Property Right during Armed Conflict: Application of Adopting Principles of International Humanitarian Law by the European Court of Human Rights

Maheta M. Molango*

I. Introduction

The proliferation of non-international armed conflicts over the last three decades has drawn the attention of scholars and commentators on the complex interrelationship between international humanitarian law ("IHL" or "laws of war") and human rights law. The European Court of Human Rights ("European Court" or "ECtHR") has been reluctant to apply IHL provisions to situations where arguably it should, or even has, used the laws of war as authoritative guidance. The decisions of the ECtHR in the cases of prolonged states of emergency (such as in southeastern Turkey or Chechnya) have illustrated the flaws of its position regarding the application of IHL principles.[1]

Although IHL and human rights law may at times have reached similar conclusions based on a different reasoning, it is crucial to establish a clear distinction between these two sets of norms and to determine when, how and under what conditions they should apply. The most obvious point of friction is the right to life, where the application of IHL or human rights law may substantially alter the outcome of decisions. However, controversy is not limited to this concrete right.

This paper analyzes property rights during armed conflicts, particularly ECtHR's approach in addressing alleged violations of property rights and its reliance on the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention" or "ECHR"). The paper first discusses the interplay between IHL and human rights law, providing a brief background and introduction to the basic concepts. Then, it discusses positions adopted by the ECtHR and the European Commission of Human Rights[2] with regard to the application of IHL in a selection of cases involving the United Kingdom, Turkey and Russia. The third part of the paper discusses the regulation of property rights under the European Convention and its relationship with Article 15 and Article 60 of the ECHR. The fourth part of the paper dwells upon property rights provisions existing under the laws of war.In particular, it focuses on property rights during military occupations and the relationship between military and civilian objectives. The fifth part focuses on the advantages and possible dangers in the application of IHL provisions by human rights bodies during armed conflicts. The paper concludes with some recommendations.

II. The Interplay between IHL and Human Rights Law

International humanitarian law and international human rights law have long been considered two strictly separate and distinct bodies of law.[3] The two sets of rules were considered mutually exclusive, fundamentally due to the fact that they followed a different historical evolution and responded to different motivations.[4] International human rights law protects individuals from possible abuse of power of the State, thus setting forth a number of limitations for the latter vis-à-vis the persons under its control. International humanitarian law, however, regulates conduct of parties to an armed conflict, restricting the methods and means of warfare.[5] Note, in this respect, that the Universal Declaration of Human Rights of 1948 and the 1949 Geneva Conventions[6] were drafted and signed during the same period without taking each other into consideration.[7] Despite their different historical background, some links were established between the two.[8] In the Geneva Convention of 1949, there is a tendency to consider the provisions not only as obligations of the Contracting Parties, but as individual rights of every person during an armed conflict.[9] On the other side, human rights conventions integrated derogation clauses, allowing states to abrogate certain provisions in exceptional circumstances such as situations of war or public emergencies threatening the life of the nation.[10]

It was not until the Teheran International Conference on Human Rights ("Conference") that the United Nations expressly recognized the application of human rights law in armed conflicts.[11] The Conference was followed by General Assembly Resolution 2444 and two reports from the secretary general that concluded human rights law ensures a more comprehensive protection than the existing laws of war.[12] Moreover, human rights law influenced drafting of the two 1977 Additional Protocols to the Geneva Conventions.[13] In that respect, it is fairly easy to detect how several provisions of the two protocols bear a striking similarity with the guarantees established under the International Covenant on Civil and Political Rights.[14] In the same vein, the International Court of Justice ("ICJ") confirmed application of human rights law in situations of armed conflicts in its *Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons* of 1996:

> The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely the law applicable in armed conflict which is designated to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[15]

The ICJ's *Nuclear Weapons* opinion gave rise to interpretations, according to which international humanitarian law should be the applicable law in situations of armed conflict instead of human rights law—although the latter was not totally excluded.[16] In a more recent *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ made it clear that human rights law may not be automatically set aside during armed conflicts and may even be directly applicable depending on the circumstances.[17] The Court elaborated:

> More generally, the Court considers that the protection offered by human rights conventions *does not cease in case of armed conflict*, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: *some rights may be exclusively matters of international humanitarian law*; *others may be exclusively matters of human rights law*; yet *others may be matters of both these branches of international law*. In order to answer the question put to it, the Court will have to take into consideration both branches of international law, namely human rights law and, as lex specialis, international humanitarian law.[18] (emphasis added)

This opinion clarifies applicability of IHL during armed conflict without totally excluding international human rights law. Thus, the debate now seems focused on establishing the detail of interactions between IHL and international human rights law.[19]

III. Position of the European Commission and European Court of Human Rights

When an international institution is created within the framework of a concrete treaty, it usually sustains its competence within the limited rights and obligations set forth under the respective treaty.[20] This is clearly the position adopted by the ECtHR. It is a human rights body, which applies international human rights law. Even though, it is easy to detect application of IHL in some of ECtHR's decisions,[21] as a general rule it has resolutely avoided applying IHL standards to the claims raised before it.

A. Application of IHL at the European Court of Human Rights

The first case in which the ECtHR had to deal with a possible concurrence of IHL norms and human rights law was the occupation of Northern Cyprus by Turkish forces in 1974. The occupation gave rise to the first state complaint brought to the ECtHR, along with a number of individual complaints, where violations of the right to peaceful enjoyment of one's property were alleged. In *Loizidou v. Turkey*, the complainant was alleging her denial of access to several of her plots of land following the Turkish invasion.[22] The complainant alleged violation of Article 1 of Protocol 1 to the European Convention (peaceful use of complainant's property).[23] Regardless of apparent military occupation, the ECtHR did not apply the IHL principles.[24] This is surprising, because the Court expressed in its judgment the importance of construing its rulings in accordance with the principles of the Vienna Convention on the Law of Treaties and in particular Article 31(3)(c) of the said treaty, which sets forth that "any relevant rules of international law applicable in the relations between the parties" has to be taken into consideration.[25]

Later on, the ECtHR was called upon in several situations of internal armed conflicts and military occupation to determine whether possible violations of the European Convention had occurred. Nevertheless, it limited its findings to alleged infringements of human rights provisions without discussing possible violations of IHL.[26] This led to the application of the same set of rules to situations ranging from mere law enforcement cases to situations of acute violence involving armed groups who probably met the high threshold established under Additional Protocol II.[27] The following cases illustrate how the ECtHR has addressed the hostilities in different cases:

> The decision in *McCann and Others v. United Kingdom* involved a joint operation by the Gibraltar police and British military forces aimed at preventing a car bomb attack that three IRA members would have allegedly carried out.[28] The soldiers erroneously believed that the terrorists would have activated the bomb using a push-button remote device.[29] Contrary to their fears, no weapons or detonating devices were ever discovered.[30] The ECtHR found that the State had violated the men's right to life, as the planning of the operation permitted the individuals to enter Gibraltar and allowed military personnel to kill them.[31]

As mentioned earlier, the ECtHR has occasionally used IHL principles as interpretative tools in order to address specific situations.[32] For instance, southeastern Turkey—the Kurdish part of the country—has witnessed a number of cases involving attacks on civilians and civilian targets. The *Ergi v. Turkey* case was about the accidental death during a military operation of a woman who was not directly taking part in the hostilities.[33] Applying the IHL principle, the Court elaborated, "the lawfulness of the target, on the proportionality of the attack and on whether the foreseeable risk regarding civilian victims was proportionate to military advantage."[34] The ECtHR would have probably reached the same conclusion by referring to international human rights and applying provisions of the European Convention.

Conversely, in *Özcan v. Turkey,* the ECtHR may have reached a different conclusion had it analyzed the material damage caused to the applicants' homes from an IHL perspective.[35] The case involved killings, deprivations of liberty and the burning of houses in the above-mentioned Kurdish areas.[36] The Court strictly based its judgment on human rights law (provisions of the European Convention) and on no occasion applied IHL by questioning whether the properties destroyed could have been military targets. *Alkdivar and Others v. Turkey* is another example of the same approach, in which the ECtHR omitted any direct or indirect reference to IHL, merely finding that "the deliberate burning of the applicants' homes and their contents constitutes at the same time a serious interference with the right to respect for their family lives and homes and with the peaceful enjoyment of their possessions."[37]

Isayeva v. Russia[38] and *Isayeva, Yusupova and Basayeva v. Russia*[39] provide other examples in which the ECtHR followed the analysis established in its previous *McCann v. United Kingdom* ruling that individuals' property right had been violated.[40] The facts of both cases bear some similarities as they both deal with the use of heavy weaponry that killed civilians and damaged their properties through aerial bombardments. In *Isayeva I*, the Russian air force was accused of having bombed vehicles of individuals who were evacuating a village that had been declared a "safe zone."[41] Similarly, in *Isayeva II*, the Russian forces bombarded an outlying village as applicants were trying to take advantage of a "humanitarian corridor" arranged by the Russian military to escape from the fighting in Grozny.[42] Applying the IHL, the Court may have reached a different conclusion if it had started by determining whether there was a legitimate military objective for targeting the properties:

> Risk to innocent civilian life and property must indeed also be minimized in armed conflicts, but if the target is a legitimate military one, then lethal force might be the first recourse, at least in some circumstances, provided that risks to people and objects in the vicinity are taken into account.[43]

Based on this application of IHL, if the attack had been carried out against a legitimate military objective, the collateral damage or destructions affecting applicants' homes should not have been considered a violation of their property rights.

B. Contribution of the Inter-American Commission of Human Rights

The Inter-American Commission of Human Rights ("IACHR") has applied the IHL in many cases involving armed conflicts. In the *Abella* case, the IACHR had to deal with attacks that took place at military barracks in La Tablada (Argentina), which gave rise to a battle between the attackers and Argentinean military forces that lasted for more than thirty hours.[44] Although a detailed analysis of the Commission's report is beyond the scope of our analysis, it is worth highlighting that the IACHR defended the application of IHL as lex specialis based on the following reasoning:

> 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. Therefore the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance[45]

In the same vein, the IACHR noted in its 1999 Third Report on the Human Rights situation in Colombia that:

> [T]he American Convention and other universal and regional human rights instruments were not designed specifically to regulate in detail internal conflicts situations and thus, they do not contain specific rules governing the use of force and the means and methods of warfare" and "both sets of norms [IHL and human rights law] apply during internal armed conflicts, although in many cases international humanitarian law may serve as lex specialis, providing more specific standards for analysis[46]

IACHR's reasoning can set a precedent for other international bodies, such as ECHR. In that respect, one can claim that the European Convention fails to provide the tailored and detailed legal framework on the conduct of warfare that IHL norms offer.

IV. The Right of Property in the European System of Human Rights

A. Provisions of Article 1 of Additional Protocol I

Article 1 of the ECHR Protocol contains a sufficient legal basis to support the utilization of IHL rules as authoritative guidance in situations of armed conflict. It states:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.[47]

This is the first economic right protected by the Convention.[48] Although the norm refers to the concept of "possessions," which should be understood in a broad and autonomous fashion,[49] in *Marks v. Belgium,* the ECtHR clarified that Article 1 is in substance guaranteeing the right of property.[50]

The article consists of two paragraphs, and the first paragraph can itself be divided into two parts. In relation with the first paragraph, its first sentence sets forth the basic guarantee of the right of property, while the second sentence seems to establish specific provisions concerning expropriation. The second paragraph contains the norm applicable to legislation restricting the use of property. In *Sporrong and Lönnroth v. Sweden*, the ECtHR adopted a similar position, noting that Article 1 contains three parts that are distinct but maintain nonetheless close links.[51]

The fact that expropriation appears as the only limit to the right of property contemplated in this article does certainly raise a number of legitimate questions. How should the ECtHR address situations in which military forces bomb a building where a group of insurgents have sought shelter, and as a result, cause damage or destroy several home in the neighborhood? Would this constitute a violation of the right of property? Most importantly, does the ECHR offer the required tools to adequately answer those questions?[52]

The second sentence of the first paragraph states that "no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."[53] Two explanations are possible: a) the drafters pursued the objective of guaranteeing that the special rules established in the ECHR would not supersede general rules of public international law whenever those applied;[54] b) the ECHR established the same standards as recognized in public international law for those under the jurisdiction of a High Contracting Party to the ECHR.[55] The ECtHR, and before it the European Commission of Human Rights, adopted the first approach in their jurisprudence. Both bodies found that Article 1 offered no protection to nationals of a state deprived of their possessions by their own state.[56]

When both IHL and human rights law apply, the ECtHR should turn to the specific IHL standards in order to determine whether there was an illegal deprivation of

property.[57] The *Ireland v. United Kingdom* case perfectly demonstrates that under the ECHR, it is generally possible to refer to international humanitarian law. The ECtHR analyzed whether the derogations adopted by the U.K. in Northern Ireland were in accordance with the state's duties under the 1949 Geneva Conventions.[58]

Morevover, it is worth dwelling upon the rules regulating the right of property in situations of internal armed conflicts. A possible explanation for the existing reluctance to apply IHL norms is that, apart from Common Article 3 and the limited rules of Additional Protocol II, not many relevant rules apply in non-international armed conflicts, and that human rights principles are therefore the only source of guidance in those circumstances.[59] In that respect, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Red Cross Committee's ("ICRC") study on customary law have stated that there is a set of international norms applicable to any armed conflict whether internal or international. The ICRC study demonstrated that, although not all the rules of IHL are applicable to non-international conflicts, a majority of IHL provisions remain applicable.[60] Furthermore, in its decision in the *Tadic* case, the ICTY advocated in favor of widening the scope of IHL to noninternational armed conflicts, arguing that some treaty rules, such as Common Article 3 or a majority of norms in Additional Protocol II, became part of customary international law.[61] The ICTY also notes that the principle of distinction as well as the protection of civilian population and property apply in armed conflicts of any kind.[62]

B. Article 1 of ECHR Protocol and Its Relationship with Article 15 ECHR

The interpretation given to Article 15 is particularly important in situations of noninternational armed conflicts. If a state decides to suspend certain guarantees based on the faculties granted by a derogation clause, and in addition the state has not ratified the relevant IHL instrument or the level of hostilities does not reach the necessary threshold, individuals are obliged to explore other alternatives for relief. Article 15 of the ECHR provides:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
>
> No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Article 3, 4 (paragraph 1) and 7 shall be made under this provision.[63]

This provision contains a general authorization for temporary derogation from the rights and freedoms established in the ECtHR in cases of public emergencies threatening the life of the nation. However, this article is not applicable to situations when the state decides to suspend certain guarantees based on the faculties granted by a derogation clause, or if the State has not ratified the relevant IHL instrument, or the level of hostilities do not reach the necessary threshold. The main limitations to the powers of derogation attributed to the States are the duty of proportionality and the requirement of compliance with international law, "provided that such measures are not inconsistent with other obligations under international law."[64]

From the perspective of the interplay between IHL and human rights law, this reference to international law principles could potentially play an important role.[65] Despite the position maintained by a majority of human rights bodies, arguing that their mandate only encompasses the rights and obligations set forth in their respective treaties, some have advanced the possibility of discussing IHL provisions through derogation clauses such as Article 15.[66] The first element that should be emphasized is that the right of property was not included within the provisions from which no derogation may be possible under any circumstances.[67] Contrary to human rights law, IHL provisions are not subject to derogation at any time.[68] Therefore, IHL provides a set of minimum rules applicable even in cases of emergency.[69] The general requirements of humanitarian law, especially the principle of distinction between civilian and military targets, necessity and proportionality, and humane treatment of protected persons represent "the bottom line below which derogation from human rights treaties cannot justify the freedom of action of states parties."[70] This means, in situations of noninternational armed conflicts, where homes or others' property may be destroyed or severely affected as a result of an attack against a legitimate military target, the ECtHR will not be able to correctly assess the issue unless it turns to IHL for guidance.

V. The Right of Property under International Humanitarian Law

As mentioned earlier, so far the ECtHR has dealt with two types of situations involving the application of IHL regarding property rights: deprivation of property during military occupation and destruction of property during warfare, originated in non-international armed conflicts.

A. Military Occupation

The 1907 Hague Regulations and the 1949 Geneva Convention contain specific clauses concerning private property in occupied territories.[71] The capacity of appropriation

and utilization of property in occupied territories substantially varies depending upon two main parameters: public or private character of the resource involved;[72] and the utility of the resource for the waging of war.[73] Taking of private property must be justified by a legitimate military necessity and private property cannot be taken for the occupant's own enrichment.[74] Additionally, an individual deprived of his property under such circumstances is entitled to compensation from the occupant.[75]

The 1907 Hague Regulations and the 1949 Geneva Conventions contain two central provisions regarding the destruction of property. Article 23(g) of the Hague Regulation No. IV sets forth:

> In addition to the prohibitions provided by special Conventions, it is especially forbidden:
>
> (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.[76]

This rule has a wide scope. It covers all properties in any territory where an armed conflict is taking place, regardless of the public or private nature of the property, and whether the property is located in an occupied territory or not.[77] Furthermore, the article establishes a limitation to property rights based on the imperatives of military necessity "unless … imperatively demanded by the necessities of war." The provision does not prohibit incidental damage and destruction collateral to operations, movements or combat activity of armed forces.[78] It, in fact, authorizes partial or total damage to any type of property if such damage is "necessary to, or results from, military operations either during or preparatory to combat."[79]

Contrary to the broad scope of the Article 23(g), Article 53 of the Fourth Geneva Convention is more limited and focuses on the destruction of property during occupation:

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

Once again, as it was the case in the Article 23(g), the destruction of private property will only be tolerated if the occupant can prove the necessity in causing damages ("except where such destruction is rendered absolutely necessary by military operations"), and it has met the requirement of proportionality. The destruction or appropriation of private property contravening the above-mentioned article is considered a "grave breach" according to Article 147 of the Fourth Geneva Conventions.[80]

B. Non-International Armed Conflicts

As previously mentioned, the ICTY and the ICRC have clarified applicability of customary laws of armed conflicts to all the parties to an internal conflict.[81] Those rules essentially mirror the regulation existing in cases of international armed conflicts.[82] Article 52 of Additional Protocol I establishes the general protection for civilian objects:

> 1. Civilian objects shall not be the object of attack or reprisal. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
>
> 2. Attacks shall be limited strictly to military objectives. Insofar as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
>
> 3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

According to the second paragraph, civilian objects fail to meet the two-pronged test as military objectives. The presumption in favor of civilian objects contained in the third paragraph of the article only concerns objects that ordinarily have no military use or purpose, thus excluding objects having dual uses or functions.[83] As noted in the ICRC commentary, two issues are not regulated in this article and require the recourse to complementary provisions of Additional Protocol I: first, the rule of proportionality, which allows the parties to assess the extent to which damages caused to a property are acceptable collateral or incidental damage; second, the unintentional or unavoidable, but necessary destruction of civilian objects occurring as a result of military operations, such as destruction to delay pursuit.[84]

The second paragraph of Article 52 sets forth two cumulative requirements to determine whether we are dealing with a military objective or not. First, an intended target has to make an "effective contribution to a military action." It is sufficient that the destruction of a concrete target contributes effectively to the party's overall war effort as no direct connection with combat action is necessary.[85] Second, Article 52(2) also requires that the destruction, capture or neutralization of the intended target offers a "definite"

military advantage to the attackers. As highlighted in the ICRC Commentary, such circumstance should be determined "in the context of the military advantage anticipated from the specific military operation of which the attack is a part considered as a whole, and not only from isolated or particular parts of that operation."[86] Therefore, the military advantage cannot be "hypothetical and speculative," but concrete and perceptible under the circumstances ruling at the time.[87]

Determining that an intended target is a military objective is not sufficient to assess whether it can lawfully be attacked. It is indispensable that the attack does not cause excessive collateral damage to civilians or civilian objects and that the attackers adopt certain precautionary measures in order to spare the civilian population.[88] Articles 51 and 57 refer to the concept of "expected" civilian loss rather than "actual" loss.[89] In other words, although the assessment made initially might not correspond with the situation on the ground after the attack, the commander may not necessarily be held responsible if the anticipated military advantage exceeds the advantage actually achieved.[90] As to the precautionary measures set forth in Articles 57 and 58,[91] the burden to take all the measures necessary to avoid civilian injuries or casualties is attributed to *both* parties involved in the hostilities, i.e. the party launching the attack and the party in control of the civilian population.[92]

Applying the comments above to the jurisprudence of the ECtHR, one might ask how should the ECtHR react if a complainants' properties are destroyed as a result of a carefully planned attack against a well-defined military objective, prepared with all due respect for the civilian population and carried out with appropriate and sufficiently precise weapons? Should the damage made to civilian objects not be considered a regrettable but lawful action, according to the IHL?[93]

The NATO bombing campaign against Yugoslavia generated a controversy for the ECtHR in determining what should be considered a military target.[94] The *Bankovic v. Belgium* case involved NATO's bombing of Belgrade's radio and TV station.[95] The ECtHR did not examine the merits of applicants' claims as it ruled that the victims fell outside of the jurisdiction of the respondent states and thus declared that the Court was not competent to adjudicate their claims.[96] The question as to whether a TV station can be considered a lawful military target remained thus unresolved. As noted by Sassòli, two main justifications were given for the attacks. On the one hand, it was argued that the TV station was integrated into the military communication network of the Yugoslavian forces and therefore was a military objective. On the other hand, official NATO statements merely included the media in its list of legitimate objectives of attacks without backing their assumption with any concrete facts.[97] The key issue consisted in determining whether the television studios met the two-pronged test established in Article 52(2); i.e., whether the media made an effective contribution to the Serbian military action and whether the attacks offered a definite military advantage under the circumstances ruling at the time.[98] In that regard, it was argued that the TV station was part of the propaganda machinery of the Serbian forces, therefore suggesting that such condition may suffice to consider it a legitimate target.[99] This position received strong criticism from commentators who claimed that "if the television studios were not used [for military transmissions] and were targeted merely because they were spreading propaganda to the civilian population, even including blatant lies about the armed conflict, it would be open to question whether such use could legitimately be considered an 'effective contribution to military action.'"[100] Regardless of its low possibility, even if the first requirement of Article 52(2) was met, the negative consequences resulting from the attacks may have offset any advantage that the destruction of the TV studio could have generated.[101] In that case, the second requirement of "definite" military advantage was probably not met.

VI. Challenges of Applying IHL by the ECtHR

A. Differences and Complements of IHL and International Human Rights

So far, this paper has discussed the interplay between IHL and human rights law, commented on the position of the ECtHR on the application of IHL, and exposed how the right of property is regulated under the European Convention and under the applicable IHL rules. Nevertheless, from a practical point of view, application of IHL principles by the ECtHR may not be straightforward. There are fundamental differences between human rights law and IHL. First, while the scope of application of the laws of war is confined to situations of armed conflicts, human right law applies at all times.[102] Second, IHL applies to and binds equally all the parties involved in an armed conflict, whereas human rights law "restraints the abusive practices of only one party to the conflict, namely the government and its agents."[103] Third, the majority of human rights instruments, including the European Convention,[104] contain provisions allowing states to derogate from certain obligations they assumed when they ratified the instruments. Contrary to human rights law, the laws of war do not allow derogations on grounds of emergency.[105] Fourth, while human rights law does not distinguish between the different types of conflicts, the applicable IHL norms vary depending on the qualification of the armed conflict that it is called to regulate.[106] Fifth, several commentators have highlighted the important differences between the two bodies of law in terms of procedural and secondary rights.[107] These two sets of laws, however, complement each other, thus providing a better protection to the victims of armed conflicts.[108]

B. Main Obstacles in the Application of IHL

It is argued that IHL is a very specialized discipline and that human rights tribunals like the ECtHR may not have the required expertise to adequately assess, for instance, when a situation only amounts to minor internal disturbances or has escalated to an armed conflict.[109] According to other commentators, human rights bodies may still be reluctant to apply IHL rules to politically sensitive situations where the states deny that hostilities might amount to an international armed conflict.[110] Furthermore, since human rights bodies have limited competence in assessing violations that state actors commit, they carry the risk of governments considering them illegitimate when they are not able to declare rebel groups responsible for human rights crimes.[111]

Turning our attention towards specific issues affecting the right of property under the European Convention, one of the major obstacles that the ECtHR faces is the conceptual differences existing between key terms used in international human rights and IHL.[112] Both sets of norms refer to a balancing test where they utilize "proportionality," but the values taken into consideration are different. The issue is particularly clear with regard to the use of lethal force. Human rights law severely restricts the use of lethal force by basing its assessment on the effect of a concrete measure on the targeted individual himself.[113] According to IHL, once it has been determined that the intended target is a military objective, the assessment as to whether it can be lawfully attacked focuses on the effect of the offensive on surrounding civilians and civilian objects, and not upon the targeted individual.[114] In the context of an armed conflict, the idea of proportionality is closely related to another key IHL concept: "collateral damage." Therefore, IHL does not ban the use of lethal force; it rather aims at controlling the implementation of a shoot-to-kill policy.[115]

The implications derived from an erroneous application of the concept of proportionality with regard to the right of property are obvious. Finding that a concrete attack on a military target meets the requirement of proportionality opens the door to considering that the unintentional destruction of homes in the vicinity may be tolerated if the relevant IHL rules are complied with.

VII. Conclusion

It is now widely accepted that human rights law does not automatically cease to apply during situations of armed conflicts. While IHL rules provide more specific answers concerning the means and methods of combat, in other situations — such as long-term occupation — human rights law has certainly a key role to play. Although the European Court has at times used IHL norms without expressly mentioning them, as a general rule, it has been extremely reluctant to apply IHL principles in situations of armed conflict.

As discussed, the right of property constitutes a paradigmatic example of how the assessment of a concrete attack could change radically depending on the approach taken by the Court. In some cases, both sets of bodies can interact and complement each other. Nevertheless, they remain two separate elements dealing with profoundly different situations. They may share common values of humanity and respect for human dignity, but the sui generis context of warfare remains a peculiar situation that requires a specific and tailored set of rules to apply.

The content of Article 1 of ECtHR Protocol seems to contradict the argument often put forward by the ECtHR according to which the ECtHR can only address violations arising from the provisions of the European Convention. The requirement of compliance with the principles of international law includes respecting customary humanitarian laws and rules. These rules in turn comprise the principle of distinction between civilian objects and military objectives.

A correct assessment of the destruction of property in some of the cases brought before the Court required determining first whether the property affected constituted a military target or whether it was located in the vicinity of a lawful target. We have demonstrated that the European Convention does not furnish the elements necessary to make such a determination and that the ECtHR erred in ignoring IHL provisions. The recent events in the conflict between Russia and Georgia in South Ossetia could give rise to a number of claims in which the ECtHR may be called upon to assess possible violations of the right of property. IHL experts are hoping to see a change of direction in the Court's jurisprudence and further application of IHL.

---

* Maheta Molango has been working in the employment law department of Baker & McKenzie in Madrid, Spain since April 2007. He holds a Bachelor of Laws as well as a Bachelor of Arts in political science from the Universidad Carlos III of Madrid. He received his Master of Laws in 2009 from American University Washington College of Law. Mr. Molango is also the recipient of Washington College of Law's Rubin Scholarship. He can be reached at maheta_molango@yahoo.fr.

1 *See generally* Isayeva, Yusupova and Basayea v. Russia, case no. 57947/00, 57948/00 and 57949/00, Eur. Ct. H.R. Judgment of Feb. 24, 2005; Isayeva v. Russia, case no. 57950/00, Eur. Ct. H.R., Judgment of Oct. 14, 2005; Özcan v. Turkey, case no. 21689/93, Eur. Ct. H.R., Judgment of April 6, 2004; Ergi v. Turkey, case no. 23818/94, Eur. Ct. H.R., Judgment of July 28, 1998.

2 In 1994, Protocol no.11 put an end to the two-tiered mechanism existing in the European system for the protection of human rights, merging the Commission and the Court into

a single judicial authority.

3 According to this approach, IHL regulates situations of armed conflicts while the application of human rights rules is limited to peaceful situations. As Christopher Greenwood highlighted, the defenders of a rigorous distinction between IHL and human rights law stress that the "war is a too complex and brutal phenomenon to be capable of being constrained by rules designed for peacetime" and "with the outbreak of war the law of human rights must yield to the *lex specialis* of the laws of war." *See* Christopher Greenwood, *Rights at the Frontier: Protecting the Individual in the Time of War*, in *Law at the Centre*, 277-93 (R. Barry ed., The Institute of Advanced Legal Studies, Dordrecht: Kluwer 1999).

4 *See, e.g.,* Heike Krieger, *A Conflict of Norms: the Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study,* 11 J. Conflict & Security L. 265 (2006).

5 While human rights law only addresses violations committed by the State and its agents (at least up to now), IHL applies equally to *all* parties involved in an armed conflict and whatever the merits of their cause under the ius "ad bellum." This would for instance open the door to the possibility of holding accountable non-State actors for violations of the laws of war. *See, e.g.,* Robert Kogod Goldman, *International Humanitarian Law and the Armed Conflicts in El Salvador and Nicaragua*, 2 Am. U. J. Int'l L. & Pol'y 539, 543 (1987).

6 *See generally* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 (1948); *see also* The Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at See, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 278 [hereinafter Fourth Geneva Convention] [all four collectively hereinafter 1949 Geneva Conventions].

7 *See*, *e.g.*, Dietrich Schindler and Jiri Toman (eds.), *The laws of armed conflicts: A Collection of Conventions, Resolutions & Other Documents,* (Hotei Publishing 2004) (1973).

8 *Id.*

9 *Id.* Article 3 common to the four 1949 Geneva Conventions establishes a set of minimum humanitarian law rules applicable to non-international armed conflicts, thus affecting a legal sphere traditionally exclusively attributed to sovereign States: the relationship between the States and the persons under its control; *see also,* article 7 of the First, Second and Third 1949 Geneva Conventions ("Wounded and sick, as well as members of the medical personnel and chaplains, *may in no circumstances renounce in part or in entirety the rights secured to them* by the present Convention) (emphasis added); *see also* Article 8 of the Fourth Convention relative to the protection of civilians in times of war ("Protected persons *may in no circumstances renounce in part or in entirety the rights secured to them* by the present Convention") (emphasis added).

10 Article 15 of the European Convention constitutes a good example of a derogation clause affecting the application of human rights law during armed conflicts. It will be analyzed further in this paper.

11 *See* Final Act of the International Conference on Human Rights, UN Publication, Sales No. E.68.XIV.2 (Apr. 22 - May 13, 1968), available at

http://www.unhcr.org/refworld/type,INTINSTRUMENT,UN,,3ae6b36f1b,0.html.

12 Report for the Human Rights in Armed Conflict, UN Doc. A/7729 (Nov. 20, 1969); *see also,* Report on Respect for Human Rights in Armed Conflict, UN Doc. A/8052 (Sept. 18, 1970), at para. 20-29, annex 1.

13 *See generally* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of the Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, II (1977) *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of the Victims of Non-International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, II (1977) *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

14 *See*, *e.g.* article 75 of Protocol I; *cf.* International Covenant on Civil and Political Rights, Dec.16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

15 Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226-593 (July 8), para. 25 (Nuclear Weapons case). In relation with the European Convention, it should be noted that article 15 contains a derogation clause, which expressly contemplates situations of war. *See* European Convention on Human Rights, Nov. 4, 1950, article 15, 213 U.N.T.S. 221, reprinted in 1950 Y.B. on Hum. Rts. 418. Furthermore, even though the ICJ only refers to the right to life, the important elements of the reasoning used by the Court can be applied *mutatis mutandis* to the right of property as we will try to demonstrate.

16 Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 Int'l Rev. Red Cross 737, 738 (2006).

17 *Id.; but see* M. Dennis, *ICJ Advisory Opinion on Construction of a Wall in Occupied Palestinian Territory: Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and military occupation*, 99 Am. J. of Int'l L. 119 (2005) (questioning the relationship existing between

international humanitarian law and human rights law and stressing that the precise nature of their links remain unclear).

18 ICJ Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, July 9, 2004, at para. 106. The ICJ applied the same arguments in its decision related to the human rights' and humanitarian law violations committed by Uganda during its occupation of the Eastern part of the Democratic Republic of Congo following the second Congolese war. *See* DRC v. Uganda, I.C.J. 116, Case Concerning Armed Activities on the Territory of the Congo, Dec. 19, 2005, at para. 119.

19 *See* Lubell, *supra* note 16; *see also* Cordula Droege, *The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict,* 40 Isr. L. Rev. 310 (2007).

20 *See* Lubell, *supra* note 16, at 742.

21 *See, e.g.,* Ergi v. Turkey, ECtHR, case no. 23818/94, Eur. Ct. H.R., Judgment of July 28, 1998 (stating that the responsibility of the State for a violation of the right to life is 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 to minimizing, incidental loss of civilian life); *cf.* article 57(2)(a)(ii) of Additional Protocol I (setting forth that in the conduct of military operations, the parties involved shall "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects").

22 *See* Loizidou v. Turkey, case No. 15318/89, Eur. Ct. H.R. Judgment of Dec.18, 1996.

23 *Id.* at para. 31.

24 *See* Hans-Joachim Heintze, *On the Relationship between Human Rights Protection and International Humanitarian Law*, 86 Int'l Rev. Red Cross 789, 806 (2004), available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/692EUA/$File/irrc_856_Heintze.pdf.

25 *See* Vienna Convention on the Law of Treaties, article 31, 1155 U.N.T.S. 331 (1969); *see also* Loizidou v. Turkey, *supra* note 22, at para. 43.

26 *See* Lubell, *supra* note 16.

27 *See* article 1 of Protocol II which requires dissident armed forces or other organized armed groups involved in the hostilities to be "under responsible command, exercise such control over a part of its territory [the territory of the State] as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

28 *See* McCann and others v. United Kingdom, case no. 18984/91 Eur. Ct. H.R., Judgment of Sept. 27, 1995.

29 *Id.* at para. 13-27.

30 *Id.* at para. 174-184.

31 *Id.* at para. 148-150.

32 *Id.*

33 *See* Ergi v. Turkey, *supra* note 21.

34 *See* Heintze, *supra* note 24 at 810.

35 Özcan v. Turkey, case no. 21689/93, Eur. Ct. H.R. Judgment of April 6, 2004, at para. 297.

36 Despite the prolonged state of emergency declared in the region, the Turkish government never recognized the applicability of Common Article 3 and the ECtHR has never made any comments as to whether Common article 3 or Additional Protocol II applies to the situation. Moreover, note that Turkey acceded to the 1949 Geneva Conventions on February 10, 1954, but it has not ratified Additional Protocols I and II. *See* Aisling Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, 324 Int'l Rev. of the Red Cross 513, 513-529 (1998).

37 Akdivar and others v. Turkey, Eur. Ct. H.R., Judgment of Sept. 18, 1996, at para 88; *see also* Bilgin v. Turkey, case no. 23819/94, § 108, Eur. Ct. H.R., Judgment of November 16, 2000, at para. 105-109 (declaring that Turkey had violated Article 8 of the European Convention and Article 1 of Protocol No. 1).

38 Isayeva v. Russia, case no. 57950/00, Eur. Ct. H.R., Judgment of Oct. 14, 2005 (Isayeva I).

39 Isayeva, Yusupova and Basayea v. Russia, case no. 57947/00, 57948/00 and 57949/00, Eur. Ct. H.R., Judgment of Feb. 24, 2005 (Isayeva II).

40 *Id.* at para. 171 (stating "It is necessary to examine whether the operation was planned and controlled by the authorities 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 is minimized"); *see also* Isayeva I, *supra* note 38, at para. 175.

41 *See* Isayeva I, *supra* note 38 at para. 12-28.

42 *See* Isayeva II, *supra* note 39 at para. 13-34.

43 *Id.* at 744.

44 IACHR, Abella v. Argentine, case 11.142, Report no. 55/97, OEA/Ser.L./V/ II.98, doc. 6 rev. (1998).

45 *Id*. at para. 161; *but see* Liesbeth Zegveld, *The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case*, 38 Intl' Rev. Red Cross 505 (1998); *see also* Lindsay Moir, *Law and the Inter-American Commission on Human Rights System*, 25 Hum. Rts. Q. 182, 194 (2003) (stating that, "referring to and applying the relevant provisions of humanitarian law as authoritative sources in order to settle alleged violations of human rights law is not the same as applying international humanitarian law norms directly in order to assess the responsibility of the state for violations of that law as well as for violations of human rights").

46 IACHR, Third Report on the Human Rights Situation in Colombia, OEA/Ser.L/V/II.102, Doc. 9 Rev. 1 (26 February 1999), at para. 10-11.

47 Protocol to the European Convention for the Protection

of Human Rights and Fundamental Freedoms art. I, Mar. 20, 1952, 213 U.N.T.S. 262 (ECHR Protocol or P1-1), Article 1, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm.

48 *See* Jochen Frowein, *The Protection of Property*, *in* The European System for the Protection of Human Rights 515 (R.St.J. Macdonald, F. Matscher and H. Petzold eds., Kluwer Academic Publishers 1993).

49 In other words, "possessions" (or "biens" in French) include immovable and movable property and the right of property guaranteed under the ECHR is not limited to the technical notion of property established under national laws.

50 *See* Marckx v. Belgium, case no. 6833/74, Eur. Ct. H.R., Judgment of 13 of June 1979, at para. 63.

51 The first sentence contains the general principle informing the right of property, while the second sentence of the opening paragraph and the second paragraph refer to instances of deprivation of possessions and subject them to certain rules. *See* Sporrung and Lönnroth v. Sweden, case no. 7151/75 and 7152/75, Eur. Ct. H.R., Judgment of Sept. 23, 1982.

52 *See, e.g.,* C. Lysaght, *The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments*, Report of the International Symposium of the Netherlands Red Cross on the Protocols of 1977 Additional to the Conventions of Geneva of 1949 (The Hague, Sept. 25, 1978) (discussing to the extent to which Protocol II provides additional protection to war victims than the European Convention on Human Rights)

53 *See* ECHR Protocol, *supra* note 47.

54 The direct consequence of such approach is that only properties owned by foreigners would be protected and this protection would not include the property of those under their own country's jurisdiction. *See* Frowein, *supra* note 48, at 521.

55 *See* Frowein, *supra* note 48, at 521; *see also Law of the European Convention on Human Rights* 530-531 (D.J. Harris, M. O'Boyle and C. Warbrick eds., Butterworths 1995).

56 The ECtHR noted that the respect for the general principles of international law implies that non-nationals enjoy a special protection against expropriations and in the case of lawful expropriations are entitled to compensation. *See, e.g.,* James v. United Kingdom, case no. 8793/79, Eur. Ct. H.R., Judgment of Feb. 21, 1986, at para. 61-63.

57 This view is supported by article 60 of the Convention which states that, "nothing in this Convention should be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or *under any other agreement to which it is a Party*" (emphasis added). At this respect, it seems important to highlight that all the States parties to the ECHR are also parties to the 1949 Geneva Conventions.

58 *See* Ireland v. United Kingdom, case no. 5310/71, ECtHR, Judgment of January 18, 1978.

59 *See* Lubell, *supra* note 16, at 744.

60 "The gaps in the regulation of the conduct of hostilities in Additional Protocol II have largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts". *See Customary International Humanitarian Law,* Vol. 1 (J.-M. Henckaerts and I. Doswald-Beck eds. 2005).

61 ICTY, Prosecutor v. Tadic, Appeals Chamber case no. IT-94-1-AR72, Oct. 1 1995, at para. 97-98.

62 *Id.* at para. 112.

63 *See supra* note 15.

64 *See* Ali Riza Çoban, *Protection of Property Rights within the European Convention on Human Rights*, 251-252 (Ashgate Publishing 2004).

65 So far, the ECtHR only had to discuss possible violations of article 15 on very few occasions.

66 *See* Reidy, *supra* note 36.

67 Note that the four "non-derogable" rights are the right to life (subject to the conditions established in the same article), the prohibition of torture, the prohibition of slavery and servitude, and the right not to be punished without law.

68 *See, e.g.,* Alexander Orakhelashvili, *The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, 19 Eur. J. Int'l L. 161, 165.

69 *Id.*

70 *See* Orakhelashvili, *supra* note 68*; see also* Çoban, *supra* note 64, at 253 (stating that in addition to the 1949 Geneva Convention, the States should also take into consideration norms such as article 17 of Additional Protocol II which prohibits forced movement of civilians); *see also* P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* 555 (2d ed., Kluwer 1990) (recognizing that any derogatory measure under article 15 has to comply with the rules of 1949 Geneva Conventions. Nonetheless, the author warns that although the wide formulation adopted in the article may include other customary law obligations "the Strasbourg organs will not lightly go beyond the scope of conventional law, unless they can rely on clear international case-law or an express consensus within the community").

71 *See, e.g.,* Hague Regulation No. IV of October 18, 1907, Respecting the Laws and Customs of War on Land, 36 Stat. 2277, T.S. No. 539 (Hague Regulation No. IV).

72 Base don rules regulating the right to confiscation, it is understood that there is no obligation to compensate the enemy State from which public movable property has been confiscated. While confiscation of *public* movable property is tolerated under certain conditions, article 46 of the Hague Regulation no. IV expressly prohibits such practice reaffirming that private property must be respected (with the exception of certain items of private property found on the battlefield).

73 *See* M. McDougal and F. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion,* 809-10 (Yale University Press 1961) (emphasizing that the protection of private property is not absolute and in case of doubt as to the public or private nature of a property, the presumption is that the property is public until its private nature is demonstrated).

74 *See* Jessup, *A Belligerent Occupant's Power over Property*, 38 Am. J. Int'l L. 457, 458 (1944).

75 *Id.; see also Oppenheim's International Law II: Disputes War and Neutrality* 410 (7th ed. Shearer (ed.) London Butterworths 1994) (noting that "from the rule that requisitions must always be paid for, it again becomes clear and beyond all doubt that private property is, as a rule, exempt from appropriation by an invading army").

76 *See* Hague Regulation, *supra* note 71.

77 *See* U.S. Dep't of the Army, Pamphlet 27-161-2, International Law 174-175.

78 *See* M. Bothe, K. Partsch, and W. Solf, *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* 320-327 (1982) (ICRC Commentary) (noting that "destruction which is not necessary (relevant and proportionate) to the attainment of a military advantage is prohibited").

79 *See* U.S. Dep't of the Army, Pamphlet 27-161-2, International Law 174-175.

80 Following World War II, the Nurnberg Military Tribunals found that the looting of private property by the Germans in occupied territories constituted war crimes. Interestingly, the Court declared the individual criminal responsibility of the persons involved in those illegal activities. *See* Loukis G. Loucaides, *The European Convention on Human Rights* 126 (Collected essays, Nijhof 2007).

81 *See, e.g.,* U.N. General Assembly Resolution 2444 (XXIII), U.N. GAOR, U.N. A/PV//1748 (1968) entitled "Respect for Human Rights in Armed Conflicts". The General Assembly expressly recognized the customary principles of civilian immunity and distinction between civilians objects and civilian objectives. It also made clear that these principles are applicable to any type of armed conflict, independently from its internal or international character.

82 Obvious difficulties in the day-to-day practice can stem from the fact that certain requirements, perfectly suitable to international armed conflicts, may be more problematic in the context of an internal armed conflict. For instance, it may be difficult to classify members of armed groups and determine with certainty when they can be lawfully attacked.

83 *See* IACHR Third Report on the Situation in Colombia, *supra* note 46, at para. 68; *see also Commentary on the Additional Protocols of 8 June 1977* 636 (Claude Pilloud, Yves Sandoz, and Bruno Zimmermann eds., Kluwer Law International 1987) ("the criterion of *purpose* is concerned with the intended future use of an object, while that of *use* is concerned with its present function. Most civilian objects can become useful objects to the armed forces. Thus, for example, a school or a hotel is a civilian object, but if they are used to accommodate troops or headquarters staff, they become military objectives"); for a discussion regarding the NATO targeting policy in Kosovo, where the NATO appeared to treat bridges and railway lines systematically as military targets without taking into consideration the concrete military context of the hostilities. *See* Michael Bothe, *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY*, 12 Eur. J. Int'l L. 531, 533 (2001).

84 The requirement of proportionality is discussed in Article 51(5)(b), Article 57(2)(iii) and in concrete circumstances in Articles 55 and 56 of Protocol I.

85 *See* ICRC Commentary, *supra* note 78.

86 *Id.*

87 *Id.* The timeliness and reliability of the information on which military forces base their decision as to whether an attack may be considered unlawful or not, is crucial. As the assessment may drastically change depending on the concrete circumstances of the case, a target which was clearly a military target at a specific moment in time can loose such status within hours or days. The same reasoning applies in the opposite direction too. Additionally, it bears repeating that the requirements must be fulfilled *cumulatively* and must be examined based on the *actual situation at hand*, not considering some hypothetical future moment.

88 *See* Marco Sassòli, *Legitimate Targets of Attacks Under International Humanitarian Law*, International Humanitarian Law Research Initiative Working Paper, Harvard Program on Humanitarian Policy and Conflict Research (January 2003), *available at* http://www.oejc.at/recht/Session11.pdf.

89 *See* Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977 Part II*, 9 Neth. Y. B. Int'l L. 107, 113-23 (1978).

90 *Id.*

91 Article 57 refers to "Precautions in Attack" clearly regulating the duties of the attacking Party, while Article 58 refers to "Precautions against the Effect of Attacks" articulating the obligations of the Party in control of the civilian population.

92 Although the burden placed on commanders is significant, the ICRC Commentary clarified that their action have to be judged based on a "reasonable and honest reaction to the facts and circumstances know to them from information reasonably available to them at the time they take their actions." *See* ICRC Commentary, *supra* note 78, at 276-280.

93 *See, e.g.*, W. Hays Parks, *"Precision" and "Area" Bombing: Who Did Which, and When?,* 18 Journal of Strategic Studies 145 (1995) (stressing that direct and intentional attacks against civilians are prohibited, but nonetheless collateral injury to the civilian population or damage to civilian objects is the "price

of doing business").

94 Following the Federal Republic of Yugoslavia's failure to comply with the demands of the international community in the context of the Kosovo crisis, the North Atlantic Treaty Organization (NATO) announced air strikes on Yugoslavian territory. The bombing campaign lasted from March 24 to June 9 1999. *See* W.J. Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, 12 Eur. J. Int'l L. 489 (2001).

95 *See* Bankovic v. Belgium, case no. 52207/99, Eur. Ct. H.R., Judgment on Admissibility of Dec. 12, 2001.

96 This case raised a number of issues regarding the extraterritorial application of the European Convention on Human Rights and the concept of "effective control over a territory" that has informed the ECtHR case law. One could be tempted to question whether effective control "on the ground" is any different or more effective than control "in the air." For a more detailed discussion on the topic, *see, e.g.,* M. Happold, *Bankovic v Belgium and the Territorial Scope of the European Convention on Human Rights*, 3 Human Rights Law Review 77, 77-90 (2003).

97 *See* Sassòli, *supra* note 88, at 4.

98 *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 Am. J. Int'l L. 239, 276 (2000).

99 *See, e.g.,* Fenrick, *supra* note 94.

100 George H. Aldrich, *Yugoslavia's Television Studios as Military Objectives*, 1 International Law Forum 149, 150 (arguing that the media would make an "effective contribution" if they were used to transmit orders or intelligence for military forces. Notwithstanding, Aldrich insists that not every object used to strengthen civilian morale is, by virtue of such use, a lawful military target); *see also* Amnesty International, *"Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force*, at 41-48 (2000).

101 *See* Aldrich, *supra* note 100 (mentioning the deaths of civilians working in the studio, the deprivation of information affecting the population and other adverse political and psychological effects, to illustrate negative consequences).

102 *See* Droege, *supra* note 19.

103 *See, e.g.,* Robert K. Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 Am. U.J. Int'l L. & Policy 49, 51 (1993) (emphasizing that only States and their agents can commit and be held internationally accountable for human rights violations. Abuses of a similar nature carried out by non-State actors do not constitute human rights violations).

104 *See* analysis of the relationship between article 1 of ECHR Protocol and article 15 ECHR under section V (B) of this paper.

105 *See* Meron, *supra* note 98. In relation with the non-derogability of IHL rules, it seems nonetheless important to keep present the provisions set forth in article 5 of the Fourth Geneva Convention.

106 *See* Krieger, *supra* note 4, at 279.

107 *See* Droege, *supra* note 19, at 336 (discussing the differences existing between IHL and human rights law in relation to the right to an individual remedy).

108 *Id.* at 337 (explaining that the concept of "complementarity" reflects the idea that IHL and human rights can influence and reinforce each other mutually).

109 *See, e.g.,* Byron, *supra* note 111, at 893. Contrary to the position defended by Byron, we consider that the IACHR constitute a good example of how the assumption that human rights bodies may lack the required expertise is not always an absolute truth.

110 *See* William Abresch, *A Human Rights Law of Internal Armed Conflict: the European Court of Human Rights in Chechnya*, 16 Eur. J. Int'l L. 741, 757 (2005). The position held by many States involved in internal armed seems to be based on a fundamental misconception. The application of Common 3 or Protocol II to the party does not alter the status of the parties to the conflict and does not entail a formal recognition of the rebels or dissident groups. Furthermore, it seems necessary to stress once again that there is no such thing as prisoner of war status in a non-international armed conflict. In other words, a State can perfectly capture dissidents and punish them for the commission of crimes in accordance with its domestic laws.

111 *See* Byron, *supra* note 111.

112 *See* Prosecutor v. Kunarac, ICTY, IT-96-23-T, Judgment of Feb. 22, 2001, at para. 476 (specifying that "notions developed in the field of human rights can be transported in the international humanitarian law only if they take into consideration the specificities of the latter body of law").

113 *See* Lubell, supra note 16, at 745.

114 *See* Lubell, *supra* note 16, at 745-746.

115 *See* Kenneth Watkin, *Controlling the Use of Force: a Role for Human Rights Norms in Contemporary Armed Conflict*, 98 Am. J. Int'l L. 1, 32 (2004).

* * *