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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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Conclusions Part A

The central research question in this part was: what aspects illustrate the background against which the main research questions should be answered?

A principal, leading aspect concerns the fact that, in the event the question of interplay actually arises, the system of international law offers a useful toolbox to assess the nature of norm relationships. To recall, the principal desired outcome is to examine the ability of norms to *complement* each other so as to give each of them *maximum* effect, in order to harmonize them. In some cases it is not necessary to put in any effort to harmonize them; in other situations however there is apparent conflict that can be avoided by applying interpretative techniques. In other situations, conflict cannot be avoided, and must be resolved via conflict resolution techniques.

When applied to the interplay between IHRL and LOAC, it is of relevance to take account of the fact that in terms of object and purpose, legal relationships, the nature of rights and obligations, as well as applicability, both regimes differ significantly. As will be shown, these differences may greatly impact the nature and therefore the outcome of the interplay between simultaneously applicable norms, while at the same time, such norms may overlap in providing humanitarian relief. However, the interplay between norms of IHRL and LOAC is not merely characterized by the conceptual underpinnings of the regimes, but also by the continuing discourse through which attempts are made to manipulate the outcome of the interplay, making use of the perceived weaknesses and gaps in IHRL or LOAC, depending on the interests – security or humanity – that need to be served.

While the dogmatic approaches provide insight in the varying approaches towards the relationship between LOAC and IHRL, it is important to place their importance in the proper context. The above-mentioned theories must be viewed first and foremost as indicative of the manner in which IHRL, as a legal regime, is considered to have found a place next to LOAC during an armed conflict. The approaches all represent a certain vision of the relationship as it *should be*, not necessarily *as it is*, although the complementary approach reflects *lex lata* the most. An approach's actual function therefore is that it can place a label on a particular outlook in doctrine, jurisprudence or State practice as being separatist, integrationist or complementarist. As an instrument capable of clarifying the relationship between norms of both regimes in specific situations, i.e. *practice*, it has considerably less meaning.⁷²⁷

Another aspect is that the approaches may leave the impression that the regimes of LOAC and HRL *as a whole* are complementary or integrated. This is deceptive. In reality, the relationship overall can only be determined by looking at the individual norms that are in relationship with other individual norms in the particular circumstances in which they are applied. Only once that exercise has been concluded is it possible to label the relationship.

The analysis in this chapter also demonstrates that other aspects cannot be readily ignored when assessing the interplay between IHRL and LOAC. This concerns, *firstly*, the fact that upon closer examination, the concept of insurgency illustrates that the *military context* in which the counterinsurgent-State is forced to operate today is extremely complex, in organizational, geographical and instrumental terms. From a military perspective, counterinsurgent forces are challenged by a mosaic of threats, which may vary in time, place, and nature, posed by actors with various objectives, ranging from mere criminal activity for personal gain to terrorism to undermine the public perception of the State's capacity to provide law

⁷²⁷ Bothe (2004), 387; Lorenz (2005), 206.

and order. Insurgents operate in unconventional ways, are difficult to identify and generally act with disregard for law. This complexity finds reflection in the validity and applicability of norms of IHRL and LOAC to the legal relationship between the counterinsurgent State and insurgents, as well as in the analysis of various legal concepts instrumental to determine permissibility of the targeting and detention of insurgents.

A *second* contextual aspect that cannot be ignored concerns (western) counterinsurgency *policy*, which illustrates the need for security and legitimacy, in order to drive a wedge between the population and the insurgency and to convince it to support the counterinsurgent. The particular nature of this policy, which aims at the restrained, controlled and tailored use of forcible measures focuses our attention to its potential effects on the interpretation of norms of IHRL and LOAC governing targeting and operational detention, and the interplay between them. Before we turn to the substance of these norms, however, it is imperative to first assess the potential for norms of IHRL and LOAC to interact. This is our main purpose in Part B.