International Human Rights Law and the Law of Armed Conflict in the Context of Counterinsurgency – with a Particular Focus on Targeting and Operational Detention

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Abstract

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In the past decade, few topics have attracted more attention among international lawyers than the interplay between *international human rights law* (IHRL) and the *law of armed conflict* (LOAC). At the same time, the multiple – often multinational and extraterritorial – military operations in response to the 'new threats' to (inter)national security posed by non-State actors have incited a debate among security experts on how to *counter insurgencies*. This study ties these legal and security debates together, and in doing so focuses specifically on two traditional, but controversial kinds of military power, namely *targeting* and *operational detention*. The former implies the intentional deprivation of life of insurgents designated as targets to achieve predetermined effects set by the force commander. The latter refers to the detention of persons either for purposes of criminal justice (criminal detention) or security (security detention). Counterinsurgency doctrine recognizes both as indispensible instruments to defeat an insurgency. At the same time, they are seen as strategic hazards that are to be applied with consideration and care for fundamental counterinsurgency principles. To end today's 'wars amongst the people', such as those in Iraq and Afghanistan, counterinsurgent States have come to realize that it is in their strategic interest to ensure that the conduct of their troops remains within the boundaries of the applicable law. However, precisely targeting and operational detention raise controversial issues in IHRL and LOAC as well as their interplay, which is even more complicated by the specific characteristics of modern-day insurgencies.

This study aims to contribute to the legal theory on the interplay of IHRL and LOAC, and to value the operational consequences of this interplay in the various contexts of counterinsurgency in which targeting and operational detentions may take place. As such, the study not only serves an academic, but also a military-operational purpose. The study examines the following central research questions:

(1) in light of contemporary counterinsurgency doctrine, how do IHRL and LOAC interplay in the context of targeting and operational detention in counterinsurgency operations?
(2) what are the implications of this interplay on the lawfulness of – and, therefore, operational latitude for – targeting and operational detention in counterinsurgency operations?

The methodology underlying the examination of these questions is threefold. *First*, besides the traditional sources of international law as set out in Article 38 of the Statute of the International Court of Justice, the study also takes account of extra-legal sources, such as military doctrine, policy and practice on counterinsurgency, targeting and operational detention. *Secondly*, the study applies a *situation-specific approach*, by examining the interplay

between IHRL and LOAC in four settings of counterinsurgency: NATCOIN (counterinsurgency on a State's territory), OCCUPCOIN (counterinsurgency carried out by an Occupying Power), SUPPCOIN (counterinsurgency in support of another State), and TRANSCOIN (transnational counterinsurgency). The purpose of this approach is to determine whether and, if so, how the particular dimensions of each of these settings affects the interplay between IHRL and LOAC and thus the lawful room for maneuver in targeting and operational detention.

Thirdly, the study applies a *paradigmatic approach*. Targeting and operational detention are extreme measures that may not be arbitrarily resorted to, but are limited to application in the proper context in order to serve specific objects and purposes. The concept of law enforcement comprises of all territorial and extraterritorial measures taken by a State or other collective entity to maintain or restore public security, law and order or to otherwise exercise its authority or power over individuals, objects, or territory. As a concept, hostilities comprises of all activities that are specifically designed to support one party to an armed conflict against another, either by directly inflicting death, injury or destruction, or by directly adversely affecting its military operations or military capacity. The targeting of insurgents is either a measure of law enforcement or a measure of hostilities. Operational detention is a measure of law enforcement. In essence, it is possible to identify two sub-concepts within the concept of law enforcement relative to operational detention, i.e. the concepts of *criminal detention* and *security detention*. To the extent that IHRL and LOAC provide valid and applicable norms for the regulation of targeting and operational detention, their total of norms forms distinct normative paradigms. The interplay between IHRL and LOAC within these normative paradigms will be examined, as well as the interplay between the normative paradigms.

The study is divided in four parts (Part A-D).

Part A: Context and Conceptual Framework for Analysis

In view of the focus on insurgency and counterinsurgency, a first research question is what these concepts mean and what role they potentially could play in the ascertainment of the interplay between IHRL and LOAC in the targeting and operational detention of insurgents (the military-strategic context).[1]

The research shows that counterinsurgent forces face a mosaic of threats, which may vary in time, place, and nature, posed by non-State actors with various objectives. Insurgents operate in unconventional ways, are difficult to identify and generally act with disregard for the law. Insurgents operate in unconventional ways, are difficult to identify and generally act with disregard for the law. The characteristics of this complex 'mosaic warfare' potentially have *legal* implications for the interplay between IHRL and LOAC. For example, the non-State nature of insurgents, their level of organization, their (often) cross-border activities, as well as the intensity and protractedness of the violence plays a significant, if not paramount role in the *legal qualification* of the conflict.

Counterinsurgency concerns the politico-military strategy to develop and apply a comprehensive approach of political, military, paramilitary, economic, psychological, civil and law enforcement means available to a government and its partners to simultaneously contain and defeat an insurgency and address its root causes. It aims at the return to a

[1] Chapter I.

status quo of governance under the rule of law. To attain this desired end state, counterinsurgency doctrine emphasizes the need to offer the population security as well as the legitimacy of state power. Only then is it possible to drive the necessary wedge between the insurgents and the population and to convince the latter to support the counterinsurgent State. To deal with the challenges posed by insurgency, counterinsurgency policy and strategy is unorthodox. As it constitutes population-centric warfare rather than enemy-centric warfare it is often perceived as counterintuitive by soldiers trained in regular warfare. This finds reflection, *inter alia*, in the principle of restrained, controlled and tailored use of forcible measures. The particular nature of counterinsurgency policy raises questions as to its potential effects on the interpretation of norms of IHRL and LOAC governing targeting and operational detention, and the interplay between them.

A second research question concerns the *legal* context against which the interplay between IHRL and LOAC is to be examined.[2] This concerns, *firstly*, the general *conceptual underpinnings* of IHRL and LOAC.[3] This part of the study shows that both regimes differ significantly in terms of object and purpose, the legal relationships they seek to govern, the nature of rights and obligations, as well as their scope of applicability, notwithstanding the fact that both serve humanitarian aims.
Secondly, this part examines three themes in the legal discourse on the interplay of IHRL and LOAC. These themes reflect ongoing attempts to *manipulate the outcome of the interplay* by making use of the perceived weaknesses and gaps in IHRL or LOAC. A first theme concerns the *seperatist, integrationist and complementerist approaches* on the relationship between IHRL and LOAC in armed conflict.[4] While they all represent a certain view of the relationship as it *should be*, not necessarily *as it is*, these approaches inform us on the various arguments put forward on the issue of whether LOAC and IHRL can be applicable at the same time and, if so, how they interrelate. They also assist in recognizing particular outlooks in doctrine, jurisprudence or State practice as being separatist, integrationist or complementarist.
A *second* theme nourishing the debate on the interplay between IHRL and LOAC concerns the so-called '*humanization*' of armed conflict.[5] This involves the process of legal expansion of protective norms for individuals affected by armed conflict. This expansion takes place through the interpretation and modification of existing – and the development of new – norms of LOAC by States or other actors operating in the realm of LOAC. While humanization of LOAC traditionally was State-led, the study demonstrates that a shift is taking place towards more innovative ways of humanization. This shift is led by non-State actors, such as NGO's, legal scholars and international tribunals, who attempt to introduce IHRL into LOAC. While the study acknowledges that the process of innovative humanization cannot be ignored, it is to be viewed with caution. When ignored or remaining undetected, it has the potential to upset the traditional balance between military necessity and humanity present in all norms of LOAC.

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[2] Chapter II.
[3] Chapter II, paragraph 1.
[4] Chapter II, paragraph 2.1. In brief, the separatist approach views IHRL and LOAC as mutually exclusive; the integrationist approach views IHRL and LOAC as largely integrated; and the complementarist approach views IHRL and LOAC as complementary bodies.
[5] Chapter II, paragraph 2.2.

A *third theme* influencing interplay of IHRL and LOAC concerns the discourse that arose after 9/11 on the ability of the currently available legal frameworks to fight the so-called 'new wars', i.e. wars against non-State actors that operate globally. The study demonstrates that the characteristics of this 'new war' has laid bare areas of discontent among supporters on both sides of the military necessity-humanity equation that continue to influence the debate on the interplay between IHRL and LOAC.[6]

Since it is the interplay between IHRL en LOAC that is central to this research, a third research question is how international law, in general, regulates norm relationships.[7] This part of the research shows that, as a general rule, norm relationships only arise when norms are *valid* (i.e. govern a certain subject matter) and *applicable* (i.e. they have binding force). In case of a norm-interplay, the desired outcome is to harmonize them. This requires the *ascertainment* of the ability of norms to *complement* each other so as to give each of them *maximum* effect (the *instrument of complementarity*). The principal instrument to then ascertain the complementarity of norms is *interpretation*. The outcome may be that norms are in sheer harmony, or are in potential or genuine conflict. In the case of a *potential* conflict, techniques of conflict avoidance can be used to harmonize the norms. In the case of a *genuine* conflict, resort can be had to techniques of conflict resolution. Subsequently, it must be determined whether the norms in question are in harmony or in conflict.

In view of the above, the follow-up question is how the interplay between IHRL and LOAC is regulated. This is the final research question of Part A. It shows that, following the analysis of norm relationships in international law it is possible to design a *conceptual framework for analysis* that provides the parameters necessary to carry out the examination of the interplay between IHRL and LOAC in respect of targeting and operational detention in counterinsurgency.[8] A *first* step in the conceptual framework for analysis is therefore to ascertain whether IHRL and LOAC offer such norms to regulate targeting and operational detention operations (interplay potential).
As a *second* step, each instance of interplay must be *appreciated*. This requires an examination of the substance of the applicable norms. The study takes as a viewpoint that the maxim of *lex specialis* is the principal instrument of interpretation relevant to the ascertainment, avoidance and solution of (potentially) conflicting norms of IHRL and LOAC, notwithstanding the fact that this maxim is often criticized for being inept as an instrument to entangle the interplay between IHRL and LOAC and/or because its function is often misinterpreted. This maxim entails that in the event of interplay of norms of IHRL or LOAC a specific norm and a general norm can be harmonized via interpretation of the general norm through the specific norm (*lex specialis complementa legi generali*), or that the specific norm and the general norm are incompatible (*lex specialis derogat legi generali*). In both instances, the norm specifically designed for the situation at hand, as a rule, takes *precedence* over the general rule. It does, however, not end the general norm's applicability; it does not displace the general norm. As such, the general norm may still function as the 'fall-back'-norm, for example in case the specific norm is formulated insufficiently precise.

[6] Chapter II, paragraph 2.3.
[7] Chapter II, paragraph 3.
[8] Chapter III.

In order to assess whether a certain norm is more specific than another, account may be had of a range of factors, such as the intention of States when drafting or acquiescing to the norms in question, the search for relevancy and effectiveness in their application in particular situations, the legal clarity of norms or their certainty and reliability, the nature of the norms in question, the degree of effective control exercised by the State involved, and State practice.

It is against this background that the research on the potential for, and appreciation of the interplay between IHRL and LOAC as examined in Parts B and C is to be viewed. The results of this research will be summarized below.

Part B: Interplay Potential

Part B applies the first step of the conceptual framework for analysis. It examines the *potential* of IHRL and LOAC to interrelate, by looking at whether they provide valid and applicable norms that regulate targeting and operational detention in the specific situational contexts of counterinsurgency. As follows from the analysis, the human rights that most closely govern both concepts are the right to life and the human rights pertaining to the deprivation of liberty.[9] These rights are amongst the most fundamental within the human rights catalogue.

As the wounding, killing and capture of enemy fighters are the traditional methods of warfare to force the enemy into submission, it is not surprising that LOAC offers a detailed and comprehensive set of norms. However, it is here that the traditional dichotomy between IAC and NIAC and the subsequent diversity in availability, density as well as precision of norms in the laws of IAC and NIAC could affect the potential of norm interplay with IHRL.

As regards targeting, valid norms of LOAC are found in its sub-regime of the law of hostilities. A detailed set of norms is found in the treaty-based law of IAC, all of which have attained customary law status. The law of NIAC does not provide norms on targeting.[10] This does not imply that there is a gap in regulation of hostilities in NIACs. Some argue that IHRL steps in. However, the strict requirements underlying the right to life-based use of force sit quite uncomfortably with the concept of hostilities, the characteristics of which call for greater latitude. The study adopts the view that the customary law of hostilities fills the gap, notwithstanding that some themes in the law of hostilities require further clarification or certainty.

In the area of *operational detention*, only the law of IAC offers a detailed set of treaty-based and customary norms governing both criminal and security detention. The treaty-based as well as the customary law of NIAC remains underdeveloped, particularly so in the areas of legal bases for operational detention, procedural safeguards in security detention, and transfer. Obviously, this has consequences for the potential of interplay with IHRL.

Besides norm validity, the potential for norm interplay depends on the degree of *norm applicability*. In order to determine the degree of norm applicability in targeting and operational detention in counterinsurgency, the study applies the situation-specific approach. It follows from the analysis of the several situations of counterinsurgency that

[9] Chapter IV, paragraph 1.
[10] Chapter V, paragraph 1.1.

there appears to be a rather high potential for norm interplay. Nonetheless, the analysis demonstrates that the simultaneous applicability of IHRL or LOAC cannot be readily assumed.

As regards the applicability of the valid IHRL-norms relative to targeting and operational detention,[11] the principal question is whether the insurgents affected by these forcible measures have come, at the time they were enforced, in the jurisdiction of the counterinsurgent State. Two much discussed issues loom. This concerns, *firstly*, the applicability of IHRL-obligations in times of armed conflict. Some (including Israel and the United States) adopt a separatist view and argue that IHRL never applies in armed conflict. It is today, however, generally agreed that IHRL continues to apply in armed conflict. This study adheres to this position. A *second* controversial issue is whether a State is bound by its IHRL-obligations because it exercises jurisdiction over persons when operating *outside* its own territory (extraterritorial applicability of IHRL). It follows from the analysis of doctrine and jurisprudence that such jurisdiction may arise (1) when a State exercises effective control over an area (ECA), or (2) when it exercises authority and control over persons (SAA). This implies that jurisdiction may be said to arise in all cases of operational detention. After all, in these cases the state exercises physical control over persons. Following the case law of the UNHRC and the IACtHR/IACiHR this is also the case in respect of targeting. In view of these bodies, (extraterritorial) jurisdiction under the ICCPR and ACHR arises for all types of State conduct, regardless of the location where they occur. Decisive is whether the human rights of the persons involved are affected by State conduct. To date, this functional approach has not been adopted by the ECtHR. Absent ECA (as would be the case in NATCOIN or OCCUPCOIN), jurisdiction only arises on the basis of SAA. Based on its relevant case-law to date, the ECtHR appears to accept SAA-based jurisdiction in situations of targeting where the counterinsurgent State exercises public powers or is control over the situation. However, this is more likely to arise in law enforcement situations,where a State exercises public powers of control. To date, it remains unclear whether the ECtHR accepts the applicability of the ECHR in the context of the extraterritorial targeting of persons in hostilities. It is proposed that the ECtHR adopt a functional approach similar to that adopted by the UNHRC and the IACtHR/IACiHR, provided that it subsequently examines alleged violations of the right to life in situations of hostilities through the lens of LOAC. To date, the ECtHR has refrained from explicitly doing so.

In respect of LOAC, the principal question is whether it is the law of IAC or NIAC that applies to the targeting or detention-relationship between the counterinsurgent State and the insurgents.[12] The study adopts the view that if a conflict between a State and non-State actors qualifies as an armed conflict, it is to be viewed as a NIAC, and not an IAC, and that subsequently the law of NIAC applies. The determinative factor is the very nature of the parties to the conflict (State v. non-State actor) and not the capacity of the underlying normative frameworks to protect security or humanitarian interests to the fullest extent desired. The situations of NATCOIN and SUPPCOIN qualify as NIAC. The type-qualification of OCCUPCOIN and TRANSCOIN remains subject of legal debate. Following the majority viewpoint, targeting and operational detentions in OCCUPCOIN and TRANSCOIN are governed by the law of NIAC. The principal

[11] Chapter IV, paragraph 2.
[12] Chapter V, paragraph 2.

argument put forward is that any conflict between a counterinsurgent State and insurgents is to be viewed as an armed conflict separate from any pre-existing IAC. In other words, in all situational context of counterinsurgency the law of NIAC governs the relationship between the counterinsurgent State and the insurgents, provided the thresholds of a NIAC have been crossed.

For the purposes of the study, this study assumes the existence of an armed conflict when a State is countering an insurgency. It does so, however, with the remark that the mere political qualification of an uprising by non-State actors against the State and its institutions does not in and by itself imply the existence of an armed conflict. It is stressed that the determination of a conflict as an armed conflict results from a factual examination on a case-by-case basis. This is generally not so problematic in IACs, but in the case of conflicts between a State and non-State actors this is less evident since a NIAC requires the exchange of sufficiently protracted armed violence between a State and a non-State armed group with a sufficient degree of organization. It is particularly the latter requirement that is problematic. This degree of organization may be absent or be difficult to identify. In addition, the sporadic use of force does not trigger the existence of an armed conflict. In the absence of a NIAC, LOAC does not apply and the counterinsurgent State is left to deal with the non-State actors in a IHRL-fashion only. In practice, States may be confronted with ambiguous situations whereby conflicts 'float' in the grey area between peace and armed conflict that may result in the blurring of the boundaries between IHRL and LOAC. It is here that conceptual differences between IHRL and LOAC may be played out against each other in order to serve a particular interest group's (security or humanitarian) interests.

Part C: Interplay Appreciation

Part C deals with the appreciation of the interplay. The research question to be answered is: in light of contemporary counterinsurgency doctrine, how do the relevant normative frameworks of IHRL and LOAC governing targeting and operational detention interrelate, and what does this tell us about the permissible scope of conduct in operational practice?

To answer this question, the study examines the *substantive content* of the valid norms in IHRL and LOAC governing targeting and operational detention.[13] This provides us with insight on the character of the norms and their compatibility, which is required in order to appreciate their interplay. The approach adopted is to examine the interplay of IHRL and LOAC within the various normative paradigms relative to targeting and operational detention as well as the arguments underlying the *interplay between those normative paradigms* (the paradigmatic approach).[14]

Targeting[15]

[13] As regards targeting, see Chapter VI (IHRL) and Chapter VII (LOAC). As regards operational detention, see Chapter IX (IHRL) and Chapter X (LOAC).

[14] In Chapter VIII (regarding targeting) and Chapter XI (regarding operational detention).

[15] Part C.1.

As regards *targeting*, the study demonstrates that IHRL and LOAC each offer a distinct framework of requirements to be complied with by the military commander in the planning and execution of targeting operations against insurgents.
Due to their respective objects and purposes, and the subsequent nature of the legal relationships they each regulate, the requirements under each regime – while demonstrating overlap to some degree – fundamentally differ, particularly in terms of protection of the insurgent (as the target), as well as in respect of the protection of civilians.
IHRL offers a framework with strict requirements. They entail that force may only be applied in response to an actual and imminent threat and as a measure of last resort; only that kind and degree of force may be used that is sufficient to remove the threat and it must proportionate to attain a legitimate aim only; precautionary measures must be taken to ensure that the loss of life or injury to individuals, including that of the potential target, can be avoided or, in any event, minimized; and a post-facto investigation must be carried out. In terms of object and purpose, these requirements aim to prevent the target from materializing the threat it poses and all serve to protect the right to life of the target, regardless of the nature of the threat, as well as innocent bystanders.
This framework offers sufficient latitude for the use of force for *law enforcement* purposes in conditions of peace where the State exercises control over its territory. It may, however, be questioned whether this framework is equally flexible in times of armed conflict to deal with *hostilities* in areas where such control is contested or (partially) absent. In addition, it may be questioned whether these requirements are compatible with the concept of targeting. When strictly adhered to, these requirements make the targeting of insurgents possible only in very exceptional circumstances. States may not target individuals based on their mere (military or political) label as 'insurgent', but force it to carry out an adequate assessment of the concrete and immediate threat posed at the moment that resort is taken to targeting. Neither does IHRL permit a counterinsurgent State to enact laws or policies that, as a matter of procedure, provide government forces a license to kill insurgents as a measure of first resort to, for example, remove perceived threats to the political stability or the security of the State; to destabilize and undermine an insurgency's organizational structure; or to remove a potential but unspecified threat posed by them based on past threats. Such laws and policies do not serve as a 'means' to achieve a legitimate 'end', but become an 'end' in itself, which is unlawful. In addition, IHRL bars the counterinsurgent State from targeting insurgents for purposes which under the normative paradigm of hostilities would fit in the concept of military necessity. Also, the counterinsurgent is under an obligation to take the aforementioned precautionary measures. This forces the counterinsurgent State to carefully select means and methods that do not render death inevitable or that do not result in the disproportionate use of force. This implies that the killing of insurgents with the use of, for example, attack helicopters, armed drones or aerial bombardments would require a severe threat for them not to constitute an arbitrary deprivation of life. This is not to imply that such a threat cannot materialize – terrorist attacks are the prime example – but these are clearly exceptional situations. Clearly, this framework of restrictions severely impacts the interpretation and application of fundamental principles of military operations.
In contrast to IHRL, LOAC offers a framework of requirements that is specifically designed for hostilities. It obligates the counterinsurgent State to distinguish between lawful military objectives and protected persons. The targeting must take place by means

and methods lawful under the law of hostilities. In the event that civilians and civilian objects *collocate* with targetable insurgents, LOAC permits – under strict, but reasonable conditions – their incidental death and injury when such is expected not to be excessive to the concrete and direct military advantage anticipated from the attack on lawful military objectives. So far as feasible, precautionary measures must be taken to avoid, or to minimize injury or death of civilian life, or destruction of civilian property. While this framework regulates the conduct of hostilities by issuing prohibitions and restrictions, it is to be viewed as permitting forcible conduct unless specifically constrained on the basis of humanitarian concerns. In order to attain the legitimate aim of warfare, which is to defeat the enemy, it demonstrates that the law of hostilities is cognizant of the military necessity to render an insurgent *hors de combat* – including his killing – once he qualifies as a lawful military objective. His targeting may take place at any time and in any place provided this is not otherwise prohibited under LOAC.

The above, however, does not imply that the normative content of the law of hostilities remains unproblematic and does not – as a consequence – impact the targeting of insurgents. Some subjects, such as a person's qualification as lawful military objective remain contentious. Also, the analysis of the law of hostilities shows that continuous attempts are made to recalibrate the balance between military necessity and humanity embedded in its norms. Possible the most controversial attempt concerns the idea that the concept of military necessity contains a restrictive notion that prohibits the killing of lawful military objectives if other, less harmful alternatives are available and feasible. This study does not support this viewpoint.

While offering detailed rules on the use of force as a measure of hostilities, LOAC only offers very rudimentary rules on the use of force as a measure of law enforcement They prohibit the arbitrary deprivation of life but provide no guidance similar to that found in IHRL.

In light of the above the next step is to carry out an appreciation of the interplay of IHRL and LOAC within the normative paradigms of law enforcement and hostilities. When doing so, it becomes clear that both interrelate in a harmonious manner, but that LOAC is the *lex specialis.*[16] As regards the normative paradigm of law enforcement it follows that in the absence of detailed norms in the law of IAC and NIAC governing law enforcement-based use of force, IHRL, as the *lex generalis*, fulfills a complementary role. In respect of the normative paradigm of hostilities, the IHRL-question whether a deprivation of life qualifies as arbitrary is to be answered by taking account of the specific circumstances that hostilities bring along, and whether it occurred in accordance with the special law designed for such circumstances – the law of hostilities. Here, the maxim of *lex specialis* functions as a technique of interpretation.

This logic underlying the outcome of the interplay of IHRL and LOAC *within* the normative paradigms is also reflected in the interplay *between* the normative paradigms.[17] While some argue that an insurgent's status as lawful military objective under the law of hostilities is sufficient to trigger the normative paradigm of hostilities (the formal approach), this study favors an approach following which the outcome of the interplay between both paradigms is context-specific (the functional approach). This approach takes account of the position of the target within the normative paradigms. Contrary to regular combatants in an IAC, the non-State nature of insurgents implies that they have a

[16] Chapter VIII, paragraphs 1 and 2.

[17] Chapter VIII, paragraph 3.

dual status under international law. In so far insurgents qualify as lawful military objectives the concept of hostilities *overlaps* with the concept of law enforcement, as the insurgents also pose a threat to public security, law, and order: after all, they commit criminal offences. This overlap in concepts translates into a *double relationship*: insurgents are not only in a *horizontal* belligerent relationship with the counterinsurgent State, but also in a *vertical* relationship. Under the former, counterinsurgency forces have an *authority* to attack; under the latter, they have an *obligation* to respect and protect the right to life and due process of all those under their jurisdiction. These relationships are difficult to separate.

A functional approach to the interplay between the normative paradigms mandates that the normative paradigm of law enforcement applies if the counterinsurgent State exercises control over territory where lethal force potentially resulting in the deprivation of life occurs (*territorial control*) *as well as* over the circumstances surrounding the operation (*situational control*). The normative paradigm of hostilities finds no application, but instead is placed 'in reserve' and remains 'dormant' as long as the normative paradigm of law enforcement can adequately govern all activities of the counterinsurgency forces, even when the threat posed by insurgents can be linked to hostile acts. It is not until control is not or no longer exercised to a degree that it permits the counterinsurgent State to maintain or restore public security, law, and order by resort to law enforcement measures alone that the logical limits of the normative paradigm of law enforcement have been reached. From that point onwards, the normative paradigm of hostilities becomes 'active'.

When the functional approach is applied to the various situational contexts of counterinsurgency, it follows that the normative paradigm of law enforcement is the norm, rather than the exception in targeting operations in NATCOIN and OCCUPCOIN. As stated, this implies that the targeting of insurgents may take place only in very exceptional circumstances. The functional approach also demonstrates that in all situations where territorial or situational control is absent, the counterinsurgent State is authorized to apply the normative paradigm of hostilities to the targeting of insurgents. In comparison to the normative paradigm of law enforcement, the normative paradigm of hostilities – being LOAC-led – offers the counterinsurgent State considerably more latitude to target insurgents. In terms of permissibility, the normative paradigm of hostilities enables combat operations to be carried out in line with the basic principles of warfare, such as simplicity, flexibility, initiative, offensive and maneuver.

However, the full use of this framework's strength in counterinsurgency operations is feared to undermine the strategic imperatives in counterinsurgency. Contemporary counterinsurgency doctrine demonstrates caution and restraint in the application of force, such that counterinsurgent forces are called upon to use only the minimum force strictly required by the exigencies of the situation. The net result is a dense policy paradigm, next to which the normative paradigm of hostilities plays a subordinate role. Arguably, the policy restrictions result in conduct similar to that required when adopting a functional approach. In other words, where counterinsurgent forces exercise more control, the restraint in lethal force weighs heavier. A significant difference between the functional approach and the counterinsurgency approach is that the latter imposes restrictions not mandated by the normative paradigm of hostilities in situations where such control is absent. The position taken in this study is that the legal framework of the law of hostilities remains unaffected by the counterinsurgency-based policy paradigm. These policy-based restrictions risk to be misinterpreted as normative by those supportive of innovative

humanization of armed conflict. If States ignore these signals, such development result in the adjustment of the traditional balance between military necessity and humanity and may undermine the very foundations of hostilities-based targeting.

Operational Detention[18]

In respect of an individual's deprivation of liberty, IHRL offers a detailed body of strict requirements regulating the legal basis for detention, the procedural safeguards to be afforded, the treatment, and the transfer of detainees.[19] While also applicable to other forms of deprivation of liberty, this framework is primarily designed to regulate the *criminal detention* of individuals (including insurgents). While also applicable to other forms of deprivation of liberty, this framework is primarily designed to regulate the *criminal detention* of individuals (including insurgents). The general premise underlying this framework is that is to be applied in situations of peace, where a State is in a position to establish and maintain a functioning criminal justice system, in which police, public prosecutors, defense lawyers and judges can adequately operate. In that respect, the framework is reflective of a presumption that the government exercises control over territory, objects or persons – as the very concept of law enforcement already suggests.
The concept of *security detention*, does not easily corresponds to the deprivation of liberty-framework. First of all, an explicit legal basis is missing in IHRL. While this does not imply that security detention is altogether prohibited, it is to be viewed as an extraordinary measure that may be applied exceptionally and (presumably) only when preceded by a lawful derogation. This forces States to carefully consider and continuously scrutinize security detention. Other areas of friction concern, *inter alia*, fair trial guarantees and the requirement to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention before an independent and impartial court (*habeas corpus*). An important question is whether these IHRL-requirements can be readily applied to detentions in times of armed conflict, particularly in areas of ongoing hostilities where effective control over territory is absent or under strain.

As regards the normative substance of the valid norms pertaining to operational detention in LOAC, the dichotomy between of IAC and NIAC plays a decisive role.[20]
Overall, both the law of IAC and NIAC contemplate the continued applicability of and necessity for criminal detention, notwithstanding the fact that it may be imposed in the context of an armed conflict. At the same time, it must be noted that the valid norms pertaining to criminal detention found in the law of IAC are largely embedded in the law of belligerent occupation. This confirms that even though these norms apply in armed conflict, they can only be effectively complied with when a certain degree of effective control over territory is exercised that permits the judiciary to function in a fashion to enable it to speak justice in conformity with the normative substance of these norms. Here, LOAC demonstrates its ability to differentiate between the different levels of control that may occur in an area of armed conflict, and thus demonstrating its flexibility to allow the rule of law to do its job and to punish individuals for their criminal conduct.

[18] Part C.2.
[19] Hoofdstuk IX.
[20] Chapter X.

Nonetheless, LOAC shows that it is prepared to deal with threats to the security that commonly arise in situations of armed conflict – by permitting fighters or civilians to be detained on a preventive basis. This is most strongly and detailed regulated in the law of IAC. The most lenient framework is provided in GC III, which permits the internment of POWs for the duration of the conflict without periodic reviews, yet insurgents as understood in this study would not qualify as POWs. However, they qualify as persons protected under GC IV and API, both of which allow for the security detention (internment) of insurgents. At the same time, this measure is to be considered an exceptional measure and for that reason is subjected to a range of substantive and procedural requirements. These demonstrate a considerable, but not necessarily complete, overlap with IHRL-norms. In terms of permissibility as well as clarity of the applicable norms, the law of IAC is most convenient, yet the applicability of this body of law to operational detentions in counterinsurgency operations is arguably very limited as the relationship between counterinsurgent States and insurgents in the situational contexts of counterinsurgency is most likely to be governed by the law of NIAC. In view of the absence of valid norms governing security detention in the law of NIAC, it is difficult to determine its scope of permissibility. Even though there appears to be agreement that security detention in NIAC is not prohibited, there is no explicit legal basis. Most concern is however directed at the issue of whether, and if so, what procedural safeguards are to be afforded in the event an individual is kept in security detention. Treaty law and doctrine offer several possibilities. CA 3 encourages parties to the conflict to agree upon the application of the law of IAC. Also, GC III and/or GC IV maybe applied as a matter of policy, yet this is non-binding and thus lacks the strength of certainty that is so much needed. Thirdly, CA3 and APII invite IHRL to fulfill a complementary role.

When appreciating the interplay between IHRL and LOAC, it can be concluded that notwithstanding the difference in *availability*, *density* as well as the *precision* of rules governing criminal and security detention in IHRL and LOAC (particular the law of NIAC), these norms convergence and complement each other.[21] The study argues that where LOAC provides norms it operates as the *lex specialis* and acts as an interpretative source, or – as has been submitted in the context of the legal basis for internment – as an overriding source in case of (potential) conflict with norms of IHRL.
This conclusion applies firstly to the interplay between IHRL and LOAC in the normative paradigm of criminal detention, where the normative substance of the valid norms is virtually the same.[22] Nonetheless, it is LOAC that takes the lead role, as it is the *lex specialis*. This implies that the available norms are applied in view of the conceptual underpinnings of LOAC.
The interplay of IHRL and LOAC in the normative paradigm of *security detention* reflects the availability, density and precision of the normative frameworks in the laws of IAC and NIAC.[23] As noted, these frameworks differ fundamentally. Thus, in view of the dense regulation of security detention in the law of IAC, the interplay is rather straightforward: LOAC is the *lex specialis*. In the absence of specific norms on security detention in the law of NIAC, the interplay is less straightforward, at least so in respect of the legal basis and procedural safeguards. Arguably, IHRL could step in to fill the gap. However, reliance on

[21] Chapter XI.
[22] Chapter XI, paragraph 1.
[23] Chapter XI, paragraph 2.

IHRL is not unproblematic. States may find IHRL inapplicable in armed conflict or in extraterritorial situations. Even if it is applicable, its aptness to the realities of armed conflict can be questioned. In addition, it does not bind the non-State party to the conflict, which is viewed as problematic.
There seems to be no straightforward and satisfying solution available in the law and the best option at this moment is to resort to policy that derives guidance from GC III and GC IV. This would not preclude IHRL from being included in such policy so it could, where necessary, clarify or supplement LOAC norms. This would result in a framework within which States feel comfortable and at the same time offers safeguards of a standard commensurate to the specific situation of armed conflict. The actual application of such policy may serve as a first step towards new law – either customary or in the form of a new treaty. Supporting this process may be today's counterinsurgency doctrine, policy, and practice, which already reflect much of the norms found in GC III, GC IV and IHRL.

A final issue concerns the interplay between the normative paradigms of criminal detention and security detention.[24] There is no positive rule that offers guidance. It is submitted, however, that a factor determinative of the applicability is the very object and purpose of each normative paradigm. The normative paradigm of criminal detention provides a framework to regulate an individual's detention for alleged criminal behavior that took place in the *past*, and for which he can be held *accountable to the public*. In turn, the normative paradigm of security detention in armed conflict provides a framework to regulate an individual's detention for *future* behavior, in order to *prevent* threats to the *security*. It is also submitted that in operational practice the interplay between the two forms of operational detention may be influenced by policy-based *counterinsurgency imperatives*. Overall, in counterinsurgency, criminal detention is to be preferred over security detention and the shift from the latter to the former is to made as soon as possible. However, it is submitted, reliance on criminal detention largely depends on the *control* exercised by the counterinsurgent State over territory to a degree that it can rely on an functioning criminal justice system. In environments of ongoing hostilities between the counterinsurgent State and insurgents, and where a criminal justice system is absent, or improperly functioning, criminal detention might not an option because it is simply not possible to reasonably comply with the accompanying requirements, and security detention is the only reasonable alternative provided it is used for the object and purpose it was designed for. When the situation gradually transforms from hostilities to peace, criminal detention may become more of a practical possibility, and therefore a strategic imperative. Nonetheless, criminal detention imposes upon the counterinsurgent State a heavy operational burden.

Part D: Synthesis and Conclusions

Part D seeks to draw together the principal operational and legal themes in this study that emerge from the examination of the interplay between IHRL and LOAC in light of targeting and operational detention operations carried out in counterinsurgency.
It reemphasizes the importance of the rules and principles present in the system of

[24] Chapter XI, paragraph 3.

international law to ascertain and appreciate norm relationships.[25] It also stresses the danger inherent attempts to modify the *lex lata* for purposes of humanity or security.[26] It highlights the importance of norm validity and norm applicability for the potential of interplay.[27] It also reaffirms the importance of the corresponding role of the notion of control in the concepts of law enforcement and hostilities as well as in the very object and purpose of IHRL and LOAC.[28] In addition, it stresses that the specific characteristics of insurgency and counterinsurgency cannot be left aside in the process of the interpretation of the interplay of norms of IHRL and LOAC.[29]

Part D also concludes upon the implications of the interplay of IHRL and LOAC in respect of the operational room for maneuver in the targeting and operational detention of insurgents.[30] Part D concludes with final conclusions,[31] by stressing the significance of paradigmatic-thinking over regime-thinking in military operations and by offering insight in the way forward. It proposes that States – as the primary 'legislators' of international law – should ensure that they are in 'command and control' of new developments, so as to ensure that the traditional equilibrium between what is militarily necessary on the one hand and imperative from a humanitarian perspective on the other hand is not abruptly and disproportionately put out of balance by relevant parties – States, international organizations, NGOs, and international and national (quasi-)judicial bodies - attempting to further advance these interests as they see fit.

[25] Chapter XII, paragraph 1.1.
[26] Chapter XII, paragraph 1.2.
[27] Chapter XII, paragraphs 1.3 and 1.4.
[28] Chapter XII, paragraph 1.5.
[29] Chapter XII, paragraph 1.6.
[30] Chapter XII, paragraph 2.
[31] Chapter XII, paragraph 3.