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editorial.isonomia@gmail.com

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The Prism of War and the Creation of a New Normal

Marcelo Ferrante

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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