REGIONAL HUMAN RIGHTS COURTS AND INTERNAL ARMED CONFLICTS

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I. Introduction

This article explores the role of regional human rights courts in internal armed conflicts and asks the question:

How have regional human rights courts contributed to the development of, and interplay between, international humanitarian and international human rights law in internal armed conflicts?

In order to address this question, I have first set forth a brief discussion of the laws of war ("LOW") as they pertain to internal armed conflict. This discussion will establish the framework for a discussion of the interplay between International Humanitarian Law ("IHL") and International Human Rights ("IHR") and, more specifically, why issues of convergence arise with regard to these two bodies of law. Next, I have examined the issue of convergence by looking at the approach taken by the International Court of Justice ("ICJ"). Specifically, I have examined the ICJ's approach in both the *Legality of the Threat or Use of Nuclear Weapons ("Nuclear Weapons Opinion")*[1] and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory ("Wall Opinion*").[2] I then compared the ICJ's approach to the approach taken by regional courts in addressing human rights violations during internal armed conflict with a focus on the European Court of

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[1] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ 6 (July 8) [hereinafter "*Nuclear Weapons Opinion"*].

[2] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter *"Wall opinion"*].

Human Rights' ("ECtHR") opinion in the *Isaveya*[3] cases, the Inter-American Commission of Human Rights' ("IAComHR") decision in the *Abella*[4] case, and the Inter-American Court of Human Rights' ("IACtHR") decisions in the *Las Palmeras*[5] and *Bamaca Velasquez*[6] cases. These cases provide a framework to examine the contribution that regional courts have made in developing a coherent jurisprudence on this issue. Of course, if the regional court decisions are, in fact, narrow textual decisions then their overall contribution to the jurisprudence on this issue is limited. This article examines the implications of these decisions regarding the relationship between IHL and IHR, the challenges that these decisions pose to the current understandings of the scope of each area of law, and what this all may mean for the future of laws governing internal armed conflicts.

II. Brief History of the Laws of War and Internal Armed Conflict

The focus of IHL has traditionally been aimed at regulating the conduct of hostilities in inter-state conflicts.[7] The result is a fairly well established body of law governing conflicts that cross

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[3] Isayeva, Yusupova and Bazayeva v. Russ., 41 Eur. Ct. H.R. 847 (2005) [hereinafter *Isayeva I*]; Isayeva v. Russia, 41 Eur. Ct. H.R. 791 (2005) [hereinafter *Isayeva II*].

[4] Abella v. Arg., Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.98 doc. 6 rev. 13 (1997) [hereinafter *Abella*] *available at* http://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm.

[5] Las Palmeras Case, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 67 (Feb. 4, 2000).

[6] Case of Bamaca Velasquez v. Guat., 2002 Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000) [hereinafter Bamaca Velasquez].

[7] *See generally*, Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000) (noting that "the law of war was paradigmatically interstate law, driven by reciprocity …."). *Id.* at 243. "Because of its interstate, reciprocity-based origins, the law of war traditionally protected persons on the side of the enemy, but it did not protect persons from their own government …." *Id.* at 256. "[A] country's own nationals were excluded from the definition of protected persons to avoid interfering in a state's relations with its nationals." *Id.* at 257-58 (citing ICRC's Commentary to Article 4 of the Fourth Geneva Convention). "The traditional focus on state sovereignty has shifted towards a human rights approach to international problems …." *Id.* at 262.

state borders and a quite limited body of law governing internal armed conflicts. International conflicts are governed by the Hague,[8] the 1949 Geneva Conventions[9] ("Geneva Conventions") and Additional Protocol I to the Geneva Conventions[10] ("Protocol I"). Internal armed conflicts, on the other hand, are governed only by Common Article 3 to the 1949 Geneva Conventions[11] ("Common Article 3") and Additional Protocol II to the Geneva Conventions[12] ("Protocol II"), which is a bare bones version of Protocol I.[13]

Initially, the focus of the international community was

[8] Convention II with respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899; Conventions II and IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, *text available at* www.icrc.org (last visited Jan. 21, 2007).

[9] The four Geneva Conventions of 1949 include, Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Second Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention III relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention (IV) relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, text available at www.icrc.org (last visited Jan. 21, 2007) [hereinafter "The Geneva Convention" or "The Geneva Conventions"].

[10] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter "Protocol 1"].

[11] Article 3 is common to all four Geneva Conventions. For the text of article 3, *see* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Common Article 3] (applies "[in] the case of armed conflict not of an international character ….").

[12] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609.

[13] *See, e.g.*, U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Hum. Rts., *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Minimum Humanitarian Standards*, ¶ 77, U.N. Doc. E/CN.4/1998/87 (1998) (reporting that "[t]he protections offered by Protocol II are a considerable improvement on common article 3. However, measured against the rules for inter-State wars, they are still quite basic.").

directed towards transnational disputes because those were the types of disputes that prompted development of the law in the first place.[14] Today, there is an increasing awareness of the devastating effects of internal armed conflict and an increasing realization of the international implications of such, including, refugee problems, displaced persons and ethnic cleansing. As a result, there have been a number of attempts to codify the law governing such conflicts. For example, the international community has sought to broaden the protections available during internal conflict by including in the definition of international armed conflicts in Protocol I, Art. 1(4)[15] fights for national liberation against colonialism, oppressive or racist regimes.[16] The problem is that in order for this definition to apply, the government will have to acknowledge: (1) that it is a colonial, oppressive or racist regime;[17] and (2) that the rebels are exercising their right to self-determination (i.e., the government would have to view its people as having such a right in the first place). Unfortunately, the application of Protocol I to such conflicts, though theoretically available, is, in practice, highly unlikely since these are admissions that most states are simply not prepared to make.[18]

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[14] *See generally* Meron, *supra* note 7, at 243 (noting that "[the] battle of Solferino … inspired the creation of the Red Cross movement and Geneva Law …. Nazi atrocities led to the Nuremberg Charter, the 1949 Geneva Conventions, and the Genocide Convention ….").

[15] Protocol I, *supra* note 10, art. 1(4).

[16] *See generally* Meron, *supra* note 7, at 243-44 (noting that "[t]he current changing nature of conflicts from international to internal is closely related to the normative developments. Internal conflicts have necessitated both new norms and reinterpretation of existing norms. The change in direction towards intrastate or mixed conflicts - - the context of contemporary atrocities - - has drawn humanitarian law in the direction of human rights law.").

[17] William Abresh, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT'L L. 741, 756 (2005) (noting that "the application of Protocol I to a conflict against a national liberation movement has never been acknowledged by the state involved.").

[18] *Id*. at 756-57 (stating that "[a]pplying Protocol I to an internal conflict constitutes the government's admission that it is exercising alien occupation or colonial domination against the will of the people. States deciding whether to apply humanitarian law often find the benefits of legal compliance outweighed by the political costs of these implied admissions of weakness."). Other attempts to broaden protections available during internal conflicts have also met with limited

One of the justifications for the limited role of IHL in internal conflict situations is rooted in the traditional view that IHL is contingent upon the idea of reciprocity in that the protections are available only if both sides have agreed to and do abide by the LOW.[19] Under the theory of reciprocity, it is believed that both sides to a conflict will adhere to rules governing who may use force, how that force is used, and when it may be used[20] because it is in their best interests to do so.[21] It was with reciprocity in mind that Protocol II was drafted. As such, its threshold for application is contingent upon conflicts of "a certain threshold of intensity and nature,"[22] which present at least "the possibility of" reciprocity.[23] In

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success. *See, e.g.*, ECOSOC, *Report on Prevention of Discrimination and Protection of Minorities, supra* note 13, ¶ 75 (noting that "efforts to improve upon the shortcomings of common article 3 have met with only limited success."), ¶ 77 (noting that the "protections offered by Protocol II … [as] measured against the rules for inter-State wars … are still quite basic.").

[19] *See* Meron, *supra* note 7, at 243 (in discussing the LOW, Meron notes that "reciprocity has historically been central to its development" and that "[r]eciprocity served as a key rationale for the formation of the norms ….").

[20] *Id.* at 251 (noting that "reciprocity applies to the creation of obligations under the Geneva Conventions …." (*citing* common Art. 2(3) and Art. 4(2) of GC IV)).

[21] *Id.* at 243 (referring to the LOW, Meron notes that "[r]eciprocity served …as a major factor in securing respect for them and discouraging their violation."); *see also* Toni Pfanner, *Asymmetrical warfare from the perspective of humanitarian law and humanitarian action*, 87 INT'L REV. RED CROSS 149, 161 (2005) (noting that "many rules of international humanitarian law are essentially designed to cover the belligerents' own best interests, so they should really be keen to comply with them. At the same time, the adversary is expected to have the same basic interests. Customary law and the whole body of treaty law contained in the Geneva Conventions protecting war victims have developed from the concurrence of these interests.… the bulk of international humanitarian law thus rests on the expectation of reciprocity.").

[22] ECOSOC, *Report on Prevention of Discrimination and Protection of Minorities, supra* note 13, ¶ 78 (reporting that "the bigger difficulty with Protocol II is that the protections it offers only apply in internal conflicts meeting a certain threshold of intensity and nature.") ¶ 79 (noting that Article 1(1) establishes a "two-fold test [that] would appear to limit the application of Protocol II to situations at or near the level of full-scale civil war, and certainly few Governments are prepared to admit the application of the Protocol to situations of lesser intensity.").

[23] Protocol II, *supra* note 12, Part I Scope of this Protocol, Article 1 Material

order for Protocol II to apply, dissident forces must be: (i) under responsible command, (ii) in control of a part of the territory, (iii) able to carry out sustained military operations, and (iv) *able to implement the obligations set forth therein*.[24] Its very high threshold for applicability is evidenced by the exceptionally low application of Protocol II to internal conflicts.

Although we have seen some movement in international law away from the idea of reciprocity and towards a humanitarian approach to the laws governing conflict,[25] this movement has been limited. One reason for this limited success is that states have been reluctant to extend protections to rebel forces that do not, and are not, required to abide by international treaty obligations.[26] This fact, combined with a change in the nature of conflicts, has made the shift towards humanitarianism extremely challenging. Contemporary conflicts, both internal and international, are typically asymmetric conflicts.[27] In such conflicts one side, usually the regular armed forces, has the benefit of technologically advanced weaponry

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Field of Application.

[24] *Id*. (emphasis added).

[25] *See, e.g*., Protocol I, *supra* note 10, arts. 43 - 44 (setting forth clear prohibitions against reprisals), art. 51(6) (giving protections to insurgents); *see also* Meron, *supra* note 7, at 243-244 (noting that the LOW reflect a counterbalance between military necessity and humanitarian concerns and that "the weight assigned to these two conflicting factors has shifted overtime. Humanitarian restraint has been promoted more vigorously …. [and] [t]he change in direction towards intrastate or mixed conflicts … has drawn humanitarian law in the direction of human rights law.") *see also,* Pfanner, *supra* note 21, at 163 (noting that "[o]ne of the civilizing achievements of the nineteenth century was that legal norms which were formerly only utilitarian came to demand a minimum level of humanity irrespective of reciprocity.").

[26] *See* ECOSOC, *Report on Prevention of Discrimination and Protection of Minorities, supra* note 13, ¶ 59 (noting that rebel groups "are not, strictly speaking, legally bound to respect the provisions of international human rights treaties which are instruments adopted by States and can only be formally acceded to or ratified by States.").

[27] *See* Pfanner, *supra* note 21, at 150 (noting that "[i]n asymmetrical wars the parties are unequal and the principle of equality of arms no longer holds true."); *see also* Meron, *supra* note 7, at 240 (noting that "the law of armed conflict regulates aspects of a struggle for life and death between contestants who operate on the basis of formal equality.").

enabling it to conduct war while minimizing the risks to its own soldiers by, for instance, conducting aerial raids by flying above the height that can be reached by enemy air defenses.[28] The other side, which does not have access to sophisticated weaponry, views itself as the underdog and justifies its blatant LOW violations, such as targeting civilians, co-mingling with civilians and using civilians as human shields, as a way to level the playing field.[29] Thus, from a military standpoint, an army fighting insurgents faces enormous additional risks if it has to abide by the LOW. For instance, the LOW would prohibit the military from targeting civilian objects where the insurgents have taken cover and from which they launch attacks, despite the fact that such attacks pose a grave danger to its own soldiers.[30] Because insurgents regularly reject the LOW, the tendency is for the regular army in an internal conflict to feel that it is, therefore, neither legally nor morally bound to respect those laws either.[31] The result is that internal armed conflicts face an even lower level of civilian protections than those that are in theory available under the LOW.

The deficiencies in the LOW governing internal conflicts also

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[28] *See* Marco Roscini, *Targeting and Contemporary Aerial Bombardment*, 54 INT'L COMP.L. Q. 411, 411 (2005) (noting that "[a]s the most recent armed conflicts suggest, air warfare has known an exponential growth. This is caused by several factors … [including] to minimize the attacker's casualties (thanks to the aircraft's limited vulnerability against an enemy with poor technology and to the use of unmanned aerial vehicles.").

[29] *See* Pfanner, *supra* note 21, at 151 (noting that "[t]oday the really new and essentially different factor is that acts of terror are an integral part of asymmetrical warfare…. [Moreover,] the fundamental aim of asymmetrical warfare is to find a way round the adversary's military strength by discovering and exploiting, in the extreme, its weaknesses…. Weaker parties have realized that … to strike 'soft targets' causes the greatest damage. Consequently, civilian targets frequently replace military ones.").

[30] *Id*. at 153 (noting that "[t]he dividing line between combatants and civilians in asymmetrical wars of this kind is consciously blurred and at times erased."), at 163 (noting that "[a]symmetry can indeed place a warring party at a disadvantage if it, unlike the other side, abides by the rules of the law of war.").

[31] *Id*. at 161-162 (noting that "[i]n asymmetrical wars, the expectation of reciprocity is basically betrayed and … frequently replaced by treachery…. In such cases, the other side begins to feel that it might be more in its interest not to consider itself bound by the law of war.").

arise in part because the Geneva Conventions were drafted not to regulate conduct *during* hostilities, but rather to protect persons after the conflict ended (i.e., they deal with *post*-conflict conduct).[32] Common Article 3 was therefore, meant to deal with the treatment of the sick, wounded, and civilians *post*-conflict.[33] While Common Article 3 sets minimum rules for the treatment of civilians in non-international armed conflict by requiring humane treatment,[34] it sets forth no rules governing the conduct of hostilities, and it does not provide for an enforcement mechanism. Although Common Article 3 is now widely viewed as applicable to combat activities,[35] this interpretation, while useful in terms of its theoretical applicability, nonetheless, does nothing to remedy its lack of specificity with regard to civilian protections during hostilities. Moreover, even the minimal protections it does provide are seldom realized since the declaration of an "armed conflict" is required to trigger the protection, and states commonly refuse to acknowledge that a

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[32] *See* The Geneva Conventions, *supra* note 9 (The First GC relates to the treatment of the wounded and sick armed forces on land; the Second GC relates to the treatment of the wounded, sick or shipwrecked armed forces at sea; the Third GC relates to the treatment of POW's; and, the Fourth GC relates to the treatment of civilians post-conflict.).

[33] *See* Common Article 3, s*upra* note 11 (stating, in pertinent part, that "in the case of an armed conflict not of an international character … each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active party in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat … shall in all circumstances be treated humanely ….").

[34] *See id*.

[35] Inter-Am. C.H.R., *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. 22 at Ch. II(c), ¶ 77 (2002) (noting that Common Article 3 "contains fundamental guarantees applicable at all times *during* armed conflicts ….") (emphasis added), *available at* www.cidh.org/terrorism/eng/toc.htm (last visited Jan. 21, 2007); *see also* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 ¶ 218 (June 27) (holding that customary IHL does apply to all armed conflict -- international or internal -- and that Common Article 3 reflects customary international law; therefore, its protections apply in both international and internal armed conflicts.); *see also* Pfanner, *supra* note 21, at 163-64 (noting that Common Article 3 is "a 'mini convention' applicable in all situations of armed conflict.").

conflict on its soil meets the definition of an "armed conflict."[36] Similarly, because Protocol II fails to define "conflicts not of an international character," it permits governments to evade its application by simply refusing to recognize the existence of an armed conflict within its borders.[37] As a result, even its minimal protections are not so easy to come by.[38]

The resistance against further codification of the LOW in internal conflict is also in part a reflection of the concern that if a government recognizes rebel forces not as criminal actors,[39] but rather as lawful combatants, that this recognition will somehow legitimize their acts.[40] This concern, coupled with the hesitancy of states to agree to international obligations governing treatment of their own nationals, viewing such obligations and oversight as an impingement on state sovereignty, has stymied the codification of the

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[36] *See* Meron, *supra* note 7, at 260-261 (noting that "since common Article 3 does not define 'conflicts not of an international character,' governments can easily contest its applicability…. The applicability of the Geneva Conventions as a whole or of common Article 3 has been denied in many situations."); *see also* ECOSOC, *Report on Prevention of Discrimination and Protection of Minorities, supra* note 13, ¶ 74 (reporting that because "common article 3 does not define "armed conflicts not of an international character", in practice this wording has left room for governments to contest its applicability to situations of internal violence in their countries."); *see also* Abresh, *supra* note 17, at 756 (noting that "states routinely reject the application of the humanitarian law instruments to violence within their borders.").

[37] *Id*. (noting that "governments can easily contest its applicability.").

[38] *See* Meron, *supra* note 7, at 261 (noting that "[a] very high threshold triggers the application of Additional Protocol II.").

[39] *See, e.g.*, Nehal Bhuta, *States of Exception: Regulating Targeted Killing in a "Global Civil War," in* HUMAN RIGHTS, INTERVENTION AND THE USE OF FORCE (Philip Alston & Euan MacDonald eds.) (forthcoming 2007) (manuscript ch. 7 at 28, on file with author) (stating that "the more unconventional and asymmetrical the conflict becomes, the less specificity is provided by IHL, and the more the line between 'law enforcement' and 'war' is blurred.").

[40] *See* Pfanner, *supra* note 21, at 160 (noting that "[e]xtending the principles of international humanitarian law … to the non-State parties to a war can easily be misunderstood as an attempt to legitimize them."); *see also* Abresh, *supra* note 17, at 757-58 (noting that there is a "great reluctance of states to accept that domestic insurgents ever have any right to attack government forces. Instead, states have generally treated insurgents as criminals.").

LOW governing internal conflicts.[41]

The result is that international treaties say very little about internal armed conflicts. Given such strong government resistance to further codification of the LOW governing internal armed conflicts, how can the international community use existing laws to help diminish the harmful effects of these conflicts?[42] The predominant mechanism that is discussed in this paper is the role that regional human rights courts have played in moving the law forward. These courts, with their emphasis on human rights, have at times devised ways to move away from restraints contingent upon reciprocity and instead have emphasized the humanitarian aspects of the law.[43]

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[41] *See* Meron, *supra* note 7, at 262 (noting that "the traditional focus on state sovereignty has shifted towards a human rights approach to international problems …."); *see also* INT'L INST. OF HUMANITARIAN L., IN COOPERATION WITH INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND OTHER LEGAL REGIMES: INTERPLAY IN SITUATIONS OF VIOLENCE 5 (2003), http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5UBCVX/$File/Interplay_other_regimes_Nov_2003.pdf (reporting that "the great majority of the experts declared themselves to be in favor of maintaining a dichotomy between the legal regimes applicable to non-international armed conflicts and those governing internal disturbances and tensions.").

[42] *See generally* ECOSOC, *Report on Prevention of Discrimination and Protection of Minorities, supra* note 13, ¶ 99 (arguing for "a fusion of the rules" of international humanitarian and human rights laws); *see also* ECOSOC, Comm'n on Human Rights, 61st Sess., Item 11 of the provisional agenda, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions, Extrajudicial, summary or arbitrary executions*, Report of the Special Rapporteur, Philip Alston, ¶ 52, U.N. Doc. E/CN.4/2005/7 (Dec. 22, 2004) (stating that "[t]he application of international humanitarian law to an international or non-international armed conflict does not exclude the application of human rights law. The two bodies of law are in fact complementary and not mutually exclusive."); *see also* U.N., Office of the High Comm'r for Hum. Rts., CCPR General Comment No. 14, 23rd Sess. (Nov. 9, 1984) (taking a cumulative approach to the interplay between humanitarian law and human rights by referring to both bodies of law in its assessment of the threat that nuclear weapons pose to the right to life).

[43] *See, e.g.,* Meron, *supra* note 7, at 270 (noting that "[a]lthough most human rights implementation bodies lack explicit mandates to apply international humanitarian law, violations in the context of armed conflicts have often led them to investigate certain abuses in light of humanitarian law."). *Id.* at 272 (noting that "[h]uman rights bodies and Courts have also applied, or referred to, classic concepts of the law of war such as proportionality and distinction.").

III. International Humanitarian Law Protections and Internal Armed Conflict

Aside from the problem of the applicability of Protocol II to an internal conflict, regional courts, in addressing issues that arise during internal armed conflicts, have had to grapple with the reality that even if a conflict meets the high threshold for its application, the protections available under Protocol II are minimal.[44] Its limitations are particularly evident when its protections are contrasted with those available in international conflicts. For example, while the law governing internal armed conflict contains no protections against belligerent reprisals, the LOW governing international conflicts not only provide for outright prohibition of reprisals against civilians when they find themselves in the adversary's control,[45] but they go even further by providing clear prohibitions against belligerent reprisals for all civilians who find themselves in the combat zone.[46]

Moreover, while both the LOW governing international and internal armed conflicts prohibit the intentional targeting of civilians,[47] it is only the laws governing international conflicts that

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[44] Note that Protocol II's limited protections are reflected in its treatment of the Marten's Clause. Notably, unlike Protocol I, Protocol II does not include the Marten's Clause in an article to the protocol; rather, it merely makes reference to the Marten's Clause in its preamble. Moreover, the reference in the preamble is a truncated version of the Marten's Clause. While it provides that cases not covered under the protocol are governed by principles of humanity and public conscience, it does not include two significant norms – leaving out principles of international law and custom. *See* Protocol I, *supra* note 10, art. 1(2), and Protocol II, *supra* note 12, pmbl.

[45] Note that the 1949 Geneva Conventions prohibits reprisals against persons, installations, or property, including the wounded, sick, shipwrecked, medical personnel and the civilian population or individuals *in the power of a party*; *see, e.g.*, Geneva Convention III, *supra* note 9, art. 13 (prohibits reprisals against POW's); Geneva Convention IV, *supra* note 9, art. 33, (prohibits reprisals against protected persons (defined in Article 4 as persons "who find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals")).

[46] *See, e.g.*, Protocol I, *supra* note 10, art. 51(6) (prohibits reprisals against the civilian population); art. 52(1)(prohibits reprisals against civilian objects).

[47] Given that civilian protection is the overriding purpose of IHL, there are very limited circumstances when those protections may be relaxed such as, where

provide adequate protection for civilians against the dangers posed from military operations. Although Protocol II requires governments to treat civilians humanely,[48] establishes general protections against the dangers of military operations,[49] and prohibits targeting civilians,[50] it, nonetheless, contains no prohibitions on causing excessive harm and no requirements to take precautions to protect civilians. Thus, IHL leaves the planning and execution of military attacks essentially unregulated in internal conflicts.

In contrast, in international conflicts, civilian protections are not limited to simply prohibitions on targeting,[51] but rather include additional prohibitions on military operations such as, the principle of reasonable care,[52] the principle of proportionality[53] and the principle against indiscriminate attacks.[54] Protocol I also provides that attacks must be planned and executed so as to minimize civilian casualties by requiring armies to "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and

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civilians take a direct part in the hostilities or where civilian objects are used to attack.; *see, e.g.*, Geneva Convention IV, *supra* note 9, art. 19; *see also* Protocol I, *supra* note 10, art. 51(3).

[48] Protocol II, *supra* note 12, art. 4.

[49] *Id*. art. 13.

[50] *Id*.

[51] Protocol I, *supra* note 10, art. 52(2) (providing that "[a]ttacks shall be limited strictly to military objectives").

[52] *Id*. art. 57(1) (provides for the principle of reasonable care, by requiring constant care to avoid needless civilian injuries).

[53] *Id*. art. 51(5)(b) (prohibits causing excessive harm to civilians by prohibiting an attack "which would be excessive in relation to the concrete and direct military advantage anticipated."); art. 57(2)(b) (establishes the principle of proportionality by prohibiting attacks that "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."); art. 57(2)(iii) (requiring the military to "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.").

[54] *Id*. art. 51(4) (prohibits indiscriminate attacks, i.e. attacks which employ a method or means of combat which cannot be directed at a specific military objective or the effects of which cannot be limited).

in any event minimizing incidental loss of civilian life, injury to civilians and damage to civilian objects."[55] Thus, Protocol I establishes a practical application of the principle of distinction by obligating commanders to take all feasible precautions to verify target selection, to take all practical precaution in the choice of weapons, and to refrain from launching an attack, which may be expected to cause disproportionate civilian casualties.[56]

Finally, the Geneva Conventions provide that grave breaches are subject to universal jurisdiction.[57] Protocol I not only adopts the Geneva Conventions' concept of grave breaches, but it provides for additional concepts of grave breaches, establishes an International Fact-Finding Commission to "inquire into any facts alleged to be a grave breach," and requires that compensation be paid for violations.[58] Protocol II, on the other hand, contains no such concept of grave breaches and provides no enforcement mechanisms for violations.

In reality, the laws of war governing internal armed conflicts are woefully inadequate and yet, paradoxically, it is internal armed conflicts that pose the greatest danger to civilians in today's world. As states continue to wrangle over issues of reciprocity, sovereignty, and national identity, civilians are left dangling in the space between human rights protections and the laws of war. While governments wrestle with theory and politics, 'people' suffer and die everyday in internal havoc. Fortunately, a few regional human rights courts have stepped up to the task of strengthening civilian protections.

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[55] *Id*. art. 57(2)(ii.).

[56] *See id.* art. 87 Duty of Commanders (obligating commanders to act to prevent violations and to punish violators of both the Geneva Conventions and Protocol I).

[57] Geneva Convention IV, *supra* note 9, art. 146 (each High Contracting Party shall be under the obligation to and shall bring to justice violators of grave breaches regardless of nationality.), art. 147 (defines grave breaches of the Geneva Conventions); *see also* Meron, *supra* note 7, at 253 (noting that "under the Geneva Conventions, all contracting parties have the duty either to prosecute or to extradite persons alleged to have committed grave breaches ….").

[58] Protocol I, *supra* note 10, art. 11 (Protection of persons), art. 85 (Repression of breaches of this Protocol), art. 90 (International Fact-Finding Commission), art. 91 (Responsibility).

Unfortunately, they have left us with uneven and unclear standards which academicians are left struggling to mold into a coherent whole.

IV. ICJ Reflections on the Interplay between IHL and IHR

In 1996, the ICJ issued an advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.[59] After determining that it had the authority to deliver an opinion on this question,[60] the ICJ went on to consider which international law norms were relevant to the issue. In making its determination, the ICJ rejected the contention that the protections under the International Covenant of Civil and Political Rights ("ICCPR") apply only to peacetime activities, giving way in times of war to the rules governing armed conflict.[61] Specifically, the ICJ held that the protections under the ICCPR, and in particular the right to life provision of Article 6, do not cease during war (although some rights may be derogated from in a time of national emergency as provided under Article 4).[62] That being said, however, given that the underlying circumstances have changed from a peacetime law enforcement operation to a wartime military operation, the legal context under which government acts are judged must likewise change. Thus, for instance, the definition of what constitutes 'an arbitrary deprivation of life' cannot be considered against a normal legal background, but rather, must be considered in a wartime context under the laws of war. The laws of war, "which is designed to regulate the conduct of hostilities" are, according to the ICJ, the *lex specialis* of armed conflict, 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 Convention *can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Convention itself*." [63] Therefore, under the *lex*

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[59] *Nuclear Weapons Opinion, supra* note 1.

[60] *Id*. ¶ 19.

[61] *Id*. ¶ 25.

[62] *Id*.

[63] *Id*. ¶ 25 (emphasis added).

specialis approach, the right not to be 'arbitrarily' deprived of one's life is informed by IHL principles such as, the principle of neutrality and the principle of distinction.[64]

Taken at face value, this holding arguably provides a broad scope of civilian protections as it strongly suggests that gaps in protection under IHL can legitimately be filled in with reference to IHRs and vice versa.[65] As broad as this aspect of its judgment seems to be, the reasoning that the ICJ employed in reaching its decision on the issue in this case was really quite limited. Unfortunately, after setting forth a coherent theory on the relationship between these two bodies of law, when it actually decided the issue before it, the ICJ failed to apply its own theory. For instance, the ICJ neglected to elaborate on how specific IHL principles would interact with the protections available under the ICCPR.[66] Nor did it specifically address the issue of how the use of nuclear weapons would fare under Article 6 and why. Instead, the ICJ only superficially dealt with the 'right to life' provision by merely asserting that it applied, but then failing to actually apply that provision to the issue before it. That is, the ICJ did not in any way distinguish how having a 'right to life' under IHR provides any additional protections or is in any way different than the straight protections available under IHL (i.e., the principle of neutrality and the principle of distinction). After introducing the concept of applying IHR law to situations that occur during armed conflict, the ICJ then went on to decide the issue before it solely by reference to IHL principles; thus, leaving its *lex specialis* holding as more an illusion than a coherent approach to the law.

The remainder of its opinion dealt with two unrelated issues. First, the ICJ spent some time dealing with the relationship of a

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[64] *Id*. ¶¶ 74-82.

[65] *See generally* Meron, *supra* note 7, at 267 (noting that "because human rights law, or at a minimum its non-derogable core, continues to apply in times of armed conflict, gaps in protection under the law of war can be filled in some circumstances.").

[66] *See, e.g.*, Bhuta, *supra* note 39, at 18-19 (noting that "the ICJ's invocation of *lex specialis* does not, of itself, clarify the relationship between IHL and IHR in any concrete sense ….").

state's right to self-defense and a state's obligation to protect the environment.[67] In dealing with the environmental issue, the ICJ looked to the corpus of international law relating to the environment and determined that environmental considerations are one of the factors that must be taken into account under the LOW. Specifically, the ICJ held that possible environmental damage is relevant to the consideration of whether a military action is in conformity with the principles of necessity and proportionality.[68] In this way at least, the ICJ did seem willing to fill in the gaps in IHL by reference to international law in the general sense. Second, the ICJ completed its analysis by focusing not on Article 6 of the ICCPR, or even on human rights principles in general, but rather it focused on the law governing *jus ad bellum* (resort to force) and not the law governing *jus in bello* (use of force). Thus, the remainder of the ICJ's opinion focused on the UN Charter provisions[69] and IHL[70] without further reference to either the ICCPR or human rights norms in general.

In 2004, the ICJ had an opportunity to examine the other side of this issue in its *Advisory Opinion Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[71] One of the issues in this case was whether the IHR conventions, to which Israel is a party, apply in the Occupied Territories (i.e., outside of its national borders). Here, the issue was slightly different than the issue in the *Nuclear Weapons Opinion* in that it revolved less around the role of IHL and more around the breadth of international human rights treaties and its interplay with IHL in situations of armed conflict. After confirming that the territories at issue were occupied by Israel in 1967 during the armed conflict between Israel and Jordan, and that the status of those territories had not changed, the ICJ rejected Israel's argument that the Fourth Geneva Convention is not applicable to the territories because it is not a territory of a High Contracting Party, as required

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[67] *Nuclear Weapons Opinion, supra* note 1, ¶¶ 30-31.
[68] *Id*. ¶ 31.
[69] *Id*. ¶¶ 37-50.
[70] *Id*. ¶¶ 74-95.
[71] *Wall Opinion, supra* note 2.

by the Convention.[72]

The Court then moved on to the issue of whether the international human rights conventions to which Israel is a party apply within the Occupied Palestinian Territory.[73] After noting that it had previously held in the *Nuclear Weapons Opinion* that "the protection of the International Covenant of Civil and Political Rights does not cease in times of war,"[74] it went on to extend this holding to include not just the ICCPR, but to "the protection offered by human rights conventions" in general.[75] The Court held that the sphere of influence of human rights encompasses the relationship of a government to individuals within its control and applies in times of peace or war. Thus, according to the Court, three possible interpretative possibilities arise: (i) some rights during armed conflict may be exclusively matters of IHL; (ii) some may be exclusively matters of IHR; or (iii) some may invoke both branches with IHL as *lex specialis*.[76] Here, the ICJ determines that it must look to both branches to answer the question put to it.[77] Presumably, it bases this conclusion on two findings: (i) its own determination that because Israel is 'occupying the territories,' then the international human rights treaties to which it is a party cover its actions in those territories; and (ii) its determination that because there is an on-going armed conflict in those territories, IHL must apply as *lex specialis*.

After dealing with these preliminary issues, the ICJ then looked to whether the specific jurisdictional provisions of the ICCPR and the International Covenant of Economic and Social Rights (hereinafter "ICESCR") extend to Israeli actions in the occupied territory. With regard to this issue, the Court determined that the

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[72] *Id*. ¶¶ 90-95.

[73] *Id*. ¶ 102.

[74] *Id*. ¶ 105 (*quoting Nuclear Weapons Opinion*, *supra* note 1, ¶ 25).

[75] *Id*. ¶ 106.

[76] *Id*.

[77] *See generally* Bhuta, *supra* note 39, at 14 (for the argument that the ICJ has adopted the "interpretative complementarity" approach to the interrelationship between IHL and IHR, which, as Bhuta defines it, is a regime "in which IHR rules and principles are used to inform and 'humanize' IHL rules; or IHL rules are used to give content to IHR rules in certain exceptional states.").

jurisdictional scope of both conventions extends to Israel's actions in the Occupied Territories because "those territories and populations are under its effective control."[78]

What is significant here is that the ICJ went somewhat further in its holding in this case than it did in its prior decision in the *Nuclear Weapons Opinion*. Not only did the ICJ make it clear that its holding regarding the interplay between IHR and IHL applies not just with regard to the ICCPR, but to all international human rights conventions, but by adopting the 'effective control' test, it unequivocally rejected Israel's argument that "based on the well-established distinction between human rights and humanitarian law under international law," human rights law cannot apply to its actions in the Occupied Territories "inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights."[79] Thus, whenever an armed conflict involves 'effective control' of another territory, the protections under IHR treaties, which were meant to cover a government's relationship with its own nationals, will extend to persons within the 'effective control' area. Additionally, as established in the *Nuclear Weapons Opinion*, because there is an ongoing armed conflict, the protections under those IHR treaties will be supplemented by IHL as *lex specialis*.

The ICJ then went on to identify the issues that Israel's construction of the wall raised under both IHR and IHL, and determined that Israel's construction of the wall has contravened various provisions under both bodies of law. Specifically, the ICJ determined that by impeding the liberty of movement, the right to work, health and education of the inhabitants of the Occupied Territories, Israel's acts had violated various provisions of the ICCPR, the ICESCR, and the Convention on the Rights of the Child ("CRC"). The ICJ further found that by contributing to demographic changes in the Occupied Territories, Israel had violated Article 9 of the Geneva Convention.[80] The Court went on to hold that "it is not

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[78] *Wall Opinion, supra* note 2, ¶¶ 112-113.

[79] *Id.* ¶ 112.

[80] *Id.* ¶¶ 123-131, 134.

convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives" and "that the route cannot be justified by military exigencies or by the requirements of national security or public order" and, as such, its construction "constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments."[81]

What is interesting here is that the ICJ seemed, in part, to disregard its own holdings in both the *Nuclear Weapons Opinion* and in this case, which established the *lex specialis* approach to the relationship between IHL and IHR in armed conflicts. Specifically, when interpreting the human rights provisions that were before it in the *Wall Opinion*, the ICJ did not appear to interpret those provisions in light of IHL principles, but rather, it looked very carefully at the text of the human rights provisions themselves, including their permitted restrictions, and determined that Israel's actions violated those provisions. Likewise, when addressing these provisions, although the ICJ did consider Israel's national security concerns, it did so, however, not with reference to military necessity as defined under IHL, but rather exclusively with regard to the terms of the human rights provisions themselves, which allow for some limitations where necessary to protect national security interests.[82] As a result, it is not particularly clear where the relationship between IHL and IHR stands as a result of the ICJ's holdings in these two cases, or how that relationship should be implemented in practice.

V. Regional Human Rights Mechanisms and IHL in Internal Armed Conflict

A. European Court of Human Rights

In February 2005, the ECtHR issued judgments in *Isayeva, Yusupova and Bazayeva v. Russia* ("*Isayeva I"*)[83] and *Isayeva v. Russia* ("*Isayeva II"*). [84] Both of these cases raised claims under the

[81] *Id.* ¶ 137.
[82] *Id.* ¶ 136.
[83] *Isayeva I, supra* note 3.
[84] *Isayeva II, supra* note 3.

European Convention on Human Rights[85] ("*European Convention"*) for losses sustained by civilians when the Russian military conducted aerial bombings on Chechen villages. These judgments are relevant to the issue of the interplay between IHL and IHRs because they are two of only a handful of judgments issued by regional human rights courts that have addressed claims that have arisen as a result of internal armed conflicts.

In *Isayeva I*, the three claimants alleged that they were the victims of indiscriminate Russian military bombings on a civilian convoy near Grozny.[86] In the fall of 1999, hostilities began in Chechnya between the Russian military and Chechen fighters. Shortly thereafter, the city of Grozny, from where many of the Chechen fighters were operating, was the target of Russian military attacks. The claimants, all whom lived in or near Grozny, alleged that at some date after October 25, 1999, they learned that a "humanitarian corridor" would be arranged on October 29, 1999 for civilians to escape from the fighting. On that date, the applicants along with "over 1000 cars," waited in line to cross the border out of Grozny. [87] At some point, according to the applicants, military personnel notified everyone that the "corridor" would not be opened that day and ordered everyone to return to Grozny. As the applicants were making their way back to Grozny, military planes appeared overhead and bombed the convoy.[88] During the bombing, two of the first claimant's children were killed, the first and second claimants were wounded, and the third claimant's possessions were destroyed.[89] As a result, each of the claimants alleged various violations of Articles 2, 3 and 13 of the European Convention and Article 1 of Protocol No. 1 to the European Convention. In support of their claims, the applicants submitted a report prepared by the non-governmental organization ("NGO") Human Rights Watch

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[85] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12 and 13 (September 2003) [hereinafter The European Convention].

[86] *Isayeva I, supra* note 3, ¶ 1.

[87] *Id*. ¶ 16.

[88] *Id*. ¶¶ 17-24.

[89] *Id*. ¶ 3.

("HRW"), which alleged that the "the Russian forces appear to have deliberately bombed, shelled or fired upon civilians"[90] and that the force used violated the principle of proportionality, thus possibly raising claims under both Common Article 3 and Protocol II, Article 13(2).[91]

Before ruling on the claims in this case, the Court considered the nature of the hostilities between the government and the Chechen forces, the facts surrounding the aerial attacks, the steps that the military took with regard to both the planning of the operation, and the subsequent investigation of the attack. As noted, there was also an HRW report before the Court urging it to "take into account any relevant rules of international law in interpreting the Convention including Common Article 3." [92] Despite its obvious sensitivity to the particular circumstances existing in Chechnya at the time the claims arose, and despite the fact that the issue of the applicability of IHL was squarely before it, the ECtHR, nonetheless, never explicitly addressed the issue of whether there was an internal armed conflict ongoing in Chechnya and/or what the consequences of such a finding would be with regard to the Court's analysis of the claims in this case. Instead, the Court, after noting that "[n]o derogation under Art. 15 of the Convention ha[d] been made,"[93] went on to look very carefully at the text of the European Convention and seemingly decided the issues in this case with reference only to those textual provisions and, thus, without any reference to IHL at all.

In addressing the applicant's Article 2 right to life claims, the ECtHR interpreted the language in that provision, which requires that the use of force be no more than 'absolutely necessary,' as meaning that "the force used must be *strictly proportionate* to the achievement of the permitted aims."[94] The Court did not explicitly look to or rely upon IHL norms in interpreting this provision despite its recognition

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[90] *Id.* ¶ 102.
[91] *Id.*
[92] *Id.* ¶ 161.
[93] *Id.* ¶ 125.
[94] *Id.* ¶ 169 (emphasis added).

that the situation in Chechnya called for "exceptional measures."[95] Moreover, to determine whether this proportionality test had been met, the Court determined it necessary to look to "whether the operation was planned and controlled by the authorities so as to minimize, to the greatest extent possible *recourse to lethal force* . . . [and] to ensure that any risk to life is minimized."[96] The Court's holding in this regard is interesting, because what the Court seems to have done is to borrow the duty to take precautions from the LOW governing international armed conflicts, to integrate that duty into a military action, which was part of an internal armed conflict, and finally, to strengthen that duty by redefining it in a law enforcement context. That is, under the LOW, killing the perceived enemy is viewed as a legitimate objective,[97] whereas, in a peacetime law enforcement context, killing a suspected criminal is a last resort option.[98] Given the differing moral precepts that apply to these two circumstances, the duty to take precautions as applied to a law enforcement context would logically be much more strictly construed

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[95] *Id.* ¶ 178.

[96] *Id.* ¶ 171.

[97] *See* Inter.-Am. C. H.R., *Report on Terrorism and Human Rights*, *supra* note 35, at ch. II (c), ¶ 68 (noting that "[t]he combatant's privilege in turn is in essence a license to kill or wound enemy combatants and destroy other enemy objectives. A privileged combatant may also cause incidental civilian casualties.") (*citing United States v. List* (The Hostage Case)); *see also,* Abresh *supra* note 17, at 757 (stating that "[c]ombatants have no right to life under humanitarian law."); *see also* Hans-Joachim Heintze, *On the Relationship between human rights law protection and international humanitarian law*, 86 INT'L REV. RED CROSS, 789, 797 (2004), (noting that "a combatant who, within the scope of a lawful act during an armed conflict, kills an enemy combatant cannot, according to *jus in bello*, be charged with a criminal offense.").

[98] *See* U.N., *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the 8th U.N. Cong. on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27- Sept. 7, 1990, ¶ 9 (stating that "intentional lethal use of firearms may only be made when strictly unavoidable to protect life."); *see also* Office of the High Comm'r for Hum. Rts., *Professional Training Series No. 7, Training Manual on Human Rights Monitoring*, United Nations 2001 at Ch. IV: Overview of International Human Rights and Humanitarian Law Standards, at 46 (stating that "[i]ntentional lethal use of force and firearms shall be permitted only when strictly unavoidable in order to protect human life.").

than it is in a military context. Under the laws governing international conflicts, the duty is simply to "take all *feasible* precautions in the choice of means and method of attack with a view to avoiding, and in any event *minimizing incidental loss of civilian life*."[99] In contrast, the ECtHR interprets the duty as not simply requiring precautions *to minimize civilian losses*, but as requiring the military to minimize to the greatest extent possible *recourse to lethal force* in the first place.[100]

The Court's requirement that "the forced used must be *strictly proportionate* to the *permitted aims*" also reflects a more stringent proportionality standard then we see under the LOW.[101] Under the LOW governing international armed conflicts, there is no concept of *strict* proportionality or a requirement that the means must be proportionate to the *permitted aims* – a concept which suggests that some aims may not be legitimate and, thus, an attack which seeks to further those aims would violate the proportionality test. Rather, under the LOW governing international armed conflicts, the proportionality requirement seeks to balance anticipated civilian losses against military benefits. As such, a disproportionate attack is defined as "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive in relation to the concrete and direct military advantage anticipated*."[102] Thus, the LOW both tolerates collateral damage and makes allowance for military necessity by permitting it to be balanced against civilian losses. In this case, the ECtHR's requirement of a strict connection between the means and a *legitimate aim* seemingly exhibits a much

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[99] Protocol I, *supra* note 10, art. 57(2)(a)(ii) (emphasis added).

[100] *See* Bhuta, *supra* note 39, at 24 (noting that while "the IHL framework balances an *entitlement* to kill combatants with considerations of avoiding excessive incidental non-combatant casualties, [relative to] overall objective military victory …. By contrast, the IHR framework establishes a non-derogable right to life … violation of which requires a very high threshold of justification."); *see also* Abresh, *supra* note 17, at 754 , 758 (stating that the ECtHR defined "absolute necessity" as mandating that lethal force may only be used "when capture is too risky.").

[101] *Isayeva I*, *supra* note 3, ¶ 169 (emphasis added).

[102] Protocol I, *supra* note 10, arts. 51(5)(b), 57(2)(b) (emphasis added).

lower tolerance of "collateral" damage than we see under the LOW and certainly less than we see under the LOW governing internal conflicts, which offers neither a duty to take precautions nor a proportionality requirement.

In assessing whether the military operation was "planned and conducted in such a way as to avoid or minimise [sic], to the greatest extent possible, damage to civilians,"[103] the Court recognized "that the situation that existed in Chechnya . . . called for exceptional measures on behalf of the State in order to . . . suppress the illegal armed insurgency."[104]Thus, the Court seems to have accepted that the Russian military action was taken in pursuit of a 'permitted' aim. Despite this recognition, the Court went on to conclude that "even assuming that the military were pursuing a legitimate aim . . .the Court does not accept that the operation . . . was planned and executed with the requisite care for the lives of the civilian population."[105] Thus, though the military was pursuing a legitimate aim, the Court still found that the state violated the right to life provision by failing to satisfy the duty to take precautions.[106]

The Court's scrutiny of the military's actions did not end with the planning and operation of the attack, however. Relying, once again, solely on the text of the European Convention, the Court determined that the right to life provision "read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention' requires by implication that there should be some form of *effective official investigation* when individuals have

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[103] *Isayeva I, supra* note 3, ¶ 177.

[104] *Id*. ¶ 178.

[105] *Id*. ¶ 199 (in evaluating the claims before it, the Court noted the following evidence: (1.) there were "a substantial number of civilian cars and thousands of people on the road that day" *Id.* ¶ 184; (2.) there was an "order from a senior military officer at the roadblock to clear the road and to return to Grozny" *Id.* ¶ 185; and (3.) "the apparent disproportionality of the weapons used" *Id.* ¶ 197.).

[106] *See, e.g.*, Abresh, *supra* note 17, at 762 (noting that "[t]he ECtHR approach to precautionary measures in attacks is grounded in Article 2 read in conjunction with Article 1…. This textual foundation has given the ECtHR a broad mandate to scrutinize military practices.").

been killed as a result of the use of force."[107] The Court further held that the duty to investigate requires that the government identify and punish persons responsible for Convention violations.[108] In this case, the Court found "that the authorities failed to carry out an effective investigation into the circumstances of the attack on the refugee convoy."[109] As such, the Court determined that there had been "a violation of Article 2 in this respect as well."[110] Though this duty to investigate parallels a similar duty found in the LOW governing international conflicts,[111] it, nonetheless, imposes an obligation on the military, the likes of which is unheard of in the LOW governing internal armed conflicts.

It is apparent from the Court's statement that the situation called for "exceptional measures", that it did not perceive the aerial bombardment as an ordinary law enforcement action. Rather, the Court viewed the aerial attack as an "exceptional measure", necessitated by extraordinary circumstances, i.e.- the ongoing hostilities between the Russian military and an armed insurgency.[112] Despite its apparent recognition of these extraordinary circumstances and despite the Court's knowledge of the ferocity of the fighting between the Russian forces and the Chechen rebels, the Court quite noticeably failed to address the issue of the possibility of applying IHL to the case before it.[113] The Court's failure to address this issue

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[107] *Isayeva I, supra* note 3, ¶ 208 (emphasis added).

[108] *Id*. ¶ 211.

[109] *Id*. ¶ 225 (the Court noted that the evidence "produc[ed] the strong impression of a series of serious and unexplained failures to act once the investigation had commenced" *Id.* ¶ 219; and that "[t]here appear to have been no efforts to establish the identity and rank of [military personnel involved]"; or to "identify other victims and possible witnesses." *Id.* ¶ 224.).

[110] *Isayeva I, supra* note 3, ¶ 225.

[111] *See* Protocol I, *supra* note 10, art. 87(3) (stating, in pertinent part, that state parties "shall require any commander who is aware that subordinates or other persons under his control … have committed a breach of the Conventions or of this Protocol … where appropriate, to initiate disciplinary or penal action against violators thereof.").

[112] *Id*. ¶ 178.

[113] *See generally* Abresh, *supra* note 17, at 742 (stating that "[i]t is now clear that the ECtHR will apply the doctrines it has developed on the use of force in law enforcement operations even to large battles involving thousands of insurgents,

is not terribly surprising given the nature of this conflict. Most governments are simply not open to the idea of recognizing an internal insurgency as a legitimate struggle for self-determination. Such recognition is thought to impinge too closely on national sovereignty, thus, unless the Court is prepared to take a significant leap out-of-step with its member states, it really must accept the Russian government's characterization of the fighting as an illegal insurgency, and once it does so, the Court is precluded from looking to IHL as *lex specialis.*[114] Moreover, given that the LOW governing internal armed conflicts offers very little civilian protections, the Court was presumably more than happy to disregard the issue of whether IHL applies to the conflict. In this way, the ECtHR was able to maximize civilian protections by looking not to the paltry protections under IHL, but rather, to the fuller protections available under the European Convention.

The applicant's claim in *Isayeva II* stemmed from the same underlying conflict that gave rise to the applicant's claims in *Isayeva I*. In *Isayeva II*, the claimant alleged that she was the victim of indiscriminate bombing by the Russian military in her native village of Katyr-Yurt, Chechnya, and that as a result of the bombing, her son and her three nieces were killed.[115] She brought an action alleging various violations of the European Convention, including an Article 2 right to life violation.[116] The claimant alleged that at some point during the hostilities in Grozny between the Russian military and the Chechen fighters, the rebels were led to believe that they would be granted safe exit out of Grozny towards the south.[117] As a result, a large group of Chechen fighters entered the village of Katyr-Yurt on February 4, 2000.[118] That same morning the Russian military began air strikes over the village.[119]

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artillery attacks, and aerial bombardment.").

[114] *See generally* Protocol I, *supra* note 10, art. 1(4) (defining national liberation movements as international conflicts subject to its provisions).

[115] *Isayeva II, supra* note 3, ¶ 3.

[116] *Id*.

[117] *Id*. ¶ 13.

[118] *Id*. ¶ 15.

[119] *Id*. ¶ 17.

On its face, the ECtHR's holding in *Isayeva II* seems to reflect a similar movement away from the trend towards convergence as we saw in *Isayeva I*. In this case, the ECtHR, just as it did in *Isayeva I*, dealt with all of the issues before it, at least ostensibly, with reference only to the European Convention. The Court's judgment does not make any reference to IHL provisions or principles, and it does not seriously engage the issue of whether an "armed conflict," sufficient to trigger IHL protections, was ongoing in Chechnya.[120] Instead, the Court implied that because Russia had not made an Article 15 derogation,[121] there was no ongoing "armed conflict" within the meaning of IHL.[122] Yet, the Court merely skirted around this issue rather than addressing it head-on. Moreover, just as it did in *Isayeva I*, the Court in *Isayeva II* failed to address the IHL issues, which had been raised in the HRW report that the applicant submitted in support of her claims.[123]

Had the ECtHR determined that IHL applied to the claims raised in the *Isayeva* cases, its determination would have raised three significant issues. First, does the ECtHR have the competence to apply IHL in cases before it?[124] Second, what would the effect have been on the protections afforded the civilian population had IHL

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[120] *See, e.g.*, Abresh, *supra* note 17, at 754 (contending that "[t]he facts amply support a Protocol II characterization. Journalistic accounts strongly suggest that the insurgents were 'under responsible command' while they held Grozny.").

[121] The European Convention, *supra* note 85, art. 15 (provides for derogation in time of emergency).

[122] *Isayeva II*, *supra* note 3, ¶ 191.

[123] *Id.* ¶¶ 113-114 (noting that the NGO Human Rights Watch had submitted a report alleging possible violations of both Common Article 3 and Protocol II, Art. 13(2)).

[124] Had Russia made such derogations it would have raised the related issue of the scope of the ECtHR's jurisdiction. For instance, would the ECtHR have viewed the scope of its competence as limiting it to applying only Convention provisions, or would it have held that its competence extended to both non-derogable convention rights and to IHL as the 'fallback' regime in the event of derogation? *See, e.g.*, Heintze, *supra* note 97, at 801-02 (arguing that "the cumulative and direct application of international humanitarian law has already been recognized in … individual regional complaints procedures. This is due to the wording of Article 15 of the ECHR specifying that emergency measures cannot be 'inconsistent with [the State's] other obligations under international law.").

been applied in this case? With regard to this issue, because Russia is a party to Protocol II, its provisions would apply to an internal armed conflict in its territory, but its protections are limited and it does not prohibit indiscriminate bombing. Rather, under Protocol II, the applicant must show intentional, deliberate bombing of civilians to show a violation. As a result, had IHL been applicable to the facts in this case, civilian protections would have been minimal. Finally, could the Court have credibly declared that the Chechen conflict was a war of national liberation? Although arguably the Chechen movement is a fight for national liberation and, thus, the fuller protections of Protocol I should be applicable, no one, including the state members of the Council of Europe, is ready to recognize it as such. The Russian government has made it clear that they view the Chechen fighters as terrorists and not as lawful combatants,[125] and the ECtHR seems willing to endorse this characterization of the conflict.[126] Moreover, most European countries are hesitant to recognize wars of national liberation *per se*, mainly because such recognition is seen as possibly opening a Pandora's Box full of endless secessions and annexations. Instead, in both of the *Isayeva* cases, the ECtHR side-stepped these concerns by never addressing the issue of whether the fighting was an internal armed conflict and simply taking the position that the European Convention applied to the claims before it.[127]

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[125] *See, e.g.*, Abresh, *supra* note 17, at 754 (stating that "[t]he Russian government has refused to recognize the existence of an armed conflict in Chechnya, characterizing the events there as terrorism and banditry.").

[126] *Isayeva II, supra* note 3, ¶ 180.

[127] Given the reluctance of governments to firm-up protections applicable in internal armed conflicts -- a reluctance that, while morally deficient, is not wholly unreasonable from a sovereign rights perspective -- it would not have been productive had the ECtHR characterized the Chechen conflict as a fight for national liberation. When courts render decisions that are too progressive, they run the grave risk of damaging their own legitimacy and eroding the credibility of the rule of law. Thus, this approach, while arguably cowardly, was probably the most prudent course for the Court to take. That being said, some courts have forged bolder paths, for example, in a ruling that was effectively overturned by the appeals chamber in its July 15, 1999 decision, the ICTY held that the rules of international armed conflict set forth in Protocol II apply as customary law to internal armed conflicts. *See* Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on

After determining that the Convention applied to the issues before it, the ECtHR then turned its attention to the government's defense. The government relied upon an exception to the right to life requirement in Article 2 that permits the government to use force so long as it is no more than *absolutely necessary* in defense of any person.[128] In considering this exception to the right to life requirement, the Court noted that because the right to life "enshrines one of the basic values of the democratic societies making up the Council of Europe[,] [t]he circumstances in which the deprivation of life may be justified must therefore be strictly construed."[129] Thus, given the significance of the right to life provision, the Court went on to strictly interpret the absolutely necessity requirement. The Court's reasoning and conclusions in this case track its reasoning and conclusions in *Isayeva I*. Specifically, in this case, just as in *Isayeva I*, the Court's reasoning first seems to borrow from principles commonly found in IHL as it applies to international armed conflict,[130] but then goes on to establish protections well beyond

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Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 98, 117 (Oct. 2, 1995), *aff'g* Prosecutor v. Tadić, Case No. IT-94-1-A, ICTY, Judgment in the Appeals Chamber (Jul. 15, 1999) *available at* www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf (last visited on Jan. 21, 2007).

[128] *Isayeva II, supra* note 3, ¶ 170.

[129] *Id*. ¶ 172.

[130] Two norms that are integral to the LOW governing international armed conflicts (and some would argue they apply to internal conflicts as well) are the principle of proportionality and the duty to take precautions in attack. *See generally* Inter-Am. C.H.R., Report on Terrorism and Human Rights, *supra* note 35, ¶ 65 (stating that "[i]t has been widely recognized that certain norms apply in all armed conflicts regardless of their nature. These include … [t]he principle of military necessity … [and] [t]he principle of humanity …. Inherent in the principles of military necessity and humanity are the principles of proportionality and distinction.") (*citing* United States v. List (*The Hostage Case*) *text available at* www.cidh.org/terrorism/eng/toc.htm; *see also* Meron, *supra* note 7, at 272 (noting that "[h]uman rights bodies and Courts have also applied, or referred to, classic concepts of the law of war such as proportionality and distinction."); *see also* Roscini, *supra* note 28, at 431 (stating that the principle of proportionality requires military commanders to balance the potential harm to civilians against the military advantage gained from an attack and places an obligation on the military to take all feasible measures to minimize the risk to civilians); *see also* Heintze, *supra* note 97, at 810-11 (citing prior ECtHR decisions dealing with alleged human rights

those found in IHL by looking instead to the fuller protections found in the law enforcement model.[131]

Just as it did in *Isayeva I*, the Court in this case accepted the government's contention that it was pursuing legitimate security objectives.[132] However, the fact that the government was pursuing a legitimate aim did not justify any and all actions that it took in pursuit of that aim. The ECtHR still subjected the government's acts to a high level of scrutiny, holding that two factors must be present: (1) the means used to achieve the military objective must be *strictly proportionate* to the *permitted aims* sought;[133] and (2) sufficient precautions must be taken by the military to minimize, to the greatest extent possible, *recourse to lethal force,* and to ensure that any risk to life is minimized.[134] The Court further held that state responsibility is engaged where the government fails to take *all*

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violations, Heintze noted that "the Court used the wording of international humanitarian law, e.g. by referring to 'civilian life' and 'incidental loss'. On the one hand this demonstrates the cumulative application of both legal texts. On the other it also corroborates the decision of the ICJ that international humanitarian law is *lex specialis*, namely the binding law in armed conflicts which is meant to be used to regulate the conduct of hostilities.").

[131] An example of a fuller protection found in the law enforcement model is the obligation to detain and arrest if possible and to use lethal force only as a last resort. *See, e.g.*, Bhuta, *supra* note 39, at 30 (noting that "the 'necessity' of IHL is concerned with the speedy subjugation of the enemy, while the 'absolute necessity' of IHR concerns the strong preference against lethal force in favor of capture and trial."); *see also* Abresh, *supra* note 17, at 753 , 758 (stating that the right to life provision of the European Convention prohibits "the use of lethal force unless … capture would be too risky to bystanders or the forces involved." And "[e]ven with respect to persons taking an active part in hostilities, the ECHR only permits the use of lethal force when capture is too risky.").

[132] *Isayeva II, supra* note 3, ¶ 180.

[133] *Id*. ¶ 173 Again, just as it did in *Isayeva I*, here, the ECtHR also held that "the force used must be *strictly proportionate* to the achievement of the *permitted aims*." (emphasis added).

[134] *Id*. ¶ 175 (holding that the determination as to whether the means used were strictly proportionate to the permitted aims requires the Court "to examine whether the operation was planned and controlled by the authorities so as to minimize, to the greatest extent possible, *recourse to lethal force*. The authorities must take appropriate care to ensure that any risk to life was minimized.") (emphasis added).

feasible precautions in the choice of means and methods of security operations with a view towards avoiding/minimizing loss of civilian life. This duty encompasses a *duty to foresee possible danger* to civilians as a result of military operations and to take precautions to prevent harm and/or to warn civilians.[135]

The ECtHR's holding in *Isayeva II* is noteworthy in several respects. First, just as it did in *Isayeva I*, the Court looked at the aims of the military operation to determine whether they were 'permitted aims.'[136] Second, the Court, again just as it did in *Isayeva I*, construed the 'absolute necessity' provision in Article 2 as requiring the use of force in military operations to be a last resort option.[137] The effect of this requirement is that armies must now balance the risk (i.e., they must assume more risk in order to decrease the risk to the civilian population).[138]

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[135] *Id.* ¶ 176 (holding that "[t]he State's responsibility is not confined to circumstances where there is significant evidence that misdirected fire from agents of the state has killed a civilian. It may also be engaged where they fail to take *all feasible precautions* in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimizing, incidental loss of civilian life.") (emphasis added).

[136] *Id.* ¶ 173.

[137] *Id.*

[138] Abresh, *supra* note 17, at 743 (stating that "in contrast to humanitarian law's principle of distinction, the ECHR permits the use of lethal force only where capture is too risky, regardless of whether the target is a 'combatant' or a 'civilian'."). *Id.* at 758 (stating that "[e]ven with respect to persons taking an active part in the hostilities, the ECHR only permits the use of lethal force when capture is too risky."). Compare the ECtHR's holding in *the Isayeva Cases* to the Final Report of the Prosecutor by the Committee Established to Review NATO Bombing Campaign Against the Federal Republic of Yugoslavia at www.un.org/icty/pressreal/nato061300.htm#Vrecommendations. The Committee Report suggests that the military is not required to assume additional risks in order to reduce risk to civilians. *See id.* ¶ 55 (noting that "there is nothing inherently unlawful about flying above the height which can be reached by enemy air defenses. However, NATO air commanders have a duty to take practical measures to distinguish military objectives from civilians or civilian objects."). *But see*, ¶ 29 (noting, however, that "the obligation to do everything feasible [to verify target selection] is high but not absolute…."). So how do we explain the discrepancy? Could it be that the discrepancy arises from both who the "government" is (Yugoslavia – NATO bombing *v.* Russian military - Chechnya) and what they are

Finally, the Court has imposed on the military a duty to foresee possible danger to civilians.[139] This duty goes beyond anything seen in the LOW governing either international or internal armed conflicts. Although, Protocol I does provide for two somewhat analogous duties, namely the principle of proportionality[140] and the principle of reasonable care,[141] neither of these principles explicitly and directly obligates the military to foresee possible danger to civilians. While the principle of proportionality provides limitations on attacks that may be expected to cause civilian casualties, it does not prohibit them out right. Instead, the principle of proportionality ties that expectation back to a balance between possible casualties and the military advantage anticipated from the attack. In other words, even when the military foresees that a planned attack may cause possible danger to civilians, that finding, in and of itself, does not necessarily mean that it must refrain from launching the attack. In such circumstances, the military may still launch the attack provided that the possible danger is outweighed by military necessity. Moreover, while the principle of reasonable care requires that the military take care to avoid needless civilian injuries it does not directly obligate the military to foresee possible danger to civilians. The implication being that if the military took reasonable care, but failed to foresee possible danger, liability may not attach. Thus, while throughout its decision the Court seeks to balance military needs against humanitarian concerns,[142] the Court has, nonetheless, permitted the pendulum to swing in favor of the humanitarian aspects of the law by devising a set of obligations that extend well beyond the protections available under both the LOW governing internal and international armed

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trying to achieve (Yugoslavia – stop ethnic cleansing v. Russia – quell separatist movement), i.e.- is it a policy determination, or simply different fora applying different law?

[139] *Isayeva II*, *supra* note 3, ¶ 176.

[140] Protocol I. *supra* note 10, art. 57(2)(b).

[141] *Id*. art. 57(1).

[142] *See, e.g.*, Pfanner, *supra* note 21, at 158 (noting that "[i]nternational humanitarian law rests on a balance of humanitarian and military interests.").

conflicts.[143]

In assessing the facts in this case against the standards that it had set forth, the Court determined that the legitimate state security aim was not planned and executed with the requisite care for the lives of civilians. Specifically, the Court held that "when the military considered deployment of aviation equipped with heavy combat weapons within the boundaries of a populated area, they also should have considered the dangers that such methods invariably entail."[144] Here, the use of this type of weaponry in a populated area, outside wartime, without prior evacuation of civilians and without regard to its indiscriminate effects[145] was, according to the Court, "irreconcilable with the degree of caution expected from a *law enforcement body* in a democratic society."[146] Its choice of language makes it clear that the ECtHR views the government's acts not as military operations during armed conflict, but as law enforcement activities in a democratic society and, as such, it will hold those acts to the higher level of scrutiny reserved for law enforcement acts. Thus, while both of the *Isayeva* holdings have left open the issue of what circumstances must exist in order for the Court to look to IHL in resolving claims that arise out of internal armed conflicts, the holdings do make it clear that short of such a finding, military operations will be strictly scrutinized under the Convention.

The ECtHR holdings in both *Isayeva I* and *Isayeva II* further served to strengthen individual protections in armed conflict by breaking the duties implicit in Article 2 into two components. Essentially, the Court viewed Article 2 as having both a substantive and a procedural component. Under the substantive component the Court looked to whether the Article 2 requirement of 'absolute necessity' had been satisfied. To make this determination, as noted

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[143] *But see* David Kaye, *Khashiyev & Akayeva v. Russia; Isayeva, Yusupova & Basayeva v. Russia; Isayeva v. Russia* , 99 AM. J. INT'L L. 873, 880 (2005) (Kaye seems to assume that had the ECtHR applied IHL in the *Isaveya* cases it would necessarily have applied Protocol II. This point is questionable to me for the reasons stated in section II herein).

[144] *Isayeva II, supra* note 3, ¶ 189.

[145] *Id*. ¶ 190.

[146] *Id*. ¶ 191 (emphasis added).

above, the Court looked to both the principle of proportionality and the duty to take precautions.[147] The Court derives the procedural component by looking first to the general duty in Article 1 of the Convention, which requires state parties to "secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention."[148] With this general duty in mind, the Court then determines that it is implicit in the obligation to protect the right to life that "there should be some effective official investigation when individuals have been killed as a result of the use of force."[149] In other words, the duty to protect necessarily *infers* an obligation to investigate possible violators, because, in the absence of some sort of effective investigation, state parties cannot realistically fulfill their general duty to secure the rights and freedoms of the Convention. "This investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible."[150] In both *Isayeva I* and *Isayeva II*, the ECtHR found that because the government had "failed to carry out an effective investigation into the circumstances" of the military action, there had been a violation of Article 2 in this respect as well.[151]

Along these lines, the Court also inferred a duty to investigate into Article 13's guarantee of an effective remedy. [152] The Court held that in a right to life case, the scope of the Article 13 guarantee requires, "in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible."[153] Thus, an effective remedy in a right to life claim encompasses not merely civil remedies, but also a duty to investigate. In the *Isayeva* cases,

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[147] *See supra* text accompanying notes 136-146.

[148] The European Convention, *supra* note 85, art. 1.

[149] *Isayeva I, supra* note 3, ¶ 208; *Isayeva II ,supra* note 3, ¶ 209.

[150] *Isayeva I, supra* note 3, ¶ 211; *Isayeva II, supra* note 3, ¶ 212.

[151] *Isayeva I, supra* note 3, ¶ 225; *Isayeva II, supra* note 3, ¶ 224.

[152] The European Convention, *supra* note 85, art. 13.

[153] *Isayeva I, supra* note 3, ¶¶ 236 - 237; *Isayeva II, supra* note 3, ¶¶ 226 - 227.

the ECtHR found that the investigations into the military attacks were ineffective and failed to satisfy the government's Article 13 obligations.[154] The ECtHR's holding with regard to Article 13 is significant because it is another explicit demonstration of what the Court did throughout its judgment in the *Isayeva* cases. The Court managed to move the laws governing a state's use of force against its own nationals ahead by enclosing them in the underlying principles inherent in IHL[155] (i.e., human rights protections during internal armed conflict are informed by general principles of IHL). Yet, the Court strengthened those protections by including in the protections available during *internal armed conflicts* a duty to investigate. Thus, a closer examination of this opinion reveals that while the ECtHR's approach may well be out-of-step with the ICJ's *lex specialis* approach, the norms that it serves to protect are very much consistent with, and even go far beyond, those potentially available under the ICJ's approach.[156]

The ECtHR's willingness to entertain this claim, in other words, to not simply hold that this is an internal armed conflict to which IHL applies and that this Court has no jurisdiction to hear claims other than those that arise under the European Convention,[157]

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[154] *Isayeva I, supra* note 3, ¶ 239; *Isayeva II, supra* note 3, ¶ 229.

[155] Aisling Reidy, *The approach of the European Commission and Court of Human Rights to international humanitarian law*, 324 INT'L REV. RED CROSS, 513, 516-519 (1998), (noting that the "emphasis which the Court places on the need to investigate violations of this nature and gravity, and to identify and punish the perpetrators, echoes the obligations existing in humanitarian law to suppress war crimes and grave breaches of the Geneva Conventions.").

[156] Note, however, that the ECtHR's holdings in *the Isayeva Cases* are consistent with the Court's prior precedent dealing with law enforcement activities where the Court's reasoning also parallels and makes references to IHL terms. *See, e.g.*, Heintze, *supra* note 97, at 810-11 (noting that "[i]n the *Ergi* case the ECtHR resorts directly to international humanitarian law, in that it elaborates on the lawfulness of the target, on the proportionality of the attack and on whether the foreseeable risk regarding civilian victims was proportionate to the military advantage." And, "[i]n *Gulec v. Turkey* …. The Court ruled that the use of force must be proportional to the aim and means used." "The Court's reasoning once again shows many parallels with international humanitarian law ….").

[157] Abresh, *supra* note 17, at 759-60 (noting that the ECtHR's jurisprudence makes the intensity of the conflict relevant not to the issue of what body of law

is significant because by providing an individual complaint procedure to victims of internal armed conflict, the Court has remedied a grave deficiency in IHL. IHL, unlike many human right's treaties, does not provide for either an individual complaint procedure nor for individual compensation for victims of armed conflict even when there are proven LOW violations.[158]

What we see in the *Isayeva* cases is the ECtHR moving the law in a way that governments have been unable, or unwilling to do, but it does so subtly in three ways: (1) by accepting the government's contention that the situation in Chechnya called for "exceptional measures by the state";[159] (2) by minimizing the issue of 'armed conflict'; and (3) by applying fundamental human rights norms while adapting those norms to the 'extraordinary' circumstances that exist during military operations. In doing so, the ECtHR was able to accomplish an amazing feat, it surreptitiously adjudicated a claim which it quite possibly had no jurisdiction to adjudicate, it side-stepped the limited LOW protections applicable in internal armed conflicts, and it strengthened the protections available for victims of armed conflict by clearly defining the scope of the European Convention in such situations.[160]

On the same date that the ECtHR decided the *Isayeva* cases,

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applies (i.e. IHL or IHR); but rather, to whether the use of lethal force was lawful).

[158] S*ee generally* Heintze, *supra* note 97, at 798 (noting that "[t]he underdeveloped implementation mechanisms of international humanitarian law, which have to be described as fairly ineffective, are among its great weaknesses.") at 800 (noting that "[t]here are no individual complaint procedures available to the victims of violations of international humanitarian law at the international level.") at 801 (noting that "human rights law does impose constraints upon States in as much as it envisages international complaint procedures."); *see also* Meron, *supra* note 7, at 249 (noting that "[i]nternational law has failed, however, to provide effective remedies against states that persist in violating the prohibitions on attacks against civilians or prisoners of war or that egregiously breach the principle of proportionality.").

[159] *Isayeva I, supra* note 3, ¶ 178; *Isayeva II, supra* note 3, ¶ 180.

[160] *See generally* Abresh, *supra* note 17, at 750 (noting that, while "[t]here is no place for great optimism regarding what, for example, the ECtHR might achieve in Chechnya, but given that Russia at least accepts that the ECHR is a relevant source of law, its direct application to the conduct of hostilities must be considered a promising strategy.").

it also issued an opinion in another case that arose out of Russian military action in Chechnya. In the case of *Khashiyev and Akayeva v. Russia*[161] the applicants alleged that their relatives were tortured and killed by members of the Russian military in violation of Articles 2 and 3 of the Convention.[162] They further alleged that the investigation into their deaths was inefficient and failed to satisfy the government's Article 13 obligations.[163] As in the *Isayeva* cases, the Court never explicitly addressed the issue of whether there was an ongoing internal armed conflict in Chechnya. Instead, just as it did in the *Isayeva* cases, the Court merely acknowledged that a state of emergency had not been declared and an Article 15 derogation had not been made.[164] The Court then went on to decide the issues before it by looking exclusively to the terms of the European Convention and never addressing the question of whether IHL applied.

In addressing the applicant's Article 2 claims, the Court, just as it did in the *Isayeva* cases, looked very carefully at the text of the European Convention and found both a substantive and procedural component to the right to life provision. Here, the government did not allege, as it did in the *Isayeva* cases, that the deaths resulted from a legitimate use of force, but instead took the position that "the circumstances of the applicants' relatives' deaths were unclear," therefore, according to the government, an Article 2 violation could not be proven.[165] The Court rejected this defense, finding that the evidence proved that the applicants' relatives were killed by servicemen and that because there was no justification for the use of lethal force, their deaths had been in contravention of the substantive component of Article 2.[166]

The Court then went on to define the procedural component of Article 2 as requiring an "effective official investigation when

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[161] Khashiyev & Akayeva v. Russ., App. No. 57942-5/00 (Feb. 24 2005) [hereinafter *Khashiyev]*.

[162] *Id*. ¶ 3.

[163] *Id*. ¶ 3.

[164] *Id*. ¶ 97.

[165] *Id*. ¶ 129.

[166] *Id*. ¶ 147.

individuals have been killed as a result of the use of force,"[167] which "must be able to lead to the identification and punishment of those responsible,"[168] and that a failure to do so is, in and of itself, an Article 2 violation. The Court further clarified that the duty to investigate is an automatic one in that the government has a duty to investigate at its own initiative; the duty does not merely arise as a result of a claimed violation.[169] With regard to the facts before it, the Court found that the government "failed to carry out an effective criminal investigation into the circumstances surrounding the deaths . . ."[170] and that, therefore, this duty had not been satisfied. Thus, the Court found that there had been "a violation of Article 2 also in this respect."[171]

Similar to its interpretation of Article 2, the Court interpreted Article 3's prohibition on torture as providing two components of rights: a substantive and a procedural component. Although the Court held that there was insufficient evidence to support the substantive allegations of torture, it did find a violation of the procedural component by virtue of the government's failure to conduct an "effective official investigation . . . capable of leading to the identification and punishment of those responsible."[172] Finally, just as it did in the *Isayeva* cases, here, the ECtHR held that Russia had failed to meet its Article 13 obligation to provide an effective national remedy.[173] The Court's reasoning with regard to the Article

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[167] *Id*. ¶ 153.

[168] *Id*.

[169] *Id*. ¶ 153. Note also that the *Khashiyev* Court places on the government an affirmative duty to act.

[170] *Id*. ¶ 166.

[171] *Id*. ¶ 129. Note also that the Court held that a financial damages award is insufficient to satisfy a state party's "obligation under Art. 2 and 13 to conduct an investigation ..." *Id.* ¶ 121.

[172] *Id*. ¶¶ 177, 180 (similar to its analysis of Article 2, the Court reasoned that Article 3 "read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in …[the] Convention' , requires by implication that there should be an effective official investigation … capable of leading to the identification and punishment of those responsible.") *Id.* ¶ 177.

[173] *Id*. ¶ 185.

13 violation parallels its reasoning in the *Isayeva* cases. Specifically, the Court held that in a right to life case, the scope of the duty to provide an effective remedy expands beyond simply providing civil remedies, to an affirmative duty to conduct "a thorough and effective investigation capable of leading to the identification and punishment of those responsible."[174]

What is most striking about the ECtHR's decisions is not that the Court placed stringent duties and responsibilities on the government's use of force, but rather, that it applied these stringent duties to military actions taken in the context of an internal armed conflict. Most notably, the Court found that under the European Convention there is a double duty to investigate. These duties arise from the procedural aspect that the Court finds implicit in Articles 2 and 3 and from Article 13's obligation to provide an effective remedy. The result is an affirmative duty on the government, not just to respond to individual complaints, but also to initiate investigations into possible violations even in the absence of an individual complaint.[175] The ECtHR has, thus, laid the ground-work for continued *post-ante* judicial review of military operations taken during internal armed conflicts. Moreover, its holdings have expanded the protections available during armed conflict well beyond the protections that are currently provided for under IHL, and certainly beyond anything that has been established with regard to internal armed conflicts.

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[174] *Id*. ¶¶ 183, 185-186.

[175] Reidy, *supra* note 151, at 519-520 (noting that "when one seeks to evaluate the scope of the European Convention to enforce rules of humanitarian law, the area which should not be overlooked is the jurisprudence of the Court concerning the right of a victim to an effective remedy for a violation.… The importance of this obligation … must not be underestimated. Demanding accountability and requiring effective remedies – from investigation to prosecution and payment of compensation – is the key to domestic implementation of human rights and humanitarian law.").

B. Inter-American Commission and Inter-American Court of Human Rights

Similar to the ECtHR's experience, both the Inter-American Commission of Human Rights ("IAComHR") and the Inter-American Court of Human Rights ("IACtHR") have had occasion to address claims that have arisen during internal armed conflicts. The seminal case that came out of the IAComHR is *Juan Carlos Abella v. Argentina* ("*Abella"*).[176] The Commission's decision in *Abella* represents a giant leap towards convergence, but it is a leap that unfortunately was not followed by the IACtHR. The *Abella* case arose out of Argentine military action against a group of armed persons[177] who had launched an attack on a military barracks in La Tablada, Buenos Aires.[178] The complaint was filed on behalf of forty-nine victims of the military action and alleged violations of both the American Convention on Human Rights ("*American Convention"*)[179] and IHL.[180] Specifically, the petitioners' alleged that, (1) "the State engaged in 'bloody repression' to retake the [military] barracks at La Tablada";[181] (2) after the fighting had ceased, state agents "participated in the summary execution of four of the captured attackers, the disappearance of six others, and the torture of a number of other captured attackers";[182] (3) the judicial proceedings, to which some of those captured were subjected,[183]

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[176] *Abella, supra* note 4.

[177] *Id*. n.2 (noting that most of the attackers were members of a political movement called the "All for the Fatherland Movement" (Movimiento Todos por la Patria) or the MTP).

[178] *Id*. ¶ 1.

[179] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.R.S. No. 36, 1144 U.N.T.S. 123 *available at* http://www.cidh.oas.org/Basicos/basic3.htm [hereinafter American Convention].

[180] *Abella, supra* note 4, ¶¶ 5, 148.

[181] *Id*. ¶ 7. (The petitioners claimed that their attack on the military barracks was a legal use of force intended to abort a military *coup d'état* that was planned there. Their justification is based upon Article 21 of the Argentine National Constitution, which establishes for citizens the obligation to take up arms in defense of the constitution.) *Id.* ¶ 10.

[182] *Id*. ¶ 3.

[183] *Id*. ¶ 3. (the State alleged that the MTP had the intention of changing the constitution and overthrowing the executive branch of the government) *Id.* ¶ 80.

were tainted;[184] (4) "the authorities acted with the intention of covering up the violations committed by state agents";[185] and (5) the authorities failed to investigate reported state violations "in a serious or thorough manner."[186] The petitioners' claimed that the government's actions violated various provisions of the American Convention, including Article 4's right to life, Article 5's right to humane treatment, Article 8's judicial guarantees, and Article 25's right to judicial protection.[187] The petitioners further alleged that the state also violated IHL by using "excessive force and illegal means in their efforts to recapture the La Tablada military base."[188]

Before addressing the substance of the petitioners' claims, the IAComHR explicitly dealt with the preliminary issue of whether the military action to recapture the base at La Tablada was merely an "internal disturbance or tension," or whether it amounted to a non-international armed conflict within the meaning of Common Article 3.[189] The Commission recognized that the rules that govern the two types of conflict vary significantly and that, therefore, an assessment of the nature of the conflict "is necessary to determine the sources of applicable law."[190] This approach stands in stark contrast to that taken by the ECtHR in the *Chechen* cases where the Court, at least explicitly, never even addressed the issue of the possible applicability of IHL to the issues before it. Ultimately, the Commission determined 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."[191] Notice also the stark contrast between the Commission's finding of an internal armed conflict in this confrontation that was "of brief duration," versus the lack of such a

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[184] *Id.* ¶ 41.
[185] *Id.* ¶ 4.
[186] *Id.* ¶ 4.
[187] *Id.* ¶ 5.
[188] *Id.* ¶ 147.
[189] *Id.* ¶ 148.
[190] *Id.*
[191] *Id.* ¶ 156.

classification by the ECtHR in the Chechen conflict, despite its long duration and the ferocity of the fighting.[192] What is most interesting about this contrast is less the differences in the way that each court characterized the respective conflicts, than that the two institutions took entirely different routes in their attempt to achieve a similar goal: to establish a legal regime that ensures strict scrutiny of military actions and strong civilian protections. The ECtHR attempted to achieve this goal by at least outwardly disregarding issues of IHL, while the IAComHR took on these issues head-on.

After determining that indeed IHL would be applicable to this conflict, the Commission then addressed the issue of the scope of its jurisdiction to apply IHL. In considering this issue, the Commission made a distinction between its competence "*to apply directly* rules of international humanitarian law" versus its competence "*to inform* its interpretations of relevant provisions of the American Convention by reference to these rules."[193] The Commission reasoned that while the non-derogable rights under the American Convention continue to apply during situations of internal armed conflict, [194] because these rights do not specifically address such situations,[195] it may not be possible for it to resolve issues involving claimed violations of these rights by reference solely to the American Convention.[196] For

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[192] *Id.*

[193] *Id*. ¶ 157 (emphasis added).

[194] *Id*. ¶ 158 (noting that "human rights treaties apply both in peacetime, and during situations of armed conflict").

[195] *Id*. ¶ 158 (recognizing that because human rights treaties were not "designed to regulate such situations … they contain no rules governing the means and methods of warfare."); *see also* Meron *supra* note 7, at 270 (noting that "[a]lthough most human rights implementation bodies lack explicit mandates to apply international humanitarian law, violations in the context of armed conflicts have often led them to investigate certain abuses in light of humanitarian law."). *See also id.* at 272 (noting that "[h]uman rights bodies and Courts have also applied, or referred to, classic concepts of the law of war such as proportionality and distinction.").

[196] *Abella, supra* note 4, ¶ 159 (noting that the fundamental purpose of IHL, on the other hand, "is to place restraints on the conduct of warfare in order to diminish the effects of hostilities."); s*ee also* Heintze, *supra* note 97, at 802-03 (noting that "[t]he Commission explained its reasoning for the application of international humanitarian law by saying that it was the only manner in which it

instance, its ability to resolve right to life claims that arise as a result of an armed conflict "may not be possible . . . by reference to Article 4 of the American Convention alone. . . because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations."[197] Consequently, after first noting that international humanitarian law and international human rights norms "share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity,"[198] the Commission concluded that it "must necessarily *look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance* in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations."[199]

While its use of the language "as sources of authoritative guidance" can arguably be interpreted as an attempt to limit the Commission's competence,[200] it appears from the remainder of the

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could do justice to situations of armed conflict…. [because] the Inter-American Convention on Human Rights … contains no regulations on the means and methods of conducting war."); *see also* Daniel O'Donnell, *Trends in the application of international humanitarian law by United Nations human rights mechanism*, 324 INT'L REV. RED CROSS, 481, 485-86 (1998) (stating that "[t]he obligations and prohibitions set forth in comprehensive human rights treaties … are often defined in broad terms …. [thus] [i]n the context of an armed conflict it would be logical … to take humanitarian standards into account ….").

[197] *Abella, supra* note 4, ¶ 161 (noting also that Article 4 is a non-derogable right).

[198] *Id*. ¶ 158; *see also* Meron, *supra* note 7, at 267 (noting that "[i]n the Abella case, the Inter-American Commission on Human Rights argued that its authority to apply international humanitarian law could be derived from the overlap between norms of the American Convention on Human Rights and the Geneva Conventions.… [and that] 'the provisions of Common Article 3 are essentially pure human rights law….'") (quoting *Abella,* supra note 4, ¶ 158, n.1).

[199] *Abella, supra* note 4, ¶ 161 (emphasis added).

[200] *But see* Heintze, *supra* note 97, at 803 (noting that the Commission "directly applied international humanitarian law and did not use it merely as an aid in interpretation."); *see also* Liesbeth Zegveld, *The Inter-American Commission on Human Rights and international humanitarian law: A comment on the Tablada Case*, 324 INT'L REV. RED CROSS, 505, 507-508 (1998) (stating that, instead of

decision that such a narrow interpretation of the Commission's holding is unwarranted. In looking at the entirety of the Commission's decision it is apparent that it established a broad scope of competence permitting it not merely *to inform* its interpretations of relevant provisions of the American Convention by reference to IHL, but also to *apply directly* rules of international humanitarian law.[201] The Commission reasoned that in the absence of such competence it "would have to decline to exercise its jurisdiction in many cases involving indiscriminate attacks by State agents resulting in a considerable number of civilian casualties."[202] Thus, its ability to guarantee fundamental human rights protections during internal armed conflicts, when the need for such protections is greatest, would be virtually non-existent. According to the Commission, "[s]uch a result would be manifestly absurd in light of the underlying object and purposes of both the American Convention and international humanitarian law treaties."[203]

Additionally, the Commission looked directly to the text of the American Convention, and, in particular, to Articles 25, 29 and 27 to justify its competency determination.[204] With regard to Article 25, the Commission noted that its obligation to provide an internal legal remedy for fundamental rights violations means that "when the claimed violation is not redressed on the domestic level and the source of the right is a guarantee set forth in the Geneva Conventions, which the State Party concerned has made operative as domestic law, a complaint asserting such a violation can be lodged with and decided by the Commission."[205] The Commission reasoned that because it is not possible to resolve such a claim without looking to and applying IHL in its decision, Article 25, by necessity, extends

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simply "refer[ring] to rules of humanitarian law as 'sources of authoritative guidance'…. [T]he Commission … evaluated the conduct of States party to the American Convention *directly* on the basis of international humanitarian law.").

[201] *Abella, supra* note 4, ¶¶ 115, 161.

[202] *Id*. ¶¶ 161.

[203] *Id*. ¶¶ 161.

[204] *Abella, supra* note 4, ¶¶ 163- 164, 168.

[205] *Id*. ¶ 163.

the scope of the Commission's competence to encompass IHL.[206] With regard to Article 29's mandate that no provision of the American Convention shall be interpreted as "restricting the enjoyment or exercise of any right or freedom recognized . . . by virtue of another convention to which the said state is a party,"[207] the Commission reasoned that this mandate requires it to "take due notice of and, where appropriate, give legal effect to applicable humanitarian law rules,"[208] so as not to interpret the Convention's provisions in a way that restricts those rights.[209] Finally, Article 27's derogation provision prohibits derogations that are inconsistent with a state's other obligations under international law.[210] Thus, "when reviewing the legality of derogation measures taken by a state party . . . , the Commission . . . must . . . determine whether the rights affected by these measures are similarly guaranteed under applicable humanitarian law treaties."[211] According to the Commission, each of these provisions serve to expand the scope of its competence to include "look[ing] to and apply[ing] . . . relevant rules of humanitarian law as sources of authoritative guidance."[212]

Having determined the extent of its competence *vis-à-vis* IHL, the Commission then went on to directly address the IHL claims that were before it. In doing so, the Commission sought to balance humanitarian principles against military necessity by considering the circumstances under which the military was acting. A fair consideration of these circumstances requires, according to the Commission, "a reasonable and honest appreciation of the overall situation prevailing at the time the action occurred,"[213] and should not be based on "speculation or hindsight."[214] Looking to the text

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[206] *Id*.

[207] The American Convention, *supra* note 179, art. 29(b).

[208] *Abella, supra* note 4, ¶ 164.

[209] *Id*.

[210] *Id*. ¶ 168; *see also* The American Convention, *supra* note 179, art. 27.

[211] *Abella, supra* note 4, ¶¶ 168-170.

[212] *Id*. ¶ 161.

[213] *Id*. ¶ 181.

[214] *Id*.; *see also* Roscini, *supra* note 28, at 434 (noting that, assessing whether the principle of proportionality has been violated requires "an honest and

and the basic purpose of Common Article 3 and to customary law principles, the Commission determined that although those principles "require the contending parties to refrain from directly attacking the civilian population and to distinguish in their targeting between civilians and combatants,"[215] "[b]y virtue of their hostile acts, the Tablada attackers lost the benefits of [these] precautions in attack and against the effects of indiscriminate or disproportionate attacks."[216] Thus, according to the Commission, the Tablada attackers were legitimate targets under the LOW. That being said, however, the means and method of attack under IHL are not unlimited, so the Commission still had to determine if the military's actions complied with relevant IHL principles. After reviewing the circumstances of the attack, the Commission determined that there was insufficient evidence to establish that "State agents used illegal methods and means of combat."[217] As such, the Commission held that "the killing or wounding of the attackers which occurred *prior to the cessation of combat* . . . were legitimately combat related and, thus, did not constitute violations of the American Convention or applicable humanitarian law rules."[218]

Upon the cessation of hostilities, however, the rules of the game change. The Commission noted that under both the American Convention and Common Article 3, once the attackers were captured or had surrendered, they were no longer legitimate targets under the LOW and the State was required to treat them humanely.[219] This change in circumstances, according to the Commission, changed the nature of the relationship between the attackers and the State. Once the attackers were disarmed and in state custody, the Commission found that "the relationship between the state agents and the

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reasonable bona fide appraisal of the information available to the responsible person at the relevant time, and not on the basis of hindsight.") (*citing* the ICTY Final Report in *Kupreškić et al*., Case No. IT-95-16-T, Trial Chamber II, ¶ 50 (Jan.14, 2000).

[215] *Abella, supra* note 4, ¶¶ 176 - 177.

[216] *Id*. ¶ 178.

[217] *Id*. ¶ 188.

[218] *Id.* (emphasis added).

[219] *Id*. ¶ 195.

attackers [changed and became] . . . analogous to that of prison guards and the inmates under their custody. Consistent with this relationship . . . where the deaths of or injuries to such persons under the exclusive control of the state are alleged, the State must bear the burden of proving . . ." that the circumstances of their deaths or injuries did not amount to a violation of these provisions.[220] Thus, once individuals are no longer legitimate targets under the LOW and are in the custody of the State, the Commission moves from an IHL approach and towards an ordinary law enforcement and human rights approach to the claims at issue.[221] Interestingly, the Commission supports its burden shifting by referencing the decision issued by the IACtHR in the *Neira Alegria*[222] case,[223] a case that did not involve an internal armed conflict and did not raise claims under IHL, rather, the petition in *Neira Alegria* raised claims that arose under the American Convention as a result of the death of three persons in a prison riot in Peru.[224]

The Commission's shift in emphasis is a triumph for individual rights because it takes into consideration changing circumstances, and it allows for heightened civilian protections when circumstances permit. Moreover, the shift in emphasis is justifiable where the context under which the military is operating has changed, and the risk it faces has diminished. When judging claims that arise as a result of active combat situations, it makes sense for the Commission to apply IHL principles with their built-in deference to military decision-making and to military necessity, but when active hostilities have ended and the military is no longer in imminent danger, the level of scrutiny that the Commission applies can justifiably be heightened without disadvantaging military operations.[225]

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[220] *Id*.

[221] *Id*. ¶¶ 230, 235.

[222] Neira Alegria*, et al.,* 1995 Inter-Am Ct. H.R. (ser. C) No. 20, ¶ 65 (Jan. 19, 1995) [hereinafter *Neira Alegria Case]*.

[223] *Abella. supra* note 4, ¶ 196.

[224] *Neira Alegria, supra* note 222, ¶¶ 2 -3 (the decision in this case makes no reference to IHL; rather, it is based solely on the American Convention.).

[225] *See generally* Bhuta, *supra* note 39, at 29 (noting that "[j]ust as the IHL

After reviewing the facts in this case, the Commission found that the State's actions following capture and surrender had violated various provisions of the American Convention, including the right to life under Article 4 and the right to physical integrity under Article 5.[226] The Commission also found that the State "failed in its obligation to carry out an exhaustive, impartial and conclusive investigation into the serious allegations of violations of human rights."[227] Moreover, similar to the ECtHR's holdings in the Chechen cases, the Commission links the duty to investigate, with the duty to provide the victims with a simple and effective remedy, as required by Article 25(1) of the American Convention. Interestingly, however, the Commission's holding does not include any findings of violations of IHL. So in the end, although the Commission goes to great pains to assert its competence to *directly apply* IHL, it is human rights law that controls and serves to provide the strongest measure of protections. One wonders if the Commission had followed the *lex specialis* precedent of the ICJ, whether the protections could possibly have been so stringent. Given the underlying circumstances of this case, in that the claims were brought on behalf of persons who were actually involved in the hostilities, but who had either laid down their arms or were captured (i.e., the victims were *hors de combat*), we may very well have ended up in a similar place. Had a court applying IHL as *lex specialis* been deciding this case, and had that court determined that the victims in this case were POW's, then the protections available to them, while not nearly as comprehensive, would largely track those found in a human rights regime.[228]

In any event, the Commission's efforts to establish its competence to *apply directly* IHL were soon hampered with the IACtHR's February 4, 2000, decision in the *Las Palmeras Case*.[229]

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framework is based on a certain model of war, the IHR framework presupposes a particular kind of 'normal' situation in which law enforcement takes place.").

[226] *Abella, supra* note 4, ¶¶ 245 - 246.

[227] *Id*. ¶¶ 236, 243, 247.

[228] *See generally* Third Geneva Convention, *supra* note 9 (relative to the treatment of prisoners of war).

[229] *Las Palmeras Case I, supra* note 5.

The claims in this case arose out of a 1991 military operation in Las Palmeras, Colombia.[230] The petition alleged that during the military operation, the Colombian Armed Forces fired from a helicopter, injuring a child as he walked to school, and that the National Police Force detained and extrajudicially executed at least six people who were in, and around the school on that date.[231] The Commission submitted the case to the IACtHR requesting the Court to "[c]onclude and declare that the State of Colombia has violated the right to life, embodied in Article 4 of the Convention, and Article 3, common to all the 1949 Geneva Conventions."[232] The State of Colombia filed various preliminary objections, including two objections challenging both the IAComHR's and the IACtHR's competence to apply international humanitarian law and other international treaties in cases before them.[233]

The Commission contested Colombia's preliminary objections, arguing that because the Convention was not directed towards rights protection during armed conflict, it does not address issues that commonly arise in combat situations, such as when combatants can be lawfully targeted.[234] Therefore, to fairly and accurately adjudicate claims that arise under these circumstances, the Court should look to and apply IHL in cases before it.[235] The Commission's argument relied, in part, on Article 25 of the American Convention. According to the Commission, this provision, which requires state parties to provide recourse to a competent Court "for protection against acts that violate . . . fundamental rights . . .,"[236] gives the Court the authority to apply IHL directly in cases before it.[237] Specifically, the Commission contended that in order for the Court to effectively protect fundamental rights it must, of necessity, be authorized to interpret

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[230] *Id*. ¶ 2.
[231] *Id*.
[232] *Id*. ¶ 12.
[233] *Id*. ¶ 16.
[234] *Id* .¶ 29.
[235] *Id*. ¶ 29 (*citing Nuclear Weapons Opinion, supra* note 1, at 240.
[236] The American Convention, *supra* note 179, art. 25.
[237] *Las Palmeras Case I, supra* note 5, ¶ 29.

and apply any international treaty to which the state is a party, including IHL treaties.[238]

Ultimately, the Court rejected each of the Commission's arguments, holding that the IACtHR is only competent to "determine whether the acts or norms of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions."[239] The language that the Court used in its judgment, namely that "the Court is . . . 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,"[240] seems to suggest that the issue of whether Colombia was involved in an internal armed conflict when the claims arose is irrelevant to the Court's determination as to its level of competency. It should be noted, moreover, that the Court never explicitly addressed the issue of how, if at all, the relationship between IHL and IHR would differ for claims that arose during an internal armed conflict. Nor did the Court address the possibility that if it had determined that Colombia was involved in an internal armed conflict when the claims arose, the ICJ's *lex specialis* approach might be relevant to its competency determination.[241] In fact, the Court seemed to brush aside these issues and instead looked solely to what level of competency it believed was necessary for it to effectively interpret and apply the American Convention.

Moreover, the language with which the Court chose to express its judgment leaves much to be desired as it has neither provided a clear understanding of the scope of the Court's

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[238] *Id.*

[239] *Id.* ¶ 32.

[240] *Id.* (emphasis added).

[241] *Id.* ¶ 29 (note that, this issue was directed addressed by the Commission , which argued "that Colombia had not objected to the Commission's observation that, at the time that the loss of lives … occurred, an internal armed conflict was taking place on its territory," and that therefore, the "instant case should be decided in the light of" both the Convention and IHL. In support of its position the Commission cited the ICJ opinion in the *Nuclear Weapons Opinion*, which held that "[t]he test of what is an arbitrary deprivation of life … falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict ….").

competence to apply IHL, nor clarified the exact nature of the relationship between IHL and IHR in claims that arise out of internal armed conflicts. While the Court, by rejecting the proposition that it is competent to judge whether a particular state act violated IHL, clearly set an outside limit on the scope of its competence *vis-à-vis* IHL,[242] it, nonetheless, left unanswered the question of what, if any, residual competence it retains.[243] The extent of the interplay that remains between the Convention and IHL in claims that arise during internal armed conflicts is simply not clear from the Court's holding. Is the Court free to strengthen the Convention protections by interpreting its provisions with direct reference to IHL? For example, can the Court interpret the right to life provision in the American Convention as incorporating IHL principles such as, the prohibition against indiscriminate attacks,[244] or the requirement to take all feasible precautions in the choice of means or method of attack?[245]

The language that the Court has chosen suggests that it has not interpreted its competence this broadly and, instead, has limited itself merely to looking to the norms of international law upon which a state party relies only insofar as necessary to ensure that those norms are compatible with the American Convention.[246] In other words, the Court can merely judge whether a norm or IHL principle, say for instance the principle of military necessity, as applied by a state, i.e. a state's military operation, is compatible with the Convention.[247] It can, however, make these judgments regardless of

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[242] *Id*. ¶¶ 32-33; s*ee also*, Heintze, *supra* note 97, at 804 (observing that, "the Court conceded that it could only use the Geneva Conventions for the purposes of a better interpretation of the Human Rights Convention.").

[243] *See, e.g.,* Heintze, *supra* note 97, at 804-05 (arguing that the Court in the *Las Palmeras Case* did not exclude the possibility of "us[ing] international humanitarian law indirectly as authoritative guidance in interpreting human rights norms.… though it stopped short of applying international humanitarian law directly.").

[244] Protocol I, *supra* note 10, art. 51(4).

[245] *Id*. art. 57(2).

[246] *See*, *e.g., Las Palmeras Case I, supra* note 5, ¶¶ 32 - 33.

[247] *Id*. ¶¶ 32 - 33; *see also* Bhuta, *supra* note 39, at 14 (contending that the Court's decision in the *Las Palmeras Case* is an example of what Bhuta terms the

the underlying circumstances, i.e. *in times of peace or armed conflict,* making the issue of whether there is an internal armed conflict irrelevant to its jurisprudence. Thus, its level of competence would not change even if a state denies the existence of an armed conflict on its soil.

What is unclear, however, is how the Court could determine whether a norm or principle of IHL is compatible with the Convention without first interpreting the IHL norms on which the state has relied, such as those that provide for military necessity and lawful attacks against military targets. So, in order to fulfill its task, isn't the Court, in essence, merging the two bodies of law? That is, the end result of this "compatibility" approach is that the Court has interpreted the Convention with reference to those norms of IHL that are *compatible with* it. Thus, this approach is arguably an inverted application of *lex specialis* (i.e., ultimately it is the norms of the Convention and not those of IHL that are controlling).

This understanding of the Court's opinion, while more or less consistent is, nonetheless, not quite as broad as that articulated by Judge Trindade in his concurring opinion. Judge Trindade began his opinion by noting that both the State and the Commission agree that the Court may "take into account Article 3 common to the four Geneva Conventions on International Humanitarian Law as [an] *element of interpretation* for the application of Article 4 of the American Convention on Human Rights."[248] According to Judge Trindade, it is not surprising that there was agreement on this point because this method of interpretation, which he terms "the *interpretative interaction* between distinct international instruments of protection of the rights of the human person",[249] is, in Judge Trindade's opinion, "warranted by Article 29(b) of the American Convention."[250] In fact, according to Judge Trindade, "such exercise

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"interpretive complementarity approach" to the relationship between IHL and IHR in which the norms of IHL are used to inform the content of the rights provided in the American Convention).

[248] *Id.* ¶ 3 (*quoting* Separate Opinion of Judge A.A. Cancado Trindade); *see also id.* ¶¶ 16, 28, 30.

[249] *Id.* ¶ 4.

[250] *Id.*; *see also* American Convention, *supra* note 179, art. 29(b) Restrictions

of *interpretation* is perfectly viable, and conducive to the assertion of the right not to be deprived of . . . life arbitrarily . . . in *any circumstances*, in times of peace as well as of non-international armed conflict."[251] The interpretative interaction approach, while arguably broader than the approach adopted by the majority, is, however, as far as Judge Trindade believes that the Court's competence extends. That is, while it may be necessary to look to IHL to aid in interpretation of the Convention during situations of internal armed conflict, such circumstances do not, according to Judge Trindade, permit the Court to directly apply those norms to cases before it.[252]

Regarding the State's second preliminary objection, the alleged lack of competence of the Commission to apply IHL, the Court summarily rejected the Commission's assertion of competence. While the Court clearly acknowledged that the Commission has broad jurisdiction for "the promotion and protection of human rights," it was, nonetheless, equally clear in its

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Regarding Interpretation (stating that, "No provision of this Convention shall be interpreted as: (b) 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 ….").

[251] *Las Palmeras Case I, supra* note 5, ¶ 4 (*quoting* Separate Opinion of Judge A.A. Cancado Trindade).

[252] *Id*. ¶¶ 5-8 (stating that "There is, nevertheless, 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." This difference, according to Judge Trindade, stems from his view that the convergence of the norms of IHL with those of the Convention is not a "correlation between substantive norms"; but rather, is based upon the general obligations common to the American Convention and the Geneva Conventions. "Their contents are the same: they enshrine the duty *to respect*, and *to ensure respect* for, the norms of protection, in all circumstances. This is, in [Judge Trindade's opinion], the common denominator … capable of leading us to the consolidation of the obligations *erga omnes* of protection of the fundamental right to life, *in any circumstances, in times both of peace and of internal armed conflict*.") (emphasis added) (Note that, similar to the view expressed by the majority, Judge Trindade seems to also view as irrelevant the issue of whether there was an internal armed conflict ongoing at the time that the claims arose.) *See also Las Palmeras Case I, supra* text accompanying notes 239-241.

determination that the Commission's competence does not extend beyond those rights specifically protected by the Convention.[253]

On December 6, 2001, the IACtHR issued its judgment on the merits in the *Las Palmeras Case*.[254] In these proceedings, the Commission had asked the Court "to determine whether the right to life recognized in Article 4 of the Convention has been violated [by the State of Colombia]."[255] The Commission asked the Court to consider three separate categories of deaths in making its determination. Only the final category, which involved the death of one individual, is relevant to the issues discussed herein.[256] "The Commission asked the Court to establish the circumstances of [his] death in order to determine whether Colombia had violated Article 4 of the Convention."[257] With regard to this individual, the Commission developed two theories of State responsibility: (1) that this individual was extrajudicially executed while in State custody,[258]

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[253] *Las Palmeras Case I, supra* note 5, ¶ 34 (note, however, that Judge Jackson in his dissent parts with the majority on this issue. His dispute with the majority opinion does not go to the substance of the claim, however. Jackson agrees with the majority "that neither the Court nor the Commission is authorized by the Convention to apply international humanitarian law in matters brought before them," but Jackson views the issue of whether the Commission is competent to apply IHL in matters brought before it as moot because the case is no longer before the Commission.); *see id.* at Partially Dissenting Opinion of Judge Jackson, at 1.

[254] Las Palmeras Case, Inter-Am. Ct. H.R. (Ser. C) No. 90 (Dec. 6, 2001) [hereinafter *Las Palmeras Case II*].

[255] *Id*. ¶ 36.

[256] *See generally id.* ¶¶ 32-34 (the first category involved five persons (Artemio Pantoja Ordonez, Hernan Javier Cuaran Muchavisoy, Julio Milciades Ceron Gomez, Wilian Hamilton Ceron Rojas, and Edebraes Noberto Ceron Rojas), whose deaths an administrative proceeding had previously found the State responsible for in violation of Article 4 of the Convention. With regard to this group of persons, the IACtHR declared that the prior administrative rulings were *res judicata,* that the issue had been definitively determined at the local level, and that the matter need not be brought before it for confirmation). *See generally id*. ¶ 35 (the second category involved one individual (referring to the death of N.N./Moises or N.N./ Moises Ojeda), whose death a State agent conceded that the State was responsible for in violation of Article 4 of the Convention).

[257] *Id*. ¶ 41 (referring to the death of Hernan Lizcano Jacanamejoy).

[258] *Id*. ¶ 39.

and/or (2) that the State is responsible for his death in violation of Article 4 because "it failed to conduct a serious investigation into how the events occurred."[259] With regard to its second theory of responsibility, the Commission relied in part on precedent from the ECtHR, which held that the right to life encompasses a duty to protect life, and the duty to protect implies a duty to investigate possible violations.[260] While the Court declined to adopt this broad interpretation of the right to life,[261] it did look to see whether the State had conducted an adequate investigation in this case. Based on the evidence before it, the Court determined that "in the instant case, the argument that no serious investigation was conducted cannot be made."[262] The Court further found that the evidence in this case did not support a finding that Colombia had violated the right to life provision of the Convention with regard to the death of this individual.[263]

Though the IACtHR did not follow the ECtHR's lead by inferring a duty to investigate into the right to life provision, it did, however, derive from the text of the American Convention a broad duty to provide an effective remedy.[264] Specifically, the Court looked to Article 8(1)[265] in relation to Article 25(1)[266]and held that these provisions place on the State an obligation to provide an effective remedy for Convention violations.[267] Moreover, the

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[259] *Id*. ¶¶ 39, 42.

[260] *Id*.

[261] *Id*. ¶ 42.

[262] *Id*.

[263] *Id*. ¶ 47.

[264] *See also supra* text accompanying notes 152-154, 173-175 (for similarities between the IACtHR's holding in this regard and that of the ECtHR in *the Chechen* cases).

[265] The American Convention, *supra* note 179, art. 8(1) Right to a Fair Trial ("Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal … for the determination of his rights ….").

[266] *Id*. art. 25(1) Right to Judicial Protection ("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 ….").

[267] *Las Palmeras Case II, supra* note 254, ¶¶ 58, 60.

IACtHR went on to interpret this duty very broadly, holding that it requires the State to investigate alleged Convention violations, to identify, prosecute and punish those responsible, and to compensate the victims for injuries and damages that they have suffered as a result of the violation.[268] With regard to the claimed violations in this case, the Court held that "it is self-evident that the relatives of the victims did not have an effective remedy that would guarantee the exercise of their rights in violation of Articles 8 and 25."[269]

So in the end, the IACtHR accomplished a strengthening of individual rights during internal armed conflict not unlike that which the ECtHR accomplished in the *Chechen* cases. It accomplished this strengthening by including in the protections available during internal armed conflict a duty to provide an effective remedy, which necessarily implies a role for judicial review of military decision-making. Moreover, the IACtHR's willingness to entertain this claim, and not simply to hold that IHL applies during an internal armed conflict and that the Court has no jurisdiction to apply IHL, is significant because it means that victims of internal armed conflicts now have a regional mechanism by which to raise individual claims. What is noteworthy about the Court's decision, however, is not just the outcome, but also the path it took to get there. As you will recall, in its preliminary judgment the Court established its competence to assess whether the IHL norms as applied by the State are compatible with the Convention.[270] In its judgment on the merits, however, it is unclear how this competency actually played out in practice as the Court decided this case, at least ostensibly, without any reference to IHL at all.[271]

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[268] *Id*. ¶¶ 61, 65.

[269] *Id*. ¶ 66 (noting that the criminal proceedings had been on-going for ten years and failed to identify the responsible parties.). *Id.* ¶¶ 61-64; *see also id*. at Joint Opinion of Judges Sergio Garcia Ramirez, Hernan Salgado Pesantes and Alirio Abreu Burelli (holding that "despite the long period of time that has passed since the events occurred, the State has not complied with its duty to investigate, prosecute and punish the individuals responsible…. It is, therefore, right and proper that the Court should find that the State violated articles 8 and 25 of the American Convention.") *Id.* ¶ 9.

[270] *See supra* text accompanying notes 237-247.

[271] It is, in fact, only in the concurring opinion of Judges Trindade and Gomez

On the same date that the IACtHR issued its judgment on the preliminary objections in the *Las Palmeras Case*, it also issued a decision in *Bamaca Velasquez v. Guatemala*, a case which likewise raised the issue of the relationship between the Convention and IHL.[272] The claims in *Bamaca Velasquez*, arose out of an armed encounter between guerrilla combatants and the regular army in Nuevo San Carlos, Guatemala.[273] During that encounter, Efrain Bamaca Velasquez was captured alive, taken to various military detachment centers, interrogated and allegedly tortured.[274] The last time he was seen, he was in the infirmary of a military base in San Marcos, but he has not been seen since. At the time that the case came before the court, his whereabouts were still unknown.[275] In response to a complaint that requested "precautionary measures, based on the detention and mistreatment of [Efrain] Bamaca

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that there is any reference to IHL at all. *See Las Palmeras Case II, supra* note 254, ¶ 9 (citing at Joint and Separate Opinion of Judges A.A. Cancado Trindade and M. Pacheco Gomez) (noting that "the general and fundamental duty of Article 1(1) of the American Convention finds a parallel in other treaties of human rights and of International Humanitarian Law.") *citing* the four Geneva Conventions of 1949 on International Humanitarian Law (Article 1) and the Additional Protocol I of 1977 to these latter (Article 1(1)).

[272] *Bamaca Velasquez, supra* note 6.

[273] *Id*. ¶ 121(h).

[274] *Id*. ¶¶ 121(h-m), 151, 154.

[275] *Id*. (in weighing the evidence with regard to Bamaca's disappearance the Court re-affirmed its prior jurisprudence in the area of forced disappearances noting that "due to the nature of the phenomenon and its probative difficulties, the Court has established that if it has been proved that the State promotes or tolerates the practice of forced disappearance of persons, and the case of a specific person can be linked to this practice, either by circumstantial or indirect evidence, or both, or by pertinent logical inference, then this specific disappearance may be considered to have been proven.…"); *Id*. ¶ 130; *see also id*. ¶¶ 143-144 (the Court went on to find that "[i]t can … be asserted, according to the evidence submitted in this case, that the disappearance of Efrain Bamaca-Velasquez is related to this practice …, and therefore the Court deems it to have been proven."); *Id.* ¶ 132; *see also id*. ¶ 152 (holding that "the circumstances in which the detention by State agents of Bamaca Velasquez occurred, the victim's condition as a guerrilla commander, the State practice of forced disappearances and extrajudicial executions and the passage of eight years and eight months since he was captured, without any news of him, cause the Court to presume that Bamaca Velasquez was executed."). *Id*. ¶ 173.

[Velasquez] and other combatants," the Inter-American Commission issued a report with recommendations to the State.[276] When the State failed to implement its recommendations, the Commission submitted the case to the Inter-American Court and asked it to decide whether the State had violated various provisions of the American Convention,[277] the Inter-American Convention on Torture,[278] and Common Article 3.[279] The Commission also requested that the Court "call on the State to identify and punish those responsible for the violations."[280]

At the outset, the Court noted that "when the facts relating to this case took place, Guatemala was convulsed by an internal armed conflict."[281] The Court was quick to point out, however, that this finding did not in any way absolve the State of its responsibilities under the Convention.[282] In fact, throughout its judgment, the Court repeatedly noted that "although the State has the right and obligation to guarantee its security and maintain public order, it must execute its actions 'within limits and according to procedures that preserve both public safety and the fundamental rights of the human person.'"[283] Thereby, making it clear that the Convention applies under all circumstances, including peacetime and during armed conflict, and that an ongoing armed conflict does not entitle the state to disregard its responsibilities under the Convention. Yet, despite its explicit acknowledgment that there was an internal armed conflict ongoing in Guatemala at the time when the facts relating to this case took place,

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[276] *Id*. ¶¶ 4, 16.

[277] *Id*. ¶ 2 (the Commission asked the Court to determine whether Articles 1,3, 4, 5, 7, 8, 13, and 25 of the American Convention; Articles 1,2, and 6 of the Inter-American Convention to Prevent and Punish Torture; and/or Common Article 3 had been violated).

[278] *Id*.

[279] *Id*.

[280] *Id*. ¶ 2.

[281] *Id*. ¶ 121(b) (*citing* REMHI report, Tome III; Report of the Commission for Historical Clarification, Tome I; and final arguments of the State during the public hearing held at the seat of the Court on June 16, 17 and 18, 1998).

[282] *Id*. ¶¶ 143, 155.

[283] *Id*. ¶ 143 (*citing* Durand and Ugarte Case; Castillo Petruzzi et al. Case; Godinez Cruz Case; and Velasquez Rodriguez Case); *see also id*. ¶ 174.

the Court, in resolving the majority of the alleged Convention violations never engaged either the issue of the possibility of applying IHL as *lex specialis* or even whether IHL should be used as an interpretative tool to aid it in resolving these issues. Instead, the Court, without any reference to relevant principles of IHL, simply went on to decide most of the claimed Convention violations by looking very specifically to both the text of the Convention and to its prior judgments, in which it interpreted those provisions in a law enforcement context.[284] Thus, similar to its reasoning in *Las Palmeras I*, the Court here appears to be saying that it will apply the Convention in the same manner regardless of the underlying circumstances, *in times of peace or armed conflict,* making the issue of whether there is an internal armed conflict nearly irrelevant to its jurisprudence.[285]

That being said, however, with the acquiescence of both Guatemala and the Commission,[286] the Court did address the question of a possible violation of Article 1(1) of the American Convention in relation to Common Article 3.[287] Specifically, the Commission argued that Article 1(1)'s obligation "to respect the rights and freedoms recognized herein . . ." combined with Article 29's prohibition against interpreting the Convention in a manner that restricts the rights and freedoms recognized by other international treaties to which Guatemala is a party, including Common Article 3, requires that the Convention is interpreted in a manner that does not restrict the rights found in Common Article 3, and authorizes the Court to use Common Article 3 as "a valuable parameter for interpreting the provisions of the American Convention."[288] The State did not dispute the Commission's interpretation of these provisions stating 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

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[284] *Id*. ¶¶ 136-201 (specifically, the Court found violations of art. 7 (¶ 144), art. 5 (¶ 166), art. 4 (¶ 175), arts. 8, 25 in relation to art. 1(1) (¶ 196)).

[285] *See supra* text accompanying notes 238-43.

[286] *Bamaca Velasquez, supra* note 6, ¶¶ 2, 204.

[287] *Id*. ¶¶ 203-214.

[288] *Id*. ¶ 203.

other provision that it deemed appropriate.'"[289]

In considering the question of the interplay between the Convention and Common Article 3, the Court first reiterated that the fact that Guatemala was engaged in an internal armed conflict did not exonerate it from its Article 1(1) requirement to respect and guarantee human rights.[290] The Court then went on to tie this obligation into Guatemala's Common Article 3 obligations by holding that Guatemala's duty to respect and guarantee human rights[291] extends to the protections provided in Common Article 3.[292] Thus, Guatemala must "grant those persons who are not participating directly in the hostilities or who have been placed *hors de combat* for whatever reason, humane treatment."[293] It appears from the language in its decision[294] that the Court has, in a sense, merged the laws of war with human rights norms by looking less at the circumstances that govern which sphere of law applies, and more at their common purpose – to protect the fundamental rights of the human person.[295] The Court seems to view Common Article 3 in a similar vein as it does the Convention: as an instrument of fundamental rights protection in all circumstances, be they peace or wartime.[296] Interestingly, although the Court seems to tie Guatemala to its Common Article 3 obligations, it does not interpret its own competence under the Convention as permitting it to apply IHL

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[289] *Id*. ¶ 204.

[290] *Id*. ¶ 210-213.

[291] *Id*. ¶ 207 *citing id*. ¶¶ 121(b), 143, 174.

[292] *Id*. ¶ 207 (holding that "as established in Article 3 common to the Geneva Conventions of August 12, 1949, confronted with an internal armed conflict, the State should grant those persons who are not participating directly in the hostilities or who have been placed *hors de combat* for whatever reason, humane treatment ….").

[293] *Id*. ¶ 207.

[294] *See, e.g.*, *id*. ¶ 143 (referring to "fundamental rights of the human person); *see also id*. ¶174 (referring to "fundamental rights of each individual"); *see also id*. ¶ 207 (referring to "obligations to respect and guarantee human rights.").

[295] *See id*. ¶143; *see also id*. ¶ 209 (noting that "[i]ndeed, there is a similarity between the content of Article 3, common to the 1949 Geneva Conventions, and the provisions of the American Convention, and other international instruments regarding non-derogable human rights ….").

[296] *Id*. ¶ 207.

directly in the cases before it. Although it holds that it may consider relevant IHL provisions, including Common Article 3 in *interpreting* the American Convention, it ultimately determines that it lacks the competence to directly find that Guatemala has violated those provisions.[297] Moreover, although its judgment appears to be consistent with Article 29's prohibition on interpreting the Convention in a manner that restricts a states' other international obligations, the Court never explicitly states that it has relied on this textual provision in reaching its judgment.

Although the Court cites *Las Palmeras I* in support of this portion of its holding, it should be noted that the language that the Court uses here is noticeably different than that which it used in the *Las Palmera*s *I* decision. Here, the Court held that "relevant provisions of the Geneva Conventions *may be taken into consideration as elements for the interpretation of* the American Convention."[298] In contrast, in *Las Palmeras I*, the Court held that it

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[297] *Id*. ¶¶ 208-209 (holding that the Court "lacks competence to declare that a State is internationally responsible for the violation of international treaties that do not grant it such competence, [although] it can observe that certain acts or omissions that violate 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. … Indeed [given] the similarity between the content of Article 3, common to the 1949 Geneva Conventions, and the provisions of the American Convention …. relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention."); *citing Las Palmeras I., supra* note 5, ¶¶ 32-34; *see also Bamaca Velasquez, supra* note 6, ¶ 3 (at Separate Opinion of Judge De Roux Rengifo (noting that he "share[s] the Court's assertion … about its lack of competence to declare that a State has violated the 1949 Geneva Conventions on international humanitarian law.")).

[298] *Bamaca Velasquez, supra* note 6, ¶ 209 (emphasis added); *see also id*. ¶¶ 23-25 (at Separate Concurring Opinion of Judge Sergio Garcia Ramirez on the Judgment on Merits of the Bamaca Velasquez Case) (stating that although the Court "cannot directly apply the rules of international humanitarian law embodied in the 1949 Geneva Conventions …. the forgoing does not preclude taking into consideration these provisions of international humanitarian law – another perspective of the international system - in order to interpret the American Convention..." According to Judge Garcia Ramirez, the Court can in fact go further and "observe the presence of norms of *jus cogens* resulting from the evident correlation – which shows an international consensus – between the provisions of

"is 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."[299] One possible explanation for the dichotomy in language may simply be that because the issue of the Court's competence to apply Common Article 3 was not contested in this case, the Court felt less constrained and was, therefore, clearer in its competency determination.[300] If the Court's holding in this case was dependent upon fact that Guatemala had acquiesced to the Court's use of Common Article 3, then the holding really is limited to the specific circumstances of this case and not very far-reaching. If Guatemala's acquiescence was not the basis for the Court's competency decision, then the dichotomy in the choice of language makes one wonder if even the Court has a clear understanding of the extent of its competence with regard to the application of IHL during situations of internal armed conflict.[301] Is it to look to the provisions of IHL to aid in its interpretation of the Convention where claims arise in the

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the American Convention, the Geneva Conventions, and 'other international instruments' … regarding 'non-derogable human rights'…." Thus, it appears from Judge Garcia Ramirez's opinion that the Court is seemingly free to look not just to the Geneva Conventions but to *jus cogens* in interpreting the Convention in the context of an internal armed conflict.)); *see also* Bhuta, *supra* note 39, at 14 (contending that the Court's decision in the *Bamaca* case is an example of what Bhuta terms the "interpretive complementarity approach" to the relationship between IHL and IHR, whereby, the norms of IHL are used to inform the content of the rights provided in the American Convention).

[299] *Las Palmeras I, supra* note 5, ¶¶ 32-33 (emphasis added).

[300] *See, e.g.,* Heintze, *supra* note 97, at 804-05 (stating that "if the parties to a conflict agree that international humanitarian law applies directly, then the Inter-American bodies may ensure compliance with that *corpus juris*"). Note that in *Las Palmeras I,* the state contested the Court's competency to directly apply the Geneva Conventions, although it did concede that the Court was competent to interpret those conventions. *See Las Palmeras Case I, supra* note 5, ¶¶ 16, 28, 30. *Contra*, in *Bamaca Velasquez*, the State agreed that the Court was competent to directly apply IHL. *See Bamaca Velasquez, supra* note 6, ¶ 204.

[301] *But see id*. at 804-05 (observing that "[t]he Court contended that in order to avoid an unlawful restriction of human rights law and for the sake of interpretation, Article 29 of the Convention permits reference and resort to other treaties to which Guatemala is a party" and arguing that "[t]his judgment ascertained the direct applicability of international humanitarian law by human rights Courts.").

context of an internal armed conflict? For instance, should it determine what is an 'arbitrary deprivation of the right to life' by looking to how that protection is construed under the laws of war governing internal armed conflicts, or is the Court to look to a state's acts and determine whether those acts, even if they comply with IHL obligations, are, nonetheless, incompatible with the Convention? Interestingly, when addressing the issue of possible Convention violations, the Court did not appear to adopt either of these interpretative modes. Instead, although it took notice of the obligations under Common Article 3, it is not clear how, if at all, the Court applied these obligations to its interpretative analysis of Guatemala's acts *vis-à-vis* the American Convention. It is not clear how its interpretation of Guatemala's obligations under the Convention would have been different had it not taken notice of Common Article 3. In other words, how does the Court's "use" of Common Article 3 serve to enhance fundamental human rights protections?

After determining the scope of its competence with regard to Common Article 3, the Court goes on to find that the State violated Article 1(1) of the Convention in relation to Articles 4, 5, 7, 8 and 25.[302] Article 1(1) requires state parties "*to respect* the rights and freedoms recognized [in the Convention] *and to ensure* to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms."[303] The Court interprets this provision as requiring the State "*to organize the public sector* so as to guarantee persons within its jurisdiction the free and full exercise of human rights."[304] The Court went on to tie this duty to a duty to investigate possible Convention violations and to identify and punish those responsible.[305] With regard to the facts in this case, the Court determined that "there existed and still exists in Guatemala, a situation of impunity . . . because, despite the State's obligation to

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[302] *Bamaca Velasquez, supra* note 6, ¶ 214.

[303] The American Convention, *supra* note 179, art. 1(1): Obligation to Respect Rights (emphasis added).

[304] *Bamaca Velasquez, supra* note 6, ¶ 210 (emphasis added).

[305] *Id*. ¶¶ 211- 212.

prevent and investigate, it did not do so."[306] Thus, once again we see a regional human rights court looking very specifically to the text of a regional human rights treaty to provide heighten individual rights protections during an internal armed conflict. What is also interesting about the Court's holding with respect to Article 1(1) of the Convention is that it reached this holding after establishing its competence to interpret the Convention in light of Common Article 3, but yet it failed to explain how, if at all, it considered the provisions of Common Article 3 in its decision-making process. This omission makes one wonder why the Court bothered to engage the discussion of the interpretative application of Common Article 3 in the first place. Once again, we have a situation where the IACtHR seems to be saying one thing, that it is competent to look to IHL in interpreting a regional human rights treaty in situations of internal armed conflicts, and yet seemingly doing another by disregarding its interpretative competence while deciding the issues in the case before it.

VI. Breadth of the Regional Courts' Jurisprudence

A review of the ECtHR and the IACtHR's jurisprudence on claims arising in the context of internal armed conflicts leaves one questioning what it all means for the future of IHL in general, and the laws regulating internal armed conflicts in particular. Along these lines, it raises the question of the breadth of the regional courts' decisions. Are their approaches far-reaching, or does their application of human rights law in internal armed conflicts have limited applicability?[307] In other words, are the courts' holdings uniquely a product of the text of their respective conventions or can they be construed as establishing alternative approaches to the

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[306] *Id*. ¶ 211 (holding that "there existed and still exists in Guatemala, a situation of impunity with regard to the facts of the instant case ….").

[307] *See, e.g.,* Heintze, *supra* note 97, at 801-02 (arguing that "the cumulative and direct application of international humanitarian law has already been recognized in these individual regional complaint procedures. This is due to the wording of Article 15 of the ECHR specifying that emergency measures cannot be 'inconsistent with [the State's] other obligations under international law'. Article 27 of the American Convention on Human Rights is similarly formulated.").

interplay between IHL and IHR in internal armed conflicts?

It is clear from the holdings in the *Isayeva Cases* that the ECtHR looked very carefully to the text of the European Convention in deciding the issues in these cases.[308] The 'absolute necessity test' on which the Court relies is referenced in the text of the Convention itself.[309] In order for the ECtHR to rely on this test and to apply the Convention protections to the Russian-Chechnya conflict, it had to, and did in fact, take a very narrow, formalistic view of Article 15, implicitly holding that there cannot be an armed conflict in the absence of a declared public emergency or an Article 15 derogation.[310] Because there was no such declaration or derogation here, the Convention applies[311] and, according, to the Court, "the operation in question therefore has to be judged against a normal legal background."[312] Thus, the Court proceeded to apply a law enforcement analysis to the military operations at issue.[313] Given its explicit reliance on Article 15, the Court's decision to apply human rights law to claims that arise in the context of an internal armed conflict may very well be of limited value outside of the European Court.

Similar to the textual approach taken by the ECtHR, the IACtHR also appears to have relied directly upon the text of the American Convention to justify its approach to the interplay between IHL and IHR in internal armed conflicts. In determining that it "is

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[308] *See generally* Abresh, *supra* note 17, at 762 (observing that "[t]he ECtHR's approach to precautionary measures in attacks is grounded in Article 2 read in conjunction with Article 1…. This textual foundation has given the ECtHR a broad mandate to scrutinize military practices.").

[309] The European Convention, *supra* note 85, art. 2(2).

[310] *Id*. art. 15 (providing, however, that there can be no derogation for the right to life provision in Article 2, "except in respect of deaths resulting from lawful acts of war.").

[311] *See, e.g.*, Kaye, *supra* note 143, at 877-78 (contending that the ECtHR's narrow view of Article 15 is "arguably problematic" and that "[a]mong the striking features of the Chechnya judgments…one stands out: the Court's assertion in *Isayeva* that the operation in Katyr-Yurt must 'be judged against a normal legal background.'").

[312] *Isayeva II, supra* note 3, ¶ 191.

[313] *Id*.

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,"[314] the Court, in the *Las Palmeras Case*, while not explicitly doing so, at least arguably relied upon both Article 27's derogation provision and Article 29's prohibition against interpreting the Convention in a manner that restricts the rights and freedoms recognized by other international treaties to which the state is also a party.[315] Likewise, while the Court in the *Bamaca Velasquez Case* does not explicitly claim to rely upon these articles in declaring that "relevant provisions of the Geneva Conventions *may be taken into consideration as elements for the interpretation of* the American Convention",[316] its holding, with its emphasis on protecting the fundamental rights of the human person, is certainly consistent with the provisions in these articles.[317] If the Court's interpretative approach is in fact dependent upon the provisions established in Articles 27 and 29 then, of course, this holding has limited value outside of the Inter-American Court.

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[314] *Las Palmeras I, supra* note 5, ¶¶ 32-33 (emphasis added).

[315] The argument with regard to art. 27, is that because it prohibits derogations that are inconsistent with a states' other international obligations, it, arguably, authorizes the Court to interpret other international treaties in order to ensure that this provision had not been violated. *See* The American Convention, *supra* note 175, art. 27.

[316] *Bamaca Velasquez, supra* note 6, ¶ 209 (emphasis added); *see also id.* ¶¶ 23-25, (Separate Concurring Opinion of Judge Sergio Garcia Ramirez on the Judgment on Merits of the Bamaca Velasquez Case (stating that although the Court "cannot directly apply the rules of international humanitarian law embodied in the 1949 Geneva Conventions … the forgoing does not preclude taking into consideration these provisions of international humanitarian law – another perspective of the international system - in order to interpret the American Convention....")).

[317] *See Bamaca Velasquez, supra* note 6, ¶ 143 (referring to "fundamental rights of the human person"), ¶ 174 (referring to "fundamental rights of each individual"), and ¶ 207 (referring to "obligations to respect and guarantee human rights."); *see also* The European Convention, *supra* note 85, art. 15; *see also* The American Convention, *supra* note 175, art. 29; *see also* Kaye, *supra* note 143, at 878 (noting that "[o]ne might take the position that the Court's approach is consistent with its mandate to apply the Convention normally in the absence of a declared public emergency or derogation.").

VII. A "Coherent" Jurisprudence?

What are the similarities and differences in the way that the ICJ, the ECtHR, and the IACtHR have approached human rights violations claims that occur during armed conflicts? In both the *Nuclear Weapons Opinion* and the *Wall Opinion*, the ICJ established the *lex specialis* approach to the relationship between IHL and IHR in armed conflicts, holding that when a human rights claim arises in the context of an armed conflict, the scope of that right must be interpreted by reference to IHL, and not deduced from the terms of the human rights conventions themselves.[318] When interpreting the human rights provisions that were before it in the *Wall Opinion*, however, the ICJ did not appear to interpret those provisions in light of IHL principles, but rather, it looked very carefully at the text of the human rights provisions themselves, including their permitted restrictions, and determined that Israel's actions violated those provisions.[319] Moreover, although the ICJ did consider Israel's national security concerns, it did not consider them with reference to military necessity as defined under IHL, but rather, it considered them solely with reference to the terms of the human rights provisions themselves, which allow for some limitations on rights where necessary to protect national security interests.[320] As a result, it is not particularly clear where the relationship between IHL and IHR stands as a result of the ICJ's holdings in these two cases, or how that relationship should be implemented in practice.[321]

In the *Isaveya* cases, the ECtHR viewed the military action in

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[318] *Nuclear Weapons Opinion, supra* note 1, ¶ 25; *see also Wall Opinion, supra* note 2, ¶ 106; *see also supra* text accompanying notes 59-64.

[319] *Wall Opinion, supra* note 2, ¶¶ 127-131,136; *see also supra* text accompanying notes 80-82.

[320] *Id*. ¶ 136.

[321] *See generally*, Bhuta, *supra* note 39, at 8, 13, 17 (in exploring "the proposition that IHL applies as *lex specialis* to IHR during armed conflict and asking how we might understand this", Bhuta suggests "that the concept of *lex specialis* as used by the ICJ is ambiguous, and could in fact encompass more than one of the common ways of conceiving of the interaction between IHL and IHR", therefore, "it is equally arguable that [the] ICJ's approach creates the *appearance* of logical coherence and continuity of norms, while in fact resolving very little at the level of practical application.").

Chechnya as a law enforcement action. As such, the Court subjects the military actions to the same standard that it applies to law enforcement activities, by requiring that the government's use of force be "absolutely necessary" to protect lives. According to the Court, the absolute necessity provision requires that the use of force be a last resort option and that the aims be strictly proportionate to the means. Contrarily, under the laws of war governing international armed conflicts, the use of force is a legitimate military alternative as long as it is directed towards a military objective and is not excessive relative to the direct, concrete military advantage gained from the attack.[322] Thus, the LOW allow for a greater degree of military discretion by not attempting to regulate resort to force and by permitting a military commander to balance the potential harm from a military attack against the anticipated benefits from the attack. The law enforcement standard, therefore, clearly places more stringent duties on the government than those required under either the LOW governing international armed conflicts or the LOW governing internal armed conflicts, which contain no notion of a proportionality requirement at all. The ECtHR further served to strengthen individual protections during internal armed conflicts by holding that in a right to life case, the scope of the Article 13 guarantee of an effective remedy[323] requires "in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible."[324] Thus, the protections that the ECtHR provides under human rights law, or more particularly under a law enforcement model, proved to be far more comprehensive then those otherwise available under IHL.[325]

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[322] Protocol I, *supra* note 10, art. 57.

[323] The European Convention, *supra* note 85, art. 13.

[324] *Isayeva I, supra* note 3, ¶¶ 236-237; *Isayeva II, supra* note 3, ¶¶ 226-227; *see also* Reidy, *supra* note 155, at 516-518 (arguing that the "emphasis which the Court places on the need to investigate violations of this nature and gravity, and to identify and punish the perpetrators, echoes the obligations existing in humanitarian law to suppress war crimes and grave breaches of the Geneva Conventions.").

[325] Abresh, *supra* note 17, at 751-52 (positing that the ECtHR has established three rules governing the conduct of hostilities: 1. the use of force must be

The IACtHR, on the other hand, did not view the military actions in the cases before it as strictly law enforcement activities to which only IHR norms apply. Rather, it dealt directly with the issue of the possible application of IHL to the claims before it and, in the *Las Palmeras Case*, held that while it is not permitted to directly rule on whether a state act violates IHL, it can judge whether a norm or IHL principle, such as the principle of military necessity, as applied by a state (*e.g.*, a state's military operation) is compatible with the Convention.[326] In a similar vein, the IACtHR in the *Bamaca Velasquez Case* held that "relevant provisions of the Geneva Conventions *may be taken into consideration as elements for the interpretation of* the American Convention."[327] In both cases, the Court determined that it can apply these respective approaches regardless of the underlying circumstances, be it *in times of peace or armed conflict*, making the issue of whether there is an internal armed conflict essentially irrelevant to its jurisprudence. Similar to the ECtHR's holdings in the *Chechen* cases, the IACtHR also derived from the text of the American Convention a duty to provide an effective remedy, which requires the state to investigate alleged Convention violations, to identify, prosecute and punish those responsible, and to compensate the victims for injuries and damages that they have suffered as a result of the violation. Taking a different approach, the IACtHR accomplished a strengthening of individual rights during internal armed conflict not unlike that which the ECtHR accomplished in the Chechen cases.

So, when all is said and done, are we left with a "coherent" jurisprudence on the question of the relationship between IHL and IHR in internal armed conflicts?[328] If not, can these decisions be

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absolutely necessary to achieve a permitted aim; 2. the force used must be strictly proportionate to the achievement of the permitted aims; and 3. the military operation must be planned and controlled so as to minimize civilian casualties.).

[326] *Las Palmeras I, supra* note 5, ¶¶ 32-33.

[327] *Bamaca Velasquez Case*, *supra* note 6, ¶ 209 (emphasis added).

[328] *See generally* Bhuta, *supra* note 39, at 14-15 (arguing that the IACtHR decisions in both *Las Palmeras* and *Bamaca Velasquez* cases are consistent with the decisions of the ECtHR in that they both adopt what Bhuta terms the "interpretive complementarity approach" to the relationship between IHL and IHR; but, that the ECtHR "has arguably taken interpretive complementarity in the

reconciled? Taken at face value, the approach that each of these courts have adopted is superficially opposed, with the ICJ taking the approach that IHL is *lex specialis* during armed conflict, the ECtHR failing to address the issue of "internal armed conflict" at all and, instead, applying a law enforcement regime to the claims at issue,[329] and the IACtHR, dealing with the issue head-on, finding an internal armed conflict, and asserting its competence to view compliance with human rights law by direct reference to the laws of war. Ultimately, however, it is not clear how in practice the effects of their respective approaches differ, if at all. It may be that though each court has taken a different approach to the issue, in the end, each has finished a strong supporter of fundamental rights protections during armed conflict. Moreover, as discussed earlier, there seems to be an internal dichotomy between the way that both the ICJ and the IACtHR's articulated their respective competences and the way in which they actually decided the claims before them. In the reasoning upon which they based their respective decisions, it is unclear how either the ICJ's *lex specialis* approach or the IACtHR's compatibility/interpretative approach actually plays out in practice. Specifically, the ICJ, seemingly, decided the *Nuclear Weapons Opinion* with only superficial reference to IHL and the *Wall Opinion* by looking directly to principles of IHR, while the IACtHR decided the claims before it without any indication as to how IHL affected its decision-making process.

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opposite direction, by using IHR principles to supplement or substitute for IHL norms when evaluating states' parties conduct during internal armed conflicts.").

[329] *See* Abresh, *supra* note 17, at 746, 751(arguing that "[c]omparison between the ECtHR's holdings and the rules of international humanitarian law reveals that if the ECtHR is attempting to apply humanitarian law, it is doing so in a highly imprecise manner" and that "the ECtHR has now done exactly what the Inter-American Commission avoided, by directly applying human rights law rather than turning to humanitarian law."); *but see id*. at 762 (arguing that "the rules [the ECtHR] has promulgated largely track those that humanitarian law provides for international conflicts." And that "the ECtHR shares humanitarian law's attention to careful targeting and the avoidance of incidental losses.").

VIII. Implications of the ECtHR and the IACtHR Approaches to IHL and Internal Armed Conflicts

Had the ECtHR in the *Chechen* cases not minimized the issue of "armed conflict" and held that the LOW applied to the facts before it, it is unlikely that the Russian aerial bombardments of either Katyr-Yurt or Grozny would have been in violation of those norms.[330] The underlying issue in each of the *Isayeva* cases revolved around the principle of distinction or, more specifically, the allegation that the Russian attacks were indiscriminate. Once again, while the LOW governing internal armed conflicts do prohibit the intentional targeting of civilians, there is no concept of the principle of proportionality. Consequently, in this case, where the claim was not that the attack directly targeted civilians, but rather that it was indiscriminate, the LOW governing internal conflicts would have provided little, if any, recourse.[331] Moreover, even assuming that the LOW governing international conflicts could have been applied in this case (and, as discussed earlier, it is fairly clear that they could not), the protections afforded therein would still have paled in comparison to those afforded under the European Convention. The principle of proportionality under IHL centers on whether the incidental loss to civilian life is "excessive in relation to the concrete and direct military advantage anticipated."[332] This standard is not

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[330] *See generally* Roscini, *supra* note 28, at 433 (noting that "[c]ivilian population and property may be incidentally hit as the collateral result of an attack directed against military objectives, even if the attacker was aware of such possibility …. [but that], the principle of proportionality has to be taken into account.") Note, however, that Roscini's discussion on this issue focuses on the principle of proportionality found in Protocol I, he does not specifically address the issue of the applicability of that principle to internal armed conflict; *see also* Meron, *supra* note 7, at 240 (stating that "[u]nlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage.").

[331] *See generally* Abresh, *supra* note 17, at 767 (concluding that "the ECtHR has taken a new approach and one that shows great promise. It is providing rules for the conduct of hostilities where, as it applies to internal armed conflicts, humanitarian law that is accepted as legally binding is inadequate and seldom obeyed.").

[332] Protocol I, *supra* note 10, art. 51(5).

nearly as stringent as the standard that the ECtHR applied here. The ECtHR never even addressed the issue of the military advantage gained from the attack; rather, in finding a right to life violation, it looked to determine whether "a balance [was] achieved between the aim pursued and the means employed to achieve it," with a focus on the use of force as a last resort option.[333] Thus, the ECtHR's holdings in the Chechen cases have established a much higher level of civilian protection than that which is provided under the LOW governing either international or internal armed conflicts. As importantly, the Court has very adeptly laid the foundation for a continued strong role for judicial review of military decision-making.[334]

The implications of the IACtHR's holdings, on the other

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[333] *Isayeva II, supra* note 3, ¶ 181; *see also Isayeva I, supra* note 3, ¶ 169 (holding that "the force used must be strictly proportionate to the achievement of the permitted aims."). Note that the aims pursued here are rooted in the Article 2(2)(a)exception in the European Convention, i.e. that the use of force is absolutely necessary to protect persons from unlawful violence – here to suppress the active resistance of the illegal armed groups. *See e.g.*, *Isayeva I, supra* note 3, ¶¶ 160, 171; *Isayeva II, supra* note 3, ¶¶ 170, 181.

[334] *See generally* Abresh, *supra* note 17, at 746, 747 (positing that the arguments for applying IHL as *lex specialis* do not hold up with regard to internal armed conflicts because the law that regulates these conflicts "is quite spare and seldom specific," "Common Article 3 does not regulate the conduct of hostilities at all, and Protocol II only does so with respect to civilians, and then only in general terms." Moreover, "in internal armed conflicts, [customary law] has generally been assumed to play only a minor role," thus "given that Russia at least accepts that the ECHR is a relevant source of law, its direct application to the conduct of hostilities must be considered a promising strategy."); *see also* Heintze, *supra* note 97, at 797 (arguing that the Marten's Clause "confirms that the rules of the laws pertaining to armed conflicts cannot be regarded as the final regulation of the protection of human beings, but can be supplemented with human rights law protection."); *see also* ECOSOC, *Report on Prevention of Discrimination and Protection of Minorities, supra* note 13, ¶ 99 (arguing for "a fusion of the rules" of international humanitarian and human rights laws); *see also* Comm. on Hum. Rts., *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions, Extrajudicial, summary or arbitrary executions*, Report of the Special Rapporteur, *supra* note 42, ¶ 52 (stating that "[t]he application of international humanitarian law to an international or non-international armed conflict does not exclude the application of human rights law. The two bodies of law are in fact complementary and not mutually exclusive.").

hand, are somewhat more difficult to assess because of the nature of the military actions which were under review. In the Inter-American cases, the Court struggled with claims that arose during an internal armed conflict, but the claims arose as a result of military acts that took place *after* the hostilities had ceased and when individuals had either been captured or surrendered. In the cases examined herein it is difficult to assess precisely how the outcomes would have differed had the Court applied IHL as *lex specialis*. Certainly, the LOW would require, at a minimum, that individuals who were placed *hors de combat* be treated humanely, not tortured, and not subjected to extrajudicial killings. That being said, however, under the LOW, as they pertain to internal armed conflicts, there is no notion of a duty to investigate and/or to provide an effective remedy. So as far as these aspects of the Court's holding go, the level of protection is unquestionably heightened as a result of the Court's decision to apply the Convention to the military acts at issue here.[335] Moreover, the IACtHR has clearly left the door wide open to its continued use of international law as an interpretative aid in its application of the Convention under any circumstances, whether it be peacetime or armed conflict, making this approach a potentially rich avenue for continued heightened fundamental rights protection during internal armed conflict.[336]

So in the end, both the ECtHR and the IACtHR have managed to provide a much higher level of fundamental rights protection than would otherwise be obtainable during an internal armed conflict, they have guaranteed a role for judicial scrutiny of military acts, and they have established a regional mechanism

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[335] *See generally id.* at 746-47 (arguing that while the application of IHL as *lex specialis* in international armed conflicts "has lent some unity and coherence to the otherwise fragmented standards governing armed conflicts…. The rationale that makes resort to humanitarian law appealing – that its rules have greater specificity – is missing in internal armed conflicts. While the humanitarian law of international armed conflicts is copious and sometimes painstakingly detailed, the humanitarian law of internal armed conflicts is quite spare and seldom specific.").

[336] *See generally* Zegveld, *supra* note 200, at 508 (surmising that it may offer sufficient protection if regional Courts simply interpret human rights laws in light of international humanitarian law principles rather than seeking to apply international humanitarian law directly.).

through which individual victims of internal armed conflicts can bring claims for injuries suffered as a result of military actions. Moreover, by applying IHR directly to issues that arise during an internal armed conflict, regional courts have established a mechanism through which they can provide stringent individual rights protections without the need for governments to either acquiesce in the application of the law or to acknowledge that there is an ongoing armed conflict within its borders, thereby bypassing one major deficiency of the LOW.[337]

IX. Challenges Posed By a Convergence of IHL and IHR

A review of regional court decisions dealing with claims arising in internal armed conflict demonstrates the significant contribution that these courts have made to the trend away from the principle of reciprocity.[338] Their propensity to reject *lex specialis* in favor of the direct application of IHR has made them a predominant force in the movement towards a human rights based approach to the laws of armed conflict. These courts, in dealing with claims arising during internal armed conflicts, have attempted to broaden individual protections by looking not to international humanitarian law, but rather to human rights norms. Yet, given the different value horizons that underlie each body of law, it should come as no surprise that the movement towards direct application of IHR to claims arising during armed conflicts is not without its challenges. IHL and IHR are two distinct bodies of law that were developed to address individual

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[337] *See, e.g.*, Abresh, *supra* note 17, at 757 (noting that "[t]o apply human rights law does not entail admitting that the situation is out of control or even out of the ordinary.").

[338] *But see* Round Table on Current Problems of International Law: *"International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence,*" *supra* note 41, at 16 (reporting that "[w]ith regard to the judicial mechanisms, some participants noted the reluctance of the regional human rights Courts to apply humanitarian law, even through the prism of obligations and using the vocabulary of human rights law…. [i]t seemed to many participants a delusion to rely on the regional systems of human rights law to improve the implementation of IHL, particularly as no such system exists in Asia.").

protections in two distinct circumstances: peace and war.[339] Thus, IHR operates predominately in the law enforcement context where the use of force is permitted only in limited circumstances.[340] While IHL, which is designed to deal with the realities of war, attempts to strike a balance between humanity and military necessity with reciprocity as the central competing tension. As such, IHL does not set limits on the purposes for using force, it merely tries to control the means and methods of military attacks.[341]

Historically, when societal conditions have changed from peace to war, the changed circumstances were used as a justification for a corresponding change in the legal context under which state acts are judged.[342] Yet in today's world, with the transformation in the nature of war from inter-state to internal conflicts,[343] it becomes more and more difficult to justify a strict separation between IHL and IHR, prompting a move towards the 'human rights law of armed

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[339] *See generally* Bhuta, *supra* note 39, at 15 (for a discussion on the "incompatibility approach" between IHL and IHR. The proponents of this approach contend that "IHL's preoccupation with 'relations of hostility' means that it has developed specific rules appropriate to armed conflicts … striking a suitable balance between considerations of humanity and military necessity.").

[340] *Id*. at 28 (noting that "[i]n a law enforcement model, there are no combatants or civilians. There are only rights-bearers with a right not to be arbitrarily deprived of life …. The entitlement to kill an individual is never categorical, and is always a matter of degree in which the balance is between the extent and imminence of the threat and the availability of non-lethal options ….").

[341] *Id*. at 24 (noting that "[t]he fundamental tenet of the laws of international armed conflict is the principle of distinction under which all persons within the field of application of the laws fall into one of two classes: combatant or civilian…. [C]ombatants … may be lawfully attacked at any time without warning or attempts at capture ….). *Id.* at 26 (noting, however, that "the entitlement to kill a combatant is subject to the rules of proportionality and military necessity.).

[342] *Id.* at 28 (noting that "[i]t has been commonly observed that the law enforcement model is inadequate to the nature of hostilities which characterize an armed conflict…. These concerns are persuasive if the situation under consideration is a conventional armed conflict …. But the more unconventional and asymmetrical the conflict becomes, the less specificity is provided by IHL, and the more the line between 'law enforcement' and 'war' is blurred.").

[343] *See, e.g.*, Meron, *supra* note 7, at 244 (noting that "[t]he change in direction towards intrastate or mixed conflicts -- the context of contemporary atrocities -- has drawn humanitarian law in the direction of human rights law.").

conflict.'[344] This movement, in turn, has raised the question of whether it is desirable to have courts apply a body of law that was designed to function in ordinary peacetime circumstances[345] and that was designed to be derogated from only when the general interests of

[344] Along these lines, the International Criminal Tribunal for Yugoslavia (ICTY) has attempted to side-step the limited protections of the LOW governing internal armed conflicts by redefining internal armed conflicts as international armed conflicts. For instance, the ICTY has held that protected persons under IHL are not only the nationals of the enemy state, but can include the state's own nationals in a conflict involving ethnic and/or religious groups that the government views as 'foreigners'. In this way, the ICTY has managed to provide heightened human rights protections during internal armed conflicts. *See* Prosecutor v. Dusko Tadić, Judgment in the Appeals Chamber, Case No. IT-94-1-A, ICTY, ¶¶ 163-169 (15 July 1999) *text available at* www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf. (last visited Jan. 21, 2007); *see also* Prosecutor v. Delalić, Mučić, Delić and Landzo (the *Celebici Case*), Judgment in the Appeals Chamber, Case No. IT-96-21-A, ICTY, ¶¶ 73-84 (affirming this aspect of the *Tadić* decision); *see also* Meron, *supra* note 7, at 256-58 (discussing the movement within the international community to redefined 'protected persons' in the Geneva Conventions to include a state's own nationals – traditionally the relations between a state and its' own nationals are addressed under the IHR regime.); *see also* Pfanner, *supra* note 21, at 158 (surmising that "[i]f wars between States are on the way out, perhaps the norms of international law that were devised for them are becoming obsolete as well."); *see also* Economic and Social Council, *Report on Prevention of Discrimination and Protection of Minorities, supra* note 13, ¶ 41 (noting that "[a]s regards international humanitarian law…there is the question of the adequacy of the existing rules ….").

[345] *Report on Terrorism and Human Rights*, *supra* note 35, at Ch. II(c), ¶ 61 (noting that "the American Convention and other universal and regional human rights instruments were not designed specifically to regulate armed conflict situations and do not contain specific rules governing the use of force and the means and methods of warfare in that context."); *see also* Inter-Am C.H.R., Third Report on the Human Rights Situation in Columbia, OEA/Ser.L/V/II.102 Doc. 9 rev. 1, Feb. 26, 1999, Ch. IV, ¶ 10 (stating that "although one of their underlying purposes is to prevent warfare, the American Convention and other universal and regional human rights instruments were not designed specifically to regulate in detail internal conflict situations and, thus, they do not contain specific rules governing the use of force and the means and methods of warfare."); *see* ECOSOC, *Report on Prevention of Discrimination and Protection of Minorities, supra* note 13, ¶ 40 (noting that "some human rights guarantees lack the specificity required to be applied effectively in situations where fighting is taking place."); *see also id.* ¶¶ 66-67 (noting that a "problem with the application of existing human rights standards to situations of internal violence concerns the lack of specificity of some of the most relevant rights and protections.").

society are implicated[346] to the extraordinary circumstances of an armed conflict, where it is the interests of the state and not general societal interests that control. Perhaps the answer is simply that a fundamental rights distinction based on war or peace is specious, as the IACtHR seems to suggest, and that an academic distinction between state and societal interests is untenable.[347] Putting aside this question for the moment, there still remains the analogous issue of whether courts operating outside of the realities of war are the appropriate vehicle through which to judge strategic military considerations.[348] The answer to both of these questions, I believe, is that courts really are the only vehicle through which we can effectively guarantee fundamental human rights protection, and as such, their unfettered operation is essential during times of peace and war.

X. Future of the Laws Governing Internal Armed Conflicts

What does all this mean for the future of the laws governing internal armed conflicts? One thing seems certain, with continued contribution from regional courts we will see a continued progressive movement towards application of law enforcement norms to military actions against rebel forces acting within their national borders. Correspondingly, we will see further breakdown in the barriers

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[346] Abresh, *supra* note 17, at 766 (noting that "[a]ll of the principal human rights instruments – and, more generally, the jus commune of the human rights regime – allow the enjoyment of individual rights to be limited only in the general interest of society.").

[347] *Id.* (noting that "[w]ith shifts of emphasis and wording, the idea that state interests must meet stringent requirements when they limit or endanger human rights has been incorporated into the limitation clauses and derogation regimes of … human rights conventions. The effect is to permit only the general interests of society rather than the interests of the state per se, to weigh against the individual's unfettered enjoyment of his or her rights ….").

[348] *See generally* Meron, *supra* note 7, at 239 (noting that "[h]umanitarian concerns have played an important role in triggering the negotiation of treaties prohibiting the use of certain weapons, as well as arms control treaties, but strategic considerations – such as fear of proliferation, the need or lack of need for specific weapons, and the difficulty of effective defense – have played the primary role…").

between the two bodies of law, with a distinction between the two becoming obsolete. [349] Thus far, the direction of convergence is two-fold:[350] We have seen IHR's norms influencing the course or direction of IHL,[351] and we have seen IHL furthering the role of human rights norms.[352] The inevitable result of this convergence has been, and will continue to be, a richer fuller body of fundamental rights protections during armed conflict.

The convergence approach will, of course, also have the effect of heightening protections available to insurgents. While it may seem counterintuitive to provide heightened protections for insurgents, there is a solid rationality to this approach. In today's world, the real life distinction between insurgents and civilians is often so obscure that it is frequently impossible for military operations to target one without necessarily targeting the other. As a result, heightened protections, even for insurgents, are essential to avoid needless deaths and unnecessary suffering of innocent people. Thus, the realities of today's conflicts make narrow categories of rights holders, such as civilians and combatants, less relevant than whether an individual or group is actively participating in

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[349] *See generally* Meron, *supra* note 7, at 253 (contending that "[t]he norms that define crimes against humanity, as well as those stated in common Article 3 and some rules incorporated in the ICC statute for noninternational armed conflicts, are in fact, indistinguishable from fundamental human rights."); *see also* Heintze, *supra* note 97, at 798 (noting that "[l]egal literature aptly points out that human rights protection not only shares a common philosophy with international humanitarian law, but can also be used to compensate for the deficits of international humanitarian law.").

[350] *See generally* Round Table on Current Problems of International Law: *"International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence,*" *supra* note 41, at 9 (reporting that "the great majority of the participants simply recalled that IHL represented a special law in as much as it has been specifically framed to apply in period of armed conflict …. [and] that this body of law makes it possible – in many cases – to specify the precise content of the non-derogable human rights…. [but that] as human rights law is more precise than IHL in certain domains, the relationship of interpretation must also be able to operate in the other direction.").

[351] Referring to the approach taken by the ECtHR and the IACtHR.

[352] Referring to the approach taken by the ICJ.

hostilities.[353] Regional courts have given credence to this changed circumstance by recognizing the right to life of insurgents – a right that is not recognized for combatants under the LOW. When the use of lethal force is constrained not merely by the principles of distinction and proportionality, but by making force a last resort option to be used only where capture is too risky (i.e. when the use of force is absolutely necessary and strictly proportionate to a permitted aim) it gives insurgents a level of protection unknown under the LOW. Taken at face value, such constraints may seem absurd. Yet a closer look reveals that from a pure human rights perspective these constraints are essential. The purpose of these constraints is not to provide heightened protections to insurgents. Rather, the very high threshold for the use of force is aimed at providing the very highest level of fundamental rights protection to the civilian population by ensuring that the military take extra precautions to reduce collateral damage and by securing a greater role for judicial review of military decision making.

The movement towards a 'human rights' approach to armed conflict has also caused, and will continue to cause, a breakdown between *jus ad bellum* and *jus in bello*.[354] Under IHL, there is a sharp distinction between these two concepts, with the LOW saying nothing about the legality of the resort to force and instead focusing on preventing unnecessary suffering by controlling the means and methods of warfare.[355] Contrarily, there is no such sharp distinction

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[353] *See generally* Abresh, *supra* note 17, at 759 (noting the "the case law [of the ECtHR] is best interpreted as providing the same rule for battles as for arrests, and for civil wars as for riots. This does not mean that the intensity of the conflict is legally immaterial. Resort to lethal force is more likely to be lawful if the insurgent is actively participating in battle, because then he poses an actual or imminent threat to others and capturing him would more likely unreasonably endanger government soldiers.").

[354] *See generally id*. at 743 (noting that "while in humanitarian law, the independence of the jus in bello from the jus ad bellum is axiomatic, the ECtHR's approach to evaluating the lawfulness of armed attacks assesses the means used within the terms of the justified grounds for employing lethal force.").

[355] *See generally* St. Petersburg Declaration Renouncing the Use, in a Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29/Dec. 11, 1868 *available at* http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument. (The St. Petersburg Declaration was the first formal international agreement prohibiting the

between these two concepts under a law enforcement regime. In a law enforcement context, the emphasis is on whether the resort to force is justified by the collective defense of society.[356] In order to assess whether this justification is present, it requires a review not merely of whether there existed adequate grounds for the resort to force in the first place, but also whether the means used were appropriate.[357] This dual level of scrutiny simply does not take place under the LOW. Thus, under the jurisprudence that has emerged from the regional courts we have seen, and in all likelihood will continue to see, a breakdown in the traditional categorical distinction that exists under IHL between *jus ad bellum* and *jus in bello*. This breakdown, coupled with regional courts' proclivity to view the legality of military actions during an internal armed conflict through the prism of a law enforcement model, has opened up a prodigiously rich avenue of civilian protections during internal armed conflicts.

use of certain weapons in war. Its purpose was to confirm the customary rule prohibiting the use of weapons of a nature to cause unnecessary suffering.).

[356] *See generally* Abresh. *supra* note 337.

[357] *See generally* Abresh, *supra* note 345.