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.2.

To recall, the research question to be answered in this part is:

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

1. Interplay

As the above analysis has demonstrated, the interplay of IHRL and LOAC in issues of operational detention is clear to some degree, yet remains ambiguous in other areas, mostly so in the context of NIAC.

It is submitted that a particular crucial factor in determining the interplay between IHRL and LOAC in each normative paradigm is the *availability*, *density* as well as the *precision* of rules governing criminal and security detention in IHRL and LOAC. In fact, it is precisely here that the traditional dichotomy between IAC and NIAC frustrates States in attaining clarity as to the legal obligations under international law to which they are bound. This is even more frustrating as it is precisely the most dominant type of armed conflict – NIAC – where most ambiguity is found. It determines whether only LOAC, only IHRL, or both regulate certain matters, thus triggering the question of whether such gaps need to be filled by the norm-providing regime. Also, where both regimes provide norms, it determines whether they converge or conflict with rules found in IHRL, and, if so, whether they can be harmonized. Overall, therefore, the interplay between IHRL and LOAC within the normative paradigms of criminal and security detention must take place on a case-by-case, norm-specific basis. When doing so, it is possible to distinguish between, on the one hand, areas within the normative paradigms where norms of IHRL and LOAC converge or are otherwise complementary and where the interplay between norms of IHRL and LOAC is *unproblematic*, and on the other hand, areas where this interplay is one of *potential conflict* or remains *unclear*.

Another factor complicating a clear answer to the interplay between IHRL and LOAC is the very *nature of IHRL*. There is, to begin with, the issue of derogation, in the absence of which security detention would be unlawful notwithstanding the fact that, at least in the context of internment in IAC, the law of IAC expressly authorizes it. In addition, in the context of NIAC, IHRL is proposed to provide more guidance. In fact, CA 3 and AP II invite the parties to the conflict to take recourse to this regime. However, the scope of applicability of IHRL remains subject of debate; its norms may be unfitting for application in armed conflict; and it does not bind non-State armed groups, and thus places a burden on States only.

The combination of absence of clear norms under LOAC and conceptual issues with IHRL may force States to take at least two (extreme) positions that apply mostly in extraterritorial contexts of NIAC (most fittingly SUPPCOIN, OCCUPCOIN and TRANSCOIN). A *first* position is to argue that since LOAC does not provide treaty-based or customary norms, and IHRL does not apply in armed conflict or in an extraterritorial context, therefore there are no rules, and which arguably provides an unrestricted mandate to detain that can only be

limited by policy. A *second* position is to argue that IHRL applies extraterritorially, but since the law of NIAC remains silent there are no rules that could justify a deviation from IHRL obligations the extraterritorial security detention of insurgents is likely to violate IHRL, and therefore it is perhaps better not to detain at all.
There seems to be no straightforward and satisfying solution available in the law and the best option at this moment is to resort to policy that derives guidance from GC III and GC IV. Both frameworks demonstrate its sensitiveness to the fact that an armed conflict is going on and for that reason permits military necessity to override humanitarian considerations for as long as it deems this required. This would not preclude IHRL from being included in such policy so it could, where necessary to clarify or supplement LOAC-based norms.
This would result in a framework within which States feel comfortable and at the same time offers safeguards of a standard commensurate to the specific situation of armed conflict. The actual application of such policy may serve as a first step towards new law – either customary or in the form of a new treaty. Supporting this process may be today's counterinsurgency doctrine, policy, and practice, which already reflect much of the norms found in GC III, GC IV and IHRL. This way, States also remain in the lead and may avert the development of such new law into undesired directions – overly protecting either security or humanitarian interests. This ensures that a tailored balance can be achieved between the fundamental pillars of LOAC – military necessity and humanity.

2. Permissible Scope for Operational Detention under the Normative Paradigms

As follows from the above analysis, counterinsurgent forces are to *treat* all detainees – irrespective of which type of detention they are placed in – *humanely*. This implies firstly that they are to offer certain (minimum) material conditions of treatment, and secondly that forces are to ensure that detainees are under no circumstances subjected to torture or other forms of cruel, inhuman or degrading treatment or punishment. Neither may they be *transferred* into the authority of other States when facing such risks (non-refoulement), or where they may face an unfair trial.
All detainees are to be informed of the reasons for their arrest and must be provided the right to *habeas corpus*, although it may be submitted that this right must be read down in situations of armed conflict where there is no possibility for a review by a judicial authority, as has already been contemplated by the law of IAC. Other procedural safeguards – such as the requirement of a periodic review – are to be afforded as a matter of law to criminal detainees as well as security detainees governed by the law of IAC. Such procedural guarantees are likely to be granted as a matter of policy to security detainees governed by the law of NIAC. As for criminal detainees: these are to be afforded fair trial guarantees. It remains unclear to what degree such fair trial guarantees are also to be afforded to security detainees, but this may nonetheless take place on the basis of policy. Finally, all forms of detention must be rooted in a sufficient legal basis, either in domestic law, host nation law, a SOFA, in a UNSC resolution, or otherwise.