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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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**Publication date**  
2013

[Link to publication](#)

#### **Citation for published version (APA):**

Pouw, E. H. (2013). *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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# Chapter I Strategic and Military Context

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

## 1. Insurgency

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

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

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

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<sup>76</sup> Kilcullen (2009), 183.

<sup>77</sup> Kilcullen (2010), 1.

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

<sup>79</sup> This governing authority may be indigenous or foreign, in the case of an occupation or other form of foreign governing presence.

<sup>80</sup> U.S. Department of State (2009), 11.

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

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

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

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

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

<sup>82</sup> Examples are the Taliban in Afghanistan and West-Pakistan, the PKK in Iraq and Iran, and insurgents in the Sub-Saharan regions in Africa.

<sup>83</sup> On the United States’ proxy wars in Latin America, see Brands (2010).

<sup>84</sup> Barno (2006); Cassidy (2006); Kilcullen (2005b).

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

<sup>86</sup> Galula (1964), 3-4.

<sup>87</sup> U.S. Department of Army & U.S. Marine Corps (2007), § 1-8.

<sup>88</sup> Prisk (1991), 69.

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

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

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

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

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

<sup>91</sup> Galula (1964), 19-20. Also U.S. Department of Army & U.S. Marine Corps (2007), I-49.

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

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

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

<sup>95</sup> U.S. Department of State (2009), 10-11.

<sup>96</sup> U.S. Department of State (2009), 10.

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

consisting of ambushes, bombings, and attacks on government facilities, assets and infrastructure in order to force “security forces to undertake numerous onerous, high-cost defensive activities that expend scarce resources without significantly advancing the counterinsurgents’ strategy.”<sup>99</sup>

As becomes clear, while predominantly a political struggle, violence is an integral part of insurgency warfare, up to a degree that it may, as it often does, result in an armed conflict. However, the political and military components are intrinsically linked: every military action must be weighed against its political effects, and vice versa.<sup>100</sup>

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

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

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

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

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

<sup>99</sup> U.S. Department of State (2009), 11.

<sup>100</sup> Galula (1964), 5.

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

<sup>102</sup> Metz & Johnson II (2001), 5-6 (emphasis original).

<sup>103</sup> Schmitt (2007), 15.

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

It is of relevance for the present study to also briefly look at the anatomy of an insurgency movement. *Firstly*, (as will be discussed elsewhere in more detail) irregular forces may act entirely independent from a State, assimilate into a State's armed forces, or otherwise act on their behalf.<sup>104</sup> For the purposes of the present study, however, insurgents will be regarded as non-State actors, and thus incur responsibility for their actions as *private* persons.

*Secondly*, in order for an insurgency to function, it is generally accepted that a certain minimum degree of organization must be established and maintained. As stated by O'Neill

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

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

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

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

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<sup>104</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. While in practice insurgencies may enjoy support from an outside State, this does not *a priori* amount to the designation of insurgents as *de facto* or *de jure* State agents. An example is the situation Iran, which is being accused of having trained and supported Afghan insurgents in the current Afghan insurgency. See Miglani (2010), available at <http://www.reuters.com/article/idUSTRE64T0U920100530>.

<sup>105</sup> O'Neill (2005), 116.

<sup>106</sup> U.S. Department of Army & U.S. Marine Corps (2007), 100, § 3-75.

‘well-defined vertical chain’ of command and control from the leadership to the rest of the organization. “[...] Such organizations are functionally specialized, with units below the leadership structure that fight, gather intelligence, recruit personnel, and supply money and weapons.”<sup>107</sup> Insurgencies adopting a *military-focus* or *protracted war-approach* need more complex and hierarchical organizations, even to the degree of shadow governments or insurgent states, thus forming hierarchies parallel to governmental structures. Such parallel hierarchies may be created to ‘govern’ the population in insurgent controlled areas.<sup>108</sup> In so far insurgencies rely on protracted violence, both in duration and intensity, they often create a structured military wing, where full-time and part-time (‘accidental’) guerrillas are distributed among units acting at central, regional and local levels. As Mao recognized, the more violence shifts from guerrilla to conventional warfare, the more the insurgency organization must be developed.<sup>109</sup>

Today’s insurgencies are increasingly characterized by their *decentralized* organizational structure, which is more loosely organized and flat, so that the boundaries between its subunits are fluid or difficult to identify. These organizations are even more difficult to recognize in transnational strategies, such as arguably adopted by Al Qaeda, for they require connections with associated cells and organizations throughout the world.

Subject to the strategic approach adopted by the insurgency, an insurgent organization may consist of any or all of five elements.

The *first* element, at the very center of the movement, is the *insurgency leadership*, providing effective strategy, cohesion, unity, planning, tactics and organization.<sup>110</sup> This layer is the driving force behind the movement, and consists of one or more leaders that form the strategic think-tank and primary planning cell of the insurgency.

The *second* element concerns the *armed forces* or military component of an insurgent movement, consisting of ‘fighters’, of local or foreign origin.<sup>111</sup> They perform combat tasks and security duties, such as the physical protection of training camps and the financial, doctrinal and human networks. This layer is often mistaken for the movement itself, but it performs ‘merely’ a supporting task, i.e. “to support the insurgency’s broader political agenda and to maintain local control.”<sup>112</sup>

The *third* element is the *political cadre*, which task is to execute the leadership’s policy guidance. The political cadre identifies local popular grievances and politicizes these by blaming the incompetence of the ruling government on the one hand, and by offering solutions on the other hand.<sup>113</sup>

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<sup>107</sup> Hashim (2006), 153.

<sup>108</sup> O’Neill (2005), 116. Examples are Moqtada al-Sadr’s Mahdi Army, which provided security and services in parts of southern Iraq and Bagdad under his control; Hezbollah in Lebanon; and the FARC in Colombia.

<sup>109</sup> Mao (1962), 113: “There must be a gradual change from guerrilla formations to orthodox regimental organization. The necessary bureaus and staffs, both political and military, must be provided. At the same time, attention must be paid to the creation of suitable supply, medical, and hygiene units. The standards of equipment must be raised and types of weapons increased. Communication equipment must not be forgotten. Orthodox standards of discipline must be established.”

<sup>110</sup> O’Neill (2005), 124.

<sup>111</sup> Besides Afghans, the fighting core of the insurgents in Afghanistan, for example, is known to lead a “mobile column” of some 8,000-10,000 fighters from, *inter alia*, Pakistan, Chechnya, Bosnia-Herzegovina and Saudi-Arabia. Kilcullen (2009), 84.

<sup>112</sup> U.S. Department of Army & U.S. Marine Corps (2007), § 1-62.

<sup>113</sup> For example, the Taliban’s political core uses the resentment among local Afghans against foreign presence in their living environments as a tool to hold president Karzai’s government accountable for its fail-

The *fourth* element of insurgents is made up of *auxiliaries*, i.e. that part of the civilian population that sympathizes with the insurgency and is motivated, for varying reasons, to support them. Examples of such support are the provision of food and shelter or the storage of weapons and ammunition in their private domains. They may also act as messengers or couriers, collect intelligence, warn insurgents for approaching counterinsurgent forces, or provide financial aid. This layer functions as a perfect ‘gray zone’ area in which insurgent leaders, fighters and political cadre may hide, making it difficult for counterinsurgents to identify them.<sup>114</sup>

The *mass base* forms the *fifth* element. It consists of those within the population following the insurgency, either out of free will, or following recruitment and/or coercion from the cadre. This is why insurgency is commonly referred to as a ‘grass root’-phenomenon: its seeds lie within the population.<sup>115</sup>

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

## 2. Counterinsurgency

The strategic policy of States countering insurgencies has evolved significantly over time, finding its roots in *colonial counterinsurgency* in the nineteenth and twentieth century.<sup>116</sup> The central principle of colonial counterinsurgency is to gain control over the population, based on civil – not military – power, whereby force is not ruled out, but is to be minimized, concentrated and coordinated. Based on the principles of colonial counterinsurgency, the post-World War II era of decolonization saw the rise of what is generally referred to as *classical counterinsurgency*.<sup>117</sup> The doctrine of classical counterinsurgency emphasizes the need for a clear political goal to counter the insurgency, aimed at defeating the political subversion, and not the insurgents, whereby the full capability of resources of government is used, requiring a coordinated plan to unify intelligence, political, administrative, socio-economic, military, and law enforcement efforts, and in which the principle of legitimacy is key.<sup>118</sup>

Today, triggered by the events of 9/11 and the conflicts in Afghanistan and Iraq, counterinsurgency-policy has developed into what can be described as<sup>119</sup> a combination of a global approach to counter a post-Maoist, globalized Islamist insurgency<sup>120</sup> and neo-classical coun-

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

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

<sup>115</sup> Kilcullen (2005a)???

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

<sup>117</sup> Kilcullen (2006a); Hoffman (2007). For writings from this period, see Kitson (1971); Thompson (1966); Thompson (1970); McCuen (1966).

<sup>118</sup> Thompson (1966), 50-58; Galula (1964); Kitson (1971); McCuen (1966).

<sup>119</sup> Kitzen (2013 (forthcoming)).

<sup>120</sup> Kilcullen (2005b); J.A. Nagl and B.M. Burton, *Thinking Globally and Acting Locally: Counterinsurgency Lessons from*

*Modern Wars – A Reply to Jones and Smiths*, 33 *Journal of Strategic Studies* (2010), 136-137.



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

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

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

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

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

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

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<sup>121</sup> Kilcullen (2006a); Hoffman (2007); Jones & Smith (2010).

<sup>122</sup> Nagl & Burton (2010)

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

<sup>124</sup> U.S. Department of State (2009), 12.

<sup>125</sup> U.S. Department of State (2009), 12.

<sup>126</sup> U.S. Department of State (2009), 16.

<sup>127</sup> U.S. Department of Army & U.S. Marine Corps (2007), § 1-113.

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

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

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

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

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

In a State governed by the rule of law, the monopoly on the use of force is in the hands of the State; the State provides security to individuals and their property; and the State itself is bound by the law and does not act in an arbitrary manner. Also, the State issues laws that can be readily determined and are stable enough to permit individuals to plan their own affairs; individuals have meaningful access to an effective and impartial legal system; the State protects human rights and fundamental freedoms; and individuals rely on the existence of legal institutions and the content of law in the conduct of their daily lives.<sup>133</sup>

One of the most difficult challenges facing counterinsurgents – and therefore a primary concern of the military-politico strategic level – is their obligation to uphold the principle of legitimacy and the rule of law in spite of the insurgency's strategy to apply unlawful tactics, such as terrorism and perfidious acts. Such behavior may provoke the counterinsurgent to resort to similar unlawful and immoral behavior, as is precisely the objective of the insurgents. However, modern counterinsurgency doctrine points out that people will only accept *counterinsurgent* measures when they are perceived as rule of law-based decisions, competent to tackle the major grievances upon which the insurgency thrives.<sup>134</sup> Thus,

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

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<sup>129</sup> Koninklijke Landmacht (2003), 541.

<sup>130</sup> Thompson (1966), 51. See also Kitson (1971), 50.

<sup>131</sup> US Army (2006), § 1-115.

<sup>132</sup> U.S. Army Judge Advocate General's Legal Center & School (2010), 11. This definition is based on U.S. Department of Army (2008), § 1-9 and U.S. Department of Army & U.S. Marine Corps (2007), which defines Rule of Law as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards.”

<sup>133</sup> U.S. Army Judge Advocate General's Legal Center & School (2010), 12-16.

<sup>134</sup> U.S. Department of Army & U.S. Marine Corps (2007), § 6-0.

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

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

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

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

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

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

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

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

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

<sup>140</sup> NATO (2008), § 2.

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

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

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

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

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

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

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

<sup>145</sup> United States Department of Defense (2006), 6-1 ff.

<sup>146</sup> Sitaraman (2009), 1769 (emphasis in original).

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

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

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

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

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<sup>148</sup> U.S. Department of Army & U.S. Marine Corps (2007), § I-14.

<sup>149</sup> U.S. Department of Army & U.S. Marine Corps (2007), 42, § 1-131.

<sup>150</sup> Research, carried out in Afghanistan shows the importance of this aspect. A local Afghan explains: "[w]e don't want reconstruction of the roads. The only thing we want is security. When the Taliban start fighting with the government, the only thing that happens is that innocent people are killed. [The Taliban] may lose ten people, but dozens and dozens of civilians die." Institute for War and Peace (2008), available at:

<[http://www.iwpr.net/index.php?apc\\_state=hen&s=o&o=1=EN&p=arr&s=f&o=342021](http://www.iwpr.net/index.php?apc_state=hen&s=o&o=1=EN&p=arr&s=f&o=342021)>.

<sup>151</sup> U.S. Department of Army & U.S. Marine Corps (2007), § 1-131.

<sup>152</sup> Sitaraman (2009), 1778.

<sup>153</sup> U.S. Department of Defense (2008), 8.

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

See <http://www.foxnews.com/story/0,2933,482707,00.html>.

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

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

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

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

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<sup>155</sup> Whetham (2007)725.

<sup>156</sup> U.S. Department of State (2009), 13.

<sup>157</sup> U.S. Department of State (2009), 13.

<sup>158</sup> Garret (2008), 1.

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

<sup>160</sup> U.S. Department of Army & U.S. Marine Corps (2007), § 1-141.

it is conducted?” If the answer to that question was, “No,” then we took a very hard look at the operation before proceeding.<sup>161</sup>

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

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

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

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

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<sup>161</sup> Petraeus (2008)?, 63.

<sup>162</sup> Shaw, 71 uses the term ‘risk-transfer wars’. See also Betz & Cormack (2009), 329-330.

<sup>163</sup> See also Human Rights Watch (2008), 12.

<sup>164</sup> U.S. Department of Army & U.S. Marine Corps (2007), 48, § 1-149.

<sup>165</sup> U.S. Department of Army & U.S. Marine Corps (2007), 49, § 1-153.

<sup>166</sup> U.S. Department of Army & U.S. Marine Corps (2007), 48, § 1-150.

<sup>167</sup> U.S. Department of Army & U.S. Marine Corps (2007), 48, § 1-151.

<sup>168</sup> U.S. Department of Army & U.S. Marine Corps (2007), § 1-142. See also § 1-150 and § 5-38. See also Whetham (2007)

<sup>169</sup> Oates (2010), 159-160.

<sup>170</sup> Howard (2010), cited in Human Rights First (2011), 1.

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

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

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

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

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

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

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

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<sup>171</sup> Trinquier (1964).

<sup>172</sup> COMISAF (2006).

<sup>173</sup> On the need to change military culture, see Nagl (2005).

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

<sup>175</sup> Gillman & Johnson (2012), 75-76.

<sup>176</sup> Cole, Drew, McLaughlin, *et al.* (2009), 2, § 6.



areas left largely unregulated by LOAC, such as security detention in counterinsurgency operations governed by the law of NIAC.

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

### 3. Legal Relevance

From the above it is possible to identify dimensions, each of which may be of legal significance for the interplay potential and appreciation of norms of IHRL and LOAC pertaining to targeting and operational detention.

A *first* dimension concerns the *organizational* dimension of insurgency. This refers to the organization of an insurgency and the categories of individuals within a particular society that are involved or can potentially be affected by insurgencies. From a legal point of view, this common organizational structure is of relevance for two reasons. *Firstly*, it plays a significant role in the question of the applicability of LOAC, more in particular in respect of the applicability of the law of NIAC. *Secondly*, it illustrates that an insurgency movement is made up of persons active in varying degrees of involvement, and which are engaged on a wide array of oftentimes shifting activities. This is of particular significance in relation to the question of who may be subjected to the use of force resulting in deprivation of life or liberty.

A *second* dimension concerns the *temporal* component of insurgency, i.e. the existence of an insurgency in the two temporal subsets of peace and armed conflict. While the assumption in this study is that all situational contexts of counterinsurgency take place in the context of an armed conflict, in operational reality this is a crucial and highly delicate issue, as it determines whether the conduct of counterinsurgency forces is governed by IHRL alone, or (also) by LOAC.

The *third* dimension concerns the *geographical* dimension of insurgency. This refers to the geographical area in which an insurgency movement operates, which, as we have seen, is not limited to the territory of the counterinsurgent State, but frequently also involves the territory of other States. These extraterritorial situations raise questions connected to the geographical space of armed conflict, mostly so that of NIAC, as well as concerning the extraterritorial applicability of IHRL-obligations for counterinsurgent forces operating on foreign territory.

A *fourth* dimension concerns the *policy* dimension of counterinsurgency. As follows from the above, counterinsurgency policy formulated at the political and military strategic level provides a larger framework within which counterinsurgency operations at the military operational and tactical level are to take place. In view of the counterinsurgency imperative of legitimacy, a first concern is to ensure that the outer limits of this policy corresponds with the outer limits of the counterinsurgents State's legal obligations under national and international law. As for the latter, this implies that the policy on targeting and operational detention cannot be more permissive than prescribed by law. At the same time, as noted in the introduction, the nature of contemporary counterinsurgency policy is such that it requires restraint in the use of forcible measures which, when followed in State practice, could be

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