NOTAS

SOBRE *UNA GUERRA SIN IGUAL. LA CONSTITUCIÓN EN LOS TIEMPOS DEL TERRORISMO*, DE OWEN FISS

On *A War Like No Other: The Constitution in a Time of Terror*, by Owen Fiss

On September 8, 2017, with the co-sponsorship of the Center of Constitutional Studies of the Mexican Supreme Court (CEC-SCJN), the ITAM Department of Law invited Owen M. Fiss, Sterling Professor Emeritus of the Yale Law School. He was appointed Distinguished Visiting Professor of ITAM —the highest academic award in the university— and a seminar on some of his recent work was conducted both at ITAM and at the CEC-SCJN. The program included the presentation and public discussion of Fiss' book on the erosion that the so-called "war on terror" exerted on the most basic principles of the US Constitution. The book has been recently translated into Spanish by Francisca Pou Giménez (*Una guerra sin igual. La constitución en los tiempos del terrorismo*, Marcial Pons, 2017). We are now happy to publish the comments of three of the participants in the book panel —Esteban Restrepo Saldarriaga, Marcelo Ferrante and Pau Luque Sánchez— in the order in which they were delivered that day.

El 8 de septiembre de 2017, con el copatrocinio del Centro de Estudios Constitucionales de la Suprema Corte (CEC-SCJN), el Departamento de Derecho del ITAM invitó a Owen M. Fiss, Profesor Sterling Emérito de la Escuela de Derecho de Yale. El profesor Fiss fue nombrado Profesor Visitante Distinguido del ITAM —la más alta distinción académica otorgada por la universidad— y se celebró un seminario sobre trabajo suyo reciente en el ITAM y en el CEC-SCJN. El programa incluía la presentación y debate público del libro de Fiss sobre la erosión que la llamada "guerra contra el terrorismo" ha tenido sobre los principios más básicos de la Constitución estadounidense. El libro ha sido recientemente traducido al español por Francisca Pou Giménez (*Una guerra sin igual. La constitución en los tiempos del terrorismo*, Marcial Pons, 2017). Tenemos el gusto de publicar ahora los comentarios de tres de los participantes en la presentacion —Esteban Restrepo Saldarriaga, Marcelo Ferrante y Pau Luque Sánchez— en el orden en que se pronunciaron ese día.

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Into the Light of Darkness

Esteban Restrepo Saldarriaga*

Su resuello de dragón multicéfalo impregnó de un vapor pestilente la claridad del mediodía.

Gabriel García Márquez, *Cien años de soledad*

Between 16.000 and 32.000 workers of the banana plantations of the United Fruit Company in the Province of Santa Marta were on strike since November 12, 1928. Cultivation, harvesting, and export of banana completely ceased. General Carlos Cortés Vargas was sent by the Minister of War to preserve peace in the region (LeGrand, 1989, pp. 204 and 206-207).[1] In spite of the arrest of some workers that were quickly released, the situation was relatively peaceful and negotiations between the strikers, the Government and the United Fruit Company had been underway (pp. 207-210). The conflict took on a violent turn when rumors about a "revolutionary conspiracy" (entailing the destruction of the plantations and the sabotage of communications) began to circulate (p. 210). The Government decided to break the strike by asking the United Fruit Company to hire strikebreakers who —protected by the army— would resume the harvesting and transport of banana (p. 211). During several days, the workers resisted by destroying the harvested fruit, blocking the railways, and trying to convince the strikebreakers and the soldiers to join them (p. 211). Finally, fearing defeat, the leaders of the strike sent messengers to the plantations calling the workers to gather in Ciénaga —one of the main towns of the Province— where they would start a march to

Esteban Restrepo Saldarriaga, Universidad de los Andes. Correspondencia: Cra. 1 No. 18A- 12, 111711, Bogotá, Colombia. erestrep@uniandes.edu.co

* This is an essay written in honor of my teacher and friend Owen Fiss. Unless otherwise indicated, all translations from Spanish into English are my own.

[1] I closely follow Catherine LeGrand's account of the 1928 strike of the workers of the United Fruit Company and the *masacre de las bananeras* (LeGrand, 1989). Every number in this episode of Colombian history —from the number of strikers murdered to the number of strikers murdered by the Army— has been heatedly disputed. The conflict between the United Fruit Company and its workers is part of a wider landscape of agrarian conflicts in Colombia at the beginning of the twentieth century (see LeGrand, 2016, pp. 139-165).

Santa Marta to protest before the Governor's office and demand that the United Fruit Company be forced to reach an agreement with the unions (p. 212). General Cortés Vargas and the manager of the United Fruit Company sent telegrams to Bogotá reporting that the situation was one of "imminent violence, danger and destruction originated by uncontrollable masses" (p. 212).

By midnight of December 5, General Cortés Vargas finally received news that President Miguel Abadía Méndez had declared martial law in the Province of Santa Marta and had appointed him as military and civilian chief of the region (p. 214). In the early hours of December 6, he marched with 300 soldiers to a square near Ciénaga's railway station where about 2.000 to 4.000 strikers had gathered to wait for other comrades to arrive and start the march to Santa Marta in the morning (p. 214). The soldiers took position on the northern side of the square and a captain read to the crowd the martial law decree: insofar as gatherings of more than three persons had been prohibited, the workers had to immediately disperse or the troops would shoot. After three minutes and three bugle calls, nobody had moved. The unthinkable happened (p. 214).

How many workers of the United Fruit Company were murdered in the *masacre de las bananeras* is still disputed. General Cortés Vargas reported to his superiors that thirteen strikers died; people in the Province believe that dozens or hundreds were killed; while one worker reported that sixty of his companions were murdered, another striker raised the death toll to four hundred; others believed a great number of corpses were swiftly carried to the trains and then thrown into the ocean (p. 215).[2] José Arcadio Segundo Buendía —the great grandson of José Arcadio Buendía and Úrsula Iguarán, the couple of cousins who gave birth to the legendary lineage of the Buendías of Macondo— was among the strikers in the square on that fateful morning. He fainted in the stampede of workers trying to save their lives and was thrown with dead bodies into a car of the "longest [train] he had ever seen" (García Márquez 1971, p. 285). When he recovered consciousness, he discovered he was amidst corpses that "had

[2] As previously noted, the number of workers murdered in the *masacre de las bananeras* is a matter of dispute and poses deep political and philosophical problems for the reconstruction of historical memory in Colombia. For a philosophical account of these conundrums see Uribe Botero, 2010 and Acosta, forthcoming.

the same temperature as a plaster in autumn and the same consistency of petrified foam" (p. 284). Pulling himself out the mass of dead bodies, he jumped out of the train and began walking his way back to Macondo. At dawn, he stopped in one of the first houses of the village where a woman served him a cup of coffee.

> "There must have been three thousand of them," he murmured.
>
> "What?"
>
> "The dead," he clarified. "It must have been all of the people who were at the station."
>
> The woman measured him with a pitying look. "There haven't been any dead here," she said. "Since the time of your uncle, the colonel, nothing has happened in Macondo." In the three kitchens where José Arcadio Segundo stopped before reaching home they told him the same thing: "There weren't any dead" (pp. 285-286).

In this memorable passage of *One Hundred Years of Solitude*, Gabriel García Márquez tells the magical realist version of the 1928 *masacre de las bananeras*. Although García Márquez's recount of this talismanic event in Colombian history is by no means a legal one, I take the allegory of darkness and light that prominently figures in his narrative as the starting point to illustrate the core of my argument in this essay: At least since the second decade of the twentieth century, Colombian constitutional law has emerged from the dialectic of war, peace, and law. By telling the story of this emergence, I hope to provide a counternarrative to *A War Like No Other*, the book where Owen Fiss measures the effects of the war on terrorism sparked by the Al-Qaeda attacks of September 11, 2001, on basic principles of American constitutional law. For Fiss, law as public reason —the greatest legacy of the Warren Court and a notion he has explored and articulated since the start of his academic career[3]— has eclipsed under the pragmatic pressures of an irregular war (Fiss, 2015).

[3] The idea of law as public reason is the central tenet of Owen Fiss's work. In his view, "Law is an expression of public reason and provides structure to our public life". This notion of law was at the center of the reform program initiated by the US Supreme Court in *Brown v. Board of Education*. Having the implementation of fundamental rights at its substantive center, it demands that judges, through structural injunctions, "measure practical reality against the values made authoritative by the law and then seek ways to bring that reality into accord with these values" (Fiss, 2003, ix).

In the long century of struggle beginning in the late 1920s, what Colombians have witnessed and learned is that the pragmatic needs of irregular war do not necessarily obscure the demands of law as public reason: While at times the gulf between institutional measures aimed at preserving peace and the notion of law as public reason has been wide, in other historical junctures the gap has been bridged and law as public reason has been regained. Modern Colombian constitutional law thus shows that the relationship between irregular war and constitutional law is complex and dynamic. Constitutional law has shaped the meaning of war and war has shaped the meaning of constitutional law.

To substantiate this claim, the essay will be divided in three parts. Drawing on the allegory of light and darkness in Gabriel García Márquez's account of the *masacre de las bananeras* in *One Hundred Years of Solitude*, the first section will briefly sketch the idea that the most important developments in Colombian constitutional law of the last century have resulted from the confluence of law, war, and peace. In the second part of the essay, I will discuss how until the end of the 1980s, while the "implicit powers" of the executive generally reigned supreme, there were occasions where law as public reason shimmered at the darkest hours of conflict. In the final section, the essay will show how the 1991 Colombian Constitution, a glowing emanation of the idea of law as public reason, emerged from the period that some commentators have dubbed "the long Hobbesian night of the 198os" (Bejarano 1994, p. 47 and Barreto 2011, pp. 57-72).[4]

[4] In further elaborations of the themes of this essay, a fourth part should be included. In this additional section I would outline how the Peace Accord between the Colombian government and the FARC and its implementation were possible through what could be called "transitional constitutional law"—a form of constitutional law that, again, reflects the dynamics whereby war shapes constitutional law and constitutional law shapes war. The notion of "transitional constitutional law" results from the particularities of the Colombian transition, which has been carried out *within* the framework imposed by the 1991 Constitution. Differently to most transitions from internal armed conflict to peace, the transition in Colombia has not been marked by the enactment of a *new* constitution.

I. From the allegory of light and darkness to the dialectic of law and war

Earlier we left José Arcadio Segundo Buendía wandering through Macondo asking for the workers of the American banana company murdered by the Colombian army the day before. García Márquez's version of the *masacre de las bananeras* starts, however, some days earlier when "[t]he great strike broke out," "[c]ultivation stopped halfway, the fruit rotted on the trees and the hundred-twenty-car trains remained on the sidings" (García Márquez 1971, 280). Although, as previously noted, García Márquez does not dwell in any legal detail, his story could be read, I surmise, as the confrontation —at a critical juncture in Colombian history— between the pragmatic needs of restoring public order and its deleterious consequences on law as public reason. The dialectic movement between authoritarianism and liberty is allegorically represented in the novel through a series of images that convey a complex interplay between darkness and light. *One Hundred Years of Solitude*'s version of the 1928 strike of the workers of the United Fruit Company thus provides the idea that the most luminous progresses of Colombian constitutional law have transpired from the darkest social and political hours in the country's history—that, indeed, Colombian constitutional law has to be historically gauged through the light of darkness.

The allegory of light and darkness —and, with it, the dialectic of authoritarianism and liberty— first appears in García Márquez's account of the *masacre de las bananeras* with the arrival in Macondo of three army regiments sent to preserve peace and order in the region. The troops, "whose march in time to a galley drum made the earth tremble," passed by and "[t]heir snorting of a many-headed dragon filled the glow of noon with a pestilential vapor." The soldiers "were short, stocky, and brutelike," and "had a smell of suntanned hide and the taciturn and impenetrable perseverance of men from the uplands" (p. 280). The state, law and authority thus appear to disturb the stability ("the earth trembled") of the most luminous hour ("the glow of noon") of Macondo's peaceful everyday life. The darkness of state authority —the fact that it appears as a "bad omen" to José Arcadio Segundo— has not only a mythological nature (it resembles a "many-headed dragon"), but a "pestilential" smell of "suntanned hide"

and the "brutelike" and "taciturn and impenetrable" regional character of the peoples from Bogotá (where authority and law come from). Darkness breaks light—the state and its legal apparatus interrupt peaceful regional life with an indecipherable authority that is both otherworldly and deeply human; simultaneously offering its taciturn character and the promise of brutal violence.

This idea is then sustained even more forcefully with the description of the effects of martial law on the dynamics of the strike. Somewhat following the historical record, García Márquez tells us that the soldiers "as soon as they appeared in Macondo… put aside their rifles and cut and loaded the bananas and started the trains running;" in response, the striking workers began "to sabotage the sabotage" and "burned plantations and commissaries," "cut telegraph and telephone wires" and "tore up tracks to impede the passage of the trains that began to open their path with machine-gun fire… [so that] The irrigation ditches were stained with blood" (p. 281). Here, again, the quiet and luminous everydayness of an agricultural town is turned upside down by the state and its violent martial law. Quite literally, everydayness is burned and cut by public authority. The pristine quotidian —the daily cultivation, harvesting, packing, and transport of bananas— *becomes* the dark martial law with its official bloody stamp of state authority.

Interestingly, countering historical record, the *masacre de las bananeras* in *One Hundred Years of Solitude* does not occur at night, in the early hours of December 6, 1928, but in "the scorching sun," between "[a]round twelve o'clock" and "a short time before three o'clock" (pp. 281-282). Again, García Márquez allegorizes the rupture of institutional normality by state violence through the image of blazing clarity being ripped apart by the darkness of a shooting army. The martial law decree —declaring "the strikers to be a 'bunch of hoodlums'" and authorizing "the army to shoot to kill" (p. 282)— was read by a lieutenant and five minutes were given to the strikers to withdraw. The crowd, however, did not move, "held tight in a fascination with death" (p. 283). The unbelievable violence of the massacre —occurring in the very glow that some days earlier had been disrupted by the shooters— is described by García Márquez as "it all seemed like a farce": Although the "panting rattle" and the "incandescent spitting" of the machine-guns could be heard and seen, it seemed

like they "had been loaded with caps," for "the compact crowd… seemed petrified by an instantaneous invulnerability" (p. 283). After this surreal moment, a "seismic," "volcanic," and "cataclysmic" stampede erupted in the square and expanded to the adjacent streets (p. 283). Before fainting, José Arcadio Segundo saw when "the colossal troop wiped out the empty space, the kneeling woman, the light of the high, drought-stricken sky, and the whorish world where Úrsula Iguarán had sold so many little candy animals" (p. 284). Note how García Márquez describes the sheer lethality of the violence with a series of images of light and darkness that, once again, allegorically convey the notion of liberty being smashed by martial law. The "incandescent spitting" of the machine-guns, the "volcanic" nature of the stampede and the "light of the high, drought-stricken sky" being wiped out by the troops, are all images of a period in Colombian politics where the use of executive exceptional powers to impose peace and order was out of hand.

One Hundred Years of Solitude's version of the 1928 *masacre de las bananeras* —which starts with the "glow of noon" being disrupted by the arrival of the troops and ends with the "light of the high, drought-stricken sky" being wiped out by those same soldiers— is instructive of the ebb and flow of war, peace, and violence in Colombia. As we will see in the next section of the essay, the use of lethal violence against the workers of the United Fruit Company compellingly exemplifies the abuse of the "implicit powers" doctrine, which lasted until the end of the 1980s when the Supreme Court of Justice established its unconstitutionality and law as public reason was regained. This episode, however, is not unique in Colombian history. During most of the twentieth century, it is possible to detect an oscillation between authoritarian restrictions on liberty aimed at confronting Colombia's many-headed manifestations of violence and judicial interventions that, in striking fashion, reaffirm the principles of freedom and separation of powers. Colombian constitutional history shows that at the very heart of authoritarian darkness dwells the light of law as public reason.

In *A War Like No Other*, Owen Fiss views the war on terror as an attack on the most basic and cherished principles of American constitutional law. In his view, the three branches of US government have renounced to give precedence to the "principle of liberty" over the presidential powers to wage war against an enemy that was unknown until the attacks on

the World Trade Center and the Pentagon (Fiss, 2015). Extreme measures such as indefinite detention of suspects of terrorism, the denial of habeas corpus, the trial of civilians by military courts and other executive measures, have been authorized and validated by the US Congress and the Supreme Court. To a great extent, the sort of irregular war that has afflicted Colombia in the last century only arrived in American soil after September 11, 2001. The history of other wars in other places, by teaching the pendular movement between authoritarian law and law as public reason, may bring some relief to Fiss's pessimistic narrative of the transformations of American constitutional over the last seventeen years. It may show him that the idea of law he has brilliantly defended in his courageous work only shortly disappears to be recovered at the most unexpected moments of darkness. Let's see how this is possible.

II. A century of abuse: The rise and fall of the "implicit powers" doctrine

The 1886 Constitution of Colombia was enacted in great part to confront the perceived threats of dissolution and chaos stemming from the federalist Rionegro Constitution of 1863 (González, 2015, p. 24).[5] The constitutional formula devised by the conservatives of the "Regeneration" was, on the one hand, to establish a unitary state and, on the other hand, to strengthen the powers of the President who, among those, had the power to declare the "state of siege" upon a discretional assessment that peace and public order needed to be restored (Barreto, 2011, pp. 19-20). As Jorge González Jácome points out, the notion of constitutional states of exception (or emergency powers) could be justified on different theories. In Colombia, between the late 1920s and the late 1980s, they were grounded on an "anti-liberal conception" that responded "to the wishes of political leaders to transform supposedly chaotic and disarticulated societies into

[5] In this section, I will closely follow the historical accounts of the abuse of presidential powers from the 1920s until the end of the 1980s of my colleagues Antonio Barreto Rozo (2011) and Jorge González Jácome (2015). I particularly refer to the same decisions of the Supreme Court of Justice of Colombia they use in their books.

corporatist and organic communities" (González, 2015, p. 31). Guided by this view, the Colombian state of siege was "a tool that allowed the destruction of an old legality and the attribution of constituent and legislative power to a leader who sought to keep the law in permanent connection to a changing social reality" (p. 32).

The doctrine of the "implicit powers" of the executive appeared in a context of social strife between capital and labor —which the *masacre de las bananeras* strikingly illustrates— that had been underway since the early twentieth century (LeGrand, 1989, pp. 183-201; 2016, pp. 139-165 and González, 2015, pp.104-107). In response to an unknown enemy that, at the time, was nebulously dubbed the "socialist ghost" (Barreto, 2011, p. 24), the President, based on its state of siege powers, adopted a number of severe measures that, in general, tended to suspend constitutional rights and guarantees in order to confront social unrest caused by union activity. As Antonio Barreto recounts, the most dramatic moment of the intensification of authoritarian measures occurred on November 13, 1928 (interestingly one day after the workers of the United Fruit Company voted the strike that ended with the *masacre de las bananeras*), when the Supreme Court of Justice of Colombia validated a state of siege decree issued the previous year and created the doctrine of the "implicit powers" of the executive (pp. 24-36). In this decision, the Court argued that both political branches of government had not only those powers explicitly enumerated in the Constitution, but also all those "unenumerated" or "implicit" powers necessary to decide on "every issue required by the needs and conveniences of the Nation" (SCJC, 1928, p. 199 and Barreto, 2011, pp. 27-36).

Although this doctrine equally applied to Congress and the executive, the decision extended it with particular force to the powers of the President to preserve public peace and order. According to Barreto, the Supreme Court "almost unwittingly, asserted that the President —and not Congress— was the supreme guardian of public order" (Barreto, 2011, p. 30). The rationale for this decision was that threats to public peace ought to be swiftly confronted and could not be left to "heated and intricate" legislative debates that, by force, could take more time (SCJC, 1928, p. 197 and Barreto, 2011, p. 30). Jorge González explains that the teleological interpretation of the Constitution that supported the doctrine crafted by the Court in this ruling —more precisely the idea that the branches of gov-

ernment have all the explicit and implicit powers needed to pursue their constitutional ends— was theoretically premised "on organicist conceptions of society" attuned to "the idea of an organic whole in which every member of the unity had a set of means at her disposal to reach the common objective of society" (González, 2015, p. 122).

An interesting historical aspect of this decision is how it was sparked by the haunting presence of an unknown —almost mythological— enemy with both global and domestic manifestations. Just as the enemy that, according to Owen Fiss, has spurred the harmful transformations in American law since the start on the war on terror, in 1928 the Supreme Court of Justice of Colombia tethered the implicit powers of the President to the need of confronting the "great proportions that the problem of communist propaganda presents everywhere in the world, from which Colombia is not exempt" (SCJC, 1928, p. 197). If today's terrorist global threat forced a domestic accretion of the powers of the US executive in detriment of the principle of liberty, a "communist propaganda" of global proportions domestically led the Colombian Supreme Court to decide that the executive could supersede Congress in matters of public peace and order. A cursory comparison between the American and the Colombian examples teaches that judiciaries seem to react to the threat of geographically diffuse and oddly shaped global enemies by "militarizing" executive powers in ways that aggressively curtail fundamental constitutional guarantees.

In the Colombian case, however, the initial 1928 enemy began to mutate and adopt new faces. This mutation, in turn, pushed towards the extension of the implicit powers doctrine. By the mid-1980s, the powers of the Colombian executive had grown to resemble the many-headed dragon that entered Macondo at the glow of noon when the strike of the workers of the American banana company started. During this period the Supreme Court of Justice adapted executive powers to the progressive degradation and worsening of violence in the country. Throughout the 1940s, the historical confrontation between Colombia's two traditional political parties (the Liberals and the Conservatives), which degenerated into a bloody civil war known as *La Violencia*,[6] produced one of the most distinctive, anti-dem-

[6] It has become conventional to designate this period of Colombian history —which roughly goes from 1946 to 1953— as *La Violencia*, with a capital V, in order to distinguish it from the vio-

ocratic and liberty-damaging strands of the implicit powers doctrine. In two decisions adopted in 1945 and 1948, the Court began its long-lasting doctrine that the preservation of public peace allowed the judgment of civilians by martial courts (SCJC, 1945 and 1948; Barreto, 2011, pp. 36-38 and González, 2015, pp. 121-128). As Jorge González Jácome recounts, during the 1950s and 1960s, in spite of an initial political and academic criticism against the abusive use of the state of siege, the emergence of the leftist guerrillas and other forms of social unrest supported the strengthening of exceptional presidential powers with simultaneous moves from Congress and the Supreme Court (González, 2015, pp. 219-226). While a 1968 constitutional amendment created another state of exception (the so-called "state of economic emergency") and endowed the President with the power to indefinitely detain suspects of breaching public peace, the Court kept validating —well into the 1970s— the judgment of civilians by military courts (pp. 226-232; SCJC, 1961, 1970 and 1978a; see also Gallón, 1979).

Beginning in the late 1970s —first through a series of dissenting opinions and then through majority doctrine (Barreto, 2011, pp. 40-42)— light began to slowly shimmer out of darkness. According to González, two important historical developments might explain the demise and the implicit powers doctrine. On the one hand, two of the Presidents elected during this period (Belisario Betancur and Virgilio Barco) ran their electoral campaigns with the promise of initiating peace talks with the most important leftist guerrillas operating in the country (the FARC, the M-19, the ELN, and the EPL). Although with mixed results,[7] the intention of

lences that would later transpire with the advent of the leftist guerrillas in the 1960s, the appearance of drug-trafficking cartels in the 1970s, and the emergence of the paramilitary groups in the late 1970s. The literature on this period is huge. In my view, the most illuminating and original account of *La Violencia*, which draws significant relations between the war between the Liberals and the Conservatives and the more modern Colombian armed conflict, is Mary Roldán's *Blood and Fire* (Roldán, 2002). Here, she presents a useful state of the art on the literature on this historical period (pp. 22-29). From a suggestive anthropological perspective, María Victoria Uribe has elaborated an interpretive account of the forms of carnage —especially the massacres— during *La Violencia* (Uribe Alarcón, 1990 and 2004).

[7] The assault of the M-19 on Bogotá's Palace of Justice (where Colombia's two highest courts were housed) on November 6 and 7, 1985, ended the peace process initiated by Belisario Betancur. The M-19 blamed President Betancur for the failure of the peace talks and wanted to force the Supreme Court to judge him for that failure. After twenty-seven hours of combat between the guerrilla and the Colombian Army, ninety-eight people had been murdered or died in the crossfire, eleven of

ending the armed conflict through negotiation and settlement introduced into Colombia's political lexicon the idea that peace could be achieved through deliberation and not by resorting to exceptional liberty-restricting executive powers (González, 2015, pp. 300-303 and 310-315). On the other hand, beginning in the mid-1970s, human rights mobilization and activism against official repression started to become an important force of political, legal, and social transformation (pp. 301 and 303-309). By the mid-1980s, while these two seemingly more democratic trends were developing, the drug cartels (and, especially, the Medellín Cartel) began their assault on Colombian institutions. In response to the terrorist attacks of the drug-trafficking lords, the government declared the "war on drugs" (pp. 320-323). The period of horrific violence that transpired has been known as the "long Hobbesian night of the 1980s" (Bejarano, 1994, p. 47 and Barreto, 2011, pp. 57-72). Executive authorities reacted to the spiraling violence by enacting —in an almost unconscious reflex (Barreto, 2011, p. 60)— a set of draconian state of siege measures whereby military courts could investigate and judge all crimes and misdemeanors related to drug-trafficking (p. 61).

However, in the midst of swirling violence, law as public reason was regained by the doctrine of the Supreme Court of Justice. The very Court that for almost sixty years uncritically uphold the abusive use of presidential state of siege powers began to powerfully send the message that out of hand political and social situations cannot be confronted through out of hand institutional and legal solutions. In a crucial 1987 decision, the Supreme Court simultaneously overruled the implicit powers doctrine and banned the judgment of civilians by martial courts (SCJC, 1987; Barreto, 2011, pp. 42-43 and 63-64 and González, 2015, pp. 327-330). In this opinion, as if relying on the idea of law as public reason, the Court established that, even in times of grave public disorder, the distinction between police and military powers and the power of the judiciary "to rule with the force of legal truth on the criminal liability of those who intervene in legal pro-

which were justices of the courts. Later, in 1990, President Virgilio Barco successfully reached a peace agreement with the M-19. In Barreto and González's view, the military excesses of the assault on the Palace of Justice might have a played a decisive role in the radical doctrinal transformations operated by the Supreme Court on the doctrine of implicit powers and, more generally, on the presidential powers of state of siege in the late 1980s (Barreto, 2011, p. 63 and González, 2015, p. 328).

ceedings as suspects or defendants" ought to be maintained (SCJC, 1987, p. 222). The following year, the democratizing project of the Supreme Court continued when it prohibited the capture of suspects or the search of homes without judicial warrant (SCJC, 1988 and Barreto 2011, pp. 65-66). Finally, in a 1989 decision, the Court struck down a state of siege decree that established life sentences for murders committed with terrorist purposes or by illegal armed groups (SCJC, 1989 and Barreto, 2011, p. 66).

This democratizing restriction of presidential exceptional powers and the swing towards regaining basic tenets of the rule of law and the idea of law as public reason had yet to bring about their most glowing emanations. Under a revamped doctrine of the state of siege, the Supreme Court of Justice paradoxically allowed the most radical and progressive constitutional transformation in the history of the country. The next section tells the story of how the 1991 Constitution emerged as a shining emanation of law as public reason from the darkest of hours of Colombian violence.

III. The paradoxes of the state of siege: From the "long Hobbesian night of the 1980s" to the 1991 Constitution

The "long Hobbesian night of the 1980s" is usually associated with the series of murders of Colombian high political leaders and officials planned by an alliance of traditional politicians, public security state agents, drug lords and paramilitary commanders,[8] the assassination of judges in charge

[8] It all began with the murder by assassins of the Medellín Cartel of Rodrigo Lara Bonilla, Minister of Justice of President Belisario Betancur, on April 30, 1984, in Bogotá. Then, on January 25, 1988, Attorney General Carlos Mauro Hoyos Jiménez was kidnapped and killed near Medellín by men hired by Pablo Escobar. The next high-profile victim was Jaime Pardo Leal, the leader of *Unión Patriótica*, who was murdered in La Mesa, a town close to Bogotá, on October 11, 1987. It is believed that the murder was planned by a coalition between public security state officials, traditional politicians, drug traffickers, and paramilitary leaders. On March 3, 1989, José Antequera, a political leader of *Unión Patriótica* and Ernesto Samper Pizano, then presidential pre-candidate of the Liberal Party, were shot by a gunman at Bogotá's airport. Antequera died in the attack and Samper survived (he would be elected President of Colombia on June 19, 1994). Criminal investigations have concluded that the attack on Antequera (Samper was collateral damage) was planned and executed by an alliance between public security state officials, drug lords, and paramilitary commanders. On August 18, 1989, Luis Carlos Galán Sarmiento, a presidential candidate, was murdered by gunmen

of prosecuting and judging members of drug cartels, the murder of journalists critical of drug lords, the systematic extermination of militants of the *Unión Patriótica*,[9] and the myriad attacks, murders and "social cleansing" massacres perpetrated by all the actors involved in the conflict. Some human rights organizations like Amnesty International and Human Rights Watch have estimated that, while between 1988 and 1991 about 14.800 Colombians had died as a consequence of political violence, this death toll had increased to 20.000 by 1994 (Human Rights Watch, 1992 and Amnesty International, 1994).

Yet, the event that catalyzed the constitutional process of 1989-1991 was the murder of Luis Carlos Galán Sarmiento on August 18, 1989. Galán was a hugely popular political leader who was running for the presidency and would had probably been elected President of Colombia in the elections of May 1990. He had taken distance from traditional politicians (he founded his own political party called *Nuevo liberalismo*) and, for years, he had been condemning the relationships between state authorities and illegal actors (especially the drug cartels and the paramilitary). For many, he represented the highest hopes of political and democratic renewal (Lemaitre, 2009, pp. 82-83). Just after Galán's assassination, a massive stu-

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in Soacha, a town adjacent to Bogotá, during a political manifestation. Like other political murders of this period, it was planned by a coalition of traditional political leaders, public security state agents, drug cartels, and paramilitary commanders. Then, on March 22, 1990, Bernardo Jaramillo Ossa, the presidential candidate of *Unión Patriótica*, was shot and killed at Bogotá's airport. Although the murder was initially attributed to Pablo Escobar, further criminal investigations involved Carlos and Fidel Castaño Gil, the most important paramilitary leaders of that period, who were sentenced *in absentia*. On April 26, 1990, Carlos Pizarro Leongómez, the presidential candidate of the M-19 (a recently demobilized guerrilla group turned into legal political party), was shot by a hitman during a flight between Bogotá and Barranquilla. The murder was first attributed to Pablo Escobar, but more recent criminal investigations show that public security state officials were also involved.

[9] The *Unión Patriótica* is a leftist political party founded in 1985. Although originally established "as the legal political wing of several guerrilla groups", it then took ideological distance from armed struggle and decidedly embraced the idea that Colombia's armed conflict had to be settled through peaceful negotiation (see https://es.wikipedia.org/wiki/Uni%C3%B3n_Patri%C3%B3tica_(Colombia)). The party was quite electorally successful. Several of its militants were elected to Congress, as mayors of towns, and as members of regional and local legislatures. From its very foundation, however, and well into the 1990s, its militants were systematically exterminated by a coalition of security state forces, paramilitary forces, and the drug cartels. Approximately 3.500 members of the *Unión Patriótica* were murdered. Several expressions and words have been used to designate the extermination: while some call it a "genocide," others have referred to it as "systematic extermination," "progressive elimination," "massive and systematic murder," and "extermination" (see ICtHR, 2010, ¶ 81).

dent social movement formed to claim for radical political reforms aimed at reconstructing the legitimacy of the state affected by systematic violence (pp. 85-86). The aspirations of the movement soon boiled down to a social mobilization demanding a drastic amendment of the 1886 Constitution. This aspiration, however, had to face two different problems. From a political perspective, it was unlikely that Congress (in charge of passing constitutional amendments), composed by the very political class blamed in part for the situation that the movement wanted to overcome, would adopt reforms radically disturbing the status quo. From a legal perspective, two previous attempts at thoroughly reforming the Constitution had been struck down by the Supreme Court (SCJC, 1978 and 1981). Given these obstacles, the movement realized that an alternative mechanism of constitutional reform (different from a constitutional amendment passed by Congress) had to be pursued. The idea of a constitutional assembly elected by the popular vote of Colombians thus became the central claim of the students (Lemaitre, 2009, pp. 86-93).

This revolutionary aspiration confronted, however, a major legal hurdle. In a 1978 decision, the Supreme Court had ruled that the 1886 Constitution could only be reformed through constitutional amendment passed by Congress and explicitly held that constitutional assemblies elected by the popular vote of citizens were unconstitutional (SCJC, 1978).[10] In light of this precedent, the great challenge was to devise a legal plan that would convince the Court to overrule its 1978 doctrine. It could be argued that the strategy (designed by the student movement and important advisors of President Virgilio Barco) was a combination of popular mobilization and an imaginative use of the state of siege presidential powers (cf. Lemaitre, 2009, pp. 96-113). On the one hand, following a "signal" left by the

[10] This seemingly paradoxical decision can only be explained in light of the specific system of constitutional amendment established in the Plebiscite of 1957. On December 1, 1957, Colombians voted (the first time for Colombian women who, through suffragist struggle, had secured their right to vote in 1954) a plebiscite that amended the Constitution to include the *Frente Nacional* regime. To end *La Violencia*, the Liberal and the Conservative parties agreed to establish —for a period of sixteen years (1958-1974)— a coalition regime allowing the alternation of the Presidency between the two parties and the egalitarian distribution of the seats of Congress and the Supreme Court between the Liberals and the Conservatives. In addition, the plebiscite established that, from the moment of its approval, the 1886 Constitution could only be reformed through constitutional amendment passed by Congress. Relying on this constitutional provision, the Supreme Court banned in 1978 the use of any sort of alternative amendment procedure and, particularly, the resort to a constitutional assembly.

Supreme Court in its 1978 opinion, the idea was to produce an extraordinary event of de facto political mobilization that could be interpreted as the will of the Colombian people to debunk its 1957 decision of only allowing constitutional amendments passed by Congress (Restrepo, 2017, pp. 389-390). On the other hand, the strategy aimed at exploiting the law-as-public-reason revamping of the state of siege presidential powers that the Supreme Court had been entertaining since 1987 and use it to legally "package" the de facto political mobilizations.

In more concrete terms, this plan was developed in three stages that took advantage of the elections for Congress of March 1990 and the presidential election of May of that year. In a first stage, the student movement successfully convinced an important number of Colombians to deposit an additional informal ballot (meaning that electoral authorities would not count it) in the March 1990 elections to express their will to reform the 1886 Constitution through a constitutional assembly (Lemaitre, 2009, pp. 100-108). After obtaining an important triumph with this de facto popular manifestation, the students convinced President Virgilio Barco —in what was the second stage of the strategy— to "formalize" the informal vote in favor of a constitutional assembly by ordering electoral authorities to officially count a similar vote in the presidential election of May 1990. President Barco and his legal advisors decided to give this order by resorting to state of siege powers. Although in tune with the idea that Congress would never adopt measures radical enough to disturb the political status quo, this was a risky move. Insofar as state of siege legislation was subjected to compulsory judicial review, the whole strategy was put in the hands of the Supreme Court. Facing the dilemma of choosing between Congress and the Court, the students and President Barco decided to test judicial waters. Just three days before the presidential election of May 1990, the Court validated the official count of ballots in favor of the Constitutional Assembly. The idea of law as public reason powerfully shines in the language of the opinion. In a narrative that somewhat replicates the allegory of darkness and light in García Márquez's version of the *masacre de las bananeras* in *One Hundred Years of Solitude*, the Supreme Court —led by the "public and notorious fact" of "popular clamor" claiming institutional reform— contrasts the darkness of Colombia's current "unimaginable" violence with the bright possibility of institutional reform by legal means

(SCJC, 1990, p. 15). In spite of this auspicious language, the litmus test for the strategy had yet to come.

The third and final stage of the strategy was the call to Colombians to effectively vote for the National Constitutional Assembly and elect its members. Again, this was performed by President Barco's government through state of siege powers: On December 9, 1990, citizens had to vote for a constitutional assembly that would amend the 1886 Constitution according to a list of topics and select the candidate of their preference as member of the Assembly. On October 9, 1990, the Supreme Court of Justice validated this piece of legislation in a watershed decision that went beyond the expectations of all those who believed that peace in Colombia decisively depended on the possibility to radically amend the 1886 Constitution. Indeed, nobody imagined that the Court, in an opinion relating to the use of presidential exceptional powers, would go as far as it did in reclaiming the transformative power of the values of democracy and law as public reason.

The revolutionary character of this decision lies in how it links the idea of law as public reason to the role constitutions are called to perform in fractured and violent societies.[11] For the Supreme Court, constitutions not only exist to limit the power of state authorities, but, in current times, they have the more prominent function of "integrating various social groups and reconciling opposing interests in search of what has been called constitutional consensus, which becomes the fundamental premise for the restoration of public order, social harmony, citizen coexistence, and peace" (SCJC, 1990a, pp. 61-62). Constitutions thus become legal and political spaces for articulating social differences in search for peace as the ultimate social, political, legal, and institutional goal (Restrepo, 2017, pp. 401-403). Through the narrative of peace that is the backbone of this opinion, the Court definitely abandoned its inveterate practice of allowing executive liberty-restricting behavior. The state of siege as the very instrument that for more than sixty years was used to allow human rights abuses was turned upside down and put to the service of reaching peace through democratic legal transformation. A door was opened to the discourses of hope and positive social transformation through constitutional reform and ad-

[11] I have more fully developed these ideas in Restrepo, 2017.

judication that characterized the debates of the National Constitutional Assembly and set the general tone of the social, legal and political regime imagined by the 1991 Constitution (see Lemaitre, 2009 and 2011).

IV. Conclusion

In *A War Like No Other*, Owen Fiss laments the loss of the ideals of law as public reason under the pragmatic needs of the war on terror. In this essay, I have tried to provide a counter-narrative to Fiss's worries. Just as state authoritarianism and law as public reason oscillate in the allegory of darkness and light of Gabriel García Márquez's version of the 1928 *masacre de las bananeras* in *One Hundred Years of Solitude*, the constitutional history of executive exceptional powers in Colombia teaches us that law as public reason can be regained when it is most unexpected, at the darkest hours of sheer lethal violence. This history will hopefully comfort Fiss by showing him that law as public reason always reappears as light out of darkness.

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The Prism of War and the Creation of a New Normal

Marcelo Ferrante

Let me start with a confession. I first met Owen Fiss on a Summer afternoon in the year 2000. I had just arrived in New Haven for what would be two and a half intense years there. Our common friend Roberto Gargarella — who was staying with me — would go for a coffee with Owen and asked me to join them. We had that coffee at the Law School's faculty lounge. Owen was fatherly kind. At some point he asked me for my research interests, and I told him about the theoretical issues of criminal responsibility that worried me at that time and the general philosophical discussions I thought relevant for dealing with those issues. In that conversation I asked Owen for advise on the courses I should take at Yale as an LLM and doctoral student. Owen didn't hesitate: take my first year course on civil procedure, he said. I was perplexed. First year civil procedure? Why? Why should I take a first year course on civil procedure when I came to research and write on the conditions of blame and criminal responsibility? I took the course.

Eleven years later, in 2011, as I assumed my current role at the office of the Attorney General, the focus of my professional attention moved from legal and moral philosophy to actual constitutional adjudication in criminal cases. I realized then that my conception of constitutional adjudication had been profoundly shaped by those civil procedure classes and the conversations with Owen Fiss that followed back in the years 2000, 2001 and 2002, just before and after the events of September 11 that gave rise to the developments on which Owen writes in his book *A War Like No Other*.

When Xisca Pou invited me to today's event to comment on Owen's book I thought I wouldn't have anything interesting to say on Owen's arguments on the Constitution in times of war. After thinking and preparing

Marcelo Ferrante, Procuración General de la Nación - Universidad Torcuato di Tella. Correspondencia: Av. Figueroa Alcorta, 7350 (C1428BCW), Buenos Aires, Argentina. mferrant@utdt.edu

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my comment I confirmed that first thought. I have nothing interesting to add to Owen's ideas —I like them as they are. What I do have for sure is a deep gratitude for him as a professor, as a mentor, and as an example. That's why I'm so glad to have agreed to come and be here today.

Let me now move to the subject matter of today's discussion.

Owen's book expresses an illuminating assessment of a number of governmental decisions of the *War on Terror* that the US led after the September 11 attacks. In his analysis and critiques he advances some general ideas, which I found particularly interesting —general, I mean, in the sense that they transcend the local evaluation of the constitutionality of a few contingent policies. I'd like to highlight today two of these general ideas.

The first is what he calls the *prism of war*. As I understand it, to look at an issue —like a terrorist attack— through the prism of war is to conceive of it in such a way that calls for the permissive and unilateral response of war, rather than the restrictive and collective scheme of criminal and civil justice.

There are events that properly call for war. But the prism of war is a distorting lens. Looking through the prism of war we arrive at normative conclusions we otherwise should not endorse. The view that war against terrorist organizations, such as al-Qaeda, is justified is probably an example of such a biased judgement. Somewhat more clearly, many —if not most— of the targeted killings of members of criminal organizations are only defensible under a biased war rhetoric.

The prism of war is an attractive device. For, when war is justified —and war is indeed sometimes justified— combatants, if fighting on the just side, may permissibly do a lot of harm: destroy roads, bridges, factories; intentionally kill combatants without worrying whether they are professional or forcibly drafted soldiers, confine them in prisons or camps, and even harm and kill civilians when that's a side effect of the realization of a military objective. When you are on the just side of war, winning the war gives you justifying reasons to do things that would otherwise be wrongful and even monstrous.

So, if you want to harm someone —a nation, an organization… you name it— it's not a bad idea to be on the just side of a war against that party.

But, war is war. Even though there is a law of war, war is a domain where force, not law, prevails. So, you don't go to war if your enemy is clearly stronger than you are —there are of course exceptions to this observation: 1982 Malvinas-Falkland islands war is my personal, sad example.

Now, the morality and the law of war both indicate that just war is *defensive*: you may go to war only if that's *necessary* to prevent future harm and provided the harm the war would cause is *proportional* to the harm the war would prevent.

Particularly, retaliation or retribution for a past event is *not* a justifying reason to wage war —only *defense* is. Retribution calls for criminal justice and punishment, which involves proving your claims in open court, and a fair trial before impartial judges or jurors. Additionally, retributive responses, when legitimate —as in criminal punishment— are restricted to the guilty; though you may affect other people in order to apprehend, prosecute, judge and punish a guilty defendant, you may not permissibly injure, let alone kill innocent bystanders in your way to impose legitimate punishment, no matter how guilty your target might be.

So, if the reasons you have are reasons to express your condemnation and resentment against your enemy, for whatever deeds she might have done to you or your people, then you don't have justifying reasons to go to war —instead, you have reasons to seek retributive justice.

Here is when the prism of war comes in handy. For through the prism of war it is easy to see that your enemy is likely to attack again. The prism of war may amplify a simple truth about criminal organizations. The truth is that the very claim that there is a criminal organization entails some probability of the commission of the crimes for whose commission such an organization is organized. In other words, if your enemy is an organization which we identify in terms of its commitment to perform acts of a particular kind —say, terrorist acts against your people— the claim that such an organization exists, if true, entails some probability of future instances of acts of that kind. That might look as a threat. Now, if your last reasonable chance to thwart those likely future terrorist acts involves annihilating

the whole organization right now, then the threat of a future attack might now look like an imminent attack that might justify a preemptive strike…

Organizations, let's remember, are constituted by individuals —they are individuals linked by a more or less complex net of mutual commitments. Thus, depending on the severity and number of the crimes the organization makes likely, the prism of war may convert putative individual criminal defendants into actual war enemies.

Due to the prism of war, although your reasons for acting may be dominantly retribution or retaliation, you may shape a scenario where a preemptively defensive strike seems in point and, therefore, the justificatory rhetoric of war seems to apply. So, you don't seek judicial orders of arrest, don't press criminal charges; forget about proving them beyond any reasonable doubt, before an impartial court and all those uncomfortable practices of our criminal justice routine. You just kill the members of the organization —maybe some of them— and so, hopefully, neutralize the threat. And then, as when Osama bin Laden was killed, you could move back to your genuine, retributive motives and claim that justice has been done.

Let me be clear about this. I'm not prepared to argue here —and I'm not in fact arguing — that the so-called war against al-Qaeda and other similar terrorist organizations was indeed illegitimate and, even less, imprudent or unwise. My point is that US government could have reacted against al-Qaeda for the events of September 11 as we react against criminal organizations for the crimes they commit on our soil, that is, with the toolkit of criminal justice. Instead, it managed to present the case under the rhetoric of war and acted accordingly.

I'd like to introduce at this point the second general idea of Owen's book that I want to highlight here. It is what he calls the creation of *a new normal*. The idea is simple and compelling. At its core lies the observation that what we collectively understand that's normal today is a function of what we've done yesterday. In particular, our conception of our dignity, and of the nature, scope and strength of our rights and duties depends on our collective history. More specifically, Owen's observation is that what we intend today as an exceptional measure is likely to become tomorrow's normality.

This propensity of exceptional measures to determine subsequent normality aggravates whatever evil the practices of the *War on Terror* may have involved to those locally affected by them. Even if those practices were intended to be exceptional measures addressing exceptional circumstances they mold our conception of what we deserve, and what we owe to each other in our subsequent normal situations.

I want to advance now, on that basis, the following suggestion. There has been, in recent years, a tendency to militarize the reaction against criminal organizations, not just terrorist organizations, but also those responsible for other kinds of crimes, like drugs cartels and people-trafficking organizations —a tendency not always implemented into actual policies, but at least regularly proposed, and often seriously discussed. My suggestion is that such a tendency might have been in part the result, or its development might have been helped by the dynamics of the creation of a new normal after adopting the prism of war in the reaction against notable terrorist organizations —such as al-Qaeda.

I don't have data to substantiate this suggestion. Let me just say that it falls comfortably well within the story, which contemporary Comparative Criminal Law tells, of a persistent departure from the so called due process model of criminal justice. Let me explain this.

In the nineteen-sixties, Stanford Law Professor (and Yale graduate) Herbert Packer proposed that, when comparing existing criminal justice systems across different jurisdictions, we could find two models or pure types to which every particular case of criminal justice would partly resemble or instantiate. On one hand there is the *due process model* under which the point of the system is the reaffirmation of rights, the ideal procedure revolves around jury trials, the paradigmatic crime types are harm producing actions (like murder) and the conception of punishment is retribution. On the other hand, there is the *crime control model* under which the point of the system is the prevention of crime, the ideal procedure is plea bargaining, paradigmatic crime types are inchoate crimes (like conspiracy crimes), and punishment is conceived mainly as a measure of social engineering (bringing about a mix of deterrence and rehabilitation).

A few years ago, a colleague at the University of Toronto, Markus Dubber argued that in the American jurisdictions covered in his comparative

study there was almost no trace of the due process model. He found that the practice was highly dominated by a particular version of the crime control model that he called *the police model*. Under the police model of criminal justice the point of the criminal justice system is still the prevention of crime, the core procedure is still plea bargaining but the authority of the procedure has changed: from the prosecutor's office to the police station, for it is the detention on the street while committing a flagrant crime the ideal way in which the procedure works. The paradigmatic crime type is under this model one that facilitates the detention, and favors the delegation of authority to the police officer on the street, that is, possession crimes (possession of drugs, or firearms, or whatever). Finally the working conception of punishment is the incapacitation of the person that the authority believes will commit a harmful crime —a harmful crime, that is, *other* than the one that motivated the detention.

Studies like Dubber's indicate that in the last decades there has been a move away from the due process model of criminal justice —which, again, revolves around adversarial trials on open courts— and toward an executive way of dealing with crime in which an executive officer, acting as unilaterally as possible, picks the defendant, decides the proper response, and administers it —a move, that is to say, in favor of quick and easy answers, at least as compared to the cumbersome responses involving prosecutors, defense attorneys, jurors and courts. The police model that Dubber describes is the version of this executive policy that works relatively fine for street crime. I now want to add that the way in which US government reacted against terrorist organizations —that is, through direct military action and targeted killings— may have helped to consolidate, through the dynamics of the prism of war and the creation of a new normal, a kind of *war model* of criminal justice well suited for addressing organized crime, particularly criminal activity by international criminal organizations.

If all this is true —that is, if it is true that we are undergoing such a move, gradually abandoning the due process model of criminal justice in favor of executive, police- or war-like responses to crime— my personal reaction is that that's bad news, very bad news.

To be sure, there are reasons *favoring* that move. The as yet unanswered question is whether such reasons are of a kind that *justifies* the move.

Though I've been open to discuss them, I've found myself stubbornly reluctant to understand their justifying force. Why? Well —remember— my conception of political justice and of the value of due process rights that our constitutions capture and enforce has been shaped by that course on civil procedure that Owen Fiss taught at Yale Law School back in the year 2000.

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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,

Pau Luque, Instituto de Investigaciones Filosóficas de la UNAM. Correspondencia: Circuito Maestro Mario de la Cueva s/n, Ciudad Universitaria, Coyoacán, 04510, Ciudad de México, México. pls2001@gmail.com

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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