International Human Rights Law and the Law of Armed Conflict in the Context of Counterinsurgency



With a Particular Focus on Targeting and Operational Detention

Eric Pouw

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ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor
aan de Universiteit van Amsterdam
op gezag van de Rector Magnificus
Prof. dr. D.C. van den Boom
ten overstaan van een door het college voor promoties ingestelde
commissie, in het openbaar te verdedigen in de Agnietenkapel
op donderdag 14 november 2013, te 10.00 uur

door

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geboren te Ermelo

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Design text: Eric Pouw
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Image: 'Australian and Dutch soldiers conduct patrols in preparation to hand over the Patrol Base Qudus which was build by the Reconstruction Task Force in Baluchi', Afghanistan (1 August 2008), <www.defence.gov.au/opEx/global/opslipper/images/gallery/2008/1002/20080731adf8239682_209.jpg>. This image is used with permission from the Australian Defence Force.

The Royal Netherlands Army, the Army Legal Service and the Netherlands Defence Academy have made this research and this manuscript factually and financially possible.
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Vormgeving tekst: Eric Pouw
Omslag ontwerp: Eric Pouw & Esther Winnubst
Foto: 'Australian and Dutch soldiers conduct patrols in preparation to hand over the Patrol Base Qudus which was build by the Reconstruction Task Force in Baluchi', Afghanistan (1 August 2008), <www.defence.gov.au/opEx/global/opslipper/images/gallery/2008/1002/20080731adf8239682_209.jpg>Deze foto is overgenomen met toestemming van de Australian Defence Force.

Dit onderzoek en deze publicatie zijn feitelijk en financieel mogelijk gemaakt door de Koninklijke Landmacht, de Militair Juridische Dienst Krijgsmacht en de Nederlandse Defensie Academie.
De meningen en opvattingen die in deze dissertatie worden uitgesproken zijn en blijven voor de verantwoordelijkheid van de desbetreffende auteur. Zij geven niet noodzakelijk de mening van de Minister van Defensie weer.
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List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights (1981)
ACHR	American Convention on Human Rights (1969)
ACiHPR	African Commission on Human and Peoples' Rights
ADRDM	American Declaration of Rights and Duties of Man (1948)
AO	Area of Operations
AOR	Area of Responsibility
AP I	First Additional Protocol I to the 1949 Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts (1977)
AP II	Second Additional Protocol II to the 1949 Geneva Conventions, relating to the Protection of Victims of Non-International Armed Conflicts (1977)
CA 2	Article 2 Common to the 1949 Geneva Conventions
CA 3	Article 3 Common to the 1949 Geneva Conventions
CCF	Continuous Combat Function
CCW	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (1980)
CCW Amended Prot. II	Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (1996)
CCW Protocol I	Protocol on Non-Detectable Fragments (1980)
CCW Protocol II	Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (1980)
CCW Protocol III	Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (1980)
CDE	Collateral Damage Estimation
CLS	ICRC Customary Law Study (Henckaerts/Doswald-Beck, Customary IHL, Vol. I and II)
CRC	Convention on the Rights of the Child
DPH	Direct Participation in Hostilities
DRC	Democratic Republic of Congo
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
ECiHR	European Commission of Human Rights
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
EU	European Union
FARC	Fuerzas Armadas Revolucionarias de Colombia
FM 3-24	US Army and Marine Corps Counterinsurgency Field Manual
GCs	Geneva Conventions (1949)
GC I	First Geneva Convention, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949)

GC II	Second Geneva Convention, for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949)
GC III	Third Geneva Convention, relative to the Treatment of Prisoners of War (1949)
GC IV	Fourth Geneva Convention, relative to the Protection of Civilian Persons in Time of War (1949)
GWOT	Global War on Terror
HCJ	Israel High Court of Justice
HIVR	Regulation concerning the Laws and Customs of War on Land, annexed to H IV (1907)
IAC	International armed conflict
IACiHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court (1998)
ICCPR	International Covenant on Civil and Political Rights (1966)
ICECSR	International Covenant on Economic, Social and Cultural Rights (1966)
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDF	Israeli Defence Forces
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission of the United Nations
ISAF	International Security Assistance Force-Afghanistan
Lieber Code	Instructions for the Government of Armies of the United States in the Field
LOAC	Law of Armed Conflict
MTA	Military Technical Arrangement
NATO	North Atlantic Treaty Organization
NATCOIN	National Counterinsurgency
NIAC	Non-international armed conflict
OAS	Organization of American States
OAU (AU)	Organization of African Unity (now African Union)
OCCUPCOIN	Counterinsurgency in occupied territory
OSCE	Organization for Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice
PKK	Partiya Karkeren Kurdistan (Kurdish Workers' Party)
POW	Prisoner of War
ROE	Rules of Engagement
SCSL	Special Court for Sierra Leone
SOFA	Status of Forces Agreement
SUPPCOIN	Counterinsurgency in support of another State
TRANSCOIN	Transnational counterinsurgency
UCIHL	University Centre for International Humanitarian Law, Geneva
UDHR	Universal Declaration of Human Rights (1948)

UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations Organization
UN Charter	United Nations Charter (1945)
UN Doc.	United Nations Document
UNHRC	United Nations Human Rights Committee
UNSC	United Nations Security Council
US	United States of America
VCLT	Vienna Convention on the Law of Treaties (1969)

Introduction

1. Object, Purpose and Relevance

For decades, States prepared their armies for large-scale military confrontations with the professional armies of other States. Such wars were 'industrial' in nature, with clear fronts, and relying heavily on traditional military principles, such as technology, firepower and maneuver. While certainly not extinct, today, conventional conflicts are no longer the dominant form of warfare.[1] Instead, both western and non-western States have found – or anticipate to find[2] – themselves tangled up in what can best be referred to as post-modern *insurgency* warfare, i.e. traditional, pre-Westphalian insurgency warfare, adapted to the traits of modern times (globalization, technological advancement and urbanization)[3] taking place either on national territory, or on the territory of another State.[4] In sum, such insurgencies can best be described as military-politico conflicts in which non-State actors attempt to realize a change in the existing the *status quo* of governance by means of *legal* and *illegal* acts of persuasion, subversion, and coercion, often including the use of *armed force*.

The umbrella-term used to describe a State's activities to quell an insurgency is counterinsurgency, which is a subset of *irregular warfare*. The response of States in dealing with insur-

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[1] Smith (2007). That such wars are not extinct prove the recent wars between the US and Iraq (2003) and that between Georgia and Russia (2008). See also Gray (2004), 12-13.

[2] See for example U.S. Department of State (2009), preface by Eliot A. Cohen, who states that "[i]nsurgency will be a large and growing element of the security challenges faced by the United States in the 21st century." Also US Secretary of Defense, Robert Gates, stating that "asymmetric warfare will remain the mainstay of the contemporary battlefield for some time." Gates (2007) (transcript available at http://www.defenselink/mil/speeches.aspx?speechid=1181). This is not to imply that insurgencies are new. To the contrary: according to the *Correlates of War Project*, between 1816 and 1997 464 wars took place, of which only 79 were inter-State conflicts, and 385 were intra-State wars or insurgencies. See Reid Sarkees (2000). See also http://correlatesofwar.org/. See also the *Uppsala Conflict Data Program* (available online at http://www.pcr.uu.se/gpdatabase/search.php), an in-depth database set up by the *Department of Peace and Conflict Research of Uppsala Universitet* for an overview of all armed conflicts from 1946-2009. It counts 27 intra-State conflicts in 2011, as opposed to 1 inter-State conflict, and 9 internationalized conflicts.

[3] Indeed, contrary to what some may believe, many of the characteristics of today's insurgency warfare have been present in warfare throughout the history of war and man. See Gray (2004), 5. For a discussion of insurgencies in historical perspective, see for example Beckett (1988) and Asprey (1975); Taber (1965); Laqueur (1977); Ellis (1995); Also: U.S. Department of Army & U.S. Marine Corps (2007), §§ I-15 – I-23.

[4] Some recent or current examples of (counter)insurgency warfare concern the conflict between Colombian governmental forces and the FARC (and other organizations); the insurgency in Syria since 2011; the insurgency in Libya, in 2011; the insurgency in Iraq since 2003, between multiple insurgency movements, the Iraqi government and international coalition forces (during their presence); the insurgency in Turkey, involving Turkish governmental forces and the PKK, which operates from within Turkey, or which stages operations from Iraq; the insurgency in Afghanistan, between the Afghan government – assisted by an international coalition of troops – and insurgents consisting of Taliban; and the insurgency in the Palestinian Occupied Territories between Israel and Hamas and Hezbollah.

gencies differs significantly. Frequently, insurgencies are viewed as a terrorism problem, and are approached in a conventional, military-centric and attrition-based style of warfare. One may recall how Russia dealt with the insurgency in Chechnya in the late 1990's, or how the government of Syria has handled the insurgency that has matured since 2011. However, their involvement in insurgencies (particularly those in Afghanistan and Iraq in the past decade) has led a number of (western) States to *rethink* how best to deal with this type of conflict.

As part of this trend, quite a few (western) States have reviewed the armed forces' position and function in counterinsurgency operations. Indeed, few topics in military science have attracted so much attention in the past decade as counterinsurgency.[5] This has resulted in the publication and release of several documents encapsulating the 'new' thinking on countering modern insurgency. Most noteworthy is the release in 2006 of the *U.S. Army and Marine Corps Counterinsurgency Field Manual 3-24*, which has shown to be highly influential. States and international organizations, such as the UK,[6] Canada,[7] Germany[8] and France[9] as well as NATO[10] have also released new counterinsurgency doctrine.

This thinking on military operations in counterinsurgency has shown to radically differ from traditional military thinking on warfare. In the latter, the killing and capture of combatants is the primary objective to attain the aim of warfare, which is to bring the enemy into submission. While killing and capture is certainly a valuable and often necessary part of counterinsurgency, both serve – and must be balanced against – the necessity to secure and separate the civilian population from the insurgency, which is the counterinsurgent's main centre of gravity – and not the insurgents. Principles such as *legitimacy* and *security* play a central role in order to win support for the counterinsurgent State and not the insurgency. As explained by Lieutenant-General Kiszely:

> [t]he culture and mind-set required for practitioners of post-modern warfare such as counter-insurgency are very different, requiring recognition that: the end-state that matters most is not the military end-state, but the political one; indeed, 'the insurgency problem is military only in a secondary sense, and political, ideological and administrative in a primary sense'; operational success is not achieved primarily by the application of lethal firepower and targeting; that outmanoeuvring opponents physically is less important than out-manoeuvring them mentally; that, in the words of Lawrence Freedman: '[I]n irregular warfare, superiority in the physical environment is of little value unless it can be translated into an advantage in the information environment.'[11]

Many of the principles of modern counterinsurgency have found successful implementation in policy guidelines and have been applied by thousands of soldiers from various States part of the coalition. These principles maintain a sensitive relationship with two forms of forcible measures that play a significant role in contemporary military counterinsurgency doctrine, policy and practice.

This concerns, *firstly*, *targeting*. In brief, targeting concerns the intentional deprivation of life of insurgents designated as targets to achieve predetermined effects set by the force commander. This may involve the preplanned use of lethal means and methods of combat pow-

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[5] See, for example, www.smallwarsjournal.com.
[6] U.K. Ministry of Defence (2009).
[7] Chief of the Land Staff (2008).
[8] German Army Office (2010).
[9] République Française (2010).
[10] NATO (2011).
[11] Kiszely (2007), 181-182.

er, such as fighter jets, armed drones, attack helicopters, and snipers, but also the *ad hoc* attack on insurgents with rifles and machine guns, for example following an ambush set up by the insurgents.

The *second* type of forcible measures concerns *operational detention* – a term referring to detention either for purposes of criminal justice (*criminal detention*) or security purposes (*security detention*). In the former situation, the detention takes place on order of a judge, whereas the latter is a form of administrative detention, taking place outside the judicial process. The object and purpose for security detention is generally similar to that of the internment of POWs, namely to prevent fighters from returning to the battlefield for the duration of the conflict, but in practice it is also used for reasons of intelligence gathering.

Clearly, targeting and operational detention in counterinsurgency are instruments no different than those applied in traditional warfare. However, while in the latter the kill and capture of enemy fighters is generally looked upon indifferently, as they are the 'norm', in counterinsurgency they are recognized as *strategic liabilities*. It is commonly acknowledged in contemporary counterinsurgency-doctrine that any use of forcible measures such as targeting and operational detention must be *legitimate* and must be applied with *restraint*, i.e. it must be weighed against the effects it may have on providing security to the population.[12] The misapplication of force at the tactical level – willingly or unwillingly – is almost certain to have detrimental effects at all levels of military operations, as well as the politico-strategic level. The use of force that is perceived by the population as disproportionate, even though it may be lawful, erodes any sense of security and legitimacy the population may have attributed to the counterinsurgency efforts, but it may also negatively affect international public opinion (most notably in light of today's media coverage and means of communication). As explained by Petraeus:

> [W]e should analyze costs and benefits of operations before each operation […] [by answering] a question we developed over time and used to ask before the conduct of operations: "Will this operation," we asked, "take more bad guys off the street than it creates by the way it is conducted?" If the answer to that question was, "No," then we took a very hard look at the operation before proceeding.[13]

In order to control targeting and operational detention, these States – giving weight to their legal obligations under the rule of law – have come to realize that it is in their strategic interest to remain within the boundaries of the law applicable to their operations. However, precisely targeting and operational detention raise legal issues complicated by the specific context of modern-day insurgencies.

This can be demonstrated by the following example.

Suppose intelligence reports inform counterinsurgent forces that a key insurgency leader is secretly visiting his relatives in a city under the firm control of the government. From a legal point of view, he is not only part of an organized armed group constituting a party to an armed conflict, but at the same time he is a criminal suspect for violating domestic law. His visit creates a window of opportunity to take measures against him. Now, may he be instantly killed, for example by using an armed drone that launches a missile at the commander's vehicle a few blocks from his family's apartment? Or does an obligation arise which

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[12] U.S. Department of Army & U.S. Marine Corps (2007), § 1-27. These imperatives are not new, as demonstrated by the practice of the British in Malaya, see Nagl (2005) 87-107 (2002). See also Galula (1964), 52.

[13] Petraeus (2008), 63.

forces the counterinsurgent forces to (somehow) capture and arrest him, when so feasible?[14] Would the answer to that question be different if the city was under the control of the insurgents?[15] And what if he is not found in a city, but located in a remote area, such as a jungle?[16] Is it a matter of free choice, or is there a rule of principle that determines the course of action? Would the killing be permissible if it does not concern a key military commander, but a drugs lord known to be financing the insurgency,[17] or a local governor who openly supports the insurgency? Does international law permit possible civilian casualties in these situations? If so, is this limited to a certain number or is this to be determined otherwise?

When not killed, but captured, does international law provide a legal basis for this security detention on order of the military commander in order to prevent his return to battlefield, or to obtain intelligence, or must he be brought to trial for suspected violations of criminal law? Is this is a matter of choice or obligation? What are the procedural guarantees that must be afforded to these detainees? How must they be treated? And if he is transferred to another State, is this possible at all?

Also, would it matter that the counterinsurgent forces operate not on their own territory, but on the territory of another State, with[18] or without[19] its consent or as part of a State acting as Occupying Power during a situation of belligerent occupation?

The two principal regimes of international law engaged by the issues ensuing from questions as those posed by the scenario above are IHRL and LOAC.

IHRL is the body of public international law concerning the total sum of civil, political, economic, social, cultural and collective rights, as recognized in international and regional treaties and declaration(s) as well by customary international law, protecting the human dignity of individuals and groups against the *arbitrary* exercise of power by States.

The general purpose of LOAC is to govern the conduct of the *belligerent parties* to an *armed conflict*. More specifically, LOAC aims to achieve a compromise between a belligerent party's interests arising from *military necessity*, on the one hand, and *humanitarian considerations*, on the other hand, in order to eventually:

(1) safeguard those who do not, or no longer, take a direct part in hostilities; and
(2) limit the use of force to the amount necessary to achieve the legitimate aim of the armed conflict, which – independently of the causes fought for – can be only to *weaken* the military potential of the enemy.[20]

While the questions of the example above trigger issues deep inside the bodies of IHRL and LOAC, they also create a link to the *interplay* of both regimes. Such interplay suggests that

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[14] See, for such proposals, for example Section IX of ICRC (2009).

[15] See, for example, the targeting by the IDF of Ahmed al-Jabari, a top-military leader of Hamas, whilst driving a car in one of the most densely populated areas of the world, Gaza. See http://www.nytimes.com/2012/11/15/world/middleeast/israeli-strike-in-gaza-kills-the-military-leader-of-hamas.html?pagewanted=all&_r=0.

[16] See, for example, the bombardments carried out by the Colombian air force on FARC-controlled areas of the Colombian jungle. See, for example, http://www.bbc.co.uk/news/world-latin-america-20578895.

[17] See, for example, the proposal of SACEUR to target narcotics individuals in Afghanistan, to cut the links between the narcotics trade and the Taliban. See Koelbl *NATO High Commander Issues Illegitimate Order to Kill*; Schmitt (2009c).

[18] See, for example, the targeting and operational detention operations carried out by ISAF in support of the Afghan government.

[19] See, for example, the Molina case, concerning Colombian's attack of a FARC base in Ecuador. See http://www.reuters.com/article/2009/12/10/us-ecuador-usa-raid-idUSTRE5B953020091210.

[20] Sassòli & Bouvier (1999), 67.

the two regimes are applicable at the same time and both provide rules that govern a similar situation – e.g. targeting and operational detention. It is today generally accepted, some exceptions aside, that IHRL and LOAC apply together in armed conflict and therefore may simultaneously provide norms that govern targeting and operational detention. If that is the case, the question arises which of these regimes provides the answer to the questions posed above? In other words, how do IHRL and LOAC interrelate in answering questions like these, and what determines their interplay?

Indeed, the rise of counterinsurgency and the ensuing strategic sensitivity to targeting and operational detention *coincides* with precisely this legal debate. Already in 1982, Dietrich Schindler wrote that "[t]he relationship between human rights and humanitarian law in international law is unclear, and will probably remain a matter of controversy for some time."[21] Thirty years later, these words continue to ring true.

Starting in the late 1960's,[22] the academic debate on the interplay between IHRL and LOAC travelled at a modest pace until 11 September 2001, when Al Qaeda operatives attacked the US on its soil (hereinafter referred to as: 9/11). The tragic events of that day, and the subsequent response of the US and its international partners, have propelled the train of legal discourse into high-speed mode. Indeed, to academics and legal practitioners engaged in the fields of armed conflict, human rights, and military operations, few subjects in international law have attracted so much attention at the outset of the 21st century as the interplay between IHRL and LOAC,[23] and it may indeed be "the challenge of the next generation."[24]

In view of 9/11, most of this discourse has taken place in the context of the counterterrorism measures taken by States to prevent a repetition of the tragic events that occurred that day. In taking such measures, States were presented with the legal conundrum to maximize the permissible room of maneuver to protect State security interests, knowing that this could jeopardize the humanitarian interests inherent in the law. In doing so, some States sought ways to limit the scope of international legal obligations to which they could be bound and that could limit this permissible room, by excluding their applicability in the fight against terrorism to the maximum extent possible. This particularly concerned IHRL, as this was generally felt to be unfit to cope with these 'new wars'. Also, doubts were expressed as to the capability of LOAC to deal with global terrorism, and proposals were made to adapt this field of international law to contemporary challenges. As to the remaining law, States also sought to maximize the authorities provided, such as those to kill or detain, whereas limiting obligations that were to protect the position of terrorist suspects. At the same time,

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[21] Schindler (1982), 942.

[22] The continuing applicability of IHRL in times of armed conflict was spurred by the armed conflicts in Vietnam and Nigeria as well as Israel's occupation of Arab territories, the adoption of the ICCPR and the ICESCR, and the adoption during the 1968 Tehran Human Rights Conference of Resolution XXII, entitled "Human Rights in Armed Conflicts." See General Assembly United Nations (1968), available at http://www1.umn.edu/humanrts/instree/1968a.htm. The resolution called upon the UN General Assembly to "invite the Secretary General to study […] steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts" and the "[t]he need for additional humanitarian international conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts." For a historical examination of the relationship between IHRL and LOAC, see Kolb (2006); Schäfer (2006), 39; Quénivet (2008).

[23] See, *inter alia*, Arnold & Quénivet (2008); Melzer (2008); Krieger (2006); Milanovic (2011a); Kretzmer (2005); Kretzmer (2009); Shany (2011); Ben-Naftali (2011a); Olson (2009); Sassòli (2007); Schabas (2007b); Droege (2008a); Sassòli & Olson (2008); Garraway (2010).

[24] Garraway (2007), 175.

on the humanitarian side of the spectrum, the discourse on the interplay between IHRL and LOAC in light of new military challenges has been used as a platform to advance humanitarian interests into the conduct of warfare outside the explicit consent of States (in this study referred to as *innovative humanization*). These opposing interests, yet balanced in the law – security versus humanity – play a deciding role in the backdrop of the debate on the interplay between IHRL and LOAC concerning targeting and operational detention, and may be further nourished by the particular nature of counterinsurgency doctrine, policy and practice.

IHRL, LOAC, their mutual relationship and counterinsurgency strategy form, when combined, a complex mix that not only reemphasizes the need to resolve longstanding legal issues, but that at the same time could upset the traditional outlook on the role of LOAC and IHRL in armed conflict. It addresses whether IHRL and LOAC can be brought in a relationship and if so, how; whether their norms are in disagreement, perhaps converge or complement each other; which mechanisms in public international law determine how IHRL or LOAC interrelate in such situations; and what is the effect of the specific nature of today's conflicts and the strategies that counterinsurgent States apply on the ground on the applicable normative framework in armed conflict. These interplay-issues are nourished by opposing views on the capacity of a relationship between IHRL and LOAC, the mechanisms that ought to determine the interplay of the regimes or their norms, as well as the positioning of the various interests – traditionally rooted in security and humanity. This study aims to identify these factors and to judge their validity as expressive of the *lex lata*.
The underlying *purpose of this study* is therefore to participate in the ongoing *academic* debate and to further clarify the dynamics between IHRL and LOAC. The desired added value of the study in relation to the existing literature is that it is carried out not from an entirely legal, but foremost from a *military-operational* viewpoint, whereby insurgency – as the dominant form of conflict – has been adopted as a frame of reference, rather than counterterrorism. The contemporary *counterinsurgency policy paradigm* reflects a degree of shared understanding that this is the way counterinsurgency is to be conducted; a form of military and political '*opinio juris*', if one wants to put it that way. In addition, its (f)actual application denotes a degree of State practice that can hardly be ignored, as is exemplified by the number of States having participated in the counterinsurgency campaigns in Iraq and Afghanistan in the first decade of this century. Given the particular nature of contemporary counterinsurgency doctrine, this raises the question as to whether this policy paradigm corresponds with, and may have an impact on the legal interpretation of IHRL, LOAC and their interplay and, therefore, on the legal 'room for maneuver' to carry out targeting and operational detention.
As such, the relevance of the research is not limited to the academic level, but also extends to the *military-operational* level. The legal 'room for maneuver' for counterinsurgent forces in targeting and detention operations is a factor (among others) of influence on the actual achievement of the desired strategic end state in counterinsurgency, which is a return to the *status quo* of governance under the rule of law. Therefore, knowledge of the politico-strategic and operational intricacies of contemporary conflict and the law applicable to it facilitates the transition into rules and principles that can be readily and realistically be used at the tactical level, when there is no time for reflection or consideration and decisions must be made instantaneously, and as such is determinative of whether troops are willing to execute operations in a legitimate fashion. It also determines according to which doctrine, principles and procedures forces are to be educated, trained and deployed. Finally, clarity of the legal boundaries impacts whether and how the counterinsurgent may employ combat power.

Overall, the legal analysis of the interplay of norms available in IHRL and LOAC governing targeting and operational detention it informs military commanders on the interpretation of the general principles underlying the doctrine of military operations, i.e. the principles of security, concentration of effort (or mass), objective, economy of effort, simplicity, flexibility, credibility, initiative, and legitimacy. In *combat* operations the following additional principles are valid: mobility, offensive, and surprise. These principles eventually inform a counterinsurgent State of its *capacity* to conduct targeting and operational detention.[25] This, in turn, provides the counterinsurgent State the benchmark against which it can determine the strategic liability of targeting and operational detention and the measures it may take to contain that liability.

In light of the above, this study *draws together* the topics of counterinsurgency and the (discourse on the) interplay between IHRL and LOAC in the specific context of targeting and operational detention. Its principal aim is:

> to examine how (the debate on) the interplay between IHRL and LOAC and counterinsurgency doctrine impacts the lawfulness – and therefore outer operational limits – of targeting and detention in counterinsurgency operations.

The central research questions and methodology that support this study's purpose are set out below.

2. Central Research Questions and Methodology

2.1. Central Research Questions

In furtherance of the academic debate and the formulation of practical guidance to a State and its armed forces, the following central research questions are formulated:

> (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?

2.2. Methodology

To answer these questions, the following methodology will be applied.

2.2.1. Source-Based Research

A traditional approach of research will be applied. Thus, throughout the study, recourse will be had to the traditional sources of international law, as set out in Article 38 of the Statute of the ICJ, in order to conclude upon the *lex lata*. These sources concern treaties; customary international law; the general principles of international law; judicial decisions of international courts and tribunals; and doctrine.

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[25] Military capability "is the capacity for conducting military operations." Netherlands Ministry of Defence (2005), 50. It is also referred to as fighting capability, see UK Ministry of Defence (2008), 4-1. It consists of three interrelated components. The *conceptual* component (the thought process) entails basic principles, doctrine and procedures. The *mental* component (the ability to get people to fight) comprises three aspects: the motivation to perform the task as well as possible, effective leadership and the responsible organization of the deployment of all assets in terms of personnel and equipment. The *physical* component (the means to fight) is the operational capacity of these assets, referred to by the term *combat power*.

Besides the legal sources, reference will be had to extra-legal sources. This primarily concerns counterinsurgency doctrine, policy and practice, (hereinafter referred to as counterinsurgency policy paradigm) in so far available in public sources.
Reference to these sources provides insight in the substantive content of counterinsurgency doctrine, policy and practice on targeting and operational detention and enables us to place this in comparative analysis with the substantive content of the legal sources. This may *firstly* inform us on whether the various aspects of the counterinsurgency policy paradigm correspond with the outer limits of the normative paradigms, and *secondly* provides an opportunity to assess whether the counterinsurgency policy paradigm in any way modifies – or has the potential to modify – the scope of the normative paradigms.

2.2.2. Situational Contexts

Counterinsurgencies take place in various situational contexts, each with their specific features. This study identifies four situational contexts: national counterinsurgency (NATCOIN), counterinsurgency during belligerent occupation (OCCUPCOIN), counterinsurgency in support of another State (SUPPCOIN), and transnational counterinsurgency operations (TRANSCOIN). The different features inherent in these contexts may have several legal implications, most notably in the realm of the applicability of norms relating to targeting and operational detention in the relationship between the counterinsurgent State and insurgents, but also in respect of the interplay between IHRL and LOAC.

A *first* type of counterinsurgency is the national counterinsurgency (NATCOIN). A national insurgency involves a domestic conflict between non-State armed groups and a national endogenous government, which typically take place *within* the internationally recognized territorial borders of that State. Examples of NATCOIN include the fight of the Sri Lankan government against the Tamil Tigers; the counterinsurgencies having taken place in India; the counterinsurgency of the Afghan government against the Taliban and other militant forces present in the territory of Afghanistan; and the counterinsurgency of the government of Colombia against, *inter alia*, the FARC.
For the purposes of this study, NATCOIN-operations involve counterinsurgency operations against a *national insurgency*.

OCCUPCOIN involves the counterinsurgency by an Occupying Power, in response to an insurgency or insurgencies occurring in territory under its occupation (OCCUPCOIN). For the purposes of this study, OCCUPCOIN presumes the existence of a situation of belligerent occupation. Following Article 42 HIVR, this implies that foreign territory "[…] is actually placed under the *authority* of the hostile army" of the counterinsurgent State – thereby becoming – Occupying Power.[26] Recent examples of occupational counterinsurgency operations are the occupation by Israel of the Palestinian occupied territories, the occupation of the DRC by Uganda, and the occupation of Iraq by a coalition of States between 2003 and 2004. The term OCCUPCOIN-operations refers to counterinsurgency operations in support of OCCUPCOIN.

[26] Roberts (1984), 300.

A *third* context concerns counterinsurgency carried out by a State in support of a foreign government engaged in a national counterinsurgency (SUPPCOIN).[27] Such support may be provided unilaterally, or as part of an international coalition that operates independently from, or under the umbrella of an international organization (such as the UN, NATO or the EU). The legal basis for the presence of agents of the supporting State on the territory of the host State is formed by the explicit consent of the latter and/or a mandate of the UNSC.[28] Examples of multinational SUPPCOIN operations are the NATO-led ISAF mission in Afghanistan, based on the consent of the Afghan government and a mandate of the UNSC, as well as the presence in Iraq of the Multi-National Forces-Iraq (MNF-I) in support of the Iraqi (Interim) government between 2004 and 2011, following the occupation-phase.
The term SUPPCOIN-operations refers to counterinsurgency operations in support of SUPPCOIN.

In the contexts of NATCOIN, OCCUPCOIN and SUPPCOIN, the presumption is that the insurgents stage their activities in the territory in which the counterinsurgent State primarily operates. Insurgents may however take refuge to another State B and stage operations from there. In response, the counterinsurgent State may decide to carry out operations against insurgents in the territory of State B, for example to destroy their base camps or training facilities, or to carry out operations against key persons within the insurgency.[29]
For the purposes of this study, such counterinsurgency operations are referred to as TRANSCOIN-operations are counterinsurgency operations carried out on the territory of State B, with or without that State's consent. They may form a *continuation* of an ongoing NATCOIN, OCCUPCOIN or SUPPCOIN. For example, Israel has attacked Hamas leader Khaled Mashal in Jordan (which failed), and Islamic Jihad leader Fathi Shkaki in Malta, both of which "could both be seen as extraterritorial forcible measures occurring in the context of the conflict over the Occupied Territories of the West Bank and Gaza."[30] An example of a TRANSCOIN operation constituting an extension of SUPPCOIN form the drone attacks by the US in Pakistan. An example of a TRANSCOIN operation constituting an extension of a NATCOIN is the attack by Colombia on a FARC-base in Ecuador, in 2008, Turkish operations against the PKK in Iraq and other neighboring countries. Alternatively, TRANSCOIN operations may *initiate* a new conflict between the counterinsurgent State and the insurgents.[31] An example is the conflict between Israel and Hezbollah, fought in Lebanon, in 2006.
Generally, in TRANSCOIN operations the principal addressees are the insurgents, and not (also) the host State. Therefore, TRANSCOIN operations are commonly temporary (hit-

[27] For the purposes of this chapter, the State executing counterinsurgency operations in support of another State is hereinafter referred to as the supporting State. The State receiving support from the supporting State is hereinafter referred to as the host State.

[28] A second form of supporting counterinsurgency operations may involve counterinsurgency operations of States in support of a mission mandated by the UN Security Council and carried out against insurgents who seek to gain control over a *failed* State. Examples of this type of supporting counterinsurgency operations are the UN mission in Somalia in the 1990's, or in situations such as KFOR in Kosovo (although arguably there was not an insurgency during KFOR). This type of supporting counterinsurgency operations will not be further addressed in this study.

[29] Naturally, a legal basis to do so under the *ius ad bellum* must exist. Whether such may be the case in the present scenario falls outside the scope of the present study. See paragraph 3.7 below.

[30] Lubell (2010), 97

[31] This may be the case to prevent an insurgency in a neighboring State to spread across the border to the territory of a previously uninvolved counterinsurgent State.

and-run style), and do not aim at, or result in the prolonged belligerent occupation of foreign territory.

2.2.3. Paradigmatic Approach

Targeting and operational detention are extreme State-controlled 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. Two main concepts dictate the context in, and therefore the legal framework according to which targeting and operational detention may take place: *law enforcement* and *hostilities*.

The concept of law enforcement can be said to comprise 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.[32]

While not defined in international law, in general terms the *concept of law enforcement* involves the exercise of police powers by State agents.[33] However, in present-day conflicts, it is far from unlikely that the armed forces may also have to resort to combat power to maintain or restore, or otherwise impose public security, law and order, either in support of police forces, or when carrying out police tasks in the absence of police forces, either on their own territory, or on that of another State. In fact, the duty to maintain or restore public security, law and order may include a broad range of activities that transcends crime related law enforcement duties. It may also include other activities not related to the commission of crimes, but which are required to restore or maintain public law and order, for example to control a public demonstration or disarm individuals. As further explained by McCormack and Oswald

> Whether specific positive steps to maintain law and order must be taken by forces involved in international military operations will depend upon a range of variable factors including: the nature of the suspected or actual activity; the source of the legal authority to under take law and order functions; the express or implied functions mandated to the military force; force capability; and relations with the Host State or other law and order authorities.[34]

Inherent in the concept of law enforcement is the existence of a vertical relationship between the State and individuals under its control. Control presupposes the State's ability to satisfy the strict standards of law enforcement in the exercise of its "concomitant fiduciary obligation"[35] (and commensurate authority) to maintain and restore public security, law, and order, and in doing so to protect all individuals under its control against arbitrary State conduct,[36] even when these individuals also qualify as lawful military objectives under the

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[32] Melzer (2010a), 35.

[33] United Nations (1979); United Nations (1990b); Council of Europe (2001).

[34] McCormack & Oswald (2010), 445.

[35] As explained by Criddle (2012), 1089, "As a general matter, fiduciary obligations arise in contexts where one person (the fiduciary) assumes discretionary power of an administrative nature over the legal or practical interests of another (the beneficiary), thereby rendering the beneficiary vulnerable to the fiduciary's potential abuse of power. In relationships that bear these characteristics, private law intervenes to ensure that the fiduciary exercises her discretionary power reasonably. Under the paradigmatic duty of loyalty, fiduciaries are forbidden from engaging in self-interested transactions without their beneficiary's informed consent. Where a fiduciary has multiple beneficiaries, the fiduciary is obligated to exercise her powers reasonably and even-handedly for all. The fiduciary must also take proper care to ensure that she does not squander her beneficiary's interests through arbitrary administration or neglect. See also United Nations (2009), § 14.

[36] See Article 43 HIVR and CA 3.

normative paradigm of hostilities.[37] In relation to deprivations of life, territorial control implies that "a state's authority to use force under international law is derived from, and constrained by, the fiduciary character of its relationship with its people."[38]

While armed forces may be tasked to perform law enforcement activities, they are principally designed to apply combat power in the context of armed conflict, with the purpose to defeat an enemy by killing or capturing its fighters. In other words, in doing so, the armed forces resort to means and methods of warfare 'to weaken the military forces of the enemy', which is the only legitimate purpose of warfare.[39] In this context, combat power is applied in the *context of hostilities*. As a *concept*, hostilities can be said to comprise 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.[40]

The concept of hostilities is not defined in international law, but it is a concept narrower than that of 'armed conflict' as meant in CA 2 and CA 3, but wider than 'attack', as meant in Article 49(1) AP I. The latter has been defined as 'acts of violence against the adversary, whether in offence or defence."[41] It also includes (unlawful) indiscriminate attacks or attacks against *protected* persons and objects.[42] The notion of attacks, however, does not include activities preceding attacks – activities that *are* part of the wider concept of hostilities.
Hostilities can be said to constitute those activities in the exercise of combat power that not merely contribute to the general war effort, but demonstrate causal proximity to the actual infliction of harm to the enemy.[43] This causal proximity entails that the application of combat power must demonstrate a *direct* participation in the hostilities, which the ICRC has defined as essentially all conduct which is specifically designed to support a party to an armed conflict against another, thereby establishing a nexus with a belligerent party, either by directly adversely affecting its military operations or military capacity or by inflicting death, injury, or destruction on protected persons or objects, thus crossing a certain threshold of harm and demonstrating direct causation.[44] This implies that combat power forms part of the domain of hostilities when it concerns actual combat, including preparatory measures, the actual deployment to and withdrawal from the place of combat, as long as this can be viewed as an integral part of the combat operation. More specifically, the concept of hostilities *includes*

> [a]ll attacks, that is to say, offensive and defensive operations involving the use of violence against the adversary, whether (lawfully) directed against legitimate military targets or (unlaw-

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[37] (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)*, § 22; (2004f), *Hass v. Commander of the IDF Forces in the West Bank, HCJ 10356/02 (4 March 2004)*, 455.

[38] Criddle (2012), 1073.

[39] See 1868 St. Petersburg Declaration.

[40] Melzer (2010a), 35.

[41] Sandoz, Swinarski & Zimmerman (1987), § 1882.

[42] See Articles 12(1); 42(1); 51(2) and (4)-(6), 52(1); 54(2); 55(2); 56(1); 59 (1) AP I and Articles 85(3)(a)-(e) and (4)(d) AP I.

[43] Melzer (2010a), 38. See also Sandoz, Swinarski & Zimmerman (1987), §§ 1679, 1944, 4788, which defines hostilities as "acts of war which are intended by their nature or purpose to hit specifically the personnel or *matériel* of the armed forces of the adverse Party." According to Fleck (2008a), Section 212, "[a]cts of war are all measures of force which one party, using military instruments of power, implements against another party in an international armed conflict. These comprise combat actions designed to eliminate opposing armed forces and other military objectives."

[44] ICRC (2009), Recommendation V and accompanying commentary.

> fully) against protected persons or objects. It includes not only open combat, but also the placing of explosive devices, sabotage, and computer network attacks. Also part of the hostilities are military operations preparatory to specific attacks, geographic deployments to and withdrawals from attacks, as well as unarmed activities supporting a party to the conflict by directly harming another, such as transmitting tactical intelligence, directing combat operations, interrupting the power-supply to military facilities, interference with military communications, and the construction of roadblocks impeding military deployments.[45]

In contrast, excluded from the concept of hostilities are activities that aim to weaken or defeat the enemy militarily, but constitute activities of *indirect* participation, as well as activities that *do not aim* to weaken or defeat the enemy militarily. Examples of the former are activities such as financing, recruiting and training, or the production and smuggling of weapons, ammunition or other military equipment. Examples of the latter include the use of combat power whilst exercising authority or power over individuals, objects or territory under effective control; to quell riots, demonstrations or other forms of civil unrest directed against the authority; or that applied in lawful individual self-defense against unlawful attack. In those instances, combat power constitutes the exercise of law enforcement.

To the extent that both IHRL and LOAC provide valid and applicable norms relating to the concepts of law enforcement and hostilities, they together constitute so-called *normative paradigms*, each with their specific objects and purposes, and in which IHRL and LOAC interrelate in their own fashion. It is therefore possible to construe two principal normative paradigms: the *normative paradigm of law enforcement* and the *normative paradigm of hostilities*. As will follow from the examination, it is particularly in the context of targeting that the interplay of IHRL and LOAC within these normative paradigms, as well as the interplay between the paradigms will assume a central role.
In the context of operational detention, the study examines the interplay between IHRL and LOAC in relation to criminal detention and security detention. Strictly speaking, both concepts are *part of the concept of law enforcement*, and in that respect fall under the normative paradigm of law enforcement. In essence, it is possible to identify two normative sub-paradigms within the normative paradigm of law enforcement. This concerns, *firstly*, the *normative paradigm of criminal detention*, consisting of the sum of valid and applicable norms of IHRL and LOAC regulating the deprivation of liberty for reasons of criminal justice. The prime purpose of this framework is 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*. *Secondly*, this concerns the *normative paradigm of security detention*, involving the valid and applicable norms of IHRL and LOAC governing the deprivation of liberty for reasons of security, and regulating an individual's detention for *future* behavior, in order to *prevent* threats to the *security*.

3. Scope, Limits and Definitions

3.1. Insurgency and Counterinsurgency

For the purposes of this study, counterinsurgency will be defined as

> the politico-military strategy to develop and apply a comprehensive approach of political, military, paramilitary, economic, psychological, civil and law enforcement means available to

[45] Melzer (2010a), 40.

> a government and its partners to simultaneously contain and defeat an insurgency and address its root causes.[46]

In turn, insurgency is defined as

> a protracted, asymmetric and ideology-driven military-politico struggle that has crossed into an armed conflict and which is directed against the *status quo* within a State in order to bring about politico-strategic changes to address or alleviate certain causes, staged by organized networks composed of non-State actors whose conduct cannot be attributed to a State and which operate locally, nationally or trans-nationally.[47]

Both concepts will be addressed in further detail in Chapter I.

3.2. The Counterinsurgent State and the 'Insurgent'

The two principal lead characters in this study are, on the one hand, the counterinsurgent State and, in the role of co-star, the insurgent. To begin with the former: the non-legal term 'counterinsurgent State' refers to

> a State engaged in targeting and operational detention operations in a situational context of counterinsurgency.

While there is no doubt that the subject of targeting and operational detention, and the interplay between IHRL and LOAC are of great relevance when studied from the viewpoint of the insurgents, this study's focus is on State-based military operations in counterinsurgency, and therefore the main focus is on the counterinsurgent State, as the prime subject of international law.

In this study, the terms 'insurgent' refers to:

> any individual acting in a non-governmental capacity and that can be affiliated to an insurgency.

The term 'insurgent' is not used, nor defined in conventional LOAC. The *Oxford Concise Dictionary* defines 'insurgent' as "a rebel or revolutionary" in its meaning as a noun. A 'rebel' in turn is defined as someone partaking in "[the] rise in opposition or armed resistance to an established government or ruler". The term 'revolutionary' is defined as "[someone who is] engaged in, promoting, or relating to political revolution." As previously noted, the term 'insurgent' encompasses more than individuals in combat 'functions', but also individuals who can otherwise be affiliated with the insurgency. Therefore, the term 'insurgents' can be defined broadly, to include all individuals who can reasonably be identified as to be engaged, through any means, in the support of the insurgency.
In legal terms, insurgents generally are non-State actors.[48] The term 'non-State actor' denotes individuals or groups of individuals who act in an individual capacity, as private per-

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[46] U.S. Department of State (2009), 12; United States Department of Defense (2010).

[47] Numerous definitions can be found in relevant doctrine. This definition is inspired by elements found in those definitions. The FM 3-24 defines insurgency as "[…] an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established government, occupying power, or other political authority while increasing insurgent control." U.S. Department of Army & U.S. Marine Corps (2007), § 1-2. Galula defines insurgency as a "protracted struggle conducted methodically, step by step, in order to attain specific intermediate objectives leading finally to the overthrow of the existing order." Galula (1964), 4.

[48] Both in theory and practice, the term 'non-State actors' is an umbrella-notion the personal scope of which is not equal to, and extends beyond the range of individuals that can fall under the definition insurgents. It also encompasses private individuals involved in terrorism, drug-trafficking or espionage, either as a member of a group or working singly.

sons, and as such are neither *de facto* nor *de jure* acting on instruction, or under the command or control of a State or any of its organs to a degree that their acts or omissions constitute acts of State agents attributable to a State.[49] Therefore, the examination of insurgents as State-actors falls outside the scope of the present study.

3.3. Targeting

As made clear, the targeting of insurgents is a crucial, yet sensitive instrument of combat power in counterinsurgencies, and is – together with operational detention – a concept that is central to this study to the interplay between IHRL and LOAC.
Targeting is a rational and iterative methodology[50] that systematically analyzes, prioritizes, and assigns assets against targets, in order to achieve a predetermined effect set by the force

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[49] See Article 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts and International Law Commission (2001a), 103, § 1. According to the ICTY, *de facto* State agency follows from the "assimilation of individuals to State organs *on account of their actual behaviour within the structure of a State (and regardless of any possible requirement of State instruction)*." See (1999m), *The Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment of 15 July 1999 (Appeals Chamber)*, § 141 (emphasis original). Also: (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, §§ 93-116; (2007c), *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), Judgment of 26 February 2007 (Merits)*, §§ 379-415.

[50] In sum, the targeting process consists of the following phases and steps:
Phase 1 (End State and Commander's Objectives) concerns the understanding of the desired "military nd state and the commander's intent, objectives, desired effects, and required tasks developed during operational planning." The commander's intent is "a clear and concise expression of the purpose of the operation and the military end state." The military end state refers to the "set of required conditions that defines achievement of all military objectives for the operation. Objectives "are the basis for developing the desired effects and scope of target development, and are coordinated among strategists, planners and intelligence analysts for approval by the commander."
Phase 2, (Target Development), is "the systematic examination of potential target systems (their components, individuals targets, and target elements) to determine the necessary type and duration of action that must be exerted on each target to create the required effect(s) consistent with the commander's objectives." During this phase, the target will be identified, vetted and validated. Target *vetting* concerns the question of whether a target continues to be a viable target based on the available intelligence. Target *validation* concerns the question of whether the target meets the criteria as set by the commander, LOAC and the ROE. It also includes an estimate of the effects when the target is not engaged, and of the indirect effects of the targeting, such as unintended loss of popular support as a result of collateral damage. Once identified, vetted and validated, the target may be nominated for approval by the commander as a target, followed by their prioritization based on the commander's guidance and intent. This phase results in various target lists, such as the Joint Integrated Prioritized Target List (JIPTL), which contain prioritized targets based on prioritized objectives, as well as No-Strike Lists (NSL) or Restricted Strike Lists (RTL), containing targets which may permanently or temporarily not be targeted based on military risk, LOAC, ROE or other considerations.
*Phase 3 (*Capabilities Analysis) involves an *analysis of all the lethal and nonlethal capabilities* of all the means available to carry out the targeting in conformity with the desired effects. This phase is also referred to as 'weaponeering'. In this phase, appropriate options of means and capabilities are identified, followed by a weighing of these capabilities against the target's vulnerabilities in order to determine whether the desired effects can be achieved. This weighing includes CDE in cases of targets in the proximity of civilians.
In *Phase 4* (Commander's Decision and Force Assignment), the joint forces commander decides upon the proposed targets and means, and relevant subordinate commands will be assigned the order for targeting.
In *Phase 5* (Mission Planning and Force Execution), the subordinate commander tasked with the targeting will plan the execution of the order on the basis of the available information on the target as well as the reasoning behind the desired effect to be achieved. As the situation on the ground is subject to change, much emphasis is placed on the validation of the target. Will the target (still) contribute to the desired ob-

commander.[51] At the same time, it "helps minimize undesired effects, potential for collateral damage, and reduces inefficient actions during military operations. It supports the successful application of several fundamental principles of war (e.g., mass, maneuver, and economy of force)."[52] While it may also include the use of non-lethal measures[53], targeting is here limited to the use of lethal means. Inherent in this concept is "a *process* of selecting and prioritizing targets and matching *the appropriate response* to them, considering operational requirements and capabilities."[54] In other words, this targeting process

> defines what targets are to be engaged, by which assets, using which method and in which priority order. It also specifies targets that are restricted or may not be engaged at all. Above all, the process aims to ensure all involved are entirely clear about their targeting and coordination responsibilities and constraints, in time and space.[55]

The rationale behind the process of targeting is that all application of combat power – whether executed at the strategic,[56] operational[57] or tactical[58] levels of military operations –

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jective? Are they still located accurately? Is the CDE still accurate, *et cetera*? The likelihood of change in the circumstances equally increases the need for dynamic targeting, when decisions on targeting must be made quickly. Military doctrine divides Phase 5 in five steps: find, fix, track, target, and engage. In the case of dynamic targeting a sixth step is added: assess.
In *Step 1* (Find), *emerging* targets are detected, identified, and determined to become a potential target with use of intelligence, surveillance and reconnaissance (ISR) assets, such as aircraft targeting pods, radar warning receiver indications, and special operations forces (SOF). Validation here includes an assessment of the status of the potential target under LOAC, as well as its compatibility with other restrictions, such as ROE, or commander's guidance, NSL and RTL, and CDE guidance.
In *Step 2* (Fix), ISR assets are used to confirm the identification of the target and to establish its precise location. This provides insight in the timeliness required for the prosecution, which may result in the target being classified as a time-sensitive target.
In *Step 3* (Track) the target is observed and its movements are monitored, which may provide additional input on the timeliness of the targeting.
In *Step 4* (Target) the decision is made to engage the target in order to attain the desired effects.
In *Step 5* (Engage), the order to take action against the target is given and the target is engaged with the lethal or nonlethal means selected for engagement.[50]
In *Step 6* (Assess), the results of the engagement will be examined in order to determine if the desired effects have been achieved or whether a recommendation must follow to reengage the target. United States Department of Defense (2007), II-3-19.

[51] United States Department of the Army (2010), I-2.

[52] United States Department of Defense (2007), I-6.

[53] Examples are civil-military operations, information operations, negotiation, political, economic, and social programs, and other non-combat methods – to influence the local attitudes or public perception of certain targets, such as those of people participating in the insurgency's support structure (e.g. financiers, people providing sanctuary, food, supplies, *et cetera*), or of people within formal and informal governmental functions (e.g. "people like community leaders and those insurgents who should be engaged through outreach, negotiation, meetings, and other interaction" as well as "corrupt host-nation leaders who may have to be replaced"). U.S. Department of Army & U.S. Marine Corps (2007), 48, § 5-111.

[54] United States Department of Defense (2011), GL-17; United States (2010), 307. In military doctrine, this response is generated and characterized through the systematic integration and synchronization of 'fires'. 'Fires' concerns "the use of weapon systems to create specific lethal or nonlethal effects on a target."[54] These weapon systems include *direct* surface-to-surface fires – e.g. handguns, rifles, machine guns, anti-tank guns, anti-tank rockets as well as air-to-surface fires – e.g. helicopter guns and laser-guided bombs – and *indirect* fire weapons and weapons systems – e.g. mortars and artillery. United States Department of Defense (2010), 133.

[55] NATO Standardization Agency (2011), § 0448.

[56] "The *strategic level of war* is the level of war at which a nation, often as a member of a group of nations, determines national or multinational (alliance or coalition) strategic security objectives and guidance, and develops and uses national resources to achieve these objectives. Activities at this level establish national and multinational military objectives; sequence initiatives; define limits and assess risks for the use

must be designed to attain certain direct and indirect effects[59] in support of the commander's predetermined end state for the overall military operation of which the application of combat power in a particular situation forms part, and it must fit within the overall process envisioned to reach that end state. All intended effects, whether direct or indirect, are to be achieved within the boundaries set by the concept of operations, direct limitations imposed by the commander, the ROE, LOAC, and other norms of international law.

Central to the targeting process is the selection and prioritization of targets. Targets may be engaged in two ways, namely deliberately, or dynamically. *Deliberate targeting* constitutes planned targeting, i.e. scheduled or on-call activities directed against targets known to be present in the AO to create the effects desired by the force commander. This may include time-sensitive targets. *Dynamic targeting*, on the other hand, concerns the *ad hoc*, unplanned and/or unanticipated targeting of targets of opportunity, i.e. targets whose presence in the AO was not detected, or against whom no deliberate targeting was scheduled, but who nonetheless meet criteria that warrant their targeting, as this may contribute to the achieve-

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of military and other instruments of national power; develop global plans or theater war plans to achieve those objectives; and provide military forces and other capabilities in accordance with strategic plans." United States Department of the Army (2008), § 7-9 (emphasis in original).

[57] "The operational level links employing tactical forces to achieving the strategic end state. At the operational level, commanders conduct campaigns and major operations to establish conditions that define that end state. A *campaign* is a series of related major operations aimed at achieving strategic and operational objectives within a given time and space (JP 5-0). A *major operation* is a series of tactical actions (battles, engagements, strikes) conducted by combat forces of a single or several Services, coordinated in time and place, to achieve strategic or operational objectives in an operational area. These actions are conducted simultaneously or sequentially in accordance with a common plan and are controlled by a single commander. For noncombat operations, a reference to the relative size and scope of a military operation (JP 3-0). Major operations are not solely the purview of combat forces. They are typically conducted with the other instruments of national power. Major operations often bring together the capabilities of other agencies, nations, and organizations. United States Department of the Army (2008), § 7-12 (emphasis in original).

[58] "*Tactics* uses and orders the arrangement of forces in relation to each other. Through tactics, commanders use combat power to accomplish missions. The tactical-level commander uses combat power in battles, engagements, and small-unit and crew actions. A *battle* consists of a set of related engagements that lasts longer and involves larger forces than an engagement.

Battles can affect the course of a campaign or major operation. An *engagement* is a tactical conflict, usually between opposing lower echelons maneuver forces (JP 1-02). Engagements are typically conducted at brigade level and below. They are usually short, executed in terms of minutes, hours, or days.

7-17. Operational-level headquarters determine objectives and provide resources for tactical operations. For any tactical-level operation, the surest measure of success is its contribution to achieving end state conditions. Commanders avoid battles and engagements that do not contribute to achieving the operational end state conditions. United States Department of the Army (2008), § 7-16, 17 (emphasis in original).

[59] Direct effects "are the immediate, first-order consequences of a military action […] unaltered by intervening events of mechanisms. They are usually immediate and easily recognizable." An example is the injuring or killing of an insurgent as a result of sniper fire. Indirect effects "are the delayed and/or displaced second-, third-, and higher-order consequences of action, created through intermediate events or mechanisms. These outcomes may be physical or behavioral in nature. Indirect effects may be difficult to recognize, due to subtle changes in system behavior that may make them difficult to observe."[59] An example is the crumbling of the insurgency movement, or its withdrawal from a certain stronghold following the killing of a vital commander within its military command structure. Indirect effects may, however, also be *unintended*, such as the decrease of popular support for the counterinsurgency as a result of the death of kindred insurgents or civilians by the counterinsurgent's application of combat power. United States Department of Defense (2007), I-10.

ment of the commander's objectives.[60] Particularly at the higher level of commands, where there is a wider range of targets and combat capabilities, the targeting process can be very complex and time consuming. However, lower level commands, such as platoon commands or even group commands (e.g. in the case of special forces) also engage in targeting in order to ensure that their application of combat power supports the higher commander's objectives. Here, targeting may be more random and speedily executed.

In view of the above, and in order to further delineate the concept of targeting as understood in this study, a *first* remark to be made here is that the present study is limited to the *use of force against individuals* only. In other words, it will not explore the relationship between LOAC and IHRL in the context of force applied against *objects*.
A *second* remark is that the concept of targeting as to be understood in this study does not extend to the deprivation of life of insurgents being an accidental result of a military operation. As the military concept already indicates, targeting involves the *intended*, *predetermined* killing of individuals.
A *third* element deserving some additional attention concerns the choice, made for the purposes of this study, that targeting here does not include the killing of individuals in the physical power of counterinsurgent forces, for example directly after capture, or during their detention, but is limited to what here will be referred to as *extra-custodial* targeting, i.e. there is no physical connect between the insurgent and counterinsurgent forces.
Fourthly, the concept of targeting in counterinsurgency is not limited to that applied in the context of hostilities only, but it may also relates to the use of force to restore or maintain public security, law, and order, for example to quell a riot or a demonstration, or to effect someone's arrest for crime-related purposes. In sum, targeting connotes to the application of combat power for purposes of both hostilities and law enforcement.

For the purposes of the present study, and unless indicated otherwise, the concept of targeting is to be understood as

> the intentional *deprivation of life*[61] of insurgents whilst not residing in the custody of counterinsurgent forces, resulting from the deliberate or dynamic application of lethal means of combat power resorted to for purposes of hostilities or law enforcement, and based on a targeting-decision that can be attributed to the counterinsurgent State, in order to achieve effects that support a predetermined objective set by the force commander.

3.4. Operational Detention

In military-operational practice, counterinsurgent military personnel encounters a wide range of individuals, varying from peaceful and innocent civilians, to criminals, insurgents, and terrorists. As an intrinsic part of military operations, they may be captured or placed under the control of armed forces on various occasions during military operations. For example, they may be captured in the course of or following combat when enemy personnel are no longer willing or able to continue fighting, at a road block or traffic control point,

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[60] United States Department of Defense (2007), viii.

[61] The term 'deprivation of life' is a neutral term, reflecting the *result* of conduct, regardless of how this was achieved. As will be demonstrated, it also is most closely related to the prohibition as framed in respect of the right to life in IHRL, which prohibits the arbitrary deprivation of life. It is submitted that in determining the lawfulness of deaths resulting from State conduct, regardless of the circumstances in which they occur, the benchmark is whether the State conduct constituted an arbitrary deprivation of life or not, as understood under IHRL. This benchmark remains valid in times of armed conflict.

during a cordon and search mission, on the base camp, or at border crossings. Also they may be perceived to pose a threat to the security of the military operation because they previously participated in the hostilities, or because they belong to the insurgent organization, in which case the commander may specifically order the insurgent's capture, as his killing may cause negative effects to the counterinsurgency campaign, or may perhaps serve another purpose. In yet other instances, the capture is required because the insurgent is accused of committing a serious criminal offence.

Once captured, the State in whose power the insurgent resides is confronted with the question whether to release the captive or to subject him to *operational detention*. A person is generally regarded to have been operationally detained when he is limited in his freedom to move, or has been subjected to involuntary confinement "in a bounded or restricted area such as a military camp or detention facility"[62] for one of *two* reasons.

Firstly, individuals may be detained for activities related to the hostilities, and which thus constitute a threat to the security of the armed forces, the civilian population and the interests of the State in general. This type of operational detention is *preventive* in nature. In other words, it aims to thwart *future* threats. In these instances, the detention is ordered by the executive branch (e.g. the commander) and not by a judge, without criminal charges being brought against the detainee. This form of operational detention will hereinafter be referred to as *security detention*.

Secondly, an individual's detention may also serve to enforce the law in cases where individual conduct infringes with public security, law and order, following which criminal charges are brought against him and he is subjected to a criminal judicial process. This form of operational detention is *punitive* in nature by focusing on *past* behavior. It will hereinafter be referred to as *criminal detention*.

In view of the above, operational detention is here defined as

> the deprivation of liberty[63] of individuals in the context of a counterinsurgency operation, whether for reasons of security or for law enforcement purposes, except as a result of conviction for a common criminal offence.[64]

3.5. LOAC and IHRL

The legal environment within which counterinsurgent forces operate is complex, if not for the fact alone that it may involve multiple States and international organizations. Relevant normative frameworks include the counterinsurgent State's national law, and in the case of extraterritorial counterinsurgency operations (i.e. OCCUPCOIN, SUPPCOIN and TRANSCOIN) the national law of the occupied or host State. From an international legal perspective, counterinsurgency operations bring together various existing areas of international law,

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[62] Danish Ministry of Foreign Affairs (2012), 5, Chairman's commentary to Principle 1.

[63] As with the deprivation of life, the choice for the term deprivation of liberty is deliberate, for it is result-based and is intrinsically linked with the prohibition under IHRL to arbitrary deprive someone of his liberty.

[64] This definition is based on that used by Kleffner in Gill, Fleck & al (2010), 638. Operational detention is a prolonged form of *deprivation of liberty*. Under international law, no one shall arbitrarily be detained or otherwise be held in custody by State authorities against their will. However, not every form of deprivation of liberty also constitutes operational detention. For example, when people are stopped at roadblocks or check points, or when their houses or property is searched, they may be considered to be deprived of their liberty, yet neither situation amounts to what is understood in this study as operational detention.

which "interact with each other and influence and regulate and shape the way in which contemporary military operations are planned and conducted."[65] Together, these branches form what can be referred to as the International Law of Military Operations,[66] and include

- the provision of a legal basis for any type of military operation in an international context;
- the command and control of such operations;
- the deployment of forces from the State(s) participating in the operation to and within the mission area (and vice versa) through the transit of international sea and airspace, and through the territory of third States;
- the use and regulation of force for the conduct of hostilities and law enforcement operations, the maintenance of public order, and the treatment of persons captured or detained within the context of the conduct of the operation;
- the status of forces throughout the duration of the operation; and
- the legal responsibility of States, of international organizations, and of individual members of the forces and all other entities participating in the operation for any violation of international law and contravention of relevant international regulations in force for the operation.[67]

In relation to targeting and operational detention, additional mentioning can be made of domestic law, as well as international criminal law and international refugee law. While many of these areas may be of relevance to the question of whether the conduct of counterinsurgency forces is lawful according to international law, the present study will be limited to analysis of IHRL, LOAC, and their interplay.

3.6. The Assumption of an Armed Conflict

Not every uprising by non-State actors against the State and its institions qualifies as an insurgency, nor does the mere (military or political) qualification of a conflict as an insurgency imply the existence of an armed conflict. This Study adopts the viewpoint that as a rule the determination of a conflict as an armed conflict results from a factual examination on a case-by-case basis. It is cognizant of the fact that, when using this rule, the armed conflict-determination in conflicts between a State and non-State actors is less evident and may sometimes result in concluding on the absence of an armed conflict. Nonetheless, for the purposes of this study, the assumption is that all of counterinsurgency activities carried out in the situational contexts of counterinsurgency examined here take place in the context of an armed conflict. This is a logical consequence of this study's focus on the interplay between IHRL and LOAC. For this interplay to arise both must be simultaneously applicable. The views of some persistent objectors aside, it is generally accepted that such is the case in armed conflict.
The concept of armed conflict and the applicability of LOAC and IHRL in the situational contexts of counterinsurgency will be subject of examination in Chapter 2, Part A and in Chapter V, Part B respectively.

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[65] Gill & Fleck (2010), 5.
[66] For a comprehensive handbook on the International Law of Military Operations, see Gill & Fleck (2010.
[67] Gill & Fleck (2010), 3.

3.7. Non-Examination of The Law of Inter-State Force

Counterinsurgency is not confined to the territory of the counterinsurgent State, but may extend across its borders and thus affect the sovereignty of another State, as is exemplified by the situational contexts of OCCUPCOIN, SUPPCOIN and TRANSCOIN.

The question of the lawfulness under international law of the armed presence of counterinsurgent forces on the territory of another State is a matter of the *jus ad bellum*. It is a fundamental principle of international law that the targeting and operational detention of insurgents by a counterinsurgent State carried out in the sovereign area of another State is governed by the prohibition on the use of inter-State force, or the threat thereof, as stipulated in Article 2(4) of the UN Charter. The premise is that such extraterritorial State conduct is unlawful, unless it finds justification in a recognized title under international law.[68]

Clearly, from the viewpoint of its lawfulness under *jus ad bellum*, targeting and operational detention in situations of extraterritorial counterinsurgency operations may raise important questions of relevance to the relationship between the injuring State and the injured State. However, it is submitted that this has no bearing on the question of lawfulness of targeting and operational detention of insurgents. This question concerns another relationship, i.e. the relationship between the counterinsurgent State and the individual affected by its operations and is governed by LOAC and IHRL. This is to say that, while the extraterritorial use of armed force by a counterinsurgent State may, in a particular scenario, be justified under the *jus ad bellum* and as such rightfully interferes with another State's sovereignty, the deprivation of life and liberty following an individual's targeting or operational detention by the counterinsurgent State may be carried out in disrespect of the requirements set forth in IHRL or LOAC, thus rendering the State conduct unlawful under international law. In fact, it is commonly agreed – and in fact it is one of the fundamental underpinnings of LOAC – that a clear separation ought to be maintained between the international law of inter-State force and LOAC.[69] States have accepted the obligation to abide by LOAC in the conduct of their hostilities even if it remains disputed, or is abundantly clear that the use of inter-State force lacks a basis in one of the accepted titles for justification.

Thus, the lawfulness of extraterritorial State-conduct under the international law of inter-State force on the one hand, and that under IHRL and LOAC are two distinct questions

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[68] A *first* title for justification concerns the *consent* of the State whose sovereignty is subjected to the armed presence of foreign armed forces, i.e. it has given its approval to such presence, either because it specifically invited the foreign State, for example to come to its assistance, or because it explicitly or implicitly condones its presence. A *second* title for justification, specifically mentioned in the UN Charter, is self-defense, as stipulated in Article 51. This title is of particular significance in relation to the question of whether a State may forcibly interfere with the sovereignty of another State in order to defend itself against armed attacks against it from non-State organized armed groups, such as terrorists, or insurgents. There appears to be general agreement that an armed attack by non-State actors may provide a title grounded in self-defense to armed interference in the sovereignty of another State, if the other State is not able or willing to take effective measures against the non-State actors, and provided such interference conforms to all requirements, most notably those of necessity and proportionality. On this, see Lubell (2010), 81. A *third* title for justification to forcibly interfere with the sovereignty of another State concerns a prior mandate to do so by the UNSC, in accordance with and not exceeding the powers bestowed upon it as consented to by the UN member States in the UN Charter. See Article 2(4). The situational context of SUPPCOIN is an example of extraterritorial armed presence underlying which may be a UNSC mandate, as is the case today in Afghanistan. Such a mandate may also exist next to the explicit invitation of the intervened State.

[69] Some authors, however, argue that this classic divide should be reviewed in light of armed conflicts against non-State actors. See Benvenisti (2009). Others call for the preservation of this classic divide. See Sloane (2009).

that require separate examination. This study will limit its examination to the interplay of the latter two regimes in respect of targeting and operational detention and will not further explore the *jus ad bellum* aspects of such operations.

4. Structure and Subsequent Research Questions

In order to answer the central research questions, the study is divided in four parts. In brief, Part A discusses the main concepts, context and provides a conceptual framework for the analysis of the interplay between IHRL and LOAC. Part B examines the potential of IHRL and LOAC to interrelate, by looking at whether they provide norms that regulate targeting and operational detention that are also applicable in the specific situational contexts of counterinsurgency. Part C deals with the appreciation of the interplay, by looking at the substantive content of the individual normative frameworks of IHRL and LOAC pertaining to targeting and operational detention and then to examine their interplay. Part D aims to answer the central research question and provides additional conclusions.
Below, the several parts will be addressed in more detail and the subsequent research questions will be introduced.

4.1. Part A. Context and Conceptual Framework for Analysis

Part A seeks to highlight the main context and dynamics relative to the determination of the potential and appreciation of interplay of IHRL and LOAC in targeting and operational detention. The central question in this part is what aspects illustrate the background against which the main research questions should be answered? It consists of three chapters.
Chapter I addresses in more detail the concepts of *counterinsurgency* and *insurgency*, which provides the broader military background of the study. This is of relevance, *firstly*, because it offers insight in the particular characteristics and ensuing operational challenges posed by insurgencies, and the approach to deal with these challenges in order to reach the desired end state in counterinsurgency, which is a return to the *status quo* of governance under the rule of law. As Carl von Clausewitz wrote almost two hundred years ago:

> The first, the supreme, the most far-reaching act of judgement that the statesman and commander have to make is to establish […] the kind of war on which they are embarking; neither mistaking it for, not trying to turn it into, something that is alien to its nature. This is the first of all strategic questions and the most comprehensive.[70]

However, the importance of *Von Clausewitz*'s adage is not limited to the purely operational side of insurgency and counterinsurgency, but, it is submitted, also extends to the legal environment in which such conflicts takes place. Therefore, the identification of the nature and characteristics of insurgency and counterinsurgency plays a significant, if not paramount role in the legal *qualification* of the conflict, the determination of the *applicable* law and the *interpretation* of its normative content, as well as the *interplay* between the norms of the applicable legal framework(s) governing a State's actions carried out to attain the desired strategic end state.

Chapter II aims to provide the broader *legal* context against which the issue of interplay is to be viewed.
A *first* relevant topic that arises concerns the very nature of IHRL and LOAC. As they are the principal regimes governing State conduct in armed conflict, the need arises to explore

[70] von Clausewitz (2007), 30.

their object and purpose, as well as their conceptual foundations. These may influence the existence, as well as the outcome, of the interplay with IHRL. Moreover, they are informative of the compatibility of IHRL and LOAC with the concepts of insurgency and counter-insurgency.
Given their objects and purposes, as stated previously, both regimes converge in terms of their humanitarian aims, yet the conditions for which their norms were designed, relationships they seek to regulate and the nature of their norms are not necessarily alike. Three aspects will be discussed in order to highlight some of the conceptual underpinnings of IHRL. These concern (1) the nature of the relationships regulated by IHRL, as well as the nature of the rights and obligations protected respectively imposed and (2) the scope of applicability of IHRL and (3) the concept of derogation.
As for LOAC, the following themes will be examined: (1) the nature of the relationships LOAC seeks to govern, as well as of the rights and obligations attached to those forming part of those relationships; (2) the significance of the delicate balance between military necessity and humanity; and (3) LOAC's applicability to situations of 'armed conflict' only.

A *second topic* offering context to the interplay-theme concerns the fact that in today's legal discourse, the various participants have expressed, each in their own fashion and fueled by their own backgrounds or interests, their understanding of the intricacies of the interplay. In that light, it is possible to identify three themes that potentially influence the interplay of IHRL and LOAC. Together, these themes demonstrate that the potential outcome of the interplay between IHRL and LOAC is nourished by often seemingly irreconcilable viewpoints.
A *first theme* concerns the main *dogmatic approaches* that can be detected from doctrine, the practice of (quasi-)judicial bodies and States. Three principal dogmatic 'schools' can be identified: the separatist, the integrationist, and the complementarist school. By looking at the various relevant sources of international law, together, these approaches inform us on the principle arguments put forward on the issue of whether LOAC and IHRL can be applicable at the same time, and if so, how they interrelate.
A *second theme* identifiable from the legal discourse concerns the so-called '*humanization*' of armed conflict, a term introduced by Meron in his seminal article 'The Humanization of Humanitarian Law.'[71] This process of 'humanization' of armed conflict, particularly to the extent that not States, but other 'players' in the debate seek to tweak with the traditional balance of military necessity and humanity in favor of the latter, has caused a lively academic discourse between those who seek to advance humanity in warfare, and those who seek to preserve sovereign military interests. The study points out the different views towards this process and the risks involved for the proper interpretation of the interplay.
A *third theme* influencing the role and interplay of IHRL and LOAC in armed conflict concerns the question 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.[72] The legal discourse here concentrates on the choice for the 'right' paradigm to fight 'new wars'; the alleged obsoleteness of present LOAC and the need for its revision which have arisen in the aftermath of the terrorist attacks on 9/11; and the subsequent US response in its GWOT, which has led it to carry out counter-terrorism operations all over the world. The factual make-up of this 'new war' has laid bare areas of discontent among sup-

[71] Meron (2000a)). Its definitional scope in this study, however, deviates from that meant by Meron, as will be explained.
[72] Münkler (2005); Wippman (2005).

porters on both sides of the military necessity-humanity equation that continue to spark debate today.

The *fourth topic* flowing from the interplay between IHRL and LOAC deals with the issue of interplay of norms in international law, and how norm relationships between IHRL and LOAC are to approached and appreciated. This will be dealt with in Chapter III. The purpose of this chapter is to gain insight in the mechanisms controlling the interplay between norms of international law, and serves as a precursor to Chapter III. As it "also has much to offer [to] those seeking a better understanding of the relationship between [LOAC] and [IHRL],"[73] the ILC's report "*Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*", released in 2006,[74] will be used as a principal source.

Chapter III builds on the general introduction to norm relationships in international law and aims to provide a *conceptual framework for analysis* that provides the parameters necessary to carry out the legal examination of the interplay between IHRL and LOAC in the specific context of targeting and operational detention in counterinsurgency. As will follow from this framework for analysis, for the interplay between IHRL and LOAC to be examined it is first necessary to determine the very interplay potential of both regimes by (1) identifying whether each regime provides norms that govern the concepts of targeting and operational detention of insurgents (in their capacity as non-State actors) (hereinafter referred to as: *valid* norms) and (2) whether these valid norms are actually applicable in the specific situation to which they are called upon to be applied. Once it has been determined that IHRL and LOAC offer valid norms that have a potential to be simultaneously applicable, the next task is to determine the normative content of these norms and *appreciate* their interplay. It is this framework for analysis that determines – and therefore will be used for – the structure of the remained of the study. This implies that Part B addresses the issue of *interplay potential* and Part C concentrates on the *interplay appreciation*.

4.2. Part B. Interplay Potential

As explained, in Part B our focus will be, to begin with, on the question of whether IHRL and LOAC provide valid norms – rooted in treaties or in customary law – that govern the concepts of targeting and operational detention. To some, this may appear to be a rather redundant question, for it is generally well known that both regimes offer valid norms pertaining to these two concepts. However, the exercise is less straightforward then it appears on first sight. For example, not all States are party the relevant human rights treaties, and the question that then arises is whether customary law provides valid norms, and if so, what is the content of those norms. In respect of LOAC, a problem may arise since the treaty-based law of NIAC is limited in both qualitative and quantitative terms, so the question there is whether valid norms can be found in the customary law of LOAC.

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[73] Cassimatis (2007), 624. See also Kammerhofer (2009), 2, who, while criticizing the ILC Report, predicts that "it will be studied by academia in the years and decades to come. The breadth and scope of the study group's work is amazing and there is no doubt that it presents a wide-ranging and dogmatically thorough treatise on several key aspects and problems of international law."

[74] Koskenniemi (2007b) (hereinafter: ILC Report). The study was initiated in 2002 in response to various concerns on the developing fragmentation of international law. The report was considered and duly noted by the ILC on 9 August 2006.

A *second* task at hand in Part B concerns the *applicability* of the valid norms of IHRL and LOAC in the various situational contexts of counterinsurgency under scrutiny in this study. As regards IHRL, this implies *firstly* that it must be examined whether the valid norms of IHRL apply *ratione personae* to the relationship between the counterinsurgent State and insurgents, and *secondly*, that it must be examined whether it is possible to derogate from these norms, leading to the suspension of their applicability.
The former issue – applicability *ratione personae* – proves to be particularly controversial in respect of targeting taking place in the extraterritorial situations of counterinsurgency, for it may be questioned whether the extra-custodial use of lethal force generates the authority and control required to trigger the necessary exercise of jurisdiction over the target. In addition, the issue of derogation in the context of targeting also turns out to be rather confusing and ambiguous, for the relevant treaties examined here – ICCPR, ACHR and ECHR – differ in that respect.
The applicability of LOAC raises other issues. LOAC evolves around the concept of armed conflict. Armed conflicts, however, are traditionally divided in two types: international armed conflicts (IACs) and non-international armed conflicts (NIACs). The treaty-based LOAC provides different normative frameworks – both in qualitative and quantitative terms. While the law of IAC is densely regulated and governs both Hague and Geneva law, that of NIAC is very limited in number and substance – as it offers rudimentary Geneva-based norms. For valid norms under the law of IAC or the law of NIAC to become relevant to the conduct of the counterinsurgent State vis-à-vis the insurgents, it needs to be ascertained whether the legal relationships between the counterinsurgent State and the insurgents arising from targeting and operational detention in a particular situational context of counterinsurgency is governed by the law of IAC or the law of NIAC as a corollary of the existence of an armed conflict that falls within the scope of applicability of the concept of IAC or NIAC.
In view of the above, Chapter IV examines the availability of valid norms of IHRL, and their applicability potential, while Chapter V does so in relation to LOAC.

4.3. Part C. Interplay Appreciation

Having concluded upon the interplay potential of IHRL and LOAC, the next question is how the interplay of simultaneously applicable valid norms must be appreciated. In other words, the subsequent 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 contain the examination, the choice is made to carry out this examination on the basis of a *thematic approach*, rather than a regime-based approach.[75]

Thus, Part C.1 governs the concept of interplay appreciation in *targeting*.
A first step to be taken here is to examine the normative content of the relevant valid norms within IHRL and LOAC respectively. This will take place in Chapters VI and VII. The order – IHRL first, LOAC last – is a deliberate choice, the reason being that IHRL provides a general rule that applies at all times, whereas LOAC (generally) offers exceptional rules specifically designed for armed conflict, against which the compliance with the general rule

[75] A regime-based approach would result in the scattered discussion of the substantive content of the valid normative frameworks governing targeting and operational detention.

must be assessed. The approach adopted in these chapters is to identify the legal basis for targeting, as well as the main requirements that can be distilled from the valid norms and to examine the substantive content. Legal issues that require examination include the legal basis for targeting within IHRL and LOAC, the question of who may be targeted, and the meaning of the concepts of proportionality and precautionary measures in either regime.
In that light, Chapter VI concentrates on the prohibition against arbitrary deprivation of life under IHRL and investigates the substantive content of the requirements of absolute necessity, proportionality, and precautionary measures. Chapter VII examines the valid and applicable norms of LOAC relating to targeting. An essential part of LOAC is specifically designed to regulate *hostilities*. It is the law of hostilities that occupies a central part in this chapter. The law of hostilities involves the sum of all treaty-based and customary rules and principles principally designed to regulate hostilities.
A second part of Chapter VII investigates whether LOAC regulates the use of lethal force against protected persons. Strictly speaking, the intentional killing of persons protected under the law of hostilities is part of the *concept of law enforcement*. This exercise is of relevance, *firstly*, for it may offer insight in the question of whether LOAC somehow permits the targeting of insurgents not qualifying as lawful military objectives under the law of hostilities, but who nonetheless pose a threat to the mission. *Secondly*, the substantive content of these norms may modify the substantive content of the norms found in IHRL, when concluding on their interplay.
Eventually, this substantive content not only provides insight in permissible scope for targeting, but also functions as the basis to assess whether norms that govern a similar subject-matter within those normative frameworks conflict or converge, and in the case of such conflict, how this can be solved – a task to be dealt with in Chapter VIII.
Here, use will be made of the *paradigmatic approach*. This is to say that, to the extent that both IHRL and LOAC provide valid and applicable norms, they form so-called normative paradigms, each with their specific objects and purposes, in which IHRL and LOAC interrelate in their own fashion.
In the context of targeting, two such normative paradigms can be discerned, namely the *normative paradigm of law enforcement* and the *normative paradigm of hostilities*. This division in normative paradigms logically follows from the structure underlying the law of hostilities. Following this structure, the targeting of individuals that can be identified as lawful military objectives under the law of hostilities has a nexus to the concept of hostilities and therefore is governed by the normative paradigm of hostilities. The targeting of persons protected from direct attack under the law of hostilities, however, has no nexus with the concept of hostilities. Rather, their position under international law is governed by the concept of law enforcement, and the corresponding normative paradigm of law enforcement.
The purpose of the interplay chapters is to assess, *firstly*, how IHRL and LOAC interrelate *within* those normative paradigms, i.e. whether these norms are in a relationship of harmony or conflict, and in case of the latter, how this conflict can be avoided or resolved. Eventually, this will inform whether it is IHRL or LOAC – or perhaps (a bit of) both – that governs a particular normative paradigm and whether the interplay leads to modification of the leading regime's normative framework.
After having assessed the interplay of IHRL and LOAC within the normative paradigms of law enforcement and hostilities, the interplay between the normative paradigms will be examined. Here, the search is for parameters that determine whether a particular targeting of an insurgent is to be governed by the normative paradigm of law enforcement or that of hostilities. To some, this may to be rather straightforward, and indeed, that would be the

case in some situations. In other situations, however, this is not the case, most notably not where it can be determined that the insurgent to be targeted may be viewed as to fall within the personal scope of both normative paradigms. In those situations the question arises whether the normative paradigm to be applied is a matter of choice, serving subjective interests, or whether objective standards determine the applicability of the normative paradigm.

Part C.2 deals with the appreciation of the interplay in relation to *operational detention*.
The structure in this sub-part is similar to that set out in Part C.1.
Thus, Chapter IX covers the normative framework of IHRL, and the question to be answered here is: if IHRL were the sole regime regulating operational detention, is there a legal basis for operational detention and what are the principal requirements in order not to violate the human rights relative to criminal and security detention?
Chapter X explores the normative frameworks of the law of IAC and the law of NIAC pertaining to operational detention. Here too, the focus is on the legal basis for criminal and security detention and the requirements that need to be fulfilled for both to be lawful under LOAC. The non-State nature of insurgents and the applicable law – the law of IAC or the law of NIAC – demonstrate to be pivotal elements.
Chapter XI brings the normative frameworks of IHRL and LOAC together. A paradigmatic approach will be applied to the appreciation of the interplay of IHRL and LOAC in relation to criminal and security detention. As such, the norms of IHRL and LOAC pertaining to criminal detention together form the *normative paradigm of criminal detention*, whereas the norms of IHRL and LOAC pertaining to security detention form the *normative paradigm of security detention*. Strictly speaking, both form sub-paradigms of the normative paradigm of law enforcement.
Once it has been established how IHRL and LOAC interrelate in these normative paradigms, the follow-up question is how the normative paradigms interrelate to each other, the question being: what determines which normative paradigm applies?

4.4. Part D. Conclusions

In this part, we will return to the central research question and formulate an answer based on the results forthcoming of the study.

Having introduced the object and purpose of this study, its methodology and structure, as well as its scope, limitations and definitions, we will now turn to Part A, which provides the broader context of the study, as well as a conceptual framework for analyzing the interplay between IHRL and LOAC in governing targeting and operational detention.

Part A. Context and Conceptual Framework for Analysis

Chapter I Strategic and Military Context

As announced in the Introduction to this study, this chapter aims to provide more detail to the strategic and military context of this study, in view of its focus on insurgency and counterinsurgency. Paragraph 1 addresses insurgency, while paragraph 2 focuses on counterinsurgency. This chapter finalizes with paragraph 3, which identifies the legal significance of both concepts.

1. Insurgency

In most generic terms, counterinsurgency involves the use of all means of governance required to defeat an insurgency. There is, however, no standard model for counterinsurgency applicable to any form of insurgency.[76] As put by Kilcullen:

> Insurgencies, like cancers, exist in thousands of forms, and there are dozens of techniques to treat them, hundreds of different populations in which they occur, and several major schools of thought on how best to deal with them. The idea that there is one single "silver bullet" panacea for insurgency is therefore as unrealistic as the idea of a universal cure for cancer.[77]

While insurgencies may take many forms,[78] generally their aim is similar, namely to somehow realize a change in the existing '*status quo*' of governance within a particular society, through persuasion, subversion and coercion.[79] The desired change in '*status quo*' may be to overthrow the government, to force the government in political accommodation, or to be co-opted by the government to fulfill an ideology.[80]

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[76] Kilcullen (2009), 183.

[77] Kilcullen (2010), 1.

[78] A *conspirational insurgency* is a covert form of insurgency involving "a few leaders and a militant cadre or activist party seizing control of government structures or exploiting a revolutionary situation." An example is the Bolshevik Revolution in 1917. A *military-focused insurgency* seeks to achieve its desired end state by resort to military force, with a large military component and little or no political structure. An example is the focoist approach used by Che Guevara. An *urban insurgency* is a terrorism-based approach, typically applied by small, self-sufficient independent cells. Examples are the IRA, as well as some Islamic extremist groups in Iraq. An *insurgency based on protracted popular* war is a multi-phased, politico-military approach, developed and applied most notably by Mao Zedong, which requires a large mass base, and aims at building popular support for the insurgency. It relies heavily on informational and political activities, as well as overt violence. This approach was also adopted by the North Vietnamese (against the US) and the Algerians (against France). An *identity-focused insurgency* "mobilizes support based on the common identity of religious affiliation, clan, tribe, or ethnic group." The Taliban-led insurgency in Afghanistan from 2003 onwards is an example. *Composite approach and coalition-based insurgencies* pursue different approaches at the same time, while forming loose coalitions for such times as this serves their interests. Thus, "within a single AO, there may be multiple competing entities, each seeking to each seeking to maximize its survivability [*sic*] and influence – and this situation may be duplicated several times across a joint operations area. This reality further complicates both the mosaic that counterinsurgents must understand and the operations necessary for victory." U.S. Department of Army & U.S. Marine Corps (2007), § 1-26 - 1-39.

[79] This governing authority may be indigenous or foreign, in the case of an occupation or other form of foreign governing presence.

[80] U.S. Department of State (2009), 11.

In the 'traditional' set-up, an insurgency is predominantly a matter of *internal* affairs, and takes place inside a State's territory.[81] Yet, they oftentimes contain a *transnational* element. This may be the case when during an insurgency in State A insurgent elements use the territory of State B as a sanctuary, and as an area to stage cross-border activities.[82] An insurgency may also be of transnational nature when elements from another State are present in the territory of State A to create, or assist in an insurgency, as was often the case during the Cold War.[83] Some even argue that the fight against Al Qaeda is a global insurgency that is not bound by traditional territorial boundaries.[84]

As opposed to conventional war, where the application of military power is generally the chief way to achieve the strategic goal, an insurgency is foremost a *political* struggle, by which the *centre of gravity* for the insurgent is the population's perception of the government's legitimacy to rule. This emphasis on political means is born out of necessity, not choice. It compensates the insurgent's lack of *tangible* assets.[85] As explained by Galula,

> [e]ndowed with the normal foreign and domestic perquisites of an established government, [the counterinsurgent] has virtually everything – diplomatic recognition; legitimate power in the executive, legislative, and judicial branches; control of the administration and police; financial resources; industrial and agricultural resources at home or ready access to them abroad; transport and communications facilities; use and control of the information and propaganda media; command of the armed forces and the possibility of increasing their size. He is *in* while the insurgent, being *out*, has none or few of these assets.[86]

As a result of this tangible asymmetry between the government and the insurgents, the latter will not choose to *physically* defeat the government's armed forces in a conventional, open confrontation.[87] Rather, the insurgent seeks "to subvert or destroy the government's legitimacy, its ability and moral right to govern."[88] To attain this objective, the insurgent will fully exploit its *intangible* asset; the "ideological power of a cause."[89] A cause is an acute or latent grievance that characterizes the population's relationship with the existing government, and

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[81] These insurgencies can be typified as 'national' insurgencies, which can be defined as "a conflict between the insurgents and the national government, relating to distinctions based on economic class, ideology, ethnicity, race, religion, politics and other subjects within the domain of national politics. Shifting the relationship between the insurgents and the national government are 'a range of other actors', such as the population of the country, external states, and groups. Metz & Millen (2004), 2.

[82] Examples are the Taliban in Afghanistan and West-Pakistan, the PKK in Iraq and Iran, and insurgents in the Sub-Saharan regions in Africa.

[83] On the United States' proxy wars in Latin America, see Brands (2010).

[84] Barno (2006); Cassidy (2006); Kilcullen (2005b).

[85] Unlike insurgents, Western States have at their disposal satellites, airplanes, unmanned aerial vehicles (UAVs), attack helicopters, radar-systems, night vision equipment, networked command and control systems, highly developed protective armor for vehicles, lightweight body armor for the individual soldier, global positioning systems and individual weapons, battlefield management systems on secure, and wireless laptops that can be used in the field.

[86] Galula (1964), 3-4.

[87] U.S. Department of Army & U.S. Marine Corps (2007), § 1-8.

[88] Prisk (1991), 69.

[89] Galula (1964), 4. This has been illustrated by Osama bin Laden, when he says that "[t]he difference between us and our adversaries in terms of military strength, manpower, and equipment is very huge. But, for the grace of God, the difference is also very huge in terms of psychological resources, faith, certainty, and reliance on the Almighty God. This difference between us and them is very, very huge and great." Foreign Broadcast Information System (FBIS) (2004), 191, 194 (Al-Jazirah Airs 'Selected Portions' of Latest Al-Qa-ida Tape on 11 Sep. Attacks, Doha Al-Jazirah Satellite Channel Television in Arabic, 1935 GMT 18 Apr 02), quoted in Schmitt (2007), 11.

which is transformed into a principle or movement that may mobilize popular support and which the population is willing to defend or support militantly.[90] Ultimately, the cause functions as a leverage to "attract the largest number of supporters and to repel the minimum of opponents."[91] In doing so, the insurgent seeks to create *intangible* asymmetry.

In order to *mobilize the civilian population* for support of the cause (and the insurgency), insurgents resort to any means that reflect a combination of *persuasion*,[92] *subversion*[93] and *coercion*.[94]

In order to further delegitimize the authority of the governing authority, the insurgents may also direct activities directly to the government. It will do so by resorting to a combination of four tactics:[95] acts of *provocation*, in order to prompt irrational and illegitimate reactions from the government or other players of interest that harms their own interests. For example, as insurgents hide among the civilian population government forces will become frustrated by their inability to distinguish fighters from civilians. This may incite them to use force indiscriminately or to resort to security measures that may alienate the population;[96] *intimidation*, to deter government members from taking active measures against insurgents, or to deter those who support the government by tactics of persuasion, subversion or coercion; *protraction*, aimed at prolonging the conflict in order to physically and mentally wear out the government and popular will, and to avoid losses at the side of the insurgents; and *exhaustion*, by which insurgents resort to violent tactics such as guerrilla[97] and terrorism,[98]

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[90] Popular grievances may relate to (a mix of) nationalistic, religious, ideological, economical or sociological sentiments, and often result from prejudiced thoughts, susceptibilities, hopes, desires, principles, historical factors, social norms and cultural relativities. Insurgents typically develop more than one cause or change the cause as they see fit. This way they can customize their efforts to address various groups within society, thereby increasing chances of gaining popular support. Insurgents may nevertheless create artificial frictions, supported by propaganda and misinformation. Galula (1964), 14, 19-20; Koninklijke Landmacht (2003), 445, §§ 2211; U.S. Department of Army & U.S. Marine Corps (2007), I-49-50.

[91] Galula (1964), 19-20. Also U.S. Department of Army & U.S. Marine Corps (2007), I-49.

[92] Ideology or religion, or the outlook of political, economical, social, or security improvements may *persuade* people to join the insurgency, even when their motives are disconnected with the actual purpose of the insurgency. Other tactics of persuasion include political and religious indoctrination and propaganda, in order to "influence perceptions of potential supporters, opinion leaders, and opponents in the favor of the insurgents; promoting the insurgent cause and diminishing the government's resolve. More specifically, propaganda may be used to control community action, discredit government action, provoke overreaction by security forces, or exacerbate sectarian tension." U.S. Department of Army & U.S. Marine Corps (2007), 1-42; U.S. Department of State (2009), 9.

[93] Subversive activities aim, on the one hand, to infiltrate, influence, destabilize or disrupt government institutions and organizations, and on the other hand to exploit other power structures, "such as tribal hierarchies, clerical authorities or criminal networks that challenge the authority and reach of control of the central government," particularly in areas where the government authority is weak. Tactics used are information and media activities to undermine the legitimacy of the counterinsurgent and its forces, to generate popular support, or to excuse the insurgency's violations of international and national law and norms. In addition, the insurgency resorts to political activities. U.S. Department of State (2009), 9; U.S. Department of Army & U.S. Marine Corps (2007), § 3-97-99.

[94] Coercion is used to threaten those who support the government or to force key figures, such as community leaders, to choose sides. Tactics used include intimidation and killing of those who support the government or act in contravention to the beliefs of the insurgency or the public killings of criminals and corrupt or oppressive local figures.

[95] U.S. Department of State (2009), 10-11.

[96] U.S. Department of State (2009), 10.

[97] Guerrilla warfare involves the use of sabotage, subversion and raids to harass, delay or disrupt enemy forces. However, contrary to insurgency, a guerrilla need not be ideologically driven. It is simply a method of warfare. When used in conjunction with insurgency, guerrilla must be seen as a stage through which insurgency moves or a tool to accomplish its ideological goals. Guerrilla operations are a subset of insurgency. The distinction between guerrilla warfare and insurgency became apparent in the 1930s and

consisting of ambushes, bombings, and attacks on government facilities, assets and infrastructure in order to force "security forces to undertake numerous onerous, high-cost defensive activities that expend scarce resources without significantly advancing the counterinsurgents' strategy."[99]
As becomes clear, while predominantly a political struggle, violence is an integral part of insurgency warfare, up to a degree that it may, as it often does, result in an armed conflict. However, the political and military components are intrinsically linked: every military action must be weighed against its political effects, and vice versa.[100]

As follows from the strategy and tactics used by insurgents, insurgencies are by nature *asymmetry*-driven.[101] Metz and Johnson define asymmetry as:

> […], acting, organizing, and thinking *differently* than opponents in order to maximize one's own advantages, exploit an opponent's weaknesses, attain the initiative, or gain greater freedom of action. It can be *political-strategic, military-strategic, operational,* or a *combination* of these. It can entail different *methods*, *technologies*, *values*, *organizations*, *time perspectives*, or some *combination* of these. It can be *short-term* or *long-term*. It can be *deliberate* or *by default*. It can be *discrete* or pursued in *conjunction with* symmetric approaches. It can have both *psychological* and *physical* dimensions.[102]

As noted, insurgents seek to exploit intangible asset, namely the cause. In doing so, it creates and develops what can be called intangible asymmetry. Besides intangible asymmetry, insurgents also exploit other forms of asymmetry. A relevant example is *normative* asymmetry, which arises when the insurgent and counterinsurgent's conduct is regulated by different legal and policy norms.[103] For example, insurgents, as non-State actors, are not bound by human rights obligations arising out of IHRL-treaties, to which the counterinsurgent may be a party. Normative asymmetry may also arise in the realm of LOAC. Even assuming that all parties to an armed conflict are bound by the law of hostilities, asymmetry can arise as a result of the aforementioned difference in tangible assets, which may result in a higher standard for technologically advanced counterinsurgent forces to comply with LOAC than applied to insurgents, for example in the realm of precautions of attack. In addition, at the level of policy, asymmetry may arise because the counterinsurgent enforces upon their troops the observation of terms of a treaty even when it is not a party to it, or it may impose policy-based norms on its forces, that result in restrictions on the conduct not mandated by the applicable law. Restrictive norms in ROE are an important example.

40s, when social, political, economic, psychological elements of insurgencies blended with tactics of guerrilla warfare. See Manthe (2001), 1.

[98] Although, as Beckett (1988), ix states, 'insurgency and terrorism have become the most prevalent forms of conflict since 1945', they are not the same. As terrorism is used by insurgents as a tactic to achieve a strategic political goal, terrorist do not apply insurgency to obtain their goal, as their goal is not grounded in the roots of insurgency; terrorists do not intent to overthrow or undermine the state apparatus.

[99] U.S. Department of State (2009), 11.

[100] Galula (1964), 5.

[101] U.S. Department of Army & U.S. Marine Corps (2007), § 3-102. Asymmetry is not unique to insurgency, but is a feature found in any type of warfare. "Historically, opponents have always sought ways to defeat the enemy by leveraging their own strengths (*positive asymmetry*) or by exploiting the enemy's weaknesses (*negative asymmetry*), or both." See Schmitt (2007), 11. Sun Tzu already wrote on asymmetry: "an army may be likened to water, for just as flowing water avoids the heights and hastens to the lowlands, so an army avoids strengths and strikes weaknesses." Sun Tzu , 101.

[102] Metz & Johnson II (2001), 5-6 (emphasis original).

[103] Schmitt (2007), 15.

Insurgents also exploit the disparity in moral standing between counterinsurgent States and insurgents (*moral asymmetry*). By reaching out to unconventional means and methods, such as guerrilla warfare and terror, to survive and engage, they demonstrate that their conduct in hostilities is not motivated by an adherence to the art of war and disciplined obedience of common values, but by political, religious or (other) ideological motives. Driven by fanatical views and a resilient determination to achieve their goals for a just cause, insurgents often do not feel restricted by internationally accepted standards, values and agreements, including those of a humanitarian nature laid down in internationally accepted legal bodies. Rather, they intentionally, and often publicly, reject them.

It is of relevance for the present study to also briefly look at the anatomy of an insurgency movement. *Firstly*, (as will be discussed elsewhere in more detail) irregular forces may act entirely independent from a State, assimilate into a State's armed forces, or otherwise act on their behalf.[104] For the purposes of the present study, however, insurgents will be regarded as non-State actors, and thus incur responsibility for their actions as *private* persons.
Secondly, in order for an insurgency to function, it is generally accepted that a certain minimum degree of organization must be established and maintained. As stated by O'Neill

> [w]hatever the scope of the insurgency, the effective use of people will depend on the skill of insurgent leaders in identifying, integrating, and coordinating the different tasks and roles essential for success in combat operations, training, logistics, communications, transportation, and the medical, financial, informational, diplomatic, and supervisory areas. The complexity of the organizations designed to perform these functions reflects insurgent strategies.[105]

To the counterinsurgent, insight in the organizational structure of the insurgency is of pivotal importance, yet at the same time it presents one of the counterinsurgent's greatest challenges. Generally, insurgency movements adopt a policy of secrecy to the outside as well as among the various functional cells, particularly in the subversive stage, but continuing when acting in the open. Moreover,

> [i]nsurgents usually look no different from the general populace and do their best to blend with noncombatants. Insurgents may publicly claim motivations and goals different from what is truly driving their actions. Further complicating matters, insurgent organizations are often rooted in ethnic and tribal groups. They often take part in criminal activities or link themselves to political parties, charities, or religious organizations as well. These conditions and practices make it difficult to determine what and who constitutes the threat.[106]

Generally, insurgency organizations may adopt one of two organizational structures. A *hierarchical* organization, generally characterizing insurgencies in the 20th century, has "a

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[104] See Article 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts and International Law Commission (2001a), 103, § 1. According to the ICTY, *de facto* State agency follows from the "assimilation of individuals to State organs *on account of their actual behaviour within the structure of a State (and regardless of any possible requirement of State instruction)*." See (1999m), *The Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment of 15 July 1999 (Appeals Chamber)*, § 141 (emphasis original). Also: (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, §§ 93-116; (2007c), *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), Judgment of 26 February 2007 (Merits)*, §§ 379-415. While in practice insurgencies may enjoy support from an outside State, this does not *a priori* amount to the designation of insurgents as *de facto* or *de jure* State agents. An example is the situation Iran, which is being accused of having trained and supported Afghan insurgents in the current Afghan insurgency. See Miglani (2010), available at http://www.reuters.com/article/idUSTRE64T0U920100530.

[105] O'Neill (2005), 116.

[106] U.S. Department of Army & U.S. Marine Corps (2007), 100, § 3-75.

'well-defined vertical chain' of command and control from the leadership to the rest of the organization. "[…] Such organizations are functionally specialized, with units below the leadership structure that fight, gather intelligence, recruit personnel, and supply money and weapons."[107] Insurgencies adopting a *military-focus* or *protracted war-approach* need more complex and hierarchical organizations, even to the degree of shadow governments or insurgent states, thus forming hierarchies parallel to governmental structures. Such parallel hierarchies may be created to 'govern' the population in insurgent controlled areas.[108] In so far insurgencies rely on protracted violence, both in duration and intensity, they often create a structured military wing, where full-time and part-time ('accidental') guerrillas are distributed among units acting at central, regional and local levels. As Mao recognized, the more violence shifts from guerrilla to conventional warfare, the more the insurgency organization must be developed.[109]
Today's insurgencies are increasingly characterized by their *decentralized* organizational structure, which is more loosely organized and flat, so that the boundaries between its subunits are fluid or difficult to identify. These organizations are even more difficult to recognize in transnational strategies, such as arguably adopted by Al Qaeda, for they require connections with associated cells and organizations throughout the world.

Subject to the strategic approach adopted by the insurgency, an insurgent organization may consist of any or all of five elements.
The *first* element, at the very center of the movement, is the *insurgency leadership*, providing effective strategy, cohesion, unity, planning, tactics and organization.[110] This layer is the driving force behind the movement, and consists of one or more leaders that form the strategic think-tank and primary planning cell of the insurgency.
The *second* element concerns the *armed forces* or military component of an insurgent movement, consisting of 'fighters', of local or foreign origin.[111] They perform combat tasks and security duties, such as the physical protection of training camps and the financial, doctrinal and human networks. This layer is often mistaken for the movement itself, but it performs 'merely' a supporting task, i.e. "to support the insurgency's broader political agenda and to maintain local control."[112]
The *third* element is the *political cadre*, which task is to execute the leadership's policy guidance. The political cadre identifies local popular grievances and politicizes these by blaming the incompetence of the ruling government on the one hand, and by offering solutions on the other hand.[113]

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[107] Hashim (2006), 153.
[108] O'Neill (2005), 116. Examples are Moqtada al-Sadr's Mahdi Army, which provided security and services in parts of southern Iraq and Bagdad under his control; Hezbollah in Lebanon; and the FARC in Colombia.
[109] Mao (1962), 113: "There must be a gradual change from guerrilla formations to orthodox regimental organization. The necessary bureaus and staffs, both political and military, must be provided. At the same time, attention must be paid to the creation of suitable supply, medical, and hygiene units. The standards of equipment must be raised and types of weapons increased. Communication equipment must not be forgotten. Orthodox standards of discipline must be established."
[110] O'Neill (2005), 124.
[111] Besides Afghans, the fighting core of the insurgents in Afghanistan, for example, is known to lead a "mobile column" of some 8,000-10,000 fighters from, *inter alia*, Pakistan, Chechnya, Bosnia-Herzegovina and Saudi-Arabia. Kilcullen (2009), 84.
[112] U.S. Department of Army & U.S. Marine Corps (2007), § 1-62.
[113] For example, the Taliban's political core uses the resentment among local Afghans against foreign presence in their living environments as a tool to hold president Karzai's government accountable for its fail-

The *fourth* element of insurgents is made up of *auxiliaries*, i.e. that part of the civilian population that sympathizes with the insurgency and is motivated, for varying reasons, to support them. Examples of such support are the provision of food and shelter or the storage of weapons and ammunition in their private domains. They may also act as messengers or couriers, collect intelligence, warn insurgents for approaching counterinsurgent forces, or provide financial aid. This layer functions as a perfect 'gray zone' area in which insurgent leaders, fighters and political cadre may hide, making it difficult for counterinsurgents to identify them.[114]
The *mass base* forms the *fifth* element. It consists of those within the population following the insurgency, either out of free will, or following recruitment and/or coercion form the cadre. This is why insurgency is commonly referred to as a 'grass root'-phenomenon: its seeds lie within the population.[115]

In view of the above, the question that now arises is how insurgencies are countered.

2. Counterinsurgency

The strategic policy of States countering insurgencies has evolved significantly over time, finding its roots in *colonial counterinsurgency* in the nineteenth and twentieth century.[116] The central principle of colonial counterinsurgency is to gain control over the population, based on civil – not military – power, whereby force is not ruled out, but is to be minimized, concentrated and coordinated. Based on the principles of colonial counterinsurgency, the post-World War II era of decolonization saw the rise of what is generally referred to as *classical counterinsurgency*.[117] The doctrine of classical counterinsurgency emphasizes the need for a clear political goal to counter the insurgency, aimed at defeating the political subversion, and not the insurgents, whereby the full capability of resources of government is used, requiring a coordinated plan to unify intelligence, political, administrative, socio-economic, military, and law enforcement efforts, and in which the principle of legitimacy is key.[118]
Today, triggered by the events of 9/11 and the conflicts in Afghanistan and Iraq, counterinsurgency-policy has developed into what can be described as[119] a combination of a global approach to counter a post-Maoist, globalized Islamist insurgency[120] and neo-classical coun-

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ure to provide security (another grievance). As an alternative, the Taliban forms local counter-bureaucracies that seek to fill the vacuum left by the Afghan (local) government.

[114] An important group of individuals, shifting between auxiliary and fighter are, what Kilcullen dubs, 'accidental guerrilla's', i.e. civilians who join a column of full-time fighters present within their area on an *ad hoc* and temporary basis to perform a range of functions. For example, they may act as guides, conduct reconnaissance, carry ammunition and supplies, support full-time fighters during combat, provide guards and sentries for full-time fighters, and gather intelligence. They are motivated by economic self-interest; desire for excitement, honor, and prestige; fear of retaliation if they fail to support the insurgents; tribal and local identity. Kilcullen (2009), 85.

[115] Kilcullen (2005a)???

[116] Early writings from this period are Callwell (1896); Lyautey (1900); Lyautey (1920); Beckett (1988); Gwynn (1934); United States Marine Corps (1940); Marston & Malkesian (2008)13.

[117] Kilcullen (2006a); Hoffman (2007). For writings from this period, see Kitson (1971); Thompson (1966); Thompson (1970); McCuen (1966).

[118] Thompson (1966), 50-58; Galula (1964); Kitson (1971); McCuen (1966).

[119] Kitzen (2013 (forthcoming)).

[120] Kilcullen (2005b); J.A. Nagl and B.M. Burton, *Thinking Globally and Acting Locally: Counterinsurgency Lessons from*
Modern Wars – A Reply to Jones and Smiths, 33 Journal of Strategic Studies (2010), 136-137.

terinsurgency approaches.[121] The former approach, based on classical counterinsurgency principles, attempts to break up links between local cells which form part of what has been perceived as a *global* Islamist terrorist network threatening international security, and thus forcing counterinsurgent States into coordinated operations outside their own borders.[122] The latter, too, is based on classical counterinsurgency, but seeks to redesign the principles underlying to face the challenges of today's insurgency environments. This reinterpretation of classical counterinsurgency principles finds reflection in scholarly, governmental and military doctrine.[123]

In brief, contemporary counterinsurgency is a comprehensive approach by which political, security, economic and informational components of governance are integrated and synchronized with the purpose to (re)gain *control* over territory, the environment, the population, the level of security, the pace of events, and the enemy.[124] Such control strengthens

> […]governmental legitimacy and effectiveness while reducing insurgent influence over the population. COIN strategies should be designed to simultaneously protect the population from insurgent violence; strengthen the legitimacy and capacity of government institutions to govern responsibly and marginalize insurgents politically, socially, and economically.[125]

Eventually, the end state of the counterinsurgency strategy is attained when *firstly*, the government is seen as legitimate, and in control of social, political, economic, and security institutions that satisfy the populace's needs and are able to adequately address the grievances that fueled support to the insurgency; *secondly*, the insurgent movements and their leaders are co-opted, marginalized, or separated from the population; and *thirdly*, the armed forces of the insurgent movements have been disbanded or immobilized, and/or reintegrate into the political economic, and social structures of the country.[126]

In order to attain this end state, counterinsurgency strategy rests on a number of key principles, three of which are of particular relevance for the present study: *legitimacy*, *security*, and the *leading role of political factors*.

In counterinsurgency strategy, "legitimacy is the main objective."[127] Legitimacy[128] has a legal and a social component. *Legal* legitimacy implies that counterinsurgency operations must have a legal basis and be carried out in compliance with the law – both in letter and spirit. *Social legitimacy* is achieved when the population perceives the counterinsurgency operation as right and just. In the event that support for the counterinsurgent's operations is limited, action must be taken to increase support, for example via a *hearts and minds*-operation. A higher level of social legitimacy will ultimately increase the armed forces' freedom of

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[121] Kilcullen (2006a); Hoffman (2007); Jones & Smith (2010).

[122] Nagl & Burton (2010)

[123] An important example of military doctrine, which has highly influenced contemporary counterinsurgency policy all over the world, is the *US Army and Marines Field Manual 3-24 Counterinsurgency* (hereinafter FM 3-24). The successful surge in Iraq in 2007 has been attributed to the implementation of its principles and imperatives.

[124] U.S. Department of State (2009), 12.

[125] U.S. Department of State (2009), 12.

[126] U.S. Department of State (2009), 16.

[127] U.S. Department of Army & U.S. Marine Corps (2007), § 1-113.

[128] Underlying military operations in COIN are general principles of military operations. Legitimacy is one such principle, together with the principles of security, objective, economy of effort, simplicity, flexibility, credibility, initiative, as well as mobility, offensive, and surprise in relation to combat operations in particular.

movement and provide a source of information. Social legitimacy also refers to support in the homeland and its acceptance of, for example, casualties among own troops.[129]
It is therefore an essential element to regain control over the population and to win its support, and thus to obtain the initiative in the conflict.[130]

> Legitimacy makes it easier for a state to carry out its key functions. These include the authority to regulate social relationships, extract resources, and take actions in the public's name. Legitimate governments can develop these capabilities more easily; this situation usually allows them to competently manage, coordinate, and sustain collective security as well as political, economic, and social development.[131]

Legitimacy is intrinsically linked with the principle of the *rule of law*. Rule of law has been defined as

> […] a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights principles. It also requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in applying the law, separation of powers, participation in decisionmaking, and legal certainty. Such measures also help to avoid arbitrariness as well as promote procedural and legal transparency.[132]

In a State governed by the rule of law, the monopoly on the use of force is in the hands of the State; the State provides security to individuals and their property; and the State itself is bound by the law and does not act in an arbitrary manner. Also, the State issues laws that can be readily determined and are stable enough to permit individuals to plan their own affairs; individuals have meaningful access to an effective and impartial legal system; the State protects human rights and fundamental freedoms; and individuals rely on the existence of legal institutions and the content of law in the conduct of their daily lives.[133]
One of the most difficult challenges facing counterinsurgents – and therefore a primary concern of the military-politico strategic level – is their obligation to uphold the principle of legitimacy and the rule of law in spite of the insurgency's strategy to apply unlawful tactics, such as terrorism and perfidious acts. Such behavior may provoke the counterinsurgent to resort to similar unlawful and immoral behavior, as is precisely the objective of the insurgents. However, modern counterinsurgency doctrine points out that people will only accept *counterinsurgent* measures when they are perceived as rule of law-based decisions, competent to tackle the major grievances upon which the insurgency thrives.[134] Thus,

> [a]ny act that the populace considers to be illegitimate (such as the mistreatment of detainees or other criminal acts by Soldiers acting in either their individual or official capacity, even as seemingly insignificant as the failure to obey traffic laws) is likely to discourage the populace from viewing legal rules as binding. A command's ability to establish the rule of law within its area of control is dependent in large part on its *own* compliance with legal rules restricting

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[129] Koninklijke Landmacht (2003), 541.
[130] Thompson (1966), 51. See also Kitson (1971), 50.
[131] US Army (2006), § 1-115.
[132] U.S. Army Judge Advocate General's Legal Center & School (2010), 11. This definition is based on U.S. Department of Army (2008), § 1-9 and U.S. Department of Army & U.S. Marine Corps (2007), which defines Rule of Law as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards."
[133] U.S. Army Judge Advocate General's Legal Center & School (2010), 12-16.
[134] U.S. Department of Army & U.S. Marine Corps (2007), § 6-0.

> Soldiers' (and the command's own) discretion and protecting the population from the seemingly arbitrary use of force.[135]

However, legitimacy is culturally diverse,[136] and thus requires a proper identification by counterinsurgents of what the civil population views as legitimate governance.[137] If counterinsurgents do not succeed in establishing a rule of law-system that can be relied upon by the civilian population, the latter may turn to 'shadow' rule of law-institutions established by the insurgents.[138]

Legitimacy becomes an extra sensitive issue when a government calls in the support of an international force, in particular if the participating nations consider the principles underlying the rule of law of paramount importance.[139] An example is Afghanistan, where the counterinsurgents are a coalition of the Afghan government and ISAF. NATO has stated that "[i]n helping the Afghan people build security today, we are defending basic values we all share, including freedom, democracy and human rights as well as respect for the views and beliefs of others".[140] Betrayal of this commitment by ISAF conduct that is considered unacceptable in the eyes of the Afghan population will backlash at the Afghan government and undermine its rule.[141]

As noted, the *second* principle of relevance is security. To the local population, it may not be relevant at all who provides security – the insurgents or the counterinsurgents – as long as

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135 U.S. Army Judge Advocate General's Legal Center & School (2010), 20-21 (emphasis added); U.S. Department of Army & U.S. Marine Corps (2007), § 1-24.

136 As explained in the FM 3-24 (§ 114), "[i]n Western liberal tradition, a government that derives its just powers from the people and responds to their desires while looking out for their welfare is accepted as legitimate. In contrast, theocratic societies fuse political and religious authority; political figures are accepted as legitimate because the populace views them as implementing the will of God. Medieval monarchies claimed "the divine right of kings." Imperial China governed with "the mandate of heaven." Since the 1979 revolution, Iran has operated under the "rule of the jurists [theocratic judges]." In other societies, "might makes right." And sometimes, the ability of a state to provide security – albeit without freedoms associated with Western democracies – can give it enough legitimacy to govern in the people's eyes, particularly if they have experienced a serious breakdown of order."

137 The FM 3-24 lists the following six indicators of legitimacy: (1) the ability to provide security for the population; (2) the selection of leaders at a frequency and in a manner considered just and fair by a substantial majority of the population; (3) a high level of popular participation in or support for political processes; (4) a culturally acceptable level of corruption; (5) a culturally acceptable level and rate of political, economic, and social development; (6) a high level of regime acceptance by major social institutions. U.S. Department of Army & U.S. Marine Corps (2007), 38, § 1-116.

138 Kilcullen describes how in 2008, in the southern part of Afghanistan, the Taliban had set up "13 guerrilla law courts – a shadow judiciary that expanded Taliban influence by settling disagreements, hearing civil and criminal matters, and using the provisions of Islamic *shari'a* law and their own Pashtun code to handle everything from land disputes to capital crimes." When local people were asked why they turned to the Taliban to solve their disputes, they would say that despite their cruelty, the Taliban were seen as fair, whereas the governmental judiciary lacked legitimacy due to their "love of bribes." Kilcullen (2009), 47.

139 For example, all NATO member-States pledged "faith in the purposes and principles of the Charter of the United Nations", see the Preambule of the North Atlantic Treaty, Washington D.C., 4 april 1949.

140 NATO (2008), § 2.

141 See Other examples of how unlawful or immoral behavior negatively affects the counterinsurgency efforts are the examples of torture and other unlawful behavior by US soldiers vis-à-vis Iraq prisoners in the US-led prison in Abu Ghraib, or the condonement of torture by French counterinsurgents against suspected insurgents during the Algerian war of independence between 1954 and 1962.

they feel safe.[142] To separate the population from the insurgents, it is thus imperative for the counterinsurgent to ensure that the population's sense of security can be linked to its own security operations, and not to those of the insurgents. In this process, the armed forces play a pivotal, yet delicate role. To provide security, a military commander combines *stability operations* and (offensive and defensive) *combat operations*. The former "[e]ncompass various military missions, tasks, and activities […] in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief."[143] Offensive combat operations "are required to secure or isolate the populace from the insurgency; to prevent crime; to destroy, disrupt, interdict or neutralize elements of the insurgency; to secure national and regional borders and to integrate with and support host nation security forces."[144] In turn, defensive combat operations "are required to prevent or ward off insurgent attacks on the host nation population, host nation government, and infrastructure. Examples of defensive operations are the defense of a particular area; the organized movement away from the enemy; hold operations during clear-hold-build operations; and the establishment of counterinsurgency bases such as combat outposts."[145]

Stability operations form the bulk of the lines of operation most logical to achieve the desired end-state. The above is not to imply that killing and capturing insurgents is irrelevant. To the contrary: *combat operations* are essential instruments to a counterinsurgent to regain the initiative and create a secure environment. Rather, counterinsurgency strategy "is not limited to kill-capture and is not even *primarily* kill-capture."[146] The proper balance between stability operations and combat operations may lead to a stable and secure environment in which a democratically elected government is able to rule the population in accordance with the principles of the rule of law.[147] As explained by the FM 3-24,

> [a]s security improves, military resources contribute to supporting governments reforms and reconstruction projects. As counterinsurgents gain the initiative, offensive operations focus on eliminating the insurgent cadre, while defensive operations focus on protecting the populace and infrastructure from direct attacks. As counterinsurgents establish military ascendan-

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142 In Afghanistan, for example, people admit that life under the reign of the Taliban may not have been better, but at least there was security and stability. See Donnelly & Schmitt (2008), http://www.smallwarsjournal.com.

143 They include: operations to establish civil security and effective and self-sufficient host-nation security forces; the development and restoration of essential services, such as sewage systems, trash collection, potable water, electricity, transportation, schools and hospitals; the establishment of governance structures at local, regional and national level, such as leadership, governmental agencies and departments, the justice system and the electoral infrastructure to enable representative government; and, the reestablishment or restoration of the economy, by mobilizing and developing local economy, stimulating trade by initiating contracts with local businesses, rebuilding the commercial infrastructure, supporting broad-based economic opportunity and a free market economy. Along the entire spectrum of operations are information operations. Such measures address root causes and may strengthen popular confidence in the ruling authorities. U.S. Department of Army & U.S. Marine Corps (2007), §§ 5-35 – 5-49.

144 Such operations may include clear, hold and build-operations to establish civil security and control; search and attack operations in order to move into contact with the insurgents; cordon and search operations aimed to seal of certain areas to enable the search for insurgents or material, such as bomb-making facilities; ambushes; sniper operations; and patrols sent out for combat or reconnaissance. United States Department of Defense (2006), 5-1 ff .

145 United States Department of Defense (2006), 6-1 ff.

146 Sitaraman (2009), 1769 (emphasis in original).

147 For example, the strategic objective of NATO's commitment in Afghanistan is "to help the people and the elected Government of Afghanistan build an enduring stable, secure, prosperous and democratic state, respectful of human rights and free from the threat of terrorism." See NATO (2008), §1.

> cy, stability operations expand across the area of operations (AO) and eventually predominate. Victory is achieved when the populace consents to the government's legitimacy and stops actively and passively supporting the insurgency.[148]

Security is intrinsically linked to the principle of legitimacy: the higher the sense of security amongst the population, the higher the level of legitimacy. In its most ultimate form, security is achieved when a government is able to develop and sustain a legal system, in which police forces, court systems and penal facilities function in a culturally acceptable manner. It is therefore imperative to "transition security activities from combat operations to law enforcement as quickly as possible."[149] It is here that tension arises. On the one hand, the provision of security contributes to the populace's acceptance of the counterinsurgents as the legitimate authority.[150] On the other hand, this may only be achieved if the counterinsurgent's security measures have a solid basis in a legal system (if necessary) adapted to local culture and practices, are carried out in a lawful manner, and are accepted by the populace.[151] Inherent in the need for a speedily transition from combat to law enforcement is the risk of an enemy-centric approach with large-scale and intense use of force, which may be perceived as disproportionate by the local populace.

A third key principle of neo-classical counterinsurgency strategy is that it is, first and foremost, a conflict that is to be resolved by *non-forceful, political means*, and not military means.[152] Nonetheless, the use of force by armed forces cannot be excluded. In fact, forceful measures are a fundamental part of counterinsurgency. However, in view of its predominant population-centric focus, in contemporary counterinsurgency strategy the use of forceful measures is *subordinate to*, and to be applied *in support* of a more encompassing non-forceful approach serving political objectives.[153] Any use of forceful measures by military forces must be exercised in line with the desired political effects. Carelessness or neglect of this principle may have far reaching consequences for the manner in which both the local nationals and the rest of the world perceives military operations. Recent experience shows that any inflicted damage demands protracted restoration.[154] This is exactly what modern counterinsurgency doctrine warns against. As Whetham states:

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[148] U.S. Department of Army & U.S. Marine Corps (2007), § I-14.

[149] U.S. Department of Army & U.S. Marine Corps (2007), 42, § 1-131.

[150] Research, carried out in Afghanistan shows the importance of this aspect. A local Afghan explains: "[w]e don't want reconstruction of the roads. The only thing we want is security. When the Taliban start fighting with the government, the only thing that happens is that innocent people are killed. [The Taliban] may lose ten people, but dozens and dozens of civilians die." Institute for War and Peace (2008), available at:
<http://www.iwpr.net/index.php?apc_state=hen&s=o&o=1=EN&p=arr&s=f&o=342021>.

[151] U.S. Department of Army & U.S. Marine Corps (2007), § 1-131.

[152] Sitaraman (2009), 1778.

[153] U.S. Department of Defense (2008), 8.

[154] As stated in FM 3-24: "Illegitimate actions are those involving the use of power without authority – whether committed by government officials, security forces, or counterinsurgents. Such actions include unjustified or excessive use of force, unlawful detention, torture, and punishment without trial. Efforts to build a legitimate government through illegitimate actions are self-defeating, even against insurgents who conceal themselves amid noncombatants and flout the law. Any human rights abuses or legal violations committed by [COIN] forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short term COIN efforts." U.S. Department of Army & U.S. Marine Corps (2007), § 1-132, 24. An example of visible friction between the Afghan population and ISAF are the large-scale demonstrations of Afghan civilians following a U.S. bombardment on 24 January 2009, killing 16 civilians.
See http://www.foxnews.com/story/0,2933,482707,00.html.

> [t]here is clearly a fine line that needs to be walked between maintaining military effectiveness and demonstrating to the world that one is not acting with impunity. Regrettably, there are frequent reports of civilian deaths caused by coalition soldiers, sometimes allegedly with poor discipline and low morale, and with little or no accountability being demonstrated. These are exactly the kinds of events that slowly sap legitimacy and therefore add strength to the insurgency.[155]

The search in counterinsurgency, therefore, is for the appropriate mix between a population-centric approach, building effective and legitimate government, and an enemy-centric approach, destroying the insurgent movements.[156] Within this mix, the armed forces "are, in a sense, an enabling system for civil administration; their role is to afford sufficient protection and stability to allow the government to work safely with its population, for economic revival, political reconciliation and external non-government assistance to be effective."[157]

Adherence to the principle of legitimacy by all players engaged in counterinsurgency is an aspect of particular concern at the political-strategic and military-strategic levels. This is particularly so regarding the deployment of armed forces and the use of forcible measures such as targeting and operational detention to provide security. In contemporary COIN-doctrine the use of forcible measures is – when compared with conventional warfare – "very much a commander's art fraught with challenges and difficulties."[158] Some notable exceptions aside – as the example of Syria in 2012 tragically demonstrates – it is today acknowledged that the illegitimate and disproportionate application of forcible measures – willingly or unwillingly – at the tactical level undermines not only popular support for the counterinsurgency, but it may also negatively affect international public opinion and therefore is almost certain to have detrimental effects at all levels of warfare. At the same time, in applying the imperative of appropriate force, counterinsurgent forces may find themselves caught in a complex and precarious situation. *Firstly*, while legitimacy through popular support is intrinsically linked to the degree in which the counterinsurgent is able to provide security, the targeting or operational detention of insurgents to achieve that security may nonetheless subject civilians to unintended death, injury and damage, which undermines that popular support. Insurgents fully exploit this vulnerability.[159] This may even force the commander to cancel or suspend operations, as unintended casualties among the civilian population may result in the loss of support for the counterinsurgent and the recruitment of fifty more insurgents, and thus endanger the strategic end state.[160] As explained by Petraeus:

> [W]e should analyze costs and benefits of operations before each operation […] [by answering] a question we developed over time and used to ask before the conduct of operations: "Will this operation," we asked, "take more bad guys off the street than it creates by the way

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[155] Whetham (2007)725.

[156] U.S. Department of State (2009), 13.

[157] U.S. Department of State (2009), 13.

[158] Garret (2008), 1.

[159] Stephens (2010), 292. This idea is clearly reflected in COMISAF's Counterinsurgency Guidance: "Fight hard and fight with discipline. Hunt the enemy aggressively, but use only the firepower needed to win a fight. We can't win without fighting, but we also cannot kill or capture our way to victory. Moreover, if we kill civilians or damage their property in the course of our operations, we will create more enemies than our operations eliminate. That's exactly what the Taliban want. Don't fall into their trap. We must continue our efforts to reduce civilian casualties to an absolute minimum." See USFOR-A (2010), available online at http://smallwarsjournal.com/blog/2010/08/comisaf-coin-guidance-dtd-1-au/.

[160] U.S. Department of Army & U.S. Marine Corps (2007), § 1-141.

> it is conducted?" If the answer to that question was, "No," then we took a very hard look at the operation before proceeding.[161]

Secondly, the imperative sits uncomfortably with the concept of force protection, particularly in extraterritorial and multinational settings. In those situations, States focus on the prevention of casualties among their own forces, prompted by political risk factors and possible decrease of support among the civilian population back home.[162] As a consequence, States may keep ground forces within the confines of their barracks, while falling back on indirect firepower with artillery and mortars as well as other long-range technology to combat insurgents, and thus risking civilian casualties. Also, counterinsurgent forces may feel compelled to apply fierce interrogation techniques on detainees, in order to obtain intelligence that may prevent own troops from being killed in an ambush or suicide attack. Clearly, rather than closing it, this creates or further enlarges the gap with the civilian populace.[163]

In respect of targeting, the FM 3-24, therefore, lists a number of so-called counterinsurgency paradoxes that should be followed in the planning and execution of military counterinsurgency operations. Featuring paradoxes are: "Sometimes, the more you protect your force, the less secure you may be;"[164] "Some of the best weapons for counterinsurgents do not shoot;"[165] "Sometimes, the more force is used, the less effective it is;"[166] and "The more successful the counterinsurgency is, the less force can be used and the more risk must be accepted."[167] Thus – *if* resorted to – the use of force must support other, non-kinetic counterinsurgency efforts, while at the same time reflecting the need that – *whilst* resorted to – the use of force must be surgical "precisely so that it accomplishes the mission without causing unnecessary loss of life or suffering."[168] As explained by Major-General Oates:

> I will be the first one to tell you that you cannot kill your way out of a situation such as we had in Iraq. Attriting the enemy is undoubtedly important, but what we learned over time in Iraq was that success in a counterinsurgency campaign depends on more than just killing the enemy. There is a time and a place to do that for sure, but in counterinsurgency you have to take things a step further. To put it simply, you have to kill the right guys at the right places at the right times. Lethal operations have to disrupt networks and take out financiers. It's graduate-level stuff that goes well beyond the basic infantryman's ability to enter and clear a room.[169]

Similar ideas have been expressed in relation to operational detention. It is commonly recognized that detention operations must be carried out lawfully and humanely. Failing to do so may jeopardize the much-needed public support of the civilian population.[170] French COIN-specialist Roger Trinquier already recognized the sensitiveness of detainees in a COIN-campaign in 1964. In his classic book 'Modern Warfare: A French View of Counter-Insurgency', he wrote that

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161 Petraeus (2008)?, 63.
162 Shaw , 71 uses the term 'risk-transfer wars'. See also Betz & Cormack (2009), 329-330.
163 See also Human Rights Watch (2008), 12.
164 U.S. Department of Army & U.S. Marine Corps (2007), 48, § 1-149.
165 U.S. Department of Army & U.S. Marine Corps (2007), 49, § 1-153.
166 U.S. Department of Army & U.S. Marine Corps (2007), 48, § 1-150.
167 U.S. Department of Army & U.S. Marine Corps (2007), 48, § 1-151.
168 U.S. Department of Army & U.S. Marine Corps (2007), § 1-142. See also § 1-150 and § 5-38. See also Whetham (2007)
169 Oates (2010), 159-160.
170 Howard (2010), cited in Human Rights First (2011), 1.

> [o]ne of the first problems encountered, that of lodging the individuals arrested, will generally not have been anticipated. Prisons, designed essentially to accommodate offenders against common law, will rapidly become inadequate and will not meet our needs. We will be compelled to intern the prisoners under improvised, often deplorable conditions, which will lead to justifiable criticism our adversaries will exploit. From the beginning of hostilities, prison camps should be set up according to the conditions laid down by the Geneva Convention. They should be sufficiently large to take care of all prisoners until the end of the war.[171]

Fifty years later, the commander of the ISAF mission also recognized the necessity of lawful and humane detention. In 2006, the ISAF Detention SOP stipulated that:

> [c]ommanders at all levels are to ensure that detention operations are conducted in accordance with applicable international law and human rights standards and that all detainees are treated with respect and dignity at all times. The strategic benefits of conducting detention operations in a humanitarian manner are significant. Detention operations that fail to meet the high standards mandated herein will inevitably have a detrimental impact on the ISAF Mission.[172]

The tailored and restrained application of forcible measures can only be achieved if the armed forces are trained and educated on the basis of this radical shift from conventional military thinking on warfare and the use of forcible measures; something that may require a shift in military culture.[173] As explained by Harris:

> If securing the population is one of the fundamental of population-centric counter-insurgency campaigns, then the practitioner must have a mental framework to understand how violence works in small wars and how it affects all aspects of the conflict. Each leader needs to have these mental paradigms and a working knowledge of these effects if he is able to be expected to adapt to the realities on the ground in a small war.[174]

Therefore, at the strategic level the need may arise to provide precise direction to ensure that national policies and objectives find reflection in the actions of military commanders on the ground.[175]

Such policy direction may include guidance on "force posture as well as authorizations or limitations on the scope of action a commander may take to accomplish the mission."[176] This may include policy direction following the analysis of legal issues, which may ultimately lead to restrictions on the operational freedom of military commanders at the operational and tactical level that prevent them from taking action otherwise permissible under the relevant law, such as IHRL or LOAC. An example of particular relevance in the context of counterinsurgency is a policy-based restriction to limit or minimize incidental injury to civilians to levels below that acceptable by LOAC. On the other hand, in cases of ambiguous and unsettled legal issues, such as the notion of direct participation of hostilities, a State may, following its own legal interpretation, offer policy-based guidance that is more permissive than is excepted by, for example, the ICRC. Also, policy direction may be provided in

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171 Trinquier (1964).

172 COMISAF (2006).

173 On the need to change military culture, see Nagl (2005).

174 Harris (2010), 14. Harris proposes a "framework for understanding the effects of violence" which can "begin with how it affects the objectives of an operation, and then proceed to how violence affects the insurgents, and finally the population as a whole. From this framework, the local commanders can begin to think about how they need to approach the goal of securing the population, how to integrate development with security, and what security means for the population."

175 Gillman & Johnson (2012), 75-76.

176 Cole, Drew, McLaughlin*, et al.* (2009), 2, § 6.

areas left largely unregulated by LOAC, such as security detention in counterinsurgency operations governed by the law of NIAC.
Ultimately, in the planning and execution of military operations, the military commander must take these policy considerations into account. At the same time, while such restrictions may serve certain strategic imperatives, they must be executable at the operational and tactical level. In other words, for policy restrictions to trigger compliant behavior, they must have attained an acceptable degree of legitimacy among the forces. Policy restrictions that are perceived as too restrictive or unreasonable will frustrate forces. This is particularly important in a multinational setting, where differing policy imperatives of the participating nations apply to the military operation.

3. Legal Relevance

From the above it is possible to identify dimensions, each of which may be of legal significance for the interplay potential and appreciation of norms of IHRL and LOAC pertaining to targeting and operational detention.
A *first* dimension concerns the *organizational* dimension of insurgency. This refers to the organization of an insurgency and the categories of individuals within a particular society that are involved or can potentially be affected by insurgencies. From a legal point of view, this common organizational structure is of relevance for two reasons. *Firstly*, it plays a significant role in the question of the applicability of LOAC, more in particular in respect of the applicability of the law of NIAC. *Secondly*, it illustrates that an insurgency movement is made up of persons active in varying degrees of involvement, and which are engaged on a wide array of oftentimes shifting activities. This is of particular significance in relation to the question of who may be subjected to the use of force resulting in deprivation of life or liberty.
A *second* dimension concerns the *temporal* component of insurgency, i.e. the existence of an insurgency in the two temporal subsets of peace and armed conflict. While the assumption in this study is that all situational contexts of counterinsurgency take place in the context of an armed conflict, in operational reality this is a crucial and highly delicate issue, as it determines whether the conduct of counterinsurgency forces is governed by IHRL alone, or (also) by LOAC.
The *third* dimension concerns the *geographical* dimension of insurgency. This refers to the geographical area in which an insurgency movement operates, which, as we have seen, is not limited to the territory of the counterinsurgent State, but frequently also involves the territory of other States. These extraterritorial situations raise questions connected to the geographical space of armed conflict, mostly so that of NIAC, as well as concerning the extraterritorial applicability of IHRL-obligations for counterinsurgent forces operating on foreign territory.
A *fourth* dimension concerns the *policy* dimension of counterinsurgency. As follows from the above, counterinsurgency policy formulated at the political and military strategic level provides a larger framework within which counterinsurgency operations at the military operational and tactical level are to take place. In view of the counterinsurgency imperative of legitimacy, a first concern is to ensure that the outer limits of this policy corresponds with the outer limits of the counterinsurgents State's legal obligations under national and international law. As for the latter, this implies that the policy on targeting and operational detention cannot be more permissive than prescribed by law. At the same time, as noted in the introduction, the nature of contemporary counterinsurgency policy is such that it requires restraint in the use of forcible measures which, when followed in State practice, could be

(mis)interpreted as evidence of a changing legal moral among States, whereby humanitarian motives outweigh security interests in situations where this ordinarily would not be the case.

Chapter II The Legal Context

This chapter examines the broader legal context against which the interplay between IHRL and LOAC is to be examined. The research question here is: which general aspects can be identified that may determine the analysis of the interplay between IHRL and LOAC in relation to targeting and operational detention? Paragraph 1 identifies and discusses some of the general conceptual underpinnings of IHRL and LOAC, in order to provide a common picture of their object, purpose and mechanisms. Paragraph 2 examines three themes in the legal discourse on the role and interplay of IHRL and LOAC, namely the dogmatic approaches on the relationship between IHRL and LOAC; the discourse on the so-called 'humanization' of armed conflict; and the debates on the aptness of IHRL and LOAC to deal with 'new' wars. Paragraph 3 functions as a precursor to Chapter III, as it provides a general overview on the subject of norm relationships in international law.

1. Some General Notions of IHRL and LOAC

1.1. IHRL

A first principal legal regime of international law relevant to the deprivation of life and liberty of insurgents resulting from targeting and operational detention in counterinsurgency is IHRL. IHRL is the body of public international law concerning the total sum of civil, political, economic, social, cultural and collective rights, as recognized in international and regional treaties and declaration(s) as well by customary international law, protecting the human dignity of individuals and groups against the *arbitrary* exercise of power by States.
Its origins can be traced back to "the natural, constitutional, and political rights discourses that emerged in the Enlightenment and found their way into the constitutions of the 18th and 19th centuries."[177] Before 1945, international law was formal of character and built on the principle of State sovereignty. It dealt primarily with the relations between States. The principle subject matter was the delimitation of jurisdiction. The very idea of individuals as subjects of international law and, hence, the bearer of (human) rights within the framework of international law was a concept strange to the traditional State outlook on international law, if not for the mere reason that in those days the individual, as explained by Lauterpacht, "played an inconspicuous part because of the international interests of the individual and his contracts across the frontier were rudimentary."[178] This is not to say that the individual was not protected at all by international law. However, at that level, States viewed individuals "mostly as aliens and nationals, not as individuals."[179] In so far another State's treatment of their nationals coincided with the legitimate (yet predominantly political-economic) sove-

[177] Clapham (2007b), 22. For documents, see the Petition of Rights (England, 1628); the Habeas Corpus Act (England, 1679); the Bill or Rights (England, 1689), the Virginia Bill of Rights (US, 1776) and the Declaration of the Rights of Man and of the Citizen (France, 1789). For doctrine, see Locke (1946 (original in 1690)); Rousseau (1762)
[178] Lauterpacht (1950), 63.
[179] Harris (2004), 654.

reign interests of the State of which the individual was a national, States were willing to enter the realm of international law. These interests found their way into a variety of treaties, doctrines and institutions, most notably the doctrine of humanitarian intervention, the abolition of slavery,[180] the protection of minorities and the Minority System of the League of Nations,[181] the Mandates System of the League of Nations, international labor standards,[182] International Humanitarian Law,[183] the area of diplomatic protection,[184] and the area of State responsibility for injuries against aliens.[185] These treaties, doctrines and institu-

[180] 18th and 19th century: abolition of slavery. Freedom from slavery was accepted as a rule of customary international law since 1815. 1926 Slavery Convention: 60 L.N.T.S., 253; U.K.T.S. 16 (1927) Cmnd. 2910. 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery: 266 U.N.T.S., 3; U.K.T.S. 59 (1957) Cmnd. 257. Abolition of slavery was powered by economic and strategic imperatives, but there was also a genuine belief that slavery was inhuman. League of Nations set up commissions on slavery, adopted the 1926 Slavery Convention and conventions to suppress the trade of women and children.

[181] Following the post-World War I political order, the so-called Principal Allied and Associated Powers insisted that those new States with minorities signed special 'minorities treaties' containing obligations to respect rights of identified ethnic, national or religious minorities among their inhabitants. The driving force behind the protection of minorities was its potential to upset international peace. Among the signatories were Albania, Austria, Bulgaria, Czechoslovakia, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Poland, Romania, Turkey, and Yugoslavia. These treaties formed the basis from which the League of Nations, in the absence of a specific mandate thereto in the Covenant, derived its powers to serve as a guarantor of the obligations and to develop a system permitting petitions by minorities to be dealt with by the League Council, and in appeal, by the PCIJ (see e.g. Access to German Minority Schools in Upper Silesia [Advisory Opinion]; German Minority Schools in Upper Silesia [Advisory Opinion]; Minority Schools in Albania [Advisory Opinion]). For a summary history and more detailed examination of the Minorities System, see Buergenthal, Shelton & Stewart (2002), 10-14.

[182] Between World War I and World War II, the ILO embarked on a legislative and treaty-making process for the protection of labour rights. It also created a supervisory machinery to promote the implementation of these rights to which workers' organizations could appeal under certain circumstances.

[183] Most notably in relation to the adoption as rules of international law of norms governing the treatment of the wounded, sick and shipwrecked as a result of war, and prisoners of war, which sought to ensure a reciprocal standard of treatment of combatants *hors de combat* of the parties to the war.

[184] The Covenant of the League of Nations introduces a mandates system for the transfer and administration of the former colonies of the States that lost World War I by the mandatory Powers. The mandatory Powers were under an obligation to protection the wellbeing of the native populations and to establish conditions guaranteeing freedom of religion and conscience in the mandated territories, in accordance with Article 22 League Covenant.

[185] The international law concerning State responsibility for injuries to aliens conferred upon States an inter-State obligation to treat foreign nationals in compliance with certain minimum standards of civilization and justice. This offered some protection, but only in so far the State of which the injured alien was a national was willing, upon or in absence of a request of the injured national, to accept that the injuring behavior of its national was also an injury to the State and to exercise, as a measure of last resort, its right to assert a claim against the injuring State. See also the Permanent Court of International Justice in the Mavrommatis Palestine Concessions (Jurisdiction) case: "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint, Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is the sole claimant." See (1924), *The Mavrommatis Palestine Concessions - Greece v. Britain (Jurisdiction), Judgment of 30 August 1924*. See also (1927b), *United States of America (B.E. Chattin) v. United Mexican States, Award of 23 July*

tions are generally viewed by human rights lawyers as the foundation of contemporary IHRL, since they signify efforts to protect the individual at the level of international law, while at the same time they implied a recognition that a State's treatment of its citizens is a subject not always limited to its domestic jurisdiction.[186] However, "[…] it may be reasonable to doubt whether those developments authentically reflected sensitivity to human rights generally."[187]

By contrast, the position of the individual in international law, and in IHRL specifically, changed significantly after 1945, fueled by the atrocities inflicted upon populations before and during World War II. As a subject of international law, the human rights protected by IHRL are by design, i.e. directly and decisively, rather than incidentally,[188] bestowed upon individuals. This is reflected in treaty law and customary international law.[189]

Customary IHRL has developed through the consent and consistent practice of States. At its basis lies the UDHR, adopted by the UN in 1948 and containing a catalogue of fundamental human rights. While not a treaty, it is generally considered to have matured into customary international law. As a subset of the overall catalogue of human rights, fundamental human rights form a category of non-derogable human rights that are binding upon all States, irrespective of their consent to be bound or their codification into treaty law.[190] While there is no universal agreement on which human rights are fundamental, a State can be said to violate fundamental human rights when it practices, condones or encourages: genocide; slavery; murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; violence to life or limb; hostage taking; punishment without fair trial; prolonged arbitrary detention; failure to care for and collect the wounded and sick; systematic racial discrimination; and consistent patterns of gross violations of internationally recognized human rights.[191]

After the adoption of the UDHR, human rights treaties emerged at both universal and regional level. Important treaties at the level of civil and political rights, with which we are most concerned with in this study, are the ICCPR, the ECHR and the ACHR.[192] Other treaties are designed to eradicate violations of specific human rights, such as the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Prevention and Punishment of the Crime of Genocide, and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment. Human rights and freedoms find further regulation in soft-law documents that may serve as an authoritative source of interpretation of binding rules. In addition, (quasi-)judicial human rights bodies play a crucial monitoring and standard-setting role.

In the event counterinsurgent forces violate human rights, and their conduct can be attributed to the counterinsurgent State, the State can be held accountable for an international wrongful act under the international law of State responsibility, also if it acted on the basis

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1927, 282. On the international law of State responsibility for injuries to aliens in general, see, *inter alia*, Amerasinghe (1967); Lillich (1983); Harris (2004), 564-653.

186 Buergenthal (2008)

187 Henkin (1989)

188 On a discussion of theories viewing individuals as the "incidental" beneficiaries of rights and duties between State parties, see Henkin (1979), 439.

189 Lauterpacht (1950), 63.

190 Meron (1986)

191 American Law Institute (1987), § 701.

192 For economic, social, and cultural rights, see the ICESCR.

of a mandate of the UNSC.[193] An important feature of IHRL is its detailed web of monitoring and enforcement mechanisms, which offers both States as individuals redress for human rights violations. Examples are the UNHRC, which monitors the implementation of the ICCPR and resolves inter-State complaints regarding violations of the ICCPR. In addition, if States have ratified the Optional Protocol to the ICCPR, individuals subject to the jurisdiction of a State may file individual complaints with the UNHRC against States for alleged violations of their human rights. Similar individual complaint mechanisms exist with the European and Inter-American human rights systems. Accusations and condemnations of human rights violations by a counterinsurgent State have a delegitimizing effect and may greatly impact the overall counterinsurgency efforts.
Three aspects will be discussed in order to highlight some of the conceptual underpinnings of IHRL that not only characterize it as a legal regime, but also are determinative of its interplay with LOAC. These concern (1) the nature of the relationships regulated by IHRL, as well as the nature of the rights and obligations protected respectively imposed and (2) the scope of applicability of IHRL and (3) the concept of derogation.

1.1.1. Relationships

IHRL, as a regime of international law, is premised on international obligations arising between States, which denotes to a horizontal relationship. However, as a corollary of its main purpose, the principal relationship IHRL seeks to regulate is a *vertical* relationship, i.e. that between the State and the individual within its jurisdiction.[194]

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[193] In the case of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (hereinafter: Behrami & Saramati), the issue of attribution arose in the context of alleged violations of human rights by members of the armed forces of States party to the ECHR who had contributed forces to KFOR and UNMIK, the military and civil organizations established by the UNSC to govern Kosovo, a province of today's Serbia. The ECtHR ruled that the violations of human rights could not be attributed to the States, but to the UN, as they were carried out under the latter's auspices. However, in (2011a), *Al-Jedda v. United Kingdom, App. No. 27021/08, Judgment of 7 July 2011*, which concerned the detention of an individual by UK forces, the ground for which was claimed to lie in UNSC-resolution 1546, the ECtHR held that in this case the UNSC "had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations" (§ 84) and that "in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law" (§ 102).

[194] This vertical construct is one of the principal conceptual foundations of human rights law in general, finding a (philosophical) basis in the Age of Enlightenment in Europe and the doctrine of natural law. As a result, the individual is placed at the centre of the legal (and social) system, a position that has forced States to review their relationship with the individual. It no longer was one permitting intervention in the rights and freedoms of individuals based in divinity, but one of law, by which States were bound to protect individuals. For the source of this theoretical construct, see Rousseau (1762); Locke (1946 (original in 1690)).

1.1.2. Rights

At the one end of the vertical relationship-spectrum is the individual, which is the principal *rights-holder*.[195] Since 1945,[196] and reflected in the rapid development of the UDHR and the European and Inter-American human rights systems, the fundamental rights protected by IHRL are by design *universally* bestowed upon all human beings. As expressed by Haratsch:

> Bereits der Begriff "Menschenrechte", also Rechte des Mensen, verdeutlicht, daß es sich um mit der Natur des Menschen verknüphte, natürliche Rechte handelt, die unabhängig von jeder Positivierung in einder Rechtsordnung bestehen. Diese natürlichen Rechte sind unveräußlich und unabdingbar; mit ihnen steht und fällt die menschliche Persönlichkeit, deren Wert und Würde sie kennzeichnen.[197]

From the rights-holders perspective, the above implies firstly that human rights are *inalienable*, for it is not possible for a human being to loose or modify its human quality in whatever manner, neither willingly nor unwillingly.[198] In addition, it means that, save some excep-

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[195] Provost (2002), 18.

[196] Before 1945, the very idea of individuals as *subjects* of international law and, hence, the bearer of (human) rights within the framework of international law was a concept strange to the traditional outlook of States on international law. International law was formal of character and built on the principle of State sovereignty. It dealt primarily with the relations between States. The principle subject matter was the delimitation of jurisdiction. As explained by Lauterpacht (1950), 63, it is State sovereignty "[…] which rejects, as incompatible with the dignity of States, the idea of individuals as units of that international order which they have monopolized and thwarted in its growth. It is the sovereign State, with its claim to exclusive allegiance and its pretensions to exclusive usefulness that interposes itself as an impenetrable barrier between the individual and the greater society of all humanity […]." As a result, the treatment by States – and thus the position – of the individual within its territory was merely a matter of the autonomous exercise of domestic jurisdiction. Issues between the State and its own nationals did not belong to the legal periphery of other States. This is not to say that the individual was not protected at all by international law. However, at that level, States viewed individuals "mostly as aliens and nationals, not as individuals" (Harris (2004), 654). In so far another State's treatment of their nationals coincided with the legitimate (yet predominantly political-economic) sovereign interests of the State of which the individual was a national, States were willing to enter the realm of international law. These interests found their way into a variety of treaties, doctrines and institutions, most notably the doctrine of humanitarian intervention, the abolition of slavery, the protection of minorities and the Minority System of the League of Nations, the Mandates System of the League of Nations, international labor standards, LOAC, the area of diplomatic protection, and the area of State responsibility for injuries against aliens. These treaties, doctrines and institutions are generally viewed by human rights lawyers as the foundation of contemporary IHRL, since they signify efforts to protect the individual at the level of international law, while at the same time they implied a recognition that a State's treatment of its citizens is a subject not always limited to its domestic jurisdiction. However, whether these developments genuinely reflected concern for human dignity may be doubted. as explained by Henkin, "[i]n general, the principles of customary international law that developed, and the special agreements that were concluded, addressed only what happened to some people inside a State, only in respect with which other States were concerned, and only where such concern was considered their proper business in a system of autonomous States. […] If some norms and agreements in fact were motivated by concern for a State's own people generally, they did not reflect interest in the welfare of those in other countries, or of human beings generally. State interests rather than individual human interests, or at best the interests of a State's own people rather than general human concerns, also inspired voluntary inter-State co-operation to promote reciprocal economic interests." See Henkin (1989), 212.

[197] Haratsch (2001), 7-8; Donnelly (2003), 10. See also the second paragraph of the preamble of the American Convention on Human Rights. See also Donnelly (2007), 21.

[198] Donnelly (2007), 21 and 38.

tions,[199] human rights are held *equally* by all human beings, irrespective of their relationship to the State or their status in society and regardless of their "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[200]

Conventional IHRL is premised on the idea that in order to guarantee the very idea of human rights as rights of individuals, it is necessary to provide individuals with a corollary right to a substantive remedy.[201] This right to a substantive remedy has been expressed in the UDHR, as well as in other international and regional human rights instruments.[202]
Ideally, as Donnelly explains, rights are continuously "actively respected" or "objectively enjoyed," without there being a need for "assertive exercise",[203] i.e. exercise of the right through a claim. However, the *ability* of "assertive exercise" of a right implies having the power and authority to claim that right in the absence of "active respect" of "objective enjoyment". It is this possession of power or authority that "distinguishes having a right from simply being the (rights-less) beneficiary of someone else's obligation."[204]
For that very reason, IHRL provides *international mechanisms* that allow individuals to initiate and participate, fully or partially, in proceedings brought before a (quasi-)judicial body, provided it has competence following the respondent State's acceptance of its jurisdiction. Right-holders, exercising their procedural competence, can therefore be said to be in discretionary control of the relationship with duty-bearers: the right-holder decides when and how to exercise his or her rights.

The above implies that insurgents, as any other individual, have human rights that must be respected and ensured by the counterinsurgent State. In the event of a violation, insurgents have an ability to enforce these rights by making use of the mechanisms available in IHRL, and, in addition, have a right to a remedy in case of a violation of their human rights. While the above demonstrates that it is non-contentious that IHRL, in potential, is a regime of relevance to the relationship between the counterinsurgent State and insurgents, another significant issue is whether and, if so, to what extent a particular human right (and its com-

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[199] The exceptions concern either exclusions from the benefit of some rights or the granting of additional rights to specific groups of persons, such as aliens, citizens and minorities. For an overview and short discussion, see Provost (2002), 25-26.

[200] See Article 2(1) UDHR. See also Tomuschat (2003), 2; Donnelly (2007), 21; Provost (2002), 25; Dworkin (1977), 272-273.

[201] Provost (2002), 44. However, (as will be demonstrated in Section 3) the entitlement to rights does not immediately imply a competence to exercise them. It remains questionable that a right to a remedy exists in customary IHRL, see Provost (2002), 44; American Law Institute (1987), § 307; Tomuschat (1999).

[202] See Article 8 UDHR; Article 2(3) ICCPR; Article 25 ACHR; Article 7 ACHPR; Article 14 CAT; Article 6 CERD. See also Nowak (2003), 2.

[203] Donnelly (2003), 9: "Assertive exercise" means that the right is exercised (asserted, claimed, pressed), activating the obligations of the duty-bearer, who either respects the right or violates it (in which case he is liable to enforcement action); "Active respect" means that the duty-bearer takes the right into account in determining how to behave, without it ever being claimed. We can still talk of the right being respected and enjoyed, even though it has not been exercised. Enforcement procedures are never activated, although they may have been considered by the duty-bearer; "objective enjoyment" means that rights apparently never enter the transaction, as in the example of buying a loaf of bread […]; neither right-holder nor duty-bearer gives them any thought. We perhaps can talk about the right – or at least the object of the right – being enjoyed. Ordinarily, though, we would not say that the right has been respected. Neither exercise nor enforcement is in any way involved.

[204] Donnelly (2003), 9.

mensurate obligation) – such as the right to life and the right to liberty – is at all *applicable ratione personae* to regulate that relationship in a given context. It is to this aspect that we will now turn.

1.1.3. Obligations

To every individual right IHRL is linked a corresponding duty. In IHRL, the State is the principal[205] *duty-bearer*.[206] While international law does not rule out, and in fact recognizes the possibility to impose obligations on individuals such as insurgents in as much as it can grant them rights,[207] it is generally agreed that non-State actors such as insurgent movements are not bound by obligations of IHRL,[208] not even under customary international law,[209] even though it has been suggested that a process of norm-crystallization to that effect is under way.[210]

The obligations imposed on a State are designed such that they regulate the manner in which a State may take territorial and extraterritorial measures to maintain or restore public security, law and order or to otherwise exercise its authority or power over individuals, objects, or territory. These objective obligations can be categorized in *three* groups.

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[205] It is now widely accepted that, next to States, international organizations by virtue of the legal personality in general public international law, have obligations under IHRL, in so far exercise functions similar to the exercise of jurisdiction by a State. See Kleffner (2010b), 67; Clapham (2007a), 573. While, *generally*, conventional IHRL does not provide the possibility for entities other than States to become a party (in 2010, negotiations have begun between the EU and the Council of Europe for EU accession to the ECHR), international organizations are bound by norms of customary IHRL. Other bases from which to conclude that international organizations have obligations under IHRL are their treaties, internal rules and practice. See, for example, Article 103 UN Charter.

[206] Provost (2002), 102: "[…], the normative framework of human rights centres obligations firmly on the state and its agents, in a manner consonant with its basic purpose of protecting individuals against abuses by the state." In so far a breach of human rights obligations can be attributed to it, States are responsible under the general international law of State responsibility, as laid down in the Draft Articles on Responsibility of States for Internationally Wrongful Acts, see International Law Commission (2001b).

[207] In so far it concerns *conventional* international law, the case of the Jurisdiction of the Courts of Danzig, the Permanent Court of International Justice acknowledged that there is no principle in international law preventing parties to a treaty from conferring obligations upon individuals. See (1928b), *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways Administration), Advisory Opinion of 3 March 1928*, 17-18. In so far it concerns *customary* international law, examples of individual obligations can be found in the prohibition of slave trade, piracy, breach of blockade and war contraband. See Kelsen (1967), 124-131; Nørgaard (1962), 88-95. See also Resolution 95(I) of the General Assembly, 11 December 1946, on the "Principles of International Law Recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal", in particular the commentary to Principle I on individual criminal responsibility for crimes against international law, which states that "the general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law."

[208] IHRL so far has imposed obligations on individuals only in exceptional cases and the expansion of obligations should be viewed with caution, even though it may support IHRL in its efforts to achieve its primary objective. An underlying reason is fear for a heightened sense of legitimacy amongst non-State armed groups if they are accused of having violated human rights: it may be interpreted to imply that non-State armed groups are State-like entities, for only States have human rights obligations, although this argument is said to have become moot. Clapham (2007a), 576.

[209] Kleffner (2010b), 67.

[210] Tomuschat (2004), 577-584. Evidence for such a process is found in the many cases in which the UN and other bodies have called upon non-State armed groups to respect human rights. The practice of the non-State armed groups, however, undermines this process and it cannot therefore be concluded that a customary rule has emerged. Zegveld (2002), 39-46.

Firstly, obligations to *respect* are negative obligations, framed as a *prohibition*, and connote a State duty to refrain directly or indirectly from interference with the human rights and freedoms of individuals, in so far such interference is not expressly permitted by virtue of limitation clauses within the relevant treaty provisions, as a result of treaty-reservations, or following lawful derogation. Thus, the obligation not to arbitrarily deprive a person of his life or liberty corresponds with the right to life, or the freedom of liberty, or the right to physical and mental integrity.

Secondly, obligations to *ensure* are positive obligations, and imply a State's duty to *act*, in order to protect individuals from infringements by other (private) individuals. Failure to act may imply a violation of the relevant human rights. The obligation to ensure is a generic obligation, and entails two specific obligations: the obligation to *fulfill* and the obligation to *protect*.[211]

As a species of the obligation to ensure, obligations to *fulfill* human rights concerns a State's obligation to take the legislative, administrative, judicial and practical – preventive or proactive – measures necessary to ensure that the relevant rights are implemented to the greatest extent possible.[212]

The obligation to *protect* places upon States a duty to take the *proactive* measures necessary to avoid infringement by other individuals in the enjoyment of a right. This obligation is linked to the doctrine of (indirect) horizontal effects of human rights, or *Drittwirkung*.

Both the obligations to protect and fulfill confer upon a State an obligation of *due diligence*, even in cases where the act is not directly imputable to the State through its agents, but to a private individual. This implies a duty for States to prevent, investigate and punish all violations, and to adopt domestic legislation that confers obligations upon private individuals, the non-compliance of which constitutes an illegal act.[213]

While being objective in character, and therefore in principle applicable without their consent, States, in a way, have the power to influence the scope of the applicability of human rights obligations.

Firstly, States may make reservations to human rights treaties,[214] a right that has been used on large scale.[215] Reservations of human rights treaties cannot be made if they are incompatible with the object and purpose of a treaty.[216]

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[211] On the division between obligations to respect, fulfil and protect, see Office of the High Commissioner for Human Rights available at: http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx

[212] UNHRC (2004), § 7. An obligation to fulfil involves the obligations of due diligence. For example, in the case of (1988e), *Velasquez Rodriguez v. Honduras, Judgment of 29 July 1988*, § 176, the IACiHR ruled that "[t]he State is obliged to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction."

[213] See, *inter alia*, (1988e), *Velasquez Rodriguez v. Honduras, Judgment of 29 July 1988*, § 172; (1987c), *Herrera Rubio v. Colombia, Comm. No. 161/1983 of 2 November 1987*, 198;

[214] According to Article 2 VCLT, a reservation is a "unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a Treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the Treaty in their application to that State."

[215] As of 1 January 2013, the ICCPR had 167 State parties and 74 signatories. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

[216] Reservations are also prohibited when prohibited by the treaty itself. See Article 19 VCLT. However, with a few exceptions, the human rights treaties remain silent on permissibility of making reservations.

Secondly, States may limit the enjoyment of certain human rights in circumstances explicitly set out in the relevant provisions, provided they are prescribed in law,[217] pursue a legitimate aim,[218] and are necessary in a democratic society.[219] It here concerns an adjustment by the State of the scope of a human right.[220]
A *third* instrument that may be used by a State to limit its human rights obligations is derogation. Derogation involves a suspension of human rights in the case of a public emergency threatening the life of the nation, such as an armed conflict. It is subject to strict requirements, as will be separately addressed below.
Finally, and limited to human rights obligations under the ECHR, the State Parties to that treaty have a 'margin of appreciation' that permits them to implement their obligations in view of their historical, social, political, and legal specificities.

Many human rights obligations can be said to constitute obligations *erga omnes*, i.e. "in view of the importance of the rights involved, all States can be held to have a legal interest in their protection."[221] As such, they are IHRL-obligations that principally concern the vertical, rather than the horizontal, relationships between State and those under its control and, whether conventional or customary in nature "represent the adherence of the state to a normative, public order system which is not conditioned on the performance of any parallel obligation by other states."[222] In other words, while, as argued by Simma "[o]n the normative level, the treaties under consideration set forth reciprocal rights and obligations in precisely the same way as their more traditional counterparts,"[223] at the same time, as explained by Mégret

> [t]he special character of human rights suggests that states' human rights obligations are in some ways independent of their consent to be bound by them. […] States are solemnly committing to something which they were already, at least morally or philosophically, obliged

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[217] (1979d), *Sunday Times v. the United Kingdom, App. No. 6538/74, Judgment of 26 April 1979*, § 49.

[218] A legitimate aim must be "a pressing social need." Examples are situations threatening national security, public order, public health or morals or the rights and freedoms of others. See (1976d), *Handyside v. the United Kingdom, App. No. 5493/72, Judgment of 7 December 1976*, § 48.

[219] The limitation must be necessary in a democratic society, and it must be proportionate to the achieved aim.

[220] For example, the right to life, as set out in Article 2 ECHR, may be limited by the imposition of the death penalty, as a result of lawful acts of war, or in (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection. See also Parts B, Chapter IV, and C, Chapter VI below.

[221] (1970), *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application 1962) (Belgium v. Spain), Judgment of 5 February 1970 (Merits)*, § 33: "[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination." See also Jennings & Watts (1992), 4; American Law Institute (1987), 161.

[222] Provost (2002), 171; Fitzmaurice (1957-II), 125-126. See also (1961a), *Austria v. Italy, App. No. 788/60, Judgment of 11 January 1961*, 116, 138-140. In relation to the ACHR, see (1982f), *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, September 24, 1982*, 20-23

[223] Simma (1982)401.

> to recognize. Another way of putting it would be to say that becoming a party to a human rights treaty is declaratory of states' obligations rather than constitutive of them.[224]

Given the nature of such commitment, it would be "profoundly misleading" and "wrong" to typify human rights treaties as grounded in reciprocity, for there is generally no interest involved for States in the non-compliance with its obligations by another State at the vertical level.[225] As concluded by ICJ's *Advisory Opinion on the Reservations to the Genocide Convention*:

> [T]he contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.[226]

Conceptually, a breach by a State party merely has an "indirect, universal impact on states."[227]

1.1.4. The Scope of Applicability of IHRL

A second feature characterizing IHRL as a regime is its scope of applicability. Only when IHRL is applicable do rights and obligations between States and individuals arise, and can a State be held responsible for violations of its obligations. As noted, ratification, limitation clauses, derogation and concepts as 'margin of appreciation' may limit a State's human rights obligations, and as such, can be said to limit the applicability of human rights. Other fundamental aspects of applicability concern the question, *firstly*, whether, upon ratification, a treaty-based obligation arises because an individual can be said to come within the jurisdiction of the State, and *secondly*, whether the State continues to be bound by IHRL obligations in times of armed conflict. Both aspects will be addressed below.

1.1.4.1. IHRL Obligations Following 'Jurisdiction'

In drafting human rights treaties, States have sought to introduce a reasonable limit to State responsibility, without encroaching upon their object and purpose. (With the exception of the ACHPR), the principal universal and regional human rights treaties central in this study each provide, in varying formulations, that their substantive and procedural norms only apply to individuals who are "within the jurisdiction" of its State Parties. Thus, the ICCPR, in Article 2(1) requires each State Party to respect and to ensure the human rights guaranteed therein "to all individuals *within its territory and subject to its jurisdiction*,"[228] whereas Article 1 of the ECHR states that "[t]he High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention.[229] Similar language can be found in Article 1(1) of the ACHR, which calls upon State Parties "to ensure to all persons *subject to their jurisdiction* the free and full exercise of those rights and free-

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[224] Mégret (2010), 129.

[225] Mégret (2010), 127-128.

[226] (1951), *Reservations to the Genocide Convention, Advisory Opinion of 28 May 1951*, § 23. See also (1982e), *The Effect of Reservations on the Entry into Force of the American Convention (Arts 74 and 75), OC-2/82, IACtHR, Series A No. 2 (24 September 1982)*, §§ 29-30.

[227] Provost (2002), 167-8. Third States may be affected by another State's breach of conventional HRL-obligations in various ways, e.g. when it is confronted with the effects of human rights violations in another State (refugees); on the basis of a national, religious, ethnic or other relationship with an individual under the control of another State; when it is economically affected by human rights violations.

[228] Emphasis added.

[229] Emphasis added.

doms, […].[230] It is this concept of 'jurisdiction' that provides the conceptual element integrated in IHRL treaties that establishes the vertical relationship between the individual and the State. It serves as a threshold-condition for the applicability *ratione personae* of IHRL,[231] and implies that an individual's position *outside* the State's jurisdiction obstructs his legal ability to confront the State with its obligation to guarantee his/her human rights, for States have accepted that such a duty does not exist in those circumstances.

1.1.4.1.1. The Meaning of 'Jurisdiction' in General International Law

While "a degree of uniformity of usage does exist and may be noticed", the term 'jurisdiction' in general international law is often used as a generic term to cover a wide range of issues.[232] In the most generic terms, 'jurisdiction' refers to the scope of a State's competence to regulate its exercise of power within its public order over persons and property, natural and legal, via its domestic law, and subject to similar competence and sovereignty of other States.[233]

The concept of jurisdiction in general international law is premised in the idea that States, in their horizontal relations with each other, must protect their unfettered sovereignty from unlawful interference by another State.[234] In terms of *function*, the law on jurisdiction *primarily* imposes limitations on the display of legal power *outside* the domestic arena to prevent infringements upon another State's sovereignty. As such, it regulates whether or not a State's claim to competence of exercising its jurisdiction on the territory of another State is lawful or unlawful. A *secondary* function of the law of jurisdiction is that it regulates the consequences of unlawful exercise of that power.[235]

In general international law, two traditional distinct *types* of jurisdiction can be identified. The *first* type concerns a State's rule or law-making authority – also known as *prescriptive* or *legislative* jurisdiction. *Secondly*, a State has the authority to take action to ensure compliance with the laws – also known as *prerogative* or *enforcement* jurisdiction.[236] In the context of military operations, it is jurisdiction to enforce that is of particular relevance.[237]

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[230] Emphasis added.

[231] As was made clear by the ECtHR in the case of *Pad and Others v. Turkey*, "[…] the exercise of jurisdiction is a *necessary condition* for a Contracting State to be held responsible for acts imputable to it which give rise to an allegation of infringement of rights and freedoms set out in the Convention." (2007d), *Pad v. Turkey, App. No. 60167/00, Judgment of 28 June 2007*, § 52 (emphasis added).

[232] It may simply refer to the territory of the State, to its legal system, or to the competence *ratione materiae*, *personae* or *loci* of a court or tribunal. See Gondek (2009), 47. A historical examination of treaty provisions since World War I, carried out by Milanovic, shows that the word 'jurisdiction' is used in various contexts, even if they are mentioned in the same provisions.[232]

[233] The definition contains elements found in definitions or descriptions of jurisdiction found in Brownlie (2003), 297; Harris (2004), 265; Oxman (1997)55; Shaw (2003), 572; Brownlie (2003), 297; Jennings & Watts (1992), 456; Mann (1984), 20.

[234] While 'sovereignty'-centered, 'jurisdiction is not to be viewed as an equivalent of – and therefore not to be confused with – sovereignty. See Brownlie (2003); Malanczuk (1997), 109. It is (principally) an "an aspect or an ingredient or a consequence of sovereignty," and its application is restricted to limits of a State's sovereignty." See Mann (1984), 20. Similarly: Brownlie (2003), 297. At the same time, as noted by Gondek: "It is now beyond doubt that the sovereignty of state is no longer unfettered and is itself subject to the limits of international law." Gondek (2009), 49.

[235] Mann (1964), 15; Higgins (1994), 56; Shaw (2003), 573; Brownlie (2003), 297. The first consequence is that an unlawful claim to competence will not be accepted by the State affected. The second consequence is that it may give rise to State responsibility.

[236] Lowe (2006), 339. In addition, 'jurisdiction' may refer to a State's authority to settle legal disputes – jurisdiction to adjudicate, or *adjudicative jurisdiction*. Generally, this third type is considered to be a species of

The authority to *enforce* jurisdiction is generally only lawful when exercised *within* a State's own territory. Given its intrusive character on the sovereignty of other States, the exercise of *extraterritorial* enforcement jurisdiction by State A on the territory of State B is in principle unlawful, unless it takes place on an exceptional basis accepted in international law.[238] For example: State A, in its lawful exercise of jurisdiction has criminalized terrorism. State A decides to enforce this piece of legislation by sending military forces across its borders to abduct terrorist X from the territory of State B, for the purposes of interrogation. This extraterritorial exercise of jurisdiction to enforce is unlawful, unless it can be based on an exceptional basis recognized in international law. In general, the exceptional basis to enforce jurisdiction extraterritorially follows from the consent,[239] invitation or acquiescence of State

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both prescriptive and enforcement jurisdiction. Arguably, as its main principles are that of territoriality and nationality, adjudicative jurisdiction shares more common ground with prescriptive jurisdiction than with enforcement jurisdiction. Schachter (1991), 255.

[237] In its authority of *prescriptive* jurisdiction, the State has the sovereign power to extend the applicability of its domestic law to any individual, property, territory or situation, regardless of their geographical position or occurrence and even without the consent of another State, provided that there is no rule of international law that specifically prohibits a State from doing so. An example is the law on diplomatic immunities. See Mann (1984); Bernhardt (1997), 55-9; Bernhardt (1995), 337-343; Jennings & Watts (1992), § 137; Brownlie (1998), 287, 301 and 312-314. However, the scope of *exercise* of lawful prescriptive jurisdiction is regulated by a number of principles, each containing their own limitations on the exercise of jurisdiction. These principles include (1) the principle of territoriality, according to which a State may prescribe legislation with regard to every individual present on its territory; (2) the nationality (or active personality) principle, according to which a State may exercise jurisdiction over (i.e. regulate the conduct of) nationals abroad; (3) the passive nationality principle, which permits a State to prohibit conduct that may harm nationals, even if the perpetrator of the act is not a national and the prohibited conduct takes place outside the State's territory; (4) the protective principle, according to which a State may prohibit (and adjudicate) acts that (may) harm the security of the State; and (5) the universality principle, which permits a State to prohibit conduct that may affect the international community as a whole, such as war crimes or crimes against humanity. Each principle contains conditions that must be complied with in order to avoid State responsibility for wrongful acts in international law. See also Kamminga (2008), §§ 7-9: "State practice does not support the view that the *exercise* of any form of prescriptive and adjudicative jurisdiction beyond a State's borders is permitted as long as there is no specific rule of international law prohibiting it" (emphasis added). Of these principles, the principle of territoriality takes the dominant position. After all, it is on their own territory that States exercise their jurisdiction in the vast majority of cases. However, it is today commonly accepted in doctrine that prescriptive jurisdiction is not essentially and rigidly territorial, but that an *approach of flexibility and reasonableness* is to be applied in determining the lawfulness of the extraterritorial exercise of prescriptive jurisdiction. This approach holds that "[i]f a *sufficiently close connection* between the exercise of authority and the extraterritorial situation over which the authority is exercised, subject to the principle of reasonableness, can be shown, a state may lawfully legislate or adjudicate."[237]

[238] This follows from the PCIJ in the *Lotus* judgment: "Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it *may not exercise its power* in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention." (1927a), *The Case of the S.S. "Lotus" (France v. Turkey), Judgment of 7 September 1927*.

[239] Such consent is often obtained through bilateral or multilateral agreements. Examples are the 1984 Inter-American Convention on Jurisdiction in the International Sphere for Extraterritorial Validity of Foreign Judgments (adopted 24 May 1984, entered into force 24 December 2004, 24 ILM, 468); the 1999 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands concerning a Scottish Trial in the Netherlands, concluded at The Hague, Netherlands, on 18 September 1998 and entered into force on 8 January 1999 (United Kingdom Treaty Series No. 43 [1999]); EU Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction in Civil and Commercial Matters (2001 OJ L12/1, 23). See also the NATO Sta-

B, or if State A is an occupying power in view of the relevant rules of LOAC.[240] If a legal basis is absent, the State carrying out the extraterritorial forcible act is responsible under international law for the infringement of the sovereignty of State B.

In sum, the notion of 'jurisdiction' in general international law is *essentially territorial*. The *extraterritorial* exercise of the jurisdiction to enforce is in principle prohibited, unless it has an exceptional basis in international law. It thus follows that the applicability *ratione personae* of IHRL is, in any case, contingent upon its applicability *ratione loci*, most notably in extraterritorial context. In today's fragmented and globalized world, the significance of these geographic limits of 'jurisdiction' is greater than ever before. The potential for jurisdictional clashes rises, also because States rely in military power to enforce jurisdiction on other States. It is here that tension arises between the meanings of 'jurisdiction' in general international law and the 'jurisdiction'-based applicability of IHRL-treaties. The application of the ordinary meaning of jurisdiction in general international law to extraterritorial military operations States suggests that treaty-based IHRL obligations *only* arise when a State's presence in another State finds a basis in the exceptional situations *permitted* by international law. This would imply that the unlawful conduct of a State in the territory of another State would not trigger the applicability of treaty-based IHRL obligations, whereas that very conduct could very well affect an individual's human rights. Such outcome would be illogical. It is submitted that even the unlawful exercise of authority also constitutes the exercise of IHRL-jurisdiction.

To return to the example of the abduction of insurgent X by counterinsurgent State A: whilst the presence of armed forces in State B requires a lawful basis in international law for it to be in compliance with the notion of jurisdiction as understood in general international law, the fact remains that the very act of abduction affects the human rights of the individual X, and, for the purposes of determining whether State A was under an obligation to respect or ensure the human rights of X, it triggers the issue of whether X came within the 'jurisdiction' of State A.[241] As it appears, the ordinary meaning of jurisdiction is of particular relevance for the question of whether State responsibility arises as a result of its conduct vis-à-vis another State, and as such pertains to the traditional horizontal relationship between States. The question therefore arises whether this ordinary meaning in international law also applies to the question of State responsibility following from a State's conduct vis-à-vis individuals, and thus applies to the vertical relationship between State and individual, or whether 'jurisdiction' in the applicability-clauses of IHRL-treaties refer to something else. In addition, the question may be asked whether a State's IHRL obligations under customary international law are also subject to this notion of jurisdiction.

As follows, answers to these issues are of particular relevance for the conduct of military operations in the various situational contexts of counterinsurgency under scrutiny here, particularly in view of their extraterritorial scope. Eventually, the applicability or not of particular IHRL-obligations not only informs us on the potential of IHRL forming a relationship with equally valid norms of LOAC, but also of how such interplay is to be appre-

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tus of Forces Agreement and the EU Status of Forces Agreement, or Status of Forces agreements in general, which generally contain clauses permitting the enforcement of domestic legislation by the visiting State on the territory of a receiving State to forces of the visiting State.

[240] Bernhardt (1997), 59; Bernhardt (1995), 338-340; Brownlie (1998), 313; Cassese (2001), 89; The Venice Commission (2001).

[241] The example given here takes place in an extraterritorial setting. However, the jurisdiction to enforce may also be unlawfully exercised in a domestic setting, for example when the State orders the abduction, torture or targeted killing individuals, thereby clearly violating its own domestic laws.

ciated and how such appreciation impacts the very conduct of counterinsurgency operations, with a particular focus on those resulting in the deprivation of life and liberty.

1.1.4.1.2. The Meaning of 'Jurisdiction' in the *Travaux Préparatoires*

While they cannot function as a decisive means of treaty interpretation,[242] a first source for determining the meaning of 'jurisdiction' in IHRL-treaties is the *travaux préparatoires*. The preparatory work shows that the drafters struggled with the choice between a 'territory'- or 'jurisdiction'-based scope of application, with a general preference for the latter. In particular the drafters of the ICCPR debated at length the implications of a mere 'territory'-based scope of application, which was proposed by the US delegation.[243] The present formula of Article 2(1) ICCPR, based on a subsequent amendment of the US delegation ("within its territory and subject to its jurisdiction") is a compromise that was eventually adopted, even though the drafting history shows strong resistance from other States against the inclusion of the words "within its territory".[244] In addition, arguably, the US' territorial focus only had a limited scope as, *inter alia*, it merely appeared to cover *positive* obligations under the ICCPR which they could not in practice be capable of satisfying "in territories where they do not have the authority to do so" or where the imposition thereof would be excessive.[245] This suggests that the US amendment did not also seek to bar from extraterritorial applicability obligations to *respect*, as it may have envisaged the effective compliance with this type of obligations as not problematic.[246] In sum, this points at the limited significance of the "with-

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[242] The *travaux préparatoires*, or preparatory work of a treaty is a supplementary means of interpretation. Article 32 VCLT stipulates that recourse may be had to supplementary means of interpretation only "in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." See also (1995e), *Loizidou v. Turkey (Preliminary Objections), App. No. 40/1993/435/514, Judgment of 23 March 1995*, § 71.

[243] In 1950, a proposal for amendment was put forward by the US, according to which Article 2 should read: "[e]ach State Party hereto undertakes to ensure to all individuals *within its territory* the rights set forth in this Covenant." The words "within its territory" were intended to replace the words "within the jurisdiction" present in earlier drafts of the provision.

[244] Opposition to the US amendment came from France, Yugoslavia, Greece, Italy, Japan, China and Peru who all argued that the 'jurisdiction' reference was sufficient. United Nations (1963), § 30.

[245] As explained by Mrs. Roosevelt, the US representative, the US amendment "[…] was designed to make clear that the Covenant was applicable only to persons within the territory and jurisdiction of the contracting parties. Otherwise it could be interpreted as obliging a contracting party to adopt legislation applying to persons outside its territory although technically within its jurisdiction for certain questions. That would be the case, for example, in the occupied territories of Germany, Austria and Japan, as persons living in those territories were in certain respects subject to the jurisdiction of the occupying powers, but were in fact outside the legislative sphere of those Powers." See United Nations (1950), § 53. For additional reasons pointing at the limited scope of the United States amendment, see Gondek (2009), 100-101.

[246] Lubell (2010), 201. See also McGoldrick (2004a), 66. Similarly, see Gondek (2009), 100, 107-108. This argument finds further support with the ICJ, which in its Palestinian Wall Advisory Opinion held that "[t]he *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of the that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence. See (2004l), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ (Advisory Opinion of 9 July 2004)*, § 109. See also Tomuschat's individual opinion in (1981b), *Sergio Euben López Burgos v. Uruguay, Comm. No. 12/52 of 29 July 1981*, Appendix.

in the territory"-phrase and justifies a *disjunctive* reading of the two components of Article 2(1). A *disjunctive* approach interprets "and" as "or" and results into a separation of the phrases "within its territory" and "subject to its jurisdiction."[247] Despite some fervent resistance by, most notably, the US[248] and Israel, there is no doubt that this approach is the correct interpretation[249] and that the relevant aspect for determining whether an obligation arises under the ICCPR is the issue of whether the State in question exercised 'jurisdiction' over the individual.

As for the ECHR, the first drafts of the ICCPR – which still referred to 'jurisdiction' – only inspired the drafters of the ECHR to change the initial wording of Article 1 ECHR from 'residing within the territories' to 'within its jurisdiction'.[250] This change was made because the more flexible and ambiguous term 'jurisdiction' made it possible to extend the applicability of the ECHR to individuals present on the territory of a State Party beyond the mere range of those *residing* on the territory of a State party. Indeed, this has been viewed by some, including the ECtHR, to conclude that the words "within its jurisdiction" were not

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[247] A literal reading of the word "and" implies a limitation of the applicability of human rights obligations under the ICCPR, to the extent that it (1) excludes its applicability outside a State Party's territory, even if it can be concluded that an individual is subject to its jurisdiction and (2) that it excludes individuals, such as diplomatic and consular personnel or members of the armed forces of a visiting State, who, while present on the territory of a State Party, are not within its jurisdiction.

[248] Dennis (2005).

[249] For an early recognition of the disjunctive approach, see (1982d), *Sophie Vidal Martins v. Uruguay, Comm. No. R.13/57 of 23 March 1982*; (1983b), *Mabel Pereira Montero v. Uruguay, Communication No. 106/1981 of 31 March 1983*; (1983d), *Varela Nunez v. Uruguay, Comm. No. 108/1981 of 22 July 1983*; (1983c), *Samuel Lichtensztejn v. Uruguay, Comm. No. 77/1980 of 31 March 1983*.. See also (1981c), *Sergio Euben López Burgos v. Uruguay, Comm. No. 12/52, UNHRC (29 July 1981)*, and most particularly, Tomuschat. See also (2004l), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ (Advisory Opinion of 9 July 2004)*, § 109. To argue against the disjunctive reading, as argued by some scholars, would lead to results that are inconsistent with the object and purpose of the ICCPR in the sense of Article 31 VCLT, or that are manifestly absurd in the sense of Article 32 VCLT. This takes places at three levels. *Firstly*, it would lead to absurd results *in relation to the application of certain rights*, for example in relation to the right to enter ones own country (Article 12(4) ICCPR). See Buergenthal (1981), 74; McGoldrick (2004a)48. For more examples, see Mose & Opsahl (1981), 297-298; (1983c), *Samuel Lichtensztejn v. Uruguay, Comm. No. 77/1980 of 31 March 1983*., §§ 4.1 and 6.1. *Secondly*, *in relation to territorial State conduct*, the literal reading of the phrase would limit the applicability of the ICCPR to only those situations where individuals are present on the territory of a contracting State, and also under its jurisdiction. However, the territorial control by another entity, such as an insurgent movement, an occupying power, or an international organization, could preclude individuals from becoming subject to that State's jurisdiction, which would prevent individuals from exercising their right to enforce their human rights under the ICCPR. See McGoldrick (2004a)49. *Thirdly*, *in relation to extraterritorial State conduct*, the literal reading of the phrase would imply that a State Party could evade its obligations under the ICCPR by carrying out its acts violating human rights outside their own territory. See Nowak (2005), 859; Lubell (2010), 205. Also: Nowak (2005), 44; Meron (1995), 79 Similarly, but arguing in relation to human rights obligations in general: Cassese (2005), 386.

[250] In its final report to the Committee of Ministers, the Committee of Experts justified the adoption of the change as follows: "The Assembly draft had extended the benefits of the convention to 'all persons residing within the territories of the signatory States.' It seemed to the Committee that the term 'residing' might be considered too restrictive. It was felt that there were good grounds for extending the benefits of the Convention *to all persons in the territories of the signatory States*, even those who could not be considered as residing there in the legal sense of the word. This word, moreover, has not the same meaning in all national laws. The Committee therefore replaced the term 'residing' by the words 'within their jurisdiction', which are also contained in the Draft Covenant of the United Nations Commission." See Report to the Committee of Ministers submitted by the Committee of Experts instructed to draw up a draft Convention of Collective Guarantee of Human Rights and Fundamental Freedoms of 16 March 1950 (Doc. CM/WP I (50) 15; A 924), in Robertson (1975-1985), Volume IV (1977), 20.

adopted with a view to the extraterritorial application of the ECHR, but had a primarily territorial connotation.[251] Gondek argues that nowhere in the *travaux préparatoires* is the meaning of 'jurisdiction' "discussed or explained. It is therefore, as Lawson suggests, "not unlikely that the drafters of the Convention did not give much thought at all to any extraterritorial impact of the Convention."[252] However, the amendment that eventually led to the adoption of the words "within its jurisdiction" expressed as its aim "to *widen as far as possible* the categories of persons who are to benefit by the guarantees contained in the Convention."[253] While it is difficult if not impossible to reach any definite conclusions on the basis of the *travaux préparatoires* of the Convention, this at least suggests that the ECHR may also apply outside the territories of the State parties.

In regard of the Inter-American human rights system, we will focus on the drafting history of the ACHR only, since the ADRDM is not a treaty.[254] The first drafts of Article 1 ACHR called upon the States Parties "to respect the rights and freedoms recognized herein and to ensure to all persons *within their territory and subject to their jurisdiction* the free and full exercise of those rights and freedoms, […]."[255] Eventually the reference to "within their territory" was dropped.[256] As corroborated by the IACiHR in the case of Molina

> 89. The drafting history of the Convention does not indicate that the parties intended to give a special meaning to the term "jurisdiction." […]
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> 90. At the time of adopting of the American Convention, the Inter-American Specialized Conference on Human Rights chose to omit the reference to 'territory' and establish the obligation of the State parties to the Convention to respect and guarantee the rights recognized therein to all persons subject to their jurisdiction. In this way, the range of protection for the rights recognized in the American Convention was widened, to the extent that the States not

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[251] (2001c), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, Judgment of 12 December 2001*, § 65.

[252] Lawson (2004), 89-90.

[253] Robertson (1975-1985), 200 (emphasis added). See also Lawson (2004), 89.

[254] Article 32 VCLT refers to the preparatory work of treaties. The ADRDM was drafted in 1945. Though not a treaty and not legally binding, it has proved to be a very important instrument in the Inter-American human rights system. Since it "was not intended to function as a treaty and no consideration was given to describing how to apply it to the OAS member states," the final text ADRDM does not contain a specific jurisdiction clause. However, during the drafting stage, specific reference was made to jurisdiction in draft Article XVIII, the predecessor of the current Article II, which concerns the right to equality before the law and the prohibition of discrimination. In its Resolution XXX, the reference to 'jurisdiction' was deleted. The OAS held that, in its personal scope, the "essential rights of man are not derived from the fact that he is a national of a certain State, but are based upon attributes of his human personality" that can only be limited "by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy." It is therefore not surprising that, today, the IACiHR, despite the absence of a specific reference to 'jurisdiction' relies on Article II to justify the extraterritorial scope of applicability of the obligations arising from the ADRDM in situations of extraterritorial conduct of the members of the OAS.

[255] See Draft Inter-American Convention on Protection of Human Rights, Document 5 of 22 September 1969, in Buergenthal & Norris (1982-1993), Volume II, booklet 13 (August 1982), 1-24, at 2, and Annotations on the Draft Inter-American Convention on Protection of Human Rights (documents prepared by the Secretariat of the Inter-American Commission of Human Rights), in Buergenthal & Norris (1982-1993), Volume II, booklet 13 (August 1982), 25-82, at 34.

[256] As annotated in the Report of the US Delegation to the conference, "Panama was particularly interested in this deletion to protect the human rights of persons residing in the Panama Canal Zone which is subject to US jurisdiction but is not US territory." See Buergenthal & Norris (1982-1993), Volume III, booklet 15 (August 1982), 1-66, at 15. It may be noted, particularly in light of the US' present position with respect to the phrase "within its territory" in Article 2(1) ICCPR, that the US did not oppose in any way Panama's proposal. See also Gondek (2009), 111.

only may be held internationally responsible for the acts and omissions imputable to them within their territory, but also for those acts and omissions committed wherever they exercise jurisdiction.[257]

In sum, the *travaux préparatoires* provide only limited insight in the underlying motives of the drafters of the IHRL treaties central in this study for the choice for the wording used to delineate their scopes of applicability.[258] While demonstrating a preference for the concept of 'jurisdiction' over 'territory', the *travaux préparatoires* provide no fundament to draw definite conclusions on the geographical scope that the drafters attached to the concept of 'jurisdiction'. Nor does it offer insight in the precise meaning of the notion of 'jurisdiction'. At the same time, however, it follows that the choice for the word 'jurisdiction' may be interpreted as a sign that the scope of applicability is not limited to a State's territory, but may extend to areas where individuals come within that State's jurisdiction. The subsequent practice of the human rights supervisory bodies and the ICJ, however, offer more insight.

1.1.4.1.3. Subsequent Practice of Human Rights Supervisory Bodies and the ICJ

The practice of the human rights supervisory bodies and, to a lesser extent, of the ICJ on the issue of the 'jurisdiction' in an extraterritorial context is extensive. The practice demonstrates a difference in approach between the UNHRC, IACiHR/IACtHR[259] and ICJ on the one hand, and the ECiHR/ECtHR on the other hand. While the former appear to adopt a rather relaxed threshold for the extraterritorial applicability of the ICCPR and the ADRDM/ACHR, the latter takes a more cautious stance, which *inter alia* finds reflection in its position concerning the outer geographic boundaries of the ECHR in extraterritorial situations.[260]

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[257] (2010c), *Franklin Guillermo Aisalla Molina v. Ecuador, Case IP-02, OEA/Ser.L/V/II.140 Doc. 10 (2010), Judgment 21 October 2010 (Admissibility)*, §§ 89-90.

[258] For an extensive history of the drafting of the ECHR, see Robertson (1975-1985). See also Gondek (2009), 84-92; Lawson (2004), 88-90.

[259] The vast majority of the relevant practice concerning the scope of applicability of human rights obligations arising from the Inter-American system follows from the IACiHR, in relation to both the ADRDM and the ACHR. While not a treaty, and not containing a jurisdiction-clause, the ADRDM is nevertheless of significance as it reflects human rights principles of the OAS; it functions as the basis for human rights accountability for those States that have not ratified the ACHR, most notably Canada, the United States and Cuba; and both the IACiHR and IACtHR view the ADRDM's provisions as binding international obligations for the member-States of the OAS. As argued by Melzer, the ADRDM is of importance not despite, but arguably *because* it does not "interpret a jurisdiction clause of a particular convention, but [focuses] on the generic content of the human rights relationship between the State and the individual exposed to its collective power. It may also be recalled that no provision of the American Convention 'shall be interpreted as […] excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have'." Melzer (2008), 126.

[260] In *Bankovic*, the ECtHR excluded the applicability of the ECHR to the territory of States not belonging to the legal space of the ECHR.[260] In relevant part it held that "[i]n short, the convention is a multi-lateral treaty operating […] in an *essentially* regional *context* and *notably* in the legal space (*espace juridique*) of the contracting States […]. The FRY clearly does not fall within this legal space. The convention was not designed to be applied throughout the world, even in respect of the conduct of contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the convention" ((2001c), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, Judgment of 12 December 2001*, § 67)". This ruling generated a great deal of discontent among scholars, particularly in light of the participation of members of the Council of Europe in the then recently begun conflicts in Afghanistan (and later

Notwithstanding the difference in stance between the bodies examined, upon closer examination of this practice, it is possible to identify two approaches or tests to determine when an individual whose human rights are affected by the extraterritorial conduct of a State come within the jurisdiction of that State for the purposes of the applicability of the relevant treaty-based human rights obligations.

On the one hand, 'jurisdiction' arises by virtue of the exercise of *State Agent Authority* (SAA). The function of this approach is that it brings individuals within the jurisdiction of a State by virtue of the conduct of its State agents, even if this conduct can be considered an unlawful form of enforcement jurisdiction. In these instances, it is not the geographic location or a person's nationality, rather than the nature of the relationship between the State agent(s) and individuals, which ought to be one of authority and control in order for jurisdiction to arise.

A characteristic feature resulting from the SAA-based practice is that the relevant bodies appear to accept that the obligations arising from rights and freedoms protected in the treaties can be tailored and divided to the degree of authority and control exercised over the individual.[261] In other words, a State is bound to comply with the human rights affected by its conduct only, and not with the entire catalogue of rights protected within the treaty. In addition, it may imply that, as the ICJ suggests, "the obligations of States with regard to the rights of other States and their inhabitants in areas beyond national control are generally limited to the *duty to respect*, that is to say, not to interfere with those rights, and that additional positive obligations require a express basis in international law."[262]

SAA features as the dominant approach in the practice of the UNHRC[263] (thereby adopting a disjunctive reading of Article 2(1) ICCPR)[264] and is used as a more *general, overarching prin-*

Iraq). Lawson and Wilde both interpreted the words "essentially", "notably" and "context" as leaving an opening for the applicability of the ECHR outside the geographical scope of the ECHR. Lawson (2004), 114; Wilde (2005), 794-795. In its subsequent case-law, however, the ECtHR has slowly distanced itself from its ruling in *Bankovic*. Cases such as *Öcalan, Issa* and *Al-Saadoon and Mufdhi* demonstrate that the ECtHR has accepted the applicability of the ECHR in Kenya and Iraq. Finally, in *Al-Skeini*, the ECtHR explicitly recognizes the applicability of the ECHR outside its *espace juridique*: "The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a "vacuum" of protection within the "Convention legal space" […]. However, the importance of establishing the occupying State's jurisdiction in such cases does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States. The Court has not in its case-law applied any such restriction […]" ((2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*, § 142.)

[261] (2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*, § 136 (emphasis added).

[262] Melzer (2008), 135, in conclusion of the ICJ's recognition of the "general obligation of States to ensure that activities within their jurisdiction and control *respect* the environment of other States or of areas beyond national control."

[263] See, inter alia, UNHRC (2004), § 10: "States Parties are required by Article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant *to anyone within the power or effective control of that State Party*, *even if not situated within the territory of the State Party*. […] This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, *regardless of the circumstances in which such power or effective control was obtained*, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation." See also (1981c), *Sergio Euben López Burgos v. Uruguay, Comm. No. 12/52, UNHRC (29 July 1981)*, § 12.2 (emphasis added), in which it held that 'jurisdiction' re-

ciple allowing for the broad extraterritorial applicability of the relevant human rights instruments, regardless of the nature of the State conduct. Thus, 'jurisdiction' is to be understood as a matter of *factual* exercise of power rather than the lawful competence to exercise jurisdiction as understood in general international law,[265] in any case when it concerns the conduct of a State through its agents infringing upon the conventional rights protected under the ICCPR when present outside the territorial jurisdiction of that State.[266] This view is shared by the IACiHR/IACtHR,[267] and seemingly also the ICJ.[268]

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fers "not to the place where the violation occurred, but rather to the *relationship* between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred."

[264] A disjunctive reading of Article 2(1) ICCPR entails that the word 'and' should be read as 'or', implying that jurisdiction under Article 2(1) ICCPR stretches to persons who are within a State Party's territory, as well as to persons who are subject to a State Party's jurisdiction. The phrase "to *anyone* within the power or effective control of that State Party" points out that jurisdiction is linked to the person, and not to a territory (even though the General Comment remains silent on the parameters that determine when the required degree of "power or effective control" is sufficiently satisfied).

[265] It also reached this conclusion in (1981c), *Sergio Euben López Burgos v. Uruguay, Comm. No. 12/52, UNHRC (29 July 1981)*, § 12.3: "Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, *whether with the acquiescence of the Government of that State or in opposition to it*."

[266] See also Melzer (2008), 125.

[267] (1999f), *Coard and Others v. the United States ('US Military Intervention in Grenada), Case No. 10.951, Decision of 29 September 1999*, § 37 (emphasis added). The IACiHR used almost identical wording in *Brothers to the Rescue* (i.e. the case of *Armando Alejandre Jr. and Others v. Cuba*), a case concerning the shooting down of two small airplanes by Cuban military aircraft in international airspace. See (1999c), *Armando Alejandre Jr. and Others v. Cuba ('Brothers to the Rescue'), Case No. 11.589, IACommHR (29 September 1999)*, §§ 23 and 25 (emphasis added). Applied to the facts of the case, "[t]he Commission has examined the evidence and finds that the victims died as a consequence of direct actions taken by agents of the Cuban State in international airspace. The fact that the events took place outside Cuban jurisdiction does not limit the Commission's competence *ratione loci*, because, as previously stated, *when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues* – in this case the rights enshrined in the American Declaration. *The Commission finds conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots of the "Brothers to the Rescue" organization under their authority*." For other expressions on the 'authority and control over persons'-approach, see also Inter-American Commission on Human Rights (1985), § 29 (concerning the extraterritorial assassination of the former Chilean Minister of State and Ambassador, Orlando Letelier, and the former Chilean Commander-in-Chief of the Army, General Carlos Prats); (1993d), *Salas and Others v. the United States (US military intervention in Panama), Case No. 10.573, Decision of 14 October 1993*, § 29 (concerning civilian harm arising from the military operations carried out in 1989 by the US in Panama with the objective of removing General Noriega from power); (1999f), *Coard and Others v. the United States ('US Military Intervention in Grenada), Case No. 10.951, Decision of 29 September 1999* (concerning 17 Grenadian citizens who had been involved in the overthrow of the Biship government and were detained by the US armed forces. They claimed that they had been held in *in communicado* detention for 9-12 days; they had been mistreated and that they had been deprived of their right to a fair trial as a result of US involvement in the judiciary process after having been handed over to the Grenadian authorities); (2002j), *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba, Decision of 13 March 2002* (concerning the request for precautionary measures on behalf of 300 individuals held in detention by the US in Guantanamo Bay, Cuba after their capture in Afghanistan and elsewhere).

[268] In (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, § 29, the ICJ recognizes the continued applicability of the ICCPR during IAC, which indicates that the ICCPR is viewed to apply per definition to a factual exercise of extraterritorial conduct, regardless of the lawfulness of that conduct. According to Melzer (2008), 134, the fact that the ICJ examined the lawfulness of the use of nuclear weapons by States, combined with the assumption that States are not likely to

In contrast, within the European human rights system the practice of (particularly) the ECtHR demonstrates a more cautious and restrictive approach, by adhering to the traditional interpretation of 'jurisdiction' that "[a] State's jurisdictional competence under Article 1 is primarily territorial, […]"[269] and that only in exceptional cases can acts of States carried out, or having effects, extraterritorially constitute an exercise of jurisdiction within the meaning of Article 1.[270] While the ECiHR and ECtHR have recognized in a number of cases that exceptional circumstances may give rise to the applicability of the ECHR in situations of State conduct carried out, or having effects, in the territory of another State, the existence of such exceptional circumstances has been determined on a case-by-case basis, based on the specific facts at hand.[271] As a result, not every situation of State agent-conduct results in the exercise of jurisdiction on the basis of SAA. In sum, SAA may arise:

(1) from acts of diplomatic and consular agents present on foreign territory in accordance with international law (most notably the international law of diplomatic privileges and immunity);[272]
(2) where a State exercises jurisdiction extraterritorially when, through the *consent*, *invitation* or *acquiescence* of the government of the 'receiving' State, it exercises public powers normally to be exercised by that government;[273]
(3) when a State, through its agents, uses *forcible measures* that thereby bring the individual under the control of the State;[274]

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use such weapons in areas under its effective control, points at the applicability of the ICCPR, regardless of geographical location, on the basis of authority and control over persons.

[269] (2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*, § 138, referring to (1989d), *Soering v. the United Kingdom, App. No. 14038/88, Judgment of 7 July 1989*, § 86; (2001c), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, Judgment of 12 December 2001*, §§ 61 and 67; (2004h), *Ilascu and Others v. Moldova and Russia, App. No. 48787/99, Judgment of 8 July 2004*, § 312.

[270] (2001c), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, Judgment of 12 December 2001*, § 67.

[271] (2001b), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, ECtHR (12 December 2001)*, § 61.

[272] (2001b), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, ECtHR (12 December 2001)*, § 73, in reference to (1965), *X v. Federal Republic of Germany, App. No. 1611/62, Decision of 25 September 1965*; (1977c), *X v. UK, App. No. 7547/76, Decision of 15 december 1977*, 74; (1992d), *W.M. v. Denmark, App. No. 17392/90, Decision of 14 October 1993*. In (1975a), *Cyprus v. Turkey (App. No. 6780/74 and No. 6950/75, 26 May 1975)*, § 8, the ECiHR extends this to "authorized agents of the State", to include the armed forces. For almost identical reasoning, see also (1985b), *G. v. the United Kingdom and Ireland, App. No. 9837/82, Decision of 7 March 1985*, § 25.

[273] This possibility has been expressly mentioned in the case of (2001b), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, ECtHR (12 December 2001)*, § 71 and was reaffirmed in *Al-Skeini*, where the ECtHR explained that "[…] where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State. (2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*, § 135. See also (1992a), *Drozd and Janousek v. France, App. No. 12747/87, Judgment of 26 June 1992*; (2002c), *Gentilhomme, Schaff-Benhadji and Zerouki v. France, App. Nos 48205/99, 48207/99, 48209/99, Judgment of 14 May 2002*; and (1977b), *X and Y v. Switzerland, App. No. 7289/75, Decision of 14 July 1977*. For more detailed discussion, see Gondek (2009), 147-150.

[274] (2005l), *Öcalan v. Turkey, App. No. 46221/99, Judgment (Grand Chamber) 5 December 2005*; (2004j), *Issa v. Turkey, App. No. 31831/96, Judgment of 16 November 2004*; (2007d), *Pad v. Turkey, App. No. 60167/00, Judgment of 28 June 2007*; (2008k), *Solomou v. Turkey, App. No. 36832/97, Judgment of 24 June 2008*; (2010d), *Medvedyev and Others v. France, App. No. 3394/03, Judgment of 29 March 2010*; (2010b), *Al-Saadoon and Mufdhi*

(4) when a foreign State remains present on another State's territory following the removal from power of a State's government, and assumes the exercise of some or all of the public powers normally to be exercised by a sovereign government, but which it is no longer able to fulfill, such as the authority and responsibility for the maintenance of security in a territory or part thereof.[275]

A *second* approach detectable from the practice of the relevant human rights bodies (most notably the ECtHR) and the ICJ concerns *Effective Control over an Area* (ECA). As explained by the ECtHR, ECA concerns the situation

> when as a consequence of military action – *whether lawful or unlawful* – [a State] *exercises effective control of an area* outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[276]

The effect of effective overall control over territory is that it is not necessary to demonstrate whether in a particular case jurisdiction arose from the conduct of State agents affecting the human rights of a particular individual. Rather, it automatically generates jurisdiction of the State in relation to all individuals present within the territory of control (i.e. the area of operations), regardless of the nature of the acts of the State. As such, under ECA, the rights and freedoms cannot be tailored and divided in a fashion similar to SAA, but the State is, in principle, bound to guarantee the full range of rights and freedoms protected under the treaty.

Based on the practice of the ECtHR and ICJ, the question of ECA has arisen in the following situations:

(1) a State's loss of control over part of its own territory;[277]

(2) military occupation;[278]

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v. the United Kingdom, App. No. 61498/08, Judgment of 2 March 2010; (2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*; (2011a), *Al-Jedda v. United Kingdom, App. No. 27021/08, Judgment of 7 July 2011*.

[275] As per the reasoning applied by the ECtHR in (2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*, § 149.

[276] (1995e), *Loizidou v. Turkey (Preliminary Objections), App. No. 40/1993/435/514, Judgment of 23 March 1995* (emphasis added). See also (2001d), *Cyprus v. Turkey, App. No. 25781/94, Judgment of 10 May 2001*, § 76; (1996h), *Loizidou v. Turkey (Merits), App. No. 40/1993/435/514, Judgment of 18 December 1996*, § 52; (2001c), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, Judgment of 12 December 2001*, § 70; (2004h), *Ilascu and Others v. Moldova and Russia, App. No. 48787/99, Judgment of 8 July 2004*, §§ 314-316; (2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*, § 138.

[277] (2004h), *Ilascu and Others v. Moldova and Russia, App. No. 48787/99, Judgment of 8 July 2004*, § 313. In casu, this implied that "Moldova still has a positive obligation to take the diplomatic, economic, judicial or other measures that it is in the power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention." See § 331

[278] (1995e), *Loizidou v. Turkey (Preliminary Objections), App. No. 40/1993/435/514, Judgment of 23 March 1995*, § 62; (2001d), *Cyprus v. Turkey, App. No. 25781/94, Judgment of 10 May 2001*; confirmed in (2001b), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, ECtHR (12 December 2001)*, § 71; (1999f), *Coard and Others v. the United States ('US Military Intervention in Grenada), Case No. 10.951, Decision of 29 September 1999*, § 37; (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, §§ 111 and 113; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*, § 216. In the latter case, after having established the thresholds for determining that Ugandan forces occupied the Ituri region in the sense of Article 42 of the Hague Regulations, the ICJ held that an Occupying Power is "[…] under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its

(3) invitation, consent or acquiescence;[279]
(4) when a relationship of dependence exists between a State and a local administration within another State;[280]
(5) temporary control over territory.[281]

As can be concluded from the above, the question applicability of valid treaty-based IHRL norms pertaining to targeting and operational detention to determine the interplay potential is subject the the counterinsurgent State's ratification of a relevant treaty as well as the specific context in which the counterinsurgency operation takes place. This will be examined in more detail in Chapter IV below.

1.1.4.1.4. Customary IHRL

The issue of applicability of human rights obligations under regional and universal treaties, particularly in an extraterritorial context, does not affect the continued applicability of human rights obligations under customary international law, irrespective of where, why and how a State operates. As noted by Lubell:

> [t]he debate over extraterritorial effect of human rights treaties is paramount to the determination of the competence of treaty monitoring bodies to scrutinize the cases but, regardless of the outcome of this debate, if the affected right is part of customary international law then, by taking the extraterritorial forcible measure, a state may have violated its international legal obligations.[282]

The applicability of customary IHRL is not depending on the fulfillment of an applicability clause and as such IHRL is appears not to be territorially limited in its application, particularly not in the case of IHRL-obligations *erga omnes* and *jus cogens*. In sum, therefore, States continue to be bound by customary IHRL obligations wherever they operate, regardless of whether the conventions to which they are a party apply, and irrespective of how applicability of such treaties is determined.

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power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. *This obligation comprised the duty to secure respect for the applicable rules of international human rights law* and international humanitarian law, to protect the inhabitants occupied territory against acts of violence, and not to tolerate such violence by any third party" (§ 178 (emphasis added)). However, as argued by Ruys and Verhoeven, the threshold established by the ICJ in *DRC v. Congo* is "open to questioning." Ruys & Verhoeven (2008), 195. The ICJ's ruling that "international human rights instruments are applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory," *particularly* in occupied territories" arguably indicates that jurisdiction also arises in situations other than occupation, as argued by Melzer (2008), 134. Also: Gondek (2009), 210.

279 (2001b), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, ECtHR (12 December 2001)*, § 71.

280 (2004g), *Ilascu and Others v. Moldova and Russia, App. No. 48787/99, ECtHR (8 July 2004)*, § 392 (emphasis added), confirmed in (2012a), *Catan and Others v. Moldova and Russia, App. Nos 43370/04, 8252/05 and 18454/06, Judgment of 19 October 2012*, § 89.

281 (2004j), *Issa v. Turkey, App. No. 31831/96, Judgment of 16 November 2004*. In the this case, regarding large-scale military operations by Turkish forces in Northern Iraq, the ECtHR held that Turkey, had the applicants established "the required standard of proof" (§ 84), would have exercised *de facto* temporary control over such territory (§ 74).

282 Lubell (2010), 235.

1.1.4.2. Applicability in Armed Conflict

As noted, the assumption in this study is that the situational contexts of counterinsurgency take place in the context of armed conflict. The assumption of the existence of an armed conflict is also of relevance for the question of applicability of IHRL. After all, if only LOAC applies in an armed conflict, as some argue, then no interplay will arise. Indeed, a brief look in history teaches us that, in its initial phase as a regime of public international law immediately after World War II, IHRL was not envisaged to be applicable in armed conflicts, in any case not in international armed conflicts.[283] This separatist stance changed in the early 1950's, on instigation of the UN when it invoked human rights in relation to the Korean conflict[284] and the Soviet invasion in Hungary.[285] The turning point, however, came with the Six Day War, in 1967,[286] the 1968 Tehran International Conference on Human Rights and the subsequent adoption by the General Assembly of resolution 2675, in which the principle was laid down that "[f]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict."[287] Not until the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (1974-1977), and the resulting documents (AP I and II) before the ICRC, albeit seemingly hesitantly at first, acknowledged that human rights continue to apply during armed conflict.[288] Both protocols refer expressly to human rights.[289]

Today, despite persistent objection among some States (most notably Israel and the US) and scholars,[290] the applicability *ratione temporis* of human rights is generally accepted to stretches from peace to armed conflict "and any point on the blurred scale between them."[291] In other words: human rights apply *at all times*. Both the UN and the ICRC have consistently and continuously reaffirmed the applicability of human rights in armed conflict.[292] Also in

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[283] The two principal players – the UN and the ICRC – had different goals in mind. Whereas the UN focused on peace, armed conflict and the place of IHRL therein – as the law of peace – was not an issue. Peace was also the principal temporal mindset of the UDHR. The ICRC, on the other hand, concentrated on the regulation of armed conflict, be it international armed conflict or non-international armed conflict. The principal legal regime to regulate armed conflict was LOAC. On the separation between IHRL as the law of peace, and LOAC as the law of war, see Draper (1971); Suter (1976), 393.

[284] United Nations (1953) (the resolution dealt with the treatment of captured civilians and soldiers in Korea by North Korean and Chinese forces).

[285] United Nations (1958a): "to respect […] the Hungarian people's enjoyment of fundamental human rights and freedoms."

[286] United Nations (1958b), preamble, § 1(b): "essential and inalienable human rights should be respected even during the vicissitudes of war."

[287] United Nations (1970a). This resolution finalized the Tehran process and followed two reports of the Secretary-General (United Nations (1969) and United Nations (1970b), §§ 20-29, Annex 1)

[288] Sandoz, Swinarski & Zimmerman (1987), §§ 4429.

[289] For examples, see Article 72 AP I and the Preamble of AP II.

[290] For the States and scholars in question, see the separatist view, discussed in Chapter II (Legal Context).

[291] Lubell (2010), 236-237.

[292] See, for example, at the level of the UN, in relation to the armed conflicts in the Middle East, in, *inter alia*, GA Res. 2546 (XXIV), UN Doc. A/RES/2546/XXIV (11 December 1969) (pursuant the Six Day War)); the former Yugoslavia (SC Res. 1019, UN Doc. S/RES/1019 (9 November 1995); SC Res. 1034, UN Doc. S/RES/1034 (21 December 1995)); Kuwait and Iraq (GA Res. 46/135, UN Doc. A/RES/46/135 (19 December 1991)); Afghanistan (in *inter alia*, SC Res. 1974, UN Doc. S/RES/1974 (22 March 2011)); the Great Lakes Region (SC Res. 1635, UN Doc. S/RES/1635 (28 October 2005); SC Res. 1653, UN Doc. S/RES/1653 (27 January 2006)); and most recently in Libya (SC Res. 1973, UN Doc. S/RES/1973, (17 March 2011). The ICRC has done so, *inter alia*, in its Customary IHL Study. See ICRC (2005a), 299-305.

the practice of international and regional (quasi-)judicial (human rights) bodies – most notably the UNHRC,[293] the IACiHR/IACtHR,[294] ECtHR,[295] ICJ,[296] and ICTY[297] – there is an abundance of evidence demonstrating the acceptance of the applicability of human rights in armed conflict.

In addition to practice of (quasi)-judicial (human rights) bodies, State practice, while not completely uniform, also points in the acceptance of the applicability of IHRL in armed conflict, also in extraterritorial situations.[298]

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[293] See, for example, Human Rights Committee (2001c), § 3 (emphasis added). See also UNHRC (2004), § 11; *Concluding Observations of the Human Rights Committee: Israel (21 Augustus 2003)*, UNHRC, UN Doc. CCPR/CO/78/ISR (2003).

[294] See, for example, (1995b), *Bautista de Arellana v. Colombia, Comm. No. 563/1993 of 27 October 1995*; (1979c), *Maria Fanny Suarez de Guerrero v. Colombia, Comm. No. 11/45 of 5 February 1979*; (1987b), *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, January 30, 1987*; (1987d), *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, October 6, 1987*; (1997b), *Abella et al. v. Argentina (La Tablada), Case No. 11.137, Decision of 18 November 1997*; (2002e), *Las Palmeras Case v. Colombia, Case No. 96, Judgment of 26 November 2002*; (2000b), *Bámaca Velásquez v. Guatemala, Case No. 11/129, Judgment of 25 November 2000*; (2002i), *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba* (emphasis added); IACiHR (2002), § 61.

[295] See, for example, (1998f), *Ergi v. Turkey, App. No. 66/1997/850/1057, Judgment of 28 July 1998*; (2004n), *Özkan v. Turkey, App. No. 21689/93, Judgment of April 6, 2004*; (1998g), *Gülec v. Turkey, Appl. No. 21593/93, Judgment of 27 July 1998*; (2005e), *Isayeva v. Russia, App. No. 57950/00, Judgment of 14 October 2005*; (2005f), *Isayeva, Yusupova and Bazayeva v. Russia, App. No. 57947/00, 57948/00, 57949/00, Judgment of 24 February 2005*; (2005h), *Khashiyev and Akayeva v. Russia, App. Nos. 57942/00 & 57945/00, Judgment of 24 February 2005*. In relation to this practice, it must be noted that while the existence of an armed conflict became unambiguously clear from the facts of the case, the claimed violations of human rights of the ECHR were never reviewed in that light. The main reasons arguably lie in the ECtHR's unfamiliarity with LOAC and its reluctance, for political considerations, to take a position as regards the qualification of the situations at hand as an armed conflict when the respondent State has not done so. Also, the States concerned refused to acknowledge the existence of an armed conflict taking place within their own territory (which became, *inter alia*, clear from the absence to derogate from obligations under the ECHR based on the existence of a state of emergency). See also (2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*, as demonstrated by its discussion of the ICJ's view on the interplay between IHRL and LOAC in armed conflict, see § 90 ff, and of the continued duty of States to investigate violations of IHRL in armed conflict, see § 92 ff.

[296] (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, § 25; (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*,; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*, § 216. See also Ruys & Verhoeven (2008), 195.

[297] (2001n), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-12-A, Judgment of 20 February 2001 (Appeals Chamber)*, § 149; (2002m), *The Prosecutor v. Kunarac and Others, Case Nos. IT-96-23 & IT-96-23/1, Appeals Chamber (June 12, 2002)*, § 60.

[298] Evidence in support of such State practice can be derived from the reactions, and absence of reactions of respondent States to that effect in State reports and individual complaint procedures. For example, in relation to occupation, in (2004o), *Al-Skeini*; (2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*, the UK government did not argue that IHRL was not applicable to its armed forces operating in occupied Iraq, but rather that the UK did not exercise sufficient effective control over the occupied territory. Also, no State party to the ECHR has objected to Turkey's payment of the damages with respect to its violation of human rights during its occupation of Northern-Cyprus. See (2000k), *Loizidou v. Turkey, Interim Resolution DH 105 Concerning the Judgment of the European Court of Human Rights of 28 July 1998 in the case of Louizidou against Turkey, adopted by the Committee of Ministers on 24 July 2000 at the 716th Meeting of the Ministers' Deputies*,
available at http://www.coe.int/T/CM/WCD/humanrights_en.asp#.[298] Russia has never challenged the ECtHR's application of IHRL in the Chechnya cases.

A final important source demonstrating support of the applicability of IHRL in armed conflict are the derogation clauses available in the ICCPR, ACHR and ECHR. These clauses, permitting suspension of certain human rights upon satisfaction of certain requirements, are designed to cover situations public emergency threatening the existence of the State, to include situations of armed conflict.

Notwithstanding the abundance of evidence demonstrating the continued applicability of IHRL during armed conflict, the very impact of such armed conflict on the security and continued existence of the counterinsurgent State may necessitate the suspension of human rights. The principal human rights instruments all provide for specific clauses that permit the derogation from human rights in times of emergency, unless indicated otherwise. The following paragraph will highlight the conditions under which such derogation may take place.

1.1.5. Derogation

A final aspect characterizing IHRL as a regime is the concept of derogation. While not widely resorted to,[299] the concept of derogation concerns the authority recognized in IHRL to suspend the applicability of a derogable catalogue of individual human rights in exceptional situations of public emergency that threaten the life of the nation. The purpose of derogation, as expressed by the UNHRC in its General Comment 29, is "the restoration of a state of normalcy where full respect for the Covenant can again be secured […]."[300]

States "may" derogate from individual human rights in situations of public emergency threatening the life of the nation,[301] such as an armed conflict. This power is expressly regu-

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[299] For example, in the context of the ECHR, to date, Albania, France, Greece, Ireland, Turkey and the United Kingdom are the only State parties to have made use of Article 15 ECHR. Between 2 March-14 July 1997, Albania derogated in relation to the "communist armed rebellion" caused by the collapse of the 'pyramid' games (Derogation contained in a Note Verbale from the Ministry of Foreign Affairs of Albania). Between 7 February-2 September 1985, France derogated in relation to severe civic disturbances during parliamentary elections and civil war in New-Caledonia (Declaration contained in a letter from the Charge d'Affaires a.i. of France, and withdrawn by a letter of the Charge d'Affaires a.i. of France, dated 2 September 1985). Greece derogated in relation to the coup d'etat in 1967. Ireland derogated twice in relation to the IRA, from 20 July 1957-3 April 1962 (Derogation contained in a letter from the Secretary General of the Department of External Affairs of Ireland; Withdrawal of derogation contained in a letter from the Secretary General of the Department of External Affairs of Ireland, dated 3 April 1962, registered at the Secretariat General on 6 April 1962) and from 1976-1977 (Derogation contained in a Note verbale from the Permanent Representation of Ireland; Withdrawal of derogation contained in a letter from the Secretary General of the Department of External Affairs of Ireland). Between 20 July 1957-22 August 1984, the United Kingdom derogated in relation to the situation in Northern-Ireland. The United Kingdom derogated again from 23 December 1988-19 February, also in relation to the situation in Northern Ireland (Communication contained in a letter from the Permanent Representative of the United Kingdom, and withdrawn by a Notification from the Permanent Representation of the United Kingdom, dated 19 February 2001). The third derogation by the United Kingdom relates to the attacks of 11 September 2001 and the "terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism", and refers to the period from 18 December 2001-14 March 2005 (Declaration contained in a Note Verbale from the Permanent Representation of the United Kingdom; Withdrawal of derogation as of March 14, 2005, Note verbale from the Permanent Representation of the United Kingdom). See also Warbrick (2004).

[300] UNHRC (2001), § 1.

[301] Arguably, the concept of state of emergency involves a seemingly *subjective discretionary power of self-characterization*. Provost (2002), 284 ff. Views as to the nature of the self-characterizing authority to dero-

lated in Article 4 ICCPR,[302] Article 27 ACHR[303] and Article 15 ECHR.[304] Thus, the mere fact that the circumstances within a State's territory cross the *de iure* thresholds that permit derogation does not inevitably imply the further non-applicability of derogable human rights. Instead, this requires a deliberate, final *decision* of the derogating State to invoke the relevant derogation clause. In other words, if a State decides not to invoke his right to dero-

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gate, however, differ. The ECtHR has accepted a wide margin of appreciation. See See also (1977a), *Ireland v. the United Kingdom, Case No. 5310/71, Judgment of 13 December 1977*, § 207; (1993a), *Brannigan and McBride v. the United Kingdom, App. No. 14553/89; 14554/89, Judgment of 26 May 1993*, §§ 43, 47. The UNHRC has adopted a, what appears to be, *objective approach* towards the discretionary power of States to characterize a situation that warrants derogation from human rights obligations. See UNHRC (2001), § 6 and also Siracusa Principle 63, stipulating that "the provisions of the [ICCPR] allowing for certain derogations in a public emergency are to be interpreted restrictively" (United Nations (1985), available at: http://www.unhcr.org/refworld/docid/4672bc122.html [accessed 3 May 2011]) and § 8 of the 1990 ILC Guidelines for Bodies Monitoring Human Rights During a State of Emergency: "in contentious cases arising out of both inter-state and individual applications, the treaty implementing body should not extend a broad "margin of appreciation" to the derogating state but should make an objective determination whether a public emergency as defined in the treaty actually existed […]" (ILA (1990)). Among scholars there is debate as to the proper approach. Adopting a restrictive approach: Higgins (1978); Meron (1987); Oraá (1992). Adopting a wide discretionary power, see Hartman (1981). The better view therefore is that expressed by Provost, namely that "the state does not have exclusive or ultimate powers of characterisation, and that other actors may proceed to their own assessment of the situation. From a legal standpoint, the state cannot effectively […] maintain [a situation] as a state of emergency. Once the equal validity of characterisation by other agents is recognised, there may be some pressure put on the state to revise its opinion, […]."Provost (2002), 291.

[302] Article 4 ICCPR reads:

> 1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
>
> 2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
>
> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

[303] Article 27 ACHR reads: "In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin."

[304] Article 15 ECHR reads: "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 Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

gate, its obligations to guarantee individual human rights under the relevant treaty remain fully applicable, even in the case of an armed conflict.

However, a mere decision to derogate is not sufficient, but must be lawful following satisfaction of certain *substantive* and *procedural* requirements.[305] These concern:

- the requirement of necessity, requiring States to demonstrate that a public emergency exists that threatens the life of the nation;[306]

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[305] While all human rights treaties generally contain the same requirements, the interpretation thereof differs at some points. Relevant sources are the case-law of the relevant human rights bodies, as well as to General Comments 5 and 29 of the UNHRC, both of which provide further explanation and guidance on Article 4 ICCPR (UNHRC (1981); UNHRC (2001). Also, guidance can be derived from Concluding Observations and Comments by the UNHRC on country reports. Other relevant sources of interpretation are, in relation to Article 4 ICCPR, the Siracusa Principles on the Limitations and Derogation Provisions in the International Covenant on Civil and Political Rights (hereinafter: *Siracusa Principles*) of the International Commission of Jurists, the *Paris* Minimum *Standards* of Human Rights Norms in a State of Emergency (hereinafter: *Paris Standards*) and the Queensland Guidelines for Bodies Monitoring Respect for Human Rights During States of Emergency (hereinafter: *Queensland Guidelines*), of the International Law Association (ILA (1990).

[306] In terms of the ICCPR, these exceptional circumstances exist in "time of public emergency which threatens the life of the nation." The ECHR refers to "time of war or other public emergency threatening the life of the nation." The ACHR speaks of "time of war, public danger, or other emergency that threatens the independence or security of a State party." Fawcett explains that it is sufficient that "[…] there is such a breakdown of order or communications that organized life cannot, for the time being, be maintained." Fawcett (1987), 308. See also (2009a), *A. and Others v. United Kingdom, App. No. 3455/05, Judgment of 19 February 2009*, § 79 involving derogation measures of the United Kingdom taken in response to the attacks of 11 September 2001 and the ensuing terrorist threat to, and in the UK. The ECtHR found that while the UK's measures were disproportionate, it did accept that, in terms of severity, there was a threat to the life of the nation caused by terrorism "even though the institutions of the State did not appear to be imperrilled." While it was questioned by the applicants that terrorism constituted a threat to UK's insitutions and existence as a civil community, the ECtHR held that it "[…] has in previous cases been prepared to take into account a much broader range of factors in determining the nature and degree of the actual or imminent threat to the "nation" and has in the past concluded that emergency situations have existed even though the institutions of the State did not appear to be imperilled […]." In *temporal* terms, the use of the verb "threatening" suggests that the threat must be ongoing or, at a minimum, about to become manifest. See Ducheine (2008), 423, and accompanying footnote 369. Preventative derogation is not allowed. O'Donnell (1985), 24. In *geographical* terms, the threat does not have to affect the State's entire territory, but may be geographically limited. However, the ECHR adopts a more flexible standard than in the ICCPR. For example, in relation to the former, in *Aksoy v. Turkey*, the ECtHR acknowledged that "the particular extent and impact of PKK terrorist activity in South-East Turkey has undoubtedly created, in the region concerned, a "public emergency threatening the life of the nation."" ((1996a), *Aksoy v. Turkey, App. No. 21987/93, Judgment of 18 December 1996*, § 70. See also Hartman (1981), 16). It is, however, still required that the effects of the public emergency threaten the life of the *entire* population. Arguably, The Paris Standards apply a lower threshold as it applies the expression 'public emergency' to "exceptional situations of crisis or public danger, actual or imminent, which affects the whole population", but extends it to "the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed" as well as to threats affecting "the organized life of the community." This approach seems sensible in respect of States with exceptionally large territories, such as Canada, or the Russian Federation. See Lillich (1985), 1073, Section A, No. 1(b). See, in contrast, the Siracuse Principles, which applies a significantly higher threshold, as it limits derogation to threats that affect "the whole of the population and either the whole or part of the territory of the State, and threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensible to ensure and protect the rights recognized in the Covenant." See United Nations (1985), 7, No. 39. See also Joseph, Schultz & Castan (2004), 825. Also in geographical terms, the events of 9/11, and the acclaimed subsequent global terrorist threat have raised questions as to whether a threat in State

- the requirement of proportionality, requiring States to take measures that do no go further in intensity, geographical scope and duration than is "strictly required by the exigencies of the situation";[307]
- the requirement that derogation measures may not be inconsistent with the derogating State's other treaty-based and conventional obligations under international law, such as those under LOAC;[308]
- the prohibition to derogate from non-derogable human rights, identified as such;[309]
- the requirement that the derogation amounts to discrimation;[310]
- the requirement to officially proclaim the state of emergency;[311]

A can threaten the life of other nations, and even if so, whether it can be imminent. Joseph (2002), 84; Gross & Ní Aolaín (2006), 257-258.

[307] The requirement of proportionality reflects the principle that derogation measures are viewed as effective means to achieve the return to normal life in a lawful manner. It also reflects the principle that in view of the threat level, "normal measures or restrictions, permitted by the Covenant for the maintenance of public safety, health and order, are plainly inadequate." See (1969a), *"Greek Case", App. No.3321/67, Decision of 5 November 1969*, § 153. This implies that measures of derogation may not be adopted if alternative measures which less restrict individual human rights are available. Also, the measures must not go beyond that which is necessary to remove the threat. This is also known as the principle of subsidiarity, or suitability. See Arai-Takahashi (2010), 465.

[308] In relation to the ICCPR, the principle of consistency must be read in conjuction with Article 5 (1) of the ICCPR, which states that 'there shall be no restriction upon or derogation from any fundamental rights recognized in other instruments on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent'. Also, "other obligations" include those accepted by the UNHRC beyond the list of non-derogable rights mentioned in Article 4(2) ICCPR, to include crimes against humanity as laid down in the Rome of the International Criminal Court, as well as "elements [of human rights] that in the Committee's opinion cannot be made subject to lawful derogation under article 4." UNHRC (2001), § 11-13.

[309] Article 4 ICCPR mentions the right to life (Article 6); prohibition from torture (Article 7); prohibition from slavery and servitude (Article 8 (paragraphs 1 and 2); prohibition from imprisonment on the basis of inability to fulfil a contractual obligation (Article 11), no punishment without law (Article 15), right to recognition as a person before the law (Article 16); and right to freedom of thought, conscience and religion (Article 18).

Article 15 ECHR specifically mentions right to life (Article 2), "except in respect of deaths resulting from lawful acts of war," and: prohibition of torture (Article 3); prohibition of slavery or servitude (4 (paragraph 1); no punishment without law (Article 7).

Article 27 ACHR mentions as non-derogable the following human rights: right to juridical personality (Article 3); right to life (Article 4); right to human treatment (Article 5); freedom from slavery (Article 6); freedom from ex post facto laws (Article 9); freedom from conscience and religion (Article 12); rights of the family (Article 17); right to a name (Article 18); rights of the child (Article 19); right to nationality (Article 20); right to participate in government (Article 23).

In its General Comment 29, the UNHRC has extended the list of peremptory non-derogable human rights beyond the list mentioned in Article 4 ICCPR: "States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence." UNHRC (2001), § 11.

[310] The list of non-discriminatory grounds is exhaustive and does not mention other elements such as national origin, disability or sexual orientation. Only *direct* discrimination is prohibited, as the word "solely" makes clear. See McGoldrick (2004b), 413.

[311] The duty of proclamation is also referred to as the *principle of legality* and is designed to prevent arbitrary or *de facto* derogation. UNHRC (2001), § 2: "The [requirement of proclamation of a state of emergency] is essential for the maintenance of the principles of legality and rule of law at times when they are most needed." According to Hartman, it requires States "to act openly from the outset of the emergency and

- the requirement of notification.[312]

Under customary IHRL, derogation is arguably possible on the basis of general concepts of necessity in public international law. The most suitable doctrines are those of 'state of necessity'[313] and '*force majeure*',[314] even though it is argued by Duffy that the relevance of these doctrines in the context of IHRL is limited.[315]

Thus, under the doctrine of 'state of necessity', a public emergency may arguably amount to a circumstance precluding the wrongfulness of an act that contravenes human rights obligations. In that case, derogation is permissible under customary international law if it protects "an essential interest", i.e. the life of the nation, against "a grave and imminent peril", i.e. the circumstances leading to a public emergency. In addition, the derogation may not impair an "essential interest" of the derogating State, or of the international community as a whole. Arguably, respect for human rights is such "an essential interest"

However, necessity may not be invoked, in any case, if (1) the international obligation in question excludes the possibility of invoking necessity; or (2) if the State has contributed to the situation of necessity. The first requirement, most relevant in this respect, raises the question of whether and, if so, which human rights are non-derogable under customary IHRL. Arguably, these are the same rights listed as non-derogable under the ICCPR, ACHR and ECHR, supplemented with other rights that have attained the status of customary law or general principles of law, and which can be considered as non-derogable.[316] Among these principles are, arguably, the requirements of an exceptional threat, proportionality, non-derogability and of non-discrimination.[317]

Under the doctrine of 'force majeure', derogation from human rights obligations may be permissible if the situation amounts to "the occurrence of an irresistible force or of an unforeseen external event beyond the control of the State, making it materially impossible in the circumstances to perform the obligation."[318]

It thus follows that if certain human rights obligations are or cannot be derogated from in armed conflicts, they are forced to co-exist with equally applicable obligations of LOAC,

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to delegitimize after-the-fact justifications for violation of fundamental rights." See Hartman (1985), 99-100.

312 The notification requirement functions to ensure supervision by international bodies of the legality of the establishment of a state of emergency. A notification must be submitted in writing and express the factual circumstances, as well as the measures necessitating the State to derogate. Under the ICCPR, there is a duty to inform the other State parties immediately, via the UNSG, of (1) the provisions from which is has derogated from, and (2) of the reasons necessitating the derogation. With respect to the former, a notification of derogation under the ECHR implies no obligation to notify which human rights are derogated from (unlike the ICCPR), nor does it entail an obligation to declare a state of emergency[312] or to actually enforce the measures of derogation. Nevertheless, the ECiHR has stated that some form of public and official announcement is required. (1961b), *Lawless v. Ireland, App. No. 332/57, Judgment of 1 July 1961 (Merits)*, § 47; (1978a), *Cyprus v. Turkey, App. No. 8007/77, Decision of 10 July 1978*, § 527; (1993a), *Brannigan and McBride v. the United Kingdom, App. No. 14553/89; 14554/89, Judgment of 26 May 1993*, § 72. In temporal sense, a State is allowed, to a reasonable degree, to delay the notification after commencement of enforcement of measures of derogation. A delay of twelve (*Lawless v. Ireland*) and fortythree (*Ireland v. United Kingdom*) days has been accepted; four months (*Greek Case*) delay not.

313 See Article 25, International Law Commission (2001b); Naert (2010), 583-584; Duffy (2005), 297-298; Oráa (1999), 435;

314 Article 23 of International Law Commission (2001b). Duffy (2005), 298.

315 Duffy (2005), 298.

316 Naert (2010), 584; Duffy (2005), 296; Oráa (1999), 437; Seiderman (2001), 81.

317 Oráa (1999); Kolb, Poretto & Vité (2005), 457.

318 Article 23 of International Law Commission (2001b).

which then triggers issues as to the appreciation of such interplay. In Part B, Chapter IV we will therefore more closely examine the possibility of derogation of human rights affected by targeting and operational detention operations.

1.2. LOAC

Besides IHRL, the regime of LOAC is of fundamental relevance to the question of the lawfulness of deprivations of life and liberty resulting from counterinsurgency operations. The general purpose of LOAC is to govern the conduct of the *belligerent parties* to an armed conflict. More specifically, LOAC aims to achieve a compromise between a belligerent party's interests arising from *military necessity*, on the one hand, and *humanitarian considerations*, on the other hand, in order to eventually:

(3) safeguard those who do not, or no longer, take a direct part in hostilities; and
(4) limit the use of force to the amount necessary to achieve the legitimate aim of the armed conflict, which – independently of the causes fought for – can be only to *weaken* the military potential of the enemy.[319]

From this general purpose several generic themes can be distilled, most importantly (1) the nature of the relationships LOAC seeks to govern, as well as of the rights and obligations attached to those forming part of those relationships; (2) the significance of the delicate balance between military necessity and humanity; and (3) LOACs applicability to situations of 'armed conflict' only. These themes merit further attention, for together they form the conceptual underpinnings of LOAC, which characterize it as a regime and distinguish it from IHRL. As such, they may influence the existence, as well as the outcome, of the interplay with IHRL. Moreover, they are informative of the relationship of the concepts of insurgency and counterinsurgency vis-à-vis LOAC. Our focus will therefore now turn to these themes, to begin with the nature of the relationships it seeks to regulate, as well as the nature of the obligations and rights it respectively imposes and affords.

1.2.1. Relationships

LOAC regulates two principal relationships. *Firstly*, LOAC regulates the *horizontal* relationship between the belligerent parties to the armed conflict, and, as such, that among individual fighters who take a direct part in the hostilities. More specifically, it imposes upon the parties to the conflict obligations that regulate how they are to behave vis-à-vis each other, most notably in respect of (1) individuals directly participating in hostilities; (2) individuals who no longer take a direct part in the hostilities because they are wounded, sick or shipwrecked, or taken prisoner; and (3) individuals who do not take a direct part in hostilities, i.e. civilians. At the same time, besides obligations, LOAC provides the parties to the armed conflict far-reaching authorizations, enabling them to attain the legitimate objective of warfare, which is to defeat the enemy.

Secondly, LOAC regulates the *vertical* legal relationship between belligerent parties to the armed conflict, on the one hand, and protected persons, most generally, fighters who are *hors de combat* (i.e. wounded, sick or shipwrecked, or have been take prisoner) as well as civilians. The precise protection offered to these categories of individuals is subject to the nature of the armed conflict as IAC or NIAC, as well as the fulfillment of the conditions underlying categorization into a protected group.

[319] Sassòli & Bouvier (1999), 67.

1.2.2. Rights

1.2.2.1. Standards of Treatment

From the perspective of the protected individual, the protective 'rights' under LOAC are to be viewed as *objective public order standards of treatment*,[320] "which depend as little as possible, for their application, on the wishes of those concerned."[321] In other words, these public order standards of treatment connote a certain dual nature:[322] protected individuals have no power to renounce the protection provided to them under LOAC, regardless of the nature of their (previous) conduct, but have the right to seek compliance with their protective status. At the same time the individual is dependent on the willingness of States to comply with the public order obligation to afford certain standards of treatment to protected individuals, but when fulfilling its obligation, the State also has the right to afford the protection required, regardless of their behavior or wish.[323]

1.2.2.2. Authorizations and Privileges

Besides conferring standards of treatment upon protected persons, LOAC also offers 'rights' to the parties to the armed conflict and individual members of their armed forces. These 'rights' are, on the one hand, to be viewed as authorizations, premised in military necessity. Conduct based on these authorizations may have far-reaching consequences for subjects and objects. For example, LOAC, through its law of hostilities, permits the parties to an armed conflict to directly attack military objectives, resulting in the destruction of objects, or the killing or wounding of individuals, in so far permissible. Also, LOAC permits parties to the conflict to relocate the civilian population to protect them from the dangers of hostilities, or to intern enemy fighters and civilians. At an individual level, the law of IAC grants a qualified privilege to individuals who qualify as combatants, who, under immunity from prosecution, are permitted to kill enemy combatants and other persons directly participating in hostilities. However, these 'rights' do not authorize unlimited behavior, but are subject to strict requirements framed in obligations.

1.2.3. Obligations

As a general rule, the obligations arising in relation to the two principal purposes of LOAC are binding upon all entities and individuals who have the substantive ability to participate in an armed conflict by making acts of war,[324] i.e. the contribution to the armed conflict must

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[320] Provost (2002), 34.

[321] Pictet (1958b), 75 (emphasis added). Despite occasional – explicit or implicit – mentioning of the term 'right(s)' (e.g. Common Articles 6, 7 (GC I, II and III) and 5, 7, 8 (GC IV), the normative framework of LOAC is not based upon a system of 'rights' similar to that under IHRL (Provost (2002), 29). This is not to imply that rights under LOAC are – so to speak – 'blank rounds' or hollow phrases, lacking any strength. However, the 'rights' found in LOAC are generally denied self-executing power.[321] In other words, the individual in LOAC is incapable of exercising or waiving rights.[321] For an overview of case-law denying LOAC provisions self-executing power, see Provost (2002), 33, footnote 60.

[322] Pictet (1958b), 77; Abi-Saab (1984)(265), 269; Dinstein (1984)(345), 354-6; Greenwood (1999), 282; Meron (2000a), 251-253.

[323] Illustrative of this dual nature is Article 85 GC III, which grants continued prisoner of war status to war criminals. As explained by Provost (2002), 31, "the protection given is not in the nature of rights held by individuals but of standards existing independently of any action of the benefited persons."

[324] Fleck & Wolfrum (2008), 722.

be effective. This low threshold is to ensure that entities or persons participating in an armed conflict are bound by the norms of LOAC, and no gaps in protection arise.[325]
LOAC, *firstly*, binds States[326] and their armed forces.[327] States violating LOAC obligations incur State responsibility for internationally wrongful acts. *Secondly*, international organizations are bound by customary LOAC[328] in so far the conflicts in its areas of presence cross the threshold of an armed conflict, and in so far troops of troop contributing nations (TCNs) operating under the command and control of these organizations take a part in the hostilities.[329] *Thirdly*, the obligations arising from LOAC also bind non-State organized armed groups,[330] although the precise conceptual basis remains a matter of controversy.[331]

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[325] Kolb & Hyde (2008), 86.

[326] States are bound either by customary law, in so far they have not persistently objected, or by virtue of their commitment as a party to a treaty; by their obligations under a treaty, whether pertaining to IAC or NIAC (for IAC, see Common Article 1 GCI-IV and Article 1(1) API. For NIAC, see Common Article 3 GCI-IV, which established fundamental rules of humanitarian protection binding all parties to a NIAC); by principles of LOAC in so far they have attained the status of general principles of international law as meant in Article 38(1)(c) of the ICJ Statute; and by norms embodied in binding resolutions of intergovernmental organizations, notwithstanding the applicability of such norms to the State by virtue of the aforementioned sources. Kleffner (2010a), 61, referring to Nolte (2008), 532.

[327] As part of their overall responsibility under public international law, States are responsible for acts of its agents, and, more in particular, for acts carried out by its armed forces during armed conflicts. See Article 3, 1907 Hague Convention IV; Article 29, 1949 Geneva Convention IV; Article 91, Additional Protocol I. As the principal echelon acting as an organ of the State engaged in hostilities during armed conflicts, and without differentiation in status or rank within the military system, it follows that the armed forces of a State are, albeit more indirect, bound by the obligations of LOAC as well. After all, most of its rules have been designed for those who have to apply them directly on the battlefield. Provost (2002), 75.

[328] As only States can become parties to treaties, international organizations party to an armed conflict are not bound by conventional LOAC.

[329] On the applicability of LOAC to international organizations in general, see Kleffner (2010a), 62. See also (2009i), *The Prosecutor v. Sesay, Kallon and Gbao, Trial Chamber (2 March 2009)*, § 233. On the UN, see Secretary General (1999), Section 1 states, in paragraph 1.1: "The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence." See also Greenwood (1998), 16; Shraga (1998), 65. On the EU, see Zwanenburg (2008), 400-401; Naert (2010), 515 ff.

[330] Support is widespread. CA 3, for example, applies to "*each* Party to the conflict". See also See also Articles 7 and 8, 1999 Second Hague Protocol; Article 8(2)(e)(vii) and Article 8(2)(e)(xi) ICC Statute. In *Prosecutor v. Norman*, the Special Court for Sierra Leone held that "[…] it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties. See (2004s), *The Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction, Special Court for Sierra Leone (22 May, 2004)*, § 22. See also (2004q), *The Prosecutor v. Kallon and Kamara, Appeals Chamber Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (13 March 2004)*, § 45. Several resolutions of the UN Security Council call upon "all parties" to an armed conflict to comply with LOAC. See UNSC Resolutions 1868 (2009), Preamble (Afghanistan); 1863 (2009), § 15 (Somalia); 1856 (2008), § 23 (DR Congo), calling upon "all parties" to the respective armed conflicts to comply with LOAC. In 1999, the International Law Commission reflected customary international law by stating that "[a]ll parties to armed conflicts in which non-State entities are parties, irrespective of their legal status […] have the obligation to respect international law" and that "[e]very State and every non-State entity participating in an armed conflict are legally bound vis-à-vis each other as well as all other members of the international community to respect international humanitarian law in all circumstances. See International Law Commission (1999), Articles 2 and 5.

[331] A *first* basis is the doctrine of legislative jurisdiction, i.e. that the Geneva Conventions (and other treaties of LOAC) become applicable to non-State groups by virtue of the State's accession or ratification to a

Fourthly, *all* individual have obligations in times of armed conflict,[332] whether a member of the armed forces of a State; a civilian State agent; a member belonging to a non-State entity; or an individual acting in a purely private capacity.[333] All that is required to create obligations for an individual is a *nexus* to an armed conflict.[334] Individuals violating LOAC are individually criminally responsible, independent and without prejudice to any questions of the responsibility of States under international law.[335]

The availability, density and precision of obligations arising under LOAC is contingent on the nature of the armed conflict. The overall normative framework constituting the law of IAC is extensive, and regulates a wide variety of issues related to armed conflict in numerous treaties. They can be divided in, what can be referred to as Geneva-law, setting forth protective rules, which can be found most notably in the GCs and (partly) in AP I, and Hague-law, aimed predominantly at the conduct of hostilities, and found in HIVR and special treaties on the means of warfare, such as the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. A specific subset of the law of IAC pertains to situations of belligerent occupation. This law of belligerent occupation is particularly comprised of Articles 42-56 HIVR, Articles 47-78 GC IV, and customary international law.
In contrast, the conventional rules applicable to NIAC are limited to those available in CA 3 and AP II (as far as States are a party and so far it applies at all). These rules are very rudi-

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particular treaty, and subsequent legislation for its nationals. Such an act engages the applicability of the treaty's obligations to all the State's nationals, including members of a non-State armed group. This theory finds support with Pictet (1960), 34; Baxter (1974), 527; Schindler (1979), 151; Elder (1979), 55; Greenspan (1959), 623; Draper (1965), 96. An alternative view to the doctrine of legislative jurisdiction is proposed by Moir, who contends that "one possible solution is to assert that treaties entered into by States are binding upon insurgents provided the rebel authority exercises effective control over part of the national territory. Insurgents are then said to be bound by reason of the fact, and to the extent, that they purport to represent the State or part of it." A *second* basis is that LOAC, in general, imposes individual obligations on each individual, to include members of an insurgent group (see the active applicability *ratione personae* to individuals, below). *Thirdly*, some contend that LOAC applies to an organized armed group by virtue of its exercise of *de facto* governmental functions. See Pictet (1958a), 37. *Fourthly*, as concluded by the Darfur Commission of Inquiry, an organized armed group may be bound by LOAC because of its international legal personality. See International Law Commission (1999), Articles 2 and 5, available at http://www.idi-iil.org/idiE/resolutionsE/1999_ber_03_en.PDF. A *final* conceptual basis on which LOAC becomes applicable to a non-State entity is when it consents to be bound by LOAC (or parts) of its contents in a specific armed conflict by virtue of 'special agreements', a possibility offered in CA 3. An example is the declaration issued by the Polisario Front of Liberation in Western Sahara, 1975.

[332] For an early case, see The Henfield's case, 11 F. Cas. 1099 (C.C.D.Pa. 1793)(No. 6, 360), reprinted in Paust, Bassiouni & Scharf (2000), 232-238. (1947c), 222-3. The Permanent Court of International Justice held in 1928, in the Danzig Case that the humanitarian conventions in force at that time had been drafted with the purpose of creating individual obligations. (1928b), *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways Administration), Advisory Opinion of 3 March 1928*, 17-18. See also Oppenheim (1952c), 211, footnote 3; Provost (2002), 98; (1997l), *Tadić*,§ 573.

[333] For case law, see Provost (2002), 75-102.

[334] The threshold for the establishment of a nexus is low. According to the ICTY, in *Tadic*, "it would be sufficient to prove that the crime was committed in the course of or as part of the hostilities in, or occupation of, an area controlled by one of the parties. […] The only question, to be determined in the circumstances of each individual case, is whether the offences were closely related to the armed conflict as a whole." (1997l), *Tadić*, § 573.

[335] (1997l), *Tadić*, § 573.

mentary in nature and offer a minimum standard of protection. Rules regulating the conduct in hostilities are virtually absent.

It is generally recognized that large portions of conventional LOAC have crystallized into customary international law. This applies to most, if not all, of the provisions of the GCs, as well as many provisions of AP I and AP II. In 2005, the ICRC published its study (CLS) on customary IHL,[336] in which it established the customary status of norms of LOAC by looking at "State practice (*usus*) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinio juris sive necessitates*)."[337] However, the CLS is not free from criticism, particularly in regards to the manner in which the ICRC has concluded the existence of State practice.[338] Nonetheless, the value of the CLS is not to be underestimated, as is illustrated by its use in domestic and international courts.[339] Customary rules of LOAC are a crucial source in filling gaps left by conventional LOAC, or where States have not ratified treaties. The CLS therefore forms an important source, which should not be overlooked to easily by States. As held by Fleck,

> [w]here there are gaps in existing positive law, States should be encouraged to use the ICRC Study with a view to closing such gaps, rather than criticizing progressive statements made in the Study, or taking advantage of legal lacunae in a spirit of advocating freedom of operations and even drawing short-sighted unilateral advantage at the expense of victims of armed conflicts.[340]

A final important (potential) source of obligation is the Martens clause,[341] which is considered to fill any voids left by both conventional and customary law, and calls upon States ensure that

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[336] ICRC (2005a).

[337] ICRC (2005a), 178.

[338] Scobbie (2007).

[339] (2006b), *Hamdan v. Rumsfeld (Judgment of 26 June 2006)*; (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)*, §§ 23, 29-30, 41-42; (2005n), *The Prosecutor v. Enver Hadzihasanovic and Amir Kabura, Case No. IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98Bis Motions for Acquittal, 11 March 2005*, §§ 29-30.

[340] Fleck (2006), 181.

[341] One of the most fundamental sources and rules of LOAC, the Martens clause was first introduced in the 1899 Hague Peace Conference and holds that "[u]ntil a more complete code of the laws of war has been issued, the High Contracting parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience."
The Martens clause has been readopted in slightly different wording in Article 1(2) AP I and in the Preamble of AP II. According to the ICRC Commentary, the Martens Clause has two functions: "First, despite the considerable increase in the number of subjects covered by the law of armed conflicts, and despite the detail of its codification, it is not possible for any codification to be complete at any given moment; thus the Martens clause prevents the assumption that anything which is not explicitly prohibited by the relevant treaties is therefore permitted. Secondly, it should be seen as a dynamic factor proclaiming the applicability of the principles mentioned regardless of subsequent developments of types of situation or technology (Sandoz, Swinarski & Zimmerman (1987), 38-39). Kolb and Hyde add a number of functions. In their view, "[…] the Martens clause serves as a basis for interpreting the LOAC in a humanitarian sense. Moreover, it can be seen as a call to apply international human rights law in order to complement the LOAC and eventually to fill its gaps. Furthermore, it can be read as a reminder that customary international law applies to all armed conflicts, whether or not a particular situation or event is contemplated by treaty law, and whether or not the relevant treaty law binds as such the parties to the conflict. Finally, the command to consider humanity contained in the clause can serve the purpose of stimulating the states which make the LOAC to heed the interests of the potential victims of armed conflict when negotiating new LOAC norms" (Kolb & Hyde (2008), 63).

> in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the law of humanity, and the dictates of the public conscience.[342]

However, the precise meaning of the Martens clause in today's LOAC remains subject of debate,[343] and this has been taken by some scholars to argue that it may serve as a vehicle to import IHRL into LOAC.[344]

An important concept underlying obligations under LOAC is *reciprocity*, i.e. the mechanism by which a party to the conflict agrees to comply with restrictions of its actions during hostilities grounded in the faith that the adversary party will do the same. LOAC includes a mélange of reciprocal norms in some areas, while it has rejects the concept in others.[345] As concluded by Watts, "the history of the law of war and its relationship with reciprocity reveals a trajectory of development, refinement, and obscuration of reciprocity doctrine."[346] At its outset, reciprocity had a firm presence throughout the *jus in bello* because it primarily served a belligerent parties' interests.[347] LOAC's early international treaties contained general participation and reciprocity clauses or no first-use declarations and reservations.[348] For example, both the Hague Conventions of 1907 and the Geneva Convention of 1906 contained so-called *clausula si omnes*, rendering the entire convention inapplicable if a belligerent party to the conflict was a non-party to a convention.[349] Probably "the most explicit recognition of the reciprocity principle within humanitarian law"[350] is the concept of belligerent reprisals.[351] Its fundamental premise is that a party to a conflict may resort to belligerent reprisals in case of a violation of LOAC by another party to the conflict by taking measures normally prohibited under LOAC, provided certain requirements are met. The aim of re-

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[342] See Preamble, HIVR. A contemporary version of the Martens clause has been stipulated in Article 63(4) GC I; Article 62(4) GC II; Article 142(4) GC III; Article 158(4) GC IV.

[343] Meron (2000b); Cassese (2000); Ticehurst (1997).

[344] Kolb & Hyde (2008), 63.

[345] Osiel (2009), 79.

[346] Watts (2009), 386.

[347] An example is the pre-codification practice of so-called *cartels*, by which belligerent parties agreed to conduct warfare on an 'equal' basis. Although they reflected practical military interests rather than humanitarian concerns, *cartels* were clear examples of immediate reciprocity, drafted on an *ad hoc* basis and valid between the belligerent parties for a specific battle only.

[348] For example, the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare amounts to a no first-strike agreement.

[349] Article 2 of the 1907 Hague Convention IV provides: "The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention." Article 24 of the 1906 Geneva Convention stipulates that "the provisions of the present Convention are obligatory only on the Contracting Powers, in case of war between two or more of them. The said provisions shall cease to be obligatory if one of the belligerent Powers should not be signatory to the Convention." State practice during World War I, however, showed a willingness of State parties to apply the terms regardless of the fact that one of the belligerent States, Montenegro, was a non-party.

[350] Osiel (2009), 36.

[351] The legality of belligerent reprisals has been a subject of debate since the early days of PIL. While Grotius (Grotius (1625)) considered them lawful in some circumstances, other's, such as De Vitoria (de Vitoria (1917)), Calvo (Calvo (1896), 518-519) and Fiori (Fiore (1896), 214), opposed the concept. Nevertheless, the concept found root in PIL and its scope was further crystallized by the Naulilaa Incident Arbitration ((1928c), *Naulilaa Incident Arbitration, Portugal v. Germany*

prisals is two-fold: on the one hand, to stop the violation of LOAC by a belligerent party and at the same time, to convince that party to resume full compliance with LOAC.[352]
Under influence of persistent attempts to humanize LOAC, the conventional LOAC developed after World War II shows a change in stance towards the principle of reciprocity in armed conflict. As it progressively moved away from the traditional layer of international law governing inter-State relations and gradually aimed to the governance of the position of individuals under influence of the 'humanization' of LOAC, it simultaneously has gradually shifted from "collective responsibility, with the attendant collective sanctions of classical international law: belligerent reprisals *durante bello* and war reparations *post bellum*"[353] to what can be described as an individual responsibility of States to unilaterally comply with obligations owed *erga omnes*, in the interest of humanity, regardless of the behavior of other States' conduct.[354]
This gradual move away from systemic, explicit reciprocity is reflected, *inter alia*, by the abandonment of the *si omnes* clauses from the 1929 Geneva Convention; the incorporation in Article 1 of the GCs to "ensure respect" for the norms embodied in the GCs; the prohibition set forth in Article 60(5) to terminate or suspend "provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against person protected by such treaties"; the limitations imposed in respect of belligerent reprisals;[355] the generally accepted rule that the appeal on the principle of *tu quoque* is inadmissible the defense of violations of LOAC;[356] and the incorporation of IHRL-based norms within LOAC, particularly in its protective scope, e.g. that concerning individuals deprived of their liberty.
However, while explicit conditions of systemic reciprocity have slowly disappeared, "reciprocity continues to form a critical component of the law of war and structures both theoretical and pragmatic discourse."[357] Today, reciprocity is more immediate in nature, in that it is characterized by a unilateral willingness of compliance. As explained by Provost:

> immediate reciprocity plays a much more prominent role in humanitarian law than in human rights, a reflection of the different place of reciprocity in the substantive inter-state relationships created. […] Shared values are […] significant in humanitarian law, more so now than

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[352] The US Army defines reprisals as follows: "Reprisals are acts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognised rules of civilised warfare." U.S. Army (1956), § 497(a). The UK Ministry of Defence, in its 'Manual of the Law of Armed Conflict' defines reprisals as "extreme measures to enforce compliance with the law of armed conflict by the adverse party. They can involve acts which would normally be illegal, resorted to after the adverse party has itself carried out illegal acts and refused to desist when called upon to do so. They are not retaliatory acts or simple acts of vengeance. Reprisals are, however, an extreme measure of coercion, because in most cases they inflict suffering upon innocent individuals. Nevertheless, in the circumstances of armed conflict, reprisals, or the threat of reprisals, may sometimes provide the only practical means of inducing the adverse party to desist from its unlawful conduct." See U.K. Ministry of Defence (2004), 420-421, § 16.16 ff..

[353] Abi-Saab (1999), 650.

[354] Meron (2000a); Geiß (2006), 772. See also Provost (2002), 137;

[355] See GCI, Article 14 and 46; GCII, Article 16 and 47; GCIII, Article 13; GCIV, Article 33; API, Article 20, 51(6), 52(1), 53(c), 54(4), 55(2) and 56. See also the Cultural Property Convention 1954, Article 4(4). Also, combatants do not lose their status even if they violate IHL during hostilities (see API). See also Hampson (1988), 831.

[356] See, e.g. Articles 44(2) or 51(8) AP I.

[357] Watts (2009), 367; Osiel (2009), 50.

> fifty years ago, but there remains in the nature of relationships governed by these norms a pull towards immediate reciprocity which reflects the strong state interests present.[358]

Notwithstanding the above, reciprocity has come under strain as a result of the asymmetric nature of contemporary warfare. As put by Pfanner, "[i]n asymmetrical wars, the expectation of reciprocity is basically betrayed and the chivalrous ethos is frequently replaced by treachery."[359] Asymmetrical conflicts are not merely typified by the rejection of compliance with LOAC by non-State actors such as insurgents, but also by the tempting and often actual counter-rejection of compliance by the State, pushing behavior in combat to a slippery slope. After all, why would the State continue to comply with LOAC if such compliance places it at the disadvantage?[360] This incentive to negative reciprocity may undermine one of LOACs basic fundaments. As explained by Schmitt,

> when asymmetry disrupts the presumption and one side violates the agreed rules, the practical incentive for compliance by the other fades. Instead, IHL begins appearing as if it operates to the benefit of one's foes. When that happens, the dictates of the law appear out of step with reality, perhaps even "quaint". So, the real danger is not so much that the various forms of asymmetry will result in violations of IHL. Rather, it is that asymmetries may unleash a dynamic that undercuts the very foundations of this body of law.[361]

In addition, negative reciprocity may under cut the very foundations of counterinsurgency, namely that of legitimacy. Thus, in view of the potential harm caused by negative reciprocal conduct by the State in response to asymmetric tactics used by insurgents, the continued compliance with obligations under LOAC, notwithstanding violations thereof by insurgents, is of utmost relevance to decision makers, military commanders and individual soldiers engaged in counterinsurgency.

Having established the nature of the relationships, rights, and obligations of LOAC, we will now turn to the fundamental balance constituting the "very foundations" of LOAC, i.e. the balance between military necessity and humanity.

1.2.4. Military Necessity and Humanity

LOAC seeks to regulate a phenomenon – i.e. war – that, while reflecting human nature in its most extreme form, is "perhaps the most ancient form of inter-group relationship."[362] Its regulation is similarly deeply rooted in history. Indeed, while detached temporarily and geographically, initiatives "to accept an exceptional legal order"[363] designed for the regula-

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[358] Provost (2002), 151.

[359] Pfanner (2005), 161.

[360] Pfanner (2005), 163: "It might then at least entertain the thought that the use of torture just might yield information about the adversary and its intentions, that it would be quicker and easier to take an alleged civilian terrorist out of circulation by deliberately killing him than by putting him on trial and, similarly, that a huge military strike which also hits the civilian population indiscriminately, wiping out not only combatants but also their families and other possible sympathizers, might undermine the morale of a movement."

[361] Schmitt (2007), 47-48. What Schmitt refers to is the issue that lies at the heart of the academic debate that emerged after the US response to the Al-Qaeda-attacks of 11 September 2001, most notably its decisions regarding the treatment of detainees captured in the so-called Global War on Terror and held in detention facilities such as Guantanamo Bay, i.e. the issue of whether the law available must still be upheld, in order to remain on the moral high ground, or whether it should be set aside, to make way for the possibility to breach norms in response an earlier breach grounded in asymmetry.

[362] Kolb & Hyde (2008), 3.

[363] Maurice (1992), 371.

tion of the conduct of human groups in the incomparable circumstances that armed conflict brings about appear to fulfill a *universal* desire of *all times* – a desire apparently inherent in human nature, detached from civilization, philosophy or religion.[364] As a consequence, LOAC was among the very first branches of public international law to be codified since the latter's inception in 1648 and continues to form one of its core regimes.[365] From the outset, it is imperative to stress what LOAC does not try to attain: to prevent war. To the contrary, it accepts the "exigencies of war and […] the military necessity impelling each Belligerent Party to take the requisite measures to defeat the enemy,"[366] regardless of its legal basis, or absence thereof in the *jus ad bellum*.[367]

However, in view of Cicero's adage '*inter arma leges silent*' – 'in war the law is silent' – one may question what law could add to the waging of war. As accurately described by Osiel:

> Still, what could be more absurd, one might fairly ask, than lawyers' efforts to ensure the recognition of human dignity in situations that essentially amount to suspensions of it? At its best, law is clean, transparent, logical, neat, orderly, civilized, and peaceful, whereas war is dirty, opaquely foggy, irrational, emotional, unkempt, disorderly, and savagely violent. How could the messy experience of the latter ever be made to fit the concepts of the former?[368]

It is therefore not surprising that LOAC can be perceived as to reflect a paradox, attempting to unify two seemingly irreconcilable concepts, i.e. war and law. Some would claim that law should steer clear from war, because it interjects with the effectiveness of the application of force or because it lowers the threshold of acceptability of war. Others would argue that attempts to regulate warfare are vain, because when push comes to shove, the animalistic struggle for life over death will transcend rational values based in law.[369] Walzer, for example, comments that "[w]ar is so awful that it makes us cynical about the possibility of restraint, and then it is so much worse that it makes us indignant at the absence of restraint."[370] Nevertheless, while the vast majority of other core subjects of public international law regulate inter-State co-ordination and co-operation – a traditional function of public international law – in times of peace, the fact is that States have placed LOAC in the exceptional position to do so when the very existence of international and national institutional frameworks and their underpinning values and traditions, philosophies and cultures are challenged by the violence and inhumanity of armed conflict.[371]

Those who overcome their initial sepsis towards LOAC's contradictory attempt to unison law and war are immediately confronted with a *second* paradox, i.e. the manner in which LOAC seeks to achieve its main purpose, namely by *balancing the conflicting notions of military necessity and humanity*. This paradoxical, yet "delicate"[372] balancing between humanitarian

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[364] Sources from Christianity (see *inter alia* Deuteronomy, XX, 10-14; 19-20 and Kings, VI, 22-23. Cockayne (2002); Islam (Khadduri (1955), 87); Judaism (Roberts (1988); Hinduism (Subedi (2003), 355-356) and Buddhism, to Confucius and Sun Tzu and from ancient Egypt, India and Greece to Rome provide evidence of common, albeit often rudimentary, customs and principles that, albeit in modified form, have continued to be of fundamental significance in the regulation of warfare throughout history.[364]

[365] War takes a position within PIL next to subjects as international trade, diplomatic relations, the law of the sea, air- and space law, the protection of the environment and the delimitation of international boundaries. Schindler (2003), 166.

[366] Dinstein (2010), 4.

[367] Dinstein (2010), 3.

[368] Osiel (2009), 44.

[369] Greenwood (2003), 789.

[370] Walzer (1992), 46.

[371] Sassòli & Bouvier (1999), 74.

[372] Schmitt (2010b).

considerations and military imperatives is probably the most fundamental conceptual feature of LOAC.

1.2.4.1. A Delicate Balance

The *concept* of military necessity, *as a term of military science*, aims to maximize the scope of military conduct, necessary to attain a military advantage and to win the war. *In the creation of norms of LOAC*, it functions as a fundamental instrument to ensure

> that the rules leave enough manoeuvering space for military authorities to effectively conduct military operations against the enemy armed forces, in order to suppress the military resistance of the enemy and to end the conflict. […] The law in itself must accordingly leave enough breathing space for military operation planning if counter-strategies are not to be deemed inadmissible from the outset. A law that would doom the lawful actor to failure from the outset would be a ridiculous enterprise.[373]

However, if LOAC would constitute a system that would only reflect considerations of military necessity, "no limitation of any significance would have been imposed on the freedom of action of Belligerent Parties"[374] and it would become a

> 'whore of power', [which] would tend to justify sheer force as it is seen to be necessary by military commanders – and would thus abandon any attempt of disciplining military practice and would simply serve as a rhetorical device disguising the mere pragmatics of power.[375]

Given the destructive impact of warfare on any society, several considerations aim to function as a counterbalance to military necessity and intend to impose *limitations* upon the desired scope of conduct in warfare. These considerations may be environmental, cultural or political in nature, but in view of the devastating effects of war on persons, considerations of humanity, in the wider sense, form the principal counterweight.

Within the normative framework of LOAC, humanity (*lato sensu*) is reflected, *firstly*, in the *principle of limitation* or *unnecessary suffering*, which derives from the Hague law and entails the idea that the means and methods that may be applied to attain the legitimate aim of the conflict, i.e. to weaken the military potential of the enemy, are limited.[376] Principally, the principle of limitation/unnecessary suffering aims to limit the superfluous injury and unnecessary suffering of *individuals taking a direct part in the hostilities*, and not of those who do not (protected persons).[377]

Secondly, humanitarian considerations find expression in the *principle of humanity* (*stricto sensu*), which imposes on parties to the conflict to safeguard those who do not, or no longer, take a direct part in hostilities (i.e. those categories of individuals belonging to the passive scope of the applicability *ratione personae* of the law of hostilities).

However, if only humanitarian considerations were to guide conduct in warfare, the underlying system of law

> […] would become a well-sounding, but basically empty habit of 'doing good' – a variant of an ethics of conscience that would abandon in reality the attempt of influencing military

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373 Oeter (2010), 171-172.

374 Dinstein (2010), 4.

375 Oeter (2010), 169-171. See also Dinstein (2010), 4.

376 1868 St. Petersburg Declaration (The object of disabling the greatest possible number of men "would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable."; Article 22 1907 HIVR. Today, the principle of limitation is embodied in Article 35(1) AP I, which states that "[t]he right of belligerents to adopt means and methods of injuring the enemy is not unlimited."

377 Solis (2009), 270; Dinstein (2010), 8.

> conduct, in order not to 'corrupt' the just way of thinking. Such a radical variant of an ethics of conscience would implicitly have to accept that wrong rules that lead to wrong incentive structures would create a lot of damage in practice – but this would be irrelevant in its perspective since looking at the consequences is a taboo argument in a radical ethics of conscience. The body or rules resulting from such an approach would in reality destroy its own fundaments, since its rules would not be capable of influencing military practice.[378]

The "hallmark" of LOAC,[379] therefore is to achieve a "delicate"[380] balance between military and humanity. This conceptual balance permeates *every* norm of LOAC, whether conventional or customary.[381] As stated by Dinstein:

> While the outlines of the compromise vary from one LOIAC norm to another, it can be categorically stated that no part of LOIAC overlooks military requirements, just as no part of LOIAC loses sight of humanitarian considerations. All segments of this body of law are animated by a pragmatic (as distinct from a purely idealistic) approach to armed conflict.[382]

This balance is of crucial importance in understanding the mechanics and logic of LOAC in the conduct of warfare.[383] In sum, the balance entails that the *authoritative* scope of the total of military conduct necessary to win the war (i.e. in its use as a term of *military science*) is *limited* by the *restrictive* scope of the total of humanitarian (and other) considerations. The subtraction of this restrictive scope from the authoritative scope results in a *netto* scope of *ultimate lawful* conduct within which boundaries the enemy may be defeated. In essence, the rationale that a State's lawful conduct in warfare results from the balancing of military interests against humanitarian considerations is generally known as the *principle* of military necessity *latu sensu*.

1.2.4.2. Military Necessity

While formerly present as a concept in legal and military doctrine,[384] military necessity was first codified by a State by the US in the Lieber Code of 1863.[385] Article 14 stipulates that military necessity:

> […] as understood by modern civilized nations, consists in the *necessity* of those measures which are *indispensable* for securing the ends of the war, and which are *lawful* according to the modern law and usages of war.

It first appeared in an *international* treaty in 1864, in the Preamble of the 1868 St. Petersburg Declaration[386] and has been explained in case law, most notably in 1948, in *re List and Others*.

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[378] Oeter (2010), 169-171. See also Dinstein (2010), 4.

[379] Meron (2000a), 243.

[380] Schmitt (2010b).

[381] Dinstein (2009a); Dinstein (2004), 16-20; Draper (1973), 141.

[382] Dinstein (2010), 5.

[383] Meron (2000a), 243. This is particularly so given the fact that, over time, the weight of military and humanitarian elements within that balance has shifted considerably. See also Schmitt (2010b).

[384] The specific idea of military necessity was first introduced by Grotius ('*necessaria ad finem belli*'). See also Napoleon, who is claimed to have stated that "[m]y great maxim has always been, in politics and war alike, that every injury done to the enemy, even though permitted by the rules, is excusable only so far it is absolutely necessary; everything beyond that is criminal." Best (1994), 242.

[385] For an extensive account of the motives for the introduction of the principle of military necessity in the Lieber Code, see Carnahan (1998); Carnahan (2001).

[386] The Preamble states: "[t]he only legitimate object which states should endeavour to accomplish in war is to *weaken* the military forces of the enemy [and that for that purpose] it is *sufficient* to disable the greatest possible number of men."

> Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete *submission* of the enemy with the least possible expenditure of time, life, and money. […] It permits the destruction of life of armed enemies and other persons whose destruction is *incidentally unavoidable* by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill.[387]

The definition also appears in many military manuals. For example, the UK Manual of the Law of Armed Conflict defines military necessity as to permit

> […] a State engaged in an armed conflict to use that degree and kind of force, *not otherwise prohibited by the law of armed conflict*, that is required in order to achieve the *legitimate purpose* of the conflict, namely the *complete or partial* submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.[388]

Military necessity is the *jus in bello*-species of the doctrine of necessity in international law.[389] It has been described as "a basic principle of the law of war, so basic, indeed, that without it there could be no law of war at all."[390] Today, it undisputedly enjoys status as customary law even to the degree of constituting a norm of *jus cogens*.[391] Under certain conditions its breach may constitute a war crime.[392]

It may be concluded from the above that in it's meaning as *principle* of LOAC, military necessity embodies two functions. *Firstly*, in its *restrictive* function, military necessity allows that kind and degree of force not otherwise prohibited by LOAC and thereby reflects the notion that humanitarian and other considerations may trump sovereign military (and intrinsically political) interests and may subsequently prohibit the employment of any kind or degree of force *not* indispensible for the achievement of 'the ends of war'.[393] *Secondly*, in its *authoritative* function, the principle of military necessity "relates exclusively to conduct that would be

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[387] (1948b), *United States v. Wilhelm List, et al. (Hostages Case), UNWCC (8 July 1947-19 February 1948)*. In relation to property, the court held that in order for its destruction to be lawful, it "must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication, or any other property that might be utilized by the enemy. Private homes and churches may even be destroyed if necessary for military operations."

[388] U.K. Ministry of Defence (2004), Section 2.2 (emphasis added). Until August 2010, the UK manual used to state "[…] to use *only* that degree and kind of force." The word "only" has been striken in an amendment of September 2010. See United Kingdom Ministry of Defence (2010), available at < http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/LegalPublications/LawOfArmedConflict/>. See also U.S. Army (1956), § 3.a., at 4: "[M]ilitary necessity […] has been defined as that principle which justifies those measures not forbidden by international law which are *indispensable* for securing the complete *submission* of the enemy as soon as possible. […] Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war." For an overview of other definitions appearing in military manuals, see Melzer (2008), 283-285.

[389] The doctrine of necessity covers both the *jus ad bellum* and the *jus in bello*. See Gardam (2004), 4-19.

[390] O' Brien (1957), 110.

[391] ILC (1980b), Part 2, 50, § 37. See also Sandoz, Swinarski & Zimmerman (1987), § 1389 ff (commentary to Article 35 AP I).

[392] See Rome Statute, Article 8(2)(a)(iv) (Intentionally launching an attack knowing it will cause excessive death and damage); 8(2)(b)(xiii) (Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war).

[393] Melzer (2008), 286. While in agreement with Melzer on the point that the principle of military necessity has a restrictive function, it must at the same time be emphasized that, in so far it concerns the scope of that restrictive function, Melzer and this study take *differing* viewpoints. This aspect will be subject of more detailed discussion in Chapter VII below.

prohibited under international law in situations other than armed conflict"[394] and which renders permissible measures "indispensible for securing the ends of the war, and which are lawful according to the modern law and usages of war."[395]

Military necessity and humanity are present in LOAC in several ways.

Firstly, a rule may simply *explicitly prohibit* certain conduct. In such cases, the drafters of the rules agreed that humanitarian interests outweigh military interests.[396] It is today generally accepted that military necessity may, under no circumstances whatsoever, be invoked as a ground for derogation from a prohibition.[397] Thus, a prohibition under LOAC may not be deviated from on the basis of the material impossibility to comply with a rule.[398] In addition, appeals on military necessity that overrule prohibited conduct under LOAC in order to avoid defeat,[399] or to avert severe danger to the continued existence of the State, or to avoid that compliance to the laws of war could endanger a party's strategic objectives are *a priori* unlawful.[400] Such motives were once relied upon as part of the now commonly rejected[401] Prussian doctrine *Kriegsraison geht vor Kreigsmanier* (in short: *Kriegsraison*) in the late 19th, early 20th century[402] and *Staatsnotstand* (the principle of self-preservation).[403]

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394 Melzer (2008), 286.

395 Article 14, Lieber Code.

396 An example is Article 51(2) AP I, which prohibits attacks or acts or threats violence against "the civilian population as such, as well as individual civilians," or Article 51(4), which prohibits "indiscriminate attacks." The provision reflects the compromise that while the killing of civilians may be advantageous, considerations of humanity fully prevail. A prohibitive rule may, however, also reflect that military necessity and humanity are in agreement as to the normative content of that rule, i.e. that the prohibition serves both military and humanitarian interests. The overall protection of combatants *hors de combat* may serve as an example: it was in the interest of all parties to the conflict that such combatants be respected on a reciprocal basis. While these rules save lives, they also prevented States from having to recruit and train new soldiers once they returned to their units.

397 (1949c), *Krupp Case (United States of America v. Alfried Felix Krupp von Bohlen und Halbach et al.) (Judgment) (31 July 1948)*; Sandoz, Swinarski & Zimmerman (1987), 628; § 1403 and 1405.

398 According to McCoubrey it was *nota bene* Pictet who suggests this. See McCoubrey (1991), 220. Criticising McCoubrey: Hayashi (2010b), 54.

399 Westlake (1913), 126-128; Risley (1897), 125; Oppenheim (1952b), 231-233.

400 On *Kriegsraison*, see See also Melzer (2008), 279-280.

401 The doctrine of *Kriegsraison* was rejected by the various war crimes tribunals after World War II. See (1948b), *United States v. Wilhelm List, et al. (Hostages Case), UNWCC (8 July 1947-19 February 1948)*; (1948c), *US v. von Leeb et al. (Case No. 72: the High Command trial)*; (1949c), *Krupp Case (United States of America v. Alfried Felix Krupp von Bohlen und Halbach et al.) (Judgment) (31 July 1948)*. For a discussion of post-World War II trials involving the doctrine of military necessity, see Dunbar (1952), 446-452. Several authors have rejected the doctrine of *Kriegsraison*. See e.g. Carnahan (1998), 218; Rauch (1989), 214 ff.; Greenspan (1959), 314; Rogers (2004), 4; Best (1983), 172-179; Melzer (2008), 280; Hayashi (2010b), 52; Sandoz, Swinarski & Zimmerman (1987), 391, § 1386.

402 As explained by Melzer, *Kriegsraison* "essentially elevated the principle of State self-preservation from a general principle of law, to be taken into consideration in the balance inherent in the concept of military necessity, to the level of an absolute value capable of excusing any violation of the laws and customs of war." Melzer (2008), 280.

403 In support: Stone (1954), 352 ff. Opposing: Sandoz, Swinarski & Zimmerman (1987), 391, § 1387; ILC (1980a), 34, 46-47, 50. The ICJ, in relation to the issue of the legality of the threat or use of nuclear weapons, acknowledged that it could not "lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence […] when its survival is at stake" but nevertheless concluded that it could not "conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence in which the very survival of a State would be at stake." See (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, 263. But see Dunbar (1952), 443, who contends that the doctrine of self-preservation and military necessity should be separated: "[T]he phrase 'necessity in self-preservation' is more properly employed to de-

Secondly, military necessity becomes visible as an *explicit exceptional* element in the *lex scripta* which functions as a basis for *deviation* of otherwise prohibited conduct, provided that the measure resorted to is required to serve a legitimate purpose and is otherwise in conformity with LOAC.[404] Examples of norms permitting a plea on military necessity are Article 23(g), 1907 HIVR, which principally forbids the destruction or seizure of enemy property, "unless such destruction or seizure be imperatively demanded by the necessities of war" and, of particular interest for the present study, Article 78 GC IV, according to which the Occupying Power may *intern* persons protected under GC IV when necessary for "*imperative reasons of security*". Exceptional military necessity remains undefined in conventional LOAC.[405] While viewed by some as an expression of *Kriegsraison*,[406] the proper understanding of exceptional military necessity is not that it constitutes a deviation from LOAC as a normative framework, but a deviation *in accordance* with LOAC[407] based on the fact that in relation to certain norms the drafters have taken into account that under strict conditions States and individual operators applying the norms may *invoke* military necessity as a legal basis for otherwise foreclosed derogation from a prohibition protecting humanitarian and other considerations. Norms permitting the exceptional call on military necessity demand the verification of its balance with humanitarian interests *in each individual case* because of the conditions incorporated. It logically follows, as has been generally accepted in doctrine and jurisprudence, that outside the scope of exceptional rules *appeals* on military necessity as an *authorizing* instrument are *a priori* unlawful.[408]

Despite its frequent mentioning in conventional LOAC, the precise meaning and mechanics of exceptional military necessity is found by many to be elusive and has led the concept to become "prone to misunderstanding, manipulation and invocation at cross-purposes"[409] Nonetheless, an appeal on military necessity will only be lawful when it conforms with two requirements underlying the general principle of military necessity as a whole: (1) the re-

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scribe a danger or emergency of such proportions as to threaten immediately the vital interests, and, perhaps, the very existence, of the state itself. Military necessity should be confined to the plight in which armed forces may find themselves under stress of active warfare." On this distinction, see also Greenwood (1999), 249-250.

[404] Sandoz, Swinarski & Zimmerman (1987), § 1403; Hayashi (2010b), 59: "As of yet, there is no uniquely authoritative definition of exceptional military necessity. It is proposed here that, as an exception, military necessity exempts a measure from certain specific rules of international humanitarian law prescribing contrary action to the extent that the measure is required for the attainment of a military purpose and otherwise in conformity with that law. Military necessity must be distinguished from necessity as a circumstance precluding wrongful conduct. See ILC (1980a), 45-46). While both may coincide, military necessity must be treated separately as an accepted *exception* under LOAC, whereas necessity may not be relied upon as a *justification* for deviation from LOAC. Both have different functions (exceptional v. justificatory) and requirements. See Hayashi (2010b), 58.

[405] Despite the absence of a definition, the 1949 Geneva Conventions make specific mentioning of exceptional military necessity in the following provisions: GC I, Articles 8, 30, 33, 34; GC II, Articles 8, 28, 51; GC III, Articles 8, 76, 126, 130; GC IV, Articles 9, 49, 53, 55, 108, 112, 143, 147; AP I, Articles 54, 62, 67, 71; AP II, Article 17; 1907 HR IV, Article 23(g).

[406] Gardam (2004), 7, footnote 30; Martin (2001), 394.

[407] Melzer (2008), 281.

[408] Dunbar (1952), 202; Tucker (1957), 22-37; Draper (1973), 142; Dinstein (2004), 18-19; Kalshoven (1971), 366; Hayashi (2010b), 56 (emphasis added); Dinstein (2010), 6.

[409] Hayashi (2010b), 41. Melzer (2008), 279 arguing that "hardly any notion of that body of law has been more neglected and misunderstood in legal doctrine" and that military necessity contains a restrictive function that prohibits parties to an armed conflict to apply lethal force in circumstances where such force is manifestly not necessary. Schmitt, on the other hand, also argues that the principle of military necessity is misunderstood, but because it has been interpreted (as Melzer does) "to impose impractical and dangerous restrictions on those who fight." Schmitt (2010b), 796.

quirement of necessity for the achievement of a *legitimate military purpose*, and (2) the requirement that the *measure* must be otherwise in conformity with LOAC.[410]
Thirdly, military necessity is embedded as an *implicit* basis permitting certain conduct in warfare. Examples in case are the rules implicit in LOAC that permit the capture or placing *hors de combat* of individuals directly participating in hostilities, the hindrance of military deployments, the occupation of territory, or the destruction or seizure of military objectives. In these cases, the parties to the conflict are in principle free to act, provided the act itself is in conformity with LOAC and international law in general.[411] It thus follows that in relation to these rules there is no further need, nor legal basis for a distinct *appeal* on military necessity to perform certain desired conduct: the military necessity to resort to a particular measure is presumed to be principally omnipresent, thereby outweighing humanitarian interests. Conversely, inasmuch as military necessity may not be invoked to deviate from a prohibition, neither does LOAC permit the deviation from norms on *humanitarian* interests additional to those already taken in consideration when drafting the norm, unless expressly so provided for. As Dinstein explains:

> [e]ach one of the laws of war discloses a balance between military necessity and humanitarian sentiments, as produced by the framers of international conventions or as crystallized in the practice of States. The equilibrium may be imperfect, *but it is legally binding in the very form that it is constructed*. It is not the privilege of each belligerent, let alone every member of its armed forces, to weigh the opposing considerations of military necessity and humanitarianism so as to balance the scales anew. *A fortiori*, it is not permissible to ignore legal norms *on the ground that they are overridden by one of the two sets of considerations*.[412]

As will be addressed in more detail below, recent interpretations of the principle of military necessity in the context of the conduct of hostilities arguably elevate it to the level of an independent norm that demands from States and individual operators to carry out a rebalancing of military interests with humanitarian interests in each individual application of unqualified rules permitting certain "conduct that IHL does not prohibit in the abstract" (i.e. rules that do not contain absolute prohibitions, nor exceptions to prohibitions).[413]
Fourthly, in the *absence* of a positive rule of LOAC covering desired conduct, the parties to the conflict are "in principle free […]."[414] However, the Martens Clause demands that the lawfulness of the desired conduct must be established by reaching an *ad hoc* and reasonable compromise between military necessity and humanitarian interests in view of the "principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."[415]

In sum, the unique balance between military necessity and humanity forms the backbone of LOAC, and understanding this concept is of crucial importance not only in understanding

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[410] For a detailed analysis of these requirements, see Hayashi (2010b). See also Chapter IX for an application of exceptional military necessity to the case of internment under Article 78 GC IV.

[411] Sandoz, Swinarski & Zimmerman (1987), § 1403: "In other words, when the Parties to the conflict do not clash with a formal prohibition of law of armed conflict, they can act freely within the bounds of the principles of international law, i.e., they have the benefit of a freedom which is not arbitrary but within the framework of law."

[412] Dinstein (2009a), 274 (emphasis added).

[413] Melzer (2008), 286.

[414] Sandoz, Swinarski & Zimmerman (1987), § 1403.

[415] The Martens Clause was firstly adopted at the 1899 Hague Peace Conferences and the Preamble of the 1907 HIVR Preamble. See also (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, 257 for a confirmation of its continuing applicability.

why LOAC functions the way it does, but also in understanding its interplay with other regimes, most notably IHRL. While one could argue that parties to the conflict are in principle prohibited from conduct, unless expressly permitted in principles and rules of positive international law, the conceptual construct inherent in the grammar of LOAC is that, generally, LOAC allows *any* conduct in order to attain the legitimate purpose of warfare, *unless* it is specifically prohibited or restricted by rules and principles of positive international law.[416]

However, a preliminary issue is whether LOAC at all applies. It is to this issue of *applicability* that we will now turn.

1.2.5. Applicability: 'Armed Conflict'

In terms of its applicability *ratione materiae*, LOAC only regulates *armed conflicts*. This concept of 'armed conflict' was introduced in 1949, with the adoption of the four GC's. It meant the termination of 'the state of war' as the concept central in classic international law relied upon by States to trigger the applicability of the laws of war.[417] To increase the likelihood of the applicability of LOAC, the concept of 'armed conflict' was adopted as an *objective* norm, which

> provided a practical scope of application for humanitarian law based on actual need rather than political considerations and avoided endless discussions on the legal qualification of certain acts as law enforcement, self-defence, reprisals or war, before the rules on the protection of individuals and populations from the consequences of the hostilities could be invoked.[418]

It implies that a State's mere labeling of a particular tension with another entity as an 'armed conflict', or as 'fight', 'war', 'civil war', 'terrorism', 'rebellion', or 'insurgency' does not imply that, at the *legal* level, an armed conflict indeed exists to which LOAC applies.[419] In contrast, neither is a State's declaration that its counterinsurgent forces are operating under LOAC sufficient to conclude upon the existence of an armed conflict with the insurgents. At the same time it cannot be *a priori* excluded that a conflict between a counterinsurgent State and insurgents does not constitute an armed conflict and is therefore not governed by LOAC. What is required is the determination of the existence of an armed conflict based on the merits in each case. As noted, the assumption in this study is that such determination has taken place and that the counterinsurgency takes place in the context of an armed conflict.

One would expect that a notion so key to the applicability of LOAC be set out in a clear and uncontroversial definition. This is, however, not the case. The most authoritative description, other than those found in doctrine, follows from the ICTY's *Tadic*-jugdment of 1995. To recall,

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[416] Hampson (2011), 193 f; also Kleffner (2011), 7.

[417] Detter (2000), 26; Oppenheim (1952a), 202; Greenwood (2008b), 45; Grob (1949), 64-79. Also Jinks (2003), 1; Lubell (2010), 87-88.

[418] Melzer (2008), 247; Pictet (1952b), 32.

[419] In classic international law, legal doctrine recognized three concepts to denote an internal conflict as civil war: rebellion, insurgency and belligerency. The explicit recognition as such entailed certain consequences for the legal position of the insurgents vis-à-vis the government, as well as the relationship of the government with third States. In extremis, a formal declaration of recognition of belligerency by the counterinsurgent State implied the applicability of the laws of war in the relationship between the government and the insurgents. In practice, for political reasons mostly, States refused to explicitly recognize belligerency, and in doing so, to admit to the existence of a war.

> […] an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[420]

This 'definition' has provided an authoritative starting point for States and international organizations, as well as judicial organs (national and international) and scholars,[421] although it may be criticized for being over-inclusive.[422] It makes clear that the notion of 'armed conflict' cannot be explicated in a singular definition, i.e. encapsulating any situation of armed conflict, regardless of where and between what parties they take place. The *Tadic*-definition clearly maintains the *traditional dichotomy* between two types of armed conflict – IAC and NIAC – based in the nature of the parties to the conflict, and suggests the existence of different thresholds, requiring "a resort to armed force between States" for IAC, and "protracted" armed violence and "organized armed groups" in the case of NIAC.

This dichotomy is of fundamental importance to the question of the lawfulness of targeting and operational detention of insurgents in the context of counterinsurgency, as each type has its own, distinct body of norms, at the customary and conventional level.

Since long, arguments for a convergence of the regulatory frameworks of IAC and NIAC have been proposed,[423] so that "what will matter as regards legal regulation will not be

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[420] (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)* , § 70.

[421] The Tadic-formula has been used by various other tribunals and courts. It has been used by the ICTR ((1998k), *The Prosecutor v. Akayesu, Case No. 96-4-T, Trial Chamber Judgment (2 September 1998)* , § 619; (2005b), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Separate Opinion of Judge Simma (19 December 2005)*, § 23; (2005p), *The Prosecutor v. Moinian Fofana, et al., Decision on Appeal against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence", Appeals Chamber Decision (16 May 2005)*, § 32; (2007h), *The Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Décision sur la confirmation des charges (29 January 2007)*, § 233. The *Tadic*-formula has also been used by the UN Special Rapporteur on the situation of human rights in the Palestinian Territories and by the Commission on Human Rights concerning the situation in Somalia, see United Nations (2001), § 13 and United Nations Commission on Human Rights (1997), § 54 respectively. It has also found its way in the ICC Statute. The latter can be viewed as proof of its development into a rule of customary law.

[422] Lubell (2010), 87.

[423] As Emmerich de Vattel argued, "the common laws of war, those maxims of humanity, moderation and probity [...] are in civil wars to be observed by both sides." See de Vattel (1760), 109-110. Rosemary Abi-Saam argues that the Lieber Code is to be regarded, as a minimum, as a progressive move in the direction of a codification of the laws and customs of war in general. See Abi-Saab (1991), 210. But see also Pictet (1956), 29, footnote 1 ("one day the Power will accord at all times and to all men the benefits they have already agreed to grant their enemies in time of war.") and Schwarzenberger (1968a), 255 ("the distinction between international and internal armed conflicts [was becoming] increasingly relative"). More recently: McDonald (1998), 121; Meron (2000a); Moir (2002), 51; Crawford (2010); Crawford (2007). See also Cassese (1996), § 11. According to Cassese, such convergence has indeed taken place in respect of the customary international law regulating armed conflicts. Cassese based his argument on the findings of the Trial Chamber in the *Tadic* case. Dealing with the issue of the dichotomy, the Trial Chamber asked and duly answered the following question: "Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a single State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that

whether an armed conflict is international or internal, but simply whether an armed conflict exists per se."[424] Indeed, it can be argued that the normative frameworks of both types have drawn closer together in some areas, such as that of the conduct of hostilities, but in so far this convergence has taken place it did so at the level of customary law, not conventional law. Thus, to conclude that a definite convergence of IAC and NIAC has taken place seems to be premature, to say the least, and to some there are some "insurmountable obstacles that stand in the way of such an amalgamation being effected in the practice of States,"[425] particularly in the field of the legal status of individuals in hostilities and detention; the law of neutrality and the body of law relating to belligerent occupation.[426] As a minimum, the convergence requires a change in attitude of the community of States that IAC and NIAC are no longer fundamentally different in character. Only such a change would open the door to take a necessary last step to unification of IAC and NIAC, which is to amend the GCs and its additional protocols. As much as this may be desired, it is fair to say that this will not occur in the foreseeable future.

In sum, therefore, this study adopts the position that the traditional dichotomy between IAC and NIAC persists. This is of particular significance in view of the question whether a conflict between counterinsurgent State and insurgents is governed by the law of IAC or NIAC.

The law of IAC applies to *four* distinct situations. Three of them may be distilled from CA 2,[427] which each qualify as genuine types of IAC:

(1) armed conflict between two or more States (inter-State armed conflict);
(2) declared war; and
(3) partial or total occupation, even when unopposed.

Article 1(4) AP I adds a *fourth* situation that is technically not a type of IAC, but to which the application of the law of IAC is *extended*, i.e.[428]

> armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

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the aforementioned dichotomy should gradually lose its weight." See (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)* , § 97. However, in § 126 the Trial Chamber did acknowledge the fact that "(i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal armed conflicts, rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts."

[424] Moir (2002), 51.

[425] Lietzau (2012), 407.

[426] Lietzau (2012), 407-408; Naert (2006), 55.

[427] CA 2 states: "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of *declared war* or of any other *armed conflict which may arise between two or more of the High Contracting Parties*, even if the state of war is not recognized by one of them.
The Convention shall also apply to all *cases of partial or total occupation of the territory* of a High Contracting Party, even if the said occupation meets with no armed resistance."

[428] Technically, liberation movements, upon recognition as belligerents, do not constitute States, and therefore one cannot speak of an inter-State armed conflict, but only of an armed conflict to which the relevant norms of LOAC governing IAC apply.

The situation of declared war, while mentioned in CA 2(1), has become a rare feature of State practice and has rendered that part of the provision practically obsolete.[429] Also, while Article 1(4) AP I is still in force, it has never been applied in practice and the likelihood of its application is very small. Wars of national liberation, to which the provision refers, have become a virtually extinct form of armed conflict.[430] In addition, notwithstanding the fact that the vast majority of States have ratified AP I, Article 1(4) AP I, it remains very controversial[431] and cannot be considered as having crystallized into a customary norm. Given the manner in which insurgent movements operate, it is highly unlikely that a State is willing to recognize the applicability of the laws of IAC to a national liberation movement, for such movements generally will not fulfill the strict conditions required of a party to an IAC, as set out in Artice 43 AP I. Thus, subsequent examinations on the applicability of the law of IAC to the situational contexts of counterinsurgency will be limited to the situations of *inter*-State armed conflict and occupation only.

The second traditional type of armed conflict recognized in LOAC is NIAC. LOAC defines NIAC in two places.
Firstly, CA 3 delineates its scope of applicability to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties," to be determined in each single case.[432] *Secondly*, according to Article 1 of AP II, the material field of application of AP II, while also excluding its applicability to armed conflicts covered by Article 1 AP I, is restricted to armed conflicts

> [w]hich take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. [433]

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[429] However, there are examples of States that expressed their being at war with another State through other means than a formal declaration of war. Examples are the explicit statements of a number of Arab States in 1948 and 1967 with respect to the war with Israel, and those made by Iran and Iraq during the First Gulf War (1980-1988) and that of Pakistan during its conflict with India in 1965. See Greenwood (1987), 290-294. Despite their decline in importance on the international level, declarations of war may be of importance on the domestic level, particularly in relation to the activation of emergency laws allowing for derogation from human rights obligations (for example in the area of deprivation of liberty).

[430] From the viewpoint of the purposes of LOAC, the incorporation of wars of national liberation into the scope of IAC has contributed significantly to the 'internationalization' of conflicts that before belonged to the domestic jurisdiction of States, a development that must be viewed as a major deviation from the protective shield of State sovereignty to which States held on to until 1977. Today, wars of national liberation are a virtually extinct form of conflict. Article 1(4) AP I is, however, not a dead letter. It has gained significant importance in relation to alien occupation, i.e. "partial or total occupation of a territory which has not yet been fully formed as a State." Greenwood (1989), 194-96. See also Ducheine (2008), 517; Sandoz, Swinarski & Zimmerman (1987), § 112. Alien occupation must not be confused with belligerent occupation, i.e. the occupation by another State of (a part of) a State's territory. Sandoz, Swinarski & Zimmerman (1987).

[431] It was among the main reasons why many States, including the US and Israel, to date have refused to ratify AP I.

[432] (2003n), *Rutaganda v. The Prosecutor, Case No. 96-3-A, ICTR, Appeals Chamber Judgment (26 May 2003)*, § 93: "The definition of an armed conflict is termed in the abstract, and whether or not a situation can be described as an 'armed conflict', meeting the criteria of Common Article 3, is to be decided upon on a case by-case basis."

[433] Article 1 AP II clearly limits its applicability to armed conflicts "which take place *in the territory* of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups […]" (emphasis added).

The question of relevance for the present study is whether the law of IAC or NIAC regulates the legal relationship between a Counterinsurgent State and insurgents in the various situational contexts of counterinsurgency? This determination will take place in Chapter V. For now it suffices to conclude from the above that the forcible conduct between a counterinsurgent State and insurgents in the contexts of NATCOIN, OCCUPCOIN, SUPPCOIN or TRANSCOIN taking place in armed conflict is always regulated by LOAC, whether the conflict can be qualified as an IAC or a NIAC. Clearly, this qualification is of relevance in view of the significant difference in availability, density and precision of rules in conventional IAC and NIAC, but it also means that conduct in armed conflict cannot take place in a legal vacuum.

2. Themes in the Legal Discourse on the Role and Interplay of IHRL and LOAC

Ultimately, the lawfulness of targeting and operational detention in counterinsurgency operations is contingent upon the very interpretation of concepts underlying the relevant normative frameworks of IHRL and LOAC, as well as the particular outlook on the interplay of both regimes in armed conflict. This section identifies and discusses three themes that may be distilled from the academic discourse on the interplay between IHRL and LOAC, and which together demonstrate that the potential outcome of that interplay is nourished by often seemingly irreconcilable viewpoints.
The themes that will be addressed are (1) the dogmatic approaches with respect to the relationship between IHRL and LOAC that can currently be identified from the legal discourse; (2) the issue of the humanization of LOAC; (3) the legal discourse relating to legal issues following the characteristics of today's 'new war paradigm', in particular the war on terrorism.

2.1. Dogmatic Approaches on the Interplay IHRL-LOAC

From doctrine, practice of (quasi-)judicial bodies and State practice, three principal dogmatic 'schools' can be identified: the separatist, the integrationist, and the complementarist school. Each school will be addressed separately below. By looking at the various relevant sources of international law, together, these approaches inform us on the principle arguments put forward on the issue of whether LOAC and IHRL can be applicable at the same time, and if so, how they interrelate. The purpose here is not to place a value to each of the views, but rather to objectively observe their presence within the debate.

2.1.1. Separatist Approach

The separatist approach is founded on the historical divide between LOAC and IHRL in terms of both material and institutional development.[434] It is built on the traditional premise that LOAC and IHRL are two fundamentally different legal regimes that each occupy a distinct area of international law since 1945 and cannot be reconciled in any way. LOAC is

[434] The historical roots of this theory date back to 1945, which marks the birth of both the Geneva Conventions and the UDHR and the separate development of both regimes until 1968. In terms of institutional development, LOAC was principally a regime 'belonging' to the ICRC, whereas IHRL was governed by the UN only. The turning point came in 1967, after the 6-Day War. This conflict triggered the debate of the role of human rights in armed conflict, which eventually led to the Tehran Conference in 1968.

preserved as the law of war; IHRL as the law of peace.[435] LOAC must be viewed as the law that "comes into force when the human rights system is no longer valid, in order to protect those who are unable to continue the fighting (e.g. wounded and sick) or never took part in it (civilians)."[436]
In essence, therefore, a relationship between them is out of the question: both regimes forcibly lead a life as singles, and are forbidden to even lay eyes on each other. As put by Meyrowitz:

> Nous avons constaté que le droit des conflit armés et la notion des droits de l'homme sont, par leur origine, leur fondement, leur nature, leur objet, leur finalité et leur contenu, radicalement différents, s'ils ne sont pas diamétralement opposes, et qu'ils sont irréductibles l'un a l'autre.[437]

Uniting LOAC and HRL would, it is argued, amount to politicization of both branches and, as a consequence, legal confusion; something that should be avoided.[438]

The separatist approach in its original form appears to have been overtaken by the progression of law, especially after 1968 with the adoption of the Teheran Declaration, and no longer enjoys systemic or teleological support.[439] However, the attacks of 11 September 2001 spurred renewed support for the separatist approach, in both literature and State practice, particularly that of the US and Israel.
Several authors have expressed support for the separatist view. For example, while acknowledging that the ICCPR and the ICESCR may be applicable in NIAC, Dennis categorically rejects such application outside a State's territory in the context of IAC and occupation, in which LOAC is the *lex specialis* and displaces IHRL as the primary source for determining legality of action. To demand the application of IHRL in international armed conflict and occupation "offers a dubious route towards increased state compliance with international norms" and " is likely to produce confusion rather than clarity and increase the gap between legal theory and state compliance."[440] Other authors rely on other arguments to confirm the ongoing separation of LOAC and IHRL. Lattanzi, for example, appears to stress the limited scope of jurisdiction of human rights bodies to apply LOAC.[441] Bowring argues that LOAC

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[435] Pictet (1975): "humanitarian law is valid only in the case of armed conflict while human rights are essentially applicable in peacetime." This strict separation shows similarity with the integrationist view, which, as we shall see, also appears to maintain a division between war law and peace law. Schäfer questions whether the separatist view categorically rules out the applicability of IHRL in armed conflict. He finds room for the acceptance of the applicability of IHRL in Mushkat's remark that "the human rights system […] is applied *principally* in times of peace", and not exclusively. See Schäfer (2006), 38, referring to Mushkat (1978), 166 (emphasis added).

[436] Mushkat (1978), 161.

[437] Meyrowitz (1972), 1104. Between both branches exists an "*antinomie irréductible*" or an "*incompatibilité foncière*" (Meyrowitz (1972), 1095). Other early proponents of separatism are Suter (Suter (1976)), Mushkat (Mushkat (1978)), and Dinstein (Dinstein (1977), 148). Dinstein nowadays appears to have abandoned his earlier radical view and has shifted to a complementarist approach, showing acceptance of the applicability of IHRL in times of armed conflict, in particular in those areas of IHRL where it is able to step into gaps left unregulated by LOAC, such as remedies for breach of the law. See Dinstein (2004), 25.

[438] Kolb (2006), § 28.

[439] Lorenz (2005), 206; Kälin (1994), 26.

[440] Dennis (2005), 141. Support for this argument follows in his view from State practice in IAC and occupation, as well as the position of States during the drafting stage of HRL treaties in view of LOAC treaties. See also Hansen (2007), 4.

[441] Lattanzi (2007), 569-570.

and IHRL are so different, that "[t]here is no unity there in the first place to be fragmented." Therefore, it is out of the question that LOAC were to be applied by a human rights treaty body.[442] Stein takes a more pragmatic approach and argues that in military practice "it is not easy what one would gain from a "joint venture" between human rights and humanitarian law in an armed conflict, be it international or non-international."[443]

In so far it concerns State practice, the US and Israel openly reject the applicability of IHRL in armed conflict. Adhering to an absolute exclusionist interpretation of the maxim of "*lex specialis*", the US has assumed a particular separatist position with respect to activities it has undertaken in view of the GWOT since the attacks of 11 September 2001. This is reflected, *inter alia*, in its legal position concerning the detention of individuals held at detention centers at various places, of which Guantanamo Bay is the most debated.[444]

The US adopted a similar position with respect to its military operations in Iraq, in 2003, and the targeted killing by the CIA of suspected Al Qaeda operatives in Yemen, in 2002, by explaining to the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions that "where humanitarian law is applicable, it operates to exclude human rights law."[445]

In similar vein, Israel has maintained a separatist view towards the application and relationship of IHRL with LOAC in the occupied territories. In relation to the ICCPR and ICESCR, Israel, *inter alia*, submits that IHRL does not apply since LOAC is the specific legal regime regulating situations of occupation.[446]

In light of treaty law, international practice and jurisprudence, the US and Israeli positions are isolated and have been criticized for having no support in systemic and teleological

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[442] Bowring (2009), 3.

[443] Stein (2002), 163-165

[444] In response to the decision of the IACiHR to order precautionary measures in the *Guantanamo Detainees Case*, the United States concluded that: "International human rights law is not applicable to the conduct of hostilities or the capture and detention of enemy combatants, which are governed by the more specific laws of armed conflict." See (2002k), *Response of the United States to Request for Precautionary Measures (Detainees in Guantanamo Bay, Cuba)*, 1022), available at
<http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=7lt0qaX9CP&Content=134>). See also Dennis (2005); Dennis (2007); Reply of the Government of the United States of America to the Report of the Five UNHCR Special Rapporteurs on Detainees in Guantanamo, March 10, 2006, available at http://www.usmission.ch/Press2006/USFinalReplyto GITMOreport2006.pdf; Oral Statements by the United States Delegation to the Committee against Torture, May 8, 2006, available at http://www.usmission,ch/Press2006/CAT-May8.pdf; U.S. Statement on the Draft Convention on Enforced Disappearances, June 27, 2006, available at: http://www.usmission.ch/Press2006/0672U.S.StatementonForcedDissapearances.html.
The Legal Advisor, U.S. Department of State (John Bellinger III) explained to the Committee Against Torture that the U.S. viewpoint is the CAT only applies where the U.S. has *de iure* territorial jurisdiction, and not to areas which are under U.S. military occupation where it merely exercised *de facto* control. Such areas are part of "ongoing armed and, accordingly, are governed by the law of armed conflict, which is the *lex specialis* applicable to those particular operations." See www.us-mission.ch/Press2006/CAT-May8.pdf and www.us-mission.ch/Press2006/CAT-MAY5-SPOKEN.pdf.

[445] United Nations (2004), §§ 43, 48.

[446] Israel has argued before the ICJ that "the rejection of the application of certain human rights to Palestinian inhabitants of the Occupied Territories was based on the notion that in those areas IHL applied, not human rights law." See (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*. See also UNHRC, Second Periodic Report by Israel (CCPR), § 8; ECOSOC, Second Periodic Report by Israel (CECSR), § 5. For condemnations of Israel's viewpoint, see (1998c), *Concluding Observations of the Human Rights Committee: Israel (Concluding Observations/Comments) (18 August 1998)*, § 21; (2003a), *Concluding Observations of the Human Rights Committee: Israel (21 Augustus 2003)*, § 11; (2003b), *Concluding Observations on Israel (23 May 2003)*; Committee on Economic (2001), § 15; (1998d), *Concluding Observations on Israel (30 May 1998)*, § 10; (2002l), *Summary Records Israel (10 October 2002)*, § 20.

interpretation.[447]. Even if both States would support their position by relying on the persistent objector-principle, as some advise,[448] it remains doubtful that such a claim would be accepted. As Hampson and Salama point out, not only is it questionable that the doctrine of persistent objector can be applied to IHRL, in particular when it concerns human rights norms that have attained the status of *jus cogens*, but "more fundamentally, there is a grave doubt as to the persistence of their objection."[449] For example, before 11 September 2001, the US relied on a similar reasoning as the ICJ in the *Nuclear Weapons Case* with respect to the right to life, namely that it continues to apply in armed conflict.[450]

In sum, the arguments underlying the traditional separatist view towards LOAC and IHRL do not provide much insight, if any, into the question of how LOAC and IHRL interrelate once they are in a relationship. It merely points out that in fact no relationship is going to exist. Contemporary views towards the separatist approach barely offer more clarity. It merely becomes clear that the modern-day separatist view appears not to reject the applicability of IHRL during armed conflict all together (e.g. not in traditional intra-State non-international armed conflict), and thus to allow a relationship to evolve, but that both regimes are in such conflict with each other particularly in international armed conflicts and situations of occupation, that separation logically must follow by application of the *lex specialis* principle in an absolute manner.

2.1.2. Integrationist Approach

With the separatist view at the one end of the spectrum, it can be said that the integrationist theory is positioned at the other end. Its aim at "*eine Verschmelzung von Menschenrechten und humanitärem Recht* […]".[451] In other words, LOAC and IHRL are to be seen as two branches belonging to one all-encompassing regime of humanitarian law. Their contents are mutually exchangeable. Some authors refer to this idea as the convergence[452] or merger approach.[453] Views as to how IHRL and LOAC should be integrated differ. Robertson argues that

> […] human rights is the genus of which humanitarian law is a species. Human rights law relates to the basic rights of all human beings everywhere, at all times; humanitarian law relates to the rights of particular categories of human beings – principally, the sick, the wounded, prisoners of war – in particular circumstances, i.e. during periods of armed conflict.[454]

Others, such as MacBride, Draper and Kälin argue that the merger of IHRL and LOAC logically follows from the fact that IHRL, IHRL in cases of emergency, and LOAC form a horizontally connected continuum.[455]Contemporary signs of support for this approach

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[447] Lorenz (2005), 212; Salama & Hampson (2005), 17, § 69.

[448] In relation to the US position, see Hansen (2007), 61-64.

[449] Salama & Hampson (2005), 17, § 70.

[450] Alston, Morgan-Foster & Abresch (2008), 193.

[451] Lorenz (2005), 205.

[452] Heintze (2004b), 794, referring to Meron (1987), 28; Provost (2002).

[453] Quénivet (2008), 14. Other verbs used to denote an integrationist approach are "confluence" (Quentin-Baxter (1985)), "meshing" (Meron (1983), 589) and "fusing" (Rogers (1999), 2).

[454] Robertson (1984), 797. Compare with Pictet, who, although arguably adhering a complementary view, expresss an integrationist position when arguing that in essence international law contains a larger body of humanitarian law, which consists of a body of humanitarian law in the strict sense, i.e. Geneva Law and Hague Law, applicable only in times of armed conflict, and human rights law, mainly applicable in peace time.See Pictet (1975), 13 ff; Pictet (1966), 7 ff.

[455] MacBride, Draper and Kälin.; McBride (McBride (1970), Draper (Draper (1971); Draper (1972)) and Kälin (Kälin (1992); Kälin (1994))

among legal scholars follow from the writings of Meron,[456] Martin,[457] Heintze,[458] and Krieger.[459] The UN Sectretary-General appears to support the integrationist view. To evade "[…] lengthy debates on the definition of armed conflicts, the threshold of applicability of humanitarian law, and the legality under international law of derogations from human rights obligations," he recognizes that fundamental standards of humanity, derived from IHRL, LOAC, international criminal law, international refugee law and other related fields, are "applicable at all times, in all circumstances and to all parties."[460] An example of integration is the Turku Declaration, which attempts to provide a framework of minimum-guarantees taken from both regimes in situations of conflict that do not cross the threshold of a NIAC (but which admittedly lacks sufficient strength due to its non-bindingness as a 'soft-law'-instrument).

It is difficult to ignore the underlying idealist stance of the integrationists towards the way in which LOAC and IHRL are to interact. Clear examples *de lege lata* of integration of LOAC and IHRL are uncommon.[462]
The validity of the integrationist theory has been questioned in international legal literature.[463] Schäfer aruges that even though the development of the relationship between LOAC and IHRL points in the direction of integration, "[…] eine tatsächliche Verschmelzung der beiden Gebiete bereits wegen des unterschiedlichen institutionellen Rahmens auf absehbare Zeit weder realistisch nog unbedingt wünschenswert erscheint."[464] To Lubell, merging LOAC and IHRL would result in a "genetically modified mutation."[465] In light of the ICJ's Advisory Opinion in the *Palestinian Wall Case*, it may be concluded that the integrationist approach does not find support with the ICJ.[466] It seems therefore justified to conclude that the integrationist approach is a reflection at most of *lege ferenda*, not of *lex lata*.

2.1.3. Complementary Approach

The complementary theory appears to be the dominant view among scholars and judicial bodies[467] and reflects the *lex lata*.[468] As to the meaning of 'complementary', Kleffner explains that,

> [g]enerally speaking, matters or things are described as being 'complementary' if and when they are 'completing something else' or 'making a pair or a whole'. 'Complementarity', in turn, refers to a relation of different parts and denotes the condition of things that comple-

[456] Meron (1987), 28. See also Meron (2000a).
[457] Martin (2001).
[458] Heintze (2004b), 812.
[459] Krieger (2006), 273-4.
[460] United Nations Secretary-General (1998), § 3.
[461] Turku Declaration (1990).
[462] An exception that is often mentioned is Article 38 of the Convention on the Rights of the Child (CRC), a human rights convention that explicitly integrates LOAC as a framework of protection of children in times of armed conflict. See also §§ 12 and 14 of the Preamble and Article 5 to the Facultative Protocol to the CRC.
[463] Ben-Naftali & Shany (2004), 56; Dennis (2005); Lubell (2007), 655; Stein (2002), 163-165; Bowring (2009), 3; Gross (2007), 4-5.
[464] Schäfer (2006), 39.
[465] Lubell (2007), 655.
[466] Quenivet (2004).
[467] Schäfer (2006), 35-42.
[468] Heintze (2004a), 247 ff.

ment one another, while a 'complement' is generally understood as something that, together with other things, forms a unit.[469]

Indeed, supporters of the complementarity-theory accept that while LOAC and IHRL have different historical, conceptual, applicability and material backgrounds and must be considered as unique regimes,[470] this does not preclude the possibility that both can be applicable in parallel: IHRL continue to be applicable during armed conflict and, following their simultaneous applicability, the one regime may come to the assistance in the completion of the other if the latter shows insufficient or no regulation. As explained by Schäfer:

> Nach der komplementaristischen Theorie sind das humanitäre Völkerrecht und die Menschenrechte weiterhin gleichgeordnete und voneinander verschiedene, wenn auch eng verbundene und sich zum Teil überlappende Gebiete des Völkerrechts, die sich gegenseitig ergänzen […] wodurch Lücken im materiellrechtlichen Bereich geschlossen werden und Zwei verschiedenartige Überwachungsmechanismen greifen und damit besseren Schutz bieten können.[471]

In spite of what is often thought, complementarity is reciprocal.[472] In other words, as much as IHRL can complement LOAC, so can LOAC complement IHRL. It is generally recognized that the determination of the complementarity of IHRL and LOAC must take place on a case-by-case basis, in view of the specific norms in case and the context in which they are used.[473]

Given the abundance of evidence within the various sources of international law, the complementary character of the relationship between IHRL and LOAC is difficult to deny. It "currently enjoys the status of the new orthodoxy."[474] A large amount of treaty norms, either implicitly or explicitly, arguably provides an opening for IHRL to step in and to complement gaps, or clarify vague areas.[475] Decisions and pronouncements of various quasi-judicial and judicial organs, at the international,[476] regional[477] or domestic level,[478] or estab-

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469 Kleffner (2010a)73.

470 Provost (2002), 116.

471 Schäfer (2006), 38-39; Abi-Saab (1997), 122-123; Kleffner (2010a)73; Droege (2008a), 337.

472 Abi-Saab (1997), 122-123; Duffy (2005), 300.

473 Henckaerts (2008), 264; Schäfer (2006), 48-52; Krieger (2006), 271.

474 Ben-Naftali (2011a), 5.

475 Examples of treaty texts are, in so far it concerns LOAC-treaties: CA3; Article 7 GC I; Articles 6 and 7 GC II, Articles 6, 7, 14, 84, 105, 109, 130 GC III; Articles 5, 7, 8, 27, 30, 38, 78, 80, 146, 158 GC IV; Articles 11, 44(5), 45(3), 75, 85 API; the Preamble and Articles 4, 6(2) APII.

476 International Court of Justice: (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*; (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*; UN Commission on Human Rights: UNCHR (2005); UN Human Rights Committee: Human Rights Committee (2004a), § 11; Human Rights Committee (2004b), § 11.

477 Inter-American Commission on Human Rights: (1997b), *Abella et al. v. Argentina (La Tablada), Case No. 11.137, Decision of 18 November 1997*, § 166; (1999f), *Coard and Others v. the United States ('US Military Intervention in Grenada), Case No. 10.951, Decision of 29 September 1999* § 39; IACommHR (2002), § 45 available at
http://www.cidh.org/Terrorism/Eng/part.b.htm#C.%20%20%20%20%20%20%20%20%20International%20Humanitarian%20Law;

478 See, for example, (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)*.

lished *ad hoc*[479] tribunals contain proof of complementarity. Similarly, statements, resolutions and reports of international organizations[480] and NGOs[481] contribute to the complimentary approach. In addition, there exists overwhelming support among a large group of authors for the existence of a state of completion between IHRL and LOAC.[482]
Supporters of the complementary approach see a potential for increasing the protective scope of norms regulating armed conflict. In their view human rights strengthen the position of the individual in armed conflict *vis-à-vis* the State. This aspect will be further highlighted in the following section.

2.2. The Discourse on the 'Humanization' of Armed Conflict

A second theme identifiable from the legal discourse concerns the so-called 'humanization' of armed conflict, a term introduced by Meron in his seminal article 'The Humanization of Humanitarian Law.'[483] This process of 'humanization' of armed conflict, particularly in its modern stage, has caused a lively academic discourse between those who seek to advance humanity in warfare, and those who seek to preserve sovereign military interests.
This section addresses the notion of 'humanization' of armed conflict as understood in this study.[484] It then points out the different views towards this process, views that also color the discourse on the relationship between IHRL and LOAC.

2.2.1. The Meaning of 'Humanization'

'Humanization' can be viewed as one of the venues by which restraint in warfare, legal or extra-legal, can be achieved.[485] According to Meron, humanization has influenced almost every aspect of LOAC.[486] For the purposes of this study, humanization of armed conflict is defined as:

> the process of legal expansion of protective norms for individuals affected by armed conflict through (1) the interpretation and modification of existing – and (2) the development of new norms of LOAC, of either conventional or customary nature, by States or other subjects operating in the realm of LOAC.

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[479] ICTY: (1998n), *The Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Chamber Judgment of 10 December 1998*;

[480] General Assembly United Nations (1968); Human Rights Council (2009); International Law Commission (2007), § 29.

[481] Human Rights Watch (2008); ICRC (2008d); ICRC (2005a), xxxi.

[482] Gasser (2002), 162 ("complementary character"); Gasser (1991), 583 ("gegenseitig ergänzen"); Haug (1991), 643 ("gegenseitige Beinflussung und Bereicherung"); Salama & Hampson (2005), 5-8, § 9-23; Sands (1998), 85-105 ("cross-fertilization"); Provost (2002), 350 ("cross-polination"); Kretzmer (2005), 171 ("mixed-model"); Prud'homme (2007), 14 ("pragmatic theory of harmonization"); Schabas (2007b), 598 ("belt and suspenders"); Doswald-Beck & Vité (1993); Vité (2004); Greenwood (1998); Bothe (2004); Gillard (2004); Benvenisti (1992); O'Donnell (1998); Kälin (1994); Künzli (2001); Gasser (2002).

[483] Meron (2000a)). Its definitional scope in this study, however, deviates from that meant by Meron, as will be explained.

[484] As will be explained, the definitional scope of 'humanization' meant in this study deviates from that meant by Meron.

[485] Other incentives for restraint in warfare can be reasons of economical, political or military nature in so far the use of excessive force would endanger the political objectives. This is also called economy of force and it is one of the fundamental principles of military doctrine.

[486] Meron (2000a), 239. Traces can be found in the prohibitions on unnecessary suffering and indiscriminate warfare on the regulation of weapons; the ban on antipersonnel mines and blinding laser weapons; the protection of combatants; the scope of the principle of reciprocity in LOAC; the accountability for violations of LOAC; and innovations in the formation, formulation and interpretation of rules.

At a deeper level, humanization refers to the ongoing process of recalibration of the balance between military necessity and humanity. As noted, the positioning of both elements is of crucial importance in understanding the mechanics and logic of LOAC in both legal and military practice.[487] While in rare occasions both point in the same direction,[488] they ordinarily reflect diametrically opposed interests that somehow have to be harmonized.[489]

The process of humanization is one of *cost and benefit*. On the one hand, humanization is intrinsically linked with the principle of humanity, which functions as the LOAC-gateway to achieve the desired benefit: to increase of protection of individuals *hors de combat*, and their property. On the other hand, humanization encounters resistance in the principle of military necessity. To maintain the traditional balance of LOAC, every desired increase in humanitarian protection must be weighed against the costs for sovereign military interests. While increasing the humanitarian value of LOAC is a laudable endeavor, it is understandable that States view the 'fiddling' with the traditional balance under pressure of 'humanization' as potentially dangerous because it risks making warfare potentially more difficult than it already is.

Humanization, commensurate to the development of LOAC, has been a *responsive* process. Following developments in warfare in the last century and a half, most notably after both World Wars, LOAC has enjoyed a progressive increase in 'weight' attached to the element of humanity. This process is marked by a number of shifts at various levels.

Firstly, the process of humanization marks a shift in the *substantive character* of limitations on warfare. Assuming a conservative, protectionist stance of preserving military necessity, States initially accepted restrictions that would not affect disproportionately sovereign military interests. However, as warfare developed, States progressively shifted to restrictions in which they increasingly, and genuinely have added weight to aspects of humanity. In addition, by imposing humanitarian restrictions on warfare, States have shifted from predominantly combatant-related protections and limitations to civilian-related protections and limitations.

Secondly, a *participatory* shift has taken place in the process of humanization, meaning that besides States, today non-State actors, such as NGOs, judicial bodies and legal scholars, principally based in the human rights movement, are engaged in attempts to further humanize LOAC.

Thirdly, the process of humanization is characterized by a *methodological* shift. For decades, humanization was 'controlled' by States, subject to their willingness to 'pull in' self-imposed restrictions grounded in humanity while relinquishing sovereign military interests through codifications of the law. As explained by Schmitt

> Although not all states agree on the suitability of the balancing set forth in the various IHL instruments, they remain free to opt out of legal regimes that they believe have inappropriately tilted the law in one direction or the other. Since only states make international law, the risk of becoming bound by laws (or legal interpretations) to which they do not consent, either *de jure* or *de facto*, has generally remained slight.[490]

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[487] The balance between humanitarian considerations and military interests has been codified in the 1868 St. Petersburg Declaration, which "fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity," and the IV Hague Convention on the Laws and Customs of War on Land of 1907, which speaks of "the desire to diminish the evils of war, *as far* as military requirements permit."

[488] See for example Article 25 of the 1899 Hague Convention II and 1907 Hague Convention IV.

[489] For similar wording, see the Preamble of the 1899 Hague Conventions II and the 1907 Hague Convention IV.

[490] Schmitt (2010a), 716.

Today, humanization appears to take place more on 'push'-basis. That is to say, in rather innovative ways, non-State actors seek to 'superimpose' upon States elements of humanization outside the realm of the process of international codification, and to a certain degree tempting the limits acceptable by States. As argued by Anderson, this movement represents

> […] a long-term historical project of international regulation of armed conflict with a certain political vision of gradually emerging supranational governance, on the one hand, and a more immediate politics of constraining the superpower by constraining how it fights, on the other.[491]

Fourthly, the process of humanization is characterized by a shift in *origin* of the restrictions imposed on warfare. While traditionally the humanization of armed conflict was a process to be regulated solely by LOAC, a trend appears to emerge that limits the conduct of hostilities in warfare by incorporating elements 'foreign' to LOAC, such as those belonging to IHRL.

In sum, the above shows that the recalibration of the weight attached to humanity in warfare essentially springs from two sources: one of so-called *traditional* humanization, the other of so-called *innovative* humanization.
Traditional humanization concerns the promulgation of restrictions on warfare to the benefit of individuals affected by it *initiated by, and with the consent of States*. This may involve the adoption of restricting norms in treaties, or the acquiescence to rules of customary nature. In other words, traditional humanization reflects the desire of States, as the principle law-making subjects of international law, to retain control over the balance between humanity and military necessity, and as such may be said to come from within LOAC.
Innovative humanization refers to the expansion of the protective scope of LOAC as the result of the penetration into LOAC of sources coming from *outside* LOAC, most dominantly from IHRL. This process is led by international law-actors other than States, such as international organizations, NGOs and legal scholars. Exploring innovative routes to modify the law without State consent, they attempt to "take human rights to places, […], where, as a matter of practical reality, no human rights have gone before."[492] The latter development has spurred a great deal of debate. The question is: what are the legal arguments put forward in this debate.

2.2.2. Support for Innovative Humanization

Premised in the *complementary* character of the core values of both IHRL and LOAC, combined with the *universality* of human rights, the proponents of innovative humanization seek "to weave a net, thicker than hitherto available, for the protection of the rights to life, liberty, and dignity of all individuals under all circumstances",[493] with the aim to further humanize armed conflict. In their view, such an endeavor is legitimate because both armed conflict and LOAC have progressively moved from State-centric to people-centric.[494] With the demise of inter-State conflicts – involving States – and the rise of intra-State conflicts – involving the population – the claim is that the regulation of warfare ought to no longer be an affair solely reserved for States, and should not be depending on States' willingness to

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[491] Wippman (2005), 7.
[492] Milanovic (2011a), 96.
[493] Ben-Naftali (2011a), 4.
[494] As we have seen in Chapter I, this is a shift that is also present in the evolution of warfare, and which is especially visible in the shift from inter-State to intra-State conflicts, such as insurgencies.

impose on themselves limitations grounded in reciprocity. "Rather, human beings embroiled in armed conflict still retain those rights that are inherent in their human dignity, which are more, not less, important in wartime, and which apply regardless of considerations of reciprocity between the warring parties."[495] Therefore, non-State actors ought to have a say in the progression of LOAC as well.

A principal mechanism to achieve the humanization of LOAC is the (re)interpretation of the relationship between LOAC and IHRL. In doing so, innovative humanitarians search for weaknesses within the contemporary LOAC framework at conceptual, applicability and normative level and examine their legal potential to be 'cured' with relevant elements available within IHRL.

For example, at the *conceptual* level, a principle weakness of LOAC is its lack of enforcement mechanisms available for individuals affected by violations of LOAC. Innovative humanitarians, however, see a potential in human rights mechanisms at international and domestic level to alleviate this problem.[496] This may be particularly pregnant in 'grey area' situations, such as NIAC, occupation and the UN-mandated international administration of territory.[497].

At the *applicability* level, the separation line between peace and armed conflict, and thus the issue of whether LOAC applies or not, remains ambiguous, particularly in NIAC. Supporters of innovative humanization favor a high threshold for NIAC to arise and call for the application of IHRL, as its applicability is not subject to the determination of the existence of an armed conflict.

At the *normative* level, innovative humanization, in a more revolutionary and controversial fashion, seeks to recalibrate the normative balance between military necessity and humanity presently reflected in State-consented treaty law and attempts to push it in the direction of the latter. It does so, on the one hand, by exploiting the presence of IHRL elements already present in LOAC, and on the other hand "by using human rights norms to fill the gaps or areas left unregulated or very sparsely regulated by IHL, for example with regard to non-international armed conflicts, and partly by trying to change some outcomes that are in fact determined by IHL through the introduction of human rights rules and arguments into the equation."[498] In the latter fashion, it uses the principle of humanity as a gateway for the gradual infiltration of IHRL concepts into the realm of LOAC. This is why authors such as Kretzmer and Watkin,[499] as well as in international[500] and domestic[501] judicial bodies, call for

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[495] Milanovic (2011a), 95. See also Ben-Naftali (2011a), 4.

[496] Heintze (2004b), 812; Verdirame (2008), 691. See for example, the case-law of UK domestic courts, relating to the occupation in Iraq and involving the 1998 Human Rights act: (2007e), *R (on the application of Al-Skeini and others) v Secretary of State for Defence, [2007] UKHL 26, [2008] AC 153*; (2006a), *Al-Jedda v. Secretary of State for Defense*; (2008h), *R (Al-Saadoon and Mufdhi) v Secretary of State for Defence [2008] EWHC 3098 (Al-Saadoon HC)*; (2009e), *R (Al-Saadoon and Mufdhi) v Secretary of State for Defence [2009] EWCA Civ 7 (Al-Saadoon CA);* ; (2010b), *Al-Saadoon and Mufdhi v. the United Kingdom, App. No. 61498/08, Judgment of 2 March 2010*.

[497] Krieger (2006), 273-4.

[498] Milanovic (2011a), 96; Shany (2011), 26.

[499] Kretzmer (2005); Watkin (2004). Also: Prud'homme (2007).

[500] (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004* [implicitly pointing at a mixed model by stating that "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*)(emphasis added).

[501] (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)* [introducing, through an interpretation of the principle of proportionality, a duty to resort to least harmful measures even in relation to lawful targets under LOAC; (2008a), *A. and B v. Israel, CrimA*

a 'mixed' model, which combines 'the best of both worlds', to cope with terrorism and other 'new' conflicts.

Views towards the *reach* of innovative humanization differ. Some, such as Koller,[502] Bennoune,[503] and Martin,[504] adopt a rather unlimited view and argue that human rights should be the dominant regime regulating armed conflict, regardless of the practical realities that war entails. Others take a more moderate or pragmatic approach. For example, Meron, one of the principle driving forces behind 'innovative' humanization admits that its parameters "[…] need to be drawn so that it can be related to the reality of armed conflicts."[505] Similarly, Milanovic cautions that, *firstly*, there are limits to the mechanisms available in international law to harmonize norms of IHRL and LOAC, and *secondly* that humanization ought to remain pragmatic and realistic, rather than "some sort of abstract discovery of the law […]" creating "[…] the impression of a fluffy, utopian human rightist disregard for the realities of international relations."[506] This implies that humanization can only be successful, in terms of effectiveness and acceptance, if it produces "some relatively clear, workable rules on both threshold applicability issues and on substantive issues that can arise from the joint application of IHL and IHRL" and if it realizes that "[…] human rights norms cannot be applied in a business-as-usual kind of way, […]" but need, to an acceptable degree, to "[…] be watered down to be applied jointly with IHL."[507]

An important effect, intended or not, of the increased humanitarian standard within LOAC through the injection of IHRL is the imposition on States of obligations with normative contents the specificity of which go beyond requirements currently present in LOAC.[508] In other words, via 'gapfilling' and reinterpretation, innovative humanitarians seek to subject States to norms that narrow down the existing permissible scope of action. Examples of 'new' IHRL-based norms are attempts to introduce a duty, strange to LOAC, to pay individual reparations to individuals killed or injured in military operations; or to fill gaps within

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3261/08 [pointing at duty for the State (*in casu*, Israel) to determine prisoner of war status on an individual basis, not on the mere basis of group affiliation]; (2008e), *HCJ 9132/07, Ahmad v The Prime Minister, ILDC 883 (IL 2008)* [indicating that even though Israel is not longer occupying Gaza, it continues to be bound by an obligation to maintain a minimum level of humanitarian conditions in Gaza].

[502] Koller (2005).

[503] Bennoune (2004).

[504] Martin (2001).

[505] Meron (2000a), 239: "Humanizing the law can and should temper the treatment of civilians and POWs and protect civilian, especially cultural, objects. But it does little to discourage resort to war. It cannot give complete protection to civilians and outlaw collateral damage that does not violate the rules of proportionality. It has a limited role on the battlefield except in the protection of the sick and wounded, and offers very little succor to combatants except with regard to such rules of fair play as the obligation not to refuse quarter."

[506] Milanovic (2011a), 97. Similarly, Goldstone: asked what change he would make to international law, Richard Goldstone, presiding the United Nations fact-finding commission to the Israeli military operations in Gaza in the winter of 2008-2009, and criticized for having relied on HRL in interpreting norms of LOAC, responded: "[t]he first change is to require all international human rights lawyers to get a serious education in military affairs," so they could learn "to balance military necessity and human concerns." The balance is "immensely difficult in the new age of warfare," he said, where "liberal democracies are fighting transnational terrorists." Haven (2011).

[507] Milanovic (2011a), 97. Human rights "must not be watered down too much. Not only would this defy the whole purpose of the exercise, but it would also potentially compromise the values safeguarded by the human rights regime in peacetime. For instance, allowing the State to kill combatants or insurgents *under human rights law* without showing the absolute necessity for doing so, or to detain preventively during armed conflict, might lead to allowing the State to do the same outside armed conflict."

[508] Shany (2011), 25.

LOAC in relation to detention with IHRL-based due process guarantees. One of the most controversial topics of supporters of innovative humanization concerns the subject of targeting – more precisely targeted killing – and the issue of whether there exists in international law regulating armed conflict an obligation to consider alternatives to killing before resorting to lethal force.

To attain this intended effect – more restrictions, more humanity – innovative humanitarians resort to norm-creating tactics that bypass States and their, normally required, consent. As noted by Benvenisti:

> NGOs, private legal experts, and other non-state actors have noted the willingness of tribunals to move the law beyond formal state consent and have embarked on several efforts to generate new law by adopting soft law "guiding principles" and other such informal norms that ostensibly interpret the law. These norms practically move the law beyond state consent and below the radar screens of governments in the hope that domestic and international courts will resort to them as reflecting evolving law."[509]

An important international judicial body that can be said to have contributed in further humanizing LOAC in an 'innovative' fashion is the ICTY.[510] For example, it concluded that "[a] State sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach."[511] And, quite controversially, in relation to the customary status of the prohibition of belligerent reprisals against civilians, the ICTY held that

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[509] Benvenisti (2010), 345-346. See also: Abbott (2007)168-169: "NGOs and other advocates often expect privately generated soft law […] to develop greater normative authority than sovereignty-conscious states and other objectors anticipate, in part by mobilizing and empowering affected groups." An example is the development of the Guiding Principles on Internal Displacement of 1998, a soft-law instrument designed "to progressively develop certain general principles of human rights law where the existing treaties and conventions may contain some gaps." See Deng (2007); Cohen (2004). Another example is the Draft Declaration of International Law Principles on Compensation for Victims of War by the International Law Association, which proposes an obligation for States to pay reparations to individuals rather than States in the case of inter-State use of force. This proposal has been recognized as a right by some national courts and the ICJ also appears to see it that way. (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, 138. Clearly, such developments may also occur in relation to the injection of IHRL elements into the voids left in LOAC.

[510] Admittedly, it has made significant contributions to clarifying various areas of LOAC, in which it has shown sensitivity to the military necessity-humanity balance. Examples are numerous, and include, *inter alia*, interpretations of command responsibility (see (2000p), *The Prosecutor v. Blaskic, Case No. IT-95-14-T, Trial Chamber Judgment (3 March 2000)*, § 332; (2008n), *The Prosecutor v. Strugar, Case No. IT-01-42-A, Judgment of 17 July, 2008 (Appeals Chamber)*, § 299); the defense of superior orders (see (1997m), *The Prosecutor v. Erdemovic, Case No. IT-96-22-A, Judgment of 7 October 1997, Separate Opinion of Judge McDonald and Judge Vohrah (Appeals Chamber)*, § 34); the conduct of hostilities (e.g., on the scope of the prohibition on terror, see (2006f), *The Prosecutor v. Galic, Case No. IT-98-29-A, Judgment of 30 November 2006 (Appeals Chamber)*, §§ 90, 103-104; (2004p), *The Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment of 29 July 2004 (Appeals Chamber)*, §§ 109, as well as on the relationship between military objectives and military necessity, see (2008n), *The Prosecutor v. Strugar, Case No. IT-01-42-A, Judgment of 17 July, 2008 (Appeals Chamber)*, §§ 293-294); the definition of non-international armed conflict, and status of CA3 (see (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)* , §§ 98-99; (2001n), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-12-A, Judgment of 20 February 2001 (Appeals Chamber)*, §§ 157, 174); the extent to which norms of international armed conflict have the status of customary international law in non-international armed conflicts (see (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)* , § 127

[511] (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)* , § 97.

> principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. […] [A] slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred […] [so that] […] belligerent reprisals against civilians and fundamental principles of human beings are absolutely inconsistent legal concepts.[512]

In various cases concerning the, in essence, non-international armed conflict in Chechnya, the ECtHR has examined the Russian military operations through the lens of human rights, which resulted in standards of necessity and proportionality in armed conflict that not only appeared to be stricter than those applicable in peacetime, but also conflict with fundamental principles of LOAC.[513]

Attempts to further humanize armed conflict are also made through the reliance on human rights norms in reports of NGOs. Examples are the Goldstone report, issued by a fact-finding committee of the UNHRC, and which examined the military operations of Israel in Gaza in the winter of 2008-2009;[514] Amnesty Internationals Report on the NATO air campaign in Kosovo,[515] and Human Rights Watch's Report on the invasion of Iraq in 2003.[516]

Similarly, the ICRC appears to be also supporting innovative ways to influence the development of the law towards more humanity through the lens of HRL. While cast in an interpretation of LOAC, evidence of this development can be found in Section IX of its *Interpretive Guidance on the Notion of Direct Participation in Hostilities in International Humanitarian Law*, which calls for the restraint on the use of force against individuals who can be identified as direct participants in the hostilities. Presented as limitations already present in the principles of humanity and restrictive interpretations of the principle of military necessity, they are in essence restrictions based in IHRL.

Another approach of innovative humanization involves military doctrine on counterinsurgency, as well as State practice in counterinsurgency operations in Afghanistan and Iraq. Restrictions on the use of force and detention imposed on troops may be viewed by IOs, NGOs, (quasi-)judicial bodies and legal experts as humanitarian restrictions that find their basis in IHRL, and as such may support an argument that States themselves are consenting to the recalibration of military necessity and humanity, and thus take effective part in the interpretation of the relationship between IHRL and LOAC.

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[512] (2000q), *The Prosecutor v. Kupreskic et al., Case No. IT-95-16-Y, Judgment of 14 January 2000 (Trial Chamber)*, §§ 527, 529. For a rejection of this standpoint, see Schmitt (2010b), 820-821. See also the expressions on belligerent reprisals in United States Department of the Navy (2007), § 6.2.4. ("Reprisals may be taken against enemy armed forces, enemy civilians other than those in occupied territory, and enemy property") and U.K. Ministry of Defence (2004), 421, in line with its reservation made by AP I (reprisals "may sometimes provide the only practical means of inducing the adverse party to desist from its unlawful conduct." Specific reference in footnote 62 is made to the Kupreskic case, qualifying the ICTY's "reasoning [as] unconvincing and the assertion that there is a prohibition in customary law flies in the face of most of the state practice that exists." The ICRC does not share the viewpoint of the ICTY either. See ICRC (2005a), 523: "Because of existing contrary practice, albeit very limited, it is difficult to conclude that there has yet crystallized a customary rule specifically prohibiting reprisals against civilians."

[513] (2005e), *Isayeva v. Russia, App. No. 57950/00, Judgment of 14 October 2005*; (2005f), *Isayeva, Yusupova and Bazayeva v. Russia, App. No. 57947/00, 57948/00, 57949/00, Judgment of 24 February 2005*

[514] While this report relies on LOAC sources, it contains human rights related elements. Examples thereof can be found in its interpretation of the term "effective warning" in Article 57(2)(c) AP I, in relation to the so-called Israeli applied 'knock on the roof' warning system. The Goldstone-committee concluded that Israel had not complied with a range of strict precautionary measures, elements of which appear to be rooted in IHRL and which the drafters of Article 57(2)(c) AP I arguably had not envisaged.

[515] Amnesty International (2000).

[516] Human Rights Watch (2003a).

2.2.3. Criticism of Innovative Humanization

It is not surprising that supporters of traditional humanization view the shift from traditional to innovative humanization with concern (and disgust, to some).

A *first* strain of concern is based on the fact that innovative humanization takes place outside the traditional control of States. Actors such as international tribunals and NGOs replace States in their role as the ultimate arbiter on the balance between military necessity and humanity.[517] In the view of Anderson, NGOs play a crucial role in this process, but

> the pendulum shift toward them has gone further than is useful, and the ownership of the laws of war needs to give much greater weight to the state practices of leading countries. […] [T]he state practice of democratic sovereigns that actually fight wars should be ascendant in shaping the law. And this includes raising the standards of the laws of war to reflect, for example, advances in technology and precision weapons, standards that should become the norm for leading militaries, first for NATO and then beyond.[518]

Secondly, as a consequence of uncontrolled innovative humanization, it is feared that LOAC "with its greater tolerance for operational mistakes committed during the fog of war is cast aside, and human rights law, which arguably imposes a more exacting standard of care, is selected as the principal legal framework for the imposition of liability."[519] This may result in a disconnect between legal theory and practical reality that may eventually not lead to more, but to less protection. As Hansen explains

> moderating warfare through the application of the human rights regime, if not filtered through the lens of humanitarian law and tempered by reference to the realities of modern armed conflict, will result in the eventual "emasculation of warfare." That is, it will unnecessarily restrict warfighters to a point never envisioned by those who framed and ratified the major instruments designed to regulate warfare. It could make winning wars nearly unachievable for those who try to comply with its strict requirements, and "'[e]xcessive' humanization might exceed the limits acceptable to armed forces, provoke their resistance, and thus erode the credibility of the rules." Furthermore, humanization also could serve to unnecessarily prolong armed conflict, and thereby increase the evils of war that it purports to eradicate.[19] Therefore, the unconstrained expansion of human rights law into matters of war must be stopped, for the sake of Soldiers and humanity alike.[520]

A third claim of concern is that the liberal introduction of IHRL-idealism upsets the fundamental 'realist' tenets and "lines of logic" on which LOAC is built. Uttering concern for the fundamentals of LOAC, Osiel writes that for supporters of innovative humanization,

> the empire of human rights knows no limits; it knows exceptions "in no circumstances." A state of armed conflict is apparently irrelevant to whether or how human rights should be applied, […]. There is no need for compromise or accommodation, in other words, between the differing purposes and provisions of each legal universe.[521]

While acknowledging that "the momentum behind the complimentary application of both the law of armed conflict and human rights is too powerful a trend to reverse" Corn contends that the expansion of human rights principles into the realm of armed conflict "borders on the absurd, […]" and that "a blurring of the proverbial lines of logic was inevitable"

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[517] Schmitt (2010a), 822.

[518] Anderson (2003), 42.

[519] Shany (2011)

[520] Hansen (2007), 4. See also Stein (2002), 163-165; Shany (2011), 29. Also: Lubell (2005); Schabas (2007b); Garraway (2007), 175. Ben-Naftali (2011b);

[521] Osiel (2009), 131.

and "is now reaching a wholly illogical context."[522] In addition, Anderson fears negative effects for the value of reciprocity in LOAC. He argues that the injection of "[…] an even more utopian law of war […]" grounded in an "absolutist human rights ideology" may undermine the reciprocal nature of LOAC. In his view, the resulting raising of standards to protect the civilian population increases the burden of 'correct' warfare on the stronger State, and at the same time "assumes, indeed permits, that the weaker side must fight by using systematic violations of the law and its method. This is unsustainable as a basis for the law of war. Reciprocity matters."[523]

In sum, humanization is a "complex partnership – dance, even – between idealism and realism."[524] At the same time, it is a process that cannot be marginalized. Claims as to its normative crystallization in certain areas of LOAC should be viewed with caution, particularly when its roots lie in IHRL. The difficulty in establishing the scope and limits of humanization is to establish in which areas it reflects the *lex lata* and where it is merely an expression of the *lege ferenda*. As will become clear, innovative humanization is a trend that manifests itself particularly in the interplay of the normative frameworks of IHRL and LOAC relevant to the deprivation of life and liberty. The outcome of this interplay informs us on the outer limits of innovative humanization.

2.3. IHRL, LOAC and the 'New Paradigm' of Warfare

A third theme influencing the role and interplay of IHRL and LOAC in armed conflict concerns the legal discourse on the choice for the 'right' paradigm to fight 'new wars'; the alleged obsoleteness of present LOAC and the need for its revision which have arisen in the aftermath of the terrorist attacks on the US by Al Qaeda, on 9/11; and the subsequent US response in its GWOT, which has led it to carry out counter-terrorism operations all over the world. The factual make-up of this 'new war' has laid bare areas of discontent among supporters on both sides of the military necessity-humanity equation that continue to spark debate today. Three responses can be identified: (1) the law enforcement response; (2) the armed conflict response; and (3) the mixed response.

2.3.1. The Law Enforcement Response

Traditionally, States perceived the fight against terrorism as a law enforcement enterprise, as any other criminal activity. Domestically, terrorism was an issue governed by criminal law and human rights law.[525] While terror has been commonly perceived as a – potentially global – threat to national security, on an international level, the approach to counter it was one of enhanced international coordination and cooperation.[526]

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[522] Corn (2010), 56, 93-94.

[523] Anderson (2003), 43. See also Osiel (2009), 110.

[524] Kennedy (2006), 137.

[525] Upon its ratification of AP I in 1998, the UK, for example, made a 'statement of understanding' that, in its view, "the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation."

[526] This law enforcement basis is clearly visible in all thirteen counter-terrorism treaties currently existing. See Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 14 1963, 704 UNTS 219; Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), 16 December 1970, 860 UNTS 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), 23 September 1971, 974 UNTS 177; Protocol for the Suppression of Unlawful Acts

To many States, however, the attacks of 9/11 were of a magnitude that rose above the level of mere criminal conduct, a magnitude that, in their view, exposed the flaws in the existing international counter-terrorism treaties and reached the legal boundaries of a domestic law enforcement response. While acknowledging the external dimension to national security of terrorist acts such as those of 9/11, most European States have continued to confront terrorism as a criminal act, to be dealt with under a normative paradigm of law enforcement, even when attacks take place on their own territory, such as those in Madrid (2004) and London (2005). Generally, the counterterrorism strategy of most European States has aimed at the prevention of terrorist acts through a holistic approach, centered in democracy, human rights and social justice, to be achieved by international cooperation, rather than at retribution and repression by military means alone.[527] As explained by German Federal Minister for Foreign Affairs, Joschka Fischer:

> Tough action and repression alone do not […] constitute a satisfactory response to the threat posed by modern terrorism. We will only be able to curb it through a policy of prevention, if we manage to take a new joint approach to effectively fighting its many different causes. This includes new strategies against hunger, poverty and lack of opportunities as well as the socially just management of economic globalization. But this includes above all protection of human rights, civil, political, as well as socio-economic and cultural rights.[528]

Also among many legal scholars there is support for the argument that the fight against terrorism is principally, if not solely, a law enforcement issue.[529] Overall, they adopt a more human rights centered law-enforcement stance, and aim to prevent "the removal of large parts of the fight against terror from the purview of domestic legal systems to an underdeveloped international legal framework, with fewer hard and fast rules in place, and even more limited supervisory mechanisms."[530]

Nevertheless, at a domestic level, many States modified their existing – and in their view no longer adequate – law enforcement frameworks to meet the security threats posed by the new terror threats. Measures following the revision include the administrative freezing of assets and bank accounts of organizations and individuals listed on a black list;[531] legislation

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of Violence at Airports Serving International Civil Aviation, 23 September 1971, 1589 UNTS 473; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 14 December 1973, 1035 UNTS 167; Convention on the Physical Protection of Nuclear Materials, 26 October 1979, 1456 UNTS 125; International Convention Against the Taking of Hostages, 17 December 1979, 1316 UNTS 205; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988, 1678 UNTS 221; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 10 March 1988, 1678 UNTS 303; Convention on the Marking of Plastic Explosives for the Purpose of Identification, 1 March 1991, UN Doc. S/22393 (1991); International Convention for the Suppression of Terrorist Bombings, 15 December 1997, 37 ILM (1998) 249; Financing Convention, 39 ILM (2000) 270; International Convention for the Suppression of Acts of Nuclear Terrorism, 13 April 2005, UN Doc. A/59/766 (2005).

527 Schorlemer (2003), 267. See also Van Sliedregt (2010), 413; Dworkin (2009), 2.

528 Fischer (2002).

529 Greenwood (2006), 431-432: "In the language of international law there is no basis for speaking of a war on Al-Qaeda or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of criminals"; Drumbl (2002); Paust (2004), 1340-1343; Paust (2002); Paust (2003); Amnesty International (2003), *available at* http://web.amnesty.org/library/pdf/mde310062003english/$file/mde3100603.pdf: "Under existing international humanitarian law, it is not possible to have an international armed conflict between a state on the one hand and a nonstate actor on the other, should the armed group not form part of the armed forces of a Party to the Geneva Conventions."

530 Shany (2011), 23.

531 This measure is part of a package of measures directed against presumed terrorists authorized by UNSC Res. 1267, U.N. Doc. S/RES1267 (Oct. 15, 1999) (which aimed at supporters and members of the Tali-

that allows more flexibility in relation to the detention (such as prolonged pre-trial detention,[532] lower thresholds for pre-trial detention;[533] administrative detention for imperative reasons of security,[534] or detention on the basis of extensive interpretation of immigration laws);[535] legislation permitting the authorization and regulation of coercive interrogation of terror suspects;[536] and laws regulating the prosecution of terrorist suspects (*inter alia*, the prosecution of terrorist suspects on the basis of conspiracy,[537] more liberal rules on evidence admissibility;[538] the establishment of special courts or chambers;[539] restrictions on the right to meet with legal representatives);[540] and the policy of punitive house demolitions.[541] These changes can be said to have led to a normative shift, eroding liberties to enhance security, as well as a shift in responsibilities from the judiciary to the executive branch, weakening the judicial controls to guarantee such rights.[542] As some argue, these developments have incited States to enter a slippery slope, risking overreaction and inflation of threats to

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ban regime in Afghanistan). Resolution 1267 was extended in Resolution 1333 (2000) to individuals associated with Al-Qaeda (U.N. S.C. Res. 1333, UN. Doc. S/RES/1333 (Dec. 19, 2000). See also S.C. Res. 1363, U.N. Doc. S/RES/1363 (July 30, 2001); S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002); S.C. Res. 1455, U.N. Doc. S/RES/1455 (Jan. 17, 2003); S.C. Res. 1456, U.N. Doc. S/RES/1456 (Jan. 20, 2003); S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004); S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005); S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006); S.C. Res. 1699, U.N. Doc.S/RES/1699 (Aug. 8, 2006); This measure has been criticized for its non-transparency. See, *inter alia*, Bothe (2008)541; Bianchi (2006), 881. By enacting Council Regulation 881/2002 (27 May, 2002), the European Community Council followed the UNSC and proceeded to freeze the financial assets of blacklisted organizations and individuals throughout the EU. Following the action by Kadi, a national of Saudi Arabia whose assets were frozen as a result of Regulation 881/2002, brought against the Council of the European Union and the Commission of the European Communities ((2005g), *Kadi v. Council, Case T-315/01, 2005 E.C.R. II-3649 (2002 O.J. (C 56) 16)*), the European Court of Justice (in appeal) held that Regulation 881/2002 violated fundamental principles of EU law. As Kadi still features on the UN blacklist, the European Community adopted Council Regulation 1190/2008 (28 November, 20908) and re-entered Kadi on the blacklist. Kadi has brought new procedures against European Court of First Instance (see (2008f), *Joined Case C-402/05 and C-415/05 P Kadi and Al Barakaat International Foundation v. Council and Commission, Judgment of 3 September 2008*.

[532] See for Australia: the Anti-Terrorism Act 2004, Sections 5 and 7; for the United Kingdom: the Criminal Justice Act 2003, Section 306 and the Terrorism Act 2006, Section 23; for France: the Code of Criminal Procedure, Articles 78-2-2; and for Israel: the Criminal Procedure Law (Detainee Suspect of a Security Offence)(Temporary Measure) 2006, Section 3-5.

[533] See for the Netherlands, Article 67(1) of the Dutch Code of Criminal Procedure; Italy, Article 270(5) of the Penal Code.

[534] See for example: the Anti-Terrorism Act (No. 2) (2005) of Australia (Sch 4, Div 105); The Emergency Powers (Detention) Law 1979 of Israel; and the Indian Code of Criminal Procedure 1973, Sections 107 and 151.

[535] See for example: Part 4 of the Anti-Terrorism, Crime and Security Act 2002 of the United Kingdom; Title 4 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act) of the United States; and Sections 77-85 of the Immigration and Refugee Protection Act 2001 of Canada.

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[537] See, for France: reference made by Dworkin (2009), 3; for the Netherlands, see Bulletin of Acts and Decrees (Staatsblad), 2004, 290, 373.

[538] See, for Germany: Criminal Procedure Code, Section 110a; for Canada: the Anti-Terrorism Act 2001, Part 3; for the United Kingdom: the Terrorism Act 2000, Section 109.

[539] For example in India, see Section 23 of the Prevention of Terrorism Act.

[540] For example in Israel, according to Section 35 of the Criminal Procedure Law (Enforcement Powers – Detention) 1996 (amended in 2005).

[541] Farrell (2003), 871; Zemach (2004), 65.

[542] For an overview of measures taken by European States and the EU, see Van Sliedregt (2010).

justify counterterrorist measures.[543] In addition, some fear a spillover of human rights restrictions based on terrorism to other areas of social tension. Not surprisingly, these measures have led to criticism among scholars and domestic, regional and universal judicial institutions who fear that counter-terrorism measures may affect human rights such as the presumption of innocence; the right to a fair trial; freedom from torture; freedom of thought; privacy rights; freedom of expression and peaceful assembly; the right to seek asylum; freedom from discrimination.[544]
Nonetheless, the overall law enforcement approach by most States differs significantly from the strategy chosen by the US in response to 9/11. It is particularly this approach that has ignited the debate on the re-evaluation of LOAC and the position and role of IHRL in armed conflict.

2.3.2. The Armed Conflict Response

While some States resorted to adaptation of their domestic law enforcement paradigms, leading to limitations of human rights protections, other States, most notably the US, made a more rigorous move, and held that the attacks of 9/11 constituted the beginning of an armed conflict, to which the law enforcement paradigm no longer applied.
To the US, the Al Qaeda attacks of 9/11 marked the day on which its "presumption of invulnerability was irretrievably shattered."[545] The Bush Administration argued that the attacks formed an "armed attack"[546] of terrorists on the US, and constituted the beginning of a "war against terrorism – the first war of the twenty-first century".[547] Unlike the general perception in Europe, where the phrase 'war against terrorism' was viewed as mere rhetorics

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[543] For example, Russia used the attacks of 9/11 as pretext to justify its actions in the Chechnya conflict, as allegedly Chechen rebels were linked with the Taliban and Al-Qaeda. Similar justifications followed from China in relation to the insurgency in Xinjiang province.

[544] (2005c), *Case T-315/01, Kadi v. Council, 2005 E.C.R. II-3649 (2002 O.J. (C 56) 16)*; (2008f), *Joined Case C-402/05 and C-415/05 P Kadi and Al Barakaat International Foundation v. Council and Commission, Judgment of 3 September 2008*; (2009c), *Case T-341/07, Sison v. Council, Judgment of 30 September 2009*; (2008j), *Sayadi v. Belgium, Comm. No. 1472/2006 of 22 October 2008* ; (2004a), *A. v. Secretary of State for the Home Department*; (2002f), *Mar'ab et al. v. IDF Commander of Judea and Samaria et al, HCJ 3239/02, Israel Supreme Court*; (2002d), *HCJ 7015/02, Ajuri v. IDF Commander in West Bank*; (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)*; (2006b), *Hamdan v. Rumsfeld (Judgment of 26 June 2006)*; (2008d), *Boumediene v. Bush, 128 S. Ct 2229 (2008).*

[545] White House (2002), 27.

[546] The United States views the attacks of Al-Qaeda as an armed attack in terms of the *jus ad bellum*, i.e. an act to which it is entitled under Article 51 of the UN Charter to defend itself against. This viewpoint is supported by the United Nations (see U.N. S.C. Res. 1368, U.N. Doc S/RES/1368 (12 September 2001); U.N. S.C. Res. 1373, U.N. Doc. S/RES/1373 (28 September 2001), NATO (see NATO (2001), available at http://www.nato.int/cps/en/natolive/official_texts_18848.htm.), the OAS, and States such as Australia, New Zealand, the United Kingdom, Israel and others. See also Dworkin .

[547] President George Bush, Remarks by The President Upon Returning to the White House, 16 September 2001, available at http://www.whitehouse.gov/news/releases/2001/09/20010916-2.html (23 September, 2001). President Obama, too, has repeatedly publicly stated that the US is at war with Al Qaeda and that the law of armed conflict is the proper legal regime to govern its operations in this war; not US federal criminal laws. See President Barack Obama (2009), transcript available at http://www.whitehouse.gov/search/site/remarks%20by%20the%20president%20on%20national%20security%2021%20may%202009, and President Barack Obama (2010), transcript available at http://www.whitehouse.gov/the-press-office/remarks-president-strengthening-intelligence-and-aviation-security.

and a statement with no more than political implication,[548] to the US it was more than that:[549] it also implied an armed conflict in the legal sense, to be regulated by LOAC.[550] To preserve national security, the US concluded that domestic legal innovations similar to those in European and other States were highly unlikely given the historically conservative line of constitutional interpretation by the US Supreme Court, and as a result would be inadequate to deal with this 'new' phenomenon.[551] Neither would such an approach be logical: given their scale and characteristics, these attacks resembled ordinary inter-State war, although performed by non-State actors.

Among legal scholars, some support the separatist viewpoint of the US government and argue that, because the conflict constitutes an armed conflict, the applicable normative framework can only be found in the LOAC-based 'armed conflict'-paradigm, not in the IHRL-based 'law enforcement'-paradigm. The aim of this view is to create as much flexibility as possible within the boundaries of LOAC to enable a workable response to the threat of terrorism.[552] The trigger for its applicability is no longer whether the facts cross the thresholds of CA 2 or CA 3 of the GCs, but whether

> […] the *de facto* nature of the operation justifies an armed conflict characterization, if for no other reason than the State's implicit invocation of the principle of military objective as a justification for the use of deadly force. […] Depriving warriors of the value of such an important set of principles – a value validated by hundreds of years of history – on the basis of technical legal analysis of two treaty provisions is no longer acceptable. Instead, all warriors must understand that when they "ruck up" and "lock and load" to conduct operations during which an opponent will be destroyed on sight, the laws of war go with them.[553]

Under the umbrella of the armed conflict paradigm, the US went forward with a range of controversial measures.[554] For example, the US takes the viewpoint that it is legally entitled to kill terrorist suspects anywhere in the world. Such killings are governed by the norms and principles underlying the law of hostilities of LOAC, and may also result in the death or injury of innocent civilians and the destruction of their property if this does not outweigh

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548 For example, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office (Baroness Amos), in answer to questions posed in the House of Lords, stated that "[t]he term "the war against terrorism" has been used to describe the whole campaign against terrorism, including military, political, financial, legislative and law enforcement measures." (Hansard 22 Nov 2001: Col. WA153).

549 As viewed by Jackson, "[t]he language of the 'war on terrorism' is not a neutral or objective reflection of policy debates and the realities of terrorism and counter-terrorism," [but]Jackson (2005) "a very carefully and deliberately constructed—but ultimately artificial—discourse that was specifically designed to make the war seem reasonable, responsible, and 'good,' as well as to silence any forms of knowledge or counter-argument that would challenge the exercise of state power." See Jackson (2005), 148

550 The US administration adopts a very broad concept of 'armed conflict'. Its instructions to Military Commissions explain that armed conflict: "does not require […] ongoing mutual hostilities […]. A single hostile act or attempted act may provide sufficient basis […] so long as its magnitude or severity rises to the level of an 'armed attack' or an 'act of war', or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement." See Section 5(C) of Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission, April 30, 2003, www.dtic.mil/whs/directives/corres/mco/mci2.pdf.

551 Garraway (2006), 4.

552 Koh (2010); Bellinger III (2010); Dennis (2007); Hays Parks (2010a).

553 Corn (2009), 30, 36.

554 Dworkin (2009), 3.

the concrete and direct military advantage anticipated.[555] This standpoint has found its peak moment in the targeted killing of Osama bin Laden, Al-Qaeda's leader, on 2 May 2011.

Another highly sensitive measure is the US's claim to a right to global detention power. For the reasons outlined above, the Bush administration has made a number of far-reaching determinations regarding the status and treatment of Al-Qaeda and Taliban detainees, which has attracted a great deal of criticism from many directions.[556]

Other highly sensitive measures taken by the Bush administration were the secret detention of individuals under a classified CIA program,[557] the authorization of interrogation techniques such as 'water-boarding' based on flexible interpretations of the definition of torture as laid down in Article 1 of the CAT, to which the US is a party;[558] as well as rendition, i.e. the extra-judicial transfer of individuals from one State to the US for purposes of trial or from one State to another State for purposes of legal process or interrogation.[559] A final controversial measure taken by the Bush administration was the establishment of military

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[555] A well-known example is the CIA-led aerial strike against Al-Qaeda suspects in Yemen, in 2002. President Obama has continued this controversial program with drone strikes against Al-Qaeda and Taliban targets in Pakistan. According to Harold Koh, the Legal Advisor of the U.S. Department of State, "[I]t is the considered view of this Administration […] that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war." See Koh (2010). In a less confident fashion on the legality of targeted killings, see John Bellinger III, the former Legal Advisor to the U.S. Department of State who argues that even if LOAC is an acceptable framework, after eight years, *it is still not clear to the United States or any other country* what legal rules apply to targeting and detention issues."[555] See Bellinger III (2010), 336, (emphasis added)

[556] Shortly after his inauguration, President Obama announced a range of measures. He announced the intention of closing the detention facility on Guantanamo, (see The White House (2009c)). At the time of this writing, Guantanamo has not closed, as the U.S. Congress has barred the President's authority to transfer detainees to the United States. See Associated Press (2011), available at http://www.foxnews.com/us/2011/02/17/gates-prospect-low-guantanamo-closes/. He also introduced, *inter alia*, the more strict requirement of "*substantial* support" (as a deviation from mere "support) as a basis, next to membership, to detain Taliban or Al-Qaeda forces or associated forces anywhere in the world (see (2009f), *Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, (13 March 2009)*, 2, 7) This includes a right of preventive detention for security reasons – i.e. detention of "people who cannot be prosecuted for past crimes, but who nonetheless pose a threat to the security of the United States" – under the premise that such individuals are to be prosecuted when feasible

(see (2009g), available at http://www.nytimes.com/2009/05/21/us/politics/21obama.text.html.). In addition, he announced to bring detention in line with international law, for which purposes he set up the Special Interagency Task Force on Detainee Disposition (see The White House (2009d). On the Task Force, see http://www.whitehouse.gov/the_press_office/Review_of_Detention_Policy_Options. The task force established to review detention policy was to report six months after its establishment, but its mandate was extended with another year. At the time of this writing, the task force is still struggling with the issues and has not reported.

[557] Allegedly, and contrary to official government statements, such detentions continued at least until 2006, when President Bush announced the transfer of fourteen detainees from the CIA to Guantanamo. In addition, it is now known that the CIA operated from secret detention facilities in Poland and Romania, even though to date neither State has confirmed these allegations nor publicly acknowledged to have given permission to do so. The program has been closed down by President Obama, see http://nytimes.com/2009/01/23/us/politics/23GITMOCND.thml?pagewanted=all&_r=0.

[558] Bybee (2002a).

[559] In 2009, the Obama administration announced it would continue this program. See Johnston (2009), available at http://www.nytimes.com/2009/08/25/us/politics/25rendition.html. At the same time, he announced his intent to bring the practice of rendition in conformity with domestic and international law. For this purpose, President Obama established an Interrogation and Transfer Policy Task Force, pursuant to The White House (2009b). On the announcement of the Task Force and its mandate, see http://www.justice.gov/opa/pr/2009/August/09-ag-835.html.

tribunals for suspects charged with violating the laws of war based on the Military Commissions Act of 2006.[560]

2.3.3. The 'Mixed' Response

The third response detectable is the 'mixed' response. This response argues that neither the law enforcement model, nor the armed conflict model provides a suitable framework for conflicts between a State and transnational terrorist groups. Kretzmer, for example, proposes to replace the concepts of military necessity and proportionality under LOAC with those governing the right to self-defense under Article 51 UN Charter, with the aim to restrict the use of force against terrorists to that strictly necessary in light of the circumstances, including the risk that civilians may be killed.[561]

In sum, on a more conceptual level, the different responses seem to reflect a process of recalibration of the equilibrium between national security interests and humanitarian concerns, in favor of the former.[562] On the one hand, they represent a shift within the law enforcement paradigm to a regime with fewer human rights protections. On the other hand they posit a shift from individual-based law enforcement measures to collective-based armed conflict measures.

2.3.4. LOAC: Outdated? Revision?

Generally, the evolution of LOAC has always followed the evolution of warfare.[563] In a way, "[e]very war is a petri dish for the next round of the laws of war."[564] To many, the events of 9/11 mark the most recent benchmark to reconsider LOAC
While, in its view, the regime of LOAC offered the US the proper toolbox to deal with terrorist threats of this magnitude, the determination of the applicability of LOAC soon presented the Bush administration with a major dilemma: a dilemma that has proved to be the starting point of a fierce debate that continues today. Indeed, to the US, the conflicts with Al Qaeda and the Taliban (predominantly the former) appeared to imply a paradigmatic shift away from the traditional categories of armed conflict and an encompassing breakdown of traditional boundaries of armed conflict, i.e. between

> […] armed conflict and "internal disturbances" that do not rise to the level of armed conflict; between states and nonstate actors; between combatants and noncombatants; between spatial zones in which conflict is occurring and zones in which conflict is not occurring; between temporal moments in which there is no conflict and temporal moments in which there is

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[560] Under President Obama, these military tribunals are being reformed to ensure that they are "[…] a legitimate forum for prosecution, while bringing them in line with the rule of law." Particularly, the military commissions will be governed by new rules, to "[…] ensure that: First, statements that have been obtained from detainees using cruel, inhuman and degrading interrogation methods will no longer be admitted as evidence at trial. Second, the use of hearsay will be limited, so that the burden will no longer be on the party who objects to hearsay to disprove its reliability. Third, the accused will have greater latitude in selecting their counsel. Fourth, basic protections will be provided for those who refuse to testify. And fifth, military commission judges may establish the jurisdiction of their own courts." See The White House (2009e), available at http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Military-Commissions/.

[561] Kretzmer (2005). See also Rona (2003); Garraway (2006); Dworkin (2005).

[562] Shany (2011), 23.

[563] For an overview of the evolution of warfare and LOAC, see Section 2.

[564] Anderson (2003), 42.

conflict; and between matters that clearly affect the security of the nation and matters that clearly do not.[565]

The Bush administration decided that it was engaged in two conflicts. On the one hand it was party to a global armed conflict involving al-Qaeda and affiliated terrorist organizations – viewed as a 'new paradigm' and called the GWOT. On the other hand, it was in armed conflict with the Taliban, the *de facto* government of the recently invaded Afghanistan, a safe haven for Al Qaeda.

In relation to the qualification of the nature of both armed conflicts, the Bush administration took decisions that continue to be at the heart of academic and practical debate today.

First, in relation to the armed conflict with Al Qaeda, President Bush decided – pursuant to his authority as Commander in Chief and Chief Executive of the United States, and following legal advice of the Department of Justice and its 'Attorney General[566] – that in relation to the conflict with Al Qaeda in Afghanistan or elsewhere throughout the world," none of the provisions of the GCs pertaining to international armed conflicts applied since, "among other reasons, Al Qaeda is not a High Contracting Party to Geneva."[567] Neither could the armed conflict with Al Qaeda be dealt with under CA 3 to the GCs, because – following a strict interpretation – the conflict was not limited to "the territory of one of the High Contracting Parties", i.e. the US, but was a conflict of an international character, and CA 3 applies only to "armed conflict not of an international character."

In relation to the armed conflict in Afghanistan, against the Taliban, the Bush Administration viewed the conflict as an IAC, to which the GCs applied, even though legal advice concluded that President Bush had "the authority under the Constitution" to suspend their applicability. As with Al Qaeda detainees, Taliban detainees were not protected by CA 3. In addition, President Bush determined that Taliban detainees did not fulfill the requirements for combatant status, nor were they to be awarded the protection of civilians, as they lost such protection due to their participation in the hostilities. Hence, they were "unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva." Nor were 'unlawful combatants' to be dealt with under domestic law or benefit from protection following obligations under IHRL.

However, as it turned out, the determination of the non-applicability of the GCs and CA 3 to Al Qaeda and Taliban detainees was rather lop-sided, for it merely referred to a denial of the protective standards of enemy fighters; not to a denial of privileges to the US.

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565 Brooks (2004), 677.

566 For the legal advice provided to President Bush, see Gonzales (2005), also available at http://www/gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf. See also Former U.S. Deputy Assistant Attorney General John Yoo, who argued that the United States was at war with Al Qa'eda, in Yoo & Ho (2003); and the memorandum by Jay S. Bybee to Alberto Gonzales and William J. Haynes II, General Counsel of the Department of Defense of 22 January 2002, stating that the GCs did not apply because the US was not at war with another State (which barred that application of LOAC pertaining to international armed conflicts), not was it involved in an armed conflict taking place in the territory of one State (which barred the application of CA3 relating to NIACs), see Bybee (2002), available at http://news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf. As to the interpretation of the Convention Against Torture, see the so-called Bybee Memo, Bybee (2002a), available at http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html.

567 The reference to "other reasons" possibly refers to the United States viewpoint on the applicability of the LOAC pertaining to international armed conflicts to terrorists and other none-State actors as expressed in 1987, in its explanation for not ratifying AP I. This viewpoint entails that acceptance of the applicability of LOAC governing international armed conflict to non-State actors would be tantamount to recognition of a right for such groups to resort to armed force, a right that is prone to abuse.

Thus, while the Bush administration claimed it ought to benefit from the privileges awarded to a party under the LOAC pertaining to IACs, to include, most importantly, the privilege to attack enemy combatants without prior attempt of arrest or detention, and the right to intern Al Qaeda fighters until the end of hostilities of the GWOT, on the other hand it felt it was not under an obligation to provide Al Qaeda and Taliban detainees the standards of treatment normally provided to POWs under GC III.[568]
The rationale for this position is that:

> [s]imply put, the United States did not want to be handicapped by rules more suited to conflicts between states with professional armed forces that can be expected generally to observe the laws of war. To fight an enemy intent on hiding among the civilian population in order to launch attacks on civilians, the Bush Administration wanted as free a hand as possible in deciding when to use force, whom to detain, how to interrogate them, and how long to keep them incarcerated. The Administration feared that applying the laws of war in full would tie its hands while imposing no constraints on al Qaeda and other terrorists organizations.[569]

As such, the US' 'armed conflict' response can be said to reflect a post-modern form of *Kriegsraison.*

Consequently, as argued by many, it becomes increasingly difficult to cast the nature of the today's threats in terms of applicable law.[570] In addition, the question is raised whether the 'enforced', perhaps artificial application of traditional norms of LOAC would not undermine the traditional and foundational balance between military necessity and humanity.[571]
The seminal question underlying this ongoing discussion, posed by many, appears that if (transnational) armed conflicts against non-State actors become the norm, and inter-State armed conflicts the exception, is it now not the time to review and, if necessary, update LOAC to a standard which permits States to preserve national security from these new threats?[572]
Answering the question in the affirmative, some refer to today's conflicts as "new wars", requiring "new laws".[573] This group points at LOAC as a regime that is outdated, because it contains norms that are unreasonable and impracticable.[574] A revision of LOAC is required

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[568] Despite these determinations on the applicability of the Geneva Conventions, President Bush held that "our values as a Nation, […], call for us to treat detainees humanely, including those who are not legally entitled to such treatment." Therefore, "[a]s a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." President George Bush (2002).

[569] Wippman (2005), 10. See also Dworkin (2009), 3.

[570] Brooks (2004), 744. See also Sloane (2007), 484-485.

[571] Shany (2011), 24.

[572] Pfanner, for example, asks if "wars between States are on the way out, perhaps the norms of international law that were devised for them are becoming obsolete as well." Pfanner (2005), 158; in a similar fashion, Rona questions whether LOAC is "passé, or at least stale and in need of revision—inadequate to deal with the demands of modern day terrorism and the efforts to combat it?" Rona (2003), 56 (answering that it is not).

[573] Ravid & Pfeffer (2009), available at: http://www.haaretz.com/hasen/spages/1122546.html ("Prime Minister Benjamin Netanyahu instructed the Foreign, Justice and Defense ministries to prepare an international initiative that would see the laws governing warfare adjusted to combating terrorism. Netanyahu would like to rally Western countries involved in the war on terror in formulating changes to the international law on warfare, so that it would be possible for countries to have enshrined in law their right to defend themselves against acts of terrorism.")

[574] For example, Alberto R. Gonzales, Counsel to the President, in a memorandum of 25 January 2002 to President Bush, qualifies certain parts of the Geneva Conventions as "obsolete" and "quaint." See Gonzales (2005)118-121, 119.

to increase the permissible scope of action to cope with the changing, terrorist face of warfare and the manner in which to counter the threats arising there from.[575] For example, Rieff argues that "[t]he crisis of international humanitarian law was an accident waiting to happen" and "[…] when law and material reality no longer coincide, it is, of course, law that must give way."[576]

Others, arguably from a human rights/humanization point of view, support a change of LOAC because they fear that State responses may lead to overreaction, lawlessness, and abuse of power at the detriment of human rights safeguards. Their principle aim is, as Ignatieff argues, to engage in "the battle of ideas: it has to challenge directly the claim that national security trumps human rights."[577]

Another group calls for the need for a set of norms, between law enforcement and armed conflict, that reflect the transnational character of modern-day conflict, but that find a balance between civil liberty and national security. Some focus on the US' domestic legal situation. For example, Ackerman proposes an "Emergency Constitution;" Hakimi suggests an administrative approach.[578] Others look for balanced and pragmatic solutions with LOAC and IHRL, and appreciative of the complex military situation on the ground. Sloane, for example, proposes a "voluntarist war convention" which balances between "security and freedom from fear" and "conceptions of human dignity and rights that have been rightly acknowledged as laudable hallmarks of the postwar international legal order."[579]

Sitaraman identifies a disconnect between present LOAC and counterinsurgency and argues that "if we are to devise a legal regime for contemporary conflict, it must be based on the right understanding of the strategic balance" and that "in the face of today's challenges – in this age of counterinsurgency – the laws of war must continue to keep up with the realities of war or else become increasingly irrelevant and potentially ignored."[580]

Another group, however, sees no need for change. Instead, they argue for "a candid recognition of the true nature of the "conflict" in which the US is engaged – and a good faith adherence to both the law of armed conflict and the other controlling principles of international law."[581] In search for the flexibility of its boundaries in the permissive sense, they call not for a codified revision of LOAC through a diplomatic conference, but rather a reinterpretation of LOAC in such ways to lower its threshold of applicability, or to find arguments to circumvent its applicability.[582] Others strongly oppose a revision. As explained by Sassòli:

> As with all laws, the laws of war can and must adapt to new developments. However, no law can be adapted in every new case of application to fit with the results desired by those (or some of those) involved. As part of international law, and pending a Copernican revolution

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[575] This group includes Israel. Ravid & Pfeffer (2009), *available at* http://www.haaretz.com/hasen/spages/1122546.html (referring to Prime Minister Netanyahu's initiative to "see the laws governing warfare adjusted to combating terrorism.")

[576] Rieff (2002), available at http://www.crimesofwar.org/sept-mag/sept-home.html.

[577] Ignatieff (5 February 2002), *Is the Human Rights Era Ending?*.

[578] Ackerman (2006), 1-9; Hakimi (2008), 373.

[579] Sloane (2007), 484-485.

[580] Sitaraman (2009), 1749.

[581] Graham (2003), 335-336. See also President Bush, writing the National Security Council that "[T]he war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva. President George Bush (2002),
available at: http://www.washingtonpost.com/wpsrv/nation/documents/020702bush.pdf.

[582] As President Bush wrote to the National Security Council:

> of the Westphalian system, the law must, in addition, be the same for all States. To see it only as a means, to be immediately adapted to new claims, or to apply it selectively undermines the predictability and therefore the normative force that defines legal rules.[583]

To accept too easily that LOAC fails to deal with a new set of facts obviously undermines the normative content of its prohibitions.[584] They also caution against the danger of modifying the boundaries of LOAC. While LOAC aims to humanize armed conflict, at the same time it contains a permissible area of action that goes further than what domestic law or IHRL allows. Some fear that the modification of LOAC opens an opportunity for States to negotiate more lenient rules to combat terrorism, at the cost of humanitarian interests. The risk is that "fiddling with the boundaries or, more accurately, with the overlap between humanitarian law and other legal regimes can have profound, long-term, and decidedly "unhumanitarian" consequences on the delicate balance between state and personal security, human rights, and civil liberties."[585]

Others argue that changes to LOAC actually admit to the claim that LOAC is not capable to impose limitations on the measures taken by the US.[586] They rather seek to clarify the thresholds for applicability of LOAC, and, in those areas in which it is ambiguous, to clarify the normative content of LOAC. Dworkin, for example, "acknowledges the unprecedented nature of a non-international armed conflict on a global battlefield, but maintains that it can nevertheless be adequately regulated through a proper interpretation of existing law." In his view

> […] the principle legal regimes that apply are domestic law and, most importantly, human rights law. In the face of armed challenge of al Qaeda, the United States may appeal to military necessity to justify the use of force under some circumstances, but it must always do so within the limits set by the law of human rights. Indeed, the most important question raised by the war on terror is how human rights principles should apply in this kind of transnational but not inter-state conflict.[587]

Others emphasize that such an interpretation and clarification of the existing norms and principles of LOAC takes account of the complexities and nature of contemporary warfare. Watkin, while stressing that the challenge of 'three block wars' is not new, argues that "the complexity of the security situation appears to require an approach that acknowledges the humanitarian law principles, but seeks to temper their application by considering less violent means to contain the threat where feasible. […]"[588] Garraway calls for "a holistic approach to the law" that offers "some sort of rapprochement between the strict standards of human rights law and the more relaxed provisions of the law of armed conflict […] in ways that respect the rights of all as well as reflecting a proper understanding of the realities on the ground."[589] Stephens and Lewis stress "that the ambiguities inherent in key aspects of the

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583 Sassòli (2004), 221; See also Rona (2003); Lubell (2010), 125 ff;

584 Rona (2003), 57.

585 Rona (2003), 57-58; Stahn (2002), 195; Dinstein, 2009 #2120 , 54-55. See also Paust (2002), 12: "[…], claimed changes in the status of war, thresholds for application of the laws of war, and "combatant" status could have serious consequences for the United States, other countries, U.S. military personnel, military personnel of other countries, and the rest of humankind. In some ways, claimed changes could even serve those who attacked the United States on September 11th as well as other nonstate actors who might seek to engage in various forms of transnational terrorism in the future. Mean-spirited denials of international legal protections would not merely be unlawful, but would also disserve a free people. Such denials have no legitimate claim to any role during our nation's responses to terrorism."

586 Brooks (2004)

587 Dworkin (2005), 55.

588 Watkin (2005b), 46-47.

589 Garraway (2006)

law of armed conflict may contribute to neither the proper realisation of humanitarian goals nor the attaining of effective victory on the battlefield. There is a need for a more pragmatic assessment of many of the principles underpinning the law and a recognition that the law should evolve to take account of current operational and technological realities, especially in the context of targeting decisions."[590] In other places, links between interpretation of LOAC and counterinsurgency are made. Most notably, Stephens notes that

> […] within established mainstream legal thinking, […] [a] formalist methodology of interpretation and a continued commitment to the attritional focus of the law of armed conflict (LOAC) remain the prevalent orthodoxy, notwithstanding that such binary thinking has proven to have limited utility within counterinsurgency (COIN) and stabilization operations. There is plainly a need for renewed thinking, or at least an appreciation of the direction warfare is going, so that interpretative techniques employed in LOAC may be reimagined and recalibrated in order to remain relevant to operational realities.[591]

A principal player in the field of LOAC, the ICRC, argues that LOAC as it stands today is sufficient, but requires clarification at certain points.[592] Noteworthy in this regard is its recently completed Study on the Current State of International Humanitarian Law aimed at strengthening legal protection for victims of armed conflicts, which identified four core areas that require further legal development or clarification.[593] In his address of 21 September 2010, ICRC President Dr. Jakob Kellenberger stated that LOAC

> […] remains, on the whole, a suitable framework for regulating the conduct of parties to armed conflicts, international and non-international. […] What is required in most cases - to improve the situation of persons affected by armed conflict - is greater compliance with the existing legal framework, not the adoption of new rules. […] All attempts to strengthen humanitarian law should, therefore, build on the existing legal framework. There is no need to discuss rules whose adequacy is long established. […] However, the study also showed that humanitarian law does not always respond fully to actual humanitarian needs. Some challenges that exist - in protecting persons and objects during armed conflict - are the result of gaps or weaknesses in the existing legal framework, which requires further development or clarification.[594]

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[590] Stephens & Lewis (2005), 55.

[591] Stephens (2010), 290.

[592] For example: Roberts (2003), 230: "Suggestions that the existing laws of war are generally out of date in the face of the terrorist challenge are wide of the mark. […] However, some modest evolutionary changes in the law can be envisaged. […] Some changes in some of these areas may require a formal negotiating process. Some, however, may be achieved – indeed, may have been achieved – by the practice of states and international bodies, including through explicit and internationally accepted derogations from particular rules that are manifestly inappropriate to the circumstances at hand; and also through the application of rules in situations significantly different from inter-state war."

[593] This process follows an earlier project, launched in 2002, "on the Reaffirmation and Development of IHL". Recognizing the renewed interest in LOAC following the events of 11 September, 2001 and the international response to them, the ICRC launched the "Project on the Reaffirmation and Development of IHL" to examine issues relating to the applicability of LOAC to the global war on terrorism, the conflicts in Iraq and Afghanistan, the rise of internal armed conflicts and the compliance of parties to an armed conflict with LOAC. The Study was sponsored by the Swiss Foreign Ministry to "[…] provide a space for debate on the reaffirmation and development of international humanitarian law in light of the new and evolving realities of contemporary conflict situations." The Study addressed seven topics in expert meetings. One of those topics concerned the study to explore the notion of "direct participation in hostilities under IHL", which in 2009 resulted in the ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.

[594] Address by Dr. Jakob Kellenberger, President of the ICRC, 21 September 2010, on the ICRC study on the current state of international humanitarian law.

In this process, IHRL is being looked at – explicitly or implicitly – as an appropriate vehicle to fill these gaps and provide clarification.[595] While this may increase protection of the victims of armed conflict, such developments may also lead to (further) restrictions of the permissible scope of action, or may viewed upon as having such effect.

3. The Regulation of Norm Relationships in International Law

3.1. International Law as a Legal System

The starting point for examining norm relationships in international law is the idea that international law is generally to be viewed as a legal (sub-)*system* within the system of law as whole with features distinct from other legal systems. As explained by the ILC Report

> [i]ts rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them.[596]

Based on this systemic vision,[597] legal practitioners are able to identify norms, interpret them, determine their mutual relationship and solve friction between them "not only by resorting to the specific treaties at hand but also by relying on the basic principles of the system and its underlying norms."[598]

3.2. Norm Relationships: 'Valid' and 'Applicable'

Norm relationships only develop when norms are *valid* and *applicable* to the same situation.[599] A norm is valid in relation to a situation if it covers "the facts of which the situation consists."[600] A relationship is only then established if *both* norms are valid. If only one regime provides a norm, no relationship will be formed.
In addition to its validity, the applicability of the norm must be determined. According to the ILC Report, the fact "[t]hat two norms are applicable in a situation means that they have binding force in respect to the legal subjects finding themselves in the relevant situation."[601] This binding effect can be determined by assessing whether a treaty applies *ratione materiae*, *personae*, *temporis* and *loci* to a particular situation; whether the State is party to a treaty provid-

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[595] See, again, Kellenberger, who stressed that "[…], it bears reminding that strengthening the legal framework applicable to armed conflict also requires that other relevant legal regimes - besides humanitarian law - be taken into consideration." At the same time he cautions that "[i]t is essential that any development or clarification of humanitarian law avoids all unnecessary overlapping with existing rules of human rights law. Any risk of undermining these rules must be avoided. However one essential fact must always be kept in mind: humanitarian law has to be respected in all circumstances whereas derogation from some provisions of human rights law is permitted during emergencies. The codification of humanitarian law may therefore help to prevent legal gaps in practice."

[596] Koskenniemi (2007a), § 14(1). See also Higgins (1994), 8.

[597] The systemic approach to international law is strongly influenced by the systemic German approach in constitutional law, vis-à-vis the more contractual American approach to constitutional law. On that topic, see Nolte (2005). On the influence of German legal scholarship on the systemic approach to international law, see Benvenisti (2008). See also Vogenauer (2006), 657, who characterizes German legal culture as "[…] the emphatically academic and scientific spirit of legal scholarship with its struggle for rationality, systematic coherence, logical consistency, building on first principles, obsession with taxonomy, abstractness, precision and clarity of concepts […]."

[598] Benvenisti (2008), 397

[599] Pauwelyn (2006), § 35. See also Koskenniemi (2007b), 16, § 20.

[600] Koskenniemi (2007a), 263, § 14(2), accompanying footnote 6.

[601] Koskenniemi (2007a), 263, § 14(2), accompanying footnote 6.

ing the norm; whether it has made reservations to the norm; whether it has derogated from the norm; whether it has indicated to be a persistent objector to the norm in case it is of customary nature; and whether the norm applies extraterritorially. A relationship is only then established if *both* norms are applicable. As such, relationships may exist between general norms and more special norms, between norms at different hierarchical levels, between older and newer norms and between norms and their larger 'normative environment'.
In sum, it may thus be that both norms are valid, but that one of the norms, or even both, lacks applicability. *In extremis*, it may be that a particular matter is only regulated by a valid norm of regime A, and another regime B does not provide a valid norm, but that ultimately the matter remains unregulated, because the norm of regime A, while valid, is not applicable.

3.3. Complementarity, Harmonization and Normative Conflict

It is a well-established principle of law that once it is established that norms are both valid and applicable in relation to a particular subject matter – and thus it is certain that they are in a state of relationship – an obligation arises to search for their ability to *complement* each other so as to give each of them *maximum* – not necessarily *equal* – effect. This *general principle of complementarity*[602] is not limited solely to international law, but it is inherent to the law as a whole, although in international law it may play a more important role in the absence of a more formal hierarchical structure that one may normally find in other legal systems, such as domestic law.
Complementarity is a reflection of the function of all general principles underlying the legal system as a whole, namely to provide a coherent legal methodology that will enable the lawyer to reconcile differences between different legal systems and to provide a general framework for the relationship between different legal regimes and the rules and principles that form part of those regimes. In international law, this desire for complementarity is a reflection of the desire for the *harmonization* of norms to the fullest extent, so as to ensure that both norms "appear as parts of some coherent and meaningful whole."[603] When a state of harmonization is reached "there appears to be no conflict or divergence at all."[604]

As stated by the ILC Report, "in international law, there is a strong presumption against *normative conflict*."[605] Normative conflict is "a phenomenon in every legal order."[606] Under-

[602] As to the meaning of 'complementary' *as a concept*, Kleffner (2010a), 73, explains that, "[g]enerally speaking, matters or things are described as being 'complementary' if and when they are 'completing something else' or 'making a pair or a whole'. 'Complementarity', in turn, refers to a relation of different parts and denotes the condition of things that complement one another, while a 'complement' is generally understood as something that, together with other things, forms a unit."
[603] Koskenniemi (2007b), 208, § 214.
[604] Koskenniemi (2007b), 16, § 20.
[605] Koskenniemi (2007b), 25, § 37. The issue of normative conflict is intrinsically linked with the issue of fragmentation of international law. Fragmentation of international law can be described as the process in which "specialized and (relatively) autonomous rules or rule-complexes" (Koskenniemi (2007b), 11, § 8) have emerged, developed and become functional in a spontaneous, decentralized and non-hierarchical fashion along separate historical, functional and regional lines (Jenks (1953), 403), both in substance (i.e. primary rules) and procedure (i.e. secondary rules) (Pauwelyn (2006), § 1). Fragmentation is the logical consequence of the absence in international law of a general legislative body, the multiplicity of national legal regimes and the "functional differentiation" of the international and national society due to globalization. Exemplary of such rules or rule-complexes are fields such as trade law, environmental law, international refugee law, the law of the sea, European law, and, of relevance, LOAC and IHRL. Each has its

standing the meaning of the notion of 'conflict' is crucial for the understanding of normative relationships. While the exact meaning of 'conflict' is disputed among contemporary scholars there appears to be support for a broad definition, both in general legal theory[607] as well as in international law.[608] For the purposes of this study, we will adhere to the definition adopted in the ILC Report, which defines conflict "as a situation where two *rules or principles* suggest different ways of dealing with a problem."[609]

The ILC Report's definition goes beyond the more traditional (and "bland")[610] narrow view that 'conflict' "in the strict sense of direct incompatibility" occurs (only) "where a party to the two treaties cannot simultaneously comply with its obligations under both treaties."[611] According to the ILC Report such a focus on "mere logical incompatibility mischaracterizes legal reasoning as logical subsumption."[612] The definition in the ILC Report instead adopts a 'looser understanding of conflicts', i.e. those arising from relationships where norms "may possess different background justifications or emerge from different legislative policies or aim at divergent ends."[613] Central in this view appears to be the focus on the competing *interests* involved, whether they originate from prohibitions, obligations or permissions.[614]

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own sets of rules and principles, legal institutions and legal practice. As a result, "[a]lthough these systems are part of the wider framework of international law, their relationship to it and to each other is far from clear" (Lindroos (2005), 31). While some perceive fragmentation to constitute a principal cause of forum-shopping, normative conflict, conflicting jurisprudence, erosion of the unity of general international law and legal security (DuPuy (2002); Jennings (1997); Guillaume (1996); Schwebel (1999); Hafner (2004); Brownlie (1987)), according to the ILC Report "[…] the fragmentation of the substance of international law […] *does not pose any very serious danger to legal practice*. It is as normal a part of legal reasoning to link rules and rule-systems to each other, as it is to separate them and to establish relations of priority and hierarchy among them. The emergence of new "branches" of the law, novel types of treaties or clusters of treaties is a feature of the social complexity of a globalizing world. If lawyers feel unable to deal with this complexity, this is not a reflection of problems in their "tool-box" but in their imagination about how to use it" (Koskenniemi (2007b), 114-115, § 222 (emphasis added). See also Pauwelyn (2006), § 7: "[…] its benefits – a laboratory of ideas, efficiency and legitimacy through specialization, contestation and competition, as well as respect for the diversity between States – should normally outweigh its risks, i.e., the potential of overlaps and conflicting rules and rulings. This ought to be the case especially when all actors involved respect a minimum of dialogue, tolerance and curiosity toward other legal regimes and actors." In sum, therefore, the acceptance of fragmentation as a development inherent to the international legal system implies acceptance of the fact that valid and applicable international norms are not always in harmony with each other, but that international law is flexible enough to withstand conflicts before reaching a breaking point.

606 Koskenniemi (2007b), § 26.

607 See for example Engisch (1935), 46.

608 Karl (1983); Klein (1962), 555; Falke (2000), 328; Pauwelyn (2003), 176;

609 Koskenniemi (2007b), § 25.

610 Kammerhofer (2005), 2. See also Vranes (2006), 404, for a critical analyses of the narrow definition.

611 Jenks (1953), 426 (emphasis added). In Jenks view, 'conflicts' between other norms than obligations are to be called divergences. Narrow definitions are also found with Czapliński & Danilenkow (1990), 12-13 and Wolfrum & N (2003), 4, although there is debate on their exact scope and meaning. For a discussion see Vranes (2006), 402 and footnotes 44 and 45.

612 Koskenniemi (2007b), 19, § 25.

613 Koskenniemi (2007b), 19, § 24.

614 Bentham (1970), 93-109 and 153-183. See also Vranes (2006) for support of a definition allowing accepting conflicts between prohibitions, obligations or permissions. Not all authors support such broadening. Jenks (1953), 401, for example, argues that the simultaneous applicability of a right and an obligation should be viewed as a situation of conflict avoidance. After all, if a right conflicts with an obligation, the State can opt not to exercise its right in order to comply with the obligation. Pauwelyn (2003), 184-188, in turn, rejects this view and argues that the forcible non-enforcement of a right frustrates the right as much as would the non-compliance with the obligation.

This would allow for the qualification as a proper norm-conflict the friction between a permissive norm and an obligation; a permissive norm and a prohibition; and a prohibition and an obligation.[615]
In addition, the ILC Report's definition also appears to go beyond the rather absolute view that a potential breach only results from 'total conflict', i.e. if in relation to a particular subject-matter one norm prohibits certain behavior prescribed by the other norm.[616] Adherence to such incompatibility would exclude from the definition of normative conflict situations of 'partial conflict', i.e. where two norms are generally in harmony, but one of them diverges from the other only partially.[617]

Notwithstanding the nature of the conflict (be it total or partial), when not avoided or resolved it will result in the – equally total or partial – *breach* of one of the norms. Clearly, such result could undermine the aim for harmonization.[618]
It thus follows that a need arises, in each situation of norm relationships, to *ascertain* the nature of the norm relationship – one of natural harmony or one of conflict – and in case of conflict, to determine the potential for harmonization by making use of the available techniques or 'tools' of conflict *avoidance* or conflict *resolution*.

3.4. Conflict Ascertainment, Avoidance, and Resolution

Intrinsically linked to the questions of conflict ascertainment, avoidance and resolution is the *concept of interpretation*.[619] According to Kammerhofer, interpretation is, in sum

> […] the *cognition* of legal norms. Legal norms need to be cognized in order to be understood by humans. Humans, whether legal professionals or individuals in an organ, start a process of interpretation as soon as they look at a legal text, irrespective of whether they succeed in the process or not. Interpretation necessarily takes place, however clear the words may sound to us, because they only sound clear to us as a result of interpretation.[620]

When examining a norm more closely, it can be said to provide a frame that delineates the outer limits within which there is room for the formulation of differing opinions of the

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[615] According to Vranes (2006), 396, this opens up the possibility to apply conflict principles such as *lex specialis* and *lex posterior*. Their application would be foreclosed when adhering to a narrow definition and bar the priority of rights over obligations even when the former are more specific or later in time.

[616] Kelsen (1968), 1438.

[617] Kelsen (1968), 1438.

[618] The emphasis is on the *breach* of a norm. See Kelsen (1960), 26-27, 77, 209: "*[e]in Konflikt zwischen zwei Normen liegt vor, wenn das, was die eine als gesollt setzt, mit dem, was die andere als gesollt setzt, unvereinbar ist, und daher die Befolgung oder Anwendung der einen Norm notwendiger- oder möglicherweise die Verletzung der anderen involviert*" (English: "A conflict between two norms occurs when there is an incompatibility between what one ought to do under the first norm and what one ought to do under the second norm, and therefore obeying or applying one norm necessarily or possibly involves violating the other" (translation by Kammerhofer (2005), 2, footnote 10). References to sources using similar definitions can be found in Kammerhofer (2005), 2, footnote 11. This is the 'classic' example of '*Nicht-gleichzeitig-existieren-Können*' ("[t]he state of not being able to exist at the same time") of the simultaneously valid and applicable *obligations* A and B. Not only is it factually impossible, but it is also "*rein logischer Natur* ("purely logical nature") that these norms cannot exist together when applied to the same situation. See Weinberger (1981), 99 (translation: Kammerhofer (2005), 3, footnote 16). See also Pauwelyn (2003), 176, who speaks of conflict when "one norm constitutes, has led to, or may lead to, a breach of the other" and Vranes (2006), 415: "There is a conflict between two norms, one of which may be permissive, if in obeying or applying one norm, the other one is necessarily or possibly violated."

[619] Koskenniemi (2007b), 207, § 412.

[620] Kammerhofer (2009), 6-7 (emphasis added).

possibilities for application, independently from other valid and applicable norms. In other words, in order to 'get to know' a norm, the frame leaves room for *a* meaning; it does not necessarily represent *one* meaning.[621] Much therefore depends on the clarity of the norm: if the frame is hardly visible, it is difficult to determine the interpretative boundaries.[622] As such, interpretation is applied as a *technique of norm cognizance*.

Norm cognizance is a *conditio sine qua non* for *conflict ascertainment*. It is only possible to draw conclusions as to the possible application of a norm vis-à-vis another norm and *vice versa* if a decision is made on the possible meaning of both norms. Thus when, following the application of interpretation as technique of norm cognizance, the interpretative outcome of a norm A is placed next to the interpretative outcome of norm B, conclusions can be drawn as to whether both norms are in harmony or conflict, and, in the event of the latter, how to deal with such conflicts.

Two basic types of types of conflicts can be discerned,[623] and the objective is, in view of the principle of harmonization, to interpret them, "to the extent possible […] so as to give rise to a single set of compatible obligations"[624]

A *first* type of conflicts concerns *apparent* conflicts. *Apparent* conflicts involve norms that appear to be in disagreement at first sight, but can be harmonized through the application of *techniques of conflict avoidance*. By avoiding conflict, the norms can be said to exist in a *relationship of interpretation*. A case of relationships of interpretation arises

> where one norm assists in the interpretation of another. A norm may assist in the interpretation of another norm for example as an application, clarification, updating or modification of the latter. In such a situation, both norms are applied in conjunction.[625]

As follows, besides functioning as a technique of norm cognizance and conflict ascertainment, interpretation also plays a fundamental role in the recognized techniques of the avoidance of apparent conflicts. Examples of conflict avoidance techniques – or interpretation techniques – are, *inter alia*, the maxims of *lex specialis derogare lege generali* and *lex posterior derogat lege priori*.

In the event that the 'ordinary' conflict avoidance techniques fail to harmonize treaty norms, recourse may be had to Article 31(3)(c) VCLT, which stipulates that

> [t]here shall be taken into account, together with the context: […] (c) any relevant rules of international law applicable in the relations between the parties.

This provision reflects, what is referred to as, the principle of complementarity or *systemic integration*.[626] Dubbed by Kammerhofer as a "new trend in international legal scholarship",[627]

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[621] Kelsen (1960), 348-349; Kammerhofer (2009), 7.

[622] Kammerhofer (2009), 7-8.

[623] Milanovic (2011a).

[624] Koskenniemi (2007a), 264, § 14(4).

[625] Koskenniemi (2007a), 263, § 14(2).

[626] McLachlan (2005), 279-320; Sands (1999), 95. Article 31(3)(c) VCLT has long been a provision that "languished in […] obscurity", (McLachlan (2005), 279) probably also because it does not provide much guidance as to its scope of application. For expressions of criticism, see Judge Weeramantry's Separate Opinion in (1997j), *Gabcikovo-Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997*, 114, and Thirlway (1991), 58. It was revived by its use by the ICJ in the *Oil Platforms* case ((2003k), *Oil Platforms Case (Iran v. United States of America), Judgment of 6 November 2003 (Merits)*, §§ 40-41). For case law of other international tribunals, see for example: (1987a), *Amoco International Finance Corporation v. Iran*, 222, § 112; (1975c), *Golder v. the United Kingdom, App. No. 4451/70, Decision of 21 February 1975*, 213; (1996h), *Loizidou v. Turkey (Merits), App. No. 40/1993/435/514, Judgment of 18 December 1996*, 462, § 44; (2001a), *Al-Adsani v. the United Kingdom, App. No. 35763, Judgment of 21 November 2001*; (2001f), *Fogarty v. the United Kingdom, App.*

the objective of systemic integration is that "whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact."[628] Beyond interpretation of the words in a treaty giving expression to the intent of parties, systemic integration calls for the appreciation of the international law as a legal system and thus to take into account other treaty rules, customary international law and the general principles of law in situations where a treaty rule is unclear or open-textured;[629] where a term in a treaty rule has a particular meaning recognized in customary international law or a general principle of law; or where a treaty does not regulate a particular matter.[630] As expressed by Pauwelyn,

> t]his fall-back on other rules of international law, without the need for any explicit incorporation or reference in the treaty under examination, is a crucial, if not the most important, tool to maintain a modicum of coherence and interaction between the branches of international law. In that sense, it can be seen as the gene-therapy against excessive fragmentation of international law, in particular, the risk of sealed-off compartments or self-contained regimes operating independently from the broader corpus of international law.[631]

As such, the provision is held to serve as "a "master key" to the house of international law."[632]

No. 37112/97, Judgment of 21 November 2001; (2000l), *McElhinney v. Ireland and the United Kingdom, App. No. 30882/96, Judgment of 9 February 2000*; (2005i), *MOX Plant Case, Request for Provisional Measures Order (Ireland v. the United Kingdom) (3 December 2001).*(1998e), *EC Measures Concerning Meat and Meat Products (Hormones) - Report of the Appellate Body (16 January 1998) WT/DS-26/AB/R*; (1998o), *United States: Import Prohibition of Certain Shrimp and Shrimp Products - Report of the Appellate Body (12 October 1998) WT/DS58/AB/R*; (2002g), *Pope & Talbot v. Canada, Merits (10 April, 2001); Damages (31 May 2002)* and the ILC (ILC (2004a), § 729; see also the preliminary study carried out by McLachlan and Mansfield on the topic of Article 31(3)(c) (ILC(LVI)/SG/FIL/CRD.3/Rev 1) presented at the ILC's Fifty-sixth Session (ILC (2004b). According to the ILC Study Group, Article 31(3)(c) VCLT "provides one means within the framework of the VCLT, through which relationships of interpretation […] may be applied" (Koskenniemi (2007a), § 14(17). Although Kammerhofer maintains that "[t]here are several theoretical problems" to identify the principle of systemic integration laid down in Article 31(3)(c) VCLT as such (Kammerhofer (2009), 6), it is according generally held to be a rule of customary international law. See Koskenniemi (2007b), 215, § 427; McLachlan (2005), 293; Villiger (1985), 334-43 (although he qualified Article 31(3)(c) to be among the "emerging customary rules on interpretation which originated in Vienna". For case-law, see (1994c), *Territorial Dispute (Libyan Arab Jamahiriya v. Chad), Judgment of 3 February 1994*, 6; (1975c), *Golder v. the United Kingdom, App. No. 4451/70, Decision of 21 February 1975*; (1986c), *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC-3/83, September 8, 1983, Inter-Am. Ct. H.R.* ; (1996j), *United States - Standards for Reformulated and Conventional Gasoline AB - 1996-1 WT/DS2/AB/R, 29 April 1996, 16*). McLachlan contends that it has the status of a constitutional norm within the international legal system and as such serves as a "master key in a large building" (McLachlan (2005), 279-280, who adopted this expression from the Ambassador to China in the Netherlands and member of the ILC, Xue Hanquin: "Mostly the use of individual keys will suffice to open the door to a particular room. But, in exceptional circumstances, it is necessary to utilize a master-key which permits access to all of the rooms. In the same way, a treaty will normally be capable of interpretation and application according to its own terms and context. But in hard cases, it may be necessary to invoke an express justification for looking outside the four corners of a particular treaty to its place in the broader framework of international law, applying general principles of international law." See also Koskenniemi (2007b), 211, § 420).

627 Kammerhofer (2009), 16.

628 Koskenniemi (2007a), § 14(17).

629 (1928a), *Georges Pinson Case (France/United Mexican States), Award of 19 October 1928*, 422.

630 McLachlan (2005); Koskenniemi (2007b), 244, § 480. For a critical view, see Kammerhofer (2009), 16.

631 Pauwelyn (2006), § 28.

632 Koskenniemi (2007b), 211, § 420.

In some cases, harmonization through the application of interpretation techniques is achieved relatively *consistently*, through reconciliation of the language, object and purpose, and other structural elements of the two (apparently) conflicting norms. While this could imply the 'reading down' of norm A in order to enable it to inform norm B, it is a type of avoidance that remains consistent with the law.[633] The aim here is to interpret "the relevant materials from the perspective of their contribution to some generally shared – "systemic" – objective."[634] In such cases "the process of reasoning follows well-worn legal pathways: references to normal meaning, party will, legitimate expectations, good faith, and subsequent practice, as well as the "object and purpose" and the principle of effectiveness."[635] In other cases, conflict is avoided in a more *creative* manner, by legally or illegally bending norms or even inventing rules. In its most extreme form, conflicts are avoided *forcibly* by rewriting the rules.[636]

A *second* type of conflict concerns *genuine* conflicts.[637] The norms "point to incompatible decisions, and the conflict cannot be avoided."[638] A *choice* must be made in order to *solve* a normative conflict. Here, interpretation meets its outer boundaries: it only offers the opportunity to attach a meaning to the content of a norm within the outer limits of its frame. It cannot make or invalidate a new norm.[639]
Genuine conflicts are more easily solved in the case of incongruities *within one single regime*, as they are often the result of "legal-technical" mistakes, e.g. a divergence of norms that 'slipped' into a treaty during its drafting process, "that could be "avoided" by a more sophisticated way of legal reasoning."[640] Such reasoning is possible, because the parties often share the same interests. This is different with respect to conflicts *between regimes*. In such situations,

> the positions of the parties are so wide apart from each other – something that may ensue from the importance of the clash of interests or preferences that is expressed in the normative conflict, or from the sense that the harmonizing solution would sacrifice the interests of the party in a weaker negotiation position. In this respect, there is a limit to which a "coordinating" solution may be applied to resolve normative conflicts.[641]

In order to attain harmonization of the norms, genuine conflict between them must be resolved by application of the available *conflict resolution techniques*. These techniques will lead to the *prioritization* of one of the norms over the other. The principal recognized ways of resolving conflict by prioritization are (1) *jus cogens*; (2) obligations *erga omnes*; (3) Article 103 of the UN Charter; (4) conflict clauses in treaties; (5) *lex specialis derogat legi generali*; and (6) *lex posterior derogat legi priori*.[642]

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633 This is what Milanovic dubs 'consistent avoidance'. Milanovic (2011a), 106.
634 Koskenniemi (2007b), 208, § 412.
635 Koskenniemi (2007b), 208, § 412.
636 The latter situations of conflict avoidance are called 'creative avoidance' and 'forced avoidance'. See Milanovic (2011a), 106 (including examples).
637 Koskenniemi (2007b), 27, § 42.
638 Koskenniemi (2007a), § 14(2).
639 Kelsen (1979), 179 (emphasis EP); Kammerhofer (2009), 9.
640 Koskenniemi (2007b), 245, § 484.
641 Koskenniemi (2007b), 27, § 42.
642 Some argue that some genuine normative conflicts cannot be resolved in a legal fashion; they must be resolved by policy. See Milanovic (2011a), 108. The viewpoint taken in this Study, however, is that genuine norm conflicts are never unresolvable.

This paragraph has demonstrated how international law functions as a legal system in which norms belonging to different regimes may, once they are valid and applicable to the same situation, enter into a relationship of harmony or conflict. In that case, "[i]n applying international law, it is often necessary to determine the precise relationship […].[643]

We have also concluded that the principal desired outcome is to examine the ability of norms to *complement* each other so as to give each of them *maximum* effect, in order to harmonize them. In some cases it is not necessary to put in any effort to harmonize them; in other situations however there is apparent conflict that can be avoided by applying interpretative techniques. In other situations, conflict cannot be avoided, and must be resolved via conflict resolution techniques.

The above brings us to the question of how this general conceptual framework governing normative relationships in international law plays out in the context of the relationship of the legal subsystems of international law central to the present study, i.e. IHRL and LOAC. This will be examined in the next chapter, where the aim is to formulate a conceptual framework for analysis of the interplay of norms of IHRL and LOAC.

643 Koskenniemi (2007a), § 14(2).

Chapter III Conceptual Framework for Analysis on the Interplay of Norms of IHRL and LOAC

The purpose of this chapter is to provide a conceptual framework for analysis that provides the parameters necessary to carry out the legal examination of the interplay between IHRL and LOAC in respect of deprivations of life and liberty in counterinsurgency. In essence, the interplay of IHRL and LOAC is an issue of norm relationships. The research question central in this chapter is: what are the rules, principles, concepts, or doctrines of international law underlying the relationship of norms in general, and that of IHRL and LOAC in particular?

Paragraph 1 addresses the issue of norm relationships between IHRL and LOAC. Paragraph 2 focuses on the general meaning of the maxim of *lex specialis*. Paragraph 3 examines the role of the *lex specialis* maxim in the context of IHRL and LOAC. Finally, in paragraph 4, a conceptual framework for analysis will be distilled that will function as the guide for the remainder of the study.

1. Norm Relationships between IHRL and LOAC

When applied to the relationship between IHRL and LOAC, the instrument of complementarity entails that both regimes mutually reinforce each other and, where necessary, complete and perfect each other[644] by drawing from each other's rules originating from treaty and customary international law, as well as general principles of international law.[645]

As can be inferred from the ICJ in its *Palestinian Wall Advisory Opinion*,[646] the complementary interplay between IHRL and LOAC finds reflection in three situations:

Firstly, where a matter is regulated by LOAC, *but not by IHRL*, the former may fill the regulatory gaps of the latter;

Secondly, where a matter is regulated by IHRL, *but not by LOAC*: the former may fill the regulatory gaps of the latter.

A *third* situation arises where a matter is regulated by both IHRL and LOAC. In that case recourse must be taken to instruments available within international law capable of regulating norm-relationships.

Of the instruments available in the 'toolbox', the maxim of *lex specialis derogat legi generali* (hereinafter referred to as the maxim of *lex specialis*) is generally considered to be the most appropriate 'tool'.[647] In the practice of the (quasi-)judicial bodies of international law, the maxim of *lex specialis* is frequently mentioned and applied. In quite a few instances, LOAC has been identified as the *lex specialis* in regulating conduct during armed conflict.[648] Howev-

644 Kleffner (2010b), 73; Droege (2008a), 522. See also (2010c), *Franklin Guillermo Aisalla Molina v. Ecuador, Case IP-02, OEA/Ser.L/V/II.140 Doc. 10 (2010), Judgment 21 October 2010 (Admissibility)*, §§ 121-122.

645 For example, on the role of customary IHRL in interpreting LOAC, see Cassimatis (2007), 633-637.

646 (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, § 106, confirmed in (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*, § 216 (although in the latter opinion the ICJ refrains from using the *lex specialis*-rule. It remains unclear as to why it did so).

647 Kleffner (2010b), 73.

648 (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, § 25; (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, § 106. The UNHRC too has emphasized the *lex specialis* position of LOAC (UNHRC (2004), §

er, the precise meaning of the maxim of *lex specialis*[649] and its aptness in the regulation of the interplay between IHRL and LOAC,[650] have been challenged in doctrine, particularly by those who seek to strengthen the role of IHRL in the regulation of armed conflict.[651] This calls for a closer examination of the maxim.

2. *Lex Specialis*

The maxim *lex specialis derogat lex generali* is a historically deeply rooted[652] and nowadays commonly accepted[653] mechanism to regulate normative relationships of two norms being simultaneously valid and applicable to the same subject matter.[654]
In its traditional meaning, the *lex specialis* principle entails that in situations of simultaneous applicability of two norms to a similar factual situation, the more specific norm is awarded priority over the norm that is more general.[655] This interplay between specific and general norms was already recognized in the writings of classic international law scholars such as

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11) but it has also stressed that acts permissible under LOAC, but derogating from the rights set forth in the ICCPR are lawful "only if and to the extent that the situation constitutes a threat to the life of the nation." See UNHRC (2001), § 3. See further the IACiHR in (1997b), *Abella et al. v. Argentina (La Tablada), Case No. 11.137, Decision of 18 November 1997*, § 159; (1999), *Third Report on the Situation of Human Rights in Colombia, IACiHR (26 February 1999)*, §§ 11, 151-154; (1999f), *Coard and Others v. the United States ('US Military Intervention in Grenada), Case No. 10.951, Decision of 29 September 1999*, § 42; (2002j), *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba, Decision of 13 March 2002*,.

649 University Centre for International Humanitarian Law (2005), 19-20; Bowring (2009); Milanovic (2010a), 17-18, 24.

650 University Centre for International Humanitarian Law (2005), 19-20; Schabas (2007b); Kolb (2006), § 4; Ben-Naftali & Shany (2004) ; Prud'homme (2007), 383, 385-386: "The broadness of this principle allows manipulation of the law, a maneuvering of the law that supports diametrically opposed arguments from supporters that are both for and against the compartmentalization of international humanitarian law and international human rights law. Ultimately, the vagueness of the theory of *lex specialis* means that using it [as] a conflict-solving or interpretative device leads to decisions being made based on political or other motives rather than on sound legal grounds."

651 Lubell (2007).

652 The *lex specialis* principle has historical roots in Roman law as part of the *Corpus Iuris Civilis*. See Papinian, Dig. 48, 19, 41 and Dig. 50, 17, 80. The last text states: "*in toto iure generi per speciem derogatur et illud potissimum habetur, quod ad speciem derectum est*", which translates as "in the whole of law, special takes precedence over genus, and anything that relates species is regarded as most important." See Mommsen & Kruger (1985).

653 The *lex specialis* principle is commonly accepted as an instrument of legal interpretation and conflict-resolution, both in domestic law and in international law. From the viewpoint of international law it is generally seen as a general principle of international law (see (1999j), *Southern Bluefin Tuna, ITLOS Order (27 August 1999)*, § 123. See also Cheng (1987), 25 *et seq*. *Lex specialis* was referred to here as an example of a general principle in the drafting process of Article 38 of the Statute of the PCIJ). Although viewed differently by some (see Judge Hsu, in his dissenting opinion in the *Ambatielos Case*, (1953), *Ambatielos Case, Judgment of 19 May 1953 (Merits), Dissenting Opinion of Judge Hsu*, 87 *et seq*.), it is generally not accepted as a rule of customary law *per se* (see McCarthy (2008), 104). It can, however, be seen to have attained that status through its incorporation, be it not explicitly, as one of the treaty interpretation principles as meant in Articles 31 and 32 of the VCLT,[653] recognized by the ICJ as customary (see (1994c), *Territorial Dispute (Libyan Arab Jamahiriya v. Chad), Judgment of 3 February 1994*, 6, § 41). In the view of Pauwelyn it is a principle of legal logic (Pauwelyn (2003), 388. See also Jenks (1953), 436).

654 Hereinafter: the *lex specialis* principle. Alternative formulations are "*generalibus specialia derogant*"; "*generi per speciem derogatur*"; "*specialia generalibus, non generalia specialibus*".

655 Koskenniemi (2007a), 264, § 14(2)(5).

Grotius,[656] Von Pufendorf[657] and Vattel.[658] As concluded by the ILC Study Group, the rationale for such priority is that

> special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may also often create a more equitable result and it may often better reflect the intent of the legal subjects.[659]

The scope of *lex specialis* is not limited to treaty law, but also extends to customary international law.[660] It can thus be applied between norms of a single treaty;[661] between norms of different treaties;[662] between treaty- and non-treaty norms[663] or between two non-treaty norms.[664]

While a principle with deep historical roots and a basis as a general principle within public international law, there remains a great deal of ambiguity as to the precise scope and function of the *lex specialis* maxim within contemporary public international law. The ILC Study Group points out that the *lex specialis*-maxim "cannot be meaningfully codified."[665] In legal doctrine and jurisprudence, the way the maxim finds application has been subject of criticism and views as to its precise meaning and function differ.[666] This lack of unity in ap-

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[656] Grotius (1625).

[657] Pufendorf (1732).

[658] de Vattel (1758).

[659] Koskenniemi (2007a), 265, § 14(2)(7). See also

[660] Villiger (1997), 60; Villiger (1985), 161; Jennings & Watts (1992), 1270-1280; Koskenniemi (2007b), 46-47, § 84.

[661] (1979a), *Beagle Channel Arbitration (Argentina v. Chile), 18 February 1977*, 141, §§ 36, 38 ("[…] [A]ll conflicts or anomalies can be disposed of by applying the rule *generalia specialibus non derogant*, on which basis Article II (*generalia*) [of a Boundary Treaty of 1881] would give way to Article III (*specialia*), the latter prevailing; […]"); (2002b), *Case C-96/00, Rudolf Gabriel, Judgment of 11 July 2002, ECR (2002) I-06367*, 6398-6399, §§ 35-36; 6404, § 59; (1993a), *Brannigan and McBride v. the United Kingdom, App. No. 14553/89; 14554/89, Judgment of 26 May 1993*, 57, § 76 ([…] since the requirements of Article 13 are less strict than those of Article 5, para. 4, [the latter] must be regarded as the *lex specialis* in respect of complaints under Article 5); (1984b), *De Jong, Baljet and van den Brink v. the Netherlands, App. No. 8805/79; 8806/79; 9242/81, Judgment of 22 May 1984*, 27, § 60; (1994b), *Murray v. the United Kingdom, App. No. 14310/88, Judgment of 28 October 1994*, 37, § 98; (1999h), *Nikolova v. Bulgaria, App. No. 31195/96, Judgment of 25 March 1999*, 25, § 69.

[662] (1924), *The Mavrommatis Palestine Concessions - Greece v. Britain (Jurisdiction), Judgment of 30 August 1924*, 31 (concerning a conflict between the 1922 Mandate for Palestine and the 1923 Protocol XII of the Treaty of Lausanne: "in cases of doubt, the Protocol, being a special and more recent agreement, should prevail"); (1999n), *Turkey - Restrictions on Imports of Textile and Clothing Products, 31 May 1999, WT/DS34/R*, § 9.92; (1998h), *Indonesia - Certain Measures Affecting the Automobile Industry, 2 July 1998, WT/DS54, WT/DS55/R, WT/DS59/R, WT/DS64/R*, § 4.20.

[663] (1985c), *INA Corporation v. Iran, Iran-US Claims Tribunal*, 378 ("we are in the presence of a *lex specialis* in the form of a Treaty of Amity, which in principle prevails over general rules."); (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, § 274 ("in general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim"); (1982b), *Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 14 April 1981*, § 24 ([i]t would no doubt have been possible for the Parties to identify in the Special Agreement certain specific developments in the law of the sea […], and to have declared that in their bilateral relations in the particular case such rules should be binding as *lex specialis*).

[664] (1957), *Case Concerning the Right of Passage over Indian Territory (Preliminary Objections) (Portugal v. India)*, 44, concerning a conflict between an established practice of transit passage between India vs Britain/Portugal and the general law on transit passage: "such a particular practice must prevail over any general rules".

[665] Koskenniemi (2007b), 64, § 119.

[666] See for example Kammerhofer (2005).

proach may result in differing legal conclusions and thus practical effect of the principle when applied.[667]

Various areas of ambiguity can be detected. For example, it has been pointed out that the *lex specialis* principle does not function when applied to norms belonging to two different systems part of the decentralized and non-hierarchical framework of international law, but finds applicability only in domestic law, which is more unified.[668] This raises the issue of the aptness of the *lex specialis* principle in relation to LOAC and IHRL, being two distinct regimes,

Others argue that the *lex specialis* principle is used based on the inadequate or dated presumption of the 'billiard-ball model' of international law, which takes as a starting point that all states conclude treaties or endorse customary law with the same, unified intent.[669] However, in practice

> [t]here is no single legislative will behind international law. Treaties and custom come about as a result of conflicting motives and objectives – they are "bargains" and "package-deals" and often result from spontaneous reactions to events in the environment.[670]

Thus, in contrast to domestic law, international law consists of a "variety of fora, many of which are disconnected and independent from each other, creating a system different from the more coherent domestic legal order."[671] As a consequence, international law knows no hierarchy of norms.

An additional uncertainty concerns the position of the maxim of *lex specialis* vis-à-vis other rules of interpretation and maxims of conflict resolution – such as *lex prior*, *lex posterior*, autonomous operation, and legislative intent, *a contrario*, acquiescence, *contra proferentem*, *ejusdem generis*, and *expression unius est exclusio alterius*. It has been argued that the determination of this interplay between interpretative principles and maxims of conflict resolution cannot be determined in a general manner, but is subject to a contextual appreciation.[672] However, it is submitted that all of these are tools, but they each have a specific function. They exist side by side and are not intrinsically mutually exclusive, but there is a logical function for each. It may thus be that in one point in time the *lex specialis* applies, but that in another point in time another principle or maxim takes precedence, such as the *lex posterior derogat legi priori*-maxim. This plays alongside *lex specialis*, but an older specific rule takes precedence over a newer general rule.

A fundamental area of ambiguity is the very function of the maxim. However, according to the ILC Study Group "[t]here are two ways in which law may take account of the relationship of a particular rule to general one."[673]

In the first, more traditional, function of *lex specialis*, referred to as "genuine *lex specialis*",[674] the maxim operates *as a means to resolve conflict* between norms that, when applied to the same situation, lead to different results. The norm identified as *lex specialis* then functions as an *exception* to the general rule, by way of which the former "may be considered as a *modification*, *overruling* or a *setting aside* of the latter"[675] in so far this is permitted by general international

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667 Milanovic (2010a), 15; McCarthy (2008), 105.
668 Lindroos (2005), 28.
669 Simma & Pulkowski (2006), 489.
670 International Law Commission (2004), § 28.
671 Lindroos (2005), 28.
672 Koskenniemi (2007b), § 251; Lindroos (2005), 40-41; Matheson (2007), 427; Jenks (1953), 407.
673 Koskenniemi (2007b), 49, § 88.
674 Koskenniemi (2007b), 49, § 88.
675 Koskenniemi (2007b), 49, § 88.

law.[676] In these cases, "speciality in the sense of logic implies that the norm that applies to certain facts must give way to the norm that applies to those same facts *as well as to an additional fact present in that situation*. Between two applicable rules, the one which has the larger 'common contact surface area' with the situation applies."[677] This function of the *lex specialis* is referred to as *lex specialis derogata*. In this function, the *lex specialis* "is a "structural necessity" to preserve the coherence and systematicity in positing the two separate set of rules in a single unitary legal order."[678]

This function of *lex specialis* has been *misinterpreted* as representing the *single* manner in which the maxim operates, i.e. as an instrument that only applies once it becomes clear that conflict avoidance through harmonization cannot be avoided. It is then viewed as a rule solely designed for conflict resolution.[679]

However, a second, "proper", function[680] is that the maxim operates as a *technique of interpretation*. As such, "[…] a rule may […] be *lex specialis* in regard to another rule as an *application, updating or development* thereof, or, which amounts to the same, as a *supplement*, a provider of instructions on what a general rule requires in some particular case.[681] This function, also referred to as *lex specialis complementa*, "is sometimes seen as not a situation of normative conflict at all, but is taken to involve the *simultaneous* application of the special and the general standard."[682] Both norms may point in the same direction in a relationship in which the special norm functions as the "means" and the general norm as the "ends".[683] The focus here is at *conflict-avoidance* through harmonization of the two norms. In essence, the *lex specialis* principle then is applied not to resolve a case of normative conflict, but rather as a partner-norm in a *relationship of interpretation*, in which one of the norms complements the other in its area of 'weakness'. As such, the *specialis* informs the interpretation of the *generalis*.

Whether applied as an application or as a derogation of the general law, the application of the *lex specialis* does not result in the general law to become invalid or inapplicable. To the contrary, the general law "will, in accordance with the principle of harmonization […] continue to give direction for the interpretation and application of the relevant special law […] and will become fully applicable in situations not provided for by the latter."[684]

Once a norm is identified as more special than another applicable norm because it more closely relates to the factual context and reflects State intent, "the relevant special norm applies, and that is all."[685] However, critical steps in the application of the maxim of *lex specialis derogat legi generali* are the identification of a norm as *lex specialis* and the determination of its function as an instrument of conflict resolution or as technique of interpretation in the specific context. This brings us to another aspect of alleged controversy, namely that the principle itself does not provide any guidance as to how to identify a norm as being more special than another in a particular relationship, which makes this determination vulnerable

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[676] Derogation from general law is not permitted in all cases. It is, for example, forbidden to derogate from a general rule that represents *jus cogens*.

[677] Sassòli & Olson (2008), 604 (emphasis added); Koskenniemi (2007b), § 105.

[678] Arai-Takahashi (2010), 417; Pulkowski , 12, section 5.

[679] See (1999n), *Turkey - Restrictions on Imports of Textile and Clothing Products, 31 May 1999, WT/DS34/R*, §§ 9.92-9.96.

[680] Koskenniemi (2007b), 50, § 91.

[681] Koskenniemi (2007b), 54, § 98.

[682] Koskenniemi (2007b), 49, § 88.

[683] Koskenniemi (2007b), 52, § 93, mentioning (2003d), *Djavit An v. Cyprus, Appl. No. 20652/92, Judgment of 20 February 2003*, § 39.

[684] Koskenniemi (2007a), § 14(2)(10).

[685] Koskenniemi (2007b), 52, § 92.

to subjective values and policy-choices.[686] Generally, however, in most cases the identification of the *lex specialis* is unproblematic, for it obviously was designed to regulate a particular subject-matter. An example is GC III, which is specifically designed to govern the subject-matter of POW. In other instances, the *lex specialis* is expressly presented as such by the relevant general law. This may take place because the *lex specialis* is a specific application of the *jus dispositivim* of general law, which allows parties to establish specific rights or obligations to govern their behavior in treaties.[687] As such, treaties enjoy priority over custom; particular treaties enjoy priority over general treaties;[688] and local customs have primacy over general customs. This informal hierarchy follows from a "forensic"[689] or a "natural"[690] aspect of legal reasoning. The *lex specialis* may also be specifically appointed as an exception to general law,[691] or as a specific exception within a treaty, e.g. derogation-clauses in human rights treaties.[692] In other cases, a norm that points at being more specific than another is barred from rising to the level of *lex specialis* in the application of the principle because to do so is an act expressly prohibited by the relevant general law, for example because the 'other' norm is a norm of *jus cogens*. This is what the ILC Study Group refers to as "easy" cases: "the speciality of the standard or instrument does not even emerge as an object of argument" and there is no "need to look "behind" or "around" the *prima facie* standard or instrument".[693]

However, in some other, "hard" cases, it may be more difficult to categorize a particular norm as special, and as such, as an "application" or "modification" or as an "exception" to another norm. The specialty of a norm and its function vis-à-vis the other norm must be ascertained "through the normal means through which the presence of a tacit agreement, estoppel, effectivités, historic title, *rebus sic stantibus*, or, say, local custom (*Right of Passage* case) is identified."[694] This can only take place through interpretation of different considerations that are attached to the particular situation. This is why the ILC Study Group accentuates that the function of one norm vis-à-vis another "depends on how we view those rules in the environment in which they are applied, including what we see as their object and purpose."[695] It is thus necessary to examine what is "behind" or "around" the norms in question in determining whether a norm is *lex specialis*, and the function of the maxim. Such appraisal for "more nuanced factors in the process of interpretation," 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 factual situations (effectiveness), and the legal clarity of norms or their certainty and reliability (normative weight),[696] "enables more carefully calibrated conclusions concerning applicability. This leaves space for less categori-

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[686] Lindroos (2005), 42.

[687] (1969c), *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands)*, § 72: "*it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases or as between particular parties.*"

[688] Verdross & Simma (1984), 143-144.

[689] Jennings & Watts (1992), 26, note 2.

[690] Villiger (1985), 161. See also Lauterpacht , 86-88.

[691] Jenks (1953). For example, as a legal regime in relation to another legal regime: LOAC constitutes an exception to the rules laying out the peace-time norms. As such, they override the latter norms

[692] An example of relevance for this study is Article 4 ICCPR, which allows for derogation from certain rights and freedoms "[i]n time of public emergency which threatens the life of the nation". As we have concluded earlier, such situations include armed conflicts, which allows for the application of LOAC.

[693] Koskenniemi (2007b), 48-49, §§ 86.

[694] Koskenniemi (2007b), 58, § 106.

[695] Koskenniemi (2007b), 53, § 97.

[696] McCarthy (2008), 111; Droege (2008a), 524.

cal outcomes while acknowledging that in some circumstances a degree of simultaneous applicability may exist."[697] Factors that can be taken into account are the wording and content of the norms, the nature of the norms in question, the degree of effective control exercised by the State involved, the expression of State intent, and State practice.[698]
At the same time, one is cautioned not to confuse the degree of specificity of a norm with its degree of precision. As argued by McCarthy, while often unproblematic, the identification of a norm as *lex specialis* based on their mere clarity, efficacy and relevancy runs the risk of oversimplification. It is in particular the notion of 'effectiveness' that is often overrated and therefore not always intrinsically linked to the *lex specialis*, but can instead suitably be applied to the *lex generalis*. General law is capable of governing a particular situation with as much effectiveness as the special law, often because of their generality. In addition, effectiveness (and relevance) are not static, absolute notions strongly attached to an evaluation of the degree of sophistication of the law, but they "are a function of adaptability and evolution," linked also to the specific facts of a particular situation and thus subject to change. In those cases, special law may turn out to be too narrowly framed and, as a consequence, inflexible to adapt to the situation.[699] The general law then steps in, in its function as a "fall back" regime.[700]

In its function as a conflict avoiding interpretive instrument, the maxim of *lex specialis* "[…] comes very close to the principle of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, according to which treaties must be interpreted in the light of each other."[701] While prevalence is awarded to the special norm, the general norm continues to apply in the background. It is just that in the case of a dispute over the relevant obligations, the special norm will be used as the primary basis, and not the general norm. Nevertheless, the principles and purposes of the general norm continue to 'feed' the special norm, by conveying its meaning to the special norm.[702] The crucial point is that there is no controversy between the special and general norm.[703] The special norm is simply more detailed and thus "approaches most nearly the to the subject in hand" and is "are ordinarily more effective."[704]
As the above demonstrates, in determining which norm is the *lex specialis* and whether the maxim is to be applied as *lex specialis derogata* or *complementa*, the maxim of *lex specialis derogat*

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[697] McCarthy (2008), 110; Koskenniemi (2007b), 48-49, §§ 86-87; McDougal, Laswell & Miller (1994), 83.
[698] Hathaway, Crootof, Levitz*, et al.* (2012), 1935.
[699] McCarthy (2008), 116-117.
[700] Pauwelyn (2006), § 28.
[701] Droege (2008a), 524.
[702] See for example the ICJ's reasoning in the *Oil Platforms Case*, where the general law concerning the use of force influenced the meaning of "necessity," as laid down in the 1955 Treaty of Amity between Iran and the United States. See (2003j), *Oil Platforms Case (Iran v. United States of America) (Merits)*, § ?.
[703] The ILC Study Group mentions as an example of this functioning of the *lex specialis* the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, which is the special law in relation to the more general 1985 Vienna Convention on the Protection of the Ozone Layer. Another example is the judgment of the Iran-US Claims Tribunal in the case of *Amoco International Finance Corporation v. Iran* I which it held that "[a]s a *lex specialis* in the relations between the two countries, the [Treaty of Amity between Iran and the United States] supersedes the *lex generalis*, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, the rules of customary law may be useful in order to fill in possible *lacunae* of the Treaty, to ascertain the meaning of the undefined terms in its text or, more generally, to aid interpretation and implementation of its provision." ((1987a), *Amoco International Finance Corporation v. Iran*, 222.). For their discussion, see Koskenniemi (2007b), §§ 99-102.
[704] Grotius (1625), Book II, Chapter XVI, Section XXIX, 428.

legi generali does not work as an instrument of *conclusory* procedure.[705] When applied as such, the maxim operates in an absolute, categorical and mechanical manner, by which the special norm fully *supplants* the general norm to a degree that the latter has no further role to play and is rendered non-applicable.[706] A conclusory approach is depreciative of the inherent relative, specific contextual manner in which the *lex specialis* principle is to be properly applied. In other words, it does not offer insight in the *interpretative process* that lies underneath the qualification of a norm as *lex specialis*, or in the arguments indicative of the basis (as *derogata* or *complementa*) of its prioritization.[707] As a result, it allows for *subjectiveness* in the appointment of a norm as being special, based on its character as being more 'just'.[708] Support for a conclusory interpretation of the derogative nature of a special rule is exceptional[709] and must be rejected.

In sum, it follows from the above that the maxim of *lex specialis* may function as an *interpretative tool* aimed at harmonizing differing applicable and valid *norms*, whereby the more general rule is interpreted in light of the more specific rule. In situations where differing norms demonstrate a genuine conflict, the maxim of *lex specialis* functions as a *conflict-resolution instrument*. In determining whether a rule is more specific than another and how the maxim of *lex specialis* is to function, account must be had of the precision and clarity of the relevant norms, the intent of States when drafting or acquiescing to the norms, and the flexibility of the norms to mold to the particularities of the factual situation at hand without losing effectiveness. In other words, the maxim of *lex specialis* is *norm-* rather than (solely) regime-sensitive, as well as *context*-sensitive.

3. *Lex Specialis*, IHRL and LOAC

Having closely examined the maxim of *lex specialis* in more general terms, its role and function in the interplay between IHRL and LOAC must be determined.
The aptness of the maxim of *lex specialis* to the regulation of the interplay between IHRL and LOAC, as well as the generic pronouncement of LOAC as the *lex specialis* by (quasi-

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[705] Analogous to McCarthy (2008).

[706] McCarthy (2008), 106.

[707] McCarthy (2008), 103, 108-109; Lindroos (2005), 42, 46; Koskenniemi (2007b), 64, § 120; Krieger (2006), 269; Jenks (1953), 447. See also Simma & Pulkowski (2006), 507 in relation to Article 55 of the Draft articles on state responsibility: "[…] a formal, almost mechanical application of the *lex specialis* principle, based on a presumption in favour of the 'general' provision, does not suffice to establish the applicability of the rules on state responsibility. The *lex specialis* maxim is merely an argumentative tool to articulate further, normative considerations."

[708] McCarthy (2008), 108. Note, however, that Sassòli and Olson argue that "[t]he systemic order of international law is a normative postulate founded on value judgments. Some consider that in reality the decision-maker first determines which rule is more just and then characterizes it as *lex specialis*. In particular, when formal standards do not indicate a clear result, the teleological criterion must weigh in, *even though it allows for personal preferences*." Sassòli & Olson (2008), 604 (emphasis EP).

[709] Proponents of this conclusory view are Anzilotti (1929), 103 (who argues that "*in toto jure genus per speciem derogatur*; *la norme de droit particulière l'emporte sur la norme generale*"); Erberich (2004), 44-48 ("*bei der gleichzeitigen Geltung verschiedener Regelungskomplexe [gilt dass], wenn der eine die Situations erschöpfend und abschließend regelt und diese Regelungen durch die Anwendung des anderen Regelungscomplexes ausgehebelt würden, der allgemeinere dann verdrängt wird*"); Dennis (2005) and the governments of the United States and Israel with respect to the relationship between IHRL and LOAC, identifying the latter as the *lex specialis*, thus resulting in the non-applicability of IHRL in armed conflict. In relation to the former, see in particular Oral Statements by the United States Delegation to the Committee Against Torture (8 May, 2006), 4, available at www.us-mission.ch/Press2006/CAT-May8.pdf.

)judicial bodies of international law has been frequently challenged, particularly by scholars who seek to strengthen the role of IHRL in the regulation of affairs in armed conflict.
Much criticism, for example, is aimed at the practice of the ICJ. A *first* complaint is that the ICJ, in its *Nuclear Weapons Advisory Opinion*, does not explain what it means with '*lex specialis*' in functional terms.[710] In this case, the ICJ held, in sum, that the prohibition not to *arbitrarily* deprive a person of his life is not violated when this results from conduct lawful under the *lex specialis* of the law of hostilities under LOAC.[711] While some experts have interpreted '*lex specialis*' to refer to its function as the *lex specialis derogat*,[712] others have argued that the way the ICJ applied it points at its function as *lex specialis complementa*.[713] Yet again, others view it is as an indication that while the law of hostilities may be the more specific law, it does not result in the application of the maxim of *lex specialis* per se.[714] *Secondly*, the ICJ has been criticized for not explaining why it persistently points to LOAC as the *lex specialis*. As some argue, in some instances IHRL may be the more specific law.[715] *Thirdly*, the designation of LOAC as the *lex specialis* has raised the question of whether this implies that the regime of LOAC, *in toto*, is *the lex specialis*, or that subject to the concrete circumstances some of its norms assume that position vis-à-vis simultaneously relevant and applicable norms of IHRL. The ICJ, so is the complaint, is not clear: in its *Palestinian Wall Advisory Opinion* it points to LOAC as the *lex specialis*, whereas in its *Nuclear Weapons Advisory Opinion* it refers to a specific subset of LOAC, i.e. the law of hostilities, as the *lex specialis* within the specific context at hand.[716] It is submitted, however, that notwithstanding these arguments, the ICJ's ruling must be viewed in the proper context in which it occurred, namely that of hostilities in an armed conflict, and that it identifies the law of hostilities as the *lex specialis*, and not the entire body of LOAC.
Some argue for the application of other instruments, such as the maxim of *lex posterior*,[717] so that recent IHRL-norms override pre-dating norms of IHRL, or the *most-favorable principle*, so that the norm offering the most protection prevails, or to stress weaknesses in LOAC to undermine its dominant position of LOAC in the regulation of hostilities. The underlying argument in many instances is that IHRL is generally believed to offer more protection.
However, at closer scrutiny, these alternatives must be rejected. For example, the maxim of *lex posterior* finds no application in respect of treaty norms of different regimes, such as IHRL and LOAC, even when the treaties pertain to the same subject-matter (which is a requirement for its application).[718] Instead, States are bound to comply with their obligations as far as possible, "with the view of mutual accommodation and in accordance with the principle of harmonization."[719] As argued by Milanovic,

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[710] Prud'homme (2007), 378; Schäfer (2006), 43-44.
[711] (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, § 25.
[712] See most notably the views of the United States and Israel.
[713] Henckaerts (2008), 264; Alston, Morgan-Foster & Abresch (2008), 192-193; Salama & Hampson (2005), § 57.
[714] Schabas (2007b), in particular 598. Schabas seems to adopt a conclusory approach towards *lex specialis* and submits that that in reality the relationship between LOAC and HRL is not a matter of *lex specialis* and *lex generalis*, but rather one of belt and suspenders: both regimes fill each others gaps.
[715] Milanovic (2010a), 6.
[716] Milanovic (2010a), 6.
[717] Olson (2009), 448, 445.
[718] Milanovic (2010b), 9-10.
[719] Koskenniemi (2007a), § 14(5)(26): "The *lex posterior* principle is at its strongest in regard to conflicting or overlapping provisions that are part of treaties that are institutionally linked or otherwise intended to advance similar objectives (i.e. form part of the same regime). In case of conflicts or overlaps between trea-

> When it comes to the IHL and IHRL treaties in particular, not only is there the obvious problem that the law-making in the two areas temporally occurred in several waves, so that it is somewhat absurd to treat these treaties as successive to the other in a *lex posterior* sense, but there is also not the slightest hint of State intent that the relationship between the two bodies of law should be governed by this rule.[720]

In addition, in Schäfer's view there is only room for the *lex posterior*-principle if a younger rule univocally calls for the setting aside of the old rule, and only if there is a conflict to begin with.[721] But even in the case of conflict between a newer and an older rule, the more specific rule of the two prevails, and this may very well be the older rule.

Others call for a more expansive application of the most-favorable principle. However, it is submitted that this principle finds no application in the relationship between IHRL and LOAC unless it specifically mandates a party to do so.[722] An example of an explicit basis for an appeal on this principle is the Martens clause, which finds codification in Article 75 AP I. Outside such explicit bases attempts to further injection of IHRL within the realm of armed conflict must be approached with caution, *firstly*, because generally, in armed conflict, LOAC provides norms more specific than those of IHRL, and *secondly*, because IHRL need not always provide more protection. For example, in a situation of occupation.[723]

> […] experience shows that […] IHRL can be used to actually undermine the protection of rights and legitimize their violation. The decisions of Israel's High Court of Justice illustrate how the introduction of rights analysis into the context of occupation abstracts and extrapolates from this context, placing both occupiers and occupied on a purportedly equal plane. This move upsets the built-in balance of IHL, which ensures special protection to people living under occupation, and widens the justification for limiting their rights beyond the scope of a strict interpretation of IHL. The different meanings ascribed to proportionality in these two bodies of law are conflated, further contributing to this imbalance. The attempt to bring the ' rule ' of rights into the ' exception ' of the occupation, rather than alleviating the conditions of people living under occupation may render rights part of the occupation structure.[724]

To conclude, this study takes the position that the maxim of *lex specialis* is a principal instrument to the interplay of IHRL and LOAC, and that the latter regime, given its specific design for armed conflict, can *generally* be considered the *lex specialis*. However, this position of LOAC is not to be misinterpreted as being all exclusive and unlimited, thus excluding any role for IHRL in the regulation of affairs during armed conflict. The interplay of IHRL and LOAC requires a nuanced approach, with account of the specific circumstances in which the norms apply, and without losing sight of the fundamental characteristics of the regimes to which the norms belong. This may imply that the norm more specifically tailored to the situation applies. This view also finds support from States. Canada, for example, has declared that

> a state's international human rights obligations, to the extent that they have extraterritorial effect, are not displaced [in armed conflict]. However, the relevant human rights principles can only be decided by reference to the law applicable in armed conflict, the *lex specialis* of IHL: Critically, in the event of an apparent inconsistency in the content of the two strands of law, the more specific

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ties in different regimes, the question of which of them is later in time would not necessarily express any presumption of priority between them."

720 Milanovic (2010b), 9-10.

721 Schäfer (2006), 47; Ben-Naftali & Shany (2004), 103.

722 Naert (2008), 405; Schäfer (2006), 47-48.

723 Gross (2007), 4-5.

724 Gross (2007), 1-2.

provisions will prevail: in relation to targeting in the conduct of hostilities, for example, human rights law will refer to more specific provisions (the *lex specialis*) of humanitarian law.[725]

4. Resulting Conceptual Framework of Analysis for the Interplay of IHRL and LOAC in the Regulation of Deprivations of Life and Liberty

In view of the above, it is proposed that the interplay of LOAC and IHRL in respect of deprivations of life and liberty is examined by first determining whether each of the regimes provides norms that are *valid* and whether these norms are *applicable*. In other words, it must be established that IHRL and LOAC – in its law of IAC and NIAC – provide norms that govern the concepts of targeting and operational detention of insurgents (in their capacity as non-State actors). In addition to its validity, the applicability of the norm must be determined. Thus, for the purposes of this study, it must be established whether in a particular situational context of counterinsurgency valid norms of IHRL and LOAC regulating conduct resulting in the deprivation of life and liberty apply. This implies, on the one hand, that it must be examined whether IHRL applies, most importantly in extraterritorial situations, and in view of the authority of derogation. On the other hand, it must be established whether it is the law of IAC or the law of NIAC applies to a conflict between a counterinsurgent State and insurgents in a particular situational context of counterinsurgency.
In turn, it needs to be established in so far both IHRL and LOAC provide valid and applicable norms how their relationship must be appreciated. This implies that we must first determine the substantive content of the norms and secondly, it needs to be established, through interpretation, whether both norms are in conflict or not. When the substantive content of both norms is exactly the same, both norms are naturally in harmony. However, in case of a difference in one norm vis-à-vis the other norm, their potential of complementarity must be established. One of two solutions is possible. Either, the conflict between norms can be avoided through the technique of interpretation so as to ensure that both norms remain intact as far as possible and can mutually reinforce each other, or the norm conflict can only be resolved by recourse to a conflict-resolution technique, which implies that one of both norms is prioritized over the other.
In the event that IHRL and LOAC both regulate a certain event or matter in armed conflict, the maxim of *lex specialis* is generally the most appropriate 'tool', particularly in view of its binary function as means of conflict-resolution and technique of interpretation. This may imply that:
(1) the specific norm and the general norm can be harmonized via interpretation of the general norm through the specific norm, or (2) the specific norm and the general norm are incompatible.
In the event that, for example, LOAC provides a norm specifically designed for the situation at hand it, as a rule, takes *precedence* over the general rule of IHRL, without ending the latter's applicability; it does not displace the norm of IHRL. This is of significance, because the norm of LOAC, while being more specific, may nonetheless not be more precise than the general norm of IHRL. In so far this imprecision cannot be clarified through the usual means of treaty interpretation, and by reference to the general principles underlying LOAC,

[725] (2008c), *Amnesty International Canada v. Chief of the Defence Staff for the Canadian Forces (18 January, 2008), Respondents' Factum Re: Determination of Two Questions, Pursuant to Rule 107 of the Federal Courts Rules, Regarding the Application of the Canadian Charter of Rights and Freedoms*, 26.

recourse may be had to the general rule of IHRL to offer guidance.[726] As such, the norm of IHRL functions as the 'fall-back'-regime.

In determining the specificity of the norm, recourse must be had to, *inter alia*, the intention of States when drafting or acquiescing to the norms in question, the search for relevancy and effectiveness in their application in particular factual situations (effectiveness), the legal clarity of norms or their certainty and reliability (normative weight), the nature of the norms in question, the degree of effective control exercised by the State involved, and State practice. It remains irrelevant whether the more specific norm offers more or less protection to individuals affected by particular State conduct mandated by that norm.

Where the specific norm is not sufficiently clear or precise to determine the lawfulness of certain conduct, it may be clarified by having recourse to the general norm, but only to the extent that ambiguity in the specific norm cannot first be resolved by recourse to usual instruments of treaty interpretation or to the general principles underlying the regime to which the specific norm belongs.

[726] Melzer (2008), 81.

Conclusions Part A

The central research question in this part was: what aspects illustrate the background against which the main research questions should be answered?
A principal, leading aspect concerns the fact that, in the event the question of interplay actually arises, the system of international law offers a useful toolbox to assess the nature of norm relationships. To recall, the principal desired outcome is to examine the ability of norms to *complement* each other so as to give each of them *maximum* effect, in order to harmonize them. In some cases it is not necessary to put in any effort to harmonize them; in other situations however there is apparent conflict that can be avoided by applying interpretative techniques. In other situations, conflict cannot be avoided, and must be resolved via conflict resolution techniques.
When applied to the interplay between IHRL and LOAC, it is of relevance to take account of the fact that in terms of object and purpose, legal relationships, the nature of rights and obligations, as well as applicability, both regimes differ significantly. As will be shown, these differences may greatly impact the nature and therefore the outcome of the interplay between simultaneously applicable norms, while at the same time, such norms may overlap in providing humanitarian relief. However, the interplay between norms of IHRL and LOAC is not merely characterized by the conceptual underpinnings of the regimes, but also by the continuing discourse through which attempts are made to manipulate the outcome of the interplay, making use of the perceived weaknesses and gaps in IHRL or LOAC, depending on the interests – security or humanity – that need to be served.
While the dogmatic approaches provide insight in the varying approaches towards the relationship between LOAC and IHRL, it is important to place their importance in the proper context. The above-mentioned theories must be viewed first and foremost as indicative of the manner in which IHRL, as a legal regime, is considered to have found a place next to LOAC during an armed conflict. The approaches all represent a certain vision of the relationship as it *should be*, not necessarily *as it is*, although the complementary approach reflects *lex lata* the most. An approach's actual function therefore is that it can place a label on a particular outlook in doctrine, jurisprudence or State practice as being separatist, integrationist or complementarist. As an instrument capable of clarifying the relationship between norms of both regimes in specific situations, i.e. *practice*, it has considerably less meaning.[727]
Another aspect is that the approaches may leave the impression that the regimes of LOAC and HRL *as a whole* are complementary or integrated. This is deceptive. In reality, the relationship overall can only be determined by looking at the individual norms that are in relationship with other individual norms in the particular circumstances in which they are applied.. Only once that exercise has been concluded is it possible to label the relationship.
The analysis in this chapter also demonstrates that other aspects cannot be readily ignored when assessing the interplay between IHRL and LOAC. This concerns, *firstly*, the fact that upon closer examination, the concept of insurgency illustrates that the *military context* in which the counterinsurgent-State is forced to operate today is extremely complex, in organizational, geographical and instrumental terms. From a military perspective, counterinsurgent forces are challenged by a mosaic of threats, which may vary in time, place, and nature, posed by actors with various objectives, ranging from mere criminal activity for personal gain to terrorism to undermine the public perception of the State's capacity to provide law

[727] Bothe (2004), 387; Lorenz (2005), 206.

and order. Insurgents operate in unconventional ways, are difficult to identify and generally act with disregard for law. This complexity finds reflection in the validity and applicability of norms of IHRL and LOAC to the legal relationship between the counterinsurgent State and insurgents, as well as in the analysis of various legal concepts instrumental to determine permissibility of the targeting and detention of insurgents.

A *second* contextual aspect that cannot be ignored concerns (western) counterinsurgency *policy*, which illustrates the need for security and legitimacy, in order to drive a wedge between the population and the insurgency and to convince it to support the counterinsurgent. The particular nature of this policy, which aims at the restrained, controlled and tailored use of forcible measures focuses our attention to its potential effects on the interpretation of norms of IHRL and LOAC governing targeting and operational detention, and the interplay between them. Before we turn to the substance of these norms, however, it is imperative to first assess the potential for norms of IHRL and LOAC to interact. This is our main purpose in Part B.

Part B. Interplay Potential

Introduction

As noted, the *first* step in assessing the relationship potential of IHRL and LOAC is to identify the *valid norms* pertaining to the concepts of targeting and operational detention of insurgents (in their capacity as non-State agents) in so far available in both regimes. *Secondly*, the applicability of those norms to the situational contexts of counterinsurgency will be examined. Chapter IV and V do so in relation to IHRL and LOAC respectively.

Chapter IV IHRL

As noted, this chapter aims to identify the valid norms available in IHRL pertaining to targeting and operational detention and to examine their applicability in the situational contexts of counterinsurgency, which will take place in paragraphs 1 and 2 respectively.

1. Valid Norms

The first question to be addressed here is whether IHRL offers valid norms governing the concepts of targeting and operational detention. Paragraph 1.1. focuses on targeting, paragraph 1.2 addresses operational detention.

1.1. Targeting

The principal human right governing the concept of targeting is the human *right to life*. The right to life has been secured in all the human rights treaties under scrutiny in the present study.[728] Thus, within the UN conventional human rights framework, Article 6 ICCPR states that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be *arbitrarily* deprived of his life." Article 4(2) ICCPR categorically prohibits the derogation from the right to life *under any circumstances*.[729]
The ACHR contains an almost identical provision, in Article 4,[730] and also prohibits *any* derogation from the right to life in Article 27(2) ACHR.

Article 2 of the ECHR stipulates that "[n]o one shall be deprived of his life *intentionally* save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." In contrast to the texts of the ICCPR and the ACHR, which use the term '*arbitrary*' as a threshold to determine a violation of the right to life, Article 2 ECHR contains an *exhaustive list* of exceptional situations in which the *extra-judicial* deprivation of life does not violate the right to life. Thus,

> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:[731]

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[728] All texts exclude from the scope of unlawful deprivation of life deaths resulting from the death penalty imposed by a competent court and in accordance with the law, i.e. *judicial* executions. This basis will not be further explored for the purposes of the present study.

[729] (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, § 216; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*, § 216; Buergenthal (1981), 83; Rowe (2006), 4.

[730] 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be *arbitrarily* deprived of his life. 2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

a) in defence of any person from unlawful violence;
b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
c) in action lawfully taken for the purpose of quelling a riot or insurrection.

In contrast to the derogations clauses of the ICCPR and ACHR, which do not permit derogation from the right to life under any circumstances, the text of Article 15 ECHR implies that derogation from the right to life is permissible "[i]n time of war or other public emergency threatening the life of the nation," when it concerns "[…] deaths resulting from lawful acts of war."

While the principal sources underpinning State practice and *opinio juris* in the formation of customary IHRL differ significantly from those in the formation of customary obligations relating to other branches of international law,[732] there is overwhelming evidence that the contemporary human right to life is a rule of customary international law or a general principle of international law. Evidence is found in the practice of the non-judicial organs, agencies and appointed representatives of the UN,[733] practice of the ICJ,[734] State practice;[735] and doctrine.[736]

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[731] It may be noted that the use of the words "no more than" is confusing, as the requirement of absolute necessity expresses a threshold which, as a minimum, must be crossed. The better interpretation therefore appears to be to read the words "no more than" as "no *less* than".

[732] While principally based in State practice and *opinio juris* as any other customary rule, the formation of customary IHRL in general, and the human right to life in particular is strongly influenced by the conceptual anomaly within IHRL "regarding the interrelation between the obligation, the entitlement and the benefit arising from human rights norms."[732] In the case of human rights treaties, States accept *obligations* to respect and ensure the human rights protected in the instrument. However, as explained, the 'special character' of human rights obligations entails that, while commitment to such obligations is undertaken at the horizontal level between States, (1) they generally constitute obligations *erga omnes* and (2) the nature of the obligation seeks to benefit individuals from the human rights at the vertical level. It thus follows that while States are, vis-à-vis each other, legally entitled to *compliance* with those obligations, there is generally no genuine interest in enforcing that claim on other States as (1) the *erga omnes*-character of the obligations has removed the incentive to claim reciprocal behavior; and (2) the nature of the obligations seeks to regulate a vertical relationship that generally belongs to the sovereign, domestic affairs of the other State. In addition, State practice shows an abundance of cases that violate the obligation to respect the right to life; a fact which, as argued by Tomuschat (Tomuschat (2010), 16.) bars its development into a norm of customary law.

Thus, while in 'normal' situations the customary nature of obligations may be inferred from the 'normal' sources of evidence reflecting State practice and *opinio juris*, such as arbitral awards or international judicial decisions, the consequence of the 'special character' of IHRL is that recourse must be had to a wide variety of other sources such as "the virtually universal the adherence to the United Nations Charter and its human rights provisions, and acceptance of the Universal Declaration of Human Rights even if only in principle; virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights; the adoption of human rights principles by states for UN resolutions declaring, recognizing, invoking, and applying international human rights principles in international law; action by states to conform their national law or practice to standards or principles declared by international bodies, and the incorporation of human rights provisions, directly or by reference, in national constitutions and laws; invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions; and other diplomatic communications or action by states reflecting the view that certain practices violate international human rights law, including condemnation and other adverse state reaction to violations by other states." See American Law Institute (1987), § 107, footnote 2. See also Schachter (1991), 334 ff; Melzer (2008), 182-183; Paust (1996), 147 ff; Lillich (1996), 9; Hannum (1996), 320; D'Amato (1996), 91 ff, 98.

[733] See resolutions of the UN General Assembly, the UN Security Council, the UN HRC, the UN ECOSOC, statements and reports of the UN Secretary General, the Special Rapporteur on Summary, Arbitrary and Extralegal Executions.

The right to life as a non-conventional source of customary international law[737] is of significance because (1) it binds States not party to human rights treaties protection the right to life (but which are nevertheless engaged in operations involving the extra-judicial application of lethal force);[738] (2) its force is equivalent to that of the conventional right to life, if not stronger if one were to accept it as a rule of *jus cogens*; and (3) it binds all States in the conduct of all military operations, whether they take place on own territory, or extraterritorially. In other words, even if a State is not bound by the conventional right to life of a particular treaty because the individual affected by its use of force was not, at that time, in its jurisdiction as understood in the relevant treaty, the State is nonetheless bound to comply with its obligations under the customary right to life, given the fact that a customary norm applies *erga omnes*.

There is less certainty of its status as a norm of *jus cogens*,[739] even though there is considerable support for such contention in statements and decisions of international organs[740] as

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[734] While the right to life has been object of deliberation in a number of cases, the ICJ thus far has refrained from recognizing the obligations arising from right to life as customary rules. See (1970), *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application 1962) (Belgium v. Spain), Judgment of 5 February 1970 (Merits)*, § 34; (1980c), *United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment of 24 May 1980*, § 91; (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, § 25; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*, §§ 216-219. Instead, it has derived obligations from 'general principles of law recognized by civilized nations' within the meaning of Article 38(1)(c) ICJ Statute, in particular the 'elementary considerations of humanity' prohibiting murder and extra-judicial execution embedded in CA 3 to the Geneva Conventions. See (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, § 218. Also: (1949a), *Corfu Channel Case (United Kingdom v. Albania), Judgment of 9 April 1949 (Merits)*, 22. See also Tomuschat (2010), 16.

[735] State practice follows from States' participation in the UN; national constitutional and statutory law and jurisprudence, regional declarations, such as the ADRDM and the EU Charter of Fundamental Rights, the Cairo Declaration on Human Rights in Islam and the Kuala Lumpur Declaration on Human Rights; unilateral acknowledgement of the non-derogable nature of the right to life (see for example the written statements submitted by Malaysia, Indonesia, Qatar and Nauru to the ICJ in the Nuclear Weapons Advisory Opinion.

[736] See, *inter alia*, American Law Institute (1987), Ramcharan (1985), 3; Dinstein (1981), 115; Paust (1996), 154; Ruys (2005), 16; Kretzmer (2005), 185; Hannikainen (1988), 514ff; Henkin (1995/1996), 39; Paust (1996), 154.

[737] Customary rules and general principles are both recognized as sources of international law, see Article 38(1)(b) and (c), ICJ Statute.

[738] Examples include China (signatory to the ICCPR, but no ratification), Laos (signatory to the ICCPR, but no ratification), Myanmar, Pakistan and Saudi Arabia.

[739] Denouncing the status of *jus cogens* is Green (2002), 429. Less certain are for example Nowak (2005), 105; Kremnitzer (2004), 1; Rodley (2010), 221-222.

[740] For example, evidence is found, as for example Melzer argues, (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*; Human Rights Committee (2001b), § 10; (1996k), *Victims of the Tugboat "13 de marzo" v. Cuba, Case No. 11.436, Decision of 16 October 1996*; (1999o), *Villagrán Morales et al. Case (the "Street Children" Case), Judgment of November 19, 1999*, § 139; and several High-Level Expert Conferences, such as the Siracuse Principles on the Limitation and Derogation Provisions in the ICCPR (1984), the Paris Minimum Standards of Human Rights Norms in a State of Emergency, the Turku Declaration of Minimum Humanitarian Standards and the Expert Meeting on Non-Derogable Human Rights. See Melzer (2008), 216-219 for a more complete overview and the arguments in support of *jus cogens*);

well as in legal doctrine,[741] even to a degree that, as Melzer argues, "today, the *jus cogens* character of the right to life has become virtually unassailable."[742]
As for the *substantive scope* of the customary right to life, particular assistance is offered by the relevant sources of 'soft law',[743] to include first and foremost the UDHR,[744] as well as the UN Code of Conduct for Law Enforcement Officials[745] and the UN Force and Firearms Principles, and the practice of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.[746] It is submitted that these sources permit the use of lethal force on basis of similar requirements as the conventional human right to life.

1.2. Operational Detention

Inherent to the concept of operational detention are a number of subjects that each find protection in IHRL. It not merely affects a person's liberty and security, but pertains to the safeguards that must be afforded to a detainee in the criminal or administrative process underlying his detention, his treatment in detention, and his transfer to another authority.

At the basis of the IHRL-norms governing operational detention lays the *right to liberty and security of the person*. In essence, the right to liberty and security of the person is a container of numerous protections to thwart the arbitrary use of detention powers and to provide protections to eliminate ill treatment or disappearance from instances of permitted detention.[747] The ECtHR has explained the importance of this right as follows:

> […] the authors of the Convention reinforced the individual's protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. […] What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.[748]

Some differences aside, of all conventional instruments examined in this study, Articles 9 ICCPR and 7 ACHR are most identical in expressing the right to liberty and security of the person. In sum, both stipulate that everyone has the right to liberty and security of his person, and shall not be subjected to *arbitrary* arrest or detention. In other words, all forms of detention that can be considered as non-arbitrary are lawful.
In addition, the deprivation of liberty of *anyone* is subject to several procedural requirements that will be subject to closer examination in paragraph 3. While some provisions within Articles 9 ICCPR and 7 ACHR specifically address the rights of criminal detainees, all other

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741 For example: Boyle (1985), 6, 11, 15; Hannikainen (1988), 514 ff; Kretzmer (2005), 185; Ramcharan (1985), 15. For a more extensive overview and a short discussion of the several views, see Melzer (2008), footnote 231 and 219-220.
742 Melzer (2008), 220. See also Lubell (2010), 170, footnote 8.
743 For a more detailed examination of this body of 'soft law', see Melzer (2008), 189 ff.
744 Despite its status as 'soft law', it is, as a minimum, in full expressive of customary international law) Hannum (1996), 332), and to some, as reflective of *jus cogens* (e.g. McDougal, Lasswell & Chen (1980), 274).
745 United Nations (1979); United Nations (1990b).
746 See, for example, United Nations (2004); United Nations (2006).
747 Shah (2010), 305.
748 (1998i), *Kurt v. Turkey, App. No. 24276/94, Judgment of 25 May 1998*, § 123.

provisions set out rights to be afforded to *all* types of detainees, arguably also including security detainees.
In contrast to the ICCPR and the ACHR, Article 5 ECHR is somewhat different. While it contains the same procedural requirements as Articles 9 ICCPR and 7 ACHR, it differs significantly in that it does not permit the deprivation of liberty that is non-arbitrary, but those forms of detention expressly mentioned in an *exhaustive* list of *exceptional* bases for lawful deprivation of liberty. This implies that any form of deprivation of liberty not falling within any of the exceptions is *a priori* unlawful and constitutes a violation of the human right to liberty and security of person.[749] A quick scan of the list reveals that – at least not in so many words – security detention is not expressly listed. In other words, while Article 5 ECHR permits the arrest and detention of insurgents suspected of criminal offences, it appears not to unconditionally allow for the security detention of insurgents.

Similar to the right to life, the right to liberty is also firmly embedded within general international law as a norm of customary international law, and aspects of it have attained the status of *jus cogens*.[750] As for the material scope of the customary right to liberty, particular assistance is offered by the relevant sources of 'soft law'.
At the level of the UN, this includes first and foremost the UDHR,[751] as well as the UN Standard Minimum Rules for the Treatment of Prisoners (UN Minimum Rules);[752] the (UN Basic Principles);[753] the UN Rules for the Protection of Juveniles Deprived of their Liberty;[754] the UN Body of Principles for the Protection of all Persons under Any Form of Detention of Imprisonment (UN Body of Principles),[755] and the practice of the Working Group on Arbitrary Detention.[756] In addition, notice may be had of the 1990 Turku Declaration of Minimum Humanitarian Standards[757] and the Paris Minimum Standards of Human Rights Norms in an Emergency.[758]
At the regional level, both the Inter-American system and the European system provide guidance through 'soft law'. Relevant sources are the Inter-American Commission of Human Rights' Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (IACiHR Principles);[759] the American Declaration of the Rights and Duties of Man (ADRDM)[760] and the Council of Europe Minimum Rules for the Treatment of Prisoners (CoE Minimum Rules).[761]

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[749] (2000j), *Labita v. Italy, App. No. 26772/95, Judgment of 6 April 2000*.
[750] Hannikainen (1988), 425 ff; Meron (1986), 80; Duffy (2005), 395; American Law Institute (1987), section 702; Human Rights Committee (2001c), § 11; (2007b), *Boumediene and Others v. Bosnia and Herzegovina, App. Nos. 38703/06, 40123/06, 43301/06, 43302/06, 2131/07 and 2141/07, Written Submissions of Interights and the International Commission of Jurists*, 2.
[751] Despite its status as 'soft law', it is, as a minimum, in full expressive of customary international law) Hannum (1996), 332), and to some, as reflective of *jus cogens* (e.g. McDougal, Lasswell & Chen (1980), 274).
[752] United Nations (1955).
[753] United Nations (1990a).
[754] United Nations (1990c).
[755] United Nations (1988).
[756] See http://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx.
[757] Turku Declaration (1990).
[758] Paris Minimum Standards (1985).
[759] IACiHR (2008).
[760] IACiHR (1948).
[761] CoE Minimum Rules (1973).

Of particular relevance to the concept of operational detention are also the fair *trial guarantees*, which find protection in Article 14 ICCPR, Articles 8 and 9 ACHR and Articles 6 and 7 ECHR. As explained by Pejic,

> Judicial guarantees aim to ensure: i) that an innocent person is not subject to criminal sanctions; ii) that the process by which someone's innocence or guilt is determined is basically fair; and iii) that a person's other rights, such as the right to be free from torture or other forms of ill-treatment, are also respected in the administration of justice. Judicial guarantees thus comprise a 'safety net' that must be respected in order to ensure that any deprivation of liberty as the result of criminal proceedings is lawful and non-arbitrary.[762]

It is generally recognized that these guarantees have crystallized into norms of customary law.

Another principal human right related to operational detention, and governing the treatment of arrestees and detainees, is the *freedom from torture and inhuman or degrading treatment*. This fundamental human right finds protection not only in the ICCPR, ACHR and ECHR,[763] but also in the CAT[764] at the UN-level, and in the Inter-American Convention to Prevent and Punish Torture[765] and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[766] at the regional level. Besides finding a basis in treaties, these fundamental human rights constitute norms of customary law (and in the case of the freedom from torture even *jus cogens*).

Finally, notion must be had of the norms governing the transfer of detainees to other States. The transfer of detainees is subject to the principle of *non-refoulement*.[767] IHRL prohibits the transfer of persons to States where there is a real risk of violation of certain fundamental human rights, such as the prohibition from torture, or other forms of cruel, inhuman or degrading treatment or punishment. It also prohibits transfers where a person faces the risk of imposition or execution of the death penalty, also when such trial was in accordance with the necessary requirements,[768] and even if the detaining State has reserved the right to im-

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762 Pejic (2011), 23.

763 Article 7 ICCPR; Article 5(2) ACHR; and Article 3 ECHR.

764 United Nations (1948).

765 Organization of American States (1985).

766 Council of Europe (1989).

767 On the principle of non-refoulement, see Gillard (2008); Lauterpacht & Bethlehem (2003); Droege (2008b). This principle is firmly rooted in refugee law (see Article 33, 1951 Refugee Convention; Article 2(3), OAU Convention governing the Specific Aspects of Refugee Problems in Africa. See also Goodwin-Gill & McAdam (2007)); LOAC (Article 12(2) GC III; Article 45(3) GC IV) and extradition treaties. It is explicitly mentioned in Article 3 CAT, Article 22(8) ACHR, Article 13(4) Inter-American Convention to Prevent and Punish Torture, Article 16; International Convention for the Protection of All Persons from Enforced Disappearance, and Article 19(2) of the Charter of Fundamental Rights of the European Union. In addition, the principle of *non-refoulement* has been recognized to be an implicit part of the ICCPR (via Article 7) (Human Rights Committee (2004c), § 12; UNHRC (2004), § 9; (1991a), *Chitat Ng v. Canada, Comm. No. 469/1991 of 5 November 1991*, § 14.1; (1991b), *Kindler v. Canada, Comm. No. 470/1991 of 18 November 1993*, § 6.2.) and the ECHR ((1989d), *Soering v. the United Kingdom, App. No. 14038/88, Judgment of 7 July 1989*, § 91; (1990a), *Cruz Varas and Others v. Sweden, Appl. No. 15576/89, Judgment of 29 August 1990*, §§ 69-70; (1991d), *Vilvarajah and Others v. United Kingdom, App. No. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Judgment of 30 October 1991*, §§ 102-110; (1996b), *Chahal v. United Kingdom, App. No. 22414/93, Judgment of 15 November 1996*, § 74).

768 (2010b), *Al-Saadoon and Mufdhi v. the United Kingdom, App. No. 61498/08, Judgment of 2 March 2010*, §§ 123, 142-143.

pose the death penalty in times of war.[769] More generally, transfer is prohibited if it is foreseen that a person will be exposed to a flagrantly unfair trial.[770] The prohibition of *non-refoulement* also applies to subsequent transfers, i.e. the transfer of an already transferred individual from State B to a third State C.[771]

2. Applicability

Having established that IHRL provides valid norms that govern targeting and operational detention, it needs to be established whether these norms apply to the relationship between the counterinsurgent State and insurgents in a particular situational context of counterinsurgency. This relates to two distinct issues.

Firstly, the question of applicability relates to the applicability *ratione personae* of the valid norms. As has been previously addressed, the applicability of IHRL-treates has been made subject to the question of whether it has been established that an individual has come within the jurisdiction of a State party to the treaty. While this issue is less controversial in targeting operations taking place on the territory of a counterinsurgent State (as in NATCOIN), a far more contentious issue is whether States are bound by its obligations under the right to life in relation to targeting operations taking place outside their own territories, as would be the case in OCCUPCOIN, SUPPCOIN and TRANSCOIN. Paragraph 1 deals with this issue.

A *second* issue of applicability concerns the question whether IHRL permits derogation from the valid norms. In the context of counterinsurgency, such derogation would imply that their is temporarily suspended in situations of public emergencies threatening the life of the nation, to the extent strictly required by the exigencies of the situation. Consequently, the counterinsurgent State would for the period of derogation not be bound by the requirements governing the deprivation of life in the normative framework of IHRL. This issue will be addressed in § 2.

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[769] Article 2(1) ICCPR offers States the possibility to make a reservation to permit "[…] the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime." Such a reservation is not possible under the European human rights system. Protocol No. 13 to the ECHR, Concerning the Abolition of the Death Penalty in All Circumstances forbids States to do so. See also Article 19 of the Charter of Fundamental Rights of the European Union.

[770] (2001e), *Einhorn v. France, Admissibility, ECtHR (16 October 2001)*, § 32; (1989d), *Soering v. the United Kingdom, App. No. 14038/88, Judgment of 7 July 1989*, § 113 ("The Court does not exclude that an issue might exceptionally be raised under Article 6 (art. 6) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country"); (1992a), *Drozd and Janousek v. France, App. No. 12747/87, Judgment of 26 June 1992*, § 110 ("The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice"). The HCR, in Human Rights Committee (2004a), § 12, has adopted general standards: "article 2 […] entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed." See also the United Nations Model Treaty on Extradition, Annex to UN General Assembly resolution 45/116, 14 December 1990, article 3(f) (listing a violation of minimum fair trial guarantees as laid down in article 14 ICCPR as a mandatory ground for refusing extradition).

[771] (2000n), *T.I. v. the United Kingdom, App. No. 43844/98, Admissibility Decision of 7 March 2000*, 15; Committee Against Torture (1997), § 2.

2.1. (Extra-)territorial Applicablity *Ratione Personae* of Valid Norms of IHRL to Targeting and Operational Detention in Counterinsurgency Operations

As noted previously, it follows from the practice of the UNHRC and IACtHR/IACiHR regarding the territorial scope of applicability of human rights obligations that jurisdiction may arise following SAA and ECA. To recall, the concept of SAA refers to jurisdiction generated by the authority and control over *persons* by State agents. ECA, in turn, refers to jurisdiction arising from a State's control over *territory*. What follows below is an examination of the SAA and ECA-based practice of the UNHRC, IACtHR/IACiHR, ECtHR and ICJ in order to determine the applicability of the valid treaty-based norms in respect of situations of targeting and operational detention in situational contexts of counterinsurgency.

2.1.1. SAA

To recall, when placed in the context of counterinsurgency, the approach of SAA brings insurgents and other individuals within the jurisdiction of a counterinsurgent State by virtue of the conduct of its counterinsurgent forces, even if this conduct can be considered an unlawful form of enforcement jurisdiction, regardless of whether counterinsurgent forces operate in OCCUPCOIN, SUPPCOIN or TRANSCOIN. Below, it will be examined whether jurisdiction based on SAA arises in relation to operational detention and targeting respectively.

2.1.1.1. Operational Detention

In respect of the concept of *operational detention*, it is today generally agreed that, regardless of the circumstances leading to it, the *physical* power that such act entails is a clear reflection of such total/full and exclusive authority and control over an individual that it engages the jurisdiction of the State executing it. This has been widely demonstrated in the case law of the (quasi-)judicial bodies[772] and doctrine.[773] It is irrelevant whether the detention facility is a formal, recognized facility,[774] or a make-shift facility,[775] or whether the detention takes place outside a facility;[776] whether the period of detention is brief[777] or long;[778] and whether the

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[772] As for the UNHRC, see, *inter alia*, (1981b), *Sergio Euben López Burgos v. Uruguay, Comm. No. 12/52 of 29 July 1981*; UNHRC (2004), § 10 (emphasis added). As for the IACiHR and IACtHR, see (2010c), *Franklin Guillermo Aisalla Molina v. Ecuador, Case IP-02, OEA/Ser.L/V/II.140 Doc. 10 (2010), Judgment 21 October 2010 (Admissibility)*; (1999f), *Coard and Others v. the United States ('US Military Intervention in Grenada), Case No. 10.951, Decision of 29 September 1999*, § 37 (emphasis added). As for the ECiHR and ECtHR, see (1975d), *Ilse Hess v. United Kingdom, App. No. 6231/73, Decision of 28 May 1975*; (2005l), *Öcalan v. Turkey, App. No. 46221/99, Judgment (Grand Chamber) 5 December 2005*; (2010d), *Medvedyev and Others v. France, App. No. 3394/03, Judgment of 29 March 2010*; (2010b), *Al-Saadoon and Mufdhi v. the United Kingdom, App. No. 61498/08, Judgment of 2 March 2010*.

[773] This also applies to arrest and abduction. Support in doctrine: Gondek (2009); Lubell (2010), 216; Melzer (2008), 136.

[774] (2002j), *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba, Decision of 13 March 2002*; (2007e), *R (on the application of Al-Skeini and others) v Secretary of State for Defence, [2007] UKHL 26, [2008] AC 153*; (1975d), *Ilse Hess v. United Kingdom, App. No. 6231/73, Decision of 28 May 1975*.

[775] (1981b), *Sergio Euben López Burgos v. Uruguay, Comm. No. 12/52 of 29 July 1981*; (1981a), *Lilian Celiberti de Casariego v. Uruguay, Comm. No. 56/1979 of 29 July 1981*;

[776] (2004i), *Issa v. Turkey, App. No. 31831/96, ECtHR (16 November 2004)*; (2005l), *Öcalan v. Turkey, App. No. 46221/99, Judgment (Grand Chamber) 5 December 2005*; (2010d), *Medvedyev and Others v. France, App. No. 3394/03, Judgment of 29 March 2010*.

detention is lawful,[779] or in accordance with State policy.[780] "The determining factor, […], is that an individual is being held powerless in direct control of agents of the state."[781]
IHRL continues to play a role for counterinsurgent States that are somehow not bound by the treaty-norms (for example, because they are not a party to the treaty in question), as it is widely recognized that they are norms of customary international law.
In sum, it may therefore be concluded that in all situational contexts of counterinsurgency examined here, the counterinsurgent States are bound by the relevant norms of IHRL governing an insurgent's operational detention.

2.1.1.2. Targeting

While SAA-based jurisdiction is relatively straightforward and uncontroversial in relation to operational detention due the exercise of actual, direct *physical power* by State agents, the issue in respect of targeting is whether authority and control over persons also arises in the event of extra-custodial deprivations of life, resulting from targeting operations. This is a relevant question, because in these situations the counterinsurgent State does not exercise direct but rather *indirect* physical power over persons. To place this issue in the right perspective: in the context of counterinsurgency, does the concept of SAA accommodate deprivations of life resulting from the extracustodial use of force during patrols, following mortar attacks, sniper guns, close-quarter combat situations or aerial bombardments with manned and unmanned planes using precision-guided missiles?
As we will see, here the approaches of the UNHRC and IACiHR/IACtHR and those of the ECtHR are quite different, and lead to diverging results.

2.1.1.2.1. UNHRC and IACiHR/IACtHR

In respect of the right to life, it follows from the practice of the UNHRC that the counterinsurgent State is always bound by the obligations attached to it, regardless of the geographic qualification of its relationship with the individual affected by its conduct.[782] The IACiHR has expressed a similar view. In *Brothers to the Rescue*, concerning the shooting down of two civilian Cessna's by Cuban MiGs in international airspace, the IACiHR found that

> the victims died as a consequence of direct actions taken by agents of the Cuban State in international airspace. The fact that the events took place outside Cuban jurisdiction does not limit the Commission's competence *ratione loci*, because, as previously stated, when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues – in this case the rights enshrined in the American Declaration. *The Commission finds conclusive evidence that agents*

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[777] (2005l), *Öcalan v. Turkey, App. No. 46221/99, Judgment (Grand Chamber) 5 December 2005*; (2004i), *Issa v. Turkey, App. No. 31831/96, ECtHR (16 November 2004)*.
[778] (1975d), *Ilse Hess v. United Kingdom, App. No. 6231/73, Decision of 28 May 1975*; (2002j), *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba, Decision of 13 March 2002*.
[779] (2005l), *Öcalan v. Turkey, App. No. 46221/99, Judgment (Grand Chamber) 5 December 2005*.
[780] (2002j), *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba, Decision of 13 March 2002*.
[781] Lubell (2010), 220.
[782] UNHRC (2004), § 10 (emphasis added); (1981c), *Sergio Euben López Burgos v. Uruguay, Comm. No. 12/52, UNHRC (29 July 1981)*, § 12.2 (emphasis added), in which it held that 'jurisdiction' refers "not to the place where the violation occurred, but rather to the *relationship* between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred."

> *of the Cuban State, although outside their territory, placed the civilian pilots of the "Brothers to the Rescue" organization under their authority.*[783]

The civilian pilots were placed under the authority of the MiG-pilots as a mere result of selected and personalized use of lethal force. Following the transcript of the communication between the MiG-pilots and the military control tower, the Cessna's were locked in their sights, and the order was given to fire, upon which both aircraft were destroyed.
In the more recent case of *Molina*, the IACtHR affirmed its position by accepting that Colombia exercised authority and control over persons during operation 'Phoenix', involving the bombardment of a FARC-camp in Ecuador, followed by a ground operation.[784] The test applied appears to be one of 'cause and effect', as follows from the case of *Franklin Guillermo Aisalla Molina v. Ecuador* (hereinafter: *Molina*), in which the IACiHR held that

> the following is essential […] in determining jurisdiction: the exercise of authority over persons by agents of a State even if not acting within their territory, without necessarily requiring the existence of a formal, structured and prolonged legal relation in terms of time to raise the responsibility of a State for acts committed by its agents abroad. At the time of examining the scope of the American Convention's jurisdiction, it is necessary to determine whether there is a *causal nexus* between the extraterritorial conduct of the State and the alleged violation of the rights and freedoms of an individual.[785]

In sum, following the approach of the UNHRC and IACiHR/IACtHR, the counterinsurgent State is prohibited from arbitrary deprivations of life as recognized in the right to life under the ICCPR and ACHR also in targeting operations, irrespective of the situational context of the counterinsurgency.

2.1.1.2.2. ECtHR

To the dismay of various experts,[786] the position of the ECtHR in respect of the extraterritorial applicability of Article 2 ECHR on the basis of SAA can be said to be more case-specific and context-sensitive, and adheres to the rule that "[a] State's jurisdictional competence under Article 1 is primarily territorial, […]"[787] and that only in exceptional cases acts of States carried out, or having effects, extraterritorially constitute an exercise of jurisdiction within the meaning of Article 1.[788] Based on the practice of the ECtHR, extraterritorial jurisdiction in respect of the right to life may arise in exceptional circumstances only.

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[783] (1999c), *Armando Alejandre Jr. and Others v. Cuba ('Brothers to the Rescue'), Case No. 11.589, IACommHR (29 September 1999)*, §§ 23 and 25 (emphasis added).

[784] (2010c), *Franklin Guillermo Aisalla Molina v. Ecuador, Case IP-02, OEA/Ser.L/V/II.140 Doc. 10 (2010), Judgment 21 October 2010 (Admissibility)*, §§ 78 ff.

[785] (2010c), *Franklin Guillermo Aisalla Molina v. Ecuador, Case IP-02, OEA/Ser.L/V/II.140 Doc. 10 (2010), Judgment 21 October 2010 (Admissibility)*

[786] Lawson (2004), 103-104; Scheinin (2004), 75-77; Ben-Naftali & Shany (2004), 64; Lubell (2010), 223; Salama & Hampson (2005), 22; Roxstrom, Gibney & Einarsen (2005); Loucaides (2006); Hannum (2002), 96-99; (2011c), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011, Concurring Opinion of Judge Bonnello*.

[787] (2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*, § 138, referring to (1989d), *Soering v. the United Kingdom, App. No. 14038/88, Judgment of 7 July 1989*, § 86; (2001c), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, Judgment of 12 December 2001*, §§ 61 and 67; (2004h), *Ilascu and Others v. Moldova and Russia, App. No. 48787/99, Judgment of 8 July 2004*, § 312.

[788] (2001c), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, Judgment of 12 December 2001*, § 67. See also the ECtHR response in § 75 to the applicant's argument that Article 1 ought to be applied on a 'cause and effects'-basis, which it rejected as being "[…] tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act

A *first* basis is when a counterinsurgent State, through the *consent*, *invitation* or *acquiescence* of the government of the territorial State, it exercises *public powers* normally to be exercised by that government. This possibility has been expressly mentioned in *Bankovic*[789] and was reaffirmed in *Al-Skeini*, where the ECtHR explained that "[…] where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State."[790] When applied to the situational contexts of counterinsurgency, the above could provide a basis for jurisdiction arising in SUPPCOIN and consensual TRANSCOIN, as both take place with the consent, invitation or acquiescence of the territorial State. However, in practice, States are not likely to hand-over public powers to a visiting State. An example is the US-Iraq SOFA,[791] concluded in 2008 to regulate the presence in and the witdrawal of US forces from Iraq. While the SOFA in relation to facilities and areas in use of the US, "Iraq authorizes the United States Forces to exercise within the agreed facilities and areas all rights and powers that may be necessary to establish, use, maintain, and secure such agreed facilities and areas,"[792] outside of such facilities and areas the SOFA strongly suggests an *absence* of permission to exercise effective control or public powers by the US. For example, it stipulates that all US military operations in support of Iraq must be agreed upon, and coordinated with the government of Iraq and its authorities;[793] that such operations must take place with full respect for the Iraqi Constitution and the laws of Iraq and "not *infringe upon the sovereignty* of Iraq and its national interests, as defined by the Government of Iraq;" that Iraq has extensive criminal and civil jurisdiction;[794] and that the detention of arrest by United States forces (except for members of those forces and of the civilian component) requires a prior Iraqi decision."[795]
Thus, while in theory it cannot *a priori* be excluded that SAA-jurisdiction on this basis may arise, in practice this is unlikely to occur and apprears to be of little further relevance.

A *second* basis was adopted by the ECtHR in the case of *Al-Skeini*, and most closely resembles the position of a counterinsurgent Occupying Power in OCCUPCOIN. It holds that individuals come under the authority and control of a counterinsurgent State when the latter remains present on another State's territory following the removal from power of a State's government, *and thereby assumes the exercise of some or all of the public powers normally to be exercised by a sovereign government*, but which it is no longer able to fulfill, such as the authority and

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may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention."

789 (2001b), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, ECtHR (12 December 2001)*, § 71.

790 (2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*, § 135. See also (1992a), *Drozd and Janousek v. France, App. No. 12747/87, Judgment of 26 June 1992*; (2002c), *Gentilhomme, Schaff-Benhadji and Zerouki v. France, App. Nos 48205/99, 48207/99, 48209/99, Judgment of 14 May 2002*; and (1977b), *X and Y v. Switzerland, App. No. 7289/75, Decision of 14 July 1977*. For more detailed discussion, see Gondek (2009), 147-150.

791 Unites States of America & Republic of Iraq (2008).

792 Article 6(2), Unites States of America & Republic of Iraq (2008).

793 Article 4(1) and 4(3), Unites States of America & Republic of Iraq (2008).

794 Article 12, Unites States of America & Republic of Iraq (2008).

795 Article 22, Unites States of America & Republic of Iraq (2008).

responsibility for the maintenance of security in a territory or part thereof.[796] *Al-Skeini* concerned the death of six persons in Basra, Iraq in 2003, five of which resulting from the extracustodial use of force by UK troops. The ECtHR held that

> […] following the removal from power of the Ba'ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.[797]

Among the UK's security tasks were patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations.

Al-Skeini is of importance as it implies that counterinsurgent States acting extraterritorially and having a responsibility to exercise *public powers* normally to be exercised by the government of the territorial State exercise jurisdiction in relation to *all* its conduct carried out by its agents, *irrespective of their nature*. In other words, while normally authority and control must be demonstrated in each single case, the public powers-approach entails that, once established, all individuals whose human rights are affected by the conduct of counterinsurgent forces in the exercise of such powers come with the counterinsurgent State's jurisdiction.

It follows from the above that SAA-jurisdiction on this basis may be of particular relevance to the situation of OCCUPCOIN, but of little relevance to SUPPCOIN and TRANSCOIN, as the counterinsurgent State in those situations does not replace the indigenous government.

A *third* basis for the extraterritorial applicability of IHRL-based valid norms on the basis of SAA is when a State, whilst not exercising public powers, through its agents, uses *forcible measures* that thereby bring the individual under the control of the State.[798] In so far these forcible measures constitutes the use of extra-custodial force (as would be so in the case of targeting), the practice of the ECtHR is very case-specific, and to may be perceived as somewhat capricious.

To begin with, it follows from the *Bankovic*-case that, in the absence of public powers, *collective* and *depersonalized* bombardments on foreign territory do *not* constitute an exercise of authority and control over persons. In other words, the bombardments were not primarily directed at a specific individual or group of individuals, but against objects (*in casu*, the RTS-

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[796] As per the reasoning applied by the ECtHR in (2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*, § 149.

[797] (2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*, § 149.

[798] (2005l), *Öcalan v. Turkey, App. No. 46221/99, Judgment (Grand Chamber) 5 December 2005*; (2004j), *Issa v. Turkey, App. No. 31831/96, Judgment of 16 November 2004*; (2007d), *Pad v. Turkey, App. No. 60167/00, Judgment of 28 June 2007*; (2008k), *Solomou v. Turkey, App. No. 36832/97, Judgment of 24 June 2008*; (2010d), *Medvedyev and Others v. France, App. No. 3394/03, Judgment of 29 March 2010*; (2010b), *Al-Saadoon and Mufdhi v. the United Kingdom, App. No. 61498/08, Judgment of 2 March 2010*; (2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*; (2011a), *Al-Jedda v. United Kingdom, App. No. 27021/08, Judgment of 7 July 2011*.

facilities in Belgrade), as a result of which individuals were secondarily killed.[799] To date, the ECtHR has not had an opportunity to re-examine aerial bombardments in an extraterritorial context.[800] Arguably (since it was not concerned in *Bankovic* with other forms of use of force but the aerial bombardments) the ECtHR left open the applicability of the SAA-approach in other cases of extracustodial use of force. This may be exemplified by the cases of *Pad v. Turkey*, *Solomou v. Turkey*, and *Andreou v. Turkey*.

Pad v. Turkey concerned the alleged killing of individuals resulting from a Turkish helicopter attack against PKK-fighters in Iran. It remained unclear whether the applicants were killed in Turkey or in Iran, and whether they were killed by helicopter fire or after they had been captured. As Turkey claimed that the incident had occurred inside its territory and that the deaths had resulted from the fire discharged from its helicopters, and subsequently admitted to it having jurisdiction, the ECtHR was not required to look into the issue of extraterritorial jurisdiction. Nonetheless, the case is of relevance because the ECtHR concluded that Turkey exercised authority and control over persons based on the mere fact that "the fire discharged from the [Turkish] helicopters had caused the killing of the [applicants]."[801] In view of the fact that it remained factually unclear whether the killings had taken place in Turkey or Iran, it thereby implicitly recognized that the geographic location of the killing is irrelevant; what matters is whether a State has the direct capability to affect an individual's right. This may also be concluded from the ECtHR's decision that jurisdiction arises also outside the legal space of the ECHR where individuals "are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State […]."[802]

The case of *Solomou v. Turkey* concerns the killing of Solomos Solomou who attended the funeral of his cousin Anastassios Isaak, who had been killed days before by Turkish forces. Later that day, he and some others went to the site where Anastassios was killed to demonstrate. Solomou was shot and killed with multiple rounds by Turkish forces when he climbed in a flagpole flying the Turkish flag located on the UN buffer zone. Even though the Turkish soldiers fired their shots from territory under the effective control of Turkey, the effects of their conduct took place in territory not under the control of Turkey. The ECtHR held that Solomou's death fell within the jurisdiction of Turkey since "*the bullets which had hit [him] had been fired by the members of the Turkish-Cypriot forces.*"[803] The case is of

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[799] (2001b), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, ECtHR (12 December 2001)*, § 73, in reference to (1965), *X v. Federal Republic of Germany, App. No. 1611/62, Decision of 25 September 1965*; (1977c), *X v. UK, App. No. 7547/76, Decision of 15 december 1977*, 74; (1992d), *W.M. v. Denmark, App. No. 17392/90, Decision of 14 October 1993*. In (1975a), *Cyprus v. Turkey (App. No. 6780/74 and No. 6950/75, 26 May 1975)*, § 8, the ECiHR extends this to "authorized agents of the State", to include the armed forces. For almost identical reasoning, see also (1985b), *G. v. the United Kingdom and Ireland, App. No. 9837/82, Decision of 7 March 1985*, § 25.

[800] However, this opportunity may arise since in 2008, Georgia filed an inter-State complaint against Russia concerning the inter-State armed conflict waged on the territory of Georgia, involving Russian armed forces, including its air force. At the time of this writing, the ECtHR has declared the case admissible, but has not dealt with the question of 'jurisdiction', which it postponed to the merits phase. See (2012c), *Georgia v. Russia No. 2, App. No. 38263/08, Judgment of 4 January 2012*. In contrast to extraterritorial bombardments, the ECtHR did have an opportunity to examine aerial bombardments in a territorial context, namely in (2005e), *Isayeva v. Russia, App. No. 57950/00, Judgment of 14 October 2005*; (2005f), *Isayeva, Yusupova and Bazayeva v. Russia, App. No. 57947/00, 57948/00, 57949/00, Judgment of 24 February 2005*.

[801] (2007d), *Pad v. Turkey, App. No. 60167/00, Judgment of 28 June 2007*, § 54.

[802] (2007d), *Pad v. Turkey, App. No. 60167/00, Judgment of 28 June 2007*, § 53.

[803] (2008k), *Solomou v. Turkey, App. No. 36832/97, Judgment of 24 June 2008*, § 51. For an analysis, see Zwanenburg (2009), 8.

interest, as it deviates from the ECtHR's ruling in Bankovic, by which it had been concluded that jurisdiction does *not* arise regarding the use of force exercised in territory not under effective control.

The case of *Andreou v. Turkey* concerns the shooting and injuring of Ms. Andreou by Turkish forces when they opened fire on the crowd gathered in the UN buffer zone after they had shot Solomou. Ms. Andreou was in Cyprus when she was shot. The ECtHR found jurisdiction to exist on the basis that "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from *close range* […] was the *direct and immediate* cause of those injuries."[804]

These cases differ from *Bankovic* to the extent that the use of force is not collective and depersonalized, but *selective and individualized use of force*, i.e. it concerns force used against specific or preselected, pre-identified individuals or a group of individuals that form the primary target. Besides the nature of the target itself, the ECtHR also appears to take account of the weapon system as well as the proximity of the weapon to the target.[805] Finally, this case-law illustrates that the ECtHR appears to be prepared to apply a *cause-and-effect* based approach. On the other hand, these cases also demonstrate that SAA-based jurisdiction for selective and personalized extracustodial use of force arises where the State involved exercises control over territory and/or the situation. The question that arises is whether this would also be the case where such control is absent, such as is typically the case in hostilities.

The case-law of the ECtHR, also raises other questions that to date remain unanswered. For example, would the aerial bombardment in *Bankovic* have triggered SAA-based jurisdiction if the targets were not objects, but persons (for example, high-level government personnel)? Does it matter that armed forces make use of indirect fire, such as mortars or artillery, or of unguided 'dumb' bombs instead of precision-guided missiles launched from drones, thereby using technology that enable a high-altitude attack on an individual located at a certain grid? Similarly, does it matter whether an individual is killed with modern sniper equipment, which makes it possible to kill an individual from up to one kilometer, or with a handgun used from closer proximity that is less accurate? Should account be had of the fact that armed forces have available ISTAR-resources that enables it to follow the whereabouts of an individual for days, weeks and even months, or that once an individual is caught in the cross hairs, modern technology enables the shooter to keep him/her there for minutes, perhaps hours, without him knowing it. Does it make a difference that an individual is killed as a result of an operation planned, organized and controlled for that purpose alone, or does SAA-based jurisdiction also arise for deprivations of life resulting from the use of lethal force in a situation of chaotic and intense combat?

In the absence of an explicit and general functional jurisdiction-approach adopted by the UNHRC and the IACiHR, these questions will remain unanswered until the ECtHR is required to answer them when raised in a particular case. As some argue, the ECtHR's approach provides an incentive for States to avoid arrest, capture or detention. It may even be argued that, if there is an absolute intent to kill an individual, the State should opt for a *modus operandi* that does not result in death while in custody.[806] This was also remarked by Judge Bonnello, in his concurring opinion to *Al-Skeini*:

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[804] (2009b), *Andreou v. Turkey, App. No. 45653/99, Judgment of 27 October 2009*, §

[805] Frostad (2011), 149.

[806] Lubell (2010), 224. As put by Hannum, in response to *Bankovic*: "[…] simply shooting suspects is apparently immune from scrutiny, so long as you are careful not to arrest them first!" Hannum (2002), 98.

> 15. Adhering to doctrines other than this may lead in practice to some riotous absurdities in their effects. If two civilian Iraqis are together in a street in Basrah, and a United Kingdom soldier kills the first before arrest and the second after arrest, the first dies desolate, deprived of the comforts of United Kingdom jurisdiction, the second delighted that his life was evicted from his body within the jurisdiction of the United Kingdom. Same United Kingdom soldier, same gun, same ammunition, same patch of street – same inept distinctions. I find these pseudo-differentials spurious and designed to promote a culture of law that perverts, rather than fosters, the cause of human rights justice.[807]

Judge Bonnello is one of many experts in support of an outright *cause-and-effect* based approach – or *functional* approach – regarding the question of jurisdiction in terms of Article 1 ECHR in situations of extracustodial use of force, similar to the approach adopted by the UNHRC and IACiHR.[808] This approach follows the 'maison de l'escargot' theory, put forward by Condorelli, which implies that the relationship between the State and jurisdiction is similar to that between a snail and its scale, i.e. the scale (jurisdiction) follows the snail (the State) wherever it goes.[809] As explained by Hampson and Salama, it

> […] ensures that applicants complaining of the same acts under the same control of the same State agents are treated in the same way, whether the harm occurs within or outside national territory. E.g. *Isiyok v. Turkey*, 22309/93, admissibility decision of 3 April 1995; friendly settlement of 31 October 1997; the alleged violation was the harm that resulted from aerial bombardment. It would seem somewhat strange if whether or not a victim is within the jurisdiction of a State depends on which side of the border the missile falls. It would also ensure that victims of aerial attack would be subject to the same jurisdictional criterion as victims of ground attack. If the test is control of the victim, as opposed to control over the infliction of the alleged violation, ground forces may be found to be in control of the applicant, as in the *Issa* case, […], but it is difficult to see how airborne forces could be, even when that person is intentionally targeted. The difficulty with the admissibility decision of the ECHR in the case of *Bankovic*, […], is that it appears to make jurisdiction dependent on the colour of the uniform or on the type of weapon used.[810]

While there is some merit in a functional approach, at the same time it has been argued that the functional approach is too wide. The main opposing argument is that, in terms of mili-

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807 (2011c), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011, Concurring Opinion of Judge Bonnello*.

808 Lawson (2004), 103-104 ("direct and immediate link between the extraterritorial conduct of a state and the alleged violation of an individual's rights"); Scheinin (2004), 75-77 (applying a test of "facticity determines normativity"); Ben-Naftali & Shany (2004), 64 (proposing a "conduct oriented approach"); Lubell (2010), 223 ("[…] the appropriate test for circumstances of this kind is the exercise of authority or control over the individual in such a way that the individuals's rights are in the hands of the state. If state agents, even if acting from a distance, are able to carry out their plan to target individuals with intent to take life, this might amount to a form of authority or control over the life of the individual"); (2011c), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011, Concurring Opinion of Judge Bonnello*. ("16. In my view, the one honest test, in *all* circumstances (including extra- territoriality), is the following: did it depend on the agents of the State whether the alleged violation would be committed or would not be committed? Was it within the power of the State to punish the perpetrators and to compensate the victims? If the answer is yes, self-evidently the facts fall squarely within the jurisdiction of the State. All the rest seems to me clumsy, self-serving alibi hunting, unworthy of any State that has grandiosely undertaken to secure the "universal" observance of human rights whenever and wherever it is within its power to secure them, and, may I add, of courts whose only *raison d'etre* should be to ensure that those obligations are not avoided or evaded. The Court has, in the present judgment, thankfully placed a sanitary cordon between itself and some of these approaches").

809 Condorrelli (2005), 95; Condorrelli (2010), 32-33. See also Andenas & Bjorge (2012), 492.

810 Salama & Hampson (2005), 22, footnote 94 (on 37-38); Scheinin (2004), 77-78. (2011c), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011, Concurring Opinion of Judge Bonnello*.

tary operations, it appears not to differentiate between preplanned and *ad hoc* extracustodial use of force. However, "considerations of fairness and expediency require that States should not bear responsibility for indirect or unforeseen consequences of their actions in areas outside their control."[811] Thus, while a chaotic combat situation following an ambush is not likely to meet the test of authority and control, preplanned operations could. As argued by Ruys and Verhoeven:

> [i]t is hard to see how civilians, killed in the midst of hostilities, would be under the authority and control of the state involved. It could be argued that this requires some degree of stability; some control over the circumstances in which the killings took place. If the killing would be the result of a pre-planned operation, and/or would not be connected to a context of ongoing hostilities, there may indeed by room for accepting the exercise of jurisdiction. An even stronger case could be made when the extra territorial killing results from a pre-planned operation carried out with the consent or support of the host state, as was the case with the 2002 U.S. Predator strike against Al Qaeda suspects in Yemen.[812]

Arguably, little if no support for a general functional approach by the ECtHR is to be expected from States. Perhaps States would be more inclined to give up their defense if they could trust the ECtHR to examine the alleged violation of the right to life in light of the context at hand and on the basis of the relevant law, particularly in situations where the use of force was applied in the domain of hostilities during an armed conflict. While the case-law of the reflects the ECtHR's sensitivity to the level of the threat, the ECtHR so far has examined the right to life in the context of hostilities by reference to the requirements imposed by IHRL alone, and not by explicit application of the law of hostilities under LOAC.[813] In other words, while the first line of defense for States to evade international responsibility for conventional human rights violations lies in the jurisdiction-issue, the greater problem is the ECtHR's approach to examine instances of hostilities-based use of force. Admittedly, States themselves have contributed to this development by not acknowledging the existence of an armed conflict on their territories, thus barring the ECtHR from resorting to LOAC in the interpretation of the right to life.

It is recalled that the ECtHR's case law is very case-specific and context-sensitive, and that future pronouncements on the issue of extraterritorial jurisdiction in respect of extracustodial uses of force fully depend on the merits of the case. At the time of this writing, two cases are pending before the ECtHR that may further close the gaps so far left by the ECtHR. The first case concerns the inter-State complaint by Georgia against Russia regarding the inter-State armed conflict between both States involving ground, air and naval forces.[814] A second case concerns *Jaloud v. the Netherlands*, concerning the alleged killing of Jaloud by Netherlands armed forces at a vehicle checkpoint of Iraqi security forces in Iraq in 2004.[815]

In sum, while a functional approach may be preferred, the practice of the ECtHR in respect of extra-custodial use of force to date demonstrates that it *cannot be excluded* that SAA-based jurisdiction is generated by the selected and personalized use of lethal means of combat

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[811] Ben-Naftali & Shany (2004), 64. Also: Lubell (2010), 227; Ruys & Verhoeven (2008), 178; Salama & Hampson (2005), § 92.

[812] Ruys & Verhoeven (2008), 178. Similarly: Lubell (2010), 227.

[813] See the string of cases concerning the conflicts between Turkey and the PKK (e.g. (1997h), *Ergi v. Turkey, App. No. 23818/94, Decision of 20 May 1997* as well as those arising from the conflict between Russia and rebels in Chechnya (e.g. (2005e), *Isayeva v. Russia, App. No. 57950/00, Judgment of 14 October 2005*.

[814] (2012c), *Georgia v. Russia No. 2, App. No. 38263/08, Judgment of 4 January 2012*.

[815] (2012d), *Jaloud v. the Netherlands, App. No. 47708/08, Pending*.

power, which is precisely the type of lethal force that the concept of targeting covers. However, this practice concerned situations where the State exercised control over territory or the situation. Whether the right to life applies extraterritorially in hostilities, where such control is absent, remains unclear, but in analogy to the functional approach adopted by the ICCPR and ACHR, the assumption here is that it does.
To date, the ECtHR has not accepted SAA-jurisdition in respect of collective and depersonalized aerial bombardments, i.e. the targeting of objects whereby persons are killed or injured as collateral damage. However, given the concept of targeting, this ruling has no further merit to our examinations.

2.1.2. ECA

A first approach detectable from the practice of the ECtHR and the ICJ concerns ECA. Principally, a State exercises its power over individuals *within its own territory*. Thus, all individuals present on the territory of that State are presumed to find themselves within the jurisdiction of that State, in so far it exercises effective overall control over its territory, and irrespective of the nature of the State conduct or omissions.[816] As the ECtHR held in *Ilascu*, this presumption "may be limited," *not invalidated*,[817] "in exceptional circumstances, particularly where a State is *prevented* from exercising its authority in part of its territory," for example following foreign military occupation, acts of war or rebellion, or the acts of a foreign State supporting a separatist movement.[818] This is of particular relevance for situations of NATCOIN, where parts of the counterinsurgent State's territory are in the hand of the insurgency (for example in the case of Colombia, where considerable parts of its territory are under the control of the FARC. In those instances "such a factual situation *reduces* the scope of the jurisdiction to the degree that it may no longer be possible to comply with its negative obligations under the ECHR." Nonetheless, a State still has "positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory […]" and that "[t]hose obligations remain even where the exercise of the State's authority is limited in part of its territory, so that it has a duty to take all the appropriate measures which it is still within its power to take."[819]
In *extraterritorial* situations, effective control over an area arises

> when as a consequence of military action – *whether lawful or unlawful* – [a State] *exercises effective control of an area* outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[820]

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816 (2004h), *Ilascu and Others v. Moldova and Russia, App. No. 48787/99, Judgment of 8 July 2004*, § 312.
817 Gondek (2009), 188.
818 (2004h), *Ilascu and Others v. Moldova and Russia, App. No. 48787/99, Judgment of 8 July 2004*, § 312, in reference to (2001b), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, ECtHR (12 December 2001)*, § 59.
819 (2004h), *Ilascu and Others v. Moldova and Russia, App. No. 48787/99, Judgment of 8 July 2004*, § 313. In casu, this implied that "Moldova still has a positive obligation to take the diplomatic, economic, judicial or other measures that it is in the power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention." See § 331
820 (1995e), *Loizidou v. Turkey (Preliminary Objections), App. No. 40/1993/435/514, Judgment of 23 March 1995* (emphasis added). See also (2001d), *Cyprus v. Turkey, App. No. 25781/94, Judgment of 10 May 2001*, § 76; (1996h), *Loizidou v. Turkey (Merits), App. No. 40/1993/435/514, Judgment of 18 December 1996*, § 52; (2001c), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, Judgment of 12 December 2001*, § 70; (2004h), *Ilascu and Others v. Moldova and Russia, App. No. 48787/99, Judgment of 8 July*

In the case of ECA, "the controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified."[821] In other words, when it is established that a counterinsurgent State exercises effective control over an area, it is bound to comply with the requirements inherent to the obligation to respect the right to life in the application of combat power against insurgents.
As previously established, ECA may arise in four situations, and the question before us now is to establish whether ECA is likely to exist in the situations of OCCUPCOIN, SUPPCOIN and TRANSCOIN.

Firstly, ECA-based jurisdiction may be established in situations of *prolonged military occupation*, whereby the Occupying Power exercises public powers normally to be exercised by the government of the occupied State (e.g. Turkey's occupation of Northern-Cyprus; Israel's occupation of the Occupied Palestinian Territories; Uganda's occupation of Itari, DRC; the US occupation of Grenada).[822] In other words, deprivations of life resulting from OCCUPCOIN trigger jurisdiction and thus the applicability of the right to life.
It is not necessary to determine whether an occupying State Party *exercises detailed control* over the policies and actions of the subordinate local administration. Generally, *effective overall control* is sufficient, implying that the local administration survives as a result of the Contracting State's military and other support.[823] Whether ECA arises is a question of fact, which must be established on a case-by-case basis. It is submitted that two parameters can be derived from the practice of the ECtHR, to determine when control over territory is effec-

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2004, §§ 314-316; (2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*, § 138.

[821] (2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*, § 138, confirming (2001d), *Cyprus v. Turkey, App. No. 25781/94, Judgment of 10 May 2001*, §§ 76-77.

[822] (1995e), *Loizidou v. Turkey (Preliminary Objections), App. No. 40/1993/435/514, Judgment of 23 March 1995*, § 62; (2001d), *Cyprus v. Turkey, App. No. 25781/94, Judgment of 10 May 2001*; confirmed in (2001b), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, ECtHR (12 December 2001)*, § 71; (1999a), *Coard and Others v. the United States ('US Military Intervention in Grenada), Case No. 10.951, Decision of 29 September 1999,* § 37; (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, §§ 111 and 113; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*, § 216. In the latter case, after having established the thresholds for determining that Ugandan forces occupied the Ituri region in the sense of Article 42 of the Hague Regulations, the ICJ held that an Occupying Power is "[…] under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. *This obligation comprised the duty to secure respect for the applicable rules of international human rights law* and international humanitarian law, to protect the inhabitants occupied territory against acts of violence, and not to tolerate such violence by any third party" (§ 178 (emphasis added)). However, as argued by Ruys and Verhoeven, the threshold established by the ICJ in *DRC v. Congo* is "open to questioning." Ruys & Verhoeven (2008), 195. The ICJ's ruling that "international human rights instruments are applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory," *particularly* in occupied territories" arguably indicates that jurisdiction also arises in situations other than occupation, as argued by Melzer (2008), 134. Also: Gondek (2009), 210.

[823] The rationale for the 'effective control over territory' approach lies in the fact that it can be applied to situations taking place within a prolonged period of time, such as a military occupation, as long as it can be established that during that time-frame the State exercised control over the territory in which the violation allegedly took place. As such, it lowers the threshold for establishing 'jurisdiction' in contrast to the test of authority and control over persons, which can only be applied to extraordinary and distinct circumstances in which the direct involvement of State agents can be established.

tive. A *first* parameter is the degree to which a local administration under control is dependent on the military, economic and political support provided by a State.[824] A *second* parameter is the *strength of the State's military presence in the area*.[825] Indicators are the number of troops, the duration of the presence, the geographical dispersion of the troops and their nature of their activities, but these must be assessed in a case-by-case situation. Thus, in *Loizidou*, the ECtHR held that the presence of 30,000 troops is sufficient to establish effective overall control.[826]

The requirement of effective control over territory in the doctrine of ECA coincides with the similar requirement under Article 42 HIVR, in which effective control functions as the threshold based upon which a State can be regarded as Occupying Power.[827] The question thus arises whether the mere fact that a State exercises effective control over a territory such that it is to be regarded an Occupying Power for the purposes of LOAC automatically implies that that State exercises jurisdiction over all individuals present in the occupied territory for the purposes of the applicability of IHRL. While opinions to this matter differ,[828] the majority view appears to be that the thresholds of effective control in both the law of belligerent occupation and IHRL are similar, although not necessarily identical.[829] Campenalli, for example, argues that while there are situations other than military occupation in which a State exercises effective control over territory,

> […], the reverse is not true: a situation of military occupation without effective control of the occupied territory is inconceivable, since military occupation is by definition a *de facto* situation characterized by effective control of the occupying power over the occupied territory. […] As a result, admitting the existence of a military occupation is tantamount to admitting a degree of territorial control by the occupant, which, by virtue of the definition of military occupation, satisfies the conditions of Article 1 of the ECHR. To rule out the United Kingdom's responsibility for human rights violations suffered by certain of the said Iraqi civilians on the grounds that the British army did not have effective control of Basrah City, while ad-

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[824] (1997k), *Loizidou v. Turkey (Merits), ECtHR (18 December 1996)*, §§ 16 and 56; (2004g), *Ilascu and Others v. Moldova and Russia, App. No. 48787/99, ECtHR (8 July 2004)*, § 387.

[825] (2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*, § 139, referring to (1997k), *Loizidou v. Turkey (Merits), ECtHR (18 December 1996)*, § 56. See also (2004i), *Issa v. Turkey, App. No. 31831/96, ECtHR (16 November 2004)*, § 315; (2004g), *Ilascu and Others v. Moldova and Russia, App. No. 48787/99, ECtHR (8 July 2004)*, § 387.

[826] (1997k), *Loizidou v. Turkey (Merits), ECtHR (18 December 1996)*, § 56.

[827] For a detailed discussion of Article 42 HIVR, see chapter III below.

[828] See, for example, Lord Justices Brooke and Brown, who in relation to the UK's presence as Occupying Power's in Iraq held that "[…] it is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and [GC IV], was in effective control of Basrah City for the purposes of the ECHR jurisprudence at the material time. If it had been, it would have been obliged, pursuant to the *Bankovic* judgment, to secure to everyone in Basrah City the rights and freedoms guaranteed by the ECHR. One only has to state that proposition to see how utterly unreal it is. The UK possessed no executive, legislative or judicial authority in Basrah City, other than the limited authority given to its military forces […]. It could not be equated with a civil power: it was simply there to maintain security, and to support the civil administration in Iraq in a number of different ways[…]. It would indeed have been contrary to the Coalition's policy to maintain a much more substantial military force in Basrah City when its over-arching policy was to encourage the Iraqis to govern themselves." See (2007e), *R (on the application of Al-Skeini and others) v Secretary of State for Defence, [2007] UKHL 26, [2008] AC 153*, §§ 124-125.

[829] http://www.diakonia.se/sa/node/asp?node=852.

> mitting at the same time that Britain was the occupying power of this city, is thus contradictory from the point of view of the law of military occupation.[830]

An additional question, related to the above, is triggered by *Al-Skeini* and involves the issue of whether a bellligerent occupation implies the exercise of public powers by the Occupying Power.[831] It is submitted that this question must be answered in the affirmative. While a belligerent occupation does not affect the sovereignty of the occupied State,[832] the Occupying Power acquires possession of the occupied territory with jurisdictional rights – within the constraints imposed by LOAC – to prescribe, adjudicate and to enforce.[833] In addition, it is bound by the obligation of Article 43, 1907 Hague Regulations, which imposes on the Occupying Power the responsibility to "take all the *measures in his power to restore, and ensure, as far as possible, public order and safety*, while respecting, unless absolutely prevented, the laws in force in the country." These responsibilities amount to the exercise of public powers, regardless of whether the Occupying Power in fact complies with the duties ensuing from them.[834] As remarked by Dinstein, Article 43 contains an obligation of conduct, not of result: "[t]he Occupying Power must pursue the goal prescribed, yet nobody can cavil if the measures taken will not be crowned with success."[835]

In sum, it may be concluded that, normally, the mere fact that a counterinsurgent State occupies foreign territory implies the existence of ECA, and the State is bound to guarantee all the rights and freedoms in the treaty to which it is party to all those residing within the occupied territory.

Secondly, ECA-based jurisdiction arises when a State A is present on the territory of another State B upon the latter's *invitation, or with its consent or acquiescence, and State A exercises public powers normally to be exercised by the government* of State B.[836] Thus, arguably ECA-based jurisdiction could arise in the cases of SUPPCOIN and consensual TRANSCOIN. However, the mere invitation, consent or acquiescence by the host State to permit the *presence* of the State on its territory itself is not sufficient to conclude the latter's *effective control* over the former's territory. As required by *Bankovic*, the effective control must involve the exercise of *public powers* by the State normally to be exercised by the host State. This suggests that the 'granting' of exercise of public powers must be a specific condition of the consent. As previously noted, it is unlikely that a State is prepared to permit the counterinsurgent State to exercise public powers, unless the government itself is absent or unable/unwilling to take up this responsibility. An example is the presence of ISAF in Afghanistan (which constitutes a SUPPCOIN). According to the MTA between NATO and Afghanistan signed in 2002, "the Mission of the ISAF is to *assist* it in the maintenance of the security in the area of responsibility […]" and the Afghan Interim Administration bore the primary responsibility for the provision of security and law and order.[837] The relevant UNSC resolutions to date do not

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[830] Campenalli (2008), 665. See also http://www.diakonia.se/sa/node/asp?node=852; Ruys & Verhoeven (2008), 179 (emphasis added), arguing that "the criteria for applicability of the laws of occupation and international human rights law to occupied territory seem to be *largely* analougous."

[831] While the public powers-element was used in relation to the personal approach, it has equal bearing on the territorial approach.

[832] Dinstein (2009c), 49.

[833] Dinstein (2009c), 46.

[834] Campenalli (2008), 664.

[835] Dinstein (2009c), 92.

[836] (2001b), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, ECtHR (12 December 2001)*, § 71.

[837] NATO (2002), Articles IV(1) and III(1).

offer a basis to assume that the States operating under ISAF exercise effective control over the territory of Afghanistan. While ISAF's mandate has geographically expanded to the entire territory of Afghanistan, the mandate is limited to the execution of particular tasks in support of the Afghan government, which itself has full responsibility over legislative, executive and judicial powers in Afghanistan.
In sum, ECA-based jurisdiction on this basis is unlikely to take place and of no further relevance for counterinsurgency operations.

Thirdly, jurisdiction may arise in situations where a State exercises *temporary control over (a part of) another State's territory* (e.g. Turkey's military operations against the PKK in Irak in the mid-'90s) without that State's consent.[838] Such temporary control is of no relevance to SUPPCOIN and OCCUPCOIN. Whether ECA-based jurisdiction on this basis arises in TRANSCOIN is doubtful. The threshold for establishing jurisdiction on this basis appears to be rather high. In order for temporary control to arise, as with military occupation, it is necessary to establish the presence of armed forces of the State deploying the military action on the foreign territory, and on the other, that the said forces assume some, or the totality of, the public powers that would normally fall under the prerogatives of the State where the military operation is undertaken, totally or partially displacing the authorities of the local Government. Thus, in the TRANSCOIN-case of *Molina*, in which Colombia deployed a very small number of troops – "landing helicopter-borne troops to be joined by 18 men of the Colombian Police's Jungle Commando unit, 20 Army Special Forces soldiers and 8 Navy specialists"[839] – in a raid carried out against a FARC-leader by Colombian air and ground forces in Ecuador, the latter argued that "[…] that the State of Colombia took control of areas in the territory of Ecuador during a military operation extending from midnight until 11:00 a.m. on March 1, 2008."[840] However, if the ECtHR were to have examined the case, it is unlikely that it would have concluded that Colombia exercised temporary effective control over the relevant part of Ecuador's territory.[841] To the ECtHR, even large numbers of troops are not necessarily sufficient to establish jurisdiction, as is exemplified by the case of *Issa*. In determining whether Turkey exercised effective control over northern Iraq, the ECtHR compared the figures of Turkey's operations in Iraq with Turkey's occupation in northern Cyprus. The Turkish operations in Iraq involved in excess of 35,000 troops accompanied by tanks, armoured vehicles, aircraft and helicopters, and lasted six weeks between 19 March and 2 May 1995, in which period Turkish troops infiltrated 40-50 kilometers southwards into Iraq and 385 kilometers to the east.[842] However, the ECtHR held that

> […], notwithstanding the large number of troops involved in the aforementioned military operations, it does not appear that Turkey exercised effective overall control of the entire area of northern Iraq. This situation is therefore in contrast to the one which obtained in

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838 (2004j), *Issa v. Turkey, App. No. 31831/96, Judgment of 16 November 2004*. In the this case, regarding large-scale military operations by Turkish forces in Northern Iraq, the ECtHR held that Turkey, had the applicants established "the required standard of proof" (§ 84), would have exercised *de facto* temporary control over such territory (§ 74).

839 (2010c), *Franklin Guillermo Aisalla Molina v. Ecuador, Case IP-02, OEA/Ser.L/V/II.140 Doc. 10 (2010), Judgment 21 October 2010 (Admissibility)*, § 33.

840 (2010c), *Franklin Guillermo Aisalla Molina v. Ecuador, Case IP-02, OEA/Ser.L/V/II.140 Doc. 10 (2010), Judgment 21 October 2010 (Admissibility)*, § 78.

841 This also appears to have been the conclusion of the IACiHR, as it fully relies on the personal approach to establish jurisdiction.

842 (2004i), *Issa v. Turkey, App. No. 31831/96, ECtHR (16 November 2004)*, § 45 and § 63. Turkey denied that it carried out operations in the area where the killings occurred.

> northern Cyprus in the *Loizidou v. Turkey* and *Cyprus v. Turkey* cases […]. In the latter cases, the Court found that the respondent Government's armed forces totalled more than 30,000 personnel (which is, admittedly, no less than the number alleged by the applicants in the instant case – see § 63 above – but with the difference that the troops in northern Cyprus were present over a very much longer period of time) and were stationed throughout the whole of the territory of northern Cyprus. Moreover, that area was constantly patrolled and had check points on all main lines of communication between the northern and southern parts of the island.[843]

In sum, while it cannot be excluded, it is unlikely that TRANSCOIN-operations trigger ECA-based jurisdiction following which a counterinsurgent State is bound to comply with the requirements inherent to the obligation to respect the right to life in the exercise of combat power against insurgents. Overall, therefore, ECA-jurisdiction on this basis is of no practical relevance for extraterritorial counterinsurgency operations.

2.1.3. Overview

Following the above, the following overview can be drawn in respect of the extraterritorial applicability of the valid norms pertaining to the targeting and operational detention of insurgents in the context of OCCUPCOIN, SUPPCOIN and TRANSCOIN.

a. Operational detention: counterinsurgent States continue to be bound by the obligations arising form the valid normative framework under IHRL in all counterinsurgency operations.
b. Targeting:
   - ECA-based jurisdiction arises only in the situation of OCCUPCOIN in view of the presumption that the counterinsurgent State is an Occupying Power and as such exercises effective control over the occupied territory;
   - SAA-based jurisdiction arises in OCCUPCOIN, SUPPCOIN or TRANSCOIN in respect of counterinsurgent States party to the ICCPR or ACHR;
   - SAA-based jurisdiction for counterinsurgent States party to the ECHR arises:
     (1) in the case of OCCUPCOIN as the counterinsurgent State exercises some or all public powers normally to be exercised by the government of the State in which it carries out its operations;
     (2) relative to all types of extraterritorial counterinsurgency operations: *possibly* in situations of selected and individualized extracustodial use of force (even though this is not clear whether SAA-jurisdiction arises in every event of selected and individualized extracustodial use of force).

In sum, this overview shows that counterinsurgent States are likely to be bound by valid norms of IHRL in extraterritorial targeting and operational detention operations, even though this is somewhat less clear in relation to targeting operations carried out by States party to the ECHR and not exercising control over territory.
In other words, in terms of interplay potential, these valid norms are likely to interrelate with simultaneously valid norms of LOAC. However, it also needs to be established whether the potential for interplay is affected by the possibility to derogate. This will be examined in the next paragraph.

[843] (2004i), *Issa v. Turkey, App. No. 31831/96, ECtHR (16 November 2004)*, § 75.

2.2. Derogation

As noted, States have the possibility to derogate from human rights in the event of public emergencies that threaten the life of the nation. Such derogations suspend the applicability of valid norms. Belows follows an examination of the possibility to derogate from the right to life, pertaining to targeting, and the valid norms of IHRL governing operational detention. Also, the extraterritorial applicability of the derogation clauses will be briefly examined.

2.2.1. Targeting

The study has previously explored the requirements that determine the lawfulness of an act of derogation if permissible under IHRL. The purpose of this paragraph is to examine the concept of derogation vis-à-vis the deprivation of life, with a particular focus on armed conflict. Given the notable difference in the texts of the derogation clauses set forth in Article 4 ICCPR and Article 27 ACHR on the one hand, and Article 15 ECHR on the other hand, the latter will be addressed separately.

2.2.1.1. ICCPR and ACHR

Article 4(1) ICCPR permits States to derogate from human rights protected under the ICCPR in times of emergency threatening the life of the nation, to include armed conflicts. However, Article 4(2) ICCPR categorically prohibits the derogation from the right to life *under any circumstances*, to include situations of emergency threatening the life of the nation such as armed conflict.[844]
Similarly, Article 27(2) ACHR prohibits *any* derogation from the right to life.

While subject to more detailed examination in Part C.1., it is submitted that the prohibition to derogate from the right to life during armed conflicts does not imply that deprivations of life during armed conflict are by definition unlawful. It is recalled that the prohibition under Articles 6(1) ICCPR and 4(1) ACHR does not extend to *any* deprivation of life, but is limited to the *arbitrary* deprivation of life as protected. This observation is of particular relevance in the context of armed conflict, for, as we will see, a deprivation of life in armed conflict is non-arbitrary when resulting from conduct lawful under LOAC. In other words, the prohibition of derogation from the right to life in times of armed conflict does not result in a prohibition for the State to resort to LOAC, or to put it otherwise: the applicability and actual application of LOAC is not subject to the possibility of and actual act of derogation. It merely implies that the State is prohibited from adjusting its legal relationship in terms of human rights with its population.[845]
In sum, therefore, it suffices to conclude that since derogation from the right to life is prohibited, the right to life always applies in armed conflict, and that a State is bound to conform to the requirements determining the arbitrariness of a deprivation of life in such circumstances.

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[844] (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, § 216; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*, § 216; Buergenthal (1981), 83; Rowe (2006), 4.
[845] Kretzmer (2009), 8.

2.2.1.2. ECHR

While Article 15(1) ECHR permits derogation from most of the obligations in ECHR "[i]n time of war or other public emergency threatening the life of the nation," Article 15(2) ECHR specifically prohibits derogation from Article 2 ECHR (right to life). Nonetheless (and in contrast to the ICCPR and the ACHR), Article 15(2) ECHR stipulates that derogation from Article 2 ECHR extends to all deprivations of life, "except in respect of deaths resulting from *lawful acts of war*." This implies that, in principle, the right to life may be derogated from (1) in situations of armed conflict and (2) to the extent permissible under LOAC. In addition, the phrase 'lawful acts of war' suggests that the derogation is only permissible in respect of measures carried out in the conduct of hostilities, and not law enforcement.[846]

Both 'war' in Article 15(1) ECHR and 'lawful acts of war' in Article 15(2) ECHR remain terms surrounded by certain ambiguity. This ambiguity concerns two issues: (1) whether Article 15 ECHR accommodates both IAC and NIAC; (2) whether Article 15 ECHR permits automatic derogation from the right to life in armed conflicts, or whether it requires a formal derogation.
Problematic is that neither term is further defined in the ECHR. Nor were they subject of discussion in the preparatory work to Article 15 ECHR.[847] It also follows that the practice of the ECtHR is, in this respect, not very helpful. Notwithstanding the fact that a considerable number of cases declared admissible by the ECtHR concerned deprivations of life arising from situations qualifiable as IAC or NIACs, States have rarely notified armed conflict- related derogations and have in no case explicitly derogated from the right to life.[848] Thus, the UK did not derogate from the right to life in the Falkland-war. Similarly, Turkey has not derogated from the right to life in relation to its occupation of Northern-Cyprus. Also, no European State partaking in the invasion and subsequent occupation of Iraq in 2003 has derogated. Likewise, no European State engaged in the NATO air-campaign over Libya in 2011 has issued a notification of derogation. Similarly, none of the States engaged in NIACs have derogated. Thus, the UK never derogated from the right to life in respect of the confict in Northern Ireland[849] and neither did Turkey (concerning the PKK);[850] and Russia (concerning rebels in Chechnya).[851]
Arguably, a central motive for States not to derogate from the right to life in NIAC is that it would be tantamount to admitting to the existence of a NIAC, which States are hesitant to do. Such acknowledgment is often feared to imply an acknowledgment of the rebel or insurgent group as belligerents with commensurate rights and privileges that governments are

[846] Melzer (2008), 122.
[847] Council of Europe (1956).
[848] Admittedly, a notification of derogation from human rights under the ECHR does not have to contain a specific enumeration of the rights from which is being derogated. However, it must demonstrate the existence of an armed conflict, which in itself suggests the likelihood of infringements on the right to life.
[849] On the existence of a NIAC in the UK, see Haines (2012).
[850] (1998f), *Ergi v. Turkey, App. No. 66/1997/850/1057, Judgment of 28 July 1998*; (2004n), *Özkan v. Turkey, App. No. 21689/93, Judgment of April 6, 2004*.
[851] (2005e), *Isayeva v. Russia, App. No. 57950/00, Judgment of 14 October 2005*; (2005f), *Isayeva, Yusupova and Bazayeva v. Russia, App. No. 57947/00, 57948/00, 57949/00, Judgment of 24 February 2005*; (2008g), *Khatsiyeva et al. v. Russia, App. No. 5108/02, Judgment of 17 January 2008*; (2011d), *Esmukhambetov et al. v. Russia, App. No. 23445/03, Judgment of 29 March 2011*; (2011f), *Kerimova and others v. Russia, App. Nos. 7170/04, 20792/04, 22448/04, 23360/04, 5681/05, 5684/05, Judgment of 3 May 2011*; (2011g), *Khamzayev et al. v. Russia, App. No. 1503/02, Judgment of 3 May 2011*.

not willing to concede to armed groups undermining their authority. It may be observed also that, to date, none of the European States participating in the ISAF-mission in Afghanistan has derogated from the right to life. Overall, it may be assumed that, generally, States find it unnecessary to derogate when using force in hostilities or they reject the extraterritorial applicability of Article 15 ECHR.
As a result of the absence of derogations, the ECtHR has not had an opportunity or deemed it necessary to clarify the meaning of 'war' and 'lawful acts of war' in Article 15 ECHR as the governments in question had not derogated from Article 2 ECHR.[852]
In the absence of other guidance, below follows an examination of the two main issues introduced earlier.

2.2.1.2.1. Article 15 ECHR: IAC *and* NIAC?

As noted, it remains unclear whether Article 15 ECHR accommodates both IAC and NIAC. Several interpretations are possible:

- Option 1: 'war' in Article 15(1) and (2) ECHR only refers to IAC, and Article 15 ECHR does not otherwise accommodate NIAC.
- Option 2: 'war' in Article 15(1) ECHR covers both IAC and NIAC. The phrase 'lawful acts of war' only refers to conduct lawful under the law of IAC.
- Option 3: 'war' in Article 15(1) ECHR only refers to IAC and the term 'other public emergency' in Article 15(1) ECHR accommodates NIAC. The phrase "lawful acts of war" in Article 15(2) ECHR refers to conduct lawful under the law of in IAC only.
- Option 4: 'war' in Article 15(1) and (2) ECHR refers to both IAC and NIAC.
- Option 5: 'war' in Article 15(1) ECHR only refers to IAC and term 'other public emergency' accommodates NIACs. The phrase 'lawful acts of war' also includes acts in NIAC.

2.2.1.2.1.1. 'War' in Article 15(1) ECHR

In relation to the ECHR, the term "war" itself refers to war *de iure*, i.e. proclaimed war, as well as *de facto*, i.e. an armed conflict as understood in LOAC. While it is generally accepted that "war" includes IAC,[853] there is ongoing debate as to whether it also includes NIAC.[854] As some experts argue, "NIAC was never referred to as "war" when the Convention was drafted."[855] However, it is submitted that such conclusion cannot be readily drawn from the preparatory work to Article 15 ECHR, as it simply does not explain what was meant with 'war'.[856] In the absence of any other guidance, it cannot therefore be excluded that 'war' also refers to NIAC.
However, in so far it concerns the interpretation of the term 'war' in Article 15(1) ECHR, this question has – rightly so – been regarded as irrelevant. The concept of "public emergency" is to be interpreted broadly and besides rebellion or insurgency, revolution, conspir-

[852] Loof (2005), 488.
[853] Melzer (2008), 122; University Centre for International Humanitarian Law (2005), 13; Ergec (1987), 125-128.
[854] University Centre for International Humanitarian Law (2005), 13: "A number of experts doubted whether this derogation possibility under the [ECHR] was ever meant to encompass the situation of NIAC, especially as NIAC was never referred to as "war" when the Convention was drafted."
[855] University Centre for International Humanitarian Law (2005), 13.
[856] Council of Europe (1956).

acy or *coup d'etat*, disruption of the economy, dangers to the food supply, and severe natural disasters also includes war,.[857]
This conclusion immediately disqualifies *option 1* as a viable interpretation of the *lex lata*, for if there is no room for NIAC in Article 15 ECHR at all this would imply that derogations of human rights other than the right to life in the context of NIAC are not possible under the ECHR at all, which is not the case.

2.2.1.2.1.2. 'Lawful Acts of War' in Article 15(2) ECHR

As it is unlikely that NIACs are fully excluded from the scope of Article 15(1) ECHR, the question of whether Article 15 ECHR accommodates derogations from Article 2 ECHR in NIAC then appears to hinge on the interpretation of the phrase "lawful acts of war" under Article 15(2) ECHR. In *options 2* and *3*, derogation from human rights would be possible as NIAC could qualify as either 'war' or 'other public emergency', yet Article 15(2) ECHR prevents derogation from the right to life under those situations, whereas in *options 4* and *5* derogation is possible for deprivations of life in any armed conflict. Indeed, two views emerge from doctrine: (A) Article 15(2) ECHR is limited to lawful conduct in IAC only and (B) Article 15(2) encapsulates lawful conduct in IAC *and* NIAC.

A. IAC Only, and the Alternative Approach of Article 2(2) ECHR

In the view of those who regard Article 15(2) ECHR to apply to IAC only, derogations from the right to life in the context of NIAC are prohibited. It would logically follow that the lawfulness of deprivations of life in NIAC is then to be examined under one of the exceptions mentioned in Article 2(2) ECHR.[858] Indeed, in quite a few cases concerning hostilities in what were flagrant cases of NIAC (but not acknowledged as such by the States involved), the ECtHR examined the lawfulness of deprivations of life of individuals that would qualify as protected persons under the law of hostilities under of Article 2(2) ECHR, as the defending governments argued that their conduct was legitimate under one of its exceptions.
For example, in *Isayeva v. Russia* and *Isayeva, Yusupova and Bazayeva v. Russia*, the Russian government argued that a large-scale aerial attack on Chechen fighters was absolutely necessary in the circumstances for the protection of civilians against unlawful violence, thereby relying on Article 2(2)(a) ECHR.[859] While the ECtHR concluded in these cases that Russia had not sufficiently planned, organized and controlled the operations with a view to minimizing the use of lethal force, in these instances of a large presence of heavily armed insurgents the ECtHR accepted the claims on Article 2(2)(a) ECHtR even though it had – in the latter case – "certain doubts as to whether the aim can at all be said to be applicable." It was however, in view of "the context of the conflict in Chechnya at the relevant time" to "assume […] that the military reasonably considered that there was an attack or a risk of attack from illegal insurgents, and that the air strike was a legitimate response to that attack."[860] Not all

[857] Hartman (1981), 4; Oraá (1992), 30-31; Svensson-McCarthy (1998), 216; Meron (1995), 58-59.
[858] Melzer (2008), 122; Van Dijk, Van Hoof, Van Rijn*, et al.* (2006), 1059-1060; University Centre for International Humanitarian Law (2005), 13; Naert (2010), 572.
[859] (2005e), *Isayeva v. Russia, App. No. 57950/00, Judgment of 14 October 2005*, §§ 200 (the ECtHR's acceptance of Article 2(2)(a) ECHR as a legitimate aim) and § 179 (Russia's claim to Article 2(2)(a) ECHR).
[860] (2005f), *Isayeva, Yusupova and Bazayeva v. Russia, App. No. 57947/00, 57948/00, 57949/00, Judgment of 24 February 2005*, §§ 160 and 181. See also (2004n), *Özkan v. Turkey, App. No. 21689/93, Judgment of April 6,*

military operations involving hostilities against non-State actors, however, easily fit in Article 2(2)(a). In *Esmukhambetov v. Russia*, the ECtHR did not accept the claim by the Russian government that an air raid on suspected terrorists, arguably preparing for a large-scale terrorist attack, and which destroyed almost the entire village, could be legitimized with a call on Article 2(2)(a) ECHR. While under the law of hostilities insurgents preparing for terrorists attacks could arguably have qualified as lawful military objectives, i.e. CCF-members of the armed forces, permitting their pre-planned intentional killing, Article 2(2)(a) ECHR does not allow this, and only permits deprivations of life that were the unintended result of the use of lethal force.

The same case also demonstrates that, while flexible, the exception of Article 2(2)(b) ECHR cannot be readily applied to any military operation against insurgents. The Russian government contended that the air raid was aimed to arrest the terrorists. Even though the ECtHR had accepted this argument in other cases, it was rejected in *Esmukhambetov*, for being "grossly disproportionate."[861] In addition, in defense of the Russian government, it may be argued that aerial attacks may be necessary to force insurgents into submission, so they can be captured, thus the mere deployment of aerial assets should not always be incompatible with Article 2(2)(b) ECHR, although, admittedly, much depends on how these assets are used. In that respect, it would be difficult to see how Article 2(2)(b) ECHR could be relied upon when, from the outset, the intent was to bombard the insurgents with little to no chance of survival.

A final basis to legitimize deprivations of life in NIAC is Article 2(2)(c) ECHR, which sanctions the deprivation of life absolutely necessary in support of "action lawfully taken for the purpose of quelling a riot or insurrection." This basis is frequently mentioned in doctrine as the proper alternative for NIACs to Article 15 ECHR.[862] It has been relied upon by the Russian government in the case of *Kerimova v. Russia*[863] and in *Abuyeva v. Russia*.[864]

In the view of experts, the term "insurrection" in Article 2(2)(c) ECHR is believed to also include the situation of NIAC, although it remains ambiguous whether this is a proper interpretation.[865] The absolute necessity of deprivations resulting from hostilities must then be examined in light of the question whether action is "lawfully taken." Arguably, the words "lawfully taken" serve as the gateway to determine the 'arbitrariness' of the deprivation of life through the lens of the law of hostilities. This alternative completely bypasses Article 15 ECHR, and would still allow for the resort to measures under the law of hostilities lawful under Article 2 ECHR.

However, it remains questionable whether States are willing to embrace this approach, for reliance on Article 2(2)(c) ECHR to justify deprivations of life in hostilities in an armed conflict could – in similar fashion as would a derogation – be misinterpreted as a form of recognition of belligerency, whereas the State prefers to view insurgents or terrorists as sheer criminals.[866]

2004, § 179; (2011d), *Esmukhambetov et al. v. Russia, App. No. 23445/03, Judgment of 29 March 2011*, § 141; (2011g), *Khamzayev et al. v. Russia, App. No. 1503/02, Judgment of 3 May 2011*, §§ 167 ff.

861 (2011d), *Esmukhambetov et al. v. Russia, App. No. 23445/03, Judgment of 29 March 2011*, § 146.

862 Doswald-Beck (2006), 883-884. The University Centre for International Humanitarian Law (2005), 13; Melzer (2008), 122; Farer (1974), 318-319; Irmscher (2006), 12-13 and 17-18; Neuman (2004), 1021.

863 (2011f), *Kerimova and others v. Russia, App. Nos. 7170/04, 20792/04, 22448/04, 23360/04, 5681/05, 5684/05, Judgment of 3 May 2011*, §

864 (2010a), *Abuyeva v. Russia, App. No. 27065/05, Judgment of 2 December 2010*, § 193.

865 The *travaux préparatoires* to Article 2 ECHR provide no guidance as they are non-existent. See http://www.echr.coe.int/library/colentravauxprep.html.

866 Bijl (2011), 333.

While it cannot be denied that the exceptions of Article 2(2) ECHR may provide a proper legal basis to legitimize deprivations of life in hostilities in NIAC, it may be doubted whether the requirements of non-arbitrary deprivation of life are sufficiently flexible[867] to take into account the extreme circumstances that may prevail in situations of NIAC without having recourse to the law of hostilities, even in cases of civil wars with "large battles involving thousands of insurgents, artillery attacks and aerial bombardment."[868] In the absence of derogation, reliance on Article 2(2) ECHR implies that the case will be examined against a normal background. While, as will be examined in more detail later, the ECtHR has demonstrated its willingness to rely, at least implicitly, on the law of hostilities, it has also demonstrated that it is prepared to mix IHRL and LOAC in a fashion that contradicts the latter. An example in case is that the ECtHR, in relation to aerial attacks on Chechen insurgents concludes that such operations, in order to be lawful under Article 2(2) ECHR must be planned, organized and controlled "to avoid or minimize, to the greatest extent possible, risks of loss of lives, both of persons at whom the measures were directed and of civilians."[869] Here, the ECtHR implicitly resorts to the requirement of precaution under the law of hostilities, but, as concluded previously, this requirement does not demand from commanders to avoid or minimize harm or injury to lawful military objectives, but only of civilians.

Overall, it follows that the exceptions of Article 2(2) ECHR could accommodate deprivations of life resulting from hostilities in counterinsurgency operations carried out in the context of NIAC, but it remains questionable whether the requirement of absolute necessity is sufficiently flexible to accommodate military necessity-driven intentional deprivations of life normally lawful under the law of hostilities. In view of the fact that the ECtHR has frequently dealt with these issues, and in view of the fact that they involve an assessment of the compatibility of IHRL and LOAC, this issue will be further dealt with when examining the interplay between IHRL and LOAC in the normative paradigms of hostilities and law enforcement.

B. IAC *and* NIAC

A second view is that, while it is undisputed that the term 'war' in this phrase in any case refers to IAC, and while the drafters may not have had NIAC in mind when they designed Article 15(2), it would not seem unreasonable to interpret the phrase "lawful act of war" *today* as referring not to conduct in a specific type of armed conflict, but als to conduct in NIAC. After all, the law of hostilities, which in the contemporary *lex lata* is generally regarded to apply to both IAC and NIAC, governs the lawfulness of 'acts of war'. Following this view, derogation from the right to life is also permissible in respect of conduct in the context of NIAC. This brings us to the second issue, examined in the next paragraph.

2.2.1.2.2. Automatic or Authoritative Derogation

A second issue evolving from Article 15 ECHR is whether the applicability of the law of hostilities implies that a State automatically derogates from the right to life (*automatic deroga-*

867 Affirmative: Melzer (2008), 122, and 382 ff.

868 Abresch (2005), 742. ECHR.

869 (2011d), *Esmukhambetov et al. v. Russia, App. No. 23445/03, Judgment of 29 March 2011*, § 146; (2011g), *Khamzayev et al. v. Russia, App. No. 1503/02, Judgment of 3 May 2011*, § 180; (2011f), *Kerimova and others v. Russia, App. Nos. 7170/04, 20792/04, 22448/04, 23360/04, 5681/05, 5684/05, Judgment of 3 May 2011*, § 248.

tion), implying there is no further need to comply with any of the requirements for lawful derogation (also implying that it is not required to issue a notification of derogation thereby demonstrating that there is a threat to the life of the nation or that the derogation from Article 2 ECHR is strictly required by the exigencies of the situation),[870] or that a formal and lawful derogation is reguired (*authoritative derogation*).
A basis for automatic derogation is found in the argument that, since the right to life is *Notstandfest*, it can therefore not be authoritative of a formal act of derogation, not even in view of "deaths resulting from lawful acts of war."[871] Instead, this phrase must be read as a basis to lawfully infringe upon the right to life, additional those set forth in Article 2(2) ECHR.[872]
The basis for such authoritative derogation follows from the phrase "except in respect of deaths resulting from lawful acts of war" which must be read in conjunction with the words "[n]o derogation of Article 2 […] *shall be made under this provision*." The words "this provision" arguably refer to Article 15(1) ECHR.[873] Derogation is then possible if the measures leading to the deprivation of life are carried out during an armed conflict and the derogation otherwise conforms to the relevant requirements of derogation, to include the condition that the use of force is limited "to the extent strictly required by the exigencies of the situation" and "provided that such measures are not inconsistent with its other obligations under international law," the latter requirement in the situation of armed conflict referring particularly (but not exclusively) to LOAC.[874] This view finds support among a number of authors.[875]

An argument in support of automatic derogation – and against authoritative derogation – is that it is more compatible with the logic underlying the system of international law in general and the relationship between IHRL and LOAC in particular. For example, the failure to demonstrate that the armed conflict threatens the life of the nation would imply that States – able to demonstrate an armed conflict, but unable to demonstrate such threat – may formally not derogate from the right to life, while at the same time they are engaged in an armed conflict which would permit them under the applicable law of hostilities to lawfully attack legitimate targets.[876]
Another argument supportive of automatic derogation is that it has remained *unclear* wheth-

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[870] University Centre for International Humanitarian Law (2005), 13.
[871] Loof (2005), 487, footnote 125.
[872] Loof (2005), 487; Ducheine (2008), 432.
[873] This is further corroborated by the Dutch text of Article 15(2) ECHR, which in translation and in relevant part reads: "the *previous* provision prohibits derogation from Article 2, except in respect of deaths resulting from lawful acts of war, […]" [in Dutch: "de voorgaande bepaling staat geen enkele afwijking toe van Artikel 2, behalve in geval van dood als gevolg van rechtmatige oorlogshandelingen, […]." Clearly, the word "previous" ["voorgaande"] is absent in the English text of Article 15(2) ECHR.
[874] Svensson-McCarthy argues that the derogating State must also justify its use of force under the *jus ad bellum*. Svensson-McCarthy (1998), 515. Ducheine rejects this requirement, arguing that the applicability of human rights and the *jus in bello* are to be separated from the basis for the use of force in the *jus ad bellum*. Ducheine (2008), 431. However, the requirement posited by Svensson-McCarthy is possibly to be viewed to fall within the scope of the requirement that derogations must take place in conformity with the derogating State's other obligations under international law. These obligations include, arguably, the obligations under the *jus ad bellum*.
[875] Abresch (2005), 745; Bijl (2007), 104; Harris, O'Boyle & Warbrick (1995), 37; Svensson-McCarthy (1998), 515; Melzer (2008), 122; Montealegre (1983), 43-44; Krieger (2002), 690; Irmscher (2006), 16-17; Wicks (2010), 82.
[876] Bijl (2011), 332.

er the threshold for exercising force that is "strictly required by the exigencies of the situation" is less stringent than the normal "absolutely necessary" threshold and thus also facilitates military necessity-powered actions permissible under the law of hostilities, but falling outside the scope of situations mentioned in Article 2(2) ECHR.[877] An example is the preplanned direct attack against an insurgent constituting a lawful military objective.

Also, if States opt *not* to derogate – which to date has been State practice – it logically follows from the authoritative derogation-view that deprivations of the right to life taking place in armed conflict must be valued on the basis of Article 2(2) ECHR *sec*, and thus to be viewed as unintentional (or non-arbitrary) they must result "from the use of force which is no more than absolutely necessary" to attain a legitimate aim as set forth in subparagraphs (a)-(c). As previously established, recourse of the counterinsurgent State to Article 2(2) ECHR may not be possible in respect of every deprivation of life, particularly not those which are pre-planned.

Support for the 'automatic derogation'-view may also be deduced from the fact that a provision equivalent to Article 15(2) ECHR is absent in the ICCPR and ACHR. As noted, there, derogation from the right to life is prohibited and the lawfulness of deprivations of life in armed conflict are to be examined through interpretation of the term 'arbitrary' in light of the law of hostilities.

In addition, the practice of the ECtHR in respect of the Turkish and Chechen cases suggests the ECtHR is, at least tacitly, supportive of the *automatic derogation* from the right to life in situations of NIAC.[878] As mentioned, as the States involved had not derogated from the right to life or otherwise contended that the deprivations of life had occurred in the context of an armed conflict, the ECtHR was required to examine the case from a peacetime perspective. Nonetheless, the phrasing used by ECtHR when interpreting requirements such as absolute necessity, proportionality and precaution suggest that the ECtHR relied on the law of hostilities.[879]

Following the above, there would appear to be little objection against accepting the doctrine of automatic derogation at least with respect to IAC. The question is whether the same applies for NIAC. Naert, for example, argues that while the practice of the ECtHR in the Turkish and Chechen cases is indicative of automatic derogation, nonetheless "for non-international armed conflicts a derogation should not be automatic because of the lesser clarity of the law applicable to [such] conflicts."[880] It may be doubted that this is a convincing argument in the context of the law of hostilities, for its substantive content is relatively similar in IAC and NIAC, and contentious subjects – such as DPH – are not limited to NIAC alone. Nonetheless, there is merit in the argument that an automatic derogation in the context of NIAC may be a bridge too far and merits authoritative derogation, although a differentiation may be made between AP II-style civil wars, where the government has less

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[877] University Centre for International Humanitarian Law (2005), 13.

[878] Naert (2010), 573.

[879] Of significance in this respect could therefore be the inter-State complaint by Georgia against Russia, currently pending before the ECtHR, concerning the inter-State armed conflict between both involving large-scale military operations involving ground, air, and naval forces. As neither State had derogated from the right to life under Article 2 ECHR, the question is whether the ECtHR will examine the lawfulness of the deprivations of life under Article 2 ECHR in a fashion similar as in the Turkish and Chechen cases or whether it explicitly recognizes the fact that an inter-State armed conflict took place the deprivations of life of which need to be examined by *direct* reference to the law of hostilities. Admittedly, the significance is limited to the relationship between Article 15 ECHR and IAC only, in view of the nature of the conflict between both States.

[880] Naert (2010), 573.

control over the situation and loss of life is inherent to the level of violence, and low intensity CA 3-conflicts, where, under the law of hostilities, insurgents may be identified as lawful military objectives which may be directly attacked, while at the same time the exigencies of the situation would permit a law enforcement-type operation aimed at their arrest. In these *hybrid* situations, the State would be required to formally derogate and demonstrate the strict necessity and proportionality of the derogation. However, in view of State practice to date, such derogations are not likely to occur. In such instances, recourse may be had to Article 2(2)(a)-(c) ECHR. Once the conflict reaches AP II-style proportions, where a government must fight to maintain or restore control over territory, it would seem reasonable to accept that automatic derogation follows.

In sum, it follows from the above that, while a textual interpretaton of Article 15 ECHR would require a formal derogation, there is substantial ground to accept automatic derogation at least in IAC, and arguably also in NIAC, although with respect to the latter conflicts a more cautious approach appears to be preferable in low-intensity settings.

2.2.1.3. Derogation from the Customary Right to Life

As noted previously, the right to life is firmly rooted in customary international law. Does the non-conventional right to life permit derogation? In view of this issue, it must be remarked that general international law precludes the wrongfulness of State conduct in violation of international obligations when carried out in exceptional circumstances such as *force majeure*, distress, consent, self-defence, necessity and countermeasures, except in case of obligations the derogation of which is excluded or restricted by more specific law or *jus cogens*.[881] As stated previously, while disputed by some, there is overwhelming support for the contention that the right to life can be viewed as *jus cogens*. In light of the above, it must therefore be concluded that derogation of the non-conventional right to life is not accepted. The *jus cogens*-nature of the right to life, however, does not necessarily imply that the deprivation of life in armed conflict resulting from the conduct of hostilities is by definition unlawful. The non-conventional right to life prohibits, as the conventional right to life, not *all* deprivation of life, but *arbitrary* deprivation of life. It would thus follow that the meaning of 'arbitrary' in the context of deprivations of life resulting from hostilities in an armed conflict must be interpreted in that context and through the lens of the law of hostilities. In that case, deprivations of life resulting from acts lawful under the law of hostilities do not amount to arbitrary deprivation of life.

2.2.2. Operational Detention

This paragraph examines the possibility of derogation from valid norms pertaining to operational detention. The issue of derogation here is particularly relevant in light of the permissibility of security detention, but may also be of relevance for the scope of requirements to be granted to criminal detainees, for example in situations of long-lasting hostilities where normal peacetime criminal justice institutions are not or no longer properly functioning.

[881] See Draft Articles 20 to 25, 26 and 55.

2.2.2.1. Conventional Normative Framework

2.2.2.1.1. Derogation from the Right to Liberty and Security of the Person

None of the relevant treaty instruments prohibits derogation from the right to liberty and security of the person.[882] It may therefore be concluded that, generally, derogation from the right to liberty and security is permissible, provided such derogation itself is lawful and the deprivation of liberty is not otherwise arbitrary. In practice, States have made use of the possibility to derogation from their obligations under the right to liberty and security to ensure a legal basis for security detention.[883] However, the right to derogate from the right to liberty is *not absolute*. While derogation from Article 9 ICCPR may offer a legal basis for security detention of insurgents, this does not imply that derogation is permitted from all of the norms embedded in that provision. For example, the right to *habeas corpus* is widely regarded as non-derogable,[884] because it is essential to guarantee *other* non-derogable rights, such as the right not to be tortured.[885] Thus, the HRC has expressed its concern

> […] about the frequent use of various forms of administrative detention, particularly for Palestinians from the Occupied Territories, entailing restrictions on access to counsel and to the disclose of full reasons of the detention. These features limit the effectiveness of judicial review, thus endangering the protection against torture and other inhuman treatment prohibited under Article 7 and derogating from Article 9 more extensively than what in the Committee's view is permissible pursuant to Article 4. In this regard, the Committee refers to its earlier concluding observations on Israel and to its general comment No. 29.[886]

In sum, it may be concluded that the counterinsurgent State may derogate from the right to liberty in order to create a legal basis for the security detention of insurgents. However, this does not imply that the security detention is otherwise lawful and that derogation is permitted from other human rights relevant to the concept of deprivation of liberty.

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[882] Article 4 ICCPR; Article 27 ACHR; Article 15 ECHR.

[883] For example, at the time of ratification of the ICCPR, Israel has submitted a declaration that it has been in a state of emergency from the time of its founding. In relation to Article 9 ICCPR, Israel has submitted that it derogates from the right to liberty to the extent that its detention measures conflict with its obligations under Article 9 ICCPR. See also See, for example, the derogations from the ECRH and ICCPR communicated by the United Kingdom, on 18 December 2001, available at http://conventions.coe.int/Treaty/EN/v3MenuDecl.asp and http://treates.un.org/Pages/ViewDetails/aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

[884] While not specifically mentioned in Article 9 ICCPR, Article 27 ACHR and Article 15 ECHR as non-derogable rights, the right to *habeas corpus* is generally perceived to be non-derogable under international law. See ICRC (2005a), 350-351 (in the footnotes). Pejic (2005), 387; ICRC (2008d), 11. In relation to the ICCPR, see also Human Rights Committee (2001c). In relation to the ACHR, see Article 27(2) ACHR; (1987b), *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, January 30, 1987*; IACommHR (2002), § 124. In relation to the ECHR, see (1961b), *Lawless v. Ireland, App. No. 332/57, Judgment of 1 July 1961 (Merits)*; (1993a), *Brannigan and McBride v. the United Kingdom, App. No. 14553/89; 14554/89, Judgment of 26 May 1993* (1996a), *Aksoy v. Turkey, App. No. 21987/93, Judgment of 18 December 1996*.

[885] Human Rights Committee (2001c), § 16. While States cannot derogate from the right to *habeas corpus* as such, it has been argued that they may derogate from the element of 'prompt', as the U.K. successfully did in *Brannigan v. United Kingdom*. There, the ECtHR found lawful the administrative detention for up to 7 days without judicial review during an emergency situation ((1993a), *Brannigan and McBride v. the United Kingdom, App. No. 14553/89; 14554/89, Judgment of 26 May 1993*. However, in *Aksoy v. Turkey*, the ECtHR held that the detention of a suspected terrorist for up to 14 days without judicial review left him susceptible to arbitrary deprivation of his liberty (and even torture) ((1996a), *Aksoy v. Turkey, App. No. 21987/93, Judgment of 18 December 1996*.

[886] (2003a), *Concluding Observations of the Human Rights Committee: Israel (21 Augustus 2003)*, § 12.

2.2.2.1.2. Derogation from Fair Trial Guarantees

Derogation from the fair trial guarantees is widely regarded as prohibited, even in times of armed conflict.[887] As the UNHRC held, "States parties may in *no circumstances* invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance […] by deviating from fundamental principles of fair trial, including the presumption of innocence."[888] As the UNHRC further explains:

> [a]s certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of a fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.[889]

2.2.2.1.3. Derogation from Norms Pertaining to the Treatment and Conditions of Detention

In view of its status as *jus cogens*, the freedom from torture and inhuman or degrading treatment or punishment has been explicitly designated as non-derogable. All treaty-based instruments explicitly prohibit derogation.[890] In view of the reference to the inherent dignity of the human person in the preamble to the Covenant and by the close connection between articles 7 and 10, the UNHRC has also held as non-derogable the right be treated with humanity and with respect for the inherent dignity of the human person," even though this right, prescribed in article 10 of the Covenant, is not separately mentioned in the list of non-derogable rights in article 4(2) ICCPR.[891]
Other rules governing the treatment of detainees previously mentioned arguably are derogable, as they are stipulated in 'soft law'-documents. Yet, the non-compliance with these rules in and by itself may result in torture or inhuman or degrading treatment or punishment.

2.2.2.1.4. Derogation from Norms Pertaining to the Transfer of Individuals Deprived of their Liberty

The principle of *non-refoulement*, central to the issue of transfer of detainees into the control of another State, is a non-derogable principle, even when, in the case of an insurgency, insurgents pose a threat to the security of the counterinsurgent State.

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[887] Article 4 ICCPR; Article 27 ACHR; and Article 15 ECHR.

[888] Human Rights Committee (2001c), § 11 (emphasis added).

[889] Human Rights Committee (2001c), § 16. See also (1987b), *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, January 30, 1987*; (1987d), *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, October 6, 1987*; (1993a), *Brannigan and McBride v. the United Kingdom, App. No. 14553/89; 14554/89, Judgment of 26 May 1993*, § 62.

[890] Article 4 ICCPR; Article 27 ACHR; and Article 15 ECHR.

[891] Human Rights Committee (2001c), § 13(a).

2.2.2.2. Derogation from the Non-Conventional Right to Liberty

As noted previously, general international law permits a State to derogate from its obligations under international law in situations of *force majeure*, distress, consent, self-defence, necessity and countermeasures, unless the obligation constitutes an obligation of *jus cogens*.
The right to liberty and security of the person is not of *jus cogens*-stature, but some of the rights related to it are, such as the freedom from torture, as well as some requirements determinative of the lawfulness of a deprivation of liberty, as set out above.

2.2.3. Extraterritorial Applicability of Derogation Clauses

While the concept of derogation is principally designed to cover public emergencies taking place on the territory of a State party – after all, the State is viewed as the principle entity capable to characterize a situation taking place on its territory as a public emergency – the question rises whether a State could derogate from its human rights obligations when operating extraterritorially, such as in OCCUPCOIN, SUPPCOIN and TRANSCOIN?
Admittedly, it may be argued that this is more a theoretical exercise than one that reflects practice, as, to date, no derogations have been made by State parties to the ICCPR, ECHR or ACHR in an extraterritorial context other than in relation to their former colonies and areas overseas.[892] Nevertheless, it cannot be ruled out that the need to do so arises. In light of the present chapter, the outcome of an examination of the extraterritorial applicability of derogation clauses informs us also of the scope, and suspension, of applicability of human rights obligations in extraterritorial military operations.
Within the available doctrine, two schools of thought can be discerned: one rejecting extraterritorial applicability, the other viewing extraterritorial applicability a possibility.

The 'rejective' school,[893] which appears to represent the *majority view*, argues that in extraterritorial settings it is generally not the life of the visiting State party's nation that is threatened, but that of the receiving State party, on which territory the situation (and military operations) take place. In other words, "the life of the nation" refers to the State party on whose territory the public emergency takes place.[894] Following this approach, a counterinsurgent State could never derogate from its obligations from the ICCPR, ACHR and ECHR, and thus remains bound by the requirements flowing from them.

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[892] France made these derogations in relation to a public emergency on New Caladonia; the UK in relation to Cyprus, Malaysia, Kenia, North-Rhodesia, Nyasaland, Aden, Zanzibar and Mauritius. See Svensson-McCarthy (1998), 702.

[893] Erberich (2004), 52; Krieger (2002), 690; Häußler (2007), 69-70;

[894] This school finds support in the ECtHR's ruling that it "[d]oes not find any basis upon which to accept the applicants' suggestion that Article 15 covers all "war" and "public emergency" situations generally, whether obtaining inside or outside the territory of the Contracting State." (2001c), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, Judgment of 12 December 2001*, § 62. The UNHRC attached to Article 4 extraterritorial applicability in relation to Israel and the situation in the Occupied Territories. See (2003a), *Concluding Observations of the Human Rights Committee: Israel (21 Augustus 2003)*, 11. It was also the opinion of Lord Bingham of Cornhill, in (2007f), *R. (on the application of Al-Jedda) v. Secretary of State for Defence*, that derogation […] may only be exercised in time of war or other public emergency threatening the life of the nation seeking to derogate, and only then to the extent strictly required by the exigencies of the situation. […] It is hard to think that these conditions could ever be met when a state has chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw."

The 'opportunistic' school does not rule out the extraterritorial applicability of derogation clauses. In relation to Article 15 ECHR, for example, Naert finds the rejective view

> […] flawed. If one accepts that the ECHR can apply extraterritorially, especially to entire areas under effective control, it follows that the local "nation" is under the jurisdiction of the "occupying" State. In that case, it is logical that a threat to the life of *this* nation can justify a derogation.[895]

Similarly, Sassòli holds that

> […], one cannot simultaneously hold a State accountable because it has a certain level of control abroad and deny it the possibility to derogate because there is no emergency on that State's own territory. An emergency on the territory where the State has a certain limited control must be sufficient.[896]

Following this approach – and it is submitted this is the right approach – it is sufficient for a right to derogate to arise for the counterinsurgent State when on the territory of the receiving State a public emergency takes place threatening the life of that nation, provided the counterinsurgent States exercises a degree of effective control over territory. This would most certainly be the case in OCCUPCOIN, but arguably less so in situations of SUPPCOIN and TRANSCOIN. Whether the possibility to derogate also arises when no such control over territory is exercised remains unclear. For example, the question would arise whether a counterinsurgent State in SUPPCOIN would be entitled to derogate from its obligations under IHRL when it detains an insurgent. It would seem that to the extent that the public emergency threatens the life of the nation of the receiving State, the treat posed by that public emergency may also affect the counterinsurgent State's ability to uphold its own obligations. As noted, to date no State acting extraterritorially has derogated. A possible reason may be that doing so would imply the recognition of the extraterritorial applicability of the treaty to which they are party, something that States might want to avoid. Therefore it seems reasonable to conclude that in practice, in extraterritorial counterinsurgency situations not constituting OCCUPCOIN the counterinsurgent State, in the absence of derogations, remains bound by its obligations under IHRL in so far these apply extraterritorially. As such, the potential for interplay with simultaneously applicable valid norms of LOAC is quite pertinent in those situations.

3. Observations

This chapter has demonstrated that IHRL offers valid norms pertaining to targeting and operational detention that are also (potentially) widely applicable, even in extraterritorial situations. That IHRL provides valid norms pertaining to these subjects is not a surprising conclusion. After all, the right to life and the human rights pertaining to the deprivation of liberty are amongst the most fundamental rights within the human rights catalogue. Their applicability, particularly in extraterritorial context, has been more controversial, particularly in the context of targetings carried out by States party to the ECHR. When applied to situational contexts of counterinsurgency, the following picture emerges:

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[895] Naert (2010), 578. Naert finds support for his reasoning in a reversed reading of the ruling of the ECtHR in Bankovic that "Article 15 itself is to be read subject to the "jurisdiction" limitation enunciated in Article 1 of the Convention." While the ECtHR applied a restrictive, territorial interpretation, the current standing is that Article 1 also applies extraterritorially, and that as a result, Article 15 also applies extraterritorially.

[896] Sassòli (2009), 438.

Firstly, in NATCOIN, the counterinsurgent State is always bound by the requirements flowing from the right to life and the valid norms governing operational detetention, even in areas not under its control.
As regards OCCUPCOIN, the valid norms of IHRL apply extraterritorially by virtue of the fact that the counterinsurgent State exercises effective control over the occupied territory (ECA). Also, SAA-based jurisdiction arises for counterinsurgent States party to the ICCPR and the ACHR (functional approach) as well as for States party to the ECHR because the counterinsurgent State exercises public powers normally to be exercised by the governement of the occupied State.
As regards SUPPCOIN and (consensual and non-consensual) TRANSCOIN, the valid norms governing *operational detention* apply by virtue of SAA-based jurisdiction, regardless of whether the counterinsurgent State is a party to the ICCPR, ACHR or ECHR. As regards the concept of *targeting*, in view of the UNHRC and ACiHR/ACtHR, SAA-based jurisdiction would undoubtedly arise. This is not the view of the ECtHR, which at this point, in so far it concerns the selective and individualized use of force (which targeting involves) has sporadically accepted jurisdiction, although it appears that the exercise of control over territory or the situation may be of relevance. Whether this also is the case in the context of *hostilities* remains unclear. At least, it may be concluded that SAA-based jurisdiction for targeting operations cannot be excluded, and thus counterinsurgent States are to take account of this.

A final concluding observation concerns derogation. In so far a State is bound by the obligations arising from the conventional *right to life*, the above analysis of the concept of derogation vis-à-vis the right to life demonstrates that:
Firstly, all relevant treaties prohibit derogation from the right to life. The ICCPR and ACHR do so in regards of all circumstances. It follows that with respect to these treaties the right to life always applies, also in armed conflict (whether IAC or NIAC), but that the lawfulness of deprivations of life resulting from hostilities is to be examined by interpreting the notion of arbitrariness through the law of hostilities.
Secondly, as for the right to life under Article 2 ECHR, it follows that, in the absence of guidance from the treaty-text, the preparatory work to Article 15 ECHR and practice of the ECtHR, the precise meaning and functioning of Article 15 ECHR in the context of the right to life remains subject of debate. It is however possible to conclude that (1) Article 15(1) ECHR does accommodate both IAC and NIAC; (2) that arguably Article 15 ECHR would permit automatic derogation from the right to life but that (3) in the context of NIAC the better approach is to examine the lawfulness of deprivations of life resulting from hostilities by reference to Article 2(2) ECHR.
Irrespective of whether treaty-based obligations arise following a State exercise of jurisdiction or not, a counterinsurgent State is always bound by the obligations arising from the customary right to life. The *jus cogens*-nature of the prohibition on the arbitrary deprivation of life bars derogation. However, whether a particular deprivation of life resulting from hostilities in armed conflict constitutes as arbitrary is to be examined in light of the law of hostitities.
Examination of the possibility to derogate from the valid norms of IHRL pertaining to *operational detention* shows that derogation is prohibited from the freedom from torture and degrading treatment or punishment, the prohibition of non-refoulement and the fair trial guarantees to be afforded to criminal detainees. Derogation, however, is permitted from the

right to liberty and security of the person. As we will see in Chapter VIII, this possibility to derogate is of particular importance for the lawfulness of *security detentions*.

Having examined the availability of valid norms on targeting and operational detention in IHRL, and their applicability in the situational contexts of counterinsurgency, we can now turn to LOAC, to carry out a similar examination.

Chapter V LOAC

After having identified the availability of valid norms in IHRL pertaining to targeting and operational detention and their applicability in the situational contexts of counterinsurgency, this chapter carries out a similar exercise. Paragraph 1 concerns the identifiation of valid norms, whereas paragraph 2 turns to the issue of applicability in the various situational contexts of counterinsurgency.

1. Valid Norms

As in the previous chapter, the first question to be addressed here is whether LOAC offers valid norms governing the concepts of targeting and operational detention. Given the traditional dichotomy between the law of IAC and the law of NIAC, this chapter will examine the availability of valid norms pertaining to targeting and operational detention within each regime. Thus, paragraph 3.1 examines the law of IAC, whereas paragraph 3.2 adresses the law of NIAC.

1.1. Targeting

1.1.1. The Law of IAC

In respect of the valid normative framework in the law of IAC governing the concept of targeting recourse can be had, *firstly*, to the treaty-based law of IAC.
Within this body of law, and relative to the concept of hostilities, the law of hostilities 'occupies' a crucial part of the full 'territory' of treaty-based norms of LOAC. The principal conventional sources are found in 1907, HIVR and AP I. Additional rules may be found in more specific treaties, mainly in the domain of weapons.[897] With respect to 1907, HIVR, only one of three sections concerns hostilities (Section II: Hostilities). As for AP I, that consists of seven sections, only Part III, Section I (Means and Methods of Warfare), and Part IV, Section I (General Protection against Effects of Hostilities) regulate hostilities. Large parts of the relevant sections of HIVR – which also reflect customary law – have been complemented by AP I (except where there are clear differences). HIVR, however, remains relevant for States not party to AP I. Overall, the norms found in the law of hostilities are connected to the fundamental principles underlying LOAC, i.e. distinction, proportionality, military necessity and humanity.
Besides offering protection against direct attack in the context of hostilities, both conventional[898] and non-conventional LOAC,[899] stipulate, in sum, that parties to the conflict are

[897] Admittedly, the 1954 HPCP also contains rules regarding hostilities vis-à-vis cultural property (see Article 4), but this treaty will not be further addressed for lack of relevancy to the present study.

[898] Article 46, 1907 HIVR ("the lives of persons […] must be respected"); Article 23(1)(c), 1907 HIVR (prohibiting "to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion"); Articles 12(1) and (2) GC I and GC II (wounded, sick, and shipwrecked "shall be respected and protected in all circumstances" and "any attempts upon their lives, or violence to their persons shall be strictly prohibited; in particular, they shall not be murdered or ex-

under an obligation to respect and protect the lives of protected persons falling within the authority, or exposed to the conduct of a party to the conflict and provide a general prohibition against the willful killing of protected persons in situations of IAC, including belligerent occupation. These norms relate to the deprivation of life in armed conflict not having a nexus with the hostilities, but to *law enforcement*.

Notwithstanding the availability within conventional LOAC of a comprehensive normative framework governing the deprivation life, it remains of importance to emphasize the relevance of the non-conventional normative framework, for two reasons. *Firstly*, AP I has not been ratified by all States, with the US, Israel, Iran, Pakistan, India, and Turkey being notable exceptions. *Secondly*, the conventions may not cover certain situations, in which case customary law functions as a safety net.[900]
In 2005, the ICRC finalized and published a comprehensive study to the customary status of norms of LOAC, including the law of hostilities. While both the method applied and the material content of the Customary Law Study have been criticized,[901] in large part it confirmed what had been earlier concluded in case-law and doctrine, namely that in view of the scope of customary law of hostilities it is today generally accepted that most of its substantive rules have attained the status of customary law.[902] These customary rules are derived from the vast majority of rules provided for in the four GCs and the HIVR (except for

terminated"); Article 13(1) GC III ("[a]ny lawful act or omission by the Detaining Power causing death […] of a prisoner of war in its custody is prohibited"); Article 27(1) GC IV (with respect to 'protected persons' under GC IV (see Article 4 GC IV) "all acts of violence" are prohibited and "any measure of such a character as to cause the […] extermination of protected persons in their hands" to include "murder […] whether applied by civilian or military agents"); Article 32 GC IV, prohibiting the "murder" of protected persons under GC IV; Article 75(2) AP I (prohibiting in relation all persons 'affected' by an international armed conflict who find themselves in the power of a party to the conflict, to include any person who has taken part in the hostilities "violence to life" and "murder" committed by civilian or military agents of a party to the conflict).

899 (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, § 75; (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, § 89; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*, § 217, all confirming the customary nature of Articles 23(1)(c) and Article 46 HIVR; Rule 89 (murder) and 100 (extrajudicial execution), ICRC (2005a), 311 ff. and 352 ff. Confirming the customary nature of CA 3, see (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, § 218; (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)* , § 102 (both confirming the normative content of CA 3 as to reflect 'elementary considerations of humanity' and its applicability in both IAC and NIAC). On the customary nature of Article 75 AP I, see Dörmann (2003b), ; Aldrich (2002), 893; IACiHR (2002), § 76.

900 See Article 1(2) of AP I, which states that "in cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." This is a recodification of the Martens clause, which will be examined below. See also Article 49(4) AP I, which states that the rules of Part IV, Section 1 (General Protection against the Effects of Hostilities) apply in addition to "other rules of international law relating to the protection of civilians and civilians objects on land […] against the effects of hostilities."

901 On the methodological framework of the ICRC Customary Law Study and the approach to customary international law, see Bethlehem (2007) and Scobbie (2007) respectively. On the subject of targeting, see Schmitt (2007).

902 Meron , < http://www.crimesofwar.org/a-z-guide/customary-law/ >. For jurisprudence: (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)* ; For doctrine: Dinstein (2010), 10; Sassòli & Bouvier (2006), 109.

administrative, technical and logistical rules), as well as many, if not most, of the rules of AP I. In view of their material content, the CLS concludes that the identified rules of customary nature are not more restrictive than their conventional counterparts.[903] However, as concluded by Schmitt, while "in nearly every case, the Rules are likely to be accepted by States as a correct enunciation of the targeting norm in question" at the same time, the CLS "occasionally brushes over, or neglects altogether, discussion of those matters about which uncertainty or disagreement exists."[904] Aspects of particular contention, as we will see below, are related to (but not limited to) the requirements of distinction, proportionality and precautionary measures.

In sum, it may be concluded that the law of IAC offers a comprehensive treaty-based and customary normative framework.

1.1.2. The Law of NIAC

In contrast to the law of IAC, the law of NIAC is (generally) limited to two conventional sources: CA 3 and AP II.[905] While both sources together provide an important legal framework for NIAC, they 'merely' offer a rudimentary framework of minimum safeguards for the protection of victims of armed conflict. As such, the normative content of both sources is essentially a reflection of Geneva-law, i.e. aimed at the protection of individuals not or no longer directly participating in the hostilities. Both conventional[906] and non-conventional LOAC[907] expressly prohibit the 'murder' of protected persons in situations of NIAC.[908]

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[903] ICRC (2005a), Introduction, available at <http://www.icrc.org/customary-ihl/eng/docs/v1_cha_in_in>.

[904] Schmitt (2007), 168.

[905] Additional conventions applicable to NIACs are the Convention on Certain Conventional Weapons, as amended; the Statute of the International Criminal Court; the Ottawa Convention banning anti-personnel landmines; the Chemical Weapons Convention; and the Hague Convention for the Protection of Cultural Property and its Second Protocol.

[906] CA 3 prohibits "at any time and in any place whatsoever […] (a) violence to life and person, in particular murder of all kinds [and] (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" with respect to "persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause."
Article 4(2)(a) AP II prohibits "at any time and in any place whatsoever […] violence to the life […], in particular murder […]" of "[a]ll persons who do not take a direct part or who have ceased to take a part in hostilities." In addition, Article 6(2) AP II, while not explicitly prohibiting the death penalty for offences related to the armed conflict, requires that "no sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality." Nor shall the death penalty "be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children" (Article 6(4) AP II).

[907] Rule 89 (murder) and Rule 100 (extrajudicial execution), ICRC (2005a), 311 ff. and 352 ff; IACommHR (2002), § 76; (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, § 218 (referring to CA 3 as "elementary considerations of humanity"; (1995i), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber (2 October 1995)*, § 98; (1997n), *Tadić*, § 615; (2000o), *The Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment of 3 March 2000 (Trial Chamber)*, § 166; (2002m), *The Prosecutor v. Kunarac and Others, Case Nos. IT-96-23 & IT-96-23/1, Appeals Chamber (June 12, 2002)*, § 68; (1998k), *The Prosecutor v. Akayesu, Case No. 96-4-T, Trial Chamber Judgment (2 September 1998)*, §§ 608 ff; United Nations (2000a), § 14.

However, in so far it concerns *hostilities* both CA 3 and AP II remain virtually silent.
As guidance is of the essence, both for the benefit of the protection of individuals and military operators, the question arises where guidance is to emanate from instead. Two views may be distilled.
A *first* view contends that the primary eligible source to fill this gap is the customary law of hostilities, which is also applicable in NIAC.[909] As held by the ICRC in its Customary Law Study

> This study provides evidence that many rules of customary international law apply in both international and non-international armed conflicts and shows the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts. In particular, 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.[910]

Other sources confirm the customary nature of the law of hostilities applicable in NIAC, such as the Manual on the Law of Non-International Armed Conflict.[911]
A *second* view is that the customary law of hostilities cannot readily be used to complement the gap in regulation of the conduct of hostilities. Besides general doubts as to its applicability at all in NIAC, its applicability is arguably limited to AP II-NIACs only.[912] CA 3-NIACs "presumably"[913] entail the application of domestic law, which implies that the deprivation of life of non-State actors who would normally qualify as lawful military objectives under the law of hostilities would have to comport with the relevant standards under IHRL in order to be lawful. In addition, many aspects of the substantive content of the customary law of hostilities, as identified by the CLS, remain subject to debate, and thus should not provide a basis for the lawfulness of deprivations of life in hostilities in NIAC.[914]

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[908] As held by the ICTY in the *Delalic* case, the normative content of the terms 'wilful killing' and 'murder' is the same and there is no reason to differentiate between IAC and NIAC in so far it concerns the prohibition to intentionally kill protected persons. (1998m), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber)*, § 422-423. See also (2001o), *The Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-T, Judgment of 26 February 2001 (Trial Chamber)*, § 233 (stressing that the scope of protected persons embraces the term "persons taking no active part in the hostilities" as stipulated in CA 3). Similarly: (1997n), *Tadić*, § 615.

[909] Oeter (2008), 124-125; Kalshoven (1975), 267-285.

[910] ICRC (2005a), Introduction. Available at <http://www.icrc.org/customary-ihl/eng/docs/v1_cha_in_in>. Support for this conclusion can be found in IIHL (2006). See also Schmitt (2007), 135, pointing at the "inherent uncertainty" in attempting to ascertain that the customary rules on targeting apply in both IAC and NIAC. See also Kreß (2010), 258.

[911] IIHL (2006). See also, for example (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)* , § 107 ("Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules […] cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities") and 8(2)(e), ICC Statute.

[912] Hampson (2011), 204; Garraway (2010), 510; Kretzmer (2009), 1

[913] Hampson (2011), 204.

[914] Garraway (2010), 504 ff; Hampson (2011), 196 ff; Krieger (2006), 274; Abresch (2005), 746-47.

While this view cannot be ignored, it is one that is largely limited to a certain school of academic opinion. One finds little support for it in actual practice or in in the jurisprudence of the *ad hoc* tribunals (or ICC Statute).
While cognizant of the continued applicability of IHRL in armed conflict, the application of the standards underlying the normative framework governing the deprivation of life under IHRL would raise significant issues that call into doubt the appropriateness of such application in NIAC, even in cases of CA 3-NIACs. Among the main issues is the very applicability of the obligation to respect the right to life under IHRL, as not all States are party to human rights treaties; not all States that are party to such treaties have accepted the optional individual complaints procedure; States may have made reservations limiting the jurisdiction of the relevant human rights body;[915] and the extraterritorial applicability of conventional human rights obligations remains controversial, particularly in the area of extra-custodial deprivations of life. Another deficit of the application of IHRL in the realm of hostilities is that obligations arising from IHRL do not bind non-State actors, such as insurgents, so there is an absence of reciprocity that is difficult to overcome.[916] In addition, both from an operational viewpoint as from a legal viewpoint the scale and nature of hostilities may simply overstretch the capabilities of IHRL to regulate hostilities, even in the event of a CA 3-NIAC. A final issue raised by the application of IHRL-based limitations on the deprivation of life in hostilities is that it may adversely affect the outlook of military operators on both IHRL and LOAC if armed forces are going to perceive the obligation to capture following from IHRL-requirements as rules that do not correspond with the situation at hand and are therefore not working.[917] This is particularly worrisome, because IHRL will likely be rejected in cases where it supports the successful execution of a military operation.
While acknowledging that many issues within the law of hostilities remain unresolved, these issues are not limited to customary law only, but also concern treaty-based norms. As follows from the analysis below, the mechanisms underlying LOAC and the law of hostilities in particular are sufficiently flexible to accommodate a reasonable balancing of military and humanitarian imperatives without the help of IHRL. Therefore, it is submitted that, *in principle*, the customary law of hostilities or – at the very minimum – the basic principles underlying this regime[918] fill the gap in conventional regulation of hostilities persistent the law of NIAC.

The above identification of the normative frameworks relevant in IAC and NIAC to the deprivation of life in armed conflict has revealed that there is a significant *quantitative* difference in treaty-based norms in the laws of IAC and NIAC. It is however submitted that the customary rules of LOAC relating to targeting make little distinction between the applicable law in IAC or NIAC.[919]
In *qualitative* terms, this means that LOAC provides valid principles and norms that may be commonly applied to any type of armed conflict.

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[915] For example, the United States does not accept that the IACiHR or the HRC applies LOAC in determinations of violations of human rights. See for example (2002k), *Response of the United States to Request for Precautionary Measures (Detainees in Guantanamo Bay, Cuba)*; the United States of America (2006).

[916] See, for example, (1997b), *Abella et al. v. Argentina (La Tablada), Case No. 11.137, Decision of 18 November 1997*, § 175.

[917] Corn (2010), 55-56; Osiel (2009), 131.

[918] U.K. Ministry of Defence (2004), 388-389, § 15.5.

[919] This, notwithstanding the other distinctions in LOAC between the two regimes (e.g. the status of POW as accepted in the law of IAC, but not in NIAC) and also without prejudice to relevant rules of IHRL and national law applicable in NIAC (and in some cases in IAC as well).

1.2. Operational Detention

1.2.1. The Law of IAC

The law of IAC pertaining to operational detention is densely regulated and provides norms to be applied both in the territory of a party to the conflict or in the occupied territory. These norms mainly concern the detention of two groups of people. *Firstly*, a major portion of these norms pertain to the internment of POWs, a classic aspect of warfare since ancient times and today a widely recognized custom aimed to resist the escape of POWs and to prevent their return to their own forces and the battlefield. While in classical and feudal times POWs were recognized to be in the power of the individual who captured them, today, they are held to fall in the power of the detaining State. The internment of POWs belongs to one of the first subjects States were willing to regulate at the level of international law on a reciprocal basis. Chapter II (Prisoners of War) of 1907 HIVR contains fifteen provisions dealing with POWs. Today, these norms have been superseded and expanded by the detailed framework set forth in GC III, providing norms aimed to protect POWs from arbitrary conduct by the detaining State, and providing a basis for the detaining State to *intern* POWs for the duration of the conflict, as well as AP I.[920]
Secondly, the law of IAC regulates the deprivation of liberty of individuals not qualifying as POWs. Most notably, GC IV, pertaining to the protection of civilians recognized as protected persons under the scope *ratione personae* of GC IV,[921] as well as Article 75 AP I, provide numerous provisions dealing with the deprivation of liberty. These involve requirements relative to both criminal detention and security detention.

The principal guarantees available in the law of IAC specific to *criminal detention* are fair trial rights. Depriving a person of the right to a fair trial is listed as a war crime in the statutes of the ICC, ICTY and ICTR, as well as the SCSL.[922] The right to fair trial is set forth in numerous military manuals and its denial in the context of armed conflict is a criminal offence under the legislation of a very large number of States.[923]
Articles 65-77 GC IV and Article 75(4) AP I provide fair trial guarantees to criminal detainees. Of additional relevance is CA 3, which contains a provision with guarantees that, given its applicability to all armed conflicts, also pertains to conflicts regulated by the law of IAC. In more general terms, it prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensible by civilized peoples."

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[920] See Articles 43-47 AP I. AP I, however, does not provide an explicit threshold for deprivation of liberty following the determination of combatant-status. It merely presumes that once it has been determined that an individual is entitled to combatant- and POW-status under AP I, upon capture the normative framework of GC III applies and, as concluded above, the POW *may* be interned, subject to a decision to do so by the Detaining/Occupying Power as set out in Article 21 GC III, prompted by considerations of military necessity and humanity.

[921] I.e. "those who, at any given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals", Article 4 GC IV.

[922] See Article 8(2)(a)(vi) and (c)(iv), ICC Statute; Article 2(f), ICTY Statute; Article 4(g), ICTR Statute;, Article 3(g), SCSL Statute.

[923] For an overview of States mentioning the right to fair trial in military manuals and its denial as a criminal offence, see footnotes 6 and 7 accompanying the commentary to Rule 100 of the ICRC's CLS.

The treaty-based fair trial guarantees can be categorized in three groups. A *first* group concerns guarantees set out in *both* GC IV and Article 75(4) AP I.[924] A *second* group concerns guarantees *exclusively* recognized by Article 75(4) AP I, and includes the right of the accused to be presumed innocent;[925] the right of the accused to be present at the trial;[926] and the right of the accused not to be compelled to testify against himself or to confess guilt.[927] A *third* group concerns guarantees *exclusively* recognized by GC IV, i.e.

- the safeguard of the accused that a penalty shall be proportionate to the offence;[928]
- the right to trial without undue delay;[929]
- the right of the accused to present evidence necessary to his defense;[930]
- the right of the accused to be assisted by a qualified advocate or counsel of his own choice;[931]

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[924] The safeguards that both sources have in common are: the right of the accused to trial by an independent, impartial and regularly constituted court (Article 66 GC IV; CA 3; Article 75(4)(chapeau) AP I); the right of the accused to be informed of the nature and the cause of accusation (Article 71(2) GC IV; Article 123(2) GC IV, with respect to the internees who commit offences *during* internment (Article 117 GC IV); Article 75(4)(a) AP I); the prohibition of collective punishment (individual criminal responsibility) (Article 33 GC IV. See also Article 50, 1907 HIVR; Article 75(4)(b) AP I); the prohibition of retroactive application of criminal laws (*nullem crimen nulla poena sine lege*) (Articles 65 and 67 GC IV; Article 75(4)(c) AP I); the right of the accused to examine witnesses or the right to have witnesses examined (Article 72(1) GC IV; Article 123(2) GC IV (accused internees); Article 75(4)(g) AP I); the right of the *convicted* to be informed of available remedies and of their time-limits (Article 73 GC IV; Article 75(4)(j) AP I); the freedom of the accused from double jeopardy (*ne bis in idem*) (Article 117(3) GC IV; Article 75(4)(h) AP I); the right of the accused to public hearings (Article 74(1) GC IV; Article 75(4)(i) AP I)

[925] Article 75(4)(d) AP I. It is absent in GC IV, nor mentioned in CA 3, although in the latter case it may be presumed to fall under the wider phrase of "all the judicial guarantees which are recognized as indispensible by civilized peoples." This right is widely recognized to have customary status in international law. ICRC (2005a), 357-358.

[926] Article 75(4)(e) AP I; It has also been recognized in Article 63(1) and Article 67(1) ICC Statute; and Article 21(4)(d) ICTY Statute; Article 20(4)(d) ICTR Statute; Article 17(4)(d) Statute of the Special Court for Sierra Leone, Article 17(4)(d). While recognized by the ICRC as to have customary status, one may question the existence of State practice to that effect, although argued otherwise by the ICRC. As noted by the ICRC in its Customary Law Study, "[u]pon ratification of the Additional Protocols, several States made a reservation to this right to the effect that this provision is subject to the power of a judge to exclude the accused from the courtroom, in exceptional circumstances, when the accused causes a disturbance and thereby impedes the progress of the trial." However, the statutes of the international criminal courts prohibit trials *in absentia*. See Article 63(1) and Article 67(1) ICC Statute; and Article 21(4)(d) ICTY Statute; Article 20(4)(d) ICTR Statute; Article 17(4)(d) Statute of the Special Court for Sierra Leone, Article 17(4)(d).

[927] Article 75(4)(f) AP I. It is recognized by the ICRC to have customary status under LOAC, ICRC (2005a), Rule 100. The ICRC points specifically at the influence of IHRL in the development of this right in the context of armed conflict. Correlating to this right is the right to remain silent. While fully accepted as a right under IHRL, it is not expressly mentioned by either the GC IV or AP I. Neither is it mentioned in the ICRC Customary Law Study. It was incorporated in the CPA Memorandum No. 3 in occupied Iraq, which demonstrates State practice to its acceptance as a rule of customary law in armed conflict (at least in occupied territory). See Arai-Takahashi (2010), 543.

[928] Article 67 GC IV.

[929] Article 71(2) GC IV.

[930] Article 72(1) GC IV; Article 123(2) GC IV (accused internees).

[931] Article 72(1) and (2) GC IV. Also: Article 67(1)(d) ICC Statute; Article 21(4)(d) ICTY Statute; Article 20(4)(d) ICTR Statute; Article 17(4)(d) Statute of Sierra Leone If the accused fails to choose a legal counsel, he may be appointed one by the protecting power. In case of a serious charge and a non-functioning protecting power, the Occupying Power will appoint a legal counsel with the approval of the accused. While the ICRC recognizes the right to *free* counsel to be customary of nature, Arai-Takashi places

- the right of the advocate or counsel to freely visit the accused;[932]
- the right of the advocate or counsel to enjoy the necessary facilities for preparing the defense;[933]
- the right of the internee to have recourse to a qualified interpreter.[934]

The latter five guarantees all concern rights relating to the means of defense. Article 75(4) AP I does not specifically set out these rights, but it may be argued that they are included in the phrase "all necessary rights and means of defence" in Article 75(4)(a) AP.
Besides treaty-based fair trial rights, such rights arguably have attained customary law-status, as recognized by the ICRC in its CLS.[935]
It is to be noted here that IHRL-treaties function as a principle source for these customary norms. The ICRC has relied heavily on its documents and case-law to justify its recognition of these rules as customary under LOAC.[936]

As regards *security detention*, GC IV and Article 75 AP I provide norms providing the *legal basis* for security detention (Article 42 and Article 78 GC IV) and norms affording *procedural guarantees*, to include the requirement of prompt information on the grounds for the internment (Article 75(3) AP I), and the requirement to carry out an initial and periodic review of the lawfulness of the internment by an independent and impartial body (Articles 43 and 78 GC IV).
The law of IAC also provides norms pertaining to the *treatment* of detainees (regardless of the type of detention) (see *inter alia* Article 27 GC IV and Article 75 AP I). Also GC IV provides an extensive list of norms concerning the material conditions of treatment (see Article 76 GC IV relative to criminal detainees) and (Section IV) of GC IV (i.e. Articles 79-

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doubts as to whether the ICRC could have reasonably come to that conclusion as it solely relies on the practice in IHRL. Arai-Takahashi (2010), 538, including footnote 263.

[932] Article 72(1) GC IV. Also: Article 67(1)(b) ICC Statute; Article 21(4)(b) ICTY Statute; Article 20(4)(b) ICTR Statute; Article 17(4)(b) Statute of Sierra Leone.

[933] Article 72(1) GC IV. Also: Article 67(1)(b) ICC Statute; Article 21(4)(b) ICTY Statute; Article 20(4)(b) ICTR Statute; Article 17(4)(b) Statute of Sierra Leone. It must be noted that, in contrast to IHRL, this right only extends to facilities, and not to time. Arai-Takahashi argues that Article 72 embraces the time-element as well: "[t]his interpretation can be attended by the argument that the corresponding customary norm equipped with the same material elements has already been shaped and grafted onto the relevant treaty norm under IHL (namely, the norm embodied under Article 72 GC IV). The cogency of such argument can be reinforced by the express recognition of this right in the instruments of international human rights law and international criminal law. Arai-Takahashi (2010), 539.

[934] Article 72(3) GC IV; Article 123(2) GC IV (in relation to internees); Article 67(1)(f) ICC Statute; Article 21(4)(f) ICTY Statute; Article 20(4)(f) ICTR Statute; Article 17(4)(f) Statute of Sierra Leone.

[935] Rule 100, ICRC (2005a) mentions the following fair trial guarantees: the right of a trial by an independent, impartial and regularly constituted court; the presumption of innocence; information on the nature and cause of the accusation; necessary rights and means of defense, to include the right to defend oneself or to be assisted by a lawyer of one's own choice, the right to free legal assistance if the interests of justice so require, the right to sufficient time and facilities to prepare the defense, the right of the accused to communicate freely with counsel; the right of trial without undue delay; the right of examination of witnesses; assistance of an interpreter; the right of presence of the accused at the trial; the freedom of the accused from forcible self-incrimination or confession of guilt; the right to public proceedings; the right to be advised of available remedies and of their time-limits; *non bis in idem*.

[936] This method has been criticized. Arai-Takahashi, for example, argues that "[f]irst, it fails to determine the normative status and weight of such sources. Second, it has not addressed the question whether, and if so, to what extent, it is methodologically defensible to transfer the elements and principles developed in relation to those fair trial guarantees which are yet to be declared non-derogable even in the documents or the case-law of the human rights monitoring bodies." Arai-Takahashi (2010), 516. But see Hampson (2007a), 299.

135) (relative to civilian internees). Finally, GC IV also provides express guidance on the *transfer* of internees (see Articles 45, 49, 127 and 128 GC IV).

As for the valid *non-conventional* normative framework, it is generally accepted that the rules of GC III and IV all have hardened into customary law.[937] These rules have been identified in the ICRC's CLS.[938] In addition, the CLS relies extensively on principles and norms deriving from IHRL in the area of fundamental guarantees to be afforded to detainees.[939]

In view of the present study, it is impossible to ignore at this stage the references made in the relevant conventional framework regarding IHRL. A first important source in this respect is Article 72 AP I, which stipulates that

> the provisions of this Section ["Treatment of persons in the power of a party to the conflict"] are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, *as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict*.

This provision clearly authorizes the reliance on sources of IHRL in addition to rules set out in LOAC in relation to persons "in the power of a party to the conflict."[940] Additionally,

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[937] On the customary nature of GC III and IV, see Meron (2005); (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)* , § 137; (1997n), *Tadić*, § 577; (1998m), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber)*, §§ 305 and 316; (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, § 82; (2003m), *Partial Award in Eritrea's Prisoner of War Claims (Eritrea v. Ethiopia), Eritrea-Ethiopia Claims Commission (1 July 2003)*, § 38; (2004d), *Civilians Claim - Ethiopia's Claim 5 (Ethiopia v. Eritrea), Eritrea-Ethiopia Claims Commission (17 December 2004)*, § 28; United Nations (1993a), § 35.

[938] See Chapter 32 (Fundamental Guarantees), governing the following subjects: humane treatment (Rule 87); non-discrimination (Rule 88); violence to life (Rule 89); torture and cruel, inhuman or degrading treatment (Rule 90); corporal punishment (Rule 91); mutilation and medical, scientific or biological experiments (Rule 92); rape and other forms of sexual violence (Rule 93); slavery and slave trade (Rule 94); forced labour (Rule 95); hostage-taking (Rule 96); human shields (Rule 97); enforced disappearance (Rule 98); deprivation of liberty (Rule 99); fair trial guarantees (Rule 100); the principle of legality (Rule 101); individual criminal responsibility (Rule 102); collective punishments (Rule 103); respect for convictions and religious practices (Rule 104); respect for family life (Rule 105). See also Chapter 37 (Deprivation of Liberty), governing the following subjects: provision of basic necessities to persons deprived of their liberty (Rule 118); accommodation for women deprived of their liberty (Rule 119); accommodation for children deprived of their liberty (Rule 120); location of internment and detention centres (Rule 121); pillage of personal belongings of persons deprived of their liberty (Rule 122); recording and notification of personal details of persons deprived of their liberty (Rule 123); ICRC access to persons deprived of their liberty (Rule 124); correspondence of persons deprived of their liberty (Rule 125); visits to person deprived of their liberty (Rule 126); respect for convictions and religious practices of persons deprived of their liberty (Rule 127); release and return of persons deprived of their liberty (Rule 128).

[939] It is submitted that the ICRC has relied on IHRL in two ways. *Firstly*, as explained by Hampson, norms of IHRL have been relied upon not as direct sources of obligation in situations of armed conflict – which would have required the ICRC to demonstrate that the norms had independent status of customary law. Instead, the ICRC has used IHRL "as evidence of state practice and *opinion* [*sic*] *iuris* merely to provide *additional support* for a principle established by humanitarian law evidence." In such cases, "it is legitimate to use material derived directly or indirectly from human rights treaties, provided that there is evidence that the *essence* of the treaty norm is to be found in customary human rights law" (Hampson (2007b), 72). *Secondly*, the ICRC has made use of IHRL to clarify the meaning of rules or concepts left unexplained or ambiguous in LOAC.

[940] Sandoz, Swinarski & Zimmerman (1987), §§ 2927-2935.

Article 75 AP I, in two instances indicates a complementary role for IHRL. In its first paragraph, it is stressed that the protective framework offered in Article 75 AP I function "as a minimum" guarantee, which suggests that it may be supplemented by other, more protective norms of LOAC and, arguably, IHRL. The complementary role of the latter regime is more also envisaged in Article 75(8) AP I, which states that "[n]o provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, *under any applicable rules of international law*, to persons covered by paragraph 1."

1.2.2. The Law of NIAC

As with the conduct of hostilities, the relevant conventional normative framework governing the deprivation of liberty in NIAC is limited to two principal sources: CA 3 and AP II.[941] *Quantitatively*, both sources contain only few rules on the deprivation of liberty.[942]
However, unlike the law of hostilities, where customary law on hostilities closes the gap in treaty-based norms resulting from the traditional dichotomy between IAC and NIAC, this same dichotomy demonstrates to be the principal cause for a disbalance in normative density and the question of how to solve this, particularly in the area of security detention.
Indeed, as regards *criminal detention*, the treaty-based law of IAC and NIAC almost converge, and any remaining gaps in the list of fair trial guarantees found in treaty-based law of NIAC are complemented by those guarantees that are viewed to have attained the status of customary law, and which can be found in the ICRC's CLS.[943]

CA 3 refers to "judicial guarantees which are recognized as indispensable by civilized peoples" but otherwise remains silent on what precisely those guarantees are.[944] Largely based on the ICCPR,[945] Article 6 AP II sets forth a number of fair trial guarantees to individuals prosecuted and punished for *criminal offences* related to the armed conflict. This list is not as extensive as the list of guarantees stipulated throughout GC IV and in Article 75(4) AP I applicable in the context of an IAC. Nonetheless, it provides for a wide variety of fair trial guarantees.[946] Technically, this list does not apply to NIACs that do not trigger the applicability of AP II.

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[941] As noted previously, given the situational focus on NATCOIN only, the relevance of AP II is limited, and most attention is directed to CA 3.

[942] Besides CA 3, AP II deals with the deprivation of liberty principally in its Articles 4-6.

[943] Rule 100, ICRC (2005a) mentions the following fair trial guarantees: the right of a trial by an independent, impartial and regularly constituted court; the presumption of innocence; information on the nature and cause of the accusation; necessary rights and means of defense, to include the right to defend oneself or to be assisted by a lawyer of one's own choice, the right to free legal assistance if the interests of justice so require, the right to sufficient time and facilities to prepare the defense, the right of the accused to communicate freely with counsel; the right of trial without undue delay; the right of examination of witnesses; assistance of an interpreter; the right of presence of the accused at the trial; the freedom of the accused from forcible self-incrimination or confession of guilt; the right to public proceedings; the right to be advised of available remedies and of their time-limits; *non bis in idem*.

[944] During the drafting stage of CA 3, some States proposed such a list to be added, but this was not accepted. See Diplomatic Conference, Geneva, Final Record, Vol II-B, 78 and 84 (France); 49 and 84 (Italy); 83 (US).

[945] Commentary AP II, , 1397.

[946] See Article 6(2) AP II. These rights involve the right of the accused to a trial by an independent, impartial and regularly constituted court; the right of the accused to be promptly informed of the nature and the cause of accusation; the prohibition of collective punishment (individual criminal responsibility); the prohibition of retroactive application of criminal laws (*nullem crimen nulla poena sine lege*); the right of the

However, it is submitted that even if the armed conflict would 'only' constitute a CA 3-NIAC, the link with Article 6 AP II is so strong that its guarantees nonetheless may find application. This link has been acknowledged already during the drafting stage,[947] as well as in the ICC Elements of Crimes.[948]

As regards *security detention*, neither CA 3 nor AP II provides treaty-based grounds or procedural guarantees comparable to those afforded by the law of IAC (or IHRL). The only notable exception is Article 5(2)(b) AP II, which provides the right "to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary." As explained by Pejic,

> [t]his is presumably because the drafters of the Geneva Conventions, i.e. of Common Article 3, had in mind that domestic law would govern the due process aspect of deprivation of liberty, and because they chose not to take into account that internment might in practe be carried out by non-state armed groups.[949]

When looking for customary rules to fill this treaty-based gap, the ICRC's CLS lists only two procedural requirements, namely (1) the "obligation to inform a person who is arrested of the reasons for arrest;" and (2) an "obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention" (*habeas corpus*).[950] These rules derive from Article 75(3) AP I, and are generally held to reflect customary law applicable in all types of armed conflict.

The scarcity of customary norms on security detention in comparison to those recognized as customary LOAC in the context of an IAC triggers the question as to whether and, if so, how this gap is to be filled.

Two possibilities can be identified to close the gaps in the treaty-based law of NIAC *by reference to LOAC* itself.

Firstly, the absence of rules may be resolved by the parties to the conflict by virtue of arrangements mentioned in CA 3(3), or when the government of the State affected by the non-international armed conflict claims for itself belligerent rights. In both cases, captured non-State fighters should benefit from the same treatment as granted under GC III to POWs in IACs, while detained civilians should benefit from the same treatment as granted to civilian persons protected by GC IV in IACs.

Secondly, several proposals have been made to strengthen the normative paradigm of security detention in NIAC through the *policy*-based application of the main principles underlying the normative framework of security detention in the law of IAC. As is argued by its propo-

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accused to be presumed innocent; the right of the accused to be present at the trial; the right of the accused not to be compelled to testify against himself or to confess guilt; the right of the convicted to be informed of available remedies and of their time-limits; the right of the accused before and during his trial of all necessary rights and means of defence. The phrase "all necessary rights and means of defence" can be said to include: the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power; the right to be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release; the right to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; the right to defend himself/herself in person or through legal assistance; the right to be tried without undue delay; the right to present and examine witnesses; the right to an interpreter.

947 Diplomatic Conference, Geneva, Official Records, Volume 8, 357, par. 3.

948 Dormann, Preparatory Commission for the International Criminal Court: the Elements of War Crimes, 82 IRRC, 771.

949 Pejic (2012), 90.

950 ICRC (2005a), 348-351.

nents, the differences between IAC and NIAC are not so fundamental that they would bar the application of provisions of IAC to NIAC, provided that the rules are applied based on a person's *function* (based on his activities as a civilian or a person directly participating in hostilities) rather than his *status*.[951] The idea of analogous application finds support with the ICRC, which proposes to apply GC III to 'combatants', and GC IV to civilians.[952] Indeed, in view of the 'membership-approach' and the concept of CCF as introduced in the Interpretive Guidance, analogous application of GC III would make sense, particularly so because it would not introduce combatant immunity, or impose on the Occupying Power a duty to carry out any review of internment, as would be otherwise mandated under GC IV. However, it also reveals practical downsides, most notably the difficulty in determining who is a fighter and when a NIAC ends, such that it has been suggested that not GC III, but only GC IV should apply in analogy.[953] The major difference, then, lies in the fact that combatants in an IAC may be interned for the duration of the armed conflict without review of their status, whereas in a NIAC, in analogy of GC IV, they are entitled to such review.

A *first* area where the policy-based application of the LOAC of IAC may take effect concerns the very grounds for security detention. As noted, none of the relevant IHRL treaties provides such ground. To solve this issue recourse may be had to the LOAC of IAC and the Article 78 GC IV-formula of "necessary for imperative reasons of security". This formula has been widely used by States, and has been accepted by the ICRC to apply as the minimum standard in *all* situations of violence that "strikes a workable balance between the need to protect personal liberty and the detaining authority's need to protect against activity that is seriously prejudicial to its security."[954] It is particularly apt for application in extraterritorial forms of NIAC, such as SUPPCOIN, as security detentions there demonstrate similarities with internment in occupied territory.[955] It is to be stressed, however, that, as Article 78 GC IV only applies to IAC, even as a rule of customary law, its formula can only be relied upon *as a matter of policy*, and not law.

A *second* area that would particularly benefit from this approach is the area of procedural guarantees, in which case GC IV offers useful guidance.[956] As explained by Deeks,

> the core procedures contained in the Fourth Geneva Convention are battle-tested and serve as an excellent basis for administrative detention during all types of armed conflict. These procedures impose a high standard for a state to initially detain, require the state to immediately review that detention, permit the detainee to appeal the initial detention decision, require the state to review the detention periodically, and obligate the state to release the detainee when the reasons for his detention have ceased. Coupled with a requirement to inform a detainee of the reasons for his detention, this collection of procedures would offer a strong and operationally-sustainable standard for administrative detention. Adopting such baseline rules (as matter of clearly-stated policy, if not legal obligation) would ensure that all states strike the proper balance between national security and personal liberty, would let states

[951] Sassòli & Olson (2008), 623; Sassòli & Bouvier (2006), 258.

[952] ICRC (2005a), 352. This finds support with the current Obama administration. See (2009d), *In Re: Guantanamo Bay Detainee Litigation, Respondents' Memorandum Regarding the Government's Authority Relative to Detainees Held at Guantanamo Bay, Misc. No. 08-442 TFH.*

[953] Sassòli & Olson (2008), 625.

[954] Dörmann (2012), 356. See also ICRC & Chatham House (2008), 3: "it flows from the practice of armed conflict and the logic of IHL that parties to a conflict may capture persons deemed to pose a serious security threat and that such persons may be interned as long as they continue to pose a threat. Otherwise the alternatives would be to either release or kill captured persons."

[955] Dörmann (2012), 356

[956] Deeks (2009); Oswald (2007); Rose (2012), 3; Pejic (2005), 377.

> avoid answering hard questions about the type of armed conflicts they are fighting, and might facilitate multi-national operations among allies with different detainee policies.[957]

A *third* area concerns the *transfer of detainees*. In recent State practice, examples can be found of arrangements between States whereby they agree that detainees will be treated in accordance with the standards set out in GC III.[958]

As regards both forms of detention, CA 3 provides that "persons taking no active part in the hostilities," to include persons deprived of their liberty must be treated *humanely* and in a *non-discriminatory* manner. In addition, they may not be made subject to violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; be taken hostage; or become subject to outrages upon personal dignity, in particular humiliating and degrading treatment.
Article 4 AP II embodies similar rules, and, in addition to CA 3, prohibits collective punishments; acts of terrorism; slavery and the slave trade in all their forms; pillage and threats to commit any of the acts prohibited in Article 4(2) AP II.
The aforementioned guarantees also find protection under customary law, as indicated in the CLS.[959]
In addition to Article 4 AP II, Article 5 contains a list of material conditions, which "shall be respected *as a minimum* with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."[960] As noted previously, requirements pertaining to the material conditions of treatment also find regulation in customary law, as indicated by chapter 37 of the CLS.

In contrast to the law of IAC, which contains detailed provisions on the transfer of persons deprived of their liberty, such provisions are entirely absent in the treaty-based and customary law of NIAC. However, as argued by Kleffner,

> As far as humanitarian law is concerned, the transfer of a person by a State to another State despite the former State's knowledge that the person is likely to face inhumane treatment may incur the responsibility under international law of that State since it may be qualified as aid or assistance in the commission of an internationally wrongful act, provided that the person concerned will indeed be subjected to inhumane treatment subsequent to the transfer.[961]

As such, transfer of an individual in control or under the authority of a State to another State may violate the explicit prohibitions of CA 3 when it amounts to murder, torture, or other forms of ill treatment.

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[957] Deeks (2009), 405.

[958] See, for example, the 2005 Arrangement between Canada and Afghanistan, which qualifies as a Memorandum of Understanding and therefore is not a legally binding document.

[959] See Rules 87-98,

[960] These include the treatment of the wounded and sick; food and drinking water; health and hygiene; protection against the rigors of the climate and the dangers of the armed conflict; the reception of individual and collective relief; the practice of religion and the reception of spiritual assistance from persons upon request and when appropriate; in case of work: working conditions and safeguards similar to those enjoyed by the civilian population the separation of men and women; the sending an reception of cards and letters (albeit subject to restriction based on military necessity); the location of places of internment and detention away from the combat zone; the evacuation of internees and detainees away from dangers arising out of armed conflict; the benefit of medical examinations; the freedom from danger to physical and mental health and integrity by any unjustified act or omission, such as medical procedures not indicated by the state of health of the person concerned; the taking of measures necessary to ensure the safety of releases persons.

[961] Kleffner (2010c), 478.

In light of the question of interplay, it must also be mentioned that both CA 3 and AP II expressly leave open the possibility of strengthening the protective status of its provisions by resort to other bodies of law, most notably IHRL and domestic law.[962]

2. Applicability

For valid norms under the law of IAC or the law of NIAC to become relevant to the conduct of the counterinsurgent State vis-à-vis the insurgents, it needs to be established whether these frameworks at all apply. In other words, it needs to be ascertained whether the conflict between the counterinsurgent State and the insurgents in a particular situational context of counterinsurgency is governed by the law of IAC or the law of NIAC as a corollary of the existence of an armed conflict that falls within the scope of applicability of the concept of IAC or NIAC. The question of applicability of the law of IAC or NIAC is subject to two issues. A *first* issue concerns the question whether the conflict between the counterinsurgent State and the insurgents takes place in the context of an armed conflict. As already indicated in the introduction, in order to limit the scope of the present study, the very assumption is that in all situations of counterinsurgency examined here the conflict between the counterinsurgent State and insurgents takes place in the context of an armed conflict. There is thus no further need at this stage to deal with this first issue of applicability of the law of IAC or the law of NIAC.
This, however, leaves open a *second* issue, namely whether it is the law of IAC or the law of NIAC that governs the relationship between the counterinsurgent State and insurgents.
Paragraph 2.1 examines the applicability of the law of IAC; paragraph 2.2 examines the applicability of the law of NIAC.

2.1. Applicability of the Law of IAC to Counterinsurgency Operations

As has been previously established, the law of IAC may find application in a range of situations. It has also been established that, of these situations, this study limits its examinations to inter-State armed conflict and belligerent occupation only.

2.1.1. Inter-State Armed Conflict

As noted, underlying the concept of 'armed conflict' is the need for a factual determination of the existence of an armed conflict. In the context of an inter-State armed conflict, it has been argued "States generally recognise one when they see it."[963] In some instances, such as intense hostilities, there is little doubt that the threshold to armed conflict has been crossed. Other situations are less clear. This may concern (low-intensity) border clashes, the extra-territorial deployment of armed forces for counter-terrorist purposes, or the involvement in hostilities of a State's armed forces as a participant in a peace-support force.[964] Two views with respect to the objective parameters to determine the crossing of the vertical threshold of IAC can be discerned.

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[962] The Preamble of AP II makes a specific reference to IHRL as a venue of reinforcement, stipulating that "international instruments relating to human rights offer a basic protection to the human person", to include the ICCPR, CAT and regional human rights treaties. As confirmed by Sandoz, Swinarski & Zimmerman (1987), §§ 4428-4430.
[963] Moir (2002), 33.
[964] Ducheine (2008), 470.

The first (majority) view, reflected *inter alia* in the practice of ICRC and the ICTY, supports a low threshold, implying that "[a]ny *difference* arising between two States and leading to the *intervention* of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war."[965] Elements such as the degree of the intensity of the fighting, or the duration, are of little relevance.[966] The mere fact that unilateral or mutual hostilities take place that prompt the *raison d'être* of LOAC is sufficient, how minor they may appear. At the basis of the concept of inter-State armed conflict lies the premise that two or more belligerent States are in a relationship of *conflicting* interests by which one or all express a belligerent intent or *animus belligerendi*.[967] According to Melzer, such belligerent intent

> must be presumed to exist as soon as there is an armed interference by one State with another's 'sphere of sovereignty', that is to say, with the whole body of rights and attributes, which a State possesses in its territory and in its international relations to the exclusion of all other States.[968]

The belligerent intent need not cross the threshold of hostilities (as the concept of declaration of war signifies), nor does the concept of IAC demand the active resistance of the State affected by the armed interference. However, as stressed by Kleffner

> [i]t may be obvious, however, that a minor incursion by the armed forces of one State into another State, for instance, will not bring into operation the whole plethora of rules of international humanitarian law. Rather, the factual circumstances of a military operation amounting to an international armed conflict will determine which of the rules are practically relevant and, as a consequence, the extent to which the law applies.[969]

Another school of thought considers the view explained above as too simplistic and takes a narrower view.[970] Although IAC offers few space for ambiguous situations in which hostilities take place, in the view of this school, they exist and demand thorough consideration before they are marked as armed conflicts. If the threshold is too lenient, it increases the risk of an escalation of the conflict due to the "psychological" impact that merely the involvement of armed forces may have.[971] Thus, minor incidents, such as border clashes involving a State's armed forces (mentioned earlier) or naval incidents, should not always be viewed as an armed conflict.[972] Generally speaking, elements such as intensity and duration of the hostilities are to be included in the determination. Both elements suggest the presence of a minimum threshold.[973]

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965 Pictet (1952a), 6-7. See also (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)* , § 70, according to which an inter-State armed conflict arises whenever there is a "resort to armed force between States."

966 United Nations General Assembly (2010), 16, § 51; Kleffner (2010b), 54, § 4.01.

967 Melzer (2008), 247.

968 Melzer (2008), 250, referring to (1949a), *Corfu Channel Case (United Kingdom v. Albania), Judgment of 9 April 1949 (Merits)*, 43.

969 Kleffner (2010b), 54.

970 ICRC & IIHL (2003), www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5UBCVX/$File/Interplay_other_regimes_Nov_2003.pdf, 3.

971 ICRC & IIHL (2003), 3.

972 Greenwood (2008b), 48; Kleffner (2010b), 54, § 4.01.

973 See, for example, Gill (2002) ("[o]nce military force of any intensity beyond the level of the maintenance or restoration of law and order is used, at least some of [the] basic principles [of LOAC] will become applicable"); Greenwood (2008b), 48 (arguing that an armed conflict exists when "the fighting reaches a level of intensity which exceeds that of […] isolated clashes"); Gill & Van Sliedregt (2005), 30 (in relation

In sum, the determination of inter-State armed conflict is a matter of objective judgment, to be based on the facts. Other criteria may be added, as long as they are objectively verifiable. The incorporation of overly subjective elements would undermine the system of 'armed conflict' put in place in 1949 and may jeopardize the intended wide applicability of humanitarian law.
As noted in the introduction, the assumption is that all of the counterinsurgency situations examined in this study take place in the context of an armed conflict. It may therefore be assumed that, in so far it has been established that the law of IAC applies to a particular situational context of counterinsurgency, the threshold as set out above has been crossed. An issue that remains, however, is whether the law of IAC may at all regulate the conflict between a counterinsurgent State and insurgents, since the very concept of inter-State armed conflict is limited to conflicts between States. As noted, the assumption in this study is that, in those situational contexts of counterinsurgency to which the law of IAC applies, the threshold of IAC as explained above has been crossed.

The principal question before us, however, remains whether the law of IAC applies because a conflict between a counterinsurgent State and insurgents qualifies as an inter-State armed conflict. In its horizontal scope, inter-State armed conflict by definition takes place *between* two or more *States*, provided they are High Contracting Parties to the GCs.[974] In *participational* terms, *only* States may qualify as 'parties' to an in inter-State armed conflict. An additional feature of the horizontal scope of inter-State armed conflict is that, in *geographical* terms, an inter-State armed conflict by definition involves *extraterritorial* State conduct, from one or all parties to the conflict.
In view of its definition for the purposes of this study, the above is an additional ground for disqualifying NATCOIN as an inter-State armed conflict (apart from its incompatibility with the horizontal scope in participational terms).
It also follows that the limited participational scope of the concept of inter-State armed conflict obstructs the qualification of a conflict between counterinsurgent State and insurgents as inter-State armed conflict. It is recalled that the concept of insurgency, as understood in this study, is limited to "more or less organized networks composed of *non-State actors*." In view of the *lex lata*, insurgents cannot be a High Contracting Party to the GCs, and by definition cannot become a party to an inter-State armed conflict.[975] Thus, *based on its*

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to duration: "[i]nternational armed conflicts occur when the armed forces of one party are engaged in hostilities of a reasonably sustained nature against another party").

974 (1999m), *The Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment of 15 July 1999 (Appeals Chamber)*; ICRC (2008c); Dinstein (2004), 14. See also Article 2 HIVR, which also restricts its applicability to armed conflicts between two or more contracting parties. Today, all States are party to the GCs, and therefore they would apply to every inter-State armed conflict irrespective of their customary status. In general, it remains irrelevant whether a State or its regime is recognized under international law by all or a majority of States. It is also irrelevant whether a the States involved act alone or upon the authorization or under cover of an international organization, be it regional or universal The mere fact that a State is a Contracting Party to the Geneva Conventions and AP I is sufficient to consider it as a party to an IAC. Thus, the US government's initial argument that the Taliban regime was not recognized as the legitimate regime of Afghanistan and that as a result it was not bound to treat its fighters in accordance with GC II was unfounded. See also Schindler (1979), 129; (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, §§ 90-92, concerning the applicability of GC IV to Israel despite Jordan's position towards recognition of Israel.

975 It has been suggested that a norm of customary international has developed that permits transnational non-State actors to qualify as parties to an IAC. It is, however, submitted that, to date, there is insufficient *opinio juris*, nor State practice from which to conclude that the law of IAC applicable to inter-State

failure to qualify as an inter-State armed conflict, the law of IAC does not regulate a conflict between a counterinsurgent State and an insurgent movement irrespective of the situational context in which it takes place, and regardless of the international character thereof. It thus follows that in establishing whether a conflict constitutes an inter-State armed conflict, it is the very *nature of the parties* to the conflict, and not the geographical scope of the conflict that is determinative.

This does not, however, preclude the possibility that a conflict between the counterinsurgent State and insurgents could *evolve into* an inter-State armed conflict. This would occur when it can be established that the insurgent's hostile activities against the counterinsurgent State are legally attributable to another State due to that State's exercise of control over the insurgents, such that the insurgency movement can be regarded to belong to the other State, party to the IAC. We have dealt with this construct in the previous section.

Dinstein submits another basis for the existence of an inter-State war between a counterinsurgent State and insurgents. In view of the invasion in Afghanistan 2001 and the subsequent military operations against the ousted Taliban government, he holds that

> [c]ontrary to conventional opinion, I believe that the inter-State war in Afghanistan that started on October 7, 2001 continues unabated to this very day, despite the transformation in the status of the Taliban (who no longer form the *de facto* government of Afghanistan). When American and allied troops are fighting the Taliban (and their al Qaeda ally) on Afghan or adjacent (Pakistani) soil, this is direct sequel to the hostilities that led to the ouster of the Taliban from the seat of power in Kabul. Both segments (past and present) of the hostilities are consecutive scenes in the same drama unfolding in Afghanistan. The inter-State war will not be over until it is over. And it will only be over once the Taliban are crushed.[976]

However, (as Dinstein himself acknowledges) this is a minority view which, it is submitted, is flawed as the Taliban, once ousted as the government of Afghanistan, can no longer be viewed to represent the State of Afghanistan and as such constitutes from that moment an organized armed group of non-State actors the actions over which Afghanistan as a State no longer exercises effective control.

Whereas the nature of the insurgents prevents the law of IAC to become applicable to the conflict between them and the counterinsurgent State on the mere basis of its qualification as an inter-State armed conflict, this, however, does not exclude the applicability of the *law of IAC* to the conduct of counterinsurgent forces vis-à-vis an insurgent movement, and vice-versa.

For example, an insurgent movement may become a party to an IAC, *firstly*, because the belligerency of the group is formally recognized by the opposing State, and *secondly*, when the movement represents a national liberation movement as meant in Article 1(4) AP I. However, while the two exceptions to this rule are, in theory, possible, today they find no application in practice. The application of the law of IAC on this basis is therefore not realistic.

Also, (parts of) the law of IAC may become applicable in the relationship between the counterinsurgent and the insurgents based on declaratory statements on the side of the latter that it considers itself bound by (certain parts of) the law of IAC, or by means of special arrangements, as set forth in CA 3.

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armed conflicts should also apply to situations outside the periphery of that scope. Melzer (2008), 267; Sassòli (2006), 4.

976 Dinstein (2009b), 51.

Finally, while a minority standpoint, there is growing support for the view that the law of IAC also regulates the conduct of a counterinsurgent State vis-à-vis the insurgents in so far a counterinsurgent State's operations against insurgents exercised in the territory of another State B qualify as an inter-State armed conflict with that State.[977] Given the condition of *animus belligerenti* underlying the concept of inter-State armed conflict, an inter-State armed conflict does not arise when a State genuinly and unambiguisly[978] invites, or consents – explicitly or tacitly – to the execution of military operations of another State on its territory, as there is no interference with the consenting State's sovereignty.[979] It would therefore follow that the inter-State relationship between a counterinsurgent State and a 'host' State in the contexts of SUPPCOIN and *consensual* TRANSCOIN do not qualify as inter-State armed conflicts, and that as a consequence the law of IAC has no bearing on the conduct of the counterinsurgent vis-à-vis the insurgents.

Of the situational contexts examined in this study, an inter-State armed conflict could arise in the context of *non-consensual* TRANSCOIN. In *non-consensual* TRANSCOIN the law of IAC applies in the conflict between a counterinsurgent State and insurgents not because *that* conflict qualifies as an inter-State armed conflict, but rather as a corollary of the inter-State conflict between the counterinsurgent State and State B in which territory the TRANSCOIN operations take place. As a result, the law of IAC regulates the vertical relationship between the counterinsurgent State and the insurgents, in which the latter are to be viewed not as party to the conflict, but as civilians protected from direct attack unless and for such time as they DPH. As explained by Akande, the principal argument underlying this construct is that

> [i]t may well be that a conflict between a State and a non-state group is not to be regarded as an international armed conflict in and of itself. However, that contention does not itself resolve the matter under consideration. It is important to recall that the purpose of classification of conflicts is so that one can determine the law which applies to the actions of participants in the conflict. Therefore, the essential question in such a case is which law applies to the conflicts between a foreign State and a non-state group in the territorial State. Where the conflict between the foreign State and the non-state group is inextricably bound up with

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[977] Akande (2012a), 72 ff. See also (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)*, § 40, which relies on a section from Antonio Cassese's book '*International Law*' principally focusing on situations of belligerent occupation. The Israel HCJ extends Cassese's interpretation to all armed conflicts taking place outside the obrders of a state. See, for criticism of the HCJ's conclusion, also Schöndorf (2007), 304.

[978] Ago (1979), § 68. Consent under duress obtained in violation of Article 2(4) UN Charter is not a valid basis for a legal agreement, see Article 52, VCLT, with the exception of threat or use of force authorized by the UN Security Council.

[979] Clearly, the consent must be valid and genuine. As argued by some experts, a request for support may be unlawful, both under international law and, in most cases, national law in the case of an emerging civil war, when the control of the State may have crumbled to the extent that there is possibly no longer a legitimate authority competent to issue a lawful request for external assistance to other States.[979] In other instances, the concept of consent may be used as "a mere device used by the neighbouring state to mask an invasion, or be made by an individual not constitutionally capable or speaking for the State." Byron (2001), 82. In the words of Reisman and Silk, every State could arguably "maintain a stable of political would-bes and has-beens of varying national pedigrees then at the appropriate time, one with the right nationality would be saddled and bridled and brought to the ring to issue the necessary 'invitation'." See Reisman & Silk (1988), 472-74 Examples are the arguably doubtful 'invitation' to the Soviet Union by the puppet-government of Afghanistan in 1979; the Hungarian Uprising in 1956; the Czechoslovak case in 1968; the Grenada case in 1983. See Harris (2004), 917-20. Similar doubts have been raised in respect of the invitation by the Afghan Interim Government in 2002, and the invitation by the Iraqi government following the end of the occupation phase of the Iraq war in 2004. See Turns (2010).

another conflict (notably a conflict between two States) such that acts under the two conflicts (to the extent the conflicts can be distinguished) cannot be separated, that participants will, in reality, be bound to observe the law of international armed conflict.[980]

Whether in the context of a TRANSCOIN an inter-State armed conflict arises must be determined on the facts, but it cannot be *merely* concluded from the fact that the counterinsurgent State operates on the territory of State B. As noted, inter-State armed conflict is characterized by the existence of *conflicting* interests by which one or all express a belligerent intent vis-à-vis the other State.[981] A determinative factor is the issue of consent. Where such consent is absent, an inter-State armed conflict undoubtedly arises when State B actively resists the application of combat power in TRANSCOIN, even when this is strictly limited to operations against the insurgents. It may also be argued that an inter-State armed conflict arises where the application of combat power in TRANSCOIN, while strictly limited to operations against the insurgents, takes place when in response to a request for permission by the counterinsurgent State, State B explicitly refused the consent but otherwise refrains from active resistance. Finally, some argue that an inter-State armed conflict is said *not* to arise when consent was not at all sought prior to the operations, but the *animus belligerendi* was only directed against the insurgents, and not in any way against the territorial State.[982]
(While a minority view) some, however, contend that the *mere* fact that TRANSCOIN takes place on the territory of another State *without that State's consent* triggers an IAC, regardless of the reasons for the absent of that consent, and regardless of whether the *animus belligerendi* was aimed at the insurgents of State B.[983] Support for this contention is said to be found in the obligations arising from Article 2(4) UN Charter, which prohibits the use or threat of force directed *against* the territorial integrity or political independence of another State. As a consequence of acts violating this fundamental obligation of the law of inter-State force, "a situations of armed conflict between the two automatically arises," and it "[it] matters not (and ought to matter not) whether the territorial State responds by using force against the foreign State."[984] After all, following Article 2 GC IV, an inter-State conflict also arises in the absence of a formal acknowledgment of war. In that light, it is also *not relevant* for a violation of Article 2(4) UN Charter – and an inter-State armed conflict to arise between the counterinsurgent State and State B – whether the TRANSCOIN operations were directed against the government of State B, and/or solely served other objectives, for example to eradicate an insurgent stronghold in State B.[985] This was also the view of the UN Commission of Inquiry regarding the Israeli military operations against Hezbollah in Lebanon. It concluded that, notwithstanding the fact that "the hostilities in actual fact and in the main

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[980] Akande (2012a), 72-73.
[981] Melzer (2008), 247.
[982] Szesnat & Bird (2012), 236-237, in respect of Operation Phoenix, the Colombian TRANSCOIN directed against the FARC in Ecuador, in which case no consent was requested at all prior to the operations.
[983] Vöneky (2004), 944; Cassese (2005), 420; Dinstein (2009c), 100; Akande (2012a), 72-73;
[984] Akande (2012a), 74.
[985] Support is found in the ICJ's decision in *DRC v. Uganda*, in which it held that […] the obligations arising under the principles of non-use of force and non-intervention were violated by Uganda even if the objectives of Uganda were not to overthrow President Kabila, and were directed to securing towns and airports for reason of its perceived security needs, and in support of the parallel activity of those engaged in civil war(2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*, § 163. See also (1999l), *The Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment of 15 July 1999 (Appeals Chamber , Separate Opinion of Judge Shahabuddeen*. See also the resolution adopted by the OAS following operation 'Phoenix', constituting a TRANSCOIN by Colombia on the territory of Ecuador, which was held to violate the territorial sovereignty of Ecuador.

only" took place between the IDF and Hezbollah, Lebanon was to be viewed as a party to an inter-State armed conflict as it

> was the subject of direct hostilities conducted by Israel, consisting of such acts, as an aerial and maritime blockade that commenced on 13 July 2006, until their full lifting on 6 and 8 September 2006, respectively; a widespread and systematic campaign of direct and other attacks throughout its territory against its civilian population and civilian objects, as well as massive destruction of its public inrastructure, utilities, and other economic assets; armed attacks on its Armed Forces; hostile acts of interference with its internal affairs, territorial integrity and unity and acts constituting temporary occupation of Lebanese villages and towns by IDF.[986]

In sum, in the minds of those supporting this approach, what matters is that non-consensual TRANSCOIN operations against insurgents in the territory of State B, while perhaps intended to be solely directed against the insurgents, constitute the use of non-consensual armed force that at all times establishes a link with State B, because it violates its sovereignty.[987] The two conflicts can therefore not be separated and thus any deprivation of life occurring resulting from TRANSCOIN operations must comply with the law of IAC.
Assuming the conflict between the counterinsurgent State and the territorial State constitutes an inter-State armed conflict, the follow-up question is whether the law of IAC – as a consequence – governs the relationship between the counterinsurgent State and the insurgents.
While the majority view is that this is not the case (and that the law of NIAC applies), when following the IAC-approach set out above the argument could be made that the insurgents are to be principally viewed not as parties to the conflict bearing horizontal obligations vis-à-vis the counterinsurgent State (in the context of a separate NIAC), but must be regarded as civilians present in the geographical space of an IAC, and must be treated as subjects in the vertical relationship with the counterinsurgent State in accordance with their conduct (just as any other civilian having nothing whatsoever to do with the insurgency). For the question of their targetability, this implies that, in the absence of their DPH, they are to be viewed as mere criminal suspects to be treated under the normative paradigm of law enforcement. In contrast, following their DPH, they may be directly attacked, but only "for such time," under the normative paradigm of hostilities, and in conformity with the remaining principles, prohibitions and restrictions.[988] Here, the law of IAC differs significantly from the law of NIAC, for, as we will see in Chapter VII, under the latter regime insurgents qualifying as members of the armed forces of an insurgency movement in a continuous combat function may be attacked continuously. Nonetheless, it is in the area of detention that the applicability of the law of IAC is of importance, for it offers a quite comprehensive framework of valid norms practically all of which are missing in the law of NIAC.

We will now turn to the question of the applicability of the law of IAC in the context of belligerent occupation. This exclusively relates to the situation of OCCUPCOIN.

2.1.2. Belligerent Occupation

This paragraph examines the applicability of the law of IAC to OCCUPCOIN. Traditionally, belligerent occupation was understood to follow an inter-State war following a declara-

[986] UNHRC (2006), §§ 55, 58.
[987] Akande (2012a), 77.
[988] For an analysis of the concept of DPH, see Chapter VII.

tion of war, or following a capitulation or armistice (neither of which ends the state of war). CA 2, paragraph 1 covers this situation. Taking into account the virtually non-resisted occupations of Denmark and Czechoslovakia by Nazi Germany in World War II, in its paragraph 2, CA 2 opens the applicability of the Geneva Conventions to "*all* cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." The only form of occupation excluded from the scope of CA 2 is treaty-based occupation.[989] The principal question before us is therefore whether the legal relationship between the counterinsurgent State and insurgents following the latter's targeting or operational detention is governed by the law of IAC by virtue of the fact that it takes place in occupied territory. In addition, it is of essence to briefly introduce the concept of belligerent occupation, notwithstanding the assumption that the concept of OCCUPCOIN, as defined in this study, already presumes the existence of a situation of belligerent occupation. Nonetheless, in operational practice, this is a question of crucial importance, for clearly it determines the normative framework to which a State is bound. In addition, it is submitted that the concept of belligerent occupation for it also assumes that an Occupying Power exercises *authority* over territory.[990] Such exercise of authority is, as will be discussed in more detail in Chapter VIII, of practical relevance for the question of the interplay between IHRL and LOAC and the issue whether a targeting operationa is to be governed by the normative paradigm of law enforcement or hostilities. It is to this issue that we will first briefly turn.

2.1.2.1. The Concept of Belligerent Occupation

As argued by Paulus, "it should be sufficient for the establishment of 'authority' if the occupying power has established general control over the occupied territory."[991] Such exercise of authority is temporary, in the sense that "the occupying power does not hold enemy territory by virtue of any legal right."[992] It may, however, be long lasting.[993]
Effective control is *not* established by the mere formal proclamation of occupation. Nor is the mere non-consensual presence of military forces in foreign territory sufficient for effective control to take effect. Thus, patrols or hit-and-run actions by units that withdraw from the foreign territory do not amount to the occupation of the territory in which they operate. The same may be concluded in the case of invading airborne or mechanized units.[994] While

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[989] Kelly (1999), 149; Roberts (1984), 250; Dinstein (2009c), 31-32, 35; Pictet (1958a), 22; Arai-Takahashi (2010), 27, referring to Stein (1948), 353; Colby (1925), 911; Feilchenfeld (1942), 12.

[990] Following Article 42 HIVR, belligerent occupation implies that foreign territory "[…] is actually placed under the *authority* of the hostile army" of a State – thereby becoming – Occupying Power. The occupation extends only to the territory where such *authority* has been established and can be exercised. This may involve the territory of an adverse party to the conflict, as well as territory of neutral States or even co-belligerents. Roberts (1984), 300; Dinstein (2009c), 34. Arai-Takahashi (2010), 8, suggests that the law of belligerent occupation also applies to States exercising effective control over disputed areas formally part of their own territories, such as Kashmir or Nagorno-Karabav. This view must be rejected. As made clear by Dinstein (2009c), 34, "the law of belligerent occupation is *inapplicable* to non-international armed conflicts (so called 'civil wars'). […] [I]n an internal conflict, neither territory controlled by insurgents nor that preserved or regained by the central government can be regarded as belligerently occupied." This is limited to cases in which the insurgents are not recognized as party to an armed conflict in the sense of Article 1(4) AP I, or where they are recognized as belligerents. In both cases, the armed conflict will be governed by LOAC regulating IAC.

[991] Paulus (2012), 134.

[992] (1948d), *USA v. Otto Ohlendorf et al. (Einsatzgruppen Trial) (10 April 1948)*, 492-493.

[993] As exemplified by Turkey's occupation of northern-Cyprus, which began in 1974.

[994] U.K. Ministry of Defence (2004), 276, § 11.3.2.

they may 'hold' territory after combat, it does not automatically entail the crossing of the thresholds of effective control required by the law of belligerent occupation, as appears to be the view of the ICRC and the ICTY.[995]

Instead, the exercise of effective control is generally perceived to commence once, and for so long an invading State has the *capability* "to exercise the level of authority over enemy territory necessary to enable it to discharge all the obligations imposed by the law of occupation,"[996] irrespective of a State's willingness to exercise authority. According to the UK Manual of the Law of Armed Conflict, a two-prong test applies.

Firstly, that the former government has been rendered incapable of publicly exercising its authority in that area; and *secondly*, that the occupying power is *in a position to substitute* its own authority for that of the former government.[997]

Whether control is *sufficiently* 'effective' cannot be answered in the abstract, but is a factual determination. As argued by Dinstein, occupation cannot take effect by air supremacy or naval power, but requires "'boots' on the ground."[998] Occupation does not take effect if continuing combat obstructs a sufficient degree of stabilization, and when it remains impossible to determine who exercises effective control over the particular part of territory. Some general guidelines that apply to every situation of occupation are, as stated in the UK's Manual of the Law of Armed Conflict that

[f]or occupation of an area it is not necessary to keep troops permanently stationed throughout that area. It is sufficient that the national forces have withdrawn, that the inhabitants have been disarmed, that measures have been taken to protect life and property and to secure order, and that troops are available, if necessary to enforce authority in the area.[999]

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[995] For the ICRC, see Thürer, arguing that "a situation of occupation exists whenever a party to a conflict is exercising some level of authority or control over territory belonging to the enemy," which may imply that the state of belligerent occupation may arise already in the invasion phase of hostilities. See Thürer (2005), available at http://www.icrc.org/web/eng/siteeng0.nsf/html/occupation-statement-211105?opendocument. See also Pictet (1958a), 60. As for the ICTY, see (2003i), *Naletilic, aka Tuta and Martinovic, aka Stela, IT-98-34-T, Trial Chamber Judgment (31 March 2003)*, § 221-222. While acknowledging the requirement of effective control for the purposes of Article 42 1907 Hague Regulations, it held that, in so far it concerned the issues relating to the protection of "individuals" as civilians under GC IV, such effective control is not required. The threshold to be applied is the determination that the individuals in question have fallen into "the hands of the Occupying Power." Zwanenburg criticizes this viewpoint, arguing that the ICTY "appears to conflate the determination of "protected person" with the determination of an occupation, and does not recognize that the Convention contains a number of provisions that apply specifically to occupied territories." Zwanenburg (2004), 749. See also Naert (2005), 24. It is submitted that this interpretation merely seeks to ensure the early applicability of GC IV, so as to enhance the protection of civilians in the early stages of armed conflict. It is therefore not to be viewed as reflecting the *lex lata* for the establishment of effective control as meant in Article 42 HIVR.

[996] Thürer (2005), available at http://www.icrc.org/web/eng/siteeng0.nsf/html/occupation-statement-211105?opendocument.

[997] U.K. Ministry of Defence (2004), 275, § 11.3 (emphasis added). The US Field Manual on the Law of Land Warfare, takes a narrower approach in relation to the second requirement, and demands that the Occupying Power must have "successfully substituted" authority; a phrasing which implies a higher threshold. U.S. Department of Army (1956), rules 352-356. See also (2003i), *Naletilic, aka Tuta and Martinovic, aka Stela, IT-98-34-T, Trial Chamber Judgment (31 March 2003)*, § 217; Dinstein (2009c), 39; Roberts (1984), 300-301; Schmitt (2003) (http://www.crimesofwar.org/print/onnews/iraq5-print.html); Faite (2004), 72; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*, 310

[998] Dinstein (2009c), 44; also Gasser (2008), 274. But see the situation of Gaza, and the question of whether Israel's supremacy of the air and control over the borders entails occupation.

[999] U.K. Ministry of Defence (2004), 276, § 11.3.2. The US Field Manual on the Law of Land Warfare contains similar language, and opens the possibility for remote effective control, holding that "[i]t is suffi-

More specific parameters that may be taken into consideration are the size of the occupying forces, the manner in which they operate, the particular terrain, the density of the population, the degree of opposition, *et cetera*.

Of particular relevance to the situation of OCCUPCOIN, it is generally acknowledged that the occupation does not end[1000] because of the mere "existence of a rebellion or the activity of guerrilla or paramilitary units"[1001] or "[…] a temporarily successful rebellion in part of the area under occupation,"[1002] even when characterized by almost continuous hostilities.[1003] Determinative elements for the verification of the existence of a situation of occupation met with resistance are "the extent of the area controlled by the movement and the length of time involved, the intensity of the operations, and the extent to which the movement is internationally recognized."[1004] Locally, the Occupying Power's degree of effective control may be temporarily reduced or ceased to insurgents, but this too does not end the occupation.[1005] The state of belligerent occupation will remain in effect as long as the Occupying Power is *capable* of assuming control of any part of the territory, at its own will.[1006] Thus, a State continues to be an Occupying Power while it does not exercise effective control in

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cient that the occupying force can, within a reasonable time, *send detachments of troops to make its authority felt* within the occupied district. It is immaterial whether the authority of the occupant is maintained by fixed garrisons or flying columns, whether by small or large forces, so long as the occupation is effective. See U.S. Department of Army (1956), 139(emphasis added). The ICTY relied on this passage in (2003i), *Naletilic, aka Tuta and Martinovic, aka Stela, IT-98-34-T, Trial Chamber Judgment (31 March 2003)*, § 217.

[1000] Occupation *terminates* when the Occupying Power ceases to exercise effective control over the occupied territory. Schwarzenberger (1968b), 317. This, too, is a factual determination. This takes place, firstly, when it evacuates the occupied area, either at its own accord or involuntarily (due to such resistance that effective control no longer sufficiently exists and the occupying power is forced to retreat); Secondly, occupation terminates when, and in so far, effective control transfers to another (military) authority; U.K. Ministry of Defence (2004), 277, § 11.7. On 28 June 2004, the so-called Coalition Provisional Authority formally handed over full governmental control to the Interim Government of Iraq. It is argued by some that, when applying the factual test of effective control, the continued presence of the multinational force in Iraq, based on the latter's consent, after 28 June 2004 suggests continued occupation. For this argument, see Arai-Takahashi (2010), 11; Roberts (2005), 37-39. However, it must be borne in mind that the Interim Iraqi Government enjoyed the right, expressly recognized, to demand the withdrawal of the coalition troops. In that respect, the situation differs fundamentally from occupation. See Roberts (2006), 617. Thirdly, occupation terminates in the case of subjugation or conquest, which "implies a transfer of sovereignty, which generally takes the form of annexation and is normally effected by a treaty or peace." See U.S. Department of Army (1956), 139, § 353. Occupation *does not terminate* following a declaration aimed at that effect. Neither does occupation terminate "if the occupant, after establishing its authority, moves forward against the enemy, leaving a smaller force to administer the affairs of the district." U.S. Department of Army (1956), § 360. The UK LOAC Manual adds that the occupying power must have disarmed the inhabitants, and that the "authority of the occupying power should be presented by the presence of a commissioner or civil officials." U.K. Ministry of Defence (2004), 277, § 11.6.

[1001] U.S. Department of Army (1956), § 360.

[1002] U.K. Ministry of Defence (2004), 277, § 11.7.1.

[1003] Roberts (2005), 34. An example is the fierce resistance met by coalition forces in Iraq in 2004, which was in certain respects not under control.

[1004] U.K. Ministry of Defence (2004), 277, § 11.7.1.

[1005] Graber (1949), 69; Dinstein (2009c), 43; Zwanenburg (2004), 748.

[1006] (1948b), *United States v. Wilhelm List, et al. (Hostages Case), UNWCC (8 July 1947-19 February 1948)*, 56. See also U.S. Department of Army (1956), § 360. The United Kingdom Manual of the Law of Armed Conflict appears to demand actual military action ("[…] so long as the occupying power takes the steps to deal with the rebellion and re-establish its authority or the area in question is surrounded and cut off"). U.K. Ministry of Defence (2004), 277, § 11.7.1.

terms of Article 42, 1907 HIVR in *all* parts of the occupied territory.[1007] As made clear by Dinstein, effective control may "ebb and flow", and "the fluctuations may be egregious."[1008] It is not until "the power of the occupant is effectively displaced for any length of time, […]" that the state of belligerent occupation as a result of violent confrontations ends.[1009] The crossing of the vertical threshold of belligerent occupation implies the applicability of the law of belligerent occupation, and thus places the counterinsurgent Occupying Power under the obligations and subsequent limitations commensurate to it.

2.1.2.2. The Applicability of the Law of IAC to OCCUPCOIN?

As may be concluded from the above, the concept of belligerent occupation entails that, at least in the relationship between the counterinsurgent Occupying Power and the occupied State, the law of IAC, and the law of belligerent occupation, applies. The question before us is, however, whether the law of IAC also governs the relationship between the counterinsurgent Occupying Power and the insurgents. This is a controversial subject, and principally two approaches can discerned: (1) those viewing that the law of IAC applies and (2) those, opposing the first approach, but arguing that conflicts between the Occupying Power and insurgents constitute a CA 3-NIAC. This paragraph addresses the first view. The NIAC-approach will be subject of examination in paragraph 4.2.

In both doctrine[1010] and case law[1011] support can be found for the view that a conflict between an Occupying Power and insurgents is governed by the law of IAC *as a consequence* of an existing IAC between the Occupying Power and the occupied State.[1012] Cassese, for example, argues:

> as belligerent occupation is governed by the Fourth Geneva Convention and customary international law, it would be *contradictory* to subject occupation to norms relating to international conflict while relating the conduct of armed hostilities between insurgents and the Occupant on the strength of the norms relating to *internal* conflicts.[1013]

It has been held by the ICJ that the law of belligerent occupation – as a subset of the law of IAC – even applies applies to occupied area that is not a State.[1014] The underlying motiva-

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[1007] This was arguably the case in Iraq, 2003. While the United Kingdom was, *de iure*, an Occupying Power, it did not exercise effective control over the city of Basra. It must be emphasized, however, that the notion of effective control was here examined in light of the applicability of the ECHR. (2005r), *Al Skeini*, § 124, per Lord Justice Brooks.

[1008] Dinstein (2009c), 45.

[1009] U.S. Department of Army (1956), § 360.

[1010] Cassese (2005), 420; Dinstein (2009c), 100; Akande (2012b); Akande (2012a), 46 ff.

[1011] (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)*, §§ 16-22; (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*; (2007h), *The Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Décision sur la confirmation des charges (29 January 2007)*, § 200; (2007g), *The Prosecutor v. Katanga and Chui, Case No. ICC-01/04-02/07, Décision sur la confirmation des charges (26 September 2008)*, § 240.

[1012] Discussing this issue: University Centre for International Humanitarian Law (2005), 20; Naert (2010), 490; Lubell (2010), 252; Paulus & Vashakmadze (2009), 115; Melzer (2008), 157; Ferrero (2012), 122 ff.

[1013] Cassese (2005), 420.

[1014] (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, §§ 144-177. In regards Israel's conduct vis-à-vis the Palestinian territories, it held that, notwithstanding the fact that the Palestinian territories are not a State, the conflict between Israel and the Palestinians falls under the umbrella of CA 2(1), as it concerns a a situation of occupation arising from a conflict between Israel and its neighbouring countries.

tion for these conclusions is that in respect of OCCUPCOIN the question is not whether a conflict between the Occupying Power and the insurgents qualifies as IAC or NIAC, but to what law the Occupying Power is bound in its relationship with individuals present in the occupied territory. In that light, "it is the law of occupation and other rules of international armed conflict (including the law of targeting) that conditions how the occupier may respond to an uprising in the foreign territory of which it has temporary occupation. […] To determine otherwise would be to ignore much of the protections to which occupied people are entitled."[1015]

Following this approach, as with TRANSCOIN, the insurgents do not qualify as a party to an IAC, and the conduct of the counterinsurgent Occupying Power vis-a-vis insurgents is regulated by the relevant law of IAC designed to govern the vertical relationship between, on the one hand, a party to the conflict and, on the other hand, civilians.[1016] This implies that the counterinsurgent Occupying Power must view insurgents as civilians who either engage in criminal conduct or in conduct amounting to DPH. In other words, the question is not whether the insurgents are a party to an armed conflict, but whether they are a party to the hostilities.[1017]

2.2. Applicability of the Law of NIAC to Counterinsurgency Operations

This paragraph examines the applicability of the law of NIAC to counterinsurgency operations. This is relatively straightforward in the context of NATCOIN as it constitutes a conflict that by definition is non-international as it not only takes place between the counterinsurgent State and non-State insurgents, but is limited to the territory of the counterinsurgent State.

SUPPCOIN and consensual TRANSCOIN both constitute cases of foreign intervention with the consent or at the invitation of another State B which itself is already engaged in NATCOIN operations against insurgents. It is widely accepted,[1018] despite attempts to the contrary,[1019] that the mere fact that foreign States intervene on the territory of State B does not cause a shift in the existing character of the conflict in State B, i.e. it remains non-international. The consent and invitation indicate that the two States are not opposing enemies whose relationship demonstrates *animus belligerendi*.

It is, for example, therefore that in respect of Afghanistan, as of 19 June 2002, the majority opinion is that a NIAC has been taking place[1020] between, on the one hand, the government of Afghanistan, with support of international military forces combined in ISAF,[1021] and, on the other hand, "individuals and armed groups of diverse backgrounds, motivations and

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1015 Akande (2012a), 47-48.

1016 This may explain why the Israel Supreme Court arrived at a similar conclusion in the *Targeted Killings* case when holding that "[…] the fact that the terrorist organisations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict." (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)*, § 21. See also Cassese (2005), 420.

1017 ICRC (2009), 84; Melzer (2008), 273.

1018 Fleck (2008b), 605; Kleffner (2010b), 59; (2009h), *The Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Confirmation of Charges Decision (15 June 2009)*, § 246.

1019 Aldrich (2000), 62-63.

1020 Duffy (2005), 256; UNAMA & Afghanistan Independent Human Rights Commission (2010); Schmitt (2009), 309; Ducheine & Pouw (2009), 65; Human Rights Watch (2007), 79; Hampson (2012), 265,

1021 ISAF supports the government of Afghanistan on the basis of Security Council Resolution 1386 of 20 December 2001, which endorsed the Bonn Agreement, in which Afghan political factions had agreed to the stationing of ISAF.

command structures including those characterized as the Taliban, the Haqqani network, Hezb-e-Islami and al-Qaida affiliates such as the Islamic Movement of Uzbekistan, Islamic Jihad Union, Lashkari Tayyiba and Jaysh Muhammad."[1022]

More controversial, however, is the applicability of the law of NIAC to the relationship between the counterinsurgent State and insurgents in the contexts of non-consensual TRANSCOIN and OCCUPCOIN.

To recall, it was previously concluded that arguments could be made that it is the law of IAC that governs the relationship between the counterinsurgent State and insurgents in those situations. However, the majority view is that hostilities between the counterinsurgent State and members of the armed forces of insurgency movements in both contexts should be regarded as separate armed conflicts that qualify as NIAC when such insurgency movements can be viewed as a party to a separate armed conflict when they operate *independently* from another State.[1023] Arguments in favor of this conclusion differ. Criticism has been expressed, for example, on the Israel HCJ's conclusion in the *Targeted Killings* case that "[t]he fact that the terrorist organizations and their members do not act in the name of a State does not turn the struggle against them into a *purely internal state conflict*" and thus that "[c]onfronting the dangers of terrorism constitutes part of the international law dealing with armed conflicts of international character."[1024] In his comment on this case, Schöndorf remarks that "the fact that a conflict is not an internal one is not sufficient to substantiate the conclusion that it is an international armed conflict. Articles 2 and 3 of the Geneva Conventions appear inconsistent with the line of argument adopted by the Court on this point."[1025] Indeed, among commentators, the most common argument is that in view of their non-State nature, it follows that the conflict cannot qualify as an IAC, as this would upset the State-oriented party-structure of the concept of IAC, and thus would have to qualify as a NIAC.[1026] As argued by the ICRC, "any other view would discard the dichotomy in all armed conflicts between the armed forces of the parties to the conflict and the civilian population; it would also contradict the definition of international armed conflicts as confrontations between States and not between States and non-State actors."[1027]

In addition, it has been argued that the applicability of the relevant framework of LOAC pertaining to CA 3-NIACs is preferable over the applicability of the law of IAC, as it is thought that non-State organized armed groups are unable to comply with the many demands set forth in the law of IAC, which may eventually undermine their willingness at all to comply with LOAC. CA 3, instead, is designed for armed conflicts in which non-State organized armed groups are a party as it contains basic obligations.[1028]

[1022] UNAMA & Afghanistan Independent Human Rights Commission (2010),

[1023] Support for this view can be found in (1999m), *The Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment of 15 July 1999 (Appeals Chamber)*, § 84, in which it was held that each separate armed conflict has to be qualified on its own merits, and (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, § 219, where the ICJ held that, besides the IAC between the US and Nicaragua, a NIAC existed between Nicaragua and the *contras*.

[1024] (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)*, § 21 (emphasis added).

[1025] Schöndorf (2007), 304.

[1026] Ferrero (2012), 124, 125 and 128; Milanovic (2007), 383-386; Arai-Takahashi (2010), 300-303; Lubell (2012), 434; Sassòli (2006), 8-9; Murphy (2007), 14-32; Jinks (2004), 189; Paulus & Vashakmadze (2009), 111; Kreß (2010), 245;

[1027] ICRC (2009), 23-24.

[1028] Ferrero (2012), 124, 125 and 128; Lubell (2012), 434.

Having addressed the principal reasons for qualifying the situational contexts as NIACs, it is of relevance to recall that the concept of NIAC itself involves two types recognized under LOAC, namely (1) CA 3-NIACs and (2) AP II-NIACs.
In view of the above, two important issues require examination. *Firstly*, does the horizontal scope of CA 3 or Article 1 AP II accommodate all of the situational contexts that seemingly qualify as NIACs? *Secondly*, when is the threshold of CA 3 or AP II crossed, allowing the relevant law of NIAC to become applicable at all? While the latter is an assumption in the present study, it is nonetheless of relevance given the difficulty in establishing the crossing of the thresholds of CA 3 and AP II in the context of insurgency.
Both questions will be addressed consecutively in respect of CA 3 and AP II respectively.

2.2.1. CA 3-NIACs

2.2.1.1. The Applicability of the Law of CA 3-NIAC to Counterinsurgency Operations

CA 3 delineates its scope of applicability to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties," to be determined in each single case.[1029] This provision constitutes a major deviation from the traditional, sovereignty-focused view on war, for CA 3 recognized that non-State actors who were not formally recognized as belligerents, and who could not be considered as agents of a State as a result of their affiliation therewith could become a party to a conflict.[1030]
However, this phrase has been subject of much debate in respect of its ability to accommodate so-called transnational use of force, i.e. situations where a State applies combat power on the territory of another State not against that State, but against a non-State armed group. In the context of this study, this situation is encapsulated in the concept of TRANSCOIN. As noted previously, examples of such situations are commonplace: the use of force by Uganda and Rwanda against rebels in the Democratic Republic of the Congo, the Israel intervention in Lebanon to attack Hezbollah; operation 'Phoenix' by Colombia in Ecuador against the FARC; Turkish military operations on the territory of Iraq against the PKK; US drone attacks in Pakistan against Al Qaeda and the Taliban, and so forth. The principal issue is that, when interpreting both CA 2 and CA 3 (as well as Article 1 AP II) in a strict fashion, these situations fall outside the concepts of both IAC and NIAC. As to the former, transnational operations by a counterinsurgent State against insurgents on the territory of another State cannot qualify in and by itself as an inter-State armed conflict or belligerent occupation as the insurgents are not a State. As to the latter, these conflicts are not strictly of a 'non-international' nature, as they are carried out on the territory of another State, so there is an international element. In addition, when reading CA 3 (and Article 1 AP II), it could be concluded that the applicability of both provisions is, in geographical terms, limited to conflicts taking place on the territory of one Contracting Party.
This conundrum has been subject of much debate in the past years, and was raised mostly as a result of the US position vis-à-vis its perceived global armed conflict against Al Qaeda and terrorism in general. Many have proposed new approaches,[1031] including new types of conflicts, but these have mostly been rejected. The majority view is that the traditional di-

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[1029] (2003n), *Rutaganda v. The Prosecutor, Case No. 96-3-A, ICTR, Appeals Chamber Judgment (26 May 2003)*, § 93: "The definition of an armed conflict is termed in the abstract, and whether or not a situation can be described as an 'armed conflict', meeting the criteria of Common Article 3, is to be decided upon on a case by-case basis."
[1030] Moir (2002), 1 ff.
[1031] See, for example, Corn (2007), 295; Schöndorf (2004), 26.

chotomy between IAC and NIAC persists and that LOAC is sufficiently flexible to face these 'new' conflict-constructs.[1032]

In light of the horizontal scope of CA 3, two issues are attached to this phrase: (1) for a situation to qualify as a CA 3-NIAC, when is a situation of conflict "an armed conflict *not of an international character*"; and (2) what is the meaning of the word "one" in the phrase "occurring in the territory of *one* of the High Contracting Parties"?

2.2.1.1.1. "In the Territory of *One* of the High Contracting Parties"

CA 3 states that it applies to armed conflicts "in the territory of one of the High Contracting Parties". The phrase contains a *geographical* element, the scope of which is disputed. It is uncontroversial that this phrase refers to *internal* NIACs, i.e. armed conflicts between a State Party to the Geneva Conventions and a non-State opponent taking place on the territory of that State. The language of CA 3 strongly suggests so and such a reading would logically follow from the drafting history of CA 3.[1033] In contrast to some persistent views to the contrary,[1034] it may, however, also be concluded from the preparatory works to CA 3 that its wording was not chosen to *exclude* its applicability to situations of armed conflicts between States and non-State armed groups taking place on another State's territory, or on more than one State's territory.[1035] All that is required is a territorial link with a State Party to the GCs. As explained by Melzer,

> "[…], as the applicability of Article 3 GC I to IV, contrary to Article 2 GC I to IV, does not require the involvement of a contracting State as a party to the conflict, it is only logical that this criterion was replaced by the prerequisite of a territorial link to a contracting State. The legislative novelty of Article 3 GC I to IV was that each contracting State established binding rules not only for its own conduct, but also for that of the involved non-State parties. The authority to do so derives from the contracting State's domestic legislative sovereignty, wherefore a territorial requirement was incorporated in Article 3 GC I to IV.[1036]

[1032] Akande (2012a), 71; Lubell (2012), 439; Bethlehem (2012), 464 ff.

[1033] Murphy (2007), 10; Bartels (2009), 63; Cerone (2007), 12, arguing that a reading limiting the applicability of CA 3 to internal NIACs only "[…] comports with the notion that the provisions of Common Article 3 were drafted against the backdrop of state authority and jurisdiction over the battlefield, an authority and jurisdiction which would not exist (or would exist to a much lesser extent) outside of the state's authority." It may be noted that the draft text of CA 3 that appeared before the Diplomatic Conference of 1949 referred to "all cases of armed conflict which are not of an international character which may occur in the territory of *one or more* of the High Contracting Parties, […].[1033] The words "or more" were eventually omitted from the final text. As explained by Bartels, in the Final Record "no mention is made of the reason for omitting 'or more'. It is possible that so-called off-the-record 'hallway diplomacy' gave rise to this change, but it seems more plausible, in view of the recorded discussion in the Special Committee, that at some point the words 'or more' were felt to be void because everyone seemed to agree that the type of armed conflict being discussed was *purely internal in character*" (Bartels (2009), 63 (emphasis added).

[1034] In relation to its conflict with Al Qaeda, the US Administration has supported this restrictive reading of CA 3 to conclude that CA 3 could not apply to Al Qaeda operatives detained by the US, arguing that the conflict did not take place "in the territory of *one* of the High Contracting Parties" (i.e. the US alone), but, potentially, on the territory of *any* High Contracting Party. Bybee (2005), 86. See also (1998l), *The Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgment of 27 January 2000 (Trial Chamber)*, § 248 ("non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups within the territory of a *single* State" (emphasis added)).

[1035] For evidence, see the statements of the Mexican and Soviet delegates, (1949b), 336 and 327. See also Melzer (2008), 258. In contrast: Moir (2002), 31.

[1036] Melzer (2008), 258.

This extensive view finds widespread support among *inter alia*, legal scholars,[1037] the Statute of the ICTR,[1038] the U.S. Supreme Court,[1039] the ICRC[1040] as well as the ICJ,[1041] and finds further corroboration by State practice.[1042] The interpretation therefore, adhered to in the present study, is that the word "one" is to be read as "a". "[B]ased on a textual reading and on a contextual approach that considers the reasoning and objective of the article"[1043] the applicability of CA 3 then stretches to an armed conflict between a State and non-State organized armed groups (or between such organized armed groups) as long as it takes place on the territory of *a* High Contracting Party to the GCs. As today (nearly) every State is a party to the Geneva Conventions, CA 3 has universal application. In addition, given the customary status of CA 3,[1044] any territorial limitation following from the text of CA 3 is rendered meaningless. In sum, CA 3 does not require (1) that the State in which the conflict occurs should also be a party to the conflict; (2) that a NIAC cannot take place in the territory of more than one State; and (3) that the State on which territory the conflict takes place is a High Contracting Party to the GCs.

2.2.1.1.2. "Armed Conflict Not of an International Character"

The phrase "armed conflict not of an international character" has been subject to much attention since the drafting stage. In the words of Farer: "[o]ne of the most assured things that might be said about the words 'armed conflict not of an international character' is that no one can say with assurance precisely what meaning they were intended to convey."[1045] However, most attention was given to the meaning of the words "armed conflict" in the context of the vertical scope of CA 3 (see below), and not so much to the words "not of an international character." It was quite clear from the outset that CA 3, as "an almost unhoped for extension of Article 2" covering wars between States, was to cover "civil wars and internal conflicts, the dangers of which are sometimes even greater than those of international wars."[1046] While on the one hand the reference to civil wars and internal conflicts may be viewed to exclude the applicability of CA 3 from situations of less gravity in terms

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[1037] Moir (2002), 36 ("there is no question of the application of [Common] Article 3 being dependent upon any criteria other than the existence of an armed conflict in the territory of *a* High Contracting Party"); Sassòli (2006), 9; Murphy (2007); Bassiouni (2002); Jinks (2004), 189.

[1038] See Articles 1 and 7, extending the jurisdiction of the ICTR to violations of LOAC committed in Rwanda and its neighbouring States.

[1039] (2006b), *Hamdan v. Rumsfeld (Judgment of 26 June 2006)*

[1040] ICRC (2008c), 3: "Indeed, any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention."

[1041] (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, § 218, referring to its ruling in (1949a), *Corfu Channel Case (United Kingdom v. Albania), Judgment of 9 April 1949 (Merits)*, 22, that CA 3 reflects "elementary considerations of humanity, even more exating in peace than in war," pointing at the universal applicability of the provision (arguably even to IAC).

[1042] Brown (1996).

[1043] Lubell (2010), 101.

[1044] (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, § 218, referring to its ruling in (1949a), *Corfu Channel Case (United Kingdom v. Albania), Judgment of 9 April 1949 (Merits)*, 22, that CA 3 reflects "elementary considerations of humanity, even more exating in peace than in war," pointing at the universal applicability of the provision (arguably even to IAC).

[1045] Farer (1971), 43.

[1046] Pictet (1960), 28.

of the vertical scope of NIAC,[1047] at the same time it could be understood to mean that, in terms of its horizontal scope, the words "not of an international character" would exclude armed conflicts on the territory of another State party to the conflict or involving another State. In fact, a draft version of CA 3, presented at the XVIIth International Red Cross Conference in Stockholm, specifically referred to "cases of *civil war, colonial conflicts, or wars of religion*,"[1048] as forms of conflict "not of an international character;" words that eventually were omitted. However, at the same time, this also corroborates that from the outset the drafters viewed the words "armed conflict not of an international character" to be essentially *limited* to internal armed conflicts.[1049] This limited applicability may also be concluded from the ICRC Commentary on CA 3, which interprets the phrase "not of an international character" to mean armed conflicts "which are in many respects similar to an international war, but take place *within the confines of a single country*," despite its call that CA 3 was to be applied as wide as possible.[1050] Nowhere in the *travaux preparatoires*, nor in the ICRC Commentary is there any indication that the words "armed conflicts not of an international character" were to include conflicts between a State and a non-State armed group taking place in the territory of another State.

Today, there is, however, increasing support for the view that the phrase "armed conflict not of an international character" is to be understood to go beyond the limits of internal war. A *first* basis for support can be found in the removal from the draft text of CA 3 of "civil war, colonial conflicts, or wars of religion." Rather than weakening the text, the removal can be said to have enlarged its scope.[1051] Indeed, such extension would be quite logical. As explained by Cerone

> [i]t could be argued that use of the term "non-international," instead of internal, was a conscious choice intended to ensure that all armed conflicts were covered. Under that reading of "non-international" armed conflict, the phrase would encompass any armed conflict other than one that was international in the sense of Common Article 2 (i.e. interstate). This position rests on the logic of the Convention regime in the context of the international legal system. If Common Article 3 would apply even in the context of a purely internal conflict, then *a fortiori* it would apply to a conflict with a transnational dimension, in which the principle of non-intervention would have less force.[1052]

A *second* basis for support is the practice of the ICJ and ICTY. Both institutions view the rules of CA 3 as 'elementary considerations of humanity' that constitute a minimum yardstick under customary international law for any armed conflict, to include IACs.[1053] It logically follows that if its norms apply to IACs – which by definition are international – CA 3 clearly applies extraterritorially. Also, in *Tadic*, the ICTY explained that an armed conflict transfers from a NIAC to an IAC in two cases only:

> in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops,

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[1047] See below.

[1048] Pictet (1960), 31.

[1049] See also Cullen (2010), 7-61, and his analysis of the origins of NIAC.

[1050] Pictet (1960), 36.

[1051] Pictet (1952b), 43.

[1052] Cerone (2007), 11-12.

[1053] (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, § 218 (citing (1949a), *Corfu Channel Case (United Kingdom v. Albania), Judgment of 9 April 1949 (Merits)*, 22); confirmed in (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)* , § 102.

or alternatively if (ii) some of the participants in the internal armed conflicts act on behalf of that state.

This implies that in situations other than the two cited by the ICTY, an armed conflict involving a State and a non-State armed group is to be viewed as a NIAC. This was also the position of the US Supreme Court in *Hamdan v. Rumsfeld.*[1054] It strengthened the view that, naturally, the phrase "not of an international character" refers firstly to internal armed conflicts, but that it should not be interpreted to limit the scope of application of CA 3 merely to such armed conflicts. According to the US Supreme Court, the phrase should be taken literally, i.e. CA 3 covers any armed conflict that "does not involve a clash between nations (whether signatories or not),"[1055] thus affirming the residual function of CA 3.[1056] Such types of conflict include also conflicts between States and non-State armed groups taking place on the territory of another State.[1057] This position finds support among numerous legal scholars.[1058] In sum, it may therefore be concluded that what distinguishes CA3-NIAC from IAC lies in the *nature* of the parties to the conflict, and not in the territorial location of the armed conflict.[1059] As a result, it follows that a CA 3-NIAC involves all armed conflicts that cannot qualify as an IAC. As such, it accommodates all situational contexts under examination in this study.

2.2.1.2. The CA 3-Threshold

The issue of when an armed conflict arises in the meaning of CA 3 has proven to be a major source of controversy. The drafting history and the ICRC Commentary to CA 3 clearly point out that the phrase "armed conflict not of an international character" was quite controversial from the outset, received a great deal of attention, and was eventually deliberately kept vague. The phrase is the outcome of a compromise between unease over too much precision – restricting the application of CA 3 to certain situations only, and excluding others[1060] – on the one hand, and the desire for deliberate ambiguity – in an attempt to encour-

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[1054] (2006b), *Hamdan v. Rumsfeld (Judgment of 26 June 2006)*.

[1055] (2006b), *Hamdan v. Rumsfeld (Judgment of 26 June 2006)*.

[1056] In addition to its intended focus on armed conflicts other than IACs, it is also generally accepted that the material content of Common Article 3, in a supplementary manner, applies to IACs. In the *Nicaragua Case*, the ICJ held that there is "no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity'." See (1986b), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986*, 113-114. (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)* This position of the ICJ has been confirmed by the ICTY in the *Tadic* Case, leading it to conclude that, "at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant." See (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)* , § 102.

[1057] In addition, nor the text of CA 3, neither the Commentary limit the applicability of CA 3 to conflicts waged between governmental armed forces and non-State armed groups. In fact, CA 3 remains silent on a definition of the parties to the NIAC. Neither does it demand that the government is a party to the conflict. This opens the way for the conclusion that, as put by Moir, "[i]t is certainly not the case that, in order for Article 3 to be applicable to a situation, the conflict must simply be between government forces and some rebel organization. An armed conflict between two or more insurgent factions, whether or not it involves government troops or the police, can thus still be regulated by the Article" (Moir (2002), 39). Thus, in contrast to Additional Protocol II, CA 3 applies to situations of failed States, such as Somalia.

[1058] Kretzmer (2005), 195; Arai-Takahashi (2010), 302.

[1059] Zegveld (2002), 136 (emphasis added).

[1060] Castrén (1966), 85.

age the application of CA 3 in dubious cases[1061] – on the other hand.[1062] The controversy over CA 3-applicability relates to two issues: (1) when does an "*armed conflict* not of an international character" arise? (2) Which situations of conflict does the phrase "armed conflict *not of an international character*" cover? The latter question is particularly controversial in view of conflicts between a State and insurgents not taking place on the territory of that State. This will be dealt with in more detail in Chapter V, when addressing the question of applicability of the law of CA 3-NIACs to counterinsurgency situations.

The first issue – when does a CA 3-NIAC arise – is equally of relevance. During the drafting stage of CA 3 the State delegates expressed their concern that the term "armed conflict" "[…] might be taken to cover *any act* committed by force of arms - any form of anarchy, rebellion, or even plain banditry.[1063] For example, if a handful of individuals were to rise in rebellion against the State and attack a police station, would that suffice to bring into being an armed conflict within the meaning of the Article?" The ICRC Commentary points out that the drafters left little doubt that CA 3 is to be applied to "genuine armed conflict" only, i.e. "armed conflicts, with armed forces on either side engaged in hostilities - conflicts, in short, which are *in many respects similar to an international war*, but take place within the confines of a single country. In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front." For an accurate understanding, the comparison with "international war" serves to indicate that "an armed conflict not of an international character" for the purposes of CA 3 has certain *de facto* characteristics that typically belong to an IAC, but certainly not to situations of "a mere act of banditry or an unorganized and short-lived insurrection."[1064]

While it is clear that "armed conflicts not of an international character" does not refer to "any act committed by force of arms – any form of anarchy, rebellion, or even plain banditry," "[…] the line separating an especially violent situation of internal disturbances from the "lowest" level Article 3 armed conflict may sometimes be blurred and, thus, not easily determined."[1065]

Today, two major conclusions may be drawn regarding the vertical threshold of an "armed conflict not of an international character" as meant in CA 3. *Firstly*, despite the references to that extent in the drafting history of CA 3 and the ICRC Commentary, the phrase "armed conflict not of an international character" in CA 3 does not implicate that the applicability

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[1061] Pictet (1975), 16-17. See also Moir (2002), 32.

[1062] Pictet (1985), 47. See also Moir (2002), 32-33, stating that "the open texture of common Article 3 [can be seen] as a strength rather than a weakness, permitting humanitarian protection in as many situations as possible through a broad interpretation of its provisions." See also Cullen (2005), 189.

[1063] This concern must be viewed in light of States' outlook on international law and State sovereignty. States would subject their response to situations of domestic unrest and conflict only to the international laws of war upon recognition of belligerency, which required the fulfillment of quite stringent conditions. As such, the adoption of CA 3 was a major step for States as they were anxious that the threshold of CA 3 would include situations that normally would have belonged to the sovereign prerogative of domestic law enforcement.

[1064] Pictet (1958a), 35-36 (emphasis added). See also the list of "convenient criteria" seemingly introducing a high threshold approximating that of situations of *civil war* in the traditional sense (Pictet (1960), 35-36). However, the ICRC Commentary emphasizes that "[t]he above criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection" and are not to be viewed as excluding the applicability of CA 3 to "cases where armed strife breaks out in a country, but does not fulfil any of the [conditions of the list] […]" (Pictet (1958a), 36).

[1065] (1997c), *Abella v. Argentina, Case 11.137, IACtHR, Report No. 55/97, OEA/Ser.L/V.II.98, doc. 6 rev.*, § 153.

of CA 3 does not arise in situations of conflict not constituting a civil war.[1066] *Secondly*, it is now generally accepted that in its vertical scope, CA 3 extends to all armed conflicts falling within the horizontal scope of CA 3 provided: (1) that the clashes of violence are *protracted*, i.e. not sporadic, isolated and short-lived, but of a certain duration and intensity such that it requires a response of governmental armed forces; and (2) that that the non-State armed group engaged in the conflict upholds a *level of organization* sufficient to qualify it as "party" to the conflict.[1067]

The two parameters ensure that, as desired by the ICRC, CA 3's scope of applicability is "as wide as possible,"[1068] while at the same time excluding its applicability from "banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law", i.e. acts that are sporadic and unilateral, carried out by individuals or *ad hoc* groups and that do not necessitate the engagement of armed forces.[1069]

2.2.1.2.1. Protracted Armed Violence

In *Tadic*, the ICTY Appeals Chamber did not further specify how 'protracted' should be interpreted. At first sight, the element of 'protracted' on the surface points at a *temporal* element to the definition of armed conflict, i.e. it suggests that the violence must have reached a certain *duration.*[1070] There is no requirement, however, that the hostilities are taking place on a *continuous* basis.[1071] In other words, interruptions in the fighting do not necessarily interrupt the applicability of CA 3.[1072] As suggested by the *Abella*-case, neither is there

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[1066] The phrase "armed conflict not of an international character" was originally intended to refer to "civil wars and internal conflicts, the dangers of which are sometimes even greater than those of international wars," (Pictet (1960), 28).

[1067] The origin for these conditions is found in (1999m), *The Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment of 15 July 1999 (Appeals Chamber)*, § 70) and has been further developed in other cases of the *ad hoc* tribunals of the ICTY and ICTR. It may be concluded that the *Tadic*-formula is also adopted in Article 8(2)(d) and (f)[1067] of the Rome Statute of the International Criminal Court (ICC). For an extensive analysis of the meaning of both provisions for the meaning of the concept of non-international armed conflict in LOAC, see Cullen (2010), 159-185. Specifically on the debate of whether Article 8(2)(f) reflects the *Tadic*-formula, or creates another threshold, see also Sassòli & Bouvier (2006), 110; Provost (2002), 268-269; Schabas (2007a), 116 and 131; Meron (1999), 54; Meron (2000a), 260; Bothe (2002), 423. See also (2004t), *The Prosecutor v. Slobodan Milosevic, Decision on Motion for Judgment of Acquittal (Milosevic Rule 98bis Decision), Case No. IT-02-54-T, (16 June 2004)*, § 20; (2005o), *The Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment of 30 November 2005 (Trial Chamber)*, § 87 for confirmation by the ICTY that Article 8(2)(f) reflects the *Tadic*-formula.

[1068] Pictet (1958a), 36. According to the ICRC, such wide applicability is justified, as it does not, on the one hand, hamper in any way a State's sovereign right to quell situations of internal conflict, nor does it grant non-State fighters more authority. On the other hand, such wide applicability of CA 3 facilitates a smooth transition of essential rules of treatment that already existed in domestic law, when dealing with situations of internal disturbances and tensions, to situations of armed conflict. This broad range of applicability has been criticized by some authors as expanding "its scope further than intended." See Moir (2002), 35-6; Cullen (2005), 84.

[1069] (1997n), *Tadić*, § 562. See also (2005o), *The Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment of 30 November 2005 (Trial Chamber)*, § 89.

[1070] (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*, § 186.

[1071] (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*, § 185: "what matters is whether the acts are perpetrated in isolation or as part of a protracted campaign that entails the engagement of both parties in hostilities."

[1072] Zimmermann (1999), 285. This should not be confused with the situation in which the use of violence is sporadic, followed by a period of relative calmness. In other words, there is a breaking point between situations in which the use of violence is exceptional and situations in which a period of calmness is exceptional.

a requirement that an armed conflict should be of a certain minimum duration.[1073] In other words, even isolated incidents, with a high degree of intensity and organization of the parties involved may arguably involve an armed conflict. The emphasis on duration to determine whether hostilities are protracted is, moreover, problematic, as it would jeopardize the applicability of CA 3 to hostilities in the early stages of conflict, "irrespective of the degree of armed violence or the number of armed confrontations."[1074]

Instead, the ICTY, has shifted towards a focus on the *intensity* of the armed conflict.[1075] In the cases of *Haradinaj* and *Boskoski and Tarculovski* the ICTY relied on a number of indicative factors, to include:[1076]

- the seriousness of attacks and whether there has been an increase in armed clashes;
- the spread of clashes over territory and over a period of time;
- any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict;
- whether the conflict has attracted the attention of the UNSC, and whether any resolutions on the matter have been passed;
- the number of civilians forced to flee from the combat zones;
- the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles;
- the blocking or besieging of towns and the heavy shelling of these towns;
- the extent of and the number of casualties caused by shelling or fighting;
- the quantity of troops and units deployed; existence and change of front lines between the parties;
- the occupation of territory, and towns and villages;
- the deployment of government forces to the crisis area;
- the closure of roads; cease fire orders and agreements, and the attempt of representatives from international organisations to broker and enforce cease fire agreements.[1077]

[1073] (1997b), *Abella et al. v. Argentina (La Tablada), Case No. 11.137, Decision of 18 November 1997*, § 152, in which the IACiHR accepted the existence of a NIAC lasting 36 hours.

[1074] Cullen & Öberg (2008).

[1075] (2008m), *The Prosecutor v. Ramush Haradinaj et. al., IT-04-84-T, Judgment of 3 April, 2008 (Trial Chamber)*, § 49; (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*, § 175. The focus on intensity does not imply that the protractedness in terms of duration of the hostilities has become an irrelevant aspect. To the contrary, "care is needed not to lose sight of the requirement for protracted armed violence in the case of [an, sic] internal armed conflict, when assessing the intensity of the conflict." However, protractedness now appears to have a function as an additional supportive factor for the determination of the level of intensity. (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*, § 175. See also (1998m), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber)*, § 184; (2005o), *The Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment of 30 November 2005 (Trial Chamber)*, § 84; (2008m), *The Prosecutor v. Ramush Haradinaj et. al., IT-04-84-T, Judgment of 3 April, 2008 (Trial Chamber)*, § 38. See also (1997b), *Abella et al. v. Argentina (La Tablada), Case No. 11.137, Decision of 18 November 1997*, § 152, in which the IACiHR held that "[…] it is important to understand that application of Common Article 3 does not require the existence of large-scale and generalized hostilities or a situation comparable to civil war in which dissident armed groups exercise control over parts of national territory." Instead, "[c]ommon article 3 is generally understood to apply to low intensity and open armed confrontations between relatively organized armed forces or groups that take place within the territory of a particular state."

[1076] (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*,§ 177 ff.

[1077] (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*, § 177. This is not an all-inclusive list of factors; other facts may also provide an indication of the intensity of the

Interestingly, particular for the purposes of the present study, the ICTY also focused on

> the use of force by governmental authorities, in particular, *how certain human rights are interpreted*, such as the right to life and the right to be free from arbitrary detention, *in order to appreciate if the situation is one of armed conflict*.[1078]

2.2.1.2.2. Organized Armed Groups

The second criterion for recognition of a CA 3-NIAC involves the organization of non-State armed groups. A reasonable interpretation of CA 3 implicates that, in order to recognize a non-State armed group as a "party" to the armed conflict, a certain *minimum* level of organization must be present. The question, however, arises as to what level of organization is required. The Israel HCJ, in its *Targeted Killings*-decision, held that the mere facts that "a terrorist organization is likely to have considerable military capabilities," and that "[a]t times, they have military capabilities that exceed those of states' support the need to characterized hostilities between a state and such terrorist organizations as an armed conflict. Such characterization would address the Court's expressed need to take the struggle beyond 'the state and its penal laws'."[1079] Even when the HCJ had stated this to support a conclusion that the conflict under scrutiny was governed by the law of NIAC (as noted, it did not: it held it was governed by the law of IAC) it may however be doubted whether this is sufficient.[1080]
Indeed, neither CA 3, nor the ICRC Commentary (except for the list with indicative criteria) require an organization under a responsible authority and with the ability to implement LOAC to the extent required by AP II or the requirements of belligerency.[1081] In addition, CA 3 does not require that non-State armed groups have control over a part of the territory of the State to an extent that they are able to carry out sustained and concerted military operations to implement CA 3,[1082] let alone that they act as a *de facto* government, as required by the concept of belligerency.[1083] Control over territory undoubtedly strengthens the (progress towards) existence of an armed conflict. However, and despite arguments to the contrary,[1084] "the lack of territorial control […] need not necessarily preclude its application."[1085]
Nevertheless, the requirement of organization, as put by Moir

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hostilities. Neither is the list cumulative; if one of the factors indicated by the Trial Chamber cannot be established, other factors may provide sufficient evidence of the intensity required.

[1078] (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*, § 178 (emphasis added).

[1079] (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)*, § 21.

[1080] Schöndorf (2007), 304.

[1081] (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*, § 197.

[1082] This is required by Article 1(1) of AP II.

[1083] Technically, this requirement under the traditional laws of war could never be a requirement for application of CA 3, as the Geneva Conventions (as the principle successor of the laws of war) are not applicable to it. Provost (2002), 266.

[1084] During the Diplomatic Conference, some delegates insisted on the continued use, and formal incorporation of the requirements of belligerency, to include territorial control, into Common Article 3. See Pictet (1952b), 49-50. Territorial control also features repeatedly in the "indicative criteria" proposed by Pictet in the Commentary to Common Article 3. Also, Draper insisted on the idea of a minimum degree of organization of the non-State armed group would be insufficient for the insurgents to comply with Common Article 3. In addition, he proposed that the insurgents should control to some degree (a part of) national territory. See Draper (1965), 90.

[1085] Moir (2002), 38.

> […] would appear to support the proposition that, in order for insurgents to be a 'party' to an internal conflict, the level or organisation required probably must be such that they are capable of carrying out the various obligations imposed upon them by Article 3, which imposes duties and obligations on all sides to the conflict. It is therefore difficult to accept that an armed conflict can exist without the rebels being capable of observing these obligations. This, in turn, seems unlikely without the insurgents being organised (at least to a degree) along military lines, including a responsible command structure and controlling authority.[1086]

A similar view is expressed by the ICRC: "[a] party to an armed conflict is usually understood to mean armed forces or armed groups with a certain level of organization, command structure and, therefore, the ability to implement international humanitarian law."[1087] This organization-requirement seems no more than reasonable, because without it CA 3 would apply to conflicts with a "[…] a random group of looters and rioters" which are "undoubtedly difficult to accept as being a party to a serious conflict."[1088] Though such an outcome would support the ICRC's desire that CA 3 must be applied as wide as possible, it cannot go as far as to demand from a loosely and an on *ad hoc*-basis assembled group of rebels to comply with the laws of war in their relation with the government, not even if these laws contain an absolute minimum of obligations.[1089]

According to the ICTY, a non-State party to the conflict is sufficiently organized for CA 3 to become applicable if it "[…] has a structure, a chain of command and a set of rules as well as the outward symbols of authority" and that its members do not act on their own but conform "to the standards prevailing in the group" and are "subject to the authority of the head of the group". Thus, for an armed group to be considered organized, it would need to have "some hierarchical structure and its leadership requires the capacity to exert authority over its members."[1090] It is important to stress here that the ICTY does not require that the leadership *de facto* exert authority over its members; it should merely have the *capacity* to do so. An indication thereof is the extent to which the group is able to respect LOAC, even if they show a reluctance to comply.[1091] There is no requirement that a non-State entity actually acts in conformity with LOAC.[1092] However, if the non-State armed group does comply

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[1086] Moir (2002), 36. See also ICRC (2008c), 3.

[1087] ICRC (2003), 18-19. See also Moir (2002), 36; ICRC (2008c), 3; Kolb & Hyde (2008), 78; and (2008m), *The Prosecutor v. Ramush Haradinaj et. al., IT-04-84-T, Judgment of 3 April, 2008 (Trial Chamber)*, § 60 ("an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means"); (2005o), *The Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment of 30 November 2005 (Trial Chamber)*, § 88-89; 94-134; (1997c), *Abella v. Argentina, Case 11.137, IACtHR, Report No. 55/97, OEA/Ser.L/V.II.98, doc. 6 rev.*, § 152 ("[t]he concept of armed conflict, [which], in principle, requires the existence of organized armed groups that are capable of and actually do engage in combat and other military operations against each other").

[1088] Moir (2002), 36.

[1089] Moir (2002), 37. See also Bond (1971)270 and Bond (1974), 54, stating that "Pictet apparently believes that even one man brandishing a gun in another's face is non-international armed conflict within the meaning of Article 3."

[1090] (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*, § 195.

[1091] Zegveld (2002), 34-5.

[1092] This is not even a requirement in Article 1(1) of Additional Protocol II. The condition to implement the substantive rules of Additional Protocol II "*implies that it is not the effective respect for IHL which his required but rather the capacity to respect this body of law as resulting from the organisation of the group.*" A group is considered organized in terms of Article 1(4), if they "*[…] are led by a responsible command and the chain of command is sufficiently effective for the implementation of the obligations incumbent on it under IHL.*" IIHL & ICRC (2003), 5. Neither is the actual compliance with IHL a condition required of national liberation movements in the context of Article 1(4) of Additional Protocol I.

with LOAC, it of course would only contribute to the existence of an organization.[1093] The same applies to the opposite situation: if a non-State entity violates LOAC in accordance with a military strategy on order of the leadership, rather than on their own accord, this is indicative of a level of organisation sufficient to determine that the group is a party to an armed conflict.[1094]

The ICTY has provided a list of indicative factors to establish the level of organization.[1095] They can be categorized as follows:

1) Factors pointing towards the *presence of a command structure* (to include the presence of a headquarters and staff, the dissemination of internal orders and regulations, communiqué's, spokespersons, command relationships, ranks, descriptions of duties of commanders, a chain of military hierarchy);[1096]
2) Factors indicating the *capacity of carrying out operations in an organized manner* (see above);[1097]
3) Factors indicating a *level of logistics* (to include the ability to recruit new members, the providing of military training, the organized supply of military weapons, the supply and use of uniforms and the existence of communications equipment for linking headquarters with units or between units);[1098]
4) Factors indicating a *level of discipline and ability to implement the obligations of CA 3* (to include the establishment of disciplinary rules and mechanisms, training, the existence and effective dissemination of internal regulations);[1099]
5) Factors indicating the *ability to speak with one voice* (to include the capacity to negotiate on behalf of the members of the group with representatives of the international community and the ability to negotiate and conclude cease-fire agreements or peace accords.)[1100]

As noted in the introduction, this study assumes the existence of an armed conflict. Therefore, the assumption is that the parameters of 'armed conflict' identified above have been fulfilled in those instances where it could be reasonably concluded that a conflict between the counterinsurgent State and insurgents is to be governed by the law of NIAC.

2.2.1.2.3. Some Remarks on the Role of the Vertical Scope in Determining the Applicability of the Law of CA 3-NIACs to Counterinsurgency Operations

As noted in the introduction, this study assumes the existence of an armed conflict. Therefore, the assumption is that not only a counterinsurgency situation fits within the horizontal scope of CA 3-NIAC (in so far this has been established above), but also that the parame-

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[1093] (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*, § 195. See also Ducheine & Pouw (2009), 24.

[1094] (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*, § 205.

[1095] They include: "the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords." See (2008m), *The Prosecutor v. Ramush Haradinaj et. al., IT-04-84-T, Judgment of 3 April, 2008 (Trial Chamber)*, § 160.

[1096] (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*, § 199.

[1097] (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*, § 200.

[1098] (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*, § 201.

[1099] (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*, § 202.

[1100] (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*, § 203.

ters of 'armed conflict' identified above have been fulfilled. This implies that there is no further need to examine the fulfillment of these parameters when investigating whether the law of CA 3-NIAC applies in the situational contexts of counterinsurgency under examination in this study.

However, it is nonetheless imperative to demonstrate how the characteristics of insurgency complicate the determination of the existence of a NIAC, as a result of which it may have to be concluded that the relationship between the counterinsurgent State and the insurgents is not governed by LOAC at all (a situation which may happen in reality, but which has been excluded in this study given the assumption of the existence of an armed conflict) or that that relationship is not governed by the law of NIAC, but can still be governed by the law of IAC, given the fact that the counterinsurgent State is a party to an inter-State armed conflict (as may be the case in TRANSCOIN) or bound by the law of IAC because it is an Occupying Power.

To recall, in order to cross the vertical threshold of CA 3-NIAC, two obstacles must be overcome: (1) the armed violence between the counterinsurgent State and the insurgents must be sufficiently protracted and (2) the insurgency movement must be sufficiently organized to qualify as a party to the armed conflict.

In respect of the *first* requirement, it is submitted that the mere qualification of anti-government activities as insurgency does not automatically imply the use of armed violence by the insurgency. An insurgency movement may, particularly in its initial phase of existence, avoid hostilities and only resort to subversive techniques, such as "clandestine radio broadcasts, newspapers or pamphlets that openly challenge the control and legitimacy of the established authority,"[1101] or criminal violence, such as the organization and partaking in violent riots and demonstrations. In other words, the activities of an insurgency movement may be limited to "banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law."[1102] Illustrative in this respect may be the development of events in Northern Ireland between 1968-1994[1103] as well as those in the Arab Spring of 2011, most notably those arising in Tunesia, Egypt, Yemen and some of the Arab Emirates, as well as the early stages of the uprisings in Libya and Syria. While a clear shift from acts belonging to the realm of internal disturbances and tensions to acts that may be considered hostilities is generally noticable, one of the main difficulties for the counterinsurgent State is that insurgents may use different approaches locally. Thus,

> insurgents may use guerrilla tactics in one province while executing terrorist attacks and an urban approach in another. There may be differences in political activities between villages in the same province. The result is more than just a "three-block war": it is a shifting "mosaic war" that is difficult for counterinsurgents to envision as a coherent whole.[1104]

The main difficulty, in terms of establishing whether 'the insurgency' is a party to a NIAC, is that it is not always clear to which group a particular hostile act can be attributed. Obviously, this challenge rises in areas where a counterinsurgent State is confronted with multiple groups or factions that do not form one coherent block, but which even fight among each other, as was the case in Iraq regarding the multiple Sunnist and Shi'ite groups fighting the multinational (counterinsurgent) coalition, as well as themselves.

[1101] U.S. Department of Army & U.S. Marine Corps (2007), 12, § 1–33.

[1102] (1997n), *Tadić*, § 562. See also (2005o), *The Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment of 30 November 2005 (Trial Chamber)*, § 89.

[1103] Haines (2012).

[1104] U.S. Department of Army & U.S. Marine Corps (2007), 15, § 1-37.

While it may be concluded that, overall, the armed violence between the counterinsurgent State and armed non-State actors is clearly protected, the decisive factor is that it must be the armed violence between the counterinsurgent State and a particular organized armed group that counts.

As regards the *second* condition – organized armed group – it has already been established in Part A that as a concept the term insurgency refers to groups that have attained a level of organization. In fact, in order to survive as an insurgency, a certain minimum degree of organization must be established and maintained. In light of the legal requirement that there must be "some hierarchical structure and [that] its leadership requires the capacity to exert authority over its members,"[1105] it is of particular relevance to observe that, from the viewpoint of insurgency doctrine, it is generally perceived as imperative for an insurgency movement to have a central strategic command in order to create cohesion or unity within the insurgency. "Although it may delegate the conduct of operations and responsibility to local leaders, a general headquarters that exercises authoritative control over policy, discipline, ethics, and ideology is deemed indispensible."[1106] Without it, effective strategy, planning, tactics and organization are not possible. It may therefore be concluded that once the counterinsurgent recognizes an insurgency, it has most likely also detected signs of an organization. The difficulty, however, lies just there. Generally, insurgency movements adopt a policy of secrecy to the outside as well as among the various functional cells, particularly in the subversive stage, but continuing when acting in the open. In addition, insurgents tend to adapt their organizational structures to their needs. Moreover,

> [I]nsurgents usually look no different from the general populace and do their best to blend with noncombatants. Insurgents may publicly claim motivations and goals different from what is truly driving their actions. Further complicating matters, insurgent organizations are often rooted in ethnic and tribal groups. They often take part in criminal activities or link themselves to political parties, charities, or religious organizations as well. These conditions and practices make it difficult to determine what and who constitutes the threat.[1107]

Nonetheless, during a conflict the degree of organization may be brought to light by sources outside the counterinsurgent government, such as non-governmental organizations, the ICRC and the media. For example, in 1993 and 1994 evidence as to the degree of organization of parties involved in the hostilities in eastern Zaire was provided "by various UN fact-finding bodies and human rights organizations based in and outside Zaire, as well as media accounts of the conflict, […]."[1108]

An additional factor which may complicate, or eventually bar a conflict between a counterinsurgent State and insurgents is that a CA 3-NIAC cannot be said to have arisen because the insurgency movement cannot be qualified as sufficiently organized, notwithstanding the fact that the armed violence between them is protracted, or vice versa, i.e. that the insurgency movement is sufficiently organized, but that the armed violence is not or no longer sufficiently protracted.

However, even when it may objectively clear to a State that it is engaged in a CA 3-NIAC with an insurgency movement, it is, exceptions aside, common practice of States to deny the existence of an armed conflict in their territory, or to classify an acknowledged armed con-

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[1105] (2008l), *The Prosecutor v. Boskoski & Tarculovski, IT-04-82-T, Judgment of 10 July, 2008 (Trial Chamber)*, § 195.
[1106] O'Neill (2005), 124.
[1107] U.S. Department of Army & U.S. Marine Corps (2007), 100, § 3-75.
[1108] Arimatsu (2012), 153.

flict as CA 3 or AP II-NIAC, particularly in grey-area conflicts.[1109] This reluctance has also been attributed to the fact that States feel no urge to apply CA 3 because it contains merely the "very generally worded principles of humanity which normally ought to be realized by every State and in any circumstances."[1110]

2.2.2. AP II-NIACs

2.2.2.1. The Applicability of the Law of AP II-NIAC to Counterinsurgency Operations

To recall, the horizontal scope of AP II is unambiguously limited to *internal* NIACs only. Following the horizontal scope of Article 1 AP II, the applicability of the law of AP II-NIACs is limited to only one situational context, namely NATCOIN. Examples of AP II-NIAC are the former conflict between the government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE) and the (at the time of this writing) conflict between Colombia and the FARC.[1111]
It has been asserted by some authors that AP II may also apply extraterritorially in settings like SUPPCOIN, where a State assists another State where both States are party to AP II. One such theory is that the forces of the counterinsurgent State can be considered to be part of the forces of the supported State. Another theory is that AP II becomes applicable to acts of the counterinsurgent State by means of the law of State responsibility, by which the supported State can be held responsible for violations of AP II by the forces of the counterinsurgent State. However, the majority view is that such is not the case, as the conflict does not take place in the territory of the counterinsurgent State, but in that of the supported State.[1112] A possible exception to this outcome could arguably be that norms of AP II apply to the counterinsurgent State on the basis of their being customary law.[1113]

2.2.2.2. The Threshold of AP II-NIAC

As follows from its Article 1(2), AP II does not apply "[…] to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." The ICRC defined *internal disturbances* as:

> […] situations in which there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or dura-

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[1109] See the recent statement by President Assad of Syria, denying the existence of a civil war in Syria, but "but proxy terrorism by Syrians and foreign fighters." See http://rt.com/news/assad-interview-exclusive-syria-265/. Other, historic, examples of State practice denying or ignoring the existence of a CA 3-NIAC are the UK vis-à-vis the (P)IRA in Northern Ireland, Colombia vis-à-vis the FARC, Turkey vis-à-vis the PKK and Russia in regards of rebels in Chechnya. On the classification as CA 3-NIAC in Northern Ireland, see Haines (2012), 134 ff (arguing that at least in the early 1970's a CA 3-NIAC existed in Northern Ireland to which the UK was a party). On the classification of the conflict in Colombia, see Szesnat & Bird (2012), 214 ff.

[1110] Schindler (1979), 147. The latter effect is even more unfortunate, considering the fact that the narrow field of protection laid down in Common Article 3 was a compromise for the inability to define 'armed conflict not of an international character'. In other words, had the compromise been reached that CA 3 would cover a limited range of clearly defined internal conflicts in exchange for a wider range of protection, States would arguably have been more motivated to apply CA 3. See Moir (2002), 29.

[1111] Szesnat & Bird (2012), 243. See also for an overview of the classification of the other conflicts taking place in Colombia. At the time of this writing, peace negotiations between the government of Colombia and the FARC are taking place in Cuba.

[1112] Akande (2012a), 55.

[1113] Hampson (2012), 256.

> tion and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order. The high number of victims has made necessary the application of a minimum of humanitarian rules.[1114]

Internal tensions, in turn,

> […] could be said to include in particular situations of serious tension (political, religious, racial, social, economic, etc.), but also the sequels of armed conflict or of internal disturbances" and involve "large scale arrests; a large number of "political" prisoners; the probable existence of ill-treatment or inhumane conditions of detention; the suspension of fundamental judicial guarantees, either as part of the promulgation of a state of emergency or simply as a matter of fact; [and] allegations of disappearances.[1115]

While AP II is not applicable to internal disturbances and tensions, the mere protractedness of violence and organization grade of the non-State armed group as required as a minimum by CA 3 is not sufficient to trigger the applicability of AP II. AP II is a compromise with the aim to develop and supplement CA 3 in content by providing more detailed rules in a more restricted range of situations, while at the same time leaving undisturbed CA 3's narrower substantive content applicable in a wider range of situations.[1116] AP II merely defines the more intense form of NIAC, similar to civil wars.[1117] This is reflected in the conditions that must be fulfilled for AP II to become applicable.

Therefore, in terms of its vertical threshold, it follows from Article 1(1) AP II that (1) the non-State armed group must act under responsible command; (2) the non-State armed group has to exercise control over a part of a State's territory; (3) the non-State armed group must be *able* to carry out sustained and concerted military operations; (4) the non-State armed group must be able to implement the provisions of Additional Protocol II.

In so far it can be established that a particular counterinsurgency situation qualifies as an AP II-NIAC, the assumption, for the purposes of the study, is that these requirements have been fulfilled in the case of NATCOIN. However, what has been stated previously in relation to the vertical threshold of CA 3 also applies here, namely that operational reality may be such that it is not always easy to conclude upon the fulfillment of these requirements. In

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[1114] Sandoz, Swinarski & Zimmerman (1987), 1354, § 4475. See also the IACiHR's judgment in the *Abella*-case, in which it concluded that a 30 hour clash between members of the *Movimento Todos por la Patria* (MTP) and the Argentinean army after an armed attack on the military barracks in *La Tablada* (*Abella*-case), killing 39 people and injuring another 60, could not "[…] be properly characterized *as a situation of internal disturbances*. What happened there was not equivalent to large scale violent demonstrations, students throwing stones at the police, bandits holding persons hostage for ransom, or the assassination of government officials for political reasons – all forms of domestic violence not qualifying as armed conflicts." (1997c), *Abella v. Argentina, Case 11.137, IACtHR, Report No. 55/97, OEA/Ser.L/V.II.98, doc. 6 rev.*, § 149-156.

[1115] Sandoz, Swinarski & Zimmerman (1987), 1354, § 4476.

[1116] ICRC (1971), 34-6; ICRC (1972), 68-9, § 2.54-64; Provost (2002), 261.

[1117] See also Cullen (2005), 95. Green goes further, asserting that AP II would "probably not operate in a civil war until the rebels were well established and had set up some form of *de facto* government, as has been the case with the nationalist revolution in Spain" (Green (2000), 66-67). However, Green seems to place the threshold of AP II one step too high. Here, Green incorporates into Article 1(1) of AP II two requirements belonging to belligerency as understood in traditional law, according to which insurgents should occupy a substantial part of the State and "establish some semblance of government or administration in the area under their control." For other support that Article 1(1) AP I reinstates belligerency, see Rwelamira (1984), 234-35. Criticizing this viewpoint as not "entirely accurate", see Lootsteen (2000), 130, arguing that Additional Protocol II bears a closer resemblance to insurgency.

those cases, the relationship between the counterinsurgent State and the insurgents remains covered by CA 3, which functions as a back-up, provided the vertical threshold of that provision has been crossed.

3. Observations

This chapter has demonstrated that LOAC provides valid norms pertaining to targeting and operational detention. This is the logical result from the fact that in armed conflict the rendering *hors de combat* of enemy fighters by killing, injuring or capturing them is a traditional instrument to bring the enemy into submission.
However, it is not possible to apply this conclusion across the board of armed conflicts. The traditional dichotomy between IAC and NIAC has left its marks in the availability of valid norms, not so much in the area of hostilities, but particularly so in the area of operational detention. The law of IAC relevant to the operational detention of insurgents offers a quite detailed framework not only authorizing both criminal and security detention, but also providing a set of relatively detailed requirements offering not only protection to detained insurgents, but also offering guidance as to how, as a minimum, operational detention is to be carried out. This framework stands in sharp contrast with that of the law of NIAC, which offers very few treaty-based norms, a gap that is only partly filled with customary law, but leaves the grounds for security detention and procedural safeguards to be granted uncovered. This has crucial repercussions given the fact that, as concluded previously, most, if at times not all, types of counterinsurgency operations may qualify as being governed by the law of NIAC. In the absence of specific arrangements under CA 3 to apply, *de iure*, the law of IAC, this body of law only finds application on a policy basis. Particularly the policy-based reliance on the grounds and procedural guarantees found in GC IV finds growing support. This does not, however, necessarily imply that IHRL has no further role to play. CA 3 specifically stipulates that States party a NIAC are bound to apply the provisions of CA 3, *as a minimum*, thus pointing out that where CA 3 shows gaps, these may be filled by norms from other sources (such as IHRL or domestic law). As explained by Pejic, CA 3

> thus provides a set of basic guarantees that are absolutely fundamental in nature, but does not provide anywhere near sufficient guidance for the myriad legal and protection issues that arise in conflicts not of an international character. Moreover, the wording itself suggests that the parties will need to rely on additional norms if they are to meet more than the minimum obligations.[1118]

A similar invitation to IHRL to complement LOAC where necessary is made in AP II, in its Preamble. The issue of reliance on norms of IHRL will be part of the examination of the interplay between IHRL and LOAC in the Chapter X, where we will examine the interplay of the former regime with the latter.

As to the issue of *applicability*, the above analysis demonstrates that conflict classification is imperative, but highly contextual and complicated, for reasons of fact as well as law. Particularly in the case of non-State actors such as insurgents it could be, and often is, difficult to determine who opposes the counterinsurgent and in which stage of development certain groups are. In addition, it is in practice problematic to establish with certainty whether

[1118] Pejic (2011), 17. This minimum baseline of protection also finds articulation in AP II, which stipulates that, in addition to the protections afforded by Article 4 AP II, the provisions in Article 5 AP II "shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

armed violence can be attributed to independent individuals, a loosely organized group of individuals, or involves members of the armed forces of an insurgency, even when a public claim to that effect has been made (such a claim may be ruse by one movement to discredit another movement with which it is also in conflict).
The above analysis also illustrates why the proper question to be asked is not whether a conflict between a counterinsurgent State and insurgents qualifies *as* an IAC or NIAC, but whether, in view of the lawfulness of deprivations of life resulting from operations carried out under the umbrella of the situational contexts, the legal relationship between both is governed by the law of IAC or the law of NIAC.
Overall, on the basis of that analysis, the following picture emerges:
Firstly, the law of NIAC undoubtedly applies to NATCOIN, SUPPCOIN and consensual TRANSCOIN.
Secondly, in regard of OCCUPCOIN the following may be concluded:

- the law of IAC (including the law of belligerent occupation in regards of OCCUP-COIN) always applies (as some argue) to targeting and operational detention, because the conflict between the counterinsurgent State and the insurgents takes place in the context of an IAC;
- in so far this concerns *targeting in hostilities*, the law of CA 3-NIAC applies, because the conflict between the counterinsurgent State and the insurgents constitutes a CA 3-NIAC. As will be explained in more detail in Chapter VII, this is of particular relevance for insurgents who qualify as members of the armed forces of the insurgency movement by virtue of their so-called continuous combat function. These individuals may be attacked at all times. Other individuals affiliated with the insurgency but not constituting such members qualify as civilians and may only be attacked unless and for such time as they DPH. It remains unclear whether the latter are to be viewed as civilians in a NIAC or in an IAC, although this has no crucial implications for the question of targeting: both the law of IAC and NIAC stipulate that immunity from attack is only lost unless and for such time as a civilian directly participates in the hostilities;
- the law of IAC nonetheless arguably applies in the following situations:
    - when adhering to the NIAC-view, in those instances where the CA 3-threshold has not been met as a result of which the insurgency is not a party to a CA3-NIAC, but where the relationship between the counterinsurgent State and these individuals is characterized by the exchange of hostilities taking place in an area governed by the law of IAC/law of belligerent occupation;
    - when adhering to the NIAC-view, in relation to individuals who, while affiliated with the insurgency, are not members of the armed forces of the insurgency movement party to the CA 3-NIAC;
    - when adhering to the NIAC-view, arguably, in respect of *operational detention*. Members of the armed forces of an insurgency and DPH-civilians captured and detained are in the hands of the counterinsurgent Occupying Power, and it would logically follow that the law of IAC and law of belligerent occupation (as species of the law of IAC) applies.

Thirdly, as regards non-consensual TRANSCOIN:

- the law of IAC always applies (as some argue) to targeting and operational detention, because the conflict between the counterinsurgent State and the insurgents takes place in the context of an IAC;
- the law of NIAC applies (which seems to be the majority view) to targeting and operational detention, as the conflict is to be viewed separately from the IAC between the counterinsurgent State and the territorial State.
- the law of IAC nonetheless arguably applies in the following situations:
    - when adhering to the NIAC-view, in those instances where the CA 3-threshold has not been met as a result of which the insurgency is not a party to a CA3-NIAC, but where the relationship between the counterinsurgent State and these individuals is characterized by the exchange of hostilities taking place in an area governed by the law of IAC/law of belligerent occupation;
    - when adhering to the NIAC-view, in relation to individuals who, while affiliated with the insurgency, are not members of the armed forces of the insurgency movement party to the CA 3-NIAC;
    - when adhering to the NIAC-view, arguably, in respect of *operational detention*. Members of the armed forces of an insurgency and DPH-civilians captured and detained are in the hands of a party to an IAC, and it would logically follow that the law of IAC (as species of the law of IAC) applies.

Conclusions Part B.

As mentioned in the introduction, the aim of this part was to examine the *interplay potential* of norms of IHRL and LOAC relative to targeting and operational detention.
This implies, *firstly*, that norms must be available within IHRL and LOAC that govern these concepts. As demonstrated, both IHRL and LOAC provide such norms. This is not a surprising conclusion. After all, in so far it regards IHRL, both the right to life and the human rights pertaining to the deprivation of liberty are amongst the most fundamental rights within the human rights catalogue. Similarly, the wounding, killing and capture (and subsequent internment) of enemy fighters are the traditional methods to force the enemy into submission, and it may therefore not come as a surprise that it is precisely in these areas that LOAC offers a detailed and comprehensive set of norms. Nonetheless, it has been worthwhile to carry out this examination to the availability of valid norms, because it has also demonstrated that the treaty-based law of NIAC is far from comprehensive and – notwithstanding the fact that killing and capturing enemy fighters is part and parcel also of these types of conflicts – does not provide a set of norms comparable to the law of IAC. In so far it concerns hostilities, customary law has filled this gap, but cognizance must be had of the fact that this finds opposition amongst those who rather see this gap filled by IHRL.
As regards operational detention, the impact of the traditional dichotomy between IAC and NIAC becomes most apparent, as in this area the treaty-based law of NIAC is underdeveloped in terms of availability, density and precision. This gap is not readily filled with customary norms, particularly not in the area of the legal basis for security detention and the procedural safeguards that must be granted, and thus triggers the question as to whether IHRL may fill this gap. This will be dealt with in Chapter IX.

The mere fact that IHRL and LOAC show a potential for interplay because they each provide norms valid to the concept of targeting and operational detention is not sufficient for interplay to arise. It also needs to be established that these norms simultaneously *apply* to the concrete situation at hand. As the analysis demonstrates, the issue of applicability of either IHRL or LOAC is not free from controversy and several outcomes are possible. In respect of IHRL, its applicability in times of armed conflict and extraterritorial settings remains contested by some States, which complicates the legal debate as well as the cooperation on the ground.
This part also shows the importance of armed conflict classification, which is of significance for a number of reasons,[1119] but mostly so because it eventually determines which part of LOAC applies to a particular targeting or detention operation. As demonstrated, in respect of NATCOIN, SUPPCOIN and consensual TRANSCOIN there is general agreement that targeting and operational detention operations are governed by the law of NIAC. This is less sure in OCCUPCOIN and non-consensual TRANSCOIN, where arguments can be made that support the applicability of both the law of IAC or NIAC.

[1119] For a list of reasons, see Bethlehem (2012), v-vi.

This is less problematic in the context of hostilities, as here the law has merged. The opposite is true with respect to operational detention. Here, the laws of IAC and NIAC have not merged, at least not to a significant degree, which raises problems, as we will see in Chapter X.

This chapter has also shown that the possibility to derogate from the right to life and the valid IHRL norms pertaining to operational detention is limited. In so far derogation is possible, it must nonetheless comply with all the requirements mentioned in Chapter 2 in order to be lawful.

When the applicability issue of the valid norms of IHRL and LOAC is placed in situational context in order to attain an overview of the interplay potential, the following picture emerges.

1) Operational Detention
Firstly, IHRL norms governing *operational detention* apply in all situational contexts and interplay with the valid norms of LOAC. In the context of NATCOIN, SUPPCOIN and consensual TRANSCOIN this concerns the law of CA 3-NIAC (and possibly AP II in NATCOIN), which, in the absence of many rules, in practice entails that the interplay of IHRL takes place with the available customary norms relevant to operational detention in CA 3-NIACs. As regards OCCUPCOIN and non-consensual TRANSCOIN, the majority view is that these situations too are governed by the law of CA 3-NIAC, although in the context of operational detention it cannot be excluded that the law of IAC nonetheless applies. This implies that the interplay of IHRL norms takes place with the comprehensive framework of LOAC regulating internment and criminal detention.

2) Targeting
In respect of all situational contexts where the counterinsurgent State is a party to the ICCPR and ACHR, the right to life always applies to *targeting*.
In case the counterinsurgent State is a party to the ECHR, the extraterritorial applicability of the right to life in targeting-related situations has been accepted, even though this is arguably so because it concerned situations where the State exercised control over the territory or situation. Whether the right to life applies extraterritorially in *hostilities*, where such control is absent, remains unclear, but in analogy to the functional approach adopted by the ICCPR and ACHR, it is here presumed that it does.
In so far it concerns *targeting with a direct nexus to the hostilities*, the right to life interplays with the law of hostilities, regardless of the situational context.
In respect of the use of lethal force *outside the context of hostilities*, the right to life interplays with the valid norms relevant to law enforcement available in LOAC.

In sum, there appears to be a rather high potential for interplay between valid norms or IHRL and LOAC governing operational detention and targeting. The next step is to examine the substantive content of the valid norms of IHRL and LOAC and to turn to the appreciation of their interplay.

Part C. Interplay Appreciation

Part C.1. Targeting

Introduction

After having concluded upon the interplay potential of IHRL and LOAC norms governing targeting, it is now time to turn to the interplay appreciation of these norms. The research question to answered in this part is:

> in light of contemporary counterinsurgency doctrine, how do the relevant normative frameworks of IHRL and LOAC governing targeting interrelate and what does this tell us about the permissible scope of conduct in operational practice?

To answer this question, it is, *firstly*, required to examine the substantive content of the valid norms. This provides us with insight on the character of the norms and their compatibility, which is required in order to conclude upon their interplay. Chapters VI and VII examine the norms of IHRL and LOAC respectively. To facilitate this process, several requirements have been identified that will each be further examined.

Chapter VIII eventually deals with the question of interplay. The approach in this chapter is to examine the interplay of IHRL and LOAC in relation to the two contexts in which targeting operations may occur, i.e. *law enforcement* and *hostilities*. To the extent that IHRL and LOAC provide valid and applicable norms for the regulation of deprivations of life for the purposes of law enforcement and hostilities, their total of norms form two distinct normative paradigms. Chapter VIII not only seeks to determine the interplay of IHRL and LOAC within these normative paradigms, but more importantly, the arguments underlying the i*nterplay between those normative paradigms*. As will be demonstrated, it is the latter interplay that eventually determines whether and according to which modalities the targeting of insurgents must be planned and executed.

Chapter VI IHRL

In Chapter IV we have identified the right to life as the principal human right governing the concept of targeting. It follows from the practice of the human rights supervisory bodies as well as soft law documents that the converged substantive scope of non-arbitrary deprivation of life can be distributed among a number of requirements. These include four substantive requirements, i.e. (1) the requirement of a sufficient legal basis; (2) the requirement of absolute necessity; (3) the requirement of proportionality; and (4) the requirement of precaution, as well as the procedural requirement to carry out a post-facto investigation. Paragraph 2 of this chapter identifies and examines the substantive content of the principal conceptual requirements within conventional and non-conventional IHRL determinative for the *non-arbitrariness* of the deprivation of life under IHRL. Before we turn to exercise, paragraph 1 briefly examines the complementarity of the notions of 'arbitrary' in Article 6 ICCPR and Article 4 ACHR, and 'intentional' in Article 2 ECHR.

1. 'Arbitrary' and 'Intentional': Complementary?

As noted, a preliminary remark must be made in respect of the term 'arbitrary' as used in Article 6 ICCPR and Article 4 ACHR, and the term 'intentional' as used in Article 2 ECHR. The use of the terms 'arbitrary' and 'intentional' demonstrates that, while the deprivation of life is prohibited and may not be derogated from under any circumstances during peacetime, the right to life and the commensurate scope of prohibited deprivation of life is nevertheless *not absolute*.[1120] Reasoned *a contrario*: the *non-arbitrary* and *non-intentional* deprivation of life falls outside the *principally prohibitative scope* of the right to life and thus provides a basis for *exceptional permissible* use of lethal force. The above calls for a closer examination of the concepts or 'arbitrary' and 'intentional' and more in particular of the scope and requirements determining whether the deprivation of life resulting from the use of force is (non-)arbitrary or (non-)intentional.

While the *travaux préparatoires* offer little assistance, it is submitted that both terms share a similar function, i.e. the lawfulness of a deprivation of life is subject to the outcome of the interpretation of what is 'arbitrary' or 'intentional' in a particular context. As can be further corroborated by relevant case-law and international practice in the interpretation of the right to life,[1121] "there is no or no significant discrepancy between deprivations of life that are

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[1120] Also: Boyle (1985), 6, 11 ,15; Vande Lanotte & Haeck (2004), 92, § 13; Ducheine (2008), 416; Melzer (2008), 92.

[1121] See, for example, (2003h), *Myrna Mack Chang v. Guatemala, Judgment of 25 November 2003*, § 157; (2003f), *Juan Humberto Sanchez Case, Judgment of 7 June 2003*, § 112, where the IACtHR refers to 'intentional' deprivation of life. Similarly, for the HRC: (1985a), *Baboeran et al v. Suriname, Comm. No. 146/1983 and 148-154/1983, 10 April 1984, UN Doc. Supp. No. 40 (A/40/40)*, § 14.3 and (1979c), *Maria Fanny Suarez de Guerrero v. Colombia, Comm. No. 11/45 of 5 February 1979*, § 13.2. The ECtHR regularly speaks of 'arbitrary' deprivation of life, see e.g. (2004m), *Makaratzis v. Greece, App. No. 50385/99, Judgment of 20 December 2004*, § 58; (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, § 97 and 99; (2001l),

unlawful under Article 2 ECHR, and deprivations of life that are arbitrary within the meaning of Article 6 ICCPR, Article 4 ACHR and Article 4 ACHPR."[1122] For that reason, this study will continue to use the term (non-)arbitrary deprivation of life.

2. Normative Substance of the Requirements of (Non-)Arbitrary Deprivation of Life

2.1. The Requirement of a Sufficient Legal Basis

The requirement of legal basis follows from the principle of legality. It implies the positive obligation upon each State to *prevent* arbitrary killing by its own security forces. This obligation entails, *inter alia*, that the application of potentially lethal force by a State's authorities in the exercise of law enforcement tasks requires a national law, available to the public, which strictly controls and limits the circumstances in which a person may be deprived of his or her life by the authorities of a State.[1123] This implies that it must make "the recourse to lethal force dependent on a careful assessment of the surrounding circumstances, including both the nature of the offence committed and the threat posed by the suspect or fugitive."[1124] In doing so, the national law must take account of the internationally recognized principles, further addressed below, that determine when and how force is to be used.[1125] The UN Basic Principles on the Use of Force by Law Enforcement Officials stipulates that

> Rules and regulations on the use of firearms by law enforcement officials should include guidelines that:
> (a) Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted;
> (b) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;
> (c) Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;
> (d) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;
> (e) Provide for warnings to be given, if appropriate, when firearms are to be discharged;
> (f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.[1126]

A State's *failure* to adopt national legislation that regulates and controls the use of lethal force in conformity with international legal standards results in arbitrary deprivations of life

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Streletz, Kessler and Krenz v. Germany, App. Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001, §§ 92 ff., 94.

[1122] Melzer (2008), 118-120.

[1123] (1979c), *Maria Fanny Suarez de Guerrero v. Colombia, Comm. No. 11/45 of 5 February 1979*, §§ 13.1-13.3; Human Rights Committee (1982a), § 3; Also: (2001l), *Streletz, Kessler and Krenz v. Germany, App. Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001*, § 87 and 102; (2004m), *Makaratzis v. Greece, App. No. 50385/99, Judgment of 20 December 2004*, §§ 67, 70; (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, §§ 99 ff; (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, § 154. See also United Nations (1979) (Article 1); Principles 1 and 11, United Nations (1990b).

[1124] Melzer (2008), 287.

[1125] (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, § 152.

[1126] Principle 11, United Nations (1990b).

following the actual application of force "not dissimilar to that of being extra-judicial."[1127] In addition, it implies a violation of that State's positive obligation to protect the right to life even if force is not applied.[1128] Thus, in *Makaratzis v. Greece*,[1129] concerning the shooting by Greek police officers of an arrestee, the ECtHR held that Greece had violated the right to life as at the time of the event

> […] a law commonly acknowledged as obsolete and incomplete in a modern democratic society was still regulating the use of weapons by State agents. The system in place did not afford to law-enforcement officials *clear guidelines and criteria governing the use of force in peacetime*. It was thus unavoidable that the police officers who chased and eventually arrested the applicant should have enjoyed a greater autonomy of action and have been left with more opportunities to take unconsidered initiatives than would probably have been the case *had they had the benefit of proper training and instructions*. The absence of clear guidelines could further explain why a number of police officers took part in the operation spontaneously, without reporting to a central command.[1130]

Also, in *Suarez de Guerrero v. Colombia*[1131] the UNHRC held that in relation to the killing of seven individuals merely suspected of involvement in a kidnapping at close range and without prior warning by Colombian police officers, the Colombian Legislative Decree No. 0070 of 20 January 1978, while providing a legal basis for the police action, did not adequately protect the right to life. According to the UNHRC, the law provided a ground that would exonerate police forces from conviction for otherwise prohibited conduct exercised "in the course of operations planned with the object of preventing and curbing the offences of extortion and kidnapping, and the production and processing of and trafficking in narcotic drugs."[1132]

Similarly, in the case of *Streletz et al v. Germany*, the border-policing policy adopted by the German Democratic Republic, which permitted border guards to use lethal force against fugitives, was held to be contrary to Article 2 ECHR, as a result of its failure to comply with the requirement of a sufficient legal basis. According to the ECtHR it could not even "be described as "law" within the meaning of Article 7 of the Convention."[1133]

In the context of the present study, it is relevant to note that counterinsurgent forces resorting to the use of lethal force under the concept of law enforcement act on the basis of "national laws and doctrines, rules of engagement and other legislative or executive instruments" that fully reflect the requirements of absolute necessity, proportionality and precaution of the right to life under IHRL examined below and that clearly distinguishes such use of force from that under the concept of hostilities.[1134]

[1127] Lubell (2010), 171.

[1128] Human Rights Committee (1982a), § 3; (1979c), *Maria Fanny Suarez de Guerrero v. Colombia, Comm. No. 11/45 of 5 February 1979*, §§ 13.1-13.3; (1985a), *Baboeran et al v. Suriname, Comm. No. 146/1983 and 148-154/1983, 10 April 1984, UN Doc. Supp. No. 40 (A/40/40)*, § 14.3; (2003h), *Myrna Mack Chang v. Guatemala, Judgment of 25 November 2003*, § 153.

[1129] (2004m), *Makaratzis v. Greece, App. No. 50385/99, Judgment of 20 December 2004*. The case concerned the use of force during the pursuit by the Greek police of a vehicle which ignored a red traffic light in the centre of Athens, in the course of which it broke through five police road blocks and hit several other vehicles, injuring two drivers (§ 11 ff.)

[1130] (2004m), *Makaratzis v. Greece, App. No. 50385/99, Judgment of 20 December 2004*, § 70.

[1131] (1979c), *Maria Fanny Suarez de Guerrero v. Colombia, Comm. No. 11/45 of 5 February 1979*.

[1132] (1979c), *Maria Fanny Suarez de Guerrero v. Colombia, Comm. No. 11/45 of 5 February 1979*, §§ 13.1-13.3.

[1133] (2001l), *Streletz, Kessler and Krenz v. Germany, App. Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001*, § 87.

[1134] Melzer (2008), 287.

Most of the examples used above relate to domestic situations. In extraterritorial counterinsurgency operations, this requirement also applies. Thus, in OCCUPCOIN, the legal basis for targeting must be available in the domestic law of the occupied territory already (or still) in force, or must, in the alternative, find a basis in the law introduced by the Occupying Power. In SUPPCOIN and TRANSCOIN, the counterinsurgent forces are generally entitled to act in self-defense or defense of others on the basis of their own criminal law, or on the basis of specific domestic laws pertaining to the targeting of insurgents abroad. In addition, a basis may be found in the domestic law of the receiving State, in so far the counterinsurgent forces' presence is consent based.

2.2. The Requirement of Absolute Necessity

In general terms, the requirement of absolute necessity entails that, in view of the concrete circumstances at hand, only that measure is lawful which is *strictly required* (and thereby 'strictly proportionate'[1135], or 'indispensible'[1136]) to attain a recognized legitimate objective to maintain or restore the preceding state of affairs in law and order in a given society. Generally, the concept of legitimate aim can be summarized to include

> self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape.[1137]

The requirement of absolute necessity finds a firm basis in the conventional[1138] and non-conventional[1139] normative frameworks pertaining to the right to life, the practice of the relevant human rights supervisory bodies[1140] as well as doctrine.[1141] In relation to this gener-

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[1135] (1986d), *Wolfgram v. Germany, App. No. 11257/84, Decision of 6 October 1986*; (1993c), *Kelly v. the United Kingdom, App. No. 17579/90, Decision of 13 January 1993*; (1997f), *Ayetkin v. Turkey, App. No. 22880/93, Decision of 18 September 1997*; (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, § 149; (1997d), *Andronicou and Constantinou v. Cyprus, App. No. 25052/94, Judgment of 9 October 1997*, § 171; (2001i), *McKerr v. the United Kingdom, App. No. 28883/95, Judgment of 4 May 2001*, § 110; (2001h), *Kelly and Others v. the United Kingdom, App. No. 30054/96, Judgment of May 4, 2001*, § 93; (2001k), *Shanaghan v. the United Kingdom, App. No. 37715/97, Judgment of 4 May 2001*, § 87; (2001g), *Jordan v. United Kingdom, App. No. 24726/94, Judgment of 4 May, 2001*, § 104; (2000g), *Gül v. Turkey, App. No. 22676/93, Judgment of 14 December 2000*, § 77; (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, § 94.

[1136] (1976d), *Handyside v. the United Kingdom, App. No. 5493/72, Judgment of 7 December 1976*, § 48.

[1137] Principle 9, United Nations (1990b). Similarly: Article 2(2) ECHR, which justifies the use of force that is no more than absolutely necessary to "(1) to remove a threat posed to human life materializing from unlawful violence, (2) to effect a lawful arrest or to prevent the escape of a person lawfully detained, and (3) to lawfully quell a riot or insurrection."

[1138] Article 2(2) ECHR.

[1139] Article 3, United Nations (1979); Principles 4, 9, 13-14, United Nations (1990b).

[1140] (1979c), *Maria Fanny Suarez de Guerrero v. Colombia, Comm. No. 11/45 of 5 February 1979*, §§ 13.1-13.3; (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, §§ 132, 149, 196 ff, 212; (1997d), *Andronicou and Constantinou v. Cyprus, App. No. 25052/94, Judgment of 9 October 1997*, § 171; (2001i), *McKerr v. the United Kingdom, App. No. 28883/95, Judgment of 4 May 2001* § 110; (2000g), *Gül v. Turkey, App. No. 22676/93, Judgment of 14 December 2000*, § 77; (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, §§ 94, 108; (1976d), *Handyside v. the United Kingdom, App. No. 5493/72, Judgment of 7 December 1976*, § 48; (1999b), *Armando Alejandre Jr. and Others v. Cuba ('Brothers to the Rescue'), Case No. 11.589, Decision of 29 September 1999*, §§ 37, 42; (2001j), *Report on the Situation of Human Rights in Guatemala (6 April 2001)*, § 50; (2002h), *Report on Terrorism and Human Rights (22 October 2002)*, §§ 87-88, 90-92; (1996c), *Chumbivilcas v. Peru, Case No. 10.559, Decision of 1 March 1996*; (1995g), *Neira Alegria et al. v. Peru, Judgment of 19 January 1995*. See also Commentary to Article 3, United Nations (1979).

al description, absolute necessity can be verified by assessing three aspects: the *qualitative*, *quantitative*, and *temporal* aspect.[1142] These will be discussed below.

2.2.1. Qualitative Aspect of Necessity

The qualitative aspect of necessity implies that there must be a *causal relation* between the attainable legitimate objective of the operation, and the *necessity* to use *lethal* force, instead of less harmful means, or no force at all.[1143] Put otherwise,

> the use of potentially lethal force must be 'strictly unavoidable' in the sense that less harmful means remain ineffective or without any promise of achieving the purpose of the operation (qualitative necessity).[1144]

Thus, any use of potentially lethal force renders the resulting deprivation of life, whether so intended or accidentally caused,[1145] unlawful when applied in lieu of instruments of less harmful nature available and feasible to attain a legitimate aim. In that sense, this aspect of the qualitative element of the concept of necessity applies "[…] to the *hierarchy* of coercive measures in which lethal or potentially lethal force is reserved as a *last resort*."[1146]

In the case of *Brothers to the Rescue* (*Armando Alejandre Jr. and Others v. Cuba*), in respect of the shooting down by two Cuban MIG-29's in international airspace of two unarmed civilian Cessna's heading towards Cuba, the IACiHR held that Cuba had violated the right to life as

> The Cuban Air Force never notified nor warned the civil small aircraft, did not attempt to make use of other methods of interception, and never gave them the opportunity to land. The first and only response of the MIGs was the intentional destruction of the civil aircraft and of their four occupants.[1147]

In the case of *Nachova v. Bulgaria*, concerning the shooting by a Bulgarian army officer of two unarmed soldiers who had escaped from short-term imprisonment for non-violent offences, and who at the time of the shooting posed no threat, the ECtHR held that

> the conduct of Major G., the military police officer who shot the victims, calls for serious criticism in that he used grossly excessive force.
>
> (i) It appears that there were other means available to effect the arrest: the officers had a jeep, the operation took place in a small village in the middle of the day and the behaviour of Mr Angelov and Mr Petkov was apparently predictable, since, following a previous escape, Mr Angelov had been found at the same address (see paragraphs 17, 18, 23 and 24 above).[1148]

[1141] Melzer (2010c), 283; Corn (2010), 80-81

[1142] Melzer (2010c), 227.

[1143] (1999b), *Armando Alejandre Jr. and Others v. Cuba ('Brothers to the Rescue'), Case No. 11.589, Decision of 29 September 1999*, §§ 37, 42; (2001j), *Report on the Situation of Human Rights in Guatemala (6 April 2001)*, § 50; (2002h), *Report on Terrorism and Human Rights (22 October 2002)*, § 87; (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, § 108. See also Principle 4, United Nations (1990b).

[1144] Melzer (2010c), 283.

[1145] (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, § 148.

[1146] Rodley (1999), 185. Also: Lubell (2010), 173; Corn (2010), 80-81; Kretzmer (2005), 178: "The absolute necessity tests involves examining two questions: 1. Is the use of *force* absolutely required, or could other measures be employed to protect the threatened persons? 2. Assuming that no other measures are available, is it absolutely necessary to use *lethal* force, or could some lesser degree of force be employed?" Also: (2011e), *Giuliani v. Italy, App. No. 23458/02, Judgment of 24 March, 2011*, § 214; (2006d), *Montero-Aranguren and Others (Detention Centre of Catia) v. Venezuela, Judgment of 5 July 2006*, § 67.

[1147] (1999c), *Armando Alejandre Jr. and Others v. Cuba ('Brothers to the Rescue'), Case No. 11.589, IACommHR (29 September 1999)*, § 8.

[1148] (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, § 108.

2.2.2. Quantitative Aspect of Necessity

Complementary to the qualitative aspect of necessity is the *quantitative* aspect of necessity. It requires that only that force may be used that, as a minimum, is strictly required to attain a legitimate objective. This means that in the event that the use of potentially lethal force is unavoidable, counterinsurgent forces remain under the obligation to ensure that, in light of the circumstances at hand and based on the information available to them, the potential lethal force is not more harmful to the life of the targets than the legitimate objective of the operation strictly necessitates, and aim to minimize damage and injury, and respect and preserve human life.[1149] In essence, the quantitative aspect of necessity demands a deliberation of strict proportionality (*stricto sensu*).[1150]

It follows that the extra-judicial use of potentially lethal force renders the deprivation of life *unlawful*, if it cannot be demonstrated that the intended killing of the individual under target was "objectively indispensible for the success of the operation" and it would not suffice to merely incapacitate the individual.[1151] Obviously, such is the case "where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost […]."[1152] Thus, in the aforementioned case of *Brothers to the Rescue*, the IACiHR held that it

> […] cannot but comment, also, on the conclusions of the ICAO with respect to the fact that the agents of the Cuban State *did nothing to employ methods other than the use of lethal force to conduct the civil aircraft out of the restricted or danger zone*. The Commission considers that the indiscriminate use of force, and in particular the use of firearms, is an attack on the life and on the integrity of the person. In this case in particular, the military aircraft acted in an irregular fashion: Without prior warning, without proof that its action was necessary, without proportionality, and without the existence of due motivation.[1153]

[1149] (1979c), *Maria Fanny Suarez de Guerrero v. Colombia, Comm. No. 11/45 of 5 February 1979*, §§ 13.1-13.3; (1995g), *Neira Alegria et al. v. Peru, Judgment of 19 January 1995*, §§ 43, 69 and 72; (2003h), *Myrna Mack Chang v. Guatemala, Judgment of 25 November 2003*, §§ 134.6 ff; (1999b), *Armando Alejandre Jr. and Others v. Cuba ('Brothers to the Rescue'), Case No. 11.589, Decision of 29 September 1999*, §§ 37, 42, 45; (2001j), *Report on the Situation of Human Rights in Guatemala (6 April 2001)*, § 50; (2002h), *Report on Terrorism and Human Rights (22 October 2002)*, § 169; (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, § 212; (1998g), *Gülec v. Turkey, Appl. No. 21593/93, Judgment of 27 July 1998*, §§ 71 and 73; (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, § 108. See also Principles 4 and 9, United Nations (1990b).

[1150] As explained by Melzer, the deliberation of strict proportionality must be strictly viewed as an element of the quantitative aspect of necessity and not be conflated with the requirement of proportionality *latu sensu*, discussed below, which has a different purpose and scope and requires an assessment independent from necessity. Melzer (2008), 228, footnote 33. To hold otherwise "deprives the law in force of the value judgement inherent in the principle of proportionality and, thereby, of one of the safeguards indispensible for its ability to provide adequate answers to contemporary challenges."

[1151] Melzer (2010c), 283.

[1152] (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, § 95. Also: (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, §§ 146-150, 192-214; (2004m), *Makaratzis v. Greece, App. No. 50385/99, Judgment of 20 December 2004*, §§ 64-66; (2001l), *Streletz, Kessler and Krenz v. Germany, App. Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001*, §§ 87, 96-97.

[1153] (1999b), *Armando Alejandre Jr. and Others v. Cuba ('Brothers to the Rescue'), Case No. 11.589, Decision of 29 September 1999*, § 42.

2.2.3. Temporal Aspect of Necessity

The *temporal* aspect of necessity entails that "the use of lethal force is unlawful if, at the very moment of its application, it is not *yet or no longer* absolutely necessary to achieve the desired purpose."[1154] Thus, potential lethal force may not be applied in the *anticipation* of a threat that is merely *presumed* to become manifest. IHRL requires the manifestation of a *concrete* and *specific* threat, only *in response* to which force may be applied. As formulated by the UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, "there is no legal basis for shooting to kill for any reason other than near certainty that to do otherwise will lead to loss of life."[1155] This arguably implies that the deprivation of life is unlawful in situation where an individual is killed in response to his previous use of lethal force against other individuals, whilst not presenting a threat at the moment of his killing by State agents.[1156] This is of particular relevance in view of the question of deprivations of life of insurgents, for it follows that the mere designation of an individual as insurgent – and the general perceived threat this 'status' brings along – is insufficient to permit the use of combat power when acting in the domain of law enforcement as long as his conduct does not amount to a concrete and specific threat that necessitates the use of lethal force to attain a legitimate aim.[1157] In response to the targeted killing-policies adopted by some States to fight terrorism, the UN Special Rapporteur on Extra-Judicial, Summary and Arbitrary Executions concluded that

> [e]mpowering Governments to identify and kill 'known terrorists' places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other alternative had been exhausted. While it is portrayed as a limited 'exception' in international norms, it actually creates the potential for an endless expansion of the relevant category to include any enemies of the State, social misfits, political opponents, or others.[1158]

As a result, 'shoot to kill'-policies that authorize State agents to kill anyone falling under a certain category of persons – insurgents, guerrilla's, terrorists, et cetera – on that basis alone are unlawful.

Similarly, potential lethal force may no longer be applied when the threat has subsided, partially or totally, for example because the suspect has been apprehended, has surrendered, or has been incapacitated, and further abstains from hostile acts.[1159] As held by the IACiHR:

[1154] Melzer (2010c), 283. Evidence of this aspect can be found in (1999b), *Armando Alejandre Jr. and Others v. Cuba ('Brothers to the Rescue'), Case No. 11.589, Decision of 29 September 1999*, § 42; (2002h), *Report on Terrorism and Human Rights (22 October 2002)*, §§ 90 ff; (1995g), *Neira Alegria et al. v. Peru, Judgment of 19 January 1995*; (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, § 108; (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, §§ 70 ff, 132, 196 ff). See also Commentary (a) to Article 3 United Nations (1979).

[1155] United Nations (2006), §§ 50, 59.

[1156] As argued by Melzer (2008), 229, criticizing the Swiss court which deemed the deprivation of life of Ewald K lawful at a moment that he showed on the balcony of his apartment with the barrel of his rifle pointed to the floor hours after he had seriously injured a police man and killed a police dog in previous attempts to arrest him. (2000e), *Ewald K. Case*, § 13.

[1157] Corn (2010), 28-29.

[1158] United Nations (2004), § 41.

[1159] IACommHR (2002), § 91 (emphasis added); (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, §§ 70 ff, 132, 196 ff); (1995g), *Neira Alegria et al. v. Peru, Judgment of 19 January 1995*. In the context of armed conflict: (1997b), *Abella et al. v. Argentina (La Tablada), Case No. 11.137, Decision of 18 November 1997*, §§ 204, 218, 245 (considering that the killing of individuals who had been involved in attacks on military barracks but who later surrendered constituted a violation of Article

"states must not use force against individuals who no longer present a threat as described above, such as individuals who have been apprehended by authorities, have surrendered or who are wounded and abstain from hostile acts."[1160] According to the ECtHR, the temporal aspect of necessity was arguably ignored in *Nachova*:

> Mr Petkov was wounded in the chest, a fact for which no plausible explanation was provided (see paragraphs 41 and 50-54 above). In the absence of such an explanation, the possibility that Mr Petkov had turned to surrender at the last minute but had nevertheless been shot cannot be excluded.[1161]

Another example in case is *Neira Alegria et al. v. Peru*,[1162] in which the IACtHR took account of the conclusion in the Peruvian Congressional Commission investigative report that "[t]he final demolition, after the surrender which occurred at 14:30 hours on the nineteenth, *would not have a logical explanation* and would, consequently, be unjustified."[1163]

The appraisal of an existence of 'absolute necessity' must be made in light of the circumstances and on the basis of the information available. For example, the case of *Finogenov and Others v. Russia* concerned the taking hostage of almost a thousand civilians by over forty heavily armed Chechen terrorists equipped with explosives in the Dubrovka theatre in Moscow. The Russian authorities decided to use an opiate gas to incapacitate the terrorists before storming the theatre. The gas caused the death of 125 hostages. Regarding the question of absolute necessity, the ECtHR held that

> In sum, the situation appeared very alarming. Heavily armed separatists dedicated to their cause had taken hostages and put forward unrealistic demands. The first days of negotiations did not bring any visible success; in addition, the humanitarian situation (the hostages' physical and psychological condition) had been worsening and made the hostages even more vulnerable. The Court concludes that there existed a real, serious and immediate risk of mass human losses and that the authorities had every reason to believe that a forced intervention was the "lesser evil" in the circumstances. Therefore, the authorities' decision to end the negotiations and storm the building in the circumstances did not run counter to Article 2 of the Convention.[1164]

The, in retrospect, mistaken, but objectively honest belief that an individual posed a threat so severe and immediate to the lives of individuals that it absolutely necessitated the use of lethal force may exonerate State agents from an unlawful deprivation of life.[1165] An example in case is the tragic death of Jean Charles de Menezes, a Brazilian citizen killed by the London Metropolitan Police in a metro, who was falsely believed to be a suicide bomber. A connected issue is whether sufficient precautions were taken that may have prevented the use of lethal force; an issue that will be explored in more detail below.

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4). See also (1997e), *Arturo Ribón Avilán v. Colombia, Case 11.142, Report No. 26/97, Judgment of 30 September 1997*, §§ 134 ff. and 159 ff.

[1160] (2002h), *Report on Terrorism and Human Rights (22 October 2002)*, § 91.

[1161] (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, § 108.

[1162] (1995g), *Neira Alegria et al. v. Peru, Judgment of 19 January 1995*. The case involved the quashing of a prison riot in the San Juan Bautista Prison by Peruvian security forces, including the Navy, killing more than 100 prisoners. The Navy used dynamite to completely destroy – rather than force a way into – the so-called 'Blue Pavillon'.

[1163] (1995g), *Neira Alegria et al. v. Peru, Judgment of 19 January 1995*, § 62, 43 (emphasis added).

[1164] (2012b), *Finogenov and others v. Russia, App Nos. 18299/03 and 27311/03, Judgment (Grand Chamber) of 20 December 2011*, § 226. See also the preceding §§ 219-225.

[1165] (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, § 200.

In sum, from an operational viewpoint, the requirement of absolute necessity entails that the use of combat power by counterinsurgent forces (potentially) resulting in the deprivation of life of insurgents when acting under the concept of law enforcement is lawful only when, in light of the circumstances at hand and the information available to the operator actually applying the force, non-lethal measures remain ineffective or without any promise of intended result and the use of lethal force is unavoidable. In the application of unavoidable lethal force, counterinsurgent forces must aim to minimize the damage or injury to human life, including that of the insurgent, to the extent that this is proportionate to attain a legitimate aim. The mere fact that an individuals is identified or labeled as 'insurgent' (or 'guerrilla', or 'terrorist') warrants no lethal force if it is not established that he poses a concrete and specific threat to human life. Also, once an insurgent has been incapacitated to the extent that the grounds for continued lethal force have subsided, the continued use of lethal force is no longer strictly necessary.

2.3. The Requirement of Proportionality

The determination that the deprivation of life is absolutely necessary to attain a legitimate objective does not remove the obligation to carry out an independent follow-up assessment of the proportionality of the harm or injury to life in relation to the seriousness of the offence and the legitimate aim pursued. [1166] In other words, a deprivation of life violates the right to life when the nature and scale of the threat does not outweigh the harm or injury to life resulting from the use of force applied in support of a legitimate aim.[1167]
It therefore logically follows that the use of force must also be proportionate to the legitimate aim, i.e. the deprivation of life is lawful *only* if the force applied serves to attain an exceptional *legitimate* objective. In other words, the deprivation of life may not be the primary aim, irrespective of the reason why.[1168] As noted previously, the range of legitimate objectives permitting the application of potentially lethal force is limited and exceptional to

> self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest

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[1166] Melzer (2010c), 285.

[1167] (1986d), *Wolfgram v. Germany, App. No. 11257/84, Decision of 6 October 1986*. See also (1979c), *Maria Fanny Suarez de Guerrero v. Colombia, Comm. No. 11/45 of 5 February 1979*, §§ 13.1-13.3; (1995g), *Neira Alegria et al. v. Peru, Judgment of 19 January 1995*, §§ 43, 69 and 72; (2003h), *Myrna Mack Chang v. Guatemala, Judgment of 25 November 2003*, §§ 134.6 f.; (1999b), *Armando Alejandre Jr. and Others v. Cuba ('Brothers to the Rescue'), Case No. 11.589, Decision of 29 September 1999*, §§ 37, 42, 45; (2001j), *Report on the Situation of Human Rights in Guatemala (6 April 2001)*, § 50; (2002h), *Report on Terrorism and Human Rights (22 October 2002)*, §§ 87 and 92; (1999), *Third Report on the Situation of Human Rights in Colombia, IACiHR (26 February 1999)*, § 169; (1993c), *Kelly v. the United Kingdom, App. No. 17579/90, Decision of 13 January 1993*; (1997f), *Ayetkin v. Turkey, App. No. 22880/93, Decision of 18 September 1997*, § 95; (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, § 192 ff; (2000g), *Gül v. Turkey, App. No. 22676/93, Judgment of 14 December 2000*, § 82; (2001l), *Streletz, Kessler and Krenz v. Germany, App. Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001*, §§ 87, 96, 102; (2004m), *Makaratzis v. Greece, App. No. 50385/99, Judgment of 20 December 2004*, § 64-66; (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, § 95; See also Commentary (c) to Article 3, United Nations (1979); Principles 4 and 9, United Nations (1990b).

[1168] (1993c), *Kelly v. the United Kingdom, App. No. 17579/90, Decision of 13 January 1993*; (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, § 147; (1997d), *Andronicou and Constantinou v. Cyprus, App. No. 25052/94, Judgment of 9 October 1997*, § 171.

a person presenting such a danger and resisting their authority, or to prevent his or her escape.[1169]

As a consequence, any deprivation of life resulting from intentional lethal force applied for purposes lying *outside* the scope of exceptional legitimate objectives is, besides strictly unnecessary, *a priori* disproportionate.[1170] Thus, a deprivation of life cannot be lawful to attain a *political* purpose, or where the threat is merely *political* in nature. In addition, the use of lethal force is disproportionate when the threat concerns a *potential* and *unspecified* threat that may materialize in the future, the application of intentional lethal force is likely to be disproportionate; what is required is a *specific* and *concrete* threat.[1171] It therefore follows that the decision to use of lethal force in a law enforcement operation must take place on an individual basis, and not on mere suspicion of an individual's involvement in a crime or membership to a group. As held by the IACiHR in relation to Colombia:

> The Commission recognizes that the National Police have the right and responsibility to act, and even to use force, to impede crime or to protect themselves or others. However, the police are never justified in depriving an individual of his life based on the fact that he belongs to a "marginal group" or has been suspected of involvement in criminal activity. Nor may the police automatically use lethal force to impede a crime or to act in self-defense. The use of lethal force in such cases would only be permissible if it were *proportionate* and *necessary*.[1172]

The proportionality assessment must be made on a case-by-case basis. Thus, while an operation to arrest an individual who is about to commit a serious crime involving grave threat to life – for example a terrorist attack on a crowded cinema – may render the use of lethal force indispensible in light of the circumstances and the information available, the use of lethal force renders the actual deprivation of life unlawful if the law enforcement officers at the scene could have reasonably established that the individual, *de facto*, did not pose a threat.[1173] Thus, while the use of force complies with the requirement of proportionality *stricto sensu* (as part of the quantitative aspect of necessity), the use of lethal force in the absence of a threat does not or no longer serves a legitimate aim. Instead, law enforcement officers are under an obligation to resort to non-lethal alternatives, or, ultimately, the escape of the individual. In that respect, the proportionality assessment must be made not only *in abstracto*, on the basis of the letter of the relevant and applicable law, but also *in concreto*,

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[1169] Principle 9, United Nations (1990b); Melzer (2008), 284. Similarly: Article 2(2) ECHR, which justifies the use of force that is no more than absolutely necessary to "(1) to remove a threat posed to human life materializing from unlawful violence, (2) to effect a lawful arrest or to prevent the escape of a person lawfully detained, and (3) to lawfully quell a riot or insurrection."

[1170] (1986d), *Wolfgram v. Germany, App. No. 11257/84, Decision of 6 October 1986*; (1993c), *Kelly v. the United Kingdom, App. No. 17579/90, Decision of 13 January 1993*; (1997f), *Ayetkin v. Turkey, App. No. 22880/93, Decision of 18 September 1997*, § 91; (1997d), *Andronicou and Constantinou v. Cyprus, App. No. 25052/94, Judgment of 9 October 1997*, § 171; (2001i), *McKerr v. the United Kingdom, App. No. 28883/95, Judgment of 4 May 2001*, § 110; (2001h), *Kelly and Others v. the United Kingdom, App. No. 30054/96, Judgment of May 4, 2001*, § 93; (2001k), *Shanaghan v. the United Kingdom, App. No. 37715/97, Judgment of 4 May 2001*, § 87; (2001g), *Jordan v. United Kingdom, App. No. 24726/94, Judgment of 4 May, 2001*§ 104; (2000g), *Gül v. Turkey, App. No. 22676/93, Judgment of 14 December 2000*, § 77; (2001l), *Streletz, Kessler and Krenz v. Germany, App. Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001*, §§ 96; (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, § 94.

[1171] Principle 9, United Nations (1990b).

[1172] (1999), *Third Report on the Situation of Human Rights in Colombia, IACiHR (26 February 1999)*, § 213 (emphasis added).

[1173] Melzer (2010c), 284; Lubell (2010), 173.

"with due regard to the pre-eminence of respect for human life as a fundamental value."[1174] As an example may serve the case of *Kelly v. the United Kingdom*. In applying the law to the facts, the ECiHR held firstly that it

> […] is satisfied that the shooting in this case was for the purpose of apprehending the occupants of the stolen car, who were reasonably believed to be terrorists, in order to prevent them carrying out terrorist activities. Accordingly, the action of the soldiers in this case was taken for the purpose of effecting a lawful arrest within the meaning of Article 2 para. 2 (b) (Art. 2-2-b) of the Convention.
>
> The Government has submitted, and the applicant has not disputed, that the only course of action open to the soldiers was either to open fire or to allow the car to escape. Neither before the domestic courts, nor before the Commission, was it contended that it would have been possible to immobilise the car by shooting at the tyres or the engine block. The Commission notes that the High Court judge commented that there was a high probability that shots fired at the driver would kill him or inflict serious injury. The situation facing the soldiers, however, had developed with little or no warning and involved conduct by the driver putting them and others at considerable risk of injury. Their conduct must also be assessed against the background of the events in Northern Ireland, which is facing a situation in which terrorist killings have become a feature of life. In this context the Commission recalls the judge's comments that, although the risk of harm to the occupants of the car was high, the kind of harm to be averted (as the soldiers reasonably thought) by preventing their escape was even greater, namely the freedom of terrorists to resume their dealing in death and destruction.[1175]

In sum, the requirement of proportionality implies that counterinsurgent forces, when operating in the domain of law enforcement, in the concrete circumstances and on the basis of the information available to them must ensure that any deprivation of life (potentially) resulting from their use of force vis-à-vis insurgents is not the ultimate purpose but serves as a means to attain legitimate aim, and, and that the deprivation of life is a proportionate outcome to attain such a legitimate aim, in view of the concrete and specific threat.

2.4. The Requirement of Precaution

A final substantive requirement determinative of the lawful deprivation of life is the requirement of precaution. A necessary and proportionate deprivation of life is nonetheless unlawful when if it results from an operation that is not planned, organized and controlled with a view to minimize the use of lethal force, to the greatest extent feasible.[1176] The requirement of precaution will be addressed in more detail by examining its personal, temporal and qualitative scope.

[1174] (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, § 97. See also (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, §§ 211-214.

[1175] (1993c), *Kelly v. the United Kingdom, App. No. 17579/90, Decision of 13 January 1993*.

[1176] (1986d), *Wolfgram v. Germany, App. No. 11257/84, Decision of 6 October 1986*; (1997f), *Ayetkin v. Turkey, App. No. 22880/93, Decision of 18 September 1997*, § 97; (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, §§ 150, 194, 205; (1997d), *Andronicou and Constantinou v. Cyprus, App. No. 25052/94, Judgment of 9 October 1997*, § 171; (1998g), *Gülec v. Turkey, Appl. No. 21593/93, Judgment of 27 July 1998*, § 71; (2000g), *Gül v. Turkey, App. No. 22676/93, Judgment of 14 December 2000*, § 84; (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, § 93. See also Commentary (c) to Article 3, United Nations (1979); Principles 2, 3, 5 and 10 United Nations (1990b).

2.4.1. Personal Scope

In its *active* personal scope, the requirement of precaution is binding upon *every* individual that may be potentially involved in the use of force, *irrespective* of his of her position within the organization. Thus, from the commanding officer overseeing the operation from his headquarters to the operator on the ground, each must make an *individual assessment* of the circumstances, irrespective of superior orders. This obligation, however, is not absolute, and may be limited in view of the extent to which the circumstances reasonably permit a member of the law enforcement operation to make such an assessment (see below).
In terms of the *passive* personal scope, the requirement of precaution *firstly* implies an obligation to distinguish between those individuals that threaten the security of all, and innocent bystanders who do not pose a threat. Lethal force may only be applied against the individual posing the threat. A *second* aspect of the passive personal scope is that the requirement of precaution stretches not only to the protection of *innocent bystanders*, *but also* to the minimization of the potential death or injury of the *targeted individual*. This aspect of the requirement of precaution renders operations solely designed to kill an individual *a priori* unlawful.

2.4.2. Temporal Scope

In terms of *temporal* scope, the duty to take appropriate care in the control and organization of an operation applies to every stage of the operation, from pre-deployment training and initial planning to the actual execution of the operation, and in some extent, to the aftermath of the operation, in light of the duty to provide medical assistance to individuals injured, or otherwise affected as a consequence of the operation.

2.4.3. Qualitative Scope

In terms of *qualitative* scope, the requirement of precaution entails a duty to equip the law enforcement operators, including military forces, with all *appropriate equipment of self-defense*, such as shields, helmets, bullet-proof vests, bullet-proof means of transportation and non-lethal weapons, to enable them to execute their operation with a view to measures proportionate to the gravity of the circumstances at hand.[1177] In the case of *Gülec v. Turkey*, concerning the deployment of Turkish armed forces to control a demonstration, the ECtHR held that, besides the disproportionality of the force applied, the Turkish government failed to comply with the requirement of precaution. The armed forces were forced to use their firearms

> […] because they apparently did not have truncheons, riot shields, water cannon, rubber bullets or tear gas. The lack of such equipment is all the more incomprehensible and unacceptable because the province of Sirnak, as the Government pointed out, is in a region in which a state of emergency has been declared, where at the material time disorder could have been expected.[1178]

An additional qualitative aspect of the requirement of precaution is the duty for State agents to identify themselves and to issue a *warning* preceding the use of lethal force, unless circumstances may render the issuing of a warning pointless or inappropriate, or unduly place the law enforcement officers or other persons at risk of death or serious harm.[1179] Not only

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[1177] Articles 2 and 3, United Nations (1990b), confirmed in (1998g), *Gülec v. Turkey, Appl. No. 21593/93, Judgment of 27 July 1998*, § 71.
[1178] (1998g), *Gülec v. Turkey, Appl. No. 21593/93, Judgment of 27 July 1998*, § 71.
[1179] Article 10, United Nations (1990b).

must such a warning be effective in terms of clarity and comprehensibility, it must also provide the addressee with sufficient time for the warning to be observed,[1180] so as to give the suspect time to surrender or to put down his arms, *et cetera*.[1181]

Furthermore, States are under an obligation to *train* law enforcement operators and to equip them with clear guidelines such as rules of engagement that contain rules governing the use of force that carefully reflect both the national standard as well as the substance of the IHRL standard. This follows from the ECtHR's judgment in the *McCann*-case, concerning the shooting by members of the Special Air Service (SAS, a UK Army special forces regiment) of suspected IRA-terrorists in Gibraltar. The ECtHR concludes that while

> it is not clear whether they had been trained or instructed to assess whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest [,…] [t]heir reflex action in this vital respect lacks the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects, and stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police which had been drawn to their attention and which emphasised the legal responsibilities of the individual officer in the light of conditions prevailing at the moment of engagement […]. This failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation.[1182]

This must prevent that State agents act "not only on the basis of the letter of the relevant regulations, *but also with due regard to the pre-eminence of respect for human life as a fundamental value*."[1183] This aspect is of particular relevance in light of *counterinsurgency operations*. Most States predominantly if not exclusively train their armed forces for combat in the domain of hostilities, where they are taught to apply force against individuals with a purpose to kill without a need to assess whether such is absolutely necessary in light of the circumstances at hand. Operational reality, however, makes clear that such operations not uncommonly take place in environments of mosaic warfare, where forces are forced to quickly shift from a hostilities-mode to a law enforcement mode in the application of the means available to them. In such a law enforcement situation, forces unaware and not trained in the use of force in a law enforcement manner will automatically take recourse to the skills and drills of combat in hostilities. An interesting example of State practice where forces are trained and equipped with ROE to apply force in both the hostilities and law enforcement mode is Colombia. There, armed forces apply force on the basis of two-colored ROE-card. The 'red card' (*tarjeta roja*) contains rules for operations during hostile scenarios directed against military objectives controlled by an organized armed group (*Operaciones en escenarios de hostilidades*); the blue card (*tarjeta azul*) provides rules for operations to maintain security (*Operaciones para el mantenimiento de la seguridad*),[1184] i.e.

> all other operations that are performed not against a specific military objective, but against all sorts of violent criminals. In these situations, a framework of normal peacetime law enforcement including human rights law is generally applicable, the resort to force only being

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[1180] Article 10, United Nations (1990b).

[1181] (1979c), *Maria Fanny Suarez de Guerrero v. Colombia, Comm. No. 11/45 of 5 February 1979*, § 13.2; (1995g), *Neira Alegria et al. v. Peru, Judgment of 19 January 1995*, §§ 43, 62, 69; (1999b), *Armando Alejandre Jr. and Others v. Cuba ('Brothers to the Rescue'), Case No. 11.589, Decision of 29 September 1999*, § 42.

[1182] (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, § 212.

[1183] (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, § 97. See also (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, §§ 211-214.

[1184] Colombia (2009). See also Von der Groeben (2011), 150; Szesnat & Bird (2012), 228 ff.

> allowed as *ultima ratio*.[1185] […] [B]lue card operations are of a genuine law enforcement nature, with the particularity that they are addressed at soldiers, rather than the police forces. The blue card establishes a legal framework for robust law enforcement by the military and can be understood as an attempt to bridge the divide between police and military forces, reflecting the constitutional term of 'public forces'. The blue card instructions are intended to regulate situations where the threat surpasses the capacities of ordinary police forces, especially when the intensity of the violence or its territorial extensions are of such a nature that the police is not equipped to fight it.[1186]

Also, in the planning and execution of operations involving a high probability of use of lethal force, such as counter-terrorist operations, States are under a duty *to continuously reassess* the necessity to such resort, particularly when the use of lethal force is predetermined. In practice, this implies a duty to evaluate the intelligence at their disposal before transmitting it to the operators, particularly if it concerns operators "whose use of firearms automatically involved shooting to kill,"[1187] such as special forces of the armed forces. As noted by the ECtHR in *Nachova and Others v. Bulgaria*:

> […] a crucial element in the planning of an arrest operation ... must be the analysis of all the available information about the surrounding circumstances, including, as an absolute minimum, the nature of the offence committed by the person to be arrested and the degree of danger – if any – posed by that person. The question whether and in what circumstances recourse to firearms should be envisaged if the person to be arrested tries to escape must be decided on the basis of clear legal rules, adequate training and in the light of that information.[1188]

Finally, and noted previously in relation to the temporal scope, the requirement of precaution includes a duty to ensure the *availability of medical assistance* in operations that are likely to involve the use of lethal force.[1189]

2.4.4. Standard: 'Reasonableness in the Circumstances'

The requirement of precaution is not absolute, but contingent on a standard of 'reasonableness in the circumstances'.[1190] As the ECtHR held in *Andronicou and Constantinou v. Cyprus*,[1191]

[1185] Von der Groeben (2011), 150.

[1186] Von der Groeben (2011), 154.

[1187] (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, § 211.

[1188] (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, § 104.

[1189] Principle 5, United Nations (1990b). See also (2012b), *Finogenov and others v. Russia, App Nos. 18299/03 and 27311/03, Judgment (Grand Chamber) of 20 December 2011*, §§ 266, where the ECtHR held that Russia had violated its obligation to take precautions since "the rescue operation of 26 October 2002 was not sufficiently prepared, in particular because of the inadequate information exchange between various services, belated beginning of the evacuation, limited on-the-field coordination of various services, lack of appropriate medical treatment and equipment on the spot, and inadequate logistics."

[1190] (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, § 200; (1997d), *Andronicou and Constantinou v. Cyprus, App. No. 25052/94, Judgment of 9 October 1997*, § 192; (2001i), *McKerr v. the United Kingdom, App. No. 28883/95, Judgment of 4 May 2001*, § 116; (2001h), *Kelly and Others v. the United Kingdom, App. No. 30054/96, Judgment of May 4, 2001*, § 99; (2001g), *Jordan v. United Kingdom, App. No. 24726/94, Judgment of 4 May, 2001* § 110; (2000g), *Gül v. Turkey, App. No. 22676/93, Judgment of 14 December 2000*, § 78; (2004m), *Makaratzis v. Greece, App. No. 50385/99, Judgment of 20 December 2004*, §§ 66, 69.

[1191] (1997d), *Andronicou and Constantinou v. Cyprus, App. No. 25052/94, Judgment of 9 October 1997*, § 171. The case concerned the killing by Cypriot special police forces of an individual who held hostage a young woman and whose life was believed to be in serious danger. After negotiations to end the hostage failed, the authorities sent in a team of special police forces who intentionally killed the hostage taker, and unintentionally killed the hostage.

> "[i]n carrying out its assessment of the planning and control phase of the operation from the standpoint of Article 2 of the Convention, the Court must have particular regard to the *context* in which the incident occurred as well as to the *way in which the situation developed over the course of the day*."[1192]

While it is unreasonable to resort to lethal force based on the mere suspicion that an individual may constitute a threat because of his or her perceived involvement in a crime or his belonging to a criminal group, as was the case in *Guerrero*,[1193] the applied standard of reasonableness leaves room for the lawfulness of lethal force "based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken," as was accepted by the ECtHR in *McCann*. As applied to the facts in that case,

> [t]he Court accepts that the soldiers honestly believed, *in the light of the information that they had been given*, as set out above, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life. The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives. […] To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.[1194]

As explained by Melzer,

> The distinctive criterion between 'mere suspicion' and 'honest but mistaken belief' is not only the degree of subjective conviction or doubt actually held by the operating personnel, but also the *objective reasonableness* of that subjective conviction in view of the circumstances prevailing at the time.[1195]

In the recent case of *Finogenov and Others v. Russia*, mentioned previously, the ECtHR applied a similar reasoning when assessing the lawfulness of the actions of the Russian authorities. It demonstrates that the normative framework governing the right to life is sufficiently flexible to take account of the severity of the circumstances at hand, as illustrated by the ECtHR's sensitivity for contemporary threats to the public safety and national security of States posed by terrorism, also in Russia:

> Although hostage taking was, sadly, a widespread phenomenon in recent years, the magnitude of the crisis of 23-26 October 2002 exceeded everything known before and made that situation truly exceptional. The lives of several hundred hostages were at stake, the terrorists were heavily armed, well-trained and devoted to their cause and, with regard to the military aspect of the storming, no specific preliminary measures could have been taken. The hostage-taking came as a surprise for the authorities (see, in contrast, the case of Isayeva v. Russia, no. 57950/00, §§ 180 et seq., 24 February 2005), so the military preparations for the storming had to be made very quickly and in full secrecy. It should be noted that the authorities were not in control of the situation inside the building. In such a situation the Court accepts that difficult and agonising decisions had to be made by the domestic authorities. It is prepared to grant them a margin of appreciation, at least in so far as the military and technical aspects of the situation are concerned, even if now, with hindsight, some of the decisions taken by the authorities may appear open to doubt.[1196]

In sum, it follows that counterinsurgent forces, when operating in the domain of law en-

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[1192] (1997d), *Andronicou and Constantinou v. Cyprus, App. No. 25052/94, Judgment of 9 October 1997*, § 182.

[1193] (1979c), *Maria Fanny Suarez de Guerrero v. Colombia, Comm. No. 11/45 of 5 February 1979*.

[1194] (1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, § 200. See also

[1195] Melzer (2010c), 286 (emphasis added).

[1196] (2012b), *Finogenov and others v. Russia, App Nos. 18299/03 and 27311/03, Judgment (Grand Chamber) of 20 December 2011*, § 213.

forcement, are obliged to plan, organized and execute their operations with a view to the minimization of the use of lethal force to the extent feasible in light of the circumstances and information available to them. This implies, *inter alia*, a duty to train and educate forces in the standards of the use of force in law enforcement operations; to provide the forces with equipment that allows them to respond to threats in a non-lethal manner to the maximum extent possible; to identify themselves and to issue a warning that lethal force will be resorted to, thereby allowing the suspect adequate time to respond. Finally, the application of lethal force must take place in the honest belief that all requirements to do so are fulfilled. The mere suspicion or assumption that these requirements are fulfilled is not sufficient.

2.5. The Requirement of Investigation

A fundamental requirement embedded in the right to life imposed on the State is the duty to investigate *each* deprivation of life attributable to the State. This requirement is generally accepted in conventional and non-conventional IHRL, as well as jurisprudence of the principal human rights bodies.[1197] The requirement of investigation follows by implication from the obligation to protect the right to life and the general obligation to secure to everyone within its jurisdiction the rights and duties laid down in the relevant conventions.[1198] As expressed by the ECtHR in *Nachova v. Bulgaria*,

> The essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.[1199]

In its General Comment 31 the UNHRC noted that "a failure by a State Party to investigate violations could in and of itself give rise to a separate breach of the Covenant."[1200] Once a matter has come to their attention, the authorities having used the lethal force must initiate an investigation.[1201] A central aspect in the requirement of investigation is that it must be *effective*. This implies, *firstly*, that the persons responsible for carrying out the investigation must be independent and impartial.[1202] *Secondly*, the investigation must be sufficiently proficient to result in the determination of lawfulness of the use of force, as well as to the identi-

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[1197] For non-conventional IHRL, see, *inter alia*, ECOSOC (1989), 9; United Nations (1990b), § 22. For jurisprudence, see, *inter alia*, (2003h), *Myrna Mack Chang v. Guatemala, Judgment of 25 November 2003*; (2005f), *Isayeva, Yusupova and Bazayeva v. Russia, App. No. 57947/00, 57948/00, 57949/00, Judgment of 24 February 2005*, §§ 208-213; (2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*, §§ 151 ff; (2001i), *McKerr v. the United Kingdom, App. No. 28883/95, Judgment of 4 May 2001*, § 111.

[1198] (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, § 111; (1999d), *Çakiki v. Turkey, App. No. 23657/94, ECtHR*, § 86.

[1199] (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, § 110, in reference to (2002a), *Anguelova v. Bulgaria, App. No. 38361/97, Judgment of 13 June 2002*, § 137.

[1200] UNHRC (2004), § 15.

[1201] (2000h), *Îlhan v. Turkey, App. No. 22277/93, Judgment (Grand Chamber) of 27 June 2000*, § 63.

[1202] (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, § 112; (1998g), *Gülec v. Turkey, Appl. No. 21593/93, Judgment of 27 July 1998*, §§ 81-82; (1999i), *Ogur v. Turkey, App. No. 21594/93, Judgment of 20 May 1999*, §§ 91-92; (1998f), *Ergi v. Turkey, App. No. 66/1997/850/1057, Judgment of 28 July 1998*, §§ 83-84; (2001i), *McKerr v. the United Kingdom, App. No. 28883/95, Judgment of 4 May 2001*, § 113; (2005e), *Isayeva v. Russia, App. No. 57950/00, Judgment of 14 October 2005*, § 210-211. See also ECOSOC (1989), 9; United Nations (1990b), § 22.

fication and punishment of the responsible State agents.[1203] In view of the ECHR, this means, in practice, that

> [t]he authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eye-witness testimony and forensic evidence. The investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements and must apply a standard comparable to the "no more than absolute necessary" standard required by Article 2 § 2 of the Convention. Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person is liable to fall foul of the required measure of effectiveness […].[1204]

In addition, there must be a sufficient element of public scrutiny of the investigation. As a minimum, this entails that the victim's relatives must be involved in the procedure to the extent necessary to safeguard their legitimate interests.[1205] They must remain free from any form of discrimination. Finally, the investigation must be made public.

In sum, the requirement of investigation implies that a counterinsurgent State is bound to carry out an independent and impartial investigation into the use of lethal force by its forces. It must thereby ensure that counterinsurgent forces, as well as those conducting the investigation, are not only equipped with the financial and technical means to collect forensic evidence, to conduct autopsies, to call witnesses, to adequately dispose of the body, but are also trained in the use of such means.

3. Observations

The purpose of this chapter was to conclude upon the permissible scope for targeting insurgents resulting from an examination of the substantive content of the requirements underlying the prohibition on arbitrary deprivation of life, and which are imposed on a counterinsurgent State when its forces resort to the use of lethal force.

Generally, as follows from the relevant soft-law documents and the practice of the UNHRC, IACiHR and ECtHR, the question of whether a deprivation of life is arbitrary or not is subject to the compliance by a State with a body of strict substantive and procedural requirements. While the (procedural) requirement of investigation typically is a *post-facto* requirement, all other (substantive) requirements – absolute necessity, proportionality and precautionary measures – must be complied with both before and during the actual application of lethal force. In nature, these requirements are all designed to respect the right to life to the maximum extent possible as an exercise of *law enforcement* (in a peacetime context). 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.

In view of the permissible scope for targeting insurgents on the basis of IHRL, two principal, connected observations in respect of can be made.

Firstly, as may be concluded from their very object and purpose, the requirements of IHRL sit quite uncomfortably with the notion of targeting as understood in this study. The *intentional* deprivation of life in the concept of targeting is difficult to reconcile with the idea underlying the use of force used as a measure of law enforcement, where the law mandates

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[1203] (2005k), *Nachova v. Bulgaria, App. No. 43577/98, Judgment of 6 July 2005*, § 113; (1999i), *Ogur v. Turkey, App. No. 21594/93, Judgment of 20 May 1999*, § 88;

[1204] (2001h), *Kelly and Others v. the United Kingdom, App. No. 30054/96, Judgment of May 4, 2001*, §§ 96-97; (2002a), *Anguelova v. Bulgaria, App. No. 38361/97, Judgment of 13 June 2002*, § 139, 144.

[1205] (2001i), *McKerr v. the United Kingdom, App. No. 28883/95, Judgment of 4 May 2001*, § 113.

that operations are planned and executed with the primary aim to minimize, to the greatest extent possible, the recourse to lethal force. As the principles of absolute necessity and proportionality indicate, targeting may only be resorted to as a measure of last resort, and when it serves a legitimate aim as recognized under IHRL. In sum, IHRL offers only a very limited permissible scope for the targeting, which, as a rule, is prohibited, and may only be resorted to in exceptional circumstances. In operational terms, these exceptional circumstances are limited to situations where insurgents pose a concrete and direct threat to the lives of counterinsurgent forces and the civilian population. In other words, where a commander aims to achieve other effects with the targeting of insurgents – for example, to disrupt the command chain within the insurgency movement – IHRL offers little permissible room for maneuver.

This brings us to the *second* observation, which is that if (hypothetically speaking) IHRL were the sole regime applicable to govern a State's conduct in the situational contexts of counterinsurgency, its strict requirements would not only severly impact the counterinsurgent State's operational ability to target insurgents present in territory under its control, but mostly so in territory *not under the control of the counterinsurgent State*. It is for precisely this reason that LOAC provides a more tailored regime. It is to this regime that we will now turn in the next chapter.

Chapter VII LOAC

In Chapter V, we have identified the valid normative frameworks available in LOAC relative to the concept of targeting. In view of its place in the waging of war – killing being a traditional form of forcing the ememy in submission – it does not come as a surprise that LOAC offers a comprehensive body of law governing targeting. It is therefore equally unsurprising that the vast majority of this body pertains to the concept of hostilities. Underlying this law of hostilities is a number of requirements, encapsulated in principles, prohibitions and restrictions, which characterize the permissible and prohibited conduct in hostilties and targeting in particular. These requirements need to be further explored, for they inform us on their compatibility with the requirements pertaining to the prohibition of arbitrary deprivation of life, identified and examined Chapter VI. This will take place in paragraph 1 of this Chapter. Besides this vast body governing the conduct of hostilities, LOAC also provides some norms of relevance to the use of force outside hostilities – norms that regulate the State's conduct in *law enforcement*-situations during armed conflict. These norms will be further explored in paragraph 2. Both paragraphs will finalize with some observations.

1. Normative Substance of the Valid Normative Framework Relative to Targeting in the Context of Hostilities

As noted, the law of hostilities is a vast body of norms. Many of these norms impose requirements that follow from principles, prohibitions and restrictions within the law of hostilities. These concern (1) the principle of *distinction* (paragraph 1.1); (2) the principle of *proportionality* (paragraph 1.2); (3) the requirement to take *precautionary measures* (paragraph 1.3); and (4) restrictions and prohibitions relative to the *means* and *methods* of warfare (paragraph 1.4). It is also imperative to examine the notion of *military necessity*, which has been subject of extensive academic debate following assertions by some that it contains a restrictive element that is fervently opposed by others for imposing, arguably IHRL-based restrictions that are alien to the law of hostilities (paragraph 1.5). Paragraph 1.6 offers some final observations.

1.1. The Principle of Distinction

The first, most pivotal requirement of the law of hostilities is the requirement of distinction. Conceptually, LOAC is a regime of categorization: in order to determine the lawfulness of conduct in armed conflict, persons (and objects) must first be placed in distinct categories. These categories and the commensurate rules attached to them determine their status and treatment under LOAC.[1206] In the law of hostilities, this concept of categorization also determines which persons in the conduct of hostilities may be lawfully deprived of their lives as a result of the application of combat power by a party to the conflict. A key notion in this respect is that of "attacks". As Article 52(1) AP I stipulates: "attacks shall be limited

[1206] Gill & Van Sliedregt (2005), 29.

strictly to military objectives."[1207] Indeed, it is a fundamental obligation for all parties to the conflict to identify persons as persons who may be directly attacked, and those who are protected from such attack: the principle of distinction. Today, the principle of distinction is a rule of customary law,[1208] and has attained the status of *ius cogens*.[1209] It is a reflection of the notion of military necessity that the sole legitimate aim of war is limited to "the weakening of the *military forces of the enemy*."[1210] As a result, only the military apparatus of the opposing party to the conflict can constitute legitimate military objectives, since only that

> [….] constitutes a real threat to the security of a party to an armed conflict and endangers the very survival of a State and the self-determination of its people. Thus only the attempt to overcome the opposing military apparatus is needed in order to fight back an illegitimate use of force, and to reconstruct peace.[1211]

It follows that individuals who may become subject to the effects of attacks in the context of hostilities fall in one of two mutually exclusive, but complementary categories.[1212] One such category comprises of persons who qualify as lawful military objective because they are not, or no longer immune from the consequences of hostilities. This category is hereinafter referred to as the *authoritative personal scope of attack*. The opposing category consists of persons protected against the effects of hostilities and in particular the effects from direct attack, because they *do not or no longer directly participate in hostilities* (hereinafter: DPH). This category is hereinafter referred to as the *prohibitative personal scope of attack*.

The purpose of this paragraph is to determine when individuals labeled as 'insurgent' qualify as lawful military objectives within the authoritative personal scope, and when they are protected from direct attack. Such legal distinction is of decisive relevance in the validation of targets in various stages of the targeting process. It is recalled that, for the purposes of the present study, the term 'insurgent' refers to non-State actors.
As concluded in Chapter V, it is not unconceivable that the law of IAC applies to situations of OCCUPCOIN and non-consensual TRANSCOIN. In so far it does not, it would be the law of NIAC that applies (assuming the existence of an armed conflict). Therefore, the law of IAC and NIAC will be examined separately in paragraphs 1.1.1 and 1.1.2 respectively. In each paragraph, a preliminary identification of the authoritative and prohibitative personal scope of attack on the basis of the relevant normative frameworks will take place and it will be examined when persons can be categorized in a recognized status in the law of hostilities. Paragraph 1.1.3 assesses a person's position under the law of hostilities as a result of a shift in protective status due to change in circumstances, either as a result of a civilian's DPH (emanating in the loss of protection), or as a result of an individual's rendering *hors de combat* (emanating in the benefit of protection). The law governing such shift in immunity is similar in the law of IAC and NIAC, so there is no need for a separate analysis under both regimes. The paragraph finalizes with some observations (paragraph 1.1.4).

[1207] According to Article 49(2) AP I, "attacks" means "acts of violence against the adversary, whether in offence of in defence."
[1208] Rule 1, ICRC (2005a).
[1209] ILC (2001), commentary on Draft Article 40, § 5, 284; (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, § 78 f.
[1210] 1868 St. Petersburg Declaration (emphasis added).
[1211] Oeter (2010), 171-172.
[1212] Melzer (2008), 300.

As a point of reference, the following analysis builds on the view of the ICRC on the principle of distinction as expressed in its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.[1213] This document, which aims to clarify the notion of DPH,[1214] also contains the ICRCs current view on the operation of the requirement of distinction in the conduct of hostilities in both IAC and NIAC.
This is not to imply that the present study adopts the views of the ICRC. The views expressed in the Interpretive Guidance are non-binding and, on many points, remains controversial in the eyes of States and commentators.[1215] While the controversy aims at specific topics related to the notion of DPH and the requirement of distinction, the general line of argument in opposition of the Interpretive Guidance is that it upsets the delicate balance between military necessity and humanity by stressing the latter to the detriment of the former.[1216] The following examination also aims to point out where such imbalance may arise.

1.1.1. The Law of IAC

1.1.1.1. Preliminary Identification of the Prohibitative and Authoritative Personal Scope of Attack

As previously concluded, in the context of OCCUPCOIN and non-consensual TRANSCOIN it cannot be excluded that the relationship between the counterinsurgent State and insurgents relative to the latter's targeting is governed by the law of IAC. This may be so because one supports the view that in those situations the law of IAC always applies, or, in the alternative, that the conflict between the counterinsurgent State and the insurgents qualifies in principle as a NIAC. In the latter instance, in the event the threshold of CA 3 has not been crossed, or in the event the targeting concerns individuals affiliated to the insurgency, but are not a member of the armed forces of the insurgency, the question arises how such insurgents qualify under the law of hostilities.
The primary source within the law of IAC for identifying which individuals enjoy immunity from direct attack, and who do not, is Article 48 AP I:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the *civilian population* and *combatants* […] and accordingly shall direct their operations only against military objectives.

As may be noted, its principal focus lies on the distinction between combatants, who may be directly attacked, and civilians, who are protected from direct attack. Indeed, the law of hostilities in IAC maintains a closed status-circuit consisting of mutually exclusive and, simultaneously, complementary *status*-compartments according to which individuals present in the arena of armed conflict are either combatants or civilians. However, in as much as the concepts of combatant and civilian form a closed status-circuit, the mere identification of an individual's status under the law of hostilities in IAC is not, in itself, conclusive of that individual's immunity from direct attack under LOAC. In that respect, one is cautioned to view

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[1213] Hereinafter: Interpretive Guidance, available at <http://www.icrc.org/Web/Eng/Siteeng0.nsf/htmlall/p0990/$File/ICRC_002_0990.pdf.

[1214] The study was carried out in cooperation with the T.M.C. Asser Institute, The Hague, the Netherlands between 2003 and 2009 and included the participation of around forty international legal experts. While the initial aim was to release a document reflecting a consensus, the controversy surrounding certain issues forestalled overall agreement with the final text and led some experts to request that their names be deleted. It was eventually released to express the view of the ICRC alone.

[1215] Dinstein (2010), 146; Schmitt (2010a); Schmitt (2010c);

[1216] Schmitt (2010c), 6.

Article 48 AP I as the sole guiding norm in identifying the prohibitive and authoritative personal scopes of direct attack.
To the contrary, LOAC takes account of the fact that, in practice, the factual circumstances surrounding combatants and civilians may change and demand a reevaluation of the balance between military interests and considerations of humanity. For example, combatants may be left vulnerable on the battlefield due to the injuries sustained from combat. Similarly, civilians may decide to take up arms and resist an invading force. Thus, LOAC is designed such that individuals belonging to either one of the status-categories may gain or loose immunity from attack as a result of changing circumstances either attributable to their own conduct, or as a result of conditions sustained as a result of conduct attributable to the enemy. It therefore follows from several provisions in the GCs and AP I, as well as customary law, that while a combatant may be lawfully made subject to direct attack, he or she enjoys protection from direct attack when rendered '*hors de combat*'. However, conversely, once a combatant '*hors de combat*' commits 'hostile acts', he loses protection from direct attack. Similarly, whilst a civilian enjoys protection against direct attack, he loses such protection once, and for the time he or she directly participates in the hostilities. In addition, the law of IAC offers protection to medical, religious and civil defense personnel of the armed forces of a party to a conflict, unless such personnel engages in 'acts harmful' to the adversary.
In sum, it may be concluded that, pursuant to the relevant provisions of LOAC pertaining to IAC, the *prohibitative* personal scope of direct attack involves the following categories of individuals:[1217]

- civilians[1218]
- medical, religious and civil defense personnel of the armed forces[1219]
- combatants and civilians directly participating in the hostilities who are rendered *hors de combat*, as a result of their capture, sickness or injury.[1220]

Likewise, the *authoritative* personal scope of direct attack in IAC includes the following categories of individuals:

- combatants
- civilians directly participating in the hostilities
- medical, religious and civil defense personnel carrying out acts 'harmful to the enemy'
- combatants '*hors de combat*' who commit 'hostile acts'.

To limit our examination to the most relevant categories, we will solely concentrate on the distinction between civilians and combatants.

1.1.1.2. Status-Identification

In order to classify an insurgent as belonging to the prohibitative or authoritative personal scope of direct attack in the law of IAC, this paragraph, as stated, aims to determine whether an insurgent may qualify as *combatant* or *civilian* under the law of IAC.

[1217] The protective scope also stretches to belligerent reprisals that constitute a direct attack against the various protected categories of individuals. See Article 46 GC I; Article 47 GC II; Article 20 AP I; Article 13(3) GC III; Article 33(3) GC IV; Article 51(6) AP I; Rule 146 ICRC (2005a).

[1218] Article 51(1) AP I.

[1219] Medical and religious personnel: Article 24 GC I; Article 36 GC II, Rules 25 (medical personnel) and 27 (religious personnel) ICRC (2005a); Article 8(2)(b)(xxiv) ICC Statute; civil defense personnel: Article 67(1) AP I.

[1220] Article 41(1) and (2) AP I; Rule 47, ICRC (2005a). For rules on general protection, particularly against arbitrary power, see the relevant norms in GC I-IV.

The law of IAC defines civilians negatively, to include any person that does not belong to "one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol."[1221] Individuals falling into any of these categories are combatants. In its *generic*[1222] or *functional*[1223] meaning, a combatant is a member of the armed forces who fights. In *legal* terms, a combatant is a person (1) who belongs to a *levée en masse* or (2) is a member of the armed forces of a party to the conflict, so designated by domestic law.

The implications of the combatant-status are significant. On the one hand, a combatant is – under fulfillment with strict conditions[1224] – privileged to participate directly in the hostilities, whilst enjoying immunity ('combatant immunity') from prosecution "for those warlike acts that do not violate the laws and customs of war but that might otherwise be common crimes under municipal law."[1225] In addition, upon capture, combatants must be afforded POW-status.[1226] If a person cannot qualify as belonging to either category, or when in doubt, he must be considered a civilian.[1227]

On the other hand, combatants are "persons who do not enjoy the protection against attack accorded to civilians."[1228] Such loss of protection is *permanent*, until the combatant "disen-

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[1221] Article 50(1) AP I. The relevant parts of Article 4(A) GC III refer to "members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed fores" (Article 4(A)(1)); "Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions" (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war" (Article 4(A)(2)); "Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power" (Article 4(A)(3)); and "Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war" (Article 4(A)(4)).
Article 43(2) AP I states: "Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities."

[1222] Ipsen (2008), 81.

[1223] Melzer (2008), 327.

[1224] The privileges are subject to strict conditions: a combatant (1) is subordinate to a responsible command; (2) is recognizable by a fixed distinctive emblem; (3) carries his arms openly; and (4) conducts hostilities in accordance with LOAC. Article 44(3) AP I (contentiously) allows (particularly irregular) combatants to keep these privileges if only they carry their arms openly "during each military engagement" and "during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launch of an attack in which he is to participate." See Article 1, 1907 HIVR; Article 4A(2) GC III; Article 43 AP I; Article 44(3) AP I.

[1225] Solf (1983), 57. This immunity does not extend to violations of LOAC or ICL. Also: Gill & Van Sliedregt (2005), 31; Dinstein (1989), 103-106.

[1226] Article 3, 1907 HIVR; Articles 4(A)(1) and (2) GC III. As to the conditions underlying POW-status, see Part D2, Chapter III.

[1227] Article 50(1) AP I. The combatant privilege and immunity also ensures that combat is waged between combatants (and military objects), and not against those protected from the consequences of hostilities. The absence of combatant-privilege and immunity with civilians functions as a logical barrier against direct attack, as they are not supposed to pose a threat to those who are privileged to fight, i.e. combatants. ICRC (2009), 23.

[1228] ICRC (2005a), 3.

gages from active duty and reintegrates in civilian life, whether due to a full discharge from duty or as a deactivated reservist."[1229]

In the event that a combatant does not comply with the individual conditions attached to 'privileged combatancy',[1230] he forfeits his privileges and immunity but this does not remove his membership in the *armed forces of a party to the conflict*,[1231] and he may still lawfully be attacked on that basis alone, unless rendered '*hors de combat*'.[1232]

The question left to be answerewd is: do insurgents – as understood in the present study – lose immunity from direct attack as a result of their identification as *combatants*? The answer is: no. This will be explained below.

Firstly, the *levée en masse* involves inhabitants of *unoccupied* territory who spontaneously take up arms to resist the *invading* armed forces without having time to organize themselves into an armed force.[1233] In view of the situational contexts of NATCOIN, OCCUPCOIN, SUPPCOIN and TRANSCOIN, the concept of *levée en masse* is irrelevant.[1234]

Secondly, while LOAC accepts that members of irregular forces - more specifically militia and volunteer corps as well as organized resistance movements – may become members of the armed forces of a State party to the IAC,[1235] it is also required that a *belligerent nexus* exists between the armed forces of which the insurgent is a member and a party to the IAC. In this context, an essential element implied in Article 43(1) AP I is that the position of the 'armed forces' in the law of IAC vis-à-vis the party to the conflict is premised on the as-

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[1229] ICRC (2009), 25.

[1230] Article 44(3) AP I. It must be stressed that the presumption that a combatant-member of the armed forces complies with these conditions is very strong. Regular combatants generally fulfill combatant-conditions. Therefore, the above is of particular relevance to combatants of irregular armed forces.

[1231] See below. If the party to the conflict fails to prosecute its members that violate LOAC on a continuous basis, the party may not conform to its obligation under LOAC to effectively run an internal disciplinary system and the armed forces may no longer be viewed as those belonging to a party to the conflict, as a result of which its members will lose combatant status.

[1232] To argue that a combatant's unprivileged participation in the hostilities removes the combatant-status would imply that he then is to be placed under the more protective regime afforded to civilians. This would contradict the logic underlying the principle of distinction in the law of hostilities in general, and the concept of combatant in particular. In sum, the consequences of unprivileged combatancy become manifest not in the realm of permissibility of direct attack, but in the realm of post-capture treatment and immunity from criminal prosecution. ICRC (2009), 23.

[1233] Article 4(A)(6) GC III; Article 2, 1907 HIVR. Participants in a *levée en masse* are not members of the armed forces; neither are they civilians. They are, however, combatants, required that they carry their arms openly and comply with the laws and customs of war.

[1234] In essence, they can be seen as insurgents. However, as explained by Dinstein, the status of the *levée en masse* "lapses *ex hypothesi* after a relatively short time:" "The trajectory of subsequent events will go in one of three different directions: either (i) the territory is occupied (despite the *levée en masse*); or (ii) the invading force is repulsed (thanks to the *levée en masse* or to the arrival of reinforcements); or else (iii) the battle of defence stabilizes, and then there is ample opportunity for organization and meeting all four Hague conditions." Dinstein (2009c), 97. As to the *levée en masse* in a contested area, see also (1945), *Bauer et al. Trial (Permanent Military Tribunal at Dijon)*, 18. From the moment that a *de facto* occupation has materialized, those partaking in the *levée en masse* lose their combatant status and become civilians directly participating in hostilities. In terms of insurgency, they switch from insurgents in an unoccupied territory to insurgents in an occupied territory. The former situation – insurgency in unoccupied territory – remains outside the scope of the present study.

[1235] See Article 1 HIVR, Articles 13 GC I, Article 13 GC II, Article 4 GC III. With respect to militia and volunteer corps, Article 43(1) AP I embraces both militia and volunteer corps that form an integral part of a State's army, and those that are additional to that army. Ipsen (2008), 85. See also Article 1, 1907 HIVR and Article 4(A)(1) and (2) GC III, which both make a distinction between both organizational forms.

sumption that the 'party to the conflict' is a *subject of international law* to which the conduct of its armed forces can be attributed.[1236] In essence, that subject of international law implies a State; after all, the concept of IAC is limited to armed conflicts between States only.[1237] Indeed, insurgents become combatants when they belong to the armed forces of an insurgency movement that 'belongs' to a State party to the conflict. The Interpretive Guidance explains that such is the case when there is

> […] at least a "de facto" relationship between an organized armed group and a party to the conflict. This relationship may be officially declared, but may also be expressed through tacit agreement or conclusive behaviour that makes clear for which party the group is fighting.[1238]

As noted, Article 43 AP I foresees this possibility by explicitly referring to militia and volunteer corps and organized resistance movements. Generally, a State's national law determines that certain militias and volunteer corps are or become fully incorporated in the regular armed forces.[1239] This, however, need not necessarily be the case. If so, the degree of *control* must be established independently.[1240] Such control may result from a State's direct or indirect support to the insurgents, e.g. when it finances, trains, equips or otherwise provides operational support to the insurgents, or assists or has a leading role in the organization, coordination and planning of the military actions of the insurgents.[1241] To date, it remains ambiguous as to when a State exercises control over an irregular organized armed group sufficient to conclude that it can be said to 'belong' to the organ of the armed forces of that State. The different tests for identifying such a relationship of control are not clear and appear to be diverging.[1242] The ICJ requires 'effective control' by the State over each operation,[1243] thus control on the tactical level.[1244] The ICTY, instead, requires 'overall control', i.e. overall control over the actions of the insurgents, so that not every operation on the

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[1236] Ipsen (2008), 80; Melzer (2008), 307. This is also reflected in the two conditions laid down in Article 43(1) AP I that: (1) the armed forces must be "under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party;" (2) "[s]uch armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict."

[1237] The exception is a conflict under Article 1(4) AP I, but these conflicts are left outside this study.

[1238] ICRC (2009), 23, referring to the ICRC Commentary to Article 4 GC III, see Pictet (1960), 57.

[1239] If so, the State party is under an obligation to notify the other parties to the conflict. Failure to comply with this obligation has no consequences for the status of the incorporated irregular forces, groups or units, but does entail a violation of LOAC.

[1240] (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, § 115; (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)* , § 145; (1999m), *The Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment of 15 July 1999 (Appeals Chamber)*, § 93 ff.

[1241] (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, §§ 75-125; (1999m), *The Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment of 15 July 1999 (Appeals Chamber)*, §§ 88-145; Paulus & Vashakmadze (2009) , 111. This was for example claimed by Congo in DRC v. Congo, arguing that the DRC supported or tolerated anti-Congo insurgents. The ICJ found there was insufficient evidence. (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*, § 276, 298, 301 and 304.

[1242] Holland (2011), 20-24; Spinedi (2007), 832.

[1243] (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, § 64-65; (2007c), *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), Judgment of 26 February 2007 (Merits)*, §§ 399-400.

[1244] Kleffner (2010b), 57.

tactical level needs to be carried out on the effective control of the State.[1245] As noted by the ICRC, "[i]n practice, in order for an organized armed group to belong to a party to the conflict, it appears essential that it conduct hostilities *on behalf and with the agreement* of that party."[1246]
However, this construct sits uncomfortably with the concept of insurgency as understood in this study. To recall, within this concept the insurgency movement acts *independently* from any State, to the extent that there is no belligerent nexus between the insurgency movement and a State to the extent that its conduct can be attributed to a State.
In the absence of such belligerent nexus with a State it would follow that an insurgency movement, *as a group*, cannot be viewed to partake in the hostilities between the parties to the IAC, notwithstanding the fact that the armed violence it uses through its armed forces to attain its political goals geographically and temporally coincides with an ongoing armed conflict.[1247] As a result, individuals who belong to the armed forces of an insurgency movement, while perhaps identifiable as combatants in the *generic* sense, *cannot be regarded as combatants in the legal sense* and thus cannot be attacked on a permanent basis, but are, as a matter of legal logic, to be regarded *a priori* as *civilians* and are, on that basis, *in principle* immune from attack by a (counterinsurgent) State. While this outcome is in itself uncontroversial, the fact remains that, *de facto*, insurgents resort to armed violence against a State party to the conflict. This implies that the application of combat power against these insurgents is limited to that permissible as a measure of law enforcement, unless the armed violence amounts to hostilities triggering the loss of immunity against attack on a basis recognized under the law of hostilities.

A first basis for such loss forms civilian DPH, but, notwithstanding the ICRC's Interpretive Guidance on the issue, this notion is controversial in many respects, and most arguably fails to accommodate the operational challenges posed by non-State actors such as insurgents who operate as an organized unit with features similar to that of regular armed forces, but who on the basis of their the status as civilian may not be attacked on a continuous basis, *but only "unless and for such time" they directly participate in hostilities*. Whereas the intricacies of civilian DPH will be further examined below, it is of relevance here to note that in relation to attacks on insurgents who must be qualified as civilians, the "belonging to"-condition has been criticized for being out of sync with operational reality, the principal argument being that it is not so much relevant whether insurgents are fighting *for* a party, but rather whether they are fighting *against* a party to the conflict for reasons related to the conflict, for example in the case of belligerent occupation, where insurgents fight against the presence of the Occupying Power. As explained by Schmitt, the logic expressed by the ICRC that the principle of distinction precludes protection as civilians of irregular armed forces belonging to a party to the conflict also when they do not conform with the conditions of privileged combatancy should also apply to organized armed groups not belonging to a party to the conflict. In his view, the "belonging to"-condition does not regulate the relationship between a State and individuals in targeting matters, but only in relation to detention issues: "[i]t may be sensible to shape detention issues by relationship to a belligerent, as states understandably wish to protect those who fight on their behalf. However, in targeting matters, the ap-

[1245] (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)* , §§ 115, 122, 137.
[1246] ICRC (2009), 23 (emphasis added).
[1247] Melzer (2010b), 841.

propriate relationship logically should be determined by whom the individuals to be attacked are fighting against."[1248]
It has therefore been proposed that the armed forces of insurgent movements are either to be treated on an equal basis as a State's regular armed forces, regardless of their ties to a party to the conflict, or its members should be treated, in so far they do not belong to a party to the conflict, as civilians directly participating in the hostilities on a *continuous* basis, throughout the duration of their membership in the armed forces.[1249] The added benefit is that upon capture of such individuals a detailed framework governing their subsequent deprivation of liberty is available, in contrast to NIAC.[1250]

A *second* basis for lawful attack on insurgents engaged in armed violence against a party to an IAC entails that the insurgent movement could be viewed as a party to a *distinct* NIAC with the counterinsurgent State (which also is party to an IAC), provided the threshold-criteria for NIAC – protracted violence and sufficient level of organization – are fulfilled.[1251] Based on this construct, insurgents who qualify as members of the armed forces belonging to a party in a NIAC can – under conditions – be attacked permanently. We will more closely examine this in the next paragraph.

1.1.2. The Law of NIAC

1.1.2.1. Preliminary Identification of the Prohibitative and Authoritative Personal Scopes of Attack

A *conventional* norm defining the principle of distinction in the conventional law of NIAC similar to Article 48 AP I is absent. It is therefore necessary to fall back on *customary* law. The ICRC Customary Law Study formulates the rule of distinction as follows:

> The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.[1252]

It must be noted that the reference to the term 'combatants' here must be interpreted in its generic, *functional* manner, i.e. it refers to members of the armed forces that fight.[1253] It does not imply reference to the notion combatant privilege as embodied in the law of IAC. To date, this has not been accepted in the context of NIAC. As a result, the term 'combatant' is absent in the conventional law of NIAC.[1254]

[1248] Schmitt (2010c), 17. As explained by Schmitt,"

[1249] Schmitt (2010c), 18; Lubell (2010), 149 ff.

[1250] See also Part 2, Chapter III. This is particularly so when members of organized armed groups not belonging to a party to the conflict are viewed as civilians, which are then governed by GC IV and/or AP I. An important issue remains, nonetheless, whether the members of such organized armed groups, when equalized with members of regular armed forces, are to fall under the protective scope of GC III. In any case, they are covered by AP I and GC IV (when classified as 'protected person' under Article 4 GC IV).

[1251] ICRC (2009), 23.

[1252] ICRC (2005a), Rule 1.

[1253] For further use of the term 'combatant' in the context of NIAC, see also Article 8(2)(e)(ix) of the ICC Statute; (1999), *Third Report on the Situation of Human Rights in Colombia, IACiHR (26 February 1999)*, § 55; (1997b), *Abella et al. v. Argentina (La Tablada), Case No. 11.137, Decision of 18 November 1997*, 325.

[1254] It was feared that the adoption of the notion of combatant would be used as an instrument further legitimizing insurgencies, and not to view insurgents as civilians subject to attack only when, and for such time they took a direct part in the hostilities. Melzer (2008), 323.

Nonetheless, even if one were to accept the existence of combatants in a generic sense, it is submitted that the prohibitative and authoritative personal scopes of the principle of distinction in NIAC go beyond the definition proposed by the ICRC. In fact, they are quite similar to those in an IAC.

In short, the *prohibitative* personal scope[1255] consists of civilians,[1256] medical and religious personnel of the armed forces[1257] and persons '*hors de combat*.'[1258]

The *authoritative* personal scope consists, *firstly*, of members of the armed forces of a party to the conflict, save those serving in medical and religious functions and whilst not '*hors de combat*'.[1259] *Secondly*, civilians who take a direct part in the hostilities lose immunity from direct attack from the moment and for the time they do so.[1260] *Thirdly* and *fourthly*, medical and religious personnel and members of the armed forces who are '*hors de combat*' may lawfully become subject to direct attack when they engage, respectively in 'acts harmful' to the adversary[1261] or 'hostile acts', or try to escape.[1262]

It follows that, pursuant to the relevant provisions of LOAC pertaining to NIAC, the *prohibitative* personal scope of direct attack involves the following categories of individuals:[1263]

- civilians;[1264]
- medical, religious and civil defense personnel of the armed forces;[1265]
- members of the armed forces of a party to the conflict who are *hors de combat.*[1266]

Likewise, the *authoritative* personal scope of direct attack in NIAC includes the following categories of individuals:

[1255] The resulting prohibition of direct attack includes reprisals constituting a direct attack. See Rule 148, ICRC (2005a).

[1256] Article 13 AP II; Rule 1, ICRC (2005a); Article 8(2)(e)(i) ICC Statute.

[1257] Article 9(1) AP II; Rules 25 (medical personnel) and 27 (religious personnel); Article 8(2)(e)(ii) ICC Statute. Conventional law of NIAC remains silent on civil defense personnel, but it may be assumed that direct attacks against civil defense personnel is unlawful. See also Melzer (2008), 312.

[1258] Article 7(1) AP II; Rule 47, ICRC (2005a). For general protection (not specifically against direct attack in hostilities) see CA 3 GC I-IV and Article 4(1) AP II.

[1259] CA 3 provides that all persons "taking no active part in the hostilities, including *members of armed forces* who have laid down their arms and those placed '*hors de combat*' by sickness, wounds, detention, or any other cause" are entitled to protection from "violence to life and persons, in particular murder of all kinds, mutilation, cruel treatment and torture." It follows therefore that members of the armed forces who do take an active part in the hostilities are not entitled to immunity from direct attack for so long they do not lay down their arms or are placed '*hors de combat*'. This principle finds further support in Article 4(1) AP II, which affords immunity from direct attack to "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted." See also Sandoz, Swinarski & Zimmerman (1987), § 4520 (Article 4 AP II): "*Ratione temporis* combatants are protected as soon as they are hors de combat."

[1260] Article 13(3) AP II; Rule 6, ICRC (2005a).

[1261] Article 11(2) AP II; Rules 25 and 27, ICRC (2005a).

[1262] Rule 47, ICRC (2005a).

[1263] The protective scope also stretches to belligerent reprisals that constitute a direct attack against the various protected categories of individuals. See Article 46 GC I; Article 47 GC II; Article 20 AP I; Article 13(3) GC III; Article 33(3) GC IV; Article 51(6) AP I; Rule 146 ICRC (2005a).

[1264] Article 51(1) AP I.

[1265] Medical and religious personnel: Article 24 GC I; Article 36 GC II, Rules 25 (medical personnel) and 27 (religious personnel) ICRC (2005a); Article 8(2)(b)(xxiv) ICC Statute; civil defense personnel: Article 67(1) AP I.

[1266] CA 3; Article 5 AP II.

- members of the armed forces of a party to the conflict, to include members of (1) the regular armed forces of a State party to the conflict and (2) non-State organized armed groups;
- civilians directly participating in the hostilities;
- medical, religious and civil defense personnel carrying out acts 'harmful to the enemy';
- members of the armed forces '*hors de combat*' who commit 'hostile acts' or try to escape.

1.1.2.2. Status-Identification

The starting point to identify the status of individuals potentially subject to attack is the position awarded in the (customary) law of NIAC to civilians. Similar to IAC, civilians can be defined negatively, i.e. all persons who are not members of the armed forces of a party to the conflict[1267] and enjoy immunity from direct attack unless and for such time as they take a direct part in the hostilities.[1268] In the absence of the status of combatants in NIAC, individuals either have the status of civilian, or that of member of the armed forces of a party to the conflict.

While the relevant sources apply the term 'armed forces' differently, thereby confusing the interpretation of what is meant by 'armed forces',[1269] in the view of the ICRC it follows from a teleological interpretation of the texts of CA 3 and Article 1(1) AP II[1270] that the notion of 'armed forces' refers to (1) the regular armed forces of a State, party to the conflict; (2) dissident armed forces; and (3) other organized armed groups of a party to the conflict, such as the armed forces of an insurgency movement.[1271]

For the purposes of the present study, the concept that requires further examination is that of dissident armed forces and organized armed groups. After all, insurgencies may consist of dissident armed forces and organized armed groups.[1272] The examination of the concept of regular armed forces of a State has no further significance for the present study, as we are here examining the lawfulness of attacks on insurgents by the regular armed forces, and not *vice versa*. So, the question before us is: when do insurgents qualify as members of dissident armed forces or organized armed groups, and when are they to be regarded as civilians?

[1267] As may be concluded from Article 1(1) AP II and Article 13(1) AP II. Also Melzer (2008), 322; Goldman (1993), 84.

[1268] Article 13(3) AP II.

[1269] Zegveld (2002), 134; Watkin (2010), 653.

[1270] It is, *firstly*, of importance to stress that while Article 1(1) AP II fails to make a distinction between the 'dissident armed forces' and 'other organized armed groups' and the non-State party to the conflict to which they belong, the armed forces itself cannot and should not be equated with the non-State party to the conflict as a whole, but only refers to its fighting components. *Secondly*, the use of the term 'armed forces' in relation to the regular armed forces of a High Contracting Party and dissident armed forces, and the use of the word 'group' in relation to organized armed groups must not be interpreted to imply that, while the former are clearly armed forces, the latter are to be viewed as civilians, who may not be attacked unless and for such time they take a direct part in the hostilities, as contended by Moodrick Even-Khen (2007), 12, as well as by experts, see University Centre for International Humanitarian Law (2005), 35. As argued by Melzer, "this view is a misconception of major proportions, which necessarily entails a distortion of the fundamental concepts of 'civilian', 'armed forces' and 'direct participation in hostilities' and, ultimately, leads to irreconcilable contradictions in the interpretation of these terms."

[1271] ICRC (2009), 30; For an analysis, see Melzer (2008), 322; Bothe, Partsch & Solf (1982), 672.

[1272] This is demonstrated by the armed conflicts in Libya until the removal of Colonel Khadaffi's regime, and Syria in 2011 and 2012, where the insurgencies have, in part, been led by, or been characterized by the participation of dissident members of the armed forces of Libya and Syria.

In view of the negative formulation of the concept of civilians, the main focus is on membership of the armed forces of a party to the conflict. The principal issues are: (1) when is an insurgent a member of dissident armed forces or an organized armed group; and (2) when does the organized armed group belong to a party to the conflict?

1.1.2.2.1. *Members* of the Armed Forces of a Party to the Conflict

As concluded previously, the premise underlying membership to the armed forces of a party to an IAC is that all members are combatants, and are subject to lawful attack, with the exception of medical, religious and civil defense personnel. The question that arises is whether in the law of NIAC membership in the armed forces is based on the same presumption, i.e. whether it equally applies to (the regular armed forces of a State-party to the conflict,)[1273] dissident armed forces or organized armed groups.
According to the ICRC, membership in dissident armed forces can be established on the basis of the organizational structures of the State armed forces to which they formerly belonged.[1274] Individual membership of organized armed groups is far more *contentious*.[1275] At the foundation of the problem is the fact that where membership in regular armed forces depends on an individual's *formal* integration, as regulated by domestic law, into armed units, such domestic law is absent in relation to organized armed groups. Membership of an organized armed group generally takes place by simply taking up a *function* within the armed forces, whether voluntarily, involuntarily or based on traditional notions of clan or family.[1276] In many cases, the beginning and end of membership is difficult to establish for the outside world because of the lack of uniforms, insignia and other distinctive signs. In addition, non-State parties, e.g. insurgent movements, operate in a mix of contexts – e.g. cultural, political, military – as a result of which mere affiliation to the non-State party cannot necessarily be viewed as membership of the armed forces, as understood in LOAC.[1277] For example, civilians often provide supporting services to an organized armed group. While their support constitutes an affiliation with the non-State party, it does not imply that they are to be viewed as members of the organized armed group.

1.1.2.2.1.1. Continuous Combat Function

One way of dealing with this issue is to argue that members of organized armed groups are in essence civilians who may or may not directly participate in hostilities on a *continuous* basis and subsequently lose protection from direct attack for the entire duration of their membership. The ICRC, however, rejects this approach, its justification being that it

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[1273] As for *regular* armed forces, "membership in State armed forces is generally defined by domestic law and expressed through formal integration into permanent units distinguishable by uniforms, insignia and equipment" and lasts until a member disengages from active duty and reintegrates into civilian life. ICRC (2009), 31.

[1274] ICRC (2009), 32. Yet, the Interpretive Guidance, however, has been criticized for its failure to offer guidance as to when, and with what consequences, the organizational structure is no longer sufficient to determine membership. Watkin (2010), 655.

[1275] As noted, its relevance stretches to irregular armed forces belonging to armed forces of a State-party to an armed conflict (whether IAC or NIAC); to organized armed groups taking part in the hostilities of an IAC, but not belonging to a party to the IAC; and to organized armed groups of a non-State party to a NIAC.

[1276] ICRC (2009), 33.

[1277] Melzer (2008), 320.

> would seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction, most notably because it would create parties to non-international armed conflicts whose entire forces remain part of the civilian population.[1278]

Instead, the ICRC prefers to uphold the dichotomy between on the one hand civilians proper, who may not be attacked unless and for such time as they directly participate in hostilities, and on the other hand members of armed forces of a party to the conflict. In the view of the ICRC, only this distinction upholds the mutual exclusivity between civilians and armed forces.[1279] However, it does not accept that *all* members of an organized armed group indeed lose immunity from direct attack. Arguing that, "[f]or the practical purposes of the principle of distinction, […], membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse," the ICRC has proposed that

> […] membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict. Consequently, under IHL, decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: "*continuous combat function*"). Continuous combat function does not imply de jure entitlement to combatant privilege. Rather, it distinguishes members of the organized fighting forces of a non-State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions.[1280]

In terms of consequence, the 'continuous combat function' (hereinafter: CCF) implies "lasting integration into the organized armed group acting as the armed forces of a non-State party to an armed conflict."[1281] This implies that an insurgent in a CCF ceases to be a civilian and loses immunity from attack on a *continuous* basis *throughout the duration of his CCF*.[1282] It also follows that an insurgent, engaged in a 'continuous *non-combat* function' within the organized armed group, must be viewed as a civilian and enjoys immunity from direct attack unless and for such time as he takes a direct part in the hostilities. The existence of a CCF must be determined in view of the concrete circumstances. In the case of doubt, an insurgent must be regarded as a civilian.

The seminal question remains: what is the *scope* of acts or functions within the organized armed group amounting to a CCF? As follows from the above, the identification of a CCF is relative to the interpretation of the notion of DPH.[1283] While we will address this issue in more detail below, the view of the ICRC is that besides genuine fighting functions, functions within CCF *include* the preparation, execution and command of acts or operations themselves amounting to DPH, as well as the recruitment, training and equipment of indi-

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[1278] ICRC (2009), 27-28.

[1279] In doing so, the ICRC adopts a viewpoint that stands in contrast with previous viewpoints. It may be noted in that respect that the ICRC Customary Law Study recognized that "practice is *ambiguous* as to whether members of armed opposition groups are considered to be members of armed forces or civilians." ICRC (2005a), 17.

[1280] ICRC (2009), 33-34. (emphasis added).

[1281] ICRC (2009), 34.

[1282] ICRC (2005b), 64; Melzer (2008), 352. According to the Interpretive Guidance, this approach found support with the majority of the experts during the ICRC/Asser-expert meetings. ICRC (2009), 71, footnote 192. Also: de Cock (2008), 94.

[1283] ICRC (2009), 69.

viduals by an organized armed group with the aim to continuously and directly participate in the hostilities, without actually carrying out a hostile act.[1284] It is acknowledged that personnel in *combat* support functions are engaged in a CCF, for their activities "would almost invariably constitute an integral part of combat operations, because they generally involve direct support to combat units (such as tactical intelligence, communications, logistics, and engineering) having relatively immediate impact on the hostilities."[1285]
In contrast, the ICRC *excludes* from the scope of membership of the armed forces, and subsequently regards as *civilians*, *firstly*, persons who can be regarded as non-combatants of the insurgency and have assumed *exclusively* "combat service support" functions, and *secondly*, civilian supporters who contribute via their function to the *general war effort* by continuously accompanying or supporting an organized armed group, but whose function does not involve direct participation in the hostilities. This applies to political and religious leaders, instigators, militants, recruiters, trainers, financiers, collaborators,[1286] as well as individuals engaged in the "purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations or to the collection of intelligence other than of a tactical nature."[1287] These functions do not constitute CCFs. The principal reason for such exclusion of both categories is that

> the informal, fluctuating, and often clandestine membership and command structures of most irregularly constituted armed groups make it not only practically impossible, but also conceptually meaningless to distinguish between "non-combatant" members of such groups and civilian supporters accompanying them without taking a direct part in the hostilities.[1288]

As civilians, these individuals may only be lawfully attacked for such time as they take a direct part in the hostilities. In the absence of DPH, the application of combat power by the counterinsurgent is restricted to law enforcement measures.

1.1.2.2.1.2. Criticism

While finding support among many, the ICRC's preference for members of organized armed groups as members of armed forces of a party to the conflict over civilians that continuously directly participate in the hostilities, and the introduction of the CCF has been viewed as highly contentious.
From a purely *humanitarian* perspective, the ICRC-approach is feared to undermine civilian protection. For example, Alston criticizes the CCF for extending the notion of direct participation beyond the limits set in positive law. In his view, "the creation of CCF category is, de facto, a status determination that is questionable given the specific treaty language that limits direct participation to "for such time" as opposed to "all the time."[1289] This is particularly troublesome, as noted by Hampson, because the CCF is difficult to establish and thus prone to mistakes, abuse or arbitrariness. It would risk the designation of civilians as members of the armed forces of the insurgency which may be targeted at all times even in situa-

[1284] ICRC (2009), 34. For that matter, the ICRC excludes individuals commensurate to reservists in the regular armed forces. While recruited, and trained, they generally reintegrate into civilian life until called to active duty.
[1285] Melzer (2010b), 848.
[1286] Melzer (2008), 320-321; ICRC (2009), 34-35.
[1287] ICRC (2009), 34-35.
[1288] Melzer (2010b), 849-850.
[1289] United Nations General Assembly (2010), 20-21, §§ 64-65.

tions where the government exercises effective control over the territory and would be able to arrest or capture him as measure of law enforcement.[1290]

Besides humanitarian concerns, others also take into account the *operational* consequences of the CCF. The principal point of criticism is that the CCF-approach creates a "pseudo-status in non-international armed conflicts"[1291] which is more advantageous for members of organized armed groups than for members of regular armed forces, and which in the end negatively impacts the ICRC's purpose for the introduction of the CCF, which aimed to increase the protection of peaceful civilians in view of the differences between State armed forces and irregularly constituted organized armed groups and the practical difficulties these pose.

The requirement of CCF places States at a disadvantage in several ways. Members of regular armed forces, pursuant to the regulation of their member ship in domestic law, have a right to directly participate in the hostilities. They also have a commensurate *obligation* to distinguish themselves from the civilian population, as a result of which they are generally easily recognizable as legitimate military targets to organized armed groups. In fact, members of regular armed forces may be attacked based merely on the *presumption* that every member is a lawful target, unless they can be recognized as medical and religious personnel, or unless they are *hors de combat*.

In contrast, members of organized armed groups have no right of direct participation, nor an obligation, or other legal incentive, to distinguish themselves from the civilian population. In fact, from an operational point of view, they have every reason not to do so, and indeed, in practice, they are generally difficult to recognize as legitimate military targets.[1292] While this legal and operational asymmetry in itself places regular armed forces at a disadvantageous position, the requirement of a CCF makes matters worse. The CCF-approach has been criticized for creating an artificial distinction between two groups of fighters based on "potentially deceptive" assumptions adopted by the ICRC. As critics argue, the ICRC wrongly assumes that the function of a member of an organized armed group is more or less permanent, while it may very well be subject to change; conversely, civilians directly participating in hostilities do not necessarily have 'loose' ties with a party to a conflict, but may be of consistent support.[1293] Even if they were to use identification cards or uniforms, these may provide an indication of membership, but they are not particularly helpful in identifying the precise *function* of an individual within the organized armed group.[1294] In operational context, the extra obligation of identifying someone's CCF requires extra output from the intelligence branch, who are not only tasked with the difficult job of mapping out the organizational structure of organized armed groups and the identification of its members purely for intelligence purposes, but are now also forced to determine the specific function of each individual within that organization and to value that function in view of their eligibility within the scope of targetable members for the purpose of the principle of distinction in the law of hostilities, while there is no obligation in the *lex lata* or following State practice to do so.[1295] This may slow down and postpone operations at times when speed is of the essence. In fact, the realization of such inequality and disadvantages among

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[1290] Hampson (2011), 201.

[1291] Hayashi (2010a), 2.

[1292] Hayashi (2010a), 2.

[1293] Boothby (2010), 754; de Cock (2010), 119.

[1294] Schmitt (2010c), 23.

[1295] Watkin (2010), 643, who argues that the ICRCs approach to organized armed groups "directly calls into question the observation found in the Interpretive Guidance that it "does not purport to change the law, but provides an interpretation of the notion of direct participation in hostilities within existing parameters" (referring to ICRC (2009), 6).

members of regular armed forces may undermine the credibility of LOAC and their willingness to comply with its norms.
Beyond the difficulty of establishing CCF in the first place, once CCF has been established, the possibility for attack is limited. In contrast to regular armed forces, where only medical and, religious personnel are immune from attack, the scope of (non-CCF) functions immune from attack with organized armed groups is much larger, as noted. Thus, while non-combatant combat support personnel, such as cooks, or administrative personnel of organized armed groups may not be attacked by regular armed forces, the reverse is not true with their counterparts in regular armed forces: as members of the regular armed forces they are combatants not immune from attack.[1296]
In practice, the above implies that only a relatively small group of individuals within an organized armed group may be lawfully attacked, whereas the vast majority enjoys, in principle, protection from such attack as non-CFF, *unless and for such time* as they directly participate in hostilities. As will be outlined in more detail below as well, this temporal aspect has additional consequences in terms of military practice, particularly in relation to those members not in a continuous combat function that nonetheless frequently directly participate in the hostilities.
To remove this inequality between non-organized armed groups and regular armed forces[1297] it has been proposed to consider *all* those identifiable as members of organized armed groups as either members of the armed forces, analogous to regular armed forces, or as civilians *continuously* participating in hostilities.[1298] Not surprisingly, those advancing humanitarian concerns look upon these approaches with concern.

As follows from the above, the law has not crystallized on this issue. Yet, all sides appear to agree that besides actual fighters, also those persons involved in the planning of an operation can be regarded as CCF.

1.1.2.2.2. Members of the Armed Forces of a *Party to the Conflict*

As the above examination has made clear, the issue of membership is crucial in distinguishing between the non-State party to the conflict and its armed forces. This determination serves to distinguish between "irregularly constituted armed groups conducting organized hostilities on the one hand, and civilians directly participating in hostilities on a merely unorganized, sporadic or spontaneous basis on the other."[1299]
According to the ICRC, it must therefore be established that the organized armed group operates functionally *on behalf* of the non-State party. This is expressed in the requirement that the organized armed group must act under a command responsible to a party to the conflict for the conduct of its subordinates.[1300] As with irregular armed groups in IAC, an

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[1296] This, however, does not exclude the possibility that in order to maximize the combat capability of the insurgent movement combat support tasks may be carried out in addition to, rather than instead of a continuous combat function.[1296] Melzer (2010b), 849-850; Mao (1962), Table 1 ("Organization of an Independent Guerrilla Company"), Note 4.

[1297] Clearly, it does not remove the difference between functional membership and formal membership inherent to these forces.

[1298] Watkin (2010), 675. For the analysis, see 674 ff.

[1299] Melzer (2008), 319.

[1300] ICRC (2005a), Rule 4. Such command need not be equivalent to a hierarchical system of military organization generally found in regular armed forces. Sandoz, Swinarski & Zimmerman (1987), § 4463. It seems reasonable to demand that they possess the features required for resistance movements in IAC. Melzer (2008), 319.

organized armed group may be considered to 'belong' to a non-State party to the conflict when it can be determined that a *de facto* relationship exists which finds expression by tacit agreement or an official declaration, or may be concluded from its behavior.[1301] As noted by Melzer

> […] these elements appear to provide margins which are flexible enough to take into account organizational, structural, cultural, political and other contextual diversities while maintaining the core content of what functionally constitutes the armed forces of a party to the conflict in contradistinction to the civilian population.[1302]

Some perceive the condition of 'belonging' to a party to the conflict as a limiting factor. After all, it would exclude from attack all members of armed forces of an organized armed group *not* belonging to a party to the conflict, but which nonetheless reflect all the other necessary requirements of an organized armed group.[1303] These persons must in principle be regarded as civilians protected from attack, unless and for such time as they directly participate in the hostilities. This would thus bar the counterinsurgent forces from attacking them on a continuous basis.

1.1.3. Shift in Immunity

In both IAC and NIAC, the mere identification of an individual's status is a crucial, but not always a conclusive exercise in answering the question of attackability. It may be that circumstances surrounding a member of the armed forces of a party to the conflict or a civilian change such that the principle of distinction – as a reflection of notions of military necessity and humanity – affords immunity from direct attack, or suspends that immunity.
The immunity of the following individuals otherwise protected from direct attack is *suspended* or *terminated* due to their own conduct when:

- Civilians take a direct part in the hostilities;
- Medical, religious and persons *hors de combat*, as well as civil defense personnel engage in acts harmful to the adversary;

Of these categories, particular attention will be paid below to civilians who take a direct part in the hostilities (paragraph 3.3.1). As concluded above, the CCF-requirement introduced by the ICRC implies that only part of the armed forces of an insurgent movement can be considered as members of the armed forces to a party to the conflict, and hence, and has lost immunity from attack on a continuous basis. This implies that all other individuals who are part of an insurgency movement, including members of the armed forces of an organized armed group in a non-CCF function, must be considered civilians. The same applies to all individuals affiliated with an insurgency movement that is not a party to the conflict, to include members of its armed forces regardless of their CCF. They become subject to attack only when and for such time as they lose immunity from attack due to their DPH.

A second category of individuals subject to a shift in immunity concerns individuals otherwise subject to lawful direct attack, but *afforded* immunity due to their being rendered *hors de combat* (paragraph 3.3.2). In essence, this concerns all individuals belonging to the authoritative personal scope of hostilities. For the purposes of the study, the focus will be on 'insurgent'-civilians directly participating in hostilities, and members of the armed forces of an insurgency movement party to the conflict.

[1301] Analogous to resistance organizations in IAC, see Pictet (1960), 57; Melzer (2008), 320.
[1302] Melzer (2008), 320.
[1303] Schmitt (2009a), 817.

1.1.3.1. Civilian DPH

It is generally accepted in both the conventional and customary law of IAC and NIAC that civilians are to be protected from direct attacks "unless and for such time they DPH."[1304] Unlike combatants, civilians have no right to DPH: they lack combatant privilege.[1305] Nevertheless, DPH is not prohibited in international law,[1306] and it is not in itself a war crime.[1307] Upon DPH, civilians are obliged to comply with LOAC. If they fail to do so they may become subject to prosecution for war crimes.[1308] In addition, and as a result of the absence of combatant privilege, they lack combatant immunity: DPH-civilians may be prosecuted for acts violating a State's domestic law. Finally, DPH-civilians in an IAC are not entitled to post-capture POW-status.[1309]

The general underlying premise of the concept of DPH is that, while civilians are generally protected from direct attack because they do not pose a military threat, their engagement in hostile acts does; and that for the time civilians engage in such acts ("unless and for such time") their immunity from direct attack is *suspended*. The phrase "unless and for such time" implies therefore an important *temporal* element, in that the immunity from direct attack is restored from the moment the civilian ceases to DPH.[1310]

The concept of civilian DPH therefore triggers two primary questions: (1) what does the general concept of DPH entail; and (2) what is the scope of the phrase "unless and for such time"? Both questions will be addressed below.

1.1.3.1.1. The General Concept of "Direct Participation in Hostilities"

Given the *factual* significance of the role of civilians in contemporary conflicts (resulting from the shift of military operations to population centers in contemporary conflicts, the deliberate mixture of violent non-State actors among the civilian population, and the increase in the participation of hostilities of civilians),[1311] the need for legal clarity of the concept of DPH has become paramount. Clearly, such clarity serves the interest of civilians.[1312] As noted by Melzer,

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[1304] Article 51(3) AP I; Article 13(3) AP II; Rule 6, ICRC (2005a).

[1305] Civilians directly participating in hostilities are often designated as 'unlawful combatants' or 'unprivileged combatants'. One is, however, cautioned in the use of both terms. As noted, the term 'unlawful combatant' is absent in conventional and customary LOAC and must be primarily viewed as descriptive and, for legal purposes, in light of its interpretation in domestic law. In addition, the term 'unprivileged combatant' is reserved for combatants in an IAC who have forfeited their combatant privilege, for example because they do not comply with the conditions as set out in Article 44 AP I. See Watkin (2005c), 139; Dörmann (2003b), 46 f.

[1306] The only exception is found in Article 67(1) AP I, which prohibits civil defense personnel from directly participating in the hostilities whilst in the performance of their civil defense duty. Direct participation in hostilities may constitute a criminal offence in domestic law. See Rule 6, ICRC (2005a). See also Melzer (2008), 330-331.

[1307] It does not appear, for example, as a war crime in the statutes of the ICTY, ICTR, ICC or SCSL.

[1308] (2002n), *The Prosecutor v. Kunarac and Others, Case Nos. IT-96-23 & IT-96-23/1, Judgment of 12 June 2002 (Appeals Chamber)*, §§ 57 ff; (2002o), *The Prosecutor v. Mitar Vasiljevic, Case No. IT-98-32, Judgment of 29 November 2002 (Trial Chamber)*, §§ 24 ff.

[1309] As for the normative framework of deprivation of liberty applicable to civilians during an armed conflict, see Part 2, Chapter III.

[1310] This stands in contrast to the other categories of individuals mentioned above, whose immunity from direct attack is *terminated* once they engaged in harmful acts or hostile acts. Melzer (2008), 330.

[1311] For a brief historical overview, see Schmitt (2010c), 7-11.

[1312] Bothe, Partsch & Solf (1982), 302.

> [i]n the absence of such clarity, armed forces operation in a hostile environment might be inclined to consider any civilian showing the slightest enmity as directly participating in hostilities, which would amount to a *de facto* presumption of loss of protection irreconcilable with the fundamental principle of distinction.[1313]

Clarity, however, also benefits military interests. As noted in the discussion of the concepts of insurgency and counterinsurgency, abidance to notions of distinction, security for the civilian population, and legitimacy are tactical, operational and strategic imperatives that cannot be ignored. Frustratingly, while frequently appearing in conventional and customary LOAC, the term 'direct participation in hostilities' remains undefined. No clear guidance can be derived from the *travaux préparatoires*,[1314] State practice, or jurisprudence.
As a result, views to the concept differ. Those in favor of maximum protection for civilians interpret the concept *restrictively* and limit it to direct combat and active military operations posing an immediate threat only; thus excluding its extension to support of the general war effort.[1315] Others support a *liberal* approach, implying direct participation to hostilities not only to include direct acts of hostilities, but also second tier activities sustaining the general war effort, such as planning, organization, recruitment and the exercise of logistical functions.[1316]

In the view of the ICRC, DPH, whether in the context of an IAC or a NIAC, amounts to "*specific* hostile acts carried out by *individuals* as part of the conduct of *hostilities* between *parties* to an armed conflict."[1317] This definition thus combines two elements: *firstly*, the concept of 'hostilities', i.e. the "(collective) resort by the *parties to the conflict* to means and methods of injuring the enemy" and, *secondly*, "the *individual involvement* of a person in these hostilities"[1318] through specific acts. The choice of the ICRC for *specific* hostile acts is deliberate, and aims to avoid the possibility that a party to the conflict regards the concept of DPH to include an individual's continuous loss of immunity from direct attack based on his

> […] *continued* intent to carry out unspecified hostile acts in the future. However, any extension of the concept of direct participation in hostilities beyond specific acts would blur the distinction made in IHL between temporary, activity-based loss of protection (due to direct participation in hostilities), and continuous, status or function-based loss of protection (due

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1313 Melzer (2008), 333.

1314 Rule 6, ICRC (2005a); Watkin (2005c), 140; Schmitt (2004), 507 ff; Gehring (1980), 17 f; Melzer (2008), 333.

1315 Gehring (1980), 19; Sandoz, Swinarski & Zimmerman (1987), § 1944-1954 (Article 51 AP I); § 1679 (Article 43 AP I); § 4787 (Article 13 AP II); (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)*, § 37; (1999), *Third Report on the Situation of Human Rights in Colombia, IACiHR (26 February 1999)*, § 53-54.

1316 Hays Parks (1989), 6 f (proposing that civilians within military objectives are subject to lawful direct attack and arguing that the distinction between civilians and civilians directly participating in hostilities needs to be resolved along policy lines, as the law does not provide a clear answer); Schmitt (2004), 509 (proposing that civilians in 'grey areas' (e.g. working in munitions factory) must be presumed to have lost their immunity, until proven otherwise by that civilian); Watkin (2005c), 145, 153 (proposing that in relation to members of an organized armed group direct participation need not be established on an individual basis, but on a group basis, using a functional approach by equalizing an organized armed group with the organizational military staff structure of regular armed forces). Opposing the liberal approach: Melzer (2008), 341.

1317 ICRC (2009), 43.

1318 ICRC (2009), 43. As explained by Melzer, the concepts of 'hostilities' and 'direct participation' "cannot be separated because the collective 'conduct of' hostilities essentially corresponds to the sum total of all military operations or hostile acts carried out by those 'directly participating in' hostilities." Melzer (2008), 342.

> to combatant status or continuous combat function). In practice, confusing the distinct regimes by which IHL governs the loss of protection for civilians and for members of State armed forces or organized armed groups would provoke insurmountable evidentiary problems. Those conducting hostilities already face the difficult task of distinguishing between civilians who are and civilians who are not engaged in a specific hostile act (direct participation in hostilities), and distinguishing both of these from members of organized armed groups (continuous combat function) and State armed forces. In operational reality, it would be impossible to determine with a sufficient degree of reliability whether civilians not currently preparing or executing a hostile act have previously done so on a persistently recurrent basis and whether they have the continued intent to do so again. Basing continuous loss of protection on such speculative criteria would inevitably result in erroneous or arbitrary attacks against civilians, thus undermining their protection which is at the heart of IHL.[1319]

To determine an individual's direct participation of hostilities, the ICRC proposes that three, cumulative constitute elements need be fulfilled: (1) the threshold of harm; (2) direct causation; and (3) belligerent nexus.[1320] All three will be briefly addressed below.

1.1.3.1.1.1. Threshold of Harm

According to the Interpretative Guidance,

> [i]n order to reach the required threshold of harm, a specific act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack.[1321]

Harm to military operations or the military capacity of a party to an armed conflict concerns damage as a result of any specific act that *reasonably* may be expected to have a negative influence on the *military* operations or the *military* capacity of a party to the conflict, irrespective of its scope.[1322] The threshold of harm implies that DPH does not arise in the absence of conduct that causes harm of *other* than military nature or death, injury or destruction on protected persons of objects, such as that resulting from "the building of fences or roadblocks, the interruption of electricity, water, or food supplies, the appropriation of cars and fuel, the manipulation of computer networks, and the arrest or deportation of persons […]."[1323]

The *actual materialization* of harm is *not required.*[1324] Nor is it required that the harm reach a certain quantitative threshold: "any consequence adversely affecting the military operations or military capacity of a party to the conflict" is sufficient harm.[1325] Besides death, injury, or destruction on military personnel and objects, this includes harm resulting from sabotage and other armed and unarmed activities, such as the disruption or restrictions of deployments, logistics or communication, the denial of the use of means, objects or terrain, capturing prisoners or communicating target-information at an approximating attack.[1326] In the

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[1319] ICRC (2009), 45.

[1320] Generally speaking, some exceptions aside, these elements found support with the experts during the ICRC/Asser expert meetings.

[1321] ICRC (2009), 47.

[1322] Schmitt argues that the concept of 'harm' should also include acts of a party that may strengthen its capacity, in other words: any specific act that reasonably may be expected to have a *positive* influence on the military operations or the military capacity of a party to the conflict. Schmitt (2010c), 27.

[1323] ICRC (2009), 49.

[1324] See also: Schmitt (2010c), 27.

[1325] ICRC (2009), 47.

[1326] ICRC (2009), 48 (also, for more examples).

view of the ICRC harm does not arise when a civilian' conduct fails to positively affect the military operations or military capacity of a party to the conflict.[1327] An example is the civilian who refuses to collaborate with a party to the conflict.
The threshold of harm is also crossed when the conduct does not adversely affect the military operations or capacity of a party to the conflict, but still inflicts death, injury or destruction on persons or objects protected against direct attack.[1328] Examples are sniper attacks against civilians[1329] or the bombardment or shelling of civilian villages or urban residential areas.[1330]

1.1.3.1.1.2. Direct Causation

For participation in hostilities to result in the loss of immunity from direct attack it is required that such participation is 'direct'.[1331] The ICRC has formulated the meaning of the condition 'direct' as follows:

> [i]n order for the requirement of direct causation to be satisfied, there must be a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part.[1332]

It is only in the event of a direct connection between the specific act and the harm that military necessity overrides humanitarian considerations.[1333] The emphasis on 'specific' and 'concrete' is made to point out that, at the collective level of the opposing parties to an armed conflict, 'direct' participation "is restricted to specific acts that are so closely related to the hostilities conducted between parties to an armed conflict that they constitute an integral part of those hostilities."[1334] In the view of the ICRC, it is this conduct that brings about the required harm in "*one causal step*": direct causation.[1335] This is not to imply that the conduct must be indispensible. At the same time, the mere fact that the conduct is indispensible is not in itself sufficient.[1336] For example: while the financing of the armed forces may be indispensible, it does not in itself amount to an act of direct participation in hostilities. In contrast, an individual functioning as one of several 'spotter' (i.e. a lookout) may not

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[1327] ICRC (2009), 49.

[1328] ICRC (2009), 49. The underlying rationale is that the concept of attacks, as defined in LOAC (as "acts of violence against the adversary, whether in offence or in defence" (Article 49(1) AP I)), is target-neutral, but merely demands a belligerent nexus of an attack. Schmitt questions "why the criterion should be limited to death, injury, or destruction. Would it not, for instance, constitute direct participation to force inhabitants of a particular ethnic group to leave an occupied area during a conflict in which ethnicity factored? A more useful criterion in this regard would distinguish actions directly related to the armed conflict from those that are merely criminal in nature." Schmitt (2010c), 28.

[1329] (2003o), *The Prosecutor v. Galic, Case No. IT-98-29-T, Judgment of 5 December 2003 (Trial Chamber)*, § 27 jo. § 52.

[1330] (2008n), *The Prosecutor v. Strugar, Case No. IT-01-42-A, Judgment of 17 July, 2008 (Appeals Chamber)*, § 282 jo § 289.

[1331] The relevant provisions in the law of NIAC uses the words 'active' (in CA 3) and 'direct' (Articles 51(3) AP I; 43(2) AP I; 67(1) AP I and 13(3) AP II. The French texts in all sources refers to "participent directement." Today, there is general agreement that the terms 'active' and 'direct' "refer to the same quality and degree of individual participation in hostilities." ICRC (2009), 43, confirmed in (1998k), *The Prosecutor v. Akayesu, Case No. 96-4-T, Trial Chamber Judgment (2 September 1998)*, § 629; Melzer (2008), 335; Dinstein (2010), 146.

[1332] ICRC (2009), 51 (emphasis added).

[1333] Schmitt (2010a), 726.

[1334] ICRC (2009), 58.

[1335] ICRC (2009), 53.

[1336] ICRC (2009), 54.

be indispensible, but would be taking a direct part in the hostilities. In addition, the ICRC warns that the requirement of direct causation must not be confused with *geographical* or *temporal* proximity. For example, while the use of delayed or remotely controlled means remains direct despite the temporal delay, the deliverance of food to troops engaged in combat does not amount to direct causation.[1337] Nonetheless, some scholars argue that distance does matter (although admitting that it "is not everything").[1338]

The requirement of "direct" participation at the same time implies that participation in hostilities that can be qualified as "indirect" does not amount to DPH and consequently does not lead to loss of protection. Participation is "indirect" when the individual is engaged in activities that are part of: (1) the *general war effort* or (2) may be characterized as *war-sustaining activities*.[1339] Unlike the conduct of hostilities, which is designed to bring about the materialization of the required harm, the general war effort and war sustaining activities "merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm […]."[1340] While both may create a causal link between the act and resulting harm – ultimately even harm reaching the threshold required for DPH – this link is merely indirect. To accept an indirect causation as a standard for DPH "would bring the entire war effort within the concept of direct participation in hostilities and, thus, would deprive large parts of the civilian population of their protection against attack."[1341] Examples of indirect causation are the imposition of a regime of economic sanctions on a party to an armed conflict, depriving it of financial assets; providing its adversary with supplies and services, such as electricity, fuel, construction material, finances and financial services; scientific research and design, production and transport of weapons and equipment not carried out as an integral part of a specific military operations designed to directly cause the required threshold of harm; the recruitment and training of personnel for other purposes than the execution of a predetermined hostile act.[1342]

The question arises whether measures which form part of chain acts must each be separately examined for their direct cause. An example is the detonation of an IED, which is characterized by the chain of acts to include the finance, purchase and smuggling of components, their assembly and storage, the transportation of the IED to the scene of detonation, its planting and actual detonation.[1343] It is the view of the ICRC that, "where a specific act does

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[1337] ICRC (2009), 55; Dinstein (2010), 149-150.

[1338] Dinstein (2010), 151; Stephens & Lewis (2006), 50; Guillory (2001), 135-136. Dinstein, for example, argues that a civilian driving a military munitions truck in the US while the area of operations is Afghanistan renders him a civilian protected from direct attack, whereas that same civilian would be directly participating in the hostilities if he were to drive the same truck in Afghanistan. In contrast, Rogers argues that the civilian enjoys protection from direct attack at all times. Rogers (2004), 11-12.

[1339] The ICRC defines the general war effort as "to include all activities objectively contributing to the military defeat of the adversary (e.g. design, production and shipment of weapons and military equipment, construction or repair of roads, ports, airports, bridges, railways and other infrastructure outside the context of concrete military operations). The ICRC defines war-sustaining activities as to "include political, economic or media activities supporting the general war effort (e.g. political propaganda, financial transactions, production of agricultural or non-military industrial goods)." ICRC (2009), 51. See also Sandoz, Swinarski & Zimmerman (1987), §§ 1679 (Article 43 AP I) and 1945; (1999), *Third Report on the Situation of Human Rights in Colombia, IACiHR (26 February 1999)*, § 56.

[1340] ICRC (2009), 52.

[1341] ICRC (2009), 52.

[1342] ICRC (2009), 54.

[1343] Another example concerns the launching of a missile via an unmanned aerial vehicle, involving computer specialists operating the vehicle with remote control; forward air controllers, intelligence personnel, the commander.

not on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm."[1344]

While it is generally recognized that the relationship between the act and the harm should be relatively proximate, the "one causal step"-approach of the ICRC has been criticized as interpreting the requirement of directness too restrictively, and should include acts that contribute to the capacity of specific operations.[1345] In view of IED attacks, for example, the ICRC-approach "limits action to deal with such attacks to a reactive posture focused on "acts" rather than on the capacity of an opponent to plan and attack in the future. The initiative is therefore surrendered to the enemy force."[1346] As argued by Schmitt, the better approach is to view as sufficient that the act should form "an integral part" of the operation causing harm. While the Interpretive Guidance uses this condition, it does so only in connection to coordinated military operations, and not to individual operations. In that way, individuals engaged in acts that by and of itself do not constitute DPH, such as intelligence collection, and that may not be indispensible *per se*, are still part of the entire operation and could be lawfully attacked.[1347] As explained by Schmitt

> [t]he benefits of an approach focusing on integrality rather than number of steps should be apparent. After all, it is difficult to conceive of an indirect, yet integral act. And acts many steps removed from an eventual hostile act may nevertheless be integral to an operation. An example is acquiring the materials to build an improvised explosive device or suicide vest to be used in a predetermined attack. Perhaps most importantly, from a practical perspective, those involved in armed conflict are likely to have a much better grasp of which acts are integral to "military" operations than those which meet a juridical test of direct causation.[1348]

Following the 'integral part'-approach, acts now excluded from DPH following the 'one causal step'-approach may reasonably result in the loss of immunity from direct attack.

1.1.3.1.1.3. Belligerent Nexus

The third condition of DPH is the requirement of *belligerent nexus*. As explained by the ICRC

> [i]n order to meet the requirement of belligerent nexus, an act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.[1349]

While an act may directly adversely affect the military operations or military capacity of a party to an armed conflict or directly inflict death, injury, or destruction on persons and objects protected against direct attack, it would not amount to DPH if it is carried out in the absence of a so-called belligerent nexus. Thus, in view of the ICRC, the use of lethal force

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[1344] ICRC (2009), 54-55.

[1345] Schmitt (2010c), 29; Schmitt (2010a), 727.

[1346] Watkin (2010), 658.

[1347] Schmitt (2010a), 729 ff. Particular controversy arose during the ICRC/Asser expert meetings with respect to the issues of IEDs, collective operations, and, most notably, human shields. ICRC (2006), 44; ICRC (2008a), 70. On human shields, see Schmitt (2009b); Lyall (2008). In relation the subject of human shields, the Interpretive Guidance takes the approach that voluntary human shields should not be regarded as civilians directly participating in the hostilities. Opponents of this view argue that "[…], those who argue that voluntary shields should be treated as direct participants embrace the characterization not because they want the shields to be subject to attack, but rather because it will preclude the inclusion of their death or injury in the proportionality calculation and thereby maintain the delicate military necessity-humanitarian considerations balance."

[1348] Schmitt (2010a), 729.

[1349] ICRC (2009), 58.

by civilians in situations of individual self-defense,[1350] during their exercise of power over persons or territory, or in situations of civil unrest or inter-civilian violence does not, without more, constitute hostilities, for lack of a belligerent nexus.[1351] In all of these situations, the permissibility of the use of force is to be regulated by the normative paradigm of law enforcement. The harm must follow from an act that constitutes *armed* violence, directly following from the means and methods used in the conduct of hostilities and thus constituting acts of direct participation. A belligerent nexus clearly cannot be established if the acts that are designed to inflict harm are acts of indirect participation, as explained above.

The existence of a belligerent nexus must be determined objectively and reasonably in view of the circumstances. Unless it can objectively and reasonably be concluded that an individual is *not aware* of his or her direct participation in the hostilities,[1352] the determination of belligerent nexus must be take place without further account of the subjective intent or other mental state underlying the individual's participation in the hostilities or his or her hostile intent.[1353] As formulated by the ICRC:

> […] the decisive question is whether the conduct of a civilian, in conjunction with the circumstances prevailing at the relevant time and place, can reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party.[1354]

While the least controversial of the three conditions of DPH, some have objected against the limitations underlying the phrase "in support of a party to the conflict and to the detriment of another," for it implies that a belligerent nexus only arises when specific hostile acts of members of an organized armed group of individual civilians support a party to the conflict, whereas it is conceivable that such specific acts are carried out not in support of a particular party to the conflict, but merely *against* a party to the conflict. Schmitt refers in this context to the Shia militia in Iraq, which staged operations against both the Sunni and the international coalition, but which in his view had no belligerent nexus with one of the parties to the IAC (i.e. the US and coalition States, and Iraq). The, in his eyes, preferred phrase would call "in support of a party to the conflict *or* to the detriment of another."[1355]

[1350] As noted by Melzer, the use of force in individual self-defense "presupposes an *unlawful* attack, and can therefore not be exercised against *lawful* military operations of an adverse party to the conflict. The use of armed force in response to lawful military operations of the adversary would amount to direct participation in hostilities. The use of armed force by civilians in self-defence against direct attacks on the civilian population or to prevent marauding soldiers from looting, burning and raping in conquered territory would not, however, deprive civilians of their protection against direct attack." Melzer (2008), 343; Schmitt (2004), 520; (2000o), *The Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment of 3 March 2000 (Trial Chamber)*, § 407.

[1351] ICRC (2009), 62-63.

[1352] It is argued that these individuals remain protected civilians, and any use of force resulting in their deprivation of life must be based on the proportionality assessment underlying military operations that may result in incidental civilian death or injury.

[1353] The notion of hostile intent is a term not of LOAC, but a technical term related to ROE. It may prohibit the use of lethal force in situations clearly constituting an act of direct participation in hostilities, while at the same time it may provide the basis for the use of lethal force in individual self-defense against conduct not constituting direct participation in hostilities. ICRC (2009), 59 (footnote 151)-60.

[1354] ICRC (2009), 64.

[1355] Schmitt (2010a), 736.

1.1.3.1.2. "Unless and For Such Time"

The concept of DPH contains an important temporal element: the requirement that a civilian enjoys immunity from direct attack "unless and for such time" he or she directly participates in the hostilities. This element has two functions: *firstly*, it is determinative of the substantive scope of the concept of DPH (i.e. the beginning and end of a specific act constituting DPH), and *secondly*, it functions as a modality governing the temporal aspect of the loss of protection against direct attack.

1.1.3.1.2.1. Beginning and End of DPH

With respect to the first function, the element "for such time" is material in the determination of the concept of DPH. More concretely, it triggers the question of what acts may be viewed as the *beginning* and *end* of DPH. In the view of some, the temporal element must be interpreted restrictively, to refer only to the *actual engagement* in hostile acts, such as the firing of weapons.[1356] The ICRC adopts a somewhat more lenient approach, and accepts that the temporal element allows for the inclusion of

> […] measures *preparatory* to the execution of such an act, as well as the *deployment* to and *return* from the location of its execution, where they constitute an integral part of such a specific act or operation.[1357]

Preparatory measures are in essence military operations preparatory to an attack. It is because of the close and direct link to the subsequent execution of a *specific* act (the attack) that they may be viewed as an integral part of that act.[1358] They must be distinguished from preparatory measures that support the general war effort to carry out unspecified acts, which constitute acts of indirect participation in hostilities.[1359] The temporal or geographic proximity of the preparatory act to the specific act is irrelevant. Nevertheless, whether a preparatory measure constitutes an act of DPH is a determination that requires "a careful assessment of the totality of the circumstances prevailing in the concrete context and at the time and place of action."[1360] According to the ICRC, examples of preparatory measures with a view to the execution of a specific act and amounting to DPH *include*, *inter alia*, the equipment, instruction, training and transport of personnel, gathering of intelligence; and preparation, transport, and positioning of weapons and equipment. In contrast, the ICRC *excludes* from the scope of preparatory acts amounting to DPH *inter alia* the purchase, production, smuggling and hiding of weapons; general recruitment and training of personnel; and financial, administrative or political support to armed actors.[1361]
As far as the *deployment* and *return* are concerned: the ICRC holds that if acts form an integral part of the specific act, they are to be considered as an integral part of an act of DPH. The

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[1356] Amnesty International (2001), 29; McKeogh (2002), 140.
[1357] ICRC (2009), 65.
[1358] ICRC (2009), 65-66; also Article 44(3) AP I. Conversely, acts preparatory to the general campaign of unspecified acts do form part of an act of direct participation in hostilities.
[1359] Criticizing this approach is Boothby (2010), 746-747, who contends that the ICRC arguably misinterprets the phrase "in a military operation preparatory to an attack," in Article 44(3) AP I. The ICRC Commentary to Article 44(3) AP I explains that the phrase refers to "*any* action carried out with a view to combat." Sandoz, Swinarski & Zimmerman (1987), § 1692 (Article 44(3) AP I) (emphasis added). In his view, the better approach is to establish whether the preparatory act itself constitutes an act of DPH, and not whether the act may be preparatory to an act of DPH.
[1360] ICRC (2009), 67.
[1361] ICRC (2009), 66-67.

relevant condition is the *physical displacement* to and from a location, and the *physical separation* from the operation upon return.[1362]
Overall, the ICRC's approach in relation to preparatory acts as well as deployment and return is by many perceived as unnecessarily and unrealistically restricting the notion of DPH. Some experts suggest an alternative approach, which focuses on the chain of causation and implies that the period of direct participation includes all acts, before and after, in causal connection to the hostile act. As explained by Dinstein, "[i]n demarcating the relevant time span in the course of which a civilian is directly taking part in hostilities, it is necessary to go as far as is reasonably required both 'upstream' and 'downstream' from the actual engagement."[1363]

1.1.3.1.2.2. Temporal Scope of the Loss of Protection

The phrase "unless and for such time" also functions as a *modality* governing the temporal aspect of the loss of civilian protection against direct attack. Unlike members of an organized armed group in a CCF, who may be targeted for the duration of their membership and cease to be civilians, in relation to *civilians*, the immunity from direct attack is *suspended* only during the period from the beginning until the end of the DPH[1364] and in relation to an existing and *concrete* threat arising from a specific act of DPH.[1365] In other words, the civilian retains his or her status as a civilian when directly participating in hostilities.[1366] The ICRC has been adamant not to interpret the phrase "unless and for such time" to imply that civilians who participate on a "persistently recurring basis" could be attacked on a continuous basis.[1367] In the view of the ICRC it would be "impossible to determine with a sufficient degree of reliability whether civilians not currently preparing or executing a hostile act have previously done so on a persistently recurring basis and whether they have the continued intent to do so again."[1368] Rather, the phrase "unless and for such time" is limited to participation taking place on a merely *spontaneous, unorganized or sporadic* basis."[1369]
As such, the phrase "unless and for such time" in the context of civilians directly participating in hostilities signifies the possibility of a '*revolving door*', implying that the civilian immunity from attack shifts depending on whether the individual is on the protective or unprotected side of the door.[1370] In the view of the ICRC, this 'revolving door'-function is "an integral part, not a malfunction" of LOAC.[1371]

[1362] ICRC (2009), 67-68.

[1363] Dinstein (2010), 148. Also Dinstein (2008), 189-190; Watkin (2004), 17; Schmitt (2010c), 36-37; Boothby (2010), 750 ff. For example, while the Interpretive Guidance excludes from the temporal scope of direct participation preparatory measures such as the acquisition of materials to build an IED, such acts are included in the alternative approach.

[1364] ICRC (2009), 71. As noted by Melzer, "[a]s there is temporal identity between the duration of 'direct participation in hostilities' and the duration of the ensuring 'suspension against direct attack', determining the temporal scope of the loss of protection is equivalent to clarifying the beginning and end of direct participation in hostilities itself." Melzer (2008), 347.

[1365] Melzer (2008), 347.

[1366] Dinstein argues that an individual – not member of the armed forces of a party to the conflict – directly participating in the hostilities loses his status of civilian and effectively becomes an unlawful combatant. See Dinstein (2010), 147. Also: Goodman (2009), 51.

[1367] ICRC (2009), 44.

[1368] ICRC (2009), 45.

[1369] ICRC (2009), 71.

[1370] The idea of the 'revolving door' was mentioned for the first time by Hays Parks in his article Air War and the Law of War, explaining that the "initial problem with the establishment of combatant or civilian sta-

> It prevents attacks on civilians who do not, at the time, represent a military *threat*. […] As the concept of direct participation in hostilities refers to specific hostile acts, IHL restores the civilian's protection against direct attack each time his or her engagement in a hostile act ends.[1372]

While those protecting humanitarian interests applaud this mechanism, it has been objected from an operational point of view, for it provides a window of abuse, which may severely hampering military operations.

On a more general note, Schmitt opposes the idea that the civilian poses a *military threat* whilst directly participating in hostilities, and does *not* pose such threat when acting as a civilian. In his view, the loss of protection is not subject to the determination of a threat, but an individual's *decision* to directly participate in the hostilities. In relevant part, he argues:

> Indeed, particular acts of direct participation may not pose an immediate threat at all, for even by the restrictive ICRC approach, acts integral to a hostile operation need not be necessary for its execution. Instead, the notion of "threat" is one of self-defense and defense of the unit, which is a different aspect of international law. It is accounted for in operational procedures known as rules of engagement, which are based as much in policy and operational concerns as in legal requirements. To the extent it is based in law, self-defense applies to civilians who are not directly participating in hostilities rather than those who are participating (as they may be attacked without any defensive purpose).[1373]

More specifically, instead of increasing the protection of neutral civilians, the 'revolving door'-approach may have just the opposite effect, particularly in the case of recurring participation. As argued by Watkin,

> [i]n adopting the "revolving door" theory as it has, the Interpretive Guidance blurs the line between those civilians who take a direct part in hostilities and members of organized armed groups. Combined with a narrow concept of membership in an organized armed group and a correspondingly broad notion of who is a civilian, the protection normally associated with uninvolved civilians begins to look like a form of immunity for insurgents. It is a protection which is consciously not provided to State security forces. Further, on one level the term "revolving door" evokes the idea of a form of carnival shooting gallery, where soldiers must wait until an opponent pops out from behind a door to be shot at. At some point, the credibility of the law begins to be undermined by suggesting an opponent can repeatedly avail themselves of such protection.[1374]

The 'revolving door' is particularly difficult to reconcile with civilians who do not directly participate in the hostilities on a spontaneous, unorganized or sporadic basis, but who instead participate on a "persistently recurring basis."[1375] As held by several experts, such civilians ought to lose immunity from attack on a *continuous* basis as long as their DPH lasts. Support for this view can be found in ICRC Commentary to Article 13(1) AP II for support. In relevant part, the commentary states that

> [i]f a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks *for as long as his participation lasts*. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked.[1376]

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tus lies in the new revolving door provided for by Protocol I for certain 'civilians.'" Hays Parks (1990), 118)

[1371] ICRC (2009), 70.

[1372] ICRC (2009), 70-71.

[1373] Schmitt (2010c), 37. Also: Boothby (2010), 757.

[1374] Watkin (2010), 689. See also Boothby (2010), 757-758.

[1375] ICRC (2009), 44.

[1376] Sandoz, Swinarski & Zimmerman (1987), § 4789 (emphasis added).

Boothby argues that, on closer inspection, the phrase "for as long as his participation lasts" is not supportive of a 'revolving door', but instead

> […] suggests, or at least implies, that while the civilian persists in participating in the hostilities he will lose protection. The AP1 [sic] Commentary interpretation makes sense, moreover, because during the period of such persistent participation, that civilian has chosen to become part of the fight.[1377]

As has been noted previously, eligible for continuous civilian DPH are individuals who are to be regarded as civilians, whether in an IAC or NIAC (1) acting independently from any armed forces; (2) who are members of the armed forces of an organized group not belonging to a party to an IAC or NIAC; (3) who cannot be considered members of an organized armed group belonging to a party to a NIAC because they fulfill not CCF. Not only would this imbalance distort the inherent balance between military necessity and considerations of humanity; it also potentially undermines the incentive to pay overall respect for compliance with the law.

The better view, it is proposed, is therefore not to rely on the approach of the 'revolving door', but to make a distinction between civilians who directly participate in hostilities on a sporadic, *ad hoc*, basis, and those who, in essence, participate on a persistent and recurring basis, and therefore lose immunity from direct attack for the entire duration of direct participation, to include the intermittent periods in between hostile acts.[1378] This approach appears to find support with the Israel Supreme Court as well:

> On the one hand, a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization which has become his "home", and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack "for such time" as he is committing the chain of acts. *Indeed, regarding such a civilian, the rest between hostilities is nothing more that preparation for the next hostility.*[1379]

As Schmitt continues, in the case of 'continuous' direct participation, civilian immunity from direct attack is only re-established once the individual "[…] unambiguously opts out through extended nonparticipation or an affirmative act of withdrawal."[1380] Clearly, there remains on the attacking side an obligation to carry out the determination of DPH in good faith and reasonableness based on the information available in the circumstances ruling at the time.[1381] This obligation corresponds with the general obligation set out in the requirement of precaution, which will be discussed in more detail below, that the attacking party must take all feasible measures to ensure that the objective is, indeed, a military objective.

[1377] Boothby (2010), 756 (erroneously referring to AP I).

[1378] Dinstein (2010), 149. See also Boothby (2010), 748 ff, 756-757; Schmitt (2010c), 38.

[1379] (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)*, § 39 (emphasis added). It is also the United States' position (see Boothby (2010), 758, and accompanying footnote 55).

[1380] Schmitt (2010c), 38. In his view, it is only the direct participant himself who can remove the presumption of attack by clearly signifying, in whatever way, his return to civilian status. If the attacking party wrongly attacks an individual no longer directly participating in the hostilities, such is to be viewed not as a violation of the presumption of doubt, but as a mistake of fact, which has already been accounted for in LOAC which permits reasonable mistakes in view of the circumstances ruling at the time.

[1381] This appears also to be the view of Canada as expressed in the, as of yet, unpublished Joint Doctrine Manual on the Law of Armed Conflict At the Operational and Tactical Levels, B-GJ-005-104/FP-024. See Boothby (2010), 759, footnote 57.

Schmitt argues that notwithstanding the attacking party's full compliance with the aforesaid obligation, it appears nonetheless no less than reasonable to argue that it remains the burden of the civilian having taken the decision to directly participate in the chain of hostilities – participation in which he was not entitled to in the first place – to remove any misunderstanding that may arise with the attacking party as to his return to civilian status and subsequent entitlement to protection from direct attack by expressing a clear and objectively verifiable overt act of disengagement.[1382] The – in hindsight – erroneous conclusion that the individual was not a civilian does, as is argued by some, not violate the presumption of doubt (as there was no doubt as to the immunity from attack), but rather constitutes a mistake of fact which has already been accounted for in LOAC as it permits reasonable mistakes in view of the circumstances ruling at the time.[1383]

1.1.3.2. 'Hors de Combat'

As noted, the concept of *hors de combat* implies the shift from insurgents subject to direct attack to immunity from direct attack. In IAC, the relevant conventional source is Article 41 AP I and customary law.[1384] In NIAC, these sources concern CA 3, Article 5 AP II[1385] and customary law.[1386] Under Article 85(3)(e) AP I, "making a person the object of attack in the knowledge that he is *hors de combat*" is a grave breach of the Protocol. Overall, the prohibition of direct attack against persons *hors de combat* has been adopted in the military manuals of numerous States, and finds additional expression in national law.

In terms of *material* scope an insurgent qualifying as lawful military target is *hors de combat* when:[1387]

(1) He is in the power of an adverse party to the conflict (generally, persons detained for reasons related to the conflict)[1388] (category 1); or
(2) He clearly expresses an intention to surrender (category 2); or
(3) He has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself (category 3).[1389]

The subsequent immunity from attack is conditional, in that the individual may not engage in hostile acts, or attempt to escape.[1390]

In terms of *personal* scope, the material scope of '*hors de combat*' extends to insurgents qualifying as members of the armed forces of an organized armed group party to a NIAC as well as civilians directly participating in the hostilities in IAC and NIAC.

In terms of *temporal* scope, the three aforementioned material grounds of *hors de combat* each trigger questions as to the beginning of the safeguard of *hors de combat*. To be precise, when should it be clear to the armed forces of a party to the conflict that (1) an individual is in its

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[1382] Boothby (2010), 760 and conform the United States' view.
[1383] Schmitt (2010c), 38-39; Boothby (2010), 754.
[1384] Rule 47, ICRC (2005a).
[1385] Article 5 AP II must be read in conjunction with Article 4 AP II, which prohibits violence to life, in particular murder, with regard to persons who are deprived of their liberty for reasons related to the armed conflict. Römer (2009), 73.
[1386] Rule 47, ICRC (2005a).
[1387] Article 41(2) AP I; Rule 47, ICRC (2005a).
[1388] Rule 47, ICRC (2005a); Dinstein (2007), 148; McDonald (2008), 220.
[1389] Article 41(2) AP I; Rule 47, ICRC (2005a). See also Article 23(c), 1907 HIVR.
[1390] Article 41(2) AP I.

"power"?; (2) that an individual expresses "an *intention* to surrender"; and (3) that an individual is "incapable of defending himself"?
A conceptual feature of the notion of *hors de combat* is that it adds to the status-based distinction the element of *threat*: individuals *hors de combat* no longer pose a threat. The absence of a threat, normally inherent in the status of a person directly participating in the hostilities or a member of the armed forces of a party to the conflict bars his killing. As explained by the ICRC Commentary: "[i]t is only the soldier who is himself seeking to kill who may be killed. The abandonment of all aggressiveness should put an end to aggression."[1391]

1.1.3.2.1.1. "In the Power of an Adverse Party"

The phrase "in the power of an adverse Party" is not defined. It is generally accepted that it refers to situations of actual *physical* custody, i.e. capture and subsequent detention or internment. An insurgent may come in the power of an adverse party because he has been captured without prior surrender or in a state in which he is able to defend himself; following surrender; or following sickness, wounds or their being shipwrecked which has left him in a state of defenselessness.
However, the ICRC Commentary indicates that the condition of "being in the power of an adverse Party" as set out in Article 41 AP I *also* includes situations in which persons otherwise directly participating in the hostilities are rendered *hors de combat prior* to their actual physical custody by enemy forces. An example is given by Römer:

> […], a person who is armed but defenceless because he or she needs medical care falls under the safeguard, while an unarmed, and thus defenceless, soldier (maybe also wounded, but not in need of medical care or assistance) would not be protected. An unconscious soldier (who is severely wounded and has a weapon laying next to him or her) falls under the safeguard, but a sleeping soldier (who might be slightly wounded) without having a weapon next to him or her would not be protected. In order to avoid these undesirable differences, the safeguard should be granted to the first category.[1392]

These words "being in the power of an adverse Party" are deliberately chosen to distinguish Article 41 AP I from Article 4 GC III, relating to POWs, which refers to "falling into the power" of the enemy. As the ICRC Commentary explains:

> [a]lthough the distinction may seem subtle, there could be a significant difference between "being" in the power and having "fallen" into the power. Some consider that having fallen into the power means having fallen into enemy hands, i.e., having been apprehended. This is virtually never the case when the attack is conducted by the airforce, which can certainly have enemy troops in its power without being able, or wishing, to take them into custody or accept a surrender (for example, in the case of an attack by helicopters). In other cases land forces might have the adversary at their mercy by means of overwhelmingly superior firing power to the point where they can force the adversary to cease combat. A formal surrender is not always realistically possible, as the rules of some armies purely and simply prohibit any form of surrender, even when all means of defence have been exhausted. A defenceless adversary is 'hors de combat' whether or not he has laid down arms. Some delegations considered that this situation was already covered by the Third Geneva Convention. If so, those concerned are protected both as prisoners of war and by the present provision. In this sense there is an overlap. On the other hand, others considered that the Third Convention only

[1391] Pictet (1952b), 136.
[1392] Römer (2009), 86.

> applies from the moment of the actual capture of the [p.485] combatant, and that therefore the present provision constitutes the only safeguard in the interim.[1393]

In the view of Römer, for a person to be recognized by an adverse Party to have come in its power

> *any criterion suffices* that allows the operating forces to recognize the attacked individual as discontinuing his or her participation in hostilities and, thus, is no longer defending him/herself, and not resisting further.[1394]

The above would imply that even situations where insurgents are not entirely defenseless, but have been outnumbered and overpowered by counterinsurgent forces so that the insurgents are essentially at the mercy of the counterinsurgent forces, the latter must consider the insurgents to be in their power, even if they have not expressed the intention of surrender. Similarly, following the above, an unarmed civilian 'spotting' for the insurgents and transmitting intelligence about the position and activities of counterinsurgent forces to the insurgents and therefore DPH-ing, may not be attacked and must be considered *hors de combat* when he can be easily captured without additional risk to the counterinsurgent forces.[1395]
Others, however, adopts a more restrictive view. To Dinstein, for example, there is only two ways in which fighters can come "in the power of the adverse party", namely by choice, through surrender, or by force of circumstances, when having become wounded, sick or shipwrecked.[1396] In other words, there is no requirement of recognition that individuals discontinue their DPH in situations where they are not yet physically in the hands of the adversary forces. He thereby refers to the misconception that it is prohibited to attack soldiers "retreating in disarray – as epitomized by the Iraqi land forces during the Gulf War."[1397] It is submitted that this approach of Dinstein, while restrictive, is in fact the *lex lata*. While the phrase "falling into the power of the adversary party" in Article 41 AP I indeed serves to close a gap of protection, it refers to the gap between the moment in which it becomes manifestly clear that an enemy fighter surrenders, or is injured in such a manner that he or she is rendered defenseless and requires medical attention, and the moment of actual physical control, i.e. of 'being' in the power. It does not refer to situations absent surrender of defenselessness following injury, and where a fighter is rendered defenseless on other grounds. A fighter who despite his wounds continues to fight remains subject to lawful direct attack. The same applies to a fighter that sleeps or the unarmed civilian 'spotter' in the example above. Such are the risks that come with DPH. If one desires to gain immunity from direct attack, one has to make the choice to surrender. These are the rules of the 'game' and any other interpretation would distort its clarity. It is exactly for this reason that it is essential that military leadership, whether of States or organized armed groups, must disseminate this kind of knowledge of the LOAC to their troops (even if national law or internal regulations forbid surrender). Of course, the above does not imply that a commander must kill in the absence of surrender, for that decision remains his prerogative. Another issue is: when is surrender a fact? It is to this question that we will now turn.

[1393] Sandoz, Swinarski & Zimmerman (1987), § 1612.
[1394] Römer (2009), 81 (emphasis added).
[1395] Römer (2009), 81 (emphasis added).
[1396] Dinstein (2007), 148.
[1397] This is also the view of the US. In its report on the conduct in the Persian Gulf War to Congress, the US Department of Defense took the position that retreating combatants, if they do not communicate an offer of surrender, whether armed or not, are still subject to attack and that there is no obligation to offer an opportunity to surrender before an attack. See United States , § 349.

1.1.3.2.2. "An Intention to Surrender"

A person directly participating in the hostilities is afforded immunity from direct attack once he expresses an *intention* to surrender.[1398] "Surrendering means to cease fighting and give oneself into the power of the adversary, not resisting capture by the enemy."[1399] An individual acts perfidiously when he feigns the intention to surrender, and in doing so leads the adversary "to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence."[1400]
The requirement of expressing the intent to surrender implies that the *initiative* to surrender lies with the person at that time directly participating in the hostilities, at his discretion. It also implies that the burden to communicate that intent in a manner recognizable to the adversary lies with the surrendering individual. After all, it is for the adversary to recognize, or to recognize from the circumstances, that a person is surrendering. In the view of the UK, the initiative to surrender includes the initiative of the party offering surrender to come forward and submit itself to the control of the enemy forces.[1401] According to the US an offer of surrender has to be made at a time when it can be received and properly acted upon.[1402] As explained by the ICRC Commentary:

> In land warfare, surrender is not bound by strict formalities. In general, a soldier who wishes to indicate that he is no longer capable of engaging in combat, or that he intends to cease combat, lays down his arms and raises his hands. [p.487] Another way is to cease fire, wave a white flag and emerge from a shelter with hands raised, whether the soldiers concerned are the crew of a tank, the garrison of a fort, or camouflaged combatants in the field. If he is surprised, a combatant can raise his arms to indicate that he is surrendering, even though he may still be carrying weapons.[1403]

Once a person expresses his intention of surrender, the adversary forces have an obligation to accept it.[1404] The denial of quarter is a war crime.[1405] This implies that the individual is *hors de combat* prior to his the actual physical capture by the adversary forces.

1.1.3.2.3. "Incapable of Defending Himself"

A person who is sick or wounded,[1406] unconscious or shipwrecked[1407] is considered "incapable of defending himself" so long as he abstains from any hostile act, and enjoys immunity

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[1398] The killing or wounding of a person who has surrendered at discretion is a war crime. Article 8(2)(b)(vi) Rome Statute.
[1399] Cottier (2008), 344.
[1400] Article 37(1)(a) AP I.
[1401] As mentioned in ICRC (2005a), Rule 47.
[1402] United States , § 349.
[1403] Sandoz, Swinarski & Zimmerman (1987), § 1618 (Article 41 AP I). Rogers (2004), 49. On surrender on the sea and in the air, see also Dinstein (2010), 161.
[1404] Robertson (1995), 547.
[1405] Article 40 AP I; Article 23(d), 1907 HIVR; Article 8(2)(e)(x). See also Article 60 of the 1863 Lieber Code: "It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter." For an example of killings after surrender, see Schork , available at <http://www.crimesofwar.org/a-z-guide/hors-de-combat/>.
[1406] Article 8(a) AP I defines sick and wounded persons as those, "whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility."
[1407] Article 8(b) AP I defines shipwrecked persons as those, "whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility."

from direct attack from the moment it can be reasonably concluded that the person in question is rendered defenseless. In other words, individuals falling in one of these limited categories can no longer participate in the hostilities and no longer form a military threat. It is in the incapability of continued participation in hostilities that forces should recognize the applicability of the safeguard of '*hors de combat*'. Indicative is the (requested) need for medical care or assistance, or the struggle of shipwrecked persons to survive. It should be emphasized that "[t]he mere fact that a soldier is wounded does not necessarily mean that he is incapacitated."[1408]

In sum, an insurgent, DPH-ing on an *ad hoc* basis, or as a CCF-member of the armed forces of an organized armed group belonging to a insurgent movement party to the conflict may not be attacked due to his being *hors de combat*, from the moment he:

(1) is physically in the power of the counterinsurgent forces;
(2) clearly expresses an intention to surrender;
(3) has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself.

The 'closing the temporal gap'-incentive of Article 41 AP I is not to imply that an individual falls under the safeguard of *hors de combat* when defenseless, but not injured or sick, and without surrender or actual capture. It should therefore not be misinterpreted in furtherance of the humanization of LOAC.

Finally, a conceptual feature of the notion of *hors de combat* is that it adds to the status-based distinction the element of *threat*: persons *hors de combat* no longer pose a threat, as there is no longer a nexus with the hostilities. Any use of combat power resulting in the deprivation of life is only permissible when carried out as a lawful measure of law enforcement.

1.1.4. Observations

The purpose of this paragraph was to examine whether insurgents fall within the prohibitative scope of direct attack, or in the authoritative scope of direct attack. This determination is an essential step in any targeting process. However, in counterinsurgency practice commanders are faced with *two paradoxes*. The *first* paradox is that, while targeting the 'right' people is imperative to protect and secure the civilian population, distinguishing the civilian population from the insurgents is extremely difficult in operational reality. In legal terms, in a single area of operations, counterinsurgent forces may be confronted with a myriad of persons qualifying differently under the law: genuinely peaceful civilians, who want nothing to do with the insurgency; peaceful civilians, who support the insurgency, without *directly* participating in the hostilities; civilians supporting the insurgency such that they directly participate in the hostilities; members of the insurgency movement who do not have a fighting function; and members of the insurgency movement with a fighting function. This conglomeration of individuals is difficult to differentiate outside situations of hostilities, and once hostilities break out, counterinsurgents are prone to make mistakes in discriminating between protected persons and legitimate military objectives. This brings us to the *second* paradox, which is that counterinsurgnet forces must comply with the applicable law, to include the rules of distinction under the law of hostilities, but at the same time it remains ambiguous as to what exactly these rules mean.[1409]

[1408] U.K. Ministry of Defence (2004), 58, § 5.6.1.
[1409] Ducheine & Pouw (2010), 104.

The ICRC's Interpretive Guidance has sought to clarify this notion. In doing so, it has build in several defense mechanisms against the arbitrary or erroneous attack of civilians in order to increase their protection. With respect to organized armed groups, it follows that, while the ICRC recognizes that members of an organized armed groups belonging to a party to the conflict are to be distinguished from civilians and may be targeted on a continuous basis, the built-in conditions of 'belonging to a party to the conflict'; proof of membership; and a limited interpretation of the scope of CCF must prevent that individuals somehow engaged with irregular movements, such as insurgency movements, fall too easily within the authoritative scope of personal attack. Those falling outside the scope of organized armed groups, are all civilians, and thus entitled to protection from direct attack, unless and for such time as they DPH. In respect of civilian DPH, the ICRC has again sought to limit the scope of attackable civilians, by demanding a specific hostile act, by interpreting the requirement of direct causation restrictively, and by endorsing the 'revolving door'-effect of the temporal requirement of "unless and for such time."

While providing useful guidance, many aspects in the Interpretive Guidance remain controversial. From an operational viewpoint, doubts have arisen as to the operational feasibility of fulfilling some of the requirements, such as establishing CCF-membership, as well as the inequality between regular and irregular organized armed groups regarding the scope of persons within such forces that may be attacked.

To date, States have refrained from expressing their views on the notion of DPH. As expressed by the UN High Commissioner on Human Rights, "[t]he failure of States to disclose their criteria for DPH is deeply problematic because it gives no transparency or clarity about what conduct could subject a civilian to killing. It also leaves open the likelihood that States will unilaterally expand their concept of direct participation beyond permissible boundaries"[1410] and adopt an "intermediate (ie lower) level of protection"[1411] for individuals not, or indirectly participating in hostilities, but who somehow can be related to that group, due to their presence in an area, their familial ties, or because of their suspected loyalty or cooperation with the insurgency movement.[1412] A noteworthy example in this respect concerns the targeting by States contributing to the NATO mission in Afghanistan (ISAF) of individuals engaged in the Afghan narcotics-industry, in order to cut the ties between that industry and the insurgency in Afghanistan. According to open-source NATO information, such individuals may be attacked when it is determined that they have "*a clearly established link with the insurgency*."[1413]

[1410] United Nations General Assembly (2010), 21, § 68

[1411] Melzer (2008), 175.

[1412] (1999), *Third Report on the Situation of Human Rights in Colombia, IACommHR (26 February 1999)*, Chapter IV, §§ 202, 293.

[1413] See NATO's Role in Afghanistan, available at the NATO Website, at: http://www.nato.int/issues/Afghanistan/index.html (emphasis added). As part of ISAF's new counter-narcotics (CN) approach Commander ISAF (COMISAF) is mandated since February 2009 to order his troops, "upon request of the Afghan Government and with the consent of the national authorities of the forces involved" to provide "[...] enhanced support". This enhanced support includes "the destruction of processing facilities and action against narcotic producers provided there is a *clearly established link* with the insurgency." Arguably, "action against narcotic producers" encompasses targeting operations resulting in their death. Criticizing this approach, see United Nations General Assembly (2010), 21, § 68: "68. Thus, although the US has not made public its definition of DPH, it is clear that it is more expansive than that set out by the ICRC; in Afghanistan, the US has said that drug traffickers on the "battlefield" who have links to the insurgency may be targeted and killed. This is not consistent with the traditionally understood concepts under IHL – drug trafficking is understood as criminal conduct, not an activity that would subject someone to a targeted killing. And generating profits that might be used to fund hostile actions does

In view of examples as the above, it is submitted that while in many instances individuals within the insurgency leadership, armed forces, political cadre, auxiliaries, and mass base could be designated by the counterinsurgent State – at the military or political level – as 'insurgent (or as 'guerrilla', 'terrorist' or otherwise) for their affiliation with the insurgency, the mere designation of individuals as such is by and in itself meaningless for the purposes of distinction in the law of hostilities. As we have learnt, in a NIAC, not even all insurgents in the armed forces may be attacked, except those with a CCF. Also, it can be no automatism to designate as lawful military targets individuals at level of the insurgency leadership, political cadre, unless it follows that those engaged at those levels either also perform CCFs within the armed forces, or they are caught in the act of DPH. At the level of the mass base, the presumption is that they are civilians from which the insurgents draw support, following which it may be concluded that they enter the armed forces in a CCF function, or perform acts that constitute DPH for such time as they do so. Thus, while perhaps indicative of a link between the individual and the insurgency movement, an individual's designation as 'insurgent' is merely an emblematic designation of particular use in military or political parlance, but one that does not automatically justify his deprivation of life resulting from the use of combat power.

In addition, an insurgent's designation within the authoritative scope, as difficult as this may be, however, is all that: it merely identifies his eligibility as a lawful military objective under the law of hostilities. It does not imply that the subsequent application of force is otherwise unrestricted and lawful. To the contrary: an insurgent's designation within the authoritative scope brings into position the principles, prohibitions and restrictions governing the direct attack of lawful military objectives, namely: the principle of proportionality; the requirement to take precautionary measures; and the prohibitions and restrictions on means and methods of warfare. It is to these principles, prohibitions and restrictions that we will now turn.

1.2. The Principle of Proportionality

Next to the principle of distinction, the principle of proportionality belongs to the nucleus of LOAC. It must be viewed as a "*restriction* on attacks that is *additional* to the principle limiting them to combatants and military objectives."[1414] It can be found at various places within conventional LOAC,[1415] and its status as a rule of customary international law is undisputed.[1416] Notwithstanding its firm position within the law of hostilities, its precise meaning and application in practice remain subjects of debate.

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not constitute DPH." See also Akande (2009); Schmitt (2009c); Gallahue (2010), all arguing that the act of narcotics trafficking does not constitute DPH.

[1414] Schmitt (2005), 457 (emphasis added); Dinstein (2010), 129; Rauch (1982), 67; Sandoz, Swinarski & Zimmerman (1987), § 1979 (Article 51 AP I).

[1415] Without using the term 'proportionality' explicitly, the rule can be derived from Articles 15 and 22 of the Lieber Code, as well as Article 24 of the 1923 Hague Air Warfare Rules. Since the adoption of AP I in 1977, its most important codification can be found in the combination of Articles 51(5)(b), 57(2)(a)(iii) en (b) en 85(3)(b) of API.

[1416] See ICRC (2005a), 297 (Rule 14): "Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited." See also Dinstein (2010), 129; (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, Dissenting Opinion Judge Rosalyn Higgins; (2000q), *The Prosecutor v. Kupreskic et al., Case No. IT-95-16-Y, Judgment of 14 January 2000 (Trial Chamber)*, § 524: the norms laid down in Articles 57 and 58 AP I are "part of customary international law, not only because they specify and flesh out general

1.2.1. The Basic Rule

The principle of proportionality holds that, after it has been established that a target (whether an individual or an object) is a lawful military objective, it must be ensured that the incidental loss of civilian life, injury to civilians and harm to civilian objects (also referred to incidental injury and collateral damage)[1417] to be *expected* from an attack is not *excessive* in relation to *anticipated concrete* and *direct* military advantage attained from its destruction, capture or neutralization. In the event of *disproportionality*, while retaining its status as such,[1418] "even a legitimate target may not be attacked."[1419] With that, the principle of proportionality is, in the words of Rogers, "an *attempt* to balance the conflicting military and humanitarian interests."[1420] Indeed, its application, no matter how meticulous, is no guarantee that "humanitarian interests" will be left unharmed. It is, without a doubt, one of the most difficult principles of LOAC to apply in practice. At the same time, the principle of proportionality is one of the prime examples demonstrating that the law of hostilities was designed to reflect the reality on the battlefield.[1421] After all, as the history of warfare has demonstrated, "there is no way to avert altogether harmful consequences to civilians flowing from attacks against military objectives."[1422] It therefore speaks in terms of broad prohibitions.[1423] Proportionality is not a total prohibition.[1424] To the contrary, it offers commanders – and this element is crucial for a proper understanding of the principle – a certain lawful *discretion* to inflict collateral damage.[1425] However, with that authority comes a heavy responsibility, namely that the commander may only proceed with the attack after he has come to a reasonable determination of "the relative importance of the various interests in light of the actual needs in the situation in question."[1426]

On that note, the principle of proportionality governing the conduct of hostilities discussed here is also referred to as the principle of proportionality *stricto sensu* and is not to be confused with that related to the principle of (military or absolute) necessity, namely that the application of combat power must be objectively limited to that required to attain the legitimate aim of an operation, whether carried out in the domain of law enforcement or hostilities.[1427] Neither should it be confused with the principle of proportionality protecting

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pre-existing norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol."

[1417] The term 'collateral damage' is used to summarize the phrase "*incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof*", as mentioned in 51(5)(b).

[1418] Dinstein (2010), 129.

[1419] (1996e), *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 587, Dissenting Opinion Judge Rosalyn Higgins.

[1420] Rogers (2004), 17 (emphasis added).

[1421] Ducheine (2008), 468.

[1422] Dinstein (2004), 119.

[1423] (1996g), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ, Advisory Opinion of 8 July 1996, Dissenting Opinion Judge Higgins*, § 20.

[1424] Solis (2009), 274.

[1425] This room for discretion is, however, subject to the requirement of precaution, see Article 57 AP I. See also § 3 of this Section.

[1426] Cannizzaro (2006),786.

[1427] This is also referred to as the principle of proportionality *lato sensu*. To recall, in LOAC, the legitimate aim of military operations is to achieve the submission of the enemy with the least expenditure of time, life and physical resources, whereas in IHRL, as noted, the legitimate aim of the use of lethal force is limited to that required to remove a threat posed to human life materializing from unlawful violence, to effect a lawful arrest or to prevent the escape of a person lawfully detained, and to lawfully quell a riot or insurrection.

combatants against means and methods of warfare 'of a nature to cause superfluous injury or unnecessary suffering'.[1428] The protective scope *ratione personae* of the principle of proportionality, as set out in conventional LOAC, concerns "incidental loss of *civilian* life, injury to civilians, damage to civilian objects." The principle of proportionality *stricto sensu* does not demand a proportionality examination between the concrete and direct military advantage anticipated from the attack and the expected harm to *lawful military objectives*. In addition, if no civilian damage is to be expected, a proportionality-test is not required in relation to the attack of a lawful military objective, provided the attack conforms with the prohibitions and restrictions with respect to means and methods of warfare. As explained by Corn:

> [t]he object of [armed] conflict is to bring about the submission of an enemy as promptly and efficiently as possible. History testifies to the fact that this objective is often implemented by unrelenting and violent application of force in a manner that demonstrates to an enemy the futility of continued resistance. Even fundamental principles of military operations reflect this truism. For example, pursuant to the principle of mass, a military commander is instructed to bring maximum firepower and resources to bear on critical points on the battlefield and enemy vulnerabilities in order to overwhelm the enemy. The notion of striking an enemy with overwhelming force is an axiom of military operations, but it also reflects the [sic] fundamental objectives of armed conflict are inconsistent with making *enemy forces* the beneficiaries of a proportionality rule.[1429]

In other words, the requirement of proportionality in the conduct of hostilities already presumes that harm and injury inflicted upon the opposing party to the conflict is military necessary in order to attain its defeat.[1430]

1.2.2. What Determines the Balance of Interests?

The principle of proportionality thus requires (1) an appreciation of (a) the anticipated concrete and direct military advantage; and (b) the expected collateral damage, and (2) the weighing of both interests against each other. The law of hostilities is not particularly helpful in guiding practitioners to conclude on the balance of interests. In addition, there is no universal agreement on how the principle of proportionality is to be understood.[1431] Nonetheless, the assessment of the two elements, and their weighing against each other is necessarily contextual. The law cannot possibly provide a concrete guideline to what proportionality means in any given situation. By means of examining a number of key elements of Article 51(5)(b), the following examination attempts to provide insight in the deliberations a commander and his staff must make with regard to the issue of proportionality.

1.2.2.1. '*Incidental* Loss of Civilian Life, Injury to Civilians, Damage to Civilian Objects, or a Combination Thereof'

Article 51(5)(b) sees to "incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, [...]". The emphasis is on "incidental". The civilian damage may not be intended. Thus, an attack on a particular military objective may not be carried out as an excuse to hit a civilian who does not qualify as a direct participant in the hos-

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[1428] See Article 35(2) AP I and Article 23(e) HIVR. See also Gardam (2004), 49 ff and 59 ff. On means and methods, see also § 4 below.

[1429] Corn (2010), 90. See also Dinstein (2010), 129; Melzer (2008), 359.

[1430] Melzer (2008), 359, footnote 260.

[1431] Schmitt (2006), 293. Hays Parks, however, argues that, for that reason, the proportionality rule cannot be a rule of customary law: *opinio juris* is absent. Hays Parks (1990), 168 ff.

tilities, but whose death is nonetheless a military advantage. Nonetheless, the civilian damage may be inevitable. It is therefore a misinterpretation of the principle of proportionality to argue that civilian damage that could be foreseen bars its characterization as 'incidental' and qualifies as a violation of LOAC.[1432] As argued previously, the principle of proportionality allows for a certain margin of collateral damage. That margin does, indeed, not exist once it is foreseeable that the harm to civilians will be *excessive* in relation to the military advantage anticipated (or the attack as a whole). Only in that case, the proponents of the proposition are right: a war crime has been committed, the attack is indiscriminate.[1433]

1.2.2.2. "*Concrete* and *Direct* Military Advantage"

The requirement of proportionality demands the determination of the "concrete and direct military advantage anticipated" from the attack on a lawful military objective. This determination alone is not sufficient to conclude on the excessiveness of the attack. It is only one part of that test, for it still needs to be positioned against the expected collateral damage.[1434]
That the advantage anticipated must be of a military nature is generally not debated.[1435] From the ICRC Commentary to AP I it can be concluded that the notions "concrete" and "direct" are to be interpreted restrictively: "the advantage concerned should be substantial and relatively close, and […] advantages which are hardly perceptible and those which would only appear in the long term should be disregarded"[1436] However, as noted by Dinstein, "this paraphrase is questionable: 'substantial' is not synonymous with 'concrete', and long-term effects may be both direct and concrete.[1437]
While held by the ICRC as not reflective of the *lex lata*,[1438] doctrine,[1439] State practice[1440] and conventional law[1441] also indicate that "military advantage" concerns the attack as a whole, and not each singular attack incorporated in the '*overall*' operation plan. Schmitt mentions as an example a deceptive air attack in Sector A, meant to lure the enemy to sector B, where the main attack will take place.[1442] On the other hand, while in this example the military advantage anticipated from the attacks in the example may be accumulated and together be balanced against the accumulated collateral damage expected from the operation as a

[1432] Dinstein (2010), 136.
[1433] Conform artikel 51(5)(b).
[1434] Melzer (2008), 360-361.
[1435] Schmitt (2006), 295.
[1436] Sandoz, Swinarski & Zimmerman (1987), § 2209.
[1437] Dinstein (2010), 134; Melzer (2010c), 293.
[1438] This was the view of the ICRC expressed in its Paper submitted to the Working Group on Elements of Crimes of the Preparatory Commission for the International Criminal Court. See ICRC (2005a), vol. II, 331, § 191.
[1439] Dinstein (2010), 134; Gardam (2004), 99 f.
[1440] The Netherlands has adopted a reservation to AP I that reads: "5. With regard to Article 51, paragraph 5 and Article 57, paragraphs 2 and 3 of Protocol I: It is the understanding of the Government of the Kingdom of the Netherlands that military advantage refers to the advantage anticipated from the attack considered as a whole and not *only* from isolated or particular parts of the attack;" Available at http://www.icrc.org/ihl.nsf/NORM/E6EF925C67966E90C1256402003FB532?OpenDocument (emphasis added). See also the similar reservation of the UK, restated in U.K. Ministry of Defence (2004), 56, § 5.4.4
[1441] The condition of 'overall' has been incorporated in Article 8(2)(b)(iv).
[1442] Schmitt (2006), 295; Dinstein (2004), 123; Boivin (2006), 44.

whole,[1443] such accumulation cannot extend to the entire military campaign at the strategic level.[1444]

1.2.2.3. "*Expected* Incidental Loss" and "Military Advantage *Anticipated*"

While in hindsight it may be concluded that the appreciation of the expected collateral damage and the military advantage anticipated was inaccurate, a crucial aspect inherent in the design of the principle of proportionality is that the lawfulness of the attack is to be judged from the viewpoint of the commander when taking the decision to proceed with the attack. As noted by Dinstein, "the linchpin is what is mentally visualized before the event."[1445] Thus, the outcome of the proportionality test is the result of a balance of interests carried out *before* the actual attack. It is not the result of an analysis of the actual incidental loss and the achieved military advantage *post facto*. The latter analysis may be of relevance to verify whether the assessment *ante facto* was in fact accurate, but it is, as such, not relevant to the proportionality rule.[1446] Article 51(5)(b) and Article 57(2)(a)(ii) demonstrate this concept: the proportionality test is complied with if the attacker has taken "all feasible precautions" to determine the "expected" collateral damage in relation to the "anticipated" military advantage.

1.2.2.4. Test: "Excessive"

The principle of proportionality demands that the collateral damage expected cannot be "excessive" in relation to the military advantage. In other words, the threshold is not "any"[1447] or "extensive" collateral damage.[1448] In addition, "excessive" does not mean[1449] "*clearly* excessive."[1450] The mere fact that collateral damage may be qualified as extensive does not automatically imply that it is excessive.[1451] In fact, the prime conceptual aspect of the principle of proportionality is that the standard of excessiveness is relative, and thus context-specific. As explained in the Manual on International Law Applicable to Air and Missile Warfare, "[i]t is not a matter of counting civilian casualties and comparing them to the number of enemy combatants that have been put out of action. It applies when there is a *significant imbalance* between the military advantage anticipated . . . and the expected collateral damage to civilians and civilian objects."[1452]
The law of hostilities does not provide detailed directions, laid down in rules or charts, which indicate in quantified measures the relationship between military advantage and collateral damage.[1453] As a result, objective strategies using predetermined calculations are diffi-

[1443] Boivin (2006), 44.
[1444] Gardam (2004), 101 f.
[1445] Dinstein (2010), 132.
[1446] Schmitt (2006), 294; Dinstein (2010), 132; Kalshoven (2007), 220.
[1447] Rosen (2009), 735.
[1448] Pillaud & al. (1987), 626.
[1449] Dinstein (2010), 131; Greenwood (1997), 461-462; Melzer (2008), 360; Rogers (2004), 18.
[1450] Article 8(2)(b)(iv) Rome Statute.
[1451] Greenwood (1997), 461-462; Rogers (2004), 18. As noted by Melzer "[w]hile extensive collateral damage will always require a very high standard of justification, the excessiveness of collateral damage never depends on the extent of collateral damage alone, but always on whether, in the concrete circumstances, the expected collateral damage is outweighed by the importance of the 'concrete and direct military advangage anticipated'." Melzer (2008), 360.
[1452] Program on Humanitarian Policy and Conflict Research (2010), 91-92.
[1453] Schmitt (2006), 293. Also: Cannizzaro (2006), 786; Dinstein (2010), 130; Fenrick (1982), 102; Melzer (2008), 360.

cult if not impossible to apply in a lawful manner.[1454] It is therefore not possible to determine in advance that, regardless of the circumstances at hand, and the information available to the commander, an attack likely to cause incidental injury or collateral damage is *a priori* lawful or unlawful. The principle of proportionality has been designed on the presumption that responsible commanders have a wide margin of discretion to assess in good faith the concrete and direct military advantage anticipated and the possibility of collateral damage in light of the circumstances at hand, making use of information available to him at that time, to include the information he 'should have known.'[1455] This assessment can be said to form a *subjective* aspect of the proportionality-test, and is followed by an *objective* phase, in which the commander, based on his assessment of the concrete and direct military advantage, as well as the expected collateral damage, must decide on the excessiveness of the latter vis-à-vis the former on the basis of reasonableness, guided by the question of whether other commanders, in comparable conditions and with the same information would have reached the same outcome.[1456] However, while objective in theory, in practice it seems inevitable, as Dinstein argues,[1457] to take into account the influence of the conditions of combat on the analytical capacity of the commander,[1458] conditions to which individuals may respond differently. Conditions of influence include sleep deprivation, hunger, thirst, casualties, combat stress, *et cetera*. Thus, *subjective* elements will in all likelihood be mixed in with the objective analysis carried out in all reasonableness and good faith.

On a final note, reference is made here to the argument raised by the ICTY in the *Kupreskic* case, in which it held that in the interpretation and application of the test of excessiveness, recourse may be had to the 'elementary considerations of humanity' and more specifically to the Martens clause:

> As an example of the way in which the Martens clause may be utilized, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul per se of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardize excessively the lives and assets of civilians, contrary to the demands of humanity.[1459]

[1454] Melzer (2010c), 294; Dinstein (2010), 132.

[1455] Schmitt, Garraway & Dinstein (2006), 23; Dörmann (2003a), 165; Wright (2010), 9; (2003o), *The Prosecutor v. Galic, Case No. IT-98-29-T, Judgment of 5 December 2003 (Trial Chamber)*, § 58; Office of the Judge Advocate General (1992), 4-5.

[1456] Schmitt (2005), 457; Schmitt, Garraway & Dinstein (2006), 23; Cannizzaro (2006), 787-788; Henderson (2009), 222; Wright (2010), 9.

[1457] Dinstein (2004), 122 ("[t]he whole assessment of what is 'excessive' in the circumstances entails a mental process of pondering dissimilar considerations – to wit, civilian losses and military advantage – and is not an exact science. There is no objective possibility of 'quantifying the factors of the equation', and the process 'necessarily contains a large subjective element'. This 'subjective evaluation' of proportionality is viewed with a jaundiced eye by certain scholars, but there is no serious alternative. Undeniably, the attacker must act in good faith, and not 'simply turn a blind eye on the facts of the situation; on the contrary, he is obliged to evaluate all available information").

[1458] Dinstein (2010), 133, footnote 817; Rogers (2004)110.

[1459] (2000q), *The Prosecutor v. Kupreskic et al., Case No. IT-95-16-Y, Judgment of 14 January 2000 (Trial Chamber)*, § 526.

1.2.3. "Concrete and Direct Military Advantage" in Counterinsurgency Doctrine

It is widely acknowledged in contemporary counterinsurgency-doctrine that any use of force must be *legitimate*, both in a social and a legal sense, and must be applied with *restraint*, i.e. it must be weighed against the effects it may have on providing security to the population.[1460] The misapplication of force at the tactical level – willingly or unwillingly – is almost certain to have detrimental effects at all levels of military operations, as well as the politico-strategic level. The use of force that is perceived by the population as disproportionate, even though it may be lawful, erodes any sense of security and legitimacy the population may have attributed to the counterinsurgency efforts, but it may also negatively affect international public opinion (most notably in light of today's media coverage and means of communication). The necessity of killing an insurgent, while perfectly lawful under LOAC, appears to be secondary to the 'necessity' to win and maintain the support of the civilian population.
This imperative also affects the way counterinsurgent forces are to approach the concept of collateral damage. Counterinsurgency doctrine mandates that commanders must demonstrate "genuine compassion and empathy for the populace"[1461] and "serve as a moral compass,"[1462] so that "the populace must feel protected, not threatened, by counterinsurgency forces' actions and operations."[1463] Most importantly, "[l]eaders must consider not only the first-order, desired effects of a munition or action but also possible second- and third-order effects – including undesired ones."[1464] The secondary and tertiary effects of such collateral damage may include the alienation of the population from the counterinsurgent, a propaganda victory for the insurgency and the media coverage negative to the counterinsurgency-strategy.[1465] This was also recognized by the ISAF command in 2009, as expressed in its Tactical Directive:

> Like any insurgency, there is a struggle for the support and will of the population. Gaining and maintaining that support must be our overriding operational imperative – and the ultimate objective of every action we take. […] We must avoid the trap of winning tactical victories – but suffering strategic defeats – by causing civilian casualties or excessive damage and thus alienating the people. […] [T]he carefully recognized and disciplined employment of force entails risks to our troops – and we must work to mitigate that risk wherever possible. But excessive use of force resulting in an alienated population will produce far greater risks. We must understand this reality at every level of our force. […][1466]

In view of the imperative to protect the civilian population, ISAF troops were subjected to a policy-based paradigm of strict guidelines aimed at avoiding and minimizing collateral damage,[1467] even in situations where, from the viewpoint of law, such damage could have been justified. Thus,

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[1460] U.S. Department of Army & U.S. Marine Corps (2007), § 1-27. These imperatives are not new, as demonstrated by the practice of the British in Malaya John A. Nagl, *Learning tot Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam*, (2005), 87-107 (2002). See also David Galula, *Counterinsurgency Warfare: Theory and Practice*, (1964), 52.

[1461] U.S. Department of Army & U.S. Marine Corps (2007), § 7-8.

[1462] U.S. Department of Army & U.S. Marine Corps (2007), § 7-9.

[1463] U.S. Department of Army & U.S. Marine Corps (2007), § 7-5.

[1464] U.S. Department of Army & U.S. Marine Corps (2007), § 7-36.

[1465] U.S. Department of Army & U.S. Marine Corps (2007), § 7-37: "Fires that cause unnecessary harm or death to noncombatants may create more resistance and increase the insurgency's appeal – especially if the populace perceives a lack of discrimination in their use."

[1466] Commander ISAF (2009).

[1467] This policy paradigm includes coalition and national rules of engagement (ROE); no-strike lists (for reasons such as IHL or host-nation sensitivities); restricted target lists (in which attack requires special

> […] leaders at all levels [are] to scrutinize and limit the use of force like close air suport (CAS) against residential compounds and other locations likely to produce civilian casualties in accordance with this guidance. Commanders must weigh the gain of using CAS against the cost of civilian casualties, which in the long run make mission success more difficult and turn the Afghan people against us. […] The use of air-to-ground munitions and indirect fires against residential compounds is only authorized under very limited and prescribed conditions (specific conditions deleted due to operational security). We will not isolate the population from us through our daily conduct or execution of combat operations.[1468]

The question arises as to how the notion of "concrete and direct military advantage" in the LOAC proportionality requirement relates to "military advantage" in the context of counterinsurgency operations. Under the law of hostilities, "[…] a somewhat linear formulation of assessment is undertaken. Hence civilians and civilian objects are accorded a "value" and an exchange is precessed along consequentialist lines, whereby an attack may proceed on the basis that "anticipated concrete and direct military advantage" outweighs, by even the smalles of margins, the expected civilian loss."[1469] To recall, the notion "concrete and direct" implies that the advantage concerned should be substantial and relatively close and is linked to a specific tactical operation.[1470] Thus, "[a] military advantage can only consist in ground gained and in *annihilating or weakening the enemy armed forces*,"[1471]

In deviation from the proporationality-calculus in the normative paradigm of hostilities, military advantage as understood in the counterinsurgency-requirement of proportionality

> […], is best calculated *not in terms of how many* insurgents are killed or detained, but rather *which* enemies are killed or detained. If certain key insurgent leaders are essential to the insurgents' ability to conduct operations, then military leaders need to consider their relative importance when determining how best to pursue them. In COIN environments, *the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if allowed to escape*. If the target in question is relatively inconsequential, then proportionality requires combatants to forego severe action, or seek noncombative means of engagement.[1472]

It is difficult to ignore the underlying sociopolitical objective of winning hearts and minds that appears to form part of the calculus of military advantage in a counterinsurgency-environment. Indeed, in counterinsurgency, the emphasis is not on the status of the insurgent under the law, but on his individual identity, and his ability, potentially, to harm the interests of the counterinsurgent.[1473] This potential threat is to be measured against the potential incidental civilian loss not just in physical terms of death and injury, but, more importantly, also in terms of the sociopolitical damage resulting in the alienation of the civilian population from the counterinsurgent as an effect of disproportionate use of force.[1474] Indeed, in counterinsurgency, the fear for the potential impact of collateral damage on this central strategic aim of the counterinsurgency campaign is so great that collateral

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preapproval, e.g., due to negative cultural implications); individual target folder restrictions (such as a requirement to use a particular munition or strike a particular "desired point of impact"); the implementation of a Joint Targeting Coordination Board; the issuing of directives in SOPs, SOIs and ROEs; the development of target lists; the development of procedures to analyse intelligence; the conclusion of a Weapons Release Matrix; Joint Air Operations Plans, execute orders, fragmentary orders, fire support coordination measures and soldier cards. See Schmitt (2009), 314.

[1468] Commander ISAF (2009).

[1469] Stephens (2010), 304.

[1470] Sandoz, Swinarski & Zimmerman (1987), §§ 2209.

[1471] Sandoz, Swinarski & Zimmerman (1987), §§ 2218 (emphasis added).

[1472] U.S. Department of Army & U.S. Marine Corps (2007), 247-248, § 7-32 (emphasis added).

[1473] Watkin (2007), 280; Watkin (2005c), 153-154.

[1474] Stephens (2010), 305.

damage that is not excessive in relation to the anticipated military advantage in legal terms is generally held to be intolerable in counterinsurgency. Rather, in counterinsurgency, the mere chance of *any* collateral damage precludes the use of lethal force to serve strategic goals.[1475] This has also found its way in ROE and other use of force-guidelines.[1476] Stephens:

> Military policy has imposed a high value on civilian loss that effectively weighs the proportionality formula in favor of the humanitarian side, not because it is the "nice" thing to do, but rather as Kilcullen notes, "our approach was based upon a clear-eyed appreciation of certain basic facts" concerning the nature and quality of fighting an insurgency.[1477]

However, one has to be cautious in classifying the counterinsurgency-imperatives of protecting and securing the civilian population as to be driven by purely humanitarian considerations, because, in essence, they are not. While such considerations may play a role to some degree, it is submitted that these imperatives serve a necessity, which is that in acting in compliance with them, the insurgency may be defeated and the *status quo* in public security, law, and order returns, and moreover, that the government resumes total control over the monopoly on the use of force. In other words, fighting 'humanely' or 'ethically' sound serves, first and foremost, *strategic purposes*. As such, counterinsurgency-doctrine requires military commanders to take account of "advantages which are hardly perceptible and those which would only appear in the long term."

Here, the counterinsurgency-based calculus of proportionality deviates from the LOAC-based calculus of proportionality. A traditional explanation of the latter implies that vague and indirect strategic advantages "should be disregarded" when assessing military advantage in LOAC-proportionality.[1478] During the drafting stage of Articles 51 and 57 AP I, the calculus of military advantage of strategic objectives was rejected by the fear that such objectives would be used as a legal basis to eventually outweigh the counterweight of collateral damage. In counterinsurgency, however, the effect of these strategic objectives is the opposite: it functions as an argument to *limit* or *outlaw* any collateral damage. LOAC-proportionality, however, does not require or even mandate this. As remarked by Schmitt, concrete and direct military advantage

> does not extend to winning hearts and minds, a point illustrated by agreement that destroying enemy civilian morale does not qualify as advantage vis-à-vis the definition of military objective. […] Political, economic or social advantage does not suffice. This being so, any assertion that collateral damage should diminish military advantage would have to be supported by a direct nexus to military factors. While true that collateral damage motivates civilian sympathy for the enemy, such general effects are too attenuated. As a general rule, then, collateral damage plays no part in proportionality calculations beyond being measured against the yardstick of excessiveness.[1479]

In sum, the proportionality-calculus in counterinsurgency is strictly policy-based and powered by strategic imperatives, and results in restrictions on causing collateral damage not required by the LOAC-based principle of proportionality.

1.2.4. Observations

In sum, the requirement of proportionality demonstrates that while military commanders are afforded a wide margin of discretion in determining the excessiveness of the concrete

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[1475] Beran (2010), 9.
[1476] Schmitt (2009), 321.
[1477] Stephens (2010), 306.
[1478] Sandoz, Swinarski & Zimmerman (1987), §§ 2209.
[1479] Schmitt (2009), 323. See also Stephens (2010), 305.

and direct military advantage anticipated from an attack vis-à-vis the incidental damage expected to ensue from that attack, at the same time it imposes on the commander the heavy burden of carrying out such assessment in all reasonableness and in good faith on a case-by-case basis, in light of the circumstances at hand and the information available. In any case, the principle of proportionality thereby precludes that attacks can be generally carried out on standardized basis, implying that lawfully targetable insurgents with military advantage of an absolute weight X under any circumstances permit the incidental harm to a pre-fixed number of civilians. To the contrary, while in some instances such number of civilian casualties could be lawful to attain the military advantage following from the attack on insurgent A, an attack on insurgent B could be unlawful, as the military advantage anticipated does not outweigh the civilian harm to the same number of civilians.

1.3. The Requirement of Precautionary Measures

The law of hostilities imposes upon military commanders the duty to take precautionary measures in attack. This obligation has been codified in Article 57(1) API, which stipulates that "[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."[1480] This requirement of precaution is a rule of customary law in both IAC and NIAC.[1481] In situations of *pre-planned* targeting, the requirement to take all feasible precautions "merits particularly strict and literal interpretation."[1482] It is complementary, on the one hand, to the requirement of distinction, as it aims to ensure that an individual subject to attack falls is a lawful military objective. On the other hand, it is complementary to the requirement of proportionality in attack, in that it aims to avoid, or minimize to the maximum extent feasible, incidental harm to the civilian population expected.[1483] Therefore, the duty to take precautionary measures should not be seen as a follow-up test, to take place *after* the requirements of distinction and proportionality, but as a continuous requirement that underlies the law of hostilities in attack, and, as a consequence permeates through the targeting cycle as set out in military doctrine.

1.3.1. Specific Obligations

The general requirement of precaution consists of specific obligations related to (1) the ascertainment that the objective to be attacked is lawful under the law of hostilities; and (2) to avoid, or at least, to minimize incidental harm to civilians.

1.3.1.1. Ascertainment of Lawful Military Objective

The law of hostilities imposes upon military personnel the obligation to ensure, as far as this is *feasible*, that the objectives to be attacked are, at the relevant time, in fact lawful military objectives under the law of hostilities, i.e. fall within the authoritative personal scope of direct attack.[1484] Unless the commander has personally been able to determine the status of

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[1480] Article 57(1) AP I. Military operations means more than attacks, and also concerns maneuvers, patrols and transfers. Rogers (2004)96;

[1481] ICRC (2005a), Rules 15-21; (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)* § 111-112; (2006e), *Partial Award (Central Front), Eritrea's Claims 1,3,5,9-13, 14, 21,25 and 26 (2005)*, 417, 425.

[1482] Melzer (2010c), 292.

[1483] Article 57 AP I is to be viewed as complementary to Articles 48, 51, 52 en 54 API. Sandoz, Swinarski & Zimmerman (1987), § 2189.

[1484] Article 57(2)(a)(i) API; ICRC (2005a), Rule 16.

the object, this duty to act does not imply that there has to be an *absolute* certainty that the object is a military objective: "mistakes based on faulty intelligence can be made."[1485] Nevertheless, there is a duty to constantly review target lists that may provide the basis for targeting, for objectives may cease to be military objectives.[1486] This implies that the commander or his staff, besides his (possible) personal knowledge of the potential target, may also have to rely on other information, for example intelligence or on reports of subordinate commanders in the field. Even when there is little or no doubt, there is a duty to obtain subsequent information, for example by carrying out additional reconnaissance operations. This is not merely a legal obligation, it also serves a military interest: "[…] no responsible military commander would wish to attack objectives which were of no military interest. In this respect humanitarian interests and military interests coincide."[1487] The UK Manual of the Law of Armed Conflict mentions of a number of factors a commander has to pay regard to before deciding upon the attack. These include:

a. whether he can personally verify the target;
b. instructions from higher authority about objects which are not to be targeted;
c. intelligence reports, aerial or satellite reconnaissance pictures, and any other information in his possession about the nature of the proposed target;
d. any rules of engagement imposed by higher authority under which he is required to operate
e. the risks to his own forces necessitated by target verification.[1488]

As stipulated by Article 57(b) AP I, once an attack is underway, it shall be cancelled or suspended "if it becomes apparent that the objective is not a military one […]." This may be the case when it becomes clear that a person was erroneously identified as a legitimate military target, when the target is a civilian that ceases to directly participate in hostilities, or when the target surrenders or falls *hors de combat*.

1.3.1.2. Avoidance or Minimization of Incidental Harm to the Civilian Population

The law of hostilities also imposes upon military personnel the obligation to take, as far as 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.[1489] This provision includes a double objective.[1490] The *first* objective is an ultimate, and preferred, aspiration: to avoid, in total, the occurrence of collateral damage. Realizing that this is not always possible, a *second* objective has been built in: irrespective of whether collateral damage can be avoided, in any event the focus shall be on minimizing, as much as feasible, collateral damage. How is this obligation to be applied in relation to the proportionality-test? Article 57(2)(a)(ii) allows for multiple interpretations. One can argue, for example, that the provision is an autonomous instrument, to be applied *after* a commander, *in abstracto*, has carried out the proportionality test. This approach is, however, an artificial one, for the commander is only able to reach a sound judgment if he knows, as part of the weaponeering-phase during the targeting process, with which means and methods he can carry out the attack, both operationally and lawfully.

[1485] Rogers (2004), 96-96, referring to Obradovic, who requires absolute certainty (Obradovic (1979)).
[1486] U.K. Ministry of Defence (2004), 83, § 5.32.2.
[1487] Sandoz, Swinarski & Zimmerman (1987), § 2195.
[1488] U.K. Ministry of Defence (2004), 83, § 5.32.2.
[1489] Article 57(2)(a)(ii) AP I; ICRC (2005a), Rule 17.
[1490] The ICRC Commentary does not address this.

The preferable approach, therefore, is to firstly gain insight in which means and methods limit the expected collateral damage beforehand.[1491] Factors of influence in the choice in means and methods are the importance of the object; the time-constraints; the availability and accuracy of intelligence on the object; the available weapon(s) and weapon systems; the availability of various types of ammunition; the effect, range and accuracy of the ammunition and the weapon systems; the circumstances in which the attack takes place (time of day, terrain, weather conditions); the presence of civilians or protected objects; and risks for friendly troops.[1492] In light of the circumstances at the time, and the information available to him, the commander can determine, in second instance, whether the collateral damage that may still be expected is disproportionate in relation to the military advantage anticipated. In that event, the decision to launch an attack shall be refrained from, as mandated by Article 57(b) AP I.[1493] This duty is, as Article 51(5)(b) AP I, a codification of the proportionality principle. While the latter provision contains a qualification (a disproportionate attack is indiscriminate and therefore prohibited), the former contains an unequivocal *instruction* to the commander: the attack must be cancelled if disproportionate.

When civilians are expected to be harmed, Article 57(c) AP I stipulates that they shall be warned *effectively* in advance of the attack, "unless circumstances do not permit."[1494] The purpose of warnings is to provide civilians the opportunity to leave the area of operations or to enable them to seek shelter from coming attacks, and to enable the civil defense authorities to take appropriate measures. A warning is not required "if military operations are being conducted in an area where there is no civilian population or if the attack is not going to affect the civilian population at all."[1495] In all other cases, a warning must be "effective" unless "circumstances do not permit" or require a warning.[1496]

To be sufficiently effective "the warning must be in time and sufficiently specific and comprehensible" to enable civilians to leave the area or to seek shelter."[1497] In some circumstances a general warning may suffice.[1498] The warning may be given by using radio, leaflets, phone calls, SMS-messages, via the internet, or, if necessary by mouth.[1499] Recent events, such as the Israeli military campaign in Gaza from 27 December 2008 – 18 January 2009 have led to new interpretations of the requirement of warning. For example, the Goldstone Report, a report following the investigation by the HRC of the aforesaid Israeli campaign, holds that a warning

> […] must reach those who are likely to be in danger from the planned attack, it must give them sufficient time to react to the warning, it must clearly explain what they should do to avoid harm and it must be a credible warning. The warning also has to be clear so that the civilians are not in doubt that it is indeed addressed to them. As far as possible, warnings should state the location to be affected and where the civilians should seek safety. A credible

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[1491] Oeter (2008), 210-211.

[1492] U.K. Ministry of Defence (2004), 83-84, § 5.32.4 and 5.32.5 for examples on the accuracy of weapon-systems and ordinance and factors to be taken into account.

[1493] Article 57(2)(a)(iii) AP I; ICRC (2005a), Rule 18.

[1494] Article 57(2)(c) AP I; ICRC (2005a), Rule 20.

[1495] U.K. Ministry of Defence (2004), 83, § 5.32.8.

[1496] NATO's AJP-3.9 does not make reference to this requirement. Annex E (Legal Considerations to Joint Targeting) does, see United States Department of Defense (2007), E-4, (§ 5(b)(2)(b).

[1497] U.K. Ministry of Defence (2004), 83, § 5.32.8. For a detailed analysis of the requirement of warnings in theory and practice, see Baruch & Neuman (2011).

[1498] This is also acknowledged by the Goldstone Report. Human Rights Council (2009), § 37. This is also the view of the United States. See ICRC (2005a), State Practice, §§ 483-485. See also The State of Israel (2009), § 137.

[1499] U.K. Ministry of Defence (2004), 83, § 5.32.8.

> warning means that civilians should be in no doubt that it is intended to be acted upon, as a false alarm of hoax may undermine future warnings, putting civilians at risk.[1500]

It may be doubted whether the level of specificity suggested by the Goldstone Report is indeed required by law and will be 'feasible' in most, or at least many circumstances. In addition, the Goldstone Report's understanding of what constitutes an "effective" warning imposes upon the attacking party obligations that are strange to the law of hostilities and disregard the balance between military necessity and humanity implied in the relevant rules. For example, it wrongly asserts that

> [t]he question is whether the injury or damage done to civilians or civilian objects by not giving a warning is *excessive* in relation to the advantage to be gained by the element of surprise for the particular operation.[1501]

As rebutted by Schmitt

> No basis exists in IHL for applying this proportionality standard to the warnings requirement; they are separate and distinct norms. Conflating the two upsets the agreed-upon balance resident in them. What the authors of the report have neglected is that an attacker is already required to assess the proportionality of a mission as planned; the issuance of warnings would be a factor in that analysis, as would other factors such as timing of the attack, weapons used, tactics, life patterns of the civilian population, reliability of intelligence, and weather. A subsequent proportionality analysis would consequently be superfluous. Additionally, the warning requirement applies whenever the attack "may affect the civilian population." Warnings must be issued even if the collateral damage expected in the absence of a warning would not be excessive relative to the anticipated military advantage and even if they are unlikely to minimize harm to civilians and civilian objects (as in the case of regularly unheeded warnings). Thus, the position proffered in the report paradoxically sets a lower humanity threshold than required by IHL.[1502]

The circumstances meant here concern mostly the question whether a warning would have detrimental effects on the element of surprise of the attack. Nevertheless, the drafters have opted not to incorporate an additional clause that limits the discretionary room to only that situation (such as: 'except in the case of an attack').[1503] It provides a commander a basis to refrain from issuing a warning because of other operational considerations. One can think of time-sensitive situations, such as 'ticking time-bomb'-scenarios like the targeting of suspect suicide bombers, or the unexpected appearance of a High Value Target, requiring dynamic targeting.

A final requirement flowing from the general obligation to avoid or minimize incidental harm to civilians is that "[w]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects."[1504]

[1500] Human Rights Council (2009), § 528. The government of Israel has released its own report: The State of Israel (2009), available at <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationwLinks.pdf>.

[1501] Human Rights Council (2009), § 527.

[1502] Schmitt (2010b), 827-828. Another example is the requirement are the requirement that the warning "[…] must clearly explain what [civilians] should do to avoid harm", which in fact is an obligation to be complied with by the attacked party (Article 58 AP I; ICRC (2005a), Rule 22: "The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects *under their control* against the effects of attacks"). Also, the Goldstone Report wrongly suggests that the warning must include information on the timings of the attack.

[1503] Rogers (2004), 100.

[1504] Article 57(3) AP I; ICRC (2005a), Rule 21.

Notwithstanding these obligations, the law of hostilities limits their compliance to situations where precautionary measures are not 'feasible'. It is to the notion of 'feasibility' that we will now turn.

1.3.2. "Feasible"

The requirement to take precautionary measures is not absolute. As instructed by Article 57(a)(1) AP I, the attacking party is under an obligation to "do everything feasible" to ascertain that the potential target is a military objective.[1505] In addition, Article 57(2)(a)(ii) requires the attacking party to "take all feasible precautions" in the choice of means and methods of attack in order to avoid or limit collateral damage. "Feasible" has been defined in conventional law as:

> [...] those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.[1506]

As such, the law of hostilities offers a certain degree of discretion to military commanders to determine which of the selected means of combat power – envisioned to attain the desired effects – shall be used and how they shall be used.[1507] The requirement of precautionary measures, via the notion of 'feasibility', therefore permits the reliance on considerations of military necessity.[1508] However,

> [t]he feasibility test is a fine balance because the commander will not wish to take precautions to such an extent as to reduce his chances of military success. On the other hand, military considerations cannot be overriding so as to render the protection for civilian useless.[1509]

Factors which may determine whether precautionary measures are 'feasible' are, *inter alia*, the location of the military objects, the possible change of protective status of objectives, weather conditions, the presence of civilians, the configuration of the surrounding area, the accuracy of the weapons(-systems) available, the physical and mental condition of the soldiers, the availability of intelligence on the military objectives and the area of operations in general, the degree of control exercised over the AO by the armed forces, and the urgency of the attack.[1510] The requirement to take feasible precautions lasts until the very moment of the strike or impact. For example, if during the flight-time of a laser-guided rocket heading towards the place of impact it becomes clear to the military personnel operating the rocket that a lawful military objective has gained protection, or that civilians have emerged which render the attack disproportionate, an obligation arises to avert the rocket to another place of impact, or to otherwise limit to a maximum extent the consequences of the impact, in so far this is feasible.

1.3.3. Scope *Ratione Personae* of the Requirement of Precautionary Measures

The scope *ratione personae* of the requirement of precautionary measures consists, on the one hand, of those upon whom the obligations are imposed (*active scope*), and on the other hand, those who are to benefit from the protections resulting from compliance with the obligations (*passive scope*).

[1505] Article 57(2)(a)(i) API.
[1506] Article 3(4) Protocol II, 1980 CWC.
[1507] United Nations (2000b), § 29.
[1508] Greenwood (2008a),
[1509] Rogers (2004), 98.
[1510] Melzer (2008), 366.

As regards the active scope, the requirement of precaution is a requirement of the attacking party to the conflict, be it for offensive or defensive purposes.[1511] Article 57 AP I places the responsibility to take precautionary measures with "those who plan or decide upon an attack [...]." These are, firstly, commanders, planners and other (staff) officers responsible for a specific operation.[1512] However, these could also be individual soldiers.[1513] One can think of the Joint Tactical Air Controller (JTAC-er) or a fighter or bomber pilot. The same counts for a team of Special Forces, mostly operating autonomously, who, when arriving at the target, are confronted with a civil population suddenly present.

Some States oppose a shift of the duty to take precautionary measures to a lower level (read: platoon and lower).[1514] The majority of States does not share this view. More so, in a contemporary conflict it is unavoidable. The complexity of military operations demands that commanders at a lower tactical level are increasingly responsible for independent tasks related to strategic targets.[1515] During hostilities the commander must be able to independently make an analysis of the situation on the battlefield. Therefore, it is almost unavoidable that he can be held responsible for taking precautionary measures when applying force. This aspect stresses the necessity (apart from the obligation thereto) for thorough education and training of armed forces at all levels in the law of hostilities.[1516]

The individual responsible for taking precautionary measures is also the one who, in light of the information available at that time, determines whether the measures are feasible.[1517] At first sight, this appears to be a subjective determination, with respect to which LOAC trusts, in good faith, the considerations of reasonable commanders.[1518] Nonetheless, a certain degree of objectivity is required.[1519] The Commentary to Article 57(2)(a)(1), for example, states:

> [t]he interpretation will be a matter of common sense and good faith. What is required of the person launching an offensive is to take the necessary identification measures in good time in order to spare the population as far as possible. It is not clear how the success of military operations could be jeopardized by this.[1520]

When following Schmitt, however, that requirement is limited:

> In the end, feasibility means that those who plan, approve, or execute an attack must take those measures that a reasonable warfighter in same or similar circumstances would take to limit harm to civilians – *nothing more*.[1521]

As regards the passive scope, the prime beneficiaries of the requirement of precaution are civilians and other persons who do not or no longer directly participate in the hostilities. In other words, once it has been determined that a target is a lawful military objective, and

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[1511] Sandoz, Swinarski & Zimmerman (1987), § 2188. In that respect, Article 57 API differs from Article 58 API, which imposes obligations on the attacked party, not the attacking party to the conflict to take measures protection the civilian population from the effects of attacks.

[1512] Rogers (2004), 96.

[1513] Oeter (1995), § 457.2.

[1514] An example is Switzerland, which has made a reservation to Article 57(2) stating that the obligations arising from the requirement of precaution do not impose obligations to military personnel below the leval of batallion. Sandoz, Swinarski & Zimmerman (1987), 689, footnote 5.

[1515] Krulak (1999).

[1516] Sandoz, Swinarski & Zimmerman (1987), § 2197.

[1517] (1948b), *United States v. Wilhelm List, et al. (Hostages Case), UNWCC (8 July 1947-19 February 1948)*, 69.

[1518] Oeter (1995), § 457.4

[1519] Sandoz, Swinarski & Zimmerman (1987), § 2208.

[1520] Sandoz, Swinarski & Zimmerman (1987), § 2198; Bothe (2001), 45.

[1521] Schmitt (2006), 303.

there is not incidental harm of civilians and civilian objects expected, there is no requirement to take precautionary measures vis-à-vis the target.

1.3.4. Information

A determinative factor in the analysis of taking feasible precautions is the availability of information *at the moment of planning, deciding upon or executing attacks*, and not that which was available in hindsight."[1522] As held by Watkin

> [t]he reality of combat must also be taken into consideration when assessing precautionary measures. As a result, the written word of the Protocols must be interpreted in the practical context within which the rules were designed to be applied. Those assessing the actions of those participating in targeting decisions must remember that "[d]etached reflection cannot be demanded in the presence of an upturned knife."[1523]

For example, in 2009, the German command of the ISAF mission in the province of Kunduz, Afghanistan ordered the aerial bombardment of two stranded fuel trucks, close to its headquarters. The order to launch the attack against the trucks was ordered on the basis of intelligence available to the German ISAF command that the trucks were plundered by 60-70 Taliban fighters. The Battle Damage Assessment carried out after the attack made clear that many of the 'fighters' killed in the bombardment were in fact civilians. The German commander was acquitted from further criminal persecution in Germany because the prosecutor concluded that the commander had acted in good faith, on the basis of the information available to him at that time – which indicated that all those present near the trucks were lawful military objectives, and that his decision to proceed with the attack was justified in light of the circumstances at hand.[1524]

The availability of information has intensified due to the availability of new technologies. While these technologies undoubtedly contribute to a more accurate assessment of the situation on the ground, they are no absolute guarantee that mistakes will no longer be made. In fact, the intelligence produced by these systems requires its processing, and may lead to an overload of information that is difficult to digest, particularly when a decision is to be made quickly.

1.3.5. Observations

The law of hostilities imposes upon military personnel the continuous obligation to assess and reassess the lawfulness of an attack, up and until the moment of the actual strike, to the extent feasible. While leaving a certain degree of discretion to the commander, at the same time this latitude involves a responsibility to examine to the utmost degree reasonably possible the circumstances under which the attack takes place, notwithstanding the difficulties under which the commander operates at that time. The 'fog of war' itself cannot be used as an excuse to avail oneself of this responsibility, yet it is an aspect to be taken into account when assessing – *post facto* – whether it had been reasonable to take precautionary measures.

1.4. Prohibited and Restricted Means and Methods

Besides the requirements of proportionality and precaution, LOAC also contains prohibitions and restrictions on the *means and methods* of warfare applied in the conduct of hostilities

[1522] Hays Parks (1997), 802 (emphasis added).
[1523] Watkin (2005a), 25.
[1524] Ducheine & Baron (2010).

against lawful military objectives. These specific prohibitions and restrictions follow from the general rules embodied in Article 22 and 23(e), 1907 HIVR and Article 35 AP I,[1525] reflecting the idea that the enemy fighter must be given a chance to return to normal civil life after the end of the conflict and that therefore the means and methods which parties to an armed conflict may adopt are not unrestricted, and that means and methods that cause superfluous injury or unnecessary suffering are prohibited. These concepts permeate the entire body of the law of hostilities and are reflected in numerous specific prohibitions regulating the means methods of warfare.

In so far it concerns *means of warfare* LOAC generally prohibits the employment of indiscriminate weapons[1526] as well as weapons that are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment.[1527] More specifically, it contains prohibitions on the following weapons: bacteriological or biological weapons;[1528] chemical weapons;[1529] dum-dum bullets;[1530] explosive[1531] and fragmentation weapons;[1532] anti-personnel landmines;[1533] 'other devices';[1534] nuclear weapons;[1535] and the employment of poison or poisoned weapons;[1536]

[1525] Article 22, 1907 HIVR states that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited." Article 23(e), 1907 HIVR adds: "In addition to the prohibitions provided by special Conventions, it is especially forbidden to employ arms, projectiles, or material calculated to cause unnecessary suffering." While the former provision is limited to "means" only, Article 35(2) AP I extends the limitation to "methods" as well: "In any armed conflict, the right of the Parties to the conflict to choose the methods and means of warfare are not unlimited. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."

[1526] Article 51(4) AP I;

[1527] Article 35(3) AP I;

[1528] 1925 Geneva Gas Protocol; 1972 BWC. While Article 1 BWC does not explicitly prohibit the use of these types of weapons, at the Fourth Review Conference in 1996 States agreed that Article 1 nonetheless has a prohibitative effect.

[1529] Article I(1) of the CWC prohibits States party to undertake never under any circumstances the development, production, otherwise acquirement, stockpiling or retainment of chemical weapons, or their transportation, directly or indirectly, to anyone; the use of chemical weapons; their engagement in any military operations; and to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party to the CWC. For a definition of chemical weapons, see Article II CWC.

[1530] 1899 Hague Declaration 3 Concerning Expanding Bullets; ICRC (2005a), Rule 77. Dum-dum bullets "expand of flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions."

[1531] Concerning exploding bullets: ICRC (2005a), Rule 78; 1868 St. Petersburg Declaration. Concerning incendiary bullets: ICRC (2005a), Rule 85

[1532] Protocol I on Non-Detectable Fragments to the CCW prohibits "any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays". Generally, under the rule embodied in Article 35(2) AP I, the use of weapons or projectiles that discharge broken glass, nails, and so forth is prohibited. See also Oppenheim (1952c), 340; U.K. Ministry of Defence (2004), 110, § 6.11.1.

[1533] Article 1, 1997 Ottawa Convention prohibits the possession or use of anti-personnel mines as well as assistance, encouragement, or inducement to any other person to possess or use these mines. The prohibition is limited to the States party to the Ottawa Convention. States, not party to the Ottawa Convention are, in the view of the ICRC, bound by the customary rule that "When landmines are used, particular care must be taken to minimize their indiscriminate effects." ICRC (2005a), Rule 81.

[1534] 'Other devices' refers to "manually-emplaced munitions and devices including improvised explosive devices designed to kill, injure or damage and which are actuated manually, by remote control or automatically after a lapse of time." Article 2(5) Amended Mines Protocol.

[1535] There is no specific rule prohibiting the use of nuclear weapons in neither conventional nor customary international law. Nonetheless, according to the ICJ, the threat or use of nuclear weapons would generally be unlawful in view of the rules of the *jus ad bellum*, as well as in view of the law of hostilities, except

In addition to strictly prohibited weapons, the following weapons are in principle lawful, but may be used only restrictively: bayonets and swords;[1537] booby-traps;[1538] incendiary weapons;[1539] anti-vehicle landmines;[1540] laser weapons;[1541] and riot control agents.[1542]
In the context of counterinsurgency operations, the use of booby-traps, dum-dum bullets (or bullets with a 'stopping' effect in general), as well as riot control agents may at times, at least from an operational point of view, be quite useful if not an outright necessity. For example, the use of tear gas or ammunition that does not leave the human body is particularly useful in close-quarter battles where there is a likelihood of indicental injury or collateral damage to civilians, as well as to own troops. However, the prohibitions on the use of these weapons are limited to its use as a means of warfare. This implies that even during an armed conflict, dum-dum bullets and riot control agents may be used in the context of activities that may qualify as law enforcement (even though the insurgents may also qualify as lawful military objectives under the law of hostilities). Examples of such law enforcement situations in armed conflict are riots or hostage situations.[1543]

Prohibited and restricted *methods of warfare* include perfidy,[1544] the prohibition of denial of quarter,[1545] the prohibition of terror attacks,[1546] the prohibition of using civilians or pro-

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perhaps in an extreme circumstance of self-defense in which the survival of the State is at stake. (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, 165-166.

[1536] Article 23(a), 1907 HIVR;

[1537] Generally, stabbing or cutting weapons, such as bayonets, swords, and knives are lawful, unless they are of a nature to cause superfluous injury and unnecessary suffering, for example due to serrated edges. U.K. Ministry of Defence (2004), 105, § 6.6.

[1538] Generally, booby-traps are permitted, provided they are (1) not specifically directed against civilians; (2) indiscriminate in nature; and (3) feasible precautions are taken to protect civilians from their effects. See Article 3(10) CCW. A booby-trap is "any device or material which is designed, constructed, or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act." (Article 2(4) Amended Mines Protocol). Other prohibitions are laid down in Article 3(3), (5) and 7(1), (2) and (3) Amended Mines Protocol.

[1539] An incendiary weapon is "any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof, produced by a chemical reation of a substance delivered on the target," such as "flamethrowers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incediary substances." Article 2(2) to the Incendiaries Protocol (Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons) to the CCW prohibits "in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons." It follows that the use of incendiary weapons against military objectives is lawful provided the military necessity to do so outweighs the humanitarian harm inflicted by its use. Article 1(1) to the Incendiaries Protocol contains a list of weapons not considered incendiary.

[1540] See Amended Mines Protocol (Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices 1996).

[1541] See Lasers Protocol (Protocol IV on Blinding Laser Weapons to the CCW). It prohibits the employment of laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision.

[1542] Article 1(5) CWC.

[1543] Melzer (2008), 367 ff; de Cock (2010), 123 ff

[1544] Article 23, 1907 HIVR; Article 37(1) AP I; Rule 65, ICRC (2005a). A perfidious act invites the confidence of the adversary to lead him to believe that he is entitled to or is obliged to afford protection under LOAC, with intent to betray that confidence. Examples are the feigning of an incapacitation by wounds or sickness; the feigning of being a civilian or combatant; the feigning of an intent to negotiate under a flag of truce or to surrender; and the feigning of protective status by the use of signs, emblems or uniforms of the United Nations or of neutral States or other States not parties to the conflict. It must

tected persons or objects as shields,[1547] the prohibition of indiscriminate attacks,[1548] the prohibition of attack on civilian objects,[1549] cultural objects and places of worship,[1550] the prohibition of starvation of the civilian population,[1551] the prohibition from attack on objects indispensible to survival,[1552] prohibition of environmental manipulation;[1553] the prohibition from employing methods and means of warfare which are intended, or may be expected to cause widespread, long-term and severe damage to the natural environment,[1554] works and installations containing dangerous forces;[1555] locations and zones under special protection.[1556]

1.5. Additional Restrictions Imposed by Military Necessity (and Humanity)?

As follows from the analysis thus far, an attack is lawful under the law of hostilities, *firstly*, when it has been established – in compliance with the requirements of distinction, proportionality and precautionary measures – that the target is a lawful military objective, and that the incidental harm to civilians and civilian objects does not outweigh the military advantage anticipated from the attack, and, *secondly*, in so far the means and methods of warfare applied in that attack are lawful, i.e. are not restricted or prohibited.
Recent views express the idea that the lawfulness of an attack under the law of hostilities is subject to an *additional restriction*, namely that the kind and degree of force that may be applied against a legitimate military target may not exceed that which is necessary to attain the lawful objective of warfare. This requirement is said to follow from restrictions on the kind and degree of force flowing from the notions of military necessity and humanity. *Materially*, these interpretations of military necessity and humanity result in the introduction of requirements imposing a duty to be carried out by individual soldiers to (re)assess the necessity to apply lethal force against lawful military objectives in the concrete circumstances of each military operation or part thereof with the aim to avoid, or in any event *to minimize the loss of life or injury of lawful military objectives*. In sum, it introduces a 'least harmful means'-approach of lethal force vis-à-vis lawful military objectives. While some, such as Blum, acknowledge that such restrictions are mere suggestions of the direction in which the law of

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be distinguished from ruses of war, which are lawful and aim to mislead an adversary or to induce him to act recklessly, provided they do not infringe upon a rule of LOAC. Rule 57, ICRC (2005a).

[1545] Article 23, 1907 HIVR; Article 37(1) AP I; Rule 48, ICRC (2005a). In view of the generic obligation to limit warfare to the defeat of the enemy, it is prohibited to order that there shall be no survivors, or to conduct hostilities on that basis, to refuse to accept a surrender or to kill those who are *hors de combat*.

[1546] Article 51(2) AP I;

[1547] Article 51(7) AP I;

[1548] Article 51(4) AP I;

[1549] Article 52(1) AP I;

[1550] Article 53 AP I;

[1551] Article 54(1) AP I;

[1552] Article 54(2) AP I;

[1553] Article I ENMOD

[1554] Article 35(3) AP I;

[1555] Article 56(1) AP I;

[1556] These include undefended towns, villages, dwellings, or buildings (Article 25, 1907 HIVR); hospital zones and localities for the protection of the wounded and sick of the armed forces and medical personnel (Article 23 GC I); safety zones for wounded and sick civilians, old people, expectant mothers, and mothers of small children (Article 14 GC IV); neutralized zones for protection of the wounded and sick, both combatants and civilians, and also civilians who are taking no part in hostilities (Article 15 GC IV); non-defended localities (Article 59 AP I); demilitarized zones (Article 60 AP I).

hostilities should develop, others, and most notably the ICRC and Dr. Nils Melzer,[1557] submit an interpretation of the position, function and interpretation of the notions of military necessity and humanity which in their view reflects the *lex lata*. In recent times particularly the ideas of the ICRC and Melzer have been strongly opposed, most notably because the 'least harmful means'-approach was adopted in Section IX of the heavily scrutinized Interpretive Guidance, and merits discussion.

This paragraph addresses the question whether and, if so, how the notions of military necessity and humanity may limit the commander's discretion to determine the *kind and degree* of force of his choosing against the lawful military objective. It will first set out the traditional view on the role and function of military necessity and humanity regarding the killing of lawful military objectives, which, it is submitted, reflects the *lex lata*, followed by an overview of the principal aspects of this 'least harmful means'-approach as understood by the ICRC and Melzer. It concludes that currently there is no legal basis for an approach as proposed by the ICRC and Melzer.

1.5.1. Traditional View Reflecting the *Lex Lata*

To recall what has been previously noted when setting out the legal context of counterinsurgency operations (in Part A), the conceptual construct inherent in the grammar of the law of hostilities is that it allows *any* conduct in hostilities in order to attain the legitimate purpose of warfare, *unless* it is specifically prohibited or restricted by rules and principles of positive international law. Possibly the supreme reflection of this construct is the authority to render *hors de combat* enemy personnel by death, injury or capture, once it has been determined that this complies with the requirements of distinction, proportionality and precaution, and is not otherwise prohibited or restricted by specific rules of the law of hostilities (e.g. those on the means and methods of warfare). The law of hostilities simply *presumes* that, besides capture, the injuring and killing of individuals taking a direct part in the hostilities is inherently *necessary* to achieve the legitimate aim of warfare, which is "to weaken the military forces of the enemy."[1558] This is a presumption at the strategic or, at the most, operational level of military operations. Beyond the requirements, prohibitions and restrictions discussed previously, the law of hostilities, by design, dictates that military necessity prevails over humanitarian considerations,[1559] and thus remains otherwise silent on the kind and degree of force permissible against lawful military objectives at the tactical level of military operations, i.e. it is legally irrelevant whether there is a specific necessity to do so via the capture, injury or killing of military objectives in each individual operation.[1560] This is also how the phrase "degree and kind of force" in the definition of military necessity in the UK Manual of the Law of Armed Conflict must be read. It permits

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[1557] The principal source of the ICRC is the Interpretive Guidance, where the approach is adopted in Section IX, titled 'Restraints on the Use of Force in Direct Attack'. The principal source of Dr. Melzer is his book 'Targeted Killing in International Law'. As Dr. Melzer functioned as the main author of the Interpretive Guidance, there is considerable overlap in the arguments as set out in both sources. Support can also be found with Alston (2010), §§ 75-77; Römer (2009), 70-72; Droege (2008a), 534.

[1558] As stipulated in the 1868 St. Petersburg Declaration.

[1559] Schmitt (2009a), 817.

[1560] See also Corn (2010), 75 (emphasis added): "deliberate targeting of enemy personnel is permitted by the law of armed conflict based not on a manifestation of actual threat, but instead on a presumption of necessity derived from the determination of status as "enemy." Once that status is determined, the law *permits* the government agent to use of the *most efficient means to subdue the enemy personnel*, which in warfare is synonymous with the use of deadly force as a measure of first resort."

> […] a State engaged in an armed conflict to use that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.[1561]

In the absence of a prohibition or guiding rule in positive international law to that effect, it is submitted, therefore, that, *firstly*, as a matter of law, there is no legal basis authorizing a distinct *appeal* on military necessity for the use of lethal force against a lawful military objective, nor a legal basis for a requirement to *demonstrate* the continuing existence of the presumed military necessity to apply lethal force in relation to each lawful military objective. *Secondly*, there is not, as a matter of law, a legal basis within the *principle of humanity* authorizing an *appeal* on, or imposing a *requirement* to demonstrate that humanitarian interests override military necessity in each concrete application of lethal force.

1.5.2. The 'Least Harmful'-Approach

As noted, recent interpretations of the notions of military necessity and humanity challenge the traditional outlook on the kind and degree of force permissible against lawful military objectives at the tactical level of military operations. The most authoritative source in encapsulating these recent interpretations – Section IX of the Interpretive Guidance, titled 'Restraints on the Use of Force in Direct Attack' – formulates the following rule:

> In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.[1562]

At the heart of this restriction is the assertion that the traditional outlook explained above is flawed. Notwithstanding that fact that there is a strong presumption that in armed conflict it will be necessary to kill, injure or capture enemy personnel to win the war, the fact that the law of hostilities does not provide a distinct rule regulating the kind and degree of force that may be applied against a lawful military objective does not imply that his killing is permissible when there is *manifestly* no necessity to do so.[1563] An example is the situation where a lawful military objective, not *hors de combat*, is nonetheless in a defenseless position, and could easily be apprehended.

While it is not the aim of the Interpretive Guidance to "replace the judgment of the military commander by inflexible or unrealistic standards" but rather "to avoid error, arbitrariness, and abuse" it nonetheless seeks to provide "*guiding principles* for the choice of means and methods of warfare based on [the commander's] assessment of the situation."[1564] The prin-

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[1561] U.K. Ministry of Defence (2004), Section 2.2 (emphasis added). Until August 2010, the UK manual used to state "[…] to use *only* that degree and kind of force." The word "only" has been deleted in an amendment of September 2010. See United Kingdom Ministry of Defence (2010), available at < http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/LegalPublications/LawOfArmedConflict/>. For an overview of other definitions appearing in military manuals, see Melzer (2008), 283-285.

[1562] ICRC (2009), 77.

[1563] Melzer (2008), 288 (emphasis added). This argument not only finds support among lawyers, but is also found among philosophers. See May (2007), 115 ff; Kasher (2009);

[1564] ICRC (2009), 80.

cipal vehicle it uses for these guiding principles is the Martens clause.[1565] While referring to it in a footnote, the Interpretive Guidance explains as follows:

> It has long been recognized that matters not expressly regulated in treaty IHL should not, "for want of a written provision, be left to the arbitrary judgment of the military commanders" (Preamble H II ; Preamble H IV) but that, in the words of the famous Martens Clause, "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience" (Art. 1 [2] AP I). First adopted in the Preamble of Hague Convention II (1899) and reaffirmed in subsequent treaties and jurisprudence for more than a century, the Martens Clause continues to serve as a constant reminder that, in situations of armed conflict, a particular conduct is not necessarily lawful simply because it is not expressly prohibited or otherwise regulated in treaty law.[1566]

In view of the Martens clause, it has been argued that notwithstanding the absence of specific rules to that effect, the law of hostilities nonetheless imposes a restriction on the kind and degree of lethal force against lawful military objectives that finds its *legal basis* principally in the complementary function of military necessity and humanity, which function as "guiding *principles* for the interpretation of the rights and duties of belligerents."[1567] As such, elementary considerations of humanity have a complementary role, forming an integral part of – what is referred to as[1568] – the *restrictive* function of the principle of military necessity:[1569]

> The restrictive function of the principle of military necessity is sometimes expressed in the maxim 'necessity is the limit of legality'. In this dimension, the principle is by no means contrary to humanitarian, cultural, religious, environmental and other protective values but, on the contrary, is the very expression of their priority over the political liberty of states. Far more restrictive than any of those values by themselves, the principle of military necessity reduces the sum total of lawful military action from that which positive IHL does not prohibit *in abstracto* to that which is actually required *in concreto*. Put more plainly, in its *restrictive* function, the principle of military necessity prohibits the employment of any kind or degree of force which is not indispensible for the achievement of 'the ends of the war', *even if such force would not otherwise be prohibited by IHL*.[1570]

[1565] As sources are cited: Article 1(2) AP I. See also the Preamble of the 1899 HC II; Preamble, 1907 HIVR; Article 63 GC I; Article 63 GC II, Article 142 GC III; Article 158 GC IV; Preamble AP II; (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, 257. As acknowledged by the ICTY, "this Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates." (2000q), *The Prosecutor v. Kupreskic et al., Case No. IT-95-16-Y, Judgment of 14 January 2000 (Trial Chamber)*, § 525. Also: Lauterpacht (1952), 379 ("the law on these subjects must be shaped- so far as it can be shaped at all – by reference not to existing law but to more compelling considerations of humanity, of the survival of civilization, and of the sanctity of the individual human being.") During the ICRC/Asser-Interpretive Guidance expert meetings, a group of experts proposed that "instead of referring directly to the principles of military necessity and humanity and incorporating a vague "without prejudice"-clause, Section IX should be based on the famous Martens Clause." ICRC (2008a), 22.

[1566] ICRC (2009), 80, footnote 219.

[1567] ICRC (2009), 78-79 (emphasis added).

[1568] The term is not mentioned in the Interpretive Guidance.

[1569] Melzer also identifies a *permissive* function. This function "relates exclusively to conduct that would be prohibited under international law in situations other than armed conflict" (Melzer (2008), 286), and "is that aspect of the principle which must be *balanced* against other interests, such as humanitarian, cultural, religious, political, environmental, or economic values in order to determine the lawfulness of conduct in situations of armed conflict." Melzer (2008), 291.

[1570] Melzer (2008), 287 and accompanying footnote 243 (emphasis added). The 1868 St. Petersburg Declaration is submitted as evidence for support of this argument. While it is accepted that its permission to

As argued by Melzer, the restrictive function of military necessity is "the inevitable result of logical reasoning"; the *manifest* absence of a necessity, otherwise presumed to exist, to attack and kill a lawful military objective renders such use of force, nonetheless employed, unlawful.[1571]

To operationalize the determination of 'necessity' in the specific circumstances of a case, Melzer identifies three "objective standards" that are not "new aspects to the concept of military necessity:"[1572] *qualitative*, *quantitative* and *temporal* military necessity.

Qualitative necessity refers to the condition that "the achievement of the desired concrete and direct military advantage[1573] *must* require a direct attack against the individual in question."[1574] This implies, *firstly*, that a commander is under an obligation to question in *each specific engagement* the necessity for the use of lethal force against a military objective.[1575] *Secondly*, he must refrain from the use of lethal force when it is manifestly clear that the necessity to do so is absent because the desired military advantage can be attained by feasible alternatives, such as capture.[1576] The purpose here is to exclude from 'necessity' – and thus to qualify as 'unnecessary' (and hence as unlawful) – the use of lethal force that is merely convenient;[1577] that amounts to 'potential' military advantage;[1578] or that which is "hardly perceptible [or] would only appear in the long term."[1579]

Quantitative necessity relates to the *kind and degree of force required* to achieve the desired military advantage and embodies the very essence of the 'least-harmful'-approach. This aspect of necessity introduces a *proportionality*-test grounded not in LOAC (with the aim of *minimizing incidental* harm to protected persons and property), but in general international law (proportionality *lato sensu*), and is aimed at *limiting* the kind and degree of *intended* force applied *against lawful military objectives*.[1580] In more concrete terms, the aspect of quantitative necessity

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"weaken the military forces of the enemy" presumes a military necessity to kill, at the same time it limits such killing to that which is "*sufficient* to disable the greatest possible number of men." As Melzer argues, "the word 'sufficient' would have no meaning without a corresponding requirement or [sic] necessity" (Melzer (2008), 288).

1571 Melzer (2008), 288; ILC (1980a), 46 ("a circumstance precluding the lawfulness of conduct which that rule normally allows").

1572 Melzer (2008), 296.

1573 Melzer (2008), 292 ff. The condition of 'direct and concrete military advantage' follows from an inductive examination of Article 52(2) AP I, defining military objects, and which uses the term 'definite military advantage', and Articles 51(5)(b) and 57(2)(a)(iii) AP I, on proportionality, which contain the phrase "concrete and direct military advantage anticipated." Objecting this approach: Hays Parks (2010b), 796-797 ff.

1574 Melzer (2008), 398 (emphasis added).

1575 For support of this idea, see United Nations General Assembly (2010), 16, § 47.

1576 See also Blum (2009), 42.

1577 Melzer (2008), 292; Draper (1973), 135; (1949d), *UK v. von Lewinski (called von Manstein)*, 522.

1578 Melzer (2008), 293.

1579 Sandoz, Swinarski & Zimmerman (1987), § 2209.

1580 This element of proportionality was relied upon by the Israel High Court in (2004c), *Beit Sourik Village Council v. The Government of Israel et al., HCJ 2056/04), Israel Supreme Court (sitting as the High Court of Justice), Judgment of 30 June 2004*, § 37: "Proportionality is recognized today as a general principle of international law. […] From the foregoing principle springs the Principle of Humanitarian Law (or that of the law of war): Belligerents shall not inflict harm on their adversaries out of proportion with the object of warfare which is to destroy or weaken the strength of the enemy." See also, (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)*, § 40: "[…] a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those

imposes upon a party to the conflict not only a moral or ethical obligation, but foremost a *legal obligation* in two respects. *Firstly*, of the range of reasonable *measures* available and feasible to attain the military advantage, a party to the conflict must apply only that measure which is the *least harmful* to the military objective.[1581] Thus, if a lawful military objective can be captured, he should not be attacked. *Secondly*, the measure that is qualitatively necessary and is least harmful must be applied in the least harmful *manner* that is proportionate to attain the desired military advantage. In the context of direct attacks against lawful military objectives, this implies that, if the military advantage can be attained by wounding, his killing would be quantitatively unnecessary, and thus unlawful. The legal basis for this rule is said to follow from Article 35(2) AP I, which prohibits the employment of means and methods of warfare that cause superfluous injury and unnecessary suffering,[1582] as well as the so-called Pictet's use-of-force continuum, which rules that "humanity demands capture rather than wounds, and wounds rather than death; that non-combatants shall be spared as much as possible; that wounds shall be inflicted as lightly as circumstances permit, in order that the wounded may be healed as painlessly as possible; and that captivity shall be made as bearable as possible."[1583]

Finally, *temporal* necessity limits, and qualifies as unnecessary, force that is not yet, or no longer qualitatively or quantitatively necessary at the moment of its application. An example is the situation "where a group of defenceless soldiers has not had the occasion to surrender, but could clearly be *captured without additional risk to the operating forces*."[1584]

In essence, these aspects of military necessity require the identification and appraisal of the *actual threat* posed by individuals to own troops or innocent bystanders, notwithstanding and additional to their status as a lawful military objective under the law of hostilities.[1585] Melzer

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are the means which should be employed […]. Trial is preferable to use of force. A rule-of-law State employs, to the extent possible, procedures of law and not procedures of force." However, it is important to stress here that the High Court appears to view this obligation as one that follows from domestic law, not international law.

[1581] Melzer (2008), 289.

[1582] Article 35(2) AP I is not mentioned in the Interpretive Guidance. It has, however, emerged as a subject during the ICRC/Asser-expert meetings (see ICRC (2006), 75; ICRC (2008b), 39; ICRC (2008a), 19) and in Melzer's response to Hays Parks critique in Melzer (2010b), 905-906.

[1583] Pictet (1975), 32. See also : ICRC (1973), 13 (if [a combatant] can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed, and if he can be put out of action, grave injury should be avoided"); ICRC (1975), § 25 ("if two or more weapons would be available which would offer equal capacity to overcome (rather than 'disable') and adversary, the weapon which could be expected to employ the least injury ought to be employed"); also Pictet (1985), 75 f. Pictet's use-of-force continuum is explicitly mentioned in the Interpretive Guidance and Melzer's book (ICRC (2009), 82 and Melzer (2008), 289.

[1584] Melzer (2008), 288.

[1585] While acknowledging the *lege ferenda*-nature of her suggestion, Blum proposes "the relaxation of the status-based determination by supplementing it with an obligation to assess the individual threat emanating fro many particular human target. This would require an amendment to the principle of distinction, from one separating combatants from civilians to one distinguishing threatening combatants from unthreatening ones. This amendment would essentially operate as the mirror-image of the doctrine of civilian immunity: civilians are presumed innocent and immune unless and for such time as they take direct part in hostilities (art. 51(3) of API). The proposed change would make combatants presumptively dangerous, unless they pose no or marginal threat. Once there is reason to believe that the level of threat is low, even if the enemy soldier is not *hors de combat*, the targeting forces would have to refrain from direct fire. […] Naturally, nonthreatening combatants could still be killed where distinguishing them from others is impossible or where they are affected as collateral damage. The point I wish to emphasize here is that they should not be targeted intentionally, and that reasonable efforts to spare them should be made." Blum (2009), 35.

and the ICRC acknowledge that, ultimately, great latitude may have to be given to the commander, as it is he who has to make the assessment of necessity in the concrete circumstances prevailing at the time. However, in their view the restrictions imposed by the principles of military necessity and humanity should be flexible enough to take into account the nature and reality of armed conflict.[1586] In acknowledgement of the fact that in practice the determination of the kind and degree of lethal force in terms of necessity "involves a complex assessment based on a wide variety of operational and contextual circumstances."[1587] Melzer and the ICRC propose a "flexible scale" between reasonable and absolute necessity, which also takes account of the risk to the lives of the security forces and the civilian population.[1588] As explained by the ICRC:

> In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL. The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.[1589]

An important source for this approach is the Israel High Court of Justice (hereinafter: Israel HCJ) decision in the *Targeted Killings Case*, which holds that

> a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest […]. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated and tried, those are the means which should be employed […]. [T]rial is preferable to the use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force […]. Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required […]. It might actually be particularly practical under the conditions of belligerent occupation, in which the army *controls the area in which the operation takes place*, and in which arrest, investigation, and trial are at times realizable possibilities […]. Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby

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[1586] Melzer (2008), 295; ICRC (2009), 80.

[1587] ICRC (2009), 80.

[1588] This view finds support among other scholars. Sassòli and Olson point at combat and 'peace' as being two ends of a spectrum and submit that the extent to which the armed forces are able to "effect an arrest (of individuals or groups) without being overly concerned about interference by other rebels in that operation […]" functions as a rule of thumb to identify control (Sassòli & Olson (2008), 614). Droege mentions other parameters, such as the outcome of an assessment of the likelihood of a successful arrest, the degree of threat to own forces and innocent bystanders when doing so, and the danger the enemy poses, based on the number of forces, the weapons and methods used, the frequency, duration and intensity of likely hostilities and other indications (Droege (2008a), 536).

[1589] ICRC (2009), 80-81. Note that the ICRC, appears to suggest that even "in classic battlefield situations involving large scale confrontations" resort to law enforcement measures is required, as it argues that "[…] armed forces operating in situations of armed conflict, even if equipped with sophisticated weaponry and means of observation, may not *always* have the means or opportunity to capture rather than kill." For similar wording, see Melzer (2008), 295. See, however, Blum (2009), 42, arguing that "[…] while feasibility may depend on tactical capabilities in a particular time and place, it is unclear why it should be ruled out altogether from "classic battlefield situations involving large scale confrontations."

innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used.[1590]

In sum, the 'least harmful means'-approach implies that while the necessity to attack and kill military objectives is presumed *to generally exist*, the restrictive function of military necessity implies a requirement to determine in *light of the prevailing circumstances at the time of employment of force* that a *necessity* to attack and kill still exists, based on the actual *threat* posed by the legitimate military objective at the very moment of attack, "and not only where positive IHL so demands."[1591] This obligation would not only exist for governments and senior military commanders, but also for individual soldiers.[1592]

1.5.3. Observations on the Idea of a 'Least Harmful Means'-Obligation under the Law of Hostilities

There is not doubt that one's designation as DPH-civilian or member of an organized armed group has significant, and potentially lethal consequences, as it entails a shift from protective to unprotected status under the law of hostilities, which in the case of membership even results in the continuous loss of immunity from direct attack. As it is not unconceivable that civilians will be erroneously or arbitrarily identified as DPH-civilians or as members of organized armed groups (in a CCF), the restriction in Section IX of the Interpretive Guidance seeks to add a level of protection in order to save the lives of civilians.[1593] While laudable from a humanitarian point of view, it is submitted that there is no legal basis in positive international law, State practice or *opinio juris* that substantiates the claim that the qualitative, quantitative and temporal aspects of military necessity are to be part of every government's, commander's and soldier's assessment of the use of force against lawful

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[1590] (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)*, § 40 (emphasis added). An example of State practice, arguably adopting the 'flexible approach' and the interpretation of the principles of military necessity and humanity as expressed in the Interpretive Guidance, is the "Manual de Derecho Operacional" of 7 December 2009 by the General Command of the Colombian Armed Forces. The Manual, in relevant part, states as follows: "Principle of necessity: Generally speaking, the principle of necessity implies that all combat activity must be justified by military purposes, wherefore activities that are not military necessary are prohibited. Inherent in the concept of military necessity is an important element of restriction: only that force will be used, which is necessary to achieve the military purposes; any use of force exceeding this purpose contravenes military necessity. […] The fact that officers, non-commissioned officers and soldiers are required to adapt the principle of military necessity while planning and executing an operation does not mean that it is possible to adapt military necessity in all scenarios of hostilities. There are many combat situations where this is not possible without exposing one's own men to unacceptable risks and without losing operational effectiveness." Colombia (2009), 88, 92 (emphasis in original; translation Nils Melzer, in Melzer (2010b), 910).

[1591] It is argued, in more detail, that "[…], the various provisions of IHL which permit a particular conduct in armed conflict constitute the result of 'equations' which already include the 'necessity-factor'. Since it is precisely this necessity-factor which makes that conduct lawful despite its deviation from the more restrictive rules applicable in peace-time, the loss or absence of this factor necessarily changes the equation to the effect that the said conduct becomes unlawful." Melzer (2008), 287. And: "as much as the positive rules of IHL may *presume* the existence of military necessity, they also *presuppose* such necessity as an *inherent condition for the lawfulness of military operations*." Melzer (2008), 289 (emphasis original and added).

[1592] Melzer (2010b), 908-909.

[1593] It is particularly problematic that the ICRC appears to extend the 'least harmful means'-requirement to all individuals not protected from direct attack, to include members of the regular armed forces, in which cases errors or arbitrariness in the identification as lawful military objectives are less likely to occur, but which nonetheless demands from military personnel to resort to the least harmful means of combat power.

military objectives *as a matter of legal obligation*, and that arguments in support of such a claim are generally to be regarded as flawed.[1594]

To recall, the Martens clause has been relied upon as a main vehicle to fill the gap in regulation of the kind and degree of force permissible against lawful military objectives. A problematic aspect of the Martens clause remains not only that its scope of applicability remains subject of dispute,[1595] but also that there is no agreed interpretation by States or case-law that supports the argument that the principles of humanity and the dictates of conscience implied in the Martens clause constitute *positive rules* restricting conduct not further expressly prohibited by positive LOAC. At the most, it is argued, the "principles of humanity" and "dictates of public conscience" "may be driving forces for the development of the law."[1596]

In addition, serious objections have been raised against the view that military necessity and humanity are "*guiding principles* for the choice of means and methods of warfare based on [the commander's] assessment of the situation."[1597] The principal point of criticism expressed by experts is that, as "guiding *principles*", *considerations* of military necessity and humanity would in effect function and be elevated, via the Martens clause, to "independent normative standards that possess legal force in and of themselves," which they are pertinently not.[1598] As further explained by Kleffner,

> […] if the law is silent on a given issue, neither humanity nor military necessity can directly and on its own force alone, provide an answer to the underlying question. If the law is permitting a given action, such as the use of force against a combatant or a fighter, considerations of humanity do not provide for further *legal* restraints on the use of that force, nor does the restrictive dimension of military necessity.[1599]

In the quantitative aspect of military necessity, which inhibits the 'least harmful means'-requirement, support was found in, arguably, Article 35(2) AP I and the Pictet's use-of-force continuum. Both bases are flawed. As for Article 35(2) AP I, as contended by Kleffner, there is no State practice or sufficiently established jurisprudence to date from which it follows that the prohibition of *methods* of warfare of a nature to cause superfluous injury and unnecessary suffering functions as a basis for a 'least harmful means'-requirement, implying that this requirement is violated if the use of lethal force as a method of warfare to cause superfluous injury or unnecessary suffering is avoidable.[1600] In addition, as argued by Hays Parks, Pictet's argument arguably was not taken seriously by governmental delegations during conferences preparatory to, for example, the Conventional Weapons Convention and therefore has no standing as a source of international law.[1601]

A final source for the 'least harmful means'-approach is the Israel HCJ's reasoning in the *Targeted Killings*-case. However, this reasoning has been termed as "misrepresentative of existing law"[1602] and "at best, unsubstantiated and probably also inaccurate."[1603] As argued by, for example, Cohen and Shany, the 'least harmful means-approach relied upon by the HCJ belongs to the normative paradigm of law enforcement and cannot be readily applied

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[1594] For an extensive analysis, see Kleffner (2011); Hays Parks (2010b), 796-797 ff; Hayashi (2012), 60-61.
[1595] Meron (2000b); Cassese (2000); Ticehurst (1997).
[1596] Kleffner (2011), 7-8.
[1597] ICRC (2009), 80.
[1598] Kleffner (2011), 10.
[1599] Kleffner (2011), 10.
[1600] Kleffner (2011), 14
[1601] Hays Parks (2010b), 796-797 ff. For additional opposition against Pictet's argument, see ICRC (1975), § 27; Kalshoven (1984), 380.
[1602] Hays Parks (2010b), 792-793.
[1603] Cohen & Shany (2007), 314.

in the context of armed conflict. The law of hostilities does not require such an approach and its application in the context of hostilities against individuals DPH-ing would offer them more protection than afforded to members of the regular armed forces.[1604] In addition, its importance for the interpretation of the law of hostilities must be viewed in the proper context.[1605] It is one of very few cases available that adopts this approach. More importantly, it constitutes a case ruled in the specific context of Israel, terrorism and belligerent occupation, in which the Israel HCJ applies domestic law, and gives instructions to military commanders and the Israeli government.[1606] It can therefore not be stretched to apply across the entire spectrum of conflict, nor be interpreted as a reflection of international law imposing obligations on individual soldiers.[1607]

In sum, the legal basis for a 'least harmful means'-approach in the law of hostilities appears to be absent, or very thin, at the most. In fact, to argue that such restrictions in the kind and degree of force against lawful military objectives are part of the *lex lata* triggers the question whether States have not violated the law of hostilities all along. After all, for decades, its troops have engaged enemy fighters without second doubts as to whether killing them was lawful or not, whether they were asleep and armed, or unarmed but not *hors de combat*. This is not because the notion of military necessity has been neglected or misunderstood in legal doctrine, as suggested by Melzer,[1608] but simply because States have always had a clear view as to whether the killing of lawful military objectives was lawful or not: such killing serves, in view of the 1868 St. Petersburg Declaration, always a military necessity in the grand scheme of the war. In the absence of a clear legal basis for further restrictions, despite suggestions *de lege ferenda* or *de lex lata* to the contrary, it follows that the killing of a lawful military objective even in the *manifest absence of necessity in specific circumstances at hand* remains a lawful act under the law of hostilities.[1609]
It is, however, emphasized that the mere *permissibility* to employ lethal force is not to be equated, nor confused with an *obligation* to employ lethal means of combat power.[1610] Nei-

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[1604] Cohen & Shany (2007), 315. At § 31 of the Targeted Killings Case, Israel High Court President Barak argued that "[t]hat aspect of proportionality is not required regarding harm to a combatant, or to a civilian taking a direct part in the hostilities at such time as the harm is caused. Indeed, a civilian taking part in hostilities is endangering his life, and he might – like a combatant – be the objective of a fatal attack." (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)*, § 31.

[1605] ICRC (2008a), 15.

[1606] Hays Parks (2010b), 796-797 ff.

[1607] Hays Parks (2010b), 792-793; Cohen & Shany (2007), 315.

[1608] Melzer (2008), 279.

[1609] The Interpretive Guidance notes that *no claims* were made by the experts that "a person could be lawfully killed in a situation where there is manifestly no military necessity to do so." See ICRC (2009), 78, footnote 212. However, it is submitted the absence of claims to that effect does not in itself imply that all experts objected to the idea of rendering lawful military objectives *hors de combat* despite the manifest absence of military necessity. Neither does it imply that the experts unequivocally embrace a 'least harmful means'-approach.

[1610], Corn (2010), 78: "law of armed conflict establishes the outer limits of permissible conduct; it has never established a mandate that combatants employ the full scope of authority granted by the law to subdue an enemy. Put more simply, authority is not synonymous with obligation. As a result, how commanders choose to exercise the authority they are granted by the law of armed conflict is, and has always been a choice dictated by operational considerations. Thus, it is certainly true that there have been and will undoubtedly continue to be many instances where a commander who could employ deadly force against an enemy chooses not to do so, but to instead employ a lesser degree of force to bring the enemy into submission. However, by characterizing the exercise of such operational restraint as a legal obligation, the

ther does it pave the way for arbitrariness or abuse the use of lethal means of combat power to satisfy military convenience. Rather, it is reflective of an *authority* left to the commander to decide on the kind and degree of force he desires to apply on the basis of reasonableness and good faith. As observed by Dinstein, "[m]ilitary commanders are often the first to understand that their duties can be discharged without causing pointless torment."[1611] In fact, there may be very valid personal or moral reasons to resort to non-lethal alternatives. In addition, the century-old concept of *chivalry* – a concept that not only permeates throughout the law of hostilities, but that is also firmly established within military doctrine, philosophy and ethics – may lead a commander to decide to offer surrender, to resort to alternative, non-lethal means of combat power, or to abort, to postpone, or to cancel an operation.[1612] Not seldom, it is doctrinal, strategic, operational or tactical imperatives that determine the kind and degree of force to be applied by forces. This is particularly so in the context of *counterinsurgency*, which reflects a 'least harmful means' approach to killing insurgents.

In view of the difficulty to determine who may be lawfully attacked and who not – and the risk of using indiscriminate and disproportionate force (i.e. the kind and degree of force not in balance with the threat-level) the practice of recent counterinsurgency indeed shows that forces are sometimes required to determine the actual (rather than inherent) *threat* posed by individuals in a specific situation, and to *only use minimum force*. This threat-based targeting has been applied by Canadian Special Forces operating in Afghanistan.

> Based on a police model, (JTF2 replaced the RCMP's SERT task force in 1993) Canada's super-secret soldiers emphasize the minimization of the use of force, especially deadly force. Don't kill unless you absolutely have to. […] To minimize the need for training, and prevent potentially deadly confusion, Canadian special operators adhere to a single standard overseas and at home. In Afghanistan, a JTF2 [Joint Task Force Two] operator will apply the same standards he would in Toronto for a domestic event. This means that CANSOFCOM operators meet, and frequently exceed, the standards for laws of armed conflict, Day explains. Every target is assessed on a "threat" or "no-threat" basis. Simply because an insurgent is a target does not make them an immediate threat or give the justification for killing them. It is illegal for a JTF2 commando to kill an unarmed person, no matter who they are. I don't just mean civilians or an insurgent who has been previously forcibly disarmed. A JTF2 operator who has spotted a wanted terrorist must first determine whether they are a threat, (read: Armed) rather than simply calling in an air or artillery strike on the location the way some allies do. Then they will attempt to devise a way to take the target into custody without harming them. The insurgent is then turned over to Afghan authorities using the same rules that govern every other Canadian soldier in Afghanistan.[1613]

However, the use of minimum force in targeting transcends mere practical considerations. As has been previously noted in the introduction to this study, neo-classical counterinsurgency doctrine is founded in a number of key principles. Of particular relevance in the context of this study are the principles of legitimacy, security and the notion that policital factors are prime. The importance of these principles finds reflection in the ideas on the use of force in counterinsurgency operations. Unlike traditional wars of attrition, where the

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ICRC is transforming a policy based upon operational judgment into a legal obligation that is unsupported by either treaty law or custom."

[1611] Dinstein (2004), 17.

[1612] Corn (2010), 82.

[1613] Stephenson (2010), http://www.winnipegsun.com/comment/columnists/mercedes_stephenson/2010/12/10/16509861.html.

physical destruction of enemy forces is viewed as "the overriding principle of war,"[1614] it is not an "overriding principle" of counterinsurgency.

Clearly, in counterinsurgency, the physical destruction of enemy forces forms an integral part of offensive and stability operations. However, even when the legal principle of distinction allows for the targeting of insurgents, counterinsurgency doctrine calls upon counterinsurgents to clearly examine the *necessity* to kill in each specific situation. As argued by Stephens,

> The strategies and tactics for COIN/stability operations are profoundly more nuanced than what the law provides. The COIN doctrine counsels greater restraint when confronting and targeting individuals who come squarely within the criteria of DPH targeting. It has become clear that functional categorization of individuals and the validity of the norm are not the complete answer for lawful targeting – just as it has become clear that a state cannot kill its way out of an insurgency.[1615]

Counterinsurgency expert David Kilcullen, in his article "*Twenty-Eight Articles: Fundamentals of Company-Level Counterinsurgency*," writes that (particularly) in (the late stages of) counterinsurgency, forces should

> [t]ry not to be distracted, or forced into a series of reactive moves, by a desire to kill or capture the insurgents. Your aim should be to implement your own solution - the "game plan" you developed early in the campaign, and then refined through interaction with local partners. Your approach must be environment-centric (based on dominating the whole district and implementing a solution to its systemic problems) rather than enemy-centric. This means, particularly late in the campaign, you may need to learn to negotiate with the enemy. […] *At this stage, a defection is better than a surrender, a surrender is better than a capture, and a capture is better than a kill*.[1616]

Those supporting further humanization of armed conflict will be triggered by the last sentence, as it closely resembles Pictet's use-of-force continuum, discussed earlier (and to humanizers encapsulating a restraint in the kind and degree of force permissible as a matter of law. Indeed, ROE applied in recent SUPPCOIN (Afghanistan) and OCCUPCOIN (Iraq) operations generally require counterinsurgent forces to resort to the use of minimum force only, i.e. "the minimum degree of authorized force which is necessary and reasonable in the circumstances, limited to the degree, intensity, and duration necessary to achieve the objective," and which may include deadly force.[1617] However, whether the counterinsurgency use of force-continuum is grounded in humanitarian considerations as as much Pictet's may be doubted, even though it is difficult to ignore the second or third degree humanitarian benefits that may ensue from it. Rather, in counterinsurgency, the necessity for targeting should include

> greater consideration of individual identity and broader sociopolitical considerations relating to the individual and the sectarian/tribal/regional connections he/she may be entwined within.[1618]

[1614] See Von Clausewitz, who argued that the destruction of enemy forces "[…] is the overriding principle of war, and, so far as positive action is concerned, the principal way to achieve our object." Clausewitz (1989), 258.See also Jomini: "'strategy is the key to warfare; that all strategy is controlled by invariable scientific principles, and that these principles prescribe offensive action to mass forces against weaker enemy forces at some decisive point if strategy is to lead to victory." Jomini (1811), 312.

[1615] Stephens (2010), 301.

[1616] Kilcullen (2006b), 26 (emphasis added).

[1617] Cathcart (2010), 208.

[1618] Stephens (2010), 302.

This way, it becomes possible to identify and distinguish between those who show willingness for reconciliation and those who persist in the fight. For example, in Iraq, policy guidance was distributed stipulating that

> [w]e cannot kill our way out of this endeavour. We and our Iraqi partners must identify and separate the "reconcilables" from the "irreconcilables" through engagement, population control measures, information operations, kinetic operations, and political activities. We must strive to make reconcilables a part of the solution, even as we identify, pursue, and kill, capture, or drive out the irreconcilables.[1619]

This not only requires of the counterinsurgent soldier to be sensitive to the legality of the targeting operation, but also to develop

> […] a mental framework to understand how violence works in small wars and how it affects all aspects of the conflict. Each leader needs to have these mental paradigms and a working knowledge of these effects if he is able to be expected to adapt to the realities on the ground in a small war.[1620]

To facilitate this mental shift, the FM 3-24 stresses that "[k]indness and compassion can often be as important as killing and capturing insurgents."[1621] Elsewhere, it calls upon counterinsurgent forces to reconsider the necessity for resort to lethal means, for "[c]ounterinsurgents often achieve the most meaningful success in garnering public support and legitimacy for the [host nation] government with activities that do not involve killing insurgents (although, again, killing clearly will often be necessary)."[1622]

These ideas have also found their way in State practice. A noteworthy example is the approach adopted by the Colombian government in its counterinsurgency campaign against the FARC and other non-State organized armed groups. More specifically, one of the ROE applicable in operations during hostile scenarios requires forces to capture, not kill legitimate military objectives when feasible. As has been noted previously, the underlying motive for this approach is to reconsider what military necessity means in the process of extending and consolidating the rule of law, "and to modulate that principle with the human rights principle of capturing or demobilizing first and using lethal force as a last resort."[1623] As explained by Von der Groeben,

> […], all efforts, even military, must be subordinate to this policy aim of enforcing the rule of law. This conflict is in essence one between legality versus illegality, but instead of invoking just war theories aiming to justifiy an even larger amount of violence, the Government re-

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[1619] MNF-1 Commander (2008).

[1620] Harris (2010), 14. Harris proposes a "framework for understanding the effects of violence" which can "begin with how it affects the objectives of an operation, and then proceed to how violence affects the insurgents, and finally the population as a whole. From this framework, the local commanders can begin to think about how they need to approach the goal of securing the population, how to integrate development with security, and what security means for the population."

[1621] U.S. Department of Army & U.S. Marine Corps (2007), § 5-38.

[1622] U.S. Department of Army & U.S. Marine Corps (2007), § 1-153.

[1623] As stated by the Colombian Vice-Minister of Defense, the Honourable Sergio Jaramillo Caro, in Pfanner, Melzer & Gibson (2008), 828 (emphasis EP). The phrase "to rethink what military necessity means in these contexts and to modulate that principle with the human rights principle of capturing or demobilizing first and using lethal force as a last resort" may be taken to imply that military necessity needs to be reinterpreted as to contain a 'least harmful means'-obligation derived from IHRL. This study interprets the phrase to mean that in situations as in Colombia the function of military necessity fundamentally differs from its traditional, leading *function* (i.e. where it serves as the primary objective to do all that is required and permissible by LOAC to render the enemy *hors de combat*, in order to defeat him). Rather, military necessity, while still existing, plays a subordinate role in situations where the objective of reestablishing the Rule of Law can be attained by measures short of lethal force.

> strains itself by following a law enforcement pattern. In other words, the aim of the Colombian fight against their opponents is not only primarily to annihilate them but also to bring them to justice.[1624]

In a way, therefore, counterinsurgency doctrine, policy and practice demonstrate a certain degree of convergence between "descriptive humanity and material military necessity in counterinsurgency warfare:"[1625] it is militarily expedient to apply force in a humane as possible manner, even more so than is warranted by the law of hostilities. However, the convergene reaches its limits – in the sense that military necessity and humanity diverge in favor of the former – when the tactical situation changes such that it is no longer expedient to be humane, and that a shift is made to pure military necessity to render insurgent forces *hors de combat* by the application of sheer military force.[1626]
Clearly, such directives on the kind and degree are imposed as policy, and not intended to reflect a legal position towards the notion of military necessity. Yet, it risks to be misinterpreted by supporters of humanization as just that – the expression of State practice that is gradually turned into a reflection of *opinio juris*. It is submitted that States are to be cognizant of such developments in order to maintain control as the principal 'legislators' of international law.

In view of the above, the 'least harmful-approach' is a clear example of *innovative humanization*: an attempt to humanize LOAC as a legal regime, and armed conflict as a sociological phenomenon through methods bypassing States. However, it not only lacks a basis in international law, but its forced application on the battlefield – as an obligation under international law – is most likely going to be perceived by commanders as to greatly disable their "tangible operational latitude"[1627] implicitly present in military necessity to independently decide on the kind and degree of force he desires to apply. The very danger inherent in accepting the restrictive notion of military necessity as part of the *lex lata* is its neutralizing effect on this authority. As noted earlier, the ICRC stresses that

> the aim [of restrictive military necessity] cannot be to replace the judgment of the military commander by inflexible or unrealistic standard; rather it is to avoid error, arbitrariness, and abuse […][1628]

In spite of this aim, it is to be expected that Section IX might be perceived exactly so: as an inflexible and unrealistic standard.[1629] A commander's decision to fully apply the room for maneuver to use lethal force against a legitimate military objective as an outcome of the balancing of multiple considerations now risks to be replaced by a single, overriding parameter, namely the 'obligation' to resort to non-lethal alternatives when practically feasible. It is more likely to strengthen the military commanders resolve to "preserve their discretion as to how exactly LOAC should be applied and translated into rules of engagement (ROE) […]."[1630] Apart from the operational consequences of such obligation, the commander would be forced to possibly upset the long-established and delicate balance underlying LOAC. In as much as an individual rebalancing of humanitarian considerations could further restrict permissive conduct, some fear this may also be viewed as an incentive to interp-

[1624] Von der Groeben (2011), 162.
[1625] Hayashi (2012), 74.
[1626] Hayashi (2010c), personal e-mail to the author.
[1627] Dinstein (2004), 16.
[1628] Melzer (2009), 80.
[1629] Corn (2010), 41.
[1630] ICRC (2008a), 9.

ret the *permissive* side of military necessity as a basis to overrule established prohibitions. Such interpretations "would be tantamount to re-introducing the universally condemned doctrine of "*Kriegsraison geht vor Kriegsmanier*"."[1631]

In view of the above, it is therefore submitted that, while laudable from a humanitarian perspective, a 'least harmful means'-approach to regulate the conduct of hostilities against lawful military objectives "represents a dangerous confusion between law and policy,"[1632] lacks a sound legal basis, challenges the historical balance between military necessity and humanity with a potential to undermine further compliance with the law of hostilities and must be therefore be rejected.

1.6. Observations

As this paragraph has demonstrated, the substantive content of the standards governing targeting under the law of hostilities reflects the awareness with its designers that, in order to ensure observance with its principle users – soldiers – it had to comport with the reality of warfare. Hence, in so far it concerns the use of lethal means and methods of combat power against insurgents who not or no longer enjoy immunity from direct attack, humanitarian considerations give way to considerations of military necessity to the extent that such means and methods are not "of a nature to cause superfluous injury or unnecessary suffering." Beyond this restriction, the law of hostilities imposes no other restrictions or prohibitions that would limit the kind and degree of force against lawful military objectives. Thus, contrary to IHRL, in respect of insurgents qualifying as lawful military objectives, counterinsurgent forces are not under an obligation to resort to lethal force only when a direct and concrete threat has emerged and when no non-lethal alternatives are feasible, notwithstanding attempts to incorporate such limitations. While laudable from a humanitarian perspective, attempts to introduce such 'least harmful means'-based limitations are to be viewed as products of innovative humanization that are not likely to generate *opinio juris* among States. To the contrary, under the law of hostilities, upon someone's qualification as lawful military objective, the use of lethal force is permissible at any time during which he is not immune from direct attack. Admittedly, in the case of insurgents, this authority is considerably limited by the strict temporal requirement underlying the notion of DPH ('unless and for such time'), which in practice implies that the targeting of insurgents who qualify as lawful military objectives on that basis may only occur once, and as long as a hostile act takes place. This considerably limits the targeting of insurgents in situational contexts of counterinsurgency to which the law of IAC applies (OCCUPCOIN and non-consensual TRANSCOIN). One solution for this restriction on targeting is to adopt the CCF-membership approach recently recognized by the ICRC in its Interpretive Guidance in relation to NIACs, and on which basis insurgents qualifying as such are targetable at all times during their membership. Of course, the problem here is the limited scope of CCF and the practical difficulty of establishing membership.
Obligations to avoid or minimize harm, however, are imposed on counterinsurgent forces in respect of innocent civilians who may be affected by the hostilities, as set forth in the requirements of proportionality and precautionary measures. These echo the principle that persons having no belligerent nexus with the hostilities are to be spared as much as feasible, and in any event in those cases where the concrete and direct military advantage anticipated

[1631] ICRC (2008a), 7; Kleffner (2011), 8-9.
[1632] Corn (2010), 78.

from an operation does not outweigh the harm to civilians and civilian objects. Here, military necessity yields to humanitarian considerations. The final call of this determination, however, lies with the commander. While thereby providing the commander considerable latitude, at the same time it places him under much responsibility, which requires that he takes the decision to go forward with an operation notwithstanding the possible civilian harm on the basis of good faith and reasonableness. Nonetheless, at all times, he must take precautionary measures in order to avoid or minimize collateral damage.
Overall, the law of hostilities offers a flexible scope for targeting insurgents who qualify as lawful military objectives in the difficult and complex situation of hostilities, where generally the effective control over territory or the situation at hand is absent. In that respect, the law of hostilities under LOAC serves as a natural alternative to the far more inflexible regime under IHRL.
This paragraph has also demonstrated that the permissible scope for targeting is so wide that it may not always be expedient to make use of the full scope of maneuver, in order to serve strategic counterinsurgency imperatives. In the areas of distinction, proportionality and military necessity, counterinsurgents may be restricted, based on policy guidelines, in the use of force, even to the extent that it resembles requirements imposed under IHRL. Nonetheless, the position taken in this study is that the legal framework of the law of hostilities remains unaffected by the counterinsurgency-based policy paradigm. It is stressed that such policy-based restrictions may be (ab)used by those who seek to advance the humanization of armed conflict as evidence of emerging *opinio juris* supported by State practice. As such, when left unacknowledged by States, counterinsurgency policy may unintendedly contribute to a change in perception among those involved in armed conflicts on the traditional balance between military necessity and humanity.

2. Normative Substance of the Valid Normative Framework Relative to Targeting in the Context of Law Enforcement

As has become clear in the previous paragraph, the law of hostilities offers a detailed and dense regulatory framework permitting the deprivation of life of insurgents who qualify as lawful military objectives. We concluded that the direct attack of lawful military objectives is intrinsically linked to the concept of hostilities. In view of the notion of DPH, we have also been able to conclude that not all those who can be labeled as insurgent qualify as lawful military objective, and thus must be regarded person protected under the law of hostilities. To recall, this concerns civilians, medical and religious personnel, as well as fighters who have fallen *hors de combat*. As such, any direct attack upon these insurgents is prohibited. They do not, or no longer have a belligerent nexus with the hostilities, and any measures imposed upon them, including those resulting in the deprivation of life, can be lawful *as measures of law enforcement only*. The question before us in this section is therefore whether the laws of IAC and NIAC themselves offer valid law enforcement-based norms regulating the deprivation of life of persons protected under the law of hostilities.

2.1. The Law of IAC

This paragraph aims to examine the substantive content of valid norms of LOAC pertaining to the deprivation of life in law enforcement situations. As noted, parties to the conflict are under an obligation to respect and protect the lives of protected persons falling within the authority, or exposed to the conduct of a party to the conflict and provide a general prohibition against the *willful killing* of protected persons in situations of IAC, including belligerent

occupation. In so far the law of IAC applies, this prohibition is of relevance to counterinsurgent forces in OCCUPCOIN and non-consensual TRANSCOIN. 'Willful killing' concerns cases of death resulting from an omission or willful act with the intent to kill, to include reprisals.[1633] The willful killing of protected persons is a grave breach of LOAC and constitutes a war crime.[1634] It follows that, outside cases of willful killing, any deprivation of life of individuals resulting from the conduct of a counterinsurgent party to the conflict can only be lawful when complying with the standards of law enforcement, as set out in the normative framework governing the deprivation of life under IHRL.

A more detailed set of norms governing the deprivation of life outside the context of hostilities of particular relevance in the context of OCCUPCOIN is found in the law of belligerent occupation, as found in HIVR, GC IV and AP I. A general purpose of the law of belligerent occupation is to ensure that the civilian population is protected against the *arbitrary exercise* of power by the Occupying Power, and can lead as normal a life as possible[1635] – a purpose the fulfillment of which is subject to the security interests of the Occupying Power.[1636]

The relevant sources of the law of belligerent occupation provide guidance on the protective scope *ratione personae* of the law of belligerent occupation. Articles 44-45 HIVR refer to the "inhabitants" of the occupied territory. GC IV, according to its title, applies to "civilian persons". While suggesting a wide scope of applicability covering all civilians, Article 4 GC IV sets out the scope *ratione personae* of persons protected by GC IV. Article 4(1) GC IV limits its protective scope to persons:

[1633] Pictet (1952b), 371 f (Article 50 GC I); Pictet (1960), 626 (Article 130 GC III); Pictet (1958a), 597 (Article 147). See also (2000o), *The Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment of 3 March 2000 (Trial Chamber)*, § 153; (2001o), *The Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-T, Judgment of 26 February 2001 (Trial Chamber)*, § 229.

[1634] Article 8(2)(a)(i) ICC Statute (stipulating that the willful killing of protected persons under the Geneva Conventions constitutes a war crime); Article 2(1) and 5(2) ICTY Statute (stipulating that the willful killing of protected persons under the Geneva Conventions constitutes a serious violation of international humanitarian law). See also Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV, as well as Article 85 AP I, the willful killing of protected persons constitutes a grave breach. In addition, LOAC imposes upon States the obligation to carry out investigations in relation to the deprivation of life. These obligations do not, as in IHRL, see to the investigation of every deprivation of life, including those of lawful military objectives, but are limited to alleged grave breaches of the obligations set forth in the GCs and AP I. See Articles 49 GC I; 50 GC II; 129 GC III; 146 GC IV. While not explicitly stipulating the obligation to carry out investigations, this obligation is implicit in the obligation to "search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and [to] bring such persons, regardless of their nationality, before its own courts." See also Article 85 AP I. For specific investigatory obligations, see e.g. Article 121 GC III, in relation to deaths or POWs, and Article 131 GC IV, in relation to deaths of civilian internees.

[1635] Kolb & Hyde (2008), 231 (emphasis added); Melzer (2008), 158; Dinstein (2009c), 92. This also follows from Article 64 GC IV, which stipulates: "the penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws." See also Gasser: "[a]lthough Article 64 mentions only criminal law which remains in force, the entire legal system of the occupied territories is actually meant by this rule." Gasser (2008), 286, § 544, referring to Pictet (1958a), 335.

[1636] Melzer (2008), 158.

> […] who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power *of which they are not nationals* [emphasis added].

By implication, Article 4(1) GC IV suggests the exclusion from the protective scope of GC IV of persons *not* in the hands of an Occupying Power. However, according to the ICRC Commentary, the phrase "in the hands of […]" "need not necessarily be understood in the *physical* sense; it simply means that the person is in territory which is under the control of the Power in question."[1637] Thus, in the context of occupied territory, the phrase "in the hands of […]" must be understood to mean that the whole population of the occupied territory comes within the power of the Occupying Power. However, in geographical terms, the applicability of GC IV is limited to all persons within the occupied territory, not all person in the territory of the occupied State.

Also by implication of Article 4(1) GC IV, the rights and protections of GC IV do not apply to:

- nationals of that Occupying Power.[1638]
- nationals of a State which is not bound by the Convention;[1639]
- nationals of a neutral State who find themselves *in the territory of a belligerent State*,[1640] and nationals of a co-belligerent State, while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are;[1641]
- individuals protected by GC I, II and III.[1642]

In addition, States, party to both GC IV and AP I must consider as protected persons under GC IV and extend the applicability of its Parts I and III, "in all circumstances and without any adverse distinction," to "[p]ersons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence." This extension follows not from GC IV, but from Article 73 AP I.

In the view of the ICTY, the nationality-element in Article 4 GC IV must not be interpreted to stringent. Instead, the determination of a person's status as protected person under Article 4 GC IV may depend solely on his allegiance to the party to the conflict "in the hands" of which they reside (i.e. the Occupying Power in the context of this study).[1643]

A question of particular relevance here is whether the personal scope of GC IV accommodates as protected person the insurgent taking a direct part in the hostilities. This question is of importance, for if the answer is in the affirmative, insurgents fall within the scope *ratione personae* of both the law of hostilities, as well as the law enforcement-based normative

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[1637] Pictet (1958a), 47.

[1638] Article 4(1) GC IV. This exception is included because, as a principle, international law does not interfere in a State's relations with its own nationals, with the exception of Article 70(2) GC IV. Pictet (1958a), 46.

[1639] Article 4(2) GC IV. This provision has become obsolete, given today's universal ratification of GC IV.

[1640] Arai-Takahashi argues that Article 4(2) GC IV does not exclude nationals of a neutral State who are present in the occupied territory. See also Von Glahn, Glahn (1957), 91-92. However, the phrase "in the territory of a belligerent State" refers to occupied territory, which still belongs to the occupied belligerent State.

[1641] Article 4(2) GC IV. Citizens of neutral States or co-belligerent States in normal diplomatic relationships with the detaining Power were deliberately left out because in 1949, during the negotiations leading to the Geneva Conventions it was assumed that sovereign States would protect their own citizens.

[1642] Article 4(4) GC IV.

[1643] (1999m), *The Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment of 15 July 1999 (Appeals Chamber)*, §§ 165-168. See also (2001n), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-12-A, Judgment of 20 February 2001 (Appeals Chamber)*, §§ 51-106.

framework. This in turn, triggers the question which framework is to be applied for example when a key military leader of an insurgency is found present in occupied territory; an issue that we will turn to in Chapter VIII.

As to the position of the civilian taking a direct part in the hostilities, several views appear to persist within doctrine.

Dinstein and Baxter conclude that unprivileged belligerents captured whilst taking a direct part in the hostilities in combat are excluded from the protection of GC IV. Protection to them is offered by the Martens clause, CA 3 and Article 75 AP I, as well as customary law.[1644]

The present study, however, adopts the view that GC IV also applies to civilians taking a direct part in the hostilities.[1645] Besides doctrinal support,[1646] support for this conclusion can be found with the ICRC Commentary to Article 5 GC IV[1647] and the Israeli HCJs decision in the *Targeted Killings*-case.[1648] Additional support is found in Article 5 GC IV and the accompanying ICRC Commentary, which states that

> [i]t may, nevertheless, seem rather surprising that a humanitarian Convention should tend to protect spies, saboteurs or irregular combatants. Those who take part in the struggle while not belonging to the armed forces are acting deliberately outside the laws of warfare. Surely they know the dangers to which they are exposing themselves. It might therefore have been simpler *to exclude them from the benefits of the Convention*, if such a course had been possible, but the terms espionage, sabotage, terrorism, banditry and intelligence with the enemy, have so often been used lightly, and applied to such trivial offences, that it was not advisable to leave the accused at the mercy of those detaining them.[1649]

In sum, insurgents may qualify for protection as a civilian/protected person under GC IV provided they fall under the protective scope of Article 4 GC IV. Such qualification is, however, by and of itself not sufficient to deprive him from his liberty, for this may occur

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[1644] Dinstein (2009c); Baxter (1951).

[1645] See Articles 43 AP II ff.

[1646] Melzer (2008), 160; Dörmann (2003b), 50; Arai-Takahashi (2010), 307; University Centre for International Humanitarian Law (2005), 21-22, footnote 33. Admittedly, Arai-Takahashi here refers to "hostile activities" and not to "direct participation in hostilities." It is submitted that, while the latter always is a hostile activity, not every hostile activity amounts to direct participation in hostilities. Noteworthy is Dinstein's view to the applicability of GC IV, who, as it appears, distinguishes between occupied territory and "areas where fighting is in progress." It appears that Dinstein limits the non-applicability of Article 5, and GC IV as a whole to "unlawful combatants *captured on the battlefield in enemy territory* (*prior to the onset of belligerent occupation*)" and thus accepts the applicability of GC IV to unprivileged belligerents present in *occupied territory*. Dinstein (2009c).

[1647] See Pictet (1958a), 53 (emphasis added), which states that "[i]t may, nevertheless, seem rather surprising that a humanitarian Convention should tend to protect *spies, saboteurs or irregular combatants*. Those who take part in the struggle while not belonging to the armed forces are acting deliberately outside the laws of warfare. Surely they know the dangers to which they are exposing themselves. It might therefore have been simpler *to exclude them from the benefits of the Convention*, if such a course had been possible, but the terms espionage, sabotage, terrorism, banditry and intelligence with the enemy, have so often been used lightly, and applied to such trivial offences, that it was not advisable to leave the accused at the mercy of those detaining them." See also Pictet (1958a), 47; Sandoz, Swinarski & Zimmerman (1987), § 2912. See also Melzer (2008), 160; Dörmann (2003b), 50.

[1648] (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)*, §§ 28, 40.

[1649] Pictet (1958a), 53 (emphasis added). See also Pictet (1958a), 47; Melzer (2008), 160; Dörmann (2003b), 50; Sandoz, Swinarski & Zimmerman (1987), § 2912

only when taking place as a measure of (1) law enforcement or (2) internment necessary for imperative reasons of security.[1650] Deprivation of liberty outside these two bases is unlawful.

Commensurate to the purpose of the law of belligerent occupation, the Occupying Power is under an obligation, stipulated in Article 43 HIVR, to take "all the measures in his power to restore, and ensure, as far as possible, public order and safety" while complying with the negative obligation to respect, "unless absolutely prevented, the laws in force in the country."[1651] This obligation arises once a State exercises effective control over the territory of another State – in accordance with Article 42 HIVR – and becomes bound by the law of belligerent occupation. Thus, commensurate to this purpose, and in the fulfillment of the obligation under Article 43 HIVR, troops of the Occupying Power must try, to the maximum extent possible, to calm down situations of upheaval, rather than to benefit from the situation and to support "alternatively one side or the other according to their political and financial interest."[1652] As such, it may not stand by idle when killings take place, but must take positive action. The obligation arising from Article 43 HIVR implies that "public order is generally restored through police, not military, operations."[1653] However, the use of military forces in executing such operations cannot be excluded, particularly not in situations where the local police are not present or functioning and the troops of the Occupying Power are the only forces available to carry out police tasks.[1654]
The obligation under Article 43 HIVR to restore and ensure public order and safety as far as possible "goes far beyond the issue of a crime wave in an occupied territory."[1655] It continues in times of major disturbances and upheaval. An example in case is riots,[1656] such as those experienced by US forces in Fallujah, Iraq.[1657] Police operations may even extend to "countering small insurgent bands supported by the local population."[1658] The Israel Supreme Court, in the case of *Taha*, concluded that Israel had a duty to fulfill its obligations under Article 43 HIVR during the first *intifada*, which was marked by hostilities.[1659] The

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[1650] A third basis for deprivation of liberty is mentioned in Article 49(5) GC IV, which permits deprivation of liberty of individuals pursuant their presence in an area exposed to the dangers of war, and when the security of the population or imperative military reasons demands their detention. This basis will not be further examined for lack of relevance for the present study.

[1651] Article 43, 1907 HIVR (emphasis added). This commonly used English text is a translation from the official French text, and is, as such, formally non-binding. The French text states: l'autorité de pouvoir légal ayant de passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolut, les lois en vigueur dans le pays." Dinstein points out that the two texts show discrepancies, as result of mistranslation, the most significant of which is the use of the word 'safety' in the English text, a word that is not mentioned in the French text at all. See Dinstein (2009c), 89, with reference to the *travaux préparatoires* on 90.
The words 'l'ordre et la vie [publics]' have separate meanings, the former referring to 'security and general safety', the latter denotes 'social functions [and] ordinary transactions which constitute daily life'. Schwenk (1944-5), 398.

[1652] (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*, § 209.

[1653] Droege (2008a), 538; Sassòli (2005), 665.

[1654] Watkin (2008), 179.

[1655] Dinstein (2009c), 92.

[1656] Dinstein (2009c), 98. See also University Centre for International Humanitarian Law (2005), 26.

[1657] Human Rights Watch (2003b), available at http://www.hrw.org/reports/2003/iraqfalluja/.

[1658] U.S. Department of Army & U.S. Marine Corps (2007), § 6-91.

[1659] (1988d), *Taha (minor) et al. v. Minister of Defence et al., Israel Supreme Court*, 300. See also Judge Shamgar, in the case of (1983a), *Abu Aita et al. v. Commander of the Judea and Samaria Region et al.*, 356-357, holding that

mere occurrences of hostilities does not automatically, nor necessarily, terminate the effective control over occupied territory. As follows from the US Military Tribunal in Nuremburg's judgment in the *List* Case, the temporary control of insurgents over occupied territory does not terminate the occupation as long as the Occupying Power has the capacity to "assume physical control of any part of the country."[1660] It must, however, be borne in mind that this ruling was based on the factual superiority of the German army in relation to the Yugoslav and Greek partisans. Because it actually could go anywhere it wanted and assert effective control at will, it was determined that the occupation was intact. However, this is not necessarily the case in every situation whereby an occupation is contested. So while it seems reasonable to argue that there is a *rebuttable presumption* of effective control, and that the obligation under Article 43 HIVR continues to apply and protection under GC IV continues, eventually the existence of effective control must depend on the factual situation in question.

Underlying the obligation in Article 43 HIVR to take "all the measures in his power to restore, and ensure, as far as possible, public order and safety" entails a positive duty is the presumption that the Occupying Power has an authority to take affirmative measures to fulfill this obligation. With respect to the question whether these affirmative measures may include deprivations of life, two provisions are of particular interest: Article 27(4) and Article 64(3) GC IV.

Article 27(4) permits a counterinsurgent State, party to an IAC "to take such measures of control and security in regard to protected persons *as may be necessary as a result of the war*." While the text suggests to provide a basis for the *intentional* deprivation of life on the basis of exceptional military necessity,[1661] it follows from the ICRC Commentary that, "[w]hile a great deal is thus left to the discretion of the Parties to the conflict as regards the choice of means, […] the measures of constraint they adopt *should not affect the fundamental rights of the persons concerned*," but "these rights must be respected even when measures of constraint are justified."[1662] Similar language follows from the Final Record of the Diplomatic Conference, which states that while "[i]t seemed fair, in view of the individual rights ensured, to take into account the vital requirements of the State, […] this reservation does not re-establish arbitrary governmental power," Rather, "it deals only which such persons as really constitute a danger for the security of the State and *it leaves intact the general prohibitions imposed by the humanitarian principles of the Convention*."[1663] Following this conceptual construct, LOAC only permits derogations from the prohibitions and restrictions established in its norms when explicitly foreseen, and there is not authority for a party to the conflict to set aside the prohibition on willful killing. In fact, LOAC places strict limitations on the permissible measures. Article 5 GC IV permits derogation only from the rights of communication of persons detained by an Occupying Power for reasons related to hostile activities and thus does not permit derogation from the right to life. Article 41 GC IV stipulates that the most severe measures that may be imposed are internment and assigned residence, thus implying that

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the obligation to restore public life and security is an "immediate and primary duty," and that the duty to ensure public order and safety is a "subsequent and continuous duty".

[1660] (1948b), *United States v. Wilhelm List, et al. (Hostages Case), UNWCC (8 July 1947-19 February 1948)*, 56.

[1661] To recall, exceptional military necessity refers to those instances where an appeal on military necessity is specifically provided in norms of LOAC.

[1662] Pictet (1958a), 207 (emphasis added).

[1663] United Nations (1949), 821 (emphasis added).

the intentional deprivation of life of a protected person, being a measure more severe than internment and assigned residence, is prohibited.[1664] In sum, while Article 27(4) GC IV permits the Occupying Power to take "all the measures in his power to restore, and ensure, as far as possible, public order and safety," required by military necessity, this does not include the intentional deprivation of life. Rather, any measures resulting in the deprivation of life cannot be grounded in military necessity, but are only lawful when adhering to the standards of absolute necessity, underpinning the normative framework governing the deprivation of life under IHRL. This outcome is fully in line with Article 27(1) GC IV, which stipulates that "protected persons are entitled, in all circumstances, to respect for their persons, […], and shall be protected especially against all acts of violence or threats thereof […]"[1665]

A *second* implied basis relevant to deprivations of life of protected persons resulting from measures taken to restore and ensure public order and safety is found in Article 64(3) GC IV, which stipulates that the Occupying Power may subject the population

> to provisions which are essential to enable the Occupying Power [1] to fulfil its obligations under the present Convention, [2] to maintain the orderly government of the territory, and [3] to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.[1666]

This provision recognizes the right of the Occupying Power to guarantee its own security "as a fundamental prerequisite to the [Occupying Power's] own ability to maintain law and order."[1667] The legislation enacted for one or more of the above purposes may offer a basis for a wide range of measures, such as a ban on the possession of firearms, restrictions concerning border security, demonstrations, weapons control, the prohibition of irregular armed forces and militias not under a unified command, seizure of means of communication and for transmission,[1668] as well as those measures permissible in the context of Article 27 GC IV. However, such new legislation may not contravene obligations under international law.[1669] It follows that the Occupying Power may not issue legislation that overrides the prohibition of willful killing under LOAC, or that is more permissive than the standards provided for under the normative framework governing the deprivation of life under IHRL.

In sum, it may be concluded that the law of belligerent occupation, while acknowledging the performance of law enforcement-based tasks for the Occupying Power, does not provide precise, explicit norms that regulate the deprivation of life of individuals in occupied territo-

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[1664] See Article 41 GC IV; Pictet (1958a), 207. For an examination of internment, see Part C.

[1665] Pictet (1958a), 207: "[…] the measures of constraint [adopted by the Occupying Power] should not affect the *fundamental rights* of the persons concerned. As has been seen, those rights must be respected even when measures of constraint are justified."

[1666] Article 64(3) GC IV corresponds to the second part of Article 43, 1907 HIVR, which contains a negative obligation to respect, "*unless absolutely prevented*, the laws in force in the country." On the three exceptions in Article 64(3) GC IV in general: Dinstein (2009c), 112 ff; Arai-Takahashi (2010), 123 ff.

[1667] McCormack & Oswald (2010), 457.

[1668] These were measures taken in Iraq by the CPA. See CPA Orders 3 (Weapons Control, CPA/ORD/31 December 2003/3; 14 (Prohibited Media Activity, CPA/ORD/10 June 2003/14); 16 (Temporary Control of Iraqi Borders, Ports and Airports, CPA/ORD/04 June 2004/16; 19 (Freedom of Assembly, CPA/ORD/09 July 2003/19, Section 6; Law of Administration for the State of Iraq for the Transitional Period, 8 March 2004, Article 27(B).

[1669] Dinstein (2009c), 113.

ry outside the context of hostilities. It may however be concluded that the Occupying Power, while given the authority "to restore, and ensure, as far as possible, public order and safety," must properly balance this authority "against the rights, needs and interests of the local population."[1670] In respect of the lawfulness of deprivations of life of protected persons resulting from measures taken by the Occupying Power to "restore, and ensure, as far as possible, public order and safety," this implies that such deprivations of life may not amount to willful killings, but must be the result of measures of law enforcement measures lawful under the normative framework governing the deprivation of life under IHRL. As such, it may also be concluded that LOAC is not more permissive than the normative framework governing the deprivation of life under IHRL.

2.2. The Law of NIAC

The law of NIAC only provides very scarce guidance as to the permissibility of deprivations of life of protected persons. As a general rule of international law, States on whose territory a NIAC takes place are equally entitled to, as well as responsible for taking appropriate measures for maintaining or restoring law and order, and to defend their national unity and territorial integrity. This rule implicitly underlies CA 3 and Article 3(1) AP II. As the commentary to the latter provision states, AP II "does not affect the right of States to take appropriate measures for maintaining or restoring law and order, defending their national unity and territorial integrity. This is the responsibility of governments and is expressly recognized here."[1671]
More precise guidance is found in reference to the prohibition of 'murder' of protected persons in situations of NIAC, to be found in both conventional[1672] and non-conventional LOAC.[1673] The scope of persons protected by CA 3 and AP II extends to "persons taking

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[1670] (2004c), *Beit Sourik Village Council v. The Government of Israel et al., HCJ 2056/04), Israel Supreme Court (sitting as the High Court of Justice), Judgment of 30 June 2004*, § 34.

[1671] Sandoz, Swinarski & Zimmerman (1987), § 4500 (commentary to Article 3(1) AP II): AP II "does not affect the right of States to take appropriate measures for maintaining or restoring law and order, defending their national unity and territorial integrity. This is the responsibility of governments and is expressly recognized here."

[1672] CA 3 prohibits "at any time and in any place whatsoever […] (a) violence to life and person, in particular murder of all kinds [and] (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" with respect to "persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause."
Article 4(2)(a) AP II prohibits "at any time and in any place whatsoever […] violence to the life […], in particular murder […]" of "[a]ll persons who do not take a direct part or who have ceased to take a part in hostilities." In addition, Article 6(2) AP II, while not explicitly prohibiting the death penalty for offences related to the armed conflict, requires that "no sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality." Nor shall the death penalty "be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children" (Article 6(4) AP II).

[1673] Rule 89 (murder) and Rule 100 (extrajudicial execution), ICRC (2005a), 311 ff. and 352 ff; IACommHR (2002), § 76; (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, § 218 (referring to CA 3 as "elementary considerations of humanity"; (1995i), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber (2 October 1995)*, § 98; (1997n), *Tadić*, § 615; (2000o), *The Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment of 3 March 2000 (Trial Chamber)*, § 166; (2002m), *The Prosecutor v. Kunarac and Others, Case Nos. IT-96-23 & IT-96-23/1, Appeals Chamber (June 12, 2002)*, § 68; (1998k), *The Pros-*

no active part in the hostilities" as phrased in CA 3, or to "[a]ll persons who do not take a direct part or who have ceased to take a direct part in hostilities" as set forth in Article 4 AP II. Such persons concern the wounded, sick, and shipwrecked members of the armed forces, as well as those captured, and civilians not or no longer directly participating in hostilities.[1674] As stated by the ICTY in the *Delalic*-case, "[…] the nature and purpose of the prohibition contained in the Geneva Conventions […] is clearly to proscribe the deliberate taking of the lives of those defenceless and vulnerable persons who are the objects of the Conventions' protections."[1675] The 'murder' of protected persons is a 'grave breach' of LOAC and constitutes a war crime.[1676]

Beyond these sources, the law of NIAC does not provide any guidance. Generally, domestic law fills this 'gap', and it is therefore that law which provides the basis for the use of force. Today, as many States have committed themselves to obligations – conventionally or customary – under IHRL, their domestic laws must be in conformity with IHRL, and it is in that way that the deprivation of life of protected persons in a NIAC is regulated at the level of international law.

2.3. Observations

This paragraph has examined a second string of norms under LOAC relating to the deprivation of life, i.e. that in respect of protected persons, and following from conduct that has no nexus with the hostilities, but that is connected to law enforcement. This string of norms – where it relates to the deprivation of life of protected persons – is not military necessity-based at all, but reflects the view of its designers that humanitarian considerations are to prevail at all times, and that infringements on the right to life are permissible only when absolutely necessary. This is reflected, *firstly*, in the fact that both the law of IAC and NIAC contain a general prohibition on the willful killing or murder of protected persons. While the law of NIAC remains silent as to deprivation of life of protected persons not constituting murder, the law of IAC is more elaborate. Of particular relevance to the present study is the law of belligerent occupation, which in object and purpose is law enforcement-oriented, at least in so far it concerns the use of force. In order for the Occupying Power to comply with its obligation to restore, and ensure public order and security in the occupied territory, it is permitted to take measures required by military necessity. However, in relation to the measures resulting in the deprivation of life, an appeal on military necessity to derogate from the prohibition on willful killing and the general obligation to respect the right to life as set forth in Article 27 GC IV is not permitted, thereby implying that the only basis on which a person may be deprived of his life is when such is absolutely necessary, as understood in the normative framework governing the deprivation of life under IHRL. How such interplay (and that of the right to life with the law of hostilities) is to be appreciated will be examined in the next chapter.

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ecutor v. Akayesu, Case No. 96-4-T, Trial Chamber Judgment (2 September 1998), §§ 608 ff; United Nations (2000a), § 14.

[1674] See also (1997n), *Tadić*, § 615.

[1675] (1998m), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber)*, § 431.

[1676] Article 3, Statute of the ICTY ("violations of the laws or customs of war"); (1995i), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber (2 October 1995)*, § 89; Article 1 jo. Article 4, Statute of the ICTR ("serious violations of humanitarian law"); Article 1(1) jo. Article 3, Statute of the SCSL ("serious violations of humanitarian law"); Article 8(2)(c), ICC Statute ("war crimes").

Chapter VIII Interplay

In the previous chapters, we have been able to conclude that IHRL and LOAC have valid norms that govern targeting operations, that these norms are applicable in the situational contexts of counterinsurgency examined in this study. It also shows that, in terms of normative content, these valid and applicable normative frameworks have distinct objects and purposes – i.e. *law enforcement* and *hostilities* – that determine the operational latitude of targeting operations against insurgents.

To recall, as a concept, *law enforcement* refers to "all territorial and extraterritorial measures taken by a State to maintain or restore public security, law, and order or to otherwise exercise its authority or power over individuals, objects, or territory."[1677] As such, it regulates the *vertical* relationship between the counterinsurgent State and these individiduals. As previously explained, in so far the normative framework governing the deprivation of life under IHRL simultaneously applies with the normative framework governing the deprivation of life under LOAC to regulate the use of lethal force against insurgents as a measure of law enforcement during armed conflict, they can be said to together form part of the *normative paradigm of law enforcement*.

Alternatively, the concept of *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."[1678] To recall, in so far the normative framework governing the deprivation of life under IHRL simultaneously applies with the normative framework governing the deprivation of life under LOAC to regulate the use of lethal force against insurgents as a measure of hostilities, they form the *normative paradigm of hostilities*.

In this chapter we will focus on the next step in our analysis, namely the *appreciation* of the *interplay* between IHRL and LOAC.

The purpose is to *firstly* determine how the norms of IHRL and LOAC interrelate *within* these normative paradigms, i.e. to establish whether these norms are in a relationship of harmony or conflict, and in case of the latter, how this conflict can be avoided or resolved. Eventually, this will inform whether it is IHRL or LOAC – or perhaps (a bit of) both – that governs targeting in law enforcement and hostilities and whether the interplay leads to modification of the leading regime's substantive scope.

Having concluded upon the relationship of IHRL and LOAC within the normative paradigms, a *second* issue must be dealt with, namely the interplay *between* the normative paradigms. In other words, in planning and executing targeting operations, what determines whether it is the normative paradigm of law enforcement or the normative paradigm of hostilities that applies? Is it an arbitrary choice? Does the normative paradigm of hostilities prevail on the basis of a person's mere qualification as a lawful military objective under the law of hostilities? Or are there other factors that must be taken into account?

[1677] Melzer (2010a), 36.

[1678] Melzer (2010a), 40-41.

Finally, when having determined the interplay between the normative paradigms, it is of essence to examine its operational significance for targeting operations in counterinsurgency and to look at how counterinsurgency doctrine, policy and practice relate to the legal scope of permissible targeting.

This chapter is structured as follows. Paragraph 1 and 2 examine the relationship between IHRL and LOAC within the normative paradigms of law enforcement and hostilities respectively. Paragraph 3 examines the interplay between both normative paradigms.

1. The Interplay of IHRL and LOAC in the Normative Paradigm of Hostilities

Strictly speaking, the interplay of IHRL and LOAC in the normative paradigm of hostilities pertains to two relationship-pairs, namely that between IHRL and the law of hostilities as part of the law of IAC and that between IHRL and the law of hostilities as part of the law of NIAC. To recall, however, this study takes the position that the law of hostilities in the law of IAC and NIAC is practically similar, which removes the necessity to deal with the relationship-pairs separately. On that note, it is generally agreed that the law of hostilities functions as the *lex specialis* vis-à-vis IHRL. As stated by Dinstein, this interplay between IHRL and LOAC "[…] is the incontrovertible *lex lata* today."[1679] To recall, as a general rule "the applicable law will have to be determined by recourse to […] the norm that is more specific (*lex specialis derogat legi generali*)."[1680] As a result, in targeting insurgents under the normative paradigm of hostilities, the counterinsurgent State may use the more relaxed, hostilities-proof normative framework of the law of hostilities, as set out above.
While this may be taken for granted as a matter of fact, the legal question remains how to reconcile the application of the LOAC-based framework with the strict and more rigid framework under IHRL? After all, when comparing the requirements governing targeting operations under IHRL and LOAC, there is some overlap, but there are at the same time some crucial differences, particularly in respect of the protection granted to the person targeted. In brief, under the law of hostilities, insurgents may be identified and attacked on the basis of their status under LOAC, even when not posing a concrete threat to one's life of health, whereas under IHRL such threat is required. Military necessity dictates someones targeting, and there is no requirement to resort to force only as a measure of last resort in the absence or non-feasibility of alternative less harmful means, as required under the absolute necessity-requirement under IHRL. Also, the proportionality-principle under LOAC does not, as under IHRL, seek to protect the lawful military objective, but only focuses on the protection of civilians. In addition, it allows for a wider margin of appreciation for the incidental injury and death of civilians than would be permissible under IHRL. Similarly, precautionary measures under LOAC need not be taken to avoid or minimize injury or death of the target(s), as is required under IHRL. At the same time, LOAC prohibits the use of certain means that are permissible under IHRL. Also, in contrast to IHRL, LOAC does not require a *post-facto* investigation. Thus, as both apply during armed conflict, it would

[1679] Dinstein (2011), 491. See also Schmitt (2009), ?: ("Although the conflict [in Afghanistan] has become non-international, it must be understood that the IHL norms governing attacks in international armed conflicts, on one hand, and non-international armed attacks, on the other, have become nearly indistinguishable").

[1680] (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, § 106; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*, § 216.

follow that the application of the LOAC-based framework violates that under IHRL, unless this can somehow be justified by recourse to the rules of norm relationships present in general international law. It is to this justification that we will now turn.
In addressing this issue, it is submitted that account must be had of the manner in which the right to life is organized in the relevant human rights treaties; the object and purposes of the two 'competing' frameworks under IHRL and LOAC; and how the relevant (quasi-)judicial bodies have dealt with hostilities in their case-law.

In respect of the ICCPR and ACHR, which both expressly prohibit the arbitrary deprivation of life, the justification for the leading role of the law of hostilities in the regulation of hostilities in deviation from the stricter framework under IHRL lies in the word 'arbitrary.' The principal authoritative source of judicial practice in this respect is the ICJ's view set forth in its *Nuclear Weapons Advisory Opinion*. When assessing the permissibility of deprivations of life resulting from the use of nuclear weapons in armed conflict in the context of the right to life under Article 6 ICCPR, the ICJ, cognizant of the fact that derogation from the right to life is prohibited under any circumstances, held that:

> [t]he test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can *only* be decided by reference to the law applicable in armed conflict and *not deduced from the terms of the Covenant itself*.[1681]

Here, the maxim of *lex specialis* was applied in context, as a *technique of interpretation* by which conflict between IHRL and LOAC was avoided.[1682] The ICJ

> did hardly more than indicate that though it might have been desirable to apply only human rights, such a solution would have been too idealistic, bearing in mind the speciality and persistence of armed conflict. So the Court created a systemic view of the law in which the two sets of rules related to each other as today's reality and tomorrow's promise, with a view to the overriding need to ensure "the survival of a State".[1683]

The word "only" and the phrase "not deduced from the terms of Covenant itself" indicate that if one wishes to establish whether the deprivation of life resulting from hostilities constitutes an arbitrary deprivation of life, the 'arbitrariness' must be determined by applying the specific body of LOAC regulating the conduct of hostilies, which, unlike Article 6 ICCPR, is specifically designed to regulate such conduct. It is here that the difference in objects and purposes between the frameworks under IHRL and LOAC proves to play a crucial factor. The normative framework distilled from the right to life protected under IHRL is designed for law enforcement operations in situations where the State exercises control over territory or persons – as is central to the concept of law enforcement. Typically, such control is absent in situations of hostilities. There, a military necessity arises to defeat the enemy, and this is ordinarily achieved by capturing, injuring *and* killing enemy fighters. As we have seen, the law of hostilities regulates this in great detail, and it would defeat legal logic to argue that killing mandated under the law of hostilities violates the right to life under IHRL. As such, the law of hostilities provides an exceptional basis in the occurance of hostilities to derogate from conduct generally prohibited under IHRL. In so far

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[1681] (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, § 25 (emphasis added).
[1682] Koskenniemi (2006), § 104; Kleffner (2010b), 74. For another view, see Milanovic (2011a), 120.
[1683] International Law Commission (2006), § 76.

IHRL is not otherwise "affected" by LOAC it continues to apply in full alongside LOAC, but in the background,[1684] for example, to provide guidance as to the obligation to investigate, an obligation not found in LOAC.
While some experts have stressed that the ICJ's pronouncement on the role of the law of hostilities is limited to the particular context[1685] – i.e. an IAC and concerning hostilities involving the use of nuclear weapons – and thus only applies to IAC, there is no reason to conclude that the ICJ-formula as expressed in its *Nuclear Weapons Advisory Opinion* cannot be equally applicable in the context of NIAC. The ICJ's approach finds equal application in relation to the right to life under the ACHR, as follows from the case-law of the IACiHR in, most notably, *Coard v. the United States*[1686] and *Abella*.[1687]

In respect of the right to life under the ECHR, the route taken by the ECtHR in respect of cases where the alleged violation of the right to life was to be examined in the context of hostilities is somewhat different, but leads to the same result, namely that the question of whether the right to life may be lawfully infringed upon msut be answered by reference to the law of hostilities.
To recall, Article 2 ECHR does not hinge upon the notion of 'arbitrariness.' It prohibits deprivations of life that are 'intentional,' except those 'absolutely necessary' in limited, exceptional circumstances.[1688] Deprivations of life outside this limited construct are permissible *only* as derogations from the right to life "in respect of deaths resulting from lawful acts of war," as Article 15(2) ECHR stipulates.
With the exceptions of the ECiHR's viewpoints expressed in the early cases of *Cyprus v. Turkey*-case[1689] and the *Engel*-case,[1690] so far the ECtHR has not had many opportunities to

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[1684] Henckaerts (2008), 264; Alston, Morgan-Foster & Abresch (2008), 192-193.

[1685] University Centre for International Humanitarian Law (2005), 39.

[1686] (1999f), *Coard and Others v. the United States ('US Military Intervention in Grenada), Case No. 10.951, Decision of 29 September 1999* § 42. admittedly, the IACiHR used the ICJ's reasoning in relation to the interpretation of the lawfulness of detentions in respect of the prohibition to arbitrary deprive someone of his liberty, which at least suggests it would apply a similar approach in respect of the prohibition of arbitrary deprivation of life as set forth in Article 4 ACHR.

[1687] (1997b), *Abella et al. v. Argentina (La Tablada), Case No. 11.137, Decision of 18 November 1997*, § 159, in which it held that in order to assess the lawfulness of deprivations of life resulting from hostilities in armed conflict it is not possible to resort to the right to life alone. Its ability "to resolve claimed violations of this non-derogable right arising out of an armed conflict may not be possible in many cases by reference to Article 4 of the American Convention alone. This is because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations. Therefore, the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations. To do otherwise would mean that the Commission would have to decline to exercise its jurisdiction in many cases involving indiscriminate attacks by State agents resulting in a considerable number of civilian casualties. Such a result would be manifestly absurd in light of the underlying object and purposes of both the American Convention and humanitarian law treaties." See also (1999), *Third Report on the Situation of Human Rights in Colombia, IACiHR (26 February 1999)*, §§ 11, 151; (1999f), *Coard and Others v. the United States ('US Military Intervention in Grenada), Case No. 10.951, Decision of 29 September 1999*, § 42; (2002j), *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba, Decision of 13 March 2002*; (2010c), *Franklin Guillermo Aisalla Molina v. Ecuador, Case IP-02, OEA/Ser.L/V/II.140 Doc. 10 (2010), Judgment 21 October 2010 (Admissibility)*, §§ 120-122. See also (2005m), *Report No. 11/05 (Admissibility), Petition 708/03, Gregoria Herminia, Serapio Cristián and Julia Inés Contreras, El Salvador, (February 23, 2005)*, § 20.

[1688] Article 2(2) ECHR.

[1689] (1975b), *Cyprus v. Turkey, App. No. 6780/74, 6950/75, Admissibility Decision of 26 May 1975*.

explicitly refer to or apply the law of hostilities *in the context of IAC*, nor has it otherwise expressed an outspoken viewpoint with respect to the relationship between the law of hostilities (or LOAC in general) and IHRL. There is no formal obstacle to resort to LOAC: while the ECtHR's jurisdiction is limited to the examination of possible violations of its own provisions, not of provisions of LOAC, in fact, Article 15(1) ECHR as well as Article 31(3)(c) VCLT require the ECtHR to take into account "any relevant rules of international law" in the interpretation of the ECHR. Arguably, the ECtHR would have had an opportunity to do so in the *Bankovic*-case, which concerned aerial hostilities in an IAC, if the ECtHR had declared the case admissible (which it did not).[1691] In *Al-Skeini*, when assessing the lawfulness of deprivations of life that occurred during the UK's occupation of Basra, Iraq, the ECtHR did not rely on the law of hostilities either,[1692] as the complaint concerned the UK's failure to carry out an effective and independent investigation, and not whether the UK had otherwise violated the right to life.[1693] Possibly, the ECtHR will have an opportunity to provide its views on the interplay between IHRL and LOAC in respect of the hostilities during the inter-State armed conflict between Georgia and Russia in 2008 – a case of particular interest as neither State had formally derogated from the right to life[1694] – but for now, an explicit pronouncement on the position of the law of hostilities vis-à-vis the right to life in respect of hostilities in an IAC remains absent.

However, more guidance can be distilled from the ECtHR's case law in respect of NIAC. As has been previously noted, the ECtHR has been frequently concerned with cases arising from hostilities having taken place during NIACs in Turkey and Chechnya. In none of these cases, the respondent States relied on the concept of derogation (as none had actually derogated from the right to life), but they all tried to justify the deprivations of life by reference to one of the legitimate aims listed in Article 2(2) ECHR. As none of the respondent States had admitted to the existence of an armed conflict at the time of the alleged violations, the ECtHR was required to assess the lawfulness of the use of lethal force by Turkish and Russian security forces against a normal background.

Admittedly, the cases at hand concerned claims by individuals who under the law of hostilities would have qualified as protected person. In other words, in none of the cases the ECtHR was required to examine the lawfulness of attacks on individuals who had been identified as lawful military objectives. In addition, the claims concerned State conduct that also would have been impermissible under the law of hostilities. In other words, this case law can be said to be of particular interest for demonstrating the convergence between IHRL and LOAC with respect to deprivations of life of protected persons. While this case-law must therefore be viewed from the proper perspective, the practice of the ECtHR nonetheless demonstrates that the law of hostilities was frequently resorted to – albeit tacitly – to interpret the requirements of absolute necessity, proportionality and precaution under the normative framework governing the deprivation of life under IHRL.[1695] It may there-

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[1690] (1976c), *Engel v. The Netherlands (Merits), Appl. Nos. 5100/71; 5101/71; 5102/71; 5102/72 (8 June 1976)*

[1691] (2001c), *Bankovic and Others v. Belgium and 16 Other Contracting States, App. No. 52207/99, Judgment of 12 December 2001*.

[1692] Assuming here, for the sake of the argument, that the deprivations of life in the cases at hand took place within the concept of hostilities.

[1693] (2011b), *Al-Skeini and Others v. the United Kingdom, App. No. 55721/07, Judgment of 7 July 2011*, § 3.

[1694] In 2008, Georgia filed an inter-State complaint against Russia, which has been declared admissible by the ECtHR in (2012c), *Georgia v. Russia No. 2, App. No. 38263/08, Judgment of 4 January 2012*.

[1695] The ECtHR's jurisdiction is limited to the examination of possible violations of its own provisions, not of provisions of LOAC. However, there is no formal obstacle in the ECHR for the ECtHR to apply LOAC in the interpretation of its provisions. In fact, Article 15(1) ECHR as well as Article 31(3)(c)

fore, on closer examination, be rightly concluded that "[e]ven if the European Court applies human rights law directly to the conduct of hostilities, almost all of the standards and a substantial part of the terminology it employs are imported from IHL. In fact, what claims to be a human rights based approach draws most of its substantive content directly from the *lex specialis* of IHL."[1696] Standards that can be detected are those of distinction, proportionality, precaution and necessity.[1697]

The practice of the ECtHR shows that to a great extent – and in any case in so far it concerns low-intensity conflicts – the normative framework governing the deprivation of life under IHRL is sufficiently flexible to accommodate situations of hostilities by reference to the law of hostilities. This is even the case in respect of military operations involving heavily armed insurgents, large numbers of counterinsurgent troops, and the use of artillery, mortars and large-scale aerial bombardments, as exemplified by the Chechnya cases. In the absence of case-law involving even larger conflicts, it remains unknown to which extremities the requirements can be stretched.[1698] Notwithstanding the above, it is submitted that the practice of the ECtHR is not to be interpreted as evidence of a *total* convergence of the normative frameworks governing the deprivation of life as set forth in IHRL and the law of hostilities, and that in fact the essential features continue to exist, and thus must be resolved by resort to the *lex specialis*–rule.

It may be concluded that the relationship between IHRL and LOAC in the normative paradigm of hostilities demonstrates that despite some fundamental substantive differences a conflict between norms can be averted quite simply by interpreting the general prohibition to arbitrarily deprive a person of his life as set out in IHRL by reference to the law of hostilities, which after all was specifically designed to deal with deprivations of life in the extreme circumstances that hostilities in armed conflict may bring about. As such, the relationship between IHRL and the LOAC in the normative paradigm of hostilities is determined by the maxim of *lex specialis derogat legi generali*, which functions here as a *technique of interpretation* and implies that, as a general rule, the norms present in the law of hostilities, *in toto*, function as a guiding source in the interpretation of the right to life protected under IHRL when assess-

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VCLT require the ECtHR to take into account "any relevant rules of international law" in the interpretation of the ECHR. With the exceptions of the ECiHR's viewpoints expressed in the early cases of *Cyprus v. Turkey*-case ((1975b), *Cyprus v. Turkey, App. No. 6780/74, 6950/75, Admissibility Decision of 26 May 1975* and the *Engel*-case ((1976c), *Engel v. The Netherlands (Merits), Appl. Nos. 5100/71; 5101/71; 5102/71; 5102/72 (8 June 1976)*), so far the ECtHR has not explicitly refered to or applied LOAC, nor has it expressed an outspoken viewpoint with respect to the relationship between LOAC and IHRL, even though it arguably could have as it dealt with flagrant cases of armed conflict. Possible motives for this approach are that it views IHRL as a self-contained regime, or that it shies away from making pronouncements on the interpretation of the law of hostilities and its interplay with IHRL. Arguably, the ECtHR would have had an opportunity to do so in the *Bankovic*-case, which concerned aerial hostilities in an IAC, but as concluded earlier, the ECtHR never came to an assessment of the merits, as the case stranded in its admissibility phase.

[1696] Melzer (2008), 393; Naert (2008), 401; Bijl (2007), 105; Contra: Krieger (2006).

[1697] (1998f), *Ergi v. Turkey, App. No. 66/1997/850/1057, Judgment of 28 July 1998*; (2004n), *Özkan v. Turkey, App. No. 21689/93, Judgment of April 6, 2004*, § 178-179; (2005f), *Isayeva, Yusupova and Bazayeva v. Russia, App. No. 57947/00, 57948/00, 57949/00, Judgment of 24 February 2005*, § 178; (2008g), *Khatsiyeva et al. v. Russia, App. No. 5108/02, Judgment of 17 January 2008*; (2011g), *Khamzayev et al. v. Russia, App. No. 1503/02, Judgment of 3 May 2011*, 185; (2011f), *Kerimova and others v. Russia, App. Nos. 7170/04, 20792/04, 22448/04, 23360/04, 5681/05, 5684/05, Judgment of 3 May 2011*, 253.

[1698] Melzer (2008), 392; Kretzmer (2009), 24. Possibly, the ECtHR's examination of the inter-State complaint regarding the armed conflict between Georgia and Russia will provide more guidance.(2012c), *Georgia v. Russia No. 2, App. No. 38263/08, Judgment of 4 January 2012*.

ing the lawfulness of targeting operations in the context of hostilities. As a result, the requirements pertaining to the deprivation of life under the latter regime have no function in hostilities and therefore do not in any way modify the substantive content of the law of hostilities. As such, both regimes demonstrate to be sensitive to the specific objects and purposes for which their respective norms were designed, by taking into account the circumstances in which they are to be applied.
It follows that, under the normative paradigm of hostilities:

(1) individuals qualifiable as lawful military objectives are no longer protected against direct attack;
(2) their *intentional* deprivation of life is:
    a. by definition an act related to the conduct of hostilities and therefore constitutes no 'murder' in violation of the law of hostilities (and amounts to a war crime under LOAC), but a lawful act of war provided it takes place in conformity with other requirements imposed by the law of hostilites; *and*
    b. under those conditions, does not constitute an arbitrary deprivation of life under IHRL.

2. The Interplay of IHRL and LOAC in the Normative Paradigm of Law Enforcement

The interplay between IHRL and LOAC within the normative paradigm of law enforcement in respect of the issue of deprivation of life[1699] is greatly impacted by the manner in which LOAC regulates the conduct of States in their vertical relationship with protected persons. As could be concluded, LOAC imposes upon States party to a the conflict – whether in IAC or NIAC – the duty and commensurate authority to take appropriate measures to restore, and ensure public law, order, and safety, yet it does not provide detailed norms governing the deprivation of life in the exercise of this duty, other than those prohibiting the willful killing or murder of protected persons.[1700]
Nonetheless, it is in these norms that various 'points of contact' with IHRL can be identified.
For example, in relation to the interplay between IHRL and the law of belligerent occupation, Articles 27(4) GC IV and 64(3) GC IV provide the Occupying Power authorizations to imposes measures to comply with its positive obligation under Article 43 HIVR "to restore, and ensure, as far as possible, public order and safety," but these measures may not result in deprivations of life qualifiable as willful killings. Intentional conduct resulting in the deprivation of life violates Article 27(1) GC IV, which stipulates that "protected persons are en-

[1699] It is submitted that the normative paradigm of law enforcement also includes rules that govern the treatment of captured/interned persons.

[1700] To recall, under the law of belligerent occupation the Occupying Power is to ensure that the civilian population can lead as normal a life as possible – a purpose the fulfillment of which is subject to the security interests of the Occupying Power. Specifically, Article 43, 1907 HIVR[1700] places upon the Occupying Power the duty to take "all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." States on whose territory a NIAC takes place are equally entitled to, as well as responsible for taking appropriate measures for maintaining or restoring law and order, and to defend their national unity and territorial integrity. This follows from CA 3 and Article 3(1) AP II.

titled, in all circumstances, to respect for their persons, […], and shall be protected especially against all acts of violence or threats thereof […]"[1701]
Similar complementarity is found in Article 64(3) GC IV, which authorizes the Occupying Power to subject the population of the occupied territory

> to provisions which are essential to enable the Occupying Power [1] *to fulfil its obligations under the present Convention,* [2] *to maintain the orderly government of the territory, and* [3] *to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.*[1702]

As concluded by Melzer, the three exceptional bases mentioned in Article 64(3) GC IV in essence correspond "to the scope of ordinary law enforcement activities conducted by legitimate sovereigns in peace time."[1703] It may be concluded that in terms of legitimate purposes for the use of lethal force potentially resulting in the deprivation of life, the law of belligerent occupation and IHRL converge.
In the absence of further guidance as to the necessity for, and the conditions of the use of lethal force against protected persons outside the context of hostilities, it would logically follow that the question of the lawfulness of deprivations of life resulting from lethal force by counterinsurgent forces is to be answered by reference to the requirements underlying the deprivation of life in IHRL.[1704] As such, IHRL provides a complementary role:[1705] it "[…] reinforces the weight to be given to the [law of belligerent occupation's] principles and objective, that is, to protect the occupied population and provide for its wellbeing."[1706]

A similar complementary interplay between IHRL and LOAC in the normative paradigm of law enforcement can be found in the context of NIAC.[1707] The law of NIAC prohibits the willfull killing of protected persons. To recall, the scope *ratione materiae* of persons protected by CA 3 and AP II extends to "persons taking no active part in the hostilities" as phrased in CA 3, or to "[a]ll persons who do not take a direct part or who have ceased to take a direct part in hostilities" as set forth in Article 4 AP II. Such persons concern the wounded, sick, and shipwrecked members of the armed forces, as well as those captured, and civilians not or no longer directly participating in hostilities.[1708]
In view of the general prohibition in the law of hostilities to directly attack protected persons, their intentional deprivation of life can never be based on military necessity. In principle, therefore, any measure imposed on them by the State party to the NIAC falls under the concept of law enforcement. As neither CA 3 nor AP II expressly regulates the depriva-

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[1701] Pictet (1958a), 207. As noted, the most severe measures that may be imposed on the basis of military necessity are assigned residence and internment, see Article 41 GC IV. See also Article 32 GC IV, which prohibits murder by civilian or military agents, i.e. "any form of homicide not resulting from a capital sentence by a court of law in conformity with the provisions of the Convention." Pictet (1958a), 222 (Article 32 GC IV).

[1702] Article 64(3) GC IV corresponds to the second part of Article 43, 1907 HIVR, which contains a negative obligation to respect, "*unless absolutely prevented*, the laws in force in the country." On the three exceptions in Article 64(3) GC IV in general: Dinstein (2009c), 112 ff; Arai-Takahashi (2010), 123 ff.

[1703] Melzer (2008), 164-165. Melzer concludes for example that the three exceptional legislatory bases in Article 64 GC IV correspond in qualitative terms with the three legitimate aims for deprivation of life under Article 2(2) ECHR. See also Kretzmer (2005), 201, footnote 154.

[1704] Melzer (2008), 165-166 (emphasis added). In the view of Sassòli, not LOAC, but IHRL assumes the position of *lex specialis*. Sassòli (2011), 77.

[1705] Frowein (1998), 11.

[1706] Ben-Naftali & Michaeli (2003), 289.

[1707] Moir (2002), 199, 214; Meron (2000a), 266.

[1708] See also (1997n), *Tadić*, § 615.

tion of life unrelated to hostilities when so necessary to restore or ensure public security, law and order, IHRL functions as the complementary regime to reinforce LOAC and thereby functions as the default regime against which the lawfulness of the deprivation of life of protected persons is to be assessed.[1709]

This complementarity interplay between IHRL and LOAC in the area of deprivations of life as a measure of law enforcement can be illustrated by several instances of the practice of judicial and quasi-judicial organs, and most in particular that of the IACiHR, in so far they were concerned with situations of the use of force against persons protected under the law of hostilities in a NIAC, *and* expressly applied both IHRL and LOAC.[1710]

This case law illustrates that (without removing its status as a provision of LOAC) CA 3 can be viewed as "essentially *pure human rights law*," which in respect of deprivations of life of protected persons thus imposes upon States obligations they already had under the right to life.[1711] It also affirms that the principle of distinction under the law of hostilities is a closed-off circuit consisting of two categories – legitimate military objectives and, on the other hand, civilians and other persons not or no longer DPH-ing – and that there is no intermediate level of non-protection. Thus, the mere fact that individuals are present in insurgent-controlled areas; are relatives of insurgents; or are suspected of being loyal to, or cooperate with insurgents is not sufficient to qualify them as legitimate military objectives.[1712] Also, when a State issues manuals advising State agents to "neutralize […] carefully selected and planned targets," such as judges, police officers, state security officials and so forth, it violates its obligation under CA 3 that prohibits

> "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which aere recognized as indispensiable by civilized peoples" and probably also of the prohibition of "violence to life and person, in particular murder of all kinds, […][1713]

It thereby also violates its complementary obligation under the right to life to provide a legal basis that *prevents* arbitrary killing by its own security forces by strictly controlling and limit-

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[1709] Corn (2010), 62; United Nations General Assembly (2010), 10.

[1710] (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, § 255; (1982a), *Caracoles Community (Bolivia), Case No. 7481, Decision of 8 March 1982*; (1997b), *Abella et al. v. Argentina (La Tablada), Case No. 11.137, Decision of 18 November 1997*, 195; (1999e), *Case Concerning the Massacre of the Jesuites in El Salvador, Case No. 10.488, Decision of 22 December 1999*, § 237; (1999), *Third Report on the Situation of Human Rights in Colombia, IACommHR (26 February 1999)*, Chapter IV, §§ 11, 169, 202, 206, 293; United Nations (1993b), § 610.

[1711] (1997b), *Abella et al. v. Argentina (La Tablada), Case No. 11.137, Decision of 18 November 1997*, 158. However, at the same time it explicitly refers to Article 29(b) of the ACHR, which contains the "most-favorable-to-the-individual-clause". Article 29(b) provides that no provision of the IACHR shall be interpreted as "restricting the enforcement or exercise of any right or freedom recognized by virtue of the laws of any State Party or another convention which one of the said states is a party." Following this clause, the IACiHR holds that since LOAC offers more protection than the ACHR, preference should be given to LOAC. In reverse, if LOAC is not, IHRL (in this context the provisions of the ACHR) should be followed. (1997b), *Abella et al. v. Argentina (La Tablada), Case No. 11.137, Decision of 18 November 1997*, § 164-167. Naert disagrees with this view. Except for non-derogable human rights, the *lex specialis* principle is not a 'more favourable'-principle: "the *lex specialis* rule clearly implies that in some cases the LOAC will prevail even where it offers less protection. In other words: more specific does not necessarily equal more favourable." Naert (2008), 396-397, referring to Meron (1987), 30; Gross (2007), 35; Schäfer (2006), 47-48. *A contrario*: Orakhelashvili (2008), 181-182.

[1712] (1999), *Third Report on the Situation of Human Rights in Colombia, IACommHR (26 February 1999)*, Chapter IV, §§ 202; 293.

[1713] (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986 (Merits)*, § 255.

ing the circumstances in which a person may be deprived of his or her life by the authorities of a State.
In fact, State agents must take account of the fact that during a specific conflict the normative paradigms of hostilities and law enforcement may simultaneously apply and that the treatment of a single individual may *shift* from that of law enforcement to hostilities and back. Thus, in respect of an armed confrontation between prison inmates and guards in the *La Tablada*-prison on Argentina, in respect of which the IACiHR concluded that the violence reached the threshold of intensity sufficient to conclude upon the existence of a NIAC, it concluded that the armed forces deployed to quell the violence had failed to make this distinguishment. Thus, in contrast to prisoners that did not partake in the violence, as well as peaceful civilians living nearby the prison, the rioting prisoners "assume the role of combatants by directly taking part in fighting, whether singly or as a member of a group, they thereby become legitimate military targets" […] they "lost the benefits of the above mentioned precautions in attack and against the effects of indiscriminate or disproportionate attacks pertaining to peaceable civilians."[1714] However, once the prisoners were captured, the relationship between the State agents and them "was analogous to that of prison guards and the inmates under their custody. As such, the State had, under Article 1(1) of the American Convention and Common Article 3 of the Geneva Conventions, a duty to treat these persons humanely in all circumstances and to ensure their safety."[1715]
Nonetheless, as in peacetime situations, particular conduct by persons protected by CA 3 (and AP II), while not amounting to their DPH, may nonetheless require the use of force by counterinsurgent forces that is absolutely necessary to attain a legitimate aim recognized under IHRL in fulfillment of its right and duty to restore public security, law and order in response to such volatile acts. As held by the IACiHR,

> [n]ot all killings occurring outside of combat activities necessarily imply arbitrary deprivations of life. Thus, for example, deaths which occur as a result of police actions in the defense of the public order do not constitute violations of the right to life where they are carried out with proper respect for proportionality and in conformity with the law. Also, in those cases occurring in the context of an armed conflict, humanitarian law provides standards for determining whether a loss of life is arbitrary. As noted above, pursuant to international humanitarian law norms, not all deaths occurring outside of combat-related activities automatically constitute violations of international law.[1716]

For example, CA 3 permits the use of lethal force against a person "forcibly resisting detention."[1717] However, while the use of lethal force may find a basis in a recognized legitimate aim, it still requires a sufficient legal basis and must comply with the requirements of absolute necessity, proportionality and precaution.

In sum, it is submitted that the few available norms present in LOAC are specifically designed to protect persons in armed conflict and may be viewed as the *lex specialis* in the conduct of hostilities. As no additional clarity can be attained from the ordinary rules of treaty interpretation or the principles underlying LOAC, recourse may be had to the *lex generalis*, which is IHRL, to *complement* LOAC. As such, the right to life-framework under IHRL functions as the *default* normative framework applicable in situations involving the deprivation of life of persons protected under the law of IAC and NIAC.

[1714] (1997b), *Abella et al. v. Argentina (La Tablada), Case No. 11.137, Decision of 18 November 1997*, § 178.
[1715] (1997b), *Abella et al. v. Argentina (La Tablada), Case No. 11.137, Decision of 18 November 1997*, § 195.
[1716] (1999), *Third Report on the Situation of Human Rights in Colombia, IACommHR (26 February 1999)*, § 169.
[1717] (1999), *Third Report on the Situation of Human Rights in Colombia, IACiHR (26 February 1999)*, § 116.

The interplay is here characterized by harmony, not conflict, by which IHRL and LOAC demonstrate their ability to mutually reinforce each other. In its complementary role, IHRL 'takes the lead' and informs the determination of the lawfulness of deprivations of life of persons protected under LOAC. As follows from the analysis below, the relevant requirements underlying the normative framework of deprivations of life under IHRL remain intact, i.e. they are not in any way altered by the fact that they are applied in the context of an armed conflict.
It follows that, under the *normative paradigm of law enforcement*, the deprivation of life of protected persons is:

a. an act unrelated to the conduct of hostilities;
b. constitutes 'murder' in violation of the law of hostilities (and amounts to a war crime under LOAC); *and*
c. amounts to an arbitrary deprivation of life under IHRL;

unless it serves a legitimate aim under IHRL and otherwise conforms with the requirements of sufficient legal basis, absolute necessity, proportionality and precaution, therewith taking account of the possible volatile circumstances at hand.

3. The Interplay between the Normative Paradigms of Hostilities and Law Enforcement

In the previous paragraphs, we have determined how IHRL and LOAC interrelate *within* the normative paradigms of hostilities and law enforcement. As concluded, the normative paradigm of law enforcement is principally IHRL-based, whereas the law of hostilities shapes the normative paradigm of hostilities.
Both normative paradigms offer important military operational guidance relevant to targeting operations. They not only draw the outer boundaries of permissible targeting; the requirements inherent in these frameworks function as essential and decisive instruments in the interpretation and application of the fundamental principles of military operations essential in determining the course of action in specific situations of targeting. Commonly recognized general principles of military operations are security; objective; the economy of effort; simplicity; flexibility; credibility; initiative; and legitimacy. Additional principles principally related to targeting are mobility, offensive and surprise. These principles are of equal value in the context of targeting operations in counterinsurgency.
Military operations require an unequivocal, clearly described and attainable *objective*. In counterinsurgency, one of the principal objectives of the overall counterinsurgency campaign, and military operations part thereof, is the provision of physical *security* to the counterinsurgent's own forces, as well as the local population, and representatives of international and non-international organizations. The normative paradigms determine whether and, if so, how use can be made of the instruments of force to provide such security. Is the counterinsurgent commander bound by the strict regime offered by the normative paradigm of law enforcement, so any use of force is in principle a measure of last resort or can he make use of the operational latitude provided by the normative paradigm of hostilities? These are significant questions, as they inform the commander to what extent use can be made of the elements of *mobility*, *surprise* and *offensive* in combat operations – all of which reflect notions of military necessity taken into account when designing the law of hostilities. In the absence of clearly identifiable lawful military objectives, *security* by means of application of potentially lethal force can only be provided in conformity with the requirements of law enforcement, as recognized under IHRL. A proper analysis of the applicable normative paradigm will offer the commander insight in how he is to deploy its available assets as an application of

the principle of *economy of effort*. For example, under the normative paradigm of hostilities, the commander is entitled to make use of air assets such as the widely discussed drones in lieu of ground forces to target a particular persons, which enables him to deploy those ground forces elsewhere. However, under the normative paradigm of law enforcement, the application of such air assets would most likely not be lawful, and ground forces must carry out the operation. Unquestionably, the planning and execution of military operations by air assets or ground forces requires very different degrees of effort (e.g. in terms of logistics). Also, a determination of the proper normative paradigm will provide the commander the necessary direction in how to *simplify* his plans to the maximum extent possible, and contributes to the *credibility* and *social legitimacy* of the military operations. Certainty about the applicable normative paradigm will offer an opportunity to design a realistic concept of operations with the proper means, which will support morale and the dedication to execute the task at hand in a consistent, disciplined, accurate, effective, and foremost, legitimate manner. Also, normative paradigms with substantive contents devised for specific circumstances offer military commanders a venue to quickly adapt to changing situations in contemporary mosaic warfare by shifting from the one normative paradigm to the other and back when so required by the facts on the ground. It does, however, require troops that are proficient in applying force in both law enforcement-type situations, as well as hostilities, which requires training and education. This way, military commanders are also guided in their interpretation of the principle of *initiative*. For example, in situations of law enforcement the military principle of initiative is to be viewed in light of the requirement of absolute necessity, and pro-active, anticipatory lethal force is lawful in very limited circumstances; the vast majority of use of lethal force under the law enforcement paradigm is reactive. As a result, commanders are forced to adjust their process of 'outthinking' the enemy to the permissible scope of action under the normative paradigm of law enforcement, in order to preserve legitimacy, which in practice implies that the principle of initiative is contingent upon reactionary, rather than pro-active conduct. It also offers commanders a platform to consider whether to prioritize initiative over legitimacy.

As follows, the operational latitude for targeting insurgents is greatly impacted by the applicable normative paradigm. This triggers a crucial question, namely what factors determine which normative paradigm applies to a particular situation of targeting?
Admittedly, the answer to this question is rather straightforward in relation to some situations. For example, in situations where the potential target concerns a person protected from direct attack under the law of hostilities and is present in territory under the effective control of the counterinsurgent State, such as in occupied territory or a peaceful area of a State in whose territory a NIAC takes place, it is uncontroversial that the normative paradigm of law enforcement applies. In that respect, there is no meaningful difference between IHRL and the concept of law enforcement, as both assume such effective control over territory for the rules to be effectively applied. Here, the determining factor for the applicability of the normative paradigm of law enforcement is the exercise of effective control and the very absence of a *nexus* with the concept of hostilities.
A similar reasoning applies to the situation that insurgents qualifiable as lawful military objectives are present in areas where such control over territory exercised by the counterinsurgent State is manifestly absent (for example because the territory is in the hands of the insurgents) or where insurgent and counterinsurgent forces are fighting for such control. In this case, the normative paradigm of hostilities undoubtedly applies, as there is *no nexus* with law enforcement.

However, it is submitted that the issue of interplay between both normative paradigms is arguably *less straightforward* in relation to insurgents *who qualify as lawful military objectives under the law of hostilities, but who happen to be present in territory under the effective control of the counterinsurgent State*. An example is provided by the case of *Guerrero v. Colombia*, where Colombian security forces raided a home where they thought members of the insurgency were holding a kidnapped official. As neither the insurgents nor the official were found in the house, the security forces decided to wait for the insurgents to return and killed them all. Another example concerns the situation where intelligence sources reveal that key insurgents are to convene at a certain location to plan a terrorist attack. A final example concerns the situation where insurgents, on route to a location to plant an explosive, are intercepted by counterinsurgency forces.

It would appear that both normative paradigms apply, and the question arises whether the normative paradigm to be used is a matter of choice, serving subjective interests, or whether objective standards determine the applicability of the normative paradigm. In the latter case, the application of the normative paradigm results from an obligation, which triggers questions as to what is the source of the obligation and what are the parameters that determine the applicability of the 'right' normative paradigm. This potential for dual application of the normative paradigms can best be explained by comparing the situation of insurgents with that of regular combatants (as understood in the law of IAC).

Traditionally, inter-State armed conflicts are characterized by *symmetry*, i.e. "[a]ll parties to the conflict are bound by the same norms, even if lack of respect for those norms by one of them does not provide the others with grounds for reciprocal lack of respect."[1718] One of the most fundamental features of symmetry in inter-State armed conflict is the recognized status of combatants. As noted, the status of combatant entails certain privileges, to include immunity from criminal prosecution for direct participation in the hostilities in so far lawful under the law of hostilities. The identification of an individual as a combatant by definition limits the use of lethal force as a measure serving the concept of hostilities, in which case the death of regular combatants *solely* concerns the *horizontal* relationship between belligerents in an armed conflict. In other words, there is *no nexus* with the concept of law enforcement whatsoever. Under the then prevailing normative paradigm of hostilities, there is no further incentive to take further account of the context in which force is applied: a combatant may be attacked even when unarmed or asleep and it is left solely to the discretion of military commanders to decide to resort to alternative non-lethal measures, such as capture and arrest in situations where this would be feasible. As noted by Hakimi, "the combatant domain declines to muddy its otherwise rule-like prescription – targetable unless *hors de combat* – for the exceptional case in which an officer knows that he can capture a combatant without putting himself at serious risk or undermining his mission."[1719] Proposals to that effect, as made by Melzer and the ICRC, have gained some support[1720] but are generally concerned to not reflect the *lex lata*.

Unlike the relationship of regular combatants in an inter-State armed conflict, which is characterized by horizontal legal symmetry, the relationship between counterinsurgent forces and insurgents is by definition, one of *legal asymmetry*.

In situations regulated by the law of IAC, insurgents do not qualify as combatants, but are civilians who are unprivileged to DPH, and while they may be attacked for such time as they

[1718] Kretzmer (2009), 25.
[1719] Hakimi (2012), 1395.
[1720] Ferrero (2012), 129.

do DPH, they are also subject to criminal prosecution for violation of domestic criminal law.
In situations regulated by the law of NIAC, combatant-status is entirely absent, and there are thus no commensurate combatant-privileges for anyone participating in the conflict, whether member of the counterinsurgency forces or an insurgent. While this suggests symmetry, the relationship between both is nonetheless asymmetrical, for international law does not prohibit the State to criminalize, prosecute and punish insurgents on the basis of their membership in the armed forces of the insurgency movement, or for their DPH, whereas as members of the counterinsurgent forces are not subject to prosecution.[1721]
As a consequence of this legal asymmetry, the use of lethal force against insurgents does not serve only the concept of law enforcement and hostilities, but may serve *both* concepts. Not only do the insurgents pose a military threat, at the same time, however, the concept of hostilities *overlaps* with the concept of law enforcement, as the insurgents also pose a threat to public security, law, and order.[1722] 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. As Kretzmer explains in relation to internal NIACs:

> in such conflicts one cannot distinguish between "outsiders," who are not subject to the State's jurisdiction and the State's own citizens and residents, who are subject to its jurisdiction. Those involved in the armed conflict are subject to the State's jurisdiction, and this certainly does not change because an internal armed conflict exists. It is thus quite clear that during an internal armed conflict in a State's territory that State remains bound by its human rights obligations toward those in its territory and subject to its jurisdiction. In such situations, the State's right to derogate from part of its human rights obligations has clear implications, not only vis-à-vis persons in the State who have no nexus to the armed conflict, but also to those who are participants in that conflict.[1723]

It is submitted that Kretzmer's assessment is no different in situations of belligerent occupation.

As to the question of how to deal with the question of the applicable normative paradigm in targeting operations – particularly so in situations of dual relationships – two views may be distilled from legal doctrine: (1) a formal approach and (2) a functional approach.

3.1. A Formal Approach

A first, more traditional and *formal approach* identifies the applicable normative paradigm solely based on a person's immunity-based status under the law of hostilities and concludes that the normative paradigm of hostilities should always apply relative to insurgents qualifying as lawful military objectives.[1724] Thus, the identification of individuals as lawful military objectives under the law of hostilities triggers the applicability of the hostilities paradigm – functioning as the *lex specialis*. Conversely, the law enforcement paradigm applies to all indi-

[1721] Kretzmer (2009), 29. See, however, Article 6(5) AP II, which mandates that "[a]t the end of hostilities the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict."
[1722] Melzer (2010a), 43.
[1723] Kretzmer (2009), 10.
[1724] Schmitt (2010c), 16.

viduals who qualify as protected persons. In fact, counterinsurgent States – as the principal users of the law – may be particularly attracted to this approach as it offers a justifiable basis to keep the strict standards of law enforcement at bay while making full use of the operational and legal benefits of first-resort use of lethal force lawful military objectives rather than having to treat them as suspected criminals who should be afforded the guarantees of a criminal process;[1725] the proportionate incidental killing of civilians, and the authority to kill without having to carry out an independent investigation in each instance of use of lethal force. While the benefits per se are not problematic, their *comprehensive application* – even in situations where resort to less forceful measures permissible under the normative paradigm of law enforcement would suffice to remove the threat to public security, law, and order – is.

Closer analysis of the process behind the formal approach reveals that the identification of the hostilities paradigm as the *lex specialis* is the result of a rather conclusory, static process where no account is had of the *overall* context in which the norms are applied; an individual's 'immunity'-status under the law of hostilities suffices. The maxim of *lex specialis* here applies in its function as "*lex specialis derogata*." As such, the l*ex specialis* functions as an *exception* to the general rule by way of which the former "may be considered as a *modification*, *overruling* or a *setting aside* of the latter."[1726]

It is submitted that, in view of the conclusory approach underlying it, the formal approach is pertinent in respect of lethal force against regular categories of individuals in situations of 'classic' inter-State armed conflict, but is *flawed* in respect of deprivations of life in irregular conflict involving insurgents.

The discomfort with the formal approach in identifying the normative paradigm governing the deprivation of life of insurgents lies, *firstly*, in the fact that a conclusory process smothers a necessary context-sensitive legal discourse and consequently results in the justified comprehensive application of the standards underlying a normative paradigm also in less-fitting contexts.[1727] *Secondly* (and related to the first point), such lack in legal discourse allows different actors (States, (quasi-)judicial bodies, NGO's) to reach opposing conclusions as to the applicable normative paradigm in relation to the same insurgent.[1728] The context-indifferent nature of the formal approach therefore 'feeds' uncertainty as to which normative paradigm should apply, which ultimately, may undermine the position of individuals, whether potential target or innocent bystander, under either normative paradigm.[1729]

Neither normative paradigm appears to offer a seamless fit. In fact, it has led experts to also construct new[1730] or 'hybrid approaches' that are more permissive than would be authorized under the normative paradigm of law enforcement, but are more restrictive than mandated by the normative paradigm of hostilities. Problematic, however, is that these approaches lack a solid legal basis and are to be viewed more as reflections as to how the law should develop than of what the law currently is.

In view of the above, this study submits that the interplay between the normative paradigms

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[1725] Kretzmer (2009), 18.

[1726] Koskenniemi (2007a), 49, § 88.

[1727] Hakimi (2012), 1367.

[1728] Admittedly, much of the debate among experts concerns the killing of terrorists, but the legal questions underlying such killings do not differ in the context of insurgents (as understood in the present study).

[1729] Hakimi (2012), 1366-1367.

[1730] Sloane (2007); Schöndorf (2004).

of law enforcement and hostilities in the context of deprivations of life in counterinsurgency operations is to be determined by an alternative: a *functional approach*. As will be demonstrated below, its principal strength is to balance "the demands of the universality of human rights and practical considerations of effectiveness"[1731] in situations of dual relationships, without bending or penetrating the boundaries seperating the two normative paradigms. In other words, the functional approach enables the normative paradigms to operate in a harmonious fashion, while leaving their substantive contents intact.

3.2. A Functional Approach

3.2.1. The General Concept

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, while offering valid norms, finds no application to the relationship between the counterinsurgent State and insurgents qualifying as lawful military objectives, but instead is placed 'in reserve' and remains 'dormant' as long as the normative paradigm of law enforcement can adequately govern all conduct of the counterinsurgency forces in response to imminent and concrete threats posed to public security, law, and order by the insurgents, even when these 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'.[1732] In these instances, the normative paradigm of law enforcement loses the *effectiveness* required in the concrete situation, i.e. and from that point on, the normative paradigm of hostilities is simply more detailed and demonstrates its capacity to be more effective.
Equally, the newly gained or restored exercise of control mandates a shift from the normative paradigm of hostilities to the normative paradigm of law enforcement, as from that moment onwards the counterinsurgent State is presumed to maintain or restore public security, law, and order by resort to measures permissible under the normative paradigm of law enforcement.

3.2.2. Law or Policy?

Support for a functional approach is growing, both in doctrine[1733] and in the practice of (quasi-)judicial bodies.[1734] However, there is no explicit positive rule that mandates this approach. While presented by some as the *lex lata*, others propose that this is what the law

[1731] Milanovic (2011b).
[1732] Criddle (2012), 1100. See also 1089 ff; Ferrero (2012), 122; Kretzmer (2009), 35; Gaggioli & Kolb (2007).
[1733] Kretzmer (2005); Kretzmer (2009); Criddle (2012); Ni Aoláin (2007), 583; Droege (2008a); Ferrero (2012), 130; Watkin (2004), 18; Ben-Naftali & Michaeli (2003), 287 ff; Sassòli & Olson (2008), 614; Cohen & Shany (2007), 315; Arai-Takahashi (2010), 443; Watkin (2008), 192; Römer (2009), 66-67; Lubell (2005), 749 ff; Abresch (2005), 760; Gaggioli & Kolb (2007); Milanovic (2011a), 120-121; Kleffner (2010b), 74; Hampson (2011), 204; Garraway (2010), 510; Hakimi (2012). See also United Nations Office of the High Commissioner for Human Rights (2011), 63.
[1734] (2005d), *HCJ 769/02, The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005)*, §§ 26 ff, 39-40; United Nations (2009), § 14-15.

should be like or how security forces should act as a matter of *policy*, because it is the 'right' thing to do in light of, for example, the grand strategy of the counterinsurgency campaign. As explained by Watkin:

> It does not mean that during armed conflict capture must, as a matter of law, be carried out. However, capture may provide a more publicly acceptable option. […] Another factor to consider in respect of 'control' is that governing authorities may prefer a law enforcement response in order to limit the potential for injury to the civilian population and to demonstrate the exercise of their civil jurisdiction. As a government begins to regain control of territory the use of military force may be seen as less necessary.[1735]

Policy also provides the basis for the Israel Supreme Court in its *Targeted Killings*-decision when it gives instructions to Israeli security forces as to how it should operate. In relevant part, the HCJ held that a DPH-civilian

> cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, *one must choose the means whose harm to the human rights of the harmed person is smallest* […]. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated and tried, those are the means which should be employed […]. [T]rial is preferable to the use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force […].[1736]

The HCJ accepts, however, that the application of the law enforcement-based principle of proportionality has its limits:

> Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required […]. It might actually be particularly practical under the conditions of belligerent occupation, in which the army *controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities* […]. Of course, *given the circumstances of a certain case, that possibility might not exist*. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used.[1737]

As explained by Milanovic, while

> [i]t used the kernel of a human rights rule – ie that necessity must be shown for any intentional deprivation of life, to restrict the application of an IHL rule […] [t]he Court's holding was not based on *lex specialis* or any other form of mechanical reasoning. It made a policy and value judgment that in the context of prolonged Israeli occupation of Palestinian territories the traditional IHL answer was no longer satisfactory, and it had a basis in human rights law to say so.[1738]

Similarly, the Colombian government, when adopting ROE instructing its forces to apply a least harmful means-approach in respect of lawful military objectives when circumstances so

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[1735] Watkin (2005b), 30-31.

[1736] (2005q), *The Public Committee Against Torture in Israel v. The Government of Israel, HCJ 769/02, High Court of Justice (11 December 2005)*, §§ 39-40, relying on the ECtHR's judgment in McCann, see Melzer (2008)mcc(1995f), *McCann and Others v. United Kingdom, App. No. 18984/91, Judgment of 5 September 1995*, § . This is also the position of the UN HRC on Israel's targeted killing policy: "before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted." (2003a), *Concluding Observations of the Human Rights Committee: Israel (21 Augustus 2003)*, § 15.

[1737] (2005q), *The Public Committee Against Torture in Israel v. The Government of Israel, HCJ 769/02, High Court of Justice (11 December 2005)*, §§ 39-40 (emphasis added).

[1738] Milanovic (2011a), 120.

permit, did so not because there is an explicit rule in international law that requires it to do so, but because it is the best policy. As the Colombian Minister of Justice explains:

> We have called our security policy the policy of consolidation, and that means that we want progressively to reduce the application of [LOAC] as we continue to make headway in the extension and consolidation of the rule of law. But along the way, you run into situations such as the ones I described with the sniping or scouting militias, which are a challenge. Again, the solution we have found is not just to sort out the difficult question of direct participation in hostilities by determining membership, but *to rethink what military necessity means in these contexts and to modulate that principle with the human rights principle of capturing or demobilizing first and using lethal force as a last resort.*[1739]

In other words, the overriding value for the conduct of military operations is the Rule of Law to establish peace. As explained by Von der Groeben,

> […], all efforts, even military, must be subordinate to this policy aim of enforcing the rule of law. This conflict is in essence one between legality versus illegality, but instead of invoking just war theories aiming to justifiy an even larger amount of violence, the Government restrains itself by following a law enforcement pattern. In other words, the aim of the Colombian fight against their opponents is not only primarily to annihilate them but also to bring them to justice.[1740]

Despite the policy-approach generally adopted, it is submitted that the functional approach, while not captured in a positive rule of international law logically follows from – and finds a legal basis in – the very objects and purpose underlying IHRL and the law of hostilities, which must be interpreted in light of the specific circumstances, following which the normative paradigm of law enforcement always finds application when the counterinsurgent State exercises effective control over territory and the specific situation at hand.

Indeed, central to a functional approach is an *interpretive rather than a conclusory* application of the maxim of *lex specialis* which reflects the need to look at how – in terms of intent, relevancy, effectiveness, certainty and reliability – different rules operate in the factual environment where they apply without loosing sight of their object and purpose. As such, it is appreciative of the notion that international law preceeds to a conclusion *through reason* rather than intuition.[1741]

The interpretive process underlying the functional approach entails that the identification of the applicable normative paradigm does not solely hinge on the immunity-based status of individuals under the law of hostilities, but *also* takes particular account of the interplay between the objects and purposes of the normative paradigms relative to the prevailing facts to which both apply by looking at *which relationship between the counterinsurgent State and the targetable insurgent best fits the context in which the targeting operation takes place*.

[1739] As stated by the Colombian Vice-Minister of Defense, the Honourable Sergio Jaramillo Caro, in Pfanner, Melzer & Gibson (2008), 828 (emphasis EP). The phrase "to rethink what military necessity means in these contexts and to modulate that principle with the human rights principle of capturing or demobilizing first and using lethal force as a last resort" may be taken to imply that military necessity needs to be reinterpreted as to contain a 'least harmful means'-obligation derived from IHRL. This study interprets the phrase to mean that in situations as in Colombia the function of military necessity fundamentally differs from its traditional, leading *function* (i.e. where it serves as the primary objective to do all that is required and permissible by LOAC to render the enemy *hors de combat*, in order to defeat him). Rather, military necessity, while still existing, plays a subordinate role in situations where the objective of reestablishing the Rule of Law can be attained by measures short of lethal force.

[1740] Von der Groeben (2011), 162.

[1741] Hakimi (2012), 1368, citing, *inter alia*, Chayes & Handler Chayes (1995), 118 (("[T]he interpretation, elaboration, application, and, ultimately, enforcement of international rules is accomplished through a process of (mostly verbal) interchange among the interested parties.")

As held by Watkin:

> It is unwise to stick stubbornly to either normative [paradigm] in the face of facts that point to a more nuanced approach where an escalation in the use of force (in the case of human rights law) or a limitation on the potential violence (in the case of humanitarian law) is required. Acting otherwise will not meet the needs of the society being protected. *The use of force and the successful application of the normative frameworks will ultimately be contextually driven by the facts on the ground rather than restricted by dogmatic approaches to applying the law*. Where security forces use force it is the right to life that must be emphasized […]. It is only on that basis that law and order can be maintained and with it true respect for the rule of law affirmed.[1742]

To recall, the principal relationship in the normative paradigm of law enforcement is a *vertical* relationship between the counterinsurgent State and all individuals *under its control*. This relationship is intrinsically connected to the *fiduciary obligation* to respect and protect the human rights of these individuals. In respect of the issue of deprivation of life, this fiduciary obligation entails a duty to bring insurgents into the criminal justice process by capturing them. The use of lethal force is only permissible when *absolutely necessary*. The string of the elements *vertical relationship-control-fiduciary obligation-absolute necessity* is representative of the IHRL-heavy nature of the object and purpose of the normative paradigm of law enforcement.

In the alternative, the principal relationship in the normative paradigm of law enforcement is the *horizontal* relationship between the counterinsurgent State and the insurgent qualifying as lawful military objective, which ordinarily presupposes the *absence of control*. This relationship is intrinsically connected to the authority to fully exploit, within the set boundaries, the benefits of permissible direct attack under the law of hostilities. Underlying this authority is the notion of *military necessity*. The string of the elements *horizontal relationship-absence of control-authoritative benefits-military necessity* is representative of the LOAC-based nature of the normative paradigm of hostilities.

The interpretive process of the functional approach allows for an assessment of the facts at hand in order to determine how, on the one hand, the string of the law enforcement-based elements is to interplay with the string of hostilities-based elements.

When taking the situation of belligerent occupation as an example, this fiduciary-based, context-related approach seems to underlie the idea behind Article 43 HIVR. To recall, it imposes on the Occupying Power the obligation "to take all the measures […] to restore, and ensure, […] public order and safety" to those "in his power" and "as far as possible". As previously established, these measures are not unlimited. Deprivations of life may only result from measures lawful under the normative paradigm of law enforcement. The elements "in his power" and "as far as possible" function as the parameters to assess the ability and effectiveness of measures lawful under the normative paradigm of law enforcement to comply with Article 43 HIVR, once the Occupying Power is confronted with hostilities. As such, both elements function as the bases to make way for resort to measures permissible under the normative paradigm of hostilities.[1743] Whether such is the case remains within the discretion of the Occupying Power, but it is submitted that the determination must be made in view of the aim of the law of belligerent occupation and the Occupying Power's presumed capacity to commit to the Rule of Law in governing its vertical relationship with individuals present in the occupied territory over which it exercises effective control. If the

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[1742] Watkin (2008), 199-200 (emphasis added).

[1743] This is not to imply that the obligation under Article 43, 1907 HIVR ceases to apply in case of such precedence of the law of hostilities, for it continues to govern the relationship between the Occupying Power and persons protected under the law of hostilities.

Occupying Power were to ignore these elements, and prioritizes the applicability of the law of hostilities over the law of belligerent occupation solely based on someone's loss of immunity from direct attack due to his direct participation in the hostilities, the Occupying Power would arguably escape a continuing obligation under international law on the basis of the wrong threshold.[1744]

3.2.3. Control

The decisive parameter in the interpretive process to determine whether the counterinsurgent State is authorized to make the shift from law enforcement to hostilities-based use of force, and in the alternative, when it is under an obligation to transfer from hostilities to law enforcement, is the *notion of control*.[1745]

Ultimately, it would follow that, in the exercise of control, the fiduciary *obligation* prevails over the *authoritative* benefits under the normative paradigm of hostilities. Indeed, the fiduciary obligation cannot be reasonably upheld when insurgents do not surrender and are not otherwise under the effective control of the counterinsurgent State. As such, the standard of *absolute necessity* inherent to the fiduciary obligation 'feeds', as it were, the *military necessity* inherent to the authority to kill.

Thus, the context-sensitive control-test ensures that, on the one hand, the normative paradigm of law enforcement stops where its continued application would only increase the risk that operators, out of frustration, would discard rules altogether because its highly demanding object and purpose exceed operationally feasible limits.

On the other hand, the context-sensitive control-test functions as a barrier against the injudicious application of the normative paradigm of hostilities in situations where the justifiable exploitation of its *authoritative* benefits would manifestly undermine the 'fiduciary' *obligatory* standards of protection against the effects of lethal force for all those within the counterinsurgency State's control, whether target or innocent bystander. As noted earlier, the benefits *per se* are not problematic. Their application in situations where the exercise of control would have permitted the counterinsurgent State to uphold the high standard law enforcement-based level of protection, however, is, particularly so in light of contemporary counterinsurgency doctrine. In fact, the full exercise of the benefits arising from the normative paradigm of hostilities when applied by counterinsurgent States exercising control is troublesome because it particularly affects the position of the counterinsurgent's most important, intangible asset: the civilian population.

[1744] See also Criddle (2012), 1101: "HRL would also supply the applicable proportionality standard for states conducting counterinsurgency operations within contexts of belligerent occupation. The international law of occupation requires occupying powers to stand in as steward for a displaced sovereign to maintain legal order for the duration of their occupation. Because an occupying state asserts control over the legal and practical interests of persons within occupied territory, the fiduciary principle requires an occupier to respect the basic human rights of occupied peoples during belligerent occupation regardless of whether the resident population has consented to the occupation. Occupying states must afford "the civilian population" the "maximal safeguards feasible under the circumstances." Although a state need not give persons within an occupied territory all of the benefits bestowed upon its own nationals, it must refrain from colonialist exploitation and other forms of domination. The relational theory of *lex specialis* supports these features of the law of occupation and suggests that states must honor the heightened protection of HRL's strict proportionality standard when they use force within an occupied territory."

[1745] It is emphasized that the counterinsurgent State, even when it is authorized to resort to lethal force under the normative paradigm of hostilities, remains authorized to make a policy-judgment and to opt for a law enforcement approach if it so desires.

Firstly, the derogation from the protective standards of the normative paradigm of law enforcement by applying the standards of the normative paradigm of hostilities implies that the counterinsurgent State is entitled to apply lethal force as a measure of first resort vis-à-vis insurgents without being under an obligation to resort to non-lethal alternative measures to respect their right to life even if it reasonably could. In fact, in the case of insurgents qualifying as CCF-members of the insurgency, preplanned lethal force would be permissible without them posing a threat. Also, it permits the immediate killing of individuals DPH-ing, even when the hostile conduct itself would even in peacetime settings not warrant the use of lethal force. This would not have been too problematic if insurgents were easily identifiable as lawful military objectives, which would be the case in situations of open combat. However, precisely in insurgencies, operational practice demonstrates that the identification of individuals as 'good' or 'bad' is extremely difficult. It is often uncertain who belongs to an organized armed group, or who acts on an individual or unorganized basis. In the case of organized armed groups it is difficult to determine when, or on what basis individuals join or quit their memberships. And because such groups are illegal, and their members are criminal suspects, they will do anything to remain unnoticed as members. As concluded, the law of hostilities as it stands today is not particularly helpful in identifying individuals as lawful military objectives, and notwithstanding the guidance by the ICRC, counterinsurgent States remain relatively 'free' in deciding for themselves when to qualify non-State actors as lawful military objectives, which may imply that civilians are placed in the authoritative scope of direct attack based on error or arbitrariness. A too lenient approach towards adopting the normative paradigm of hostilities as the default framework would risk the lives of civilians, "whether they are symphathizers of the group, members of the 'political wing', belong to the same ethnic group, or simply happen to be in the wrong place at the wrong time."[1746]

Secondly, application of the normative paradigm of hostilities to insurgents under the control of the counterinsurgent State would imply that the latter is authorized to apply the looser standards permitting the incidental killing of innocent civilians as proportionate collateral damage even in circumstances where this would manifestly not be permissible under the normative paradigm of law enforcement, while applying the latter would have led to a result more compatible with the situation at hand.

Thirdly, application of the normative paradigm of hostilities releaves the counterinsurgent State from the obligation to carry out independent investigations, even though the exercise of control would permit it to do so without unduly placing investigators at risk. This implies that counterinsurgent States may escape accountability for human rights violations in situations where accountability is a prime factor in building and upholding social legitimacy, mostly so when the counterinsurgent State is a visiting force supporting another government in building the rule of law.

As may be concluded from the above, the functional approach ensures that both normative paradigms function as two communicating vessels, rather than in a static manner where both paradigms are viewed as two conflicting bodies and contest one another.[1747] Droege admits that "[i]n practice, the lines will not always be easy to define. But a coherent interpretation of these existing bodies of law must attempt to provide a framework which gives some direction while at the same time remaining flexible in order to accommodate a large number of possible situations."[1748] As such, the functional approach demonstrates its prin-

[1746] Sassòli (2011), 81-82. See also Orakhelashvili (2008), 167; Kremnitzer (2004), 4-8.

[1747] Ni Aoláin (2007), 583.

[1748] Droege (2008a), 537.

cipal strength, which is its ability to balance "the demands of the universality of human rights and practical considerations of effectiveness"[1749] in situations of dual relationships, without adjusting the degrees of protection to individuals inherent in the normative paradigms by penetrating the boundary seperating them. In other words, the functional approach enables the normative paradigms to operate in harmonious fashion, while leaving their substantive contents intact.

The functional approach requires the assessment of *two* types of control: (1) *territorial control* where lethal force potentially resulting in the deprivation of life occurs and (2) *situational control*.

3.2.3.1. Territorial Control

As previously concluded, situations in which a State is generally recognized to exercise effective control over territory include instances of control over own territory; military occupation; a State's exercise effective control over (part of) another State's territory upon invitation, consent or acquiescence of the territorial State; and instances of temporary control over part of another State's territory. Generally, such control is deemed to be absent (and irrelevant) in the concept and commensurate normative paradigm of hostilities.
The manifest absence of effective territorial control implies that the counterinsurgent State is unable to fulfil its fiduciary obligation, and that it is fully entitled to exercise the benefits of the normative paradigm of hostilities in relation to the insurgent(s) in question. When applied to situations of counterinsurgency examined in the present study, we concluded that effective control over territory triggering obligations under IHRL is generally absent in SUPPCOIN and TRANSCOIN, but undoubtly arises in situations of OCCUPCOIN and NATCOIN.
In respect of OCCUPCOIN, the test for the existence of effective control over areas in the territory of an occupied State is the capacity to exercise the level of authority over territory required to enable it to satisfy the fiduciary obligations imposed by the law of occupation,"[1750] irrespective of a State's willingness to exercise authority. This capacity does not automatically vanish because of the presence of insurgents in occupied territory, or the carrying out of hostilities regardless of the concrete threat these pose. It is submitted that once it can be established that the capacity to exercise public powers of the counterinsurgent Occupying Power over the area of operation has been displaced by the insurgents, or where it is unclear which party exercises public powers that, in respect of that part of the occupied territory, the counterinsurgent Occupying Power does not exercise effective control (in which case, technically, that territory no longer can be regarded as occupied by the counterinsurgent Occupying Power).
The second situation in which the capacity to exercise effective control over territory is also presumed to typically exist, is in situations of NATCOIN. Indeed, the formal existence of an armed conflict does not exclude the possitibilty that parts of the State's territory may remain firmly under governmental control, even in an AP II-NIAC.[1751] In other areas, how-

[1749] Milanovic (2011b).
[1750] Thürer (2005), available at http://www.icrc.org/web/eng/siteeng0.nsf/html/occupation-statement-211105?opendocument.
[1751] Some experts, however, propose to make a distinction between CA 3-NIACs and AP II-NIACs. See, for example, Hampson (2011), 204; Garraway (2010), 510; Kretzmer (2009), 1; Ni Aoláin (2007), 579; Gaggioli & Kolb (2007). In their view, the default normative paradigm to govern the use of force in the former is the law enforcement paradigm, in which the normative paradigm of hostilities finds no application

ever, effective control over territory may be contested or in the hands of the insurgents, which calls for the law of hostilities to be applied. For example, in *Isayeva v. Russia*, the ECtHR took notice of the fact

> that the situation that existed in Chechnya at the relevant time called for exceptional measures by the State in order to *regain control* over the Republic and to suppress the illegal armed insurgency. Given the context of the conflict in Chechnya at the relevant time, those measures could presumably include the deployment of army units equipped with combat weapons, including military aviation and artillery. The presence of a very large group of armed fighters in Katyr-Yurt, and their active resistance to the law-enforcement bodies, which are not disputed by the parties, may have justified use of lethal force by the agents of the State, thus bringing the situation within paragraph 2 of Article 2."[1752]

3.2.3.2. Situational Control

While the exercise of effective territorial control is generally presumed to generate a 'fiduciary' obligation in a general sense, it is not sufficient to assume the application of the normative paradigm of law enforcement to control the use of force. The functional approach adds another test, which is that the counterinsurgent forces are in control of the specific situation at hand.

Generally, no doubt, control over circumstances surrounding the counterinsurgency operation is exercised when persons *are* within the *physical* custody of agents of the counterinsurgent State, exercising in that instance authority and control. While of particular significance for the concept of deprivation of liberty, the exercise of authority and control over persons in situations of *extracustodial* use of force, to which the concept of deprivation of life as understood in the present study pertains, remains more controversial, particularly in extraterritorial settings (such as in SUPPCOIN and TRANSCOIN). As concluded, events of lethal force against persons always raises the obligation to respect and protect the right to life under the ICCPR and ACHR, whereas under the ECtHR this is not always the case, notwithstanding the fact that this 'gap' is slowly closing. In view of the above, the concept

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at all. In contrast, it is only in AP II-type conflicts that the law of hostilities may find application. This is not to imply that *LOAC* does not at all apply to CA 3-NIACs; CA 3 and AP II clearly find application when their respective thresholds for application have been crossed. Yet, both sources essentially reflect Geneva-based law, and not Hague law, the latter of which is more hostilities-related. While it has been proposed that the law of hostilities finds application in AP II-NIACs on the basis of customary law, these experts argue that there is no such basis for the law of hostilities in CA 3-NIACs, and that, hence, deprivations of life in the latter type of NIACs are by definition governed by IHRL only. In addition, such division has the additional benefit that all use of lethal force in CA 3-NIACs is by definition 'threat'-based and not 'immunity'-based, which avoids erroneous or arbitrary identifications of individuals as DPH-civilians or CCF-members, and thus supports civilian protection agains the effects of the armed conflict. It is also assumed that the standards governing the deprivation of life under the normative paradigm of law enforcement are sufficiently flexible to allow counterinsurgent forces to cope with the type and intensity of violence common to CA 3-NIACs. Hampson (2011), 198, for example, uses the example of "Bloody Sunday" to clarify the need for a division: "Can it seriously be suggested that it would be appropriate if international law allowed the British armed forces to open fire against any presumed member of the IRA, irrespective of what he was doing at the time? Would it be sufficient if international law gave them that authority but a commander chose to act within greater restrictions than the law allowed and ordered his forces only to open fire in self-defense? In other words, should such discretion have been allowed to a military commander or should international law have required him to act within a law and order paradigm?"

[1752] (2005e), *Isayeva v. Russia, App. No. 57950/00, Judgment of 14 October 2005*, § 180. Also (2005f), *Isayeva, Yusupova and Bazayeva v. Russia, App. No. 57947/00, 57948/00, 57949/00, Judgment of 24 February 2005*, § 178.

of 'situational control' arguably includes instances where, in view of the information available, a counterinsurgent operation directed against insurgents can be planned, organized and controlled such that the capture and subsequent arrest – and thus the physical exercise of authority and control – of the insurgents is reasonably feasable, without the insurgents posing such a threat that it places the counterinsurgent forces at undue risk.

As noted by Watkin, "[t]he implementation of law-and-order activities would require a significant degree of *control* over the area or situation under scrutiny."[1753] As Kretzmer explains,

> A human rights regime rests on the idea of protection of individual rights. The assumption is that threats to security and public order can and should be contained by taking measures against *individuals* who threaten those interests. Thus, for example, when an individual has committed or is threatening to commit an act of violence he or she should be arrested, brought before a judge, and be given a fair trial before a competent and independent court. One of the criteria for judging whether the human rights regime is appropriate or not is whether, given the group nature and extent of the violence involved, arresting persons suspected being involved in protracted violence is a real and practical option that does not pose totally unreasonable risks to law-enforcement officials and to persons in the area. When the State does not have sufficient control to carry out an arrest without causing a major conflagration and loss of life the human rights regime may not be appropriate.

Several parameters may determine the existence of such "significant degree". For example, account must be had, on the one hand, of the nature of the *threat*, ranging from individual crime-based violence such as murder, rape or hostage taking, to internal disturbances and tensions, such as riots or isolated acts of violence, as well as sporadic and infrequent hostilities and large-scale combat situations. Other parameters are whether the counterinsurgency forces outweigh the number of insurgents, or the type of means and methods applied by both the insurgents and the State's counterinsurgency forces and the effects in terms of harm to both fighters and civilians.[1754] For example, in the case of *Anik et al. v. Turkey*, concerning the killing by Turkish security forces of two village guards who were suspected of directly participating in hostilities in support of the PKK, the ECtHR stressed that

> the soldiers were in *total control* of the area with which they were familiar. They largely outnumbered the surrounded suspects and had at their disposal sophisticated night vision equipment and at least one sniper for whom it might have been possible to shoot the two people without jeopardising their lives.[1755]

In *temporal* terms, control refers to the frequency and duration of the violence.[1756]

Once it has been established that the counterinsurgent State exercises both types of control, the normative paradigm of law enforcement applies. Thus, while the mere exercise of territorial control over the area in which a specific counterinsurgency operation takes place presumes the ability to satisfy the fiduciary obligation, in dealing with insurgents the absence of situational control nonetheless justifies the full exercise of the benefits of the normative paradigm of hostilities.

[1753] Ferrero (2012), 114; Watkin (2004), 18.

[1754] Ben-Naftali & Michaeli (2003), 287 ff; Droege (2008a), 537; Ni Aoláin (2007), 578; Sassòli & Olson (2008), 614. See also (2005q), *The Public Committee Against Torture in Israel v. The Government of Israel, HCJ 769/02, High Court of Justice (11 December 2005)*, §§ 39-40; (2003a), *Concluding Observations of the Human Rights Committee: Israel (21 Augustus 2003)*, § 15; (2005j), *Nachova v. Bulgaria, App. No. 43577/98, ECtHR (6 July 2005)*, § 95.

[1755] (2007a), *Anik et al. v. Turkey, App. No. 63758/00, Judgment of 5 juni 2007*, § 65.

[1756] Droege (2008a), 537; Ni Aoláin (2007), 578.

Ultimately, a functional approach forces counterinsurgent States to abandon rigid, 'across-the-board' approaches towards the targeting of insurgents when such an approach is substantively difficult to uphold in view of the circumstances at hand, but instead forces them to take a nuanced and case-sensitive stance under the threat of accountability for violations of international law. In fact, as will be demonstrated in more detail below, such posture towards the issue of lethal force and the deprivation of life corresponds with the views on the use of force and the principal role of legitimacy in contemporary counterinsurgency doctrine.

3.2.3.3. Application of the Functional Approach in Situational Contexts of Counterinsurgency

When applying the functional approach to targeting operations in situational contexts of counterinsurgency, four situations may arise.
In situation 1, the counterinsurgent State does not exercise effective control over territory, nor situational control. In this case, the normative paradigm of hostilities governs the targeting. This situation may arise in any type of counterinsurgency operation. For example, in OCCUPCOIN or NATCOIN, a counterinsurgent may have lost control over part of the occupied territory, which it seeks to regain. In the case of SUPPCOIN and TRANSCOIN, control over territory is generally absent, and situational control may not be feasible in view of the large presence of insurgent forces which precludes the realistic application of the law enforcement paradigm.
In situation 2, the counterinsurgent State exercises effective control over territory, but no situational control. As in situation 1, the normative paradigm of hostilities applies where the counterinsurgent State is not capable of dealing with the situation with the instruments available under the normative paradigm of law enforcement. This situation may typically arise in situations of NATCOIN and OCCUPCOIN, where the State exercises effective control over territory.
In situation 3, the counterinsurgent State exercises both effective control over territory, and situational control. In this case, the normative paradigm of law enforcement applies. For the reasons stated under situation 2, this situation may typically arise in situations of NATCOIN and OCCUPCOIN.
In situation 4, the counterinsurgent State exercises no effective control over territory, but exercises control over the situation. In this case, it is submitted, the normative paradigm of hostilities applies, but the counterinsurgent State is strongly advised to resort to alternative, non-lethal measures as a measure of *policy*. Nonetheless, first measure resort to lethal force would not be unlawful. This situation may typically arise in situations of SUPPCOIN and TRANSCOIN.

As follows from the above, it is the normative paradigm of hostilities that regulates the majority of the targeting operations. The principal setback of the functional approach in operational terms is limited to the prohibition of preplanned targeting operations in situations where the counterinsurgent State exercises effective control over territory and the situation at hand is such that it warrants the use of lethal force under the law enforcement paradigm. In operational reality the impact of this setback may be quite limited. As explained, in counterinsurgency operations, the static choice for killings in situations where capture would have been feasible may in fact undermine, rather than contribute to social legitimacy.

4. Observations

In this chapter, the study examined the interplay between relevant and applicable norms of IHRL and LOAC in regulating the targeting of insurgents. Two normative paradigms govern such targeting operations, namely the normative paradigm of law enforcement and hostilities. As both IHRL and LOAC provide valid and applicable norms relative to both concepts, a first task at hand was to determine the interplay of these norms *within* the respective normative paradigms. As it may be concluded, the interplay is such that IHRL takes a lead role in the *normative paradigm of law enforcement* without being modified by the valid norms of LOAC. In the *normative paradigm of hostilities*, it is LOAC that takes up the lead role. IHRL remains applicable in the background, but does not in any way modify the normative substance of the law of hostilities under LOAC.

The next task was to determine which normative paradigm governs particular targeting operations – crucial question from an operational point of view. One approach to answer this question is to identify the immunity-based status of individuals under the law of hostilities. While this approach functions in relation to regular combatants, who generally enjoy immunity from criminal prosecution for taking up arms and thus have no nexus with law enforcement, it is too static when dealing with insurgents. Their dual status as lawful military objective and criminal suspect implies that both normative paradigms may apply. In determining which normative paradigm applies, an interpretive process entails that the identification of the applicable normative paradigm does not solely hinge on the immunity-based status of individuals under the law of hostilities, but looks at which relationship between the counterinsurgent State and the targetable insurgent best fits the context in which the targeting operation takes place. The notion of control plays a crucial role in this respect. While lacking a basis in a positive rule of international law, this approach logically follows from the object and purpose of either normative paradigm

Overall, when applying this approach to the various operational contexts, it follows that the normative paradigm of law enforcement has a greater potential of governing targeting operations in NATCOIN and OCCUPCOIN. In contrast, targetings in SUPPCOIN and TRANSCOIN are more likely to be governed by the normative paradigm of hostilities, as a result of the lack of territorial control. However, it is submitted that in situations where the territorial State exercises effective control over territory, and where there is a presumption of law enforcement as the leading concept, it would be more sensible when the visiting counterinsurgent State must – as a matter of policy – follow suit and should not rely on the normative paradigm of hostilities for the mere fact that it does not exercise control over the territorial State's territory.

Conclusions Part C.1.

The research question central to this part was:

> in light of contemporary counterinsurgency doctrine, how do the relevant normative frameworks of IHRL and LOAC governing targeting *interrelate* and what does this tell us about the *permissible scope of conduct* in operational practice?

1. Interplay

As demonstrated above, IHRL and LOAC each offer a 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 relationships they each seek to regulate in the circumstances for which each regime was designed, the requirements under each regime – while demonstrating overlap to some degree – fundamentally differ, particularly in terms of protection of the target, as well as in respect of the protection of civilians.
It is here that the issue of interplay becomes relevant. Indeed, while IHRL offers a strict framework of requirements that offers sufficient latitude for *law enforcement* purposes in conditions of peace where the State exercises control over its territory, it may 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 and informs the legal scope of permissible conduct in such situations. In contrast, LOAC offers a framework of requirements that is specifically designed for hostilities, thus providing the *lex specialis*.
When carrying out an appreciation of the interplay of IHRL and LOAC in the normative paradigms of law enforcement and hostilities, it becomes clear that both interrelate in a harmonious manner. In the absence of detailed norms in the law of IAC and NIAC governing law enforcement-based use of force, IHRL assumes a leading role, which in view of the object and purpose of its norms is a logical outcome. A similar result is achieved in respect of the normative paradigm of hostilities. The question of 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.

This logic behind the outcome of the interplay of IHRL and LOAC *within* the normative paradigms is also reflected in the interplay *between* the normative paradigms. This study favors a functional approach. As has been argued, such an approach logically follows from the object and purpose of the normative paradigms and the regimes in control of those paradigms. Using an interpretative rather than conclusory approach towards the maxim of *lex specialis*, the outcome of the interplay between both paradigms is context-specific, implying that the degree of territorial or situational control in a specific situation of targeting determines the applicable normative paradigm. It thus immediately follows that the applicability of the normative paradigm is not a matter of choice, serving a counterinsurgent State's best interests. In other words, when in the targeting process the decision is made that the killing

of an insurgent generates an effect that best serves the desired objective, a counterinsurgent State cannot – for that reason – opt for the more flexible normative paradigm of hostilities. Rather, it must first be assessed which normative paradigm applies before a final decision to can be made. Clearly, this impacts to operational latitude in counterinsurgency operations. As concluded, the threshold for applicability of the normative paradigm of law enforcement is – at a minimum – the exercise of control over territory. Such control is ordinarily only exercised in the context of NATCOIN and OCCUPCOIN. Yet, in those situations, the applicability of the normative paradigm of law enforcement is the norm rather than the exception, and as the law of belligerent occupation – as a species of LOAC –demonstrate, the State exercising control is expected to maintain and restore public security, law, and order in those situations. In the situations where such control is absent, the counterinsurgent State is authorized to apply the normative paradigm of hostilities.

2. Permissible Scope for Targeting under the Normative Paradigms

2.1. Normative Paradigm of Law Enforcement

In sum, under the normative paradigm of law enforcement, when so applicable, counterinsurgent forces are to comply with the following requirements in the planning and execution of targeting operations against insurgents.

a) A Sufficient Legal Basis

The counterinsurgent must ensure that the targeting of insurgents finds a sufficient legal basis in domestic law. This law must be publicly accessible and strictly regulate the use of force in conformity with international norms of IHRL and other norms of international law governing the deprivation of life as a measure of law enforcement, also in times of public emergency threatening the life of the nation. It must stipulate that the recourse to lethal force is an exceptional measure that is to be resorted to only after a careful assessment of the circumstances at hand and the concrete and direct threat posed by an individual. A domestic law that permits the shoot-to-kill based targeting of individuals as a general policy, following their mere labeling as insurgents is contrary to international law.

b) Proportionality

The requirement of proportionality, *firstly*, implies that the kind and degree of harm resulting from the use of lethal force must not be disproportionate to the kind and degree of threat posed. *Also*, the counterinsurgent must ensure that the targeting serves to attain, and is limited to, a legitimate purpose, which in general terms is limited to "self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape."[1757] This implies that the counterinsurgent must be aware that the measure of targeting is not applied as a measure of punishment, but as a measure of prevention.

To illustrate, a legal basis for targeting an insurgent may arise in the event that:

[1757] Principle 9, United Nations (1990b); Melzer (2008), 284. Similarly: Article 2(2) ECHR, which justifies the use of force that is no more than absolutely necessary to "(1) to remove a threat posed to human life materializing from unlawful violence, (2) to effect a lawful arrest or to prevent the escape of a person lawfully detained, and (3) to lawfully quell a riot or insurrection."

(1) he poses a concrete and immediate threat to the life of others, for example when it becomes apparent that he is to detonate a bomb, as part of the terrorism campaign of the insurgency movement;
(2) an attempt is made to his arrest and in doing so counterinsurgent forces are met with resiststance that may lead to the loss of life or injury of the counterinsurgent forces attempting to make the arrest, or innocent civilians collocated in the vicinity of the arrest scene; and
(3) he partakes in a riot instigated by an insurgency movement and individually poses a threat to the life of innocent bystanders or to the counterinsurgent forces present.
Nonetheless, while these situations of targeting serve as a means to attain a legitimate aim, to be lawful the targeting operation remains subject to the subsequent requirements of strict necessity, proportionality and precautions.
This implies that the counterinsurgent must be aware that the targeting of insurgents for other purposes, such as their perceived threat 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, does not serve as a 'means' to achieve a legitimate 'end', but becomes an 'end' in itself and renders the targeting unlawful. It follows that the counterinsurgent is under an obligation to refrain from deciding to launch, or to terminate a targeting operation in process if it becomes apparent that the targeting is carried out in the absence of a legitimate purpose.

c) Absolute Necessity

To attain the legitimate purpose, the counterinsurgent may only resort to the measure of targeting when absolutely necessary in *qualitative*, *quantitative* and *temporal* terms.
Necessity in qualitative terms implies that the targeting must be strictly unavoidable to achieve the desired legitimate purpose. This implies that the counterinsurgent is under an obligation to apply lethal force as a measure of last resort, and to refrain from deciding to launch, or to terminate a targeting operation in process if it becomes apparent that the threat to human life can be removed by non-lethal alternatives, such as arrest.
Necessity in qualitative terms implies that even if the resort to lethal force is strictly unavoidable, the counterinsurgent forces remain under an obligation to avoid, and in any event, to minimize the loss of life and injury of the insurgent and any other person which may potentially be affected by the use of lethal force. Thus, cognizant of the intent to kill implied in the targeting of the insurgent, the counterinsurgent forces may only apply lethal force in a manner and to a degree which is objectively strictly necessary and proportionate to attain the removal of the threat.
Necessity in temporal terms implies that the counterinsurgent is prohibited from targeting insurgents when this measure is *not yet* absolutely necessary, e.g. when the threat to human life is merely hypothetical, or has not matured to a sufficient level of concreteness and immediacy. In the alternative, the counterinsurgent is prohibited from targeting insurgents when this measure is no longer absolutely necessary, e.g. when a threat to human life has subsided following an insurgent's surrender. This implies that the counterinsurgent is under an obligation to constantly reassess the absolute necessity to resort to the measure of targeting in relation to the desired removal of the threat.

d) Precautionary Measures

The counterinsurgent is under an obligation to take precautionary measures 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. This obligation extends from the training and education-phase

to the actual execution of the targeting operation, and includes the issuing of clear rules of engagement and equipment aimed to facilitate that lethal force is used as a measure of last resort. Of particular relevance in the context of targeting insurgents as understood in the present study is that despite a decision to resort to targeting as a measure of intentional killing of an insurgent, the requirement of precaution entails that counterinsurgents are under an obligation to ensure that resort be taken to measures of potentially lethal force, or non-lethal force once circumstances change such that the intentional use of lethal force is no longer absolutely necessary. Overall, the counterinsurgent must be aware that the pre-planned targeting of insurgents, whilst perhaps serving a legitimate aim, and otherwise in conformity with requirements of absolute necessity, is generally incompatible with the requirement of precaution. As a result, the measure of targeting as a lawful measure may be decided upon more in an *ad hoc*-fashion in the presence of a concrete and immediate threat, and is clearly not permissible as a standardized, policy-based measure.

e) Investigation

The counterinsurgent is under an obligation to investigate the loss of life or injury to individuals arising from a targeting operation, and to compensate victims in case of unlawful deprivation of life.

2.2. Normative Paradigm of Hostilities

In sum, the comparative analysis of IHRL and LOAC demonstrates that counterinsurgent forces, when targeting insurgents as a measure of hostilities, are to comply with the following requirements forming part of the normative paradigm of hostilities.

a) Distinction

The counterinsurgent State may only target insurgents who qualify as lawful military objectives under the law of hostilities, i.e. that the insurgent is an individual who is not, or no longer protected from direct attack as a result of his direct participation in hostilities. Consequently, the counterinsurgent must refrain from the *intended* targeting of insurgents who qualify as protected persons under the law of hostilities. Such targeting constitutes indiscriminate attacks, prohibited under the law of hostilities. In case of doubt, the counterinsurgent must consider the insurgents to be civilians under the law of hostilities. The requirement of distinction thus implies that the mere designation of an individual as an insurgent, e.g. by proclamation or as a result of his fulfilling requirements set out in domestic law or policy is not by itself sufficient to conclude upon the absence of immunity against direct attack, but is subject to a more nuanced determination of the position of the individual under the law of hostilities. (While inherently part of the requirement to take precautionary measures), in the planning and decision-phase of a targeting, the counterinsurgent must do everything feasible to verify that the insurgents to be attacked are indeed lawful military objectives under the law of hostilities. In the event that *during execution* of the targeting it becomes apparent that the objective is not a lawful military objective, the operation must be cancelled or suspended.

b) Military Necessity

Once it has been established that an insurgent qualifies as a lawful military objective under the law of hostilities, the military necessity to render him *hors de combat* – to include by means of targeting – is presumed to be inherent and needs not to be established separately. His

targeting may take place at any time and in any place provided this is not otherwise prohibited under LOAC.

c) Means and Methods

The targeting must take place by means and methods lawful under the law of hostilities. In addition, the counterinsurgent may only employs means and methods which can be directed at the targetable insurgents, and the effects of which can be limited. Failure to do so amounts to a prohibited indiscriminate attack.

d) Proportionality

In the event that civilians and civilian objects *collocate* with targetable insurgents, additional requirements must be complied with. These requirements entail, *firstly*, that the counterinsurgent is under an obligation to refrain from attacks by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area – for example insurgent hot spots – containing a similar concentration of civilians or civilian objects. *Secondly*, any loss and injury to civilian life and damage to civilian objects must be *incidental*, not intended, and may not be excessive to the concrete and direct military advantage anticipated. *Thirdly*, the law of hostilities imposes upon the counterinsurgent an obligation to determine (1) the concrete and direct military advantage anticipated from the targeting of the insurgents; (2) the collateral damage to be expected; and (3) the excessiveness of such expected collateral damage in relation to the anticipated concrete and direct military advantage.

e) Precautionary Measures

The counterinsurgent is required, at all times, to take precautionary measures in order to avoid, or to minimize injury or death of civilian life, or destruction of civilian property. Besides the aforementioned requirement to assess whether a target constitutes a lawful military objective, the requirement to take precautionary measures includes a range of obligations. In so far this concern collateral damage that is deemed *excessive* in relation to the concrete and direct military advantage anticipated, the counterinsurgent must, *firstly*, refrain from *deciding to launch* the attack. *Secondly*, the targeting must be postponed or cancelled if, following a decision to launch an attack, it becomes nonetheless apparent that the collateral damage is deemed to be excessive in relation to the concrete and direct military advantage anticipated. In the event that loss and injury to civilian life and damage to civilian objects is likely to occur, but is considered *not* to be *excessive* in relation to the direct and concrete military advantage anticipated, the counterinsurgent must, *firstly*, 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 or civilian life, injury to civilians and damage to civilian objects; *Secondly*, when a choice is possible between several targetable insurgents for obtaining a similar military advantage, only that insurgent may be targeted which may be expected to cause the least danger to civilian lives and to civilian objects; *Thirdly*, the counterinsurgent must issue effective advance warnings to the civilian population, unless circumstances do no permit.

Counterinsurgency doctrine, policy and practice impose upon counterinsurgent forces restrictions that go beyond those found in the law of hostilities. Given their policy-based nature, these restrictions leave the normative substance of the law of hostilities fully intact.

Part C.2. Operational Detention

Introduction

In the previous part, we have examined the interplay between IHRL and LOAC in the context of targeting. In the present part, the assumption is that the insurgent is not targeted, but detained.

The research question to answered in this part is:

> in light of contemporary counterinsurgency doctrine, how do the relevant normative frameworks of IHRL and LOAC governing operational detention interrelate and what does this tell us about the permissible scope of conduct in operational practice?

The approach adopted in this part is similar to that in Part B. This means that the first two chapters (Chapters VIII and IX) in this part examine the concept of operational detention of insurgents in IHRL and LOAC respectively. Chapter X examines, *firstly*, the interplay of both regimes in, what will be referred to as, the *normative paradigm of security detention* and the *normative paradigm of criminal detention* – both of which are sub-paradigms of the normative paradigm of law enforcement specifically dealing with operational detention. *Secondly*, it aims to determine what are the incentives that drive the interplay between both normative paradigms.

Chapter IX IHRL

Inherent to the concept of operational detention are a number of subjects that each find protection in IHRL. It not merely affects a person's liberty and security, but pertains to the safeguards that must be afforded to a detainee in the criminal or administrative process underlying his detention, his treatment in detention, and his transfer to another authority. This chapter aims to further examine the substantive content of the requirements that may be distilled from the IHRL-based norms relating to these subjects. These concern the substantive requirements of a sufficient legal basis and of strict necessity and proportionality as well as a number of procedural requirements. In addition, attention will be had to the fair trial guarantees; requirements pertaining to the treatment and conditions of detention; and requirements pertaining to the extra-territorial transfer of individuals deprived of their liberty. These will be dealt with in paragraph 2. Paragraph 1 will briefly address the notion of 'arbitrariness' central the prohibition of arbitrary deprivation of liberty, which forms the center of the present examination.

1. 'Arbitrary'?

As noted, Article 9 ICCPR and Article 7 ACHR each prohibit the *arbitrary* deprivation of liberty. In *Mukong v. Cameroon*, the UNHRC concluded that "[t]he drafting history […] confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of *inappropriateness*, *injustice*, *lack of predictability* and *due process of law*."(1994d)[1758] The term 'arbitrary' is absent in Article 5 ECHR, which instead lists the grounds on which deprivation of liberty may take place. Nonetheless, in view of Article 5 ECHR, the ECtHR has opined that "the expressions 'lawful' and 'in accordance with a procedure prescribed by law' in Article 5 § 1 stipulate not only full compliance with the procedural and substantive rules of national law, but also that any deprivation of liberty be consistent with the purpose of Article 5 and *not arbitrary* […]."[1759] It may therefore be concluded that the lawfulness of a deprivation of liberty under IHRL is subject to the determination of whether the deprivation of liberty was arbitrary or not.

2. Normative Substance of the Requirements of (Non-)Arbitrary Deprivation of Liberty

2.1. The Requirement of a Sufficient Legal Basis

A first substantive requirement for lawful deprivation of life is the requirement of a sufficient legal basis. It follows from the universal principle of *legality*, underpinning law as a whole. It entails that an individual may not be deprived of his personal and physical liberty

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[1758] (1994d), *Womah Mukong v. Cameroon, Comm. No. 458/1991 of 21 July 1994*; also Nowak (2005), §§ 29-30.

[1759] (1998j), *Steel and Others v. the United Kingdom, App. No. 24838/94, Judgment of 23 September 1998*, § 54; (1981d), *X v. the United Kingdom, App. No. 7215/75, Judgment 5 November 1981*, § 43; (1996a), *Aksoy v. Turkey, App. No. 21987/93, Judgment of 18 December 1996*, § 76.

except on the grounds serving a legitimate aim (*substantive* aspect) and under the conditions (*procedural* aspect) set forth, *firstly*, in an accessible, foreseeable and certain domestic law, and *secondly*, in IHRL.[1760]

In relation to domestic law, the ECtHR has held that

> [i]t is essential that the applicable national law meet the standard of 'lawfulness' set by the Convention, which requires that all law, whether written or unwritten, be *sufficiently precise to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in all circumstances, the consequences which a given action may entail.*"[1761]

It follows that a legal basis for deprivation of liberty may not be secret or unpublished. Thus, the requirement of a sufficient legal basis is "[…] violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation."[1762] The requirement of a valid *ground* for deprivation of liberty under IHRL concerns not only the initial reason for such deprivation, but also the reason for *continued* deprivation of liberty. The absence of a valid ground violates the principle of legality and renders the deprivation of liberty arbitrary.[1763]

While the normative framework of IHRL prohibits the deprivation of liberty as a general rule, it is undisputed and generally recognized that the deprivation of liberty for reasons related to *criminal justice*, i.e. following an arrest, during the pre-trial and resulting from a conviction for the violation of a State's penal codes, is lawful. Strict safeguards, however, regulate such detention. Thus, in the context of an insurgency, the members of an insurgency movement, or other persons otherwise affiliated with the insurgency may be deprived of their liberty as criminal detainees, provided that there is a sufficient legal basis in domestic law that permits such detention.

The legal basis for *security detention* within the ICCPR, ACHR and ECHR, however, is less certain. Indeed, neither the ICCPR, nor the ACHR provides an explicit basis for security detention. On the other hand, neither instrument explicitly rules out the possibility for security detention as an exception to the prohibition of arbitrary deprivation of liberty. In the absence of specifically listed grounds for deprivation of liberty, the language of the relevant provisions of the ICCPR and the ACHR suggests that, in principle, the deprivation of liberty may serve *any* aim, as long as it takes place "on such grounds and in accordance with such procedure as are established by law."[1764] In relation to the ICCPR, the permissibility of security detention in terms of serving a legitimate aim may also be concluded from the fact that the UNHRC seems to acknowledge security detention – as a form of preventive detention – as a possibility in its General Comment 8,

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[1760] Principle IV, IACiHR Principles. See also Article 9(1) ICCPR; Article 7(2) ACHR; Article XXV ADHR; Article 5(1) ECHR; Principles 9 and 12, UN Body of Principles. Also: Shah (2010), 308.

[1761] (1998j), *Steel and Others v. the United Kingdom, App. No. 24838/94, Judgment of 23 September 1998*, § 54.

[1762] (1997g), *C. McLawrence v. Jamaica, Comm. No. 702/1996 of 18 July 1997*, § 5.5

[1763] (1984a), *Ann Maria Garcia Lanza de Netto v. Uruguay, Comm. No. 8/1977, U.N. Doc. CCPR/C/OP/1*; (1995c), *Constitutional Rights Project v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 60/91 (1995)*; (1980d), *William Torres Ramirez v. Uruguay, Comm. No. R. 1/4 of 23 July 1980*.

[1764] Article 9(1) ICCPR; Article 7(3) ACHR. See also Article XXV ADHR; Article 9 UDHR. This is further corroborated by the HRC, which in its General Comment 8 states that "paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc." Human Rights Committee (1982b), § 1. Also: Cassel (2009), 6.

> […] *if so-called preventive detention is used, for reasons of public security*, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted."[1765]

However, to date, the UNHRC has not enunciated whether derogation from Article 9(1) ICCPR is required in order to render the internment for security reasons lawful.

Similarly, the IACiHR has explicitly addressed the issue of security detention. Principle III(2) of the IACiHR Principles and Best Practices for example states that

> The law shall ensure that personal liberty is the general rule in judicial and administrative procedures, and that preventive deprivation of liberty is applied as an exception, in accordance with international human rights instruments. […]
> Preventive deprivation of liberty is a precautionary measure, not a punitive one, which shall additionally comply with the principles of legality, the presumption of innocence, need, and proportionality, to the extent strictly necessary in a democratic society.[1766]

As concluded by Cassel, generally, under the ICCPR and ACHR, "[…], the question is not whether security detention is permitted, but on what grounds, pursuant to what procedures, and under what conditions such detention would be acceptable."[1767]

Case law relating to the detention by the US of individuals in Guantanamo Bay indicates that, despite the absence of an explicit prohibition thereto, detention may not take place for just any purpose. As concluded by the UN Chairperson of the Working Group on Arbitrary Detentions and the UN Special Rapporteur on the Independence of Judges and Lawyers, "information obtained from reliable sources and the interviews […] with former Guantanamo Bay detainees confirm, […] that the *objective* of the ongoing detention is not primarily to prevent combatants from taking up arms against the United States again, but to obtain information and gather intelligence on the Al-Qaida network."[1768] This conclusion contributed to the overall determination that "the ongoing detention of Guantanamo Bay detainees as 'enemy combatants' does in fact constitute an arbitrary deprivation of the right to personal liberty."[1769]

The situation regarding security detention under the ECHR is yet again different. As noted, Article 5 ECHR specifically and exhaustively lists the grounds for deprivation of liberty. The restrictive list of Article 5 ECHR implies that, in principle, the deprivation of liberty on other grounds than those listed is unlawful under IHRL, even if this ground can be found in a State's domestic law. While there is no doubt that insurgents may be arrested and detained for reasons of criminal justice, the limited approach clearly has some influence on the lawfulness of security detentions of insurgents. In the absence of a specific ground listed in Article 5 ECHR permitting security detention, such detention may arguably follow from the interpretation of any of the grounds listed in Article 5 ECHR. In that respect, only Article 5(1)(b) and (c) ECHR seem to be suitable candidates. On closer inspection, however, it

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1765 Human Rights Committee (1982b), § 4 (emhasis added).
1766 Principle III(2), IACiHR Principles and Best Practices; IACiHR (2002), § 124.
1767 Cassel (2009), 6.
1768 United Nations Chairperson of the Working Group on Arbitrary Detentions et al. (2006), § 23.
1769 United Nations Chairperson of the Working Group on Arbitrary Detentions et al. (2006), § 20.

must be concluded that these alternatives were not intended, and to date have not been reasonably interpreted to allow for security detention.[1770] Both will briefly be addressed.

Firstly, Article 5(1)(b) ECHR permits detention "in order to secure the fulfillment of any obligation prescribed by law." However, as explained by the ECtHR in *Engel v. the Netherlands*, these words

> concern only cases where the law permits the detention of a person to compel him to fulfil a specific and concrete obligation which he has until then failed to satisfy. A wide interpretation would entail consequences incompatible with the notion of the rule of law from which the whole Convention draws its inspiration […]. It would justify, for example, administrative internment meant to compel a citizen to discharge, in relation to any point whatever, his general duty of obedience to the law.[1771]

Examples of such "specific and concrete obligations" are the duty to perform military service, or the duty to file a tax form.[1772] Article 5(1)(b) ECHR does not cover "obligations to comply with the law generally, so that it does not justify preventive detention of the sort that a state might introduce in an emergency situation."[1773]

In turn, Article 5(1)(c) ECHR refers to "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or *when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so*." The majority opinion among scholars appears to be that this provision can be applied in a criminal law-context only.[1774] As concluded by Harris, O'Boyle and Warbrick:

> […] at first sight, Article 5(1)(c) could be read as authorizing a general power of preventive detention […]. This interpretation was rejected in Lawless v. Ireland, as "leading to conclusions repugnant to the fundamental principles of the Convention."[…] [T]he Court rejected the defendant government's argument that the detention of the applicant, a suspected IRA activist, under a statute that permitted the internment of persons "engaged in activities […] prejudicial to the […] security of the state," could be justified as being "necessary to prevent his committing an offence". […] [T]he detention of an interned person under the statute was not effected with the purpose of initiating a criminal prosecution.[1775]

To open up Article 5(1)(c) to detention for security reasons would be tantamount to authorizing the temporally unlimited detention of anyone suspected of committing a criminal offence in the (near) future based on an *executive decision*. "Such an assumption, with all its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention."[1776]

In *Guzzardi v. Italy*, in relation to the detention of a suspected member of the Italian *maffia*, the ECtHR points at the difference between preventive detention for security reasons and

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[1770] (1961b), *Lawless v. Ireland, App. No. 332/57, Judgment of 1 July 1961 (Merits)*, §§ 8-15; (1980a), *Guzzardi v. Italy, App. No. 7367/76, ECtHR (6 November 1980)*, §§ 101-102. See also Harris, O'Boyle & Warbrick (1995), 113 and 117.

[1771] (1976b), *Engel and others v. The Netherlands, App. Nos. 5100/71; 5101/71; 5102/71; 5102/72, Judgment of 8 June 1976 (Merits)*, § 69.

[1772] Harris, O'Boyle & Warbrick (1995), 112-113.

[1773] Harris, O'Boyle & Warbrick (1995), 113, note 3.

[1774] Harris, O'Boyle & Warbrick (1995), 112-113.

[1775] Harris, O'Boyle & Warbrick (1995), 181, citing (1961b), *Lawless v. Ireland, App. No. 332/57, Judgment of 1 July 1961 (Merits)*, §§ 51-53. However: Sassòli (2009), 448, contending that it appears difficult to draw this conclusion from the jurisprudence of the ECtHR, which in *Lawless v. England obiter dicta* points at a contradictory conclusion.

[1776] (1961b), *Lawless v. Ireland, App. No. 332/57, Judgment of 1 July 1961 (Merits)*, § 14.

preventive detention for purposes of criminal prosecution, barring the former from its scope *ratione materiae*:

> In any event, the phrase under examination is not adapted to a policy of general prevention directed against an individual or a category of individuals who, like mafiosi, present a danger on account of their continuing propensity to crime; it does no more than afford the Contracting States a means of preventing a concrete and specific offence. This can be seen both from the use of the singular ("an offence", "celle-ci" in the French text; see the Matznetter judgment of 10 November 1969, Series A no. 10, pp. 40 and 43, separate opinions of Mr. Balladore Pallieri and Mr. Zekia) and from the object of Article 5 (art. 5), namely to ensure that no one should be dispossessed of his liberty in an arbitrary fashion (see the above-mentioned Winterwerp judgment, p. 16, par. 37).[1777]

In *Jecius v. Lithouania*, the ECtHR came to a similar conclusion and ruled out the preventive detention of individuals based on Article 5(1)(c):

> The Government stated that the applicant's preventive detention was compatible with Article 5 § 1 (c) of the Convention as […] the Code of Criminal Procedure had permitted detention with a view to preventing the commission of banditry, criminal association and terrorizing a person. […] The Court observes that a person may be deprived of his liberty only for the purposes specified in Article 5 § 1. A person may be detained under Article 5 § 1 (c) *only in the context of criminal proceedings*, for the purpose of bringing him before the competent legal authority on suspicion of his having committed an offence […]. The Court considers therefore that preventive detention of the kind found in the present case is not permitted by Article 5 § 1 (c).[1778]

Shortly after the attacks of 9/11, the UK adopted an immigration law authorizing the preventive detention of suspected terrorists who were non-UK nationals and who could not be transferred to their States of origin or elsewhere for fear that they may suffer torture. The UK Government argued that such detention was justified under Article 5(1)(c) ECHR as they were immigration measures. The ECtHR, however, held that the detention found no basis in Article 5(1). In its view, the detention measures were not taken with a view to transfer as such transfer was not foreseeable in the first place.[1779]

The above is not to imply that security detention under the ECHR is unlawful under any circumstances. The limited list of Article 5 ECHR may be circumvented in two ways.

Firstly, Article 5 ECHR may be derogated from in times of emergency, provided such derogation itself is lawful. In other words, a State may circumvent the exhaustive list of legitimate aims in Article 5(1) ECHR via derogation. The extent to which derogation is possible, however, is subject to limitations, as was discussed in Part A. In fact, in the case of *Al-Jedda v. The United Kingdom*, the ECtHR held that, for security detention to be lawful, derogation is always required, even when the security detention is required for imperative reasons of security as mandated by LOAC.[1780]

Secondly, it follows from the case of *Al-Jedda* that security detention does not constitute a violation of Article 5 ECHR when it is required as an obligation by the UNSC.[1781]

[1777] (1980b), *Guzzardi v. Italy, App. No. 7367/76, Judgment of 6 November 1980*, § 102.
[1778] (2000i), *Jecius v. Lithouania, App. No. 34578/97, Judgment of 31 July 2000.*
[1779] (2009a), *A. and Others v. United Kingdom, App. No. 3455/05, Judgment of 19 February 2009*, 29.
[1780] (2011a), *Al-Jedda v. United Kingdom, App. No. 27021/08, Judgment of 7 July 2011.*
[1781] (2011a), *Al-Jedda v. United Kingdom, App. No. 27021/08, Judgment of 7 July 2011.*

2.2. The Requirements of Strict Necessity and Proportionality

The conventional texts all express the presumption that everyone has the right to liberty and security of the person, and that deviations from this presumption are permissible only in exceptional circumstances. It follows therefore that, for a deprivation of liberty to be lawful, the State must demonstrate that, in view of the concrete circumstances at hand, the measure leading to the deprivation of liberty is strictly required to attain a recognized legitimate objective.[1782] More specifically, it may be argued that any deprivation of liberty must comply with the elements of *qualitative*, *quantitative* and *temporal* necessity.

In *qualitative* terms, the deprivation of liberty is always an *exceptional* measure,[1783] and must *firstly* serve, and be proportionate to, a legitimate aim. For example, according to Article 5(1)(c) ECHR a person may be deprived of his liberty "[…] for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so." The necessity for deprivation of liberty follows from the individual's risk of flight; the risk of an interference with the course of justice; the need to prevent crime; or the need to preserve public order. However, the necessity for a deprivation of liberty under Article 5(1)(c) ECHR is limited to criminal offences only, and may, as noted, not extend to preventive deprivation of liberty for reasons of security.[1784] Pre-trial detention therefore cannot be applied as a "general rule".[1785] Similarly, deprivation of liberty may not result from mere convenience, or be used as a pretext to attain another goal,[1786] or simply find no basis whatsoever in, for example, a criminal offence.[1787]
Secondly, qualitative necessity demands that there must be a *causal relation* between, on the one hand, the attainable legitimate objective of the deprivation of liberty, and, on the other hand, the *necessity* to deprive the individual of his liberty. Analogous to its meaning in relation to the deprivation of life, this aspect of qualitative necessity means that the deprivation of liberty must be 'strictly unavoidable' in the sense that less harmful alternatives remain ineffective or without any promise of achieving the legitimate purpose. In other words, the non-use of available, less harmful alternatives may render the deprivation of liberty arbitrary.[1788]

[1782] (1997a), *A. v Australia, Comm. No. 560/93 of 3 April 1997*, § 9.2; (1995d), *Garcia v. Peru, Case 11.006, Decision of 17 February 1995*, § 47.

[1783] (2000c), *Baumgartner v. Germany, Comm. No. 960/2000*, § 9.4.

[1784] (1994d), *Womah Mukong v. Cameroon, Comm. No. 458/1991 of 21 July 1994*, § 9.8. As stated by the IACiHR Principles, "[i]t shall only be applied within the strictly necessary limits to ensure that the person will not impede the efficient development of the investigations nor will evade justice, provided that the competent authority examines the facts and demonstrates that the aforesaid requirements have been met in the concrete case." See also Nowak (2005), 233; Cassel (2008), 825; Principle III.2, IACiHR Principles.

[1785] Article 9(3) ICCPR; Principle III.2, IACiHR Principles.

[1786] (1989a), *Ciulla v. Italy, App. No. 11152/84, Judgment of 22 Febuary 1989*.

[1787] (1989b), *Lukanov v. Bulgaria, App. No. 21915/93, Judgment of 29 November 1989*

[1788] For example, the deprivation of liberty on the basis of Article 5(1) (e), which permits the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of un-sound mind, alcoholics or drug addicts or vagrants, is arbitrary when such person cannot "be considered as occasionally dangerous for public safety" or "that their own interests may necessitate their detention." (1980b), *Guzzardi v. Italy, App. No. 7367/76, Judgment of 6 November 1980*, § 98.

The *quantitative* test of necessity demands that the interference with the liberty and security of the person is strictly proportionate to the legitimate aim pursued.[1789] In other words, it requires an assessment of whether the deprivation of liberty is more harmful to the liberty and security of the person than the legitimate objective of the operation necessitates. For example, a deprivation of liberty must take place on the basis of an individual decision taken in a specific case, and may not take place on a discriminatory basis (i.e. by focusing only on person's because of their sex, religion, ethnic background, *et cetera*). The deprivation of liberty of a whole group of individuals as a collective measure – for example because of their suspected membership to an insurgency movement – is disproportionate, even in times of emergency.

Finally, the requirement of strict necessity involves a *temporal* aspect. This aspect embodies one of the most fundamental aspects of the deprivation of liberty and implies that the deprivation of liberty is unlawful when, at the very moment of its application, it is not yet or no longer strictly necessary to achieve the desired purpose.[1790] Thus, a deprivation of liberty may not be applied in the anticipation of a necessity that is merely *presumed* to become manifest. IHRL requires the manifestation of a *concrete and specific* necessity, only *in response* to which force may be applied. Similarly, deprivation of liberty may no longer be applied when the necessity has subsided, partially or totally. It protects individuals against indefinite detention and is an aspect of the right to liberty and security of the person that is non-derogable. It is a responsibility of the detaining State to demonstrate the continued necessity to detain an individual. However, the detainee has the right to challenge the grounds for his detention before an independent court or authority. This right of *habeas corpus* will be discussed in more detail below.

While relevant to any form of deprivation of liberty, the requirement of strict necessity is particularly relevant to security detention, which is generally agreed to be permissible as an exceptional measure only, short of less harmful alternatives and requiring a continuing assessment of the threat posed by the insurgent to the security.

2.3. Requirements Pertaining to Procedural Safeguards

The mere fact that a State complies with its substantive obligations for lawful deprivation of liberty does not imply that the deprivation of liberty cannot be otherwise arbitrary. IHRL provides the individual with an important set of procedural guarantees that imposes upon the State commensurate obligations. These will be addressed below.

[1789] Human Rights Committee (1982b), §§ 1-4. (1990d), *Van Alphen v. Netherlands, Comm. No. 305/1988 of 15 August 1990*, § 5.8; (1999k), *Spakmo v. Norway, Comm.No. 631/1995, UN Doc A/55/40 (vol. II)*, § 6.3; (1997a), *A. v Australia, Comm. No. 560/93 of 3 April 1997*, § 9.1; (1995d), *Garcia v. Peru, Case 11.006, Decision of 17 February 1995*, § 47.

[1790] Principle III(1), IACiHR Principles: "As a general rule, the deprivation of liberty of persons shall be applied for the minimum *necessary* period" (emphasis added); United Nations (2003b), § 60; IACiHR (1977), Section II, Part I. Also: Cassel (2009), 2.

2.3.1. The Requirement of Registration of the Detention in an Officially Recognized Place of Detention

Any person detained must be registered and held in an *officially recognized* place of detention.[1791] *Secret* detention is prohibited. Thus, States are required to record the reasons for the arrest, the time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority; the identity of the law enforcement officials concerned; and the precise information concerning the place of custody. The denial, or refusal to deny or confirm, or the active concealment of the fact that an individual is detained amounts to *unacknowledged* detention, which is prohibited under international law and may amount to cruel and inhumane treatment.[1792] In addition, these records of detention must be actively communicated to the detained person, his family, or his counsel, if any, in the form prescribed by law.[1793] Non-compliance with this aspect of the requirement of registration amounts to *unannounced* detention.

2.3.2. The Requirement to Grant a Detainee the Right to Communicate with the Outside World

Detaining States are required to permit the detainee to communicate with the outside world, i.e. family, friends, independent lawyers, the judiciary or doctors.[1794] While communication may be denied for a few days, States are generally prohibited from subjecting detainees to prolonged *incommunicado* detentions, save some exceptions.[1795] It has been acknowledged that prolonged deprivation of communication may amount to torture or cruel or inhuman treatment. As held by the IACtHR, in *Velasquez Rodriguez v. Honduras*:

> [T]he mere subjection of an individual to prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment which harms the psychological and moral integrity of the person, and violates the right of every detainee […] to treatment respectful of his dignity.[1796]

[1791] Principles 12 and 16, UN Body of Principles; Principle IX, IACiHR Principles. See also Art. 10 (1) UN Declaration on the Protection of All Persons from Enforced Disappearance, and Principle 6, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by UN Economic and Social Council.

[1792] Principle III.1 IACiHR Principles: "The law shall prohibit, in all circumstances, […] secret deprivation of liberty since [it] […] constitute[s] cruel and inhuman treatment."

[1793] See also Principles 12(1)(b) and (d) of the UN Body of Principles.

[1794] Principles III.1 and XVIII IACiHR Principles

[1795] Principles 15, 16(4) and 18(3) UN Body of Principles

[1796] (1988e), *Velasquez Rodriguez v. Honduras, Judgment of 29 July 1988*, § 187. See also (1994a), *El-Megreisi v. Libyan Arab Jamahiriya, Comm. No. 440/1990 of 23 March 1994* , § 5.4: "Mohammed El-Megreisi was detained incommunicado for more than three years, until April 1992, when he was allowed a visit by his wife, and that after that date he has again been detained incommunicado and in a secret location. Having regard to these facts, the Committee finds that Mr. Mohammed Bashir El- Megreisi, by being subjected to prolonged incommunicado detention in an unknown location, is the victim of torture and cruel and inhuman treatment, in violation of articles 7 and 10, paragraph 1, of the Covenant." See also (2003a), *Concluding Observations of the Human Rights Committee: Israel (21 Augustus 2003)*, § 13: "the use of prolonged detention without any access to a lawyer or other persons of the outside world violates Articles of the Covenant (Arts. 7, 9, 10 and 14, para. 3 (b)".

2.3.3. The Requirement of Prompt Notification of Reasons of Arrest and Detention and Access to Consular Rights.

Detaining States are under an obligation to notify detainees of the reasons for their arrest and detention.[1797] This obligation embraces both criminal detentions and security detentions, as confirmed by HRC, in General Comment 8.[1798] As explained by Shah, "this elementary safeguard exists to ensure that individuals know why they are being detained, which serves both to reduce the distress of being incarcerated, as well as allowing detainees to challenge the reasons for their detention."[1799] It may therefore be said to constitute an element of the obligation of humane treatment, "as a person's uncertainty about the reasons for his or her detention is known in practice to constitute a source of acute psychological stress."[1800]

The reasons for arrest must be given in a language the individual understands and contain sufficiently detailed information to indicate why the individual is being detained, so the individual can take immediate steps to challenge, and request a decision on the lawfulness of his security detention.[1801] Thus, the mere statement that an individual has breached State security is insufficient, as the UNHRC held in *Ilombe and Shandwe v. Democratic Republic of Congo*.[1802] In relation to foreign detainees, the detaining State is obliged to notify the detainee of his right to consular communication.[1803]

The reasons for arrest must be provided *promptly*, i.e. within reasonable period of time after the moment of arrest, though not necessarily immediately thereafter.[1804] Seven hours is considered reasonable;[1805] seven days, however, is not.[1806]

2.3.4. The Requirement to Provide a Person Deprived of Liberty with an Opportunity to Challenge the Lawfulness of Detention (*Habeas Corpus*)

A requirement of controversy in relation to security detention in particular is the granting of *habeas corpus*, which entails that a detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.[1807] As explained by Kälin:

> The right to *habeas corpus*, i.e. the right to "take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful" must be "real and not merely formal", i.e. effective. This means that, "court review of the lawfulness of detention under Article 9, paragraph 4 […] must include the possibility of ordering release, [and] is not limited to mere compliance of the detention

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[1797] Article 9(2) ICCPR; Article 7(4) ACHR; Article 5(2) ECHR, Principle 10, UN Basic Principles; Principle V, IACiHR Principles.

[1798] Human Rights Committee (1982b), § 1.

[1799] Shah (2010), 309.

[1800] Pejic (2005), 384.

[1801] Pejic (2005), 384.

[1802] (2006c), *Ilombe and Shandwe v. Democratic Republic of Congo, Comm. No. 1177/2003 of 17 March 2006*.

[1803] Principle 16(2), UN Body of Principles; Principle V, IACiHR Principles.

[1804] Principle 14, UN Body of Principles;

[1805] (1990c), *Fox, Campbell and Hartley v. United Kingdom, App. Nos. 12244/86, 12245/86 and 12383/86, Decision of 30 August 1990*, § 42.

[1806] (1996i), *Peter Grant v. Jamaica, Comm. No. 597/1994 of 22 March 1996*, § 8.1.

[1807] Articles 9(4) ICCPR; 5(4) ECHR; 7(6) jo. 25 ACHR; 7(1)(a) ACHPR; Principle 32(1) of the UN Body of Principles; Article V, IACiHR Principles; Human Rights Committee (1982b), § 1 (emphasis added).

with domestic law."[1808] In this regard, the Committee told Columbia that legislation allowing the security forces to carry out arrests without judicial order or to detain them in administrative detention without access to a court would violate Articles 9, 14 and 17.[1809] Sri Lanka was criticized that "the Prevention of Terrorism Act (PTA) remains in force and that several of its provisions are incompatible with the Covenant (Arts. 4, 9 and 14)" including provisions allowing "arrest without a warrant and permit[ing] detention for an initial period of 72 hours without the person being produced before the court […], and thereafter for up to 18 months on the basis of an administrative order issued by the Minister of Defence".[1810]

It thus follows that the right to *habeas corpus* is violated when detainees are held *incommunicado*.[1811] Also, the right of *habeas corpus* is subject to the principle of *equality of arms*, i.e. the detainee "must be allowed access to a lawyer and to appear in court to argue his or her case on equal terms with the prosecuting or other authorities; this right also implies that the detained person must have access to all relevant information concerning his or her case."[1812] The lawfulness of the detention must be determined by an *independent and impartial court*, and not by a representative of the executive branch, such as a government minister.[1813]

IHRL does not explicitly demand a period for judicial review. However, it may be interpreted to require judicial review on a periodic basis.[1814] It has however been argued that "if the circumstances surrounding the detention have not changed, or the detention has only been for a short period of time, then there is no requirement of periodic review."[1815]

While conventional IHRL does not prohibit derogation from the right to *habeas corpus*, (quasi-)judicial human rights bodies such as the HRC,[1816] organizations such as the ICRC,[1817] as well as legal experts[1818] have claimed its non-derogability. At least in so far IHRL mandates this, the right to *habeas corpus* must be granted to all insurgents in operational detention.

[1808] (1997a), *A. v Australia, Comm. No. 560/93 of 3 April 1997*, § 9.5.

[1809] (2004e), *Concluding observations on Columbia's Fifth Periodic Report, CCPR/CO/80/COL (25 March 2004)*, § 9.

[1810] (2003c), *Concluding Observations on Sri Lanka's Combined Fourth and Fifth Periodic Reports, CCPR/CO/79/LKA (1 December 2003)*, § 13.

[1811] (1982c), *H. G. Dermit on behalf of G. I. and H. H. Dermit Barbato, Comm. No. 84/1981, (21 October 1982), UN doc. GAOR, A/38/40*, § 10.

[1812] United Nations (2003a), 207-208.

[1813] United Nations (2003a), 199; (1999a), *Amnesty International and Others v. Sudan, Comm. Nos. 48/90, 50/91, 52/91 and 89/93, Decision, 26th Session, Kigali, 1–15 November 1999*, § 60; (1999g), *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria, Comm. Nos. 143/95 and 159/96, 26th Session, Kigali, 1–15 November 1999*, §§ 31 and 34; (1961b), *Lawless v. Ireland, App. No. 332/57, Judgment of 1 July 1961 (Merits)*, § 14; (1978b), *Ireland v. the United Kingdom, Case No. 5310/71, Judgment of 18 January 1978*, §§ 199-200.

[1814] (1998b), *Assenov and Others v. Bulgaria, App.No. 24760/94, Judgment of 28 October 1998*, § 162, in which it was held that Article 5(4) "requires that a person detained on remand must be able to take proceedings *at reasonable intervals* to challenge the lawfulness of his detention" and, "in view of the assumption under the Convention that such detention is to be of strictly limited duration, […] *periodic review at short intervals is called for* […]".

[1815] Shah (2010), 311.

[1816] Human Rights Committee (2001c), 16; (1987b), *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, January 30, 1987*; (1987d), *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, October 6, 1987*.

[1817] ICRC (2008d).

[1818] Cassel (2008), 829 and footnotes 130-132 (concerning the non-derogability of *habeas corpus*).

2.3.5. The Requirement of Compensation for Unlawful Detention

In the finding of an unlawful deprivation of liberty, the detaining State is under an obligation to compensate for the damages incurred as a result of the detention.[1819]

2.4. Additional Procedural Requirements for Criminal Detainees

In addition to the general procedural requirements set out above, two procedural requirements specific to criminal detainees follow from Article 9(3) ICCPR and Article 5(3) ECHR, to be precise:

- the right be brought promptly before a judge or other officer authorized by law to exercise judicial power;[1820]
- the right to trial within a reasonable time or to release pending trial.[1821]

2.5. Requirements Pertaining to Fair Trial Rights

Other fundamental guarantees to be granted to detainees are fair trial guarantees, "aimed at the proper administration of justice."[1822] The right to a fair trial is acknowledged widely throughout the relevant frameworks of IHRL.[1823]
Some fair trial guarantees, and their commensurate requirements, enjoy general application, and thus apply to both criminal and security detainees. These include the right of all persons to be treated equally before the courts and tribunals (more specifically the right of all persons to equal access to a court of first instance[1824] and the right of equality of arms and treatment without discrimination)[1825] and the right of all persons to a fair and public hearing by a competent, independent and impartial tribunal established by law[1826] (to include the

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[1819] Article 9(5) ICCPR; Article 7(5) ACHR; Article 5(5) ECHR; Article 35(1) UN Body of Principles.

[1820] Article 9(4) ICCPR; Article 7(6) ACHR; Article 18 ADHR; Article 7 AfCHPR; Principle 32 UN Basic Principles; Principles 4 and 11(3) UN Body of Principles. The initiative lies with the State, and the fulfillment of this requirement is thus not subject to a request for judicial review by the arrested individual. While 'promptly' does not mean 'immediately,' any delays must be explained and may in no case exceed a few days. See Human Rights Committee (1982b), § 2; (2004b), *Abdumalik Nazarov v. Uzbekistan, Comm. No. 911/2000,*, holding that five days delay is too long, and (1988b), *Brogan & others v. UK, App. No. 11209/84, 11234/84/11266/84, Judgment of 29 November 1988*, holding that a delay of four days and six hours is too long.

[1821] Article 9(3) ICCPR; Article 7(5) ACHR; Article 5(3) ECHR. Generally, individuals must be released, unless their prolonged detention is required "to ensure the presence of the accused at the trial, to avert interference with witnesses and other evidence, or the commission of other offences." ((1992c), *W.B.E. v. The Netherlands, Comm. No. 432/1990 of 23 October 1992*, § 6.3). The element of 'reasonable' is contextual, depending on the complexity of the case, the conduct of the accused and the efficiency of the national authorities. See Shah (2010), 313.

[1822] Human Rights Committee (1984), § 1.

[1823] Articles 10 and 11 UDHR; Article 14 ICCPR; Articles 8 and 9 ACHR; Articles 6 and 7 ECHR.

[1824] Human Rights Committee (2004b), § 9: "access to administration of justice must be effectively guaranteed in all cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice."

[1825] Equality of arms involves the obligation to ensure that all parties have the same procedural rights unless there is an objective and reasonable justification not to do so and there is no significant disadvantage of either party. Neither may trials take place on a discriminatory basis.

[1826] While not mentioned in Articles 14(2) ICCPR, Article 6(2) ECHR; Article 8(2) as non-derogable, it is recognized to be of peremptory nature by the IACiHR, see IACiHR (2002), §§ 245 and 247. The term "independent" refers to a court's ability to make decisions free from influence from any other branch of government, particularly the executive branch. For relevant case-law, see for example (1988a), *Belilos v. Switzerland, App. No. 10328/83 , Judgment of 29 April 1988*, § 64. Impartiality refers to both subjective (no

right to be tried in one's presence;[1827] the right to be tried without undue delay;[1828] the right to public proceedings).[1829]

In addition to the general fair trial guarantees, IHRL recognizes a number of fair trial guarantees specifically designed to protect criminal detainees. These include, but are not limited to:

- the right of the accused to be presumed innocent;[1830]
- the right to adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;[1831]
- the right to be tried without undue delay;[1832]
- the right to defend oneself in person or through legal assistance of one's own choosing; the right to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;[1833]
- the right to call and examine witnesses;[1834]
- the right to the free assistance of an interpreter;[1835]

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bias or prejudice from judges) and objective (ability of the court to offer guarantees to remove doubts as to their impartiality) impartiality. See, for example, (1997i), *Findlay v. United Kingdom, App. No. 22107/93, Judgment of 25 February 1997*, § 73.

[1827] This is a derogable right. A hearing *in absentia* is permissible provided the State has given effective notice of the hearing and the accused chooses not to appear. See for example (1990b), *Daniel Monguya Mbenge v. Zaire, Comm. No. 16/1977 of 25 March 1983*. The right to be present in person is also required in appeal proceedings if the appeal hears questions of both fact and law, and not only of law. See (1988c), *Ekbatani v. Sweden, App. No. 10563/83, Judgment of 26 May 1988*, § 31; (1992b), *Karttunen v. Finland, Comm. No 387/1989 of 5 November 1992*.

[1828] Article 14(3)(c) ICCPR; Article 5(3) and 6(1) ECHR; Article 8(1) ACHR; Principle 38, UN Body of Principles; Article 47 EU Charter of Fundamental Rights. This right is derogable in case of emergency. As held by the IACiHR, such delay must be subject to judicial review and may not be indefinite. (2002h), *Report on Terrorism and Human Rights (22 October 2002)*, §§ 253 and 262(c).

[1829] Article 14(1) ICCPR; Article 6(1) ECHR; Article 8(5) ACHR. See also Articles 10-11 UDHR; Article XXVI ADHR; Article 47(2) EU Charter of Fundamental Rights. This right entails, firstly, that the proceedings must be conducted publically and orally, and secondly, that the judgments must be made available to the public. See also: Human Rights Committee (2004b), § 29.

[1830] Human Rights Committee (1984), § 7; (2000f), *Gridin v. Russia, Comm. No. 770/1997 of 20 July 2000*, § 8.3; (1995a), *Allenet de Ribemont v. France, App. No. 15175/89, Judgment of 10 February 1995*, § 41. It is a duty of the State to prove the charge beyond reasonable doubt. The accused has the benefit of the doubt. This right is derogable, see Articles 14(2) ICCPR, Article 6(2) ECHR; Article 8(2) ACHR. For views to the contrary, see Human Rights Committee (2001c), §§ 11 and 16; IACiHR (2002), §§ 245 and 247.

[1831] Article 14(3) ICCPR; Article 6(3)(c) ECHR; Article 8(2)(e) ACHR; Principle 18(2), UN Body of Principles.

[1832] Article 14(3)(c) ICCPR.

[1833] The access to legal counsel must be ensured in the pre-trial stage and at all crucial stages of the proceedings. (1991c), *Little v. Jamaica, Comm. No. 283/1988 of 1 November 1991* , §§ 8.3-8.4; (2000a), *Averill v. United Kingdom, App. No. 36408/97, Judgment of 6 June 2000*, §§ 57-61; (1989c), *Resolution No. 29/89, Case 10.198, Nicaragua (29 September 1989), OEA/Ser.L/V/II.77 rev.1, doc. 7, Annual Report of the Inter-American Commission on Human Rights, (19989-1990), third statement and Conclusions*, § 2. The access to legal counsel must in principle be free of charges. See Articles 14(3) ICCPR; Article 6(3)(c) ECHR; Article 8(2)(e) ACHR.

[1834] Article 14(3)(e) ICCPR; Article 6(3)(d) ECHR; Article 8(2)(f) ACHR. This right is derogable according to the relevant derogation clauses within the ICCPR, ECHR and ACHR. However, the HRC and the IACiHR view the right as non-derogable. Human Rights Committee (2001c), §§ 11 and 16; IACiHR (2002), §§ 247, 251, 261(c)(iv) and 262(b).

[1835] Article 14(3)(f) ICCPR; Article 6(3)(e) ECHR; Article 8(2)(a) ACHR.

- the right of the accused not to be compelled to testify against oneself or confess guilt.[1836]
- the right to be informed of available remedies and of their time-limits[1837]
- the freedom of double jeopardy (*ne bis in idem*);[1838]

Of the abovementioned guarantees, the right to counsel warrants particular attention in light of security detainees. The texts of the relevant treaty instruments suggest that this requirement is limited to criminal detainees only.[1839] 'Soft law' documents, however, extend the right to counsel to *all* detainees.[1840] This would imply that insurgents detained as security detainees also have a right to counsel. As stated by Cassel: "Few circumstances could be more significant for a detainee than a hearing on whether he may lawfully be detained indefinitely. Thus, the right to counsel is arguably an essential element of a fair hearing."[1841] This seems to be corroborated by the HRC, which in its General Comment 20 on Article 7 ICCPR holds that "the protection of *the* detainee also requires that prompt and regular access be given to […] lawyers […]." This view seems to have been shared by the US District Court in the case of *Padilla v. Rumsfeld*. The US Government argued that security detainees do not have a right to counsel for fear that the presence of a counsel would disrupt the necessary "atmosphere of dependency and trust between the subject an the interrogator."[1842] The court rejected the US Government's argument, not as "wrong", but as "unconvincing" and therefore "speculative",[1843] and could therefore not bar Padilla's right to counsel.

2.6. Requirements Pertaining to the Treatment of Detainees

The requirements pertaining to the treatment of detainees can be separated in two categories: (1) treatment in the narrow sense (*stricto sensu*) and (2) material conditions. Both will be discussed below.

[1836] Article 14(3)(g) ICCPR; Article 8(2)(g) ACHR; Principle 21, UN Body of Principles. It is not expressly mentioned in the ECHR, but recognized by the ECtHR in its case-law. See (1993b), *Funke v. France, App. No. 10828/84, Judgment of 25 February, 1993*, § 44; (1996d), *John Murray v. United Kingdom, App. No. 18731/91, Judgment of 8 February 1996*, § 47; (2000m), *Quinn v. Ireland, App.No. 36887/97, Judgment of 21 December 2000*, § 47. While a fundamental right in IHRL and international criminal law, it is not mentioned as a non-derogable right in Articles 14(2) ICCPR, Article 6(2) ECHR; Article 8(2) ACHR. However, the IACiHR views it as a peremptory right. IACiHR (2002), §§ 247 and 261(c)(iii). Evidence obtained in violation if this right may not be used in a court of law. See Article 15 CAT; (2000d), *Coëme and Others v. Belgium, App. No. 32492/96, 32547/96, 32548/96, 33209/96, 33210/96, Judgment, 22 June 2000*, § 128.

[1837] Article 14(5) ICCPR; Article 2(1) of Protocol 7 to the ECHR; Article 8(2)(h) ACHR; Article 7(1)(a) ACHPR. While not listed as non-derogable, the IACtHR considers it as such. IACiHR (2002), §§ 261(c)(v).

[1838] Article 14(7) ICCPR; Article 8(4) ACHR; Article 4, Protocol 7 to the ECHR; Article 50 EU Charter of Fundamental Rights.

[1839] Article 14(3)(d) ICCPR; Article 8(2)(4) ACHR ; Article 6(3)(c) ECHR.

[1840] For example, see Principles 17 and 18, UN Body of Principles; Principle V, IACiHR Principles and Best Practices.

[1841] Cassel (2008), 840, footnote 225.

[1842] As explained by the Director of the Defense Intelligence Agency, Admiral Jacoby in his testimony in (2003l), *Padilla v. Rumsfeld, 243 F. Supp. 2d*, 49: "Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence-gathering tool. […] Any insertion of counsel into the subject-interrogator relationship, for example – even if only for a limited duration or for a specific purpose – can undo months of work and may permanently shut down the interrogation process."

[1843] (2003l), *Padilla v. Rumsfeld, 243 F. Supp. 2d*, 53.

2.6.1. Treatment in Narrow Sense

Detaining States are under an obligation to treat all detainees with humanity and with respect for the inherent dignity of the human person.[1844] Both concepts – humanity and human dignity – are difficult to define and constitute broad notions. Clearly, it includes aspects related to the physical and mental health of detainees, but it also extends to the general vulnerability of detainees whilst in the hands and mercy of the detaining authority. As noted by Pejic,

> [i]t is not possible to translate the obligation to respect the dignity of detained persons into a definitive list of concrete measures and safeguards that must be implemented in a detention setting, given that human dignity means different things to different people and that its constituent elements are dependent, among other things, on a person's cultural and religious background.[1845]

Nonetheless, States have a positive obligation to ensure the freedom of detainees from

> [a]ny hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.[1846]

A principle requirement, highlighted here, is that under no circumstances may detainees be subjected to torture[1847] or to cruel, inhuman or degrading treatment or punishment.[1848] The distinction between the two prohibitions remains unclear, and has been interpreted differently by for example the HRC and[1849] the ECtHR.[1850]

The prohibition of torture is a rule of *jus cogens*;[1851] the prohibition of cruel, inhuman, or degrading treatment or punishment is not. Nonetheless, the prohibition of torture and other forms of cruel, inhumane and degrading treatment or punishment was, is and remains abso-

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[1844] Article 10 ICCPR; Article 5 ACHR; implicitly: Articles 2, 3, and 4 ECHR.

[1845] Pejic (2011), 215.

[1846] Human Rights Committee (2001a), § 3

[1847] UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 1 describes torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[1848] Article 7 ICCPR; Article 5(2) IACHR; the Inter-American Convention to Prevent and Punish Torture, entered into force 28 February 1987; Article 3 ECHR; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT/Inf/C(2002) 1 (Part 1) – Strasbourg, 26.XI.1987 (Text amended according to the provisions of Protocols no 1 (ETS No. 151) and no. 2 (ETS No. 152), entered into force 1 March 2002.

[1849] Human Rights Committee (2004c), § 4, basing the distinction on the nature, purpose, and severity of the treatment applied.

[1850] Available case-law suggests a distinction based on the intensity of the inflicted pain and suffering, torture being to most severe form. See (1978b), *Ireland v. the United Kingdom, Case No. 5310/71, Judgment of 18 January 1978*, § 167-168.

[1851] (1998n), *The Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Chamber Judgment of 10 December 1998*, § 153-157; (2001a), *Al-Adsani v. the United Kingdom, App. No. 35763, Judgment of 21 November 2001*, 60-61; Rodley (1999), 74.

lute in nature and scope and is non-derogable, despite recent attempts[1852] to formulate a more restrictive prohibition, to invoke torture as a lawful means to extract information believed critical in so-called 'ticking bomb'-scenario's,[1853] or to evade responsibility for violation of the prohibition by 'outsourcing' torture by transferring detainees to other States.[1854]

2.6.2. Treatment in Terms of Material Conditions

Measures and safeguards pertaining to the conditions of detention include, *inter alia*, rules on the following subjects: physical and mental integrity; dignity and respect; safety; food and drinking water; hygiene and clothing; personal belongings; accommodation; medical care; humanitarian relief; religion; open air and exercise; the treatment of women and minors; work and recruitment; family contact; discipline and punishment; transfer; records; public curiosity; death; complaint mechanisms; release; foreigners; and oversight.[1855] The failure of States to comply with the minimum measures and safeguards set out above in itself may amount to torture or cruel, inhumane and degrading treatment or punishment.[1856]

2.7. Requirements Pertaining the Transfer of Individuals Deprived of Their Liberty

The transfer of detainees is subject to the principle of *non-refoulement*.[1857] IHRL prohibits the

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[1852] The US Government reinterpreted the definition of torture in Article 1 to those cases where "[t]he victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result." Examples of permissible acts were listed, to include "(1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, (10) the waterboard." See Bybee (2002b). The practice of 'waterboarding', admitted to by the CIA, drew particular attention and has been revoked by the Obama Administration by The White House (2009a).

[1853] In support: A. Dershowitz, *The Torture Warrant: a Response to Professor Strauss*, 48 New York Law School Review (2004) 275, 275-294; A. Dershowitz, *Tortured Reasoning*, in: Torture, (S. Levinson ed., 2004) Start Page, 257-280; O. Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 Minnesota Law Review (2004) 1481, 1481-; Eric A. Posner, *Torture, Terrorism and Interrogation*, in: Torture, (S. Levinson ed., 2004) Start Page, 291-298. Rejecting: Rodley (2006); Rodley (1999), 182-183; Shue (2005); Nowak (2006). In general: Association for the Prevention of Torture (2007); Ginbar (2008). For a general analysis of 'ticking time bomb-scenario's' and detention, see Ruys & Heyndrickx (2006).

[1854] Priest & Gellman (26 December 2002), *U.S. Decries Abuse but Defends Interrogations*; Van Natta Jr. (9 March 2003), *Questioning Terror Suspects in a Dark and Surreal World*.

[1855] For the precise rules on these subjects, see the principal soft-law documents referred to in this chapter.

[1856] For a discussion of relevant case-law, see Ruys & Heyndrickx (2006), 123-126.

[1857] On the principle of non-refoulement, see Gillard (2008); Lauterpacht & Bethlehem (2003); Droege (2008b). This principle is firmly rooted in refugee law (see Article 33, 1951 Refugee Convention; Article 2(3), OAU Convention governing the Specific Aspects of Refugee Problems in Africa. See also Goodwin-Gill & McAdam (2007)); LOAC (Article 12(2) GC III; Article 45(3) GC IV) and extradition treaties. It is explicitly mentioned in Article 3 CAT, Article 22(8) ACHR, Article 13(4) Inter-American Convention to Prevent and Punish Torture, Article 16 International Convention for the Protection of All Persons from Enforced Disappearance, and Article 19(2) of the Charter of Fundamental Rights of the European Union. In addition, the principle of *non-refoulement* has been recognized to be an implicit part of the ICCPR (via Article 7) (Human Rights Committee (2004c), § 12; UNHRC (2004), § 9; (1991a), *Chitat Ng v. Canada, Comm. No. 469/1991 of 5 November 1991*, § 14.1; (1991b), *Kindler v. Canada, Comm. No. 470/1991 of 18 November 1993*, § 6.2.) and the ECHR ((1989d), *Soering v. the United Kingdom, App. No. 14038/88, Judgment of 7 July 1989*, § 91; (1990a), *Cruz Varas and Others v. Sweden, Appl. No. 15576/89, Judgment of 29 August 1990*, §§ 69-70; (1991d), *Vilvarajah and Others v. United Kingdom, App. No. 13163/87,*

transfer of persons to States where there is a real risk of violation of certain fundamental human rights, such as the prohibition from torture, or other forms of cruel, inhuman or degrading treatment or punishment. It also prohibits transfers where a person faces the risk of imposition or execution of the death penalty, also when such trial was in accordance with the necessary requirements,[1858] and even if the detaining State has reserved the right to impose the death penalty in times of war.[1859] More generally, transfer is prohibited if it is foreseen that a person will be exposed to a flagrantly unfair trial.[1860] The prohibition of *non-refoulement* also applies to subsequent transfers, i.e. the transfer of an already transferred individual from State B to a third State C.[1861]

The generally accepted threshold to determine the risk to ill-treatment or deprivation of liberty resulting from the transfer must "assessed on grounds that go beyond mere theory or suspicion" but does not have to be "highly probable."[1862] As held by the ECtHR in *Saadi v. Italy*, "[i[n order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bear-

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13164/87, 13165/87, 13447/87, 13448/87, Judgment of 30 October 1991, §§ 102-110; (1996b), *Chahal v. United Kingdom, App. No. 22414/93, Judgment of 15 November 1996*, § 74).

[1858] (2010b), *Al-Saadoon and Mufdhi v. the United Kingdom, App. No. 61498/08, Judgment of 2 March 2010*, §§ 123, 142-143.

[1859] Article 2(1) ICCPR offers States the possibility to make a reservation to permit "[…] the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime." Such a reservation is not possible under the European human rights system. Protocol No. 13 to the ECHR, Concerning the Abolition of the Death Penalty in All Circumstances forbids States to do so. See also Article 19 of the Charter of Fundamental Rights of the European Union.

[1860] (1989d), *Soering v. the United Kingdom, App. No. 14038/88, Judgment of 7 July 1989*, § 113 ("The Court does not exclude that an issue might exceptionally be raised under Article 6 (art. 6) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country"); (1992a), *Drozd and Janousek v. France, App. No. 12747/87, Judgment of 26 June 1992*, § 110 ("The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice"). The HCR, in Human Rights Committee (2004a), § 12, has adopted general standards: "article 2 […] entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed." See also the United Nations Model Treaty on Extradition, Annex to UN General Assembly resolution 45/116, 14 December 1990, article 3(f) (listing a violation of minimum fair trial guarantees as laid down in article 14 ICCPR as a mandatory ground for refusing extradition).

[1861] (2000n), *T.I. v. the United Kingdom, App. No. 43844/98, Admissibility Decision of 7 March 2000*, 15; Committee Against Torture (1997), § 2.

[1862] Committee Against Torture (1997), § 6. See also Human Rights Committee (2004c), § 12 ('must not expose individuals to the danger"); UNHRC (2004), § 9 ("substantial grounds for believing that there is a real risk of irreparable harm"); (1991a), *Chitat Ng v. Canada, Comm. No. 469/1991 of 5 November 1991*, § 14.1 ("to a real risk"); (1989d), *Soering v. the United Kingdom, App. No. 14038/88, Judgment of 7 July 1989*, § 91 ("when substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk"); (1991d), *Vilvarajah and Others v. United Kingdom, App. No. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Judgment of 30 October 1991*, §§ 102-110; (1996b), *Chahal v. United Kingdom, App. No. 22414/93, Judgment of 15 November 1996*, § 74 and 80. While different language is used, ' [i]n practical terms, however, it is not clear whether the differences in the various formulations will be material, particularly as the Human Right Committee, the European Court of Human Rights, and the Committee against Torture […] have all indicated in one form or another that, whenever an issue of refoulement arises, the circumstances surrounding the case will be subjected to rigorous scrutiny." Lauterpacht & Bethlehem (2003), § 247.

ing in mind the general situation there and his personal circumstances."[1863] In addition, "[…] the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion."[1864]
It remains unclear whether transfer would be prohibited in cases other than those where there is a risk of torture or inhuman or degrading treatment or punishment, or where such transfer would not be in accordance with the State's law.[1865]
Finally, the principle of *non-refoulement* also implies a number of post-transfer obligations, to include the obligation to make reparations for transfers violating international law;[1866] the obligation to remain informed regarding the well-being and the location of transferred individuals; and an obligation to investigate allegations of mistreatment.

3. Observations

The purpose of this chapter was to conclude upon the permissible scope for operational detention of insurgents by examining the normative substance of the valid norms of IHRL.
As is the case in regards of targeting, the question of whether an operational detention is lawful is subject to the compliance by a State with a body of strict substantive and procedural requirements.
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 policy, public prosecutors, defence 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.
In view of the permissible scope for the operational detention of insurgents on the basis of IHRL, it may be observed that the *criminal detention* of individuals – as a species of operational detention of relevance in counterinsurgency operations – is a typical measure of law enforcement that has a thorough legal basis in IHRL and is regulated by specific norms, the meaning of which has been strengthened by the case-law of international and domestic (quasi-)judicial bodies. While there can be no doubt that criminal detention is permitted, the applicability of these requirements in armed conflicts situations raises questions as to their feasibility, particularly in areas of ongoing hostilities where effective control over territory is absent or under strain. In addition, from an operational perspective, the requirements of criminal detention – when to be carried by counterinsurgent forces (trained to fight) – are likely to severely impact military operations.
Turning to *security detention* of insurgents, it must be immediately concluded that, unlike criminal detention, an explicit legal basis is missing in IHRL. Nonetheless, the overall conclusion must be that security detention is not altogether prohibited. It is recognized as an extraordinary measure that is to be applied exceptionally and (presumably) only when preceded by a lawful derogation. This forces States to carefully consider and continuously

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[1863] (2008i), *Saadi v. Italy, App. No. 37201/06, Grand Chamber, Judgment (28 February 2008)*, § 130; (1991d), *Vilvarajah and Others v. United Kingdom, App. No. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Judgment of 30 October 1991*, § 108.
[1864] (2008i), *Saadi v. Italy, App. No. 37201/06, Grand Chamber, Judgment (28 February 2008)*, § 133.
[1865] UCIHL (2004), 40.
[1866] As noted by Gillard, "Although this obligation is unquestionable, actual practice indicating the form reparation should take is limited and consists principally of the findings and recommendations of human rights courts and other supervisory bodies." Gillard (2008), 741.

scrutinize security detention at the stage of legislation; when the executive branch as a measure of emergency invokes it; and when the judiciary considers its necessity on a case-by-case basis.[1867]

More problematic is the fact that some of the elements characterizing security detention do not easily correspond with many of the criminal justice-requirements under IHRL. For example, as fair trial guarantees are to be offered to all detainees, some of these guarantees clearly aim at the clarification of events having taken place in the past, whereas security detention is future-focused. Also, public proceedings are warranted; a requirement that, in view of the classified intelligence often used to support the necessity for security detention conflicts with a State's security interests. A final example concerns a conflict with the *habeas corpus*-rule, which requires that an independent and impartial court determines the lawfulness of the detention, thus suggesting that an administrative decision constitutes a violation of the right to habeas corpus.

As derogation of these rights is generally considered to be prohibited, the question is raised whether they can be readily applied in times of armed conflict, particularly in areas of ongoing hostilities where effective control over territory is absent or under strain.

In view of the above, the next question is whether the valid norms of LOAC contain similar rules and requirements that more adequately reflect the needs in armed conflict. It is to this issue that our attention will now turn.

[1867] Cassel (2008), 851.

Chapter X LOAC

This chapter's focus is on the regulation of the operational detention of insurgents in the different situational contexts of counterinsurgency governed by the law of IAC or by the law of NIAC. As concluded, the law of IAC and NIAC both apply situational contexts of counterinsurgency, so there is an imperative to closer examine the normative substance of the valid norms available in them. Unlike the deprivation of life in the conduct of hostilities, where the substantive requirements in the law of IAC and NIAC are quite similar, the law of IAC and NIAC differ fundamentally in relation to the deprivation of liberty. This justifies a separate discussion of the law of IAC and NIAC.
Therefore, the chapter is divided in two paragraphs. Paragraph 1 examines the normative substantive of the valid norms relative to operational detention in the context of IAC; paragraph 2 examines the normative substantive of the valid norms relative to operational detention in the context of NIAC.

1. Normative Substance of the Valid Normative Framework Relative to Operational Detention in the Context of IAC

This paragraph examines in more detail the substance of the valid normative framework relative operational detention. The approach adopted is to first determine the status of the insurgent within the valid normative framework governing operational detention as identified in Chapter V. Following this analysis, several requirements will be identified and examined that govern the criminal and security detention in the context of IAC.

1.1. The Principle of Distinction

As concluded previously, the *principle* of distinction is a fundamental requirement under LOAC in relation to the question of which individuals may be directly attacked during armed conflict, and who is protected from such direct attack. However, it is submitted this principle is not limited to the conduct of hostilities, but pervades throughout the entire LOAC.[1868] As such, distinction also plays a fundamental role in the identification of who may be lawfully deprived of his liberty under LOAC (hereinafter: the *authoritative* personal scope of deprivation of liberty), and, in the alternative, who are to be protected from deprivation of liberty (hereinafter: the *prohibitative* personal scope of deprivation of liberty) for reasons related to the armed conflict once they have fallen into the hands of a party to the conflict.
In applying the principle of distinction to the concept of operational detention of insurgents, a preliminary issue to be dealt with concerns the deviation in LOAC between several categories of detainees. The primary category of detainees in the law of IAC concerns POWs, who may be interned for the duration of the armed conflict in order to prevent their return to the battlefield. Inherent in this concept is the idea that those who qualify as POWs, by virtue of their status as combatant, always pose a threat to the security of the

[1868] Gill & Van Sliedregt (2005), 29.

detaining State. Based on the classic divide between combatants and civilians, a second category concerns civilians, who may be interned as well in the event, and for as long as they, as we shall see, pose a threat to the security of the State. A third category of detainees concerns civilians suspected of criminal offences, who are subjected to a judicial process. The preliminary question of relevance to be dealt with here is: do insurgents qualify as combatants or as civilians?

1.1.1. Regime Admissibility

1.1.1.1. GC III

As noted previously, the law of IAC offers a detailed framework of norms governing the internment of POWs. Underlying the traditional concept of POW-*status* is the idea that, until his capture, an individual was a *privileged* or *lawful* combatant,[1869] i.e. a combatant who was authorized to take a direct part in the hostilities, thereby enjoying commensurate combatant *immunity*, because he complied with *all* the conditions of combatant-status.[1870]

[1869] As envisaged in Article 1, 1907 HIVR, and later in Article 4 GC III and Article 43 AP I, although it must be stressed that POW-status is no longer exclusively linked to combatants. See also Ipsen (2008), 106-107.

[1870] These traditional conditions can be retrieved not only from Article 4A GC III, but also follow from Article 1, 1907 HIVR and Articles 43 AP I (for States party to AP I). A lawful combatant:
(1) is subordinate to a responsible command (Article 1, 1907 HIVR; Article 4A(2) GC III. This is a group requirement);
(2) is recognizable by a fixed distinctive emblem (Article 1, 1907 HIVR; Article 4A(2) GC III. This is primarily a group requirement; secondarily an individual requirement. See also Dinstein (2010), 49);
(3) carries his arms openly (Article 1, 1907 HIVR; Article 4A(2) GC III. This is an individual requirement); and
(4) conducts hostilities in accordance with LOAC (Article 1, 1907 HIVR; Article 4A(2) GC III; Article 43 AP I. This requirement is mainly collective, but also individual, and largely situation dependent. See extensively: Dinstein (2010), 50. Also: Gill & Van Sliedregt (2005), 33-34). These four conditions are presumed to be have been met by regular armed forces. Nonetheless, fulfillment of these conditions must be demonstrated in all cases, whether regular armed forces or irregular armed forces. As follows from (1942), *Ex parte Quirin et al.* , 35-36 as well as from (1968), *Bin Haji Mohamed Ali and Another v. Public Prosecutor, 29 July 1968*, 449-450, the presumption that regular armed forces always fulfill the traditional requirements can be rebutted.
For the purpose of POW-status of *irregular* armed forces, three additional conditions have been suggested (Dinstein (2010), 47), namely:
(5) a sufficient degree of organization or the armed group (Article 4(A)(2) GC III. This is a group requirement);
(6) the organized armed group must belong to a Belligerent Party (Article 4(A)(2) GC III. See also (1969b), *Military Prosecutor v. Omar Mahmud Kassem and Others, Judgment of 13 April 1969*, 470. This requirement is also presumed to be inherent 1907, HIVR. See Nurich & Barrett (1946), 567-569. This is a group requirement. It is undisputed that the term 'Belligerent Party' refers to, and is limited to, States. As explained by the ICRC Commentary to Article 4(A)(2) GC III, "[i]t is essential that there should be a 'de facto' relationship between the resistance organization and the party to international law which is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting. But affiliation with a Party to the conflict may also follow an official declaration, for instance by a Government in exile, confirmed by official recognition by the High Command of the forces which are at war with the Occupying Power. These different cases are based on the experience of the Second World War, and the authors of the Convention wished to make specific provision to cover them." Pictet (1958a), 57; also (1995h), *The Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber)* , 1537 and

Combatants are members of the armed forces of a Party to the conflict, and it has been submitted that this results in their qualification as State agents under international law. This automatically brings insurgents, defined as *non-State actors* in the present Study, outside the scope of POW-status.[1871] The relevance of the valid norms of POW-status would arise only when there is doubt as to a captured person's status as POW or not.[1872] However, once it has been established that a captured person is not entitled to POW-status or treatment as such, other norms of the law of IAC may govern his relationship with the detaining Power. This will also be the presumption based upon which the present study continues. As a result, the primary focus of the subsequent analysis shifts to the deprivation of liberty under

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(7) the combatant must demonstrate a lack of duty of allegiance to the Detaining Power (Dinstein (2010), 43. Also: (1967), *Public Prosecutor v. Oie Hee Koi and connected appeals, 4 December 1967*, 857. This is an individual requirement).

It is undisputed that the first four conditions, as well as condition (7) determine POW-status. Conditions (5) and (6), however, are not generally recognized as State practice, although some States may adhere to them. Neither of them is specifically cited in conventional LOAC as a condition for POW-status (Solis (2009), 197-198).

[1871] Admissibility for protection under GC III can be established via two routes: (1) via Article 4 GC III, and (2) via Articles 43-45 AP I. The scope *ratione personae* of GC III, *firstly*, extends to the categories of persons recognized in Article 4 GC III, i.e. (1) the categories of persons eligible for POW-*status* as laid down in Article 4(A) GC III. Individuals belonging to the categories of personnel entitled to POW-status are entitled to this status, and the commensurate standards of treatment prescribed in GC III; (2) individuals, mentioned in Article 4(B) GC III, not entitled to the status of POWs, but nonetheless entitled to the standards of *treatment* under the regime of GC III; (3) *retained* personnel as mentioned in Article 4C G III *juncto* Article 33 G CIII and Article 28 GC I "with a view to assisting prisoners of war,", i.e. members of the armed forces qualifying as medical personnel, chaplains attached to the armed forces, and staff of National Red Cross societies or other voluntary aid societies duly recognized and authorized by their governments. They are not POWs (for they do not qualify as combatants), but while *retained* by the Detaining power they "shall […] receive as a minimum the benefits and protection of [GC III], and shall also be granted all facilities necessary to provide for the medical care of, and religious ministration to prisoners of war" (see Article 33 GC III). *Secondly*, and in deviation from the strict regime set forth in Article 4 GC III, GC III applies to members of armed forces, groups and units mentioned in Articles 43 AP I, which belong to a Party to the conflict; are organized; under a command responsible to a party to the international armed conflict; and subject to an internal disciplinary system.[1871] Following Article 44(3) AP I, such members will retain the *status* of combatant, and as a result that of POW when they, individually, and at the time of their capture (Article 44(5) AP) fulfill the obligation to distinguish themselves from the civilian population while engaged in an attack or a military operation preparatory to an attack, and in exceptional "situations in armed conflicts" – such as occupied territories – by carrying their arms openly during each military engagement and as long as they are visible to the enemy while engaged in a military deployment preceding the launching of an attack in which they are to participate. Following Article 45 AP I, a person taking a direct part in hostilities and falling into the power of a party to the conflict shall be *presumed* POW, and be protected by GC III (1) if he claims the status of POW; (2) if he appears entitled to such status; or (3) if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. In case of doubt as to the status of POW, Article 45 AP I stipulates that the individual continues to be entitled to the status of POW and subsequent protection by GC III until such time as his status has been determined by a competent tribunal. Compare Article 5 GC III, which does not refer to continued recognition of status of POW, but stipulates that in case of doubt an individual "shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."

In addition, AP I extends *treatment* under GC III to members of organized armed groups who do not fulfill the requirements set forth in Article 44(3) AP I and have forfeit their right to POW-status.

[1872] Article 5 GC III.

GC IV and AP I and to the question of whether insurgents may be deprived of their liberty under the relevant norms set forth in those instruments.[1873]

1.1.1.2. GC IV

The scope *ratione personae* of GC IV has been subject of examination previously, in Chapter VI of Part C.1., where we examined the normative substance of the valid norms of LOAC pertaining to the use of force as a measure of law enforcement. There, we concluded that GC IV applies in so far insurgents are not

- nationals of that Occupying Power.[1874]
- nationals of a State which is not bound by the Convention;[1875]
- nationals of a neutral State who find themselves *in the territory of a belligerent State*,[1876] and nationals of a co-belligerent State, while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are;[1877]
- individuals protected by GC I, II and III[1878]

and find themselves in the hands of a counterinsurgent State party to an IAC (which may the case in non-consensual TRANSCOIN) or constituting an Occupying Power.
Also, we concluded that GC IV applies not only to insurgents who did not directly participate in the hostilities (peaceful civilians), but also to those who did.

1.1.1.3. AP I

The scope *ratione personae* of AP I is wide. In the context of deprivation of liberty, it designates who are combatants and who are entitled to POW-status or treatment under GC III.[1879] Of particular relevance to the present study is also Chapter I of Section III, AP I,

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[1873] On that note, GC III is – admittedly – not entirely irrelevant. Similar to the principle of distinction in the normative framework governing hostilities, the framework governing deprivation of liberty follows a system of deduction: as follows from Article 4(4) GC IV, individuals only qualify for protection under GC IV if they do not qualify for protection under GC III (even though it must also be ruled out that an individual does not qualify for protection under GC I and II. In view of the present chapter, admissibility for protection under GC I and II will however not be further discussed). In other words, in order to determine whether an individual may be deprived of his liberty under GC IV, it must first be ruled out that he is protected under GC III. It is expressive of the compartmentalized system and confirms that there is no intermediate status. As confirmed by the ICRC Commentary to Article 4 GC IV: "Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that that is a satisfactory solution – not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view." Pictet (1958a), 51. See also: ICRC (1949), 68.

[1874] Article 4(1) GC IV. This exception is included because, as a principle, international law does not interfere in a State's relations with its own nationals, with the exception of Article 70(2) GC IV. Pictet (1958a), 46.

[1875] Article 4(2) GC IV. This provision has become obsolete, given today's universal ratification of GC IV.

[1876] Arai-Takahashi argues that Article 4(2) GC IV does not exclude nationals of a neutral State who are present in the occupied territory. See also Von Glahn, Glahn (1957), 91-92. However, the phrase "in the territory of a belligerent State" refers to occupied territory, which still belongs to the occupied belligerent State.

[1877] Article 4(2) GC IV. Citizens of neutral States or co-belligerent States in normal diplomatic relationships with the detaining Power were deliberately left out because in 1949, during the negotiations leading to the Geneva Conventions it was assumed that sovereign States would protect their own citizens.

[1878] Article 4(4) GC IV.

[1879] See Articles 43 and 44 AP I.

which sets out the field of application of persons in the power of a party to the conflict. It follows from Article 72 AP I that the provisions relevant to the deprivation of liberty in Section III are supplementary to those applicable to protected persons under GC IV. Hence, the provisions of Article 75 AP I also apply to them.[1880] Article 73 AP I extends the applicability of Parts I and III GC IV to "[p]ersons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence."

Of particular relevance is Article 75 AP I. It applies to "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol."

According to the ICRC Commentary, for persons to benefit from the protections under Article 75 AP I, they must fulfill three conditions:

(1) they must be in the power of a Party to the conflict;
(2) they must be affected by armed conflict or by occupation;
(3) they must not benefit from more favorable treatment under the GCs or under AP I.[1881]

These persons concern:

(1) nationals of States not parties to the conflict;
(2) nationals of allied States;
(3) persons having become refugees after the beginning of hostilities, and stateless persons;[1882]
(4) mercenaries;
(5) other persons denied POW-status, i.e. unlawful combatants who do not benefit from more favourable treatment in accordance with GC IV, such as civilians who directly participate in hostilities, on an individual basis or as a member of an organized armed group;
(6) persons protected under GC IV, but who are subject to derogations in accordance with Article 5 of GC IV.[1883]
(7) persons protected under GC IV, additional to the protections set out therein.[1884]

After having established which persons find protection under GC IV and AP I, the next question is whether this treaty offers a legal basis for the two forms of operational detention subject to examination in the present study.

[1880] As well as "other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict." See Article 72 AP I.

[1881] Sandoz, Swinarski & Zimmerman (1987), § 3009.

[1882] As noted, Article 73 AP I extends the protection of GC IV to persons who were refugees and stateless persons before the beginning of the hostilities. According to the ICRC Commentary, stateless persons always enjoy the protection of GC IV, as they by definition do not have the nationality of the State in whose hands they are, as required by Article 4(1) GC IV. Sandoz, Swinarski & Zimmerman (1987), § 2936 and 3028.

[1883] Given the customary nature of Article 75 AP I, its substantive content binds all States. In its customary form, Article 75 AP I is therefore of supplementary value to States party to GC IV, but not party to AP I.

[1884] Following Article 72 AP I.

1.1.2. Legal Basis for Operational Detention in GC IV

1.1.2.1. Criminal Detention

Firstly, and relevant to situations of OCCUPCOIN, insurgents may be deprived of their liberty for *criminal justice* purposes in the execution of the Occupying Power's obligation under Article 43, 1907 HIVR to take "all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[1885] As part of this positive obligation, the Occupying Power is entitled to take affirmative measures such as the arrest, and subsequently criminal detention of individuals for violation of the penal laws in force in the occupied territory in order to protect the civilian population's ordinary standard of public order and safety. This includes the prosecution of unlawful combatants for commission of crimes prohibited by the Occupying Power, such as the taking up of arms against the Occupying Power, or the commission of war crimes.
The logical benchmark to determine whether an individual poses a threat to public order and safety is his very violation of the penal laws in force in the occupied territory. While principally under a negative obligation to respect the laws in force in the occupied territory,[1886] the Occupying Power is nonetheless authorized to enact legislation "essential to fulfil its obligations under [GC IV], to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them."[1887] To that effect, the Occupying Power is authorized to adopt laws that permit the criminal detention of individuals for conduct which was previously not prohibited, provided such laws do not violate international law.[1888]
In sum, therefore, the authoritative personal scope of deprivation of liberty for law enforcement purposes may consist only of people who are suspected and convicted of violating the penal laws in force in the occupied territory.

Of interest for the situation of TRANSCOIN, GC IV does not provide a legal basis for the deprivation of liberty for criminal purposes, i.e. when a counterinsurgent State in the course of a TRANSCOIN-operation captures and arrests an insurgent for violation of its own penal laws. Nonetheless, the implied authority to do so may be assumed to be present. CA 3 and Article 37 GC IV impose the obligation upon the State to treat such detainees humanely. Also, it is a rule of customary law, as recognized by the ICRC, that "no one may may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed; […]," [1889] from which it may be concluded that criminal detention is permitted.

[1885] Article 43, 1907 HIVR. See also Article 64 GC IV.

[1886] Article 64(1) GC IV, "with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention." In so far it concerns crimes punishable under the penal codes of the occupied territory, a local court has jurisdiction.

[1887] Article 64(3) GC IV.

[1888] Following Article 66 GC IV, a military court established by the Occupying Power has jurisdiction to administer offences of penal laws established by the Occupying Power.

[1889] Rule 101, ICRC (2005a).

1.1.2.2. Security Detention

While principally imposing a prohibition to do so, GC IV also permits the internment of protected persons, namely when "in accordance with the provisions of Articles 41, 42, 43, 68 and 78." Article 42 GC IV permits the internment of non-repatriated persons in the power of the counterinsurgent State, party to the conflict, as an exceptional measure "if the security of the Detaining Power makes it absolutely necessary." This provision would apply in situations of TRANSCOIN where the law of IAC applies to the relationship between the counterinsurgent State and insurgents. In the context of OCCUPCOIN, Article 78 GC IV is of relevance. It permits the Occupying Power to *intern* persons protected under GC IV when necessary for "*imperative reasons of security*".[1890]

The element of 'security' is not further defined in LOAC. The ICRC Commentary to Article 78 GC IV is not helpful in clarifying the meaning of "security".[1891] According to the ICTY, the term "security" is not susceptible of being more precisely defined and

> [t]he measure of activity deemed prejudicial to the internal or external security of the State which justifies internment or assigned residence is left largely to the authorities of that State itself.[1892]

This provides States considerable leeway to decide what type of conduct poses a threat to its security. Security, however, is public order based. There is little doubt that individuals captured while taking a direct part in the hostilities pose a threat to the security of the Occupying Power.[1893]

However, the concept of 'security' is not limited to individuals taking a direct part in the hostilities.[1894] It also includes individuals not taking a *direct* participation of hostilities, but who, for example, indirectly contribute to the hostilities, or do not contribute to the hostili-

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[1890] The general basis for internment can be found in Article 5 GC IV and Article 27 GC IV. The text of Article 5 GC IV infers that deprivation of liberty for reasons of security is generally permissible, as it authorizes the Occupying Power to derogate from the right to communication in cases of absolute military security "[w]here in occupied territory an individual protected person is detained […] as a person under definite suspicion of activity hostile to the security of the Occupying Power." Article 27 GC IV permits a Party to the conflict to "take such measures of control and security in regard to protected persons as may be necessary as a result of the war." As an ultimate form of such measures of control and security, GC IV permits in exceptional circumstances the "assigned residence or internment of protected persons." A general basis for these measures is found in Article 41(1) GC IV, which provides the Detaining Power (to include the Occupying Power in whose hands the protected persons remains) a legal basis for the assigned residence or internment of protected persons. These measures are recognized as the *most severe measure of control* and may *only* be resorted to if the Detaining Power considers the measures of control and security referred to in Article 27 GC IV to be *inadequate*. Assigned residence and internment shall be carried out in conformity with Articles 42 and 43 GC IV. Article 42 GC IV provides that the *unvoluntary* assigned residence or internment of protected persons is a measure at the discretion of the Detaining Power "only if the security of the Detaining Power makes it *absolutely necessary*." In the alternative, internment must take place on the specific request of a protected person, i.e. voluntarily "if his situation renders this step necessary."

[1891] On the ambiguity of "imperative", see also (1979b), *Ben Zion v. IDF Commander of Judea and Samaria et al., HCJ 369/79, Israel Supreme Court*.

[1892] (1998m), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber)*, § 574. See also Pictet (1958a), 257-258: "It did not seem possible to define the expression "security of the State" in a more concrete fashion. […]."

[1893] For example, based on Israel's Detention of Unlawful Combatants Statute of 2002, an individual qualifying as an unlawful combatant resulting from his direct participation in hostilities or his membership of an organized armed group may be subjected to security detention based on the rebuttable presumption that he is a threat to Israel's security.

[1894] Gehring (1980), 85.

ties at all, but nonetheless otherwise pose a threat to the security. As stated in the ICRC Commentary to Article 42 GC IV, which is the general provision authorizing internment in an IAC, and which uses the phrase "security of the State":

> Subversive activity carried on inside the territory of a Party to the conflict or actions which are of direct assistance to an enemy Power both threaten the security of the country; a belligerent may intern people or place them in assigned residence if it has serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances, or that they may seriously prejudice its security by other means, such as sabotage or espionage; the provisions of Article 5 of the present Convention may also be applied in such cases.[1895]

Other conduct that may be perceived as threats, however, constitute no threats to the security. As held by experts, "[…] ordinary crimes, such as random acts of domestic violence or non-organised larceny, may not be controlled appropriately in this manner."[1896] The above also applies to individuals interned for their intelligence value. As has been argued, an individuals intelligence value alone may not serve as an "imperative reason of security" leading to internment, unless the individual also poses a threat to the security of the Occupying Power.[1897] In addition,

> […], the mere fact that a person is a *subject* of an enemy Power cannot be considered as threatening the security of the country where he is living; it is not therefore a valid reason for interning him or placing him in assigned residence. To justify recourse to such measures the State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.[1898]

Similarly, mere affiliation with the hostilities or an organized armed group is not sufficient. As held by the Israel High Court in *A. v. Israel*:

> […] in order to detain a person it is *not* sufficient for him to have made a remote, negligible or marginal contribution to the hostilities.
> [I]t is *insufficient* to show any tenuous connection with a terrorist organization [but there must be a] connection and contribution to the organization […] that are sufficient to include him in the cycle of hostilities in its broad sense.[1899]

Following the above, it may be concluded that an Occupying Power only acts within its power of internment if it is able to demonstrate that an individual, by virtue of his activities,

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[1895] Pictet (1958a), 257-258, affirmed in (1998m), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber)*, § 576. The criteria leading the the qualification of 'serious' and 'legitimate' are not further defined and remain subjective. See also the ICRC's Commentary to Article 5 GC IV that permits the derogation of certain rights and privileges of spies and saboteurs when their acts are "hostile to the security of the state." In the view of the ICRC "[t]he idea of activities prejudicial or hostile to the security of the State, is very hard to define. That is one of the Article's weak points. What is meant is probably above all espionage, sabotage and intelligence with the enemy Government or enemy nationals. The clause cannot refer to a political attitude towards the State, so long as that attitude is not translated into action." Pictet (1958a), 56.

[1896] UCIHL (2004), 19.

[1897] Pejic (2005), 380; Arai-Takahashi (2010), 485.

[1898] Pictet (1958a), 257-258 [emphasis added]. See also the ICRC's Commentary to Article 5 GC IV which permits the derogation of certain rights and privileges of spies and saboteurs when their acts are "hostile to the security of the state." In the view of the ICRC "[t]he idea of activities prejudicial or hostile to the security of the State, is very hard to define. That is one of the Article's weak points. What is meant is probably above all espionage, sabotage and intelligence with the enemy Government or enemy nationals. The clause cannot refer to a political attitude towards the State, so long as that attitude is not translated into action." Pictet (1958a), 56.

[1899] (2008a), *A. and B v. Israel, CrimA 3261/08*, § 21.

knowledge or qualifications poses a real threat to its present or future internal and external security. For example, mere intelligence, residency or political allegiance is insufficient for internment unless it can be linked to a substantiated threat to that security.

This power to intern necessitates the answering of two questions. *Firstly*, when does an insurgent pose a threat to the *security* of the counterinsurgent State? *Secondly*, when is this threat sufficiently imperative to *necessitate* his internment? As both elements are in essence substantive requirements, they will be dealt with in paragraph 3.1.2.1 below.

It thus follows from the structure of GC IV that the deprivation of liberty of individuals recognized as protected persons under Article 4 GC IV that cannot be justified under one of the bases set out above is unlawful. This general protection follows from Article 27(1) GC IV, which is recognized as "the basis of the Convention"[1900] and holds that "[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity" with the exception of "such measures of control and security in regard to protected persons as may be necessary as a result of the war."
It equally follows from the structure of GC IV that persons not falling under the scope *ratione personae* of GC IV (via Article 4) may not be deprived of their liberty on the legal bases provided by GC IV. The basis for their deprivation of liberty must then be available elsewhere, most notably in AP I.

1.1.3. Legal Basis for Operational Detention in AP I

While addressed to persons *in the power of* a party to the conflict, AP I does not explicitly outline the legal basis or bases for operational detention.
In relation to persons *also* protected under GC IV, the protective measures set out in Article 75 AP I do not interfere with the authority for operational detention already present in GC IV, but rather presumes that it takes place – whether it concerns criminal detention or security detention. Whether such may be the case is thus dependent on the identification of the position of such individuals under GC IV and the crossing of the relevant thresholds for deprivation of liberty embodied therein, as discussed above.
The question of deprivation of liberty of "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol" is more ambiguous. It may be concluded from the explicit use of the words "arrest", "detention" and "internment" in Article 75 AP I that the deprivation of liberty – be it for reasons of criminal justice or security – is contemplated as a matter of fact.[1901] As for the legal basis to do so, the absence of an explicit prohibition at least suggests that the operational detention of such individuals is authorized. One route in closing this gap would be to rely on the customary nature of GC IV. However, while there it is relatively undisputed that the content of GC IV (and all GC's for that matter) have now attained customary status,[1902] the question remains open whether its scope *ratione personae* includes the persons protected in Article 75 AP I (and not already protected by GC IV).

[1900] Pictet (1958a), 199-200.
[1901] Article 75(3) AP I. See also Sandoz, Swinarski & Zimmerman (1987), § 3076.
[1902] Meron (2006).

It is submitted that the lawfulness of the desired conduct calls for the application of the Martens clause, i.e. that the deprivation of liberty in the concrete circumstances must be established by reaching an *ad hoc* and reasonable compromise between military necessity and humanitarian interests in view of the "principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." It is submitted that such compromise is to be reached on the basis of considerations not more lenient than those determining the criminal detention or security detention of protected persons as authorized under GC IV.

1.1.4. The Resulting Authoritative and Prohibited Personal Scopes of Operational Detention

In sum, it can be concluded that the *authoritative* personal scope of operational detention in the law of IAC relevant to insurgents not qualifying as POW consists of:

- all individuals recognized as protected persons as meant in Article 4 GC IV and who may be deprived of their liberty:[1903]
    - for *law enforcement* purposes in the execution of the Occupying Power's obligation "to restore, and ensure, as far as possible, public order and safety;"[1904]
    - by means of *internment* pursuant a decision of the Occupying Power when necessary for "imperative reasons of security;"[1905]
- all individuals falling under the protective scope of Article 75 AP I and whose deprivation of liberty is warranted for reasons analogous to those permitting the deprivation of liberty under GC IV.

The *prohibitative* personal scope of operational detention in the law of IAC relevant to insurgents not qualifying as POW consists of:

- all individuals falling within the scope *ratione personae* of Article 4 GC IV, but whose deprivation of liberty:
    - for *law enforcement* purposes is not warranted by the Occupying Power's obligation "to restore, and ensure, as far as possible, public order and safety."[1906]
    - cannot be (reasonably) regarded necessary for "imperative reasons of security;"[1907]
- all individuals falling under the protective scope of Article 75 AP I and whose deprivation of liberty is *not* warranted for reasons analogous to those permitting the deprivation of liberty under GC IV.

The deprivation of liberty of persons falling under the prohibitative personal scope of operational detention under LOAC constitutes unlawful confinement under LOAC. Historical precedents for this qualification of arbitrary deprivation of liberty in armed conflict can be found in the case law of the war crime tribunals post World War II.[1908] "Unlawful confine-

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[1903] Article 4 GC IV; Article 73 AP I.

[1904] Article 43, 1907 HIVR.

[1905] Articles 42 and 78 GC IV.

[1906] Article 43, 1907 HIVR.

[1907] Articles 42 and 78 GC IV.

[1908] See, *inter alia*, (1947a), *Notomi Sueo and Others, Netherlands Temporary Court-Martial at Makassar (Judgment, 4 January 1947)*; (1947b), *Trial of Shigeki Motomura and 15 Others, Netherlands Temporary Court-Martial at Makassar (Judgment, 18 July 1947)*; (1948a), *Trial of Hans Albin Rauter, Netherlands Special Court in 's-Gravenhage (The Hague Judgment delivered on 4th May 1948) and Netherlands Special Court of Cassation (Judgment delivered on 12th January 1949)* (ibid., § 2626).

ment" of civilians is a grave breach of GC IV[1909] and under the ICC Statute,[1910] the Statute of the ICTY[1911] and UNTAET Regulation 2000/15 for East Timor.[1912] The Elements of Crimes for the International Criminal Court extends unlawful confinement to any person, and not just civilians, protected under one of the GCs.[1913] Unlawful confinement is prohibited by law in many States.[1914]
Unlawful confinement is the equivalent of an arbitrary deprivation of liberty under IHRL, and as noted by the ICRC Customary Law Study, in Rule 99, "arbitrary deprivation of liberty is prohibited" in *all* armed conflicts.

As may be concluded, there is no doubt *that* insurgents may be deprived of their liberty. The law of IAC provides clear-cut legal bases with distinct thresholds for the deprivation of liberty of individuals: the principal conventional protective regime's – GC III, GC IV and AP I – form a compartmentalized system, *each* with their own *status*-based scopes *ratione personae*. Any deprivation of liberty must follow from an individual's assigned status as POW under GC III, or as a protected person/civilian under GC IV or AP I; there is no intermediate status.

Once it has been determined that an individual falls within the personal scope of authorized deprivation of liberty, the follow-up question is: what requirements dictate the lawfulness of such deprivation of liberty? The following examination aims to identify these requirements within the relevant normative frameworks pertaining to situations of COIN governed by the law of IAC, and to discuss their substantive content. The assumption is that these requirements apply to both OCCUPCOIN and TRANSCOIN. Some requirements, however, are specifically designed to address the Occupying Power and they only apply to the situation of OCCUPCOIN. Where such is the case, this will be indicated.

1.2. Requirements Specific to Criminal Detention

A first requirement, applicable to any type of detention, is the need for a sufficient legal basis. As previously established, the counterinsurgent State bound by the law of IAC is authorized to criminally detain individuals. However, it may only lawfully apply this authority when this has been announced in law accessible to the public. In the case of TRANSCOIN, this would imply that the legal basis for criminal detention is to be found in the domestic law of the counterinsurgent State. In the case of OCCUPCOIN, the legal basis is to be found in the domestic law of the occupied State, or in the penal laws enacted by the Occupying Power.[1915] The Occupying Power is under an obligation to publish the penal laws it enacts, and it is not until then that they come into force. The effect of these laws may not be retroactive.[1916]

[1909] Article 147 GC IV.
[1910] Article 8(2)(a)(vii) ICC Statute.
[1911] Article 2(g), ICTY Statute.
[1912] Section 6(1)(a)(vii) UNTAET Regulation 2000/15.
[1913] Elements of Crimes for the ICC, Definition of unlawful confinement as a war crime (ICC Statute, Article 8(2)(a)(vii)).
[1914] For an overview, see
[1915] Per Article 43, 1907 HIVR and Article 64 GV IV.
[1916] Article 65 GC IV.

As concluded in Chapter V, the law of IAC also provides an extensive treaty-based and customary normative framework of fair trial rights to be afforded to criminal detainees. In terms of normative substance, these rights converge with the fair trial rights to be found in IHRL. In terms of interplay appreciation, IHRL and LOAC here demonstrate to be complementary.

1.3. Requirements Specific to Security Detention

1.3.1. The Requirement of a Sufficient Legal Basis

The principle of a sufficient legal basis implies that the counterinsurgent State desiring to make use of its authority to intern insurgents can only do so when it rests on a basis within the law. In the context of TRANSCOIN, this would imply that the counterinsurgent State has adopted a law that provides for the internment of insurgents, even when they are captured and transferred from another State. In the context of OCCUPCOIN, this means that it must adopt a specific law that provides the legal basis for internment within the occupied territory. This follows from Article 78(2) GC IV, which stipulates that "[d]ecisions regarding such assigned residence or internment shall be made according to a regular procedure *to be prescribed* by the Occupying Power in accordance with the provisions of the present Convention." For example, the Coalition Provisional Authority (CPA) in occupied Iraq adopted its Memorandum No. 3 (revised) of 27 June 2004, which authorized the detention of persons for security reasons or law enforcement reasons and contained the necessary procedural safeguards.[1917] The authority to adopt such laws can be found in Article 64(3) GC IV. However, specific internment-laws may not contain provisions that violate international law, most notably fundamental human rights.[1918] For example, it may not authorize the internment for reasons that are manifestly unlawful, such as an individual's allegiance to a political party, or intelligence gathering. In addition, it may not violate the procedural safeguards; safeguards pertaining to the treatment of internees or transfer of internees.

1.3.2. The Requirement of Necessity

As discussed above, Articles 42 and 78 GC IV permit the internment of protected persons when "the security of" the counterinsurgent State "makes it absolutely necessary" or for "imperative reasons of security" if the Occupying Power deems this measure "necessary". As noted by the ICRC Commentary to GC IV, "[i]n occupied territories the interment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict."[1919] No doubt, the reference to 'necessity' reflects the notion of *military necessity* underlying the entire *corpus* of LOAC. Articles 42 and 78 GV IV are examples of *exceptional* military necessity, i.e. they are provisions that authorize a military commander to deviate from otherwise prohibited conduct.
As noted previously, an appeal on exceptional military necessity is lawful upon the compliance with two requirements: (1) the requirement of necessity for the achievement of a

[1917] Coalition Provisional Authority (2004). While having adopted this CPA Memorandum, the CPA in essence failed to observe its obligations to do so until just a few days before the formal end of the occupation-phase.
[1918] See also Article 27(4) AP I, and the ICRC Commentary, noting that the measure of internment, and arguably the adoption of laws to provide the legal basis to do so, "should not affect the fundamental rights of the persons concerned." Pictet (1958a), 207.
[1919] Pictet (1958a), 367.

legitimate military purpose, and (2) the requirement that the measure must be otherwise in conformity with LOAC. Both requirements will be addressed in more detail below.

(1) The Requirement of Necessity for the Achievement of a Legitimate Military Purpose

This requirement itself consists of three sub-requirements: (a) the purpose for the measure must be a *legitimate military purpose*; (b) the legitimate purpose must be a *military* purpose; and (c) the measure must serve a *necessity*.

(a) A *Legitimate* Military Purpose

The requirement of a legitimate military purpose demands that the purpose for which the measure of internment is taken – i.e. the protection of the security of the counterinsurgent State – must be lawful. This implies *firstly* that the purpose of internment must be lawful as a measure of overall warfare, which it is when limited to attaining the submission or defeat of the enemy. *Secondly*, the *specific* military advantage to be attained – i.e. the protection of the security of the counterinsurgent State – must be lawful under LOAC. As the general normative framework regulating the internment of protected persons under GC IV indicates, the protection of the security of the State is generally perceived to be paramount to ensure that it can fulfill its obligations under the law of IAC (including the law of belligerent occupation). In sum, the aim of guaranteeing the security of the counterinsurgent State is no doubt a lawful aim under LOAC.

(b) A Legitimate *Military* Purpose

The security of the counterinsurgent State serves, in essence, a military purpose and the measure of internment may only be adopted in that context. In other words, the measure of internment may not be used if internment serves solely and purely a political, demographic, ideological or economic purpose.[1920] Also excluded from the scope of military necessity are measures taken for individual purposes, such as greed or lust.

(c) Necessity

As set out previously, the requirement of necessity entails *three* aspects, all of which must be complied with: (i) qualitative, (ii) quantitative and (iii) temporal necessity.

(i) Qualitative Necessity

The *first* aspect is that of *qualitative* necessity, *in casu* pertaining to the question of whether the measure of internment is materially relevant to achieve a military advantage, i.e. there must be a reasonable causal connection between the measure of internment and the desired military advantage. In the context of internment, this is measured by determining whether the security of the counterinsurgent State *cannot* be maintained or guaranteed if the measure of internment in the specific case is not resorted to. Thus, the decision to intern constitutes an unlawful resort to exceptional military necessity if other alternatives to thwart the threat

[1920] These interests may become particularly manifest in situations of belligerent occupation and measures in support of these interests are often 'sold' as militarily necessary.

posed by an individual to the counterinsurgent State's security are feasible.[1921] In other words, internment must be a measure of *last resort*,[1922] and is permitted only if there are "serious and legitimate reasons" to think that the interned persons may seriously prejudice the security of the counterinsurgent State.[1923] The ICRC Commentary to Article 42 GC IV explains why:

> The Convention stresses the exceptional character of measures of internment and assigned residence by making their application subject to strict conditions; its object in doing this is to put an end to an abuse which occurred during the Second World War. All too often the mere fact of being an enemy subject was regarded as justifying internment. Henceforward only absolute necessity, based on the requirements of state security, can justify recourse to these two measures, and only then if security cannot be safeguarded by other, less severe means. All considerations not on this basis are strictly excluded.[1924]

Additional, specific reasons why internment should be viewed this way are, *firstly*, that the decision is taken by an administrative body, not a court; *secondly*, that the decision is often based on classified material, not overt evidence; and *thirdly*, that the internment is not restricted in time, so the measure of internment could be imposed indefinitely.[1925] Clearly, the material relevance of internment to the military advantage is absent if internment is used as an instrument of convenience, for example to bypass more stringent requirements underlying the criminal process.

Examples of alternatives are "the duty of registering with and reporting periodically to the police authorities, the carrying of identity cards or special papers, or a ban on the carrying of arms, to harsher provisions such as a prohibition on any change in place of residence without permission, prohibition of access to certain areas, restrictions of movement."[1926]

In many instances it is conceivable that a person is a criminal suspect while simultaneously posing a threat to the security of the counterinsurgent State. The primary example is that of an insurgent directly participating in hostilities against the Occupying Power. The question arises whether he may be interned. In view of the ICRC Commentary, "Article 78 relates to people who have *not been guilty of any infringement of the penal provisions enacted by the Occupying Power*, but that Power may, for reasons of its own, consider them dangerous to its security and is consequently entitled to restrict their freedom of action."[1927] This implies that the measure of internment does not extend to individuals who, while constituting a threat to the security of the counterinsurgent State, can *also* be considered a suspect of a criminal offence under the penal laws in force in the occupied territory and are held in pre-detention awaiting trial, or have already been convicted and serving a penalty.[1928] This view is shared by Pejic, who argues that the regimes of criminal detention and internment must be regarded as separated in the *first* place because "a person who is suspected of having committed a crimi-

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[1921] Melzer (2008), 165-166.

[1922] Gasser (2008), 319-320.

[1923] (2001n), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-12-A, Judgment of 20 February 2001 (Appeals Chamber).*

[1924] Pictet (1958a), 258.

[1925] (1998a), *Al Amla et al. v. IDF Commander of Judea and Samaria et al., HCJ 2320/98, Israel Supreme Court.*

[1926] Pictet (1958a), 207.

[1927] Pictet (1958a), 368.

[1928] This viewpoint has been corroborated by the Israel Supreme Court (per President Barak) in the L. Salame case. See (2003g), *L. Salame et al. v. IDF Commander of Judea and Samaria, HCJ 5784/03, Israel Supreme Court*, 289. See also the definition used by Pejic, stating that internment of administrative detention constitutes the deprivation of liberty that has been ordered by the executive branch (and not by the judiciary) without criminal charges brought against the internee/administrative detainee. Pejic (2005), 375-376.

nal offence, whether in armed conflict or other situations of violence, has the right to benefit from the additional stringent judicial guarantees provided for in humanitarian and/or human rights law for criminal suspects, which include the right to be tried by a regularly constituted, independent and impartial court" and *secondly*, because "there is a danger that internment might be used as a substandard system of penal repression in the hands of the executive power, bypassing the one sanctioned by a country's legislature and courts. The rights of criminal suspects would thus be gravely undermined."[1929] Dinstein, however, appears to take the opposite view, stating that "[o]f course, speaking empirically, the two lawful types of detention are not hermetically sealed from each other. Detention may initially be undertaken with penal prosecution in mind, yet – upon further reflection – the military government may switch gears and (instead of either charging the suspect or releasing him) opt to have recourse to internment consistent with Article 78."[1930] In the view of the Israel Supreme Court, internment is permissible if prosecution would reveal intelligence sources.[1931]

(ii) Quantitative Necessity

The *second* aspect of the requirement of necessity is *quantitative* necessity. In the context of internment this aspect of necessity implies, *firstly*, that even if qualitatively necessary, the measure of internment may be quantitatively unnecessary if the desired military advantage can be attained by alternative measures which are less harmful.
Secondly, in the event that internment is both qualitatively necessary and constitutes the least harmful measure feasible to guarantee the security of the counterinsurgent State, it must be applied in a manner that balances the interests of the internee and the interests of the State. In practice, this means that internment must be applied in a manner least harmful to the internee, whilst protecting the security of the counterinsurgent State. In that respect, it must be noted that internment is not a measure that is *a priori* disproportionate, for Article 78 GC IV explicitly sets out that it is a measure which "at the most" may be adopted.[1932] In other words, in order to guarantee its security, as meant in Article 27 GC IV, a State may not go *beyond* the measure of internment. At the same time, it must be established whether the measure of internment, even though it may be resorted to, *is and continues to be* the proper measure to guarantee the security of the counterinsurgent State in the concrete and individual circumstances of the case.[1933] In so far possible,[1934] internment must be justified in each

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[1929] Pejic (2005), 381 (emphasis added); Arai-Takahashi (2010), 492. This viewpoint has been corroborated by the Israel Supreme Court (per President Barak) in the L. Salame case. See (2003g), *L. Salame et al. v. IDF Commander of Judea and Samaria, HCJ 5784/03, Israel Supreme Court*, 289.

[1930] Dinstein (2009c), 174. It remains unclear whether he considers such practice lawful or not.

[1931] (2003g), *L. Salame et al. v. IDF Commander of Judea and Samaria, HCJ 5784/03, Israel Supreme Court*.

[1932] Also: ICRC (2007), 729-730.

[1933] Goodman (2009), 53. See Pictet (1958a), 254; (2004r), *The Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-A, Judgment of 17 December 2004 (Appeals Chamber)* § 72-73; (2001n), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-12-A, Judgment of 20 February 2001 (Appeals Chamber)*, § 327; (1999), *Third Report on the Situation of Human Rights in Colombia, IACommHR (26 February 1999)*.

[1934] As the ICRC Commentary to Article 41 GC IV explains, it was discussed during the Diplomatic Conference at great length whether Article 41 GC IV should include a phrase indicating that the decision of internment or assigned residence "should be taken individually," but it was decided not to do so because in some situations, such as the threat of an invasion, a government would have to act without delay and it would not be possible to comply with such requirement. The Commentary to Article 78, however, rules out the possibility of taking collective measures of internment in occupied territory, because in intern-

single case, even if multiple persons are detained simultaneously.[1935] As the decision of internment belongs to the discretion of the State, it is its responsibility to demonstrate the initial *and* continuing necessity for each case of internment,[1936] a responsibility that will increase commensurate to the duration of the internment.[1937] The burden of proof to demonstrate a change in circumstances that should lead to his release lies evidently not with the internee.[1938]

(iii) Temporal Necessity

A *final* aspect of necessity pertains to the temporal necessity to resort to internment. This includes, *firstly*, the question of whether internment may *yet* be resorted to. Internment is unlawful when the threat to the security is merely hypothetical, and not concrete, i.e. based on a current threat, even though it may materialize in the future. Internment is a preventative measure, aimed at the preclusion of *future* dangers to the security. While past activities may be taken into account in the determination of possible future behavior,[1939] the measure of internment may never be invoked as a (punitive) measure for offences that happened in the past, but of which there is no likelihood that they will take place again in the future.[1940] *Secondly*, temporal necessity pertains to the question whether internment may *still* imposed. Internment may not take place indefinitely. In the view of the ICRC, this is a prohibition of customary nature.[1941] Article 132 GC IV is clear: "[e]ach interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist."[1942] Article 75(3) AP I also stipulates that "[e]xcept in cases of arrest or detention for penal offences, such persons shall be released wit the minimum delay possible and in any event as soon as the circumstance justifying the arrest, detention or internment have ceased to exist." This implies a positive obligation for the State to regularly update and verify the information upon which threat and necessity assessments are based throughout the duration of internment and in addition, to periodically review the continued necessity for internment as a measure to remove or minimize the threat.[1943] A principal reason necessitating internment in situations of occupation is the occupation itself. Hence, once the occupation ends, the grounds for internment cease to exist, and the internee must either be released,[1944] or be

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ment in those circumstances is to be regarded as even more exceptional than it is to be viewed in territories of parties to the conflict. See Pictet (1958a), 256 (Article 41 GC IV); 367 (Article 78 GC IV).

1935 (2002f), *Mar'ab et al. v. IDF Commander of Judea and Samaria et al, HCJ 3239/02, Israel Supreme Court*

1936 (2001n), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-12-A, Judgment of 20 February 2001 (Appeals Chamber)*, §§ 328-329.

1937 Arai-Takahashi (2010), 491.

1938 Dinstein (2009c), 176;

1939 (2003e), *Federman v. Minster of Defence, HCJ 8788/03, Israel Supreme Court*, 185.

1940 Dinstein (1978), 125; Arai-Takahashi (2010), 485.

1941 ICRC (2005a), Rule 128; Pejic (2005), 381-382.

1942 Article 75(3) AP I. See also (1998m), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber)*, § 581: "the fundamental consideration must be that no civilian should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely demands."

1943 ICRC & Chatham House (2008), 6.

1944 Article 133(1) GC IV. See also Article 134 GV IV, imposing on the Occupying Power the obligation to ensure the return of all internees to their last place of residence of facilitate their repatriation. In the *Delalic Case*, the ICTY Trial Chamber held that "[t]he fundamental consideration must be that no civilian should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely requires" ((1998m), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber)*, § 581, confirmed by (2001m), *The*

criminally charged.[1945] Internment is unlawful when the threat has subsided to a degree that it no longer poses a threat to the State's security, or when the threat to the security continues, but no longer necessitates the measure of internment. In any case, the necessity for internment is removed after the close of hostilities, and internment must cease.[1946]

(2) The Requirement That the Measure of Internment Be Otherwise in Conformity with LOAC

The *measure* of internment itself must be lawful under LOAC. This requirement is in essence a reflection of the overarching principle of legality, which requires that all State action must be grounded in a legal basis. This requirement demands that the *measure* – i.e. internment – adopted to attain that purpose is (a) by itself permitted under LOAC (*substantive* part of legality), and (b) executed in conformity with LOAC (*procedural* part of legality).

Firstly, in its substantive part, the principle of legality underlying the notion of military necessity requires that an individual's internment must find a basis in norms that permit that measure. Clearly this basis exists in LOAC, by virtue of the combination of norms set out in Articles 27, 41, 42 and 78 GC IV. *Secondly*, the *execution* of the measure must comply with LOAC (*procedural* part of legality). In other words, the measure of internment must comply with any other conditions set forth in LOAC. It has been acknowledged that the non-compliance with these procedural safeguards constitutes "unlawful confinement," which is a grave breach under Article 147 GC IV and constitutes a war crime under the statutes of the ICC and the ICTY.[1947]

In sum, the authoritative personal scope in the context of the interment of persons in occupied territory may consist only of those individuals that pose a threat upon the security of the counterinsurgent State that is of such nature that it necessitates the extreme measure of internment. While the counterinsurgent State has certain discretion in determining which threats pose a threat to its security, the decision to internment is limited by the strict requirements underlying the test of military necessity. The failure to demonstrate that the existence of a concrete threat to the security of the counterinsurgent State can only be removed by the measure of internment places the individual in the prohibitative personal scope of deprivation of liberty and implies that his subsequent internment constitutes a measure of unlawful confinement.

Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-12-A, Appeals Chamber Judgment (20 February 2001), § 322: "an initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in article 43 GC IV").

[1945] Articles 132-134 GC IV.

[1946] Article 133 GC IV.

[1947] Article 8(2)(a)(vii), ICC Statute; Article 2(g) ICTY Statute; see also (1998m), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber)*, § 583; (2001n), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-12-A, Judgment of 20 February 2001 (Appeals Chamber)*, § 322.

1.3.3. Requirements Pertaining to Procedural Safeguards

The Convention contains procedural rules that aim to ensure that States do not abuse the considerable margin of discretion they have in interpreting threats to their security. It is to their normative substance that we will now turn.

1.3.3.1. The Requirement of Prompt Information on the Reasons of Internment

Article 75(3) AP I provides that "[a]ny person arrested, detained or *interned* for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken." In effect, the counterinsurgent State must inform the internee that his conduct poses a threat to its security. According to the ICRC, this rule has customary status and is non-derogable.[1948] From the perspective of the internee, the right to information is intrinsically linked to his right to humane treatment, his right to *habeas corpus* and the right not to be deprived of one's liberty *incommunicado*. However, "international law does not shed much light on the practical details of that obligation: what information must be released at what time, by whom and to whom?"[1949] Clearly, this goes beyond the mere statement that he is detained for imperative reasons of security or poses a threat.[1950] As explained by the ICRC Commentary to Article 75 AP I: "Internees will therefore generally be informed of the reason for such measures in broad terms, such as legitimate suspicion, precaution, unpatriotic attitude, nationality, origin, etc. without any specific reasons being given."[1951] Experts agree that, subject to an absolute necessity for reasons of security, there is no requirement for the counterinsurgent State to provide detailed information, yet States remain under an obligation to provide an internee with as much information as possible, as soon as possible, to enable him to challenge the legality of their detention. In practice, this means that a State can only withhold information when this cannot reasonably be shared directly with the internee, or his legal representative, without endangering the State's security. As the obligation to inform the internee of the reasons for his deprivation of liberty, the State carries the burden of demonstrating that the procedure adopted to determine the release of classified information is in conformity with this and its other obligations under international law.[1952]
The requirement of "promptly" is to be viewed as flexible, i.e. there is no absolute requirement to *immediately* inform the internee of the reasons of his internment, as circumstances may preclude the counterinsurgent State to do so, but, as the ICRC Commentary explains, "ten days would seem the maximum period."[1953]

1.3.3.2. The Requirement of Registration of the Detention in an Officially Recognized Place of Detention

As explained by Pejic, "[t]he entire system of detention laid down by the Conventions, and in which the ICRC plays a supervisory role, is based on the idea that detainees must be registered and held in officially recognized places of detention accessible, in particular, to

[1948] ICRC (2005a), 349-350.
[1949] ICRC & Chatham House (2008), 10.
[1950] ICRC & Chatham House (2008), 11.
[1951] Sandoz, Swinarski & Zimmerman (1987), 875.
[1952] ICRC & Chatham House (2008), 10.
[1953] Sandoz, Swinarski & Zimmerman (1987), 876.

the ICRC."[1954] Elements reflective of this requirement are present in Articles 105, 106, 107 132, 136, 137 and 138 GC IV. In view of the ICRC, this requirement is part of customary LOAC.[1955] These obligations require the counterinsurgent State to inform the internee's family, Protecting Power and the Information Bureau and Central Tracing Agency as soon as possible of his internment, the location of the internment and subsequent transfer to other places of internment.

1.3.3.3. The Requirement to Grant the Internee the Right to Communicate with the Outside World

Internees are, in principle, permitted to communicate with the outside world. Article 106 GC IV permits them "to send direct to his family, on the one hand, and to the Central Agency provided for by Article 140, on the other, an internment card […] informing his relatives of his detention, address and state of health." Article 107 GC IV permits correspondence in the form of letters and cards. Article 116 stipulates that the internee may be allowed "to receive visitors, especially near relatives, at regular intervals and as frequently as possible." The right to correspondence may be limited under certain conditions. In addition, Article 5 GC IV permits derogation from the right to communication provided there are reasons of "absolute military security" to do so in the case of spies, saboteurs or persons "under definite suspicion of activity hostile to the security of the Occupying Power."

1.3.3.3.1. The Requirement to Carry out an Initial Review of the Decision of Internment

The counterinsurgent State is under an obligation to afford an interned insurgent the opportunity to have this measure reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.[1956] In imposing this requirement is,

> the Fourth Geneva Convention implicitly recognizes that states will make mistakes in the field. Thus, the Fourth Geneva Convention contemplates that, after a state's military or other forces detain an individual for security reasons, that individual has a near-term ability to challenge that detention before a court or an administrative board (at the choice of the state).[1957]

While there is no obligation for the counterinsurgent State to review the initial decision automatically, it must do so "as soon as possible".[1958] The phrase "as soon as possible" may be interpreted flexibly, so to take account of the particular circumstances, such as the board's caseload."[1959]

1.3.3.4. The Requirement to Afford the Right of Appeal

Articles 43 and Article 78(2) GC IV impose upon the counterinsurgent State the obligation to afford the internee a right to appeal against the decision upon initial review to uphold the internment.[1960]

[1954] Pejic (2005), 384.
[1955] ICRC (2005a), Rule 123.
[1956] Articles 43 and 78 GC IV.
[1957] Deeks (2009), 408.
[1958] Pictet (1958a), 260.
[1959] Deeks (2009), 409.
[1960] According to the ICRC Commentary to Article 78 GC IV (Pictet (1958a), 368) "[i]t is for the Occupying Power to decide on the procedure to be adopted; but it is not entirely free to do as it likes; it must observe the stipulations in Article 43, which contains a precise and detailed statement of the procedure to

While not stating it with so many words, the right of appeal reflects the right of *habeas corpus*.; a right recognized by the ICRC to be of customary nature, even though it remains unclear whether it forms part of the customary law of LOAC, or of the customary law applicable in armed conflict (i.e. that it is in fact a rule of IHRL applicable in armed conflict).
The authority that took the initial decision of internment and the body authorized to carry out the review on appeal may not be the same.[1961] According to the ICTY, the body of appeal must have "the necessary power to decide finally on the release of prisoners whose detention could not be considered justified for any serious reason."[1962] In addition, it is "*upon the detaining power* to establish that the particular civilian does pose such a risk to its security that he must be detained, and the obligation lies on it to release the civilian if there is inadequate foundation for such a view."[1963]
An additional requirement of the right to appeal is that the decision on appeal must be taken in the minimum time necessary ("with the least possible delay").[1964] It remains unclear, and subject of debate, whether the right to appeal includes the right of the internee to assistance of a lawyer. It is clear that neither Article 78 GC IV nor Article 43 GC IV specifically address this issue. Neither does the ICRC Commentary.

1.3.3.5. The Requirement of a Periodic Review

Articles 43 and 78(2) GC IV require the counterinsurgent State to carry out a *periodic* review of the lawfulness of the internment. This is to take place "at least twice yearly" or "if possible six months". This periodic review must take place on the own initiative of the Occupying Power, or upon request of the internee.[1965] While the text of Article 78 GC IV explicitly links the "competent body" to the "periodical review" in the "event of a decision being upheld" it may be concluded from the fact that it concerns a "review", as well as from the ICRC Commentary to Article 43 GC IV, that the "competent body" may be the same body that decided upon the appeal challenging the lawfulness of the internment.[1966]
Of significance is that Article 78(2) GC IV does not require that the review is to take place in the presence of the internee. As such, it is lawful to carry out the review *ex parte*.
While the latter provision suggests that a single review per year violates LOAC, Article 78 GC IV seems not to sanction the failure to carry out a review once per six months ("if

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be followed when a protected person who is in the territory of a Party to the conflict when hostilities break out, is interned or placed in assigned residence."

[1961] Pejic (2005), 386.

[1962] (2001n), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-12-A, Judgment of 20 February 2001 (Appeals Chamber)*, § 328.

[1963] (2001m), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-12-A, Appeals Chamber Judgment (20 February 2001)*, § 328, 329.

[1964] Dörmann (2004), 14. In interpreting the similar requirement under Article 43 AP I, the ICRY has held that "[…], the reasonable time which is to be afforded to a detaining power to ascertain whether detained civilians pose a security risk has any objective foundation such that it would found a "definite suspicion" of the nature referred to in Article 5 of Geneva Convention IV." (2001n), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-12-A, Judgment of 20 February 2001 (Appeals Chamber)*, § 328.

[1965] Here, Article 78 GC IV seems to deviate from Article 43 GC IV, which permits the internment of civilians in enemy territory, and requires judicial review "at least twice yearly." Arai-Takahashi (2010), 497.

[1966] This may also be concluded from the ICRC Commentary to Article 43 GC IV, which in relation to appeals being rejected notes that "[t]he court or administrative board mentioned in the preceding sentence [which refers to the right of appeal by an appropriate court or administrative body] must reconsider their cases periodically, and at least twice a year, with a view to favourably amending the initial decision if circumstances permit." Pictet (1958a), 260.

possible"). This difference, however, finds explanation in the *travaux préparatoires*, which explain that the drafters agreed it impossible "[…] to push the analogy between the situation of internees on the territory of a belligerent and that of internees in occupied territory any further. The two situations were so entirely different that no argument by analogy was possible."[1967]

1.3.3.6. The Requirement of a Review by an *Independent* and *Impartial* Body

The "appropriate court or administrative board designated by the Detaining Power for that purpose" (Article 43 GC IV) or the "competent body set up" (Article 78 GC IV) by the Occupying Power must qualify as independent and impartial bodies. At first sight, Article 78 GC IV does not seem to require that the body of review is impartial or independent, or that it must be independent from the authority that took the initial decision of internment.[1968] However, by stipulating that "[d]ecisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention," Article 78 GC IV opens the door for reference to other provisions in GC IV, such as Article 43. According to the ICRC Commentary to Article 43 GC IV, "where the decision is an administrative one, it must be made not by one official but by an administrative board offering the necessary guarantees of independence and impartiality."[1969] According to experts, for a review body to be independent and impartial it should: have direct decision-making power with respect to the continued internment or decision to release an internee "without that decision being subject to further confirmation by operational command"; have access to all available information; have members appointed from outside the chain of command "or at least be effectively independent from the latter's influence"; have permanent members whose only task is to review internment-cases; have at least one qualified lawyer.[1970]
Thus, Article 78 GC IV authorizes the Occupying Power to make a choice with respect to reviews of detention, which takes account of the "usage in different States".[1971] As stated in the expert report of the ICRC/Chatham House:

> The main advantage of a court – in principle – is that it offers better guarantees of independence and impartiality and respect for essential procedural safeguards. The main disadvantage is that a court – in principle – is not accustomed to dealing with cases of security internment in a situation of armed conflict and that it is not feasible to expect military forces to collect evidence according to judicial standards in war. In practical terms, it may be difficult to bring internees before a court for security and/or logistical reasons in active theatres of war. Court proceedings can be and usually are slow.
> The main advantage of an administrative body is that it can be (and in IAC and occupation is foreseen as being) set up specifically for the purpose of internment review, meaning that it can be adapted to the specific context and type of deprivation of liberty involved. The main disadvantage of *ad hoc* administrative bodies is that there is little, if any regulation, on their composition, powers and procedures making it difficult to ensure independence and impartiality as well as effective implementation of the necessary procedural safeguards.[1972]

1967 United Nations (1949), Committee II, 47th Meeting (on draft Article 68), Statement of Mr. Haksar (India).
1968 Arai-Takahashi (2010), 496; UCIHL (2004), 17.
1969 Pictet (1958a), 260.
1970 ICRC & Chatham House (2008), 17.
1971 Pictet (1958a), 260.
1972 ICRC & Chatham House (2008), 16.

Experts have argued that, in general, a challenge of the lawfulness of one's detention should be dealt with by a body that is independent and impartial, thereby stressing the *characteristics* of the body towards the facts rather than its *nature*. Nonetheless, by most experts, judicial review is preferred over administrative review,[1973] although Gasser stresses that review by an administrative board is all that is required by the law.[1974]

1.4. General Requirements Pertaining to *All* Protected Persons

1.4.1. Requirements Pertaining to the Treatment of Protected Persons

The requirements pertaining to the treatment of protected persons can be split into two categories: (1) treatment in the narrow sense (*stricto sensu*) and (2) treatment in terms of material conditions. Both will be separately discussed below.

1.4.1.1. Treatment in the Narrow Sense

LOAC also imposes on the counterinsurgent State requirements pertaining to the treatment of all protected persons. The general rule can be found in Article 27 GC IV, which states that:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.
> Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.
>
> Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

The final sentence of Article 27 GC IV stipulates that "the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war." These measures, however, may not derogate from the fundamental human rights of protected persons deprived of their liberty.[1975]

The general obligation of the counterinsurgent State vis-à-vis civilians it detains, whether they are law enforcement detainees or internees, is that they "shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria."[1976] Thus, in relation to spies and saboteurs put on trial, Article 5 GC IV stipulates that:

> […] In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

[1973] UCIHL (2004), 17; Arai-Takahashi (2010), 499.
[1974] Gasser (2008), 320.
[1975] Pictet (1958a), 207.
[1976] CA 3.

Similarly, Article 37 GC IV imposes upon a State party to GC IV to treat "[p]rotected persons who are confined pending proceedings or serving a sentence involving loss of liberty" humanely during their confinement.
More specific to the treatment of civilians deprived of their liberty, Article 32 forbids the counterinsurgent State "from taking any measure of such a character as to cause the physical suffering or extermination of protected persons […]." It implies the prohibition of "murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person" and of "any other measures of brutality whether applied by civilian or military agents." As the ICRC Commentary stresses, the words "of such a character as to cause" denote that "it is not necessary that an act should be intentional for the person committing it to be answerable for it."[1977]
Turning to Article 75 AP I, it offers fundamental guarantees to all civilians deprived of their liberty and stipulates that they "shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article in a non-discriminatory manner. More in particular, it prohibits "at any time and in any place whatsoever, whether committed by civilian or by military agents" violence to life, health, or physical or mental well-being or persons – such as murder; torture of all kinds, whether physical or mental; corporal punishment; and mutilation – outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; the taking of hostages; collective punishments; and threats to commit any of the foregoing acts."[1978] These protections shall be afforded to detainees "until their final release, repatriation or re-establishment, even after the end of the armed conflict."[1979] Finally, in the case of protections available under international law that are more favorable to those provided in Article 75 AP I, their restriction or limitation by the rules embodied in Article 75 AP I is prohibited.[1980] Thus, provisions of IHRL offering more protection than those provided in Article 75(3) AP I must be preferred.
Finally, there is no doubt whatsoever as to the customary status under LOAC of the requirement of humane treatment and the prohibitions on all of the acts enumerated in Article 75(3) AP I.[1981] Many of these requirements and prohibitions were already recognized in pre-Geneva law of war documents,[1982] or stipulated as war crimes in the statute of the Nuremburg War Crimes tribunals.[1983]

1.4.1.2. Treatment in Terms of Material Conditions

The law of IAC also provides norms pertaining to material conditions of treatment. Article 76 GC IV provides a rudimentary list of norms in regard of the treatment of criminal detainees in occupied territory and stipulates that they shall:

- be detained in the occupied territory, and if convicted they shall serve their sentences therein;

[1977] Pictet (1958a), 222.
[1978] Article 75(3) AP I.
[1979] Article 75(6) AP I.
[1980] Article 75(8) AP I.
[1981] ICRC (2005a), Rules 87-98.
[1982] On the prohibition of inhumane treatment, see for example Article 76 Lieber Code, Article 76; Article 23(3), 1874 Brussels Declaration; Article 63, Oxford Manual; Article 4(2), 1907 HIVR.
[1983] See for example Article 6(b) IMT Charter (Nuremberg).

- if possible, be separated from other detainees and shall enjoy conditions of food and hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country;
- receive the medical attention required by their state of health;
- have the right to receive any spiritual assistance which they may require;
- be confined in separate quarters and shall be under the direct supervision of women;
- be paid to the special treatment due to minors;
- have the right to be visited by delegates of the Protecting Power and of the International Committee of the Red Cross, in accordance with the provisions of Article 143 and
- have the right to receive at least on relief parcel monthly.

The list of material conditions to be provided to interned persons is far more extensive and concerns an entire section (Section IV) of GC IV (i.e. Articles 79-135). These rules are quite similar to those pertaining to POWs, although they do take account of the civilian character of the internees.[1984] Following the headings of the chapters, requirements for authorized deprivation of liberty pertain to a wide range of subjects, to include the places of internment; food and clothing; hygiene and medical attention; religious, intellectual and physical activities; personal property and financial resources; administration and discipline; relations with the exterior; penal and disciplinary sanctions; transfer of internees; deaths; and release, repatriation and accommodation in neutral countries.

In addition to these treaty-based rules, the material conditions of treatment have also been secured in customary law and can be found in chapter 37 of the CLS.

1.4.2. Requirements Pertaining to the Transfer of Protected Persons

The transfer of protected persons (in general) is subject to the norms set out in Article 45 GC IV. It permits the transfer of protected persons, also for reasons of extradition for offences against ordinary criminal law, in pursuance of extradition treaties concluded before the outbreak of hostilities, to another, accepting State, provided that (1) the accepting State is a party to GC IV; (2) "the Detaining Power has satisfied itself of the willingness and ability of such transferee Power [accepting State] to apply the present Convention;" (3) the transferring State has satisfied itself that the protected person has no reason "to fear persecution for his or her political opinions or religious beliefs" in the accepting State.

Once accepted, the accepting State assumes responsibility for the protected person. This does not imply that the transferring State is availed of all obligations under the GC IV vis-à-vis the transferred protected person, for if the accepting State "fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with."

Article 49 GC IV, more specific to situations of belligerent occupation, forbids the forcible transfer or deportation, on whatever grounds, of protected persons from the occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not. However, if the security of the population or imperative military reasons so demand, the Occupying Power is permitted to evacuate, in total or partially, a given area, provided that such evacuation does not take the protected persons outside the boundaries of the occupied territory, unless this is, for material reasons, unavoidable. Nevertheless, imme-

[1984] Gasser (2008), 320.

diately after the cessation of the hostilities in the evacuated area, the protected persons are to be transferred back to their homes.

Additional to Articles 45 and 49 GC IV, Articles 127 and 128 GC IV specifically concern the conditions and method of transfer of *internees*. Thus, the Occupying Power is, *inter alia*, under an obligation to take into account the interests of the internees when deciding upon transfer, and to treat internees transferred humanely, and to supply them with drinking water and food "in quantity, quality and variety to maintain them in good health," as well as with the necessary clothing, shelter and medical attention. Also, it must take precautionary measures to ensure the safety of the internees, both prior and during their transfer. In addition, the Occupying Power must notify the internee of his departure, and new postal address, so they can collect their belongings and inform their next of kin.

2. Normative Substance of the Valid Normative Framework Relative to Operational Detention in the Context of NIAC

2.1. The Principle of Distinction

2.1.1. Regime Admissibility

The law of NIAC does not expressly stipulate who may be deprived of their liberty and on what basis. While drafting CA 3, States preferred to regulate the consequences of direct participation in the hostilities in internal armed conflicts not at the horizontal State-to-State level, but rather through their *domestic* laws, at the vertical State-to-individual level, in their own fashion.[1985]

As a result, the law of NIAC does recognize a status-based categorization between combatants *de iure* and civilians, as found in GC III and GC IV.[1986]

The only concession that States were willing to make was to adopt rules and provisions solely concerned with the guarantees of fair trial and treatment afforded in the case *that* individuals are deprived of their liberty. In doing so, CA 3 addresses one generic group of individuals: "persons taking no active part in the hostilities." While it specifically mentions, as part of the generic group, "members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause," CA 3 "naturally applies first and foremost to civilians."[1987] Similarly, the scope *ratione personae* of AP II

[1985] For a summary of the State arguments opposing the idea of such extension, see Pictet (1958a), 31 ff.

[1986] The principal objection is that, in the context of NIAC, affording combatant-status to civilians would undermine the system underlying the principle of distinction. An essential purpose of the combatant-status is to authorize the participation in hostilities and to render lawful the performance of belligerent acts otherwise unlawful in times of peace, provided they are carried out in accordance with LOAC. This combatant privilege and immunity also ensures that combat is waged between combatants (and their military objects), and not against those protected from the consequences of hostilities. The absence of combatant-privilege and immunity with civilians functions as a logical barrier against direct attack, as they are not supposed to pose a threat to those who are privileged to fight, i.e. combatants. Gill & Van Sliedregt (2005), 32. Other objections are that extending the combatant-status to internal armed conflicts would give insurgents the status of belligerents, and a degree of legal recognition; imply a risk of ordinary criminals being encouraged to give themselves a semblance of organization as a pretext for claiming combatant immunity; introduce a legal basis to ask for the assistance and intervention of a Protecting Power; and force a State to release captured rebels, now POWs, at the end of the hostilities, whereas they have also violated domestic penal laws. See also Pictet (1958a), 31.

[1987] Pictet (1958a), 40.

extends to "*all* persons affected by an armed conflict as defined in Article 1 [i.e. AP II-type NIAC]" on a non-discriminatory basis.[1988] Thus, CA 3 and AP II both accommodate captured or arrested insurgents, whether they are peaceful civilians, civilians captured while directly participating in the hostilities, or CCF-members of the armed forces of the insurgency movement.

2.1.2. Legal Bases

The above also explains why CA 3 and AP II remain silent on the exact thresholds informative of whether operational detention – be it for criminal or security reasons – may actually take place. Nonetheless, both CA 3 and AP II undoubtedly *contemplate* the deprivation of liberty.[1989]

This can, *firstly*, be concluded from the relevant texts. The authority for *criminal detention* follows from the mere use of the word "detention" in CA 3. In fact, the ICRC Commentary to CA 3 emphasizes that CA 3 "does not protect an insurgent who falls into the hands of the opposing side from prosecution in accordance with the law, even if he has committed no crime except that of carrying arms and fighting loyally." Article 5 AP II, relates to persons *interned* or *detained* for reasons related to the armed conflict, to include criminal detention.[1990] In turn, Article 6 AP II is more specific to criminal detention, as it explicitly "applies to the prosecution and punishment of criminal offences related to the armed conflict."[1991]

As for *security detention*, additional to the more generic references to internment and detention in CA 3 and AP II, Kleffner explains that security detention

> […] logically follows from the fact that members of the armed forces may be directly attacked and that civilians directly participating in hostilities lose their protection from direct attack. Since such direct attacks allow for the use of potentially deadly force, the lesser means of putting such person *hors de combat* by detention is equally lawful.[1992]

[1988] Article 2 AP II.

[1989] Olson (2009), 440.

[1990] According to the ICRC Commentary, the phrase "for reasons related to the armed conflict" in Article 5 AP II includes both law enforcement detainees and security detainees (in so far the latter are not prosecuted under penal law). See Sandoz, Swinarski & Zimmerman (1987), 1386, § 4568.

[1991] The ICRC Commentary explains: "[…], there must be a link between the situation of conflict and the deprivation of liberty; consequently prisoners held under normal rules of criminal law are not covered by this provision." Sandoz, Swinarski & Zimmerman (1987), § 4568.

[1992] Kleffner (2010c), 471. See also ICRC & Chatham House (2008), 3-4: "There was prevailing agreement that any party to a NIAC has an inherent power or "qualified right" to intern persons captured." While reaching the same result, Goodman argues that "[…], IHL in international armed conflict – and the Fourth Geneva Convention in particular – is directly relevant because it establishes an outer boundary of permissive action. States have accepted more exacting obligations under IHL in international than in noninternational armed conflicts. That is, IHL is uniformly less restrictive in internal armed conflicts than in international armed conflicts. Accordingly, if states have authority to engage in particular practices in an international armed conflict […], they *a fortiori* possess the authority to undertake those practices in noninternational armed conflict. *Simply put, whatever is permitted in international armed conflict is permitted in noninternational armed conflict.* Hence, if IHL permits states to detain civilians in the former domain, IHL surely permits states to pursue those actions in the latter domain. […] *Interpretations of IHL that contravene [this general postulate] should be considered suspect or implausible*." See Goodman (2009), 50, 57 (emphasis added).

2.1.3. The Resulting Authoritative and Prohibited Personal Scopes of Operational Detention

In sum, it follows from the above that the *authoritative* personal scope of operational detention under the law of NIAC consists of those insurgents prosecuted for crimes for reasons related to the armed conflict, as well as insurgents detained for reasons of security.
In turn, the *prohibitative* personal scope of deprivation of liberty under the law of NIAC consists of all individuals whose deprivation of liberty is not demanded for criminal purposes or security reasons.

2.2. Normative Substance of Authorized Operational Detention

The next issue is: in view of the authoritative scope of operational detention, what is the normative substance of the requirements that can be distilled from the normative framework under the law of NIAC governing operational detention. As previously noted, in both qualitative and quantitative terms, the treaty-based law of NIAC is very limited. Three categories of requirements can be identified.
A *first* category of requirements concerns the fair trial guarantees to be afforded to criminal detainees. As previously noted in Chapter V, the law of NIAC provides a rather comprehensive set of treaty-based and customary norms on fair trial guarantees. In terms of normative substance, these guarantees do not differ from those protected under IHRL, and in that sense, fully converge.
A *second* category concerns requirements specific to procedural safeguards in security detention. As concluded, the treaty-based NIAC does not provide any norms on security detention, but customary law imposes two obligations: (1) the "obligation to inform a person who is arrested of the reasons for arrest;" and (2) an "obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention" (*habeas corpus*).
In terms of normative substance, these requirements do not differ from those protected under IHRL. However, as we have seen, the law of IAC contains similar requirements, and these somewhat differ from those under IHRL, to the extent that they are more sensitive to the specific environment of armed conflict in which they need to applied. Given the context of armed conflict, it would logically follow that these customary-based requirements follow the line adopted in the law of IAC. As regards the simultaneous applicability of both IHRL and LOAC, here a potential area of norm conflict is identified that deserves further examination in Chapter X.
Since the law of IAC contains a more comprehensive body of procedural safeguards, another issue that arises is whether this gap can be filled by IHRL. This, too, is an issue of interplay.
A *third* category of requirements concerns the treatment of criminal and security detainees. In sum, the law of NIAC provides norms that aim to protect the human dignity of detainees and imposes obligations in respect of the material conditions of treatment. In terms of normative substance, these norms converge with those found in the law of IAC and customary law. Here too, to a large degree, these conditions converge with similar conditions imposed under IHRL.

3. Observations

In the present chapter we examined the normative substance of the valid norms pertaining to operational detention in the law of IAC and the law of NIAC, with a view to the permissible scope for criminal and security detention.

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, which indicates 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.

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 those qualifying as POWs for the duration of the conflict without periodic reviews, yet this body of law does not apply, as previously concluded, to insurgents as understood in the present study. However, commanders or other administrative authorities still are afforded a considerable degree of latitude in GC IV to determine whether an individual poses an imperative threat to the security thus necessitating their security detention. 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 that demonstrate 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 some situational contexts of counterinsurgency clearly constitute NIACs (NATCOIN, SUPPCOIN and consensual TRANSCOIN), whereas others (OCCUPCOIN and non-consensual TRANSCOIN) are only exceptionally regulated by the law of IAC, unless one adheres to the view that this is always the case. In any case, the density and clarity of norms governing security detention in the law of IAC functions as an argument to bolster the argument that in these situations the law of IAC applies. This is not to say that all problems are solved, for the valid norms on security detention in the law of IAC differ in some respects from similar valid norms under IHRL, thus triggering the question of their interplay – the outcome of which may impact the lawfulness of this type of detention.

Far more problematic is the situation in the law of NIAC, in view of the absence of valid norms governing security detention. The law of NIAC does not recognize a category of POWs that, similar to GC III, may be interned until the end of the conflict without a periodic review of the reasons for their internment. Neither does it offer a framework such as provided in GC IV and Article 75 AP I. Nonetheless, there appears to be agreement that security detention under the law of NIAC is not prohibited – to the contrary: it is already contemplated in some parts of the treaty law. Thus, the question of permissibility is not likely to arise in the area of legal basis. Most concern is directed at the issue of whether, and

if so, what procedural safeguards are to be afforded. Here, the question of gap-filling arises. As concluded previously, CA 3 encourages parties to the conflict to agree upon the application of the law of IAC, the immediate downside of which is of course that is consent-reliant. 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. It is here that IHRL may fill the gap. After all, this is expressly foreseen in CA 3 and AP II. It is to the appreciation of the interplay that we will now turn.

Chapter XI Interplay

In view of the above, this chapter examines the interplay between IHRL and LOAC in relation to criminal detention and security detention. As announced in the introduction, it is possible to identify within the normative paradigm of law enforcement – in so far it relates to detentions – two normative sub-paradigms. This concerns, *firstly*, the *normative paradigm of criminal detention*, consisting of the sum of valid and applicable norms of IHRL and LOAC regulating the deprivation of liberty for reasons of criminal justice. To recall, the prime purpose of this framework is 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*. *Secondly*, this concerns the *normative paradigm of security detention*, involving the valid and applicable norms of IHRL and LOAC governing the deprivation of liberty for reasons of security, and regulating an individual's detention for *future* behavior, in order to *prevent* threats to the *security*.

Paragraph 1 examines the interplay of IHRL and LOAC in the normative paradigm of criminal detention, whereas paragraph 2 focuses on security detention. Paragraph 3, finally, investigates the interplay between both normative paradigms.

1. The Interplay of IHRL and LOAC in the Normative Paradigm of Criminal Detention

Irrespective of whether it concerns the interplay between IHRL and the law of IAC or that between IHRL and the law of NIAC, in some areas both frameworks are characterized by *convergence* and *complementarity*. Convergence can be found particularly in the area of treatment (both in the narrow sense (*stricto sensu*),[1993] as well as treatment in terms of material conditions). Here, essentially all principles and guarantees to be found in IHRL treaties also have found their way into LOAC, either as a treaty norm, or as a norm of customary law (in respect of treatment *strict sensu*), or LOAC provides norms that also find protection in IHRL 'soft law'-documents (in respect of material conditions).

[1993] Both IHRL and LOAC prohibit murder (compare CA 3 and Article 4(2)(a) AP II; Article 6(1) ICCPR; Article 4(1) ACHR; Article 2(1) ECHR); torture (compare Article 1 CAT; CA 3 and Article 4(2) AP II; Rule 90 CIHL. Note, however, that the definition of torture in LOAC does, in contrast to that of Article 1 CAT, not require that the severe physical or mental pain or suffering be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity") and other forms of cruel, inhuman, and degrading treatment and punishment (compare CA 3 and Article ? AP II: Article 7 ICCPR; Article 5(2) ACHR; Article 3 ECHR. The human rights obligations go further than those under LOAC, for they prohibit cruel, inhuman and degrading treatment *and* punishment. See ICC Statute, Elements of Crime for the war crime of torture, Article 8(2)(a)(ii)-1 and war crime of inhuman treatment, Article 8(2)(a)(ii)-2; war crime of torture, Article 8(2)(c)(i)-4 and war crime of cruel treatment, Article 8(2)(c)(i)-3. Rodley (2003); Nowak (2006), 830-832; Lubell (2010), 179-180); mutilation; and medical or scientific experiments; as well as other forms of violence to life and health, which include prohibitions of sexual violence and rape.

In relation to other areas, IHRL and LOAC not so much converge, but rather *complement* each other as they both point in the same direction. A key example is the legal basis for criminal detention. In the context of situations where the law of IAC applies (i.e. OCCUP-COIN and possibly non-consensual TRANSCOIN), both IHRL and LOAC provide valid rules that essentially point in the same direction. For example, the requirement present in all relevant human rights conventions that the deprivation of liberty must only take place "on such grounds and in accordance with such procedure as are established by law" corresponds with the authority under Article 64 GC IV to enact penal legislation and the requirement under Article 65 GC IV stipulating that the "[t]he penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language" as well as the obligation under Article 43 HIVR that the Occupying Power is entitled "to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Further proof of this convergence follows from the fact that the prohibition of arbitrary deprivation of liberty – in essence a rule of IHRL – is recognized as a rule of customary LOAC.[1994] This also applies to the principle of legality, stipulating "no one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed."[1995]

In the context of counterinsurgency operations where the law of NIAC applies, it has been concluded that the former does not provide an explicit legal basis for criminal detention, but merely assumes this (as follows from references to criminal detention in its treaty law). IHRL offers more specific guidance as criminal detention is the prime form of deprivation of liberty regulated in IHRL. To recall, Article 5 ECHR is most specific in pointing out that detention for reasons of criminal justice does not violate the right to liberty.

Another area where IHRL and LOAC norms are complementary is that of *transfer*. To recall, the principle of *non-refoulement* under the latter stipulates that transfer is prohibited where there is a real risk of violation of certain fundamental human rights, such as the prohibition from torture, or other forms of cruel, inhuman or degrading treatment or punishment. It also prohibits transfers where a person faces the risk of imposition or execution of the death penalty, also when such trial was in accordance with the necessary requirements,[1996] and even if the detaining State has reserved the right to impose the death penalty in times of war.[1997] More generally, transfer is prohibited if it is foreseen that a person will be exposed to a flagrantly unfair trial.[1998] The content of this prohibition overlaps with the requirement

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[1994] ICRC (2005a), Rule 99.

[1995] ICRC (2005a), Rule 101.

[1996] (2010b), *Al-Saadoon and Mufdhi v. the United Kingdom, App. No. 61498/08, Judgment of 2 March 2010*, §§ 123, 142-143.

[1997] Article 2(1) ICCPR offers States the possibility to make a reservation to permit "[…] the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime." Such a reservation is not possible under the European human rights system. Protocol No. 13 to the ECHR, Concerning the Abolition of the Death Penalty in All Circumstances forbids States to do so. See also Article 19 of the Charter of Fundamental Rights of the European Union.

[1998] (2001e), *Einhorn v. France, Admissibility, ECtHR (16 October 2001)*, § 32; (1989d), *Soering v. the United Kingdom, App. No. 14038/88, Judgment of 7 July 1989*, § 113 ("The Court does not exclude that an issue might exceptionally be raised under Article 6 (art. 6) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country"); (1992a), *Drozd and Janousek v. France, App. No. 12747/87, Judgment of 26 June 1992*, § 110 ("The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a fla-

under Article 45 GC IV that the transferring State shall satisfy itself that "the Detaining Power has satisfied itself of the willingness and ability of such transferee Power [accepting State] to apply the present Convention," which as noted also prohibits torture, or other forms of cruel, inhuman or degrading treatment or punishment, and that the protected person has no reason "to fear persecution for his or her political opinions or religious beliefs" in the accepting State.

Finally, it is of interest to closer examine the interplay between IHRL and LOAC in relation to *fair trial rights*. In so far the law of IAC applies, we have been able to conclude that GC IV and Article 75(4) AP I offer a quite comprehensive list of fair trial rights that are to be afforded to all persons in the power of a party to the conflict, to include persons not protected by GC IV. We have also concluded that fair trial rights have attained customary law status. Besides the treaty-based LOAC norms, IHRL-treaties function as a principal source. Both overlap.
In so far the law of NIAC applies, we are confronted with a gap in regulation. To recall, CA 3 refers to "judicial guarantees which are recognized as indispensable by civilized peoples" and thus hardly provides specific guidance. Indeed, the ICCPR-based Article 6 AP II offers more detail, but technically this provision only applies when the threshold of AP II has been crossed. If this is not the case (and only CA 3 applies), or to supplement Article 6 AP II (when it applies), reference may be had to the law of IAC, but as previously noted, this may only take place on a policy-basis, as formally these norms apply only between States, party to the conflict. Finally, IHRL may fill the gap, but this only binds States, and not the insurgents (which may be assumed to detain as well), so there is no reciprocity in obligations. The latter problem can be said to have been largely solved as the fair trial rights found in IHRL are regarded to have crystallized into norms of LOAC, as argued by the ICRC, and as such they become binding on all parties to the NIAC.
In these instances of convergence and complementarity, it is submitted that LOAC, in so far it provides valid treaty based or customary norms, forms the *lex specialis*, for the mere fact that it provides those norms in the specific context of armed conflict.[1999] This has the added benefit that LOAC reinforces the relevant IHRL norms as it allows no derogation from fair trial rights in situations of armed conflict. Nonetheless, in these situations, IHRL remains applicable in the background to act alongside it to *complement* LOAC where this body of law does not explain an issue or uses ambiguous notions that can be given more concrete meaning in the light of relevant human rights guarantees and, where necessary, to *complement* LOAC to fill remaining gaps. An example of clarification is the meaning of torture, mentioned in Article 75(3) AP I, but remaining undefined in LOAC, and which "has proved to be the standard whose interpretation and application in practice requires the

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grant denial of justice"). The HCR, in Human Rights Committee (2004a), § 12, has adopted general standards: "article 2 […] entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed." See also the United Nations Model Treaty on Extradition, Annex to UN General Assembly resolution 45/116, 14 December 1990, article 3(f) (listing a violation of minimum fair trial guarantees as laid down in article 14 ICCPR as a mandatory ground for refusing extradition).

[1999] See also (1999f), *Coard and Others v. the United States ('US Military Intervention in Grenada), Case No. 10.951, Decision of 29 September 1999*, § 42.

cross-analysis of international human rights law and international humanitarian law."[2000] In order to understand the precise meaning of the prohibition of torture under LOAC, it is essential to examine its meaning under IHRL, more precisely the definition and interpretation thereof used in the 1984 CAT. Another example of clarification is the fair trial-related prohibition in CA 3 to pass sentences and to carry out "executions without previous judgment pronounced by a *regularly constituted* court, […]". The question of when a court can be said to have been regularly constituted, independent or impartial can be answered by reference to the case law of (quasi-)judicial human rights bodies, which have frequently addressed the issue.[2001]

In sum, it may be concluded that, generally speaking, the interplay of IHRL with LOAC in the normative paradigm of criminal detention is one of convergence and complementarity, and that both are in harmony without conflict. IHRL places no restrictions on the conduct of States in the context of criminal detention that go further than those imposed by LOAC. Even in those instances where a State denies the extraterritorial applicability of IHRL, or its applicability in armed conflict, its obligations under treaty-based and customary LOAC would offer clear guidance from which it may not derogate.

2. The Interplay of IHRL and LOAC in the Normative Paradigm of Security Detention

The normative paradigm of security detention is an area where the difference between the law of IAC and NIAC in terms of availability, density and precision of norms is a crucial factor in determining the interplay between IHRL and LOAC. It is for that reason that the interplay will be examined separately.

2.1. The Interplay Between IHRL and the Law of IAC

The interplay between IHRL and the law of IAC is, too, predominantly characterized by *convergence* and *complementarity*, although it is also possible to identify areas of *potential conflict* or *ambiguity*.

The areas of convergence are quite similar to those in the normative paradigm of criminal detention. Thus, in so far it concerns the *treatment* of security detainees, both regimes provide guidance, although it must be admitted that in relation to the material conditions of treatment only LOAC provides treaty and customary norms (these norms can only also be found in IHRL 'soft law' documents). Here, LOAC is truly the *lex specialis*.

Another area where IHRL and LOAC largely converge or can be harmonized is the area of *procedural guarantees*. To a large degree, both regimes stipulate the same rules, but there are some notable differences where both norms can be said to diverge. An example concerns the obligation of the Occupying Power to set up "an appropriate court *or* administrative board." When choosing an administrative board, it must offer "the necessary guarantees of independence and impartiality."[2002] In contrast, the rule of *habeas corpus* under IHRL de-

[2000] Orakhelashvili (2007), 22-24. See, for example, the comparative analysis carried out by the ICTY in the cases of (1998n), *The Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Chamber Judgment of 10 December 1998*, §§ 134-146; (1998m), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case), Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber)*, §§ 440 ff.

[2001] For examples, see footnotes 27-29 accompanying the text of Rule 100, ICRC (2005a).

[2002] Pictet (1958a), 260.

mands that a *court* must hear any challenges to the lawfulness of the detention, thus implying that the review by an administrative body would violate IHRL.
Again, one solution would be to derogate from this aspect of the rule of *habeas corpus*. None of the relevant treaties prohibits derogation from the right to liberty or the right to *habeas corpus* specifically. However, views as to the need for, as well the possibility of, derogation differ. Some argue that the rule of *habeas corpus* is non-derogable, but while this seems entirely consistent with the object and purpose of the rule in peacetime where it may be assumed "that the courts are functioning, that the judicial system is capable of absorbing whatever number of persons may be arrested at any given time, that legal counsel is available, that law enforcement officials have the capacity to perform their task, etc.",[2003] it can be questioned whether its non-derogable nature must persist in armed conflict.
In the absence of derogation, or the possibility to do so, the norm conflict persists, and needs to be avoided or resolved. Some[2004] adopt the view that the IHRL-requirement of judicial review is a reflection of "modern usage",[2005] and that the IHRL-requirement of a court – as the *lex posterior* – now trumps the *lex prior*-right in the law of IAC to choose for an administrative board, unless *force majeure* forces it to do otherwise.[2006] Among experts, the choice of a court over an administrative board should be the preferred order of priority when the circumstances permit this,[2007] but it is submitted that the choice for an administrative body cannot *a priori* be excluded merely because a later source deviates from an earlier source. Firstly, it is generally accepted that an earlier rule of a specific nature (in this case Articles 43 and/or 78 GC IV) will prevail over a (later) rule of a more general character in the event of a conflict between them. *Secondly*, it is submitted that, in light of the object and purpose of LOAC, the choice for a court or administrative board is to be viewed as *context-driven*. While in situations of relative peace, such as in the case of prolonged occupation, easy access may be had to a court,[2008] in other situations no courts may at all be available or functioning. In addition, during armed conflict there is no guarantee that a court may offer the best protection.[2009] For example, in Iraq,

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[2003] ICRC (2011), 16.

[2004] Cassel (2008), 847, accompanying footnote 221; Kälin (2004), 29, 30. See also Human Rights Committee (2001c), § 16 and (1998c), *Concluding Observations of the Human Rights Committee: Israel (Concluding Observations/Comments) (18 August 1998)*, § 21.

[2005] Pictet (1958a), 260, explaining that the underlying rationale for a choice between a court or administrative body lies in the "usage in different States," thus acknowledging that (at least in 1949) States used both courts and administrative boards to carry out reviews.

[2006] See also Article 23, International Law Commission (2001b).

[2007] See, for example Pejic (2005), 387, stating that "[i]t may be presumed that judicial supervision of internment would more likely comply with the requirements of independence and impartiality. It is therefore submitted that judicial supervision would be *preferable* to an administrative board and should be organized *whenever possible*."

[2008] Kleffner (2010b), 74-75.

[2009] Arguments found in literature are that a court "is not accustomed to dealing with cases of security internment in a situation of armed conflict and that it is not feasible to expect military forces to collect evidence according to judicial standards in war." In addition, "the equality of rights and obligations of the parties to an armed conflict under IHL means that there must be an alternative to judicial review that could be utilized by non-State armed groups who are unlikely to have any – recognized – court system." See ICRC & Chatham House (2008), 17; Kälin (2004), 29. Arai-Takahashi (2010), 501 adds that "[f]irst, controversy over extra-territorial jurisdiction may cast doubt on the capacity of the judicial organs of the occupying power's home country to undertake judicial review of acts done in occupied territories. Second, in the harsh reality of occupation, the prospect that local courts in occupied territory during the period of occupation may scrutinise the occupying power's decisions on internment or administrative de-

> [t]he criminal justice model did not take account of the security realities on the ground – including long delays for trials and resulting congestion, the failure of witnesses to appear in court, the absence of prisoners in court and the assassination of judges. In addition, there was no established specialised criminal procedure, which resulted in Iraqi judges often excluding evidence.[2010]

Rather, a "balance must be struck between military necessity and operational limitations in armed conflict on the one hand, and the rights of internees, on the other."[2011] Following this balance, an administrative body may be preferred over a court.

In addition, various sources in legal doctrine indicate that in the context of a belligerent occupation the focus lies on the review body's *capacity* to be *independent* and *impartial*, stressing the *characteristics*, rather than the *nature* of the body.

There can be little doubt, therefore, that Article 78 GC IV, while the *lex prior*, also is the *lex specialis* in the situation of belligerent occupation. It is a well-established principle of international law that the older, but more specific rule precedes a newer, but more general rule. Therefore, in order to avoid or resolve the conflict with obligations under IHRL when the choice is made for an administrative body, use can be made of the maxim of *lex specialis* as a technique of *interpretation* or *conflict resolution*.[2012]

As regards the legal basis to intern, IHRL and LOAC are also complementary, at least in so far it concerns the interplay between, on the one hand, Articles 43 and 78 GC IV and, on the other hand, Articles 9 ICCPR and 7 ACHR. To recall, the former *permit* the internment of persons, whereas the latter *prohibit* arbitrary deprivation of liberty. The question to be answered thus is: does the interment of insurgents violate the prohibition of arbitrary deprivation of liberty. In its General Comment on Article 2 ICCPR, regarding the arbitrary deprivation of life, the HRC has stated that "[w]hile, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive."[2013] This statement – which in essence reflects the ICJ's *Nuclear Weapons Advisory Opinion*-formula[2014] – equally applies to Article 9 ICCPR and Article 7 ACHR. Thus, the test of what is an arbitrary deprivation of liberty under these norms of IHRL falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate internment in occupied territory. It follows that in so far the internment of individuals takes place within the boundaries of Article 78 GC IV – namely when necessary for imperative reasons of security – the interplay IHRL and LOAC in this area can be characterized as one of harmony rather than conflict. Admittedly, while this seems to smoothly harmonize IHRL and LOAC – by following this interpretation no conflict arises –

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tention is discouragingly slim. Even if such review takes place, practical difficulty remains as to the implementation and enforcement of such review decisions."

[2010] Rose (2012), 10.

[2011] ICRC & Chatham House (2008), 17.

[2012] The former technique is applied when answering the question of whether the choice for an administrative body amounts to the arbitrary deprivation of liberty prohibited under the ICCPR and ACHR. In that case, recourse may be had to the ICJ's *Nuclear Weapons*-formula, implying that an individual's review of the lawfulness of his security detention in occupied territory is not arbitrary when carried out by an administrative body that is independent and impartial. In relation to Article 5 ECHR, the maxim of *lex specialis* must be applied as a technique of conflict resolution: in view of the facts underlying the choice for an administrative body, there is no choice other than to set aside the IHRL-based requirement that the challenge of the lawfulness of a decision to security detention is to be handled by a court.

[2013] Human Rights Committee (2004b), § 12.

[2014] (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, § 25.

one issue could complicate matters, namely whether it is required to derogate from Articles 9 ICCPR and 7 ACHR. Those in support of an obligation for derogation would argue that in the absence of derogation the internment constitutes an arbitrary deprivation of liberty. However, as previously stated, there seems to be no agreement on a requirement to derogate from these provisions in order to create a legal basis for security detention under the ICCPR and ACHR.

Derogation is also a crucial factor in the harmonization of Articles 43 and 78 GC IV with the right to liberty protected in Article 5 ECHR. Here the interplay raises a *potential conflict* and arguably, of continuing ambiguity. As concluded, the latter provision does not list security detention among the legitimate aims for deprivation of liberty listed in its paragraph 2, nor can any of the grounds mentioned be interpreted as to permit security detention in so far this can be considered as lawful under LOAC. As such, a conflict of norms arises that seemingly can be avoided only by making use of the possibility to *lawfully* derogate from Article 5 ECHR, or, in the alternative, when the UNSC requires security detention.[2015]
Following the ECtHR in *Al-Jedda*, in the *absence* of derogation the norm conflict persists and the argument could be made that – at least in so far it concerns its lawfulness under the ECHR – the detention is unlawful, even if it constituted a perfectly lawful exercise of internment authorities as prescribed by the law of IAC. As such, the detention would constitute a violation of Article 5 ECHR, thus incurring State responsibility for a wrongful act. This would imply that a State must derogate even in the event a State interns POWs. As argued by Pejic, "the decision has confused the interplay of international humanitarian law and human rights law in the area of detention and will make it legally, politically, and practically difficult for Council of Europe State to take part in military or stabilization operations abroad."[2016]
It is submitted, however, that in these types of 'hard cases', the maxim of *lex specialis* as a technique of conflict resolution would be the applicable tool to resolve this conflict. This means that, in so far LOAC offers a more specific rule, it precedes the incompatible IHRL rule. The right to liberty *in toto* is not a rule of *jus cogens*, and the fact that it may be derogated from indicates that it may be suspended under exceptional circumstances, even when these circumstances short of an armed conflict. It is therefore submitted that, *in the absence of derogation*, the measure of security detention is to be considered as a legitimate 'automatic' measure of derogation in times of armed conflict in so far it can be legitimately taken under LOAC.[2017] As such, the right to liberty can be lawfully curtailed in armed conflict when carried out in conformity with LOAC.[2018] This outcome is also consistent with the outcome under Article 9 ICCPR and Article 7 ACHR. Numerous States are party to both the ICCPR and ECHR. When we assume that a derogation is not required to permit security detention under the ICCPR, it would defy logic if such State then would violate Article 5 ECHR while exercising a widely recognized and well-established authority in times of armed conflict,

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[2015] (2011a), *Al-Jedda v. United Kingdom, App. No. 27021/08, Judgment of 7 July 2011.*

[2016] Pejic (2012), 92.

[2017] This line of reasoning had already been presented by judges Sperduti and Trechsel in 1974, and, it is submitted, is still valid today. (1976a), *Cyprus v. Turkey, Case No. 6780/74, 6950/75, Decision of 10 July 1976, Dissenting Opion by Mr. G. Sperduti Joined by Mr. S. Trechsel on Article 15 of the Convention*, § 7.

[2018] This line of reasoning is also accepted with respect to the authority provided under GC III to intern POWs until the cessation of hostilities without having the right to legally challenge their detention. This authority sets aside the obligation under IHRL that anyone has the right to challenge the lawfulness of their detention. Kleffner (2010b), 74.

namely to intern individuals when necessary for imperative reasons of security. However, it remains unclear whether this reasoning enjoys wide support.

In sum, the interplay between IHRL and the law of IAC in the normative paradigm of security detention demonstrates that both are in harmony to a significant degree. In fact, to a large extent, they converge. However, it is submitted that, in the context of an armed conflict, the law of IAC is the *lex specialis* and forms the guiding framework against which security detention is to be considered. IHRL may play a role only when taking account of the factual circumstances in which the requirement is to be applied, thereby striking a balance between military necessity, translated into security concerns, on the one hand, and protection of the security detainee.

While the interplay between IHRL and the law of IAC is relatively clear in most areas, the normative paradigm of security contains areas where it remains *unclear* and subject to debate. One such area concerns the issue of whether security detainees – when their detention is being reviewed – are entitled to *fair trial guarantees*. As we have concluded, LOAC does not offer fair trial rights to internees, so the question rises whether IHRL should fill this gap. As we have seen, IHRL recognizes that with respect to *all* judicial proceedings, as well as certain administrative proceedings, *certain* fair trial rights must be guaranteed, "aimed at the proper administration of justice."[2019] Nonetheless, it remains subject of debate whether security detainees should be granted all fair trial guarantees. If the situation is such that, for example, the counterinsurgent Occupying Power is in solid control of the occupied territory such that it is practically possible to provide the detainee with legal counsel, is seems plausible to consider the counterinsurgent Occupying Power bound by that rule. On the other hand, it may be simply practically impossible to fulfill this obligation in circumstances where combat is taking place over control of an area. All in all, in armed conflict, the imposition to guarantee fair trial rights to internees on the basis of IHRL may reach its logical limit where it is simply practically not possible to fulfill these standards. In so far it is not possible to lawfully derogate from these obligations, the IHRL norms must be read down to the extent that it takes into account the specific circumstances in which they are to be applied.

2.2. The Interplay Between IHRL and the Law of NIAC

The most problematic and controversial area of interplay in the context of operational detention undoubtedly concerns that between IHRL and the law of NIAC in the normative paradigm of security detention.
Admittedly, both IHRL and the law of NIAC demonstrate a degree of convergence, most notably in relation to the treatment of security detainees, both in the narrow sense as well as in terms of conditions of detention. However, some areas remain more contentious. The most precarious areas concern those of the *legal basis* for security detention and *procedural safeguards*.

As regards the *legal basis* for security detention, it has been previously established that neither CA 3 nor AP II provide an express legal basis comparable to Articles 42 and 78 GC IV, but merely contemplates such detention, the idea being that States regulate such detention in their domestic laws. While it is generally accepted that the grounds mentioned in the GC IV-provisions may function as a basis for States to justify security detentions, at the same

[2019] Human Rights Committee (1984), § 1.

time this policy lacks the strength of a legal norm. Thus, strictly speaking from the viewpoint of positive international law, the gap in the law of NIAC continues to exist. At the same time, as concluded, IHRL mandates that deprivations of life may not be arbitrary, an obligation that States must take into account when incorporating security detention in their domestic laws. While some argue that IHRL provides the only framework for reference, another view is that IHRL remains the default regime, but that its application should be read down such as to accommodate for the specific circumstances of armed conflict. As States cannot rely on an explicit rule deriving from the law of NIAC they can instead use the GC IV-grounds to justify security detentions under IHRL. As explained by Sassòli:

> Possible bases for arrest, detention or internment are entirely governed by domestic legislation and the human rights law requirement that no one be deprived of his or her liberty except on such grounds and in accordance with procedures as are established by law. In State practice too, governments confronted by non-international armed conflicts base arrests, detentions, and internment of rebels, including rebel fighters, either on domestic criminal law or on special security legislation introduced during the conflict. They never invoke the "law of war."[2020]

Given the closed system of Article 5 ECHR, which only allows deprivations of life in limited situations, this would require a derogation from the right to liberty and security of the person. In the absence of such derogation, the security detention would clearly be arbitrary.[2021] It is not possible to argue that there is no need for derogation because Article 5 ECHR is automatically set aside by a 'hard' rule of LOAC when an armed conflict arises, for the mere fact that such a rule is absent.
Whether this reasoning also applies in respect of the relevant provisions under the ICCPR and ACHR is unclear, as arguably, derogation may not be required.

The area of *procedural safeguards* and *fair trial rights* is probably the most contentious area in respect of security detentions in the context of a NIAC. As noted, the law of NIAC provides only two procedural safeguards, namely (1) the obligation to inform a detainee of the reasons of his detention and (2) the obligation to afford the detainee to right to challenge the lawfulness of his detention (*habeas corpus*). IHRL and the law of IAC provide a far more comprehensive set of safeguards, which immediately triggers the question how this gap is to be filled. There seems to no agreement on a permanent solution. The effects of such ambiguity have become visible in practice. In the *Second Congo War*, the State authorities claimed wide internment powers on the grounds of 'reasons of security' without providing procedural safeguards or complying with the minimum standards of treatment to be afforded to detainees.[2022]
To recall, a solution to close this precarious gap would be for the parties to the conflict to make use of the possibility provided in CA 3 to conclude special arrangements according to which GC III and/or GIV find formal application.
Another, law-based solution is to conclude a new treaty that specifically addresses the topic of detention in NIAC. Yet, at this moment, it is unlikely that States are prepared to set aside the arguments that prevented them from concluding upon more expansive rules on the regulation of NIAC in the past, so there is a need for a more pragmatic approach.
In the legal discourse there is also growing support that recourse should be had to IHRL. A basis for this complementary role for IHRL has already been expressly recognized in the law

[2020] Sassòli (2006), 64.
[2021] (2011a), *Al-Jedda v. United Kingdom, App. No. 27021/08, Judgment of 7 July 2011.*
[2022] Arimatsu (2012), 199.

of NIAC, in CA 3 and AP II.[2023] As explained by Hampson, it is permissible to rely solely on IHRL

> where the human rights material relates specifically to situations of [armed] conflict and where there is no conflict with humanitarian law. It is simply that humanitarian law appears to be silent. It may be particularly appropriate to do so when a rule appears to exist in international armed conflict and the doubt arises in the field of non-international armed conflict. Article 75 of Protocol I provides certain procedural and due process guarantees. It would not be surprising to find that similar rules exist in non-international conflicts, even if the evidence is to be found in human rights materials.[2024]

This role for IHRL is not surprising: in drafting CA 3 and AP II, States never agreed to regulate in an international treaty the manner in which they wished to regulate the security detention of individuals posing a threat to their security in the context of *internal* armed conflicts. The preferred method is to regulate this by *domestic law*. Following this line of argument, security detainees are to be afforded all of the procedural safeguards as well as the fair trial guarantees protected under IHRL.

While IHRL offers a readily available and detailed framework, reliance on its norms in the regulation of security detention in NIAC is, however, *problematic*.

Firstly, the very applicability of IHRL remains disputed, particularly in situations of extraterritorial multinational operations. Four issues may arise: (1) the applicability of IHRL in times of armed conflict, which is rejected by some States, but accepted by (most) others; (2) in multinational operations, the TCNs are not always bound by the same IHRL-treaties, which triggers the predominantly unresolved issues concerning (a) the customary status of IHRL-rules, and (b) the differences in view of the applicability of treaties, particularly in an extraterritorial context;[2025] (3) the question of whether derogation is necessary or possible and, if so, which State (the visiting State or the host State) must derogate from its obligations under IHRL in so far possible; and (4) ambiguity concerning bilateral treaties between the visiting State and the host State regulating aspects of security detention by the former in the territory of the latter, as well as UNSC resolutions providing a basis for security detention, and their potential to override human rights obligations of either State.

In the event that IHRL applies, a *second* aspect arises, which concerns the contextual appreciation of IHRL norms when applied in armed conflict. While IHRL applies in armed conflict, it is not principally designed to cope with the realities of armed conflict, unlike LOAC. Yet, IHRL is generally peacetime-focused. The detention of individuals is mostly linked to crimes, which can be dealt with by a functioning judicial system equipped to process the usual quantity of suspects.[2026] This reality may not exist in armed conflict, where the numbers of detainees may far exceed what is normal, where the judicial system may no longer function properly and where other concerns than merely criminal justice may justify one's deprivation of liberty. The forced application of IHRL peacetime-rules raises important questions as to how they should be applied in the realities of armed conflict. Legal experts continue to struggle with this issue. As experts noted, "any rules or guidelines regarding

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[2023] See paragraph 2, Preamble of AP II, which provides the link with IHRL by stating that "international instruments relating to human rights offer a basis protection to the human person." The Commentary to AP II specifically makes mention of the CAT and ICCPR, among others, as well as the regional human rights treaties, such as the ECHR and ACHR. Sandoz, Swinarski & Zimmerman (1987), §§ 4428-4430.

[2024] Hampson (2007b), 298.

[2025] Note the difference in opinion between the US and European States on the extraterritorial applicability of IHRL. On this in more detail, see Hampson (2012), 266.

[2026] Dörmann (2012), 353.

internment must be formulated in a way that would allow them to be implemented in a realistic way in the different types of [NIACs], by both States and non-State actors."[2027]

An example illustrating the above concerns the internment review-process, and most notably the aspect of *habeas corpus*. In an IAC, normally, enemy combatants qualify as POWs, and nowhere does GC III acknowledge the right of *habeas corpus* for POWs, so the question has been raised why this right should be granted to captured fighters in a NIAC. A plausible or at least possible ground for this difference is that a POW – having belligerent privilege or combatant immunity – has committed no crime by engaging hostilities. This renders the need for *habeas corpus* for POWs moot. In NIAC, a captured fighter is automatically subject to prosecution under domestic law simply for direct participation in the hostilities and should be afforded the right to *habeas corpus*. Pejic offers another explanation, arguing that

> In reality, there is far less certainty as to the threat a captured enemy civilian actually poses than is the case with a combatant who is, after all, a member of the adversary's armed forces. In contemporary warfare civilians are, for example, often detained not in combat, but on the basis of intelligence information suggesting that they represent a security threat. The purpose of the review process is to enable a determination of whether such information is reliable and whether the person's activity meets the high level standard that would justify internment.[2028]

However, experts disagree on the question of whether this right must be granted to fighters who are held as security detainees in a NIAC and if not, whether it is at all possible to derogate from it. Some contend that since the right to *habeas corpus* is non-derogable, and since there is no overriding norm in LOAC that would permit derogation on the basis of military necesity, it cannot be set aside unless the government of the State party to a NIAC claimed for itself belligerent rights, in which case captured fighters should benefit from the same treatment as granted to POWs in IACs and detained civilians should benefit from the same treatment as granted to civilian persons protected by GC IV in IACs. However, while the non-derogability of the writ of *habeas corpus* may be in sync with the realities in peacetime, it can be questioned whether it can be practically upheld in the face of realities on the battlefield. The better view – which also seems to be shared by the ICRC – is therefore to regard the right of *habeas corpus* derogable in times of armed conflict where review by a court is not possible, provided that a properly functioning administrative review procedure has been institutionalized.[2029]

A *third* aspect complicating the debate on the interplay between IHRL and law of NIAC in the area of procedural safeguards is the *asymmetry* in the applicability *ratione personae* of IHRL and LOAC to the non-State party to the conflict, and their capacity to extend their normative framework to them.[2030] To explain, the LOAC of NIAC binds all the parties to the conflict,[2031] but does not provide a comprehensive normative framework governing security detention. In contrast, IHRL, while offering a detailed normative framework, and stepping in to fill the voids in regulation left by LOAC, only binds States, and not non-State parties to the conflict. And even if it did bind non-State parties, it remains to be seen how they could comply with the strict requirements under IHRL.

In view of the deficits of IHRL as 'gap-filler', one approach would be to apply norms of GC III and GC IV on a policy basis. While this is not a legal solution, this way States are at least

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[2027] Expert meeting, 862.
[2028] Pejic (2012), 89.
[2029] ICRC (2011), 17-18.
[2030] ICRC (2011), 18.
[2031] See CA 3.

prevented from carrying out security detentions in a manner that would be more permissive than allowed under the law of IAC.[2032]

Others propose a mixture of IHRL and the law of IAC. While admitting that the analogous application of the LOAC of IAC, as well as the application of IHRL in the context of a NIAC have their own deficits, Olson argues that when both are applied in unison they may mutually reinforce each other, as they remove each other's weaknesses and as such provide a coherent normative framework for the internment of individuals in NIAC. Olson explains how:

> If IHRL is not used to interpret an IHL rule, but instead IHRL is used as a complement to IHL in the sense of applying simultaneously, yet separately. In other words, apply IHRL "next to" IHL, instead of "within" IHL. IHL would apply to parties to the conflict, State and non-State actors, and IHRL would continue to apply to State actors, as it was traditionally designed to do. This avoids the problematic application to non-State actors, and, yet, mandates States to continue to meet their international obligations. One may claim this is unfair, as States would need to abide by additional obligations than non-State actors in a non-international armed conflict. This is true at the international level, where States are traditionally legal actors, but it would only be true of the rules to which the States obligated themselves. Also, it must not be forgotten that non-State actors remain bound by domestic law.[2033]

When used as complementary instruments, IHRL would offer procedural protection for interned insurgents, whereas LOAC would provide clarity to insurgents' obligations, which results in better protection of the State's armed forces when captured. However, while pragmatic, its main deficit is that it remains a solution that is not legally binding.

In view of the operational and humanitarian issues involved, several initiatives in the international community have been initiated to look for ways to close gaps and to clarify ambiguities. A particular noteworthy source aimed at closing the gaps in regulation of security detention and strengthening the position of victims is the ICRC's document called "*Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*",[2034] which contains legal and policy guidelines to be followed by States in the execution of the measure of security detention.[2035]

[2032] GC III and GC IV has been relied upon by INTERFET-forces in East-Timor. See Kelly, McCormack, Muggleton*, et al.* (2001); Oswald (2000).

[2033] Olson (2009).

[2034] Pejic (2005).

[2035] According to the ICRC, security detainees are, as a minimum, to be afforded the following general and procedural guarantees:

General guarantees:

- internment/administrative detention is an exceptional measure;
- internment/administrative detention is not an alternative to criminal proceedings;
- internment/administrative detention can only be ordered on an individual, case-by-case basis, without discrimination of any kind;
- internment/administrative detention must cease as soon as the reasons for it cease to exist;
- internment/administrative detention must conform to the principle of legality.

Procedural safeguards:

- right to information about the reasons for internment/administrative detention;
- right to be registered and held in a recognized place of internment/administrative detention;
- foreign nationals in internment/administrative detention have the right to consular access;
- a person subject to internment/administrative detention has the right to challenge, with the least possible delay, the lawfulness of his or her detention;
- review of the lawfulness of internment/administrative detention must be carried out by an independent and impartial body;

Another example is the *Copenhagen Process on the Handling of Detainees in International Military Operations*, an intergovernmental consulting initiative of the Danish Ministry of Foreign Affairs,[2036] triggered by legal, political and military concerns on detention in military operations,[2037] and with the aim to reach consensus among States[2038] and relevant international organizations[2039] on the international legal regimes applicable to taking and handling detainees in military operations; and to agree upon generally acceptable principles, rules, and standards for the treatment of detainees. In substance, the principles largely overlap with those recognized by the ICRC in its Procedural Principles and Safeguards mentioned above. The principles apply to "the detention of persons who are being deprived of their liberty for reasons related to an international military operation."[2040] While supposedly reflecting State practice and policy, the principles, however, have received notable criticism, mostly so because it arguably favors imperatives of military necessity.[2041] However, they are not designed to reflect the final word on detention. To the contrary, "it might […] be assumed that the participants in the Copenhagen Process anticipate that the work carried out in developing the Principles and Guidelines will influence the ICRC discussions and any other discussions or developments concerning detention that might arise in the future. In a similar vein, nothing in the Principles and Guidelines precludes states or organizations from further developing principles, rules, or guidelines concerning detention."[2042]
Finally, in 2010, the UN Department of Peacekeeping Operations has issued Interim Standard Operating Procedures on Detention in United Nations Peace Operations. These are binding in UN troops.[2043]

In the absence of a comprehensive legal framework, the manner in which States exercise security detention in the context of NIAC is a reflection of their own perspectives and interpretations. On the one hand, the persisting gap could be (ab)used by States to argue in

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- an internee/administrative detainee should be allowed to have legal assistance;
- an internee/administrative detainee has the right to periodical review of the lawfulness of continued detention;
- an internee/administrative detainee and his or her legal representative should be able to attend the proceedings in person;
- an internee/administrative detainee must be allowed to have contacts with – to correspond with and be visited by – members of his or her family;
- an internee/administrative detainee has the right to the medical care and attention required by his or her condition;
- an internee/administrative detainee must be allowed to make submissions relating to his or her treatment and conditions of detention;
- access to persons interned/administratively detained must be allowed.

[2036] Available at http://um.dk/en/~/media/UM/English-site/Documents/Politics-anddiplomacy/Copenhangen%20Process%20Principles%20and%20Guidelines.pdf/.

[2037] An important trigger is formed by cases pending before courts of the several participating States, i.e. Denmark, the UK, the US, and Canada. See for references to these cases Oswald & Winkler (2012), footnotes 5-11.

[2038] States participating were Argentina, Australia, Belgium, Canada, China, Denmark, Finland, France, Germany, India, Malaysia, New Zealand, Nigeria, Norway, Pakistan, Russia, South Africa, Sweden, Tanzania, the Netherlands, Turkey, Uganda, the UK, and the US.

[2039] Organizations participating were: AU, EU, NATO, the UN, ICRC

[2040] Danish Ministry of Foreign Affairs (2012), Principle 1.

[2041] http://www.amnesty.org/en/news/copenhagen-principles-military-detainees-undermine-human-rights-2012-10-22; http://www.ejiltalk.org/the-copenhagen-process-principles-and-guidelines/.

[2042] See Oswald and Winkler in ASIL Insight, http://www.asil.org/pdfs/insights/insight121226.pdf.

[2043] United Nations (2010)

favor of a security-favored margin of appreciation when determining the grounds and safeguards for detention and transfer of detainees. At the same time, as previously remarked in the introduction to this part, States have come to realize that detention operations that do not take place in accordance with the rule of law are a strategic liability and undermine the social legitimacy of the counterinsurgency effort, particularly so when acting in the territory of another State.[2044] As noted by Vice-Admiral Howard, Commander of Detainee Review Task Force

> Detention operations are tactical missions with broad-ranging strategic effects. As we separate those who use violence and terror to achieve their aims from the rest of the Afghan population, we must do so in a lawful and humane manner. We have an obligation to treat all Afghan citizens and third-country nationals (TCNs) with dignity and respect. Fulfilling this obligation strengthens our partnership with both the Government of the Islamic Republic of Afghanistan (GIRoA) and the Afghan people. Failure to fulfill this obligation jeopardizes public support for both the Coalition and the GIRoA.[2045]

In the Iraqi and Afghanistan campaigns, this insight has led TCNs to adopt detailed policy frameworks or arrangements with the host States to govern detention, with clear purposes, tasks and responsibilities, in order to guarantee that the detention process does not violate the fundamental rights of the detainee without losing sight of the security interests involved.[2046] For example, the detainee-review process in place in 2009 and 2010 providing safeguards and rights to detainees held by the US in the Baghram detention facility in Afghanistan were said to "substantially adhere to all safeguards that could be considered customary international law and even those advanced by human rights advocates."[2047]

In fact, nowadays these frameworks – while policy based – oftentimes provide more safeguards to detainees than are required by law.[2048] For example, operational practice of TCN's

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[2044] For a detailed and convincing account of US detention policy and the progress from strategic liability to legitimacy, see Bovarnick (2010)

[2045] Howard (2010), cited in Human Rights First (2011), 1.

[2046] See for example, the ISAF detention policy (COMISAF (2006) which stipulates that, upon capture, detainees may be held in detention for a maximum of 96 hours. COMISAF is the commanding authority to decide upon the extension of the detention beyond 96 hours. However, detention may only be extended "in order to effect his release or transfer in safe circumstances."[2046] The SOP recognizes the right of the detainee to be promptly informed of the reasons of his arrest and detention. It also stresses that intelligence gathering may not constitute a ground for detention, although "where detention is justified, questioning can be directed towards perceived threats and other issues of relevance."[2046] Annexes C and D to the SOP 362 provide detailed guidance on the treatment *strictu sensu* of detainees, the material conditions of detention, as well as the procedural safeguards to be complied with, including the review of the necessity for detention. After 96 hours, the detainee should be either released or transferred to the Afghan authorities. Such transfer is to be reported to HQ ISAF and the ICRC must be notified. Also, the reason of detention and the identity of the detainee must be clear, as well as the identity of the Afghan government official to which the detainee is being handed over. Particular attention is devoted to maintain accurate records of detention, irrespective of the duration of the detention, and should provide clear information on the circumstances surrounding the detention, to include the date and time, as well as the place of initial and subsequent detention. It should also include routine reviews of detention. More importantly, when transferring the detainee to the Afghan authorities, details of the circumstances surrounding the detention must be made available to the Afghan authorities for use in follow-up legal proceedings. The TCN must inform the ICRC not only of the detention of individuals, but also of any change in circumstances of detention, such as the transfer, release or on handover to the Afghan authorities. Also, the ICRC must be informed "of any instance resulting in the hospitalization or death of a detainee. Finally, the ICRC must be granted access to ISAF detention facilities.

[2047] Bovarnick (2010), 44. For a comparative analysis of the US detainee safeguards with Rule 99 of the CLS and the ICRC Procedural Principles and Safeguards, see 43-44.

[2048] Bovarnick (2010).

participating in ISAF demonstrates that bilateral agreements are being closed that regulate the transfer of detainees, often to include a monitoring authority of the transferring State. Here, States go well beyond their obligations under international law, as they are not required to monitor the well-being of detainees after hand-over to another State. Nonetheless, monitoring is carried out to ensure that the treatment of the detainee does not resonate on the strategic efforts.

3. The Interplay between the Normative Paradigms of Criminal Detention and Security Detention

Having identified and examined the interplay between IHRL and LOAC within the two normative paradigms of criminal detention and security detention, the question arises what determines which normative paradigm applies in a concrete situation. Clearly, this issue is less pregnant in the event that insurgents evidently pose no threat to the security to the State such that this warrants their detention on that basis, but can instead be regarded purely as criminal suspects. However, as we have previously established, an insurgent's behavior may simultaneously trigger acts of crime and acts committed as part of an armed conflict. This is undoubtedly the case when insurgents are captured on the battlefield when directly participate in hostilities whilst – in doing so – at the same time violating a State's domestic criminal law. This would imply that grounds exist to detain insurgents for reasons of both criminal justice and security. It is here that the question of interplay arises. In fact, as argued by Lietzau, "[t]his confluence of applicable bases for detention and attendant legal paradigms is the primary complicating factor in twenty-first-century detention policy."[2049]

At the heart of the problem is the absence of a positive rule in international law, or any other form of general State consent, that determines which normative paradigm is to be applied. It remains unclear whether States are under an obligation, for example, to resort to the normative paradigm that offers the most protection. Although the law remains unclear, a factor determinative of the applicability may be the very object and purpose of each normative paradigm. To recall, 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*.

In view of the above, the ICRC argues that

> Internment/administrative detention is a measure of control aimed at dealing with persons who pose a real threat to State security, currently or in the future, in situations of armed conflict, or to State security or public order in non-conflict situations; it is not a measure that is meant to replace criminal proceedings. A person who is suspected of having committed a criminal offence, whether in armed conflict or other situations of violence, has the right to benefit from the additional stringent judicial guarantees provided for in humanitarian and/or human rights law for criminal suspects, which include the right to be tried by a regularly constituted, independent and impartial court. Unless internment/administrative detention and penal repression are organized as strictly separate regimes there is a danger that internment might be used as a substandard system of penal repression in the hands of the executive power, bypassing the one sanctioned by a country's legislature and courts. The rights of criminal suspects would thus be gravely undermined. [2050]

[2049] Lietzau (2012), 333.

[2050] Pejic (2005), 381.

However, it is also argued that security detention would be allowed when the insurgent's behavior in the past is telling of his behavior in the future and constitutes a potential threat to security. Others differentiate in the nature of the crime. For example, as promulgated in its doctrine, the UK holds that in an IAC, persons, while normally given a custodial sentence,

> can instead be sentenced to a period of internment and then will become internees […]. This is likely to be the case where the crime was political in character and aimed at UK Armed Forces or the occupation administration, rather than a crime for personal gain.[2051]

State practice, however, demonstrates that the legal ambiguity on the interplay between criminal detention and security detention in armed conflict has led States to take quite extreme positions. On one extreme is the position of States – mostly so the US – that argue that the normative 'wartime' paradigm of security detention should always be applicable to insurgents captured on the battlefield. Any other outcome would defy the logic of the distinction between law principally designed for peacetime situations – IHRL-based criminal detention – and wartime situations – LOAC-based security detention. As argued by Lietzau,

> [i]t would make no sense suddenly to "turn off" the wartime paradigm and switch to that of-law enforcement, providing all the process associated with criminal procedure. To do so would be the equivalent of telling the nineteen-year-old recruit, "You have legal authority to kill another human being, but if you capture him instead, you had better collect enough evidence to prove him guilty of a crime in a courtroom." Making it more complex to capture a person in combat by adding additional obligations could incentivize killing-ironically and perversely-in the name of human rights.[2052]

The problem then encountered is that the normative paradigm of security detention – particularly so in the context of NIAC – offers little guidance, and given the separatist stance of the US regarding the applicability of IHRL in wartime, as well as its applicability extraterritorially, IHRL-based norms can only apply as a matter of policy, leaving unresolved the issue that "[t]he Geneva Conventions, written more than a half century ago, simply were not designed for the present conflict."[2053] In any case, it has not deterred the US from carrying out security detentions on a massive scale during the conflicts in Iraq and Afghanistan.

Other – mostly European – States have taken a far more cautious stance towards the issue of detention and have opted not to resort to security detention at all, at least not long-term. As follows from the practice of many States partaking in the ISAF-mission in Afghanistan, the choice has been to hold captured persons for a maximum of 96 hours – a limit based on ECHR-case law – and then to either release them, or to hand them over to the Afghan authorities for criminal proceedings.[2054] A possible incentive behind this approach may be these States' fear for IHRL-based claims that long-term security detentions may be condemned as arbitrary deprivations of liberty.

It is however 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, reliance on criminal detention is to be preferred over security detention. For example, "[i]n dealing with a developing insurgency, all restrictive measures – curfews and restrictions on movement, or in an extreme case, detention without trial – place a strain on democracy, and any decision to introduce them must not be made lightly."[2055]

[2051] United Kingdom Ministry of Defence (2011), § 144.

[2052] Lietzau (2012), 331.

[2053] Lietzau (2012), 331.

[2054] For an overview of conflict-related detainees held by the Afghan authorities, see UNAMA (2013).

[2055] Chief of the Land Staff (2008), 4-4.

After all, the desired end state in any counterinsurgency is the return to the *status quo* prior to the insurgency, which amount to a state of peace, where – in the absence of an armed conflict – affairs between the State and those under its control are governed by IHRL. This implies that the deprivation of liberty principally is to be rooted in the repression of crimes. As explained by Porter Harlow,

> [u]sing Soldiers and Marines to detain insurgents in a U.S. detention facility is not the best COIN tactic because, while it labels the insurgent a criminal in the eyes of the U.S. military, it is less likely to label the insurgent as a criminal in the eyes of the most important audience: local nationals. Local nationals are more likely to see an insurgent as a criminal when a local national policeman detains him, a local national judge convicts him of a crime, and a local national incarcerates him in a local prison. Accordingly, mothers and fathers may be less willing to allow a son to join a criminal organization than an alternatively identified sectarian or ethnic organization.[2056]

Thus, "it is most useful to shift as quickly as possible to a law enforcement regime that treats insurgent combatants as criminals to be dealt with by a peacetime criminal justice system."[2057] However, it is submitted, reliance on criminal detention largely depends on the degree of *control* exercised by the counterinsurgent State over territory to a degree that it can rely on an functioning criminal justice system. The rules of the normative paradigm of criminal detention presume a certain degree of stability and peace for them to be carried out properly. In environments of ongoing hostilities between the counterinsurgent State and insurgents, and where a criminal justice system is absent, or improperly functioning, the criminal detention-option might not be viable 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. This was also the approach adopted by the US in the final stages of its presence in Iraq, where captures and detentions were predominantly conducted under the normative paradigm of criminal detention following an agreement with the Iraqi authorities. On 31 December 2008, the mandate of UNSC Resolution 1546 expired. The US and Iraq concluded a Security Agreement, which provided a legal framework for U.S. involvement in detentions.[2058] Following Article 22 of the agreement (1) all security detainees held by the Coalition on 31 December 2008 must either be released in a "safe and orderly manner" or must be transferred to Iraqi custody if Iraqi officials have a judicial order, and (2) any detentions after 31 December 2008 must be conducted in accordance with Iraqi law, including the Iraqi Law on Criminal Proceedings of 1971.[2059]

[2056] Porter Harlow (2010), 68.

[2057] Lietzau (2012), 334.

[2058] (2008b).

[2059] Article 22 of the agreement stipulates as follows:

> 1. No detention or arrest may be carried out by the United States Forces (except with respect to detention or arrest of members of the United States Forces and of the civilian component) except through an Iraqi decision issued in accordance with Iraqi law and pursuant to Article 4.
> 2. In the event the United States Forces detain or arrest persons as authorized by this Agreement or Iraqi law, such persons must be handed over to competent Iraqi authorities within 24 hours from the time of their detention or arrest.
> 3. The Iraqi authorities may request assistance from the United States Forces in detaining or arresting wanted individuals.
> 4. Upon entry into force of this Agreement, the United States Forces shall provide to the Government of Iraq available information on all detainees who are being held by them. Competent Iraqi au-

A similar process is taking place in Afghanistan. The crux of the matter is, however, that there is no legal obligation to do so, but this shift is rather the result of policy decisions that aim at the gradual return to normality when circumstances so permit, because it serves the counterinsurgency end state.

4. Observations

In this chapter, we have sought to examine the interplay between IHRL and LOAC in two normative paradigms, i.e. those pertaining to criminal detention and security detention.

The interplay of IHRL and LOAC in the normative paradigm of *criminal detention* is uncontroversial: it is one of convergence and complementarity. IHRL places no restrictions on the conduct of States in the context of criminal detention that go further than those imposed by LOAC. The firm basis of fair trial guarantees in LOAC ensures that States cannot evade similar obligations under IHRL by means of derogation, or by arguing that IHRL is not applicable in armed conflict or outside the State's territory.

In operational practice, the latter aspect may involve the reading down of fair trial rights to the extent they can be realistically applied in armed conflict, so as not to impose upon States obligations it could never fulfill. Clearly, it would not be possible to comply with the obligations relative to fair trial rights if the counterinsurgent forces were constantly engaged in hostilities. Rather, in view of their object and purpose, fair trial rights require more compliance once the situation returns to (relative) normalcy.

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. As noted, these frameworks differ fundamentally, resulting from the conceptual viewpoints of States when designing them.

Security detention is quite densely regulated by the law of IAC and here, the interplay is rather straightforward: 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.

The interplay in the context of NIAC is less straightforward, at least so in respect of the legal basis and procedural safeguards, where LOAC hardly provides norms. The absence of specific rules in the law of NIAC may lead States to apply the law of IAC as a matter of policy. It arguably also necessitates the reliance on IHRL. However, reliance in IHRL is not unproblematic. It may not always apply, due to varying reasons, and if it does, its aptness to the particularities and realities of armed conflict can be questioned.

The dichotomy in legal regulation between the law of IAC and the law of NIAC is of great significance for operational detentions. Perhaps with the exception of OCCUPCOIN and non-consensual TRANSCOIN, in all situational contexts of counterinsurgency the relationship between the counterinsurgent State and the insurgent could potentially be regulated by

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thorities shall issue arrest warrants for persons who are wanted by them. The United States Forces shall act in full and effective coordination with the Government of Iraq to turn over custody of such wanted detainees to Iraqi authorities pursuant to a valid Iraqi arrest warrant and shall release all the remaining detainees in a safe and orderly manner, unless otherwise requested by the Government of Iraq and in accordance with Article 4 of this Agreement.

5. The United States Forces may not search houses or other real estate properties except by order of an Iraqi judicial warrant and in full coordination with the Government of Iraq, except in the case of actual combat operations conducted pursuant to Article 4.

See also Greig (2009), 28.

the law of NIAC, so the legal issues arising in relation to security detention practically always arise.

Having established the interplay of IHRL and LOAC in the normative paradigms, this chapter finally investigated the interplay *between* both normative paradigms, the question being what are the parameters that determine which normative paradigm apply to a particular situation of detention. Clearly, the question of applicability arises in situations where an insurgent poses not only a threat to the security, but also constitutes a criminal suspect. This combination potentially applies to many insurgents, particularly those in a fighting function.

Here, in determining the applicable normative paradigm, it was submitted that the object and purpose of each normative paradigm is an overriding factor. It, however, remains unsure what the law exactly is on this issue, thus leaving room for States to adopt policy-based approaches that best serve their interests. In the context of counterinsurgency, the 'choice' of the normative paradigm appears to be dictated by imperatives that direct counterinsurgency forces to operate in the direction of the 'peacetime' criminal detention rather than 'wartime' security detention once circumstances so permit.

Conclusions Part C.2.

To recall, the research question to be answered in this part is:

> in light of contemporary counterinsurgency doctrine, how do the relevant normative frameworks of IHRL and LOAC governing operational detention *interrelate* and what does this tell us about the *permissible scope* of conduct in operational practice?

1. Interplay

As the above analysis has demonstrated, the interplay of IHRL and LOAC in issues of operational detention is clear to some degree, yet remains ambiguous in other areas, mostly so in the context of NIAC.

It is submitted that a particular crucial factor in determining the interplay between IHRL and LOAC in each normative paradigm is the *availability*, *density* as well as the *precision* of rules governing criminal and security detention in IHRL and LOAC. In fact, it is precisely here that the traditional dichotomy between IAC and NIAC frustrates States in attaining clarity as to the legal obligations under international law to which they are bound. This is even more frustrating as it is precisely the most dominant type of armed conflict – NIAC – where most ambiguity is found. It determines whether only LOAC, only IHRL, or both regulate certain matters, thus triggering the question of whether such gaps need to be filled by the norm-providing regime. Also, where both regimes provide norms, it determines whether they converge or conflict with rules found in IHRL, and, if so, whether they can be harmonized. Overall, therefore, the interplay between IHRL and LOAC within the normative paradigms of criminal and security detention must take place on a case-by-case, norm-specific basis. When doing so, it is possible to distinguish between, on the one hand, areas within the normative paradigms where norms of IHRL and LOAC converge or are otherwise complementary and where the interplay between norms of IHRL and LOAC is *unproblematic*, and on the other hand, areas where this interplay is one of *potential conflict* or remains *unclear*.

Another factor complicating a clear answer to the interplay between IHRL and LOAC is the very *nature of IHRL*. There is, to begin with, the issue of derogation, in the absence of which security detention would be unlawful notwithstanding the fact that, at least in the context of internment in IAC, the law of IAC expressly authorizes it. In addition, in the context of NIAC, IHRL is proposed to provide more guidance. In fact, CA 3 and AP II invite the parties to the conflict to take recourse to this regime. However, the scope of applicability of IHRL remains subject of debate; its norms may be unfitting for application in armed conflict; and it does not bind non-State armed groups, and thus places a burden on States only.

The combination of absence of clear norms under LOAC and conceptual issues with IHRL may force States to take at least two (extreme) positions that apply mostly in extraterritorial contexts of NIAC (most fittingly SUPPCOIN, OCCUPCOIN and TRANSCOIN). A *first* position is to argue that since LOAC does not provide treaty-based or customary norms, and IHRL does not apply in armed conflict or in an extraterritorial context, therefore there are no rules, and which arguably provides an unrestricted mandate to detain that can only be

limited by policy. A *second* position is to argue that IHRL applies extraterritorially, but since the law of NIAC remains silent there are no rules that could justify a deviation from IHRL obligations the extraterritorial security detention of insurgents is likely to violate IHRL, and therefore it is perhaps better not to detain at all.
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. Both frameworks demonstrate its sensitiveness to the fact that an armed conflict is going on and for that reason permits military necessity to override humanitarian considerations for as long as it deems this required. This would not preclude IHRL from being included in such policy so it could, where necessary to clarify or supplement LOAC-based 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. This way, States also remain in the lead and may avert the development of such new law into undesired directions – overly protecting either security or humanitarian interests. This ensures that a tailored balance can be achieved between the fundamental pillars of LOAC – military necessity and humanity.

2. Permissible Scope for Operational Detention under the Normative Paradigms

As follows from the above analysis, counterinsurgent forces are to *treat* all detainees – irrespective of which type of detention they are placed in – *humanely*. This implies firstly that they are to offer certain (minimum) material conditions of treatment, and secondly that forces are to ensure that detainees are under no circumstances subjected to torture or other forms of cruel, inhuman or degrading treatment or punishment. Neither may they be *transferred* into the authority of other States when facing such risks (non-refoulement), or where they may face an unfair trial.
All detainees are to be informed of the reasons for their arrest and must be provided the right to *habeas corpus*, although it may be submitted that this right must be read down in situations of armed conflict where there is no possibility for a review by a judicial authority, as has already been contemplated by the law of IAC. Other procedural safeguards – such as the requirement of a periodic review – are to be afforded as a matter of law to criminal detainees as well as security detainees governed by the law of IAC. Such procedural guarantees are likely to be granted as a matter of policy to security detainees governed by the law of NIAC. As for criminal detainees: these are to be afforded fair trial guarantees. It remains unclear to what degree such fair trial guarantees are also to be afforded to security detainees, but this may nonetheless take place on the basis of policy. Finally, all forms of detention must be rooted in a sufficient legal basis, either in domestic law, host nation law, a SOFA, in a UNSC resolution, or otherwise.

Part D. Synthesis and Conclusions

Chapter XII Synthesis and Conclusions

At the outset of this study we stated that the aim of this study is to examine how (the debate on) the interplay between IHRL and LOAC and counterinsurgency doctrine impacts the lawfulness – and therefore outer operational limits – of targeting and detention in counterinsurgency operations.
In furtherance of the academic debate and serving the formulation of practical guidance to a State and its armed forces, two central questions were framed:

> (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?

This is the concluding chapter of this study. In view of the stated aim and central questions, it seeks to draw together the principal 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.
The chapter consists of three paragraphs. Paragraph 1 summarizes the main operational and legal themes that characterize and impact the determination of the interplay of IHRL and LOAC in the context of targeting and operational detention in counterinsurgency operations. Paragraph 2 discusses the legal and operational implications of the interplay for targeting and detention operations in counterinsurgency on the basis of the outcome of the interplay. Paragraph 3 reaches final conclusions.

1. Operational and Legal Themes Characterizing the Interplay

As noted, the aim of this paragraph is to summarize the main operational and legal themes that characterize and impact the determination of the interplay of IHRL and LOAC.

1.1. Norm Relationships

A theme underlying – and controlling – the very subject of interplay in general, and that of IHRL and LOAC in particular, concerns the issue of norm relationships in international law. As concluded, international law functions as a legal system in which norms belonging to different regimes may enter into a relationship in which case it is necessary to determine their interplay. A principal issue in norm relationships is that, in order for them to arise, there are two norms that are (1) valid, i.e. govern a particular subject-matter in a particular context, and are (2) applicable, i.e. they have binding effect on the subjects of international law involved in the context. The principal desired outcome is to *ascertain* the ability of norms to *complement* each other so as to give each of them *maximum* effect, in order to *harmonize* them (the *instrument of complementarity*). The instrument of complementarity entails that both regimes mutually reinforce each other and, where necessary, complete and perfect each

other by drawing from each other's rules originating from treaty and customary international law, as well as general principles of international law.[2060]

IHRL and LOAC are generally considered to be complementary.[2061] As can be inferred from the ICJ in its *Palestinian Wall Advisory Opinion*,[2062] the complementary interplay between IHRL and LOAC finds reflection in three situations:
Firstly, where a matter is regulated by LOAC, *but not by IHRL*, the former may fill the regulatory gaps of the latter; *secondly*, where a matter is regulated by IHRL, *but not by LOAC*: the former may fill the regulatory gaps of the latter; and *thirdly*, where a matter is regulated by both IHRL and LOAC. In the latter situation, actual interplay arises. The question that arises is whether the norms in question are in harmony or in conflict. A principal tool to *ascertain* harmony or conflict and – for that matter – to *avoid* or *solve* conflicts is *interpretation*.
In interpreting norms, account may be had of a variety 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 factual situations (effectiveness), the legal clarity of norms or their certainty and reliability (normative weight), the nature of the norms in question, the degree of effective control exercised by the State involved, and State practice. In some cases it is not necessary to put in any effort to ascertain harmonization, for their normative substance clearly converges; in other situations however there is apparent conflict that can be avoided by applying interpretative techniques. In other situations, conflict cannot be avoided, and must be resolved via conflict resolution techniques.
A principal instrument of interpretation generally considered to be relevant to the ascertainment, avoidance and solution of (potentially) conflicting norms of IHRL and LOAC is the maxim of *lex specialis*, whereby the more general rule is interpreted in light of the more specific rule. While often misinterpreted as a rule of conclusory nature only (*lex specialis derogat legi generali*), whereby the specific rule fully neutralizes the general rule, the better approach is to view the maxim as an instrument of interpretation in which account is had of, *inter alia*, the precision and clarity of the relevant norms, the intent of States when drafting or acquiescing to the norms, and the flexibility of the norms to mold to the particularities of the factual situation at hand without losing effectiveness. In other words, the maxim of *lex specialis* is *norm-* rather than (solely) regime-sensitive, as well as *context*-sensitive. In that light, it is inconclusive to assess the interplay of regimes as a whole, i.e. the interplay of IHRL and LOAC as regimes. Doing so has the potential of neglecting particular nuances within particular norms that – when taken into account – would likely have led to another outcome.[2063]
Notwithstanding the above, the interpretation and position of the maxim of *lex specialis* as the dominant instrument in the interplay between IHRL and LOAC has been subject of fierce criticism throughout the legal discourse,[2064] which in part appears to be motivated by the fact that in armed conflict LOAC is designated as the *lex specialis*, which in view of its intense and robust regime is considered to threaten humanitarian interests in armed conflict.

[2060] Chapter III, paragraph 1.
[2061] Chapter II, paragraph 2.1.
[2062] (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, § 106, confirmed in (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*, § 216 (although in the latter opinion the ICJ refrains from using the *lex specialis*-rule. It remains unclear as to why it did so).
[2063] Chapter III, paragraph 2.
[2064] Chapter III, paragraph 3.

In that respect, it is argued here, such debates form part of the attempts to further humanize armed conflict. Such attempts to harmonize armed conflict contrast with attempts to protect, as far as possible, security interests, a second theme that colors the (debate on) the interplay of IHRL and LOAC.

1.2. Attempts to Modify the *Lex Lata* for Purposes of Humanity or Security

The manner in which the interplay between IHRL and LOAC is approached is largely determined by a power-struggle between, on the one hand, those desiring to further humanize armed conflict, and with that, LOAC, by increasing the influence of IHRL, and on the other hand those seeking to further expand the permissible scope of action in the interest of State security. Following the terrorist attacks of 9/11 and the ensuing proverbial War on Terror, and the subsequent conflicts in Afghanistan and Iraq, some seek to interpret legal aspects within the relative normative frameworks of IHRL and LOAC, as well as their interplay, in such a manner as to preserve security interests. This can be concluded from the rejection by some States of the applicability of IHRL in armed conflict;[2065] the rejection of the extra-territorial applicability of IHRL-obligations arising from human rights treaties;[2066] a rigid interpretation of the *lex specialis*-maxim, as to imply that in the situation of armed conflict LOAC totally neutralizes IHRL;[2067] the arguments in response to the ICRCs Interpretive Guidance, in order to widen the scope of targetable individuals as far as possible,[2068] and the measures adopted in the post 9/11 era, to include (allegedly) secret detention, rendition and torture of terrorists.[2069]

The overbroad attention for security interests, however, generally results in the expansion of the current boundaries of the *lex lata*, or the search for legal gaps leaving room for a State's own policies. As such, States may carry out extra-legal operations. Such policies may undermine essential counterinsurgenvy-objectives.

Those desiring the humanization of armed conflict seek to further the scope of applicability and substantive content of IHRL, with a view to limit State conduct detrimental to humanitarian interests. While some propose a regime change, mostly humanization is reflected in proposals to shift the emphasis from LOAC-applicability to IHRL-applicability, or to inject into LOAC IHRL-based norms or principles. Particular areas 'under attack' are the absence of LOAC norms pertaining to hostilities in the law of NIAC, a gap which should be filled by IHRL;[2070] the inappropriateness of the *lex specialis*-maxim as constituting a mechanism to determine the interplay between IHRL and LOAC;[2071] the interpretation of military necessity to include a restrictive notion, implying the injection of the principles of absolute necessity and proportionality of IHRL into the realm of the law of hostilities;[2072] the interpretation of the meaning of *hors de combat*; and the interpretation of the notion of direct participation in hostilities;[2073] as well as the role of IHRL in security detentions in the context of NIAC.[2074]

[2065] Chapter II, paragraph 1.1.4.2; Chapter II, paragraph 2.1.1.
[2066] Chapter II, paragraph 1.1.4.1.2.
[2067] Chapter III, paragraph 2.
[2068] Chapter VII, paragraph 1.1.
[2069] Chapter II, paragraph 2.3.2.
[2070] Chapter V, paragraph 1.1.2.
[2071] Chapter III, paragraph 3.
[2072] Chapter VII, paragraph 1.5.2.
[2073] Chapter V, paragraph 1.1.3.
[2074] Chapter X, paragraph 2.

This study recognizes that the process of humanization of LOAC is irreversible. However, *overbroad* humanization through the influx of IHRL elements into the realm of LOAC may upset the delicate balance between humanitarian considerations and military interests – at the cost of the latter – beyond the limits acceptable by States. This balance is the fundamental premise of LOAC, with deep historical roots; a balance that – it is submitted – should be kept intact. As such, the process of humanization through the injection of IHRL elements into LOAC cannot affect every aspect of the latter regime. It meets its limitations within the law where it upsets the delicate balance between humanity and military necessity at the cost of the latter by progressively imposing additional legal restrictions on the conduct of military operations during hostilities to those already present in the law. As such, humanization across these borders collides with conceptual underpinnings and normative frameworks of LOAC and reflects the *lege ferenda* (the law as it is desired) rather than the *lex lata* (the law as it stands). Such a development would have a multifold negative effect: *Firstly*, as humanization would cause an imbalance at the cost of military necessity, the remaining principles of LOAC (distinction, proportionality and chivalry) risk normative distortion as well. *Secondly*, overbroad humanization would conflict with the interests of States. States are likely to regard additional restrictions through the incorporation of IHRL concepts as a threat to their sovereignty and national security. Rather, States aim at the preservation of existing limits on military operations present in LOAC. Therefore, States are unlikely to sanction such a development. *Thirdly*, strict limitations based on overbroad humanization are likely to be perceived by the armed forces as operationally non-executable. Hence, such restrictions run the risk of being discarded. Therefore, overbroad humanization but could eventually turn against the very objective it intends to serve. In fact, this may even transcend the level of individual soldiers, as today we may already see examples of States that may feel threatened by the process of humanization and attempt to counter it by adopting overbroad measures by interpreting ambiguous concepts like DPH broadly.

However, even when deprivations of life and liberty may be the result of lawful conduct, this does not guarantee that a population perceives them as legitimate. The vast majority of the population is fully unaware of the legal scope of permissible conduct and the precise conditions under which forcible measures may be taken. While clear-cut cases of, for example, self-defense or combat, or the detention of criminal suspects may be tolerated, in other cases government-inflicted deprivations of life or liberty may very well be received as unjust, particularly when carried out by foreign troops. This may, for example, be the case where individuals are targeted whilst an arrest had been possible, where civilians are killed as collateral damage, yet proportionate to the military advantage anticipated, or where they are kept in security detention. To the civilian population, there may be no difference between conduct lawful under international law and arbitrary/criminal State conduct.

In this context, lawfare plays an important role. Insurgents will be quick to exploit forcible measures that are perceived by the population as illegitimate. At the same time, NGOs contribute to the lawfare efforts of insurgents, by informing civil society that States are acting in a manner which is not lawful or should no longer be lawful. Paradoxically, the underlying motive of the humanizers is to shorten armed conflicts to the greatest extent possible, and to minimize victims as much as possible. However, by adjusting the legal foundations of LOAC or its interplay with IHRL, in order to change the rules of the game, the 'humanizers' in fact undermine the social legitimacy for the counterinsurgent's operations among the civilian population. As a result, previously innocent of neutral civilians may decide to join the insurgency, which only lengthens the conflict. Most ironic is the fact that States are already prepared, as follows from contemporary counterinsurgency doctrine, to

limit the permissible scope of action under LOAC. So, while humanitarian interests are joined by the State interest to win and preserve social legitimacy by acting in a manner that is even more humanitarian than LOAC prescribes, innovative humanization may in fact frustrate this process.

1.3. Norm Validity

Norm validity is a first condition for norm relationships to arise. It is here that the impact of norm validity on the question of interplay between regimes of international law immediately becomes clear: without a valid norm in one regime, there will not be a relationship with a valid norm in the other regime. This, however, does not necessarily imply that the valid norm has no further role to play; as indicated by the ICJ, it may function as a 'gap-filler'.
The force of norm validity also affects the interplay between IHRL and LOAC. This is predominantly caused by the traditional dichotomy between IAC and NIAC, which sustains the diversity in availability, density as well as precision of norms relative to the concepts of targeting and operational detention in the laws of IAC and NIAC.
As regards the concept of targeting in hostilities, IHRL offers valid norms, yet CA 3 remains silent. As is commonly agreed, the gap is filled by LOAC itself, as the customary rules of hostilities also apply to NIAC. So, here, both IHRL and LOAC offer valid norms. Account must be had, however, of the view advanced by some that the gap of CA 3 is not filled with customary law, or not with sufficiently clear norms of customary law. Instead, IHRL ought to apply, thus implying that targeting operations are to take place within the rather strict permissible scope of the right to life.[2075] This is a position that sits quite uncomfortably with the concept of hostilities, the characteristics of which call for greater latitude. This study takes the position that there is no gap in regulation of hostilities in NIACs. At the same time this is not to be understood that all is clear, for several themes in the law of hostilities require further clarification or certainty.
The dominant role of norm validity is particularly visible in the area of operational detention, mostly so in respect of security detentions in NIAC. While IHRL provides valid norms governing various issues relative to the concept of operational detention (legal basis, procedural safeguards, fair trial rights, transfer), CA 3 and AP II remain underdeveloped, particularly so in the areas of legal bases for operational detention, procedural safeguards in security detention, and transfer. Following the ICJs approach, it is for IHRL to step in and to provide the missing norms. It is here that the limited suitability of IHRL in the context of armed conflict becomes visible, particularly in extraterritorial context.[2076] It is submitted that in those instances where IHRL obligations reach the logical limits in view of the particular situation in which they are to be applied recourse is had to the law of IAC (GC III and GC IV) on the basis of policy. As noted, in the absence of clear rules, this will at least prevent States from acting outside the confines of GC III and GC IV.
In sum, as it turns out, the interplay between IHRL and LOAC is highly dependent on norm validity. The importance of norm validity is further reinforced by the second condition for norm interplay: norm applicability.

[2075] Chapter V, paragraph 1.1.2.
[2076] Chapter X, paragraph 2.2.

1.4. Norm Applicability

The theme of applicability of valid norms of IHRL and LOAC has its own dimensions in respect of each regime, and therefore affects the question of interplay between in its own fashion.

As regards the applicability of the valid IHRL-norms relative to targeting and operational detention, 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. This triggers *two issues*: the question of whether such jurisdiction entails the applicability of IHRL-obligations in times of armed conflict, and whether they apply extraterritorially. As regards the former, it is commonly agreed that IHRL continues to apply in armed conflict. Obviously, the applicability of IHRL in armed conflict is of relevance, since it implies that it applies simultaneously with LOAC. Nonetheless, at least two States – of particular relevance in view of their frequent/constant engagement in armed conflict – persistently object to the applicability of IHRL in armed conflict: Israel and the US. Such positions complicate the discussion on the lawful scope of conduct, particularly in multinational operations.
Notwithstanding its application in armed conflict, the applicability of conventional IHRL to a State's conduct depends on the State's ratification of a particular treaty, reservations made to provisions, the use of clauses of limitation or derogation, as well as the question of whether the State exercises 'jurisdiction' over individuals affected by its conduct. The latter issue is of relevance in domestic context as well as in extra-territorial context and is connected to the question of whether a State exercises effective control over an area, or authority and control over persons. When applied to the various situational contexts of counterinsurgency operations, the impact of IHRL applicability becomes readily visible, mostly so as a result of the diverging position of the ECtHR in interpreting the meaning of 'jurisdiction' in Article 1 ECHR.
In sum, jurisdiction under the ICCPR and ACHR arises for any type of conduct affecting a person's human rights. Under the ECHR, the picture is somewhat more complex. In relation to operational detention, jurisdiction arises in all situational contexts. As regards targeting, jurisdiction is likely to arise in NATCOIN (both ECA and SAA), OCCUPCOIN (ECA and SAA, in so far exercising public powers), yet this may be less likely in the context of SUPPCOIN and TRANSCOIN as, following the practice of the ECtHR, jurisdiction does not arise in the context of depersonalized and collective bombardments (which admittedly falls outside the scope of targeting) and targeting in the course of hostilities, for lack of territorial or situational control.

Insurgent and counterinsurgent military operations are governed by LOAC only when the conflict between the counterinsurgent State and the insurgents reaches the level of an armed conflict. For the purposes of interplay examination, the existence of an armed conflict is of crucial importance for a number of reasons.
Firstly, a conflict must be an armed conflict. In other words, the mere qualification of a situation as an insurgency in itself does not imply the existence of an armed conflict. To judge the lawfulness of the action's that States take to counter an insurgency, it is not the political label of 'war' that places all activities related to insurgency automatically within the realm of one single armed conflict, but rather whether the activities of insurgents and States, based on a factual examination on a case-by-case basis, are to be viewed as (part of) an armed conflict, or not.

Secondly, the question of whether an armed conflict exists is intrinsically linked to the question of its qualification as IAC or NIAC. In view of the issue of norm validity and the underdevelopment of the law of NIAC this question is pivotal in terms of interplay, as this determines whether targeting or operational detention is governed by the law of IAC or NIAC.
An issue complicating the armed conflict-typification is the question whether the concept of NIAC as it may currently be interpreted under CA 3 is sufficiently flexible to include all types of armed conflict not waged between two or more States (i.e. IACs), including those taking place outside the territory of a State engaged in an armed conflict with a non-State party? In identifying the type of armed conflict, the determinative factor is the *nature* of the parties to the conflict; 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 indisputably qualify as NIACs. The type-qualification of OCCUPCOIN and TRANSCOIN remains subject of legal debate. Several arguments in favor of applicability of the law of IAC or the law of NIAC can be made, although the majority viewpoint is in favor of the latter in both cases, the principal argument being that the conflict between a counterinsurgent State and insurgents in these broader contexts is to be viewed as an entirely separate armed conflict. Nonetheless, it cannot be excluded that the law of IAC applies in regards of, for example, conflicts that do not (yet) reach the threshold of a NIAC. As far as TRANSCOINs are concerned: they are at a minimum governed by the law of NIAC, in order to avoid that they are not governed by LOAC at all.
Thirdly, in the absence of an armed conflict, only IHRL applies, and no interplay arises, implying that targeting and operational detention operations are to comply with the requirements inherent in the valid norms. For the purposes of this study, the assumption was that the counterinsurgency situations all took place in the context of an armed conflict. In practice, the crossing of the threshold of armed conflict must be determined on a case-by-case basis. This is generally not so problematic in inter-State armed conflicts, but in the case of NIAC the organization characteristics of an insurgency play a significant role. A NIAC requires the exchange of frequent and sufficiently intense violence between a State and a non-State organized armed group. Generally, the very concept of an insurgency requires a minimum degree of organization to be effective. However, the sporadic use of force does not trigger the existence of an armed conflict, and the counterinsurgent State is left to deal with the insurgency in an IHRL-fashion only. In sum, States may be confronted with ambiguous situations whereby conflicts 'float' in the grey area between peace and armed conflict. The potential blurring of the boundaries between peace and armed conflict unavoidably results in the blurring of the boundaries between the applicable international legal regimes, respectively IHRL, and LOAC. It is here where conceptual differences between IHRL and LOAC become apparent.
Firstly, IHRL, unlike LOAC, sanctions States to derogate from certain human rights. Similar rights can also be found in CA 3, yet LOAC prohibits derogation from its norms (unless so provided for). Thus, while the protective norms of CA 3 continue to apply in armed conflict, similar protective norms under IHRL may be suspended through the instrument of derogation.
Secondly, IHRL imposes obligations upon States, whereas LOAC imposes obligations (also) on individuals. As for CA 3, its provisions are equally binding on all the parties to the conflict. This is of great relevance in a situation of NIAC, when at least one, and sometimes all the parties to the conflict are individuals belonging to a non-State entity. If a situation cannot (or no longer) be qualified as an armed conflict, the obligations otherwise conferred

upon the non-State actors by virtue of CA 3 would, considering the current position of IHRL with regard to horizontal effect of human rights obligations, not (or no longer) bind them.
Thirdly, the existence of an armed conflict and applicability of LOAC also implicates a shift in the room for maneuver in terms of the forcible measures such as the use of force and detention that may be taken against insurgents. Also in NIAC, the applicability of LOAC opens the door to forcible measures otherwise prohibited under IHRL.

1.5. The Notion of Control in the Concepts of Law Enforcement and Hostilities as well as in Object and Purpose of IHRL and LOAC

A fifth aspect influencing the (debate on the) interplay between IHRL and LOAC concerns 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
IHRL is principally designed for peacetime situations, where a State exercises control over territory, and as such is able to control the vertical relationship it has with the persons within its jurisdiction. As such, IHRL is intrinsically connected with the concept of *law enforcement*, which is an intrinsic authority and obligation of the State in order to maintain and restore public security, law, and order. In exercising its law enforcement duties, forcible measures are to be applied on the basis of absolute necessity only. LOAC differs fundamentally. It is founded on a delicate balance between military necessity and humanity in order to enable parties to an armed conflict to wage war without losing sight of the humanitarian consequences involved. Therefore it principally (not exclusively) regulates *hostilities*, in which situations control over territory is contested and that over persons is absent (in so far not in the hands of a party to the conflict). In this study, this difference in relationships becomes manifest in the question of interplay between the normative paradigms of law enforcement and hostilities,[2077] but also in the area legal basis for and procedural safeguards afforded in security detention.[2078] In both instances, IHRL norms are found to reach the logical limits of reasonable and practicable application in the extreme circumstances that armed conflict brings along.

1.6. Insurgency and Counterinsurgency

As noted, the instrument of interpretation requires that the specific context in which valid norms simultaneously apply be taken into account when ascertaining the nature of norm relationships. The specific characteristics of insurgency and counterinsurgency, as subsets of the dominant form of warfare today, cannot be left aside in this process. Counterinsurgent forces act within a complex environment. From a military perspective, counterinsurgent forces are challenged by a mosaic of threats, which may vary in time, place, and nature, posed by actors with various objectives, ranging from mere criminal activity for personal gain to terrorism to undermine the public perception of the State's capacity to provide law and order. Insurgents operate in unconventional ways, are difficult to identify and generally act with disregard for the law. As indicated in Chapter I, these characteristics of 'mosaic warfare' have legal implications. This concerns most notably the non-State nature of the insurgents, which has implications in respect of their status as lawful military objectives within the law of hostilities, as well as their status as detainees. It also affects the qualifica-

[2077] Chapter VIII, paragraph 3.2.
[2078] Chapter X, paragraph 2.

tion of the conflict as NIAC and thus the scope of relevance of valid norms. Also, the level of organization that is required for an insurgency to function may have implications for the qualification of the conflict as an armed conflict. A *second* feature of significance for the interplay is the geographical scope of insurgent and counterinsurgent operations, to involve several territories, which triggers issues as to the extraterritorial applicability of IHRL and the qualification of armed conflict as IAC or NIAC. *Thirdly*, while insurgencies in this study are assumed to take place in the context of armed conflict, they usually start in peacetime, which triggers the question of when the threshold of armed conflict is crossed, and thus when LOAC joins IHRL as applicable regime.

A second aspect of (potential) influence concerns (western) counterinsurgency *policy*, which demonstrates the need for security and legitimacy, in order to drive a wedge between the population and the insurgency and to convince it to support the government. Failure to acknowledge the meaning and strength of these principles is generally considered to undermine popular support for the counterinsurgency campaign. Therefore, these imperatives find reflection in guidelines issued to counterinsurgent forces with respect to their conduct in the application of force and detention of suspected insurgents. These guidelines indicate that in counterinsurgency it is to be preferred that counterinsurgent forces not resort to the strength of LOAC, but that instead resort should be taken to law enforcement measures and criminal justice procedures.[2079]
At the same time, this may be viewed by 'humanizers' as evidence that counterinsurgency doctrine coincides in an interesting fashion with the attempts to further humanize the conduct of parties to an armed conflict. This is of interest, because those wishing to humanize armed conflict may interpret this development as State practice demonstrating States' willingness to impose restrictions upon the conduct of its forces that are in agreement with the proposals for humanization. 'Humanizers' may see this is as a sign that States themselves are ready to agree on new interpretations of the *lex lata*, or to adjust the law in the near future. As such, a shift takes place from external to internal humanization. It is however essential to distinguish between policy and law. From a positivist viewpoint, policy does not belong to the realm of law, and the only manner in which policy-rules would transfer into legal norms is by means of their transformation into norms of customary international law, save of course those situations where they have been included as treaty-norms. It is expected that there is unlikely to be any or insufficient *opinio juris* among States to view the imposition of policy conditions as new legal restrictions. However, as a trend has emerged to identify *opinio juris* on the basis of evidence of State practice alone, the execution of policy restrictions by multiple States joined in a coalition such as ISAF may serve as an incentive by some to view them as norms of law in their desire to expand humanization. While States may feel comfortable with imposing policy restrictions that are narrower than the law, it will be argued that they will not accept such restrictions to become new law. Therefore States are advised to monitor developments in that direction in order to protect their interests. It will be argued that the emergence of new customary rules in this fashion is not necessary to attain *de facto* enhanced protection of individuals and their property. This can be attained by following the principles underlying contemporary counterinsurgency doctrines as applied in the field. Doing so thus serves the interests of States and humanitarians. This way, humanization can be achieved in a harmonious fashion without upsetting the balance between humanity and military necessity as intended by States when they designed LOAC.

[2079] Stephens (2010), 310.

2. Operational Implications of the Interplay for Targeting and Detention in Counterinsurgency

This paragraph concludes upon the operational implications following the interplay of IHRL and LOAC in respect of targeting and operational detention in counterinsurgency.

2.1. Targeting

To recall, the concept of targeting as understood in the present study concerns

> the intentional *deprivation of life*[2080] of insurgents whilst not residing in the custody of counterinsurgent forces, resulting from the deliberate or dynamic application of lethal means of combat power resorted to for purposes of hostilities or law enforcement, and based on a targeting-decision that can be attributed to the counterinsurgent State, in order to achieve effects that support a predetermined objective set by the force commander.

A preliminary question for the counterinsurgent State in any targeting operation is whether it is governed by the normative paradigm of law enforcement or that of hostilities. The answer to this question immediately impacts the intent-based nature of targeting, the possibility for pre-planned targeting, and first and foremost, the question of whether the predetermined objective as set by the force commander can be attained through the effects resulting from an insurgent's targeting. In other words, it forces commanders to adjust their process of 'outthinking' the enemy to the permissible scope of action under the applicable normative paradigm. More generally, it impacts the interpretation and application of basic principles of warfare. For example, clarity on the applicable normative paradigm will offer the commander insight in how he is to deploy its available assets as an application of the principle of *economy of effort*. Also, a determination of the proper normative paradigm will provide the commander the necessary direction in how to *simplify* his plans to the maximum extent possible, and contributes to the *credibility* and *social legitimacy* of the military operations. Certainty about the applicable normative paradigm will offer an opportunity to design a *realistic concept* of operations with the proper means, which will support *morale* and the dedication to execute the task at hand in a consistent, disciplined, accurate, effective, and foremost, legitimate manner.
The applicability of the normative paradigm is, however, not a matter of arbitrary choice. Such choice would open the door for States to get around the strict requirements underlying the use of force in the normative paradigm of law enforcement in situations where these requirements would hinder the set objectives. Rather, the applicability of a normative paradigm follows logically from the object and purpose underlying the concepts of law enforcement and hostilities, whereby – strictly speaking – the normative paradigm of law enforcement governs all targeting operations that are not governed by the normative paradigm of hostilities.

A first concern for the counterinsurgent State is therefore to assess whether it operates as party to an armed conflict, and if so, whether – within that context – the targeting forms part of hostilities, i.e. "all activities that are specifically designed to support one party to an

[2080] The term 'deprivation of life' is a neutral term, reflecting the *result* of conduct, regardless of how this was achieved. As will be demonstrated, it also is most closely related to the prohibition as framed in respect of the right to life in IHRL, which prohibits the arbitrary deprivation of life. It is submitted that in determining the lawfulness of deaths resulting from State conduct, regardless of the circumstances in which they occur, the benchmark is whether the State conduct constituted an arbitrary deprivation of life or not, as understood under IHRL. This benchmark remains valid in times of armed conflict.

armed conflict against another, either by directly inflicting death, injury or destruction, or by directly adversely affecting its military operations or military capacity." The existence of an armed conflict is, as concluded, not to be made dependent on the counterinsurgent State's subjective assessment, but must follow from an objective analysis. Thus, a State's mere designation of a conflict with insurgents as a armed conflict or, in the alternative, that State's denial of (or silence in making any pronouncement to) the existence of an armed conflict cannot be guiding in concluding upon the applicability of the normative paradigm of hostilities without not also taking account of the facts on the ground.

In the *absence of an armed conflict* to which the counterinsurgent State is a party, armed violence between the counterinsurgent State and insurgents cannot qualify as hostilities as understood in the law of hostilities and – as a consequence – cannot trigger the applicability of the normative paradigm of hostilities.

The counterinsurgent State must also conclude upon the non-applicability of the normative paradigm of hostilities when, during an armed conflict, *the targeting operation does not qualify as an act of hostilities, but as an act of law enforcement*, i.e. "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." A first reason for this conclusion could be that *the very threshold of hostilities is not met*. A second reason could be that, while the threshold of hostilities has been met, *the target does not qualify as a lawful military objective under the law of hostilities*. In all of the above situations, the normative paradigm of law enforcement always governs the targeting of insurgents.

However, as follows from the *functional approach*, even when an insurgent qualifies as a lawful military objective operating in the context of hostilities during an armed conflict, his targeting may be subject to the question of whether the counterinsurgent State at that moment exercises effective control over the territory in which the targeting is to take place, and whether it is also capable of exercising control over the situation at hand. As follows from the previous analysis, inherent in the very concept of hostilities is the absence of effective control, and in those situations where operational reality dictates that the counterinsurgent State clearly is not in effective control over territory, the normative paradigm of hostilities applies. This is typically the case in situations of SUPPCOIN and TRANSCOIN, where (generally) the counterinsurgent State does not exercise effective control over territory. However, this need not necessarily be the case in situations of NATCOIN and OCCUPCOIN. Here, the exercise of jurisdiction over territory is presumed to exist, and in so far insurgents qualifying as lawful military objectives reside in areas under effective control, the very object and purpose of IHRL, and the obligations ensuing from it override the authority under the law of hostilities to target insurgents as lawful military objectives under the normative paradigm of hostilities.

The above reveals that counterinsurgent States *cannot resort to a standard policy for hostilities-based targetings* in order to make use of the more liberal standards under the normative paradigm of hostilities (and thus to evade the strict standards under the normative paradigm of law enforcement). Rather, on a case-by-case basis, the assessment of the applicable normative paradigm must be made. This requires sound legal judgment, as well as a flexibility to quickly shift – both mentally as skill-wise - in stance towards a particular targeting situation. Also, it may force the counterinsurgent State to suspend or abort a targeting operation altogether, and to resort to second and third-tier alternatives, permissible under the normative paradigm of law enforcement.

On the other hand, the counterinsurgent State has a discretionary authority to issue policy – based on strategic imperatives – requiring forces to also resort to (law enforcement-based)

minimum use of force in situations absent effective control over territory, but where control over the situation is present or achieved. Similarly, in situations of SUPPCOIN and TRANSCOIN the counterinsurgent State may instruct its forces to apply only minimum force in areas over which itself does not exercise effective control, but the territorial State in which territory it operates, however, does, and thus where law enforcement operations are feasible. In situations where the normative paradigm of law enforcement applies – as a matter of law or policy – the exercise of control over territory or the situation corresponds fine with the counterinsurgency principles of legitimacy and security, as well as with the idea that political factors are prime in a counterinsurgency. In fact, it continues to govern the use of force by counterinsurgent forces also in the event of internal tensions and disturbances characterized by frequent terrorist attacks, violent riots and demonstrations, and other use of force by non-State actors not rising to the level of hostilities. For those purposes it is sufficiently flexible. Since it cannot be excluded that counterinsurgent forces are to resort to lethal force as a measure of law enforcement, counterinsurgent States must ensure (as part of the requirement of precaution) that these forces as well as their command are adequately educated and trained in the use of force in law enforcement situations. To some armed forces, this may imply a radical deviation of the 'normal' hostilities-based education and training.

Clearly, the analysis in this study demonstrates that counterinsurgent forces can not be deployed with a hostilities-based state of mind, but must attain the flexibility to immediately shift to law enforcement-based conduct. Indeed, in practice, forces may be required to make this shift because they are deployed from a hostilities area (red zone) in one part of a territory to a law enforcement area (blue zone) in another part of that territory. For example, in Colombia, large parts of the country have been identified as red zones under control of the FARC, whereas other parts are under firm control of the government and are identified as blue zones. However, some situations may be more complex. In contemporary mosaic warfare, forces may be deployed to a single city, parts of which are under its control, wheras other parts are in control of insurgents. Even within those areas, a mix of law enforcement situations and hostilities may take place forcing counterinsurgent forces to shift multiple times a day, perhaps even within the time space of hours. An example is the situation in Bagdad between 2004 and 2009.[2081] This requires States to review how its forces are educated and trained, and to ensure that they are able to make this shift between hostilities-based conduct and law enforcement-conduct in operational practice with a deeper understanding of the imperatives guiding successful counterinsurgency and thus of the strategic impact of their conduct.

2.1.1. Hostilities

The applicability of the normative paradigm of hostilities offers the counterinsurgent State considerably more latitude to target insurgents. From an operational point of view, the normative paradigm of hostilities is designed with a view to permit combat operations to be carried out in line with the basic principles of warfare. It other words, as follows from the object and purpose of the very concept of hostilities, the normative paradigm of hostilities is cognizant of the military necessity to render enemy forces *hors de combat* – including their killing – in order to attain the legitimate aim of warfare, which is to defeat the enemy. In other words, its fundamental premise is that it permits forcible conduct unless specifically constrained on the basis of humanitarian concerns. This way, basic principles of warfare,

[2081] Robinson (2008).

such as *mobility*, *surprise* and *offensive* in combat operations, as well as *security* and *initiative* – all of which reflect notions of military necessity taken into account when designing the law of hostilities – remain largely preserved. This is not to imply, however, that the normative substance of the law of hostilities remains unproblematic and does not – as a consequence – impact the targeting of insurgents.

A *first* issue of impact concerns the qualification of insurgents as lawful military objectives. After all, in the absence of such positive qualification, insurgents remain protected from direct attack and can only be targeted in so far permissible under the normative paradigm of law enforcement. Throughout the entire targeting cycle, the initial as well as the continued confirmation of the targetable status of insurgents remains an issue of attention for counterinsurgency forces at all levels, arising from the requirements of distinction and precautionary measures. In operational practice, the identification of lawful targets is problematic and places a huge burden on intelligence resources, due to the very *modus operandi* of insurgents themselves, the obscurity of their organizations and each individual's role therein, as well as the behavior of the civilian population themselves. From a legal perspective two principal issues impact targeting operations. This concerns, *firstly*, the fact that while the law of hostilities limits the targetability of insurgents as non-State actors to those instances where they can be said to DPH (in the context of IAC and NIAC), or qualify as (CCF-)members of the armed forces of the insurgency (in the context of NIAC), the precise law on these bases remains a matter of dispute. While some States may feel compelled to adopt a restrictive interpretation in order to avoid civilian casualties as a result of abuse or mistake, other States may use the ambiguity to adopt broad policies designating individuals or groups of individuals on the mere basis of their labeling as 'insurgent' of to adopt standards such as 'male suspects of fighting age'. This brings us to the *second* issue, namely that such wide interpretations or policies cannot in and of itself be sufficient to conclude upon the absence of immunity against direct attack, but is to be made subject to a more nuanced determination of the position of the potential target under the law of hostilities on a case-by-case basis.
In any case, the counterinsurgent remains under an obligation to abort or suspend an attack in case of doubt, as such doubt automatically qualifies an insurgent – notwithstanding suspicions indicating to the contrary – as protected from direct attack, in which case he may only be targeted in so far permissible under the normative paradigm of law enforcement.
A *second* issue concerns the use of means and methods restricted or prohibited by LOAC, more in particular the use of expanding bullets and CF-gas. While both means are permissible in times of armed conflict when applied in the context of law enforcement operations, their operational benefits exceed such operations. Thus, the use of expanding bullets in for example close-quarter combat situations in densely populated areas, with a higher risk of civilian casualties as well as blue-on-blue accidents, would greatly facilitate the principles of *mobility* and *security*, whereas the use of tear gas would permit counterinsurgent forces to keep *initiative* and *surprise*. Both would only enhance the possibility of counterinsurgency forces to gain control over the situation at hand and thus to resort to non-lethal alternatives to defeat the insurgents in that particular situation – whether such resort follows from standard policy or an order of the on-scene commander. Given their exclusion in hostilities-based operations, this effect is less likely to be achieved and counterinsurgent forces may feel compelled to remain active under the normative paradigm of hostilities.
A *third* issue concerns the possibility of collateral damage. The law of hostilities offers clear instructions to counterinsurgent forces:

- they must refrain from attacks by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area – for example insurgent hot spots – containing a similar concentration of civilians or civilian objects.
- the counterinsurgent is under an obligation to determine (1) the collateral damage to be expected; and (2) the excessiveness of such expected collateral damage in relation to the concrete and direct military advantage anticipated to result from the targeting.

While the former instruction is relatively straightforward, the latter is far more sensitive to interpretation and abuse. Here, the law of hostilities places a great amount of trust in the judgment of operators by allowing them to interpret, in light of information available, the concreteness and directness of the military advantage anticipated and the excessiveness of the expected collateral damage relative to it. Oftentimes, such judgment must be made in a matter of seconds, whereas in pre-planned targeting situations full use can – and must – be made of the intelligence sources available.

In the event that such incidental or collateral damage is deemed *excessive* in relation to the concrete and direct military advantage anticipated, the counterinsurgent must refrain from *deciding to launch* the attack or must be postpone or cancel an attack in process. This may greatly impact the force commander's objectives in the case of time-sensitive targetings, where it is unlikely that another chance to target may quickly arise again (e.g. in the case of principal insurgency commanders who normally remain in hiding).

In the event that loss and injury to civilian life and damage to civilian objects is considered *not* to be *excessive* in relation to the direct and concrete military advantage anticipated, the counterinsurgent must, *firstly*, 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 or civilian life, injury to civilians and damage to civilian objects; *Secondly*, when a choice is possible between several targetable insurgents for obtaining a similar military advantage, only that insurgent may be targeted which may be expected to cause the least danger to civilian lives and to civilian objects; *Thirdly*, the counterinsurgent must issue effective advance warnings to the civilian population, unless circumstances do no permit. The operational impact of these precautions is evident, for it requires choices, thus implying that operationally more effective options must yield to operationally less effective options.

Counterinsurgent forces are to be aware that they take account of these requirements throughout the entire targeting cycle, thereby accepting that these are 'the rules of the game' rather than focusing on what they cannot or no longer do as a result. This enables them to conclude that, notwithstanding these requirements, the principle of proportionality in essence permits collateral damage to result from targeting operations, provided this is not excessive in relation to the concrete and direct military advantage anticipated. In fact, States have increasingly come to realize that in the context of counterinsurgency collateral damage per se is detrimental to the strategic objectives, and for that reason they have adopted limitations overriding the legal restraints. These restraints should be viewed in unison with policy whereby the targeting is more selective and focuses on leadership and – within that nucleus – on reconcilables-irreconcilables. In so far the counterinsurgent seeks to defeat the insurgency by pre-planned targeting of irreconcilables – often in individual case – collateral damage may still be considered acceptable – given the relative weight of the target. Counterinsurgent States should however be aware of the risk of devaluation of the notion of excessiveness, particularly given the fact that such strategies are highly intelligence-sensitive and may result in targetings of individuals which – in hindsight – proved to be wrongly identified, and in the process of which numerous civilians were killed.

Notwithstanding its remaining ambiguities and pitfalls, the law of hostilities offers a wide margin of appreciation for commanders on the ground to enable them to carry out targeting operations. In operational practice it is not so much the law, but policy that curtails this latitude. The full use of this framework's strength in the context of counterinsurgency operations, however, is feared to undermine the strategic imperatives in counterinsurgency. The overall picture that emerges is that contemporary counterinsurgency doctrine demonstrates care and restraint in the application of force, such that it may be concluded, as a default position, that counterinsurgent forces are called upon to use only the minimum force strictly required by the exigencies of the situation. The imperatives of COIN doctrine, policy and practice shift

> the focus of military operations, the mindset and strategy of the military, and the default position from which the military begins. Destruction and killing is not undertaken lightly and when it does take place, the military is as concerned with its effects on the population as it is on the targets themselves.[2082]

The net result is a dense policy paradigm, one in which the normative paradigm of hostilities plays a subordinate role relative to policy and operational considerations.[2083]
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. As Schmitt warns, while "humanitarians and counterinsurgency warfighters paradoxically find themselves in lockstep," at the same time "[t]heir perspectives on the practices may, nevertheless, conflict."[2084] Indeed, from a legal perspective, these policy-based restrictions risk to be misinterpreted as normative by those supportive of the further external humanization of armed conflict. They may be viewed as expressive of State practice, and thus of proof of the emergence of a new string of customary international norms. If States ignore these signals, such development may undermine the very foundations of hostilities-based targeting and result in the re-adjustment of the traditional balance between military necessity and humanity. Nonetheless, as noted, the position taken in this study is that the legal framework of the law of hostilities remains unaffected by the counterinsurgency-based policy paradigm.

2.1.2. Law Enforcement

In so far it has been determined that a targeting is governed by the normative paradigm of *law enforcement*, its requirements have significant operational consequences. These consequences inherently follow from the very object and purpose of the concept of law enforcement, which presumes the exercise of control over territory, persons or objects, thus offering a State the operational room to carry out law enforcement operations in a fashion whereby the deprivation of life of individuals is in principle prohibited, and is permissible only in exceptional circumstances and subject to strict requirements which cumulatively must be complied with.

[2082] Sitaraman (2009), 1776.
[2083] Schmitt (2009), 314.
[2084] Schmitt (2009), 328.

Firstly, the counterinsurgent must ensure that, regardless of whether such operations take place on its own territory or that of another State, the targeting of insurgents as a measure of law enforcement finds a sufficient legal basis in domestic law, which is publicly accessible and regulates the use of force in conformity with international norms of IHRL and other norms of international law governing the deprivation of life as a measure of law enforcement, also in times of public emergency threatening the life of the nation. Targetings taking place in the absence of such legal basis are unlawful. In sum, counterinsurgent forces need to ascertain that they are provided with a mandate that permits them to carry out targeting operations as a measure of law enforcement.

A *second* issue impacting a targeting operation concerns the fact that it may only be resorted to as an instrument of *prevention* whereby the loss of life is the *potential* outcome and not of punishment where the loss of life is the *intended* outcome, and is thereby limited to situations in which an identified insurgent poses a concrete and immediate threat to the life of counterinsurgent forces of innocent bystanders; where an insurgent resist upon arrest in a fashion that this may lead to the loss of life or injury of the counterinsurgent forces attempting to make the arrest, or innocent civilians collocated in the vicinity of the arrest scene; and where an insurgent partakes in a riot or insurrection instigated by an insurgency movement and individually poses a threat to the life of innocent bystanders or to the counterinsurgent forces present. In addition, targeting is a measure of last resort only and when resorted to as a measure of absolute necessity it may not exceed that kind and degree of force absolutely required to remove these threats, and for the time this is necessary. This implies that policies by which the counterinsurgent resorts to the instrument of targeting as an instrument of first resort to 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, does not serve as a 'means' to achieve a legitimate 'end', but becomes an 'end' in itself and is unlawful. It follows that the counterinsurgent is under an obligation to refrain from deciding to launch, or to terminate a targeting operation in process if it becomes apparent that the targeting is carried out in the absence of a legitimate purpose. In addition, the counterinsurgent is under an obligation to take precautionary measures 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.

Clearly, this framework of restrictions sits uncomfortably with the very object and purpose of the concept of targeting, and servely impacts the interpretation and application of fundamental principles of military operations. The requirement of last resort, for example, hinders the counterinsurgent State in its reliance on principles such as *initiative*, *mobility*, *surprise* and *offensive*. This also applies to the limited range of legitimate aims available, which prevents the counterinsurgent State from carrying out targetings for purposes which under the normative paradigm of hostilities would fit in the concept of military necessity. In addition, the preventive nature of deprivation of life as a measure of law enforcement does not easily correspond to the intentional nature of targeting, and would almost in all cases exclude the possibility of pre-planned targetings, or targeting as a standardized, policy-based measure. Also, targeting under the normative paradigm of law enforcement force 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. For example, the use of attack helicopters, armed drones or aerial bombardments would require a severe threat for their use 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.

The counterinsurgent is also to remain aware that it does not target individuals based on their mere status as 'insurgent' but carries out an adequate assessment of the concrete and immediate threat posed at the moment that resort is taken to the measure of targeting.
Finally, in contrast to LOAC, the counterinsurgent is under an obligation to investigate the loss of life or injury to individuals arising from a targeting operation, and to compensate victims in case of unlawful deprivation of life. To comply with this obligation, the counterinsurgent State is bound to dedicate forces to investigative tasks for which they are generally not trained. Also, it may be questioned whether this requirement can be carried out in an adequate manner in areas within the territory of armed conflict where the security situation is such that doing so would impose unacceptable risks to the counterinsurgent forces.

2.2. Operational Detention

To recall, operational detention is in this study defined as

> the deprivation of liberty[2085] of individuals in the context of a counterinsurgency operation, whether for reasons of security or for law enforcement purposes, except as a result of conviction for a common criminal offence.[2086]

It refers, *firstly*, to security detention, i.e. the preventive, administrative detention of individuals who may be detained for activities related to the hostilities, and which thus constitute a future threat to the security of the armed forces, the civilian population and the interests of the State in general. *Secondly*, it refers to *criminal detention*, i.e. an individual's punitive detention following charges related to criminal conduct in the past and during which he is subjected to a criminal judicial process. Each form of detention is governed by a specific normative paradigm
As is the case in relation to targeting, the counterinsurgent is to be aware of which normative paradigm applies: that of criminal detention of security detention. This will much depend on the very mandate based on which the counterinsurgent operates. For example, in a situation of SUPPCOIN, a supporting counterinsurgent State may operate on the basis of a UNSC resolution permitting it to take 'all necessary measures' to include security detention, yet its own government may limit detentions to brief periods either with the intent to either release captives or to transfer them. This is wide practice in Afghanistan. Such policy-based choices are of great operational significance, particularly when operating jointly with forces that have a wider mandate to detain insurgents for security reasons (including for reasons of interrogation). Other issues that have an operational impact on whether a counterinsurgent State may detain a person for criminal or security reasons concerns the issue of extraterritorial applicability of IHRL. In the context of an IAC, this is less of an issue, for here LOAC provides a quite dense framework of valid norms similar to those found in IHRL, but which are applicable due to the mere existence of an armed conflict. In the context of

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[2085] As with the deprivation of life, the choice for the term deprivation of liberty is deliberate, for it is result-based and is intrinsically linked with the prohibition under IHRL to arbitrary deprive someone of his liberty.

[2086] This definition is based on that used by Kleffner in Gill, Fleck & al (2010), 638. Operational detention is a prolonged form of *deprivation of liberty*. Under international law, no one shall arbitrarily be detained or otherwise be held in custody by State authorities against their will. However, not every form of deprivation of liberty also constitutes operational detention. For example, when people are stopped at roadblocks or check points, or when their houses or property is searched, they may be considered to be deprived of their liberty, yet neither situation amounts to what is understood in this study as operational detention.

NIAC, this is more complicated given the absence of valid norms and thus the lack of clarity as to what is allowed or not.
Another issue of operational impact is the very absence or disfunctioning of the justice system in an AOR that is non-permissive to civilian rule of law officers. In those instances there may be no other choice but to task the military to rebuild or reform the justice system and thus to take control of criminal detention issues,[2087] as has been demonstrated by the NATO-mission KFOR in Kosovo,[2088] OEF and ISAF in Afghanistan,[2089] INTERFET in East-Timor,[2090] and Iraq during and after the occupation stage [2091]
Clearly, rule of law reform is a law enforcement affair falling outside the traditional scope of responsibilities of armed forces. As we have seen, the legal regime governing criminal detention is detailed and imposes upon States strict obligations that, when placed on the shoulders of the armed forces, have tremendous operational implications. Counterinsurgent forces may be compelled to build prisons and courtrooms; to provide personnel to guard prisoners and to provide legal assistance; to train judges and prosecutors; to carry out police-related tasks such as evidence gathering and forensic investigations. Some would label this as 'mission creep', i.e. tasks that should not be carried out by the armed forces.[2092] After all, soldiers are trained to fight, not to collect evidence. To do so would negatively affect combat effectiveness. However, today such tasks appear to be inevitable, which requires States to make adequate preparations. An important spin-off of rule of law operations carried out in counterinsurgency concerns the coordination with the more kinetic side of the operation – i.e. the targeting operations. In order to avoid popular support for the rule of law gained over a long period of time to be lost in a split second, it is imperative that rule of law officers and targeting operators coordinate their efforts by which – it is submitted – the targeting of insurgents must yield where this may result in the loss of support for the rule of law. In view of the functional approach, this would be a logical approach arguably rooted in law.

3. Final Conclusions

3.1. Significance of Normative Paradigms in Military Thinking

The normative paradigms applicable to the concepts of deprivation of life and deprivation of liberty offer important military operational guidance relevant to the conduct of military operations. They not only draw the outer boundaries of permissible targeting and operational detention; the requirements inherent in these frameworks function as essential and decisive instruments in the interpretation and application of the fundamental principles essential in determining the course of action in specific situations of targeting and operational detention.
In a particular AOR, the normative paradigms may find application simultaneously and in alternative fashion, as required by the situation on the ground. In establishing which rules apply to the deprivation of life and liberty of insurgents, this study recommends a shift from a regime-based approach to a paradigm-based approach. The drawbacks of a regime-based

[2087] U.S. Army Judge Advocate General's Legal Center & School (2011), 123.
[2088] OSCE (2006).
[2089] Talbot Jensen & Pomeroy (2009). See also http://www.usip.org/programs/projects/rulelaw-afghanistan/pubs.
[2090] Oswald (2000); Linton (2001).
[2091] al-Saedi (2010).
[2092] Talbot Jensen & Pomeroy (2009), 473.

approach are that it fails to reconcile fundamental differences in thinking between the various stakeholders about the applicability of IHRL and LOAC, as well as the interplay between them.
A paradigmatic approach levels such differences. Thus, in view of the fact that the normative paradigm of hostilities is law of hostilities-driven, it is no longer relevant whether a State adopts a separatist view to the relationship between IHRL and LOAC or not. If it does, and LOAC is the only regime applicable in extraterritorial armed conflict, the law of hostilities regulates hostilities against lawful military objectives. This outcome is no different than when States, or other stakeholders accept the applicability of IHRL in armed conflict and in extraterritorial situations.[2093]
Similarly, when stakeholders begin to refer to the normative paradigm of law enforcement, all know that it is IHRL-driven. It is submitted that the rejection of the applicability of IHRL in armed conflict and in extraterritorial situations by 'separatist' States is overcome by the fact that, as a result of treaty-based IHRL-obligations, the standards underlying the deprivation of life as a measure of law enforcement have been crystallized in domestic penal law, and it generally accepted that such laws follow the armed forces wherever they go.
In operational practice, a paradigmatic approach is particularly relevant, mostly so in multinational operations, because as argued, it levels fundamental differences in legal thinking.
In addition, the paradigmatic approach helps to train forces to apply both paradigms in order to shift quickly when so warranted by the circumstances at hand.
Also, a paradigmatic approach penetrates the traditional dichotomy between peace and armed conflict. It is cognizant of the comprehensive obligation of States to maintain and restore public security, law, and order by instruments of law enforcement in all situations where it exercises control over territory, thereby transcending the barrier between peace and armed conflict. It is also cognizant of the fact that, in armed conflict, the concept of law enforcement and the concept of hostilities coexist, and thus necessitate an ability of forces to shift when so required by the exigencies of the situation. The paradigmatic approach helps forces to distinguish in situations that are manifestly connected to the hostilities and those that are not.

3.2. The Way Forward

The study demonstrates that the conduct of armed forces in respect of targeting and operational detention in the context of an armed conflict is not limited to a single normative framework of IHRL or LOAC. Notwithstanding the existence of an armed conflict, and the subsequent applicability of LOAC, there is an important role to play for IHRL, most notably when LOAC is silent and human rights may step in to fill the gap. But where both regimes cover a particular aspect, there can be no doubt that the norm that regulates that aspect in most detailed fashion prevails over the other norm by application of the maxim of *lex specialis*, either to avoid or, when necessary, to resolve a conflict. This may indeed result in the application of the norm permitting the lawful infringement of human rights, but humanitarian considerations are not a leading criterion in assessing the interplay between norms, unless specifically so instructed by the relevant norms, such as in the case of Article 75 AP I. As the study shows, this is an aspect not much favored by those wishing to further humanize armed conflict. However, the fact that IHRL-norms may be leading does not

[2093] Admittedly, the extremist view that the normative paradigm of hostilities is entirely IHRL driven would distort the leveling-power of the paradigmatic approach, but it is submitted that such views are not adopted by States, and are a minority view that lack any basis in international law.

necessarily imply that they always offer better protection. In contrast to LOAC, human rights may be limited for reasons of national security, or derogated from in times of armed conflict, save those that are non-derogable. In addition, in view of humanitarian interests, LOAC-norms are not categorically less developed than norms of IHRL. In fact, LOAC may at times be more stringent than IHRL.

Following the general principles underlying norm relationships in international law, it is possible to bring order and balance in the simultaneous applicability of IHRL and LOAC and the interplay between individual norms regulating the same subject matter. While experts place much emphasis on the proper mechanisms determining the interplay between IHRL and LOAC, this study demonstrates that, in reality, the interplay of norms of IHRL and LOAC governing targeting and operational detention is rather straightforward, and hinges upon the applicability and validity of norms in a particular context, as well as their level of specificity and nature as *jus cogens* in international law.

Ultimately, having the most impact on the permissible conduct for military forces is the very interpretation of the applicability and substantive content of the relevant frameworks of IHRL and LOAC. As the study illustrates, many issues remain subject of debate and further crystallization into clear legal rules, and clearing them up would only further facilitate defining the permissible scope of action. This does not imply, however, that the current framework is so unclear that it results in unworkable and inhuman rules. Particularly in the context of counterinsurgency, States are increasingly aware of the necessity to limit the conduct of their forces to a degree acceptable to sustain a credible level of legitimacy without undermining their ability to provide security. As such, contentious areas such as the notion of direct participation in hostilities and security detention are dealt with by means of policy guidelines directing the conduct of military forces in the desired direction. This also implies that there is no need for a distinct legal framework for counterinsurgency. The current *lex lata* is sufficiently equipped to govern both targeting and operational detention. LOAC is a regime that is capable of facing the legal challenges of today's conflicts. This is not to say that the law is perfect or that LOAC is immune to the changing face of war. However, the primary challenge is to look at the law as it stands today to examine its flexibility to deal with the conflicts of tomorrow, before proposing new rules.

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. Overbroad attempts to further humanize armed conflict by imposing – as a matter of law – restrictions on the conduct of armed forces that simply do not correspond with reality undermine, rather than advance humanitarian interests. One could say that – in as much as the notion of military necessity in LOAC finds its limits in conduct that goes beyond the legitimate aim of waging war, which is to *defeat* the enemy with the least expenditure of time and resources – it is here that innovative humanization finds its own limits. Again, further humanization of armed conflict is a laudable endeavor, but in order to succeed, one has to come with propositions that can be taken seriously by States in order to gain their consent to further develop the law in that direction.

At the same time, post-modern forms of *Kriegsraison* – sold to the international community and the public as sound and logic interpretations of international law (and thus leaving no alternatives) – simply have no merit, not even (or perhaps particularly not) when articulated

by States with an interest in wider issues of rule of law and of international peace and security. In a globalizing world where modern means of communication almost instantly advertize a State's conduct in (and outside!) armed conflict, the abuse and neglect of its legal obligations to advance military necessity only undermines the State's interests. In fact, in counterinsurgency, the State's worst enemy is probably its own ignorance for the legal obligations to which it is committed. Here, a government's respect for the rule of law in the treatment of individuals it is to govern is the very key to security. Therefore, it is a responsibility of governments that give weight to its legal obligations to take the lead in the further humanitarian development of the law applicable in armed conflict. Today's population-centric counterinsurgency strategy – adopted and (successfully) applied in practice by many States and which so radically deviates from traditional enemy-centric military strategy applied in conventional State-to-State conflicts – may in fact serve as the ultimate platform for the controlled and tailored development of the law such that it may adequately govern the specific characteristics of today's conflicts.

Abstract

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

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).[2094]
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 *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

[2094] Chapter I.

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.[2095] This concerns, *firstly*, the general *conceptual underpinnings* of IHRL and LOAC.[2096] 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.[2097] 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.[2098] 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.
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.[2099]

[2095] Chapter II.
[2096] Chapter II, paragraph 1.
[2097] 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.
[2098] Chapter II, paragraph 2.2.
[2099] Chapter II, paragraph 2.3.

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.[2100] 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.[2101] 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.
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.

[2100] Chapter II, paragraph 3.
[2101] Chapter III.

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.[2102] 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.[2103] 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 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,[2104] 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-

[2102] Chapter IV, paragraph 1.
[2103] Chapter V, paragraph 1.1.
[2104] Chapter IV, paragraph 2.

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.[2105] 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 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

[2105] Chapter V, paragraph 2.

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.[2106] 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).[2107]

Targeting[2108]

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

[2106] As regards targeting, see Chapter VI (IHRL) and Chapter VII (LOAC). As regards operational detention, see Chapter IX (IHRL) and Chapter X (LOAC).
[2107] In Chapter VIII (regarding targeting) and Chapter XI (regarding operational detention).
[2108] Part C.1.

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*.[2109] 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.[2110] 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 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

[2109] Chapter VIII, paragraphs 1 and 2.

[2110] Chapter VIII, paragraph 3.

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[2111]

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.[2112] 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

[2111] Part C.2.
[2112] Hoofdstuk IX.

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.[2113]
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.
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.[2114] The study argues that where LOAC

[2113] Chapter X.
[2114] Chapter XI.

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.[2115] 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.[2116] 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 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.[2117] 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

[2115] Chapter XI, paragraph 1.
[2116] Chapter XI, paragraph 2.
[2117] Chapter XI, paragraph 3.

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 international law to ascertain and appreciate norm relationships.[2118] It also stresses the danger inherent attempts to modify the *lex lata* for purposes of humanity or security.[2119] It highlights the importance of norm validity and norm applicability for the potential of interplay.[2120] 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.[2121] 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.[2122]
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.[2123] Part D concludes with final conclusions,[2124] 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.

[2118] Chapter XII, paragraph 1.1.
[2119] Chapter XII, paragraph 1.2.
[2120] Chapter XII, paragraphs 1.3 and 1.4.
[2121] Chapter XII, paragraph 1.5.
[2122] Chapter XII, paragraph 1.6.
[2123] Chapter XII, paragraph 2.
[2124] Chapter XII, paragraph 3.

Samenvatting

Het internationale recht van de rechten van de mens (International Human Rights Law: IHRL) en het recht der gewapende conflicten (Law of Armed Conflict: LOAC) in the context van counterinsurgency – *met bijzondere aandacht voor 'doelbestrijding' en 'operationele detentie'*

In het afgelopen decennium hebben weinig onderwerpen meer aandacht getrokken onder internationaal juristen dan het samenspel tussen IHRL en LOAC. Tegelijkertijd hebben de vele – vaak multinationale en extraterritoriale – militaire operaties in reactie op de 'nieuwe dreigingen' van niet-statelijke actoren tegen de nationale en internationale veiligheid tot een debat geleid onder militaire- en veiligheidsexperts over de vraag hoe opstanden (*insurgencies*) het beste kunnen worden bestreden (*counterinsurgency*).
Deze studie verbindt deze debatten en richt zich specifiek op twee traditionele, maar veelbesproken vormen van militaire macht, te weten doelbestrijding (*targeting*) en operationele detentie (*operational detention*). Doelbestrijding impliceert de doelbewuste levensontneming van opstandelingen die als doel worden aangewezen om vooraf door de commandant vastgestelde effecten te bereiken. Operationele detentie refereert naar de vrijheidsbeneming van personen, ofwel voor strafrechtelijke doeleinden (strafrechtelijke detentie of *criminal detention*), of voor veiligheidsdoeleinden (veiligheidsdetentie of *security detention*).
Counterinsurgency-doctrine erkent dat doelbestrijding en operationele detentie onmisbare instrumenten zijn om een opstand te beëindigen. Tegelijkertijd worden ze beschouwd als strategische risico's, die weloverwogen en met zorg voor fundamentele beginselen van counterinsurgency moeten worden toegepast. Om hedendaagse 'oorlogen onder de bevolking', zoals die in Irak en Afghanistan, te beëindigen zijn staten betrokken bij counterinsurgency (hierna: de counterinsurgent) tot het inzicht gekomen dat het hun strategische belangen dient als ze verzekeren dat het gedrag van hun troepen binnen de grenzen van het toepasselijke recht blijft. Het zijn tegelijkertijd juist doelbestrijding en operationele detentie die controversiële vraagstukken oproepen binnen IHRL en LOAC, evenals over hun samenspel. Vraagstukken die bovendien gecompliceerd worden door de specifieke karakteristieken van hedendaagse opstanden.

Deze studie levert een bijdrage aan de theorievorming over het samenspel tussen IHRL en LOAC, en biedt inzicht in de operationele gevolgen van dit samenspel in de verschillende contexten waarin doelbestrijding en operationele detentie in counterinsurgency kan voor komen. Om die reden dient de studie niet alleen een academisch, maar ook een militair-operationeel doel. De studie onderzoekt de volgende centrale onderzoeksvragen:

(1) in het licht van hedendaagse counterinsurgency doctrine, hoe interacteren IHRL en LOAC in de context van doelbestrijding en operationele detentie in counterinsurgency operaties?
(2) wat zijn de gevolgen van deze wisselwerking op de rechtmatigheid – en dus operationele ruimte – van doelbestrijding en operationele detentie in counterinsurgency operaties?

De methodologie die aan het onderzoek over deze vragen ten grondslag ligt is drieledig. Ten eerste: naast de traditionele bronnen van internationaal recht zoals uiteengezet in artikel 38 van het statuut van het Internationaal Gerechtshof neemt het onderzoek tevens niet-juridische bronnen in beschouwing, zoals militaire doctrine, beleid en praktijk op het gebied van counterinsurgency, doelbestrijding en operationele detentie.
In de tweede plaats past het onderzoek een situatiespecifieke benadering toe door het samenspel tussen IHRL en LOAC te onderzoeken in vier situaties waarin counterinsurgency kan plaatsvinden: NATCOIN (counterinsurgency binnen het grondgebied van een staat), OCCUPCOIN (counterinsurgency uitgevoerd door een bezettingsmacht), SUPPCOIN (counterinsurgency ter ondersteuning van een andere staat), en TRANSCOIN (transnationale counterinsurgency). Het doel van deze benadering is vast te stellen of en, zo ja, hoe de verschillende dimensies van deze situaties het samenspel tussen IHRL en LOAC – en daarmee de rechtmatige bewegingsvrijheid in *doelbestrijding* en *operationele detentie* – beïnvloeden.
In de derde plaats past het onderzoek een paradigma-benadering toe (*paradigmatic approach*). Doelbestrijding en operationele detentie zijn extreme maatregelen die niet willekeurig gebruikt kunnen worden, maar beperkt zijn tot toepassing in een specifieke context om een specifiek doel te dienen. Deze studie beziet de paradigma's rechtshandhaving (*law enforcement*) en vijandelijkheden (*hostilities*). Het concept van rechtshandhaving omvat alle territoriale en extraterritoriale maatregelen genomen door een staat of een andere collectieve entiteit om de openbare veiligheid, recht en orde te handhaven of te herstellen of om anderszins autoriteit of macht uit te oefenen over individuen, objecten, of grondgebied. Het concept van vijandelijkheden omvat alle activiteiten die specifiek ontworpen zijn om een partij in een gewapend conflict te ondersteunen tegen een andere partij, ofwel door rechtstreeks dood, verwonding of verwoesting toe te brengen, dan wel door de militaire operaties of militaire capaciteit van anderen rechtstreeks negatief te beïnvloeden. Doelbestrijding van opstandelingen is of een rechtshandhavingsmaatregel, of een maatregel van vijandelijkheden. Operationele detentie kan worden beschouwd als een rechtshandhavingsmaatregel. In wezen is het mogelijk aangaande operationele detentie twee categorieën binnen het concept van rechtshandhaving te onderscheiden, te weten criminele detentie en veiligheidsdetentie. Voor zover IHRL en LOAC valide en toepasselijke normen voor der regulering van doelbestrijding en operationele detentie bieden vormt het totaal van deze normen verscheidene normatieve paradigma's. Het samenspel tussen IHRL en LOAC binnen deze normatieve paradigma's wordt onderzocht, evenals het samenspel tussen de normatieve paradigma's onderling.

Het onderzoek bestaat uit vier delen (delen A-D).

Deel A: context en conceptueel raamwerk voor analyse

Dit deel beoogt de verschillende aspecten te identificeren die de achtergrond vormen waartegen de hoofdvragen van dit onderzoek wordt beantwoord.
Gezien de focus op insurgency en counterinsurgency is een eerste deelvraag wat deze begrippen betekenen en welke rol zij mogelijk kunnen spelen bij de vaststelling van het samenspel tussen IHRL en LOAC in de doelbestrijding en operationele detentie van opstandelingen (de militair-strategische context).[2125]
Het onderzoek laat zien dat counterinsurgency-eenheden worden geconfronteerd met een mozaïek van dreigingen door niet-statelijke actoren met verscheidene doelen, die variëren in tijd, plaats en aard. Opstandelingen opereren op onconventionele wijze, zijn moeilijk als

[2125] Hoofdstuk I.

zodanig te identificeren en handelen over het algemeen zonder ontzag voor het recht. De karakteristieken van dergelijke complexe 'mosaic warfare' hebben mogelijk juridische implicaties voor het samenspel tussen IHRL and LOAC. Bijvoorbeeld, de niet-statelijke aard van opstandelingen, hun organisatiegraad, hun (vaak) grensoverschrijdende activiteiten, evenals de intensiteit en duur van het geweldgebruik spelen een belangrijke, zo niet cruciale rol in de juridische kwalificatie van het conflict.
Counterinsurgency betreft de politiek-militaire strategie om een uitgebreide benadering van politieke, militaire, paramilitaire, economische, psychologische, civiele en rechtshandhavingsmiddelen die een regering en haar partners ter beschikking staan te ontwikkelen om de opstand gelijktijdig te beperken en te verslaan alsmede de oorzaken ervan aan te pakken. Counterinsurgency streeft naar een terugkeer van de *status quo* van bestuur onder de *rule of law*. Om deze gewenste eindsituatie te bereiken benadrukt counterinsurgency-doctrine de noodzaak van het bieden van veiligheid aan de bevolking én legitimiteit van het handelen van de overheid. Alleen dan kan de noodzakelijke wig tussen de opstandelingen en de bevolking gedreven worden. Om de uitdagingen van insurgency het hoofd te bieden is counterinsurgency-beleid en -strategie meestal onorthodox. Omdat een counterinsurgency-campagne bevolkingsgerichte oorlogvoering betreft (en geen vijandgerichte oorlogvoering) ervaren soldaten die getraind zijn in reguliere oorlogvoering counterinsurgency vaak als contra-intuïtief. Bevolkingsgerichte oorlogvoering uit zich onder andere in het beginsel dat geweldgebruik terughoudend, gecontroleerd en op maat dient te zijn. De aard van counterinsurgency-beleid roept vragen op over de mogelijke effecten ervan op de interpretatie van normen van IHRL en LOAC, bij doelbestrijding en operationele detentie, en het samenspel daartussen.

Een tweede deelvraag betreft de vraag tegen welke juridische achtergrond het samenspel tussen IHRL en LOAC onderzocht kan worden.[2126] Dit betreft, in de eerste plaats, de algemene conceptuele onderbouwing van IHRL en LOAC.[2127] Dit deel van de studie laat zien dat beide regimes behoorlijk van elkaar verschillen wat betref hun onderwerp en doel, de juridische relaties die ze beogen te reguleren, de aard van rechten en plichten, evenals hun toepassingsbereik, ondanks het feit dat beide humanitaire doeleinden dienen.
In de tweede plaats onderzoekt dit deel drie thema's die een plaats innemen in het juridische debat over het samenspel tussen IHRL and LOAC. Deze thema's weerspiegelen voortdurende pogingen om de uitkomst van het samenspel te manipuleren door gebruik te maken van de veronderstelde zwakheden en lacunes in IHLR en LOAC.
Een eerste thema betreft de separatistische, integrale en complementaire benaderingen over de relatie tussen IHRL en LOAC in gewapend conflict.[2128] Hoewel zij allen een zekere kijk hebben op de relatie zoals die zou moeten zijn, en niet zozeer zoals hij daadwerkelijk is, informeren ze ons over de verscheidene argumenten in het debat over de vraag of IHRL en LOAC gelijktijdig van toepassing kunnen zijn en, zo ja, hoe ze zich dan ten opzichte van elkaar verhouden. Ze helpen ook om bepaalde gezichtspunten in doctrine, jurisprudentie of statenpraktijk als separaat, integraal of complementair te herkennen.

[2126] Hoofdstuk II.
[2127] Hoofdstuk II, paragraaf 1.
[2128] Hoofdstuk II, paragraaf 2.1. In het kort houdt de separatistische benadering in dat IHRL en LOAC elkaar uitsluiten; de integrale benadering ziet IHRL en LOAC als grotendeels geintegreerd; en de complementaire benadering ziet IHRL en LOAC als twee aanvullende regimes.

Een tweede thema dat het debat over het samenspel tussen IHRL en LOAC voedt betreft de zogenaamde 'humanisering' (*'humanization'*) van het gewapend conflict.[2129] Dit betreft het proces van de juridische uitbreiding van beschermende normen voor slachtoffers in/van een gewapend conflict. Deze uitbreiding vindt plaats door de interpretatie en modificatie van bestaande – en ontwikkeling van nieuwe – normen van LOAC door staten of andere actoren die in de omgeving van LOAC opereren. Terwijl 'humanisering' traditioneel een door staten geleid proces is, laat het onderzoek zien dat een verschuiving plaatsvindt in de richting van meer innovatieve manieren om te humaniseren. Deze verschuiving wordt geleid door niet-statelijke actoren zoals NGO's, juristen en internationale tribunalen. Zij proberen IHRL-elementen binnen LOAC te introduceren. Hoewel de studie erkent dat het proces van 'innovatieve humanisering' niet kan worden genegeerd, heeft dit tegelijkertijd het potentieel om de traditionele balans tussen militaire noodzaak en humaniteit welke ten grondslag ligt aan alle normen van LOAC te verstoren.
Een derde thema dat het samenspel tussen IHRL en LOAC beïnvloedt betreft het debat dat ontstond na '9/11' over het vermogen van het huidige juridische raamwerk om de zogenaamde 'nieuwe oorlogen' ('new wars'), te weten oorlogen tegen niet-statelijke actoren die wereldwijd opereren, te voeren. De studie laat zien dat de karakteristieken van deze oorlogen bij zowel aanhangers van de militaire noodzaak als humaniteit gebieden van ontevredenheid over de kwaliteit van het huidige recht heeft blootgelegd die de discussie over het samenspel tussen IHRL en LOAC beïnvloeden.[2130]

Tegen deze achtergrond moet het onderzoek naar het potentieel voor, en de waardering van het samenspel tussen IHRL en LOAC in delen B en C worden gezien. De resultaten van dit onderzoek worden hieronder samengevat.

Nu in dit onderzoek het samenspel tussen IHRL en LOAC centraal staat is een derde deelvraag hoe internationaal recht in algemene zin relaties tussen normen reguleert. Dit deel laat zien dat, als een algemene regel, norm relaties alleen ontstaan als (twee of meer) normen valide zijn (ze reguleren een bepaald onderwerp) en toepasselijk (ze hebben bindende kracht). Bij wisselwerking tussen normen is harmonisatie het ultieme streven. Hiertoe dient van deze normen het vermogen te worden vastgesteld om elkaar aan te vullen en zodoende elkaar maximaal effect te geven (het instrument van complementariteit). Het belangrijkste instrument om vervolgens de complementariteit van deze normen vast te stellen is interpretatie. De conclusie kan zijn dat normen in pure harmonie met elkaar zijn, dan wel in een mogelijk of daadwerkelijk conflict met elkaar zijn. Bij een mogelijk conflict kunnen technieken van conflictvermijding worden gebruikt. In het geval van een daadwerkelijk conflict kan de toevlucht worden genomen tot conflictoplossende technieken.

In het licht van het bovenstaande is de vervolgvraag hoe het samenspel tussen IHRL en LOAC is gereguleerd. Dit is de laatste onderzoeksvraag van deel A. Het onderzoek laat zien dat het mogelijk is om op basis van de analyse over normrelaties in internationaal recht een conceptueel raamwerk voor analyse te ontwerpen dat de noodzakelijke parameters biedt om het samenspel tussen IHRL en LOAC met betrekking tot doelbestrijding en operationele detentie in counterinsurgency te onderzoeken.[2131] Een eerste stap in het conceptuele raamwerk voor analyse is daarom om vast te stellen of IHRL en LOAC dergelijke normen met

[2129] Hoofdstuk II, paragraaf 2.2.
[2130] Hoofdstuk II, paragraaf 2.3.
[2131] Hoofdstuk III.

betrekking tot doelbestrijding en operationele detentie bieden (*interplay potential*). Een tweede stap houdt in dat ieder geval van wisselwerking kritisch dient te worden beschouwd (*interplay appreciation*). Dit vereist onderzoek van de inhoud van de toepasselijke normen. Vervolgens dient te worden vastgesteld of de desbetreffende normen in harmonie of conflict met elkaar zijn. Het onderzoek neemt als uitgangspunt dat de maxime van de *lex specialis derogat legi generalis* het belangrijkste interpretatie-instrument is voor de vaststelling, ontwijking en oplossing van (mogelijk) conflicterende normen van IHRL en LOAC.. Het maxime houdt in dat bij wisselwerking tussen IHRL en LOAC een specifieke en een algemene norm kunnen worden geharmoniseerd via interpretatie van de algemene norm door middel van de specifieke norm (*lex specialis complementa legi generali*), of dat de specifieke norm en de algemene norm onverenigbaar zijn (*lex specialis derogat legi generali*). In beide gevallen heeft de norm die specifiek is ontworpen voor een bepaalde situatie, als regel, voorrang boven de algemene norm. Daarmee wordt de toepassing van de algemene norm echter niet beëindigd; de specifieke vervangt de algemene norm ook niet. De algemene norm kan nog steeds als 'achtervang' dienen, bijvoorbeeld in het geval de specifieke norm onvoldoende precies is geformuleerd.
Om vast te stellen of een bepaalde norm specifieker is dan een andere kan rekenschap worden gegeven van een reeks factoren, zoals de intentie van staten tijdens het ontwerpen of toetreden tot de desbetreffende norm, de zoektocht naar relevantie en effectiviteit in hun toepassing in bepaalde situaties, de juridische duidelijkheid van normen of hun zekerheid en betrouwbaarheid, de aard van desbetreffende normen, de mate van effectieve controle die door de staat wordt uitgeoefende, en statenpraktijk.

Deel B: Het potentieel van wisselwerking

Deel B past de eerste stap toe van het conceptueel raamwerk voor analyse. Het onderzoekt het potentieel van IHRL en LOAC om tot wisselwerking te komen, door te bezien of het valide en toepasselijke normen biedt die doelbestrijding en operationele detentie in specifieke situaties van counterinsurgency reguleren. Uit deze analyse volgt dat het recht op leven en de mensenrechten die betrekking hebben op vrijheidsbeneming de normen van IHRL zijn die op deze concepten betrekking hebben.[2132] Deze rechten behoren tot de meest fundamentele in de mensenrechtencatalogus.
Aangezien het verwonden, doden en gevangennemen van strijders tot de traditionele methoden van oorlogvoeren horen is het niet verrassend dat LOAC een gedetailleerde en uitgebreide set van normen biedt. Echter, hier zou de traditionele scheiding tussen internationaal gewapende conflicten (*international armed conflict* of *IAC*) en niet-internationaal gewapende conflicten (*non-international armed conflict* of *NIAC*) en de navolgende verscheidenheid in beschikbaarheid, dichtheid evenals precisie van normen in het recht van IAC en NIAC het samenspel tussen IHRL en LOAC kunnen beïnvloeden.
Valide normen van LOAC die betrekking hebben op doelbestrijding kunnen worden gevonden in het deelregime van het recht van vijandelijkheden. Een gedetailleerde normenset kan worden gevonden in het verdragsrecht over IAC, welke de status van gewoonterecht hebben. Het recht over NIAC bevat dergelijke normen niet.[2133] Dit betekent niet dat er een lacune in de regulering van vijandelijkheden in NIACs bestaat. Sommigen beargumenteren dat IHRL dit gat vult. De strikte eisen over geweldgebruik in relatie tot het recht op leven verhouden echter zich op oncomfortabele wijze met het concept vijandelijkheden. Dit con-

[2132] Hoofdstuk IV, paragraaf 1.
[2133] Hoofdstuk V, paragraaf 1.1.

cept verlangt meer 'bewegingsvrijheid'. De studie neemt als uitgangspunt dat het gewoonterecht over vijandelijkheden de lacune vult, hoewel sommige aspecten binnen het recht van de vijandelijkheden nadere duidelijkheid of zekerheid vragen.
Voor *operationele detentie* bevat alleen het recht van IAC een gedetailleerde set van verdragsrechtelijke en gewoonterechtelijke normen die strafrechtelijke detentie en veiligheidsdetentie reguleren. Het recht van NIAC is sterk onderontwikkeld, met name met betrekking tot de juridische basis, de procedurele waarborgen voor veiligheidsdetentie, en overdracht. Het is duidelijk dat dit gevolgen heeft voor het potentieel om tot wisselwerking met IHRL te komen.

Naast normvaliditeit is het potentieel voor wisselwerking tussen normen afhankelijk van de mate van toepasselijkheid van normen. Het onderzoek gebruikt de situationele benadering om deze toepasselijkheid vast te stellen met betrekking tot doelbestrijding en operationele detentie in counterinsurgency. Uit de analyse van de onderzochte situaties van counterinsurgency blijkt dat het potentieel voor normwisselwerking relatief hoog is. Tegelijkertijd blijkt dat gelijktijdige toepassing van normen van IHRL en LOAC niet automatisch kan worden aangenomen.

Bij de toepasselijkheid van IHRL-normen op het gebied van doelbestrijding en operationele detentie[2134] is de deelvraag of opstandelingen die tijdens de daadwerkelijke uitvoering van doelbestrijding en operationele detentie worden getroffen onder de rechtsmacht van de counterinsurgent vielen. Twee controversiële kwesties spelen daarbij op. Dit betreft, ten eerste, de toepasselijkheid van IHRL-verplichtingen in tijd van gewapend conflict. Sommige (inclusief Israël en de Verenigde Staten) nemen een separatistisch standpunt in en stellen dat IHRL nooit van toepassing is tijdens een gewapend conflict. Het is tegenwoordig algemeen aanvaard dat IHRL van toepassing blijft tijdens gewapend conflict. Dit onderzoek ondersteunt deze positie. Een tweede controversieel onderwerp betreft de extraterritoriale toepasselijkheid van IHRL. Het gaat om de vraag of een staat aan haar IHRL-verplichtingen gebonden is omdat het rechtsmacht uitoefent over personen buiten het eigen grondgebied. Uit de analyse van doctrine en de jurisprudentie blijkt dat dergelijke rechtsmacht kan ontstaan (1) als een staat effectieve controle uitoefent over grondgebied ('*effective control over an area*' of ECA), of (2) als het autoriteit en controle uitoefent over personen ('*state agent authority*' of SAA). Hieruit volgt dat kan worden gesteld dat rechtsmacht altijd ontstaat in gevallen van operationele detentie. Immers, dan is er sprake van fysieke controle over een persoon. Op basis van de jurisprudentie van het Mensenrechtencommittee van de VN ('United Nationals Human Rights Committee' of UNHRC) en de Inter-Amerikaanse Commissie alsmede het Inter-Amerikaanse Hof voor de Rechten van de Mens ('Inter-American Commission of Human Rights' en IACiHR/'Inter-American Court of Human Rights' en IACtHR) zou dit ook het geval zijn bij doelbestrijding. Volgens deze instanties ontstaat (extraterritoriale) rechtsmacht onder de ICCPR en ACHR voor alle soorten overheidsgedrag, ongeacht de locatie waar ze plaatsvinden. Bepalend is of de mensenrechten van de personen die het betreft, geraakt worden door het overheidsgedrag. Deze zogeheten 'functionele' benadering is niet overgenomen door het Europees Hof voor de Rechten van de Mens ('European Court of Human Rights' of ECtHR). Voor zover geen sprake is van ECA (waarvan sprake is in NATCOIN of OCCUPCOIN) ontstaat jurisdictie alleen op basis van SAA. Op basis van haar jurisprudentie tot dusverre zou het Europees hof SAA-rechtsmacht alleen accepteren in situaties van doelbestrijding waarbij de counterinsurgent openbare macht (*public po-*

[2134] Hoofdstuk IV, paragraaf 2.

wers) uitoefent of controle uitoefent over de situatie. Hiervan lijkt echter alleen sprake te kunnen zijn in situaties van rechtshandhaving.Tot op heden blijft onduidelijk of het Europees Hof het Europees verdrag voor de rechten van de mens ('European Convention for the Protection of Human Rights and Fundamental Freedoms' of ECHR) van toepassing acht bij extraterritoriale doelbestrijding van personen tijdens vijandelijkheden. Voorgesteld wordt dat het Europees Hof een functionele benadering zoals de UNHRC en de IACtHR/IACiHR die voorstaan. De voorwaarde daarbij is dat zij vervolgens vermeende schendingen van het recht op leven in situaties van vijandelijkheden door de lens van LOAC onderzoekt. Tot op heden heeft het Europees hof nagelaten dit expliciet te doen.
Met betrekking tot LOAC is de hoofdvraag of het het recht van IAC of NIAC van toepassing is op de doelbestrijdings- of detentie-relatie tussen de counterinsurgent en opstandelingen.[2135] Het onderzoek neemt als uitgangspunt dat een gewapend conflict tussen een staat en niet-statelijke actoren als een NIAC gekwalificeerd moet worden, en dat vervolgens het recht van NIAC van toepassing is. De bepalende factor betreft de status van de partijen bij het conflict (staat versus niet-statelijke actor) en niet de capaciteit van de onderliggende normatieve kaders om veiligheid of humanitaire belangen zo goed mogelijk te beschermen. De situaties NATCOIN en SUPPCOIN kunnen als NIAC worden gekwalificeerd. De conflictkwalificatie van OCCUPCOIN en TRANSCOIN blijft echter onderwerp van discussie. Op basis van meerderheidsstandpunt kan worden aangenomen dat doelbestrijding en operationele detenties in OCCUPCOIN en TRANSCOIN beheerst worden door het recht van NIAC. Het hoofdargument hiervoor is dat elk conflict tussen de counterinsurgent en opstandelingen in deze situaties als een op zichzelf staand gewapend conflict, los van een reeds bestaand IAC, gezien moet worden. Met andere woorden, het recht van NIAC reguleert de relatie tussen de staat en opstandelingen, onder voorwaarde dat de drempel van een NIAC overschreden is.
Voor de doeleinden van dit onderzoek wordt het bestaan van een gewapend conflict aangenomen in het geval een staat een opstand bestrijdt. Hierbij is wel opgemerkt dat een louter politieke kwalificatie van een opstand van niet-statelijke actoren tegen de staat en haar instellingen als insurgency niet automatisch inhoudt dat er sprake is van een gewapend conflict. Benadrukt wordt dat de vaststelling van een conflict als gewapend conflict het gevolg is van een feitenonderzoek op een *case-by-case* basis. Over het algemeen is een dergelijke vaststelling niet zo problematisch voor een IAC, maar in het geval van conflicten tussen een staat en niet-statelijke actoren is dit minder snel duidelijk omdat een NIAC de uitwisseling van voldoende langdurig en intens gewapend geweld tussen een staat en een niet-statelijke gewapende groep met een voldoende mate van organisatie vereist. Het is vooral de laatste eis die problematisch is. Een voldoende mate van organisatie kan afwezig zijn, of is moeilijk vast te stellen. Daarenboven zal sporadisch geweldgebruik ook geen gewapend conflict tot stand brengen. Als er geen sprake is van een NIAC is LOAC niet van toepassing en is de counterinsurgent gehouden om de niet-statelijke actoren binnen de grenzen van IHRL te bestrijden. In de praktijk kunnen staten geconfronteerd worden met onduidelijke situaties waarbij conflicten 'zweven' in het grijze gebied tussen vrede en gewapend conflict wat een vervaging van de grenzen tussen IHRL en LOAC tot gevolg kan hebben. Vooral in deze situaties worden conceptuele verschillen tussen IHRL en LOAC door verschillende belangenhebbenden tegen elkaar uitgespeeld om veiligheids- of humanitaire belangen veilig te stellen.

Deel C: Kritische beschouwing van de wisselwerking

[2135] Hoofdstuk V, paragraaf 2.

Deel C betreft de kritische beschouwing van het samenspel. De onderzoeksvraag die dient te worden beantwoord is: in het licht van hedendaagse counterinsurgency doctrine, hoe verhouden de relevante normatieve raamwerken van IHRL en LOAC betreffende doelbestrijding en operationele detentie zich tot elkaar, en wat betekent dit voor de toegestane omvang van overheidsgedrag in de operationele praktijk?
Om deze vraag te beantwoorden is de materiële inhoud van de valide normen van IHRL en LOAC op het gebied van doelbestrijding en operationele detentie onderzocht. Dit biedt inzicht in het karakter van de betreffende normen en hun verenigbaarheid.[2136] Vervolgens wordt de paradigma-benadering toegepast.[2137]

Doelbestrijding[2138]

Bij doelbestrijding laat het onderzoek zien dat IHRL en LOAC weliswaar elk een afzonderlijk raamwerk van eisen biedt waaraan de militaire commandant zich bij het plannen en uitvoeren van doelbestrijdingsoperaties tegen opstandelingen dient te houden. Vanwege hun onderscheidenlijke objecten en doelen, en dientengevolge de aard van de rechtsverhoudingen die zij elk trachten te reguleren verschillen de eisen binnen ieder regime fundamenteel (hoewel ze enige mate van overlapping vertonen) vooral in termen van bescherming van de opstandelingen (als de doelen), alsook ten aanzien van de bescherming van burgers.
IHRL biedt een raamwerk met strikte eisen. Deze houden in dat geweld alleen mag worden aangewend in reactie op een daadwerkelijke en onmiddellijke dreiging en als een laatste redmiddel; alleen die soort en mate van geweld mag worden aangewend die voldoende is om de dreiging weg te nemen en het moet zich verhouden tot het bereiken van een legitiem doel; voorzorgsmaatregelen dienen te worden genomen om te verzekeren dat het verlies van leven of verwonding van individuen, inclusief degene die de dreiging uit, kan worden voorkomen of in ieder geval kan worden beperkt; en er moet een feitenonderzoek worden uitgevoerd. In termen van onderwerp en doel streven deze eisen er naar te voorkomen dat dreiging zich voltrekt en dat het leven van het doelwit, ongeacht de aard van de dreiging, alsmede dat van onschuldige omstanders beschermd wordt.
Dit kader biedt over het algemeen voldoende ruimte voor het gebruik van geweld voor rechtshandhavingsdoeleinden in vredesomstandigheden waarbij de staat controle over grondgebied uitoefent. Men kan zich echter afvragen of dit kader voldoende flexibel is om in tijden van gewapend conflict met vijandelijkheden om te gaan in gebieden waar dergelijke controle wordt bevochten of (gedeeltelijk) afwezig is.
Bovendien is het twijfelachtig of deze eisen verenigbaar zijn met het concept van doelbestrijding. Wanneer strikt nageleefd is de doelbestrijding van opstandelingen alleen mogelijk in zeer uitzonderlijke omstandigheden. Het is staten niet toegestaan om personen louter op basis van het (militaire of politieke) label van 'insurgent' aan te grijpen. Dit mag alleen op basis van een concrete en onmiddellijke dreiging op het moment uit te voeren voordat toevlucht wordt genomen tot doelbestrijding.
Ook staat IHRL het een counterinsurgent niet toe om wetten of beleid uit te vaardigen dat regeringstroepen een '*license to kill*' verstrekt om daarmee een dreiging tegen de politieke stabiliteit of de veiligheid van de staat weg te nemen; om daarmee de organisatiestructuur van de opstandelingen te destabiliseren of the ondermijnen; of om een mogelijke, maar

[2136] Wat betreft doelbestrijding, zie Hoofdstuk VI (IHRL) en Hoofdstuk VII (LOAC). Wat betreft operationele detentie, zie Hoofdstuk IX (IHRL) en Hoofdstuk X (LOAC).
[2137] In Hoofdstuk VIII (betreffende doelbestrijding) and Hoofdstuk XI (betreffende operationele detentie).
[2138] Deel C.1.

onduidelijke dreiging van opstandelingen weg te nemen louter op basis van eerdere dreigingen. Bovendien verbiedt IHRL de staat opstandelingen te '*targeten*' voor doeleinden die normaliter zouden passen in het concept van militaire noodzaak zoals bedoeld in het normatieve paradigma van vijandelijkheden. Daarenboven heeft de counterinsurgent de verplichting om de hiervoor bedoelde voorzorgsmaatregelen te treffen. Dit dwingt het om zorgvuldig die methoden en middelen te selecteren die de dood niet onvermijdelijk maken or die niet resulteren in het gebruik van disproportioneel geweld. Dit betekent dat het doden van opstandelingen met bijvoorbeeld aanvalshelikopters, bewapende onbemande vliegtuigen ('*drones*') of luchtaanvallen een zware dreiging vereisen om niet als een willekeurige levensontneming bestempeld te worden. Dit betekent niet dat een dergelijke dreiging zich niet kan voltrekken – terreuraanvallen zijn het voornaamste voorbeeld – maar dit zijn duidelijk uitzonderlijke situaties. Al met al kan worden geconcludeerd dat dit strikte kader de interpretatie en toepassing van de fundamentele beginselen van de militaire operaties ernstig beïnvloedt.

In tegenstelling to IHRL biedt LOAC een raamwerk met eisen die specifiek ontwikkeld zijn voor vijandelijkheden. Het verplicht de counterinsurgent om onderscheid te maken tussen rechtmatige doelwitten en beschermde personen. De *doelbestrijding* dient plaats te vinden met middelen en methoden die toegestaan zijn onder het recht van vijandelijkheden. In het geval dat onschuldige burgers en burgerobjecten zich vermengen met opstandelingen staat LOAC – onder strikte, maar redelijke voorwaarden – 'collateral damage' tot op zekere hoogte toe. Daarbij moeten, in zoverre dit uitvoerbaar is, voorzorgsmaatregelen worden getroffen om de verwonding of dood van burgers, of de verwoesting van burgereigendom, te voorkomen of te minimaliseren. Hoewel dit raamwerk vijandelijkheden reguleert met verboden en beperkingen kan het worden gezien als een raamwerk dat geweldgebruik toestaat *tenzij* dit specifiek verboden is op grond van humanitaire gronden. Om het rechtmatige doel van oorlogvoering – het verslaan van de vijand – te bereiken, laat het recht van vijandelijkheden zien dat het zich bewust is van de militaire noodzaak om een opstandeling buiten gevecht ('*hors de combat*') te stellen – inclusief zijn doding – op het moment dat hij gekwalificeerd kan worden als rechtmatig doelwit. Zijn doelbestrijding mag op iedere plaats en op ieder moment plaatsvinden onder voorwaarde dat dit niet verboden is onder LOAC.

Het bovenstaande betekent niet dat de inhoud van het recht van vijandelijkheden onproblematisch is en daarmee – als gevolg daarvan – de doelbestrijding van opstandelingen niet beïnvloedt. Sommige onderwerpen, zoals de kwalificatie van een persoon als rechtmatig doelwit, blijven onderwerp van discussie. Ook blijkt uit de analyse van het recht van vijandelijkheden dat er bij voortduring pogingen worden ondernomen om de balans binnen de normen tussen militaire noodzaak en humaniteit te herijken. De meest controversiële poging daartoe betreft de idee dat het concept van militaire noodzaak een beperkende zijde kent die het doden van rechtmatige doelwitten verbiedt zolang andere, minder schadelijke alternatieven beschikbaar en uitvoerbaar zijn. Dit onderzoek deelt deze opvatting niet.

Terwijl het gedetailleerde regels biedt voor het gebruik van geweld in vijandelijkheden biedt LOAC slechts zeer rudimentaire regels op het gebied van geweldgebruik als een maatregel van rechtshandhaving. Zij verbieden willekeurige levensontneming, maar vormen verder geen richtinggevend kader zoals dat van IHRL.

In het licht van het bovenstaande kan worden overgegaan tot een appreciatie van het samenspel van IHRL en LOAC binnen de normatieve paradigma's van rechtshandhaving en vijandelijkheden. Hieruit wordt duidelijk dat beide op een harmonieuze wijze met elkaar in verband staan, maar dat LOAC de *lex specialis* is.[2139]

[2139] Hoofdstuk VIII, paragrafen 1 and 2.

Wat betreft het normatieve paradigma van rechtshandhaving wordt duidelijk dat IHRL, als *lex generalis*, complementair is, nu LOAC geen gedetailleerde normen op het gebied van geweldgebruik in rechtshandhaving bevat. Met betrekking tot het normatieve paradigma van vijandelijkheden dient de IHRL-vraag of een levensontneming als willekeurig kan worden gekwalificeerd beantwoord te worden door de specifieke omstandigheden die vijandelijkheden met zich meebrengen in aanmerking te nemen en of de levensbeneming zich kan verdragen met het recht dat daar specifiek voor ontwikkeld is – het recht van vijandelijkheden. Hier vervult het maxime van de *lex specialis* de rol van interpretatietechniek.
Deze logica van het resultaat van het samenspel van IHRL en LOAC *binnen* de normatieve paradigma wordt ook weerspiegeld in het samenspel *tussen* de normatieve paradigma.[2140]
Hoewel sommigen beweren dat de status van de opstandeling als rechtmatig doelwit onder het recht van vijandelijkheden voldoende is om het normatieve paradigma van vijandelijkheden in werking te stellen (de formele benadering), blijkt uit dit onderzoek dat de uitkomst van de wisselwerking tussen beide paradigma's contextspecifiek is (de functionele benadering). Deze benadering houdt rekening met de positie van het doelwit binnen de normatieve paradigma. In tegenstelling tot reguliere combattanten in een IAC betekent de niet-statelijke aard van opstandelingen dat zij een duale status innemen in het internationale recht. In zoverre zij kwalificeren als rechtmatige doelwitten overlapt het concept van vijandelijkheden met dat van rechtshandhaving, nu de opstandelingen ook een dreiging vormen voor de openbare veiligheid, recht en orde: zij plegen immers strafbare feiten. Deze overlapping van concepten vertaalt zich in een dubbele relatie: opstandelingen bevinden zich niet alleen in een horizontale relatie met de counterinsurgent, maar ook in een verticale relatie. In de eerstgenoemde hebben counterinsurgents een autoriteit om aan te vallen; onder laatstgenoemde bestaat er een plicht om het recht op leven en een eerlijk proces van een ieder binnen de rechtsmacht van de staat. Deze relaties kunnen moeilijk worden gescheiden.
Een functionele benadering van het samenspel tussen de normatieve paradigma's houdt in dat het normatieve paradigma van rechtshandhaving van toepassing is als de counterinsurgent controle uitoefent over het grondgebied waar het geweldgebruik dat resulteert in de levensontneming plaatsvindt (territoriale controle) *alsmede* over de omstandigheden omtrent de operatie (situationele controle). Het normatieve paradigma van vijandelijkheden vindt geen toepassing, maar wordt 'in reserve' geplaatst en blijft 'slapend' zo lang het normatieve paradigma van rechtshandhaving de activiteiten van de strijdkrachten op adequate wijze kan reguleren, ook al kan de dreiging die de opstandelingen vormen als daden van vijandelijkheid worden gekwalificeerd. Niet eerder dan het moment waarop er geen sprake (meer) is van controle uitgeoefend in een mate dat het de counterinsurgent toestaat om de openbare veiligheid, recht, en orde te handhaven of te herstellen met rechthandhavingsmaatregelen worden de logische limieten van het normatieve paradigma van rechtshandhaving bereikt. Vanaf dat moment wordt het normatieve paradigma van vijandelijkheden 'actief'.

Wanneer de functionele benadering op de verschillende situaties waarin counterinsurgency plaatsvindt wordt toegepast, kan worden geconcludeerd dat het normatieve paradigma van rechtshandhaving eerder de norm dan de uitzondering is in doelbestrijdingsoperaties in NATCOIN en OCCUPCOIN. Zoals geconcludeerd impliceert dit dat de doelbestrijding van opstandelingen alleen mag plaatsvinden in zeer buitengewone omstandigheden. De functionele benadering demonstreert ook dat de counterinsurgency-state het normatieve paradigma van vijandelijkheden mag gebruiken in alle gevallen waarin territoriale en/of situationele controle afwezig is. Dit normatieve paradigma maakt het mogelijk om gevechts-

[2140] Hoofdstuk VIII, paragraaf 3.

operaties uit te voeren in overeenstemming met de basisbeginselen van oorlogvoering, zoals eenvoud, flexibiliteit, initiatief, offensief handelen en beweeglijkheid. LOAC is daarmee een zeer krachtig regime. Het volle gebruik ervan in counterinsurgency-operaties kan echter fundamentele beginselen van counterinsurgency te ondermijnen. Hedendaagse counterinsurgency-doctrine laat zien dat voorzichtigheid en terughoudendheid bij geweldgebruik noodzakelijk zijn, zodat counterinsurgents op basis van strategische beleidsoverwegingen wordt opgedragen om alleen de minimale hoeveelheid geweld te gebruiken die strikt vereist is door de situationele omstandigheden. Het normatief paradigma van vijandelijkheden speelt daarbij een ondergeschikte rol. Men zou kunnen stellen dat deze beleidsbeperkingen resulteren in gedrag dat lijkt op dat volgende uit de functionele benadering. Met ander woorden, daar waar counterinsurgents meer controle uitoefenen weegt de terughoudendheid in geweldgebruik zwaarder. Een belangrijk verschil tussen de functionele benadering en de counterinsurgency benadering is dat de laatstgenoemde beperkingen opleggen die niet worden opgelegd door het normatieve paradigma van vijandelijkheden in situaties waar controle afwezig is. Het standpunt dat in deze studie wordt ingenomen is dat het juridische kader van het recht van vijandelijkheden niet wordt aangetast door het counterinsurgency-paradigma. Deze beleidsbeperkingen zouden echter als normatief kunnen worden opgevat door hen die 'innovatieve humanisering' van gewapend conflict steunen. Als staten deze signalen negeren kan deze ontwikkeling resulteren in een aanpassing van de traditionele balans tussen militaire noodzaak en humaniteit en daarmee de fundering van doelbestrijding zoals begrepen binnen het concept van vijandelijkheden ondermijnen.

Operationele detentie[2141]

Met betrekking tot de vrijheidsbeneming van personen biedt IHRL een gedetailleerd raamwerk van strikte eisen die de juridische basis voor detentie bieden, alsmede de procedurele waarborgen die geboden dienen te worden, en normen over de behandeling en de overdracht van gevangenen.[2142] Hoewel dit raamwerk ook van toepassing is op andere vormen van vrijheidsbeneming, is het hoofdzakelijk ontworpen om de criminele hechtenis van personen te reguleren. De algemene premisse die aan dit raamwerk ten grondslag ligt is dat het kan worden toegepast in vredesomstandigheden, waarin een staat in staat is om een functionerend strafrechtssysteem op te richten en te handhaven, waarin de politie, openbare aanklagers, advocaten en rechters op adequate wijze kunnen opereren. Met andere woorden, het raamwerk reflecteert de veronderstelling dat de regering controle over grondgebied, objecten of personen uitoefent – zoals het concept van rechtshandhaving al aangeeft.
Het concept van veiligheidsdetentie correspondeert moeizaam met dit raamwerk. Ten eerste ontbreekt er een expliciete juridische basis in IHRL. Hoewel dit niet betekent dat veiligheidsdetentie bij voorbaat verboden is, dient het te worden gezien als een buitengewone maatregel die alleen bij hoge uitzondering mag worden toegepast en (vermoedelijk) alleen als het voorafgegaan wordt door derogatie. Dit dwingt staten om veiligheidsdetentie zorgvuldig te overwegen en voortdurend te bewaken. Andere gebieden van frictie betreffen, onder andere, de waarborgen op een eerlijk proces en de eis om een gedetineerde de gelegenheid te geven om de rechtmatigheid van zijn detentie voor een onafhankelijk en onpartijdig hof aan te vechten (*habeas corpus*). Een belangrijke vraag is of deze IHRL-eisen zomaar kunnen worden toegepast op detenties in tijd van gewapend conflict, met name in gebieden van

[2141] Deel C.2.
[2142] Hoofdstuk IX.

voortdurende vijandelijkheden waar effectieve controle over grondgebied afwezig is of onder druk staat.

Voor de normatieve inhoud van de valide normen aangaande *operationele detentie* in LOAC speelt de scheiding tussen IAC en NIAC een doorslaggevende rol.[2143]
Over het algemeen hebben zowel het recht van IAC als NIAC de voortdurende toepassing en noodzaak van strafrechtelijke detentie voor ogen. Tegelijkertijd moet worden opgemerkt dat de normen van LOAC die strafrechtelijke detentie reguleren kunnen worden gevonden in het recht van IAC en dan vooral in het bezettingsrecht. Dit bevestigt dat, hoewel deze normen in gewapend conflict van toepassing zijn, ze alleen effectief kunnen worden nageleefd als er sprake is van een voldoende mate van effectieve controle over grondgebied dat de rechtspraak in staat stelt om in overeenstemming met de inhoud van die normen te functioneren. Hier laat LOAC zien dat het in staat is om te differentiëren tussen verschillende niveaus van controle die kunnen plaatsvinden in een gebied van gewapend conflict. Dit demonstreert dus de flexibiliteit om de rechtsstaat haar werk te laten doen en personen voor hun criminele gedrag te bestraffen.
Toch laat LOAC tevens zien dat het bereid is om met veiligheidsdreigingen tijdens gewapend conflict om te gaan door strijders en burgers op preventieve basis te detineren. Dit is het krachtigst en gedetailleerd geregeld in het recht van IAC. Het ruimste raamwerk is neergelegd in GC III, dat de internering van krijgsgevangenen toestaat voor de duur van het gewapend conflict, en zonder periodieke herzieningen. Opstandelingen zoals begrepen in dit onderzoek zullen echter niet als krijgsgevangene gekwalificeerd kunnen worden. Zij kunnen wel als persoon beschermd onder GC IV en AP I worden gekwalificeerd. Beiden staan de internering toe van personen.
Tegelijkertijd moet deze maatregel worden beschouwd als een uitzonderlijke maatregel. Om deze reden is het onderworpen aan een reeks substantieve en procedurele eisen. Deze eisen demonstreren een aanzienlijke, maar niet noodzakelijkerwijs complete, overlapping met IHRL-normen. In termen van toelaatbaarheid, evenals de duidelijkheid van de toepasselijke normen is het recht van IAC het meest voor de hand liggend. De toepasselijkheid van dit deel van het recht op operationele detenties in counterinsurgency operaties is echter erg beperkt nu de relatie tussen counterinsurgency-staten en opstandelingen in de verschillende situaties van counterinsurgency over het algemeen zullen worden beheerst door het recht van NIAC. Met het oog op de afwezigheid van valide normen op het gebied van veiligheidsdetentie in het recht van NIAC is het moeilijk de toelaatbaarheid ervan vast te stellen. Hoewel er overeenstemming lijkt te zijn dat veiligheidsdetentie in NIAC verboden is, bestaat er geen expliciete juridische grondslag voor in het recht van NIAC. Het meest zorgwekkend is echter de vraag welke procedurele waarborgen in het geval van veiligheidsdetentie moeten worden toegekend. Het verdragsrecht en de doctrine bieden verscheidene mogelijkheden. Gemeenschappelijk artikel 3 moedigt partijen bij het conflict aan overeen te komen het recht van IAC toe te passen. Daarnaast kunnen GC III en/of GC IV bij wijze van beleid worden toegepast. Dit bindt partijen echter niet en dus mist het de zekerheid die zo nodig is. Ten derde nodigen gemeenschappelijk artikel 3 en AP II IHRL uit om een aanvullende rol te spelen.

Een kritische beschouwing van het samenspel tussen IHRL en LOAC betreffende operationele detentie laat zien dat beide regimes met elkaar samensmelten of elkaar aanvullen – ondanks het verschil in beschikbaarheid, dichtheid en precisie van de normen op het gebied

[2143] Hoofdstuk X.

van strafrechtelijke -en veiligheidsdetentie in IHRL en LOAC (vooral het recht van NIAC).[2144] Uit het onderzoek blijkt dat indien LOAC normen ter beschikking heeft, LOAC de *lex specialis* is en als een interpretatiebron fungeert, of als een dwingende bron geldt bij (potentieel) conflict met normen van IHRL. Dit betekent dat de beschikbare normen moeten worden toegepast in het licht van de conceptuele grondslagen van LOAC. Deze conclusie is in de eerste plaats van toepassing op het samenspel tussen IHRL en LOAC in het normatieve paradigma van strafrechtelijke detentie, waar de normatieve inhoud van de valide normen vrijwel gelijkaardig is.[2145] .

Het samenspel tussen IHRL en LOAC in het normatieve paradigma van *veiligheidsdetentie* reflecteert de beschikbaarheid, dichtheid en precisie van de normatieve kaders in het recht van IAC en NIAC.[2146] Zoals eerder opgemerkt, verschillend deze kaders fundamenteel. Nu veiligheidsdetentie in het recht van IAC gedetailleerd is gereguleerd, is het samenspel met IHRL relatief eenduidig: LOAC is de *lex specialis*. In de afwezigheid van specifieke norm voor veiligheidsdetentie in het recht van NIAC is het samenspel met IHRL minder eenduidig, in ieder geval met betrekking tot de juridische basis en de procedurele waarborgen. Hier zou IHRL het gat kunnen vullen. Deze afhankelijkheid van IHRL is echter niet zonder problemen. Staten kunnen van mening zijn dat IHRL niet van toepassing is in gewapend conflict of buiten het eigen grondgebied. Zelfs als het van toepassing is wordt de geschiktheid van IHRL voor de realiteit van het gewapend conflict betwijfeld. Daar kan aan worden toegevoegd dat IHRL de niet-statelijke actoren die partij zijn bij het gewapende conflict niet bindt, wat als problematisch wordt ervaren.

Er lijkt geen eenvoudige en bevredigende zuiver juridische oplossing beschikbaar en de beste optie op dit moment is om terug te vallen op beleid dat afgeleid is van GC III en GC IV. Dit sluit niet uit dat IHRL kan worden gebruikt zodat het, waar nodig, LOAC normen nader kan verduidelijken of aanvullen. Dit resulteert mogelijk in een kader waarmee staten zich comfortabel voelen en dat tegelijkertijd waarborgen biedt van een niveau dat correspondeert aan de specifieke situatie van gewapend conflict. De daadwerkelijke toepassing van dergelijk beleid kan de eerste stap vormen op weg naar nieuw recht – van gewoonterechtelijke aard of in de vorm van een nieuw verdrag. Hedendaagse counterinsurgency-doctrine, -beleid en -praktijk dat al veel van de normen van GC III, GC IV en IHRL bevat, kan dit proces mogelijk steunen

Een laatste onderwerp omvat het samenspel tussen het normatieve paradigma van strafrechtelijke detentie en veiligheidsdetentie.[2147] Er is geen positiefrechtelijke regel die sturing geeft. Het onderzoek bepleit (echter) dat het doel dat ieder paradigma nastreeft een bepalende factor is. Het normatieve paradigma van strafrechtelijke detentie bevat een kader om detentie te reguleren voor vermeend crimineel gedrag dat zich in het verleden voordeed, en waarvoor publieke verantwoording moet worden afgelegd. Omgekeerd bevat het normatieve paradigma van veiligheidsdetentie in gewapend conflict een kader om detentie te reguleren vanwege toekomstig gedrag, om veiligheidsdreigingen te voorkomen. Het onderzoek benadrukt ook dat het samenspel tussen de twee soorten paradigma's in de operationele praktijk beïnvloedt kan worden door beginselen van counterinsurgency neergelegd in beleid. Over het algemeen wordt in counterinsurgency een voorkeur gegeven aan strafrechtelijke detentie boven veiligheidsdetentie. Tegelijkertijd moet worden opgemerkt dat de afhankelijkheid van

[2144] Hoofdstuk XI.
[2145] Hoofdstuk XI, paragraaf 1.
[2146] Hoofdstuk XI, paragraaf 2.
[2147] Hoofdstuk XI, paragraaf 3.

criminele detentie grotendeels berust van de controle die wordt uitgeoefend over het grondgebied in een dusdanige mate dat het kan vertrouwen op een functionerend strafrechtsysteem. In omgevingen van voortdurende vijandelijkheden tussen de counterinsurgent en opstandelingen, en waar een strafrechtsysteem afwezig is, of onvoldoende functioneert, kan strafrechtelijke detentie geen optie zijn omdat het simpelweg niet mogelijk is om in redelijkheid niet mogelijk is om aan de daarbij behorende voorwaarden te voldoen. In die gevallen is veiligheidsdetentie het enige redelijke alternatief, onder voorwaarde dat het wordt uitgevoerd voor het doel waar het voor is bedoeld. Als de situatie zich geleidelijk transformeert van vijandelijkheden naar vredesomstandigheden kan strafrechtelijke detentie een praktisch uitvoerbare mogelijkheid worden, en om die reden een strategische voorwaarde. Dit laat onverlet dat de operationele belasting voor counterinsurgents groot is. Strafrechtelijke detentie is immers een taak die buiten de traditionele taken van de krijgsmacht valt. Tegenwoordig zijn dergelijke taken echter onvermijdelijk en moeten krijgsmachten (en militairen) hierop voorbereid zijn.

Deel D: Synthese en conclusies

Deel D verbindt de belangrijkste operationele en juridische thema's in dit onderzoek naar het samenspel tussen IHRL en LOAC in doelbestrijding en operationele detentie in counterinsurgency. Het benadrukt het belang van de regels en beginselen van internationaal recht om norm relaties vast te stellen en kritisch te beschouwen.[2148] Het beklemtoont het gevaar dat schuilt in pogingen om de *lex lata* om redenen van veiligheid of humaniteit te modificeren.[2149] Het belicht het belang van norm-validiteit en norm-toepasselijkheid voor het potentieel van samenspel.[2150] Het herbevestigt het belang van de overeenkomstige rol van de notie van controle in de concepten van rechtshandhaving en vijandelijkheden, alsmede in het onderwerp en doel van IHRL en LOAC.[2151] Daarenboven benadrukt het dat de specifieke karakteristieken van insurgency en counterinsurgency niet genegeerd kunnen worden in het interpretatieproces over het samenspel van normen van IHRL en LOAC.[2152]
Deel D trekt ook conclusies over de gevolgen van het samenspel tussen IHRL en LOAC voor de operationele ruimte voor de doelbestrijding en operationele detentie.[2153] Deel D eindigt met finale conclusies,[2154] door het belang van de paradigma benadering in militaire operaties te benadrukken en door een blik te werpen op de weg vooruit. Het roept staten – als de primaire 'wetgevers' van internationaal recht – op zich ervan te verzekeren dat ze in '*command en control*' van nieuwe ontwikkelingen blijven. In command and control blijven is noodzakelijk zodat het traditionele evenwicht tussen dat wat enerzijds militair noodzakelijk is, en anderzijds noodzakelijk is vanuit humanitair perspectief, niet abrupt en op disproportionele wijze uit balans wordt gebracht door relevante partijen – staten, internationale organisaties, NGO's en internationale en nationale (quasi-)rechtsprekende organen – die hun eigen belangen naar voren proberen te schuiven.

[2148] Hoofdstuk XII, paragraaf 1.1.
[2149] Hoofdstuk XII, paragraaf 1.2.
[2150] Hoofdstuk XII, paragraafs 1.3 and 1.4.
[2151] Hoofdstuk XII, paragraaf 1.5.
[2152] Hoofdstuk XII, paragraaf 1.6.
[2153] Hoofdstuk XII, paragraaf 2.
[2154] Hoofdstuk XII, paragraaf 3.

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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*. 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, especially 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 development of the legal theory on the interplay of IHRL and LOAC, and to value the operational consequences of this interplay on targeting and operational detention in counterinsurgency. As such, the study not only intends to serve an academic, but also a military-operational purpose.

Among the issues covered in this study are the concepts of insurgency and counter-insurgency; the conceptual underpinnings of IHRL and LOAC; the 'humanization' of armed conflict; the international law on the interplay of norms in general and the maxim of *lex specialis derogat legi generali* in particular. Other topics include the applicability of IHRL and LOAC in counterinsurgency operations; and the regulation of targeting and operational detention under IHRL and LOAC, including controversial topics such as the concept of direct participation in hostilities, the existence of a requirement of 'least harmful means' in the concept of military necessity, and the requirements pertaining to security detention in non-international armed conflicts.