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International human rights law and the law of armed conflict in the context of counterinsurgency: With a particular focus on targeting and operational detention

Pouw, E.H.

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Conclusions Part C.1.

The research question central to this part was:

in light of contemporary counterinsurgency doctrine, how do the relevant normative frameworks of IHRL and LOAC governing targeting *interrelate* and what does this tell us about the *permissible scope of conduct* in operational practice?

1. Interplay

As demonstrated above, IHRL and LOAC each offer a framework of requirements to be complied with by the military commander in the planning and execution of targeting operations against insurgents. Due to their respective objects and purposes, and the subsequent nature of the relationships they each seek to regulate in the circumstances for which each regime was designed, the requirements under each regime – while demonstrating overlap to some degree – fundamentally differ, particularly in terms of protection of the target, as well as in respect of the protection of civilians.

It is here that the issue of interplay becomes relevant. Indeed, while IHRL offers a strict framework of requirements that offers sufficient latitude for *law enforcement* purposes in conditions of peace where the State exercises control over its territory, it may be questioned whether this framework is equally flexible in times of armed conflict to deal with *hostilities* in areas where such control is contested or (partially) absent and informs the legal scope of permissible conduct in such situations. In contrast, LOAC offers a framework of requirements that is specifically designed for hostilities, thus providing the *lex specialis*.

When carrying out an appreciation of the interplay of IHRL and LOAC in the normative paradigms of law enforcement and hostilities, it becomes clear that both interrelate in a harmonious manner. In the absence of detailed norms in the law of IAC and NIAC governing law enforcement-based use of force, IHRL assumes a leading role, which in view of the object and purpose of its norms is a logical outcome. A similar result is achieved in respect of the normative paradigm of hostilities. The question of whether a deprivation of life qualifies as arbitrary is to be answered by taking account of the specific circumstances that hostilities bring along, and whether it occurred in accordance with the special law designed for such circumstances – the law of hostilities.

This logic behind the outcome of the interplay of IHRL and LOAC *within* the normative paradigms is also reflected in the interplay *between* the normative paradigms. This study favors a functional approach. As has been argued, such an approach logically follows from the object and purpose of the normative paradigms and the regimes in control of those paradigms. Using an interpretative rather than conclusory approach towards the maxim of *lex specialis*, the outcome of the interplay between both paradigms is context-specific, implying that the degree of territorial or situational control in a specific situation of targeting determines the applicable normative paradigm. It thus immediately follows that the applicability of the normative paradigm is not a matter of choice, serving a counterinsurgent State's best interests. In other words, when in the targeting process the decision is made that the killing

of an insurgent generates an effect that best serves the desired objective, a counterinsurgent State cannot – for that reason – opt for the more flexible normative paradigm of hostilities. Rather, it must first be assessed which normative paradigm applies before a final decision to can be made. Clearly, this impacts to operational latitude in counterinsurgency operations. As concluded, the threshold for applicability of the normative paradigm of law enforcement is – at a minimum – the exercise of control over territory. Such control is ordinarily only exercised in the context of NATCOIN and OCCUPCOIN. Yet, in those situations, the applicability of the normative paradigm of law enforcement is the norm rather than the exception, and as the law of belligerent occupation – as a species of LOAC – demonstrate, the State exercising control is expected to maintain and restore public security, law, and order in those situations. In the situations where such control is absent, the counterinsurgent State is authorized to apply the normative paradigm of hostilities.

2. Permissible Scope for Targeting under the Normative Paradigms

2.1. Normative Paradigm of Law Enforcement

In sum, under the normative paradigm of law enforcement, when so applicable, counterinsurgent forces are to comply with the following requirements in the planning and execution of targeting operations against insurgents.

a) A Sufficient Legal Basis

The counterinsurgent must ensure that the targeting of insurgents finds a sufficient legal basis in domestic law. This law must be publicly accessible and strictly regulate the use of force in conformity with international norms of IHRL and other norms of international law governing the deprivation of life as a measure of law enforcement, also in times of public emergency threatening the life of the nation. It must stipulate that the recourse to lethal force is an exceptional measure that is to be resorted to only after a careful assessment of the circumstances at hand and the concrete and direct threat posed by an individual. A domestic law that permits the shoot-to-kill based targeting of individuals as a general policy, following their mere labeling as insurgents is contrary to international law.

b) Proportionality

The requirement of proportionality, *firstly*, implies that the kind and degree of harm resulting from the use of lethal force must not be disproportionate to the kind and degree of threat posed. *Also*, the counterinsurgent must ensure that the targeting serves to attain, and is limited to, a legitimate purpose, which in general terms is limited to “self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape.”¹⁷⁵⁷ This implies that the counterinsurgent must be aware that the measure of targeting is not applied as a measure of punishment, but as a measure of prevention.

To illustrate, a legal basis for targeting an insurgent may arise in the event that:

¹⁷⁵⁷ Principle 9, United Nations (1990b); Melzer (2008), 284. Similarly: Article 2(2) ECHR, which justifies the use of force that is no more than absolutely necessary to “(1) to remove a threat posed to human life materializing from unlawful violence, (2) to effect a lawful arrest or to prevent the escape of a person lawfully detained, and (3) to lawfully quell a riot or insurrection.”

- (1) he poses a concrete and immediate threat to the life of others, for example when it becomes apparent that he is to detonate a bomb, as part of the terrorism campaign of the insurgency movement;
- (2) an attempt is made to his arrest and in doing so counterinsurgent forces are met with resistance that may lead to the loss of life or injury of the counterinsurgent forces attempting to make the arrest, or innocent civilians collocated in the vicinity of the arrest scene; and
- (3) he partakes in a riot instigated by an insurgency movement and individually poses a threat to the life of innocent bystanders or to the counterinsurgent forces present.

Nonetheless, while these situations of targeting serve as a means to attain a legitimate aim, to be lawful the targeting operation remains subject to the subsequent requirements of strict necessity, proportionality and precautions.

This implies that the counterinsurgent must be aware that the targeting of insurgents for other purposes, such as their perceived threat to the political stability or the security of the State; to destabilize and undermine an insurgency's organizational structure; or to remove a potential but unspecified threat posed by them based on past threats, does not serve as a 'means' to achieve a legitimate 'end', but becomes an 'end' in itself and renders the targeting unlawful. It follows that the counterinsurgent is under an obligation to refrain from deciding to launch, or to terminate a targeting operation in process if it becomes apparent that the targeting is carried out in the absence of a legitimate purpose.

c) Absolute Necessity

To attain the legitimate purpose, the counterinsurgent may only resort to the measure of targeting when absolutely necessary in *qualitative*, *quantitative* and *temporal* terms.

Necessity in qualitative terms implies that the targeting must be strictly unavoidable to achieve the desired legitimate purpose. This implies that the counterinsurgent is under an obligation to apply lethal force as a measure of last resort, and to refrain from deciding to launch, or to terminate a targeting operation in process if it becomes apparent that the threat to human life can be removed by non-lethal alternatives, such as arrest.

Necessity in qualitative terms implies that even if the resort to lethal force is strictly unavoidable, the counterinsurgent forces remain under an obligation to avoid, and in any event, to minimize the loss of life and injury of the insurgent and any other person which may potentially be affected by the use of lethal force. Thus, cognizant of the intent to kill implied in the targeting of the insurgent, the counterinsurgent forces may only apply lethal force in a manner and to a degree which is objectively strictly necessary and proportionate to attain the removal of the threat.

Necessity in temporal terms implies that the counterinsurgent is prohibited from targeting insurgents when this measure is *not yet* absolutely necessary, e.g. when the threat to human life is merely hypothetical, or has not matured to a sufficient level of concreteness and immediacy. In the alternative, the counterinsurgent is prohibited from targeting insurgents when this measure is no longer absolutely necessary, e.g. when a threat to human life has subsided following an insurgent's surrender. This implies that the counterinsurgent is under an obligation to constantly reassess the absolute necessity to resort to the measure of targeting in relation to the desired removal of the threat.

d) Precautionary Measures

The counterinsurgent is under an obligation to take precautionary measures to ensure that the loss of life or injury to individuals, including that of the potential target, can be avoided or, in any event, minimized. This obligation extends from the training and education-phase

to the actual execution of the targeting operation, and includes the issuing of clear rules of engagement and equipment aimed to facilitate that lethal force is used as a measure of last resort. Of particular relevance in the context of targeting insurgents as understood in the present study is that despite a decision to resort to targeting as a measure of intentional killing of an insurgent, the requirement of precaution entails that counterinsurgents are under an obligation to ensure that resort be taken to measures of potentially lethal force, or non-lethal force once circumstances change such that the intentional use of lethal force is no longer absolutely necessary. Overall, the counterinsurgent must be aware that the pre-planned targeting of insurgents, whilst perhaps serving a legitimate aim, and otherwise in conformity with requirements of absolute necessity, is generally incompatible with the requirement of precaution. As a result, the measure of targeting as a lawful measure may be decided upon more in an *ad hoc*-fashion in the presence of a concrete and immediate threat, and is clearly not permissible as a standardized, policy-based measure.

e) Investigation

The counterinsurgent is under an obligation to investigate the loss of life or injury to individuals arising from a targeting operation, and to compensate victims in case of unlawful deprivation of life.

2.2. Normative Paradigm of Hostilities

In sum, the comparative analysis of IHRL and LOAC demonstrates that counterinsurgent forces, when targeting insurgents as a measure of hostilities, are to comply with the following requirements forming part of the normative paradigm of hostilities.

a) Distinction

The counterinsurgent State may only target insurgents who qualify as lawful military objectives under the law of hostilities, i.e. that the insurgent is an individual who is not, or no longer protected from direct attack as a result of his direct participation in hostilities. Consequently, the counterinsurgent must refrain from the *intended* targeting of insurgents who qualify as protected persons under the law of hostilities. Such targeting constitutes indiscriminate attacks, prohibited under the law of hostilities. In case of doubt, the counterinsurgent must consider the insurgents to be civilians under the law of hostilities. The requirement of distinction thus implies that the mere designation of an individual as an insurgent, e.g. by proclamation or as a result of his fulfilling requirements set out in domestic law or policy is not by itself sufficient to conclude upon the absence of immunity against direct attack, but is subject to a more nuanced determination of the position of the individual under the law of hostilities. (While inherently part of the requirement to take precautionary measures), in the planning and decision-phase of a targeting, the counterinsurgent must do everything feasible to verify that the insurgents to be attacked are indeed lawful military objectives under the law of hostilities. In the event that *during execution* of the targeting it becomes apparent that the objective is not a lawful military objective, the operation must be cancelled or suspended.

b) Military Necessity

Once it has been established that an insurgent qualifies as a lawful military objective under the law of hostilities, the military necessity to render him *hors de combat* – to include by means of targeting – is presumed to be inherent and needs not to be established separately. His

targeting may take place at any time and in any place provided this is not otherwise prohibited under LOAC.

c) Means and Methods

The targeting must take place by means and methods lawful under the law of hostilities. In addition, the counterinsurgent may only employ means and methods which can be directed at the targetable insurgents, and the effects of which can be limited. Failure to do so amounts to a prohibited indiscriminate attack.

d) Proportionality

In the event that civilians and civilian objects *collocate* with targetable insurgents, additional requirements must be complied with. These requirements entail, *firstly*, that the counterinsurgent is under an obligation to refrain from attacks by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area – for example insurgent hot spots – containing a similar concentration of civilians or civilian objects. *Secondly*, any loss and injury to civilian life and damage to civilian objects must be *incidental*, not intended, and may not be excessive to the concrete and direct military advantage anticipated. *Thirdly*, the law of hostilities imposes upon the counterinsurgent an obligation to determine (1) the concrete and direct military advantage anticipated from the targeting of the insurgents; (2) the collateral damage to be expected; and (3) the excessiveness of such expected collateral damage in relation to the anticipated concrete and direct military advantage.

e) Precautionary Measures

The counterinsurgent is required, at all times, to take precautionary measures in order to avoid, or to minimize injury or death of civilian life, or destruction of civilian property. Besides the aforementioned requirement to assess whether a target constitutes a lawful military objective, the requirement to take precautionary measures includes a range of obligations. In so far as this concerns collateral damage that is deemed *excessive* in relation to the concrete and direct military advantage anticipated, the counterinsurgent must, *firstly*, refrain from *deciding to launch* the attack. *Secondly*, the targeting must be postponed or cancelled if, following a decision to launch an attack, it becomes nonetheless apparent that the collateral damage is deemed to be excessive in relation to the concrete and direct military advantage anticipated. In the event that loss and injury to civilian life and damage to civilian objects is likely to occur, but is considered *not* to be *excessive* in relation to the direct and concrete military advantage anticipated, the counterinsurgent must, *firstly*, take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; *Secondly*, when a choice is possible between several targetable insurgents for obtaining a similar military advantage, only that insurgent may be targeted which may be expected to cause the least danger to civilian lives and to civilian objects; *Thirdly*, the counterinsurgent must issue effective advance warnings to the civilian population, unless circumstances do not permit.

Counterinsurgency doctrine, policy and practice impose upon counterinsurgent forces restrictions that go beyond those found in the law of hostilities. Given their policy-based nature, these restrictions leave the normative substance of the law of hostilities fully intact.