

On Limited Force: Prudence Below the Threshold of War

Studies in Christian Ethics

1–20

© The Author(s) 2024



Article reuse guidelines:

sagepub.com/journals-permissions

DOI: 10.1177/09539468241258946

journals.sagepub.com/home/sce

**Esther D. Reed** 

College of Humanities, University of Exeter, Exeter, UK

Abstract

This article asks how military ethics should respond to adversaries deliberately conducting hostilities below the threshold of war. Three options are considered: a novel, limited force paradigm; an expanded hostilities paradigm, i.e., within the law of armed conflict; and an international law enforcement paradigm derived primarily from human rights law. None is problem-free. Mindful of under-deployed classic just war reasoning arguments for discrimination between vices opposed to peace, this article argues against an expanded hostilities paradigm and shows that the retributive, 'equilibrium of justice' test used sometimes to support such an expansion is necessary but not sufficient. It explains the need for further examination of whether/how Aquinas and his interpreters can/should conceive of actions under the paradigm of war occurring against non-state actors.

Keywords

Justice, limited force, threshold, prudence, ethics.

The Question

Adversaries deliberately conduct hostilities below the threshold of war, whether by pursuing malicious cyber activities, interfering in democratic processes, cutting off food and energy supplies, or planning/conducting terrorist attacks.¹ Such hostile activities are well documented. In 2016, a RAND report described how the United States of America struggles to counter state actors using cunning and aggression to destabilize governments in the pursuit of strategic aims.² In 2022, another report listed nearly 80 different 'gray'

1. I am grateful to James M. Page and Mary Ellen O'Connell for insight and critique. All errors and shortcomings remain my own.
2. Ben Connable, Jason H. Campbell and Dan Madden, *Stretching and Exploiting Thresholds for High-Order War: How Russia, China, and Iran Are Eroding American Influence Using*

Corresponding author:

Esther D. Reed, Theology and Religion, College of Humanities, University of Exeter, Exeter, EX4 2EQ, UK.

Email: e.d.reed@exeter.ac.uk

tactics deployed by state and non-state actors against Taiwan, Japan, Vietnam, India, and the Philippines across all instruments of national power.³ Also in 2022, Lucas Kello used the word ‘unpeace’ to describe cyber disruption to Western countries’ democratic integrity instigated by those not sharing the same liberal values.⁴ Many more examples could be cited. Proliferation of the use of commercial spyware, ransomware and offensive cyber capabilities by state and non-state actors, geopolitical tensions over sources of energy,⁵ perceived threats to their undersea infrastructure and increased security patrols,⁶ long-standing threats from terrorism and serious and organised crime, and more, are all variously occurring below the threshold of war. Our question is given by these realities of state and non-state actors variously disrupting the peaceable good order of non-allies by whatever means available: how to respond ethically and legally?

The question is complex because of the multiple intersections of ethics and law, state and non-state actors, human rights law, the law of armed conflict (LOAC)/International Humanitarian Law (IHL), uncertainty about the extent to which the rules-based international order is being undermined, and more. For present purposes, I concentrate on hostilities below the threshold of war perpetrated by non-state actors and limited force responses by states. A working definition of ‘limited force’ (which I use interchangeably with ‘limited strikes’ and *jus ad vim*) is given by Daniel R. Brunstetter:

Limited strikes arguably fall below the threshold of war. Whether an isolated drone strike, a flurry of cruise missile launches, or an attack carried out by a fighter jet sortie, limited strikes are of very short duration and circumscribed in scope, generally with a minimal target list. They are thus quite different from prolonged air campaigns or ground invasions.

Limited strikes can have multiple objectives....⁷

Brunstetter’s definition serves because of the significance of his 2021 book *Just and Unjust Uses of Limited Force* in framing debate about how the military capability of

Time-Tested Measures Short of War (Santa Monica, CA: RAND Corporation, 2016), https://www.rand.org/pubs/research_reports/RR1003.html (all URLs accessed 28 January 2024).

3. Bonny Lin et al., *A New Framework for Understanding and Countering China’s Gray Zone Tactics* (Santa Monica, CA: RAND Corporation, 2022), p. 2, https://www.rand.org/pubs/research_briefs/RBA594-1.html.
4. Lucas Kello, *Striking Back: The End of Peace in Cyberspace – and How to Restore It* (New Haven, CT: Yale University Press, 2022), p. 11. Unpeace is different from war, he says, because direct forms of violence do not occur, nor are they threatened. New technology allows an adversary to achieve harmful effects short of physical destruction.
5. All of these concerns are outlined in Ministry of Defence (MoD), *Integrated Review Refresh 2023: Responding to a More Contested and Volatile World* (March 2023), esp. §8, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1145586/11857435_NS_IR_Refresh_2023_Supply_AllPages_Revision_7_WEB_PDF.pdf.
6. See UK.GOV press release (18 May 2023), <https://www.gov.uk/government/news/uk-and-norway-to-increase-cooperation-on-undersea-capabilities>.
7. Daniel R. Brunstetter, ‘Introduction: The Ethical, Legal, and Strategic Implications of Limited Strikes’, *Ethics & International Affairs* 34.2 (2020), pp. 157–59 (157).

delivering limited strikes poses ethical, legal, and strategic questions.⁸ For Brunstetter, just war principles do not apply directly if/when limited strikes arguably fall below the threshold of war: ‘the scholarship of just war is rich and well developed, but limited strikes arguably fall into a different category’.⁹ Hence Brunstetter’s question: ‘If not the just war principles, what ethical criteria should instead guide their use?’¹⁰ And hence his proposal to treat limited strikes as an alternative to war to be used in accordance with a recalibration of traditional just war principles, for limited ends such as appropriate responses to terrorist bombings, attacks on embassies or military installations, the kidnapping/killing of citizens, and so on.¹¹ I focus on two kinds of limited force: drones and targeted airstrikes.¹²

Theoretical Context(s) and Proposal

The theoretical context of this article is given by the Nijmegen workshop organized by the Radboud University and the Institut für Theologie und Frieden, *Just War or Just Peace? On the Future of Catholic Thinking on War and Peace*. Its context was given, in turn, *inter alia* by Pope Francis’s encyclical *Fratelli Tutti* and his expressed discomfort in speaking of the possibility of a just war. Notwithstanding that ‘just war’ is widely accepted as a misnomer because no war is ever just in the sense of fulfilling the virtue of justice perfectly, Pope Francis’s concerns included overly broad interpretation(s) in just war reasoning (JWR) that have permitted ‘evils and disorders graver than the evil to be eliminated’, amplification of the effects of poverty even in countries not directly affected by fighting, and more.¹³ Additional Holy See concerns about new weapons technologies, notably autonomous weapons systems, were expressed elsewhere.¹⁴ The very possibility of a ‘just war’ appeared to be being removed by the ecclesial authorities whose predecessors evaluated its conditions as belonging to the potential judgement of those in political authority.¹⁵ The Catechism of the Catholic Church retains its teaching

8. Daniel R. Brunstetter, *Just and Unjust Uses of Limited Force: A Moral Argument with Contemporary Illustrations* (Oxford: Oxford University Press, 2021).

9. Brunstetter, ‘Introduction’, p. 158.

10. Brunstetter, ‘Introduction’, p. 158.

11. Daniel R. Brunstetter, ‘Wading Knee-Deep into the Rubicon: Escalation and the Morality of Limited Strikes’, *Ethics & International Affairs* 34.2 (2020), pp. 161–73 (162).

12. Brunstetter also considers no-fly zones and small-scale interventions by special forces.

13. Pope Francis, *Fratelli Tutti*, §258, https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_enciclica-fratelli-tutti.html.

14. E.g., *Translating Ethical Concerns into a Normative and Operational Framework for Lethal Autonomous Weapons Systems* submitted by Holy See to the Sixth Review Conference of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (20 December 2021), CCW/CONF.VI/WP.3, [https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_SixthReview_Conference_\(2021\)/CCW-CONF.VI-WP.3.pdf](https://docs-library.unoda.org/Convention_on_Certain_Conventional_Weapons_-_SixthReview_Conference_(2021)/CCW-CONF.VI-WP.3.pdf).

15. Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, §500, https://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html.

on the just war doctrine; the Catholic Church in its entirety does not reject the possibility of just war reasoning.¹⁶ The particular theoretical context of *Fratelli Tutti*'s challenges explains the conjunction 'or' in the workshop title, however; it is conceivable in Catholic and other Christian thinking that classic JWR must be substituted by just peace endeavours, that is, replaced by a vigorous and proactive disposition toward peace-building to avoid violent conflicts.¹⁷ Amidst 'Just War or Just Peace?' debates, my argument at its broadest is that justice in war and sub-war conditions can and must remain a moral obligation if the international community is not to find itself in yet more ruinous conditions. This article warns, however, against reducing classic JWR to the retributive, 'equilibrium of justice' test, and seeks to access the power of prudence in negotiating the relationship between justice and peace.

More specifically: *contra* any supposed impossibility of ethically responsible JWR, I begin to investigate the demands of prudence for the practice of judgement in the face of adversary hostilities below the threshold of war; *contra* theorists opposed *de novo* to a new moral paradigm of limited force (*L. jus ad vim*), I note that Aquinas's discussion in *ST* II-II qq.34–43 of the range of vices opposed to peace invites specificity when considering types of hostility and response(s), namely, keeping the door open to this theoretical conversation but expressing wariness given that the new paradigm has no current reality in law; *contra* selected arguments for limited force, I reconsider Aquinas's teaching to show that prudent justice is not satisfied by remedial action 'to restore the equilibrium of justice' by the exacting of retribution.¹⁸ The effect is to warn against an expanded hostilities paradigm, although further examination is needed regarding whether Aquinas and his interpreters can/should conceive of actions under the paradigm of war applied to non-state actors.

Why the Emphasis on Prudence?

Why the emphasis on a prudent consideration of prudent response(s) to adversary hostilities below the threshold of war? Sometimes mistakenly reduced in meaning to discretion or caution, as if needed only to avoid reckless disregard for the dangers of a situation, prudence can be diminished to mean care taken to avoid the possibility of suffering harm or injury, or taken to avoid mistakes. Prudence is a virtue far more ambitious, however, because it also means disposing practical reason to discern the true good in every circumstance, and to choose the right means of achieving it.¹⁹ Prudence is the foremost of the virtues and a prerequisite to justice. Prudence informs all the other virtues and is the first source of duty. '[J]ustice is useless if...

16. The Catechism of the Catholic Church, 'Safeguarding Peace', III, §§2302–2317, at 2309 esp. https://www.vatican.va/archive/ENG0015/_P81.HTM.

17. On possible variations in relationship(s) between just war and just peace, see Lisa Sowle Cahill's article in this issue.

18. Christian Nikolaus Braun, *Limited Force and the Fight for the Just War Tradition* (Washington DC: Georgetown University Press, 2023), ch. 2.

19. See *Catechism of the Catholic Church*, §1806, https://www.vatican.va/archive/ENG0015/_P65.HTM.

without prudence', wrote Ambrose.²⁰ Nor does prudence always avoid conflict. David chose single-handed combat with Goliath: 'he spurned the armour offered to him, saying that it would only weigh him down'.²¹ Prudence, for David, taught Ambrose, was the knowledge of what to seek and what to avoid gained by considering the highest cause.²²

The focus on prudence below the threshold of war in this article serves firstly as a reminder that classic JWR does not concern only the resort (or not) to lethal force in any manner isolated from a much more extensive political theology/theory and teleologically-framed ethic.²³ Prudence is learned by meditation upon God, the *Summum bonum*, 'through revelation', but is available also by 'philosophical science built up by reason', that is, by rational meditation upon the obligations of reason.²⁴ Prudent decision-making is associated in this tradition with the passion of sorrow (*L. tristitia*) which conjoins perception of a good and some evil. To 'care' is to undergo mental suffering, sorrow, grief, trouble, and so on, regarding how good is to be done and pursued, and evil is to be avoided: The 'Damascene says (*De Fide Orth.* ii, 12) that "the dreaded evil gives rise to fear, the present evil is the cause of sorrow".²⁵ Like the English word 'care' which may be associated with lamenting for the loss of well-being,²⁶ the passion of sorrow is understood by Aquinas as undergoing mental anguish, grief and

-
20. '[N]eque enim potest iustitia sine prudentia esse cum examinare quid iustum, quidve iniustum sit, non mediocris prudentiae sit; summus in utroque error.' Ambrose, *De Officiis*, edited with translation and commentary by Ivor J. Davidson (Oxford: Oxford University Press, 2002), Book I, XXVII, 126, p. 190. Davidson translates: 'For justice cannot exist without prudence'. Josef Pieper renders the text: '[J]ustice is useless if ... without prudence'. Josef Pieper, *The Four Cardinal Virtues: Prudence, Justice, Fortitude, Temperance* (Notre Dame, IN: University of Notre Dame Press, 2010), p. 24.
 21. Ambrose, *De Officiis*, XXXVI, 177. [*Ambrose: De Officiis: Edited with an Introduction, Translation, and Commentary*, 2 vols. (Oxford: Oxford University Press, 2002), p. 221.]
 22. Thomas Aquinas, *Summa Theologiae* (*ST*), 2nd and rev. edn, 1920. Translated by Fathers of the English Dominican Province. Online Edition Copyright © 2017 by Kevin Knight. <https://www.newadvent.org/summa>, *ST* II-II, q.47, a.1, *sed contra*; II-II, q.47, a.2, ad.1.
 23. See Jean Porter, *A Thomistic Theory of the Natural Law: Nature as Reason* (Grand Rapids, MI: Eerdmans, 2005), p. 6.
 24. Aquinas, *ST* I, q.1, a.2, *sed contra*. Jean Porter helpfully uses the term 'ethical naturalism' as a shorthand summary of this association between reason and the natural law: 'human morality and always culturally diverse forms is an expression of the distinctive inclinations and activities proper to the human animal, especially (but not only) the distinctive forms of human social behaviour. As such, morality should be understood first of all as a natural phenomenon, "natural" in contrast to "transcendentally grounded" or "implicitly divine".' Porter, *Thomistic Theory of the Natural Law*, p. 124.
 25. Aquinas, *ST* I-II, q.36, a.1, c. On evil as depriving a thing of its perfection, see Aquinas, *De Malo*, trans. Richard Regan, SJ, ed. Brian Davies, OP (Oxford: Oxford University Press, 2003), q.1, a.2, Answer.
 26. *Oxford English Dictionary Online*, Old English *caru*, *cearu* = Old Saxon *cara*, Old High German *chara*, Gothic *kara*, trouble, grief, care, Old Norse *kōr* (< *karu*), meaning bed of trouble or sickness.

trouble because a good (here, justice) is caused by a loss. Prudence is thus born of loss or a concern about a possible loss. To care about prudent decision-making may thus be treated, at least initially, as sorrowing that one undergoes or suffers (L. *pati* – suffer).²⁷

The emphasis on prudence serves secondly to align this article with recent scholarly drives to recover JWR as a political ethic.²⁸ As the late Nicholas Rengger advised, statecraft and international relations are inseparable in the neo-classical tradition: ‘the central fact about the tradition was that it was a tradition of moral and political reflection rooted in practice, and the practice concerned not merely the business of war and the use of force but its role in statecraft and, indeed, its involvement with people’s everyday lives’.²⁹ Reflection upon the moral duty of those in political authority with the capacity to effect what ‘may yet be sufficiently necessary for the common good to be required for peace’ and the requirement to do so, is situated within the wider obligations of good governance.³⁰ It belongs to governments, says Aquinas, to enact justice and judgement and hold to account those guilty of grievous sins.³¹ The necessary duties of government in human society include administration of the law, defence of the people from enemies of the nation, and the restraint of criminals.³² The corrective influence of the ‘just peace’ movement looks rightly for ways to break repeating cycles of violence by *inter alia* strengthening international efforts for cooperation and human rights, and is properly alert to unduly permissive uses of lethal force.³³ Even so, the classic JWR stance remains

27. ‘Care’ also signifies a wealth of biblical connotations which Aquinas would have been familiar with: ‘cultivation’ (Gen. 2:15 Heb. עָבַד *‘abad*), ‘enabling something to fare well’ (Gen. 30:29 חָיָה *hâyâh*), ‘protection’ or ‘charge’ (Gen. 30:35 יָדָה *yâd*), ‘keeping’ or ‘guarding’ (Gen. 12:6 מִשְׁמֶרֶת *mishmereth*), ‘keeping watch over’ (Num. 23:12 שָׁמַר *shamar*), ‘ministering unto’ (Num. 1:50 שָׁרָת *shârath*), ‘to be concerned about’ (1 Sam. 9:5 מִן *min*), ‘attend to’/ ‘pay attention to’ (Ps. 8:4 פָּקַד *pâqad*); ‘oversight’ (Job 10:12 פָּקַדָּה *p^equddâh*), ‘seek well-being of’ (Jer. 30:14 דָּרַשׁ *dârash*), ‘bandage or bind up’ (Lk. 10:34 Gr. καταδέω *katadéō*), ‘have a mind to care for physically or otherwise’ (Lk. 10:35 ἐπιμελέομαι *epimeléomai*); ‘be interested in’ (Lk. 10:40 μέλω *mélō*), ‘guard or have regard for’ (Acts 20:28 προσέχω *proséchō*), ‘promote the interests of’ (1 Cor. 12:25 μεριμνάω *merimnāō*), ‘earnestness of heart for’ (2 Cor. 8:16 σπουδὴν ... ἐν τῇ καρδίᾳ). See D. Stephen Long on Aquinas and reading the bible, in ‘Thomas Aquinas’ Divine Simplicity as Biblical Hermeneutic’, *Modern Theology* 35.3 (2019), pp. 496–507, <https://www.doi.org/10.1111/moth.12510>.

28. Joseph E. Capizzi, *Politics, Justice, and War: Christian Governance and the Ethics of Warfare* (Oxford: Oxford University Press, 2015); H. David Baer, *Recovering Christian Realism: Just War Theory as a Political Ethic* (Lanham, MD and Boulder, CO: Lexington, 2015).

29. Nicholas Rengger, ‘On the Just War Tradition in the Twenty-First Century’, *International Affairs* 78.2 (2002), pp. 353–63 (360).

30. Aquinas, *ST* II-II, q.40, a.1.

31. Aquinas, *ST* I-II, q.60, a.1, *sed contra*; *ST* I-II, q.60, a.2, ad.3.

32. Thomas Aquinas, *On the Governance of Rulers*, trans. Gerald B. Phelan (Toronto: St Michael’s College, 1935), pp. 44, 50, 107.

33. E.g., as developed by Eli S. McCarthy et al., *A Just Peace Ethic Primer: Building Sustainable Peace and Breaking Cycles of Violence* (Washington DC: Georgetown University Press, 2020); Lisa Sowle Cahill, ‘Just War, Pacifism, Just Peace, and Peacebuilding’,

that seeking after justice and the practice of judgement is an obligation upon political authorities, even as adversaries deliberately conduct hostilities below the threshold of war and new weapons technologies facilitate both threats and new response capabilities. Temporal authorities within divine providence are required to persevere (Rom. 13:6 Gr. εἰς αὐτὸ τοῦτο προσκατεροῦντες, that is, to be constantly diligent/attending assiduously) to this end.

Thresholds and Conceptual (In)determinacy

How, then, to consider the demands of justice prudently as adversaries deliberately conduct hostilities below the threshold of war? Doing nothing is not a morally defensible option within classic JWR; allowing criminals or other aggressors who sin against peace to escape justice would deny the obligations upon those in government. Neither is conceptual indeterminacy with respect to thresholds used by Aquinas as a ploy to benefit from obfuscation. To the contrary, Aquinas considers a multiplicity of vices opposed to peace including discord, contention, schism, war, strife and sedition.³⁴ Strife and sedition, for instance, are said to have many provocative causes including hatred and other destructive passions. Aquinas denounces tyrannical rulers perpetrating harm upon subjects. All these various vices are to be countered by the requisite means—ranging from the overcoming of pride and vainglory that give rise to discord, to the lawful conduct of war. In other words, when considering vices opposed to peace, Aquinas gives detailed, evidence-based consideration to the atrocity/ies committed—the implication for classic JWT reasoners today being that similar discrimination regarding adversary hostilities below the threshold of war is both required and possible within the classic tradition of just war reasoning. No adversarial conduct of hostility/ies need thus be excluded from consideration due to novelty or type. The duties of government in human society include discrimination between different kinds of action contrary to peace,³⁵ but war remains categorically different from other vices opposed to peace.³⁶ All vices against peace are carefully described—the suggestion being that differences between the vices demand different responses; conceptual (in)determinacy and thresholds matter.

In our own day, thresholds matter ethically and legally because different laws apply. Alasdair McIntyre rarely wrote about military ethics but spoke in 2015 of ‘a discipline in crisis’ due, in part, to changing conceptions of war.³⁷ Alongside failures to adequately learn and relearn the meaning of the military virtues, notably courage and justice, within this specialised community of discourse, and related failures within the profession

Theological Studies 80.1 (2019), pp. 169–85; Anna Floerke Scheid, *Just Revolution: A Christian Ethic of Political Resistance and Social Transformation* (Lanham, MD: Lexington Books, 2015), ch. 3; Glen Harold Stassen (ed.), *Just Peacemaking: The New Paradigm for the Ethics of Peace and War*, new edn (Cleveland, OH: Pilgrim Press, 2008).

34. Aquinas, *ST II-II*, qq.37–42.

35. Aquinas, *On the Governance of Rulers*, pp. 44, 50, 107.

36. Aquinas, *ST II-II*, q.40, a.1, c.

37. Alasdair McIntyre, ‘Military Ethics: A Discipline in Crisis’, in George Lucas (ed.), *Routledge Handbook of Military Ethics* (London: Taylor & Francis Group, 2015), p. 13.

to reflect well on experiences, McIntyre spoke of conceptual indeterminacy around the distinction between war and not war. For all the troubles of the era, says McIntyre, the 1860s–1980s were marked by a broadly conventional concept of warfare. The development of the Geneva Conventions by Francis Lieber et al. and Henri Dunant's work in founding the Red Cross represented progress toward agreement about how wars begin with a formal declarative act, laws governing discrimination between combatants and non-combatants, treatment of prisoners, and more: 'it was possible in this period to entertain as a not wholly unrealistic hope that the framework of rules that had developed for 100 years out of the work of Dunant and Lieber would be improved and strengthened, so that all large-scale armed conflict would be brought within its scope'.³⁸ Now, says McIntyre, the hope of general agreement 'is no longer realistic'.³⁹ Well-defined wars have metamorphosed into ill-defined wars, with blurred thresholds.⁴⁰

Two decades after McIntyre's call for closer attention to threshold concepts,⁴¹ the realities of adversaries conducting hostilities below the threshold of war present new questions about thresholds and sub-war conflict ethics. Prior to Russia's 2022 invasion of Ukraine, concepts such as 'persistent competition'⁴² below the threshold of war and 'the competition continuum'⁴³ were increasingly commonplace. Rather than thinking of countries either at peace or at war, engaged in an armed conflict or not, the 'competition continuum' ideology described a world of enduring competition conducted 'through a continuous mixture of cooperation, competition below armed conflict, and armed conflict'. Conceptual indeterminacy besets political and other debate regarding what justice going to war consists in, what justice the conduct of war consists in, and what justice the ending of war consists in. How, then, to resist the blurring of thresholds and conceptual (in)determinacy even amidst a multiplicity of vices opposed to peace?

Conventionally, the international community recognises two bodies or paradigms of law—domestic and international law enforcement governed by the domestic law of the relevant nation-states and international human rights law (IHRL), and the conduct of hostilities governed by international humanitarian law (IHL). The law enforcement paradigm is derived primarily from human rights law. Witness Nils Melzer's clear comparison in *Targeted Killing in International Law* of the international law enforcement paradigm that applies in peace time and is based upon human rights, as compared to the hostilities paradigm that applies at war:

38. McIntyre, 'Military Ethics: A Discipline in Crisis', p. 6.

39. McIntyre, 'Military Ethics: A Discipline in Crisis', p. 6.

40. McIntyre, 'Military Ethics: A Discipline in Crisis', p. 7.

41. McIntyre, 'Military Ethics: A Discipline in Crisis', p. 10.

42. Phrase used by General Sir Nick Carter, Chief of Defence Staff, RUSI Annual Lecture 2020, <https://www.gov.uk/government/speeches/chief-of-defence-staff-at-rusi-annual-lecture> (accessed 24 August 2021).

43. *Special Operations Forces within the Competition Continuum* (last updated: 1 February 2020), Air Force Doctrine Publication 3-05 – Special Operations. Available at Curtis E. Lemay Centre for Doctrine Development and Education, https://www.doctrine.af.mil/Portals/61/documents/AFDP_3-05/3-05-D03-SOF-Competition-Continuum.pdf.

In order to be lawful under the normative paradigm of law enforcement, a particular targeted killing must, cumulatively:

- have a sufficient legal basis in domestic law, which regulates the use of lethal force in accordance with the international normative paradigm of law enforcement;
- not be of punitive but of exclusively preventive nature;
- aim exclusively at protecting human life from unlawful attack;
- be absolutely necessary in qualitative, quantitative and temporal terms for the achievement of this purpose;
- be the undesired ultima ratio, and not the actual aim, of an operation which is planned, prepared and conducted so as to minimize, to the greatest extent possible, the recourse to lethal force.⁴⁴

By contrast, under the paradigm of hostilities:

[I]n order to be lawful under the normative paradigm of hostilities, a particular targeted killing must, cumulatively:

- constitute an integral part of the conduct of hostilities in a situation of international or non-international armed conflict;
- be likely to contribute effectively to the achievement of a concrete and direct military advantage without there being an equivalent non-lethal alternative;
- be directed against an individual not entitled to protection against direct attack;
- not be expected to inflict incidental death, injury or destruction on persons and objects protected against direct attack that would be excessive in relation to the concrete and direct military advantage anticipated;
- be planned and conducted so as to avoid erroneous targeting, as well as to avoid, and in any event to minimize, the incidental infliction of death, injury and destruction on persons and objects protected against direct attack;
- be suspended when the targeted individual surrenders or otherwise falls hors de combat, regardless of the practicability of capture and evacuation;
- not be conducted by undercover forces feigning non-combatant status or otherwise by resort to perfidy;
- not be conducted by resort to poison, expanding bullets or other prohibited weapons and must respect the restrictions imposed by IHL on booby traps and other devices.⁴⁵

44. Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008), p. 239.

45. Melzer, *Targeted Killing*, pp. 418–19.

Melzer's discussion is more nuanced than can be represented here and takes account, for instance, of how conflict under both paradigms occurs within situations of international or non-international armed conflict.⁴⁶ He considers, for instance, recent state practice with regards to targeted killing/limited force under the paradigm of law enforcement and lists a range of concerns.⁴⁷ The point for our purposes is the importance of the threshold above and below an armed attack under Article 51 of the United Nations Charter.⁴⁸ The ethical question following Aquinas remains how to discriminate appropriately between vices against peace and respond prudently.

Three Options

Potentially viable response options to adversaries deliberately conducting hostilities below the threshold of war are currently: a novel limited force paradigm; an expanded hostilities paradigm, i.e., under the law of armed conflict; or an expanded international law enforcement paradigm. No option is problem-free. Nor should all distinctions between these options be overdrawn. As Michael Schmitt advises: 'law enforcement plays a role in armed conflict, particularly during occupation or non-international armed conflict. Further, and despite the *lex specialis* nature of IHL, human rights and other norms may govern, or at least shape, targeted killing operations during armed conflicts.'⁴⁹ Across this complexity, however, competing ethical requirements wrestle for conceptual clarity, practicability and legality.

First, a novel limited force paradigm is Daniel Brunstetter's answer to adversary hostilities below the threshold of war: 'I propose ethical guidelines tethered to a general presumption against letting limited strikes escalate to war, in consideration of what I call moral truncated victory'⁵⁰ The meaning of 'just' is broadly drawn from modern,

46. The major institutions through which international law enforcement happens are the International Criminal Court (ICC) which investigates and, where warranted, 'tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression', and the International Court of Justice (ICJ). See: International Criminal Court, <https://www.icc-cpi.int>. 'As a court of last resort, it seeks to complement, not replace, national Courts.' The ICC is governed by an international treaty called the Rome Statute. See: International Court of Justice, <https://www.icj-cij.org/court>. The latter was established in June 1945 by the Charter of the United Nations and is the principal judicial organ of the United Nations (UN).

47. E.g., whether states are reluctant to acknowledge their obligation to respect the law enforcement paradigm, proportionality and the absolute necessity criterion, and 'the practical consequences of an operational shift from "potentially" to "intentionally" lethal force'. Melzer, *Targeted Killing*, pp. 423–24.

48. For an update on international law sources for the law enforcement paradigm, see Mary Ellen O'Connell, 'Targeted Killings', in Edward Elgar, *Encyclopedia of Human Rights*, ed. Christina Binder et al. (Northampton, MA: Edward Elgar Publishing, 2022), <https://www.elgaronline.com/display/book/9781789903621/b-9781789903621.targeted.killings.xml>.

49. Michael N. Schmitt, 'Targeted Killing in International Law', *American Journal of International Law* 103.4 (2009), pp. 813–18 (815).

50. Brunstetter, 'Introduction', p. 158.

Western interpretations of just war (drawing upon principles of just cause, right intention, proportionality, etc.). The critical point, however, is that, for Brunstetter, limited force is different from war ‘and thus requires a different ethics from that of a just war’.⁵¹ Limited force short of war refrains from crossing the Rubicon that is the boundary beyond which war is loosed. Aware that such strikes are considered by many to be illegal under international law, and may lower the bar for resorting to military force thereby destabilising international order,⁵² Brunstetter maintains a difference between limited force (*vim*) and war (*bellum*)—the implication being that limited force options should be lawfully available to the international community when countering adversaries deliberately conducting hostilities below the threshold of war. He emphasises the norms of non-escalation and non-combatant immunity and, moreover, attempts to think from the *jus post vim*, that is, discerning the justice of using limited force given that ‘[p]eace is the cornerstone of the just war tradition’.⁵³ Fundamentally, however, it is because of the differences between war and isolated drone strikes, ‘a flurry of cruise missile launches, or an attack carried out by a fighter jet sortie’, etc.,⁵⁴ that he deems a new ethical and potentially legal category to be necessary.

Second, an expanded hostilities paradigm is advocated by Christian N. Braun in *Limited Force and the Fight for the Just War Tradition*. Albeit framed with reference to Brunstetter’s argument, Braun does not opt for ‘limited force’ as a distinct moral framework but instead proposes adjusting the established *jus ad bellum* to include retributive and anticipatory uses of limited force.⁵⁵ *Contra* Brunstetter, Braun disavows *jus ad vim* as a distinct framework and argues, in effect, for lowering the threshold of what rises to the level of an armed attack to include uses of limited force within the established *jus ad bellum*, allowing ‘threats and distributive uses of limited force to enforce international norms’.⁵⁶ Like Brunstetter, Braun is concerned about counterterrorist activities that cannot be properly addressed by either *jus ad bellum* or the law enforcement paradigm. One of the challenges he addresses is bringing terrorists to justice when they are successfully evading prosecution and may be expected to resist recapture, and when relations with the relevant host government might be tense.⁵⁷ ‘[W]e need to regulate acts of *vis*’, he says.⁵⁸ ‘Sitting idly by would have risked the lives of many

51. Brunstetter, *Just and Unjust Uses*, p. 255.

52. ‘Permitting limited strikes ... may make the world an even more dangerous place than it already is by eroding the restraints that international law, ever tenuously, has imposed on the use of force.’ Brunstetter, ‘Introduction’, p. 159. He is *inter alia* introducing Eric A. Heinze and Rhiannon Neilsen, ‘Limited Force and the Return of Reprisals in the Law of Armed Conflict’, *Ethics & International Affairs* 34.2 (2020), pp. 175–88.

53. Brunstetter, *Just and Unjust Uses*, p. 89.

54. Brunstetter, ‘Introduction’, p. 158.

55. Braun, *Limited Force*. See also Christian Nikolaus Braun, ‘Just and Unjust Uses of Limited Force: A Moral Argument with Contemporary Illustrations’, *Cambridge Review of International Affairs* 35.5 (2022), pp. 766–68.

56. Braun, *Limited Force*, p. 214. Citing *ST II-II*, q.47, a.2.

57. Braun, *Limited Force*, pp. 147–53.

58. Braun, *Limited Force*, p. 219.

Americans.⁵⁹ Hence the need for remedial action ‘to restore the equilibrium of justice’.⁶⁰ Framed also with reference to disagreements between Walzerians and revisionist just war theorists about justifications for the use of force (that is, between those who develop Michael Walzer’s initial idea to develop a theory of ‘measures short of war’ with restraints that run parallel to the conduct of just war,⁶¹ and those who question the moral standing whilst open to new ways of thinking about the use of force from the perspective(s) of individual responsibility and human rights⁶²), Braun’s overarching commitment is to re-engage the neo-classical tradition for just war reasoning today. The neo-classical just war tradition (JWT), he urges, offers a third way that supports revisionist arguments about the redundancy of a novel *jus ad vim* category whilst being sensitive to the peculiarities of given situations.⁶³

A third alternative is to use the paradigm of international law enforcement wherever feasible and without permissive laxity.⁶⁴ So, for instance, Melzer lamented in 2008 ‘the banalization and institutionalization of targeted killings in the wake of the “global war on terror”’ and strives to reverse ‘corrosive trends in cooperative multilateral system of international peace and security, development, and human rights’.⁶⁵

Law enforcement is predicated upon a ‘capture-rather-than-kill’ approach: the use of force must be the last resort for protecting life, when other means are ineffective or without promise of achieving the intended result, and must be strictly proportionate to the legitimate aim to be achieved (e.g., to prevent crime, to effect or assist in the lawful arrest of offenders or suspected offenders, and to maintain public order and security).⁶⁶

59. Braun, *Limited Force*, p. 148.

60. Braun, *Limited Force*, ch. 2.

61. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th edn (New York: Basic Books, 2006), p. xv. In limited similarity to Walzer, Braun supposes that practical morality is casuistic in character. With the revisionists, Braun is wary of abuses of casuistry, accepts that dominant just war theory must be subject to question and rejects an independent moral framework of *jus ad vim*.

62. The literature is extensive but includes Helen Frowe, ‘On the Redundancy of *Jus ad Vim*: A Response to Daniel Brunstetter and Megan Braun’, *Ethics & International Affairs* 30.1 (2016), pp. 117–29; Jeff McMahan, ‘Targeted Killing: Murder, Combat or Law Enforcement?’ in Claire Finkelstein et al. (eds.), *Targeted Killings* (Oxford: Oxford University Press, 2012); David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002).

63. Braun, *Limited Force*, p. 47.

64. Melzer, *Targeted Killing*. See also Mary Ellen O’Connell, ‘The Popular but Unlawful Armed Reprisal’, *Ohio Northern University Law Review* 44 (2018), p. 325. Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/1337. O’Connell urges the enhancement of security and re-doubling of law-enforcement measures rather than over-easy recourse to killing with military force.

65. Melzer, *Targeted Killing*, p. 10.

66. On the difference and overlaps between the two legal regimes, see ICRC International Committee of the Red Cross, ‘What is the Difference between IHL and Human Rights

The law enforcement paradigm is not punitive, says Melzer: ‘the lawfulness of a deprivation of life for punitive purposes is inconceivable “without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”’.⁶⁷ It is further advocated *inter alia* by Mary Ellen O’Connell in peace contexts where means to enforce justice in response to an individual or community’s wrongdoing are not properly military force.⁶⁸ Despite understandable and proper outrage at the actions of terrorist individuals and groups, insurgents, and even governments, i.e., both state and non-state actors, O’Connell urges the full and proper use of the deliberative processes of courts, the Security Council, and other authorized bodies. Armed force, she is clear, whether military or police force, is a lawful response to armed force or violence only in the moment of emergency for protection or, in other words, legitimate defence. Military force in punitive strikes, reprisals and the like, is resisted.

No Ideal Solution

No ideal solution presents itself. The suggestion of a distinct ‘limited force’ category carries a risk that problems in classifying the applicable legal regime will be multiplied rather than reduced.⁶⁹ In 2007, Michael Walzer spoke of the difficulties in deciding upon clear standards in the in-between space between law enforcement and war.⁷⁰ Walzer hesitated to develop ‘an alternative account of the limits or the rights of people acting or being acted upon in the in-between space’, that is, a novel legal regime.⁷¹ I am still inclined to agree with Walzer. Whilst Aquinas’s enumeration of vices against peace resonates harmoniously with increased discrimination in ethical and legal assessments of adversary hostility below the threshold of war, no matching legal paradigm currently exists. A distinct ‘limited force’ category currently exists only as a debating point amongst theorists. For pragmatic rather than theoretical reasons, it is thus difficult to lend much support currently to this proposal for a distinct ‘limited force’ category. Nor, however, is the law enforcement paradigm entirely satisfactory. The need for this paradigm to function appropriately below the threshold of war is urgently pressing but the political/practical difficulties are many. Might such a court have been constituted for Osama bin Laden, for instance, or the Britons in Syria targeted by the UK in 2015? Could an international law-enforcement paradigm realistically have been applied? A

Law?’, <https://www.icrc.org/en/document/what-difference-between-ihl-and-human-rights-law>.

67. Melzer, *Targeted Killing*, p. 223. Citing Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949. Art3(1)GC I to IV.

68. O’Connell, ‘The Popular but Unlawful Armed Reprisal’, pp. 325–50.

69. Threshold questions ‘are determinative questions because the existence of an armed conflict is a condition precedent to IHL’s application’. Michael Schmitt, ‘Ukraine Symposium – Classification of the Conflict(s)’, *Lieber Institute, West Point* (14 December 2022), <https://lieber.westpoint.edu/classification-of-the-conflicts/>.

70. Michael Walzer, ‘On Fighting Terrorism Justly’, *International Relations* 21.4 (2007), pp. 480–84.

71. Walzer, ‘On Fighting Terrorism Justly’, p. 483.

‘capture-rather-than-kill’ approach is not readily available against Houthi fighters, nor their bringing to trial.⁷²

So, is Braun’s expanded hostilities paradigm the best available option to JWR? In the absence of an international law-enforcement paradigm capable of prosecuting and bringing to justice bin Laden et al., Braun’s argument is that the classic just war tradition includes a retributive dimension that contemporary political and military authorities may call upon in response to adversaries deliberately conducting hostilities below the threshold of war. Capture rather than kill should be the first resort with any decision to target weighed against escalatory risks, he says.⁷³ Retributive targeted killing of culpable unjust individuals requires trials *in absentia* that establish guilt in order to be morally defensible.⁷⁴ Beyond this, a recalibration of the established *jus ad bellum* is advanced to include retributive and anticipatory uses of limited force, and justified under the claim of prudence on the grounds that, for Aquinas, retribution/vengeance can be lawful and virtuous, and that the severity of vengeance ‘should be brought upon a few of the principals’ of a conflict.⁷⁵ Braun recognises the importance of prudence as a cautioning ‘against an embrace of the most opportune solution available at the moment’ and, indeed, he appeals to Aquinas’s understanding of prudence as ‘right reason applied to action’.⁷⁶ His core argument developed in conversation with Aquinas, however, is that limited force (including retributive and anticipatory force) within an expanded *jus ad bellum* is morally defensible.⁷⁷

What Meaning Peace?

Braun’s ambition—which I share—is to recover aspects of classic just war tradition for contemporary statecraft and the entire spectrum of adversary action.⁷⁸ I have grave concerns, however, about his inclusion of limited force under the paradigm of hostilities if/when the more appropriate paradigm is international law enforcement under human rights law. It was Thomas Hobbes not Aquinas who wrote that peace is a condition like the weather when many days together have been fair. As it takes more than a shower or two of rain for the weather to be described as foul or inclement, so, with war, it takes more than one or two instances of conflict for the situation to be described as war. If peace is expanded to include responses to vices against peace under the paradigm of hostilities, its meaning in any ethic risks indeterminacy. The God revealed in Christ Jesus is a

72. ‘The threat was genuine, demonstrating both his intent and his capability of delivering the attacks. ... The threat of attack was current; and an attack could have become a reality at any moment and without warning.’ Rt Hon. Dominic Grieve QC MP, *Lethal Drone Strikes in Syria*, HC 1152 (26 April 2017), §31, https://isc.independent.gov.uk/wp-content/uploads/2021/01/20170426_UK_Lethal_Drone_Strikes_in_Syria_Report.pdf.

73. Braun, *Limited Force*, pp. 156–57.

74. Braun, *Limited Force*, p. 155.

75. Aquinas, *ST* II-II, q.108, a.3, c; II-II, q.108, a.1, ad.5.

76. Braun, *Limited Force*, pp. 63, 66.

77. Braun, *Limited Force*, p. 142.

78. Braun, *Limited Force*, Part III sub-heading.

God of peace not war. To blur the meaning of peace by including under its remit responses to vices against peace under the paradigm of hostilities that are properly dealt with by civil and criminal courts, risks indeterminacy as to whether and/or why war and peace are different, and sounds more like Hobbes than Aquinas. More important than the instances of fighting for the definition of war, says Hobbes, is the disposition of the relevant parties, that is, their inclination, tendency or attitude. Hence the nature of war consists not in actual fighting but in a disposition to contend:

Hereby it is manifest, that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man. For WARRE, consisteth not in Battell onely, or the act of fighting; but in a tract of time, wherein the Will to contend by Battell is sufficiently known: and therefore the notion of Time, is to be considered in the nature of Warre; as it is in the nature of Weather. For as the nature of Foule weather, lyeth not in a showre or two of rain; but in an inclination thereto of many dayes together: So the nature of War, consisteth not in actuall fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary. All other time is PEACE.⁷⁹

By this definition, it would be difficult to determine whether ours is an era of war or peace—which sits uncomfortably in the classic JWR tradition.⁸⁰

Present-day Nominalism

Further, my concern is use of a casuistic methodology without deep and obvious connections to the ethical naturalism informing Aquinas's moral reasoning. 'The core components of a casuistical investigation', says Braun 'are an instant case, a paradigm case, and additional cases that take on the function of a conduit between instant and paradigm cases.'⁸¹ The casuist, he says, starts with the taxonomy of a paradigm case and allows its resolution, as either morally appropriate or to be rejected as clearly wrong, to yield examples that seem fitting for just war theory. Mindful that casuistry is associated with histories of abuse, Braun proposes to bolster casuistry with safeguards derived from virtue ethics.⁸² He establishes paradigm cases as benchmarks against which to assess subsequent cases, and aims to follow Aquinas in maintaining that prudence perfects the rational capacity to choose actions that will lead to genuine flourishing.⁸³ His ambition is to recapture traditional casuistry as a method for just war thinking.⁸⁴ Prudence, says Braun, is the rational capacity to choose actions that will lead to genuine flourishing.⁸⁵ Indeed, he

79. Thomas Hobbes, *Leviathan* (London: Andrew Crooke, 1651), ch. XIII. Project Gutenberg eBook, <https://www.gutenberg.org/files/3207/3207-h/3207-h.htm>.

80. God's will for humankind is the ontological truth of creation and goal of history. See Oliver O'Donovan, *The Just War Revisited* (Cambridge: Cambridge University Press, 2003), p. 2.

81. Braun, *Limited Force*, p. 57.

82. Braun, *Limited Force*, pp. 9, 55.

83. Braun, *Limited Force*, p. 66.

84. Braun, *Limited Force*, p. 55.

85. Braun, *Limited Force*, pp. 63, 66.

devotes significant subsections to prudence where the point is underlined that military acts should be carried out for the common good, and those in political and military authority bear responsibility for that good.⁸⁶

I broadly support this ambition,⁸⁷ and yet casuistry can take various forms. Aquinas was a casuist who engaged difficult cases and drew conclusions from practical syllogisms.⁸⁸ Following Aquinas's death, however, his approach to casuistry tended to be replaced by methods that de-emphasised reason as a participation in the good—whereby conscience (*L. synderesis*) moves prudence to judge particular situations in the light of universal principles—and emphasises choices made by the practical intellect, with little consideration given to teleology. Rather than the Thomist/scholastic ethical naturalism whereby moral decision-making can be discussed intelligibly with no mention of the divine because it is teleologically oriented towards the good (whether human and other natural flourishing or God),⁸⁹ the nominalism of Duns Scotus and William Ockham emphasised how the good human will makes decisions with reference to the divine will. Unlike Aquinas and the scholastics, nominalists supposed that universals or general ideas are mere names without any corresponding reality. Applied in ethics, this means that the universal or general idea of 'the good' is a mere name attaching to what God has said to be good, and what humans choose as good. The general idea of 'the common good' has no inherent nature for the nominalists but, rather, represents what humans deem needful for society. Ethical concepts of good are separated from the being of God and human nature as nominalism loses capacity for teleological argument because it lacks orientation towards, or analysis of the substance of, 'the good', 'the common good', 'human flourishing', and so on. The words are still used but their meaning has changed.

Scotus, says Sedgwick, 'rejects teleological theories associated with Aquinas of beings seeking their ends and their ultimate perfection'.⁹⁰ 'Nominalism', says

86. Braun, *Limited Force*, pp. 110–11 (110).

87. With the proviso that the problem of paternalism is difficult to escape in Western, post-colonial discussions of common good, see Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', *Third World Quarterly* 27.5 (2006), pp. 739–53, <http://www.jstor.org/stable/4017775>. Cf. Martti Koskeniemi, 'International Law in Europe: Between Tradition and Renewal', *European Journal of International Law* 16.1 (2005), pp. 113–24, <https://doi.org/10.1093/ejil/chi105>. With Koskeniemi, I am committed to the universalisation of modern international law: 'The fact that international law is a European language does not even slightly stand in the way of its being capable of expressing something universal', p. 115.

88. Consider, for example, the case of the person with money deposited with him or the discussion of credit sales and usury to James of Viterbo, Lector at Florence, further illustrated by Aquinas with three further cases: Aquinas and Richard J. Regan, *Commentary on Aristotle's Politics* (Indianapolis: Hackett Publishing Company, 2007), Bk 1, ch. 9; Aquinas, 'A Letter on Credit Sales and Usury', *Opuscula III – Collations, Letters*, <https://aquinas.cc/1a/en/~DeEmp.n1>.

89. And yet available without appeal to revelation; Aquinas, *ST I.II*, q.13, a.1, ad.2.

90. Peter H. Sedgwick, *The Origins of Anglican Moral Theology* (Boston: Brill, 2018), p. 124.

Cessario, 'offers a person little to consider about finality causality. And because it possesses no way to analyse the final end of human flourishing, causality replaces the notion of moral natures.'⁹¹ '[H]uman activities are explained solely by appeal to naked free will' and isolated precepts.⁹² In Thomist/scholastic ethical naturalism, casuistry is typically oriented towards final end(s), notably human flourishing. By contrast, present-day nominalism dissociates casuistry from any ethical theory and is thus likely to lose capacity for prudence. Discrete ethical principles (e.g., restoration of the equilibrium of justice) are prioritised over final end(s). The risk is that present-day nominalism perpetuates a narrowness of vision that pays very little attention to goods beyond the immediate objective (here, justice) due to a rejection of the teleological method. Prudence is the exercise of sound judgement that inclines toward wisdom and desires good end, 'especially the basic goods of human fulfilment'.⁹³ Hence, for instance, Braun looks for prudence to inform decision-making with respect to retribution.⁹⁴ His casuistic method, however, is explicitly not associated with an ethical theory but aims 'to derive judgements about the rightfulness or wrongfulness of actions by investigating particular cases'.⁹⁵ 'Casuistry is no ethical theory in the sense of deontology/ Kantianism or utilitarianism because it neither tries to advance a comprehensive account of ethics nor constitutes an account of how ethical decisions are ultimately grounded.'⁹⁶ Casuistry without an ethical theory is very different from Aquinas's syllogistic mode of reasoning.⁹⁷ Separating the casuistic method from the ethical naturalism—within which activities proper to the human animal include the 'rational appetite' for justice as integral to the tendency of all things naturally to their flourishing—risks depriving a casuistry of moral power as the exercise of justice in Thomist tradition.

'Equilibrium of Justice' Test Necessary but Not Sufficient

Hence, thirdly and relatedly, is my concern about the delimited relationship between prudence and retribution. To be clear, there is no doubt that, for Aquinas, retribution/vengeance is a demand upon political authorities following wrongdoing. Executing wrath on those who practise evil can be lawful and virtuous (Rom. 13:4). Appropriate retribution consists in 'the infliction of a penal evil on one who has sinned'.⁹⁸ Hence Aquinas's discussion of responses to the vices opposed to peace, by way of excess *and* deficiency,⁹⁹ and

91. Romanus Cessario, *Introduction to Moral Theology* (Washington, DC: The Catholic University of America Press, 2001).

92. Cessario, *Introduction to Moral Theology*, p. 230.

93. Romanus Cessario OP, *The Moral Virtues and Theological Virtues*, 2nd edn (Notre Dame, IN: University of Notre Dame Press, 2009), p. 80.

94. E.g., Braun, *Limited Force*, p. 192.

95. Braun, *Limited Force*, p. 56.

96. Braun, *Limited Force*, p. 56.

97. Aquinas, *ST* I-II, q.13, a.1, ad.2.

98. Aquinas, *ST* II-II, q.108, a.1, c.

99. Aquinas, *ST* II-II, q.108, a.2, ad.3.

Braun's criticism of retributive acts that are punitive, bloodthirsty or where targets have an uncertain relationship to the wrongdoing; such acts are precluded.¹⁰⁰ Yet Aquinas never speaks of retribution as an end in itself. The infliction of retribution on the guilty is not, of itself, a good that warrants the act:

Accordingly, in the matter of vengeance, we must consider the mind of the avenger. For if his intention is directed chiefly to the evil of the person on whom he takes vengeance and rests there, then his vengeance is altogether unlawful¹⁰¹

Retribution is not an end in itself because it is not of itself a good:

for a man may not sin against another just because the latter has already sinned against him, since this is to be overcome by evil, which was forbidden by the Apostle, who says (Romans 12:21): 'Be not overcome by evil, but overcome evil by good'.¹⁰²

While vengeance might properly restore the equilibrium of justice and conduce to some good by 'preserving from future sin',¹⁰³ restoring the equilibrium of justice is not enough. Aquinas allows for retributive uses of force in diverse contexts, but this is too narrow a test against which to judge whether limited force of the type described is (il)licit. He says more, however, about retributive justice. Aquinas says more about the perpetrator, the mind of the avenger, and, most important for our purposes, the wider, good ends of human flourishing. Despite allowing the death penalty, Aquinas's first concern is for the perpetrator's own well-being, and other potential victims: 'that the sinner may amend, or at least that he may be restrained and others be not disturbed'.¹⁰⁴

In other words, the retributive, 'equilibrium of justice' test may and should be deemed necessary but not sufficient. Retribution is not a good to be sought for its own sake. Restoring the equilibrium of justice is not enough. Aquinas allows for retributive and potentially anticipatory uses of limited force in law enforcement, but this is too narrow a test against which to judge whether limited force of the type described is illicit within a Thomist-influenced neoclassical tradition of JWR.

100. Braun, *Limited Force*, p. 194. Aquinas's use of the term *L. vindicta* can be translated as retribution or vengeance. In what follows I use 'vengeance' only for morally precluded acts, and 'retribution' for a potentially listed aspect of the procedures of justice and/or punishment. See Peter Karl Koritansky, *Thomas Aquinas and the Philosophy of Punishment* (Washington DC: Catholic University of America Press, 2011), ch. 3.

101. Aquinas, *ST II-II*, q.108, a.1, c.

102. Aquinas, *ST II-II*, q.108, a.1, c.

103. Aquinas, *ST II-II*, q.108, a.4, c.

104. Aquinas, *ST II-II*, q.108, a.3.

Conclusion

How, then, to meet the demands of prudence when the available options for responding to adversary hostility/ies below the threshold of war are all beset by problems? Law enforcement is the appropriate paradigm for hostile acts below the threshold of war perpetrated by individuals and some small groups, but not always capable of responding effectively. The novel, limited force paradigm recognises the Rubicon threshold beyond which the laws of war apply. How to work, realistically, however, with what so far is only an idea in academic debate? The expanded hostilities paradigm unacceptably risks the dilution of the requirements of 'armed attack' in the international law of self-defence, and threatens to unacceptably weaken human rights protections against the arbitrary deprivation of life. As Braun himself further recognises, there is also 'the worry that justifying specific uses of *vis* may lead to a regime of *vis perpetua*'.¹⁰⁵ Killings are likely to take place 'only in third world countries'. '[R]etributive force in weak states has a certain neocolonial taste to it',¹⁰⁶ and 'it is not clear that the punishing state can be trusted to make an unbiased decision'.¹⁰⁷ The risk of a slippery slope to multiple abuses of lethal force below the threshold of war is ever-present.¹⁰⁸ Hence the need for further examination of whether/how Aquinas and his interpreters can/should conceive of actions under the paradigm of war occurring against non-state actors.

To conclude: too expansive an hostilities paradigm, i.e., to incorporate responses to vices against peace properly dealt with under the law enforcement paradigm, runs contrary to Thomist impulses to discriminate between war and peace. Failing to respond appropriately under the international law enforcement paradigm, however, to individuals or groups who are a part of a terrorist organisation deemed to be a non-state actor under international law, is also unacceptable. At the least, Aquinas's spirit of discrimination is needed. More than this, a crux of the matter moving forward with classic JWR is whether Aquinas and his interpreters can/should conceive of actions under the paradigm of war occurring against an individual or small numbers of individuals who are a part of a terrorist group.¹⁰⁹ More questions must be asked about how non-state actors could/should feature in international law enforcement moving forward; the status of non-state actors at international law is not to be underestimated as a contributory factor in the complexities of what constitutes ethically and potentially legal appropriate response(s) to adversary

105. Braun, *Limited Force*, p. 6.

106. Braun, *Limited Force*, p. 156.


107. Braun, *Limited Force*, p. 157.

108. David Bentley Hart observes that Christians and others find themselves in the odd position of having to resign themselves 'to fighting at the behest of a political holder that has not necessarily placed itself under the sway of those principles', i.e., principles derived from divine law. David Bentley Hart, *In the Aftermath: Provocations and Lamentations* (Grand Rapids, MI: Eerdmans, 2009), pp. 151–52.

109. I am grateful to James M. Page for the clarity with which he made this and subsequent points that I deploy in this paragraph.

hostilities below the threshold of war.¹¹⁰ Pursuit of these questions is preferable to the currently proposed expanded hostilities paradigm.

ORCID iD

Esther D. Reed  <https://orcid.org/0000-0002-9714-6617>

110. Peter Tzeng, for instance, reports how non-state actors have now begun acting as respondents before international judicial bodies, but that questions remain about: '(1) how non-state actors acquire obligations under international law; and (2) how international judicial bodies acquire jurisdiction *ratione personae* over non-state actors'. Peter Tzeng, 'Non-State Actors as Respondents before International Judicial Bodies', *ILSA Journal of International & Comparative Law* 24.2 (2018), pp. 397–416.