

EXPANDING THE BOUNDARIES OF INTERNATIONAL HUMAN RIGHTS ADJUDICATION:
EXTENDING THE REACH OF INTERNATIONAL HUMAN RIGHTS
INSTRUMENTS THROUGH “OPEN CLAUSES”

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INTRODUCTION

Throughout the past 50 years, international human rights law has experienced a great growth and consolidation as a major area of international law. The language of Human Rights permeates most legal debates today. The recognition of the human being as the center of the legal order brought with it the idea that the ultimate goal of law is to promote human rights. As such, the rhetoric of human rights became one of high profile, and more and more attention is paid to international human rights law.

This phenomenon, though, led to the perception that human rights permeate all areas of law, and that all legal questions have a human rights perspective to them. At the same time, it made the concept of human rights increasingly appealing to those struggling to give greater recognition and importance to certain areas of law.

This growth of Human Rights law can be seen for example in the multiplication of instruments addressing several facets of human dignity that were not imaginable six decades ago (for example, human rights related to the human genome). More importantly, international human rights law created a rich array of institutions to supervise State compliance with the obligations undertaken by them under several instruments. These institutionalized bodies vary in terms of activities (for example,

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whether individual petitions can be heard, or only State reporting) and power (i.e., whether decisions by these bodies are binding upon the States concerned).

Many of these bodies have gained prestige over the years, and have reached a point in which they could venture to expand their field of activity beyond the narrow limits of the language of the instrument the application of which they oversee. This has happened primarily because human rights instruments are widely considered as “living instruments”, the interpretation of which is to be done not in accordance with the intent of the drafters, but with present-day circumstances. Also, human rights instruments often contain articles which allow for greater choice of the adjudicator in giving it meaning; I call these articles “open clauses”.

These two aspects (the interpretation as a “living instrument”, and the “open clauses”) have been used not only to update the scope of rights (including, for example, new surveillance technologies in privacy cases),¹ but also to create new areas altogether. It seems that one of the reasons why this has been done is to take advantage of the existing human rights institutional mechanisms, which enjoy a certain credibility, legal force (at least arguably), and a large group of States already Parties, dispensing with long negotiations over a new instrument, and with an also lengthy ratification process, which is likely not to reach the same number of States Parties as some of the most traditional human rights instruments.

Further, this approach potentially avoids the multiplication of international bureaucracy, a phenomenon which has been recently identified as a shortcoming of international law.² On the other hand, to give new meaning (or, rather,

¹ See *Malone v United Kingdom* (A/82) (1985) 7 E.H.R.R. 14.

² See HENRY J. STEINER AND PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 773-7 (Oxford University Press, 2nd edition 2000); and HENRY J. STEINER AND PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 918-22 (Oxford University Press, 3rd edition 2008). In the context of international humanitarian law, see Fanny Martin, *Application du Droit International Humanitaire par la Cour Interaméricaine des Droits de*

to expand the meaning) to treaty obligations deviating from what States originally wanted can put the organ's reliability in check, and ultimately threaten the credibility of the entire human rights system.

This paper aims precisely at analyzing this phenomenon: I will look at how human rights, at the level of international adjudication, have been expanded so as to include areas that would not be thought to fall within human rights but a few decades ago. I will undertake three case studies of areas in which this expansion has been attempted: the protection of cultural identity, environmental concerns, and international humanitarian law.

Using the framework of civil and political rights offers several advantages. First, it is a well-established framework, with a large membership, which means that States are more likely to be parties to one of these mechanisms, thus creating a forum. Secondly, many of these bodies are empowered to hear individual complaints, giving the victims a venue they can address directly, covering thus a gap experienced by the areas which I am analyzing here.³ Thirdly, many States are likely to take human rights obligations more seriously than they would take other international law obligations.⁴ Fourthly, many of these organs have been willing to expand the scope of the rights they supervise through the use of "general" or "open-

l'Homme, 83 INTERNATIONAL REVIEW OF THE RED CROSS 1037, 1048 (2001); and Hans-Joachim Heintze, *On the Relationship between Human Rights Law and International Humanitarian Law*, 86 INTERNATIONAL REVIEW OF THE RED CROSS 789, 798 (2004).

³ In the context of international humanitarian law, see Hans-Joachim Heintze, *On the Relationship between Human Rights Law and International Humanitarian Law*, 86 INTERNATIONAL REVIEW OF THE RED CROSS 789, 798 (2004).

⁴ See William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 741, 750 (2005) (arguing this in the context of international human rights versus international humanitarian law obligations).

textured” clauses.⁵ I will focus my analysis on this last feature, and I will analyze the case law of three bodies that bring particularly relevant examples of this practice.

I will analyze the ways in which three different institutionalized systems have dealt with these issues: the Inter-American Court and Commission of Human Rights, the European Court and Commission of Human Rights, and, whenever possible, the United Nations Human Rights Committee, responsible for administering the International Covenant on Civil and Political Rights. I have chosen these three organs because they hear individual complaints, and oversee “general” instruments (as opposed to more “specific” instruments, such as the Convention on the Elimination of All Forms of Discrimination against Women, or the Convention on the Rights of the Child, to name but two examples), thus having a rich jurisprudence.⁶

My contention is that these expansions are a positive development, and help reinforce the argument that public international law is being re-oriented from the focus on the protection of States interests to a focus on the protection of the human rights of individuals. To the extent that human rights bodies undertake more and more functions, they crystallize this theory and give strength to the project of a re-conceptualization of international law centered on international human rights law.

⁵ See JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 474-83 (Oxford, Oxford University Press 2005) (discussing the impact of the supervisory organs of the European and American Conventions on Human Rights in shaping the content and reach of the instruments they supervise).

⁶ I have also intentionally omitted the African System, for two main reasons. First and foremost, the themes of the case studies I undertake here are covered by the Banjul Charter, which is at least in its language a much more progressive instrument; thus, any application of such rights would not consist of an expansion, it would rather be simply a direct application of rights protected by this instrument. Secondly, the African system is still fairly underdeveloped in its jurisprudence, and its future is currently uncertain due to the installation of the African Court of Human Rights and the extinction of the African Commission.

Cultural identity has been protected in Human Rights (HR) adjudication either by specific regimes, such as that of article 27 of the ICCPR, or, when such regime fails or simply does not exist, through open clauses. I will focus my analysis on the latter possibility, looking at the right to family life and general provisions on equality and non-discrimination.

A) The Right to Family Life as a Means to Bring Culture into Civil and Political Rights

a) Human Rights Committee

The Human Rights Committee was created by the ICCPR, but it was only its optional protocol, opened for signature on the same day as the ICCPR, that gave the HRC the competence to analyze individual petitions.⁷ The work of the HRC in terms of protection of culture derives mainly from the work on article 27 of the Covenant,⁸ although it also involves the right to family life. Although the latter is more important for the present purposes, some commentary is needed with regard to article 27.

⁷ *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force: 23 March 1976. Number of States parties as of October 2007: 110.

The relevant provision is the following: “**Article 1.** A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.”

⁸ “**Article 27.** In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

The HRC has approved a General Comment regarding the application of article 27 of the Covenant.⁹ In this comment, the HRC stresses that the scope of application of this provision relates to culture and the maintenance of a certain way of life.¹⁰ The jurisprudence of the HRC was the source for this conclusion, but it also includes some extra elements, thus deserving some further commentary.

Of the cases decided by the HRC between 1977 (year of the first decision of the HRC under the individual complaints procedure) and the time of writing, 18 cases involved article 27 of the ICCPR. Out of these, ten were declared inadmissible,¹¹ six were considered as non-violations of the Covenant,¹² and only in two cases did the Human Rights Committee decide that the State Party (in both cases, Canada) had violated rights under the ICCPR.¹³

⁹ General Comment No. 23, *The rights of minorities (art. 27)*, 8 April 1994.

¹⁰ *Id.*, at para. 3.2.

¹¹ Human Rights Committee, Communication No. 942/2000, *Jarle Jonassen v. Norway*, UN Doc. CCPR/C/76/D/942/2000, 12 November 2002; Human Rights Committee, Communication No. 557/1993, *X v. Australia*, UN Doc. CCPR/C/57/D/557/1993, 1 August 1996; Human Rights Committee, Communication No. 431/1990, *O. Sara et al. v. Finland*, UN Doc. CCPR/C/50/D/431/1990, 24 March 1994; Human Rights Committee, Communication No. 359/1989, *R.L. et al. v. Canada*, UN Doc. CCPR/C/43/D/358/1989, 28 November 1990; Human Rights Committee, Communication No. 220/1987, *T.K. v. France*, UN Doc. CCPR/C/37/D/220/1987, 8 December 1989; Human Rights Committee, Communication No. 222/1987, *H.K. v. France*, UN Doc. CCPR/C/37/D/222/1987, 8 December 1989; Human Rights Committee, Communication No. 262/1987, *R.T. v. France*, UN Doc. CCPR/C/35/D/262/1987, 3 April 1989; Human Rights Committee, Communications Nos. 324 and 325/1988, *J.B. and H.K. v. France*, UN Doc. CCPR/C/34/D/324/1988, 26 October 1988; Human Rights Committee, Communication No. 228/1987, *C.L.D. v. France*, UN Doc. CCPR/C/33/D/228/1987, 26 July 1988; and Human Rights Committee, Communication No. 243/1987, *S.R. v. France*, UN Doc. CCPR/C/31/D/243/1987, 5 November 1987.

¹² Human Rights Committee, Communication No. 879/1999, *George Howard v. Canada*, UN Doc. CCPR/C/84/D/879/1999, 4 August 2005; Human Rights Committee, Communication No. 1023/2001, *Jouni Länsman, Eino Länsman and the Muotkatunturi Herdsmen's Committee v. Finland*, UN Doc. CCPR/C/83/D/1023/2001, 15 April 2005; Human Rights Committee, Communication No. 547/1993, *Apirana Mahuika et al. v. New Zealand*, UN Doc. CCPR/C/70/D/547/1993, 15 November 2000; Human Rights Committee, Communication No. 671/1995, *Jouni E. Länsman et al. v. Finland*, UN Doc. CCPR/C/58/D/671/1995, 22 November 1996; Human Rights Committee, Communication No. 511/1992, *Ilmari Länsman et al. v. Finland*, UN Doc. CCPR/C/52/D/511/1992, 8 November 1994; and Human Rights Committee, Communication No. 197/1985, *Ivan Kitok v. Sweden*, UN Doc. CCPR/C/33/D/197/1985, 10 August 1988.

¹³ Human Rights Committee, Communication No. 167/1984, *Lubicon Lake Band v. Canada*, UN Doc. CCPR/C/38/D/167/1984, 10 May 1990; and Human Rights Committee, Communication No. 24/1977, *Sandra Lovelace v. Canada*, UN Doc. CCPR/C/13/D/24/1977, 30 July 1981.

An in-depth analysis of cases under article 27 has been made elsewhere, and is beyond the scope of this paper.¹⁴ Suffice it to say that, as a rule, the HRC grants a wide margin of discretion to States in implementing their obligations under article 27.

The case involving private life and family protection, *Francis Hopu and Tepoaitu Bessert v. France*, involved the threat posed by a hotel-construction project to the traditional lands, including the traditional burial ground, of a Polynesian tribe.¹⁵ The HRC accepted the petitioners' contention that the Committee should interpret the term "family" in accordance with their traditions, by which "family" would mean the entire population of the tribe, and determined that the construction of the hotel complex as planned would interfere with the privacy and family life of the petitioners.¹⁶

The case had previously been declared inadmissible under article 27 of the Covenant because of a reservation made by France excluding the application of this provision.¹⁷ This explains why the HRC decided to broaden its understanding of family for this case, but this position was criticized by some of its members, on the grounds that even a broadened understanding of family could not possibly encompass all the members of a certain ethnic group.¹⁸ In any event, for the present purposes, suffice it to say that a provision of the ICCPR other than the specific one on the

¹⁴ See Martin Scheinin, *The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land*, in *THE JURISPRUDENCE OF HUMAN RIGHTS LAW: A COMPARATIVE INTERPRETIVE APPROACH* 159, 163-72 (Theodore S. Orlin, Allan Rosas and Martin Scheinin Eds.) (Turku, Institute for Human Rights 2000).

¹⁵ Human Rights Committee, Communication No. 549/1993, *Francis Hopu and Tepoaitu Bessert v. France*, UN Doc. CCPR/C/60/D/549/1993/Rev/1, 29 December 1997 [hereinafter "Francis Hopu and Tepoaitu Bessert v. France"], para. 2.2 and 2.5.

¹⁶ *Id.*, at para. 10.3.

¹⁷ All cases brought against France, totalizing six out of the ten cases declared inadmissible by the HRC, were so declared because of this reservation. See *supra* note 11.

¹⁸ *Francis Hopu and Tepoaitu Bessert v. France*, *supra* note 15, Individual dissenting opinion by Committee members David Kretzmer and Thomas Buergenthal, cosigned by Nisuke Ando and Lord Colville, para. 4.

protection of minority culture was used to protect characteristics relative to a people's way of life.

b) European Court of Human Rights

If the HRC has chosen the right to private and family life as a means to protect culture, the European Court of Human Rights (ECtHR), in interpreting the European Convention,¹⁹ has followed a similar path in cases dealing with individuals of Roma origin and aspects of their culture. One example of such an approach is *Lee v. U.K.*²⁰

Mr. Thomas Lee brought an application against the United Kingdom alleging that certain environmental measures prevented him from settling with his caravan in the place he had chosen for such purposes, and he contended that this was contrary to his right to respect for home, family and private life.²¹ As a Roma, he had a nomadic lifestyle, and because of it he had been repeatedly prosecuted for “illegal encampment”. To rectify this situation, he bought a piece of land and decided to settle there permanently.²² One year after he had settled on the piece of land he had purchased, he received an eviction order, as his lands were in an area of special zoning due to landscape preservation concerns.²³

The Court found that the issues of the case fell under article 8 of the European Convention, reasoning that Mr. Lee's choice to live in a caravan “[...] is an integral part of his ethnic identity as a gypsy [and that m]easures which affect the

¹⁹ **Convention for the Protection of Human Rights and Fundamental Freedoms**, C.E.T.S. 005, opened for signature on November 4, 1950, entry into force on September 3, 1953 [hereinafter “the European Convention” or “ECHR”].

²⁰ *Case of Lee v. The United Kingdom* (Application no. 25289/1994), judgment of 18 January 2001.

²¹ *Id.*, at para. 3.

²² *Id.*, at paras. 10-11.

²³ *Id.*, at para. 15.

applicant's occupation of his caravans [...] affect his ability to maintain his identity as a gypsy and to lead his private and family life in accordance with that tradition.”²⁴

After deciding that the case fell under article 8, the Court went on to analyze whether there was an interference with the rights under this provision, and, if this was confirmed, whether the interference was justifiable. After determining that there had been an interference,²⁵ and that it was one of environmental law (urban planning).²⁶ The ECtHR then said that States enjoy a wide margin of appreciation in dealing with environmental matters.²⁷

When responding to the argument concerning the protection of minorities, the Court accepted the contention that the Council of Europe Convention on Minority Protection was an indicator of an emerging consensus around the protection of minority rights.²⁸ However, according to the Court, the consensus was not such so as to reduce the margin of appreciation granted to States in imposing limitations upon article 8 rights, as the language of the instrument was mostly open-textured.²⁹ Thus, the applicant's argument was rejected, and the interference with his family life was found to fall within the State's margin of appreciation, in relation to which the Court would play a “strictly supervisory role”.³⁰

With this reasoning, the ECtHR accepted that elements of the way of life of a certain culture fall within the private life of individuals belonging to such culture. Even though leading to a similar result, the reasoning adopted by the Court is distinct from that of the HRC in a very important way. The ECtHR did not expand the concept of “family”; instead, it simply said that a way of life is an integral part of

²⁴ *Id.*, at para. 75.

²⁵ *Id.*, at para. 80.

²⁶ *Id.*, at para. 84.

²⁷ *Id.*, at para. 94.

²⁸ *Id.*, at paras. 85 and 95.

²⁹ *Id.*, at para. 96.

³⁰ *Id.*

one's private life. This reasoning is more powerful than that adopted by the HRC, and far less controversial, at least if one accepts a liberal notion of human rights as individual rights to support the protection of cultural identity (which often has intrinsic collective dimensions).³¹ I will now briefly look at the alternative reasoning adopted by the Inter-American Court of Human Rights.

B) Using General Provisions of Guarantee of Human Rights: The Inter-American Court of Human Rights

The Inter-American Court of Human Rights has adopted a very different approach. Instead of focusing on the right to family and private life (still fairly undeveloped by its jurisprudence), the IACtHR chose to look at the general provision of the American Convention on the Guarantee and Safeguard of Human Rights (article 1.1).³²

³¹ On how cultural rights are collective rights, see Darlene M. Johnston, *Native Rights as Collective Rights: A Question of Group Self-Preservation*, 2 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 19 (1989), reprinted in THE RIGHTS OF MINORITY CULTURES 179, 180-2 (Will Kymlicka ed.) (Oxford University Press 1995) (arguing that communitarianism can be an alternative to a rights-based ethics); and Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 102, 115 (1976). The majority of legal commentators, however, accepts that even rights of minorities, at least in terms of their international legal protection, are framed in the language of individual rights. See Michael Hartney, *Some Confusions Concerning Collective Rights*, 4 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 293 (1991), reprinted in THE RIGHTS OF MINORITY CULTURES 202, 219 (Will Kymlicka ed.) (Oxford University Press 1995); Darlene M. Johnston, *Native Rights as Collective Rights: A Question of Group Self-Preservation*, 2 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 19 (1989), reprinted in THE RIGHTS OF MINORITY CULTURES 179, 185 (Will Kymlicka ed.) (Oxford University Press 1995) (mentioning an argument according to which collective rights are meaningless and individual rights collectively asserted are a common phenomenon); Chandran Kukathas, *Are There Any Cultural Rights?*, 20 POLITICAL THEORY 105, 107 (1992), reprinted in THE RIGHTS OF MINORITY CULTURES 228 (Will Kymlicka ed.) (Oxford University Press 1995); and Miodrag A. Jovanović, *Recognizing Minority Identities Through Collective Rights*, 27 HUMAN RIGHTS QUARTERLY 625, 628-9 (2005).

³² **American Convention on Human Rights “Pact of San José, Costa Rica”**. Adopted on November 22, 1969. Entry into force: July 18, 1978. Number of States Parties: 24 [hereinafter “American Convention” or “Pact of San José”]. The relevant provision is the following: “**Article 1. Obligation to Respect Rights**. 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language,

This new line of jurisprudence began with the *Case of the Yakye-Axa Community v. Paraguay*, in which the Court said, in *obiter dictum*, that the right to equality, as guaranteed by the general provision on the respect for human rights of article 1.1, imposed on States an obligation to undertake measures to accommodate cultural differences.³³ This was later developed in the *Case of López Álvarez v. Honduras*, in which the Court gave full meaning to the confused expression of the earlier case to say that a right to the enjoyment of one's culture was indeed contained within the general provision of article 1.1, and that measures preventing an individual from expressing himself in his indigenous language amounted to a violation of the right to freedom of expression in conjunction with the general provision.³⁴

Thus, the IACtHR derives the possibility of protecting cultural specificities from a general provision and the requirements of equality. This is a very welcome development, in the sense that all aspects of cultural identity can be protected under all rights of the Pact of San José, while the other bodies seem to be rather constrained in that they can only make use of the provisions related to the right to family life.

Nevertheless, what is important is that two rather "open-textured" clauses, the right to private and family life and the right to equality, have been

religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

³³ I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 51. This paragraph deserves full transposition: “51. In view of the fact that the instant case addresses the rights of the members of an indigenous Community, the Court deems it appropriate to recall that, pursuant to Articles 24 (Right to Equal Protection) and 1(1) (Obligation to Respect Rights) of the American Convention, the States must ensure, on an equal basis, full exercise and enjoyment of the rights of these individuals who are not subject to their jurisdiction. However, it is necessary to emphasize that to effectively ensure those rights, when they interpret and apply their domestic legislation, the States must take into account the specific characteristics that differentiate the members of the indigenous peoples from the general population and that constitute their cultural identity. The Court must apply that same reasoning, as it will do in the instant case, to assess the scope and content of the Articles of the American Convention, which the Commission and the representatives allege were breached by the State.”

³⁴ I/A Court H.R., *Case of López-Álvarez v. Honduras*. Merits, Reparations and Costs. Judgment of February 01, 2006. Series C No. 141, paras. 169 and 174.

invoked to protect rights not originally contained in international instruments (with the exception of the HRC case above, in which a specific provision existed, but could not be invoked, creating a comparable situation). I will now look at how environmental concerns entered the domain of international human rights adjudication.

II – RELIVING THE ANTHROPOCENTRIC CONCEPTION OF ENVIRONMENTALISM: BRINGING ENVIRONMENTAL CONCERNS IN

The dominant approach among international environmental lawyers nowadays seems to be an ecocentric one, that is, an approach that justifies environmental protection as a goal in itself, being the environment worthy of protection not because it is important for human beings, but because it possesses an intrinsic value. An anthropocentric approach, that was the dominant one for several decades, advocates the importance of the environment in terms of what it represents for human beings.³⁵

At the same time that international environmental lawyers try to give the area a greater emphasis on its ecocentric features, to think of environmental law in terms of human rights means to give anthropocentrism a new breath. If one wants to translate environmental concerns into the language of *human* rights, an anthropocentric perspective is inevitable.

Another interesting clash happens in the approaches taken to HR and environmental law in the international sphere: while HR are no longer considered to

³⁵ For a brief outline of this discussion, see MARCOS A. ORELLANA, DERECHOS HUMANOS Y AMBIENTE: DESAFÍOS PARA EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS, *available at* <<http://www.ciel.org/Hre/programhre.html>> (last accessed April 23, 2008). For a criticism of the ecocentric position, see COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, ENVIRONMENT AND HUMAN RIGHTS, REPORT, 16 April 2003, para. 39.

fall within the reserved domain of States, international environmental instruments invariably reaffirm State sovereignty over natural resources.³⁶ Nevertheless, the linkage between the two areas has been made in terms of how the protection of the environment is a condition for the full enjoyment of human rights such as the right to life and the right to health.³⁷

There are basically two ways in which HR and the environment interact: the first one is by allowing limitations to the exercise of certain human rights for the sake of environmental protection;³⁸ the second one, and the focus of my analysis, is the “environmental content” of certain human rights, or rather how certain human rights are open enough in their content to allow for environmental considerations.

A) The Right to Family Life and Environmental Protection: The European Court of Human Rights

The European Court of Human Rights has dealt with the issue in several cases; I will analyze three of them. The first one of them, *López Ostra v. Spain*,³⁹ has set the standards for the case-law on the connection between human rights and the environment in this Court.

³⁶ See MARCOS A. ORELLANA, DERECHOS HUMANOS Y AMBIENTE: DESAFÍOS PARA EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS, available at <<http://www.ciel.org/Hre/programhre.html>> (last accessed April 23, 2008).

³⁷ ICJ, *Gabcikovo-Nagymaros Dam*, judgment September 25 1997, ICJ REPORTS 1997. Judge Weeramantry, Separate Opinion.

³⁸ This was the case in *Lee v. UK*, discussed above. Mr. Lee was forbidden from setting his caravan where he wanted because of environmental legislation, and the ECtHR said not only that environmental restrictions were permissible, but also that States enjoyed a wide margin of appreciation in the implementation of their environmental policies, even if such implementation meant interference with human rights. See *supra* notes 19-30 and accompanying text.

³⁹ *Case of López Ostra v. Spain* (Application no. 16798/90), judgment of 9 December 1994.

Mrs. Gregoria Lopez Ostra lived in the vicinities of several leather industries, who produced a great amount of waste that was dumped into the nearby river, causing an excessive amount of pollution that brought nausea and several other health problems to people exposed to it.⁴⁰ The Commission presented the case alleging a violation of articles 3 (cruel, inhuman and degrading treatment) and 8 (private and family life) of the European Convention.⁴¹

When analyzing the case under article 8, the Court established that “a *certain* margin of appreciation” (as opposed to a “wide” margin of appreciation”) was left to States in the application of environmental policies, and that it was not important to determine whether the obligations in this case were positive or negative obligations.⁴² However, when it came to the application of these principles to the facts, the Court said it only would analyze whether the national authorities had taken the necessary measures to protect the right to private and family life of Mrs. López and her family,⁴³ which brings the case to an assessment of positive obligations, a view confirmed by the lack of a proportionality analysis of any interference. The Court declared a violation of article 8⁴⁴ and, with respect to article 3, said that, even though the conditions to which the applicant had been submitted were certainly harsh, they did not amount to degrading treatment.⁴⁵

Another relevant case is *Fadeyeva v. Russia*, concerning the pollution caused by an iron smelter.⁴⁶ The Court, when analyzing the claims under article 8, stated that “no right to nature preservation is as such included among the rights and

⁴⁰ *Id.*, at paras. 7-9.

⁴¹ *Id.*, at para. 1.

⁴² *Id.*, at para. 51.

⁴³ *Id.*, at para. 55.

⁴⁴ *Id.*, at para. 58.

⁴⁵ *Id.*, at para. 60.

⁴⁶ *Case of Fadeyeva v. Russia* (Application no. 55723), judgment of 30 November 2005, paras. 10-8.

freedoms guaranteed by the Convention”,⁴⁷ which can be read to mean that environmental concerns will only be relevant to the Court inasmuch as they affect human lives, thus reaffirming the anthropocentric approach to environmentalism I argue to be necessary to human rights adjudication.

The ECtHR said that it was necessary to prove there had been an actual interference with the applicant’s private life, and that this interference had been of a certain severity, to justify declaring a violation of article 8.⁴⁸ In doing such assessment, while concluding that the interference had not been directly caused by the State, the Court found that its positive obligations connected the State to the interference.⁴⁹ And, even though this case was one of positive obligations, the Court went on to analyze the proportionality of the interference, and it found that, despite the margin of appreciation granted to States for environmental matters (which even seemed to amount to deferentialism at some point),⁵⁰ the interference had been of such gravity so as to violate rights under article 8.⁵¹

This case, for being the latest one on environmental rights, is the right watermark for connecting HR and the environment under the ECtHR. This means that a wide margin of appreciation is given to States in implementing their environmental policies, and that a proportionality analysis is required. This heightened burden might imply certain unwillingness by the ECtHR in keeping on extending its jurisdiction into environmental law. At the same time, the extended margin of appreciation is consonant with the argument mentioned above that environmental law usually opens more room for the reserved sovereign domain of States than human rights law. The fact that the ECtHR seems reluctant to take new environmental cases in, and the high

⁴⁷ *Id.*, at para. 68.

⁴⁸ *Id.*, at para. 70.

⁴⁹ *Id.*, at paras. 89-92.

⁵⁰ *Id.*, at para. 105.

⁵¹ *Id.*, at para. 134.

degree of deference paid to national authorities in *Isayeva* might indicate a trend contrary to the expansion of jurisdiction into this area. It is hard to retreat from this totally, though, once the Court has already precedents on it. The next case, an earlier decision, does not take much of this approach into account, and offers a view more in favor of the expansion of jurisdiction.

In the third case (second in chronological order), *Guerra and others v. Italy*, the Court analyzed whether the lack of information about the polluting activities of a chemical factory amounted to a violation of rights protected under articles 10 (freedom of expression), 8 (right to private and family life) and 2 (right to life) of the ECHR.⁵² Procedurally, it is important to mention that it was not the applicants, but rather the Commission, who invoked article 8: the applicants focused their case on article 10 and the right to receive information.⁵³ Subsequently the applicants linked the lack of access to information to a violation of their rights protected under articles 2 and 8,⁵⁴ and the Court, in applying the principle of *jura novit curia*, decided it had jurisdiction *ratione materiae* to analyze the claims under all three articles of the ECHR.⁵⁵

The claim under article 10 was dismissed for falling out of its scope.⁵⁶ When analyzing the claim under article 8, the ECtHR affirmed that, since there had been no interference with the right, but rather the lack of compliance with a positive obligation, it would not undertake a proportionality analysis in the case.⁵⁷ And, when

⁵² *Case of Guerra and others v. Italy* (Application no. 116/1996/735/932), judgment of 19 February 1998, paras. 12-8.

⁵³ *Id.*, at para. 40.

⁵⁴ *Id.*, at para. 41.

⁵⁵ *Id.*, at paras. 42-4.

⁵⁶ *Id.*, at para. 54.

⁵⁷ *Id.*, at para. 58.

balancing the effect of the State's omission, it concluded there had been a breach of article 8.⁵⁸

As to the claim on the right to life, the Court decided that, since it had already declared a violation of article 8, it was not necessary to analyze the case under article 2 as well.⁵⁹ However, concurring opinions on the case expressed the view that there was a linkage between environmental concerns and the right to life.⁶⁰ I now turn to how this linkage has been construed in other systems.

B) Attempting to Reinterpret the Right to Life

a) Human Rights Committee

The three cases brought before the Human Rights Committee on environmental claims have all been declared inadmissible, on different grounds. But, while the HRC has never pronounced itself on the merits of the connection between the environment and human rights, it has recognized some important links.

In *Port Hope Environmental Group v. Canada*, for example, the HRC was asked to analyze whether the disposal of nuclear waste affected the right to life of present and future generations.⁶¹ The Committee stated that the communication raised serious concerns with regard to the protection of the right to life under the ICCPR.⁶² However, it understood that (1) the interests of future generations were to be treated only as an expression of concern to put the importance of the environmental matter

⁵⁸ *Id.*, at para. 60.

⁵⁹ *Id.*, at para. 62.

⁶⁰ See *Concurring Opinion of Judge Walsh*, and *Concurring Opinion of Judge Jambrek*.

⁶¹ Human Rights Committee, Communication No. 67/1980, *Port Hope Environmental Group v. Canada*, UN Doc. CCPR/C/17/D/67/1980, 27 October 1982, paras. 1.2-1.3.

⁶² *Id.*, at para. 8.

“into due perspective”,⁶³ and (2) that local remedies had not been exhausted,⁶⁴ thus declaring the communication inadmissible.⁶⁵

Similarly, in *Susila Malani Dahanayake et al. v. Sri Lanka*, the Committee looked at a claim based on the right to life (art. 6 ICCPR).⁶⁶ This case concerned the loss of livelihood and the harm caused to wetlands in Sri Lanka due to the construction of a road.⁶⁷ While the State recognized the link between the right to life and environmental protection,⁶⁸ and the HRC did not openly discard such connection, the Committee considered that the claim had not been significantly substantiated for the purposes of admissibility, and declared the communication inadmissible.⁶⁹

Another case, *André Brun v. France*, asked the Committee to look at the impact of Genetically Modified Organisms (GMOs) on the environment, based on the precautionary principle.⁷⁰ The author of the communication suggested initially a violation of the right to private and family life, in cross-fertilization with the jurisprudence of the ECtHR,⁷¹ and at a later stage suggested also the connection with the right to life, even citing the *Port Hope Environmental Group* case.⁷² However, the Committee understood that a claim based on the precautionary principle could not be substantiated, as it was not an imminent threat of violation or an actual violation of any rights;⁷³ thus, the communication was declared inadmissible.⁷⁴ By rejecting a

⁶³ *Id.*, at para. 8.a.

⁶⁴ *Id.*, at para. 8.b.

⁶⁵ *Id.*, at para. 9.

⁶⁶ Human Rights Committee, Communication No. 1331/2004, *Susila Malani Dahanayake et al. v. Sri Lanka*, UN Doc. CCPR/C/87/D/1331/2004, 14 September 2006, para. 3.2.

⁶⁷ *Id.*, at para. 2.2.

⁶⁸ *Id.*, at para. 4.7.

⁶⁹ *Id.*, at paras. 6.4 and 7.

⁷⁰ Human Rights Committee, Communication No. 1453/2006, *André Brun v. France*, UN Doc. CCPR/C/88/D/1453/2006, 23 November 2006, para. 2.1.

⁷¹ *Id.*, at para. 3.1.

⁷² *Id.*, at paras. 5.2 and 5.6.

⁷³ *Id.*, at para. 6.3.

claim based on the precautionary principle, while not discarding the possibility of analyzing cases based on actual environmental harm, the HRC seems to have determined the limits to which it would be willing to take jurisdiction with respect to environmental claims.

b) Inter-American System

The Inter-American system has a very peculiar approach to environmental issues: instead of thinking of environmentalism as an autonomous area of concern, the organs of the Inter-American system, particularly the Commission, connect the protection of the environment with the protection of indigeneity. Most cases brought before either one of these bodies involving environmental harms concern indigenous communities, and one of these cases gets to the point of categorizing the effects of pollution into material values (including health) and the *spiritual values associated with the environment*.⁷⁵

This case, involving the Community of San Mateo de Huanchor in Peru, concerns the pollution caused by a toxic waste sludge next to the community,⁷⁶ and a claim to the violation of the right to life, among others,⁷⁷ has been declared admissible by the Inter-American Commission.⁷⁸ It is important to mention that, while the petitioners also claimed a violation of the right to the protection of dignity and the right to protection of the family, these claims have been deemed unfounded by the

⁷⁴ *Id.*, at para. 7.

⁷⁵ IACHR, Report n. 69/04, Petition 504/03, Admissibility. *Community of San Mateo de Huanchor and its Members v. Peru*, 15 October 2004, para. 16.

⁷⁶ *Id.*, at para. 1.

⁷⁷ *Id.*, at para. 66. These other rights include the rights to personal security, the right of the child and judicial protection.

⁷⁸ *Id.*, at para. 67.

Commission, and will not be analyzed in their merits.⁷⁹ This means that, while the Commission accepts the connection between the right to life and the environment, it seems to reject the connection with private and family life, characteristic of the European System.

Another case, involving the effects of the construction of a dam in Chile, did not frame the connection between indigenous peoples and the environment based on the right to life, but rather on the right to physical integrity and the right to freedom of religion,⁸⁰ thus reinforcing the connection between the spiritual element of indigeneity and the environment characteristic of the Inter-American System. The case ended in a friendly settlement, however, and the Commission did not have the opportunity to analyze the merits of such connection.

Therefore, even though there had been no decisions by any of these bodies declaring the breach of the right to life by a State on the grounds of environmental harm, it is important to bear in mind that this link has not been discarded, and has indeed been admitted. That the right to life has been used to expand the boundaries of these bodies in interpreting their instruments offers a suitable bridge for another context in which the right to life plays an important role, that of applying international humanitarian law in human rights bodies.

⁷⁹ *Id.*, at para. 66.

⁸⁰ IACHR, Report n. 30/04, Petition 4617/02, Friendly Settlement. *Mercedes Julia Huentao Beroiza et al. v. Chile*, 11 March 2004. The original petition illustrating this claim, along with other documents of the case, is available at the website of the Centre for International Environmental Law (CIEL), who was doing the litigation of the case. See CENTRE FOR INTERNATIONAL ENVIRONMENTAL LAW, WEBSITE, available at <<http://www.ciel.org>> (last accessed April 23, 2008).

III – BLURRING THE DISTINCTION BETWEEN WAR AND PEACE: INTERNATIONAL HUMANITARIAN LAW IN INTERNATIONAL HUMAN RIGHTS ADJUDICATION

International Humanitarian Law (IHL) is concerned with the regulation of conduct during time of hostilities. In its interface with human rights law, IHL is primarily concerned with the treatment of civilians during armed conflict, of international or non-international (internal) character. Between the end of World War II and the 1960s, the differences between these two areas have been accentuated by the institutional separation, since HR became a matter for the United Nations, whereas IHL was for a long time exclusively dealt with by the International Committee of the Red Cross (ICRC).⁸¹ Also, the fact that HR and IHL “speak different languages” imposes some obstacles on making use of the many points of connection between the two areas.⁸²

Generally, IHL is considered to be a *lex specialis* to international human rights law. This means that, while HR will apply during times of peace, IHL is the set of rules to be used during hostilities; HR rules (at least not non-derogable norms, but arguably all norms) are not “suspended” during conflicts, but they are applied bearing in mind the specificities of IHL.⁸³ The most important of these specificities is the “license to kill” of humanitarian law (that allows for combatants to legitimately kill individuals during conflict, unless they are civilians or combatants *hors de combat*).⁸⁴

⁸¹ See Amna Guellali, *Lex Specialis, Droit International Humanitaire et Droits de l’Homme: Leur Interaction dans les Nouveaux Conflits Armés*, 2007 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 539, 540.

⁸² See Noam Lubell, *Challenges in applying human rights law to armed conflict*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 737, 744-6 (2005).

⁸³ See Louise Doswald-Beck and Sylvain Vité, *International Humanitarian Law and Human Rights Law*, 293 INTERNATIONAL REVIEW OF THE RED CROSS 94 (1993).

⁸⁴ The term generally used in International Humanitarian Law is that of “protected persons”. This term is defined differently in each of the four Geneva Conventions. See art. 13 of the I Geneva Convention;

That IHL is *lex specialis* from HR has been established by the International Court of Justice (ICJ) in the *Advisory Opinion on the Legality of the Use or Threat of Use of Nuclear Weapons*, in which the Court, after affirming the complementarity of the two fields, said that the protection of human life, while an absolute value in HR law, is not so sacred in IHL, precisely because of the distinction indicated above.⁸⁵ This notion, however, has been questioned by some commentators, who allege that the lack of precision of IHL rules prevents it from being applied as *lex specialis* to HR law, which is more well-defined.⁸⁶

In this sense, for HR bodies to venture into IHL is not so much an effort of expansion, as it is one of exploring overlaps between the two areas.⁸⁷ In this way the exercise I propose with these case studies gains a different color when it comes to international humanitarian law: given the clearer subject-matter proximity between the two areas, the extent to which one can really talk of an expansion of mandate is more limited here, but still very palpable.

While the use of IHL in the interpretation of HR provisions has not been excluded by the Human Rights Committee,⁸⁸ no clear case in the HRC jurisprudence could be found on this relationship.⁸⁹ Thus, for the purposes of this part

art. 13 of the II Geneva Convention; art. 4 of the III Geneva Convention; and art. 4 of the IV Geneva Convention.

⁸⁵ See Amna Guellali, *Lex Specialis, Droit International Humanitaire et Droits de l'Homme: Leur Interaction dans les Nouveaux Conflits Armés*, 2007 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 539, 543-4.

⁸⁶ See William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 741, 747 (2005); and Noam Lubell, *Challenges in applying human rights law to armed conflict*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 737, 750 (2005).

⁸⁷ See Hans-Joachim Heintze, *On the Relationship between Human Rights Law and International Humanitarian Law*, 86 INTERNATIONAL REVIEW OF THE RED CROSS 789, 794 (2004).

⁸⁸ See UN Doc. CCPR/C/74/CPR.4/Rev.6 (cited by Hans-Joachim Heintze, *On the Relationship between Human Rights Law and International Humanitarian Law*, 86 INTERNATIONAL REVIEW OF THE RED CROSS 789, 797 (2004)).

⁸⁹ A borderline case is *Guerrero v. Colombia*, in which the arbitrary executions of seven people in Colombia were found to be a violation of the ICCPR by the HRC. In the context of this case, there was a derogation from rights under the ICCPR due to a state of emergency, but the HRC said the right to life was non-derogable. This case, however, does not directly address the relationship between

I will focus on the two distinctive approaches of the European and Inter-American systems.

A) Creating a System Parallel to IHL within a HR Framework: The European System

The European system is rather cautious in its dealing with situations that may involve the application of IHL rules. First of all, the trigger for any such application is the declaration of a state of emergency derogating from rights under the Convention; generally, the Court (as did the defunct Commission) will not assess whether a situation is one of such derogation, and will leave a wide margin of appreciation to States in determining whether there is a scenario in which derogation from rights under the European Convention is to be sought.⁹⁰

Generally, the European bodies do not make express reference to IHL, except for some isolated separate opinions,⁹¹ and one recent decision, to be analyzed below.⁹² This does not mean that IHL considerations are outside the European system, as these bodies have often faced HR questions that happened within the context of armed conflicts.

In one of these cases, *Cyprus v. Turkey*, the Commission dealt with human rights violations allegedly perpetrated by Turkey during its occupation of

humanitarian and human rights law, and I will not consider it in my analysis. See Human Rights Committee, Communication No. 45/1979, *Pedro Pablo Camargo on behalf of the the husband of Maria Fanny de Suarez de Guerrero v. Colombia*, UN Doc. CCPR/C/15/D/45/1979, 31 March 1982. For a commentary on this case, see Louise Doswald-Beck, *The right to life in armed conflict: does international humanitarian law provide all the answers?*, 88 INTERNATIONAL REVIEW OF THE RED CROSS 881, 885 (2006).

⁹⁰ See Aisling Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, 324 INTERNATIONAL REVIEW OF THE RED CROSS 513 (1998).

⁹¹ Documented by Aisling Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, 324 INTERNATIONAL REVIEW OF THE RED CROSS 513 (1998).

⁹² See *infra* notes 99-101 and accompanying text.

Northern Cyprus.⁹³ In it, the Commission acknowledged the existence of rules on the treatment of prisoners of war (POW) that had been ratified by both parties to the conflict, but it gave no specific consideration to them, rather assessing the legality of arrests under POW rules. The Commission concluded that, since article 5 of the European Convention did not include POW status as a legitimate ground for detention, there had been a violation of the European Convention.⁹⁴ Even though article 5 can be derogated from under article 15 of the ECHR, the Commission, apparently because no such situation had been declared by either party to the conflict, disregarded the possibility of derogation, and excluded IHL from its considerations.

In other cases, also because there had been no derogation based on article 15, the Court found that the destruction of property had amounted to a violation of article 8 of the ECHR, protecting the right to private and family life.⁹⁵ It seems thus that the fact that States are resistant to derogating from rights under article 15 of the ECHR (since this would, at least to a certain extent, politically imply giving recognition to the “rebels”)⁹⁶ is exploited by the ECtHR in order to give it competence to analyze violations of rights other than those that cannot be derogated from.

The same can even be said about alleged violations of the right to life in the context of non-international armed conflicts. While in the Turkish and Northern Ireland cases the ECtHR could be considered to be applying IHL *sub silentio*, according to one commentator it is no longer possible to make this point in light of the

⁹³ *Cyprus v. Turkey*, Report of the Commission, 4 E.H.R.R. 482.

⁹⁴ *Id.*, at para. 313.

⁹⁵ See *Akdivar and others v. Turkey*, judgment of 18 September 1996, 23 E.H.R.R. 143, paras. 83-7; *Mentes v. Turkey*, judgment of 28 November 1997, paras. 70-3, Reports of Judgments and Decisions, 1997-IV; and *Selcuk and Asker v. Turkey*, judgment of 24 April 1998, Reports of Judgments and Decisions 1998, paras. 83-7.

⁹⁶ See William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 741, 756-7 (2005).

cases involving Chechnya.⁹⁷ In fact, the ECtHR seems to have developed its own methodology to deal with violations of the right to life, a methodology that is not totally consistent with IHL, at least to the extent it does not consider whether a situation of conflict changes the threshold for a violation of article 2 ECHR. This methodology, once again, apparently can be linked to the fact that no States (including Russia, for this particular analysis) have ever derogated from the right to life by force of “lawful acts of war” (art. 15.2 ECHR).⁹⁸

It seems, thus, that it is not so much a specific right, but rather a political resistance from States in derogating from rights protected under the ECHR that gives the European Court the competence to assess IHL concerns. Perhaps it is precisely because of this that the European bodies avoid making reference to International Humanitarian Law: referring to IHL would establish a situation of emergency, from which derogation might be possible; by not referring to IHL, a situation of normality – in which all rights protected by the ECHR are applicable – is presumed, and the “range of action” of the European Court is not diminished in any aspect. The way the ECtHR exploits this shortcoming of States when it comes to non-international armed conflicts is through rights such as the right to life and the right to private and family life, depending on the specific context of the case.

In the event of international armed conflicts, however, the situation is quite different. This is illustrated by the recent decision of the ECtHR in *Varnava v. Turkey*. In this case, concerning the disappearance of nine men during the Turkish

⁹⁷ See William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 741, 742 (2005) (analyzing *Isayeva, Yusupova and Bazayeva v. Russia* (Applications no. 57947-49/00), judgment of February 24, 2005; and *Isayeva v. Russia* (Application no. 57950/00), judgment of February 24, 2005).

⁹⁸ See William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 741, 745 (2005).

occupation of Northern Cyprus,⁹⁹ the Court made a clear distinction between the former Chechnya and Turkey cases, and it said that in this case, because the conflict involved two States battling on the same territory, International Humanitarian Law rules (that had acquired the status of international customary law, according to the Court) were applicable in helping to determine a different standard of proof. In this case, because there was an international armed conflict, much of the information belonged solely to military intelligence, and it could not be reasonably expected from the victims to be able to bring supporting evidence to their claims before the Court.¹⁰⁰ The Court used this reasoning to declare a continued violation of article 2 (Right to Life) of the ECHR over the disappearance of nine men during the conflict.¹⁰¹

While this could mean a new direction in the ECtHR's relationship with IHL, a more cautious approach advises us to look at this decision to indicate only that the ECtHR is willing to consider IHL rules as interpretive aids in cases of international conflicts, but that in internal conflicts its standards will remain the same. I will now look at how the Inter-American system has incorporated IHL concerns, what has happened in a way very different from that of its European counterpart, since the former openly refers to IHL provisions even in the context of non-international armed conflicts.

B) Merging IHL Rules into HR Adjudication: The Inter-American System

The organs of the Inter-American System (Commission and Court) have adopted different positions over time as to the relationship between IHL and HR

⁹⁹ *Case of Varnava and Others v. Turkey* (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90), Judgment of 10 January 2008, para. 13-7. At the time of writing, a request for referral to the Grand Chamber is still pending.

¹⁰⁰ *Id.*, para. 130.

¹⁰¹ *Id.*, para. 133.

in their individual petition system. Initially, the Inter-American Commission has rejected using IHL rules in interpreting the American Declaration on the Rights of Man and Citizen¹⁰² in the case of *Disabled Peoples' International et al. v. United States*, concerning a bombing promoted by the U.S. in Grenada in 1987 that injured 16 inmates of a psychiatric clinic.¹⁰³ The Commission restricted its analysis to the American Declaration – or at least it did not openly mention the application of IHL rules – and declared the case admissible.

Later, in the *La Tablada v. Argentina* case, the Inter-American Commission, when analyzing whether it could apply IHL rules directly and declare their violation, decided it could do so based on five primary reasons,¹⁰⁴ the most important of which was the fifth one. It stated that, because the Inter-American Court had affirmed it could analyze other treaties in its exercise of jurisdiction in an Advisory Opinion,¹⁰⁵ the Commission could accordingly extend its mandate to analyze alleged violations of other treaties, including the Geneva Conventions of 1949 and its Additional Protocols.¹⁰⁶

The finding of the Advisory Opinion had been restricted to the advisory competence of the Court, however, and was therefore misinterpreted by the

¹⁰² This instrument was used instead of the American Convention because the U.S. is not a party to the latter, and thus the competence of the Commission for hearing individual complaints, while still existent, is limited to the rights protected by the Declaration.

¹⁰³ For commentaries on this case, see David S. Weissbrodt and Beth Andrus, *The Right to Life During Armed Conflict: Disabled Peoples' International v. United States*, 29 HARVARD INTERNATIONAL LAW JOURNAL 59 (1988); Hans-Joachim Heintze, *On the Relationship between Human Rights Law and International Humanitarian Law*, 86 INTERNATIONAL REVIEW OF THE RED CROSS 789, 802 (2004); and Louise Doswald-Beck and Sylvain Vité, *International Humanitarian Law and Human Rights Law*, 293 INTERNATIONAL REVIEW OF THE RED CROSS 94 (1993).

¹⁰⁴ These reasons are listed by Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 324 INTERNATIONAL REVIEW OF THE RED CROSS 505 (1998); and Hans-Joachim Heintze, *On the Relationship between Human Rights Law and International Humanitarian Law*, 86 INTERNATIONAL REVIEW OF THE RED CROSS 789, 803 (2004). While the latter seems to be convinced by them, the former, who wrote his commentary when the decision came out, was not persuaded by any of them, except the fifth one.

¹⁰⁵ I/A Court H.R., *"Other treaties" subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982*. Series A No. 1.

¹⁰⁶ IACHR Report No. 55/97, *Case No. 11.137, Argentina*, OEA/Ser/L/V/II.97, Doc. 38, October 30, 1997, para. 157.

Commission. This was later corrected by the Court in its decision on preliminary objections in the *Las Palmeras* case.¹⁰⁷ In this case against Colombia, the Commission had declared a violation of Common Article 3 to the Geneva Conventions in its report on the merits, and had requested the Court, upon submitting the case to it, to make the same finding. The Court, however, declined to directly determine whether a rule of International Humanitarian Law had been breached in the case; instead, it determined that it could use Common Article 3 in interpreting the reach of the American Convention.¹⁰⁸

One commentator has argued that the only reason why the Court admitted using Common Article 3 to illuminate the scope of the right to life as protected by the American Convention was because such article represented customary law.¹⁰⁹ However, subsequent practice of the Inter-American Court shows that this was not the case, or, if the customary status of a rule was ever a requirement, that this requirement was dropped.

The *Bámaca Velásquez* case is quite remarkable in the practice of the Inter-American Court. In this case, while analyzing the enforced disappearance and (presumed) execution of the victim, the Court analyzed, under a separate heading, the violation of article 1.1 of the American Convention in light of Common Article 3 to the Geneva Conventions.¹¹⁰ The Court said that Common Article 3 imposed upon States several obligations that overlapped with provisions of the American

¹⁰⁷ I/A Court H.R., *Case of Las Palmeras v. Colombia*. Preliminary Objections. Judgment of February 4, 2000. Series C No. 67.

¹⁰⁸ I/A Court H.R., *Case of Las Palmeras v. Colombia*. Preliminary Objections. Judgment of February 4, 2000. Series C No. 67, paras. 32-3.

¹⁰⁹ See Fanny Martin, *Application du Droit International Humanitaire par la Cour Interaméricaine des Droits de l'Homme*, 83 INTERNATIONAL REVIEW OF THE RED CROSS 1037, 1039 (2001).

¹¹⁰ I/A Court H.R., *Case of Bámaca-Velásquez v. Guatemala*. Merits. Judgment of November 25, 2000. Series C No. 70, paras. 203-14.

Convention,¹¹¹ and in this way it seems to have drawn a parallel between the provision of the Geneva Conventions and its general provision. In the end, though, the Inter-American Court decided to declare the violation of article 1.1 in conjunction with other provisions of the American Convention, and not directly with Common Article 3.¹¹²

Article 1.1, the general provision on the guarantee of rights, is not usually given autonomous meaning within the American Convention, and is always analyzed in the light of another provision, as it is the case with cultural identity, explained above.¹¹³ The fact that the Court decided that the only provision it needed in order to give meaning to article 1.1 was an extraneous provision, coming from International Humanitarian Law, gives Common Article 3 a very important status. More important for the present purposes, the Inter-American Court drew on its general provision on the guarantee of rights so as to extend its competence and apply humanitarian law.

Subsequent practice of the Inter-American Court on the relationship between IHL and HR appears in using provisions of the Geneva Conventions and Additional Protocol II (relative to non-international conflicts) in interpreting the rights to freedom of movement,¹¹⁴ property and private and family life,¹¹⁵ for example.

All of these subsequent cases, however, as the entire practice of the Inter-American, refer to the specific provisions in connection with the general

¹¹¹ I/A Court H.R., *Case of Bámaca-Velásquez v. Guatemala*. Merits. Judgment of November 25, 2000. Series C No. 70, para. 209.

¹¹² I/A Court H.R., *Case of Bámaca-Velásquez v. Guatemala*. Merits. Judgment of November 25, 2000. Series C No. 70, para. 214.

¹¹³ See *supra* notes 32-34 and accompanying text.

¹¹⁴ I/A Court H.R., *Case of the "Mapiripán Massacre" v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, paras. 167-189; I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006 Series C No. 148, paras. 201-35.

¹¹⁵ The rights to property and private and family life were analyzed jointly in I/A Court H.R., *Case of the Ituango Massacres v. Colombia*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006 Series C No. 148, paras. 169-200.

provision on the guarantee of rights. Thus, none of them contradict the finding in *Bámaca Velásquez*, and it looks like it is by illuminating the general obligation on the guarantee of rights, a general clause within the American Convention, that the Inter-American Court opens room for extending its competence to assessing IHL concerns.

CONCLUDING REMARKS

That institutional dispute-settlement mechanisms for the protection of human rights have been attempting to expand the boundaries of their competences is a fact. The advantages offered are several, and make a compelling case for this expansion.

However, there are also some risks involved. One of them is that such a “stretch” of the human rights system will eventually lead to its loss of credibility. If everything can be translated into human rights, the human rights ideal loses some of its value, as it becomes less “essential”, it loses its proximity to the core of values human beings cannot live without in their social relations. Further, politically, and in the long run, States may be more cautious before entering into human rights treaties, and may show less willingness to comply with decisions taken by HR bodies.

This perspective does not seem to go unnoticed by adjudicatory bodies, even if only at an unconscious level. The only case that is not controversial is the protection of cultural identity, but that is probably attributable to the clear connection between identity and dignity.

The fact that these bodies have “braked” the expansion of their authority into the area of environmental law, as one can see from the raising of the threshold imposed by the ECtHR in the *Fadeyeva* case, points out in this direction.

Plus, the reluctance of the same European Court in applying International Humanitarian Law Directly seems to point in the same direction, even if can also be looked at a crafty way to circumvent the derogability of some of the provisions of the European Convention.

Plus, the Human Rights Committee's reluctance to substantiate claims connecting environmental protection and the right to life, and the Inter-American Court's denial to directly apply IHL, using it rather only as an interpretive tool, also indicate that this expansion, while firm, is not unrestrained.

It is nevertheless a welcome development, especially as it truly reflects the spirit behind the interpretation of human rights instruments, that command they should be interpreted in accordance with the evolution of human needs. In times like these, when cultural specificities help us remain afloat in a sea of homogeneity, when environmental degradation threatens the survival of the human race, and when conflict knocks on our backyard, it is important that the human rights system is ready and willing to look after our present and future.