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Abstract of the PhD Thesis

INTERACTION OF THE EUROPEAN AND INTER-AMERICAN COURTS OF HUMAN RIGHTS

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I. SUMMARY OF THE RESEARCH TASK, OBJECTIVES OF THE RESEARCH

The world celebrated the 60th anniversary of the Universal Declaration of Human Rights. According to the Utopian anticipation of that time, today there would be neither wars nor human rights violations. As we all know, it has not materialized. The necessity and topicality of human rights protection cannot be denied until nowadays: the events in Burma, China, Darfour occurring more often in recent times in the international media are nevertheless only the peak of the iceberg. The so-called 'female genocide' in Guatemala or the hardships of the tribes in Middle- or South-America reminding of World War II are much less mentioned, and the situation of the Kurds in Turkey (and Iraq) appears from time to time in the forefront of the international interest, and then disappears again.

Since the Universal Declaration, the protection of human rights has significantly developed. The dissertation focuses on two regional systems: the Inter-American and the European, not denying nevertheless that protection systems have been established elsewhere too; but as to the efficiency and the significance in international jurisdiction, these two systems outstand. The thesis – in a way which is maybe not common – deals not only with the accomplishments and the gloomy sides of the Strasbourg jurisdiction, but tries to draw the attention of the European

reader also to another continent. It does so in order to show that also elsewhere there has been a great development, and examining the results of the American continent we are even going to have the feeling sometimes as if Europe would be left behind. It is not sure anyway that it has developed the optimum in every field…

In order to show all this, the thesis treats the interaction of the two tribunals, the Inter-American (IACtHR) and European Courts of Human Rights (ECtHR); one of the main elements of this interaction is the quotation of each others' decisions in the judgments. The significance of the interaction of these two fora is shown by the growing number of judgments, at both sides, with citations of a certain segment of the other's jurisdiction. The interaction of international tribunals itself is a highly topical question, especially when – for the first time after sixty years – in 2007 the International Court of Justice itself 'joined the club', quoting the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY). The so far only on the top of the hierarchy standing International Court of Justice gave a boost to the – according to some, only 'wide-spreading' – practice that shows the theoretical traversability of international tribunals, and some expect it to lead directly to a new *ius gentium*.

The mere fact of the interaction of international fora, especially the Inter-American and European human rights tribunals, the topicality of the question is supported by other elements, notable dates. Above all, the first judgment of the Inter-American Court of Human Rights was delivered

twenty years ago (*Velásquez-Rodríguez v. Honduras*), the American Convention on Human Rights entered into force approximately thirty years ago and was signed forty years ago, (and the ECtHR has been working for circa fifty years). We could continue like that as in 2008/2009 we may find other anniversaries or significant dates both in the American and the European systems. What is more important though is the development delivered by the Inter-American system in the past few decades.

The next point of topicality and significance can be found in the European system itself. Although I take for granted in the thesis that the readers know the European system well, I do mention some interesting-topical-problematic questions. First of all, there is no doubt left: the human rights protection in the Council of Europe is in the need of a reform. The problems of the European system arise on the one hand from the incredible amount of complaints. The court of 47 judges receives ten thousands of complaints every year. Besides rethinking the procedural questions, some Inter-American – and so: ready – answers to certain legal questions may serve the speed-up as well, although the solution to the European problems as to the question of time would certainly be the procedural reforms. Therefore, the reforms are topical, the interaction – at a certain level – exists, would the European system be ready and able to use evidently Inter-American solutions in order to go on? This is an important question of the near future. Is there going to be introduced some kind of a procedure of an advisory opinion or of a preliminary ruling, that could ease off the ECtHR?

Or every such an attempt only contributes to the case-load? How can the ECtHR react to the problems connecting environmental protection and human rights that are going to become one of the key questions of the near future? Is it going to take over some of the solutions of San José – reached e.g. in indigenous cases? As it does not only depend on the 47 judges of Strasbourg, would the European states want to spend money and dedicate efforts for a reform that had nearly exclusively advantages on the long term?

And – concerning rather the theoretical solutions of certain freedoms – is the examined interaction useful and to be desired? It is also important to find the answer to this question. As some of the authors find this phenomenon, the multiplying citations of each other tribunals' judgments (or at least a part of it) to be topical, though alarming. While the interaction of Luxembourg and Strasbourg becomes evident (although it is not perceived positively by everyone either), the question arises: is it possible that we ought to take a look to the Inter-American practice while arguing at the Strasbourg court?

The interaction – as to the legal solutions concerning certain freedoms – draws our attention to questions of other fields of the human rights protection that have become topical again these days: the interaction of the two tribunals working on the basis of different conventions may be a sign of the universality of human rights – or at least of a part of them; it is

also a question that is highly debated until nowadays. It is not less typical than sixty years ago, at the birth of the Universal Declaration of Human Rights, this is shown by the events in China, Burma, Guatemala, Darfour or Pakistan and many other countries. The situation may be ameliorated by satisfactorily settling the question in the appropriate international political frames.

The structure of the thesis is influenced by the nature of the chosen topic. Although the dissertation treats the interaction of the Inter-American and European systems, especially that of their tribunals (and their jurisdiction), it has to deal with questions which might appear rather marginal at first sight.

Therefore, it briefly presents the Inter-American human rights protection system which is far less known in Hungary than the European one (Part I Chapter 1); here, the American development of the human rights, as well as the legal and institutional frames are displayed. Chapter 2 of Part I (which deals with the main dogmatic questions) treats the interaction of international tribunals in general, mentioning especially the human rights interactions and the human rights' universality context.

Although Part II and Part III are narrowly connected, reasons of didactics and logic made me separate them. These two main parts examine namely two major aspects of the jurisdictions: the procedural and the

material legal aspects. The procedural part deals with three topics: the advisory opinions (Part II Chapter 1), interim or provisional measures (Part II Chapter 2) and the question of the victims (Part II Chapter 3). The last part is divided into two chapters having different functions: first of all, the question of the right to life is examined thoroughly (Part III Chapter 1), and then – as a kind of summary, remaining in the frames of a thesis – the interaction concerning other rights and freedoms is treated (Part III Chapter 2). Every chapter – besides presenting the interaction in a system – reflects and argues as to whether the interaction is adequate and where would it be necessary to have a more effective interaction. The thesis namely aims at displaying that i. the interaction is mutual, ii. its effects are positive, it could even strengthen the universality, iii. in the future its extended application – for instance in the mentioned fields – would contribute to a more effective human rights protection.

II. METHODS AND SOURCES OF THE RESEARCH

The object of my research is therefore the jurisdiction of the Inter-American and European Courts of Human Rights, to compare them, especially as to their interaction. The object of the research determines the method of the research. As the examined social, economic, political relations, the historical background, even the geography has to be paid

attention to, the method of the research is to a certain extent interdisciplinary: in order to research the topic, it is essential to use certain results of sociology, politics and history; but only to a necessary extent. As to the jurisprudence, several legal branches are to be considered: besides the international law, the civil law, constitutional law, criminal and administrative law and environmental law of the given countries, sometimes also in a comparative aspect; the dissertation uses legal history and legal theory aspects to a restricted extent. Even in international law, several fields are affected: human rights, humanitarian law, law of diplomatic and consular relations, law of state responsibility, international environmental law, international criminal law, law of international treaties, law of international organizations. Comparative law has – according to the topic – a crucial role in the thesis. Once in a while it can be seen that the thesis displays the Inter-American practice in a more detailed way than as it would be absolutely necessary – all this serves the better understanding.

Sources of the dissertation are the foreign and Hungarian legal literature, where – according to the particularities of the topic – the former is more accentuated, and, furthermore, the judgments of the Inter-American and European Courts of Human Rights that this thesis had to examine thoroughly, and partly also the jurisdiction of other international tribunals, such as the International Court of Justice.

III. SUMMARY OF THE SCIENTIFIC RESULTS

Europe has been and is until today the cradle of many thoughts and initiatives concerning human rights protection. In order to prove that the development has not stopped, it is enough to remind of the fact that today all (!) of the continental political organizations deals with the protection of human rights (Council of Europe, Organization for Security and Co-operation in Europe, European Union). This may be of course an example for all the other continents. Nevertheless – partly because of the different social circumstances – other regional systems may and do develop the field of human rights protection. In the thesis, besides the European, the other most developed regional protection system, the Inter-American gets into the focus.

The dissertation deals with the general questions of the interaction of international tribunals, but draws the attention to the fact how special is the interaction examined in the present thesis: it seems obvious, for instance, that different courts on the same continent with a partly corresponding legal source pay attention to each other's jurisdiction (as it happens in Strasbourg and Luxembourg). It is not astonishing either that the judgments and decisions of a tribunal at universal level appear in the practice of regional courts (e.g. the decisions of the International Court of

Justice or the Human Rights Committee at the European Court of Human Rights). The thesis draws the attention to a phenomenon that – unlike the examples above – scratches on the classical logics of the legal sources: there exists an interaction (in procedural as well as in material aspects) between two regional tribunals working on two different continents (having a different territorial and personal scope), on the basis of different conventions. The thesis uses a two-sided approach: it inevitably compares the two systems, and examines the interaction of the European and Inter-American Courts of Human Rights. Interaction or cross-fertilization means that the two tribunals – knowing each other's jurisdiction – explicitly or not take over certain elements from the other into its own jurisdiction.

Excellent but not exclusive evidence for this interaction is when the given courts expressly quote each others' jurisdiction, in general or taking over a specific assessment of the other, and all that to support their own argumentation or result. As to the two tribunals examined by the thesis, the Inter-American Court of Human Rights quotes the European jurisprudence in nearly exactly the half of its judgments (97), while we can speak of about 50 decisions containing citations of the opposite direction (while there are approximately 100 000 European judgments). Although the main subject of the thesis is to examine these judgments and the quotations therein, besides the explicit cross-fertilization I sometimes equally consider the possibility of a hidden interaction.

The thesis tries to prove that an interaction exists between the two tribunals, and although this interaction is not of an equal measure, but definitely reciprocal. In my dissertation I tried to show this reciprocity in every chapter, as to every issue treated: the ECtHR's effect on the Inter-American Court of Human Rights, as well as the effect of the IACtHR on Strasbourg. Although in general San José quotes the ECtHR more often than the other way, I tried to show that this fact is sometimes less advantageous for the receiving institution. Of course, we have to be aware all the time of the already mentioned fact that we speak about the interaction of two tribunals working on different continents, on the basis of different conventions (having different territorial scope, etc.), that still found a way to take into consideration the accomplishments of the partner tribunal on the other side of the ocean. As to the advisory opinions, it has to be emphasized that eleven of the altogether nineteen American advisory opinions mention the European system. Concerning the interim or provisional measures, e.g. in the *Mamatkulov and Askarov v. Turkey* judgment, the Inter-American influence on the Strasbourg court is obvious, despite the basically different conventional basis. In the future, maybe the Strasbourg solution as to the – on Article 34 of the European Convention on Human Rights based – sanction concerning the obligatory force of these measures may be of interest for the American continent, too. Excellent examples for the interaction in material legal aspects are (in both ways) the

right to life, the right to personal liberty and security, as well as (heading West, i.e. from Europe to America) the prohibition of torture, inhumane, degrading treatment, the protection of property or the freedom of expression. Here, the question of forced/enforced disappearances has to be emphasized, where not only the right to life, but the right to personal liberty and security and very often the prohibition of torture, inhumane, degrading treatment is concerned – here we can speak about a really strong mutual interaction; for instance, the European *Kurt* as well as *Timurtaş v. Turkey* cases use the Inter-American results. Apart from this circle, the thesis treats the interaction as to other topics as well, e.g. in the Inter-American jurisdiction (among others in the *Hilaire, Constantine és Benjamin v. Trinidad and Tobago*, and the *Montero-Aranguren v. Venezuela cases*) the European statements made as to the death-row phenomenon or the prison circumstances reoccur. With the related judgments I did not only try to present the existence of the interaction but also that it is possible to systematize the overtaken theories.

Secondly, I sought the answer to the question whether this interaction is positive. As I mentioned in Part II Chapter 2 on interaction, a certain kind of harmonization of the jurisdiction of the international tribunals and fora is inevitable in order to guard the unity of international law and to contribute to its general development. Apart from this general objective, in the field of the international law of human rights protection –

where it has to be especially paid attention to not to stick needlessly the neck out, providing an opportunity for the states, and every chance has to be used for a development – the interaction of the two regional courts is especially useful. Besides providing the harmony, the parts of procedural and material legal questions treated the issues where this interaction is fruitful, useful and contributes to the international development of human rights; providing a hardly contestable argument for the universality of one right or another. I emphasized the immensely positive consequences e.g. in Part III as to the forced disappearances or the continuing violation/situation theory, or in Part II when examining the problematic of *ius standi-locus standi*. The (Inter-American) hypotheses connected to the forced disappearances were used by the ECtHR, which accelerated the concerning European (Turkish, Russian) cases in a great deal. The continuing violation theory – coming from Europe, further developed in America and, as expected, returning to Europe – enabled to adjudge violations that would have only left the feeling of inequity without this theory, but can be used without violating the prohibition of *ex post facto* adjudication. The right of the individual to turn directly to the international human rights court is an objective to be reached in America, but something known in Europe, which situation the IACtHR tries to reach as well.

Thirdly, the thesis sought the answer to the question what are the territories where the interaction now considered as proven should be expanded in the future, due to its positive effect on the protection of human rights. Among the procedural questions, first of all the reparations have to be mentioned as a field where Europe urgently needs a reform and where such a development would be possible for the ECtHR, without depending on the states (it could use for instance the project of life theory or could take into consideration to create a financial fund). The thesis dealt furthermore with the question of advisory opinions, here it is nevertheless much more difficult to make useful and hardly contestable proposals, all because of the particularities of the European circumstances. In Europe, the interaction concerning the material legal questions could be developed almost everywhere: for instance as to the forced/enforced disappearances related right to life violations concerning – in some cases, as the European jurisdiction is not entirely coherent in this regard – the question of proof, or in the frame of the freedom of expression as to the right to answer, or in certain questions which are related to environmental protection (see the indigenous cases).

To examine these questions, I was motivated on the one hand by the general amelioration of the international protection of human rights, presuming that the interaction of Strasbourg and San José may point to values that can be represented also against different cultural, economical

and political backgrounds, which values are necessarily universal ones. On the other hand, I was also pushed by the idea that the examination of this interaction and the new directions may contribute to the European protection. As the originally intended European reform, which is unanimously considered as necessary among those knowing the Strasbourg system or acting within, seems to have been blocked. The – debated – Protocol No. 14 was blocked by Russia, and even after the change in the presidential seat, there is no hope for a change in the Russian attitude. There are authors who called for a 'Protocol No. 15' years ago, elaborating its possible or expected elements. Anyhow, I presume that even they have not thought of such a wash-out of Protocol No. 14. (After that I have concluded my work, the 27th May 2009 the Protocol No. 14bis was open for signature, trying to compensate the situation: due to this protocol, but only regarding the given signing state, some of the provisions of Protocol No. 14 may enter into force).

Though the way, amending the system with protocols seems to have run out of breath, we still cannot say that the European system would not work in its current form. After an effective reform that is capable of reducing the obstacles (case-load and the element of time), it could nevertheless work even better. But international law, and in particular human rights have always been exposed to the political realities and international politics. The international political realities of nowadays are not favourable to a significant development of human rights. Therefore,

what is impossible should not be forced, and the European protection should be strengthened there and in a way that international politics influence it the least: through the well-known, and in Europe in general often used jurisdictional development and through the examined interaction. As this jurisdictional development – within plausible frames – may use the results of San José.

The statistics mentioned above make it clear that both in numbers and proportions, it is the Inter-American Court of Human Rights that quotes Strasbourg more often than the other way. Nevertheless, according to the argumentation of the dissertation – although it would not change the proportions significantly – this interaction has to be extended on the European side as well, also to other, not yet concerned fields. The thesis – with the sometimes more detailed description of the Inter-American system – tried to draw attention to the phenomenon (which is for sure a little bit extraordinary in Europe): that the otherwise highly precious Strasbourg jurisdiction may not have developed in the most optimal way; there are questions where the Strasbourg solutions are more progressive.

The thesis aimed furthermore at drawing the attention – through the comparison and the presentation of the interaction of the Inter-American and European systems – to the role of the Inter-American and European Human Rights Courts in the general development of international law, and especially human rights law. This is even more remarkable, as we speak about regional organs, working on their own geographical territory. Such a contribution to human rights may be the

result of their assessment that puts the human into the focus. This is something which helped the European Court of Human Rights to a – some say: almost fatal – success, and which is clearly visible when regarding the efforts of the Inter-American Court of Human Rights. The two tribunals' – in the dissertation treated and possible future – interaction may be, I hope, the instrument by which these tribunals may survive the less favourable international political processes, guaranteeing the old dream of *René Cassin* and others: the creation of a system that is built on human rights and fundamental freedoms, and that flexibly adapts to the changing circumstances as well as the new challenges.

IV. CATALOGUE OF THE PUBLICATIONS FROM THE SUBJECT MATTER OF THE THESIS

1. The European Convention on Human Rights and the European Union. (in Hungarian) *University of Miskolc, Doktorandusz Fórum, 9th November 2005, Állam- és Jogtudományi szekciókiadvány, edit.:Róth, Erika pp. 222-226*

2. La protection des droits de l'homme au niveau (double) européen : Les divergences entre deux jurisprudences. (in French) *Miskolc Journal of International Law, www.mjil.hu 2006/1. pp. 17-37*

3. The Impact of the European Union on the System for the Protection of Human Rights of the Council of Europe. (in Hungarian) *Publicationes Universitatis Miskolcinensis, Sectio Juridica et Politica, Tomus XXIV 2006. pp. 313-327*

4. Human Rights Before New Challenges – Some Questions of the Globalization, in particular concerning the WTO. (in Hungarian) *Collega, 2006/2-3 pp. 238-241*

5. Victims' Position in the European and Inter-American Human Rights Protection Systems. (in English) *University of Miskolc, Doktorandusz Fórum, 9th November 2006, Állam- és Jogtudományi szekciókiadvány pp. 185-188*

6. The (E)migratory Theory of Continuing Situation (Certain connections and comparisons between the European and the Inter-American approach to human rights). (in English) *Publications of the University of Kiev,* ЄВРОПЕЙСЬКА, ЮРИДИЧНА ОСВІТА І НАУКА: смубеимсвкий зимір, *КИЇВСЬКИЙ УНІВЕР ПРАВА, Kiev*, 2007. pp. 10-16

7. Similarities and Differences in the Jurisprudence of Strasbourg and San José or What Could We (L)earn from the Latin-Americans? (in Hungarian) *Publicationes Universitatis Miskolcinensis, Sectio Juridica et Politica, Tomus XXV/2, pp. 431-445*

8. Some Human Rights Aspects of Criminal Procedure Law (in Hungarian), *Studia Iurisprudentiae Doctorandum Miskolciensium, Miskolc, Bíbor Kiadó 2007 pp. 347-361*

9. Wechselwirkung der internationalen Menschenrechtsforen (in German), *Collega*, *2007/2-3. pp. 306-309*

10. Transfer of Values as to Regional Human Rights Tribunals (in English), *ESIL Web Publications of the Biennial Research Forum in Budapest, 28-29th September 2007,* http://www.esil-sedi.eu/fichiers/en/Agora_Raisz_465.pdf