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Transfer of Values as to the Regional Human Rights Tribunals

1 Introduction

Europe has been the mother of several human rights related thoughts or initiatives, and all (!) – completely or almost – continent wide, basically political international organizations deal with the protection of human rights. This could serve and served indeed as an example for other continents, and the transfer of European and universal values took place, but – partly according to the different social circumstances – other regional systems reach amazing and significant development in the field of human rights protection as well. Therefore, in this paper I treat the question of interaction between the European and Inter-American Courts of Human Rights.[2] Some authors (e.g. A.A. Cançado Trindade) already talk about the development towards a new *ius gentium*, a procedure these tribunals contribute to. Research in this field is essential in order to determine which road human rights protection ought to or is going to take in the near future.

Interaction – or cross-fertilization – between human rights tribunals this article deals with, is a very interesting development of international law. That the two European Courts, Luxembourg and Strasbourg refer to each other is self-evident in the meantime, and also essential for countries being members in both international organizations. That the regional human rights courts make references to certain achievements in the UN system, is more and more often now and not completely incomprehensible. Though the fact that regional systems on – admittedly similar, but surely not adequate, so – different conventional basis use the explicit quotation of each other's jurisprudence in support of their own judgments, is a highly interesting and not at all evident phenomenon.

In this paper I focus on the above mentioned quotations, inlaying them in a system, showing what are the fields where this cross-fertilization, so quasi transfer of values is the most apparent. I would like to emphasize that although the Inter-American system has been created after the European model, and Africa[3] is eager to copy the positive results of these two and apply them for itself, so we could think that it is only Europe who contributed to this 'human rights civilization' or transfer of values, it should be reminded that the other continents, especially the American one is worth making a second glance at. Although often occurs the complaint that universality of human rights would not even be possible, as it is only a European (or rather West-European) measure of imperialism, I am going to show clearly some of the achievements of the San José Court, delivering at the same time arguments on which achievements Strasbourg could pay more attention to, in order to further ameliorate Europe's human rights protection.

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[2] Another interesting topic is the examination of the human rights related jurisdiction of the European Community's Court of Justice which unfortunately exceeds the frames of this article.

[3] In the frame of this article I do not have the possibility to treat the African system in depth, mainly because the transfer of values, the interaction there is one-sided: the African Court having started only last year, has no relevant impact on the two other regional courts so far; and the Commissions (the African as well as the Inter-American) are not examined in this paper – nevertheless, it would be another interesting parallel project. See furthermore M. Bortfeld: *Der Afrikanische Gerichtshof für Menschenrechte*, Nomos, Hamburg (2005).

2 Interaction in General

Interaction and cross-fertilization of international fora, above all, tribunals dealing with human rights protection is not a new phenomenon. Although I have to agree that in most of the cases it is not deliberately constructed and applied, but rather occurrent,[4] to find in international fora's decisions reference to another forum's jurisdiction or a part of that is a highly interesting phenomenon worth taking a glance at. Nevertheless, it is true that international jurisdiction in general is like the 'secret science of the pontives':[5] the judges rarely explain their motives, the jurisprudence has the task to find the logic behind; and so do the international judges as to interaction as well.

The European Court of Human Rights (hereinafter: ECtHR) cites often the jurisdiction of the Permanent Court of International Justice (hereinafter: PCIJ) and the International Court of Justice,[6] and more and more often the jurisdiction of the Inter-American Court for Human Rights (hereinafter: IACtHR), and the whole Inter-American system[7] as well as the UN human rights protection system occurs in the judgments.[8] The IACtHR equally refers to the judgments of the ECtHR,[9] but the ICJ has quoted practically no other international forum until recently – except for the jurisprudence of the PCIJ which he regards as its own.[10] In March 2007 the judgment in the case of Bosnia and Herzegovina and Serbia has been delivered, and the ICJ made reference to the jurisprudence of the ICTY, the International Criminal Tribunal created in order to punish the crimes committed in the former Yugoslavia.

3 Cross-fertilization: Strasbourg – San José

A *The regional systems*[11]

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[4] See P. Kovács: 'Szemtől szembe… Avagy hogyan kölcsönöznek egymástól a nemzetközi bíróságok, különös tekintettel az emberi jogi vonatkozású ügyekre'. 49 *Acta Humana* (2002) 11

[5] Kovács: 'Développement et limites de la jurisprudence en droit international', in Société Française pour le Droit International, *La juridictionnalisation du droit international*, Paris, Editions A. Pedone (2003) 269-341, 271

[6] See e.g. *Cyprus v. Turkey*, ECtHR (2001) no. 25781/94, Reports 2001-IV (May 10, 2001), reference on the case of Namibia.

[7] See furthermore *Akdivar v. Turkey*, ECtHR (1996) (preliminary objections, hereinafter: prel.), September 16, 1996, 68

[8] See e.g. *Ergin v. Turkey*, ECtHR (2006) no. 47533/99 (May 4, 2006), 25 where the UN-system as well as the IACtHR Durand and Ugarte judgment (see later) is cited, both dealing with civilians judged by military tribunals. See also *Maszni v. Romania*, ECtHR (2006) September 21, 2006, 32-33, 49. The ECtHR even refers to the Committee on the Prohibition of Torture.

[9] See e.g. '*The Last Temptation of Christ' (Olmedo Bustos et al. v. Chile)*, IACtHR (2001) Series C No. 73, 69, *Gómez Palomino v. Peru* IACtHR (2005) Series C No. 136, separate opinion of Cecilia Medina Quiroga, 5, or *Palamara-Iribarne v. Chile*, IACtHR (2005) Series C No. 135, 178 and 219

[10] See Kovács: 'Szemtől szembe…' 7

[11] For a detailed description see among others Laly-Chevalier, 'Chronique de la jurisprudence de la Cour Interaméricaine des Droits de l'Homme (2002-2004)', 62 *RTDH* (2005) 459-498; Cançado-Trindade, The Inter-American Court of Human Rights at a crossroads: Current challenges and its emerging case-law on the eve of the new century, in P. Mahoney – F. Matscher – H. Petzold – L. Wildhaber (eds), *Protection des droits de l'homme: la perspective européenne, mélanges à la mémoire de Rolv Ryssdal*, Carl Heymanns Verlag, Köln, Berlin, Bonn, München (2000) 167-191**;** M. Janis – R. Kay – A. Bradley, *European human rights law*, Oxford, Oxford University Press (2000); J. F. Renucci: *Droit européen des droits de l'homme*, Paris, Broché (2001); F. Sudre – J. P. Marguénaud – J. Andriantsimbazovina – A. Gouttenoire – M. Levinet, *Les grands arrêts de la Cour européenne des Droits de l'Homme*, Presses Universitaires de France, Paris (2004).

Europe has been the origin of many brilliant ideas concerning human rights protection. Nevertheless, in this article only the first one, the European Convention for the Protection of Human Rights and Fundamental Freedoms signed the 4th November 1950 (hereinafter: European Convention or ECHR) and especially its Court is going to be treated more in depth, as the within the frame of the Council of Europe signed and by now[12] by 47 European states ratified European Convention has *the* incontestably significant role in the field of the protection of civil and political rights.

Before examining the transfer of values between Strasbourg and San José, some words on the Inter-American system as well (which is more complex than the European): the Inter-American Commission of Human Rights (hereinafter: IACnHR) is an organ of both the in 1948 (six months before the Universal Declaration!) in Bogota signed Declaration on the Rights and Duties of Man and the – after the model of Europe created – American Convention on Human Rights (hereinafter: American Convention or ACHR), signed in 1969 in San José. The latter has the IACtHR as its principle organ of control. Almost every American state is member of the Organization of American States and so of the Declaration as well as the IACnHR, less ratified the American Convention on Human Rights and even less accepted the jurisdiction of the Court: this equally weakens the American victims' position.

The question treated in this chapter is something astonishing: interaction and transfer of values in human rights matters between different continents. The comparison of these two systems serves to determine what kind of interaction exists between Strasbourg and San José, and therefore what values are transferred from one continent to another. Partly, I also search the reasons for the differences and examine especially the achievements the Inter-American system affected or should affect the European with, in order to reach a better protection. I am equally going to enumerate the main fields where Europe's value-transfer is clearly visible in the Inter-American jurisdiction.

In order to make this transfer visible, I am going to treat the following topics: interim measures as well as the situation of victims, and pick out one of the protected rights: the right to life.

B *Interaction as to procedural questions*

When treating the interaction between San José and Strasbourg in procedural questions, some facts of the European system have to be reminded of. Above all, in the European Convention's system practically one procedure works: the individual petitions; the other two are the state versus state and the advisory opinions, but the first is really a small percentage (although some cases of this type were significant),[13] and the latter has never been used so far. As the Inter-American system was created after the model of the European, the European Convention's system's actual control mechanism, i.e. the European system of the 1960s served as a model. It means that the division of the tasks between the IACnHR and the IACtHR followed the concept of Strasbourg, but was of course adapted to the special circumstances of the American continent. That the individual petitions did not manage to gain a to the European comparable status before the IACtHR as they did in the meantime in Europe, is of course due to the different political situation and historical development. In compensation to the individuals' smaller role, the advisory opinions are in the Inter-American

[12] September 2007
[13] See e.g. *Ireland v. United Kingdom,* ECtHR (1978) no. 5310/71 (January 18, 1978)

system of great significance, but the state versus state procedure is not popular in Latin-America either.[14]

1 *Interim or provisional measures*

Interim measures are a subject where the European human rights protection – and the ICJ's[15] – system was a model for the Inter-American one. Interim or provisional measures serve as prevention, mainly to prevent violation of Articles 2 and 3 ECHR[16] respectively or – as the Rules of Procedure of the IACnHR says, to prevent irreparable harm to persons in general. And it is a topic where the IACtHR developed the law more than Europe did.[17] When applying these interim measures, San José can look in Europe mainly at the cases against Turkey and Bulgaria, unfortunately the IACtHR itself has many occasions to use this.[18] One of the most famous type of these cases is where the death penalty cannot be executed,[19] such as in the *Öcalan v. Turkey*[20] case in 1999, but in Latin-America other types of violations are in the focus, e.g. the numerous cases where special groups are affected: like the matter of the *Peace Community of San José de Apartadó* regarding Colombi*a (since 2000) or of* Haitians and Dominicans of Haitian-origin in the Dominican Republic (since 2000). The president of the IACtHR (which is not a permanent working court as the ECtHR now) can order the provisional measures which are reinforced later on by the 7 member-tribunal, like it happened in the very famous *Loayza Tamayo* case[21]. These measures were inspired by the above mentioned jurisdiction of the ICJ, but it can be established that the practice of the IACtHR went much further than Europe's or the ICJ's. In the case of *Mamatkulov and Askarov v. Turkey*,[22] the ECtHR even cites (a significant part of) the jurisdiction of the IACtHR and the rules of the IACnHR, in order to support its position against a state not fulfilling certain obligations.

2 *Transfer of values as to the victims*[23]

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[14] See Fix-Zamudio, 'The European and the Inter-American Courts of Human Rights: A brief comparison', in Mahoney et al. ibid. 507-533

[15] See the famous *LaGrand* case *(Germany v. United States of America)*, ICJ Reports (2001) p. 466

[16] See Haeck – Burbano Herrera, 'Interim Measures in the Case Law of the European Court of Human Rights', *NQHR*, 21/4 (2003) 625-675

[17] See Cançado-Trindade, 'The Evolution of Provisional Measures of Protection under the Case-Law of the Inter-American Court of Human Rights (1987-2002)', *Human Rights Law Journal*, 24 5-8 (2003) 162-168

[18] The so far last interim measure took place in the case of 19 Tradesmen v. Colombia in February 2007 (May 15, 2007).

[19] ICJ, *LaGrand* case (mentioned above) and *Avena and Other Mexican Nationals (Mexico v. United States of America)* (2003), ICJ Reports (2004) p. 12

[20] *Öcalan v. Turkey*, ECtHR (2003, 2005) no. 46221/99, Reports 2005-IV, (March 12, 2003; May 12, 2005). The ECtHR acted without having a respective explicit disposition in the Convention (it did not act completely *contra legem*: Article 39 enables such steps).

[21] *Loayza Tamayo v. Peru*, IACtHR (1997, 1998) Series C No. 33, Series C No. 42. In this case Ms. María Elena Loayza-Tamayo, professor at the San Martín de Porres University was charged with terrorism and being member of the Peruvian Communist Party. Although the lady disclaimed everything, she was held in detention, tortured, menaced, her family was not informed, she could not talk for a long time with her lawyer, at last – after one and a half year imprisonment – she was condemned for partly the same alleged crimes by both a military and a civil tribunal, and became twenty years of imprisonment. These events show an arsenal of human rights violations from unlawful detention to the violation of principles like that of *res judicata*.

[22] *Mamatkulov and Askarov v. Turkey*, ECtHR (2005) nos. 46827/99 and 46951/99 (February 4, 2005) 49-53

[23] The determination of *who is* a victim is a highly discussed question on international level, here the UN GA Res. 40/34, 29 November, 1985 on the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power is taken as a basis. (para. A.1-3)

The victims' (who we define by the direct victims of human rights abuses and those directly concerned, e.g. family) position in these two systems is going to be examined in three aspects here: the start of the international procedure (a), the participation in that procedure (b), and results (c).

(a) The right of the individual to address a petition to the international human rights forum is the corn of an effective position of the victim before international forums. In the European system[24] as well as in the Inter-American,[25] several conditions have to be fulfilled in order to present a successful petition (e.g. exhaustion of local remedies, time limit of 6 months). The main difference is that while in Europe – since November 1998 at the latest – the individual petition is not only a common accepted, but a compulsory part of the states' obligations, in the Inter-American system the individual can only get directly to the IACnHR, but not to the IACtHR. The IACtHR can treat individual petitions only through the Commission which forwards him the cases judged to be of a higher relevance but not being able to solve it alone or with the active contribution of the parties (friendly settlement). To be able at all to start an international procedure, i.e. the *jus standi* position of the European victims is much stronger as the IACnHR – though its contribution to the settlement of problems is incontestable – does not have a comparable situation to the IACtHR. This is a value of the European system the Inter-American judges would welcome as well, nevertheless currently there is no political will to establish *jus standi* for the individuals.

(b) Contrary and compared to Europe, in the Inter-American system the *locus standi* of the victims is much stronger.[26] They have the right to participate at any stage of the procedure, make comments or just to be present, or even to mention articles of the ACHR the IACnHR ignored in his report when forwarded to the IACtHR.[27] This is due to a change that happened in 2001 with the new Procedure Code of the IACtHR. It was necessary after that in the legendary case of El Amparo[28] one of the judges started to ask directly the victims – without bothering on the procedure rules. In Europe – where there is a written and an oral part of the procedure (hearings), but the former is much more accentuated – the victims' position is much weaker in this aspect[29]…

(c) The results of the procedures mean the judgments, particularly the remedies provided for the victims in the judgments.[30] Concerning the remedies, there exists a variegation which the IACtHR uses more than the ECtHR:[31] pecuniary reparation,[32] non-pecuniary reparation, moral compensation, fact-finding, social reconciliation, or more concretely: '*obligaciones de hacer*', the obligation to do something (e.g. to solve the explosive social situation), building a

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[24] The European Convention's Article 34 concerns the individual petition right before the ECtHR.

[25] The weaker position of the Court in the Inter-American system equally weakens the American victims' position.

[26] See Gialdino, 'Le nouveau règlement de la Cour interaméricaine des droits de l'homme', *RTDH* (2005) 979-997, 981-985

[27] See Laly-Chevalier ibid. 473

[28] *El Amparo v. Venezuela*, IACtHR (1996) Series C No. 28 (Reparations).

[29] For more similarities and differences between the two systems (the European and the Inter-American) see Buergenthal, 'The European and Inter-American Human Rights Courts: Beneficial interaction', in Mahoney et al. ibid. 123-133

[30] As to the right of victims to reparation see among others Shelton, Dinah, '*Remedies in International Human Rights Law*', Oxford, Oxford University Press (2005) and Shelton, Dinah, 'Reparations in the Inter-American System', in D. J. Harris – S. Livingstone, '*The Inter-American System of Human Rights*', Oxford, Calendron Press, (1998) 151-172

[31] E.g. in the case of *Szebellédi v. Hungary*, ECtHR (2007) no. 38329/04 (June 21, 2007), the following remedies were agreed: non-pecuniary reparations, costs and expenses, but no just satisfaction.

[32] Unreal sums of reparation are in- or even counter-effective: the – most of the time – poor states cannot pay it anyway, or there is no money left for the other victims and worse, it can hinder other states to be willing to participate in the Inter-American human rights protection system. The IACtHR uses such a great range of alternatives in order to evade this problem.

school for indigenous children, etc.[33] In the *Aloeboetoe* case[34] the IACtHR even ordered the establishment of a monetary fund for the victims. To name a street after the victim, to effectuate a public apology can also constitute a remedy. Europe, representing the concept that the state has to find out itself how to provide remedy,[35] stays by the declaration of the injustice happened as an adequate moral indemnification; at the same time it is more favourable for the victims concerning the costs of the international procedure than the Inter-American system. A revolutionary idea of the IACtHR is the so-called 'project of life' which pays exceptional attention to the victim and plays a part in the determination of the reparation.[36] This is clearly an area where the solutions and the values connected with it should be transferred in the near future to Europe as well.

C *Interaction as to the matter – The right to life*

Among the various rights and freedoms protected by the two here relevant conventions I am going to focus on that part of the jurisdictions where the transfer of values, the interaction of the two tribunals became obvious or where such an interaction in the near future could help maintaining the level of human rights protection in Europe.

The right to life is a field San José – due to the special circumstances – had more possibility to deal with. As Strasbourg[37] until the end of the 1980s did not really had to treat the question, it is quite obvious that later it paid attention to what the little sister, San José did. This reference became two-sided,[38] i.e. the two courts refer to each other in this field, but, admittedly, the topic is much more elaborated in the jurisdiction of San José as they have met more variations of the violation of the right to life in the past years.

Special cases in the Inter-American system are the so-called 'forced disappearances'. Already the first case, the *Velásquez Rodríguez v. Honduras*[39] (1988), disappearances in Honduras was the subject of the case of *Godínez Cruz*[40] as well.[41] This jurisdiction and its achievements were discussed in the complicated case of *Kurt v. Turkey*[42]. The – from the experienced Latin-America transferred logic – was helpful here, but actually the OAS and also another American relevant convention was taken into consideration. Furthermore, already in 1975 (the American Convention was not even in force) reference was made to the

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[33] *Indigenous Community Yakye Axa v. Paraguay*, IACtHR (2006) Series C No. 142 Interpretation of the Judgment on the merits, Reparations and Costs.
[34] *Aloeboetoe et al. v. Suriname*, IACtHR (1993) Series C No. 15 (Reparations).
[35] *Zanghì v. Italy*, ECtHR (1993) no. 11491/85 (Judgment of February 10, 1993). Strasbourg rejected the application of the *in integrum restitution* here.
[36] '*Street Children' (Villagrán-Morales et al.) v. Guatemala*, IACtHR (1997) Series C No. 32; *Loayza-Tamayo v. Perú*, IACtHR (1997) Series C No. 33, Series C No. 42 (Reparations).
[37] See e.g. the so-called *Gibraltar case (McCann et al. v. United Kingdom*, ECtHR (1995) (September 27, 1995), *Çiçek v. Turkey*, ECtHR (2001) (February 27, 2001); *Ognyanova and Choban v. Bulgaria*, ECtHR (2006) (February 23, 2006), etc.
[38] See e.g. *Massacre of La Rochela v. Colombia*, IACtHR (2007) Series C No. 163, 126
[39] *Velásquez-Rodríguez v. Honduras*, IACtHR (1987, 1988) Series C No. 1 (prel.), Series C No. 4. This case treated the unlawful detention and torture of Angel Manfredo Velásquez Rodríguez, student of the National Autonomous University in Honduras, which was disclaimed by the authorities.
[40] *Godínez-Cruz v. Honduras*, IACtHR (1987, 1989) Series C No. 3 (prel.), Series C No. 5.
[41] Among others also: *Caballero Delgado és Santana v. Colombia*, IACtHR (1995) Series C No. 22; *Durand and Ugarte v. Peru*, IACtHR (2000) Series C No. 68; *Barrios Altos v. Peru*, IACtHR (2001) Series C No. 75; *'Street Children' (Villagrán Morales et al. v. Guatemala)*, IACtHR (1999) Series C No. 63; *Mapiripani Massacre v. Colombia*, IACtHR (2005) Series C No. 134; all cases dealing mainly with amnesty or the obligation to investigate.
[42] *Kurt v. Turkey*, ECtHR (1998) no. 24276/94 (May 25, 1998); 66-67 ff.

Inter-American system (*Golder v. United Kingdom*)[43]. (And anything alike was completely forgotten in the case of *Cyprus v. Turkey*).[44]

The IACtHR elaborated already in the above mentioned judgments the triple system[45] of state obligations which leads us to the interesting problematic of the continuing violation theory, another sign of the transfer of values (see below). However, and it is now another aspect of the right to life, one of the main values of the European continent, the prohibition of the death penalty could not have been transferred until now: the IACtHR denied the demand of the IACnHR in November 2005 to give an advisory opinion on the death penalty…[46] Still, in the European case of *Öcalan* (mentioned above), Strasbourg has taken into consideration how the judges in San José deal with the problematic of the death penalty,[47] and in *VO v. France* the IACtHR was even cited as to the rights of a foetus.[48]

The establishment and consolidation of the continuing situation theory[49] is – at least partly – due to interaction. As declared, above all, in the cases *Moiwana Village v. Suriname*[50] and *Blake v. Guatemala*[51], the doctrine of 'continuing violation' is accepted[52] and applied in the Inter-American system. It means that once the country accepted the jurisdiction of the Court, 'any of its subsequent actions or inactions were subject to review, even if those actions arose out of an event that occurred prior to acceptance'.[53]

In the *Blake* case Nicholas Chapman Blake, an American journalist was detained and killed by members of a Guatemalan 'civil patrol', a paramilitary group in March 1985, two years later his body was disinterred, burned and re-buried elsewhere in order to make evidence disappear. The family tried in vain to get information from the Guatemalan authorities for years, it was due to private deals with civil patrol leaders that they got enough information to find at last his remains in June 1992.[54] In the meantime, in 1987, the state accepted the jurisdiction of the Inter-American Court of Human Rights. In the case of Blake, the Court found that the duty of the state to investigate is a continuing obligation, which persists until the remains of the disappeared person are found and the guilty have been prosecuted and punished.[55] The theory is based explicitly or can be derived from the right to fair trial and the general provision binding the states to respect human rights.[56]

In the *Moiwana Village* case, a rather recent decision of the IACtHR, object of the consideration was that 'on November 29, 1986, members of the armed forces of Suriname

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[43] *Golder v. United Kingdom*, ECtHR (1975) no. 4451/70 (February 21, 1975)
[44] *Cyprus v. Turkey*, ECtHR (May 10, 2001)
[45] To prevent, investigate and punish the human rights violations, and furthermore to provide reparations.
[46] See furthermore: Tigroudja, 'Chronique de la jurisprudence de la Cour Interaméricaine des Droits de l'Homme (2005)', in 66 *RTDH* (2006) 277-329, 282 f.
[47] ECtHR, *Öcalan* case, 63-64
[48] *VO v. France*, ECtHR (2004) no. 53924/00 July 8, 2004
[49] I use the notions 'continuing situation' and 'continuing violation' as synonyms, based on the judgments and the separate opinions of the cases (see below) *Moiwana Village, Blake, Serrano Cruz sisters, Alfonso Martín del Campo Dodd.*
[50] *Moiwana Village v. Suriname*, IACtHR (2005) Series C No. 124.
[51] *Blake v. Guatemala case*, IACtHR (1996, 1998) Series C No. 27 (prel.), Series C No. 36.
[52] The theory became in the meantime a well established place in the argumentation of the parties, see the e.g. the case of *Vargas-Areco v. Paraguay*, IACtHR (2006) Series C No. 155, 48.
[53] Ormachea, Pablo A.: Moiwana Village: The Inter-American Court and the 'continuing violation' doctrine, *Harvard Human Rights Journal*, 19 (2006) 283-288 (http://www.law.harvard.edu/students/orgs/hrj/iss19/ormachea.shtml, 10/09/2007)
[54] As already mentioned, until now, there are not too many cases in the system of the ECtHR where an effective violation of Article 2 of the European Convention has been established: see above. Whereas in the system of the Inter-American Court of Human Rights approximately forty percent of the jurisdiction had to treat the question of the right to life or physical integrity.
[55] IACtHR, *Blake* case, prel. 39-40
[56] ACHR, Article 1 (Obligation to Respect Rights) and Article 8 (Right to a Fair Trial).

attacked the N'djuka Maroon village of Moiwana. State agents allegedly massacred over 40 men, women and children, and razed the village to the ground'.[57] In a year, there was a change in the political system, and a new, democratically elected government came to power, which – after ratifying the American Convention on Human Rights – recognized the IACtHR's jurisdiction (in 1987). The same happened as in the Blake case: due to the continuing situation theory, the state was found guilty, not in the massacre, but in not having fulfilled 'its obligation to investigate the facts of the case, as well as identify, prosecute, and punish the responsible parties'.[58]

Already in the *Velásquez Rodríguez v. Honduras* case[59] in 1988, in one of the first cases for the IACtHR, the Court established a breach of the American Convention as regard to the general duty to guarantee the protected rights.[60] Ever since then – though not radically, but – it did not hesitate to interpret to some extent human rights in a manner that advances the victim's aspect to that of the diplomacy.

The *Blake* as well as the *Moiwana Village* cases are *the* extremely conformable examples for the continuing violation theory,[61] both of them concerning states that accepted the jurisdiction of the Court after the mentioned terrific events had happened.[62] This theory nevertheless enables the Court to stay within its competence, rejecting direct examination of events that happened prior to the recognition of the jurisdiction (principle of non-retroactivity), but exercising *de facto* jurisdiction. If the state fails to investigate, it does not fulfil its obligation to 'ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms' contained in the ACHR.[63] As the IACtHR expressed itself, 'in the case of a continuing or permanent violation, which begins before the acceptance of the Court's jurisdiction and persists even after that acceptance, the Tribunal is competent to examine the actions and omissions occurring subsequent to the recognition of jurisdiction, as well as their respective effects'.[64] Both in the *Blake* as well as in the *Moiwana Village* cases the state violated Blake's family's and respectively the survivors' right to judicial protection[65] and a fair trial[66].

Although the most characteristic occurrence of this theory is the American continent, the system of the Inter-American Court of Human Rights, we have to be aware that as *Judge Cançado-Trindade* has written in his separate opinion to the judgment *Blake v. Guatemala*, he observed the mentioned category occurring in some of the cases before the European Court of Human Rights[67] in the 1960s, mainly in the field of detention, and uses this fact also as an

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[57] IACtHR, *Moiwana Village* case, 3
[58] IACtHR, *Moiwana Village* case, Decision, 1
[59] IACtHR, *Velásquez-Rodríguez v. Honduras* case, Judgment of July 29, 1988.
[60] See furthermore Laly-Chevalier, ibid.
[61] See furthermore the *Serrano-Cruz Sisters v. el Salvador*, IACtHR Series C No. 120, 67, and the *Alfonso Martín del Campo Dodd v. Mexico*, Series C No. 113, 79
[62] The state recognition of the adjudicatory jurisdiction of the Court is essential both in the Inter-American system as well as in Europe, but – unlike in the European system – there it can even be done for specific unique cases (ACHR, Article 62).
[63] ACHR, Article 1(1)
[64] IACtHR, *Moiwana Village* case, 39
[65] ACHR, Article 25
[66] ACHR, Article 8
[67] *Neumeister v. Austria*, ECtHR (1968) Series A, No. 8 (Judgment of June 27, 1968); *Stögmüller v. Austria*, ECtHR (1969) Series A, No. 9 (Judgment of November 10, 1969); *Becker v. Belgium*, ECtHR (1962) Series A, No. 4 (Judgment of March 27, 1962). See also *Lawless v. Ireland (no.3)*, ECtHR (1961) Series A, No. 3 (Judgment of July 1, 1961); *Matznetter v. Austria*, ECtHR (1969) Series A, No. 10 (Judgment of November 10, 1969); *Ringeisen v. Austria*, ECtHR (1971) Series A, No. 13 (Judgment on the merits of July 16, 1971); *Wemhoff v. Germany*, ECtHR (1968) Series A, No. 7 (Judgment of June 27, 1968); *De Wilde, Ooms & Versyp (Vagrancy) v. Belgium*, ECtHR (1971) Series A, No. 12 (Judgment on the merits of June 18, 1971) and *Winterwerp v. the Netherlands*, ECtHR (1979) Series A, No. 33 (Judgment of October 24, 1979).

argument in his separate opinion.[68] The general obligation to respect human rights is also present in Article 1 ECHR, they are quasi parallel dispositions (another clear sign of the transfer of values).

As Cançado-Trindade emphasized: 'the provisions of human rights treaties bind not only the governments (as commonly and mistakenly assumed), but, more than that, the *States* (all its powers, organs and agents); the time has come, accordingly, to give precision to the extent of the *legislative and judicial obligations* of the States Parties to human rights cases'.[69] This approach makes us think about whether the related results of the Inter-American system could get back to the European system.[70] Taking into consideration also the time factor and the European legal traditions, the resuscitation of the theory in Strasbourg would only be of relevance for the last adhered some countries, where it can occur that the legislative and judicial obligations have not been completely fulfilled; or as to recently acknowledged rights (see additional protocols).[71]

The continuing violation theory is a way of thinking which has its origins in the European system, but was without doubt developed in the Inter-American system of human rights, especially in the jurisdiction of the Inter-American Court, and therefore again a value transferred from one continent to another.

4 Conclusions

The role of the Inter-American and European Human Rights Tribunals is significant in the general development of international law, especially as to the evolution of human rights protection in universal level as well, due to the transfer of values between these tribunals. It is to hope that both will adopt furthermore from each other the progressive and sometimes revolutionary legal institutions, or simply the way of thinking. The broad acceptance of this interaction between regional tribunals is clearly shown in the mere fact that even the parties themselves cite the jurisdiction of the IACtHR in Europe (*Akkum et al. v. Turkey*);[72] the great impact the interaction has on the European human rights protection is incontestable. And furthermore, it is very positive that in the field of international law, where there is actually no institutionalized coordination of the international fora, the latter take themselves the initiatives and pay attention to the jurisdiction of others.

Such a cross-fertilization is not at all uncommon for authors who already talk about a new *ius gentium.*[73] A *ius gentium*, which has as a basis the universality of at least certain rights and which is – so the logic – also clearly visible in the interaction of the international tribunals. As examined in this paper, the IACtHR has never been afraid of referring to the ECtHR, also in order to support its position, the latter takes more and more often into consideration what kind of solutions find the judges in San José. This results in a transfer of

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[68] As to the approximation of the respective case-laws see Cançado Trindade, Approximations and convergences in the case-law of the European and Inter-American Courts of Human Rights, in G. Cohen-Jonathan – J. F. Flauss (eds): *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l'homme*, Nemesis-Bruylant, Brussels, (2005) 101-138, 102

[69] Cançado-Trindade, ibid. 187

[70] See furthermore Cançado Trindade: Tribunais internacionais contemporâneos: coexistência e expansâo, January/June *DelRey jurídica*, Belo Horizonte, Brazil (2006) 6-11

[71] Where this well developed theory could have a greater effect is maybe the Human Rights Committee's practice (especially for those member states who have accepted individual complaints), or, more probably, the third big regional complex, the African continent's human rights protection system. This latter makes anyway a great use of the European and Inter-American systems logic, results and lessons.

[72] *Akkum et al. v. Turkey*, ECtHR (2005) no. 21894/93 Reports 2005-II (March 24, 2005)

[73] Cançado Trindade: General Course on Public International Law, in: *Recueil des cours, Académie de droit international, La Haye, 2005, Tome 316.* Martinus Nijhoff, Leiden-Boston, 2006. pp. 37-60

values, logic and way of appreciation, and so in a more unified human rights protection worldwide. And it is even true when really, every continent has its special features and circumstances.

With *Christian Tomuschat*'s words: '…the human rights idea has lost nothing of its original impetus… There is a growing awareness that human rights must be seen within the context of appropriate institutions. Human rights alone do not ensure the survival of human rights. They must be included in a network of institutions which are guided by the same philosophy… But it is clear… that human rights cannot be seen in isolation.'[74] Agreeing with these words, we can conclude that the interaction and transfer of values the regional human rights tribunals effectuate is a process helping human rights not only to be strengthened in their own territory, but equally in a universal context.

[74] C. Tomuschat, '*Human Rights. Between Idealism and Realism'*, Oxford University Press, New York (2003) 57