

# From *Jus ad Bellum* to *Jus ad Vim*: Recalibrating Our Understanding of the Moral Use of Force

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In the preface of the 2006 edition of *Just and Unjust Wars*, Michael Walzer makes an important distinction between, on the one hand, “measures short of war,” such as imposing no-fly zones, pinpoint air/missile strikes, and CIA operations, and on the other, “actual warfare,” typified by a ground invasion or a large-scale bombing campaign. Even if the former are, technically speaking, acts of war according to international law, he proffers that “it is common sense to recognize that they are very different from war.” While they all involve “the use of force,” Walzer distinguishes between the level of force used: the former, being more limited in scope, lack the “unpredictable and often catastrophic consequences” of a “full-scale attack.”<sup>1</sup> Walzer calls the ethical framework governing these measures *jus ad vim* (the just use of force), and he applies it to state-sponsored uses of force against both state and nonstate actors outside a state’s territory that fall short of the quantum and duration associated with traditional warfare. Compared to acts of war, *jus ad vim* actions present diminished risk to one’s own troops, have a destructive outcome that is more predictable and smaller in scale, severely curtail the risk of civilian casualties, and entail a lower economic and military burden. These factors make *jus ad vim* actions nominally easier for statesmen to justify compared to conventional warfare, though this does not necessarily mean these actions are morally legitimate or that they do not have potentially nefarious consequences.

Just war scholars, however, often do not differentiate between force and war, but rather talk about *bellum justum* as if all uses of force implied the same moral challenges. The tendency is therefore to evaluate forces short of war through

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the lens of *jus ad bellum*.<sup>2</sup> We question whether this assumption is warranted. In particular, we inquire whether *jus ad bellum* offers a useful moral framework for assessing the acts of force short of war that increasingly characterize global conflict. Thus, in the first part of the article, we articulate the limitations of *jus ad bellum* principles in evaluating recent trends in international affairs—such as the rise of nonstate actors and the advancements in precision weapons technology (for example, drones)—that have weakened the sovereignty norm and facilitated small-scale uses of force to combat perceived threats. We argue that the *jus ad bellum* framework does not offer sufficient leverage for assessing the *jus ad vim* actions that have become the hallmarks of the Obama administration’s approach to combating terrorism.

While some scholars have begun to imagine how *jus ad bellum* principles might look different when adapted to the use of limited force against nonstate actors, there has been no systematic attempt to theorize about *jus ad vim*.<sup>3</sup> We therefore ask: What would a theory of *jus ad vim* that counters the shortcomings of the *jus ad bellum* framework look like? In the second part of the article we contend that a viable theory of *jus ad vim* can be constructed by recalibrating *jus ad bellum* criteria and adding a new principle—the probability of escalation. Determining the moral distinctiveness of *jus ad vim* helps us evaluate the spectrum of options available to statesmen, which range from nonviolence, to force short of war, and ultimately to war itself. However, we warn that *jus ad vim* raises a host of tensions that just war theorists must be mindful of, and point to some challenges to which thinking in terms of *jus ad vim* may itself give rise. We also raise questions about *jus ad vim* that open up future paths of research on the topic.

## SMALL-SCALE FORCE AND THE LIMITATIONS OF *JUS AD BELLUM*

C. A. J. Coady identifies a recent trend in forms of violence, namely, that “the last quarter of the twentieth century and the beginning of the twenty-first century have seen a dramatic decline in warfare understood as direct state-to-state conflict.”<sup>4</sup> An important part of this shift is due to the rise of nonstate actors, such as al-Qaeda and its affiliates, which pose significant threats to international peace and security, but do not have international legal status and operate in the porous or disputed border regions of sovereign states. As states seek to respond to the perceived threat of terrorism, the struggle against nonstate actors has led to the diminished importance of geographic boundaries in circumscribing the legitimate use of

force, and raised questions about the violability of a state's right to territorial integrity. This process began in the 1990s, a decade that saw humanitarian crises in Rwanda and the Balkans challenge the viability of the legalist paradigm. The ensuing debates about the sanctity of territorial integrity, followed by the emergence of the Responsibility to Protect norm, mark a key shift in traditionally state-centric just war thinking, which considered the violation of territorial sovereignty an exception to the sovereignty norm.

With regard to nonstate actors, Eric Heinze argues that their rise has led to the emergence of a "regime of non-state responsibility," which means that weak states are not responsible for what goes on within their (uncontrolled) borders. But the consequences, Heinze argues, are two-fold. First, it has led to "the expansion of the right of self-defense under international law," in a "limited and targeted fashion," against nonstate actors within another state (Heinze cites a 2002 drone strike against al-Qaeda as a legal precedent). Second, this new regime has caused the loosening of "the normative and legal constraints on using force against states for their tolerance of such activity within their borders."<sup>5</sup> The result is a serious challenge to the territorial definition of sovereignty. While Heinze suggests this may increase the likelihood of interstate conflict, the limited scope of such actions—particularly in the case of drones—has not yet led to expanded conflict, but rather has increased instances of *jus ad vim*.

While war used to be easily defined as a zone of combat where lethal force was justified (to be distinguished from a zone of peace, where it was not), the struggle against terrorism has created "in-between spaces" of moral uncertainty where force is used on a consistent and limited scale, but war is not declared.<sup>6</sup> These are places where terrorist groups have taken up residence and the host country does not have the will and/or capacity to deal with the threat they pose, such as in the border areas between Pakistan and Afghanistan or the southern region of Yemen. Who has the right to address the threat emanating from these places, and with what level of force? Walzer's conclusion—that international policing actions, in conjunction with actions by local authorities, should be tried first—is intuitively appealing. If these fail, then the unilateral use of lethal force by the state that feels threatened would become warranted. However, the ethical challenge lies in determining when the threshold separating international policing and unilateral force has been crossed, and what level of force is justified.

The response by the United States to the events of 9/11 serves as an illuminating example. The Authorization for the Use of Military Force passed by Congress

in September 2001, in conjunction with President George W. Bush's classified Memorandum of Notification, signed in September of that year, gave the CIA the right to kill members of al-Qaeda in anticipatory self-defense virtually anywhere in the world. Bush's struggle against al-Qaeda, however, took place predominantly within the framework of traditional just war thinking by waging war against sovereign states wherein al-Qaeda was perceived (not always accurately) to be operating—most notably, Afghanistan and Iraq. And insofar as he undertook only a few *jus ad vim* acts, the ethical concerns they raised, while duly noted by a few scholars, remained peripheral to broader just war debates. Nevertheless, his policies opened the way for a mode of conflict that transcends international borders.

President Barack Obama, despite rejecting Bush's view of *jus ad bellum*, has continued—indeed expanded—the precedent established by his predecessor. What paved the way for this shift was, first, the perceived failure of the Bush doctrine. Citing as consequences of the Bush approach an “overstretched” budget, a “resurgent” al-Qaeda, a “strengthened” Iran, and the tarnished global image of the United States, Obama clearly repudiated the *jus ad bellum* “mind-set” that legitimated the Iraq war.<sup>7</sup> A second element that facilitated this shift was Obama's use of drone technology. From a political perspective, drones provide a precise and calibrated tactic for addressing the security threat linked to nonstate actors. They can be used to target combatants, while significantly reducing the risk to U.S. troops and diminishing the number of civilian casualties.<sup>8</sup> The result has been a six-fold increase in drone strikes in Pakistan under President Obama and an increase of strikes in several other countries, such as Yemen and Somalia.<sup>9</sup> This use of violence, while certainly less intense and widespread than that of the multiple wars waged by the Bush administration, nevertheless raises serious human rights concerns.

### *Forces Short of War and the Issue of Human Rights*

The concept of just war must weigh two views of rights against each other: a state's right to sovereignty and universal human rights (especially those of noncombatants). In an ideal world, a just use of force should satisfy both, but the reality is that there are no easy answers as to the right balance. Some scholars suggest that just war thinking reinforces individual human rights because it requires the protection of noncombatants and endorses the Responsibility to Protect doctrine, while critics argue that just war principles condoning the violation of state sovereignty serve to reinforce Western (and in particular, American) exceptionalism, thus

promoting a form of neoimperialism that privileges the capacity of powerful states to use force.<sup>10</sup>

Technology has exponentially increased mankind's capacity for violence through nuclear weapons, but it has also facilitated more limited applications of force that reduce the destruction of combat. Aircraft can provide a less invasive form of intervention than ground troops. Precision weaponry and so-called smart bombs allow for highly targeted and localized uses of force. More recently, some have claimed that drones, compared to other weapons systems, better adhere to the principles of discrimination and proportionality.<sup>11</sup> In this vein, proponents of drones claim that their use is a "moral imperative" to avoid the unnecessary risk to those fighting for a just cause.<sup>12</sup>

In an earlier issue of this journal we compared the number of civilian casualties at the height of the war in Iraq (34,500 in 2006) to drone deaths in Pakistan from 2004 to 2011 (as many as 2,283), concluding that drones seem to cause less damage than the often unpredictable and destabilizing uses of large-scale force.<sup>13</sup> Even within the category of drone strikes, statistics indicate collateral damage is decreasing. While the U.S. government's claims of zero civilian casualties are manifestly false and good evidence is hard to come by, research by the New America Foundation suggests that of the over 330 U.S. drone strikes in Pakistan since 2004, "the average non-militant casualty rate over the life of the program is 15–16 percent. In 2012 it has been 1–2 percent, down sharply from its peak in 2006 of over 60 percent."<sup>14</sup> Moreover, in theory at least, the damage caused to the civilian infrastructure of a state subjected to *jus ad vim* should be less than that caused by large-scale interstate wars. Small-scale uses of force may still have wide-ranging effects, but the destructive effects are believed to be more predictable. This makes it possible to maintain a stronger correlation between the use of force and its intended effects. Kenneth Anderson puts it succinctly:

If the facts ascribed to the technology are correct, technology provides a *deus ex machina* and an escape from the *jus in bello* proportionality trap. After all, everything in the *jus in bello* category here works together, not against each other. The technology provides force protection to (one side's) combatants; it provides greater protection to civilians through precision targeting.<sup>15</sup>

The result is the perception that such uses of force follow from and reinforce the very human rights norms that prompted a norm of casualty aversion and intolerance for collateral damage in battle.

However, on a practical level the conceptual boundaries between small-scale and large-scale uses of force are fluid because the number of casualties does not tell the full story. Technology that permits *jus ad vim* actions, if not governed appropriately, empowers strong states to use force in ways to further their own security and interests, while placing weak states at their sufferance. We already see this happening in states such as Pakistan and Yemen, where the United States has appealed to the challenges posed by fighting terrorists in order to justify intruding into the domestic affairs of these states, sometimes without the full and open consent of their ruling governments. The problem is that while the struggle against terrorism is couched in terms of protecting human rights, the human rights of noncombatants may be sacrificed as the increased capacity for governments to satisfy the *jus in bello* principles of proportionality and discrimination may tempt these same governments into using force more frequently than necessary.

Even if the number of civilian casualties has been reduced by the turn to *jus ad vim* actions, the use of armed force still raises key human rights issues. Some scholars claim that relying on technology to decrease the risk to U.S. soldiers transfers the risk to noncombatants in the area of conflict.<sup>16</sup> This pattern is evident in the casualty figures from recent conflicts, such as Kosovo, where there were no allied casualties, and the war in Afghanistan, where, as John Williams observes, “non-combatants will be protected so long as their protection does not require taking measures that may endanger the lives of soldiers.”<sup>17</sup> The same could be said of President Bush’s “global war on terror” and President Obama’s drone campaign.<sup>18</sup>

### *The Inadequacy of Jus ad Bellum Principles in Guiding Force Short of War*

When one thinks of the principles of the just war tradition, one tends to think in terms of their capacity to capture the moral dilemmas of large-scale employments of force. Brian Orend’s definition of war serves as a good example:

War should be understood as an *actual, intentional* and *widespread* armed conflict between political communities. . . . War is a phenomenon which occurs *only* between political communities, defined as those entities which either are states or intend to become states (in order to allow for civil war). . . . Further, the actual armed conflict must be intentional and widespread: isolated clashes between rogue officers, or border patrols, do not count as acts of war. The onset of war requires a conscious commitment and a significant mobilization on the part of the belligerents in question. There’s no real war so to speak until the fighters *intend* to go to war and until they do so with a heavy *quantum* of force.<sup>19</sup>

A 2010 International Law Association report on the meaning of armed conflict tracks closely with Orend's definition:

As a matter of customary international law a situation of armed conflict depends on the satisfaction of two essential minimum criteria, namely:

- a. the existence of organized armed groups
- b. engaged in fighting of some intensity.<sup>20</sup>

The problem is that the terms “war” and “armed conflict” do not adequately capture the full spectrum of force available to statesmen. The right to wage war is traditionally justified by reference to the duty of leaders to defend the members of their state from aggression, and the legal permission, informed by Article 51 of the UN Charter, to use force in self-defense. When one state wages an aggressive war against another, it is easy to see how a large-scale use of force could be warranted as a response and how the *jus ad bellum* criteria could govern this decision. However, the evolving notion of threat illustrates the need for a more calibrated view of force. In cases of threat associated with terrorism, humanitarian catastrophe, and the spread and use of weapons of mass destruction, the potential for significant human rights violations warrants some kind of response, but not necessarily the declaration of a full-scale international war.

According to recent research by the Council on Foreign Relations, between 1991 and June of 2009 the United States carried out thirty-six “discrete military operations,” which they define as “a single or serial physical use of kinetic military force to achieve a defined military and political goal by inflicting casualties or causing destruction, without seeking to conquer an opposing army or to capture or control territory.”<sup>21</sup> Considering additional uses of force complicates matters more. No-fly zones—which utilize air power in support of peace operations by denying the enemy use of designated air space, and provide a means for monitoring ground operations<sup>22</sup>—arguably constitute a lower level of force compared to war, though they still require some level of violence to enforce. No-fly zones have been employed three times in the last two decades, namely, in Iraq from 1991 to 2003, Bosnia and Herzegovina from 1993 to 1995, and Libya in 2011. While seemingly less violent than full-scale war, they have significant costs insofar as they require strong regional support to access local air bases and acquire fly-over permission. Moreover, their maintenance requires the implied threat of force, which puts multiple categories of peoples—civilians and soldiers—at risk. As Coady argues, the Iraq containment zone opened the way for human rights

violations by authorizing approximately 34,000 sorties per year between 1991 and 2002. Coady points to 300 civilian deaths as well as “many Iraqi military deaths and much property destruction” that lack adequate documentation.<sup>23</sup>

In addition, despite the 2010 report by the International Law Association on the meaning of armed conflict that argues that terrorist attacks do not amount to just cause for small-scale uses of force,<sup>24</sup> U. S. government officials continue to operate within a moral gray zone created by the increased influence of nonstate actors, which, some argue, blurs the relationship between morality, international law, and the use of force.<sup>25</sup> Discussing the rise of drone warfare, Kenneth Anderson argued before the U.S. House of Representatives in 2010 that the strategic advantage of drones is their ability to provide a “limited, pinprick, covert strike” in order “to avoid a wider war.”<sup>26</sup> John Brennan, White House counterterrorism advisor, recently defended drones in the following way:

As a matter of international law, the United States is in an armed conflict with al-Qaeda, the Taliban, and associated forces, in response to the 9/11 attacks, and we may also use force consistent with our inherent right of national self-defense. There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.<sup>27</sup>

Critics would argue that Brennan has misinterpreted international law altogether.<sup>28</sup> But while one could simply retort that such acts violate international law, it is important to adjudicate between what is strictly speaking unlawful and what is morally and strategically justifiable. By recognizing a political reality in which statesmen retain their prerogative over a wide range of activities that involve the use of lethal force, it becomes clear that the ethical challenges facing statesmen have not diminished; they are merely different.

The limited level of force employed to combat nonstate actors points to a problematic assumption in just war thinking, namely, that advances in technology do not alter the interpretation of *jus ad bellum* principles. Anderson, for example, assumes that technology does not change the way we think about just cause.<sup>29</sup> Additionally, he speaks as though *jus ad bellum* standards are sufficient for evaluating limited uses of force and to prevent unjust uses of these types of force. Yet while technology may effectively reduce the risk to soldiers and the probability of collateral damage, it may also lead to more frequent uses of low level force to quell



a perceived threat if the moral and political calculus—what is understood as just cause—is altered based on the scale of force being applied. Moreover, as we have argued in a previous issue of this journal, the risk becomes, somewhat paradoxically, that drones forestall the threshold of last resort for larger military deployment, but that the last resort criterion is not applied to drone strikes themselves because the targeted killing of (alleged) terrorists becomes the default tactic. Thus, the use of *jus ad vim* as a means to enhance a state's capacity to act on just cause proportionately and discriminately may lead to its propensity to do the opposite.<sup>30</sup> Indeed, U.S. drone targeting practices have expanded in worrisome ways. The initial policy was to target only high-level leaders, but the targeting list has since widened to include signature strikes against individuals based on suspicious patterns of behavior. New research suggests that under the Obama administration only 13 percent of drone strikes have killed a militant leader, while leaders represent just 2 percent of all drone related fatalities.<sup>31</sup> Even if such targeting is successful in keeping al-Qaeda on the run, this does not necessarily make such a practice just. Indeed, recent reports suggest that within the U.S. government there is debate about whether certain drone strikes satisfy the criterion of last resort.<sup>32</sup> In sum, we suggest that these concerns point to the need to inquire about what *jus ad bellum* principles mean in the context of drone strikes. More generally, they illustrate the importance of understanding how using force short of war might change just war principles and the need to theorize about a more precise understanding of when force, at all levels of violence, can be justified.

## THE PRINCIPLES OF *JUS AD VIM*

In this section, we propose a set of principles to help navigate the ethical challenges with regard to the use of force short of war. For contemporary just war theorists, the challenge lies in attending to the potentially different moral processes at work in determining the appropriate level of force to respond to specific international concerns, including humanitarian intervention, the threat of nonstate actors, and the spread of weapons of mass destruction (WMD).

### *The Permissive Nature of Just Cause and Understanding Last Resort*

Understanding the distinctiveness of *jus ad vim* begins with a definition of just cause. In *vim*, as with *bellum*, self-defense and other-defense are the only legitimate causes for the use of force. However, as Walzer proffers, a theory of *jus ad vim* should be “more permissive” than *jus ad bellum*, but not “overly tolerant

or permissive.”<sup>33</sup> In *jus ad vim*, defense is interpreted more broadly. This means there are more cases in which *injuria* justifies some turn to force, but not necessarily war. Within the context of *jus ad vim*, a state has just cause to use measures short of war when responding to *injuria* against its interests or citizens. This includes responding to terrorist bombings, attacks on embassies or military installations, and the kidnapping of citizens. These are acts of aggression that justify the right to a forceful response. Imminent threats of terrorist attacks also provide just cause, as does responding to ongoing or impending humanitarian catastrophes. Threats linked to concerns about WMD present a possible just cause, depending on the conditions; if a state that has WMD is on the brink of collapsing into a failed state, or if a state is about to use such weapons on its own population, then *jus ad vim* acts are legitimate. Preemptive strikes to stop states from acquiring WMD require a caveat. We will return later to several criteria that restrict the way in which just cause can be acted upon.

There is, nevertheless, good reason to be skeptical of arguing for a theory of the use of force that is more permissive than that allowed in traditional just war thinking. Coady identifies the core logic of Walzer’s distinction between *jus ad bellum* and *jus ad vim*, namely, that “there should be greater reluctance to engage in wholesale invasion than, for example, to send in a small armed unit to effect a minimal objective.” However, Coady also argues that “we do not need some more permissive theory quite distinct from just war thinking,” because any turn to political violence, whatever the scale, should “require satisfaction of the genuine reluctance constraint.”<sup>34</sup> Coady is quick to warn, in stronger language than Walzer, of the potential dangers of *jus ad vim* in promoting unnecessary and unjust uses of force. His critique reminds us that *jus ad vim* acts cannot diminish the ethical burden of a state seeking to use force. *Jus ad vim* may be more permissive than *jus ad bellum*, but this permissiveness needs to be circumscribed by clear restraining mechanisms that limit the way in which a state responds to *injuria*.

Satisfying just cause does not tell us about if and when to use force, or the level of force to be used. It simply tells us that one has the right to do so as a response to some *injuria* or threat, depending on the satisfaction of additional criteria. Under the rubric of *jus ad bellum*, a state must cross the threshold of last resort. One could imagine *jus ad vim* actions as being contained within this principle, as options to be tried before resorting to war. Walzer writes, for example, that “force-short-of-war obviously comes before war itself.” The failure of *jus ad vim* actions could be taken to imply that war is a just and necessary response.

Assuming just cause is satisfied, as well as the other *jus ad bellum* criteria, one might then argue that the threshold of last resort has been crossed and war has become justified. We, on the contrary, argue that *jus ad vim* should not be conceived of as part of the actions leading up to war, but rather should serve as an *alternative set of options* to the large quantum of force associated with war. This stems from the essence of *jus ad vim*—its advantage in avoiding the unpredictable and widespread destructive consequences of war. Consequently, *jus ad vim* must be seen as morally distinct from the *jus ad bellum* last resort process.

*Jus ad vim* actions can provide a proportional response to certain security threats, and to the extent they are successful they arguably raise the threshold of last resort for large-scale military deployment. However, *jus ad vim* actions are also responsible for satisfying some version of last resort, or what Coady calls the condition of “genuinely reluctant resort [to force].”<sup>35</sup> Some attempt at nonviolent diplomatic measures must be tried before resorting to force, even if the limited levels of violence of *jus ad vim* mean that this requirement is less exacting than in the case of war. Pertinent here is Walzer’s argument that nonlethal policing actions, akin to what must be undertaken in zones of peace, should be prioritized.<sup>36</sup> These include expanding intelligence gathering activities, freezing terrorists’ assets, creating strategic partnerships with the governments of other countries to pursue and isolate terrorists, and working to marginalize the destructive ideology of terrorist organizations. However, as Walzer recognizes, policing operations will not always be adequate to address imminent threats, and states cannot be required to sacrifice their right to national security in the name of individual rights. Thus, there may be instances where the *injuria* does not rise to a level that would justify war, but is sufficient to warrant an armed *jus ad vim* response. There is no exact science as to when the last resort threshold of *jus ad vim* is crossed, but there must be an imminent threat and conditions that rule out policing measures. Moreover, this threshold must be crossed with trepidation because, as the example of drone strikes illustrates, *jus ad vim* actions inevitably lead to some civilian casualties, which, in addition to its own tragedy, can stoke the fires of future violence. If abused, these actions run the risk of perpetuating an endless cycle of perceived threat, inevitable collateral damage, and mutual animosity.<sup>37</sup>

### *Proportionality and the Probability of Escalation*

Assuming the threshold of last resort for *jus ad vim* is breached, it is necessary to regulate *jus ad vim* to ensure that any use of force is consistent with the

requirement of proportionality—as a just response that is mutually exclusive from war. This means the *raison d'être* of *jus ad vim* resides in the calculation of the maximally just level of force that can be applied to a specific situation, not what level to begin with and potentially escalate from. Determining *jus ad vim* is different from the vague concept of proportionality that cuts across both *jus ad bellum* and *jus in bello*, which many contemporary just war scholars understand as being “unrefined and imprecise.”<sup>38</sup>

Thomas Hurka’s conception of proportionality—his idea that, “if formulated properly, the principle of proportionality can incorporate the other just war conditions about consequences”<sup>39</sup>—offers one important exception to the general characterization of proportionality as a nebulous and indeterminate constraint. The thrust of Hurka’s arguments is two-fold. First, while it may be impossible to make precise proportionality calculations, this does not mean that some general proportionality judgments cannot be made to guide decision-making about the use of force. Hurka’s argument echoes the broader claim discussed in the previous section that advances in technology make the use of force more predictable than it used to be. Thus, second, as proportionality concerns become easier to satisfy, this will affect the way statesmen pursue just cause and understand the notion of last resort. But this is a problematic assumption. Belief in the satisfaction of the proportionality criteria is based on incomplete calculations, which has resulted in a set of moral standards that “may function not so much as limitations on war as tools for its liberation.”<sup>40</sup> *Jus ad vim* must seek to remedy this.

If one cannot rely on proportionality calculations, how does one gauge the level of appropriate force? Partly, by defining what constitutes a successful outcome and determining which actions will enable this outcome. The salience of the probability of success criterion, as Frances Harbour explains, “contributes morally significant insights to prewar *jus ad bellum* decisions,” for example, that “force and perhaps other tools are means to some goal, which may or may not entail military victory.”<sup>41</sup> These prewar insights point to the relevance of thinking about *jus ad vim*. Determining in a *jus ad vim* context whether a specific use of force would succeed in its goal parallels the *jus ad bellum* notion of probability of success: namely, that one does not want to engage in an act that would in all likelihood fail to produce the desired outcome. However, in the context of *jus ad vim*, there is a second element to identifying success that determines whether resorting to limited force is justifiable. Because the probability of success of a *jus ad vim* action hinges on avoiding escalation to a full-blown war, a new criterion is warranted: the probability of escalation.

An essential element of any *jus ad vim* action is that it does not lead to the outbreak of war. Escalation is defined as the elevation of hostilities to war, which increases the costs of resolving a specific crisis, and introduces the totalizing and unpredictable consequences of widespread conflict. If engaging in *jus ad vim* actions has a high probability of resulting in war, then one could argue that such actions are not justifiable, and must be subject to the stricter *jus ad bellum* regime. This criterion is never satisfied once and for all, but must be frequently re-evaluated in the face of evolving circumstances. In theory, the probability of escalation principle serves to restrict *jus ad vim* by limiting recourse to it in circumstances where the decision to use limited force may lead to war. In practical terms, however, the principle is plagued by ambiguity. Three contemporary examples raise further questions.

First, in the case of drone strikes in Pakistan and Yemen, there appears to be little risk (for the moment at least) that these strikes will lead to war with either country, despite instances of collateral damage. Drone strikes in Pakistan are an extension of the effort to deal with the Taliban operating in the Afghanistan-Pakistan border region, with what amounts to the tacit consent of the Pakistani government. In Yemen, the strikes target al-Qaeda operations in the southern region of the country, with the full consent of the Yemeni government. In both cases, the security of the host country is enhanced by U.S. drone operations. However, U.S. actions raise serious concerns regarding human rights, and run the risk of inciting terrorist recruitment and eliciting a cycle of violent responses. Drones may therefore lead to the promotion of *insecurity short of war*, which needs to be carefully weighed against the potential for drones to succeed in denying terrorists safe havens and disrupting their activities.<sup>42</sup> But at what point do transborder operations infringe upon the rights of the host country and risk escalation? How should *jus ad vim* account for potential escalation with nonstate actors capable of retaliatory terrorist attacks? And how does the level of consent attained from the host country affect the moral calculation?

Second, in the case of establishing no-fly zones, the Libya example illustrates the need to delimit the boundaries between *vim* and *bellum*. Looking critically at the NATO-led operation in Libya—which started as a no-fly zone tasked with protecting civilians, but escalated to the objective of regime change—James Pattison argues that the just war tradition lacks “the conceptual tools to consider the morality of an intervention that was permissible when it was launched but that later becomes morally problematic.”<sup>43</sup> Although Pattison does not reference *jus ad vim*,

the crux of his argument highlights the need for a more nuanced language to respond to the questions the Libya case raises. What, for instance, is the relationship of *jus ad vim*, protecting civilians, and regime change? And how should a theory of *jus ad vim* relate to the Responsibility to Protect norm?<sup>44</sup>

Finally, there is the question of what the probability of escalation criterion would mean in the case of the existential threats linked to WMD. One could imagine a caveat to our argument above. If, for instance, Iran was about to acquire nuclear weapons, or Syria was losing control of its WMD stock, and if a *preemptive* use of *jus ad vim* actions had a good chance of neutralizing such a threat, then *jus ad vim* actions should be tried even if their failure would lead to a war. *Jus ad vim* acts could thus be a means to try to eliminate a future threat involving the catastrophic use of WMD. But such a scenario raises a host of questions. Could these actions be undertaken unilaterally, or would UN Security Council approval be required? What if the threat is looming instead of imminent? And what measures would need to be taken to ensure the threat does not return in the future? In the space of this article, it is impossible to delineate exhaustively the probability of escalation criterion. However, the concerns we raise highlight the need for just war scholars to think about what escalation means with regard to the limited use of force.

#### *Maximizing the Rights of the Other through Right Intention and Legitimate Authority*

In this final section we discuss several additional criteria that limit recourse to *jus ad vim*. The first is linked to the *jus ad bellum* notion of right intention. While in a *jus ad vim* context the ability to act on just cause is expanded in the sense that a more favorable proportionality calculus makes it more likely that ethical restraints will be satisfied, the curtailed tactics of *jus ad vim* restrict the goals that can be pursued. Right intention in *jus ad vim* is necessarily circumscribed by the limited quantum of force that *jus ad vim* employs. It is unlikely that drone strikes or no-fly zones alone can remake the world order by defeating authoritarian regimes and facilitating the spread of democracy, but they can serve to cripple those seeking to undermine peace and the status quo or to threaten the innocent, such as al-Qaeda and the Qaddafi regime. Right intention must therefore be directed toward upholding the rights of the Other. In this sense, right intention for *jus ad vim* means quelling a specific threat, while causing the least amount of damage possible by protecting civilians.

Several consequences emerge from this point. The first is that there exists a strict relationship between *jus ad vim* and the *jus in bello* principles of proportionality and discrimination. The proportionality principle is inherent in *jus ad vim*, and is reinforced by the probability of escalation criterion. Regarding the discrimination principle, scholars such as Walzer have argued that in war one can imagine a sliding scale that allows for violations of *jus in bello* principles under certain circumstances—notably supreme emergency—as well as the need, when thinking ethically, to distinguish between intended and unintended effects (in other words, about the doctrine of double effect). Sometimes necessity requires, as the argument goes, breaking the rules of noncombatant immunity, while other, less extreme circumstances occasionally result in unforeseen and nefarious consequences that do not outweigh the overall justness of the use of force. This line of reasoning has been the subject of considerable debate.<sup>45</sup> However, in terms of *jus ad vim* the advancement of technology should make the consequences of the use of force more predictable, which, coupled with the necessarily limited scope of force, means that there should be no recourse to such moral loopholes. In other words, *jus ad vim* must maintain stricter adherence to the principle of discrimination than *jus ad bellum*.

The scrupulous observance of the principle of discrimination is of increased importance in a *jus ad vim* context for multiple reasons. War assumes a significant, but potentially legitimate, risk of collateral damage because of the egregiousness of the *injuria* that justifies recourse to a large quantum of force. However, because the provocation that might merit a *jus ad vim* response is lower, there is less moral latitude for inflicting unintended harm on noncombatants. Moreover, the importance of minimizing the probability of escalation requires that states assiduously avoid the collateral costs that might further inflame the passions for violence, and guard against the dangers of mission creep. A state undertaking *jus ad vim* actions thus cannot forego the rights of the Other for the sake of its own security (or the rights of its own civilians or combatants), which can (arguably) be legitimate in *jus ad bellum*. While some form of force might be legitimate because just cause is satisfied, the limited nature of the threat means that the scope of force applied must also be limited in ways that uphold human rights.

*Jus ad vim*, then, must be anchored in international law, as there is an important, symbiotic relationship between just war principles and law of this type. As Alex Bellamy notes, “Political leaders will always find moral arguments to justify recourse to force, and positive law provides an important check on those

arguments. A comprehensive account of the just war tradition cannot, therefore, avoid the interdependence between [natural and positive law].”<sup>46</sup> However, just as just war principles need to evolve to include *jus ad vim*, international law may also have to evolve. While a strict interpretation of the law of armed conflict would not allow for the legal use of *jus ad vim* acts (even if they may be morally justified), state practices may quickly make these acts an element of customary law that will necessitate an evolution in our legal thinking that parallels the transformation of our ethical judgments. This, however, cannot occur in a legal and normative vacuum, which leads us to the role of legitimate authority in *jus ad vim*.

One way of thinking about legitimate authority and *jus ad vim* is as a unilateral action, whereby a state takes matters of limited self-defense into its own hands by exercising the right contained in Article 51 of the UN Charter. According to Davis Brown, these kinds of actions exemplify the “right to remedy,” which, based in international law and just war principles, means that “an injury involving the use of force must confer a right to use force in response,” but only if such a response is proportional to the injury received and is “calculated to induce the state to cease its injury.”<sup>47</sup> The problem with *jus ad vim* unilateralism is that proportionality, as discussed above, is often miscalculated to the detriment of the rights of the Other; and defining what it means to contribute to ceasing injury, especially in the case of non-state actors, is overly vague and may lead (as in the case of the U.S. drone campaign) to the emergence of a problematic norm that may undermine human rights in the long run. It should also be noted that having permission of the host state to undertake *jus ad vim* acts—as in the case of U.S. drone strikes in Yemen—may change the legal situation, although this does not guarantee maximizing the rights of the Other, which depends on the moral scruples of the host–outside state partnership.

An alternative way of thinking of legitimate authority for *jus ad vim* would be as part of a collective international exercise. Walzer argues for this kind of arrangement in terms of the institution of no-fly zones, thus placing *jus ad vim* in the context of collective security measures.<sup>48</sup> Walzer does not specifically say that all *jus ad vim* actions need to have international support, but one could see how *jus ad vim* acts could be effectively curtailed by insisting on broad approval. The existence of a large number of states willing to support and commit to lower levels of force in a specific scenario could be seen as a sign that the scale of force being applied is the maximal level that ensures protecting the rights of the Other and satisfies the probability of escalation principle, while a lack of support would suggest that recourse to *jus ad vim* acts is unjustified.



A stronger argument regarding legitimate authority would require UN Security Council authorization for all *jus ad vim* acts. This argument assumes that the level of threat for *jus ad vim* actions is not high enough to legitimize a state's exercising of the right to self-defense under Article 51 of the UN Charter, and that the Security Council is the central authority on the use of international force. Arguably, such a line of reasoning would help to ensure that *jus ad vim* actions would not be undertaken too permissively, although the risk is that the veto system may paralyze their just use. That said, Bellamy argues that despite strong criticism, the evidence shows that, in the post-9/11 era, the Security Council "fulfills its duty remarkably well," which suggests it would be a reliable judge of *jus ad vim* actions.<sup>49</sup> One could therefore view Security Council resolutions as a base criterion of legitimacy for most *jus ad vim* cases, but allow states to argue for exceptions in hard cases or where the collective decision-making process is flawed.

As norms of sovereignty shift, technology evolves, and new threats emerge, the debates within and decisions by the Security Council can help to illuminate the tensions among the use of force short of war, ethics, law, and security. This can help ensure that *jus ad vim*, while more permissive in responding to *injuria* than *jus ad bellum*, must also limit the scale of force that can legitimately be applied and maximize the rights of the Other.

## CONCLUSION

The need for a theory of *jus ad vim* arises from a normative trend in military affairs, namely, the perception that in contemporary and future conflicts the large-scale use of force may give way to small-scale, or "surgical," applications of force that not only have more limited and more predictable effects, such as reduced collateral damage, but also cost less and do not put "our" soldiers in harm's way. While one might suggest the ethical principles that inform the requirements of *jus ad bellum* are simply transferable to the evolving international system, we argue that their meaning changes significantly in a *jus ad vim* context, and a new principle—the probability of escalation—is required. Under our interpretation of *jus ad vim*, just cause remains firmly rooted in self-defense, but as the ability to act proportionally expands, so too does the capacity to act on lesser threats. While this may forestall the last resort category of *jus ad bellum*, in the context of *jus ad vim*, states would still be required to privilege nonviolent responses over violent ones. These violent responses must also be seen as distinct from the *jus ad bellum*

principle of last resort. Finally, any resort to force would have to be tempered by the anticipated consequences of said force. Measures short of war should therefore serve to prevent war and thus minimize the probability of escalation while maximizing the rights of the Other. This is more likely to be achieved when legitimate authority is embedded in the Security Council.

The moral purchase of *jus ad vim* accommodates the shift toward lower levels of force made possible by advances in technology, such as drones, and by the exponential economic and military costs of war. By updating the language of the just war tradition, it helps address the ethical, strategic, and bureaucratic dilemmas facing statesmen and just war theorists today. The introduction of the *jus ad vim* category, however, raises many questions that require deeper inquiry. Should international law evolve to accommodate technology that privileges *jus ad vim* acts? If so, how? When is the threshold of last resort for *jus ad vim* actions crossed? In the case of WMD, when is the threshold between *vim* and *bellum* crossed? What level of civilian casualties would satisfy *jus ad vim*'s more restrictive discrimination principle? In what ways do the nonlethal effects of *jus ad vim*—such as increases in terrorist recruitment and long-term post-traumatic stress disorder—alter its moral calculus? What role might *jus ad vim* acts play in *jus post bellum* situations (for instance, in Iraq, Afghanistan, and Libya)? To answer these questions, we must first take as our starting point the important distinction between force short of war and war, for the unique ethical contexts raised by the former make clear the need to further develop a theory of *jus ad vim*.

#### NOTES

<sup>1</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2006 [1977]), pp. xv–xvi. In this article, we focus on *jus ad vim* acts that are military actions. The moral dilemmas posed by other *jus ad vim* acts that track less closely with common conceptions of international violence, including sanctions, blockades, and cyber attacks, are beyond our scope. In future research, it would be important to investigate the extent to which non-violent actions, especially sanctions, adhere to the proportionality principle *jus ad vim* seeks to preserve.

<sup>2</sup> Prominent examples include: Alex J. Bellamy, “Is the War on Terror Just?” *International Relations* 19, no. 3 (September 2005), pp. 275–96; Nicholas Rengger, “The Judgment of War: On the Idea of Legitimate Force in World Politics,” *Review of International Studies* 31, no. S1 (December 2005), pp. 143–61; Brian Orend, *The Morality of War* (Peterborough, ON: Broadview Press, 2006); James Turner Johnson, “The Just War Idea: The State of the Question,” *Social Philosophy and Policy* 23, no. 1 (January 2006), pp. 167–95; Eric A. Heinze and Brent J. Steele, eds., *Ethics, Authority and War: Non-State Actors and the Just War Tradition* (New York: Palgrave Macmillan, 2008); Alex J. Bellamy, “When Is it Right to Fight? International Law and *Jus ad Bellum*,” *Journal of Military Ethics* 8 (September 2009), pp. 231–55; Bradley Jay Strawser, “Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles,” *Journal of Military Ethics* 9, no. 4 (December 2010), pp. 342–68; and James Turner Johnson, “Humanitarian Intervention after Iraq: Just War and International Law Perspectives,” *Journal of Military Ethics* 5, no. 2 (August 2006), pp. 114–27. See also the articles in a special issue of the *Journal of Military Ethics* 10, no. 3 (September 2011) entitled “The Just War Tradition and the Crisis of *Jus ad Bellum*.”

- <sup>3</sup> Daniel Brunstetter and Megan Braun, "The Implications of Drones on the Just War Tradition," *Ethics & International Affairs* 25, no. 3 (September 2011), pp. 337–58; John Williams, "Space, Scale and Just War: Meeting the Challenge of Humanitarian Intervention and Trans-National Terrorism," *Review of International Studies* 34, no. 4 (October 2008), pp. 581–600; p. 598; and Sarah Kreps and John Kaag, "The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis," *Polity* 44, no. 2 (April 2012), pp. 260–85; pp. 278 and 280.
- <sup>4</sup> C. A. J. Coady, *Morality and Political Violence* (Cambridge: Cambridge University Press, 2008), p. 4.
- <sup>5</sup> Eric A. Heinze, "The Evolution of International Law in Light of the 'Global War on Terror,'" *Review of International Studies* 37, no. 3 (July 2011), pp. 1069–94; pp. 1080, 1082, and 1091.
- <sup>6</sup> Michael Walzer, "On Fighting Terrorism Justly," *International Relations* 21, no. 4 (December 2007), pp. 480–84; p. 480.
- <sup>7</sup> Cited in "Transcript of Thursday's Democratic presidential debate," CNN, last modified January 31, 2008; [www.cnn.com/2008/POLITICS/01/31/dem.debate.transcript/index.html](http://www.cnn.com/2008/POLITICS/01/31/dem.debate.transcript/index.html).
- <sup>8</sup> Megan Braun, "The Obama Doctrine: Drones and Just Wars," *Foreign Policy*, September 25, 2012; [afpak.foreignpolicy.com/posts/2012/09/25/obama\\_doctrine\\_drones](http://afpak.foreignpolicy.com/posts/2012/09/25/obama_doctrine_drones).
- <sup>9</sup> Peter Bergen and Megan Braun, "Drone is Obama's Weapon of Choice," CNN, September 25, 2012; [edition.cnn.com/2012/09/05/opinion/bergen-obama-drone/index.html?iref=allsearch](http://edition.cnn.com/2012/09/05/opinion/bergen-obama-drone/index.html?iref=allsearch).
- <sup>10</sup> Williams, "Space, Scale and Just War," p. 597.
- <sup>11</sup> John Brennan, "The Ethics and Efficacy of the President's Counterterrorism Strategy" (remarks, Woodrow Wilson International Center for Scholars, Washington, D.C., April 30, 2012); [www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100](http://www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100).
- <sup>12</sup> Strawser, "Moral Predators," p. 344.
- <sup>13</sup> Brunstetter and Braun, "The Implications of Drones," p. 348.
- <sup>14</sup> "Year of the Drone," New America Foundation, [counterterrorism.newamerica.net/drones](http://counterterrorism.newamerica.net/drones).
- <sup>15</sup> Kenneth Anderson, "Efficiency in *Bello* and *ad Bellum*: Making the Use of Force Too Easy?" in Claire Finkelstein and Jens David Ohlin, eds., *Targeted Killings: Law and Morality in an Asymmetric World* (Oxford: Oxford University Press, 2012), pp. 374–402; p. 388.
- <sup>16</sup> For example, see Martin Shaw, "Risk-Transfer Militarism, Small Massacres and the Historical Legitimacy of War," *International Relations* 16, no. 3 (December 2002), pp. 343–59 and pp. 354–55; and Anthony Burke, "Just War or Ethical Peace? Moral Discourses of Strategic Violence After 9/11," *International Affairs* 80, no. 2 (March 2004), pp. 229–353; p. 330.
- <sup>17</sup> Williams, "Space, Scale and Just War," p. 589.
- <sup>18</sup> Bellamy, "Is the War on Terror Just?" p. 289; and Brunstetter and Braun, "The Implications of Drones," pp. 350–51.
- <sup>19</sup> Orend, *Morality of War*, pp. 2–3; emphasis in the original.
- <sup>20</sup> Mary Ellen O'Connell et al., "The ILA Use of Force Committee's Final Report on the Definition of Armed Conflict in International Law," in Mary Ellen O'Connell, ed., *What is War? An Investigation in the Wake of 9/11* (Leiden: Martinus Nijhoff, 2012), pp. 319–67.
- <sup>21</sup> Micah Zenko, "Between Threats and War," *Council on Foreign Relations*, September 2010; [www.cfr.org/united-states/between-threats-war/p22621?excerpt=1](http://www.cfr.org/united-states/between-threats-war/p22621?excerpt=1).
- <sup>22</sup> Alexander Benard, "Lessons from Iraq and Bosnia on the Theory and Practice of No-Fly Zones," *Journal of Strategic Studies* 27, no. 3 (September 2004), pp. 454–78.
- <sup>23</sup> Coady, *Morality*, p. 6.
- <sup>24</sup> O'Connell et al., "ILA Use of Force Committee's Final Report," p. 332.
- <sup>25</sup> Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (New York: The Penguin Press, 2008), p. 13.
- <sup>26</sup> Rise of the Drones: Unmanned Systems and the Future of War: Hearings on H.R., Before the Subcommittee on National Security and Foreign Affairs, 111th Cong., 1st sess., March 23, 2010 (Testimony by Mr. Kenneth Anderson, Professor, Washington College of Law American University).
- <sup>27</sup> Brennan, "Ethics."
- <sup>28</sup> United Nations Human Rights Council, A/HRC/14/24/Add.6, "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston," May 28, 2010; [www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf).
- <sup>29</sup> Anderson, "Efficiency," p. 398.
- <sup>30</sup> Brunstetter and Braun, "The Implications of Drones," pp. 345–46.
- <sup>31</sup> Braun, "The Obama Doctrine."
- <sup>32</sup> Scott Shane, "Election Spurred a Move to Codify U.S. Drone Policy," *New York Times*, November 24, 2012; [www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?hp&r=0](http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?hp&r=0).
- <sup>33</sup> Michael Walzer, "Regime Change and Just War," *Dissent* 53, no. 3 (Summer 2006), pp. 103–108.
- <sup>34</sup> Coady, *Morality*, p. 93.

- <sup>35</sup> Coady, *Morality*, p. 91.
- <sup>36</sup> Walzer, "On Fighting Terrorism Justly," p. 482.
- <sup>37</sup> Daniel Brunstetter, "Can We Wage a Just Drone War?" *The Atlantic* (July 2012); [www.theatlantic.com/technology/archive/2012/07/can-we-wage-a-just-drone-war/260055/](http://www.theatlantic.com/technology/archive/2012/07/can-we-wage-a-just-drone-war/260055/).
- <sup>38</sup> Orend, *Morality of War*, p. 60.
- <sup>39</sup> Thomas Hurka, "Proportionality in the Morality of War," *Philosophy and Public Affairs* 33 (January 2005), pp. 34–66; p. 37.
- <sup>40</sup> Burke, "Just War or Ethical Peace?" p. 330.
- <sup>41</sup> Frances V. Harbour, "Reasonable Probability of Success as a Moral Criterion in the Western Just War Tradition," *Journal of Military Ethics* 10, no. 3 (September 2011), pp. 230–41; pp. 231 and 234.
- <sup>42</sup> We thank an anonymous reviewer for suggesting this term.
- <sup>43</sup> James Pattison, "The Ethics of Humanitarian Intervention in Libya," *Ethics & International Affairs* 25, no. 3 (Fall 2011), pp. 1–7.
- <sup>44</sup> "Death from the Skies," *The Economist*; [www.economist.com/node/21562922](http://www.economist.com/node/21562922).
- <sup>45</sup> Walzer, *Just and Unjust Wars*, pp. 153–54; and Shaw, "Risk-Transfer Militarism," pp. 354–55.
- <sup>46</sup> Bellamy, "When is it Right to Fight?" p. 243.
- <sup>47</sup> Davis Brown, "Proportionality in Modern Just War Theory: A Tort Based Approach," *Journal of Military Ethics* 10, no. 3 (September 2011), pp. 213–29; pp. 216–17.
- <sup>48</sup> Walzer, "Regime Change."
- <sup>49</sup> Bellamy, "When Is It Right to Fight?" p. 240.