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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Part D. Synthesis and Conclusions

Chapter XII Synthesis and Conclusions

At the outset of this study we stated that the aim of this study is to examine how (the debate on) the interplay between IHRL and LOAC and counterinsurgency doctrine impacts the lawfulness – and therefore outer operational limits – of targeting and detention in counterinsurgency operations.
In furtherance of the academic debate and serving the formulation of practical guidance to a State and its armed forces, two central questions were framed:

> (1) in light of contemporary counterinsurgency doctrine, how do IHRL and LOAC interplay in the context of targeting and operational detention in counterinsurgency operations?
> (2) what are the implications of this interplay on the lawfulness of – and, therefore, operational latitude for – targeting and operational detention in counterinsurgency operations?

This is the concluding chapter of this study. In view of the stated aim and central questions, it seeks to draw together the principal themes in this study that emerge from the examination of the interplay between IHRL and LOAC in light of targeting and operational detention operations carried out in counterinsurgency.
The chapter consists of three paragraphs. Paragraph 1 summarizes the main operational and legal themes that characterize and impact the determination of the interplay of IHRL and LOAC in the context of targeting and operational detention in counterinsurgency operations. Paragraph 2 discusses the legal and operational implications of the interplay for targeting and detention operations in counterinsurgency on the basis of the outcome of the interplay. Paragraph 3 reaches final conclusions.

1. Operational and Legal Themes Characterizing the Interplay

As noted, the aim of this paragraph is to summarize the main operational and legal themes that characterize and impact the determination of the interplay of IHRL and LOAC.

1.1. Norm Relationships

A theme underlying – and controlling – the very subject of interplay in general, and that of IHRL and LOAC in particular, concerns the issue of norm relationships in international law. As concluded, international law functions as a legal system in which norms belonging to different regimes may enter into a relationship in which case it is necessary to determine their interplay. A principal issue in norm relationships is that, in order for them to arise, there are two norms that are (1) valid, i.e. govern a particular subject-matter in a particular context, and are (2) applicable, i.e. they have binding effect on the subjects of international law involved in the context. The principal desired outcome is to *ascertain* the ability of norms to *complement* each other so as to give each of them *maximum* effect, in order to *harmonize* them (the *instrument of complementarity*). The instrument of complementarity entails that both regimes mutually reinforce each other and, where necessary, complete and perfect each

other by drawing from each other's rules originating from treaty and customary international law, as well as general principles of international law.[2060]

IHRL and LOAC are generally considered to be complementary.[2061] As can be inferred from the ICJ in its *Palestinian Wall Advisory Opinion*,[2062] the complementary interplay between IHRL and LOAC finds reflection in three situations:
Firstly, where a matter is regulated by LOAC, *but not by IHRL*, the former may fill the regulatory gaps of the latter; *secondly*, where a matter is regulated by IHRL, *but not by LOAC*: the former may fill the regulatory gaps of the latter; and *thirdly*, where a matter is regulated by both IHRL and LOAC. In the latter situation, actual interplay arises. The question that arises is whether the norms in question are in harmony or in conflict. A principal tool to *ascertain* harmony or conflict and – for that matter – to *avoid* or *solve* conflicts is *interpretation*.
In interpreting norms, account may be had of a variety of factors, such as the intention of States when drafting or acquiescing to the norms in question, the search for relevancy and effectiveness in their application in particular factual situations (effectiveness), the legal clarity of norms or their certainty and reliability (normative weight), the nature of the norms in question, the degree of effective control exercised by the State involved, and State practice. In some cases it is not necessary to put in any effort to ascertain harmonization, for their normative substance clearly converges; in other situations however there is apparent conflict that can be avoided by applying interpretative techniques. In other situations, conflict cannot be avoided, and must be resolved via conflict resolution techniques.
A principal instrument of interpretation generally considered to be relevant to the ascertainment, avoidance and solution of (potentially) conflicting norms of IHRL and LOAC is the maxim of *lex specialis*, whereby the more general rule is interpreted in light of the more specific rule. While often misinterpreted as a rule of conclusory nature only (*lex specialis derogat legi generali*), whereby the specific rule fully neutralizes the general rule, the better approach is to view the maxim as an instrument of interpretation in which account is had of, *inter alia*, the precision and clarity of the relevant norms, the intent of States when drafting or acquiescing to the norms, and the flexibility of the norms to mold to the particularities of the factual situation at hand without losing effectiveness. In other words, the maxim of *lex specialis* is *norm-* rather than (solely) regime-sensitive, as well as *context*-sensitive. In that light, it is inconclusive to assess the interplay of regimes as a whole, i.e. the interplay of IHRL and LOAC as regimes. Doing so has the potential of neglecting particular nuances within particular norms that – when taken into account – would likely have led to another outcome.[2063]
Notwithstanding the above, the interpretation and position of the maxim of *lex specialis* as the dominant instrument in the interplay between IHRL and LOAC has been subject of fierce criticism throughout the legal discourse,[2064] which in part appears to be motivated by the fact that in armed conflict LOAC is designated as the *lex specialis*, which in view of its intense and robust regime is considered to threaten humanitarian interests in armed conflict.

[2060] Chapter III, paragraph 1.
[2061] Chapter II, paragraph 2.1.
[2062] (2004k), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, § 106, confirmed in (2005a), *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment of 19 December 2005*, § 216 (although in the latter opinion the ICJ refrains from using the *lex specialis*-rule. It remains unclear as to why it did so).
[2063] Chapter III, paragraph 2.
[2064] Chapter III, paragraph 3.

In that respect, it is argued here, such debates form part of the attempts to further humanize armed conflict. Such attempts to harmonize armed conflict contrast with attempts to protect, as far as possible, security interests, a second theme that colors the (debate on) the interplay of IHRL and LOAC.

1.2. Attempts to Modify the *Lex Lata* for Purposes of Humanity or Security

The manner in which the interplay between IHRL and LOAC is approached is largely determined by a power-struggle between, on the one hand, those desiring to further humanize armed conflict, and with that, LOAC, by increasing the influence of IHRL, and on the other hand those seeking to further expand the permissible scope of action in the interest of State security. Following the terrorist attacks of 9/11 and the ensuing proverbial War on Terror, and the subsequent conflicts in Afghanistan and Iraq, some seek to interpret legal aspects within the relative normative frameworks of IHRL and LOAC, as well as their interplay, in such a manner as to preserve security interests. This can be concluded from the rejection by some States of the applicability of IHRL in armed conflict;[2065] the rejection of the extra-territorial applicability of IHRL-obligations arising from human rights treaties;[2066] a rigid interpretation of the *lex specialis*-maxim, as to imply that in the situation of armed conflict LOAC totally neutralizes IHRL;[2067] the arguments in response to the ICRCs Interpretive Guidance, in order to widen the scope of targetable individuals as far as possible,[2068] and the measures adopted in the post 9/11 era, to include (allegedly) secret detention, rendition and torture of terrorists.[2069]

The overbroad attention for security interests, however, generally results in the expansion of the current boundaries of the *lex lata*, or the search for legal gaps leaving room for a State's own policies. As such, States may carry out extra-legal operations. Such policies may undermine essential counterinsurgenvy-objectives.

Those desiring the humanization of armed conflict seek to further the scope of applicability and substantive content of IHRL, with a view to limit State conduct detrimental to humanitarian interests. While some propose a regime change, mostly humanization is reflected in proposals to shift the emphasis from LOAC-applicability to IHRL-applicability, or to inject into LOAC IHRL-based norms or principles. Particular areas 'under attack' are the absence of LOAC norms pertaining to hostilities in the law of NIAC, a gap which should be filled by IHRL;[2070] the inappropriateness of the *lex specialis*-maxim as constituting a mechanism to determine the interplay between IHRL and LOAC;[2071] the interpretation of military necessity to include a restrictive notion, implying the injection of the principles of absolute necessity and proportionality of IHRL into the realm of the law of hostilities;[2072] the interpretation of the meaning of *hors de combat*; and the interpretation of the notion of direct participation in hostilities;[2073] as well as the role of IHRL in security detentions in the context of NIAC.[2074]

[2065] Chapter II, paragraph 1.1.4.2; Chapter II, paragraph 2.1.1.
[2066] Chapter II, paragraph 1.1.4.1.2.
[2067] Chapter III, paragraph 2.
[2068] Chapter VII, paragraph 1.1.
[2069] Chapter II, paragraph 2.3.2.
[2070] Chapter V, paragraph 1.1.2.
[2071] Chapter III, paragraph 3.
[2072] Chapter VII, paragraph 1.5.2.
[2073] Chapter V, paragraph 1.1.3.
[2074] Chapter X, paragraph 2.

This study recognizes that the process of humanization of LOAC is irreversible. However, *overbroad* humanization through the influx of IHRL elements into the realm of LOAC may upset the delicate balance between humanitarian considerations and military interests – at the cost of the latter – beyond the limits acceptable by States. This balance is the fundamental premise of LOAC, with deep historical roots; a balance that – it is submitted – should be kept intact. As such, the process of humanization through the injection of IHRL elements into LOAC cannot affect every aspect of the latter regime. It meets its limitations within the law where it upsets the delicate balance between humanity and military necessity at the cost of the latter by progressively imposing additional legal restrictions on the conduct of military operations during hostilities to those already present in the law. As such, humanization across these borders collides with conceptual underpinnings and normative frameworks of LOAC and reflects the *lege ferenda* (the law as it is desired) rather than the *lex lata* (the law as it stands). Such a development would have a multifold negative effect: *Firstly*, as humanization would cause an imbalance at the cost of military necessity, the remaining principles of LOAC (distinction, proportionality and chivalry) risk normative distortion as well. *Secondly*, overbroad humanization would conflict with the interests of States. States are likely to regard additional restrictions through the incorporation of IHRL concepts as a threat to their sovereignty and national security. Rather, States aim at the preservation of existing limits on military operations present in LOAC. Therefore, States are unlikely to sanction such a development. *Thirdly*, strict limitations based on overbroad humanization are likely to be perceived by the armed forces as operationally non-executable. Hence, such restrictions run the risk of being discarded. Therefore, overbroad humanization but could eventually turn against the very objective it intends to serve. In fact, this may even transcend the level of individual soldiers, as today we may already see examples of States that may feel threatened by the process of humanization and attempt to counter it by adopting overbroad measures by interpreting ambiguous concepts like DPH broadly.

However, even when deprivations of life and liberty may be the result of lawful conduct, this does not guarantee that a population perceives them as legitimate. The vast majority of the population is fully unaware of the legal scope of permissible conduct and the precise conditions under which forcible measures may be taken. While clear-cut cases of, for example, self-defense or combat, or the detention of criminal suspects may be tolerated, in other cases government-inflicted deprivations of life or liberty may very well be received as unjust, particularly when carried out by foreign troops. This may, for example, be the case where individuals are targeted whilst an arrest had been possible, where civilians are killed as collateral damage, yet proportionate to the military advantage anticipated, or where they are kept in security detention. To the civilian population, there may be no difference between conduct lawful under international law and arbitrary/criminal State conduct.

In this context, lawfare plays an important role. Insurgents will be quick to exploit forcible measures that are perceived by the population as illegitimate. At the same time, NGOs contribute to the lawfare efforts of insurgents, by informing civil society that States are acting in a manner which is not lawful or should no longer be lawful. Paradoxically, the underlying motive of the humanizers is to shorten armed conflicts to the greatest extent possible, and to minimize victims as much as possible. However, by adjusting the legal foundations of LOAC or its interplay with IHRL, in order to change the rules of the game, the 'humanizers' in fact undermine the social legitimacy for the counterinsurgent's operations among the civilian population. As a result, previously innocent of neutral civilians may decide to join the insurgency, which only lengthens the conflict. Most ironic is the fact that States are already prepared, as follows from contemporary counterinsurgency doctrine, to

limit the permissible scope of action under LOAC. So, while humanitarian interests are joined by the State interest to win and preserve social legitimacy by acting in a manner that is even more humanitarian than LOAC prescribes, innovative humanization may in fact frustrate this process.

1.3. Norm Validity

Norm validity is a first condition for norm relationships to arise. It is here that the impact of norm validity on the question of interplay between regimes of international law immediately becomes clear: without a valid norm in one regime, there will not be a relationship with a valid norm in the other regime. This, however, does not necessarily imply that the valid norm has no further role to play; as indicated by the ICJ, it may function as a 'gap-filler'.
The force of norm validity also affects the interplay between IHRL and LOAC. This is predominantly caused by the traditional dichotomy between IAC and NIAC, which sustains the diversity in availability, density as well as precision of norms relative to the concepts of targeting and operational detention in the laws of IAC and NIAC.
As regards the concept of targeting in hostilities, IHRL offers valid norms, yet CA 3 remains silent. As is commonly agreed, the gap is filled by LOAC itself, as the customary rules of hostilities also apply to NIAC. So, here, both IHRL and LOAC offer valid norms. Account must be had, however, of the view advanced by some that the gap of CA 3 is not filled with customary law, or not with sufficiently clear norms of customary law. Instead, IHRL ought to apply, thus implying that targeting operations are to take place within the rather strict permissible scope of the right to life.[2075] This is a position that sits quite uncomfortably with the concept of hostilities, the characteristics of which call for greater latitude. This study takes the position that there is no gap in regulation of hostilities in NIACs. At the same time this is not to be understood that all is clear, for several themes in the law of hostilities require further clarification or certainty.
The dominant role of norm validity is particularly visible in the area of operational detention, mostly so in respect of security detentions in NIAC. While IHRL provides valid norms governing various issues relative to the concept of operational detention (legal basis, procedural safeguards, fair trial rights, transfer), CA 3 and AP II remain underdeveloped, particularly so in the areas of legal bases for operational detention, procedural safeguards in security detention, and transfer. Following the ICJs approach, it is for IHRL to step in and to provide the missing norms. It is here that the limited suitability of IHRL in the context of armed conflict becomes visible, particularly in extraterritorial context.[2076] It is submitted that in those instances where IHRL obligations reach the logical limits in view of the particular situation in which they are to be applied recourse is had to the law of IAC (GC III and GC IV) on the basis of policy. As noted, in the absence of clear rules, this will at least prevent States from acting outside the confines of GC III and GC IV.
In sum, as it turns out, the interplay between IHRL and LOAC is highly dependent on norm validity. The importance of norm validity is further reinforced by the second condition for norm interplay: norm applicability.

[2075] Chapter V, paragraph 1.1.2.
[2076] Chapter X, paragraph 2.2.

1.4. Norm Applicability

The theme of applicability of valid norms of IHRL and LOAC has its own dimensions in respect of each regime, and therefore affects the question of interplay between in its own fashion.

As regards the applicability of the valid IHRL-norms relative to targeting and operational detention, the principal question is whether the insurgents affected by these forcible measures have come, at the time they were enforced, in the jurisdiction of the counterinsurgent State. This triggers *two issues*: the question of whether such jurisdiction entails the applicability of IHRL-obligations in times of armed conflict, and whether they apply extraterritorially. As regards the former, it is commonly agreed that IHRL continues to apply in armed conflict. Obviously, the applicability of IHRL in armed conflict is of relevance, since it implies that it applies simultaneously with LOAC. Nonetheless, at least two States – of particular relevance in view of their frequent/constant engagement in armed conflict – persistently object to the applicability of IHRL in armed conflict: Israel and the US. Such positions complicate the discussion on the lawful scope of conduct, particularly in multinational operations.
Notwithstanding its application in armed conflict, the applicability of conventional IHRL to a State's conduct depends on the State's ratification of a particular treaty, reservations made to provisions, the use of clauses of limitation or derogation, as well as the question of whether the State exercises 'jurisdiction' over individuals affected by its conduct. The latter issue is of relevance in domestic context as well as in extra-territorial context and is connected to the question of whether a State exercises effective control over an area, or authority and control over persons. When applied to the various situational contexts of counterinsurgency operations, the impact of IHRL applicability becomes readily visible, mostly so as a result of the diverging position of the ECtHR in interpreting the meaning of 'jurisdiction' in Article 1 ECHR.
In sum, jurisdiction under the ICCPR and ACHR arises for any type of conduct affecting a person's human rights. Under the ECHR, the picture is somewhat more complex. In relation to operational detention, jurisdiction arises in all situational contexts. As regards targeting, jurisdiction is likely to arise in NATCOIN (both ECA and SAA), OCCUPCOIN (ECA and SAA, in so far exercising public powers), yet this may be less likely in the context of SUPPCOIN and TRANSCOIN as, following the practice of the ECtHR, jurisdiction does not arise in the context of depersonalized and collective bombardments (which admittedly falls outside the scope of targeting) and targeting in the course of hostilities, for lack of territorial or situational control.

Insurgent and counterinsurgent military operations are governed by LOAC only when the conflict between the counterinsurgent State and the insurgents reaches the level of an armed conflict. For the purposes of interplay examination, the existence of an armed conflict is of crucial importance for a number of reasons.
Firstly, a conflict must be an armed conflict. In other words, the mere qualification of a situation as an insurgency in itself does not imply the existence of an armed conflict. To judge the lawfulness of the action's that States take to counter an insurgency, it is not the political label of 'war' that places all activities related to insurgency automatically within the realm of one single armed conflict, but rather whether the activities of insurgents and States, based on a factual examination on a case-by-case basis, are to be viewed as (part of) an armed conflict, or not.

Secondly, the question of whether an armed conflict exists is intrinsically linked to the question of its qualification as IAC or NIAC. In view of the issue of norm validity and the underdevelopment of the law of NIAC this question is pivotal in terms of interplay, as this determines whether targeting or operational detention is governed by the law of IAC or NIAC.
An issue complicating the armed conflict-typification is the question whether the concept of NIAC as it may currently be interpreted under CA 3 is sufficiently flexible to include all types of armed conflict not waged between two or more States (i.e. IACs), including those taking place outside the territory of a State engaged in an armed conflict with a non-State party? In identifying the type of armed conflict, the determinative factor is the *nature* of the parties to the conflict; not the capacity of the underlying normative frameworks to protect security or humanitarian interests to the fullest extent desired. The situations of NATCOIN and SUPPCOIN indisputably qualify as NIACs. The type-qualification of OCCUPCOIN and TRANSCOIN remains subject of legal debate. Several arguments in favor of applicability of the law of IAC or the law of NIAC can be made, although the majority viewpoint is in favor of the latter in both cases, the principal argument being that the conflict between a counterinsurgent State and insurgents in these broader contexts is to be viewed as an entirely separate armed conflict. Nonetheless, it cannot be excluded that the law of IAC applies in regards of, for example, conflicts that do not (yet) reach the threshold of a NIAC. As far as TRANSCOINs are concerned: they are at a minimum governed by the law of NIAC, in order to avoid that they are not governed by LOAC at all.
Thirdly, in the absence of an armed conflict, only IHRL applies, and no interplay arises, implying that targeting and operational detention operations are to comply with the requirements inherent in the valid norms. For the purposes of this study, the assumption was that the counterinsurgency situations all took place in the context of an armed conflict. In practice, the crossing of the threshold of armed conflict must be determined on a case-by-case basis. This is generally not so problematic in inter-State armed conflicts, but in the case of NIAC the organization characteristics of an insurgency play a significant role. A NIAC requires the exchange of frequent and sufficiently intense violence between a State and a non-State organized armed group. Generally, the very concept of an insurgency requires a minimum degree of organization to be effective. However, the sporadic use of force does not trigger the existence of an armed conflict, and the counterinsurgent State is left to deal with the insurgency in an IHRL-fashion only. In sum, States may be confronted with ambiguous situations whereby conflicts 'float' in the grey area between peace and armed conflict. The potential blurring of the boundaries between peace and armed conflict unavoidably results in the blurring of the boundaries between the applicable international legal regimes, respectively IHRL, and LOAC. It is here where conceptual differences between IHRL and LOAC become apparent.
Firstly, IHRL, unlike LOAC, sanctions States to derogate from certain human rights. Similar rights can also be found in CA 3, yet LOAC prohibits derogation from its norms (unless so provided for). Thus, while the protective norms of CA 3 continue to apply in armed conflict, similar protective norms under IHRL may be suspended through the instrument of derogation.
Secondly, IHRL imposes obligations upon States, whereas LOAC imposes obligations (also) on individuals. As for CA 3, its provisions are equally binding on all the parties to the conflict. This is of great relevance in a situation of NIAC, when at least one, and sometimes all the parties to the conflict are individuals belonging to a non-State entity. If a situation cannot (or no longer) be qualified as an armed conflict, the obligations otherwise conferred

upon the non-State actors by virtue of CA 3 would, considering the current position of IHRL with regard to horizontal effect of human rights obligations, not (or no longer) bind them.
Thirdly, the existence of an armed conflict and applicability of LOAC also implicates a shift in the room for maneuver in terms of the forcible measures such as the use of force and detention that may be taken against insurgents. Also in NIAC, the applicability of LOAC opens the door to forcible measures otherwise prohibited under IHRL.

1.5. The Notion of Control in the Concepts of Law Enforcement and Hostilities as well as in Object and Purpose of IHRL and LOAC

A fifth aspect influencing the (debate on the) interplay between IHRL and LOAC concerns the corresponding role of the notion of control in the concepts of law enforcement and hostilities as well as in the very object and purpose of IHRL and LOAC
IHRL is principally designed for peacetime situations, where a State exercises control over territory, and as such is able to control the vertical relationship it has with the persons within its jurisdiction. As such, IHRL is intrinsically connected with the concept of *law enforcement*, which is an intrinsic authority and obligation of the State in order to maintain and restore public security, law, and order. In exercising its law enforcement duties, forcible measures are to be applied on the basis of absolute necessity only. LOAC differs fundamentally. It is founded on a delicate balance between military necessity and humanity in order to enable parties to an armed conflict to wage war without losing sight of the humanitarian consequences involved. Therefore it principally (not exclusively) regulates *hostilities*, in which situations control over territory is contested and that over persons is absent (in so far not in the hands of a party to the conflict). In this study, this difference in relationships becomes manifest in the question of interplay between the normative paradigms of law enforcement and hostilities,[2077] but also in the area legal basis for and procedural safeguards afforded in security detention.[2078] In both instances, IHRL norms are found to reach the logical limits of reasonable and practicable application in the extreme circumstances that armed conflict brings along.

1.6. Insurgency and Counterinsurgency

As noted, the instrument of interpretation requires that the specific context in which valid norms simultaneously apply be taken into account when ascertaining the nature of norm relationships. The specific characteristics of insurgency and counterinsurgency, as subsets of the dominant form of warfare today, cannot be left aside in this process. Counterinsurgent forces act within a complex environment. From a military perspective, counterinsurgent forces are challenged by a mosaic of threats, which may vary in time, place, and nature, posed by actors with various objectives, ranging from mere criminal activity for personal gain to terrorism to undermine the public perception of the State's capacity to provide law and order. Insurgents operate in unconventional ways, are difficult to identify and generally act with disregard for the law. As indicated in Chapter I, these characteristics of 'mosaic warfare' have legal implications. This concerns most notably the non-State nature of the insurgents, which has implications in respect of their status as lawful military objectives within the law of hostilities, as well as their status as detainees. It also affects the qualifica-

[2077] Chapter VIII, paragraph 3.2.
[2078] Chapter X, paragraph 2.

tion of the conflict as NIAC and thus the scope of relevance of valid norms. Also, the level of organization that is required for an insurgency to function may have implications for the qualification of the conflict as an armed conflict. A *second* feature of significance for the interplay is the geographical scope of insurgent and counterinsurgent operations, to involve several territories, which triggers issues as to the extraterritorial applicability of IHRL and the qualification of armed conflict as IAC or NIAC. *Thirdly*, while insurgencies in this study are assumed to take place in the context of armed conflict, they usually start in peacetime, which triggers the question of when the threshold of armed conflict is crossed, and thus when LOAC joins IHRL as applicable regime.

A second aspect of (potential) influence concerns (western) counterinsurgency *policy*, which demonstrates the need for security and legitimacy, in order to drive a wedge between the population and the insurgency and to convince it to support the government. Failure to acknowledge the meaning and strength of these principles is generally considered to undermine popular support for the counterinsurgency campaign. Therefore, these imperatives find reflection in guidelines issued to counterinsurgent forces with respect to their conduct in the application of force and detention of suspected insurgents. These guidelines indicate that in counterinsurgency it is to be preferred that counterinsurgent forces not resort to the strength of LOAC, but that instead resort should be taken to law enforcement measures and criminal justice procedures.[2079]
At the same time, this may be viewed by 'humanizers' as evidence that counterinsurgency doctrine coincides in an interesting fashion with the attempts to further humanize the conduct of parties to an armed conflict. This is of interest, because those wishing to humanize armed conflict may interpret this development as State practice demonstrating States' willingness to impose restrictions upon the conduct of its forces that are in agreement with the proposals for humanization. 'Humanizers' may see this is as a sign that States themselves are ready to agree on new interpretations of the *lex lata*, or to adjust the law in the near future. As such, a shift takes place from external to internal humanization. It is however essential to distinguish between policy and law. From a positivist viewpoint, policy does not belong to the realm of law, and the only manner in which policy-rules would transfer into legal norms is by means of their transformation into norms of customary international law, save of course those situations where they have been included as treaty-norms. It is expected that there is unlikely to be any or insufficient *opinio juris* among States to view the imposition of policy conditions as new legal restrictions. However, as a trend has emerged to identify *opinio juris* on the basis of evidence of State practice alone, the execution of policy restrictions by multiple States joined in a coalition such as ISAF may serve as an incentive by some to view them as norms of law in their desire to expand humanization. While States may feel comfortable with imposing policy restrictions that are narrower than the law, it will be argued that they will not accept such restrictions to become new law. Therefore States are advised to monitor developments in that direction in order to protect their interests. It will be argued that the emergence of new customary rules in this fashion is not necessary to attain *de facto* enhanced protection of individuals and their property. This can be attained by following the principles underlying contemporary counterinsurgency doctrines as applied in the field. Doing so thus serves the interests of States and humanitarians. This way, humanization can be achieved in a harmonious fashion without upsetting the balance between humanity and military necessity as intended by States when they designed LOAC.

[2079] Stephens (2010), 310.

2. Operational Implications of the Interplay for Targeting and Detention in Counterinsurgency

This paragraph concludes upon the operational implications following the interplay of IHRL and LOAC in respect of targeting and operational detention in counterinsurgency.

2.1. Targeting

To recall, the concept of targeting as understood in the present study concerns

> the intentional *deprivation of life*[2080] of insurgents whilst not residing in the custody of counterinsurgent forces, resulting from the deliberate or dynamic application of lethal means of combat power resorted to for purposes of hostilities or law enforcement, and based on a targeting-decision that can be attributed to the counterinsurgent State, in order to achieve effects that support a predetermined objective set by the force commander.

A preliminary question for the counterinsurgent State in any targeting operation is whether it is governed by the normative paradigm of law enforcement or that of hostilities. The answer to this question immediately impacts the intent-based nature of targeting, the possibility for pre-planned targeting, and first and foremost, the question of whether the predetermined objective as set by the force commander can be attained through the effects resulting from an insurgent's targeting. In other words, it forces commanders to adjust their process of 'outthinking' the enemy to the permissible scope of action under the applicable normative paradigm. More generally, it impacts the interpretation and application of basic principles of warfare. For example, clarity on the applicable normative paradigm will offer the commander insight in how he is to deploy its available assets as an application of the principle of *economy of effort*. Also, a determination of the proper normative paradigm will provide the commander the necessary direction in how to *simplify* his plans to the maximum extent possible, and contributes to the *credibility* and *social legitimacy* of the military operations. Certainty about the applicable normative paradigm will offer an opportunity to design a *realistic concept* of operations with the proper means, which will support *morale* and the dedication to execute the task at hand in a consistent, disciplined, accurate, effective, and foremost, legitimate manner.
The applicability of the normative paradigm is, however, not a matter of arbitrary choice. Such choice would open the door for States to get around the strict requirements underlying the use of force in the normative paradigm of law enforcement in situations where these requirements would hinder the set objectives. Rather, the applicability of a normative paradigm follows logically from the object and purpose underlying the concepts of law enforcement and hostilities, whereby – strictly speaking – the normative paradigm of law enforcement governs all targeting operations that are not governed by the normative paradigm of hostilities.

A first concern for the counterinsurgent State is therefore to assess whether it operates as party to an armed conflict, and if so, whether – within that context – the targeting forms part of hostilities, i.e. "all activities that are specifically designed to support one party to an

[2080] The term 'deprivation of life' is a neutral term, reflecting the *result* of conduct, regardless of how this was achieved. As will be demonstrated, it also is most closely related to the prohibition as framed in respect of the right to life in IHRL, which prohibits the arbitrary deprivation of life. It is submitted that in determining the lawfulness of deaths resulting from State conduct, regardless of the circumstances in which they occur, the benchmark is whether the State conduct constituted an arbitrary deprivation of life or not, as understood under IHRL. This benchmark remains valid in times of armed conflict.

armed conflict against another, either by directly inflicting death, injury or destruction, or by directly adversely affecting its military operations or military capacity." The existence of an armed conflict is, as concluded, not to be made dependent on the counterinsurgent State's subjective assessment, but must follow from an objective analysis. Thus, a State's mere designation of a conflict with insurgents as a armed conflict or, in the alternative, that State's denial of (or silence in making any pronouncement to) the existence of an armed conflict cannot be guiding in concluding upon the applicability of the normative paradigm of hostilities without not also taking account of the facts on the ground.

In the *absence of an armed conflict* to which the counterinsurgent State is a party, armed violence between the counterinsurgent State and insurgents cannot qualify as hostilities as understood in the law of hostilities and – as a consequence – cannot trigger the applicability of the normative paradigm of hostilities.

The counterinsurgent State must also conclude upon the non-applicability of the normative paradigm of hostilities when, during an armed conflict, *the targeting operation does not qualify as an act of hostilities, but as an act of law enforcement*, i.e. "all territorial and extraterritorial measures taken by a State or other collective entity to maintain or restore public security, law and order or to otherwise exercise its authority or power over individuals, objects, or territory." A first reason for this conclusion could be that *the very threshold of hostilities is not met*. A second reason could be that, while the threshold of hostilities has been met, *the target does not qualify as a lawful military objective under the law of hostilities*. In all of the above situations, the normative paradigm of law enforcement always governs the targeting of insurgents.

However, as follows from the *functional approach*, even when an insurgent qualifies as a lawful military objective operating in the context of hostilities during an armed conflict, his targeting may be subject to the question of whether the counterinsurgent State at that moment exercises effective control over the territory in which the targeting is to take place, and whether it is also capable of exercising control over the situation at hand. As follows from the previous analysis, inherent in the very concept of hostilities is the absence of effective control, and in those situations where operational reality dictates that the counterinsurgent State clearly is not in effective control over territory, the normative paradigm of hostilities applies. This is typically the case in situations of SUPPCOIN and TRANSCOIN, where (generally) the counterinsurgent State does not exercise effective control over territory. However, this need not necessarily be the case in situations of NATCOIN and OCCUPCOIN. Here, the exercise of jurisdiction over territory is presumed to exist, and in so far insurgents qualifying as lawful military objectives reside in areas under effective control, the very object and purpose of IHRL, and the obligations ensuing from it override the authority under the law of hostilities to target insurgents as lawful military objectives under the normative paradigm of hostilities.

The above reveals that counterinsurgent States *cannot resort to a standard policy for hostilities-based targetings* in order to make use of the more liberal standards under the normative paradigm of hostilities (and thus to evade the strict standards under the normative paradigm of law enforcement). Rather, on a case-by-case basis, the assessment of the applicable normative paradigm must be made. This requires sound legal judgment, as well as a flexibility to quickly shift – both mentally as skill-wise - in stance towards a particular targeting situation. Also, it may force the counterinsurgent State to suspend or abort a targeting operation altogether, and to resort to second and third-tier alternatives, permissible under the normative paradigm of law enforcement.

On the other hand, the counterinsurgent State has a discretionary authority to issue policy – based on strategic imperatives – requiring forces to also resort to (law enforcement-based)

minimum use of force in situations absent effective control over territory, but where control over the situation is present or achieved. Similarly, in situations of SUPPCOIN and TRANSCOIN the counterinsurgent State may instruct its forces to apply only minimum force in areas over which itself does not exercise effective control, but the territorial State in which territory it operates, however, does, and thus where law enforcement operations are feasible. In situations where the normative paradigm of law enforcement applies – as a matter of law or policy – the exercise of control over territory or the situation corresponds fine with the counterinsurgency principles of legitimacy and security, as well as with the idea that political factors are prime in a counterinsurgency. In fact, it continues to govern the use of force by counterinsurgent forces also in the event of internal tensions and disturbances characterized by frequent terrorist attacks, violent riots and demonstrations, and other use of force by non-State actors not rising to the level of hostilities. For those purposes it is sufficiently flexible. Since it cannot be excluded that counterinsurgent forces are to resort to lethal force as a measure of law enforcement, counterinsurgent States must ensure (as part of the requirement of precaution) that these forces as well as their command are adequately educated and trained in the use of force in law enforcement situations. To some armed forces, this may imply a radical deviation of the 'normal' hostilities-based education and training.

Clearly, the analysis in this study demonstrates that counterinsurgent forces can not be deployed with a hostilities-based state of mind, but must attain the flexibility to immediately shift to law enforcement-based conduct. Indeed, in practice, forces may be required to make this shift because they are deployed from a hostilities area (red zone) in one part of a territory to a law enforcement area (blue zone) in another part of that territory. For example, in Colombia, large parts of the country have been identified as red zones under control of the FARC, whereas other parts are under firm control of the government and are identified as blue zones. However, some situations may be more complex. In contemporary mosaic warfare, forces may be deployed to a single city, parts of which are under its control, wheras other parts are in control of insurgents. Even within those areas, a mix of law enforcement situations and hostilities may take place forcing counterinsurgent forces to shift multiple times a day, perhaps even within the time space of hours. An example is the situation in Bagdad between 2004 and 2009.[2081] This requires States to review how its forces are educated and trained, and to ensure that they are able to make this shift between hostilities-based conduct and law enforcement-conduct in operational practice with a deeper understanding of the imperatives guiding successful counterinsurgency and thus of the strategic impact of their conduct.

2.1.1. Hostilities

The applicability of the normative paradigm of hostilities offers the counterinsurgent State considerably more latitude to target insurgents. From an operational point of view, the normative paradigm of hostilities is designed with a view to permit combat operations to be carried out in line with the basic principles of warfare. It other words, as follows from the object and purpose of the very concept of hostilities, the normative paradigm of hostilities is cognizant of the military necessity to render enemy forces *hors de combat* – including their killing – in order to attain the legitimate aim of warfare, which is to defeat the enemy. In other words, its fundamental premise is that it permits forcible conduct unless specifically constrained on the basis of humanitarian concerns. This way, basic principles of warfare,

[2081] Robinson (2008).

such as *mobility*, *surprise* and *offensive* in combat operations, as well as *security* and *initiative* – all of which reflect notions of military necessity taken into account when designing the law of hostilities – remain largely preserved. This is not to imply, however, that the normative substance of the law of hostilities remains unproblematic and does not – as a consequence – impact the targeting of insurgents.

A *first* issue of impact concerns the qualification of insurgents as lawful military objectives. After all, in the absence of such positive qualification, insurgents remain protected from direct attack and can only be targeted in so far permissible under the normative paradigm of law enforcement. Throughout the entire targeting cycle, the initial as well as the continued confirmation of the targetable status of insurgents remains an issue of attention for counterinsurgency forces at all levels, arising from the requirements of distinction and precautionary measures. In operational practice, the identification of lawful targets is problematic and places a huge burden on intelligence resources, due to the very *modus operandi* of insurgents themselves, the obscurity of their organizations and each individual's role therein, as well as the behavior of the civilian population themselves. From a legal perspective two principal issues impact targeting operations. This concerns, *firstly*, the fact that while the law of hostilities limits the targetability of insurgents as non-State actors to those instances where they can be said to DPH (in the context of IAC and NIAC), or qualify as (CCF-)members of the armed forces of the insurgency (in the context of NIAC), the precise law on these bases remains a matter of dispute. While some States may feel compelled to adopt a restrictive interpretation in order to avoid civilian casualties as a result of abuse or mistake, other States may use the ambiguity to adopt broad policies designating individuals or groups of individuals on the mere basis of their labeling as 'insurgent' of to adopt standards such as 'male suspects of fighting age'. This brings us to the *second* issue, namely that such wide interpretations or policies cannot in and of itself be sufficient to conclude upon the absence of immunity against direct attack, but is to be made subject to a more nuanced determination of the position of the potential target under the law of hostilities on a case-by-case basis.
In any case, the counterinsurgent remains under an obligation to abort or suspend an attack in case of doubt, as such doubt automatically qualifies an insurgent – notwithstanding suspicions indicating to the contrary – as protected from direct attack, in which case he may only be targeted in so far permissible under the normative paradigm of law enforcement.
A *second* issue concerns the use of means and methods restricted or prohibited by LOAC, more in particular the use of expanding bullets and CF-gas. While both means are permissible in times of armed conflict when applied in the context of law enforcement operations, their operational benefits exceed such operations. Thus, the use of expanding bullets in for example close-quarter combat situations in densely populated areas, with a higher risk of civilian casualties as well as blue-on-blue accidents, would greatly facilitate the principles of *mobility* and *security*, whereas the use of tear gas would permit counterinsurgent forces to keep *initiative* and *surprise*. Both would only enhance the possibility of counterinsurgency forces to gain control over the situation at hand and thus to resort to non-lethal alternatives to defeat the insurgents in that particular situation – whether such resort follows from standard policy or an order of the on-scene commander. Given their exclusion in hostilities-based operations, this effect is less likely to be achieved and counterinsurgent forces may feel compelled to remain active under the normative paradigm of hostilities.
A *third* issue concerns the possibility of collateral damage. The law of hostilities offers clear instructions to counterinsurgent forces:

- they must refrain from attacks 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.
- the counterinsurgent is under an obligation to determine (1) the collateral damage to be expected; and (2) the excessiveness of such expected collateral damage in relation to the concrete and direct military advantage anticipated to result from the targeting.

While the former instruction is relatively straightforward, the latter is far more sensitive to interpretation and abuse. Here, the law of hostilities places a great amount of trust in the judgment of operators by allowing them to interpret, in light of information available, the concreteness and directness of the military advantage anticipated and the excessiveness of the expected collateral damage relative to it. Oftentimes, such judgment must be made in a matter of seconds, whereas in pre-planned targeting situations full use can – and must – be made of the intelligence sources available.

In the event that such incidental or collateral damage is deemed *excessive* in relation to the concrete and direct military advantage anticipated, the counterinsurgent must refrain from *deciding to launch* the attack or must be postpone or cancel an attack in process. This may greatly impact the force commander's objectives in the case of time-sensitive targetings, where it is unlikely that another chance to target may quickly arise again (e.g. in the case of principal insurgency commanders who normally remain in hiding).

In the event that loss and injury to civilian life and damage to civilian objects 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 or 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 no permit. The operational impact of these precautions is evident, for it requires choices, thus implying that operationally more effective options must yield to operationally less effective options.

Counterinsurgent forces are to be aware that they take account of these requirements throughout the entire targeting cycle, thereby accepting that these are 'the rules of the game' rather than focusing on what they cannot or no longer do as a result. This enables them to conclude that, notwithstanding these requirements, the principle of proportionality in essence permits collateral damage to result from targeting operations, provided this is not excessive in relation to the concrete and direct military advantage anticipated. In fact, States have increasingly come to realize that in the context of counterinsurgency collateral damage per se is detrimental to the strategic objectives, and for that reason they have adopted limitations overriding the legal restraints. These restraints should be viewed in unison with policy whereby the targeting is more selective and focuses on leadership and – within that nucleus – on reconcilables-irreconcilables. In so far the counterinsurgent seeks to defeat the insurgency by pre-planned targeting of irreconcilables – often in individual case – collateral damage may still be considered acceptable – given the relative weight of the target. Counterinsurgent States should however be aware of the risk of devaluation of the notion of excessiveness, particularly given the fact that such strategies are highly intelligence-sensitive and may result in targetings of individuals which – in hindsight – proved to be wrongly identified, and in the process of which numerous civilians were killed.

Notwithstanding its remaining ambiguities and pitfalls, the law of hostilities offers a wide margin of appreciation for commanders on the ground to enable them to carry out targeting operations. In operational practice it is not so much the law, but policy that curtails this latitude. The full use of this framework's strength in the context of counterinsurgency operations, however, is feared to undermine the strategic imperatives in counterinsurgency. The overall picture that emerges is that contemporary counterinsurgency doctrine demonstrates care and restraint in the application of force, such that it may be concluded, as a default position, that counterinsurgent forces are called upon to use only the minimum force strictly required by the exigencies of the situation. The imperatives of COIN doctrine, policy and practice shift

> the focus of military operations, the mindset and strategy of the military, and the default position from which the military begins. Destruction and killing is not undertaken lightly and when it does take place, the military is as concerned with its effects on the population as it is on the targets themselves.[2082]

The net result is a dense policy paradigm, one in which the normative paradigm of hostilities plays a subordinate role relative to policy and operational considerations.[2083]
Arguably, the policy restrictions result in conduct similar to that required when adopting a functional approach. In other words, where counterinsurgent forces exercise more control, the restraint in lethal force weighs heavier. A significant difference between the functional approach and the counterinsurgency approach is that the latter imposes restrictions not mandated by the normative paradigm of hostilities in situations where such control is absent. As Schmitt warns, while "humanitarians and counterinsurgency warfighters paradoxically find themselves in lockstep," at the same time "[t]heir perspectives on the practices may, nevertheless, conflict."[2084] Indeed, from a legal perspective, these policy-based restrictions risk to be misinterpreted as normative by those supportive of the further external humanization of armed conflict. They may be viewed as expressive of State practice, and thus of proof of the emergence of a new string of customary international norms. If States ignore these signals, such development may undermine the very foundations of hostilities-based targeting and result in the re-adjustment of the traditional balance between military necessity and humanity. Nonetheless, as noted, the position taken in this study is that the legal framework of the law of hostilities remains unaffected by the counterinsurgency-based policy paradigm.

2.1.2. Law Enforcement

In so far it has been determined that a targeting is governed by the normative paradigm of *law enforcement*, its requirements have significant operational consequences. These consequences inherently follow from the very object and purpose of the concept of law enforcement, which presumes the exercise of control over territory, persons or objects, thus offering a State the operational room to carry out law enforcement operations in a fashion whereby the deprivation of life of individuals is in principle prohibited, and is permissible only in exceptional circumstances and subject to strict requirements which cumulatively must be complied with.

[2082] Sitaraman (2009), 1776.
[2083] Schmitt (2009), 314.
[2084] Schmitt (2009), 328.

Firstly, the counterinsurgent must ensure that, regardless of whether such operations take place on its own territory or that of another State, the targeting of insurgents as a measure of law enforcement finds a sufficient legal basis in domestic law, which is publicly accessible and regulates 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. Targetings taking place in the absence of such legal basis are unlawful. In sum, counterinsurgent forces need to ascertain that they are provided with a mandate that permits them to carry out targeting operations as a measure of law enforcement.

A *second* issue impacting a targeting operation concerns the fact that it may only be resorted to as an instrument of *prevention* whereby the loss of life is the *potential* outcome and not of punishment where the loss of life is the *intended* outcome, and is thereby limited to situations in which an identified insurgent poses a concrete and immediate threat to the life of counterinsurgent forces of innocent bystanders; where an insurgent resist upon arrest in a fashion that this 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 where an insurgent partakes in a riot or insurrection instigated by an insurgency movement and individually poses a threat to the life of innocent bystanders or to the counterinsurgent forces present. In addition, targeting is a measure of last resort only and when resorted to as a measure of absolute necessity it may not exceed that kind and degree of force absolutely required to remove these threats, and for the time this is necessary. This implies that policies by which the counterinsurgent resorts to the instrument of targeting as an instrument of first resort to remove perceived threats 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 is 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. In addition, 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.

Clearly, this framework of restrictions sits uncomfortably with the very object and purpose of the concept of targeting, and servely impacts the interpretation and application of fundamental principles of military operations. The requirement of last resort, for example, hinders the counterinsurgent State in its reliance on principles such as *initiative*, *mobility*, *surprise* and *offensive*. This also applies to the limited range of legitimate aims available, which prevents the counterinsurgent State from carrying out targetings for purposes which under the normative paradigm of hostilities would fit in the concept of military necessity. In addition, the preventive nature of deprivation of life as a measure of law enforcement does not easily correspond to the intentional nature of targeting, and would almost in all cases exclude the possibility of pre-planned targetings, or targeting as a standardized, policy-based measure. Also, targeting under the normative paradigm of law enforcement force the counterinsurgent State to carefully select means and methods that do not render death inevitable or that do not result in the disproportionate use of force. For example, the use of attack helicopters, armed drones or aerial bombardments would require a severe threat for their use not to constitute an arbitrary deprivation of life. This is not to imply that such a threat cannot materialize – terrorist attacks are the prime example – but these are clearly exceptional situations.

The counterinsurgent is also to remain aware that it does not target individuals based on their mere status as 'insurgent' but carries out an adequate assessment of the concrete and immediate threat posed at the moment that resort is taken to the measure of targeting.
Finally, in contrast to LOAC, 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. To comply with this obligation, the counterinsurgent State is bound to dedicate forces to investigative tasks for which they are generally not trained. Also, it may be questioned whether this requirement can be carried out in an adequate manner in areas within the territory of armed conflict where the security situation is such that doing so would impose unacceptable risks to the counterinsurgent forces.

2.2. Operational Detention

To recall, operational detention is in this study defined as

> the deprivation of liberty[2085] of individuals in the context of a counterinsurgency operation, whether for reasons of security or for law enforcement purposes, except as a result of conviction for a common criminal offence.[2086]

It refers, *firstly*, to security detention, i.e. the preventive, administrative detention of individuals who may be detained for activities related to the hostilities, and which thus constitute a future threat to the security of the armed forces, the civilian population and the interests of the State in general. *Secondly*, it refers to *criminal detention*, i.e. an individual's punitive detention following charges related to criminal conduct in the past and during which he is subjected to a criminal judicial process. Each form of detention is governed by a specific normative paradigm
As is the case in relation to targeting, the counterinsurgent is to be aware of which normative paradigm applies: that of criminal detention of security detention. This will much depend on the very mandate based on which the counterinsurgent operates. For example, in a situation of SUPPCOIN, a supporting counterinsurgent State may operate on the basis of a UNSC resolution permitting it to take 'all necessary measures' to include security detention, yet its own government may limit detentions to brief periods either with the intent to either release captives or to transfer them. This is wide practice in Afghanistan. Such policy-based choices are of great operational significance, particularly when operating jointly with forces that have a wider mandate to detain insurgents for security reasons (including for reasons of interrogation). Other issues that have an operational impact on whether a counterinsurgent State may detain a person for criminal or security reasons concerns the issue of extraterritorial applicability of IHRL. In the context of an IAC, this is less of an issue, for here LOAC provides a quite dense framework of valid norms similar to those found in IHRL, but which are applicable due to the mere existence of an armed conflict. In the context of

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[2085] As with the deprivation of life, the choice for the term deprivation of liberty is deliberate, for it is result-based and is intrinsically linked with the prohibition under IHRL to arbitrary deprive someone of his liberty.

[2086] This definition is based on that used by Kleffner in Gill, Fleck & al (2010), 638. Operational detention is a prolonged form of *deprivation of liberty*. Under international law, no one shall arbitrarily be detained or otherwise be held in custody by State authorities against their will. However, not every form of deprivation of liberty also constitutes operational detention. For example, when people are stopped at roadblocks or check points, or when their houses or property is searched, they may be considered to be deprived of their liberty, yet neither situation amounts to what is understood in this study as operational detention.

NIAC, this is more complicated given the absence of valid norms and thus the lack of clarity as to what is allowed or not.
Another issue of operational impact is the very absence or disfunctioning of the justice system in an AOR that is non-permissive to civilian rule of law officers. In those instances there may be no other choice but to task the military to rebuild or reform the justice system and thus to take control of criminal detention issues,[2087] as has been demonstrated by the NATO-mission KFOR in Kosovo,[2088] OEF and ISAF in Afghanistan,[2089] INTERFET in East-Timor,[2090] and Iraq during and after the occupation stage [2091]
Clearly, rule of law reform is a law enforcement affair falling outside the traditional scope of responsibilities of armed forces. As we have seen, the legal regime governing criminal detention is detailed and imposes upon States strict obligations that, when placed on the shoulders of the armed forces, have tremendous operational implications. Counterinsurgent forces may be compelled to build prisons and courtrooms; to provide personnel to guard prisoners and to provide legal assistance; to train judges and prosecutors; to carry out police-related tasks such as evidence gathering and forensic investigations. Some would label this as 'mission creep', i.e. tasks that should not be carried out by the armed forces.[2092] After all, soldiers are trained to fight, not to collect evidence. To do so would negatively affect combat effectiveness. However, today such tasks appear to be inevitable, which requires States to make adequate preparations. An important spin-off of rule of law operations carried out in counterinsurgency concerns the coordination with the more kinetic side of the operation – i.e. the targeting operations. In order to avoid popular support for the rule of law gained over a long period of time to be lost in a split second, it is imperative that rule of law officers and targeting operators coordinate their efforts by which – it is submitted – the targeting of insurgents must yield where this may result in the loss of support for the rule of law. In view of the functional approach, this would be a logical approach arguably rooted in law.

3. Final Conclusions

3.1. Significance of Normative Paradigms in Military Thinking

The normative paradigms applicable to the concepts of deprivation of life and deprivation of liberty offer important military operational guidance relevant to the conduct of military operations. They not only draw the outer boundaries of permissible targeting and operational detention; the requirements inherent in these frameworks function as essential and decisive instruments in the interpretation and application of the fundamental principles essential in determining the course of action in specific situations of targeting and operational detention.
In a particular AOR, the normative paradigms may find application simultaneously and in alternative fashion, as required by the situation on the ground. In establishing which rules apply to the deprivation of life and liberty of insurgents, this study recommends a shift from a regime-based approach to a paradigm-based approach. The drawbacks of a regime-based

[2087] U.S. Army Judge Advocate General's Legal Center & School (2011), 123.
[2088] OSCE (2006).
[2089] Talbot Jensen & Pomeroy (2009). See also http://www.usip.org/programs/projects/rulelaw-afghanistan/pubs.
[2090] Oswald (2000); Linton (2001).
[2091] al-Saedi (2010).
[2092] Talbot Jensen & Pomeroy (2009), 473.

approach are that it fails to reconcile fundamental differences in thinking between the various stakeholders about the applicability of IHRL and LOAC, as well as the interplay between them.
A paradigmatic approach levels such differences. Thus, in view of the fact that the normative paradigm of hostilities is law of hostilities-driven, it is no longer relevant whether a State adopts a separatist view to the relationship between IHRL and LOAC or not. If it does, and LOAC is the only regime applicable in extraterritorial armed conflict, the law of hostilities regulates hostilities against lawful military objectives. This outcome is no different than when States, or other stakeholders accept the applicability of IHRL in armed conflict and in extraterritorial situations.[2093]
Similarly, when stakeholders begin to refer to the normative paradigm of law enforcement, all know that it is IHRL-driven. It is submitted that the rejection of the applicability of IHRL in armed conflict and in extraterritorial situations by 'separatist' States is overcome by the fact that, as a result of treaty-based IHRL-obligations, the standards underlying the deprivation of life as a measure of law enforcement have been crystallized in domestic penal law, and it generally accepted that such laws follow the armed forces wherever they go.
In operational practice, a paradigmatic approach is particularly relevant, mostly so in multinational operations, because as argued, it levels fundamental differences in legal thinking.
In addition, the paradigmatic approach helps to train forces to apply both paradigms in order to shift quickly when so warranted by the circumstances at hand.
Also, a paradigmatic approach penetrates the traditional dichotomy between peace and armed conflict. It is cognizant of the comprehensive obligation of States to maintain and restore public security, law, and order by instruments of law enforcement in all situations where it exercises control over territory, thereby transcending the barrier between peace and armed conflict. It is also cognizant of the fact that, in armed conflict, the concept of law enforcement and the concept of hostilities coexist, and thus necessitate an ability of forces to shift when so required by the exigencies of the situation. The paradigmatic approach helps forces to distinguish in situations that are manifestly connected to the hostilities and those that are not.

3.2. The Way Forward

The study demonstrates that the conduct of armed forces in respect of targeting and operational detention in the context of an armed conflict is not limited to a single normative framework of IHRL or LOAC. Notwithstanding the existence of an armed conflict, and the subsequent applicability of LOAC, there is an important role to play for IHRL, most notably when LOAC is silent and human rights may step in to fill the gap. But where both regimes cover a particular aspect, there can be no doubt that the norm that regulates that aspect in most detailed fashion prevails over the other norm by application of the maxim of *lex specialis*, either to avoid or, when necessary, to resolve a conflict. This may indeed result in the application of the norm permitting the lawful infringement of human rights, but humanitarian considerations are not a leading criterion in assessing the interplay between norms, unless specifically so instructed by the relevant norms, such as in the case of Article 75 AP I. As the study shows, this is an aspect not much favored by those wishing to further humanize armed conflict. However, the fact that IHRL-norms may be leading does not

[2093] Admittedly, the extremist view that the normative paradigm of hostilities is entirely IHRL driven would distort the leveling-power of the paradigmatic approach, but it is submitted that such views are not adopted by States, and are a minority view that lack any basis in international law.

necessarily imply that they always offer better protection. In contrast to LOAC, human rights may be limited for reasons of national security, or derogated from in times of armed conflict, save those that are non-derogable. In addition, in view of humanitarian interests, LOAC-norms are not categorically less developed than norms of IHRL. In fact, LOAC may at times be more stringent than IHRL.

Following the general principles underlying norm relationships in international law, it is possible to bring order and balance in the simultaneous applicability of IHRL and LOAC and the interplay between individual norms regulating the same subject matter. While experts place much emphasis on the proper mechanisms determining the interplay between IHRL and LOAC, this study demonstrates that, in reality, the interplay of norms of IHRL and LOAC governing targeting and operational detention is rather straightforward, and hinges upon the applicability and validity of norms in a particular context, as well as their level of specificity and nature as *jus cogens* in international law.

Ultimately, having the most impact on the permissible conduct for military forces is the very interpretation of the applicability and substantive content of the relevant frameworks of IHRL and LOAC. As the study illustrates, many issues remain subject of debate and further crystallization into clear legal rules, and clearing them up would only further facilitate defining the permissible scope of action. This does not imply, however, that the current framework is so unclear that it results in unworkable and inhuman rules. Particularly in the context of counterinsurgency, States are increasingly aware of the necessity to limit the conduct of their forces to a degree acceptable to sustain a credible level of legitimacy without undermining their ability to provide security. As such, contentious areas such as the notion of direct participation in hostilities and security detention are dealt with by means of policy guidelines directing the conduct of military forces in the desired direction. This also implies that there is no need for a distinct legal framework for counterinsurgency. The current *lex lata* is sufficiently equipped to govern both targeting and operational detention. LOAC is a regime that is capable of facing the legal challenges of today's conflicts. This is not to say that the law is perfect or that LOAC is immune to the changing face of war. However, the primary challenge is to look at the law as it stands today to examine its flexibility to deal with the conflicts of tomorrow, before proposing new rules.

States – as the primary 'legislators' of international law – should ensure that they are in 'command and control' of new developments, so as to ensure that the traditional equilibrium between what is militarily necessary on the one hand and imperative from a humanitarian perspective on the other hand is not abruptly and disproportionately put out of balance by relevant parties – States, international organizations, NGOs, and international and national (quasi-)judicial bodies - attempting to further advance these interests as they see fit. Overbroad attempts to further humanize armed conflict by imposing – as a matter of law – restrictions on the conduct of armed forces that simply do not correspond with reality undermine, rather than advance humanitarian interests. One could say that – in as much as the notion of military necessity in LOAC finds its limits in conduct that goes beyond the legitimate aim of waging war, which is to *defeat* the enemy with the least expenditure of time and resources – it is here that innovative humanization finds its own limits. Again, further humanization of armed conflict is a laudable endeavor, but in order to succeed, one has to come with propositions that can be taken seriously by States in order to gain their consent to further develop the law in that direction.

At the same time, post-modern forms of *Kriegsraison* – sold to the international community and the public as sound and logic interpretations of international law (and thus leaving no alternatives) – simply have no merit, not even (or perhaps particularly not) when articulated

by States with an interest in wider issues of rule of law and of international peace and security. In a globalizing world where modern means of communication almost instantly advertize a State's conduct in (and outside!) armed conflict, the abuse and neglect of its legal obligations to advance military necessity only undermines the State's interests. In fact, in counterinsurgency, the State's worst enemy is probably its own ignorance for the legal obligations to which it is committed. Here, a government's respect for the rule of law in the treatment of individuals it is to govern is the very key to security. Therefore, it is a responsibility of governments that give weight to its legal obligations to take the lead in the further humanitarian development of the law applicable in armed conflict. Today's population-centric counterinsurgency strategy – adopted and (successfully) applied in practice by many States and which so radically deviates from traditional enemy-centric military strategy applied in conventional State-to-State conflicts – may in fact serve as the ultimate platform for the controlled and tailored development of the law such that it may adequately govern the specific characteristics of today's conflicts.