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Redefining Combatants
David Whippman†

Comment on Richard Arneson’s Just Warfare Theory and Noncombatant Immunity

Good afternoon. I would like to thank the organizers of the Symposium for putting together such a terrific program. In particular, thanks to Professor Arneson for giving us a provocative and very interesting paper, and for having the courage to challenge received wisdom in an area that has become as conventional and assumed as the combatant/non-combatant distinction. Professor Arneson’s paper is an essay on moral philosophy. He is analyzing the just war tradition, and he is trying to provide a deontological, not a consequentialist, answer to a fundamental question: Is it ever morally permissible to attack non-combatants and, if so, under what circumstances? His paper really deserves an answer on its own terms. That is, it demands a philosophical and deontological answer, and I’m afraid that I am not the right person for that. So, I feel a little bit like we are two ships passing in the night.

There is some irony here because many of my colleagues on the faculty and on other law faculties think that international law is not law but rather philosophy, a form of moral positivism. As an international lawyer, I tend to disagree. I think international law is, in fact, law and not just philosophy. So, this is a long way of saying I am not the right person. In general, most of us think that law is something that is informed by morality and yet really quite distinct from morality. That is certainly true of international law, which, although it shapes moral notions and is shaped by moral notions, is at its bottom a product of state interests. It is a product of bargaining among states to produce an agreed set of rules that reflect the interests and power of the states that are trying to create and implement those rules.

To take one example, the Additional Protocols to the Geneva Conventions, adopted in 1977 after three years of negotiations, were the product of significant debate. On one side were militarily powerful states, which had certain objectives and anticipated being on the distributing end of military violence. On the other side were militarily weaker states, which generally expected that they would be on the receiving end. So they had different objectives, which significantly shaped the form and content of the Protocols.

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The United States refused to accept the Additional Protocols for a variety of reasons. The U.S. refused to accept Additional Protocol II governing internal armed conflicts because, among other things, the U.S. thought it dangerously privileged unconventional fighters, such as guerrilla forces, and the U.S. was uncomfortable with that. We were past the days in which we expected to have to deploy guerrilla forces. The U.S. was also skeptical about Additional Protocol I, which governed international armed conflict and represented the most lucid codification of the law of non-combatant immunity. The U.S. felt that it did not go far enough in some ways. It did not, for example, put enough of an onus on defenders as opposed to attackers. This was crucial because the U.S. anticipated being in the position of attacking rather than defending military targets. So, moral considerations in international law are there, but they are secondary.

Let me point out some ways in which Professor Arneson’s paper diverges from conventional international law understandings, and examine why they might be problematic. The fundamental difference, as both of the prior speakers have explained, is that international law tends to posit a strict separation between, on the one hand, the law governing the resort to force, or jus ad bellum, and, on the other hand, the law governing how force is used once you have actually resorted to force or are in an armed conflict, or jus in bello.

As I think Professor Teitel pointed out, this distinction has never been absolute—it has been exaggerated—but in general, international law posits a separation of those two things. What does that mean? At the outset, if you examine the combatant/non-combatant distinction the way Professor Arneson does, then you are really blending justice in going to war, the jus ad bellum, and justice in war, the jus in bello. Even though the paper starts out by saying it is not really going to do that, it nevertheless seems to move into that, so that justice in war is ultimately determined by the justice of the war. In other words, what one may do in fighting a war really turns on whether one is fighting on the right side.

If you accept this premise, then I think a fair amount, though not all, of what Professor Arneson argues follows from it, but I am not convinced that we ought to accept that premise. International humanitarian law certainly does not accept it. It says we have to ignore the right or the just cause when deciding how individuals should behave in waging war. Professor Arneson acknowledges that there may be good consequentialist reasons for this; however, he is evaluating this proposition from a deontological standpoint.

Part of the problem, I think, is that states do not agree, and certainly do not agree ex ante, about whether a particular war is just or not. There may be circumstances in which a fairly broad consensus emerges. Consider the first Gulf War. Iraq invaded Kuwait and the large majority of states said, yes, that is an unlawful invasion, and the Security Council authorized the use of force by coalition forces. Most states would agree that that use of force was both lawful and just. There is, of course, always going to be at least one dissenter. In this case, the dissenter was the gov-
ernment of Iraq. And, you can understand how the Iraqi soldiers who get their information from the government of Iraq might think, well, maybe there was a just cause for their state. The government of Iraq had a number of reasons why it thought it was okay to invade Kuwait: economic reasons, political justifications, historical considerations, territorial claims, and so on. While many were ultimately unpersuaded that Iraq’s cause was just, it is possible that those in Iraq thought otherwise. States recognize that they cannot know when they are setting up the rules to govern warfare which side of the just/unjust spectrum they are going to be on, and they do not want to be judged in hindsight. They neither want their own forces to be prosecuted for war crimes after participating in hostilities, nor do they want their own non-combatants attacked.

So states agreed on a set of rules to govern warfare, and those rules say that how you fight is not dependent on whether or not you are fighting for a just cause. In the international humanitarian law paradigm, the term combatant has a particular meaning. It is a term of art. Although it’s not clearly defined, it is possible to figure out what a combatant is by looking at treaties such as the Third Geneva Convention and the criteria for determining who is a prisoner of war. If you look at those criteria, you will see that international humanitarian law says we have to figure out whether someone is fighting, in just war terms, with right authority. For humanitarian law purposes, what that usually means is, are you fighting on behalf of a state? And, in particular, are you a member of the armed services of a state, or are you a member of a militia or some other group that belongs to a party to the conflict—which is another way of asking, are you a part of a group fighting on behalf of a state?

It is obvious why states set it up this way. This privileges states over non-state actors. I agree with Professor Arneson that that is not always valid from a deontological and moral standpoint. One can imagine situations in which non-state actors have a just cause for fighting, and the state does not. But in general, states have insisted that non-state actors fighting against a state be treated as either rebels or criminals, and that is why we have different rules for internal armed conflicts and international armed conflicts. Only soldiers fighting for the state in an international armed conflict are deemed to have the combatant’s privilege, which is essentially a way of saying that it is not illegal for them to participate in hostilities. They have a right to use force—to use violence against enemy soldiers and enemy forces. Otherwise, we could not wage war, which, of course, would be a terrible thing. So, for international humanitarian law, legal rights turn on combatant status. You are either fighting for a state or you are not. It does not turn on the justice of your cause. Your status can be stripped under various circumstances, but essentially, it is a question of status, and humanitarian law presumes that questions about the legality of the war and the justice of the war will be decided by states and their governments rather than individual soldiers or those actually participating in the conflict.
Therefore, combatant, as I said, is a term of art. It does not apply as it would in a lay sense to anyone who is engaged in fighting. When in common parlance we say somebody is engaged in combat, we just mean someone who is fighting. In humanitarian law, however, a combatant specifically identifies someone who is fighting on behalf of the state. On the other hand, someone who is not fighting on behalf of the state but participates in hostilities is an unprivileged belligerent. The Bush administration has confused us all because they use the term "enemy combatant," which is a technically inaccurate use of the term. What they mean is "unprivileged belligerent," i.e., a civilian, an Al-Qaeda member, someone who is not fighting for a state who takes up a gun and uses it against a state. Following on this notion that only those fighting for a state can fight lawfully, the Bush administration argues that U.S. forces, which have a combatant's privilege because they are fighting for the U.S., can always attack Al-Qaeda members wherever they find them. But Al-Qaeda members cannot attack U.S. Forces because, by definition, Al-Qaeda members are not fighting on behalf of a state. There are many problems with that position, but it reflects a fairly general view about who can and cannot lawfully engage in combat.

Professor Arneson's paper essentially redefines what it means to be a combatant. He is saying that it no longer matters whether or not you are fighting on behalf of a state. What matters is whether you are fighting for a just cause. If you are fighting on the right side, then you possess what becomes the new combatant's privilege. And if you are not fighting on the right side, then you do not have a combatant's privilege, that is, you do not have a right to use violence. This essentially turns soldiers who are fighting for an unjust cause into unprivileged belligerents, where the mere act of fighting may subject them to prosecution and, in Professor Arneson's view, to attack.

This silent shift from a war paradigm to a criminal justice paradigm is problematic. Whether or not one fights for a state becomes unimportant. The central issue becomes whether you are culpable, i.e., fighting on the wrong side. That logic, then, permits you to attack those who would ordinarily be deemed civilians if they are supporting the wrong side. The pitfalls of such an approach are significant. It ignores the fact that there is a prior understanding among states that that is not how we are going to deal with combatants. Combatants are going to be those fighting for a state. But even setting that aside, it assumes that soldiers can determine whether or not they are fighting on the right side. I am prepared to agree with Professor Arneson that hypothetical cases could exist where this would be so. Maybe in World War II one could say that German soldiers should have known that fighting for the Nazis was the wrong thing to do, and should have refused to fight on behalf of their government, although that was not the reaction after World War II. They were not prosecuted simply for participating in the hostilities, but one could imagine that as a tenable position.
As Professor Arneson points out, two moral justifications are usually advanced for eliminating soldiers' obligation to determine whether or not they are fighting for the right side before engaging in combat. One is coercion and the other is excusable ignorance. There is a debate in international law about whether coercion should be treated as an excuse, a justification, or as a mitigating factor in determining punishment. But let's set coercion aside, because I am prepared to agree that, in general, that is not what drives soldiers to fight. Generally, it is not coercion in the legal sense. Excusable ignorance, though, seems to be much harder to get around. Professor Arneson pretty much dismisses it, saying that soldiers should be able to figure out whether the war is just or not. International humanitarian law, however, presumes that they cannot do that, or at least that they should not have to do that. It assumes, effectively, that they are excusably ignorant, and if you think about the jus in bello context, the war crimes context, soldiers are generally entitled to rely on superior orders unless they are manifestly unlawful or should obviously not be executed.

Carrying that by analogy to the jus ad bellum, or justice of war, context, you might say the same test should apply. If the war is somehow manifestly unjust, maybe we could expect a soldier not to fight it. But it is going to be a pretty rare case, I think, where we will be able to say that. International humanitarian law is designed not for that rare case but rather for the more general case, where we do not want to insist that the soldiers be held responsible for the justice of the conflict. Professor Arneson acknowledges this point, and says it may be the case, in practice, that we never have to assume that soldiers themselves lack good reason to believe that their own cause is just. But he wants to say, let's assume for purposes of moral analysis that they have the relevant information. As a practical matter, I am not prepared to assume that they have that information.

Even assuming that soldiers do have the relevant information to determine if their cause is just, I would still have problems with some of Professor Arneson's conclusions. For example, there is an argument that the bystander who cheers on the aggressor is culpable in a significant way. I am not really sure that is right. It seems to me a little bit like saying that an NBA player is permitted to assault a fan in the stands for cheering the other team. There is something to the notion that soldiers, even if they are drafted, are somehow part of the conflict in a way that those who are not taking up arms are not, and that we ought to respect that distinction.