Bringing Back War:

Part I – The Moral Distinctiveness of War

Claire Finkelstein begins her thought provoking piece, *Responsibility for the Acts of War*, but stating that “It is tempting to suppose that the moral rules that govern responsibility for acts of war and those that govern ordinary wrongdoing are radically different.” She then goes on to promote a detailed and well-defended assault on this supposition. I confess, however, that I have fallen for this temptation. I believe that the moral and regulatory paradigms for “ordinary wrongdoing” and acts of war are so dissimilar in origin and historical practice that it is improper to cross apply the terms and lessons of one into the other.

Professor Finkelstein’s piece was a rebuttal to Jeff McMahan’s attack on the moral equality of soldiers. Under just war theory, Michael Walzer, in the seminal book on the topic *Just and Unjust Wars*, affirmed the long held belief that the justness of a state party to a conflict, or lack thereof, did not affect the morality of the actions of individual combatants employed by that state. In other words, the *jus ad bellum* determination did not affect the morality of *jus in bello* actions. Professor McMahan attacked this long held belief, concluding that the combatant activities of a belligerent in an unjust cause could not be considered morally justified or permissible. He shied away from finding these soldiers culpable, however, and instead found their actions to be a form of excused self-defense. Professor Finkelstein, through a set of hypothetical situations, presented a strong rebuttal to McMahan by showing the difficulties in applying this one side justified, one side excused paradigm of combatant morality.

My initial inclination was to agree with Professor Finkelstein, but an insightful comment by Professor Luis Chiesa caused me to rethink the entire concept. Professor Chiesa, using the German tripartite approach to criminal liability, argued that belligerent acts are neither justified nor excused, but in fact, fail to meet the substantive elements of the offense. At first blush this does not appear to have any merit. A battlefield ‘targeted’ death meets the elements of homicide: the intentional killing of another human. The answer is that the legal and moral norms of criminal law, the very basis for the elements of the offense, do not apply to acts of combat. To show this, I will need to review the genesis of criminal law.
The Development of Criminal Law:

A commonality and fundamental precept of all of criminal law systems is the sovereign’s unquestioned monopoly on the use of violence/force to achieve its ends.\(^1\) In most situations, the individual must rely upon the state to exercise the necessary force or threat of force to protect her body and her property. It is the state and only the state that has the power to arrest, try and punish the criminal. It is the state that can use violence or the threat thereof to tax income or possessions for the public good, seize personal property through models like eminent domain, quarantine individuals for public safety, and even conscript individuals into military service. Even possessing the most benevolent of motives focusing on the public good, the individual is prohibited from using force in a similar manner.

The paradigm for criminal law is that all non-State use of violence or threat of violence against another human or the possessions of another human is prohibited. Criminal law grants the individual back certain narrow exceptions to this blanket prohibition which are incorporated within the concepts of justification and excuse. These concepts include self-defense, necessity and duress.

Under criminal law, self-defense is rooted in the idea of allowing the individual to react to an imminent or ongoing attack in a manner timely enough to prevent the threatened harm. Said another way, when time constraints preclude the force of the State from preventing a serious harm, an individual may exercise the necessary (and proportional) force to prevent that harm. If the attack is not imminent to the point where State action is precluded, even self-defensive force is not authorized. If a neighbor comes running at you with a knife evincing an unlawful intent to kill or seriously harm you, because the ordinary power of the State cannot react quickly enough eliminate this threat to your person, the State will temporarily cede back the ability to use force. If, however, the neighbors threatened attack is days away, the State will maintain its monopoly and require you to notify its agents (law enforcement) to eliminate the threat. Similarly, necessity may authorize the individual to use force normally reserved to the State in situations where the State is incapable of reacting quickly enough to an amoral danger. For example, necessity may authorize an individual to seize another’s abandoned vehicle and use it to escape an oncoming tsunami. Note that, in both of these situations, the individual is granted temporary authority to use the State’s lawful force.

Dissimilar to self-defense and necessity, duress does not authorize the temporary use of State’s inherent force, but rather allows the individual to avoid culpability for their actions in situations where no force, state or otherwise, would be authorized under the law. The quintessential example to show the

\(^1\) I mean, of course, violence and the use of force between humans rather than the use of violence to say, chop down one’s own trees.
differences between justified conduct such as self-defense and excused conduct such as duress is Kant’s North Sea Plank. There are two men in the ocean and a wooden plank that is sufficient to keep only a single of them from drowning. The individual who originally possesses the plank is justified in using force to fend off the other who is attempting to co-opt the plank for his own survival. Meanwhile, the drowning man who is plank-less is not justified in stealing the other’s life sustaining plank to save his own life. If he does use force towards those ends, however, his homicidal act may be excused under the law. Excuse applies to those acts that, although legally prohibited and blameworthy, do not justify criminal punishment. The drowning man’s violent acts to seize the plank are visceral and could not be deterred. Subsequent punishment by the State accomplishes nothing.

In sum, the criminal law paradigm concerning the use of force is one of comprehensive prohibition with limited exceptions. (Even the State’s law enforcement agents are authorized to use force only by matter of exception.) Before we leave this overview of criminal law, however, we must explore its boundaries.

The power to punish for criminal acts has historically been vested in the sovereign and limited by the legal reach of that State. For example, a State does not normally have the power to punish acts that occur outside its geographic jurisdiction. Further, a State sometimes does not have the power to punish acts that occur within its geographic jurisdiction. Concepts such as diplomatic immunity have long restricted the actions of a sovereign even within its own borders.

This begs the question, how do limits on a State’s criminal jurisdiction affect the morality of an act? Both McMahan and Finkelstein, for sake of the discussion, use “… the prevailing approach to the central questions of criminal law as a proxy for general morality.” As Professor Finkelstein notes, “…many scholars have noted the commonality of intuitions concerning justice across a broad array of peoples and cultures.” Their approach, however, incorrectly limits these common intuitions to issues of substantive criminal law. They fail to see the significance of the similar general common intuitions of criminal procedure, particularly the morality interrelated to jurisdiction. Consider the following example:

Private Smith is a combatant for State A. For this example, assume that State A does not have the just cause in the conflict. Private Smith engages in combat and kills soldiers from State B in the sovereign territory of State B. When Private Smith is subsequently captured by State B, the laws of war prevent his prosecution for murder, even though he engaged in the intentional killing of a citizen soldier of State B on that State’s sovereign territory. McMahan would argue that the moral basis for this immunity is one of excuse and Finkelstein would argue that it is one of justification. In fact, it is neither. Let us take the story further, however. Private Smith, while a prisoner of war, kills his military prison
guard and escapes back to the forces of State A. Since Smith was a prisoner, he was legally *hors de combat* and not eligible for privileged belligerency. Thus, legally, he committed the punishable crime of homicide in State B without justification or excuse. Theoretically, once peace is restored, State A should extradite Private Smith to State B for prosecution. However, this is neither required nor the common practice of states. Instead, Private Smith has been not only protected from punishment, but even rewarded for his “heroic” escape. If the common morality of criminal law applies to this situation, the entire world should abhor this immoral act of murder. A different general intuition is at play here, however, one that is based upon the common morality that has arisen within context of the laws of war.

The Development of the Law of War

A fundamental principle of the laws of war is that of military necessity: the principle whereby a belligerent has the right to apply any measures which are required to bring about the successful conclusion of a military operation and which are not forbidden by the laws of war. Said another way, a belligerent has the right to do anything and everything to win the war except violate the laws of war. Note that no other systems of law are included in this narrow prohibition to this blanket authorization. Thus, under the laws of war, a privileged belligerent can potentially violate each and every one of the domestic laws of the enemy state in its sovereign territory in order to achieve victory and yet retain her immunity from prosecution (provided that they do not violate the laws of war as well). Not only is this conduct authorized, but it is mandated both legally and morally by the controlling sovereign. Unlike any other profession, a soldier can be prosecuted for negligently failing to perform their duties, in this case the duty to wage war effectively.

The blanket authorization/mandate for violence was originally without any form of meaningful limitation. Long after states had developed criminal prohibitions against murder, rape, theft and pillage, combatants were allowed to engage in all four with impunity. What restrictions states did put on their combatants were often limited to amoral issues such as shares of pillaged wealth. Originally war aptly reflected Clausewitz’s “… absolute and unlimited brutality.”

Into this moral vacuum, a code of arms/chivalry emerged. Although clothed in romantic notions, the essence was a code of conduct for combatants. Genteel belligerents grew to abhor the unrestricted violence of war. Through custom/practice they created a set of rules that applied exclusively to combatants. This was not sovereign based law or morality; it was not mandated
by an external source. The sovereigns’ sole command: Win the war. Said another way, the foundation was military necessity.

Unlike the restrictive approach of criminal law, the laws of war have a permissive approach. All violence is authorized (and potentially mandated) unless specifically prohibited. Modern principles of the Law of War that prohibit violence include: the responsibility to discriminate between military and civilian targets; the responsibility to limit collateral (non-military) damage in an attack to less than the military advantage gained; and to refrain from causing unnecessary physical suffering (e.g. using glass fragmentation to inhibit life saving procedures). Note that everyone one of these starts with the concept that violence is authorized unless it violates these prohibitions. Consider the effect of this permissive approach towards force as compared to the restrictive nature of criminal law on the concept of a proportional use of violence.

Captain Jones has received the military mission to engage an enemy unit and capture a certain isolated hilltop. Captain Jones is aware that the enemy’s morale is very low in general and many of them surrender immediately after initial contact. Captain Jones believes that, if he approached the enemy unit and engaged it with small arms, the chance of injury to his unit is moderate and the probability that this enemy will immediately surrender is high. This would cause minimal enemy casualties. Alternatively, Captain Jones could engage the enemy unit with an area of effect weapon system (artillery) and this would also involve less risk to his soldiers but it would kill most, if not all, of the enemy unit.

Under the criminal law concept, Captain Jones, as a police officer, would have the legal and moral responsibility to attempt to capture the enemy unless he concluded that course of action did not have a reasonable chance of success and/or was unreasonably dangerous. Captain Jones the police officer is restricted in his use of violence against any target, even the most wanton and dangerous of criminals. He can never do more violence than is required to eliminate the imminent threat. (Tennessee v. Garner) He can never escalate to deadly force unless all lesser means are deemed unfeasible.

Captain Jones the soldier, under the customs, practices, and laws of war, does not have a legal or moral responsibility to minimize enemy casualties. If the only targets affected are legitimate military targets, then there is no proportional limitation on Captain Jones’ use of force.
whatsoever. The threat posed by uniformed enemy soldiers does not have to be imminent or even factually probable for Captain Jones to engage every one of them. In other words, Captain Jones has no responsibility to provide enemy soldiers the opportunity to surrender before engaging them with deadly force.

*(Beyond the mere option to use “excessive force” against an enemy military target, a soldier can be required to do so. If Private Brown, the soldier operating the field artillery piece, has a personal moral belief that Captain Jones should capture the enemy if reasonably possible, and thus refuses to fire the weapon, the legal and moral code of general tenets of military law would allow for his severe punishment. For example under the Uniform Code of Military Justice Article 90, disobeying a lawful order from a superior commissioned officer in time of war has a maximum punishment of death. By comparison, Correctional Officer Brown who refuses to conduct a lawfully adjudicated execution faces nothing more than loss of position.)*

In addition to necessity and proportionality, substantive criminal law concepts like self-defense, and duress also have significantly different meanings and application in the realm of combat and military law. Consider that soldiers can have their individual right of self-defense (for the purposes of unit self-defense) pulled from them even if they are facing imminent death from an unjust aggressor. This concept is entirely outside of any aspect of criminal jurisprudence that I am aware of, and would appear to violate human rights law if it was not.

The criticism to my approach is that it appears I am focusing on legality rather than morality. Certainly there are different substantive and procedural differences concerning acts of war and the legal evaluation thereof, but isn’t Captain Jones’ failure to limit enemy casualties actually immoral? I do not believe so.

The common “general intuitions” that are the moral basis of criminal law are a product of interpersonal relations in civilized society. They are fundamentally based on the human desire for stability. Every civilized society can intuitively see the benefit of having a near total restriction on the use of violence within that community. These same common intuitions give rise to substantive crimes such as homicide and defenses such as justifications and excuses. They are part and parcel to any and every civilization going back millennia. The existence of commonality of intuitions within the vast array of civilian criminal systems has been used to
prove the existence of some level of objective morality. (See Lon Fuller) If this is an appropriate method and conclusion, the same test applied to common intuitions within the laws of war is evidence of the existence of a separate moral code for acts of combat.

The principles of the laws of war arose from customary practice on the battlefield. The existence of customary international law is shown by the general practice of states and the opinion that these practices are required by legal obligation. This “legal obligation” however, does not stem from a positive source but is historically the product of natural law… or morality. In other words, the laws of war are the products of the commonly held moral beliefs of combatants. (Note that the genesis of the laws of war was in the minds of combatants, not sovereigns. Even the famous Lieber Code was the product of a committee consisting of a combat veteran (Lieber) and active duty general officers). The manner in which combatants evaluate the use of violence (permissive rather than restrictive) is part and parcel to this separate moral code for combat.

The very concept of privileged belligerency defeats any rebuttal of the equal moral standing of lawful combatants. Belligerent acts of combatants in the unjust cause are considered “privileged,” not excused. Under criminal law, excuse applies to impermissible conduct and brings with it some level of shame. Historically, however, soldiers from aggressor states that fought honorably have been viewed with respect after the cessation of hostilities. Fighters from both sides of the U.S. Civil War have been continually honored after the war. If Jeff McMahan is correct, society should have viewed the veterans of one side, similar to the drowning man who kills another in his panic, as morally shameful even if they were not punishable.

As Professor Chiesa astutely noted, one cannot even get to the concept of justification unless one has first found the elements of an offense. A privileged belligerent’s acts in war have been universally considered outside the reach of civilian criminal law. The desire for stability in a civilized community that has birthed criminal law’s moral norms has no correlation in the realm of combat, where violence is not only authorized and accepted, but mandated.

(One can draw a parallel between this historical development of criminal law’s restriction on the use of force and the relatively modern concept of jus ad bellum. It might be helpful to view the world community of states as a group of individuals forced to cohabitate on the proverbial island. Initially there is violence between the individuals as they fight for control of the limited resources. Eventually a
sort of social contract evolves between the members as they come to realize some semblance of order is preferable. Consequently, a sovereign concept is created to maintain that order and this sovereign is given the exclusive right to use force to preserve the order on the island. So to, the international community, operating as independent states, initially quarreled over limited resources until the sheer cost of the violence (e.g. WWII) brought about the sovereign like concept that is the United Nations. Further, this sovereign claims the exclusive right to use violence to maintain international peace and security. To complete the analogy, both the United Nations charter and criminal jurisprudence return certain limited abilities to use violence to the ‘individuals’. Given this parallel historical and philosophical development, it makes rationale sense that the voluminous body of criminal jurisprudence be used to help provide meaning to similar concepts in international law as George Fletcher and Jens Ohlin have argued.

Part II (An Outline) Calling a War… a War

Given that the morals and jurisprudence of substantive criminal law cannot be readily applied to combat, it becomes important that the existence of war be a clear matter of law rather than an arguable conclusion of fact. If war has such a totally unique set or rules, laws and even morals, then clearly defining its reach and even its very existence is a crucial debt owed to humanity. This entire conference on the subject of targeting killing starts with the fundamental question concerning which legal paradigm to apply: criminal law or international humanitarian law.

I believe our predecessors understood this need for clarity when they drafted the Third Hague Convention of 1907 (Hague III) which required:

“The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.”

Although this has arguably been superseded by the U.N. Charter since states no longer have free access to war as a tool of national policy, it suggests a simple solution to the targeting killing question concerning the existence of armed conflict. I propose that the state of war can exist if an only if it has been publically declared. Further, I propose that privileged belligerency under International Humanitarian Law be legally limited to situations in which the combatant’s
state has declared war (or soon does so within a reasonable time after the initiation of hostilities). Before I cover the merits of this proposal, I would like to address the obvious objections.

1. How does this apply to the targeted killing scenario? An element of the modern asymmetric conflict that gives rise to the targeted killing debate is that one party to the conflict is not a state. Thus, there is no political entity against whom to declare war. I agree with this objection, but provide the simple solution that states should be granted the ability to declare a state of war against any group or individual.

2. Second, non-state actors do not have the legal capability to declare war and therefore would not be eligible for privileged belligerency. I agree, but find this to be unimportant. Privileged belligerency can only be granted to those who are openly combatants and who comply with the laws of war (among other restrictions). The only time where this might realistically occur for a non state actor is in the case of an insurgency. For example, in the current conflict in Libya, theoretically the rebel forces could distinguish themselves sufficiently to qualify for privileged belligerency. This would be a nominal benefit at best. While privileged belligerency prohibits prosecution for lawful acts of combat, it fails to immunize the insurgent for loyalty offenses. In other words, if they are captured by Libyan government forces they can claim immunity for the crime of murder on the battlefield, but still be tried and sentenced for treason.

Now on to the merits of this suggestion:

1. A declaration of war brings back the necessary principle of distinction to asymmetrical armed conflict. Distinction protects the innocent. Not only does it prevent noncombatants from being targeted by belligerents, it also provides notice of the danger of association. During an armed conflict, noncombatants are aware that associating with military targets places them at risk of being collateral damage in a lawful attack. A declaration of war against a list of individuals provides official notice to innocent noncombatants as well as the opportunity to sever their association with these individuals.
2. This will provide a necessary check on the power of the permanent five members of the Security Council. Currently, five states can engage in aggressive war with impunity. The only vehicle to enforce the United Nations Charter is the Security Council and these five members have the legal capability to forestall any such action. Domestic prosecutions, however, require no international approval. Americans have an intense dislike/fear of having their military subject to a foreign tribunal. (See the debate concerning ratification of the ICC). If a captured U.S. military pilot would be legally and properly subject to prosecution for any acts of violence they committed in a foreign state, there would be immediate opposition to engaging in any undeclared war. Further, the extreme political measure that is a declaration of actual war will serve as a deterrent to continued activities that look more like extrajudicial executions rather than lawful military targeting to the general public.

3. The existence of war should be subject to legal review. If a declaration of war is a required legal process, interested states would have the capability to challenge this declaration before the International Court of Justice. Theoretically, this Court could be empowered to place a stay on the existence of war (and thus the applicability of privileged belligerency) and then adjudicate if the declaration violates the terms of the U.N. Charter. Interested parties would be any state in which one or more members of the opposing force are located. This process of legal review appears to coincide with the U.N. Charter’s preference for resolution of all disputes peacefully.

4. The declaration of war would require neutral states that are housing members of the opposing force to act in conformity with The Hague and Geneva Conventions regarding the presence of combatants in their neutral territory. Failure to do so would authorize the declaring state to conduct combat activities within their borders.

5. States would have a greater incentive to overtly support insurgent forces rather than to continue to do so covertly. If the United States wants to support the Libyan insurgency and believes they are justified in doing so either as a matter of collective self-defense or
U.N. resolution, they can declare war on Libya on behalf of the insurgents, granting these same insurgents the opportunity to attain privileged belligerency.

Ultimately this new legal requirement to acquire privileged belligerency provides some benefit to all innocent parties. Noncombatants are given increased capability to avoid being a casualty in the modern nonlinear battlefield. Weaker States are given a real power to voice their objections and/or moral and clear legal authority to prosecute violations of their sovereignty. Stronger states are given the moral and legal authority to publicly require smaller states to defend their neutrality by seizing all combatants in their territory to legally invite violations of their sovereignty. War becomes clearly servable from civilized life; by forcing a war to be an actual war, a concept for which humanity has evolved a strong distaste, perhaps it will occur less often. Finally, if, in fact, Jeff McMahan is proven correct and I am proven wrong, this will provide a process for Soldiers to know that they are part of a just cause and avoid blameworthy (albeit not culpable) conduct.