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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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## Chapter IV IHRL

As noted, this chapter aims to identify the valid norms available in IHRL pertaining to targeting and operational detention and to examine their applicability in the situational contexts of counterinsurgency, which will take place in paragraphs 1 and 2 respectively.

### 1. Valid Norms

The first question to be addressed here is whether IHRL offers valid norms governing the concepts of targeting and operational detention. Paragraph 1.1. focuses on targeting, paragraph 1.2 addresses operational detention.

#### 1.1. Targeting

The principal human right governing the concept of targeting is the human *right to life*. The right to life has been secured in all the human rights treaties under scrutiny in the present study.<sup>728</sup> Thus, within the UN conventional human rights framework, Article 6 ICCPR states that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be *arbitrarily* deprived of his life.” Article 4(2) ICCPR categorically prohibits the derogation from the right to life *under any circumstances*.<sup>729</sup>

The ACHR contains an almost identical provision, in Article 4,<sup>730</sup> and also prohibits *any* derogation from the right to life in Article 27(2) ACHR.

Article 2 of the ECHR stipulates that “[n]o one shall be deprived of his life *intentionally* save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.” In contrast to the texts of the ICCPR and the ACHR, which use the term ‘*arbitrary*’ as a threshold to determine a violation of the right to life, Article 2 ECHR contains an *exhaustive list* of exceptional situations in which the *extra-judicial* deprivation of life does not violate the right to life. Thus,

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary.<sup>731</sup>

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<sup>728</sup> All texts exclude from the scope of unlawful deprivation of life deaths resulting from the death penalty imposed by a competent court and in accordance with the law, i.e. *judicial* executions. This basis will not be further explored for the purposes of the present study.

<sup>729</sup> (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion of 9 July 2004*, § 216; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, *Judgment of 19 December 2005*, § 216; Buergenthal (1981), 83; Rowe (2006), 4.

<sup>730</sup> 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be *arbitrarily* deprived of his life. 2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

- a) in defence of any person from unlawful violence;
- b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- c) in action lawfully taken for the purpose of quelling a riot or insurrection.

In contrast to the derogations clauses of the ICCPR and ACHR, which do not permit derogation from the right to life under any circumstances, the text of Article 15 ECHR implies that derogation from the right to life is permissible “[i]n time of war or other public emergency threatening the life of the nation,” when it concerns “[...] deaths resulting from lawful acts of war.”

While the principal sources underpinning State practice and *opinio juris* in the formation of customary IHRL differ significantly from those in the formation of customary obligations relating to other branches of international law,<sup>732</sup> there is overwhelming evidence that the contemporary human right to life is a rule of customary international law or a general principle of international law. Evidence is found in the practice of the non-judicial organs, agencies and appointed representatives of the UN,<sup>733</sup> practice of the ICJ,<sup>734</sup> State practice,<sup>735</sup> and doctrine.<sup>736</sup>

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<sup>731</sup> It may be noted that the use of the words “no more than” is confusing, as the requirement of absolute necessity expresses a threshold which, as a minimum, must be crossed. The better interpretation therefore appears to be to read the words “no more than” as “no *less* than”.

<sup>732</sup> While principally based in State practice and *opinio juris* as any other customary rule, the formation of customary IHRL in general, and the human right to life in particular is strongly influenced by the conceptual anomaly within IHRL “regarding the interrelation between the obligation, the entitlement and the benefit arising from human rights norms.”<sup>732</sup> In the case of human rights treaties, States accept *obligations* to respect and ensure the human rights protected in the instrument. However, as explained, the ‘special character’ of human rights obligations entails that, while commitment to such obligations is undertaken at the horizontal level between States, (1) they generally constitute obligations *erga omnes* and (2) the nature of the obligation seeks to benefit individuals from the human rights at the vertical level. It thus follows that while States are, vis-à-vis each other, legally entitled to *compliance* with those obligations, there is generally no genuine interest in enforcing that claim on other States as (1) the *erga omnes*-character of the obligations has removed the incentive to claim reciprocal behavior; and (2) the nature of the obligations seeks to regulate a vertical relationship that generally belongs to the sovereign, domestic affairs of the other State. In addition, State practice shows an abundance of cases that violate the obligation to respect the right to life; a fact which, as argued by Tomuschat (Tomuschat (2010), 16.) bars its development into a norm of customary law.

Thus, while in ‘normal’ situations the customary nature of obligations may be inferred from the ‘normal’ sources of evidence reflecting State practice and *opinio juris*, such as arbitral awards or international judicial decisions, the consequence of the ‘special character’ of IHRL is that recourse must be had to a wide variety of other sources such as “the virtually universal the adherence to the United Nations Charter and its human rights provisions, and acceptance of the Universal Declaration of Human Rights even if only in principle; virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights; the adoption of human rights principles by states for UN resolutions declaring, recognizing, invoking, and applying international human rights principles in international law; action by states to conform their national law or practice to standards or principles declared by international bodies, and the incorporation of human rights provisions, directly or by reference, in national constitutions and laws; invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions; and other diplomatic communications or action by states reflecting the view that certain practices violate international human rights law, including condemnation and other adverse state reaction to violations by other states.” See American Law Institute (1987), § 107, footnote 2. See also Schachter (1991), 334 ff; Melzer (2008), 182-183; Paust (1996), 147 ff; Lillich (1996), 9; Hannum (1996), 320; D’Amato (1996), 91 ff, 98.

<sup>733</sup> See resolutions of the UN General Assembly, the UN Security Council, the UN HRC, the UN ECOSOC, statements and reports of the UN Secretary General, the Special Rapporteur on Summary, Arbitrary and Extralegal Executions.

The right to life as a non-conventional source of customary international law<sup>737</sup> is of significance because (1) it binds States not party to human rights treaties protection the right to life (but which are nevertheless engaged in operations involving the extra-judicial application of lethal force);<sup>738</sup> (2) its force is equivalent to that of the conventional right to life, if not stronger if one were to accept it as a rule of *jus cogens*; and (3) it binds all States in the conduct of all military operations, whether they take place on own territory, or extraterritorially. In other words, even if a State is not bound by the conventional right to life of a particular treaty because the individual affected by its use of force was not, at that time, in its jurisdiction as understood in the relevant treaty, the State is nonetheless bound to comply with its obligations under the customary right to life, given the fact that a customary norm applies *erga omnes*.

There is less certainty of its status as a norm of *jus cogens*,<sup>739</sup> even though there is considerable support for such contention in statements and decisions of international organs<sup>740</sup> as

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<sup>734</sup> While the right to life has been object of deliberation in a number of cases, the ICJ thus far has refrained from recognizing the obligations arising from right to life as customary rules. See (1970), *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application 1962) (Belgium v. Spain)*, Judgment of 5 February 1970 (Merits), § 34; (1980c), *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment of 24 May 1980, § 91; (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, § 25; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment of 19 December 2005, §§ 216-219. Instead, it has derived obligations from 'general principles of law recognized by civilized nations' within the meaning of Article 38(1)(c) ICJ Statute, in particular the 'elementary considerations of humanity' prohibiting murder and extra-judicial execution embedded in CA 3 to the Geneva Conventions. See (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986 (Merits), § 218. Also: (1949a), *Corfu Channel Case (United Kingdom v. Albania)*, Judgment of 9 April 1949 (Merits), 22. See also Tomuschat (2010), 16.

<sup>735</sup> State practice follows from States' participation in the UN; national constitutional and statutory law and jurisprudence, regional declarations, such as the ADRDM and the EU Charter of Fundamental Rights, the Cairo Declaration on Human Rights in Islam and the Kuala Lumpur Declaration on Human Rights; unilateral acknowledgement of the non-derogable nature of the right to life (see for example the written statements submitted by Malaysia, Indonesia, Qatar and Nauru to the ICJ in the Nuclear Weapons Advisory Opinion.

<sup>736</sup> See, *inter alia*, American Law Institute (1987), Ramcharan (1985), 3; Dinstein (1981), 115; Paust (1996), 154; Ruys (2005), 16; Kretzmer (2005), 185; Hannikainen (1988), 514ff; Henkin (1995/1996), 39; Paust (1996), 154.

<sup>737</sup> Customary rules and general principles are both recognized as sources of international law, see Article 38(1)(b) and (c), ICJ Statute.

<sup>738</sup> Examples include China (signatory to the ICCPR, but no ratification), Laos (signatory to the ICCPR, but no ratification), Myanmar, Pakistan and Saudi Arabia.

<sup>739</sup> Denouncing the status of *jus cogens* is Green (2002), 429. Less certain are for example Nowak (2005), 105; Kremnitzer (2004), 1; Rodley (2010), 221-222.

<sup>740</sup> For example, evidence is found, as for example Melzer argues, (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986 (Merits); Human Rights Committee (2001b), § 10; (1996k), *Victims of the Tugboat "13 de marzo" v. Cuba*, Case No. 11.436, Decision of 16 October 1996; (1999o), *Villagrán Morales et al. Case (the "Street Children" Case)*, Judgment of November 19, 1999, § 139; and several High-Level Expert Conferences, such as the Siracuse Principles on the Limitation and Derogation Provisions in the ICCPR (1984), the Paris Minimum Standards of Human Rights Norms in a State of Emergency, the Turku Declaration of Minimum Humanitarian Standards and the Expert Meeting on Non-Derogable Human Rights. See Melzer (2008), 216-219 for a more complete overview and the arguments in support of *jus cogens*;

well as in legal doctrine,<sup>741</sup> even to a degree that, as Melzer argues, “today, the *jus cogens* character of the right to life has become virtually unassailable.”<sup>742</sup>

As for the *substantive scope* of the customary right to life, particular assistance is offered by the relevant sources of ‘soft law’,<sup>743</sup> to include first and foremost the UDHR,<sup>744</sup> as well as the UN Code of Conduct for Law Enforcement Officials<sup>745</sup> and the UN Force and Firearms Principles, and the practice of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.<sup>746</sup> It is submitted that these sources permit the use of lethal force on basis of similar requirements as the conventional human right to life.

## 1.2. Operational Detention

Inherent to the concept of operational detention are a number of subjects that each find protection in IHRL. It not merely affects a person’s liberty and security, but pertains to the safeguards that must be afforded to a detainee in the criminal or administrative process underlying his detention, his treatment in detention, and his transfer to another authority.

At the basis of the IHRL-norms governing operational detention lays the *right to liberty and security of the person*. In essence, the right to liberty and security of the person is a container of numerous protections to thwart the arbitrary use of detention powers and to provide protections to eliminate ill treatment or disappearance from instances of permitted detention.<sup>747</sup> The ECtHR has explained the importance of this right as follows:

[...] the authors of the Convention reinforced the individual’s protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. [...] What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.<sup>748</sup>

Some differences aside, of all conventional instruments examined in this study, Articles 9 ICCPR and 7 ACHR are most identical in expressing the right to liberty and security of the person. In sum, both stipulate that everyone has the right to liberty and security of his person, and shall not be subjected to *arbitrary* arrest or detention. In other words, all forms of detention that can be considered as non-arbitrary are lawful.

In addition, the deprivation of liberty of *anyone* is subject to several procedural requirements that will be subject to closer examination in paragraph 3. While some provisions within Articles 9 ICCPR and 7 ACHR specifically address the rights of criminal detainees, all other

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<sup>741</sup> For example: Boyle (1985), 6, 11, 15; Hannikainen (1988), 514 ff; Kretzmer (2005), 185; Ramcharan (1985), 15. For a more extensive overview and a short discussion of the several views, see Melzer (2008), footnote 231 and 219-220.

<sup>742</sup> Melzer (2008), 220. See also Lubell (2010), 170, footnote 8.

<sup>743</sup> For a more detailed examination of this body of ‘soft law’, see Melzer (2008), 189 ff.

<sup>744</sup> Despite its status as ‘soft law’, it is, as a minimum, in full expressive of customary international law ) Hannum (1996), 332), and to some, as reflective of *jus cogens* (e.g. McDougal, Lasswell & Chen (1980), 274).

<sup>745</sup> United Nations (1979); United Nations (1990b).

<sup>746</sup> See, for example, United Nations (2004); United Nations (2006).

<sup>747</sup> Shah (2010), 305.

<sup>748</sup> (1998i), *Kurt v. Turkey*, App. No. 24276/94, Judgment of 25 May 1998, § 123.

provisions set out rights to be afforded to *all* types of detainees, arguably also including security detainees.

In contrast to the ICCPR and the ACHR, Article 5 ECHR is somewhat different. While it contains the same procedural requirements as Articles 9 ICCPR and 7 ACHR, it differs significantly in that it does not permit the deprivation of liberty that is non-arbitrary, but those forms of detention expressly mentioned in an *exhaustive* list of *exceptional* bases for lawful deprivation of liberty. This implies that any form of deprivation of liberty not falling within any of the exceptions is *a priori* unlawful and constitutes a violation of the human right to liberty and security of person.<sup>749</sup> A quick scan of the list reveals that – at least not in so many words – security detention is not expressly listed. In other words, while Article 5 ECHR permits the arrest and detention of insurgents suspected of criminal offences, it appears not to unconditionally allow for the security detention of insurgents.

Similar to the right to life, the right to liberty is also firmly embedded within general international law as a norm of customary international law, and aspects of it have attained the status of *jus cogens*.<sup>750</sup> As for the material scope of the customary right to liberty, particular assistance is offered by the relevant sources of ‘soft law’.

At the level of the UN, this includes first and foremost the UDHR,<sup>751</sup> as well as the UN Standard Minimum Rules for the Treatment of Prisoners (UN Minimum Rules);<sup>752</sup> the (UN Basic Principles);<sup>753</sup> the UN Rules for the Protection of Juveniles Deprived of their Liberty;<sup>754</sup> the UN Body of Principles for the Protection of all Persons under Any Form of Detention of Imprisonment (UN Body of Principles),<sup>755</sup> and the practice of the Working Group on Arbitrary Detention.<sup>756</sup> In addition, notice may be had of the 1990 Turku Declaration of Minimum Humanitarian Standards<sup>757</sup> and the Paris Minimum Standards of Human Rights Norms in an Emergency.<sup>758</sup>

At the regional level, both the Inter-American system and the European system provide guidance through ‘soft law’. Relevant sources are the Inter-American Commission of Human Rights’ Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (IACiHR Principles);<sup>759</sup> the American Declaration of the Rights and Duties of Man (ADRDM)<sup>760</sup> and the Council of Europe Minimum Rules for the Treatment of Prisoners (CoE Minimum Rules).<sup>761</sup>

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<sup>749</sup> (2000j), *Labita v. Italy*, App. No. 26772/95, Judgment of 6 April 2000.

<sup>750</sup> Hannikainen (1988), 425 ff; Meron (1986), 80; Duffy (2005), 395; American Law Institute (1987), section 702; Human Rights Committee (2001c), § 11; (2007b), *Boumediene and Others v. Bosnia and Herzegovina*, App. Nos. 38703/06, 40123/06, 43301/06, 43302/06, 2131/07 and 2141/07, *Written Submissions of Interights and the International Commission of Jurists*, 2.

<sup>751</sup> Despite its status as ‘soft law’, it is, as a minimum, in full expressive of customary international law (Hannum (1996), 332), and to some, as reflective of *jus cogens* (e.g. McDougal, Lasswell & Chen (1980), 274).

<sup>752</sup> United Nations (1955).

<sup>753</sup> United Nations (1990a).

<sup>754</sup> United Nations (1990c).

<sup>755</sup> United Nations (1988).

<sup>756</sup> See <http://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx>.

<sup>757</sup> Turku Declaration (1990).

<sup>758</sup> Paris Minimum Standards (1985).

<sup>759</sup> IACiHR (2008).

<sup>760</sup> IACiHR (1948).

<sup>761</sup> CoE Minimum Rules (1973).

Of particular relevance to the concept of operational detention are also the fair *trial guarantees*, which find protection in Article 14 ICCPR, Articles 8 and 9 ACHR and Articles 6 and 7 ECHR. As explained by Pejić,

Judicial guarantees aim to ensure: i) that an innocent person is not subject to criminal sanctions; ii) that the process by which someone's innocence or guilt is determined is basically fair; and iii) that a person's other rights, such as the right to be free from torture or other forms of ill-treatment, are also respected in the administration of justice. Judicial guarantees thus comprise a 'safety net' that must be respected in order to ensure that any deprivation of liberty as the result of criminal proceedings is lawful and non-arbitrary.<sup>762</sup>

It is generally recognized that these guarantees have crystallized into norms of customary law.

Another principal human right related to operational detention, and governing the treatment of arrestees and detainees, is the *freedom from torture and inhuman or degrading treatment*. This fundamental human right finds protection not only in the ICCPR, ACHR and ECHR,<sup>763</sup> but also in the CAT<sup>764</sup> at the UN-level, and in the Inter-American Convention to Prevent and Punish Torture<sup>765</sup> and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment<sup>766</sup> at the regional level. Besides finding a basis in treaties, these fundamental human rights constitute norms of customary law (and in the case of the freedom from torture even *jus cogens*).

Finally, notion must be had of the norms governing the transfer of detainees to other States. The transfer of detainees is subject to the principle of *non-refoulement*.<sup>767</sup> IHRL prohibits the transfer of persons to States where there is a real risk of violation of certain fundamental human rights, such as the prohibition from torture, or other forms of cruel, inhuman or degrading treatment or punishment. It also prohibits transfers where a person faces the risk of imposition or execution of the death penalty, also when such trial was in accordance with the necessary requirements,<sup>768</sup> and even if the detaining State has reserved the right to im-

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<sup>762</sup> Pejić (2011), 23.

<sup>763</sup> Article 7 ICCPR; Article 5(2) ACHR; and Article 3 ECHR.

<sup>764</sup> United Nations (1948).

<sup>765</sup> Organization of American States (1985).

<sup>766</sup> Council of Europe (1989).

<sup>767</sup> On the principle of non-refoulement, see Gillard (2008); Lauterpacht & Bethlehem (2003); Droege (2008b). This principle is firmly rooted in refugee law (see Article 33, 1951 Refugee Convention; Article 2(3), OAU Convention governing the Specific Aspects of Refugee Problems in Africa. See also Goodwin-Gill & McAdam (2007)); LOAC (Article 12(2) GC III; Article 45(3) GC IV) and extradition treaties. It is explicitly mentioned in Article 3 CAT, Article 22(8) ACHR, Article 13(4) Inter-American Convention to Prevent and Punish Torture, Article 16; International Convention for the Protection of All Persons from Enforced Disappearance, and Article 19(2) of the Charter of Fundamental Rights of the European Union. In addition, the principle of *non-refoulement* has been recognized to be an implicit part of the ICCPR (via Article 7) (Human Rights Committee (2004c), § 12; UNHRC (2004), § 9; (1991a), *Chitat Ng v. Canada*, *Comm. No. 469/1991 of 5 November 1991*, § 14.1; (1991b), *Kindler v. Canada*, *Comm. No. 470/1991 of 18 November 1993*, § 6.2.) and the ECHR ((1989d), *Soering v. the United Kingdom*, *App. No. 14038/88*, *Judgment of 7 July 1989*, § 91; (1990a), *Cruz Varas and Others v. Sweden*, *App. No. 15576/89*, *Judgment of 29 August 1990*, §§ 69-70; (1991d), *Vilvarajah and Others v. United Kingdom*, *App. No. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87*, *Judgment of 30 October 1991*, §§ 102-110; (1996b), *Chahal v. United Kingdom*, *App. No. 22414/93*, *Judgment of 15 November 1996*, § 74).

<sup>768</sup> (2010b), *Al-Saadoon and Mufdhi v. the United Kingdom*, *App. No. 61498/08*, *Judgment of 2 March 2010*, §§ 123, 142-143.

pose the death penalty in times of war.<sup>769</sup> More generally, transfer is prohibited if it is foreseen that a person will be exposed to a flagrantly unfair trial.<sup>770</sup> The prohibition of *non-refoulement* also applies to subsequent transfers, i.e. the transfer of an already transferred individual from State B to a third State C.<sup>771</sup>

## 2. Applicability

Having established that IHRL provides valid norms that govern targeting and operational detention, it needs to be established whether these norms apply to the relationship between the counterinsurgent State and insurgents in a particular situational context of counterinsurgency. This relates to two distinct issues.

*Firstly*, the question of applicability relates to the applicability *ratione personae* of the valid norms. As has been previously addressed, the applicability of IHRL-treaties has been made subject to the question of whether it has been established that an individual has come within the jurisdiction of a State party to the treaty. While this issue is less controversial in targeting operations taking place on the territory of a counterinsurgent State (as in NATCOIN), a far more contentious issue is whether States are bound by its obligations under the right to life in relation to targeting operations taking place outside their own territories, as would be the case in OCCUPCOIN, SUPPCOIN and TRANSCOIN. Paragraph 1 deals with this issue.

A *second* issue of applicability concerns the question whether IHRL permits derogation from the valid norms. In the context of counterinsurgency, such derogation would imply that their is temporarily suspended in situations of public emergencies threatening the life of the nation, to the extent strictly required by the exigencies of the situation. Consequently, the counterinsurgent State would for the period of derogation not be bound by the requirements governing the deprivation of life in the normative framework of IHRL. This issue will be addressed in § 2.

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<sup>769</sup> Article 2(1) ICCPR offers States the possibility to make a reservation to permit “[...] the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.” Such a reservation is not possible under the European human rights system. Protocol No. 13 to the ECHR, Concerning the Abolition of the Death Penalty in All Circumstances forbids States to do so. See also Article 19 of the Charter of Fundamental Rights of the European Union.

<sup>770</sup> (2001e), *Einborn v. France, Admissibility*, ECtHR (16 October 2001), § 32; (1989d), *Soering v. the United Kingdom*, App. No. 14038/88, Judgment of 7 July 1989, § 113 (“The Court does not exclude that an issue might exceptionally be raised under Article 6 (art. 6) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country”); (1992a), *Drozd and Janousek v. France*, App. No. 12747/87, Judgment of 26 June 1992, § 110 (“The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice”). The HCR, in Human Rights Committee (2004a), § 12, has adopted general standards: “article 2 [...] entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.” See also the United Nations Model Treaty on Extradition, Annex to UN General Assembly resolution 45/116, 14 December 1990, article 3(f) (listing a violation of minimum fair trial guarantees as laid down in article 14 ICCPR as a mandatory ground for refusing extradition).

<sup>771</sup> (2000n), *T.I. v. the United Kingdom*, App. No. 43844/98, *Admissibility Decision of 7 March 2000*, 15; Committee Against Torture (1997), § 2.

## 2.1. (Extra-)territorial Applicability *Ratione Personae* of Valid Norms of IHRL to Targeting and Operational Detention in Counterinsurgency Operations

As noted previously, it follows from the practice of the UNHRC and IACtHR/IACiHR regarding the territorial scope of applicability of human rights obligations that jurisdiction may arise following SAA and ECA. To recall, the concept of SAA refers to jurisdiction generated by the authority and control over *persons* by State agents. ECA, in turn, refers to jurisdiction arising from a State's control over *territory*. What follows below is an examination of the SAA and ECA-based practice of the UNHRC, IACtHR/IACiHR, ECtHR and ICJ in order to determine the applicability of the valid treaty-based norms in respect of situations of targeting and operational detention in situational contexts of counterinsurgency.

### 2.1.1. SAA

To recall, when placed in the context of counterinsurgency, the approach of SAA brings insurgents and other individuals within the jurisdiction of a counterinsurgent State by virtue of the conduct of its counterinsurgent forces, even if this conduct can be considered an unlawful form of enforcement jurisdiction, regardless of whether counterinsurgent forces operate in OCCUPCOIN, SUPPCOIN or TRANSCOIN. Below, it will be examined whether jurisdiction based on SAA arises in relation to operational detention and targeting respectively.

#### 2.1.1.1. Operational Detention

In respect of the concept of *operational detention*, it is today generally agreed that, regardless of the circumstances leading to it, the *physical* power that such act entails is a clear reflection of such total/full and exclusive authority and control over an individual that it engages the jurisdiction of the State executing it. This has been widely demonstrated in the case law of the (quasi-)judicial bodies<sup>772</sup> and doctrine.<sup>773</sup> It is irrelevant whether the detention facility is a formal, recognized facility,<sup>774</sup> or a make-shift facility,<sup>775</sup> or whether the detention takes place outside a facility;<sup>776</sup> whether the period of detention is brief<sup>777</sup> or long;<sup>778</sup> and whether the

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<sup>772</sup> As for the UNHRC, see, *inter alia*, (1981b), *Sergio Euben López Burgos v. Uruguay*, *Comm. No. 12/52 of 29 July 1981*; UNHRC (2004), § 10 (emphasis added). As for the IACiHR and IACtHR, see (2010c), *Franklin Guillermo Aisalla Molina v. Ecuador*, *Case IP-02, OEA/Ser.L/V/II.140 Doc. 10 (2010), Judgment 21 October 2010 (Admissibility)*; (1999f), *Coard and Others v. the United States (US Military Intervention in Grenada)*, *Case No. 10.951, Decision of 29 September 1999*, § 37 (emphasis added). As for the ECiHR and ECtHR, see (1975d), *Ilse Hess v. United Kingdom*, *App. No. 6231/73, Decision of 28 May 1975*; (2005l), *Öcalan v. Turkey*, *App. No. 46221/99, Judgment (Grand Chamber) 5 December 2005*; (2010d), *Medvedyev and Others v. France*, *App. No. 3394/03, Judgment of 29 March 2010*; (2010b), *Al-Saadoon and Mufdhi v. the United Kingdom*, *App. No. 61498/08, Judgment of 2 March 2010*.

<sup>773</sup> This also applies to arrest and abduction. Support in doctrine: Gondek (2009); Lubell (2010), 216; Melzer (2008), 136.

<sup>774</sup> (2002j), *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba*, *Decision of 13 March 2002*; (2007e), *R (on the application of Al-Skeini and others) v Secretary of State for Defence*, [2007] UKHL 26, [2008] AC 153; (1975d), *Ilse Hess v. United Kingdom*, *App. No. 6231/73, Decision of 28 May 1975*.

<sup>775</sup> (1981b), *Sergio Euben López Burgos v. Uruguay*, *Comm. No. 12/52 of 29 July 1981*; (1981a), *Lilian Celiberti de Casariego v. Uruguay*, *Comm. No. 56/1979 of 29 July 1981*;

<sup>776</sup> (2004i), *Issa v. Turkey*, *App. No. 31831/96, ECtHR (16 November 2004)*; (2005l), *Öcalan v. Turkey*, *App. No. 46221/99, Judgment (Grand Chamber) 5 December 2005*; (2010d), *Medvedyev and Others v. France*, *App. No. 3394/03, Judgment of 29 March 2010*.

detention is lawful,<sup>779</sup> or in accordance with State policy.<sup>780</sup> “The determining factor, [...], is that an individual is being held powerless in direct control of agents of the state.”<sup>781</sup>

IHRL continues to play a role for counterinsurgent States that are somehow not bound by the treaty-norms (for example, because they are not a party to the treaty in question), as it is widely recognized that they are norms of customary international law.

In sum, it may therefore be concluded that in all situational contexts of counterinsurgency examined here, the counterinsurgent States are bound by the relevant norms of IHRL governing an insurgent’s operational detention.

#### 2.1.1.2. Targeting

While SAA-based jurisdiction is relatively straightforward and uncontroversial in relation to operational detention due the exercise of actual, direct *physical power* by State agents, the issue in respect of targeting is whether authority and control over persons also arises in the event of extra-custodial deprivations of life, resulting from targeting operations. This is a relevant question, because in these situations the counterinsurgent State does not exercise direct but rather *indirect* physical power over persons. To place this issue in the right perspective: in the context of counterinsurgency, does the concept of SAA accommodate deprivations of life resulting from the extracustodial use of force during patrols, following mortar attacks, sniper guns, close-quarter combat situations or aerial bombardments with manned and unmanned planes using precision-guided missiles?

As we will see, here the approaches of the UNHRC and IACiHR/IACtHR and those of the ECtHR are quite different, and lead to diverging results.

##### 2.1.1.2.1. UNHRC and IACiHR/IACtHR

In respect of the right to life, it follows from the practice of the UNHRC that the counterinsurgent State is always bound by the obligations attached to it, regardless of the geographic qualification of its relationship with the individual affected by its conduct.<sup>782</sup> The IACiHR has expressed a similar view. In *Brothers to the Rescue*, concerning the shooting down of two civilian Cessna’s by Cuban MiGs in international airspace, the IACiHR found that

the victims died as a consequence of direct actions taken by agents of the Cuban State in international airspace. The fact that the events took place outside Cuban jurisdiction does not limit the Commission’s competence *ratione loci*, because, as previously stated, when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state’s obligation to respect human rights continues – in this case the rights enshrined in the American Declaration. *The Commission finds conclusive evidence that agents*

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<sup>777</sup> (2005l), *Öcalan v. Turkey*, App. No. 46221/99, Judgment (Grand Chamber) 5 December 2005; (2004i), *Issa v. Turkey*, App. No. 31831/96, ECtHR (16 November 2004).

<sup>778</sup> (1975d), *Ilse Hess v. United Kingdom*, App. No. 6231/73, Decision of 28 May 1975; (2002j), *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba*, Decision of 13 March 2002.

<sup>779</sup> (2005l), *Öcalan v. Turkey*, App. No. 46221/99, Judgment (Grand Chamber) 5 December 2005.

<sup>780</sup> (2002j), *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba*, Decision of 13 March 2002.

<sup>781</sup> Lubell (2010), 220.

<sup>782</sup> UNHRC (2004), § 10 (emphasis added); (1981c), *Sergio Euben López Burgos v. Uruguay*, Comm. No. 12/52, UNHRC (29 July 1981), § 12.2 (emphasis added), in which it held that ‘jurisdiction’ refers “not to the place where the violation occurred, but rather to the *relationship* between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.”

of the Cuban State, although outside their territory, placed the civilian pilots of the “Brothers to the Rescue” organization under their authority.<sup>783</sup>

The civilian pilots were placed under the authority of the MiG-pilots as a mere result of selected and personalized use of lethal force. Following the transcript of the communication between the MiG-pilots and the military control tower, the Cessna’s were locked in their sights, and the order was given to fire, upon which both aircraft were destroyed.

In the more recent case of *Molina*, the IACtHR affirmed its position by accepting that Colombia exercised authority and control over persons during operation ‘Phoenix’, involving the bombardment of a FARC-camp in Ecuador, followed by a ground operation.<sup>784</sup> The test applied appears to be one of ‘cause and effect’, as follows from the case of *Franklin Guillermo Aisalla Molina v. Ecuador* (hereinafter: *Molina*), in which the IACiHR held that

the following is essential [...] in determining jurisdiction: the exercise of authority over persons by agents of a State even if not acting within their territory, without necessarily requiring the existence of a formal, structured and prolonged legal relation in terms of time to raise the responsibility of a State for acts committed by its agents abroad. At the time of examining the scope of the American Convention’s jurisdiction, it is necessary to determine whether there is a *causal nexus* between the extraterritorial conduct of the State and the alleged violation of the rights and freedoms of an individual.<sup>785</sup>

In sum, following the approach of the UNHRC and IACiHR/IACtHR, the counterinsurgent State is prohibited from arbitrary deprivations of life as recognized in the right to life under the ICCPR and ACHR also in targeting operations, irrespective of the situational context of the counterinsurgency.

#### 2.1.1.2.2. ECtHR

To the dismay of various experts,<sup>786</sup> the position of the ECtHR in respect of the extraterritorial applicability of Article 2 ECHR on the basis of SAA can be said to be more case-specific and context-sensitive, and adheres to the rule that “[a] State’s jurisdictional competence under Article 1 is primarily territorial, [...]”<sup>787</sup> and that only in exceptional cases acts of States carried out, or having effects, extraterritorially constitute an exercise of jurisdiction within the meaning of Article 1.<sup>788</sup> Based on the practice of the ECtHR, extraterritorial jurisdiction in respect of the right to life may arise in exceptional circumstances only.

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<sup>783</sup> (1999c), *Armando Alejandro Jr. and Others v. Cuba* (‘Brothers to the Rescue’), Case No. 11.589, IACommHR (29 September 1999), §§ 23 and 25 (emphasis added).

<sup>784</sup> (2010c), *Franklin Guillermo Aisalla Molina v. Ecuador*, Case IP-02, OEA/Ser.L/V/II.140 Doc. 10 (2010), Judgment 21 October 2010 (Admissibility), §§ 78 ff.

<sup>785</sup> (2010c), *Franklin Guillermo Aisalla Molina v. Ecuador*, Case IP-02, OEA/Ser.L/V/II.140 Doc. 10 (2010), Judgment 21 October 2010 (Admissibility)

<sup>786</sup> Lawson (2004), 103-104; Scheinin (2004), 75-77; Ben-Naftali & Shany (2004), 64; Lubell (2010), 223; Salama & Hampson (2005), 22; Roxstrom, Gibney & Einarsen (2005); Loucaides (2006); Hannum (2002), 96-99; (2011c), *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, Judgment of 7 July 2011, *Concurring Opinion of Judge Bonello*.

<sup>787</sup> (2011b), *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, Judgment of 7 July 2011, § 138, referring to (1989d), *Soering v. the United Kingdom*, App. No. 14038/88, Judgment of 7 July 1989, § 86; (2001c), *Bankovic and Others v. Belgium and 16 Other Contracting States*, App. No. 52207/99, Judgment of 12 December 2001, §§ 61 and 67; (2004h), *Ilascu and Others v. Moldova and Russia*, App. No. 48787/99, Judgment of 8 July 2004, § 312.

<sup>788</sup> (2001c), *Bankovic and Others v. Belgium and 16 Other Contracting States*, App. No. 52207/99, Judgment of 12 December 2001, § 67. See also the ECtHR response in § 75 to the applicant’s argument that Article 1 ought to be applied on a ‘cause and effects’-basis, which it rejected as being “[...] tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act

A *first* basis is when a counterinsurgent State, through the *consent, invitation* or *acquiescence* of the government of the territorial State, it exercises *public powers* normally to be exercised by that government. This possibility has been expressly mentioned in *Bankovic*<sup>789</sup> and was reaffirmed in *Al-Skeini*, where the ECtHR explained that “[...] where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State.”<sup>790</sup> When applied to the situational contexts of counterinsurgency, the above could provide a basis for jurisdiction arising in SUPPCOIN and consensual TRANSCOIN, as both take place with the consent, invitation or acquiescence of the territorial State. However, in practice, States are not likely to hand-over public powers to a visiting State. An example is the US-Iraq SOFA,<sup>791</sup> concluded in 2008 to regulate the presence in and the withdrawal of US forces from Iraq. While the SOFA in relation to facilities and areas in use of the US, “Iraq authorizes the United States Forces to exercise within the agreed facilities and areas all rights and powers that may be necessary to establish, use, maintain, and secure such agreed facilities and areas,”<sup>792</sup> outside of such facilities and areas the SOFA strongly suggests an *absence* of permission to exercise effective control or public powers by the US. For example, it stipulates that all US military operations in support of Iraq must be agreed upon, and coordinated with the government of Iraq and its authorities;<sup>793</sup> that such operations must take place with full respect for the Iraqi Constitution and the laws of Iraq and “not *infringe upon the sovereignty* of Iraq and its national interests, as defined by the Government of Iraq;” that Iraq has extensive criminal and civil jurisdiction;<sup>794</sup> and that the detention of arrest by United States forces (except for members of those forces and of the civilian component) requires a prior Iraqi decision.<sup>795</sup> Thus, while in theory it cannot *a priori* be excluded that SAA-jurisdiction on this basis may arise, in practice this is unlikely to occur and appears to be of little further relevance.

A *second* basis was adopted by the ECtHR in the case of *Al-Skeini*, and most closely resembles the position of a counterinsurgent Occupying Power in OCCUPCOIN. It holds that individuals come under the authority and control of a counterinsurgent State when the latter remains present on another State’s territory following the removal from power of a State’s government, *and thereby assumes the exercise of some or all of the public powers normally to be exercised by a sovereign government*, but which it is no longer able to fulfill, such as the authority and

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may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.”

<sup>789</sup> (2001b), *Bankovic and Others v. Belgium and 16 Other Contracting States*, App. No. 52207/99, ECtHR (12 December 2001), § 71.

<sup>790</sup> (2011b), *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, Judgment of 7 July 2011, § 135. See also (1992a), *Drozd and Janousek v. France*, App. No. 12747/87, Judgment of 26 June 1992; (2002c), *Gentilhomme, Schaff-Benbadji and Zerouki v. France*, App. Nos 48205/99, 48207/99, 48209/99, Judgment of 14 May 2002; and (1977b), *X and Y v. Switzerland*, App. No. 7289/75, Decision of 14 July 1977. For more detailed discussion, see Gondek (2009), 147-150.

<sup>791</sup> Unites States of America & Republic of Iraq (2008).

<sup>792</sup> Article 6(2), Unites States of America & Republic of Iraq (2008).

<sup>793</sup> Article 4(1) and 4(3), Unites States of America & Republic of Iraq (2008).

<sup>794</sup> Article 12, Unites States of America & Republic of Iraq (2008).

<sup>795</sup> Article 22, Unites States of America & Republic of Iraq (2008).

responsibility for the maintenance of security in a territory or part thereof.<sup>796</sup> *Al-Skeini* concerned the death of six persons in Basra, Iraq in 2003, five of which resulting from the extracustodial use of force by UK troops. The ECtHR held that

[...] following the removal from power of the Ba’ath regime and until the accession of the Interim Government, the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.<sup>797</sup>

Among the UK’s security tasks were patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations.

*Al-Skeini* is of importance as it implies that counterinsurgent States acting extraterritorially and having a responsibility to exercise *public powers* normally to be exercised by the government of the territorial State exercise jurisdiction in relation to *all* its conduct carried out by its agents, *irrespective of their nature*. In other words, while normally authority and control must be demonstrated in each single case, the public powers-approach entails that, once established, all individuals whose human rights are affected by the conduct of counterinsurgent forces in the exercise of such powers come with the counterinsurgent State’s jurisdiction.

It follows from the above that SAA-jurisdiction on this basis may be of particular relevance to the situation of OCCUPCOIN, but of little relevance to SUPPCOIN and TRANSCOIN, as the counterinsurgent State in those situations does not replace the indigenous government.

A *third* basis for the extraterritorial applicability of IHRL-based valid norms on the basis of SAA is when a State, whilst not exercising public powers, through its agents, uses *forcible measures* that thereby bring the individual under the control of the State.<sup>798</sup> In so far these forcible measures constitutes the use of extra-custodial force (as would be so in the case of targeting), the practice of the ECtHR is very case-specific, and to may be perceived as somewhat capricious.

To begin with, it follows from the *Bankovic*-case that, in the absence of public powers, *collective* and *depersonalized* bombardments on foreign territory do *not* constitute an exercise of authority and control over persons. In other words, the bombardments were not primarily directed at a specific individual or group of individuals, but against objects (*in casu*, the RTS-

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<sup>796</sup> As per the reasoning applied by the ECtHR in (2011b), *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, Judgment of 7 July 2011, § 149.

<sup>797</sup> (2011b), *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, Judgment of 7 July 2011, § 149.

<sup>798</sup> (2005l), *Öcalan v. Turkey*, App. No. 46221/99, Judgment (Grand Chamber) 5 December 2005; (2004j), *Issa v. Turkey*, App. No. 31831/96, Judgment of 16 November 2004; (2007d), *Pad v. Turkey*, App. No. 60167/00, Judgment of 28 June 2007; (2008k), *Solomou v. Turkey*, App. No. 36832/97, Judgment of 24 June 2008; (2010d), *Medvedyev and Others v. France*, App. No. 3394/03, Judgment of 29 March 2010; (2010b), *Al-Saadoon and Mufdhi v. the United Kingdom*, App. No. 61498/08, Judgment of 2 March 2010; (2011b), *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, Judgment of 7 July 2011; (2011a), *Al-Jedda v. United Kingdom*, App. No. 27021/08, Judgment of 7 July 2011.

facilities in Belgrade), as a result of which individuals were secondarily killed.<sup>799</sup> To date, the ECtHR has not had an opportunity to re-examine aerial bombardments in an extraterritorial context.<sup>800</sup> Arguably (since it was not concerned in *Banković* with other forms of use of force but the aerial bombardments) the ECtHR left open the applicability of the SAA-approach in other cases of extracustodial use of force. This may be exemplified by the cases of *Pad v. Turkey*, *Solomou v. Turkey*, and *Andreou v. Turkey*.

*Pad v. Turkey* concerned the alleged killing of individuals resulting from a Turkish helicopter attack against PKK-fighters in Iran. It remained unclear whether the applicants were killed in Turkey or in Iran, and whether they were killed by helicopter fire or after they had been captured. As Turkey claimed that the incident had occurred inside its territory and that the deaths had resulted from the fire discharged from its helicopters, and subsequently admitted to it having jurisdiction, the ECtHR was not required to look into the issue of extraterritorial jurisdiction. Nonetheless, the case is of relevance because the ECtHR concluded that Turkey exercised authority and control over persons based on the mere fact that “the fire discharged from the [Turkish] helicopters had caused the killing of the [applicants].”<sup>801</sup> In view of the fact that it remained factually unclear whether the killings had taken place in Turkey or Iran, it thereby implicitly recognized that the geographic location of the killing is irrelevant; what matters is whether a State has the direct capability to affect an individual’s right. This may also be concluded from the ECtHR’s decision that jurisdiction arises also outside the legal space of the ECHR where individuals “are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully – in the latter State [...]”<sup>802</sup>

The case of *Solomou v. Turkey* concerns the killing of Solomos Solomou who attended the funeral of his cousin Anastassios Isaak, who had been killed days before by Turkish forces. Later that day, he and some others went to the site where Anastassios was killed to demonstrate. Solomou was shot and killed with multiple rounds by Turkish forces when he climbed in a flagpole flying the Turkish flag located on the UN buffer zone. Even though the Turkish soldiers fired their shots from territory under the effective control of Turkey, the effects of their conduct took place in territory not under the control of Turkey. The ECtHR held that Solomou’s death fell within the jurisdiction of Turkey since “the bullets which had hit [him] had been fired by the members of the Turkish-Cypriot forces.”<sup>803</sup> The case is of

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<sup>799</sup> (2001b), *Banković and Others v. Belgium and 16 Other Contracting States*, App. No. 52207/99, ECtHR (12 December 2001), § 73, in reference to (1965), *X v. Federal Republic of Germany*, App. No. 1611/62, Decision of 25 September 1965; (1977c), *X v. UK*, App. No. 7547/76, Decision of 15 December 1977, 74; (1992d), *W.M. v. Denmark*, App. No. 17392/90, Decision of 14 October 1993. In (1975a), *Cyprus v. Turkey* (App. No. 6780/74 and No. 6950/75, 26 May 1975), § 8, the ECtHR extends this to “authorized agents of the State”, to include the armed forces. For almost identical reasoning, see also (1985b), *G. v. the United Kingdom and Ireland*, App. No. 9837/82, Decision of 7 March 1985, § 25.

<sup>800</sup> However, this opportunity may arise since in 2008, Georgia filed an inter-State complaint against Russia concerning the inter-State armed conflict waged on the territory of Georgia, involving Russian armed forces, including its air force. At the time of this writing, the ECtHR has declared the case admissible, but has not dealt with the question of ‘jurisdiction’, which it postponed to the merits phase. See (2012c), *Georgia v. Russia No. 2*, App. No. 38263/08, Judgment of 4 January 2012. In contrast to extraterritorial bombardments, the ECtHR did have an opportunity to examine aerial bombardments in a territorial context, namely in (2005e), *Isayeva v. Russia*, App. No. 57950/00, Judgment of 14 October 2005; (2005f), *Isayeva, Yusupova and Bazayeva v. Russia*, App. No. 57947/00, 57948/00, 57949/00, Judgment of 24 February 2005.

<sup>801</sup> (2007d), *Pad v. Turkey*, App. No. 60167/00, Judgment of 28 June 2007, § 54.

<sup>802</sup> (2007d), *Pad v. Turkey*, App. No. 60167/00, Judgment of 28 June 2007, § 53.

<sup>803</sup> (2008k), *Solomou v. Turkey*, App. No. 36832/97, Judgment of 24 June 2008, § 51. For an analysis, see Zwanenburg (2009), 8.

interest, as it deviates from the ECtHR's ruling in *Bankovic*, by which it had been concluded that jurisdiction does *not* arise regarding the use of force exercised in territory not under effective control.

The case of *Andreou v. Turkey* concerns the shooting and injuring of Ms. Andreou by Turkish forces when they opened fire on the crowd gathered in the UN buffer zone after they had shot Solomou. Ms. Andreou was in Cyprus when she was shot. The ECtHR found jurisdiction to exist on the basis that "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from *close range* [...] was the *direct and immediate* cause of those injuries."<sup>804</sup>

These cases differ from *Bankovic* to the extent that the use of force is not collective and depersonalized, but *selective and individualized use of force*, i.e. it concerns force used against specific or preselected, pre-identified individuals or a group of individuals that form the primary target. Besides the nature of the target itself, the ECtHR also appears to take account of the weapon system as well as the proximity of the weapon to the target.<sup>805</sup> Finally, this case-law illustrates that the ECtHR appears to be prepared to apply a *cause-and-effect* based approach. On the other hand, these cases also demonstrate that SAA-based jurisdiction for selective and personalized extracustodial use of force arises where the State involved exercises control over territory and/or the situation. The question that arises is whether this would also be the case where such control is absent, such as is typically the case in hostilities.

The case-law of the ECtHR, also raises other questions that to date remain unanswered. For example, would the aerial bombardment in *Bankovic* have triggered SAA-based jurisdiction if the targets were not objects, but persons (for example, high-level government personnel)? Does it matter that armed forces make use of indirect fire, such as mortars or artillery, or of unguided 'dumb' bombs instead of precision-guided missiles launched from drones, thereby using technology that enable a high-altitude attack on an individual located at a certain grid? Similarly, does it matter whether an individual is killed with modern sniper equipment, which makes it possible to kill an individual from up to one kilometer, or with a handgun used from closer proximity that is less accurate? Should account be had of the fact that armed forces have available ISTAR-resources that enables it to follow the whereabouts of an individual for days, weeks and even months, or that once an individual is caught in the cross hairs, modern technology enables the shooter to keep him/her there for minutes, perhaps hours, without him knowing it. Does it make a difference that an individual is killed as a result of an operation planned, organized and controlled for that purpose alone, or does SAA-based jurisdiction also arise for deprivations of life resulting from the use of lethal force in a situation of chaotic and intense combat?

In the absence of an explicit and general functional jurisdiction-approach adopted by the UNHRC and the IACiHR, these questions will remain unanswered until the ECtHR is required to answer them when raised in a particular case. As some argue, the ECtHR's approach provides an incentive for States to avoid arrest, capture or detention. It may even be argued that, if there is an absolute intent to kill an individual, the State should opt for a *modus operandi* that does not result in death while in custody.<sup>806</sup> This was also remarked by Judge Bonello, in his concurring opinion to *Al-Skeini*:

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<sup>804</sup> (2009b), *Andreou v. Turkey*, App. No. 45653/99, Judgment of 27 October 2009, §

<sup>805</sup> Frostad (2011), 149.

<sup>806</sup> Lubell (2010), 224. As put by Hannum, in response to *Bankovic*: "[...] simply shooting suspects is apparently immune from scrutiny, so long as you are careful not to arrest them first!" Hannum (2002), 98.

15. Adhering to doctrines other than this may lead in practice to some riotous absurdities in their effects. If two civilian Iraqis are together in a street in Basrah, and a United Kingdom soldier kills the first before arrest and the second after arrest, the first dies desolate, deprived of the comforts of United Kingdom jurisdiction, the second delighted that his life was evicted from his body within the jurisdiction of the United Kingdom. Same United Kingdom soldier, same gun, same ammunition, same patch of street – same inept distinctions. I find these pseudo-differentials spurious and designed to promote a culture of law that perverts, rather than fosters, the cause of human rights justice.<sup>807</sup>

Judge Bonello is one of many experts in support of an outright *cause-and-effect* based approach – or *functional* approach – regarding the question of jurisdiction in terms of Article 1 ECHR in situations of extracustodial use of force, similar to the approach adopted by the UNHRC and IACiHR.<sup>808</sup> This approach follows the ‘*maison de l’escargot*’ theory, put forward by Condorelli, which implies that the relationship between the State and jurisdiction is similar to that between a snail and its scale, i.e. the scale (jurisdiction) follows the snail (the State) wherever it goes.<sup>809</sup> As explained by Hampson and Salama, it

[...] ensures that applicants complaining of the same acts under the same control of the same State agents are treated in the same way, whether the harm occurs within or outside national territory. E.g. *Isiyok v. Turkey*, 22309/93, admissibility decision of 3 April 1995; friendly settlement of 31 October 1997; the alleged violation was the harm that resulted from aerial bombardment. It would seem somewhat strange if whether or not a victim is within the jurisdiction of a State depends on which side of the border the missile falls. It would also ensure that victims of aerial attack would be subject to the same jurisdictional criterion as victims of ground attack. If the test is control of the victim, as opposed to control over the infliction of the alleged violation, ground forces may be found to be in control of the applicant, as in the *Issa* case, [...], but it is difficult to see how airborne forces could be, even when that person is intentionally targeted. The difficulty with the admissibility decision of the ECHR in the case of *Bankovic*, [...], is that it appears to make jurisdiction dependent on the colour of the uniform or on the type of weapon used.<sup>810</sup>

While there is some merit in a functional approach, at the same time it has been argued that the functional approach is too wide. The main opposing argument is that, in terms of mili-

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<sup>807</sup> (2011c), *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, Judgment of 7 July 2011, Concurring Opinion of Judge Bonello.

<sup>808</sup> Lawson (2004), 103-104 (“direct and immediate link between the extraterritorial conduct of a state and the alleged violation of an individual’s rights”); Scheinin (2004), 75-77 (applying a test of “facticity determines normativity”); Ben-Naftali & Shany (2004), 64 (proposing a “conduct oriented approach”); Lubell (2010), 223 (“[...] the appropriate test for circumstances of this kind is the exercise of authority or control over the individual in such a way that the individual’s rights are in the hands of the state. If state agents, even if acting from a distance, are able to carry out their plan to target individuals with intent to take life, this might amount to a form of authority or control over the life of the individual”); (2011c), *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, Judgment of 7 July 2011, Concurring Opinion of Judge Bonello. (“16. In my view, the one honest test, in all circumstances (including extra-territoriality), is the following: did it depend on the agents of the State whether the alleged violation would be committed or would not be committed? Was it within the power of the State to punish the perpetrators and to compensate the victims? If the answer is yes, self-evidently the facts fall squarely within the jurisdiction of the State. All the rest seems to me clumsy, self-serving alibi hunting, unworthy of any State that has grandiosely undertaken to secure the “universal” observance of human rights whenever and wherever it is within its power to secure them, and, may I add, of courts whose only *raison d’être* should be to ensure that those obligations are not avoided or evaded. The Court has, in the present judgment, thankfully placed a sanitary cordon between itself and some of these approaches”).

<sup>809</sup> Condorelli (2005), 95; Condorelli (2010), 32-33. See also Andenas & Bjorge (2012), 492.

<sup>810</sup> Salama & Hampson (2005), 22, footnote 94 (on 37-38); Scheinin (2004), 77-78. (2011c), *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, Judgment of 7 July 2011, Concurring Opinion of Judge Bonello.

tary operations, it appears not to differentiate between preplanned and *ad hoc* extracustodial use of force. However, “considerations of fairness and expediency require that States should not bear responsibility for indirect or unforeseen consequences of their actions in areas outside their control.”<sup>811</sup> Thus, while a chaotic combat situation following an ambush is not likely to meet the test of authority and control, preplanned operations could. As argued by Ruys and Verhoeven:

[i]t is hard to see how civilians, killed in the midst of hostilities, would be under the authority and control of the state involved. It could be argued that this requires some degree of stability; some control over the circumstances in which the killings took place. If the killing would be the result of a pre-planned operation, and/or would not be connected to a context of ongoing hostilities, there may indeed be room for accepting the exercise of jurisdiction. An even stronger case could be made when the extra territorial killing results from a pre-planned operation carried out with the consent or support of the host state, as was the case with the 2002 U.S. Predator strike against Al Qaeda suspects in Yemen.<sup>812</sup>

Arguably, little if no support for a general functional approach by the ECtHR is to be expected from States. Perhaps States would be more inclined to give up their defense if they could trust the ECtHR to examine the alleged violation of the right to life in light of the context at hand and on the basis of the relevant law, particularly in situations where the use of force was applied in the domain of hostilities during an armed conflict. While the case-law of the ECtHR reflects the ECtHR’s sensitivity to the level of the threat, the ECtHR so far has examined the right to life in the context of hostilities by reference to the requirements imposed by IHRL alone, and not by explicit application of the law of hostilities under LOAC.<sup>813</sup> In other words, while the first line of defense for States to evade international responsibility for conventional human rights violations lies in the jurisdiction-issue, the greater problem is the ECtHR’s approach to examine instances of hostilities-based use of force. Admittedly, States themselves have contributed to this development by not acknowledging the existence of an armed conflict on their territories, thus barring the ECtHR from resorting to LOAC in the interpretation of the right to life.

It is recalled that the ECtHR’s case law is very case-specific and context-sensitive, and that future pronouncements on the issue of extraterritorial jurisdiction in respect of extracustodial uses of force fully depend on the merits of the case. At the time of this writing, two cases are pending before the ECtHR that may further close the gaps so far left by the ECtHR. The first case concerns the inter-State complaint by Georgia against Russia regarding the inter-State armed conflict between both States involving ground, air and naval forces.<sup>814</sup> A second case concerns *Jaloud v. the Netherlands*, concerning the alleged killing of Jaloud by Netherlands armed forces at a vehicle checkpoint of Iraqi security forces in Iraq in 2004.<sup>815</sup>

In sum, while a functional approach may be preferred, the practice of the ECtHR in respect of extra-custodial use of force to date demonstrates that it *cannot be excluded* that SAA-based jurisdiction is generated by the selected and personalized use of lethal means of combat

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<sup>811</sup> Ben-Naftali & Shany (2004), 64. Also: Lubell (2010), 227; Ruys & Verhoeven (2008), 178; Salama & Hampson (2005), § 92.

<sup>812</sup> Ruys & Verhoeven (2008), 178. Similarly: Lubell (2010), 227.

<sup>813</sup> See the string of cases concerning the conflicts between Turkey and the PKK (e.g. (1997h), *Ergi v. Turkey*, App. No. 23818/94, Decision of 20 May 1997 as well as those arising from the conflict between Russia and rebels in Chechnya (e.g. (2005e), *Isayeva v. Russia*, App. No. 57950/00, Judgment of 14 October 2005.

<sup>814</sup> (2012c), *Georgia v. Russia No. 2*, App. No. 38263/08, Judgment of 4 January 2012.

<sup>815</sup> (2012d), *Jaloud v. the Netherlands*, App. No. 47708/08, Pending.

power, which is precisely the type of lethal force that the concept of targeting covers. However, this practice concerned situations where the State exercised control over territory or the situation. Whether the right to life applies extraterritorially in hostilities, where such control is absent, remains unclear, but in analogy to the functional approach adopted by the ICCPR and ACHR, the assumption here is that it does.

To date, the ECtHR has not accepted SAA-jurisdiction in respect of collective and depersonalized aerial bombardments, i.e. the targeting of objects whereby persons are killed or injured as collateral damage. However, given the concept of targeting, this ruling has no further merit to our examinations.

### 2.1.2. ECA

A first approach detectable from the practice of the ECtHR and the ICJ concerns ECA. Principally, a State exercises its power over individuals *within its own territory*. Thus, all individuals present on the territory of that State are presumed to find themselves within the jurisdiction of that State, in so far it exercises effective overall control over its territory, and irrespective of the nature of the State conduct or omissions.<sup>816</sup> As the ECtHR held in *Ilascu*, this presumption “may be limited,” *not invalidated*,<sup>817</sup> “in exceptional circumstances, particularly where a State is *prevented* from exercising its authority in part of its territory,” for example following foreign military occupation, acts of war or rebellion, or the acts of a foreign State supporting a separatist movement.<sup>818</sup> This is of particular relevance for situations of NATCOIN, where parts of the counterinsurgent State’s territory are in the hand of the insurgency (for example in the case of Colombia, where considerable parts of its territory are under the control of the FARC. In those instances “such a factual situation *reduces* the scope of the jurisdiction to the degree that it may no longer be possible to comply with its negative obligations under the ECHR.” Nonetheless, a State still has “positive obligations to take appropriate steps to ensure respect for those rights and freedoms within its territory [...]” and that “[t]hose obligations remain even where the exercise of the State’s authority is limited in part of its territory, so that it has a duty to take all the appropriate measures which it is still within its power to take.”<sup>819</sup>

In *extraterritorial* situations, effective control over an area arises

when as a consequence of military action – *whether lawful or unlawful* – [a State] *exercises effective control of an area* outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.<sup>820</sup>

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<sup>816</sup> (2004h), *Ilascu and Others v. Moldova and Russia*, App. No. 48787/99, Judgment of 8 July 2004, § 312.

<sup>817</sup> Gondek (2009), 188.

<sup>818</sup> (2004h), *Ilascu and Others v. Moldova and Russia*, App. No. 48787/99, Judgment of 8 July 2004, § 312, in reference to (2001b), *Banković and Others v. Belgium and 16 Other Contracting States*, App. No. 52207/99, ECtHR (12 December 2001), § 59.

<sup>819</sup> (2004h), *Ilascu and Others v. Moldova and Russia*, App. No. 48787/99, Judgment of 8 July 2004, § 313. In casu, this implied that “Moldova still has a positive obligation to take the diplomatic, economic, judicial or other measures that it is in the power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.” See § 331

<sup>820</sup> (1995e), *Loizidou v. Turkey (Preliminary Objections)*, App. No. 40/1993/435/514, Judgment of 23 March 1995 (emphasis added). See also (2001d), *Cyprus v. Turkey*, App. No. 25781/94, Judgment of 10 May 2001, § 76; (1996h), *Loizidou v. Turkey (Merits)*, App. No. 40/1993/435/514, Judgment of 18 December 1996, § 52; (2001c), *Banković and Others v. Belgium and 16 Other Contracting States*, App. No. 52207/99, Judgment of 12 December 2001, § 70; (2004h), *Ilascu and Others v. Moldova and Russia*, App. No. 48787/99, Judgment of 8 July

In the case of ECA, “the controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified.”<sup>821</sup> In other words, when it is established that a counterinsurgent State exercises effective control over an area, it is bound to comply with the requirements inherent to the obligation to respect the right to life in the application of combat power against insurgents.

As previously established, ECA may arise in four situations, and the question before us now is to establish whether ECA is likely to exist in the situations of OCCUPCOIN, SUPPCOIN and TRANSCOIN.

*Firstly*, ECA-based jurisdiction may be established in situations of *prolonged military occupation*, whereby the Occupying Power exercises public powers normally to be exercised by the government of the occupied State (e.g. Turkey’s occupation of Northern-Cyprus; Israel’s occupation of the Occupied Palestinian Territories; Uganda’s occupation of Itari, DRC; the US occupation of Grenada).<sup>822</sup> In other words, deprivations of life resulting from OCCUPCOIN trigger jurisdiction and thus the applicability of the right to life.

It is not necessary to determine whether an occupying State Party *exercises detailed control* over the policies and actions of the subordinate local administration. Generally, *effective overall control* is sufficient, implying that the local administration survives as a result of the Contracting State’s military and other support.<sup>823</sup> Whether ECA arises is a question of fact, which must be established on a case-by-case basis. It is submitted that two parameters can be derived from the practice of the ECtHR, to determine when control over territory is effec-

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2004, §§ 314-316; (2011b), *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, Judgment of 7 July 2011, § 138.

<sup>821</sup> (2011b), *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, Judgment of 7 July 2011, § 138, confirming (2001d), *Cyprus v. Turkey*, App. No. 25781/94, Judgment of 10 May 2001, §§ 76-77.

<sup>822</sup> (1995e), *Loizidou v. Turkey (Preliminary Objections)*, App. No. 40/1993/435/514, Judgment of 23 March 1995, § 62; (2001d), *Cyprus v. Turkey*, App. No. 25781/94, Judgment of 10 May 2001; confirmed in (2001b), *Banković and Others v. Belgium and 16 Other Contracting States*, App. No. 52207/99, ECtHR (12 December 2001), § 71; (1999a), *Coard and Others v. the United States (US Military Intervention in Grenada)*, Case No. 10.951, Decision of 29 September 1999, § 37; (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, §§ 111 and 113; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment of 19 December 2005, § 216. In the latter case, after having established the thresholds for determining that Ugandan forces occupied the Ituri region in the sense of Article 42 of the Hague Regulations, the ICJ held that an Occupying Power is “[...] under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants occupied territory against acts of violence, and not to tolerate such violence by any third party” (§ 178 (emphasis added)). However, as argued by Ruys and Verhoeven, the threshold established by the ICJ in *DRC v. Congo* is “open to questioning.” Ruys & Verhoeven (2008), 195. The ICJ’s ruling that “international human rights instruments are applicable “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory,” particularly in occupied territories” arguably indicates that jurisdiction also arises in situations other than occupation, as argued by Melzer (2008), 134. Also: Gondek (2009), 210.

<sup>823</sup> The rationale for the ‘effective control over territory’ approach lies in the fact that it can be applied to situations taking place within a prolonged period of time, such as a military occupation, as long as it can be established that during that time-frame the State exercised control over the territory in which the violation allegedly took place. As such, it lowers the threshold for establishing ‘jurisdiction’ in contrast to the test of authority and control over persons, which can only be applied to extraordinary and distinct circumstances in which the direct involvement of State agents can be established.

tive. A *first* parameter is the degree to which a local administration under control is dependent on the military, economic and political support provided by a State.<sup>824</sup> A *second* parameter is the *strength of the State's military presence in the area*.<sup>825</sup> Indicators are the number of troops, the duration of the presence, the geographical dispersion of the troops and their nature of their activities, but these must be assessed in a case-by-case situation. Thus, in *Loizidou*, the ECtHR held that the presence of 30,000 troops is sufficient to establish effective overall control.<sup>826</sup>

The requirement of effective control over territory in the doctrine of ECA coincides with the similar requirement under Article 42 HIVR, in which effective control functions as the threshold based upon which a State can be regarded as Occupying Power.<sup>827</sup> The question thus arises whether the mere fact that a State exercises effective control over a territory such that it is to be regarded an Occupying Power for the purposes of LOAC automatically implies that that State exercises jurisdiction over all individuals present in the occupied territory for the purposes of the applicability of IHRL. While opinions to this matter differ,<sup>828</sup> the majority view appears to be that the thresholds of effective control in both the law of belligerent occupation and IHRL are similar, although not necessarily identical.<sup>829</sup> Campenalli, for example, argues that while there are situations other than military occupation in which a State exercises effective control over territory,

[...], the reverse is not true: a situation of military occupation without effective control of the occupied territory is inconceivable, since military occupation is by definition a *de facto* situation characterized by effective control of the occupying power over the occupied territory. [...] As a result, admitting the existence of a military occupation is tantamount to admitting a degree of territorial control by the occupant, which, by virtue of the definition of military occupation, satisfies the conditions of Article 1 of the ECHR. To rule out the United Kingdom's responsibility for human rights violations suffered by certain of the said Iraqi civilians on the grounds that the British army did not have effective control of Basrah City, while ad-

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<sup>824</sup> (1997k), *Loizidou v. Turkey (Merits)*, ECtHR (18 December 1996), §§ 16 and 56; (2004g), *Ilascu and Others v. Moldova and Russia*, App. No. 48787/99, ECtHR (8 July 2004), § 387.

<sup>825</sup> (2011b), *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, Judgment of 7 July 2011, § 139, referring to (1997k), *Loizidou v. Turkey (Merits)*, ECtHR (18 December 1996), § 56. See also (2004i), *Issa v. Turkey*, App. No. 31831/96, ECtHR (16 November 2004), § 315; (2004g), *Ilascu and Others v. Moldova and Russia*, App. No. 48787/99, ECtHR (8 July 2004), § 387.

<sup>826</sup> (1997k), *Loizidou v. Turkey (Merits)*, ECtHR (18 December 1996), § 56.

<sup>827</sup> For a detailed discussion of Article 42 HIVR, see chapter III below.

<sup>828</sup> See, for example, Lord Justices Brooke and Brown, who in relation to the UK's presence as Occupying Power's in Iraq held that "[...] it is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and [GC IV], was in effective control of Basrah City for the purposes of the ECHR jurisprudence at the material time. If it had been, it would have been obliged, pursuant to the *Bankovic* judgment, to secure to everyone in Basrah City the rights and freedoms guaranteed by the ECHR. One only has to state that proposition to see how utterly unreal it is. The UK possessed no executive, legislative or judicial authority in Basrah City, other than the limited authority given to its military forces [...]. It could not be equated with a civil power: it was simply there to maintain security, and to support the civil administration in Iraq in a number of different ways[...]. It would indeed have been contrary to the Coalition's policy to maintain a much more substantial military force in Basrah City when its over-arching policy was to encourage the Iraqis to govern themselves." See (2007e), R (*on the application of Al-Skeini and others*) v Secretary of State for Defence, [2007] UKHL 26, [2008] AC 153, §§ 124-125.

<sup>829</sup> <http://www.diakonia.se/sa/node/asp?node=852>.

mitting at the same time that Britain was the occupying power of this city, is thus contradictory from the point of view of the law of military occupation.<sup>830</sup>

An additional question, related to the above, is triggered by *Al-Skeini* and involves the issue of whether a belligerent occupation implies the exercise of public powers by the Occupying Power.<sup>831</sup> It is submitted that this question must be answered in the affirmative. While a belligerent occupation does not affect the sovereignty of the occupied State,<sup>832</sup> the Occupying Power acquires possession of the occupied territory with jurisdictional rights – within the constraints imposed by LOAC – to prescribe, adjudicate and to enforce.<sup>833</sup> In addition, it is bound by the obligation of Article 43, 1907 Hague Regulations, which imposes on the Occupying Power the responsibility to “take all the *measures in his power to restore, and ensure, as far as possible, public order and safety*, while respecting, unless absolutely prevented, the laws in force in the country.” These responsibilities amount to the exercise of public powers, regardless of whether the Occupying Power in fact complies with the duties ensuing from them.<sup>834</sup> As remarked by Dinstein, Article 43 contains an obligation of conduct, not of result: “[t]he Occupying Power must pursue the goal prescribed, yet nobody can cavil if the measures taken will not be crowned with success.”<sup>835</sup>

In sum, it may be concluded that, normally, the mere fact that a counterinsurgent State occupies foreign territory implies the existence of ECA, and the State is bound to guarantee all the rights and freedoms in the treaty to which it is party to all those residing within the occupied territory.

*Secondly*, ECA-based jurisdiction arises when a State A is present on the territory of another State B upon the latter’s *invitation, or with its consent or acquiescence, and State A exercises public powers normally to be exercised by the government* of State B.<sup>836</sup> Thus, arguably ECA-based jurisdiction could arise in the cases of SUPPCOIN and consensual TRANSCOIN. However, the mere invitation, consent or acquiescence by the host State to permit the *presence* of the State on its territory itself is not sufficient to conclude the latter’s *effective control* over the former’s territory. As required by *Bankovic*, the effective control must involve the exercise of *public powers* by the State normally to be exercised by the host State. This suggests that the ‘granting’ of exercise of public powers must be a specific condition of the consent. As previously noted, it is unlikely that a State is prepared to permit the counterinsurgent State to exercise public powers, unless the government itself is absent or unable/unwilling to take up this responsibility. An example is the presence of ISAF in Afghanistan (which constitutes a SUPPCOIN). According to the MTA between NATO and Afghanistan signed in 2002, “the Mission of the ISAF is to *assist* it in the maintenance of the security in the area of responsibility [...]” and the Afghan Interim Administration bore the primary responsibility for the provision of security and law and order.<sup>837</sup> The relevant UNSC resolutions to date do not

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<sup>830</sup> Campenalli (2008), 665. See also <http://www.diakonia.se/sa/node/asp?node=852>; Ruys & Verhoeven (2008), 179 (emphasis added), arguing that “the criteria for applicability of the laws of occupation and international human rights law to occupied territory seem to be *largely* analogous.”

<sup>831</sup> While the public powers-element was used in relation to the personal approach, it has equal bearing on the territorial approach.

<sup>832</sup> Dinstein (2009c), 49.

<sup>833</sup> Dinstein (2009c), 46.

<sup>834</sup> Campenalli (2008), 664.

<sup>835</sup> Dinstein (2009c), 92.

<sup>836</sup> (2001b), *Bankovic and Others v. Belgium and 16 Other Contracting States*, App. No. 52207/99, ECtHR (12 December 2001), § 71.

<sup>837</sup> NATO (2002), Articles IV(1) and III(1).

offer a basis to assume that the States operating under ISAF exercise effective control over the territory of Afghanistan. While ISAF's mandate has geographically expanded to the entire territory of Afghanistan, the mandate is limited to the execution of particular tasks in support of the Afghan government, which itself has full responsibility over legislative, executive and judicial powers in Afghanistan.

In sum, ECA-based jurisdiction on this basis is unlikely to take place and of no further relevance for counterinsurgency operations.

*Thirdly*, jurisdiction may arise in situations where a State exercises *temporary control over (a part of) another State's territory* (e.g. Turkey's military operations against the PKK in Iraq in the mid-'90s) without that State's consent.<sup>838</sup> Such temporary control is of no relevance to SUPPCOIN and OCCUPCOIN. Whether ECA-based jurisdiction on this basis arises in TRANSCOIN is doubtful. The threshold for establishing jurisdiction on this basis appears to be rather high. In order for temporary control to arise, as with military occupation, it is necessary to establish the presence of armed forces of the State deploying the military action on the foreign territory, and on the other, that the said forces assume some, or the totality of, the public powers that would normally fall under the prerogatives of the State where the military operation is undertaken, totally or partially displacing the authorities of the local Government. Thus, in the TRANSCOIN-case of *Molina*, in which Colombia deployed a very small number of troops – “landing helicopter-borne troops to be joined by 18 men of the Colombian Police's Jungle Commando unit, 20 Army Special Forces soldiers and 8 Navy specialists”<sup>839</sup> – in a raid carried out against a FARC-leader by Colombian air and ground forces in Ecuador, the latter argued that “[...] that the State of Colombia took control of areas in the territory of Ecuador during a military operation extending from midnight until 11:00 a.m. on March 1, 2008.”<sup>840</sup> However, if the ECtHR were to have examined the case, it is unlikely that it would have concluded that Colombia exercised temporary effective control over the relevant part of Ecuador's territory.<sup>841</sup> To the ECtHR, even large numbers of troops are not necessarily sufficient to establish jurisdiction, as is exemplified by the case of *Issa*. In determining whether Turkey exercised effective control over northern Iraq, the ECtHR compared the figures of Turkey's operations in Iraq with Turkey's occupation in northern Cyprus. The Turkish operations in Iraq involved in excess of 35,000 troops accompanied by tanks, armoured vehicles, aircraft and helicopters, and lasted six weeks between 19 March and 2 May 1995, in which period Turkish troops infiltrated 40-50 kilometers southwards into Iraq and 385 kilometers to the east.<sup>842</sup> However, the ECtHR held that

[...], notwithstanding the large number of troops involved in the aforementioned military operations, it does not appear that Turkey exercised effective overall control of the entire area of northern Iraq. This situation is therefore in contrast to the one which obtained in

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<sup>838</sup> (2004i), *Issa v. Turkey*, App. No. 31831/96, Judgment of 16 November 2004. In this case, regarding large-scale military operations by Turkish forces in Northern Iraq, the ECtHR held that Turkey, had the applicants established “the required standard of proof” (§ 84), would have exercised *de facto* temporary control over such territory (§ 74).

<sup>839</sup> (2010c), *Franklin Guillermo Aisalla Molina v. Ecuador*, Case IP-02, OEA/Ser.L/V/II.140 Doc. 10 (2010), Judgment 21 October 2010 (Admissibility), § 33.

<sup>840</sup> (2010c), *Franklin Guillermo Aisalla Molina v. Ecuador*, Case IP-02, OEA/Ser.L/V/II.140 Doc. 10 (2010), Judgment 21 October 2010 (Admissibility), § 78.

<sup>841</sup> This also appears to have been the conclusion of the IACiHR, as it fully relies on the personal approach to establish jurisdiction.

<sup>842</sup> (2004i), *Issa v. Turkey*, App. No. 31831/96, ECtHR (16 November 2004), § 45 and § 63. Turkey denied that it carried out operations in the area where the killings occurred.

northern Cyprus in the *Loizidou v. Turkey* and *Cyprus v. Turkey* cases [...]. In the latter cases, the Court found that the respondent Government's armed forces totalled more than 30,000 personnel (which is, admittedly, no less than the number alleged by the applicants in the instant case – see § 63 above – but with the difference that the troops in northern Cyprus were present over a very much longer period of time) and were stationed throughout the whole of the territory of northern Cyprus. Moreover, that area was constantly patrolled and had check points on all main lines of communication between the northern and southern parts of the island.<sup>843</sup>

In sum, while it cannot be excluded, it is unlikely that TRANSCOIN-operations trigger ECA-based jurisdiction following which a counterinsurgent State is bound to comply with the requirements inherent to the obligation to respect the right to life in the exercise of combat power against insurgents. Overall, therefore, ECA-jurisdiction on this basis is of no practical relevance for extraterritorial counterinsurgency operations.

### 2.1.3. Overview

Following the above, the following overview can be drawn in respect of the extraterritorial applicability of the valid norms pertaining to the targeting and operational detention of insurgents in the context of OCCUPCOIN, SUPPCOIN and TRANSCOIN.

- a. Operational detention: counterinsurgent States continue to be bound by the obligations arising from the valid normative framework under IHRL in all counterinsurgency operations.
- b. Targeting:
  - ECA-based jurisdiction arises only in the situation of OCCUPCOIN in view of the presumption that the counterinsurgent State is an Occupying Power and as such exercises effective control over the occupied territory;
  - SAA-based jurisdiction arises in OCCUPCOIN, SUPPCOIN or TRANSCOIN in respect of counterinsurgent States party to the ICCPR or ACHR;
  - SAA-based jurisdiction for counterinsurgent States party to the ECHR arises:
    - (1) in the case of OCCUPCOIN as the counterinsurgent State exercises some or all public powers normally to be exercised by the government of the State in which it carries out its operations;
    - (2) relative to all types of extraterritorial counterinsurgency operations: *possibly* in situations of selected and individualized extracustodial use of force (even though this is not clear whether SAA-jurisdiction arises in every event of selected and individualized extracustodial use of force).

In sum, this overview shows that counterinsurgent States are likely to be bound by valid norms of IHRL in extraterritorial targeting and operational detention operations, even though this is somewhat less clear in relation to targeting operations carried out by States party to the ECHR and not exercising control over territory.

In other words, in terms of interplay potential, these valid norms are likely to interrelate with simultaneously valid norms of LOAC. However, it also needs to be established whether the potential for interplay is affected by the possibility to derogate. This will be examined in the next paragraph.

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<sup>843</sup> (2004i), *Issa v. Turkey*, App. No. 31831/96, ECtHR (16 November 2004), § 75.

## 2.2. Derogation

As noted, States have the possibility to derogate from human rights in the event of public emergencies that threaten the life of the nation. Such derogations suspend the applicability of valid norms. Below follows an examination of the possibility to derogate from the right to life, pertaining to targeting, and the valid norms of IHRL governing operational detention. Also, the extraterritorial applicability of the derogation clauses will be briefly examined.

### 2.2.1. Targeting

The study has previously explored the requirements that determine the lawfulness of an act of derogation if permissible under IHRL. The purpose of this paragraph is to examine the concept of derogation vis-à-vis the deprivation of life, with a particular focus on armed conflict. Given the notable difference in the texts of the derogation clauses set forth in Article 4 ICCPR and Article 27 ACHR on the one hand, and Article 15 ECHR on the other hand, the latter will be addressed separately.

#### 2.2.1.1. ICCPR and ACHR

Article 4(1) ICCPR permits States to derogate from human rights protected under the ICCPR in times of emergency threatening the life of the nation, to include armed conflicts. However, Article 4(2) ICCPR categorically prohibits the derogation from the right to life *under any circumstances*, to include situations of emergency threatening the life of the nation such as armed conflict.<sup>844</sup>

Similarly, Article 27(2) ACHR prohibits *any* derogation from the right to life.

While subject to more detailed examination in Part C.1., it is submitted that the prohibition to derogate from the right to life during armed conflicts does not imply that deprivations of life during armed conflict are by definition unlawful. It is recalled that the prohibition under Articles 6(1) ICCPR and 4(1) ACHR does not extend to *any* deprivation of life, but is limited to the *arbitrary* deprivation of life as protected. This observation is of particular relevance in the context of armed conflict, for, as we will see, a deprivation of life in armed conflict is non-arbitrary when resulting from conduct lawful under LOAC. In other words, the prohibition of derogation from the right to life in times of armed conflict does not result in a prohibition for the State to resort to LOAC, or to put it otherwise: the applicability and actual application of LOAC is not subject to the possibility of and actual act of derogation. It merely implies that the State is prohibited from adjusting its legal relationship in terms of human rights with its population.<sup>845</sup>

In sum, therefore, it suffices to conclude that since derogation from the right to life is prohibited, the right to life always applies in armed conflict, and that a State is bound to conform to the requirements determining the arbitrariness of a deprivation of life in such circumstances.

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<sup>844</sup> (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion of 9 July 2004*, § 216; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, *Judgment of 19 December 2005*, § 216; Buergenthal (1981), 83; Rowe (2006), 4.

<sup>845</sup> Kretzmer (2009), 8.

### 2.2.1.2. ECHR

While Article 15(1) ECHR permits derogation from most of the obligations in ECHR “[i]n time of war or other public emergency threatening the life of the nation,” Article 15(2) ECHR specifically prohibits derogation from Article 2 ECHR (right to life). Nonetheless (and in contrast to the ICCPR and the ACHR), Article 15(2) ECHR stipulates that derogation from Article 2 ECHR extends to all deprivations of life, “except in respect of deaths resulting from *lawful acts of war*.” This implies that, in principle, the right to life may be derogated from (1) in situations of armed conflict and (2) to the extent permissible under LOAC. In addition, the phrase ‘lawful acts of war’ suggests that the derogation is only permissible in respect of measures carried out in the conduct of hostilities, and not law enforcement.<sup>846</sup>

Both ‘war’ in Article 15(1) ECHR and ‘lawful acts of war’ in Article 15(2) ECHR remain terms surrounded by certain ambiguity. This ambiguity concerns two issues: (1) whether Article 15 ECHR accommodates both IAC and NIAC; (2) whether Article 15 ECHR permits automatic derogation from the right to life in armed conflicts, or whether it requires a formal derogation.

Problematic is that neither term is further defined in the ECHR. Nor were they subject of discussion in the preparatory work to Article 15 ECHR.<sup>847</sup> It also follows that the practice of the ECtHR is, in this respect, not very helpful. Notwithstanding the fact that a considerable number of cases declared admissible by the ECtHR concerned deprivations of life arising from situations qualifiable as IAC or NIACs, States have rarely notified armed conflict-related derogations and have in no case explicitly derogated from the right to life.<sup>848</sup> Thus, the UK did not derogate from the right to life in the Falkland-war. Similarly, Turkey has not derogated from the right to life in relation to its occupation of Northern-Cyprus. Also, no European State partaking in the invasion and subsequent occupation of Iraq in 2003 has derogated. Likewise, no European State engaged in the NATO air-campaign over Libya in 2011 has issued a notification of derogation. Similarly, none of the States engaged in NIACs have derogated. Thus, the UK never derogated from the right to life in respect of the conflict in Northern Ireland<sup>849</sup> and neither did Turkey (concerning the PKK);<sup>850</sup> and Russia (concerning rebels in Chechnya).<sup>851</sup>

Arguably, a central motive for States not to derogate from the right to life in NIAC is that it would be tantamount to admitting to the existence of a NIAC, which States are hesitant to do. Such acknowledgment is often feared to imply an acknowledgment of the rebel or insurgent group as belligerents with commensurate rights and privileges that governments are

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<sup>846</sup> Melzer (2008), 122.

<sup>847</sup> Council of Europe (1956).

<sup>848</sup> Admittedly, a notification of derogation from human rights under the ECHR does not have to contain a specific enumeration of the rights from which is being derogated. However, it must demonstrate the existence of an armed conflict, which in itself suggests the likelihood of infringements on the right to life.

<sup>849</sup> On the existence of a NIAC in the UK, see Haines (2012).

<sup>850</sup> (1998f), *Ergi v. Turkey*, App. No. 66/1997/850/1057, Judgment of 28 July 1998; (2004n), *Özkan v. Turkey*, App. No. 21689/93, Judgment of April 6, 2004.

<sup>851</sup> (2005e), *Isayeva v. Russia*, App. No. 57950/00, Judgment of 14 October 2005; (2005f), *Isayeva, Yusupova and Bazayeva v. Russia*, App. No. 57947/00, 57948/00, 57949/00, Judgment of 24 February 2005; (2008g), *Khat-siyeva et al. v. Russia*, App. No. 5108/02, Judgment of 17 January 2008; (2011d), *Esmukhambetov et al. v. Russia*, App. No. 23445/03, Judgment of 29 March 2011; (2011f), *Kerimova and others v. Russia*, App. Nos. 7170/04, 20792/04, 22448/04, 23360/04, 5681/05, 5684/05, Judgment of 3 May 2011; (2011g), *Khamzayev et al. v. Russia*, App. No. 1503/02, Judgment of 3 May 2011.

not willing to concede to armed groups undermining their authority. It may be observed also that, to date, none of the European States participating in the ISAF-mission in Afghanistan has derogated from the right to life. Overall, it may be assumed that, generally, States find it unnecessary to derogate when using force in hostilities or they reject the extraterritorial applicability of Article 15 ECHR.

As a result of the absence of derogations, the ECtHR has not had an opportunity or deemed it necessary to clarify the meaning of ‘war’ and ‘lawful acts of war’ in Article 15 ECHR as the governments in question had not derogated from Article 2 ECHR.<sup>852</sup>

In the absence of other guidance, below follows an examination of the two main issues introduced earlier.

#### 2.2.1.2.1. Article 15 ECHR: IAC *and* NIAC?

As noted, it remains unclear whether Article 15 ECHR accommodates both IAC and NIAC. Several interpretations are possible:

- Option 1: ‘war’ in Article 15(1) and (2) ECHR only refers to IAC, and Article 15 ECHR does not otherwise accommodate NIAC.
- Option 2: ‘war’ in Article 15(1) ECHR covers both IAC and NIAC. The phrase ‘lawful acts of war’ only refers to conduct lawful under the law of IAC.
- Option 3: ‘war’ in Article 15(1) ECHR only refers to IAC and the term ‘other public emergency’ in Article 15(1) ECHR accommodates NIAC. The phrase “lawful acts of war” in Article 15(2) ECHR refers to conduct lawful under the law of in IAC only.
- Option 4: ‘war’ in Article 15(1) and (2) ECHR refers to both IAC and NIAC.
- Option 5: ‘war’ in Article 15(1) ECHR only refers to IAC and term ‘other public emergency’ accommodates NIACs. The phrase ‘lawful acts of war’ also includes acts in NIAC.

##### 2.2.1.2.1.1. ‘War’ in Article 15(1) ECHR

In relation to the ECHR, the term “war” itself refers to *war de iure*, i.e. proclaimed war, as well as *de facto*, i.e. an armed conflict as understood in LOAC. While it is generally accepted that “war” includes IAC,<sup>853</sup> there is ongoing debate as to whether it also includes NIAC.<sup>854</sup> As some experts argue, “NIAC was never referred to as “war” when the Convention was drafted.”<sup>855</sup> However, it is submitted that such conclusion cannot be readily drawn from the preparatory work to Article 15 ECHR, as it simply does not explain what was meant with ‘war’.<sup>856</sup> In the absence of any other guidance, it cannot therefore be excluded that ‘war’ also refers to NIAC.

However, in so far it concerns the interpretation of the term ‘war’ in Article 15(1) ECHR, this question has – rightly so – been regarded as irrelevant. The concept of “public emergency” is to be interpreted broadly and besides rebellion or insurgency, revolution, conspir-

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<sup>852</sup> Loof (2005), 488.

<sup>853</sup> Melzer (2008), 122; University Centre for International Humanitarian Law (2005), 13; Ergec (1987), 125-128.

<sup>854</sup> University Centre for International Humanitarian Law (2005), 13: “A number of experts doubted whether this derogation possibility under the [ECHR] was ever meant to encompass the situation of NIAC, especially as NIAC was never referred to as “war” when the Convention was drafted.”

<sup>855</sup> University Centre for International Humanitarian Law (2005), 13.

<sup>856</sup> Council of Europe (1956).

acy or *coup d'état*, disruption of the economy, dangers to the food supply, and severe natural disasters also includes war.<sup>857</sup>

This conclusion immediately disqualifies *option 1* as a viable interpretation of the *lex lata*, for if there is no room for NIAC in Article 15 ECHR at all this would imply that derogations of human rights other than the right to life in the context of NIAC are not possible under the ECHR at all, which is not the case.

#### 2.2.1.2.1.2. 'Lawful Acts of War' in Article 15(2) ECHR

As it is unlikely that NIACs are fully excluded from the scope of Article 15(1) ECHR, the question of whether Article 15 ECHR accommodates derogations from Article 2 ECHR in NIAC then appears to hinge on the interpretation of the phrase "lawful acts of war" under Article 15(2) ECHR. In *options 2* and *3*, derogation from human rights would be possible as NIAC could qualify as either 'war' or 'other public emergency', yet Article 15(2) ECHR prevents derogation from the right to life under those situations, whereas in *options 4* and *5* derogation is possible for deprivations of life in any armed conflict. Indeed, two views emerge from doctrine: (A) Article 15(2) ECHR is limited to lawful conduct in IAC only and (B) Article 15(2) encapsulates lawful conduct in IAC *and* NIAC.

##### A. IAC Only, and the Alternative Approach of Article 2(2) ECHR

In the view of those who regard Article 15(2) ECHR to apply to IAC only, derogations from the right to life in the context of NIAC are prohibited. It would logically follow that the lawfulness of deprivations of life in NIAC is then to be examined under one of the exceptions mentioned in Article 2(2) ECHR.<sup>858</sup> Indeed, in quite a few cases concerning hostilities in what were flagrant cases of NIAC (but not acknowledged as such by the States involved), the ECtHR examined the lawfulness of deprivations of life of individuals that would qualify as protected persons under the law of hostilities under of Article 2(2) ECHR, as the defending governments argued that their conduct was legitimate under one of its exceptions.

For example, in *Isayeva v. Russia* and *Isayeva, Yusupova and Bazayeva v. Russia*, the Russian government argued that a large-scale aerial attack on Chechen fighters was absolutely necessary in the circumstances for the protection of civilians against unlawful violence, thereby relying on Article 2(2)(a) ECHR.<sup>859</sup> While the ECtHR concluded in these cases that Russia had not sufficiently planned, organized and controlled the operations with a view to minimizing the use of lethal force, in these instances of a large presence of heavily armed insurgents the ECtHR accepted the claims on Article 2(2)(a) ECHR even though it had – in the latter case – "certain doubts as to whether the aim can at all be said to be applicable." It was however, in view of "the context of the conflict in Chechnya at the relevant time" to "assume [...] that the military reasonably considered that there was an attack or a risk of attack from illegal insurgents, and that the air strike was a legitimate response to that attack."<sup>860</sup> Not all

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<sup>857</sup> Hartman (1981), 4; Oraá (1992), 30-31; Svensson-McCarthy (1998), 216; Meron (1995), 58-59.

<sup>858</sup> Melzer (2008), 122; Van Dijk, Van Hoof, Van Rijn, *et al.* (2006), 1059-1060; University Centre for International Humanitarian Law (2005), 13; Naert (2010), 572.

<sup>859</sup> (2005e), *Isayeva v. Russia*, *App. No. 57950/00, Judgment of 14 October 2005*, §§ 200 (the ECtHR's acceptance of Article 2(2)(a) ECHR as a legitimate aim) and § 179 (Russia's claim to Article 2(2)(a) ECHR).

<sup>860</sup> (2005f), *Isayeva, Yusupova and Bazayeva v. Russia*, *App. No. 57947/00, 57948/00, 57949/00, Judgment of 24 February 2005*, §§ 160 and 181. See also (2004n), *Özkan v. Turkey*, *App. No. 21689/93, Judgment of April 6,*

military operations involving hostilities against non-State actors, however, easily fit in Article 2(2)(a). In *Esmukhambetov v. Russia*, the ECtHR did not accept the claim by the Russian government that an air raid on suspected terrorists, arguably preparing for a large-scale terrorist attack, and which destroyed almost the entire village, could be legitimized with a call on Article 2(2)(a) ECHR. While under the law of hostilities insurgents preparing for terrorists attacks could arguably have qualified as lawful military objectives, i.e. CCF-members of the armed forces, permitting their pre-planned intentional killing, Article 2(2)(a) ECHR does not allow this, and only permits deprivations of life that were the unintended result of the use of lethal force.

The same case also demonstrates that, while flexible, the exception of Article 2(2)(b) ECHR cannot be readily applied to any military operation against insurgents. The Russian government contended that the air raid was aimed to arrest the terrorists. Even though the ECtHR had accepted this argument in other cases, it was rejected in *Esmukhambetov*, for being “grossly disproportionate.”<sup>861</sup> In addition, in defense of the Russian government, it may be argued that aerial attacks may be necessary to force insurgents into submission, so they can be captured, thus the mere deployment of aerial assets should not always be incompatible with Article 2(2)(b) ECHR, although, admittedly, much depends on how these assets are used. In that respect, it would be difficult to see how Article 2(2)(b) ECHR could be relied upon when, from the outset, the intent was to bombard the insurgents with little to no chance of survival.

A final basis to legitimize deprivations of life in NIAC is Article 2(2)(c) ECHR, which sanctions the deprivation of life absolutely necessary in support of “action lawfully taken for the purpose of quelling a riot or insurrection.” This basis is frequently mentioned in doctrine as the proper alternative for NIACs to Article 15 ECHR.<sup>862</sup> It has been relied upon by the Russian government in the case of *Kerimova v. Russia*<sup>863</sup> and in *Abuyeva v. Russia*.<sup>864</sup>

In the view of experts, the term “insurrection” in Article 2(2)(c) ECHR is believed to also include the situation of NIAC, although it remains ambiguous whether this is a proper interpretation.<sup>865</sup> The absolute necessity of deprivations resulting from hostilities must then be examined in light of the question whether action is “lawfully taken.” Arguably, the words “lawfully taken” serve as the gateway to determine the ‘arbitrariness’ of the deprivation of life through the lens of the law of hostilities. This alternative completely bypasses Article 15 ECHR, and would still allow for the resort to measures under the law of hostilities lawful under Article 2 ECHR.

However, it remains questionable whether States are willing to embrace this approach, for reliance on Article 2(2)(c) ECHR to justify deprivations of life in hostilities in an armed conflict could – in similar fashion as would a derogation – be misinterpreted as a form of recognition of belligerency, whereas the State prefers to view insurgents or terrorists as sheer criminals.<sup>866</sup>

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2004, § 179; (2011d), *Esmukhambetov et al. v. Russia*, App. No. 23445/03, Judgment of 29 March 2011, § 141; (2011g), *Khamzayev et al. v. Russia*, App. No. 1503/02, Judgment of 3 May 2011, §§ 167 ff.

<sup>861</sup> (2011d), *Esmukhambetov et al. v. Russia*, App. No. 23445/03, Judgment of 29 March 2011, § 146.

<sup>862</sup> Doswald-Beck (2006), 883-884. The University Centre for International Humanitarian Law (2005), 13; Melzer (2008), 122; Farer (1974), 318-319; Irmscher (2006), 12-13 and 17-18; Neuman (2004), 1021.

<sup>863</sup> (2011f), *Kerimova and others v. Russia*, App. Nos. 7170/04, 20792/04, 22448/04, 23360/04, 5681/05, 5684/05, Judgment of 3 May 2011, §

<sup>864</sup> (2010a), *Abuyeva v. Russia*, App. No. 27065/05, Judgment of 2 December 2010, § 193.

<sup>865</sup> The *travaux préparatoires* to Article 2 ECHR provide no guidance as they are non-existent.

See <http://www.echr.coe.int/library/colentravauxprep.html>.

<sup>866</sup> Bijl (2011), 333.

While it cannot be denied that the exceptions of Article 2(2) ECHR may provide a proper legal basis to legitimize deprivations of life in hostilities in NIAC, it may be doubted whether the requirements of non-arbitrary deprivation of life are sufficiently flexible<sup>867</sup> to take into account the extreme circumstances that may prevail in situations of NIAC without having recourse to the law of hostilities, even in cases of civil wars with “large battles involving thousands of insurgents, artillery attacks and aerial bombardment.”<sup>868</sup> In the absence of derogation, reliance on Article 2(2) ECHR implies that the case will be examined against a normal background. While, as will be examined in more detail later, the ECtHR has demonstrated its willingness to rely, at least implicitly, on the law of hostilities, it has also demonstrated that it is prepared to mix IHRL and LOAC in a fashion that contradicts the latter. An example in case is that the ECtHR, in relation to aerial attacks on Chechen insurgents concludes that such operations, in order to be lawful under Article 2(2) ECHR must be planned, organized and controlled “to avoid or minimize, to the greatest extent possible, risks of loss of lives, both of persons at whom the measures were directed and of civilians.”<sup>869</sup> Here, the ECtHR implicitly resorts to the requirement of precaution under the law of hostilities, but, as concluded previously, this requirement does not demand from commanders to avoid or minimize harm or injury to lawful military objectives, but only of civilians.

Overall, it follows that the exceptions of Article 2(2) ECHR could accommodate deprivations of life resulting from hostilities in counterinsurgency operations carried out in the context of NIAC, but it remains questionable whether the requirement of absolute necessity is sufficiently flexible to accommodate military necessity-driven intentional deprivations of life normally lawful under the law of hostilities. In view of the fact that the ECtHR has frequently dealt with these issues, and in view of the fact that they involve an assessment of the compatibility of IHRL and LOAC, this issue will be further dealt with when examining the interplay between IHRL and LOAC in the normative paradigms of hostilities and law enforcement.

## B. IAC *and* NIAC

A second view is that, while it is undisputed that the term ‘war’ in this phrase in any case refers to IAC, and while the drafters may not have had NIAC in mind when they designed Article 15(2), it would not seem unreasonable to interpret the phrase “lawful act of war” *today* as referring not to conduct in a specific type of armed conflict, but also to conduct in NIAC. After all, the law of hostilities, which in the contemporary *lex lata* is generally regarded to apply to both IAC and NIAC, governs the lawfulness of ‘acts of war’. Following this view, derogation from the right to life is also permissible in respect of conduct in the context of NIAC. This brings us to the second issue, examined in the next paragraph.

### 2.2.1.2.2. Automatic or Authoritative Derogation

A second issue evolving from Article 15 ECHR is whether the applicability of the law of hostilities implies that a State automatically derogates from the right to life (*automatic deroga-*

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<sup>867</sup> Affirmative: Melzer (2008), 122, and 382 ff.

<sup>868</sup> Abresch (2005), 742. ECHR.

<sup>869</sup> (2011d), *Esmukhambetov et al. v. Russia*, App. No. 23445/03, Judgment of 29 March 2011, § 146; (2011g), *Khamzayev et al. v. Russia*, App. No. 1503/02, Judgment of 3 May 2011, § 180; (2011f), *Kerimova and others v. Russia*, App. Nos. 7170/04, 20792/04, 22448/04, 23360/04, 5681/05, 5684/05, Judgment of 3 May 2011, § 248.

tion), implying there is no further need to comply with any of the requirements for lawful derogation (also implying that it is not required to issue a notification of derogation thereby demonstrating that there is a threat to the life of the nation or that the derogation from Article 2 ECHR is strictly required by the exigencies of the situation),<sup>870</sup> or that a formal and lawful derogation is required (*authoritative derogation*).

A basis for automatic derogation is found in the argument that, since the right to life is *Notstandfest*, it can therefore not be authoritative of a formal act of derogation, not even in view of “deaths resulting from lawful acts of war.”<sup>871</sup> Instead, this phrase must be read as a basis to lawfully infringe upon the right to life, additional those set forth in Article 2(2) ECHR.<sup>872</sup>

The basis for such authoritative derogation follows from the phrase “except in respect of deaths resulting from lawful acts of war” which must be read in conjunction with the words “[n]o derogation of Article 2 [...] shall be made under this provision.” The words “this provision” arguably refer to Article 15(1) ECHR.<sup>873</sup> Derogation is then possible if the measures leading to the deprivation of life are carried out during an armed conflict and the derogation otherwise conforms to the relevant requirements of derogation, to include the condition that the use of force is limited “to the extent strictly required by the exigencies of the situation” and “provided that such measures are not inconsistent with its other obligations under international law,” the latter requirement in the situation of armed conflict referring particularly (but not exclusively) to LOAC.<sup>874</sup> This view finds support among a number of authors.<sup>875</sup>

An argument in support of automatic derogation – and against authoritative derogation – is that it is more compatible with the logic underlying the system of international law in general and the relationship between IHRL and LOAC in particular. For example, the failure to demonstrate that the armed conflict threatens the life of the nation would imply that States – able to demonstrate an armed conflict, but unable to demonstrate such threat – may formally not derogate from the right to life, while at the same time they are engaged in an armed conflict which would permit them under the applicable law of hostilities to lawfully attack legitimate targets.<sup>876</sup>

Another argument supportive of automatic derogation is that it has remained *unclear* wheth-

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<sup>870</sup> University Centre for International Humanitarian Law (2005), 13.

<sup>871</sup> Loof (2005), 487, footnote 125.

<sup>872</sup> Loof (2005), 487; Ducheine (2008), 432.

<sup>873</sup> This is further corroborated by the Dutch text of Article 15(2) ECHR, which in translation and in relevant part reads: “the *previous* provision prohibits derogation from Article 2, except in respect of deaths resulting from lawful acts of war, [...]” [in Dutch: “de voorgaande bepaling staat geen enkele afwijking toe van Artikel 2, behalve in geval van dood als gevolg van rechtmatige oorlogshandelingen, [...]”]. Clearly, the word “previous” [“voorgaande”] is absent in the English text of Article 15(2) ECHR.

<sup>874</sup> Svensson-McCarthy argues that the derogating State must also justify its use of force under the *jus ad bellum*. Svensson-McCarthy (1998), 515. Ducheine rejects this requirement, arguing that the applicability of human rights and the *jus in bello* are to be separated from the basis for the use of force in the *jus ad bellum*. Ducheine (2008), 431. However, the requirement posited by Svensson-McCarthy is possibly to be viewed to fall within the scope of the requirement that derogations must take place in conformity with the derogating State’s other obligations under international law. These obligations include, arguably, the obligations under the *jus ad bellum*.

<sup>875</sup> Abresch (2005), 745; Bijl (2007), 104; Harris, O’Boyle & Warbrick (1995), 37; Svensson-McCarthy (1998), 515; Melzer (2008), 122; Montealegre (1983), 43-44; Krieger (2002), 690; Imscher (2006), 16-17; Wicks (2010), 82.

<sup>876</sup> Bijl (2011), 332.

er the threshold for exercising force that is “strictly required by the exigencies of the situation” is less stringent than the normal “absolutely necessary” threshold and thus also facilitates military necessity-powered actions permissible under the law of hostilities, but falling outside the scope of situations mentioned in Article 2(2) ECHR.<sup>877</sup> An example is the pre-planned direct attack against an insurgent constituting a lawful military objective.

Also, if States opt *not* to derogate – which to date has been State practice – it logically follows from the authoritative derogation-view that deprivations of the right to life taking place in armed conflict must be valued on the basis of Article 2(2) ECHR *sec*, and thus to be viewed as unintentional (or non-arbitrary) they must result “from the use of force which is no more than absolutely necessary” to attain a legitimate aim as set forth in subparagraphs (a)-(c). As previously established, recourse of the counterinsurgent State to Article 2(2) ECHR may not be possible in respect of every deprivation of life, particularly not those which are pre-planned.

Support for the ‘automatic derogation’-view may also be deduced from the fact that a provision equivalent to Article 15(2) ECHR is absent in the ICCPR and ACHR. As noted, there, derogation from the right to life is prohibited and the lawfulness of deprivations of life in armed conflict are to be examined through interpretation of the term ‘arbitrary’ in light of the law of hostilities.

In addition, the practice of the ECtHR in respect of the Turkish and Chechen cases suggests the ECtHR is, at least tacitly, supportive of the *automatic derogation* from the right to life in situations of NIAC.<sup>878</sup> As mentioned, as the States involved had not derogated from the right to life or otherwise contended that the deprivations of life had occurred in the context of an armed conflict, the ECtHR was required to examine the case from a peacetime perspective. Nonetheless, the phrasing used by ECtHR when interpreting requirements such as absolute necessity, proportionality and precaution suggest that the ECtHR relied on the law of hostilities.<sup>879</sup>

Following the above, there would appear to be little objection against accepting the doctrine of automatic derogation at least with respect to IAC. The question is whether the same applies for NIAC. Naert, for example, argues that while the practice of the ECtHR in the Turkish and Chechen cases is indicative of automatic derogation, nonetheless “for non-international armed conflicts a derogation should not be automatic because of the lesser clarity of the law applicable to [such] conflicts.”<sup>880</sup> It may be doubted that this is a convincing argument in the context of the law of hostilities, for its substantive content is relatively similar in IAC and NIAC, and contentious subjects – such as DPH – are not limited to NIAC alone. Nonetheless, there is merit in the argument that an automatic derogation in the context of NIAC may be a bridge too far and merits authoritative derogation, although a differentiation may be made between AP II-style civil wars, where the government has less

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<sup>877</sup> University Centre for International Humanitarian Law (2005), 13.

<sup>878</sup> Naert (2010), 573.

<sup>879</sup> Of significance in this respect could therefore be the inter-State complaint by Georgia against Russia, currently pending before the ECtHR, concerning the inter-State armed conflict between both involving large-scale military operations involving ground, air, and naval forces. As neither State had derogated from the right to life under Article 2 ECHR, the question is whether the ECtHR will examine the lawfulness of the deprivations of life under Article 2 ECHR in a fashion similar as in the Turkish and Chechen cases or whether it explicitly recognizes the fact that an inter-State armed conflict took place the deprivations of life of which need to be examined by *direct* reference to the law of hostilities. Admittedly, the significance is limited to the relationship between Article 15 ECHR and IAC only, in view of the nature of the conflict between both States.

<sup>880</sup> Naert (2010), 573.

control over the situation and loss of life is inherent to the level of violence, and low intensity CA 3-conflicts, where, under the law of hostilities, insurgents may be identified as lawful military objectives which may be directly attacked, while at the same time the exigencies of the situation would permit a law enforcement-type operation aimed at their arrest. In these *hybrid* situations, the State would be required to formally derogate and demonstrate the strict necessity and proportionality of the derogation. However, in view of State practice to date, such derogations are not likely to occur. In such instances, recourse may be had to Article 2(2)(a)-(c) ECHR. Once the conflict reaches AP II-style proportions, where a government must fight to maintain or restore control over territory, it would seem reasonable to accept that automatic derogation follows.

In sum, it follows from the above that, while a textual interpretation of Article 15 ECHR would require a formal derogation, there is substantial ground to accept automatic derogation at least in IAC, and arguably also in NIAC, although with respect to the latter conflicts a more cautious approach appears to be preferable in low-intensity settings.

### 2.2.1.3. Derogation from the Customary Right to Life

As noted previously, the right to life is firmly rooted in customary international law. Does the non-conventional right to life permit derogation? In view of this issue, it must be remarked that general international law precludes the wrongfulness of State conduct in violation of international obligations when carried out in exceptional circumstances such as *force majeure*, distress, consent, self-defence, necessity and countermeasures, except in case of obligations the derogation of which is excluded or restricted by more specific law or *jus cogens*.<sup>881</sup> As stated previously, while disputed by some, there is overwhelming support for the contention that the right to life can be viewed as *jus cogens*. In light of the above, it must therefore be concluded that derogation of the non-conventional right to life is not accepted. The *jus cogens*-nature of the right to life, however, does not necessarily imply that the deprivation of life in armed conflict resulting from the conduct of hostilities is by definition unlawful. The non-conventional right to life prohibits, as the conventional right to life, not *all* deprivation of life, but *arbitrary* deprivation of life. It would thus follow that the meaning of ‘arbitrary’ in the context of deprivations of life resulting from hostilities in an armed conflict must be interpreted in that context and through the lens of the law of hostilities. In that case, deprivations of life resulting from acts lawful under the law of hostilities do not amount to arbitrary deprivation of life.

### 2.2.2. Operational Detention

This paragraph examines the possibility of derogation from valid norms pertaining to operational detention. The issue of derogation here is particularly relevant in light of the permissibility of security detention, but may also be of relevance for the scope of requirements to be granted to criminal detainees, for example in situations of long-lasting hostilities where normal peacetime criminal justice institutions are not or no longer properly functioning.

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<sup>881</sup> See Draft Articles 20 to 25, 26 and 55.

## 2.2.2.1. Conventional Normative Framework

### 2.2.2.1.1. Derogation from the Right to Liberty and Security of the Person

None of the relevant treaty instruments prohibits derogation from the right to liberty and security of the person.<sup>882</sup> It may therefore be concluded that, generally, derogation from the right to liberty and security is permissible, provided such derogation itself is lawful and the deprivation of liberty is not otherwise arbitrary. In practice, States have made use of the possibility to derogate from their obligations under the right to liberty and security to ensure a legal basis for security detention.<sup>883</sup> However, the right to derogate from the right to liberty is *not absolute*. While derogation from Article 9 ICCPR may offer a legal basis for security detention of insurgents, this does not imply that derogation is permitted from all of the norms embedded in that provision. For example, the right to *habeas corpus* is widely regarded as non-derogable,<sup>884</sup> because it is essential to guarantee *other* non-derogable rights, such as the right not to be tortured.<sup>885</sup> Thus, the HRC has expressed its concern

[...] about the frequent use of various forms of administrative detention, particularly for Palestinians from the Occupied Territories, entailing restrictions on access to counsel and to the disclosure of full reasons of the detention. These features limit the effectiveness of judicial review, thus endangering the protection against torture and other inhuman treatment prohibited under Article 7 and derogating from Article 9 more extensively than what in the Committee's view is permissible pursuant to Article 4. In this regard, the Committee refers to its earlier concluding observations on Israel and to its general comment No. 29.<sup>886</sup>

In sum, it may be concluded that the counterinsurgent State may derogate from the right to liberty in order to create a legal basis for the security detention of insurgents. However, this does not imply that the security detention is otherwise lawful and that derogation is permitted from other human rights relevant to the concept of deprivation of liberty.

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<sup>882</sup> Article 4 ICCPR; Article 27 ACHR; Article 15 ECHR.

<sup>883</sup> For example, at the time of ratification of the ICCPR, Israel has submitted a declaration that it has been in a state of emergency from the time of its founding. In relation to Article 9 ICCPR, Israel has submitted that it derogates from the right to liberty to the extent that its detention measures conflict with its obligations under Article 9 ICCPR. See also See, for example, the derogations from the ECHR and ICCPR communicated by the United Kingdom, on 18 December 2001, available at <http://conventions.coe.int/Treaty/EN/v3MenuDecl.asp> and [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en).

<sup>884</sup> While not specifically mentioned in Article 9 ICCPR, Article 27 ACHR and Article 15 ECHR as non-derogable rights, the right to *habeas corpus* is generally perceived to be non-derogable under international law. See ICRC (2005a), 350-351 (in the footnotes). Pejic (2005), 387; ICRC (2008d), 11. In relation to the ICCPR, see also Human Rights Committee (2001c). In relation to the ACHR, see Article 27(2) ACHR; (1987b), *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)*, *Advisory Opinion OC-8/87, January 30, 1987*; IACommHR (2002), § 124. In relation to the ECHR, see (1961b), *Lawless v. Ireland, App. No. 332/57, Judgment of 1 July 1961 (Merits)*; (1993a), *Brannigan and McBride v. the United Kingdom, App. No. 14553/89; 14554/89, Judgment of 26 May 1993* (1996a), *Aksoy v. Turkey, App. No. 21987/93, Judgment of 18 December 1996*.

<sup>885</sup> Human Rights Committee (2001c), § 16. While States cannot derogate from the right to *habeas corpus* as such, it has been argued that they may derogate from the element of 'prompt', as the U.K. successfully did in *Brannigan v. United Kingdom*. There, the ECtHR found lawful the administrative detention for up to 7 days without judicial review during an emergency situation ((1993a), *Brannigan and McBride v. the United Kingdom, App. No. 14553/89; 14554/89, Judgment of 26 May 1993*). However, in *Aksoy v. Turkey*, the ECtHR held that the detention of a suspected terrorist for up to 14 days without judicial review left him susceptible to arbitrary deprivation of his liberty (and even torture) ((1996a), *Aksoy v. Turkey, App. No. 21987/93, Judgment of 18 December 1996*).

<sup>886</sup> (2003a), *Concluding Observations of the Human Rights Committee: Israel (21 Augustus 2003)*, § 12.

#### 2.2.2.1.2. Derogation from Fair Trial Guarantees

Derogation from the fair trial guarantees is widely regarded as prohibited, even in times of armed conflict.<sup>887</sup> As the UNHRC held, “States parties may in *no circumstances* invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance [...] by deviating from fundamental principles of fair trial, including the presumption of innocence.”<sup>888</sup> As the UNHRC further explains:

[a]s certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of a fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant.<sup>889</sup>

#### 2.2.2.1.3. Derogation from Norms Pertaining to the Treatment and Conditions of Detention

In view of its status as *jus cogens*, the freedom from torture and inhuman or degrading treatment or punishment has been explicitly designated as non-derogable. All treaty-based instruments explicitly prohibit derogation.<sup>890</sup> In view of the reference to the inherent dignity of the human person in the preamble to the Covenant and by the close connection between articles 7 and 10, the UNHRC has also held as non-derogable the right be treated with humanity and with respect for the inherent dignity of the human person,” even though this right, prescribed in article 10 of the Covenant, is not separately mentioned in the list of non-derogable rights in article 4(2) ICCPR.<sup>891</sup>

Other rules governing the treatment of detainees previously mentioned arguably are derogable, as they are stipulated in ‘soft law’-documents. Yet, the non-compliance with these rules in and by itself may result in torture or inhuman or degrading treatment or punishment.

#### 2.2.2.1.4. Derogation from Norms Pertaining to the Transfer of Individuals Deprived of their Liberty

The principle of *non-refoulement*, central to the issue of transfer of detainees into the control of another State, is a non-derogable principle, even when, in the case of an insurgency, insurgents pose a threat to the security of the counterinsurgent State.

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<sup>887</sup> Article 4 ICCPR; Article 27 ACHR; and Article 15 ECHR.

<sup>888</sup> Human Rights Committee (2001c), § 11 (emphasis added).

<sup>889</sup> Human Rights Committee (2001c), § 16. See also (1987b), *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87, January 30, 1987; (1987d), *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87, October 6, 1987; (1993a), *Brannigan and McBride v. the United Kingdom*, App. No. 14553/89; 14554/89, Judgment of 26 May 1993, § 62.

<sup>890</sup> Article 4 ICCPR; Article 27 ACHR; and Article 15 ECHR.

<sup>891</sup> Human Rights Committee (2001c), § 13(a).

### 2.2.2.2. Derogation from the Non-Conventional Right to Liberty

As noted previously, general international law permits a State to derogate from its obligations under international law in situations of *force majeure*, distress, consent, self-defence, necessity and countermeasures, unless the obligation constitutes an obligation of *jus cogens*.

The right to liberty and security of the person is not of *jus cogens*-stature, but some of the rights related to it are, such as the freedom from torture, as well as some requirements determinative of the lawfulness of a deprivation of liberty, as set out above.

### 2.2.3. Extraterritorial Applicability of Derogation Clauses

While the concept of derogation is principally designed to cover public emergencies taking place on the territory of a State party – after all, the State is viewed as the principle entity capable to characterize a situation taking place on its territory as a public emergency – the question rises whether a State could derogate from its human rights obligations when operating extraterritorially, such as in OCCUPCOIN, SUPPCOIN and TRANSCOIN?

Admittedly, it may be argued that this is more a theoretical exercise than one that reflects practice, as, to date, no derogations have been made by State parties to the ICCPR, ECHR or ACHR in an extraterritorial context other than in relation to their former colonies and areas overseas.<sup>892</sup> Nevertheless, it cannot be ruled out that the need to do so arises. In light of the present chapter, the outcome of an examination of the extraterritorial applicability of derogation clauses informs us also of the scope, and suspension, of applicability of human rights obligations in extraterritorial military operations.

Within the available doctrine, two schools of thought can be discerned: one rejecting extraterritorial applicability, the other viewing extraterritorial applicability a possibility.

The ‘rejective’ school,<sup>893</sup> which appears to represent the *majority view*, argues that in extraterritorial settings it is generally not the life of the visiting State party’s nation that is threatened, but that of the receiving State party, on which territory the situation (and military operations) take place. In other words, “the life of the nation” refers to the State party on whose territory the public emergency takes place.<sup>894</sup> Following this approach, a counterinsurgent State could never derogate from its obligations from the ICCPR, ACHR and ECHR, and thus remains bound by the requirements flowing from them.

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<sup>892</sup> France made these derogations in relation to a public emergency on New Caladonia; the UK in relation to Cyprus, Malaysia, Kenia, North-Rhodesia, Nyasaland, Aden, Zanzibar and Mauritius. See Svensson-McCarthy (1998), 702.

<sup>893</sup> Erberich (2004), 52; Krieger (2002), 690; Häußler (2007), 69-70;

<sup>894</sup> This school finds support in the ECtHR’s ruling that it “[d]oes not find any basis upon which to accept the applicants’ suggestion that Article 15 covers all “war” and “public emergency” situations generally, whether obtaining inside or outside the territory of the Contracting State.” (2001c), *Bankovic and Others v. Belgium and 16 Other Contracting States*, App. No. 52207/99, Judgment of 12 December 2001, § 62. The UNHRC attached to Article 4 extraterritorial applicability in relation to Israel and the situation in the Occupied Territories. See (2003a), *Concluding Observations of the Human Rights Committee: Israel (21 Augustus 2003)*, 11. It was also the opinion of Lord Bingham of Cornhill, in (2007f), R. (*on the application of Al-Jedda*) v. *Secretary of State for Defence*, that derogation [...] may only be exercised in time of war or other public emergency threatening the life of the nation seeking to derogate, and only then to the extent strictly required by the exigencies of the situation. [...] It is hard to think that these conditions could ever be met when a state has chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw.”

The ‘opportunistic’ school does not rule out the extraterritorial applicability of derogation clauses. In relation to Article 15 ECHR, for example, Naert finds the rejective view

[...] flawed. If one accepts that the ECHR can apply extraterritorially, especially to entire areas under effective control, it follows that the local “nation” is under the jurisdiction of the “occupying” State. In that case, it is logical that a threat to the life of *this* nation can justify a derogation.<sup>895</sup>

Similarly, Sassòli holds that

[...], one cannot simultaneously hold a State accountable because it has a certain level of control abroad and deny it the possibility to derogate because there is no emergency on that State’s own territory. An emergency on the territory where the State has a certain limited control must be sufficient.<sup>896</sup>

Following this approach – and it is submitted this is the right approach – it is sufficient for a right to derogate to arise for the counterinsurgent State when on the territory of the receiving State a public emergency takes place threatening the life of that nation, provided the counterinsurgent State exercises a degree of effective control over territory. This would most certainly be the case in OCCUPCOIN, but arguably less so in situations of SUPPCOIN and TRANSCOIN. Whether the possibility to derogate also arises when no such control over territory is exercised remains unclear. For example, the question would arise whether a counterinsurgent State in SUPPCOIN would be entitled to derogate from its obligations under IHRL when it detains an insurgent. It would seem that to the extent that the public emergency threatens the life of the nation of the receiving State, the threat posed by that public emergency may also affect the counterinsurgent State’s ability to uphold its own obligations. As noted, to date no State acting extraterritorially has derogated. A possible reason may be that doing so would imply the recognition of the extraterritorial applicability of the treaty to which they are party, something that States might want to avoid. Therefore it seems reasonable to conclude that in practice, in extraterritorial counterinsurgency situations not constituting OCCUPCOIN the counterinsurgent State, in the absence of derogations, remains bound by its obligations under IHRL in so far as these apply extraterritorially. As such, the potential for interplay with simultaneously applicable valid norms of LOAC is quite pertinent in those situations.

### 3. Observations

This chapter has demonstrated that IHRL offers valid norms pertaining to targeting and operational detention that are also (potentially) widely applicable, even in extraterritorial situations. That IHRL provides valid norms pertaining to these subjects is not a surprising conclusion. After all, the right to life and the human rights pertaining to the deprivation of liberty are amongst the most fundamental rights within the human rights catalogue. Their applicability, particularly in extraterritorial context, has been more controversial, particularly in the context of targetings carried out by States party to the ECHR. When applied to situational contexts of counterinsurgency, the following picture emerges:

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<sup>895</sup> Naert (2010), 578. Naert finds support for his reasoning in a reversed reading of the ruling of the ECtHR in *Bankovic* that “Article 15 itself is to be read subject to the “jurisdiction” limitation enunciated in Article 1 of the Convention.” While the ECtHR applied a restrictive, territorial interpretation, the current standing is that Article 1 also applies extraterritorially, and that as a result, Article 15 also applies extraterritorially.

<sup>896</sup> Sassòli (2009), 438.

Firstly, in NATCOIN, the counterinsurgent State is always bound by the requirements flowing from the right to life and the valid norms governing operational detention, even in areas not under its control.

As regards OCCUPCOIN, the valid norms of IHRL apply extraterritorially by virtue of the fact that the counterinsurgent State exercises effective control over the occupied territory (ECA). Also, SAA-based jurisdiction arises for counterinsurgent States party to the ICCPR and the ACHR (functional approach) as well as for States party to the ECHR because the counterinsurgent State exercises public powers normally to be exercised by the government of the occupied State.

As regards SUPPCOIN and (consensual and non-consensual) TRANSCOIN, the valid norms governing *operational detention* apply by virtue of SAA-based jurisdiction, regardless of whether the counterinsurgent State is a party to the ICCPR, ACHR or ECHR. As regards the concept of *targeting*, in view of the UNHRC and ACiHR/ACtHR, SAA-based jurisdiction would undoubtedly arise. This is not the view of the ECtHR, which at this point, in so far it concerns the selective and individualized use of force (which targeting involves) has sporadically accepted jurisdiction, although it appears that the exercise of control over territory or the situation may be of relevance. Whether this also is the case in the context of *hostilities* remains unclear. At least, it may be concluded that SAA-based jurisdiction for targeting operations cannot be excluded, and thus counterinsurgent States are to take account of this.

A final concluding observation concerns derogation. In so far a State is bound by the obligations arising from the conventional *right to life*, the above analysis of the concept of derogation vis-à-vis the right to life demonstrates that:

*Firstly*, all relevant treaties prohibit derogation from the right to life. The ICCPR and ACHR do so in regards of all circumstances. It follows that with respect to these treaties the right to life always applies, also in armed conflict (whether IAC or NIAC), but that the lawfulness of deprivations of life resulting from hostilities is to be examined by interpreting the notion of arbitrariness through the law of hostilities.

*Secondly*, as for the right to life under Article 2 ECHR, it follows that, in the absence of guidance from the treaty-text, the preparatory work to Article 15 ECHR and practice of the ECtHR, the precise meaning and functioning of Article 15 ECHR in the context of the right to life remains subject of debate. It is however possible to conclude that (1) Article 15(1) ECHR does accommodate both IAC and NIAC; (2) that arguably Article 15 ECHR would permit automatic derogation from the right to life but that (3) in the context of NIAC the better approach is to examine the lawfulness of deprivations of life resulting from hostilities by reference to Article 2(2) ECHR.

Irrespective of whether treaty-based obligations arise following a State exercise of jurisdiction or not, a counterinsurgent State is always bound by the obligations arising from the customary right to life. The *jus cogens*-nature of the prohibition on the arbitrary deprivation of life bars derogation. However, whether a particular deprivation of life resulting from hostilities in armed conflict constitutes as arbitrary is to be examined in light of the law of hostilities.

Examination of the possibility to derogate from the valid norms of IHRL pertaining to *operational detention* shows that derogation is prohibited from the freedom from torture and degrading treatment or punishment, the prohibition of non-refoulement and the fair trial guarantees to be afforded to criminal detainees. Derogation, however, is permitted from the

right to liberty and security of the person. As we will see in Chapter VIII, this possibility to derogate is of particular importance for the lawfulness of *security detentions*.

Having examined the availability of valid norms on targeting and operational detention in IHRL, and their applicability in the situational contexts of counterinsurgency, we can now turn to LOAC, to carry out a similar examination.