How Should We Govern Lethal Force Short of War? An Evaluation of Jus Ad Vim

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How Should We Govern Lethal Force-Short-of-War? A Critical Evaluation of Jus Ad Vim

The introduction of the combat drone has indulged "the oldest dream of the second oldest profession": the desire to kill from a great distance (Enemark 2014:366). Surgical airstrikes fired by American reachback operators in Nevada can by the push of a button eliminate al-Qaeda targets in Yemen, Somalia and Pakistan (Mayer 2009). None of these countries are currently at war with the US, yet US forces eliminate targets in their territory, often with tacit or open consent from the 'host government'. Heinze calls this a "regime of non-state responsibility"; a situation where weak states are not responsible for what goes on within their porous borders (2011:1080). Killing citizens of another country during times of peace is illegal according to our current understanding of just war theory. Yet, with the expansion of drone-warfare, a demand for a renewal of just war theory, and the doctrine of *jus ad bellum* especially, has arisen. Particularly, the framework of *jus as vim* has been suggested as an alternative. This essay will elucidate the consequences of introducing *jus ad vim* through examining American post-9/11 drone-warfare, conducted in the ethical vacuum in which the struggle against terrorism takes place. Though controversial, it may be the best alternative to explain and perhaps control the thus far unregulated use of transnational force.

The just war tradition can be summed up in two questions: how does one determine the justice of *going* to war (*jus ad bellum*) and how does one determine what one can do *in* war (*jus in bello*). This bipolar categorisation has recently been challenged by scholars claiming that there is a "morally ambiguous" grey area to which the "argument about *jus ad bellum* needs to be extended" (Brunstetter and Braun 2011; Walzer 2006:xvff). Many just war scholars tend to ignore instances of use of *force,* and focus on *bellum justum,* "as if all uses of force [implies] the same moral challenges" (Brunstetter and Braun 2013:87). Walzer however makes a distinction between "measures short-of-war" and "actual warfare", stating that "[w]e urgently need a theory of just and unjust use of *force"* (2006[emphasis added]). Measures short-of-war include no-fly zones, pinpoint missile-strikes and sanctions, while traditional warfare relates to large-scale bombings and ground invasion. The differences, Walzer states, are twofold: firstly, the former measures are "very different from war", and, secondly, while both lethal force-short-of-war and warfare are morally wrong, use of war is more wrong than use of force (Walzer 2006).

The ethical framework relating to just use of lethal force is called *jus ad vim,* where *vim* represents "force-short-of-war" (Enemark 2014:365). Ford defines use of *vim* as "an act of intentional killing of a person who is a culpable unjust threat, by a member of a military institution, acting on behalf of a legitimate political community which is not at war" (2013:65). This is reminiscent of American airstrikes against suspected Al-Qaeda operatives. The current post-9/11 paradigm has, due to globalisation and the rise of terrorism, seen a decline of warfare understood as "direct state-to-state conflict", and the rise of war against tactics (Coady 2008:9). *Jus ad bellum* fails to theorise such a transnational structure. Introducing *jus ad vim* would arguably create a framework to address the fact that transnational violence in world affairs can often be inflicted both unjustly and with impunity (Brunstetter and Braun 2013). However, this introduction is not unproblematic.

First, *jus ad vim* challenges our understanding of war. Currently, *jus ad bellum* outlines key criteria that need to be met in order to go to just war: proper authority, just cause, probability of success, proportionality, and last resort

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(Brunstetter and Braun 2011). These criteria are widely accepted and have been gradually codified in international law. The introduction of *jus ad vim* challenges several of these principles. One example is that of 'last resort', a principle that may be loosened if just "war" is replaced with just "force" (Coady 2008). The principle of last resort makes it clear that a state should not go to war unless every sensible, non-violent alternative has been unsuccessfully attempted (BBC 2014). This threshold has become increasingly important following the dawn of nuclear weapons, making total war even less desirable. Force-short-of-war however, is employed systematically and with impunity in countries that are, perhaps unwillingly, "with the terrorists". *Vim* drone strikes are not subject to limits set by *jus ad bellum*, and non-violent alternatives, such as the capture of terrorists, is rarely advocated. Military robotics eliminates risk to ourselves in war, and "lowers the barriers to starting or engaging in wars in the first place", insofar as it limits human, social, economic, and political costs (Lin 201:324). Hence, the "problem of drones", and of a potential *jus ad vim* framework in general, is that it has become a measure of first, rather than last, resort (Coady 2008).

As opposed to missions on the ground, drones offer a non-existent degree of physical risk to one's own troops and are popular among a war-tired electorate. They often offer precise and predictable outcomes, limit civilian casualties and have dramatically lower military and economic costs than traditional warfare (Brunstetter and Braun 2013). As such, it is more appealing to eliminate "enemies of state" without having to justify, afford, or implement conventional warfare. Drones are particularly advantageous as they provide "limited, pinprick, covert strike[s]", used "to *avoid* a wider war" (Anderson 2010:5). Indeed, to avoid total war the US engages limited lethal force perpetually, in what Enemark calls *vis perpetua,* or perpetual force (2014:365). This may in turn develop into a perpetual overhanging threat of war and destabilize the perceived balance of violence, if used against the wrong party. In sum, we see continuous use of *vim*, often against civilians (Mayer 2009), under a banner of peace; to avoid total war countries cherry-picking weapons from an *à la carte* menu of force without ordering the entire assortment of war, which would be both too expensive and too time consuming.

An important point to remember is that combat drone technology is not necessarily bad. Surgical strikes strengthen *jus in bello* criteria of distinction and proportionality (Brunstetter and Braun 2011). However, the abovementioned affordability and availability of combat-drones contribute to lowering the threshold of assassination across borders. If we allow the military to use force-short-of-war, and with it, combat-drones, in a "broader context" (Mayer 2009), the frequency of political force will increase and the level of destruction will rise (Ford 2013:68). *Jus ad vim* cannot lessen the ethical burden of violence, and may lead us into a first resort 'slippery-slope' of violence (Coady 2008). Additionally, allowing 'regulated' *jus ad vim* violence softens the description and immorality of political violence, making it more permissive. That being said, we must not forget that this is the reality we are faced with today. Lethal force-short-of war is already a vast component of the post-9/11-paradigm, and the use of combat-drones will likely increase in the future.

The US has launched 413 drone-strikes in Pakistan alone between 2004 and 2015, 362 of which were under Obama. The number of deaths is disputed, and range from 2438 to 3942 (BIJ 2015). These numbers show that force-short-of-war is unlikely to decrease, it is the "only game in town" (Mayer 2009). As the reach of global terrorism has expanded, the employment of combat-drones has followed suit. The 'regime of non-state responsibility' has not only led to an expansion of the right of self-defence, but also to the loosening of constraints on the use of force against states who allow terrorist activity in their lands (Heinze 2011). When faced with the threat of terrorism, "the point of last resort may arrive prior to the point of imminence" (Totten 2010:186). Using force has only become easier with time and technological development, which may indicate that the threshold of last resort may already have been crossed.

As seen, there are many sound arguments against the introduction of *jus ad vim,* including the weakening of last resort, followed by the above-mentioned slippery-slope of violence. However, as Walzer suggests, the threshold of last resort may not be lowered; it may already have been crossed independently of *jus ad vim* (Brunstetter and Braun 2013:97). If the criterion of last resort has already been lowered beyond recognition, it may be better to accept and adapt to the inevitable and introduce *jus ad vim* as an alternative to *jus ad bellum*. Today, there is little restriction on the use of drone strikes. By opening lethal force-short-of-war up for regulation, you can hope to inhibit the further movement down the slippery-slope (Ford 2013).

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In sum, it may be convenient to find a theoretical middle-ground between the zone of peace and zone of war where the struggle against terrorism takes place. The paradigm in which stronger states punish and kill criminals and terrorists in foreign jurisdictions will likely remain in play for the foreseeable future. The "normalisation" of the combat drone should be followed by a just war-language of regulation; the question remains if the imperfect *jus ad vim* is the right language to employ. The introduction of an internationally codified *jus ad vim* framework would address how drones and *vim* postpone total war, whilst perhaps simultaneously lowering the threshold for violence outside of war. The point of contention is whether or not this has already happened, or if we can still control the further development of the just use of *vim*. The debate outlined above shows that it is important to discuss moral implications of combat-drones, the future of just war theory and to renew *jus ad bellum* post-9/11.

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