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HUMAN RIGHTS QUARTERLY

Law and the Inter-American Human Rights System

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ABSTRACT

The relationship between human rights and humanitarian law is a close one, especially in the context of internal armed conflict. Although regulated by humanitarian law, human rights law remains valuable in such conflicts for several reasons. These include the possibility that enforcement mechanisms created by human rights instruments could serve as alternative fora for the enforcement of humanitarian standards. The Inter-American machinery has been particularly active in this area, and this article examines the relationship between human rights and humanitarian law as it has been reflected and developed in the jurisprudence of the Inter-American Commission and Court of Human Rights.

I. INTRODUCTION

There is undeniably a particularly close relationship between international human rights law and international humanitarian law,[1] with both branches of the law, at least potentially, applying simultaneously to situations of armed conflict. This is perhaps especially true of internal armed conflict, owing partly to the substantive content of the relevant legal rules, and partly

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1. For more detailed discussion of their precise relationship, see, for example, Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws*, 31 Am. U. L. Rev. 935 (1982); Louise Doswald-Beck & Sylvain Vité, *International Humanitarian Law and Human Rights Law*, 293 Int'l Rev. of the Red Cross 94 (1993).

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to the nature of the relationship between the parties to hostilities.[2] Derogation provisions, such as Article 27 of the American Convention on Human Rights,[3] do, however, allow states a certain degree of leeway in terms of limiting, or temporarily suspending, human rights obligations in times of grave national difficulty, and armed conflict probably represents the archetypal situation of public emergency. Article 27(1) accordingly includes "war, public danger, or other emergency" as a valid ground for derogation.[4]

It is not true, of course, that an armed conflict must exist in order to trigger the derogation provision. Other situations representing "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed"[5] are equally possible.[6] Neither should it be too readily assumed that an armed conflict would meet the criteria for derogation. Limited conflicts, confined to a specific part of a state's territory, for example, may well fall short of the requirement that they endanger "the whole population." Nor, indeed, is it necessarily the case that states involved in armed conflict would actually seek to limit their human rights obligations.[7]

Although the possibility of derogation may *prima facie* seem to support the proposition that human rights tend to fall by the wayside in times of armed conflict, the inclusion of derogation provisions in international

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2. Michael Bothe et al., New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, 619 (1982) states that, "it cannot be denied that the general rules contained in international instruments relating to human rights apply to non-international armed conflicts as well as the more specific rules of humanitarian law." Human rights apply between states and individuals within their jurisdiction, typically the state's own citizens. This is also the relationship at the heart of many internal conflicts.
3. *See* American Convention on Human Rights, *signed* 22 Nov. 1969, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev.6 (1979) (*entered into force* 18 July 1978), *reprinted in* 9 I.L.M. 673 (1970) [hereinafter American Convention].
4. *Id.* art. 27(1).
5. Lawless v. Ireland (Merits), 1 Eur. Hum. Rts. Rep. 15, 31 (1979–1980). This European Case is accepted as setting out the general requirements for derogation. The Inter-American Commission on Human Rights has been much more cautious than its European counterpart, tending to analyze abuses committed by state authorities rather than examining the factual situation in order to determine whether derogation was actually necessary. *See* Christina M. Cerna, *Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies, in* Implementation of International Humanitarian Law 31, 48–51 (Frits Kalshoven & Yves Sandoz eds., 1989).
6. Such as natural disasters or concerted terrorist campaigns.
7. El Salvador, for example, made no official statement of derogation during the civil war which raged there from 1980 until 1992. Lucio Parada Cea et al. V. El Salvador, Report No. 1/99, Case 10.480, Inter-Am C.H.R. 531, ¶ 65, OEA/Ser.L/V/II.102, doc. 6 rev. (1999). Likewise, Turkey made no statement of derogation following its invasion and occupation of Cyprus in 1974. *See* Cyprus v. Turkey, 4 Eur. Hum. Rts. Rep. 482 (1982).

human rights instruments can actually serve to stress the continuing importance of human rights beyond peacetime. As the International Court of Justice stated in the context of the International Covenant on Civil and Political Rights, human rights protection "does not cease in times of war, except by operation of Article 4."[8] The same is true of the American Convention on Human Rights. Furthermore, any derogation made by a state must not be "inconsistent with its other obligations under international law."[9] This is of fundamental importance, and means that even those human rights provisions which are, in principle, derogable under the terms of the particular instrument *cannot* be the subject of a valid derogation if they are restated in, or otherwise protected by, international humanitarian law.

International human rights law instruments therefore remain extremely valuable, even during times of armed conflict, for a variety of reasons. First, they can be used as interpretative devices to expand upon and clarify a number of the protections afforded by humanitarian law. As the International Criminal Tribunal for the former Yugoslavia explained in the context of torture, for example, "[i]nternational humanitarian law, while outlawing torture in armed conflict, does not provide a definition of the prohibition. Such a definition can instead be found in Article 1(1) of the 1984 Torture Convention."[10] Interpretative assistance also works in the opposite direction, with humanitarian law being used to expand upon and explain human rights instruments. As the International Court of Justice again outlined in the *Nuclear Weapons* Advisory Opinion,

> [i]n 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 [ICCPR], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[11]

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8. Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ 226, ¶ 25 (July 8) [hereinafter Nuclear Weapons Advisory Opinion]; *see* International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 4, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976) [hereinafter International Covenant on Civil and Political Rights]. Article 4 is the ICCPR's derogation provision.
9. American Convention, *supra* note 3, art. 27(1). Similar provisions exist in the following: International Covenant on Civil and Political Rights, *supra* note 8, art. 4; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, *opened for signature* 4 Nov. 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (*entered into force* 3 Sept. 1953) [hereinafter European Convention].
10. Prosecutor v. Furundzija, 38 I.L.M. 317, ¶ 159 (1999).
11. Nuclear Weapons Advisory Opinion, *supra* note 8.

Second, human rights can continue to apply fully alongside the applicable humanitarian law where states either opt not to derogate from their human rights obligations, or else cannot validly derogate for the reasons outlined above. Thirdly, a number of human rights law provisions are non-derogable, and therefore remain operational regardless.[12] Finally, and representing the focus of this article, it may well be possible that, in the absence of a functioning permanent criminal tribunal with jurisdiction over violations of the laws of war, the enforcement mechanisms created by international human rights law instruments can serve as an alternative forum for the enforcement of humanitarian standards.

Human rights violations are routinely committed by the military and security forces of states in the context of internal disturbances and tensions,[13] and decisions regarding these can be potentially valuable in terms of the protection of individuals during armed conflict. Relatively few decisions by human rights bodies, however, deal directly with the application of humanitarian law. The machinery of the Inter-American human rights system has been by far the most active in this area, dealing with alleged human rights violations in the context of (primarily internal) armed conflicts, such as those occurring in Colombia, El Salvador, Guatemala, Mexico and Peru. How, then, has this vital relationship between human rights and humanitarian law been reflected in the jurisprudence of the Inter-American Commission and Court of Human Rights?

II. INITIAL DECISIONS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The Inter-American Commission on Human Rights first publicized three decisions dealing specifically—and in some detail—with the application of

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12. Although these non-derogable rights vary from instrument to instrument. The American Convention, *supra* note 3, lists eleven: art. 3 (right to juridical personality); art. 4 (right to life); art. 5 (right to humane treatment); art. 6 (freedom from slavery); art. 9 (freedom from *ex post facto* laws); art. 12 (freedom of conscience and religion); art. 17 (rights of the family); art. 18 (right to a name); art. 20 (right to nationality); art. 23 (right to participate in government). In contrast, the European Convention, *supra* note 9, lists only four non-derogable articles, and the International Covenant on Civil and Political Rights, *supra* note 8, has seven.
13. *See, e.g.,* violations committed by Turkish security forces in the context of the situation involving the PKK in South East Turkey (as outlined in Akdivar and Others v. Turkey, 15 Eur. Ct. H.R. 1192 (1996-IV) and Aksoy v. Turkey, 25 Eur. Ct. H.R. 2260 (1996-VI)), violations committed by British security forces in the course of the troubles in Northern Ireland (as outlined in Farrell v. UK, 5 Eur. H. R. Rep. 466 (1983) and McCann and Others v. UK, 21 Eur. Ct. H. R. (ser. A) (1996), and violations committed by Uruguay during the 1970s (as outlined in López v. Uruguay, 68 I.L.R. 29, Dermit v. Uruguay, 71 I.L.R 354).

humanitarian law in its 1997 *Annual Report*.[14] The cases concerned alleged violations of the American Convention on Human Rights by Colombia, Peru, and Argentina.

A. *Avilán et al. v. Colombia*

On 30 September 1997, the Commission adopted Report No. 26/97 concerning the circumstances surrounding the deaths of eleven citizens killed as a result of an armed confrontation between members of the Colombian Army, Departamento Administrativo de Seguridad, police and police intelligence on one side, and M-19, an armed dissident group, on the other.[15] The Commission found that the eleven victims had not been killed as a result of combat, however, and that they had instead been extra-judicially executed whilst either trying to escape or to surrender, and whilst wounded and defenseless. All of the victims had died from gunshot wounds, which in most cases had been fired from close range (including distances of less than one meter).[16] The Commission therefore concluded that Colombia had violated Articles 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial) and 25 (judicial protection) of the American Convention, in conjunction with Article 1(1), for the executions and the subsequent lack of justice by means of domestic legal proceedings.[17] The petitioners had requested just such a finding, and so it would have been quite sufficient for the Commission to leave matters there. Instead, it went much further, asserting in paragraph 202:

> [t]hat in this case the Colombian state did not carry out its obligation to respect and guarantee the right of persons who are placed *hors de combat* in an internal

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14. Inter-Am. Comm'n on Hum. Rts., *1997 Annual Report of the Inter-American Commission on Human Rights*, Inter-Am. C.H.R. OEA/Ser.L/V/II.98, doc. 7 rev. (1998). In a fourth case, regarding actions taken by the Mexican military against a civilian community in Chiapas state, the Commission asserted at ¶ 41, n.5, that it was competent to apply directly the rules of humanitarian law, and pointed out that common Article 3 regulated behavior during internal hostilities, expressly prohibiting summary executions and torture. It held that "[t]orture and summary execution of any person by state agents not only violates common Article 3, but also Articles 4 and 5 of the American Convention," although its conclusions stated only that Mexico was responsible for violations of Articles 4, 5, 7, 8, and 25 of the American Convention. No reference was made to the responsibility of the state for violations of international humanitarian law. Severiano Santiz Gomez et al. v. Mexico, Report No. 48/97, Case 11.411, Inter-Am. C.H.R. 637,OEA/ser.L/V/II.95, doc. 7 rev. (1997).
15. Avilán v. Colombia, Report No. 26/97, Case 11.142, Inter-Am. C.H.R. 444, OEA/ser.L/V/II.98, doc.6 rev. (1998).
16. *Id.* ¶¶ 120–30.
17. *Id.* ¶ 200.

> armed conflict. The extrajudicial execution of the 11 victims constituted a flagrant violation of Common Article 3 of the Geneva Conventions in that State agents were absolutely required to treat humanely all of the persons within their power due to injury, surrender or detention, whether or not they had previously participated in hostilities.[18]

The Commission recognized that Colombia had "the full right to defend itself from violent actions that may be taken against it, and to take military actions against the M-19 and other irregular armed groups,"[19] but that the members of M-19 in this case were only legitimate military targets up until the point of their surrender, arrest, or of being wounded. Common Article 3 of the Geneva Conventions was stated as governing conduct during hostilities as in this case, so that:

> [O]nce the members of the M-19 were *hors de combat* and in the custody of the Colombian authorities, the Colombian State had no right to attack or kill them. These combatants who were wounded or defenseless, like any wounded civilian, had the absolute right to the guarantees of humane treatment provided for in the non-derogable guarantees of Common Article 3 of the Geneva Conventions and of the American Convention. The evidence submitted in this case supports the petitioners' claim that the victims were executed extrajudicially by state agents in a clear violation of Common Article 3 . . . as well as the American Convention.[20]

In fact, at no point did the petitioners actually claim that Colombia had violated humanitarian law, a point raised by Colombia during the proceedings.[21] The argument held little water for the Commission, however, which asserted that the state itself had opened up this avenue of investigation. Colombia had argued that "the events occurred in an armed confrontation . . . in which the police made legitimate use of its authority in order to re-establish public order,"[22] and that actions which may *prima facie* appear to be human rights violations can, in fact, be legitimate where they occur in the context of an armed conflict.[23] It was irrelevant to the Commission that none of the parties had actually invoked humanitarian law—the facts of the

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18. *Id.* ¶ 202.
19. *Id.* ¶ 133.
20. *Id.* ¶ 134. Since Article 27 of the American Convention does not permit derogation from the right to life (art. 4) in any circumstances, it continued to apply to this situation, as informed by humanitarian law. The Commission therefore concluded that the executions violated both common Article 3 and Article 4 of the American Convention. *See id.* ¶ 135.
21. Avilán v. Colombia, ¶ 169.
22. *Id.* ¶ 167 (in note 13 referenced in ¶ 167, the court stated that it was quoting "Observations by the state, 1 December 1995").
23. *Id.*

case required its application if they were to be analyzed in their proper context, i.e. that of armed confrontation,[24] and disclosed the international responsibility of Colombia for grave violations of both human rights and the laws of armed conflict.[25]

B. *Hugo Bustíos Saavedra v. Peru*

On 16 October 1997, the Inter-American Commission adopted Report No. 38/97, concerning the death of a journalist, and injuries suffered by his colleague, as a result of an attack upon them by the Peruvian military.[26] Peru had tried to argue that those responsible for the ambush were, in fact, members of the Shining Path, but the Commission found that this assertion was completely lacking in foundation.[27]

The petitioners had requested the Commission to adopt a resolution censuring Peru for violating Articles 1(1), 4(1), 5, 13(1) and 25 of the American Convention but, having noted that common Article 3 "contains minimum rules governing the conduct of hostilities . . . in any internal armed conflict, including Peru's,"[28] the Commission held that:

> [T]he standards of international customary law that govern armed conflicts, as well as common article 3 of the Geneva Conventions, prohibit attacks by combatants against civilians and against the civilian population in general. In this respect, the only circumstance in any armed conflict where a civilian loses the immunity from direct individualized attack is when that civilian directly participates in hostilities, which, practically speaking, means assuming the role of a combatant, either individually or as a member of a group. Though journalists or reporters in combat zones implicitly assume a risk of death or injury either incidentally or as a collateral effect of attacks on legitimate military targets, the circumstances surrounding the attacks on Hugo Bustíos and Alejandro Arce clearly indicate that they were not accidental, but intentional.[29]

It was therefore held that Saavedra had been the victim of extra-judicial execution, and that Arce had suffered an attack on his bodily integrity. As the petitioners had requested, the Commission's conclusion was that Peru

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24. *Id.* ¶ 169, citing as authority the *Velásquez Rodríguez* Judgment of 29 July 1988, where it was held at ¶ 163 that the Commission had "the power and the duty to apply the juridical provisions relevant to the proceeding, even where the parties do not expressly invoke them."
25. Avilán v. Colombia, ¶ 148.
26. Hugo Bustíos Saavedra v. Peru, Report No. 38/97, Case 10.548, Inter-Am. C.H.R. 753, OEA/ser.L/V/II.98, doc. 6 rev. (1998).
27. *Id.* ¶ 62.
28. *Id.* ¶ 58.
29. *Id.* ¶ 61.

had violated the rights contained in Articles 4, 5, 13 and 25 of the American Convention, in connection with Article 1(1). In addition, however, it found that, "[w]ith 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."[30]

C. *Juan Carlos Abella v. Argentina*

On 18 November 1997, the Inter-American Commission adopted its most celebrated report in this area. It concerned an attack launched on 23 January 1989 by 42 armed individuals on the barracks of the General Belgrano Mechanised Infantry Regiment No. 3, at La Tablada, in the Buenos Aires province of Argentina.[31] The attackers had managed to enter the barracks and seize a number of weapons to defend their positions, in response to which the Argentine military decided to retake the barracks using armed force (characterized by the state as a "military operation"). The subsequent confrontation lasted for approximately thirty hours, resulting in the deaths of twenty-nine of the attackers, as well as a number of state agents. The surviving attackers alleged that, both during and after actual combat, Argentina had been responsible not only for violating a number of the provisions of the American Convention on Human Rights, but also a number of the rules of international humanitarian law.[32] In particular, it was claimed that the military had refused to accept the attackers' offer to surrender, equivalent to a denial of quarter, and had used weapons designed to cause superfluous injury and unnecessary suffering in order to recapture the base, specifically incendiary weapons.[33]

The Commission decided that, "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."[34] The recapturing of the

30. *Id.* ¶ 88.
31. Juan Carlos Abella v. Argentina, Report No. 55/97, Case 11.137, Inter-Am C.H.R. 271, OEA ser.L/V/II.98, doc. 6 rev. (1998).
32. *Id.*
33. *Id.* ¶ 180.
34. *Id.* ¶ 156. The attack was distinguished from mere internal disturbances on the grounds that the attackers had

> carefully planned, co-ordinated and executed an armed attack, i.e., a military operation, against a quintessential military objective—a military base. The officer in charge . . . sought, as was his duty, to repulse the attackers, and President Alfonsin, exercising his constitutional authority as Commander-in-Chief of the armed forces, ordered that military action be taken to recapture the base and subdue the attackers.

Id. ¶ 155.

military base was therefore judged according to the standards of humanitarian law, which the Commission applied directly. It felt, however, that the surviving attackers were guilty of misunderstanding the legal consequences of their actions:

> Specifically, when civilians, such as those who attacked the Tablada base, assume the role of combatants by directly taking part in fighting . . . they thereby become legitimate military targets. As such, they are subject to direct individualized attack *to the same extent as combatants*. Thus, by virtue of their hostile acts, the Tablada attackers *lost* the benefits of . . . precautions in attack and against the effects of indiscriminate or disproportionate attacks pertaining to *peaceable* civilians.[35]

In light of this, and the nature of the evidence presented, the Commission was unable to conclude that the Argentine forces had rejected an attempt to surrender by the attackers.[36] Furthermore, the lack of evidence regarding methods and means of warfare meant that the Commission was only able to conclude that the killing or wounding of the attackers that occurred before the end of hostilities was "legitimately combat related and, thus, did not constitute violations of the American Convention or applicable humanitarian law rules."[37] Events following the surrender of the surviving attackers did give rise to violations by Argentina of a number of human rights contained in the American Convention, including the right to life and the right to humane treatment, but the Commission did not go so far as to hold that these violations also represented breaches of international humanitarian law.[38]

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35. *Id.* ¶ 178. The Commission was careful to point out, however, that the attackers were only legitimate military targets for as long as they were actively involved in hostilities. Once surrendered, captured or wounded, they were entitled to the guarantees provided in both common Article 3 and the American Convention on Human Rights. *See id.* ¶ 189.
36. *Id.* ¶¶ 182–85.
37. *Id.* ¶¶ 186–88. The Commission further held that, even it had been proved that the Argentine military had used incendiary weapons specifically designed to cause burn injuries, that their use in January 1989 would not have violated an explicit prohibition applicable to the conduct of internal armed conflicts at that time. The Protocol on Incendiary Weapons annexed to the 1981 UN Weapons Convention was not ratified by Argentina until 1995, and Article 1 of the Convention provides that the Incendiary Weapons Protocol is applicable only to *international* armed conflicts in any case. Furthermore, the Protocol does not prohibit the use of incendiary weapons in all circumstances—deployment against legitimate military targets remains permissible. *See id.* ¶ 187.
38. *Id.* ¶ 437.

III. COMPETENCE TO APPLY HUMANITARIAN LAW: THE COMMISSION'S VIEW

The competence of the Inter-American Commission is set out in Article 44 of the American Convention as relating to "denunciations or complaints of *violation of this Convention* by a State Party."[39] Other provisions of the Convention talk in terms of the Commission's competence to deal with alleged violations of human rights "set forth in this Convention,"[40] or of "rights protected by this Convention,"[41] and it is clearly possible to argue that a number of the rights contained in the American Convention are also protected by other facets of international law. Nonetheless, it seems reasonable to conclude that, as regards communications made under the American Convention, the Commission is competent only to assert the responsibility of states for violations of the American Convention itself. Colombia accordingly asserted during proceedings in the *Avilán* Case that the Commission was not competent to apply international humanitarian law in individual cases brought under Articles 44 to 51 of the American Convention.[42] The Commission strongly rejected the argument, however, and set out in detail just why it considered itself competent to directly apply humanitarian law. Likewise, in *Abella* v. *Argentina*, the Commission went to great pains to justify its application of the laws of armed conflict.[43] The various justifications advanced can generally be described in the following terms.

A. Necessary Interpretative Device

The first ground advanced by the Commission was that it was compelled to apply humanitarian law as a source of "authoritative guidance" to cases involving human rights violations in time of armed conflict. Although both human rights law (in particular the American Convention on Human Rights) and humanitarian law are technically applicable during armed conflict,

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39. American Convention, *supra* note 3, art. 44 (emphasis added). Although the Commission existed prior to the adoption of the American Convention, and so accordingly also has competence to deal with alleged violations of the American Declaration on the Rights and Duties of Man under the OAS Charter. *See* J. Scott Davidson, Human Rights 127–42 (1993).
40. American Convention, *supra* note 3; *see, e.g.,* art. 45(1).
41. *Id.*; *see, e.g.,* art. 48(1).
42. Avilán v. Colombia, ¶ 170.
43. Abella v. Argentina, ¶ 157–71. For an excellent treatment of the justifications advanced in Abella v. Argentina, see Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 38 Int'l Rev. of the Red Cross 505 (1998).

human rights instruments are not specifically designed to govern hostilities. Accordingly, human rights law contains no norms regulating the methods and means of warfare. Instead, international humanitarian law provides for the detailed and specific protection of victims of armed conflicts.[44]

The Commission therefore concluded that, as explained above,[45] "the Commission must *necessarily* look to *and apply* definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of . . . claims alleging violations of the American Convention in combat situations."[46] This is true. Methods and means of warfare, questions of civilian status and so on, are left entirely to humanitarian, rather than human rights law. As Zegveld points out, however, "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."[47] In fact, all common Article 3 does is to set out the minimum level of humanitarian protection applicable in any armed conflict, or, as the ICJ stated, "elementary considerations of humanity."[48] Indeed, to the extent that it is concerned only with those who are not participating in hostilities, common Article 3 has no impact on the regulation of methods and means of warfare.[49] There is now a body of law regulating methods and means of warfare in internal armed conflict, after the International Criminal Tribunal for the former Yugoslavia found it:

> preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.[50]

Such developments have, however, taken place in the context of customary international law.

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44. Avilán v. Colombia, ¶¶ 171–73; Abella v. Argentina, ¶¶ 158–61.
45. *See* Nuclear Weapons Advisory Opinion, *supra* note 8, and accompanying text.
46. Abella v. Argentina, ¶ 161 (emphasis added).
47. Zegveld, *supra* note 43, at 507.
48. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US) (Merits) 76 I.L.R. 5, ¶ 218.
49. Protocol II Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, U.N. Doc. A/32/144, Annex II, art. 4(1), 1125 U.N.T.S. 513 (*entered into force* 7 Dec. 1978), *reprinted in* 16 I.L.M. 1442 (1977). Even that part of draft dealing with methods and means of hostilities was removed, so that all that remains in Additional Protocol II as adopted in terms of methods and means of warfare is the final sentence of Article 4(1), prohibiting orders of no quarter.
50. Prosecutor v. Dusko Tadić, Case No. IT-94-1-AR72, Appeal on Jurisdiction of 2 Oct. 1995, 35 I.L.M. 32, ¶ 119 (1996).

The Commission went on to assert that, should it fail to apply humanitarian law as an authoritative source, it would be forced to decline its jurisdiction in many cases involving indiscriminate attacks. This would seem to be stretching the truth somewhat. Zegveld points to the European example of *Akdivar and Others* v. *Turkey*[51] to show that, at least as far as the European Court on Human Rights is concerned, international human rights law can have a limiting impact on the conduct of military operations.[52] The protection of human rights during armed conflict need not, then, necessarily involve the direct application of humanitarian law.

Of course, the Commission actually need only have taken notice of the relevant norms of humanitarian law so far as was necessary to interpret the relevant provisions of the American Convention in light of the circumstances pertaining at the time. Referring to and applying the relevant provisions of humanitarian law as authoritative sources in order to settle alleged violations of human rights law is *not* the same as applying international humanitarian law norms directly in order to assess the responsibility of the state for violations of that law as well as for violations of human rights. Nonetheless, this is precisely what the Commission wanted to do, and it therefore presented a number of other arguments in favor of just such a course of action.

B. Substantive Overlap

The Commission argued in both *Avilán* v. *Colombia* and *Abella* v. *Argentina* that it had the competence to apply humanitarian law directly, or at least to apply common Article 3 directly, as the norms found in common Article 3 are also found in human rights treaties. It concluded that:

> 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 [the 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.[53]

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51. *See* Akdivar and Others v. Turkey, 15 Eur. Ct. H.R. 1192 (1996-IV). The European Court of Human Rights held at ¶¶ 83–88 that the burning of villagers' homes by state security forces in the context of an operation against the PKK (Workers' Party of Kurdistan) violated Article 8 of the European Convention on Human Rights and Article 1 of the Convention's First Protocol. No decision was made by the Court as to whether the activity also violated Articles 3, 5, 6 and 13 of the Convention.
52. Zegveld, *supra* note 43, at 507.
53. Abella v. Argentina, ¶ 158, n.19. *See also* Avilán v. Colombia, where the Commission stated at ¶ 172 that, "in practice the application of Common Article 3 to a State party to the American Convention does not impose additional burdens on the State."

To an extent that is certainly true, and much of common Article 3 corresponds to a number of human rights provisions, although human rights law does go further in some respects with a number of non-derogable provisions finding no place in common Article 3.[54] In any event, it is much more difficult to see any substantive overlap between the norms of the American Convention and those rules of humanitarian law not contained within common Article 3. To seek to apply the rules regulating methods and means of warfare on this basis, as the Commission sought to do in *Abella*, is therefore dubious in the extreme.

In any case, the simple fact that there is a degree of overlap between the norms of the American Convention on Human Rights and those of common Article 3 is not in itself enough to allow the Commission to actively enforce the provisions of common Article 3. As Zegveld states, many of the relevant norms may well be found in both instruments, but that does not mean that the instruments are inter-changeable. Human rights and humanitarian law may be closely related, but they are quite distinct legal systems, with their own independent spheres of operation.[55] In addition, it is necessary to distinguish between the actual substance of legal norms and the relevant methods of enforcement: "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."[56]

C. Article 29(b) of the American Convention on Human Rights

Article 29(b) of the American Convention has been called the "most-favorable-to-the-individual clause,"[57] and it provides that no provision of the 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 by virtue of another convention to which one of the said states is a party."[58] The Commission has held that no provision of the American Convention can accordingly be interpreted as either excluding or limiting the effect of other international acts of the same nature, e.g. customary international law

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54. *See* Lindsay Moir, The Law of Internal Armed Conflict 197–210 (2002).
55. Zegveld, *supra* note 43, at 508. *See also* ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 1340, ¶ 4429 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1987); Schindler, *supra* note 1, at 935; Doswald-Beck & Vité, *supra* note 1, at 94.
56. Zegveld, *supra* note 43, at 508.
57. Abella v. Argentina, ¶ 164.
58. American Convention, *supra* note 3, art. 29(b).

or general principles of international law, including international humanitarian law.[59]

Highly influential in this regard was a comment made by Bothe, Partsch and Solf regarding the close, and reciprocal, relationship between human rights and humanitarian law—in particular between Additional Protocol II to the Geneva Conventions and the International Covenant on Civil and Political Rights during internal armed conflict. They asserted that, where the more detailed provisions of Additional Protocol II set a higher standard of protection than the ICCPR, then that higher standard should prevail since, "the Protocol is 'lex specialis' in relation to the Covenant."[60] The Commission believed that this was equally true of the relationship between the American Convention on Human Rights and sources of humanitarian law, so that, as a consequence,

> in those situations where the American Convention and humanitarian law instruments apply concurrently, Article 29(b) of the American Convention necessarily require[s] the Commission to take due notice of and, where appropriate, give legal effect to applicable humanitarian law rules.[61]

Article 29(b) does indeed require the Commission to take due notice of international humanitarian law where a state claims that the American Convention allows it to limit or restrict the protection afforded by humanitarian law. Such claims can, after all, only be properly assessed by the Commission if due regard is had for the relevant humanitarian law provisions. As Zegveld explains, however, reference to humanitarian law must be "for the sole purpose and only to the extent necessary to decide whether there has been a violation of Article 29(b) of the American Convention. This Article does not require or authorize the Commission to examine the State's compliance with humanitarian law as such."[62] Nonetheless, in *Abella* v. *Argentina* the Commission boldly asserted that,

> where 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 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.[63]

Such a proposition can, indeed, reasonably be described as "remarkable."[64]

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59. Hugo Bustíos Saavedra v. Peru, ¶ 59, n.7; Severiano Santiz Gomez v. Mexico, ¶ 41, n. 5.
60. Bothe et al., *supra* note 2, at 636.
61. Abella v. Argentina, ¶ 164.
62. Zegveld, *supra* note 43, at 509.
63. Abella v. Argentina, ¶ 165.
64. Zegveld, *supra* note 43, at 509.

D. Article 25 of the American Convention on Human Rights

The Commission also considered that Article 25 of the American Convention is relevant to the application of humanitarian law.[65] Article 25 sets out the right to judicial protection, and provides that individuals are entitled to a domestic judicial remedy in response to violations of human rights "recognized by the constitution or laws of the state concerned or by this Convention. . . ."[66] In *Avilán*, the Commission accordingly held that, since the right to be protected by international humanitarian law was recognized by domestic law in Colombia, it was competent to analyze Colombia's adherence to humanitarian law in the case.[67] Likewise, in *Abella* the Commission held that, provided the Geneva Conventions have been incorporated into a state's domestic law, where a violation does not meet with redress in domestic law, "a complaint asserting such a violation can be lodged with and decided by the Commission under Article 44 of the American Convention. Thus, the American Convention itself authorizes the Commission to address questions of humanitarian law in cases involving alleged violations of Article 25."[68]

Again, however, it would seem that the reasoning of the Commission on this point is fatally flawed. Even where the relevant provisions of international humanitarian law have been incorporated into domestic law, the Commission may not use Article 25 to apply that humanitarian law directly and to assess the level of the state's compliance with it. Rather, as Zegveld explains, "the Commission's competence would be limited to allegations of violations of the right to an effective remedy."[69] In other words, Article 25 only grants the Commission competence to deal with alleged violations of Article 25 of the American Convention, and not to pronounce on violations by states of humanitarian law *per se*.

E. Article 27(1) of the American Convention on Human Rights

As already outlined, Article 27 of the American Convention permits states to derogate from a number of provisions due to a situation of public emergency.[70] Article 27(1) is relevant to the application of humanitarian law

65. *See* Avilán v. Colombia, ¶¶ 175–78; Abella v. Argentina, ¶ 163.
66. American Convention, *supra* note 3, art. 25.
67. *See* Avilán v. Colombia, ¶¶ 177–78.
68. *See* Abella v. Argentina, ¶ 163.
69. Zegveld, *supra* note 43, at 509.
70. *See* American Convention, *supra* note 3, art. 27(1).

in two ways. First, and clearly relevant to the argument that the overlap in protection between human rights and common Article 3 of the Geneva Conventions allows the Commission to apply humanitarian law, is the fact that some provisions of the Convention may not be derogated from in any circumstances. Thus, as the Commission pointed out in *Avilán* v. *Colombia*,

> [i]t is precisely in situations of internal armed conflict that human rights and humanitarian law converge most precisely and reinforce one another. In this specific case . . . the relevant rights . . . are . . . the right to life and physical integrity, rights which are non-derogable even in situations of armed conflict. Both Common Article 3 of the Geneva Conventions and the American Convention guarantee these rights . . . and the Commission should apply both bodies of law.[71]

For the reasons stated above in relation to the "substantive overlap" argument, however, such an assertion is not convincing.

The second aspect of Article 27(1) relevant to the possible application of humanitarian law by the Commission is the requirement that any derogation may not be inconsistent with the state's other obligations under international law.[72] Accordingly, when asked to review the validity of any purported derogation made by a state party to the American Convention in the course of, or as a result of, an armed conflict, the Commission is unable to rely solely on Article 27. Where humanitarian law is equally applicable, the Commission must assess the rights which the state is seeking to temporarily suspend in light of the guarantees offered by international humanitarian law. This is uncontroversial.

The Commission's suggestion in *Abella* v. *Argentina* that Article 27(1) supports the direct application of humanitarian law is not, however, quite so straightforward.[73] As Zegveld outlines, there are two main problems in this regard.[74] First, Article 27(1) only assumes any relevance where the state concerned has actually declared formally that a state of emergency exists, and has actively sought to derogate from any of the provisions of the Convention.[75] As already explained, this may not necessarily happen, and states might be perfectly happy not to derogate from any human rights provisions despite the existence of an armed conflict.[76] Where a state does not make use of Article 27, the issue of its compliance with humanitarian law does not—indeed *cannot*—arise in that context.

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71. Avilán v. Colombia, ¶ 174.
72. *See* American Convention, *supra* note 3, art. 27(1).
73. Avilán v. Colombia, ¶¶ 168–70.
74. Zegveld, *supra* note 43, at 510.
75. *See id.*
76. *See generally, supra* note 7.

Second, derogation can only take place with respect to provisions of the American Convention.[77] Clearly, then, the Commission is only in a position to consider humanitarian law to the extent that it coincides with any of the rights actually contained in the Convention. Those rules of humanitarian law which are not repeated in the American Convention on Human Rights cannot, therefore, be implemented by relying on Article 27(1).[78] This may present few problems in terms of common Article 3 or several provisions of Additional Protocol II, many of which have human rights foundations, but many other rules of humanitarian law, and perhaps especially those rules regulating the methods and means of warfare, are consequently beyond the reach of Article 27(1).

F. Inter-American Court of Human Rights Advisory Opinion OC-1/82

Finally, the Commission pointed to approval by the Inter-American Court of Human Rights for the Commission's practice of applying other sources of international law, in addition to the American Convention on Human Rights.[79] Article 64(1) of the American Convention provides that, "[t]he member states of the Organization [of American States] may consult the Court regarding the interpretation of this Convention *or of other treaties concerning the protection of human rights* in the American states,"[80] and in an Advisory Opinion (requested by Peru) regarding the term "other treaties," the Inter-American Court asserted that:

> [t]he 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 their bilateral or multilateral character, or whether they have been adopted within the framework or under the auspices of the Inter-American system.[81]

77. *See* Zevgeld, *supra* note 43, at 510.
78. *See id.*, where Ms. Zevgeld makes reference to Jaime Oraà, Human Rights in States of Emergency in International Law 190–91 (1992).
79. Avilán v. Colombia, ¶ 132; Abella v. Argentina, ¶ 171.
80. American Convention, *supra* note 3, art. 64(1) (emphasis added).
81. Advisory Opinion OC-1/82, 24 Sept. 1982, *"Other Treaties" Subject to the Consultive Jurisdiction of the Court (American Convention on Human Rights, art. 64),* Series A: Judgments and Opinions, No. 1, ¶ 43 (1982) [Advisory Opinion OC-1/82]. The Court cited with approval reports by the Commission on human rights in El Salvador (1978); Cuba (1979); Argentina (1980); Nicaragua (1981); Colombia (1981); Guatemala (1981); and Bolivia (1981). For discussion of the Court's advisory jurisdiction, and "Other Treaties" in particular, see Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 Am. J. Int'l L. 1, esp. 5–8 (1985); J. Scott Davidson, The Inter-American Court of Human Rights 112–22 (1992).

Zegveld found this argument to be more persuasive in terms of the Commission's application of humanitarian law,[82] a viewpoint which would seem to be supported by the Court's approval of the Commission's decision in a case concerning Bolivian military action against a mining community in Caracoles. There it was pointed out to Bolivia that the acts complained of had not only violated Articles 4, 5 and 7 of the American Convention, but also "[a]rticle 3 of the 1949 Geneva Convention on protection of war victims, which has been ratified by the Bolivian Government."[83]

Unfortunately, the value of the Court's statements in this regard are rather limited. The Advisory Opinion was not specifically concerned with humanitarian law.[84] The Court made no explicit reference to humanitarian law treaties, and it is certainly possible to argue that they are qualitatively different from human rights treaties, and accordingly beyond the Court's sphere of competence.[85] On the other hand, one might convincingly argue that a number of provisions of humanitarian law are indeed concerned with "the protection of human rights set forth in any international treaty applicable in the American states,"[86] thus allowing the Court to interpret these norms in the context of its advisory jurisdiction. In any case, however, it is important to remember that the Advisory Opinion concerned the Court's *own* competence to interpret other treaties concerning the protection of human rights, not the Commission's.

IV. CONTINUING ACTIVITY OF THE COMMISSION

The Inter-American Commission's decisions to directly enforce international humanitarian law were made on distinctly shaky, and ultimately unconvincing, legal grounds. Despite this, and emboldened by its determination that it *was* perfectly competent to decide upon the responsibility of OAS members for violations of the laws of armed conflict, the Commission continued to do precisely that in a number of subsequent cases.

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82. Zegveld, *supra* note 43, at 510.
83. Bolivia, Resolution No. 30/82, Case 7481, Inter-Am. C.H.R., OEA/Ser.L/V/II.57, doc. 6 rev. 1 (1982).
84. Zegveld, *supra* note 43, at 510–11.
85. *See supra* note 55 above and accompanying text.
86. Advisory Opinion OC-1/82, ¶ 52, *supra* note 81. Buergenthal, *supra* note 81, at 6, expressed the belief, that Article 64(1) *would* permit the Court to interpret the Geneva Conventions.

A. *Lucio Parada Cea et al. v. El Salvador*

On 27 January 1999, the Commission adopted Report No. 1/99, concerning the detention, torture and killing of a number of farm workers during a military operation carried out by units of the Salvadoran Army in a rural area of El Salvador.[87] The incidents took place in the context of the internal armed conflict which raged in El Salvador from 1980 until 1992, and the Commission consequently held that not only was the American Convention on Human Rights applicable in this case, but that the rules of international humanitarian law regulating non-international armed conflict were equally applicable, "particularly Article 3, common to the four Geneva Conventions of 1949 and its Additional Protocol II of 1977, to which El Salvador is a party."[88]

The Commission stated that, in situations of internal armed conflict, common Article 3 and Additional Protocol II (in particular Article 4) require that all persons be treated humanely, whether they have ceased to actively participate in hostilities or not, and including those combatants who are captured, surrender, or are placed *hors de combat* due to sickness or injury.[89] Noting with approval that previous decisions of the Commission had declared its competence to "directly enforce rules of international humanitarian law,"[90] and that "[i]ntentional mistreatment and . . . summary execution of those persons would constitute a particularly grave violation of the non-suspendable guarantees established in the previously mentioned instruments,"[91] the Commission concluded that El Salvador had violated a number of provisions of the American Convention on Human Rights with regard to the victims. It also held that the state had "violated, with respect to the same persons, common Article 3 of the Four Geneva Conventions of 1949 and Article 4 of [Additional] Protocol II."[92]

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87. Lucio Parada Cea v. El Salvador.
88. *Id.* ¶ 65. El Salvador had not sought to derogate from any rights contained in the American Convention (see *supra* note 7), and although the government refused to admit that Additional Protocol II was *de jure* applicable to the conflict, it did agree to apply its provisions as merely developing and supplementing common Article 3. *See* Christopher J. Greenwood, *Customary Law Status of the 1977 Geneva Protocols in* HUMANITARIAN LAWS OF ARMED CONFLICT: CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITS KALSHOVEN 93, 113 (Astrid J. Delissen & Gerard J. Tanja eds., 1991); ICRC ANNUAL REPORT 1989, at 39; Prosecutor v. Dusko Tadić, *supra* note 50, ¶ 117.
89. Lucio Parada Cea v. El Salvador, ¶ 67.
90. *Id.* ¶ 66, referring to the decisions in Abella v. Argentina and Avilán v. Colombia.
91. *Id.* ¶ 67.
92. *Id.* ¶ 160.

B. *Jose Alexis Fuentes Guerrero et al. v. Colombia*

On 13 April 1999, the Commission adopted Report No. 61/99, concerning a counter-insurgency military operation carried out in January 1994 by Colombian troops in the hamlet of Puerto Lleras.[93] During the course of the operation, eight unarmed civilians had been killed as a result of indiscriminate gunfire, and the survivors subsequently used as a human shield to protect troops from any potential attack by armed dissidents.[94] The forensic evidence presented to the Commission demonstrated that none of the eight victims had died in combat, with some having been shot from a range of less than one meter.[95]

Citing *Avilán* v. *Colombia* as authority, the Commission held that those persons killed had been in the custody of the Colombian Army at the time of their death, and that, accordingly, they had "an absolute right to have their lives respected, consistent with the guarantees afforded by international humanitarian law and the American Convention."[96] In light of the circumstances surrounding the case, the Commission believed that the facts should therefore be examined with reference to international humanitarian law.[97]

Outlining the influence exerted on proceedings by decisions of the International Criminal Tribunal for the Former Yugoslavia, and in particular the *Tadić* case,[98] the Commission accepted that United Nations Resolutions 2444 and 2675 were declaratory of customary international law on the protection of civilian populations and property "in armed conflicts of any nature,"[99] and that such protection was also codified in common Article 3 (which was applicable to hostilities in Colombia) and in Article 13 of Additional Protocol II (to which Colombia was a party).[100] The Commission therefore concluded that Colombia was responsible for violating the victims' "right to life pursuant to Article 4 of the American Convention *and common*

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93. Jose Alexis Fuentes Guerrero v. Colombia, Report No. 61/99, Case 11.519, Inter-Am. C.H.R. 466, OEA/ser.L/V/II.95, doc. 7 rev. (1998).
94. *Id.* ¶ 2. These were the facts as alleged by the petitioners, which Colombia did not dispute.
95. *Id.* ¶ 33.
96. *Id.* ¶ 34.
97. *Id.* ¶ 37.
98. *Id.* ¶ 37. *See* Prosecutor v. Dusko Tadić, *supra* note 50.
99. Guerrero v. Colombia, ¶ 37. Resolution 2444, U.N. GAOR, 3rd Committee, 23rd Sess., UN Doc. A/C.3/SR.1534 (1968) is concerned with human rights in armed conflict, and Resolution 2675, U.N. GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1970) with basic principles for the protection of civilian populations in armed conflicts. *See* Prosecutor v. Dusko Tadić, *supra* note 50, ¶ 112.
100. Guerrero v. Colombia, ¶¶ 39–40.

Article 3 of the Geneva Conventions," as well as Articles 8 and 25 of the American Convention.[101]

C. *Coard v. United States*

On 29 September 1999, the Commission adopted Report No. 109/99. This case is unique in the jurisprudence of the Commission, in that it concerns the *international*, rather than internal, use of force. The petitioners alleged that the military action taken by US troops in Grenada during late October and early November 1983 "violated a series of international norms regulating the use of force by states," resulting in a number of violations of the American Declaration on the Rights and Duties of Man.[102] In particular, it was alleged that the victims had been detained by US forces during the early stages of the operation, held incommunicado for a substantial period of time, and mistreated.[103]

The United States asserted that the situation was governed entirely by international humanitarian law, which the Commission had neither the jurisdiction nor the requisite expertise to apply,[104] and that its treatment of all detainees had, in any case, been in complete conformity with "applicable international rules concerning the law of armed conflict, including the rules governing the treatment of civilian detainees and military prisoners."[105] The Commission accepted that it must look to the American Declaration as the primary source of applicable law in this case, but refused to accept the argument that it may not make reference to other sources of relevant law, including humanitarian law.[106]

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101. *Id.* ¶ 67 (emphasis added).
102. Coard v. United States, Report No. 109/99, Case 10.951, Inter-Am. C.H.R. 1283, ¶ 1, OEA/Ser.L/V/II.106, doc. 3 rev. (1999). The United States is not a party to the American Convention on Human Rights. For background and legal reaction to the US action in Grenada, see J. Scott Davidson, Grenada: A Study in Politics and the Limits of International Law (1987); Christopher C. Joyner, *The United States Action in Grenada*, 78 Am. J. Int'l L. 131 (1984); John N. Moore, *Grenada and the International Double Standard*, 78 Am. J. Int'l L. 145 (1984); Francis A. Boyle, *International Lawlessness in Grenada*, 78 Am. J. Int'l L. 172 (1984).
103. Coard v. United States, ¶ 1.
104. *Id.* ¶ 38. Having referred to the detainees at various stages of proceedings as both prisoners of war and as civilians, the United States eventually settled on the position that the petitioners were "civilian detainees held briefly for reasons of military necessity," although, technically, whether they had been held as prisoners of war or as civilians was irrelevant since they were treated "*de facto* to the highest legally available standard of protection that can be afforded to persons in such status." *See id.* ¶¶ 21–27, 30–32, 48.
105. *Id.* ¶ 21.
106. *Id.* ¶ 38. In his concurring opinion, Commissioner Bicudo accepted in ¶¶ 18–19 that, were the Commission to approach the case:

Several reasons were outlined for the Commission's reference to humanitarian law in this particular case. First, although in general terms humanitarian law applies in times of armed conflict and human rights law in times if peace, there is such a close relationship between the two that the application of one does not necessarily displace the other. They share a common nucleus of protection for the individual, so that both human rights and humanitarian law could be applied to the situation in question.[107] The American Declaration was neither intended to apply in absolute terms, nor in a legal vacuum, and the Commission is therefore right to monitor its observance with reference to other international obligations relevant to the issue, including humanitarian law.[108] Secondly, general principles of international law require specific instruments to be interpreted and applied within the overall framework of the legal system in force at the time in question. It would be inconsistent with this general principle for the Commission to apply the American Declaration without also taking account of other relevant international legal obligations of the United States.[109] Thirdly, the Commission reiterated the argument that, during armed conflict,

> [t]he test for assessing the observance of a particular right, such as the right to liberty, may, under given circumstances, be distinct from that applicable in a time of peace. For that reason, the standard to be applied must be deduced by reference to the applicable *lex specialis* . . . the analysis of the petitioners' claims under the Declaration within their factual and legal context requires reference to international humanitarian law, which is a source of authoritative guidance and provides the specific normative standards which apply to conflict situations.[110]

> exclusively from the humanitarian perspective, whereby the validity of the petitioners' arrest would essentially be examined in accordance with humanitarian law (Geneva Conventions) . . . the Commission would be going beyond its competence since it is not authorized to supervise fulfilment of these conventions.

Id. ¶¶ 18–19.

An acceptable compromise, however, is stated in paragraph 23 of his Opinion as being "one that integrates humanitarian law . . . with the legal system of human rights . . . leading to the application of the latter, and permitting indirect control of the former. *Id.* ¶ 23.

107. *Id.* ¶ 39.

108. *Id.* ¶ 41. *See* ICJ, Interpretation of the Agreement of 25 March 1951 between WHO and Egypt, ICJ Rep. 73, 76 (1980). The Commission also again cited Inter-American Court of Human Rights Advisory Opinion OC-1/82 in support of this practice.

109. *Id.* ¶ 40. The Commission relied upon Inter-American Court of Human Rights Advisory Opinion OC-10/89, 14 July 1989, *Interpretation of the American Declaration on the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, Series A, No. 10, ¶ 37 (quoting ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 16, 31 (1971)).

110. *Id.* ¶ 42.

The Commission went on to find that the relevant provision of humanitarian law applicable in this case was Article 78 of the Fourth Geneva Convention,[111] which provides that:

> [i]f the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.
>
> Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.[112]

Article 78 therefore sets out the minimum safeguards against arbitrary detention in the course of armed conflict, in terms considered by the Commission to be largely in conformity with the American Declaration. The Commission concluded that the petitioners had been detained for a number of days—even after the end of hostilities—with no access to a review of the legality of their detention. Even allowing for the fact that human rights and humanitarian law permit a degree of balancing between public security and individual liberty,[113] this lack of access to a review of detention was "incompatible with the terms of the American Declaration of the Rights and Duties of Man as understood with reference to Article 78 of the Fourth Geneva Convention."[114]

There was, however, no determination by the Commission of the United States' responsibility for a violation of international humanitarian law. Instead, it was content to find that the deprivation of liberty "did not comply with the terms of Articles I, XVII and XXV of the American Declaration."[115]

D. *Ignacio Ellacuría, S.J. v. El Salvador*

On 22 December 1999, the Commission adopted Report No. 136/99, concerning the alleged extra-judicial execution of eight individuals (six

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111. *Id.* ¶ 55.
112. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), *adopted* 12 Aug. 1948, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (*entered into force* 21 Oct. 1950) (*entered into force for US* 2 Feb. 1956).
113. Coard v. United States, ¶ 59.
114. *Id.* ¶ 57.
115. *Id.* ¶ 61.

Jesuit priests and two women) by the armed forces of El Salvador,[116] and marking a return to the more direct enforcement of the laws of humanitarian law. This case also arose in the context of the internal armed conflict which existed in El Salvador from 1980 until 1992, and the Commission accordingly held that, "the international responsibility of the States also arises from international humanitarian law, since the Jesuit priests who were killed were not legitimate military targets, but members of the civilian population who should not have been the object of attack."[117]

The Commission again underlined that it had been guided in its interpretation and application of humanitarian law by the ICTY's decision in *Tadić* regarding UN Resolutions 2444 and 2675, and by common Article 3 and Article 13 of Additional Protocol II,[118] before concluding that El Salvador had violated the right to life as contained in Article 4 of the American Convention, "together with the principles recognized in common Article 3 of the Geneva Conventions."[119]

V. COMPETENCE TO APPLY HUMANITARIAN LAW REVISITED: THE COURT'S VIEW

By the end of 1999, the Inter-American Commission on Human Rights had shown itself to be both bullish in defense of its capacity to directly enforce humanitarian law, and relatively active in doing so. Following the decision in *Abella* v. *Argentina*, and referring to the Commission's reliance on Advisory Opinion OC-1/82, Zegveld wrote that the Court's opinion had not specifically concerned humanitarian law, but that, "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."[120] Just such an opportunity duly presented itself in the *Las Palmeras* case.

A. The *Las Palmeras* Case

The *Las Palmeras* case was submitted to the Court by the Commission in July 1998, and concerned an armed operation carried out in Las Palmeras, Colombia, by members of the National Police Force, aided by the

116. Ignacio Ellacuría, S.J. v. El Salvador, Report No. 136/99, Case 10.488, Inter-Am. C.H.R. 608, OEA/ser.L/V/II.106 doc. 3 (1999).
117. *Id.* ¶ 158.
118. *Id.* ¶¶ 159–62.
119. *Id.* ¶ 237.
120. Zegveld, *supra* note 43, at 511.

Colombian armed forces, in which at least six individuals were executed extra-judicially.[121] The Commission requested the Court to:

> conclude and declare that the State of Colombia has violated the right to life, embodied in Article 4 of the [American] Convention [on Human Rights], *and Article 3, common to all the 1949 Geneva Conventions*, to the detriment of six persons . . . [and to] establish the circumstances of the death of a seventh person . . . in order to determine whether the State of Colombia has violated his right to life embodied in Article 4 of the [American] Convention and Article 3, common to all the 1949 Geneva Conventions.[122]

In response to this request, however, Colombia filed a number of preliminary objections. The second and third objections are vital for present purposes, asserting that neither the Commission nor the Court were competent to apply international humanitarian law, or other international treaties.[123]

The Court dealt first with its own competence to apply international humanitarian law. Its jurisdiction is outlined in Article 62(3) of the American Convention, which provides that the Court has the competence to act in "all cases concerning the interpretation and application of the provisions of *this Convention* that are submitted to it."[124] Colombia had accordingly argued that Article 62 (in conjunction with Article 33) limited the Court's jurisdiction solely to the application of the provisions of the American Convention, and that, according to Advisory Opinion OC-1/82, the Court "should only make pronouncements on the competencies . . . specifically attributed to it in the Convention."[125]

In its brief to the Court, the Commission dealt jointly with the objections regarding both its own competence and that of the Court. It claimed that, as a matter of principle, the case should be decided by reference not only to the American Convention, but also to the relevant provisions of customary international humanitarian law regarding internal armed conflict, as contained in common Article 3. The Commission believed that "both the Court and the Commission were competent to apply this legislation,"[126] and proceeded to outline the reasons—corresponding to the reasons already addressed in Section III above—as to why this should be so.[127]

Colombia refuted these suggestions, in particular refusing to accept that either Article 25 or Article 27(1) of the American Convention authorize the

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121. Las Palmeras, Preliminary Objections, Judgment of 4 Feb. 2000, Series C: Decisions and Judgments No. 67.
122. *Id.* ¶ 12 (emphasis added).
123. *Id.* ¶ 16.
124. American Convention, *supra* note 3, art. 62(3) (emphasis added).
125. *Las Palmeras*, ¶ 28.
126. *Id.* ¶ 29.
127. *Id.* ¶¶ 29, 31.

direct application of the Geneva Conventions by the Court.[128] The state ultimately outlined its position as being one which distinguished between "interpretation" and "application": i.e., that the Court can legitimately *interpret* the American Convention with reference to humanitarian law, but it may only *apply* the Convention itself.[129]

The Commission, however, continued to maintain the competence of both itself and the Court to apply humanitarian law, arguing that:

> alleged violations of the right to life committed in a context of internal armed conflict may not always be resolved . . . solely by invoking Article 4 of the American Convention. The American Convention does not expressly remit to international humanitarian law under these circumstances; however, in view of the status of this branch of international law and its recognized interrelation and complementarity with human rights, it is evident that this is not a deliberate omission, but rather an omission that affects a fundamental right that may not be suspended.[130]

That may well be true, but it represents little more than a restatement of the fact that during armed conflicts, humanitarian law can—and indeed should—be used to interpret the relevant provisions of human rights law. As Colombia correctly argued, interpretation is *not* the same as direct enforcement.

As regards its own competence to apply international humanitarian law, the Court accordingly held that:

> When a State is a Party to the American Convention and has accepted the contentious jurisdiction of the Court, the Court may examine the conduct of the State to determine whether it conforms to the provisions of the Convention . . . . The Court is also competent to determine whether any norm of domestic or international law applied by a State, in times of peace or armed conflict, is compatible or not with the American Convention. In this activity, the Court has no normative limitation: any legal norm may be submitted to this examination of compatibility.
>
> In order to carry out this examination, the Court interprets the norm in question and analyzes it in the light of the provisions of the Convention. The result of this operation will *always* be an opinion in which the Court will say whether or not that norm or that fact is compatible with *the American Convention*. The latter 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.[131]

The third preliminary objection of Colombia was therefore admitted.

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128. *Id.* ¶ 30.
129. *Id.*
130. *Id.* ¶ 31.
131. *Id.* ¶¶ 32–33 (emphasis added).

The second preliminary objection, regarding the competence of the Commission to apply humanitarian law received the same response. The Commission vehemently defended its capacity to enforce humanitarian law in cases of armed conflict, and Colombia disputed the Commission's ability to do so, rejecting in particular arguments that Articles 25, 27 and 29(b) permitted such a course of action. It accepted that the Commission was able to interpret the Convention in light of other treaties, but not that common Article 3 could therefore be applied as a norm violated by the states in an individual case.[132] The Court again found Colombia's arguments the more persuasive. It duly admitted the second preliminary objection, concluding that:

> 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.[133]

B. The *Bámaca Velásquez* Case

In its *Bámaca Velásquez* judgment of 25 November 2000,[134] the Court reiterated its decision in the *Las Palmeras* case. In the context of the internal armed conflict in Guatemala, the Commission had asked the Court to decide whether the state had violated a number of provisions of the American Convention, as well as common Article 3 of the 1949 Geneva Conventions.[135]

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132. *Id.* ¶ 34. Articles 25 and 27(1) were said to be norms establishing rights, and Article 29(b) a norm of interpretation.
133. *Id.* There was a partially dissenting opinion relating to the Court's decision on the Commission's capacity, although not with respect to the actual substance of the decision itself. Rather, Judge Jackman felt that the motion ought to have been dismissed in the first place, as not actually having the true character of a preliminary objection. Colombia's second preliminary objection challenged:

> not the jurisdiction of the Court, which is the tribunal seised of the case, but, rather, the jurisdiction of the Commission, which, from the moment it presents a case before the Court is automatically disseised. . . . Thus, the question whether or not the Commission is competent to apply international humanitarian law is, at best, moot, and at worst impertinent and irrelevant, since an answer in the affirmative would in no way affect the jurisdiction of the Court to hear the case. While I entirely support the view that neither the Court nor the Commission is authorised by the Convention to apply international humanitarian law. . . I find it impossible to hold that the nature and purpose of the State's plea falls within the clearly defined scope of preliminary exceptions in international law.

Id., Separate Opinion of Judge Jackman.

134. Bámaca Velásquez Case, Judgment of 25 Nov. 2000, Series C: Decisions and Judgments No. 70.
135. *Id.* ¶ 2.

Interestingly, in its final oral arguments, Guatemala had accepted that, "although the case was instituted under the terms of the American Convention, since the Court had 'extensive faculties of interpretation of international law, it could [apply] any other provision that it deemed appropriate.'"[136] The Court disregarded this, however, and maintained that it lacks the competence "to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence."[137] Nonetheless, the Court pointed out that it is able to "observe" that certain acts, which violate the provisions of the American Convention on Human Rights, "also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, common Article 3."[138] Referring to its judgment in the *Las Palmeras* case, however, the Court underlined that such observations can only be taken into consideration in interpreting the American Convention itself.[139]

Despite the terms of the Commission's request, therefore, the Court found only that Guatemala was responsible for violations of Article 1(1) of the American Convention in relation to Articles 4, 5, 7, 8 and 25.[140]

VI. SUBSEQUENT ACTIVITY OF THE COMMISSION

A. *Monsignor Oscar Arnulfo Romero y Galdámez v. El Salvador*

On 13 April 2000, after the Court's decision in *Las Palmeras* (although before the *Bámaca Velásquez* judgment had been published), the Inter-American Commission adopted Report No. 37/00.[141] In the context of El Salvador's civil war, it concerned the extra-judicial execution of the Archbishop of San Salvador by members of the Salvadoran armed forces acting as a "death squad."[142] What effect did the Court's decision in *Las Palmeras* have on the Commission's willingness to directly apply humanitarian law?

The petitioners alleged that El Salvador had violated the Archbishop's right to life, right to a fair trial and right to judicial protection, as well as the obligation to respect and guarantee the human rights enshrined in the

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136. *Id.* ¶ 204.
137. *Id.* ¶ 208.
138. *Id.*
139. *Id.* ¶ 209.
140. *Id.* ¶¶ 213–14.
141. Monsignor Oscar Arnulfo Romero y Galdámez v. El Salvador, Report No. 37/00, Case 11.481, Inter-Am. C.H.R. 671, OEA Ser.L./V/II.106, doc. 3 rev. (1999).
142. *Id.* ¶ 1.

American Convention on Human Rights.[143] No request was made for a finding of responsibility regarding breaches of common Article 3, although the Commission had been willing to do so in the past, regardless. In this case, with respect to the right to life, the Commission held that, in addition to the provisions of human rights law:

> [The Commission] should also note that the assassination of Monsignor Romero constitutes a grave infraction of the basic principles of international humanitarian law, insofar as it was an attack directed against a member of the civilian population, who in no way could be considered a legitimate target in the context of the armed conflict in El Salvador. Specifically, common Article 3 . . . prohibits "violence to life and person" of "persons taking no active part in the hostilities . . . ." In addition, the basic rules of common Article 3 are developed and strengthened by Article 13 of [Additional Protocol II].[144]

Clearly, then, the Commission used the provisions of common Article 3 and Additional Protocol II to inform its interpretation of Article 4 of the American Convention. Whether it actually stopped short of finding El Salvador responsible for a violation of humanitarian law is less easy to determine, given the Commission's conclusion that "El Salvador has violated . . . Article 4 of the American Convention, *in conjunction with* the principles codified in common Article 3."[145]

On the one hand, this could reasonably be interpreted as meaning that El Salvador was held to have violated both Article 4 *and* common Article 3. That may well be the conclusion based on the ordinary meaning of the words, and if that were the case, then the Commission was guilty of blatantly rejecting the Court's decision in the *Las Palmeras* case. An alternative reading, however, could be that the Commission found El Salvador to be responsible for a violation of Article 4 of the American Convention, as interpreted according to the principles of common Article 3. If that was the Commission's intention, it would have been infinitely preferable for the Commission to have explained itself in less ambiguous terms. Indeed, whichever was the intention of the Commission, a greater degree of clarity would have been desirable.

B. Riofrío Massacre, Colombia

If the Commission was guilty of sitting on the fence to an extent in *Romero* v. *El Salvador*, it seems to have finally accepted the Court's version of the

143. *Id.* ¶ 2.
144. *Id.* ¶¶ 66–67.
145. *Id.* ¶ 72 (emphasis added).

role of humanitarian law with its decision in the *Riofrío Massacre* case.[146] On 6 April 2001, the Commission adopted Report No. 62/01 concerning the extra-judicial execution of thirteen individuals by members of the Colombian army in collaboration with state actors in plain clothes.

The petitioners alleged that Colombia was responsible for violating "Articles 4 and 19 of the American Convention, as well as common Article 3 of the 1949 Geneva Conventions and Article 2 of its Second Additional Protocol."[147] This represented an invitation to directly apply humanitarian law that the Commission would previously have been happy to accept, and yet in this case it stated that its responsibility was to determine only "whether the State is responsible for violating *the right to life established in the American Convention*."[148] The Commission noted that the extra-judicial execution of civilians is "absolutely prohibited in all circumstances in light of the basic considerations of humanity reflected in common Article 3 of the Geneva Conventions,"[149] but went on to conclude—on that basis—that the victims had been deprived of their right to life "in violation of the obligations established in Article 4(1) of the American Convention."[150]

VII. CONCLUSIONS

For a period up until the end of 1999, the Inter-American Commission was relatively active in the direct application and enforcement of international humanitarian law, something which has never been done by the corresponding regional human rights enforcement bodies. The Commission's activities were undoubtedly well-intentioned, with the aim of increasing human rights protection in times of armed conflict, and there are those who would argue that human rights bodies should indeed actively enforce humanitarian law.[151] Nonetheless, in seeking to apply humanitarian law, the Commission was clearly acting beyond the competence granted to it by the

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146. Riofrío Massacre, Colombia, Report No. 62/01, Case 11.654, Inter-Am. C.H.R. 758, OEA/Ser.L/V/II.111, doc. 20 rev. (2000).
147. *Id.* ¶ 53.
148. *Id.* (emphasis added).
149. *Id.* ¶ 54.
150. *Id.* ¶ 58.
151. *See* Cerna, *supra* note 5; see Judge A.A. Cançado Trindade, in his Separate Opinion to the *Las Palmeras* case, where he explains that the American Convention and Geneva Conventions are both concerned with the common denominator of guaranteeing the rights of the human person as obligations *erga omnes*. Human rights instruments offer the avenues to collectively guarantee such rights: "In other words, the mechanisms for application of the obligations *erga omnes partes* of protection already exist, and what is urgently [needed] is to develop their legal regime, with special attention to the positive obligations and the juridical consequences of the violations of such obligations."

American Convention on Human Rights, which limits its activities to alleged violations of that instrument. Not surprisingly, then, the claims advanced by the Commission in justification of its application of humanitarian law have been less than convincing.

Ultimately, the activities of the Commission in this regard were based on a misunderstanding of the role that humanitarian law (and indeed other rules of international law) plays in the American human rights system. Many of the arguments presented by the Commission are perfectly valid, but only in terms of an ability, or a requirement, to interpret the provisions of the American Convention in light of international humanitarian law where the alleged violation has occurred in the context of armed conflict. The Commission seems to have taken this to mean that it could directly apply the relevant norms of humanitarian law themselves. That is not the case, as the Court has now stated. This does not mean, however, that the Commission (or indeed the Court) is prevented from considering humanitarian law in all circumstances. The norms governing armed conflict remain relevant, but only insofar as they are useful for interpreting the provisions of human rights law. As already outlined, in armed conflict situations, whether there has been a violation of human rights law will often be determined according to the applicable *lex specialis*, i.e. humanitarian law. The Commission's error was failing to realize that this did not allow it to actually enforce the provisions of humanitarian law *per se*. Rather, humanitarian rules ought to have been used in order to determine whether violations of the American Convention had taken place.

As Judge Sergio Garcia Ramirez explained in his Separate Concurring Opinion in the *Bámaca Velásquez* case, "It is not an issue of directly applying [common] Article 3, . . . but of admitting the facts provided by the whole system of laws—to which this principle belongs—in order to interpret the meaning of a norm that the Court [or Commission] must apply directly."[152] Since the Court's pronouncements, the Commission seems to have realized the error of its ways, and is now prepared to use humanitarian law in order to determine violations of human rights law. It need only look to its decisions in *Coard* and *Riofrío* to see how it should have been utilizing international humanitarian law throughout its jurisprudence. The Commission may no longer be in a position to find states responsible for violations of the laws of armed conflict, but the importance of humanitarian law for the effective protection of human rights in the Americas remains very much intact.

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152. *Bámaca Velásquez*, Separate Opinion of Judge Sergio Garcia Ramirez, ¶ 24.