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Will the War on Terror Ever End?

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Will the War on Terror Ever End?

Rebecca Mignot-Mahdavi

A French version of the paper is available here

1 The question of the temporal scope of application of international humanitarian law (IHL) is one of the most unsettled issue of IHL (or "the laws of war", or "*jus in bello*"), while it may be the most problematic in the context of contemporary endless wars. International law provides insufficient guidance to ascertain the end of non-international armed conflicts, that is conflicts opposing governmental forces and non-state armed groups.Article 3 Common to the Geneva Conventions of 12 August 1949, and Additional Protocol IIrelating to the Protection of Victims of Non-International Armed Conflicts do not contain express provisions concerning the termination of NIACs. The exploitation of thislegal grey areacan lead to wars endingupon annihilation of all members of the enemy group; in other words, to potentially infinite conflicts in a context where the enemy in question recomposes and metamorphoses in time and space.

2 Legal uncertainty on the end-point of armed conflicts and, hence, of the application of IHL rests on four alternative theories on the end of armed conflicts (and, in particular for this short analysis, of NIACs) that can be derived from theGeneva Conventionsand Additional Protocol II, from their*travauxpréparatoires*but also fromcase decisions, such as the cornerstone decisionProsecutor v. DuskoTadic of October 2, 1995 (§70). Dustin Lewis, Gabriella Blum and NazModirzadehconducted an in-depth analysis of the question in 2017 and define these four alternatives as follows:

3 "• The two-way-ratchet theory: as soon as at least one of the constituent elements of the NIAC—intensity of hostilities or organization of the nonstate armed group—ceases to exist;

4 • The no-more-combat-measures theory: upon the general close of military operations as characterized by the cessation of actions of the armed forces with a view to combat;

5 • The no-reasonable-risk-of-resumption theory: where there is no reasonable risk of hostilities resuming; and

6 • The state-of-war-throwback theory: upon the achievement of a peaceful settlement between the formerly-warring parties."

7 Rather than considering these alternative theories as a list, I suggest to picture them as a spectrum, on the extremities of which we find, on the one hand, the two-way ratchet theory and on the other hand, the no-reasonable-risk-of-resumption theory; in the middle, there would be the achievement of a peaceful settlement theory and the no-more-combat-measures theory. The two-way ratchet theory offers the perspective of a prompter end of conflicts. First because it includes a test based on factual elements, which does not require for instance to wait for the subjective decision of the parties to resume hostilities through a peaceful settlement, but rather an objective analysis of a context that fulfils or not the criteria that initially allowed the classification of the conflict. Second, the end of the conflict should in principle be pronounced earlier than under the other theories, for the simple reason that the conduct of hostilities – it is its objective – shouldpractically reduce both the level of organization of a non-state armed group but also (and in consequence of the reduced capacities of the parties) the intensity of hostilities. Simultaneously, this theory does not require to wait for parties not to (be able to) conduct combat measures at all. In light of these elements, under the two-ratchet theory, the end of hostilities can potentially be identified sooner than according to the two other theories in the middle of the spectrum, and even more than under the no-reasonable-risk-of resumption theory. The latter features particularly uncertain limits as it does not exclude to set a very high threshold to assess the absence of reasonable risk.

8 Yet, the no-reasonable-risk-of resumption theory has never been set aside by the different actors of international law. Without being explicitly referred to, it even comes out nowadays from the idea that the conflict against ISIS will end only when all its members have been taken out. According to this viewpoint, the weakening of the enemies armed forces – leading to the actual cessation of actions of the armed forces with a view to combat – is insufficient. On the contrary, the idea is that all members of the enemy group should be eliminated to obtain the determine that there is no reasonable risk that hostilities resume; only then can the conflict be considered terminated.While the no-more-combat-measures theory requires what we can call the “defeat” of the enemy’s armed forces (or “weakening” resulting on cessation of hostilities), such a perception of armed conflicts awaits the “annihilation” of the enemy group members. Such a theory on the end of armed conflicts, enacting what I call here “wars until annihilation”, if it is adopted, would (II) contradict the function of contemporary IHL to regulate (and not prevent the resumption of) hostilities; and (III) generate an overlap between IHL and the *jus ad bellum*. Before delving into these issues, I will start the analysis by a reminder of the geopolitical and legal context in which I identified elements echoing the no-reasonable-risk-of resumption theory (I).

1./Wars Until Annihilation… of All Enemy Group Members

9 The announcement of President Trump on 19 December 2018 that the US wouldwithdraw its troops from Syria and following reactions from allies and scholars provide evidence of the uncertainties on the end of armed conflicts. To justifyhis decision to bring US troops back from Syria, President Trump emphasized the “large defeat” of ISIS. This declaration, heavily commented as an erroneous analysis of reality, in fact did not necessarily mean that the United States consider the organization completely eradicated. Rather, and this second understand is corroborated byTrump’s State of the Union address,the observation

was that, as of now, ISIS was incapable of mounting military operations in Syria that could justify keeping troops in the framework of the armed conflict opposing the United States to the said armed group. Hence, it seems that Trump followedeither a version of the “no-more-combat-measure theory” - the enemy is so weakened that it cannot combat anymore and the conflict ends – orat least a moderate version of the “no-reasonable-risk-of-resumption theory” – the enemy is so weakened that there is no reasonable risk that hostilities resume.

10 Immediately after Trump’s announcement, somestate officialsdissociated themselves from President Trump’s decision.UK Defence minister insisted thatISIS is “very much alive”,after US president declaration on troop withdrawal. French Defence ministerFlorence Parly acknowledged that the group had been significantly weakened, but said the battle was not over. On the aftermath of Trump’s announcement, she twitted that the"Islamic State has not been wiped from the map, nor have its roots. The last pockets of this terrorist organization must be defeated militarily once and for all."This declaration, while not explicitly declaring commitment to a specific legal theory on the end of armed conflicts, reveals a thought structure that indirectly reminds the language of an extensive version of the “no-reasonable-risk-of-resumption theory” according to whichNIAC ends when there is no reasonable risk of hostilities resuming. In fact, it would not be surprising to anyone following closely the French counterterrorism strategy et related (implicit) legal framework that such theory is the one followed by France. In the absence of clearly articulated legal rationale, the following analysis must be read with caution for it relies upon a study of language, which is up to French governmental officials to specify or rectify.

11 The 2017 French Strategic Review on Defence and National Security, in its section on ‘Rootedness and Dissemination of Jihadist Terrorism’ (p.37), insists that “jihadist terrorism is going through a transformative phase that will not diminish its reach and the danger it represents for the forthcoming decade: the main jihadist organizations will decline in some areas, yet without disappearing, and their underpinning ideology will persist”. The text, that will later serve as the foundation for the law n° 2018-607 on military programming adopted on 13 July 2018, explains that through their “operational and ideological matrix, where the know-hows are transmitted from generation to generation, the current jihadist organizations, Daech, Al Qaida and their several affiliates managed to adapt and mutate despite the setbacks they have suffered”. Likewise, the annexed report to the law on military programming insists that jihadist terrorism because of its “complexity and geographical spread”,“recomposes and extends itself to new regions of the world’. For this reason, the 2017 Strategic Review and 2018 Law on Military Programming aim to reinforce the “intelligence and anticipation” capacities in order to be able to act “upstream and downstream of crises, including in new spaces of confrontation, and to foster France’s capacity to play a driving and federating role in strengthening a European defence, through a proactive strategy”. The terminology used in these official and legal documents, accompanied by the declaration of Minister of Defence Florence Parly in the aftermath of the announcement of US troops withdrawal, suggests thatFrance might consider that the conflict it intends to carry (against all jihadist groups?) has to persist as long as these groups exist, re-emerge and recompose themselves.

12 If this posture indeed turns out to be the official French position, and that France considers its military actions to be part of an armed conflict under IHL, the French

operational and legal logic would gobeyond the US rationale – recently affirmed at least concerning Syria and reminding the rationale on the end of conflicts framed as follows underthe Obama administration:

13 "there will come a tipping point – a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed. At that point, we must be able to say to ourselves that our efforts should no longer be considered an "armed conflict" against al Qaeda and its associated forces; rather, a counterterrorism effort against individuals who are the scattered remnants of al Qaeda, or are parts of groups unaffiliated with al Qaeda".

14 Before a different legal theory on the end of armed conflicts is officially and explicitly adopted by anyone, among states or scholars, it seems important to try and identify what such an approach legally implies.

2./Wars until Annihilation…of Modern IHL?

15 What would wars of annihilation imply for modern IHL?First and foremost, it should be underlined that in the context of intense legal uncertainty on the end of armed conflicts, one cannot convincingly conclude that one theory rather than another is blatantly misguided or clearly violates the law. However, by identifying the consequences that a choice of a theory over another triggers, it is possible to confront these consequences to other norms of IHL or to the logic or function of this legal framework; as a result, it is also possible to deduce whether this choice is savvy or even, on the normative level, desirable.To figure this out, onepreliminary question to ask is what war consists in when it persists after the enemy group has been defeated –in other words, once it is effectively incapable to mount military operations.Under this scenario, the un-terminated conflict could not materially consist in conducting operations against individuals directly participating in hostilities: by definition, there would not be such thing as active hostilities.

16 Instead of targeting individuals directly participating in hostilities, the conflict's goal would be, according to the no-reasonable-risk-of-resumption theory and the abovementioned logic of "anticipation", to prevent capacity building of the enemy group. Concretely, one can imagine that military operations would take the form of manhunt and interception of individuals – through capture or kill – when they pose a threat. Such threat could be established if they still embrace the ideology of the enemy group and carry a hostile mindset, including the intention to rebuild the operational capacities of the group.

17 Such practice, although it derives from one of the legal options on the end of hostilities,would entail to accept conceptual shifts in IHL. Let us succinctly describe the two main shifts. First of all, if the strength of the enemy group has been successfully diminished, there are no direct participants in hostilities, traditionally understood as individuals carrying acts supporting the non-state armed group. Yet, under the law of NIACs,there is no combatancy membership and privilege for non-state actors under IHL that would allow governmental forces to attack at any point in time the "members" of the enemy non-state armed group. Rather, article 3 common to the Geneva Conventions

limited military actions of governmental forces to persons directly participating in hostilities: an individual is targeted for the acts that he perpetrates only when they amount to direct participation in hostilities and, above all, only as long , and for such time as he does directly participate in hostilities. A war until annihilation, once the enemy's forces are so diminished that hostilities are interrupted, would target individuals who by definition do not directly participate in hostilities but feature a hostile mindset. The abovementioned definition of direct participation in hostilities derived from the Geneva Conventions (and not explicitly included in the text of the Conventions) would not allow such practice.

18 Such practice, to be valid, would require to accept (an extensive version of) the continuous combat function (CCF), established by the ICRC in its Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (pp.34-35). This notion expands targeting possibilities of state armed forces in NIACs in that it attributes a quasi-combatant status (quasi because not associated with a privilege of combatancy) to individuals whose affiliation to the non-state armed group is established. This notion thereby creates a distinction that did not exist until then between civilians spontaneously and punctually directly participating in hostilities on the one hand, and members of non-state armed forces on the other hand. This (quasi) combatant function creates the possibility to target its owner outside moments of direct participation in hostilities.

19 Carrying out wars until annihilation, post-incapacitation of the enemy group to conduct military operations, would necessarily require to embrace this emerging legal notion of continuous combat function and to define it in a flexible, or even extensive way. Indeed, the ICRC specifies that it is not sufficient for an individualto carry a support function: continuous combat function is established only if the function consists in engaging in combat. An individual who is "recruited, trained and equipped by such a groupto continuously and directly participate in hostilities on its behalf can beconsidered to assume a continuous combat function even before he or shefirst carries out a hostile act" (p.34). In order to legally justify targeting individuals post-incapacitation of the enemy group under the CCF framework would imply to stretch the notion of continuous combat function and come up with a version referring to the *former* continuous direct participation in hostilities and/or to the intention of continuously participating in *forthcoming* hostilities once the operational capacities are rebuilt and allow the group to conduct operations again.

20 The second conceptual and paradigmatic shift that wars until annihilation would entail is even more systemic as it pertains to the very function of international humanitarian law: regulating the conduct of hostilities. Waiting for the eradication of all members of the enemy group and pursue the conflict seeking that end goal, although the enemy group has been sufficiently weakened or although it does not actually conduct any combat measures, would immediately deprive IHL of such function of *regulation* of hostilities. The Geneva Conventions were envisaged as regulating conflicts, through a series of rules and principles seeking a balance between simultaneously activating authorisations and limitations to the amount of violence in conflicts. Without hostilities to regulate, the function attributed to the norms of IHLwould be diluted in an abstract and vague aggregate of operations seeking to prevent the resumption of hostilities.

3./Wars until Annihilation…of the Divide between Ad Bellum and In Bello?

21 Maintaining the characterization of NIAC after the enemy group has been incapacitated to track individuals who essentially pose a continuous imminent threatcreates a great overlap between jus in bello and jus ad bellum.This is true because in the past decade, active states in the war on terror, in particular the United States, joined by the United Kingdom and Australia, but also some scholars – first and foremost Sir Daniel Bethlehem– put pressures on the*jus ad bellum*, and in particular on the right of individual self-defence. The proposed version of the right of individual self-defence, suggests that article 51 of the United Nations Charter establishing this right should be applied to continuous imminent threats. More importantly and even more debated (considering the wide acceptance of a restrained version of imminence, based on the Caroline case, when the threat is "instant" and "overwhelming"), the proposed version supports that the imminence of the threat could be deduced from an accumulation of events revealing "a concerted pattern of continuing armed activity" and when there is an "objective basis for concluding that those threatening or perpetratingsuch attacks are acting in concert".

22 Today, when states decide to withdraw their troops and terminate hostilities under the *jus in bello* have at their disposal an extensive interpretation of the *jus ad bellum* which, if it remains contentious, was sufficiently firmly and astutely articulated by the Obama administration to legitimize an operational practice and strategical choice characterized by anticipation. Even without accepting the most extensive version of the proposed revisionist framework of the *jus ad bellum*, and as mentioned above, the concepts of imminence of the threat and preemptive self-defence are widely accepted.

23 In this legal context, the idea of war until annihilation based on an extensive version of the no-reasonable-risk-of-resumption theory that would consist in hunting down until annihilation all surviving members of the enemy group, in the framework of a NIAC, resembles the idea to target individuals in self-defence in anticipation of the continuous imminent threat they represent. What surfaces here is a context of legal torment where pressures are put on the one hand on the *jus ad bellum* to make it a suitable framework for targeting individuals, not because of an identified armed attack in the making, but because of the threat they represent as members of the jihadist network; and on the other hand on the *jus in bello* to use it as a legitimizing tool with no expiry date for targeting individuals, not because of their direct participation in hostilities, but to prevent the resumption of those hostilities. This context of legal torment generates a confused admixture of *in bello/ad bellum* that enables infinite extraterritorial use of force.

24 It has been possible to trace this admixture of *in bello/ad bellum* in official discourses of the Obama administration, but also in scholarship, including recently in France in the brief analysis conducted by Jean-Baptiste JeangèneVilmer, director of the French Institute for Strategic Research at the Military School (IRSEM), but writing in his personal capacity in his article « L'élimination ciblée des terrorists est à employer avec parcimonie ». He explains that there are reasons to "defend the targeted killing of high value targets posing an *imminent* and demonstrable threat to national security, *in a context of armed conflict*" (italics added). The mixed terminology could derive from a mistake but it seems important to refer back to the legal and practical consequences that were just explored and, by the same token, to underline the emergence of the confusion even in

papers explicitly aiming to clarify the question of the legal framework applicable to extraterritorial operation.

25 In conclusion, these developments diagnosed under what legal and practical conditions an unlimited use of force can arise in the counterterrorism context. We tried to identify the grey zones of international humanitarian law and related degrees of uncertainty. Besides, in a context of general silence in France on the interpretation of the applicable legal frameworks to the extraterritorial use of force in the counterterrorism context, it is with caution that French official rhetoric was analysed and a hypothesis framed on the theory possibly chosen regarding the end of conflicts. This analysis, that awaits to be rectified where necessary, allowed to assess that France might endorse the idea that conflicts end when there is no reasonable risk of resumption of hostilities. Exploring this hypothesis then consisted in identifying the legal consequences that such perspective would entail: first, IHL move away from it very function, that is the regulation of hostilities, towards a function of prevention of conflict resurgence; second, the blurring of distinction between *jus ad bellum* / *jus in bello*, that could lead on an *à la carte*, and thus potentially unlimited, justification of the use of force.

26 It is not fortuitous that legal uncertainties on the end of armed conflicts emerge today as a major problem. As soon as the participants in a conflict have a mutual intention to erase each other from the surface of the earth, the use of force enters in an exacerbated temporal dimension. A hypothesis to explain this socio-legal phenomenon is that this legal grey zone did not appear to be problematic until now because the desire of annihilation had not been so intense(ly shared). On the contrary, rules of IHL were created to regulate conflicts either between *equal public powers* or *between states and aspiring states* willing to challenge the sovereign exercising its power over them to replace it; none of which were motivated by a desire of annihilation, and all of which were acting in an interstate paradigm and thereby, preserved it. The hypothesis is that once we depart from this premise to reach a new concrete scenario, namely the use of force against anti-statist transnational terrorist networks, attacking public forces seek annihilation of the enemy (and vice versa).This dynamic conceals heavy consequences. This blog shows that such conflicts, as being regulated by norms that present uncertainties catalysing extension, are potentially infinite.

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RÉSUMÉS

The announcement of President Trump on 19 December 2018 that the US would withdraw its troops from Syria and following reactions provide evidence of the uncertainties on the end of

armed conflicts, asa factual, strategic and legal matter.The question of the temporal scope of application of international humanitarian law (IHL) is one of the most unsettled issue of IHL, while it may be the most problematic in the context of contemporary endless wars. In the aftermaths of Trump's announcement, French Defence minister Florence Parly acknowledged that the group had been significantly weakened, but said the battle was not over because the "Islamic State has not been wiped from the map, nor have its roots. The last pockets of this terrorist organization must be defeated militarily once and for all."This declaration, while not explicitly declaring commitment to a legal theory on the end of conflicts, deserves special attention as it reminds the language of the "no-reasonable-risk-of-resumption theory" according to which non-international armed conflicts end (and IHL ceases to apply in relation to it) where there is no reasonable risk of hostilities resuming. This theory, if the threshold to assess the absence of reasonable risk is set high – achieved once all members of the enemy group are annihilated – is the object of the present analysis.The goal of this blog, thereby, is not to attribute a legal theory to Francethat it has not explicitly adopted, but to investigate whatdoing so would entail.

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