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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 VIII Interplay

In the previous chapters, we have been able to conclude that IHRL and LOAC have valid norms that govern targeting operations, that these norms are applicable in the situational contexts of counterinsurgency examined in this study. It also shows that, in terms of normative content, these valid and applicable normative frameworks have distinct objects and purposes – i.e. *law enforcement* and *hostilities* – that determine the operational latitude of targeting operations against insurgents.

To recall, as a concept, *law enforcement* refers to “all territorial and extraterritorial measures taken by a State to maintain or restore public security, law, and order or to otherwise exercise its authority or power over individuals, objects, or territory.”<sup>1677</sup> As such, it regulates the *vertical* relationship between the counterinsurgent State and these individuals. As previously explained, in so far the normative framework governing the deprivation of life under IHRL simultaneously applies with the normative framework governing the deprivation of life under LOAC to regulate the use of lethal force against insurgents as a measure of law enforcement during armed conflict, they can be said to together form part of the *normative paradigm of law enforcement*.

Alternatively, the concept of *hostilities* comprises of “all activities that are specifically designed to support one party to an armed conflict against another, either by directly inflicting death, injury or destruction, or by directly adversely affecting its military operations or military capacity.”<sup>1678</sup> To recall, in so far the normative framework governing the deprivation of life under IHRL simultaneously applies with the normative framework governing the deprivation of life under LOAC to regulate the use of lethal force against insurgents as a measure of hostilities, they form the *normative paradigm of hostilities*.

In this chapter we will focus on the next step in our analysis, namely the *appreciation* of the *interplay* between IHRL and LOAC.

The purpose is to *firstly* determine how the norms of IHRL and LOAC interrelate *within* these normative paradigms, i.e. to establish whether these norms are in a relationship of harmony or conflict, and in case of the latter, how this conflict can be avoided or resolved. Eventually, this will inform whether it is IHRL or LOAC – or perhaps (a bit of) both – that governs targeting in law enforcement and hostilities and whether the interplay leads to modification of the leading regime’s substantive scope.

Having concluded upon the relationship of IHRL and LOAC within the normative paradigms, a *second* issue must be dealt with, namely the interplay *between* the normative paradigms. In other words, in planning and executing targeting operations, what determines whether it is the normative paradigm of law enforcement or the normative paradigm of hostilities that applies? Is it an arbitrary choice? Does the normative paradigm of hostilities prevail on the basis of a person’s mere qualification as a lawful military objective under the law of hostilities? Or are there other factors that must be taken into account?

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<sup>1677</sup> Melzer (2010a), 36.

<sup>1678</sup> Melzer (2010a), 40-41.

Finally, when having determined the interplay between the normative paradigms, it is of essence to examine its operational significance for targeting operations in counterinsurgency and to look at how counterinsurgency doctrine, policy and practice relate to the legal scope of permissible targeting.

This chapter is structured as follows. Paragraph 1 and 2 examine the relationship between IHRL and LOAC within the normative paradigms of law enforcement and hostilities respectively. Paragraph 3 examines the interplay between both normative paradigms.

## 1. The Interplay of IHRL and LOAC in the Normative Paradigm of Hostilities

Strictly speaking, the interplay of IHRL and LOAC in the normative paradigm of hostilities pertains to two relationship-pairs, namely that between IHRL and the law of hostilities as part of the law of IAC and that between IHRL and the law of hostilities as part of the law of NIAC. To recall, however, this study takes the position that the law of hostilities in the law of IAC and NIAC is practically similar, which removes the necessity to deal with the relationship-pairs separately. On that note, it is generally agreed that the law of hostilities functions as the *lex specialis* vis-à-vis IHRL. As stated by Dinstein, this interplay between IHRL and LOAC “[...] is the incontrovertible *lex lata* today.”<sup>1679</sup> To recall, as a general rule “the applicable law will have to be determined by recourse to [...] the norm that is more specific (*lex specialis derogat legi generali*).”<sup>1680</sup> As a result, in targeting insurgents under the normative paradigm of hostilities, the counterinsurgent State may use the more relaxed, hostilities-proof normative framework of the law of hostilities, as set out above.

While this may be taken for granted as a matter of fact, the legal question remains how to reconcile the application of the LOAC-based framework with the strict and more rigid framework under IHRL? After all, when comparing the requirements governing targeting operations under IHRL and LOAC, there is some overlap, but there are at the same time some crucial differences, particularly in respect of the protection granted to the person targeted. In brief, under the law of hostilities, insurgents may be identified and attacked on the basis of their status under LOAC, even when not posing a concrete threat to one’s life or health, whereas under IHRL such threat is required. Military necessity dictates someone’s targeting, and there is no requirement to resort to force only as a measure of last resort in the absence or non-feasibility of alternative less harmful means, as required under the absolute necessity-requirement under IHRL. Also, the proportionality-principle under LOAC does not, as under IHRL, seek to protect the lawful military objective, but only focuses on the protection of civilians. In addition, it allows for a wider margin of appreciation for the incidental injury and death of civilians than would be permissible under IHRL. Similarly, precautionary measures under LOAC need not be taken to avoid or minimize injury or death of the target(s), as is required under IHRL. At the same time, LOAC prohibits the use of certain means that are permissible under IHRL. Also, in contrast to IHRL, LOAC does not require a *post-facto* investigation. Thus, as both apply during armed conflict, it would

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<sup>1679</sup> Dinstein (2011), 491. See also Schmitt (2009), ? (“Although the conflict [in Afghanistan] has become non-international, it must be understood that the IHL norms governing attacks in international armed conflicts, on one hand, and non-international armed attacks, on the other, have become nearly indistinguishable”).

<sup>1680</sup> (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion of 9 July 2004*, § 106; (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, *Judgment of 19 December 2005*, § 216.

follow that the application of the LOAC-based framework violates that under IHRL, unless this can somehow be justified by recourse to the rules of norm relationships present in general international law. It is to this justification that we will now turn.

In addressing this issue, it is submitted that account must be had of the manner in which the right to life is organized in the relevant human rights treaties; the object and purposes of the two ‘competing’ frameworks under IHRL and LOAC; and how the relevant (quasi-)judicial bodies have dealt with hostilities in their case-law.

In respect of the ICCPR and ACHR, which both expressly prohibit the arbitrary deprivation of life, the justification for the leading role of the law of hostilities in the regulation of hostilities in deviation from the stricter framework under IHRL lies in the word ‘arbitrary.’ The principal authoritative source of judicial practice in this respect is the ICJ’s view set forth in its *Nuclear Weapons Advisory Opinion*. When assessing the permissibility of deprivations of life resulting from the use of nuclear weapons in armed conflict in the context of the right to life under Article 6 ICCPR, the ICJ, cognizant of the fact that derogation from the right to life is prohibited under any circumstances, held that:

[t]he test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can *only* be decided by reference to the law applicable in armed conflict and *not deduced from the terms of the Covenant itself*.<sup>1681</sup>

Here, the maxim of *lex specialis* was applied in context, as a *technique of interpretation* by which conflict between IHRL and LOAC was avoided.<sup>1682</sup> The ICJ

did hardly more than indicate that though it might have been desirable to apply only human rights, such a solution would have been too idealistic, bearing in mind the speciality and persistence of armed conflict. So the Court created a systemic view of the law in which the two sets of rules related to each other as today’s reality and tomorrow’s promise, with a view to the overriding need to ensure “the survival of a State”.<sup>1683</sup>

The word “only” and the phrase “not deduced from the terms of Covenant itself” indicate that if one wishes to establish whether the deprivation of life resulting from hostilities constitutes an arbitrary deprivation of life, the ‘arbitrariness’ must be determined by applying the specific body of LOAC regulating the conduct of hostilities, which, unlike Article 6 ICCPR, is specifically designed to regulate such conduct. It is here that the difference in objects and purposes between the frameworks under IHRL and LOAC proves to play a crucial factor. The normative framework distilled from the right to life protected under IHRL is designed for law enforcement operations in situations where the State exercises control over territory or persons – as is central to the concept of law enforcement. Typically, such control is absent in situations of hostilities. There, a military necessity arises to defeat the enemy, and this is ordinarily achieved by capturing, injuring *and* killing enemy fighters. As we have seen, the law of hostilities regulates this in great detail, and it would defeat legal logic to argue that killing mandated under the law of hostilities violates the right to life under IHRL. As such, the law of hostilities provides an exceptional basis in the occurrence of hostilities to derogate from conduct generally prohibited under IHRL. In so far

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<sup>1681</sup> (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, § 25 (emphasis added).

<sup>1682</sup> Koskeniemi (2006), § 104; Kleffner (2010b), 74. For another view, see Milanovic (2011a), 120.

<sup>1683</sup> International Law Commission (2006), § 76.

IHRL is not otherwise “affected” by LOAC it continues to apply in full alongside LOAC, but in the background,<sup>1684</sup> for example, to provide guidance as to the obligation to investigate, an obligation not found in LOAC.

While some experts have stressed that the ICJ’s pronouncement on the role of the law of hostilities is limited to the particular context<sup>1685</sup> – i.e. an IAC and concerning hostilities involving the use of nuclear weapons – and thus only applies to IAC, there is no reason to conclude that the ICJ-formula as expressed in its *Nuclear Weapons Advisory Opinion* cannot be equally applicable in the context of NIAC. The ICJ’s approach finds equal application in relation to the right to life under the ACHR, as follows from the case-law of the IACiHR in, most notably, *Coard v. the United States*<sup>1686</sup> and *Abella*.<sup>1687</sup>

In respect of the right to life under the ECHR, the route taken by the ECtHR in respect of cases where the alleged violation of the right to life was to be examined in the context of hostilities is somewhat different, but leads to the same result, namely that the question of whether the right to life may be lawfully infringed upon must be answered by reference to the law of hostilities.

To recall, Article 2 ECHR does not hinge upon the notion of ‘arbitrariness.’ It prohibits deprivations of life that are ‘intentional,’ except those ‘absolutely necessary’ in limited, exceptional circumstances.<sup>1688</sup> Deprivations of life outside this limited construct are permissible *only* as derogations from the right to life “in respect of deaths resulting from lawful acts of war,” as Article 15(2) ECHR stipulates.

With the exceptions of the ECiHR’s viewpoints expressed in the early cases of *Cyprus v. Turkey*-case<sup>1689</sup> and the *Engel*-case,<sup>1690</sup> so far the ECtHR has not had many opportunities to

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<sup>1684</sup> Henckaerts (2008), 264; Alston, Morgan-Foster & Abresch (2008), 192-193.

<sup>1685</sup> University Centre for International Humanitarian Law (2005), 39.

<sup>1686</sup> (1999f), *Coard and Others v. the United States (US Military Intervention in Grenada)*, Case No. 10.951, Decision of 29 September 1999 § 42. admittedly, the IACiHR used the ICJ’s reasoning in relation to the interpretation of the lawfulness of detentions in respect of the prohibition to arbitrarily deprive someone of his liberty, which at least suggests it would apply a similar approach in respect of the prohibition of arbitrary deprivation of life as set forth in Article 4 ACHR.

<sup>1687</sup> (1997b), *Abella et al. v. Argentina (La Tablada)*, Case No. 11.137, Decision of 18 November 1997, § 159, in which it held that in order to assess the lawfulness of deprivations of life resulting from hostilities in armed conflict it is not possible to resort to the right to life alone. Its ability “to resolve claimed violations of this non-derogable right arising out of an armed conflict may not be possible in many cases by reference to Article 4 of the American Convention alone. This is because the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less, specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations. Therefore, the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations. To do otherwise would mean that the Commission would have to decline to exercise its jurisdiction in many cases involving indiscriminate attacks by State agents resulting in a considerable number of civilian casualties. Such a result would be manifestly absurd in light of the underlying object and purposes of both the American Convention and humanitarian law treaties.” See also (1999), *Third Report on the Situation of Human Rights in Colombia*, IACiHR (26 February 1999), §§ 11, 151; (1999f), *Coard and Others v. the United States (US Military Intervention in Grenada)*, Case No. 10.951, Decision of 29 September 1999, § 42; (2002j), *Request for Precautionary Measures Concerning the Detainees at Guantánamo Bay, Cuba*, Decision of 13 March 2002; (2010c), *Franklin Guillermo Aisalla Molina v. Ecuador*, Case IP-02, OEA/Ser.L/V/II.140 Doc. 10 (2010), Judgment 21 October 2010 (*Admissibility*), §§ 120-122. See also (2005m), Report No. 11/05 (*Admissibility*), Petition 708/03, *Gregoria Herminia, Serapio Cristián and Julia Inés Contreras, El Salvador*, (February 23, 2005), § 20.

<sup>1688</sup> Article 2(2) ECHR.

<sup>1689</sup> (1975b), *Cyprus v. Turkey*, App. No. 6780/74, 6950/75, *Admissibility Decision of 26 May 1975*.

explicitly refer to or apply the law of hostilities *in the context of IAC*, nor has it otherwise expressed an outspoken viewpoint with respect to the relationship between the law of hostilities (or LOAC in general) and IHRL. There is no formal obstacle to resort to LOAC: while the ECtHR's jurisdiction is limited to the examination of possible violations of its own provisions, not of provisions of LOAC, in fact, Article 15(1) ECHR as well as Article 31(3)(c) VCLT require the ECtHR to take into account "any relevant rules of international law" in the interpretation of the ECHR. Arguably, the ECtHR would have had an opportunity to do so in the *Bankovic*-case, which concerned aerial hostilities in an IAC, if the ECtHR had declared the case admissible (which it did not).<sup>1691</sup> In *Al-Skeini*, when assessing the lawfulness of deprivations of life that occurred during the UK's occupation of Basra, Iraq, the ECtHR did not rely on the law of hostilities either,<sup>1692</sup> as the complaint concerned the UK's failure to carry out an effective and independent investigation, and not whether the UK had otherwise violated the right to life.<sup>1693</sup> Possibly, the ECtHR will have an opportunity to provide its views on the interplay between IHRL and LOAC in respect of the hostilities during the inter-State armed conflict between Georgia and Russia in 2008 – a case of particular interest as neither State had formally derogated from the right to life<sup>1694</sup> – but for now, an explicit pronouncement on the position of the law of hostilities vis-à-vis the right to life in respect of hostilities in an IAC remains absent.

However, more guidance can be distilled from the ECtHR's case law in respect of NIAC. As has been previously noted, the ECtHR has been frequently concerned with cases arising from hostilities having taken place during NIACs in Turkey and Chechnya. In none of these cases, the respondent States relied on the concept of derogation (as none had actually derogated from the right to life), but they all tried to justify the deprivations of life by reference to one of the legitimate aims listed in Article 2(2) ECHR. As none of the respondent States had admitted to the existence of an armed conflict at the time of the alleged violations, the ECtHR was required to assess the lawfulness of the use of lethal force by Turkish and Russian security forces against a normal background.

Admittedly, the cases at hand concerned claims by individuals who under the law of hostilities would have qualified as protected person. In other words, in none of the cases the ECtHR was required to examine the lawfulness of attacks on individuals who had been identified as lawful military objectives. In addition, the claims concerned State conduct that also would have been impermissible under the law of hostilities. In other words, this case law can be said to be of particular interest for demonstrating the convergence between IHRL and LOAC with respect to deprivations of life of protected persons. While this case-law must therefore be viewed from the proper perspective, the practice of the ECtHR nonetheless demonstrates that the law of hostilities was frequently resorted to – albeit tacitly – to interpret the requirements of absolute necessity, proportionality and precaution under the normative framework governing the deprivation of life under IHRL.<sup>1695</sup> It may there-

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<sup>1690</sup> (1976c), *Engel v. The Netherlands (Merits)*, Appl. Nos. 5100/71; 5101/71; 5102/71; 5102/72 (8 June 1976)

<sup>1691</sup> (2001c), *Bankovic and Others v. Belgium and 16 Other Contracting States*, App. No. 52207/99, Judgment of 12 December 2001.

<sup>1692</sup> Assuming here, for the sake of the argument, that the deprivations of life in the cases at hand took place within the concept of hostilities.

<sup>1693</sup> (2011b), *Al-Skeini and Others v. the United Kingdom*, App. No. 55721/07, Judgment of 7 July 2011, § 3.

<sup>1694</sup> In 2008, Georgia filed an inter-State complaint against Russia, which has been declared admissible by the ECtHR in (2012c), *Georgia v. Russia No. 2*, App. No. 38263/08, Judgment of 4 January 2012.

<sup>1695</sup> The ECtHR's jurisdiction is limited to the examination of possible violations of its own provisions, not of provisions of LOAC. However, there is no formal obstacle in the ECHR for the ECtHR to apply LOAC in the interpretation of its provisions. In fact, Article 15(1) ECHR as well as Article 31(3)(c)

fore, on closer examination, be rightly concluded that “[e]ven if the European Court applies human rights law directly to the conduct of hostilities, almost all of the standards and a substantial part of the terminology it employs are imported from IHL. In fact, what claims to be a human rights based approach draws most of its substantive content directly from the *lex specialis* of IHL.”<sup>1696</sup> Standards that can be detected are those of distinction, proportionality, precaution and necessity.<sup>1697</sup>

The practice of the ECtHR shows that to a great extent – and in any case in so far it concerns low-intensity conflicts – the normative framework governing the deprivation of life under IHRL is sufficiently flexible to accommodate situations of hostilities by reference to the law of hostilities. This is even the case in respect of military operations involving heavily armed insurgents, large numbers of counterinsurgent troops, and the use of artillery, mortars and large-scale aerial bombardments, as exemplified by the Chechnya cases. In the absence of case-law involving even larger conflicts, it remains unknown to which extremities the requirements can be stretched.<sup>1698</sup> Notwithstanding the above, it is submitted that the practice of the ECtHR is not to be interpreted as evidence of a *total* convergence of the normative frameworks governing the deprivation of life as set forth in IHRL and the law of hostilities, and that in fact the essential features continue to exist, and thus must be resolved by resort to the *lex specialis*-rule.

It may be concluded that the relationship between IHRL and LOAC in the normative paradigm of hostilities demonstrates that despite some fundamental substantive differences a conflict between norms can be averted quite simply by interpreting the general prohibition to arbitrarily deprive a person of his life as set out in IHRL by reference to the law of hostilities, which after all was specifically designed to deal with deprivations of life in the extreme circumstances that hostilities in armed conflict may bring about. As such, the relationship between IHRL and the LOAC in the normative paradigm of hostilities is determined by the maxim of *lex specialis derogat legi generali*, which functions here as a *technique of interpretation* and implies that, as a general rule, the norms present in the law of hostilities, *in toto*, function as a guiding source in the interpretation of the right to life protected under IHRL when assess-

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VCLT require the ECtHR to take into account “any relevant rules of international law” in the interpretation of the ECHR. With the exceptions of the ECiHR’s viewpoints expressed in the early cases of *Cyprus v. Turkey*-case ((1975b), *Cyprus v. Turkey*, *App. No. 6780/74, 6950/75, Admissibility Decision of 26 May 1975* and the *Engel*-case ((1976c), *Engel v. The Netherlands (Merits)*, *App. Nos. 5100/71; 5101/71; 5102/71; 5102/72 (8 June 1976)*), so far the ECtHR has not explicitly referred to or applied LOAC, nor has it expressed an outspoken viewpoint with respect to the relationship between LOAC and IHRL, even though it arguably could have as it dealt with flagrant cases of armed conflict. Possible motives for this approach are that it views IHRL as a self-contained regime, or that it shies away from making pronouncements on the interpretation of the law of hostilities and its interplay with IHRL. Arguably, the ECtHR would have had an opportunity to do so in the *Bankovic*-case, which concerned aerial hostilities in an IAC, but as concluded earlier, the ECtHR never came to an assessment of the merits, as the case stranded in its admissibility phase.

<sup>1696</sup> Melzer (2008), 393; Naert (2008), 401; Bijl (2007), 105; Contra: Krieger (2006).

<sup>1697</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*, § 178-179; (2005f), *Isayeva, Yusupova and Bazayeva v. Russia*, *App. No. 57947/00, 57948/00, 57949/00, Judgment of 24 February 2005*, § 178; (2008g), *Khatsiyeva et al. v. Russia*, *App. No. 5108/02, Judgment of 17 January 2008*; (2011g), *Khamzayev et al. v. Russia*, *App. No. 1503/02, Judgment of 3 May 2011*, 185; (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*, 253.

<sup>1698</sup> Melzer (2008), 392; Kretzmer (2009), 24. Possibly, the ECtHR’s examination of the inter-State complaint regarding the armed conflict between Georgia and Russia will provide more guidance. (2012c), *Georgia v. Russia No. 2*, *App. No. 38263/08, Judgment of 4 January 2012*.

ing the lawfulness of targeting operations in the context of hostilities. As a result, the requirements pertaining to the deprivation of life under the latter regime have no function in hostilities and therefore do not in any way modify the substantive content of the law of hostilities. As such, both regimes demonstrate to be sensitive to the specific objects and purposes for which their respective norms were designed, by taking into account the circumstances in which they are to be applied.

It follows that, under the normative paradigm of hostilities:

- (1) individuals qualifiable as lawful military objectives are no longer protected against direct attack;
- (2) their *intentional* deprivation of life is:
  - a. by definition an act related to the conduct of hostilities and therefore constitutes no ‘murder’ in violation of the law of hostilities (and amounts to a war crime under LOAC), but a lawful act of war provided it takes place in conformity with other requirements imposed by the law of hostilities; *and*
  - b. under those conditions, does not constitute an arbitrary deprivation of life under IHRL.

## 2. The Interplay of IHRL and LOAC in the Normative Paradigm of Law Enforcement

The interplay between IHRL and LOAC within the normative paradigm of law enforcement in respect of the issue of deprivation of life<sup>1699</sup> is greatly impacted by the manner in which LOAC regulates the conduct of States in their vertical relationship with protected persons. As could be concluded, LOAC imposes upon States party to a the conflict – whether in IAC or NIAC – the duty and commensurate authority to take appropriate measures to restore, and ensure public law, order, and safety, yet it does not provide detailed norms governing the deprivation of life in the exercise of this duty, other than those prohibiting the willful killing or murder of protected persons.<sup>1700</sup>

Nonetheless, it is in these norms that various ‘points of contact’ with IHRL can be identified.

For example, in relation to the interplay between IHRL and the law of belligerent occupation, Articles 27(4) GC IV and 64(3) GC IV provide the Occupying Power authorizations to imposes measures to comply with its positive obligation under Article 43 HIVR “to restore, and ensure, as far as possible, public order and safety,” but these measures may not result in deprivations of life qualifiable as willful killings. Intentional conduct resulting in the deprivation of life violates Article 27(1) GC IV, which stipulates that “protected persons are en-

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<sup>1699</sup> It is submitted that the normative paradigm of law enforcement also includes rules that govern the treatment of captured/interned persons.

<sup>1700</sup> To recall, under the law of belligerent occupation the Occupying Power is to ensure that the civilian population can lead as normal a life as possible – a purpose the fulfillment of which is subject to the security interests of the Occupying Power. Specifically, Article 43, 1907 HIVR<sup>1700</sup> places upon the Occupying Power the duty 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.” States on whose territory a NIAC takes place are equally entitled to, as well as responsible for taking appropriate measures for maintaining or restoring law and order, and to defend their national unity and territorial integrity. This follows from CA 3 and Article 3(1) AP II.

titled, in all circumstances, to respect for their persons, [...], and shall be protected especially against all acts of violence or threats thereof [...]"<sup>1701</sup>

Similar complementarity is found in Article 64(3) GC IV, which authorizes the Occupying Power to subject the population of the occupied territory

to provisions which are essential to enable the Occupying Power [1] *to fulfil its obligations under the present Convention*, [2] *to maintain the orderly government of the territory*, and [3] *to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them*.<sup>1702</sup>

As concluded by Melzer, the three exceptional bases mentioned in Article 64(3) GC IV in essence correspond "to the scope of ordinary law enforcement activities conducted by legitimate sovereigns in peace time."<sup>1703</sup> It may be concluded that in terms of legitimate purposes for the use of lethal force potentially resulting in the deprivation of life, the law of belligerent occupation and IHRL converge.

In the absence of further guidance as to the necessity for, and the conditions of the use of lethal force against protected persons outside the context of hostilities, it would logically follow that the question of the lawfulness of deprivations of life resulting from lethal force by counterinsurgent forces is to be answered by reference to the requirements underlying the deprivation of life in IHRL.<sup>1704</sup> As such, IHRL provides a complementary role:<sup>1705</sup> it "[...] reinforces the weight to be given to the [law of belligerent occupation's] principles and objective, that is, to protect the occupied population and provide for its wellbeing."<sup>1706</sup>

A similar complementary interplay between IHRL and LOAC in the normative paradigm of law enforcement can be found in the context of NIAC.<sup>1707</sup> The law of NIAC prohibits the willful killing of protected persons. To recall, the scope *ratione materiae* of persons protected by CA 3 and AP II extends to "persons taking no active part in the hostilities" as phrased in CA 3, or to "[a]ll persons who do not take a direct part or who have ceased to take a direct part in hostilities" as set forth in Article 4 AP II. Such persons concern the wounded, sick, and shipwrecked members of the armed forces, as well as those captured, and civilians not or no longer directly participating in hostilities.<sup>1708</sup>

In view of the general prohibition in the law of hostilities to directly attack protected persons, their intentional deprivation of life can never be based on military necessity. In principle, therefore, any measure imposed on them by the State party to the NIAC falls under the concept of law enforcement. As neither CA 3 nor AP II expressly regulates the depriva-

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<sup>1701</sup> Pictet (1958a), 207. As noted, the most severe measures that may be imposed on the basis of military necessity are assigned residence and internment, see Article 41 GC IV. See also Article 32 GC IV, which prohibits murder by civilian or military agents, i.e. "any form of homicide not resulting from a capital sentence by a court of law in conformity with the provisions of the Convention." Pictet (1958a), 222 (Article 32 GC IV).

<sup>1702</sup> Article 64(3) GC IV corresponds to the second part of Article 43, 1907 HVR, which contains a negative obligation to respect, "*unless absolutely prevented*, the laws in force in the country." On the three exceptions in Article 64(3) GC IV in general: Dinstein (2009c), 112 ff; Arai-Takahashi (2010), 123 ff.

<sup>1703</sup> Melzer (2008), 164-165. Melzer concludes for example that the three exceptional legislative bases in Article 64 GC IV correspond in qualitative terms with the three legitimate aims for deprivation of life under Article 2(2) ECHR. See also Kretzmer (2005), 201, footnote 154.

<sup>1704</sup> Melzer (2008), 165-166 (emphasis added). In the view of Sassòli, not LOAC, but IHRL assumes the position of *lex specialis*. Sassòli (2011), 77.

<sup>1705</sup> Frowein (1998), 11.

<sup>1706</sup> Ben-Naftali & Michaeli (2003), 289.

<sup>1707</sup> Moir (2002), 199, 214; Meron (2000a), 266.

<sup>1708</sup> See also (1997n), *Tadić*, § 615.

tion of life unrelated to hostilities when so necessary to restore or ensure public security, law and order, IHRL functions as the complementary regime to reinforce LOAC and thereby functions as the default regime against which the lawfulness of the deprivation of life of protected persons is to be assessed.<sup>1709</sup>

This complementarity interplay between IHRL and LOAC in the area of deprivations of life as a measure of law enforcement can be illustrated by several instances of the practice of judicial and quasi-judicial organs, and most in particular that of the IACiHR, in so far they were concerned with situations of the use of force against persons protected under the law of hostilities in a NIAC, *and* expressly applied both IHRL and LOAC.<sup>1710</sup>

This case law illustrates that (without removing its status as a provision of LOAC) CA 3 can be viewed as “essentially *pure human rights law*,” which in respect of deprivations of life of protected persons thus imposes upon States obligations they already had under the right to life.<sup>1711</sup> It also affirms that the principle of distinction under the law of hostilities is a closed-off circuit consisting of two categories – legitimate military objectives and, on the other hand, civilians and other persons not or no longer DPH-ing – and that there is no intermediate level of non-protection. Thus, the mere fact that individuals are present in insurgent-controlled areas; are relatives of insurgents; or are suspected of being loyal to, or cooperate with insurgents is not sufficient to qualify them as legitimate military objectives.<sup>1712</sup> Also, when a State issues manuals advising State agents to “neutralize [...] carefully selected and planned targets,” such as judges, police officers, state security officials and so forth, it violates its obligation under CA 3 that prohibits

“the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples” and probably also of the prohibition of “violence to life and person, in particular murder of all kinds, [...]”<sup>1713</sup>

It thereby also violates its complementary obligation under the right to life to provide a legal basis that *prevents* arbitrary killing by its own security forces by strictly controlling and limit-

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<sup>1709</sup> Corn (2010), 62; United Nations General Assembly (2010), 10.

<sup>1710</sup> (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986 (Merits), § 255; (1982a), *Caracoles Community (Bolivia)*, Case No. 7481, Decision of 8 March 1982; (1997b), *Abella et al. v. Argentina (La Tablada)*, Case No. 11.137, Decision of 18 November 1997, 195; (1999e), *Case Concerning the Massacre of the Jesuites in El Salvador*, Case No. 10.488, Decision of 22 December 1999, § 237; (1999), *Third Report on the Situation of Human Rights in Colombia*, IACommHR (26 February 1999), Chapter IV, §§ 11, 169, 202, 206, 293; United Nations (1993b), § 610.

<sup>1711</sup> (1997b), *Abella et al. v. Argentina (La Tablada)*, Case No. 11.137, Decision of 18 November 1997, 158. However, at the same time it explicitly refers to Article 29(b) of the ACHR, which contains the “most-favorable-to-the-individual-clause”. Article 29(b) provides that no provision of the IACHR shall be interpreted as “restricting the enforcement or exercise of any right or freedom recognized by virtue of the laws of any State Party or another convention which one of the said states is a party.” Following this clause, the IACiHR holds that since LOAC offers more protection than the ACHR, preference should be given to LOAC. In reverse, if LOAC is not, IHRL (in this context the provisions of the ACHR) should be followed. (1997b), *Abella et al. v. Argentina (La Tablada)*, Case No. 11.137, Decision of 18 November 1997, § 164-167. Naert disagrees with this view. Except for non-derogable human rights, the *lex specialis* principle is not a ‘more favourable’-principle: “the *lex specialis* rule clearly implies that in some cases the LOAC will prevail even where it offers less protection. In other words: more specific does not necessarily equal more favourable.” Naert (2008), 396-397, referring to Meron (1987), 30; Gross (2007), 35; Schäfer (2006), 47-48. *A contrario*: Orakhelashvili (2008), 181-182.

<sup>1712</sup> (1999), *Third Report on the Situation of Human Rights in Colombia*, IACommHR (26 February 1999), Chapter IV, §§ 202; 293.

<sup>1713</sup> (1986a), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986 (Merits), § 255.

ing the circumstances in which a person may be deprived of his or her life by the authorities of a State.

In fact, State agents must take account of the fact that during a specific conflict the normative paradigms of hostilities and law enforcement may simultaneously apply and that the treatment of a single individual may *shift* from that of law enforcement to hostilities and back. Thus, in respect of an armed confrontation between prison inmates and guards in the *La Tablada*-prison on Argentina, in respect of which the IACiHR concluded that the violence reached the threshold of intensity sufficient to conclude upon the existence of a NIAC, it concluded that the armed forces deployed to quell the violence had failed to make this distinction. Thus, in contrast to prisoners that did not partake in the violence, as well as peaceful civilians living nearby the prison, the rioting prisoners “assume the role of combatants by directly taking part in fighting, whether singly or as a member of a group, they thereby become legitimate military targets” [...] they “lost the benefits of the above mentioned precautions in attack and against the effects of indiscriminate or disproportionate attacks pertaining to peaceable civilians.”<sup>1714</sup> However, once the prisoners were captured, the relationship between the State agents and them “was analogous to that of prison guards and the inmates under their custody. As such, the State had, under Article 1(1) of the American Convention and Common Article 3 of the Geneva Conventions, a duty to treat these persons humanely in all circumstances and to ensure their safety.”<sup>1715</sup>

Nonetheless, as in peacetime situations, particular conduct by persons protected by CA 3 (and AP II), while not amounting to their DPH, may nonetheless require the use of force by counterinsurgent forces that is absolutely necessary to attain a legitimate aim recognized under IHRL in fulfillment of its right and duty to restore public security, law and order in response to such volatile acts. As held by the IACiHR,

[n]ot all killings occurring outside of combat activities necessarily imply arbitrary deprivations of life. Thus, for example, deaths which occur as a result of police actions in the defense of the public order do not constitute violations of the right to life where they are carried out with proper respect for proportionality and in conformity with the law. Also, in those cases occurring in the context of an armed conflict, humanitarian law provides standards for determining whether a loss of life is arbitrary. As noted above, pursuant to international humanitarian law norms, not all deaths occurring outside of combat-related activities automatically constitute violations of international law.<sup>1716</sup>

For example, CA 3 permits the use of lethal force against a person “forcibly resisting detention.”<sup>1717</sup> However, while the use of lethal force may find a basis in a recognized legitimate aim, it still requires a sufficient legal basis and must comply with the requirements of absolute necessity, proportionality and precaution.

In sum, it is submitted that the few available norms present in LOAC are specifically designed to protect persons in armed conflict and may be viewed as the *lex specialis* in the conduct of hostilities. As no additional clarity can be attained from the ordinary rules of treaty interpretation or the principles underlying LOAC, recourse may be had to the *lex generalis*, which is IHRL, to *complement* LOAC. As such, the right to life-framework under IHRL functions as the *default* normative framework applicable in situations involving the deprivation of life of persons protected under the law of IAC and NIAC.

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<sup>1714</sup> (1997b), *Abella et al. v. Argentina (La Tablada)*, Case No. 11.137, Decision of 18 November 1997, § 178.

<sup>1715</sup> (1997b), *Abella et al. v. Argentina (La Tablada)*, Case No. 11.137, Decision of 18 November 1997, § 195.

<sup>1716</sup> (1999), *Third Report on the Situation of Human Rights in Colombia*, LACommHR (26 February 1999), § 169.

<sup>1717</sup> (1999), *Third Report on the Situation of Human Rights in Colombia*, IACiHR (26 February 1999), § 116.

The interplay is here characterized by harmony, not conflict, by which IHRL and LOAC demonstrate their ability to mutually reinforce each other. In its complementary role, IHRL ‘takes the lead’ and informs the determination of the lawfulness of deprivations of life of persons protected under LOAC. As follows from the analysis below, the relevant requirements underlying the normative framework of deprivations of life under IHRL remain intact, i.e. they are not in any way altered by the fact that they are applied in the context of an armed conflict.

It follows that, under the *normative paradigm of law enforcement*, the deprivation of life of protected persons is:

- a. an act unrelated to the conduct of hostilities;
- b. constitutes ‘murder’ in violation of the law of hostilities (and amounts to a war crime under LOAC); *and*
- c. amounts to an arbitrary deprivation of life under IHRL;

*unless* it serves a legitimate aim under IHRL and otherwise conforms with the requirements of sufficient legal basis, absolute necessity, proportionality and precaution, therewith taking account of the possible volatile circumstances at hand.

### **3. The Interplay between the Normative Paradigms of Hostilities and Law Enforcement**

In the previous paragraphs, we have determined how IHRL and LOAC interrelate *within* the normative paradigms of hostilities and law enforcement. As concluded, the normative paradigm of law enforcement is principally IHRL-based, whereas the law of hostilities shapes the normative paradigm of hostilities.

Both normative paradigms offer important military operational guidance relevant to targeting operations. They not only draw the outer boundaries of permissible targeting; the requirements inherent in these frameworks function as essential and decisive instruments in the interpretation and application of the fundamental principles of military operations essential in determining the course of action in specific situations of targeting. Commonly recognized general principles of military operations are security; objective; the economy of effort; simplicity; flexibility; credibility; initiative; and legitimacy. Additional principles principally related to targeting are mobility, offensive and surprise. These principles are of equal value in the context of targeting operations in counterinsurgency.

Military operations require an unequivocal, clearly described and attainable *objective*. In counterinsurgency, one of the principal objectives of the overall counterinsurgency campaign, and military operations part thereof, is the provision of physical *security* to the counterinsurgent’s own forces, as well as the local population, and representatives of international and non-international organizations. The normative paradigms determine whether and, if so, how use can be made of the instruments of force to provide such security. Is the counterinsurgent commander bound by the strict regime offered by the normative paradigm of law enforcement, so any use of force is in principle a measure of last resort or can he make use of the operational latitude provided by the normative paradigm of hostilities? These are significant questions, as they inform the commander to what extent use can be made of the elements of *mobility*, *surprise* and *offensive* in combat operations – all of which reflect notions of military necessity taken into account when designing the law of hostilities. In the absence of clearly identifiable lawful military objectives, *security* by means of application of potentially lethal force can only be provided in conformity with the requirements of law enforcement, as recognized under IHRL. A proper analysis of the applicable normative paradigm will offer the commander insight in how he is to deploy its available assets as an application of

the principle of *economy of effort*. For example, under the normative paradigm of hostilities, the commander is entitled to make use of air assets such as the widely discussed drones in lieu of ground forces to target a particular persons, which enables him to deploy those ground forces elsewhere. However, under the normative paradigm of law enforcement, the application of such air assets would most likely not be lawful, and ground forces must carry out the operation. Unquestionably, the planning and execution of military operations by air assets or ground forces requires very different degrees of effort (e.g. in terms of logistics). Also, a determination of the proper normative paradigm will provide the commander the necessary direction in how to *simplify* his plans to the maximum extent possible, and contributes to the *credibility* and *social legitimacy* of the military operations. Certainty about the applicable normative paradigm will offer an opportunity to design a realistic concept of operations with the proper means, which will support morale and the dedication to execute the task at hand in a consistent, disciplined, accurate, effective, and foremost, legitimate manner. Also, normative paradigms with substantive contents devised for specific circumstances offer military commanders a venue to quickly adapt to changing situations in contemporary mosaic warfare by shifting from the one normative paradigm to the other and back when so required by the facts on the ground. It does, however, require troops that are proficient in applying force in both law enforcement-type situations, as well as hostilities, which requires training and education. This way, military commanders are also guided in their interpretation of the principle of *initiative*. For example, in situations of law enforcement the military principle of initiative is to be viewed in light of the requirement of absolute necessity, and proactive, anticipatory lethal force is lawful in very limited circumstances; the vast majority of use of lethal force under the law enforcement paradigm is reactive. As a result, commanders are forced to adjust their process of ‘outthinking’ the enemy to the permissible scope of action under the normative paradigm of law enforcement, in order to preserve legitimacy, which in practice implies that the principle of initiative is contingent upon reactionary, rather than pro-active conduct. It also offers commanders a platform to consider whether to prioritize initiative over legitimacy.

As follows, the operational latitude for targeting insurgents is greatly impacted by the applicable normative paradigm. This triggers a crucial question, namely what factors determine which normative paradigm applies to a particular situation of targeting?

Admittedly, the answer to this question is rather straightforward in relation to some situations. For example, in situations where the potential target concerns a person protected from direct attack under the law of hostilities and is present in territory under the effective control of the counterinsurgent State, such as in occupied territory or a peaceful area of a State in whose territory a NIAC takes place, it is uncontroversial that the normative paradigm of law enforcement applies. In that respect, there is no meaningful difference between IHRL and the concept of law enforcement, as both assume such effective control over territory for the rules to be effectively applied. Here, the determining factor for the applicability of the normative paradigm of law enforcement is the exercise of effective control and the very absence of a *nexus* with the concept of hostilities.

A similar reasoning applies to the situation that insurgents qualifiable as lawful military objectives are present in areas where such control over territory exercised by the counterinsurgent State is manifestly absent (for example because the territory is in the hands of the insurgents) or where insurgent and counterinsurgent forces are fighting for such control. In this case, the normative paradigm of hostilities undoubtedly applies, as there is *no nexus* with law enforcement.

However, it is submitted that the issue of interplay between both normative paradigms is arguably *less straightforward* in relation to insurgents *who qualify as lawful military objectives under the law of hostilities, but who happen to be present in territory under the effective control of the counterinsurgent State*. An example is provided by the case of *Guerrero v. Colombia*, where Colombian security forces raided a home where they thought members of the insurgency were holding a kidnapped official. As neither the insurgents nor the official were found in the house, the security forces decided to wait for the insurgents to return and killed them all. Another example concerns the situation where intelligence sources reveal that key insurgents are to convene at a certain location to plan a terrorist attack. A final example concerns the situation where insurgents, on route to a location to plant an explosive, are intercepted by counterinsurgency forces.

It would appear that both normative paradigms apply, and the question arises whether the normative paradigm to be used is a matter of choice, serving subjective interests, or whether objective standards determine the applicability of the normative paradigm. In the latter case, the application of the normative paradigm results from an obligation, which triggers questions as to what is the source of the obligation and what are the parameters that determine the applicability of the ‘right’ normative paradigm. This potential for dual application of the normative paradigms can best be explained by comparing the situation of insurgents with that of regular combatants (as understood in the law of IAC).

Traditionally, inter-State armed conflicts are characterized by *symmetry*, i.e. “[a]ll parties to the conflict are bound by the same norms, even if lack of respect for those norms by one of them does not provide the others with grounds for reciprocal lack of respect.”<sup>1718</sup> One of the most fundamental features of symmetry in inter-State armed conflict is the recognized status of combatants. As noted, the status of combatant entails certain privileges, to include immunity from criminal prosecution for direct participation in the hostilities in so far lawful under the law of hostilities. The identification of an individual as a combatant by definition limits the use of lethal force as a measure serving the concept of hostilities, in which case the death of regular combatants *solely* concerns the *horizontal* relationship between belligerents in an armed conflict. In other words, there is *no nexus* with the concept of law enforcement whatsoever. Under the then prevailing normative paradigm of hostilities, there is no further incentive to take further account of the context in which force is applied: a combatant may be attacked even when unarmed or asleep and it is left solely to the discretion of military commanders to decide to resort to alternative non-lethal measures, such as capture and arrest in situations where this would be feasible. As noted by Hakimi, “the combatant domain declines to muddy its otherwise rule-like prescription – targetable unless *hors de combat* – for the exceptional case in which an officer knows that he can capture a combatant without putting himself at serious risk or undermining his mission.”<sup>1719</sup> Proposals to that effect, as made by Melzer and the ICRC, have gained some support<sup>1720</sup> but are generally concerned to not reflect the *lex lata*.

Unlike the relationship of regular combatants in an inter-State armed conflict, which is characterized by horizontal legal symmetry, the relationship between counterinsurgent forces and insurgents is by definition, one of *legal asymmetry*.

In situations regulated by the law of IAC, insurgents do not qualify as combatants, but are civilians who are unprivileged to DPH, and while they may be attacked for such time as they

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<sup>1718</sup> Kretzmer (2009), 25.

<sup>1719</sup> Hakimi (2012), 1395.

<sup>1720</sup> Ferrero (2012), 129.

do DPH, they are also subject to criminal prosecution for violation of domestic criminal law.

In situations regulated by the law of NIAC, combatant-status is entirely absent, and there are thus no commensurate combatant-privileges for anyone participating in the conflict, whether member of the counterinsurgency forces or an insurgent. While this suggests symmetry, the relationship between both is nonetheless asymmetrical, for international law does not prohibit the State to criminalize, prosecute and punish insurgents on the basis of their membership in the armed forces of the insurgency movement, or for their DPH, whereas as members of the counterinsurgent forces are not subject to prosecution.<sup>1721</sup>

As a consequence of this legal asymmetry, the use of lethal force against insurgents does not serve only the concept of law enforcement and hostilities, but may serve *both* concepts. Not only do the insurgents pose a military threat, at the same time, however, the concept of hostilities *overlaps* with the concept of law enforcement, as the insurgents also pose a threat to public security, law, and order.<sup>1722</sup> This overlap in concepts translates into a *double relationship*: insurgents are not only in a *horizontal* belligerent relationship with the counterinsurgent State, but also in a *vertical* relationship. Under the former, counterinsurgency forces have an authority to attack; under the latter, they have an obligation to respect and protect the right to life and due process of all those under their jurisdiction. These relationships are difficult to separate. As Kretzmer explains in relation to internal NIACs:

in such conflicts one cannot distinguish between “outsiders,” who are not subject to the State’s jurisdiction and the State’s own citizens and residents, who are subject to its jurisdiction. Those involved in the armed conflict are subject to the State’s jurisdiction, and this certainly does not change because an internal armed conflict exists. It is thus quite clear that during an internal armed conflict in a State’s territory that State remains bound by its human rights obligations toward those in its territory and subject to its jurisdiction. In such situations, the State’s right to derogate from part of its human rights obligations has clear implications, not only vis-à-vis persons in the State who have no nexus to the armed conflict, but also to those who are participants in that conflict.<sup>1723</sup>

It is submitted that Kretzmer’s assessment is no different in situations of belligerent occupation.

As to the question of how to deal with the question of the applicable normative paradigm in targeting operations – particularly so in situations of dual relationships – two views may be distilled from legal doctrine: (1) a formal approach and (2) a functional approach.

### 3.1. A Formal Approach

A first, more traditional and *formal approach* identifies the applicable normative paradigm solely based on a person’s immunity-based status under the law of hostilities and concludes that the normative paradigm of hostilities should always apply relative to insurgents qualifying as lawful military objectives.<sup>1724</sup> Thus, the identification of individuals as lawful military objectives under the law of hostilities triggers the applicability of the hostilities paradigm – functioning as the *lex specialis*. Conversely, the law enforcement paradigm applies to all indi-

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<sup>1721</sup> Kretzmer (2009), 29. See, however, Article 6(5) AP II, which mandates that “[a]t the end of hostilities the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict.”

<sup>1722</sup> Melzer (2010a), 43.

<sup>1723</sup> Kretzmer (2009), 10.

<sup>1724</sup> Schmitt (2010c), 16.

viduals who qualify as protected persons. In fact, counterinsurgent States – as the principal users of the law – may be particularly attracted to this approach as it offers a justifiable basis to keep the strict standards of law enforcement at bay while making full use of the operational and legal benefits of first-resort use of lethal force lawful military objectives rather than having to treat them as suspected criminals who should be afforded the guarantees of a criminal process;<sup>1725</sup> the proportionate incidental killing of civilians, and the authority to kill without having to carry out an independent investigation in each instance of use of lethal force. While the benefits per se are not problematic, their *comprehensive application* – even in situations where resort to less forceful measures permissible under the normative paradigm of law enforcement would suffice to remove the threat to public security, law, and order – is.

Closer analysis of the process behind the formal approach reveals that the identification of the hostilities paradigm as the *lex specialis* is the result of a rather conclusory, static process where no account is had of the *overall* context in which the norms are applied; an individual's 'immunity'-status under the law of hostilities suffices. The maxim of *lex specialis* here applies in its function as "*lex specialis derogata*." As such, the *lex specialis* functions as an *exception* to the general rule by way of which the former "may be considered as a *modification, overruling* or a *setting aside* of the latter."<sup>1726</sup>

It is submitted that, in view of the conclusory approach underlying it, the formal approach is pertinent in respect of lethal force against regular categories of individuals in situations of 'classic' inter-State armed conflict, but is *flawed* in respect of deprivations of life in irregular conflict involving insurgents.

The discomfort with the formal approach in identifying the normative paradigm governing the deprivation of life of insurgents lies, *firstly*, in the fact that a conclusory process smothers a necessary context-sensitive legal discourse and consequently results in the justified comprehensive application of the standards underlying a normative paradigm also in less-fitting contexts.<sup>1727</sup> *Secondly* (and related to the first point), such lack in legal discourse allows different actors (States, (quasi-)judicial bodies, NGO's) to reach opposing conclusions as to the applicable normative paradigm in relation to the same insurgent.<sup>1728</sup> The context-indifferent nature of the formal approach therefore 'feeds' uncertainty as to which normative paradigm should apply, which ultimately, may undermine the position of individuals, whether potential target or innocent bystander, under either normative paradigm.<sup>1729</sup>

Neither normative paradigm appears to offer a seamless fit. In fact, it has led experts to also construct new<sup>1730</sup> or 'hybrid approaches' that are more permissive than would be authorized under the normative paradigm of law enforcement, but are more restrictive than mandated by the normative paradigm of hostilities. Problematic, however, is that these approaches lack a solid legal basis and are to be viewed more as reflections as to how the law should develop than of what the law currently is.

In view of the above, this study submits that the interplay between the normative paradigms

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<sup>1725</sup> Kretzmer (2009), 18.

<sup>1726</sup> Koskeniemi (2007a), 49, § 88.

<sup>1727</sup> Hakimi (2012), 1367.

<sup>1728</sup> Admittedly, much of the debate among experts concerns the killing of terrorists, but the legal questions underlying such killings do not differ in the context of insurgents (as understood in the present study).

<sup>1729</sup> Hakimi (2012), 1366-1367.

<sup>1730</sup> Sloane (2007); Schöndorf (2004).

of law enforcement and hostilities in the context of deprivations of life in counterinsurgency operations is to be determined by an alternative: a *functional approach*. As will be demonstrated below, its principal strength is to balance “the demands of the universality of human rights and practical considerations of effectiveness”<sup>1731</sup> in situations of dual relationships, without bending or penetrating the boundaries separating the two normative paradigms. In other words, the functional approach enables the normative paradigms to operate in a harmonious fashion, while leaving their substantive contents intact.

### 3.2. A Functional Approach

#### 3.2.1. The General Concept

A functional approach to the interplay between the normative paradigms mandates that the normative paradigm of law enforcement applies if the counterinsurgent State exercises control over territory where lethal force potentially resulting in the deprivation of life occurs (*territorial control*) as well as over the circumstances surrounding the operation (*situational control*). The normative paradigm of hostilities, while offering valid norms, finds no application to the relationship between the counterinsurgent State and insurgents qualifying as lawful military objectives, but instead is placed ‘in reserve’ and remains ‘dormant’ as long as the normative paradigm of law enforcement can adequately govern all conduct of the counterinsurgency forces in response to imminent and concrete threats posed to public security, law, and order by the insurgents, even when these can be linked to hostile acts. It is not until control is not or no longer exercised to a degree that it permits the counterinsurgent State to maintain or restore public security, law, and order by resort to law enforcement measures alone that the logical limits of the normative paradigm of law enforcement have been reached. From that point onwards, the normative paradigm of hostilities becomes ‘active’.<sup>1732</sup> In these instances, the normative paradigm of law enforcement loses the *effectiveness* required in the concrete situation, i.e. and from that point on, the normative paradigm of hostilities is simply more detailed and demonstrates its capacity to be more effective.

Equally, the newly gained or restored exercise of control mandates a shift from the normative paradigm of hostilities to the normative paradigm of law enforcement, as from that moment onwards the counterinsurgent State is presumed to maintain or restore public security, law, and order by resort to measures permissible under the normative paradigm of law enforcement.

#### 3.2.2. Law or Policy?

Support for a functional approach is growing, both in doctrine<sup>1733</sup> and in the practice of (quasi-)judicial bodies.<sup>1734</sup> However, there is no explicit positive rule that mandates this approach. While presented by some as the *lex lata*, others propose that this is what the law

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<sup>1731</sup> Milanovic (2011b).

<sup>1732</sup> Criddle (2012), 1100. See also 1089 ff; Ferrero (2012), 122; Kretzmer (2009), 35; Gaggioli & Kolb (2007).

<sup>1733</sup> Kretzmer (2005); Kretzmer (2009); Criddle (2012); Ni Aoláin (2007), 583; Droege (2008a); Ferrero (2012), 130; Watkin (2004), 18; Ben-Naftali & Michaeli (2003), 287 ff; Sassòli & Olson (2008), 614; Cohen & Shany (2007), 315; Arai-Takahashi (2010), 443; Watkin (2008), 192; Römer (2009), 66-67; Lubell (2005), 749 ff; Abresch (2005), 760; Gaggioli & Kolb (2007); Milanovic (2011a), 120-121; Kleffner (2010b), 74; Hampson (2011), 204; Garraway (2010), 510; Hakimi (2012). See also United Nations Office of the High Commissioner for Human Rights (2011), 63.

<sup>1734</sup> (2005d), H<sup>C</sup>J 769/02, *The Public Committee Against Torture in Israel v. The Government of Israel* (11 December 2005), §§ 26 ff, 39-40; United Nations (2009), § 14-15.

should be like or how security forces should act as a matter of *policy*, because it is the ‘right’ thing to do in light of, for example, the grand strategy of the counterinsurgency campaign. As explained by Watkin:

It does not mean that during armed conflict capture must, as a matter of law, be carried out. However, capture may provide a more publicly acceptable option. [...] Another factor to consider in respect of ‘control’ is that governing authorities may prefer a law enforcement response in order to limit the potential for injury to the civilian population and to demonstrate the exercise of their civil jurisdiction. As a government begins to regain control of territory the use of military force may be seen as less necessary.<sup>1735</sup>

Policy also provides the basis for the Israel Supreme Court in its *Targeted Killings*-decision when it gives instructions to Israeli security forces as to how it should operate. In relevant part, the HCJ held that a DPH-civilian

cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, *one must choose the means whose harm to the human rights of the harmed person is smallest* [...]. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated and tried, those are the means which should be employed [...]. [T]rial is preferable to the use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force [...].<sup>1736</sup>

The HCJ accepts, however, that the application of the law enforcement-based principle of proportionality has its limits:

Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required [...]. It might actually be particularly practical under the conditions of belligerent occupation, in which the army *controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities* [...]. Of course, *given the circumstances of a certain case, that possibility might not exist*. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used.<sup>1737</sup>

As explained by Milanovic, while

[i]t used the kernel of a human rights rule – ie that necessity must be shown for any intentional deprivation of life, to restrict the application of an IHL rule [...] [t]he Court’s holding was not based on *lex specialis* or any other form of mechanical reasoning. It made a policy and value judgment that in the context of prolonged Israeli occupation of Palestinian territories the traditional IHL answer was no longer satisfactory, and it had a basis in human rights law to say so.<sup>1738</sup>

Similarly, the Colombian government, when adopting ROE instructing its forces to apply a least harmful means-approach in respect of lawful military objectives when circumstances so

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<sup>1735</sup> Watkin (2005b), 30-31.

<sup>1736</sup> (2005q), *The Public Committee Against Torture in Israel v. The Government of Israel*, HCJ 769/02, *High Court of Justice* (11 December 2005), §§ 39-40, relying on the ECtHR’s judgment in *McCann*, see Melzer (2008)mcc(1995f), *McCann and Others v. United Kingdom*, App. No. 18984/91, *Judgment of 5 September 1995*, § . This is also the position of the UN HRC on Israel’s targeted killing policy: “before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.” (2003a), *Concluding Observations of the Human Rights Committee: Israel* (21 Augustus 2003), § 15.

<sup>1737</sup> (2005q), *The Public Committee Against Torture in Israel v. The Government of Israel*, HCJ 769/02, *High Court of Justice* (11 December 2005), §§ 39-40 (emphasis added).

<sup>1738</sup> Milanovic (2011a), 120.

permit, did so not because there is an explicit rule in international law that requires it to do so, but because it is the best policy. As the Colombian Minister of Justice explains:

We have called our security policy the policy of consolidation, and that means that we want progressively to reduce the application of [LOAC] as we continue to make headway in the extension and consolidation of the rule of law. But along the way, you run into situations such as the ones I described with the sniping or scouting militias, which are a challenge. Again, the solution we have found is not just to sort out the difficult question of direct participation in hostilities by determining membership, but *to rethink what military necessity means in these contexts and to modulate that principle with the human rights principle of capturing or demobilizing first and using lethal force as a last resort.*<sup>1739</sup>

In other words, the overriding value for the conduct of military operations is the Rule of Law to establish peace. As explained by Von der Groeben,

[...], all efforts, even military, must be subordinate to this policy aim of enforcing the rule of law. This conflict is in essence one between legality versus illegality, but instead of invoking just war theories aiming to justify an even larger amount of violence, the Government restrains itself by following a law enforcement pattern. In other words, the aim of the Colombian fight against their opponents is not only primarily to annihilate them but also to bring them to justice.<sup>1740</sup>

Despite the policy-approach generally adopted, it is submitted that the functional approach, while not captured in a positive rule of international law logically follows from – and finds a legal basis in – the very objects and purpose underlying IHRL and the law of hostilities, which must be interpreted in light of the specific circumstances, following which the normative paradigm of law enforcement always finds application when the counterinsurgent State exercises effective control over territory and the specific situation at hand.

Indeed, central to a functional approach is an *interpretive rather than a conclusory* application of the maxim of *lex specialis* which reflects the need to look at how – in terms of intent, relevancy, effectiveness, certainty and reliability – different rules operate in the factual environment where they apply without losing sight of their object and purpose. As such, it is appreciative of the notion that international law precedes to a conclusion *through reason* rather than intuition.<sup>1741</sup>

The interpretive process underlying the functional approach entails that the identification of the applicable normative paradigm does not solely hinge on the immunity-based status of individuals under the law of hostilities, but *also* takes particular account of the interplay between the objects and purposes of the normative paradigms relative to the prevailing facts to which both apply by looking at *which relationship between the counterinsurgent State and the targetable insurgent best fits the context in which the targeting operation takes place.*

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<sup>1739</sup> As stated by the Colombian Vice-Minister of Defense, the Honourable Sergio Jaramillo Caro, in Pfanner, Melzer & Gibson (2008), 828 (emphasis EP). The phrase “to rethink what military necessity means in these contexts and to modulate that principle with the human rights principle of capturing or demobilizing first and using lethal force as a last resort” may be taken to imply that military necessity needs to be reinterpreted as to contain a ‘least harmful means’-obligation derived from IHRL. This study interprets the phrase to mean that in situations as in Colombia the function of military necessity fundamentally differs from its traditional, leading *function* (i.e. where it serves as the primary objective to do all that is required and permissible by LOAC to render the enemy *hors de combat*, in order to defeat him). Rather, military necessity, while still existing, plays a subordinate role in situations where the objective of reestablishing the Rule of Law can be attained by measures short of lethal force.

<sup>1740</sup> Von der Groeben (2011), 162.

<sup>1741</sup> Hakimi (2012), 1368, citing, *inter alia*, Chayes & Handler Chayes (1995), 118 (“[T]he interpretation, elaboration, application, and, ultimately, enforcement of international rules is accomplished through a process of (mostly verbal) interchange among the interested parties.”)

As held by Watkin:

It is unwise to stick stubbornly to either normative [paradigm] in the face of facts that point to a more nuanced approach where an escalation in the use of force (in the case of human rights law) or a limitation on the potential violence (in the case of humanitarian law) is required. Acting otherwise will not meet the needs of the society being protected. *The use of force and the successful application of the normative frameworks will ultimately be contextually driven by the facts on the ground rather than restricted by dogmatic approaches to applying the law.* Where security forces use force it is the right to life that must be emphasized [...]. It is only on that basis that law and order can be maintained and with it true respect for the rule of law affirmed.<sup>1742</sup>

To recall, the principal relationship in the normative paradigm of law enforcement is a *vertical* relationship between the counterinsurgent State and all individuals *under its control*. This relationship is intrinsically connected to the *fiduciary obligation* to respect and protect the human rights of these individuals. In respect of the issue of deprivation of life, this fiduciary obligation entails a duty to bring insurgents into the criminal justice process by capturing them. The use of lethal force is only permissible when *absolutely necessary*. The string of the elements *vertical relationship-control-fiduciary obligation-absolute necessity* is representative of the IHRL-heavy nature of the object and purpose of the normative paradigm of law enforcement.

In the alternative, the principal relationship in the normative paradigm of law enforcement is the *horizontal* relationship between the counterinsurgent State and the insurgent qualifying as lawful military objective, which ordinarily presupposes the *absence of control*. This relationship is intrinsically connected to the authority to fully exploit, within the set boundaries, the benefits of permissible direct attack under the law of hostilities. Underlying this authority is the notion of *military necessity*. The string of the elements *horizontal relationship-absence of control-authoritative benefits-military necessity* is representative of the LOAC-based nature of the normative paradigm of hostilities.

The interpretive process of the functional approach allows for an assessment of the facts at hand in order to determine how, on the one hand, the string of the law enforcement-based elements is to interplay with the string of hostilities-based elements.

When taking the situation of belligerent occupation as an example, this fiduciary-based, context-related approach seems to underlie the idea behind Article 43 HIVR. To recall, it imposes on the Occupying Power the obligation “to take all the measures [...] to restore, and ensure, [...] public order and safety” to those “in his power” and “as far as possible”. As previously established, these measures are not unlimited. Deprivations of life may only result from measures lawful under the normative paradigm of law enforcement. The elements “in his power” and “as far as possible” function as the parameters to assess the ability and effectiveness of measures lawful under the normative paradigm of law enforcement to comply with Article 43 HIVR, once the Occupying Power is confronted with hostilities. As such, both elements function as the bases to make way for resort to measures permissible under the normative paradigm of hostilities.<sup>1743</sup> Whether such is the case remains within the discretion of the Occupying Power, but it is submitted that the determination must be made in view of the aim of the law of belligerent occupation and the Occupying Power’s presumed capacity to commit to the Rule of Law in governing its vertical relationship with individuals present in the occupied territory over which it exercises effective control. If the

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<sup>1742</sup> Watkin (2008), 199-200 (emphasis added).

<sup>1743</sup> This is not to imply that the obligation under Article 43, 1907 HIVR ceases to apply in case of such precedence of the law of hostilities, for it continues to govern the relationship between the Occupying Power and persons protected under the law of hostilities.

Occupying Power were to ignore these elements, and prioritizes the applicability of the law of hostilities over the law of belligerent occupation solely based on someone's loss of immunity from direct attack due to his direct participation in the hostilities, the Occupying Power would arguably escape a continuing obligation under international law on the basis of the wrong threshold.<sup>1744</sup>

### 3.2.3. Control

The decisive parameter in the interpretive process to determine whether the counterinsurgent State is authorized to make the shift from law enforcement to hostilities-based use of force, and in the alternative, when it is under an obligation to transfer from hostilities to law enforcement, is the *notion of control*.<sup>1745</sup>

Ultimately, it would follow that, in the exercise of control, the fiduciary *obligation* prevails over the *authoritative* benefits under the normative paradigm of hostilities. Indeed, the fiduciary obligation cannot be reasonably upheld when insurgents do not surrender and are not otherwise under the effective control of the counterinsurgent State. As such, the standard of *absolute necessity* inherent to the fiduciary obligation 'feeds', as it were, the *military necessity* inherent to the authority to kill.

Thus, the context-sensitive control-test ensures that, on the one hand, the normative paradigm of law enforcement stops where its continued application would only increase the risk that operators, out of frustration, would discard rules altogether because its highly demanding object and purpose exceed operationally feasible limits.

On the other hand, the context-sensitive control-test functions as a barrier against the injudicious application of the normative paradigm of hostilities in situations where the justifiable exploitation of its *authoritative* benefits would manifestly undermine the 'fiduciary' *obligatory* standards of protection against the effects of lethal force for all those within the counterinsurgency State's control, whether target or innocent bystander. As noted earlier, the benefits *per se* are not problematic. Their application in situations where the exercise of control would have permitted the counterinsurgent State to uphold the high standard law enforcement-based level of protection, however, is, particularly so in light of contemporary counterinsurgency doctrine. In fact, the full exercise of the benefits arising from the normative paradigm of hostilities when applied by counterinsurgent States exercising control is troublesome because it particularly affects the position of the counterinsurgent's most important, intangible asset: the civilian population.

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<sup>1744</sup> See also Criddle (2012), 1101: "HRL would also supply the applicable proportionality standard for states conducting counterinsurgency operations within contexts of belligerent occupation. The international law of occupation requires occupying powers to stand in as steward for a displaced sovereign to maintain legal order for the duration of their occupation. Because an occupying state asserts control over the legal and practical interests of persons within occupied territory, the fiduciary principle requires an occupier to respect the basic human rights of occupied peoples during belligerent occupation regardless of whether the resident population has consented to the occupation. Occupying states must afford "the civilian population" the "maximal safeguards feasible under the circumstances." Although a state need not give persons within an occupied territory all of the benefits bestowed upon its own nationals, it must refrain from colonialist exploitation and other forms of domination. The relational theory of *lex specialis* supports these features of the law of occupation and suggests that states must honor the heightened protection of HRL's strict proportionality standard when they use force within an occupied territory."

<sup>1745</sup> It is emphasized that the counterinsurgent State, even when it is authorized to resort to lethal force under the normative paradigm of hostilities, remains authorized to make a policy-judgment and to opt for a law enforcement approach if it so desires.

*Firstly*, the derogation from the protective standards of the normative paradigm of law enforcement by applying the standards of the normative paradigm of hostilities implies that the counterinsurgent State is entitled to apply lethal force as a measure of first resort vis-à-vis insurgents without being under an obligation to resort to non-lethal alternative measures to respect their right to life even if it reasonably could. In fact, in the case of insurgents qualifying as CCF-members of the insurgency, preplanned lethal force would be permissible without them posing a threat. Also, it permits the immediate killing of individuals DPH-ing, even when the hostile conduct itself would even in peacetime settings not warrant the use of lethal force. This would not have been too problematic if insurgents were easily identifiable as lawful military objectives, which would be the case in situations of open combat. However, precisely in insurgencies, operational practice demonstrates that the identification of individuals as ‘good’ or ‘bad’ is extremely difficult. It is often uncertain who belongs to an organized armed group, or who acts on an individual or unorganized basis. In the case of organized armed groups it is difficult to determine when, or on what basis individuals join or quit their memberships. And because such groups are illegal, and their members are criminal suspects, they will do anything to remain unnoticed as members. As concluded, the law of hostilities as it stands today is not particularly helpful in identifying individuals as lawful military objectives, and notwithstanding the guidance by the ICRC, counterinsurgent States remain relatively ‘free’ in deciding for themselves when to qualify non-State actors as lawful military objectives, which may imply that civilians are placed in the authoritative scope of direct attack based on error or arbitrariness. A too lenient approach towards adopting the normative paradigm of hostilities as the default framework would risk the lives of civilians, “whether they are sympathizers of the group, members of the ‘political wing’, belong to the same ethnic group, or simply happen to be in the wrong place at the wrong time.”<sup>1746</sup>

*Secondly*, application of the normative paradigm of hostilities to insurgents under the control of the counterinsurgent State would imply that the latter is authorized to apply the looser standards permitting the incidental killing of innocent civilians as proportionate collateral damage even in circumstances where this would manifestly not be permissible under the normative paradigm of law enforcement, while applying the latter would have led to a result more compatible with the situation at hand.

*Thirdly*, application of the normative paradigm of hostilities relieves the counterinsurgent State from the obligation to carry out independent investigations, even though the exercise of control would permit it to do so without unduly placing investigators at risk. This implies that counterinsurgent States may escape accountability for human rights violations in situations where accountability is a prime factor in building and upholding social legitimacy, mostly so when the counterinsurgent State is a visiting force supporting another government in building the rule of law.

As may be concluded from the above, the functional approach ensures that both normative paradigms function as two communicating vessels, rather than in a static manner where both paradigms are viewed as two conflicting bodies and contest one another.<sup>1747</sup> Droege admits that “[i]n practice, the lines will not always be easy to define. But a coherent interpretation of these existing bodies of law must attempt to provide a framework which gives some direction while at the same time remaining flexible in order to accommodate a large number of possible situations.”<sup>1748</sup> As such, the functional approach demonstrates its prin-

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<sup>1746</sup> Sassòli (2011), 81-82. See also Orakhelashvili (2008), 167; Kremnitzer (2004), 4-8.

<sup>1747</sup> Ni Aoláin (2007), 583.

<sup>1748</sup> Droege (2008a), 537.

cial strength, which is its ability to balance “the demands of the universality of human rights and practical considerations of effectiveness”<sup>1749</sup> in situations of dual relationships, without adjusting the degrees of protection to individuals inherent in the normative paradigms by penetrating the boundary separating them. In other words, the functional approach enables the normative paradigms to operate in harmonious fashion, while leaving their substantive contents intact.

The functional approach requires the assessment of *two* types of control: (1) *territorial control* where lethal force potentially resulting in the deprivation of life occurs and (2) *situational control*.

### 3.2.3.1. Territorial Control

As previously concluded, situations in which a State is generally recognized to exercise effective control over territory include instances of control over own territory; military occupation; a State’s exercise effective control over (part of) another State’s territory upon invitation, consent or acquiescence of the territorial State; and instances of temporary control over part of another State’s territory. Generally, such control is deemed to be absent (and irrelevant) in the concept and commensurate normative paradigm of hostilities.

The manifest absence of effective territorial control implies that the counterinsurgent State is unable to fulfil its fiduciary obligation, and that it is fully entitled to exercise the benefits of the normative paradigm of hostilities in relation to the insurgent(s) in question. When applied to situations of counterinsurgency examined in the present study, we concluded that effective control over territory triggering obligations under IHRL is generally absent in SUPPCOIN and TRANSCOIN, but undoubtedly arises in situations of OCCUPCOIN and NATCOIN.

In respect of OCCUPCOIN, the test for the existence of effective control over areas in the territory of an occupied State is the capacity to exercise the level of authority over territory required to enable it to satisfy the fiduciary obligations imposed by the law of occupation,<sup>1750</sup> irrespective of a State’s willingness to exercise authority. This capacity does not automatically vanish because of the presence of insurgents in occupied territory, or the carrying out of hostilities regardless of the concrete threat these pose. It is submitted that once it can be established that the capacity to exercise public powers of the counterinsurgent Occupying Power over the area of operation has been displaced by the insurgents, or where it is unclear which party exercises public powers that, in respect of that part of the occupied territory, the counterinsurgent Occupying Power does not exercise effective control (in which case, technically, that territory no longer can be regarded as occupied by the counterinsurgent Occupying Power).

The second situation in which the capacity to exercise effective control over territory is also presumed to typically exist, is in situations of NATCOIN. Indeed, the formal existence of an armed conflict does not exclude the possibility that parts of the State’s territory may remain firmly under governmental control, even in an AP II-NIAC.<sup>1751</sup> In other areas, how-

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<sup>1749</sup> Milanovic (2011b).

<sup>1750</sup> Thürer (2005), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/occupation-statement-211105?opendocument>.

<sup>1751</sup> Some experts, however, propose to make a distinction between CA 3-NIACs and AP II-NIACs. See, for example, Hampson (2011), 204; Garraway (2010), 510; Kretzmer (2009), 1; Ni Aoláin (2007), 579; Gaggioli & Kolb (2007). In their view, the default normative paradigm to govern the use of force in the former is the law enforcement paradigm, in which the normative paradigm of hostilities finds no application

ever, effective control over territory may be contested or in the hands of the insurgents, which calls for the law of hostilities to be applied. For example, in *Isayeva v. Russia*, the ECtHR took notice of the fact

that the situation that existed in Chechnya at the relevant time called for exceptional measures by the State in order to *regain control* over the Republic and to suppress the illegal armed insurgency. Given the context of the conflict in Chechnya at the relevant time, those measures could presumably include the deployment of army units equipped with combat weapons, including military aviation and artillery. The presence of a very large group of armed fighters in Katyr-Yurt, and their active resistance to the law-enforcement bodies, which are not disputed by the parties, may have justified use of lethal force by the agents of the State, thus bringing the situation within paragraph 2 of Article 2.”<sup>1752</sup>

### 3.2.3.2. Situational Control

While the exercise of effective territorial control is generally presumed to generate a ‘fiduciary’ obligation in a general sense, it is not sufficient to assume the application of the normative paradigm of law enforcement to control the use of force. The functional approach adds another test, which is that the counterinsurgent forces are in control of the specific situation at hand.

Generally, no doubt, control over circumstances surrounding the counterinsurgency operation is exercised when persons *are* within the *physical* custody of agents of the counterinsurgent State, exercising in that instance authority and control. While of particular significance for the concept of deprivation of liberty, the exercise of authority and control over persons in situations of *extracustodial* use of force, to which the concept of deprivation of life as understood in the present study pertains, remains more controversial, particularly in extra-territorial settings (such as in SUPPCOIN and TRANSCOIN). As concluded, events of lethal force against persons always raises the obligation to respect and protect the right to life under the ICCPR and ACHR, whereas under the ECtHR this is not always the case, notwithstanding the fact that this ‘gap’ is slowly closing. In view of the above, the concept

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at all. In contrast, it is only in AP II-type conflicts that the law of hostilities may find application. This is not to imply that *LOAC* does not at all apply to CA 3-NIACs; CA 3 and AP II clearly find application when their respective thresholds for application have been crossed. Yet, both sources essentially reflect Geneva-based law, and not Hague law, the latter of which is more hostilities-related. While it has been proposed that the law of hostilities finds application in AP II-NIACs on the basis of customary law, these experts argue that there is no such basis for the law of hostilities in CA 3-NIACs, and that, hence, deprivations of life in the latter type of NIACs are by definition governed by IHRL only. In addition, such division has the additional benefit that all use of lethal force in CA 3-NIACs is by definition ‘threat’-based and not ‘immunity’-based, which avoids erroneous or arbitrary identifications of individuals as DPH-civilians or CCF-members, and thus supports civilian protection against the effects of the armed conflict. It is also assumed that the standards governing the deprivation of life under the normative paradigm of law enforcement are sufficiently flexible to allow counterinsurgent forces to cope with the type and intensity of violence common to CA 3-NIACs. Hampson (2011), 198, for example, uses the example of “Bloody Sunday” to clarify the need for a division: “Can it seriously be suggested that it would be appropriate if international law allowed the British armed forces to open fire against any presumed member of the IRA, irrespective of what he was doing at the time? Would it be sufficient if international law gave them that authority but a commander chose to act within greater restrictions than the law allowed and ordered his forces only to open fire in self-defense? In other words, should such discretion have been allowed to a military commander or should international law have required him to act within a law and order paradigm?”

<sup>1752</sup> (2005e), *Isayeva v. Russia*, App. No. 57950/00, Judgment of 14 October 2005, § 180. Also (2005f), *Isayeva, Yusupova and Bazayeva v. Russia*, App. No. 57947/00, 57948/00, 57949/00, Judgment of 24 February 2005, § 178.

of ‘situational control’ arguably includes instances where, in view of the information available, a counterinsurgent operation directed against insurgents can be planned, organized and controlled such that the capture and subsequent arrest – and thus the physical exercise of authority and control – of the insurgents is reasonably feasible, without the insurgents posing such a threat that it places the counterinsurgent forces at undue risk.

As noted by Watkin, “[t]he implementation of law-and-order activities would require a significant degree of *control* over the area or situation under scrutiny.”<sup>1753</sup> As Kretzmer explains,

A human rights regime rests on the idea of protection of individual rights. The assumption is that threats to security and public order can and should be contained by taking measures against *individuals* who threaten those interests. Thus, for example, when an individual has committed or is threatening to commit an act of violence he or she should be arrested, brought before a judge, and be given a fair trial before a competent and independent court. One of the criteria for judging whether the human rights regime is appropriate or not is whether, given the group nature and extent of the violence involved, arresting persons suspected being involved in protracted violence is a real and practical option that does not pose totally unreasonable risks to law-enforcement officials and to persons in the area. When the State does not have sufficient control to carry out an arrest without causing a major conflagration and loss of life the human rights regime may not be appropriate.

Several parameters may determine the existence of such “significant degree”. For example, account must be had, on the one hand, of the nature of the *threat*, ranging from individual crime-based violence such as murder, rape or hostage taking, to internal disturbances and tensions, such as riots or isolated acts of violence, as well as sporadic and infrequent hostilities and large-scale combat situations. Other parameters are whether the counterinsurgency forces outweigh the number of insurgents, or the type of means and methods applied by both the insurgents and the State’s counterinsurgency forces and the effects in terms of harm to both fighters and civilians.<sup>1754</sup> For example, in the case of *Anik et al. v. Turkey*, concerning the killing by Turkish security forces of two village guards who were suspected of directly participating in hostilities in support of the PKK, the ECtHR stressed that

the soldiers were in *total control* of the area with which they were familiar. They largely outnumbered the surrounded suspects and had at their disposal sophisticated night vision equipment and at least one sniper for whom it might have been possible to shoot the two people without jeopardising their lives.<sup>1755</sup>

In *temporal* terms, control refers to the frequency and duration of the violence.<sup>1756</sup>

Once it has been established that the counterinsurgent State exercises both types of control, the normative paradigm of law enforcement applies. Thus, while the mere exercise of territorial control over the area in which a specific counterinsurgency operation takes place presumes the ability to satisfy the fiduciary obligation, in dealing with insurgents the absence of situational control nonetheless justifies the full exercise of the benefits of the normative paradigm of hostilities.

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<sup>1753</sup> Ferrero (2012), 114; Watkin (2004), 18.

<sup>1754</sup> Ben-Naftali & Michaeli (2003), 287 ff; Droege (2008a), 537; Ni Aoláin (2007), 578; Sassòli & Olson (2008), 614. See also (2005q), *The Public Committee Against Torture in Israel v. The Government of Israel*, HCJ 769/02, High Court of Justice (11 December 2005), §§ 39-40; (2003a), *Concluding Observations of the Human Rights Committee: Israel (21 Augustus 2003)*, § 15; (2005j), *Nachova v. Bulgaria*, App. No. 43577/98, ECtHR (6 July 2005), § 95.

<sup>1755</sup> (2007a), *Anik et al. v. Turkey*, App. No. 63758/00, Judgment of 5 juni 2007, § 65.

<sup>1756</sup> Droege (2008a), 537; Ni Aoláin (2007), 578.

Ultimately, a functional approach forces counterinsurgent States to abandon rigid, ‘across-the-board’ approaches towards the targeting of insurgents when such an approach is substantively difficult to uphold in view of the circumstances at hand, but instead forces them to take a nuanced and case-sensitive stance under the threat of accountability for violations of international law. In fact, as will be demonstrated in more detail below, such posture towards the issue of lethal force and the deprivation of life corresponds with the views on the use of force and the principal role of legitimacy in contemporary counterinsurgency doctrine.

### 3.2.3.3. Application of the Functional Approach in Situational Contexts of Counterinsurgency

When applying the functional approach to targeting operations in situational contexts of counterinsurgency, four situations may arise.

In situation 1, the counterinsurgent State does not exercise effective control over territory, nor situational control. In this case, the normative paradigm of hostilities governs the targeting. This situation may arise in any type of counterinsurgency operation. For example, in OCCUPCOIN or NATCOIN, a counterinsurgent may have lost control over part of the occupied territory, which it seeks to regain. In the case of SUPPCOIN and TRANSCOIN, control over territory is generally absent, and situational control may not be feasible in view of the large presence of insurgent forces which precludes the realistic application of the law enforcement paradigm.

In situation 2, the counterinsurgent State exercises effective control over territory, but no situational control. As in situation 1, the normative paradigm of hostilities applies where the counterinsurgent State is not capable of dealing with the situation with the instruments available under the normative paradigm of law enforcement. This situation may typically arise in situations of NATCOIN and OCCUPCOIN, where the State exercises effective control over territory.

In situation 3, the counterinsurgent State exercises both effective control over territory, and situational control. In this case, the normative paradigm of law enforcement applies. For the reasons stated under situation 2, this situation may typically arise in situations of NATCOIN and OCCUPCOIN.

In situation 4, the counterinsurgent State exercises no effective control over territory, but exercises control over the situation. In this case, it is submitted, the normative paradigm of hostilities applies, but the counterinsurgent State is strongly advised to resort to alternative, non-lethal measures as a measure of *policy*. Nonetheless, first measure resort to lethal force would not be unlawful. This situation may typically arise in situations of SUPPCOIN and TRANSCOIN.

As follows from the above, it is the normative paradigm of hostilities that regulates the majority of the targeting operations. The principal setback of the functional approach in operational terms is limited to the prohibition of preplanned targeting operations in situations where the counterinsurgent State exercises effective control over territory and the situation at hand is such that it warrants the use of lethal force under the law enforcement paradigm. In operational reality the impact of this setback may be quite limited. As explained, in counterinsurgency operations, the static choice for killings in situations where capture would have been feasible may in fact undermine, rather than contribute to social legitimacy.

#### 4. Observations

In this chapter, the study examined the interplay between relevant and applicable norms of IHRL and LOAC in regulating the targeting of insurgents. Two normative paradigms govern such targeting operations, namely the normative paradigm of law enforcement and hostilities. As both IHRL and LOAC provide valid and applicable norms relative to both concepts, a first task at hand was to determine the interplay of these norms *within* the respective normative paradigms. As it may be concluded, the interplay is such that IHRL takes a lead role in the *normative paradigm of law enforcement* without being modified by the valid norms of LOAC. In the *normative paradigm of hostilities*, it is LOAC that takes up the lead role. IHRL remains applicable in the background, but does not in any way modify the normative substance of the law of hostilities under LOAC.

The next task was to determine which normative paradigm governs particular targeting operations – crucial question from an operational point of view. One approach to answer this question is to identify the immunity-based status of individuals under the law of hostilities. While this approach functions in relation to regular combatants, who generally enjoy immunity from criminal prosecution for taking up arms and thus have no nexus with law enforcement, it is too static when dealing with insurgents. Their dual status as lawful military objective and criminal suspect implies that both normative paradigms may apply. In determining which normative paradigm applies, an interpretive process entails that the identification of the applicable normative paradigm does not solely hinge on the immunity-based status of individuals under the law of hostilities, but looks at which relationship between the counterinsurgent State and the targetable insurgent best fits the context in which the targeting operation takes place. The notion of control plays a crucial role in this respect. While lacking a basis in a positive rule of international law, this approach logically follows from the object and purpose of either normative paradigm.

Overall, when applying this approach to the various operational contexts, it follows that the normative paradigm of law enforcement has a greater potential of governing targeting operations in NATCOIN and OCCUPCOIN. In contrast, targetings in SUPPCOIN and TRANSCOIN are more likely to be governed by the normative paradigm of hostilities, as a result of the lack of territorial control. However, it is submitted that in situations where the territorial State exercises effective control over territory, and where there is a presumption of law enforcement as the leading concept, it would be more sensible when the visiting counterinsurgent State must – as a matter of policy – follow suit and should not rely on the normative paradigm of hostilities for the mere fact that it does not exercise control over the territorial State's territory.