
REGULATING THE USE OF ARMED DRONES IN THE CONTEXT OF FORCE SHORT OF WAR

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INTRODUCTION

Drones, unmanned aerial vehicles, or unmanned aircraft systems; titles aside, drones have become a tool in the arsenal of intelligence gathering as well as a mechanism for the use of force when equipped with weaponry. The classification of combat aircraft in the United Nations Register of Conventional Arms encompasses drones that are versions of combat aircraft, bringing some under the purview of the Arms Trade Treaty.¹ Drones represent another output of the “process of rapid technological change in

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¹ RACHEL STOHL & SHANNON DICK, *THE STIMSON CTR., THE ARMS TRADE TREATY AND DRONES* 2–4 (2018); Arms Trade Treaty art. 5.3, Sept. 25, 2013, 3013 U.N.T.S. 269 (“national definitions . . . shall not cover less than the descriptions used in the United Nations Register of Conventional Arms at the time of entry into force of this Treaty.”); U.N. Secretary-General, *Report on the Continuing Operation of the United Nations Register of Conventional Arms and Its Further Development*, ¶ 96, U.N. Doc. A/61/261 (Aug. 15, 2006) (“[T]he Group discussed intensively developments in unmanned aerial vehicles (UAVs) and the observation that category IV already covered those unmanned platforms that were versions of combat aircraft or that otherwise fell within the existing definition but not specially designed UAVs.”).

warfare” over the last hundred-or-so years, as weapons have increased in precision, range, and destructive power.² Prior technological advances, such as the cannon or manned aircraft, increased the range and precision of munitions and launching systems and decreased risk for the party in possession of such technology; the advent of remotely piloted weapons has also removed one party’s human combatants from direct engagement and, thus, from direct threat of harm in carrying out the strike.³ Armed drones have minimized the necessity of physical human presence on one side in many situations, changing the way parties engage.

Beyond the ability to unload lethal force, armed drones possess cameras and sensors to capture and transmit information in almost real time and can remain in the air for a great deal of time.⁴ This ability extends the operator’s reach into areas that otherwise may be risky for a manned flight or ground forces and facilitates general intelligence gathering, specifically enabling surveillance prior to or after a drone strike.⁵ If arguments about the superior perception and information gathering abilities of drones are to be believed, drones may be capable of more accurate and precise targeting because of their ability to remain longer in the air and gather information prior to a strike, and the detailed view that the cameras and sensors provide.⁶ Many drone advocates argue that the costs and risks of drone use are less than conventional weapons systems due to the advantages of this superior technology; the operator is nowhere near the target and nearly entirely removed from risk of harm.⁷ However, this very benefit may potentially lower the resistance to the use of force precisely given the lesser costs to one side.⁸

As of July 2020, thirty-nine countries and twenty-three non-state armed groups possess armed drones.⁹ The number of non-state armed groups with drone technology is perhaps the more troubling data point, as it illustrates

² Michael J. Boyle, *The Legal and Ethical Implications of Drone Warfare*, 19 INT’L J. HUM. RTS. 105, 106 (2015).

³ See Matthew Crosston, *Pandora’s Presumption: Drones and the Problematic Ethics of Techno-War*, 7 J. STRATEGIC SEC. 1, 17 (2014).

⁴ STOHL & DICK, *supra* note 1, at 1.

⁵ *Id.*

⁶ See *id.*; Daniel R. Brunstetter & Arturo Jimenez-Bacardi, *Clashing Over Drones: The Legal and Normative Gap Between the United States and the Human Rights Community*, 19 INT’L J. HUM. RTS. 176, 184, 193 (2015).

⁷ See STOHL & DICK, *supra* note 1, at 1.

⁸ *Id.*; Chris Cole, *Harm to Global Peace and Security*, in THE HUMANITARIAN IMPACT OF DRONES, 48, 49–50 (Ray Acheson, et al. eds., 2017).

⁹ Peter Bergen et al., *World of Drones*, NEW AMERICA, <https://www.newamerica.org/international-security/reports/world-drones/> [<https://perma.cc/7SG6-FGWN>] (July 30, 2020). These numbers may not be exact, given non-state actors’ interest in secrecy.

both that states alone no longer have the monopoly on such weapons and the greater ease of access to this advanced technology. Non-state armed groups are new players in a game formerly limited to nation-states, and the international legal community is yet unsure how to comprehensively treat them, as they have not signed the treaties that govern much of international conduct and, most importantly, those agreements governing conduct in war. Though non-state armed groups are considered bound by at least customary international law (“CIL”),¹⁰ many non-state armed groups with a large footprint in international affairs are deemed terrorist organizations, such as the Islamic State and Hezbollah, and do not plan their actions around compliance with international laws of armed conflict protecting noncombatants. Additionally, armed drones are often employed outside of an active theater of armed conflict as “force short of war.” Force short of war, as the name implies, is limited force shy of armed conflict, and relates to *jus ad vim*, the framework governing decisions to use limited force.¹¹

This Note will consider the use of armed drones in the context of force short of war and their place within the frameworks of international law and just war. It will propose that the framework of *jus ad vim* be codified into an international agreement to set out best practices for the use of force short of war, particularly in relation to drone use. *Jus ad vim* presents a suitable way to organize rules around the use of armed drones in this unique context, as *jus ad vim* is rooted in existing just war tenets already present in international law.¹²

Part One will discuss the laws of armed conflict as set out by existing instruments of international law, principally the distinction between civilian and combatant and the rules regarding when armed conflict is triggered. *Jus ad bellum* and *jus in bello* will be explored and their essential principles explicated. *Jus ad vim* will next be discussed as a potential extension of the just war framework. International law in the realm of force short of war,

¹⁰ See *id.*; Dieter Fleck, *International Accountability for Violations of the Ius In Bello: The Impact of the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SEC. L. 179, 192 (2006); see Nicolas Carrillo-Santarelli, *The Possibilities and Legitimacy of Non-State Participation in the Formation of Customary Law*, 19 INT’L CMTY. L. REV. 98, 98–99 (2017); *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal, Formulated by the International Law Commission, Second Session*, 4 INT’L ORG. 714, 715, 717–20 (1950); *Customary Law*, INT’L COMM. OF THE RED CROSS (ICRC), <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law> [<https://perma.cc/52XR-J7CN>] (Apr. 2022).

¹¹ Jai Galliot, *An Introduction to Force Short of War*, in *JUS AD VIM: FORCE SHORT OF WAR IN MODERN CONFLICT* 1, 6 (Jai Galliot ed., 2019).

¹² *Jus ad vim*, literally translated from Latin, means the right to force. Brought into discussion by Michael Walzer in 2006, the term has come to signify the just use of force short of war and was used by Walzer in discussing a framework for thinking about the use of force in the “grey area” between the zone of armed conflict and the zone of peace. See *id.*; MICHAEL WALZER, *JUST AND UNJUST WARS*, at xv, xvi (4th ed. 2006); Galliot, *supra* note 11, at 6.

especially when targeting a non-state armed group, lacks clear consensus: the use of force short of war is less clearly understood than are the rules of engagement governing armed conflict. Because of the sparse comprehensive understanding of the rules of using force short of war and the extensive use of drones as tools to enact this force on the territory of states not engaged in armed conflict, the when and where of drone use and the limitations of force short of war ought to be clarified and consented to by states in an international agreement. This is necessary to provide an agreed-upon standard against which conduct of states can be measured and states may be credibly held to account for any violations.

Subsequently, Part Two will review the use of armed drones by the U.S. The U.S. drone program is an appropriate case study given that it was the first state known to develop and operate armed drones and the state most prolific in their use, especially outside of an active and declared conflict.¹³ The focus shall be on the use of armed drones as force short of war by the Central Intelligence Agency (“CIA”) in Pakistan against non-state armed groups, outside the context of an active armed conflict and within the territory of a state with which the U.S. is not engaged in armed conflict.¹⁴

Finally, Part Three will discuss the importance of international accountability and the possibility of mitigating the issues and controversies over use of armed drones in the context of force short of war via an international agreement that sets standards of drone use through the framework of *jus ad vim*. Crafting and securing assent to an international agreement on the limitations of armed drone use outside of armed conflict is vital given both the unique abilities of drones that may tend to lower the threshold to resort to lethal force and the increasingly widespread access to drone technology.¹⁵ Furthermore, as access to armed drones continues to expand, it is important to have a framework that elucidates the restrictions on their permissible use within armed combat as well as outside an active theater of conflict, which a framework of *jus ad vim* can provide. The number of actors with access to armed drones continues to increase; although the U.S. perhaps engages the most in use of drones, another state or entity can presently or will soon be able to take similar action. While neither the U.S. nor any other state likely seeks to hold themselves accountable for violations of international law, we must establish a framework to define the bounds of drone usage and determine when their use has transgressed the limits of permissible action, so as to hold all to the same standard in international law.

¹³ Bergen et al., *supra* note 9 (describing the United States as one of the biggest producers and sellers of drones).

¹⁴ The terms “war” and “armed conflict” used interchangeably by international bodies and academic authors. See, e.g., *Armed Conflict*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/armed-conflict/> [<https://perma.cc/5SBN-H5KR>].

¹⁵ See Cole, *supra* note 8, at 49.

The rabbit is out of the hat: drones are here to stay as tools of limited force and have already been often used outside the context of armed conflict. *Jus ad vim* is helpful in creating a framework to codify rules of using force short of war.

I. THE LAW OF ARMED CONFLICT AND JUST WAR FRAMEWORK

Armed conflict and the use of force within it are regulated by international humanitarian law (“IHL”), alternatively known as the law of armed conflict.¹⁶ The law of armed conflict is contained in CIL and a number of treaties.¹⁷ At its core, the law of armed conflict is concerned with maintaining basic rules both to structure armed conflict and for the respect and dignity for human persons.¹⁸ Importantly, as noted in the Martens Clause of the second Hague Convention, although treaties will never encompass every possibility, the acceptable methods and means of armed conflict are not unlimited;¹⁹ thus, the lack of a direct prohibition on an action in armed conflict does not mean it is permissible.²⁰ As technologies change the use of force and the context in which it is used, understandings around the conduct of war shift in turn; still, the essential respect for human dignity in the law of armed conflict must not be decentered.

Recourse to the use of force is intended to be narrowly limited. The U.N. Charter notes that states may only resort to force in self-defense;²¹ the International Court of Justice (“ICJ”) elaborates on this in *Nicaragua v. United States*, noting that an attack giving rise to the right to self-defense must be significant.²² Under the ruling of the ICJ and the U.N. Charter,

¹⁶ *The Use of Armed Drones Must Comply with Laws: Interview with ICRC President Peter Maurer*, ICRC (May 10, 2013), <https://www.icrc.org/en/doc/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm> [<https://perma.cc/H37F-8WTQ>]; see Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 58, U.N. Doc. A/HRC/26/36 (Apr. 1, 2014) [hereinafter Heyns Report] (explaining that IHL will not apply to drone use if there is not protracted violence meeting the threshold of intensity or organized armed groups present).

¹⁷ Customary law comes from general practices accepted as international law. It fills gaps left by treaties and is recognized as binding by the International Court of Justice. See *Customary Law*, *supra* note 10; Vincent Chetail, *The Contribution of the International Court of Justice to International Humanitarian Law*, 85 INT’L REV. RED CROSS 235, 238 (2003).

¹⁸ Chetail, *supra* note 17, at 240.

¹⁹ See Hague Convention No. II with Respect to the Laws and Customs of War on Land, preamble, July 29, 1899, 32 Stat. 1803, T.S. 403.

²⁰ See Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 37 INT’L REV. RED CROSS 125, 126 (1997).

²¹ U.N. Charter art. 2, ¶ 4; *id.* art. 51.

²² *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 195 (June 27) [hereinafter *Nicaragua Judgment*]; Mary Ellen

preemptive self-defense is not permissible; lethal force cannot be used to prevent some potential violent action in the future.²³

The International Criminal Tribunal for the Former Yugoslavia defines a threshold for armed conflict in *Prosecutor v. Tadić*:

[W]e find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. . . [In the former Yugoslavia] [t]here has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups.²⁴

The International Law Association (“ILA”) noted that among the slightly varied definitions of armed conflict, the core common elements consist of “the existence of organized armed groups” and “[e]ngage[ment] in fighting of some [level of] intensity.”²⁵ Armed conflict is split into either “non-international armed conflict,” where non-state armed groups confront state forces, or “international armed conflict,” in which opposing state forces conflict.²⁶ Crossing this threshold suspends the greater protections of peacetime and triggers the law of armed conflict, which derogates select human rights treaty obligations.²⁷ However, the ICJ has suggested that both the law of armed conflict and international human rights law, which reigns in peacetime, apply jointly during times of war; the right to life is non-derogable, but what constitutes an arbitrary deprivation of life in armed conflict can only be decided through the law of armed conflict, which regulates conduct in the circumstances of armed conflict.²⁸ Therefore, while the law of armed conflict and international human rights law may both apply, the determination of what constitutes a violation of the right to life is not

O’Connell, *The International Law of Drones*, 14 AM. SOC’Y INT’L L. INSIGHTS (2010), <https://www.asil.org/insights/volume/14/issue/37/international-law-drones> [<https://perma.cc/2W4X-EXGT>]; International Law Association [ILA], *Final Report on the Meaning of Armed Conflict in International Law*, The Hague Conference at 9 (2010) [hereinafter *ILA Final Report*]; U.N. Charter arts. 2(4), 51.

²³ O’Connell, *supra* note 22; *ILA Final Report*, *supra* note 22, at 9; U.N. Charter art. 2, ¶ 4; Nicaragua Judgment, *supra* note 22, ¶ 195.

²⁴ *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

²⁵ *ILA Final Report*, *supra* note 22, at 2.

²⁶ *Internal Conflicts or Other Situations of Violence – What Is the Difference for Victims?: Interview with Kathleen Lawand*, ICRC (Dec. 12, 2012), <https://www.icrc.org/en/doc/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm> [<https://perma.cc/WW22-HD6T>].

²⁷ See *ILA Final Report*, *supra* note 22, at 4.

²⁸ See Chetail, *supra* note 17, at 240–41 (quoting Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8)).

determined by peacetime standards.

Assuming the necessary threshold is met for armed conflict, lethal force may only be directed at combatants.²⁹ The Geneva Conventions³⁰ define combatants as members of armed forces or militia who “report to a responsible chain of command, distinguish themselves by wearing distinctive signs or uniforms, carry arms openly, or conduct their actions in compliance with the laws and customs of armed conflict.”³¹ Distinguishing noncombatants from combatants is paramount as the latter are the only lawful targets of lethal force; noncombatants are those not part of the armed forces on either side or refrain from engaging in hostilities, including medical and religious personnel in the armed forces.³² Noncombatants may not be targets. The Geneva Conventions make clear that combatants must take care not to harm civilians and civilian objects and take measures to ensure any harm is minimal.³³ Furthermore, any noncombatant who engages directly in hostilities is only a lawful target of lethal force for the length of time they engage directly in the hostilities.³⁴ When an individual’s status is unclear, they are to be accorded noncombatant status.³⁵

These particular protections are important in the context of strikes by armed drones in the territory of states not engaged in international armed conflict. Such strikes run the risk of flouting international law of armed conflict insofar as lethal force is levied impermissibly and against persons not defined as combatants. Because drones are often used by the U.S. in the territory of states where the U.S. is not engaged in armed conflict, the U.S. has had to carefully justify their actions.³⁶ American leaders have often

²⁹ See WALZER, *supra* note 12, at 138 (describing this as “[t]he first principle of the war convention”).

³⁰ Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

³¹ Milena Sterio, *The United States’ Use of Drones in the War on Terror: The (Il)legality of Targeted Killings Under International Law*, 45 CASE W. RESERVE J. INT’L L. 197, 206 (2012).

³² *Noncombatant Persons*, 73 INT’L L. STUD. 481, 481. See *Rule 3, Definition of Combatants*, CUSTOMARY IHL DATABASE, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule3 [<https://perma.cc/T2PB-7VW5>].

³³ WALZER, *supra* note 12, at 138; Geneva Convention (III) Relative to the Treatment of Prisoners of War, *supra* note 30, art. 3.

³⁴ Protocol Additional to the Geneva Conventions (I) art. 51, ¶ 3, Jun. 8, 1977, 3 U.N.T.S. 1125 [hereinafter GC Protocol I] (“Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”); Geneva Convention (III) Relative to the Treatment of Prisoners of War, *supra* note 30, art. 3, ¶ 1 (“Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely.”); Mahmood Ahmad, *The Use of Drones in Pakistan: An Inquiry into the Ethical and Legal Issues*, 85 POL. Q. 65, 69 (2014).

³⁵ See GC Protocol I, *supra* note 34, art. 50, ¶ 1.

³⁶ See President Barack Obama, Remarks by the President at the National Defense

turned to concepts of just war to convey that the action was legitimate in the interests of protecting U.S. citizens, or in self-defense.³⁷

A. *The Just War Framework*

The just war tradition is a moral framework that helps navigate and dictate the moral resort to armed conflict.³⁸ The just war tradition influences how armed conflict and use of force in general is discussed, justified, and planned. Furthermore, state leaders often draw upon the just war framework and just war language to root themselves and their actions in concepts and explanations recognized as legitimate by the international community.³⁹ Existing international law—and debates about it—may draw from just war concepts, but the just war framework goes beyond treaties and legal documents.⁴⁰ Notions of just war adjust as laws, norms, and technology shift; thus, as the means of force and situations of its use change,⁴¹ the need to renegotiate ideas of how and when it ought to be used is not unexpected.

The just war framework has two central principles: *jus in bello* and *jus ad bellum*. *Jus ad bellum* delineates the justified resort to armed conflict, and *jus in bello* details how to conduct war justly.⁴² Both have been extended into the rhetoric about the just use of force, and both consist of requirements that deem an action just. When applying these principles of the just war framework to the use of drones outside the context of armed conflict, it should be determined on a case-by-case basis whether the strike would be deemed appropriate. The specific context dealt with here—force used outside an active theater of conflict—raises a relevant, lesser-known principle: *jus ad vim*. The principle *jus ad vim* concerns the just use of force, often force short of war.⁴³ *Jus ad vim* presents an opportunity to set standards within the murky and undefined space in which drones often operate. Scrutinizing drone strikes outside of armed conflict through *jus ad vim* can help determine what is permissible by international law on use of force.

University (May 23, 2013) [hereinafter Obama Remarks]; see also Joe Boyle, *Just War: From Augustine to Obama*, BBC NEWS (May 24, 2013), <https://www.bbc.com/news/world-us-canada-22653473> [<https://perma.cc/JTN4-JABH>].

³⁷ See, e.g., Obama Remarks, *supra* note 36. For more background on this phenomenon, see Neta C. Crawford, *Just War Theory and the U.S. Counterterrorism War*, 1 PERSPS. POL. 5, 12, 14, 19 (2003).

³⁸ Daniel Brunstetter & Megan Braun, *The Implications of Drones on the Just War Tradition*, 25 ETHICS & INT'L AFFS. 337, 338 (2011); Galliot, *supra* note 11, at 2.

³⁹ See, e.g., Crawford, *supra* note 37, at 6.

⁴⁰ *Id.* at 7.

⁴¹ See Brunstetter & Braun, *supra* note 38, at 338.

⁴² Galliot, *supra* note 11, at 2; see Sterio, *supra* note 31, at 203, 209.

⁴³ See *infra* Section C and accompanying discussion.

B. Jus ad Bellum and Jus in Bello

Jus ad bellum, *jus in bello*, and the historical roots of the just war tradition emerge from the large scale use of force in state-to-state armed conflict.⁴⁴ *Jus ad bellum* regulates when states may lawfully resort to armed conflict.⁴⁵ In the modern era and under the governance of the U.N. Charter and CIL, the resort to use of force is lawful in very limited circumstances.⁴⁶ It is permissible to use force in self-defense or when an armed attack occurs or is imminent.⁴⁷ States may also consent to the use of force by another state in their own territory.⁴⁸ *Jus ad bellum* is commonly evaluated based on six criteria: just cause, right intention, legitimate authority, proportionality, last resort, and probability of success.⁴⁹ The rationale of self-defense in response to attack and self-defense in prevention of imminent attack accepted by international law, as well as intervention in order to halt a humanitarian crisis, is incorporated in the principle of just cause: one must have a morally acceptable reason for the use of force.⁵⁰ However, preemptive self-defense is not an acceptable rationale.⁵¹ Right intention signifies the entrance into armed combat with a just aim (to achieve defense or humanitarian assistance) rather than merely reaping a reward (such as material gain in the form of land or resources).⁵² Right intention and just cause are interdependent, as a just aim is part of an acceptable reason for using force. The principle of legitimate or right authority means that the use of force was properly authorized and led by recognized officials with legal control of the state's use of force.⁵³ The

⁴⁴ See Daniel Brunstetter & Megan Braun, *From Jus ad Bellum to Jus ad Vim: Recalibrating Our Understanding of the Moral Use of Force*, 27 ETHICS & INT'L AFFS. 87, 92 (2013) [hereinafter *Moral Use of Force*].

⁴⁵ Brunstetter & Braun, *supra* note 38, at 342.

⁴⁶ U.N. Charter art. 2, ¶ 4.

⁴⁷ U.N. Charter art. 51; Heyns Report, *supra* note 16, ¶ 81. Imminence and preemption must be distinguished. A preemptive attack is a response to some possible future threat, while an imminent threat is immediate, overwhelming, and leaves no time for deliberation. See *supra* note 23 and *infra* note 82 and accompanying text.

⁴⁸ Michael N. Schmitt, *Drone Attacks Under the Jus ad Bellum and Jus in Bello: Clearing the 'Fog of Law'*, 13 Y.B. INT'L HUMANITARIAN L. 311, 315 (2010) (citing Phillip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings*, ¶ 35, U.N. Doc. A/HRC/14/24/Add.6 (May, 28 2010)); Heyns Report, *supra* note 16, ¶ 81.

⁴⁹ Brunstetter & Braun, *supra* note 38, at 342.

⁵⁰ U.N. Charter art. 51; DAVID BRUNSTETTER, JUST AND UNJUST USES OF LIMITED FORCE: A MORAL ARGUMENT WITH CONTEMPORARY ILLUSTRATIONS, 130–31 (2021); Jordy Rocheleau, *From Aggression to Just Occupation? The Temporal Application of Jus Ad Bellum Principles and the Case of Iraq*, 9 J. MIL. ETHICS 123, 125 (2010).

⁵¹ See *supra* note 23 and accompanying text.

⁵² See BRUNSTETTER, *supra* note 50, at 128.

⁵³ See Rocheleau, *supra* note 50, at 133.

proportional use of force is the use of no more force than reasonably required to defeat the threat.⁵⁴ Finally, last resort mandates that other avenues have been deemed unsuitable; it requires that use of force is not the default first choice.⁵⁵

Jus in bello concerns the just conduct of armed conflict, with three criteria: proportionality, necessity, and distinction.⁵⁶ First, while both *jus in bello* and *jus ad bellum* evaluate proportionality, the former approaches it as proportionality of means to ends: the harm inflicted must be in balance with the anticipated advantage of the use of force.⁵⁷ The First Protocol Additional to the Geneva Conventions reflects this principle.⁵⁸ Article 51(5) baldly prohibits indiscriminate attacks that “cause incidental loss of civilian life.”⁵⁹ Article 57(2)(a)(iii) expands on this, prohibiting attacks which cause “incidental loss of civilian loss of life . . . excessive in relation to” the anticipated military advantage of the attack.⁶⁰ Second, the necessity criterion requires that the use of force must be limited and required to secure the rapid and complete defeat of the opponent.⁶¹ Finally, and arguably most vital, the principle of distinction requires separating noncombatants and combatants; it is never justified to target a noncombatant with lethal force.⁶²

C. Jus ad Vim

Jus ad vim refers to the just use of force short of war and presents a helpful framework, especially in the context of state use of force in the grey area in between armed conflict and peace. This in-between space is a murky legal zone; it is neither under the law of armed conflict, nor are policing actions suitable.⁶³ A theory of *jus ad vim* is more permissive in certain areas, as shall be explicated, than a theory of just war precisely because it does not condone the full-out force of armed conflict.⁶⁴ This is not to say a theory of *jus ad vim*

⁵⁴ See Schmitt, *supra* note 48, at 317.

⁵⁵ See Rocheleau, *supra* note 50, at 131.

⁵⁶ Brunstetter & Jimenez-Bacardi, *supra* note 6, at 180.

⁵⁷ Brunstetter & Braun, *supra* note 38, at 347.

⁵⁸ See GC Protocol I, *supra* note 34, art. 51(5). While the Geneva Conventions Protocol I has not been ratified by the U.S. and is therefore not binding, the U.S. has signed the Convention and therefore must refrain in good faith from taking actions that would negate the purpose of the treaty. See Vienna Convention on the Law of Treaties, art. 18, May 23, 1969, 1155 U.N.T.S. 331.

⁵⁹ GC Protocol I, *supra* note 34, at 26, art. 51(5).

⁶⁰ *Id.* art. 57(2)(a)(iii); see also Sterio, *supra* note 31, at 210; see also Ahmad, *supra* note 34, at 71.

⁶¹ Sterio, *supra* note 31, at 209–10; Ahmad, *supra* note 34, at 70.

⁶² Ahmad, *supra* note 34, at 69.

⁶³ See *Moral Use of Force*, *supra* note 44, at 89; Michael Walzer, *On Fighting Terrorism Justly*, 21 INT’L RELS. 480, 480–81 (2007).

⁶⁴ WALZER, *supra* note 12, at xv. See *infra* notes 77–79 and accompanying text.

will be without important limits; nor is it to insinuate that all force used outside the context of armed conflict can and should be rationalized as permissible within such a framework. It is necessary to recognize the existence of this grey area of space between war and peace where force is in fact used, as is the reality in some areas like Pakistan, where terrorist groups operate within a country unable or unwilling to address the potential problems or imminent threats such groups pose.⁶⁵ It is important to theorize what a just use of this form of force entails and what the limits of its proper use are in order to determine what action is beyond the pale. There is justifiable fear that *jus ad vim* would empower strong states to use force to further their interests, leaving weaker states open to intrusions against territorial sovereignty and domestic affairs, as the use of deadly force would be bypassing the territorial state's police power and control over the punishment of its own citizens.⁶⁶

Rather than creating a permission structure for another opportunity to use force, particularly lethal force, the core logic of describing force short of war and laying out rules for its conduct is to more clearly determine when a certain objective does not meet the requirements of armed conflict but may be justly accomplished by force short of war. It can also aid in determination of the opposite, when the use of force is not justified and such action would contravene the law of armed conflict.⁶⁷ Furthermore, the increase in the involvement of non-state armed groups in armed conflict, especially in combatting terrorism, has expanded or at least called attention to this grey area.⁶⁸ The ongoing use of armed drones in this grey area is another reason to agree upon a framework for the use of force short of war based in *jus ad vim*. Deadly force continues to be used in this context; transparency and a set framework must be brought to bear.

Guidelines for the use of force short of war will not require an overhaul of

⁶⁵ Terrorism is a political and/or military strategy that involves intentional, violent acts to seriously harm or threaten harm on noncombatants. It is a means of terrorizing people of some group to achieve political goals and relies on the killing or serious harm to attract significant publicity to build fear in the targeted group. Terrorist groups are those that coordinate to undertake such activities. See Seumas Miller, *The Ethics of Targeted Killing: Osama Bin Laden, Drones, and Counter-Terrorism*, 28 PUB. AFFS. Q. 317, 318 (2014); SEUMAS MILLER, TERRORISM AND COUNTER-TERRORISM: ETHICS AND LIBERAL DEMOCRACY 55 (2008). The U.S. defines international terrorism as violent acts that violate U.S. criminal law or that would be a violation if done in the U.S. and are intended to intimidate, coerce, influence policy through intimidation or coercion, or affect conduct of government by mass destruction, assassination, kidnapping and occur primarily outside the jurisdiction of the U.S. or transcend national boundaries in means, by persons trying to intimidate/coerce, or locale where perpetrators operate or seek asylum. 18 U.S.C. § 2331(1). See WALZER, *supra* note 12, at xv.

⁶⁶ *Moral Use of Force*, *supra* note 44, at 92 (providing Pakistan and Yemen as examples where the U.S. has fought terror threats).

⁶⁷ See *id.* at 96–97.

⁶⁸ See *id.* at 88; Boyle, *supra* note 2, at 121.

the existing just war principles, but a recalibration of the existing *jus ad bellum* principles that guide planning and evaluation of the use of force.⁶⁹ The just war tradition is capable of embracing changes in the ways force is used. Proposed principles of *jus ad vim* are based in *jus ad bellum*, focusing on the criteria of just cause, last resort, and a new take on the probability of success in the form of the probability of escalation.⁷⁰ In compliance with this framework, drones used outside an active battlefield are used as a form of limited preventative force short of war with the purpose of preventing armed conflict and the understanding that limited force is narrow in scope and strategic purpose.⁷¹ It is a hybrid form, blending the ethics of just war and law enforcement to frame an understanding of limited force in the grey area between war and peace.⁷²

Just cause in *jus ad vim* is still deeply rooted in self-defense; self-defense should encompass the resort to preventative force.⁷³ This limited force would be a just cause in self-defense in response to certain *injuria* against a state or its citizens, but it ought to be circumscribed to terrorist bombings or attacks on embassies or military bases: *injuria* that affect a state's interests and citizens, typically perpetrated by a specific entity but not *injuria* warranting the response of full armed conflict in self-defense under *jus ad bellum*.⁷⁴ While this is a broader interpretation of self-defense, it needs to be narrowed to actions that might otherwise garner a response more akin to armed conflict rather than actions limited to a law enforcement response such as kidnappings, so as to reaffirm that *jus ad vim* principles are a limited response and options *short of war*, rather than an option to escalate other responses with lethal force. Just cause self-defense in *jus ad vim* would also encompass threats like impending terror attacks, embroiled in the modified criterion of last resort.

This just cause of *jus ad vim*, then, is broader than *jus ad bellum*,⁷⁵ yet would be necessarily circumscribed by a new criterion within the probability

⁶⁹ *Moral Use of Force*, *supra* note 44, at 88; BRUNSTETTER, *supra* note 50, at 21.

⁷⁰ See generally *Moral Use of Force*, *supra* note 44.

⁷¹ See BRUNSTETTER, *supra* note 50, at 3–4 (discussing Obama's decision to "not put American boots on the ground" in Syria, but rather employ "targeted missile strikes"); John Emery & Daniel R. Brunstetter, *Restricting the Preventative Use of Force: Drones, the Struggle Against Non-State Actors, and Jus ad Vim*, in PREVENTATIVE FORCE: DRONES, TARGETED KILLING, AND THE TRANSFORMATION OF CONTEMPORARY WARFARE 257, 257 (Kerstin Fisk & Jennifer M. Ramos eds., 2016).

⁷² Emery & Brunstetter, *supra* note 71, at 259.

⁷³ *Id.* at 258.

⁷⁴ *Moral Use of Force*, *supra* note 44, at 96; BRUNSTETTER, *supra* note 50, at 131–32 ("The [U.S.] response to the bombing of its embassies in Kenya and Tanzania in 1998 is a prime example of using limited force unilaterally and in self-defense to strike back . . .").

⁷⁵ BRUNSTETTER, *supra* note 50, at 130.

of success: the probability of escalation to full armed conflict.⁷⁶ Because the resort to limited force is intended to be exactly that—force short of war—an action taken that would likely provoke armed conflict would not be permissible under the probability criteria, even if it would be a just cause to take action short of war. Force short of war would only be permissible if such action would not be likely to escalate the situation into armed conflict.⁷⁷ This blends *jus ad bellum* proportionality and probability of success, to address a major risk of using force short of war.⁷⁸

Jus ad vim retains the requirement of last resort; force short of war is not an option before the resort to armed conflict, but rather an alternative.⁷⁹ Therefore, it is a last resort in and of itself. Non-violent policing measures and diplomacy must still be the first recourse.⁸⁰ This necessitates a clearer concept of last resort, with additional criteria, in connection to the expanded possible *injuria* of just cause in *jus ad vim*. Imminence, in relation to both last resort and just cause, begs clarification, especially regarding claims of imminent terror attacks, as the U.S. relies on in its self-defense justification for the use of drones outside armed conflict. The U.S. claims “perpetual imminence,” insisting that terror attacks are always just about to occur and can only be held off through the ongoing use of force.⁸¹ This contravenes the commonly understood notion of imminence of the Caroline doctrine by which an imminent threat is “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”⁸² The imminence requirement of just cause self-defense has been and continues to be a problematic aspect of the resort to drone use.⁸³ Imminence must be understood to mean a threat that

⁷⁶ *Moral Use of Force*, *supra* note 44, at 97–99.

⁷⁷ See BRUNSTETTER, *supra* note 50, at 154; *Moral Use of Force*, *supra* note 44, at 99.

⁷⁸ See BRUNSTETTER, *supra* note 50, at 131.

⁷⁹ *Moral Use of Force*, *supra* note 44, at 96–97.

⁸⁰ *Id.* at 97; BRUNSTETTER, *supra* note 50, at 141; Brunstetter & Braun, *supra* note 38, at 97.

⁸¹ Emery & Brunstetter, *supra* note 71, at 260.

⁸² *Id.* (quoting DANIEL WEBSTER, *Mr. Webster to Mr. Fox*, in THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER, WHILE SECRETARY OF STATE 123, 132 (1848)); see also Avery Plaw & João Franco Reis, *The Contemporary Practice of Self-Defense: Evolving Toward the Use of Pre-emptive or Preventative Force?*, in PREVENTATIVE FORCE: DRONES, TARGETED KILLING, AND THE TRANSFORMATION OF CONTEMPORARY WARFARE 229, 233–34 (Kerstin Fisk & Jennifer M. Ramos eds., 2016); V. Upeniece, *Conditions for the Lawful Exercise of the Right of Self-Defence in International Law*, 40 SNS WEB CONFS. 2 (2018). This understanding of imminence in self-defense ties back to the Caroline doctrine, which arose out of an incident in 1837 in which British forces torched the *Caroline*, an American ship in American waters, which had been aiding Canadian rebels. The U.S. Secretary of State Daniel Webster argued that for the British self-defense claim to be legitimate, the British had to show a “necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.” WEBSTER, *supra* note 82, at 131–32.

⁸³ In justifying drone strikes outside an active theater of conflict, the U.S. has stretched

is on the horizon, unable to be precisely pinpointed, but indeed present, as a way to balance the Caroline doctrine and the threat of terrorist attacks.⁸⁴

This is still uncomfortably broad but tempered by a set of three criteria, first proposed by Daniel Brunstetter and Megan Braun, that determine if a use of limited force satisfies the last resort requirement. First, to show force short of war is a justified last resort, states must indicate the named target and the justification for their targeting which could be accomplished through either a grand jury trial or trial in absentia.⁸⁵ This would satisfy the principle of distinction and would eliminate the American practice of signature strikes entirely by requiring that the target be specific rather than a general category of “enemy.” The use of force short of war still must centralize the principle of distinction as *jus in bello* does. The shielding of noncombatants from harm is of principal importance.⁸⁶ Standards of discrimination and proportionality must be even stricter than in *jus in bello* to achieve this protection of noncombatants; in the absence of armed conflict, and especially in situations of combating terrorism, it may be difficult to distinguish combatants from noncombatants given the lack of uniforms and clear organization, and locations used by both noncombatants and combatants. Second, the evidence brought forth must show that the target presents a demonstrable ongoing threat. Third, the target should be afforded the possibility of surrender, perhaps as simply as publicizing the target’s name as wanted by the U.S., or publicizing the charges, or coordinating with the forces in the state the target resides.⁸⁷ These criteria are posed to ensure that the resort to force short of war is circumscribed, and only used in the situations that do in fact merit such lethal action. These requirements would not contravene national security interests, as it reveals no information on methods of intelligence gathering or knowledge of target location, only knowledge of the identity of the person sought for perpetrating some *injuria* against the state. Additionally, similar actions have been effectively taken prior, as in the case of the 1998 embassy bombings in Kenya and Tanzania, in which twenty-one men were indicted by name in a grand jury trial, and nine later killed, including some by drone strike.⁸⁸

the definition of imminence to justify strikes against any leader of such groups, arguing that al-Qaeda or affiliated terrorist groups are continually plotting and just about to launch attacks. See *infra* notes 103–05 and accompanying text.

⁸⁴ Emery & Brunstetter, *supra* note 71, at 260, 272–73.

⁸⁵ See *id.* at 270–72.

⁸⁶ See WALZER, *supra* note 12, at xvii.

⁸⁷ Emery & Brunstetter, *supra* note 71, at 270, 275–76.

⁸⁸ Emery & Brunstetter, *supra* note 71, at 260, 272–73. To illustrate the feasibility of naming an individual and showing evidence of the justification for declaring them a target, the authors give the example of the 1998 embassy bombings in Kenya and Tanzania, in which twenty-one men were indicted by a grand jury in New York City. Nine of those men were captured and tried in U.S. civilian courts and at least nine were killed, some by drone strike.

In addition to the three criteria of the last resort requirement of *jus ad vim*, the criterion of right intention, tied to just cause, would be more limited than when considering right intention under *jus ad bellum*.⁸⁹ While *jus ad bellum* permits a compromise of the rights of the other for the sake of one's own security in just armed conflict, *jus ad vim* right intention upholds the rights of the other by addressing only a specific threat and facilitates a minimal amount of harm or damage, narrower than the permissible scope of *jus ad bellum*.⁹⁰ Right intention is constrained by the limited force used in *jus ad vim*.⁹¹ Because of the technological advances of drones in precision, limiting right intention to a specific threat is necessary and feasible. This is interrelated with the *jus in bello* notion of discrimination, which, as it concerns the technological advances in drones, should be tightly adhered to. Careful distinction between combatant target and civilian with the precision of drone technology must continue; while armed conflict "assumes a significant, but potentially legitimate, risk of collateral damage because of the egregiousness of the *injuria* that justifies recourse to a large quantum of force," limited force responds to narrower *injuria*;⁹² thus, noncombatant death under *jus ad vim* is not at all justified as part of an accepted "significant, but potentially legitimate" risk.⁹³

II. THE DRONE PROGRAMS OF THE UNITED STATES

The United States spends the most of any country in the world on its military; it is potentially the most powerful in the world.⁹⁴ Looked to by many states and the global public to lead in international affairs and the engine of a globalized war against terror, the use of force by the U.S. both sets an international precedent and is frequently subject to intense scrutiny. It is always of the utmost importance that the U.S. take precautions to comply with the law of armed combat and take the most careful measures to limit harm. But given its role as a world leader and trailblazer of international standards of conduct in practice, the U.S. must be especially careful in the use of modern technology with poorly defined limitations on its use in non-traditional contexts. The U.S. should also consider the benefits of placing clear, shared standards around the use of technology (like armed drones) in non-traditional contexts (like force short of war) given that other countries have already and will continue to employ the same technology; better to bind all, including oneself, by a reasonable standard than to attempt to do so after

⁸⁹ *Moral Use of Force*, *supra* note 44, at 100.

⁹⁰ *Id.* at 100–01.

⁹¹ *Id.* at 100.

⁹² *Id.* at 101.

⁹³ *Id.* at 101.

⁹⁴ Ulrike Franke, *The Power Atlas: Military*, EUROPEAN COUNCIL ON FOREIGN RELATIONS <https://ecfr.eu/special/power-atlas/military/> [<https://perma.cc/R8DM-C782>].

action has been taken contrary to U.S. interests, even if mimicking the form of prior U.S. action.

The U.S. was an early adopter and implementor of armed drones. “[T]he first reported U.S. drone strike outside an official warzone” occurred in Yemen in 2002, killing Abu Ali al-Harethi, a senior al-Qaeda leader implicated in the October 2012 bombing of the *USS Cole*.⁹⁵ The U.S. reportedly possesses the largest drone inventory of any state and has conducted the majority of drone airstrikes.⁹⁶ The U.S. government has elevated drone use as legally and morally superior to boots on the ground in places where the U.S. is not formally at war, arguing these advanced technologies enhance precision and decrease negative association with the U.S. more so than physical presence in the area.⁹⁷

The Obama administration moved most drone operations to the Pentagon, but some strikes continued in a drone program where Air Force pilots operate armed drones under a CIA mandate in a nearly entirely classified program; little information about the program, its operations, and its chain of command in authorizing a strike exists in the public domain.⁹⁸ While near-complete transparency is an unrealistic desire—given the legitimate national security risk of revealing sensitive information on target locations and means of intelligence gathering—greater clarification and lucidity on drone strike practices and standards is not impossible, as will be discussed below in the context of drone use and the *jus ad vim* framework.⁹⁹ The national security excuse can be taken too far; there is a need for transparency over the chain of command in strike authorization and in procedures governing drone strikes.¹⁰⁰

During the Obama administration, use of armed drones rose, as did

⁹⁵ Brunstetter & Jimenez-Bacardi, *supra* note 6, at 181.

⁹⁶ Franke, *supra* note 94; Ray Acheson, et al., *Introduction, in THE HUMANITARIAN IMPACT OF DRONES*, 6, 8 (Ray Acheson et al. eds., 2017).

⁹⁷ Boyle, *supra* note 2, at 105; Harold H. Koh, Legal Adviser, U.S. Department of State, Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) [hereinafter Koh, *The Obama Administration and International Law*]; Obama Remarks, *supra* note 36.

⁹⁸ See Kelsey D. Atherton, *Trump Inherited the Drone War but Ditched Accountability*, FOREIGN POL’Y (May 22, 2020), <https://foreignpolicy.com/2020/05/22/obama-drones-trump-killings-count/> [<https://perma.cc/9AFM-XQN9>]; Boyle, *supra* note 2, at 118–19.

⁹⁹ See Milena Sterio, *Lethal Use of Drones: When the Executive Is the Judge, Jury, and Executioner*, 23 INDEP. REV. 35, 37–38 (2018).

¹⁰⁰ See Sterio, *supra* note 31, at 204 (“[A] state resorting to the use of force must prove its use of force was proportionate to the military campaign’s objective.”); see also Boyle, *supra* note 2, at 117–18 (“With the targeted killing programme, the Obama administration has reversed much of this trend [of transparency] and kept most of its activities out of the gaze of Congress, the courts and the independent media.”).

concern and speculation over the legality and justness of their use.¹⁰¹ The ongoing justification by the U.S. for lethal strikes of alleged terrorists and terrorist groups is self-defense against imminent threats.¹⁰² The U.S. grounds this argument to a stretched notion of imminence. The Obama administration continued the Bush administration's drone policies around imminence, broadening both imminent threat and necessity.¹⁰³ A leaked 2011 White Paper indicated that no clear evidence of an impending specific attack was necessary to use lethal force to prevent an "imminent" threat.¹⁰⁴ Rather, because members of terrorist organizations continually plot to undertake attacks, any "operational leader" of al-Qaeda or associated forces is an imminent threat and thus may be lawfully targeted at any time.¹⁰⁵ This version of imminence is broader than the justification of self-defense against imminent attacks and runs afoul of international humanitarian law. However, the administration also tightened its standards for authorization of strikes, requiring the most complex and risky undertakings in Pakistan to first obtain President Obama's approval and mandated a standard of "near certainty" that no noncombatant Pakistani individuals would be killed in the planned action to obtain presidential approval.¹⁰⁶ Despite assurances of oversight, it remains unclear what the standards were concerning certainty of selecting the correct individual to target and what justified the use of force against that individual. This requirement for "near certainty" of distinction between combatant and noncombatant was not so precise despite the insistence of international law on noncombatant protection.¹⁰⁷ The Obama administration refuted an alleged

¹⁰¹ Charlie Savage, *Trump's Secret Rules for Drone Strikes Outside War Zones Are Disclosed*, N.Y. TIMES (May 1, 2021), <https://www.nytimes.com/2021/05/01/us/politics/trump-drone-strike-rules.html> [<https://perma.cc/CPK4-GHSQ>]; Sterio, *supra* note 99, at 36.

¹⁰² Koh, *The Obama Administration and International Law*, *supra* note 97; Obama Remarks, *supra* note 36.

¹⁰³ Rosa Brooks, *Drones and the International Rule of Law*, 28 ETHICS & INT'L AFFAIRS 83, 93–94 (2014).

¹⁰⁴ *Id.* at 93–94; U.S. DEP'T OF J., LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 1, 7–8 (2011), <https://irp.fas.org/eprint/doj-lethal.pdf> [<https://perma.cc/XF6Y-AFYQ>] [hereinafter DOJ WHITE PAPER]

¹⁰⁵ Brooks, *supra* note 103, at 94; DOJ WHITE PAPER, *supra* note 104, at 7–8.

¹⁰⁶ Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES (May 29, 2015), <https://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html> [<https://perma.cc/H56L-PQB9>] (interviewing Thomas E. Donilon, former national security advisor under the Obama administration, as well as three dozen other advisors).

¹⁰⁷ Geneva Convention (III) Relative to the Treatment of Prisoners of War, *supra* note 30, art. 4; Sterio, *supra* note 31, at 206. Alleged members of terrorist organizations are often not sequestered in military barracks, but rather living among noncombatants. This makes it difficult to distinguish between the targeted individual themselves, persons who are fellow

policy of deeming men of military age in the vicinity of a target as combatants, but views members of al-Qaeda, the Taliban, and affiliated forces as combatants, including when those persons are located in states other than those against which the original self-defense justification is invoked.¹⁰⁸ Terrorists are then considered targetable anywhere.¹⁰⁹ With the notion of perpetual imminence justifying self-defense, the Obama administration and subsequent leadership maintained that drone strikes on alleged terrorists are not assassinations and not illegal by international law in this unrestricted state of armed conflict with terrorist groups.¹¹⁰

Though a great deal of information remained hidden, Obama administration officials began to reveal aspects of their procedures as controversy and pressure mounted from human rights institutions.¹¹¹ The language of just war explicitly pervaded the rationales provided, as the administration argued that this was a “just war – a war waged proportionally, in last resort, and in self-defense.”¹¹² The Obama administration revitalized the notion of last resort and continued to emphasize imminence in drone strikes, noting that while the policy of the administration was capture and detention, the realities and exigencies of situations where targets existed outside the effective control of a government unable or unwilling to exercise nonlethal police power did not always favor such a policy.¹¹³ Lethal force was only to be used when there was a continuing imminent threat and “near certainty” the terrorist target was present and noncombatants would not be harmed, capture was not feasible and the state government would not address the threat.¹¹⁴

This rhetoric of near certainty of discrimination between combatant and noncombatant slid away in the Trump administration.¹¹⁵ During those four

combatants, and noncombatants who merely happen to be present or living in proximity.

¹⁰⁸ Press Release, Office of the Press Secretary, U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, n.1 (May 23, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism> [<https://perma.cc/32L9-FEDQ>]; Boyle, *supra* note 2, at 111.

¹⁰⁹ Sterio, *supra* note 31, at 199.

¹¹⁰ Boyle, *supra* note 2, at 120; Koh, The Obama Administration and International Law, *supra* note 97 (“In the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda . . .”).

¹¹¹ See Brooks, *supra* note 103, at 89–90.

¹¹² Obama Remarks, *supra* note 36; Brunstetter & Jimenez-Bacardi, *supra* note 6, at 180.

¹¹³ *Id.* (using Somalia and Yemen as examples).

¹¹⁴ DOJ WHITE PAPER, *supra* note 104, at 8; Becker & Shane, *supra* note 106.

¹¹⁵ See Daniel J. Rosenthal & Loren D. Schulman, *Trump’s Secret War on Terror*, THE ATLANTIC (Aug. 10, 2018), <https://www.theatlantic.com/international/archive/2018/08/trump-war-terror-drones/567218/> [<https://perma.cc/5D5P-9VKA>].

years, drone use continued under broader permissions for strike decisions, further diluting requirements for imminence of threat.¹¹⁶ To be a permissible target under these rules, the targeted individual need not constitute a “continuing, imminent threat”; the target could be a “lower-level foot soldier” and would still meet the threshold for a drone strike.¹¹⁷ The prior standard eroded from a requirement of “near certainty” that the target was onsite for the strike to merely a requirement of “reasonable certainty” that an adult man was a combatant rather than a noncombatant.¹¹⁸ The Biden administration suspended these rules on the first day of the new term, re-imposing White House approval for drone strikes outside the war zones of Afghanistan, Iraq, and Syria as it began to devise its own standards.¹¹⁹ The Biden administration eventually adopted a more centralized policy for drone strikes “outside conventional war zones” defined as “poorly governed places where Islamist militants are active but that the United States does not consider to be ‘areas of active hostilities,’” which includes the Federally Administered Tribal Areas (“FATA”) in Pakistan.¹²⁰ This policy is similar to that of the Obama administration, requiring President Biden’s approval before a suspected terrorist is deemed targetable for “direct action” and “near certainty” of both a targeted individual’s membership in a terrorist group and that noncombatants will not be harmed, which is to be applied to women and children as well as adult men, with the aim of reducing noncombatants deaths.¹²¹ The flip-flopping of the standard of imminence between administrations further supports the need for agreed upon rules of engagement with force short of war; to prevent backsliding from stricter standards, it is vital to come to common agreement on a notion of imminence in the use of armed drones in the context of force short of war.

The use of drones to take limited action, i.e., hitting a specific target and then pulling away, is heralded as their main benefit. However, this ability easily bleeds into enabling strikes under looser standards, for if the technology is readily useable at little personal cost to the user, liberalization of standards of justified use and discrimination in targets is a foreseeable temptation.¹²² Such liberalization complicates adherence to standards of the

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*; Savage, *supra* note 101 (retaining “near certainty” standard for women and children).

¹¹⁹ Savage, *supra* note 101.

¹²⁰ Charlie Savage, *White House Tightens Rules on Counterterrorism Drone Strikes*, N.Y. TIMES (Oct. 7, 2022), <https://www.nytimes.com/2022/10/07/us/politics/drone-strikes-biden-trump.html> [<https://perma.cc/6CWL-532X>].

¹²¹ *Id.*

¹²² See Brunstetter & Braun, *supra* note 38, at 339, 351 (discussing the “drone myth” and the “separation factor”).

just use of force, particularly in this in-between zone.¹²³ It would “behoove the United States to worry about creating universal ethical standards or operating under standardized and transparent ethical norms,”¹²⁴ for what constrains other states from mirroring U.S. actions with drone strikes as force short of war, outside the “hot” battlefield and against U.S. interests?¹²⁵

The secrecy over drone strike information inhibits proof of compliance with laws over the use of force to vindicate the actions taken.¹²⁶ A lack of transparency in strike criteria transforms the president into judge, jury, and executioner.¹²⁷ Furthermore, American credibility is impaired by taking lethal action outside zones of armed conflict, as in Pakistan, without clear rationalization to demonstrate that the targets and fatalities were lawful under international law and standards of use of force.¹²⁸ As recently as January 2022, U.S. senators have raised this point, calling on President Biden to make reforms to targeting criteria within its counterterrorism policy to focus on human rights and civilian protection, arguing that such reform prevents American actions from undermining American counterterrorism goals, reduces harm to humans, and ensures compliance with international law.¹²⁹

In a 2013 report by the U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, the Special Rapporteur notes that even the existence of a CIA drone program in Pakistan was classified at the time of the report.¹³⁰ However, given the public acknowledgement of the President and Secretary of State of U.S. drone strikes in Pakistan, the justification of secrecy for reasons of national security was dubious.¹³¹

U.S. drone strikes of alleged terrorists in Pakistan has been a “source of increasing friction,” especially given the resulting noncombatant casualties

¹²³ See *id.* at 351 (“[I]ncreased reliance on drones makes discerning clear rules in the context of combating terror more pressing.”).

¹²⁴ Crosston, *supra* note 3, at 3.

¹²⁵ *Id.*

¹²⁶ See Joshua Andresen, Note, *Due Process of War in the Age of Drones*, 41 YALE J. INT’L L. 155, 161 (2016).

¹²⁷ Sterio, *supra* note 99, at 37.

¹²⁸ See Andresen, *supra* note 126, at 162.

¹²⁹ Press Release, Office of Senator Chris Murphy, Murphy, Warren, Blumenthal, Khanna Call on President Biden to Overhaul U.S. Counterterrorism Policy, (Jan. 21, 2022), <https://www.murphy.senate.gov/newsroom/press-releases/murphy-warren-blumenthal-khanna-call-on-president-biden-to-overhaul-us-counterterrorism-policy> [<https://perma.cc/9CWX-5KC9>].

¹³⁰ Ben Emmerson (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 46, U.N. Doc. A/68/389 (Sept. 18, 2013).

¹³¹ *Id.*

and lack of clarity in authorization.¹³² The authorization to use force lawfully in Pakistan, a state in which the U.S. is not engaged in armed conflict, is complex. The U.S. claims the Pakistani government has consented to U.S. drone strikes of alleged terrorists, and the Obama administration supposedly provided advanced notice of impending strikes to Pakistani intelligence officials.¹³³ Both the U.S. and Pakistani public remain in the dark about the nature of the relationship as well as whether, and how, strikes were authorized. There is evidence of tacit or implied consent by the Pakistani government based on reports of Pakistani authorities, the sharing of intelligence, permissions for drones to use Pakistani airbases, and the lack of formal complaints advanced in international forums for redress.¹³⁴ This state of affairs lasted until 2012, when—after public outcry—Pakistan’s parliament called for an end to any consent to U.S. drone strikes with a resolution, albeit a nonbinding one, demanding review of the Pakistani relationship with the U.S. and an immediate end to drone strikes based on concerns for the compromise of Pakistani sovereignty.¹³⁵ It is uncertain whether the use of force in the territory of another state is lawful when invited to assist in suppressing internal armed conflict.¹³⁶ The U.N. Special Rapporteur declared that, in the wake of the action by the Pakistani Parliament, continued drone strikes in Pakistan were not permissible as

¹³² Brunstetter & Braun, *supra* note 38, at 346. Casualty estimates range, but a report from New America indicates that between 2004 and 2018, there were 414 drone strikes by the U.S. in Pakistan, resulting in the deaths of between 1,910 and 3,071 militants, between 245 and 303 noncombatants, and between 211 and 328 persons of unknown or uncertain status. *America’s Counterterrorism Wars: The Drone War in Pakistan*, NEW AMERICA (last updated June 17, 2021), <https://www.newamerica.org/international-security/reports/americas-counterterrorism-wars/the-drone-war-in-pakistan/> [https://perma.cc/T4HG-2PH4].

¹³³ See Mary Ellen O’Connell, *Game of Drones*, 109 AM. J. INT’L L. 889, 898 (2015) (“At most, the Obama administration has indicated that it has received no complaints when notice of impending drone strikes was faxed to Pakistani intelligence or military officials.”).

¹³⁴ See Emmerson, *supra* note 130, ¶ 53 (“There is strong evidence to suggest that between June 2005 and June 2008 remotely piloted aircraft strikes in Federally Administered Tribal Areas were conducted with the active consent and approval of senior members of the Pakistani military and intelligence service, and with at least the acquiescence and, in some instances, the active approval of senior government figures.”); Mark Memmott, *U.S. Believes It Has Pakistan’s ‘Tacit Consent’ for Drone Strikes*, *WSJ Reports*, NPR (Sept. 26, 2012), <https://www.npr.org/sections/thetwo-way/2012/09/26/161799390/u-s-believes-it-has-pakistans-tacit-consent-for-drone-strikes-wsj-reports> [https://perma.cc/9LR6-6L2C]; see also Arindrajit Basu & Arthad Kurlekar, *Leashing the Dogs of War: Towards a Modification of the Laws of Armed Conflict for the Regulation of the US Drone Strikes in Pakistan*, 8 J. E. ASIA & INT’L L. 471, 476 (2015); Ahmad, *supra* note 34, at 66.

¹³⁵ See Emmerson, *supra* note 130, ¶ 54 (“[D]rone strikes on [Pakistani] territory are counterproductive, contrary to international law, a violation of Pakistani sovereignty and territorial integrity, and should cease immediately.”); Brunstetter & Braun, *supra* note 38, at 346; Ahmad, *supra* note 34, at 66.

¹³⁶ See Emmerson, *supra* note 130, ¶ 54; WALZER, *supra* note 12, at xv.

allowed by Pakistan and—unless justified by international law on justified self-defense—were in violation of Pakistan’s sovereignty and international law.¹³⁷ Regardless of Pakistan’s tacit consent to U.S. drone strikes, “without explicit and public consent,” the U.S. is vulnerable to a legal claim brought by Pakistan seeking compensation; it would be difficult for the U.S. to prove such tacit agreement existed.¹³⁸

All of the U.S. drone strikes in Pakistan, bar one, have occurred in an area along the northern Afghan-Pakistani border, the Federally Administered Tribal Areas.¹³⁹ That the strikes have all occurred in FATA is notable, as FATA is an area in which the Pakistani government struggles to exercise effective law enforcement and government control.¹⁴⁰ FATA has long been a space where Islamist non-state armed groups have been tacitly allowed to remain, or at least, not actively ferreted out by the state.¹⁴¹ This gap in effective government control plays into the U.S. counterterrorism policy argument. The vacuum created by the absence of the state and, to some uncertain extent, the military’s support, or, at least, permissive attitude toward militant groups, has transformed FATA into a “safe haven” for terrorist groups like al-Qaeda and associated forces.¹⁴² The U.S. alleges that, even without the tacit consent of Pakistan, strikes in FATA would not constitute a violation of state sovereignty because it is known that the Pakistani government has failed to maintain effective control over the FATA region, or lacks the will to confront the terrorists and groups established within the region.¹⁴³ Because the Pakistani government lacks effective control in the region, and because the use of force short of war in that territory is distinct from the use of force in traditional war zones in areas under state control, the U.S. can allege its use of force is permissible under the laws of

¹³⁷ Emmerson, *supra* note 130, ¶ 53; see Oona A. Hathaway et al, *Consent Is Not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict*, 165 U. PENN. L. REV. 1, 17–18 (2016) (The prohibition on using force on another state’s territory against non-state actors must comply with prohibitions on armed conflict unless “the host state consents to use of force on its territory The lawfulness of interventions not otherwise authorized thus hinges on the consent or request of the government of the host state”).

¹³⁸ Ahmad, *supra* note 34, at 66.

¹³⁹ *America’s Counterterrorism Wars: The Drone War in Pakistan*, *supra* note 132.

¹⁴⁰ See C. Christine Fair, *Studying Drones: The Low-Quality Information Environment of Pakistan’s Tribal Areas*, in PREVENTATIVE FORCE: DRONES, TARGETED KILLING, AND THE TRANSFORMATION OF CONTEMPORARY WARFARE 199 (Kerstin Fisk & Jennifer M. Ramos eds., 2016). See generally Brunstetter & Braun, *supra* note 38, at 345 (discussing “the places in between, such as in states ‘that lose control of parts of their country or are wracked by civil war’ in which terrorists can set up camp”).

¹⁴¹ See Fair, *supra* note 140, at 207–08.

¹⁴² *Id.*; Bryce Loidolt, *Were Drone Strikes Effective? Evaluating the Drone Campaign in Pakistan Through Captured Al-Qaeda Documents*, 5 TEX. NAT’L SEC. REV. 54, 59 (2022).

¹⁴³ See Emery & Brunstetter, *Restricting the Preventative Use of Force*, *supra* note 73, at 268 (referencing parts of Pakistan, Yemen, and Somalia).

armed conflict and just war concepts, exploiting a weakness of the Pakistani state.¹⁴⁴ Pakistan more or less allows this to happen, as the elimination of terrorist organizations benefits the state and protects some citizens in FATA, who might otherwise die from terrorist attacks in the region.¹⁴⁵ Furthermore, the U.S. continues to argue that it may strike against terrorist groups wherever in the world the targeted individual may be present, relying on the argument for self-defense and the stretched notion of imminence to justify U.S. actions in the language of just war.¹⁴⁶

While U.S. actions in pursuit of individuals who have harmed American interests and violated international law may be justifiable as self-defense, the state still must show how; this is complicated by lack of clarity in the use of force short of war outside an active theater of conflict. Simply declaring a certain group's action illegal is not in tune with both the non-traditional ways in which actors cause harm and the shift toward antagonism by non-state armed groups, namely terrorist groups, which moves the nature of armed conflict away from the state-to-state arrangements assumed by law of armed conflict and toward lesser uses of force in response to different *injuria*. The standardization and codification of the use of force short of war through the framework of *jus ad vim* meets the need for clarity.

Neither the argument for Pakistani consent nor the U.S. justifications for self-defense fully satisfy international monitoring bodies or other states in the international community on the question of compliance with the law of armed conflict and international law generally. The uncertain criteria for targeting and their seeming mutability in each presidential administration contributes the dubious adherence to international law, as well as the uncertainty of what standards properly apply to the U.S. pursuit of terrorist groups, a space somewhere between armed conflict and peace but certainly neither. When the use of force occurs outside of armed conflict, which has increasingly become the way in which force is used in the modern world, standards must be laid out and agreed upon by the actors involved. Those actors here are states; though non-state armed groups, like terrorist groups, are increasingly involved; their very ethos entails a rejection of playing by the rules, whatever those rules of the use of force may be. *Jus ad vim* presents a suitable framework by which to develop standards in this grey area of force short of war.

III. THE NEED FOR AN INTERNATIONAL AGREEMENT

The ever-changing U.S. drone policy and strike standards in Pakistan indicates the need for a clearer framework of the just use of force short of war with drones. The stretched justification of the U.S. for the use of force

¹⁴⁴ See *id.*; Fair, *supra* note 140, at 205, 207–08.

¹⁴⁵ Fair, *supra* note 140, at 208–09.

¹⁴⁶ See *supra* notes 104–12 and accompanying text.

outside an active theater of conflict, as in Pakistan, for example, distorts existing standards in an attempt to fit standards applicable to armed conflict to the circumstances of force short of war where drones are utilized. *Jus ad vim* provides structure for drone use in the context of force short of war but lacks codification in an international agreement at this point. Agreement and codification of the proposed restrictions and guides for the use of force outside active armed conflict brings the weight of law, and eventually custom, to bear and thus policymakers, international tribunals, other states, and the global public may hold states to the agreed-upon limitations. Drone use is not the only form of force that would be, or should be, governed by such an agreement setting standards in the use of force short of war. However, the use of armed drones is especially challenging in this context. Furthermore, an international agreement solidifying standards of force short of war would apply to all states; while the U.S. is currently the state most know to undertake drone strikes in the context of force short war, its actions will become precedent for other states to act based on the same justifications in ways the U.S. may strongly disagree with. Setting up a common standard would benefit all states in the long run.

Whether by discussion in the U.N. Office of Disarmament Affairs, or, if possible, the entire U.N. General Assembly, or even a regional agreement committing a group of states to a common standard of action globally, in a body such as the European Union, it is feasible for state representatives to unite to regulate use of force short of war. Agreements have been crafted specifically for the prevention of select defense systems and forms of weaponry in the past.¹⁴⁷ Furthermore, the Geneva Conventions, oft seen as the codification of some of the tenets of just war theory, prohibit certain means and methods, illustrating collective assent that certain actions even against combatants are not acceptable practices.¹⁴⁸ That states may come together to craft an agreement defining the limits of the use of force short of war, particularly with reference to drones, is not outlandish. *Jus ad vim* provides an excellent framework. Codifying, at the least, the *jus ad vim*

¹⁴⁷ See, e.g., Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of the Intermediate-Range and Shorter-Range Missiles, U.S.-U.S.S.R., Dec. 8, 1987, 1657 U.N.T.S. 2. Despite meeting issues in 2014 and the U.S. withdrew in 2019, it operated effectively from 1987 and led to the destruction of nearly 3,000 missiles. Daryl Kimball, *The Intermediate-Range Nuclear Forces (INF) Treaty at a Glance*, ARMS CONTROL ASS'N, <https://www.armscontrol.org/factsheets/INFtreaty> [<https://perma.cc/HKX2-MR4J>]; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Sept. 3, 1992, 1975 U.N.T.S. 45 (though violated during the Arab Spring, the violation became a signal to the international community that for intervention because state was blatantly out of compliance with international law).

¹⁴⁸ See François Bugnion, *Just Wars, Wars of Aggression and International Humanitarian Law*, 84 INT'L L. REV. OF THE RED CROSS, 523, 526–27 (2002).

notion of imminence in relation to force short of war through the three proposed steps for just cause—identifying and justifying the target of lethal force, evidence to show the target constitutes an ongoing threat, and that the target has an opportunity to surrender—would require states to justify the use of lethal force in a standardized way.¹⁴⁹ This would clarify the much abused notion of imminence that various U.S. administrations have manipulated; it may also address problematic U.S. drone strikes in Pakistan, involving targets of uncertain levels of threat or even of unclear identity.

A major challenge is the reluctance of the U.S. to sign onto international agreements and to remain a party to these agreements. In 2019, the Trump administration declared that the U.S. would not become a party to the Arms Trade Treaty after its 2013 signature, and the Biden administration has not yet indicated its intent to rejoin.¹⁵⁰ However, with the turn of the Biden administration again towards international cooperation and diplomacy, the next few years could be an opportunity to craft an agreement setting out the limits of the use of force short of war.¹⁵¹ Amid, and soon hopefully in the wake of, the Russian invasion and incitement of armed conflict in Ukraine, it is possible there will be greater international appetite for limitations on the use of force; making clear the limits between force short of war and engagement in armed conflict would be a constructive use of this momentum to delineate actions appropriate for force short of war in reaction to limited objectives and which actions go beyond that threshold.

Furthermore, the attractive remote capabilities of drones must be counterbalanced. Drones, given the belief of their proponents in their enhanced capabilities, enhanced perception and targeting and precision abilities may lower the tolerance for risk, and potentially leading to their expanded use.¹⁵² The absence of risk for the U.S. when using drones, given that there is no pilot flying in the aircraft and in danger of coming to harm at that time and place, adds to the asymmetry of the engagement and eliminates a potential cost.¹⁵³

¹⁴⁹ Emery & Brunstetter, *supra* note 71, at 260.

¹⁵⁰ See Jeff Abrahamson et al., *At 100 Days, Grading Biden's Progress Toward a More Responsible U.S. Arms Trade Policy*, JUST SEC. (Apr. 28, 2021), <https://www.justsecurity.org/75929/at-100-days-grading-bidens-progress-toward-a-more-responsible-us-arms-trade-policy/> [<https://perma.cc/3J3V-SB8Q>].

¹⁵¹ See President Joseph Biden, Remarks on by President Biden on America's Place in the World (Feb. 4, 2021) <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/04/remarks-by-president-biden-on-americas-place-in-the-world/> [<https://perma.cc/8DU4-7B4K>]; Melissa Block, *Biden's Foreign Policy Faces Many Challenges During His First Year in Office*, NPR (Dec. 23, 2021), <https://www.npr.org/2021/12/23/1067172048/bidens-foreign-policy-faces-many-challenges-during-his-first-year-in-office> [<https://perma.cc/RZ4Y-GR5L>].

¹⁵² See *supra* notes 39, 91–95 and accompanying text. Cole, *supra* note 8, at 49.

¹⁵³ Cole, *supra* note 8, at 49–50.

Above all, use of armed drones in the context of force short of war is still and must continue to be governed by the existing tenets of the law of armed conflict. This is not an argument to create a structure that enables states' use (specifically American use) of lethal drone strikes with increasing freedom. Rather, the international community must recognize that advances in weaponry and the structure of engagement change how force is used and will not be swept back under the rug. In response, international law, the just war tradition, and the law of armed conflict must always evolve to meet the moment. The law must reiterate and centralize principles of the use of force to uphold fundamental concerns of human dignity and distinction.

CONCLUSION

Setting out rules governing the use of force short of war based on the *jus ad vim* framework developed in existing scholarship and eventually crafting an international agreement is not a radical departure from the rules of warfare prior codified. Furthermore, *jus ad vim* delineates what goes beyond the pale, to hold states like the U.S. to a common standard of when and how such force short of war can be used, rather than enabling an actor with a great deal of power and persuasive arguments to redefine standards as suits its needs and interests. As technology improves, drones and other forms of remotely-piloted weaponry are likely to further change the ways parties use force. Even if we accept the claim that drones and other technology are more accurate than, for example, conventional bombing, it is not definite that drone use will lead to fewer total deaths of innocents; the reduction in the "price" of initiating an attack provided by drones, by removing one side from harm and potentially narrowing the strike, may be offset by an increase in total noncombatant deaths due to the greater use of drone strikes. An international agreement describing a force short of war framework rooted in *jus ad vim* is needed to circumscribe the possible uses of such technology and maintain the fundamental focus in the law of armed conflict on maintaining human dignity in conflict.