

# Le Silence des Agneaux: France's War Against 'Jihadist Groups' and Associated Legal Rationale

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Silence is deceitful. While France has not publicly articulated a legal framework for its war on terror, its silence should not be taken for the absence of a well-defined military strategy and corresponding legal rationale. While the geographical and temporal scope of the United States' war on terror has been highly debated from a legal point of view and led the US to develop extensive interpretations of the laws regulating the use of force, France's military strategy remains largely underexplored by lawyers. This contribution brings to light that France frames its involvement in foreign territories as part of a unique war against jihadist groups, going a step further to the US' war against "Al-Qaeda and associated forces". Because France claims to fight against terrorism in the respect of international law, but without providing its interpretation of it in detail, identifying its military strategy allows me to determine what legal interpretations such strategy implies to embrace. These interpretations are much closer to the US' than anyone would admit. The paper outlines the relevant legal standards applicable to the situations of use of force against terrorist groups and focuses on France, in an attempt to force the conversation on what it has been doing in the Sahel region, and following which legal interpretations of the norms regulating the use of force.

*“In reality, the threat persists as a mutant that changes and multiplies to spread out. (...) It seems to be annihilated in one place but it resurrects in another under a new shape. The threat is multifaceted and confused; and thus even more difficult to tackle. (...) From this, one can certainly deduce that the dynamics of violence and fear are underway, putting at stake the response of legitimate force. A new war-cycle has opened, in which we are confronted to an enemy who seeks to impose its ideology. We are not waging war against a disembodied terrorism; we are waging war against jihadist groups.”*

- Général Pierre de Villiers, May 2016<sup>1</sup>

## Introduction

Silence is deceitful. While France has not publicly articulated a legal framework for its war on terror, its silence should not be taken for the absence of a well-defined military strategy and corresponding legal rationale. While the geographical and temporal scope of the United States’ war on terror has been highly debated from a legal point of view and led the US to develop extensive interpretations of the laws regulating the use of force, France’s military strategy remains largely underexplored by lawyers. This contribution brings to light that France frames its involvement in foreign territories as part of a unique war against jihadist groups, going a step further to the US’ war against “Al-Qaeda and associated forces”. Because France claims to fight against terrorism in the respect of international law, but without providing its interpretation of it in detail, identifying its military strategy allows me to determine what legal interpretations such strategy implies to embrace. These interpretations are much closer to the US’ than anyone would admit.

Since 9/11, a series of propositions about how the laws regulating the use of force should be interpreted have been articulated to justify the targeting of members of terrorist networks wherever they are. In particular, the Obama administration crafted very robust legal narratives<sup>2</sup> exploiting legal indeterminacies to legitimize a new reality: an infinite

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<sup>1</sup> Général Pierre de Villiers, Chief of Defence, Hearing, National Assembly, May 9, 2016, <http://www.assemblee-nationale.fr/14/rap-enq/r3922-t2.asp> [translated from French]: “En réalité, la menace perdure sous les traits d’un mutant qui se transforme et se démultiplie pour se répandre. (...) On le croit éradiqué ici mais il renaît là-bas sous une forme nouvelle. La menace est protéiforme et nébuleuse ; elle n’en est que plus difficile à contrer.(...) De ces observations je crois que nous pouvons tirer une certitude : les dynamiques de la violence et de la peur sont enclenchées, mettant au défi la réponse de la force légitime. Un nouveau cycle guerrier s’est ouvert ; il nous oppose à un ennemi qui cherche à imposer son idéologie. Nous ne faisons pas la guerre à un terrorisme désincarné ; nous faisons la guerre à des groupes djihadistes.”

<sup>2</sup> Remarks of Harold Hongju Koh, Legal Adviser, U.S. Department of State Annual Meeting of the American Society of International Law, Washington, D.C., March 25, 2010 “The Obama Administration and International Law”. Justice Department White Paper May 25, 2011 “Legality of a Lethal Operation by the CIA Against a US Citizen”. Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism Harvard Law School, Cambridge, Massachusetts September 16, 2011 “Strengthening Our Security by Adhering to Our Values and Laws”. Justice Department White Paper November 8, 2011 “Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated Force”. Remarks of Eric Holder, Attorney General of the United States Northwestern University School of Law, Chicago, IL March 5, 2012. Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism Woodrow Wilson International Center for Scholars, Washington, D.C. April 30, 2012. Presidential Policy Guidance, May 22, 2013 – released only in 2016, Procedures for approving direct action against terrorist targets located outside the united states and areas of active hostilities. Remarks of President Barack Obama National Defense University, Fort McNair, Washington, D.C. May 23, 2013. Remarks of Brian J. Egan, Legal Adviser, U.S. Department of State Annual Meeting of the American Society of International Law, Washington, D.C.

war on terror in time and space. That the United States use the law as a legitimizing tool, to advance and normalize national policies, is of course not new considering its long tradition of smart power.<sup>3</sup> That states in the War on Terror propose new legal interpretations to adapt to a new context is also not a big surprise and quite acceptable: uncertainty is not only inherent but in my view also an acceptable feature of norms in any legal system that uses general classifications to regulate conduct.<sup>4</sup> However, what is more curious here with the pressures that states put on the norms regulating the use of force and how they exploit their inherent grey zones is that rules so interpreted are deprived of any constraining function. Including France in the scope of the *état des lieux* of the legal interpretations proposed by states active in the war on terror<sup>5</sup> is very

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 April 1, 2016 "International Law, Legal Diplomacy, and the Counter-ISIL Campaign". Executive Order July 1, 2016 "United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force".

<sup>3</sup> Joseph Nye, *The Future of Power*, Broché, 2011. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law, 15 March 2010), available at [www.state.gov/s/l/releases/remarks/139119.htm](http://www.state.gov/s/l/releases/remarks/139119.htm): "'smart power'—a blend of principle and pragmatism" that makes "intelligent use of all means at our disposal," including promotion of democracy, development, technology, and human rights and international law to place diplomacy at the vanguard of our foreign policy". Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law*, 1 edition (Oxford ; New York: Oxford University Press, 2006). Bernard Harcourt, *The Counterrevolution. How Our Government Went to War Against its Own Citizens*, 1 edition (Hachette; New York: Basic Books, 2018): "Still today, the use and legal regulation of torture or drone strikes by American presidents work in a similar way: they stabilize and balance American interests in such a way as to secure and steady the political regime". See Harold Koh, *The Trump Administration and International Law* (Global OUP, 2018), confirms the Obama's administration approach in line with Nye's conceptualisation of it: "The more successful, durable approach, political scientist Joseph Nye argues, is for wise nations to seek to influence the world through "smart power"—a combination of "hard" and "soft" power that gains legitimacy from espousing international law and common values. If a nation squanders its reputation for legitimacy, it devalues its greatest asset in exercising global leadership".

<sup>4</sup> Even the most famous positivist considers that "whichever device, precedent or legislation, is chosen for the communication of standards of behavior, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application in in question, prove indeterminate; they will have what has been termed and *open texture*. So far we have presented this, in the case of legislation, as a general feature or human language; uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact. Natural languages like English are when so used irreducibly open-textured. It is, however, important to appreciate why, apart from this dependence on language as it actually is, with its characteristics of open texture, we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, a fresh choice between open alternatives. Put shortly, the reason is that the necessity for such choice is thrust upon us because we are men, not gods. It is a feature of the human predicament (and so of the legislative one) that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim. If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provisions could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice. Everything could be known, and for everything, since it could be known, something could be done and specified in advance by rule. This would be a world fit for 'mechanical' jurisprudence. Plainly this world is not our world". Hart, *The Concept of Law*, pp.127-8.

<sup>5</sup> Note that it could extend beyond France and the US when looking for instance at the UK which does not explicitly embrace the idea of expansive warfare to wherever terrorist groups emerge. However, it appears from discussions on the UK's first drone strikes in Syria and their refusal to disclose information on the location of current drone operations, that the temporal and spatial limitation of their war on terror might be more rhetorical/procedural (close Parliamentary scrutiny) than actually reflecting the course of operations. Besides, the UK appears explicitly closer to the US concerning the use of force in self-defense against terrorists and propose a Bethlehem style transformation of the right of self-defense into a paradigm that tackles threats posed by individuals carrying hostile intent rather than by imminent armed attacks. See in that regard, Letter of the UK Permanent Representative, United Kingdom Mission to the UN, to the President of the Security Council, 7 September 2015. Oral statement to Parliament, Syria: refugees and counter-terrorism – Prime Minister's statement, 7 September 2015. House of Commons, Oral evidence: The

instructive to take heed of the reach and breadth of the well-known sophisticated legal rationales crafted by the Obama administration. Concretely, it helps us understand that the United States is not alone pursuing and shaping an infinite war on terror. In this, the contribution fills a gap both in legal literature, which has not discussed French legal rationales for its war on terror; and political science scholarship which has not scrutinized parliamentary discussions (lengthy and in French) informing us on the strategic framework and scope of France's war on terror. Instead, current scholarship approaches the Sahel situation and French presence in the region from empirical, historical institutional, strategic studies, international, and defence studies perspectives,<sup>6</sup> which are all certainly very useful but also complemented by other sources and a legal perspective as the contribution will show.

France has been highly militarily active in two geographical areas against terrorist groups, in Syria and Iraq on the one hand, and in the Sahel—Mali, Niger, Mauritania, Burkina Faso and Chad—on the other hand. The Law on Military Programming for 2019–2025,<sup>7</sup> incorporating the Strategic Review on Defence and National Security—to borrow the terminology used by state officials—provides a military strategy for France's "war against jihadist groups". This paper finds that for this military strategy to be justified in a legal way, extensive interpretations of the legal frameworks regulating the use of force have to be accepted. There are three corpuses of norms potentially applicable to the extraterritorial use of force against non-state armed groups: the law regulating the conduct of hostilities (or "international humanitarian law" or *jus in bello*), the law of non-intervention (or "law on the use of force" or *jus ad bellum*) and human rights law. This

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 Work of the Attorney General, RT Hon Jeremy Wright QC, Attorney General, HC 409, Tuesday 15 September 2015. Joint Committee on Human Rights, Oral evidence: The UK Government's policy on the use of drones for targeted killing (Michael Fallon), HC 574, Wednesday 16 December 2015. House of Lords House of Commons, Joint Committee on Human Rights, The Government's policy on the use of drones for targeted killing, Second Report of Session 2015–16, 27 April 2016. Speech, Attorney General's speech at the International Institute for Strategic Studies, Attorney General discusses the modern law of self-defense at the International Institute for Strategic Studies, Published 11 January 2017. Intelligence and Security Committee of Parliament, UK Lethal Drone Strikes in Syria, 26 April 2017. See also Australian officials statements – see the public lecture on "The Right of Self-defense Against Imminent Armed Attack In International Law", delivered in April 2017 by Australian Attorney-General, Senator the Hon. George Brandis Q – and to the positions of Turkey and Russia in specific circumstances. On Turkey, see the analysis of Tom Ruys, "Quo Vadit Jus ad Bellum?: A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq", 9 *Melbourne Journal of International Law*, 334, 338, 342, 353 (2008). On Russia, see Permanent Representative of Georgia to the United Nations, Letter dated Sept. 13, 2002 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General transmitting a statement by Russian Federation President V. V. Putin dated Sept. 12, 2002, U.N. Doc. A/57/409–S/2002/1035, Annex (Sept. 16, 2002).

<sup>6</sup> For a variety of approaches, see: Tony Chafer, Gordon Cumming and Roel van der Velde, "France's interventions in Mali and the Sahel: A historical institutionalist perspective", *Journal of Strategic Studies*, 16 March 2020. Abdelhak Bassou, Ihssane Guennoun, "Le Sahel Face aux Tendances Al-Qaeda et Daech : Quel Dénouement Possible ? / Al-Qaeda vs. Daech in the Sahel: What to Expect?", *AfricaPortal*, January 2017, <https://www.africaportal.org/publications/le-sahel-face-aux-tendances-al-qaeda-et-daech-quel-d%C3%A9nouement-possible-al-qaeda-vs-daech-in-the-sahel-what-to-expect/>. Christopher Griffin, "Operation Barkhane and Boko Haram: French Counterterrorism and Military Cooperation in the Sahel", (2016) *Small Wars & Insurgencies*, Vol 27, Issue 5: Jihadist Insurgent Movements. Nicolas Desgrais, "La Force conjointe du G5 Sahel ou l'émergence d'une architecture de défense collective propre au Sahel", (2018) *Les Champs de Mars* 1, n°30, pp. 211-220. Isaac Kfir, "Organized Criminal-Terrorist Groups in the Sahel: How Counterterrorism and Counterinsurgency Approaches Ignore the Roots of the Problem", (2018) *International Studies Perspectives*, Volume 19, Issue 4, pp. 344–359. Fiona Schnell, "Pour une approche longitudinale de la lutte antiterroriste au Sahel", 2018 *Les Champs de Mars*, 1, n°39, pp. 221-229. Méryl Demuyck and Julie Coleman, "The Shifting Sands of the Sahel's Terrorism Landscape" *ICCT Journal*, 12 March 2020, <https://icct.nl/publication/the-shifting-sands-of-the-sahels-terrorism-landscape/>.

<sup>7</sup> Statute reference is : Loi n° 2018-607 du 13 juillet 2018 relative à la programmation militaire pour les années 2019 à 2025 et portant diverses dispositions intéressant la défense, <https://www.legifrance.gouv.fr/eli/loi/2018/7/13/ARMX1800503L/jo/texte>.

paper focuses on the contentious points of French *ad bellum* and *in bello* interpretation—all of which derive from the fact that the French military make no distinction between the various terrorist groups being fought (or that will be fought). Instead, the government establishes a general strategy for what seems to be a single “war against jihadist groups”.

A question which will be of particular concern for the lawyer reading this piece is whether, in a context where transparency on the interpretation of the law is lacking, it is nonetheless possible to formulate hypotheses on the French interpretation of the laws regulating the use of force. A follow-up to this question, which will be answered positively, is what do these interpretations practically entail for the nature and scope of the war that is being fought?

This investigation requires some indications on the sources and methods used. First, concerning the sources, I follow the construction process of the French counter-terrorism military strategy by scrutinizing declarations of state officials in French Parliament and official documents. More specifically, as summed up in the annexed table for clarity purposes,<sup>8</sup> I analyse (i) laws proposed by the government, (ii) the last two Strategic Defence Reviews (that of 2013, prior to the series of Paris attacks starting in January 2015, still called “White Paper on Defense”, and that of 2017, then called “Strategic Defence Review”) (iii) Parliamentary investigations, (iv) Parliamentary debates on laws proposed by the government, (v) official speeches pronounced by members of the executive both to the Parliament and elsewhere. I sometimes use interviews of government officials to corroborate the analysis made of official documents and statements. I should emphasise already that I make great use of the discussions related to the law on military programming for 2019-2025 that was adopted on July 13, 2018,<sup>9</sup> five months after an expedited legislative procedure was initiated by the Macron Government. On June 28, 2018, this legislative proposal and annexed report overwhelmingly passed in the Parliament, with a vote of 326 against 14. The reason why this law—and related parliamentary discussions—is particularly helpful is that it defines the budgetary framework for the development of the strategic goals contained in the 2017 Strategic Review on Defence and National Security<sup>10</sup> that preceded and shaped the adopted law, and includes the defence policy guidelines in a very informative report annexed to the proposed law.<sup>11</sup> The parliamentary discussions were held to discuss and ultimately adopt both the law and its annexed report.<sup>12</sup>

Regarding the method, as I will develop further in a preliminary section, I propose a method according to which when states are silent or vague on the international scene about their counter-terrorism strategy and understanding of the relevant legal norms, national parliamentary processes are key to unlocking international law-making processes that silence seems to freeze. If these sources cannot be used to provide

<sup>8</sup> Annex, “Main Sources”, p.34.

<sup>9</sup> Loi n° 2018-607 du 13 juillet 2018 relative à la programmation militaire pour les années 2019 à 2025 et portant diverses dispositions intéressant la défense, <https://www.legifrance.gouv.fr/eli/loi/2018/7/13/ARMX1800503L/jo/texte>.

<sup>10</sup> Strategic Review, Revue stratégique de défense et de sécurité nationale, 2017, <https://www.defense.gouv.fr/dgris/presentation/evenements/revue-strategique-de-defense-et-de-securite-nationale-2017>.

<sup>11</sup> Annexed Report to the Law on Military Programming (it should be noted that it also has legislative value), *Rapport annexé*, (appears at the end of the legislation), <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037192797&dateTexte=20181122>.

<sup>12</sup> Article 2, *Loi n° 2018-607 du 13 juillet 2018 relative à la programmation militaire pour les années 2019 à 2025 et portant diverses dispositions intéressant la défense*, <https://www.legifrance.gouv.fr/eli/loi/2018/7/13/ARMX1800503L/jo/texte#JORFARTI000037192814>.

definite conclusions on the silent state’s interpretation of the laws regulating the use of force, they help formulate solid hypotheses on the matter. The paper finds that, just as their allies, France seems to exploit legal uncertainties in favour of extensive interpretations of the norms and corresponding extensive practices. A map of the relevant legal concepts and their evolution will be drawn in a preliminary section, where I will also explain the challenges posed by state silence and how I propose to address it using the French case. Against this background, the findings of this paper consist of a series of hypotheses which can be summed up as follows: French parliamentary processes display a military strategy and legal interpretations which are much closer to the UK’s and even to the US’ counter-terrorism legal narratives than anyone would admit.

First, regarding the laws on the use of force, also referred to as *jus ad bellum*, the paper finds in Section 1 that France seems to support an extensive version of the right of self-defense according to which it can emerge from an analysis of past events revealing a continuing threat and the propensity of group members to maintain this posture of hostility. Second, concerning the legal framework on the conduct of hostilities, or *jus in bello*, Section 2 shows that France seems to consider that an armed conflict can take place transnationally and follow its participants wherever they are; that conflicts end only when there is no reasonable risk of resumption of hostilities; and that the non-state enemy group—referred to in the Geneva Conventions as the “organized armed groups”—can extend to any affiliated forces of the group. It is up to French governmental officials to specify or rectify these hypotheses on the way they frame their war on terror, which I urge them to do in a conclusive part.

## Legal frameworks regulating the use of force against terrorists

### I. International Legal Processes, Grey Areas, and State Silence

As mentioned in introduction, grey areas and uncertainties are inherent to legal norms. Just as it is banally human to ignore what the future holds, it is normal that behaviours are regulated according to general standards only. Such standards will then have to be applied to particular cases that were not and could not be envisaged.<sup>13</sup> In order to take place, this application involves that the relevant actors of a system—in the international legal order, these actors are more often states than judges—interpret the general standard. For a while, such interpretation can remain constant and submitted to limited controversies, and this as long as the circumstances stay the same. During this period of time, the norm might therefore appear clear and certain. Yet, when circumstances

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<sup>13</sup> While this feature of the law is commonly attributed to legal realism or critical legal studies (see Jean D’Aspremont, *Formalism and the Sources of International Law* (OUP, 2011) p.138: “Legal realism had long ago proved that law is beset by indeterminacy and that its language is insufficient to provide a determinate answer to problems which it is purported to apply to, thereby endowing law-applying authorities with a leeway that allows them to make decisions according to their understanding of justice”), even famous legal positivists asserted the indeterminate nature of the law (see Hart, *The Concept of Law*, *op.cit.*. Hart wrote entire chapters respectively on discussing the open-textured feature of law, the inevitability of exercising discretion for applying the law and on the rule-creating powers of judges. In the same vein, Kelsen highlighted that all law is partly determinate and partly indeterminate, and that law application involves a cognitive and a willful act. In a similar line, Raz notes that legal authorities do not necessarily and always apply the law of a given system / legally valid rules).

change, the norm's inherent grey areas and indeterminacies—which had remained invisible for a while—will be salient again and trigger discussions about the necessity and benefits of formulating a new interpretation. In such circumstances, legal uncertainty will lead to (reasonable) disagreement and some plausible arguments will be formulated in support of each interpretative theory. What often prevents the legal debate from being fruitful in these cases is when its participants do not accept that there is more than one possible interpretation of the norms—and that additional reasons in support of a given interpretative theory must be mobilised.

Legal uncertainties, if inherent to any legal system, might be even more salient in international law, for some of its most important sources, rules of customary international law, are not inserted in treaties but developed through state practice and *opinio juris*.<sup>14</sup> As there is no formal custom-identification standards and mechanisms, the identification of such rules depends on the observation of factual elements that can be analysed in different ways depending on the actors engaging in the process of international law-making (and depending on their own interests).<sup>15</sup> This specificity interests us for two reasons. First, because both norms on the use of force (*jus ad bellum*) and norms regulating the conduct of hostilities (*jus in bello*) that will be at the heart of the following developments include such customary rules. The *jus ad bellum* for instance is a set of standards on the use of force deriving from the United Nations Charter and completed or adapted by customary international law (CIL).<sup>16</sup> The *jus in bello* regulates the conduct of hostilities on the basis of the Geneva Conventions of 1949 and Additional Protocols, also refined and adapted by rules of customary international humanitarian law. In addition to being inherent to legal systems, this source of international law further explains the fluidity of norms interpretation in this field. Therefore, the reader should keep in mind when reading the developments of Sections 1 and 2 that the legal developments that France's war on terror implies are not a matter of France bluntly violating the law regulating the use of force. Rather, it is about exploiting legal uncertainties and grey areas that were always part of the norms; in some cases to such an extent that norms so interpreted lose all constraining function and normalize infinite warfare.

Second, in a context where France actively conducts an active war on terror without making its interpretation of the norms explicit, the non-formal process of norms creation in international law matter. The fact that customary norms derive not only from state practice but also from *opinio juris*,<sup>17</sup> defined as the acceptance of a given interpretation as law, makes state silence challenging. The debate over how state silence can be interpreted to understand the extent to which a uniform practice (1<sup>st</sup> characteristic of CIL) has been accepted as law (2<sup>nd</sup> characteristic of CIL) has long occupied legal scholars.<sup>18</sup>

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<sup>14</sup> ICJ, *Military and Paramilitary Activities in and Against Nicaragua v. U.S.*, Judgment, 1986 I.C.J. Rep. 14 § 207 (“[F]or a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice’, but they must be accompanied by the *opinio juris sive necessitatis*”).

<sup>15</sup> Oscar Schachter, “New Custom: Power, *Opinio Juris*, and Contrary Practice” in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21<sup>st</sup> Century, Essays in Honour of Krzysztof Skubiszewski* 531-540 (1996), p.533: “We would laugh at a notice that read “this custom will take effect tomorrow.” For much the same reason, it seems anomalous to speak of a “demand” for new customary law. We are expected to recognize custom only after it has come into existence through the accretion of acts that are perceived *ex post facto* as the basis of a new legal rule or principle”.

<sup>16</sup> Monica Hakimi, “The Jus Ad Bellum’s Regulatory Form”, (2018) *The American Journal of International Law* 112 (2), p.160.

<sup>17</sup> ICJ Statute, Article 38(1)(b).

<sup>18</sup> I.C. MacGibbon, “The Scope of Acquiescence in International Law”, (1954) *British Year Book of International Law*, 31, p. 143-186.

Some have found in silence the sign of acquiescence, that is tacit or passive consent,<sup>19</sup> while others have considered that consent can never be derived from silence.<sup>20</sup> Between these two extremes, there is the point of view that silence can be interpreted and understood as acquiescence under certain circumstances. The ICJ has for instance distinguished between “a silence when something ought to have been said and “a mere failure to mention a matter at a particular point in somewhat desultory diplomatic exchanges”, making these instances respectively legally relevant and irrelevant.<sup>21</sup> It is in my opinion plausible to say that except in situations where the silent state is directly concerned by a legal issue (such as personal interest in a territorial dispute, but also more remotely when concerning a practice that a silent state adopts), it is vain to try and guess what opinion lies behind its reserve.

However, I will not delve into these discussions as it is not my objective to develop an interpretative theory of state silence in this contribution. Nonetheless, I propose and apply a method to alleviate the problem posed by state silence. I suggest that even in cases where a given state’s interests are at stake, the interpretation of state silence is a precarious exercise that should be systematically preceded by an investigation of official documents and statements formulated at the domestic level, one that has been underexplored by international lawyers. To date, for instance, even though France has actively deployed troops both in the Middle East and in the Sahel and intensified its military operations against jihadist groups since 2015, the present analysis of parliamentary discussions and new legislation adopted at the domestic level is to my knowledge the first. Such a preliminary investigation will help us to identify documents that shed light on the interpretation of the relevant legal norms. The expectation here is that very often the state, though apparently silent, is really mute only at the international level. My hypothesis is that this will in fact always be the case when states’ constitutional architecture involves a system of separation of powers (regardless of the specific nature of the constitutional regime—be it parliamentary, presidential or semi-presidential) as long as legislation proposals or executive actions are discussed in parliament or at least the object of reporting obligations at some point.

## II. Jus ad Bellum

There are several options for a state to justify the use of force on another state’s territory. The extraterritorial use of force, *a priori* in violation of the prohibition to use force (cornerstone principle of the United Nations Charter),<sup>22</sup> must be grounded on one of these exceptions to be legal. These three options are traditionally referred to as (i) Security Council authorization, (ii) state consent and (iii) right of self-defense.<sup>23</sup> While the two first exceptions to the prohibition to use force are pretty straightforward—either the Security Council or state on whose territory force will be used authorize such action—the conditions of existence of a right to self-defense are debated. This is mainly because Article 51 of the UN Charter provides that the right of self-defense emerges “if

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<sup>19</sup> Paul Fauchille, *Traité de droit international public*, (8th ed., 1925), vol. i, part 2, p. 382. Secretariat Memorandum on the Régime of the High Seas (14 July 1950), United Nations (General Assembly) Doc. A/CN.4/32, p. 60.

<sup>20</sup> Fisheries case, Pleadings, vol. iv, p. 605.

<sup>21</sup> ICJ, 1989, *Eletronica Sicula S.p.A.*, para 15).

<sup>22</sup> Article 2(4) of the United Nations Charter, 26 June 1945, entered into force on 24 October 1945.

<sup>23</sup> I decided to leave aside, for purpose of clarity, the discussions on whether to consider state consent as an actual exception to the principle of territorial integrity. The controversy derives from the fact that sovereignty cannot really be considered as violated if the host state validates or even requests intervention. In any event, this scenario remains one of extraterritorial use of force, and thus an exception to the principle of prohibition to use force on another state’s territory.



an armed attack occurs against a Member of the United Nations” does not further spell out the conditions of emergence of such right. I will try to provide a brief account of how their interpretation has evolved without going too much into details, as I have done it elsewhere.<sup>24</sup>

### *Ratione personae* limitation: Who Perpetrates the Armed Attack?

Although initially understood as limited to attacks perpetrated by states, it is now widely accepted that force can be used in self-defense against non-state armed attacks under certain conditions.<sup>25</sup> To that end, a link of attribution has to be established; that is, a certain level of involvement of the state on whose territory the litigious armed attack is perpetrated by non-state actors (generally called the “host state” or “territorial state”). The discussion concerning this criterion of the right of self-defense intends to establish what level of involvement from the part of the host state is required.<sup>26</sup> I cannot go through these discussions and all relevant case law of the International Court of Justice (ICJ) here, and it has been done with great care elsewhere.<sup>27</sup> To put it simply, the ICJ first established that for the conduct of irregular forces to be attributable to a state, that state has to exercise “effective control [over] the military or paramilitary operations” that are carried out against another state.<sup>28</sup> In a series of ulterior cases, the ICJ referred to its Nicaragua decision,<sup>29</sup> and maintained a requirement for a close link of attribution between the host state and the non-state armed attack.<sup>30</sup> However, the notion of

<sup>24</sup> The following developments on the right of self-defense are a condensed and reformulated version of an analysis of some basic materials (mainly case law) provided in Rebecca Mignot-Mahdavi, “Drone Programs, The Individualization of War and the Ad Bellum Principle of Proportionality”, forthcoming in Claus Kress & Robert Lawless (eds.), *Lieber Series* Vol. 4 (OUP, 2020), <https://ssrn.com/abstract=3504779>. The analysis, however, does not serve to build the same argument here and there.

<sup>25</sup> While the use of force against territorial integrity or political independence of other states is expressly mentioned, Article 2(4) does not indicate that territorial integrity is considered to be threatened only when the menace comes from state actors. As such, Article 3 can be considered as banning “any use of inter-State force by Member States for whatever reason [...] unless explicitly allowed by the Charter”. In support of this view, the UN General Assembly Resolution of the 2005 World Summit Outcome reiterated “the obligation of all Member States to refrain in their international relations from the threat or use of force in any manner inconsistent with the Charter” and reaffirmed that the purposes and principles guiding the United Nations are, *inter alia*, “to maintain international peace and security, to develop friendly relations among nations”.

<sup>26</sup> Claus Kreß, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater* (Duncker & Humblot, Berlin 1995). Yoram Dinstein, *War, Aggression and Self-Defense* (CUP, Cambridge, 1988).

<sup>27</sup> Claus Kreß, “The International Court of Justice and the ‘Principle of Non-Use of Force’”, in Marc Weller, *The Oxford Handbook of the Use of Force in International Law* (2015), OUP, pp.561-604.

<sup>28</sup> ICJ, ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14. s., at paras 109 and 115; as well as para. 17 of Judge Ago’s separate opinion.

<sup>29</sup> See for instance ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43 s., para 391.

<sup>30</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136, para 139. In this 2004 Wall Advisory Opinion, the Court reaffirmed that Article 51 applied only to “an armed attack by one State against another State”. Because there was no state to whom the discussed non-state actions could be attributed (Israel being the occupying power) Article 51 was deemed inapplicable. See also Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, I.C.J. Reports 2005, p. 168., para. 146: “The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC”. In this case, the ICJ reaffirmed the necessity to attribute the acts perpetrated by non-state actors, which on another note could not be considered as constituting armed attacks in that case, to a State. Finally, see ICJ, *Genocide* judgement, *op.cit.*, para 392. In the same vein, the Court defined the link of attribution as “acting

“effective control” used in Nicaragua was ambiguous enough to open discussions on a looser connection between the host state and the threatening non-state actors.<sup>31</sup>

Some convincing arguments in support of the departure from a more restrictive interpretation of Article 51 have been formulated, starting with the fact that this provision does not require that the armed attack be perpetrated by a state actor.<sup>32</sup> In addition, Article 51 aims at allowing states to use force when their security is endangered and as a matter of fact non-state actors have the capacity to conduct armed attacks that pose such high threat. Therefore it is not only respectful of the text but also logical to include in the scope of the right of self-defense armed attacks of non-state actors.<sup>33</sup> Finally, to the objection that the UN Charter intends to regulate interstate relations, the argument has been made that extending the right to attacks of non-state actors can remain compatible with this feature by maintaining the condition for some sort of link of attribution to be established with the host state, even a loose and indirect one.<sup>34</sup> This is what the proponents of the unwilling unable doctrine put forward: the unwillingness or inability of the host State to counter the terrorist attacks that are perpetrated from its territory is sufficient to recognize a right of self-defense.<sup>35</sup> This doctrine was set forth by states and by scholars but was never endorsed (neither was it rejected) by the ICJ, and receives increasing support since 9/11.<sup>36</sup>

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 on behalf of the state” in the Genocide case by stating the following: “Persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument.”

<sup>31</sup> Claus Kreß, “The International Court of Justice and the ‘Principle of Non-Use of Force’”, *op.cit.*, p.584: “Those requirements are, in the alternative, the complete dependence of a group of violent non-state actors on the support of the state concerned or the latter’s effective control over the specific forcible actions carried out from within such a group. The ‘harbouring’ by a state of transnationally violent non-state actors on its territory, to take one specific and recently much discussed example, would seem to fall into that grey area”.

<sup>32</sup> On this posture, see Claus Kreß, “The Fine Line Between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force against IS in Syria”, *Just Security*, February 17, 2015.. Sean Murphy, “Terrorism and the Concept of “Armed Attack” in Article 51 of the UN Charter”, 43 *HARV. INT’L L. J.* 41, 50 (2002). For a seemingly more hesitant acceptance of non-state armed attacks entering the scope of article 51, see Philip Alston, *op.cit.*, §40: Philip Alston is not drawing any conclusion on whether article 51’s armed attacks criterion includes attacks perpetrated by non-State actors. However, he underlines that “it will only be in very rare circumstances that a non-state actor whose activities do not engage the responsibility of any State will be able to conduct the kind of armed attack that would give rise to the right to use extraterritorial force”.

<sup>33</sup> Ashley Deeks, “Unwilling or Unable, Toward a Normative Framework for Extraterritorial Self-defense”, *Virginia Journal of International Law*, Vol.52:483, 2012, p.493.

<sup>34</sup> Going even further, some scholars consider that attacks committed by non-state actors without any link of attribution to the state constitute armed attacks under Article 51. Thomas M. Franck, “Terrorism and the Right of Self-Defense”, 95 *American Journal of International Law* 839, 840 (2001). Christopher Greenwood, “International Law and the Preemptive Use of Force: Afghanistan, al-Qaida, and Iraq”, 4 *San Diego International Law Journal* 7, 17 (2003). Raphaël Van Steenberghe, “Self-defense in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?”, 23 *Leiden Journal of International Law* 183, 184 (2010). Yoram Dinstein, *op.cit.*, 214.

<sup>35</sup> Ashley Deeks, “Unwilling or Unable, Toward a Normative Framework for Extraterritorial Self-Defense”, *Virginia Journal of International Law*, Vol.52:483, 2012, p.486: “More than a century of state practice suggests that it is lawful for State X, which has suffered an armed attack by an insurgent or terrorist group, to use force in State Y against that group if State Y is unwilling or unable to suppress the threat”.

<sup>36</sup> Strong normative arguments against the ‘unwilling or unable’ test are rare – see for an exception: Olivier Corten, “The ‘Unwilling or Unable’ Test: Has it Been, and Could it be, Accepted?”, *Leiden Journal of International Law*, Volume 29, Issue 3, September 2016, pp.777-799. Otherwise, see for example the Chatham House, “Principles of International Law on the Use of Force by States in Self-defense”, (2006) 55 *ICLQ* 963, point 6. Or, more recently, Nico Schrijver and Larissa van den Herik, “Leiden Policy Recommendations on Counter-terrorism and International Law”, Universiteit Leiden, 1 April 2010, [http://www.iipsl-cologne.com/fileadmin/sites/iipsl/Forschung/Anlagen/III\\_1.pdf](http://www.iipsl-cologne.com/fileadmin/sites/iipsl/Forschung/Anlagen/III_1.pdf). See for support of the doctrine: “Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism

## *Ratione Materiae* Limitation: The Armed Attack Requirement and the Accumulation Doctrine

The traditional interpretation of the *ratione materiae* limitation entails that in order to give rise to a right of self-defense, the attack must be an armed attack that presents a certain degree of gravity.<sup>37</sup> A more flexible interpretation derives from the accumulation of events doctrine as discussed by the litigants in the DRC–Uganda<sup>38</sup> and Oil Platforms<sup>39</sup> cases which provides that instead of necessarily having to identify one grave armed attack, the armed attack criterion is also fulfilled by the existence of “*a series of minor incidents, taken together, [which] can be said to reach the threshold of an armed attack*”.<sup>40</sup> The doctrine admits the use of force in self-defense both against an attack of a certain gravity and less grave uses of force which amount to an armed attack when forming part of a chain of events.<sup>41</sup> In addition to the many occasions where States invoked the accumulation of events theory,<sup>42</sup> the ICJ did not expressly reject it, and can even be considered as having implicitly followed the argument of the US that the attacks should be considered together.<sup>43</sup>

More recently, the UN Security Council, in its Resolution 2249 (2015), includes what appears as an extensive version of the accumulation of events doctrine. It condemns:

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Operations Outside the United States and Areas of Active Hostilities”, May 23, 2013, (URL: <https://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>). The US interpretation of *ratione personae* criterion as only requiring “an assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons. But also, UN special rapporteurs, such as Philip Alston, recognize a right to self-defense when “the second State is unwilling or unable to stop armed attacks against the first State launched from its territory”. Philip Alston, “Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions”, 28 May 2010, United Nations Human Rights Council, A/HRC/14/24/Add.6, para. 1. See also Rebecca Mignot-Mahdavi, “Drone Programs, The Individualization of War and the Ad Bellum Principle of Proportionality”, forthcoming in Claus Kress & Robert Lawless (eds.), *Lieber Series* Vol. 4 (OUP, 2020), <https://ssrn.com/abstract=3504779>.

<sup>37</sup> ICJ, *Military and Paramilitary activities*, 101, para 191; *Oil Platforms*, ICJ Rep (2003), paras 51 and 64.

<sup>38</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, I.C.J. Reports 2005, p. 168.

<sup>39</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, I.C.J. Reports 2003, p. 161.

<sup>40</sup> Christian J. Tams, “The Use of Force against Terrorists”, *The European Journal of International Law*, Vol.20, n°2, 2009, p. 388. *Oil Platforms Case*, *op.cit.*, para. 64: “On the hypothesis that all the incidents complained of are to be attributed to Iran, and thus setting aside the question, examined above, of attribution to Iran of the specific attack on the Sea Isle City, the question is whether that attack, either in itself or in combination with the rest of the “series of . . . attacks” cited by the United States can be categorized as an “armed attack” on the United States justifying self-defense”.

<sup>41</sup> Tom Ruys, *Armed Attack and Article 51 of the UN Charter, Evolutions in Customary Law and Practice*, Cambridge University Press, 2010, p.168.

<sup>42</sup> See for e.g., UN Doc. S/PV.749, 30 October 1956, §33-39 (Israel); UN Doc. S/PV.749, 30 October 1956, §§154-173 (France); UN Doc. S/PV.749, 30 October 1956, §37 (Australia); UN Doc. S/PV.1106, 2 April 1964, §§39-48 (UK); UN Doc. S/PV.1111, 9 April 1964, §5 (US), §11 (Republic of China). For further example and deeper analysis, see Tom Ruys, *Armed Attack and Article 51 of the UN Charter, Evolutions in Customary Law and Practice*, Cambridge University Press, 2010.

<sup>43</sup> In the *Oil Platforms case*, *op.cit.*, even if the ICJ does not conclude that the incidents it analyses constitute an armed attack, the Judges were ready to “take them cumulatively” to conduct the qualification, paras. 46 to 64. See for concurring view and more detailed analysis, Claus Kreß, “The International Court of Justice and the ‘Principle of Non-Use of Force’”, in Marc Weller, *The Oxford Handbook of the Use of Force in International Law* (2015), OUP, pp.582: “The question would lose some practical significance were the ICJ to finally endorse, as it seemed inclined to do in the *Oil Platforms case* as well as in the *Armed Activities case*, some form of accumulation of events doctrine for the purpose of measuring gravity in cases of a series of attacks”. Christian J. Tams, “The Use of Force against Terrorists”, *op.cit.*, 388.

“the horrifying terrorist attacks perpetrated by ISIL also known as Da’esh which took place on 26 June 2015 in Sousse, on 10 October 2015 in Ankara, on 31 October 2015 over Sinai, on 12 November 2015 in Beirut and on 13 November 2015 in Paris, and all other attacks perpetrated by ISIL also known as Da’esh, including hostage-taking and killing, and notes it has the capability and intention to carry out further attacks and regards all such acts of terrorism as a threat to peace and security”.<sup>44</sup>

If this definition of “threat” is endorsed as a way of framing the armed attack requirement and the accumulation doctrine in self-defense, an additional step would be taken in the extension of this right. Indeed, it would mean that the threat can be assessed based on past events revealing a continuing threat, and the propensity of individual groups members to maintain hostile intent.

### *Ratione Temporis* Limitation: Addressing Continuing Imminent Threats

Different interpretations of the temporal limitation of self-defense have been formulated. On the one hand, a strict interpretation of the right could be referred to as responsive self-defense, which describes the use of force in response to an armed attack that may be completed or may still be ongoing but exists in reality.<sup>45</sup> On the other hand, “anticipatory” self-defense is a more flexible version of the right which can itself include two temporal versions of self-defense, that is pre-emptive and preventive self-defense.<sup>46</sup> Pre-emptive self-defense refers to the use of force against an attack that has not occurred yet, but which is imminent.<sup>47</sup> Preventive self-defense covers the use of force that seeks to anticipate potential future attacks, while no observable fact of reality indicates such attacks will occur, except the dangerousness of an individual.

The legality of pre-emptive self-defense is already controversial as it implies to agree on what we understand as imminence.<sup>48</sup> Preventive self-defense is even more controversial as it entails to widen the temporal scope of the right of self-defense further. However, some scholars who reject preventive self-defense might simultaneously embrace the most recent and flexible proposition formulated about the *ratione materiae* condition of self-defense mentioned above. Yet, accepting the accumulation of events doctrine without carefully defining it, or expressly endorsing the backward looking version of the accumulation of events doctrine inevitably entails a temporal modification of the right in comparison to a “responsive” version of self-defense.<sup>49</sup> This version of the right

<sup>44</sup> UN Security Council Resolution 2249 (2015), Adopted by the Security Council at its 7565th meeting, on 20 November 2015, S/RES/2249(2015).

<sup>45</sup> Tom Ruys, *op.cit.*, p.253.

<sup>46</sup> *Idem.*

<sup>47</sup> Defined in the Caroline case as the scenario where the threat is ‘instant, overwhelming, leaving no choice of means and no moment for deliberation’ – for an explanation of the *Caroline* incident, see Matthew Allen Fitzgerald, “Note, Seizing Weapons of Mass Destruction from Foreign-Flagged Ships on the High Seas under Article 51 of the UN Charter”, 49 VA. J. INT’L L. 473, 477–79 (2009). Ashley Deeks, “Unwilling or Unable, Toward a Normative Framework for Extraterritorial Self-defense”, 2012, p.502.

<sup>48</sup> Claus Kreß, “Extraterritorial Targeted Killings of non-State Actors by States in Response to Transnational non-State Violence”, in Robert Schuman Centre for Advanced Studies Policy Papers, 2013/17, Global Governance Programme, *Targeted Killing, Unmanned Aerial Vehicles and EU Policy*, (contributions of Nehal Bhuta, Claus Kreß, Ian Seiderman, Christof Heyns, Nils Melzer, Martin Scheinin, Eyal Benvenisti, Anthony Dworkin), p.4, para. 8; For a detailed view that Article 51 only includes one form of self-defense, namely in response to an armed attack, see Yoram Dinstein, *War, Aggression and Self-defense*, Cambridge University Press, 2011, 5<sup>th</sup> Edition, p.67; and Christine Gray, *International Law and the Use of Force*, Oxford University Press, July 2008, 3rd Edition, 480 p. Christian J. Tams, *op.cit.*, p.389.

<sup>49</sup> Christian Tams, *op.cit.*, *EJIL* 20 (2009), 359 – 397, p.390. Rebecca Mignot-Mahdavi, “Drone Programs, The Individualization of War and the Ad Bellum Principle of Proportionality”, *op.cit.*

creates the risk of an infinite time frame during which the right of self-defense may be exercised once a non-state armed attack was committed.<sup>50</sup>

### *Ratione Conditionis* Limitation: Proportionality to the Threat Posed by an Attack vs. by a Terrorist Group or Network

Even though the conditions of proportionality and necessity are not expressly mentioned in Article 51 of the UN Charter, their existence under customary law has constantly been reinstated by the ICJ.<sup>51</sup> Traditionally, the principle of necessity requires that the state attacked or threatened must not have had any means of halting the attack other than recourse to the armed force. The principle of proportionality demands that the state halts the attack with the amount of force it requires (not more). Both principles traditionally revolve around the armed attack.<sup>52</sup> Now, as I have shown elsewhere and without going into too much details, the above-mentioned propositions to change the temporal and material criteria of self-defense cannot but transform what is meant by proportionality and necessity. Indeed, the traditional interpretation of the tests are de facto impossible to conduct if no armed attack is identified. Nonetheless, references to these principles are maintained which means that something else is understood by proportionality and necessity: in fact, when the material and temporal conditions of the right of self-defense are extensively interpreted, the scope and intensity of the use of force tend to be compared with the general threat posed by a transnational terrorist group or network.<sup>53</sup>

## III. Jus in Bello

Two key features of armed conflicts, their geographical and temporal scopes, are at the heart of current discussions related to the war on terror. I will try to help the reader capture the reasons for scholarly tensions on these questions. To start with, the reader should have in mind that there is no unitary concept of armed conflict: the Geneva Conventions recognize two types of armed conflicts that are distinguished according to the status of the parties.<sup>54</sup> As such, an interstate conflict qualifies as an international armed conflict (IAC), while a conflict between a state and a non-state actor qualifies as a non-international armed conflict (NIAC). Traditionally, the distinction between the two types of armed conflicts informally corresponded to a territorial characteristic. On the one hand, an interstate conflict—an IAC—was considered as involving border crossing. On the other hand, a conflict between a state and a non-state actor—an NIAC—was presumed to be confined to one state's territory. Therefore, international humanitarian law (IHL) would apply in the whole territory of the warring parties or, in the case of NIAC, the whole territory under the control of a party to the conflict.<sup>55</sup>

<sup>50</sup> Marc Weller, "Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self Defence Against Designated Terrorist Groups", November 25, 2015, *EJIL: Talk!*, (URL: <http://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defense-against-designated-terrorist-groups/>).

<sup>51</sup> ICJ, Judgment of 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua*, (Nicaragua v. United States), merits, para. 194. ICJ, 6 November 2003, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, para. 73- 77.

<sup>52</sup> ICJ, *Uganda v. DRC*.

<sup>53</sup> Rebecca Mignot-Mahdavi, "Drone Programs, The Individualization of War and the Ad Bellum Principle of Proportionality", *op.cit.*

<sup>54</sup> Common Article 2, Geneva Conventions.

<sup>55</sup> ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, para. 57, available at: [www.icty.org/x/cases/kunarac/acjug/en/kun-](http://www.icty.org/x/cases/kunarac/acjug/en/kun-)

However, the *jus in bello* was never designed to confine armed conflicts territorially and in principle applies irrespective of the parties' geographical location. Hence, the coincidence of the two legal categories with a geographical distinction existed as a matter of fact and not as a matter of law. Indeed, in the absence of express territorial limitation in the law, the *jus in bello* applies "wherever belligerent confrontations occur, including international air space, the high seas, cyberspace and, indeed, the territory of third States, whether hostile, cobelligerent, occupied, or neutral. What is decisive is not where hostile acts occur but whether, by their nexus to an armed conflict, they actually do represent "acts of war"."<sup>56</sup> Although i) a territorialized legal reasoning originally framed the *jus in bello* and ii) the two types of armed conflicts established by contemporary IHL used to implicitly correspond to two distinct geographical realities, it is in my view hard to deny that there are no geographical criteria in the *jus in bello* to delimit armed conflicts; but many scholars have tried to argue in this direction to limit the geographical scope of the war on terror.

In addition to the geography of war, the question of the temporal scope of application of IHL is one of the most unsettled issue of the field, while it may be the most problematic in the context of contemporary endless wars as I analysed at length elsewhere.<sup>57</sup> 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 and the Geneva Conventions and Additional Protocols do not contain express provisions concerning the termination of NIACs. The exploitation of this legal grey area can lead to potentially infinite conflicts.

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 the Geneva Conventions and Additional Protocol II, from their *travaux préparatoires* but also from case decisions, such as the cornerstone decision *Prosecutor v. Dusko Tadic* of October 2, 1995.<sup>58</sup> Dustin Lewis, Gabriella Blum and Naz Modirzadeh conducted an in-depth analysis of the question in 2017 and define these four alternatives as follows:

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

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 aj020612e.pdf. Jelena Pejic, 'Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications', *International Review of the Red Cross*, 96.893 (2014), 67–106, 95.

<sup>56</sup> Nils Melzer, Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare, Study, European Parliament, Directorate-General for External Policies, Policy Department, May 2013, p. 21, available at: [www.europarl.europa.eu/delegations/en/studiesdownload.html?languageDocument=EN&file=92953](http://www.europarl.europa.eu/delegations/en/studiesdownload.html?languageDocument=EN&file=92953).

<sup>57</sup> Rebecca Mignot-Mahdavi, "Will the War on Terror Ever End?", *Revue des Droits de l'Homme*, Actualités Droits-Libertés, March 10, 2019, URL : <http://journals.openedition.org/revdh/6269>. The development that follows on the temporal scope of armed conflicts and the French perspective partly reproduces, or at least derives from, the analysis conducted in this publication of March 2019.

<sup>58</sup> ICTY, *Prosecutor v. Dusko Tadic* of October 2, 1995, para 70.

- The state-of-war-throwback theory: upon the achievement of a peaceful settlement between the formerly-warring parties.”<sup>59</sup>

In my previous publication on this issue, I further suggested that rather than considering these alternative theories as a list, they should be pictured 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 should practically 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.

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 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), the no-reasonable-risk-of-resumption theory awaits the “annihilation” of the enemy group members.

Having outlined the relevant legal standards applicable to the situations of use of force against terrorist groups, the next sections of the paper will focus on France, in an attempt to force the conversation on what it has been doing in the Sahel region, and following which legal interpretations of the norms regulating the use of force. As noted in the introduction, France has been recalcitrant in formulating its legal interpretation as to how it engages with *jus ad bellum* and *jus in bello* norms. It is important to not only provide a solid outline of the legal norms applicable to the situation, but also what legal interpretations a specific military strategy implies. Ultimately, it might remind France of its obligations and responsibilities, and push state officials to reflect on the role France might or might not play as guarantor of the rule of law on the international scene.

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<sup>59</sup> Dustin A. Lewis, Gabriella Blum, and Naz K. Modirzadeh, "Indefinite War, Unsettled International Law On The End Of Armed Conflict", *Harvard Law School Program on International Law and Armed Conflict*, Legal Briefing, February 2017, p.ii

## Section 1. Jus ad Bellum: Military assistance on request and/or Continuous Anticipatory Self-defense?

France started its military engagement in the Sahel region after Mali asked support to regain territory seized by Islamist groups in 2013.<sup>60</sup> In 2014, the G5 Sahel bloc was created, bringing together Burkina Faso, Mali, Mauritania, Niger, and Chad, to institutionalize regional coordination and cooperation mechanisms to address, among other things, security and stability issues. To pursue this mission, a joint task force was deployed from 2017. France, having continuously supported these operations through military involvement, focused on two frameworks to justify its continued and geographically expanded intervention, from Mali to the five abovementioned countries. First, emphasis was put on the fact that France intervened in Mali upon request of the host state and deployed the Serval Operation in Mali accordingly.<sup>61</sup> Similarly, when engagement was extended to the region and the Serval Operation was replaced by the Barkhane Operation in 2014, France insisted that it was still acting in cooperation with the territorial states.<sup>62</sup> State consent thus served as justification for the extraterritorial use of force that now concerned not only one but five states. In addition to the host state consent justification, France also pursued a Security Council authorization to normalize its counterterrorism efforts in the Sahel. To that end, France proposed a resolution to obtain UN backing both for the G5 Sahel local task force and for French involvement in the region. After two weeks of negotiation on the French draft text (and after France accepted to tone down the language to reassure its American allies who did not believe a resolution was necessary),<sup>63</sup> the UN Security Council Resolution 2359 (2017) was adopted in June 2017.<sup>64</sup> The resolution still serves to “support” and “encourage” the deployment of the task force and explicitly welcomes the efforts of the French forces to support joint military counter-terrorist operations in the region.<sup>65</sup>

Interestingly, however, French officials have used a self-defense narrative on several occasions, including in the law on military programming, for the same situations. The new law on military programming and its annexed report repeatedly use contemporary *jus ad bellum* vocabulary – in particular propositions of extensive interpretations of the

<sup>60</sup> President François Hollande, “France supporting Mali against terrorists”, Statement following the select defense council, Paris, 12 January 2013, <https://uk.ambafrance.org/France-supporting-Mali-against-terrorists>.

<sup>61</sup> Ministry of Armed Forces (formerly Ministry of Defence), Presentation of the Serval Operation in Mali 2013-2014, “Présentation de l’Opération”, <https://www.defense.gouv.fr/english/operations/missions-achevees/operation-serval-2013-2014/dossier/presentation-de-l-operation>.

<sup>62</sup> News item on the announcement by French Minister of Defence Jean-Yves Le Drian to extend the Serval Operation to the region and, hence, to rename it “Barkhane Operation”; see « Fin de Serval au Mali, lancement de l’opération “Barkhane” au Sahel », France 24, 13 July 2014, <https://www.france24.com/fr/20140713-operation-serval-mali-france-barkhane-le-drian-defense-militaire-terroriste>. Jean Guisnel, « Le Drian et Hollande installent l’opération Barkhane », Le Point, 16 July 2014, [https://www.lepoint.fr/editos-du-point/jean-guisnel/le-drian-et-hollande-installent-l-operation-barkhane-16-07-2014-1846497\\_53.php](https://www.lepoint.fr/editos-du-point/jean-guisnel/le-drian-et-hollande-installent-l-operation-barkhane-16-07-2014-1846497_53.php).

<sup>63</sup> Instead of encouraging the use of “all necessary means” to carry out its operations, the draft resolution ended up “welcom[ing] the deployment” of the Sahel joint forces “throughout the territories of the contributing countries”. See Michelle Nichols, “France softens proposed U.N. backing for Sahel force to appease U.S.” Reuters, June 20, 2017, <https://www.reuters.com/article/us-africa-security-sahel-un/france-softens-proposed-u-n-backing-for-sahel-force-to-appease-u-s-idUSKBN19B321>.

<sup>64</sup> Security Council Resolution 2359 (2017), Adopted by the Security Council at its 7979<sup>th</sup> meeting, on 21 June 2017, <http://unscr.com/en/resolutions/doc/2359>.

<sup>65</sup> Idem.



right of self-defense<sup>66</sup> including for instance references to the existence of a continuing imminent threat. In her address to the French Parliament that opened the parliamentary discussions on the proposed law on military programming for 2019-2025 in March 2018, French Minister of the Armed Forces Florence Parly declared that the government intends to know, predict and anticipate terrorist threats and to tackle them.<sup>67</sup> The law and report also insist that a key objective of France is to enhance the preventive function of the military. In this regard, the report says that “deterrence remains the cornerstone of our military strategy”.<sup>68</sup> The threefold objective of the government is to (a) ensure a ‘permanent presence’; (b) acquire modern technological tools enabling anticipation, knowledge gathering and responsiveness; (c) ensure a ‘permanent production of strategic intelligence’ through the use of enhanced means of data collection and analysis. The report adds that the significance of ‘prevention’ should be emphasized, in line with the ‘global approach’ adopted to face terrorist threats.

More recently, in an interview of April 2018, Macron justified the expansion of France’s war against jihadist terrorist groups overseas to Syria.<sup>69</sup> He explained that “in Syria, we wage war against IS, that is against the Islamist terrorist groups that had, I remind you, attacked our country, considering that it is in Raqqa that the November 2015 attacks were planned”. Macron’s statement implicitly echoes what would be an extensive version of the accumulation of events doctrine according to which the threat is assessed based on past events revealing a continuing threat, and the propensity of group members to maintain this posture of hostility. In this, it resembles the logic followed by the UN Security Council in its Resolution 2249 (2015).<sup>70</sup> As mentioned above, such version of the armed attack requirement of the right of self-defense goes even further than the initial idea that “a series of minor incidents, taken together, can be said to reach the threshold of an armed attack”. Expressly endorsing the backward-looking version of the accumulation of events doctrine risks leading to a perpetuation of the time frame during which the right of self-defense may be exercised against any individual belonging to a hostile non-state armed group.<sup>71</sup>

In addition to the warnings that an extensive version of self-defense calls for, implicit references to self-defense justification by French officials invites us to reflect on the role performed by legal rhetoric. State consent and Security Council authorization play a prominent role in the legal rationale that they put forward to legitimize their action in the Sahel. However, references to self-defense to justify action in Syria tell us that consent and Security Council authorization might solely perform the role of procedural

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<sup>66</sup> For an analysis of this chain of propositions see, Christian J. Tams, “The Use of Force against Terrorists”, *The European Journal of International Law*, Vol.20, n°2, 2009, p. 388. Christian Tams and James Devaney, “Applying Necessity and Proportionality to Anti-Terrorist Self-defense”, *Israel Law Review* 45(1) (2012), pp 91–106. Rebecca Mignot-Mahdavi, “Drone Programs, The Individualization of War and the Ad Bellum Principle of Proportionality”, forthcoming in Claus Kress & Robert Lawless (eds.), *Lieber Series* Vol. 4 (OUP, 2020), <https://ssrn.com/abstract=3504779>.

<sup>67</sup> Florence Parly, Assemblée nationale, XV<sup>e</sup> législature, Session ordinaire de 2017-2018, Compte rendu intégral, Première séance du mardi 20 mars 2018, <http://www.assemblee-nationale.fr/15/cr/2017-2018/20180160.asp#P1204140>.

<sup>68</sup> *Rapport annexé*, (appears at the end of the legislation), § 2.1.2.1. “La dissuasion”, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037192797&dateTexte=20181122>.

<sup>69</sup> “Macron, un an après : le grand entretien en intégralité, Mediapart”, Youtube, <https://www.youtube.com/watch?v=mt0as7x-kfs&t=964s>.

<sup>70</sup> UN Security Council Resolution 2249 (2015), Adopted by the Security Council at its 7565th meeting, on 20 November 2015, S/RES/2249(2015).

<sup>71</sup> Marc Weller, “Permanent Imminence of Armed Attacks: Resolution 2249 (2015) and the Right to Self Defence Against Designated Terrorist Groups”, November 25, 2015, *EJIL: Talk!*, (URL: <http://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-self-defense-against-designated-terrorist-groups/>).

preconditions to use force by France on the territory of the G5 Sahel states, but might not be the actual *justification* for such operations. The following developments on how France considers being at war against jihadist groups corroborate this hypothesis that consent of the G5 hides the actual justification to use force against non-state armed groups: that is, to anticipate threats posed by members of jihadist terrorist groups who continuously carry a hostile intent against France.

## Section 2. The Indefinite Geographical and Temporal Scope of An Armed Conflict Against “Jihadist Groups”

On several occasions, former and current French government officials have declared being at war against jihadist terrorism, from President François Hollande,<sup>72</sup> Prime Minister Manuel Valls<sup>73</sup> and Minister of Defence Jean-Yves Le Drian<sup>74</sup> to President Emmanuel Macron<sup>75</sup> and Minister for the Armed Forces (new name for the Minister of Defence since Macron’s Presidency) Florence Parly.<sup>76</sup> They insisted on the Hydra-headed character of the threat, calling for a response wherever the enemies are.<sup>77</sup> This framing is also reflected in authoritative documents. President Macron identifies in the 2017 Strategic Review on Defence and National Security ‘Islamist terrorism’ as the focus of French military actions overseas. The annexed report of the newly adopted law establishes that the budgetary programming aims to combat ‘jihadist terrorism’, also referred to as a ‘terrorist threat inspired by the Jihadist movement’, or the simple umbrella term, ‘jihadist groups’. Rather than defining those multiple fronts as separate situations, jihadist groups from al-Qaeda, ISIS, Jabhat al-Nusra to Boko Haram are considered as part of the same conflict against terrorism.<sup>78</sup>

The discussions in Parliament preceding the adoption of the law on military programming confirmed that the law was built on the objective to fight against jihadist groups. For instance, on May 23, 2018, discussions at the Senate focused on how to

<sup>72</sup> President François Hollande, Speech in front of Parliament, November 16, 2015, <https://www.youtube.com/watch?v=d6Hdlq3DLAM>.

<sup>73</sup> Prime Minister Manuel VALLS, Speech at the National Assembly, “French Involvement in Syria”, November 25, 2015, [https://www.gouvernement.fr/sites/default/files/document/document/2016/01/20151125\\_discours\\_de\\_manuel\\_valls\\_premier\\_ministre\\_-\\_engagement\\_forces\\_en\\_syrie\\_relu.pdf](https://www.gouvernement.fr/sites/default/files/document/document/2016/01/20151125_discours_de_manuel_valls_premier_ministre_-_engagement_forces_en_syrie_relu.pdf).

<sup>74</sup> Minister of Defence Jean-Yves Le Drian, “Qui est l’ennemi ?” [Who is the Enemy], Opening Speech of the 2015 National Conference on Strategic Research, Paris, December 1, 2015, reworked and published version, Le Drian, *Qui est l’ennemi?*, Cerf Editions, Paris, 2016. French Parliament, Committee of inquiry on the means used by the state to counter terrorism, Commission d’enquête parlementaire relative aux moyens mis en œuvre par l’État pour lutter contre le terrorisme, Hearing Transcripts, <http://www.assemblee-nationale.fr/14/cr-cemoyter/15-16/c1516032.asp>: Jean-Yves Le Drian, currently Minister of European and Foreign Affairs and formerly Minister of Defence under Hollande’s Presidency, told Parliament that French nationals belonging to ISIS could be targeted abroad by France as being enemy combatants.

<sup>75</sup> “Macron, un an après : le grand entretien en intégralité, Mediapart” [Macron, A Year After : the Great Interview in full, Mediapart], Youtube, <https://www.youtube.com/watch?v=mt0as7x-kfs&t=964s>.

<sup>76</sup> Florence Parly, “L’EI est d’ores et déjà en train de redéployer son action”, *France 24*, 15 November 2017, <https://www.france24.com/fr/20171511-entretien-florence-parly-etat-islamique-terrorisme-barkhane-g5-sahel>.

<sup>77</sup> Général Pierre de Villiers, chef d’état-major des armées, Commission d’enquête relative aux moyens mis en œuvre par l’État pour lutter contre le terrorisme depuis le 7 janvier 2015, Lundi 9 mai 2016, Séance de 14 heures, Compte rendu n°20, Présidence de M. Georges Fenech, Président, [http://www.assemblee-nationale.fr/14/cr-cemoyter/15-16/c1516020.asp#P324\\_120754](http://www.assemblee-nationale.fr/14/cr-cemoyter/15-16/c1516020.asp#P324_120754).

<sup>78</sup> Général Pierre de Villiers, chef d’état-major des armées, idem.

identify the enemy.<sup>79</sup> The Senate's communist group had proposed an amendment seeking to replace the terminology "jihadist terrorism" used in the law by "fundamentalist, racist and political terrorism". After the unfavourable opinion of both the Rapporteur of the Parliamentary Commission and Minister Parly, the proposed amendment was withdrawn. Rapporteur Christophe Cambon and Minister Florence Parly both considered that "in a law on military programming, it is required to name the adversary" in order "to promote the modes of organization that have to be put into place and make the necessary efforts to fight against this enemy" and underlined that as a matter of fact, since 2015, this enemy—the point of focus of French military operations overseas—is jihadist terrorism.<sup>80</sup>

What do these elements potentially tell us about the French interpretation of the rules regulating the conduct of hostilities? If the enemy encompasses any jihadist group that might spring up over the years, the military response does not present geographical and temporal limits. In the absence of distinction between the different non-state armed groups being fought, the fight against jihadist terrorism is not to be held only in the Middle East and in the Sahel but also, it seems, anywhere it might spread in the future. This goes beyond the US "Al-Qaeda and associated forces" framework established by the Congress 2001 Authorization for the Use of Military Force (AUMF).<sup>81</sup>

If this indeed turns out to be the official French position, the French operational logic would imply the corresponding legal interpretations: (i) an armed conflict can take place transnationally, even in non-neighbouring countries as it follows its participants wherever they are; (ii) conflicts end only when there is no reasonable risk of resumption of hostilities; (iii) the category of "organized armed groups" can include several affiliated forces.

## I. Legal interpretation 1 : An armed conflict can take place transnationally, even in non-neighbouring countries as it follows its participants wherever they are;

Building on this legal reality, states involved in conflicts against non-state armed groups in the counterterrorism context cannot be said to adopt expansive interpretations of IHL's geographical scope as others have argued.<sup>82</sup> Those who say otherwise should be clear about the fact that they speak in normative terms and consider that it is not *desirable* for the scope of application of IHL in NIACs to remain without limitation.<sup>83</sup>

<sup>79</sup> Transcript of Parliamentary debates, Senate, Session of 23 May 2019, Communist Party Amendment Proposal n°52 to the debated law on military programming for 2019-2025, <https://www.senat.fr/seances/s201805/s20180523/s20180523011.html>.

<sup>80</sup> Transcript of Parliamentary debates, Senate, Session of 23 May 2019, Communist Party Amendment Proposal n°52, Response of Rapporteur Cambon, <https://www.senat.fr/seances/s201805/s20180523/s20180523012.html> [paraphrased above, originally expressed as follows in French]: "Madame Prunaud, nous n'allons pas, à cette heure, engager un long débat sur la nature du terrorisme. Toute forme de terrorisme est évidemment condamnable. Pour autant, dans une loi de programmation militaire, il est préférable de nommer son adversaire : cela permet de mieux promouvoir les modes d'organisation à mettre en place et les efforts à consentir pour lutter contre celui-ci. Or force est de constater que, depuis 2015, c'est tout de même bien le terrorisme djihadiste qui a durement frappé la France et fait quelque 280 victimes."

<sup>81</sup> US Congress 2001 Authorization for the Use of Military Force (AUMF) <https://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>.

<sup>82</sup> For a similar understanding, see Michael N. Schmitt, 'Charting the Legal Geography of Non-International Armed Conflict', *Mil. L. & L. War Rev.*, 52 (2013), 109.

<sup>83</sup> Marko Milanovic, 'On Whether IHL Applies to Drone Strikes Outside 'Areas of Active Hostilities': A Response to Ryan Goodman', *EJIL: Talk!*, 5 October 2017, <https://www.ejiltalk.org/on-whether-ihl-applies->

Because no legal provision limits the scope of applicability of IHL rules to the battlefield, and if one accepts the Tadic logic as valid,<sup>84</sup> the idea that NIACs do not suddenly stop because a border is crossed is applicable no matter how many borders are crossed. As Ryan Goodman rightly pointed out, ‘once it is understood that the laws of war extend transnationally to other States not involved in the conflict, it seems practically, if not also conceptually, unsustainable to draw the line around only immediately adjacent or neighbouring States’.<sup>85</sup> Why would the purpose of IHL suddenly evolve into preventing armed conflicts or confining them territorially (rather than regulating them wherever they occur), other than because it is deemed desirable?<sup>86</sup>

However, the way France frames its war on terror can be said to *exploit* the absence of geographical limitation in the law to develop military operations anywhere. Besides, France indirectly justifies the geographical indefiniteness of its war on terror by the emergence of transnational non-state armed groups deemed to call for a new way of conducting warfare. This rationale increases the geographical expansion of war, which is further exacerbated when France aggregates all jihadist groups together and include them in the same armed conflict.

## II. Legal Interpretation 2: Conflicts end only when there is no reasonable risk of resumption of hostilities;

Concerning the temporal scope of the armed conflict, France once again appears to be exploiting the absence of clear guidance in the law to ascertain the end of an armed conflict.<sup>87</sup> On the aftermath of Trump’s announcement that he will withdraw the American troops from Syria, French Minister of Armed Forces Florence Parly acknowledged that the group had been significantly weakened, but said the battle was not over. She tweeted 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

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to-drone-strikes-outside-areas-of-active-hostilities-a-response-to-ryan-goodman/. Jelena Pejic, ‘Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications’, *International Review of the Red Cross*, 96.893 (2014), 67–106, 95. Jennifer C. Daskal, ‘The Geography of The Battlefield: A Framework for Detention and Targeting Outside The “Hot” Conflict Zone’, *University of Pennsylvania Law Review*, 161.5 (2013), 1165–1234.

<sup>84</sup> In its 1995 Tadic Decision on Interlocutory appeal, the ICTY judges declared that: “On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there

<sup>85</sup> Ryan Goodman, ‘Why the Laws of War Apply to Drone Strikes Outside “Areas of Active Hostilities” (A Memo the Human Rights Community)’, *Just Security*, 4 October 2017 <<https://www.justsecurity.org/45613/laws-war-apply-drone-strikes-areas-active-hostilities-a-memo-human-rights-community/>>. Interestingly, in support of our view, Ryan Goodman adds: ‘What’s more, how can limiting the scope of the laws of war to immediately adjacent and neighboring States remain viable in the age of drone warfare or especially cyber conflict in which belligerents may attack from a continent away?’.

<sup>86</sup> Some commentators are sharper in their analysis by admitting the absence of geographical limitation in the law and then explaining why it is problematic. See Emily Crawford, ‘The Temporal and Geographic Reach of International Humanitarian Law’, 2016 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2785420](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2785420)>. Still, even in this case, Section 4 will explore how the author tries to introduce a geographical dimension to the jus in bello.

<sup>87</sup> Dustin A. Lewis, Gabriella Blum, and Naz K. Modirzadeh, ‘Indefinite War, Unsettled International Law On The End Of Armed Conflict’, *Harvard Law School Program on International Law and Armed Conflict*, Legal Briefing, February 2017.

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 which NIAC 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. As detailed above, 2017 French Strategic Review on Defence and National Security and Law n° 2018-607 on Military Programming adopted on 13 July 2018 insist on the capacities of jihadist groups to aggregate, mutate, transform and thus emphasize on the necessity to address these groups throughout their evolutionary processes.

This clearly suggests that France 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; in other words, it suggests that France embraces the most extensive legal theory on the end of armed conflicts.

Such theory requires accepting (i) an extensive version of the notion of direct participation in hostilities as continuous combat function – which I will not develop as I demonstrated it elsewhere –<sup>88</sup> but also (ii) a diluted version of the organized armed group notion.

### III. Legal Interpretation 3: The category of “organized armed groups” can include several affiliated forces;

As we have seen above, the notion of “jihadist groups” frames the French counterterrorism efforts. In this, it goes beyond the US ‘Al-Qaeda and associated forces’ framework established by the Congress 2001 Authorization for the Use of Military Force (AUMF).<sup>89</sup> Contrarily to the all-inclusiveness “jihadist groups” category, the US notion of “associated forces”—even if also over-inclusive—puts some boundaries to the incorporation of new groups. In 2012, the Obama administration even publicly articulated a test to integrate an associated force into the war against al-Qaeda: an associated force had to be 1) an organized armed group that 2) aligned itself with al-Qaeda, and 3) entered the fight against the United States and its coalition partners.<sup>90</sup> However, even the restraining function performed by the US “associated forces test” is extremely limited as the case of al-Shabaab exemplified.<sup>91</sup> But of course, it is even more

<sup>88</sup> Rebecca Mignot-Mahdavi, “Will the War on Terror Ever End?”, *Revue des Droits de l’Homme, Actualités Droits-Libertés*, March 10, 2019, §18-20, URL: <http://journals.openedition.org/revdh/6269>.

<sup>89</sup> US Congress 2001 Authorization for the Use of Military Force (AUMF) <https://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>.

<sup>90</sup> Remarks by Jeh Charles Johnson, Dean’s Lecture at Yale Law School, “National Security Law, Lawyers and Lawyering in the Obama Administration”, February 22, 2012.

<sup>91</sup> Charlie Savage. *Power Wars: The Relentless Rise of Presidential Authority and Secrecy* (Little, Brown and Company, 2017) p. 275-7. In the summer 2011, the Obama legal team discussed whether al-Shabaab could be considered an associated force of al-Qaeda. After deep analysis of al-Shabaab, Harold Koh came to the conclusion that al-Shabaab was not a unified well-organized group but rather an association of several factions, led by different militants. As such, Koh considered, al-Shabaab as a whole could not be identified as an associated force of al-Qaeda. Jeh Johnson entered in a heated debated with Koh, changing his mind several times but most of the time considering that the entire group qualified as an associated force of al-Qaeda. In 2016, against Koh’s idea, the decision was made to formally deem al-Shabaab an associated force of al-Qaeda under the AUMF. This decision took place not because the group appeared to have gained in organization and cohesiveness, but because the context called for it: the US was carrying more and more

open-textured to have a notion as broad as “jihadist groups” that does not involve any such test—at least it has never been publicly shared.

This is another example of how states can exploit legal uncertainties to support extensive practice, in this case the extension of enmity. This extension has concerned three types of cases in the war on terror. Starting from (i) a group initially identified as the enemy group, or “nuclear group”, military operations are extended to (ii) members of the broader group’s network, some of which are (iii) isolated individuals based outside of the Middle East or the Sahel region, usually in Western states, who conduct terrorist acts in their country or in western states. Although they have little or no contact with the “nuclear” group, they will sometimes be affiliated to it posthumously.<sup>92</sup> Operations happen to be also extended (iv) to terrorist groups that spring up over the years.

France seems to go with the flow of this multiheaded extension of enmity, and this comes out from the way in which France frames external and domestic counter-terrorism operations. The presence of jihadists on domestic soil justified the integration of the military to security practices alongside police forces. The Sentinel Operation, established after the 2015 attacks, deployed permanent military personnel on domestic soil, with a possibility to increase their number if the situation demands it, and with authorization to use force. The Sentinel operation was explicitly framed as a permanent domestic military operation in a continuum with France’s external operations against jihadist groups.<sup>93</sup> It is true that individuals who take action in Western states are often targeted by the host state police or military forces *during* and *because of* the use of force and the threat to life that they pose. As such, they are usually not targeted according to an armed conflict/IHL rationale, as the (loose) connection between these individuals and the terrorist group is established posthumously. It is the threat to life posed by the individuals at the moment of action that makes them subject to the use of lethal force. However, and considering the elaboration of such domestic military operations as the Sentinel Operation in France, it should not be excluded that if such individuals appeared during the domestic chase as being affiliated directly or indirectly to a terrorist group, the host state targets them as enemies under IHL (thereby creating overlaps between times and spaces of war and peace).

Two arguments can be formulated upfront against this extension. First, states cannot just unite different terrorist groups in a single non-international armed conflict when those groups show major differences and little cohesiveness.<sup>94</sup> Another point could be

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strikes in Somalia to defend American personnel deployed there, as well as African Union and Somali government partner forces.

<sup>92</sup> Olivier Roy, *Globalized Islam: The Search for a New Ummah* (New York, NY: Columbia University Press, 2006).

<sup>93</sup> Governmental Report to Parliament on the Conditions of Military Intervention on Domestic Soil to Protect the Population, 2016, [translated from French “Conditions d’emploi des armées lorsqu’elles interviennent sur le territoire national pour protéger la population”]. I paraphrase the declaration by Former Minister of Defence Jean-Yves Le Drian who defines as follows the Sentinel Operation: “cet engagement inédit et durable, décidé par le Président de la République, de plusieurs milliers de militaires en appui de la mission de sécurité intérieure et de contre-terrorisme conduite par les forces de sécurité intérieure se place, pour les armées et services de la défense, dans la continuité de nos opérations extérieures pour lutter contre Daech”.

<sup>94</sup> Noam Lubell, “The War (?) against Al-Qaeda”, in E. Wilmschurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, 421-454, 436. Geoffrey Corn, “Making the Case for Conflict Bifurcation in Afghanistan: Transnational Armed Conflict, Al-Qaeda, and the Limits of the Associated Militia Concept”, in Michael N. Schmitt (ed.), *The War in Afghanistan: A Legal Analysis*, International Law Studies, Vol. 85 2009, 182-218. For a deep analysis of the evolving narrative of modern co-belligerency theory and contestation of the assumption that co-belligerency is a well-established principle, see Rebecca Ingber, “Co-Belligerency”, *The Yale Journal of International Law*, Vol. 42:1, 68-120.

that states cannot aggregate to the enemy group any individual across the world who allegedly acts in the name of such groups, but have little or no contact at all with this group; and/or are not targeted for their ongoing and apparent engagement in military operations.<sup>95</sup>

However, these arguments—based on the concept of organized armed group—may have limited practical impact. Indeed, the extension of enmity is another example of how states can exploit legal uncertainties to support extensive practice. The uncertainty about the existence or not of a legal requirement to re-evaluate the conflict overtime makes it difficult to see how the organized armed group criterion can really perform a restraining function throughout the conflict. The organized armed group criterion requires—in order for a non-international armed conflict to exist—that a non-state armed group is sufficiently organized (organization being defined, *inter alia*, as the possibility to engage in armed attacks, as having a sufficient level of connection and nexus among members and to hostilities).<sup>96</sup> If the law clearly required that the conditions of the conflict be re-evaluated each time that circumstances evolve, this organized armed group would be a point of reference limiting the characterization of armed conflict and thus the application of IHL to certain situations only. But it is not the case. This is not necessarily a lacuna as it can be logically explained: the Geneva Conventions regulate conflicts as they are. By definition, conflicts evolve, and the initial features of the non-state armed group are expected to weaken throughout the conflict. To make sure that civilians are protected, and hostilities are duly regulated, it can be argued that IHL was designed to apply even when the initial features of the organized armed group (that led to the characterization of the situation as an armed conflict) are diluted. Hence, the absence of such requirement to re-evaluate.

Nevertheless, analysing the absence of legal requirement to re-evaluate the conflict practically leads to leaving unchecked the extension of the conflict to new enemy groups throughout the years. This “one shot” characterization enterprise is a feature of the *jus in bello* which, contrary to the *jus ad bellum* does not examine the legality of the use of force on a case-by-case basis.

Just as it is unclear whether IHL requires to make sure that there is the same amount of initial organizational level and violence intensity each time force is used, there is no co-belligerency legal test to ensure that force is used only when there is a belligerent nexus between new non-state entities and the initial enemy group. Yet, it is interesting to note that, in order to address the criticisms on the extension of the enemy group to new affiliated forces, the Obama administration used a concept of co-belligerency. The concept was transposed from the law of neutrality's concept of co-belligerency, which was initially applicable to states who violate their obligation to remain impartial and

<sup>95</sup> Marco Sassòli, “Transnational Armed Groups and International Humanitarian Law”, *Program on Humanitarian Policy and Conflict Research*, Harvard, Occasional Paper Series, 2006, no. 6, 1-45, 10. Jens David Ohlin, “Targeting co-belligerents”, in Claire Finkelstein, Jens David Ohlin, and Andrew Altman (eds.), *Targeted Killings: Law and Morality in an Asymmetrical World*, Oxford University Press, 2012, 60-89. For an opposite view, see Peter Margulies and Matthew Sinnott, “Crossing Borders to Target Al-Qaeda and Its Affiliates: Defining Networks as Organized Armed Groups in Non-International Armed Conflicts”, in T.D. Gill et al. (eds.), *Yearbook of International Humanitarian Law*, T.M.C. Asser Press, 2013, 319-345.

<sup>96</sup> Additional Protocol II to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. ICTY, Prosecutor v. Dusko Tadić a/k/a “Dule”, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber, IT-94-1-I, Oct. 2, 1995, §70 [hereinafter, “Tadić, Decision on Interlocutory Appeal”]. Prosecutor v. Tadic (Judgement). Case No. IT-94-1-A. 38 ILM 1518 (1999), International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, July 15, 1999, para.70.

refrain from participating in a conflict.<sup>97</sup> The ensuing principle, when transposed to NIACs, entails that force may be used by a state against any new non-state entities that provide some kind of support to its enemy.<sup>98</sup>

However, the option that these groups are co-belligerents in order to be considered as part of the same conflict does not appear in the law of NIACs.<sup>99</sup> Co-belligerency even rarely appears in treaty language concerning international armed conflicts and when it is, it is more of an informal term of identification than a well-established legal concept.<sup>100</sup> The law does not say that when multiple non-state armed groups do not just have affinities but form a coherent group, then those groups can be considered as a party to the same conflict.

The uncertain legal options to address conflict evolutions partly explain why there is very little legal academic work on the personal scope of the conflict (i.e. trying to address the question of who the enemy is). If some scholars refer to the war on terror as composed of a multiplicity of armed conflicts,<sup>101</sup> very few voices have been heard on this issue since the Obama administration departed from the “global war on terror” terminology to focus on the more nuanced statement that the US was at war against al-Qaeda and affiliated forces.<sup>102</sup>

The declaration that we should consider the war on terror as an aggregate of several conflicts, although desirable for violence curtailment purposes, does not benefit from clear legal grounds.

In the absence both of a clear delineation of when conflicts end, how can the systematic identification of the existence of a new armed conflict, each time a new group or faction or network is targeted, be expected? One could argue that it is a matter of perspective, and that each group should be regarded as a potential party to separate armed conflicts. This instruction would however appear disconnected from the specificity of a context where various groups might emerge at the same time, sometimes in similar state territories, or in neighbouring states, or at least in the same region of the world. Such option is detached from the difficulty to unravel the many evolutions both within a group and between various groups. To face this reality, the strategy that consists in including every individual or group that aligns itself with the nuclear group, in the latter, sounds in a way pragmatic. States are putting pressure for this understanding and, again, little reaction to it is being voiced.<sup>103</sup>

<sup>97</sup> Lassa Oppenheim, *International Law: A Treatise*, H. Lauterpacht, ed., 5th ed. (London, Longmans, 1935), pp. 203 and 206.

<sup>98</sup> Rebecca Ingber, ‘Co-Belligerency’, 1 *The Yale Journal of International Law*, Vol. 42, December 2017, 87.

<sup>99</sup> UNGA, Report of the Special Rapporteur on extrajudicial summary or arbitrary executions, Christof Heyns, 13 September 2013, A/68/382, §60-61.

<sup>100</sup> *Idem.*, 80.

<sup>101</sup> Philip Bobbit, *Terror and Consent: The Wars for the Twenty-First Century*, First Anchor Books Edition, April 2009.

<sup>102</sup> Before this, scholars gathered forces to make the legal case against the global war on terror, like Mary Ellen O’Connell, “The Legal Case Against the Global War on Terror”, 36 *Case W. Res. J. Int’l L.* 349 (2004) ; others noted that the break operated by the Obama administration was not that categorical, like Christine Gray, “President Obama’s 2010 United States National Security Strategy and International Law on the Use of Force”, *Chinese Journal of International Law*, 1 March 2011; but very few focused on the question nonetheless. The exceptions, for their part, consider the importance of legal grey zones and do not put forward simplistic claims. This is the case of Rebecca Ingber’s work on co-belligerency: Rebecca Ingber, “Co-Belligerency”, *The Yale Journal of International Law*, Vol.42:1, 2016, pp.68-119.

<sup>103</sup> Direct support for this holistic approach from Daniel Bethlehem, explicitly embraced by the US with the notion of “Al-Qaeda and associated forces” and France, with the umbrella category “jihadist groups”; indirect support found in UN Security Council Resolutions, calling to “combat terrorism”, in UN SC 6526th



All in all, the legal uncertainty on when and how to re-evaluate the features of a situation over time enables the extension of the enemy group to other individuals who either support from distance the group ideology or act for affiliated groups.

## Conclusion and Recommendations

In light of the above, this paper urges France to publicly explain how it interprets the laws on the use of force regulating its counter-terrorism operations abroad, including the relevant aspects of *jus ad bellum* and *jus in bello*. The French tradition of quasi-blind reliance on the President's military decisions—a tradition deriving from the very nature of the Fifth Republic presidential regime<sup>104</sup>—will, in my view, prove insufficient in the forthcoming years. Although this constitutional tradition explains state silence on their interpretation of the laws regulating the use of force, I doubt that the government will be able to maintain silence on legal matters when French combat drones start being actively used in the Sahel region in the early months of 2020. This is especially true because France has realized its dependence on allies' support and how much the country would benefit from tighter European Defence cooperation in the fight against terrorism.<sup>105</sup> In order to achieve these objectives in the long run, while at the same time maintaining its traditional objective of autonomy, it seems inevitable that France will have to indulge the power of legal rhetoric. Especially so that, as the paper shows, France's so-far discrete military strategy seems to include highly controversial interpretations of norms regulating the use of force.

France should clarify its understanding of the personal, geographical, and temporal scope of armed conflicts, if not before the Parliament then, at least in a speech accessible by the population and France's international allies.

While crafting a public legal rationale for its counter-terrorism efforts, France should be careful not to exploit legal uncertainties and grey areas if they want to preserve the constraining function of international legal norms and appear as a guarantor of the rule of law on the international stage. France should keep in mind that distinguishing between jihadist groups ensures a type of military engagement that releases the pressures put on legal frameworks and thus preserves the restraining function of norms of IHL. The present paper also encourages France to draw spatial distinctions delineating its different conflicts in the counter-terrorism context to avoid the characterisation of *any* action (against individual members of terrorist groups) as part of what would

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Meeting, 2 May 2011, UN Press Release SC/10239; to "take any measure to combat terrorism", in UN Security Council Resolution 2249 (2015), Adopted by the Security Council at its 7565th meeting, on 20 November 2015, S/RES/2249(2015).

<sup>104</sup> Constitution of the French Fifth Republic, 4 October 1958, Article 15, [https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank\\_mm/anglais/constiution\\_anglais\\_oct2009.pdf](https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf). Elizabeth Zoller, "The War Powers in French Constitutional Law", *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 90, 1996, 46-51. Alice Pannier, Olivier Schmitt, "To fight another day: France between the fight against terrorism and future warfare", 94 *International Affairs* 4 (2019), 898: "The French president is the central pillar of the institutional architecture, enjoying a high level of institutional flexibility through the 'reserved domain' (*domaine réservé*) of defence, security and foreign policy".

<sup>105</sup> Minister of the Armed Forces Florence Parly, speech at Global Leaders Forum, CSIS, Washington DC, 20 October 2017, <https://www.csis.org/events/global-leaders-forum-he-florence-parly-minister-armed-forces-france>. Joint statement of intent by Mr Jean-Yves Le Drian, (former) Minister of Defense of the French Republic, and the Honorable Ashton Carter, Secretary of Defense of the United States of America, signed in Washington DC, 28 November 2016, p.1. "President Macron on relations with the US, Syria and Russia", *Fox News*, 22 April 2018. De Galbert, "After the Paris Attacks, a European Anti-ISIS Coalition Comes Together", *Center for Strategic and International Studies*, 3 December 2015. Alice Pannier and Olivier Schmitt, *op.cit.*

otherwise appear as a global armed conflict against jihadist groups. It should be emphasised that taking into consideration jihadists groups' specificities ensures the curtailment of violence: each jihadist group fought will be the object of an "organized armed group" test and conflict characterization, and not be the object of an automatic classification of armed conflict (instead, if the test requirements are not met, human rights law will apply). It also ensures that counter-terrorism efforts be deployed against material threats and will not extensively seek annihilation of anybody who potentially carries hostile intent. Finally, it is a guarantee of refined military strategy that tackles threats with various intensities or means.

Following the recommendations above would constitute an unprecedented move by France to reaffirm and reinforce the rule of law and would put the brakes on current development of perpetual and anywhere war justifications. France should keep in mind that this framing exercise would finely regulate, but in no way prevent, the development of its counter-terrorism efforts.

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Rebecca Mignot-Mahdavi

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