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The Wages of Just War [comments]

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Comment on Richard Arneson's *Just Warfare Theory and Noncombatant Immunity*

Introduction

Professor Arneson's paper usefully illuminates the interaction between a contemporary trend and a rethinking of what constitutes just war. It also reveals connections between this rethinking and key normative questions regarding how war is waged. The paper can be seen as a part of an extraordinary resurgence of interest in both the substance and parameters of just war theory, on the one hand, and the normative relationship between just war theory and the conduct of warfare, on the other.

The paper principally raises questions about the normative connection between the justice of the war, and the way it is waged. It revisits the relation between jus ad bello and jus in bello, i.e, the values and principles involved in war's initiation, as opposed to the values and principles involved in the waging of war. The panel's principal paper argues against the longstanding "principle of distinction,"[1] which differentiated justice in waging an actual war from the justice of the war's broader aims and purposes.

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1. *See* MICHAEL WALZER, JUST AND UNJUST WARS 21 (2006).

I will begin by trying to situate the paper's central claim. In the contemporary moment, adherence to the notion of independent war regimes, at least from a legal perspective, is seemingly under siege. Increasingly, there are challenges to the notion that there are two autonomous legal regimes regulating war. To some extent, this revisiting, or questioning, is illustrated in the paper's challenge to the law of war's longstanding treatment of civilians in war, and to the implications of linking the justice of the war with the norms of conduct among battling armies; or, what I characterize here as the "wages" of just war.

Moreover, even if we accept that there are real substantive changes in the juridical scheme, the remaining broader question may well be the need to think of how, given present political changes, these two regimes ought to be connected. This question will be taken up at the end of my remarks with various normative proposals about the link between the justice of war and the contemporary law of war.

I. The Principle of Distinction and Contraverting Convention

Arneson's central argument addresses the proliferation of the immunities regime in the law of war. The paper's core challenge to the normative principles guiding the treatment of persons in war is hardly trivial. Rather, it goes to the question of what is the conception of the self at the heart of the emergent humanitarian law regime.

Historically, there has often been an insistence on adherence to the rigid separation erected between the two normative strands of just war. Since 1648 and the Westphalian arrangement limiting the justification for religious wars and wars of expansion, the justice of war has largely been relegated to the development of a reciprocal legal scheme regarding the conduct of war, a matter of interstate concern.

This trend continued in the wake of post-World War II legal developments with the establishment of the UN charter system, and its clear regulation of war-making and emphasis on non-expansionism and limiting war to self-defense. There was a further evolution away from the potential of the justice of war, and additional constraints were set on war's possible uses. Modern changes in the panorama of armed conflict further diminished the ambit for "just war theory." After the twentieth century's wars, there appeared to be an inexorable drift towards the obsolescence of an idea of just war, with the possible exception of clear cases of self-defense set forth in the UN charter.[2]

II. Contemporary Revisitings: The Just War Tradition

Nevertheless, the panel's central paper aims to revisit and destabilize the so-called "distinction principle" and its core division. It proposes that moral principles guiding the justice of a war should somehow inform the regulation of practices in the waging of the war. More particularly, Arne-

2. *See* U.N. Charter, arts. 2, 51.

son also interrogates the core conceptual division between the justice *of* war, and justice *in* war, and levels a radical challenge to the law of war's cardinal principle: civilians and noncombatants in war are entitled to protection, without regard to the war's aims or purposes.[3]

The instant paper's central claim concerns the implications of waging a just war on the way it is to be waged, as well as its supposed independence from consequentialist considerations.[4] The core claim is that the cause of the war ought to define how it is conducted, or, as the author puts it, that the justice of warfare ought to be exclusively informed by "deontological" rather than "consequentialist" considerations.[5] For Arneson, it is the morality, or justness, of a war that somehow becomes determinative of how it ought to be waged.

Indubitably, insofar as the paper challenges the prevailing conceptualization of the divide between areas of justice in war and justice in the law of war, Arneson's claim reflects a substantial departure from the last century's legal regime of war. Nevertheless, his claim is also overstated. To be sure, the prevailing idea of distinction remains, but this is not the same as a notion of acoustic separation between juridical regimes. Consider, to begin, whether it is possible to sustain an *a priori* understanding of "war" for "just war" purposes that did not also conceptualize war as informed and shaped by prevailing practices. From its inception, therefore, the understanding of "just war" has been inevitably connected with the practices and customs of war over the years.

This has become even more so in recent years, with the significant revisiting of just war theory, as well as its law of war, or humanitarian law, dimension. For decades, the prevailing understanding of just war, or *jus ad bellum*, was reduced largely to the conditions regarding aggression and self-defense set out in UN charter. Of late, there has been a significant expansion in the reach of international humanitarian law, encompassing internal conflict, related changes in rule of law values, and a general humanitarian impulse.

In the present political context, characterized by heightened instability, there appears to be a significant appeal to the rethinking of just war theory and the conduct of war. In a number of areas, there is a broader conception of the potential for the uses of war, especially for humanitarian intervention. For example, where humanitarian rights violations, such as "crimes against humanity", have themselves become the bases for engagement in just wars. Humanitarian arguments were made in support of the interventions in Kosovo and the Middle East. These policy debates have infused just war theory with new life.

Multiple factors explain contemporary changes in just war theory. The end of the cold war, for example, obviated the need for containment, with

3. Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 9-13 (2004).

4. *See* Richard Arneson, *Just Warfare Theory and Noncombatant Immunity*, 39 CORNELL INT'L L.J. 501, 663.

5. *Id.* at 663.

the apparent potential for an expanded ambit for war-making. Other changes relate to globalization, and to the increase in the privatization and outsourcing of conflict, as well as terrorism.[6] Historically, there was a clear understanding of the subjectivity of the war regime, with implications for the justice of war, i.e., the legitimacy of the combatant defined in regard to the relationship to states. These long-established understandings are now being destabilized. Consider, for example, the recent revisiting of "just war" theory, occasioned by the peculiarity of the terrorist threat, which has impacted the scope of permissible "self-defense" and "preventive" war.[7] At the present moment, there has been a significant reengagement regarding what constitutes the just war—all with significant implications for the conduct of war.

III. The Immunity Claim: Consequentialist Considerations

More particularly, the paper addresses the status of the existing immunities regime, aims to destabilize the noncombatant privilege, and argues for eliminating such immunities. By challenging the immunities system, the paper goes to the very hallmark of the prevailing just war system, which relies upon maintaining a "principle of distinction" between jus ad bello and jus in bello. Pursuant to the core principle of the prevailing immunities regime, protection of civilians and noncombatants is required without regard to the justice of the war.

Aiming to destabilize the immunities regime, Arneson offers a series of hypotheticals, which, he argues, are not amenable to an absolute immunity rule because of complex, often competing moral considerations.[8] With this general point on the absence of absolute immunity, I am in agreement. The prevailing immunities regime unquestionably raises complex moral problems. Moreover, while the conventions of just warfare refer to "immunity," perhaps there is a confusion implied by the deploying of the term immunity "right," and the implication that the use of the word "right" somehow goes to the immunity's absolute non-defeasibility. Yet, the use of the term in the law of war does not now, and has never, constituted an absolute.

Despite the many examples where the paper seeks to destabilize the immunity, it fails to offer an alternative proposal or way of thinking through this.

One ultimately wonders what is at stake in the attempt to eliminate the immunities regime? Under Arneson's scheme, to what extent would the proposed logic result in the propagation of all just wars as total war? Would all adults become equally vulnerable in wartime? Why stop there: how about children? Obviously, guiding principles are needed, and they cannot simply be derived from judgment of war's morality.

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6. *Compare* Kenneth Roth *Combatants or Criminals? How Washington Should Handle Terrorists*, FOREIGN AFFAIRS, May/June 2004, 128 *with* Ruth Wedgwood, *id.* at 128.

7. *See* Joseph S. Nye, *Before War*, WASH. POST, Mar. 14, 2003, at A27.

8. *See* Arneson, *supra* note 4, at 663-65.

In wartime conditions, applying the prevailing law of war's "immunity" regime has always required some level of interpretation. What sorts of considerations are relevant and go into this? Here, the argument takes an extraordinary turn, with the claim that just war theory should be guided exclusively by deontological, i.e., moral considerations.[9] But, waging war has always meant tough choices. The immunity regime is not now "all or none," and never was. Moreover, as the paper concedes, beyond the deontological considerations that guide "just war theory" are the principles of "proportionality" and "nondiscrimination." These principles help illuminate the non-absolutism underlying just war logic. Application of the noncombatant immunity in a wartime context depends upon calculations of military necessity. While the standards of permissibility depend on human rights, they are not precisely defined by those rights—the definition is complex and, in Walzerian terms, shaped in a significant way by the military context, i.e., by "the pressure of military necessity."[10]

Accordingly, the just war regime has never been a fully independent, hermetically sealed tradition but rather has always been grounded in consequentialist considerations relating to the contest and conduct of war. Moreover, to the extent the justice of war depends on its being waged in a successful way, the just war regime involves calculations of comparative risk/benefit and military necessity, with implications for adherence to the immunity regime. It seems beyond dispute that beyond the justice of a war, principles of proportionality and military necessity would apply and, moreover, would point in the same direction as the present immunities regime. Moreover, there is no inherent conflict presented by adherence to the two strands of the law of war. Indeed, one can imagine a just war rationalized on necessity grounds, without necessarily implying or affording a basis for total war.[11]

For example, consider the sort of analysis implied in the application of the "immunity right." The bearer of the immunity possesses this right, which is less dependent on nationality than one's identity as a human being. Therefore, the noncombatant immunity right ought to attach without regard to nationality. This core dimension of a humanitarian right is being problematized now, with new technology and largely aerial means of waging war. As a result of these changes in the conduct of war, there is a significant increase in the risk to other nation's civilians with a concomitant decrease in the dangers to combatants as a general matter. In this light, Arneson's argument cannot be understood as specious or a mere thought experiment. To the contrary, dimensions of his argument are already playing themselves out at a time when wartime deaths of civilians are at an all-time high.[12] Again, this morally complex question can only be

9. *Id.*

10. *See* WALZER, *supra* note 1, at 146.

11. *See id.* at 144-156.

12. *See* MARY KALDOR, NEW AND OLD WARS (1999) (referring to the steady increase in ratio of civilian-soldier deaths since World War I); *see also* Anthony Dworkin, *The Middle East Crisis and International Law*, CRIMES OF WAR PROJECT, July 18, 2006, http://

evaluated in terms of the likelihood of risk and related factors that arise in a wartime context.

The notion of a right means that everyone is presumed to have a right to immunity from attack, unless and until they bear arms, assist in combat, or engage in similar conduct. Moreover, even where persons otherwise immune haven't lifted arms, they may be subject to attack, where there is a "military necessity." Ultimately, this is why the proposed argument does not succeed: there are always principles of necessity and proportionality guiding the just war regime, with implications for the preservation of the immunities regime within the political realities of wartime.

IV. Preserving the Civilian: Humanity Rights in an Age of Terror

A. An Expanding Law of War

In this Part, I would like to go beyond the question of adherence to the immunities regime by discussing the instant paper's broader underlying themes and reconnecting them to contemporary political conditions. Arneson argues that the two strands of just war theory and the laws regarding the waging of war, jus in bello, are somehow zero-sum. That is, one cannot have both: where the "war is just," no limits should be imposed on how the war is waged.

Here, I want to reconnect the two dimensions of the law of war but to do so in a different way than Arneson proposes. I want to make the very opposite argument of the central paper and instead suggest a much closer nexus between just war and adherence to the laws of war, including, but going beyond, the instant immunities regime.

As discussed above, the contemporary rethinking of the relationship between the two dimensions has explored multiple angles: post-cold war, globalization, and privatization of war-making. All of these go to the redefinition of the subject of the just war regime. Just as the conception of war is changing, there is no stable concept of war that prefigures these considerations and rules. Indeed, one might say that the practices and customs of war, including the privileges themselves, shape how war has been conceived and is being reconceived. By this, I mean that developments in jus in bello shape jus ad bello and reflect a continuum in these two ideas. Accordingly, in a number of areas, there is a revisiting of the prevailing "principle of distinction." What this means is that the way we know a "just" war is not exclusively by its aims or purposes but also by its form and ways it is conducted.

There are developments in the humanitarian law regime, as well as Geneva Convention changes, e.g., Article 1, Protocol 1, and supporting wars of "self-determination," which all go to the question of an ongoing adherence to the "principles of distinction." At the same time, there are institutional changes, including the U.N., ad hoc tribunals associated with

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www.crimesofwar.org/onnews/news-middleeast.html (last visited Nov. 10, 2006) (referring to the growing civilian death toll in the Middle East crisis).

the NATO invasion, and the subsequent establishment of the International Criminal Court, which could also be seen as altering the playing field. For it is precisely here that we find an instance where the two strands of just war theory are brought together. Consider, for example, that the ICC charter provides the same enforcement scheme for prosecuting war crimes and aggression.[13] In the U.N. system, the new "responsibility to protect" would appear to support an explicit duty of intervention to save civilian lives where threatened, with implications for the ethics and legality of the uses of force under the U.N. system.[14]

B. On the Waging of Just War

I would like now to discuss two areas that further reflect an evolution towards the elimination of the "principle of distinction." This is where the very justice of war connects to the regulation of the immunities regime and the norms guiding the treatment of persons.

This nexus, I argue, is particularly true regarding the emergent wars of humanitarian intervention and the wars on terror. Indeed, one would expect the laws of war to be most closely observed precisely where the claim is to a "just war," and that, moreover, the conduct or practices would become a part of what goes into a just war, i.e., a sign of the justice of the war. One might expect that just wars should foster better behavior in warfare. This would be particularly important in instances in which the relevant wars are not clearly ones of self-defense[15] and, therefore, necessitate some demonstrable proof of good aims. Thus, if one were even to accept the central premise of Arneson's paper regarding a connection between the two strands in the legal regime, the ensuing logic would, nevertheless, not militate for diminished adherence to the laws of war. To the contrary, stricter adherence would be warranted.

A similar argument might well apply to the waging of a just "war against terror." Here again, to the extent the "just war" argument for the war against terror goes beyond justifications of self-defense, it often emphasizes the illegitimacy of the initial attack on civilians. Accordingly, it follows that the claim of a just war against terror would have to be reconcilable not only with the laws of war, including concerns regarding civilian immunity, but also with scrupulous adherence to these rules. The very justice of the war would be on the line. Yet, as a practical matter, this raises acute dilemmas, as waging such wars often implies limiting civilian immunity.

The failure to respect immunities is commonly the practice of a weaker power fighting a guerilla war. The deliberate targeting of noncombatant civilians is also a practice of contemporary terrorists. Insofar as the instant

13. *See* ICC Charter arts. 5, 8.

14. *See* U.N. Protection of Civilians in Armed Conflict, S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006). *See generally* Rebecca J. Hamilton, *The Responsibility to Protect: From Document to Doctrine–But What of Implementation?*, 19 HARV. HUM. RTS. J. 289 (2006).

15. *See* U.N. Charter arts. 2, 51.

paper can be understood to destabilize such practices, it also implicitly challenges the social construction of terrorism. One might well expect that a "just war" initiated against terrorism ought scrupulously to adhere to the immunities regime in order to underscore the claim to the war's justice.

C. Humanity-Law: Justifying Wars of Humanitarian Intervention and Liberation

Another area in which contemporary just war theory and jus in bello increasingly overlap is the present expansion of, and controversy over, the definition of just war for humanitarian purposes. Here is a growing area of concern, often characterized in terms of global justice, that seems to present an increasingly significant exception to traditional sovereignty and territoriality principles, as well as ordinary UN charter proscription.

Consider, for example, a humanitarian war, such as was launched in Kosovo. A just war claim to legitimize this attack would be especially vulnerable to criticism if the attacking force cavalierly treated civilian casualties. Indeed, this apparently occurred in Kosovo, when there were attacks on the hospitals that hit too close to home to the justification for the campaign. It was controversial and necessitated further investigation.[16] By analogy, justifying the war in Iraq as a war of "liberation" undertaken for the ostensible benefit of the Iraqi people also generated legitimate expectations regarding the care and the treatment of the country's peoples, restoration of the rule of law, and state-building. Accordingly, the present expansion of just war discourse, particularly in the context of the use of military intervention in the name of human rights, would appear to demand scrupulous observance of civilian immunities, particularly in the implicated country.

Indeed, one might go further and conclude that the very meaning of the justice of war is increasingly defined in terms of the treatment and protection of persons and peoples rather than exclusively in terms of the defense and interests of the state. And, further, that as these transformations continue, they will have sweeping implications for a new global rule of law, which places the individual and his rights rather than the state at its core. Therefore, the expansion of the humanitarian discourse will have the potential radically to impact the evolution of the logic of the just war tradition in the contemporary moment.

Conclusion

To conclude, this paper refutes the central claim of the paper, which challenges the current humanity-law immunity scheme and the principles of distinction regarding noncombatants. I have argued that there is a close relationship between the justice of a war and the justice of its waging; and moreover, that the normativity of this area of the law of war calls for even

16. *See* INDEPENDENT COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED (2000).

closer adherence to international humanitarian law when the justice of war hangs in the balance. These observations should have a number of normative implications for contemporary interventions justified on humanitarian grounds.