

# Challenges and Opportunities for Walzer's "Jus ad Vim" for the 21st Century

Written by Jonathan Haseldine

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### Exploring the Challenges and Opportunities for Operationalising Walzer's Concept of *Jus ad Vim* for the 21<sup>st</sup> Century

#### INTRODUCTION

There are, one could argue, three broad traditions which dominate the ethics of war and peace: Realism, Pacifism and Just War Theory.[1] Realism, as a school of thought, offers scepticism and disregard to any notion of ethical war, seeing it as almost an oxymoronic term, and its components such as principles of justice and fairness.[2] In contrast, the Pacifist school of thought argues that ethics are, actually, very much part of international relations and should be treated accordingly. From a pacifist perspective, war is always wrong regardless of the situation and any alternative to conflict must be sought.[3] However, it is with the final tradition that this research project is concerned. Just War Theory has arguably always been the predominant and most influential of the three traditions of the ethics of war, with a wide range of scholars concerning themselves with it as an area of study.[4] The role played and value of Just War theory is not lost on politicians and decision makers in the twenty-first century.

In his acceptance speech at the 2009 Nobel Peace Prize, President Barack Obama referred to the importance of just war theory and tradition stating, in reference to the use of force: "And over time, as codes of law sought to control violence within groups, so did philosophers and clerics and statesmen seek to regulate the destructive power of war. The concept of a "just war" emerged, suggesting that war is justified only when certain conditions were met: if it is waged as a last resort or in self-defense; if the force used is proportional; and if, whenever possible, civilians are spared from violence".[5] Obama's reference was merely one in a list signalling just war theory as the predominant theoretical force when it came to debating and discussing the ethics of war within both the political and academic community.

In the eyes of many, the leading figure of the just war tradition over the last forty or so years has been Michael Walzer. His magnum opus '*Just and Unjust War: A Moral Argument with Historical Illustrations*', first published in 1977, is generally considered to be the go to core text for any teaching or discussion of the ethics of war both in academia and the policy making world. It is in the fourth edition of his classic text, published in 2006, that Walzer first makes reference to what he calls '*jus ad vim*' or the use of force short of war.[6] This theory, Walzer suggests, "should not be an overly tolerant or permissive theory, but it will certainly be more permissive than the theory of just and unjust war".[7] It is with this theory of *jus ad vim* that this research project is chiefly concerned.

The primary research aim of this project is to assess and analyse the challenges and opportunities for conceptualising and operationalising Walzer's theory of *jus ad vim*. This will require an understanding of what Walzer meant when first outlining the concept and what he hoped to achieve from it. Similarly, it will require the adaptation of

# Challenges and Opportunities for Walzer's "Jus ad Vim" for the 21st Century

Written by Jonathan Haseldine

the existing just war framework principles of *jus ad bellum* and *jus in bello*, namely: Just Cause, Right Authority, Right Intention, Proportionality, Last Resort and Reasonable Prospect of Success.

Chapter one will concern itself with the conceptualisation of a workable framework for the use of *jus ad vim*. It will show that while it is undoubtedly possible to create a framework of *jus ad vim*, it is not without difficulty, especially in the tension of how permissive the framework should be, something that critics such as C.A.J. Coady have picked up on.[8] Nevertheless, the chapter will show that the traditional just war principles that have been outlined can be adapted and conceptualised into a tentative and preliminary working framework of *jus ad vim*. It will begin by exploring the principle of just cause, noting that the best way to utilise it is to relax the other *ad bellum* threshold of last resort. Likewise, the adapted principle of proportionality will suggest that there are two ways of setting it out in a *jus ad vim* context: introducing Janina Dill's standard of necessity and/or Megan Braun and Daniel Brunstetter's probability of escalation criteria.[9] The chapter will conclude that while a framework of *jus ad vim* can certainly be conceptualised, issues may well arise from the perceived ambiguity of some of the principles.

Chapter two will take the conceptual framework of *jus ad vim* outlined in chapter one and attempt to operationalise it, using the context of the United States government CIA-led drone programme in the Middle East, especially focused on Pakistan. The chapter begins with a wider and more generalised assessment of the use of the drones by states and the exponential growth in numbers that states appear to possess. It will then go on to argue that, on the whole, drones strikes, especially in the last three years, have conformed to the proportionality principle of the *jus ad vim* framework. At the same time however, it is far harder to accept a *jus ad vim* reading of the principle of right authority because the situation remains ambiguous as to whether right authority is provided or not, and, if so, by whom?

Chapter three will follow on from chapter two in that it will once again take the theory conceptualised in chapter one and attempt to apply it to the notion of humanitarian intervention. It will begin by exploring what we understand the concept of humanitarian intervention to be about before once again applying the principles of the just war framework. Chapter three is deliberately shorter than chapter two due to the nature of the chapter itself. Humanitarian intervention is not something that has been considered under a framework of *jus ad vim* before.[10] Therefore the aim of the chapter is to explore potential new terrain for a *jus ad vim* framework and assess whether humanitarian intervention should be conceptualised by the framework at all.

The conclusion will bring together all strands of the arguments from all three chapters in order to make an overall conclusion on the challenges and opportunities for operationalising Michael Walzer's theory of *jus ad vim*. It will suggest that while there are certainly opportunities for operationalising *jus ad vim*, there are significant hurdles and moral ambiguities to overcome first.

## CHAPTER 1: ORIGINS TO ADAPTATION: *JUS AD BELLUM* TO *JUS AD VIM*

If we acknowledge the vast range and scope of ethical and moral study and contemplation of the resort to and use of armed force, then the terminology and examples used are many and, more often than not, conflicting. Consequently, while the employment of the terms *jus in bello* – relating to how one properly and justly conducts oneself in war and *jus ad bellum* – the justice of going to war in the first place, is of relatively recent coinage, the concept of a just war is not.[11] Saint Augustine of Hippo, a Bishop in North Africa in the early fifth century, has often tended to be described as the founding father of the just war tradition. This notion is arguably somewhat wide of the mark in terms of both being influenced by scholars who preceded him and shaped by those who followed him. Thucydides, while not specifically touching upon whether the act of warfare was just, clearly provides a starting point when it comes to the relationship between ethics and war at least 750 years before Saint Augustine was even born. Similarly, scholars such as Gregory Reichberg, Henrik Syse and Endre Begby have argued that it would be the task of later thinkers "Gratian and his successors...to shape Augustine's moral intuitions into a doctrine of just war".[12] Thus, as is the

# Challenges and Opportunities for Walzer's "Jus ad Vim" for the 21st Century

Written by Jonathan Haseldine

case with almost all theories and traditions, there is no arbitrary start point, but rather a culmination of a range of sources to produce what we are familiar with today.

This chapter will examine the key 'just war' criteria for *jus ad bellum* (the justice of going to war): Just cause, Right authority, Right Intention, Proportionality, Last resort and Reasonable prospect of success, and if it is possible to adapt them to fit Walzer's theory *jus ad vim* (the use of force-short-of-war).[13] This will be explored through the proposed analysis already set out by Daniel Brunstetter and Megan Braun in their 2013 article for *Ethics & International Affairs* titled 'From *Jus ad Bellum* to *Jus ad Vim*: Recalibrating our Understanding of the Moral Use of Force'. [14] Similarly, the conceptual framework will be critiqued using the work of C.A J. Coady as a focal point, as it remains the most relevant and complete counter-argument to Walzer's original theory.[15]

In the first instance, this chapter will consider the principle of 'just cause' and the extent to which it needs to be satisfied under *jus ad vim* as well as whether the *ad bellum* principle of 'last resort' carries equal significance. Having established, as Walzer set originally, that *vim* should be "more permissive", to a certain extent, than *jus ad bellum* the chapter will move on to discuss the core tenant "proportionality". It will argue that while Brunstetter and Braun's suggestion of a new criterion of "probability of escalation" and Janina Dill's suggestion of a criterion of 'necessity' are necessary, they both remain somewhat problematic in certain instances. Having considered this, the following section shall deal with the case of "right authority and "right intention" thus having considered the main principles of *jus ad bellum* from a *jus ad vim* perspective. The combination of these elements will lead to a tentative and preliminary conceptual framework for a theory of *jus ad vim*, therefore allowing for its application in future chapters.

## *Just Cause*

How we perceive acts of the use of force in relation to the just war tradition are regulated by a specific set of criteria, one of which is 'just cause'. As previously mentioned, such criteria are certainly not new, with St Thomas Aquinas writing in the thirteenth century about three criteria by which the justness of war could be established: Sovereign Authority, just cause and rightful intention.[16] On the whole, it is easy to determine whether the just cause criteria has been met. Wars of aggression cannot be deemed to have a just cause, which leaves only defensive wars, wars of liberation and, some would argue, humanitarian intervention.[17] Similarly, the 1993 U. S. Catholic bishops' Conference defined 'just cause' as "force may be used only to correct a grave, public evil, i.e., aggression or massive violation of the basic rights of whole populations".[18] Thus, quite simply, self-defence and other-defence (the defence of a third party) are the only legitimate causes for the use of force. This is the case with *jus ad bellum* and also with *jus ad vim*.

However, if we agree with the notion outlined by Walzer that a theory of *jus ad vim* should "not be overly tolerant or permissive, but it will certainly be more permissive than a theory of just and unjust war", then we therefore need to recalibrate our understanding of 'just cause'. [19] Arguably, *jus ad vim* allows for our understanding of defence to be interpreted more broadly, thus leading to more cases where the use of force is justified following *injuria*. As Brunstetter and Braun suggest, such *injuria* could include, "terrorist bombings, attacks on embassies or military installations, and the kidnapping of citizens". [20] Similarly, imminent humanitarian catastrophes such as, for example, disease, famine or flooding may, in certain situations, provide just cause as is the case with potential acts of terrorism.

Nevertheless, it is clear that creating a theory with more permissiveness when it comes to using force is, to say the least, potentially problematic. Satisfying the criterion of just cause merely tells us that, if needed, states have a right to respond to threats or injustice against them. It does not inform us the amount of force that can be justifiably used or if and when to do so. This is tapered somewhat by the criterion of proportionality, which we shall explore later, as it covers the question of the amount of force that it is justifiable to use. Critics of *jus ad vim*, C.A.J. Coady being most prominent, argue pointedly that "we do not need some more permissive theory quite distinct from just war thinking". [21] While fully accepting the reasons for Coady's concern, I take issue with it for two reasons. Firstly, the notion that a theory of *jus ad vim* is 'quite distinct' from just war thinking is rather misleading and debatable. *Jus ad vim* is very much part of just war thinking, this is somewhat undeniable when it shares the same criterion as *jus ad bellum*. Secondly, by distancing *jus ad vim* from traditional just war thinking, Coady makes it easier to attack and

# Challenges and Opportunities for Walzer's "Jus ad Vim" for the 21st Century

Written by Jonathan Haseldine

critique it as a theory. There is no denying that conceptualising *vim* as a wide-ranging and different theory makes it ripe for attack and critique. Therefore, it is necessary to define it in as narrower terms as possible.

Arguably, the most sensible way to characterise the criterion of 'just cause' would be through relaxing the *jus ad bellum* principle of the threshold of 'last resort'. This is necessary for a couple of reasons. Firstly, and rather simply, quite obviously overstepping the threshold of last resort ends with the consequence of war. Therefore, as *jus ad vim* is the use of force short of war it becomes necessary to relax this notion of last resort. Interestingly, however, Brunstetter and Braun suggest 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".[22] Such an understanding is conceivably useful as it allows the *jus ad vim* last resort process to be seen as distinct from the last resort process associated with *jus ad bellum*. However, while the theory of *jus ad vim* remains distinctly different and independent from a theory of *jus ad bellum* I would argue that despite being necessary for different purposes, the moral notion of last resort remains the same.

Therefore, what constitutes the last resort threshold of *jus ad vim* being crossed? As I will explore later in Chapter 2, the use of drone strikes in order to eliminate those considered to be a threat to another state is one such example. After all, it is a situation that is beyond the scope of a national police force and yet, at the same time, does not require what would be considered an act of warfare, such as troops on the ground. Similarly, Chapter 3 will explore the notion of 'just cause' in the context of humanitarian intervention and moral responsibility. It will explore whether, in today's world, the use of force short of war can be used to assess and conceptualise how we respond to events such as humanitarian crises, global disease outbreaks and poverty.

*Jus ad vim* is certainly not an exact scientific formula due to both its relative newness as a concept and the fact that international norms and laws are constantly evolving. Therefore, when it comes to the question of 'just cause' the following can be said. To satisfy the 'just cause' criterion of *jus ad vim*, the act itself must be both beyond the scope of a national police force or crime agency but, at the same time, also below the threshold for resorting to war. At the same time, there must be an element of 'last resort', although it remains difficult to qualify exactly what the last resort threshold of a concept of *jus ad vim* may entail. I appreciate that this is a rather vague statement however, at the same time, it suits the purpose of what I intend to explore in later chapters.

## *Proportionality*

Having assessed how the *jus ad bellum* principle of 'just cause' may be adapted to suit a theory of *jus ad vim* I shall now consider the principle of 'proportionality'. As mentioned when discussing just cause, the proportionality principle covers the question of the amount of force that it is justifiable to use in a given situation or, in the case of *jus ad bellum* considerations, "the destructiveness of war must not be out of proportion to the relevant good the war with do".[23] This is necessary if we assume that the aforementioned principle of 'last resort' has been breached, to ensure that any force that is used is proportionate to the reason for using such force. The problem with gauging whether or not an act of using force is proportionate or not is simply the inherently unpredictable nature of doing so. In this line of thought, some scholars such as Brian Orend have described the vague concept of proportionality as being "unrefined and imprecise".[24] Quite simply, you cannot create an arbitrary level of proportionality because different uses of force require different amounts and levels of force. In this regard, it is better to think of proportionality as more of a sliding scale whereby the greater the original provocation or crime, the greater the retaliatory use of force is permitted to be.

However, there may well be a way of getting past the unpredictability of the principle of proportionality if we choose to reassess our terminology and definitions. In order to do so we need to pan out from a purely *jus ad bellum* outlook, and consider the entire concept of the just war tradition. One such approach is that of Janina Dill, who examines the principle of proportionality in combat operations through the lens of International Humanitarian Law (henceforth to be referred to as IHL), a concept I will touch upon in later chapters.[25] Dill argues that the principle of proportionality fails in three areas:

1. To sufficiently guide a well-intentioned combatant in his or her actions in the field;

# Challenges and Opportunities for Walzer's "Jus ad Vim" for the 21st Century

Written by Jonathan Haseldine

2. To adequately protect civilians in armed conflict; and
3. To provide a standard for an unbiased assessment of the conduct of hostilities.[26]

One such way to get around the vagueness of proportionality, Dill argues, is to draw on a standard of necessity for any given operation. In theory, necessity provides us with an absolute standard, whereas proportionality does not. "For an attack to have been necessary there can have been no alternative course of action with a reasonable chance of achieving a certain advantage that would have caused fewer civilian casualties".[27] In theory, a standard of necessity lowers the boundary for the principle of proportionality, a notion which ties in with Walzer's original requirement that a theory of *jus ad vim* be "more permissive" than that of *jus ad bellum*.

Furthermore, just because the principle of proportionality is vague, it does not mean that general judgements of what is considered proportionate cannot be made to some degree. In extremis, for example, it is painfully obvious to all that launching a drone strike at a school full of children, merely because their teacher is considered to be a key terrorist target is clearly not a proportionate use of force. On the other hand, if the individual in question is travelling alone in a car and a strike is launched, the response is considerably more proportionate. While I would agree that Dill's argument has merit and could certainly work in relation to *jus in bello* I remain somewhat wary of whether it could be beneficial to a theory of *jus ad vim*.

Another alternative is that of Brunstetter and Braun who suggest that an altogether new criterion 'the probability of escalation' is warranted in relation to a theory of *jus ad vim*. Clearly, defining and outlining the desired end goal of any *jus ad vim* operation is common sense necessity. We know that from the outset of an operation, as Frances Harbour points out, that "force and perhaps other tools are means to some goal".[28] However, at the same time, Brunstetter and Braun argue that a second element of the probability of escalation is required because *jus ad vim* action hinges on avoiding escalation to a full-blown war".[29] Again, I find the argument of using the principle of the 'probability of escalation' an intriguing one, however, there are a number of questionable elements behind it. Firstly, the authors assert that "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".[30] Surely, if engaging in a course of action has a high probability of resulting in war then it is never a *jus ad vim* action in the first place? Similarly, like Dill, they quite rightly point out that the "criterion is never satisfied once and for all...and is plagued by ambiguity".[31]

Subsequently they raise three contemporary examples which raise further questions, rather than giving the answers which are needed. One of these, the case of drones, is an area that will be explored in far greater depth in chapter two. Here Brunstetter and Braun raise two important questions; how should *jus ad vim* account for potential escalation with non-state actors capable of retaliatory terrorist attacks and how does the level of consent attained from the host country affect the moral calculation?[32] As already mentioned, the ideas of terrorism and the changing character of war shall be addressed in later chapters but, briefly, it is clear that ideally a level of consent is obtained from the host country in order to relax the moral calculation of the *jus ad vim* act. However, this evidently is not sometimes possible (the Bin Laden raid in 2011 being the most prominent example) and in the scheme of the *jus ad vim* principles outlined in this chapter, the principle of the probability of escalation is arguably not the most important in the scheme of things.

As was the case with the principles of just cause and last resort, the principle of proportionality is an extremely vague and fluid concept. Arguably, in a concept of *jus ad vim* proportionality is similar to what it would be in a *jus ad bellum* reading because it can only really be assessed on a case by case basis having been underlined with common sense norms of what it is morally permissible and what is not. I certainly believe Janina Dill's concept of 'necessity' playing a part in proportionality is an interesting one, especially seeing as it should eradicate any ambiguity at the lower end of the scale of escalation. After all, as Dill points out, "damage to civilians that is not necessary is never proportionate".[33] However, she uses it in the context of proportionality in war (*jus in bello*) so it remains to be seen if it could be adapted to represent the use of force short of war.

## *Legitimate Authority & Right Intention*

# Challenges and Opportunities for Walzer's "Jus ad Vim" for the 21st Century

Written by Jonathan Haseldine

The final principles that this chapter will consider are those of *Legitimate Authority* and *Right Intention*. The principle of 'right intention' is a tricky one to deal with for two reasons. Firstly, on the face of it, a principle of 'right intention' sounds remarkably similar to one of 'just cause'. After all, they are both based on the same guiding principle of having a reason that is right and just and, as such; it would be easy to suggest that they are interchangeable. Secondly, and in contradiction to the first point, the principles of 'right intention' and 'just cause' are indeed similar, but at the same time they are both distinctively different. Indeed, it appears to be that the prevailing view suggests that in order to satisfy right intention, in a *jus ad bellum* context, a war has to be fought *for* the just cause.[34] In their framework of converting the *jus ad bellum* principles into *jus ad vim* principles, Brunstetter and Braun argue that right intention must be directed towards upholding the rights of the Other. Therefore, a *jus ad vim* principle of right intention means "quelling a specific threat, while causing the least amount of damage possible by protecting civilians".[35] Furthermore, in an age of increasingly accurate precision technology, the consequences that result from the use of force should inherently become more predictable, therefore making it far easier to discriminate while using force.

Conceivably, there are two ways of looking at the principle of legitimate authority. This can either be through a notion of collective international mission, whereby states come together to enact the common good or through unilateral action, under which states would take matters into their own hands and act in self-defence. The way in which Walzer originally set out this concept of *jus ad vim* is problematic because he fails to cover the question of *whose* authority is legitimate. In terms of international law, the provision for using force is, on the face of it, rather clear. Article 2, Section 4 of the UN Charter places a prohibition on the use of force, stating that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".[36] This remains the default pacifist position of international law because it essentially rules out the use of force on a state to state basis.

However, as with many things, the way to get around a rule or law is to find an exception to such law. The UN provides this in Article 51 which states that that "nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations".[37] Therefore, as a state you are prohibited from using force against another state yet, at the same time, you still have an inherent right to self-defence. This inherently contradictory nature of international law produces a number of ambiguously blurred lines. Therefore, it is arguably reasonable in a theory of *jus ad vim* to require UN approval (in the form of the Security Council) as a threshold and base criterion in order to satisfy the principle of Right authority. While this may appear rather restrictive to some, it would be necessary in order to diminish the risks posed by *jus ad vim* use of force.

## Conclusion

This chapter has demonstrated how the principles of *jus ad bellum* may be adapted and conceptualised in order to fit a framework of *jus ad vim*, the use of force short-of-war. It has examined the key principles of *jus ad bellum* – Just cause, Proportionality, Right authority, Right intention – as well as amalgamating the final two – Last resort and Reasonable prospect of success – into them, in turn, allowing for a clear analysis of the principles. Having analysed each principle, it then explored how principle could be adapted in order to conceptualise a theory of *jus ad vim*. The reality of the situation around a theory of *jus ad vim* is, as has already been mentioned in the introduction and will be continued throughout this dissertation, that it is simply far too under-explored to make a definitive judgement. It would be impossible to make such a judgement in 12,000 words, especially considering the lack of specific literature on the subject. However, preliminary judgements can be made on what a working theory of *jus ad vim* may look like.

In terms of a 'just cause', the *jus ad vim* action must be beyond the scope of a national police force but not enough for a full scale act of war to break out. Likewise, an element of 'last resort' must remain the same under *jus ad vim* as is it under *jus ad bellum*. This, once again, is understood best on a case-by-case basis. While they do inevitably share a number of crossover characteristics, both *jus ad bellum* and *jus ad vim* activities must be considered for their individual characteristics and merits in order to make an ethical judgement. This is also the case when we consider the *jus ad vim* principle of 'proportionality'. Whether an activity is acceptable has to be considered independently of other decisions, although the notion of 'necessity' must also be considered here.[38] As previously

# Challenges and Opportunities for Walzer's "Jus ad Vim" for the 21st Century

Written by Jonathan Haseldine

mentioned, "damage to civilians that is not necessary is never proportionate", therefore for the use of force short-of-war to be just, it should also be necessary.[39] Finally, for the scope of this dissertation, 'legitimate authority' is understood to be, ideally authorisation from the United Nations (although this is understandably unlikely), but more realistically, the permission and acceptance of the host country. Thus, having set out a provisional working theory of *jus ad vim*, it will now be applied to various practical and empirical examples.

## CHAPTER 2: DRONE WARFARE AND *JUS AD VIM*

After having set out a working theory of *jus ad vim* in chapter 1, the notion of whether this can be successfully applied to the use of drones as a major component of the use of force in twenty-first century conflict. After all, it would render such a theory completely redundant if it were not applied to empirical examples in order to test its effectiveness. As such, chapter 2 will consider the case of the Central Intelligence Agency's drone programme and whether a more tolerant theory of *jus ad vim* gives it greater agency and permissibility. It will ultimately show that while it is certainly possible to apply a theory of *jus ad vim* to the activities of the CIA drone programme, an overarching question of whom provides authority to such activities and to whom they are accountable remains.

This chapter will first, briefly, consider the background to the CIA drone programme exploring what it does, where it operates, who it targets and how it differs markedly from the drone activities of the United States armed forces. It will then be argued, using the framework laid out in Chapter 1, that while the use of drones is arguably more proportionate and discriminatory than other uses of force, it remains unlikely that they could ever fully satisfy a complete framework of *jus ad vim*. As the chapter will explore later, the CIA's notion of proportionality compared to that of the United States military is problematic to say the least.[40] Under an *ad vim* framework, states should be prevented from justifying higher levels of killing and damage normally permissible in war.[41] Proponents of the CIA drone programme would argue that this is certainly the case, but the question remains of just exactly what level of killing and damage is permissible under a theory of *jus ad vim*.

On a hot summers evening, in early August 2009, a man named BaitullahMehsud lay reclined on the rooftop of his father-in-law's house in Zanghara, a hamlet located in the remote and mountainous region of South Waziristan.[42]Mehsud, a diabetic, was attached to an intravenous drip and receiving medical treatment from his uncle, a medic. They were joined on the rooftop by his wife. Minutes later they, along with Mehsud's mother-in-law, a lieutenant, and seven bodyguards, would be dead. We know all of this detail because, at that precise moment in time, the events taking place in Zanghara were being watched by officials at the Central Intelligence Agency, almost 7,000 miles away in Langley, Virginia via an uninhabited aerial vehicle (UAV) or 'drone'.[43] The relayed image from the drone stayed constant and stable even when it fired two hellfire air-to-surface missiles into the house, killing all twelve inhabitants.[44] There is no debate surrounding the question of whether BaitullahMehsud deserved what he got; he was a hardened terrorist who, according to the government of Pakistan, was responsible for masterminding the assassination of former Prime Minister Benazir Bhutto in 2007 as well as a string of suicide bombing across the border in Afghanistan.[45] Instead, what must be assessed is whether the use of force against Mehsud, in the form of a drone strike, was morally and ethically acceptable in the eyes of international law and the just war tradition.

### *The Use of Drones by States*

Pre-9/11, the United States drone arsenal consisted of a tiny number of experimental drones that were not intended or used for combat purposes. September 11<sup>th</sup> 2001 and the use of force it engendered altered this reality. Today, according to some estimates, there are more than 7,000 drones in American possession, around 200 of which are armed and which have killed thousands of people.[46] As the former director of the NSA and CIA Michael Hayden put it bluntly in 2013, "What was reasonable on the morning of September 11, 2001 was different than what was reasonable in the afternoon".[47] The United States currently has two drone programmes in place, having begun in 2002. The first, run by the United States military, predominantly uses drones for surveillance and air support to

# Challenges and Opportunities for Walzer's "Jus ad Vim" for the 21st Century

Written by Jonathan Haseldine

ground troops in territories such as Iraq, Afghanistan and Libya where the United States openly engages in armed conflict. In contrast, the second programme, run by the CIA, uses drones in territories where the United States is not openly engaged in war, such as Pakistan, Yemen and Somalia, for the specific purpose of striking and killing individuals who they deem to be terrorists. It is with the second programme that this chapter is primarily concerned. According to research compiled by the New America Foundation, there are now 86 states who possess some form of drone capability, be it armed or unarmed.[48] Of the 86, four states (United States, United Kingdom, Pakistan and Israel) have used armed drones in combat, while 78 states have drones with pure surveillance capabilities.[49]

What is clear is that the use of drones is simply going to keep growing exponentially in the years to come, especially as and when new technological advances continue to be made. Speaking before a Congressional committee in 2009, the then Chairman of the Joint Chiefs of Staff Admiral Mike Mullen suggested that the manned-Joint Strike Fighter aircraft might be the last manned aircraft; "I mean, there are those that see JSF as the last manned fighter. I'm one that's inclined to believe that".[50] Simply put, it is not unreasonable to imagine a scenario in 20 years' time when using drones becomes the prevailing norm and manned aircraft become obsolete. The number of drones is expected to increase by 35% in the decade to 2020, at an estimated spending cost, according to the US Congressional Budget Office, of around \$36.9 billion over ten years.[51] Therefore, is a *jus ad vim* reading of the use of drones, in particular targeted killings, possible and how would it be set out?

## *Proportionality*

In a speech given to the Council on Foreign Relations in April 2012, then Homeland Security Advisor and now Director of the CIA, John Brennan commended the proportionality of United States targeted killing, stating that;

Targeted strikes conform to the principle of proportionality—the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated military advantage. By targeting an individual terrorist or small numbers of terrorists with ordnance that can be adapted to avoid harming others in the immediate vicinity, it is hard to imagine a tool that can better minimize the risk to civilians than remotely piloted aircraft.[52]

In Brennan's, and therefore the United States government's, eyes, the targeted killing programme was proportionate because it successfully killed terrorists, while at the same time minimising the risk to non-combatants. While such a reading is, to an extent, perfectly valid, it does, at the same, neglect to explicitly suggest what ratio of terrorists killed to civilian casualties would be acceptable to the Obama administration. Strictly from a legal standpoint, Brennan's assessment of proportionality corresponds reasonably well with that outlined in Protocol I Additional to the Geneva Conventions Article 51(5)(b) which states that "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".[53] The problem which remains, however, is not what we, broadly speaking, understand the principle of proportionality to mean, but rather, how it should be assessed.[54]

From a traditional standpoint, scholars remain divided on whether the use of drones is more proportionate or not. Backing up the view held by the US government, Avery Plaw suggests that "All things considered, it looks like the proportionate alternative if one is committed to going after dangerous militants operating in the FATA[55] with military force".[56] In stark contrast, Sarah Kreps and John Kaag have posited that an exaggerated reliance on the *jus in bello* proportionality leads to a problematic growth of military objectives.[57] The problem with such a growth is that it allows for the lowering of the threshold of the use of force that would traditionally be in place in traditional just war theory components of *jus ad bellum* and *jus in bello*. For some scholars that would be enough, and they are content that drones can be evaluated according to traditional *jus ad bellum* and *jus in bello* standards.[58]

This is where Janina Dill's notion of necessity becomes useful in establishing whether a drone strike is proportionate under a framework of *jus ad vim*. [59] Here, it becomes necessary to discuss the *Authorization for Use of Military Force Against Terrorists* passed by the United States Congress on September 14<sup>th</sup> 2001 which states that the President is;

authorized to use all necessary and appropriate force against those nations, organizations, or persons he



# Challenges and Opportunities for Walzer's "Jus ad Vim" for the 21st Century

Written by Jonathan Haseldine

determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[60]

The Authorization for Use of Military Force (henceforth to be referred to as AUMF) is problematic for a number of reasons. Firstly, as will be discussed in greater detail later when it comes to right authority, does this joint resolution even have any practical purchase under international law? As will be discussed, yes, it does but it remains debatable as to what extent. Furthermore, when the authorization talks about 'persons' it is talking about combatants; which is perfectly acceptable. The problem that stems from this notion however, is the Obama administration's definition of what and, more importantly, who a combatant actually is. Currently and, I would suggest somewhat, controversially the Obama administration identifies all males over the age of 18 as combatants.[61] Counterterrorism officials in the United States argue that there is the simple logic that people who are with a known Al-Qaeda official or in an area of terrorist activity are "probably up to no good".[62] As one official put it in 2012 interview with *The New York Times*, "Al Qaeda is an insular, paranoid organization — innocent neighbors don't hitchhike rides in the back of trucks headed for the border with guns and bombs".[63] Such a distinction is deeply problematic and, under a framework of *jus ad vim* just simply would not be acceptable.

Another way to assess the use of drones under the framework of *jus ad vim* is to analyse the statistics that are available for such drone strikes and operations. Because the CIA covert drone programme does not officially exist there is relatively little information on where drone strikes happen, how many people are killed and who is killed. However, there are a number of organisations that compile data and various news reports in order to create databases for tracking casualty numbers.[64] As Braun and Brunstetter have pointed out, the proportionality of each drone strike must be considered individually and one such way of doing this is to analyse the 'collateral damage ratio' – the "strikes that produced collateral damage compared to total strikes".[65] According to the New America Foundation statistics, between 2004 and the present day the United States has conducted 397 drone strikes in Pakistan.[66] Of those 397 strike, 82 strikes or 21% of total strikes, killed non-militants (defined as either 'civilians' or 'unknowns').

Are the numbers of non-militant deaths in CIA drone strikes proportional? From a pure numerical point of view, they are certainly becoming more proportional. Over the four year period between 2004 and 2007, 70% of drone strikes involved non-militant deaths. Over the subsequent period between 2008 and 2012, this number dropped sharply to 22%. Furthermore, the data from 2013 to the present day shows a non-militant death strike percentage of 3.7%. The most promising aspect from the point of view of the *jus ad vim* framework is that there have been no recorded non-militant deaths since 2013.[67] These numbers read well with both Janina Dill's standard of necessity and Braun and Brunstetter's probability of escalation.[68]

As mentioned in Chapter 1, in theory, a standard of necessity provides us with an absolute standard. This is because for an attack to have been necessary there can be "no alternative course of action with a reasonable chance of achieving a certain advantage that would have caused fewer civilian casualties".[69] While the exact circumstances behind CIA drone strikes remain unknown, there is enough reason to believe that those being targeted in a drone strike, are targeted because they are both morally questionable characters and pose a threat to the United States in some capacity. If civilians or non-militants are not being killed at all in drone strikes then it is reasonable to suggest that such strikes are a just use of force short of war. Clearly there is very little, or no chance of apprehending the targets alive, an alternative that would be arguably be preferred in a number of cases. As Daniel Byman argues, when possible, "it's almost always better to arrest terrorists than to kill them. You get intelligence then. Dead men tell no tales".[70] Therefore, targeted drone strikes are the only option and thus Dill's standard of necessity is met because there is no alternative course with a chance of achieving fewer civilian casualties. Certainly, in the cases of the last two years, that we are aware of, it would have been physically impossible to get fewer casualties when there were none to begin with.

Likewise, Braun and Brunstetter's 'probability of escalation' is also, in all probability, more likely to be met. While it cannot be proven for definite, common sense and history suggest that the more civilians that are killed in an attack, the greater the retaliatory threat and escalation is likely to be. Therefore, under the principle of probability of

# Challenges and Opportunities for Walzer's "Jus ad Vim" for the 21st Century

Written by Jonathan Haseldine

escalation, drone strikes have been increasingly more acceptable under a framework of *jus ad vim* since non-militant casualty numbers started to decline in 2011. However, as pointed out earlier in Chapter 1, it is almost impossible to satisfy a criterion that is plagued by ambiguity. After all, what is defined as an 'escalation'? Is it merely a protest by citizens in the affected areas or is it a specific retaliatory attack by militants on pro-western/government targets? Such ambiguity and the notion of a sliding scale response make it extremely difficult to justify the 'probability of escalation' as an acceptable and adequate criterion to use in a framework of *jus ad vim*. Nevertheless it has still been relevant to consider it and explore its potential.

The question of whether CIA drone strikes can satisfy the *jus ad vim* principle of proportionality remains a difficult and problematic question. While there is no doubt that in the eyes of the US government that they are acting completely within the law, it remains difficult to justify drone strikes as proportional at the overall level.[71] On the level of individual drone strikes, it is possible to argue that they do satisfy the *ad vim* reading of proportionality, especially in the last three years, because a standard of necessity and probability of escalation are met by the use of force. However, it is arguably harder to justify CIA drone programme as a whole as proportional due to the significant numbers of 'non-militant' casualties in the earlier years of the programme.

## *Just Cause*

Having considered whether the CIA drone programme satisfies a *jus ad vim* reading of the principle of proportionality, I shall now do the same for the just war principle of 'just cause'. It was argued in chapter 1 that in order to satisfy the principle of just cause, the act itself must be both beyond the scope of a national police force or crime agency but, at the same time, also below the threshold for resorting to war. At the same time, there must remain an element of last resort.[72] Furthermore, under a *jus ad vim* framework there must be continual re-assessment of the act taking place, unlike in traditional just war theory whereby the act only need satisfy the *jus ad bellum* and *jus in bello* criteria once at the point of conception.

Therefore, from a *jus ad vim* perspective, are the CIA drone strikes in Pakistan a just cause? Well, to start with, they facilitate a need for us to adjust the parameters on what we consider to be last resort. Overstepping last resort in a standard just war reading would automatically reach the threshold for war. Therefore US drone strikes should be read as a means to an end rather than a tipping point to war. As previously mentioned, if there is a diminished probability of escalation then it is likely that a drone strike will be a last resort and thus lead to war.

## *Right Authority*

Having examined how a *jus ad vim* reading of US drone strikes might look through the principles of proportionality and just cause, it is necessary to also look at how a *jus ad vim* reading of the right authority of drone strikes may look. After all, while a moral and ethical evaluation of the use of drones is undoubtedly important and necessary, a legal reading is also paramount. This is especially necessary due to the controversy that surrounds the legality of drones.[73] As argued in Chapter 1 there are, conceivably, two ways of looking at the principle of right authority; either through a notion of collective international mission to enact the common good or through unilateral action by a state acting in self-defence.[74] As the vast majority of drone strikes are performed by the CIA, ergo the United States, the primary focus of this section shall be the latter of the two.

Speaking in 2013, Ben Emmerson, the United Nations special rapporteur on human rights and counter-terrorism stated that:

despite the proliferation [of drones], there remains a lack of consensus among international lawyers and between states on the core legal principles. It's not the drone that is the problem. The problem is the lack of clarity under which it is lawful to deploy lethal force by drone.[75]

To put the comment in context, it was made during a UN session where numerous countries queued up call the United States drone programme out as illegal and a violation of international law.[76] Likewise, some academics, such as Mary Ellen O'Connell have claimed that drone use is "not legal outside of official armed conflict zones,

# Challenges and Opportunities for Walzer's "Jus ad Vim" for the 21st Century

Written by Jonathan Haseldine

meaning that drone strikes such as those in Pakistan cannot be just because there are no legitimate military targets".[77] However, the government of the United States remains insistent that the drone programme is legal.[78]

After all, Article 51 of the United Nations charter explicitly states that "nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations".[79] Amid controversy, the USA, observes Eric Heinze, have interpreted international law as permitting strong states to intervene in weak states who cannot control their borders, leading to a consequence of "the expansion of the right of self-defence under international law in a limited and targeted fashion".[80]

The framework of *jus ad vim*, constructed in Chapter 1, posited that, in an ideal scenario, UN approval would be sought and required in order to use force in a foreign state short of war. That in itself was a rather optimistic aim and, in relation to the CIA drone programme seems incredibly unlikely to happen. In anticipation of this, the framework added the caveat that the permission and acceptance of the host country would be enough to satisfy the right authority requirement. This is where the example of the CIA drones programme gets interesting. According to Emmerson, the UN special rapporteur, he was told by Pakistani authorities that "reports of continuing tacit consent by Pakistan to the use of drones on its territory by any other State are false, and confirmed that a thorough search of Government records had revealed no indication of such consent having been given".[81] If that is the case, then under the *jus ad vim* framework, United States drone strikes in Pakistan would be unacceptable.

However, a month after Emmerson's statement, former President of Pakistan Pervez Musharraf admitted "giving permission for the CIA to launch drone attacks inside his country, directly contradicting repeated claims by the Pakistani government that it has never authorised drone strikes".[82] He went on to say that Pakistan gave permission "only on a few occasions, when a target was absolutely isolated and there was no chance of collateral damage".[83] This contradiction raises the possibility of a *jus ad vim* reading because it suggests that permission was indeed given. Under this scenario, the use of drones by the United States in Pakistan would be acceptable because sovereign approval was given for the action. Thus, while such ambiguity remains on whether permission has actually been given, it would arguably be problematic to argue that the use of drones satisfies the *jus ad vim* principle of right authority. This appears unlikely to change anytime soon and despite this, such drone activity will undoubtedly continue.

## Conclusion

This chapter has explored whether the CIA drone programme conducted by the United States of America is acceptable and permissible under the *jus ad vim* framework that was conceptualised in Chapter 1. When opening up the theory and operationalising it with real world examples, it becomes apparent that the *jus ad vim* framework suffers in practice in the same place it does in theory, namely it remains highly ambiguous. This is problematic in that the reason that Walzer proposed a theory of *jus ad vim* in the first place was in order to recognise that the use of force short of war is a "grey area of moral ambiguity to which the argument about *jus ad bellum* needs to be extended".[84]

Despite the issues surrounding ambiguity, this chapter has shown that it is possible to make preliminary observations about the use of drones, through a *jus ad vim* framework. It is possible to argue that the use of force is, in certain scenarios, proportionate enough to satisfy the criteria, especially if there are no non-militant casualties. Furthermore, while there will always be debates surrounding what constitutes 'just cause', under *jus ad vim*, the use of drone arguably satisfies just cause as a response to terrorism. Finally, and in contrast, the chapter has highlighted that an *ad vim* reading of right authority is not fundamentally possible due to the ambiguity of whether permission has been given. While the United States has a right to self-defence, it also has a responsibility to respect the sovereign territory of other states. Thus, because the question of authority remains controversial, it does not satisfy the *jus ad vim* framework. Having operationalised the *jus ad vim* framework in a conventional use of force short of war scenario, Chapter 3 will do a similar task with the notion of humanitarian intervention.

# Challenges and Opportunities for Walzer's "Jus ad Vim" for the 21st Century

Written by Jonathan Haseldine

## CHAPTER 3: *JUS AD VIM* AND HUMANITARIAN INTERVENTION

So far this dissertation has explored the challenges and opportunities for operationalising Walzer's theory of *jus ad vim* as a workable framework and subsequently applied the framework to the United States, CIA-led drone programme in Pakistan, a major component of the use of force in twenty-first century conflict. Chapter 2 argued that it is certainly possible to apply the framework to an actual operational example, although a precise reading of the situation would be difficult due to ambiguity and fluidity of the framework and its principles. Chapter 3 will once again use the *jus ad vim* framework set out in Chapter 1 but will instead attempt to apply it to the concept of 'humanitarian intervention' and explore the extent it fits together. It will ultimately conclude that there is certainly an opportunity to consider humanitarian intervention as an exercise in the just use of force short of war but ultimately, as was the case with Chapter 2, the deliberate ambiguity of international law makes definitive judgements rather tricky to make.

The Chapter will begin by summarily discussing what we actually understand the concept of humanitarian intervention to entail; namely, by whom and where is it predominantly used. Using the framework laid out in Chapter 1, it will be argued that by placing humanitarian intervention in a category of the use of force short of war, it may potentially make it more appealing to its critics. One again, however, the relaxing of the principle of proportionality would arguably be incredibly problematic for both the protection of citizens and international law. Similarly, while there is undoubtedly a just cause underlying the concept of humanitarian intervention, there remains the potential for a breach of Braun and Brunstetter's principle of probability of escalation.[85] Furthermore, the chapter will also argue that our *jus ad vim* understanding of right and legitimate authority is altered and, subsequently, expanding by the Responsibility to Protect (R2P) norm.[86] Under a *jus ad vim* framework, humanitarian intervention is, it will be argued, in a better position to be evaluated effectively compared to the traditional just war framework because, ordinarily, humanitarian intervention is conducted in order to avoid war, thus it should not be evaluated under a war-based framework.

### *Humanitarian Intervention*

Humanitarian Intervention is inherently difficult to define due to it being both normative and descriptive; it "simultaneously identifies a phenomenon and evaluates it".[87] Often, academic definitions are broadly the same yet contain subtle and contextual differences. For example, Jennifer Welsh defines humanitarian intervention as the "coercive interference in the internal affairs of a state, involving the use of armed force, with the purposes of addressing massive human rights violations or preventing widespread human suffering".[88] Similarly, it is defined by Ian Brownlie as "the threat or use of armed force by a state, a belligerent community, or an international organization, with the object of protecting human rights".[89] Welsh's definition is somewhat problematic because arguably, the interference in the international affairs of a state does not necessarily have to be coercive in nature, although there is a highly likely chance that it is.

Humanitarian Intervention is certainly not a new idea when it comes to the realm of international law, ethics and morality. Francisco Vitoria, a fifteenth-century theologian, suggested that monarchs may use military force in order to punish other monarchs or rulers who had violated the rights of their subjects.[90] Similarly, seventeenth-century scholar and lawyer Hugo Grotius, arguably one of the fathers of 'modern' just war theory argued that military force can be used to punish those who violate the rights of others and defend the helpless.[91] Therefore, while how we view and analyse humanitarian intervention may have adapted over the years and especially in the twenty-first century, its basic tenets are based in long established international law and just war traditions.

At the core of humanitarian intervention, there exists a single paramount tension; namely the principle of fighting for a just cause against an immoral enemy contrasted against the principle of non-intervention and a state's paramount sovereignty. At their extremities, the two are incompatible due to the simple fact and argument that even if widespread human rights abuses are taking place, a state's sovereignty cannot be violated. The reality of the argument is that such extremities do not, on the whole, exist today in the twenty-first century. The discussion and framework within which it is situated has altered. The goalposts have been moved. Paramount to humanitarian

# Challenges and Opportunities for Walzer's "Jus ad Vim" for the 21st Century

Written by Jonathan Haseldine

intervention is the discussion of right and legitimate authority and thus, therefore, it is with that the chapter will concern itself in the first instance.

## *Whose Authority to Intervene?*

As has been repeatedly pointed out throughout all the Chapters so far, the United Nations Charter makes it explicitly clear that the use of force in another sovereign state is a violation of international law. Article 2, Section 4 offers a prohibition on the use of force stating that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".[92] This therefore essentially rules out any form of forceful intervention by one state in another, thus it is regarded as the default pacifist position manifesting in international law. This is crucial because it posits a state's sovereignty as a right rather than a responsibility. The notion of moving from an era of sovereignty as a right – to sovereignty as a responsibility – will be discussed later in the chapter. Once again, it is noted that this is contradicted by Article 51 which states that "nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations".[93] However, as J.L. Holzgrefe argues, most of the disagreements are less about the "source of moral (and legal) concern" than the "breadth and weight of the concern".[94] In other words, it is on the whole accepted what the legal boundaries are, instead the argument is around where problems are situated within those boundaries.

In regards to the authority to intervene, the role played by the United Nations, and especially the Security Council, is absolutely crucial. In setting out the *jus ad vim* framework in chapter 1, it was argued that 'legitimate authority' is understood to be, ideally authorisation from the United Nations (although this is understandably unlikely), but more realistically, the permission and acceptance of the host country. In comparison with the United States, CIA-led drone programme that was discussed in the previous chapter, the concept of humanitarian intervention is far more concerned with the authorisation of the United Nations because it is far more likely to involve a scenario which places boots on the ground. For example, both the United Task Force sent to Somalia in 1992, and the United Nations Assistance Mission for Rwanda in August 1993 were explicitly sanctioned by United Nations Security Council resolutions 794 and 872 respectively.[95][96]

## *The Responsibility to Protect*

For as long as sovereignty has existed as a norm, it has been assumed to be a right for every state. This assumption began to change around the time of the atrocities in Rwanda with Francis Deng's appointment as the United Nations Special Representative on Internally Displaced Persons (IDPs) in 1993. Alex Bellamy suggests that Deng's appointment was the catalyst for the concept of sovereignty as a responsibility.[97] Deng saw the current approach to Westphalian sovereignty as a "barrier against international involvement".[98] His principle of sovereignty as responsibility has two important dimensions to it. First of all is the implication that sovereignty "obliges the state to protect and assist its citizens if...they wish to qualify as a legitimate and respected member of international society".[99] It appears highly unlikely that any state would actively seek to not be(come) a respected member of international society. The second dimension according to Deng entails 'accountability' with the notion that if a state "fails to discharge its responsibility for the welfare of its citizens...the concerned international community...is obliged to find a way of intervening to provide the needed assistance".[100] This was somewhat of a new understanding as it placed responsibility on both individual states and the international community as a whole.

The Responsibility to Protect takes its name from the report published in December 2001, by the International Commission on Intervention and State Sovereignty.[101] The commission was set up following the publication of then UN-Secretary General Kofi Annan's report entitled 'We the People: The role of the United Nations in the Twenty-First Century', in which he asked "if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica — to gross and systematic violations of human rights that offend every precept of our common humanity?".[102] Fundamentally, what is relevant to this chapter is the following from the commission who stated that;

While there is no universally accepted single list, in the Commission's judgement all the relevant decision making

# Challenges and Opportunities for Walzer's "Jus ad Vim" for the 21st Century

Written by Jonathan Haseldine

criteria can be succinctly summarized under the following six headings: right authority, just cause, right intention, last resort, proportional means and reasonable prospects.[103]

Clearly, the commission were influenced by a traditional just war theoretical framework when creating their report as can be seen by their chosen headings. In keeping with Michael Walzer's assertion that a theory of *jus ad vim* should "not be overly tolerant or permissive, but it will certainly be more permissive than a theory of just and unjust war" is the commission's assessment that military intervention for humanitarian purposes should be "be regarded as an exceptional and extraordinary measure".[104][105] It is worth noting that, as James Pattison points out, the Responsibility to Protect is "much *broader* than humanitarian intervention" because it comprises "three central responsibilities—the responsibility to prevent, the responsibility to react, and the responsibility to rebuild, whereas humanitarianmilitary intervention falls only under the responsibility to *react*".[106] Despite this, clearly from a *jus ad vim* point of view, this chapter is centrally focused on the responsibility to react.

## *Just Cause*

As has already been explored in previous chapters, the principle of just cause in a *jus ad vim* framework is crucial in order to satisfy its requirements. On the face of it, a just cause for intervening for humanitarian reasons is, on the whole, usually reasonable easy to find, promote and justify. One only has to look at the cases of Rwanda, Somalia, Yugoslavia and, more recently, Libya and Syria in order to see the atrocities that are being committed in those countries.[107] In today's twenty-first century, twenty-four hour news cycle and internet age, images of dying children instantly provoke uproar around the world, especially in the so-called western democracies.

Yet, at the same time, while identifying a just cause seems reasonable easy, attempting to justify it is an entirely different matter. Speaking before the House of Commons Foreign Affairs Committee on 25<sup>th</sup> November 1997, Simon Jenkins stated:

What is the basis on which you decide that a particular outrage against human rights in a particular country which has not, necessarily, threatened cross-borders is something in which you should involve yourself? What is the military objective that you take...How do you know that you have won this particular conflict? Most important of all, it becomes quite difficult, at a certain stage, to justify asking your own troops...to commit their lives to the defence of-what?[108]

Despite this, under a *jus ad vim* framework it would simply be unacceptable to offer a weakened principle of just cause merely because it became difficult to distinguish whose suffering mattered more. As Coady argues, there should be a distinction between "a right and a duty to intervene: we may have both a right and a duty to intervene, but we may have a right without a duty".[109] It is here that Braun and Brunstetter's principle of probability of escalation and Dill's principle of necessity are vital.[110] It is clear that sending ground troops, be it a multilateral United Nations taskforce or a unilateral state force, is far more likely to cause escalation than the use of drones talked about in chapter 2.

We are once again brought back to the original problem that was highlighted in chapter 1 and continues to be one of the underlying issues of a *jus ad vim* framework; the idea of the sliding scale. As Eric Heinze contends, "whether or not the use of military force can be expected to avert more harm than it brings about thus depends crucially on how large-scale or severe the situation to be corrected is".[111] Logic suggests that the larger the intervention is in scale, the more likely it is that casualties will be sustained by the intervening force, causing a potential drain on resources. As James Pattison argues, "if the infliction of these sorts of harms is to be legitimate, the humanitarian crisis must be of such a magnitude that the good that might be secured by intervention is sufficiently large to outweigh the badness of those harms".[112] Thus, for there to be a just cause, there evidently needs to be a significantly widespread violation of 'basic' rights, such as physical security, which amounts to systematic and gross physical abuse of citizens.[113]

## *Conclusion*

This chapter has attempted to explore whether the framework of *jus ad vim* set out in chapter 1 could be applied to the concept of humanitarian intervention and the *Responsibility to Protect*. This was always going to be a tricky task

# Challenges and Opportunities for Walzer's "Jus ad Vim" for the 21st Century

Written by Jonathan Haseldine

for a number reasons, not least because the theory of *jus ad vim*, first posited by Michael Walzer back in 2006, is relatively new and considerably underdeveloped. Furthermore, humanitarian intervention as a concept remains both controversial and contested. Questions of moral ambiguity are thrown back and forth such as who is more deserving of help or even is it worth saving strangers?[114]

Nevertheless, it is still possible to make conclusions on what has been discussed throughout this chapter. Firstly, unlike the United States CIA-led drone strikes discussed in the previous chapter, humanitarian intervention is comparatively easy to classify and position ethically in terms of the *jus ad vim* principle of right authority. As pointed out in the sub-section on right authority, the majority of operations that would be considered as humanitarian intervention over the last twenty years or so have been undertaken by a United Nations sanctioned task force. Whether these operations were successful or not is another matter entirely, however when it came to right authority they have, on the whole, satisfied the key right authority criterion of United Nations approval or support. Arguing for a just cause is not quite as straightforward as right authority, especially when it comes down to the argument, expressed above, of do some people deserve saving more than others? As Simon Caney suggests, although it may sometimes be difficult to assess the existence or seriousness of the crisis, in other cases an external party may have substantial evidence of human suffering.[115] Despite this, on the whole, it would appear possible to justify cases of humanitarian intervention through a *jus ad vim* framework of use of force short of war. However, any potential future *jus ad vim* framework will require significant work and deeper consideration before this takes place.

## CONCLUSION

This research project has employed Michael Walzer's theory of the use of force short of war – *jus ad vim* – and attempted to construct a working framework around it.[116] By re-calibrating the main principles of the Just War Tradition, namely: Just Cause, Right Authority, Right Intention, Proportionality, Last Resort and Reasonable Prospect of Success, it has been possible to create a new theory that is relevant for the twenty-first century and that begins to satisfy the original research question. Subsequently, the latter two chapters have taken the re-calibrated framework outlined in chapter one and attempted to apply it to two key areas of international relations today; the use of drones to target individuals and the practice of humanitarian intervention. Analysing both areas from a new and very much untried ethical perspective has allowed for a number of interesting conclusions to be drawn and has also presented an opportunity to view both from new angles and outlooks.

Throughout this project, a major issue of content for critics and proponents alike has been Walzer's assertion that a theory of *jus ad vim* should "not be overly tolerant or permissive, but it will certainly be more permissive than a theory of just and unjust war".[117] Simply put, a theory that simply makes it easier and the use of force more accessible and permissible is not desirable when expressed in such stark terms. There are a number of examples of this being the case, including one that took place on the 30<sup>th</sup> August 2013 when Members of Parliament voted against possible UK military action against Syrian President Bashar al-Assad's government to deter the use of chemical weapons and other human rights abuses.[118] The government only lost by thirteen votes, however the mere fact that they lost at all was hugely significant. Such a rejection by vote showed that MPs and, by extension, the British public, were firmly against any kind of military action in Syria or, more likely, anywhere full stop. However, if such a rejection of military action showed anything, it was the need for an ethical theory that allowed certain levels of action to be taken without a descent into full scale armed conflict, ergo war. In the above scenario, it was not so much that the British people did not want to help Syrians suffering horrific travesties in a war zone, it was that they did not want to be dragged into another foreign war.

By identifying Walzer's theory of *jus ad vim* as a relatively new and unexplored area in the discourse surrounding the ethics of war and the Just War Tradition, this research project has attempted to make a broader contribution to the field by identifying areas of potential, interesting, further exploration and research. It is reasonably obvious to anybody who has an interest in the field that this theory is one of both contention and, from some scholars, outright

# Challenges and Opportunities for Walzer's "Jus ad Vim" for the 21st Century

Written by Jonathan Haseldine

hostility.[119] Chapter one was tasked with assessing whether it is possible to conceptualise a theory of *jus ad vim* that could have some form of practical purchase and usage. One major obstacle in place to start with was the simple question; is such a theory needed in the first place? There a number of scholars, such as Christian Enemark, who are content that the activities explored in later chapters such as the use of drones can be evaluated according to traditional *jus ad bellum* and *jus in bello* standards.[120] This research project has argued from the beginning that such a theory is indeed necessary and even beneficial to the existing just war theory framework. Certain activities such as the enforcement of no-fly zones, economic sanctions and use of certain types of weaponry are all activities that take place outside of and short of war. They may well be precursors to war but they are independently short of it. Therefore, a *jus ad vim* framework is arguably both useful and necessary in today's world.

Having conceptualised a workable *jus ad vim* framework, chapter two addressed another of the key research questions by attempting to operationalise the conceptualised theory using the thoroughly relevant and current example of the United States drone programme led by the Central Intelligence Agency. In doing this, the research project highlighted both the potential uses and shortcomings that *jus ad vim* had when operationalised. As addressed at the end of chapter two it is clear that the *jus ad vim* framework suffers in practice in the same place it does in theory, namely that it remains highly ambiguous. The theory suffers because it starts off in the wrong place as being a negative definition. It is defined as the use of force short of war, thus there is an absence of war. As one academic points out, "logically, the knowledge of what something *isn't* does not nearly equate to understanding what it is".[121] Despite this ambiguity, the chapter was able to prove that viewing the United States drone programme through *jus ad vim* framework was indeed possible, and arguably, to a degree, successful in adapting the principle of proportionality making drone use short of war more ethically acceptable.

Placed on the long timeline of the history of the Just War Tradition, *jus ad vim* is incredibly new and contentious. Bringing new ideas and concepts to a tradition is inherently a good thing, a natural process of evolution and discussion. As was stated in the introduction, 12,000 words of an undergraduate dissertation are nowhere near enough to make a definitive judgement or exploration of a theoretical framework of *jus ad vim*. However, it has hopefully contributed to the debate in some way, even if that is merely the fact that it raises the issue of *jus ad vim* in the first place and attempted to discuss it. *Jus ad vim* undoubtedly has a role to play in the ethical evaluation of certain military and government activities, especially in the realm of emerging technology, as pointed out with drones. It remains to be seen whether it can have any impact on areas such as humanitarian intervention, but there is certainly no reason to suggest it could not. *Jus ad vim* is a young and contentious theoretical ethical framework but there is little doubt that it has the potential to play a role in future discussion.

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# Challenges and Opportunities for Walzer's "Jus ad Vim" for the 21st Century

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