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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

Pouw, E.H.

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Conclusions Part B.

As mentioned in the introduction, the aim of this part was to examine the *interplay potential* of norms of IHRL and LOAC relative to targeting and operational detention.

This implies, *firstly*, that norms must be available within IHRL and LOAC that govern these concepts. As demonstrated, both IHRL and LOAC provide such norms. This is not a surprising conclusion. After all, in so far it regards IHRL, both the right to life and the human rights pertaining to the deprivation of liberty are amongst the most fundamental rights within the human rights catalogue. Similarly, the wounding, killing and capture (and subsequent internment) of enemy fighters are the traditional methods to force the enemy into submission, and it may therefore not come as a surprise that it is precisely in these areas that LOAC offers a detailed and comprehensive set of norms. Nonetheless, it has been worthwhile to carry out this examination to the availability of valid norms, because it has also demonstrated that the treaty-based law of NIAC is far from comprehensive and – notwithstanding the fact that killing and capturing enemy fighters is part and parcel also of these types of conflicts – does not provide a set of norms comparable to the law of IAC. In so far it concerns hostilities, customary law has filled this gap, but cognizance must be had of the fact that this finds opposition amongst those who rather see this gap filled by IHRL.

As regards operational detention, the impact of the traditional dichotomy between IAC and NIAC becomes most apparent, as in this area the treaty-based law of NIAC is underdeveloped in terms of availability, density and precision. This gap is not readily filled with customary norms, particularly not in the area of the legal basis for security detention and the procedural safeguards that must be granted, and thus triggers the question as to whether IHRL may fill this gap. This will be dealt with in Chapter IX.

The mere fact that IHRL and LOAC show a potential for interplay because they each provide norms valid to the concept of targeting and operational detention is not sufficient for interplay to arise. It also needs to be established that these norms simultaneously *apply* to the concrete situation at hand. As the analysis demonstrates, the issue of applicability of either IHRL or LOAC is not free from controversy and several outcomes are possible. In respect of IHRL, its applicability in times of armed conflict and extraterritorial settings remains contested by some States, which complicates the legal debate as well as the cooperation on the ground.

This part also shows the importance of armed conflict classification, which is of significance for a number of reasons,¹¹¹⁹ but mostly so because it eventually determines which part of LOAC applies to a particular targeting or detention operation. As demonstrated, in respect of NATCOIN, SUPPCOIN and consensual TRANSCOIN there is general agreement that targeting and operational detention operations are governed by the law of NIAC. This is less sure in OCCUPCOIN and non-consensual TRANSCOIN, where arguments can be made that support the applicability of both the law of IAC or NIAC.

¹¹¹⁹ For a list of reasons, see Bethlehem (2012), v-vi.

This is less problematic in the context of hostilities, as here the law has merged. The opposite is true with respect to operational detention. Here, the laws of IAC and NIAC have not merged, at least not to a significant degree, which raises problems, as we will see in Chapter X.

This chapter has also shown that the possibility to derogate from the right to life and the valid IHRL norms pertaining to operational detention is limited. In so far derogation is possible, it must nonetheless comply with all the requirements mentioned in Chapter 2 in order to be lawful.

When the applicability issue of the valid norms of IHRL and LOAC is placed in situational context in order to attain an overview of the interplay potential, the following picture emerges.

1) Operational Detention

Firstly, IHRL norms governing *operational detention* apply in all situational contexts and interplay with the valid norms of LOAC. In the context of NATCOIN, SUPPCOIN and consensual TRANSCOIN this concerns the law of CA 3-NIAC (and possibly AP II in NATCOIN), which, in the absence of many rules, in practice entails that the interplay of IHRL takes place with the available customary norms relevant to operational detention in CA 3-NIACs. As regards OCCUPCOIN and non-consensual TRANSCOIN, the majority view is that these situations too are governed by the law of CA 3-NIAC, although in the context of operational detention it cannot be excluded that the law of IAC nonetheless applies. This implies that the interplay of IHRL norms takes place with the comprehensive framework of LOAC regulating internment and criminal detention.

2) Targeting

In respect of all situational contexts where the counterinsurgent State is a party to the ICCPR and ACHR, the right to life always applies to *targeting*.

In case the counterinsurgent State is a party to the ECHR, the extraterritorial applicability of the right to life in targeting-related situations has been accepted, even though this is arguably so because it concerned situations where the State exercised control over the territory or situation. Whether the right to life applies extraterritorially in *hostilities*, where such control is absent, remains unclear, but in analogy to the functional approach adopted by the ICCPR and ACHR, it is here presumed that it does.

In so far it concerns *targeting with a direct nexus to the hostilities*, the right to life interplays with the law of hostilities, regardless of the situational context.

In respect of the use of lethal force *outside the context of hostilities*, the right to life interplays with the valid norms relevant to law enforcement available in LOAC.

In sum, there appears to be a rather high potential for interplay between valid norms or IHRL and LOAC governing operational detention and targeting. The next step is to examine the substantive content of the valid norms of IHRL and LOAC and to turn to the appreciation of their interplay.