



Master of Arts Thesis
Euroculture

Palacký University Olomouc

University of Strasbourg

June, 2016

**Inspiration and Cooperation between
the European Court of Human Rights and
the Inter-American Court of Human Rights**

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MA Programme Euroculture Declaration

I, Kornélie Gronska hereby declare that this thesis, entitled “Inspiration and Cooperation between the European Court of Human Rights and the Inter-American Court of Human Rights”, submitted as partial requirement for the MA Programme Euroculture, is my own original work and expressed in my own words. Any use made within this text of works of other authors in any form (e.g. ideas, figures, texts, tables, etc.) are properly acknowledged in the text as well as in the bibliography.

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Date June 1st, 2016

Preface

First and foremost, I would like to thank my supervisors, namely Elisabeth Lambert-Abdelgawad and Pavel Bureš, for their guidance, time and advice. Additionally, I would like to thank Judge Paulo Pinto de Albuquerque for sharing his viewpoint on cooperation between international Courts. I am also expressing my thanks to the Senior Staff Attorney of the Inter-American Court of Human Rights, Jorge Calderon Gamboa as well as the Lawyer of the Research Division of the Jurisconsult at the ECtHR, Guillem Cano-Palomares, who provided me with very precious and interesting information. Last but not least, I would like to thank my editors Laurie Crippen, Tamika Glouftsis, Joshua Hurd, and Deborah Teska for perfecting the linguistic side of my paper.

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1 Introduction

With the adoption of the Universal Declaration of Human Rights in December of 1948, an essential change for the human rights system was put into motion. Though the Declaration is not a legally binding document, it is completely relevant from a political perspective. Additionally, mechanisms which increase the efficiency of human rights on a regional level were founded. These mechanisms included establishments of international tribunals, which are empowered to point out structural deficiencies of legal framework within the national systems. International tribunals of human rights were established in different regions of the world: The European Court of Human Rights [ECtHR] with its headquarters in Strasbourg and the Inter-American Court of Human Rights [IACtHR] with its headquarters in San José, Costa Rica. The main focus of this thesis is to explore the possible inspiration and ongoing cooperation between these Courts.

Both Courts of the studied regional systems of human rights were developed in very different historical, social and cultural environments.¹ These environments naturally differ from each other even in today's society.² López Guerra and Saiz Arnaiz argue that interactions between regional systems of human rights have an impact on the universality of human rights despite the social, political and cultural differences.³ One can argue these entities to be too disparate, but that does not signify that they cannot inspire, interact, and cooperate. Both continents continue to develop mechanisms to protect human rights regionally, but the question is, whether or how much they interact and inspire each other. Furthermore, one could pose a question, if these interactions might result in bringing the systems closer together and eliminating the differences within their jurisdictions.

The European Convention on Human Rights [ECHR] was essential to the safeguarding of human rights on the European continent. The ECHR, signed in 1950, entered into force on September 3rd, 1953 and is considered to be a tremendous achievement of the Council of Europe. It may be true that the Universal Declaration of Human Rights was implemented on a regional level in a form of the Convention.⁴ The Preamble of the Convention even entails an explicit reference to the Declaration. In addition to that, some

¹ Scott Davidson, *The Inter-American Court of Human Rights* (Aldershot: Dartmouth Publishing Company Limited, 1992), 4.

² Davidson, *The Inter-American Court*, 5.

³ Luis López Guerra and Alejandro Saiz Arnaiz, *Los sistemas interamericano y europeo de protección de los derechos humanos: Una introducción desde la perspectiva del diálogo entre tribunales* (Lima: Palestra Editores, 2015), 351.

⁴ Clovis C. Morrison, *The Developing European Law of Human Right* (Leiden: A.W. Sijthoff, 1967), 18-19.

articles of the ECHR relate to articles of the Declaration. To state a few examples, Article 2, the right to life, was based on Article 3 of the Declaration, or Article 3, freedom from torture and inhumane punishment, found inspiration in Article 5 of the Declaration.⁵ It may be the case that Europe took the necessity to protect human rights into account, but it is indispensable to point out that both of the documents were based on the same inspiration by René Cassin.

Nevertheless, countries of Western Europe intended to show that their dedication to human rights goes beyond the Declaration, which was not legally binding.⁶ The principle aim was to eliminate authoritarianism and dictatorship. After the atrocities of the Second World War, Western Europe endeavored to prevent any reappearance of these horrors.⁷ In addition, fear of the spread of communism throughout the whole of Europe added a strong incentive to ratify the Convention.⁸ Subsequently, the establishment of the ECtHR⁹ was encouraged by the newly formed Council of Europe to provide individuals with an effective mechanism to seek restoration of their rights in case of their violation.¹⁰

After WWII, however, Europe remained divided as a result of the Cold War. Western Europe prospered and aimed for integration, while part of the Central and Eastern Europe was ruled by communists and Soviet Union. One of the crucial examples of Western aims for Europe to cooperate is the establishment of the Council of Europe, which can be seen as the oldest political organization of Europe.¹¹ Additionally, Western Europe started to unite, by first coordinating the steel and coal industries, followed by the removal of the trade barriers. Post-communist countries joined the integration processes much later, after liberating and reforming themselves in order to become eligible as member states of the international bodies such as the Council of Europe or the EU.

⁵ Morrison, *The Developing European*, 19.

⁶ Ed Bates, "The Birth of the European Convention and on Human Rights and the European Court of Human Rights," in *The European Court of Human Rights Between Law and Politics*, ed. Jonas Christoffersen, and Mikael Rask Madsen (Oxford: Oxford University Press, 2011), 18.

⁷ Morrison, *The Developing European*, 17.

⁸ Bates, "The Birth of the European," 18.

⁹ In 1950, the mechanism was formed by the European Commission for Human Rights and the ECtHR. It was a single mechanism of double level.

¹⁰ Morrison, *The Developing European*, 17.

¹¹ On May 5th, 1949 ten State Parties signed the Statute of the Council of Europe: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. In August 1949 they were followed by Turkey, a year later by Greece and another year later by the Federal Republic of Germany.

"The Signing of the Treaty – The First Organizations and Cooperative Ventures in Post-War Europe," accessed May 4, 2016, <http://www.cvce.eu/en/education/unit-content/-/unit/026961fe-0d57-4314-a40a-a4ac066a1801/a18e2f7e-b57b-471b-99e3-f7a26b8327ca>.

It can be contended that the magnitude of human rights protection reaches far beyond the EU's borders, since many of the contracting parties to the Convention are not EU members. The Council of Europe currently has 47 member states. The increase of the number of member states of the Council of Europe and their accession to the Convention in the 1990s had an immense influence on the ECtHR.¹² The Court had to deal with an increasing number of applications and therefore adjust its mechanisms to the new challenges.¹³

The State Parties to the Convention under auspices of the Council of Europe made a series of changes by introducing the Protocol n° 11 in 1998, which led to a fusion of the European Commission on Human Rights and the Court. The two-tier structure was replaced by one permanent organ. Another significant reform that had a positive influence on the backlog reduction was the Protocol n°14 in 2010, which introduced new judicial formations or new admissibility criteria.¹⁴ However, many potential issues still remain such as the chronic problems in the Ukrainian, Russian, or even Italian systems of justice.

The level of democracy can be questionable in some of the member states such as Azerbaijan, which evinces features of a repressive government.¹⁵ Russia, Ukraine and Turkey, which are responsible for many repetitive cases reaching the Court, can be also considered as countries lacking certain levels of democracy. Is it not a prerequisite that the contracting party shall evince a high level of democracy? It is disputed that the Council of Europe allowed some countries to become member states and contracting parties to the Convention, even though they were not purely democratic. The intention was to enable the international organization to have a positive influence on the countries' shortcomings.¹⁶ One shall consider that the influence of the Council of Europe has been more successful in some countries than others. On the other hand, the Council of Europe has the possibility to monitor implementation of the Convention, and improve the levels of democracy, human rights protection and rule of law such as through MONEYVAL Committee of Experts, the Group of Experts on Action against Trafficking in Human Beings [GRETA] and many more.¹⁷

¹² Also countries such as Ukraine and Russia.

¹³ Theodora Christou and Juan Pablo Raymond, foreword to *European Court of Human Rights: Remedies and Execution of Judgements*, by Nicholas Bratza (London: The British Institute of International and Comparative Law, 2005), v.

¹⁴ The newly introduced admissibility criterion by Protocol n°14 was the "significant disadvantage" for the applicant.

¹⁵ G.E. Tbilisi, "Do as We Say, Not as We Do," *The Economist* (2014), accessed March 17, 2016, <http://www.economist.com/blogs/easternapproaches/2014/05/azerbaijan-and-council-europe>.

¹⁶ Vugar Gojayev, "Azerbaijan and the Council of Europe: A Crisis of Legitimacy," *EurasiaNet* (2014), accessed April 14, 2016, <http://www.eurasianet.org/node/68369>.

¹⁷ "Azerbaijan - Member State," Council of Europe, accessed March 9, 2016, <http://www.coe.int/web/portal/azerbaijan>.

Nevertheless, tolerance or rather ignorance coming from an international organization protecting human rights towards dictatorships appeared quite often on the other side of the Atlantic.¹⁸ The Charter of the Organization of American States, which was signed in Bogotá in 1948, brings certain doubts, whether human rights were on top of the agenda of the Organization of American States [OAS]. Authoritarian countries and dictatorships were tolerated to be member states of this regional organization. The form of government was a matter of internal concern, unless it was a communist dictatorship such as Cuba.¹⁹ However, the protection of human rights evolved further with the establishment of the IACtHR.

The Inter-American Specialized Conference resulted in adopting the American Convention on Human Rights in 1969. The Convention then entered into force in 1978 and the IACtHR was established a year later by adopting a resolution of the OAS.²⁰ Another distinction of the Inter-American system lies in the exceptional position of the USA, which had not yet ratified the 1969 American Convention on Human Rights.²¹ The reports concerning violation of human rights in the USA are then based on the 1948 American Declaration of the Rights and Duties of Man.²² It should be taken into account that the USA has often been reluctant to sign and ratify international conventions concerning human rights, since the ratification requires approval by two-thirds majority. The USA has not even ratified the UN Convention on the Rights of the Child along with Somalia and South Sudan. It is often argued that the USA does not ratify conventions, which could overrule the existing laws.²³ The region of the OAS, however, has even more specificities.

After democratic reforms in countries of Central and South America in the 1990s, the region remained having problems with inefficient judicial systems. Crisis of democracy and rule of law was and still is a common problem for many of them. Moreover, limited political stability existed in Latin America in the 20th century and the criminal justice system was in a desperate need of reforming. Therefore, judicial reforms in the area of criminal procedure were part of a wider political and developmental project for Latin America, which was

¹⁸ To state few examples: Panama, Nicaragua, Uruguay, etc.

¹⁹ Bates, "The Birth of the European," 20.

²⁰ Davidson, *Inter-American Court*, 1.

²¹ Full table of signatory countries as well as ratifications of countries are available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm.

²² Edward H. Lawson and Mary Lou Bertucci, *Encyclopedia of Human Rights* (Washington DC: Taylor & Francis, 1996).

²³ S.C., "Why Won't America Ratify the UN Convention on Children's Rights?" *The Economist*, (2013), accessed May 4, 2016, <http://www.economist.com/blogs/economist-explains/2013/10/economist-explains-2>.

supposed to improve democracy and rule of law.²⁴ The rule of law agenda of the 1990s focused on strengthening democracy, promoting “market rule” and responding to various social concerns.²⁵

Nevertheless, there are still many remaining problems in the national systems of the region. Judicial corruption is still considered as an immense issue.²⁶ The lack of honest investigation can be considered as another constant problem. Court procedures are often not followed and sometimes even ignored with intention. Additionally, police lack proper training, motivation and are often accused of accepting bribes. Institutional corruption is very difficult to trace and controls of the institutions are not efficient enough. Besides that violence against the judiciary is very common, since the executive branch does not provide enough security and safety for the judicial officers.²⁷

Notwithstanding the particularities of the Central and South American region, the adoption of the American Convention on Human Rights was reached in November, 1969. It was ratified by seven countries nine years later.²⁸ Up to the present day, the American Convention was ratified by twenty-five countries except for the USA, Canada, Belize, Guyana and several islands. Venezuela as well as Trinidad and Tobago denounced the Convention.²⁹

Arguably, the Inter-American region of human rights is very peculiar and does not evince much generality, since not all of the member states of the OAS have ratified the American Convention. Nevertheless, this paper focuses on the Inter-American system of human rights as a whole, despite the peculiarities of some member states. The main focus is on the two international tribunals: the IACtHR and the ECtHR. However, before analyzing any further, it is worth to mention the main direction of cooperation between the two international organizations.

²⁴ Claudia Cano, Andy Chamber and Yacine Barry, “Judicial Reform of Criminal Justice in Latin America,” *Office of the Assistant Secretary for Legal Affairs*, accessed December 1, 2015, http://www.oas.org/legal/english/osla/judicial_reform.doc.

²⁵ Pilar Domingo and Rachel Sieder, *Rule of Law in Latin America: The International Promotion of Judicial Reform* (London: University of London, 2001), 143.

²⁶ It often originates from the illegal drug production and trafficking, for example in Panama, Chile, Mexico, Brazil, and a number of islands of the Caribbean.

²⁷ Luz Estella Nagle, “The Cinderella of Government: Judicial Reform in Latin America,” *California Western International Law Journal*, 30 (2000): 360 – 368, accessed December 13, 2015, <http://scholarlycommons.law.cwsl.edu/cwilj/vol30/iss2/20>.

²⁸ In 1978 it was ratified by El Salvador, Grenada, Guatemala, Jamaica, Panama, Peru and Dominican Republic. Costa Rica ratified it in 1970, Colombia in 1973 and Venezuela and Ecuador in 1977.

²⁹ “American Convention,” accessed May 4, 2016, https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm.

The Organization of American States and the Council of Europe have been cooperating for decades. These two institutions first agreed to a Cooperation Framework on November 13th, 1987 through an exchange of letters.³⁰ This diplomatic act was later deepened by a Memorandum of Understanding signed on September 19th, 2011.³¹

The document prepared by the Institutional Relations of the Department of International Affairs / Secretariat for External Relations of the OAS, *Cooperation Profile between the Council of Europe and OAS*, stated that by the year of 2011 there had been an ongoing cooperation between these two international organizations. It entailed the promotion of democracy and human rights; terrorism and cyber security; corruption and cyber crime.³² Plans and aims for the future cooperation in areas such as human rights, social cohesion, rule of law, or promotion of international legal standards were expressed as well. Concerning the cooperation within the field of human rights, the document declared a special focus on women's rights, children's rights and rights of persons with disabilities.³³ These objectives set by the international organizations do not necessarily signify that they are imposed on the judicial institutions. The judicial institutions have more concrete objectives and they are revealed under the scope of this thesis.

Cooperation in order to promote human rights has been in the interests of the IACtHR and the ECtHR. Much of this cooperation has emerged in the last 20 years. According to the report of the Committee of Juridical and Political Affairs, the IACtHR “remained in constant contact and cooperation with different human rights organizations.”³⁴ Its activities included meetings with the president, judges, and staff of the European Court of Human Rights, held in July and October of that year (2000) in Strasbourg.³⁵ More recently, during the visit of the delegation of the IACtHR in October 2014, Daniel Spielmann, the former president of the ECtHR, admitted an existence of “natural bond, history of exchange and interaction that goes back many years”³⁶ He also expressed that relations between the two institutions have recently intensified.³⁷

³⁰ Organization of American States, Institutional Relations of the Department of International Affairs / Secretariat for External Relations of the OAS, *Cooperation Profile: Cooperation between the Council of Europe and the OAS*, (Washington D.C.: Organization of American States, 2012).

³¹ *Cooperation Profile*, 1.

³² *Cooperation Profile*, 4.

³³ *Cooperation Profile*, 3.

³⁴ Organization of the American States, Permanent Council of the Organization of American States, *Report Of The Committee On Juridical And Political Affairs On The Observations And Recommendations Of The Member States Regarding The Annual Report Of The Inter-American Court Of Human Rights*, CP/CAJP-1790/01 Rev. 1 (Permanent Council of the Organization of American States, 2001).

³⁵ *Ibid.*

³⁶ Daniel Spielmann, “Welcome Speech” (speech, Strasbourg, October 20, 2014), European Court of Human

Spielmann broadly spoke about the history of interactions between the Courts. To be more specific, the delegation of the ECtHR visited the Court in San José already in 1986³⁸ as well as in 1991.³⁹ Visits between the Courts then continued and intensified since the new millennium. However, the annual reports of the ECtHR of 2000, 2001, 2002 do not contain any information about cooperating with the IACtHR. It is not until the Annual Report of 2003, which entails a speech by the former president of the IACtHR, Antônio Augusto Cançado Trindade, on the occasion of the opening of the judicial year 2004. He reveals that the Courts “indeed succeeded in establishing a fruitful method of cooperation, by means of holding periodic or annual joint meetings, in rotation in Strasbourg and San José of Costa Rica, of delegations of judges and members of the Registry and Secretariat of our two international tribunals of human rights, in order to inform each other of, and to assess, the current trends in our activities and the respective recent jurisprudential developments.”⁴⁰

However, interactions and cooperation are not only to be found in the soft form of conferences and joint meetings between these institutions. The former president of the Inter-American Commission on Human Rights, Paolo Carozza, emphasized a few interconnections between the two regional systems. ECtHR inspired the structural and procedural aspects of the Inter-American system and the dissolved European Commission served as a model for establishing the Inter-American Commission. In addition, Europe had an impact on the Americas concerning their norms and jurisprudence.⁴¹

Both of the Courts refer to the jurisprudence of one another. According to López Guerra and Saiz Arnaiz, most references between the Courts are made in cases of enforced disappearances and in cases of lack of positive obligations of member states such as a lack of

Rights, http://www.echr.coe.int/Documents/Speech_20141020_OV_Spielmann_ENG.pdf.

³⁷ Spielmann, “Welcome Speech.”

³⁸ Inter-American Commission on Human Rights, and Inter-American Court of Human Rights, *Inter-American Yearbook on Human Rights: Anuario Interamericano De Derechos Humanos 1986* (Dordrecht: Martinus Nijhoff Publishers, 1988), accessed March 3, 2016, https://books.google.fr/books?id=DJPV1x3E6b4C&printsec=frontcover&hl=cs&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

³⁹ Inter-American Commission on Human Rights, and Inter-American Court of Human Rights, *Inter-American Yearbook on Human Rights: Anuario Interamericano De Derechos Humanos 1991* (Dordrecht: Martinus Nijhoff Publishers, 1995), accessed March 3, 2016, https://books.google.fr/books?id=S_MaSOki411C&printsec=frontcover&hl=cs&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

⁴⁰ Antônio Augusto Cançado Trindade, “The Development of International Human Rights Law through the Activities and Case Law of the European and the Inter-American Courts of Human Rights” (speech, Strasbourg, January 22, 2004), European Court of Human Rights, http://www.echr.coe.int/Documents/Annual_report_2003_ENG.pdf.

⁴¹ Paolo Carozza, “Presentation by Paolo Carozza” (speech, Strasbourg, January 30, 2009), European Court of Human Rights, http://echr.coe.int/Documents/Dialogue_2009_ENG.pdf.

an effective investigation.⁴² It may be the case that the IACtHR might have more experience in dealing with enforced disappearances. On the other hand, the ECtHR might have more experience in dealing with cases concerning conflicting rights and their balancing such as freedom of expression and freedom of thought, conscience and religion.

One of the research questions of this thesis concerns the reasons why there was a need for a dialogue between the different regional systems of human rights. Moreover, the Courts intensified their communication “from a murmur to a roar.” Did the cooperation develop naturally or was there a certain interest in developing such cooperation? Who or which actors would force the international Courts to interact? Were there any specific internal or external factors for such cooperation? Furthermore, what would the impact of such cooperation be? Should cooperation between these regional systems of human rights be more extended? Why or why not?

From a general perspective, tribunals are independent and impartial entities, which are supposed to be immune to external influences. However, if the tribunal seeks the right interpretation, it might gain inspiration from other tribunals. There has been an ongoing dialogue between the Courts in order to improve the protection of human rights, to avoid the fragmentation of international law and to enhance the universality of human rights law.

The aim of this thesis is to show how the two Courts interact, cooperate and inspire each other. The thesis focuses particularly on interactions concerning the Articles 2 and 3 of the European Convention on Human Rights / Article 4 and 5 of the American Convention on Human Rights, which refer to the right of life and the prohibition of torture. After selecting a sample of twenty-six judgments and decisions of the ECtHR and twenty-eight judgments of the IACtHR, which entail references made to the other regional system of human rights, it can be shown that majority of these judgments and decisions (15 out of 26 in the case of the ECtHR / 15 out of 28 in the case of the IACtHR) particularly concerned the most serious violations. What are the specific directions of cooperation and to what extent have the Courts gained inspiration from each other especially while dealing with these Articles?

These Articles are often considered as the most crucial rights of the Convention. Therefore, it is necessary to discuss links between these rights and peremptory norms, and if it is favorable to include these rights under the umbrella of *jus cogens*. According to the former judge of the IACtHR Antônio A. Cançado Trindade,⁴³ the jurisprudence of the Court also entails increasing material content of *jus cogens*, which includes the absolute prohibition of

⁴² López Guerra and Saiz Arnaiz, *Los sistemas interamericano*, 343.

⁴³ Currently, Antônio A. Cançado Trindade is a judge at the International Court of Justice.

torture. He also argues that humanization of international law is necessary, complementary to the principle of *jus cogens*. It can be argued that both Courts of human rights have an impact on the links between the *jus cogens* and the human rights law. They contribute to the development of the material content of the international *jus cogens*. According to Cançado Trindade, *jus cogens* is not “a closed juridical category, but rather one in evolution and expansion.”⁴⁴

One may consider that jurisprudence of the Courts has had a reciprocal impact. The European Court summarized its references to the IACtHR, which appear within its case law up to August 2012.⁴⁵ Furthermore, analysis of references of the IACtHR to the ECtHR was made only to a certain extent by López Guerra and Saiz Arnaiz. However, their work aims to pinpoint the significance of the jurisprudence of the IACtHR, which has been often overlooked by its European counterpart. López Guerra and Saiz Arnaiz argue that the jurisprudence of the IACtHR has had to a certain extent an effect on the ECtHR as well. It can be considered that the influential inspirations were and will be flowing reciprocally. Both of the Courts are drawing nearer by interacting and exchanging ideas. Their interest in each other and in the manners of their interpretation of international law has evolved and intensified.

Concerning the main focus of the thesis, an analysis of a selection of cases of both Courts, which concern the right to life and the prohibition of torture / the right to humane treatment, is conducted. The selection of case law of the ECtHR includes not only judgments, but also its decisions. Additionally, several interviews are conducted, to allow for the internal point of view to be explored and studied more thoroughly. The interview with the Judge Pinto de Albuquerque, who is very much in favor of cooperation between the two entities, provides a perspective of an actor of intercontinental cooperation. Moreover, interviews with two more actors, lawyer Guillem Cano-Palomares of the ECtHR and lawyer Jorge Calderon Gamboa of the IACtHR, who play an active part in intercontinental cooperation, are conducted.

The thesis is based on a comparative qualitative analysis and uses methodology of social science, namely the grounded theory [GT]. The GT is a classical qualitative research method, which does not contain an already existing theoretical framework or hypothesis. It begins with a research question or collection of qualitative data collected through theoretical sampling. The collection of data then enables to commence an instant comparative analysis. This methodology is very suitable for this research and more specifically the case

⁴⁴ Ibid.

⁴⁵ Council of Europe/European Court of Human Rights, Research Division, *Research Report: References to the Inter-American Court of Human Rights in the Case Law of the European Court of Human Rights*, (Strasbourg: Council of Europe, 2012).

law analysis, since there is a lack of existing theories concerning interactions between the Courts of different regional systems of human rights. Furthermore, the GT generates a new theory and results from the collected data instead of testing an existing theory. The new theory generated from the collected data can result in either a general theory or a substantive theory. Since the sample for analysis is rather small and concerns a particular area, the final result of this analysis is a substantive theory. The main advantage of a substantive theory lies in its ability to speak specifically for the elements of cooperation derived from the data.

As mentioned previously, both regional systems of human rights dispose of their own specificities. However, the variety and differences might provide a new edge to such cooperation. Both Courts might profit from the dialogue, in order to protect human rights more effectively, avoid the fragmentation of international law and contribute to some extent to *jus cogens*. Regarding the relationship between human rights and *jus cogens*, human rights are conducted under international law and only the non-derogable ones are overlapping to *jus cogens*.⁴⁶ However, defining hierarchy of human rights is rather complicated. Since appointing certain human rights to be non-derogable means that they are appointed to be more important than others. This problematic will be discussed further in another chapter of this thesis.

The first chapter explores the development of interactions between the ECtHR and the IACtHR. The discussion focuses on why there was a need for a dialogue between the different regional systems of human rights and, whether the cooperation developed naturally or there was a certain interest in developing such cooperation. First interactions appeared as a result of diplomacy between the Council of Europe and the Organization of American States and subsequently developed in regular dialogues between the Courts. Such interactions can be considered as “soft” or “diplomatic” cooperation, since this kind of cooperation takes place during international conferences and meetings. It is viewed as “soft” cooperation, because of its diplomatic character to build and deepen relations between these international entities. It is viewed as “diplomatic” cooperation, since the Courts, or the presidents of the Courts,⁴⁷ express the significance of this cooperation for the future and the long history of reciprocal relations, which can be interpreted as a diplomatic discourse.

⁴⁶ Erika Hennequet, “*Jus Cogens* and Human Rights: Interactions Between Two Factors of Harmonization of International Law,” in *The Influence of Human Rights in International Law*, ed. Norman Weiss et al. (Cham: Springer International Publishing Switzerland, 2015), 14.

⁴⁷ Such as the former president of the ECtHR, Daniel Spielmann, who expressed, during a conference held for the 50th anniversary of the ECtHR, the significance of reciprocal relations between the Courts.

The Courts are seen as global institutions, but are there any particular departments, individuals, or even governments, who are more in favor of developing this cross Atlantic cooperation? The second chapter focuses on the specific actors of cooperation such as the presidents of the Courts, judges, Registry, but also governments of particular Member States. It is necessary to examine the actors, which interact between each other and develop the “soft” / “diplomatic” or “hard” / “juridical” cooperation. It is discussed, whether or how the actors influence these international Courts to interact and what are the internal or external factors for such cooperation. Internal factors are associated with the human aspects of actors, such as education, professional history, personal ties, or personal motivation. External factors are then associated with opportunities for interactions such as organization of meetings and conferences and selection of specific speakers, and participants.

Both Courts have a common aim to protect human rights as effectively as possible. It was previously discussed, how much the regions differ from each other culturally, economically and socially. In addition to that, the Conventions protecting human rights differ on both sides of the Atlantic as well as their interpretation by the Courts. Since the Conventions are considered as living instruments, the Courts then aim to compare their positions, in order to find the most suitable solution to protect human rights effectively. The following chapter focuses on interactions, which occur within the judgments and decisions issued by the Courts. This type of cooperation can be viewed as “hard” or “juridical”, since it can be found in the jurisdiction of the Courts. It may well be that such references occurring in judgments of the Court have an additional value to the diplomatic talks. The selection of judgments and decisions of both Courts serves to analyze the directions of “hard” or “juridical” cooperation. The analysis explores similarities and differences between the Courts’ interpretations of the Conventions as well as reciprocal inspirations, especially in the area of the most serious violations.

Last but not least, the analysis concentrates on the results of such cooperation. It is discussed, what is the impact of the dynamic of interactions and cooperation on universality of human rights and fragmentation of international law in relation to the concrete issues of both Courts. It is shown that these concrete issues result from the analysis of selected case law and they are examined while taking into account their impact on international human rights law. Finally, the paper concludes with suggestions and possible future development.

2 Development of Interactions between the Courts

It can be indicated that cooperation between the ECtHR and the IACtHR has its long history. The ECtHR had been in contact with the IACtHR already in its early beginnings. Even though the main aim of the initial interactions was keeping good relations between the institutions, the IACtHR was interested in the European jurisprudence as well as the institutional aspects of the European Court. The ECtHR was seen as a model for the Inter-American system. One of such inspirations can be seen in the similarities between the Inter-American Commission, which was inspired by the original European Commission on Human Rights. Moreover, these initial inspirations were reciprocal. The American Declaration on the Rights and Duties of Man was signed before the Universal Declaration of Human Rights, which then served as an inspiration to the European Convention on Human Rights. It may be the case that Europe followed the American and universal tendency to protect human rights.

However, cooperation between these two tribunals has recently increased. As mentioned previously, interactions between the Courts can be characterized as “soft” / “diplomatic” or “hard” / “juridical”. Before analyzing the development of interactions any further, it is necessary to briefly introduce cooperation between the two international organizations, the Council of Europe and the OAS, since their agenda also includes protection of human rights, however in a different scope.

Cooperation between the international organizations, the Council of Europe and the OAS emerged almost 30 years ago.⁴⁸ The first diplomatic contact in form of an agreement to a Cooperation Framework, which was expressed through an exchange of letters, occurred on November 13th, 1987.⁴⁹ The document, *Cooperation Profile: Cooperation between the Council of Europe and the Organization of American States*, does not provide any information about further diplomatic cooperation until signing the Memorandum of Understanding on September 19th, 2011.

The Memorandum of Understanding specifies directions and areas of cooperation between the OAS and the Council of Europe. The efficiency of human rights protection and how to raise awareness of a system that protects human rights regionally can be seen as one of the main issues.⁵⁰ Victims of human rights violations are very often women and both regions aim to eliminate violence against them. Moreover, the international organizations expressed

⁴⁸ Organization of American States, *Dialogue with the Council of Europe* (Washington, D.C.: Organization of American States, 2012).

⁴⁹ *Cooperation Profile*.

⁵⁰ *Dialogue with the Council*.

their intentions to strengthen children's rights as well as the rights of people with disabilities. Other objectives of the Memorandum include deepening international collaboration within the areas of the rule of law, democracy building in electoral matters, reducing illegal drugs business, and promoting international legal standards.⁵¹ Additionally, establishing and signing the Memorandum enabled both signatory parties to identify new possible areas of cooperation and continue with ongoing institutional cooperation in the promotion of democracy, the fight against terrorism, cyber security, cyber crime, corruption, education systems and most importantly human rights.⁵²

It can be contended that these objectives are determined very broadly and expressed only through a document, which is far from being legally binding. However, the use of diplomacy and increasing dialogue between international organizations has a positive impact on future cooperation, which might include putting the broad objectives in more concrete terms. Moreover, cooperation between the two international organizations can have an effect on cooperation of their individual bodies such as the ECtHR and the IACtHR.⁵³

2.1 “Soft” / “Diplomatic” Cooperation

The *Inter-American Yearbook on Human Rights* of 1986 recapitulates that the IACtHR has already received a delegation of the ECtHR during that year. The delegation was composed of the President of the ECtHR, Rolv Ryssdal, Judges John Cremona, Ronald J. MacDonald, and the Registrar, Marc-André Eissen. Furthermore, the yearbook reveals that regular program of joint consultations between the regional Courts had already existed. The joint consultations between the IACtHR and the ECtHR signify that judges, who can be considered as actors of interactions and cooperation between the Courts, analyze the points of common interest while taking into consideration both of the Conventions concerning human rights, as well as the jurisprudence and the advisory opinions of both Courts. Additionally, the judges generally agreed that the meetings were valuable for both of the regional Courts.⁵⁴

Furthermore, the *Inter-American Yearbook on Human Rights* of 1991 states that during the Twenty-fourth Regular Session at the seat of the IACtHR in San José, Costa Rica, the Court received a delegation of the ECtHR from December 12th - 14th, 1991. The

⁵¹ *Cooperation Profile*.

⁵² *Ibid*.

⁵³ However, the IACtHR does not have the same position within the OAS as the ECtHR in the Council of Europe. The IACtHR interacts with the Inter-American Commission on Human Rights, which can be considered as a body of the OAS. The IACtHR is rather autonomous.

⁵⁴ Inter-American Commission on Human Rights, and Inter-American Court of Human Rights, *Inter-American Yearbook on Human Rights 1986*.

delegation of the ECtHR was composed of Judges Thor H. Vilhjalmsson (Iceland), Feyyaz Gölcüklü (Turkey), Rudolf Bernhardt (Germany), Raimo Oskari Pekkanen (Finland) and the Deputy Secretary, Herbert Petzold. The delegation of the ECtHR was received by the Second Vice-President of Costa Rica, the Supreme Court, the President of the Legislative Assembly, Costa Rican legislators, and the Inter-American Institute of Human Rights. Interactions between the delegations covered topics related to international human rights law and the experiences of the two regions.⁵⁵ Arguably, fragmentation of international law and the universality of human rights were in the interests of the Courts already in 1991.

Since the Inter-American system is dual, it is not only the IACtHR, which plays a significant role in interacting with Europe, but also the Inter-American Commission on Human Rights. In 1991 the Executive Secretary of the Inter-American Commission, Edith Márquez Rodríguez, engaged in a visit to Madrid, Seville, Strasbourg and Brussels.⁵⁶ The Executive Secretary of the Inter-American Commission met with the Executive Secretary of the European Commission on Human Rights as well as other senior officials of the Council of Europe. The yearbook states that “collaboration and cooperation between the Inter-American Commission and the organs of the European system were reaffirmed.”⁵⁷ The role of the Inter-American Commission is analyzed in the following chapter, which is dedicated to the actors of intercontinental cooperation.

On February 29th, 2012 a delegation from the ECtHR with the President of that time, Sir Nicolas Bratza, met with the Chair of the Permanent Council, the President and the Executive Secretary of the Inter-American Commission on Human Rights, high-level officials from the OAS and representatives from the Permanent Observer Missions of France, Italy and Spain.⁵⁸ The aim was to examine the directions for cooperation not only between the regional Courts, but also between the OAS and the Inter-American Commission on Human Rights.

It may be true that there has been a long tradition of cooperation and interactions between the two guardians of human rights, the ECtHR and the IACtHR, respectively the Inter-American Commission. It must not be forgotten that the aim to protect human rights lies in the interests of the Council of Europe as well as the Organization of American States. However, human rights are not on top of the agenda of the OAS. One may consider that the

⁵⁵ Inter-American Commission on Human Rights, and Inter-American Court of Human Rights, *Inter-American Yearbook on Human Rights 1991*.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Inter-American Commission on Human Rights, and Inter-American Court of Human Rights, *Inter-American Yearbook on Human Rights 2012*.

Council of Europe supports the ECtHR more in comparison with the OAS and the IACtHR. Moreover, ties in the Americas between the IACtHR and the Commission make it rather complicated,⁵⁹ but this will be analyzed extensively in the following chapter.

In order to protect human rights more efficiently, cooperation between the Courts has been highly encouraged. One may consider that diplomatic dialogues between these institutions evolved into a more effective way of cooperating. The delegations of the Courts still visit each other on regular basis. They also meet to celebrate together some special occasions such as the 60th anniversary of the Universal Declaration of Human Rights in 2008, when three regional Courts met in Strasbourg.⁶⁰ It can be argued that diplomatic events are part of these interactions and they might have a positive impact on international law and the universality of human rights. When interactions between the Courts are intensified, they relate to more concrete areas or actors of the Courts such as lawyers and judges of the Courts.

Support for intercontinental cooperation was pronounced by the Strasbourg Court itself in 2012, when the President of the ECtHR of that time, Sir Nicolas Bratza, expressed that there was no other Court or Commission, which would be of such importance for the ECtHR as the IACtHR and the Inter-American Commission on Human Rights.⁶¹ Additionally, he acknowledged the significance of the joint work programs between the IACtHR, the Commission and the ECtHR. The joint work programs include sharing knowledge of techniques and procedures that increase the efficiency of human rights protection.⁶² It is disputed that the diplomatic discourse of the ECtHR has been lately very positive towards cooperation with the IACtHR. The tendency of the Court continuous to support and be more opened to deepening interactions with the other tribunal.

Ambassador de Zela emphasized that institutions of the Inter-American system refer to the decisions of the ECtHR much more often than the ECtHR to the decisions of the IACtHR, even though both of the regions share common standards in human rights legislation.⁶³ One of his hopes he shared at the meeting was that judges of the ECtHR would be well acquainted with the work and decisions of the IACtHR.⁶⁴ It can be considered, if judges of the ECtHR

⁵⁹ Jorge Calderon Gamboa, interview by Kornélie Gronská, European Court of Human Rights, May 18, 2016.

⁶⁰ European Court of Human Rights, *60Th Anniversary Of The Universal Declaration Of Human Rights: Three Regional Human Rights Courts To Meet In Strasbourg*, 2008, [http://hudoc.echr.coe.int/eng-press#{"fulltext":\["inter-american"\],"itemid":\["003-2559572-2787457"\]}](http://hudoc.echr.coe.int/eng-press#{).

⁶¹ Nicholas Bratza, "President's Speech to OAS Permanent Council" (speech, Washington D.C., February 29, 2012), http://www.echr.coe.int/Documents/Annual_report_2012_ENG.pdf.

⁶² Bratza, "President's Speech."

⁶³ During a visit of Nicholas Bratza in 2012 to the OAS. Organization of American States, *Visit of H.E. Sir Nicolas Bratza*, Washington D.C.: Organization of American States, 2012.

⁶⁴ Ibid.

were more familiar with the Inter-American system, the number of references to the IACtHR could be increased. De Zela tried to point out that San José Court is very well acquainted with the European Court and therefore they refer to its jurisprudence more often.⁶⁵ However, the increase of cooperation and interactions between the Courts may result in equalizing the number of references. It can be indicated that equalization of references may have a positive impact on universality of human rights by adding multiculturalism to regional jurisprudence.

The President of the ECtHR in 2012, Nicolas Bratza, argued that both Courts have opened their jurisprudence to the case law and legal reasoning of one another over the past years.⁶⁶ Nevertheless, he claims that there is still a need to develop even deeper interactions between the Courts. For instance, the IACtHR has more experience in giving advisory opinions than its “European sister” and the ECtHR is often inspired by the IACtHR on issues of disappearances, torture, State liability for human rights violations perpetrated by private parties, protection against repetitive criminal prosecution on the same facts, and the consequences of non-compliance with interim measures.⁶⁷ Finally, the Courts agreed on interacting through enabling its judges to visit the other Court of human rights, as well as through staff exchanges between the Registries, in order to share the long experiences of human rights cases.⁶⁸

This is an example of a very positive development and deepening relations between the two tribunals. It will enable the ECtHR to become more familiar with the Inter-American system. Increase of interactions between regional systems of human rights effects to a certain extent universality of human rights. Interpretation of not only Conventions, which are applicable to the region, but also jurisprudence of other regions as well as other Conventions from different regions broaden the scope of human rights. It may be true that the tendency of the European Court is to universalize and internationalize their approach to human rights and discuss what the most suitable solution to the problem is.

To state an example, the President of the IACtHR, Antônio Augusto Cançado Trindade, was invited to the occasion of the opening of the judicial year on January 22nd, 2004.⁶⁹ He emphasized that both Courts hold periodic or annual joint meetings in rotation in San José or Strasbourg. Delegations of judges, members of the Registry and Secretariat meet

⁶⁵ Organization of American States, *Visit of H.E. Sir Nicolas Bratza*.

⁶⁶ Nicholas Bratza, “President’s Speech.”

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ European Court of Human Rights, *Annual Report 2003 of the ECtHR* (Strasbourg: European Court of Human Rights, 2004).

to discuss the latest developments and trends of the Courts.⁷⁰ Judge Cançado Trindade also points out some of the reasons for a dialogue between the two regional systems. He argues that these interactions between Courts help for a better understanding of the universality of human rights as well as to intensify the feeling of solidarity.

It can be shown that there has been a clear upswing of diplomatic interactions and soft cooperation between the Courts. Both Courts organize regular visits and meetings for the delegates of the other Court. Why was there a need for a dialogue between the different regional systems of human rights? Did such cooperation develop naturally or was there a specific interest? Why do the presidents of the Courts often express the need of even further cooperation?

2.2 Main Aims of Cooperation

One of the main aims, which was expressed during the visit in Washington D.C. by the President of the ECtHR in 2012, Nicolas Bratza, was the universality of fundamental human rights such as the right to life, dignity, freedom, justice and equality. The Courts share common goals and common approaches, which convinces the two regional systems to interact and cooperate.⁷¹ However, both of the regional systems from time to time differ in their interpretations and that might be an obstacle to the universality of human rights, since different interpretations of human rights protection may hinder the universal approach to it.

Discussion about universality is often connected to the issue of human rights. Before examining the notion of universality of human rights, it is indispensable to define its purpose. Since the meaning of universality of human rights differs throughout the literature, it is therefore necessary to define its concept in the scope of this thesis. The foundational document of global approach to human rights is the Universal Declaration of Human Rights.⁷² It can be disputed that this is an interpretation with a general or worldwide impact. However, this notion may be too idealistic, since this document is not legally binding.

Universality concerning human rights does not necessarily mean that it is held everywhere and at all times.⁷³ According to Donnelly, human rights are universal in three directions. First of all, human rights are universally supported by states through so called

⁷⁰ Cançado Trindade, "The Development of International."

⁷¹ Bratza, "President's Speech."

⁷² Jack Donnelly, "Universality," in *Encyclopedia of Human Rights*, ed. David P. Forsythe (New York: Oxford University Press, 2009), accessed May 6, 2016, https://books.google.fr/books?id=1QbX90fmCVUC&printsec=frontcover&hl=cs&source=gbs_ge_summary_r&cad=0#v=onepage&q=universality&f=false, 261.

⁷³ Donnelly, "Universality."

international legal universality.⁷⁴ This type of universality refers to the possession of human rights, not the enforcement. However, enjoyment of human rights depends on the willingness of states to enforce them, which often varies. Moreover, human rights are protecting individuals from violations and threats by the states, so their universality is also *functional*. Nevertheless, protection of human rights is a very modern notion, so human rights are not considered to be historically universal. Last but not least, Donnelly argues that human rights have *overlapping consensus universality*, since they limit the political legitimacy by protecting individuals, families and groups. However, it is not possible to show that they exist independently without humans believing in them.⁷⁵

One of the crucial characteristics of universality to be pointed out is the dependence of human rights on the sovereign states. Even though the possession of human rights shall be seen as universal and possessed by all human beings, the reality is often different. Human rights are often being violated by the states. It is the state that decides the level of its determination to protect human rights. Donnelly calls support for human rights by state representatives as *international normative universality of human rights*.⁷⁶ It can be argued that if a state supports the international human rights treaty, it embraces a part of the universality, concretely normative universality, which can be interpreted as a willingness of the State to be formally dedicated to protecting human rights covered by the international treaty.

Moreover, according to van Dijk the formal willingness of the State to protect human rights is accompanied with willingness to be a subject under an international supervision.⁷⁷ International Courts such as the IACtHR and the ECtHR can be seen as the supervision bodies. They represent a supervisory part within the scope of functional universality of human rights, since they decide on the responsibility of sovereign states with regard to obligations, which arise from the Convention. It may well be that the IACtHR and the ECtHR figure as guards of human rights, but the question is to which extent they agree on various issues.

Additionally, it is often criticized that universality of human rights lacks multiculturalism.⁷⁸ The notion universal itself is in actual fact supposed to include the entire world and not only the Western approach to human rights. However, as it was already discussed above, the idea of equal rights possessed by human beings just because they are human is modern. In fact this idea was missing not only in traditional Asian, African and

⁷⁴ Donnelly, "Universality," 261.

⁷⁵ Ibid.

⁷⁶ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, 2001), 6-7.

⁷⁷ Brems, *Human Rights*, 7.

⁷⁸ Brems, *Human Rights*, 10-11.

Islamic societies but also in the West.⁷⁹ Moreover, Donnelly argues that human rights have no religious or philosophical foundation. In fact, it developed other way around. Human rights are believed to be a result of deepest values of political expression. However, today many religious and Western comprehensive doctrines embrace the role of human rights.⁸⁰

Arguably, the notion of human rights is modern and is still developing, but the impact of the United States and Western Europe in its development is undeniable. Moreover, the multicultural aspects of human rights are evolving along with democratization of countries.⁸¹ Most certainly, the adoption of Conventions protecting human rights throughout the regions has had an impact on development of universality of human rights as well.⁸²

As it was discussed above, regional Conventions of human rights were developed and based on the specificities of each region. On the other hand, it is disputed that the Conventions have a common approach. The following chapters analyze how much the interpretation and the functional universality between the regions differ. Concerning the normative universality, it can be indicated that it differs throughout the regions, since many countries of the Inter-American system have not ratified the American Convention yet. Therefore, it can be considered that their willingness to protect human rights is not on a very high level, or they do not ratify it for some political reasons. To allow some international tribunal to supervise the responsibility and obligations of a state to the Convention leads according to some to a loss of sovereignty.

It may be the case that functional universality of human rights is partly represented by supervisory functions of the international tribunals. The ECtHR and the IACtHR can be considered as guards of human rights. Cooperation on intercontinental level and the development of interactions between these two Courts have had an impact on universality of human rights by adopting Conventions and reforms to become more efficient as international tribunals. Some argue that the supervisory position of the Court is more efficient, since all the Member States of the Council of Europe are also contracting parties to the European Convention. On the other hand, the IACtHR cannot supervise all the Member States of the OAS, but only the contracting parties to the American Convention. Some countries have not even ratified the American Convention and it is therefore questionable how universal the

⁷⁹ Donnelly, "Universality," 263.

⁸⁰ Donnelly, "Universality," 265.

⁸¹ Such as democratization of Indonesia, political liberalization of Singapore or establishment of human rights mechanisms within ASEAN.

⁸² As examples serve the ECtHR, the IACtHR, but also the African Court of Human Rights and the Arab Court of Human Rights.

willingness of the countries in the Americas truly is. It can be contended that functional universality is in the Americas lacking.

Since two regional human rights systems are analyzed, it must be taken into account, whether interactions and cooperation between these regions have an impact on multiculturalism of human rights. However, first it is necessary to analyze each region in regard with multiculturalism separately. Arguably, ratifying the European Convention in Eastern countries such as Russia, Ukraine, Georgia or Azerbaijan signified at least some political will to approach closer to the Western aim to protect human rights. However, the number of cases reaching the Court from some of the Eastern countries is alarming and one may wonder if the protection of human rights is really efficient.

Multiculturalism of human rights in the Americas also raises doubts, since not all of the countries are contracting parties of the American Convention. Moreover, there is a lack of multiculturalism within the region itself, since discrimination towards indigenous people is a long term problem and it appears that states continue to lack a strong willingness to make improvements. One shall consider, if cooperation between the continents can have an impact on multiculturalism of human rights not only from a universal point of view, but also from the regional one.

It can be considered that since both of the Courts refer to the Conventions of one another, their reciprocal interpretations help to their mutual cooperation. On one hand, such mutual cooperation may contribute to the universality of human rights as well as a decrease of the lack of multiculturalism, since both regions are more aware of each other. On the other hand, it may bring certain disagreements in interpretation of human rights and weaken the universality of human rights. The balance of universality is then achieved by other international organs, which monitor implementation of the Conventions such as the Human Rights Committee, or Committee against Torture, or Committee on the Elimination of Racial Discrimination, which are all organs of the United Nations. It may be true that the UN plays a crucial role in the universality of human rights and aims to increase the level of multiculturalism in regard with human rights as well.

The criticism of the lack of multiculturalism can be seen as another reason for the intensification of interactions between the two international tribunals. Contemporary international human rights law can be then interpreted more consistently, if the tribunals have a possibility to interpret viewpoints of one another. In addition to that, it is more likely to

avoid fragmentation of international law.⁸³ If international law is fragmented, its efficiency decreases and space for differing interpretations is allowed. This can be seen as an advantage as well as disadvantage. It can be seen as advantage, since differences in interpretation usually take into account the specificities of the issue or the State. On the other hand, it is an obstacle to the universality, since different approaches might be found in different parts of the world.

International law and especially international justice are still evolving. It can be argued that new era arrived with a growing number of international courts throughout the second half of the 20th century.⁸⁴ In addition to that, the Courts are often in a dialogue. The only reason for a dialogue is not only universality of human rights or its insufficiency, since different interpretations and attitudes of different Courts exist. However, Courts often agree with one another, but then the level of multiculturalism within universality is being criticized. Another reason could be the aim to set limits to state voluntarism and enforce considerations of *ordre public* over the aims of individual States.⁸⁵

According to Judge Cançado Trindade, the IACtHR and the ECtHR have contributed to the international *ordre public*. He also argues that international law is becoming *humanized*, since new vision of relations between public power and human being are acknowledged.⁸⁶ Moreover, he claims that both the ECtHR and the IACtHR have contributed to the development of public international law.⁸⁷ Nevertheless, before discussing it any further, it is necessary to define *ordre public* and its relation to the public international law.

Ordre public refers to obligations of the State to protect all human beings under its jurisdictions. It is once again a modern approach, since in the past human beings were believed to exist for the State and their protection was not in the main interest of the State. *Ordre public* relates to public international law. Public international law is defined as “the set of legal rules governing international relations between public bodies such as States and international organizations.”⁸⁸ International Conventions are the instrument of public international law.⁸⁹ It can be contended that in the interest of public international law is to promote *ordre public*, so the public power would protect human beings under its jurisdiction more efficiently. Conventions such as the European Convention or the American Convention

⁸³ Paulo Pinto de Albuquerque, interview by Kornélie Gronská, European Court of Human Rights, April 18, 2016.

⁸⁴ Cançado Trindade, “The Development of International,” 31.

⁸⁵ Cançado Trindade, “The Development of International,” 32.

⁸⁶ Cançado Trindade, “The Development of International,” 35.

⁸⁷ Ibid.

⁸⁸ “Public International Law – Justice,” last modified July 16, 2013, http://ec.europa.eu/justice/glossary/public-international-law_en.htm.

⁸⁹ “Public International Law – Justice.”

on Human Rights are instruments of public international law, which have an impact on their contracting parties. The role of international tribunals is then to authenticate the responsibility of States, the public powers, in regard with the Conventions.⁹⁰

As already alluded to above, the ECtHR as well as the IACtHR have contributed to the development of public international law and *ordre public*. It can be indicated that cooperation and interactions between the two Courts may contribute to further evolution of public international law and most certainly international human rights law.⁹¹ Interpretation of the Conventions, which are living instruments of public international law, and interest of the Courts to use interpretation from other part of the world, may have an evolutionary impact in the future.

Since interpretations of the Courts of human rights tend to centralize the role of a human being and set limits to the State, it can be shown that international law becomes more and more protective of the individual.⁹² Moreover, the Courts examine if the State's obligations to protect this individual were fulfilled or not. On one hand, it is disputed that international law has become centralized around human beings and their rights. On the other hand, human rights protection mostly depends on the willingness of the State to protect them. This is the point, where functional universality of human rights interacts with the efficiency or the lack of efficiency of public international law and *ordre public*.⁹³ State is encouraged to protect all human beings under its jurisdictions and public international law provides the instruments to internationally protect human rights of each individual. However, it is often the case that the State ignores the supervisory body such as the ECtHR and the IACtHR.⁹⁴ Therefore, cooperation between regional human rights systems can result in finding solutions for the challenges regarding each system.

Another of the reasons for interactions and inspirations is a common focal point concerning the role of international Courts in the global arena of international law and justice. How they can preserve and deepen their autonomy as international human rights tribunals? The IACtHR has been agonized by this question in its relation with the OAS and its members. The remaining issue is that not all Member States of the OAS signed and ratified the American Convention on Human Rights. How can the Court keep its legitimacy and autonomy? One of the most positive developments for the IACtHR was the agreement on

⁹⁰ Ibid.

⁹¹ Cançado Trindade, "The Development of International."

⁹² Ibid.

⁹³ Functional universality in the sense of Donnelly's definition.

⁹⁴ One may consider continuously repetitive cases of some State Parties.

administrative autonomy with the General Secretariat of the OAS, which came into force January 1st, 1998.⁹⁵ The main purpose of this agreement was to secure administrative autonomy of the IACtHR by allowing the Court to administer its own budget or hire Secretariat personnel. However, communication with the Permanent Council and the General Assembly of the OAS is maintained, since the execution of judgments is supervised by the parent organization.⁹⁶

Cançado Trindade proposes to add a supervisory body within the Inter-American system, which would play a similar role as the Committee of Ministers of the European system.⁹⁷ Arguably, interactions and cooperation between the two regional systems may inspire the Courts in other areas than interpretation of the Conventions. However, results of interactions and cooperation are analyzed under a different chapter. At this point, it is necessary to discuss the intensification of cooperation between the Courts.

The tendency of interactions and cooperation between the ECtHR and the IACtHR has intensified due to regular and rotational visits especially after the year 2010.⁹⁸ Once taking into consideration the IACtHR, inspirations by the European system were deepened along with an increasing frequency of referring to the case law of the ECtHR. Likewise, the interest of the ECtHR has been increasing in the last couple of years. In 2015, the previous President of the ECtHR, Dean Spielmann, welcomed the Inter-American Delegation with the following words: “I am pleased to note the ever-closer relationship that has been built up over the years between our two Courts.”⁹⁹ Spielmann referred to the intensification of relations between these two regional systems and how significant it is to deepen these relations even more.

Cooperation has intensified between these two tribunals not only in the direction of regularity of reciprocal visits, and increased interest of the ECtHR in the case law of its “sister” institution, but also through enabling staff exchanges and video-conferences.¹⁰⁰ One of the key results of these interactions and cooperation can be considered a compilation of a selection of leading decisions by each Court in 2014: *Dialogue across the Atlantic: Selected Case Law of the European and Inter-American Human Rights Courts*.¹⁰¹ This book includes a

⁹⁵ Cançado Trindade, “The Development of International,” 33.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Staff exchanges followed three years later.

⁹⁹ Daniel Spielmann, “Speech on the Occasion of the Opening of the Judicial Year” (speech, Strasbourg, January 20, 2015), European Court of Human Rights, 33.

¹⁰⁰ European Court of Human Rights, *Annual Report 2014 of the ECtHR* (Strasbourg: Council of Europe/European Court of Human Rights, 2015), 73.

¹⁰¹ European Court of Human Rights, *Dialogue across the Atlantic: Selected Case Law of the European and Inter-American Human Rights Courts* (Oisterwijk: Wolf Legal Publishers, 2015).

selection of decisions delivered by both of the Courts in the year of 2014. The objective is to accentuate the upswing of interests of the Courts concerning their interpretation of Conventions and their approach to human rights protection. Furthermore, the book reveals the similarities in interpretation of each of the Conventions as well as the differences in the judicial approach of the Courts.

This paper focuses on the similarities and differences within interpretations of the regional Conventions as well. However, the scope of the analysis is different, since it concentrates mainly on the Articles concerning the right to life and the prohibition of torture. Before approaching further with the case law analysis, or the “hard”/ “juridical” cooperation, it is vital to examine which are the actors of cooperation.

3 Actors

The previous chapter has already alluded to some of the actors that have influenced the intensification of interactions and cooperation between the Courts. The Courts are seen as global institutions, but are there any particular departments, individuals, or even governments, who are more in favor of developing this cross Atlantic cooperation? Were there any specific internal or external factors for such cooperation? This chapter analyzes, who are the actors behind the closed doors.

In regard to “soft” / “diplomatic” cooperation, presidents of the Courts can be considered as the main actors. They are the ones, who express the significance of such cooperation between these institutions. In order to reveal the positions of the Courts throughout the recent years, this chapter attempts to code and categorize support for “soft” / “diplomatic” cooperation expressed by the Courts.¹⁰² The attempt to provide such an overview will lead to coding and categorization of support, which was expressed by the presidents of both Courts throughout the years. It can be argued that presidents as actors of “soft” / “diplomatic” cooperation might be affected by various internal or external factors, which are explored.

Internal factors are associated with human aspects, such as education, professional history, personal ties, or personal motivation. External factors are then associated with opportunities for interactions such as organization of meetings and conferences and selection of specific speakers, and participants. It is discussed, whether or how these actors motivate the international Courts to interact and what are the internal or external factors for such cooperation.

Cooperation can be also supported by external actors. External actors are considered specific governments, which provide financial resources to accomplish the ideas of cooperation. Governments might even participate in organization of international conferences, or just financially support staff exchanges between the Courts. This chapter reveals, which governments have enabled the upswing of interactions and cooperation and it will be discussed why these governments are interested in endorsing these interactions. Furthermore, it will be examined, what kind of links are between these governments and the Courts and how much the Courts need this kind of support in order to fulfill their aims of cooperation.

¹⁰² The main focus is on actors, who participated in intensification processes between the Courts. Therefore, the categorization takes into account the most recent years starting from 2009. However, it does not mean that there were not any international visits before that. On the contrary, visits between Courts date back to the establishment of the IACTHR.

Regarding “hard” / “juridical” cooperation, in other words cooperation, which is taken into account in the extent of jurisprudence and interpretation by the Courts, actors can be found behind the walls of the Courts. Some actors, however, are independent outsiders, which provide a third point of view on the problem. Actors of the ECtHR are considered judges, who from time to time play a role within the diplomatic scope. Registry and the Research Division, which is attached to the Jurisconsult, are also considered as actors of “hard” / “juridical” cooperation. The Registrar, who is an essential figure of the Registry figures as an actor of diplomatic interactions as well as juridical interactions. The Registrar participates not only in international visits but also has an impact on the selection of relevant case law for both Courts.

It is not surprising that judges on the other side of the Atlantic are also considered to be actors of intercontinental cooperation. However, the organizational structure of the Inter-American system differs from the European one and so do the actors. Other actors of the Inter-American system that are involved in intercontinental cooperation are the Secretariat of the IACtHR and its Senior Attorneys. To a certain extent, the Inter-American Commission on Human Rights can be considered as an actor of cooperation as well, but it represents the OAS, not the Court. The Inter-American Commission cannot be associated as a part of the IACtHR, but they both interact. Their roles as well as how these actors involve in interactions and intercontinental cooperation are discussed below.

3.1 Actors of the European Court of Human Rights

After the method of open coding, it can be discussed which actors of the ECtHR have an impact on intercontinental cooperation. Actors, which endorse “soft” / “diplomatic” cooperation of the ECtHR, are including the President of the Court and delegations visiting the “sister” Court, usually composed of judges and the Registrar. On the other hand, judges and the Registry play a significant role in developing “hard” / “juridical” cooperation in practice. Under the umbrella of the Registry are included Sections of Registries, non-judicial rapporteurs and Jurisconsult with a Research Division, but also the Registrar.

It can be indicated that major actors of cooperation need a base for the main interactions between Courts. The Research Division provides such a base. The Research Division is attached to the Jurisconsult’s office and its main task is to provide reports, which subsequently assist the Grand Chamber and Sections in the examination of pending cases. Among the total of 53 reports, which were prepared by the Research Division in 2012, was a

report concerning references to the IACtHR and the American Convention.¹⁰³ These references may assist the Strasbourg Court and can be entailed within the judgments, when needed. It can be shown that the Research Division prepares and provides the base for interactions in a form of materials (such as reports) and the main actors of “hard” / “juridical” cooperation may efficiently use it.

The main actors are then to be revealed within the Court’s case law. Various judgments of the ECtHR refer to the Inter-American system of human rights as well as the American Convention. References to the Inter-American system can be accompanied by references to other regional systems such as the African one.¹⁰⁴ Furthermore, judges have the opportunity to express their separate opinion on the case and it occurs that they take into account other regional systems or the Inter-American one in particular.¹⁰⁵ The Court’s case law does not only reveal the actors, but also elements of “hard” / “juridical” cooperation.

Actors, which take part in preparing the case law, are the Registry lawyers of the Court. The role of the Registry, more specifically the Registry lawyers, is not only administrative to sort out applications that reached the Court, they prepare the draft in close cooperation with the judges or in line with the instructions coming from the judges. Therefore, the Registry lawyers can be also seen as interpreters of the Convention, and international human rights law. Additionally, some may participate in staff exchanges with the Secretariat of the IACtHR.¹⁰⁶

These staff exchanges can be considered as a particular result of interactions between these two Courts, since they are considered as the only “sister” Courts in the “family” of international tribunals. Staff exchanges can be seen as instruments to intensify interactions between the Courts. The Registry lawyer joins his/her counterparts on the other side of the Atlantic to conduct research, which would be prosperous for both sides of the Atlantic. These staff exchanges between the Registry of the ECtHR and the Secretariat of the IACtHR last usually for a 3-month term.¹⁰⁷ Results of this program are not yet concrete, but it can be argued that references within the case law of the ECtHR to the Inter-American system have increased.

¹⁰³ European Court of Human Rights, *Annual Report 2013 of the ECtHR* (Strasbourg: Council of Europe/European Court of Human Rights, 2014).

¹⁰⁴ European Court of Human Rights, *Annual Report 2014 of the ECtHR* (Strasbourg: Council of Europe/European Court of Human Rights, 2015), 123-124.

¹⁰⁵ Such as Judge Paulo Pinto de Albuquerque.

¹⁰⁶ Inter-American Court of Human Rights, *Annual Report 2014* (San José: Inter-American Court of Human Rights, 2015), 93.

¹⁰⁷ Inter-American Court of Human Rights, *Annual Report 2015* (San José: Inter-American Court of Human Rights, 2015), 123.

Some judges of the ECtHR are crucial actors of both spheres of cooperation. They certainly have an impact on international cooperation, but also on the direction and development of international law. They may act as actors of “soft” / “diplomatic” cooperation as well as “hard” / “juridical” cooperation. Once a delegation of the ECtHR is invited to visit the IACtHR, it is usually constituted by the President of the Court as well as judges and the Registrar. These visits are type of cooperation, which has more of a diplomatic character. Moreover, judges of both Courts have a possibility to interact with each other and some of the judges of the ECtHR are on very good terms with at least one judge from the IACtHR.¹⁰⁸

Once a judge sits in the Chamber or Grand Chamber, he/she may be considered as an actor of cooperation of a juridical character, since his/her background and opinions have an impact on the result and essence of the judgment. It needs to be taken into account that most references to the Inter-American system are made by a Grand Chamber. According to Cano-Palomares, who is currently a lawyer of the Research Division of the ECtHR, the workload of the Court does not provide enough time to refer to the Inter-American system, unless the case reaches the Grand Chamber, respectively the Chamber.¹⁰⁹

It can be contended that interests by Spanish, Portuguese or Italian judges are usually connected with the Americas and the IACtHR. But who are the judges of the ECtHR, who are in favor of bringing these regional systems closer and who are the ones more active in this intercontinental cooperation? In October 2014, the ECtHR welcomed a delegation from the IACtHR. The ECtHR was represented by its Vice Presidents Josep Casadevall (Andorra) and Guido Raimondi (Italy), who were accompanied by judges Luis López Guerra (Spain), Angelika Nissberger (Germany) and Paulo Pinto de Albuquerque (Portugal), as well as the Registrar, Erik Fribergh and the Deputy Registrar Michael O’Boyle alongside with Registry officers Patrick Titun, Montserrat Erich-Mas, Carmen Morte Gomez and Guillem Cano-Palomares.¹¹⁰ It can be indicated that judges participating in this dialogue and “soft” / “diplomatic” cooperation welcome the idea of intensifying relations between the international tribunals. These judges can be considered as proponents of intercontinental cooperation not only diplomatically but also jurisdictionally. They are open-minded to bringing regional systems of human rights closer. However, some judges of the Court may not

¹⁰⁸ Paulo Pinto de Albuquerque.

¹⁰⁹ Guillem Cano-Palomares, interview by Kornélie Gronská, European Court of Human Rights, May 24, 2016.

¹¹⁰ Inter-American Court of Human Rights, *Annual Report 2014*, 93.

share this idea.¹¹¹ It may be true that some judges of the Court are less supportive or not interested in intercontinental cooperation.

The mindset of each judge is influenced by specific factors, which may vary from person to person. Decisions by judges have an impact on decisions and judgments of the Court. It may be the case that judgments are in a way result of interplay between the opinions of judges and factors, which form their opinions. It is not possible to analyze all these factors of all the judges, but it can be illustrated on a particular example.

The European constitutional Judge Paulo Pinto de Albuquerque is one of the proponents of bringing the different regional systems closer. According to him it is a win-win situation for all of the participants. He argues that cooperation on inter-regional level can have a positive impact on international law and it can eliminate its fragmentation. “We all speak the same language.” This phrase demonstrates his open-mindedness to cooperate not only between the ECtHR and the IACtHR, but with other national and international Courts as well.

To be more specific, currently Judge Pinto de Albuquerque works on developing “soft”/ “diplomatic” cooperation between the ECtHR, the Constitutional Court of South Africa and the Supreme Court of India. The Supreme Court of India has an impact on a high number of individuals. India with its population 1.3 billion people has a potential effect on such a big number of individuals and their human rights.¹¹² Similarly, the Constitutional Court of South Africa is seen by the eyes of Judge Pinto de Albuquerque as a highly influential Court in the region. Cooperation with these two Courts could have an impact on human rights of many individuals. Arguably, the ECtHR does not only cooperate with other regional Courts, but also national Courts, which are highly influential for the whole region. The region of the Americas is not an exception.

Nevertheless, what are the external and internal factors that may have an impact on the judge, his/her mentality and open-mindedness towards cooperation on a global level? It is impossible to analyze every factor of each single judge, but some of the factors can be illustrated. Regarding Judge Paulo Pinto de Albuquerque, who supports cross-fertilization of human rights protection, some of the internal factors can be derived from his nationality, language abilities, and his professional experiences at Brazilian, or Argentinean universities. He also taught at the USA Illinois College University. Experiences concerning teaching and being in contact with intellectuals of this region need to be taken into account in regard to

¹¹¹ Paulo Pinto de Albuquerque.

¹¹² “India Population,” Worldometers, accessed April 20, 2016, <http://www.worldometers.info/world-population/india-population/>.

forming an influence on the judge. The external factors include external opportunities. Judge Pinto de Albuquerque has been involved in an exchange with at least one judge of the IACtHR. Moreover, he attends visits between Courts and encourages cooperating even further. He is not only supporting intercontinental cooperation, but he also plays an active part in it. Since the idea of Judge Pinto de Albuquerque is to develop a single body of international law, he is involved not only in cooperation with the Americas, but also other regions of the world.

As mentioned previously, interactions between the ECtHR and the IACtHR have recently intensified. Moreover, cooperation between the European Court and the highest national courts of some contracting parties to the American Convention has been developed. It is indispensable to point out that the role of national courts in countries such as Brazil, are of a high interest of the ECtHR. Judge Pinto de Albuquerque revealed that he has worked on cooperation with Brazil, whose delegation visited Strasbourg in May, 2016.¹¹³

Another example can be cooperation with Mexico, whose former President Jesús Enrique Jackson Ramírez along with the National Commission on Human Rights of Mexico visited the ECtHR in 2003. It can be indicated that the interregional cooperation between Courts of human rights is often accompanied or is preceded by “soft” / “diplomatic” cooperation between the ECtHR and the national highest Courts in order to spread the know-how about human rights as efficiently as possible. As already discussed above, it is crucial that the State itself plays the role of a guard of human rights. Therefore, the role of national Courts must not be omitted.

As it was alluded to above, actors of “soft” / “diplomatic” cooperation, who represent the Court during dialogues and interactions with delegations of the other Court, are usually the President, the Vice-President, and the Registrar, who may be accompanied by the judges. The role of the President and the Vice-President is to speak in the Court’s voice. The Registrar represents the Registry and participates during these visits between Courts. The Registrar Marc-André Eissen was, for instance, among delegates of the ECtHR to the IACtHR already in 1986.

Regarding functions of the Registrar, he/she is responsible for the organization and activities of the Registry under the authority of the President of the Court. Such responsibilities include elements of “hard” / “juridical” cooperation, since he/she selects the directions of relevant case law between the Courts.¹¹⁴ In addition to that, it is the Registrar,

¹¹³Paulo Pinto de Albuquerque.

¹¹⁴Jorge Calderon Gamboa.

who replies to requests for information concerning the work of the Court, for instance, from the press.¹¹⁵ It can be contended that the Registrar communicates with the press and informs the press about Court's activities, which include cooperation between the "sister" Courts. The Registrar reveals development of intercontinental cooperation, participates as an actor during diplomatic interactions, and selects the juridical directions of cooperation.

Recently, visits and discussions between delegations of the Courts became considered as regular interactions. The table on the following page provides an overview of these visits as well as the participants. It serves as an overview of visits, which were documented through annual reports or *Dialogue between Judges* published by the ECtHR. However, the table does not provide all interactions that occurred between the Courts, only those which were remarkable enough to be included in annual reports or reports of *Dialogue between Judges*. Moreover, the table provides mostly an overview of the actors of "soft" / "diplomatic" cooperation.

¹¹⁵ European Court of Human Rights, Registry of the European Court of Human Rights, *Rules of the Court*, (Strasbourg: Council of Europe/European Court of Human Rights, 2016).

Table 1

Interactions between the Courts				
Year	Location	Actors of the ECtHR	Actors of the IACtHR	Source
2014	Strasbourg	Vice Presidents: Josep Casadevall and Guido Raimondi; Judges: Luis López Guerra, Angelika Nussberger and Paulo Pinto de Albuquerque; Registrar: Erik Fribergh; Deputy Registrar: Michael O'Boyle; Registry Officials: Patrick Titun, Montserrat Enrich-Mas, Carmen Morte Gomez and Guillem Cano Palomares	President: Humberto Sierra Porto Vice President: Roberto F. Caldas; Judges: Manuel E. Ventura Robles, Diego García-Sayán, Eduardo Vio Grossi and Eduardo Ferrer Mac-Gregor Poisot Secretary: Pablo Saavedra Alessandri	Annual Report of the IACtHR 2014
2012	Mexico City	“member of the ECtHR” (not specified)	President Diego García-Sayán	Annual Report of the IACtHR 2012
2012	San José	President: Sir Nicolas Bratza Vice Presidents: Josep Casadeval, Dean Spielmann Registrar: Santiago Quesada	President Diego García-Sayán (not fully specified)	Annual Report of the IACtHR 2012
2011	Strasbourg	President Jean Paul Costa Succeeding president Nicolas Bratza	President Diego García-Sayán	Annual Report of the IACtHR 2011
2009	Strasbourg	President Jean-Paul Costa	President Paolo Carozza	Dialogue between Judges

It can be shown that the ECtHR is in regular contact with its counterpart. Diplomatic dialogues, which were established in the early beginning of the IACtHR and intensified later on, have moved relations between the two Courts into another dimension. Interactions between Courts resulted in a project of regular staff exchanges. They shall improve the reciprocal comprehension of mechanisms of the Courts. The Research Division of the ECtHR also published a report in 2012, which concerned the jurisprudence of the IACtHR. This report could serve the Grand Chamber, Chamber and Sections of the Registry to refer to relevant international law within their judgments. Moreover, staff exchanges resulted in publishing a joint publication *Dialogue across the Atlantic: Selection of the European and Inter-American Human Rights Courts* of 2014.

One can consider that due to intensification of interactions between these two international tribunals, interpretation of jurisprudence and Conventions, which serve as instruments of public international law, enters a new cross-regional dimension. It is not only the European Convention that is being interpreted and included in the jurisprudence of the ECtHR, it is also the interpretation of American Convention, which is considered relevant in the scope of international law in regard to the particular case.

It may be true that actors of the ECtHR intend to avoid fragmentation of international law as well as the lack of multiculturalism of international law. Increase of universality of human rights can be considered as another reason of the proponents of intercontinental cooperation. However, disagreements between interpretations of Convention may be found. One may argue that it can lead to new fragmentation of international law, since new disputes may arise. However, such disputes arise only rarely, but they can lead to inter-regional discussion and open new solutions to the problem.

3.2 Actors of the Inter-American Court of Human Rights

Before analyzing the actors of the Inter-American system, it is necessary to briefly discuss the dual character of the Inter-American system. Two organs are established by the American Convention to supervise the implementation and enforcement of rights covered by the Convention.¹¹⁶ These two organs are the Inter-American Commission on Human Rights and the IACtHR. The Inter-American Commission on Human Rights that is composed of seven members, who represent all of the Member States of the OAS, functions as educational, investigative, advisory, administrative and supervisory organ. Competences of the

¹¹⁶ Davidson, *Inter-American Court*, 21.

Commission incorporate the conduct of country studies and reports, on-site investigations and review of petitions regarding violations of human rights.¹¹⁷ It is indispensable to point out that the Inter-American Commission represents the OAS and not the Court. The IACtHR is in interaction with the Inter-American Commission, but its administration is autonomous.

The particularity of the Inter-American system lays in the fact that only petitions regarding the Member States of the OAS, which ratified the American Convention on Human Rights, shall refer the case to the IACtHR. As it was previously discussed, there is still a high number of States that have not yet ratified this Convention. The result is that countries, which have not ratified the American Convention, do not accept the supervisory body of IACtHR.

The Inter-American Commission is based on three pillars: “the individual petition system, monitoring of the human rights situation in the Member States, and the attention devoted to priority thematic areas.”¹¹⁸ The Commission decides about admissibility of the petition, it also studies the problematic of the alleged violation and first aims to reach a friendly settlement between the Member State accused of violating human rights and the alleged victim. If a friendly settlement cannot be reached, the petition is transferred in the form of a merits report to the IACtHR.

Furthermore, the Inter-American Commission selects at least one of its members as delegates and representatives before the IACtHR. The Executive Secretary is also appointed as a delegate before the Court. The Commission provides its delegates with instructions and guidelines indicating the tasks, which are supposed to be followed before the Court.¹¹⁹ In 2015 the activities of the Commission in relation to the IACtHR included referral of contentious cases, participating in public and private hearings, writing reports on observing the States in cases, which involved supervision of compliance with the judgment, and on implementing the provisional measures.¹²⁰

It may well be that the position of the Inter-American Commission is more advantageous in comparison to the IACtHR, since the Commission has a delegate before the Court. The Court may request any other petition, evidence, document or information, which concerns the case. Only the processes of reaching a friendly settlement are not to be transmitted to the Court. However, finally it is the Commission, which decides about the

¹¹⁷ Ibid.

¹¹⁸ “Democracy for Peace, Security, and Development,” Organization of American States, accessed April 24, 2016, <http://www.oas.org/en/iachr/mandate/what.asp>.

¹¹⁹ Ibid.

¹²⁰ Inter-American Commission on Human Rights, *Annual Report 2015* (Washington D.C.: Inter-American Commission on Human Rights, 2016), 27.

transmittal of documents to the Court. Therefore, it can be disputed that the Commission has an advantageous position over the Court.

Even though it is commonly argued that the form of the Inter-American Commission resembles the original European Commission on Human Rights, it does not mean that the Inter-American system has not undergone any reforms. On the contrary, the recent reforms are applicable to the relation between the Inter-American Commission and the Inter-American Court. To state a few examples, it was agreed that the Commission instead of initiating proceedings through the submission of an application, it will submit its merits report in accordance with Article 50 of the American Convention. Furthermore, the Commission will not be able to offer witnesses or the statements of alleged victims. It is only allowed to offer Expert Witnesses under certain circumstances.¹²¹ Expert Witnesses can be academics, specialists, or experts from NGOs.¹²²

Moreover, some of the Rules of Procedure of the IACtHR have undergone certain modifications, which concern actors of the Court. The Court established that judges, who are nationals of the respondent State, are not allowed to participate in the consideration and deliberation of an individual petition, which is submitted to the Court.¹²³ On the other side of the Atlantic, the “national judge” is always included when the Court hears cases as a seven-judge Chamber or a seventeen-judge Grand Chamber. However, a “national judge” is never responsible for a deliberation in the single-judge formation, and only exceptionally he/she may be invited to sit in the Committee.¹²⁴

The recent reforms of the IACtHR’s Rules of Procedure may be a subject to consideration, whether any external player might have had an impact on these new rules. Could it have been the European Court? The official document *Statement of Motives for the Reform of the Rules of Procedure* does not list any European actors that would be taken into account.¹²⁵ However, it refers to an Advisory Opinion OC 20-09 on Article 55 of the

¹²¹ Corte Interamericana de Derechos Humanos, *Statement of Motives for the Reform of the Rules of Procedure* (San José, Costa Rica: Corte Interamericana de Derechos Humanos, 2009).

¹²² Jorge Calderon Gamboa.

¹²³ Corte Interamericana de Derechos Humanos, *Statement of Motives*.

¹²⁴ European Court of Human Rights, Public Relations. *The ECHR in 50 Questions* (Strasbourg: Council of Europe, 2014).

¹²⁵ The document states that the following participants submitted observations: the Inter-American Commission; the States of Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, El Salvador, Guatemala, Mexico, Peru and Venezuela; various civil society organizations: the Center for Justice and International Law; a group of Colombian organizations made up of the *Comisión Colombiana de Juristas* (Colombian Commission of Jurists), the *Corporación Sisma Mujer* (Sisma Mujer Corporation), Minga, the *Grupo Interdisciplinario por los Derechos Humanos* (Interdisciplinary Group for Human Rights), the *Corporación Reiniciar* (Corporation Reinstantiate), *Colectivo de Abogados “José Alvear Restrepo”* (José Alvear Restrepo Lawyers Collective), and the

American Convention, which concerns the deliberation of a judge, who is a national of the State party before the Court. Mexico in its observations includes:

“The right of a judge to participate in the deliberation of a case related to his country of origin rests upon the statutes, the preparatory works and the several orders issued by the most important international Courts, such as the extinct Permanent Court of International Justice, the current International Court of Justice, the Inter-American and European Courts of Human Rights and the International Court on Maritime Law.”¹²⁶

One cannot argue that there has been a direct impact of the ECtHR. In fact, Mexico points out that the issue remains to be decided on regionally. However, it is undeniable that Mexico made a slight reference to the particularity of the “national judge” of the ECtHR participating in the deliberation of a case. To sum it up, the ECtHR has in a very limited way contributed to argumentation of a State Party of the IACtHR, but it does not signify that the ECtHR would have somehow influenced these reforms. On the other hand, one can argue that the original foundation of the Inter-American Court was based in many ways on the European system, but the European system has changed tremendously ever since. The Inter-American system remains in its core the same.

Actors of intercontinental cooperation in the Americas slightly differ, since the institutional structure diverges from the current European one.¹²⁷ However, some actors are responsible for very similar activities on both sides of the Atlantic. For instance judges of the

Comisión Intereclesial de Justicia y Paz (Intereclesial Commission for Justice and Peace); a Group of Mexican organizations made up of the *Centro de Derechos Humanos Miguel Agustín Pro Juárez A.C* (Miguel Agustín Pro Juárez Human Rights Center, Civil Association), the *Comisión Mexicana de Defensa y Promoción de los Derechos Humanos* (Mexican Commission for Defence and Promotion of Human Rights), *Asistencia Legal para los Derechos Humanos* (Legal Assistance for Human Rights), the *Centro de Derechos Humanos* (Legal Assistance for Human Rights), the *Centro de Derechos Humanos “Fray Francisco de Vitoria O.P” A.C* (Friar Francisco de Vitoria O.P. Center for Human Rights), the *Tlachinollan* Human Rights Center of the Montaña, and *Fundar, Centro de Análisis e Investigaciones* (FUNDAR Center for Analysis and Investigations; and two attorneys.

¹²⁶ Inter-American Court of Human Rights, *Advisory Opinion OC-20/09* (San José: Inter-American Court of Human Rights, 2009).

¹²⁷ Human rights recognized in: The American Declaration of the Rights and Duties of Man, the American Convention on Human Rights (“Pact of San José, Costa Rica”), the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”), the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Convention of Belém do Pará”), in accordance with their respective provisions, the Statute of the Commission, and these Rules of Procedure.”
“Democracy for Peace, Security, and Development.”

IACtHR play a very similar role as the judges of the ECtHR. They are actors of “soft” / “diplomatic” cooperation, once they are involved in dialogue between delegations. Secondly, they are considered as actors of “hard” / “juridical” cooperation, since they have a direct influence on the Court’s decisions and judgments. However, the IACtHR does not have the same number of judges as its’ State Parties. The situation is more particular. The IACtHR disposes of seven judges with a President and a Vice-President. Nevertheless, if the situation requires, interim judges or *ad hoc* judges are appointed to interstate cases. The *ad hoc* judge is appointed by the State, whose interests are in concern. If there are more countries present, they can either choose one *ad hoc* judge to represent all or each country can choose its own.¹²⁸

The number of judges of the IACtHR is much lower in comparison with the number of judges in Europe. It can be argued that the variety of positions and mindsets of judges concerning intercontinental cooperation also differs. Judges of the Court and even the *ad hoc* judges can be considered as actors of “hard” / “juridical” cooperation, since they interpret the American Convention and include references to the European Convention and jurisprudence. According to Burgorgue-Larsen and Montoya Céspedes, concretely the judges Antonio Cançado Trindade and Diego García Sayán often referred to the ECtHR during their term of office.¹²⁹ It could be shown that both judges were active players involved in diplomatic dialogues with the European Court.¹³⁰

To illustrate the internal and external factors, which have an impact on judges and their openness to intercontinental cooperation in the Americas, the background of one of the crucial proponents of intercontinental cooperation is discussed. Moreover, he has been already mentioned several times throughout this thesis. Antonio Cançado Trindade, who is currently the Judge of the International Court of Justice, was born in Brazil. He studied international law at the University of Cambridge and his European background did not stop there. He was also a lecturer at The Hague Academy of International Law, University of Cambridge, and Utrecht University as well as at the annual study sessions held by the Institute of Human Rights in Strasbourg. The complete list of universities, where he was employed as a visiting

¹²⁸ Inter-American Court of Human Rights, *Rules of Procedure of the Inter-American Court of Human Rights* (San José: Inter-American Court of Human Rights, 2009).

¹²⁹ Laurence Burgorgue-Larsen and Nicolás Montoya Céspedes, “Diálogo judicial entre la Corte Interamericana de Derechos Humanos y la Corte Europea de Derechos Humanos,” in *Los sistemas interamericano y europeo de protección de los derechos humanos, Una introducción desde la perspectiva del diálogo entre tribunales* ed. by Luis López Guerra et al. (Lima : Palestra Editores, 2015), 333.

¹³⁰ García Sayán used to be the President of the IACtHR in 2011 to 2012. Antonio Cançado Trindade was elected as the President of the IACtHR in 1999 and reelected in 2002.

professor is almost endless.¹³¹ Arguably, these internal factors have an essential influence on his openness to intercontinental cooperation. Moreover, during his Presidency of the IACtHR he had the opportunity to actively participate and encourage the intercontinental dialogue, which he did. It may be the case that he used the opportunities of external factors to cooperate with the ECtHR as much as possible, since he participated in many international visits such as the opening of the judicial year of the ECtHR in 2003. Moreover, he was active by sharing his ideas in separate opinions to judgments of the Court. As it was discussed, judges play a crucial role regarding intercontinental cooperation, but who are the other specific actors within the Inter-American system?

Another actor of cooperation is the Secretariat of the Inter-American Court. It can be contended that the Secretariat of the Court plays a similar role as the Registry of the ECtHR. However, the Secretariat of the IACtHR is much smaller in comparison with the Registry. Around twenty to thirty lawyers permanently work in San José and they are in contact only a couple of times a year with the judges, who are not permanently in San José. It is due to the small number of cases that reach the IACtHR. According to Calderon, the IACtHR can be compared to the Grand Chamber of the ECtHR. The Inter-American Commission can be compared in the amount of cases pending to the ECtHR.¹³²

Attorneys of the Secretariat can be involved in activities other than the administrative ones. Some attorneys of the Court's Secretariat participate actively in intercontinental cooperation, since staff exchanges are launched between the Registry and the Secretariat. "Hard" / "juridical" cooperation is then regularly developed. This symbol of opening the doors to a lawyer from other regional Court is crucial for intercontinental cooperation and future interactions between the two Courts.

Another actor of intercontinental cooperation can be considered the Inter-American Commission on Human Rights that decides about the admissibility of petition and when needed it transmits the case to the Court in form of a merits report. After the reforms, which were discussed above, the Inter-American Commission has lost some of its privileged positions within the Inter-American system. However, it may play the role of an actor of "hard" / "juridical" as well as "soft" / "diplomatic" cooperation. However, the Inter-American Commission shall not be associated with the Court. The Court expressly aims to distance itself from the Commission, as can be interpreted in the interview with Calderon.

¹³¹ "Current Members," International Court of Justice, accessed May 9, 2016, <http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=167>.

¹³² Guillem Cano-Palomares.

The role of the Commission as an actor of “hard” / “juridical” cooperation is through its’ merits reports, where the Commission may refer to the European system such as in the case of Miguel Campos et al. v. Ecuador, when the Commission stated to be “in line with the constant jurisprudence of the European Court” concerning the principle of judicial independence.¹³³ The Inter-American Commission is the first authority to assess the petition and its admissibility. It can be the first authority to refer to the European system. However, the aim of this thesis is to focus on the judgments of the Court, which also include the descriptions of procedures and activities of the Commission.

The Inter-American Commission shall be considered an actor of “soft” / “diplomatic” cooperation, since the Commissioners are in touch with the ECtHR. However, the Inter-American Commission has increased its’ interactions with the EU institutions such as the European Commission. It can be shown that the IACtHR and actors behind its walls are the main actors interacting with the ECtHR. Although, one may wonder, since the Inter-American system is characterized as a dual system, shall cooperation between the two regions be dual as well?

These are not the only reasons why it is necessary for the ECtHR to interact with both bodies of the Inter-American system. In fact, a delegation of the ECtHR visited the IACtHR in February, 2012 and had a dialogue with Commissioners Dinah Shelton and José de Jesús Orozco.¹³⁴ It is disputed that the ECtHR would welcome an increase of interactions with the Commission, but there is not enough political will from the side of the Commissioner. So far, they are in touch, but no intentions to intensify cooperation have been expressed.

The most recent reports of the Inter-American Commission from the years of 2013, 2014, and 2015 have not informed about any visits or cooperation with the ECtHR. On the other hand, the annual reports of the San José Court concerning the same time period, have informed about various interactions with the ECtHR. It can be considered that the ties between the two Courts have intensified but the ties between the Inter-American Commission and the ECtHR stagnate, since the responsibility to interact with the ECtHR is rather in the hands of the IACtHR. Moreover, the last reports indicate that the Commission increased contact with the EU officials.

¹³³ Miguel Camba Campos et. al v. Ecuador, Series C No. 268 (Inter-American Commission on Human Rights 2011), 19.

¹³⁴ Inter-American Commission on Human Rights, *Annual Report 2012* (Washington D.C.: Inter-American Commission on Human Rights, 2013), 31.

It may be true that human rights in the Americas are protected by a dual system. However, not all public powers of the OAS are willing to be supervised by an international body, particularly the IACtHR. This is one of the reasons why some States have not ratified the American Convention. On the other hand, these OAS State Parties are still subjected to supervision by the Inter-American Commission. One may consider that public international law has not been fully developed across this region, since some States are not willing to ratify the American Convention and fully guarantee human rights of their citizens. Lack of political will or fears of losing sovereignty are common reasons for rejecting the ratification.

One shall consider that dual intercontinental cooperation between Europe and the Americas would be desirable. Although the ECtHR is in contact with both the IACtHR as well as the Inter-American Commission, relations with the Court have much more evolved. It may well be that the Inter-American Commission is rather reluctant to intensify such cooperation with the ECtHR. Based on recent developments it can be shown that interactions between the Courts and actors of the Courts have intensified. One must not forget about the staff exchanges, which are organized between the Registry of the ECtHR and the Secretariat of IACtHR. Nevertheless, the recent tendencies show that dialogues continue between the delegations and Registries of the Courts. Diplomatic talks between the ECtHR and the Inter-American Commission still persist, but are not as frequent as they used to be. To a certain extent the Inter-American Commission tends to develop interactions with bodies of the EU.

3.3 External Actors

It was alluded to above that actors, who support intercontinental cooperation are not only to be found inside the international institutions. There are also actors, who are so to speak, external players. Some of these external players such as governments are able to financially support cooperation activities between the Courts. Other external players such as NGOs are able to provide the Court with valuable information concerning the issue of the case, but also other international law practices or particular practices of the Court. However, the role of NGOs is to a certain extent additional and cannot be considered as binding.

The financial contributors to intercontinental cooperation, precisely the governments of certain countries, may be considered as actors of cooperation. Since they have an impact on organization of intercontinental meetings as well as staff exchanges indirectly, they are considered within the category of external actors. In order to reach efficient and productive cooperation especially on an intercontinental level, certain amounts of financial sources are needed. Unfortunately, the IACtHR barely has the financial sources to run its own business.

The ECtHR is dependent on the Council of Europe, which also needs to do its counting. Therefore, an external support is needed.

The following paragraphs reveal which governments have enabled the upswing of interactions and cooperation activities such as the staff-exchange program, which enables Registry lawyers and staff of the Executive Secretariat to become familiar with the methods and jurisprudence of the other Court. Since there are not many documents that would publicly talk about this financial support, it will be hypothetically discussed why these governments are interested in endorsing these interactions. Furthermore, it will be discussed, if there are any links between the supporting governments and the Courts.

Countries, which have recently financially contributed to cooperation activities of the Courts, have mostly been Luxembourg and Norway.¹³⁵ Namely these two countries enabled lawyers from both Courts to familiarize with the case law and methodology of the Courts. An acknowledgement expressly dedicated to Luxembourg and Norway was included in the recent document issued by the ECtHR: *Dialogue across the Atlantic: Selected Case Law of the European and Inter-American Human Rights Courts*.

Norway and Luxembourg belong to countries with the highest living standards in Europe. More particularly, Norway is well known for its generosity concerning aid to the least developed countries, also some poorer countries of Europe and last but not least the Council of Europe. Luxembourg is another famous donor of financial aid and it has supported cooperation activities between these Courts more than once. The former president of the ECtHR, Dean Spielmann acknowledged within his speech on the occasion of the opening of the judicial year 2013 that cooperation with the IACtHR would continue only due to the generosity of the Luxembourg Government.¹³⁶

In order to discuss the roles of Norway and Luxembourg as donors, some facts and statistics regarding their position in official development assistance [ODA] follow. In 2012, Norway gave out 0.93 percent of its gross national income [GNI], which made this country the third most-generous country in terms of these two ratios. Since the estimates about Norwegian economy assume steady economic growth, the mean aid volumes might increase. What are the main reasons for Norway to be so generous? According to the OECD's Development Assistance Committee, Norway's focus is on global issues, in order to play an international role in the areas of peace-building, climate change and global health. Moreover,

¹³⁵ Erik Fribergh and Paolo Saavedra Alessandri, Introduction to: *Dialogue across the Atlantic: selected case law of the European and Inter-American human rights courts*, by the European Court of Human Rights, (Oisterwijk: Wolf Legal Publishers, 2015).

¹³⁶ European Court of Human Rights, Registry of the European Court of Human Rights, *Annual Report 2013*, 23.

Norway aims to play a role as a niche donor in areas of sustainable development and climate change.¹³⁷ Arguably, Norway has also added human rights to its interests but why?

It is true that Norway is a generous contributor. Nevertheless, the current discussion concerns the real efficiency of aid donors. Concerning aid assistance to the least developed countries, it usually entails risks and support disbursements are sometimes postponed, due to some strange machinations with previously received disbursements.¹³⁸ One may think that providing some financial aid to international organizations or institutions is less risky and probably more efficient. However, being a global donor is one of Norway's creeds, which puts it on the high spot of international players.

Luxembourg is also a very generous country, since it allocated 0.97% of its GNI to official development assistance in 2011. Moreover, in 2011 Luxembourg was the third most-generous donor right after Sweden and Norway, while taking into account a portion of its economy.¹³⁹ Luxembourg focuses mainly on reducing poverty, humanitarian assistance and cooperation with nine developing country partners. Once again, the aim is to be visible as an international player in the global arena and international aid is one of its essences. Therefore, it may not be surprising that Luxembourg embraced the chance to have an impact on human rights even overseas.

Concerning the governments on the other side of the Atlantic, it is much more complicated. The most top source funding country of the OAS is the United States of America, which was responsible for 41% of the total 2013 OAS budget.¹⁴⁰ Moreover, the crucial position of the USA inside the OAS and more importantly the Inter-American Commission can be interpreted through its very stable representation. The USA has enjoyed having a Commissioner in the Inter-American Commission with only one interruption in two years (2004-2005) in the whole history of the Commission.¹⁴¹ It may be due to the fact that

¹³⁷ "Norway High up the Aid Donor Table but Could Improve Allocation," OECD, accessed April 17, 2016, <http://www.oecd.org/newsroom/norway-high-up-the-aid-donor-table-but-could-improve-allocation.htm>.

¹³⁸ Stefan Koeberle, Zoran Stavreski and Jan Walliser, *Budget Support as More Effective Aid? Recent Experiences and Emerging Lessons* (World Bank Publications, 2006), accessed April 1, 2016, <https://books.google.fr/books?id=irM4rySL73sC&pg=PA416&dq=norway+as+a+donor&hl=cs&sa=X&ved=0ahUKEwi40rW5kpTMAhWCICwKHfdcAH8Q6AEIRDAF#v=onepage&q=norway%20as%20a%20donor&f=false>.

¹³⁹ "Luxembourg - DAC Peer Review of Development Co-Operation," OECD, accessed April 17, 2016, <http://www.oecd.org/dac/peer-reviews/peer-review-luxembourg.htm>.

¹⁴⁰ Peter. J Meyer, *Organization of American States: Background and Issues for Congress* (Washington DC: Congressional Research Service, 2014), 5.

¹⁴¹ According to the list of Commissioners apart from 1960: available at: <http://www.oas.org/en/iachr/mandate/composition.asp>.

the USA is responsible for more than a half of the budget of the Commission.¹⁴² However, the USA does not support the IACtHR not only through not ratifying the American Convention, but also through providing little budget to the Court. It can be indicated that interest of the USA to support the IACtHR itself may be marginal, since only a half or less of the total budget of the Court, is financed by the OAS, where the USA has a financially dominant position. The other half of the Court's budget is financed by voluntary contributors, such as countries of Central and South America, European countries, various institutions and other agencies. The IACtHR would be without these voluntary contributors an ineffective body unable to protect human right in the Americas.

Just for emphasis, the budget of the IACtHR for 2014 constituted the total amount of US\$5,520,300.85 (4, 893,016.18 euro). In comparison with its sister Court, the budget of the ECtHR for 2014 was 67,650,400 euro and it was provided with further funding by 22 countries in the amount of 2,000,000 euro. Norway and Germany were the leading contributors by providing more than a half of that sum to recruit more legal staff by the Registry to reduce the backlog of admissible cases.¹⁴³

Concerning the budget of the IACtHR, it is composed of regular income from the OAS, which in 2014 amounted to US\$2,661,000 and special income that is provided through voluntary contributions from States, international cooperation, and other agencies. In 2014, the IACtHR received in voluntary contributions the total amount of US\$2,885,811.85, which was more than from the OAS.¹⁴⁴ Among the voluntary contributors of 2014 were governments of Central and South American countries such as Mexico, Costa Rica, Ecuador, Paraguay, but also some contributions came from Europe such as the Spanish International Development Cooperation Agency [AECID].¹⁴⁵

To conclude, the position of the USA and its relation to the OAS and the Court may bring certain doubts. The previous paragraphs aimed to discuss and understand the budgetary system of the Court and it brings a certain conclusion. It can be interpreted that the USA, which has a financial leading position in the OAS and stable representation in the Inter-American Commission, does not highly support the Court. Moreover, the regular

¹⁴² Inter-American Commission on Human Rights, *Annual Report 2013* (Washington DC: Inter-American Commission on Human Rights, 2014), 603.

¹⁴³ European Court of Human Rights, Registry of the European Court of Human Rights, *Annual Report 2014* (Strasbourg: Council of Europe/European Court of Human Rights, 2015), 14.

¹⁴⁴ Inter-American Court of Human Rights, *Annual Report 2014* (San José: Inter-American Court of Human Rights, 2015), 78.

¹⁴⁵ Project concerned strengthening the abilities of the Inter-American Court to evaluate status of compliance with provisional measures and to decide particularly complex contentious cases, which was supported by the amount of US\$90,000.

income has in the past years decreased in proportion to the special income of the Court. In 2014, the regular income composed of 48% of the total budget and the special income of 52 % of the total budget.¹⁴⁶ As it was stated above, efficiency of the IACtHR would be threatened, if no voluntary contributions were provided. It can be contended that the interest of European countries, which support protection of human rights in the Americas, is higher than the interest of such hegemony as the USA.

Nevertheless, international cooperation to protect human rights is significant. Two funding contracts supporting the international cooperation between the ECtHR and the IACtHR were signed during the 2014. According to the *Annual Report 2014*, the first contract concerned a dialogue between the Courts on their experiences and jurisprudence as well as meetings with State and academic authorities in Germany on access to justice of the Inter-American system. Subsequently, the second contract agreed on cooperation regarding information and communication technologies.¹⁴⁷

The IACtHR signed a “Memorandum of Understanding” with Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH [GIZ] and agreed on joining efforts in the context of a program *Regional International Law and Access to Justice in Latin America*. This agreement included an assignment of a German lawyer/consultant specialized on access to justice and accompanied by a financial contribution of 350, 000 euro.

To sum up the analysis regarding financial contributors, there is not only support for cooperation and an increased interaction between the Courts; assistance is provided to the IACtHR itself in the form of voluntary contributions, which are essential for the Court of San José. Governments that were expressly acknowledged by the ECtHR to most recently contribute to interactions with its counterpart are Luxembourg and Norway. The IACtHR has acknowledged contributions from the governments of Norway and Denmark, but also Germany and Spain in the form of GIZ and the Spanish AECID.¹⁴⁸ These contributions also concern the development of protection of human rights in the Americas, not explicitly interactions between the Courts. However, GIZ financially supported the IACtHR and its visit to the ECtHR in 2014.

¹⁴⁶ Inter-American Court of Human Rights, *Annual Report 2014*, 79.

¹⁴⁷ *Ibid.*

¹⁴⁸ The program *Regional International Law and Access to Justice in Latin America* is commissioned by the German National for Economic Cooperation and Development. AECID is under the Ministry of External Affairs and Cooperation.

However, the IACtHR shall worry about its own future, since Norway as well as Denmark will probably cut their contributions.¹⁴⁹ It may be the case that the interest of these countries will move to more alarming issues relating to the refugee crisis, which has a direct as well as indirect influence on European countries. Therefore, the interest in the Americas of these Scandinavian countries may decrease. Countries with historic interests in the Americas such as Spain, Portugal or Italy have due to the economic crisis already cut their contributions to the IACtHR. The Court shall consider finding new voluntary contributors or its State Parties shall increase their financial support of the IACtHR.

Other external actors that start to increase their magnitude within the case law are non-governmental organizations. However, roles of NGOs vary between the two regions. In Europe, NGOs are usually so called third interveners and their interpretations and research results are included within the judgments or decisions of the ECtHR. Some NGOs such as Amnesty International, which has a worldwide reputation, are regularly expected to provide results of their research and activities. Amnesty International even provided information relating to the Inter-American system such as in case of *P. and S. v. Poland*.¹⁵⁰

Moreover, there has been a discussion whether to allow NGOs to lodge applications on behalf of the alleged victim with disabilities. It may well be that this act can add efficiency to the European system. The tendency in national law of various European countries as well as in the Inter-American regional human rights system is to allow an NGO to lodge an application on behalf of the victim.

In 2014, another third intervener, the High Commissioner for Human Rights of the Council of Europe Nils Muižnieks, expressed that if the alleged victim with disabilities is not able to lodge an application to the Court by himself/herself, there should be a system that would allow him/her to do so. He argued that such responsibility could be transferred to an adequate NGO, which would be empowered to communicate the application to the Court on behalf of the alleged victim.¹⁵¹ Furthermore, Nils Muižnieks expressed that the ECtHR should allow NGOs to lodge applications in exceptional circumstances on behalf of the directly affected victims. Only extremely vulnerable victims should be allowed to have a representative. Extremely vulnerable victims can be considered people, who are detained in psychiatric and social care institutions, with no family or other possible representation.¹⁵²

¹⁴⁹ Guillem Cano-Palomares.

¹⁵⁰ *P. and S. v. Poland*, 57375/08 (European Court of Human Rights 2012).

¹⁵¹ Center for Legal Resources on behalf of Valentin Câmpeanu v. Romania, 47848/08 (European Court of Human Rights 2014), 33-34.

¹⁵² *Ibid.*

It can be shown that the European system has recently considered the possibility of an NGO to play a larger role. Moreover, the ECtHR made an exception in the case of *Center for Legal Resources on behalf of Valentin Câmpenau v. Romania*, where the victim, an orphan and HIV patient was ill-treated in the psychiatric hospital. Since the victim had already died and had no relatives, the Court allowed the NGO to lodge an application on behalf of this victim.¹⁵³ However, the Court does not intend to empower NGOs on a regular basis to lodge an application on behalf of the victim.¹⁵⁴

Nevertheless, regarding the practices on the other side of the Atlantic, it is a standard procedure in the Americas that NGOs may lodge an application on behalf of alleged victims. On the other hand, NGOs participate as representatives of alleged victims. They cannot play a role as third interveners anymore, as in the case law of the ECtHR, which often includes submissions by NGOs in this sense.

¹⁵³ Ibid.

¹⁵⁴ Guillem Cano-Palomares.

4 Interactions between the Courts within the Case Law

As it was previously discussed, referring to other regional systems of human rights within the Court's jurisprudence forms "hard" / "juridical" cooperation. In order to analyze the impact of such cooperation, a selection of twenty-six cases of the ECtHR and twenty-eight cases of the IACtHR will be analyzed. As indicated in the introduction, the methodology of this analysis is based on methods of grounded theory according to Strauss and Corbin.

Before continuing further with the case law analysis, it is indispensable to briefly introduce the concrete methods and directions of this part of the research. Grounded theory uses analytic procedures, which are designed to build a theory, in order to avoid the biases and assumptions which could be raised during the research. The aim of the GT is to develop an explanatory theory which closely represents the reality.¹⁵⁵ Methods used to generate an explanatory theory include open, axial and selective coding. The first two methods have been already used throughout the previous chapters, but some brief explanation may be needed.

Open coding is part of an analysis, which establishes the categorization of phenomena by examining the data closely. Open coding is accompanied with two analytical procedures including making comparisons and asking questions. During the open coding, data is examined, compared, conceptualized and finally categorized. Once the phenomena in data are identified, the conceptual labels can be grouped around them. This means that they become categorized.¹⁵⁶

Axial coding puts data back together in new ways. This enables one to spot the connections between categories.¹⁵⁷ Axial coding then results in identification of several main categories. These two methods often alternate during the research so they do not necessarily follow after one another, but rather interact.

The GT also includes selective coding, when "major categories are finally integrated to form a larger theoretical scheme that the research findings take the form of theory."¹⁵⁸ The result is a *descriptive narrative about the central phenomenon and the core category*.¹⁵⁹ Selective coding refers to a process of selecting the core category, which is systematically related to other categories that validate these systematic relations between the categories and

¹⁵⁵ Strauss and Corbin, *Basics of Qualitative Research*, 12.

¹⁵⁶ Strauss and Corbin, *Basics of Qualitative Research*, 20.

¹⁵⁷ Previously, axial coding was used to categorize the features of intercontinental cooperation. It resulted in identifying two categories: soft / "diplomatic" and "hard" / "juridical" cooperation. Moreover, open coding was used to analyze actors of cooperation.

¹⁵⁸ Strauss and Corbin, *Basics of Qualitative Research*, 143.

¹⁵⁹ *Ibid.*

the core category. Furthermore, categories that need further refinement and development are identified. Subcategories, which are identified through alternation of open and axial coding, are instantly compared and analyzed in relation to the core category.¹⁶⁰ Selective coding is a crucial step for this part of the thesis, since the two categories of intercontinental cooperation, which were generated by alternation of open and axial coding, lead to further research in order to identify the core category and generate a substantive theory of this research.

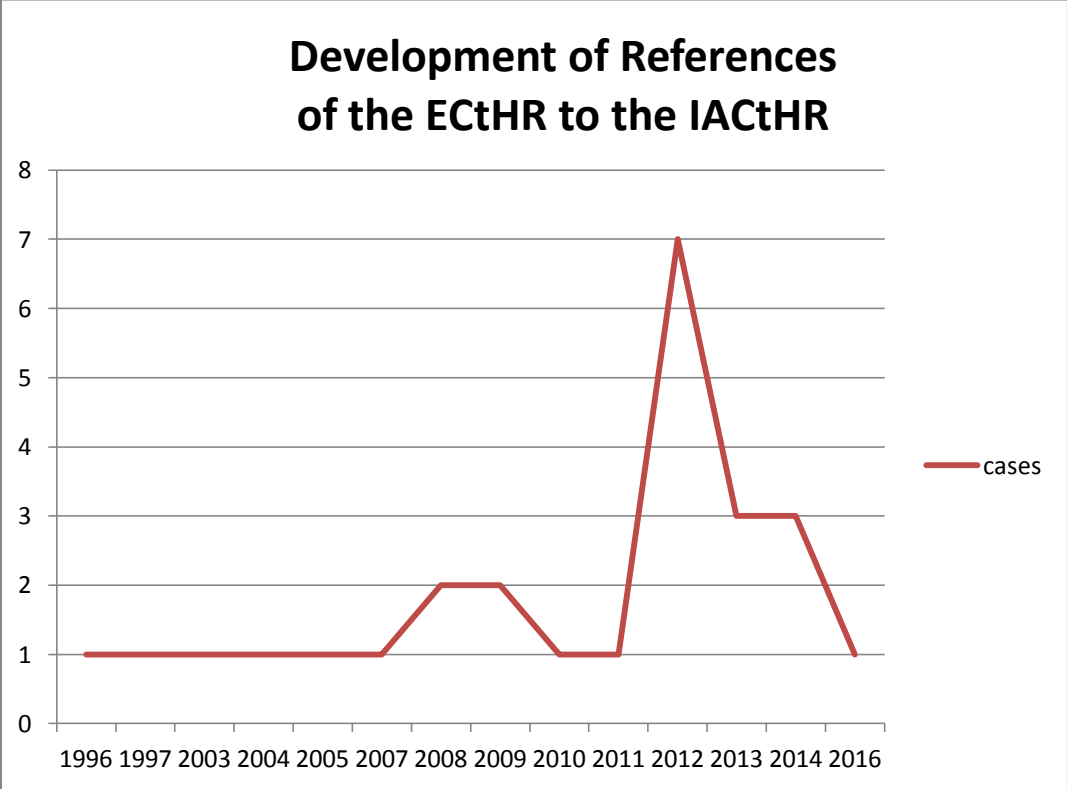
Data, which are analyzed, are provided by the sample of judgments and decisions of the two Courts. The total number of twenty-six cases of the ECtHR, which contains references to the Inter-American system, is firstly examined with the open coding method, which results in identifying the first subcategories of “hard” / “juridical” cooperation. Fifteen judgments and decisions out of twenty-six concern the Articles 2 or 3 of the European Convention: the right to life and prohibition of torture.

Concerning the case law of the IACtHR, fifteen judgments incorporated references to the European system of human rights regarding alleged violations of Articles 4 or 5 of the American Convention: the right to life and the right to humane treatment. Method of open coding identified the high number of cases concerning the right to life and prohibition of torture / the right to humane treatment. Other Articles covered within the case law sample were Articles 6 (right to a fair trial), 8 (right to respect for private and family life), and 10 (freedom of expression) of the European Convention and Articles 7 (right to personal liberty), 8 (right to a fair trial), and 25 (right to judicial protection) of the American Convention. However, for the reasons discussed above, research is focused on the right to life and prohibition of torture / the right to humane treatment.

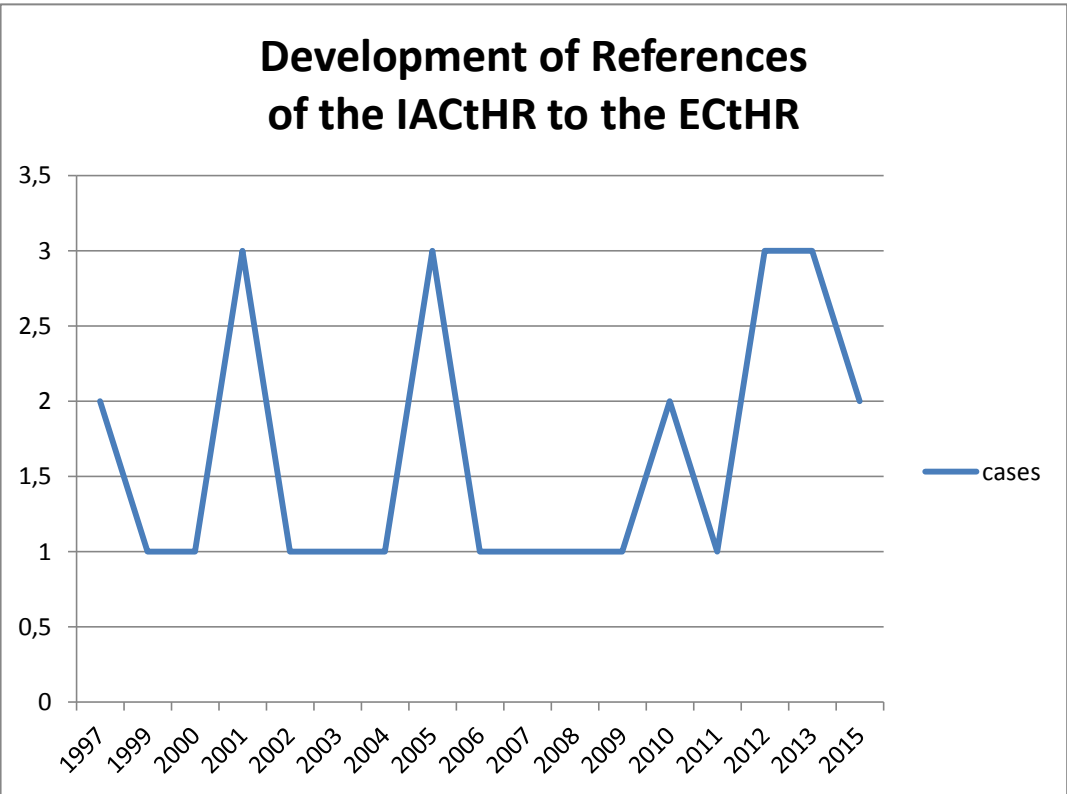
Furthermore, the graphs below show the development of references made by the Court to the other regional system regarding the case law sample. It can be contended that the IACtHR has referred to the European system quite equably (Graph 2). However, the sample of cases of the ECtHR shows that the ECtHR has intensified its interest quite recently (Graph 1). As it was mentioned previously, one can argue that the development of “soft” / “diplomatic” cooperation and interactions has had an impact on the development of “hard” / “juridical” cooperation. Moreover, staff exchanges started 3 years ago, so it can be argued that they have had an impact on the increase of references to the IACtHR already. This chapter aims to explore elements hidden in the case law of each Court and reveals trends in “hard” / “juridical” cooperation.

¹⁶⁰ Strauss and Corbin, *Basics of Qualitative Research*, 100.

Graph 1



Graph 2



4.1 Analysis of the Selected Jurisprudence of the ECtHR

Analysis of a sample of twenty-six cases, consisting of five decisions and twenty-one judgments, was carried out. Fifteen cases (three decisions and twelve judgments) regard the Articles 2 or 3 of the European Convention on Human Rights. Therefore, the main focus of the research is on these two rights and issues associated with them. Essentially, the inquiry combined open and axial coding of twenty-six cases referring to the Inter-American system. The cases submitted to an analysis ranged from the year of 1996 to January 2016.

Since the European system of human rights has undergone various reforms during this period of time, some of them need to be taken into account before continuing with the analysis. One of the most crucial reforms, which concerned the organizational structure of the European system, was the dissolution of the European Commission on Human Rights, which served as a role model to the Inter-American Commission on Human Rights. However, the Protocol 11 dissolving the European Commission came into force in 1998, so only some of the studied cases included the role of the European Commission.

It is necessary to conceptualize and explain the intentions of this part of the analysis in more detail. Methodology and methods have been already discussed, but the process of achieving the core results have not. The main focus of the inquiry is on interpretation of instruments of the Inter-American system by the ECtHR and the scope of references to the IACtHR within its jurisprudence. Some decisions and judgments incorporate a more detailed argumentation and interpretation in regard to the Inter-American system. It is indispensable to point out that references to interpretations by the IACtHR are part of the relevant international law.

In fact, references to the Inter-American system are included within *relevant international law* or *international legal documents*. It shows the aim of the Court to conceptualize the attitudes of different regional systems along with the “universal” system of human rights of the United Nations. The ECtHR also refers to the Inter-American system while discussing a concrete issue or a specific question such as: “Did the applicants’ extradition actually hinder the effective exercise of the right of the individual application?”¹⁶¹

¹⁶¹ Mamatkulov and Abdurasulovic v. Turkey, 46827/99; 46951/99 (European Court of Human Rights 2003), page 32.

Occasionally, it is not just the Court that refers to the IACtHR, but also the so-called third interveners, who submit reports on a requested topic. Third interveners are usually NGOs such as Amnesty International, and other international organizations such as the UN. Moreover, references to the Inter-American system of human rights can be included within the submissions of governments, for instance in the case of *Vo v. France*.¹⁶²

Separate opinions of judges represent an accompaniment of jurisprudence, which is necessary to take into account as well. It may provide an insight to the composition of the Chamber or Grand Chamber and explore the open-mindedness of some judges. However, the analysis takes into account only the most recent separate or concurring opinions starting from 2010, since it is preferable to reveal the current or most recent level of open-mindedness of the Court.

In order to provide a more comprehensible overview of issues, the following table shows the four main subcategories. Additionally, inspirations drawn from the Inter-American system and the respective Court are pinpointed. Moreover, the four subcategories are results of open and axial coding and interact later with the core category.

Table 2: Four Main Subcategories as a Result of Open and Axial Coding

ECtHR		
Issue	Case Law	Interpretations Related to the IACtHR
interim measures	<i>Boumedine and others v. Bosnia and Herzegovina</i> <i>Mamatkulov and Abdurasulovic v. Turkey</i> <i>Mamatkulov and Askarov v. Turkey</i> <i>Savriddin Dzhurayev v. Russia</i>	binding character of interim measures drawn partly from the IACtHR: Article 63 (2) of the American Convention
non-refoulement	<i>A v. the Neatherlands</i> <i>Hirsi Jamaa and others v. Italy</i>	Article 22 (7) and Article 22 (8) of the American Convention
inhumane treatment	<i>Babar Ahmad and others v. the United Kingdom</i>	defining inhumane treatment
right to life of a fetus	<i>Vo. v. France</i>	interpretation of the Article 4 (1) of the 1969 American Convention

¹⁶² *Vo v. France*, 53924/00 (European Court of Human Rights 2004).

4.1.1 *Interim Measures*

As it was alluded to above, this chapter aims to provide an analysis of concrete intercontinental issues discussed within the selected jurisprudence of the European Court. One of the common issues concerns the interim measures.¹⁶³ In other words, actions which are granted in serious and urgent situations to prevent irreparable harm to persons.¹⁶⁴ Regarding this case law sample, the ECtHR discussed the compliance of interim measures in regard to the expulsion of asylum seekers in cases of *Mamatkulov and Askarov v. Turkey*, *Mamatkulov and Abdurasulovic v. Turkey*, or *Boumedine and others v. Bosnia and Herzegovina*.¹⁶⁵

The ECtHR took into consideration that according to the Article 63 (2) of the American Convention, the IACtHR shall in cases of extreme gravity and urgency adopt provisional measures. It is binding for the contracting parties of the American Convention to comply with the provisional measures issued by the Court. Moreover, the Strasbourg Court took into account that the IACtHR has several times declared that efficiency of its decisions can be reached by complying with the provisional measures.¹⁶⁶

The European Convention on Human Rights does not explicitly contain provisions concerning the interim measures.¹⁶⁷ It contains Article 34 (individual applications), which cannot be interpreted as a source of interim measures. Within the joint partly dissenting opinion of judges Caflisch, Türmen and Kovler concerning the case of *Mamatkulov and Askarov v. Turkey*, it is argued that the question of whether the Court may indicate and order interim measures based on *rule of international general law* remains open.¹⁶⁸

With the current refugee crisis and growing influx of asylum seekers, the probability of increase of individual applications requesting for interim measures and the tendency to reject the Court's requests by the State in concern could occur more often. Moreover, the

¹⁶³ The ECtHR uses terminology of *interim measures* or *provisional measures*. On the other hand, terminology in the Inter-American system differs: protective measures issued by the Inter-American Commission are called *precautionary measures*, and when ruled by the Court they are called *provisional measures*. Isabela Piancetini De Andrade, *Protective Measures In The Inter-American Human Rights System*, accessed May 11, 2016, <http://www.lrwc.org/ws/wp-content/uploads/2012/03/Protective-measures-Inter-American-System.pdf>.

¹⁶⁴ European Court of Human Rights, *Interim Measures*, 2016, http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf.

¹⁶⁵ The ECtHR refers to the precautionary measures issued by the Inter-American Commission on Human Rights and the provisional measures, which are issued by the IACtHR.

¹⁶⁶ *Mamatkulov and Askarov v. Turkey*, 46827/99; 46951/99 (European Court of Human Rights 2005), paragraph 117.

¹⁶⁷ Center for Justice and International Law, and Center for Justice and International Law, *Comparative Analysis of the Practice of Precautionary Measures Among International Human Rights Bodies*, Report, Berkley: Berkley Law University of California, 2012.

¹⁶⁸ *Mamatkulov and Askarov v. Turkey*, 46827/99; 46951/99 (Caflisch L., Kovler A., Türmen R. / joint partly dissenting opinion).

tendency of many European countries is to decrease the provided number of asylums, which might result in less compliance with interim measures issued by the ECtHR.

It can be indicated that the ECtHR has paid attention to that due to intensification of interactions between the Courts. The ECtHR realized the difference, which could eventually result in disputes with the States. After interpreting the position of the IACtHR in the case of *Mamatkulov and Askarov v. Turkey*, the European Court stated that from that moment on, interim measures were considered to be binding.¹⁶⁹ One may consider that the ECtHR was aware of this issue that could soon escalate. Therefore, expressing that interim measures are binding is crucial for the European system. However, the question is if *rule of international general law* is enough, or there will be a need to add it under the umbrella of the European Convention.

4.1.2 Non-Refoulement

With the increasing refugee crisis in Europe, one may assume that the necessity to acknowledge that refugees are entitled to human rights protection will be even higher. Another issue that may occur more frequently in the future and which should not be omitted by the Court concerns non-refoulement. It is applied to individuals who would be exposed to ill-treatment or torture when expelled. It also applies to individuals who were involved in criminal activities.¹⁷⁰

In the case of *A. v. the Neatherlands* the Court examined the viewpoint of its counterpart on the unconditional nature of Article 3 of the European Convention in relation to the prohibition of refoulement and ill-treatment.¹⁷¹ The Court interpreted that under the Convention one shall not take into consideration the behavior or activities engaged in by the individual, who is a potential victim of refoulement or ill-treatment. Moreover, the viewpoint of the Strasbourg Court is shared by some national courts such as the Supreme Court of New Zealand and other international bodies such as the Committee against Torture, the UN Human Rights Committee and the Inter-American Commission.¹⁷² In the case of *Hirsi Jamaa and others v. Italy*, the ECtHR received opinions of third party interveners such as the United Nations High Commissioner for Human Rights (OHCHR) or the Committee against Torture. The multi-angle attitude to this issue points out the similarities between different regional systems of human rights, which are integrated as relevant international law.

¹⁶⁹ *Mamatkulov and Askarov v. Turkey*, 46827/99; 46951/99 (European Court of Human Rights 2005), paragraph 126.

¹⁷⁰ Such as in the case of *A. v. the Neatherlands*, 4900/06 (European Court of Human Rights 2010).

¹⁷¹ *A. v. the Neatherlands*, 4900/06 (European Court of Human Rights 2010).

¹⁷² *A. v. the Neatherlands*, 4900/06 (European Court of Human Rights 2010), paragraph 117.

The prohibition of refoulement is not only related to international human rights law but also to international humanitarian law¹⁷³ as well as international customary law. According to the UN, the international refugee law approaches the international human rights law in a certain way.¹⁷⁴ Since the European Convention itself does not explicitly talk about prohibition of refoulement, it can be argued that international refugee law extends to international human rights law,¹⁷⁵ which resorts from the rich jurisprudence of the ECtHR.

However, Europe might have drawn inspiration from other areas than just international refugee law.¹⁷⁶ The Americas have a long history and experience with immigration and granting asylum. Moreover, Article 22 (7) of the American Convention states that:

“Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.”¹⁷⁷

Due to increased cooperation between the IACtHR and the ECtHR, one may assume that the European Court may consider referring to interpretation of the IACtHR of this Article of the American Convention more. In the case of *Hirsi Jamaa and others v. Italy* the ECtHR took into account the interpretation of the IACtHR, since the European Convention does not expressly consider the prohibition of refoulement.¹⁷⁸ According to the concurring opinion of Judge Pinto de Albuquerque: “There is no such explicit prohibition in the European Convention on Human Rights, but the principle has been acknowledged by the Court as extending beyond the similar guarantee under international refugee law.”¹⁷⁹ Moreover, the Court adds references to universal human rights law as well as regional human rights law such as the American Convention. It can be disputed that the IACtHR enriched the argumentation

¹⁷³ Article 33 of 1951 Geneva Convention.

¹⁷⁴ The international refugee law can be also labeled as customary law.

“International Refugee Law: Tools for the Protection of the Displaced,” accessed May 1, 2016, <http://www.unhcr-centraleurope.org/en/resources/legal-documents/international-refugee-law.html>.

¹⁷⁵ *Hirsi Jamaa and others v. Italy*, 27765/09 (Pinto de Albuquerque, P. / concurring opinion).

¹⁷⁶ *Ibid.*

¹⁷⁷ “American Convention,” accessed March 15, 2016.

<http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>.

¹⁷⁸ It can be argued that the Americas have more experience in dealing with asylum seekers. Between the post-war periods up to 1960, there were around 700,000 people, who asked for asylum in the USA.

“Refugee Facts, Information, Pictures,” accessed May 1, 2016,

<http://www.encyclopedia.com/topic/refugee.aspx>.

¹⁷⁹ *Hirsi Jamaa and others v. Italy*, 27765/09 (Pinto de Albuquerque, P. / concurring opinion).

of the European Court (or at least one judge of the Court, who is an actor of intercontinental cooperation), since the Article 22 (8) of the American Convention additionally states that:

“In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.”¹⁸⁰

Furthermore, the ECtHR might have to consider if the customary character of international refugee law and its interpretation within the jurisdiction of the Court will be sufficient. It can be contended that the European human rights system will additionally need to incorporate that refugees and asylum seekers are entitled to have their rights equally protected.

4.1.3 Inhumane Treatment

The analysis also reveals a discussion concerning Article 3 in regard to conditions in prisons, specifically solitary confinement. In the case of *Babar Ahmad and others v. the United Kingdom* the ECtHR deals with the issue of solitary confinement and its relation to inhumane treatment.¹⁸¹ The Court refers to the IACtHR, which claims that solitary confinement may in certain circumstances be considered inhumane treatment. Both Courts usually aim to distinguish between torture, inhumane, and degrading treatment. However, the Strasbourg Court has refrained from it under certain circumstances:

“The proposed removal would be in violation of Article 3 because of a real risk of ill-treatment which would be intentionally inflicted in the receiving State; it has normally refrained from considering whether the ill-treatment in question should be characterized as torture or inhuman or degrading treatment or punishment.”¹⁸²

¹⁸⁰“American Convention.”

¹⁸¹ *Babar Ahmad and others v. the United Kingdom*, 24027/07; 11949/08; 36742/08; 66911/09; 67354/09 (European Court of Human Rights 2012).

¹⁸² Reference made in the case of *Babar Ahmad and others v. the United Kingdom*, 24027/07;11949/08;36742/08;66911/09;67354/09, (European Court of Human Rights 2012), paragraph 171.

It can be shown that the Courts are open to broadening the scope of what constitutes inhumane treatment. The ECtHR does not intend to distinguish different actions of torture, but broaden the scope of torture. For instance, inhumane treatment or torture does not only include physical but also psychological acts. These psychological acts are not considered as a different action of torture but as a part of the whole act of torture. The development of interpreting psychological torture became crucial for both regions. Physical suffering but also moral anguish is nowadays increasingly considered as torture.

In these cases the ECtHR does not distinguish between the various forms of ill-treatment, whether it should be labeled as a torture, inhumane, or degrading treatment or punishment, as in the case of *Mamatkulov and Askarov v. Turkey*.¹⁸³ All of these kinds of ill-treatment are considered by the Court to be prohibited.¹⁸⁴ It may be the case that the ECtHR does not tend to define exact distinctions of different forms of ill-treatment in the above mentioned cases. The reason could be that the Court tends to provide one clear statement that any kind of ill-treatment is considered as violation of Article 3 and there is no need to determine distinctions between them, since one shall not claim that certain ill-treatment is worse than the other.

4.1.4 The Right to Life of an Unborn Child

Another issue of an intercontinental scope concerns the right to life in regard to an unborn young. Does the right to life also apply to the fetus? This topic can be often controversial due to the disputes between religious, scientific and secular attitudes. The religious point of view aims to apply the right to life to a fetus. On the other hand, the growing secular society sees it differently. The Courts must be independent so how did they solve this particular situation?

Viewpoints of third party interveners were needed. In the case of *Vo v. France* the ECtHR cited Article 4 (1) of the 1969 American Convention: “Every person has the right to have his life respected. The right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”¹⁸⁵ Even though the American Convention states that the right to life shall be protected from the moment of conception, it does not mean that the Court interprets that same right to a fetus. Moreover, the Center for Reproductive Rights stated that the Inter-American Court does not provide absolute protection

¹⁸³ Ibid.

¹⁸⁴ The IACTHR prohibits them as well. However, the IACTHR distinguishes different kinds of ill-treatment.

¹⁸⁵ “American Convention.”

to a fetus before birth. It is interpreted that the Article 4 of the American Convention did not preclude the national law concerning abortions.¹⁸⁶

On the other hand, the European Convention does not incorporate such wording as the American Convention. Moreover, when the European Convention was signed in 1950, basically all of the contracting parties had already authorized abortion in certain circumstances.¹⁸⁷ The European Convention does not consider the right to life to be included from the moment of conception and the ECtHR's judgment referred to scientific facts indicating that fetus is considered as viable at 6 months.¹⁸⁸

Naturally, this may bring certain controversy, since some contracting parties of the Convention are rather Catholic and may result in a dispute such as in the case of *P. and S. v. Poland*, where Catholicism is very strong. Moreover, the right to life of an unborn young may be discussed from another point of view regarding its absolute character, but that is discussed in the following subchapter.¹⁸⁹

Additionally, the position of the embryo regarding the right to respect private and family life was discussed in the case of *Parillo v. Italy*. The Court stated that there was no European consensus on the subject of donation of embryos not destined for implantation.¹⁹⁰ Therefore, Italy was afforded a wide margin of appreciation. It can be argued that such "delicate and moral questions" are left to be decided by the respective State Party of the European Convention as in the case of *Parillo v. Italy*.¹⁹¹ However some argue, such as Judge Dedov, that such question shall not be left to a margin of appreciation.¹⁹² On the other hand, the Inter-American Court decided that other competing rights shall be taken into account by the State such as in the case of *Artavia Murillo v. Costa Rica*, where the Court concluded that "human embryo prior to implantation could not be understood to be a person for the purposes of Article 4 (1) of the American Convention on Human Rights."¹⁹³

¹⁸⁶ *Vo v. France*, 53924/00 (European Court of Human Rights 2004), paragraph 75.

¹⁸⁷ *Vo v. France*, 53924/00 (European Court of Human Rights 2004), paragraph 52.

¹⁸⁸ *Ibid.*

¹⁸⁹ The ECtHR has analyzed actions and attitudes of the IACtHR in other areas. However, the aim of the analysis is to distinguish between the main subcategories and formulate the core category as a result of selective coding.

¹⁹⁰ *Parillo v. Italy*, 46470 / 11 (European Court of Human Rights, 2015), paragraph 176.

¹⁹¹ *Ibid.*

¹⁹² *Parillo v. Italy*, 46470 /11 (Dedov, D. / concurring opinion), paragraphs 4, 8.

¹⁹³ *Parillo v. Italy*, 46470 /11 (Pinto de Albuquerque / concurring opinion), paragraph 13.

4.2 Analysis of the Selected Jurisprudence of the IACtHR

Analysis of a selection of twenty-eight judgments was carried out. The inquiry combined open and axial coding of twenty-eight cases referring to the European system of human rights. The cases ranged from the year 1997 to September 2015. It was revealed that fifteen judgments concerned Articles 4 and 5 of the American Convention and the way they were interpreted by the Court was the focal point of the analysis.

Both Courts agree that Conventions are living instruments and their interpretation is continuously evolving.¹⁹⁴ Referring to other regional systems of human rights is part of the evolution. However, Judge Eduardo Vio Grossi argues that instruments of interregional cooperation such as interpretation of other Conventions lack relevance, since Conventions are designed by and for the specific region.¹⁹⁵ Nevertheless, this argument omits the original idea of human rights as being universal and one may assume that this is what cooperation between the Courts aims for. Moreover, the Court focuses on interpretations of Conventions made by the other Court and it is analyzed below. Analysis of the Court's jurisprudence may provide a more concrete insight and the following paragraphs aim to reveal the impact of Court's interpretation on development of human rights and the specific issues in concern.

In order to provide a more comprehensible overview of issues, the following table shows the four main subcategories. Additionally, inspirations drawn from the European system and the respective Court are pinpointed. Moreover, the four subcategories are results of open and axial coding and interact later with the core category.

Table 3: Four Main Subcategories as a Result of Open and Axial Coding

IACtHR		
Issue	Case law	Interpretations Related to the ECtHR
positive obligations of the State	<i>“Mapiripán Massacre” v. Colombia</i> <i>Pueblo Bello Massacre v. Colombia</i>	illegal amnesties

¹⁹⁴ Gonzales Lluy and others v. Ecuador, Serie C No. 298 (Inter-American Court of Human Rights, 2015), paragraph 21.

¹⁹⁵ Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, Series C No. 257 (Vio Grossi, E. / dissenting opinion).

right to humane treatment	<i>Cantoral-Benavidades v. Peru</i> <i>“Las Dos Erres” Massacre v. Guatemala</i> <i>Maritza Urrutia v. Guatemala</i> <i>“Street Children” (Villagrán-Morales) v. Guatemala</i> <i>Tibi v. Ecuador</i>	defining inhuman treatment interpretation of the Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment
prompt judicial process	<i>Gelman v. Uruguay</i> <i>Gomes Lund et al. (“Guerrilha de Araguaia”) v. Brazil</i>	Article 5 of the European Convention reasons for authorizing a custodial measure
right to life of a fetus	<i>Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica</i>	absolute character of the right to life vs. not absolute character of the right to life

4.2.1 Positive Obligations of the State

In many countries of Central and South America the right to life and humane treatment as well as obligations of States to protect these rights remain a common issue.¹⁹⁶ For instance in the case of *“Mapiripán Massacre” v. Colombia* or *Pueblo Bello Massacre v. Colombia*, the State failed to fulfill its obligations of prevention and protection of several rights including the right to life, personal liberty and humane treatment. The sad reality that individuals or groups of individuals disappear, are killed by paramilitary groups or even State agents occurs throughout this region. The State usually declines to provide any information on enforced disappearance.

However, in the scope of the Inter-American human rights system, the State is condemned with violating the right to life, when conclusive evidence of the State’s fulfillment of its obligations to protect the right is not clear such as in the case of *“Mapiripán Massacre” v. Colombia*.¹⁹⁷ The aim is to encourage the State to fulfill its obligations in terms of safeguarding the right to life and also its obligation to investigate if violations occur. The IACtHR referred to the ECtHR’s statement that “positive obligations” of the State Party to

¹⁹⁶ “International Regional Law and Access to Justice in Latin America,” accessed April 17, 2016, <https://www.giz.de/en/worldwide/25549.html>.

¹⁹⁷ Case of “Massacre of Mapiripán” v. Colombia, Series C No. 134 (Inter-American Court of Human Rights 2005), paragraph 227.

investigate if an unclear death has occurred.¹⁹⁸ It can be disputed that the IACtHR has drawn inspiration from the European interpretation.

Furthermore, an efficient investigation is often lacking in cases of enforced disappearances. Enforced disappearance contains violation of several articles including the right to life, humane treatment, personal liberty or freedom of thought and expression. Before proceeding any further with the analysis, it is necessary to define this term. Enforced disappearance is defined as deprivation of liberty by intervention of State agents refusing to acknowledge the detention and to reveal anything or very little about the situation.¹⁹⁹

Lack of efficient investigation and positive obligations of the State are not the only issues that go hand in hand with enforced disappearances. Moreover, both Courts agree that such serious violations of human rights may not be compatible with amnesty releases, which is often the case once the perpetrator is condemned. The seriousness of illegal amnesties and the necessity to avoid them was highlighted by the Inter-American Commission on Human Rights, the organs of the United Nations, and the ECtHR.²⁰⁰ In fact amnesties concerning enforced disappearances are illegal according to international law and this was affirmed by courts and organs of all regional systems protecting human rights. When such serious violations are committed, an effective remedy is of the highest importance according to the ECtHR.²⁰¹ Attitudes of international bodies towards illegal amnesties are shared. It may well be that these shared attitudes are another example of the universality of human rights and similarities in interpretation of human rights conventions.

4.2.2 Right to Humane Treatment

One of the crucial issues, which is in the interests of the IACtHR, regards the interpretation of the right to humane treatment. In regard with the studied sample of jurisprudence, the right to humane treatment is often accompanied by alleged violations of other Articles such as Article 7 (right to personal liberty) in the case of *Maritza Urrutia v. Guatemala*, and Article 8 (right to a fair trial) in the case of *“Las Dos Erres” Massacre v. Guatemala*.²⁰² However, one

¹⁹⁸ Case of “Massacre of Mapiripán” v. Colombia, Series C No. 134 (Inter-American Court of Human Rights 2005), paragraph 232.

¹⁹⁹ Case of Gomes Lund et Al. (“Guerrilha do Araguaia”) v. Brazil, Serie C No. 219 (Inter-American Court of Human Rights 2010), paragraph 104.

²⁰⁰ Case of Gelman v. Uruguay, Serie C No. 221 (Inter-American Court of Human Rights 2011), paragraphs 195-214.

²⁰¹ Case of Gomes Lund et Al. (“Guerrilha do Araguaia”) v. Brazil, Serie C No. 219 (Inter-American Court of Human Rights 2010), paragraph 161.

²⁰² Concerning the right to a fair trial, violations are often caused by unlawful custody without any proceedings.

of the most frequent concerns in regard with Article 5 relates to the definition and interpretation of inhumane treatment and torture itself.

As previously mentioned, under certain circumstances the ECtHR does not tend to distinguish different forms of ill-treatment, but it contributed to the interpretation of what includes torture.²⁰³ The IACtHR referred to the European Court and its perception that certain acts of inhumane and degrading treatment were not in the past understood expressively as torture. It can be indicated that the interpretation of prohibition of torture or the right to humane treatment has evolved and broadened its scope.²⁰⁴ Moreover, the ECtHR observes that certain acts will be classified differently in the future and the IACtHR will pay attention to it.

The IACtHR examined what constitutes inhumane treatment and included a reference to the European Court defining that: “creating a threatening situation or threatening an individual with torture may, at least in some circumstances, constitute inhuman treatment.”²⁰⁵ In order to define torture or what it consists of, the IACtHR once again referred to the interpretation of the ECtHR, which derived one of the elements of the definition from Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment stating: “infliction of physical or mental pain or suffering from certain purposes, such as obtaining information from a person or intimidating or punishing him/her.”²⁰⁶

It can be argued that international systems prohibiting all forms of torture have been established. According to Judge Cançado Trindade, prohibition of torture including psychological torture belongs to international *jus cogens*. He also claims that a real international juridical regime against torture has evolved.²⁰⁷ This juridical regime is then composed of three international instruments and procedures of human rights: Conventions, the Special Rapporteur on Question of Torture of the UN Commission on Human Rights and the Working Group on Arbitrary Detention of the UN Commission. He also argues that combating torture is secured by three co-existing conventions.²⁰⁸ It can be indicated that the approach to the right to humane treatment is universal.

²⁰³ Babar Ahmad and others v. the United Kingdom, 24027/07; 11949/08; 36742/08; 66911/09; 67354/09 (European Court of Human Rights 2012).

²⁰⁴ Cantoral-Benavides v. Peru, Series C no 69 (Inter-American Court of Human Rights 2000), paragraph 102.

²⁰⁵ “Street Children” (Villagrán-Morales et al.) v. Guatemala, Series C No. 63 (Inter-American Court of Human Rights, 1999), paragraph 165.

²⁰⁶ Cantoral-Benavides v. Peru, Series C no 69 (Inter-American Court of Human Rights 2000), paragraph 97.

²⁰⁷ Case of Maritza Urrutia v. Guatemala, Series C No. 103 (Inter-American Court of Human Rights 2003), paragraph 92.

²⁰⁸ One of the United Nations of 1984, the Inter-American of 1985 and the European of 1987. Convention for the Prevention of Torture and Cruel, Inhuman or Degrading Treatment.

Generally, both Courts agree on various aspects of the right to humane treatment, such as no derogation of that right even in case of public danger, which would threaten the whole nation. The ECtHR prohibits torture in threat of large-scale crimes such as terrorism. However, the exact formulation of the IACtHR is as follows: “any *use of force* that is not strictly necessary, given the behavior of the person detained, constitutes an affront to human dignity.”²⁰⁹ Moreover, the Court defines that “*the need* to conduct investigations and the undeniable difficulties inherent to combating terrorism are not grounds for *placing restrictions* on the protection of the physical integrity of the person.”²¹⁰

It can be argued that articulation of the Inter-American Court seems less absolute, since expressions such as *the need* instead of the necessity or *use of force* instead of inhumane treatment are used. One of the main aspects of the prohibition of inhuman treatment is that no one shall be tortured in any case no matter what his/her previous crimes were. However, the IACtHR states “any use of force that is not strictly necessary,” which does not emphasize a strong urgency of the true meaning of prohibition of inhumane treatment. It may well be that the interpretation of the IACtHR is not as absolute and from time to time it seems rather lax. The ECtHR also stated and the IACtHR agreed that immigrants should not be held in regular prisons but detention centers. However, often even detention centers do not meet the necessary requirements.

4.2.3 Prompt Judicial Process

The Inter-American Court takes into account the viewpoint of the European Court, which indicates that it is the State that must ensure that conditions in detention are compatible with a person’s human dignity. However, the reality varies from the expected obligations of States. In fact, conditions of detention are still very poor in most of the European countries, as well as the Americas.²¹¹ The reality is that jails are overcrowded with poor sanitation, there is an excessive application of solitary confinement and very current topics refer to detention centers for immigrants with unhygienic and inhuman conditions.²¹² The unsatisfactory conditions are not the only issue.

²⁰⁹ Cantoral-Benavides v. Peru, Series C no 6 (Inter-American Court of Human Rights 2000), paragraph 96.

²¹⁰ Ibid.

²¹¹ Cantoral-Benavides v. Peru, Series C no 6 (Sergio Garcia-Ramirez / separate concurring opinion of judge).

²¹² Ibid.

The IACtHR does not only deal with cases concerning unsatisfactory conditions and ill-treatment in prisons but also with the circumstances of imprisonment, which are associated with violations of Article 7 (right to personal liberty).²¹³ The problem that the IACtHR often has to deal with regards imprisonment without any judicial process or investigation. The IACtHR agrees with the ECtHR that reasonable suspicion of a person must be based on specific facts or information.²¹⁴ The IACtHR states that law establishing every reason for deprivation is not sufficient. The main responsibility comes from the State to ensure that the measures taken are not arbitrary and they need to be compatible with the Convention. Moreover, it is the State's obligation to ensure that the measures are adequate and strictly proportionate to the purpose sought. Any restriction of liberty must be based on specific facts and justification.²¹⁵ It is disputed that arbitrary arrests remain a problem not only in the Americas but also in Europe, especially in countries such as Russia or Turkey. Both Courts aim to encourage the States to fulfill their obligations to the Convention and become guardians of justice in the domestic law.

The IACtHR interpreted another aspect of the right to personal liberty in the case of *Vélez Loor v. Panama*, where the applicant, an immigrant from Ecuador, had his rights to humane treatment, personal liberty and fair trial violated.²¹⁶ The two Courts have a different stance concerning the guarantee established in Article 7 (5) of the American Convention, which states:

“Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.”²¹⁷

²¹³ Article 7(3) of the American Convention states: “no one shall be subjected to arbitrary arrest or imprisonment.”

²¹⁴ Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, Series C No 170 (Inter-American Court of Human Rights 2007), paragraphs 102-103.

²¹⁵ Ibid.

²¹⁶ The case dealt with an arrest of Mr. Jesús Tranquilino Vélez Loor, a citizen of Ecuador, and his subsequent prosecution for crimes relating to his immigration status.

Vélez Loor v. Panama, Serie C No. 218 (Inter-American Court of Human Rights 2010).

²¹⁷ “American Convention.”

The American Convention does not restrict the exercise of the guarantee of either a prompt judicial process or a release without prejudice to the continuation of the proceedings.²¹⁸ This guarantee must be also met in the case of the person's detention or arrest based on his or her migratory status. Moreover, it shall be in accordance with the principles of judicial control and procedural immediacy.²¹⁹ However, according to the European Convention,²²⁰ the right to be promptly entitled to trial or to release pending trial is exclusively related to the category of detainees stated by Article 7 paragraph 1 (c): "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."²²¹

The IACtHR claims that in order to satisfy the guarantee established in Article 7 (5) of the American Convention in relation to immigrants, the judicial review must be handled as quickly as possible so the detainee can enjoy his rights as soon as possible. The IACtHR proposed concrete steps to reach this guarantee such as requirement of impartiality and independence of those authorized to determine the rights and obligations of persons with migratory status. Moreover, these requirements must be implemented to judicial but also administrative bodies.²²²

Another distinction stated in the case of *Vélez Loor v. Panama* is that the American Convention does not establish the reasons, cases or circumstances legitimate for authorizing a custodial measure under domestic legislation. The IACtHR interprets that Article 5 of the European Convention establishes such reasons. However, the American Commission states that "no one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto." It may be the case that the American Convention provides the State Party with more benevolence in regard with reasons and conditions established within the constitution. One may consider that the European Convention establishes reasons for authorizing a custodial measure under domestic legislation in regard with Article 5, but these reasons have still a rather generalizing character. Moreover, it can be argued that interpretation of the European Court concerning the right to personal liberty is less wide.

²¹⁸ Vélez Loor v. Panama, Serie C No. 218 (Inter-American Court of Human Rights 2010), paragraph 107.

²¹⁹ Under the principle of *pro persona*.

²²⁰ Contemplated in Article 5, paragraph 3 of the European Convention.

²²¹ Article 5(1) c of the European Convention.

²²² Vélez Loor v. Panama, Serie C No. 218 (Inter-American Court of Human Rights 2010), paragraph 108.

4.2.4 Right to Life of a Fetus

The right to life became a subject of interpretation in the case of *Artavia Murillo (“In Vitro Fertilization”) v. Costa Rica*. The question of when an unborn child is considered as a human being was examined by the IACtHR. The Court also took into account the interpretation and viewpoint of the ECtHR. Article 4 (1) concerning the right to life of the American Convention was already cited and discussed above. Even though the American Convention states that the right to life shall be protected from the moment of conception, it does not mean that the Court interprets that fetus has the right to life.

The IACtHR also referred to the European sphere such as the German Constitutional Court, or the Constitutional Court of Spain. They stated that the right to life in regard with the obligation to protect an unborn child cannot be understood as absolute. In the Americas they share a similar opinion. The United States Supreme Court and the Supreme Court of Justice of Mexico have declared that the right to life cannot be in this sense considered absolute.²²³

Moreover, the issue can be seen as a possible conflict between the right to privacy and the right to life. The right to privacy asserts that no one shall interfere with one’s private life, his family, his home, or his correspondence.²²⁴ The point is that a mother has her right to privacy and it includes her decisions concerning the fetus. The “sanctity” of life is not more than “sanctity” of privacy. The main argument is that the protection of prenatal life cannot be more valuable than the respect of the mother’s private life.²²⁵ Therefore, it is not possible to interpret that the right to life of an unborn young would be considered absolute. It is an evolutionary interpretation of the Convention aiming towards universality.

4.3 Substantive Theory

The reason why this analysis covers issues connected with the right to personal liberty in such scope relates to the circumstances of violations, which may be often applicable to individuals with migratory status and asylum seekers. As it was alluded to above, in such cases the right to personal liberty is often an additional violation of the right to humane treatment. According to the IACtHR, preventive custody may be applicable to the remaining problem in the

²²³ Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, Series C No. 257 (Inter-American Court of Human Rights 2012), paragraph 262.

²²⁴ Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, Series C No. 257 (Inter-American Court of Human Rights 2012), paragraph 275.

²²⁵ Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, Series C No. 257 (Inter-American Court of Human Rights 2012), paragraphs 314-316.

Americas and increasing problem in Europe given the circumstances of the refugee crisis. Both Courts agree that detention of immigrants must not be of punitive nature.²²⁶

To conclude this part of analysis concerning jurisprudence of both Courts, it is disputed that some issues regarding Articles 2 and 3 of the European Convention / Articles 4 and 5 of the American Convention are more associated with one particular region, but some issues cross the ocean. However, it cannot be argued that the categorization of issues would be relevant only in one region. On the contrary, both regions deal with similar issues, but the aim is to distinguish the specificities of this particular sample of jurisprudence and categorize, which issues are rather specific and which are common. One of the clearest common issues on both continents concerned interpretation of the right to life of an unborn young and it may be true that they share the same point of view.

Regarding the rather specific issues, the problem of enforced disappearances is still a daily reality in the Americas. Arguably, enforced disappearances are rather typical for the Inter-American system, but one may consider that the political development in some contracting parties to the European Convention is not ideal either, such as in Russia, Azerbaijan, or Turkey. Another rather sad truth about the Central and South American region is the lack of responsibility of the State to protect the right to life. The question of balancing values, on the other hand, deals with the prohibition of refoulement applied to individuals who would be exposed to ill-treatment or torture when expelled, but who were at the same time involved in criminal activities.

Another specific issue in Europe is the lack of the right to petition by a third party, which is permitted in the Americas. Discussion about allowing such rights was even in the interest of the High Commissioner for Human Rights of the Council of Europe Nils Muižnieks. He expressed that if the alleged victim with disabilities is not able to lodge an application to the Court by himself/herself, there should be a system that would allow him/her to do so. This argument was indicated in the previous chapter concerning external actors of cooperation, since the procedural access to the Court is of concern. NGOs figure in the European system as actors or third interveners, who may refer to the Inter-American system. On the other hand, NGOs in the Americas more likely represent the victim. As it was discussed in the previous chapter about external actors, there was a discussion in Europe about allowing the NGOs to represent the victim. However, the European Convention states very clearly that the right to individual petition is explicitly afforded to the victim.

²²⁶ Case of Vélez Loor v. Panama, Serie C No. 218 (Inter-American Court of Human Rights 2010), paragraph 169.

Nevertheless, the analysis results in identification of its core category. The method of selective coding identified that both Courts cooperated, while referring to each other and interpreting the Conventions, in issues which may be applicable to immigration issues, asylum seekers and refugees. Given the current situation in Europe, one may consider that such cooperation might be even intensified.

Issues concerning illegal immigration and seeking for an asylum relate to several rights of both Conventions. The Courts have discussed issues of inhumane treatment in detention, as well as the guarantee of prompt judicial trial even when detained as an immigrant. Moreover, differences between the formal characters of interim measures between the Courts, led to inspiring the ECtHR. Some impact of interactions between Courts is visible and the following chapter explores its scope.

5 Results of Cooperation between the Courts

This chapter focuses on the results of cooperation between the Courts from two points of view. First of all, the concrete impacts and results of “soft” / “diplomatic” cooperation are discussed. It was mentioned previously that interactions between the two Courts have recently intensified. It may well be that regular international visits between Courts and dialogues between presidents and judges of the Courts have resulted in extending cooperation from “soft” / “diplomatic” to “hard” / “juridical” cooperation. The Courts have referred to each other within their jurisprudence even before this intensification, but not to such an extent.

After analyzing elements of “hard” / “juridical” cooperation contained within the studied sample of jurisprudence of both Courts, a core category was identified through the method of selective coding. The next step is to provide the core category with a process and conditions around it, in other words, giving the substantive theory a sense of “life” or movement.²²⁷ Process is the dynamic and evolving nature of action/interaction and is linked with the structure of the core category.²²⁸ Therefore, issues connected with human rights violations regarding immigrants and asylum seekers are analyzed in relation to the development of universality and fragmentation of international law. It is discussed how dynamics of cooperation between the Courts change and what is the impact on international human rights law in relation to the main issues, which were analyzed.

Lastly, suggestions and possible future developments are analyzed. The core category focuses on the European environment protecting human rights of refugees and asylum seekers. It is discussed, whether the European Court is prepared for the possible upcoming challenges and it is suggested, which directions of efficient protection of human rights need more attention of the Court.

5.1 Staff Exchanges

In order to support arguments of the core category, it is necessary to validate its theoretical scheme. This theoretical scheme can be validated through telling the story to respondents and asking them to comment it, if or how well it fits to their own case. Therefore, interviews with two lawyers specialized on cooperation between the two Courts were conducted.²²⁹ Moreover, these interviews provide not only verification of the theory, they also provide the missing

²²⁷ Strauss and Corbin, *Basics of Qualitative Research*, 168.

²²⁸ Strauss and Corbin, *Basics of Qualitative Research*, 179.

²²⁹ The highly suitable respondents are the ones, who are in the direct and regular contact and interact closely through staff exchanges.

pieces and details of the substantive theory, which mainly focuses on the European environment protecting human rights of refugees and asylum seekers. However, this substantive theory relates to one of the main results of “soft” / “diplomatic” cooperation: the staff exchanges. Through staff exchanges the European Court receives very valuable information about its counterpart’s jurisprudence and interpretation of similar rights. The Court may learn or discuss these interpretations in relation to the challenges the Court must face.

Staff exchanges, which started three years ago, can be considered a result of intensified “soft” / “diplomatic” cooperation, but are themselves part of “hard” / “juridical” cooperation. The result of staff exchanges is not only diplomatic in building relations but also juridical. The research of jurisprudence of the respective Court can be visible later on in the increase of references by the Court to the other Court. So far the IACtHR has received two lawyers from the European Court and will receive another one in September.²³⁰ The first lawyer designated by the ECtHR was Guillem Cano-Palomares, who currently works for the Research Division of the Court. The project of staff exchanges is reciprocal and Jorge Calderon Gamboa, the Senior Attorney at the Inter-American Court is the third lawyer of the Inter-American Court to come to Strasbourg this year.

The main purpose of these staff exchanges is to reciprocally provide information about methodologies and realities of each Court. Additionally, lawyers are charged to do a research on relevant jurisprudence, which could be useful for the case law of the respective Court.²³¹ The lawyer on a staff exchange integrates with a team of the Registry / Secretariat and works there as any other lawyer trying to learn about the working methods, the case law, the proceedings before the Court and then integrating all that knowledge, when he / she returns back.²³²

Lawyers on staff exchanges at the ECtHR are allowed to participate in deliberations, draft research or charts for the Secretariat. In the words of Calderon, lawyer’s participation has a double purpose. During the three to four month study visit, lawyer learns about the system and methodologies of the Court, but also provides information about his / her Court to the different divisions of the Registry. He / she is in contact with some judges, or some members of the Committee of Ministers, who are interested in learning about supervision

²³⁰ Jorge Calderon Gamboa.

²³¹ Ibid.

²³² Guillem Cano-Palomares.

methodologies of the IACtHR. Moreover, informing public also belongs to the responsibilities of such a mission.²³³

Similar activities are completed by the lawyers on staff exchange at the IACtHR. For instance, Guillem Cano-Palomares joined the Secretariat of the IACtHR for four months. He learnt about the methodologies and organization of the IACtHR. Moreover, he could attend the public hearings and be in contact with other actors of intercontinental cooperation.

Staff exchanges enable the actors of cooperation to understand the decision making processes, identify good practices and potentially explore new methodologies, which could be useful for the other system. Another purpose of these staff exchanges is to enable more efficient exchange of information through the *CLIN* database. It serves as a source of relevant jurisprudence. The aim of such cooperation is to apply the same concept of human rights but in different contexts.

It can be shown that both Courts are already connected, since they are in a constant dialogue. According to Calderon, each Court has experiences in different contexts, but the core idea of human rights is the same.²³⁴ The IACtHR has a very consolidated jurisprudence concerning violations such as massacres, disappearances, and torture cases, which serves the ECtHR in case of similar violations in the Eastern State Parties of the Convention. On the other hand, the ECtHR has a much consolidated jurisprudence regarding more sophisticated violations: the right to privacy and family life concerning issues of in vitro fertilization.

Concrete results of staff exchanges can be found in cross-fertilization of international law. The graphs above showed an increase of references by the ECtHR to the IACtHR. One may consider that the comparative method of interpretation has recently intensified. Proponents of cooperation between Courts argue that Conventions of both regions are very similar, so the Courts may draw inspiration from each other. For instance, the *Margus v. Croatia* case concerning amnesties showed that the ECtHR drew inspiration from the IACtHR by interpreting that amnesties concerning grave human rights violations are unacceptable.²³⁵

Concerning the references made by the IACtHR to the ECtHR, Calderon argues that the IACtHR refers mostly to the ECtHR in regard to more sophisticated rights. On the other hand, the studied sample showed that the Court also refers to its European counterpart in cases of gross violations. It can be contended that the main purpose is not to draw inspiration from Europe but to emphasize and strengthen the interpretation of the IACtHR.

²³³ Jorge Calderon Gamboa.

²³⁴ *Ibid.*

²³⁵ *Margus v. Croatia*, 4455/10 (European Court of Human Rights 2014), paragraph 139.

Altogether the staff exchanges have an impact on the elements of references between Courts. The studied sample of jurisprudence showed that the ECtHR has been interested in interpretation of not only gross violations such as massacres, but also in issues, which may concern illegal immigrants and asylum seekers. Arguably, the Court is preparing for dealing with such issues, since the refugee crisis in Europe has been on its rise.

5.2 Selected Elements of International Human Rights Law in Regard to the Analyzed Issues

As it was alluded to above, after selecting the core category of the analysis and defining its structure, it is indispensable to link the structure with a process. The first part of the process is concerned with exploring issues of the core category. It is contextualized with the current development and impact of cooperation on the universality of human rights and fragmentation of international law. The aim of this part of analysis is to look at actions and interactions between various issues and international human rights law in order to trace the reasons why the process changes or remains the same. It is discussed, how interpretations concerning the issues based on the studied sample relate to the universality of human rights and international human rights law.

The aim of some actors to decrease fragmentation of international human rights law and strengthen the universality of human rights may be considered crucial for approaching the attitudes of international courts closer together.²³⁶ The intention is to protect human rights more efficiently and be prepared for the upcoming challenges. The substantive theory of this research suggests that the ECtHR is interested in interpretation concerning issues connected with the possible challenges resulting from the refugee crisis. It can be contended that interactions and cooperation between the two Courts have evolved, but there might be a further need for cooperation. Moreover, similarities and differences between the Courts and the Conventions might help to draw inspiration reciprocally. It is crucial to analyze, how cooperation between these two entities influences the universality of human rights as well as the fragmentation of international law.

²³⁶ As expressed by the lawyers Jorge Calderon Gamboa and Guillem Cano-Palomares.

5.2.1 Ordre Public and Protection of an Individual

One of the most visible evolutions concerns *ordre public*, since both of the Courts aim to encourage their State Parties to comply with their responsibilities and obligations set by the Conventions.²³⁷ It may well be that some countries make a progress, but others seem to “stand still” for years.²³⁸ Both Courts base their interpretations of Conventions on a human being and set limits to the State. It may be true that international law becomes more and more protective of the individual.²³⁹ As a result jurisprudence of the Courts becomes centralized around the particular case of the human being.²⁴⁰ Additionally, by referring to other international systems, the focus on the individual rather than the State is intensified.²⁴¹ However, it is necessary to point out the role of the State, which indeed has the final say in protecting rights of an individual.²⁴²

It can be indicated that by referring to other regional systems and conventions along with discussing the similarities and differences, international law evolves and its actors become more aware of issues around the world.²⁴³ The Court may even draw inspiration from its counterpart. One of the crucial developments, which has an impact on the position of States and the *ordre public*, concerns the interim or provisional measures.

Originally, European system of human rights allowed the State Party to decide to comply with interim measures. It can be argued that *international normative universality*²⁴⁴ of human rights was lacking in relation to interim measures. The European Convention provided the State Party with more sovereignty, since the State Party was not obliged to comply with the interim measures request.²⁴⁵ Although the contracting parties of the European Convention were willing to be under international supervision, the State Party was still sovereign in decisions concerning interim measures. On the other hand, in the Americas, contracting parties have always been obliged to comply with the request of provisional measures. Therefore, it could be considered that *international normative universality* disposed of an additional obligation, which the contracting parties of the American Convention must have complied with.

²³⁷ Cançado Trindade, “The Development of International.”

²³⁸ Such as repetitive cases of Ukraine, Russia, Turkey, and Italy.

²³⁹ Ibid.

²⁴⁰ Cançado Trindade, “The Development of International,” 35.

²⁴¹ Ibid.

²⁴² Donnelly, “Universality,” 261.

²⁴³ Pinto de Albuquerque.

²⁴⁴ As defined by Jack Donnelly.

Brems, *Human Rights: Universality*, 6-7.

²⁴⁵ Brems, *Human Rights*, 7.

The result was that sovereignty of contracting parties differentiated from Convention to Convention. It could be argued that contracting parties to the American Convention had less sovereignty concerning obligations related to the provisional measures. After intensifying cooperation between the Courts, the ECtHR realized this difference, which could eventually result in disputes with the States. After interpreting the position of the IACtHR in the case of *Mamatkulov and Askarov v. Turkey*, the European Court stated that from that moment on, interim measures were considered to be binding.²⁴⁶ It can be shown that the ECtHR drew inspiration, which could be considered crucial in terms of protection of asylum seekers.

5.2.2 *Universality and Multiculturality of Human Rights*

Impact of cooperation between Courts can be also discovered in multiculturalism of human rights, which is often discussed along with the universality of human rights.²⁴⁷ It can be considered that by adding interpretation of other international instruments of human rights, the level of multiculturalism increases. The more often Court interprets other Courts and their interpretations of international treaties, the more familiar they are with issues of other regions. As a result, they may become more aware of similarities between the regions and more open to discuss the differences.

It may be true that increase of multiculturalism and universality has an impact on solidarity between the continents.²⁴⁸ According to Judge Cançado Trindade, the increase of solidarity goes hand in hand with remarkable jurisprudential cross-fertilization.²⁴⁹ One may think of many examples of jurisprudential cross-fertilization.²⁵⁰ Concerning the analyzed case law sample in particular, a highly suitable example can be considered an interpretation of the right to life of an unborn young.²⁵¹ Both Courts refer to the interpretation of one another. Although the American Convention states that the right to life is protected from the moment of conception, it is not interpreted so precisely. Jurisprudential cross-fertilization can be also discovered in regard to the limits of the right to life. The right to life is not absolute in relation to the mother's right to respect for private and family life. Both Courts agree with such a viewpoint, unless there are some specific circumstances such as in the case of *Parillo v. Italy*, where the issue required more of a moral and ethical approach.²⁵²

²⁴⁶ *Mamatkulov and Askarov v. Turkey*, 46827/99; 46951/99 (European Court of Human Rights 2005), paragraph 123.

²⁴⁷ Brems, *Human Rights*, 10-11.

²⁴⁸ Cançado Trindade, "The Development of International."

²⁴⁹ *Ibid.*

²⁵⁰ Pinto de Albuquerque.

²⁵¹ *In cases of Vo. v. France and Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica.*

²⁵² *Parillo v. Italy*, 46470 / 11 (European Court of Human Rights, 2015).

5.2.3 *Jus Cogens*

Previously it was discussed, whether the evolution of cooperation between Courts and reciprocal interpretation of the Conventions has an impact on *jus cogens*. According to Cançado Trindade prohibition of torture can be considered as part of *jus cogens*.²⁵³ However, the previous analysis revealed that the Courts have a different viewpoint concerning the necessity of distinguishing between various acts of torture.²⁵⁴ The ECtHR has more of a general approach and does not tend to distinguish between different acts of torture in detail in an extra-territorial context.²⁵⁵ The Court states that “prospective assessment is required; it is not always possible to determine whether the ill-treatment which may ensue in the receiving State will be sufficiently severe as to qualify as torture.”²⁵⁶ The Court aims to emphasize that any kind of torture is prohibited. However, the IACtHR has a rather more concrete interpretation and distinguishes between different acts of torture, inhumane and degrading treatment.²⁵⁷ Even though each region has its own particularities in interpretation concerning acts of torture, it may well be that the overall attitude to prohibition of torture can be related as part of *jus cogens*.²⁵⁸

Some argue that other treaties or statements of judgments of international Courts cannot be considered as relevant to various regions.²⁵⁹ However, these attitudes seem to ignore the original idea of human rights as being universal.²⁶⁰ The recent history of human rights was based on a universal idea of protecting human beings. To conclude, it can be indicated that the notion of human rights has been developed recently and is still evolving. Human rights are believed to be a result of the deepest values of political expression and interactions between different regions²⁶¹ and Courts may add more relevance to the universality and decrease fragmentation of international law.

²⁵³ , Antônio Augusto Cançado Trindade, “ ‘Jus Cogens’: The Determination and the Gradual Expansion of its Material Content in Contemporary International Case-Law,” (paper presented at the XXXV Course of International Law, Rio de Janeiro, August 2008).

²⁵⁴ Babar Ahmad and others v. the United Kingdom, 24027/07; 11949/08; 36742/08; 66911/09; 67354/09 (European Court of Human Rights 2012).

²⁵⁵ Babar Ahmad and others v. the United Kingdom, 24027/07; 11949/08; 36742/08; 66911/09; 67354/09 (European Court of Human Rights 2012)., paragraph 171.

²⁵⁶ Babar Ahmad and others v. the United Kingdom, 24027/07; 11949/08; 36742/08; 66911/09; 67354/09 (European Court of Human Rights 2012), paragraph 170.

²⁵⁷ Babar Ahmad and others v. the United Kingdom, 24027/07; 11949/08; 36742/08; 66911/09; 67354/09, (European Court of Human Rights 2012), paragraph 171.

²⁵⁸ The character of peremptory norms has been stated even by other international tribunals (ICJ) or doctrine.

²⁵⁹ Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica, Series C No. 257 (Vio Grossi, E. / dissenting opinion).

²⁶⁰ Donnelly, “Universality,” 261.

²⁶¹ Donnelly, “Universality,” 265.

5.3 Suggestions

The text above explored relations between the Courts' interpretations of the Conventions and elements of international law such as the universality of human rights, *jus cogens*, or public international law. This subchapter focuses on the second part of the core category's process while considering the current changes and possible challenges coming in the future. Lastly, suggestions for the future development are made in order to ensure and strengthen the efficiency of human rights protection.

Based on the analysis of selected case law of both Courts, it was discovered that violation of Articles 2 and 3 of the European Convention / Articles 4 and 5 of the American Convention were often accompanied by violations of the right to liberty and security / the right to personal liberty.²⁶² Moreover, it was discovered that references of both Courts concerned violation of articles, which could be applicable to issues connected with illegal immigration or seeking for asylum: references regarding interim measures, non-refoulement, inhumane treatment in detention centers and prompt judicial process or a release without prejudice subjected to guarantees to assure a person's appearance to trial. These subjects can be considered as issues, which along with the circumstances of political development in Europe might need to be reassured and strengthened.

Recently, Europe has experienced the highest number of asylum seekers in its history. Moreover, the numbers of migrants and refugees have been constantly increasing. In comparison with 2014, when 280,000 refugees crossed the borders of Europe, last year it was more than a million and influx of migrants still continues.²⁶³ It can be contended that individual applications concerning ill-treatment, bad conditions in detention centers or lack of prompt judicial process will increase.

It is necessary that the ECtHR is prepared for the new challenges and it may draw some inspiration from its counterpart, the IACtHR. Even though the IACtHR did not have to face the same situation as Europe is facing now, the American Convention expressly states under the Article 22 that every person has to right to seek and be granted an asylum, which is missing in the European Convention.

²⁶² Article 5 of the European Convention on Human Rights / Article 7 of the American Convention on Human Rights.

²⁶³ "Why Is EU Struggling with Migrants and Asylum?" *BBC News* (2016), accessed May 16, 2016. <http://www.bbc.com/news/world-europe-24583286>.

Even though the Court ruled that interim measures are binding to the State Parties, they are still part of Rules of Procedure, not the Convention. According to Cano-Palomares the judgment stating the binding character of interim measures is powerful enough.²⁶⁴ However, they are not considered as a general rule. Judge Türmen points out that interim measures are mostly contained in the Rules of Procedure or Statutes, so it cannot be seen as a general rule.²⁶⁵ The only possibility for the view would be to add it to the Convention. The Committee on Migration, Refugees and Demography proposed that the Convention should include provision on interim measures and the obligation of member states to follow recommendations of the Court.²⁶⁶ However, the Committee of Ministers declined this proposition.²⁶⁷ For now, declaring interim measures to be binding within a judgment and having the right to individual application in the Convention is sufficient. However, the Court shall still consider strengthening its request for interim measures due to the political developments in Europe.

Interim measures are also discussed in the Americas. However, they concern an issue connected with the dual system. The problem is that the American Convention entitles only the Court with binding provisional measures requests. The Inter-American Commission is entitled to only ask for precautionary measures, which are not binding to the State Parties.²⁶⁸ These different roles often result in disputes between the Inter-American Commission and the Court.²⁶⁹ However, the State Party must be a contracting party to the American Convention. Otherwise the Court does not have any authority. This dual system is an issue of the Americas. It could be argued that the system has double standards.

As it was discussed above, current atmosphere in Europe is rather challenging. It is necessary that Europe pays even more attention to safeguarding human rights of refugees, who are as any other person entitled to have their rights protected. Concerning the protection of refugees, the American Convention is a step further. The Article 22 (7) refers to the right to seek and be granted asylum in a foreign territory, and the Article 22 (8) prohibits deportation to a country in the case where the rights of the individual are in danger.²⁷⁰ However, the European Convention was established much earlier than the American Convention, so that is

²⁶⁴ Guillem Cano-Palomares.

²⁶⁵ Mamatkulov and Abdurasulovic v. Turkey, 46827/99; 46951/99 (Türmen, R / partly dissenting opinion).

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ De Andrade, *Protective Measures*.

²⁶⁹ Ibid.

²⁷⁰ "American Convention."

the reason why it does not express, so explicitly, to protect asylum seekers. It is the ECtHR, which interpreted the Convention in the same direction.

Due to increasing cooperation between the IACtHR and the ECtHR, one may assume that the European Court may consider not only continuing to refer to the interpretation of this article of the American Convention, but also encouraging innovations in the case law. This could allow the Court to face the current and future challenges more efficiently.

As in the case of interim measures, the ECtHR based its viewpoint on interpretation of the European Convention. The ECtHR developed protection of asylum seekers by interpreting the Articles 2 and 3 of the European Convention in the direction of guaranteeing these rights to the refugees. The Court developed the notion of non-refoulement, which has a similar function as Article 22 (8) of the American Convention.²⁷¹ However, it is not expressly guaranteed by the European Convention. Once again, judgments protecting refugees are considered as powerful enough to protect these individuals.

Another issue, which may relate to the substantive theory in relation to refugees and asylum seekers, are the conditions in detention centers. Both Courts agree that migrants are supposed to be placed in detention centers, not the prisons. It is not in accordance with the American Convention to imprison a person, who aims for a refugee status. Conditions in detention must not violate the prohibition of torture / the right to humane treatment. Moreover, the detainees are entitled to a prompt judicial process, which in theory shall be protected by the State.²⁷² However, with the increasing influx of asylum seekers, and the insufficient capacity of detention centers, the situation may result in increase of violations of human rights of these peoples.

It may be true that the ECtHR has recently increased its references to the IACtHR.²⁷³ The studied sample of jurisprudence shows that the Court referred to its counterpart in issues which may relate to the increased immigration to Europe.²⁷⁴ It can be considered that the Court is preparing for the future challenges by interpreting the Convention while taking into account interpretations of the IACtHR.

²⁷¹ Such as in the case of *Hirsi Jamaa and others v. Italy*.

²⁷² "American Convention."

²⁷³ As shown in the Graph 1.

²⁷⁴ Such as the following cases: *Boumedine and others v. Bosnia and Herzegovina*, *Mamatkulov and Abdurasulovic v. Turkey*, *Mamatkulov and Askarov v. Turkey*, *Savriddin Dzhurayev v. Russia*, *A v. the Neatherlands*, *Hirsi Jamaa and others v. Italy*, *Babar Ahmad and others v. the United Kingdom*.

Inspirations between Courts are still evolving. Staff exchanges, joint publications and interest in the case law of one another have an impact on international law and the universality of human rights. It may be the case that these practices between these two Courts may inspire also other Courts and other regions. However, there is also another initiative to tighten cooperation in human rights protection globally.

6 Conclusion

This paper reveals that interactions and cooperation between the ECtHR and the IACtHR is fruitful and still evolving. The scope of interactions and cooperation between the two Courts can be divided into two main categories: “soft” / “diplomatic” cooperation includes international meetings and visits and “hard” / “juridical” cooperation includes staff exchanges and references in the case law.

To summarize, both Courts have expressed support towards an intensified cooperation. Staff exchanges can be considered as a crucial step towards developing other practices in international law and eventually decrease its fragmentation. Relevance of such cooperation can be explained very easily: The original idea of human rights was to apply them universally and even though there are conventions protecting human rights regionally, it can be considered that their core is the same. Conventions are living instruments and the Courts are the ones to interpret them in particular circumstances of each case. These interpretations are then crucial for the research conducted between the Courts.

Based on the studied case law sample regarding Articles 2 and 3 of the European Convention / Articles 4 and 5 of the American Convention, it was explored that the ECtHR refers to the IACtHR in regard to issues, which could be applied to refugees. As it was previously discussed, the current development in Europe requires the Court to be more aware of the future challenges. Therefore, references and understanding interpretation of almost the same rights by another international body may have a positive impact on the efficiency of the Court.

Issues concerning illegal immigration and asylum may concern several rights. Although the States are sovereign in accepting refugees, it is crucial to encourage them to protect human rights of refugees. Moreover, the European Court is interested in interpretation of rights relating to inhumane treatment in detention, as well as the guarantee of prompt judicial trial. Furthermore, the European Court has already drawn inspiration from the Inter-American Court concerning the binding provisional measures in the Americas. The ECtHR stated in its case law that interim measures are now binding also in the European system. It may well be that the Court has taken into account the danger of non-compliance of its State Parties with interim measures, which may be soon increasing.

Additionally, it may well be that intercontinental cooperation became crucial for both Courts. Cooperation between these two Courts may also draw inspiration to other international tribunals. For instance, the IACtHR as well as the ECtHR cooperate with the

International Court of Justice. Moreover, the Courts do not cooperate only with international courts but also with supreme national courts. The ECtHR cooperates with the Supreme Courts of Brazil, India, and South Africa because these countries are considered to have an influential position in their region. Therefore, interacting with them may also bring some positive results.

The research has introduced the concept of cooperation and interactions, which are carried out between the two Courts. Moreover, it has explored the concrete actors not only behind the doors of the Courts but also the financial contributors, which are indispensable for developing this cooperation even further. Voluntary contributions from countries such as Norway and Luxembourg are even crucial for the organization expenses of the IACtHR. However, along with the political development and refugee crisis in Europe, the traditional contributors to the Americas are about to cut their financial support. However, how the IACtHR will deal with this in the future remains a question.

Most importantly, the analysis of the selected case law resulted in a substantive theory, which argues that the judgments and decisions regarding Articles 2 and 3 of the European Convention / 4 and 5 of the American Convention pinpointed some crucial differences, which need to be taken into account mostly on the European level. The substantive theory points out that the ECtHR has already taken into account the possible challenges that Europe might have to face sooner or later. Therefore, ECtHR is often interested in interpretations of the IACtHR concerning non-refoulement, inhumane treatment in detention centers and prompt judicial process or a release without prejudice subjected to guarantees to assure person's appearance to trial. All these issues can be applied in situations of violating human rights of refugees and asylum seekers.

Further research is still needed. Since the Inter-American system is considered as a double-system, analyses of merit reports of the Inter-American Commission and its interests in interpretations of the ECtHR would be valuable. Additionally, cooperation between the ECtHR and the Inter-American Commission shall be studied as well. It can be shown that the Inter-American Commission used to be a crucial actor of "soft" / "diplomatic" cooperation, but with the increased activities of the IACtHR, the Commission stays rather in the background. The ECtHR shall have the interest to intensify cooperation with the Commission, since the workload of pending cases is rather comparable with this body rather than the IACtHR. The role of the IACtHR was compared to the role of the Grand Chamber of the ECtHR. Therefore, it may be beneficial to study the obstacles that hinder to build new ties between the ECtHR and the Inter-American Commission.

Other suggestions made for a further research concern the effects of staff turnover. Since staff exchanges have been taking place for 3 years, a comparative analysis of case law before and after such cooperation could be investigated, in order to measure the success or the need of improvement. It would be helpful for both Courts as well as their actors to identify the concrete results of their actions and suggest some improvements. However, the question is, if it is possible to see the results already after three years. It may be more preferable analyze it after a higher number of staff exchanges.

Finally, understanding other regions and discussing the similarities and differences in interpretations may have a positive impact on the evolution of international human rights law. Since the Conventions are living instruments, they still evolve and one may think that this is just another step in the evolution. The crucial point is that both Courts share the same idea of human rights as being universal. Human rights should be protected by efficient mechanisms and this is exactly why cooperation across regions is so crucial for the present as well as the future. Currently Europe has to face new challenges with the high influx of asylum seekers and the ECtHR aims to strengthen the acknowledgment of their rights. It can be shown in the inspiration drawn from the IACtHR. The fact that the ECtHR is often interested in interpretations of the IACtHR concerning non-refoulement, inhumane treatment in detention centers and prompt judicial process, indicates the beneficial character this cooperation brings.

Resumé

Tato práce uvádí, že spolupráci mezi Evropským soudem pro lidská práva a Interamerickým soudem pro lidská práva lze rozdělit na: „měkkou“ / „diplomatickou“ spolupráci a „tvrdou“ / „jurisdikční“ spolupráci. Historie diplomatických interakcí mezi soudy byla započata již po založení Interamerického soudu. Nedávno tyto diplomatické vztahy vyústily ve společný projekt týkající se krátkodobých výměn pracovníků. Hlavním účelem těchto výměn je, aby si soudy mohly vzájemně poskytovat informace o užívaných metodách a realitách. Právníci jsou také pověřováni analyzovat judikaturu, která by mohla být užitečnou pro příslušný soud.

V rámci práce je analyzován výběr judikatury obou soudů. V minulých letech se množství referencí Evropského soudu k Interamerickému zvýšilo. Výběr judikatury týkající se článků 2 a 3 Evropské úmluvy o ochraně lidských práv / článků 4 a 5 Americké úmluvy o lidských právech prokázal, že se štrasburský soud odkazuje na Interamerický soud v souvislosti s otázkami, které mohou souviset s migranty a žadateli o azyl.

Současný vývoj v Evropě poukazuje na to, že Evropský soud by se měl zaměřit na možné budoucí výzvy. Z tohoto důvodu interpretace velmi podobných práv může mít pozitivní vliv na ochranu lidských práv v Evropě. Evropský soud pro lidská práva má často zájem o interpretaci práv vztahujících se k nelidskému zacházení ve vazbě, nebo záruce rychlého soudního líčení. Kromě toho se již Evropský soud inspiroval Interamerickým soudem v oblasti předběžných opatření.

Interamerický soud měl také vliv na počátek diskuse o postavení neziskových organizací. Možnost, že by nezisková organizace mohla podat žádost k soudu jménem oběti, jako je to možné v rámci interamerického systému, nebyla v Evropě podpořena. I přesto, že oba soudy jsou svými realitami velice odlišné, jejich vzájemné reference spějí ke zlepšení řešení pro daný případ a region. Zájem Evropského soudu o ten Interamerický se zvyšuje. Jedním z důvodů je upevnit pozici mezinárodního práva a také univerzality lidských práv.

Résumé

The analysis identifies that cooperation between the European Court of Human Rights and the Inter-American Court of Human Rights can be divided into two main streams: “soft” / “diplomatic” cooperation and “hard” / “juridical” cooperation. The diplomatic interactions, which date back to the establishment of the Inter-American Court, have recently resulted in staff exchanges. The main purpose of these staff exchanges is to reciprocally provide information about methodologies and realities of each Court. Additionally, lawyers are charged to do a research on relevant jurisprudence, which could be useful for the case law of the respective Court.

The analysis focuses on a selection of case law of both Courts and shows that the European Court has increased the amount of references to the Inter-American Court in the past years. Based on the studied case law sample regarding Articles 2 and 3 of the European Convention / Articles 4 and 5 of the American Convention, it is explored that the Strasbourg Court refers to the San José Court in regard to issues, which can be applied to migrants and asylum seekers.

The current development in Europe requires the European Court to be more aware of the future challenges. Therefore, references and understanding interpretation of almost the same rights by the Inter-American Court may have a positive impact in Europe. The European Court is interested in interpretation of rights relating to inhumane treatment in detention, as well as the guarantee of prompt judicial trial. Furthermore, the European Court has already drawn inspiration from the Inter-American Court concerning the binding provisional measures in the Americas.

The Inter-American system has had an impact on Europe in terms of opening a discussion on the position of NGOs in petitions to the Court. In the Americas, NGOs may lodge an application on behalf of the victim. This is not indeed possible in Europe. However, the ECtHR does not and will not draw inspiration in this sphere.

Even though both Courts function in different realities, they use the interpretations of one another in order to find the best solution for the region and the specific case. The main point is that the interest of the European Court in the Inter-American system is increasing, in order to add relevance to international human rights law and universality of human rights.

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List of Abbreviations

European Convention on Human Rights

ECHR

European Court of Human Rights

ECtHR

Grounded Theory

GT

Inter-American Court of Human Rights

IACtHR

Organization of American States

OAS

Appendices

Interview with Guillem Cano-Palomares

Lawyer of the Research Division of the Jurisconsult at the ECtHR

Participated in a staff exchange in San José for 4 months (2013, beginning of 2014)

You cooperate with the IACtHR quite regularly. Would you please explain the activities you have previously participated in? Do you still participate in this project of the Courts?

It is a project that we started in 2013. It is a staff exchange program, so there is a lawyer from the ECtHR who goes to the IACtHR for three to four months and then there is a lawyer who comes here, so it is an exchange. We have been doing it since 2013 I was the first one to go from the Court in 2013 and the beginning of 2014. We have had a Russian lawyer who went last year, and a Polish lawyer will go this year. We have also received three lawyers from the IACtHR, and now we have the third lawyer Jorge Calderon Gamboa, who is here from the IACtHR for three and a half months. So the staff exchange program is the main activity, and then we have other activities of cooperation such as joint publications. The first joint publication between the ECtHR and the IACtHR was the compilation of the most important cases of 2014 and it was published in the beginning of this year. It is an important and symbolic step in cooperation, because we have never done a joint publication. So it is something to start for the future. Before 2012/2013, there have been some official visits by judges of our Court and judges of the IACtHR since the establishment of the IACtHR, but there was not a regular cooperation program or contact between persons to be in charge of cooperation with the respective Court. Since 2013 it has improved a lot.

Do you agree that they are a result of an intensified dialogue between the Courts? (such as international visits, dialogues between judges)

Yes, this was clearly a result of official visits by judges, or even the president of that time Nicholas Bratza. I think it was in 2012 when the delegation with Nicholas Bratza visited the Court in San José. They started to talk about this possibility of staff exchange between the two Registries of the Courts. So it was thanks to those official visits that we started to implement this staff exchange program.

Did you work on the joint publication during your stay in San José in 2013, beginning of 2014?

No, because at that time we were not working on the joint publication. This came later in 2015. The main activities we do during the staff exchange are integrating in the Registry and working as any other lawyer of the Court, so we work on cases there, trying to give all the input of our knowledge of the respective Court. We are working there as lawyers. Same goes for Calderon, who currently works here. He participates in drafting reports, cases, attending deliberations of judges, so the exchange program is not only focused on joint publications.

This first joint publication was a result of the program, but the objective of the program is that lawyer from each Court joins the other Court for three months and integrates with a team of the Registry and works there as any other lawyer trying to learn about the working methods, the case law, the proceedings before the Court and then integrating all that knowledge, when he / she returns back.

Were you also in contact with the judges of the IACtHR?

Yes, that is a very small institution compared to this one. They have seven judges and 20-30 lawyers so it is quite easy to know all the people when you are there. All the deliberations of the judges were open to me, so I could go and attend those deliberations - not only deliberations on which I have worked, but also to see how the deliberations of the Court and the methods of the Court work in general. This also applies to the Mexican lawyer, Jorge Calderon, who is on a staff exchange here at the moment. Lawyers of the IACtHR who participate in the staff exchange, can attend deliberations of the judges. For instance, Jorge Calderon goes to the deliberations of Section III, which is presided by the Spanish judge, and every Tuesday (such as this morning) he attends these deliberations of the Section to see how deliberations work, to see the cases that they discuss every week.

Were you in contact with the Inter-American Commission?

No, I worked only for the Court, but I have met some people from the Inter-American Commission. At the public hearings there were people from the Inter-American Commission coming to present the position of the Inter-American Commission, because in the public hearings they have a victim, they have the State, but there is also the Inter-American Commission who is the one who brought the case before the Court so it is a party to the proceedings. We had meetings with people from the Inter-American Commission, but I have never been to the Inter-American Commission in Washington D.C.. I think that it would be interesting as well, because in terms of the workload, our situation is more comparable to the situation of the Inter-American Commission, which has many more cases pending than the Court. The IACtHR has around 20-30 cases pending per year. These are the cases selected by the Inter-American Commission. So I always say that the IACtHR would be more like our Grand Chamber, and then the rest of the European Court, which deals with all the pending cases, would be more similar to the Inter-American Commission. Because our Court also deals with the admissibility. In 1998, the European Commission disappeared, so all the admissibility stages of the proceedings have been absorbed by the Court since 1998. So we deal with the admissibility, with filtering all the inadmissible cases, and also with the merits of the cases, which deserve examination of the merits.

Are there any attempts of the Court to cooperate more with the Inter-American Commission?

I mean of course there would be an intention. We know it is a good idea, but for the time being, there has not been any progress in that sphere. We have some contacts but it is not the same as with the IACtHR. Cooperation with the IACtHR is now regular.

How do these staff exchanges help the Courts? Why are they interested in such cooperation?

Because we live in a global world. I think that all international regional courts have to look at what others are doing. We cannot be isolated in our own European Convention on Human Rights. We have to see how others work, such as the International Court of Justice, UN Human Rights Committees, and most importantly our counterpart and “sister” Court that is basically the IACtHR. Of course, there is also the African Court, but it was established much later, so the most similar regional Court of human rights is the IACtHR. So that is why it was so important to strengthen cooperation and bonds between the Courts. This will clearly have a result in the case law because we refer more and more to the case law. The ECtHR refers more and more to the case law of the IACtHR and likewise the IACtHR refers more and more to the case law of the ECtHR. It is important because this is the comparative method of interpretation. Both texts of the European and American Convention are very similar. They have very similar rights. Naturally, the American Convention is a bit wider, because it was adopted much later, so it contains more rights than the European Convention on Human Rights of 1950. But the texts are very similar, so it is important for us to see how the other Court interprets similar text to get some inspiration as well as to interpret our Convention.

Could you think of any examples of judicial or extra-judicial cooperation between the Courts?

Concerning the interpretation, I could think of a case: *Scoppola v. Italy*. Our Court referred to the American Convention of Human Rights and the Inter-American Court’s case law on the principle of retroactivity of more lineal law. We referred to the provision of the American Convention to interpret our own Article 7 of the Convention, because we had always said that the principle of non-retroactivity of criminal law only applied to harsh law, not to more lineal law. The Court always said that this did not cover the principal of applicability of more lineal law. We got inspiration from the American Convention to include in the judgment that now Article 7 of our Convention also protected the principle of retroactivity of more lineal law. So that was an example of cross-fertilization between both Courts. The most recent example, I would say, is the *Margus v. Croatia* case concerning amnesties. The IACtHR has a very rich case law on amnesties, on the invalidity or illegal nature of amnesties concerning grave human rights violations. We also drew inspiration from that case law for our case of *Margus v. Croatia* to say that amnesties concerning gross or grave violations of human rights were unacceptable and that the Court would not accept amnesties for these gross human rights violations of Articles 2 and 3, for instance, the right to life and the prohibition of torture. We had a very scarce case law on amnesties and thanks to all this influence of other organizations as well, but mainly of the IACtHR, we could have a very clear judgment on unacceptability of amnesties concerning gross violations of human rights.

Don’t you think it is irrelevant to interpret Convention which is not designed for the particular region?

No, I would say. As I already mentioned, the texts are so similar. I mean, the rights protected are so similar because they all derive from the Universal Declaration of Human Rights,

basically. The Convention was the first treaty to implement or to guarantee in an international treaty some of the rights which were not guaranteed by the Universal Declaration of Human Rights. The American Convention is also a development of that Universal Declaration of Human Rights and of the American Declaration, which was adopted even before the Universal Declaration of Human Rights. So the base is very similar. It is quite logical that we get inspiration from each other to interpret our own texts. Of course there are regional specificities and that will be affected later in the case law and how we apply those conventions. We have different techniques of interpretation. For example, we have different doctrines such as margin of appreciation, which they do not have in the Americas. We are not bound; there is no obligation to follow the case law of the other Court. There is no legal obligation to follow the respective case law. It is rather a comparative method of interpretation. We can get some inspiration because the texts are very similar, and the purpose of the texts as well. It is the protection of human rights.

What is the exact impact of references of the jurisprudence of the other Court?

It is true that there is a bit of an imbalance because the IACtHR always, or in most of their judgments, refers to our case law. I would say that they may have around 200 cases and in the big majority of these cases they refer to our case law. So I would say there is a big impact in this sense. But from our side we cannot say the same, because maybe there are about thirty cases that refer to the case law of the IACtHR. It is very little compared to the amount of judgments that we have. We have around 1000 judgments per year. The Court has delivered more than 10,000 judgments in its whole history, so it is a bit imbalanced in that sense. Why is it so imbalanced? I would say that because for them, since they were established much later and started working in 1979, they did not have a corpus of case law, so it was easier for them at that time to get inspiration from our case law to apply and interpret their own Convention. For us it was different, because we had already been working as a Court since 1959. So we had a rich case law from the 1960s, 1970s, 1980s, of course the 1990s. Now the amount of cases and the diversity of our case law has increased considerably, but especially in the 1980s and 1990s it was not so natural for us to look at the case law of the IACtHR. It has been more recent trend. We have so many cases that our judgments cannot be as long as their judgments. They have around 20 cases per year, so their judgments include more of international law, comparative law. They have more time in that sense to construct and draft these long judgments. For us, considering our workload, it is impossible to look at the state of international law in that particular subject every time. We do it for Grand Chamber cases, but not for all the Chamber cases that the Court adopts every week. There are Section meetings every week and every week the five sections of the Court adopt judgments, so it is not comparable in the sense of workload.

According to you, do these staff exchanges have an influence on the universality and fragmentation of international human rights law?

Yes, it all goes in the same direction. Avoiding fragmentation and strengthening the unity of the international law of human rights.

Are these the reasons for cooperation? According to you, what other reasons are there for cooperation?

Yes, of course. Although, there is no legal obligation to follow the Inter-American Court's case law and they do not have any legal obligation to follow our case law. This is the matter of avoiding the fragmentation of international human rights law and trying to get more coherent approaches between both Courts.

Do you think that the difference between non-binding interim measures in Europe and binding precautionary measures in the Americas might result in inspiring the European system? Why or why not?

Well, it has already inspired the Court. It is true that the Court had always hid the fact that they were not binding but since the judgment of *Mamatkulov v. Turkey*, the Court clearly said that now interim measures, which are in the Rules of the Court, not in the Convention, were considered to be binding from that judgment on. In that judgment of *Mamtkulov v. Turkey* there were extensive references to the Inter-American system of human rights and to other international courts where the Court said that other international courts had binding interim measures, so that is one of the reasons why we shall consider our own interim measures, even though they are included in the Rules of the Court, to be binding and from that moment on they are considered to be binding, although they are not in the Convention.

There is no initiative to include them in the Convention? Is the judgment enough?

Yes, it is enough because it is the case law, which is quite clearly accepted by the States. When a State does not apply the interim measure indicated by the Court and Rule 39, the Court can later find a violation of Article 34 of the Convention, which says that the State should not hinder the right of individual petition before the Court. So if the State does not comply with interim measures by expelling the applicant to another country, where the Court said the State should not expel him during the proceedings then in that case, the Court can later find a violation of Article 34 of the Convention. So that is the consequence of the legal binding interim measure and it is quite accepted. Most of the countries now comply with interim measures.

Article 22 (7) of the American Convention states that every person has the right to seek and be granted an asylum. The European Convention does not include such statement. Do you think that with the current refugee crisis in Europe, the Convention will need some changes?

I would say that even though we do not have the right to asylum in our Convention, we have a clearly protected principle of non-refoulement for asylum seekers and refugees through the interpretation of Articles 2 and 3 of the Convention. So we do not have the right to asylum, but we have the right to life or the prohibition of the death penalty, and we have the prohibition of torture and ill-treatment. The Court has clearly interpreted that as an absolute principle with no exceptions permitting the prohibition of torture and the prohibition of ill-treatment, so if the asylum seeker claimed that there is a clear risk that he will be prosecuted

or will suffer ill-treatment in the third country, the Court will normally find that it would be a violation of Article 3, the prohibition of torture. There is already an indirect protection of the principle of non-refoulement through Articles 2 and 3 of the Convention. I do not think that we would really need an inspiration on this specific issue from the IACtHR, which protects the right to asylum, and they even have advisory opinions on that matter. There they expressly have the right to asylum, which we do not have, but we protect this right through our own means.

NGOs in the European system have quite valuable positions. What do you think about the role of NGOs in the Americas?

Actually, we have a more restricted *locus standi*, because for us the applicants must be the individual or legal persons who are the victims of the violation. We do not accept the *action popularis*, so it must be the direct or indirect victim of the violation of the Convention. But in the Inter-American system, as far as I understood, it is more similar to *action popularis* because an NGO can bring a complaint on behalf of somebody. Even though the NGO is not a victim of the violation, they can bring the complaint on behalf of the victim, or group of victims such as in the cases of massacres. There is an NGO which brings the complaint on behalf of such victims, and I think the *locus standi* is more open in that sense in the Inter-American system.

Do you think that the European Court should allow NGOs to do the same here?

No, I don't think that this is possible, because Article 34 is quite clear on that. It states that the individual has to be a victim of the violation. Although, the Court has accepted some exceptions. There was a case two years ago of Valentin Cămpeanu, it was an NGO: Center for Legal Resources on behalf of Valentin Cămpeanu v. Romania and the Grand Chamber of the Court accepted *locus standi* of the NGO in that case. Why? The direct victim had already died, so the NGO was complaining of the death and the ill-treatment of this victim, who had died in a psychiatric hospital. He was an orphan with HIV and he had been ill-treated in that psychiatric institution. Since he had died and he had no relatives at all who could lodge the complaint before the Court, the Court exceptionally accepted the *locus standi* of that NGO to bring the application on behalf of the victim. That case, I think, would not be a problem in the Inter-American system. For us it was really the first time the Court accepted such an exceptional case. Through the case law we have opened the door to that a bit. But I would not say that we would go as far as to say that all NGOs or any third person can bring a complaint on behalf of somebody, even though they do not have the mandate to do that.

Interview with Jorge Calderon Gamboa

Senior Staff Attorney at the IACtHR

Staff exchange in the Section 3 of the Registry of the ECtHR (2016)

(Under the Spanish Judge Luis López Guerra)

You are a Senior Staff Attorney at the Inter-American Court of Human Rights. Do you work only for the Court or also for the Inter-American Commission on Human Rights? Could you please explain the relation between the Commission and the Court?

There are two bodies in the Inter-American system, the Inter-American Commission and the Inter-American Court, but the Inter-American Commission is part of the OAS, whereas the Court is the body from the treaty of the American Convention. We are not officially part of the OA. But since the Inter-American Commission is part of the OAS, we have a certain relation with the OAS, but at the same time we are autonomous from the OAS. So in my case, and in the case of all the lawyers from the Inter-American Court, we are part of the Register of the Inter-American Court of Human Rights, not the OAS.

The Court has its own system. We don't have a relationship with the OAS like the ECtHR with the Council of Europe. Actually, I mean in all the administrative things, the Court is autonomous.

But then when the petition comes, it first reaches the Executive Secretariat of the Inter-American Commission?

Rather, the Commission. Not to get confused, the OAS has an Executive Secretary and Executive Secretary Office, but this is more for everything in the OAS. So in the OAS there is a Human Rights Commission, which is in charge of human rights topics. And they have also a Secretariat, but this is different than the Secretariat of the Court. So when the case is submitted, in the Inter-American system it goes first to the Commission through the Secretariat of the Commission and then they have a whole process, friendly settlement, hearings, until the Commission establishes a report regarding some violations. Then the Commission could submit the case to the Court, or the State could also submit the case to the Court. At this moment starts the activity of the Court (The case goes first to the Secretariat of the Court, note of the author.)

Also, one difference with the ECtHR is that judges are not permanent, but the Secretariat is. We lawyers live in Costa Rica and we are there permanently all year, whereas the judges meet every session period in Costa Rica or in other countries, when we have the extraordinary sessions which we can do abroad. So judges can meet abroad but we the Secretariat live in Costa Rica.

Same goes for the Commission. The Secretariat is in Washington D.C. and the Commissioners are not working full time there.

Have you previously participated in any activities between the IACtHR and the ECtHR?

Not in activities such as this exchange program. But I have participated indirectly. For example, when I received Guillem Cano, he worked in my team. So I was in charge of supervising Cano and his work. Another thing is that we have a joint publication about the Transatlantic Dialogue. There are some cases that I have drafted. They are in that publication, so I had to check reviews. We also have an internal publication of some specific cases : we call it CLIN (Case Law Information Notes, which are publically available on the website of the EctHR, note of the author.) It consists of relevant jurisprudence from the ECtHR but they also add some relevant Inter-American jurisprudence. I have submitted some cases that I have worked on before for this specific CLIN. This can be seen as indirect participation through this internal dialogue.

How do you decide what is relevant or not for the jurisprudence?

The Secretary of the Court selects cases that could be interesting for this Court and also cases that are probably more relevant in terms of a new approach to a specific right. We have some repetitive cases, so when we have something new or something that was deeply analyzed, it can be considered as a relevant case. If we have a case that we often use in our jurisprudence, or if the European Court uses the jurisprudence from us, it is a good example to show the interdialogue of jurisprudence.

These staff exchanges were established quite recently. Do you agree that they are a result of an intensified dialogue between the Courts and diplomatic cooperation? (such as international visits, dialogues between judges, etc.)

We started with this staff exchange program three years ago. I am the third one from the Inter-American Court. We have received two lawyers from the European Court and we will receive another one in September. All these experiences have been very rich. When we receive lawyers from the ECtHR, it is a very good opportunity that they, the whole Court, provide an overview of how they work with the case law. Lawyers participating in a staff exchange also participate in some deliberations, draft research, charts for the secretariat.

I am here for a double purpose. First of all, to learn how this Court works, how the internal process works, how the things are discussed here, what are the methodologies, but also I am providing a lot of information. I am working within this division (Section 3, note of the author), but I am also in contact with other divisions. I provide some jurisprudence from our Court, so the European Court can consider it as well. I am also participating in giving lectures to the Secretariat so they know how the IACtHR works. I have also a lot of dialogue with people from different divisions, departments, even from the Council of Europe, because they want to know how the IACtHR works. They also want to know more about the good practices of the Court, so we are in a dialogue. I think that it is extremely important because we have almost the same core of essential rights. We have very different realities. We are very different Courts, of course, because this is very big Court. The European Court has a straight procedure that the victims have the right to individual application. In our system, they go first to the Commission so our position can be actually compared to the Grand Chamber of the

ECtHR. The way the Grand Chamber works here, we work there. We have different realities and approaches but we have the same rights, because human rights are the same, so we are trying to deal with the things in a similar way. That is why it is essential, because we are talking about the same rights. The task of the tribunal is to interpret within the scope of the place where the right is applied, but it cannot be too much different than in other place, even in Africa, here or everywhere. The idea of human rights is that they are applied to everyone. So that is why I consider it important and it has been very relevant. And you also mentioned in a diplomatic way... This is probably the main exchange that we have but last year or two years ago, five judges came to the Court for one week and we have also received a delegation of judges from the ECtHR in Costa Rica.

This study visit is for 3 months? Do you work only with the Registry or you are in contact with the judges?

I am here for 3 months and 1 week. I have contact with some judges, especially with the Spanish division, because I am working there, but also I am also attending some deliberations. I have had a chance to meet some judges.

How do these staff exchanges help the Courts? What are the main benefits for each one of the Courts?

The first benefit would be to have relevant information, to identify good practices for both tribunals: to identify what could be good for us to use from the methodologies and approaches of the ECtHR. Secondly, to understand the decision process making. There are similarities, but there are other differences, so it is important to understand, how it works. The third one I would say to find easily information, because when you are outside of the institution you can search, you can find some information in a way, but it is not the same, once you realize how information is provided inside the institution.

For example, we used to check information in hudoc, but now I can realize more easily what is relevant and how I look for more relevant information. Even without hudoc, I can identify relevant information for the IACtHR from here. I am collecting that kind of information. It is important to learn how apply the same concept of human rights but in another context, in the European context.

Another benefit is to maintain contact and information between us. Nowadays we are very connected between these tribunals. For example, with the African Court, we have already signed an agreement, but we have no practice. Nobody has been on an exchange program yet.

Since we have this agreement, we are exchanging information. When we have a specific case concerning a new topic, we request relevant information from someone from the ECtHR: 'could you let me know what did about this situation,' and it is the same the other way around. We established some good mechanisms of good communication and exchange of information, which resulted in a joint publication and the CLIN. I think it is also very important. Additionally, I have the opportunity to be here in a personal way to be here and to see how very similar work is applied in a different dimension.

Could you think of any examples of judicial or extra-judicial cooperation between the Courts?

I think it is very general. In the early beginnings of the Inter-American system we had cases of very serious human rights violations, such as massacres, disappearances, torture cases. We have very consolidated jurisprudence about this gross jurisprudence. Here at the ECtHR, when some Eastern countries violate human rights in such a way, the Court starts dealing with these gross violations of human rights and they have been paying a lot of attention to our jurisprudence. We have a lot of requests regarding these issues.

Concerning the Inter-American system, since a couple of years ago, we have been also dealing with more sophisticated rights such as the right to privacy, family life, in vitro fertilization, gay marriage. We are paying attention to what has the ECtHR done in this field. I think this is very evident, such as in cases concerning Russia or Turkey, you can see many citations of case law of the IACtHR. In the Inter-American system, concerning the more sophisticated rights I talked about, there are many references to the ECtHR.

Don't you think it is irrelevant to interpret Convention, which is not designed for the particular region?

It is completely relevant. We are not interpreting the Convention. We are using the interpretation of the European Court. We are talking about international public law, which is not domestic law. For example, we at the IACtHR always look for the international standard, what we call the *corpus juris*. To see what the international standard is you have to see what other bodies have said about it. So it is completely compatible. Otherwise, it would be the opposite, it would be regional law. But we are dealing with international law. We don't pay attention only to the ECtHR, but also to the Committees from the UN, The UN Commission on Human Rights, the Special Rapporteurs, and other mechanisms such as the African Court, if they already have something. We also pay attention to the domestic Courts and comparative law. Since we are talking about human rights as something essential for everybody, we have to be sure that we are applying something that is common for the human being in general, not just a Latin American human being. For us it is the same, if it is in Africa, India or Europe. That is why it is so crucial for us.

Do these staff exchanges according to you have an influence on universality and fragmentation of international human rights law?

Yes, of course we have to accept that there are certain and specific differences but that's why we have an international body, the Court, which has to deal with that and has to see the reality. Otherwise it would be only a machine that would say ok, these rights or just the Convention will be enough to imply human rights. However, you need a person or group of persons who decide under the specific circumstances, and for me this is important. But the universalization of human rights is the main goal and the main purpose of human rights, for me.

Are these the reasons for cooperation? What other reasons are there according to you for cooperation?

In a certain way yes. This is not the main goal, I would say, to achieve that. I think it is implicit. That will provoke it, if we have more dialogue, we have more coincidences, of course we are walking in that direction. But we have to say that we have some different approaches. We have decided cases in different ways. For example, in Europe there is the doctrine of margin of appreciation that means that in certain cases they say ‘we don’t want to go so far’ and the State has the possibility to deal with that situation, but in our Court we do not have the margin of appreciation. I could say that we move a little bit further in that way. We have other different doctrines that we are dealing with. So these are different approaches and I think it is very good because it is related to the reality of those regions.

Do you think that the difference between non-binding interim measures in Europe and binding precautionary measures in the Americas might result in reforming the European system? Why or why not?

Sincerely, I cannot tell you because I have not studied the impact of interim measures here. At least in our system, it works very well and I think in most of the cases they are very effective. However, the Inter-American Commission also has this competence in the Rules of Procedure. Some States do not respect the provisional measures from the Commission because they say they are not part of the Convention. On the other hand, the precautionary measures in regard with the Court are in the Convention. So we have this kind of discussion in the Americas.

I am not sure if the States here really complain about it. I could not really say that those interim measures are not binding. If the Court decides to take steps to preserve a situation, for me they are binding even though they are not binding. But I think that the best approach would be that they would be included in a new protocol. I think this is the plan. But since it is a decision of the Court, for me it is binding. It is a matter of interpretation. But in our system, the provisional measures work in a broader way. We have some provisional measures that work when we have pending cases in the merits. So we say ok, take those measures while I will take the decision in the merits. We can also receive from the Commission some submissions of urgency situation, even though we don’t have a pending case. It is a broader concept, so we can have provisional measures, even though we are not dealing with the merits of that case. This is also a big difference with Europe. But I think, if it could be in the Convention, it would be better.

Article 22 (7)* of the American Convention states that every person has the right to seek and be granted an asylum. The European Convention does not include such statement. Do you think that with the current refugee crisis in Europe, the Convention will need some changes?

It is a broader article, but this is our interpretation and the Court has interpreted the freedom of movement and residence in current situation with standards of international law. It is a way of interpretation. I think the same could happen here in Europe. If the Court decides to interpret the right concerning minorities, the European Convention could do a similar approach. We also have advisory opinions, which are not very often used here. We have potential cases on provisional measures, we also monitor the compliance with our own judgments, but we also have the advisory opinions. Some States or some specific organs from the OAS could submit to the Court specific questions related to the interpretation of the Convention or related to domestic law, if the domestic law is in accordance with the Convention. It is not necessary to be related to a case, so when the Court receives these kinds of questions the Court will interpret the Convention in order to answer the specific questions. Then it is not a judgment, but it is still part of the Court's jurisprudence, because it is an interpretation of the Court.

We have a lot of advisory opinions. We have a very recent one concerning the child migrants, so we interpret Article 22 and other Articles of the Convention. We provide some interpretation, but also guidance for the States regarding this problem. So this is another interesting mechanism to approach different topics. From what I understand, the European Court also could do that and there is a protocol that eventually will do that in a more specific way.

We also monitor the compliance with the judgment. We have a different supervision mechanism than the ECtHR. So the Court monitors the compliance of the State. We have some kind of jurisprudence related to the accomplishment of our judgment. It is not a political body, it is the same Court. So the Court sometimes elaborates some standards, so the States accomplish the judgment.

Is it efficient?

Yes. For our system yes, because we have a few judgments. Not like here, where they have thousands, we have probably right now around 100 pending cases. We have a very broad catalogue of reparations, for example. Here it is mainly just satisfactions. However, in the Inter-American system, we have seven different kinds of measures, so I could say the States accomplish most of them but some others are kind of complicated and it takes more time. But we have very good examples of very good efficiency. I would say that it is very effective for our reality. It would be difficult to do it here.

Concerning the NGOs, does the Inter-American Court use information provided by NGOs? In the European jurisprudence, the Court often refers to NGOs and information provided by them.

Most of the NGOs are representatives of the applicants. That is why it is difficult to use their report, since they are themselves participants of the case. They participate as representatives, another way is to participate through the *amici curiae* (friends of the tribunal), which is also in the European system. There is a pending case relating to some interesting topic and professors. NGOs could submit some observations regarding certain topic to tell the Court 'hey pay attention to this.' Those are not binding for the Court at all but we cite them. Some are useful, some are not. We have a lot of participation from universities, NGOs, international professors, and so on.

We have public hearings in most of our cases. This is another difference; few cases have public hearings in Europe. In the Americas, 90 % of our cases have public hearings and we sometimes receive Expert Witnesses and it could be a person from an NGO, who is an expert in a particular topic. So we have received the Expert Witnesses in the public hearing or submitted through *affidavit*. We cite these international bodies more than NGOs. We prefer sources of international law such as treaties, jurisprudence, principles of international law, *jus cogens*, and obligations. Then we would probably use some soft law: law amended by international organizations or rapporteurs, but NGO would be soft, soft, soft. It is not very common.

Would you like to add anything?

I think this is very positive and it would be good to see the outcomes of this cooperation, if there are any results of this dialogue.

Since I am here, I have been also invited to talk in Heidelberg, or now I am going to Geneva, where I got invited by another university. So it is another good part of being here, to get to participate in various events. And it also applies to the lawyers from the ECtHR in the Americas.

List of Analyzed Case Law of the ECtHR

Document Title	Application Number	Document Type	Originating Body	Date
CASE OF SZABÓ AND VISSY v. HUNGARY	37138/14	HEJUD	Court (Fourth Section)	12/01/16
CASE OF MOCANU AND OTHERS v. ROMANIA*	10865/09; 45886/07; 32431/08	HEJUD	Court (Grand Chamber)	17/09/14
CASE OF CENTRE FOR LEGAL RESOURCES ON BEHALF OF VALENTIN CÂMPEANU v. ROMANIA	47848/08	HEJUD	Court (Grand Chamber)	17/07/14
CASE OF MARGUŠ v. CROATIA	4455/10	HEJUD	Court (Grand Chamber)	27/05/14
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CASE OF MARGUŠ v. CROATIA	4455/10	HEJUD	Court (First Section)	13/11/12

CASE OF P. AND S. v. POLAND	57375/08	HEJUD	Court (Fourth Section)	30/10/12
CASE OF BABAR AHMAD AND OTHERS v. THE UNITED KINGDOM	24027/07; 11949/08; 36742/08;66911/09; 67354/09	HEJUD	Court (Fourth Section)	10/04/12
CASE OF KONSTANTIN MARKIN v. RUSSIA	30078/06	HEJUD	Court (Grand Chamber)	22/03/12
CASE OF SITAROPOULOS AND GIAKOUMOPOULOS v. GREECE	42202/07	HEJUD	Court (Grand Chamber)	15/03/12
CASE OF HIRSI JAMAA AND OTHERS v. ITALY	27765/09	HEJUD	Court (Grand Chamber)	23/02/12
CASE OF BAYATYAN v. ARMENIA	23459/03	HEJUD	Court (Grand Chamber)	07/07/11
CASE OF A. v. THE NETHERLANDS	4900/06	HEJUD	Court (Third Section)	20/07/10
CASE OF A. v. THE NETHERLANDS	4900/06	HEDEC	Court (Third Section)	17/11/09
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CASE OF BOUMEDIENE AND OTHERS v. BOSNIA AND HERZEGOVINA	38703/06; 40123/06; 43301/06; 43302/06; 2131/07; 2141/07	HEDEC	Court (Fourth Section)	18/11/08

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CASE OF STOLL v. SWITZERLAND	69698/01	HEJUD	Court (Grand Chamber)	10/12/07
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CASO GONZALES LLUY Y OTROS VS. ECUADOR	Series C No. 298	Judgment (Preliminary objections, merits, reparations and costs)	01/09/2015
CASO GRANIER Y OTROS (<i>RADIO CARACAS TELEVISIÓN</i>) VS. VENEZUELA	Series C No. 293	Judgment (Preliminary objections, merits, reparations and costs)	22/06/2015
CASE OF THE CONSTITUTIONAL TRIBUNAL (CAMBA CAMPOS ET AL.) v. ECUADOR	Series C No. 268	Judgment (Preliminary objections, merits, reparations and costs)	28/08/2013
CASE OF THE SUPREME COURT OF JUSTICE (QUINTANA COELLO ET AL.) v. ECUADOR	Series C No. 280	Judgment (Preliminary Objection, Merits, Reparations and Costs)	23/08/2013
CASE OF MÉMOLI v. ARGENTINA	Series C No. 265	Judgment (Preliminary objections, merits, reparations and costs)	22/08/2013
CASE OF ARTAVIA MURILLO ET AL. (“IN VITRO FERTILIZATION”) v. COSTA RICA	Series C No. 257	Judgment (Preliminary objections, merits, reparations and costs)	28/11/2012
CASE OF NADEGE DORZEMA AND OTHERS V. DOMINICAN REPUBLIC	Series C No. 275	Judgment (Merits, Reparations and Costs)	24/10/2012
CASE OF ATALA RIFFO AND DAUGHTERS v. CHILE	Series C No. 254	Judgment (Merits, Reparations and Costs)	24/02/2012
CASO GELMAN VS. URUGUAY	Series C No. 221	Judgment (Merits and Reparations)	24/02/2011

CASO GOMES LUND Y OTROS (“GUERRILHA DO ARAGUAIA”)V. BRASIL	Series C No. 219	Judgment (Preliminary objections, merits, reparations and costs)	24/11/2010
CASE OF VÉLEZ LOOR v. PANAMA	Series C No. 218	Judgment (Preliminary objections, merits, reparations and costs)	23/11/2010
CASE OF THE “LAS DOS ERRES” MASSACRE V. GUATEMALA	Series C No. 211	Judgment (Preliminary objections, merits, reparations and costs)	24/11/2009
CASE OF CASTAÑEDA GUTMAN V. MEXICO	Series C No. 184	Judgment (Preliminary objections, merits, reparations and costs)	06/08/2008
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CASE OF THE PUEBLO BELL O MASSACRE V. COLOMBIA	Series C No. 140	Judgment (Merits, Reparations and Costs)	31/01/2006
CASE OF PALAMARA IRIBARNE V. CHILE	Series C No. 135	Judgment (Reparations and Costs)	22/11/2005
CASO DE LA "MASACRE DE MAPIRIPÁN"	Series C No. 134	Judgment (Merits, Reparations, and Costs)	15/09/2005
CASE OF YATAMA V. NICARAGUA	Series C No. 127	Judgment (Preliminary objections, merits, reparations and costs)	23/06/2005
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CASE OF MARITZA URRUTIA V. GUATEMALA	Series C No. 103	Judgment (Merits, Reparations and Costs)	27/11/2003
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CASE OF CANTOS V. ARGENTINA	Series C No. 85	Judgment (Preliminary Objections)	07/09/2001
CASE OF THE “STREET CHILDREN” (Villagrán-Morales et al.) V. GUATEMALA	Series C No. 77	Judgment (Reparations and Costs)	26/05/2001
CASE OF “THE LAST TEMPTATION OF CHRIST” (Olmedo-Bustos et al.) V. CHILE	Series C No. 73	Judgment (Merits, Reparations and Costs)	05/02/2001
CASE OF CANTORAL-BENAVIDES V. PERU	Series C no 69	Judgment (Merits)	18/08/2000
CASE OF THE “STREET CHILDREN” (Villagrán-Morales et al.) V. GUATEMALA	Series C No. 63	Judgment (Merits)	19/11/1999
CASE OF GENIE-LACAYO V. NICARAGUA	Series C No. 45	Order of the Court (Application for Judicial Review of the Judgment of Merits, Reparations and Costs)	13/09/1997
CASE OF GENIE-LACAYO V. NICARAGUA	Series C No. 30	Judgment (Merits, Reparations and Costs)	29/01/1997

*Cases in the blue print refer to Articles 2 and 3 of the European Convention on Human Rights / Articles 4 and 5 of the American Convention on Human Rights.

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