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THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS: TOWARDS A “CROSS FERTILIZATION”?

SUMMARY: 1. Introduction. - 2. Analogies and differences between the American Convention and the European Convention Human Rights. Their influences on the case-law of the Interamerican Court and of the European Court of human rights. - 3. Examples of the “judicial dialogue”. - 4. Concluding Remarks.

1. Introduction

In the more general phenomenon of the multiplication of jurisdictional remedies, many international courts tend to give up the classical judicial borrowing, based on the mere “importation” of foreign judicial systems, in search of more complex forms of judicial interaction of a “dialogic” kind, which can lead, in some cases, to a real “cross fertilization”¹.

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¹ See, among others, also, SCHEECK, *Solving Europe’s binary human rights puzzle. The interaction between supranational Courts as a parameter of European governance*, in <www.ceri-sciencespo.com/publica/question/qdr15.pdf>. In the specialized literature the phenomenon of “cross fertilization” between Courts (in the Spanish version “*cruciamiento de jurisprudencia*”) is being increasingly debated. See, among others, TREVES, *Cross-fertilization between different international courts and tribunals: the Mangouras case*, in *Coexistence, cooperation and solidarity*, 2012, n. 2, pp. 1787-1796; BROWN, *The cross-fertilization of principles relating to procedure and remedies in the jurisprudence of international courts and tribunals*, in *Loyola L.A. Int. Comp. Law Rev.*, 2008, n. 3, pp. 219-245; JACOBS, *Judicial Dialogue and the Cross-Fertilization of the Legal Systems of the European Court of Justice*, in *Texas Int. Law Jour.*, 2003, n. 38, pp. 547 ss.; ZICCARDI-CAPALDO, *Jurisprudential Cross-Fertilization Forum: A Pilot Experiment in Legal Harmonization on the Tenth Anniversary of the Global Community*, in *Glob. Comm. YB. Int. Law Jur.*, 2010, n. 1, pp. 207-211. See also in the doctrine in French language, TURGIS, *Les interactions entre les normes internationales*

Within an “integrated”² – or basically integrated system of human rights – like the European one, the “circulation” among international judicial systems, both for interpretation or inspiration needs, for parametrical and/or application ends, is by now frequent.³ An evidence of this is the mutual relationship of semantic relationship and “selective” reception of (normative and jurisprudence) values existing between the judgements of the Court of Justice of the European Union, and those of the European Court of Human Rights and, at last, of the Constitutional Courts of the different European States: all that always preserving the functional and organic autonomy of such judicial systems⁴.

Such process of mutual interaction is a “necessary” consequence of the variety of international and internal sources concerning the protection of fundamental rights⁵, since

relatives aux droits de la personne, in *Collection des “Publications de l’Institut international des droits de l’homme”*, Paris, 2012, n. 17.

² I want to refer to a kind of “integrated” system of protection of the fundamental rights that in Europe involves the international level, represented by European Convention on Human Rights (ECHR); the “supranational” level, represented by the Charter of Fundamental Rights of the European Union and by the jurisprudence on human rights of the ECJ and the national level, with special reference to the constitutional provisions of each country. STROZZI, *Il sistema integrato di tutela dei diritti fondamentali dopo Lisbona: attualità e prospettive*, in *Dir. Un. Eur.*, 2011, n. 4, p. 837 ff. uses such expression. Also in the Spanish doctrine we can find the reference, in different forms, to the idea of “*sistema integrado*”. GARCÍA ROCA, FERNÁNDEZ, *Integración europea a través de derechos fundamentales: de un sistema binario a otro integrado*, Madrid, Centro de Estudios Políticos y Constitucionales, 2009 and HENRÍQUEZ VIÑAS, *Sistema Integrado de protección de los derechos humanos*, in *Estudios Constitucionales*, 2007, n. 2, pp. 121-135. See the definition given in the latter work (p. 134 ff.) where the following is emphasized: «[...] *no deben considerarse el ámbito interno y el ámbito internacional como dos rdenes distintos de promoción y protección de los derechos humanos, totalmente divorciados o separados, sino, por el contrario, aquéllos interactúan y forman un sistema integrado de protección de los derechos humanos*» (the underlining is mine). For a reconstruction of human rights “as a system” see GUARINO, *I diritti dell’uomo come sistema: un’ipotesi di lavoro*, in *Riv. coop. giur.*, 2008, n. 28, pp. 7-45. For the particular interpretation of multilevel European “system”, see DI STASI, *Diritti umani e sicurezza regionale. Il “sistema” europeo*, Napoli, 2011, part II, where it is possible to find relevant bibliographic references.

³ In this sense, TIZZANO, *Le Cours européennes et l’adhésion de l’Union à la CEDH*, in *Dir. un. eur.*, 2011, n. 1, p. 47: «[...] *les rapports entre les ordres juridiques sont tellement imbriqués sur le plan structurel qu’on ne peut plus penser les appréhender de manière verticale. Sur plusieurs aspects il convient plutôt de les concevoir comme des relations à caractère, pour ainsi dire, circulaire*». See also ALTER, *The Global Spread of European Style International Courts*, in *Northwestern Public Law Research Paper*, 2011, June, in <www.law.northwestern.edu/faculty>, n. 11-55, in particular p. 2, where it is referred to «three adaptations of the ECtHR».

⁴ For an accurate synthesis of the debate on the subject of cooperation and mutual influence between Courts in Europe, see FRAGOLA, *La cooperazione tra Corti in Europa nella tutela dei diritti dell’uomo. Convegno interinale SIDI-Università della Calabria - Arcavacata di Rende (Cosenza), 12 Aprile 2010*, Napoli, 2012.

⁵ The formula of multilevel constitutionalism has been drawn up after the signing of Treaty of Amsterdam see PERNICE, *Multilevel Constitutionalism in the European Union*, in *Eur. Law Rev.*, 2002, n. 5, p. 511 ff. It preserves its unchanged validity also after the coming into force of the Treaty of Lisbon, where the same Author identifies its attitude to become a case of «multilevel constitutionalism in action». See PERNICE, *The Treaty of Lisbon: multilevel constitutionalism in action*, in *Col. Jour. Eur. Law*, 2009, n. 3, p. 349 ff.; PERNICE, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, in *WHI-Paper*, 2009, n. 2, p. 351 ff. On the “multilevel” protection of fundamental rights, on the variety of guarantee devices and on the judicial “activism” of the national and international Courts in Europe, see among others, D’IGNAZIO, *Multilevel constitutionalism tra integrazione europea e riforme degli ordinamenti decentrati*, Milano, 2011; CARTABIA *I diritti in azione. Universalità e pluralismo dei diritti fondamentali delle Corti europee*, Bologna, 2007; PANUNZIO, *I diritti fondamentali e le Corti in*

such coexistence and sometimes interference between sources could find some elements “simplifying” the still in course accession process of the European Union to the European Convention for the Protection of Human Rights (ECHR), according to Article 218 of the Treaty on the Functioning of the European Union (TFEU)⁶.

In Latin America we cannot find a similar phenomenon of judicial “dialogue” existing between the Inter-American Court of Human Rights and the courts ensuring the jurisdictional function within the supranational integration processes⁷ or of political-economic cultural⁸ and economic-commercial cooperation⁹.

That being stated, the above mentioned process of “circulation” of jurisprudence values that has emerged within the European observation field, can, at the same time influence the practice of two “thematic” Courts (the European Court of Human Rights and the Inter-American Court of Human Rights)¹⁰, working in fields being so distant from each other and marked with different expressions referring to “juridical particularism”?¹¹

Europa, Napoli, 2005; BILANCIA, DE MARCO *La tutela multilivello dei diritti. Punti di crisi, problemi aperti, momenti di stabilizzazione*, Milano, 2004. See also the heading by. CARDONE, *Diritti fondamentali (tutela multilivello)*, *Enc. Giu., Annali IV*, Milano, 2011, p. 335 ff.

⁶ The completion of this process, which, as it is well known, is juridically based both on Article 6(2) EU Treaty, and on Article 59 ECHR, in particular para. 2 introduced after the coming into force of Protocol XIV – will cause the transition of a jurisdictional system, built on the mere coexistence between two autonomous and independent Courts (ECJ and ECHR) and two catalogues of rights that cannot be fully assimilated to each other, towards more advanced forms of integration between the two sub-systems. For a synthesis of the recurring joining question I take the liberty of referring to DI STASI, *La vetero-nova quaestio dell'adesione dell'Unione europea alla CEDU nella prassi delle istituzioni europee*, in *Grotius*, 2012, special number, pp. 7-18.

⁷ As for example the MERCOSUR (*Mercado Común del Sur*) or the Caribbean Community (CARICOM).

⁸ Let us refer, for example, to the Union of South American Nations (UNASUR).

⁹ In particular the North American Free Trade Agreement (NAFTA). For an outline of the development of a whole of jurisdictional systems having a regional character, see P. PENNETTA *L'evoluzione dei sistemi giurisdizionali regionali ed influenze comunitarie. Atti del Convegno di Salerno 1/2 Ottobre 2009*, Bari, 2010.

¹⁰ On the similarities and differences between the jurisprudences of the two Courts, see SALVIOLI, ZANGHI, *Jurisprudencia regional comparada de Derechos Humanos. El Tribunal Europeo y la Corte Interamericana*, Valencia, 2013; AMBOS BOHM, *Tribunal Europeo de Derechos Humanos y Corte Interamericana de Derechos Humanos: ¿Tribunal tímido vs. Tribunal audaz?*, in FERRER MAC-GREGOR, HERRERA GARCÍA, *Diálogo jurisprudencial en derechos humanos entre Tribunales Constitucionales y Cortes Internacionales. In Memoriam Jorge Carpizo, generador incansable de diálogos*, México, 2013, p. 1057 ff; BURGORGUE-LARSEN, *Les Cours européenne et interaméricaine des droits de l'homme et le “système onusien”*, in DUBOUT, TOUZE, *Les droits fondamentaux, charnières entre ordres et systèmes juridiques*, Paris, 2010, pp. 91-115; HAECK, ZWAAK, VERVAELE, OLASOLO, *When Two Regional Human Rights Systems Meet: The Inter-American and European Human Rights System in a Comparative Perspective/The Role of Latin America in International Criminal Justice*, Oxford, 2010; CITRONI, *Corte europea e Corte interamericana: due corti regionali dei diritti umani a confronto*, in SCOVAZZI, PAPANICOLOPULU, URBINATI, *I diritti umani di fronte al giudice internazionale*, Milano, 2010, pp. 49-61; HAWKINS, JACOBY, *A comparison of the European and Inter-American Courts of Human Rights*, in *Jour. Int. Law Int. Rel.*, 2010, n. 6, pp. 35-83; TANZARELLA, *Gli effetti delle decisioni delle Corti dei diritti: Europa e America a confronto*, in *Quad. cost.* 2009, n. 2, pp. 323-350; REVENGA SANCHEZ, VIVIANA GARCÉS *Tendencias jurisprudenciales de la Corte interamericana y el Tribunal europeo de Derechos Humanos. Derecho a la vida, Libertad personal, Libertad de expresión, Participación política*, Valencia, 2007; CANÇADO TRINDADE, *Approximations and Convergences in the Case-law of the European and Inter-American Courts of Human Rights*, in COHEN-JONATHAN, FLAUSS *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l'homme*, Bruxelles, Bruylant, 2005, p. 101-138, in particular pp. 101-102; LONDOÑO LÁZARO, *Las Cortes interamericana y europea de derechos humanos en perspectiva comparada*, in *Rev. col. der. int.*, 2005, n. 5, pp. 89-115; CANÇADO TRINDADE, *Le développement du Droit*

Does the “circulation” process of judgments and of jurisprudence values between the European Court of Human Rights and the Inter-American Court of Human Rights causes phenomena of trans-regional judicial dialogue¹², of judicial re-use, in the sense of an expression of jurisprudential law in another context¹³, up to the formulation of a hypothesis of “cross-fertilization”?

2. Analogies and differences between the American Convention and the European Convention Human Rights. Their influences on the case-law of the Interamerican Court and of the European Court of human rights

The aim of this work is that of overcoming the rigid application of juridical categories and patterns of reconstruction investigation based both on Euro-centred and American-centred approaches. It is meant for checking the influence of the jurisprudential practice of the European Court of Human Rights on the jurisprudence of the Inter-American Court of Human Rights (and, possibly, the contrary) with reference to the regional protection of human rights guaranteed by the European Court of Human Rights and the American Convention on Human Rights (ACHR)¹⁴. All this is also guaranteed by

international des droits de l'homme à travers l'activité et la jurisprudence des Cours européenne et interaméricaine des droits de l'homme, in *Rev. univ. dr. Homme*, 2004, n. 5, pp. 177-180; BUERGENTHAL, *The European and Inter-American Human Rights Courts: Beneficial Interaction*, in MAHONEY, MATSCHER, PETZOLD, WILDHABER *Protecting Human Rights: The European Perspective - Studies in memory of Rolv Ryssdal*, Köln-Berlin-Bonn-München, Carl Heymanns Verlag KG, 2000, pp. 123-133; FIX-ZAMUDIO, *The European and the Inter-American Courts of Human Rights: a brief comparison*, in MAHONEY et Ibidem, pp. 507-533.

¹¹ For a critical analysis of the practice adopted by the Inter American Commission of Human Rights and by the IACHR in the perspective of a “*particularisme interaméricain*”, see HENNEBEL, TIGROUDJA *Le particularisme interaméricain des droits de l'homme*, Paris, 2009. For a rather sceptical interpretation of the attitude to “exportation” (*outside its own sphere*) of the *Inter-American Human Rights Law*, see NEUMAN, *The External Reception of Inter-american Human Rights Law*, in *Quebec Jour. Int. Law* 2011, pp. 99-125.

¹² The phenomenon of judicial *cross-fertilization* and of the *trans-regional judicial dialogue*, which is by now rather consolidated, can be widely found also in the so called “system of conferences”, which makes it easier for judges to have personal contacts with each other and fosters structural connections between jurisdictions. See, with special reference to Constitutional Courts ORRÙ, *La cross fertilization a carattere informale e il 'sistema delle conferenze' tra Corti costituzionali e organi equivalenti*, in *Dir. pub. comp. eur.*, 2011, n. 1, p. 189-208. Among the first affirmations of a “transjudicial communication” see SLAUGHTER, *Typology of Transjudicial Communication*, in *Univ. Rich. Law Rev.*, 1994-1995, n. 29, p. 99 ff.

¹³ See CARDUCCI, *Judicial Re-Use: “Codification” or Return of Hegelism? The Comparative Arguments in the ‘South’ of the World*, *Second Thematic Congress of the International Academy of Comparative Law*, 2012, pp. 1-14, <works.bepress.com/michelecarducci/1>.

¹⁴ In the specialized literature investigations devoted to the comparison between the two Conventions do not lack. Besides the quotations included in the foregoing reference, see the big work by ROCA, SÁNCHEZ, SANTOLAYA MACHETTI, CANOSA USERA *El Diálogo entre los Sistemas Europeo y Americano de Derechos Humanos*, Cizur Menor-Navarra, 2012 and ÚBEDA DE TORRES, *Estudio comparado de los sistemas europeo e interamericano de protección de los derechos humanos*, Madrid, 2007. See also, CLAPHAM, *Regional Human Rights Bodies*, Ibidem, *Human Rights Obligations of Non State Actors*, Oxford, 2006, pp. 347-431; BENVINDO, *Sistema europeo y sistema interamericano para la protección de los derechos humanos: un breve estudio comparado*, 2005; CAFLISCH, CANÇADO

them within their task of providing a correct interpretation and application of the rights referred to by the two conventions, and also of helping the development of jurisprudential approaches deriving from the comparison of procedures which, even if they are different from each other, are characterized by important elements of similarity¹⁵.

It is not the case to monitor a mere emulation phenomenon, which is also not the only one, compared with so many adjustment versions of a European jurisdictional model existing in different regions in the world. As regards that so widely explored field of the doctrine, which is so called “proliferation”, in different continents and sub-continents, of courts and tribunals also in the field of the protection of human rights¹⁶, the reasons for a justification of the reasons for a justification of such a comparative approach are the wide (and well known) similarity of substantial contents between the two conventions¹⁷ and the partial analogies, *mutatis mutandis*, between the revision procedures intervened within them¹⁸.

The two conventions concern juridical and meta-juridical contexts that are also very different from each other. This can account for the marked differences in the way the Courts are composed and the jurisprudence “product” size (a “flood” characteristic of the case law of the European Court of Human Rights, compared with the small amount of judgments of the Inter-American Court of Human Rights); can also justify the different trust the signing countries have on the convention method.

Between the two conventions a time interval of decennia elapses. This circumstance could lead to assume that some “revisionist” trends of a procedural kind, and some jurisprudence approaches of a “creative” kind, already experimented in the interpretation

TRINDADE, *Les Conventions américaine et européenne des droits de l'homme et le droit international général*, in *Rev. gén. dr. int. pub.*, 2004, n. 1, p. 5-61; GROS ESPIELL, *La Convention américaine et la Convention européenne des droits de l'homme. Analyse comparative*, in *Recueil des Cours*, 1989, n. 30, pp. 167-412; ROBERTSON, *The American Convention on Human Rights and the European Convention: A Comparative Study*, in *Eur. YB*, 1981, n. 29, pp. 50-76; BUERGENTHAL, *The American and European Convention on Human Rights: similarities and differences*, in *Am. Un. Law Rev.*, 1980-1981, n. 30, pp. 155-66; FROWEIN, *The European and the American Convention on Human Rights. A comparison*, in *Hum. Rights Law Jour.* 1980, n. 1, pp. 44 ff.; MENGOZZI, *Le contrôle du respect des droits de l'homme de la Convention européenne par rapport au système de mise en oeuvre Inter-américain*, in *Riv. dir. eur.* 1979, n. 1, p. 3-39.

¹⁵ On the change of the jurisprudential approaches, see, among others, on the subject of the adoption of provisional measures, the judgment of the ECHR, G.C., *Mamatkoulou and Askarov v. Turkey*, 4 February 2005, Cases Nos. 46827/99 and 46951/99, where the evolution of the foregoing *case law* also takes advantage of a comparative analysis of different procedures carried out by different Committees (United Nation Committee on human rights, United Nation Committee against torture) as well as by different Courts (ICJ, IACtHR).

¹⁶ For a global picture of the phenomenon see. PENNETTA (ed.), *supra* n. 9 and DEL VECCHIO, *I Tribunali internazionali tra globalizzazione e localismi*, Bari, 2009.

¹⁷ Let us think of the ways for selecting the “catalogue” of recognized rights that starts from the only civil and political rights and later includes other categories of rights. The similarity of the normative contents of the two conventions represents in itself an element of “fertilization” of the ECHR compared with the later Convention of San José. On this point let me refer to. DI STASI, *Il diritto all'equo processo nella CEDU e nella Convenzione americana sui diritti umani. Analogie, dissonanze e profili di convergenza giurisprudenziale*, Torino, 2012, in particular part I. Here you can find more bibliographical references about the analogies and differences between the two conventions.

¹⁸ Let us refer to the evolution of the *status* of the individual plaintiff by the consolidation of his prerogatives caused by Protocol XI in the ECHR (see. DI STASI, *supra* n. 17, Ch. II), and, at a more limited extent, by regulation changes in the Convention of San José (see A. DI STASI, *supra* n. 17, Ch. III).

and application of the ECHR, can be reproduced within the interpretation and application of the ACHR¹⁹.

They are, then, two conventions that, apart from state options of a monistic or dualistic kind²⁰, are frequently referred to in the case law of national tribunals (European and American) specially in Latin America over the last years.

3. *Examples of the “judicial dialogue”*

As above said, the marked elements of assimilability both of the fundamental “catalogue” of the protected rights and of the procedural guarantee instruments provided by the ACHR and by the ECHR represent a fertile field for the growth of a trans-regional judicial dialogue - if not of a real “cross-fertilization” - between the European Court of Human Rights and the Inter-American Court of Human Rights.

Without claiming to be exhaustive, a short overview follows, which illustrates some elements of such a “judicial dialogue”.

Taking into account the time when it was born and the characteristics of the ACHR, it was quite easy to foresee that the European Court of Human Rights was to represent a point of reference for the judges in San José. About a half of the whole amount of case law of the Court of San José, includes references to the norms of the ECHR and of its Protocols and to (the more consolidated) jurisprudence of the European Court of Human Rights. They are used within the body of judgements in different ways: among them there is that emphasizing the “internal” importance of the “*fuentes constitucionales americanas*” and (in some cases) also functioning as “nourishing source” of judicial domestic interpretations.

The reference to the judgements of the European Court of Human Rights is carried out by using a wide formula such as «*segundo jurisprudencia internacional*»²¹.

Sometimes the jurisprudence of the European is mentioned together with its own one (in a generic way within the body of the judgement and with specification in the references)²²; in other cases, instead, the reference is only made to the «jurisprudence of the

¹⁹ On the “wide extent” of some jurisprudential lines adopted by the IACTHR, considered by the Author to be useful to support the unity of the International Law, see. LIXINSKI, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, in *Eur. Jour. Int. Law*, 2010, n. 21, pp. 585-604.

²⁰ This work does not deal with these aspects and that is with the choice for a model of inclusion of conventions in internal law systems of a dualistic kind (by a national law that transforms conventional obligations into an applicable law) or of a monistic kind that (according to the obligatory character of contents of the international treaties) ensures their execution and a direct application by internal tribunals.

²¹ This is showed, among others, by IACTHR (Judgment) 26 November 2008, *Tiu Tojin v. Guatemala*, para. 85; IACTHR (Judgment) 18 September 2003, *Bulacio v. Argentina*, para. 96.

²² IACTHR (Judgment) *Luna López v. Honduras*, para. 123. In particular, in note n. 218, the Court underlines that the Inter-American Court of Human Rights has recognized in the same terms the relationship between environmental protection and the realization of human rights. See, ECtHR G.C. (Judgment) 19 February 1998, *Guerra et alia v. Italy*, Case No. 14967/89, para. 60; ECtHR (Judgment) 9 December 1994, *López Ostra v. Spain*, Cases No. 16798/90, para. 51; ECtHR (Judgment) 9 June 2005, *Fadeyeva v. Russia*, Cases No. 55723/00,

European Human Rights System»²³. Above all over the last years some interpretations made by the European Court of Human Rights have been referred to by the Inter-American Court of Human Rights to support their arguments²⁴, to define delicate bioethical issues²⁵, even by a direct reference to single points in judgments²⁶.

paras. 68-79. IACtHR (Judgment) 30 July 2009, *Reverón Trujillo v. Venezuela*, para. 70: «According to the jurisprudence of this Court and the European Court, [...] the following guarantees are derived from the judicial independence: an adequate appointment process, the tenure in the position, and the guarantee against external pressures» (the underlining is mine).

²³ IACtHR (Judgment) 1 September 2010, *Ibsen Cárdenas y Ibsen Peña v. Bolivia*, para. 60: «The characterization of forced disappearance as multiply offensive and continuing or permanent is reflected in the jurisprudence of this Tribunal and can be inferred not only from the definition of Article 2 of the Inter-American Convention on Forced Disappearance, [...] but also from other definitions included in different international instruments that similarly mention the following as concurring and constitutive elements of forced disappearance: a) the deprivation of liberty; b) the direct intervention of state agents or their acquiescence; and c) the refusal to acknowledge the detention and reveal the fate or whereabouts of the affected person. On previous occasions, this Tribunal has mentioned that, additionally, the jurisprudence of the European Human Rights System, the decisions of different bodies of the United Nations and several Constitutional Courts and high national courts of the American States agree with the indicated characterization» (the underlining is mine). See, also, IACtHR (Judgment) 19.8.2013, *Gaudiel Álvarez et al. ("diario militar") v. Guatemala*, para. 64 e IACtHR (Judgment) 29 November 2012, *García and family v. Guatemala*, para. 97 which refers to jurisprudence of the European Human Rights System on enforced disappearance.

²⁴ IACtHR (Judgment) 24 October 2012, *Nadège Dorzema et al. v. Dominican Republic*, paras. 85, 125-126: «In order to respect the appropriate measures to take if the use of force becomes essential, this must be used in keeping with the principles of legality, absolute necessity, and proportionality [...]. The ECtHR has indicated that it cannot be concluded that the requirement of "absolute necessity" for the use of force against people who do not pose a direct threat is proved, even when the lack of the use of force would result in the loss of the opportunity to capture them (the underlining is mine). Although, in theory, the events of this case could constitute the presumption of opposing resistance to authority and prevention of flight, the Court considers that, even when abstaining from the use of force would have allowed the individuals that were the subject of the State's action to escape, the agents should not have used lethal force against people who did not represent a threat or a real or imminent danger to the agents or third parties. Consequently, in short, this event did not constitute a situation of absolute necessity» (the underlining is mine); IACtHR (Judgment) 26 June 2012, *Díaz Peña v. Venezuela*, para. 114: «First, the Court notes that the State, in its arguments, seeks to require the Court to modify its consistent case law which affirms that if the objection of failure to exhaust domestic remedies is not filed at the appropriate moment, the possibility of filing this objection is relinquished. In this regard, the Court reiterates, as it has in the cases of *Reverón Trujillo*, *Usón Ramírez* and *Chocrón Chocrón*, that although the supervision of the IACtHR is of a subsidiary, supplementary and complementary nature, Article 46(1)(a) of the Convention stipulates that the rule of the exhaustion of domestic remedies must be interpreted in accordance with generally recognized principles of international law, which include the principle establishing that the use of this rule is a defense available to the State and, therefore, must be verified at the procedural moment in which the objection has been filed. If it is not filed while the admissibility is being processed before the Commission, the State has relinquished the possibility of using this measure of defense before the Court. This has been recognized not only by this Court, but also by the ECtHR (the underlining is mine). Consequently, the Court reiterates that the interpretation that it has given to Article 46(1)(a) of the Convention for more than 20 years is in conformity with international law»; IACtHR 24 February 2012, *Atala Riffo and daughters v. Chile*, para. 258 about impartiality of a judge.

²⁵ An interesting examination of the ECtHR case law on the protection of prenatal life is in IACtHR (Judgment) 28 November 2012, *Artavia Murillo et al. ("in vitro fertilization") v. Costa Rica*, paras. 234-242.

²⁶ E.g.: IACtHR (Judgment) 24 November 2009, *La Masacre de Las Dos Erres v. Guatemala*, para. 189 that refers to ECtHR (Judgment) 20 December 2001, *Buchberger v. Austria*, para. 35, ECtHR (Judgment) 12 July 2001, *T*

In some cases the Inter-American Court of Human Rights underlines, by using expressions such as «likewise»²⁷ or «similar to»²⁸ – that its directions are identical with those issued by the European Court of Human Rights; in some others, on the contrary, it highlights the analogies between the articles of the ECHR and those of the ACHR²⁹; sometimes, instead, it shows the different shades of meaning existing between the two systems³⁰.

As regards the specific judgements of the European Court of Human Rights that are referred to, the frequent reference to some of them, thus representing a kind of leading cases undoubtedly exists. They are, of course, apart from some exceptions, rather famous cases³¹.

and K v. Finland, Judgment, para. 151, EctHR (Judgment) 13 July 2000, *Elsbolz v. Germany*, para. 43, EctHR (Judgment) 9 June 1998, *Bronda v. Italy*, para. 51, EctHR (Judgment) 7 August 1996, *Johansen v. Norway*, para. 52, and *Juridical Condition and Human Rights of the Child*, OC-17/02, para. 72, on the mutual enjoyment of the coexistence between parents and their children which constitutes a fundamental element of family life); IACtHR (Judgment) 20 November 2009, *Usón Ramírez v. Venezuela*, para. 19; IACtHR (Judgment) 16 November 2009, *González et al. ("Campo Algodonero") v. México*, para. 292; IACtHR (Judgment) 24 September 2009, *Davosta Cadogan v. Barbados*, para. 18; IACtHR (Judgment) 1 July 2009, *Acevedo Buendía et al. ("Cesantes y Yubilados de la Contraloría") v. Perú*, paras. 70-101.

²⁷ IACtHR (Judgment) 24 November 2009, *"Las Dos Erres" Massacre v. Guatemala*, para. 189: «Likewise, the jurisprudence of the ECtHR has indicated that the mutual enjoyment of the coexistence between parents and their children constitutes a fundamental element of family life, and that Article 8 ECHR not only has the goal of protecting the individual against arbitrary interference by public authorities, but also presupposes positive obligations by the State to honor effective respect for family life» (the underlining is mine).

²⁸ IACtHR (Judgment) 20 November 2009, *Usón Ramírez v. Venezuela*, para. 19: «This Tribunal, similar to the ECtHR has affirmed consistently that an objection to the exercise of the Court's jurisdiction based on the alleged lack of exhaustion of domestic remedies must be submitted in a timely manner from the procedural standpoint» (the underlining is mine).

²⁹ IACtHR (Judgment) 14 May 2013, *Mendoza et al. v. Argentina*, para. 174. In this case the Court notes that, in the judgment *Harkins and Edwards v. the United Kingdom*, the ECtHR established that the imposition of a severely disproportional sentence can be a cruel treatment and, therefore, may violate Article 3 ECHR, which corresponds to Article 5 ACHR.

³⁰ IACtHR (Judgment) 20 November 2012, *Gudiel Álvarez et al. ("diario militar") v. Guatemala*, paras. 319, 391: «Lastly, regarding the alleged violation of freedom of expression to the detriment of the next of kin, the Court notes that the two freedoms (of association and of expression) are intrinsically related rights. Indeed, the European Court has recognized that the protection of freedom of thought and expression is one of the purposes of freedom of association (the underlining is mine). [...] Nevertheless, the Court considers that each of the rights contained in the Convention has its own sphere, meaning and scope».

³¹ Among them we can remember: ECtHR (Judgment) 21 June 2007, Cases Nos. 57953/00 and 37392/03, *Bitiyeva and X v. Russia*, paras. 90-91; ECtHR (Judgment) 28 January 2003, Case No. 44647/98, *Peck v. The United Kingdom*, paras. 57-59; ECtHR G.C. (Judgment) 10 May 2001, Case No. 25781/94, *Cyprus v. Turkey*, paras. 136, 150 and 158; ECtHR (Judgment) 14 November 2000, Case No. 24396/94, *Tas v. Turkey*, paras. 132-134 and 147-148; ECtHR (Judgment) 13 June 2000, Case No. 23531/94, *Timurtas v. Turkey*, para. 63; ECtHR G.C. (Judgment) 8 July 1999, Case No. 23657/94, *Çakıcı v. Turkey*, paras. 104-106; ECtHR G.C. (Judgment) 2 September 1998, Case No. 22277/93, *Yasa v. Turkey*, paras. 94-96; ECtHR (Judgment) 25 May 1998, Case No. 24276/94, *Kurt v. Turkey*, paras. 124-128; ECtHR G.C. (Judgment) 18 December 1996, Case No. 15318/89, *Loizidou v. Turkey*, para. 39; ECtHR G.C. (Judgment) 16 September 1996, Case No. 21893/93, *Akdivar et al. v. Turkey*, paras. 66-69; ECtHR (Judgment) 16 December 1992, Case No. 13071/87, *Edwards v. The United Kingdom*, para. 34; ECtHR (Judgment) 22 April 1992, Case No. 12351/86, *Vidal v. Belgium*, para. 33; ECtHR (Judgment) 26 April 1979, Case No. 6538/74, *The Sunday Times v. The United Kingdom*, para. 65.

Particularly frequent is the reference to the jurisprudence of the European Court of Human Rights on the subject of «moral damage»³², of right to trial within a reasonable time³³ and of the «interpretation of a judgment»³⁴.

The opposite phenomenon shows to be completely different in size that is the reference, by the European Court of Human Rights, to the jurisprudence developed by the Court of San José and, more in general, to the normative sources of the Inter-American system of human rights.

Starting from a generic reference to the ACHR and its articles, which can be found in the case law being most linked to the European Court³⁵ we can observe the tendency for a

³² The most frequently referred to cases in this regard are: ECtHR (Judgment) 2 November 1993, Cases Nos. 12325/86 and 14992/89, *Kemmache v. France* (nos. 1 and 2), para. 11; ECtHR (Judgment) 19 February 1991, Case No. 13440/87, *Ferraro v. Italy*, para. 21; ECtHR (Judgment) 28 June 1990, Case No. 11309/84, *Mats Jacobsen v. Sweden*, para. 44.

³³ IACtHR (Judgment) 28 August 2013, *García Lucero et alia v. Chile*, para. 246: «In this regard, the Court has taken into consideration the case law of the European Court of Human Rights, which considered that the advanced age of individuals involved in judicial proceedings required the authorities to exercise special diligence in deciding the respective proceeding»; IACtHR (Judgment) 22 August 2013, *Mémoli v. Argentine*, para. 30: «[...] Similarly, the European Court of Human Rights (hereinafter ‘European Court’) has established that the purpose of a similar rule in the European system is to ensure legal certainty, to guarantee that cases submitting matters relating to the European Convention on Human Rights are examined within a reasonable time, and to protect the authorities and other persons involved from finding themselves in a situation of lack of certainty for an extended period of time». Among others see IACtHR (Judgment) 31 August 2012, *Furlan and family v. Argentina*, para. 150: «In fact, the ECtHR has repeatedly indicated that “enforcement proceedings must be regarded as the second stage of the proceedings. Similarly, in the case of *Silva and Pontes v. Portugal*, the Court established that the guarantees established in Article 6 ECHR apply both to the first stage of the proceedings as well as to the second. In addition, in the case of *Robins v. United Kingdom* the Court concluded that all stages of the proceedings for the determination of civil rights and obligations, “not excluding stages subsequent to judgment on the merits” shall be resolved within a reasonable time (...)» and paras. 194-195: «The Court reiterates that, in the analysis of the reasonableness of the time, the adverse effect of the duration of the proceedings on the judicial situation of the person involved in it must be taken into account, bearing in mind, among other elements, the matter in dispute [...]. For its part, the ECtHR has, on several occasions, used this criterion in the analysis of a reasonable time (...); IACtHR (Judgment) 27 April 2012, *Fornerón and daughter v. Argentina*, para. 74: «In this regard, this Court has established that it is not possible to argue domestic obstacles, such as the lack of infrastructure or personnel to conduct judicial proceedings, in order to be relieved of an international obligation. Similarly, the ECtHR has determined that a chronic backlog of cases is not a valid explanation for excessive delay». About the obligation to investigate within a reasonable time, see IACtHR (Judgment) 21 May 2013, *Suárez Peralta v. Ecuador*, para. 102 that refers to the case law of the ECtHR.

³⁴ Among others see IACtHR (Judgment) 24 September 1999, *Ivcher Bronstein v. Peru*, para. 45: «[...] In the *Soering v. United Kingdom* case (1989), the ECtHR declared that in interpreting the ECHR “regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms [...] Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective»; IACtHR (Judgment) 29 May 1999, *Suárez Rosero v. Ecuador*, para. 20: «[...] The case law of this Court is consistent with that of the European Court of Human Rights, which held that interpretation of a judgment shall not alter it in respect of any issue that the Court decided “with binding force» (ECtHR (Judgment) 7 August 1996, Case No. 15175/89, *Allet de Ribemont v. France* and ECtHR (Judgment) 3 July 1997, Case No. 13616/88, *Hentrich v. France*).

more and more detailed illustration of the case law of the Inter-American Court of Human Rights and with the decisions of the Inter-American Commission of Human Rights.

Some “privileged” field subjects can be found in which the references to the Inter-American system are specially frequent and in which «the IACHR is held to be the greater expert»³⁶. I refer, for example, to the decisions on violations of Articles 2 and 3 of the ECHR in cases where torture and the right to life have been under discussion or in cases concerning forced disappearances³⁷. We cannot but underline the potential influence which the case law of the European Court of Human Rights, the Inter-American Court of Human Rights jurisprudence could have on the administrative detention of irregular migrants and, generally, on the fundamental rights of irregular migrants, above all in the light of landmark cases (as the case *Vélez Loor v. Panama*)³⁸.

As regards the context in which the reference is made, it is conveyed by the formulas «other relevant sources», «relevant domestic law and practice, international and comparative instruments», «relevant international materials» or *similia*³⁹.

³⁵ ECtHR (Judgment) 16 October 2001, Case No. 39846/98, *Brennan v. the United Kingdom*, para. 38, which refers to Article 8 (2) *American Convention on Human Rights* (ACHR); ECtHR (Judgment) 22 February 1994, Case No. 16213/90, *Burghartz v. Switzerland*, para. 24, which refers to Article 8 and Article 18 ACHR; ECtHR (Judgment) 7 July 1989, Case No. 14038/88, *Soering v. the United Kingdom*, para. 108, which refers to Article 4 ACHR.

³⁶ R. BLOME, *Wallflower or Essential Constituent? The Inter American Court of Human Rights' Role in an Emerging International Judicial Human Rights System*, in <stockholm.sgir.eu/uploads/SGIR_2010_Blome.pdf >.

³⁷ I.e. ECtHR (Judgment) 13 November 2012, Case No. 4455/10, *Marguš v. Croatia*, para. 37, in which IACtHR (Judgment) 14 March 2001 is referred to *Barrios Altos v. Peru* involving the question of the legality of Peruvian amnesty laws. In ECtHR (Judgment) 18 December 2012, Cases Nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, *Aslakhanova et al. v. Russia*, we find a reference to the IACCommHR (together with that to the UN Human Rights Committee), aiming at defining the “enforced disappearances” as «a combination of several violations of protected rights». In ECtHR, G.C. (Judgment) 18 September 2009, Cases Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, *Varnava et al. v. Turkey*, which are “cases concerning *ratione temporis* jurisdiction in disappearance cases before other international bodies” the IACtHR (Judgment) 2 July 1996, *Blake v. Guatemala*-Preliminary Objections, para. 39; IACtHR (Judgment) 23 November 2004, *Serrano-Cruz Sisters v. El Salvador*-Preliminary Objections; IACtHR (Judgment) 12 August 2008, *Heliodoro Portugal v. Panama*. In ECtHR G.C. (Judgment) 9 April 2009, Case No. 71463/01, *Šilih v. Slovenia*, which refers to IACtHR (Judgment) 29 July 1988, *Velásquez Rodríguez v. Honduras*, IACtHR (Judgment) 20 January 1989, *Godínez Cruz Case v. Honduras*, IACtHR (Judgment) 15 June 2005, *Moivana Village v. Suriname* and to IACtHR (Judgment) 23 November 2004, *Serrano-Cruz Sisters v. El Salvador*-Preliminary Objections, para. 115.

³⁸ IACtHR (Judgment) 10 December 2010, *Vélez Loor v. Panama*. See about some critical aspects, IPPOLITO, *Detention of Irregular Migrants: Dialogue and divergence between the Inter-American and European Human Rights Courts*, in *Hellenic Institute of International and Foreign Law*, 2012, n. 65, p. 583-596.

³⁹ See also the concurring or dissenting opinions of some European judges that mention the jurisprudence of the Inter-American Court or the American Convention on Human Rights. For example, on ECtHR G.C. (Judgment), 7 November 2013, *Vallianatos et alia v. Greece*, Cases Nos. 29381/09, 32684/09, see note n. 17 in “partly concurring, partly dissenting opinion of judge Pinto de Albuquerque”: «The International Court of Justice explicitly excluded the notion of reciprocal obligations with regard to human rights treaties (Reservations to the Convention on Genocide, Advisory Opinion: ICJ Reports 1951, p. 23, followed by *Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports 1964, p. 32, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, ICJ Reports 1996, p. 20), after the Permanent Court of International Justice had conceded that “the

In this regard, among the references made by the European Court of Human Rights it is worth while mentioning: the case *Scoppola v. Italy*⁴⁰ which, in order to affirm the principle of the more favourable criminal law, also refers to Article 9 ACHR⁴¹; the case *Ergin v. Turkey*⁴² that, in order to exclude civilians from the jurisdiction of military courts refers to the case *Durand and Ugarte v. Peru*⁴³, but also the line of case-law based on Article 8 ACHR that was followed in other cases decided by the Court, and the Inter-American Commission of Human Rights; the cases *Sabanchiyeva*⁴⁴, *Maskhadove*⁴⁵ and *Babar Ahmad et al. v. Russia*⁴⁶ on the subject of inhuman treatment, contrary to Article 5 of the ACHR⁴⁷; the

very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts” (Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, PCIJ, Series B, No. 15 (3 March 1928), p. 17). The Inter-American Court of Human Rights (Advisory Opinion No. OC-2/82, 24 September 1982, on the effect of reservations to the Inter-American Convention on Human Rights, paragraph 29) and the Human Rights Committee (General Comment no. 24, 2 November 1994, on reservations to the ICCPR, paragraph 17) have expressed the same opinion». See ECtHR G.C. (Judgment) 18 July 2013, *Maktouf e Damjanović v. Bosnia and Herzegovina*, Cases Nos. 2312/08 and 34179/08, note n. 31 in concurring opinion of judge Pinto de Albuquerque, joined by judge Vučinić, about principle of non-retroactivity of criminal law: «The ACHR was adopted on 22 November 1969 and has 23 States Parties. See, with regard to this principle, *Castillo Petruzzi et al. v. Peru*, Inter-American Court on Human Rights judgment of 30 May 1999, § 121».

⁴⁰ ECtHR G.C. (Judgment) 17 September 2009, *Scoppola v. Italy* (n. 2), Case No. 10249/03, para. 105.

⁴¹ See para. 105 which refers to the European Union’s Charter of Fundamental Rights; instead the applicant «submitted that the Article 7 of the Convention guaranteed not only the non-retrospectiveness of the criminal law but also the principle – set forth explicitly in Article 15 of the United Nations Covenant on Civil and Political Rights, by Article 49 of the EU’s Charter of Fundamental Rights and by Article 9 ACHR (see paragraphs 35-37 above) – that, in the event of a difference between the law in force at the time of the commission of an offence and later laws, the law to be applied was the law more favourable to the accused (para. 86)».

⁴² ECtHR (Judgment) 4 May 2006, Case No. 47533/99, *Ergin v. Turkey* (n. 6), para. 25: «The settled case-law of the IACtHR excludes civilians from the jurisdiction of military courts in the following terms: ‘In a democratic Government of Laws the penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces. Consequently, civilians must be excluded from the military jurisdiction scope and only the military shall be judged by commission of crime or offenses that by its own nature attempt against legally protected interests of military order’ (IACtHR (Judgment) 16 August 2000, *Durand and Ugarte v. Peru*, para. 117)».

⁴³ IACtHR (Judgment) 16 August 2000, *Durand y Ugarte v. Peru*, para. 117.

⁴⁴ ECtHR (Judgment) 6 June 2013, Case No. 38450/05, *Sabanchiyeva et al. v. Russia*, paras. 94-95.

⁴⁵ ECtHR (Judgment) 6 June 2013, Case No. 18071/05, *Maskhadove et al. v. Russia*, paras. 148-149.

⁴⁶ ECtHR (Judgment) 10 April 2012, Cases Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, *Barbar Ahmad et al. v. The United Kingdom*, para. 117: «The IACmmHR has found that isolation could in itself constitute inhuman treatment, and a more serious violation could result for someone with a mental disability» (*Victor Rosario Congo v. Ecuador*, case 11.427, 13 April 1999). In *Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*, judgment of 5 July 2006, the IACommHR stated: «[...] solitary confinement cells must be used as disciplinary measures or for the protection of persons only during the time necessary and in strict compliance with the criteria of reasonability, necessity and legality. Such places must fulfil the minimum standards for proper accommodation, sufficient space and adequate ventilation, and they can only be used if a physician certifies that the prisoner is fit to sustain it (footnotes omitted)».

case *Öcalan v. Turkey*⁴⁸, which, as regards death penalty, mentions both the Advisory Opinion OC-3/83⁴⁹ and the judgments *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* on death penalty⁵⁰.

Another important case is the case of *Mamatkulov and Abdurasulovic v. Turkey*⁵¹, in which, «between relevant law instrument and case-law on interim measures», a large place is taken by a whole of normative inter-American sources of different levels and normative authority: Article 63 para. 2 of the Convention, Rule 25 of Procedure of the Inter-American Court of Human Rights, Rule 25 of Procedure of the Inter-American Commission of Human Rights. In this judgment the reference to the case-law of the Inter-American Court of Human Rights is really wide and is supported by a variety of quoted cases (among other authorities) in which it has stated on several occasions that compliance with provisional measures is necessary to ensure the effectiveness of its decisions on the merits⁵².

Sometimes, instead, the normative sources of the Inter-American system are referred to not only to emphasize analogies but also to show “structural” differences between the two Conventions. It happens in the case *Assanidze v. Georgia*⁵³, to underline how, unlike the ACHR (Article 28), the ECHR doesn’t contain a “federal clause” limiting the obligations of the federal States for events occurring on the territory forming part of the federation; or on the subject of *ne bis in idem*⁵⁴ to show that, unlike the formula used by other international human rights protection instruments (for example, the United Nations International Covenant on Civil and Political Rights, Article 14, which refers to the same “crime”), the ACHR (Article 8) uses the expression «the same cause», which is a much broader term in the victim’s favor⁵⁵; or also to show how, unlike some national laws and Article 8 para. 2 of

⁴⁷ In this regard see also ECtHR (Judgment) 9 June 2009, Case No. 33401/02, *Opuz v. Turkey*, paras. 83-86; ECtHR G.C. (Judgment) 1 June 2010, Case no. 22978/05, *Gäfgen v. Germany*, paras. 65-66; ECtHR G.C. (Judgment), 7 July 2011, Case No. 55721/07, *Al-Skeini et al. v. the United Kingdom*, para. 94.

⁴⁸ ECtHR G.C. (Judgment) 12 May 2005, Case No. 46221/99, *Ocalan v. Turkey*.

⁴⁹ IACtHR (Advisory Opinion) 8 September 1983, OC-3/83, *The right to information on consular assistance in the framework of the guarantees of due process of law*, para. 134.

⁵⁰ IACtHR (Judgment) 21 June 2002, *Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago*, para. 148: «Taking into account the exceptionally serious and irreparable nature of, the observance of due process, with its bundle of rights and guarantees, becomes all the more important when human life is at stake».

⁵¹ ECtHR (Judgment) 6 February 2003, Cases Nos. 46827/99 and 46951/99, *Mamatkulov and Abdurasulovic v. Turkey*, paras. 42-49. See, also, ECtHR (Judgment) 20 March 1991, Case No. 15576/89, *Cruz varas et al. v. Sweden*, para. 94.

⁵² IACtHR (Judgment) 1 August 1991, *Chumir v. Peru*; 2 July 1996, 13 September 1996, 11 November 1997, 3 February 2001, *Loayza Tamayo v. Peru*; 25 May and 25 September 1999, 16 August and 24 November 2000, 3 September 2002, *James et al. v. Trinidad and Tobago*; 7 and 18 August 2000, 26 May 2001, *Haitians and Dominican nationals of Haitian Origin in the Dominican Republic v. Dominican Republic*; 10 August 2000, 12 November 2000, 30 May 2001, *Alvarez et al. v. Colombia*; 21 June 2002, *Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago*.

⁵³ IACtHR (Judgment) 8 April 2004, Case No. 71503/01, *Assanidze v. Georgia*, para. 141.

⁵⁴ ECtHR (Judgment) 18 October 2011, Case No. 53785/09, *Tomasovic v. Croatia*, para. 79; ECtHR (Judgment) 25 June 2009, Case No. 55759/07, *Maresti v. Croatia*, para. 79 and ECtHR G.C. (Judgment) 10 February 2009, Case No. 14939/03, *Sergey Zolotukhin v. Russia*, paras. 39-40, 79.

⁵⁵ IACtHR (Judgment) 17 September 1997, *Loayza-Tamayo v. Peru*, para. 66.

the ACHR, the ECHR does not expressly guarantee the right of a person charged with a criminal offence to communicate with defence counsel without hindrance⁵⁶.

Finally, above all in the less recent case law of the European Court of Human Rights, wide references to the approach followed by the Inter-American Commission of Human Rights⁵⁷, as well as to the Advisory Opinions issued by the Court⁵⁸, and to the Protocols added to the ACHR⁵⁹ can be found.

4. Concluding Remarks

This work had already been started from some definite points. From one side there was the certainty of a datum: the increasing “circulation” between jurisprudences as a product of an already consolidated “dialogue” of the European Court of Human Rights with other courts - international and national courts - within an “integrated” or basically integrated European space of human rights. On the other hand there was the conviction, perhaps less explored, that the above mentioned “dialogue” was based on the power of projection of the European Court of Human Rights outside Europe and on its attitude to interact with tribunals and, in a wider sense, with juridical systems inspired by a different “regional legal tradition” as well as by different “national legal traditions”.

The aim of this research was that of examine the extent and characteristics of phenomena of mutual interaction or influence - if not of embryonic “cross-fertilization” - between the case-law of the European Court of Human Rights, and that of the Inter-American Court of Human Rights, also in order to evaluate the possibility of such jurisdictional needs having a regional character, to become “universal” within the context of the protection of human rights.

The investigation has showed how the Inter-American Court of Human Rights, notwithstanding its functional and organic autonomy, is in a more or less continuous relationship with the Court of Strasbourg. The importance of “fertilization” phenomena, even if they are increasing, appears to be less relevant, that is in the sense of the European Court of Human Rights, towards the Court of San José.

⁵⁶ ECtHR (Judgment) 28 November 1991, Case No. 12629/87, *S. v. Switzerland*, para. 48.

⁵⁷ See the already quoted case ECtHR, *Ergin v. Turkey*, para. 25, ECtHR (Judgment) 11 March 2004, Case No. 42346/98, *G.B. v. Bulgaria*, para. 53; ECtHR (Judgment) 11 March 2004, Case No. 40653/98, *Iorgov v. Bulgaria*, para. 53. ECtHR G.C. (Judgment) 10 December 2007, Case No. 69698/01, *Stoll v. Switzerland*, paras. 43, 111: «Similarly, the IACmHR has taken the view that the disclosure of State-held information should play a very important role in a democratic society because it enables civil society to control the actions of the government to which it has entrusted the protection of its interests [...]».

⁵⁸ ECtHR (Judgment) 12 March 2003, Case No. 45221/99, *Öcalan v. Turkey*, para. 134: «It might be useful to recall that in a previous examination of Article 4 ACHR (Restrictions to the Death Penalty, Advisory Opinion OC-3/83 of 8 September, 1983, Series A No. 3) the Court observed that the application and imposition of capital punishment are governed by the principle that [n]o one shall be arbitrarily deprived of his life».

⁵⁹ ECtHR G.C. (Judgment), 12 September 2011, Cases Nos. 28955/06, 28957/06, 28959/06 and 28964/06, *Palomo Sánchez et al. v. Spain*, para. 25: «The American Convention has a special additional protocol concerning economic, social and cultural rights, the ‘Protocol of San Salvador’. Adopted and opened for signature on 17 November 1988, it entered into force on 16 November 1999. Article 8 of that Protocol, entitled ‘Trade Union Rights’ [...]».

The jurisprudence case law reviewed for this work has showed - apart from the different size of the two jurisprudences - the extent of such interactions. They appear to be, then, still mainly mono-directional, showing elements of analogy, in the “direct or indirect” reference, within the Inter-American system, to the positions assumed by the European Court of Human Rights. The latter, instead, when it refers to the jurisprudence of the Inter-American Court of Human Rights or to the Inter-American as a whole, uses such references in a wider context of comparison rather than as a starting point for its *ratio decidendi*.

The research has also helped to foresee elements of differentiation, mainly as a consequence of the different political-social-cultural context characterizing the States signing the two conventions. The still fragmentary Latin-American character of the protection of human rights is then to be considered a product of the adaptation, in a specific international region, of an “international legal tradition”.

Jurisprudential similarities - that are frequent because of the big normative similarities existing between the articles of the two Conventions - can be found, then, together with significant differences also as regards the drawing up technique of judgements. The latter absolutely reflects the different character of the two Courts: the Court of Strasbourg being a permanent tribunal having an enlarged number of components, within a system characterized by an institutional monism, the Inter-American Court of Human Rights, being a non permanent court having a limited number of components, within an institutional system of a dualistic kind. But the different style of judgements cannot but be influenced, as well, by the needs of trial economy influencing the works of the European Court of Human Rights; they are represented, for example, by the different recourse to public hearing, when the latter, which is much used in the works of the Inter-American Court of Human Rights, even if recently inclining to a reduction of its components, performs the function of representing a first kind of reparation of a wrong suffered.

In conclusion, jurisprudential interaction is going to become one of the leading elements of a wider circulation of “international legal traditions” of a regional kind, such as the European and the American ones (or, *rectius*, the Latin-American one)⁶⁰. The whole is about the identity of the protected good, apart from the regional reference systems, but also within the limits deriving from the power of adaptation of a conventional model”- like that of the ECHR - within a continental space like the American one which is also characterized by an outstanding receptive attitude of the *ius naturae gentium* of the European tradition⁶¹

⁶⁰ See the reference contained in the already quoted IACtHR (Judgment) 28 November 2012, *Artavia Murillo et al. (“in vitro fertilization”) v. Costa Rica* al Case of *Oliver Brüistle v. Greenpeace* of the ECJ. See, in the doctrine, PANEBIANCO, *La recezione del ‘ius gentium’ in Europa e America Latina*, in *Riv. dir. int. priv. proc.*, 1981, n. 17, p. 434 ff., as well as, from a different disciplinary point of view, SCHIPANI, *Il diritto romano nel ‘nuovo mondo’*, in *Il diritto dei Nuovi Mondi, Atti Genova 1992*, Padova, 1994, pp. 55-112. I also take the liberty of referring to my *Codice dell’integrazione latino-americana. Il SELA-Sistema Economico Latino-americano. C◻digo de la integraci◻n Latino-americana. EL SELA. Sistema Econ◻mico Latino americano, Consiglio Nazionale delle Ricerche-Progetto Europa-America Latina*, Salerno, 1992, pp. 647-674.

⁶¹ With reference to the American system of human rights, in its widest meaning, let us refer to DI STASI, *Il Sistema americano dei diritti umani. Circolazione e mutamento di una international legal tradition*, Torino, 2004, in

particular p. 13 ff. For a comparison between systems and “models” of European and Latin-American organizations, see. PENNETTA, *Integración e integraciones*, Bogotá, 2011 and. PANEBIANCO, GUIDA, DI STASI, *Introduzione al diritto comunitario comparato*, Salerno, 1993.