Michigan Journal of International Law

Volume 37 | Issue 4

2016

Ambivalent Enforcement: International Humanitarian Law at Human Rights Tribunals

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AMBIVALENT ENFORCEMENT: INTERNATIONAL HUMANITARIAN LAW AT HUMAN RIGHTS TRIBUNALS

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INTRODUCTION

What good is law that cannot be enforced? International law is often a target of this question, and thus, enforcement is a topic that has concerned many scholars of international law. Specifically, the sub-field of international law known as international humanitarian law (IHL), or the law of

* Professor Shana Tabak is a Visiting Assistant Professor at Georgia State University. This paper has benefitted from insights and conversations with colleagues including Federico Barillas Schwank, Derek Jinks, Diego Rodriguez-Pinzon, Solon Solomon, and Richard J. Wilson. This law review article arises out of and expands on the analysis discussed in my book chapter, Armed Conflict and the Inter-American System of Human Rights: Application or Interpretation of International Law? *in* APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES (D. Jinks et al. eds., 2014). Thanks also to Jacklyn Fortini for excellent editing and citation assistance.

war, suffers from a lack of enforcement options as its Achilles heel. Although IHL has attempted to limit battlefield brutality for centuries, scholars and practitioners have long bemoaned the reliance of this law on party compliance. IHL has aimed to create a semblance of order on the battlefield, and has sought to protect those individuals not fighting, such as civilians, detainees, and the sick or wounded. In spite of this well-developed ideology, humanitarian law lacks binding enforcement mechanisms. There is no single international adjudicative body specifically charged with enforcing IHL, and thus interpretation is left to a fragmented variety of judicial bodies.[1] Some recent advances have been identified. For example, the statutes of numerous international criminal tribunals have adopted specific principles of IHL.[2] Still, no tribunal exists with *explicit* subject matter jurisdiction over situations that may give rise to state violations of international humanitarian law or to find direct violations of IHL in those situations. This is because, by and large, IHL was created as a body of law that was intended to be self-regulated by states.[3] Thus, contexts in which there is no clear tribunal to offer remedies of IHL violations may include the indiscriminate massacre of indigenous villagers in Colombia,[4] acts of military defense that may exceed proportionality limitations in the Gaza Strip,[5] or the inhumane treatment of detainees at Guantanamo Bay.[6]

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1. *See* David Weissbrodt, *The Role of the Human Rights Committee in Interpreting and Developing Humanitarian Law*, 31 U. PA. J. INT'L L. 1185, 1185 (2010); *see also* Joaquín Cáceres Brun, *Aspectos destacados de la aplicación del derecho internacional humanitario y de los derechos humanos*, 78 LECCIONES Y ENSAYOS 49 (2003).

2. *See*, *e.g.*, William A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 83 INT'L REV. RED CROSS 842, 442–43 (2001); *see also* Daryl A. Mundis, *New Mechanisms for the Enforcement of International Humanitarian Law*, 95 AM. J. INT'L L. 934, 935–36 (2001). For more information on the ICTY's jurisprudence, see generally William J. Fenrick, *The Application of the Geneva Conventions by The International Criminal Tribunal for the Former Yugoslavia*, 834 INT'L REV. RED CROSS 317 (1999) and Christa Meindersma, *Violations of Common Article 3 of the Geneva Conventions as Violations of the Laws or Customs of War under Article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia*, 42 NETH. INT'L L. REV. 375 (1995).

3. *See, e.g.*, Article 1 Common to the 1949 Geneva Conventions (indicating that High Contracting Parties are required to "respect and ensure respect for" the Conventions); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] (requiring states parties to provide for effective penal sanctions against any person found to committing, or ordering to be committed, any of the grave breaches under the Convention). Notably, the Geneva Conventions do not provide for the creation of an external judicial organ charged with the adjudication of alleged violations of IHL.

4. Case of the "Mapiripan Massacre" v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005).

5. For example, the July 2014 bombings of the Gaza Strip by Israel in response to Hamas rocket attacks highlight the difficulty of defining a proportional attack as permitted under international humanitarian law. Jodi Rudoren, *Civilian or Not? New Fight in Tallying the Dead From the Gaza Conflict*, N.Y. TIMES, Aug. 5, 2014.

6. *See* Inter-Am. Comm'n H.R., *Regarding the Situation of Detainees at Guantanamo Bay*, Res. 2/11, Doc. MC 259–02 (July 22, 2011); *see also* Inter-Am. Comm'n H.R., *Report on Terrorism and Human Rights*, OEA/Ser.L/II.116, doc. 5 rev. 1, ¶ 71 (2002), http://www.cidh.org/terrorism/eng/part.b.htm [hereinafter Report on Terrorism and Human Rights],

In contrast to IHL, another more recently developed sub-field of international law has taken hold in the minds of policy-makers, jurists, and activists. The origins of the so-called "human rights revolution" are the subject of much recent debate and scholarship.[7] Whatever the most accurate history of human rights law (HRL), it has given rise to a number of judicial and quasi-judicial bodies that provide a forum for individuals and groups seeking to enforce their human rights against state violators. These tribunals have expanded the world of international law throughout the past half century. Whether their reach is international or regional in scope, each is charged with the protection of human rights as defined by constitutive treaties, to which member states willingly subject themselves.[8]

The impact of these tribunals on the advancement of human rights is certainly subject to debate. Scholars do not uniformly agree that tribunals' judgments necessarily result in the enforcement of human rights.[9] Indeed, once a judgment has been delivered by a human rights tribunal, compliance with that judgment may prove elusive.[10] On the other hand, tribunals may contribute significantly to the promotion of human rights through other secondary effects, such as human rights education, states' fear of being "named and shamed" within the world community, offering victims

("[I]nternational humanitarian law treaties are to a significant extent self-regulating, as states parties to the treaties undertake to respect and ensure respect for the terms of the agreements."); *see also* Press Release, Inter-Am. Comm'n H.R., 10 Years After Detentions in Guantanamo Began, the IACHR Repeats its Call to Close the Detention (Jan. 11, 2012), http://.oas.org///_center///.asp.

7. *See generally* Keith Suter, *Human Rights: A Global Revolution*, 2000 AUSTL. INT'L L.J. 25 (2000) (suggesting that the reform of global human rights has been in progress since 1945); SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010) (suggesting that the global view of human rights changed dramatically in the 1970s).

8. *See, e.g.*, Kelly Dawn Askin, *15 Years of International Tribunals: A Brief Look at the Past, Present, and Future of International Justice*, 17 ILSA Q. 24, 24, 27–28 (2008) (finding that the development of international tribunals has been indispensable to international justice in the last fifteen years). *See generally* Jonathan I. Charney, *The "Horizontal" Growth of International Courts and Tribunals: Challenges or Opportunities?* 96 AM. SOC'Y INT'L L. PROC. 369, 370–71 (2002) (hypothesizing that due to the examination of international jurisprudence by other international tribunals, there is a developing uniformity in international law).

9. *See*, *e.g.*, Alexandra Hunees, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, CORNELL J. OF INT'L L. 101 (2013) (highlighting that state enforcement of human rights judgments varies greatly depending on whether they require action by the executive or by the justice system); Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights*, 6 J. INT'L L. & INT'L REL. 35–85 (2010).

10. *See*, *e.g.*, James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768, 770 (2008) (arguing that the Inter-American Court of Human Rights' most effective judgments incorporated respect for human rights into broader domestic policies affecting the underlying issues); *see also* Frans Viljoen & Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994–2004*, 101 AM. J. INT'L L. 1, 1–2 (2007) (discussing the direct effect of the establishment of the African Commission on Human and Peoples' Rights on ensuring compliance with regional human rights treaties).

symbolic victories, and deterring future violations of human rights by raising awareness.[11] Regardless of how we assess the efficacy of *these* organs in achieving their stated goal of protecting human rights, they have certainly produced a great deal of jurisprudence exploring the nature of human rights law, developing interpretations of rights and, to a large extent, making human rights meaningful in the regions and the countries that are bound by these tribunals' decisions.[12] Scholars have evaluated tribunals' varying degrees of success in enforcing human rights, as well as in preventing human rights violations, and naming and shaming nations who violate human rights.

And so, the stage is set. IHL lacks a forum for enforcement. Human rights tribunals have the subject matter jurisdiction to resolve human rights disputes. There exist significant areas of substantive overlap between humanitarian law and human rights law. This Article examines whether, in light of this substantive overlap, human rights tribunals offer an appropriate forum for the enforcement of IHL, despite the many challenges present in taking on this task.

These two quite distinct, and yet strikingly complementary bodies of law pose challenges for legal scholars and practitioners seeking to understand their respective scopes of application.[13] While IHL was developed for the regulation of armed conflict and HRL was designed in peacetime conditions, at their core, these two legal regimes share many principles aimed at the protection of human life. Despite these similarities, a number of factors distinguish these regimes from one another, particularly when they are contemplated by human rights tribunals. For example, HRL never allows derogation of the right to life, while IHL, as a law of combat, does allow for the killing of certain parties within the scope of the conflict. Such distinctions are crucial, and are examined throughout this Article, with the goal of exploring the following inquiries. Considering the lack of enforcement mechanisms of IHL, should human rights bodies be tasked with its enforcement? If so, how exactly should this task be approached in terms of applying the law?

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11. *See generally* Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHI. J. INT'L L. 1 (2001) (arguing that the establishment of international tribunals and the trials of human rights violators have dissuaded political leaders from committing violations and changing the agendas of human rights organizations); Pammela Quinn Saunders, *The Integrated Enforcement of Human Rights*, 45 N.Y.U. J. INT'L L. & POL. 97 (2012) (indicating that regional human rights systems may have deterrent effects on future crimes). *But see* Holly Dawn Jarmul, *The Effect of Decisions of Regional Human Rights Tribunals on National Courts*, 28 N.Y.U. J. INT'L L. & POL. 311, 364 (1995–96) (finding that the European Court of Human Rights has not had a significant effect on the domestic law of European States because its case law is not seen as binding and is largely dismissed if in contradiction to the national law).

12. *See generally* Ariel Dulitzky, *The Inter-American Human Rights System Fifty Years Later: Time for Changes*, QUE. J. INT'L L. 127 (2011); Christina Cerna, *Reflections on the Normative Status of the American Declaration of the Rights and Duties of Man*, 30 U. PA. J. INT'L L. 1211 (2009).

13. *See*, *e.g.*, Cordula Droege, *Elective Affinities? Human Rights and Humanitarian Law*, 90 INT'L REV. RED CROSS 501, 502 (2008).

The substantive intersections between IHL and HRL could indeed be used as a way to promote IHL enforcement. Among the many scholars who explore these intersections, some argue that even if the interrelationship brought no more protection to individuals, the advantage of enforcement of IHL would still offer reason to combine them.[14] The intersections between IHL and HRL have become increasingly fraught as some human rights bodies and activists have proposed that human rights bodies can and should take on the adjudication of IHL-related claims.[15] In order to explore potential resolutions to this issue, this Article focuses on the varying approaches taken within the Inter-American System of Human Rights (Inter-American System) in its adjudication of the intersections between IHL and HRL. Though it has experienced ebbs and flows, tracing the system's evolution reveals a methodological approach toward IHL.

The answer to the normative question of how human rights tribunals should assess IHL also depends on jurisdiction. Specifically, limitations on jurisdiction *rationae materiae* in human rights organs have been cited by both those in favor and those opposed to human rights bodies taking an activist approach to enforcement of IHL. Some jurists have posited that not only should human rights bodies seek to enforce IHL, but that they are obligated by their statutes to do so.[16] To the contrary, other jurists and scholars have defended the choice not to enforce IHL, also relying on interpretations of those tribunals' jurisdictions, which are often explicitly limited to the enforcement of human rights law.

In addition to exploring the limitations of the Inter-American System's jurisdictional capacity to adjudicate issues of IHL, this Article examines Inter-American jurisprudence in light of recent scholarly conversations regarding the relevance of the principle of *lex specialis*, which seeks to guide tribunals when two bodies of law may apply simultaneously, by providing for the prioritization of a specialized body of law over a general one. This concept, first articulated by the International Court of Justice (ICJ) in the Nuclear Weapons case,[17] has proven to be the source of much scholarly consternation. As a means of addressing

14. Marko Milanovic, *A Norm Conflict Perspective on the Relationship Between International Humanitarian Law and Human Rights Law*, 14 J. CONFLICT & SEC. L. 459, 460 (2009) [hereinafter *Norm Conflict*] (explaining that from a human rights perspective, IHL could "be enforced before political bodies, such as the Human Rights Council or UN political organs more generally, or through judicial and quasi-judicial mechanisms, such as the International Court of Justice, the European Court of Human Rights, the UN treaty bodies or domestic courts").

15. *See* Christopher Greenwood, *International Humanitarian Law*, *in* F. KALSHOVEN (ED.), THE CENTENNIAL OF THE FIRST INTERNATIONAL PEACE CONFERENCE: REPORTS AND CONCLUSIONS 240–41, 251–52 (2000) (suggesting that "the monitoring mechanisms of human rights conventions could be used in an indirect way to assist in ensuring compliance with the law applicable in internal conflicts").

16. *See id.* at 206 (discussing the inter-American commission's defense of its directly applying IHL in the *Abella* decision).

17. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8, 1996).

problems arising from the fragmentation of international law, the concept has a nice ring to it, but in practical terms, it has proven to be a terribly messy concept subject to multiple interpretations. The Inter-American system has adopted an approach to fragmentation, described here as the Interpretive Reference Resolution, which relies on reference to IHL, but does not permit the direct application of that law. This method allows tribunals to walk a delicate balance: they avoid directly finding states in violation of norms of IHL while simultaneously incorporating IHL into their analysis of HRL norms. This balancing act provides a novel solution to the problem of fragmentation between IHL and HRL. Furthermore, it has allowed human rights tribunals within the Inter-American System to tether their findings of human rights violations to IHL. This approach, this Article argues, is a soft law strategy with the same potential enforcement impact as the direct finding of violations of IHL.

Therefore, this Article offers two contributions: first, it offers a normative framing for utilizing the abstract legal standard of *lex specialis* when IHL and HRL may simultaneously apply, second, the Article provides an analysis of whether the use of IHL at human rights tribunals contributes to the enforcement of IHL, even when it is not binding on states.

This Article proceeds in four parts. Part I provides the reader with some of the background necessary to understand the complicated question of whether IHL can and should be evaluated at human rights tribunals. A comparison between IHL and HRL reveals many intrinsic differences, but also significant overlap. After exploring these parallels, the Article contextualizes the conflict between IHL and HRL within the horizontal fragmentation of laws, and introduces the concept of *lex specialis* as a means to address the conflict of laws.

Part II uses the Inter-American System of Human Rights as a case study to examine jurisdictional restraints that may affect a human rights tribunal's capacity to employ IHL in its adjudication. It highlights some of the principle jurisdictional issues at the Inter-American System that—depending on how they are interpreted—will affect the tribunals' capacity to adjudicate questions involving IHL. In order to understand the approach of the Inter-American System, one must understand its *rationae materiae* competence. Although this system derives its authority from treaties and political declarations that grant jurisdiction on *human rights* questions, these organs have utilized, interpreted, and in some cases, even applied IHL.[18]

Part III traces the jurisprudence at both the Inter-American Commission of Human Rights (the Commission) and the Inter-American Court of Human Rights (the Court) in order to demonstrate the ambivalence that characterizes the approach taken by adjudicators in their attempts to achieve the appropriate balance between IHL and HRL. In contributing a framework for understanding the Inter-American System's jurisprudence,

18. *See*, *e.g.*, Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights].

this Article highlights the distinction between (1) IHL as interpretive reference and (2) direct application of IHL. IHL serves as an interpretive reference when it is employed to provide contextual interpretation and to clarify how HRL should be interpreted in situations of armed conflict.[19] Meanwhile, direct application of IHL occurs in cases where it is directly applied by the body to find a violation thereof.[20]

Part IV deconstructs the enforcement approach ultimately adopted by the Court and Commission: the interpretive reference resolution. This Part engages with recent scholarship that critiques the opaqueness of the *lex specialis* approach, insisting that a lack of clarity around its meaning has resulted in various versions of the tool being applied by tribunals. Building upon this scholarship, Part IV then explores the practical relevance of *lex specialis* with regard to the interpretive reference approach, as exemplified by the case law of the Inter-American System. This Part also offers a four-step breakdown of this approach, and demonstrates its application, concluding that it represents only one version of *lex specialis*. In addition, Part IV returns to the question of enforcement of HRL, and evaluates the benefits and drawbacks of the interpretive reference approach. Recognizing that this approach to adjudication of IHL and HRL does not impose a binding decision on States, it considers some of the potential concerns raised by hard law approaches. The interpretive reference variation of *lex specialis*—a soft law approach—offers advantages with regard to the promotion of ideals and supports the goal of enforcement in a broader sense. Although it is a less drastic application of IHL than finding that nations have committed direct violations thereof, it proves a suitable means to "humanize" IHL through its influence within decisions at human rights tribunals.

All human rights tribunals seek to protect basic and universal human rights. Yet, it is not uncommon for these judicial bodies to grapple with human rights cases arising from situations of armed conflict, which of course gives rise also to the application of IHL. Frequently, the Inter-American Human Rights system has been confronted with the intersections between HRL and IHL.[21] These occasions present the IASHR with complex legal questions that are potentially divisive, considering that the IASHR was created to enforce HRL, and not IHL, as part of its mandate.

Whether or not the human rights organs of the Inter-American System are an appropriate means of enforcement for IHL, the Commission has taken on a notably activist role in engaging with the application of

19. *See* Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L./V/II.98, doc. 6 rev. ¶¶ 158, 161 (1997) (The Commission, recognizing that human rights instruments lack guidelines to govern warfare, decided to "look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations").

20. *See id.* ¶ 163.

21. *Id.* ¶ 160 ("It is . . . during situations of internal armed conflict that these two branches of international law most converge and reinforce each other.").

IHL.[22] Further, if the IASHR declines to enforce IHL in the Americas, no enforcement body will exist to enforce the norms of IHL. This raises important questions regarding the mission of the organs of the IASHR. Is the system obligated to examine this law? Or, are the mechanisms of the system not functioning at their optimal capacity if they cannot grapple with the complicated realities of the IHL/HRL intersection? Must human rights bodies be equipped to analyze the interplay between human rights law and other areas of the law? These questions are critical ones; because the IHSHR adjudicates such a large number of cases, jurisprudential trends within this regional system may be predictive of how other regional bodies may treat these questions. Considering the multitude of questions raised by the intersection of these two bodies of law, significant controversy remains regarding their interplay.

I. Accounting for IHL violations at Human Rights Tribunals

A. *Challenges of Fragmentation between IHL and HRL*

Potential intersections between IHL and HRL epitomize a relatively recently identified phenomenon of international law in an increasingly globalized and adjudicated world. Fragmentation has been defined by Martti Koskenniemi, as the "splitting up of the law into highly specialized 'boxes' that claim relative autonomy from each other."[23] Antonio Cassese describes the overlap between different areas of law as "tight legal compartments" that are "gradually tending to influence one another . . . and international courts are tending to look at them as parts of a whole."[24] As adjudicative bodies and tribunals become more and more omnipresent, this trend of fragmentation (and the potential issues it raises) have increased. For example, the Inter-American System has grappled with fragmentation in its analysis of the intersections between IHL and HRL, which has raised significant concerns regarding jurisdiction of the body to adjudicate these matters.

The interplay between HRL and IHL is a prime example of the challenges of fragmentation, as these branches of law often apply simultaneously. As a result, much scholarly attention has been paid to the

22. *See* Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 38 Int'l Rev. Red Cross 505, 505 (1998) (observing that the Commission's decision in the 1997 *La Tablada* case, may "encourage other human rights treaty bodies, such as the United Nations Human Rights Committee, set up pursuant to the International Covenant of Civil and Political Rights, and the European Commission and Court of Human Rights, to extend their supervisory functions to international humanitarian law"); *see also* Shana Tabak, *Armed Conflict and the Inter-American System of Human Rights: Application or Interpretation of International Law*, *in* Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies (Derek Jinks et al. eds., T.M.C. Asser Press 2014).

23. Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 13, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter *Fragmentation of International Law*].

24. Antonio Cassese, International Law 45 (2001).

similarities and differences between the two areas of law.[25] Significant overlap exists between these two bodies of law, so much so that these intersections can be difficult to untangle.[26] The President of the International Committee of the Red Cross (ICRC) highlighted these commonalties when he emphasized that "the common underlying purpose of international humanitarian law and international human rights law is the protection of the life, health and dignity of human beings."[27] Both branches of law seek to protect individuals' basic rights, which may be threatened during armed conflict, whether at the hands of a State or another armed party.

The commonalities between IHL and HRL are disputed, however.[28] Although both regimes strive to protect life, some argue that the defining intellectual origins of each body of law are so different that they are intrinsically unique, and even incompatible.[29] HRL is fundamentally hostile to war; indeed, one of the purposes of this body of law is to prevent warfare.[30] IHL, on the other hand, takes no moral position regarding the justness of war in principle; rather, it seeks to regulate it within international

25. *See*, *e.g.*, Paul Eden & Matthew Happold, *Symposium on the Relationship between International Humanitarian Law and International Human Rights Law*, 14 J. CONFLICT & SEC. L. 441, 441 (2010) (exploring the intersections between international humanitarian and human rights law within a symposium of authors); *see also* Droege, *supra* note 13, at 502; Oona A. Hathaway et al., *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883, 1886 (2012).

26. *See*, *e.g.*, Françoise J. Hampson, *The Relationship Between International Humanitarian Law and International Human Rights Law*, 90 INT'L REV. RED CROSS 549, 559 (2008); *see also* Alexander Orakhelashvili, *The Interaction Between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?,* 19 EUR. J. INT'L L. 161, 168 (noting that "[States] are expected, at least by implication, to consider the impact of both human rights law and humanitarian law, to reach the outcomes permissible at the level of international law" during armed conflict).

27. Jakob Kellenberger, President, Int'l Comm. of the Red Cross, International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence, Address at the 27th Annual Round Table on Current Problems of International Humanitarian Law (Sept. 4, 2003), http://www.icrc.org/eng/assets/files/other/irrc_851_kellenberger.pdf.

28. *See, e.g.*, Bill Bowring, *Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Court of Human Rights*, 14 J. CONFLICT & SEC. L. 485, 485–86 (2009).

29. *See* Iain Scobbie, *Principle or Pragmatics? The Relationship Between Human Rights Law and the Law of Armed Conflict, in Symposium: The Relationship Between International Human Rights Law and International Humanitarian Law*, 14 J. CONFLICT & SEC. L. 449, 456 (2010) (indicating that although some overlap exists, "there is a fundamental incompatibility in what [the two systems] set out to achieve. There is no over-reaching axiology, no value system that unifies the objectives of these fields of international law.").

30. Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L./V/II.98, doc. 6 rev. ¶ 158 (1997) (indicating that one of the purposes of human rights instruments is to prevent warfare).

law.[31] As Theodore Meron explains, IHL is concerned with inserting a modicum of fair play into conflict.[32]

Fragmentation becomes particularly relevant, of course, when distinct law regimes apply simultaneously, yet offer contradicting answers to the legal questions arising from a set of facts. HRL applies through systems of international and regional treaties that dictate how states must treat human beings. It applies universally during times of war and times of peace.[33] These norms protect the physical safety and well-being of all people at all times, and serve to regulate state power between parties in an unequal relationship of power. Indeed, human rights law offers individuals, groups and their advocates a novel way of engaging with states, in that they no longer must rely on state protection, but may seek accountability if and when states violate their human rights.[34] Because of this inversion of the traditional relationship between states and individuals, which offers an alternative to domestic protections, HRL has been perceived as a threat to state sovereignty.[35] Various human rights conventions, treaties or declarations have distinct enforcement means—the IASHR is just one forum where human rights may be adjudicated.[36]

IHL, also referred to as the law of war or *jus in bello*, applies during times of armed conflict and occupation[37] between parties who are consid-

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31. Alejandro Lorite Escorihuela, *Humanitarian Law and Human Rights Law: The Politics of Distinction*, 19 MICH. ST. J. INT'L L. 299, 361–62 (2011).

32. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 241, 243–44 (2000).

33. *See, e.g.*, American Convention on Human Rights, art. 27, *supra* note 18; African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 [hereinafter African Charter on Human and Peoples' Rights]; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5 [hereinafter European Convention on Human Rights]; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

34. *See generally* MENNO T. KAMMINGA, INTER-STATE ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS (U. of Pa. Press 1992) (arguing that if a state violates its international human rights obligations, victims may seek protection from these human rights violations).

35. *See* Bowring, *supra* note 28, at 489–90.

36. *See infra* Part II.A for a discussion of specific features of the IACHR.

37. Occupation for the purposes of application of IHL is defined as "effective control" of a region, as determined by Article 42 of 1907 Hague Regulations. The definitional limits of effective control have been discussed extensively by scholars. *See, e.g.*, Hathaway et al., *supra* note 25, at 1893, 1919 ("[T]here is growing consensus among international bodies and foreign States that human rights law obligations apply abroad wherever a State exercises 'effective control' over territory or individuals outside its borders . . . . States' human rights obligations [are] limited during battlefield hostilities because the States lack effective control."); Christopher J. Le Mon, *Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested*, 35 N.Y.U. J. INT'L L. & POL. 741, 791–93 (2003) (discussing the "dissonance within the law" created by the acceptance of unilateral intervention while upholding standards of effective control and the questionable legitimacy of invited external government intervention); *see also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 109, 111-12, 116 (June 27) (finding that while the United States closely collaborated with the contra force by providing intelligence and logistic sup-

ered to function on a formally equivalent relationship in times of war. IHL was first codified in the Hague Conventions (Hague Law) around the turn of the 20th century. This set of laws addresses the governance of war, and covers topics such as the appropriate level of retaliation, and the acceptability of various military objectives and means of warfare.[38] The primary source for IHL is the Geneva Conventions, which lay out proper treatment for both civilians and non-combatants.[39] The Geneva Conventions' Additional Protocols regulate the means and methods of warfare, as well as the tactics and weapons of war.

In addition to the critical differences between IHL and HRL with regard to application, a stark distinction between the two branches of international law also emerges on the point of enforcement. Enforcement of IHL has, for the most part, been left to states parties, although more recently, certain international criminal tribunals and UN bodies have sought to utilize and potentially enforce IHL.[40] The enforcement mechanisms that have historically been available have not been regarded as very effective. These include belligerent reprisals,[41] which have been long considered to be counter-productive, and have been significantly curtailed by the Geneva Conventions.[42] Additionally, the Geneva Conventions created a doctrine called the "Protecting Powers" Doctrine, which has only been used on four occasions with limited success.[43] One other potential enforce-

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port, the U.S. "operational support" did not "justify treating the contras as acting on its behalf," precluding the claim of effective control).

38. *See generally* Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

39. *See generally* Geneva Convention IV, *supra* note 3.

40. For discussion of international criminal tribunals seeking to utilize IHL, see generally Robert Cryer, *The Interplay of Human Rights and International Humanitarian Law: The Approach of the ICTY*, 14 J. Conflict Security L. 511 (2009); for discussion of U.N. bodies analyzing IHL, see generally Roscini, Marco, *The United Nations Security Council and the Enforcement of International Humanitarian Law*, 43 Isr. L. Rev. 330, 330–59 (2010).

41. *See generally* Christopher Greenwood, *The Twilight of the Law of Belligerent Reprisals*, 20 Neth. Y.B. Int'l L. 35, 38 (1989).

42. *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 46, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, art. 47, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention IV, *supra* note 3, art. 33; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, arts. 20, 51(6), 52(1), 53(c), 55(2), 56(4), June 8, 1977, 1125 U.N.T.S. 3, [hereinafter Additional Protocol I]; *see also* Shane Darcy, *The Evolution of the Law of Belligerent Reprisals*, 175 Mil. L. Rev. 184, 199–216 (2003); Andrew D. Mitchell, *Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law*, 170 Mil. L. Rev. 155, 164–70 (2001).

43. *See* Christine Byron, *A Blurring of Boundaries: The application of IHL by International Human Rights Bodies*, 47 Va. J. Int'l L. 839, 843 (2006–07), Geneva Convention I, *supra* note 42, arts. 8, 10; Geneva Convention II, *supra* note 42, arts. 8, 10; Geneva Convention III, *supra* note 42, arts. 39, 77, 86–87; Geneva Convention IV, *supra* note 3, arts. 9, 11.

ment mechanism is advocacy by the ICRC, a non-judicial body with a mandate aimed at protecting individual victims of armed conflict from violations of IHL.[44] Under the Geneva Conventions, the ICRC may take a role in enforcement of IHL, due to its mandate which includes intervening and accounting for violations if no protecting powers are appointed, and visiting prisoners of war.[45]

Despite the existence of a variety of treaties that codify state obligations under IHL, it is often criticized as taking on little practical meaning during conflict. This can be attributed in part to the lack of any viable means for enforcement of IHL. One option to remedy this concern, as proposed by some scholars, would be the creation of a particular adjudicative body specifically aimed at regulating IHL,[46] though some find this proposal to be impracticable.[47] Due to the endemic weaknesses within each of the potential mechanisms for enforcement of IHL, activists and jurists have increasingly turned to international and regional human rights tribunals in attempts to resolve violations of IHL and to hold states accountable.[48] It is also argued that the void of enforcement of IHL should be filled through the utilization of HRL at human rights tribunals.[49]

Aside from a comparison of the common goals, application, and enforcement challenges within these two areas of law, another critical distinction between IHL and HRL is whether these laws are derogable or not. Human rights treaties allow for some margin of derogation, but only in circumstances that pose extreme danger to the self or to the nation. IHL, on the other hand, is never derogable. These divergences are critical when IHL and HRL both apply to a common set of facts. The close examination of two specific rights under both IHL and HRL in the subsequent paragraphs reveals this distinction: the right to life (which is non-derogable under HRL) and the right to personal liberty (which is derogable).

The human right to life, which is non-derogable, may receive distinct treatment within the context of IHL, and the interplay between IHL and HRL is evident in the analysis of this right. This right, protected under Article 4 of the American Convention on Human Rights ("ACHR" or

44. *See* THE ICRC'S MANDATE AND MISSION, https://www.icrc.org/eng/who-we-are/mandate/overview-icrc-mandate-mission.htm (last visited Aug. 15, 2016).

45. *See*, *e.g.*, Article 3 Common to the 1949 Geneva Conventions (providing, *inter alia*, that "[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict"); Geneva Convention III, *supra* note 42, art. 10 ("The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross. . . may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.").

46. *See* Jann Kleffner & Liesbeth Zegveld, *Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law*, 3 Y.B. INT'L HUMANITARIAN L. 384, 386 (2000).

47. *See* Hans-Joachim Heintze, *On the Relationship Between Human Rights Law Protection and International Humanitarian Law*, 856 INT'L REV. RED CROSS 789, 798–99 (2004).

48. Byron, *supra* note 43, at 847.

49. *See*, *e.g.*, Greenwood, *supra* note 15.

"the Convention"), may never be suspended.[50] Yet under IHL, deadly force is permitted against combatants until they have been captured, reflecting IHL's inherent agnostic approach toward the practice of war. Furthermore, civilians lose their immunity under IHL as soon as they participate in combat.[51] Therefore, if a person has been killed by a state during conflict, in order to determine whether there has been a violation of the right to life, that person's status as a possible combatant must be clarified. If so, then under IHL the right to life has not been violated by the State.[52] Consequently, if a killing is categorized under IHL as being against a combatant, then this killing would not constitute a violation of the non-derogable right to life under the ACHR.[53]

The right to personal liberty further reveals the complicated interaction between HRL and IHL. This right covers an individual's claim to freedom from arbitrary arrest and detention. Under Article 27 of the ACHR, any derogation must be exceptional and temporary, and the state's power to suspend this right during times of armed conflict is strictly defined.[54] For example, interpretations of the rights of Prisoners of War (POWs), who are interned for reasons of military necessity, may be distinct under these separate regimes. IHL permits the detention of POWs as an incidence of war, and therefore they need not be afforded procedural protections under the third Geneva Convention. Had these same individuals been categorized as non-combatants, however, they would be granted such protections, including judicial review and freedom from arbitrary arrest or detention.[55] Thus, a State may be permitted to treat POWs one way under IHL, and civilians another way under HRL. Circumstances exist in which the existence of armed conflict necessitates the consideration of both IHL and HRL for these populations.

The potential for simultaneous or parallel applicability of IHL and HRL has raised controversy amongst scholars and jurists. Clearly, IHL applies during armed conflict, yet courts have struggled to understand how to apply IHL during conflict while maintaining the integrity of the basic principles of HRL. What is the proper role of an adjudicative body in addressing this overlap–especially one whose mandate is dedicated to protection of human rights? As is explored in the following section, the legal principle of *lex specialis* offers some guidance, but not absolute clarity.

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50. American Convention on Human Rights, *supra* note 18, art. 4.

51. Meron, *supra* note 32, at 240.

52. *See* Robert Goldman, *Extraterritorial Application of the Human Right to Life and Personal Liberty, Including Habeas Corpus, During Situations of Armed Conflict*, *in* Research Handbook on Human Rights and Humanitarian Law 104, 112 (Robert Kolb & Gloria Gaggioli eds., 2013).

53. *See* Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L./V/II.98, doc. 6 rev. ¶ 178 (1997).

54. American Convention on Human Rights, *supra* note 18, art. 27.

55. Goldman, *supra* note 52, at 118.

B. *The Putative Lex Specialis Solution to Fragmentation*

In the ICJ's analysis of the IHL and HRL overlap, the Court has determined that the two areas of law do indeed apply conterminously.[56] Although the ICJ's subject matter jurisdiction is not limited by a human rights statute,[57] which may undermine the feasibility of applying its holding at a tribunal with more conscribed subject matter jurisdiction, its exploration of the intersection between the two branches of law is accepted by most international law experts.

In resolving the legal questions that arise at the convergence between these two areas of law, the ICJ's position reflects a classic solution to the concern of fragmentation of international law, relying on the interpretive principle of *lex specialis*. The International Law Committee (ILC), the primary interpretive body of international law norms, explains that "the maxim *lex specialis derogat legi generali* 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."[58] Although the ICJ has not strayed from this articulated position regarding the intersection of the two bodies of law, application of the rule has oftentimes proven more complicated than the ICJ's rule may reveal.[59]

Three important cases at the ICJ reveal the development of the Court's position. In the Wall case, the ICJ found that HRL applies as *lex specialis* during armed conflict, as the "protection offered by human rights conventions does not cease in the case of armed conflict."[60] The Advisory Opinion on the Legality of Threat of Nuclear Weapons sought to answer whether the use of nuclear weapons was to be interpreted as a violation of the prohibition against arbitrary deprivation of the right to life, protected

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56. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8, 1996).

57. Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 [hereinafter ICJ Statute]:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
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> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

58. *Fragmentation of International Law*, *supra* note 23, ¶ 5.

59. Hampson, *supra* note 26, at 571 (indicating that the decisions at the ICJ have not fully resolved questions about the relationship of the two bodies of law).

60. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9, 2004); *see* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. ¶ 25.

under Article 6 of the ICCPR.[61] Because Article 6 is non-derogable, the Court determined that it applied continuously, even within armed conflict. In such a context when IHL and HRL applied conterminously, the Court indicated that IHL was to apply as *lex specialis*. As a result, the term "arbitrary" within ICCPR Article 6 was to be defined according to IHL.[62] Indeed, the term *lex specialis* was first utilized by the Court in its judgment describing how to integrate IHL and HRL:

> 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.[63]

Marco Milanovic posits that this important cite from the Nuclear Weapons case may have been the first instance in which the term *lex specialis* was utilized.[64] Whether or not this claim holds to be true, the *Nuclear Weapons* case doubtlessly has come to be the dominant case artic-

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61. *See Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. ¶ 25; International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
>
> 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
>
> 4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
>
> 5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
>
> 6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

62. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. ¶ 25.

63. *Id.*

64. Marko Milanovic, *The Genesis of Lex Specialis*, EJIL: TALK! (Apr. 30, 2014), http://.ejiltalk.org/-of-lex-specialis/.

ulating the principle of *lex specialis*, providing that IHL prevails when both IHL and HRL are applicable.[65] In practical terms, this holding indicates that within combat, the right to life guaranteed in Article 6 of the ICCPR should be analyzed in light of IHL. Therefore, deaths that are legitimate under the laws of war as pertaining to military combat cannot be found to violate the right to life protected by Article 6.

Subsequent ICJ cases reiterated the continual application of HRL during instances of armed conflict. The *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* demonstrated that the right to life is to be interpreted only according to IHL as *lex specialis*, because norms developed for peacetime cannot be applied in an unqualified manner during conflict.[66]

Notwithstanding the ICJ's clear message that HRL does indeed apply during wartime, courts still face murky waters in their adjudication of facts when these two bodies of law intersect. These cases, and the intersection of IHL and HRL within them, are examined in detail in Section II of this Article. Scholars have spilled much ink attempting to determine the practical implications of the ICJ's decision:

> [f]irst, that where both IHL and human rights law are applicable, priority should be given to IHL. Second, given the ICJ's view that human rights law remains applicable at all times, by necessary implication the ICJ also meant that the human rights body should make a finding based on IHL and expressed in the language of human rights law.[67]

But despite this seemingly clear interpretation, other scholars have claimed the ICJ's resolution on this question was perhaps so ineffectual and impracticable that, in a later holding, it neglected to use the very term *lex specialis*, which it had previously relied upon as a clarifying principle.[68]

Whether or not the ICJ's holdings provide clarity on the *lex specialis* approach to overlap between IHL and HRL, regional human rights systems are nevertheless confronted with additional concerns separate from the substantive question of which law to apply. The ICJ is a tribunal whose subject matter jurisdiction is not limited by a human rights statute,[69] which potentially undercuts the feasibility of applying its holding to a tribunal

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65. *See Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. ¶ 25.

66. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 106 (July 9, 2004); *see also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶¶ 216–20 (Dec. 19).

67. Hampson, *supra* note 26, at 559.

68. *See* Milanovic, *Norm Conflict*, *supra* note 14, at 464 (noting that when quoting dictum from the Wall case, the ICJ omitted its prior reference to *lex specialis* from the Court's analysis in Armed Activities on the Territory of the Congo (DRC v. Uganda)).

69. ICJ Statute, *supra* note 57, art. 38

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

with a more conscribed subject matter jurisdiction. This universal subject matter jurisdiction at the ICJ means that it is permitted to hear claims that originate in nearly any area of public international law, including the alleged violation of human rights treaties.[70] Judges at the ICJ are also less constrained than those at regional tribunals, since the statutes of regional tribunals may explicitly limit consideration of areas of law not referred to under their statutes.[71]

The potential for conflicting outcomes presents unique challenges for any judicial body attempting to evaluate a set of facts where both IHL and HRL may apply, such as in situations of occupation or armed conflict. In particular, the utilization of IHL by human rights tribunals has led to significant controversy, since important distinctions and interpretations of terminology exist between the two areas. Finders of fact at human rights tribunals face an additional challenge above and beyond the substantive question of how these two areas of law should interface, and what the appropriate understanding of the *lex specialis* approach indicates. Human rights tribunals, such as those in the Inter-American System, are limited in their subject matter jurisdiction to human rights claims against States and to evaluation of breaches of law as specifically permitted by their constitutive instruments.[72]

These challenges of enforcement of IHL are reflected in a series of cases evaluated by the Inter-American System. That the ICJ's holdings, offering the difficult-to-apply *lex specialis* standard when HRL and IHL intersect, do not provide much clarity is evidenced by the jurisprudence in the Inter-American System. There, Commissioners and Justices have grappled with multiple cases stemming from decades of armed conflict and struggled with the appropriate balance between IHL and HRL.[73]

More recently, U.S. detention of prisoners at Guantanamo Bay has also provoked questions regarding the appropriate interplay between HRL and IHL, and whether a human rights tribunal could seek to enforce IHL.[74] In these cases, the Inter-American System has been confronted with practical contexts that have merited exploration of how to best apply the ICJ *lex specialis* standard. These practical challenges are complicated by the need for the adjudicators of the IASHR to first consider whether

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a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

70. *See id.*

71. *See* Escorihuela, *supra* note 31, at 377.

72. *Id.*

73. *See* section III, *infra.*

74. *See* Report on Terrorism and Human Rights, *supra* note 6, at 76-86.

they are competent to hear such claims in the first place. These challenges, and adjudicators' oscillating approaches to them, are tackled in the next Section.

II. The Inter-American Human Rights System: Competence During Conflict

When confronted with cases in which the alleged rights violations stem from facts occurring during armed conflict, the Commission's approach in recent years to the enforcement of IHL has boomeranged back and forth. In several early cases, the Commission determined that it was permitted to engage in the direct application of IHL, which resulted in findings that several states under its jurisdiction had committed violations thereof. Despite this progressive stance, the Court has since undermined the holding through case law supporting the consideration of IHL as an interpretive device for the application of HRL, but not supporting the direct finding of IHL violations. These patterns in the jurisprudence can be traced directly to the instruments of the Inter-American System as created by its constitutive charter.

When regional human rights systems, such as the IASHR, handle cases that address the intersection between IHL and HRL, the judgments emitted offer practical application of these laws to facts on the ground.[75] Despite this, the judicial constraints of the statutes, rather than the interplay of the two areas of law, have been dominant within these cases.[76] This is a result of the rigid constraints of the IASHR's constitutive statutes, which permit only human rights claims to be adjudicated. Before describing these patterns in the jurisprudence, this Article offers a brief overview of the regional system of human rights, its judicial and quasi-judicial organs, and its sources of authority.

A. *Evolution of the Inter-American Human Rights System*

Over the past fifty years, the Inter-American System has developed into a complex scheme of human rights organs that share the common mission of supporting States and individuals in the protection of human rights throughout the western hemisphere. Consisting of the Inter-American Commission of Human Rights, based in Washington D.C., and the Inter-American Court of Human Rights (IACtHR), located in San Jose, Costa Rica, the Inter-American System was created by the Organization of American States (OAS).[77] These instruments have worked for over a half-century to seek accountability from states that have committed

75. *See*, *e.g.*, Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L./V/II.98, doc. 6 rev. ¶ 161 (1997).

76. *See* Inter-Am. Ct. H.R., *Rules of Procedure of the Inter-American Court of Human Rights*, 1991 Annual Report, O.A.S. Doc. OEA/Ser.L/V/III.25 doc. 7, 18 (1992).

77. Christina M. Cerna, Out of Bounds? *The Approach of the Inter-American System for the Promotion and Protection of Human Rights to the Extraterritorial Application of Human Rights Law*, 1 (Ctr. for Hum. Rts. and Global Justice, Working Paper No. 6, 2006).

human rights abuses, especially during times of military dictatorships, forced disappearances, and mass displacement.[78] Yet this era has also witnessed a human rights revolution of sorts in Latin America, in which countries and NGOs have worked to secure accountability for past abuses, and succeeded in garnering global attention.[79] Standards have been set that seek to prevent and account for human rights violations that may be ongoing.[80]

The development of legal mechanisms within the Inter-American System has progressed as an iterative process over the past fifty years. As a result, the system is quite complex in its organization. In 1949, the member States of the OAS passed The Declaration on the Rights and Duties of Man (ADRDM),[81] which in 1948 became the first regional human rights resolution, coterminous with the creation of the Universal Declaration of Human Rights and the Genocide Convention.[82] At the time of its passage, the Declaration was not viewed as binding, but as hortatory.[83] It was determined by the Court that the Declaration had achieved normative status by reference into the OAS Charter, as amended by the Protocol of Buenos Aires.[84] In 1981, eleven years later, the OAS created the Commission as an autonomous and permanent organ of the OAS. At the time of its founding, the Commission aimed to promote the observance and defense of human rights throughout the region.[85] Although it is not a juridical body officially, it was granted the authority to apply the American Declaration of the Rights and Duties of Man. In 1968 it began the evaluation of individual petitions alleging violations of human rights within member States of the OAS.[86] The existence of the Commission, and its capacity to engage on an individual level with specific cases significantly raised the

78. *See* Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493, 500 (2011) ("[T]he Inter-American Court started life grappling with systematic state-sponsored mass crimes.").

79. THE HUMAN RIGHTS REVOLUTION: AN INTERNATIONAL HISTORY (Akira Iriye et al. eds., 2012); Amy Gutman, *Introduction* to MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY, at vii, vii-viii (Amy Gutman ed., 2001).

80. *See generally* Dulitzky, *supra* note 12.

81. Organization of American States, American Declaration of the Rights and Duties of Man arts. XVIII, XXV, XXVI, Apr. 30, 1948 [hereinafter American Declaration].

82. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

83. Cerna, *supra* note 12, at 1211 ("The American Declaration, like the contemporaneous but better-known Universal Declaration of Human Rights, was never intended to be a legally-binding instrument.").

84. *See* Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶¶ 43–48 (July 14, 1989).

85. *Id.*

86. *See* Organization of American States, Statute of the Inter-American Commission on Human Rights, art. 1, O.A.S. G.A. Res. 447 (Oct. 1979), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 at 93 (1992).

stakes of human rights enforcement within the Americas, breathing new life into the Declaration and multiplying its normative value within the Americas as a mechanism for protecting human rights.[87]

The OAS continued to develop more opportunities for enforcement of human rights treaties in 1979 with the creating of the Convention. The Convention, which is binding on states that have signed onto it,[88] grants the Court jurisdiction to adjudicate only those cases brought against signatories to the Convention.[89] Of the twenty-five countries that have ratified the Convention, twenty-two of those have also ceded binding jurisdiction to the Inter-American Court.[90] This aspect of the Court's jurisdiction distinguishes it markedly from the Commission, which lacks an express jurisdictional scope. Jurisdiction becomes particularly relevant in considering the role of the United States within the Inter-American System. Because the United States is a signatory to the American Declaration but not to the Convention, matters concerning human rights violations by the United States are heard by the Commission, not by the Court. Former human rights specialist at the Commission Christina Cerna explains,

> this lack of an express jurisdictional scope is relevant since most of the examples from the inter-American system, involving the extraterritorial application of its human rights instruments, concern the United States, which has not ratified the American Convention and which is considered by the Inter-American Commission to be subject to the American Declaration.[91]

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87. *See* Thomas Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AM. J. INT'L L. 828, 835 (1975).

88. *See* American Declaration, *supra* note 81, arts. XXIX-XXXVIII. The ACHR incorporated the rights that had previously been included in the ADRDM, and thus the Commission's mandate was redefined with this passage of the ACHR, although its existence formally predates the ACHR. American Convention on Human Rights, *supra* note 18, art. 1

> The States Parties to the Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

89. The jurisdiction of the Court is set out in articles 61-64 of the American Convention on Human Rights. American Convention on Human Rights, *supra* note 18, arts. 61–64.

90. The twenty-two states that have both ratified the American Convention and also accepted the binding jurisdiction of the Court are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, México, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago Uruguay and Venezuela. However, Trinidad and Tobago renounced the Convention, and withdrew from the Court's jurisdiction, in 1999. Inter-American Court of Human Rights, History (English version), http://www.corteidh.or.cr/index.php/en/about-us/historia-de-la-corteidh [hereinafter Inter-American Court Information].

91. Christina M. Cerna, *Out of Bounds? The Approach of the Inter-American System for the Promotion and Protection of Human Rights to the Extraterritorial Application of Human Rights Law* (Ctr. for Hum. Rts. and Global Justice, Working Paper No. 6, 2006). The unique relationship between the Commission and the United States becomes particularly

A final comment regarding the relationship between the Commission and the Court regards the role of precedent and deference. Due to the nature of the Court's authority as treaty-based, and the Commission's as declaration-based, the Court is understood to be the higher authority, with binding jurisdiction for States who have agreed to it.[92] Therefore, although the Commission is not *per se* obligated to follow the holdings of the Court, the two judicial organs have a symbiotic relationship. The interrelationship between the Court and the Commission, and in particular the deference traditionally granted to the former by the latter, both figure prominently in the Inter-American System's approach to the integration of IHL within human rights cases at those tribunals.

B. *Competence at the Inter-American System*

The constitutive instruments that created the Inter-American System —the OAS Charter, the ADRDM, and the ACHR — delineate the specific human rights protected within the system. The Inter-American System also applies other international instruments and covenants on Economic, Social, and Cultural Rights (ESCRs), Death Penalty, Torture, Forced Disappearances, Violence against Women, and Discrimination against Persons with Disabilities.[93] In order to determine what rights a regional human rights body may enforce, one must look to that body's

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significant in light of ongoing adjudication surrounding detention at the Guantanamo Bay Detention facility. *See* discussion *infra* Parts III.C and IV.B.

92. *See* Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. RTS. Q. 439, 443–44 (1990); *id.* at 451 (highlighting instances in which the Commission asked the Court for advisory opinions); *id.* at 453 (discussing the opinion of the Court in the advisory opinion *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, in which it finds that the Commission has a duty to present to it contentious cases). *See generally* Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INTER-AM. L. REV. 297 (1994).

93. American Convention on Human Rights, *supra* note 18, pmbl. ("Considering that these principles. . . have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope."). *See generally* "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1, ¶ 42 (Sept. 24, 1982), http://www1.umn.edu/humanrts/iachr/b_11_4a.htm (last visited Aug. 15, 2016); *id.* ¶ 52 (Determining that advisory jurisdiction of the Court may apply when it regards the protection of human rights laid out in "any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto"); American Convention on Human Rights, *supra* note 18, art. 64; *see* Laurence Burgorgue-Larsen & Amaya Úbeda de Torres, *La guerra de la Jurisprudencia de la Corte Interamaericana de Derechos Humanos*, 3 ANUARIO COLOMBIAN DE DERECHO INTERNACIONAL [ACDI] BOGOTA 117, 135 (2010) (Col.) (discussing the Court's Advisory Opinion on Other Treaties and reiterating that although the Court has granted legitimacy to an authentic interpretive strategy with regard to other treaties, this does not imply that these treaties may actually be applied by the Court: "lo cual se ha convertido en una auténtica estrategia interpretativa, eso no implica que dichos tratados puedan ser aplicables a los casos que la Corte debe examinar").

constitutive instrument. Article 44 of the Statute of the Commission indicates that "only denunciations or complaints of violations to the treaty itself by state parties can be dealt with and can provide a basis for proceedings."[94] As such, only violations of the ADRDM, and subsequently the ACHR, may be addressed by the Commission. According to the Court's interpretation of Article 44 regarding jurisdiction *rationae materiae,* examination of claims under any law other than the ACHR would violate the principle of "express consent" as articulated under the Vienna Convention on the Law of Treaties (VCLT). This principle provides that state action may only be adjudicated with regard to a particular treaty if the state has consented to that treaty.[95]

The VCLT provides for a treaty to be interpreted in good faith with the ordinary meaning of its language, considering the object and purpose of the treaty.[96] Indeed, a former judge of the IACtHR reiterates the importance of honoring this VCLT requirement. Professor Rafael Nieto Navia argues that recourse may be had to a supplemental means of interpretation only when ordinary interpretation leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable, and that none of the language in the ACHR is ambiguous.[97] As demonstrated by the conflicting perspectives of the Commission and the Court, esteemed jurists in both these bodies disagree on this point.

Situations of armed conflict, during which facts may implicate violations of both IHL and HRL, present several inter-related challenges for adjudicative bodies. First, there are multiple cases arising from armed conflict situations in which IHL and HRL apply simultaneously, yet would proscribe divergent outcomes. Thus, this parallel application of the two bodies of law may obfuscate interpretation of either area of the law. For example, the difficulty of interpretation is evidenced through examination

94. Emiliano Buis, *The Implementation of International Humanitarian Law by Human Rights Courts: The Example of the Inter-American Human Rights System*, *in* INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 269, 277 (Roberta Arnold & Noëlle Quénivet eds., 2008).

95. *See* Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1115 U.N.T.S. 331 [hereinafter Vienna Convention].

96. *Id.* art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."). *See generally* Ulf Linderfalk, *On the Meaning of the 'Object and Purpose' Criterion, in the Context of the Vienna Convention on the Law of Treaties*, 72 NORDIC J. INT'L L. 429, 433–34 (2003) (stating that in order to find the object and purpose of a treaty, one must: 1) assess its *telos*; and 2) assess it against the rights and obligations to which the treaty gives expression).

97. *See* Rafael Nieto-Navia, *The Inter-American System*, *in* RESPECTING INTERNATIONAL HUMANITARIAN LAW: CHALLENGES AND RESPONSES, 36TH ROUND TABLE ON CURRENT ISSUES OF INTERNATIONAL HUMANITARIAN LAW (Sept. 5–7, 2013), 133, 137 (Michel Veuthey ed., 2014); *see also* Santo Domingo Massacre v. Colombia, Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 259, ¶¶ 187, 211. As described by former ICTY Judge and former IACtHR President Rafael Nieto-Navia in evaluating these legal principles, the Court relied on the expertise provided by the ICRC in its publication compiling International Humanitarian Law.

of the prohibition against the arbitrary deprivation of life or arbitrary arrest or imprisonment.[98] How should the term "arbitrary" be best understood in these contexts? Depending on a judicial organ's reliance on the meaning of this term under IHL, vastly different interpretations may arise, leading to a variety of practical challenges.

In addition to the problem of obfuscated interpretation, procedural or institutional impediments within certain adjudicative bodies may block the parallel application of IHL and HRL. Substantive legal confusion has indeed presented challenges of interpretation within the jurisprudence of the Commission, but these substantive problems have proved less challenging than procedural questions regarding the jurisdiction of various bodies within Inter-American System's enforce IHL.[99]

The constitutive documents of the instruments of the Inter-American System shed light onto these jurisdictional concerns. Jurisdiction *rationae materiae* (or subject matter jurisdiction) refers to a tribunal's authority to decide a particular case.[100] The Court's jurisdiction *rationae materiae* is limited by Article 62(3) of the ACHR.[101] Although this Article determines jurisdiction, the Court's case law is critical in understanding how limited the body is in its capacity to adjudicate matters regarding the intersections of IHL and HRL.[102]

These jurisdictional constraints have resulted "in a clear bias in favor of HRL when human rights bodies within the Inter-American System examine legal facts in which both IHL and HRL could apply."[103] According to Oona Hathaway, this bias is due to jurisdictional restraints built into the ACHR.[104] This bias, however, remained unclear until the Court ultimately and definitively imposed this restriction in the seminal *Las Palmeras* case. The Court opined that "the American Convention . . . has only given the Court competence to determine whether the acts or the norms of the States are compatible with the Convention itself, and not with the 1949

98. *See generally* Goldman, *supra* note 52.

99. *See* Report on Terrorism and Human Rights, *supra* note 6, ¶ 116 (discussing the right to life and terrorism, the IACHR Report on Terrorism States "additional procedural requirements, such as the notification of Protecting Powers, may apply based upon the *lex specialis* of international humanitarian law governing international armed conflicts").

100. *See* American Convention on Human Rights, *supra* note 18, art. 62(3) (stating that the Court's jurisdiction includes "all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement").

101. *Id.*

102. *See* Laurence Burgorgue-Larsen & Amaya Úbeda de Torres, The Inter-American Court of Human Rights: Case-Law and Commentary 67–68 (Rosalind Greenstein, trans., 2011).

103. Shana Tabak, *Armed Conflict and the Inter-American System of Human Rights: Application or Interpretation of International Law? in* Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies (D. Jinks et al. eds., 2014).

104. *See* Hathaway et al., *supra* note 25, at 1909.

Geneva Conventions."[105] Thus, if the Court desires to interpret or evaluate legal norms not explicitly contemplated by the Convention, these norms still must be interpreted vis-à-vis the Convention.[106]

III. Ambivalence Toward International Humanitarian Law

The appropriate level of involvement for human rights tribunals with the law of armed conflict has proven to be an enduring question. Taken as a whole, Commissioners and Court Justices have demonstrated great ambivalence toward the notion that a human rights tribunal is responsible for IHL enforcement. Not only have they refused to find these tribunals responsible, but some jurists and scholars have even questioned the capacity, under the confines of the statute, to rule on IHL violations and consequently, to find that States had committed violations of IHL.

In recent years, the respective approaches of the Court and of the Commission to situations in which armed conflict exists have coalesced to a large degree. Currently, the Commission holds that IHL does not displace HRL during armed conflict, and that HRL always remains fully applicable aside from permissible derogations.[107] The Court, too, has held that IHL and HRL share a common origin of non-derogable rights.[108] Despite the shared theoretical rooting of the two bodies and similar interpretive methods with regard to the application of IHL, for several years, they diverged significantly and quite controversially in their approach to the analysis of IHL within the context of human rights claims arising during armed conflict.

Since 1997, the Commission has experimented with two distinct approaches to the employment of IHL.[109] First, taking a more dramatic and controversial stance, in several seminal early cases, the Commission determined that it was competent to determine whether States had explicitly violated IHL or not.[110] Second, in some factual situations that gave rise to allegations of violations of the ACHR, the Commission turned to IHL as an interpretive tool.[111] This employment of IHL as authoritative guidance in interpreting the American Convention and Declaration during armed

105. Las Palmeras v. Colombia, Judgment on Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 67, ¶ 33 (Feb. 4, 2000).

106. *Id.* ¶¶ 32–33.

107. *See* Report on Terrorism and Human Rights, *supra* note 6, ¶¶ 61–78.

108. Coard v. United States, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L./V/II.106, doc. 6 rev. ¶ 39 (1999).

109. *See* Avilán v. Colombia, Case 11.142, Inter-Am. Comm'n H.R., Report No. 26/97, OEA/Ser.L./V/II.98, doc. 6 rev. ¶ 202; (1998); Hugo Bustios Saavedra v. Peru, Case 10.548, Inter-Am Comm'n H.R., Report No. 38/97, OEA/Ser.L/V/II.98 doc. 6 rev. ¶ 88 (1998); Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L./V/II.98, doc. 6 rev. ¶ 178 (1997).

110. *See Avilán*, Case 11.142, Inter-Am. Comm'n H.R. ¶ 202; *Hugo Bustios Saavedra*, Case 10.548, Inter-Am Comm'n H.R. ¶ 61 (1998); *Abella*, Case 11.137, Inter-Am. Comm'n H.R. ¶ 178 (1997).

111. *Abella*, Case 11.137, Inter-Am. Comm'n H.R. ¶ 157.

combat tracks the IHL as *lex specialis* approach.[112] Importantly, these two approaches, in several early cases at least, were applied conterminously and were not deemed incompatible. To this day, the Commission continues to apply IHL as *lex specialis* in an interpretive capacity, but has ceased to directly apply IHL or to find direct violations thereof have been committed by States parties.[113] This retreat from judicial activism can largely be attributed to traditional deference to the Court's authority.

The approach of the Court toward integration of IHL standards has been consistently more orthodox and formalist than that of the Commission. The Court has never advocated direct application of IHL by the instruments of the Inter-American System. This position was articulated in *Las Palmeras*, in which the Court determined that the Commission had overstepped in its finding that Colombia had breached its obligations under IHL. Citing jurisdictional rationale to buttress this position, the Court held that, "the American Convention. . . has only given the Court competence to determine whether the acts or norms of the States are compatible with the Convention."[114]

Although the Court has declined to find States directly in breach of IHL, it has acknowledged that IHL may be, and occasionally should be, employed to assist in the unpacking of human rights norms that may be violated by states during conflict. It has thus rejected any direct application of IHL on jurisdictional grounds, but it does refer to IHL and considers it in an advisory capacity.[115] A chronological exploration of some of the most relevant cases within the IAHR System highlights this pattern.

A. *The Commission: IHL Applied Directly and Employed as Interpretive Reference*

In several early cases the Commission demonstrated that it found itself to be competent to apply the law of armed conflict, despite its being an adjudicative body primarily concerned with human rights. A 1997 Commission Report discussed three cases in which the Commission sought to determine whether States had committed direct violations of IHL:[116] *Avilán v. Colombia*,[117] *Hugo Bustios Saavedra v. Peru*,[118] and *Abella v. Ar-*

112. Goldman, *supra* note 52, at 112.

113. *See* Lindsay Moir, *Law and the Inter-American Human Rights System*, 25 HUM. RTS. Q. 182, 212 (2003).

114. Las Palmeras v. Colombia, Judgment on Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 67 ¶ 33 (Feb. 4, 2000).

115. *See* Weissbrodt, *supra* note 1, at 1186 n.6.

116. 1997 Annual Report of the Inter-American Commission of Human Rights, OEA/Ser.L./V/II.98 doc. 6 rev. (1998).

117. Avilán v. Colombia, Case 11.142, Inter-Am. Comm'n H.R., Report No. 26/97, OEA/Ser.L./V/II.98, doc. 6 rev. (1998).

118. Hugo Bustios Saavedra v. Peru, Case 10.548, Inter-Am Comm'n H.R., Report No. 38/97, OEA/Ser.L/V/II.98 doc. 6 rev. ¶ 88 (1998). In this case against Peru, the Commission found State violations of IHL: "With respect to the right to life of Hugo Bustíos Saavedra and the personal integrity of Eduardo Rojas Arce, the Peruvian State has also violated common Article 3 of the 1949 Geneva Conventions." *Id.* ¶ 88.

gentina.[119] In each of these cases, State-perpetrated violence was analyzed in situations that were classified as internal armed conflicts. In its evaluation of these scenarios, the Commission applied IHL and laid out the rationale for why it was competent to find direct violations of IHL.

Avilán v. Colombia addressed the rights of eleven individuals who had been extra-judicially executed during a confrontation between the Colombian army and an armed dissident group.[120] The Commission's report detailed State violations of multiple articles of the ACHR. In addition, it also determined that the state had violated Common Article 3 of the Geneva Conventions.[121] Strikingly, the Commission raised the IHL violation sua sponte; it was not alleged within the victims' initial petition.[122] In defense of this choice, the Commission explained that due to the context in which the human rights violations occurred – armed conflict – the case required the application of IHL for proper analysis. In doing so, it built upon the Court's holding in *Velazquez-Rodriguez*: that the law would be applicable under the principle of "iura novit curia, on which international jurisprudence has repeatedly relied and under which a court has the power and the duty to apply the juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them."[123] The Commission also explained that "[i]t is precisely in situations of internal armed conflict that human rights and humanitarian law converge most precisely and reinforce one another."[124] This reasoning in *Avilán* led to the Commission's determination that the state of Colombia was in violation of Common Article 3.

A second case, *Abella v. Argentina*, discussed in the Commission's 1997 report also demonstrates the Commission's controversial choice to apply IHL. Importantly, in *Abella*, the Commission emphasized that it had the capacity to find that the Argentine State had committed a violation of IHL, yet in this instance, they found that Argentina had not committed such a violation.[125] In the facts giving rise to this case, a military base in Argentina was attacked by armed combatants, holding 42 people hostage. In the Argentine military's efforts to recapture the base, 29 of the attack-

119. Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L./V/II.98, doc. 6 rev. (1997).

120. Avilán v. Colombia, Case 11.142, Inter-Am. Comm'n H.R., Report No. 26/97, OEA/Ser.L./V/II.98, doc. 6 rev. ¶ 134 (1998).

121. *Id.* ("The evidence submitted in this case supports the petitioners' claim that the victims were executed extra-judicially by state agents in a clear violation of Common Article 3 of the Geneva Conventions as well as the American Convention.").

122. *Id.* ¶ 169 ("The State notes that none of the parties invoked humanitarian law in this case.").

123. Velásquez-Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 163 (July 29, 1988). In that case, the Court found that it could order the State to investigate and punish the Plaintiff's disappearance under article 63(1) of the American Convention, even if that Article was not specifically invoked by the parties.

124. *Avilán*, Case 11.142, Inter-Am. Comm'n H.R., ¶ 174.

125. Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L./V/II.98, doc. 6 rev. ¶ 180 (1997).

ers were killed in the confrontation.[126] *Abella* was lodged by the surviving attackers, who alleged that Argentina was responsible for violations of HRL as well as of IHL – specifically claiming that the state had violated Article 4 of the ACHR, protecting right to life, as well as the right to life under IHL. These claims were rooted in the allegation that the military had refused the attackers' offers to surrender, and further, that they had used weapons designed to induce disproportionate injury.[127] On the merits, the Commission examined whether it had the capacity to apply IHL directly, and it found that it was indeed competent to do so. Despite its assertion that it had the competence to find a direct violation of IHL, the Commission found that the killings were sanctioned under IHL due to the status of the victims as combatants. Therefore, no arbitrary deprivation of life had occurred.[128]

Both *Avilan* and *Abella* highlight the two distinct techniques employed by the Commission in its analysis of the intersection between HRL and IHL during armed conflict. First, the Commission employed direct application of IHL to find (or decline to find) state violations thereof, and second, it employed IHL as an interpretive device to aid in its evaluation of the human rights violations at hand. The Commission's defense of its power to apply IHL relied on numerous grounds: on the overlapping scope of HRL and IHL, and on Articles 25, 27, 29(d) and 64(1) of the Convention.[129] Each of these defenses for the Commission's use of IHL is discussed in detail below. Critically, aside from the Commission's defense of IHL due to its overlapping scope with HRL, the Commission's defense refers specifically to the utilization of IHL as an interpretive reference for application of HRL, and not to its direct application of IHL.

In defense of its position that it was entitled to apply IHL directly and to find violations thereof, the Commission explained that enforcement of IHL within the Inter-American System should pose no additional burden to States. Due to the overlap of the scope of application of HRL and IHL, it explained, it was no more burdensome to apply IHL than it was to only apply HRL.[130] Further, the Commission explained, "integral linkage between the law of human rights and humanitarian law. . . share[s] 'a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity,' [thereby]. . .result[ing] in in a substantial overlap

126. *Id.*

127. *Id.*

128. *Id.* ¶¶ 327–28. The Commission concluded that Argentina did *not* violate the applicable provisions of international humanitarian law.

129. Each of these respective articles is discussed *infra* at 129-32. For an in-depth analysis of the way in which these defenses were discussed by the Commission, see Moir, *supra* note 113, at 194.

130. *See Abella*, Case 11.137, Inter-Am. Comm'n H.R., ¶ 158; *see also* Avilán v. Colombia, Case 11.142, Inter-Am. Comm'n H.R., Report No. 26/97, OEA/Ser.L./V/II.98, doc. 6 rev. ¶ 172 (1998).

in the application of these bodies of law."[131] Some human rights advocates encourage the use of IHL to fill enforcement gaps present within the IHL system. This theory is based on the common ideology and core principles shared between IHL and HRL.[132]

Further articulating a defense for the use of IHL as an interpretive device, the Commission relied on Article 29(d) of the Convention, which precludes interpretation of the Convention in a manner inconsistent with the other international law obligations of a member State.[133] This logic was applied in *Abella*, where Argentina's killing of the Tablada attackers was analyzed to determine whether the State had violated ACHR Article 4's right to life protection.[134] In doing so, however, reference to the ACHR alone was insufficient, because it does not offer any meaningful guidance in distinguishing between civilians and legitimate military targets in the context of armed conflict. Thus, the Commission explained, IHL provided the necessary authoritative guidance to determine whether or not Article 4 had been violated.[135] First, the Commission determined that the armed attackers did qualify as combatants, and as a result "despite its brief duration, the violent clash between the attackers and members of the Argentine armed forces triggered application of the provisions of Common Article 3, as well as other rules relevant to the conduct of internal hostilities."[136] Once it had been determined that IHL had been triggered, and that the attackers qualified as combatants, the framework of HRL became insufficient to adequately understand State obligations. Because IHL allows derogation of the right to life in the course of armed conflict, the killing of the victims (classified as combatants, rather than as civilians) was permissible. In a critical passage, the Commission determined that Argentina had not violated IHL, nor had Argentina violated the right to life under Article 4 of the ACHR:

> Based on its application of said norms of humanitarian law, the Commission found that there was not sufficient evidence to determine that the State used illegal methods and means of combat to retake the barracks at La Tablada in January 1989. It also determined that the civilians who took up arms and attacked those barracks became legitimate military targets for such time as they

131. Coard v. United States, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L./V/II.106, doc. 6 rev. ¶ 39 (1999).

132. *See* Judith Gardam, *The Contribution of the International Court of Justice to International Humanitarian Law*, 14 LEIDEN J. INT'L L. 349, 353 (2001).

133. *See* American Convention on Human Rights, *supra* note 18, art. 29(d) ("No provision of this Convention shall be interpreted as . . . excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.").

134. *Abella*, Case 11.137, Inter-Am. Comm'n H.R. ¶¶ 161, 332.

135. *Id.* ¶ 161 (1997); *see also* Parada Cea v. El Salvador, Case 10.480, Inter-Am. Comm'n H.R., Report No. 1/99, OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 65 (1999); *Avilán*, Case 11.142, Inter-Am. Comm'n H.R., ¶ 173.

136. *Abella*, Case 11.137, Inter-Am. Comm'n H.R. ¶ 156.

> actively participated in the conflict. Therefore, the deaths of and wounds inflicted on the attackers, while they were active participants in the conflict, were legitimately related to the combat, and do not constitute violations of the American Convention or of the applicable provisions of humanitarian law.[137]

Throughout the *Tablada* deliberations, the Commission employed IHL as an interpretive device, which allowed it to respect Article 29(d), prohibiting the Commission from offering judgment in violation of other international law obligations, including IHL. It determined that IHL provided a higher standard of protection for the victims in than did HRL. This outcome, however, depends on who those victims are and how they are defined by the court within the context at hand. In this instance, the enemy combatants sought the "higher" level of protection afforded them under IHL. Unexpectedly, perhaps, to petitioners in the *Abella* case, IHL did not benefit the claimants because once IHL was triggered, it allowed the Commission to evaluate the government's acts vis-à-vis combatants, not civilians.[138] In this situation, the Commission held Argentina's actions to a lower standard than they would have had the individuals not been classified as combatants under HRL. Further, the Commission proposed that that petitioners may have erred in requesting that the Commission consider IHL, neglecting to realize that triggering IHL would allow more derogations of HRL, and not necessarily result in greater protection for these victims who simultaneously qualified as combatants.[139] As a result of the Commission's incorporation of IHL and subsequent determination that the petitioners qualified as combatants, in the end it was the government that benefitted, rather than the petitioners themselves.

In defending the choice to use IHL, the Commission also relied on Article 25 of the ACHR, ensuring that each person is provided with a suitable legal remedy for any rights violation committed against him or her.[140] The Commission reasoned that if a state has committed itself to respect IHL, and if the government does not proactively enforce IHL, then it falls to the Commission to ensure that Article 25 is not violated and

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137. *Id.* ¶ 328. Similarly, in *Coard*, the Commission utilized the *lex specialis* argument, where it was asked to adjudicate on the right to liberty during an international armed conflict, and again, it interpreted this right (under the ACHR) in the context of armed conflict with the benefit of definitional guidance from IHL. Coard v. United States, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L./V/II.106, doc. 6 rev. ¶ 42 (1999).

138. In retrospect, it is difficult to understand why petitioners chose to invoke IHL considering the outcome, but it is possible that counsel for the victims (the armed attackers of the military compound) were emboldened by the Commission's holding in *Avilán* that Colombia had violated IHL, resulting in their petition that the Commission find that Argentina had also violated IHL.

139. *Abella*, Case 11.137, Inter-Am. Comm'n H.R. ¶ 178 (1997) ("The Commission believes that petitioners misperceive the practical and legal consequences that ensued with respect to the application of these rules to those MTP members who participated in the Tablada attack.").

140. American Convention on Human Rights, *supra* note 18, art. 25.

that some legal remedy for IHL violations does indeed exist for victims. This rationale underpinned the Commission's holding in *Avilán*:

> [t]he right to the protection of humanitarian law is recognized in the Colombian legal regime . . . Therefore, given that Colombian domestic law provides for the application of humanitarian law, the Convention itself authorizes the Commission to analyze humanitarian law in cases such as this one, where a violation of Article 25 has been alleged.[141]

The Commission further defended its choice to apply IHL through employing Article 27 of the ACHR. That article provides that during times of war, public danger, or other emergencies, states may be permitted to derogate from their obligations under the rest of the Convention, provided, however, that "such measures are not inconsistent with its other obligations under international law."[142] Thus, IHL (as one of a state's obligations under international law) must remain in force, even if other human rights obligations may be relaxed in the context of a public emergency.[143] If, during a time of conflict, a state is permitted to derogate from HRL obligations, then the Commission may not evaluate that state's actions with regard to HRL. The Commission reasoned that if it were also prohibited during these situations from evaluating a state's conduct with respect to IHL, then there would be no effective legal standard by which to examine a state's actions during national security emergencies, thus leaving states with completely free reign during conflict.

Finally, the Commission cited an Advisory Opinion of the Court as a rationale for its decision to consider IHL. That opinion held that the Commission may utilize treaties that do not emerge from the Inter-American System.[144] The Advisory Opinion resulted from Peru's request that the Court clarify a provision of the ACHR that allows the Court to interpret "other treaties concerning the protection of human rights in the American States."[145] The Court determined that the ambit of that provision, Article 64, included not only treaties within the Inter-American System, but also those that had been adopted outside the system, and to which other states were party.[146] This Advisory Opinion, further supported the Commission's approach of direct application of IHL standards in its interpretation of legal disputes arising out of armed conflict.

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141. Avilán v. Colombia, Case 11.142, Inter-Am. Comm'n H.R., Report No. 26/97, OEA/Ser.L./V/II.98, doc. 6 rev. ¶¶ 177–78 (1998).

142. American Convention on Human Rights, *supra* note 18, art. 27.

143. *See Avilán*, Case 11.142, Inter-Am. Comm'n H.R. ¶ 135.

144. *See* "Other Treaties" Subject to the Consultative Jurisdiction of the Court, *supra* note 93, ¶ 42.

145. American Convention on Human Rights, *supra* note 18, art. 64 ("The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American States.").

146. *See Avilán*, Case 11.142, Inter-Am. Comm'n H.R. ¶ 132.

B. *The Court: A Legalist Interpretation of the Statute*

Once the Commission began to directly apply IHL and to find states in breach of these norms, commentators predicted accurately that, before long, the Court would opine on this controversial topic.[147] The *Las Palmeras* case, decided in 2000, was both applauded and criticized extensively once the Court did just that. The case is heralded as the first case in which the Court articulated clear limitations regarding subject matter jurisdiction in matters where IHL may apply.[148] Yet, it has also been critiqued as the decision that led to the deprivation of binding recourse for victims of humanitarian crimes. Previously, the aforementioned Advisory Opinion on Article 64 did not preclude the possibility that the Court might directly apply IHL, holding that "the Commission has properly invoked in some of its reports and resolutions 'other treaties concerning the protection of human rights in the American States,' regardless of . . . whether they have been adopted within the framework or under the auspices of the Inter-American system."[149] This non-categorical approach may be attributed to the nature of the Advisory Opinion at the Court, which do not refer to specific facts in a particular state. Ultimately, though, the Court arrived at a much more black and white approach regarding the capacity of the IASHR to opine on IHL violations through a series of cases at the IACtHR.

In comparison to the Commission's approach, the Court's treatment of IHL in *Las Palmeras* is decidedly more legalistic. In this case, the Court took the firm stance that the Inter-American System lacks competence to find violations of any international law other than of its constitutive instrument, the ACHR.[150] The case itself arose through a set of facts in which at least six victims were killed extra-judicially by members of the National Police Forces, aided by the Colombian armed forces. Further, numerous other victims were injured, including children and, strikingly, the Colombian national forces attempted to cover-up the killings.[151] In referring the case to the Court, the Commission specifically requested that violations be

147. *See*, *e.g.*, Zegveld, *supra* note 22, at 511 (predicting that "at some point in the future, the Court may be in the position to give an opinion on the Commission's decision to apply international humanitarian law directly").

148. Las Palmeras v. Colombia, Judgment on Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 67 ¶¶ 28–34 (Feb. 4, 2000). Although it is correct that this was the first case in which the Court addressed the application of IHL, one commentator, Buis, highlights that the Court had previously considered the challenges inherent in the application of other treaties, notably the Inter-American Convention on Torture, the Inter-American Convention to Prevent and Punish Torture and the Convention on the Rights of the Child. *See* Buis, *supra* note 94, at 284–85.

149. "Other Treaties" Subject to the Consultative Jurisdiction of the Court, *supra* note 93, ¶ 43.

150. Las Palmeras Judgment on Preliminary Objections, Inter-Am. Ct. H.R., ¶¶ 32–33 (indicating that the American Convention "has only given the Court 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").

151. *Id.* ¶ 2.

found not only of the right to life, codified in Article 4 of the ACHR, but also of "Article 3, common to all the 1949 Geneva Conventions."[152] In requesting the Court find violations of the Geneva Conventions, the Commission relied on the competence of both it and of the Court to determine that a state had violated the Geneva Conventions.

Neither the Court nor Colombia were pleased with the Commission's choice to refer the case. Colombia's preliminary objections claimed that both adjudicative bodies lacked the competence to find violations of IHL, but it declined to challenge the classification of the facts of the case as rising from an internal armed conflict that gave rise to Common Article 3 of the Geneva Conventions.[153] Colombia did, however, argue that no jurisdiction to evaluate the IHL legal issues existed.[154] The Court agreed with Colombia, finding that it only had the competence to evaluate IHL in reference to its compatibility with the American Convention.[155] This interpretation is supported by dicta from subsequent cases addressing internal armed conflict.[156] Thus, the ACHR was read as only allowing the Court and the Commission to determine whether a state has violated human rights law, but not international humanitarian law.[157]

According to some critics, *Las Palmeras* missed an opportunity to draw explicit connections between human rights law and IHL.[158] On the other hand, those who claimed that the ACHR was unambiguous regarding how IHL should be regarded by the IASHR relied on Article 29(d) of the American Convention.[159] Later jurisprudence has not only reinforced

152. *Id.* ¶ 28.

153. *Id.* ¶¶ 28–29, 33 ("Colombia had not objected to the Commission'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.").

154. *See id.* ¶ 28 ("[T]he State declared that Articles 33 and 62 of the Convention limit the Court's competence to the application of the provisions of the Convention. It also invoked Advisory Opinion OC-1 of September 24, 1982 (paragraphs 21 and 22) and stated that the Court 'should only make pronouncements on the competencies that have been specifically attributed to it in the Convention.'").

155. *See id.* ¶ 34 ("Although the Inter-American Commission 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 Commission, which culminates in an application before the Court, should refer specifically to rights protected by that Convention (cf. Articles 33, 44, 48.1 and 48).").

156. In the *Serrano-Cruz Sisters* case, for example, the Court recalled the "complementarity of international human rights law and international humanitarian law." Serrano-Cruz Sisters v. El Salvador, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 118, ¶ 112 (Nov. 23, 2004).

157. *Id.* ¶¶ 32–33.

158. *See*, *e.g.*, Fanny Martin, *Application du droit International Humanitaire par la Cour Interaméricaine des Droits de L'homme*, 844 INT'L REV. RED CROSS 1037, 1049 (2001).

159. *See* BURGORGUE-LARSEN & ÚBEDA DE TORRES, *supra* note 102, at 69. Article 29(d) of the American Convention on Human Rights states "[n]o provision of this Convention shall be interpreted as . . . excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have." American Convention on Human Rights, *supra* note 18, art. 29(d).

this holding, but cases have also demonstrated that IHL can aid juridical bodies to arrive at suitable interpretations of HRL laws in contexts of armed conflict.[160]

Following the Court's rebuke of the Commission's activist application of IHL through *Las Palmeras*, another case brought against Guatemala revealed a less categorical approach. In *Bámaca Velásquez*, the Court confirmed its rejection of the direct application of IHL, yet it simultaneously recognized the role that IHL played as an interpretive reference for cases of armed conflict.[161] This case arose from the torture and murder of a guerilla fighter at the hands of the Guatemalan military during the internal armed conflict there.[162] The Commission referred the case to the Court, seeking that Guatemala be found to have violated both the ACHR and Common Article 3 of the Geneva Conventions. The Court refused to address the referral of the Geneva Convention violations, basing its rationale in its previously discussed lack of competence to adjudicate violations of IHL. Surprisingly, though, the Court did observe that certain acts violating the ACHR may violate other types of law, such as IHL.[163] The Court found that "the relevant provisions of the Geneva Conventions *may* be taken into consideration as elements for the interpretation of the American Convention."[164] This holding permits the organs of the Inter-American System to employ IHL as an interpretive tool, though they may not determine whether a State has definitively violated IHL.[165]

The *Bámaca Velásquez* case, as well as the 2012 case of *Santo Domingo Massacre v. Colombia*, reaffirms the Court's capacity to use IHL as *lex specialis* when adjudicating an alleged breach of human rights that has occurred in the context of armed conflict.[166] In the 2012 case of the *Santo Domingo Massacre v. Colombia*, the Court in no uncertain terms reiterated its commitment to using IHL as an interpretive reference, but remained unwilling to directly apply it stating,

> Based on the foregoing considerations, the Court reiterates that although the American Convention has only empowered it to de-

160. *See* Mapiripán Massacre v. Colombia, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 115 (Sept. 15, 2005).

161. Bámaca Velásquez v. Guatemala, Judgment, Inter-Am Ct. H.R. (ser. C) No. 70, ¶¶ 207–09 (Nov. 25, 2000).

162. *See id.* ¶¶ 2, 16, 91–92.

163. *Id.* ¶ 208.

164. *Id.* ¶ 209 (emphasis added).

165. *See* Byron, *supra* note 43, at 862. For a more complete discussion of the importance of the *Bámaca Velásquez* case, see *id.* at 861–62.

166. Santo Domingo Massacre v. Colombia, Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 259, ¶ 24 (Nov. 30, 2012). It should be noted that at the time of this writing, two cases are pending at the IACtHR which concern the intersections between IHL and HRL, yet there is no indication that the Court will deviate from its previous holdings in either of these cases: Eduardo Nicolás Cruz Sánchez v. Peru, Case No. 12.444, Inter-Am. Ct. H.R. (2011) and Hugo Oscar Arguelles v. Argentina, Case No. 12.167, Inter-Am. Ct. H.R. (2011).

> termine the compatibility of the States' acts and omissions or laws with this Convention and not with the provisions of other treaties or customary norms, when making this analysis, it can, as it has in other cases . . . interpret the obligation and the rights contained in the American Convention in light of other treaties. In this case, by using IHL as a supplementary norm of interpretation to the treaty-based provisions, the Court is not making a ranking between normative systems, because the applicability and relevance of IHL in situations of armed conflict is evident. This only means that the Court can observe the regulations of IHL, as the specific law in this area, in order to make a more specific application of the provisions of the Convention when defining the scope of the State's obligations.

Tellingly, in the *Santo Domingo* case, neither the victims' representatives nor the Commission had asked the Court to find a violation of IHL. Yet, in this case, the Court took it upon itself to integrate IHL, citing that it was

> appropriate to interpret the scope of the treaty-based norms and obligations in a way that complements the norms of international humanitarian law, based on their specificity in this matter, in particular the 1949 Geneva Conventions and, in particular, Article 3 common to the four conventions.[167]

As the Court has developed this line of cases, it has reiterated the holding that jurisdictional constraints within the ACHR require curtailing the Commission's capacity to find states in violation of IHL. Clearly the Court's holdings have limited the direct application of IHL, but not the use of IHL as an interpretive reference. This approach remains relevant within both the Court and the Commission when interpreting facts arising from armed conflict.

C. *The Commission: A More Tempered Approach?*

Subsequent to the Court's determination that direct application of IHL was inappropriate, the Commission appears to have modified its approach to analysis of facts giving rise to both HRL and IHL. The facts of *Oscar Romero v. El Salvador* led to accusations of human rights violations in the context of the complicated Salvadorian civil conflict of the 1980s.[168] Rather than finding that the state was culpable for having violated the Geneva Conventions, the Commission deliberately chose its wording in the report to reference IHL in a manner that alludes to a violation of Article 3 of the Geneva Conventions, without ever stating as such, perhaps so as not to be construed as contradicting the Court's holding in previous

167. *Id.* ¶ 187.

168. Monsignor Oscar Arnulfo Romero y Galdamez v. El Salvador, Case 11.481, Inter-Am. Comm'n H.R., Report No. 37/00, OEA/Ser.L./V/II.106, doc. 3 rev. ¶ 72 (1999).

cases.[169] Rather, the Commission's report indicated that the state had violated "the right set forth in Article 4 of the American Convention, *in conjunction* with the principles codified in common Article 3 of the Geneva Conventions."[170] The Commission has continued to simply note or reference IHL violations, but has ceded using language that would give rise to the impression that it is finding violations of IHL, thus appearing to heed the guidance of the Court.[171]

Although the Commission has not disregarded the Court's holdings on this area of law, it has, however, continued to be more active in its employment of IHL as *lex specialis*, utilizing IHL as an interpretive reference, than has the Court. Thus, one commentator's assessment that the Commission has "realized the error of its ways" and fully adopted the Court's opinion is not entirely accurate.[172] This choice to continue to actively refer to and incorporate IHL, rather than to omit it in its assessment entirely, has been particularly meaningful in light of the Commission's role as a venue for claims lodged against the United States regarding treatment of detainees in the Guantanamo Bay Detention Center.

In exploring the cases that have been brought against the United States at the Commission, two important factors stand out and distinguish these cases from cases against other countries involving IHL. First, previous cases addressing the intersection of IHL and HRL at the Commission principally concerned internal armed conflict.[173] The United States' so-called "war on terror," however, results in the contemplation of IHL violations *outside* the territory of the respondent state.[174] This situation has forced the Commission to contemplate questions of extraterritoriality into its legal analysis. Under the ACHR, a state must respect human rights within its boundaries.[175] Because the United States exercises control over Guantanamo Bay, a detention center *outside* its territory, the Commission has had to seek alternative means of legal analysis. It has adopted an "effective control" test, similar to the analysis of whether occupation exists, to determine whether human rights law merits application in these circum-

169. *See* Moir, *supra* note 113, at 210.

170. *Romero y. Galdamez*, Case 11.481, Inter-Am. Comm'n H.R. ¶ 72 (emphasis added).

171. *See* Extrajudicial Executions and Forced Disappearances v. Peru, Case 10.247 et al., Inter-Am. Comm'n H.R., Report No. 101/01, OEA/Ser.L./V/II.114 doc. 5 rev. ¶¶ 208–15 (2001); Río Frío Massacre v. Colombia, Case 11.654, Inter-Am. Comm'n H.R., Report No. 62/01, OEA/Ser.L./V/II.111 doc. 20 rev. ¶¶ 54–58 (2000); Prada González and Bolaño Castro v. Colombia, Case 11.710, Inter-Am. Comm'n H.R., Report No. 63/01, OEA/Ser.L./V/II.111 doc. 20 rev. ¶¶ 32–35 (2000); Ana, Beatriz and Celia Gonzalez Perez v. Mexico, Case 11.565, Inter-Am. Comm'n H.R., Report No. 53/01, OEA/Ser.L./V/II.111 doc. 20 rev. ¶¶ 45, 54 (2000).

172. *See* Moir, *supra* note 113, at 212.

173. *See* Buis, *supra* note 94, at 9.

174. *See generally* Goldman, *supra* note 52.

175. American Convention on Human Rights, *supra* note 18, art. 1(1).

stance.[176] The Commission has determined that individuals falling within a state's control, yet who exists outside that state's territory, are still subject to the requirements of human rights law under the ACHR. This is the case despite the fact that these situations are also simultaneously governed by IHL.[177] Thus, the Guantanamo cases raise concerns of extraterritorial violations of IHL, undoubtedly complicating the analysis of IHL and HRL in these instances.

These cases brought against the United States at the Commission differ from cases against other states for a second reason: the Commission is the only juridical body within the IASHR with the competence to hear claims lodged against the United States.[178] As a member of the OAS, the United States is obligated by the ADRDM, but refused to ratify the ACHR. As a result, petitions against the United States may be heard at the Commission (with regard to violations of the Declaration), but it has no power to adjudicate alleged violations of the Convention.[179] This also indicates that while the Commission has competence to hear these claims, the Court, normally serving as a binding opinion above the Commission, does not.[180] As a result, petitions brought against the United States do not have the option of an additional level of scrutiny at the Court. It is impossible to speculate to what extent these factors may affect deliberation in United States-related cases at the Commission, though certainly all parties involved are aware of the Commission's lack of binding jurisdiction.

Almost as soon as it gained notoriety as a detention center for 9/11 related suspects, Guantanamo Bay became the subject of legal activity at the Commission. That body received its first communication regarding

176. *See* Sarah Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 229 (2010) ("Regional human rights tribunals, the U.N. treaty bodies, and the International Court of Justice (ICJ) all have recognized that human rights obligations travel with a state or its agents place persons or territories under the state's 'effective control.'").

177. *See* Goldman, *supra* note 52, at 106.

178. *See* Carrie Bettinger-Lopez, *The Inter-American Human Rights System: A Primer*, 42 Clearinghouse Review, 581, 583–84 (describing that the United States, as party to the Charter, is legally bound by all the provisions of the Declaration).

179. *See* American Declaration, *supra* note 81, arts. XVIII, XXV, XXVI; Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 (entered into force Dec. 13, 1951); Protocol of Buenos Aires, Mar. 12, 1970, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A (entered into force Feb. 27, 1970); Protocol of Cartagena, Dec. 5, 1985, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527 (entered into force Nov. 16, 1988); Protocol of Washington, Dec. 14, 1992, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005 (entered into force Sept. 25, 1997); Protocol of Managua, June 10, 1993, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009 (entered into force Jan. 29, 1996); *see also* Roach v. United States, Case 9647, Inter-Am. Comm'n H.R., Resolution No. 3/87, OEA/Ser.L/V/II.71, doc. 9 rev. 1 ¶¶ 46–47 (1987); Smith v. United States, Petition 8-03, Inter-Am. Comm'n H.R., Report No. 56/06, OEA/Ser.L/VII.127, doc. 4 rev. 1, ¶¶ 32–33 (2006).

180. *See* Bettinger-Lopez, *supra* note 178, at 584 ("Since the United States has not ratified the Convention or its Optional Protocol, the court may not hear cases against the United States.").

Guantanamo in 2002, when advocates working on behalf of detainees in Guantanamo Bay filed a request for precautionary measures there.[181] This activity at the Commission arose even as United States Supreme Court cases proved that United States courts are unlikely venues for adjudicating HRL and IHL obligations.[182] Recourse to the Inter-American System became an important alternative forum as U.S. federal courts declined to offer a satisfactory response to allegations of human rights against detainees in Guantanamo. As advocates became more and more frustrated with the lack of protections offered by the U.S., they made a formal request that the Commission issue Precautionary Measures against the United States.[183] The victims referred to in this request were approximately 300 individuals from Afghanistan and elsewhere who had been detained in Guantánamo Bay as 'unlawful combatants.'[184] In filing the request, advocates for the detainees sought to protect a number of critical rights for these individuals, in particular focusing on their right to protections under the Geneva Conventions. These rights included their right to be treated as prisoners-of-war, to be free from arbitrary, incommunicado and prolonged detention, and to not be subject to unlawful interrogations and trials by military commissions in which they could be sentenced to death.[185]

The Commission's response to the request for Precautionary Measures on behalf of Guantánamo detainees found that the United States had violated several articles of the American Declaration on the Rights of Man, to which the United States is a signatory. Specifically, the United States had failed to ensure the right to a fair trial, to due process, and to

181. Letter from Juan E. Méndez, President of the Inter-Am. Comm'n H.R., to Detainees in Guantanamo Bay, Cuba, Request for Precautionary Measures (Mar. 13, 2002) [hereinafter Detainees in Guantanamo Bay, Cuba, Request for Precautionary Measures], http://.umn.edu///.html.

182. *See* Boumediene v. Bush, 553 U.S. 723, 732, 792 (2008) (holding that detained individuals in Guantanamo Bay have the constitutional right to file petitions for habeas corpus proceedings and challenge the legality of their detention and finding that "the constitutional privilege of habeas corpus" extends to aliens detained as enemy combatants at Guantanamo); Al-Bihani v. Obama, 590 F.3d 866, 871 (D.C. Cir. 2010) (deciding not to engage in an assessment of international law and laws of war or "quibble over the intricate application of vague treaty provisions and amorphous customary principles"); Guantanamo Review Task Force, FINAL REPORT, at ii (2010), http://.justice.gov//-final-report.pdf (demonstrating detainees remained in jurisdictional limbo as 48 detainees "determined to be too dangerous for transfer but not feasible for prosecution," and 30 Yemeni detainees were kept in "conditional" detention "based on the current security environment in that country").

183. Richard J. Wilson, *Omar Khadr: Domestic and International Litigation Strategies for a Child in Armed Conflict Held at Guantanamo*, 11 SANTA CLARA J. INT'L L. 29, 38 (2012) (indicating that request for precautionary measures "was filed on February 25, 2002, just after the first detainees began arriving at the base in Cuba").

184. Letter from the United States to the Inter-Am. Comm'n H.R., Response of the United States to Request for Precautionary Measures-Detainees in Guantanamo Bay, Cuba, *reprinted in* 41 I.L.M. 1015, 1023 (2002) [hereinafter Response of the United States to Request for Precautionary Measures–Detainees in Guantanamo Bay, Cuba].

185. *See generally* Inter-American Commission on Human Rights: Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), 41 I.L.M. 532 (2002).

protection from arbitrary arrest.[186] These findings by the Commission incorporated an analysis of IHL through interpretive reference; it did not directly find that the United States had violated IHL, per se, but instead, evaluated the human rights of the detainees (as protected by the ADRM) within the context of IHL as *lex specialis*.[187] The Commission's response to the request for PMs indicated that the United States was, first, "responsible for relocating an individual to an area of its effective control or occupation, thus implying that IHL may be applied in this instance" and, second, that context (peacetime vs. wartime) may have a bearing on particular rights guaranteed under the American Declaration.[188]

When the United States submitted its response to this request for precautionary measures, this action received great attention because for the first time, it provided the world insight into the U.S. legal posture toward its detainees in Guantanamo Bay. In this reply, the United States posited that the Commission—an adjudicative body charged with evaluating human rights—lacked competence to apply IHL, even only in a limited fashion as *lex specialis*.[189] Further, the United States offered a firm rejection of its legal obligation to protect human rights of detainees, indicating that "international human rights law is not applicable to the conduct of hostilities or the capture and detention of enemy combatants, which are governed by the more specific laws of armed conflict."[190] In the alternative, it argued, precautionary measures were unnecessary because the captured individuals, as "unlawful combatants," did not qualify for protection under the Geneva Conventions.[191] As a result, the United States argued, its detention of prisoners at Guantanamo did not violate IHL.

The Commission's response to the United States indicated that international law "dictates that it may be necessary to deduce the applicable human rights standard by reference to international humanitarian law as the applicable *lex specialis*," and reiterated that "in *all* circumstances, the minimum regime of non-derogable human rights remain applicable and

186. *Id.* at 533.

187. *Id.* In his response to petitioners, Commission President Juan Mendez's response indicated that, "[i]n certain circumstances, however, the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law, including the jurisprudence of this Commission, dictates that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis*." *Id.* (citation omitted). *See also* Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L./V/II.98, doc. 6 rev. ¶ 161 (1997); Coard v. United States, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L./V/II.106, doc. 6 rev. ¶ 42 (1999).

188. *Decision on Request for Precautionary Measures*, 41 I.L.M. at 533.

189. *See* Response of the United States to Request for Precautionary Measures–Detainees in Guantanamo Bay, Cuba, *supra* note 184, at 1020–22.

190. *Id.* at 1020.

191. *See id.* at 1018.

subject to supervision by the Commission."[192] The Commission further emphasized this approach in 2003, when it released a special Report on Terrorism and Human Rights.[193] In that report, the Commission emphasized its competence to apply IHL as *lex specialis* in instances in which there was a potential breach of Article 27 or Article 29.[194] Rick Wilson describes the Commission's framework as emphasizing the durability of human rights at all times, including times of armed conflict.[195] Indeed, the Commission's decision of March 12, 2002 predated the U.S. Supreme Court's decision in *Rasul v. Bush*[196] in so far as it emphasized that the United States' effective control of Guantanamo Bay deemed it responsible for the protection of the human rights of those detained there, and triggered the evaluation of the relevant HRL with the guidance of IHL.

The ongoing debate regarding Guantanamo Bay at the Inter-American Commission emphasizes the continued relevance of IHL as the judicial organ continues to grapple with the approaches of analysis adopted in its initial 1997 analysis of the law. Though the Commission has not determined that it is itself capable of finding violations of IHL in respondent states, it has, however, continued to use IHL as an interpretive device to assist in evaluating violations of HRL.[197] Within a set of facts such as those raised at Guantanamo, IHL provides useful interpretive guidance for how fair trial protections should optimally function under ACHR Article 8.[198] It also provides important guidance with regard to the ACHR Article 7 prohibition against arbitrary arrest or detention. As the Commission considered these protections, it acknowledged that a definition of "arbitrary" that was informed by IHL, rather than one derived directly from HRL, would lead to differing results.[199] IHL authorizes the detention of

192. Detainees in Guantanamo Bay, Cuba, Request for Precautionary Measures, *supra* note 184 (emphasis added). Note that one of the non-derogable rights in the Inter-American system is the judicial remedy of habeas corpus. Habeas Corpus in Emergency Situations (Articles 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-Am. Ct. H.R. (ser. A) No. 8, ¶ 44 (Jan. 30, 1987).

193. *See* Report on Terrorism and Human Rights, *supra* note 6, ¶¶ 29, 79.

194. *See id.* ¶¶ 62, 78.

195. Wilson, *supra* note 183, at 38–39.

196. *See* Rasul v. Bush, 542 U.S. 466, 481 n.15 (2004).

197. Detainees in Guantanamo Bay, Cuba, Request for Precautionary Measures, *supra* note 181.

198. *See, e.g.*, Additional Protocol I, *supra* note 42, art. 75(4) ("No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure . . .").

199. PM 259/02–Persons detained by the United States in Guantanamo Bay, http://www.oas.org/en/iachr/pdl/decisions/GuantanamoMC.asp#23jul (last visited Aug. 15, 2016)

> The Commission's decision was based upon, inter alia, its finding that doubts existed as to the legal status of the detainees, including the question of whether and to what extent the Third Geneva Convention or other provisions of international humanitarian law applied to some or all of the detainees and what implications this

combatants during international armed conflicts; therefore, there would be no need to derogate from Article 7 of the ACHR in order to detain an enemy combatant.[200] As Professor Robert Goldman explains, "[t]he Commission has said that during international hostilities consideration must be given to IHL rules as the applicable *lex specialis*" and therefore "[s]ince IHL permits the detention of enemy combatants in such hostilities, the Commission would find that such detentions do not constitute 'arbitrary' depravations of liberty."[201] In evaluating the right of POWs to access trial, however, IHL offers fewer protections than does HRL. As a result, the Commission cannot protect the right of POWs "to be informed of the reasons for their detention, to challenge the legality of their detention, or, in the absence of disciplinary or criminal proceedings, to be provided with access to legal counsel."[202]

Because the protection of the right to trial for POWs receives less protection under IHL than under HRL, application of IHL standards to HRL in this context results in a limitation of the habeus corpus protections under the ACHR. This is a stark distinction between IHL and HRL, as Article 7 of the ACHR may be derogable, the possibility of derogation does not extend to protections including habeas corpus or amparo, irrespective of the existence of a national emergency.[203]

The Commission, however, did temper its position that IHL exclusively governs the treatment of POWs. It did so by indicating that in situations of uncertain duration, protections of IHL may not suffice. In those contexts, IHL might prove inadequate to safeguard the personal liberty of detainees and extra precautions provided under HRL must be considered:

> Notwithstanding the existence of these specific rules and mechanisms governing the detention of persons in situations of armed conflict, there may be circumstances in which the supervising mechanisms under international humanitarian law are not properly engaged or available, or where the detention or internment of civilians or combatants continue [sic] for a prolonged period of time. Where this occurs, the minimum safeguards of IHL may prove inadequate to properly safeguard the minimum standards of detainee treatment.[204]

> may have for their international human rights protections, and that absent clarification of the legal status of the detainees, the Commission considered that the rights and protections to which they may be entitled under international or domestic law could not be said to be the subject of effective legal protection by the State.

200. Goldman, *supra* note 52, at 118.

201. *Id.*

202. Report on Terrorism and Human Rights, *supra* note 6, ¶ 142.

203. Judicial Guarantees in States of Emergency, Articles 27(2), 25 and 8 of the American Convention on Human Rights, Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶¶ 31–33 (Oct. 6, 1987).

204. Report on Terrorism and Human Rights, *supra* note 6, Executive Summary, ¶ 14.

Thus, the Commission refuses a strict analysis based on a rule that the existence of armed conflict results in the unambiguous application of IHL norms. Rather, the Commission seeks to balance IHL and HRL, and recognizes that elements of uncertainty may exist, such as the length of detention, which may become a key factor in determining when and if the protections under IHL are insufficient. Consider, for example, the issuance of precautionary measures with regard to detainees at Guantanamo Bay. Weighing a number of mitigating factors in that instance, such as the length and conditions of detention, the Commission determined that it was so concerned with the conditions that it relied on the stronger protections of HRL rather than those offered under IHL.[205]

As demonstrated by jurisprudence of the Inter-American System, the regional bodies in the Americas initially attempted a more extreme approach toward enforcement of IHL through finding states to be in direct violation thereof. Ultimately, since the competence of the American Convention does not explicitly grant the bodies of the system to find this violation, the Court has determined that the only way in which IHL should be incorporated in its jurisprudence is through an interpretive approach. The specific steps taken within this approach are described in the next section, and they are evaluated in light of the internationally recognized standard of *lex specialis*.

IV. Evaluating Enforcement

A. *Deconstructing the Interpretive Reference Approach*

The previous section offers an overview of the varied approaches that the Commission and Court have adopted when adjudicating cases that arise from armed conflict. This analysis demonstrates a number of characteristics of the Court and the Commission's treatment of the intersections between HRL and IHL. First, the Inter-American System has explored two general approaches over the years when confronted with the intersection. The more controversial approach, the direct application of IHL, was initially favored and ardently defended by the Commission in early cases. Yet, eventually, the Court determined that for a number of reasons rooted in the competence *rationae materiae* of the judicial organs of the regional system, it fell outside of the jurisdiction of the Inter-American System to directly find violations of IHL had been committed by states. Thus, the Court determined that the Inter-American System should offer no official pronouncement on whether IHL had been violated by States. The less controversial approach, which raises fewer concerns regarding the jurisdiction of the System, is the interpretive reference approach to employment

205. Inter-American Commission on Human Rights: Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), 41 I.L.M. 532, 533 (2002) (stating that "the Commission considers that precautionary measures are both appropriate and necessary in the present circumstances, in order to ensure that the legal status of each of the detainees is clarified and that they are afforded the legal protections commensurate with the status that they are found to possess. . .").

of IHL. Thus, the System's choice to rely primarily on the interpretive reference approach, rather than direct application of IHL, is an *a priori* concern of personal jurisdiction rather than substantive analysis.

Once the Court, in the *Las Palmeras* decision, essentially resolved the jurisdiction question and clarified that direct application of IHL was outside its competence, judicial organs of the Inter-American System were left to apply the interpretive reference approach to the intersections between IHL and HRL. In order to examine the technique more closely, this section deconstructs the interpretive reference resolution upon which the Court and Commission have arrived. This approach offers a resolution to an emblematic challenge of horizontal fragmentation of laws. When a tribunal faces multiple regimes of international law that may apply simultaneously to a particular set of facts, the correct approach, as offered by the ICJ, is to utilize *lex specialis*. Recent scholarship, and the jurisprudence in the Inter-American System, however, has demonstrated that the tool of *lex specialis* does not represent a singular, cogent approach.[206]

Typically defined as allowing a specialized body of law to replace the more general body of law, *lex specialis*, when considered with regard to the intersection of IHL and HRL, might lead to a general conclusion that since IHL is specialized (applying in times of conflict), and HRL is general (applying always), that IHL would take priority over HRL. Yet the approach is much more complicated in practicality and the supposed international consensus of this technique leaves many questions unanswered. Does *lex specialis* refer to the prioritization of an entire regime of law, such as IHL, or simply to the particular prioritization with regard to specific norms? Is *lex specialis* an approach that seeks to avoid a conflict between norms in IHL and HRL, or does it seek to resolve the conflict between them? In several recent articles, Marco Milanovic's scholarship clarifies the origins of the concept, and delineates at least three distinct methods of applying the *lex specialis* concept.[207]

First, the "total displacement" version of *lex specialis* relies on the notion of norm conflict avoidance. This approach is one in which IHL entirely displaces HRL, thereby avoiding any potential normative conflict that simultaneous application of the two might entail. Yet the total displacement approach to *lex specialis* flies in the face of multiple human rights bodies, courts, and scholars.[208] In assuming that any conflict between the two must be avoided, and thus displacing human rights, this

206. Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORDIC J. INT'L L. 27, 46 (2005); Nancy Prud'homme, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, 40 ISR. L. REV. 355, 367-68 (2007); Droege, *supra* note 13, at 523–24. *See generally Fragmentation of International Law*, *supra* note 23, ¶¶ 56-122.

207. *See generally* Milanovic, *Norm Conflict*, *supra* note 14; Marko Milanovic, *The Lost Origins of Lex Specialis: Rethinking the Relationship Between Human Rights and International Humanitarian Law*, *in* THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS (Jens David Ohlin ed., forthcoming), http://ssrn.com/abstract=2463957 [hereinafter *Lost Origins*].

208. Milanovic, *Lost Origins*, *supra* note 207.

approach rejects a general consensus in international law. Further, the total displacement approach is about conflict between regimes of law, rather than specific norms within each set of law. Thus, this approach is overbroad, since it is specific norms within the regimes (such as the interpretation of right to life, or detention) that may differ and need to be resolved.

A second version of *lex specialis* is the partial displacement approach, which is a version of a "strong" *lex specialis* approach. This approach seeks to resolve conflicts between norms.[209] Last is a version that relies on norm conflict avoidance or a weak *lex specialis* that only allows the specialized body of law into the conversation as an interpretive means. Thus, it has been interpreted and applied in a variety of methods.[210]

In evaluating the choices of the Inter-American System, the Commission's choice to find that States had indeed committed violations of IHL represents a conflict resolution approach in that it created a hierarchy between IHL and HRL. Meanwhile, the interpretive reference approach takes the middle ground to *lex specialis*, allowing IHL to be inserted when application of HRL leaves a critical omission or is missing appropriate conflict-related definitions. This approach requires the tribunal to engage in a four-step analysis, as I describe below.

The first step in the application of the interpretive reference approach to enforcement of IHL at a human rights tribunal is a general identification of the potential intersection of conflicting applicable laws. In the cases at the Inter-American System that address both IHL and HRL, the tribunal must recognize that the facts of a case arise from a situation of armed conflict, occupation or extended control, as is required for triggering and applying IHL. It is important to note that the tribunal distinguishes between armed conflict and simple "disturbances and internal tensions."[211] The Commission has made this distinction a number of times, clarifying that "riots, sporadic acts of violence and non-organized rebellions" of short duration and not severe, are excluded in principle from the protection of the law of war, as in conformity with Article 1.2 of Geneva Convention Additional Protocol II.[212]

Typically, human rights bodies deem it appropriate to continue to apply HRL whenever a state is able to address internal unrest through traditional law enforcement tools. When internal disturbances spark genuine armed conflict, on the other hand, IHL applies.[213] For example, in *Abella*,

209. Milanovic, *Norm Conflict*, *supra* note 14.

210. Droege, *supra* note 13, at 523-24; Lindroos, *supra* note 206, at 46; Prud'homme, *supra* note 206, at 368.

211. Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L./V/II.98, doc. 6 rev. ¶ 148 (1997).

212. Laurence Burgorgue-Larsen & Amaya Úbeda de Torres, *"War" in the Jurisprudence of the Inter-American Court of Human Rights*, 33 HUM. RTS. Q. 148, 160 (2011) (stating the Commission finds that "riots, sporadic acts of violence and non-organized rebellions'—if they are short-lived and not characterized as serious—are in principle excluded from the protection of the laws of war in accordance with Article 1(2) of the Additional Protocol II to the Geneva Conventions").

213. *See* Byron, *supra* note 43, at 865.

the Commission first addressed the question of whether the incident involved a mere "internal disturbance or tensions," or instead constituted a "non-international or internal armed conflict."[214] The answer would determine whether the Commission would apply IHL or human rights principles on the use of force. Concluding that the *Abella* incident could not "be properly characterized as a situation of internal disturbances,"[215] the Commission held that IHL would supply the relevant proportionality standard to judge whether the rights of the individuals killed were violated.[216]

Once it has determined that IHL may apply, a second step for a human rights tribunal is the identification of the specific violations of law that may be altered, affected, or re-defined by the second area of law. Notably, the Inter-American System's approach of interpretive reference has avoided the overbroad "regime-conflict" approach feared by Milanovic, and the consideration instead hones in on specific norms that may generate conflict between IHR and HRL. The Commission examines whether the facts arising from armed conflict are evaluated differently under norms of IHL and HRL. One particularly helpful way to explore the difference between IHL and HRL is through examination of the derogable instances and consideration of the differences between them, which can lead to important new definitions. For example, in *Abella*, the determination of whether the right to life had been violated turned on whether the IHL definition of combatants applied.[217] In the Guantanamo cases, a crucial norm distinction was whether indefinite detention was permissible, and whether those detained qualified as POWs.[218] Indeed, the texts of human rights treaties clarify that "States are supposed to use derogations to avoid conflicts with IHL,"[219] and therefore, intersections between IHL and HRL are likely when these derogations come into play.

Third, a tribunal must do a contextual evaluation of the issue at hand, utilizing the appropriate IHL norm to assist in determining whether human rights violations have occurred. As evidenced by the *Abella* decision, the distinction that IHL provides between combatant and civilian protection of the right to life proved crucial, resulting in the Commission being unable to find that the state had committed a violation of the ACHR. This contextual evaluation is the key moment in the application of the *lex specialis* approach, though as described above, not all *lex specialis* approaches are one and the same. The Inter-American System has arrived at an approach that can most fittingly be described as a partial displacement or a norm-specific displacement position. With this version of a "strong" *lex specialis*, the Inter-American System has clarified that it will

214. *Abella*, Case 11.137, Inter-Am. Comm'n H.R. ¶ 148.

215. *See id.* ¶ 154.

216. *Id.* ¶ 161.

217. *Id.* ¶¶ 178–79 (discussing the definition of a combatant).

218. Inter-American Commission on Human Rights: Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), 41 I.L.M. 532, 533 (2002).

219. Milanovic, *Norm Conflict*, *supra* note 14, at 24.

seek guidance from IHL when applicable, while certainly maintaining its competence to apply HRL conterminously. Importantly, this evaluation is distinct from the jurisdictional rationale discussed by the Court and the Commission, which is an *a priori* concern of personal jurisdiction rather than substantive analysis.

Fourth, the decision that the tribunal makes must be rooted in IHL, and thus achieve a balance between the two arms of law and remain cognizant of the relationship between the two and the need to apply them simultaneously. This can be termed a jurisdiction-specific finding. For example, the jurisdiction of the IACtHR only allows that Court to hold a state responsible for a violation of human rights.[220] As a result, the Court's finding under the interpretive reference resolution will never be a direct, explicit condemnation of a state's violation of IHL. Despite this, the Commission's findings of State violations of human rights may rely upon definitions with IHL, and as evidenced by the Commission's first case after *Las Palmeras*, may even obliquely notes that an IHL violation has occurred, though under this approach, it will take great pains to refrain from finding a direct violation thereof.[221] When the IACtHR rejected the Commission's attempt to directly apply IHL, thus, it not only challenged the jurisdictional questions, but also shifted the version of IHL that was applied. The Commission had attempted a version of IHL application that was a norm of conflict resolution, meaning that it prioritized IHL because it found the State directly in violation of it.[222]

Thus, the interpretive reference approach *is* a *lex specialis* approach—but it is crucial that we are clear about *which lex specialis* approach we reference. As a result of the Inter-American System's choice to interpret, rather than to directly apply IHL, no juridical body exists to determine that States in the Americas have committed violations of IHL. There is no "hard" law enforcement option for IHL. As I elaborate in the following section, however, the lack of a hard law or binding decision finding IHL violations does allow space for other forms of enforcement or compliance with IHL.

B. *Evaluation of the Interpretive Reference Method as Enforcement of IHL*

What is the enforcement impact of the interpretive reference approach to IHL adopted by the Commission? Currently, the interpretive reference status quo permits analysis utilizing an IHL framework, but does not allow the Commission to find direct violations of IHL.

One obvious result of this approach is that no juridical body exists to determine that States in the Americas have committed violations of IHL, resulting in a lack of hard techniques for the enforcement of IHL. I pro-

220. American Convention on Human Rights, *supra* note 18, art. 62(3).

221. Monsignor Oscar Arnulfo Romero y Galdamez v. El Salvador, Case 11.481, Inter-Am. Comm'n H.R., Report No. 37/00, OEA/Ser.L./V/II.106, doc. 3 rev. ¶¶ 66-69 (1999).

222. *See* Milanovic, *Norm Conflict*, *supra* note 14, at 24.

pose that the use of IHL as an interpretive reference, despite its lack of a hard technique for enforcement, has a number of advantages, and constitutes an effective soft law means of enforcing of IHL.[223] In concert with other scholars who have asked whether and why international law matters, I propose that hard law outcomes are not the only measure of success when evaluating enforcement of IHL.[224] Professors Jinks and Goodman have examined the efficacy of various hard and soft law techniques with regard specifically to the application of human rights.[225] They argue that on some occasions "'soft law' mechanisms will be more effective in establishing durable norms" than will hard law techniques.[226] I conclude that, similarly, soft methods adopted by the Inter-American System may indeed be more effective at promoting the values of IHL than would hard law techniques, which might produce binding judgments against nations.

The argument in favor of the hard law approach is attractive: judgments of the Inter-American Court (though not the Commission) are binding upon State parties. As has been discussed elsewhere, significant symbolic power can be attributed to a tribunal emitting a decision, and in particular, the words used to emit that decision can bear linguistic meaning that may be larger than the practical effect of the judgment, augmenting the impact of a tribunal's holding.[227] But scholars have emphasized a number of concerns, resulting in the conclusion that human rights tribunals should not employ IHL. Those concerns include (1) that human rights adjudicators are not necessarily experts in IHL; (2) that IHL is a system of law that relies on balanced application between parties who are equals (which is not how human rights bodies function); and finally, (3) that the utilization of IHL by human rights tribunals with limited jurisdiction constitutes a violation of the VCLT since states may not have consented to direct application of these laws, regardless of whether they are still party to those treaties. I discuss each of these concerns in turn, examining whether the concern applies only to the direct application of IHL, or

223. In the realm of international law, hard law refers to those mechanisms which are legally binding, such as treaties, conventions and customary law, as opposed to soft law commitments which are not binding. *See generally* W. Michael Reisman, *A Hard Look at Soft Law*, 82 AM. SOC'Y INT'L L. PROC. 373 (1988).

224. *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603 (1996–1997); *see generally* C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850 (1989).

225. *See* Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 689 (2004).

226. *Id.*

227. *See, e.g.*, David Luban, *Calling Genocide by its Rightful Name: Lemkin's Word, Darfur, and the UN Report*, 7 CHI. J. INT'L L. 303, 309–10 (2006) (describing how the word "genocide" has been transformed into a linguistic device with the power to rouse countries and multi-national organizations to take humanitarian intervention in the face of the most tragic human rights abuses, or to make headlines if they refuse). I do not claim that violations of IHL take on the same symbolic import as the crime of genocide; rather, I claim that the emission of a decision, a conveyance of guilt from a tribunal, does bear a symbolic importance.

whether the concern is diffused if IHL is merely applied as an interpretive reference rather than directly applied.

(1) *Lack of Expertise*: In recognition that the Commission and the Court are experts in HRL, but not necessarily in IHL, critics have expressed concern that non-experts should not be responsible for determining violations of IHL. Theodore Meron, articulating a concern that is unsurprising in an era of fragmentation of international law, has articulated the concern that a lack of expertise may result in "conclusions that humanitarian law experts find problematic."[228] Furthering concern regarding the role of expertise, Rene Provost has opined that human rights adjudicators may unwittingly preference their interpretation of IHL in the direction of HRL, due simply to their great familiarity and practice in human rights law.[229] One potential way to ameliorate concerns regarding lack of expertise in IHL is for adjudicative human rights bodies to offer trainings in IHL, as the IASHR has done.[230] Another potential problem arising from the integration of IHL and HRL is that the intersections between the two may give rise to a grey zone of uncertainty of interpretation, when IHL has traditionally relied on bright lines and clear categories in order to provide guidance and instruction to military personnel who may need to apply these rules in real-life situations in conflict zones.[231] The concern here is that the high standards laid out within a human rights framework may set unrealistically high standards that are not feasible in practical application when speedy decision-making is required.

If adjudicators who typically deal with human rights concerns are engaged in analysis of IHL, a lack of expertise in this complex field may have the potential to cause problems. Determination of whether or not IHL is triggered by a particular context, and whether that context should qualify as an armed conflict or occupation exists are legal determinations that cannot always be resolved through simple tests. Specialized expertise in IHL may be helpful in making these determinations.[232] Were the Commission

228. Meron, *supra* note 32, at 247.

229. *See* RENÉ PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW 161 (Cambridge U. Press eds., 2005).

230. *See* IACtHR Annual Report (2002), OEA/Ser.L/ V/III.57, doc. 5 (111) 45 (2003) (referring to the "Second Study and Exchange Workshop on International Humanitarian Law (IHL) and Related Issues").

231. *See* Eden & Happold, *supra* note 25, at 445.

232. Broad scholarship exists here discussing the establishment of armed conflict or occupation. *See generally* John A. Cohan, *Legal War: When Does it Exist, and When Does it End?*, 27 HASTINGS INT'L & COMP. L. REV. 221, 223–24 (2004) (assessing the existence of a war in the legal sense and whether wartime legislation and obligations are triggered); Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MIL. L. REV. 66, 69–77 (2005) (distinguishing rebellion and insurgency from belligerency and internal armed conflict which is capable of invoking rights and obligations under IHL); Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 AM. J. INT'L L. 236, 241 (1998) (criticizing the characterization of armed conflict following the ICJ decision in Nicaragua and arguing that "[t]he reality, dimensions, scope and duration of a foreign military intervention, the foreign state's direct participation in the hostilities, . . . the relative involvement of local and foreign forces,

or Court to insufficiently evaluate whether armed conflict or occupation exists, that could diminish their capacity to evaluate subsequent HRL violations.

Perhaps the most compelling logic offered by the Commission for utilizing IHL as interpretive reference is that finders-of-fact benefit from the guidance of IHL when contemplating situations of armed conflict. Yet if the Commission could not refer to IHL in preparing country reports, 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. One area where the Commission needs to refer to IHL is in distinguishing whether an individual should be considered a non-combatant or a legitimate military target.[233] In evaluating this question, the Commission indicated that, "the provisions of conventional and customary humanitarian law generally afford victims of armed conflicts greater or more specific protections than do the more generally phrased guarantees in the American Convention and other human rights instruments."[234] This generalization that victims of armed conflict will gain additional protections if IHL is employed demonstrates that the clarification offered by IHL can be instrumental in providing victims recourse.

(2) *Imbalance Between Parties*: The concept of reciprocity within IHL has long been held to be a central aspect of IHL. In other words, IHL can only be applied between equal parties with equal rights and obligations. This principle leads to a significant concern if IHL is applied by HRL tribunals who only have jurisdiction to hear claims against states: the evaluation of accountability is necessarily imbalanced, since its mandate essentially compels it to ignore potential IHL violations of non-state actors.

The *Abella* decision demonstrates how concerning an imbalance between parties can be, when a human rights tribunal finds itself competent to find that a State has committed a violation of IHL.[235] The facts demonstrated that both the attackers of the Tablada military base and the Argentine military had committed violations of IHL. Yet, because the Commission's *ratione persone* only permits evaluation of acts committed by State actors, but not those of non-State actors, it was forced to limit its application of IHL to Argentina's conduct alone. The Commission's lack of capacity to consider the actions of the armed opposition group led to a decision that was necessarily imbalanced. Although the Commission attempted to rectify this imbalance by observing that both parties had obligations under IHL, the nature of proceedings at a human rights body prevented the Commission from explicitly analyzing the actions of the

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and . . . factual and military considerations" should determine the existence of armed conflict).

233. *See* Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L./V/II.98, doc. 6 rev. ¶ 161 (1997).

234. *Id*. ¶ 159.

235. Zegveld, *supra* note 22, ¶ 21 ("Application to only one party to the conflict, the State, may be considered as contradicting a basic principle of humanitarian law, according to which both parties to the conflict have equal rights and duties.").

non-state actor. It has also aimed to ameliorate this situation through its power to examine the general situation of human rights in a country,[236] and through reports and missions, has recognized the role that non-state actors play within conflict.[237] Despite these attempts to integrate the balance requirements of IHL into the analysis at a human rights body such as the Commission, it is clear that jurisdictional constraints within the IASHR do not allow a completely balanced assessment of IHL violations.

Thus, the Commission's activist and direct application approach, as demonstrated in *Abella*, results in an imbalanced application of IHL. This highlights one of the principle critiques of tribunal enforcement of IHL: since IHL is reliant on the premise of conflict between equals,[238] a tribunal evaluating the actions of only one of the parties will be doomed to an imbalanced evaluation. This problem can be avoided to some degree through the interpretive reference approach. If IHL is not directly applied, but instead only used as interpretation, the imbalance still may remain, but is less problematic if there is no official proclamation of a violation having been committed by either party. Even though the interpretive approach still requires reference to a violation of IHL, it would not be as problematic since it allows reference to any violations of IHL without discrimination.

(3) *Potential for Violations of the Vienna Convention on the Law of Treaties (VCLT)*: Finally, principles of international treaty interpretation, most centrally embodied by the VCLT, have been cited as evidence that IHL should not be applied by human rights bodies of the Inter-American System. The American Convention itself is explicit that no other denunciations, aside from those delineated in the Convention itself, may lead to proceedings. Further, the VCLT requires that a State's acts may only be evaluated if the state has agreed to be bound by that treaty and has thus offered its express consent.[239] This principle was reiterated by the Court's holding in *Las Palmeras*:

> The American Convention is an international treaty according to which States Parties are obliged to respect the rights and freedoms embodied in it and to guarantee their exercise to all persons subject to their jurisdiction. The Convention provides for the existence of the Inter-American Court of Human Rights to hear 'all

236. Diego Rodríguez-Pinzón & Claudia Martin, The Prohibition of Torture and Ill-treatment in the Inter-American Human Rights System: A Handbook for Victims and Their Advocates 148 (Boris Wijkström ed., 2006).

237. *See generally* Third Report on the Human Rights Situation in Colombia, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.102, Doc. 9 rev. 1 (1999) (explaining that the Commission must rely on international humanitarian law because the Convention lacks standards of distinction and proportionality).

238. *See* Meron, *supra* note 32, at 240; *see also* Byron, *supra* note 43, at 883; *Fragmentation of International Law*, *supra* note 23.

239. Vienna Convention, *supra* note 95, art. 47.

> cases concerning the interpretation and application' of its provisions (Article 62.3).[240]

The requirement that states only be evaluated regarding norms to which they have offered their express consent is particularly salient considering the current political climate at the Inter-American System. In recent years, more and more states have expressed concerns regarding the viability and impartiality of the IASHR.[241] If the Court and the Commission wish to continue engaging with states as parties, the states must have confidence that the system is operating in conformity with the requirements of international law and the VCLT in particular. Yet it is inaccurate to characterize these states as refusing to follow IHL – although these states did not consent to the IASHR's evaluation of their compliance with IHL, these states did consent to comply with IHL norms by signing onto the Geneva Conventions.[242] If states are willing to sign onto a treaty committing to respect IHL, but are not willing to have their actions analyzed, this may signal as undermining their commitment to the purpose of the treaty itself.

Certainly, the VCLT does not mandate that states comply with treaties if they are not party to those treaties. Yet, in interpreting whether a treaty has been violated, treaty parties may consider "any relevant rules of international law applicable in the relations between the parties."[243] This provision of the Vienna Convention mirrors Article 29 of the ACHR, both of which support the inclusion of IHL in any context that may be pertinent. As explained by Alexsander Orakhelashvili,

> [t]he subjects governed by one body of law are frequently also governed by the other body of law, and whatever the formal and procedural constraints on the powers of national and international decision-making bodies, in the exercise of their mandate they are expected, at least by implication, to consider the impact of both human rights law and humanitarian law, to reach the outcomes permissible at the level of international law.[244]

Further, states are responsible for respecting both IHL and HRL as their relevant international obligations dictate.[245] Although required to respect IHL, a state's supervisory instruments do not necessarily have competence

240. Las Palmeras v. Colombia, Judgment on Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 67, ¶ 32 (Feb. 4, 2000).

241. During the October 2012 Sessions of the IACHR, member States gathered to discuss the crisis in the Inter-American system and potential modifications to strengthen the System. *See* Press Release, Inter-Am. Comm'n H.R., *IACHR Convenes Hearings on Strengthening of the Inter-American System on Human Rights* (Oct. 10, 2012), https://.oas.org/ //_center///.asp.

242. *See* Geneva Convention IV, *supra* note 3.

243. Vienna Convention, *supra* note 95, art. 31(3)(c).

244. Orakhelashvili, *supra* note 26, at 168.

245. Buis, *supra* note 94, at 274.

to adjudicate breaches of IHL without state consent. Despite the limitations of the requirement of "express consent" under the VCLT,[246] on occasion (as evidenced by *Abella*) IHL benefits a state's position, rather than the petitioner.

Concerns regarding the violation of the "express consent" aspect of the VCLT are most relevant in considering the direct application of IHL. In the case of IHL used as interpretive reference, no state party to the ACHR is at risk of being held to standards to which it has not expressly consented. This rationale, however, does not solve concerns regarding differing interpretations of IHL. For example, during the *Guantanamo* litigation at the Commission, the United States declined to define its detainees there as POWs, instead calling them unlawful enemy combatants and depriving them of the protection of the Geneva Conventions. As evidenced by this example, the interpretive reference solution cannot solve all potential conflicts of interpretation, but at a minimum, it expressly avoids holding countries to standards to which they may not be bound.

As highlighted above, none of these three concerns are entirely abated by human rights tribunals employing the interpretive reference approach rather than a direct application of IHL. The fact remains, however, that the stakes are somewhat lower if the tribunal is not seeking to hold a country in violation of treaty obligations. The soft law approach of interpretive reference, though it does not offer a binding decision that States have violated IHL, offers many enforcement advantages. Goodman and Jinks identify that there tends to be among scholars a shared sense that "compliance is best induced by the exercise of coercive authority–such as military intervention or binding decisions of third-party monitoring institutions."[247] They claim that an acculturation approach characterized by "soft law" mechanisms may be most effective in establishing durable norms.

Another advantage of the interpretive reference approach is that it benefits HRL, as it leads to a more nuanced, developed and sophisticated application of HRL informed by IHL, as discussed throughout this paper in the jurisprudence at the Inter-American System. Second, the approach benefits enforcement of IHL as well. Although the interpretive reference approach denies the Inter-American System the capacity to mandate binding decisions or material sanctions for violations of IHL, other soft law effects are demonstrated by this approach. This lack of jurisdiction to declare states to be in violation of IHL may not be as dire as some perceive.

Despite the lack of hard law enforcement at the Commission, the interpretive reference approach enables the Inter-American System to function within a delicate political environment. As a treaty regime that is often subject to criticism from member-states, and more recently, subject to threats and withdrawals of jurisdiction, the Inter-American System has

246. S*ee supra* Part II.B. The Vienna Convention on the Law of Treaties prohibits the enforcement of treaty obligations on States that have not consented to be bound. *See* Vienna Convention, *supra* note 95, pmbl. ("Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.").

247. Goodman & Jinks, *supra* note 225, at 689.

learned to walk the delicate line in order to maintain legitimacy in the current political arena.[248]

Additionally, consideration of the relevance of IHL may be important simply as a reminder to States of their IHL obligations. It is quite possible that states' cognizance of IHL may play a large role in these norms being respected, as buttressed by Harold Koh's claim that "[l]ike most laws, international rules are rarely enforced, but usually obeyed."[249] Due to the limited options for enforcement, if human rights bodies are able to employ IHL in any manner, this practice has the potential to strengthen States' compliance with IHL.[250] Increased awareness of and references to IHL may, in turn, prompt States to consider means of domestic accountability for IHL breaches, which conforms with the initial vision of enforcement when the Geneva Conventions were first drafted.[251]

Conclusion

This Article has explored the complexities that arise when human rights tribunals, such as the Inter-American Commission and Court of Human Rights, are confronted with the option to enforce IHL. In many instances, facts may give rise not only to use of international HRL, but also of IHL. This Article has traced the two intertwining means by which IHL has been incorporated into the IASHR's jurisprudence. First, in several specific cases, the Commission chose to find itself capable to apply IHL to facts arising from armed conflict. In those specific cases, the Commission determined that states involved had, in fact, violated their legal obligations under the laws of war. Second, on numerous occasions, both the Court and the Commission have utilized IHL as an interpretive reference which provides context and aids in interpreting the nuances of HRL during conflict. This practice, which can be viewed as a vigorous application of the *lex specialis* principle, has been critical for the adjudicators of the IASHR. It has proved to be integral to those human rights organs in interpreting complex legal norms which are significantly altered during armed conflict.

The *lex specialis* approach is certainly a less controversial one than the "direct application" approach employed on limited instances by the Commission. It is less controversial largely because it stems directly from ICJ jurisprudence interpreting the proper relationship between IHL and HRL, although that Court declined to offer any practical guidance as to how this interplay should operate in practice. The Court continues to interpret its jurisdiction *rationae materiae* as preventing the direct application of IHL,

248. *See generally* Dulitzky, *supra* note 12 (describing the recent crisis within the Inter-American System of Human Rights when States have renounced their membership in the system and criticized it as overly active in its reproach of States).

249. Koh, *supra* note 224, at 2603.

250. *See* Heintze, *supra* note 47, at 798.

251. *See* Byron, *supra* note 43, at 845.

and therefore, direct application of IHL is not considered to be within the current scope of either the Court or the Commission.

Despite these restrictions, the IASHR does allow use of IHL as an interpretive tool, as it does not conflict with the jurisdictional restraints imposed on human rights tribunals in their constitutive treaties.

This Article does not simply claim that the IASHR should, or should not, employ IHL. Instead, this Article posits that there is no legal basis for preventing the usage of IHL as an interpretive reference. This approach brings greater precision to holdings regarding violations of international human rights law within the context of armed conflict or occupation.

When this approach is utilized by the IASHR, however, an important caveat must be noted regarding the importance of expertise, as discussed extensively above. A lack of expertise in the area of IHL at the Commission or the Court may lead to greater confusion and fragmentation about the appropriate use of IHL as an interpretive reference when these organs adjudicate human rights claims that occur during times of conflict. Concern regarding the lack of expertise should not preclude the employment of IHL in this manner at human rights bodies; rather, this concern should serve as a reminder of the need for appropriate training and for great care when an adjudicative body ventures outside of its zone of comfort.

This Article has also explored the benefits and drawbacks of human rights bodies finding direct violations of IHL among state parties. Considering the paucity of tools with which to evaluate states on their compliance with IHL, it is admirable and understandable that human rights advocates would encourage the practice of direct application of IHL. In particular, if the Court for example, is already conducting a de facto evaluation of IHL in order to utilize it as an interpretive reference, efficiency might argue that that same body should be permitted to simply determine whether or not the state has committed a violation of IHL. Yet there are number of significant jurisdictional concerns that ultimately have led the court to determine that direct application of IHL is inappropriate.

This Article draws the conclusion that human rights tribunals may utilize the interpretive reference approach as a soft law technique to promote enforcement of IHL. This approach, considering the jurisdictional restraints within the system, is an apt solution, as evidenced by *Bámaca Velazquez*. There, the Court held that, "the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention."[252] This holding reveals the critical distinction between permitting mention of IHL as an interpretive reference, as opposed to having competence to find IHL violations.

Despite the lack of capacity of a human rights body to find direct violations of IHL, this does not necessarily diminish the power of any reference to the Geneva Conventions. In the process of using IHL to interpret human rights law, an adjudicative body must reference the relevant IHL

252. Bámaca Velásquez v. Guatemala, Judgment, Inter-Am Ct. H.R. (ser. C) No. 70, ¶ 209 (Nov. 25, 2000).

norms, thus flagging that a conflict situation exists triggering the Geneva Conventions. This mention alone can serve as an important reminder to State parties that conflict situations give rise to additional obligations.[253] Certainly, any reference to IHL within a judgment on human rights meets the goal of shining light on IHL obligations, and does so without the increased controversy of directly applying IHL.

In addition to flagging that a conflict situation exists in which the Geneva Conventions apply, reference to IHL by a human rights body can play a significant role in promoting self-monitoring of IHL by States during conflict. Even Colombia, a country who was hostile to the finding of direct violations of IHL by the Court, did not question that it was obligated to comply with certain requirements under IHL when these were flagged by the Court in *Las Palmeras*.

In the seminal *Las Palmeras* case, the Court rejected the Commission's application of IHL due to its evaluation of the limitations of jurisdiction *rationae materiae*. Since then, both the Commission and the Court have limited their use of IHL to interpretation, not application, of the law of war.

Will there come a time when the Inter-American System once again will become more hospitable to the finding of IHL violations by states? Despite the Court's rebuke of this approach, it should not be dismissed as a fringe or radical approach. The distinguished members of the Commission at the time saw fit to apply the law in this way, and further, even a Judge Cançado Trindade, former President of the Court, also approved of the Commission's approach in his separate opinion in *Las Palmeras*. There, he described the Commission's approach as a "*coextensive* interpretation and application of Article 4 of the American Convention on Human Rights and of Article 3 common to the four Geneva Conventions on International Humanitarian Law."[254] Were a majority of adjudicators on the Commission or the Court to adopt this mindset, it is possible that the use of IHL within the IASHR could shift once again.

Other circumstances, external to the Inter-American System, could also persuade the Court to allow direct violations to be found against state parties. These might include situations in which other regional bodies agree to adopt this approach, or if the International Law Commission or the International Court of Justice were to take a bold and unambiguous position regarding the proper role of IHL within human rights adjudicative bodies. These extreme contexts might allow the Court to reconsider its interpretation of the proper *rationae materiae*.

Currently, the Inter-American System's approach with regard to analysis of IHL is one that achieves a delicate and critical balance: it is limited

253. *See* Zegveld, *supra* note 22, at 509 (making a similar claim, that "[I]t is not obvious that the aim of protection can only be achieved by applying international humanitarian law. Would it not have sufficed for the Commission to apply provisions of the American Convention interpreted in the light of international humanitarian law?").

254. Las Palmeras v. Colombia, Judgment on Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 67, ¶ 2 (Feb. 4, 2000) (separate opinion of Judge A.A. Cançado Trindade).

in jurisdiction, yet remains politically viable within a regional system reliant on state support. The adjudicative bodies are limited in their capacity to emit binding decisions regarding any state violation of IHL norms, since interpretation of IHL is limited by the Court's strict reading of its jurisdiction *rationae materiae* during armed conflict. Still, the balance that has been achieved with regard to the use of IHL is significant, considering the controversial nature of direct application of IHL. Perhaps more importantly, this balance is also effective, considering the significant symbolism of utilizing IHL as an interpretive reference, reminding states of their obligations under IHL during times of armed conflict.