

COLLECTIVE EXPULSION OF FOREIGNERS:
A COMPARATIVE STUDY BETWEEN TWO JUDGEMENTS IN
THE EUROPEAN AND THE INTER- AMERICAN COURTS OF HUMAN RIGHTS

An analysis of the Hirsi Jamaa and others v. Italy judgment of the European Court of Human Rights and the Dominican and Haiti people expelled v. Dominican Republic judgment in the Inter-American Court of Human Rights.

Zhiri Jael Meza Fragoso



July, 2015.

A thesis submitted in partial fulfillment of the requirements for the Degree of Master in
European Law with specialization in Human rights and Migration Law.

Under the supervisor of Prof. Mr. A.B. Terlouw.

Zhiri Jael Meza Fragoso
Student number: 4455177



PREFACE

Since my undergraduate studies, immigration and human rights law have been of my full interest and inspiration. This was maybe motivated by the high rate of emigration from Mexico, as well as the increase of migrant people, mainly from Central-America across Mexico, many times seeking for a better life.

Working in a Mexican non-governmental organization, was a great opportunity for me to learn about the migration issue, not only in Mexico, but in the whole region (from Central America to the USA). I, however, also realized that an overall view and understanding of other regions in the world was necessary to combine the best practices and contribute to improve the situation regarding migrants rights issues.

For this reason, I decided to study a master in European immigration law and also develop a comparative study between the case-law of two major regional human rights courts, with respect to the expulsion of foreigners: the Inter-American Court and the European Court of human rights.

With this thesis I conclude my studies at Radboud University, thanking the university, and my thesis supervisor Mr. Terlouw, for her dedication, but above all for her patience and help.

I especially thank my parents and brothers for all the support and understanding they have always shown me. Without them I would not be here. Finally I thank to my friends for their accompaniment and affection during this process and especially to the Consejo Nacional de Ciencia y Tecnología, Mexico (CONACYT), without whose support, I would not have been able to go abroad for the studies that I conclude today.

Zhiri Jael Meza Fragoso.

Nijmegen, July 2015.

CONTENT

PREFACE	3
CHAPTER 1 - INTRODUCTION	6
1.1 Sovereignty and border controls	8
1.2 International legal framework	9
1.3 Terminology to be used in this work	11
1.4 Research questions	12
1.5 Methodology	12
1.6 Outline	13
CHAPTER 2 - INTERNATIONAL FLOWS OF MIGRANTS AND ASYLUM SEEKERS.	14
2.1 Introduction	14
2.2 International movements of people in the world	14
2.3 European migration flows	15
2.3.1 Italian migration context	17
2.3.2 Collective expulsions of foreigners	19
2.4 American migration flows	21
2.4.1 Dominican Republic migration context	23
2.4.2 Collective expulsions of foreigners	26
2.5 Conclusions	27
CHAPTER 3 - EUROPEAN AND AMERICAN HUMAN RIGHTS SYSTEMS	29
3.1 Introduction	29
3.2 The European human rights system	30
3.2.1 The Council of Europe (COE)	
3.2.2 European convention for the protection of human rights and fundamental freedoms, (ECHR)	31
3.2.3 The European Court of human rights (ECtHR)	32
3.2.4 Relation of the COE and the EU	34
3.2.5 Collective expulsion	35
a) Legal framework	35
b) Case Law	36
3.3 The Inter-American human rights system	39
3.3.1 The Organization of American States (OAS)	39
3.3.2 American convention of human rights, (ACHR)	40
3.3.3 Inter-American Commission on human rights, (IACHR)	42
3.3.4 Inter-American Court on human right court, (IAAtHR)	44
3.3.5 Collective expulsion	45
a) Legal framework	45
b) Case law	46
3.4 Conclusions	47

CHAPTER 4 - COLLECTIVE EXPULSION CASES.	49
4.1 Introduction	49
4.2 ECtHR: Hirsi Jamaa and others v. Italy	49
4.2.1 Circumstances of the case	49
4.2.2 Admissibility	50
4.2.3 Violation to the prohibition on collective expulsion (article 4 of protocol 4 of the ECHR)	51
4.2.4 Judgment	55
4.2.5 Concurring opinion	55
4.3 IAtHR: Dominican and Haiti people expelled v. Dominican Republic	57
4.3.1 Circumstances of the case	57
4.3.2 Proceedings before the Inter-American Commission of Human Rights (IACHR)	58
4.3.3 Proceedings before the Inter-American Court of Human Rights (IAtHR)	60
4.3.4 Admissibility	61
4.3.5 Violation to the prohibition on collective expulsions (Article 22.9 of the ACHR)	62
4.3. 6 Judgment	64
4.4 Conclusions	66
 CHAPTER 5 - SIMILARITIES AND DIFFERENCES BETWEEN BOTH JUDGEMENTS	 68
5.1 Introduction	68
5.2 Group of persons who were subject to expulsion	68
5.3 Meaning and scope of the prohibition of collective expulsions	71
a) The ECtHR	72
b) The IAtHR	73
5.4 Time it took to both Courts reach a judgement	74
5.5 Compliance of both decisions at national level	75
5.6 Conclusions	77
 CHAPTER 6 - CONCLUSIONS	 79
6.1 Subordinate question 1	79
6.2 Subordinate question 2	82
6.3 Subordinate question 3	83
6.4 Subordinate question 4	84
 BIBLIOGRAPHY	 87

With each victim of barbarism, we are victims too.

Juan Carrillo

1

INTRODUCTION

The contemporary international migration flows, represent a major challenge in the international arena, given their impact on its places on the agenda of governments and international bodies around the world. Not only of the countries of destination, but also in transit ones, and perhaps less visibly, in origin countries. Recently, the number of people in migration, mostly seeking for refugee status, has reached a historic peak, and it is probable that it will continue to increase if the conflicts which have caused this migration, persist.¹ Therefore, the study of the structural causes of these movements of people and their consequences, is essential and current. The causes include economic roots, armed conflict and violence, as well as historic, demographic and cultural reasons. The various consequences of migration are also evident. Among them, the expulsion of non-nationals, (sometimes) as a punitive measure, as the response of destination states to these large international movements of human beings.²

This thesis seeks to contribute a small part to this study, focussing on some legal questions related to the collective expulsion of foreigners, in the European and American continent.³

In order to do this, two judgements will be analyzed in which an infringement of the prohibition of collective expulsions was found by the responsible tribunals for the protection of human rights in each region. One of them, *Hirsi Jamma and others v. Italy*,⁴ pronounced by the European Court of Human Rights (ECtHR), responsible for the application of the Convention for the Protection of Human Rights and Fundamental Freedoms, known as the European convention

¹ The number of refugees seeking asylum in industrialized countries increased by almost 50% last year, according to the UNHCR, and it is the he highest since the war in Bosnia, more than 20 years ago. This figures will be explained in next chapter. See: http://www.bbc.com/mundo/ultimas_noticias/2015/03/150326_ulnot_acnur_aumento_refugiados_np .

² See the request for Advisory opinion on migrant children before the Inter-American Court of Human Rights, of April 6, 2011, p. 2. Available at: http://www.corteidh.or.cr/solicitudoc/solicitud_eng.pdf .

³ Important is to bear in mind that collective expulsions of foreigners has historically been practiced in several moments and regions of the world and in peace and war time.

⁴ ECtHR, *Hirsi Jamaa and Others v. Italy* , Application no. 27765/09, 23 February 2012.

on human rights (ECHR).⁵ Although the ECtHR has judged regarding this issue on several occasions, I will only concentrate on the mentioned case. Besides, I will only focus on the analysis of the judgments of this Court and not judgments of the European Court of Justice, the main judicial body of the European Union (EU), which has the purpose to ensure the compliance with EU law and their treaties, even when both have to ensure the prohibition of collective expulsion in the region.⁶

The other judgment, *Dominican and Haiti people expelled v. Dominican Republic*,⁷ dictated from the Inter-American Court of Human Rights (IACHR), responsible for the application and interpretation of the American Convention on Human Rights (ACHR). Court which has jurisdiction over twenty-two countries in the region.⁸ This judgment has been the only one in which the IAtHR found a violation to this provision.

The circumstances, reasoning and judgments of these cases, are the main topic of discussion in this work to analyze to what extent the afore mentioned courts have found common grounds or if these have been dissimilar reflections. Besides, is important to note, that the relevance of both jurisprudences may contribute to the reasoning in other regional human rights systems and the international system as a whole.⁹ As the Inter-American Court of Human Rights has recognized, the European Tribunal jurisprudence constitutes an “auxiliary mechanism of interpretation”.¹⁰

Following this, some precisions must be made to set a starting point and for the better understanding of this thesis. Precisions, relating to the sovereignty of states and their faculty of control over their borders, the international legal framework which governs collective expulsions

⁵ Convention that must to be observed by the countries part of the Council of Europe, as we will see in chapter 3.

⁶ The European Union is formed by 28 member States, meanwhile the Council of Europe is formed by 47 States of the European continent.

⁷ IACHR, Case of Dominican and Haiti people expelled Vs Dominican Republic, Judgment, 28 August 2014 (Preliminary Objections, Merits, Reparations and Costs).

⁸ IAtHR, Statute, art. 1.

⁹ According to the Statute of the International Court of Justice, article 38 (1) (a-d), “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: international conventions, international custom, the general principles of law recognized by civilized nations, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”.

¹⁰ IAtHR. Genie Lacayo Vs Nicaragua. Judgment of January 29, 1997 (Merits, Reparations and Costs), para. 77 and 81.

as well as some references to the terminology to be used during this work. Finally the research questions, methodology and outline will be explained.

1.1 Sovereignty and border controls.

Traditionally, it has been recognized that a State is an entity which has a defined territory, permanent population and an effective government, as well as the capacity to conduct international relations with other states.¹¹ Consequently, it is their sovereign right, to have exclusive jurisdiction over their own territory.¹²

This jurisdiction implies, that each country has the right to impose their own migration system, related to the control of their frontiers, entry, residence and removal of foreigners from its territory. This has also been established by the European and the Inter-American Court of Human Rights.¹³ Yet, in doing this, other regional and international laws, specifically on human rights and humanitarian law, must be observed in order to prevent migratory controls from going do far as to unjustifiably interfere with the humans rights of the people concerned.¹⁴

In this sense, the United Nations High Commissioner for Refugees (UNHCR), has also recognized, that "migration is at the very juncture between UNHCR's international refugee protection (international laws) one the one hand, and the policies and practices of governments in managing their borders, (internal law) on the other."¹⁵

In the European region, binding rules on immigration matters include: national legislation of European states, treaty concluded within the Council of Europe, treaties derived by the European Union, treaties on the framework of the United Nations (UN), and bilateral and multilateral treaties concluded between states and third countries. Meanwhile in the American

¹¹ According to the Montevideo convention on the rights and duties of states.of December 26, 1933, League of Nations Treaties Series Bd. CLXV, 25.

¹² UN, Charter of the United Nations, article 2 (1) (7).

¹³ ECtHR, Abdulaziz, Cabales and Balkandali v. UK, May 28, 1985 and Boujlifa v. France, October 21, 1997.

¹⁴ This norms include treaty and consuetudinary laws, that states have agreed in the use of their sovereignty right or that the international community have recognized as the general practice accepted by law. Although the effect of human rights treaties in domestic law is determined under a monist or dualistic system. See: P. Boeles and others, European Migration Law, Intersentia 2nd edition, 2014, p. 22.

¹⁵ UNHCR, Note on International Protection 2014. p. 6.

region, these rules include national legislation, treaties concluded within the OAS and the UN, as well as agreements between states and other parties.

However, until today, it appears to be a confrontation between the classic notion of state and the development of international law. Branch of law in which supranational courts have been granted with jurisdiction (derived from the consent of states), to dictate rules over the behaviour of states in migration matters. Indeed, some arguments from the previous century are still ongoing for some countries, as in the case of Dominican Republic.¹⁶

1.2 International legal framework.

Next to the discussions on sovereignty of states and their territorial jurisdiction, the international community, has been trying to develop a set of rules for the protection of international migrants, also as regarding their expulsion.

The first universal instrument in which a prohibition of expulsion of people was settled, came more than 60 years ago, when their freedom or life were at risk. The Convention relating to the Status of Refugees of 1951, article 33, contemplated the prohibition of expulsion or return ("*refoulement*"), which means that:

"No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".¹⁷

Although this Convention, does not expressly mention the collective expulsions, it is related to this issue, as has been set by regionals human rights courts, as well as the International Organization for Migration (IOM).¹⁸ Besides, other human rights treaties have been interpreted as entailing a prohibition of *refoulement*, such as article 3 of the convention against torture and other cruel, inhumane or degrading treatment or punishment, and article 7 of the International Covenant on Civil and Political Rights.¹⁹

¹⁶ To this respect, see UN, Hamburg session, en *Annuaire de l'Institut de droit international*. Vol. XI, 1889-1892, el Instituto de Derecho Internacional, el 8 de septiembre de 1899, p. 273-320.

¹⁷ UN, The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S 137, and the 1967 Protocol relating to the Status of Refugees, 606 U.N.T.S. 267.

¹⁸ See OIM note on the no *refoulement* principle: <http://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/IML-Information-Note-on-the-Principle-of-non-refoulement.pdf> .

¹⁹ P. Boeles and others, *European Migration Law*, Intersentia 2nd edition, 2014, p. 244.

Closely related, but until 1990, the United Nations convention on the protection of the rights of all migrant workers and members of their families in its article 22 (1) stipulates that:

“Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually”

Furthermore, it prescribes that migrant workers and members of their families may be expelled, only at the pursuance of a decision taken by the competent authority in accordance with the law. Besides these, and the Stateless Convention,²⁰ a unified code does not exist which includes the guarantees that must be followed before a foreigner may be expelled. However, several efforts to create a set of principle on this matter have been made by the UN International Law Commission and the UN Rapporteur on expulsion of foreigners.²¹

Besides the universal legal regime, protection for refugees and other migrants as well as the prohibition on collective expulsions are contained in several legal instruments at regional level. In the African Charter on Human and People’s Rights, article 12 (5); the Arab Charter on Human Rights, article 26 (2); in the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, article 25 (4). As well as in Article 4 of Protocol No. 4 to the European Convention on Human Rights,²² Article 19 (1) of the Charter of Fundamental Rights of the European Union,²³ and finally article 22 (9) of the American Convention on Human Rights. Between all these international instruments, only the African Charter mentions what could be considered as mass expulsion as: “shall be that which is aimed at national, racial, ethnic or religious group”.

However, the existence of this large legal framework and the existence of rights *per se*, does not guarantee its accomplishment. States continue to carry out collective expulsions, using different names and for different reasons, as we will see during the development of this work.

²⁰ UN, Convention relating to the status of stateless persons of 1954.

²¹ UN, International Law Commission, 64 session, No 10 (A/67/10), and third report of the expulsion of foreigners. Available at http://legal.un.org/ilc/reports/2012/All_languages/A_67_10_S.pdf.

²² Despite that the ECHR it was created before that the Convention relating to the Status of Refugees, it is mentioned before with the purpose of separate the ambits of applications of each one.

²³ Necessary to remember that the European Union it is a separated body of the Council of Europe which enforces the ECHR nonetheless is on track to become the 48th signatory of the Convention. See http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf.

1.3 Terminology to be used in this work.

Language has an important role in the perception of concepts. An appropriate use of this, is essential in situations in which strong preconceptions and discriminatory basis are present. Thus, a brief explanation of the terminology used in this work will be mentioned here.

Non-documented migrants or in an irregular (migratory) situation. The term “non-documented or in an irregular situation” will be used, in consonance with the Convention of 1990 related to the Protection of Migrant Workers.²⁴ In this way, there will be no place for terms as “illegal migrants or illegal aliens.” These terms allude to an automatic relation with criminal behaviour of people or their propensity to act illegally. Furthermore, only the actions can be illegal, not people. A non-documented or an irregular migratory situation constitutes an administrative infraction and not a crime, at least in most of the countries. Besides people seeking asylum, cannot have previously had the authorization of the state concerned, as has been laid down in article 31 of the Refugee Convention²⁵ at least they are refugees *sur place*. In this sense, in the media, the Associated Press made a significant change to the AP Style Guide in 2013.²⁶ This modification is an open door, to the appropriate use of the terms in the communication systems, directed to the general opinion and of wide public divulgance, and thus constitute more than a legal term.

An **asylum-seeker**, is an individual who has sought international protection and whose claim for refugee status has not yet been determined. As part of internationally recognized obligations to protect refugees on their territories, countries are responsible for determining whether an asylum-seeker is a refugee or not.²⁷

²⁴ UN. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Adopted by General Assembly resolution 45/158 of 18 December 1990, article 5 (b).

²⁵ The Refugee Convention laid down in article 31 (1): The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

²⁶ See: <http://www.ap.org/Content/Press-Release/2012/Reviewing-the-use-of-illegal-immigrant> .

²⁷ See: UNHCR <http://www.unhcr.org/pages/49c3646c137.html>.

Mixed migratory flows. These are the ones composed of economic migrants, asylum seekers, refugees and statelessness. Sometimes, I will mention the term migrants, comprising all of them.²⁸

Expulsion: Consistent in the action of "rejection, expellition, deportation, devolution, or push-back." a people from the territory of a States. This could also happened in transports with the State's flag, in which the State has an effective jurisdiction, as will be further explained. The name used to name expulsion actions is irrelevant to avoid states responsibilities.²⁹

1.4 Research questions.

The study is based on the following research questions:

What has been the approach of the recent judgements of the European and the Inter-American Courts of Human Rights in cases of the collective expulsion of foreigners? What are their similarities and differences?

To respond to these questions, four subordinated questions will be follow:

1. What is the context of migration flows and expulsion of foreigners in both regions and why it is important and current to analyse this subject?
2. What is the functioning and the relevant legal framework that applies in these different Courts?
3. Which ones have been the important cases dealing with collective expulsions of foreigners in both Courts?
4. How has the criteria of the judgements of each Court been? What are the differences and similarities between them?

1.5 Methodology.

Reports from different organisms will be used to establish the total amount of asylum seekers and other migrants worldwide and by regions. Furthermore this will determine the migration flows in Italy and the Dominican Republic, the respondent states in both cases, in order to respond subordinated question 1.

²⁸ See UN High Commissioner for Refugees, Note on International Protection 2014, p. 6 to 11.

²⁹ In this respect see concurring opinion of judge De Pinto in the ECtHR judgment.

For subordinate questions 2 relevant legislation governing both human rights courts will be analyzed, as well as their case-law in this matter, next to the particular opinions of the judges involved. A few references will be made to the European Union as well, but, since this thesis concerns collective expulsion judgments in human rights courts, it will mainly make reference to the European and Inter-American human rights legislation.

For subordinated question three and four, the mentioned judgments and references to case-law of both courts, will be used. Books and articles by European and American judicial scholars on migration issues, will also be used during all questions.

1.6 Outline.

To settle the basis for a comparative framework, in the second chapter it will be established what the circumstances of migration flows in the world are and in both regions, as well as information on the migration context in Italy and the Dominican Republic. Finally, data of collective expulsions effectuated by the governments of these states will be discussed.

Attending to the particularities in the European and Inter-American human rights systems, as well as the different ways in which both operate, in chapter 3, attention will be focussed on them. This will be with respect to their origins, international binding rules and composition in order to understand what their jurisdiction is in the instant cases. The legal framework of collective expulsions and case law of both courts in this matter will also be explained.

In chapter 4, judgements of each courts will described, explaining the circumstances in which both cases arose, the consideration to lead both bodies to find an infringement of the collective expulsion provisions and the scope of their judgments.

The comparative, chapter 5, will be exclusively designated to the analyses of the similarities and differences of both judgments, related to the group of persons subjected to expulsion, the meaning and scope of the prohibition of collective expulsions in the view of both set of judges, the time it take both courts to finally declare a judgment and finally the compliance at national level of both courts decisions.

I will conclude in chapter 6, by giving an answer to the subordinate questions, which will provide, as a whole, an answer to the main research question in this Master thesis.

INTERNATIONAL FLOWS OF MIGRANTS AND ASYLUM SEEKERS.

2.1 Introduction

In this first chapter, for a better understanding of the subject of collective expulsions, attention will be focused on providing a brief context of migration flows in the world. Later on, on the situation in the European and American continents will be considered, especially with regard to the data of migrants and asylum seekers that form the so-called mixed flows.

Within these continents, I will concentrate on the specific frame of international movements of people in Italy and Dominican Republic, in order to analyze the circumstances in these respondent states. In addition, the situation of collective expulsions of foreigners which is the core subject in this paper will be explored.

2.2 INTERNATIONAL MOVEMENTS OF PEOPLE IN THE WORLD.

According to the latest International Migration and Development Report of the Secretary-General of the United Nations of July 2014³⁰, globally, there were 232 million international migrants in 2013. The proportion of international migrants in the world's population has remained relatively constant for the past two decades, at about 3 percent. But the number of international migrants continues to grow between 2010 and 2013 it grew by 10.8 million.

However, we must put this increase of the numbers of international migrants into perspective. The majority of migrants residing in Africa, Europe, Latin America and the Caribbean, were born in the same region where they reside,³¹ as I will clarify in subsequent subparagraphs.

³⁰ UN Secretary- General, 60/207, 30 July 2014, p. 2. Consulted at http://www.un.org/en/development/desa/population/publications/pdf/migration/A-69-207_en.pdf .

³¹ *Ibidem* p. 3.

Regarding asylum seekers, the statistics from the Asylum Trends 2013 by the UNHCR, showing levels and trends in industrialized countries,³² convey that the number of people who asked for refugee status increased in the 44 industrialized countries, under review.³³ According to this report, there was an increase of 28 percent compared with 2012. This means that some 612,700 asylum applications were recorded, some 133,000 more than the previous year. This was the third consecutive year of increase and the second highest annual level in 20 years in these countries.

2.3 EUROPEAN MIGRATION FLOWS.

In the European continent, I distinguish two separate regions for the study of international movements of people in this paragraph. The first, is the region consisting of the 28 states that form the European Union (EU). The other, regards the rest of the countries that are geographically located in Europe, but which are not part of the EU . They, represent a territorial expanse of 10.180.000 km².

The European Union is one of the most prominent economies in the world. Its external frontiers in the South consist of several countries (Cyprus, France, Greece, Italy, Malta and Spain). The same countries that face a difficult situation dealing with international movements of people by maritime channels, especially concerning asylum seekers.³⁴ But also on the eastern borders of the European Union, there is terrestrial migration, although this is less visible and of less dimension than the migration that comes from the south.³⁵

However, not only European southern countries that are part of this Union face these challenges. Countries that are not member states also face them, as we will see next.

³² UNHCR, Asylum Trends 2013. Levels and trends in industrialized countries. Consulted at <http://www.unhcr.org/5329b15a9.html> .

³³. The report covers the 38 European and six non-European States that currently provide monthly asylum statistics to UNHCR, according to the Report, p 5.

³⁴ The Dublin Regulation stipulates that the Member States responsible for dealing with an asylum application is the one by which the applicant crossed the border by land, sea or air. Article 13 of the EU Regulation No. 604/2013 of the European Parliament and the Council of 06 June,2013.

³⁵ Silvia Marcu, The irregular immigration towards the European Union through the Rumanian eastern border, in Boletín de la Asociación de Geógrafos Españoles. No. 53-2010, p. 367-371.

On the one hand, the International Migration and Development Report reveals that the largest number of international migrants reside in Europe with a total of 72.4 million in 2013.³⁶ However, the greatest increase during the period of 2010-2013 resulted from the movement of people within the same continent. Specifically, this was from Eastern Europe to Southern and Northern Europe, and from Southern Europe to Western Europe, partly in response to the economic crisis.³⁷

This means that European migration to other countries within the same continent represents 37.8 million.³⁸ Partly, this is congruent with the objectives of the European Union. According to the Treaty of the EU and the Treaty on Functioning of the EU, citizens of the European Union and their family members have the right to move and reside freely within the territory of states that are part of the Union.³⁹

Compared to migration from Africa to Europe, in the same period, as mentioned before, this movement only consisted of 8.9 million migrants. Meanwhile, the number of migrants from and into Africa was 15.3 million.⁴⁰

So, there is no doubt that migration in Europe consists, mostly, of people of the same continent, which reveal the false "myth of invasion"⁴¹ and with it, the fear of a lot of European Governments in this respect. Nevertheless, many migrants from outside Europe, still try to reach the continent.

On the other hand with regard to asylum seekers, the Asylum Trends 2013 Report, showed that members of the European Union received an increase of 32 per cent of seekers in this year

³⁶ In millions: 8.9 from Africa, 18.6 from Asia, 37.8 from Europe, 4.5 from Latin America and the Caribbean, 0.9 from Northern America and 0.3 from Oceania.

³⁷ UN Secretary- General, 60/207, 30 July 2014, p. 2.

³⁸ *Ibidem.*, p. 2.

³⁹ Article 3 (2) of the Treaty of the European Union and 20 (1) and (2),(a), and 21 (1) of the Treaty on Functioning of the European Union. As well as European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

⁴⁰ UN Secretary- General, 60/207, 30 July 2014, p. 2.

⁴¹ See: <http://www.telegraph.co.uk/news/worldnews/europe/italy/11542063/Italians-revolt-against-migrant-invasion.html> .

compared to 2012.⁴² The Southern European country that received the most applications in this period was Turkey, which is not part of the European Union.

However, three other European Union countries were in the top five countries to receive asylum seekers; these were Germany, France and Sweden.⁴³

Concerning this matter, it is also important to mention that an “externalization” of the EU frontiers has occurred by a gradual geographical extension of control.⁴⁴ The European Union had signed different agreements with origin and transit countries, especially with Libya, Ukraine, Turkey, and Morocco.⁴⁵ This was to discourage and halt the arrival of people to the European Union’s borders. This process, beginning in places of origin, intensifies in transit countries and is reinforced in European destinations, through acts of control and deportation.

Precisely in this processes of externalization, Italy made the push-back of people reaching their borders. Specifically, through the Agreement that concluded with Libya in 2009, in which the ECtHR it ruled in the Hirsi case to analyze in this work.

2.3.1 Italian migration context.

Italy has been part of the European Union since January 1958 and also part of the Schengen Area since October 1997.⁴⁶ And, as we have seen, is a strategic European Union country managing its maritime borders by its geographical situation in the region.

This member state marks the border of Europe with the Mediterranean sea, which is a natural separation between two regions of deep social inequalities in the world. It also has two large islands: Sicily and Sardinia, as well as, around 68 smaller islands (between them Lampedusa).

⁴² UNHCR, Asylum Trends 2013. Levels and trends in industrialized countries’, p 2.

⁴³ *Ibid.*, p 9.

⁴⁴ Alexander Betts and James Milner, The Externalisation of EU Asylum Policy: The Position of African States, in Centre on Migration, Policy and Society, Working Paper No. 36, University of Oxford, 2006. Consulted at https://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2006/WP0636-Betts-Millner.pdf .

⁴⁵ Human Rights Watch, “Abused and Expelled”, VI. The Externalization of the EU’s Migration Management. February 10, 2014. Consulted at: <http://www.hrw.org/reports/2014/02/10/abused-and-expelled-0> .

⁴⁶ See: http://europa.eu/about-eu/countries/member-countries/italy/index_en.htm .

According to Frontex,⁴⁷ Italy has two main migratory routes: the central Mediterranean Route and the Apulia and Calabria Route.⁴⁸

As has been reported by this agency, economic migrants and seekers of international protection use these routes. In 2014 more than 170,000 migrants arrived in Italy alone, representing the largest influx into one country in European Union history. Syrians and Eritreans were the top two nationalities, but numerous people coming from Sub-Saharan regions also use this route.

The above is consistent with what was reported by UNHCR, according to which, in Southern Europe, the number of newly registered asylum seekers increased by 49 per cent. As was mentioned before, Turkey, a non-European Union member, was the main recipient of asylum applications in the region with 44,800 requests, followed by Italy (27,800) and Greece (8,200).⁴⁹

Furthermore, according to the NGO "Migrations at sea", in 2014 about 80 percent of migrants were asylum seekers,⁵⁰

Even though Italy had received a lot of attention in the political debate and media, the asylum applications received in this country are close to two-thirds that of Turkey. But this does not mean that Italy does not face challenges in this matter. As the same UNHCR Report has shown, this country has registered its third highest number of new asylum applications in a decade,⁵¹ and is expected to receive more in coming years. Unfortunately, the efforts of the EU to manage its borders have changed from a view of "rescue" to a view of "surveillance", as has been exposed by the Mare Nostrum and Triton Programs.⁵²

⁴⁷ The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), established by Council Regulation (EC) 2007/2004.

⁴⁸ See: <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/> .

⁴⁹ UNHCR, Asylum Trends 2013. Levels and trends in industrialized countries, p 8.

⁵⁰ See: <http://migrantsatsea.org> .

⁵¹ UNHCR, Asylum Trends 2013. Levels and trends in industrialized countries, p 12.

⁵² Meanwhile between 2013 and November 2014 the *Mare Nostrum operation* was created by the Italian Government focussed in the rescue operation and with a monthly budget, of € 9.4 million. The *Triton Operation* launched by the EU receive a monthly financing of € 3 million and are only focused in surveillance.

Indeed, during the course of this thesis, a large shipwreck was registered in the Mediterranean, with at least 800 people dead, including women and children, trying to reach the Italian coasts.⁵³ Even though it is not the first time that this has happened, the tragedy of the event certainly points to the current system of immigration in the European Union, which has claimed so many lives so far and will continue doing so if a substantial change in the policy of this region of the world does not occur. Until now, an attempt in this line has been done by the European Commission president, Jean-Claude Juncker. He has called member states “to take in not just people needing protection, but also a limited number of people wanting to come to Europe and seek work”.⁵⁴

2.3.2 Collective expulsions of foreigners.

The detention and deportation policies in Italy have achieved another essential role dealing with mixed flows of migration. Indeed, the push-backs of foreigners were common in the Mediterranean until the European Court declared them illegal.

As reported by Frontex, only in 2011, the JO Hermes Program recorded the arrival of 3,139 non-documented migrants situated in the Pelagic Islands south of Sicily.⁵⁵ Another 1,015 migrants were recorded at the detention center on the island of Lampedusa.

Specialists also assisted the Italian authorities with the processing of migrants. According to these specialists, “the vast majority of irregular migrants that arrived (in 2011) were Tunisian, mostly young adult males. Approximately 20% of them indicated an intention to apply for international protection”.⁵⁶

The expulsion of foreigners has also been the subject of several recent landmark cases by supranational tribunals. In the Court of Justice of the European Union (CJEU), *El Dridi* in April 2011. In the ECtHR in cases as *Tarakhel v. Switzerland* in 2014, and other four cases, concerning

⁵³ See: <http://www.euronews.com/2015/04/23/800-victims-of-mediterranean-sea-tragedy-remembered-in-malta/> .

⁵⁴ See: <http://www.dw.de/juncker-calls-for-eu-refugee-quotas-legal-migration-to-europe/a-18417014> .

⁵⁵ See Declaration of the Extraordinary European Council March 2011. Available at http://frontex.europa.eu/assets/Attachments_News/119780.pdf .

⁵⁶ See: <http://frontex.europa.eu/news/update-to-joint-operation-hermes-2011-7DIIlz> .

collective expulsions, among them the *Hirsi Jamma and others v. Italy* in 2012 as we will explore in point 3.2.5 (b) of next chapter.⁵⁷

In *El Dridi*,⁵⁸ the CJEU ruled that Italian legislation criminalizing irregular stay did not comply with the EU Return Directive.

In *Tarakhel*,⁵⁹ the ECtHR found a violation of Article 3 of the ECHR if the applicants were to be returned to Italy. This, without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.

And lastly, in *Hirsi*,⁶⁰ the European Court of Human Rights found that in intercepting and returning a number of Eritreans and Somalis to Libya, Italy violated the prohibition of ill-treatment and the right to an effective remedy of the European Convention on Human Rights (ECHR) as well as Article 4 of Protocol 4 to the ECHR (prohibition of collective expulsion). As it will be explained later.

These collective expulsions have been also documented in other non-EU countries, as a result of agreements signed with the European Union. This is the case of Morocco. According to Human Rights Watch, collective expulsions in this country ranged from groups of 3 migrants to groups as large as 52 migrants. In no case did the Moroccan authorities notify any of the individuals of a judicial decision to expel or return them to the border.⁶¹

As I mentioned, the prohibition of collective expulsions is contained in several international and regional instruments. This is the case of the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union.

⁵⁷ ECtHR, factsheet on collective expulsions of aliens. Available at: http://www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf .

⁵⁸ EU, ECJ, case C-61/11, Hassen El Dridi, alias Karim Soufi v. Italy, judgment of the Court (First Chamber) of 28 April 2011. of 28 April 2011.

⁵⁹ ECtHR, *Tarakhel v. Switzerland*. Application no. 29217/12, November 4, 2014.

⁶⁰ ECtHR, *Hirsi Jamaa and Others v. Italy* , Application no. 27765/09, 23 February 2012.

⁶¹ Human Rights Watch, "Abused and Expelled", III. Collective Expulsions from Morocco to Algeria. February 10, 2014. Consulted at <http://www.hrw.org/reports/2014/02/10/abused-and-expelled-0> .

2.4 AMERICAN MIGRATION FLOWS.

The territory of the American continent is of 42,549,000 km², which is composed of 35 countries. The migration situation in this region, as in the case of Europe, is also complex. Perhaps the most numerous and best known migration flow is the flow directed to the United States of America (USA), but there are also strong south-south and north-south movements.

In the International Migration and Development Report, mentioned before, two areas were separated for the study: Northern America and South America.

Between 2010 and 2013 in North America, the number of international migrants existed, was of more than 53.1 million people. This number grew primarily as a result of migration from Central America, from East and South-East Asia and the Caribbean. In South America, there were 8.5 million migrants, much of the increase in the number of international migrants was caused by migrants born in other countries in South America.⁶² Hence, the total number of international migrants in 2013 in this continent was 61.6 millions of people.

Regarding the south-south movements one of the most notable is the migration flows of Peru and Bolivia nationals to Chili. This flow represents about 2 percent of the population in that country, which is more than any country of the region has experienced.⁶³ As well Colombian migration to other countries in South America, especially to Ecuador.⁶⁴ Nicaraguans and

⁶² UN Secretary- General, 60/207, 30 July 2014, p. 2.

⁶³ See migration statistics in Chili: http://www.extranjeria.gob.cl/filesapp/censo__2002_.pdf and <http://www.extranjeria.gob.cl/media/2014/07/Permisos-de-residencia-temporal-2013.pdf>.

⁶⁴According to UNHCR, the largest refugee population in Latin America living in Ecuador. 98% of which it consists of people fleeing the internal armed conflict in neighboring Colombia. See:<http://www.acnur.org/t3/donde-trabaja/america/ecuador/>.

Salvadorans are going to Costa Rica, as well as Haitians are going to Dominican Republic, just to mention a few.

There have also been some efforts at a regional level, regarding the free movement of persons. This is the case of UNASUR;⁶⁵ which proposed the issuance of a regional passport. However, these efforts have not materialized until now.

In North America, the so-called northern triangle is one of the most important and dangerous migratory corridors in the world, made up of Central America, Mexico, and the United States.⁶⁶ In this corridor transiting migrants from Mexico and Central America, but also from other regions of the world, although in a less visible way.⁶⁷ It is clear that these movements do not only respond to economic factors, but people also emigrate for reasons of international protection. Therefore, this is also an important corridor of mixed migratory movements.

Take, for example, the situation of one Central American country. According to UNICEF: El Salvador, (where violence related to gangs is one of the biggest causes of insecurity) has the world's highest rate of children being exiled. According to the same organization, in the last decade more than 6,300 children were killed there.⁶⁸

As the Asylum Trends 2013 report showed, in North America⁶⁹ the increase of asylum seekers was 8 per cent compared to previous year. This was as a result of the rise of organized crime violence and insecurity in Central America and Mexico.⁷⁰

Only in the United States, between 2013 and 2014, the number of unaccompanied children has increased by 90 percent and there has also been a comparable increase in Mexico. This has led

⁶⁵ The Union of South American Nations (UNASUR) is a regional organization formed by 12 South American states.

⁶⁶ According to Human rights watch it is estimated that, in Mexico, around 18,000 Central American migrants (mostly) are kidnaped by organized crime, as well as numbers of deaths, mass graves and disappearance each year. See: <http://www.hrw.org/world-report-2012/mexico> .

⁶⁷ See Mexican statistics at http://www.inm.gob.mx/estadisticas/Sintesis_Grafica/2012/Sintesis2012.pdf , p. 30.

⁶⁸ UNICEF Blog: <http://blogs.unicef.org.uk/2014/12/03/families-risk-everything-escape-violence-el-salvador/> .

⁶⁹ North America's industrialized countries, this means that only refers to Canada and the United States.

⁷⁰ UNHCR, Note on International Protection 2014, p. 8.

to the arrest of hundreds of them in precarious conditions, and thus they have been detained for months in overcrowding detention centers in both countries.⁷¹

Meanwhile, securitization in the South Mexico border, has also become evident. This has been strongly supported by the USA government (Merida Plan), similar to the EU process to "externalize" their borders to other non-EU countries.⁷²

Cuban migration to the United States with the Cuban Adjustment Act⁷³ (transiting Mexico because dry feet policy) is also large. However, diplomatic relations between the USA and Cuba have recently been restored, which could make certain amendments to this law and with it, a change in migration from this Caribbean Island.

The situation of Colombian nationals is remarkable as well. Colombians seek asylum mainly in Ecuador or other South American countries and not only in the USA or Canada, (the only two countries registered in the UNHCR Report). This is in part due to the particular situation of Ecuador in the region, as it is the only country that advocate the concept of "universal citizenship".⁷⁴

2.4.1 Dominican Republic migration context.

The Dominican Republic is distinguished as a country of origin and destination of migration flows.⁷⁵ The country has the ninth largest economy in Latin America and the second in Central America and the Caribbean.

⁷¹ Migration Policy Institute, "Dramatic Surge in the Arrival of Unaccompanied Children, Has Deep Roots and No Simple Solutions", June 13, 2014. Available at <http://migrationpolicy.org/article/dramatic-surge-arrival-unaccompanied-children-has-deep-roots-and-no-simple-solutions> .

⁷² Clare Ribando Seelke and Kristin Finklea , U.S.-Mexican Security Cooperation: The Merida Initiative and Beyond in Congressional Research Service, April 2014, p. 19. Available at:<https://fas.org/sgp/crs/row/R41349.pdf> .

⁷³ The Cuban Adjustment Act of 1996, provides for a special procedure under which Cuban natives or citizens and their accompanying spouses and children may get a green card (permanent residence). See: <http://www.uscis.gov/green-card/other-ways-get-green-card/green-card-cuban-native-or-citizen> .

⁷⁴ Constitution of Ecuador Article 416 (6): It advocates the principle of universal citizenship, the free movement of all inhabitants of the planet, and the progressive extinction of the status of alien or foreigner as an element to transform the unequal relations between countries, especially those between North and South.

⁷⁵ Many Dominicans emigrate to the USA or Puerto Rico.

Regarding receiving migration, policy and legislation is largely determined by the boundary with the Republic of Haiti (the country with the most precarious economic situation in the American Continent), due to the fact that the two countries share the same island and a border of 388 km².

In 1919, after the occupation of the Dominican Republic by the United States of America, a system of regulated contracts for the importation of laborers from Haiti began. Thus, the use of Haitian labor force became the most important factor for the realization of human resource farming.

Initially, the presence of Haitians in the Dominican countryside did not generate great feelings of rejection from the Dominican population. However, from the rise of President Leonidas Trujillo (1930-1961), Haitian migrants were subject to a discriminatory policy and assassination because of their race and nationality, forging an anti-Haitian ideology.⁷⁶ Later, another important event occurred in 1991. A massive influx of people from Haiti, registered a peak of more than one hundred thousand refugees fleeing the country after the coup de Jean Bertrand Aristide. This gave vent to a new anti-Haitian political and social exclusion wave, implementing massive detention raids and deportation of Haitians and those of Haitian descent throughout the country that persists until today.⁷⁷

In 2002, the Latin American and Caribbean Demographic Centre (CELADE), with information built from the Population Census of that year, produced an estimate of the population born abroad in Dominican Republic.⁷⁸ In this way it was determined that the country has a migrant population of 96.233 people, representing 1.1% of the population. The largest group consisted of Haitians (61.863).

⁷⁶ Many of them (15,000) were massacred. See Ferguson, J., *Dominican Republic: Beyond the Light-House*, London, Latin America Bureau, 1992.

⁷⁷ Minority Rights Group International, *Report Migration in the Caribbean: Haiti, the Dominican Republic and Beyond* By James Ferguson, p 8. Consulted at: <http://www.oas.org/atip/regional%20reports/migrationinthecaribbean.pdf>.

⁷⁸ CELADE, "América Latina y el Caribe: Estimaciones y proyecciones de población 1950-2050," *Boletín demográfico* 69 (2002): part A. Consulted at: <http://www.cepal.org/publicaciones/xml/7/14347/lcg2225.pdf>.

These migration flows estimations, are contrasted against the 900,000-1,200,000 Haitians and those of Haitian origin that the Dominican government estimates reside in the territory without a regular status, meaning , approximately 11% of the total population.⁷⁹

As Mark Lattimer (Director of the Minority Rights Group International) said, “In the receiving society total migrant population figures are often exaggerated, and negative stereotyping in the media and by politicians portrays the newcomers as a demographic, cultural and sometimes linguistic threat to national identity and unity. This serves to justify the low wages, job insecurity, racism and the anti-immigrant sentiment”⁸⁰

The discriminatory attitudes persist not only with Haitians arriving as migrants or seeking international protection, but also with those born in this country of Haitian descent who have been denied the recognition of nationality. This has resulted in the rulings of the Inter-American human rights system repeatedly. First, in the case of the *Girls Yean and Bosico* in 2005,⁸¹ then in *Nadege Dorzema and Others* in 2012,⁸² and lastly, in the case *Dominican and Haiti people expelled* in 2014.⁸³ This cases will be explained in next chapter.

Besides the American Convention on Human Rights, the Dominican Republic has ratified the International Covenant on Civil and Political Rights, the UN International Convention on the Elimination of All Forms of Racial Discrimination, and several agreements with the International Labor Organization (ILO). As well as the Convention relating to the Status of Refugees and the

⁷⁹ UN. Avance del Reporte del Grupo de Trabajo del Examen Periodo Universal: República Dominicana. Asamblea General, A/HRC/WG.6/6/L.2, 3 de Diciembre de 2009, p. 5.

⁸⁰ Minority Rights Group International, Report Migration in the Caribbean: Haiti, the Dominican Republic and Beyond By James Ferguson, p. 2.

⁸¹ IAtHR, Case of the Girls Yean and Bosico vs Dominican Republic Judgment of September 8, 2005 (Preliminary Objections, Merits, Reparations, and Costs) .

⁸² IAtHR, Case of Nadege Dorzema y Otros vs. República Dominicana. Judgment of October 24, 2012 (Preliminary Objections, Merits, Reparations, and Costs).

⁸³ IACHR, Case of Dominican and Haiti people expelled Vs Dominican Republic, Judgment, 28 August 2014 (Preliminary Objections, Merits, Reparations and Costs).

Inter-American Asylum Convention, but not the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁸⁴

2.4.2 Collective expulsions of foreigners.

Expulsion is the most common Dominican response to unwanted Haitian migrants. This takes two forms: large-scale and widely reported mass expulsions, and the less known but daily expulsions of individuals and groups.⁸⁵

According to Human Rights Watch, several raids in 1991, 1996, 1997 and 1999 produced the deportation of 10,000 to 25,000 Haitians and Dominicans of Haitian descent, plus those practiced by the usual channels.⁸⁶

Later, during 2003 and 2005, mass deportations increased. In 2003, 14,700 people were sent back to Haiti; in 2004, 15,464; and in 2005, 20,811, according to a report on "Haitian Migration and Human Rights," by the Support Group for Refugees and Repatriated Persons (GARR by its acronym in Spanish).

These deportations affected migrants of all ages and both sexes, without any respect for the number of years that the person had been living in the Dominican Republic. Also people with legal resident status, and Dominican people of Haitian descendant were expelled. Further, the deportation processes prevented the deportee from appealing and receiving the pay for the completed work.

Added to this, various organizations have documented that not only immigration authorities expelled foreign group. Also Dominican armed forces, which in principle are only responsible for protecting the borders, had also attributed this powers.

⁸⁴ Accordingly with the Dominican Migration General Law, Law No. 285-04 of August 27, 2004.

⁸⁵ Minority Rights Group International, Report Migration in the Caribbean: Haiti, the Dominican Republic and Beyond By James Ferguson, p 17. Consulted at <http://www.oas.org/atip/regional%20reports/migrationinthecaribbean.pdf>.

⁸⁶ HRW. Personas Ilegales: Haitianos y dominico-Haitians en la República Dominicana. HRW, Vol. 14, No. 1 (B), April 2002, p.p. 16-22.

Collective expulsions are carried out taking people to the border in buses, which are not designed for this work. Without any kind of contact with family members, advocates or representatives. Also they leave them without belongings anywhere in the border without notice to Haitian authorities for their reception.

After the verdict in *Girls Yean and Bosico* case, the Dominican Republic reformulated access to the Dominican nationality by birth. In its new Constitution, issued in January 2010, the *ius soli* criteria were restricted to deny citizenship to transit migrants among which were temporary workers.

In addition, there have been explicit governmental statements in which undocumented immigration is considered one of the new risks and threats to peace and security in the world. These risks also include drug trafficking, poverty, and rising organized crime.⁸⁷

In these three cases in which Dominican Republic has received condemnatory judgments from the Inter-American bodies, the national authorities have said that their administration will not abide by the Inter-American Court decisions. In the first case (Yean and Bosico) even when this was the first position, then, other authorities said that the State would accept the judgment and would act accordingly. In the case from the previous year (Dominican and Haitian people expelled), the Constitutional Court of the Dominican Republic (Judgment TC/0256/14) declared the instrument accepting the jurisdiction of the Inter-American Court of Human Rights to be unconstitutional.⁸⁸

2.5 Conclusions.

For two decades, international movements of people have remained in the same average proportion, but important changes have occurred at a regional level. The European and American continents have been experiencing a similar proportion of international movement flows during 2013 (Europe 72.4 and America 61.6 million people) and in both continents, these

⁸⁷ INCEDES y Sin Fronteras, Estudio Migratorio de Republica Dominicana, en Estudio comparativo de la legislación y políticas migratorias en Centroamérica, México y República Dominicana, p. 568.

⁸⁸ With respect to the Case *Girls Yean and Bosico*, see <http://www.ipsnews.net/2007/03/dominican-republic-deport-thy-darker-skinned-neighbour/> and respect to the second case, see: http://www.oas.org/en/iachr/media_center/PReleases/2014/130.asp .

have been mixed flows (migrants and asylum seekers), although composed in a very different proportion.

While the proportion of asylum seekers in the European Union, demonstrated an increase of 32 per cent compared with 2012; in Canada and the USA (the only two countries in the region with statistics to compare) both, received an increase of only 8 percent of seekers in the same period.

At national level, Italy and the Dominican Republic are big recipient States of foreigners, but in the case of Italy, the proportion of asylum seekers is higher than that in the Caribbean country.⁸⁹

Both countries separate two regions of deep social and economic inequalities and both have set up policies and legislation contrary to their obligations before different human rights bodies. However, Italy has shown some cooperation and implementation of programs to address this situation, even when most of their EU partners has refused to share Italia's burden. In contrast, Dominican Republic has shown itself reluctant to accept the decisions of the Court by different means, continuing launching legislations that violate the rights of thousands of foreigners due to their country of origin, and also nationals because of their ancestry, making them stateless.⁹⁰

Collective expulsions also have been carried out by both countries, but in Italy, a change of behavior is also shown, but not in the case of the Dominican Republic in frank contravention to the judgments of the Court.

Hence with this information in mind, deep analyses of judgments on collective expulsions from both countries will be made. But before considering this topic, a general overview of the characteristics and legal framework of the Human Right's regional systems and the courts that have dictated these judgments will be explored in the next chapter.

⁸⁹ Although, apparently, the current policy of Italy is not register any more foreigners, as has been established by the EURODAC Regulation No 2725/2000 of 11 December 2000.

⁹⁰ Thousands of stateless in Dominican Republic are at risk of deportation. See: <http://www.reuters.com/article/2015/02/01/us-dominican-stateless-idUSKBN0L50YB20150201> .

EUROPEAN AND AMERICAN HUMAN RIGHTS SYSTEMS

3.1 Introduction.

The protection of asylum seekers, as well as of other people in the context of migration, has been a concern in the international community for a long time. This concern became evident in the aftermath of the Second World War. First, with the creation of the Convention Relating to the Status of Refugees of 1951 and its Additional Protocol⁹¹ (both documents that have been signed by 148 states up to now). Second, and almost four decades later, with the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, signed in 1990 which came into force in July 2003 (with 38 signatory States parties).⁹² Although other important instruments have also been produced by different organizations, such as the International Labor Organization (ILO), the Refugee Convention and the Migrant Workers Convention, are the most universally accepted ones.⁹³ Furthermore it is important to bear in mind that international human rights law contains rights for all human being, irrespective of whether they are refugees, asylum seekers or economic migrants, also applies in the migration field.⁹⁴

⁹¹ UN, The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S 137, and the 1967 Protocol relating to the Status of Refugees, 606 U.N.T.S. 267.

⁹² UN, 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. December 18, 1990. See: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en.

⁹³ As ILO Convention No. 97 which has been ratified by 42 countries and Convention No. 143 has been ratified by 18 countries. See: <http://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/pr-22.pdf> , p. 22.

⁹⁴ P. Boeles and others, European Migration Law, Intersentia 2nd edition, 2014, p. 245.

As I said before, besides the universal legal regime, protection for refugees and migrants is also composed of legal instruments at regional level which play an essential role in this matter. This is important, in part, due to the fact that some International instruments have lack of sufficient enforcement measures.⁹⁵ In contrast, the European and American Human Rights systems have supranational Courts with jurisdiction to make judgments to condemn States that violate the Conventions that they have signed.⁹⁶ This was the case with the judgments of *Hirsi Jamaa and Other v. Italy* and *Dominican and Haitian people expelled v. Dominican Republic* expulsions as will be analyzed.

Hence, in this chapter, focus will be placed on general features of both human rights systems and their institutions. In the European region, the one derived from the Council of Europe, and in America, the human rights system which comes from the Organization of American States (OAS).

Then, a brief context on the specific instruments and judgments that each system has produced on the protection against collective expulsions, will be explored.

3.2 THE EUROPEAN HUMAN RIGHTS SYSTEM.

3.2.1 The Council of Europe (COE).

After the devastation of two world wars, to renew efforts of peacekeeping and cooperation between European countries, leaders throughout the region founded different organizations.⁹⁷ The first time in which a Court of Human rights was proposed was on the "Congress of Europe" in The Hague in May 1948.⁹⁸ Later on, in May 1949 under the Treaty of London, the Council of

⁹⁵ The UNHCR has the task of monitoring the manner in which the States Parties apply the Refugee Convention. For the Migrant Workers Convention exist the Committee for Migrants Workers (CMD).

⁹⁶ ECHR article 32 and IACHR art 35.

⁹⁷ The Council of Europe, was one of the organizations which along with the European Union (formerly the European Community of Coal and Steel), and later the Organization for Security and Co-operation in Europe (formerly the Conference on Security and Cooperation in Europe), formed the three main organizations in the region and those which have survived until present.

⁹⁸ Hart, J.W. 2010, "The European human rights system", *Law Library Journal*, vol. 102, no. 4, pp. 533-559. p. 535.

Europe (COE) emerged through its Statute and nowadays it includes 47 member states, 28 of which are members of the European Union.⁹⁹

States that join the Council of Europe retain their individual sovereignty and political identity. However, they must fulfill treaty obligations signed at the COE headquarters located at the *Palais de l'Europe* in France.

Formally, the European system of human rights was created with the approval of the Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁰⁰ This Convention, known simply as the European Convention on Human Rights (ECHR), was designed for the realization of Human Rights and Fundamental Freedoms, as the foundation of justice and peace and for the achievement of greater unity between its members.¹⁰¹

The Convention is only related to the protection of civil and political rights. However, later in 1961, the European Social Charter prescribed those duties of an economic and social character and, unlike what happens in the European Convention on Human Rights does not establish a judicial system for monitoring compliance by States.

Some other legal instruments have been produced by the COE, which are binding to the contracting states by way of ratification or accession. Moreover, the Council has nine monitoring bodies, created by Treaties, including: the European Committee for the Prevention of Torture, the European Commission against Racism and Intolerance and the Commissioner for Human Rights.

Italy, the defendant state of one of the cases to analyze in this work, has been a founding member of the Council and member since May 1949.¹⁰²

The COE also has six observer states: Canada, The Holy See, Israel, Japan, Mexico and the United States.¹⁰³

⁹⁹ See the official site of the COE: <http://www.coe.int/en/web/about-us/our-member-states> (consulted in February 24, 2015).

¹⁰⁰ COE. Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4.XI.1950.

¹⁰¹ *Ibidem*. Preamble.

¹⁰² See: <http://www.coe.int/en/web/portal/italy> .

¹⁰³ See: <http://www.coe.int/en/web/about-us/our-member-states> .

3.2.2 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The ECHR was signed in Rome on 4 November 1950, and became effective on September 3, 1953. This was the first legal treaty of the Council of Europe to protect human rights as well as the first international human rights treaty with enforceable mechanisms. It was inspired by the Universal Declaration of Human Rights of the United Nations of 1948.¹⁰⁴

Only member states of the Council of Europe can become part of the European Convention on Human Rights.¹⁰⁵ The ECHR has a preamble, 59 articles and established two enforcement bodies: a European Commission of Human Rights and a European Court of Human Rights. Later, in 1994, the Commission disappeared and now, only the Court exists, in contrast with the Inter-American system as we will explore further.¹⁰⁶

The treaty deals mainly with civil and political rights, which are found in articles 1 to 18. Articles 19 to 51 describe the mechanism of the Court, while Protocol 1, 4, 6, 7, 12 and 13 include additional rights. The prohibition on collective expulsion is contained in article 4 of Protocol 4 in a very narrow way, that has been later clarified by case law of the ECtHR.

Also, it is very important to notice that this Convention is applicable to all state parties without distinction of jurisdiction of the nationality of the applicants, as has been prescribed in its first article. This means that any foreign person can submit an application before the Court. However the applicant must be a "victim" according to the scope of article 34 of the ECHR.¹⁰⁷

3.2.3 The European Court of Human Rights (ECtHR).

¹⁰⁴ COE. Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4.XI.1950. Preamble.

¹⁰⁵ As we will see further in point 2.2.4, until now, there is a discussion if the European Union can become a member.

¹⁰⁶ COE, Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, Strasbourg, 11.V.1994.

¹⁰⁷ As contained in article 34 of the ECHR, "The Court may receive applications from any person, nongovernmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right".

The European Court of Human Rights was established in September 1953 (when the ECHR entered into force).¹⁰⁸ Located in Strasbourg (France), the ECtHR has jurisdiction over COE member states that have chosen to have access to the optional jurisdiction of the Court. Once a state has agreed to its jurisdiction, all court decisions related to it, are binding.

The original structure of the Court and mechanism for handling cases provided a dual system for the protection of rights, which included the European Commission of Human Rights and the Court. The dichotomy between both institutions initially worked well, since the Court dealt with relatively small cases. However, the number of cases increased from 7 in 1981 to 119 in 1997.¹⁰⁹ This meant a change in the system in 1994, by Protocol 11 of the ECHR, eliminating the Commission on Human Rights and establishing the new European Court of Human Rights.¹¹⁰

The mechanisms for monitoring compliance with the Convention by states parties are basically three. The first one: reports, are made at the request of the Secretary General of the Council of Europe, in which each Member State shall give explanations on how national law ensures effective implementation of the Convention.¹¹¹

The second one: interstate applications, can be made by one or more member states against another for breach of the Convention.¹¹² Unlike what happens in other systems, in the European Convention this mechanism has been relevant in certain cases.¹¹³

The third one: individual claims, is the most important mechanism.¹¹⁴ Throughout this mechanism, any person, non-governmental organization or group of individuals may claim to be the victim of a violation by one of the Contracting Parties of the rights set forth in the Convention

¹⁰⁸ See: <http://www.coe.int/en/web/tirana/european-court-of-human-rights> .

¹⁰⁹ *Ibidem*.

¹¹⁰ In Preamble of Protocol 11 considered: "the urgent need to restructure the control machinery established by the Convention in order to maintain and improve the efficiency of its protection of human rights and fundamental freedoms, mainly in view of the increase in the number of applications and the growing membership of the Council of Europe;"

¹¹¹ ECHR, article 52.

¹¹² ECHR, article 33.

¹¹³ Until now in 17 occasions. See the report of ECHR on inter-state application, available at:http://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf .

¹¹⁴ ECHR, article 34.

or the Protocols thereto. Thus, they may bring an action before the European Court of Human Rights.

Individual claims are first examined to verify that they meet the eligibility requirements. The requirements include: having exhausted resources in their own country, not having the case referred to by another procedure of international investigation or settlement, and that the demand is lodged within six months starting from the date of the final judgment in the domestic sphere.¹¹⁵

Upon acceptance of the application, passing a Chamber of nine judges, including one of the country concerned. Rarely a meeting of the Grand Chamber can consist of 21 judges. Judges seek a friendly settlement, between the victim and the respondent State, in which case they give a ruling collecting the agreement.¹¹⁶ Otherwise, an adversary proceeding begins which concludes with a final judgment and is enforceable by the state. The Chamber judgments may be appealed to the Grand Chamber within six months. The Grand Chamber judgments are always final.¹¹⁷

The judgments are binding under international law, and can be delivered in court or in writing. If the Court finds that there has been a violation of the Convention or the Protocols thereto, states are obliged to prevent similar violations from occurring in the future. "Just satisfaction" can be awarded to victims, including compensation paid by the guilty State.¹¹⁸

In addition to the binding nature for States, the ECtHR judgments exert a growing influence on the decisions of domestic courts on human rights and in some cases, states have made significant legislative changes according to the European Convention.

Relating to the compliance with the ECtHR, the Committee of Ministers of the Council of Europe monitors the Court's judgments to ensure compensation is paid and to assist victims.¹¹⁹

3.2.4 Relation of the COE and the EU.

¹¹⁵ ECRH, article 35.

¹¹⁶ ECHR, article 39.

¹¹⁷ ECHR article 43 to 45.

¹¹⁸ ECHR, article 41.

¹¹⁹ ECHR, article 46.

The Council of Europe (COE) has jurisdiction over 47 states parties, meanwhile the European Union is composed only of 28 European States which are, at the same time, part of the COE. To avoid conflicts, according to the Treaty of the European Union (TEU), the Union shall accede to the ECHR and this accession shall not affect the Union's competence. Besides, the European Human Rights Convention shall constitute the principles of the Union's law.¹²⁰

The adherence of the EU to the ECHR would mean that the ECtHR will be able to scrutinize all acts of the EU institutions and bodies for their compatibility with the European Convention.

There have been negotiations about the accession between the Council of Europe and the EU until now, but these efforts have not been crystallized.¹²¹

Furthermore, the EU has produced its own human rights instrument. The Charter of Fundamental Rights and Freedoms was first drafted in June 1999 with the aim of covering all rights pertaining to EU citizens, including the rights based on the European Convention on Human Rights and the European Social Charter. The EU Charter has been binding since 2009, and has the same legal value as the European Union Treaties.¹²²

As was previously mentioned, Italy is the founding member of the COE, as well as a member of the EU. This means that it is obliged to comply with the treaty obligations derived from both institutions.

3.2.5 Collective expulsion.

a) Legal framework.

At COE level, originally, the prohibition of collective expulsions was not mentioned in the European Human Rights Convention of the 50's, but until 1963 with Protocol 4. This Protocol became binding five years later in May of 1968 (after the ratification of the first 5 States), and as I mentioned, the prohibition of collective expulsion was established in a very narrow way. Article 4 only prescribe that: "collective expulsions are prohibited".

¹²⁰ EU, Treaty of the European Union, article 6 (2) (3).

¹²¹ ECHR, Joint communication from Presidents Costa and Skouris. Available at: http://echr.coe.int/Documents/UE_Communication_Costa_Skouris_ENG.pdf .

¹²² *Ibidem*, article 6 (1).

Some years later, in 1984, Protocol 7 introduced a procedural safeguard relating to expulsions of foreigners, but only in the cases of lawful residents.¹²³ Upon prescribing that, a foreigner lawfully residing in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with the law and shall be allowed: to submit reasons against his expulsion, to have his case reviewed, and to be represented for these purposes before the competent authority (or a person or persons designated by that authority).

As in the Refugee and the Migrants Workers Convention, there is an exception when such expulsion is necessary in the interests of public order or is grounded in reasons of national security.¹²⁴

However, although article 1 of Protocol 7 only mentions "lawful residents", the expulsion, push-back or any other measure to expel a foreigner can infringe ECHR provisions or any other treaty provisions and thus each expulsion must be carefully analyzed.¹²⁵ One of these provisions, is the prohibition of torture, inhumane or degrading treatment or punishment contained in article 3 of the ECHR. As the European Court of Human Rights has stressed, this prohibition is made in "absolute terms, irrespective of a victim's conduct."¹²⁶ The Court has also held that states cannot deport or extradite individuals who might be subjected to these treatment or punishment in the recipient states".¹²⁷

Hence all cases of expulsion of foreigners, regardless of his or her migration status, must be properly and individually analyzed. Otherwise they may entail the responsibility of the state, as has been referred to by the ECtHR in several cases, as we will see next.

b) Case Law

¹²³ ECHR, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Strasbourg, 22.XI.1984.

¹²⁴ *Ibidem*, article 1 (2).

¹²⁵ The term, "push back" is a widely-used term that has overshadowed the legal term of collective expulsion.

¹²⁶ ECtHR, *Chahal v. United Kingdom* (1997) 23 EHRR, para, 413.

¹²⁷ *Soering v. UK*, 1989; *Vilvarajah and others v. UK*, 1991; *H.L.R. v. France*, 1997; *Salah Sheekh v. The Netherlands*, 2007.

The meaning and scope of collective expulsions has been developed progressively by case law. Until now the ECtHR has found a violation of this provision in four cases. It has declared that no violation had taken place in other two cases and has declared inadmissible four more cases. Another case is now pending before the Court, as we will see.¹²⁸

When the former European Commission of Human Rights existed, it ruled in the case named *Becker v. Denmark*, in which it defined collective expulsion as “any measure compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group.”¹²⁹ It also stressed that the purpose of Article 4 of Protocol 4 is to enable migrants to contest the expulsion measure, thereby guarding against state arbitrariness and safeguarding fairness in forced return procedures.

Although the case was declared inadmissible, it meant that the issue of collective expulsion was put before the European human right system for the first time.

Later, under the Strasbourg Court, in 2002, the ECtHR issued another judgment of collective expulsion in *Čonka v Belgium*.¹³⁰ In this case, the Court established that collective expulsion (forming a group) must be understood as meaning “any implementation of expulsion measures” and when there was not a “reasonable and objective examination of the particular circumstances of each of the foreigners forming the group”. This, considering that the applicant’s arrests were couched in identical terms, and during all the time of their detention it was very difficult to contact a lawyer and the asylum procedure had been not completed.¹³¹ Thus, the Court decided that at no stage the procedure afforded sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account. In this case, for the first time, the ECHR had found a violation of Article 4 of Protocol 4 of the European Convention on Human Rights.

¹²⁸ ECtHR fact sheet on collective expulsions. Available at: http://www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf .

¹²⁹ European Commission on Human Rights, *Becker v. Denmark*, Application 7011/75. Decision of 3 October 1975 on the admissibility of the application, p. 235.

¹³⁰ ECtHR, *Čonka v Belgium*, Application No. 51564/99, Judgment 5 February 2002.

¹³¹ *Ibidem*, paragraph 62.

In 2009 another case was logged. *Hirsi Jamaa and others v. Italy*,¹³² concerning the interception and forced return to Libya of a large group of migrants by Italian navy ships in the Mediterranean, based upon relevant bilateral agreements between Italy and Libya. In this case, the Court noted that Article 4, Protocol 4 is applicable not only to migrants lawfully within a state's territory but also to the removal of all foreigners carried out outside its national territory in use of its extraterritorial exercise of jurisdiction.¹³³ The importance of developments of this case will be further analysed.

The Court has also found in established case law, that the fact that members of a group of migrants are subject to similar, individual expulsion decisions does not automatically mean that there has been a collective expulsion, insofar as each migrant is given the opportunity to argue against this measure to the competent authorities on an individual basis. Moreover, there is no violation of Article 4, Protocol 4, according to the Court, if the lack of an expulsion decision made on an individual basis is the consequence of applicants own culpable conduct.¹³⁴

In addition to the above, two other cases have later been issued, in which a breach of the prohibition on collective expulsions was found. These were the *Georgia v. Russia* of July 2014,¹³⁵ concerned the alleged existence of an administrative practice involving the arrest, detention and collective expulsion of Georgian nationals from Russia. In this case the Court found that the prohibition of the Convention was applicable, irrespective of the lawfully resident or not, due that article of the Convention did not only refer to those lawfully residing within the territory of a State.

Finally in *Sharifi and Others v. Italy and Greece* of October 2014,¹³⁶ the Court also held a violation of the mentioned provision and reiterated that "the Dublin system (which serves to determine which European Union Member State is responsible for examining an asylum application), must be applied in a manner compatible with the Convention: no form of collective

¹³² ECtHR, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, 23 February 2012.

¹³³ *Ibidem*.

¹³⁴ See: *Berisha and Haljiti v. "the former Yugoslav Republic of Macedonia,"* where the applicants had pursued a joint asylum procedure and thus received a single common decision. Another example is the case of *Dritsas v. Italy*, in which the applicants had refused to show their identity papers to the police and as a result, the latter had been unable to issue expulsion orders to the applicants on an individual basis.

¹³⁵ ECtHR, *Georgia v. Russia*, Application no. 13255/07, Judgement, 3 July 2014.

¹³⁶ ECtHR, *Sharifi and Others v. Italy and Greece*, Application no. 16643/09, Judgment October 2014.

and indiscriminate returns could be justified (...)” and the State must be aware of the risks faced by people returned to another countries.

The *Khlaifia and others v. Italy* case, is actually pending before the Court.

In next chapter I will elaborate further only in the *Hirsi Jamaa and others v. Italy* case.

3.3 THE INTER-AMERICAN HUMAN RIGHTS SYSTEM.

3.3.1 The Organization of American States (OAS).

The Organization of American States (OAS) has its antecedents in the first International Conference of American States celebrated in Washington in 1889. This is because it is one of the oldest regional organizations in the world.¹³⁷

Some decades later, in the Ninth International Conference celebrated in 1948 in Colombia (in which 21 states participated), the Charter of the OAS and the American Declaration of the Rights and Duties of Man were declared.¹³⁸

The Charter came into force in 1951 and according to article one, the organization was established in order to achieve “an order of peace and justice, to promote their (American States) solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence”.¹³⁹ Therefore, although in the beginning the

¹³⁷ Reisman, W.M. 1998, *The Inter-American Human Rights System*, The American Society of International Law, Washington.p. 45.

¹³⁸ The ninth international conference of American states, held at Bogota, Colombia, march 30-may 2, 1948. Available at: <http://digicoll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?type=div&did=FRUS.FRUS1948v09.i0006&isize=text>.

¹³⁹ Charter of the Organization of American States (OAS). Signed in Bogotá in 1948 and amended by the Protocol of Buenos Aires in 1967, by the Protocol of Cartagena de Indias in 1985, by the Protocol of Washington in 1992, and by the Protocol of Managua in 1993.

purpose of the first Conference was mediation of the settlement of disagreements with regard to commercial matters¹⁴⁰, and then, the defence of sovereignty and territory, this evolved to become now what is now a set of institutions and provisions, known as the American System.

The OAS Charter also established the Inter-American Human Rights Commission (IACHR) as a principal organ of the OAS, whose function it is to promote the observance and protection of human rights and to serve as a consultative organ for the organization in this matter.¹⁴¹ The structure, competence and procedure of the IAHRC was later recognized in another important human rights convention, namely the American Convention on Human Rights.

The American States that ratify the OAS Charter become members of this Organization.¹⁴² So, nowadays the 35 independent States that make up the continent are part of it. Other 69 states (non American) participate as observers, as well as the European Union.¹⁴³

It is important to mention that the effectiveness of the OEA has decreased over the years, and other organizations have emerged in the region. One of them, the Union of South-American Nations, (UNASUR by its acronym in Spanish), specifically leaves the United States and Mexico out of the ambit of its decisions.¹⁴⁴ Also in financial matters, the OAS has suffered different problems that have affected the development of its institutions, especially the Inter-American Commission on Human Rights, as I will mention later.

3.3.2 American Convention of Human Rights, ACHR.

The first instrument relating to human rights in the American system was the American Declaration of the Rights and Duties of Man, adopted in April 1948, (some months before the Universal Declaration of Human Rights). In its content, the regional commitments to the protection of "essential rights of man" is recognized and this paved the way for the later adoption of the American Convention on Human Rights. The Declaration contained twenty-eight

¹⁴⁰ The objectives of the First Conference was "improvement of business intercourse and means of direct communication between said countries, and to encourage such reciprocal commercial relations as will be beneficial to all and secure more extensive markets for the products of each of said countries." See: http://www.oas.org/en/about/our_history.asp .

¹⁴¹ OAS Charter, article 106.

¹⁴² OAS Charter, article 4.

¹⁴³ See: http://www.oas.org/en/ser/dia/perm_observers/countries.asp .

¹⁴⁴ See: <http://www.lanacion.com.ar/1774783-una-oea-inoperante-le-suelta-la-mano-a-venezuelaclaves-americanas> and <http://www.unasursg.org/quienes-somos> .

articles related to human rights, among them, the right to nationality, the right to asylum and the right to protection from arbitrary arrest; as well as 10 more provisions about the duties of man.¹⁴⁵

Then, twenty-one years later, in November 1969, the American Convention on Human Rights also known as "Pact of San José," was adopted in Costa Rica. In its Preamble, it recognized that "the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states".¹⁴⁶

This instrument contained eighty-two articles which include state obligations and civil, political, economic, social and cultural rights, as well as duties. It also contains provisions related to the means of protection through two organs: the Inter-American Commission (IACHR) and the Inter-American Court of Human Rights (IAAtHR).¹⁴⁷ The Convention came into force in 1978 and with this the Inter-American human rights system was established. The Convention has two Protocols, one establishing economic, social and cultural rights, and the other related to the abolishment of the death penalty.¹⁴⁸

Twenty-five states have ratified or have acceded to this Convention and also to the jurisdiction of the Court.¹⁴⁹ This is the case with the Dominican Republic, the country against which the IAAtHR found a violation of the prohibition on collective expulsion.

Nevertheless, two states denounced the Convention and in another case the request was declared inadmissible. Hence, nowadays only 23 States are under its jurisdiction.¹⁵⁰ The first

¹⁴⁵ OAS American Declaration of The Rights And Duties of Man, Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948.

¹⁴⁶ OAS, American Convention on Human Rights "Pact Of San Jose, Costa Rica" (B-32), Preamble numeral 2.

¹⁴⁷ OAS, American Convention on Human Rights "Pact Of San Jose, Costa Rica", Articles 33 to 69.

¹⁴⁸ Protocol of San Salvador Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty of 1990.

¹⁴⁹ Canada, the United States, Belize and other 6 states have not ratified or acceded to the Convention.

¹⁵⁰ See signatories and ratifications, available at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm .

denunciation was made by Trinidad and Tobago, which was effective from May 1999. It was later attempted by Perú during the Government of Fujimori, but the petition was declared inadmissible because the Convention only offers the possibility to denounce it, not to make a “withdrawal of the recognition of the competence of the Court”. In a more recent case, Venezuela denounced the Convention and consequently withdrew the jurisdiction of the Court in September 2012.¹⁵¹

However, the Inter-American Commission will continue with jurisdiction, because as I have mentioned, the Declaration is part of the OAS Charter. This is the same for the rest of the state parties of the Charter, that have not ratified or adhered to the Convention, as in the case of Canada and the United States of America. Besides, both the Commission and the Court have established since 1989 that despite having been adopted as a Declaration and not as a Treaty, currently the American Declaration is a source of international obligations for Member States of the OAS.¹⁵²

In addition to the Declaration and the Convention, in the realm of OAS, there exist around nineteen legal instruments on human rights matters, general or sectoral that states have accepted.¹⁵³ Among them, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention Against All Forms of Discrimination and Intolerance and the Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance.

3.3.3 Inter-American Commission on Human Rights, IACHR.

The Inter-American Commission’s mandate derives from OAS Charter and the American Convention on Human Rights, according to Article 106 of the OAS Charter.

The IACHR was formally established in 1960 when the Permanent Council of the Organization approved its Statute.¹⁵⁴ The Commission is composed of seven independent members who are

¹⁵¹ See: http://www.oas.org/en/iachr/media_center/PReleases/2013/064.asp .

¹⁵² IAtHR. Advisory Opinion Oc-10/89 Of 14 July 1989. Interpretation of the American Declaration Rights and Duties of Man Under Article 64 of The American Convention on Human Rights.

¹⁵³ See the section of basic documents of the IACHR, available at: http://www.oas.org/en/iachr/mandate/basic_documents.asp .

¹⁵⁴ OAS, Statute of the Inter-American Commission on Human Rights, approved through Resolution No 447 adopted by the OAS General Assembly during its ninth period of sessions, held in La Paz, Bolivia, in October 1979.

elected in an individual capacity by the OAS General Assembly, and who do not represent their countries of origin or residence. It is based in Washington, USA.¹⁵⁵

In 1961, the Commission began conducting site visits to observe the general situation of human rights in specific countries or to investigate a particular situation. The IACHR, has nine Rapporteurs, one of them designated with a special mandate on the rights of migrants.¹⁵⁶

To date, the Commission has published four thematic reports on migration matters. The first one was in 1999, named "Progress Report on the Situation of Migrant Workers and their Families in the Hemisphere",¹⁵⁷ the second one in 2005 "Progress Report of the Special Rapporteur on Migrant Workers and Members of their Families",¹⁵⁸ then in 2011 the third one, "Report on Immigration in the United States: Detention and Due Process"¹⁵⁹ and the last one in 2013 "Human rights of migrants and others in the context of human mobility in Mexico".¹⁶⁰

Also the IACHR issued a country report about the Dominican Republic in 1999, which includes a chapter related to the situation of the Haitian migrant workers and their families in the Dominican Republic.¹⁶¹

Since 1965, the IACHR was expressly authorized to receive and process complaints or petitions on individual cases in which human rights violations are alleged. The Commission investigates the situation and can make recommendations to the State responsible to restore the enjoyment of rights, to prevent a recurrence of similar events or to investigate the facts and to make reparations. In December 2011, the IACHR had received tens of thousands of requests, which have resulted in 19,423 prosecution cases or processes.¹⁶²

¹⁵⁵ *Ibidem*, article 22 (1) and 16.

¹⁵⁶ In total, the IACHR has emitted 56 Reports about the situation of people of African descent in the Americas, among others. These can be consulted at: <http://www.oas.org/en/iachr/reports/thematic.asp> .

¹⁵⁷ IACHR, OEA/Ser.L/V/II.102, 16 abril 1999, Progress report on the situation of migrant workers and their families in the hemisphere.

¹⁵⁸ IACHR, Séptimo informe de progreso de la relatoría especial sobre trabajadores migratorios y miembros de sus familias correspondiente al período entre enero y diciembre del 2005.

¹⁵⁹ IACHR, OEA/Ser.L/V/II. Doc. 78/10, 30 December 2010, Report on Immigration in the United States: Detention and Due Process.

¹⁶⁰ IACHR, OEA/Ser.L/V/II. Doc. 48/13 30 December 2013, Human rights of migrants and others in the context of human mobility in Mexico.

¹⁶¹ IACHR, "Report on the situation of human rights in the Dominican Republic" OEA/Ser.L/V/II.104. Doc. 49 rev. 1, 7 October 1999. Original: Spanish.

¹⁶² See the report on cases: http://www.oas.org/en/iachr/decisions/cases_reports.asp .

The admissibility criteria of the petitions require that the remedies under domestic law have been pursued and exhausted, that the petition is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment, and that the subject of the petition is not pending in another international procedure for settlement. Although exceptions are also allowed in some cases.¹⁶³

Regarding its functions, some scholars have said that this organ has an analogous function to an Ombudsman. It can receive complaints of alleged violations of human rights of one Member State part of the Convention and has the potential to start a process of amicable composition or propose "recommendations".¹⁶⁴

According to Chapter VII of the American Convention, after a petition is admitted a "substantive report" will be issued with recommendations to the States. If a State accepts the recommendations this becomes binding. If not, the Commission could put the case before the Inter-American Court.

3.3.4 Inter-American Court on Human Right Court, IAHR.

An Inter-American Court was proposed back in 1923 but never materialized. Even though there was a precedent in the form of the Central American Court of Justice, which functioned from 1907 to 1918.¹⁶⁵

The IAHR was established under Chapter VII of the American Convention on Human Rights which came into force in 1978. The Court is composed of seven judges, nationals of the member states part of the OAS and is based in San Jose, Costa Rica.

The court has two competences: consultive and jurisdictional, concerning the interpretation and application of the provisions of the American Convention of Human Rights.¹⁶⁶ Only the State parties and the Commission have the right to submit a case to the Court .

¹⁶³ American Convention on Human Rights, articles 44 to 46.

¹⁶⁴ Sergio García Ramírez, Relationship Between the Jurisdiction and American States (National Systems): Some relevant issues Legal Research Institute of UNAM. May 2014. See on: <https://humanrights.nd.edu/assets/134036/garciaramireziaspan.pdf> .

¹⁶⁵ The Corte de Justicia Centroamericana (in Spanish) was the first instance of an international judicial forum which heard disputes not only between states but also between states and nationals of any of the Central American republics.

¹⁶⁶ American Convention of Human Rights, articles 62 and 64.

According to the Convention, if the Court finds that there has been a violation of a right or freedom protected by the convention, this organ shall rule that the injured party be ensured of the enjoyment of his right or freedom that was violated.¹⁶⁷ It shall also rule, if appropriate, that the breach be remedied and that fair compensation be paid to the injured party. The Convention, also provides the adoption of provisional measures in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons.

The judgment of the Court shall be final and not subject to appeal. Only in cases of disagreement as to the meaning or scope of the judgment, the Court shall interpret the judgment at the request of any of the parties. Besides, states undertake to comply with the judgment of the Court in any case to which they are party.

3.3.5 Collective expulsion.

a) Legal framework.

According to Article 1 of the Statute of the Inter-American Commission, human rights are the rights set forth in the American Convention of Human Rights, as well as in the American Declaration of the Rights and Duties of Man.¹⁶⁸

In the American Declaration there are not any provisions regarding the prohibition of collective expulsions, only regarding the right to asylum and protection against an arbitrary detention.¹⁶⁹

Otherwise, the American Convention on Human Rights provides in article 22 (9), that "collective expulsion of aliens is prohibited". As in the case of the European Convention on Human Rights this is a narrow provision, as it does not specify what it constitutes a collective expulsion.

However, this provision must be read in conjunction with the rest of the provision relating to the freedom of movement and residence. Article 22 (8) stipulates "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions".

¹⁶⁷ *Ibidem.* article 63.

¹⁶⁸ Statute of the Inter-American Commission on Human Rights. Approved by Resolution No. 447 adopted by the General Assembly OAS at its ninth regular session, held in La Paz, Bolivia, October 1979 .

¹⁶⁹ American Declaration of the Rights and Duties of Man, articles 27 and 28.

Furthermore, article 7(6) provides “Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful”, as well as other provisions that contained the right to a fair trial, the right to equal protection and the rights to judicial protection as we will see in next chapter.¹⁷⁰

With regard to the case of *Dominican and Haitian people expelled v. Dominican Republic*, in which Dominican people (of Haitian descent) were expelled, it is also necessary a brief explanation of the rights thereto.

The American Convention prescribed the right to a nationality.¹⁷¹ Accordingly, “every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality, and that no one shall be arbitrarily deprived of his nationality or of the right to change it.¹⁷² Furthermore, article 22 (5) prescribed that “no one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.”

The Inter-American Court has also brought revolutionary advisory opinions on migration matters.¹⁷³

b) Case law.

Since the Dominican Republic formally accepted the jurisdiction of the Inter-American Human Rights Court in 1999, it has given judgments in fourth times, three of them were linked to the Dominican-Haitian matters.¹⁷⁴

¹⁷⁰ Right to a fair trial: Article 8 (1) Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law (...). Right to equal protection: article 24, All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law, and right to judicial protection: article 25 (1) Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention.

¹⁷¹ American Declaration of the Rights and Duties of Man, article 20.

¹⁷² *Ibidem*, article 20 (2) and (3).

¹⁷³ See IAtHR advisory opinions: ((1) Rights and interests of children in the context of migration and / or in need of international protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A no. 21. (2) IAtHR status and rights of undocumented migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A no. 18, and (3) IAtHR the right to information on consular assistance in the framework of the guarantees of due process. Advisory Opinion OC-16/99 of October 1, 1999. Series A no. 16. Available at: <http://www.corteidh.or.cr/index.php/es/opinionones-consultivas> .

¹⁷⁴ See jurisprudence of the IAtHR, available at: <http://www.corteidh.or.cr/index.php/mapa-interactivo> .

The first of such judgements took place in 2005, in the case of the *Girls Yean and Bosico*.¹⁷⁵ In it, two girls of ages 10 and 12, were denied the right to legal personality and nationality based on *ius soli*, by refusing birth certificates in the Dominican Republic, where they were born. They were stateless persons until September 2001, and one of them, Violeta Bosico, was prevented from attending school for one year because of this, according to the Inter-American Commission on Human Rights, which referred the case to the Court. The IAtHR ruled that the Dominican State had violated the girls' rights to nationality and equality, enshrined in its national laws and established in Articles 20 and 24 of the American Convention on Human Rights.

The second one, which took place in October, 2012, corresponds to the case of *Nadege Dorzema and others*.¹⁷⁶ This case was about the excessive use of force by soldiers against a group of Haitians, in which seven persons lost their life and several more were injured. The ECtHR found the Dominican State, responsible for the violation of the right to life, to liberty and the failure, to comply with the State obligation to not to discriminate, among others.

Finally in *Dominican and Haiti people expelled*, the Court ruled, that the prohibition of collective expulsions was violated, in addition to other rights, as we will see.

Despite only in the last case was a breach of the prohibition on collective expulsion found, the previous judgments show the repeated conduct of the Dominican government with regard to this issue.

3.4 Conclusions.

Some important differences can be noticed in both systems. The first difference is related to the requirement of admittance of petitions, in the Court of the Council of Europe, only the victim's complaints are authorized (Article 34 European Convention). Whilst in the Inter-American system, "Any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission" (Article 44 of the Convention).¹⁷⁷

¹⁷⁵ IAtHR, Case of the Yean and Bosico v. Dominican Republic. Judgment of September 8, 2005. Series C No. 130.

¹⁷⁶ IAtHR, Nadege case Dorzema et al v. Dominican Republic. Reparations and Costs Fund. Judgment of October 24, 2012 Series C No. 251.

¹⁷⁷ I mention the lodging of petitions before the Commission and not before the Court because contrary to the European system in which this figure has disappeared, in the Inter-American system, only the States or the Commission can lodge petitions directly to the Court.

The second difference is related to the composition of both human rights systems. The Inter-American mechanism is composed of two institutions: the Commission and the Court. Whereas in the European system, the European Commission of Human Rights became obsolete in 1998 and now only the Court exists.

Challenges remain for both mechanisms. Both have experienced an increase in the petitions they received. In the case of the European Court, in 2014, received 56250 applications¹⁷⁸ (ill-founded requests represent about 90% of the cases). In the case of the Inter-American system, the Inter-American Commission received, in 2014, 1758 complaints with a significant lag per year.¹⁷⁹ Furthermore the Inter-American system also faces a critical financial situation due to its insufficient funds and the delay of the contributions by the states members, which affects the system as a whole.¹⁸⁰

Despite the aforementioned, in the Inter-American system more than 10 countries have still not ratified and do not adhere to the American Convention of Human Rights and the jurisdiction to the Court. This creates a different level of protection for all the people under the jurisdiction of an American State. The constitutional recognition in the ambit of each State of the rights and freedoms established in the regional human rights instruments is also necessary. This has happened in 12 countries like recently, in 2011, in Mexico throughout a constitutional reform, but it is desirable that the same will happen in the rest of the countries.¹⁸¹

Lastly, there is a challenge referring to the compliance of judgments, it is also desirable to have a law with regard to execution of judgments from international resolution that until now, only two countries in the region have. On the contrary, the European human rights mechanism appears to be a more unified system.

Despite this and as an overview it can be concluded that the importance of the regional human rights systems resides largely in the compulsory jurisdiction of their judgments. This will be brought again into consideration in chapter five.

¹⁷⁸ ECtHR, statistics 2014, available at: http://www.echr.coe.int/Documents/Stats_annual_2014_ENG.pdf .

¹⁷⁹ IACHR, statistics, available at: <http://www.oas.org/es/cidh/multimedia/estadisticas/estadisticas.html> .

¹⁸⁰ See: <http://en.mercopress.com/2011/11/01/oas-faces-critical-financial-situation-difficulties-to-pay-salaries> .

¹⁸¹ See: <http://www2.scjn.gob.mx/red/constitucion/inicio.html> .

4

COLLECTIVE EXPULSION CASES.

4.1 Introduction.

Having done a study of the international movements of people in the European and American region, as well as a study of the main features of both human rights systems, as far as relevant for the study that I intend to do. This chapter sets out the content of the two relevant judgments to analyze: *Hirsi Jamaa and others v. Italy*¹⁸² and *Dominican and Haitian people expelled v. Dominican Republic*.¹⁸³

As I mentioned, collective expulsions may occur in situations dealing with asylum seekers, refugees, undocumented migrants, stateless persons or even legal residents in the country concerned; as I will further explain in these two cases during this chapter.

Depending on the human rights system concerned, a different procedure took place. In the European one, only the judgment of the court will be analyzed, whilst in the Inter-American system, the report of the Commission as well as the judgment of the Court will be explored. Furthermore, there is an important remark related to the issuance of provisional measures that the Inter-American Court ordered, for the first time, against mass or arbitrary expulsion in the present case.

¹⁸² ECtHR, Application 27765/09. Case of Hirsi Jamaa and Others v. Italy Judgment of 23 February 2012.

¹⁸³ IAtHR. Dominican and Haitian expelled people v. Dominican Republic. Judgment of August 28, 2014, (Preliminary Objections, Merits, Reparations and Costs).

Finally, separated opinions were only made by the European Court about the collective expulsion by Judge Pinto de Albuquerque, and none were made in the case of the Inter-American Court.

4.2 ECtHR: Hirsi Jamaa and others v. Italy.

4.2.1 Circumstances of the case.

This case originates from 2009. It concerned an application against Italy by eleven Somali nationals and thirteen Eritrean nationals.¹⁸⁴ They were among a group of about two hundred people who left Libya in May that year aboard three ships to reach the Italian coast. When they were thirty-five nautical miles south of Lampedusa, they were intercepted by three Italian police ships and the coastguard.¹⁸⁵ The occupants of the boats intercepted were transferred to Italian military ships and brought back to Tripoli, (Libya), because of the bilateral agreements signed by both countries.¹⁸⁶ The plaintiffs claimed that during that trip, the Italian authorities did not inform them of their true destiny and took no steps to identify them. Besides, all their documents and personal effects were confiscated by military personnel. Upon arrival at the port of Tripoli applicants were handed over to the Libyan authorities. Two of the applicants died under unknown circumstances after the events in question and fourteen received refugee status granted by the UNHCR based in Tripoli between June and October of 2009.¹⁸⁷

The plaintiffs alleged that their transfer to Libya by the Italian authorities was a violation of article 3 of the ECHR by being exposed to the risk of inhumane and degrading treatment. They also claimed a violation of article 4 of Protocol 4 on the prohibition of collective expulsions, as well as article 13 concerning the right to have an effective remedy before an Italian Court. In this paper, I will only focus on the second alleged violated right.

4.2.2 Admissibility.

¹⁸⁴ ECtHR, application no. 27765/09.

¹⁸⁵ *Guardia di finanza*.

¹⁸⁶ Bilateral agreement concluded with Libia in the same year (2012) to "fight clandestine migration" and ensure repatriation of immigrants.

¹⁸⁷ See Judgments annex.

Regarding the proceeding, it is important to mention that the chamber of the ECtHR which received the application, relinquished its jurisdiction in favor of the Grand Chamber (composed of seventeen judges) which means they considered it a serious question of interpretation.¹⁸⁸

Besides the allegations of the Italian Government and the applicants, the ECtHR, also received third-party written observations from the UNHCR and other international organizations.¹⁸⁹

Some preliminary issues about the admissibility of the complaint were raised. The first of them was brought by the Italian Government about the validity of the powers of the applicant's attorney. This objection was rejected by the Court.¹⁹⁰ The second was about the exhaustion of domestic remedies, in which the court decided to join the merits of the complaint under article 13 of the ECHR relating to an effective remedy before a national Court.¹⁹¹

About the jurisdiction of Italy under article 1 of the ECHR,¹⁹² the Court achieved one of its major advances in the jurisdiction concept in the field of international migration law in this judgment. Having considered that Italy had denied that Italian authorities had exercised "absolute and exclusive control over the applicants", the Court assessed that even though the event occurred in high seas, it occurred on board a ship flying the Italian flag. In the court's view, this means that the people on board and events occurring on it, are subject to the exclusive jurisdiction of the state of the flag it is flying. Thus, the Court concluded that this event constituted "a case of extraterritorial exercise of jurisdiction by Italy, capable of engaging that state's responsibility".¹⁹³ This was an important decision as it determined a broader scope of the prohibition of collective expulsion, as we will see later in chapter five.

¹⁸⁸ Article 72 of the Rules of the ECtHR.

¹⁸⁹ Human Rights Watch, Columbia Law School Human Rights Clinic, the AIRE centre, Amnesty International and the International Federation for Human Rights.

¹⁹⁰ ECtHR, Application 27765/09. Case of Hirsi Jamaa and Others v. Italy Judgment of 23 February 2012. para. 52. The Court considered that "a simple written authority would be valid for the purpose of the proceeding before the Court".

¹⁹¹ *Ibidem*, para. 62.

¹⁹² ECHR, article 1 "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention".

¹⁹³ ECtHR, Application 27765/09. Case of Hirsi Jamaa and Others v. Italy Judgment of 23 February 2012, para. 78.

4.2.3 Violation to the prohibition on collective expulsion (article 4 of protocol 4 of the ECHR).

The first issue which arose with regard the infringement of this prohibition was brought by the Italian government. It alleged that the guarantee provided in article 4 of Protocol 4 of the ECHR was not applicable in this case, because it was only on the event of “expulsion” of persons on the territory of States or persons who had crossed the national border undocumented.¹⁹⁴ Then, in this case the measure alleged was a refusal to authorize entry into Italian territory, rather than “expulsion”.

The plaintiffs considered that the word “expulsion” might be seen in an evolutionary way. Therefore a functional, teleological and extraterritorial interpretation was needed to prevent push backs of migrants on the high seas.¹⁹⁵ The applicants also alleged that their return to Libya with no prior identification and no examination of the personal circumstances of each applicant, constituted a collective removal measure.

UN third-parties intervened in this matter.¹⁹⁶ In their view, article 4 of Protocol 4 was applicable in this case and stressed the importance of the “potential significant effect” of the wide interpretation of this provision in the field of international migration law. They noted that the protection against collective expulsion should benefit persons intercepted on high seas, even when they were not able to reach a State’s border. Otherwise states could be able to evade their obligations by advancing their border-control operations. They also considered an extraterritorial approach of the Contacting State’s jurisdiction to be applicable.

In conjunction with the UN bodies, the Columbia Law School Human Rights Clinic also provided its considerations.¹⁹⁷ Particularly referring to the statements of the Committee Against Torture of the UN relative to the importance of individual identification and assessment to prevent people being returned to situations where they will be at risk. It also made reference to the Inter-American Commission on Human Rights which considered that the United States had impermissibly returned interdicted Haitian migrants without making an adequate determination

¹⁹⁴ *Ibidem* para. 160.

¹⁹⁵ *Ibidem*. para. 162.

¹⁹⁶ Two United Nations (UN) bodies: the United Nation High Commissioner for Human Rights and the UNHCR, intervened.

¹⁹⁷ *Ibidem*. para. 165.

of their status and without granting them a hearing to ascertain whether they qualified as refugees.¹⁹⁸

On its assessment, the ECtHR considered first the applicability of article 4 of Protocol 4 of the ECHR. For this purpose it referred to the case in which for the first time the former Commission defined what collective expulsion of foreigners means.¹⁹⁹ Namely: "*any measure of the competent authority compelling aliens²⁰⁰ as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases to each individual alien of the group*".²⁰¹

This definition was later used by other bodies of the European convention on human rights in cases which involved persons were on the territory of the contracting states. Only in the case *Xhavara and others v. Italy and Albania*²⁰² were the conditions similar to the *Hirsi* case, but the Court rejected the complaint in that case on the ground of incompatibility *ratione personae*.²⁰³ Therefore the *Hirsi Jamaa and others* case, was the first in which the ECtHR had to examine the application of the collective expulsion prohibition concerning a situation outside of the national territory.²⁰⁴

With regard to this matter the ECtHR drew on the Vienna Convention of the Law of the Treaties.²⁰⁵ Then the Court considered that according to article 33 of this Convention "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*". The Court

¹⁹⁸ IACHR. The Haitian Centre for Human Rights at al. v. United States. Case no. 10.675. Report no. 51/96.

¹⁹⁹ The Commission ceased to exist after the entry into force of Protocol 11 to the ECHR in November 1998, which provided for the abolition of the Commission as filter of the demands.

²⁰⁰ I reproduce the word "alien" as it contained in the judgement, even when the term "foreigner" is the one used in this work.

²⁰¹ *Becker v Denmark*. Application no. 7011/75. Commission Decision of 3 October 1975, para. 236.

²⁰² ECtHR *Xhavara and Others v. Italy and Albania*, application no. 39473/98 of 11 January 2001.

²⁰³ Compatibility *ratione personae* requires the alleged violation of the Convention to have been committed by a Contracting State or to be in some way attributable to it. See: ECtHR, Application 27765/09. Case of *Hirsi Jamaa and Others v. Italy*. Judgment of 23 February 2012, para. 168, and ECHR, Practical guide on admissibility criteria, 2011, page 34.

²⁰⁴ *Ibidem*, para 169.

²⁰⁵ UN. Vienna Convention of the Law of the Treaties of 23 May 1969. articles 31 a 33.

considered that the Convention is a living instrument which must be interpreted in the light of the present day conditions. Thus, to the ECtHR the provision of the article 4, Protocol 4 was applicable and dismissed the argument of "territorial expulsion" brought forward by the Italian State.

This consideration of the Court was of instrumental importance for the current migration flows. As it has also recognized in the judgments, with a different interpretation of the prohibition on collective expulsion a "significant component of contemporary migration patterns would not fall within the ambit that provision".²⁰⁶

Surpassing the issue of the applicability of Article 4 of Protocol 4 of the ECHR, the Court focused on the analysis of the breach of this provision. Until that moment, as the court recognized, only in one case had a violation of the prohibition on collective expulsion been found, which was the *Čonka v. Belgium* case.²⁰⁷ In that case and in the instant, the Court examined the circumstances of the situations to ascertain whether the deportation decision took account of the particular circumstances on the individuals concerned.

Moreover, the Court considered the case-law of the bodies of the European Convention on Human Rights in this issue, which indicates:²⁰⁸

1. that the fact that a number of foreigners are subject to similar decisions does not, in itself, lead to the conclusion that collective expulsion of each individual is at stake,
2. it is required that each person concerned has been given the opportunity to bring forward arguments against his or her expulsion,
3. the arguments against the expulsion must be brought before competent authorities,
4. the arguments against the expulsion must be made on an individual basis,
5. finally, there will be not violation to this provision if the lack of the expulsion decision made on individual basis is the consequence of the applicant's own culpable conduct.

²⁰⁶ ECtHR, Application 27765/09. Case of *Hirsi Jamaa and Others v. Italy*. Judgment of 23 February 2012. Para. 72 and 73. para 177.

²⁰⁷ ECtHR, *Čonka v. Belgium*, application No. 51564/99, Judgment 5 February 2002.

²⁰⁸ ECtHR, Application 27765/09. Case of *Hirsi Jamaa and Others v. Italy*. Judgment of 23 February 2012. Para. 72 and 73. para 184.

After the previous analyses, the ECtHR found that the transfer of the twenty-two applicants to Libya was carried out without any form of examination of each applicant's individual situation.²⁰⁹ Moreover, the applicants had not subjected to any identification procedure by the Italian authorities, and the personnel aboard the military ships had not been trained to conduct individual interviews and were not assisted by interpreters or legal advisers. In the Court's view this means that sufficient guarantees ensuring that the individual circumstances of the applicants were actually subjected to a detailed examination were absent. Therefore, the Court concluded that the removal of the applicant was of a "collective" nature in violation of the Article 4, protocol 4 of the ECHR.

4.2.4 Judgment.

The final judgment arrived 3 years later after the application was logged, in February 2012. The ECtHR found unanimously that the applicants were within the jurisdiction of Italy and held unanimously a violation of the prohibition on collective expulsions.

The Court also held unanimously a violation of article 3 of the ECHR as the applicants were exposed to the risk of being subjected to ill-treatment in Libya and a violation of article 13 related to the right to have an effective remedy before an Italian court.

Consequently, the ECtHR ordered, unanimously, to the Italian Government to pay the applicants in respect of non-pecuniary damage and the costs and expenses of the procedure.

Finally, the Court indicated that the Italian Government should have taken all possible steps to obtain assurances from the Libyan authorities that the applicants would not be subjected to treatment incompatible with Article 3 of the Convention (prohibition of torture, inhuman or degrading treatment or punishment) or repatriated arbitrarily.²¹⁰

For all the previous, this case achieves an "historic" judgment in favor of the protection of human rights of migrants. First, with the declaration of the extraterritoriality of the European Convention on Human Rights in any space, including on a ship on the high seas in which a State party exercises its control. Then it enabled, the prohibition of collective expulsions at sea.

²⁰⁹ The Court decided to dismiss the application of two of the first plaintiffs because of their death. para. 59.

²¹⁰ ECtHR, Application 27765/09. Case of Hirsi Jamaa and Others v. Italy. Judgment of 23 February 2012. Para. 72 and 73. para 211.

4.2.5 Concurring opinion.

Only one separate opinion was given by judge Pinto de Albuquerque. Although he concurred with the Grand Chamber judgment, he decided to do a further analysis with regard to four issues. One, related to the prohibition of *refoulement* of refugees, the second to the prohibition on collective expulsion, the third one on State liability for human rights breaches during immigration and border control and the last one concerning the violation of the Convention standard by the Italian State.

With respect to the prohibition on collective expulsion, he reinforced the idea that nothing in the content of the provision of article 4, Protocol 4 indicates that it is not applicable extraterritorially. Also, he considered that the provision was made in very wide terms with the inclusion of the word "alien" (not only residents or migrants).²¹¹ In his point of view, the purpose of the provision is to guarantee the right to lodge a claim for asylum, which will be individually evaluated regardless of the legal and factual status of the asylum seeker. He also reinforced that the refugee status determination procedure must be individual, fair and effective and that it must have at least some criteria to have been recognized as standard of international human rights and refugee law.²¹²

Furthermore, he considered, that the notion of "collective expulsion" requires a similarly broadly interpretation which includes *"any collective operation of extradition, removal, informal transfer, "rendition", rejection, refusal or admission and any other collective measure which would have the effect of compelling an asylum seeker to remain in the country of origin, wherever that operation takes place"*. I will return to this opinion in the next chapter.

²¹¹ I reproduce the word "alien" as it contained in Protocol 4, even when the term "foreigner" is the one used in this work.

²¹² According to the ECHR case law, the European commission for the prevention on torture, the Committee of Ministers of the COE as well as ACNUR, the criteria must include: a reasonably time limit, a personal interview, the opportunity to submit evidence, a fully reasoned written decision by an independent first-instance body, reasonable period to appeal, full and speedy judicial review and free legal advice and representation, if necessary.

4.3 IAtHR: Dominican and Haiti people expelled v. Dominican Republic.

4.3.1 Circumstances of the case.

On 12 November 1999, several organizations²¹³ logged a request before the Inter-American Commission on Human Rights (IACHR), on behalf of seven Haitian and Dominican alleged victims.²¹⁴

The case was initially presented to the Commission as *Benito Tide Méndez, Antonio Sensión, Andrea Alezi, Janty Fils-Aime, William Medina Ferreras, Rafaelito Pérez Charles y Berson Gelim and others v. Dominican Republic*, but later, upon decision of the Inter-American Court, it received the name of *Dominican and Haiti people expelled v. Dominican Republic*.

The petitioners argued that the alleged victims were detained and in less than twenty-four hours, expelled arbitrarily from the Dominican Republic to Haiti. This procedure was without notice, hearing or opportunity to collect their belongings or contact their families, a situation that caused them serious harm, (material and emotional). They added that there were no guarantees of due process, no measures to protect the interests of the children, and there was

²¹³ Human Rights Clinic of the School of Law at the University of California, Berkeley (Boalt Hall); the Center for Justice and International Law (CEJIL) and the National Coalition for Haitian Rights (NCHR) (the petitioners). However, other organizations were added later.

²¹⁴ IACHR Report on Admissibility 68/05. Request 12,271. October 13, 2005 Consult at: <https://www.cidh.oas.org/annualrep/2005sp/RepDominicana12271sp.htm> . Initially in the petition, the names of the applicants were not specifying. Later they were identified as: Benito Tide Méndez, Antonio Sensión, Andrea Alezi, Janty Fils-Aime, William Medina Ferreras, Rafaelito Pérez Charles y Berson Gelim.

no effective judicial remedy in domestic law to allow them to challenge the decision of the Dominican authorities.

The petitioners also argued that the expulsions were part of a practice of the Dominican State of systematic and collective deportation of people who presumably were of Haitian origin. This practice was, according to them, carried out using racial profiling based on the alleged nationality of the “victims” and therefore discriminatory.

The plaintiffs complained that the Dominican authorities keep to Dominicans of Haitian descent and Haitians living in the Dominican Republic in an undocumented situation, which puts them at risk for a possible expulsion.²¹⁵

Finally, the plaintiffs alleged that their detention and expulsion infringed articles 3 (recognition of legal personality), 5 (humane treatment), 7 (personal liberty), 8 (judicial guarantees) 17 (protection of the family), 19 (rights), 20 (nationality), 22 (freedom of movement), 24 (equality before the law) and 25 (judicial protection), all in conjunction with Article 1.1 (obligation to take action) of the American Convention on Human Rights (ACHR).²¹⁶

Although the petitioners claimed an infringement of article 22 of the ACHR, related to the freedom of movement and residence in which the prohibition on collective expulsion is included (para. 9), they were not specifically signaling the violation of the prohibition of this expulsions. However, they change this changed later, in the Report of the Merits issued by the Commission and when the case was presented to the Inter-American Court.

4.3.2 Proceedings before the Inter-American Commission on Human Rights (IACHR).

Two proceeding took place before the Commission. One related to the admissibility of the case and the second, related to the merits. As is prescribed in the Rules of Procedure of the IACHR, if in the study of the Report on the Merits a violation to the American Convention is found, the State concerned must be informed. Only if this Report is not observed by the State, can the Commission present the case before the Inter-American Court.²¹⁷

²¹⁵ This means the possible expulsion of Dominican nationals, prohibited for many international laws, as well as foreigners.

²¹⁶ IACHR Report on Admissibility 68/05. Request 12,271. October 13, 2005 Consult at: <https://www.cidh.oas.org/annualrep/2005sp/RepDominicana12271sp.htm> , para. 1.

²¹⁷ IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, article 45.

In the present case, the IACHR issued the Report on admissibility on 13 October 2005 accepting the petition.²¹⁸

A request for precautionary measures was made by the petitioners on 17 November 1999. This was accepted by the IAtHR seven days later. Consequently, the Court requested the government of the Dominican Republic to take the necessary actions to put an end to mass expulsions of foreigners and, where persons in the territory of the Dominican Republic were to be deported, to fully observe the requirements of due process.²¹⁹ The Court not only ordered the government to protect the right to life, but also the right to family unification and the free movement of certain people. This was the first time, in which in the Inter-American system, the Commission persuaded the full Court to go beyond the protection of the rights of physical integrity and life in its use of provisional measures.²²⁰ Later, the measures were progressively lifted until September 2012.²²¹

The Report on the Merits, was issued seven years later (after the admissibility Report), on 12 March 2012.²²² In this Report, the Commission recognized that the case arose “in a heightened context of collective and mass expulsions of people, which also affected nationals and foreigners, documented and undocumented, who had permanent residence or close ties of family or labor relations in Dominican Republic”.²²³ It can be noticed that the Commission made a distinction between “collective” and “mass” expulsions, however in the final judgement only mention the term “collective”.²²⁴

²¹⁸ IACHR Report on Admissibility 68/05. Request 12,271. October 13, 2005.

²¹⁹ Precautionary measures granted or extended by the Commission in 1999. Consult at: <http://www.cidh.org/medidas/1999.eng.htm> .

²²⁰ Rieter, E., Preventing irreparable harm, provisional measures in international human rights adjudication, Hart, Intersentia 2010, p. 502.

²²¹ IAtHR. Dominican and Haitian expelled people v. Dominican Republic. Judgment of August 28, 2014, (Preliminary Objections, Merits, Reparations and Costs).para. 22.

²²² IACHR Report on the merits No. 64/12, Case 12.271 Benito Tide Mendez and Other v Dominica Republic on March 29, 2012. Consult at: <https://www.oas.org/es/cidh/decisiones/corte/12.271Fondo.doc> .

²²³ IAtHR. Dominican and Haitian expelled people VS. Dominican Republic. Judgment of August 28, 2014, (Preliminary Objections, Merits, Reparations and Costs). Para. 2.

²²⁴ Maybe related to the amount of more than 20,000 and 30,000 expulsions or deportations recognized in various reports.

In the end, the Commission concluded that the Dominican Republic was responsible for the violation of the rights to juridical personality, personal integrity, personal liberty, fair trial, protection of the family, children's rights, nationality, property, movement and residence, equality and non-discrimination, to judicial protection and prohibition of collective expulsion, of the victims.²²⁵

Thus, in the Report on the Merits, the IACHR issued nine recommendations to the Dominican State²²⁶:

- (1) Allow all victims who were still in the territory of Haiti to return to the territory of the Dominican Republic.
- (2) (a) Implement the necessary measures for the recognition of Dominican nationality of some victims, (b) grant or replace all necessary documentation that accredited them as Dominican nationals to others of the petitioners, and (c) that some Haitian nationals could legally stay in the Dominican Republic with their families.
- (3) Pay full compensation to the victims (comprising the material and moral damage, and property).
- (4) Publicly recognize the violations found in the case (ensuring adequate mechanisms of diffusion).
- (5) Adopt no repetition measures.
- (6) Eradicate practice of raids or operational migration control measures based on racial profiling.
- (7) Ensure that the Dominican authorities receive intensive training in human rights.
- (8) Investigate the facts of the case and identify those responsible for the violations found and establish appropriate sanctions.
- (9) Establish effective judicial remedies in cases of violation of human rights in the context of expulsion or deportation procedures.

²²⁵ *Ibidem* para. 333.

²²⁶ *Ibidem* para. 335.

The Report on the Merits, was notified to the Dominican Republic, without any response from it, in the prescribed time.²²⁷ Thus, the Commission decided to submit the case to Inter-American Court on July 12, 2012, and as was mentioned, it received a new name.²²⁸

4.3.3 Proceedings before the Inter-American Court of Human Rights (IAAtHR).²²⁹

The Commission sent the Report on the Merits to the Court, asked it to declare the infringement of the same rights previously mentioned in this Report, between them, the infringement to the prohibition of collective expulsions. Then, the applicants asked the Court to add the violation of the rights of protection of honor and dignity, the right to a name and the duty to adopt domestic law. They also asked the IAAtHR to order the State to adopt various measures of reparation and the reimbursement of certain costs and expenses.²³⁰

The judgment of the Court was not emitted until August, 28 of 2014 in a very lengthy manner that comprised of 173 pages. It ranges from the preliminary objections, the determination of the alleged victims, (since from the beginning it omitted the names of some of them), the proofs and an extensive chapter on the context of the Haitian population or Dominicans of Haitian descendant in Dominican Republic, as well as the particular situation of each of the families involved. It is also comprised of the analyses of the alleged violated rights, as well as the reparations.

In the discussion of each right that was allegedly infringed, the allegations of the Commission and the parties and finally the considerations of the Court were included.

In Chapter IX of the judgment, the minimum guarantees in immigration proceedings that may involve deprivation of liberty and expulsion or deportation, as well as the conclusion of the Court regarding the collective expulsion of foreigners was analyzed.²³¹

²²⁷ Two months.

²²⁸ By decision of the Court this name was change to "*Dominican and Haitian expelled people v. Dominican Republic*".

²²⁹ The Dominican Republic accepted the jurisdiction of the Court on 25 March 1999.

²³⁰ IAAtHR. *Dominican and Haitian expelled people v. Dominican Republic*. Judgment of August 28, 2014, (Preliminary Objections, Merits, Reparations and Costs), para. 6 and 7.

²³¹ *Ibidem*, para. 134.

Finally, the Court received papers from more than ten *amicus curiae* from non-governmental organizations, faculties of law and social study centers of the region.²³²

4.3.4 Admissibility.

The Dominican State submitted three preliminary objections: a) the alleged failure to exhaust domestic remedies; b) partial incompetence of the court *ratione personae* invoked in relation to some of the applicants; and c) the alleged incompetence of the court *ratione temporis* over certain facts and events.²³³

The IAtHR rejected the first two preliminary objections and partially admitted the preliminary objection on lack of temporal jurisdiction of the Court with respect to certain facts and acts.²³⁴

4.3.5 Violation to the prohibition on collective expulsions (Article 22.9 of the ACHR).

As I mentioned before, the right of movement and residence contained in the American Convention on Human Rights, included the prohibition on collective expulsions and was analyzed in chapter IX of the judgment.

However, in the context chapter, the Court mentioned some important facts before analyzing the infringement of the prohibition.²³⁵ In this chapter the Court brought to the case a previous judgment in 1990, in which a corroboration of mass expulsions was made.²³⁶ However, the Dominican Government categorically denied it.

²³² *Ibidem*, para. 14 a 16.

²³³ IAtHR. Dominican and Haitian expelled people v. Dominican Republic. Para 35 a 48.

²³⁴ *Ibidem*, para. 35. The State, in its reply, argued that "accepted the compulsory jurisdiction of the Court on March 25, 1999" and that the measure [...] occurred at least one (1) year after the alleged expulsion of Benito Tide Méndez, four (4) years after the first alleged deportation of Mr. Bers [s] on Gelin, almost five (5) years after the alleged expulsion of [...] Ana Virginia Nolasco, Ana Lidia Sensing, Reyita Sensing Antonia and Antonio Sensing and at least one (1) year after the first alleged deportation of Mr. Victor Jean, Marlene Mesidor, M [ar] Kenson Jean, Miguel Jean and Natalie Jean.

²³⁵ IAtHR. Dominican and Haitian expelled people VS. Dominican Republic. Judgment of August 28, 2014, (Preliminary Objections, Merits, Reparations and Costs), para 167 to 171.

²³⁶ IAtHR. Case of the Girls Yean and Bosico v. Dominican Republic Judgment of September 8, 2005 (Preliminary Objections, Merits, Reparations and Costs) para. 109 (10). Available on http://www.corteidh.or.cr/docs/casos/articulos/seriec_130_%20ing.pdf.

Moreover, the Court cited several Reports from different sources attesting the same situation: the Inter-American Commission Report on 1991, the Report of the Office of the High Commissioner for Human Rights in 2009 and Human Rights Watch report on 2000.

In all of them it was mentioned that the Dominican Republic had expelled thousands of Haitians and an unknown number of Dominicans of Haitian descent (calculated between 20,000 and 30,000). They had been deported without appeal, as a result of systematic discrimination based on race, skin color, language and nationality, although many had work permits and valid visas, and some of them, in fact were Dominicans were no family ties in Haiti"²³⁷

With this information, the IAtHR considered that at the time in which the alleged violation occurred there was a systematic pattern of expulsions. Including collective acts or procedures not involving an individualized analysis, of Haitian people and people of Haitian descent, which reflects a discriminatory conception.

Then, in the analysis of the infringement of the right to movement and residence, the Court first brought to the case the considerations about the minimum guarantees in immigration proceedings that may involve deprivation of liberty and expulsion or deportation. It cited its standards, and the international bodies who agreed with that minimum guarantees applicable to this type of situation.²³⁸

In these analyses and relative to the "collective" nature of the expulsions, the Court considered that "the fundamental criterion for determining the "collective" character of an expulsion is not the number of foreigners subject to expulsion decision, but that this decision is not based on an objective individual circumstances of each foreign analysis" ²³⁹

Later, to define the meaning of a collective expulsion, the Inter-American Court adopted an interesting position and cited two cases from the European Court of Human Rights in which this definition was elaborated. Namely the cases: *Andric v. Suecia*. and *Conka v. Bélgica*.

The Court also took the views from the UN Committee on the Elimination of Racial Discrimination, noted in its General Recommendation No. 30, and from the Office of the United Nations High Commissioner for Human Rights, in its Report of the rights of non-citizens.²⁴⁰

²³⁷ Office of the High Commissioner for Human Rights in 2009.

²³⁸ IAtHR. Dominican and Haitian expelled people VS. Dominican Republic, para. 346 to 363.

²³⁹ *Ibidem*, para 361.

²⁴⁰ *Ibidem*, para. 362 and 363.

First, the Committee on the Elimination of Racial Discrimination considered that States Parties to the International Convention on the Elimination of All Forms of Discrimination Racial, should "ensure that non-citizens are not subject to collective expulsion, especially when there are not enough assurances that take into account the personal circumstances of each of the affected people".²⁴¹

Second, the High Commissioner for Human Rights, in his report on the rights of non-citizens, stated that "the process of expulsion of a group of non-citizens must be supported by sufficient guarantees demonstrating that the personal circumstances of each of those non-citizens concerned are genuine and individually taken into account".²⁴²

After the Court analyzed the aforementioned minimum standards, it upheld that to comply with the prohibition of collective expulsions, a process that can result in expulsion or deportation of a foreigner, should be (1) individualized, to evaluate the personal circumstances of each individual. This requires at least, (2) identification of the person and clarification of the circumstances of their immigration status. This procedure should not discriminate on grounds of nationality, color, race, sex, language, religion, political opinion, social origin or other status, and must observe the minimum guarantees above mentioned.

The facts in the instant case show that four petitioners were arrested and expelled within forty-eight hours with their family and other people, and there were no evidence that they have been subject to individual examination prior their expulsion. The State did not provide any evidence showing that respect of the persons mentioned had been acknowledged by initiating a formal procedure to identify, or to evaluate the particular circumstances of their immigration status test. In view of the foregoing, the Court concluded that the expulsions of Lilia Jean Pierre, Janise Midi, Marlene Jean Mesidor and Markenson were not conducted based on individual assessments of the particular circumstances of each of them, for the purposes of Article 22.9 of the American Convention. Thus, their expulsions were considered as collective.

4.3.6 Judgment.

This judgment was the result of a long process to which the Inter-American system took near to fifteen years to finally resolve. In it, the Court concluded the violation of the Article 22.9 of the

²⁴¹ UN, Committee on the Elimination of Racial Discrimination, General Recommendation No. 30, para. 26.

²⁴² UN, Office of the United Nations Human Rights High Commissioner. "The Rights of Non-Citizens ", 2006, p. 20.

American Convention on Human Rights, by unanimity, in the detriment of four victims of Haitian nationality.²⁴³

Besides, it concluded the infringement of other several rights not only of foreigners, but also of Dominican nationals with regard to their decendance, among them a violation of the prohibition of expulsion of (Dominican) nationals.

More than ten others rights were also considered to be infringed, among them: the failure to respect rights without discrimination against people of Haitian nationality, the right to recognition of legal personality, nationality and name. It also included the right to identity, the right to personal liberty, judicial protection, the right to family protection, and the breach of the obligation to adopt domestic laws.²⁴⁴

The Court only dismissed the alleged violation of the rights to personal integrity and private property.

Thus, the Inter-American Court, ordered a comprehensive repair action.²⁴⁵ The Court acknowledged that although the judgment itself constituted *per se* a reparation, other remedies were necessary, due to the circumstances and the involvement of victims. These included restitution, satisfaction and guarantees of non-repetition.²⁴⁶ Therefore, the Court asked the Dominican government to provide documents verifying the Dominican nationality for some claimants, and in the case of others, immigration documents proving their legal residence in the country. Also the publication of the judgment and training to officials involved. But what was perhaps the biggest reason for dissatisfaction for the State was to adopt measures regarding guarantees of non-repetition. The Court ordered a review of domestic legislation and the repeal of legislation that directly or indirectly have a discriminatory impact based on race or national origin characteristics.²⁴⁷ The Court paid particular attention to the internal legislation affecting

²⁴³ IAtHR. Dominican and Haitian expelled people v. Dominican Republic, numeral 6.

²⁴⁴ The complete resolute part of the judgment can be found in the pages 169 to 173.

²⁴⁵ Contained in Article 63.1 of the ACHR: If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

²⁴⁶ IAtHR. Dominican and Haitian expelled people v. Dominican Republic. Judgment of August 28, 2014, (Preliminary Objections, Merits, Reparations and Costs), para. 444-511.

²⁴⁷ *Ibidem*, para. 468 to 472.

the right to nationality. Because the Dominican State accepted as a method of acquisition of nationality the "*ius soli*", the Court reaffirmed that the immigration status of people their children are not transmitted.²⁴⁸

Regarding collective expulsions, the judgment of the Court also considered the adoption of two measures in domestic legislation. One, to make the process of expulsion or deportation in full compliance with the guarantees of due process. The other, not make arrests or expulsions of foreign collective character.

In the Resolutions Points, the Court required that the Dominican Republic, would adopt measures to be adopted in the next six months.²⁴⁹ In this points added, the obligation of performed training programs, to assure: (a) that racial profiling does not constitute, in any way, the reason for detention or expulsion; (b) strict observance of the guarantees of due process in any proceeding relating to the expulsion or deportation of foreigners and (c) abstain, under any circumstance, expulsion of Dominicans nationals, and (d) not make expulsions of foreigners of a collective nature.²⁵⁰

Finally, it ordered that Dominican Republic would pay in a period of one year, a compensation to the victims for material and immaterial damage, as well as inform the Court of the adopted measures before August 2015. In this case no concurrent or dissenting opinions were made.

4.4 Conclusions.

An extension of the concept of collective expulsion had occurred, mainly in the European system.

In the judgment of the European Court on Human Rights, the Court recognized that States that form the external borders of the European Union are experiencing considerable difficulties to cope with the growing influx of asylum seekers and other migrants. However, this does not justify the States to not comply with their ECHR obligations.

In this notion, the Court established that even on the high seas, international human rights norms still apply, including the principle of *non-refoulement*. Consequently, the Court recognized that Article 4 of Protocol 4 applies even to the actions of delivery of foreigners to a

²⁴⁸ *Ibidem*, para. 469.

²⁴⁹ *Ibidem*, pages 169 to 173.

²⁵⁰ *Ibidem.*, Numeral 17.

third country carried out outside national territory. Moreover, the ECtHR stated that States have the obligation to obtain information about the treatment to which migrants are exposed to those States where they returned them.

The Hirsi judgment was the second judgment in which a violation of the prohibition of collective expulsion was found, but not the last. As was mentioned in the previous chapter in three more cases, until now, this infringement had been found.

In the Inter-American System, the Commission and the IAtHR, the two bodies responsible for knowing about complaints about the infringement of the prohibition to the collective expulsions found the violation of this provision in the instant case.

The *Dominican and Haitian people expelled v. Dominican Republic* judgment has been the first and only one in this matter, even is not the only country in where this expulsions takes place in the Americas.²⁵¹

A differentiation to the persons in which both judgment is addressed, is also noted. In the ECtHR judgment, collective expulsion was found related to asylum seekers, meanwhile in the IAtHR, the case concerned migrants in undocumented and documented situations and even Dominican nationals.

Related to the time in which the applications were resolved, the ECtHR only took three years from when the application was logged until the final judgment, whilst the IAtHR took almost fifteen years to finally issue a judgment.²⁵² These points and the analyses of the similarities and differences between both judgements, will be analysed in a more detailed way in next chapter.

²⁵¹ See: Odette Martínez Pérez, La expulsión de extranjeros y la labor de organismos internacionales al respecto. Comentarios de cátedra. Revista de la Facultad de Ciencias Sociales y Jurídicas de Elche, Volumen I, Número 9, Mayo de 2013. páginas 200 a 238.

²⁵² The petition before the Commission was presented on November 1999 and the final judgment occurs until August 2014 by the Court.

SIMILARITIES AND DIFFERENCES BETWEEN BOTH JUDGEMENTS.

5.1 Introduction.

The main objective of this thesis is to analyze the similarities and differences between the *Hirsi Jamaa* and *Dominican and Haiti people expelled* judgments.

Some of them have been mentioned in the previous chapter, but a detailed analysis requires examining certain characteristics of both judgments. In order to do this, the first subparagraph of this chapter, consist in an analysis of the group of persons who were subject to expulsion. The second considers the meaning and scope of the prohibition in the respectively Courts of human rights. The third concerns to the years it took both Courts to resolve these issues. Finally, in the fourth paragraph I will address the matter of compliance of both decisions at national level.

5.2 Group of persons who were subject to expulsion.

Giving that collective expulsions are carried out, by definition, in groups of more than one person, it is relevant to investigate the characteristics of the people who were subject to removal in both cases.

In the Italian case, an affluence of mixed flows of migrants with increasing numbers of asylum seekers can be observed, as has been indicated in the first chapter. Thus, it is not rare that the judgment mostly concern refugee seekers.

The judgment of the ECtHR was initially conducted for twenty-four people. Eleven Eritrean and thirteen Somali, but then it was decided by the same Court that two of the petitioners should be removed from the list because of their death.²⁵³ The expulsion took not place to the country of

²⁵³ The ECtHR, *decided* by thirteen votes to four to strike the application out of its list in so far as it concerns Mr Mohamed Abukar Mohamed and Mr Hasan Shariff Abbirahman.

origin of the applicants, but to a third one: Libya.²⁵⁴ The bilateral agreements with this African country, were in the words of the Italian Minister of the Interior "*an important turning point in the fight against clandestine migration*". However, the Hirsi judgment was the end of this policy because the ECtHR declared these agreements illegal on account of the fact that the applicants were expelled to territories in which the conditions would lead to human rights violations, for Eritrea and Somalia (for the risk of arbitrary repatriation), as well as for Libya.

Due to the risk of being exposed to ill treatment in Libya or in their origin country, most of the analyses of the applicant's cases were related to principle of *non-refoulement*. Principle set up in the Refugee Convention as well as in other international treaties.²⁵⁵ Italy ratified this Convention and in doing so it is obliged to not expel or return "*a refugee in any manner whatsoever to the frontiers territories where his life or freedom would be threatened on account of his race, religion, nationality or membership to a particular social group*".²⁵⁶

The ECtHR has interpreted the prohibition of collective expulsion in the same way, as entailing the right to an individual consideration of the person's circumstances before expulsion is effectuated.²⁵⁷

Indeed, in fourteen cases the refugee status was granted to the petitioners in the same or subsequent years after which the application was logged.²⁵⁸

In the American region and in the case of the Dominican Republic, the petitioners were not asylum seekers, but economic migrants documented and undocumented who had permanent residence and close ties of family labor relations in the Dominican Republic.²⁵⁹ All of them were

²⁵⁴ The applicants claimed to have been sent back to a country where there was sufficient reason to believe that they would be subjected to treatment that violated the ECHR. Indeed, many international sources reported about the inhuman and degrading conditions in which undocumented migrants, mainly Somali and Eritrean origin, were treated in Libya.

²⁵⁵ This prohibition has also been contained in several international instruments as the UN Convention against Torture and the ICCPR. See P. Boeles and others, *European Migration Law*, Intersentia 2nd edition, 2014. p. 343 to 347.

²⁵⁶ UN, The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S 137, article 33.

²⁵⁷ ECtHR, *Conka v Belgium*, 5 February 2002, No. 51564/99.

²⁵⁸ See Annex of the ECtHR, Application 27765/09. Case of *Hirsi Jamaa and Others v. Italy* Judgment of 23 February 2012.

²⁵⁹ Although at some point in the Haiti recent history, there were a coup and then a natural disaster as the earthquake suffered by Haiti in 2010, which also compelled people to flee.

of Haitian nationality which shows a strong discriminatory component in these expulsions, using phenotypic characteristics as a base to select and expel people.²⁶⁰ Besides, the expulsions affected not only foreigners, but also Dominican nationals.²⁶¹ In this judgment, a violation of the prohibition of collective expulsions, was found only in the case of four Haitian nationals. Different from the European Court, the Inter-American Court has not yet dealt with the issue of *non-refoulement*.²⁶²

The number of applicants in both judgements (22 and 4), however, is not representative for the number of cases in which collective expulsions have been carried out.

In Italy, it is estimated that more than 170,000 asylum seekers and other migrants arrived in the country only in 2014.²⁶³ In that year, one more judgment was addressed to Italy for doing collective expulsions in *Sharif and others v. Italy and Greece*.²⁶⁴

In the case of the Dominican Republic, according to press releases and reports from non-governmental organizations, mass expulsions (of nationals and foreigners) are still taking

²⁶⁰ See expert opinion of Pablo Ceriani Cernadas during the public hearing. In his statement, he said that the term racial profiling "is do it [...] especially when such profiling in negative terms you look, has to do with the program, practice, policy, concrete measures by which general security forces, in this case we speak of security forces in the area with competence in the field of migration, established explicitly or implicitly to the actions especially research and monitoring measures, in this case control or verification of immigration violations, certain criteria based on, can be ethnicity, or language, national origin of a person to a reasonable and objective justification to overcome such control mechanisms that then have a number of negative impacts not only to migrants, but for society" In IAtHR. Dominican and Haitian expelled people v. Dominican Republic. Judgment of August 28, 2014, (Preliminary Objections, Merits, Reparations and Costs), para. 438.

²⁶¹ Besides Haitians, in some cases it has also been documented deportation or expulsion of other foreigners, who had been mistaken for Haitians.

²⁶² The Inter-American Commission for its part, has also made the analysis of these facts in some cases. The first time was made against the United States for infringement of the right to "seek and receive asylum" as provided by Article XXVII of the American Declaration, against Haitian nationals. Although in this case there were not mention to the violation of the prohibition on collective expulsion. See: The Haitian Centre for Human Rights et al. v. United States Inter-American Commission on Human Rights March 13, 1997.

²⁶³ See: <https://www.amnesty.org/es/countries/europe-and-central-asia/italy/report-italy/> .

²⁶⁴ ECtHR, Sharifi and Others v. Italy and Greece, Application no. 16643/09, Judgment October 2014.

place.²⁶⁵ These actions consequently, bring a possible large presence of stateless persons, a situation prohibited by international law.²⁶⁶

Furthermore, it is important to note the great interest of third parties participation in both judgements. In the case of the European Court, it received written observations by two UN agencies: UNHCR and UNHCHR, as well as other organizations: Human Rights Watch and Amnesty International, law schools and human rights centers.

In the Inter-American system, the intervention of international organizations went further. Indeed were three of them who initially filed the petition with the Inter-American Commission: Human Rights Clinic of the Law School of the University Berkeley, California (Boalt Hall), the Center for Justice and International Law (CEJIL) and the National Coalition for Haitian Rights (NCHR).²⁶⁷ Both participations could be explained, precisely, for the group of people expelled, as by the historic occurrence and impact of this two cases.

However, despite the outstanding decisions discussed in this thesis, group expulsions are still taking place in both countries.

5.3 Meaning and scope of the prohibition of collective expulsions.

As noted throughout this analyses, the prohibition of collective expulsions was contained in a very narrow way in the Protocol of the European Convention and the American Convention on Human Rights.

However, it has fallen to both Courts to clarify and expand on their content and scope during the almost fifty and forty-five years respectively, in which both provisions have existed.

²⁶⁵ See Amnistía Internacional. "Urgent action in the case of collective expulsions on Dominican Republic in January 2015: <https://www.amnesty.org/download/.../AMR2700022015SPANISH.pdf> .

²⁶⁶ UN, Convention relating to the status of stateless persons of 1954, article 2. Also, see: <http://www.unhcr.org/5584221a6.html> .

²⁶⁷ At the merits stage more organizations joined and the alleged victims were represented by the Center for Justice and International Law (CEJIL), the Human Rights Clinic of the Law School of Columbia University, the Movement of Dominican Women-Haitianas (MUDHA) and the Support Group for Returnees and Refugees (GARR).

a) The ECtHR.

In the case of the European Court, a breach to this provision has been found in four judgments so far. However in more cases the ECtHR has had the opportunity to emit its reasoning even in cases in which the violation had not been founded.²⁶⁸

In the *Hirsi and others v. Italy* judgment, a progress from the concept of collective expulsions issued in *Becker v. Denmark*, can be noticed. Until a more broader one was accepted, in favor of the rights of people in international migration.²⁶⁹

The important advances of this judgment, can be summarized in the extraterritorial application of the ECHR, and with it, of the prohibition on collective expulsions. Also, the minimum standards to be observed before expulsions (principles that are to be observed in the context of interception of vessels in national or international waters),²⁷⁰ as well as the analyses of the situation in the countries where the expulsions are directed at, even when they are not the country of origin of the foreigner.

The European Court reaffirmed the importance of the evaluation of personal risk of damage of the situation of each foreigner, in case of being expelled. This can only occur when there is an effective and fair procedure to evaluate. Thus, the expulsion without an individual analyses in each case is unacceptable. Besides, article 13 of the ECHR requires that there must be judicial remedy, against the expulsion with suspensive effect.

In this sense, in the reflexion of the only judge who issued his concurring opinion, Judge De Pinto, there is a duty to: (a) warn any foreigner about their rights to international protection, (b) provide the individuals a fair and effective identification and (c) do a determination of their asylum claims. Another important statement from judge De Pinto, in his concurrent opinion, was related to the term used to do expulsions. He signaled that no matter what name is giving to the expulsions, if they have the same result, they are prohibited and will result in State responsibility.

²⁶⁸ Until now, in eight more cases, according to the ECtHR facsheet: http://www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf.

²⁶⁹ Case in which for the first time the extinct Commission explained the meaning of the provision: European Commission on Human Rights, *Becker v. Denmark*, Application 7011/7.5. Decision of 3 October 1975 on the admissibility of the application, p. 235.

²⁷⁰ These principle include: legal and interpretation assistance, the right to information, access to effective remedies against *refoulement*.

Finally, it is important to note that the Court decided by unanimity about the infringement of collective expulsion. This means that the Italian judge also voted against the Italian State. This is comprehensible and is expected due to the independence principle of judges, but it also shows a strong level of agreement from all judges about the actions taken due to the major violations committed by the Italian State.

b) The IAtHR.

The Inter-American Court has analyzed, on three occasions, the realization of collective expulsions from Dominican Republic. Although in the first two cases, they did not give rise to the pronouncement of the Court on this issue.²⁷¹

In *Dominican and Haiti people expelled*, the Court made an exhaustive analysis of the circumstances and context of the situation of the applicants. However, it did not elaborate on what is meant by collective expulsion, but takes the meaning given by the European Court. This shows clearly, the possible impact and importance of reflections and decisions of other regional human rights system on each another.

In addition, the Inter-American Court judges, considered that the fundamental criterion for determining the "collective" nature of expulsion is not the number of foreigners subject to the expulsion decision. But, whether this decision is not based on an objective analysis of the individual circumstances of each foreigner.

Further, in the IAtHR opinion, the prohibition on collective expulsions, can be directed to legal residents or undocumented migrants. From the point of view of this tribunal, there is no difference in the American Convention between the procedure and guarantees of due process to be followed for persons with a documented or undocumented immigration status.²⁷² Therefore, the standards of due process apply regardless of immigration status.²⁷³

²⁷¹ In IAtHR, Case of the *Yean and Bosico vs. Dominican Republic*. Judgment of September 8, 2005. Series C No. 130. and in IAtHR, *Nadege case Dorzema et al v Dominican Republic*. Reparations and Costs Fund. Judgment of October 24, 2012 Series C No. 251.

²⁷² IACHR, Case of Dominican and Haiti people expelled Vs Dominican Republic, Judgment, 28 August 2014 (Preliminary Objections, Merits, Reparations and Costs), para 349.

²⁷³ In this point, is important to note the Judge De Pinto, separated opinion in the ECtHR. He noted that although no specific body of rules to be applied in cases of deportation, expulsion or any other term used to exclude a foreigner, in his opinion, in the European system some of them are contained in article 1 of Protocol 7, and article 4 of Protocol 4, though both have a different personal scope. See ECtHR, Application 27765/09. Case of *Hirsi Jamaa and Others v. Italy* Judgment of 23 February 2012.

The Inter-American Court added, that guarantees of due process are equal in both, judicial and administrative matters. Therefore, expulsions or deportations, which are essentially of administrative nature, must also be seen in the light of judicial principles.

Lastly, in the view of the IAtHR, collective expulsions represent an irreparable damage that can be avoided by provisional measures. This were the criteria used in order to decide whether an interim measures should be granted in this case.²⁷⁴

Finally, in this judgment the Inter-American Court, rejected the detention of people as a punitive measure against migration flows.

5.4 Time it took to both Courts reach a judgement.

Both judgements were issued in recent years. In *Hirsi*, the European Court ruled in 2012, whilst with the *Dominicans and Haitians*, the Inter-American Court did it in 2014. Nevertheless, the time it took for the Courts to resolve the matter was vastly different.

While before the European Court the petition was filed in 2009, the final judgement was reached three years later. For its part, in the Inter-American system the petition was presented to the Commission in 1999 and then, decided by the Court almost fifteen years later.

A detail view, requires the procedure made in the Inter-America system, to understand the time spent in it.

The time spent before the Inter- American Court, was only of two years and one month.²⁷⁵ This is consistent with the report made by the IAtHR in 2009 in which it was calculated that from the moment the petition is logged before the Court, until the final judgment is granted, it takes an average time of one and a half years.²⁷⁶

However, the majority of time was spent while the case it was in the Inter-American Commission. Five years passed from the submission of the case to the Report of Admissibility in this body. Then, a further seven years passed waiting for the Report of the Merits, resulting in a total time of twelve years.

²⁷⁴ American Declaration on Human Rights, article 63 (2).

²⁷⁵ IACHR, Case of Dominican and Haiti people expelled Vs Dominican Republic, Judgment, 28 August 2014 (Preliminary Objections, Merits, Reparations and Costs), para. 1.

²⁷⁶ IAtHR anual report 2009. Available at: http://www.corteidh.or.cr/sitios/informes/docs/SPA/spa_2009.pdf.

According to the Human Rights Clinic of the University of Texas, School of Law, this delay can be explained by the fact that during the last two decades, the Commission had faced a greater influx of more complex requests.²⁷⁷ This situation has not been accompanied by a proportionate budget to meet its various responsibilities. Consequently, the Commission now has a large backlog of cases at various stages in the process, and petitioners face long procedural delays. As can be seen, although in principle the backlog of cases and delay to resolve them is concerning financial problems and the complexity of cases, this has had a huge negative impact. Not only in the Inter-American Commission but in the system as a whole, affecting the effective protection granted by both human rights bodies, but also its legitimacy and the impact of their future work.

Finally, it is important to bear in mind, that in both Courts a different number of judgments are reached per year. In the one hand, and as was mentioned, the European Court has jurisdiction over 47 countries and only during the last year, 2014, the petitions received by it decreased by 15 percent compared with the previous year 2013. The judgments dictated by this Court also represent a decrease of 35 percent in 2014 (2388), in relation to the previous year.²⁷⁸

In the other hand, the Inter-American Court has jurisdiction only over 22 countries, that have recognized it's jurisdictional competence. The court emitted only 16 judgments in 2014, with an equal number of judgments issued in the previous year.²⁷⁹

5.5 Compliance of both decisions at national level.

In the execution of judgments there are notable differences between the models of the European system and the Inter-American system of Human Rights.

In the first system, it is simply noted whether or not there was a violation of the right invoked and in general, compensatory measures are set against this violation. Then, the ruling is transmitted to the Committee of Ministers that oversees its implementation.

The ECtHR does not impose various measures and the States parties to not adopt them, if they go beyond the condemnation and setting of compensation. The Court does not establish recommendations on legislative reform or any obligation to reform a law incompatible with the

²⁷⁷ Human rights clinic of the university of Texas, school of law, maximizando la justicia, minimizando la demora:acelerando los procedimientos de la comisión interamericana de derechos humanos, diciembre de 2011. available at: <http://www.corteidh.or.cr/tablas/28253.pdf> .

²⁷⁸ See ECtHR statistics: http://www.echr.coe.int/Documents/Stats_annual_2014_ENG.pdf .

²⁷⁹ See IAtHR statistics: <http://www.corteidh.or.cr/index.php/16-juris/22-casos-contenciosos> .

Convention. In this way, it gives ample scope to States to execute the judgments, which are generally met quite effectively. However, an important criticism to this system, is that offer little help in cases of systematic violations of human rights.²⁸⁰

This has been the case with Italy. The country halted the bilateral agreement with Libya after the Hirsi case, however, this has not meant that collective expulsions have stopped.²⁸¹

In addition, it could be said that the "primacy" of the ECtHR, will reached probably its best, the day that the EU would ratify the ECHR. In this manner, the application of the Convention shall extend to acts performed by institutions, bodies and EU agencies, as FRONTEX, as well as international treaties concluded by the EU with third countries.

In the case of the Inter-American Court of Human Rights, when it has decided that there has been a violation of a right or freedom protected by the American Convention, the Court has the possibility to guarantee to the victim, the enjoyment of his violated right or freedom. Furthermore, the Inter-American Court, based on this conventional arrangement, has widely developed its tutelary and reparation powers, not only for the current victims, but the potential. In this way, in the IAtHR judgments, requires States to repair, and give the most varied legislative, public policy, administrative, judicial, educational measures and others of similar nature.²⁸²

The judgments of this Court are binding for State parties and should be executed directly by the States. According to the American Convention, the country concerned is obliged to inform the Court that progress is being made for compliance with the order in the judgments. In turn, the Court may hold public or private hearings stances with the parties to properly monitor the execution of its judgments and ask detailed information on progress in compliance. The Court should inform the General Assembly of the OAS any case in which verifies the compliance of their orders.

²⁸⁰ However, although judgements of the ECtHR has only the force of *res judicata* for Italy, the issue is considered as a matter of interpreted provision of the Convention.

²⁸¹ According to the ECtHR, Italy cannot escape to its responsibility based on their obligations under bilateral agreements with Libya. The liability of the contracting States persists even after commitments through subsequent to the entry into force of the ECHR or its Protocols agreements.

²⁸² Although in practice it is observed that the states comply more with some types of reparation, as payment of compensation, and to a lesser extent with other orders, such as reforming standards or practices, or investigate the facts of the case, judge potential responsible and punish them if corresponding.

Unlike what happened in the European system, which establishes mechanisms for monitoring compliance with the judgments of the ECtHR by the Committee of Ministers, the Inter-American system establishes a collective control within the highest authority of the OAS: the General Assembly.

However the mentioned, the Dominican Republic, has not shown any effort to comply with the judgments of the Inter-American Court. On the contrary they have challenged the jurisdiction of this Court.

The Dominican authorities declared the instrument accepting the jurisdiction of the Inter-American Court of Human Rights, unconstitutional, after this ruling (which was deposited on 1999). In the view of the Court, this Dominican Constitutional Court's judgment, has no basis whatsoever in international law, and therefore it can have no effect.²⁸³

The Dominican State must send a report of the compliance of the judgments in August of this year. Thus, it will be a good opportunity to wait for the collective response of the General Assembly of the OAS or the action to be taken by the Court.

5.6 Conclusions.

As can be noted the group of persons subjected to expulsion were different in both cases. In the European, mainly referring to asylum seekers, whilst in the Inter-American to economic migrants. In the case against the Dominican State a strong discriminatory component was the ground for detaining and expelling people. Meanwhile in the case against Italy, it was the fact that the petitioners were found in high seas and an agreement have been signed with another country, to evade its international protection responsibilities.

Relating to the meaning and scope of the prohibition of collective expulsions, the European Court has dealt with this issue for a long time, meanwhile in the Inter-American experience this is the first time. Whatever the case, some similarities can be founded, regarding the notion of collective expulsion, because the IAtHR adopted the same definition of this prohibition used by the European Court. Furthermore, the ECtHR has expanded the application of the prohibition (and of the ECHR), applying it extraterritoriality. Also, settled a set of principles that must to be observed before expelling a foreigner and obliging State parties to the ECHR, to study the situation in the countries where the expulsions are thought to be carry out.

²⁸³ See pronouncement: "Condemns Judgment of the Constitutional Court of the Dominican Republic". Available at: http://www.oas.org/en/iachr/media_center/PReleases/2014/130.asp .

The IAtHR on its own, has shown a broader interpretation of the protection granted to people in international movement. In this way it has recognized the same protection no matter what their migratory status.

The time it took for both human rights bodies to finally resolve the case were greatly different. In the Inter-American system, this delay can be explained due to financial problems and an increase in the reception of petitions by the Commission.

Finally, a positive but narrow compliance has been given in the Italian case, but not in the Dominican case. The Dominican authorities have expressed on several occasions their non-compliance with the judgment and it will be in August of this year when the Dominican states must inform, formally, to the IAtHR on the measures taken by them. Clearly, this will be an important moment to measure the effectiveness of the system as a whole.

CONCLUSIONS

The main question that guided this research project was:

What has been the approach of the recent judgements of the European and the Inter-American Courts of Human Rights in cases of the collective expulsion of foreigners? What are their similarities and differences?

To respond to this question, four subordinated questions will follow:

6.1 Subordinate question 1.

What is the context of migration flows and expulsion of foreigners in both regions and why it is important and current to analyse this subject?

As we saw, migration is a global phenomenon that affects every country in the world. However, the major conflict of current migration flows do not seem to be their proportion, as they only make up 3% of the world population, but their distribution. This results in a clear challenge for the major transit and recipient countries in which international migrants are addressed.

In Europe there is a strong inflow of refugees and other migrants. Italy, as part of the European Union and the Council of Europe, faces a particular situation because of its geographical position in the region (as well as the rest of the countries that composed the Southern border of the region). The response of this southern European country to mixed movements of migrants, in some cases, has led to a breach of its international obligations under regional and international treaties signed by it.

The American region is affected in great proportion by economic migrants but also by refugees, although there is not sufficient information about all the American countries on this issue. In the Dominican Republic case, violations to the rights of Haitian foreigners have been occurring for decades. These violations, have been motivated by discrimination based on skin colour and phenotypic traits. In addition, there is a great lack of institutionalization in the country, so it is not possible to even know the total number of people expelled. Although, as mentioned, some data were replicated by international organizations and currently there is a major effort to do so by the Jesuit Service for Migrants, an NGO that now documents cases of expelled people in the

frontiers of that country.²⁸⁴ In both regions, collective expulsions were carried out and continue to happen.

Given this situation, in the European case, some scholars have argued that migration policies in Europe have been more reactive than proactive.²⁸⁵ That is, they do not address the structural causes which provoke it, but only responds to their effects, sometimes clearly damaging the rights and integrity of the people who migrate. A strong focus on security in the management and control of migration flows has also been implemented, rather than one of protecting people whom for various reasons, forcibly migrate.²⁸⁶

Therefore, and before the strength of the figures shown and the human rights violations committed in both regions, it is worth rethinking the object and purpose of these migration policies. First, I consider, a change from a state-sovereignty and security-oriented approach to a human being-oriented approach in migration policies is necessary. Second, all the responsibility should not fall onto one State or one region of the world, but to all States, including countries of origin and transit and all of them should have equal responsibility in the matter.²⁸⁷ Despite this, it is also true that recipient countries have the most urgent need to act and to not make themselves guilty of commit the same violations which have caused that these people emigrate. Thus, it is essentially necessary for countries receiving large inflows in the world, coordination with other countries, for the reception and implementation of the procedure for recognition of refugee status and for others in need of international protection. Not to avoid responsibility and avoid dealing with problems in their own territory, but in a responsible manner and according to the regional and international legislation. In this regard, it would establish a sense of global responsibility and a fair and proportional distribution mechanism for asylum seekers among the international community. It would also be essential that countries, especially those that form the

²⁸⁴ See : https://www.sjrlac.org/campana_detalle?PTN=PROMO-20121128100737&TN=PROJECT-20130716092110&L=3 .

²⁸⁵ P. Boeles and others, *European Migration Law*, Intersentia 2nd edition, 2014, p 3.

²⁸⁶ To this respect, is important to remember the explicit governmental statements of the Dominican authorities mentioned in chapter one. This securitization has also been applied in other countries of the world, like the United States after the events of 2011, as well as in other countries around the world.

²⁸⁷ Further, receiving States, must stop making political capital of the foreigners from which their labor force is comprised and stop threatening them with expulsion. As Groenendijk has summarized with migration movements (at EU level, but that perfectly fits in with international workers movements) "the key factor is labor demand". Sending Governments, by their own, must support the call for respect of humans rights of their nationals and do not remain silent and tolerate the situation of their migrants, given the situation of their economies and the remittances that they receive.

European Union can establish a mechanism to prevent people from having to cross the sea and risking their lives. This means suppressing the requirement to ask for asylum or any other form of international protection on the states soil. In this way, they would allow the petitioners to initiate their procedures from their countries of origin or any third country, if this is possible for reasons of safety of the applicant. Indeed, some American countries such as Mexico, recognized the right to seek asylum in the (Mexican embassies or consulates) country of origin of the petitioner.²⁸⁸ That is, that european authorities, do not wait for people to risk their lives at sea, but act upon it, purposefully.

At the same time, these mechanisms of protection should not only be given to people in need of international protection, but economic migrants also should not be exposed to these risks. Therefore and in line with the statement by the European Commission president, Jean-Claude Juncker, the amount of labour required of international migrant workers should be assessed in a fair and proportionate manner. Because, if there were no jobs, foreign people would not go to a place where they know they would not find livelihood. In addition, if they would also have to face a number of difficulties such as language barriers, cultural integration, discrimination and the remoteness of their loved ones, to name a few.

Moreover, it is necessary for asylum seekers and migrants for economic reasons, not be seen only as victims or in a passive situation, for which others have to discuss, but as subjects of rights that are in a vulnerable situation.

Lastly, but not less important, it is essential to change the terminology used in this field. As was already mentioned, the term "illegal migrant", automatically puts a tag over a person considering him not only as a criminal, but also with the propensity to act illegally.

Next to this and with the security oriented approach, the term "fight against irregular or illegal migration" is commonly used. In this sense, how it could it be protecting something against which it is fighting?. Thus, an adequate language must be used not only in the legal or political spheres, but also in the media and among the population as such.

²⁸⁸ See The Refugee, Complementary Protection and Political Asylum Law of Mexico, Published in the Official Journal of the Federation on May 25, 2011. Last reform published DOF 30/10/2014, article 2 (1).

6.2. Subordinate question 2.

What is the functioning and the relevant legal framework that applies in these different Courts?

Migrant people find themselves in situations of particular vulnerability that require an international community to adopt measures for their protection. Many regional and international bodies have developed a generally recognized framework with this aim, and some States have developed standards with the same objective. Thus, and as we saw at regional level, the European and Inter-American human rights system, have played an essential role in the protection of the rights of migrant people.

Different structures govern both systems, particularly related to the bodies involved. With respect to the work of the Inter-American Commission, although it serves as “first filter” to send a case to the Inter-American Court and is the most used way to do it (despite the fact that the other possibility is through states party to the ACHR), its work has been seriously affected by an insufficient budget, as well as by an increased of the petitions received.

The work of the European Court is more efficient and it achieved a judgement in a shorter period of time, although its judgments has a narrow impact on the future violations of human rights. This is in contrast with the situation in Inter-American system, were the judgments are broader (consisting of several reparations actions), and in the opinion of some scholars difficult to accept and to comply with.²⁸⁹ Besides, there are difficulties in the mechanisms of revision of compliance.

Consequently, the idea to take good practices of both systems appears logical, even though this is not always possible, due to the particularities of both regions. For example, it could be intended to get more cooperation of States parties to the Inter-American Convention on Human Rights in order to receive more financial resources and thus sufficient personnel for the Commission to resolve cases effectively. However the problem of financial resources, could have

²⁸⁹ See the declaration made it by the Dominican Republic Ex president relating to the compliance with the IATHR judgment.

its roots in deeper concerns. One of them, is the legitimacy of the OAS as well as the economic situation of the State parties to the American Convention.²⁹⁰

Despite the previous, the impact of the work and judgments of both Courts cannot be diminished, but it is necessary to evaluate their functioning periodically, to evaluate to what extent some difficulties can be surpassed.

In addition, we must bear in mind that to the extent that a human right system achieves a breakthrough, it could provoke the same in another system and in the international jurisprudence as a whole.

6.3 Subordinate question 3.

Which ones have been the important cases dealing with collective expulsions of foreigners in both Courts?

On the one hand, in the European system, the ECtHR has judged in many occasions about migration matters, but specifically in four cases have found that Italy and other States performed collective expulsions.²⁹¹ On the other hand, in the Inter-American Court the judgment discussed was the first in which the court must analyse this prohibition.²⁹² This was the reason that this Court used the work previously done by the European to support its own reflections, specifically about the notion of the prohibition of collective expulsion.

The *Hirsi and others v. Italy*, as well as *Dominican and Haitian people expelled v. Dominican Republic* have been landmark decisions that defined the concept of expulsions of collective nature in one case, and developed for the first time this concept for a complete region, on the other.

²⁹⁰ According to the Report on compliance with quota payments to the OEA in 2012, the US is the largest contributor to the Regular Fund of the organization, this amount represents nearly 60% of all fees paid by OAS countries. They followed by Canada, with a contribution of 9.7661 million million, representing nearly 12% of all fees; Brazil (8.1094 million million, 9.9%); Mexico (6.7552 million million, 8.2%) and Argentina (1.9643 million million, 2.4%). The contribution of each country to the OAS Regular Fund is made in proportion to the size of their economies. See: http://internacional.elpais.com/internacional/2013/09/27/actualidad/1380301382_115633.html.

²⁹¹ Next to Italy, Belgium, Russia and Greece have been found responsible for breaching the ECHR in this regard.

²⁹² Indeed in the IAtHR a small number of judgments related to migration issues has been emitted. The first of them a case about migrant rights was decided by the Court in *Vélez Loor v. Panama*, in 2010.

Both cases were judged in close periods of time, but having their origins in events taking place with almost one decade of difference.²⁹³

In general, in the practice of the European Court, clearly a more judicial activity can be noticed, than in the Inter-American Court.

6.4. Subordinate question 4.

How has the criteria of the judgements of each Court been? What are the differences and similarities between them?

As was mentioned, although both judgments deal with the violation of the same prohibition, important differences were presented between them.

Regarding the group of people to which these judgments were addressed, in the European case, mostly, it was related to asylum seekers, meanwhile in the Inter-American case, concerned international workers in undocumented and documented situations, as well as people who were born on Dominican soil of Haitian heritage.

Besides, the ECtHR has used broader criteria for dealing with collective expulsion, evolving from the no recognition in the ECHR, and later to its inclusion in Protocol 4, until the case in study in which major developments were achieved.

Into the jurisdiction of this Court, a collective expulsion means: *"any measure compelling foreigners, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual foreigner of the group"*. Further, in the Hirsi case, the Court extended the territoriality notion of states bearing in mind that "a significant component of contemporary migration patterns would be outside the scope of protection".

The rights and guarantees of due process were also different in the view of both Courts. In this way, the Inter-American adopted a more broader one, making no differences between the right recognized by the American Convention of Human Rights and applying the same protection to foreigners, regardless its administrative (migratory) status.

In the European Court's view, there is a clear distinction between the guarantees provided in Article 1 of Protocol 7 of the ECHR, with respect to the procedural safeguards relating to expulsion of foreigners who are legal residents, that are not applying to people without this situation. However, to avoid expulsions made in a group, the ECtHR, considered that is an

²⁹³ In 1999 and 2009, respectively.

obligation of the State party in which soil a foreigner is found (or where the State is exercising its jurisdiction), do an individual consideration of the person's circumstances before expulsion is effectuated. Thus, it must be an evaluation if the individual are at risk under the meaning of the principle of *non-refoulement*, as well as the remedies to challenge the decision to return him or her to their country of departure.²⁹⁴

In the case of the Inter-American Court, the judgment comprises an extensive analyses of the context of expulsions of Haitian people, for strong discriminatory reasons as well as the enormous number of people historically subjected to this violation. The reparations were also broader (consisting in restitution, satisfaction and guarantees of non-repetition), and affecting different structures of the Dominican Republic, meanwhile the European Court has had a narrow but more efficient impact. Indeed and as was mentioned, the Dominican authorities have tried to ignore the jurisdiction of the Court, and also arguing that the Court went far beyond its competence in the *Dominican and Haitian people expelled* case. This, in my opinion is based in a concept of sovereignty that closely resembles those debates of past centuries against the no-involvement of international scrutiny of migratory affairs.

Besides, in the European system, the judgment was arrived within a period of three years while in the Inter-American it took almost fifteen years.

Seeing all the previous, it could be desirable that the European Court achieves a broader interpretation making no differences between documented or undocumented foreigners, granted them the same protection not only for collective expulsion matters, but in the protection of rights in general. It will be also desirable, that the Inter-American system, accomplishes a more efficient system related to the compliance of its judgments and in doing so, make possible the realization of the protection of the rights of people under the jurisdiction of any State party to the American Convention and not leave them in good faith intentions.

Thus, the conclusion is clear: though States have the sovereign right to protect their borders and control immigration, this cannot be at the cost of violating the rights guaranteed by the European and American human rights systems, as well as by other international treaties. Is it, in the end, not the purpose of the protection of human rights establish a limit to the power of the State?

²⁹⁴ So, the expulsion of foreigners must be tested against article 3 of the ECHR and article and article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Furthermore, inhabitants who are now part of the transit and destiny countries of largest influx of migration, would like to think, on the contrary, that they would have the opportunity to travel to another country to protect their life, their liberty or their integrity if needed, or to be able to access a job in order to have a decent life. Indeed, this has already happened in recent history, especially in Europe.

UNITED NATIONS.

Legislation.

- UN, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.
- UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.
- UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.
- UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117.
- UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
- UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158.
- UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.
- United Nations, *Statute of the International Court of Justice*, 18 April 1946.
- United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.
- International Labour Organization (ILO), *Migration for Employment Convention (Revised)*, C97, 1 July 1949, C97
- International Labour Organization (ILO), *Migrant Workers (Supplementary Provisions) Convention*, C143, 24 June 1975, C143.

Documents.

- OHCHR, *Discussion paper on the expulsions of aliens in international human rights law*, Geneva, September 2006. See at <http://www2.ohchr.org/english/issues/migration/taskforce/docs/Discussion-paper-expulsions.pdf>.
- OHCHR, *Fact Sheet No. 30, The United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies*, June 2005, No. 30.
- OHCHR, Grupo de Trabajo sobre el Examen Periódico Universal Sexto período de sesiones Ginebra, 30 de noviembre-11 de diciembre 2009. *Avance del Reporte del Grupo de Trabajo del Examen Periodo Universal: República Dominicana*. Asamblea General, A/HRC/WG.6/6/L.2, 3 de Diciembre de 2009. See at: http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/DO/A_HRC_WG6_6_DOM_1_S.pdf.
- UN, Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30*.
- UN, ECLAC, *Support for housing and population censuses in the decade starting in 2010*, in First session of the Regional Conference on Population and Development in Latin America and the Caribbean, 31 July, 2013. Available at: http://www.cepal.org/celade/noticias/documentosdetrabajo/5/50585/CRPD_DDR4_eng.pdf.
- UN General Assembly, *Declaration on the human rights of individuals who are not nationals of the country in which they live*, A/RES/40/144, of 13 December 1985.
- UN General Assembly, *Report of the International Law Commission on the work of its sixty-sixth session*, 17 November 2014, A/69/498.
- UN, International Law Commission, 64 session, *third report of the expulsion of foreigners*, No 10 (A/67/10). Available at http://legal.un.org/ilc/reports/2012/All_languages/A_67_10_S.pdf.

- UN Secretary-General, *International migration and development*, A/69/207, 30 July 2014. Available on: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/488/55/PDF/N1448855.pdf?OpenElement>.
- UNHCR, *UNHCR Asylum Trends 2013: Levels and Trends in Industrialized Countries*, 21 March 2014. Available on: <http://www.unhcr.org/5329b15a9.html>
- UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3,
- UNHCR, *the International Protection of Refugees: Interpreting Art. 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001.
- UN Office of the High Commissioner for Human Rights (OHCHR), *The Rights of Non-Citizens*, 2006, HR/PUB/06/11.

Literature.

- Buergenthal, T., "The U.N. Covenants and Regional Human Rights Systems", Proceedings of the Annual Meeting (American Society of International Law), vol. 80, pp. 422-425, 1986.
- Grahl-Madsen, A., *The Status of the Refugees in International Law*, Nijhoff, Leyden, The Netherlands, 1972. Goodwin-Gill, G. *The Refugee in International Law*, 2ª edición, Clarendon Press, Oxford, 1996.
- Gortázar, C., *Derecho de asilo y "no rechazo" del refugiado*, Universidad Pontificia Comillas y Dykinson, Madrid, 1997.
- Plender, Richard. *International Migration Law*. 2da edición. Rev. Dordrecht. Martinus Nijhoff, 1988,
- Stenberg, G., *Non-Expulsion and Non-Refoulement. The Prohibition against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention relating to the Status of Refugees*, IUSTUS Förlag, Uppsala, 1989.

EUROPEAN.

Legislation of the European Court of Human Rights.

- Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS.
- Council of Europe, Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, 16 September 1963, ETS 46,
- Council of Europe, Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984, ETS 117.

Case law of the European Court of Human Rights.

- European Commission on Human Rights, *Becker v. Denmark*, Application 7011/75. Decision of 3 October 1975 on the admissibility of the application.
- ECtHR, *Abdulaziz, Cabales and Balkandali v. UK*, applications 9214/80; 9473/81; 9474/81, May 28, 1985
- ECtHR, *Andric v. Sweden*, application 45917/99, 23 February 1999.
- ECtHR, *Berisha and Haljiti v. "the former Yugoslav Republic of Macedonia, application 18670/03, third Section, partial decision as to the admissibility, 16 June, 2005.*
- ECHR, *Boujlifa v. France*, application 122/1996/741/940), October 21, 1997.
- ECtHR, *Chahal v. United Kingdom*, application 22414/93, 15 November 1996.

- ECtHR, *Conka v. Belgium*, application 51564/99, 5 February 2002.
- ECtHR, *Georgia v. Russia*, Application no. 13255/07, Judgement, 3 July 2014.
- ECtHR, *Hirsi Jamaa and Others v. Italy*, application 27765/09, 23 February 2012.
- ECtHR, *H.L.R. v. France*, application 24573/94, 29 April 1997.
- ECtHR, *Salah Sheekh v. The Netherlands*, application 1948/04, 11 January 2007.
- ECtHR. *Sharifi and Others v. Italy and Greece*. Application No. 16643/09, October 21, 2014.
- ECtHR, *Soering v. UK*, application 14038/88, 7 July, 1989.
- ECtHR, *Tarakhel v. Switzerland*. Application no. 29217/12, November 4, 2014.
- ECHR, *Vilvarajah and others v. UK*, application no. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, 30, October, 1991.
- ECtHR, *Xhavara and Others v. Italy and Albania*, application no. 39473/98 of 11 January 2001.

Documents.

- ECRH, Joint communication from Presidents Costa and Skouris. Available at: http://echr.coe.int/Documents/UE_Communication_Costa_Skouris_ENG.pdf.
- ECtHR, fact sheet on collective expulsions. Available at: http://www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf.

EU legislation and case law.

- EU, *Treaty of the European Union*. Maastricht Treaty, signed in Maastricht on 7 February 1992. Official Journal of the European Union L 191, 29 July 1992, pp. 1-112.
- EU, *Consolidated Version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01.
- EU, European Parliament and Council Directive 2004/38/EC of 29 April 2004, *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*.
- EU, Regulation No. 604/2013 of the European Parliament and the Council of 06 June, 2013, *The Dublin Regulation*
- EU, Council Regulation (EC) 2007/2004, *establishing Frontex, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex)*.
- EU, Council of the European Union, Regulation No 603/2013 of the European Parliament and of the Council of 26 June 2013 *on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast)*, 29 June 2013, OJ L. 180/1-180/30; 29.6.2013, (EU)2003/86
- ECJ, case C-61/11, *Hassen El Dridi, alias Karim Soufi v. Italy*, judgment of the Court (First Chamber) of 28 April 2011. of 28 April 2011.

Literature.

- Alba, Juan Fernando Durán, *Prohibition on the collective expulsion of aliens (article 4 of protocol 4), in Europe of Rights: A Compendium on the European Convention of Human Rights*, Library of Congress, 2012. pp 629 -637.

- Alexander Betts and James Milner, *The Externalisation of EU Asylum Policy: The Position of African States*, in *Centre on Migration, Policy and Society*, Working Paper No. 36, University of Oxford, 2006. Consulted at https://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2006/WP0636-Betts-Millner.pdf.
- Den Heijer, Maarten. *Reflections on refoulement and collective expulsion in the Hirsi case*, on *International Journal of Refugee Law*, Volume 25, issue 2, p 25, Oxford University Press, 2013.
- D.J. Harris et al., Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, 2d Ed, Oxford: OUP 2009, p. 5-21
- Fernando Arlettaz. *Expulsión colectiva de extranjeros en la jurisprudencia del TEDH: Comentario a Hirsi Jamaa y otros v. Italia* (Gran Sala, Req. 27765/09, 23/02/2012). 23/02/2012). Observatorio Paz, seguridad y Defensa. Agosto 2013.
- Hart, J.W., *The European human rights system*, *Law Library Journal*, vol. 102, no. 4, pp. 533-559, 2010.
- Howley, Jacob D, *Unlocking the fortress: Protocol No. 11 and the birth of collective expulsion jurisprudence in the council of Europe system*, *Georgetown Immigration Law Journal*, 2006, Volume 21, Issue 1, p. 111.
- Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, Oxford, Fifth edition.
- Papanicolopulu, Irini, *European Convention on Human Rights - Article 3 - torture or inhuman or degrading treatment - forcible repatriation of asylum seekers - collective expulsion - right to a remedy*. *American Journal of International Law*, Volume 107, Issue 2, p. 417, 2013
- P. Boeles and others, *European Migration Law*, Intersentia 2nd edition, 2014.
- Silvia Marcu, *The irregular immigration towards the European Union through the Rumanian eastern border*, in *Boletín de la Asociación de Geógrafos Españoles*. No. 53-2010,.
- Zayas, A. *Collective Expulsions: Norms, Jurisprudence, Remedies* in *Refugee Survey Quarterly* (1997) 16 (3): 149-153.

INTER-AMERICAN.

Legislation.

- IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, 1990.
- IACHR, Statute of the Inter-American Commission on Human Rights, approved through Resolution No 447 adopted by the OAS General Assembly during its ninth period of sessions, La Paz, Bolivia, 1979.
- OAS, American Convention on Human Rights "Pact Of San Jose, Costa Rica" (B-32)
- OAS American Declaration of The Rights And Duties of Man, Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948.
- OAS, Charter of the Organization of American States (OAS). Signed in Bogotá in 1948 and amended by the Protocol of Buenos Aires in 1967, by the Protocol of Cartagena de Indias in 1985, by the Protocol of Washington in 1992, and by the Protocol of Managua in 1993.
- OAS, Protocol of San Salvador Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty of 1990.

Case law of the Inter-American Court of Human Rights

- IACHR. *The Haitian Centre for Human Rights at al. v. United States*. Case no. 10.675. Report no. 51/96.

- IACHR, case of *Dominican and Haiti people expelled Vs Dominican Republic*, Judgment, 28 August 2014 (Preliminary Objections, Merits, Reparations and Costs).
- IAtHR. case of *Genie Lacayo v. Nicaragua*. Judgment of January 29, 1997 (Merits, Reparations and Costs).
- IAtHR, case of the *Girls Yean and Bosico v. Dominican Republic* Judgment of September 8, 2005 (Preliminary Objections, Merits, Reparations, and Costs). Series C No. 130.
- IAtHR, case of *Nadege Dorzema y Otros v. República Dominicana*. Judgment of October 24, 2012 (Preliminary Objections, Merits, Reparations, and Costs). IAtHR, Series C No. 251.
- IAtHR, case of *Vélez Looor v. Panama*, Judgment of November 23, 2010 (Preliminary Objections, Merits, Reparations and Costs).

Advisory opinions of the Inter-American Court of Human Rights.

- IAtHR. Advisory Opinion Oc-10/89 of 14 July 1989. *Interpretation of the American Declaration Rights and Duties of Man Under Article 64 of The American Convention on Human Rights*.
- IAtHR, Advisory Opinion OC-18/03, September 17, 2003. Series A No. 18. *Juridical Condition and Rights of Undocumented Migrants*.
- IAtHR, Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21. *Rights and interests of children in the context of migration and / or in need of international protection*.
- IAtHR, opinión consultiva oc-16/99 de 1 de octubre de 1999. serie a no. 16. *El derecho a la información sobre la asistencia consular en el marco de las garantías del debido proceso legal*.

Reports of the Inter-American Commission on Human Rights.

- IACHR, Case 12.271 Benito Tide Mendez and Other v Dominica Republic. Report on admissibility 68/05, October 13, 2005.
- IACHR, Case 12.271 Benito Tide Mendez and Other v Dominica Republic, Report on the merits No. 64/12, March 29, 2012.
- IACHR, Human rights of migrants and others in the context of human mobility in Mexico, OEA/Ser.L/V/II. Doc. 48/13 30 December 2013.
- IACHR, *Progress report on the situation of migrant workers and their families in the hemisphere*, OEA/Ser.L/V/II.102, 16 abril 1999.
- IACHR, *Report on Immigration in the United States: Detention and Due Process*, OEA/Ser.L/V/II. Doc. 78/10, 30 December 2010.
- IACHR, Report on the situation of human rights in the Dominican Republic, OEA/Ser.L/V/II.104. Doc. 49 rev. 1, 7 October 1999.
- IACHR, *Séptimo informe de progreso de la relatoría especial sobre trabajadores migratorios y miembros de sus familias correspondiente al período entre enero y diciembre del 2005*.

Literature

- Burgorgue-Larsen, L., Amaya Ubeda de Torres, *The Inter-American Court of Human Rights Case Law and Commentary*, OUP 2011.
- Clare Ribando Seelke and Kristin Finklea , *U.S.-Mexican Security Cooperation: The Merida Initiative and Beyond* in Congressional Research Service, April 2014, p. 19. Available at:<https://fas.org/sgp/crs/row/R41349.pdf> .
- Courtney Hillebrecht 2012, *The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter-American Human Rights System*, Human Rights Quarterly, vol. 34, no. 4, pp. 959-985.

- David James Cantor & Stefania Eugenia Barichello 2013, *The Inter-American human rights system: a new model for integrating refugee and complementary protection?*, The International Journal of Human Rights, vol. 17, no. 5-6, pp. 689.
- Fix-Zamudio, H., *The European and the Inter-American Courts of Human Rights: a Brief Comparison*, in: P. Mahony, F. Matscher, H. Petzold, L. Wildhaber (eds.), *Protecting Human Rights: The European Perspective, Studies in memory of Rolv Ryssdal*, Carl Heymanns Verlag KG, Köln 2000, pp. 507-533.
- Human rights clinic of the university of Texas, school of law, *Maximizando la justicia, minimizando la demora: acelerando los procedimientos de la comisión interamericana de derechos humanos*, diciembre de 2011. available at: <http://www.corteidh.or.cr/tablas/28253.pdf> .
- INCEDES y Sin Fronteras, *Estudio Migratorio de Republica Dominicana, en Estudio comparativo de la legislación y políticas migratorias en Centroamérica, México y República Dominicana*. http://www.sinfronteras.org.mx/attachments/article/1292/REPÚBLICA_DOMINICANA.pdf
- Migration Policy Institute, *Dramatic Surge in the Arrival of Unaccompanied Children, Has Deep Roots and No Simple Solutions*, June 13, 2014. Available at <http://migrationpolicy.org/article/dramatic-surge-arrival-unaccompanied-children-has-deep-roots-and-no-simple-solutions> .
- Odette Martínez Pérez, *La expulsión de extranjeros y la labor de organismos internacionales al respecto. Comentarios de cátedra*. Revisa de la Facultad de Ciencias Sociales y Jurídicas de Elche, Volumen I, Número 9, Mayo de 2013.
- Reisman, W.M. 1998, *The Inter-American Human Rights System*, The American Society of International Law, Washington.
- Rieter, E., *Preventing irreparable harm, provisional measures in international human rights adjudication*, Hart, Intersentia, 2010.
- Schou, N. 1999, *The Inter-American System of Human Rights*, New York University Journal of International Law and Politics.
- Sergio García Ramírez, *Relationship Between the Jurisdiction and American States (National Systems): Some relevant issues Legal Research Institute of UNAM*. May 2014. See on: <https://humanrights.nd.edu/assets/134036/garciaramireziaspan.pdf> .
- Verónica Torres-Marengo, *La migración en el sistema interamericano de derechos humanos migration in the inter-american human rights system*, Vniversitas,, pp. 41 - 76.

American states national legislation

- Dominican Republic, Migration General Law, Law No. 285-04 of August 27, 2004.
- Ecuador, Constitution of the Republic of Ecuador, National Assembly, published in the Official Register on October 20, 2008.
- Mexico, The Refugee, Complementary Protection and Political Asylum Law of Mexico, Published in the Official Journal of the Federation on May 25, 2011. Last reform published DOF 30/10/2014, article 2 (1).
- USA, The Cuban Adjustment Act of 1996 (CAA), [Public Law 89-732](#), on November 2, 1966.

OTHER REPORTS

- International Organization for Migrations, OIM; Internacional Migration Law, *Information note on the principle of no-refoulement*, April, 2004. Consult at: <http://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/IML-Information-Note-on-the-Principle-of-non-refoulement.pdf> .
- Human Rights Watch, *"Abused and Expelled"*, The Externalization of the EU's Migration Management. February 10, 2014. Consulted at: <http://www.hrw.org/reports/2014/02/10/abused-and-expelled-0> .

- Human rights watch, World Report 2012: Mexico. consulted at: <http://www.hrw.org/world-report-2012/mexico>
- Human Rights Watch, *Personas Ilegales: Haitianos y dominico-Haitians en la República Dominicana*. HRW, Vol. 14, No. 1 (B), April 2002,
- Minority Rights Group International, Report Migration in the Caribbean: *Haiti, the Dominican Republic and Beyond* By James Ferguson, Consulted at: <http://www.oas.org/atip/regional%20reports/migrationinthecaribbean.pdf> .
- CELADE, "América Latina y el Caribe: Estimaciones y proyecciones de población 1950-2050," Boletín demográfico 69 (2002): part A. Consulted at: <http://www.cepal.org/publicaciones/xml/7/14347/lcg2225.pdf> .
- Global Detention Project, *Italy detention profile*, November 2012, consulted at: <http://www.globaldetentionproject.org/countries/europe/italy/introduction.html> .