitos Humanos*. 4 nov. 1950. Arts. 2(1) e 8(1)(2).

64 INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case Artavia Murilo et al. v. Costa Rica*. Judgment. Nov 28 2012, for. 191 According to the systematic argument, the rules must be interpreted as part of a whole whose meaning and scope must be determined according to the legal system to which they belong. In this sense, the Court considered that "in giving interpretation to a treaty, not only are the agreements and instruments formally related to it (second paragraph of Article 31 of the Vienna Convention [on the Law of Treaties of 1969]), but Also the system within which it is inscribed (third paragraph of Article 31), that is, International Human Rights Law [particularly, here, in the Inter-American System of Protection]", and para. 245 ["This Tribunal has stated on other occasions that human rights treaties are living instruments whose interpretation must accompany the evolution of current times and living conditions."].

65 This caveat is pertinent, since the argument put forward here is that the interpretation of the European Convention would allow Costa Rica to maintain the 2000 decision which prohibits in vitro fertilization in the country – rather than in Europe, particularly in the ECHR. Understand that life is born at the moment of its conception. Even because, according to the decision in this case, the ECHR has already stated that "the embryo's potentiality and ability to become a person requires protection in the name of human dignity without converting it into a 'person' with entitled 'life insurance' (Case V. V. France) and confirmed the Irish understanding that 'the concept of a unborn child does not apply to embryos obtained in the context of in vitro fertilization'" (Costa and Pavan v. Italy) (Id. Ibid., Para. 247 and 252).

situated – and not merely to use a Eurocentric discourse, which, in this case, would lead to the situation in relation to private and family life by means of domestic legislation.

FINAL REMARKS

The present article intended to discuss the impact of the growth of international tribunals within the international community. However, differently form other approaches, such as to debate if it collaborates to the fragmentation or the hardening of the international legal system, it intended to bring another discussion into consideration, particularly on whether the communication among tribunals through the "exchange" of jurisprudence tended to maintain the coloniality of international law.

After all, international law is commonly known to be constructed on European basis, chiefly after the events of Westphalia in 1648, concealing much of the developments of other regions, not to mention the violations committed by Europeans due to the colonial structure then presented. However, even after the independence of many nations and the problems the international community faced under two World Wars, international law keeps on having a European/northern approach to discussing themes deemed important and natural to other realities – and not theirs. And this continuance of colonial aspects even after the end of formal domination, called coloniality, are also present in jurisprudence when it circulates from region to region without considering local particularities.

In other words, sometimes, when magistrates use other tribunal's reasoning in order to confirm their arguments and support the existence of an international rule, they may end sustaining of the coloniality of power and knowledge of northern nations in the international sphere, ending up stretching a local foundations and interpretations to all others, without even noticing that it may marginalize local traditions, especially with regard to Human Rights, in favor of standards that may only be plausible in other situations/regions.

And the *Artavia Murilo et al. v. Costa Rica* case exemplifies this scenario perfectly, as it deals with problems peculiar to Latin American reality, such as gender violence, socioeconomic disparity and, why not, the influence of Catholicism in the formulation of state decisions, which should be examined from local knowledge and not shadowing them through the reproduction of Eurocentric inventions.

As a result, the judgment of the IACHR is very important because it is based on regional differences, so it was used vertical and horizontal cross-fertilization of second order when necessary to corroborate its *ratio decidendi* within the limits

of its reality, not allowing an epistemic closure and consequent silencing Of local developments reflected in the evolutionary interpretation of the American Convention by validation of the arguments brought by Costa Rica – the only country in the region that prohibits *in vitro* fertilization[66] – based on "borrowed" doctrines that would provide a space for the state to adopt rules disproportionate to individual rights.

And due to of this discussion, this case also becomes an important precedent for international law as a whole, stating that local particularities must be considered when "cross-fertilization" is used, and that technique should not be used blindly and/or unilaterally, in view of the possibility of maintaining the colonial structures of power and knowledge, to the detriment of new interpretations, properly evolutionary and environmentally situated, which should also be considered and not relegated to academic and political marginality as is repeatedly observed.

In other words, it not only contributes to the architecture of an increasingly solid international law, since formed by the most *diverse* sources, but it also avoids the unilateral construction[67] of an extremely pernicious precedent for the realization of human rights in case of an increase in the use of cross-fertilization in the future.

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[66] CORTE INTERAMERICANA DE DIREITOS HUMANOS. *Caso Artavia Murilo et al. v. Costa Rica*. Julgamento. 28 nov. 2012, para. 254.

[67] At this point, it is worth recalling the ICJ's own argument that the use of the margin of discretion in the case of "Antarctic Whaling", in reference to Japan's attempt to rely on its discretion to continue its "Investigations" involving whales in the South Pacific, suggesting that the request for a special authorization to perform acts that endangers a common good is not simply a matter for a State (INTERNATIONAL COURT OF JUSTICE. *Whaling in the Antarctic (Australia v. Japan with intervention from New Zealand)*, Judgment, March 31, 2014, to 61).

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