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THE ART OF APPLYING IHL: *JUS IN BELLO* IN THE JURISPRUDENCE OF INTER-AMERICAN HUMAN RIGHTS BODIES

ABSTRACT

Due to the ECHR's decision regarding the request for interim measures lodged by Armenia against Azerbaijan with respect to an armed conflict, the issue of giving international humanitarian law (IHL) relevance through the jurisprudence of regional human rights bodies has recently become relevant once again. Some European scholars have criticized the Court's attempt to get involved in the case concerning the international armed conflict, deeming the related interim measures vague, ineffective and incompatible with the role of the Court. However, while focusing on the jurisprudence of Inter-American human rights bodies, this paper will try to remind the readers that the ECHR is not the only human rights body which had to deal with IHL. It will be demonstrated that the experience of these bodies is far more creative and diverse as compared to that of the ECHR.

It is not the aim of this paper to argue that decisions attempting to incorporate IHL will necessarily be complied with; nor does it intend to engage into theoretical mandate-related discussion on whether or not human rights bodies should dare dealing with IHL at all or not. Rather, it will review the jurisprudence of bodies of the Inter-American system of human rights, and suggest that, should other judicial or quasi-judicial bodies be willing to manifest the bravery of giving IHL relevance through their case-law, the IACHR and the IACtHR could be the bodies the example of which might be the one to follow.

INTRODUCTION

The non-enforceable nature of international humanitarian law (hereinafter, the "IHL") has long troubled proponents of this field of law. While the Geneva Conventions (hereinafter, "GC(s)"), their Additional Protocols (hereinafter, "AP"), customary rules of IHL and the Hague Conventions altogether demonstrate a very important attempt aiming to protect individuals during armed conflicts, sadly, - and despite the latest attempts led by the International Committee of Red Cross (hereinafter, the "ICRC"), - no supervisory body has been established under *jus in bello* that would assess the state's compliance with this body of law. Accordingly, it remains largely unexecuted.

Although the discussion on whether or not international judicial and quasi-judicial human rights bodies should attempt to incorporate IHL into their jurisprudence is not a new topic, it has gained more relevance once again due to interim measures recently granted by the European Court of Human Rights (hereinafter, the "ECHR") with respect to an international armed conflict (hereinafter, "IAC") between Armenia and Azerbaijan. Similar to its previous interim measures granted in the context of armed conflicts, this decision of the Court has also attracted some criticism.

In particular, some authors argue that utilization of IHL by human rights bodies would fall beyond their mandate and that human rights bodies have no authority to interpret or apply IHL. Hence, these bodies should abstain from interpreting, and even more so – from applying *jus in bello*, given the absence of mandate and expertise in IHL. *Au contraire*, others suggest that it is precisely international human rights bodies that have the capacity to give IHL at least some relevance. Due to the Europocentric character of legal scholarship though, these discussions have mostly been centered around IHL specifically in the jurisprudence of the European Court of Human Rights (hereinafter, the "ECHR"). Many European scholars have voiced their opinions with respect to the ECHR's involvement in IHL cases, but what sometimes is forgotten is that, since their creation, the Inter-American Commission (hereinafter, the "IACHR" or the "Commission") and Court of Human Rights (hereinafter, the "IACtHR" or the "Court") have dealt with a number of cases involving an armed conflict of non-international character (hereinafter, the "NIAC").

This article does not intend to deep dive into the conversation regarding the human rights bodies' authority to interpret and apply IHL as such. Rather, it is aiming to contribute to the literature regarding application or interpretation of IHL by international human rights bodies and demonstrate, that the ECHR is not a unique human rights body "daring" to utilize IHL: its counterparts in the Americas region, - which, oftentimes, are not given enough credit, - have had a far more creative and extensive experience in interpreting and applying *jus in bello.* The paper will also attempt to demonstrate that, by references to IHL during interpretation of the Inter-American Convention (hereinafter, the "ACHR"), the bodies of Inter-American human rights system – also regarded as "pioneer[s] among regional and international counterparts to take IHL effectively into account",[1] - provide a more comprehensive solution for greater protection of human rights in the cases involving armed conflicts, while the ECHR is oftentimes more hesitant.

1. MANDATE AND FUNCTIONS OF THE IACRH AND THE IACTHR

In situations of armed conflict, even though IHL might generally be considered to be *lex specialis*[2] (see *infra* Chapter 2), international human rights law does not cease to apply. Nev-

[1] Larissa van den Herik and Helen Duffy, *Human Rights Bodies and International Humanitarian Law: Common but Differentiated Approaches*, Grotius Centre Working Paper 2014/020-IHL, p. 13; See also Cordula Droege, *Elective affinities? Human Rights and Humanitarian Law*, International Review of the Red Cross, Vol. 90, No. 871, September 2008, pp. 501-548, at. 546.

[2] See ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, p. 240,

ertheless, neither the Inter-American Court nor the Commission were established for the purposes of examining alleged breaches of *jus in bello*. Rather, both the Commission and the Court are human rights bodies, responsible for assessing human rights violations in the region. Before analyzing their involvement in IHL cases, it will be useful to take a look at the mandate and the nature of these bodies of the Inter-American human rights system.

The Commission preceded the Court. It was established under the OAS resolution[3] and started operating in 1960 through exercising its functions via on-site visits; later, it was authorized to process individual complaints of alleged human rights violations.[4] The IACHR has been recognized as the "region's principal human rights body"[5] through the OAS Charter. The latter provides, that "[the] principal function [of the IACHR] shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters".[6] In addition to being a consultative human rights body under the OAS Charter, the Commission exercises a wide variety of functions, some of the most important of which are analyzing and investigating individual petitions regarding alleged human rights violations by OAS Member States, regardless of whether they have ratified the American Convention of Human Rights or not.[7]

Besides these functions, the Commission is equipped with tools for human rights monitoring in these countries and issues a variety of reports with respect to human rights situation in OAS Member States. It is noteworthy that the IACHR has been regarded as a "very effective fact-finding body [which has] the greatest experience among international bodies in conducting on-site visits during states of emergency".[8] The Commission can also refer a case to the Inter-American Court and take part in judicial proceedings before the Court. Composition and competencies of the Commission are further clarified in the Convention.[9]

As for the Court, it was established under the American Convention of Human Rights, and its functions and mandate are specified in the Convention itself,[10] as well as the Statute of

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para. 25; See also ICRC, *IHL and human rights: Introductory Text*, available at: https://casebook.icrc.org/law/ihl-and-human-rights [accessed 22 November 2020], - pointing out that humanitarian law is "increasingly influenced by human rights-like thinking".

[3] First Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, 12-18 August 1959, available at: http://www.oas.org/council/MEETINGS%20OF%20CONSULTATION/Actas/Acta%205.pdf [accessed 20 October 2020].

[4] See International Justice Resource Center, Inter-American Human Rights System, available at: https://ijrcenter.org/regional/inter-american-system/ [accessed 21 October 2020].

[5] *ibid*.

[6] Organization of American States (OAS), Charter of the Organization of American States, 30 April 1948, Article 106.

[7] OAS, Mandate and Functions of the Commission, available at: https://www.oas.org/en/iachr/mandate/functions.asp#:~:text=Calendar-,Mandate%20and%20Functions%20of%20the%20Commission,human%20rights%20in%20the%20Americas. [accessed 20 October 2020].

[8] Subrata Roy Chowdhury, *Rule of Law in a State of Emergency: Paris Minimum Standards of Human Rights Norms in a State of Emergency*, (London: Pinter Publishers, 1989) pp. 71-72; See also Jaime Oraá, *Human Rights in State of Emergency in International Law* (Oxford: Clarendon Press), p. 57.

[9] Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, Articles 34-51.

[10] *ibid*, Articles 52-69.

the Court.[11] The Court is the judicial body, whose mandate is narrower that of the Commission (e.g. accepting the Court's contentious jurisdiction is a prerequisite for considering a case against one of the OAS Member States, and these cases shall be considered by the Commission first).[12] The principal function of the Court is to apply and interpret the ACHR, thus it is responsible for assessing the Member States' compliance with the Convention. In addition, it can issue advisory opinions on issues related to the protection of human rights within the Inter-American system of human rights, as well as order provisional measures. The function to issue advisory opinions gives the Court an opportunity to respond to questions posed by OAS Member States or its organs regarding: "a) the compatibility of internal norms with the Convention, and b) the interpretation of the Convention or other treaties concerning the protection of human rights in the American States".[13]

Both the Court and the Commission have an extensive experience with respect to cases involving armed conflicts, in particular of a non-international character. In addition, the Court has delivered its advisory opinions with respect to the standards of human rights protection applicable during a state of emergency. [14] However, before going reviewing the jurisprudence in this regard, it is important to analyze the interplay between the IHL and IHRL. The next Chapter will address the relationship between these disciplines based on the jurisprudence of the International Court of Justice and some relevant scholarly work produced in this regard.

2. FOLLOWING STEPS OF THE ICJ AND BEYOND: IACHR'S EARLY JURISPRUDENCE REGARDING APPLICATION OF IHL

When describing the relationship between international human rights law (IHRL) and humanitarian law, most of scholarly articles refer to the jurisprudence of the International Court of Justice (hereinafter, "ICJ"). Unlike the IACtHR, the ICJ is not a human rights body as such, and it deals primarily with inter-state disputes regarding breaches of international obligations in accordance with Article 36 of its Statue.[15] Although the authority to adjudicate disputes arising from Geneva Conventions and disputes primarily related to human rights violations as such is not conferred upon this Court, the ICJ has expressed its views on applicability of human rights during armed conflicts on several occasions. [16]

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[11] OAS, Statute of the Inter-American Court of Human Rights, available at: https://www.oas.org/en/iachr/mandate/Basics/statutecourt.asp [accessed 20 October 2020].
[12] International Justice Resource Center, Inter-American Human Rights System *supra* note 4.
[13] Inter-American Court of Human Rights, ABC of the Inter-American Court of Human Rights: What, How, When and Why of the Inter-American Court of Human Rights, San José, IACHR, 2019, p. 10, available at: https://www.corteidh.or.cr/sitios/libros/todos/docs/ABCCorteIDH_2019_eng.pdf [accessed 20 October 2020].
[14] See *e.g. Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), OC-8/87, Inter-American Court of Human Rights (IACrtHR), 30 January 1987; Judicial guarantees in states of emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9.
[15] United Nations, *Statute of the International Court of Justice*, 18 April 1946, Article 16.
[16] See *ibid*, Article 36. The ICJ can, however, adjudicate on human rights violations in cases involving diplomatic protection. See *e.g. Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*,

The first important piece of jurisprudence on this matter was the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*[17] (hereinafter, "the *Nuclear Weapons* Advisory Opinion"), where it established that the human rights law does not cease to apply during armed conflicts, however, the rules of IHL are to be treated as *lex specialis* during such a parallel application.[18] Such an interpretation "excludes the rigid use of the *lex specialis derogati generalis* rule" [19] and, instead of giving priority to one discipline thereby excluding the other, it reinforces a parallel application whereby IHL and IHRL complement each other.[20]

The ICJ further reiterated this approach in the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[21] For the third time, the ICJ addressed the relation of IHL and IHRL in the case concerning *Armed Activities on the Territory of the Congo (DRC v. Uganda)*,[22] where, referring to the aforesaid Advisory Opinions, it stressed that "both branches of international law […] would have to be taken into consideration".[23] Here, however, as opposed its advisory opinions, the ICJ omitted a reference to *lex specialis derogat legi generali* principle, the reasons for which are ambiguous.[24] The ICRC is of the opinion that "the *lex specialis* determines for each individual situation which rule prevails over another",[25] rather than considering IHL *lex specialis* in all cases regarding armed conflict.

Merits, Judgment, I.C.J. Reports 2010, p. 639. In addition, "[o]ther human rights treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination 1965, have a provision permitting referral to the Court after the exhaustion of the pre-condition to resort to the treaty-specific dispute settlement procedure", - Sandy Ghandhi, *Human Rights and the International Court of Justice: The Ahmadou Sadio Diallo Case*, Human Rights Law Review, Vol. 11, No. 3, 2011, p. 528; See UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, Article 22; See also Case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 70

[17] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, p. 226, (*Nuclear Weapons* advisory Opinion).

[18] *ibid*, para. 25.

[19] Nancie Prud'homme, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?,* Research Paper No. 15-07, December 2007, p. 375.

[20] *ibid*.

[21] Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, 9 July 2004, para. 106; Here, the Court explained: "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law". See also Christina M. Cerna, *The History of the Inter-American System's Jurisprudence as Regards Situations of Armed Conflict*, Koninklijke Brill NV, Leiden, International Humanitarian Legal Studies 2 (2011) 3–52, p. 27.

[22] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, p. 168.

[23] *ibid*, para. 216.

[24] See Cerna, *supra* note 21, p. 29; Droege, *supra* note 1, p. 522; See also Nancie N. Prud'homme, *supra* note 19, p. 385.

[25] ICRC, IHL and Human Rights, available at: https://casebook.icrc.org/law/ihl-and-human-rights [accessed 20

Even though it is very common to mention *lex specialis* in discussions regarding IHL and IHRL, some authors stress that "despite all that has been written on *lex specialis* and the relationship between IHL and IHRL, the meaning of the maxim remains entirely unclear".[26] The *lex specialis* approach has been criticized because of its flaws on other occasions as well,[27] however, assessing theoretical validity of the *lex specialis* approach in relation to the interplay between IHRL and IHL falls beyond the scope of this article. Rather, we should agree on the fact that "[despite much controversy surrounding it] the maxim of *lex specialis* is still generally solicited to solve the problem".[28]

The ICJ's initial *lex specialis* approach was followed by the Inter-American Commission in *Arturo Ribón Avila v. Colombia.*[29] This case was concerning extrajudicial killings of 11 persons as the result of the armed confrontation between members of the Army, the Departamento Administrativo de Seguridad (DAS), the Police, and the Sijin (Police Intelligence, F-2) of the Republic of Colombia and members of the armed dissident group the M-19.[30] The Commission relied on Article 29 of the Convention, together with the IACHR's Advisory Opinion on *Other Treaties Subject To The Consultative Jurisdiction Of The Court,*[31] and concluded that it was competent to directly apply IHL and to interpret the ACHR by referring to IHL norms.[32] Thus, even though the Commission did not provide details with respect to the scope of its competence to apply IHL, this case opened the door for direct application of IHL.[33]

The next case of a particular significance was *Juan Carlos Abella v. Argentina* (*La Tablada* case),[34] decided shortly after the ICJ's *Nuclear Weapons* Advisory Opinion, where the IACHR "examined in great detail"[35] its own competence to apply the rules governing armed conflicts. The case was concerning alleged human rights violations committed by State agents following the attack on barracks of the General Belgrano Mechanized Infantry Regiment in La Tablada, which was carried out by armed persons. Although ultimately no violation of the norms of humanitarian law was found in this case, some commentators have

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[26] Marko Milanovic, A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law, Journal of Conflict & Security Law, Oxford University Press 2010, p.473.

[27] See *e.g.* Prud'homme, *supra* note 24, p. 378.

[28] ICRC IHL Database, IHL and human rights, available at: https://casebook.icrc.org/law/ihl-and-human-rights [accessed 14 October 2020].

[29] Arturo Ribón Avila v. Colombia, Case 11.142, Report Nº 26/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 444 (1997); available at: http://hrlibrary.umn.edu/cases/1997/colombia26-97a.html [accessed 22 November 2020].

[30] *ibid*, paras. 1-2.

[31] Inter-American Court of Human Rights, Advisory Opinion Oc-1/82 Of September 24, 1982, *"Other Treaties" Subject to The Consultative Jurisdiction of the Court* (Art. 64 American Convention on Human Rights) Requested by Peru, paras. 21-22.

[32] Arturo Ribón Avila v. Colombia *supra* note 29, para. 132.

[33] Cerna, *supra* note 21, p. 31.

[34] IACHR, Report No. 55/97, Case No. 11.137: *Juan Carlos Abella et al. (Argentina),* OEA/ Ser/L/V/II.98, Doc. 38, December 6 rev., 1997, [the "Tablada case"]; available at: https://www.cidh.oas.org/annualrep/97eng/argentina11137.htm [accessed 22 November 2020].

[35] Liesbeth Zegveld, *The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada Case,* 30-09-1998 Article, International Review of the Red Cross, No. 324, available at: https://www.icrc.org/eng/resources/documents/article/other/57jpgb.htm [accessed 10 May 2018];

stressed the importance of *Tablada*, in particular, because it had an encouraging effect on other human rights bodies, such as the Human Rights Committee or the European Court and the Commission.[36] In this case, the Commission started applying IHL on the following grounds outlined in the decision:

First, international human rights law lacks provisions regarding the prohibited means and methods of warfare, as well as references to the principle of distinction, collateral damage, loss of civilian status *etc*. Further, the Commission stressed that "in any event, rules applicable to NIAC (CA 3) overlap with the duties under the American Convention (ACHR)".[37] At the same time, the IACHR attempted to draw its competence to directly apply IHL from the Convention itself, - namely, from Article 25 of the ACHR.[38] It established that if the States Parties to the ACHR fail their duty to provide remedies "to persons for violations by state agents of their fundamental rights recognized by *the constitution or laws* of the state concerned or by this Convention (emphasis in original)",[39] then " a complaint asserting such a violation, can be lodged with and decided by the Commission under Article 44 of the American Convention".[40]

In addition, the Commission relied on the ICJ's advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, and considered that IHL and human rights apply simultaneously.[41] It went on referring to Article 29(b)[42] of the ACHR, - known as the "most-favorable-to-the-individual-clause",[43] or the *pro homine* principle, - which provides that the provision of the Convention shall not be read as to restricting the rights and freedom guaranteed by "the laws of any State Party of another convention which one of the said states is a party".[44] The Commission concluded that

> […] where there are differences between legal standards governing the same or comparable rights in the American Convention and a humanitarian

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[36] See Cerna, *supra* note 21, p. 41, citing Liesbeth Zegveld, *The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada Case*, 30-09-1998 Article, International Review of the Red Cross, No. 324; See also Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, The European Journal of International Law, Vol. 19, No. 1, pp. 161-182, at p. 167. For a more detailed overview of the *Tablada* case, see Michele D'Avolio, *Regional Human Rights Courts and Internal Armed Conflicts*, Intercultural Human Rights Law Review, Vol. 2 (2017), 249-328, pp. 288-298.

[37] *Tablada* case *supra* note 34, paras. 157-162.

[38] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969, Article 25 (1) [hereinafter, the "ACHR"]: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

[39] *Tablada* case, *supra* note 17, para. 163.

[40] *ibid*. Hence, the Commission concluded that "the American Convention itself authorizes the Commission to address questions of humanitarian law in cases involving alleged violations of Article 25", - see *ibid*.

[41] *Tablada* case, *supra* note 34, para. 160.

[42] ACHR, *supra* note 38, Article 29 (b): "No provision of this Convention shall be interpreted as restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party".

[43] *Tablada* case, *supra* note 34, para. 164.

[44] *ibid.*

> law instrument, the Commission is duty bound to give legal effort to the provision(s) of that treaty with the higher standard(s) applicable to the right(s) or freedom(s) in question. If that higher standard is a rule of humanitarian law, the Commission should apply it.[45]

In *Hugo Bustios Saavedra*,[46] the Commission confirmed its approach and expressly applied relevant humanitarian law, - namely, Common Article 3 (hereinafter, the "CA 3") of the Geneva Conventions.[47] For a short period of time, the Commission continued applying the norms of humanitarian law to cases brought before it, where human rights violations had occurred in the context of a non-international armed conflict.[48] However, this practice was interrupted by the Inter-American Court's 2000 decision on *Las Palmeras v. Colombia*,[49] where it declared both – the Court and the Commission – incompetent to apply IHL.[50] The next section will proceed by analyzing the said decision and will demonstrate that, even though *Las Palmeras* rejected the competence of the IACHR and IACtHR to apply IHL directly, it still left room for using this field of law as an interpretative tool.

3. LIMITATION OF THE COMPETENCE TO APPLY IHL: *TABLADA V. LAS PALMERAS*

The case of *Las Palmeras v. Colombia* concerned extrajudicial killings of civilians throughout the course of an armed operation carried out by the Colombian National Police Force and members of armed forces. The Commission submitted an application, requesting from the Court to find, *inter alia*, the breach of Article 3 Common to 1949 Geneva Conventions. In response, Colombia raised preliminary objections thereby contesting the Court's and the Commission's competence to apply IHL.[51]

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[45] *Tablada* case, *supra* note 34, para. 165; See also Orakhelashvili, *supra* note 36, pp. 167-168; Hans-Joachim Heintze, *On the Relationship between Human Rights Law Protection and International Humanitarian Law*, International Review of the Red Cross, December 2004, Vol. 86, No. 856, pp. 789-814, at 803.

[46] Hugo Bustios Saavedra v. Peru, Case 10.548, Report N° 38/97, Inter-Am. C. H. R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 753 (1997), available at: http://hrlibrary.umn.edu/cases/1997/peru38-97.html [accessed 22 November 2020].

[47] *ibid*, para. 61; See also Cerna, *supra* note 21, p. 34.

[48] For the list of cases where the commission invoked the norms of humanitarian law and/or established violations of Common Article 3 or AP II, See Cerna, *supra* note 21, pp. 45-46. See Van den Herik and Duffy, *supra* note 1, p. 14, footnote 78: *"*Case 11.142, *Arturo RibónAvilán v Colombia*, Report No 26/97(1997), paras 134 and 135; Case 10.548, *Hugo Bustíos Saavedra v Peru*, Report No 38/97 (1997). Case 10.488, *Ignacio Ellacuria, S.J. et al. v El Salvador*, Report No 136/99 (1999), para 169. Case 11.481, *Monsignor Oscar Amulfo Romero y Galdámez v El Salvador*, Report No 37/00 (2000), para 66 and 72; Case 11.519, *José Alexis Fuentes Guerrero v Colombia*, Report No 61/99 (1999), para 43."

[49] *Las Palmeras* Case, Preliminary Objections. Judgment of February 4, 2000. Series C. No. 67, [the "*Las Palmeras"* case], available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_67_ing.pdf [accessed 22 November 2020].

[50] *ibid*, paras. 43(2) and 43(3). See Cerna, *supra* note 21, p. 3 and p. 47; See also D'Avolio, *supra* note 36, p. 296 and pp. 298-302.

[51] *Las Palmeras* Case, *supra* note 49, para. 16.

The Respondent State referred to the IACtHR Advisory Opinion OC-1 of September 24, 1982,[52] and argued that "the Court 'should only make pronouncements on the competencies that have been specifically attributed to it in the Convention'".[53] In particular, due to the lack of consent of the States Parties to the ACHR, the Court or the Commission do not have competence to apply the norms of IHL, and such a competence cannot be derived neither from Article 25 nor from Article 27(1) of the ACHR.[54] As to the Commission's competence to apply the CA 3 of GCs, - the Respondent State argued that "the American Convention limits the competence *ratione materiae* to the rights embodied in the Convention and does not extend it to those embodied in any other convention".[55] Even though Colombia did not dispute that the provisions of the ACHR are to be "interpreted in harmony with other treaties",[56] it did not agree that the Commission had the competence to infer state responsibility based on CA 3.

In response to these preliminary objections, the Commission referred *inter alia* to the ICJ's Advisory Opinion on *Nuclear Weapons* and stated that "[the case] should be decided in the light of 'the norms embodied in both the American Convention and in customary international humanitarian law applicable to internal armed conflicts and enshrined in [Common] Article 3'".[57] In addition, as established in *Tablada*, the Commission reiterated that Article 25 of the Convention allowed it to apply "international humanitarian law and other international treaties".[58]

Without giving an elaborate explanation with respect to the interplay between the IHL and human rights, the Court stated 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".[59] Hence, it decided to admit Colombia's preliminary objection regarding the Court's competence to apply international humanitarian law and other international treaties.[60] With respect to the Commission's competence to apply CA 3, - the Court reasoned that, even though the Commission had "broad faculties",[61] it could only address rights protected by the Convention. Thus, without providing much explanation, the Court interrupted the Commission's direct application of IHL which followed the *Tablada* case, and it also established that the Court itself was not compe-

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[52] *Las Palmeras* Case, *supra* note 49, para. 28; See IACHR, Advisory Opinion on *"Other Treaties "*, *supra* note 11, paras. 21-22.
[53] *ibid*, note 49, para. 28.
[54] *ibid*, para. 30. The Government of Colombia distinguished the "application" and "interpretation" of the Geneva Conventions and argued that "the Court may interpret the Geneva Conventions and other international treaties, but it may only apply the American Convention", - see *ibid*.
[55] *ibid*, para. 34.
[56] *ibid*.
[57] *ibid*, para. 29.
[58] *ibid*.
[59] *ibid*, para. 33.
[60] *Las Palmeras* case, *supra* note 49, para. 33.
[61] *ibid*. In some cases, other Conventions themselves might confer competence upon the Commission, - *e.g.* so does the Inter-American Convention on Forced Disappearance of Persons. However, such was not the case with respect to the Geneva Conventions. Hence, the Court was of the opinion that the Commission was not competent to apply the rules of IHL.

tent to apply IHL. This, however, did not fully eliminate IHL considerations from judgments of the Court.

In this regard, it is noteworthy that Judge A.A. Cançado Trindade wrote a separate opinion, where he explained the difference between *interpretation* and *application* of rules[62] and stressed that "the interpretative interaction between distinct international instruments of protection of the rights of the human person is warranted by Article 29(b) of the American Convention (pertaining to norms of interpretation)".[63] Accordingly, even though the Court did reject the idea of direct application of IHL, "the possibility of using IHL to interpret human rights law obligations in situations of armed conflict […] was still left open".[64] Such an approach was also reaffirmed in *Bámaca-Velásquez v. Guatemala*,[65] which, alongside other subsequent cases, will be reviewed in the following Chapter to demonstrate the scope of the Court's involvement in interpretation of IHL.

4. THE "RENVOI" APPROACH OR DIRECT APPLICATION OF CUSTOMARY IHL BY THE IACTHR?

The case of *Bámaca-Velásquez* was concerning the detention and mistreatment inflicted on Efraín Bámaca Velásquez and other combatants of the Guatemalan National Revolutionary Unit by the armed forces. Significance of this case lies in the fact that, without overruling its position in *Las Palmeras*, the IACHR "did take the time to demonstrate that the failure to apply international humanitarian law did not entail its exclusion as a tool for interpretation",[66] thereby "[r]eflecting its generally open approach to IHL".[67] Here, the Court

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[62] *Las Palmeras*, Separate Opinion of Judge A.A. Cançado Trindade, para. 5: "a distance between the exercise of interpretation referred to, - including here the interpretative interaction, - and the application of the international norms of protection of the rights of the human person, the Court remaining entitled to interpret and apply the American Convention on Human Rights (Statute of the Court, Article 19). In characterizing the second and third objections interposed by the respondent State in the present case as preliminary objections properly (as to competence and not as to admissibility), rather than as defenses as to the merits, the Court proceeded to decide them, in my understanding correctly, in *limine litis*, - by an imperative of juridical stability as well as of "prudence and economy of the judicial function".

[63] *ibid*, para. 4. Judge Cançado Trindade also added that "[i]n fact, such exercise of interpretation is perfectly viable, and conducive to the assertion of the right not to be deprived of the life arbitrarily (a non-derogable right, under Article 4(1) of the American Convention) in any circumstances, in times of peace as well as of non-international armed conflict (in the terms of Article 3 common to the Geneva Conventions of 1949)".

[64] Noam Lubell, Challenges in Applying Human Rights Law to Armed Conflict, International Review of Red Cross, Vol. 87, No. 860, December 2005, pp. 737-754, at 742; See also Heintze, *supra* note 45, p. 804; See also Marten Coenraad Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations*, (Lieden, 2004), p. 291.

[65] *Bámaca Velásquez v. Guatemala*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000).

[66] Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, *"War" in the Jurisprudence of the Inter-American Court of Human Rights*, Human Rights Quarterly 33 (2011), pp. 148–174, at 165.

[67] Van den Herik and Duffy, *supra* note 1, p. 15. Although the Court's position in *Las Palmeras*, has not been changed (when explicitly invoking a "renvoi" technique in *Bámaca-Velásquez*, the Court itself referred to *Las Parmeras supra* note 31, paras. 32-34, - see *Bámaca-Velásquez supra* note 2, para. 209 and *ibid*, footnote 124), it can be said that *Bámaca-Velásquez* indeed reflects a more "open approach to IHL". Namely, besides clarifying the scope of its engagement in interpretation of IHL, the Court seems to expand the restrictive language used in *Las Palmeras*, which might be attributed to the Respondent States' positions in these two cases. One of the differences between *Bámaca-Velásquez* and *Las Palmeras* was that, as opposed to Colombia, Guatemala

expressly stated that "relevant provisions of the Geneva Conventions *may be taken into consideration as elements for the interpretation of* the American Convention".[68] This technique is also referred to as a "renvoi" approach,[69] which, as pointed out by one author, helps the Court avoid the "complexion of a *lex specialis*".[70]

Both, in *Las Palmeras* and *Bámaca-Velásquez* the Court "while not explicitly doing so, at least arguably relied"[71] on Articles 27 (derogation clause) and 29 (b) (more-favorable-protection clause, or *pro homine* principle) [72] of the ACHR. The Commission accepted and shared this approach,[73] and the Court has also reaffirmed it in subsequent jurisprudence. For instance, in cases of *Mapiripán Massacre*[74] and *Ituango Massacres*,[75] both of which concerned civilians' human rights violations, - including executions, - in the context of an internal armed conflict in Colombia. The IACtHR pointed out that it "cannot set aside"[76] state obligations to protect the civilian population under IHL, and that it "[considered] it necessary useful and appropriate […] to use international treaties […] such as Protocol II of the Geneva Conventions of August 12, 1949 […] to interpret provisions [of the ACHR] in accordance with the evolution of the inter-American system, taking into account the corresponding developments in international humanitarian law".[77] Thus, in both of these cases, the Court examined alleged human rights violations in the light of CA 3 and AP II applicable to NIACs.[78]

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did not raise any objections with respect to the Court's competence to "*apply* any other provision that it deemed appropriate" (emphasis added), - See *Bámaca-Velásquez*, *supra* note 65, para. 204. In addition, "relevance of IHL as a tool of interpretation, [was not] a central [issue] to the state's or the applicant's case, - See Van den Herik and Duffy, *supra* note 1, p. 16. Michelle D'Avolio has pointed out that Guatemala's consent "[to apply Common Article 3 may explain] the dichotomy in language" and due to such consent, in this case, "the Court felt less constrained and was, therefore, clearer in its competency determination", - See D'Avolio, *supra* note 36, p. 310 and pp. 308-309.

[68] Case of *Bamaca Velasquez v. Guatemala*, *supra* note 65, para. 209.; See also *ibid*, paras. 207-208.

[69] Robert Kolb, *Human Rights and Humanitarian Law*, Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, 2012, p. 7, para. 36.

[70] *ibid.*

[71] D'Avolio, *supra note* 36, p. 314. The author argues that this can be demonstrated by the Court's emphasis on "protecting the fundamental rights of the human person, is certainly consistent with the provisions in these articles", - see *ibid* (referring, *inter alia*, to *Bámaca-Velásquez supra* note 65, para. 209).

[72] No provision of this Convention shall be interpreted as restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.

[73] See Carlos Enrique Arévalo Narváez and Paola Andrea Patarroyo Ramirez, *Treaties over Time and Human Rights: A Case Law Analysis of the Inter-American Court of Human Rights*, ACDI, Bogota, ISSN: 2027-1131/ISSNe: 2145-4493, Vol. 10, pp. 295-331, 2017, at 317, referring to *Cruz Sánchez et. al v. Peru*, Preliminary Exceptions, Merits, Reparations and Costs, Judgment of 17 April 2015, Series C No. 292, para. 267, where the Commission stressed that "the Court shall interpret the norms of the American Convention in the present case in light of the pertinent dispositions in international humanitarian law, considering that the facts occurred in the context of an armed conflict of a non-international character".

[74] *Mapiripán Massacre v Colombia*, Series C No 134, 15 September 2005 [the "*Mapiripán Massacre* case"]

[75] *Ituango Massacres v Colombia*, Series C No 148, 1 July 2006 [the "*Ituango Massacres* case"].

[76] *Mapiripán Massacre v Colombia supra* note 74, para. 114.

[77] *Ituango Massacres v Colombia supra* note 75, para. 179.

[78] See *Mapiripán Massacre supra* note 74, paras. 171-172; *Ituango Massacres* case, para. 179; See also Adamantia Rachovitsa, *Treaty Clauses and Fragmentation of International Law: Applying the More Favourable protection Clause in Human Rights Treaties*, University of Groningen/UMCG research database (Pure), p. 16). In particular, these cases concerning forced displacement in the context of NIAC were examined with reference

Some authors claim that doing so constitutes "misapplication" of Article 29,[79] arguing that through *pro homine* principle, the "IACtHR seems to *indirectly* apply other treaties and not respect the restrictions of its jurisdiction"[80] and that "[t]he IACtHR does not have the authority to […] *effectively supervise* provisions of other international treaties *under the guise* of the IACHR"[81] (emphasis in original). It has also been pointed out that "[as opposed to Article 31 (3) (c) of the VCLT,[82]] Article 29 (b) dictate[s] that the IACtHR has the *negative duty* not to endanger the more favourable protection provided for an individual under another international treaty"[83] (emphasis added). However, it is not clear how can this negative duty under the *pro homine* principle be fulfilled by the Court without taking into account applicable norms of humanitarian law, which, in some cases, might indeed provide not only more specific, but also a more favorable protection to those affected by an armed conflict.

Nevertheless, "probably aim[ing] to prevent the States from claiming that the Court is applying treaties that it has no competency for",[84] the Court seems to have revisited its approach of relying on specific provisions of AP II. In particular, in *Santo Domingo Massacre,* [85] - a case concerning an alleged bombardment perpetrated by the Colombian Air Force on the village of Santo Domingo, - the Court deemed it necessary to interpret the ACHR "in light of the pertinent norms and principles of international humanitarian law, namely: (a) the principle of distinction between civilians and combatants; (b) the principle of proportionality, and (c) the principle of precaution in attack".[86] The Court reiterated that it lacks competence to apply IHL,[87] however, it also reasoned that

> [i]n this case, by using IHL as a supplementary norm of interpretation to the treaty-based provisions, the Court is not making a ranking between

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to Article 17 of Additional Protocol II, which was "instrumental to the Court's analysis".

[79] Rachovitsa, *supra* note 63, p. 20; See also Carlos Enrique Arévalo Narváez and Paola Andrea Patarroyo Ramirez, *supra* note X, p. 317 (stating that "[in *Mapiripán* case], the Court applied the *pro personae* principle […] to incorporate IHL into the interpretation of ACHR clauses and attribute responsibility to the State [and thus] may have departed from the original intention of the parties, due to the lack of jurisdiction *ratione materiae* to declare responsibility on the grounds of IHL").

[80] Rachovista, *supra* note 78, p. 22.

[81] *ibid.*

[82] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 31 (3) (c), - stipulating that while interpreting international treaties, "any relevant rules of international law applicable in the relations between the parties [shall be taken into account, together with the context].

[83] Rachovista, *supra* note 78, p. 18.

[84] Elizabeth Salmon, *Institutional Approach between IHL and IHRL Current Trends in the Jurisprudence of the Inter-American Court of Human Rights*, Journal of International Humanitarian Legal Studies 5 (2014) pp. 152-185, at 163.

[85] *Santo Domingo Massacre v. Colombia*, Judgment of November 30, 2012 (Preliminary objections, merits and reparations), available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_259_ing.pdf [accessed 22 November 2020]. The author distinguishes three phases of the IACtHR's approach towards IHL: 1) Phase of Indifference (referring to cases *Cayara* and *Caballero Delgado and Santana*, where the Court did not give a particular significance to the existence of an armed conflict); 2) Phase of Recognition of IHL as an Interpretive Tool (referring to *Las Palmeras* (Preliminary Objections), *Bámaca-Velásquez* (Preliminary Objections), Serrano Cruz Sisters, and *Mapiripán Massacre*); and 3) Phase of the "Gray Area" (referring to *Santo Domingo Massacre* and *Operation Genesis* cases).

[86] *Santo Domingo Massacre* case, *supra* note 85, para 211.

[87] *ibid*, para. 23.

> 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.[88]

Interestingly, every section of the Court's analysis with respect to each of these principles starts by stressing that all three of them constitute a norm of customary IHL, applicable to IACs and well as NIACS.[89] It therefore seems that the focus has shifted on the customary nature of relevant IHL norms. In this regard, it should be pointed out that, in *Santo Domingo Massacre* case, while the Court still stressed the lack of its competence to apply IHL, it still seems to be applying customary humanitarian law directly.[90] The Court has examined the facts in great detail and practically assessed their compliance with these principles of customary IHL. While the Court's attempt to give IHL relevance are to be appreciated, it might be argued that it should abstain from direct application of IHL, even if this application is limited to the norms of customary IHL.

One of the arguments against direct application of customary humanitarian law might be that human rights judges are not experts in IHL and, therefore, might err in dealing with issues governed by the laws applicable to armed conflicts; however, international and regional human rights (quasi-judicial) bodies are authorized and even *required* to consider the issues of humanitarian law in their judgments. For instance, emergency provisions of major human rights treaties[91] demand that every derogation be consistent with States' obligations under international law. Given that war is a "paradigmatic example [of an] emergenc[y]",[92] these provisions refer, first and foremost, to international humanitarian law. Accordingly, "[derogation clauses] require[e] the human rights systems to consider international humanitarian law and examine *proprio motu* whether derogation is consistent with [IHL]". [93]

While applying the rules of customary IHL, regional human rights courts can refer to subsidiary means for interpreting the rules of international law.[94] ICRC's study on customary IHL[95]

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[88] *Santo Domingo Massacre* case, *supra* note 85, para 187.
[89] See *ibid*, paras. 212, 214, 216.
[90] Elizabeth Salmon, *Institutional Approach between IHL and IHRL Current Trends in the Jurisprudence of the Inter-American Court of Human Rights*, Journal of International Humanitarian Legal Studies 5 (2014), p. 163.
[91] See ACHR, *supra* note 38, Article 27; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 4; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 15. The African Charter does not have an emergency clause.
[92] Marko Milanovic, *Extraterritorial Derogations from Human Rights Treaties in Armed Conflict*, in *The Frontiers of Human Rights*, ed. Nehal Bhuta (Oxford: Oxford University Press, 2016, pp. 55-88), p. 63.
[93] Nancie N. Prud'homme, *supra* note 19, p. 365.
[94] For instance, in *Tablada* case, the Commission directly and explicitly referred to the Commentary to the 1949 Geneva Conventions and 1973 Draft Commentary on the Draft Additional Protocols to these Conventions, - *Tablada* case, *supra* note 34, para. 149; In this case, in determining the scope of application of Common Article 3, the Commission also made a reference to the Commission of Experts convened by the ICRC. See *ibid*, footnote 16. Experts can at the same time be, "highly qualified publicists", - scholars, whose teachings are considered to be subsidiary means for determining the rules of international law, - See *e.g.* ICJ Statute, *supra* note 15, Article 38.
[95] See ICRC, Customary IHL Database, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/home

might also be particularly useful in this regard. Moreover, if judges are trained in humanitarian law, application of such rules as a principle of distinction, proportionality, military necessity *etc.* does not seem to be an impossible task. After all, human rights judges are, at least, used to protecting the same core values that are protected by IHL, - as the ICTY put it: "general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law".[96]

CONCLUSION

The paper provided an overview of the jurisprudence of the Inter-American human rights bodies with respect to application of IHL in the context of NIACs. While the IACHR tried to apply IHL directly, the Court has limited its jurisdiction for doing so, choosing instead the "renvoi" approach. The latter provides more hope for IHL, and the Court's efforts to contribute to is enforcement should be appreciated. However, under the existing jurisprudence, IHL serves only as a tool for interpreting the ACHR – this approach does not go as "far" as applying IHL directly, while at the same time nor does it stay reluctant to relevant norms of IHL. On the other hand, *Santo Domingo Massacre* has shown the Court's direct engagement in assessing the State's compliance with customary IHL, while, interestingly enough, the Court still insists on lacking competence to apply IHL.

This paper demonstrated that significant steps have been made by the human rights bodies of the Inter-American system of human rights to give IHL some relevance. The Commission's initial bravery with respect to direct application of IHL might be explained by several factors, such as a quasi-judicial nature of its decisions. As for the Court's application of some norms of customary IHL, - this might have been facilitated by such specificities of the Inter-American human rights system as the conventionality control. Another factor might be that IHL cases before the Court and the Commission concerned conflicts of non-international character, rather than inter-state applications as is the case with respect to the ECHR.

Taking all of the foregoing above, it cannot be concluded that other regional and international judicial and quasi-judicial human rights bodies will necessarily succeed in trying to follow the steps of the Inter-American human rights bodies; nor can it be argued that engagement into direct application of IHL will not result in non-compliance with judgments. However, what is clear is that the Inter-American human rights bodies have made a significant progress in terms of giving IHL some relevance, - at least in the context of non-international armed conflicts – which showed their counterparts that sometimes, taking a risk might be worth it.

[accessed 22 November 2020].

[96] Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (10 December 1998), para. 183; See also Robert Kolb, *supra* note 69, p. 5, para. 22; See also D'Avolio, *supra* note 36, p. 308, - referring to *Bámaca-Velásquez*, paras. 209 and 143; See also Orakhelashvili, *supra* note 36, p. 182.