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The Inter-American Commission on Human Rights and international humanitarian law: A comment on the *Tablada* Case

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On 30 October 1997, the Inter-American Commission on Human Rights [1] (hereafter the Commission) adopted its report in the so-called *Tablada* case [2]. The case concerned an attack launched by 42 armed persons on military barracks of the national armed forces in 1989 at La Tablada, Argentina. The attack precipitated a battle lasting approximately 30 hours and resulting in the deaths of 29 of the attackers and several State agents. The surviving attackers filed a complaint with the Commission alleging violations by State agents of the American Convention on Human Rights (hereafter the American Convention) and of rules of international humanitarian law [3]. In its report the Commission examined in detail whether it was competent to apply international humanitarian law directly. It answered this question in the affirmative. [4]

This decision is of considerable importance. It means that the Commission, a regional inter-governmental human rights treaty body, is competent to invoke international humanitarian law and that it can apply the rules thereof to States party to the American Convention. This decision may pave the way for future petitions accusing, for instance, Colombia, Mexico or Guatemala of violations of international humanitarian law. It 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.

Should the *Tablada* decision set a precedent? The answer depends in part on the strength of the arguments for applying international humanitarian law in a given case. The arguments presented by the Commission to this effect are examined below, but first let us say a few words on why the Commission deemed it important that it should apply rules of international humanitarian law at all.

The Commission explained that it should apply humanitarian law because this enhanced its ability to respond to situations of armed conflict. It found that the American Convention, although formally applicable in times of armed conflict, was not designed to regulate situations of war. In particular, the Commission noted that the American Convention did not contain rules governing the means and methods of warfare. It gave the following example:

“[B]oth common Article 3 [of the 1949 Geneva Conventions] and Article 4 of the American Convention protect the right to life and, thus, prohibit, *inter alia*, summary executions in all circumstances. Claims alleging arbitrary deprivations of the right to life attributable to State agents are clearly within the Commission’s jurisdiction. But the Commission’s ability to resolve claimed violations of this non-derogable right arising out of an armed conflict may not be possible in many cases by reference to Article 4 of the American Convention alone. This is because the American Convention contains no rules that either define or distinguish civilians

from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations.” [5]

The Commission is right. Distinguishing between those who have the right to resort to acts of hostility and those who do not, for instance, is an essential feature of international humanitarian law, while human rights law has no rules to this effect [6]. Two comments are, however, in order. In the first place, we should not overestimate the role of common Article 3 vis-à-vis human rights law. Common Article 3 does not define who is a civilian. Nor does it specify when civilian casualties are a lawful consequence of military operations. Secondly, human rights law may also have an impact on the conduct of military operations [7]. The European Court on Human Rights, in the case *Akdivar and others v. Turkey* [8], restricted the State in its choice of means to combat the PKK. It appeared that even derogable human rights may apply in these situations [9]. Thus, it is questionable whether, as contended by the Commission, “it would have to decline to exercise its jurisdiction” if it had not applied international humanitarian law. [10]

Since it concluded that it should apply international humanitarian law, the Commission had to construe its legal competence. Clearly, it could not find an express legal basis. According to its Statute, the material competence attributed to the Commission is limited to the American Convention and the American Declaration of the Rights and Duties of Man [11]. These instruments do not explicitly provide a legal basis for applying international humanitarian law. How, then, could a legal basis be found? One option would have been to refer to rules of humanitarian law as ‘sources of authoritative guidance’ [12]. However, the Commission wanted to go further. It evaluated the conduct of States party to the American Convention *directly* on the basis of international humanitarian law. To support its view the Commission presented five arguments.

1. Competence to apply international humanitarian law could be derived from the overlap between the substantive norms of the American Convention and the 1949 Geneva Conventions. The Commission stated:

“Indeed, the provisions of common Article 3 are essentially pure human rights law. Thus, as a practical matter, application of common Article 3 by a State party to the American Convention involved in internal hostilities imposes no additional burdens on [a State], or disadvantages its armed forces *vis-à-vis* dissident groups. This is because Article 3 basically requires the State to do, in large measure, what it is already legally obliged to do under the American Convention.” [13]

It is doubtful whether this argument, while in itself true, provides a legal basis for the Commission to apply humanitarian law. In the first place, the fact that the substantive norms of the American Convention cover a part of common Article 3 does not mean that these instruments are interchangeable. If that were indeed the case, why do we have two separate legal systems? Indeed, as the Commission noted, human rights law and humanitarian law specify their own fields of application [14]. Secondly, one should distinguish between the substance of norms and the supervisory means attached to them. The fact that the substantive norms of human rights law and international humanitarian law are complementary in character does not mean that supervisory bodies set up under human rights law are *ipso facto* competent to apply humanitarian law. If States had wished to set up an international mechanism similar to that of the Inter-American Commission to supervise compliance with international humanitarian law, they would have established it directly in the Geneva Conventions. [15]

2. Article 29b of the American Convention could provide a legal basis to apply international humanitarian law. This Article states that no rule of the American Convention shall be interpreted as “[r]estricting the enforcement or exercise of any right or freedom recognized by virtue of ... another convention to which one of the said States is a party”. The Commission argued that:

“[W]here there are differences between legal standards governing the same or comparable rights in the American Convention and a humanitarian law instrument, the Commission is duty

bound to give legal effort [sic] to the provisions of that treaty with the higher standards applicable to the rights or freedoms in question. If that higher standard is a rule of humanitarian law, the Commission should apply it." [16]

This is a remarkable argument. Article 29b of the American Convention can be invoked against a State which claims that the Convention allows it to limit the protection prescribed by international humanitarian law. To resolve such a claim, the Commission may be required to consider whether the State concerned has indeed limited the application guaranteed by humanitarian law. However, it needs to do so for the sole purpose and only to the extent necessary to decide whether there has been a violation of Article 29b of the American Convention. This article does not require or authorize the Commission to examine the State's compliance with humanitarian law as such

3. The Commission argued that competence can be derived from Article 25 of the American Convention, which entitles everyone to an effective remedy before a national court "for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned". The Commission found that this article obliges States to provide judicial protection against violations of norms set forth in the 1949 Geneva Conventions in so far as they have incorporated these norms in domestic law. However, supposing the Commission's findings to be correct and even if States had incorporated the norms of humanitarian law in their domestic legislation, the Commission's competence would be limited to allegations of violations of the right to an effective remedy. This article does not empower the Commission to assess compliance with humanitarian law, or to examine whether States have correctly transformed humanitarian law obligations into law.

4. The Commission invoked Article 27, para. 1 of the American Convention, which stipulates that derogation measures taken by States in time of emergency may "not be inconsistent with a State's other international legal obligations".

This is a valid argument. The notion "other international legal obligations" is generally interpreted as including international humanitarian law [17]. Article 27, para. 1 empowers the Commission to evaluate the coherence of a State's derogation measures in time of armed conflict with the norms of humanitarian law by which the State is bound. However, it should be borne in mind that the scope of application of Article 27, para. 1 is limited. First, this provision applies only if the State concerned has formally declared a state of emergency under the American Convention. In practice, States may decide not to derogate from the norms of the American Convention even when an armed conflict has occurred [18]. Second, the Commission can apply international humanitarian law only in so far as it coincides with the substantive norms of the American Convention. Thus, provisions that are not covered by the American Convention cannot be implemented through this instrument. [19]

5. The Commission referred to an advisory opinion of the Inter-American Court of Human Rights as a fifth argument to apply humanitarian law. In its opinion the Court observed: "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." [20]

This argument seems to provide persuasive evidence that the Court appears to sanction application of international humanitarian law by the Commission. However, it should be noted that the Court's decision did not specifically concern humanitarian law. But at some point in the future, the Court may be in a position to give an opinion on the Commission's decision to apply international humanitarian law directly.

Should the considerations of the *Tablada* decision be taken as a precedent? There is no doubt that the objective of applying international humanitarian law, that is to improve protection, is praiseworthy. However, except possibly for the fifth argument, none of the arguments presented by the Commission seems to provide compelling authority for an unqualified application of international humanitarian law. Furthermore, it 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?

Be that as it may, the *Tablada* case is unique [21]. No other human rights treaty body has decided that it is competent to apply international humanitarian law directly. Nevertheless, international humanitarian law has surfaced in the practice of bodies such as the United Nations Human Rights Committee and the European Commission and Court of Human Rights [22]. The future will demonstrate whether other human rights treaty bodies decide to follow the Inter-American Commission's example.

Notes:

1. The Inter-American Commission of Human Rights (IACHR) is established under Article 33 of the American Convention on Human Rights, 9 *I.L.M.* 673 (1970).

2. *IACHR Report No. 55/97*, Case No. 11.137, Argentina, OEA/Ser/L/V/II.97, Doc. 38, October 30, 1997 (hereafter *IACHR Report*).

3. *IACHR Report*, p. 6, para. 16.

4. *IACHR Report*, p. 43, para. 157. The Commission concluded that Argentina did not violate the applicable provisions of international humanitarian law, *IACHR Report*, pp. 92 and 93, para. 327 and 328.

5. *IACHR Report*, p. 44, para. 161.

6. Along the same lines, the International Court of Justice stated: "[W]hether 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 [of Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself." -Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Reports 1996, p. 240.

7. F. Hampson, "Rules on the Conduct of Military Operations in Non-International Armed Conflicts", *Humanitäres Völkerrecht*, Nr. 1, 1998, pp. 70 and 71.

8. Eur. Court HR, *Akdivar and others v. Turkey*, Judgment of 16 September 1996, *Reports of Judgments and Decisions*, 1996-IV.

9. The Court condemned Turkey for the deliberate burning of the applicants' homes and their contents which constituted an illegal interference with the right to respect for family lives and homes laid down in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, *loc. cit.*, para. 88. Article 8 is derogable under Article 15 of the European Convention in time of public emergency.

10. *IACHR Report*, pp. 44 and 45, para. 161.

11. Article 1, Statute of the Inter-American Commission on Human Rights, *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L/V/II.92, doc. 31 rev. 3, 3 May 1996, p. 121; The American Declaration of the Rights and Duties of Man, 2 May 1948, *ibid.*, p. 17.

12. *IACHR Report*, p. 44, para. 161.

13. *IACHR Report*, p. 43, para. 158, note 19.

14. M. Bothe, K. Partsch & W. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 1982, p. 619, cited in

the Commission's Report, p. 44, para. 160.

15. See G.J.H. Van Hoof & K. de Vey Mestdagh, "Mechanisms of International Supervision", in P. van Dijk (Ed.), *Supervisory Mechanisms in International Economic Organizations*, Kluwer, Deventer, 1984, p. 10, which emphasizes the importance of State consent with regard to the creation of rules of supervision.

16. *IACHR Report*, p. 46, para. 165.

17. J. M. Fitzpatrick, *Human Rights in Crisis*, University of Pennsylvania Press, Philadelphia, 1994, pp. 59 and 60; J. Oraá, *Human Rights in States of Emergency in International Law*, Clarendon Press, Oxford, 1992, p. 195.

18. An example is provided by El Salvador, which lifted the state of emergency temporarily in 1987 despite the ongoing civil war, *Annual Report of the Inter-American Commission on Human Rights 1987-1988*, OEA/Ser.L/V/II.74, Doc. 10 rev. 1, 16 September 1988, p. 294.

19. Oraá, *loc. cit.* (note 18), pp. 190 and 191.

20. "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82 of 24 September 1982, Inter-Am.Ct.H.R. (Ser. A) No. 1, at para. 42.

21. The competence assumed in the *Tablada* case and the likelihood that the Commission will use this competence in the future raise intriguing questions. One question is whether the Commission will extend its new mandate to the other party to the armed conflict, the armed opposition group. In the *Tablada* case, while observing that Argentine military personnel and the armed opposition had the same duties under international humanitarian law, the Commission limited its application to the conduct of the Argentine State. 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. Future cases may show whether the Commission is willing and able to incorporate this basic principle of international humanitarian law.

22. For instance, in an inter-state complaint against Turkey, Cyprus invoked international humanitarian law before the European Commission on Human Rights (4 EHRR 482 at 552, 553 (1976) Commission Report). However, the European Commission did not examine this point. See on this subject Ch. M. Cerna, "Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies", in: F. Kalshoven, Y. Sandoz (Eds.), *Implementation of International Humanitarian Law*, Martinus Nijhoff Publishers, Dordrecht, 1989, pp. 31-67; application of humanitarian law by the United Nations, see H.-P. Gasser, "Ensuring Respect for the Geneva Conventions and Protocols: the Role of Third States and the United Nations", in H. Fox, M.A. Meyer (Eds.), *Effecting Compliance*, The British Institute of International and Comparative Law, London, 1993, pp. 15-49.