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### International human rights law and the law of armed conflict in the context of counterinsurgency: With a particular focus on targeting and operational detention

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# 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.<sup>1</sup> Instead, both western and non-western States have found – or anticipate to find<sup>2</sup> – 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)<sup>3</sup> taking place either on national territory, or on the territory of another State.<sup>4</sup> 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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<sup>1</sup> 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.

<sup>2</sup> 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 21<sup>st</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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.<sup>5</sup> 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,<sup>6</sup> Canada,<sup>7</sup> Germany<sup>8</sup> and France<sup>9</sup> as well as NATO<sup>10</sup> 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 counterinsurgency 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.'<sup>11</sup>

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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<sup>5</sup> See, for example, [www.smallwarsjournal.com](http://www.smallwarsjournal.com).

<sup>6</sup> U.K. Ministry of Defence (2009).

<sup>7</sup> Chief of the Land Staff (2008).

<sup>8</sup> German Army Office (2010).

<sup>9</sup> République Française (2010).

<sup>10</sup> NATO (2011).

<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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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<sup>12</sup> 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.

<sup>13</sup> Petraeus (2008), 63.

forces the counterinsurgent forces to (somehow) capture and arrest him, when so feasible?<sup>14</sup> Would the answer to that question be different if the city was under the control of the insurgents?<sup>15</sup> And what if he is not found in a city, but located in a remote area, such as a jungle?<sup>16</sup> 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,<sup>17</sup> 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 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<sup>18</sup> or without<sup>19</sup> 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.<sup>20</sup>

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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<sup>14</sup> See, for such proposals, for example Section IX of ICRC (2009).

<sup>15</sup> 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](http://www.nytimes.com/2012/11/15/world/middleeast/israeli-strike-in-gaza-kills-the-military-leader-of-hamas.html?pagewanted=all&_r=0).

<sup>16</sup> 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>.

<sup>17</sup> 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).

<sup>18</sup> See, for example, the targeting and operational detention operations carried out by ISAF in support of the Afghan government.

<sup>19</sup> 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>.

<sup>20</sup> Sassóli & 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.”<sup>21</sup> Thirty years later, these words continue to ring true.

Starting in the late 1960’s,<sup>22</sup> 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 21<sup>st</sup> century as the interplay between IHRL and LOAC,<sup>23</sup> and it may indeed be “the challenge of the next generation.”<sup>24</sup>

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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<sup>21</sup> Schindler (1982), 942.

<sup>22</sup> 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; Quéniwet (2008).

<sup>23</sup> See, *inter alia*, Arnold & Quéniwet (2008); Melzer (2008); Krieger (2006); Milanovic (2011a); Kretzmer (2005); Kretzmer (2009); Shany (2011); Ben-Naftali (2011a); Olson (2009); Sassòli (2007); Schabas (2007b); Droegge (2008a); Sassòli & Olson (2008); Garraway (2010).

<sup>24</sup> 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 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.<sup>25</sup> 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 (dis-course 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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<sup>25</sup> 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.<sup>26</sup> 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.

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<sup>26</sup> 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).<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

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."<sup>30</sup> 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.<sup>31</sup> 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-

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<sup>27</sup> 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.

<sup>28</sup> 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.

<sup>29</sup> 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.

<sup>30</sup> Lubell (2010), 97

<sup>31</sup> 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.<sup>32</sup>

While not defined in international law, in general terms the *concept of law enforcement* involves the exercise of police powers by State agents.<sup>33</sup> 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 undertake 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.<sup>34</sup>

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"<sup>35</sup> (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,<sup>36</sup> even when these individuals also qualify as lawful military objectives under the

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<sup>32</sup> Melzer (2010a), 35.

<sup>33</sup> United Nations (1979); United Nations (1990b); Council of Europe (2001).

<sup>34</sup> McCormack & Oswald (2010), 445.

<sup>35</sup> 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.

<sup>36</sup> See Article 43 HIVR and CA 3.

normative paradigm of hostilities.<sup>37</sup> 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.”<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup>

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.’<sup>41</sup> It also includes (unlawful) indiscriminate attacks or attacks against *protected* persons and objects.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> 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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<sup>37</sup> (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.

<sup>38</sup> Criddle (2012), 1073.

<sup>39</sup> See 1868 St. Petersburg Declaration.

<sup>40</sup> Melzer (2010a), 35.

<sup>41</sup> Sandoz, Swinarski & Zimmerman (1987), § 1882.

<sup>42</sup> 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.

<sup>43</sup> 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.”

<sup>44</sup> 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.<sup>45</sup>

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

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<sup>45</sup> Melzer (2010a), 40.

a government and its partners to simultaneously contain and defeat an insurgency and address its root causes.<sup>46</sup>

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.<sup>47</sup>

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.<sup>48</sup> The term ‘non-State actor’ denotes individuals or groups of individuals who act in an individual capacity, as private per-

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<sup>46</sup> U.S. Department of State (2009), 12; United States Department of Defense (2010).

<sup>47</sup> 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.

<sup>48</sup> 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.<sup>49</sup> 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<sup>50</sup> that systematically analyzes, prioritizes, and assigns assets against targets, in order to achieve a predetermined effect set by the force

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<sup>49</sup> 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.

<sup>50</sup> 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 end 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 ‘weaponering’. 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.<sup>51</sup> 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).”<sup>52</sup> While it may also include the use of non-lethal measures<sup>53</sup>, 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.”<sup>54</sup> 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.<sup>55</sup>

The rationale behind the process of targeting is that all application of combat power – whether executed at the strategic,<sup>56</sup> operational<sup>57</sup> or tactical<sup>58</sup> 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.<sup>50</sup>

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.

<sup>51</sup> United States Department of the Army (2010), I-2.

<sup>52</sup> United States Department of Defense (2007), I-6.

<sup>53</sup> 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.

<sup>54</sup> 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.”<sup>54</sup> 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.

<sup>55</sup> NATO Standardization Agency (2011), § 0448.

<sup>56</sup> “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<sup>59</sup> 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).

<sup>57</sup> "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).

<sup>58</sup> "*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).

<sup>59</sup> 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."<sup>59</sup> 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.<sup>60</sup> 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 relate 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*<sup>61</sup> 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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<sup>60</sup> United States Department of Defense (2007), viii.

<sup>61</sup> 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"<sup>62</sup> 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<sup>63</sup> 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.<sup>64</sup>

### 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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<sup>62</sup> Danish Ministry of Foreign Affairs (2012), 5, Chairman's commentary to Principle 1.

<sup>63</sup> 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 arbitrarily deprive someone of his liberty.

<sup>64</sup> 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.”<sup>65</sup> Together, these branches form what can be referred to as the International Law of Military Operations,<sup>66</sup> 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.<sup>67</sup>

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 institutions 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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<sup>65</sup> Gill & Fleck (2010), 5.

<sup>66</sup> For a comprehensive handbook on the International Law of Military Operations, see Gill & Fleck (2010).

<sup>67</sup> 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.<sup>68</sup>

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.<sup>69</sup> 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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<sup>68</sup> 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.

<sup>69</sup> 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.<sup>70</sup>

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

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<sup>70</sup> 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 counterinsurgency.

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.'<sup>71</sup> 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.<sup>72</sup> The legal discourse here concentrates on the choice for the 'right' paradigm to fight 'new wars'; the alleged obsolescence 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-

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<sup>71</sup> Meron (2000a)). Its definitional scope in this study, however, deviates from that meant by Meron, as will be explained.

<sup>72</sup> 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 be 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],”<sup>73</sup> 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,<sup>74</sup> 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 remainder 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 than it appears on first sight. For example, not all States are party to 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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<sup>73</sup> 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.”

<sup>74</sup> 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.<sup>75</sup>

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

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<sup>75</sup> 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 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.