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JUS AD VIM AND THE JUST USE OF LETHAL FORCE-SHORT-OF-WAR¹

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1. Introduction

My concern in this chapter is with the moral problem that soldiers² face when they are expected to kill in situations that are not clearly war. Over the last twenty years or so we have witnessed increasing use of the military for purposes other than fighting conventional wars.³ This is due in part to the emerging norm in the 1990s favouring military intervention to protect civilians whose lives are seriously threatened,⁴ in part, the recognition that the military can perform a variety of political functions in peacetime,⁵ and in part a response to the heightened attention to the threat from terrorism.⁶ These types of military operations encompass a wide range of tasks including peacekeeping, supporting civil authorities, counter-terrorism, disaster relief, enforcement of sanctions, and so on.⁷ Most of them do not require the military to use lethal force. But in some cases, because they are working in an environment of conflict, the military is expected (and prepared) to use lethal force.

Such broadening of the purpose of the military creates a moral problem in relation to the use of lethal force. The problem is that the military is expected to use its unique capabilities to apply deadly force in situations of conflict outside (what we conventionally understand as) war, where the moral grounds for their destructive actions are less clear. In war, it can be permissible for soldiers to do certain types of harms that we would not allow in any other context, especially when it comes to killing for reasons other than individual self-defense.⁸ For example, soldiers fighting a war can attack and kill enemy combatants without warning (e.g. in an ambush or a missile strike). They are also permitted to do serious collateral harm, including the killing and maiming of non-combatants, providing that the military objective is important enough and the non-combatant deaths were foreseeable and not intended.⁹ But in cases where soldiers are not at war (or at least there is some doubt that it is war) then how should we morally evaluate the military use of lethal force? Should we extend the boundaries of “war” to include less conventional conflicts? Is it a matter of developing a more sophisticated set of justifications based on individual killing in self-defense? Does policing¹⁰ offer a better paradigm for judging uses of lethal “force-short-of-war”? Or is it something else?

To illustrate the problem, consider a recent example where the military have used lethal force in a context that is not conventional warfare but also could not be adequately described as killing in self-defense¹¹ or policing. Many people might agree that killing Osama bin Laden or

Anwar al-Awlaki was justified because they were leaders of a well-organized group of people plotting to commit mass murder.¹² But the group they led – Al Qaeda – is neither a state nor does it represent a legitimate political community.¹³ If this is the case, then attacks perpetrated by Al Qaeda cannot be properly described as war and its leaders cannot, in this sense, be treated as combatants. They should be judged, instead, in the way that we would normally judge the actions of murderous criminals. This particular group of murderous criminals, however, operates outside the reach of the jurisdiction of the state (or states) whose job it is to protect the innocent victims of these aggressors. Conventional police enforcement is inadequate for such a task since these murderous aggressors can plot with impunity in some cases. Plausibly, a state that is obligated to prevent the mass murder of its jurisdictional inhabitants,¹⁴ but whose instruments of policing are rendered ineffective, could turn to its military capabilities.

The problem then, however, is that if we choose to use military capabilities for a function that is something akin to a policing role, then we can end up transporting the military mindset about using lethal force along with the military personnel, equipment and training. If the state is using its military capabilities to fulfill a policing role, then presumably the rules of lethal force should be unlike the ones we permit in war; they should be much more restrictive. Perhaps they should not be quite as restrictive as those of the police working within a well-ordered society but they should certainly be more restrictive than we are willing to allow in war. So in situations of conflict short-of-war, where they are expected to use lethal force, the military should adjust to the fact that they are not fighting a war and be more restrained in their use of lethal force. In short, when it comes to using lethal force we need a well-reasoned “hybrid” ethical framework that draws on the appropriate moral principles of both just war theory and the policing paradigm.¹⁵

In this chapter, I argue that the notion which Michael Walzer calls *jus ad vim* might improve the moral evaluation for using military lethal force in conflicts other than war, particularly those situations of conflict short-of-war. First, I describe his suggested approach to morally justifying the use of lethal force outside the context of war. I argue that Walzer’s *jus ad vim* is a broad concept that encapsulates a state’s mechanisms for exercising power short-of-war. I focus on his more narrow use of *jus ad vim* which is the state’s use of lethal force. Next I address Tony Coady’s critique of *jus ad vim*.¹⁶ I argue that Coady highlights some important problems with *jus ad vim*, but these concerns are not sufficient to dismiss it completely. Then, in the final section, I argue that *jus ad vim* provides an appropriate “hybrid” moral framework for judging the ethical decision-making outside of war by complementing other conventional just war distinctions. A benefit of *jus ad vim* is that it stops us expanding the definition of war while still providing the necessary ethical framework for examining violent conflict outside that context.

2. Walzer’s *jus ad vim*

In the first section, I outline Walzer’s approach to morally justifying the use of lethal force outside the context of war, which he refers to as “*jus ad vim*.” His description of *jus ad vim*, or the just use of force-short-of-war, can be found in the preface to the fourth edition of his book *Just and Unjust Wars*.¹⁷ Walzer argues that just war theory should include *jus ad vim* because he believes there is an “urgent need for a theory of just and unjust uses of force outside the conditions of war.”¹⁸ Walzer illustrates his point by describing the Iraq containment regime (1991–2003) as an example of the type of effective measures that states can use rather than going to war. From the perspective of international law, embargoes and the enforcement of no-fly zones are judged to be acts of war. But Walzer argues that it is common sense to recognize that these measures differ from actual warfare. Containment is, Walzer believes, much easier

to justify than a full-scale attack.¹⁹ The key moral point being that this type of measure is an exercise of state power that avoids the full destructiveness of war, even though it might involve the use, or the threatened use, of lethal force.

Walzer goes on to argue that for measures short-of-war to work against evil or dangerous regimes they should be the common work of a group of nations because “collective security”²⁰ must be a joint project.²¹ He then links the limits on when *jus ad vim* can be used (and also on the ways in which it can be used) with collective security. The collective recognition by a set of states to recognize an unrealized but likely threat (such as a potential massacre or act of aggression) and to organize a response to ward off the threat, is a source of appropriate limitations on *jus ad vim* for Walzer. He contrasts this with unilateral uses of lethal force in cases where a state is permitted to intervene to stop actualized aggression or massacre.

What are we to make of Walzer’s description of *jus ad vim*? First, Walzer’s use of the term “*jus ad vim*” is somewhat confusing. Coady (whose critique I will consider in more detail in the next section) suggests that the Iraq containment regime, which Walzer uses as his main example to describe *jus ad vim*, included three important elements: the arms embargo; the UN inspection system; and the no-fly zone. Only one of these directly involved the use of actual violence.²² So, pace Coady, Walzer appears to use *jus ad vim* in at least two importantly different ways. In the first sense, *jus ad vim* seems to refer to the kind of force usually reserved for war but, which due to contingent circumstances, needs to be used outside of the context of war. In the second sense, *jus ad vim* appears to refer to some kind of force that is qualitatively and/or quantitatively different from the kind of force typically used in war. Or to put the confusion in the form of a question, does “force-short-of-war” refer to the nature of the act, or does it refer to the nature of the context in which the act is carried out?²³

Walzer is using *jus ad vim* in the first sense but he has not obviously precluded the second sense. I suspect the second sense is what Walzer means by “measures-short-of-war.”²⁴ This then would be the broad sense of *jus ad vim* which captures all the options short-of-war available to a state in its use of power. Although discussing the full range of measures available to a state is certainly a worthy subject, it is not one I am able to tackle in this chapter. To simplify the discussion, I will assume that Walzer’s *jus ad vim* offers moral guidance for the following three things: 1) actual uses of lethal force-short-of-war; 2) threats to use lethal force-short-of-war; and 3) uses of state power short-of-war that do not involve lethal force. It is this first type of *jus ad vim* – the actual uses of lethal force-short-of-war – that I will discuss here.²⁵ For my purposes, a *jus ad vim* use of lethal force is best described 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.”

The second important point to note about Walzer’s notion of force-short-of-war is his claim that there is a significant moral distinction between localized armed conflicts (where the effects are minimal) and full-scale war. Walzer argues that we approach uses of lethal force in war differently from uses of lethal force-short-of-war because of the “moral gulf” between the two types of violent conflict.²⁶ His point is that a full-scale war, which might involve high-intensity fighting between a number of military forces over a period of years, is much worse than a localized one-off altercation between two small groups of combatants. As such, we should recognize a moral difference between them. It is clear what Walzer is trying to get at with this point: a large amount of death and destruction is morally worse than a small amount. This difference, however, needs to be more fully explained. Let’s look at an example at either end of the spectrum and compare the fighting that occurred in the Pacific against Japan’s military aggression (1941–1945) with the Entebbe Operation (1976) in which an Israeli commando raid in Uganda successfully rescued 102 hostages.²⁷ We can say that the Entebbe incident, as a use of lethal

force-short-of-war, involved intentional killing which is a serious *pro tanto* wrong. But this killing was justified by the need to rescue innocent people who were wrongfully held hostage. The fighting against Japan's aggression in World War II was also justified. But we can still conclude that the war against Japan was worse than the Entebbe Operation for three reasons. First, the Entebbe Operation consisted of one instance of low-intensity military conflict whereas the Pacific War consisted of many instances of varying levels of violent conflict. Second, the purpose of the Entebbe Operation was to rescue innocent people and lethal force was targeted at the culpable kidnappers. In contrast, the Pacific War involved killing people of varying levels of culpability, many of whom were innocent casualties. Third, the Pacific War resulted in much more overall harm than was the case in the Entebbe Operation. War in this case involved far more deaths and destruction than the use of force-short-of-war.

The third important aspect of Walzer's force-short-of-war argument is that it seemingly weakens the last-resort standard for using lethal force. That is, the threshold for permissibly using lethal force is lower in cases of *jus ad vim* than is the case for conventional just war theory. This is an issue that is of particular concern to Coady and one I will examine more fully in the next section. There a number of reasons why we should consider the idea that the use of lethal force by the military is permissible in situations of conflict short-of-war. The first is to require us to make more effective moral judgments about the just and unjust uses of lethal force that are *already* happening outside of the context of war. The second is to ensure that the extraordinary permissions to kill that we allow in war do not become normative outside that context. The third is to apply stricter and better specified rules of engagement for soldiers in situations of conflict short-of-war.

Walzer's immediate concern in writing on *jus ad vim* was to address the question of whether the permissions of just war theory should reach to democratisation and regime change, an issue he believes is closely connected to questions about preventive war.²⁸ Walzer argues that while preventive war is normally not justifiable, under certain specific conditions, we might be able to justify preventive force.

Preventive war is not justifiable either in standard just war theory or in international law, but what we might think of as "preventive force" can be justified when we are dealing with a brutal regime that has acted aggressively or murderously in the past and gives us reason to think that it might do so again.²⁹

My suggestion is that we draw on Walzer's conditions for the justified use of preventive force³⁰ and expand them so we can say that a military use of lethal force-short-of-war is an option when we are dealing with: 1) a person or group of people (including political regimes) acting in a fashion that is brutal in that they have little or no regard for fundamental human rights or the rights of other groups; 2) the person (or group) in question has a proven track record of unjust aggression in the form of unjustly killing and maiming people in its own jurisdiction and/or the peoples of other jurisdictions; and 3) we have good reasons to conclude that this unjust aggression will continue or get worse. In short, the use of lethal force-short-of-war is a military option for dealing with serious culpable threats.

The fourth, and final, point to be made about Walzer's conception of force-short-of-war is that it constrains the permissibility of targeting using the same principle of discrimination as in the conduct of war. Conventional just war theory prohibits the intentional killing of non-combatants and, according to Walzer, force-short-of-war does the same thing. In both forms of conflict, the use of lethal force should be limited in order to protect civilians from being harmed.³¹ This view, however, does not seem to go far enough. If the permissibility for targeting in *jus ad vim* is based on the same principles used in conventional just war theory then

it is hard to see what makes the two distinct. More problematically, Walzer's notion of *jus ad vim* presumably leaves open the possibility of foreseeable but not intentional killing of innocent civilians. For *jus ad vim* to be worthwhile, it should require soldiers to be distinctly more restrained in their use of lethal force than is the case in conventional just war theory.

In what way might *jus ad vim* require soldiers to be more restrained in their use of lethal force? Here are some suggestions of the type of constraints that might prove useful to consider. First, we might say that foreseeable collateral deaths are either not permissible or equivalent to what we would be willing to accept in a standard policing operation. Second, we might require better standards of evidence and proof for demonstrating that a target is, in fact, a culpable threat. Third, each operation involving the military might be required to meet its own reasonable last resort test in that it must be demonstrated that other non-lethal options (such as arrest) were not available or would have been unacceptably risky. Fourth, we might choose to hold individual soldiers, who use lethal force-short-of-war, to a higher level of personal responsibility than is the case in war. This means that the individual soldier might be required to justify any personal use of lethal force. But it also means the discretionary ability to choose not to shoot.

In sum, Walzer's suggestion that we develop the notion of *jus ad vim* is a good one, so long as it means a moral framework to improve moral judgments for using lethal force-short-of-war. But the problem for Walzer's account of *jus ad vim* is threefold. It needs to explain, first of all, why the use of lethal force is justified in the first place since even a small amount of death and destruction is worse than no amount of death and destruction. War is worse than killing short-of-war because: a) the scale of permissible harm (in terms of repeated acts of death and destruction) is higher with the potential to be much higher; and b) war permits the foreseeable (though unintended) killing of innocent people. Second, *jus ad vim* must give us some idea of where to draw the moral distinction between the two different types of armed conflict. *Jus ad vim* can do this because it acknowledges the need for a "hybrid" moral framework. My point here is *not* that it gives us a single moral principle (or set of moral principles) to apply in such cases. *Jus ad vim* covers a broad territory and it will end up covering a number of subcategories. The important move is to recognize that conventional just war theory alone is insufficient for judging these types of conflicts. Third, it needs to provide us with reasonable guidance for the additional constraints we apply to soldiers using lethal force-short-of-war. *Jus ad vim* is "hybrid" in that it borrows from both domestic law (the policing paradigm) and just war theory, the basic idea being that the actual use of lethal force should be more constrained than we permit in war.

3. Critiquing *jus ad vim*

In this next section I address Coady's critique of *jus ad vim* and his defence of a more conventional just war approach to conflict short-of-war. The first problem that Coady raises with *jus ad vim* is that it lowers the standard of last resort. He argues that lethal force-short-of-war should not allow us to relax the requirements of just war theory, especially that of last resort.³² If we are talking about political violence then we neither need nor should we have some more permissive theory quite distinct from conventional just war thinking.³³ According to Coady, political violence of any sort should require satisfaction of a "genuine reluctance constraint". That is, last resort should draw attention to the need to seek realistic solutions to political problems that are *less damaging* than resort to political violence.³⁴ But he agrees that the wrongness of war is tied to the level of destruction that it causes. Coady argues that some wars are going to be easier to justify than others on the basis of levels of destructiveness.³⁵ What should count in favour of a specific use of political violence, according to Coady, is that it involves far less killing and damage than some other proposed resort to violence might.³⁶

Coady has ongoing reservations about *jus ad vim*.³⁷ He compares it to the use of drones in targeted killings which start by claiming the high moral ground because of greater accuracy and targeting only combatants,³⁸ but end by escalating conflict, targeting people who have no connection with the conflict and provoking more resentful military responses. He believes *jus ad vim* is likely to do all of this and it will also make the resort to serious violence easier and less constrained which, given the inherent tendency of violence to escalate, is a bad idea. He argues that it will begin with the more powerful military powers, particularly the U.S., and will continue by encouraging other powers in the same direction where they can get away with it.³⁹ I am likewise cautious about the potential consequences of a “lowering-the-threshold” argument. But I am not arguing that we should lower the threshold to full-scale war. War is a horrible thing that can only be justified in the most extreme cases because of the likelihood of widespread death and destruction.⁴⁰ Combatants in war have frequently inflicted high levels of devastation: they have laid waste to the environment, destroyed cultural heritage, wounded, maimed and killed.⁴¹ War might be justified in some cases, but it is always a risky course of action and often costly. There should be, however, greater reluctance to engage in wholesale invasion than to send a small armed unit to effect a minimal objective. Coady argues that there are dangers in even limited military operations, as demonstrated by the botched U.S. attempt to rescue its captive diplomats in Iran during the Carter presidency.⁴² Coady’s view is that small-scale killing and destruction – as against available, feasible alternatives that are less damaging – needs justification.

This is correct: any use of lethal force does require the right type of justification. But Coady’s point about the dangers in using a small armed unit to achieve a minimal objective is, arguably, one of military competence. The 1980 U.S. attempt to rescue its captive diplomats in Iran may have failed and it might be judged as a poor decision because it was risky. But it does not follow that risky or bold military operations are therefore always wrong. Consider again the Entebbe Operation mentioned above. The Israeli military were successful in their attempt to rescue civilian hostages in a raid into Uganda.⁴³ The use of lethal force-short-of-war to rescue a group of innocent people, whose lives have been unjustly threatened by a culpable group of kidnappers, appears to me to be the right type of justification.

Coady’s concern is one of a slippery-slope argument because he believes that if we allow the military to use lethal force-short-of-war then the frequency of political violence will increase and inevitably the high level of destruction will follow. A key point of a slippery-slope argument is that there is no point at which one can non-arbitrarily get off the slope once one has got on to it.⁴⁴ Once we are on the slippery slope then it is likely we are heading towards a horrible result. If this is so, then I argue that *jus ad vim* works by inhibiting movement down the slippery slope. *Jus ad vim* should inhibit the slippery slope because it prevents a state from justifying higher levels of killing and damage normally permissible in war. But it does not do this if it lowers the threshold without providing additional constraints. Therefore, a *jus ad vim* moral framework must include constraints that go beyond conventional just war theory. In other words, *jus ad vim* cannot simply use the just war principles of “proportionality” and “discrimination.” A successful hybrid framework must also draw from the principles we find in policing.

It is worth noting, however, that Walzer assumes the use of force-short-of-war “does not have war’s unpredictable and often catastrophic consequences.”⁴⁵ I am circumspect about Walzer’s claim that using military lethal force is unlikely to be unpredictable or catastrophic. What starts out as one instance of lethal force may very well escalate or get out-of-control. Having said that, it is also possible to make a distinction between uses of lethal force that could (or are likely to) lead to war and those situations where a use of lethal force: 1) is highly unlikely to lead to war; 2) acts to greatly reduce the likelihood of war; or 3) prevents a catastrophic harm

or injustice so is worth the risk of war.

The second problem with force-short-of-war, according to Coady, is that it “softens” the description of political violence. He believes terms such as “lethal force” and “force short-of-war” embody the unsatisfactory softening of terms describing political violence.⁴⁶ To Coady, the “force short-of-war” description covers a wide range of military interventions such as rocket strikes and bombing raids intended to punish, rescue or deter. He also points out that Walzer uses the term for more sustained violence such as the American “no-fly zone” bombing of Iraq carried out as part of the containment system imposed after the Gulf War.⁴⁷ As I discussed in the first section, I agree with Coady that Walzer’s notion of *jus ad vim* covers a wide range of military interventions, and is perhaps too broad. But Coady could also be accused of a similar type of “softening”. He gives “political violence” a very broad remit that, much like Walzer’s *jus ad vim*,⁴⁸ also covers a wide range of phenomena. I tend to agree with Coady’s point that we do not want to let state actors off the moral hook by allowing them the use of self-justifying terms such as “force” while using terms that condemn the actions of non-state actors. But he does not make clear how we should treat political violence short-of-war.⁴⁹ And since it is not clear how Coady’s approach is superior to Walzer’s, I’m not convinced that he has effectively ruled-out *jus ad vim* as a plausible approach.

To illustrate his objection to Walzer’s notion of force short-of-war, Coady makes his point using the example of the U.S. air strike against Sudan’s alleged chemical weapons factory in 1998.⁵⁰ He argues that this incident could be described as a use of force short-of-war because: 1) the U.S. was not at war with Sudan at the time; 2) the incident was brief; and 3) the incident was self-contained. I have no disagreement with Coady when he argues that a declaration of war is not significant for the moral assessment of political violence. A war does not require a formal declaration to be a war.

Coady’s next two claims, however, I will take issue with. First, Coady suggests that although the duration of a conflict is a morally relevant factor, it makes no difference to our fundamental assessment of war *qua* war. Short and long episodes of war have the same quality: they are both war and should be judged accordingly.⁵¹ But it is not the duration that is constitutive of war but the repeated violent conflicts. While wars might be short (e.g. The Six Day War)⁵² they can also be very long (e.g. The Hundred Years War)⁵³. The point of *jus ad vim* is that it judges each incident independently. And, as I have explained earlier, we have good reason for refusing to allow all cases of political violence to be described as war: because with war we permit a wider range of destructive actions. *Jus ad vim* prevents the expansion of war. So the moral exceptionalism we allow in war is applied to fewer cases. This way, we better meet Coady’s “genuine reluctance constraint” principle which I take to mean making decisions that lead to the least overall amount of political violence.

Second, Coady also argues that the target’s incapacity or unwillingness to fight back does not do away with the need to justify the attack in the first place.⁵⁴ The moral standards appropriate to war should still apply in these cases. While it is true to say that the appropriate moral standards should be applied in cases where the target does not or cannot fight back, I’m arguing that in those specific cases *jus ad vim* gives us a better moral framework than does the conventional just war view. Importantly, *jus ad vim* makes a clearer distinction between the innocent civilian who has no intention of harming and a person (or group) who perhaps cannot do harm for the moment but are likely to do so when they have the opportunity. In judging the use of lethal force, *jus ad vim* increases the protections of the innocent group while still permitting the targeting of the culpable group.

The third criticism Coady has of *jus ad vim* is that some nation (or group of nations) possessing massive military superiority over an adversary will be tempted to see the resort to political

violence at the less spectacular end of the scale as an example not of war but of something more like forceful correcting or policing.⁵⁵ He believes that such instances can turn into asymmetrical war where the opponent must resort to less direct forms of violence because it lacks the requisite military weaponry. I agree with Coady's assessment of what I would describe as the "policing alternative". Simply applying the policing paradigm alone is an insufficient approach for dealing with the complexity of phenomena within *jus ad vim*. For an incident to be described as a policing use of lethal force it should meet the specific criteria that apply to policing. It might seem like a straightforward solution to call anything that is not a clear-cut example of warfare a law enforcement issue by default. But just because a conflict fails to meet the criteria for warfare does not mean it automatically fits the policing paradigm.⁵⁶ As I mentioned in my introduction, the tools of law enforcement are simply not capable of dealing with many of the conflicts we find in the range of *jus ad vim*. Hence there is the necessity to use military capabilities and the requirement of a hybrid moral framework.

4. Making use of *jus ad vim*

Having examined Walzer's argument for *jus ad vim* and some of Coady's main criticisms, I now argue that *jus ad vim* has the virtue of allowing us to stop the expansion of war while still providing the necessary hybrid ethical framework for judging violent conflict outside that context. First, I will explain what I mean by a "narrow" account of war using Brian Orend's definition.⁵⁷ Then I argue that there is no need to expand war into these other areas. We should keep our definition of war suitably narrow and have a distinct hybrid ethical framework for conflicts short-of-war.

War should be understood, according to Orend, as an actual, intentional and widespread armed conflict which occurs only between political communities.⁵⁸ He argues that war is a violent way for determining formal power in a given territory and "*all warfare is precisely, and ultimately, about governance.*"⁵⁹ Orend also believes that the conflict of arms must be actual and not merely threatened for it to count as war. And this actual conflict must be both intentional and widespread. According to Orend, there is no real war until the fighters intend to go to war and until they do so with a heavy quantum of force.⁶⁰ So following Orend's definition, we can describe a narrow account of war as having the following qualities: 1) deliberate and repeated acts of serious actual conflict; 2) between two or more political communities; 3) using combatants acting on their behalf; and 4) who are acting with political goals and intentions.

Now the problem with Coady's approach to political violence is to argue that the phenomenon of force-short-of-war is of the same kind as war and so this indicates that we should apply just war principles to events short-of-war in the same way as we would to war.⁶¹ But there is an important reason why we should refrain from doing this: to ensure that the moral exceptionalism that we grant in war remains as exceptional as possible.⁶² The central moral consideration in war, narrowly defined, is not just the taking of human life but the likelihood of taking many lives, many of whom are innocent. What is most morally concerning about war is the deliberate killing of human beings, typically in vast numbers.⁶³ Naturally, the taking of human life in vast numbers is something we want to avoid. My main concern with the expanded approach to war, so that war encapsulates a wider range of incidents, is that it is likely to end up actually permitting more killing and destruction than is necessary. I agree with Coady's overall aim: that is, to hold state militaries to a more rigorous ethical standard in the practice of using lethal force and to minimise the overall harm caused by physical conflict. But I argue that we should be aiming to confine the "dogs of war" to the smallest range of incidents possible and apply more appropriate constraints on the military when it operates outside of that context.

5. Conclusions

In conclusion, Coady does not want to restrict the notion of political violence to the activities of non-state agents, nor to separate ethical questions concerning such activities from those having to do with war or intervention. He is unimpressed by any attempt to put a conceptual or moral gulf between the resort to lethal force for political purposes by state agencies and its political employment by non-state actors.⁶⁴ This is because he believes it gives the mistaken impression that the purposes of state violence are somehow above politics and presumptively acceptable when employed by “our” state.⁶⁵ His fear is that freeing up the power of states to deploy the sword is more likely to wreak morally objectionable damage, at least in terms of scale, than anything non-state agents can achieve.⁶⁶ But I agree with Walzer that we can (and should) make a distinction between conflict in war and conflict short-of-war. The conventional just war approach suffers from a false dichotomy where the use of lethal force by the military is judged through the lens of either no conflict whatsoever or all-out war. It seems more reasonable to suggest that situations of conflict short-of-war might require a range of moderated responses, including military options.

Consequently, I argue, first, that we should conclude that war (narrowly understood) is worse than lethal force-short-of-war because the scale of permissible harm is higher (with the potential to be much higher) and it permits the foreseeable harm of innocent people. Second, *jus ad vim* is better than conventional just war theory alone for judging such conflicts short-of-war because it acknowledges the need for a “hybrid” moral framework that inhibits the move towards the escalating violence characteristic of war. Third, *jus ad vim* prevents the expansion of war along with its morally exceptional permissions. I agree with Coady that the distinction between state and non-state actors is not a good reason for letting state actors off the moral hook. But that is one of the reasons why I think *jus ad vim* proves its utility. It gives us a better ability to morally evaluate the actions of state actors.

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Notes

- 1 For comments on this chapter, special thanks to Tony Coady, Larry May, John Kleinig, Seumas Miller, Ned Dobos, Ross Babbage, Christian Enemark, Levi West, Adam Gastineau and in particular Adam Henschke.
- 2 I will use the term "soldiers" throughout this paper in a generic way to refer to actively serving members of a military force, including airmen, sailors, submariners, bombardiers, sappers, and so on. It does not, however, refer to civilian members of a defence organization.
- 3 It might be argued that the state's use of the military is merely an adaptation to the emergence of "New Wars." I tend to favour Jessica Wolfendale's argument that the character of war has not fundamentally changed. What is changing, however, is the willingness to use the military to serve a wider range of institutional roles and purposes. J. Wolfendale, "'New Wars,' Terrorism, and Just War Theory," in P. Tripodi and J. Wolfendale (eds), *New Wars and New Soldiers: Military Ethics in the Contemporary World*, Aldershot: Ashgate, 2011, pp. 16–17.
- 4 N. Dobos, *Insurrection and Intervention: The Two Faces of Sovereignty*, Cambridge: Cambridge University Press, 2011, p. 21.
- 5 B.M. Blechman and S.S. Kaplan, *Force Without War: U.S. Armed Forces as a Political Instrument*, Washington, DC: The Brookings Institution, 1978.
- 6 F. M. Kamm, "Failures of Just War Theory: Terror, Harm, and Justice," *Ethics* 114:4, 2004.
- 7 "Terms such as Gun-Boat Diplomacy, Low-Intensity Conflict (LIC), Small Scale Contingencies (SSC) and Military Operations Other Than War (MOOTW) attempt to capture the nebulous region between peace and war where civilian authorities retain significant control of the military power used to achieve political purpose." A.J. Stephenson, "Shades of Gray: Gradual Escalation and Coercive Diplomacy," *DTIC Document*, 2002.

- 8 Just war revisionists argue that killing in war should not be treated differently from any other kind of killing. I hold to the conventional just war view that wartime killing is in some way morally exceptional. But I cannot sufficiently address this debate here. See: B.J. Strawser, "Walking the Tightrope of Just War," *Analysis* 71:3, 2011; S. Lazar, "The Morality and Law of War," in A. Marmor (ed.), *The Routledge Companion to Philosophy of Law*, Taylor & Francis, 2012; J. McMahan, *Killing in war*, Oxford: Oxford University Press, 2009; D. Rodin, *War and self-defense*, New York: Oxford University Press Inc, 2003.
- 9 D. Luban, "The war on terrorism and the end of human rights," *Philosophy and Public Policy Quarterly* 22, 2002, p. 9.
- 10 I do not have the space to fully discuss the moral implications of the policing context for the use of lethal force. For a discussion of the ethics of the police use of lethal force, see: S. Miller and J. Blackler, *Ethical issues in policing*, Aldershot: Ashgate Pub Ltd, 2005; pp. 61–82; J. Kleinig, *The ethics of policing*, Cambridge: Cambridge University Press, 1996. pp. 96–122; J. Reiman, "The social contract and the police use of deadly force," in F. Elliston and M. Feldberg (eds), *Moral Issues in Police Work*, New Jersey: Rowman and Allanheld, 1985.
- 11 Self-defense is not the only justification for taking the life of another person. It may be that each of us has the right to kill in the defense of the lives of others. Furthermore, in certain roles such as that of a police officer or soldier, there might be a moral obligation to kill in the defense of the lives of others. S. Miller, *Terrorism and counter-terrorism: ethics and liberal democracy*, Oxford: Blackwell Publishing, 2009, pp. 64–65.
- 12 T. Junod, "The Lethal Presidency of Barack Obama," *Esquire*, 9 July, 2012.
- 13 "Al Qaeda is evidently a clandestine organization consisting of elements in many countries and apparently composed of people of various nationalities; it is dedicated to advancing certain political and religious objectives by means of terrorist acts directed against the United States and other, largely Western, nations. As such, Al Qaeda does not in any respect resemble a state, is not a subject of international law, and lacks international legal personality. It is not a party to the Geneva Conventions, and it could not be a party to them or to any international agreement. Its methods brand it as a criminal organization under national laws and as an international outlaw. Its members are properly subject to trial and punishment under national criminal laws for any crimes that they commit." G.H. Aldrich, "The Taliban, Al Qaeda, and the Determination of Illegal Combatants," *The American Journal of International Law* 96:4, 2002, p. 893.
- 14 That is, any person who is subject to a state's jurisdiction, not only its citizens.
- 15 Luban's argument against what he calls the "hybrid war-law model" is his concern that "the U.S. has simply chosen the bits of the law model and the bits of the war model that are most convenient for American interests, and ignored the rest." Luban, "The war on terrorism and the end of human rights," p. 12. But the misuse of an *ad hoc* hybrid war-law model by the U.S. does not rule out the development of a well-reasoned morally worthwhile hybrid ethical framework *per se*.
- 16 Outside of Coady's book, *Morality and Political Violence*, there has been seemingly little direct discussion of *jus ad vim* in the literature. C.A.J. Coady, *Morality and political violence*, Cambridge: Cambridge University Press, 2008.
- 17 M. Walzer, *Just and unjust wars: a moral argument with historical illustrations*, 4th edn, New York: Basic Books, 2006.
- 18 *Ibid.*, xv.
- 19 *Ibid.*, xiv.
- 20 "Collective security rests on the notion of all against one. While states retain considerable autonomy over the conduct of their foreign policy, participation in a collective security organization entails a commitment by each member to join a coalition to confront any aggressor with opposing preponderant strength...a collective security organization, by institutionalizing the notion of all against one, contributes to the creation of an international setting in which stability emerges through cooperation rather than through competition." C.A. Kupchan and C.A. Kupchan, "Concerts, Collective Security, and the Future of Europe," *International Security* 16:1, 1991, p. 118.
- 21 M. Walzer, *Just and unjust wars*, p. xiv.
- 22 C.A.J. Coady, *Morality and political violence*, p. 88.
- 23 Thanks to Ned Dobos for framing the problem this way.
- 24 M. Walzer, *Just and unjust wars*, p. xiv.
- 25 Note that I will be using the terms "force short-of-war" and "lethal force-short-of-war" interchangeably throughout the rest of this chapter.

- 26 M Walzer, *Just and unjust wars*, p. xiv.
- 27 M. Knisbacher, "The Entebbe Operation: A Legal Analysis of Israel's Rescue Action," *Journal of International Law & Economics* 12, 1977.
- 28 Walzer, *Just and unjust wars*, p. xv.
- 29 Ibid.
- 30 Ibid.
- 31 Ibid., p. xvii.
- 32 C.A.J. Coady, *Morality and political violence*, p. 93.
- 33 Coady's use of the expression "political violence" includes 'war as the primary instance of such violence, but it is also meant to cover other violent activities that some would not include under the heading of war. Such activities encompass terrorism, armed intervention (for "humanitarian" or other purposes), armed revolution, violent demonstrations or attacks by citizens aimed at less than the overthrow of their government, and the deployment of mercenary companies or individuals. It could also include other activities...such as certain forms of torture, assassination, and violent covert operations' *ibid.*, p. 3.
- 34 Ibid., p. 93.
- 35 Ibid., p. 7.
- 36 Ibid.
- 37 Coady expressed these ongoing qualms in personal communications, June 2012.
- 38 See: B. J. Strawser, "Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles," *Journal of Military Ethics* 9:4, 2010; J.C. Galliot, "Uninhabited aerial vehicles and the asymmetry objection: A response to Strawser," *Journal of Military Ethics* 11:1, 2012.
- 39 Coady says, "Given the appalling record of states in the unjustified employment of lethal force to devastate populations, economies, and cultures over the centuries, I am unimpressed by any attempt to put a conceptual or moral gulf between the resort to such force (or, as I would prefer to say, violence) for political purposes by state agencies and its political employment by nonstate actors. The tendency to talk of the state as using "force" and of terrorists or revolutionaries as using "violence" embodies an attempt to bring initial opprobrium upon the nonstate actors (via the negative connotations of "violence") and to give an a priori mantle of respectability to the state actors. When the qualification "political" is added only to the activities of the nonstate agents and withheld from the state's operations, even where the means employed are identical or similar in kind, this can suggest that the purposes of state violence are somehow above politics and presumptively acceptable, at least when employed by "our" state." C.A.J Coady, *Morality and political violence*: p. 3. Since I've deliberately given myself a very restrictive focus in this chapter by only looking at the military as functionaries of the state, it might be that Coady's point about the unfairness of state versus non-state actors applies. I'm certainly sympathetic to his point. But my primary argument remains valid: that *jus ad vim* serves to morally tighten the uses of lethal force by state actors.
- 40 L. May, *Aggression and Crimes Against Peace*, Cambridge: Cambridge University Press, 2008, p. 23.
- 41 S. Lazar, "Responsibility, Risk, and Killing in Self-Defense," *Ethics*, 119:4, 2009, p. 699.
- 42 S. Gazit, "Risk, Glory, and the Rescue Operation," *International Security* 6:1, 1981.
- 43 Knisbacher, "The Entebbe Operation: A Legal Analysis of Israel's Rescue Action."
- 44 "It is worth distinguishing two types of slippery-slope argument. The first type – the horrible result-argument – objects, roughly speaking, to what is at the bottom of the slope. The second type objects to the fact that it is a slope: this may be called the arbitrary result argument." B. Williams, "Which Slopes are Slippery?" in M. Lockwood (ed.), *Moral dilemmas in modern medicine*, Oxford: Oxford University Press, 1985.
- 45 M. Walzer, *Just and unjust wars*, p. xiv.
- 46 C.A.J. Coady, *Morality and political violence*, p. 5.
- 47 Ibid., p. 6.
- 48 Ibid., p. 3.
- 49 Norman concludes that moral arguments are unlikely to be advanced one way or another if they are conducted primarily in terms of the concept of "violence." He suggests this is because use of the term is likely to be determined by prior moral positions and the concept of "violence" cannot itself be used to defend these positions. R. J. Norman, *Ethics, killing, and war*, Cambridge University Press, 1995, p. 37.
- 50 C.A.J. Coady, *Morality and political violence*, p. 6.
- 51 Ibid.

Jus ad vim and the just use of lethal force-short-of-war

- 52 M.B. Oren, *Six Days of War: June 1967 and the Making of the Modern Middle East*, Oxford: Oxford University Press, 2002.
- 53 C. Allmand, *The Hundred Years War: England and France at War c.1300–c.1450*, Cambridge: Cambridge University Press, 1988.
- 54 C.A.J. Coady, *Morality and political violence*, p. 6.
- 55 *Ibid.*, p. 7.
- 56 “systems of accountability developed to regulate the use of force domestically cannot simply be transferred to the international humanitarian law context. Consequently, both states and human rights supervisory bodies may have to readjust their understanding of the role human rights law can play in enhancing the accountability framework regarding the use of deadly force in armed conflict. No gaps in the effort to apply appropriate norms of humanity can be allowed.” Kenneth Watkin, “Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,” *The American Journal of International Law*, 98:1, 2004.
- 57 B. Orend, *The morality of war*, Ontario: Broadview Press, 2006.
- 58 Political communities, as defined by Orend, are those entities which are either states or intend to become states, the state being the machinery of government which organises life in a given territory. *Ibid.*, p. 2.
- 59 *Ibid.*, p. 3.
- 60 *Ibid.*
- 61 J.A.C. Coady, *Morality and political violence*, p. 7.
- 62 By moral exceptionalism I simply mean the exceptional duties and permissions we grant soldiers in active theatres of war to use lethal force. For more on exceptionalism, see: A. Fiala, “A critique of exceptions: Torture, terrorism, and the lesser evil argument,” *International Journal of Applied Philosophy* 20:1, 2005; E. Allhoff, *Terrorism, Ticking Time-Bombs, and Torture: A Philosophical Analysis*, University of Chicago Press, 2012, esp. Chapter 3; J. H. Marks, “What Counts in Counterterrorism,” *Columbia Human Rights Law Review* 37:3, 2005.
- 63 R.J. Norman, *Ethics, killing, and war*, p. 37.
- 64 J.A.C. Coady, *Morality and political violence*, p. 3.
- 65 *Ibid.*
- 66 *Ibid.*