The History of the Inter-American System’s Jurisprudence as Regards Situations of Armed Conflict

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Abstract
Faced with insurgencies and situations of internal armed conflict in a number of Organization of American States (OAS) member states, some states called upon the Inter-American Commission on Human Rights (IACHR) to take into account the operations of irregular armed groups when assessing the situation of human rights in their countries. The IACHR responded that only assessment of state actions had been included within its mandate and that the OAS member states should amend the IACHR’s Statute if they wished to expand its mandate. The OAS member states failed to do so. In 1996, the International Court of Justice (ICJ), in its Advisory Opinion on Nuclear Weapons, set forth its view on the relationship between international human rights law (IHRL) and international humanitarian law (IHL). In 1997, following the ICJ’s Opinion, the IACHR began to apply IHL as the lex specialis in its assessments of the situation of IHRL and IHL to cases involving situations of armed conflict and continued to do so until the Inter-American Court of Human Rights (IACtHR) declared the IACHR incompetent to apply IHL. This article submits that the IACtHR erred in its judgment on the Preliminary Objections in Las Palmeras v. Colombia.

Keywords
Organization of American States; Inter-American Commission on Human Rights; Inter-American Court of Human Rights; armed conflict; irregular armed groups; international human rights law; international humanitarian law; Geneva Conventions

Introduction

Sir Hersch Lauterpacht once wrote: “If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously,

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at the vanishing point of international law.”¹ There is a tendency to think of IHL not as “hard law” but rather as “soft law” – good deeds carried out for reasons of humanity, not pursuant to any categorical legal imperative. The implementation of humanitarian norms in war situations is absurd and anachronistic in a world, which, in its international legal regime has outlawed war. Since wars continue to rage, however, humanitarian norms, imposed more as a result of ethical than legal considerations, attempt to “humanize” these conflicts and the treatment of the victims of these conflicts, in spite of the fact that the evolution of warfare reveals a frightening tendency towards a state of inhumanity in which no one is protected.

It is an irony and commentary on the present state of international law that the Geneva Conventions of 1949 (GCs)² have been ratified by more states than any other treaty in the world including the UN Charter, yet the failure of states to implement the provisions of the Geneva Conventions has served to render these provisions irrelevant to most victims of armed conflicts.³ At the time I first wrote these words, some 25 years ago, in reaction to the absence of a supervisory body to ensure compliance with the Geneva Conventions, I advocated the implementation of IHL norms by regional human rights bodies.⁴

The international community failed to establish a supervisory body to monitor implementation of the laws of war or specifically, the Geneva Conventions, as compared to the supervisory bodies established by a number of international human rights treaties to monitor compliance with human rights.⁵ Beginning in the 1990s with the creation of the ad hoc

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² Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), 75 UNTS 31 (entered into force 21 October 1950) [GC I]; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), 75 UNTS 85 (entered into force 21 October 1950) [GC II]; Convention relative to the Treatment of Prisoners of War (1949), 75 UNTS 135 (entered into force 21 October 1950) [GC III]; Convention relative to the Protection of Civilian Persons in Time of War (1949), 75 UNTS 287 (entered into force 21 October 1950) [GC IV].
³ As of today, 1 March 2011, 194 countries are States parties to the Geneva Convention compared to 192 member States of the United Nations.
⁵ See e.g., Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) (1966), 999 UNTS 171 (entered into force 23 March 1976) establishing the UN
International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, the International Criminal Tribunal for Rwanda (ICTR) in 1994, and the International Criminal Court (ICC) in 2002, specific international tribunals were mandated to apply international criminal law, which incorporates IHL into the category of “war crimes”, and it will be interesting to see to what extent the UN Human Rights Council will monitor compliance with IHL as well as IHRL.

Some countries have openly objected to a regional human rights body applying IHL during a state of armed conflict, arguing that they did not consent to the human rights body applying this body of law. Prior to the


8 The United States and Colombia, for example, are two countries that have taken this position before the IACHR (infra). As one commentator astutely observed: “[T]he main difficulty regarding the implementation of IHL is that States refuse to apply it even in situations where it is clearly applicable. Baxter has noted that ‘the first line of defense against IHL is to deny that it applies at all.’ H.S. Burgos, ‘The Application of IHL as Compared to Human Rights law in Situations Qualified as Internal Armed Conflict, Internal Disturbances and Tensions or Public Emergency, with Special Reference to War Crimes and Political Crimes’, in F. Kalshoven and Y. Sandoz (eds), Implementation of IHL, supra note 4, at 6. This position has been echoed: “Despite its presence in the Conventions and its status as customary law, breaches
establishment of these ad hoc tribunals, this objection made little sense because the international community did not authorize any jurisdictional body to apply the laws of war despite the universal ratification of these treaties.

This paper will examine the history of how the inter-American system has dealt with violations of IHRL in situations of internal armed conflict. The OAS member states, since at least 1980, have been urging the OAS human rights organs to consider violations committed by irregular armed groups against whom the states were engaged in armed conflict. Born of the conviction that the monitoring of human rights was biased against states, — since only states could be found responsible for human rights violations — the OAS member states repeatedly called upon the IACHR to condemn, as human rights violations, actions committed by irregular armed groups. The IACHR’s inability to hold an insurgent group responsible for violations of IHRL, since under its governing instruments cases can only be presented against states, created a tension within the system, as the IACHR called upon the OAS political bodies to provide it with the legal means necessary to conduct such investigations. The failure of the OAS to provide such a mechanism was resolved in 1996 when the ICJ issued its Advisory Opinion in the Nuclear Weapons case and established that: 1) human rights law remains applicable even during armed conflict; 2) it is applicable in situations of armed conflict, subject only to derogation and 3) when both IHL and IHRL are applicable, IHL is the lex specialis. Hampson, in her 2008 study of the relationship between IHL and IHRL from the perspective of a human rights body, suggests that the IACtHR “has shown the way, at least as regards the manner in which IHL can be taken account.”

It is the argument of this paper that it was the IACHR, and not the IACtHR, that took IHL into account, that the IACtHR effectively eliminated the consideration of IHL in situations of armed conflict by the human rights organs of the inter-American system. On the other hand, the ICJ, and UN reports such as The Goldstone Report, have shown how IHL and IHRL together may effectively be applied to situations of armed conflict by a supervisory body.

continually occur. When faced with internal difficulties, States tend to disregard the provisions of common Article 3, often denying that the situation is an armed conflict at all.” Lindsay Moir, The Law of Internal Armed Conflict (2002), at 273-274.


10 The Goldstone Report, supra note 7.
1. Obligations under International Humanitarian Law in Contrast to International Human Rights Law

The normative framework of IHRL centers obligations on the state and its agents, for the purpose of protecting the individual against abuses by the State. The normative framework of IHL, on the other hand, imposes obligations directly on the individual. The difference “rests on the fact that human rights law is centered, indeed built, on the granting of rights to the individual, while humanitarian law is focused on the direct imposition of obligations on the individual.”

IHRL grants rights to individuals and imposes obligations on the State. The State has an obligation of due diligence to protect the individual’s enjoyment of his or her rights. The duty to ensure full enjoyment of these rights involves a duty to prevent, investigate and punish any violation, through the enactment of appropriate legislation and if necessary, the reorganization of the apparatus of the state.

IHL, on the other hand, imposes obligations on the individual. Whereas most violations of the laws of war are carried out by members of the armed forces, who are state agents, some violations of IHL are carried out by individuals in a private capacity, in situations of internal armed conflict. The German industrialists, who manufactured and supplied poison gases to the SS, were private citizens, who were tried and found guilty of war crimes and sentenced to death. The law of war, unlike IHRL, binds individuals regardless of whether or not they are state agents.

Consequently, IHL applies not only to states but also to irregular armed groups in situations of internal armed conflict. International individual criminal responsibility for violations of IHL (war crimes) was until very recently only applicable in the context of international armed conflicts. Serious violations of common Article 3 GCs or violations of Protocol II were not included in the list of “grave breaches and neither common Article 3 nor Protocol II.

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14. *Ibid.*, at 86. The Goldstone Report (*supra* note 7, at para. 121) stated that: “IHRL and IHL require States to investigate and, if appropriate, prosecute allegations of serious violations by military personnel.” (emphasis added)
15. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non- International Armed Conflicts (1977), 1125 UNTS 609 (entered into force 7 December 1978) [AP II].
contemplate the prosecution of offenders of these instruments.”

Today, the duty to prosecute or extradite individual perpetrators of violations of IHL extends far beyond “grave breaches” to include the 1949 GCs, AP I and AP II and the laws and customs of war. The Goldstone Report recently noted that violations of fundamental humanitarian rules (e.g. war crimes, crimes against humanity and genocide), applicable in all types of conflict, entail individual criminal responsibility.

Individual criminal responsibility for human rights violations remains “unusual.” Most human rights treaties include no requirement or power to criminally sanction perpetrators of serious violations of human rights comparable to the “grave breaches” provisions incorporated into humanitarian law conventions and the establishment of the international criminal law tribunals designed to punish individual perpetrators.

The “duty to punish” as it has been termed, or the duty of the state to prosecute human rights violations is not set forth in international human rights treaties as it is in IHL for “grave breaches.” International human rights bodies, however, find a “convergence” between IHL and IHRL, and increasingly recommend criminal prosecution for perpetrators of grave violations of IHRL, thereby blurring the difference between IHL and IHRL. In 1996, the International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind expanded the definition of crimes against humanity as comprising acts such as murder, torture, enslavement and forced disappearance “when committed in a systematic manner or on a large scale and

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17 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977), 1125 UNTS 3 (entered into force 7 December 1978) [AP I].

18 Provost, supra note 11, at 110-111.

19 See The Goldstone Report, supra note 7, para. 287. The Goldstone Report is an example of the international community calling upon experts to investigate violations of IHL and IHRL, simultaneously, on the part of a State and non-State actors.

20 Provost, supra note 11, at 107.

21 For a contrary view, see D. Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’, 100 Yale LJ 2539 (1991). Dugard, supra note 16, suggested, in 1998, that the challenge for the next millennium will be to establish a viable international criminal court and effective domestic procedures for the prosecution of those who commit systematic or large-scale violations of human rights – whether in international or internal armed conflicts.
instigated or directed by a government or by any organization or group, without making reference to the nature of the conflict.\textsuperscript{22} Initially crimes against humanity were considered to apply only during international wars, whereas subsequent developments have made it clear that crimes against humanity can also occur in times of peace.\textsuperscript{23}

The IACtHR, in its first decision on a contentious case, held that Honduras was obligated to “prevent, investigate and punish any violation of the rights recognized by the [American] Convention” but it did not include this obligation in the operative part of the merits judgment in this landmark case.\textsuperscript{24} The IACtHR, in dictum, distinguished the nature of IHRL from criminal law and remarked on the absence of a duty to punish.\textsuperscript{25}

The widow of Manfredo Velasquez, after the IACtHR’s judgment on the merits, submitted a pleading in which she specifically requested the IACtHR to order Honduras to comply with the obligation to try and punish those responsible for the state practice of forced disappearances that led to the disappearance of her husband and others.\textsuperscript{26} Citing the classic Chorzów decision, that every violation of an international obligation creates a duty to make adequate reparation, the IACtHR elaborated in great detail on the monetary reparations to be paid.

As regards the duty to punish, however, the IACtHR briefly reiterated that the state has a continuing duty to investigate and that this duty is in addition to the duties to prevent involuntary disappearances and to punish those directly responsible.\textsuperscript{27} Since Honduras was unable to prevent the disappearance

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\item \textsuperscript{23} Dugard, \textit{supra} note 16, at pp. 447 and 450. The Statute of the International Criminal Tribunal for the former Yugoslavia gives the Tribunal jurisdiction over crimes against humanity “when committed in armed conflict, whether international or internal in character, and directed against any civilian population.” \textit{Ibid.}, at 450.
\item \textsuperscript{24} Judgment, \textit{Velasquez Rodriguez Case}, \textit{supra} note 12, para. 166. Dugard suggested that human rights violations have now been criminalized due to the blurring of the distinction between international and non-international armed conflicts and the expansion of the definition of international crimes, “particularly when they are committed in a systematic manner or on a large scale.” \textit{Ibid.}, \textit{ibid.}, at 451.
\item \textsuperscript{25} Judgment, \textit{Velasquez Rodriguez Case}, \textit{ibid.}, para. 134. (“The international protection of human rights should not be confused with criminal justice. States do not appear before the IACtHR as defendants in a criminal action. The objective of IHRL is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the states responsible.”).
\item \textsuperscript{26} Judgment (Compensatory Damages), \textit{Velasquez Rodriguez Case}, IACtHR, 21 July 1989 (Art. 63(1) ACHR), para. 7.
\item \textsuperscript{27} \textit{Ibid.}, para. 34.
\end{itemize}
of Manfredo Velasquez, the inclusion of the duty to punish the perpetrators appears as illusory in this paragraph as the duty to prevent his disappearance. In the five operative paragraphs of the Compensatory Damages judgment, however, only monetary damages are mentioned in each paragraph and the duty to punish is not even mentioned once.\textsuperscript{28}

The practice of international human rights bodies reflects the emphasis on the state's duty to ensure rights and the individual's right to a remedy.\textsuperscript{29} The obligation to prosecute perpetrators of human rights violations, it has been suggested, is driven by social and political forces rather than by human rights norms and whether or not to prosecute will remain at the discretion of the State.\textsuperscript{30}

2. The IACHR’s Concern with Situations of Internal Armed Conflict in the Early History of the Inter-American System

Although situations of internal armed conflict persisted in a number of countries, due to the existence of armed movements threatening state authority, the IACHR’s earliest approach to these conflicts, in its country reports, was to examine the rights violated, generally beginning with the right to life, stating which provision of the American Declaration\textsuperscript{31} or the American Convention\textsuperscript{32} was applicable, and describing the denunciations it had received by mail, or, in person, during an on-site visit. The IACHR interpreted its mandate restrictively, as permitting it to examine violations of IHRL, as defined under the American Declaration or the ACHR and committed by State agents.

Despite the situations of internal armed conflict in Cuba, the Dominican Republic and Chile in the period 1959-1973, the IACHR’s earliest reports on these countries make no reference to IHL when analyzing complaints of

\textsuperscript{28} Ibid., para. 60.

\textsuperscript{29} Provost, supra note 11, at 114.

\textsuperscript{30} Ibid., at 115. State practice in the inter-American system further indicates that approximately 10% of all States ordered to prosecute those responsible for human rights violations, in fact, comply.


\textsuperscript{32} American Convention on Human Rights, 22 November 1969, in force 18 July 1978. OASTS, No. 36 at 1; see also 1144 UNTS 1, No. 17955 (1979).
killings or detentions. The IACHR’s first reference to IHL was in the context of the internal armed conflict in Nicaragua.

A. The IACHR’s On-site Visit to Nicaragua (3-12 October 1978) and Serial Bombardment

The IACHR was requested by the XVII Meeting of Consultation of the OAS, a meeting of Foreign Ministers, equivalent to a regional version of the UN’s Security Council but without veto powers, to carry out an on-site visit to Nicaragua, during Nicaragua’s Civil War. The armed parties to this conflict were the Nicaraguan National Guard and the Sandinista Front for National Liberation (“FSLN”). The IACHR was requested to report back on its findings to the Meeting of Consultation. The visit took place from 3-12 October 1978 and due to the urgency of the situation, the IACHR’s report was prepared in less than five weeks (it was issued on 17 November 1978). The report begins with an analysis of the state of emergency in effect in Nicaragua since 1 December 1974, the suspension of constitutional guarantees and the application of martial law. The most important chapter, for our purposes, however, on the right to life, examines the deaths that occurred as a result of the attack by the FSLN on several National Guard detachments, beginning on 9 September 1978.

The IACHR noted that Nicaragua was a state party to the GC IV and that “common Article 3,” applied to this situation of a non-international armed conflict.34

Prior to its arrival in Nicaragua, the IACHR’s report noted, it had received numerous allegations of a large number of deaths and injuries among the civilian population due to the indiscriminate use by the National Guard of serial bombardment and heavy artillery. In order to investigate these allegations, shortly after its arrival, the IACHR visited the cities most affected by combat – Estelí, León, Masaya, Jinotepe and Chinandega. In its report, the IACHR described inspecting the different neighborhoods in these cities and

33 For a more extensive treatment of this case see C. Cerna, ‘Human Rights in Conflict with the Principle of Non-Intervention: The Case of Nicaragua before the Seventeenth Meeting of Consultation of Ministers of Foreign Affairs,’ in IACHR: Human Rights in the Americas, Homage to the Memory of Carlos A. Dunshee de Abranches (1984) at 93-107.

speaking with the people who lived there, who confirmed the magnitude of the destruction caused by the National Guard. The IACHR concluded that the National Guard had used its firepower indiscriminately causing a great number of casualties and tremendous suffering to the civilian population. The National Guard, it noted, ordered people to stay in their homes before the bombing, instead of evacuating them, thus “violating a basic humanitarian norm.”35 Also, the IACHR reported that Nicaragua had intentionally mistreated Red Cross volunteers, killing two of them, and had misused the Red Cross emblem.36

On 23 June 1979, the XVII Meeting of Consultation approved a resolution which, for the first time in the history of the OAS, deprived an incumbent government of a member state of legitimacy, based on the human rights violations committed by that government against its own population during an internal armed conflict.37

B. The IACHR’s On-site Visit to Argentina (6-20 September 1979)

Under pressure from the US Carter Administration, Argentina, under military rule, permitted the IACHR to carry out an on-site visit to examine the human rights situation in the country, characterized by an internal armed conflict

35 Ibid.
36 Ibid.
37 The text of the Resolution stated in relevant part:

WHEREAS:
The people of Nicaragua are suffering the horrors of a fierce armed conflict that is causing grave hardships and loss of life, and has thrown the country into a serious political, social, and economic upheaval.
The inhumane conduct of the dictatorial regime governing the country, as evidenced by the report of the IACHR, is the fundamental cause of the dramatic situation faced by the Nicaraguan people and;
The spirit of solidarity that guides Hemisphere relations places an unavoidable obligation on the American countries to exert every effort within their power, to put an end to the bloodshed and to avoid the prolongation of this conflict which is disrupting the peace of the Hemisphere;
THE SEVENTEENTH MEETING OF CONSULTATION OF MINISTERS OF FOREIGN AFFAIRS,
DECLARES:
That the solution of the serious problem is exclusively within the jurisdiction of the people of Nicaragua.
That in the view of the Seventeenth Meeting of Consultation of Ministers of Foreign Affairs this solution should be arrived at on the basis of the following:
1. Immediate and definitive replacement of the Somoza regime.”
between the Argentine military and irregular armed groups. Thousands of persons had been reported “disappeared” to the IACHR, a term of art meaning that they had been detained by security forces and that the authorities subsequently denied holding them in detention without providing an explanation as to their whereabouts.

The IACHR’s visit to Argentina lasted two weeks and received a great deal of national publicity. The IACHR, following its customary practice, established offices in a hotel in the capital, Buenos Aires, and also traveled into the interior. In Buenos Aires, relatives of the “disappeared” lined up for twenty city blocks in order to present their complaints to the IACHR. In that brief period, the IACHR received 5,580 individual complaints, of which over 4,000 were new, mostly cases involving the “disappeared.” The IACHR met with governmental authorities, major religious figures, representatives of human rights organizations, political parties, business organizations, trade union leaders, journalists, academics, etc. in its attempt to gather information about the human rights situation in the country.

The military government maintained that the problem of the observance of human rights in Argentina could not be given precedence over the situation caused by terrorism and subversion. The struggle against terrorism was invoked to justify its conduct as regards the violation of human rights. The IACHR was repeatedly asked by civilians and members of the military why it failed to investigate terrorist acts, why it concerned itself exclusively with actions attributable to governments and to what extent the IACHR takes terrorism and subversion into account when assessing the conduct of governments as regards human rights observance.

In its 1980 Report on the Situation of Human Rights in Argentina, the IACHR provided a detailed response to the above concerns raised by the military government, explaining that the OAS member states only granted it competence to examine human rights violations committed by states. It suggested that to examine violations committed by non-state actors would place the irregular armed groups on the same level as the state, which would be unacceptable to states. This position, by which it interpreted its mandate, would

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38 The Argentina report is available on the IACHR’s website, supra note 34.
39 Cf., for example, R. Nieto Navia, ‘Hay o no hay conflicto armado en Colombia?’ Anuario Colombiano de Derecho Internacional 139 (2008), at 140. (‘En efecto, como lo narra el autor, el 19 de junio de 2003, ante los jueces de la Corte Interamericana de Derechos Humanos en San José, Costa Rica, el presidente Uribe dijo, entre otras cosas: ‘No reconozco a los grupos violentos de Colombia, ni a la guerrilla ni a los paramilitares, la condición de combatientes; mi gobierno los señala como terroristas.’ Y añadió: ‘No se puede admitir dar legitimidad a una oposición...')
become the doctrinal position maintained by the IACHR for many years, despite repeated calls from the OAS member States for it to examine human rights violations committed by irregular armed groups.\(^{40}\)

The IACHR’s rejection of denunciations concerning terrorist acts committed by irregular armed groups was grounded in its interpretation of the “legal norms applicable” to the IACHR, namely, that human rights violations could only be committed by states and not by non-state actors. It also implicitly dismissed any hint of possible competence to apply IHL, which would have required it to examine the acts of states as well as the actions of irregular armed groups during a situation of armed conflict. The existence of many states of emergency in the 1980s was an indication of the number of conflicts in the region.

C. The IACHR’s Concern about States of Emergencies in the Hemisphere

The ACHR entered into force on 18 July 1978. Article 26 ACHR permits States to derogate from certain provisions of the ACHR in “time of war, public danger or other emergency that threatens the independence or security of a
In its 1980-1981 Annual Report, the IACHR noted that ten countries in the hemisphere were either under a state of emergency or suffered some suspension of constitutional guarantees, conducted military trials of civilians or had to some extent militarized the country. Consequently, the IACHR decided:

To recommend to those member states that maintain extended states of emergency to limit such periods of exception to the time strictly necessary, and to terminate them as soon as the circumstances permit, and that, during the state of emergency the judiciary be allowed to function so that it may check abuses by government authorities.

As one observer noted, “Whenever an OAS state declares an emergency, its experience, reflected in its reports, reveals a high correlation between emergency conditions and grave human rights abuses.”

By dint of initiative, the IACHR had transformed its statutory authority to hold meetings in any member state into the competence to conduct on-site monitoring missions in those states. Once an on-site mission was completed and the report on the state was issued, in order to continue to monitor the human rights situation in that country, the IACHR, beginning with its 1978 Annual Report, began to conduct follow-up with regard to previous on-site visits in its Annual Report. In its 1980-1981 Annual Report, the IACHR explained that in Chapter V (but beginning in 1981-1982, in Chapter IV) of its Annual Report, it would examine whether the State complied with its recommendations and would analyze the evolution of the human rights situation in the country from the publication of its country report until the preparation of its Annual Report. It noted that it conducted recent on-site visits to Argentina, Bolivia, Chile, Colombia, Cuba, Chile, El Salvador, Guatemala, Haiti, Nicaragua, Paraguay and Uruguay and consequently it would conduct follow-up with regard to a number of these countries.

In 1996, the IACHR changed its approach and began to highlight in Chapter IV of its Annual Report countries that merited “special attention.”

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41 (emphasis added). Despite the fact that the post-World War II legal architecture supposedly outlawed war, the ACHR contemplated the possibility of “war” in Article 26, as a justification for the derogation of certain rights under the Convention.

42 The ten countries singled out were: Argentina, Bolivia, Colombia, Chile, Grenada, El Salvador, Haiti, Nicaragua, Paraguay, and Uruguay.


44 In 1996, the IACHR decided to establish criteria for the inclusion of countries that “merited special attention.” The criteria were the following:
and that had been the subject of an earlier country report. Included in Chapter IV were Argentina, Chile, Cuba, El Salvador, Guatemala, Haiti, Nicaragua, Panama, Paraguay, Suriname and Uruguay. Notably absent from the IACHR’s list was Colombia, which had been under a state of emergency and in a state of internal armed conflict virtually since 1948. Argentina, Chile and Uruguay were eliminated from Chapter IV when the military governments turned over power to civilian leaders.

D. The Influence of Peru and the IACHR’s Growing Attention to Irregular Armed Groups

After the Central American wars, and the end of the dictatorships in the Southern Cone, Marxist and other insurgencies did not vanish from the region. From 1980 to the early 1990s, Peru was wracked by two subversive groups, the “Peruvian Communist Party-Shining Path” (“Sendero Luminoso”) and the Marxist “Revolutionary Movement Tupac Amaru” (“MRTA”).

1. The first criterion in which the IACHR believes that special reporting is warranted obtains in states which are ruled by governments which have not been chosen by secret ballot in honest, periodic and free popular elections in accordance with accepted international standards. The IACHR has repeatedly pointed out the centrality of representative democracy and democratically constituted systems in achieving the rule of law and respect for human rights. With respect to states in which the political rights set forth in the American Convention and Declaration are not respected, the IACHR has a duty to inform other OAS member states regarding the situation of the political and civil liberties of its inhabitants.

2. The second criterion concerns states where the free exercise of rights contained in the American Convention or Declaration have been effectively suspended, in whole or part, by virtue of the imposition of exceptional measures, such as a state of emergency, state of siege, prompt security measures, and the like.

3. The third criterion which could justify a particular state’s inclusion in this chapter is where there are serious accusations that a state is engaging in mass and gross violations of human rights set forth in the American Convention and/or Declaration or other applicable human rights instruments. Of particular concern here are violations of non-derogable rights, such as extrajudicial executions, torture and forced disappearance. Thus, where the IACHR receives credible communications denouncing such violations by a particular state which are attested to or corroborated by the reports or findings of other governmental or intergovernmental bodies and/or of respected national and international human rights organizations, the IACHR believes that it has both a moral and legal duty to bring such situations to the attention of the Organization and its member states.

4. The fourth criterion concerns those states which are in a process of transition from any of the above three situations.

The death toll from political violence in Peru from 1980 to 1992 is estimated at over 24,000 persons.\textsuperscript{46} The increase in indiscriminate and selective violence perpetrated by irregular armed groups in certain states, such as Peru, led the 1985 OAS General Assembly to recommend to the IACHR to “include reference to the action of irregular armed groups.”\textsuperscript{47}

It was not until 1990, however, with General Assembly Resolution 1043 that, for the first time, the OAS coupled the activities of irregular armed groups with human rights and recommended that the IACHR include references to the actions of irregular armed groups in its reports. This recommendation was reiterated annually by the OAS General Assembly from 1991-1995\textsuperscript{48} and the IACHR began to make regular reference to the activities of irregular armed groups in its country reports and in the updates to these reports.

In its 1990-1991 Annual Report, the IACHR considered the issue of irregular armed groups and human rights, in compliance with the General Assembly mandate. The Rapporteur for Human Rights, who formed part of the Working Group on the Strengthening of the OAS, a body comprised of representatives of OAS member states, noted that the states had agreed “to study the idea of preparing a special legal regime that covers human rights violations committed by groups of armed irregulars that engage in terrorism.”\textsuperscript{49} The IACHR, noted however, that some OAS member states were not “in favor of the idea of associating acts perpetrated by irregular groups with

\textsuperscript{46} See, IACHR, Report on the Situation of Human Rights in Peru, Chapter I, 12 March 1993. With the capture, in 1992, of Abimael Guzman and Victor Polay, the leaders of the two most important insurgent armed groups, the armed conflict in Peru effectively ceased. Peru was included in Chapter IV of the IACHR's Annual Report in 1992 and in 1993. The internal armed conflicts in Guatemala and Colombia were chronic and on-going, however, and the IACHR began to focus its attention on the activities of irregular armed groups in those countries.

\textsuperscript{47} OAS General Assembly Resolution AG/RES.1043 (XX-0/90) “Consequences of Acts of Violence Perpetrated by Irregular Armed Groups on the Enjoyment of Human Rights,” reprinted in the IACHR's 1990-1991 Annual Report. See also OAS General Assembly Resolution AG/RES. 775 (XV-0/85) “Condemnation of Terrorist Methods and Practices,” 9 December 1985, reprinted in the IACHR's 1985-1986 Annual Report. It is interesting to note that in 1985, terrorist acts were considered a criminal justice problem. See the 3rd paragraph of Res. 775: “To condemn unequivocally as criminal all acts, methods and practices of terrorism, wherever and by whoever committed, including those which jeopardize friendly relations among states and their security.”

\textsuperscript{48} Resolution 1043 recommended to the IACHR “that in reporting on the status of human rights in the American states, it include reference to the actions of irregular armed groups in such states.”

the concept of human rights” because of the harm it might do to the human rights regime. The IACHR justified its focus on the protection of the individual from abuses committed by the state, noting that the two world wars dramatically demonstrated the need to develop a system whose function is to protect the individual when the state becomes his assailant. 50

The IACHR then noted the problem of the increasing and spreading violence in the region. In defining “irregular armed groups” the IACHR considered that the concept was broad enough to encompass situations involving various types of political violence including that committed by criminal organizations, such as drug traffickers, criminal gangs, terrorists or groups involved in armed conflict. 51 It dismissed getting involved in examining situations of drug trafficking or criminal gangs and focused on terrorism and groups involved in internal armed conflict, which is regulated under Article 3 GCs. It noted that the rights protected under common Article 3 are the same as those included in the human rights instruments that it applied, but cautioned lest the IACHR were to become involved in “investigating and clarifying events that occurred amid an armed conflict that was not of an international nature. Were such a decision to be made, then specific rules to that effect would have to be drafted. In doing so, consideration would have to be given to the political implications that such functions might have for the parties in conflict” (emphasis added). 52

The IACHR noted that the expression “irregular armed groups” would “have to be carefully defined in order to establish the subjects that the IACHR is to target. The type of situations in which the activities of such groups would require the IACHR’s consideration would also have to be determined in order to give it a precise legal frame of reference by which to operate.” 53

As regards terrorism, the IACHR noted that the clearest articulation of the position of some states was in Argentina’s “Observations and Criticisms” of its 1980 Report. 54 In these “Observations and Criticisms,” Argentina argued that human rights violations are inevitable because they are the consequence of the “war” created by armed groups, who are generally portrayed as terrorists.

51 Ibid.
52 Ibid.
53 Ibid.
In order for the IACHR to investigate acts of terrorism as human rights violations, the IACHR contended, states must first define what kinds of acts they seek to have the IACHR investigate. More importantly, however, the IACHR emphasized that to examine human rights violations committed by terrorists would be preempting the state in its domestic criminal justice functions.

The IACHR was unwilling to undertake any analysis of the activities of irregular armed groups without new legal standards being drafted, and reverted to defending its earlier doctrine of concentrating exclusively on violations committed by states. It noted again that the examination of human rights violations on the part of irregular armed groups would provide those groups with the standing accorded traditionally only to states. It cautioned that: “the IACHR’s experience shows that many of the acts classified as terrorist acts occur within the context of armed domestic strife. One of the parties to the dispute may be armed groups that control pieces of territory that could qualify as belligerents and, eventually, be recognized as subjects of international law. All these considerations must be carefully weighed when drafting the standards required if one wishes to move further in the direction of linking human rights and terrorism (emphasis added).” As the work being done in connection with the issue of terrorism now stands, there is no frame of reference that would allow the inter-American system for the protection of human rights to help remedy the situations posed. After many years of study in various fora, that frame of reference is still missing because of its legal implications and the practical problems it poses.” The IACHR called upon the “pertinent organs” to define the norms on the subject matter so as then to examine whether the issue of terrorism should be linked to the issue of human rights. “As for situations involving domestic armed conflict,” the IACHR submitted, “it is the responsibility of the States to establish the norms and conditions under which the IACHR, based on the international regulations that govern it, may help to correct any problems that arise involving individual rights (emphasis added).”

E. The IACHR Begins Consideration of Irregular Armed Groups in its Reports

The IACHR for the first time included Peru in Chapter IV in its Annual Report in 1992 and again in 1993, at which time it also introduced
consideration of “irregular armed groups,” as per the General Assembly mandate set forth in Resolution 1043. In its 1992-1993 Annual Report, the IACHR noted that at a number of its sessions the OAS General Assembly had recommended that the IACHR take into account the operations of armed bands when making assessments of the status of human rights. As reviewed above, the IACHR was sensitive to this problem and took account of it in due fashion in its annual reports. However, the IACHR would note that it encountered significant procedural problems in implementing this general concern.

In Chapter IV of its 1993 Annual Report, in its monitoring of Peru, the IACHR noted that it had been observing the situation closely “given the terrible violence that country has been experiencing for many years now, and in response to the many petitions the IACHR has received concerning human rights violations attributed to agents of the Peruvian government and violations of IHL attributed to members of armed irregular groups.” A delegation of the IACHR had carried out an on-site visit in Peru from 17-21 May 1993, and for the first time, the IACHR included in its Annual Report human rights violations committed by irregular armed groups. Similarly, the IACHR included a section on “Acts of Violence by Irregular Armed Groups,” in its special country report of its on-site visit to Peru. The section is short, comprised of only two paragraphs, but, as in the Annual Report, the IACHR, for the first time, reported on specific killings attributed both to Sendero Luminoso and to the MRTA, without linking these killings to any form of state responsibility.

IACHR, 1993 Report on the Situation of Human Rights in Peru, available on the IACHR’s website, supra note 34.

Ibid., 1993 Report on Peru. The two paragraphs:

108. “The political violence caused by irregular armed groups, especially the PCP-SL, has escalated since April 5, 1992. Whereas there were three ‘car-bombs’ that exploded between January 1 and April 4, in the period from April 5 to July 31, 33 such bombs exploded. It is a well known fact that this method inflicts suffering on the entire population, indiscriminately. It reached its climax with the attack that occurred on 16 July 1992, which drew a public condemnation from the IACHR (Appendix IX). Public information that the IACHR has in its possession indicates that in the first half of 1992, there were a total of 775 attacks in Peru, of which 669 are attributed to the PCP-SL, 52 to the MRTA and the rest to other authors. In the first half of the year, 1,807 people died; of these, 255 were members of the security forces, 915 were civilians, 600 were alleged subversives and 8 were considered drug traffickers.

109. With the capture last June of Víctor Alfredo Polay, leader of the MRTA, and the recent capture of Abimael Guzmán, founder and leader of the PCP-SL, along with a considerable number of important members of that group, there may be changes in the modality and intensity of political violence in Peru.
F. Irregular Armed Groups in Guatemala

The IACHR included Guatemala in Chapter IV of its 1993 Annual Report and briefly considered the activities of “irregular armed groups”. Since it had carried out an on-site visit in September 1993, greater attention was paid to these groups in its country report on Guatemala. It noted that the 45,000 man Guatemalan Army had defeated militarily the guerrilla.

As with Peru, the IACHR reported on killings caused by non-state actors. In its analysis of the terrorist activities of irregular armed groups it noted that the main guerrilla organization, the Guatemalan National Revolutionary Unit (Unidad Revolucionaria Nacional Guerrillera (URNG) during the first six months of 1992, according to data provided by the Presidential Commission on Human Rights, “caused more than 100 deaths either of army members, or subversive and civilian combatants; and have wounded inhabitants of rural areas with Claymore buried mines that blow up the legs of anyone stepping on them” (emphasis added). This is the only reference to IHL regarding the actions of the irregular armed groups. The IACHR condemned “the crimes and terrorism of insurgent groups and recognizes the right and duty of a democratic and constitutional state to combat them with all the rigor of the law” and noted that “successful conclusion of the peace talks now under way between the government and the URNG representatives would help to create conditions more favorable to the full observance of human rights in Guatemala.” The IACHR focused on the successful conclusion of the ongoing peace talks. The peace accords were finally signed in December of 1996, between the Government of President Alvaro Arzu and the URNG, ending the 36-year civil war.

It is noteworthy that the member states did not elaborate a new legal frame of reference to enable the IACHR to investigate terrorist or subversive activities committed by irregular armed groups engaged in an armed conflict. Nonetheless, the IACHR began to reference IHL and actions of irregular armed groups pursuant to the OAS General Assembly mandate.

G. Colombia – The International Responsibility to Protect

Colombia, which had long suffered a state of internal armed conflict, since 1948, was not included in Chapter IV of the IACHR’s Annual Report until

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61 IACHR, Fourth Report on the Situation of Human Rights in Guatemala (1993) available on the IACHR’s website, supra note 34. The IACHR previously considered, in some cases, deaths caused by guerrillas, such as in its study of El Salvador in Chapter IV of its 1987-1988 Annual
1994, although it had been included in Chapter V of the IACHR’s 1981-1982 Annual Report. The internal situation in Colombia in many ways was ignored by the IACHR, the international press and public opinion.

The IACHR, in 1980, visited Colombia and carried out a year-long observation of a trial of M-19 guerrilla members in La Picota prison in Bogota, Colombia, at the request of the Government. Despite the state of internal armed conflict, or perhaps because of it, Colombia did not permit the IACHR to return to Colombia again until 1991. In April 1989, the Government of President Barco invited the IACHR to return, and then delayed the invitation until 1990 due to on-going peace negotiations with the M-19. A preparatory visit was carried out in December 1990, but the actual visit was not carried out until 4-8 May 1992, under the Government of President Cesar Gaviria. The IACHR’s report on Colombia was issued in 1993, following on-site visits carried out in 1990, 1992 and 1993. The Special Commission that carried out the visits received testimony about human rights violations committed against a backdrop of armed conflict by newly formed militarized groups and by guerrilla groups, drug traffickers and paramilitary groups, some of whom, it was alleged, acted in concert with the Army or with its acquiescence.

The central problem for the Colombian Government was the FARC (the Revolutionary Armed Forces of Colombia), the armed wing of the Colombian Communist Party, the largest Colombian guerrilla organization inspired and supported by Communist Cuba. Simultaneous with the strengthening and growth of guerrilla organizations, self-defense groups and numerous paramilitary organizations sprang up in the 1960s creating a generalized culture of violence in the country. In 1993, the IACHR examined “How the Activities of Irregular Armed Groups affect Human Rights in Colombia” as mandated by the 1991 and 1992 OAS General Assembly Resolutions.

In the Colombia Report, the IACHR noted that despite the failure of the member states to create a specific legal regime under which the IACHR could examine the situation of irregular armed groups, “on its own and without overstepping its authority, it […] discussed how the activities of irregular armed groups… stock in trade in the face of the challenge to human rights posed by the irregular armed groups.”

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Report, but it is not until the General Assembly mandate that the IACHR engages in any systematic analysis of the activity of these irregular armed groups.

63 Ibid.
64 Ibid.
armed groups help create the scenario of violence and affect the exercise of human rights.”\textsuperscript{65} It also expressly condemned such activities. The IACHR observed that its failure to examine the atrocities committed by irregular armed groups, such as kidnappings, assaults and assassinations, was due to the fact that these are common crimes and not human rights violations and that the domestic criminal justice system, not the IACHR, is the appropriate jurisdictional body to deal with such activities. The IACHR reiterated its doctrinal position that its mandate is limited to examining human rights violations committed by states.

It is worth noting, however, that in this Report, the IACHR, making reference to Colombian domestic law, suggested that a state may be internationally responsible for actions of irregular armed groups for failing to protect individuals under its jurisdiction from violations of their rights and that such victims are entitled to compensation from the state.

As a report supplied by the Office of the Presidential Adviser on Human Rights on this subject puts it, the State of Colombia is obliged to protect residents in the country from violations of their rights by criminals, regardless of the motive for the crime and regardless of whether it is the work of armed groups or individuals. To provide that protection, the State organs that prevent and punish crime and the State's law enforcement agencies must be functioning properly. This obligation is recognized in the new Constitution. Several court rulings have elaborated upon it. For example, the Council of State has ruled that victims of the actions of State agencies and the victims of guerrilla warfare, drug trafficking or criminal activities are entitled to receive compensatory damages, provided it is reasonably established that the government did not provide the victim with proper attention (and without requiring, for example, that any threats to the victim be reported to the State and even if the victim had mechanisms available to protect himself), was negligent in its actions or failed in some way to perform its fundamental obligations. This responsibility exists regardless of whether it can be shown that either there was intent on the part of the State or its agents to harm the individual, that its officials were somehow to blame, or that they can be identified. The responsibility is established within a real context that considers the availability of State resources to compensate for the actions of the criminal groups directly responsible for the acts (emphasis added).\textsuperscript{66}

The IACHR in the 1993 Colombia Report noted for the first time that the State bore international responsibility for the actions of irregular armed groups, “although there is no single criterion to establish the type and degree

\textsuperscript{65} IACHR, Chapter X of the Second Report on Colombia, supra note 62.

\textsuperscript{66} Ibid.
of that State responsibility.” In discussing the activities of Colombian guerrilla groups, the IACHR again made passing reference to violations of IHL. The Colombian government, like any other government in a state of internal armed conflict with irregular armed groups, was willing and able “to provide quite extensive and detailed statistical data on the damage caused in that country by irregular armed groups.” The IACHR, in its consideration of the effect of guerrilla actions on civilians, referred to IHL, in general, without citing or applying specific articles of the Geneva Conventions. The IACHR reported on atrocities committed by the irregular armed groups in Colombia, highlighting the practices of extortion, kidnapping, hostage taking, targeted assassinations, the placement of landmines or bombs in public places, etc., without any further consideration given to possible State or individual responsibility. It noted that between 1989 and 1992, “the Simón Bolívar Guerrilla Steering Group [had] carried out 1,352 acts of indiscriminate terrorism and [had] killed 1,560 civilians. These are the reported murders; the figure should be increased by at least 80% since many crimes are reported as ‘common crimes’ because relatives are afraid and do not believe the authors will ever be punished.” The IACHR charged that “the Government pays so little heed to these matters that there are no statistics on the number

67 Ibid.
68 Ibid.: “Between 1989 and 1992, the period to which this report refers, Colombian guerrillas stepped up their activities calculated to intimidate the civilian population. Summary executions or even executions of members of the group as punishment for having availed themselves of the amnesties increased. The terrorist acts and threats against civilians have mainly been designed to achieve a political effect, while their kidnapping and extortion are a means to raise funds to bankroll their subversive activities. […] Another method used has been to use the civilian population as a hostage in combat situations. This happened in at least two recent attacks on municipal authorities in 1991 (Charta, Santander and Morales, Bolivar) where guerrillas kidnapped the families of policemen and took them to the main square, threatening to kill them as a means to pressure the police into surrendering, which is what happened.”
69 Ibid.
70 Ibid. (For example, “After so many years of violence, the number of human rights violations committed by the guerrillas in Colombia continues to be ignored. Today, the subversive movement pursues a purely financial objective, indiscriminately and mechanically annihilating anything and anyone who is not with it. Using Vietnamese tactics and others like those used against the people of Afghanistan, it plants explosives where it chooses, explosives that end up taking innocent lives. In Orito, in the department of Putumayo, this criminal practice claimed the lives of small children killed on August 12, 1993.”)
71 Ibid.
of civilians wounded, tortured or mutilated by guerrillas, which is just further proof of how the victims of subversion have been abandoned.” The IACHR asked the Colombian Government to report on the measures it was taking to protect and assist the victims of the guerrilla war, an issue of IHL rather than strictly IHRL.

3. The Breakthrough: The ICJ’s Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons and Subsequent ICJ Decisions

In 1994, the ICJ was requested to render an advisory opinion on the legality of nuclear arms under international law and it issued its Opinion on 8 July 1996. Although without binding effect, the advisory opinions of the ICJ nevertheless carry great weight and moral authority. This advisory opinion enabled the ICJ to undertake its first comprehensive analysis of the law of armed conflict. The ICJ emphasized that Hague and Geneva law and the Additional Protocols of 1977 had become closely interrelated and known as IHL or the law of armed conflict. The law of armed conflict had so matured and was permeated with an “intrinsically humanitarian character” that the rules enjoyed universal acceptance and were “intransgressible” principles under customary international law.

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72 Ibid.
73 Both the UN General Assembly and the World Health Organization separately requested the ICJ to give an advisory opinion on whether the threat or use of nuclear weapons was permitted in any circumstance under international law.
74 Rubin, member of the Inter-American Juridical Committee, in the explanation of his vote on the Juridical Committee’s opinion with regard to what “other treaties” Article 64 of the American Convention refers to, noted that “if the ICJ issues a decision, advisory or otherwise, the IACtHR should regard that decision or opinion as being decisive.” See Explanation of the vote of Seymour J. Rubin, in Advisory Opinion, “Other Treaties” Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), IACtHR, OC-1/82, 24 September 1982, Series B. Pleadings, Oral Arguments and Documents, No. 1 at 46.
75 Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, ICJ, 8 July 1996, paras. 79 and 86 [Nuclear Weapons Advisory Opinion], (“It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (ICJ Reports 1949, p. 22), that The Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.” Ibid., para. 79). Judges Bedjaoui and Weeramantry in their Separate and Dissenting Opinions respectively, stated that the norms of IHL have acquired the status of ius cogens. Judge Koroma similarly observed that
Although for many years IHRL was perceived as only applicable in peace time, in contrast to IHL which was perceived as the “law of war,” in the *Advisory Opinion on Nuclear Weapons*, the ICJ rejected the popular contention that IHRL only applies during peace time and stated that “the protection of the ICCPR does not cease in times of war.” The laws of war, according to the ICJ, are the *lex specialis* of armed conflict, and an international human rights body, such as the UN Human Rights Committee, could not decide correctly whether a violation of IHRL had occurred in a situation of internal armed conflict without reference to the relevant norms of IHL.

The ICJ noted that in deciding whether there has been an “arbitrary” deprivation of the right to life during an armed conflict, where both IHL and IHRL are applicable, IHL is the *lex specialis*. The complete maxim is “*lex specialis derogat legi generali.*” What is the function of the *lex specialis*? Does the “some” of the rules of IHL “impose obligations of ius cogens.” [Please note that despite the large number of separate opinions in this case, only Bedjaoui and Weeramantry argued that IHL had acquired the status of ius cogens.]

Ibid, para. 25. See also *The Goldstone Report*, supra note 7, para. 295 (“It is now widely accepted that human rights treaties continue to apply in situations of armed conflict.”); L. Doswald-Beck, *IHL and the Advisory Opinion of the ICJ on the Legality of the Threat or Use of Nuclear Weapons*, 316 *IRRC* 35, at 51 (1997), (“This is a very significant statement, for it means that humanitarian law is to be used to actually interpret a human rights rule.”); D. Stephens, *Human Rights and Armed Conflict: The Advisory Opinion of the ICJ in the Nuclear Weapons Case*, 4 *Yale Hum Rts & Dev L J* 1 (2001); (“[T]he Court effectively settled a 50 year-old theoretical debate concerning the application of the law of armed conflict and IHRL to the battlefield and underscored the humanitarian principles that they both share.”); J. Dugard, *supra* note 16, (“In 1948, when the Universal Declaration of Human Rights was adopted, human rights and humanitarian law were treated as separate fields. Since the 1968 Tehran International Conference on Human Rights, the situation has changed dramatically and the two subjects are now considered as different branches of the same discipline.”).

“The Court observes that the protection of the ICCPR does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.” (emphasis added)

This maxim is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. See UN, ILC. *Conclusions of the
special law displace the relevant general law as some governments have maintained?

According to the International Law Commission (ILC): the “special law may be used to apply, clarify, update or modify as well as set aside general law”\(^{79}\) and “the general law will remain valid and applicable and will, in accordance with the principle of harmonization […] continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.”\(^{80}\) Using the example provided by the ICJ in the Nuclear Weapons Opinion, the UN Human Rights Committee is mandated to use the “law applicable in armed conflict,” namely IHL, to determine whether article 6, the right to life provision of the ICCPR, has been violated. IHL is to be used as an interpretive tool to determine whether there is a violation of an IHRL norm. But if the Committee is invoking the “law applicable” to armed conflict, what does it mean to say that it is not “applying” the law, but only “interpreting” IHL? Is the only difference between application and interpretation the finding of a violation or not?

The ICJ, in 2004, revisited the issue of the relationship between IHL and IHRL and modified its earlier position set forth in the Nuclear Weapons Advisory Opinion.\(^{81}\) The ICJ noted that it had addressed the issue in the earlier Advisory Opinion and that in the earlier proceedings it had been argued by certain States that “the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict.”\(^{82}\) The ICJ pointed out that in the earlier opinion it rejected the argument that IHRL did not apply in situations of armed conflict.\(^{83}\)

The ICJ reiterated that “the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict” except perhaps through the effect of provisions for derogation.\(^{84}\) But as regards the relationship between IHL and IHRL, the ICJ stated that there are “three possible

\(^{79}\) Ibid., 2(8) Functions of *lex specialis*.

\(^{80}\) Ibid., 2(9) The effect of *lex specialis* on general law.

\(^{81}\) Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, 9 July 2004.


\(^{83}\) Ibid., Nuclear Weapons Advisory Opinion, *supra* note 75, para. 25.

\(^{84}\) Advisory Opinion, Wall, *supra* note 81, para. 106.
situations: some rights may be exclusively matters of IHL; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”

Regrettably, there is no explanation as to why there are now three possible situations rather than simply the last,—“matters of both these branches of international law,” nor is there any clarification provided as to which situations of armed conflict are 1) exclusively under the jurisdiction of IHL or 2) exclusively under IHRL.

The ICJ, however, in its analysis in the Wall (Advisory Opinion) proceeds to take into consideration both branches of law, as it did in the Nuclear Weapons Opinion, when considering the issue of the Israeli barrier in the Occupied Palestinian Territory. Also, significantly, the ICJ states that not only is IHRL applicable in situations of armed conflict but it is applicable even “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory,” and here the reference is to the Occupied Palestinian Territory.

Lastly, in a 2005 case, concerning the Democratic Republic of the Congo and Uganda, a case, not an Advisory Opinion, the ICJ for the third time dealt with the issue of the relationship between IHL and IHRL. The ICJ recalled that it dealt with the issue of the relationship between IHL and IHRL in the two earlier advisory opinions and concluded that both branches of international law, namely IHRL and IHL, would have to be taken into consideration, as well as acts committed by a State in the exercise of its jurisdiction but outside its own territory.

In determining the responsibility of Uganda, the ICJ noted “that the following instruments in the fields of IHL and IHRL are applicable, as relevant, in the present case” to which both Uganda and the DRC are parties and identified the following instruments:

- Fourth Geneva Convention, Articles 27 and 32 as well as Article 53 with regard to obligations of an occupying Power; ICCPR, Articles 6, paragraph 1, and 7;
- First Protocol Additional to the Geneva Conventions of 12 August 1949,

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85 Ibid. One shares Iain Scobbie’s lament that “One would have wished, having dealt with the issue three times that the Court might have been a little more candid and a bit more specific. Despite the poverty of these rulings, they have nevertheless entrenched the idea that legally there is some normative relationship between these two branches of law.” I. Scobbie, ‘Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict’ 14 JCSL 449 (2010), at 452. C. Tomuschat notes that “the language of the Court was much more differentiated, without, however, entirely clarifying the problématique.” C. Tomuschat, ‘Human Rights and IHL’, 21 EJIL 1 (2010), at 18.


87 Ibid., para. 216.
Articles 48, 51, 52, 57, 58 and 75, paragraphs 1 and 2; African Charter on Human and Peoples’ Rights, Articles 4 and 5; Convention on the Rights of the Child, Article 38, paragraphs 2 and 3; Optional Protocol to the Convention on the Rights of the Child, Articles 1, 2, 3, paragraph 3, 4, 5 and 6.  

What is interesting about this list is the fact that unlike in the two earlier advisory opinions, the ICJ made no reference to “lex specialis”, which some commentators suggest is an approach that the Court has now abandoned. Further, the ICJ previously indicated that IHRL applies during a situation of armed conflict, but in this case it is demonstrating which human rights treaties apply to these facts and also that they apply simultaneously with the norms of IHL.

What is significant about this judgment is that the ICJ, in discussing the relationship between IHRL and IHL in a situation of armed conflict, decided that both bodies of law are applicable and then proceeded to apply them, despite the fact that specific bodies, named in the instruments themselves or in protocols, exist to supervise compliance with the Convention on the Rights of the Child, the ICCPR, and the African Charter on Human and Peoples’ Rights. No specific body exists to supervise compliance with the AP I, although the AP I is generally accepted today as having become customary international law. The ICJ did not decline to exercise jurisdiction in order to defer to the UN Human Rights Committee, the international body specifically mandated to supervise compliance with the ICCPR. It determined that in order to resolve the case before it, the appropriate bodies of law to be applied were IHL and IHRL.

Article 38 of the Statute of the ICJ provides the sources of international law to be applied by the ICJ which includes: a) international conventions, b) international custom, c) the general principles of law and d) judicial decisions and the teachings of the most highly qualified publicists.

Article 1 of the Statute of the IACHR provides that the IACHR is created “to promote the observance and defense of human rights” in the Americas. Human rights, for the purposes of the Statute are further defined as those rights set forth in the ACHR, in relation to the States parties thereto and in the American Declaration of the Rights and Duties of Man in relation to the other member States.

88 Ibid., para. 219.
In 1999, the IACHR, in its third country report on Colombia, explained how and why the IACHR should apply IHL to a case occurring in a situation of armed conflict.\footnote{IACHR, Chapter IV, ‘Violence and Violations of IHRL and IHL’ in \textit{Third Report on the Human Rights Situation in Colombia} (1999), para. 12, at p. 75. The Report is available on the IACHR’s website, \textit{supra} note 34.}

Echoing the ICJ Opinion on Nuclear Weapons, the IACHR explained it should first examine whether a killing by military forces is a violation of IHL and then decide whether the legality or illegality of the killing under IHL renders it also an “arbitrary” deprivation of the right to life, under Article 4 ACHR. Since the analysis under IHL is a prerequisite for the IACHR’s determination regarding a possible violation of IHRL, the IACHR is required to decide whether a violation of IHL has occurred. The IACHR, by determining whether a violation of IHL has occurred is \textit{applying} IHL to the facts of the case. The failure to permit the IACHR to apply IHL would signify that the IACHR is not competent to determine whether there are human rights violations during a situation of armed conflict, since the analysis requires the application of the \textit{lex specialis}, which is IHL.

Further, in both the \textit{Nuclear Weapons} and the \textit{Wall} Advisory Opinions, the ICJ applied both IHL and IHRL to the same facts, as it did again in the 2005 Judgment in the \textit{DRC v. Uganda} case. In addition, the UN Human Rights Council’s Fact-Finding Mission on the Gaza Conflict also applied IHL and IHRL to the facts under investigation, confirming that current international practice is not to apply either IHL or IHRL to the exclusion of the other body of law, or to use one body of law “to interpret” the other, but rather to recognize that both branches of law must be considered since they are the appropriate norms of international law to be applied in a situation of armed conflict. As to the applicability of IHL, more States have ratified the Geneva Conventions than there are member States of the UN so that we can call this universal ratification, and many States, although not all, accept that the Geneva Conventions and AP I have become part of customary international law.\footnote{J.-M. Henckaerts, ‘The Grave Breaches Regimes as Customary International Law’, 7(4) \textit{J Int Criminal Justice} 683 (2009). \textit{See also} the unique and important ICRC study, J.-M. Henckaerts and L. Doswald-Beck (eds.), \textit{Customary International Humanitarian Law} (3 vols), (2005).}

4. The IACHR Begins to Reference and Then Apply IHL in Individual Cases –1997

In the Advisory Opinion, “Other Treaties,” issued September 24, 1982 Peru requested the IACtHR to specify which treaties, other than the ACHR, would
fall within the scope of the IACtHR’s advisory jurisdiction. According to the Peruvian request, the narrowest interpretation would lead to the conclusion that only those treaties adopted within the framework or under the auspices of the inter-American system would be deemed to be within the scope of Article 64 of the Convention. By contrast, the broadest interpretation would include any treaty concerning the protection of human rights to which one or more American States are parties. The IACtHR opted for the broad interpretation and the IACHR, subsequently, availed itself of this interpretation to support its application of IHL in the Ribon Avilan case. The IACtHR’s interpretation that treaties other than the ACHR could be applied by the inter-American system opened the door to the IACHR’s application, not simply interpretation, of IHL.

By 1997, the IACHR began systematically to apply IHL in its analysis of cases involving situations of armed conflict. The three most important cases were the following:

92 Colombia did not respond to the IACtHR’s request for comments on the request for an Advisory Opinion on “Other Treaties”, see Advisory Opinion, OC-1/82, 24 September 1982, “Other Treaties” Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), para. 4.

93 Arturo Ribón Avilán and 10 others (“The Milk”), (Colombia), Report No. 26/97, Case 11.142, 30 September 1997. Ibid. See the IACtHR’s dictum in the Advisory Opinion “Other Treaties” (supra note 92), where the IACtHR referred to the practice of the IACHR as follows:

43. [...] The need of the regional system to be complemented by the universal finds expression in the practice of the IACHR and is entirely consistent with the object and purpose of the Convention, the American Declaration and the Statute of the IACHR. The IACHR has properly invoked in some of its reports and resolutions ‘other treaties concerning the protection of human rights in the American states,’ regardless of their bilateral or multilateral character, or whether they have been adopted within the framework or under the auspices of the inter-American system. [...] 44. This practice of the IACHR which is designed to enable it better to discharge the functions assigned to it compels the conclusion that the States themselves have an interest in being able to request an advisory opinion from the IACtHR involving a human rights treaty to which they are parties but which has been adopted outside the framework of the inter-American system. Situations might in fact arise in which the IACHR might interpret one of these treaties in a manner deemed to be erroneous by the States concerned, which would then be able to invoke Article 64 to challenge the IACHR’s interpretations.

94 This was largely due to the fact that the ICJ issued its Advisory Opinion on Nuclear Weapons in 1996 and to the election of Robert K. Goldman, a US citizen, to the IACHR (1996-2003) whose background and interest in IHL facilitated the IACHR’s adoption of this approach. Cf., for example, a 1995 case, Hildegard Maria Feldman et al. (Colombia), Report No. 15/95, Case 11.010, a case involving the killing of a Swiss nun and two other civilians by the Colombian military included no mention of IHL.
A. Arturo Ribón Avilán and 10 others ("The Milk"). (Colombia,) Report No. 26/97, Case 11.142, 30 September 1997

According to the petition, on 30 September 1985, a commando of the M-19 guerrilla movement took over a milk truck outside of Bogotá, and began to distribute free milk among the population. While the M-19 members were still distributing the milk, the area was cordoned off by members of the Army, Police and other members of State security in a joint operation that included approximately 500 men. The M-19 members fled in three different directions and were pursued by the security forces, resulting in armed confrontations in three different neighborhoods, resulting in the death of 11 persons. One individual, killed by the police, had nothing to do with the M-19, and was a passenger on a bus. All the deceased were between 19 and 27 years of age. The petitioners alleged violations of the right to life (Article 4 ACHR) and of due process and judicial protection (Articles 8 and 25).

Colombia responded to the facts alleged maintaining that the youths had been “killed in combat” during an armed confrontation. Nonetheless, the expert ballistics exam refuted this account, as it was determined that one of the victims had eight gunshot wounds, five of which were from a distance of less than one meter. Similarly, it was found that the corpse of another victim had eight gunshot wounds, five of which were from a distance of less than one meter.

Colombia in May 1995 acceded to AP II, the law applicable to an internal armed conflict. The IACHR, in this case, for the first time applied IHL and held that Colombia was responsible, inter alia, for violations of common Article 3 GCs. In its analysis of the applicable law, the IACHR found that Colombia was in a state of internal armed conflict and that Article 3 and AP II were applicable to the case by means of Article 29 ACHR.
The IACHR recognized that Colombia had the right to defend itself against violent actions of irregular armed groups, since the individuals who had seized the milk truck were armed combatants and as such, legitimate military targets under IHL. The information provided by eyewitnesses, however, indicated that the 11 persons who were killed did not die as a result of combat and that the State had not proven its argument that its agents acted legitimately in the context of an armed conflict and in self-defense. In light of the fact that the 11 individuals were hors de combat and in the custody of the authorities, they were entitled to humane treatment and to the protections of IHL and IHRL. Consequently, the IACHR held: “The evidence submitted in this case supports the petitioners’ claim that the victims were executed extrajudicially by state agents in a clear violation of common Article 3 of the Geneva Conventions as well as the American Convention.”

The IACHR also found a violation of common Article 3 as regards the youths on the mini-bus and the case of the young woman who surrendered with a revolver in hand and was shot when she let go of the weapon. The IACHR concluded that pursuant to common Article 3 GCs, “the state was under an obligation to provide humane treatment to defenseless individuals, treatment that was not provided to the victims in this case as they were hors de combat.”

Following the adoption of this report, the State argued that “it did not dispute that members of the police killed the victims named in this case. Nonetheless, the state considered that these deaths did not involve violations of the victims’ rights because they occurred as the result of the legitimate use of force by state agents.”

The IACHR, in response, defended its conclusion that the killings were “arbitrary” and not acts in legitimate self-defense or in the course of an armed confrontation. The IACHR provided an extensive justification for its invocation and application of IHL. It noted that the State, although it did not specifically invoke IHL, opened the door to, and required reference to humanitarian norms because it claimed specifically that the events occurred during an armed confrontation (not as an extrajudicial execution, as affirmed by the petitioner) in which the police made legitimate use of its authority in order to re-establish public order. In the opinion of the IACHR, the facts required the “application of humanitarian law if they are to be properly analyzed” and the

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98 Ibid., para. 134. (Emphasis added)
99 Ibid., para. 141.
100 Ibid., para. 165.
IACHR has the power and the duty to apply the juridical provisions relevant to a case, even when the parties do not expressly invoke them.\textsuperscript{101} It is precisely pursuant to humanitarian law that certain actions, which perhaps would be considered breaches of human rights if taken outside of an armed confrontation, are considered legitimate in the context of an armed conflict.\textsuperscript{102}

The IACHR noted that “humanitarian law may be a defense available to a state to rebut charged violations of human rights during internal hostilities. For example, state agents who kill or wound armed dissidents in accordance with applicable laws and customs of warfare incur no liability under international law.”\textsuperscript{103} It noted that in cases where the State makes special reference to the armed conflict, “the IACHR should apply humanitarian law to analyze the actions of state agents in order to determine whether they have exceeded the limits of legitimate action.”\textsuperscript{104}

In response to the State’s argument, in its request for reconsideration, that the IACHR is not competent to apply IHL in individual cases, the IACHR contended that “human rights instruments were not designed to regulate situations of armed conflict and do not include norms that govern the means and methods of such conflicts,” consequently, it is only through IHL, either as treaty based law or custom that the IACHR can address cases that occur during armed conflicts.\textsuperscript{105} The IACHR suggested that IHRL and IHL “converge” in situations of internal armed conflict.\textsuperscript{106}

The IACHR further justified its invocation of IHL in the fact that the Colombian Constitution recognizes the applicability of IHL. Article 25 ACHR obligates States to provide for remedies and to ensure that the authorities will enforce such remedies when they exist. Since Colombian domestic law provided for the recognition of IHL, the IACHR concluded that it was authorized to analyze IHL in cases where a violation of Article 25 had been alleged.\textsuperscript{107}

\textsuperscript{101} Ibid., para. 169. Under the principle \textit{iura novit curia}, the IACHR and IACtHR frequently invoke law that is not specifically alleged by the petitioners or the State.

\textsuperscript{102} Ibid., para. 167.

\textsuperscript{103} Ibid., para. 168.

\textsuperscript{104} Ibid.

\textsuperscript{105} Ibid., paras. 171-173.

\textsuperscript{106} Ibid., para. 174. (“174. It is precisely in situations of internal armed conflict that human rights and humanitarian law converge most precisely and reinforce one another. […] Both common Article 3 of the Geneva Conventions and the American Convention guarantee these rights and prohibit extrajudicial execution, and the IACHR should apply both bodies of law.”)

\textsuperscript{107} Ibid., paras. 177-178.
The IACHR concluded that Colombia had violated Articles 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial), and 25 (on judicial protection), in conjunction with Article 1(1) ACHR, for the extrajudicial execution of these eleven individuals. From the point of view of the application of international law, however, the case was more significant, because it concluded that Colombia had violated not only IHRL (i.e. the ACHR) but also IHL: “The extrajudicial execution of the 11 victims constituted a flagrant violation of common Article 3 of the Geneva Conventions in that state agents were absolutely required to treat humanely all of the persons within their power due to injury, surrender or detention, whether or not they had previously participated in hostilities.”

In comparison, at that time, none of the UN human rights treaty bodies nor the European Commission or Court had ever applied IHL in determining whether there was a violation of IHRL during a situation of armed conflict, despite the ICJ’s Advisory Opinion on Nuclear Weapons.

One might ask, however, whether it was worth the trouble to look outside of IHRL to IHL, when, as the IACHR itself stated: “[…] the provisions of common Article 3 of the Geneva Conventions are in essence also found in human rights treaties, including the American Convention. Therefore, in practice the application of common Article 3 to a state party to the American Convention does not impose additional burdens on the State.” If the addition of IHL does not impose additional burdens on the State, is it worth invoking?

The finding of a violation of common Article 3, the IACHR explained, was not to increase the number of violations found, but was useful instead as the

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108 Ribón Avilán, supra note 93, para. 202. (emphasis added)
109 See C. Byron, ‘A Blurring of the Boundaries: The Application of IHL by Human Rights Bodies,’ 47 Va. J. Int’l Law 839 (2007), who notes at 849, (“When dealing with individual applications, the HRC has never referred to or applied IHL’); and also at 851, (“With respect to the regional human rights bodies, the European Court of Human Rights on the whole has resolutely avoided applying IHL, even when dealing with cases which have arisen out of armed conflict or occupation.”); A. Reidy, ‘The Approach of the European Commission and Court of Human Rights to IHL,’ 324 IRRC 513 (1998) who notes at 519, (“Certainly neither [European] Convention body has engaged in an extensive examination of the characterization of any public emergency in terms of humanitarian law (internal disturbances and tensions versus internal armed conflict) as was carried out recently by the IACHR in the Abella case.”); Meron, on the other hand, refers to the many UN Special Rapporteurs, who have referred to IHL while examining issues of IHRL. See T. Meron, ‘The Humanization of Humanitarian Law,’ 94 AJIL 239 (2000) at 269. Meron notes that these references to IHL by human rights Rapporteurs have been challenged by Turkey and others. But see also D. O’Donnell, ‘Trends in the Application of IHL by United Nations Human Rights Mechanisms,’ 324 IRRC 481 (1998) on the inconsistent application of IHL by UN Rapporteurs.

110 Ribón Avilán, supra note 93, para. 172. (emphasis added)
lex specialis, the appropriate analytical tool to determine whether the killings were a legitimate consequence of military operations" or not, and consequently, to determine whether the killing was “arbitrary” and thus a violation of human rights.\footnote{Ibid., para. 173.}

The human rights supervisory body should invoke IHL because it is the lex specialis, the appropriate body of law to be applied in situations of armed conflict, accessible to the supervisory body as part of general international law because the Geneva Conventions are universally ratified or as customary international law.

B. Report No. 38/97, Case 10.548, Hugo Bustios Saavedra, (Peru), 16 October 1997

In this case, the IACHR first examined whether Peru was in a state of internal armed conflict and after determining that it was, concluded that IHL applied equally with IHRL. In assessing whether the Army had arbitrarily deprived the journalist of his life, the IACHR noted that under IHL, combatants are not permitted to attack a civilian as though he were a military target.\footnote{Bustios Saavedra, (Peru), Report No. 38/97, Case 10.548, 16 October 1997, at para. 61. IACHR, 1997 Annual Report. (“61. The standards of international customary law that govern armed conflicts, as well as common article 3 of the Geneva Conventions, prohibit attacks by combatants against civilians and against the civilian population in general. In this respect, the only circumstance in any armed conflict where a civilian loses the immunity from direct individualized attack is when that civilian directly participates in hostilities, which, practically speaking, means assuming the role of a combatant, either individually or as a member of a group. Though journalists or reporters in combat zones implicitly assume a risk of death or injury either incidentally or as a collateral effect of attacks on legitimate military targets, the circumstances surrounding the attacks on Hugo Bustíos and Alejandro Arce clearly indicate that they were not accidental, but intentional.”).}  

The IACHR concluded that the victim had been extra-judicially executed by agents of the State, who had arbitrarily deprived him of the right to life, in violation of Article 4 ACHR and common Article 3 GCs. This decision adds nothing new to the jurisprudence established in the Ribon Avilan decision, but is significant because it is only the second decision to expressly “apply” IHL as well as IHRL.  

In the third decision, known as the Abella or La Tablada case, the case that has received the most international attention because of the characterization of a 30 hour armed confrontation, following an armed attack on a military base, as an “internal armed conflict,” the IACHR was more cautious.
Although the IACHR defended its competence to invoke and interpret IHL, in the operative part of the decision, the IACHR held that the State was responsible for violations only of the ACHR.

C. Report 55/97, Case 11.137, Juan Carlos Abella et al, (Argentina), 18 November 1997

On 23-24 January 1989, according to the petition, 42 armed persons launched an attack on the La Tablada military barracks in Buenos Aires province, to prevent what they believed was an imminent coup d’état. Petitioners further alleged that they were justified in launching the attack since Article 21 of the Argentine Constitution requires citizens to take up arms to defend the Constitution.

The attackers were surrounded by 3,500 police who cordoned off the area and fired on them indiscriminately. Three hours after the attack, the attackers signaled their intention to surrender by waving white flags. The combat continued, however, for approximately 30 hours, resulting in the deaths of 29 of the attackers and several State agents.

The petitioners, in contrast to the Colombian case, specifically charged the State with violations of IHL during the recapture of the military barracks. The IACHR first sought to determine whether the situation was one of an internal armed conflict, in which case IHL would apply. The determination was relatively straightforward given that the petitioners and the State both agreed that there had been an “armed confrontation.”

The IACHR determined that “a proper characterization of the events at the La Tablada military base on 23-24 January 1989” was necessary to determine

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114 Ibid. According to the complaint 19 persons were killed, six were “disappeared” and four were unlawfully executed. The remaining 20 were tried and sentenced to prison terms.
115 Ribón Avilán, supra note 93.
116 Abella et al., supra note 113, at para. 147. (“147. In their complaint, petitioners invoke various rules of IHL, i.e. the law of armed conflict, in support of their allegations that State agents used excessive force and illegal means in their efforts to recapture the La Tablada military base. For its part, the Argentine State, while rejecting the applicability of interstate armed conflict rules to the events in question, nonetheless have in their submissions to the IACHR characterized the decision to retake the La Tablada base by force as a “military operation”. The State also has cited the use of arms by the attackers to justify their prosecution for the crime of rebellion as defined in Law 23.077. Both the Argentine State and petitioners are in agreement that on the 23 and 24 of January 1989 an armed confrontation took place at the La Tablada base between attackers and Argentine armed forces for approximately 30 hours.”).
the sources of applicable law, given that “the legal rules governing an internal armed conflict vary significantly from those governing situations of internal disturbances or tensions.” 117 The IACHR determined that the situation was that of an internal armed conflict rather than simply an isolated and sporadic act of violence since it involved a military operation on the part of the armed forces and the existence of an organized armed group that was capable of and actually did engage in combat. 118 The IACHR concluded that “the attackers involved carefully planned, coordinated and executed an armed attack, i.e., a military operation, against a quintessential military objective- a military base” and that despite its brief duration, the violent clash between the attackers and the armed forces “triggered the application of common Article 3, as well as other rules relevant to the conduct of internal hostilities.” 119

The IACHR then proceeded to defend its competence “to apply directly rules of IHL or to inform its interpretations of relevant provisions of the American Convention by reference to these rules.” 120 This cautious approach, defending its competence to apply IHL or to use it as an interpretive tool for better applying IHRL, reveals a cautious step backwards from the IACHR’s confidence in directly applying IHL in the earlier Colombian and Peruvian cases.

The IACHR referred to a “common nucleus of non-derogable rights and a common purpose of protecting human life and dignity” found in both IHL and IHRL, and suggested, as it had in the earlier Colombian case, that the two branches of law “converge” and reinforce each other in situations of internal armed conflict. 121 The IACHR maintained that its competence to apply humanitarian law rules is supported by the text of the ACHR, by its own case law, and by the jurisprudence of the IACtHR. Virtually every OAS member State that is a State party to the ACHR has also ratified one or more of the 1949 Geneva Conventions and/or other humanitarian law instruments. As States parties to the Geneva Conventions, the IACHR affirmed, they are obliged as a matter of customary international law to observe these treaties in good faith and to bring their domestic law into compliance with these instruments. 122 The IACHR is required to look to and apply definitional standards and relevant rules of IHL as sources of authoritative guidance in its resolution

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117 Ibid., para. 148.
118 Ibid., paras. 149-152.
119 Ibid., paras. 155-156.
120 Ibid., para. 157.
121 Ibid., para. 158-160.
122 Ibid., para. 162.
of claims alleging violations of the ACHR.\textsuperscript{123} Failure to do so, the IACHR maintained, would mean that it “would have to decline to exercise its jurisdiction in many cases involving indiscriminate attacks by State agents resulting in a considerable number of civilian casualties.”\textsuperscript{124}

The IACHR looked to Articles 25, 29(b) and 27 ACHR to justify its competence to apply IHL. Article 25 provides the victim with a simple and effective remedy. The IACHR stated when the “claimed violation is not redressed on the domestic level and the source of the right is a guarantee set forth in the Geneva Conventions, which the state party concerned has made operative as domestic law” then the victim can file a complaint with the IACHR for failure to enforce the domestic remedy. As regards Article 29(b), which provides that “no provision of the American Convention shall be interpreted as restricting the enforcement or exercise of any right or freedom” recognized by a State party to another treaty, if that higher standard is a rule of IHL then the IACHR should apply it. And lastly, Article 27 prohibits derogations that are inconsistent with a State’s other obligations under international law. Consequently, when reviewing the legality of derogation measures by virtue of the existence of an armed conflict, the IACHR should resolve the question by reference to IHL as well as with reference to the ACHR.\textsuperscript{125}

Having established that it was competent to apply IHL, the IACHR reviewed the petitioners’ claims to determine whether IHL was applicable. The IACHR noted that the petitioners claimed that their cause was “just” and lawful and argued that the State, by virtue of its “excessive and unlawful use of force in retaking the military base” violated IHL. The IACHR noted that these claims reflected “certain fundamental misconceptions concerning the nature of IHL” since it was being asked “to assess and approve of the motives” for which the petitioners had taken up arms. The IACHR, reiterated its doctrine, expressed in the 1980 Argentina Report, to the effect that its jurisdiction does not extend to the conduct of private actors, which is not imputable to the State. The IACHR’s role is not that of a “fourth instance” serving as an appellate court to examine alleged errors in the application or interpretation of national law; it is only mandated to review alleged violations of the ACHR.

As regards IHL, the IACHR indicated that the petitioners had misperceived the legal consequences of their attack on the \textit{La Tablada} base. Whereas IHL protects persons who are captured or \textit{hors de combat}, the petitioners,

\textsuperscript{123} Ibid., para. 161.
\textsuperscript{124} Ibid.
\textsuperscript{125} Ibid., paras. 163-170.
civilians, who assumed the role of combatants by directly taking part in the attack, became legitimate military targets. As such, they lost the benefits of the protections provided to civilians, although IHL continued to apply to those living in the vicinity of the base at the time of the hostilities. With regard to the claim that the armed forces used “excessive force” against them, the IACHR found that the fact “that the Argentine military had superior numbers and fire power and brought them to bear against the attackers cannot be regarded in and of itself as a violation of any rule of IHL.” Consequently, the IACHR concluded that Argentina’s actions in retaking the base did not violate the ACHR or IHL.

Following the surrender of the attackers, however, the IACHR stated that the petitioners were entitled to the guarantees of humane treatment set forth in common Article 3 GCs and Article 5 ACHR. The petitioners alleged that the State carried out the forced disappearances of six persons and the extrajudicial executions of four others, after they were taken into custody by the military authorities who had retaken the base. The IACHR reiterated that the State, under Article 1(1) ACHR and under common Article 3, had a duty to treat the persons \textit{hors de combat} humanely in all circumstances and to ensure their safety. The IACHR did not apply IHL to the prisoners in detention but continued its analysis of the detention and trial under a law enforcement paradigm, comparing the facts to prisoners in detention following a prison riot in the \textit{Neira Alegría} case, dismissing any further reference to IHL. It is possible, given the caution expressed in this decision that the majority of the members of the IACHR were hesitant to continue with the IHL approach.

Despite the justification of the IACHR’s competence to apply IHL, the IACHR concluded that Argentina was responsible for violations of IHRL, namely, the right to life (Article 4), the right to physical integrity (Article 5), the right to appeal a conviction to a higher court (Article 8(2)(h)) and the right to a simple and effective remedy (Article 25(1)), all in relation to Article 1(1) ACHR. Despite the extensive effort by which the IACHR declared itself

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126 Ibid., paras. 172-179.
127 Ibid., para. 188.
128 Ibid., paras. 190-191.
129 Ibid., para. 195.
130 Judgment, \textit{Case of Neira Alegría et al. v. Peru}, IACtHR, 19 January 1995. This case did not involve a situation of armed conflict or IHL.
131 Abella \textit{et al.}, supra note 113, para. 196 et seq. IHL requires the State to treat combatants \textit{hors de combat} humanely, however, following the section on the killings, the sections concerning the treatment of persons in detention and the trial do not consider IHL.
competent to apply IHL directly, in fact, it declared no specific violation of IHL in this case.

Zegveld was one of the first commentators to recognize the importance of the IACHR’s defense of its invocation of IHL in the Tablada case and suggested that it might encourage other petitioners to allege violations of IHL and “may encourage other human rights treaty bodies, such as the United Nations Human Rights Committee […] and the European Commission and Court” to extend their supervisory functions to IHL.

5. The IACHR Sets Forth How IHL Should Be Applied by the Inter-American System

The most complete description of how IHL should be applied by the IACHR is set forth in the IACHR’s Third Report on Colombia (1999), a report derived from its on-site visit to Colombia from 1-7 December 1997. The Report considers not only the internal state of armed conflict in the country but also the generalized situation of violence.

After years of caution and failure to apply IHL, this Colombia Report is the IACHR’s most complete defense of how and why an international human rights body should apply IHRL and IHL in the context of an armed conflict.

132 See L. Zegveld, ‘The IACHR and IHL: A Comment on the Tablada Case’, 324 IRRC 505 (1998) at 508-510. Zegveld reviews five arguments presented by the IACHR for directly invoking IHL and rejects them all; regrettably she omits the most important one, which is the ICJ’s decision on the relationship between IHL and IHRL to the effect that IHL is the lex specialis. For a similar view, see L. Moir, ‘Law and the Inter-American Human Rights System’, 25 Hum Rts Q 182 (2003). But compare F. Martin, ‘Application du droit international humanitaire par la Cour interaméricaine des droits de l’homme’, 83 IRRC 1037 (2001), at 1065. (“Pour l’heure, la Cour interaméricaine nous rappelle opportunément cette faiblesse d’un droit international en quête permanente de légitimation, en signifiant qu’elle ne peut, en l’absence de volonté clairement exprimée de la part des États, se substituer à eux pour imposer l’application du droit international humanitaire.”)

133 Ibid., at 506.

134 IACHR, Third Report on the Human Rights Situation in Colombia, 26 February 1999, available on the IACHR’s website, supra note 34.

135 Ibid., Chapter I, Context for the Analysis of the Human Rights Situation in Colombia: “In addition to the violence associated with the armed conflict, especially violence attributable to extremists on both the right and the left, there are other sources of violence that bring death or other violations of fundamental rights. Drug trafficking, abuses of authority, socio-economic violence rooted in social injustice and land disputes are but some of the sources of violence which have led to the deterioration of the human rights situation in Colombia.”
The State, the Report begins, incurs international responsibility for the actions of non-State actors when it fails to prevent illegal actions or fails to subsequently punish the perpetrators, an idea already raised in the 1993 Report on Colombia but not elaborated on until this report. 136

The IACHR declared what has become its doctrinal position, first set forth in the 1980 Report on Argentina, noting that it has no competence to investigate complaints against non-state actors for whom the State cannot be held internationally responsible.

The IACHR noted, however, that it had referenced atrocities committed by irregular armed groups and had also condemned such acts. It also explained that it had used IHL, for the first time, in two individual cases involving situations of internal armed conflict. 137

The IACHR explained that it invoked both the norms of IHRL and IHL in analyzing petitions alleging violations by State agents in situations of armed conflict. “The IACHR proceeds in this manner because both sets of norms apply during internal armed conflicts,” a position that was more controversial than this statement led one to believe, given the fact that neither Colombia nor the United States accept that the IACHR is competent to apply IHL, since neither country has specifically consented to the IACHR doing so. 138

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136 IACHR, Third Report on […] Colombia, supra note 134, paras. 4 and 5. Cf. A. Clapham, Human Rights in the Private Sphere (1993), at 123-124. (“The European Commission and Court have addressed acts of violence by non-state actors and have found the state responsible under the [European] Convention for failing to prevent or remedy them. This must be the role of such international bodies: to hold states accountable for failing to prevent and remedy private abuses.”)

137 The reference is to the cases of Ribón Avilán and 10 others, supra note 93; and Abella et al, supra note 113. The decisions are on the IACHR’s website, supra note 34. IACHR, 1997 Annual Report.

138 On 12 March 2002 the IACHR issued precautionary measures in favor of detainees being held by the United States at Guantanamo Bay, Cuba and requested the US to let a competent tribunal determine the status of these detainees to determine whether they were prisoners of war. According to the petition, at the time, approximately 254 detainees were being held by the US at its Naval Station in Guantanamo Bay, Cuba, in a facility known as ‘Camp X-Ray.’ The request indicated that these detainees were transported by the US to Guantanamo Bay beginning on or about 11 January 2002 following their capture in Afghanistan in connection with a military operation led by the US against the former Taliban regime in that country and an organization known as Al Qaeda. The request also claimed that the detainees at Guantanamo were at risk of irreparable harm because the US refused to accord them prisoner of war status. The petitioners requested that they be brought before a competent tribunal, in accordance with the GC III, and alleged that the detainees had been held arbitrarily, incommunicado and for a prolonged period of time and had been interrogated without access to legal counsel. The petitioners further alleged that certain detainees were at risk of trial and possible death sentences before military
In addition, both States maintain that IHRL is not applicable extraterritorially.\footnote{See Hampson, supra note 9. “Consent” to the application of IHL is not crucial to its legitimacy. Israel, for example, refused to cooperate with the Fact-Finding Commission that produced the \textit{Goldstone Report}, yet the Report was prepared and accepted by the UN. Zegveld notes that UN human rights bodies, the UN Commission on Human Rights and its Rapporteurs have regularly characterized situations as internal armed conflicts within the meaning of IHL, in some cases against the views of the governments concerned. The views of these bodies, however, she cautions, are not binding upon States. L. Zegveld, \textit{The Accountability of Armed Opposition Groups in International Law} (2002), at 13.}

Despite the fact that the OAS member States had never provided the “legal framework” that the IACHR had long requested in order to examine the activities of irregular armed groups, in the IACHR’s Third Report on Colombia, it declared that the norms to be applied to irregular armed groups were those of IHL.

In the 1999 Colombia Report, the IACHR specifically noted that although the OAS member States mandated the IACHR to consider violations committed by irregular armed groups that it never provided it with the tools to consider complaints filed against such groups. The IACHR, once again, on its own initiative, decided to apply and interpret IHL to the situation of irregular armed forces in countries that were engaged in an internal armed conflict:

\begin{quote}
14. If\textit{the IACHR could not refer to IHL in preparing reports such as this one, it would be placed in the extremely difficult situation of being asked to analyze the conduct of armed dissident groups without reference to any previously-established standards. The General Assembly of the OAS has, on several occasions, passed resolutions recommending that the IACHR “refer to the actions of irregular armed groups” in reporting on the human rights situation in the member states of the inter-American system. The General Assembly passed such resolutions, for example, during its regular session in Chile in 1991 and in the Bahamas in 1992. As noted above, IHRL norms, including the American Convention on Human Rights, the American Declaration on Human Rights and other instruments, only apply where state responsibility is alleged. IHL provides the only legal standard for analyzing the activities of armed dissident groups. It is therefore absolutely necessary that the IACHR reference IHL in order to fairly and adequately address the activities of those groups in its reporting.}\footnote{IACHR, \textit{Third Report on […] Colombia}, supra note 134, see Chapter IV, Violence and Violations of International Human Rights and Humanitarian Law.}
\end{quote}
The IACHR further acknowledged that it was entering a confused and difficult terrain of the law and that the fog of war often impeded the appropriate characterization of the acts committed. This confusion could lead to the failure of the IACHR to reach a conclusion as to whether there was a violation of international law or not.

While humanitarian law applies exclusively to situations of armed conflict and occupation resulting from armed conflict, it is generally accepted today that IHRL applies both in peace and war.\(^{141}\) Most international human rights treaties, such as the ACHR, permit a State to derogate from certain obligations under the Convention during a state of emergency, and Article 27 ACHR, on “Suspension of Guarantees”, specifically provides that a State may derogate “[I]n time of war, public danger, or other emergency that threatens the independence or security” of the State, clearly indicating that the Convention applies during time of war.\(^{142}\)

Colombia suggested that by applying IHL to irregular armed groups that the IACHR has placed the armed groups on a level equivalent with the State. The IACHR assured the OAS member States that by examining violations committed by irregular armed groups that this was not tantamount to placing them at the same level as the State. The State, the IACHR noted, assumed the sole responsibility for respecting and ensuring human rights by becoming

\(^{141}\) Although not all States accept the IACHR’s competence to apply or interpret IHL, in general, the literature on the subject today, in general, recognizes the applicability of IHL during wartime as well as during peace and the interdependence of IHRL and IHL. See, for example, Henckaerts and Doswald Beck, supra note 91, at 299 (“Human rights law applies at all times although some human rights treaties allow for certain derogations in a 'state of emergency'.”); Provost, supra note 11; Tomuschat, supra note 85, at 23 (2010); A. Orakhelashvili, “The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?”, 19 EJIL 161, at 162; Hampson, supra note 9; Henckaerts, supra note 5. See also UN Human Rights Committee, General Comment 31, 26 May 2004, CCPR/C/21/Rev.1/Add.13, which states:

“As implied in General Comment 29, the Covenant applies also in situations of armed conflict to which the rules of IHL are applicable. While, in respect of certain Covenant rights, more specific rules of IHL may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”

a party to the ACHR under IHL. IHL, on the other hand, is equally binding on the State and on the irregular armed groups, despite the fact that the State remains free to prosecute members of these irregular armed groups for crimes under its internal criminal law.\textsuperscript{143} The IACHR’s role, the Colombia Report suggested, is to analyze the acts of the irregular armed groups under IHL, which, it pointed out, was repeatedly suggested to it by the militaries of several member States.

Despite Colombia’s acceptance of the applicability of common Article 3 GCs and AP II to its own territory, it was unwilling to recognize the IACHR’s competence to apply IHL.\textsuperscript{144} Nonetheless, the IACHR praised Colombia for accepting the applicability of IHL to its own situation of internal armed conflict:

>>21. Indeed, few OAS member states other than Colombia have so publicly embraced IHL. Nor have other states genuinely sought to the same extent to disseminate, with the invaluable assistance of the International Committee of the Red Cross ("ICRC"), basic precepts of IHL to its security forces, the other parties to the conflict and its citizenry at large.\textsuperscript{145}<<

The IACHR continued to invoke or even declare violations of common Article 3 (or other IHL norms) in the following additional cases: \textit{Lucio Parada Cea et al.}, (El Salvador), Report No. 1/99, Case 10.480, 27 January 1999 (in the IACHR’s 1998 Annual Report). The IACHR found violations of common

\textsuperscript{143} In an extraordinary evolution of international law, a State may now refer a situation to the Prosecutor of the ICC for investigation, for the purpose of determining whether one or more individuals (e.g. members of irregular armed groups, non-State actors) should be charged with the commission of crimes under the ICC’s jurisdiction, thereby effectively ceding its right to prosecute these individuals under its own criminal law. \textit{See Article 14 of the Rome Statute. See also on the evolving role of non-State actors in international law: J. Cerone, ‘Much Ado About Non-State Actors: The Vanishing Relevance of State Affiliation in International Criminal Law’, 10 San Diego Int'l L.J. 335 (2009).}

\textsuperscript{144} Other countries have also rejected the IACHR’s competence to apply IHL. In an admissibility report involving the detention and forced disappearance of two sisters aged 15 and 7 by the Salvadoran military during the armed conflict in El Salvador, in which the IACHR invoked IHL, the State also argued that the IACHR was not competent to examine the case because the applicable law was IHL. \textit{See Admissibility Ana Julia Mejía et al., (El Salvador), Report No. 56/05, Petition No. 779/01, 12 October 2005; see also Admissibility José Adrián Rochac Hernández, (El Salvador), Report Petition No. 731-03, 21 October 2006; Admissibility Emelinda Lorena Hernandez, (El Salvador), Report No. 11/08, Petition 723-03, 5 March 2008; Admissibility Santos Ernesto Salinas, (El Salvador), Report No. 10/08, Petition No. 733-03, 5 March 2008; Admissibility Manuel Antonio Bonilla et al., (El Salvador), Report No. 66/08, Petition No. 1072-03, 25 July 2008.}


This practice changed, however, following the IACtHR’s decision in the Las Palmeras case in 2000, when the IACtHR determined, wrongly, in this writer’s opinion, that neither the IACHR nor the IACtHR was competent “to apply” IHL.

6. The IACtHR Rejects the IACHR’s Application of International Humanitarian Law – Judgment, (Preliminary Objections), Las Palmeras v. Colombia, Case No.11.237, 4 February 2000\textsuperscript{146}

In this case, as in several that preceded it, the IACHR found violations of both the ACHR and common Article 3 GCs and requested the IACtHR to do the same.\textsuperscript{147} The petitioners alleged that on January 23, 1991, the Departmental

\textsuperscript{146} Judgment (Preliminary Objections), Case of Las Palmeras v. Colombia. IACtHR, 4 February 2000.

\textsuperscript{147} Ibid., para. 12.
Commander of the Putumayo Police Force had ordered members of the National Police Force to carry out an armed operation in Las Palmeras in the Department of Putumayo. Members of the Armed Forces provided support to the National Police Force. The operation resulted in the death of seven persons. The IACHR requested the IACtHR to:

Conclude and declare that the state of Colombia has violated the right to life, embodied in Article 4 of the Convention, and Article 3, common to all the 1949 Geneva Conventions, to the detriment of six persons: Artemio Pantoja Ordoñez, Hernán Javier Cuarán Muchavisooy, Julio Milcíades Cerón Gómez, Edebraiz Cerón Rojas, William Hamilton Cerón Rojas and another person (Hernán Lizcano Jacanamejoy or Moisés Ojeda) (emphasis added).

Establish the circumstances of the death of a seventh person, who had presumably died in combat (Hernán Lizcano Jacanamejoy or Moisés Ojeda), in order to determine whether the State of Colombia has violated his right to life embodied in Article 4 of the Convention and Article 3, common to all the 1949 Geneva Conventions.  

Colombia had argued, as it had in previous cases before the IACHR, that neither the IACHR nor the IACtHR was competent to apply IHL or any other treaty other than the ACHR on Human Rights. The IACtHR considered Colombia’s preliminary objection that it was not competent to apply IHL.

As the starting point for its reasoning, the IACHR stated that Colombia had not objected to the IACHR’s observation that at the time that the loss of lives set forth in the application occurred an internal armed conflict was taking place on its territory, nor had it contested that this conflict corresponded to the definition contained in Common Article 3 GCs.  

The IACHR submitted that in an armed conflict there are cases in which the enemy may be killed legitimately while in others this was prohibited. The IACHR stated that the ACHR did not contain any rule to distinguish one hypothesis from the other and, therefore, the Geneva Conventions should be applied. The IACHR also invoked paragraph 25 of the ICJ’s Advisory Opinion on The Legality of the Threat or Use of Nuclear Weapons cited above (supra note 77).  

The IACHR stated that, in the instant case, it had first determined whether Article 3, GCs, had been violated and, once it had confirmed this, it then determined whether Article 4 ACHR had been violated.

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148 Ibid. (emphasis added)
149 Ibid., para. 29.
150 Ibid.
The IACHR also set out in its brief the nature of IHL and its relation to human rights. The IACHR argued that, in its opinion, the objection filed by Colombia was not a jurisdictional objection that can affect the elements required for the Court to exercise its competence. It suggested that it was perhaps premature to consider the State’s objection with regard to the invocation of the Geneva Conventions, since this issue was linked to the merits of the case.\textsuperscript{151}

The IACHR also argued for the applicability of IHL based on Articles 25, 27 and 29(b) ACHR, previously set forth in the \textit{Abella} case. The State in refutation of these arguments emphasized the importance of the principle of consent in international law. Without the consent of the State, Colombia argued, the IACtHR could not apply the Geneva Conventions. Lastly, Colombia established that there was a difference between “interpretation” and “application” of IHL. It suggested that the IACtHR may interpret the Geneva Conventions and other international treaties, but that it “may only apply the American Convention.”\textsuperscript{152}

The IACHR reiterated that “the alleged violations of the right to life committed in a context of internal armed conflict may not always be resolved by the IACHR, solely by invoking Article 4 of the American Convention.”\textsuperscript{153} It affirmed that its conclusion regarding the violation of Article 4, in a way which is coextensive with […] common Article 3, not only does not exceed its competence, but rather constitutes part of its mandate as an organ entrusted with ensuring observance of the fundamental human rights under the jurisdiction of the states parties.\textsuperscript{154}

The IACtHR admitted Colombia’s preliminary objection with regard to its competence to apply IHL, stating that the ACHR “has only given the IACtHR competence to determine whether the acts or the norms of the states are compatible with the Convention itself, and not with the 1949 Geneva Conventions.” The IACtHR also accepted Colombia’s preliminary objection to the effect that the IACHR also was not competent to apply IHL and other international treaties.\textsuperscript{155} The State argued that the ACHR limits the competence \textit{ratione materiae} of the IACHR to the rights embodied in that

\begin{itemize}
\item \textsuperscript{151} Ibid.
\item \textsuperscript{152} Ibid., para. 30.
\item \textsuperscript{153} Ibid., para. 31.
\item \textsuperscript{154} Ibid.
\item \textsuperscript{155} Ibid., para. 34.
\end{itemize}
Convention and “does not extend it to those embodied in any other convention.” 156 By accepting Colombia’s preliminary objection, the IACtHR effectively declared that the IACHR is not competent to apply any other convention other than the ACHR on Human Rights, except in the case of treaties that are “excepted from this rule; these include, for example, the Inter-American Convention on Forced Disappearance of Persons.” 157

Although the IACHR has broad faculties as an organ for the promotion and protection of human rights, it can clearly be inferred from the American Convention that the procedure initiated in contentious cases before the IACHR, which culminates in an application before the IACtHR, should refer specifically to rights protected by that Convention (cf. Articles 33, 44, 48.1 and 48). Cases in which another Convention, ratified by the state, confers competence on the IACtHR or IACHR to hear violations of the rights protected by that Convention are excepted from this rule; these include, for example, the Inter-American Convention on Forced Disappearance of Persons.

This reasoning is not dispositive of the issue since the provisions of the Geneva Conventions do not authorize any supervisory body to monitor compliance with IHL. Following the IACtHR’s reasoning that the legal instrument must

156  Ibid. In the most recent (13 November 2009) version of the IACHR’s Rules of Procedure, available on the IACHR’s website, supra note 34, the IACHR, under Article 23, considers itself competent to consider petitions filed under the 1) American Declaration of the Rights and Duties of Man, 2) the American Convention on Human Rights, 3) the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador,” 4) the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, 5) the Inter-American Convention to Prevent and Punish Torture, 6) the Inter-American Convention on Forced Disappearance of Persons and 7) the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, not simply the American Declaration and the American Convention.

157  In the Paniagua Morales et al. Case, Judgment, 8 March 1998, para. 136 and the Villagrán Morales et al. Case, Judgment, 12 November 1999, para. 252, the IACtHR declared that the Inter-American Convention to Prevent and Punish Torture had been violated. Although Articles XIII and XIV of the Forced Disappearances Convention specifically authorize the IACHR to process petitions and requests for provisional measures presented to it under the Convention, the Inter-American Torture Convention confers no such competence on the IACHR or the IACtHR. In fact, Article 17 of the Torture Convention mandates the IACHR “to analyze the existing situation in the member states of the OAS in regard to the prevention and elimination of torture” in its annual report. Despite the fact that the Torture Convention entered into force on 28 February 1987, and despite this explicit mandate, the IACHR has never analyzed the situation of torture in the member States in its annual reports and both the IACtHR and the IACHR have declared violations of the Torture Convention in individual cases despite the absence of an explicit authorization in the Convention to do so. The IACtHR nonetheless defended its competence to apply the Inter-American Torture Convention in Villagrán Morales et al., paras. 247-252.
confer, expressly, in the text of the treaty, competence on the IACHR for it to apply IHL would render IHL unenforceable. IHL is part of general international law and Article 27 of the American Convention specifies that “in time of war” a state may take measures derogating from its obligations under the Convention “provided that such measures are not inconsistent with its other obligations under international law.” Further, Article 29(b) of the ACHR prohibits interpreting the American Convention in any way so as to restrict “the enjoyment or exercise of any right (...) recognized (...) by virtue of another convention to which one of the said states is a party.” The IACtHR rejected the IACHR’s arguments and held that Articles 25, 27(1) and 29(b) could not be considered norms that attribute the alleged competence.\footnote{Case of Las Palmaras, supra note 146, para. 34.}

All the OAS member States are parties to the GCs and AP I is generally accepted as customary international law. All OAS member States except Mexico and the United States are also parties to AP II.\footnote{Curiously the “Compilation prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(B) of the Annex to Human Rights Council Resolution 5/1” lists Mexico as a party to AP II, but neither the Swiss Government website (http://www.eda.admin.ch), nor the website of the ICRC (http://www.icrc.org) include Mexico among the 165 States parties.}

Despite the IACHR’s invocation of the ICJ’s Nuclear Weapons Opinion, the IACtHR fails to engage in any analysis of the relevance of the ICJ Opinion for the jurisprudence of the inter-American system – it simply ignores the ICJ decision. The IACtHR should have relied on the ICJ’s Opinion to find both the IACHR and IACtHR obligated to invoke IHL as the relevant \textit{lex specialis} in cases involving a situation of armed conflict. Instead the IACtHR decides that the IACHR and IACtHR are not competent to apply IHL, but that they may “interpret” other treaties in determining whether the state has violated the ACHR.

The United Nations Fact-Finding Mission on the Gaza Conflict, established by the UN Human Rights Council in September 2009, was authorized to apply IHL and IHRL to the situation in Gaza. The UN Fact-Finding Mission was charged with finding violations of IHL and IHRL, despite the fact that the ICCPR in the text of the treaty has created a specific body (the UN Human Rights Committee), which is mandated to supervise compliance with the norms of the ICCPR with respect to the states parties. The Fact-Finding Mission was specifically authorized to apply IHRL and IHL to the situation of the armed conflict in Gaza and it proceeded to apply both bodies
of law simultaneously to the facts, as the ICJ had in the DRC v. Uganda judgment. 160

Conclusion

It is the thesis of this paper that IHL, through universal ratification and custom, is part of general international law and is to be applied in situations of armed conflict. The ICJ has defined the relationship between IHRL and IHL in situations of armed conflict to the effect that IHL, as the applicable lex specialis, and IHRL, both branches of international law, have to be taken into consideration and applied simultaneously.

Following the IACtHR’s judgment in the Las Palmeras case, the IACHR ceased to apply IHL. 161 But as suggested above, other than by a semantic sleight of hand, how can an international human rights body determine that there is a violation of IHL without applying IHL?

The ICJ’s predecessor, the Permanent Court of International Justice, issued a merits decision in 1928 that has become the authority for declaring a State’s international responsibility to provide reparations. The Factory at Chorzow case stands for the principle that “every violation of an international obligation which results in harm creates a duty to make adequate reparation.” 162 The IACHR 163 and the IACtHR cite the Factory at Chorzow case as legal authority for declaring a State’s obligation to provide reparations when a declaration of a violation of human rights is made. 164

160 See The Goldstone Report, supra note 7 and ICJ Judgment, DRC v. Uganda, supra note 86.
161 Cf. for example, para. 109(b) involving forced disappearances of two young sisters by the military during the situation of internal armed conflict in El Salvador. The State argued that IHL was applicable but that the IACtHR in Las Palmeras was declared incompetent to apply IHL. The IACHR responded that: “It had not requested the IACtHR to apply IHL, but to apply the American Convention in order to establish the international responsibility of El Salvador. […] Consequently, the IACHR will refrain from referring to the arguments of the State on the applicability of IHL.” Judgment, (Preliminary Objections), Case of the Serrano Cruz Sisters v. El Salvador, IACtHR, 23 November 2004.
162 Judgment No. 13, Factory at Chorzow, Claim for Indemnity, Merits, 1928 (PCIJ).
163 See, for example, Report No. 39/97, Case 11.233, 19 February 1998, para. 116 (Peru); Report No. 43/96, Case 11.430, 15 October 1996 (Mexico), para 89, IACHR.
164 See, for example, IACHR, Judgment (Reparations and Costs), Case of Cesti Hurtado v. Peru, 31 May 2001, para. 35; Judgment (Reparations and Costs), Case of the “Street Children” (Villagran Morales et al. v. Guatemala), 26 May 2001, para; 15; Judgment (Reparations and Costs), Case of the “White Van” (Paniagua v. Morales et al.) v. Guatemala, 25 May 2001, para. 78; Judgment (Reparations and Costs), Case of Loayza Tamayo v. Peru, 27 November 1998, para. 84;
Judge Cançado Trindade in his Separate Opinion in the *Sisters Serrano Cruz* case suggested that IHL and the non-derogable rights of international human rights treaties “belong to the domain of *ius cogens*” and consequently the state’s suggestion that the IACtHR had no jurisdiction *ratione materiae* had to be rejected. 165 The attempt to “disassociate the provisions” of HRL from IHL, he claimed, produces disastrous results, as in the case of the US claiming that the IACHR has no jurisdiction over the situation of the Guantanamo detainees because only IHL and not human rights law is applicable. In Judge Cançado Trindade’s Separate Opinion in the *Plan de Sanchez Massacre* judgment, he boldly suggests that “instead of trying to identify provisions of the 1949 Geneva Conventions or the 1977 Additional Protocols that could be considered to express general principles, it would be preferable to consider these conventions and other humanitarian law treaties as a whole, as constituting the expression – and the development – of those general principles, applicable under any circumstances, so as to better ensure the protection of the victims.” 166

The practice of the UN Fact-Finding Mission on the Gaza Conflict under the mandate “to investigate all violations of IHRL and IHL that might have been committed at any time in the context of the military operations that were conducted in Gaza” could serve as a model for regional human rights bodies, such as the inter-American system. The Fact-Finding Commission applied IHRL and IHL, finding violations of both bodies of law as the IACHR did when it applied both bodies of law in the *Ribon Avilan* case. 167 Recognizing the convergence of these two systems of law in situations of armed conflict and declaring violations of each, not simply using one system “to interpret” the other, follows the jurisprudence set forth by the ICJ in the *DRC v. Uganda* judgment that *both branches of international law, namely IHRL and IHL have to be taken into consideration.*

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165 Preliminary Objections, *Case of Serrano Cruz Sisters*, supra note 161, Dissenting Opinion of Judge Cançado Trindade.
