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War and the Rule of Law Wars

Pau Luque Sánchez

My brief work is divided into three parts. They are progressively more theoretical and abstract.

I.

When last year I was reading Owen Fiss' *A War Like No Other*, I somehow had the feeling that the worst, in terms of the attack on the Rule of Law, was behind.

The Bush era had been over for a while, and although the Obama administration had been a bit disappointing from the point of view of respecting the Rule of Law when it comes to the War on Terror, I had the feeling —and feelings are not evidence, I know— that we were in a better position in comparison to the first decade of the twenty-first century, all things considered.

So in a sense, I was a bit optimistic —in front of the question “Is the war on terror immune to the law?”, I had the feeling that the answer was “no”. I thought that there was some theoretical room for the *ius in bello*. One of the great achievements of Fiss' book is that it shows precisely this, namely, that the idea of *ius in bello* can be grounded not only on bona fide desires, but also on robust arguments, and specifically legal arguments.

But lately this optimism has been cut off. I have two recent examples, which, I think, are representative of this decline in my optimism. The first one is obvious, the second one not that much (at least not to me).

Back in 2016, before the election, the candidate Donald Trump said lots of bizarre things. Among these things, he claimed something like the United States should have taken the oil in Irak in 2003. The day after, in an interview on TV, Rudolph Giuliani, who was some sort of advisor to Trump,

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was asked by the journalist about Trump's statement. Giuliani approved Trump's words by saying that taking the oil was the way to make sure that the oil was distributed in a proper way. And then the journalist asked Giuliani: "but this is not legal, isn't it?" Giuliani answered: "of course is legal, it's a war — until the war is over anything is legal".

It's not only that Giuliani believes and says that what happens during the war is immune to the Rule of Law —it's his claiming it as if this was some sort of self-evident truth, a platitude that nobody discusses.

Well, the good news is that there are arguments against this claim, some of them developed in professor Fiss' book. The bad news is that there are no reasons to be optimistic about the Trump administration.

The second example has to do with the place I come from —Barcelona. As it is well known, there was a terrorist attack in August 2017 in Barcelona. Afterwards, most members of the terrorist group that killed all those people in La Rambla were taken down by the police in the street (not in Barcelona, but in two different small towns close to Barcelona). According to the police, the terrorists were wearing what looked like a belt full of explosives and so there was no option but to take them down. Afterwards we knew that the explosives were false.

Now, I want to notice two things here. The first one is that I said that they were "taken down" by the police because that's how the police itself described its action. I don't think this is a coincidence: if the police would have said that they "killed" the terrorists, instead of "taking them down", the death of the terrorists would have appeared less legitimate to the eyes of the citizenship.

Perhaps because we philosophers of law are obsessed with words, but it seems to me that in the war on terror the vocabulary is crucial —terrorists kill, we take them down.

But was this actually true in this particular case? I think that only the Rule of Law can answer such a question. The problem is that this is a very unpopular question right now, because most of the people, after a nightmare such the one occurred in Barcelona, usually want these violent actions to be immune to the Rule of Law. Most of the people just do not care about which were circumstances in which those people died — they only care about them being dead, no matter what.

That is why a book like *A War Like No Other* has a double value: it has theoretical value because it provides us with good arguments in order to make the case for the *ius in bello*, as I mentioned before, but it also has a counter-majoritarian value: it's not very popular to say that such sort of killings need to be reviewed in a very scrupulous fashion by the judiciary. But this is what follows from professor Fiss' compelling arguments.

II.

Many people interested in the philosophy of international law at some point identify a philosophical tension between two conceptions of international law. I'm going to be extremely austere in presenting both conceptions. But I hope that my brief presentation will be enough to grasp the philosophical tension between the two.

According to what I'm going to call the Realistic conception of international law, international relationships are a matter of national interests, and what counts when it comes to practice is basically who your allies are, and the extent of your force.

Instead, according to what I'm going to call the conception of the Global Rule of Law, international relationships are a matter of international rules. What counts when it comes to practice is not who has the force, but whether you have or not a legal claim to ground your action.

Let's go back to professor Fiss' book: When discussing the *Hamdi* and the *Rasul* decision, professor Fiss also discusses the *Verdugo-Urquidez* decision. Beyond the details of the case, Chief Justice Rehnquist ended his opinion in *Verdugo-Urquidez* by proclaiming: "For better or for worse, we live in a world of nation-states" (p. 63).

Professor Fiss endorses a more cosmopolitan view of the Constitution "that does not deny the importance of the nation-state but offers an alternative and, in my view, more appealing way of understanding the relation between the Constitution and the nation" (p. 63). The key provisions of the Bill of Rights (including the Fourth, Fifth, and Eight Amendments) are universal prohibitions.

The majority opinion in *Rasul*, as well as the majorities in *Padilla* and *Hamdi*, tried to find an equilibrium between the commitment to the Rule of Law and the protection of some vital national interests. But the pursue of an ideal (the Rule of Law and the cosmopolitan view of the Constitution are ideals) requires sacrifices, sometimes even substantial ones, according to professor Fiss.

My interest is in something that is not completely elaborated in the book. I would like to know more about how professor Fiss sees himself when it comes to dealing with the distinction that I made before between the Realistic conception of International Law and the conception of the Global Rule of Law.

I tend to think that since in the book he defends a more cosmopolitan view of the Constitution than the one of the majority of the Supreme Court in those cases, he is closer to what I named the Global Rule of Law conception. But I would like to know how close he is to this Global Rule of Law conception, since in the book he suggests that his cosmopolitan view is compatible with protecting the interests of the nation. How committed is this claim? I see three relevant options:

1) The interests of a nation are always compatible with the Global Rule of Law.

2) The interests of a nation are not always compatible with the Global Rule of Law and, when so, national interests always prevail over the Global Rule of Law and so the Global Rule of Law does not actually qualify as “Global”.

3) The interests of a nation are not always compatible with the Global Rule of Law and, when so, national interests always ought to be sacrificed in order to have a full-fledged Global Rule of Law.

There is a fourth option that I don't take into consideration here. The option is something like “well, we should go case-by-case”. And the reason why I do not take into consideration such an option is because I have been persuaded by the arguments against minimalism raised up by professor Fiss in Chapter 3, and saying that we should go case-by-case sounds to me like a minimalist answer.

I know that Professor Fiss seems to be interested only in national-level constitutionalism. But it seems to me that his idea of a more cosmopolitan view of the Constitution opens up some interesting debates regarding the discussion of the next level –the possibility of world constitutional law.

III.

At some point (280 ff.), Fiss claims that the judiciary should review the determination of the executive to target an alleged terrorist. There are two ways in which the judiciary can carry out this review. The review can be retrospective or prospective.

A retrospective inquiry can emerge after the killing of an individual if some relatives or friends hold, for example, that such individual was not a terrorist and so the killing was actually not allowed by the Constitution.

A prospective inquiry by the judiciary, by contrast, takes place before the killing. The executive must ask the judiciary whether the prospected killing is within the constitutional boundaries.

Former Attorney General Holder claimed that a prospective inquiry would require “the President to delay the action until some theoretical stage of planning when the precise time, place, and manner of attack [would] become clear.” This would create not only a high risk for American citizens but would also jeopardize the success of the action on behalf of the executive.

Fiss favors these pragmatic considerations and, just as Aharon Barak does, he takes sides for the retrospective inquiry. And so, the standards in order to consider a killing constitutionally justified, which have to be satisfied by the military, should be reviewed retrospectively by the judiciary.

This is Fiss: “We may want to take our bearings from his decision and relieve the executive from obtaining, to use the attorney general’s characterization, ‘prior approval’ or ‘permission’ from a federal court for the targeted killing of a suspected terrorist”. This does not mean, Fiss adds, that the judiciary is relieved from of the duty to articulate the aforementioned

constitutional standards. The judiciary, while reviewing retrospectively the case at hand, would be constructing those standards.

These standards would tell, to the Attorney General and to the President, what the Constitution requires and, according to Fiss, “that might be a sufficient guide to the executive in formulating and implementing its targeting policy.”

Such a retrospective inquiry would even have one more virtue: “the prospect of a retroactive inquiry into the executive’s action will itself provide further incentives for the executive to respect the law and to keep its action within the bounds of the law”.

Now, though I am sensitive to the pragmatic reasons invoked by Barak and endorsed by Fiss, in favor of a retrospective inquiry, I would like to raise one possible objection to this kind of inquiry. In particular, I am not completely convinced by the argument according to which once the Court establishes the standards this will be sufficient for the executive so that, when implementing its targeting policy, it will know what the legal boundaries are.

It is hard to imagine that such standards could be formulated but as general standards, that is, by using general terms making reference to general situations. As H.L.A. Hart noticed more than fifty years ago, when legal standards are formulated with general terms they end up being affected by vagueness or open texture. When we are in front of a legal standard, which is affected by vagueness or open texture, the law is not determined and the judge has therefore discretion to interpret the legal standard. In other words, sooner or later in a particular case we will not know what the legal boundaries are. That is Hart’s well-known conclusion.

It is not clear, as Ronald Dworkin tried to show, that Hart’s conclusion was entirely correct – it not clear that what judges do in cases of vagueness or open texture is to discretionally choose what the legal boundaries are, which is subjective, or alternatively, as Dworkin thought, it is rather to discover, through argumentation, what the legal boundaries are, which is somehow objective. But this should not stop us now. If I mention Hart’s point it is only because it poses an interesting question to Barak and Fiss’ preference for a retrospective inquiry.

When the standards are affected by vagueness or open texture there must be somebody deciding – or discovering, in a Dworkinian framework – what the legal boundaries are. If the standards for targeting alleged terrorists are general, which I think they should be – and I see no reason why Fiss should not think the same, given his refusal of the minimalist approach, which seems to be the antagonist of general standards applicable to a set of cases –, then, sooner or later, there will be some particular case in which the law appears to be indeterminate. That is, there would surely be a particular case in which the general standards fixed by the Court would not settle the case because there would be no way to know whether the specific circumstances of the case would be an instance of the general standards – this is what the problem of vagueness consists in. In such cases, the executive – if it is sincere – should admit that it could not be guided by the standards when implementing its targeting killing policy because it does not know what the Constitution requires.

In these cases, I think that the inquiry by the court should be prospective. Notice that this does not mean that the inquiry should always be prospective. Most of the times general standards settle the law and the executive knows in advance what the Constitution requires. But in a reduced number of cases, those in which the vagueness of the general standard generates problems, the inquiry should be prospective. This would be the only way to avoid that the executive does not take advantage of the vagueness of the standard to carry out a targeting that, a posteriori, it is shown to be unconstitutional.

It is true, as former Attorney General Holder claimed, that prospective inquiries would put in risk some military missions. But, on the one hand, I think that the cases in which the law is indeterminate due to the vagueness in the formulation of the standards tend to be a small fraction of the total cases to which those standards typically or potentially apply. On the other hand, as I mentioned above, professor Fiss reminds us that “the wholehearted pursuit of any ideal requires sacrifices, sometimes quite substantial ones” (p. 68).

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