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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 XI Interplay

In view of the above, this chapter examines the interplay between IHRL and LOAC in relation to criminal detention and security detention. As announced in the introduction, it is possible to identify within the normative paradigm of law enforcement – in so far it relates to detentions – two normative sub-paradigms. This concerns, *firstly*, the *normative paradigm of criminal detention*, consisting of the sum of valid and applicable norms of IHRL and LOAC regulating the deprivation of liberty for reasons of criminal justice. To recall, the prime purpose of this framework is to regulate an individual's detention for alleged criminal behavior that took place in the *past*, and for which he can be held *accountable to the public*. *Secondly*, this concerns the *normative paradigm of security detention*, involving the valid and applicable norms of IHRL and LOAC governing the deprivation of liberty for reasons of security, and regulating an individual's detention for *future* behavior, in order to *prevent* threats to the *security*.

Paragraph 1 examines the interplay of IHRL and LOAC in the normative paradigm of criminal detention, whereas paragraph 2 focuses on security detention. Paragraph 3, finally, investigates the interplay between both normative paradigms.

1. The Interplay of IHRL and LOAC in the Normative Paradigm of Criminal Detention

Irrespective of whether it concerns the interplay between IHRL and the law of IAC or that between IHRL and the law of NIAC, in some areas both frameworks are characterized by *convergence* and *complementarity*. Convergence can be found particularly in the area of treatment (both in the narrow sense (*stricto sensu*),¹⁹⁹³ as well as treatment in terms of material conditions). Here, essentially all principles and guarantees to be found in IHRL treaties also have found their way into LOAC, either as a treaty norm, or as a norm of customary law (in respect of treatment *strict sensu*), or LOAC provides norms that also find protection in IHRL 'soft law'-documents (in respect of material conditions).

¹⁹⁹³ Both IHRL and LOAC prohibit murder (compare CA 3 and Article 4(2)(a) AP II; Article 6(1) ICCPR; Article 4(1) ACHR; Article 2(1) ECHR); torture (compare Article 1 CAT; CA 3 and Article 4(2) AP II; Rule 90 CIHL. Note, however, that the definition of torture in LOAC does, in contrast to that of Article 1 CAT, not require that the severe physical or mental pain or suffering be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity") and other forms of cruel, inhuman, and degrading treatment and punishment (compare CA 3 and Article ? AP II; Article 7 ICCPR; Article 5(2) ACHR; Article 3 ECHR. The human rights obligations go further than those under LOAC, for they prohibit cruel, inhuman and degrading treatment *and* punishment. See ICC Statute, Elements of Crime for the war crime of torture, Article 8(2)(a)(ii)-1 and war crime of inhuman treatment, Article 8(2)(a)(ii)-2; war crime of torture, Article 8(2)(c)(i)-4 and war crime of cruel treatment, Article 8(2)(c)(i)-3. Rodley (2003); Nowak (2006), 830-832; Lubell (2010), 179-180); mutilation; and medical or scientific experiments; as well as other forms of violence to life and health, which include prohibitions of sexual violence and rape.

In relation to other areas, IHRL and LOAC not so much converge, but rather *complement* each other as they both point in the same direction. A key example is the legal basis for criminal detention. In the context of situations where the law of IAC applies (i.e. OCCUP-COIN and possibly non-consensual TRANSCOIN), both IHRL and LOAC provide valid rules that essentially point in the same direction. For example, the requirement present in all relevant human rights conventions that the deprivation of liberty must only take place “on such grounds and in accordance with such procedure as are established by law” corresponds with the authority under Article 64 GC IV to enact penal legislation and the requirement under Article 65 GC IV stipulating that the “[t]he penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language” as well as the obligation under Article 43 HVR that the Occupying Power is entitled “to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” Further proof of this convergence follows from the fact that the prohibition of arbitrary deprivation of liberty – in essence a rule of IHRL – is recognized as a rule of customary LOAC.¹⁹⁹⁴ This also applies to the principle of legality, stipulating “no one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed.”¹⁹⁹⁵

In the context of counterinsurgency operations where the law of NIAC applies, it has been concluded that the former does not provide an explicit legal basis for criminal detention, but merely assumes this (as follows from references to criminal detention in its treaty law). IHRL offers more specific guidance as criminal detention is the prime form of deprivation of liberty regulated in IHRL. To recall, Article 5 ECHR is most specific in pointing out that detention for reasons of criminal justice does not violate the right to liberty.

Another area where IHRL and LOAC norms are complementary is that of *transfer*. To recall, the principle of *non-refoulement* under the latter stipulates that transfer is prohibited where there is a real risk of violation of certain fundamental human rights, such as the prohibition from torture, or other forms of cruel, inhuman or degrading treatment or punishment. It also prohibits transfers where a person faces the risk of imposition or execution of the death penalty, also when such trial was in accordance with the necessary requirements,¹⁹⁹⁶ and even if the detaining State has reserved the right to impose the death penalty in times of war.¹⁹⁹⁷ More generally, transfer is prohibited if it is foreseen that a person will be exposed to a flagrantly unfair trial.¹⁹⁹⁸ The content of this prohibition overlaps with the requirement

¹⁹⁹⁴ ICRC (2005a), Rule 99.

¹⁹⁹⁵ ICRC (2005a), Rule 101.

¹⁹⁹⁶ (2010b), *Al-Saadoon and Mufidhi v. the United Kingdom*, App. No. 61498/08, Judgment of 2 March 2010, §§ 123, 142-143.

¹⁹⁹⁷ Article 2(1) ICCPR offers States the possibility to make a reservation to permit “[...] the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.” Such a reservation is not possible under the European human rights system. Protocol No. 13 to the ECHR, Concerning the Abolition of the Death Penalty in All Circumstances forbids States to do so. See also Article 19 of the Charter of Fundamental Rights of the European Union.

¹⁹⁹⁸ (2001e), *Einhorn v. France*, Admissibility, ECtHR (16 October 2001), § 32; (1989d), *Soering v. the United Kingdom*, App. No. 14038/88, Judgment of 7 July 1989, § 113 (“The Court does not exclude that an issue might exceptionally be raised under Article 6 (art. 6) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country”); (1992a), *Drozd and Janousek v. France*, App. No. 12747/87, Judgment of 26 June 1992, § 110 (“The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a fla-

under Article 45 GC IV that the transferring State shall satisfy itself that “the Detaining Power has satisfied itself of the willingness and ability of such transferee Power [accepting State] to apply the present Convention,” which as noted also prohibits torture, or other forms of cruel, inhuman or degrading treatment or punishment, and that the protected person has no reason “to fear persecution for his or her political opinions or religious beliefs” in the accepting State.

Finally, it is of interest to closer examine the interplay between IHRL and LOAC in relation to *fair trial rights*. In so far the law of IAC applies, we have been able to conclude that GC IV and Article 75(4) AP I offer a quite comprehensive list of fair trial rights that are to be afforded to all persons in the power of a party to the conflict, to include persons not protected by GC IV. We have also concluded that fair trial rights have attained customary law status. Besides the treaty-based LOAC norms, IHRL-treaties function as a principal source. Both overlap.

In so far the law of NIAC applies, we are confronted with a gap in regulation. To recall, CA 3 refers to “judicial guarantees which are recognized as indispensable by civilized peoples” and thus hardly provides specific guidance. Indeed, the ICCPR-based Article 6 AP II offers more detail, but technically this provision only applies when the threshold of AP II has been crossed. If this is not the case (and only CA 3 applies), or to supplement Article 6 AP II (when it applies), reference may be had to the law of IAC, but as previously noted, this may only take place on a policy-basis, as formally these norms apply only between States, party to the conflict. Finally, IHRL may fill the gap, but this only binds States, and not the insurgents (which may be assumed to detain as well), so there is no reciprocity in obligations. The latter problem can be said to have been largely solved as the fair trial rights found in IHRL are regarded to have crystallized into norms of LOAC, as argued by the ICRC, and as such they become binding on all parties to the NIAC.

In these instances of convergence and complementarity, it is submitted that LOAC, in so far it provides valid treaty based or customary norms, forms the *lex specialis*, for the mere fact that it provides those norms in the specific context of armed conflict.¹⁹⁹⁹ This has the added benefit that LOAC reinforces the relevant IHRL norms as it allows no derogation from fair trial rights in situations of armed conflict. Nonetheless, in these situations, IHRL remains applicable in the background to act alongside it to *complement* LOAC where this body of law does not explain an issue or uses ambiguous notions that can be given more concrete meaning in the light of relevant human rights guarantees and, where necessary, to *complement* LOAC to fill remaining gaps. An example of clarification is the meaning of torture, mentioned in Article 75(3) AP I, but remaining undefined in LOAC, and which “has proved to be the standard whose interpretation and application in practice requires the

grant denial of justice”). The HCR, in Human Rights Committee (2004a), § 12, has adopted general standards: “article 2 [...] entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.” See also the United Nations Model Treaty on Extradition, Annex to UN General Assembly resolution 45/116, 14 December 1990, article 3(f) (listing a violation of minimum fair trial guarantees as laid down in article 14 ICCPR as a mandatory ground for refusing extradition).

¹⁹⁹⁹ See also (1999f), *Coard and Others v. the United States (US Military Intervention in Grenada)*, Case No. 10.951, Decision of 29 September 1999, § 42.

cross-analysis of international human rights law and international humanitarian law.”²⁰⁰⁰ In order to understand the precise meaning of the prohibition of torture under LOAC, it is essential to examine its meaning under IHRL, more precisely the definition and interpretation thereof used in the 1984 CAT. Another example of clarification is the fair trial-related prohibition in CA 3 to pass sentences and to carry out “executions without previous judgment pronounced by a *regularly constituted* court, [...]”. The question of when a court can be said to have been regularly constituted, independent or impartial can be answered by reference to the case law of (quasi-)judicial human rights bodies, which have frequently addressed the issue.²⁰⁰¹

In sum, it may be concluded that, generally speaking, the interplay of IHRL with LOAC in the normative paradigm of criminal detention is one of convergence and complementarity, and that both are in harmony without conflict. IHRL places no restrictions on the conduct of States in the context of criminal detention that go further than those imposed by LOAC. Even in those instances where a State denies the extraterritorial applicability of IHRL, or its applicability in armed conflict, its obligations under treaty-based and customary LOAC would offer clear guidance from which it may not derogate.

2. The Interplay of IHRL and LOAC in the Normative Paradigm of Security Detention

The normative paradigm of security detention is an area where the difference between the law of IAC and NIAC in terms of availability, density and precision of norms is a crucial factor in determining the interplay between IHRL and LOAC. It is for that reason that the interplay will be examined separately.

2.1. The Interplay Between IHRL and the Law of IAC

The interplay between IHRL and the law of IAC is, too, predominantly characterized by *convergence* and *complementarity*, although it is also possible to identify areas of *potential conflict* or *ambiguity*.

The areas of convergence are quite similar to those in the normative paradigm of criminal detention. Thus, in so far it concerns the *treatment* of security detainees, both regimes provide guidance, although it must be admitted that in relation to the material conditions of treatment only LOAC provides treaty and customary norms (these norms can only also be found in IHRL ‘soft law’ documents). Here, LOAC is truly the *lex specialis*.

Another area where IHRL and LOAC largely converge or can be harmonized is the area of *procedural guarantees*. To a large degree, both regimes stipulate the same rules, but there are some notable differences where both norms can be said to diverge. An example concerns the obligation of the Occupying Power to set up “an appropriate court *or* administrative board.” When choosing an administrative board, it must offer “the necessary guarantees of independence and impartiality.”²⁰⁰² In contrast, the rule of *habeas corpus* under IHRL de-

²⁰⁰⁰ Orakhelashvili (2007), 22-24. See, for example, the comparative analysis carried out by the ICTY in the cases of (1998n), *The Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Chamber Judgment of 10 December 1998, §§ 134-146; (1998m), *The Prosecutor v. Delalic, Mucic, Delic and Landzo (the Celebici Case)*, Case No. IT-96-21-T, Judgment of 16 November 1998 (Trial Chamber), §§ 440 ff.

²⁰⁰¹ For examples, see footnotes 27-29 accompanying the text of Rule 100, ICRC (2005a).

²⁰⁰² Pictet (1958a), 260.

mands that a *court* must hear any challenges to the lawfulness of the detention, thus implying that the review by an administrative body would violate IHRL.

Again, one solution would be to derogate from this aspect of the rule of *habeas corpus*. None of the relevant treaties prohibits derogation from the right to liberty or the right to *habeas corpus* specifically. However, views as to the need for, as well the possibility of, derogation differ. Some argue that the rule of *habeas corpus* is non-derogable, but while this seems entirely consistent with the object and purpose of the rule in peacetime where it may be assumed “that the courts are functioning, that the judicial system is capable of absorbing whatever number of persons may be arrested at any given time, that legal counsel is available, that law enforcement officials have the capacity to perform their task, etc.”,²⁰⁰³ it can be questioned whether its non-derogable nature must persist in armed conflict.

In the absence of derogation, or the possibility to do so, the norm conflict persists, and needs to be avoided or resolved. Some²⁰⁰⁴ adopt the view that the IHRL-requirement of judicial review is a reflection of “modern usage”,²⁰⁰⁵ and that the IHRL-requirement of a court – as the *lex posterior* – now trumps the *lex prior*-right in the law of IAC to choose for an administrative board, unless *force majeure* forces it to do otherwise.²⁰⁰⁶ Among experts, the choice of a court over an administrative board should be the preferred order of priority when the circumstances permit this,²⁰⁰⁷ but it is submitted that the choice for an administrative body cannot *a priori* be excluded merely because a later source deviates from an earlier source. Firstly, it is generally accepted that an earlier rule of a specific nature (in this case Articles 43 and/or 78 GC IV) will prevail over a (later) rule of a more general character in the event of a conflict between them. *Secondly*, it is submitted that, in light of the object and purpose of LOAC, the choice for a court or administrative board is to be viewed as *context-driven*. While in situations of relative peace, such as in the case of prolonged occupation, easy access may be had to a court,²⁰⁰⁸ in other situations no courts may at all be available or functioning. In addition, during armed conflict there is no guarantee that a court may offer the best protection.²⁰⁰⁹ For example, in Iraq,

²⁰⁰³ ICRC (2011), 16.

²⁰⁰⁴ Cassel (2008), 847, accompanying footnote 221; Kälin (2004), 29, 30. See also Human Rights Committee (2001c), § 16 and (1998c), *Concluding Observations of the Human Rights Committee: Israel (Concluding Observations/Comments) (18 August 1998)*, § 21.

²⁰⁰⁵ Pictet (1958a), 260, explaining that the underlying rationale for a choice between a court or administrative body lies in the “usage in different States,” thus acknowledging that (at least in 1949) States used both courts and administrative boards to carry out reviews.

²⁰⁰⁶ See also Article 23, International Law Commission (2001b).

²⁰⁰⁷ See, for example Pejic (2005), 387, stating that “[i]t may be presumed that judicial supervision of internment would more likely comply with the requirements of independence and impartiality. It is therefore submitted that judicial supervision would be *preferable* to an administrative board and should be organized *whenever possible*.”

²⁰⁰⁸ Kleffner (2010b), 74-75.

²⁰⁰⁹ Arguments found in literature are that a court “is not accustomed to dealing with cases of security internment in a situation of armed conflict and that it is not feasible to expect military forces to collect evidence according to judicial standards in war.” In addition, “the equality of rights and obligations of the parties to an armed conflict under IHL means that there must be an alternative to judicial review that could be utilized by non-State armed groups who are unlikely to have any – recognized – court system.” See ICRC & Chatham House (2008), 17; Kälin (2004), 29. Arai-Takahashi (2010), 501 adds that “[f]irst, controversy over extra-territorial jurisdiction may cast doubt on the capacity of the judicial organs of the occupying power’s home country to undertake judicial review of acts done in occupied territories. Second, in the harsh reality of occupation, the prospect that local courts in occupied territory during the period of occupation may scrutinise the occupying power’s decisions on internment or administrative de-

[t]he criminal justice model did not take account of the security realities on the ground – including long delays for trials and resulting congestion, the failure of witnesses to appear in court, the absence of prisoners in court and the assassination of judges. In addition, there was no established specialised criminal procedure, which resulted in Iraqi judges often excluding evidence.²⁰¹⁰

Rather, a “balance must be struck between military necessity and operational limitations in armed conflict on the one hand, and the rights of internees, on the other.”²⁰¹¹ Following this balance, an administrative body may be preferred over a court.

In addition, various sources in legal doctrine indicate that in the context of a belligerent occupation the focus lies on the review body’s *capacity* to be *independent* and *impartial*, stressing the *characteristics*, rather than the *nature* of the body.

There can be little doubt, therefore, that Article 78 GC IV, while the *lex prior*, also is the *lex specialis* in the situation of belligerent occupation. It is a well-established principle of international law that the older, but more specific rule precedes a newer, but more general rule. Therefore, in order to avoid or resolve the conflict with obligations under IHRL when the choice is made for an administrative body, use can be made of the maxim of *lex specialis* as a technique of *interpretation* or *conflict resolution*.²⁰¹²

As regards the legal basis to intern, IHRL and LOAC are also complementary, at least in so far it concerns the interplay between, on the one hand, Articles 43 and 78 GC IV and, on the other hand, Articles 9 ICCPR and 7 ACHR. To recall, the former *permit* the internment of persons, whereas the latter *prohibit* arbitrary deprivation of liberty. The question to be answered thus is: does the internment of insurgents violate the prohibition of arbitrary deprivation of liberty. In its General Comment on Article 2 ICCPR, regarding the arbitrary deprivation of life, the HRC has stated that “[w]hile, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”²⁰¹³ This statement – which in essence reflects the ICJ’s *Nuclear Weapons Advisory Opinion*-formula²⁰¹⁴ – equally applies to Article 9 ICCPR and Article 7 ACHR. Thus, the test of what is an arbitrary deprivation of liberty under these norms of IHRL falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate internment in occupied territory. It follows that in so far the internment of individuals takes place within the boundaries of Article 78 GC IV – namely when necessary for imperative reasons of security – the interplay IHRL and LOAC in this area can be characterized as one of harmony rather than conflict. Admittedly, while this seems to smoothly harmonize IHRL and LOAC – by following this interpretation no conflict arises –

attention is discouragingly slim. Even if such review takes place, practical difficulty remains as to the implementation and enforcement of such review decisions.”

²⁰¹⁰ Rose (2012), 10.

²⁰¹¹ ICRC & Chatham House (2008), 17.

²⁰¹² The former technique is applied when answering the question of whether the choice for an administrative body amounts to the arbitrary deprivation of liberty prohibited under the ICCPR and ACHR. In that case, recourse may be had to the ICJ’s *Nuclear Weapons*-formula, implying that an individual’s review of the lawfulness of his security detention in occupied territory is not arbitrary when carried out by an administrative body that is independent and impartial. In relation to Article 5 ECHR, the maxim of *lex specialis* must be applied as a technique of conflict resolution: in view of the facts underlying the choice for an administrative body, there is no choice other than to set aside the IHRL-based requirement that the challenge of the lawfulness of a decision to security detention is to be handled by a court.

²⁰¹³ Human Rights Committee (2004b), § 12.

²⁰¹⁴ (1996f), *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996*, § 25.

one issue could complicate matters, namely whether it is required to derogate from Articles 9 ICCPR and 7 ACHR. Those in support of an obligation for derogation would argue that in the absence of derogation the internment constitutes an arbitrary deprivation of liberty. However, as previously stated, there seems to be no agreement on a requirement to derogate from these provisions in order to create a legal basis for security detention under the ICCPR and ACHR.

Derogation is also a crucial factor in the harmonization of Articles 43 and 78 GC IV with the right to liberty protected in Article 5 ECHR. Here the interplay raises a *potential conflict* and arguably, of continuing ambiguity. As concluded, the latter provision does not list security detention among the legitimate aims for deprivation of liberty listed in its paragraph 2, nor can any of the grounds mentioned be interpreted as to permit security detention in so far this can be considered as lawful under LOAC. As such, a conflict of norms arises that seemingly can be avoided only by making use of the possibility to *lawfully* derogate from Article 5 ECHR, or, in the alternative, when the UNSC requires security detention.²⁰¹⁵

Following the ECtHR in *Al-Jedda*, in the *absence* of derogation the norm conflict persists and the argument could be made that – at least in so far it concerns its lawfulness under the ECHR – the detention is unlawful, even if it constituted a perfectly lawful exercise of internment authorities as prescribed by the law of IAC. As such, the detention would constitute a violation of Article 5 ECHR, thus incurring State responsibility for a wrongful act. This would imply that a State must derogate even in the event a State interns POWs. As argued by Pejic, “the decision has confused the interplay of international humanitarian law and human rights law in the area of detention and will make it legally, politically, and practically difficult for Council of Europe State to take part in military or stabilization operations abroad.”²⁰¹⁶

It is submitted, however, that in these types of ‘hard cases’, the maxim of *lex specialis* as a technique of conflict resolution would be the applicable tool to resolve this conflict. This means that, in so far LOAC offers a more specific rule, it precedes the incompatible IHRL rule. The right to liberty *in toto* is not a rule of *jus cogens*, and the fact that it may be derogated from indicates that it may be suspended under exceptional circumstances, even when these circumstances short of an armed conflict. It is therefore submitted that, *in the absence of derogation*, the measure of security detention is to be considered as a legitimate ‘automatic’ measure of derogation in times of armed conflict in so far it can be legitimately taken under LOAC.²⁰¹⁷ As such, the right to liberty can be lawfully curtailed in armed conflict when carried out in conformity with LOAC.²⁰¹⁸ This outcome is also consistent with the outcome under Article 9 ICCPR and Article 7 ACHR. Numerous States are party to both the ICCPR and ECHR. When we assume that a derogation is not required to permit security detention under the ICCPR, it would defy logic if such State then would violate Article 5 ECHR while exercising a widely recognized and well-established authority in times of armed conflict,

²⁰¹⁵ (2011a), *Al-Jedda v. United Kingdom*, App. No. 27021/08, Judgment of 7 July 2011.

²⁰¹⁶ Pejic (2012), 92.

²⁰¹⁷ This line of reasoning had already been presented by judges Sperduti and Trechsel in 1974, and, it is submitted, is still valid today. (1976a), *Cyprus v. Turkey*, Case No. 6780/74, 6950/75, Decision of 10 July 1976, Dissenting Opinion by Mr. G. Sperduti Joined by Mr. S. Trechsel on Article 15 of the Convention, § 7.

²⁰¹⁸ This line of reasoning is also accepted with respect to the authority provided under GC III to intern POWs until the cessation of hostilities without having the right to legally challenge their detention. This authority sets aside the obligation under IHRL that anyone has the right to challenge the lawfulness of their detention. Kleffner (2010b), 74.

namely to intern individuals when necessary for imperative reasons of security. However, it remains unclear whether this reasoning enjoys wide support.

In sum, the interplay between IHRL and the law of IAC in the normative paradigm of security detention demonstrates that both are in harmony to a significant degree. In fact, to a large extent, they converge. However, it is submitted that, in the context of an armed conflict, the law of IAC is the *lex specialis* and forms the guiding framework against which security detention is to be considered. IHRL may play a role only when taking account of the factual circumstances in which the requirement is to be applied, thereby striking a balance between military necessity, translated into security concerns, on the one hand, and protection of the security detainee.

While the interplay between IHRL and the law of IAC is relatively clear in most areas, the normative paradigm of security contains areas where it remains *unclear* and subject to debate. One such area concerns the issue of whether security detainees – when their detention is being reviewed – are entitled to *fair trial guarantees*. As we have concluded, LOAC does not offer fair trial rights to internees, so the question rises whether IHRL should fill this gap. As we have seen, IHRL recognizes that with respect to *all* judicial proceedings, as well as certain administrative proceedings, *certain* fair trial rights must be guaranteed, “aimed at the proper administration of justice.”²⁰¹⁹ Nonetheless, it remains subject of debate whether security detainees should be granted all fair trial guarantees. If the situation is such that, for example, the counterinsurgent Occupying Power is in solid control of the occupied territory such that it is practically possible to provide the detainee with legal counsel, it seems plausible to consider the counterinsurgent Occupying Power bound by that rule. On the other hand, it may be simply practically impossible to fulfill this obligation in circumstances where combat is taking place over control of an area. All in all, in armed conflict, the imposition to guarantee fair trial rights to internees on the basis of IHRL may reach its logical limit where it is simply practically not possible to fulfill these standards. In so far it is not possible to lawfully derogate from these obligations, the IHRL norms must be read down to the extent that it takes into account the specific circumstances in which they are to be applied.

2.2. The Interplay Between IHRL and the Law of NIAC

The most problematic and controversial area of interplay in the context of operational detention undoubtedly concerns that between IHRL and the law of NIAC in the normative paradigm of security detention.

Admittedly, both IHRL and the law of NIAC demonstrate a degree of convergence, most notably in relation to the treatment of security detainees, both in the narrow sense as well as in terms of conditions of detention. However, some areas remain more contentious. The most precarious areas concern those of the *legal basis* for security detention and *procedural safeguards*.

As regards the *legal basis* for security detention, it has been previously established that neither CA 3 nor AP II provide an express legal basis comparable to Articles 42 and 78 GC IV, but merely contemplates such detention, the idea being that States regulate such detention in their domestic laws. While it is generally accepted that the grounds mentioned in the GC IV-provisions may function as a basis for States to justify security detentions, at the same

²⁰¹⁹ Human Rights Committee (1984), § 1.

time this policy lacks the strength of a legal norm. Thus, strictly speaking from the viewpoint of positive international law, the gap in the law of NIAC continues to exist. At the same time, as concluded, IHRL mandates that deprivations of life may not be arbitrary, an obligation that States must take into account when incorporating security detention in their domestic laws. While some argue that IHRL provides the only framework for reference, another view is that IHRL remains the default regime, but that its application should be read down such as to accommodate for the specific circumstances of armed conflict. As States cannot rely on an explicit rule deriving from the law of NIAC they can instead use the GC IV-grounds to justify security detentions under IHRL. As explained by Sassòli:

Possible bases for arrest, detention or internment are entirely governed by domestic legislation and the human rights law requirement that no one be deprived of his or her liberty except on such grounds and in accordance with procedures as are established by law. In State practice too, governments confronted by non-international armed conflicts base arrests, detentions, and internment of rebels, including rebel fighters, either on domestic criminal law or on special security legislation introduced during the conflict. They never invoke the “law of war.”²⁰²⁰

Given the closed system of Article 5 ECHR, which only allows deprivations of life in limited situations, this would require a derogation from the right to liberty and security of the person. In the absence of such derogation, the security detention would clearly be arbitrary.²⁰²¹ It is not possible to argue that there is no need for derogation because Article 5 ECHR is automatically set aside by a ‘hard’ rule of LOAC when an armed conflict arises, for the mere fact that such a rule is absent.

Whether this reasoning also applies in respect of the relevant provisions under the ICCPR and ACHR is unclear, as arguably, derogation may not be required.

The area of *procedural safeguards* and *fair trial rights* is probably the most contentious area in respect of security detentions in the context of a NIAC. As noted, the law of NIAC provides only two procedural safeguards, namely (1) the obligation to inform a detainee of the reasons of his detention and (2) the obligation to afford the detainee to right to challenge the lawfulness of his detention (*habeas corpus*). IHRL and the law of IAC provide a far more comprehensive set of safeguards, which immediately triggers the question how this gap is to be filled. There seems to no agreement on a permanent solution. The effects of such ambiguity have become visible in practice. In the *Second Congo War*, the State authorities claimed wide internment powers on the grounds of ‘reasons of security’ without providing procedural safeguards or complying with the minimum standards of treatment to be afforded to detainees.²⁰²²

To recall, a solution to close this precarious gap would be for the parties to the conflict to make use of the possibility provided in CA 3 to conclude special arrangements according to which GC III and/or GIV find formal application.

Another, law-based solution is to conclude a new treaty that specifically addresses the topic of detention in NIAC. Yet, at this moment, it is unlikely that States are prepared to set aside the arguments that prevented them from concluding upon more expansive rules on the regulation of NIAC in the past, so there is a need for a more pragmatic approach.

In the legal discourse there is also growing support that recourse should be had to IHRL. A basis for this complementary role for IHRL has already been expressly recognized in the law

²⁰²⁰ Sassòli (2006), 64.

²⁰²¹ (2011a), *Al-Jedda v. United Kingdom*, App. No. 27021/08, Judgment of 7 July 2011.

²⁰²² Arimatsu (2012), 199.

of NIAC, in CA 3 and AP II.²⁰²³ As explained by Hampson, it is permissible to rely solely on IHRL

where the human rights material relates specifically to situations of [armed] conflict and where there is no conflict with humanitarian law. It is simply that humanitarian law appears to be silent. It may be particularly appropriate to do so when a rule appears to exist in international armed conflict and the doubt arises in the field of non-international armed conflict. Article 75 of Protocol I provides certain procedural and due process guarantees. It would not be surprising to find that similar rules exist in non-international conflicts, even if the evidence is to be found in human rights materials.²⁰²⁴

This role for IHRL is not surprising: in drafting CA 3 and AP II, States never agreed to regulate in an international treaty the manner in which they wished to regulate the security detention of individuals posing a threat to their security in the context of *internal* armed conflicts. The preferred method is to regulate this by *domestic law*. Following this line of argument, security detainees are to be afforded all of the procedural safeguards as well as the fair trial guarantees protected under IHRL.

While IHRL offers a readily available and detailed framework, reliance on its norms in the regulation of security detention in NIAC is, however, *problematic*.

Firstly, the very applicability of IHRL remains disputed, particularly in situations of extraterritorial multinational operations. Four issues may arise: (1) the applicability of IHRL in times of armed conflict, which is rejected by some States, but accepted by (most) others; (2) in multinational operations, the TCNs are not always bound by the same IHRL-treaties, which triggers the predominantly unresolved issues concerning (a) the customary status of IHRL-rules, and (b) the differences in view of the applicability of treaties, particularly in an extraterritorial context;²⁰²⁵ (3) the question of whether derogation is necessary or possible and, if so, which State (the visiting State or the host State) must derogate from its obligations under IHRL in so far possible; and (4) ambiguity concerning bilateral treaties between the visiting State and the host State regulating aspects of security detention by the former in the territory of the latter, as well as UNSC resolutions providing a basis for security detention, and their potential to override human rights obligations of either State.

In the event that IHRL applies, a *second* aspect arises, which concerns the contextual appreciation of IHRL norms when applied in armed conflict. While IHRL applies in armed conflict, it is not principally designed to cope with the realities of armed conflict, unlike LOAC. Yet, IHRL is generally peacetime-focused. The detention of individuals is mostly linked to crimes, which can be dealt with by a functioning judicial system equipped to process the usual quantity of suspects.²⁰²⁶ This reality may not exist in armed conflict, where the numbers of detainees may far exceed what is normal, where the judicial system may no longer function properly and where other concerns than merely criminal justice may justify one's deprivation of liberty. The forced application of IHRL peacetime-rules raises important questions as to how they should be applied in the realities of armed conflict. Legal experts continue to struggle with this issue. As experts noted, "any rules or guidelines regarding

²⁰²³ See paragraph 2, Preamble of AP II, which provides the link with IHRL by stating that "international instruments relating to human rights offer a basis protection to the human person." The Commentary to AP II specifically makes mention of the CAT and ICCPR, among others, as well as the regional human rights treaties, such as the ECHR and ACHR. Sandoz, Swinarski & Zimmerman (1987), §§ 4428-4430.

²⁰²⁴ Hampson (2007b), 298.

²⁰²⁵ Note the difference in opinion between the US and European States on the extraterritorial applicability of IHRL. On this in more detail, see Hampson (2012), 266.

²⁰²⁶ Dörmann (2012), 353.

internment must be formulated in a way that would allow them to be implemented in a realistic way in the different types of [NIACs], by both States and non-State actors.”²⁰²⁷

An example illustrating the above concerns the internment review-process, and most notably the aspect of *habeas corpus*. In an IAC, normally, enemy combatants qualify as POWs, and nowhere does GC III acknowledge the right of *habeas corpus* for POWs, so the question has been raised why this right should be granted to captured fighters in a NIAC. A plausible or at least possible ground for this difference is that a POW – having belligerent privilege or combatant immunity – has committed no crime by engaging hostilities. This renders the need for *habeas corpus* for POWs moot. In NIAC, a captured fighter is automatically subject to prosecution under domestic law simply for direct participation in the hostilities and should be afforded the right to *habeas corpus*. Pejic offers another explanation, arguing that

In reality, there is far less certainty as to the threat a captured enemy civilian actually poses than is the case with a combatant who is, after all, a member of the adversary’s armed forces. In contemporary warfare civilians are, for example, often detained not in combat, but on the basis of intelligence information suggesting that they represent a security threat. The purpose of the review process is to enable a determination of whether such information is reliable and whether the person’s activity meets the high level standard that would justify internment.²⁰²⁸

However, experts disagree on the question of whether this right must be granted to fighters who are held as security detainees in a NIAC and if not, whether it is at all possible to derogate from it. Some contend that since the right to *habeas corpus* is non-derogable, and since there is no overriding norm in LOAC that would permit derogation on the basis of military necessity, it cannot be set aside unless the government of the State party to a NIAC claimed for itself belligerent rights, in which case captured fighters should benefit from the same treatment as granted to POWs in IACs and detained civilians should benefit from the same treatment as granted to civilian persons protected by GC IV in IACs. However, while the non-derogability of the writ of *habeas corpus* may be in sync with the realities in peacetime, it can be questioned whether it can be practically upheld in the face of realities on the battlefield. The better view – which also seems to be shared by the ICRC – is therefore to regard the right of *habeas corpus* derogable in times of armed conflict where review by a court is not possible, provided that a properly functioning administrative review procedure has been institutionalized.²⁰²⁹

A *third* aspect complicating the debate on the interplay between IHRL and law of NIAC in the area of procedural safeguards is the *asymmetry* in the applicability *ratione personae* of IHRL and LOAC to the non-State party to the conflict, and their capacity to extend their normative framework to them.²⁰³⁰ To explain, the LOAC of NIAC binds all the parties to the conflict,²⁰³¹ but does not provide a comprehensive normative framework governing security detention. In contrast, IHRL, while offering a detailed normative framework, and stepping in to fill the voids in regulation left by LOAC, only binds States, and not non-State parties to the conflict. And even if it did bind non-State parties, it remains to be seen how they could comply with the strict requirements under IHRL.

In view of the deficits of IHRL as ‘gap-filler’, one approach would be to apply norms of GC III and GC IV on a policy basis. While this is not a legal solution, this way States are at least

²⁰²⁷ Expert meeting, 862.

²⁰²⁸ Pejic (2012), 89.

²⁰²⁹ ICRC (2011), 17-18.

²⁰³⁰ ICRC (2011), 18.

²⁰³¹ See CA 3.

prevented from carrying out security detentions in a manner that would be more permissive than allowed under the law of IAC.²⁰³²

Others propose a mixture of IHRL and the law of IAC. While admitting that the analogous application of the LOAC of IAC, as well as the application of IHRL in the context of a NIAC have their own deficits, Olson argues that when both are applied in unison they may mutually reinforce each other, as they remove each other's weaknesses and as such provide a coherent normative framework for the internment of individuals in NIAC. Olson explains how:

If IHRL is not used to interpret an IHL rule, but instead IHRL is used as a complement to IHL in the sense of applying simultaneously, yet separately. In other words, apply IHRL "next to" IHL, instead of "within" IHL. IHL would apply to parties to the conflict, State and non-State actors, and IHRL would continue to apply to State actors, as it was traditionally designed to do. This avoids the problematic application to non-State actors, and, yet, mandates States to continue to meet their international obligations. One may claim this is unfair, as States would need to abide by additional obligations than non-State actors in a non-international armed conflict. This is true at the international level, where States are traditionally legal actors, but it would only be true of the rules to which the States obligated themselves. Also, it must not be forgotten that non-State actors remain bound by domestic law.²⁰³³

When used as complementary instruments, IHRL would offer procedural protection for interned insurgents, whereas LOAC would provide clarity to insurgents' obligations, which results in better protection of the State's armed forces when captured. However, while pragmatic, its main deficit is that it remains a solution that is not legally binding.

In view of the operational and humanitarian issues involved, several initiatives in the international community have been initiated to look for ways to close gaps and to clarify ambiguities. A particular noteworthy source aimed at closing the gaps in regulation of security detention and strengthening the position of victims is the ICRC's document called "*Procedural Principles and Safeguards for Internment/ Administrative Detention in Armed Conflict and Other Situations of Violence*",²⁰³⁴ which contains legal and policy guidelines to be followed by States in the execution of the measure of security detention.²⁰³⁵

²⁰³² GC III and GC IV has been relied upon by INTERFET-forces in East-Timor. See Kelly, McCormack, Muggleton, *et al.* (2001); Oswald (2000).

²⁰³³ Olson (2009).

²⁰³⁴ Pejic (2005).

²⁰³⁵ According to the ICRC, security detainees are, as a minimum, to be afforded the following general and procedural guarantees:

General guarantees:

- internment/administrative detention is an exceptional measure;
- internment/administrative detention is not an alternative to criminal proceedings;
- internment/administrative detention can only be ordered on an individual, case-by-case basis, without discrimination of any kind;
- internment/administrative detention must cease as soon as the reasons for it cease to exist;
- internment/administrative detention must conform to the principle of legality.

Procedural safeguards:

- right to information about the reasons for internment/administrative detention;
- right to be registered and held in a recognized place of internment/administrative detention;
- foreign nationals in internment/administrative detention have the right to consular access;
- a person subject to internment/administrative detention has the right to challenge, with the least possible delay, the lawfulness of his or her detention;
- review of the lawfulness of internment/administrative detention must be carried out by an independent and impartial body;

Another example is the *Copenhagen Process on the Handling of Detainees in International Military Operations*, an intergovernmental consulting initiative of the Danish Ministry of Foreign Affairs,²⁰³⁶ triggered by legal, political and military concerns on detention in military operations,²⁰³⁷ and with the aim to reach consensus among States²⁰³⁸ and relevant international organizations²⁰³⁹ on the international legal regimes applicable to taking and handling detainees in military operations; and to agree upon generally acceptable principles, rules, and standards for the treatment of detainees. In substance, the principles largely overlap with those recognized by the ICRC in its Procedural Principles and Safeguards mentioned above. The principles apply to “the detention of persons who are being deprived of their liberty for reasons related to an international military operation.”²⁰⁴⁰ While supposedly reflecting State practice and policy, the principles, however, have received notable criticism, mostly so because it arguably favors imperatives of military necessity.²⁰⁴¹ However, they are not designed to reflect the final word on detention. To the contrary, “it might [...] be assumed that the participants in the Copenhagen Process anticipate that the work carried out in developing the Principles and Guidelines will influence the ICRC discussions and any other discussions or developments concerning detention that might arise in the future. In a similar vein, nothing in the Principles and Guidelines precludes states or organizations from further developing principles, rules, or guidelines concerning detention.”²⁰⁴² Finally, in 2010, the UN Department of Peacekeeping Operations has issued Interim Standard Operating Procedures on Detention in United Nations Peace Operations. These are binding in UN troops.²⁰⁴³

In the absence of a comprehensive legal framework, the manner in which States exercise security detention in the context of NIAC is a reflection of their own perspectives and interpretations. On the one hand, the persisting gap could be (ab)used by States to argue in

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- an internee/administrative detainee should be allowed to have legal assistance;
 - an internee/administrative detainee has the right to periodical review of the lawfulness of continued detention;
 - an internee/administrative detainee and his or her legal representative should be able to attend the proceedings in person;
 - an internee/administrative detainee must be allowed to have contacts with – to correspond with and be visited by – members of his or her family;
 - an internee/administrative detainee has the right to the medical care and attention required by his or her condition;
 - an internee/administrative detainee must be allowed to make submissions relating to his or her treatment and conditions of detention;
 - access to persons interned/administratively detained must be allowed.

²⁰³⁶ Available at <http://um.dk/en/~media/UM/English-site/Documents/Politics-anddiplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf/>.

²⁰³⁷ An important trigger is formed by cases pending before courts of the several participating States, i.e. Denmark, the UK, the US, and Canada. See for references to these cases Oswald & Winkler (2012), footnotes 5-11.

²⁰³⁸ States participating were Argentina, Australia, Belgium, Canada, China, Denmark, Finland, France, Germany, India, Malaysia, New Zealand, Nigeria, Norway, Pakistan, Russia, South Africa, Sweden, Tanzania, the Netherlands, Turkey, Uganda, the UK, and the US.

²⁰³⁹ Organizations participating were: AU, EU, NATO, the UN, ICRC

²⁰⁴⁰ Danish Ministry of Foreign Affairs (2012), Principle 1.

²⁰⁴¹ <http://www.amnesty.org/en/news/copenhagen-principles-military-detainees-undermine-human-rights-2012-10-22>; <http://www.ejiltalk.org/the-copenhagen-process-principles-and-guidelines/>.

²⁰⁴² See Oswald and Winkler in ASIL Insight, <http://www.asil.org/pdfs/insights/insight121226.pdf>.

²⁰⁴³ United Nations (2010)

favor of a security-favored margin of appreciation when determining the grounds and safeguards for detention and transfer of detainees. At the same time, as previously remarked in the introduction to this part, States have come to realize that detention operations that do not take place in accordance with the rule of law are a strategic liability and undermine the social legitimacy of the counterinsurgency effort, particularly so when acting in the territory of another State.²⁰⁴⁴ As noted by Vice-Admiral Howard, Commander of Detainee Review Task Force

Detention operations are tactical missions with broad-ranging strategic effects. As we separate those who use violence and terror to achieve their aims from the rest of the Afghan population, we must do so in a lawful and humane manner. We have an obligation to treat all Afghan citizens and third-country nationals (TCNs) with dignity and respect. Fulfilling this obligation strengthens our partnership with both the Government of the Islamic Republic of Afghanistan (GIROA) and the Afghan people. Failure to fulfill this obligation jeopardizes public support for both the Coalition and the GIROA.²⁰⁴⁵

In the Iraqi and Afghanistan campaigns, this insight has led TCNs to adopt detailed policy frameworks or arrangements with the host States to govern detention, with clear purposes, tasks and responsibilities, in order to guarantee that the detention process does not violate the fundamental rights of the detainee without losing sight of the security interests involved.²⁰⁴⁶ For example, the detainee-review process in place in 2009 and 2010 providing safeguards and rights to detainees held by the US in the Baghram detention facility in Afghanistan were said to “substantially adhere to all safeguards that could be considered customary international law and even those advanced by human rights advocates.”²⁰⁴⁷

In fact, nowadays these frameworks – while policy based – oftentimes provide more safeguards to detainees than are required by law.²⁰⁴⁸ For example, operational practice of TCN’s

²⁰⁴⁴ For a detailed and convincing account of US detention policy and the progress from strategic liability to legitimacy, see Bovarnick (2010)

²⁰⁴⁵ Howard (2010), cited in Human Rights First (2011), 1.

²⁰⁴⁶ See for example, the ISAF detention policy (COMISAF (2006) which stipulates that, upon capture, detainees may be held in detention for a maximum of 96 hours. COMISAF is the commanding authority to decide upon the extension of the detention beyond 96 hours. However, detention may only be extended “in order to effect his release or transfer in safe circumstances.”²⁰⁴⁶ The SOP recognizes the right of the detainee to be promptly informed of the reasons of his arrest and detention. It also stresses that intelligence gathering may not constitute a ground for detention, although “where detention is justified, questioning can be directed towards perceived threats and other issues of relevance.”²⁰⁴⁶ Annexes C and D to the SOP 362 provide detailed guidance on the treatment *strictu sensu* of detainees, the material conditions of detention, as well as the procedural safeguards to be complied with, including the review of the necessity for detention. After 96 hours, the detainee should be either released or transferred to the Afghan authorities. Such transfer is to be reported to HQ ISAF and the ICRC must be notified. Also, the reason of detention and the identity of the detainee must be clear, as well as the identity of the Afghan government official to which the detainee is being handed over. Particular attention is devoted to maintain accurate records of detention, irrespective of the duration of the detention, and should provide clear information on the circumstances surrounding the detention, to include the date and time, as well as the place of initial and subsequent detention. It should also include routine reviews of detention. More importantly, when transferring the detainee to the Afghan authorities, details of the circumstances surrounding the detention must be made available to the Afghan authorities for use in follow-up legal proceedings. The TCN must inform the ICRC not only of the detention of individuals, but also of any change in circumstances of detention, such as the transfer, release or on handover to the Afghan authorities. Also, the ICRC must be informed “of any instance resulting in the hospitalization or death of a detainee. Finally, the ICRC must be granted access to ISAF detention facilities.

²⁰⁴⁷ Bovarnick (2010), 44. For a comparative analysis of the US detainee safeguards with Rule 99 of the CLS and the ICRC Procedural Principles and Safeguards, see 43-44.

²⁰⁴⁸ Bovarnick (2010).

participating in ISAF demonstrates that bilateral agreements are being closed that regulate the transfer of detainees, often to include a monitoring authority of the transferring State. Here, States go well beyond their obligations under international law, as they are not required to monitor the well-being of detainees after hand-over to another State. Nonetheless, monitoring is carried out to ensure that the treatment of the detainee does not resonate on the strategic efforts.

3. The Interplay between the Normative Paradigms of Criminal Detention and Security Detention

Having identified and examined the interplay between IHRL and LOAC within the two normative paradigms of criminal detention and security detention, the question arises what determines which normative paradigm applies in a concrete situation. Clearly, this issue is less pregnant in the event that insurgents evidently pose no threat to the security to the State such that this warrants their detention on that basis, but can instead be regarded purely as criminal suspects. However, as we have previously established, an insurgent's behavior may simultaneously trigger acts of crime and acts committed as part of an armed conflict. This is undoubtedly the case when insurgents are captured on the battlefield when directly participate in hostilities whilst – in doing so – at the same time violating a State's domestic criminal law. This would imply that grounds exist to detain insurgents for reasons of both criminal justice and security. It is here that the question of interplay arises. In fact, as argued by Lietzau, “[t]his confluence of applicable bases for detention and attendant legal paradigms is the primary complicating factor in twenty-first-century detention policy.”²⁰⁴⁹

At the heart of the problem is the absence of a positive rule in international law, or any other form of general State consent, that determines which normative paradigm is to be applied. It remains unclear whether States are under an obligation, for example, to resort to the normative paradigm that offers the most protection. Although the law remains unclear, a factor determinative of the applicability may be the very object and purpose of each normative paradigm. To recall, the normative paradigm of criminal detention provides a framework to regulate an individual's detention for alleged criminal behavior that took place in the *past*, and for which he can be held *accountable to the public*. In turn, the normative paradigm of security detention in armed conflict provides a framework to regulate an individual's detention for *future* behavior, in order to *prevent* threats to the *security*.

In view of the above, the ICRC argues that

Internment/administrative detention is a measure of control aimed at dealing with persons who pose a real threat to State security, currently or in the future, in situations of armed conflict, or to State security or public order in non-conflict situations; it is not a measure that is meant to replace criminal proceedings. A person who is suspected of having committed a criminal offence, whether in armed conflict or other situations of violence, has the right to benefit from the additional stringent judicial guarantees provided for in humanitarian and/or human rights law for criminal suspects, which include the right to be tried by a regularly constituted, independent and impartial court. Unless internment/administrative detention and penal repression are organized as strictly separate regimes there is a danger that internment might be used as a substandard system of penal repression in the hands of the executive power, bypassing the one sanctioned by a country's legislature and courts. The rights of criminal suspects would thus be gravely undermined.²⁰⁵⁰

²⁰⁴⁹ Lietzau (2012), 333.

²⁰⁵⁰ Pejic (2005), 381.

However, it is also argued that security detention would be allowed when the insurgent's behavior in the past is telling of his behavior in the future and constitutes a potential threat to security. Others differentiate in the nature of the crime. For example, as promulgated in its doctrine, the UK holds that in an IAC, persons, while normally given a custodial sentence,

can instead be sentenced to a period of internment and then will become internees [...]. This is likely to be the case where the crime was political in character and aimed at UK Armed Forces or the occupation administration, rather than a crime for personal gain.²⁰⁵¹

State practice, however, demonstrates that the legal ambiguity on the interplay between criminal detention and security detention in armed conflict has led States to take quite extreme positions. On one extreme is the position of States – mostly so the US – that argue that the normative 'wartime' paradigm of security detention should always be applicable to insurgents captured on the battlefield. Any other outcome would defy the logic of the distinction between law principally designed for peacetime situations – IHRL-based criminal detention – and wartime situations – LOAC-based security detention. As argued by Lietzau,

[i]t would make no sense suddenly to "turn off" the wartime paradigm and switch to that of law enforcement, providing all the process associated with criminal procedure. To do so would be the equivalent of telling the nineteen-year-old recruit, "You have legal authority to kill another human being, but if you capture him instead, you had better collect enough evidence to prove him guilty of a crime in a courtroom." Making it more complex to capture a person in combat by adding additional obligations could incentivize killing-ironically and perversely-in the name of human rights.²⁰⁵²

The problem then encountered is that the normative paradigm of security detention – particularly so in the context of NIAC – offers little guidance, and given the separatist stance of the US regarding the applicability of IHRL in wartime, as well as its applicability extraterritorially, IHRL-based norms can only apply as a matter of policy, leaving unresolved the issue that "[t]he Geneva Conventions, written more than a half century ago, simply were not designed for the present conflict."²⁰⁵³ In any case, it has not deterred the US from carrying out security detentions on a massive scale during the conflicts in Iraq and Afghanistan.

Other – mostly European – States have taken a far more cautious stance towards the issue of detention and have opted not to resort to security detention at all, at least not long-term. As follows from the practice of many States partaking in the ISAF-mission in Afghanistan, the choice has been to hold captured persons for a maximum of 96 hours – a limit based on ECHR-case law – and then to either release them, or to hand them over to the Afghan authorities for criminal proceedings.²⁰⁵⁴ A possible incentive behind this approach may be these States' fear for IHRL-based claims that long-term security detentions may be condemned as arbitrary deprivations of liberty.

It is however submitted that in operational practice the interplay between the two forms of operational detention may be influenced by policy-based *counterinsurgency imperatives*. Overall, in counterinsurgency, reliance on criminal detention is to be preferred over security detention. For example, "[i]n dealing with a developing insurgency, all restrictive measures – curfews and restrictions on movement, or in an extreme case, detention without trial – place a strain on democracy, and any decision to introduce them must not be made lightly."²⁰⁵⁵

²⁰⁵¹ United Kingdom Ministry of Defence (2011), § 144.

²⁰⁵² Lietzau (2012), 331.

²⁰⁵³ Lietzau (2012), 331.

²⁰⁵⁴ For an overview of conflict-related detainees held by the Afghan authorities, see UNAMA (2013).

²⁰⁵⁵ Chief of the Land Staff (2008), 4-4.

After all, the desired end state in any counterinsurgency is the return to the *status quo* prior to the insurgency, which amount to a state of peace, where – in the absence of an armed conflict – affairs between the State and those under its control are governed by IHRL. This implies that the deprivation of liberty principally is to be rooted in the repression of crimes. As explained by Porter Harlow,

[u]sing Soldiers and Marines to detain insurgents in a U.S. detention facility is not the best COIN tactic because, while it labels the insurgent a criminal in the eyes of the U.S. military, it is less likely to label the insurgent as a criminal in the eyes of the most important audience: local nationals. Local nationals are more likely to see an insurgent as a criminal when a local national policeman detains him, a local national judge convicts him of a crime, and a local national incarcerates him in a local prison. Accordingly, mothers and fathers may be less willing to allow a son to join a criminal organization than an alternatively identified sectarian or ethnic organization.²⁰⁵⁶

Thus, “it is most useful to shift as quickly as possible to a law enforcement regime that treats insurgent combatants as criminals to be dealt with by a peacetime criminal justice system.”²⁰⁵⁷ However, it is submitted, reliance on criminal detention largely depends on the degree of *control* exercised by the counterinsurgent State over territory to a degree that it can rely on an functioning criminal justice system. The rules of the normative paradigm of criminal detention presume a certain degree of stability and peace for them to be carried out properly. In environments of ongoing hostilities between the counterinsurgent State and insurgents, and where a criminal justice system is absent, or improperly functioning, the criminal detention-option might not be viable option because it is simply not possible to reasonably comply with the accompanying requirements, and security detention is the only reasonable alternative provided it is used for the object and purpose it was designed for.

When the situation gradually transforms from hostilities to peace, criminal detention may become more of a practical possibility, and therefore a strategic imperative. This was also the approach adopted by the US in the final stages of its presence in Iraq, where captures and detentions were predominantly conducted under the normative paradigm of criminal detention following an agreement with the Iraqi authorities. On 31 December 2008, the mandate of UNSC Resolution 1546 expired. The US and Iraq concluded a Security Agreement, which provided a legal framework for U.S. involvement in detentions.²⁰⁵⁸ Following Article 22 of the agreement (1) all security detainees held by the Coalition on 31 December 2008 must either be released in a “safe and orderly manner” or must be transferred to Iraqi custody if Iraqi officials have a judicial order, and (2) any detentions after 31 December 2008 must be conducted in accordance with Iraqi law, including the Iraqi Law on Criminal Proceedings of 1971.²⁰⁵⁹

²⁰⁵⁶ Porter Harlow (2010), 68.

²⁰⁵⁷ Lietzau (2012), 334.

²⁰⁵⁸ (2008b).

²⁰⁵⁹ Article 22 of the agreement stipulates as follows:

1. No detention or arrest may be carried out by the United States Forces (except with respect to detention or arrest of members of the United States Forces and of the civilian component) except through an Iraqi decision issued in accordance with Iraqi law and pursuant to Article 4.
2. In the event the United States Forces detain or arrest persons as authorized by this Agreement or Iraqi law, such persons must be handed over to competent Iraqi authorities within 24 hours from the time of their detention or arrest.
3. The Iraqi authorities may request assistance from the United States Forces in detaining or arresting wanted individuals.
4. Upon entry into force of this Agreement, the United States Forces shall provide to the Government of Iraq available information on all detainees who are being held by them. Competent Iraqi au-

A similar process is taking place in Afghanistan. The crux of the matter is, however, that there is no legal obligation to do so, but this shift is rather the result of policy decisions that aim at the gradual return to normality when circumstances so permit, because it serves the counterinsurgency end state.

4. Observations

In this chapter, we have sought to examine the interplay between IHRL and LOAC in two normative paradigms, i.e. those pertaining to criminal detention and security detention.

The interplay of IHRL and LOAC in the normative paradigm of *criminal detention* is uncontroversial: it is one of convergence and complementarity. IHRL places no restrictions on the conduct of States in the context of criminal detention that go further than those imposed by LOAC. The firm basis of fair trial guarantees in LOAC ensures that States cannot evade similar obligations under IHRL by means of derogation, or by arguing that IHRL is not applicable in armed conflict or outside the State's territory.

In operational practice, the latter aspect may involve the reading down of fair trial rights to the extent they can be realistically applied in armed conflict, so as not to impose upon States obligations it could never fulfill. Clearly, it would not be possible to comply with the obligations relative to fair trial rights if the counterinsurgent forces were constantly engaged in hostilities. Rather, in view of their object and purpose, fair trial rights require more compliance once the situation returns to (relative) normalcy.

The interplay of IHRL and LOAC in the normative paradigm of *security detention* reflects the availability, density and precision of the normative frameworks in the laws of IAC and NIAC. As noted, these frameworks differ fundamentally, resulting from the conceptual viewpoints of States when designing them.

Security detention is quite densely regulated by the law of IAC and here, the interplay is rather straightforward: where LOAC provides norms it operates as the *lex specialis* and acts as an interpretative source, or – as has been submitted in the context of the legal basis for internment – as an overriding source in case of (potential) conflict with norms of IHRL.

The interplay in the context of NIAC is less straightforward, at least so in respect of the legal basis and procedural safeguards, where LOAC hardly provides norms. The absence of specific rules in the law of NIAC may lead States to apply the law of IAC as a matter of policy. It arguably also necessitates the reliance on IHRL. However, reliance in IHRL is not unproblematic. It may not always apply, due to varying reasons, and if it does, its aptness to the particularities and realities of armed conflict can be questioned.

The dichotomy in legal regulation between the law of IAC and the law of NIAC is of great significance for operational detentions. Perhaps with the exception of OCCUPCOIN and non-consensual TRANSCOIN, in all situational contexts of counterinsurgency the relationship between the counterinsurgent State and the insurgent could potentially be regulated by

thorities shall issue arrest warrants for persons who are wanted by them. The United States Forces shall act in full and effective coordination with the Government of Iraq to turn over custody of such wanted detainees to Iraqi authorities pursuant to a valid Iraqi arrest warrant and shall release all the remaining detainees in a safe and orderly manner, unless otherwise requested by the Government of Iraq and in accordance with Article 4 of this Agreement.

5. The United States Forces may not search houses or other real estate properties except by order of an Iraqi judicial warrant and in full coordination with the Government of Iraq, except in the case of actual combat operations conducted pursuant to Article 4.

See also Greig (2009), 28.

the law of NIAC, so the legal issues arising in relation to security detention practically always arise.

Having established the interplay of IHRL and LOAC in the normative paradigms, this chapter finally investigated the interplay *between* both normative paradigms, the question being what are the parameters that determine which normative paradigm apply to a particular situation of detention. Clearly, the question of applicability arises in situations where an insurgent poses not only a threat to the security, but also constitutes a criminal suspect. This combination potentially applies to many insurgents, particularly those in a fighting function. Here, in determining the applicable normative paradigm, it was submitted that the object and purpose of each normative paradigm is an overriding factor. It, however, remains unsure what the law exactly is on this issue, thus leaving room for States to adopt policy-based approaches that best serve their interests. In the context of counterinsurgency, the 'choice' of the normative paradigm appears to be dictated by imperatives that direct counterinsurgency forces to operate in the direction of the 'peacetime' criminal detention rather than 'wartime' security detention once circumstances so permit.