# LIMITED FORCE AND THE FIGHT FOR THE JUST WAR TRADITION

CHRISTIAN NIKOLAUS BRAUN

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GEORGETOWN UNIVERSITY PRESS / WASHINGTON, DC

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Cataloging-in-Publication data is on file with the Library of Congress.

ISBN 978-1-64712-345-1 (hardcover)
ISBN 978-1-64712-344-4 (paperback)
ISBN 978-1-64712-343-7 (ebook)

♾ This paper meets the requirements of ANSI/NISO Z39.48-1992 (Permanence of Paper).

24 23 9 8 7 6 5 4 3 2 First printing

Printed in the United States of America

Cover design by Jim Keller
Interior design by BookComp, Inc.

# CONTENTS

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*I dedicate this book to the people of the SaarLorLux region,*
*whose war-torn history is a testament to the*
*moral obligation to work for peace.*

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# ACKNOWLEDGMENTS

The origins of this book go back to a movie theater converted into a lecture hall in Portland, Oregon. In the academic year 2012/13 I took my very first class on just war with David Kinsella at Portland State University. At the time the Obama administration's use of armed drones for targeted killings was headline news. Going through the canon of the most influential just war thinkers and applying their reasoning to the moral questions raised by the use of drones started a journey that eventually has led to this book. I was fascinated by the idea of bringing to bear a tradition of thought on a debate about an emerging weapons system that was unfolding during the course of the seminar. It also instilled in me the wish to dig deeper into the matter by pursuing a PhD. After the end of my Fulbright scholarship at Portland State and graduation from Trier University, I continued my journey at Durham University. The thesis I produced at Durham constitutes the heart of this book. That said, the journey did not end at Durham. The project has also benefited enormously from the conversations I had with the officer cadets at the Royal Military Academy Sandhurst, whom I had the privilege of teaching during my time as a senior lecturer in the Defence and International Affairs Department. The final stretch of the journey happened at Radboud University, which gave me the precious time to reflect and elaborate on my previous work.

This book would not have been possible without the support of the scholars and mentors who have helped me much more than I deserve. The very first I need to mention is Gerd Hurm, who during my time at Trier encouraged me to apply for a Fulbright scholarship and go to Portland State. Without his support, the journey would not even have started. At Portland State David Kinsella introduced me to just war thinking, and Peter Bechtold repeatedly encouraged me to do a PhD. Please "Keep Portland Weird!" A very special thank-you is due to John Williams, my PhD supervisor, who is one of the kindest persons I have met in academia and who has accompanied this project from the start to the finish line. It was a true pleasure to work with him and benefit from his enormous expertise and experience. My only regret is that I never challenged him to go for a hill climb on Crawleyside Bank. One day! I am also grateful to Durham's

Christopher Finlay, who made my viva a most enjoyable experience—despite my resistance to his attempts to turn me into a revisionist. Speaking of my viva, I am hugely indebted to the support of Cian O'Driscoll, who took on the role of external examiner. The viva was the start of a conversation that has continued ever since and has been instrumental in helping me develop a deeper understanding of the just war tradition. Cian has been more than generous in his support, and the book has greatly benefited from his insights.

Having mentioned the just war tradition, I am grateful to James Turner Johnson, who has helped and encouraged me in a way I never could have asked for. His work had always been an inspiration to me, but it was his moral support, in addition to the time he invested to comment on the manuscript, that kept me in business during the periods when I struggled. Thank you! The same applies to Daniel Brunstetter, whose pioneering work on *jus ad vim* was instrumental in helping me develop my own understanding of the morality of limited force. I greatly benefited from our conversations, and I am much obliged for his support, especially for taking the time to read multiple drafts of the manuscript.

The book has also benefited from the support of several other scholars I highly respect and who helped me at various stages of the project. Uwe Steinhoff kindly provided feedback on the book proposal. Joseph Capizzi and Tony Coates gave precious feedback on the penultimate draft of the manuscript. Thanks are also due to Christian Enemark and Lonneke Peperkamp, who gave me the opportunity to present parts of my research at workshops hosted by the University of Southampton and Radboud University. I am also grateful to Helen Frowe, who commented on the introduction and the way I frame the debate. We are likely to continue to disagree about the question of how to do just war theory, but Helen's work has certainly helped me gain a better understanding of the revisionist project. A huge thank-you also goes out to the reviewers of my book, Greg Reichberg and Tony Lang. Their feedback challenged me to think harder about several of the issues I engage with in the book, and its argument has benefited greatly from it. I was blessed to have reviewers of such a caliber. I was also very fortunate to have Don Jacobs as my editor. Finally, I would like to thank my dear parents Marlene and Rainer. Without their encouragement and support this book would not have been written. As the Bard of Avon put it: "The voice of parents is the voice of gods, for to their children they are heaven's lieutenants."

Parts of this book have been adapted from previous work. I am grateful to the following journals for allowing me to reuse previous work of mine: *International Relations*, *Journal of International Political Theory*, and *Journal of Military Ethics*. Thanks are also due to Edinburgh University Press and Stone Tower Press, who likewise allowed me to reuse prior work. This project was enabled by a Radboud Excellence fellowship from Radboud University, which has provided the necessary funding to publish the book open access.

# Introduction

I write these lines after Mariupol has been bombed to ruins. The photos from Ukraine that are printed in the newspapers every day are hard to digest and are reminiscent of the destruction unleashed on places like Coventry, Stalingrad, or Dresden during the Second World War. Vladimir Putin's war against Ukraine marks the largest war in Europe since Adolf Hitler's war. The shock wave the war has caused has hit the international community hard, exactly because large-scale warfare in Europe was considered to have become a relic of days past. Indeed, the empirical record shows that the large-scale war in Ukraine notwithstanding, limited uses of force have been the most prevalent form of interstate force in today's world. Despite the frequent employment of limited force, however, just war thinking has hesitated to conceptualize limited force as a separate category. For some that was a major omission, as the Western withdrawal from Afghanistan in 2021 seems to suggest. Instead of maintaining a ground presence in Afghanistan, the Biden administration adopted an "over-the-horizon" counterterrorism strategy mainly built around drone strikes and commando operations. This strategy was directly connected to the desire to "bring the boys home" that underpinned the withdrawal decision the Trump administration had negotiated with the Taliban in 2020. Consequently, although the Biden administration sought credit for having ended America's longest war in Afghanistan, the so-called forever war, also known as the global war on terror, will continue. In February 2022, half a year after ostensibly having turned the page on the 9/11 legacy, the Biden administration authorized a commando raid in Syria against ISIS leader Abu Ibrahim al-Hashimi al-Qurayshi.[1] This operation bore curious parallels to previous targeted killings that had been authorized by the Trump and Obama administrations, killing, respectively, al-Qurayshi's predecessor Abu Bakr al-Baghdadi in 2019 and al Qaeda leader Osama bin Laden in 2011.

In addition to the asymmetrical confrontation between state and nonstate actors that has predominantly been fought with limited force, recent history has seen an increase in limited force between states, often referred to as "force-short-of-war." For example, in response to the Assad regime's use of chemical weapons against the civilian population, the Trump administration employed air strikes in 2017 to enforce the international norm against the use of chemical weapons. The response was limited in scope, and the administration made clear from the start that the United States would not get more deeply involved in the Syrian civil war. The administration hoped to uphold the rules-based international order by sending a signal to the Assad regime and potential other norm breakers that such violations would not be tolerated. Other examples of the use of limited force include the imposition of a military-enforced no-fly zone over Libya in 2011. At least initially, the objective of this operation was to stop an imminent attack by the Qaddafi regime on the civilian population of Benghazi. The United States and its allies had been adamant that they did not seek to fight another major war after the costs and controversies of the 2003 Iraq war. The employment of force was meant to be limited; avoiding a large-scale war was a determining factor of the operation.

Upon observation, the use of limited force is markedly different compared to conventional large-scale warfare, as it seems to escape the ostensible certainties that undergird the established rules of war. On the one hand, insofar as it signals greater restraint, the shift away from the large-scale destruction of modern warfare toward more calibrated applications of force may be hailed as a step in the right direction. On the other, because uses of limited force appear more compartmentalized and therefore containable, it may encourage greater profligacy on the part of states in respect to the recourse to arms. As a critical observer has put it succinctly, exactly because limited uses of force seem more humane, it might be that they are "especially apt to endure in time and spread in space."[2] How, then, are we to make moral sense of this shift toward the recourse to limited force? Answering this question is the main task of this book.

At the outset, it is important to demarcate the difference between war and limited force. To do so is not at all straightforward. As the first chapter shows, critics have questioned the distinction between war and limited force. In their eyes, both large-scale and limited uses of force are manifestations of war. Drone strikes employed in counterterrorism operations or limited air strikes to enforce international norms may differ from the obliteration of Mariupol, but they belong to the same form of human interaction, namely war. These ethicists can draw support from international law, which considers both large-scale and more limited employments of force as acts of war. In addition, a further difficulty in classifying limited force can be found in limited nonkinetic action. As a prominent just war thinker has asked: "If loan guarantees come with conditions,

does that count? What about the imposition of tariffs or economic sanctions?"[3] However, the challenge of finding a precise demarcation point between war and limited force notwithstanding, there seems to be a moral difference between large-scale and limited employments of force. This book, while it disagrees with him about the need for an independent moral framework for uses of limited force, supports Michael Walzer's conclusion that "it is common sense to recognize that they are very different from actual warfare."[4] Simply put, there seems to be a moral difference between the indiscriminate and disproportionate force unleashed on Mariupol and the more, not necessarily sufficiently, discriminating and proportionate force employed in the military operations this book investigates.

As the previous paragraph briefly touched upon international law, it is crucial to highlight that this book makes a moral, not a legal, argument. Without a doubt, international law, and in this book's context especially international humanitarian law (IHL), imagined as a common language aimed at regulating international affairs, carries moral meaning. Historically speaking, just war thinking has exerted a major influence on the development of the laws of war.[5] Some eminent just war thinkers have even argued that the positive international law of war should be seen as a part of just war.[6] Undoubtedly, by restraining and limiting war international law is morally significant. However, it is also true that the morality of war is more demanding than the laws of war in the sense that, depending on the circumstances, it can be right to do more or less than the law sanctions. For example, "fighting well" may require combatants to take on more risk to themselves than the laws of war would require. With regard to limited force specifically, it seems that there may be circumstances in which the contemporary state of international law seems unable to rise to the moral challenges caused by the changing character of war. When that is the case, it can be morally defensible to break with parts of international law. Put differently, there can be employments of military force that may be illegal but legitimate. As many readers will recall, that was the case the North Atlantic Treaty Organization (NATO) made to justify its intervention in Kosovo in 1999. The same rationale was present in the Trump administration's defense of its strikes to punish the Assad regime as well as previously in the Obama administration's intended punitive strikes that did not materialize in the end. The majority of analysts will agree that the Trump administration's strikes were, and the Obama administration's strikes would have been, illegal acts of war. Arguably, however, they may or would have been the right thing to do nonetheless. Comparable legal and moral questions have been raised by the practice of targeted killing of alleged terrorists. As noted previously, while legally acts of war, many uses of limited force appear to differ from prototypical large-scale uses of force. Consequently the established rules of war are seemingly in need of a renegotiation, and there

is an opening to investigate how limited force can be regulated in a way that is morally defensible.

Returning to the aforementioned difficulty of demarcating limited force, how can one tell that a particular use of force resembles limited force in the first place? Building on a neoclassical reading of just war, this book makes a determination that parts ways with the legal standard governing the use of armed force.[7] As the subsequent chapters point out, classical just war thinkers did not provide a precise definition of war.[8] Unlike contemporary IHL, these thinkers did not imagine war as a state of affairs. Rather, they conceived of war as a number of just or unjust acts, including both foreign and domestic uses of force.[9] Consequently both limited and large-scale uses of force would be acts of war, or *bellum*. By adopting a neoclassical conceptualization, this book necessarily seeks to avoid a very narrow definition that would, say, define limited force or, to use the Latin word for force, *vis*, based on a certain number of killed persons. However, the preference for a broad definition notwithstanding, a set of key elements that turns limited force into a current moral issue needs to be addressed. Walzer is quite right when he argues that there is a "different 'feel'" to limited force if compared to conventional war.[10] Vis is limited in magnitude and duration. In addition, while seeking to obtain the desired military outcome, the intent behind its use is to avoid a large-scale war. Thus, the label of vis seeks to capture a moral issue that seems to escape the ostensibly precise distinction between the states of war and peace that underpins IHL and much of contemporary just war thinking.

One attempt to make sense of limited force has been the introduction of a new moral framework called *jus ad vim* (the just use of limited force), a Latin phrase that was coined by Walzer as a counterpoint to *jus ad bellum*.[11] While the latter has become the standard term to designate when going to war is morally justifiable, the former seeks to regulate limited force that seems to escape the established rules of war. Supporters view jus ad vim as a moral framework that seeks to find a middle way between the limited force the police may employ in peacetime and the more permissive standards that apply to the military in war. Most treatments of the just war idea have focused on paradigmatic cases of large-scale war, whereas limited force has been less studied by ethicists. At first glance it thus seems that adding a distinct new moral framework for assessing the rights and wrongs of vis is timely. And in fact some just war thinkers have elaborated on Walzer's call to develop a new paradigm.

At the same time, however, the jus ad vim project has had its critics. The most fundamental criticism of jus ad vim is that we do not need it to grapple with the morality of limited force. Critics argue that the traditional jus ad bellum framework is sufficient to assess limited force. Crucially, the redundancy critique has most often been made by so-called revisionist just war thinkers, who develop their reasoning in contradistinction to Walzer's.[12] These analytical

philosophers reject jus ad vim as redundant because they object to the idea that there are different moral rules for peace and war; as they reject the notion of a second set of rules, they naturally see no need for a third. As a result, jus ad vim has become a metaphorical battleground of what I call the "fight for the just war tradition."[13] As a consequence of this "fight" the conversation about the ethics of war generally, and that about jus ad vim specifically, has developed into a situation some refer to as a "schism,"[14] in which competing camps hardly engage with each other's substantive argument.[15]

I accept that the term fight for the just war tradition will sound like an exaggeration to some. It is not my intention to suggest that there has been no exchange at all between Walzerians and revisionists. However, I do think that there is a state of polarization in contemporary just war, and either side believes that their own approach gets it right and the other wrong. As a result, debate among the two camps has been inhibited. I am also happy to concede that the term "revisionist" is slightly misleading and that neither the "traditionalist" nor the "revisionist" school is monolithic.[16] In fact, based on the Thomistic argument I am making in this book, I am myself a revisionist of sorts; that is, if one defines revisionism as being in opposition to Walzer's "traditional" just war theory. However, the term "revisionist" has specifically been used by analytical philosophers working on the ethics of war who develop their arguments against Walzer's just war. As I demonstrate in chapter 2, revisionists err when they portray ostensible innovations, such as their rejection of the moral equality of combatants thesis, as their own original arguments. In fact, this argument was already inherent in Aquinas's just war. At the same time, my critique of revisionism goes beyond the revisionist school of just war narrowly conceived. By this I mean that I share Walzer's concern that many analytical philosophers build their arguments on hypotheticals that have very little in common with the realities of war. Such reasoning seems incompatible with the just war tradition's purpose of providing guidance to political and military decision makers. Just war, as I understand it, must be of practical significance. In summation, the idea of a fight for the just war tradition is based on the assumption that there are two competing camps that answer the question about the essence of just war in fundamentally different ways. In Walzer's words, "The first answer is that just war theory is about war, and the second answer is that just war theory is about moral philosophy."[17]

This book starts from the premise that the divisive state of contemporary just war is unfortunate. To me it seems that a meaningful exchange between the competing camps can lead to a deeper understanding of substantive issues, such as the rights and wrongs of limited force. That is why this book provides a third-way reading of just war that, I hope, will spark a conversation between Walzerians and revisionists. The use of limited force, imagined as one of the

hottest metaphorical battlegrounds in the fight for the just war tradition, will be the substantive issue by which I illustrate my approach. The third-way approach I advocate in this book is grounded in a historical reading of just war. It is built around two main elements. First, the book rediscovers the method of traditional casuistry for just war thinking. It seeks to demonstrate that the traditional casuistical method can approximate the analytical rigor of revisionists and could attract revisionists to an engagement with the just war tradition beyond Walzer. Second, the book develops general moral arguments that build on preceding casuistical investigations of two specific manifestations of limited force: the practice of targeted killing and the use of limited force to enforce international norms. Its general argument is grounded in the thought of Saint Thomas Aquinas (1224/5–1274), the key figure in the systematization of the classical just war. Importantly, the Thomistic just war provides a third-way reading that sides with neither Walzerians nor revisionists all of the time. Its main conclusion with regard to the utility of a new framework of jus ad vim is that, siding with Walzerians, it contributes a helpful category to think about the morality of particular military practices. However, lending support to revisionists, it adds no moral meaning to the inherited jus ad bellum framework. Put differently, vis constitutes a moral issue that needs to be grappled with, but a distinct moral framework of jus ad vim is indeed redundant.

However, in line with the classical understanding of just war as a tool of statecraft, a theme that I emphasize throughout the book, I hold that the redundancy claim provides no answers regarding how to deal with the very practical moral problems associated with limited force. This is not a book about moral purity. In this sense, I note with regret that the long-sought goal of eliminating war, or even vis, has not been achieved yet.[18] While I identify a moral responsibility to work toward that goal, I also affirm the view that a realistic just war approach needs to address the sad truth that at least for the time being, "recourse to armed coercion is a perennial feature of the human condition."[19] Consequently, as long as war has not been eliminated, if it ever will be, it needs to be regulated in a morally defensible way. In other words, I take very seriously the worry that justifying specific uses of vis may lead to a regime of *vis perpetua*,[20] which is why I emphasize that the goal of any just war must be a just peace. State leaders thus face the dual task of using limited force to maintain and (re)establish order, justice, and peace as well as creating the conditions that no longer require such force. As this book concentrates on the former aspect of the job description, it has little to say about the latter. However, this should not at all be read as relegating to second place considerations of *jus ante bellum* (right before war) and *jus post bellum* (right after war), considerations that seek to create the conditions that prevent the outbreak of war or the return to it. On the contrary, the book upholds the classical just war

position that any lethal use of force needs to be carried out with regret, as it results in the taking of life.

One particular moral issue that escapes ostensibly easy answers is the question of retributive justice in the international realm. On this question, the book's Thomistic perspective makes an original contribution by advocating a limited retributive rationale for the just use of limited force. For Aquinas, retribution—restoring justice when it has been violated, punishment of evildoing, restoration of things stolen—constituted the primary just cause for war, whereas both Walzerians and revisionists reject retribution and accept only defensive causes for war.[21] In today's debate about just war, as a leading voice puts it, there seems to be a "general loss of the intelligibility of punishment."[22] While seeking to recover parts of the classical *bellum justum* and its punitive dimension, I am aware of the dangers that are associated with punitive war. As I hope to express clearly in my moral argument, I doubt the justifiability of large-scale war as punishment. That is why I emphasize prudential considerations against punitive war to enforce regime change, a practice that has found the support of some contemporary neoclassical just war thinkers. The moral case for limited punitive force, however, seems to be different. Punitive vis, I argue, might allow for a limited return to the classical understanding of just war and, as a side effect, trigger a fruitful exchange between Walzerians and revisionists who are likely to reject this argument. Importantly, when I speak of sparking a fruitful debate as one of the objectives of this book, I have in mind mainly a debate that will advance the just regulation of limited force. As I understand the just war tradition—and I hope I will succeed in making this clear throughout the book—it seeks to grapple with the practical moral questions that arise in war. Arguing about the best way to arrive at these arguments, an undertaking that has arguably received excessive attention in recent debate, has never been at the heart of the just war tradition. In that sense, I hope that my contribution will not be limited to academic debate but will also be taken to inform political and military decision makers. As a former senior lecturer at the Royal Military Academy Sandhurst it is my ambition to provide an account of vis that can guide practitioners in their grappling with the moral issues that arise in its context.

The decision to ground the argument in the thought of Aquinas has been deliberate. As this book seeks to demonstrate, Thomas's account of just war can contribute distinctive moral arguments about the changing character of war as well as provide a third-way reading on the fight for the just war tradition. As the argument unfolds, it will emerge that the casuistical argument that draws on the thought of Aquinas can unite three revivals that started in the second half of the twentieth century but have mostly happened in isolation. This book claims to bring together just war, casuistry, and virtue ethics, and Aquinas, I assert, provides the keys for this undertaking. Importantly, while concentrating on

Aquinas, I do not seek to suggest that his thought is solely representative of the classical just war tradition. Additionally, I do not propose that all of his medieval thought, parts of which strikes us as morally indefensible today, should be taken to enrich today's debates. However, I agree with those who believe that there is meaning to be found in medieval thought vis-à-vis today's international affairs.[23] The work of Aquinas is of particular importance for the just war tradition, as he linked together various streams of thought. In fact, Aquinas developed his argument by dialectically connecting his own position to the particular opinions of his predecessors, a procedure that especially revisionists reject.[24] Aquinas's own position on just war would become the authoritative statement that later thinkers used as a foundation for their own arguments.

Throughout the book I relate the Thomistic view of just war and limited force to the positions held by Walzerians and revisionists. In this endeavor, the book benefits greatly from Daniel Brunstetter's work on jus ad vim. Brunstetter has been the most prolific jus ad vim scholar and provided the first fully elaborated theory of the framework.[25] Importantly, Brunstetter seeks to follow the Walzerian outlook, and it is his conceptualization that revisionists reject as redundant. That said, Brunstetter does not follow Walzer blindly, as he engages with the thought of previous just war thinkers. His argument is thus instrumental in this book's attempt to provide a third-way reading that sides with neither Walzerians nor revisionists all of the time. In fact, as this book seeks to demonstrate, the jus ad vim project provides a wedge issue of sorts that points to the limits of the Walzerian theory of just war and suggests a limited return to the classical bellum justum and its idea of war as law enforcement. It will emerge that despite the disagreement about the viability of jus ad vim as an independent framework, Brunstetter's and my arguments share many concerns raised by the use of limited force. However, the objectives of this book are more limited. In contrast to Brunstetter, who engages with several manifestations of vis, this book argues about the morality of two specific forms of limited force only. That is due to the amount of detail the casuistical method requires. Furthermore, two pillars of Brunstetter's theory, namely his *jus in vi* (the just conduct of limited force) and *just post vim* (justice after limited force), are not developed explicitly. That is because this book reflects Aquinas's bellum justum, which did not develop the equivalents of *jus in bello* and jus post bellum as distinct sets of principles. Furthermore, by focusing on Aquinas, this book's perspective is firmly rooted in the Christian tradition, whereas Brunstetter considers both Western and non-Western voices.

The structure of the book is determined by its desire to investigate uses of limited force within the context of the fight for the just war tradition. The first chapter provides an overview of the rationale behind jus ad vim and explains how the concept has become drawn into this "fight." It also demonstrates the

contested nature of jus ad vim by exploring the main line of criticism of it. Next, the chapter turns to the polarized state of just war thinking and discusses the disagreements between Walzerians and revisionists, which have also inhibited the debate about jus ad vim. Based on the fundamental disagreements between Walzerians and revisionists on both substance and methodology, the chapter concludes that just war thinking would benefit from a third-way approach that sides with neither of the competing camps all of the time and that is capable of shedding light on jus ad vim imagined as the latest metaphorical front in the fight for the just war tradition.

The second chapter argues for a historical approach to just war as a third-way approach. It points out that while revisionists describe the Walzerian just war as the "traditional" approach, Walzer parts with the preceding "classical" just war, the prototypical historical approach, in several ways. Thus, the historical perspective provides a position from which one can speak to both "traditionalist" and revisionist approaches to just war. The chapter also provides a discussion of jus ad vim and the division between Walzerians and revisionists that traces the origin of today's debate to a historical disagreement between just war and regular war thinkers. Having treated three different approaches to just war, the chapter turns to a discussion of the concept of just war tradition, arguing that the just war tradition is broad enough to have more than one approach. However, the contemporary state of the field, due to its polarized nature, seems unfortunate. This assumption leads to the following chapter, which presents the casuistical method as a means of showing that there is a way for fruitful debate if its participants want it. By seeking to facilitate such a debate I hope to make a modest contribution toward avoiding a polarization *in perpetua*. Just war, as I understand it, should ultimately be about providing action guidance. Without wanting to be excessive in my use of metaphors, I assert that an unwinnable academic "forever war" imagined as the failure to engage each other on substantive issues will be to the disadvantage of the field of just war as a whole.

The third chapter introduces the method this book employs in its investigations of particular historical cases of uses of limited force. Traditional casuistry seeks to derive judgments about the rightfulness or wrongfulness of action by investigating particular cases. While Walzerians argue casuistically, the chapter explains how traditional casuistry constitutes quite a different way of moral reasoning. It demonstrates that the traditional casuistical method is grounded in historical awareness and, at the same time, approximates the rigor of analytical philosophers by following a number of fixed steps. The chapter thus presents casuistry as a method that is capable of blending the merits of the Walzerian and revisionist approaches. However, acknowledging the historical disrepute of casuistry as a method that has been abused to legitimize morally indefensible action, the chapter proposes to bolster casuistry with a virtue ethics element.

Carrying out "good" casuistry, it argues, depends on the casuist's moral dispositions. Aquinas's understanding of virtue can pave the way toward that recognition and will thus inform the verdicts on the specific cases the book investigates. Building on these specific judgments, the book is in a position to draw generalized conclusions about when particular military practices are morally defensible.

Having situated the debate about jus ad vim within the fight for the just war tradition as well as having presented the approach this book adopts, the second part turns to Aquinas's conceptualization of just war. Chapter 4 contextualizes the life and work of Thomas Aquinas. Chapters 5 and 6 provide the basis for developing the book's general arguments on the morality of targeted killing and limited strikes to enforce international norms that follow the casuistical investigations of specific historical cases. Chapter 5 contrasts the Thomistic understanding of the authority criterion with the conceptualizations of Walzerians and revisionists. Chapter 6 turns to Aquinas's remaining criteria of just cause and right intention. It points out that the Thomistic understanding of just cause deviates markedly from Walzerians and revisionists on the question of retribution but shares their concern that the contemporary legal understanding of self-defense is too restrictive. Regarding right intention, the Thomistic account, which is grounded in the moral virtues, differs distinctively from the Walzerian idea, while revisionists tend to ignore the criterion altogether. The chapter also notes how different conceptualizations of just cause and right intention have featured in the debate about the morality of limited force.

Part III of the book provides casuistical investigations of two specific manifestations of limited force as well as general arguments that build on this casuistry. The two manifestations to be investigated—targeted killings and limited strikes to enforce international norms—have been selected carefully. Limited force comes in many forms, and therefore a selection had to be made. Although investigating forms such as the imposition of military-enforced no-fly zones or the emerging use of cyber warfare would also have been possible, there are important reasons to concentrate on the two forms this book tackles.[26] To begin with, the casuistical method requires a certain number of cases that can be elaborated on, which would have been difficult to find regarding no-fly zones and cyber warfare. Second, both Walzer and Jeff McMahan, the leading revisionist scholar, have argued about the morality of using targeted killing and limited force to enforce international norms. There is thus a basis for investigating these practices before the background of the fight for the just war tradition. Most importantly, the two practices this book investigates provide the best basis for investigating the retributive dimension of vis. As Walzerians and revisionists reject the retributive just cause for war, targeted killings and limited strikes to enforce international norms allow for an original Thomistic argument that it is

hoped will spark debate among the two competing camps of just war. Chapter 7 provides the cases of targeted killings that guide the moral argument made in chapter 8. Following the same blueprint, chapter 9 accounts for the cases of limited uses of force to enforce international norms that chapter 10 argues about generally.

## NOTES

1. Eric Schmitt and Ben Hubbard, "Raid Targeting ISIS Leader Came after Months of Planning," *New York Times*, February 3, 2022, https://www.nytimes.com/2022/02/03/us/politics/isis-leader-killed-syria.html.
2. Moyn, *Humane*, 13.
3. John Kelsay, "General Suleimani, U.S. Policy, and Jus ad Vim," *Sightings*, January 9, 2020, https://divinity.uchicago.edu/sightings/articles/general-suleimani-us-policy-and-jus-ad-vim.
4. Walzer, *Just and Unjust Wars*, 4th ed., xiv.
5. See Johnson, "Practically Informed Morality of War."
6. O'Brien, *Conduct of Just and Limited War*, 4.
7. I borrow the term "neoclassical" from Brown, who defines this stream of just war as "drawing on the deep history of the discourse and applying it to modern conditions." See Brown, "Justified," 442.
8. Lupton and Morkevicius, "Fog of War," 39.
9. Neff, *War and the Law of Nations*, 58.
10. Walzer, "On Fighting Terrorism Justly," 484.
11. Walzer, *Just and Unjust Wars*, 4th ed., xv–xviii.
12. Frowe, "On the Redundancy of *Jus ad Vim*."
13. Other scholars have used similar language. Vaha, for example, speaks of a "war of ethics within the ethics of war." See Vaha, "Ethics of War, Innocence, and Hard Cases," 183.
14. See Brunstetter, *Just and Unjust Uses of Limited Force*, ch. 2.
15. On this point, see Steinhoff, *Ethics of War and the Force of Law*, 1.
16. For an overview about the multiplicity of positions, see Lazar, "Just War Theory."
17. Walzer, *Just and Unjust Wars*, 5th ed., 335.
18. For superb accounts of such attempts, see Moyn, *Humane*; and Hathaway and Shapiro, *Internationalists*.
19. O'Brien, *Conduct of Just and Limited War*, 2.
20. Enemark, "Drones, Risk, and Perpetual Force."
21. For a rare treatment of the praxis of punishment in contemporary international affairs, see Lang, *Punishment, Justice and International Relations*.
22. O'Donovan, *Just War Revisited*, 57.
23. See Bain, "Medieval Contribution to Modern International Relations."
24. Reichberg, "Historiography of Just War Theory," 60.
25. Brunstetter, *Just and Unjust Uses of Limited Force*.
26. See Brunstetter; and Heinze and Neilsen, "Limited Force and the Return of Reprisals."

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# PART I

# LIMITED FORCE AND THE PROMISE OF A THIRD-WAY APPROACH

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# 1

# Limited Force and the Fight for the Just War Tradition

While the prevalence of limited force is an aspect of contemporary international affairs no observer will deny, the need for establishing a distinct moral framework of jus ad vim, in addition to the established frameworks for war and peace, remains contested among just war thinkers. This chapter provides an overview of the rationale behind jus ad vim and explains how the concept has become drawn into the fight for the just war tradition. It starts with an account of Walzer's initial suggestion for a new framework to regulate limited force. The chapter goes on to argue that, following Walzer's initial proposal, a new generation of thinkers has sought to develop the new framework, and it provides an account of Brunstetter's conceptualization as the most elaborated account to date. The following section gives an overview of the contested nature of jus ad vim by exploring the main criticisms of it. The chapter then turns to the polarized state of just war thinking that has also inhibited the debate about jus ad vim. Based on the fundamental disagreements between Walzerians and revisionists about both substance and methodology, the chapter concludes that just war thinking would benefit from a third-way reading that sides with neither of the competing camps all of the time and that can shed light on jus ad vim imagined as the latest metaphorical "front" in the fight for the just war tradition.

## THE ORIGIN OF JUS AD VIM

In a new preface to *Just and Unjust Wars*, Walzer introduces a novel moral framework in response to the measures taken against the regime of Saddam Hussein prior to the 2003 Iraq war.[1] In what he calls jus ad vim, Walzer ponders a theory governing the just use of limited force that is independent from the jus ad bellum considerations of just war. For Walzer, the Iraq war that toppled the Saddam regime was an unjust war. In his eyes, the war neither was

seeking to counter an act of aggression nor was a humanitarian intervention. Rather, its objective was regime change, a justification that seems irreconcilable with his understanding of jus ad bellum. However, while Walzer opposes the war, he by no means intends to stay indifferent to the injustices committed by the Saddam regime. Reflecting on the sanctions that had been imposed on the regime in the aftermath of the 1991 Gulf War, Walzer imagines those as "an experiment in responding differently."[2] While he accepts that elements of the containment regime, such as the imposition of a no-fly zone in Northern Iraq, were acts of war in the legal sense, Walzer argues that they were markedly different compared to conventional warfare. In response, Walzer proposes a new moral framework of jus ad vim. While more permissive than jus ad bellum, it "shouldn't be an overly tolerant or permissive theory,"[3] and he suggests moral limitations to limited force that correspond to the established jus ad bellum and jus in bello principles.

Although it originated from his uneasiness about the 2003 Iraq war, Walzer's idea of jus ad vim also underpins his thinking about the morality of the so-called war on terror, and in fact much of the jus ad vim debate has subsequently concentrated on counterterrorism practices. Walzer argues that there is a "different 'feel'" to such operations, as they are neither outright acts of war nor acts of peacetime law enforcement.[4] As a consequence, he seeks to go beyond just war theory, as he identifies a need to "maneuver between our conception of combat and our conception of police work, between international conflict and domestic crime, between the zones of war and peace."[5] Walzer thus abandons what he normally sees as a clear dichotomy between war and peace, and his "maneuver" gives birth to jus ad vim as a distinct third moral framework. When the Obama administration significantly stepped up the practice of targeted killing as part of its counterterrorism policy, the concept of jus ad vim started to gain traction within just war debate, and it lost none of its relevance under the Trump and Biden administrations.

Only ten days after the 9/11 attacks, Walzer distinguishes between a "metaphorical war" against terrorism and the "real thing,"[6] expecting that the line between law enforcement and war paradigms would become blurred. In order to demonstrate the difficulty of applying either to counterterrorism practices, Walzer provides an example that illustrates his idea about jus ad vim.[7] Referring to a US missile strike against alleged terrorists in Yemen in 2001, Walzer hypothetically transfers the strike to Afghanistan, a zone of war where the United States was engaged in armed conflict, and to Philadelphia, a zone of peace within the United States itself.[8] Had the attack happened in Afghanistan, Walzer reasons, the United States would have been justified in killing the terrorists as "it is part of the awfulness of war that people actively engaged on the other side can legitimately be killed without warning."[9] Had the attack happened in

Philadelphia, however, Walzer asserts that the law enforcement paradigm would have had to be applied, and killing the terrorists with a drone strike would not have been a justifiable option.[10]

With regard to the Yemen attack, Walzer provides the rationale behind jus ad vim as a hybrid between the war and law enforcement paradigms. He conceives of Yemen as a zone in between war and peace. Its government is too weak to enforce the law and thus provides a safe haven for terrorists to operate. Walzer thinks that ideally the Yemeni government should be supported so that it can enforce the law. However, he accepts that military necessity can make the targeting of suspected terrorists in countries such as Yemen morally justifiable.[11] In other words, the concept of jus ad vim might function as a justification for counterterrorism operations; although legally acts of war, justifiable limited force should not be judged the same way as actual war because it resembles neither the quantum nor the duration of traditional warfare.[12] Walzer's preference would be that some sort of international policing action be attempted first, but in case such efforts failed, taking unilateral lethal action would be morally justifiable.

## Jus ad Vim beyond Walzer

Unfortunately, Walzer has never elaborated in more detail on his idea of jus ad vim. This task has been taken on by a new generation of just war thinkers. S. Brandt Ford defines vis as "an act of intentional killing of a person who is a culpable unjust threat, by a member of a military institution, acting on behalf of a legitimate political community which is not at war."[13] He speaks of a "hybrid ethical framework" that draws from just war principles and the policing paradigm.[14] For Ford, the major advantage from an ethical point of view is that the new paradigm, even though it might involve the use or threatened use of lethal force, avoids the full destructiveness of war. It should thus be seen as an attempt to confine the "dogs of war."[15] While Ford's conceptualization concentrates on targeted killing as a manifestation of limited force, for Walzer thinking about jus ad vim should not be limited to one particular practice. That is why Ford distinguishes between a "broad" and a "narrow" account of jus ad vim.[16] In contrast to the narrow account, the broad account also allows for uses of limited force against states, such as the enforcement of trade embargoes and the imposition of no-fly zones.[17]

The most prolific contributor to the broad account of jus ad vim has been Brunstetter, who seeks to "follow in the footsteps of Michael Walzer."[18] Brunstetter's conceptualization mirrors the initial rationale behind Walzer's call for a new distinct moral framework. In particular, Brunstetter detects a space for vis in circumstances wherein the law enforcement paradigm appears

to be too restrictive, whereas the amount of force that could be used under the war paradigm seems excessive.[19] He engages with a number of uses of limited force, including drone strikes, limited air strikes, the imposition of no-fly zones, and special forces operations. Brunstetter's work on limited force stands out, as he imagines jus ad vim as a larger research project. He seeks to address what he sees as shortcomings of the established just war framework by developing a distinctive framework for just uses of limited force. In order to do that, he proposes a set of principles adapted to the moral challenges posed by vis. In this sense, Brunstetter's moral argument echoes calls from a limited number of international lawyers who have also identified a need to introduce new rules for uses of limited force that seem to sit in between the legal frameworks of IHL and international human rights law (IHRL).[20] Importantly, while Brunstetter identifies a "crisis in just war thinking" vis-à-vis the use of limited force,[21] he emphasizes that he does not seek to "disqualify the just war framework altogether."[22] In other words, he upholds the just war framework for assessing the justifiability of large-scale war while hoping that the just use of limited force may be able to prevent such warfare.

In a nutshell, Brunstetter starts from the notion that limited force is morally distinct from war. Based on that assumption, he proposes to recalibrate the established just war framework to derive a new and distinct moral framework to be employed exclusively for the use of limited force. Brunstetter is of the opinion that limited force has the potential to be morally advantageous compared to conventional war because it is limited in scope, intensity, and destructiveness and also seems more predictable.[23] At the same time, however, Brunstetter recognizes that limited force is necessarily less capable of achieving the moral good a just war might be able to obtain. He refers to the more moderate objectives of limited force as "moral truncated victory."[24] As limited force is more circumscribed in nature, its ambition to establish justice needs to be more limited than what a just war may achieve. Brunstetter identifies two principles guiding the pursuit of truncated victory: the reestablishment principle and the containment principle. The former calls for the use of diplomacy in tandem with limited force. That way, reestablishing a modest state of order may be achieved. The latter allows for the use of limited force in urgent circumstances wherein the military action aims at the containment of imminent or ongoing threats.[25]

The concern that limited force needs to be limited in ambition also explains Brunstetter's point of departure regarding his suggestion for a new moral framework. In fact, jus post vim (justice after limited force) reasoning is so central to his conceptualization that it is the font from which the jus ad vim (the justice of using limited force) and jus in vi (the just conduct of limited force) principles follow.[26] Brunstetter grounds his reasoning in observations of state leaders who argue for the use of limited force. He puts a particular emphasis on the

language that has been used to justify the use of vis, as he identifies an "emergent moral vocabulary" that has been employed in the framework's defense.[27] In Brunstetter's eyes, state leaders have not only resorted to limited force; they also speak in the language of vis when they justify their decisions.

As part of his theorizing, Brunstetter adapts the traditional jus ad bellum criteria of just cause, last resort, proportionality, right intention, and legitimate authority in the light of the ethical challenges posed by limited force. Additionally, Brunstetter has proposed the new criterion of "probability of escalation," which seeks to avoid a transition of jus ad vim acts to large-scale war.[28] In the context of the escalation principle, Brunstetter introduces the "Rubicon assessment," which is supposed to function as a practical test aimed at preventing descending the slippery slope from limited force to large-scale war. The use of limited force aims at unleashing an amount of force that avoids triggering a conventional war: "The assessment that limited force is the appropriate level of response means making the decision not to cross the Rubicon, to rule out war."[29]

Crucial to the argument of this book, Brunstetter partly develops his framework of jus ad vim by engaging with the just war tradition. For him, there is meaning to be found in the just war tradition, as it helps him identify the right questions and provides principles that guide the exploration of answers.[30] One particular historical just war thinker he draws on is Bartolomé de las Casas (1484–1566), who, it is of interest to point out, drew heavily on the thought of Aquinas. That Brunstetter seeks to build on the work of earlier thinkers is an important observation to make because, as will become apparent shortly, much of recent just war thinking has been put forward by thinkers who show little to no interest in the tradition. As will also emerge, Brunstetter's engagement with the just war tradition creates some tension with his claim that he is following the Walzerian just war outlook. This tension, I assert, reveals itself most explicitly in his defense of punitive rationales for jus ad vim, which seem to align more closely with the classical understanding of bellum justum and its emphasis on international order.[31]

## Jus ad Vim and Its Critics

Not surprisingly, the call for a new distinct paradigm for uses of vis has not been embraced universally. Critics of jus ad vim have mainly concentrated on three criticisms: that no new theory is needed, that it is overly permissive, and that the new escalation principle is obsolete.[32] With regard to the first point of critique, opponents of jus ad vim hold that an independent moral framework to evaluate uses of limited force is "redundant."[33] Interestingly, the redundancy claim has been made both by so-called traditionalist and revisionist just war thinkers. Traditionalists, who generally seek to maintain the dichotomy between the ethics

of war and peace, suggest that limited force can be evaluated within either the war or the law enforcement paradigm. In other words, the traditional jus ad bellum framework, if "interpreted rigorously," can sufficiently regulate limited force.[34] Alternatively, Shawn Kaplan argues that Brunstetter fails to show that uses of vis cannot be covered by the law enforcement paradigm. In particular, he points to the possibility of considering uses of limited force as unilateral law enforcement.[35] Moreover, revisionists naturally reject jus ad vim in the same way that they reject a distinction between different moral domains for war and peace.[36] In fact, the exchange between Brunstetter and Helen Frowe about the intellectual merits of jus ad vim and the question of how to do just war theory, discussed in more detail shortly, demonstrates that jus ad vim has become a metaphorical battlefield in the fight for the just war tradition.[37]

Regarding the second point of critique, that jus ad vim is too permissive, C. A. J. Coady worries that the novel moral framework softens the description of political violence.[38] Suggesting that advocates of jus ad vim adopt too broad a definition of political violence, he argues that the duration of violence does not change its nature. In particular, Coady is concerned that introducing a jus ad vim framework will result in more frequent employments of force. In other words, for Coady, jus ad vim constitutes a slippery slope toward an increase in overall violence; it might bear the price tag of loosening the constraints on the use of military force. A related critique has been provided by Christian Enemark, who considers that armed drones, frequently the means of choice used to unleash vis, bring about such a sea change in military technology that neither the war, law enforcement, nor jus ad vim paradigms are capable of regulating the weapon's use. Enemark conceptualizes targeted killings carried out by drones as a method of risk management that cannot be captured by any of the three paradigms. In the ongoing US drone policy, Enemark detects "a kind of permanent or perpetual force (*vis perpetua*), indefinitely subordinating right to might."[39] Enemark's concern about perpetuating the use of limited force ties in closely with Samuel Moyn's soul-searching account of how the humanization of war risks losing sight of the long-held desire to abolish war.[40] Speaking in just war terms, the attempt to make the use of force more humane, to confine the dogs of war, may neglect the goal of peace that is supposed to guide any justifiable use of force. With regard to the probability of escalation criterion as the third main critique put forward against jus ad vim, critics do not deny the risk of escalation as a moral concern but hold that no distinct moral principle is warranted. For Kaplan, who provides the most elaborate critique of the criterion, the concern of escalation is already included in the proportionality criterion of jus ad bellum.[41] John Lango, in more abstract terms, rejects the escalation criterion as an independent principle but argues that "a theory of just and unjust uses of force should include a theory of just and unjust escalations."[42]

## THE FIGHT FOR THE JUST WAR TRADITION

In addition to the substantive critiques of jus ad vim, debate about the intellectual merits of a new moral framework has taken place before the horizon of a narrow intradisciplinary split between so-called Walzerians and their revisionist critics.[43] In the context of this disagreement, Brunstetter speaks of a "schism" in contemporary just war.[44] In order to grasp their fundamental disagreements about both substance and methodology, the following section discusses the respective approaches of Walzerians and revisionists, after which the chapter points out how debate about jus ad vim has been inhibited as a result of the two camps' disagreements.

### Walzer's Just War

Over the last four decades, Walzer has arguably been the most influential advocate of just war thinking. Walzer's seminal work, *Just and Unjust Wars*, remains widely read today, and his arguments have triggered considerable debate. In the preface of his book Walzer emphasizes that the way he sees the morality of war is unlike the way political or moral philosophers see it. For him, the condition of war is so dire that it seems irreconcilable with the enterprise of pure philosophical reflection. In consequence, Walzer "expresses ignorance about the foundations of ethics,"[45] as in his own words, his "main concern is not with the making of the moral world but with its present character."[46] In his opinion, it is the here and now that matters, and if he were to contribute to the debate about the foundations of ethics, he would probably get lost in that debate. As a result, he describes his book as expressing a "practical morality" because he does not directly engage "the most profound questions of moral philosophy."[47]

In addition, Walzer argues that the best method for practical morality is casuistical. He seeks to consider historical cases in order to derive judgments and justifications from them, emphasizing the value of the experiences men and women have during war.[48] In particular, Walzer objects to the approach of international lawyers who, no matter the circumstances, uphold the "legalist paradigm," built around the core principles of states' rights to political sovereignty and territorial integrity. Discounting the work of lawyers as "utopian quibbling," Walzer argues that law and morality do not overlap entirely, and international law is "in need of extra-legal supplement."[49] The legalist paradigm should not be seen as sacrosanct, and there should be certain "rules of disregard."[50] Walzer sees it as his work as a moralist to consider when the legalist paradigm should be abandoned. Arguing for exceptions to the legalist paradigm, Walzer's practical morality does not associate itself with any one school of morality.[51] Rather, according to Michael Glennon, Walzer suggests a "philosophical hopscotch"

that integrates various approaches,[52] including one of individual rights that gives rise to the rights of states, as well as utilitarianism.

Having noted Walzer's criticism of the legalist paradigm, however, we see that he himself at times employs a legalist reading of the just war, as he takes the legalist paradigm as his default position. As a result, he has an uneasy relationship with the classical just war that precedes the legalist paradigm and is the historical source of the laws of war. As Anthony Lang puts it succinctly, Walzer "draws on the just war tradition, though rather lightly at points."[53] In particular, arguably due to his background as a democratic socialist thinker, Walzer seems to have little interest in engaging with the mainly Christian roots of just war.[54] Importantly, these Christian beginnings emphasized that positive law, although undoubtedly important, was subject to the higher natural law.[55] Although Walzer objects to lawyers' literal treatment of the legalist paradigm and considers positive international law "radically incomplete,"[56] critics charge that Walzer builds his account around the bedrocks of the legalist paradigm and the domestic analogy, which subsequently "do the opposite of what his opening preface suggests."[57] While Seth Lazar's view that Walzer's "central commitment is to provide moral foundations for international law as it applies to armed conflict" is perhaps too narrow,[58] international law nonetheless takes on the function of a "frame,"[59] through which he sees the moral world.[60] At times the frame of international law leads him to argue against long-established moral principles, such as the requirement to discriminate between the guilty and the innocent, as he does in his controversial argument for the moral equality of combatants.

Not surprisingly, Walzer's just war theory has been critiqued as being in danger of falling into the traps of both conservatism and relativism. The trap of conservatism entails that Walzer removes the critical function of just war, in that he starts his assessment of the morality of war from the vantage point of the legality of war. At the same time, however, Walzer's just war may be considered to be relativist in the sense that his moral argument follows the development of the legality of war and thus emphasizes changes in international society over moral principles.[61] To sum up, while Walzer reasons from "historical illustrations," he engages with the historical just war tradition in a limited way only. He takes the legalist paradigm as his starting point and either defends or argues for exceptions to it.

## Walzer's Revisionist Critics

Walzer's interpretation of just war has been challenged ever since he first put forward his argument in 1977. While four early critics caused "cracks" in his theory,[62] during the last twenty years, according to McMahan, Walzer's most prominent revisionist critic, the cracks "have widened into gaping crevices."[63] The revisionist account has been put forward by philosophers working within

the analytical tradition who have meticulously scrutinized Walzer's argument. They accuse the Walzerian just war of having "so far failed to articulate a rigorous, detailed, theoretically unified, and plausible account of the resort to war."[64] While acknowledging that their own theory is "not as yet fully worked out," their goal has been to "develop a more plausible theory of the just war."[65] The main objective of revisionists is to write novel philosophy on war-related issues. While their thinking is shaped by how violence is being carried out in the real world, their motivation to provide analytical clarity often lets them ignore the complicated causal factors that are present in particular uses of force.[66] Relying on the American philosopher John Rawls's method of reflective equilibrium, they take Walzer's just war as the ruling theory, which must be checked for logical incoherence with the goal of constructing a better theory.[67]

In order to construct their arguments, most revisionists rely on thought experiments that are quite different from the "historical illustrations" Walzer employs in his case-based approach. Their often far-fetched or even otherworldly thought experiments underpin what critics call a "theoretical bias against the historical or contingent."[68] In their defense, revisionists hold that they see the objective of philosophy not exclusively as providing answers to real-life situations. Rather, for them philosophy is also about clarifying thinking before a possible engagement with real life. In that sense, engaging with the at times conflicting circumstances of historical cases is seen as a hindrance to arriving at philosophically pristine arguments.[69] The primary target of revisionists has been the prominent role Walzerians award to the state. Rejecting the domestic analogy, revisionists allocate moral responsibility for killing in war to individuals, not states. They hope to discredit Walzer's just war, which they describe as "a very state-based, collectivist approach to war," and argue for "reductive individualism,"[70] which is reductivist following the assumption that the rules that regulate killing in war are the same as those regulating interpersonal killing outside of war. The central argument of reductivism is that there exists only one set of moral principles, which applies all of the time, rather than distinct principles for different moral domains such as war and peace. Put differently, while Walzer starts by thinking about war, revisionists start by thinking "about the ethics of killing outside of war, then apply those principles to the case of war."[71] Revisionists are likewise individualists due to the claim that moral theory must concentrate on individuals rather than collectives such as nation-states.[72] They argue against central claims of Walzer's theory, including the logical separation between the jus ad bellum and jus in bello, the moral equality of combatants and the immunity of noncombatants.

## Walzer's Response

In response to revisionists, Walzer happily acknowledges that his interest has always been in the political debates of his time and that building a coherent

theory has never been his core focus.[73] For Walzer, today's just war debate falls into two camps: his camp, which considers just war to be about war, and the revisionist camp, which considers just war to be about moral philosophy. Walzer sees little practical significance in what McMahan calls the "deep morality of war."[74] As an advocate of a practical morality of war, Walzer delegates much of the revisionist just war to the academic ivory tower.[75] He feels uneasy about a type of academic discussion that is so different from the way he himself works. The problem he identifies is that it is mostly the philosophical purpose that matters to analytical philosophers and that the "cleverness of the design" trumps the engagement with the moral questions soldiers face in war.[76] As pointed out in the following chapter, such an impractical understanding, Walzer is right to note, violates one of the two key precepts of just war thinking as it has been understood historically. However, and perhaps ironically, despite Walzer's strong objection to revisionist just war thinking, his own way of reasoning, as indicated earlier, has at times had an uneasy relationship with the second pole of the historical tradition, namely its inherently historical nature.

Given the fundamental disagreements between Walzerians and revisionists, it seems impossible to achieve a methodological reconciliation. As the analytical just war seeks to discover the moral truth, it has little interest in dealing with real-world cases and prefers to resort to abstract thought experiments instead. Thus, attempts to make the methodological crevices between the camps less deep, although praiseworthy, are unlikely to lead very far. For example, Mathias Thaler, who distinguishes between productive and unproductive hypotheticals, has made such an attempt.[77] The problem with such bridging accounts, however, is that both sides would have to compromise parts of their core assumptions. In order to arrive at productive hypotheticals, revisionists would have to make their cases more like real-world cases, while casuists would have to simplify their presentation of cases. It seems unlikely that either side will accept such a compromise. The conclusion must be that both camps will have to continue to disagree about methodological questions. However, their disagreements should not be taken as a reason not to participate in debate about substantive issues.

## JUS AD VIM IN BETWEEN WALZERIANS AND REVISIONISTS

Debate about jus ad vim has been inhibited by a fight for the just war tradition in which competing camps disagree about methodological and substantive questions. The fact that debate about jus ad vim has been affected by this intradisciplinary split can be illustrated by a recent exchange between Brunstetter and Frowe on the intellectual merits of the framework. While the former thinker defends jus ad vim following Walzer's idea of just war, the latter provides a

revisionist critique. In particular, Frowe holds that jus ad vim as a distinct moral framework beside jus ad bellum is "redundant." Admittedly, Frowe's criticism of jus ad vim is not in all aspects inspired by revisionists' distinctive approach, as her rejection of Brunstetter's novel probability of escalation criterion demonstrates.[78] On this specific question, she joins other, nonrevisionist scholars in arguing that the established just war principles already include that calculation. However, parts of her critique clearly follow her reductivist individualist position. As she rejects the notion of having different rules for war and peace, she naturally sees no need for a third set of rules governing the use of limited force. At best, jus ad vim can, in Frowe's view, provide "a label for judging measures short of war, but the category lacks any genuine normative role."[79] Furthermore, Frowe's critique of jus ad vim is underpinned by the overall purpose of her just war approach—namely, to apply the tools of analytical philosophy to develop a moral theory that is more plausible than that of Walzerians. That is why she indicates that her objective is the philosophical purpose of finding the most ideal-type justification for the use of force, rather than engaging with the often messy circumstances and profound moral questions that warfare provokes.[80] In addition, Frowe resorts to a far-fetched thought experiment that is characteristic of many revisionist just war thinkers.[81] While Brunstetter's starting point, following Walzer, has been real cases of limited force, Frowe, in contrast, does not consider history in order to make an attempt at proving Brunstetter wrong.

## Brunstetter's Walzerian Defense of Jus ad Vim

Brunstetter begins his rebuttal by situating the conversation about jus ad vim within the wider debate between Walzerians and revisionists. He asserts that Frowe's understanding about the use of force derives from a worldview that is "fundamentally" different from his and implies that Frowe's rejection of jus ad vim is informed by her bias in favor of her own worldview:[82] "It is worth noting that Frowe's critique is not simply aimed at *jus ad vim*; it is much bigger than that. Rather, she implies that any just war logic other than the revisionist viewpoint is flawed."[83] Brunstetter goes on to acknowledge that his just war logic follows Walzer's approach. He expresses his interest in how the use of force is being deliberated in international affairs. For Brunstetter, the distinction between the domains of peace and war is a fundamental aspect of the world we live in, and denying this distinction puts the practical purchase of Frowe's moral argument into question.[84] In addition, in line with Walzer's concern for a morality that is informed by real-world events, he emphasizes that his interest in jus ad vim was triggered by the changing character of war. Similar to Walzer, whose interest in just war was sparked by the war in Vietnam (1954–1975), Brunstetter points to the US drone campaign as an example where he thinks that new empirical

evidence requires a moral investigation.[85] Consequently, Brunstetter suggests that parts of Frowe's critique of jus ad vim reflect an insensibility toward the moral conundrums that war, imagined as a social practice, provokes.[86] Relatedly, he sees little value in the far-fetched thought experiments that are commonly employed by revisionists. For him, the use of unrealistic hypotheticals is characteristic of the overall shortcoming of revisionism: that much of their reasoning has little practical significance.[87] Following Walzer's casuistical approach, Brunstetter provides *A Moral Argument with Contemporary Illustrations*, which for him should be seen as an attempt to explore how statecraft should be applied to limited force in all of its messiness.

## CONCLUSION

When Walzer first identified a need for a new moral framework governing the use of limited force, he had been influenced by the changing character of war. While the sanctions regime against Saddam Hussein's Iraq involved the use of force, it somehow seemed to escape the just war framework. From a legal perspective, the no-fly zone imposed in Northern Iraq was an act of war, but in Walzer's eyes the limited amount of force that was used to implement it called for a different moral framework to assess its rights and wrongs. That is why he introduced jus ad vim to just war debate. This novel framework is supposed to evaluate the morality of uses of limited force independently from the existing moral frameworks for war and peace. As uses of vis spread in the first two decades of the twenty-first century, the debate about jus ad vim started to gain traction.

From the start, however, jus ad vim has had its critics, the most fundamental critique being that no third moral framework is needed. This argument has most prominently been made by revisionist just war thinkers. At first glance, this might not seem surprising. After all, why should revisionists accept a third moral framework when they already deny the distinctiveness of war and peace? However, despite Frowe's partly substantive critique, it seems that the generally "confusingly polarized" state of contemporary just war has transferred to the moral issue that limited force presents.[88] Put differently, jus ad vim has become part of the wider fight for the just war tradition. This state of affairs, regarding both just war generally and vis specifically, seems unfortunate. What then can be done to revive debate about vis without becoming entrapped in the narrow intradisciplinary split in contemporary just war? The contribution that this book offers in the following chapters is to recover the classical just war in relation to limited force and, in its wake, to provide a third-way reading of jus ad vim that sides with neither Walzerians nor revisionists all of the time. The latter aspect may provide a means to overcome the intradisciplinary split

by sparking a meaningful conversation among its participants. Based on the historical approach to just war, the book supports revisionists in their critique that jus ad vim as a distinct moral framework is redundant. At the same time, however, the book sides with Walzerians in the assertion that limited force puts the principles of just war, in the way they are commonly applied today, under pressure. What is needed, this book argues, is not a distinct new moral framework but a recovery of the classical bellum justum in light of novel circumstances. As a first step in this undertaking, the following chapter sets out how this book's historical approach to just war differs from the Walzerian and revisionist approaches, before it turns to a casuistical analysis of actual uses of limited force, which will provide the jumping-off point for the general moral arguments the book makes.

## NOTES

Parts of this chapter draw from Braun, "Historical Approach"; "*Jus ad Vim* and Drone Warfare"; and Braun and Galliott, "*Jus ad Vim*."

1. Walzer, *Just and Unjust Wars*, 4th ed., xv–xviii.
2. Walzer, xiii.
3. Walzer, xv.
4. Walzer, "On Fighting Terrorism Justly," 484.
5. Walzer, "Terrorism and Just War," 12.
6. Michael Walzer, "First, Define the Battlefield," *New York Times*, September 21, 2001, http://www.nytimes.com/2001/09/21/opinion/first-define-the-battlefield.html.
7. Walzer, "Terrorism and Just War," 10.
8. Walzer seems to be mistaken when he refers to the strike as having taken place in 2001. The details he provides match a drone strike that occurred in November 2002. See Grossman, *Drones and Terrorism*, 39.
9. Walzer, "Terrorism and Just War," 10.
10. Walzer.
11. Walzer, 11.
12. Walzer, *Just and Unjust Wars*, 4th ed., xiv.
13. Ford, "*Jus ad Vim*," 65.
14. Ford, 64.
15. Ford, 70.
16. Ford, 64.
17. Walzer, *Just and Unjust Wars*, 4th ed., xiv.
18. Brunstetter, *Just and Unjust Uses of Limited Force*, 16. See also Brunstetter and Braun, "From *Jus ad Bellum* to *Jus ad Vim*"; and Brunstetter, "In Defence of *Jus ad Vim*."
19. Brunstetter, *Just and Unjust Uses of Limited Force*, 8.
20. See Brooks, "Drones and the International Rule of Law," 99.
21. Brunstetter, "In Defence of *Jus ad Vim*," 288.
22. Brunstetter, 286.
23. Brunstetter, *Just and Unjust Uses of Limited Force*, 3.

24. Brunstetter, 92–96.
25. Brunstetter, 23.
26. Brunstetter, 89.
27. Brunstetter, 3.
28. See especially Brunstetter, ch. 5.
29. Brunstetter, 140.
30. Brunstetter, 14.
31. See especially Brunstetter, ch. 4.
32. Brunstetter, "In Defence of *Jus ad Vim*," 287.
33. Frowe, "On the Redundancy of *Jus ad Vim*."
34. Plaw and Colon, "Correcting the Record," 185.
35. See Kaplan, "Are Novel *Jus ad vim* Principles Needed?"
36. For prototypical accounts of the revisionist just war, see McMahan, *Killing in War*; and Frowe, *Defensive Killing*.
37. See Brunstetter, "*Jus ad Vim*"; and Frowe, "On the Redundancy of *Jus ad Vim*."
38. Coady, "Preventive Violence," 212–13. Brunstetter accepts this critique and seeks to address it in his theory. See Brunstetter, *Just and Unjust Used of Limited Force*, 137–38.
39. Enemark, "Drones, Risk, and Perpetual Force," 374.
40. Moyn, *Humane*. I will return to this question in the conclusion.
41. Kaplan, "Are Novel *Jus ad vim* Principles Needed?"
42. Lango, "Just War Theory," 154.
43. For illuminating discussions of the contemporary state of affairs in just war theory, see Meisels, *Contemporary Just War*; Pattison, "Case for the Nonideal Morality of War"; and Peperkamp, "De Oorlog in de Theorie van de Rechtvaardige Oorlog."
44. Brunstetter, *Just and Unjust Uses of Limited Force*, 70.
45. Boyle, "Just and Unjust Wars," 85.
46. Walzer, *Just and Unjust Wars*, 4th ed., xxii.
47. Walzer, xxiii.
48. Walzer, xxii–xxiv. For a closer look at Walzer's casuistry see chapter 2.
49. Walzer, xx.
50. Walzer, 86.
51. Glennon, "Pre-empting Proliferation," 118.
52. Glennon, 120.
53. Lang, "Politics, Ethics, and History in Just War," 36.
54. Brown, "Michael Walzer," 205.
55. Biggar, *In Defence of War*, 15.
56. Walzer, *Just and Unjust Wars*, 4th ed., xxii.
57. Rengger, "Judgment of War," 150.
58. Lazar, "Just War Theory," 38.
59. Johnson, *Sovereignty*, 5.
60. As chapter 2 illustrates, Walzer's reliance on international law also has an impact on his casuistry.
61. O'Driscoll, *Renegotiation of the Just War Tradition*, 96–98.
62. Beitz, "Bounded Morality"; Doppelt, "Walzer's Theory of Morality"; Luban, "Just War and Human Rights"; and Wasserstrom, "Book Review."
63. Jeff McMahan, "Rethinking the 'Just War,'" *New York Times*, November 11, 2012, https://opinionator.blogs.nytimes.com/2012/11/11/rethinking-the-just-war-part-1/.

64. McMahan, "Prevention of Unjust Wars," 242.
65. McMahan, "Rethinking the 'Just War.'"
66. Lang, "Politics, Ethics, and History in Just War," 32.
67. For a discussion of revisionists' method, see Lazar, "Evaluating the Revisionist Critique."
68. Coates, *Ethics of War*, 9.
69. Frowe, *Defensive Killing*, 4–5.
70. Frowe, 13.
71. Lazar, "Method in the Morality of War," 35.
72. Frowe, *Defensive Killing*, 13.
73. Walzer, "Response," 104.
74. McMahan, "Ethics of Killing in War," 40.
75. For a recent defense of Walzer's approach along similar lines, see Meisels, *Contemporary Just War*.
76. Walzer, *Just and Unjust Wars*, 5th ed., 337.
77. Thaler, "Unhinged Frames." For a discussion of thought experiments and how they relate to the fight for the just war tradition, see chapter 3.
78. Frowe, "On the Redundancy of *Jus ad Vim*," 121–22.
79. Frowe, 128.
80. For an illustration, see her engagement with the rationale behind practitioners' decision to authorize force. Frowe, 126.
81. See Frowe, 121.
82. Brunstetter, "*Jus ad Vim*," 131.
83. Brunstetter.
84. Brunstetter, 131–32.
85. Brunstetter, 132.
86. On the idea of just war as a social practice, see Kelsay, "Just War as a Social Practice."
87. Brunstetter, "*Jus ad Vim*," 131.
88. Clark, "Taking 'Justness' Seriously in Just War," 331.

# 2

# The Neoclassical Just War as Third Way

As thinking about the morality of war has evolved over many centuries, it should come as no surprise that different approaches have been employed by a diverse group of thinkers. As the previous chapter has demonstrated, contemporary just war debate has been dominated by two diverging approaches. On the one hand one finds the Walzerian just war, which to a large extent underpins Brunstetter's conceptualization of jus ad vim. On the other one encounters the revisionist approach, which seeks to reveal the flaws of the Walzerian theory and develop a better one. This chapter seeks to suggest a third-way approach that is capable of both advancing debate about the morality of limited force and triggering a meaningful exchange between the two competing camps. Presenting the neoclassical, or historical, approach to just war as a third way, built around the pillars of historical understanding and practical application, this chapter makes a contribution toward refocusing moral debate on the changing character of war rather than on scholarly introspection. The neoclassical just war can do that, I argue, because it sides with neither Walzerians nor revisionists all of the time. While Walzerians, like the historical approach, reflect on historical cases and provide practical arguments, engaging with the ideas of previous thinkers is not at the heart of their thinking. Most revisionists, on the other hand, reject both pillars of neoclassical just war thinking.

Having those differences in mind, this chapter argues that a historical reading of just war can provide a distinctive perspective on the fight for the just war tradition and provides two illustrations. First it demonstrates that revisionists succeed in their critique of the moral symmetry thesis, which holds, against Walzerians, that just and unjust combatants are not each other's moral equals. However, neoclassical just war also establishes that it is not necessary to resort to analytical construction in order to arrive at this judgment. Rather, the historical approach makes evident that the root of Walzer's problematic argument lies

in his limited interest in the just war tradition. It will be noted that the origin of the moral symmetry thesis can be found in "regular war" thinking, a school of thought that was opposed to the classical bellum justum. By adopting the regular war thesis about a moral equality of combatants, Walzer parted with the just war tradition and provided revisionists a target at which they could direct the tools of analytical philosophy. Second, the historical approach can shed light on the debate about jus ad vim. I argue that Walzer's just war, grounded in the legalist paradigm, is too restrictive when it comes to finding the right answers to the challenges posed by limited force. That is why he imagines jus ad vim as a more permissive theory than his theory of just and unjust wars. In that sense, the chapter suggests, jus ad vim constitutes a limited recovery of classical just war thinking. Furthermore, a neoclassical reading of just war affirms the revisionist critique that jus ad vim as a distinct moral framework is redundant. However, although the classical bellum justum provides everything that is needed to assess the morality of vis, the chapter argues that there needs to be a discussion about how the inherited criteria apply to today's uses of limited force. Arriving at this conclusion, the way is paved for the task to which the remainder of the book is dedicated: to bring to bear the wisdom of the classical bellum justum on two particular manifestations of limited force. As this chapter engages with three specific interpretations of just war, it concludes with an exploration of the concept of just war tradition, arguing that despite fundamental disagreements between various just war approaches, the tradition is broad enough to have a place for all of them.

## "TRADITIONAL" VERSUS "CLASSICAL" JUST WAR

Taking center stage in this chapter is the neoclassical, or historical, approach to just war, which contrasts markedly with the Walzerian and revisionist approaches. First I need to clarify terminology—that is, to make a distinction between traditional and classical just war. "Traditional" just war is a term commonly used by revisionists to refer to Walzerian just war.[1] Following their purpose of taking Walzer's theory as the reigning theory against which they develop their own, it should not be surprising that revisionists consider Walzerian just war the traditional approach. Importantly, however, as seen from a historical perspective, the Walzerian approach and the foundation on which he builds is by no means the traditional one. In fact, Walzerian just war differs markedly from earlier modes of just war reasoning, so-called classical just war. Classical just war, however, is of little interest to revisionists, as they concentrate on Walzer's "traditional" conceptualization.

Classical just war is a moral tradition that is significantly older than traditional just war. During the Christian Middle Ages, after the influence of

Cicero (106–43 BC) and Saint Augustine (AD 354–430) in particular, just war first emerged as a systematized school of thought.[2] According to James Turner Johnson, between the late twelfth and the early seventeenth centuries, a "well-defined tradition" was in place, which "framed the resort to force in terms of the responsibilities of sovereign political rule and the political ends of order, justice, and peace, and established limits on conduct in the use of justified force."[3] Just war was imagined as a social practice that was part of a more comprehensive "theory of politics and statecraft."[4] Its focus was on the common good of a polity and thus led to the questions of legitimate authority, just cause, and right intention as primary criteria of evaluation. At the same time, it was recognized that there was a common responsibility of rulers for the global common good.[5] Thus, to use the terms that are in use today, the common good included the concern for national security and world order. As will be pointed out in more detail later, the classical idea of just war as statecraft recognized that the use of armed force would have a role to play in the maintenance and establishment of world order. In the words of George Weigel, the classical understanding held that "public authorities are morally obliged to defend the good of *concordia*, the peace of order against the threat of chaos."[6] To put it in more flowery language, classical just war thinkers believed that armed force could help make the world a better place.[7] Importantly, that "better place" would not be a world without conflict. Rather, it would be a "humbler sort of peace," a peace imagined as "*tranquillitas ordinis*: the order created by just political community and mediated by law."[8] Consequently, the modern Westphalian standards of political sovereignty and territorial integrity, the bedrock principles of the traditional theory, are at odds with the classical idea of bellum justum. As the late Jean Elshtain put it, "In classic just war thinking, with its origins in Christian theology, jurisdictional boundaries were less defined and less important."[9]

In addition, the modern near-consensus about self-defense as the only just cause for war removes the punitive use of force from the toolkit of statesmen and stateswomen, a tool classical just war considered to be of primary importance with regard to facilitating order, justice, and peace. As far as this book's recovery of the classical bellum justum is concerned, its substantive moral arguments on two specific uses of vis should be understood as returning to the idea of just war as statecraft aimed at the common good. This focus on the common good, a claim I make throughout, is one of the paths that leads me to the thought of Aquinas. Looking at contemporary debate, the idea of vis as a part of statecraft seems undertheorized indeed. Counterintuitively, perhaps, the focus on the common good will foreground the just cause of punishment. In today's moral debate, the retributive concept of punishment often comes with a bad name due to its association with vengeance or revenge. Aquinas's thought, however, demonstrates that retribution, not vengeance, can play an important role

in the regulation of limited force. As the substantive chapters point out, there is nothing personal, much less vengeful, about the punishment of the criminal, but his/her crime must be made manifest and annulled in order to uphold the legal and moral order. Last but not least, classical just war was mostly a casuistical tradition that used the resources of the tradition to consider specific situations and was willing to strike balances between conflicting principles, such as the dualism of permission and restraint.[10] In that sense, bellum justum, in contrast to significant parts of contemporary just war, was ultimately about action-guidance.

## THE GENESIS OF TRADITIONAL JUST WAR

With the coming of the modern age, the classical consensus started to break down, and the idea of just war was "lost as a basis for creative, systematic moral reflection on war."[11] The reason for this, culminating in the work of Hugo Grotius (1583–1645), was the development of a legalistic reasoning which, in contrast to the classical tradition, stressed the right of individual self-defense as enshrined in natural law. It also imagined government as the agent of the political community that held the responsibility of defending the collective. This conception marked a striking contrast to the classical understanding, which rested not on self-defense but on overcoming injustice and punishing wrongdoing.[12] It constituted the birth of traditional just war as a primarily legalist approach that emerged in tandem with the development of modern international law, which continues to inform what Walzer calls the legalist paradigm. In the wake of this development, the nation-state became the "fundamental unit of analysis,"[13] whereas classical just war had not been bound to any particular form of political organization.

While, initially, from the seventeenth century onward, just war reasoning guided the development of international law, this role was reversed in the "long nineteenth century" when most normative developments with regard to questions of war and peace originated from legal theorists. During that era, according to Cian O'Driscoll, "the whole weight of the just war tradition [. . .] was on the development of the jus in bello rather than the jus ad bellum."[14] As the emphasis on war conduct was considered to be the most effective way of restraining the horrors of war, jurists concentrated on the codification of the laws of war.[15] As a result, the laws of war became "seen in principally legal, rather than in moral or ethical terms."[16] This development ties in closely with Moyn's history of the attempt to humanize war. While the legal codification of jus in bello can be seen as a step in the right direction morally speaking, it has marginalized the jus ad bellum concern for when states should fight wars, or end them, in the first place. Moyn detects a climax of this development in the "forever wars," or vis perpetua,

of the post-9/11 era.[17] Furthermore, the traditional take conceived of itself as a mode of reasoning about constraints on war that predominantly seeks to propose "lawlike precepts," rather than "normative, philosophical principles."[18] Due to the descriptive and inductive nature of this tradition, "based largely on what custom and past practice (precedent) have sanctioned,"[19] its critics point to an inherently conservative nature, which only follows the developments of international law. This is a criticism that, as the previous chapter has noted, has also been made of Walzer.

## THE HISTORICAL APPROACH AND WALZER'S TRADITIONAL JUST WAR

With the rise of the legalistic mode of reasoning that followed the Westphalian order, just war thinking ceased to be at the center of normative thinking on war and peace. Only after the end of World War II did it undergo a "philosophical reappropriation."[20] Walzer has been one of the most important figures in this revival.[21] The reader might remember that in the introduction I stated that this book claims to bring together three revivals. Here we encounter the first. Importantly, Walzer emphasizes that his argument is casuistical in nature. Following his intention to provide practical moral arguments, Walzer seeks to engage with military history to learn from the experiences of soldiers in war. Consequently, judging from the way Walzer presents his approach, he seems to be in line with the casuistical thinkers of the pre-Westphalian era. In fact, some authors have pointed to casuistry as a main feature of Walzer's just war.[22]

Seen from a historical just war perspective, however, Walzer's just war theory, with its strong emphasis on the legalist paradigm, is in tension with the traditional casuistical method. Walzer's interpretation of just war, as his critics argue, is a juridical reading. According to the late Nicholas Rengger, in contrast to traditional casuists, Walzer presents "a just war account that takes the norms and conventions of the just war as themselves constitutive of the tradition and believes that there is no real need to refer to anything outside such norms or conventions."[23] Although Walzer acknowledges that morality and law do not entirely overlap and stresses the role of case-based reasoning, Rengger pointed out that as Walzer delves into his just war analysis, his initial claims subside and are replaced by "a rather more programmatic account of the tradition."[24] As a result, Rengger lamented, Walzer builds his account around the bedrocks of the legalist paradigm and the domestic analogy, which subsequently "do the opposite of what his opening preface suggests."[25] This does not rule out, as Rengger acknowledged, that Walzer maintains casuistical elements, but overall he adopts a reading of just war that is more juristic than casuistical. Traditional casuistry, in contrast, seeks to find a balance between

general principles and particular circumstances.[26] Walzer, however, downplays the importance of general moral principles by taking the legalist paradigm as his starting point. A traditional casuistical analysis, as presented in the following chapter, would not give such a prominent role to the legalist paradigm. Rather, for traditional casuistry,

> any given action [. . .] would have to be examined in the context of the "rules"—which are not merely laws, and nor are they fixed, but they certainly have a centre of gravity around a common set of precepts. [. . .] It is precisely in this "casuistic," case-based way that the tradition should offer its interpretation of events, and in that respect contemporary public international law, important though it unquestionably is, is only a small part of the story and cannot be assumed in advance to trump the other parts.[27]

In addition to this general critique of Walzer's casuistry, he also seems to commit what A. J. Coates has called the two principal forms of casuistry's abuse—namely, the problem of being either too deductive or too inductive.[28] The problem of being too deductive, related to the general critique of Walzer's casuistry, means that principles are articulated before turning to circumstances, and the consideration of circumstances that follows makes no contribution to the principles as such. We encounter this "abuse" in Walzer's embrace of the legalist paradigm, a set of principles and rules he arguably accepts too easily. As a result, his "historical illustrations" seem illustrative only at times, as they mainly take on the function of justifying the legalist paradigm's conclusions. It seems that Walzer had already arrived at those conclusions before he considered the historical circumstances, the obvious example being his argument for the moral equality of combatants, which puts him at odds with both the classical and the revisionist positions. Traditional casuistry, however, as Coates notes, is an "'experiential' method" in which the cases are more than embellishment; casuistry seeks to articulate, test, and refine moral principles based on experience that is shaped by historical circumstances.

The exact opposite takes place when Walzer's casuistry is too inductive. In this type of abuse circumstances are given excessive weight, resulting in a willingness to sacrifice well-established moral principles.[29] The prime example of this is Walzer's argument for the existence of a "supreme emergency."[30] Here Walzer, due to the particular threat posed by Germany during parts of World War II, is willing to abandon one of the just war tradition's core precepts, the idea of noncombatant immunity. To paraphrase Rengger, this abandonment of the just war tradition's center of gravity, its "dual theme" of permission and restraint,[31] is indicative of neglecting the background conditions of traditional casuistry. Traditional casuistry, while being led by the cases, did not operate

outside of established morality.[32] Judgments could not be derived from a metaphorical moral vacuum. (I have more to say on this in the following chapter.) As a result, Walzer's account sits uneasily in between the historical and purely analytical approaches to just war. While Walzer's limited interest in the origins of the legalist paradigm stands against the inherently historical nature of just war thinking, his stress on the practical nature of just war reasoning is very much in line with the historical approach. This latter aspect, in particular, sets him apart from the revisionist camp.

## THE HISTORICAL APPROACH AND ANALYTICAL PHILOSOPHY

The just war tradition as it emerged historically has been built around the pillars of historical understanding and practical application. At first glance, revisionists' skepticism toward historical reasoning and the impracticality of some of their arguments seem irreconcilable with the essence of the just war tradition. Their point of departure, as Coates demonstrates, indicates an ahistorical understanding of the tradition.[33] What these thinkers do is take Walzer's particular understanding of just war and equate it with all of the just war tradition; in their own words, the traditional theory. However, as the previous section has demonstrated, while Walzer's theory has been the dominant one in contemporary just war, he is in no way representative of the tradition. Equating Walzer with the just war tradition lets revisionists fall into a trap of sorts. For example, Walzer's argument for the moral equality of combatants claims that classical just war also held this position. That assertion, however, is incorrect. Walzer, as I argue in more detail later, misidentifies classical just war with a competing line of scholars, namely, the camp of "regular war," which considered jus ad bellum and jus in bello as independent from each other.[34] Thus revisionists, by considering Walzer's traditional theory as being representative of the just war tradition, are mistaken when they try to sell their rejection of the moral equality of combatants thesis as a novel moral argument. In a sense this is not surprising, as according to Coates revisionists are not interested in how Walzer's particular take relates to the broader tradition. Their main interest is in taking Walzer's theory as the reigning theory, which they seek to test and replace with a theory that is logically more coherent. In doing this, revisionists show little to no interest in engaging with the tradition of just war.[35]

Admittedly, Coates's critique of the revisionist just war does not apply to all revisionists to the same extent. In fact, as O'Driscoll points out, some revisionists do not completely deny a role to history, although their skepticism toward it manifests itself in their writing:

> Rather what these theorists object to is what they perceive as excessive deference to the authority of tradition, where tradition is understood as a very particular historical canon of thought on the ethics of war—classical just war doctrine. Their objection, then, is in some senses a very Protestant one: they display antipathy to received practice and belief, and repudiate the idea that ethical analysis of war must, if it is to be valid, be developed exclusively via the historical tradition.[36]

For example, McMahan, although he otherwise dismisses parts of the tradition as "obviously absurd,"[37] at times uses historical examples to illustrate his argument, as I show in the chapters on using targeted killing and limited force to enforce international norms. Moreover, McMahan occasionally engages with classical thinkers, including Aquinas.[38] That said, as Johnson has argued, he employs classical thinkers mostly as "a springboard for his own thought" rather than entering into a dialogue with them.[39] The same applies to revisionist thinkers like Cécile Fabre and David Rodin, whose work I engage with in the following chapters. On the whole, however, while acknowledging that some differentiation is in order, revisionists' interest in engaging with the thought of previous thinkers is marginal.

Moreover, most revisionists do not allocate much significance to the historical approach's pillar of practical relevance. It is this pillar of a "close linkage of decision-making and concrete action" that most revisionists lose when they elaborate on unrealistic thought experiments in order to derive a specific set of rules.[40] For example, in contrast to revisionists, classical thinkers like Thomas did not seek to develop detailed rules of appropriate conduct. Aquinas's economy on rules, as Coates notes, was not at all a sign of underdevelopment. Rather, it was the direct expression of an understanding of just war that stressed the contingent in decisions taking place in the heat of battle.[41] That is why Aquinas put great emphasis on the moral virtues in order to enable soldiers to internalize what it takes to act rightly under stress. As Gregory Reichberg points out, the moral reasoning of classical just war thinkers was "inherently practical" because they wanted to assist the decision-making of individual soldiers drawn into combat. Classical thinkers, unlike today's analytical philosophers, did not rely on an exclusively deductive way of reasoning built around far-fetched hypotheticals that seek to abstract from real-world events.[42]

It is not surprising, then, that one of Aquinas's three just war criteria, the criterion of right intention, has been neglected by revisionists. Revisionists basically see the requirement of right intention as making sure that the objective of the war is in line with just cause, implying that right intention is redundant as a distinct principle.[43] Not surprisingly, Frowe, in her revisionist treatment of jus ad vim, does not address the criterion of right intention at all.[44] The classical just war

of Aquinas, however, linked the belligerents' moral dispositions to the idea of just cause. Consequently, Coates argues that as seen from a neoclassical perspective, justice in war is first and foremost determined by the moral dispositions of the belligerents. He holds that the true indicators of the morality of war are virtues and vices, not rules and principles. Virtues and vices exhibit the moral aptitude, or inaptitude, of combatants because they undergird their moral characters and consequently incline or dispose them to conduct themselves in particular ways.[45]

In contrast, analytical approaches oppose moral dispositions on principle, as the stress on the moral character of the agent clashes with the emphasis on reflective and rule-based moral reasoning.[46] Put differently, for revisionists, only a mind without moral dispositions is capable of rational reasoning. For an advocate of the historical approach, the problem with revisionist just war theory is that war is no reflective activity. War as an unforeseeable endeavor is unsuitable for imposing meaning on it from the outside through abstract reasoning.[47] In line with Thomas, who stressed the functions of the intellect and the will, Coates points out that moral agency is both cognitive and volitional. Thus, even if a person knows the right action, that does not necessarily mean that he/she will act accordingly. Consequently, the moral agent needs rightly ordered virtues so that he/she wills the right that his/her intellect has discovered. The revisionist just war, due to its reliance on rules, neglects the function of the will. Revisionists assume that reason has a self-motivating power.[48] As a result, based on their concentration on rules, much revisionist just war argument struggles to provide action guidance to military practitioners who do not always have the luxury of taking time to reflect. One of the aims of this book is to point to the importance of character formation that comes with the acquisition of rightly ordered virtues and that seems especially relevant during war. Coates summarizes this aspect succinctly: "Ultimately, however, moral conduct has its roots [. . .] in the entrenched values, customs and institutions, in the prevailing moral culture or ethos of the society to which the agent belongs and under the influence of which his or her moral character has been formed. From this perspective moral values are assimilated and moral habits are acquired in a spontaneous and largely unselfconscious way."[49]

## THE DISTINCTIVENESS OF THE HISTORICAL APPROACH

This section introduces the historical approach to just war, a variation of which is employed in this book's substantive chapters that investigate uses of limited force. Importantly, the objective here is not to open up a metaphorical new front in the fight for the just war tradition. Rather, the historical approach can, because it sides with neither Walzerians nor revisionists all of the time, be taken to refocus debate on the moral conundrums raised by the changing character of war.

The neoclassical, or historical, approach inspires the work of thinkers who share an interest in the development of the just war tradition and ask what it can teach us with regard to the moral issues we face today. Many of these thinkers are drawn to the Christian roots of the tradition because they are theologians. Others are mainly exploring the tradition's Christian heritage as part of their interest in the history of international relations. Exemplars include Nigel Biggar, the late Joseph Boyle, Chris Brown, Joseph Capizzi, Coates, Elshtain, John Kelsay, Lang, the late William O'Brien, Oliver O'Donovan, O'Driscoll, Reichberg, Rengger, Henrik Syse, Weigel, and most prominently, Johnson.[50] These thinkers have in common the conviction that in order to understand the ethical categories of war, it is instrumental to learn about how these categories evolved over time. Benefiting from this historical knowledge, the moralist can then adapt the inherited categories to meet the challenges posed by contemporary warfare.[51] Here, thinkers do not consider the work of their predecessors to hold limited value only but fully engage with it. In Johnson's words, "To reflect morally on war is to enter the historical stream of moral reflection on war and seek to learn from it, not seek to escape it to some more abstract level."[52]

Importantly, this does not at all mean that inherited principles may not be challenged. As Brunstetter and O'Driscoll put it succinctly: "The point is that cultivating a sense of the past need not enslave us to it. Rather, the hope must be that it will bestow upon us a deeper, more variegated perspective on the challenges we face today."[53] Similarly, O'Brien argued that just war should provide moral guidelines for real-life issues rather than being seen as "a museum piece to be preserved for its own sake."[54] For example, Aquinas came to his conclusions about whether war could be just through dialectically linking his own position to the particular opinions of his predecessors. As Reichberg notes, thinkers like Aquinas started with historical thinking about the ethics of war before analyzing particular issues for their own sake. These thinkers were aware that the strength of their reasoning would hinge on the moral purchase of their starting point. Therefore they would build their theoretical arguments on a critical engagement with the thought of their predecessors. As a result they relied on a comparative hermeneutics that reviewed established positions for the didactic goal of finding the right foundation for what they hoped would be their own morally sound arguments.[55] For classical thinkers, as well as for today's advocates of neoclassical just war, this approach had several benefits. First, it provided the thinker with a broader range of arguments that could be elaborated on. Second, it exposed the thinker to arguments he/she did not necessarily support and thus encouraged self-reflection. Third, the thinker was made aware that a singular argument could be interpreted in ways that resulted in different or even opposing directions. Finally, it pointed to errors found in contemporary practice, which would put the thinker in the position to argue against them.[56]

Given this focus on practical matters, it is quite indicative for the classical conceptualization of just war that these thinkers, unlike many contemporary just war scholars, did not consider themselves theorists.[57]

Seen from the perspective of the historical approach, the problem with Walzer's just war is not that he employs a "philosophical hopscotch."[58] In fact, Thomas himself articulated a tradition that had been influenced by numerous sources, including philosophical, theological, political, legal, and military thinking.[59] Rather, the problem resides with Walzer's limited interest in the development of the just war tradition. Likewise, although revisionists come to conclusions similar to those of earlier advocates of just war, for example in their insistence that there can be no moral symmetry between just and unjust combatants, their thinking is difficult to square with classical just war. Claims that revisionists are recovering the older tradition are thus valid only to the extent that they reach the same or similar conclusions as the ancients.[60] The historical approach, in contrast, puts a premium on historical awareness. Johnson describes the moralist's task as one of "keeping faith." The moral life of an individual in a particular religious tradition should rely on the ethical guidance that can be derived by remaining "faithful" in his/her thinking and decisions to those historical exemplars who are remembered by the community of believers.[61] It should be noted that while Johnson is speaking for the Christian moralist here, for himself, the task remains the same for moralists operating within secular moral communities. In fact, in the same article Johnson explains how the just war tradition constitutes such a moral community.[62] In his historical work Johnson takes the medieval consensus on just war as his starting point and investigates how the course of history required changes to the inherited tradition. As Johnson himself puts it succinctly: "My historical investigations are about moral traditions and their implications in particular historical situations, and my efforts at applied ethics proceed by extrapolating from how just war tradition was applied in such historical situations to how its meaning should be understood in present contexts."[63] Kelsay argues that for Johnson, thinking about ethics is "fundamentally historical," while at the same time he does not deny a place to moral principles and rules.[64] While such reasoning at times may seem like an attempt at "commanding the headwaters of tradition,"[65] Johnson fears that neglecting the history of the just war argument comes with a moral loss.

## THE HISTORICAL APPROACH AS TRIGGER FOR SUBSTANTIVE DEBATE

In order to demonstrate how the historical approach to just war can illuminate contemporary debate, I now engage with two examples: the moral equality of combatants and jus ad vim.

## The Moral Equality of Combatants

One of the main points of disagreement between Walzerians and revisionists is the question of whether the moral equality of combatants thesis is morally defensible. Calling it "perhaps the strangest rule of war,"[66] Walzer argues that in war it does not make a moral difference whether or not the cause a soldier is fighting for is just. Following the laws of war, Walzer holds that during war just and unjust combatants are each other's legal *and* moral equals. In his own words:

> It is the sense that the enemy soldier, though his war may well be criminal, is nevertheless as blameless as oneself. Armed, he is an enemy; but he isn't *my* enemy in any specific sense; the war itself isn't a relation between persons but between political entities and their human instruments. These human instruments are not comrade-in-arms in the old style, members of the fellowship of warriors; they are "poor sods, just like me," trapped in a war they didn't make. I find in them my moral equals.[67]

Once in a state of war, a state of exception during which a different morality applies, soldiers, as instruments of their collective, are mostly liberated from the moral responsibility to judge the justice of their collective's war. Revisionists, in contrast, are unwilling to let soldiers off the moral hook so quickly. They argue that soldiers fighting for the unjust side cannot be the moral equals of soldiers fighting for the just side. Starting from the principle of individual self-defense, the only instance in which individuals may resort to lethal force, revisionists reason that the only legitimate just cause for war is self-defense. In consequence, if a state goes to war without having been attacked, it lacks just cause, and there are thus no legitimate targets for its soldiers. McMahan essentially argues that unjust combatants who kill just combatants commit a crime equivalent to murder in everyday life.

As hinted at earlier, the moral equality of combatants thesis, although defended by Walzer, would have been alien to classical just war thinkers. The root of this divergence lies in Walzer's interpretation of just war. Due to his limited interest in engaging with the just war tradition, he follows the legalist paradigm as his default position and incorrectly seems to equate legal and moral equality. Revisionists have pointed to this morally problematic simplification. A historical reading of just war essentially vindicates the revisionist position on moral symmetry but also shows that, in order to prove Walzer wrong, it is not necessary to resort to analytical construction. Before demonstrating how Walzer's employment of the legalist paradigm vis-à-vis the moral equality thesis is problematic, a few words must be said about the inherent connection between just war argument and positive international law. Both are "historically

conditioned realities" which, on their own, contribute specific viewpoints for reflection, as well as action, relating to international affairs. At the same time, just war and international law engage with each other.[68] As far as the (legal) equality of combatants is concerned, there were important historical reasons for thinkers like Francisco de Vitoria (1492–1546) and Grotius to argue for what Johnson has called a state of "simultaneous ostensible justice,"[69] in which, due to the difficulty of determining whose side's cause was just, both sides' belligerents should fight in strict observation of jus in bello restraints. These thinkers renegotiated the just war tradition in the direction of granting equal rights to combatants on both the just and unjust sides. As Johnson notes, the contribution made by Grotius was to introduce consensual arguments about restraint in the conduct of war, which marked the start of the concept of a law of armed conflict grounded in European cultural standards.[70] However, what these thinkers did not do is break with the conviction that objectively at least one side had to be in the wrong. Put differently, they paved the way toward legal equality, while continuing to deny the notion of moral equality.

Consequently, Walzer loses something by taking the legalist paradigm as his starting point. Upholding that paradigm without revisions in his argument for a moral equality of combatants, he seems to equate legality and morality. As noted earlier, Walzer's claim that the moral equality thesis is part of classical just war is mistaken.[71] There was, in fact, a group of earlier thinkers, the so-called camp of regular war, who argued for a logical separation between jus ad bellum and jus in bello. This line of thinking started with Raphaël Fulgosius (1367–1427) and extended over Balthazar Ayala (1548–84) to Christian von Wolff (1679–1754) and Emer de Vattel (1714–67).[72] However, these thinkers cannot be considered advocates of just war. In fact, regular war and just war were very different conceptualizations.[73] In this light, the revisionist critique of Walzer's moral equality of combatants thesis is by no means a new moral argument. Rather, it is a defense of, and in some respects a return to, the classical understanding of just war.[74] Beyond the specific question of a moral equality of combatants, I would like to suggest that the contemporary disagreement between Walzerians and revisionists can be better understood by revisiting the much older divergence between just war and regular war. Classical just war thinkers, including Aquinas, imagined bellum justum as a matter of unilateral law enforcement. As a result, there was a clear jus ad bellum/jus in bello distinction in classical just war. Additionally, classical thinkers did not imagine war as a state of affairs. Rather, they saw war as a multitude of individual acts, either just or unjust. Later regular war thinkers, in contrast, made a logical separation between jus ad bellum and jus in bello. Moreover, they imagined war as a state of affairs in which belligerents would encounter each other as moral equals. As O'Driscoll summarizes the idea of regular war: "The declaration of war between

two sovereigns instituted a state of affairs; whereby rival belligerents were constituted not as cops and robbers but as legally equals adversaries; who had opted to settle their differences by war; and who in so doing committed themselves to accepting the outcome of that war as conclusive; regardless of which course it favoured."[75] In consequence, the revisionist understanding of just war marks a limited return to the classical jus ad bellum/jus in bello distinction as well as to the understanding that war was an amalgamation of individual acts.[76]

What, then, should be made of Walzer's seeming equation of legality and morality vis-à-vis the moral symmetry thesis? Given that Walzer set out to argue for a "practical morality," it seems that the relationship between legality and morality in his work is a result of his pragmatic account of just war. Rather than only being a result of his limited interest in previous thinking, Walzer might be read as making this choice for a deliberate philosophical reason. In particular, it seems that Walzer, in his defense of the moral symmetry thesis, is stressing a key element of the just war tradition—namely, the reminder that even one's enemy never ceases to be a human being. This concern for the "'poor sods, just like me,'"[77] such as German soldiers who were forced to serve in the Wehrmacht although they despised Hitler's ideology, seems to undergird Walzer's reasoning. Those soldiers were "trapped in a war they didn't make,"[78] and the result of acting in accordance with their conscience would have been the death penalty. It is this sensibility to the moral conundrums of war, I suggest, that partly explains Walzer's embrace of the moral equality of combatants.

Importantly, classical just war was not at all dismissive of the reasoning that lets Walzer arrive at the moral symmetry thesis. For classical thinkers, granting equal rights to both the just and unjust sides amounted to a violation of natural right (*jus naturale*). However, Aquinas, centuries before Vitoria and Grotius, acknowledged that "the dictates of human positive law (*lex humana*) do not entirely overlap with those of natural law (*lex naturale*)."[79] As a result, Thomas could imagine cases in which unjust combatants, while still contributing to an act of injustice, were morally blameless and should thus not be prosecuted. In other words, while there could never be a moral equality as advocated by Walzer, there might be, depending on the circumstances, reason to grant equal rights. In that sense, it seems fair to argue that Aquinas's bellum justum was a pragmatic account that was sympathetic to the practical problems of statecraft. Biggar captures this argument succinctly:

> The fact that Christian tradition maintains a basically moral, punitive justification of war and of killing does not preclude it logically from endorsing laws of war that accord equal *legal rights* to all combatants. The justification for this is at once practical and moral: namely to stop the conduct of war from spinning out of all moral control, and so to limit its evils. This does not

> imply the logical impossibility that the same belligerency can be both just and unjust at the same time.[80]

Revisionists, as I have already noted, reject any such compromise. Uwe Steinhoff refers to their position as "moral fundamentalism," defined as the position that the moral rules for war conduct are the same as peacetime rules.[81]

To sum up, for classical just war there may be reasons to grant equal rights to combatants on both the just and unjust sides, but they would not face each other as moral equals. Thus, the historical mode of just war sides with revisionists regarding the moral equality of combatants. On top of that, putting this agreement on a broader basis, the historical mode of just war can be read as giving support to the revisionist idea of a distinction between a "deep morality of war" and the laws of war. For example, McMahan implies that the laws of war may have to be "action-guiding" while the "deep morality" may have to be limited to functioning as "a guide to individual conscience."[82] There are thus curious parallels between the revisionists' maneuvering between the "deep morality of war" and the laws of war on the one hand and classical thinkers' distinction between *lex naturale* and *lex humana* on the other.

## Jus ad Vim

As a third way, the historical approach can also make an important contribution to the debate about jus ad vim imagined as a distinct third moral framework. In particular, it can explain why Walzerian just war struggles with the spread of limited force. Drawing on regular war thinking, Walzer's just war presupposes that war is a legal relation or condition that is initiated when one or more parties activate it. Once activated, this legal relation institutes new rules as binding upon the people subject to that legal relation. As part of this process, Walzer's just war framework puts considerable emphasis on the distinction or threshold between war and peace. The argument for a distinct moral framework of jus ad vim reflects the delicate nature, or even arbitrariness, of this binary. Put differently, jus ad vim seemingly promises answers to moral challenges Walzer inserted into his just war framework when he adopted regular war thinking.

In addition, in contrast to classical just war and its different conceptualization of authority, Walzerian just war rests on the modern understanding of the inviolability of territorial borders and self-defense as just cause for war. As a result, many of the limited uses of force Brunstetter argues about in *Just and Unjust Uses of Limited Force*, such as limited punitive strikes to enforce international norms, conflict with Walzer's jus ad bellum. That, I suggest, is why Walzer, in his initial argument, suggested that a theory of jus ad vim "will certainly be more permissive than the theory of just and unjust war."[83] As the following chapters

on Aquinas's just war demonstrate, the classical understanding imagined just war as a tool of statecraft to maintain and establish international order. The logical consequence of this understanding was that rulers' right to use force was not limited by the Westphalian principles. Moreover, uses of force in the service of international order beyond today's standard just cause of self-defense were considered to be licit. The just cause of retribution especially, aimed at restoring an equilibrium of justice that had been disrupted by prior wrongdoing, featured prominently in classical just war. Aquinas, for example, did not list self-defense as just cause for war. While he accepted self-defense as just cause, the emphasis was on the retributive dimension of responding to injustice. In the light of the classical argument, Walzer's call for a theory of jus ad vim that is more permissive than his jus ad bellum can be read as an acknowledgment of some of the shortcomings of his theory of just and unjust wars. It seeks to remedy the inaptitude of his jus ad bellum to respond to limited violations of the international order. Waiving the Westphalian standards for the use of limited force and accepting just causes beyond self-defense can thus be seen as an attempt to recover parts of the classical understanding of just war. I hold that the need for jus ad vim marks a step back toward the classical conceptualization of war as law enforcement that contrasts with the idea of war as a state of affairs as found in regular war thinking and adopted by Walzer. In that sense, jus ad vim amounts to a wedge issue between just war and regular war. Therefore, I would like to suggest that Brunstetter's claim that he is following in the footsteps of Walzer is only partly true. Although he is building on a proposal Walzer himself has made, his theory of jus ad vim is also—in parts—a recovery of classical just war. The type of recovery Brunstetter provides, however, is of a limited nature only. While he adds restrictive retributive rationales for vis to Walzer's account of just war, it would be wrong to argue that Brunstetter is starting from a classical presumption against injustice that supported the use of armed force for the purpose of restoring an equilibrium of justice. As the following substantive chapters show, Brunstetter's and my argument on how specific uses of limited force should be regulated overlap to a certain extent, but our starting points of moral analysis differ.

That said, although there are signs of a limited recovery of classical just war in Brunstetter's account, the idea of a distinct third moral framework of jus ad vim is at odds with classical bellum justum. As I have pointed out in the first chapter, Brunstetter explicitly grounds his theory of jus ad vim in the independence thesis, the argument that jus ad vim is morally distinct from jus ad bellum. He therefore rejects the idea that acts of vis could be employed as a precursor or a part of just war. Relatedly, Brunstetter compartmentalizes the ethics of vis into jus post vim, jus ad vim, and jus in vi, categories that respond to contemporary just war's jus post bellum, jus ad bellum, and jus in bello. In contrast, classical

just war did not distinguish between such categories. For thinkers like Aquinas, bellum justum was meant to apply to all phases of war. The ruler's responsibility for the common good of his/her own political community and that of neighboring communities included the establishment of order, justice, and peace before, during, and after the use of armed force. For example, with regard to postwar justice, the intended peace was not simply one of an absence of violence, but one that establishes and maintains a just order. As a result, the responsibility of the victorious ruler would not end with the declaration of military victory.[84] Likewise, limited force would have had its place in the toolkit available to rulers. As a result, the Walzerian intent to carve out a distinct ethics of limited force conflicts with the classical just war that applied to all phases of the use of force.

Importantly, while classical just war does not sanction a distinct category of jus ad vim and therefore supports the revisionist redundancy claim, it by no means shares the revisionist outlook that there is no moral difference between war and peace. Once more, the Thomistic view sides with neither Walzerians nor revisionists. Aquinas distinguished between two moralities in the sense that only "general war," or *bellum generale*, imagined as a confrontation between two or more polities, could constitute a just war "in the most proper sense of the term."[85] That is why he, in his seminal definition of a just war, gave a prominent role to the authority criterion, which limited the right to wage bellum generale to the ruler who has been entrusted with the responsibility for the common good of the political community.[86] The only morally justifiable use of force by private individuals—namely, acts of proportionate self-defense that responded to an immediate threat—were acts of war in a limited sense only. For "force used by or directed against private individuals,"[87] Aquinas employed the term "particular war" or *bellum particular*: "Personal and civil business is differentiated from the business of war that regards general wars. However, personal and civil affairs admit of dangers of death arising out of certain conflicts which are private wars, and so with regard to these also there may be fortitude properly so called."[88] Consequently, bellum generale and bellum particular would not be subject to the same normative principles, and the former type of war would not be reducible to the rules that apply to private self-defense.[89] Thus, the revisionist argument that any individual has the authority to wage war in the broader sense, as seen from a historical just war perspective, is morally problematic. Aquinas, who systematized the just war thinking of his day, carried on his immediate predecessors' concern to employ the authority criterion as a means of restraint. The immediate problem canonists (theological lawyers) had been facing was a worrisome multiplicity of actors who all claimed to have the right to wage war, which had resulted in "widespread banditry and warlordism."[90] By arguing that only legitimate authorities without a superior authority possessed the right to wage war in the actual sense, these thinkers delegitimized any use of force by

actors who had a superior that went beyond the necessity of immediate self-defense. Distinguishing between force employed for public and private interests, then, the neoclassical reading of just war rejects the revisionist argument that any individual can potentially wage a just war, an argument I return to in chapter 5.

The distinction between bellum generale and bellum particular also relates to the redundancy critique of jus ad vim. Aquinas would have considered uses of limited force—such as the targeted killing of culpable unjust individuals on foreign soil as well as limited retributive air strikes to enforce international norms—as bellum generale when undertaken by legitimate authorities. Consequently, for Aquinas just war reasoning would have applied to such uses of force, and a distinct moral framework of jus ad vim, imagined as blending the ethics of military conduct and policing, would seem redundant indeed. In fact, while uses of limited force would have been acts of bellum generale, Aquinas would also have used the term "war" for today's domestic police uses of force. However, such a "war" would not have fallen under the bellum generale category and thus would not have been subject to the same prudential considerations.[91] The reason for this is that normally domestic employments of force by the state do not rise to the magnitude or duration of war between political communities. While there may be instances of bellum particular, such as sedition, which may call for a more permissive interpretation of the amount of force that can be employed, such cases constitute exceptional circumstances. More common during the days of Aquinas was the domestic employment of lethal force through the imposition of the death penalty. For Aquinas, the death penalty constituted an act of bellum particular carried out by a legitimate authority against a culpable wrongdoer. In fact, one particular reading of Aquinas that concentrates on the punitive dimension argues that he imagined the death penalty as the domestic parallel to war between political communities.[92] The death penalty, however, if executed after a trial that fairly establishes the culpability of the wrongdoer, is the most discriminating of employments of lethal force, as only the wrongdoer is targeted and there is no risk that innocent people will be harmed. As a trial to determine the right punishment takes place outside the heat of battle, Aquinas accepted that different limitations would apply to bellum generale. In other words, while both forms of force, domestic and external, constitute "war," they should not necessarily be subject to the same rules.

In this context, a turn to the history of international law can provide highly illuminating insights regarding jus ad vim. As Stephen Neff argues in his seminal study *War and the Law of Nations*, so-called measures short of war, such as interventions, reprisals, and necessity measures that flourished in the nineteenth century, were to some extent a limited return to the classical understanding of bellum justum.[93] While in the nineteenth century a positivist understanding of

war as an undertaking between sovereign and equal states to settle disputes prevailed, Neff argues that measures short of war constituted a return to the older understanding of war as a tool to establish or maintain justice:

> What distinguished measures short of war from a true state of war was—very broadly speaking—their over-all nature as measures of law enforcement, as opposed to measures of national policy, which were the preserve of true war. Measures short of war were therefore, in essence, the nineteenth-century version of just wars. There was a deep irony here. . . . Just wars had been, so to speak, 'demoted'. But they were still very much part of the international scene, even if they commanded less attention than wars, both at the time and since.[94]

The best known measures short of war were armed reprisals, limited uses of force carried out in response to an act of wrongdoing.[95] Reprisals were based on a three-step justification. First, in line with the classical understanding of just cause, they had to follow a previously committed act of wrongdoing. Second, the state seeking to carry out the reprisal had to give notice of the wrong and make the attempt to resolve the issue peacefully by requesting a reparation. Finally, if the peaceful attempt failed, the punishing state's response had to be proportionate to the initial wrongful act.[96] The contemporary United Nations framework, in contrast to the regulations that were in place in the nineteenth century, rejects the legality of limited military action by states, such as reprisals. As noted earlier, states may only resort to defensive force. Only the United Nations Security Council (UNSC) would be entitled to authorize armed reprisals, but it has never done so since its birth in 1945. The general idea of reprisals, however, is still present in today's international law via so-called countermeasures, a response that follows the same three-step process noted earlier, with the exception that they must not employ military force.[97] As a result, when Brunstetter advocates limited punitive uses of force that resemble reprisal action, he turns to a precedent that itself drew on a previous understanding, the classical bellum justum. Again, the need for jus ad vim can be traced to the restrictive nature of the post-1945 jus ad bellum on which Walzer builds his theory of just and unjust wars.

As Neff also shows, there are important precedents for the phenomenon of measures short of war in the thinking of Alberico Gentili (1552–1608). Gentili distinguished between the categories of imperfect and perfect war, which point to the later distinction between measures short of war and war proper. An imperfect war was considered to be a number of war-like acts that happened during peacetime. A perfect war, in contrast, marked a complete break of all relations between belligerents and therefore opened the door for large-scale

applications of force.[98] Neff demonstrates how Gentili's conception of imperfect war became enshrined in international law in the nineteenth century in the category of measures short of war, partly due to a change in the character of war, the rise of guerrilla and partisan conflict.[99] As hinted at earlier, as the scholastics, including Aquinas, employed the term *bellum* for both small-scale engagements and full-blown war, they had no special category of measures short of war. This is also the reason that this book, owing to its turn to Aquinas, uses the phrase "just use of limited force" in its translation of jus ad vim, rather than the alternative phrase "force-short-of-war."

In conclusion, as seen from a neoclassical just war perspective, Frowe is correct in her assessment that jus ad vim "can provide a label for judging measures short of war, but the category lacks any genuine normative role."[100] While Brunstetter is right that the spread of uses of limited force is morally worrisome, he exaggerates when he detects a "crisis in just war thinking" with regard to such uses of force.[101] For classical just war, any use of force employed by a legitimate authority constitutes an act of war, and thus the just war framework is capable of assessing the use of limited force. However, arguing against the introduction of a distinct third moral framework should not be understood as downplaying the moral significance of limited uses of force. Jus ad vim is a useful category in the sense that it helps us grapple with the question of how to regulate vis. As classical political thought did not distinguish between the modern paradigms of war and policing, there are interesting parallels with the recent argument for jus ad vim as a hybrid between the two, and consequently it can help delimit which rules should govern contemporary uses of limited force. That is the task this book dedicates itself to in its moral arguments about the practice of targeted killing and limited strikes to enforce international norms. In that sense, the book suggests moving beyond the redundancy claim that has attracted considerable attention but that has also to some extent distracted attention from the central concern behind Walzer's initial proposal: to respond to a worrisome expansion of limited force. By bringing to bear the classical just war of Aquinas on the issue of vis, the book foregrounds the tradition of bellum justum, which at its core sought to provide action guidance.

## CONCLUSION: *E PLURIBUS UNUM*? ON THE DIVERSITY OF JUST WAR

Having distinguished between three approaches—the Walzerian, revisionist, and neoclassical approaches—one might ask whether it its useful to view them as parts of a singular just war tradition. As O'Driscoll summarizes the core of the debate about the existence of a singular tradition: "A review of the literature on the just war tradition reveals many diverse views on which assumptions,

conditions, and commitments are key to, and definitive of, this tradition. Where one account of the just war tradition privileges a particular normative orientation as the *sine qua non* of the tradition, others will stress a certain historical origin as key, or a given chain of transmission as essential."[102] Not surprisingly, some authors, given the diversity of just war thinking, seem to reject the notion of a just war tradition.[103] To them, the differences in the various approaches to just war seem so great that one should not speak of a singular tradition. Regarding revisionists specifically, one might ask, in Brown's words, whether they are in fact "false friends of the justified war tradition?"[104]

In response to this question, Coates notes that traditions of thought are never univocal, as a tradition that speaks with one voice only ceases to be a tradition.[105] Put differently, a tradition can pronounce differences within a shared identity. In fact, as O'Driscoll argues, regarding just war there seem to be enough commonalities between the different approaches that classifying them as belonging to one tradition is justified; in his words, "many just war theories, one just war tradition."[106] This common ground, he holds, is built around the existence of "a common moral vocabulary and mode of reasoning, historically associated with the idea of just war, and an interpretive community engaged in arguing about how best to make sense of it."[107] Johnson provides an image that helps grasp the idea of a single just war tradition:

> I like to describe just war tradition as a whole by the metaphor of a river flowing through its delta toward the sea. The common stream forms, separates, and forms again, with the main flow now being carried by this channel, now by that one. When all its parts are understood together, just war tradition represents a cultural consensus on when war is justified and what limits should be observed in fighting justly.[108]

Johnson argues that the just war tradition constitutes a consensual tradition in Western culture about the permissibility and restraint of war.[109] Being of Christian origin, the tradition was secularized in the centuries that followed. In other words, the tradition's Christian values stopped to exist as specifically Christian ones and are understood today as a general part of Western culture.[110] Johnson identifies several particular streams of thought that combined in a cultural consensus, best summarized by Aquinas, about the justification of war: theology, philosophy, chivalric custom and military practice, canon and civil law, and precedents that governed the relations between princes.[111] He goes on to argue, however, that the consensus broke down under the conditions of modernity, and the various streams that had combined in the consensus started to become increasingly distinct again. In particular, the legal stream became the dominant one, while the theological stream fell dormant until the twentieth

century.[112] The emergence of traditional just war, discussed at the beginning of this chapter, fits this narrative precisely. For contemporary just war debate Johnson identifies four particular streams that together form the "broader just war tradition": manuals of warfare and rules of engagement as provided to military practitioners, international humanitarian law, the theological just war, and the academic debate about the rights and wrongs of war.[113]

Writing in 1995, Johnson could not foresee the emergence of revisionist just war and its distinctive approach. Revisiting Johnson's distinction between the four particular streams of the "broader just war tradition," it seems that with the arrival of the revisionists there has been a new tributary to the academic stream. While this new tributary has profound disagreements on both methodological and substantive matters with the Walzerian tributary, both share just war's core of the dual theme of permission and restraint. In consequence, both tributaries contribute to the stream that is the broader just war tradition. One of the objectives of this book is to show that, while concluding that a methodological reconciliation between the two tributaries seems impossible, there is no reason why there should be only a limited exchange on substantive issues. In consequence, the fight for the just war tradition is unlikely to end through one side being "victorious," but a rapprochement between the competing approaches seems not impossible. This book demonstrates that substantive just war questions can be illuminated in a valuable and distinctive way through the historical approach. In particular, the recapture of casuistry it advocates is about showing that what lies between the Walzerian and revisionist approaches is not some barren wasteland but a rich and productive field to which they can and should both contribute, but that is also effectively tilled with a distinctive set of tools supplied by the casuistical method. How the casuistical method can achieve this and how it functions practically are explained in the next chapter.

## NOTES

Parts of this chapter draw from Braun, "The Historical Approach," "James Turner Johnson," and "*Jus ad Vim* and Drone Warfare"; and Braun and Galliott, "*Jus ad Vim*."

1. See Frowe, *Defensive Killing*, 2.
2. Begby, Reichberg, and Syse, "Ethics of War," 316.
3. Johnson, "Contemporary Just War Thinking," 25.
4. Weigel, *Tranquillitas Ordinis*, 20.
5. For an account of how the classical understanding of sovereignty differed from the modern conceptualization, see Johnson, *Sovereignty*.
6. Weigel, "Just War Case for the War."
7. I have more to say on this theme in the chapters that lay out Aquinas's idea of *bellum justum*.
8. Weigel, "Just War Tradition and the World after September 11," 705.
9. Elshtain, *Just War against Terror*, 183.

10. Rengger, *Just War and International Order*, 83.
11. Johnson, "Contemporary Just War Thinking," 26.
12. This is the argument Johnson makes succinctly in *Sovereignty*.
13. Lucas, "Case for Preventive War," 58.
14. O'Driscoll, *Renegotiation of the Just War Tradition*, 19.
15. O'Driscoll, 21.
16. Rengger, "On the Just War Tradition in the Twenty-First Century," 355.
17. Moyn, *Humane*, especially chs. 7, 8.
18. Lucas, "Defense or Offense?," 50.
19. Lucas, 54.
20. Begby, Reichberg, and Syse, "Ethics of War," 323.
21. For a recent illustration of Walzer's continuing influence on contemporary just war debate, see Parsons and Wilson, *Walzer and War*.
22. Boyle, "Just and Unjust Wars," 87.
23. Rengger, *Just War and International Order*, 86.
24. Rengger, "On the Just War Tradition in the Twenty-First Century," 150.
25. Rengger.
26. Coates, *Ethics of War*, 313.
27. Rengger, *Just War and International Order*, 155–56.
28. Coates, *Ethics of War*, 28.
29. Coates, 29.
30. Walzer, *Just and Unjust Wars*, 5th ed., 250–67.
31. Johnson, *Can Modern War Be Just?*, 2.
32. For a discussion of Walzer's just war in the context of Rengger's critique, see Lang, "Politics, Ethics, and History in Just War," 39–41.
33. Coates, *Ethics of War*, 2–5.
34. Reichberg, "Historiography of Just War Theory," 71–74.
35. Coates, *Ethics of War*, 5–6.
36. O'Driscoll, "Divisions within the Ranks?," 49–50.
37. McMahan, *Killing in War*, vii.
38. McMahan, "Just Cause for War." Likewise, Rodin, another leading revisionist, builds his own arguments partly on the thought of previous thinkers. See Rodin, *War & Self-Defense*.
39. Johnson, "Contemporary Just War Thinking," 35.
40. Reichberg, "Historiography of Just War Theory," 65.
41. Coates, *Ethics of War*, 10.
42. Reichberg, "Historiography of Just War Theory," 65.
43. Coates, *Ethics of War*, 11.
44. Frowe, "On the Redundancy of *Jus ad Vim*."
45. Coates, *Ethics of War*, 11.
46. Coates, 12.
47. Coates, 13–14.
48. Coates, 15.
49. Coates, "Two Versions of the Moral Life in Time of War I."
50. See Patterson and Livecche, *Responsibility and Restraint*.
51. O'Driscoll, "Divisions within the Ranks," 50.
52. Johnson, "Thinking Morally about War in the Middle Ages and Today," 4.
53. Brunstetter and O'Driscoll, "Introduction," 2.

54. O'Brien, *Conduct of Just and Limited War*, 5.
55. Reichberg, "Historiography of Just War Theory," 60.
56. Reichberg.
57. Reichberg, 64.
58. Glennon, "Pre-empting Proliferation," 120.
59. Johnson, "Contemporary Just War Thinking," 25.
60. See Jeff McMahan, "Rethinking the 'Just War,'" *New York Times*, November 11, 2012, https://opinionator.blogs.nytimes.com/2012/11/11/rethinking-the-just-war-part-1/.
61. Johnson, "On Keeping Faith," 98–99.
62. Johnson, 109–14.
63. Johnson, "Thinking Historically about Just War," 247.
64. Kelsay, "James Turner Johnson," 180.
65. O'Driscoll, "James Turner Johnson's Just War Idea."
66. Walzer, *Just and Unjust Wars*, 5th ed., 346.
67. Walzer, 36.
68. Johnson, "Practically Informed Morality of War," 453.
69. Johnson, *Ideology, Reason, and Limitation of War*, 20.
70. Johnson, "Practically Informed Morality of War," 458.
71. Reichberg, "Historiography of Just War Theory," 71–74.
72. Reichberg, 72.
73. See Haggenmacher, "Just War and Regular War"; Reichberg, "Just War and Regular War." For an excellent book-length study, see Kalmanovitz, *Laws of War in International Thought*.
74. I am grateful to Cian O'Driscoll for pointing me to this curious parallel.
75. O'Driscoll, *Victory*, 97.
76. Regarding the latter aspect, an important caveat needs to be added. As I argue at the end of this chapter, the classical just war imagined just war as a confrontation between two or more political communities. In contrast to the revisionist argument, individuals could not claim the right to wage just war.
77. Walzer, *Just and Unjust Wars*, 5th ed., 36.
78. Walzer.
79. Reichberg, *Thomas Aquinas on War and Peace*, 240.
80. Biggar, *In Defence of War*, 196.
81. Steinhoff, *Ethics of War and the Force of Law*, 202.
82. McMahan, "Ethics of Killing in War," 40.
83. Walzer, *Just and Unjust Wars*, 4th ed., xv.
84. Johnson, "Moral Responsibility after Conflict."
85. Reichberg, "Moral Equality of Combatants," 188.
86. Aquinas, *Summa Theologica*, II-II, q. 40, a. 1. See chapter 5 for a direct quotation.
87. Reichberg, "Moral Equality of Combatants," 188.
88. Aquinas, *ST*, II-II, q. 123, a. 5.
89. Reichberg, "Moral Equality of Combatants," 188.
90. Johnson, "Thinking Morally about War in the Middle Ages and Today," 7.
91. Reichberg, "Moral Equality of Combatants," 188.
92. See chapter 6.
93. See Neff, *War and the Law of Nations*, chap. 6.
94. Neff, 216.

95. Another form were acts of retorsion. Retorsion responds to a legally permissible injurious or objectionable act with a legally permissible act that is also injurious or objectionable. See O'Brien, *Conduct of Just and Limited War*, 66.
96. O'Connell, "Popular but Unlawful Armed Reprisal," 339.
97. O'Connell, 338–39.
98. Neff, *War and the Law of Nations*, 119–20.
99. Neff, 164.
100. Frowe, "On the Redundancy of *Jus ad Vim*," 128.
101. Brunstetter, "In Defence of *Jus ad Vim*," 288.
102. O'Driscoll, *Renegotiation of the Just War Tradition*, 91–92.
103. See Walker, *Inside/Outside*, 106.
104. Brown, "Justified," 442.
105. Coates, *Ethics of War*, 5.
106. O'Driscoll, *Renegotiation of the Just War Tradition*, 109.
107. O'Driscoll, 115.
108. Johnson, "Just War Tradition and Low-Intensity Conflict," 148.
109. Johnson, *Can Modern War Be Just?*, 1.
110. Johnson, 5.
111. Johnson, "Just War Tradition and Low-Intensity Conflict," 149.
112. Johnson, "Contemporary Just War Thinking," 25.
113. Johnson, "Just War Tradition and Low-Intensity Conflict," 149.

# 3

# Recapturing Casuistry for Just War Thinking

This chapter introduces the method that is employed in the chapters that investigate the morality of targeted killing and limited force to enforce international norms. It proposes the recapture of traditional casuistry as a method for just war thinking. Importantly, the chapter provides an account of casuistry that engages with both its merits and potential shortcomings. In order to address the latter, it suggests bolstering the casuistical method with an account of virtue ethics. Having pointed to the safeguards that can be drawn from virtue ethics, the chapter next argues that casuistry can make a valuable contribution to the debate about thought experiments in contemporary normative political theory, a conversation that partly underpins the fight for the just war tradition. The final section lays out how this book's argument integrates both pillars of the historical approach—namely, historical understanding and practical application. Moreover, it argues that a revived just war casuistry approximates the rigor of revisionists and thus makes the resort to far-fetched hypotheticals obsolete.

## THE RECAPTURE OF CASUISTRY

The previous chapter presented the historical approach to just war as a third way in between Walzerians and revisionists. The discussion now turns to traditional casuistry as the specific method this book advocates. Relying on the casuistical method, which is employed to rule on the justifiability of uses of limited force, I will be in the position to draw generalized conclusions regarding when targeted killings and limited strikes to enforce international norms can be morally permissible. The method of casuistry has a long history during which it dominated moral discourse but also fell out of favor for considerable periods of time. At the outset, it needs to be said that traditional casuistry was mainly meant to provide action guidance, such as to priests in the confessional. In contrast,

the casuistical investigations that I undertake in the following chapters employ casuistry retrospectively when I rule on the rightness or wrongness of how the Obama administration acted in a specific case. While I am applying casuistry retrospectively, I hope that it will also inform decision-making on future action. This is how casuistry has been employed in medical ethics, and I am of the opinion that it would benefit the ethics of war and peace, too. Going back to the role casuistry played in the confessional, it should also be remembered that a good confessor does much more than listen to a penitent recount his sins. By investigating relevant circumstances and the attitudes, dispositions, and intentions of the penitent, the priest aims to make a moral diagnosis and to advance the moral education of the penitent.[1]

Debra Erickson defines casuistry as "a method of ethical reasoning that takes as its starting point a single moral dilemma, that is, a case. It then uses analogy to settled cases, reference to authoritative judgments, and the application of moral principles to resolve contested cases."[2] The definition Albert Jonsen and Stephen Toulmin provided adds a slightly different emphasis when they describe casuistry as "the analysis of moral issues, using procedures of reasoning based on paradigms and analogies, leading to the formulation of expert opinions about the existence and stringency of particular moral obligations, framed in terms of rules or maxims that are general but not universal or invariable, since they hold good with certainty only in the typical conditions of the agent and circumstances of action."[3] In other words, casuistry should be seen as providing answers to what can be described as "cases of conscience." It seeks to provide action guidance for situations where the morally rightful response seems unclear. It helps the casuist to consider the available options and to choose a morally justifiable one that consequently relieves the conscience that has been troubled.[4] 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.[5] Such top-down approaches start from the assumption that it is theory that should determine right or wrong in particular situations rather than the other way around.[6] Casuistry, in contrast, seeks to derive judgments about the rightfulness or wrongfulness of action by investigating particular cases. In doing that, casuistry does not associate itself with any ethical theory. While most classical casuists relied on natural law, they did not resort to any particular theory to arrive at their conclusions.[7]

Contemporary casuistry is a method that builds on the insights of medieval theologians, clinical experiences of today's bioethicists, and the commonsense judgments of nonexperts.[8] While its roots go back to the Stoics and the thought of Cicero, casuistry had its heyday during the fifteenth and sixteenth centuries, when it was employed by Roman Catholic and Anglican moral theologians.[9]

In our times, as a result of developments in medical ethics casuistry has had a revival since the 1960s, of which Walzer's *Just and Unjust Wars* was one part. Among the most prominent casuists in this revival were John Arras, Jonsen, Richard B. Miller, and Toulmin.[10] As the attentive reader will have noticed, the revived interest in casuistry marks the second revival this book seeks to integrate in one just war argument. There are several contemporary versions of casuistry, which differ in detail. The following account concentrates on Jonsen's version, which is modeled on the approach upheld by the theologians of the fifteenth and sixteenth centuries.[11]

The core components of a casuistical investigation are an instant case, a paradigm case, and additional cases that take on the function of a conduit between instant and paradigm cases. The actual analysis starts with the instant case, whose morality it seeks to investigate. At the beginning the morphology of the instant case is laid out. The morphology of a case is defined as "the interplay of circumstances and maxims."[12] The circumstances are the "who, what, when, where, why, how, and by what means" of a case.[13] They form the descriptive heart of a case.[14] Circumstances, however, are not the most important element of the case. That position falls to a case's maxims, defined as "brief rule-like sayings that give moral identity to the case."[15] It is the work of the casuist to identify the maxims present and make a judgment about which maxim should govern the instant case. At times the casuist will adapt or replace maxims.[16] For example, the discussion of the criterion of just cause with regard to uses of limited force will start with the maxim that "punishment is not a just cause for war." This maxim functions as the starting point of most contemporary just war thinking, including both Walzerians and revisionists. The discussion, then, considers cases in which it seems doubtful that this maxim should be maintained and seeks to answer the question of how it should be adapted. As this book revisits the Thomistic just war, the casuistical analysis is informed by Aquinas's account of Christian ethics. Aquinas accepted self-defense as a just cause for war but concentrated on retribution as the prototypical just cause.[17] Thus there will be food for thought as to whether self-defense should be the only just cause for uses of limited force.

Granted, taking Christian moral principles as the baseline of analysis will inevitably lead to the charge of moral particularism. In fact, critics hold that in today's (Western) secular societies, characterized by a multitude of moral approaches, Jonsen's model fails to generate consensus, as there is no longer a universally accepted morality as existed during the heyday of casuistry in Christian Europe.[18] However, it seems questionable that there can ever be morally "neutral" interpretations in the first place, and arguably, just war debate would benefit from a conversation between its different participants, which this book hopes to spark.[19] In this context it is worth noting, as Lang does, that even

Walzer's influential secular account that seeks to provide a universal language of just war unfolds from within a "particularly American liberal" context and will be of limited appeal in other parts of the world.[20] I am of the opinion that today's increasingly diverse world calls for a conversation among world religions about common norms regarding the use of armed force.[21] That is why the late Hans Küng's plea for a "new world ethic" built around shared ethical principles on which all can agree continues to be highly relevant.[22] However, the attempt to find common ground should not, and does not need to, result in throwing one's own tradition overboard. On this question I draw inspiration from O'Brien, who also acknowledged the Catholic tradition as the source of his writing, without seeking to imply that there may not be just war arguments of similar or even superior quality that draw on other traditions.[23]

The next step is to line up cases in a certain order, the taxonomy of cases. The casuist starts the taxonomy with the paradigm case. This case's resolution is commonly either accepted as morally appropriate or rejected as clearly wrong. Jonsen uses a succinct example that seems fitting for just war thinking: "Just as an Athenian general might place his strongest and most aggressive soldiers in the forefront of the battleline, so the casuist seeks out those cases [. . .] that demonstrate the most obviously, unarguably wrong (or right) instance."[24] Elaborating on a case that is commonly accepted as clearly right or wrong provides the casuist with a rich basis of comparison. The taxonomy unfolds by comparing the instant case with both the paradigm case and other, less clear, cases. In this sense, casuistry is a bottom-up inductive process that employs a settled paradigm case in order to make judgments regarding novel cases. Additional cases that are not as clear as the paradigm case are crucial for the investigation, as they allow for second thoughts about the rightness or wrongness of the action taken in the instant case. In each case under consideration, the casuist raises the question of whether the changes in circumstances require an adaptation or even replacement of the maxims identified initially in the instant case.[25] It goes without saying, then, that the cases under consideration must be portrayed in sufficient detail, as instances of the use of lethal force and the decision-making leading up to them are often complex. Simplifying the cases has a negative impact on their purchase in the moral evaluation.

Having completed the taxonomy, the casuist can reach the verdict. Approaching this conclusion, casuistry pays attention to the "kinetics" of a case. The casuist tries to identify the "moral movement" that cases impart to each other.[26] The idea is to identify the moral motion imagined as a shift in moral judgment between the paradigm case and the other cases. In lay terms, a compare and contrast of cases enables the verdict on the instant case. As a result the casuist will be able to make moral judgments about the rights and wrongs of how the cases were resolved.[27] In order to detect this movement, it is crucial to consider the interplay

between maxims and circumstances because the relevance of a maxim depends on the circumstances of the case.[28]

Importantly, while the basic idea of casuistry is to be led by the cases, the casuist does not have to abandon general principles. For traditional casuistry, balancing general moral principles and the demands of particular circumstances is fundamental and requires "intellectual ingenuity."[29] As David Smith puts it succinctly: "Something is not made a work of casuistry by the inclusion of some discussion of specific problems; it is not disqualified as casuistry because its author has made some abstract or general commitments. But to call it casuistry tells us something about priorities in ethical reasoning."[30] Consequently, casuistry has a response to Immanuel Kant, who himself preferred theory for action guidance and had little regard for deriving moral judgment from an investigation of cases: "Such a procedure turns out a disgusting mishmash of patchwork observations and half-reasoned principles in which shallowpates revel because all this is something quite useful for the chitchat of everyday life."[31]

That said, however, Kant had a point at least in the sense that the interplay between cases and general principles can cause tension. In fact, such tension has been a common feature of casuistry throughout its history. A recent manifestation of the conflict between cases and general principles can be found in Walzer's supreme emergency argument, mentioned in the previous chapter. The reader might recall that Rengger criticized Walzer for abandoning just war's "center of gravity" by arguing against the concept of noncombatant immunity. While Walzer makes an argument that seems irreconcilable with just war's dual theme of permission and restraint, there are many examples in which practical compromises could be achieved. In fact, in some respects the Christian just war tradition is the very result of such a determination. It can be seen as a casuistical response to the ancient Christian moral principle of "thou shalt not kill."[32] Augustine's reflections on just war, partly a response to the challenge the warring Roman Empire was posing to the Christian conscience, were aimed at reconciling Jesus's teaching on nonviolence with the Decalogue's demand of love of neighbor.[33] The latter demand could require the use of force to help a neighbor who was unjustly attacked. As O'Donovan puts it, in the Christian just war "we find in its sharpest and most paradoxical form the thought that love can sometimes smite, and even slay."[34] At the same time, however, while he accepted other defense, the bishop of Hippo rejected the use of force for individual self-defense.[35] What shows through here is the theme of permission and restraint that is just war's center of gravity.

Looking at the contemporary Catholic teaching on just war that starts from what has been called a "presumption against war" and differs markedly from an earlier "presumption against injustice," the changing character of war leads to a new argument that its defenders see as in line with just war's center of gravity.

What led to this adaptation of the inherited just war argument was in a sense a casuistical reflection on the destructiveness of modern war as expressed in the Franco-Prussian War (1870–71), the two world wars (1914–18 and 1939–45), and the advent of nuclear weapons (1945).[36] While there is no room here to provide a detailed history of casuistry, it should be noted that the canonists and theologians of the medieval period, including Thomas, derived their general principles from multiple sources that had to be reflected upon in the light of current circumstances: the Bible, the Church Fathers, decrees of Church councils, and the theory of natural law.[37] As a result, this book's approach of providing general moral arguments that build on Aquinas's ethics on the basis of a preceding casuistical investigation of specific cases follows a long history of moral reasoning. It is thus able to resolve the tension between general principles and the idea of being led by the cases.

As this book derives its moral principles, its center of gravity, from Thomistic ethics, it is situated within Christian just war generally and Catholic social thought (CST) specifically. Having said that, I acknowledge that there might be other Thomistic interpretations of uses of limited force. Casuists understand that colleagues may arrive at different judgments on the same case. Therefore I am happy to accept that my defense of limited retributive force will be rejected by other Catholic thinkers who also build on Aquinas. The method of casuistry allows for more than one reading of Aquinas that can claim to be a faithful interpretation. To give just one example, my interpretation of Thomas is more restrictive than that of O'Brien, who could imagine morally justifiable uses of nuclear weapons.[38] The same pattern, it is worth mentioning, extends to CST generally. In the words of Joseph McKenna, "General rules of conduct can be established readily enough. Circumstances, however, alter cases, in the sense that varying concrete facts bring into convergence varying combinations of principle. In judging cases, then, moralists often disagree sharply on the weights they assign to the relevant facts. Where this is true, it is more accurate to speak of *a* Catholic view than *the* Catholic view."[39]

In a similar way, there might be disagreement about the applicability of Aquinas to the contemporary moral challenges the book seeks to address. After all, today's circumstances are radically different from those of medieval times. In response, it should be noted that this book's argument does not follow Aquinas blindly and in several aspects breaks with what appears to be the dominant reading of him, for example in its interpretation of the doctrine of double effect (DDE) regarding targeted killing.[40] It is through an acknowledgment that there may be different Thomistic arguments that this book's generalized conclusions on uses of vis, which follow on the casuistical investigations, should be understood. While the casuistical investigations rule on the justifiability of particular historical cases, the book also seeks to suggest general rules of conduct

with regard to targeted killing and limited force to enforce international norms. Importantly, suggesting such general rules does not contradict its case-based reasoning. Casuistry is not just about resolving particular cases. It is a method that can lead to new moral insights, including new moral principles.[41] In that sense, although he subscribes to Walzer's casuistical approach that differs from traditional casuistry, Brunstetter's novel probability of escalation principle could be seen as such a new moral insight. That said, any legitimate authority considering the use of limited force will have to interpret the circumstances of the case at hand. The general rules this book presents may guide that interpretation, but they cannot replace the consideration of circumstances.[42] The limited role of the moralist expressed here follows the conceptualization of classical just war thinking discussed in the previous chapter.

## BOLSTERING CASUISTRY WITH VIRTUE

Not surprisingly, as casuistry amounts to an act of "prudential reasoning," it is demanding for those who seek to employ it. Casuistry done well requires that it be used virtuously. Otherwise it can degenerate and be used to legitimize morally unjustifiable action. In fact, as will be noted shortly, it was such an improper use of casuistry that caused its historical disrepute. That is why the following section suggests that casuistry should unfold within the frame of virtue ethics, which is meant to function as a safeguard against what Jonsen and Toulmin called the abuse of casuistry.

Virtue ethics is the name given to the modern revival of Aristotelian ethics, an ethics Thomas incorporated into his Christian account. It is considered to be a part of normative ethics that is grounded in the virtues, which are imagined as characteristic habits of excellence. In contemporary scholarship, it seems, a reappropriation of virtue ethics has been taking place.[43] Highly relevant to this book, Michael Skerker notes that the revival of virtue ethics in the 1980s broadly coincided with the revival of just war theory that was partly triggered by Walzer, but there was no scholarship that brought the two together.[44] Looking at the field of military ethics today, it has been taking a keen interest in the military virtues, especially with regard to the education of future military leaders.[45] This book falls within this category. Virtue ethics marks the third revival, besides those of just war and casuistry, that this book seeks to integrate in its Thomistic just war casuistry. Virtue ethics seeks to foster virtues that identify the actor as a moral agent and at the same time help the actor to become a better person. This approach is unique in the sense that it favors the decision maker's character over rules or theories of moral decision-making.[46] The embrace of virtue has direct relevance for casuistry, as it leads the casuist toward a more conscientious consideration of circumstances.[47] Crucially, virtue ethics is highly relevant for

just war thinking. That is because just war criteria must be applied by decision makers; they cannot apply themselves. More generally, rules are in need of virtues, as rules alone have neither the capability to make good moral judgments nor the capacity to sustain moral action. In consequence, just war criteria, such as legitimate authority, just cause, and right intention, are determined by the character of those who apply them.[48]

I am of the opinion that the method of casuistry can be strengthened by the use of virtue ethics. As noted earlier, carrying out "good" casuistry depends to a large extent on how the method is employed by the particular casuist. Unfortunately casuistry is liable to abuse. Its historical disrepute provides important lessons for the attempt to bolster it. Casuistry's fall from grace was mainly caused by the doctrine of moral probabilism. The Dominican Bartolomeo Medina (1528–80) defined that doctrine as follows: "It seems to me that, if an opinion is probable, it is licit to follow it, even though the opposite opinion is more probable."[49] In other words, probabilists held that credible questions about the validity of a law may be sufficient to discredit it.[50] As a practical consequence, probabilist casuistry, its critics would charge, could lead to verdicts that seemed entirely arbitrary. The most influential of casuistry's critics was Blaise Pascal (1623–62), who in his satirical *Les Lettres Provinciales* mocked the distortions of casuistry through the doctrine of probabilism. It seemed that casuistry delivered a "lax treatment" of sinners and thus had lost its capacity to render morally just judgments: "King Louis XIV, it was said, would abjure his mistress on Holy Thursday, confess to his Jesuit confessor on Good Friday, take Communion on Easter Sunday, and bring back his mistress on Easter Monday."[51]

The modern casuist Kenneth E. Kirk (1886–1954) acknowledged the problem that casuistry can, if carried out lightheartedly, result in mere situation ethics. However, Kirk stressed that probabilism is not necessarily a bad practice. Rather, if the doubt about how to act rightly is "real" in a given situation, the issue should be accepted as an issue of doubt.[52] Kirk required that the doubt be authentic, "not a passing fancy or prejudice." He demanded at least one probable argument against the law the casuist seeks to abandon, and that argument must be based on a fact or opinion "whose force even conscientious consideration cannot weaken."[53] In other words, the question of whether or not to allow probabilism should depend on the seriousness of the doubt. This takes the discussion back to the argument made earlier that a casuist needs to work virtuously. Kirk demanded that the casuist be a person of good character, capable of identifying doubts that are real.[54] What shines through here is the educational aspect of casuistry, which aims at developing the conscience of members of society.[55] It should also be noted that even if the casuist reasonably concludes that the rules should be changed in a given case based on probabilistic grounds, he/she is still bound by general moral principles. Moreover, Kirk points out that in

1679, following a merely probable course had been limited by Pope Innocent XI (1611–89) to cases in which no vital interest was at stake. This limitation, Kirk noted, had been accepted by most casuists, but Pascal ignored this change in casuistical practice.[56]

In consequence, the use of virtue ethics provides a remedy against the abuse of casuistry. If the casuist acts in accordance with the virtues, he/she will do "good" casuistry. As James Keenan and Thomas Shannon propose, virtue ethics may function as a foundation for a morally responsible use of casuistry.[57] Thus, being aware of the danger of falling into the probabilistic trap, this book can go ahead with its casuistical investigations of cases featuring the use of limited force. When the verdict argues for a change of maxims, the argument will be founded on serious moral doubts, not mere "fancies," as Kirk called the probabilistic musings of casuists who fell into the probabilistic trap. In order to do this, special emphasis will be given to the virtue of prudence, which if employed correctly cautions against an embrace of the most opportune solution available at the moment.

Having argued for a safeguard against the abuse of casuistry from the inside, there is also the possibility of adding a protection from the outside. I am deliberately using the word "possibility," as the viability of this undertaking depends on the willingness of analytical philosophers to take on this task. Essentially, as noted in the previous chapter, a casuist can commit two types of mistakes in addition to the general abuse of casuistry: being either too deductive or too inductive. One of the advantages of the method of casuistry is that it is does not deny the moral value of the work of thinkers who come to different conclusions while judging the same moral problem.[58] Relatedly, it is part of the very nature of historical just war that thinkers reach different conclusions regarding the appropriate interpretation of principles and cases. The use of casuistry only becomes problematic, or arguably ceases to constitute casuistry proper, when the casuist commits one or both of the mistakes just mentioned. Historically, casuists ensured all by themselves that their analyses conformed to the principles of their method. In fact, their failure to do so, after Pascal's powerful critique, caused casuistry's historical downfall. Detecting such abuses, however, is not always straightforward, as Walzer's case illustrates. Perhaps that is why it took several decades for revisionists to emerge and fully reveal the logical inconsistencies of Walzer's just war.

Building on Coates's idea that revisionists may provide "impetus for reform,"[59] the revisionist just war is arguably uniquely positioned to pinpoint the abuses of casuistry. Whenever a casuist falls into his/her method's traps, analytical philosophers may make their voice heard and expose the problematic reasoning. Having revisionists checking on casuistry from the outside would be beneficial to today's moral debate about just war. In this sense revisionists

would be, to paraphrase Jonsen, part of "the broader community of believers" who, although they are not members of the "contemporary casuistic community" as such, check the credibility of contemporary casuistry.[60] This is a task that revisionists may accept, as their interest is not in engaging the historical tradition but in testing the dominant theory and, if possible, developing a better one. In other words, revisionists are uniquely positioned to take on the role of a lockkeeper who, when necessary, may stop the flow of poor casuistry. What I am suggesting here is that in a sense, revisionists have chosen the wrong target in Walzer. They have tried to replace an "orthodoxy" that differs from classical just war on important questions. Revisionists have been correct in identifying Walzer's theory as the dominant one in contemporary debate. However, by concentrating on an author who himself gives limited attention to the historical foundations of the tradition, they have insufficiently engaged the arguments of historical thinkers. I argue that revisionists can make a more insightful contribution to just war by acting as interlocutors with a properly casuistical account of the just war tradition. Revisionists could thus help ensure that there is a space for applied and case-based reasoning within the ethics of war that is alert to both the realities of today's conduct and the insights of those who have gone before us.

One final aspect of concern with regard to the approach of this book is the question of how the thought of Aquinas fits with the casuistical method. The generalized argument this book suggests for particular manifestations of vis, which it derives from its casuistry, builds on his idea of just war. Thus, foregrounding the thought of Aquinas leads to an ostensible contradiction. As Jonsen and Toulmin note, Aquinas was a systematic theologian, not a casuist in the style outlined previously.[61] In particular, Aquinas's treatment of the just war was not written as "an isolated piece of casuistry."[62] Reichberg argues that Aquinas deliberately situated his discussion of war within his engagement with the moral virtues. His intention was to investigate which virtues soldiers engaged in war should internalize. In consequence, Aquinas was not at all intending to develop some sort of "free-standing decision procedure by which to judge particular cases."[63] Is it not so, then, that Thomas's basis in systematic theology conflicts with casuistry's idea of being led by the cases? No, quite the contrary, as Jonsen and Toulmin note: not only did Aquinas reason casuistically at times, his thinking is also inherently connected to the development of casuistry through concepts like "natural law," "natural reason," "conscience," "prudence," and "circumstance," all of which were key elements of his thinking.[64] Alexander Shytov even goes so far as to point to Aquinas as having made the most important contribution to the development of high casuistry.[65] In fact, Thomas's "disputed question" method, like casuistry, tried to balance general principles and particular circumstances. Indeed, the very school of international ethics associated

with Aquinas, that of natural law, is built around the idea that general moral principles must be interpreted in the light of circumstances. While the precepts of natural law are self-evident, the question of how to apply them in a concrete situation is debatable.[66] And the conclusions of such debate, as Boyle pointed out, "depend not only on moral principles and conceptual analysis but also on empirical judgments and interpretations that are not simply a function of one's basic normative outlook."[67]

## ON VIRTUE AND THOUGHT EXPERIMENTS

As discussed previously, the use of thought experiments has been an important aspect of the fight for the just war tradition and the debate about jus ad vim. Importantly, the controversy about the usefulness of far-fetched thought experiments predates the disagreement between Walzer and his critics. For example, Henry Shue has questioned the use of artificial cases in ethical reasoning vis-à-vis the permissibility of torture.[68] Although this book shares most of Shue's concerns, it does not seek to deny the usefulness of thought experiments per se. Thaler's distinction between productive and unproductive hypotheticals is helpful in this regard.[69] In fact, critics might argue that Seymour Hersh's counternarratives, which this book uses for moral reflection, constitute thought experiments, too. However, even if, for example, the bin Laden raid did not happen as Hersh claims, that scenario appears to be sufficiently realistic to consider it a productive thought experiment. In the third part's casuistical investigations, I treat Hersh's accounts as if they are truthful portraits of actual events. I do so by acknowledging that his reporting has caused controversies and I do not intend to take sides. However, although I am unable to judge the accuracy of his reporting, I consider Hersh's revelations to be realistic and capable of enlightening my casuistry. That is why I employ them in my moral argument.

It should also be emphasized that traditional casuistry by no means rules out the use of thought experiments. In fact thought experiments have been used by casuists for many centuries. For example, the penitentials of the Middle Ages, one of the cornerstones in the development of high casuistry, occasionally relied on fictitious cases to lead the deliberation process of the confessor.[70] Even more important for this book, Thomas himself employed thought experiments in his reasoning:

> If a case arises wherein the observance of a law would be hurtful to the general welfare, it should not be observed. For instance, suppose that in a besieged city it be an established law that the gates of the city are to be kept closed. This is good for public welfare as a general rule, but if it were to happen that the enemy are in pursuit of certain citizens who are defenders of

> the city, it would be a great loss if the gates were not opened to them. And so in that case the gates ought to be opened, contrary to the letter of the law, in order to maintain the common good, which the lawgiver had in view.[71]

That said, when ethical debate resorts to highly unrealistic thought experiments, these have little potential to advance moral debate. As noted in the first chapter, unproductive thought experiments have featured in the debate about jus ad vim. When Frowe criticizes the framework for being redundant based on thought experiments that are highly unrealistic, there is little appreciation of the moral dilemmas decision makers face in war. Moreover, Frowe's way of reasoning employs the just war as what Thaler calls a "moral slide-rule" in order to gain a waterproof reading of justice in war. However, as Thaler points out, despite the need for rules and principles whose observance can be checked, far-fetched analytical construction lacks practical relevance.[72] Therefore, this book investigates cases that actually took place or, like Hersh's accounts, are very realistic. Unproductive thought experiments run counter to the purpose of providing action guidance and have no place in this book. Given the tension between productive and unproductive thought experiments, the question arises of how to determine when a particular thought experiment does not advance moral debate. Arguably, the key to this determination can be found in employing virtue ethics, especially in the virtue of prudence. The classical understanding of *prudentia* entails much more than the idea of caution commonly associated with prudence today. For Aquinas, prudence was "right reason applied to action."[73] Prudence perfects the rational capacity to choose actions that will lead to genuine flourishing; it combines the intellectual perception of speculative principles with the practical knowledge of particular circumstances.[74] Thus, in cases wherein the use of thought experiments seems doubtful in the sense that no action guidance can be derived from them, the prudent casuist will abandon them. The suggestion of a prudential determination about the usefulness of thought experiments should be understood as a call for a middle ground between Walzer's highly critical position on this way of moral reasoning and the use of entirely unrealistic thought experiments as employed by many analytical philosophers.

## CASUISTRY AND THE FIGHT FOR THE JUST WAR TRADITION

As discussed previously, the historical approach to just war rests on the pillars of historical understanding and practical application. Walzerians, due to the close connection of their argument to international law, naturally emphasize the latter pillar. While they also ground their argument in historical illustrations,

however, they do not thoroughly engage with the thought of previous just war thinkers, which undermines the first pillar of the historical approach. Most revisionists show little concern for either of the two pillars of the historical approach. These analytical philosophers concentrate on Walzer's just war as the reigning theory, which they seek to contradict; relying on their method of reflective equilibrium, they attempt to build a better theory. They commonly rely on far-fetched thought experiments to do that. Consequently, by focusing on Walzer, whose work is by no means representative of the just war tradition, revisionists lose the first pillar of the historical approach. Furthermore, as revisionists are mainly interested in what McMahan calls the "deep morality of war," they tend to be agnostic about the second pillar of practical relevance, too. By making an argument about how revisionist thinkers could employ the analytical rigor of their approach to test the moral purchase of a revived just war casuistry, I hope to spark a fruitful exchange among competing camps. Given the polarized state of debate, I am doubtful about the prospects of my proposal, but I think it would be a service to the ethics of war if its contributors engaged with each other constructively.

In contrast to the two contemporary camps, this book respects both pillars of the historical approach. First, through the casuistical method this book reflects on historical cases of uses of limited force. As discussed earlier, one objective of casuistry is to accomplish the exact opposite of what revisionists seek to do—namely, to consider cases in all of their complexity rather than seek to escape to some abstract level. For casuistry, there is moral meaning to be uncovered in the often messy and contradictory circumstances of ethical decision-making, especially in the heat of battle. In this respect, this book sides with Walzer, whose critique of revisionists' lukewarm interest in military history has been noted in the first chapter. At the same time, it deviates from the Walzerian approach through its in-depth engagement with the work of previous thinkers, including the argument of both contemporary opponents in the fight for the just war tradition. After having completed the casuistical investigation of two specific uses of limited force, the book, drawing on the just war thinking of Aquinas, provides a general argument on how such force should be regulated. Crucially, the book employs the just war thinking of Aquinas not as a mirror but as "a set of counter-images,"[75] which both provides a distinct reading of the morality of particular uses of limited force and makes a contribution to overcoming the narrow intradisciplinary split in contemporary just war thinking. As O'Driscoll notes: "The aim behind the historical approach is not to glean ready-made lessons from our forebears, nor to channel their theories so that they speak more directly to contemporary concerns. Rather, it is to use the diverse range of how these great thinkers conceived of and responded to the problems of their day as a backdrop against which to set (and understand) the issues we

confront today."[76] That is why this book's argument about the morality of vis builds on Aquinas's argument in conversation with Walzerians and revisionists but also occasionally parts with aspects of Thomas's thinking.

Second, this book's argument shows concern for the historical approach's pillar of practical application, as its casuistical investigations grapple with the conundrums decision makers faced when they decided to authorize the use of limited force. Noting that there is usually conflicting intelligence in the run-up to the employment of limited force, the casuistical analysis pays attention to the practical considerations decision makers were facing at the time. In addition, in its general arguments on two specific manifestations of vis, the book goes beyond the "deep morality of war" by providing arguments that can be action guiding. Last but not least, in addition to respecting both pillars of the historical approach, this book's method approximates the analytical rigor of revisionists through its set of fixed steps. Importantly, however—returning to Walzer's powerful objection to the revisionists' method of choice—while the casuistical method also starts from the cases and "test[s] our understanding of the rules,"[77] in contrast to revisionists, it does have a concern for "subjective accounts of decision making in the field."[78]

## CONCLUSION

This chapter has introduced casuistry as the method this book employs in its investigations of particular manifestations of limited force. While advocating traditional casuistry as a method that can make a distinct and valuable contribution to the ethics of war, the chapter has made an effort to provide a nuanced account of casuistry. There can be no doubt that the moral purchase of casuistry depends on the good intentions of the casuist. After all, it was the "abuse of casuistry" that caused its historical disrepute. However, casuistry done well can be a critical tool in the evaluation of cases and their particular circumstances. That is why this chapter has suggested bolstering casuistry with virtue. Having paved the way for the casuistical investigations of uses of vis, the later chapters on targeted killing and limited strikes to enforce international norms reflect on specific cases and rule on their rightness or wrongness. After the judgment on the specific cases, the book then proposes general principles to guide the use of limited force. Importantly, in line with the casuistical method, these general arguments should be understood as providing advice to those in authority who bear the responsibility to authorize or withhold the use of force. They cannot replace the necessary analysis of circumstances leading up to such decisions. Before the book turns to the investigations of cases, one important task remains to be done. As this book employs the just war of Aquinas as a third-way approach, part two of the book provides an account of his just war criteria of

legitimate authority, just cause and right intention. As noted earlier, Aquinas's thinking underpins both the casuistical investigations and the general principles on jus ad vim that are derived from them.

## NOTES

Parts of this chapter draw from Braun and Galliott, "*Jus ad Vim*."

1. I am grateful to A. J. Coates for pointing me to this educational function.
2. Erickson, "Case for Casuistry in Environmental Ethics," 287.
3. Jonsen and Toulmin, *The Abuse of Casuistry*, 257.
4. Erickson, "Case for Casuistry in Environmental Ethics," 287.
5. Strong, "Specified Principlism," 330.
6. Ananth, "Clinical Decision-Making," 146.
7. Jonsen, "Casuistry as Methodology in Clinical Ethics," 297.
8. Tremblay, "New Casuistry," 492.
9. Jonsen, "Casuistry as Methodology in Clinical Ethics," 297.
10. Smith, Introduction, xiii.
11. For a variation of Jonsen's approach, see Strong, "Critiques of Casuistry."
12. Jonsen, "Casuistry as Methodology in Clinical Ethics," 299.
13. Jonsen, 298.
14. Jonsen.
15. Jonsen.
16. Jonsen, 298–99.
17. See chapter 6.
18. See Wildes, "Priesthood of Bioethics and the Return of Casuistry."
19. For a thoughtful discussion of the relationship between religious and secular approaches, see Biggar, "Natural Flourishing," 49–50.
20. Lang, "Politics, Ethics, and History in Just War," 40.
21. See Johnson and Kelsay, *Cross, Crescent, and Sword*; and Reichberg and Syse, *Religion, War, and Ethics*.
22. See Küng, *Global Responsibility*.
23. O'Brien, *Conduct of Just and Limited War*, 2.
24. Jonsen, "Casuistry as Methodology in Clinical Ethics," 301.
25. See Jonsen, 302.
26. Jonsen, 303.
27. Jonsen.
28. Jonsen, 305.
29. Jonsen, "Practical Reasoning and Moral Casuistry," 58.
30. Smith, Introduction, xiv.
31. Kant, *Grounding for the Metaphysics of Morals*, 21.
32. Erickson, "Case for Casuistry in Environmental Ethics," 292.
33. For a collection of his writing on just war, see Augustine, "Augustine (354–430)."
34. O'Donovan, *Just War Revisited*, 9.
35. See Ramsey, *War and the Christian Conscience*; and *Just War*.
36. See Braun, "James Turner Johnson."
37. Jonsen, "Practical Reasoning and Moral Casuistry," 56.
38. O'Brien, *Conduct of Just and Limited War*, 129.

39. McKenna, "Ethics and War," 648.
40. See chapter 8.
41. Erickson, "Case for Casuistry in Environmental Ethics," 290.
42. For a similar argument against what he calls the "algorithmic approach to just war theory" and in defense of just war thinking as "an aid to judgment," see Brown, "Just War and Political Judgment."
43. See, for example, MacIntyre, *After Virtue*.
44. Skerker, Preface, xxv.
45. See, for example, Olsthoorn, *Military Ethics and Virtues*; Skerker, Whetham, and Carrick, *Military Virtues*; and Peperkamp and Braun, "Contemporary Just War Thinking." Moreover, the *Journal of Military Ethics* has been an important venue for scholarship on the military virtues. See the special issue volume 6, no. 4 (2007).
46. Calkins, *Developing a Virtue-Imbued Casuistry for Business Ethics*, 73.
47. Calkins.
48. McCarthy, "Virtue Ethic Difference," 296.
49. As cited in Jonsen and Toulmin, *Abuse of Casuistry*, 164.
50. Smith, Introduction, xxv.
51. Jonsen and Toulmin, *Abuse of Casuistry*, 233.
52. Smith, Introduction, xxv.
53. Kirk, *Conscience and Its Problems*, 269–70.
54. Smith, Introduction, xxix.
55. Shytov, *Conscience and Love in Making Judicial Decisions*, 79.
56. Kirk, *Conscience and Its Problems*, 387.
57. Keenan and Shannon, "Contexts of Casuistry," 227.
58. Jonsen, "Practical Reasoning and Moral Casuistry," 59.
59. Coates, *Ethics of War*, 17.
60. Jonsen, "Practical Reasoning and Moral Casuistry," 59.
61. Jonsen and Toulmin, *Abuse of Casuistry*, 369.
62. Reichberg, *Thomas Aquinas on War and Peace*, 14.
63. Reichberg, 15.
64. Jonsen and Toulmin, *Abuse of Casuistry*, 123.
65. Shytov, *Conscience and Love in Making Judicial Decisions*, 77.
66. Shytov, 45.
67. Boyle, "Natural Law and International Ethics," 115.
68. Shue, "Torture in Dreamland."
69. Thaler, "Unhinged Frames."
70. Jonsen, "Practical Reasoning and Moral Casuistry," 56.
71. Aquinas, *ST*, II-II, q. 96, a. 6.
72. Thaler, "On Time in Just War Theory," 531.
73. Aquinas, *ST*, II-II, q. 47, a. 2.
74. Gorman, "War and the Virtues," 70.
75. See Tosh, *Why History Matters*, 28–29.
76. O'Driscoll, "Divisions within the Ranks?," 60.
77. Walzer, *Just and Unjust Wars*, 5th ed., 337.
78. Walzer.

# PART II

# THE ENDURING RELEVANCE OF AQUINAS

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# 4

# Why Aquinas?

There can be no doubt that the thought of Aquinas has had a profound influence on Western philosophy generally and the just war tradition specifically. One reason for his long-lasting importance is that he worked at the time during which the work of Aristotle (384–22 BC) was translated into Latin and consequently challenged the previously established relation between faith and reason. Through his work, Thomas helped establish a "*modus vivendi* between faith and philosophy" that lasted for centuries until it was challenged by the new physics.[1] As Aquinas was primarily a theologian who was firmly anchored in the thinking of his time, many of today's secular political philosophers have shied away from engaging with his work thoroughly. However, as Maximilian Forschner argues, although it would be wrong to downplay the aspects of medieval thinking that seem alien to us today, it should be remembered that the philosophers who are commonly considered as having laid the foundation of our modern worldview, including Thomas Hobbes (1588–1679), René Descartes (1596–1650), John Locke (1632–1704), and Immanuel Kant (1724–1804), cannot be sufficiently understood without knowledge of medieval philosophy.[2] Another ostensible downside of the thought of Aquinas, especially with regard to the matter of this book, is that he never provided a stand-alone treatment of politics. As Peter Koritansky notes, even his most political works, such as his letter *On Kingship to the King of Cyprus* or his *Commentary on Aristotle's Politics*,[3] do not amount to a systematic political philosophy. However, this should not be taken as arguing that Aquinas did not engage with questions of political philosophy. On the contrary, many crucial topics of political philosophy, such as the meaning of law, justice, or the common good, feature prominently in his thought, particularly in his famous *Summa Theologiae*, the work in which he also engaged with the matter of just war.[4]

Within the Catholic sphere, Aquinas "has long enjoyed a special normative status in Catholic theological teaching";[5] in fact, the "Doctor of the Church"

is associated with an entire school of thought named after him, Thomism. Despite this prominent status, however, Aquinas's thought has always had its critics too, partly because of Church politics. In the early years after his death there was the so-called *Correctoria* controversy, during which Aquinas's views of Aristotle and Averroes (1126–98) were questioned. Generally, the influence of Aquinas's scholarship seems to have been limited at the end of the thirteenth century.[6] Only later on, in a process that has been described as "from condemnation to canonization,"[7] did his writings start to gain authoritative status, which at the same time gave birth to a split between Thomists and non-Thomists. This disagreement was in part a rivalry between the two mendicant orders of the Dominicans and the Franciscans. The former order followed the teachings of its arguably most prominent member, while the latter was split into followers of Bonaventura (ca. 1217–74), Scotus (ca. 1266–1308), and Ockham (ca. 1285–1347/49).[8]

Fast forwarding to the modern era, Pope Leo XIII (1810–1903), in his encyclical letter *Aeterni Patris* of 1879, called for renewed attention to be given to the thought of Aquinas. Importantly, however, the pope did so without favoring Thomism over any other school of Catholic thought. Rather, as Ralph McInerny and John O'Callaghan put it, Aquinas was presented in general terms as "the paladin of philosophy in its true sense," especially in contradistinction to the "New Philosophy" of Descartes.[9] As a result of Leo XIII's call, there was a "revival" of Thomism that was not limited to Catholic universities but extended to secular universities, too. The renewed interest in Aquinas inspired the careers of major philosophers Jacques Maritain (1882–1973) and Étienne Gilson (1884–1978). This Thomist revival, however, was relatively short-lived. The Second Vatican Council of the 1960s is considered to have "dethroned Thomas" by favoring anonymous contemporary philosophers.[10] Once more, it seems, Aquinas was being drawn into Church politics. However, the Council's decision notwithstanding, Aquinas continues to be a towering figure in Catholic thinking, in both the magisterial and scholarly realms. For example, in 1998 Pope John Paul II (1920–2005) published an encyclical titled *Fides et Ratio* (Faith and Reason) that drew on Aquinas and that some have labeled "the charter of the Thomism of the third millennium."[11]

Having provided a very brief overview of Aquinas's historical significance, the next question is, who exactly was this man whose thought has had such a profound impact on Western thinking? Aquinas was born around 1225 at Roccasecca in southern Italy.[12] His family was of minor nobility, and his father was related to and a vassal of Holy Roman Emperor Frederick II (1194–1250). As was a common practice at the time, Thomas was offered to the service of the Church because he was the youngest son of a large family. Between the ages of five or six he was sent to the prestigious Benedictine monastery of Monte

Cassino. His family was said to hope that one day he would become the abbot. At Monte Cassino Thomas received his first education, including training in the thought of Augustine, which as the following chapters illustrate would greatly influence his thinking about war. However, Aquinas's time with the Benedictines had to be cut short due to the conflict between Pope Gregory IX (1170–1241) and Emperor Frederick II. This conflict also affected the Aquino family more directly, partly because of switching allegiances. Consider, for example, the life of Thomas's eldest brother Aimo. Aimo joined an expedition to the Holy Land in the service of Frederick II but was imprisoned by a vassal of the king of Cyprus. It was the pope who ransomed him, and Aimo would remain loyal to the papacy for the rest of his life. The life of Rinaldo, another of Thomas's brothers, tells an even more dramatic story. Rinaldo was initially loyal to Frederick II but switched allegiance to Innocent IV (?–1254) when the pope deposed the emperor in 1245. In 1246 Rinaldo was executed by Frederick II for having betrayed his loyalty. Crucially, the Aquino family considered Rinaldo a martyr who had died for the Church.[13] Jean-Pierre Torrell argues that the Aquino family history of having been drawn into the conflict between the emperor and the pope partly influenced Thomas's thinking about the distinction between spiritual and temporal power.[14] I return to this aspect in more detail in the following chapter.

In 1239 Thomas entered the *studium generale* at Naples, which was under the influence of Frederick II. It was at Naples that Thomas first encountered the new Dominican order, which he joined in 1244. The Order of Preachers, as a mendicant order of low esteem, conflicted with the hopes of his family that he would rise through the Church hierarchy and bring influence and prestige. Therefore, his family kidnapped Thomas and interned him in the family castle at Roccasecca for fifteen months. Thomas's strong will to commit himself to the Dominican cause has been the subject of legend, and his family eventually accepted his decision.[15] Subsequently, Thomas continued his studies, including learning the work of Aristotle, under the supervision of Albert the Great (ca. 1200–1280) in Paris and Cologne (1245–52). In 1252 he was sent back to Paris, where he stayed for seven years, took his masters in *sacra doctrina*, and produced his first influential works. After his time in Paris Thomas was called back to Italy for seven years, first to Naples (1259–61) and then to Orvieto (1261–65). In 1265 Aquinas founded the studium at the convent of Santa Sabina in Rome. He stayed there for three years and, besides working on other projects, started working on the *Summa Theologiae*. Following his time at Santa Sabina, Thomas returned to Paris in 1268. Working there for three years, his writings included his treatment of Aristotle. His work on the *Summa*, which he never finished, continued meanwhile. In 1272 he was once again sent to Naples, where he was asked to found a new Dominican studium. Pope Gregory X (ca. 1210–76)

called Thomas to attend the 1274 Council of Lyons, but Aquinas died on his way there at the Abbey of Fossanova. He was canonized in 1323 and proclaimed a "Doctor of the Church" in 1567.

As this brief biographical sketch was meant to demonstrate, Aquinas was very much a man of his time. When, for example, he argued about the authority of the prince to wage just war, it is safe to assume that his family experience of having been drawn into the rivalry between the pope and the emperor was on his mind. Furthermore, as Reichberg has argued, Aquinas grew up in what was basically a military family, and his familiarity with the knighthood "left its imprint throughout his writings."[16] His intimate knowledge of the military profession becomes particularly apparent in his discussion of the military virtues of military prudence and battlefield courage.[17] His interest in military affairs is thus intimately connected to his interest in how to live a life of virtue. After all, the heat of battle and the passions it provokes constitute a veritable test of the soldier's virtuousness. At the same time, of course, virtuous behavior is also required at the highest level, that of legitimate authority. That is where military prudence comes in. It is this interest in the practical questions of statecraft that draws my interest to Aquinas.

By applying the thought of Aquinas on the morality of vis, my own modest contribution seeks to follow a long succession of scholars who have engaged with Thomas's bellum justum. The work of Aquinas is of particular importance for the just war tradition as he systematized classical just war by bringing together various streams of thought that "had been shaped by philosophical, theological, and political thinking on natural law, by military thought and practice, by legal traditions reaching back into Roman law, and by accumulated experience in the government of political communities."[18] Crucially, in line with the neoclassical approach I have presented in the second chapter, Aquinas developed his argument by connecting his opinions to the thought of previous thinkers. By combining and commenting on texts taken from the Bible, Aristotle, Plato (428/27–348/47 BC), Augustine, and canon law "in quite novel ways," Aquinas produced an original argument.[19] Aquinas's own position on just war would become the authoritative statement that later thinkers used as a foundation for their own arguments. As the second chapter has showed, even today's revisionist just war philosophers like McMahan occasionally refer to Aquinas as the jumping-off point for their own thinking. With regard to thinkers who built their own arguments in conversation with Aquinas, it was arguably Thomas's parsimonious discussion of just war in the *Summa* that "afforded later generations enough elbow room to develop his ideas."[20] The list of thinkers who did so is long indeed. On a nonexclusive list, including both Catholics and non-Catholics, Cardinal Cajetan (1468–1534), Vitoria, Luis de Molina (1535–1600), Francisco Suárez (1548–1617), and Grotius (1583–1645) would have to be

mentioned. In the early twentieth century, historians such as Alfred Vanderpol (1854–1915), James Brown Scott (1866–1943), and Robert Regout (1896–1942) investigated the newly emerging legal bodies of the Hague Conventions and the League of Nations based on Aquinas's classical bellum justum. These investigations were followed by the work of Maritain, Elizabeth Anscombe (1919–2001), and John Finnis, who brought to bear the just war thinking of Aquinas on, respectively, the Spanish Civil War, the Second Word War, and the Cold War.[21] In the line of eminent scholars who sought to apply the thought of Aquinas to contemporary challenges, the work of O'Brien (1923–2003) also deserves to be mentioned.

In contemporary scholarship on Aquinas and just war there is one scholar whose work stands out. Reichberg's numerous publications, which climaxed in his *Thomas Aquinas on War and Peace*, provide a holistic reading of Aquinas's bellum justum that goes beyond Thomas's concise treatment in the *quaestio de bello*. By also considering what Aquinas had to say on war and related moral issues elsewhere, Reichberg succeeds in demonstrating the originality of Thomas's just war against critics who saw the main reason for its historical influence in Aquinas's "general eminence and that of the *Summa Theologica*."[22] Moreover, Reichberg not only thoroughly engages with the substance and reception of Aquinas's bellum justum, but he also shows the relevance of his thinking to current debates in just war. To name only a few examples, Reichberg, by drawing on Thomas, has enlightened the debate about the moral equality of combatants, the "presumption against war" versus "presumption against injustice" debate, and the conversation about the moral basis of anticipatory uses of force. It is also of note that Reichberg's reading of Aquinas is highly relevant to the fight for the just war tradition. As O'Driscoll observes: "Many of the issues that divide just war theorists today were, Reichberg shows, also matters of some dispute in the Middle Ages. By revealing these continuities and bringing the views of Aquinas and his interpreters into conversation with McMahan and Walzer and their respective schools, Reichberg reminds us that behind today's fractious debates there is a fruitful dialogue about substantive issues to be had."[23]

Furthermore, one specific aspect of Reichberg's interpretation is the emphasis he gives to the military virtues in Aquinas's account. This is not to say that previous Aquinas scholarship on just war had neglected this aspect, but Reichberg's discussion of military prudence and battlefield courage succinctly points to a level of analysis that analytical philosophers struggle with.[24] As the reader might recall, the second chapter noted the critique by Coates that revisionists tend to forget that war is no reflective activity. Aquinas, in contrast, was mainly interested in the moral issues that would present themselves to soldiers on the battlefield and in response to which the virtues would be of fundamental

importance. Reichberg puts this idea eloquently in a passage that deserves to be quoted in full:

> By situating his treatment within a typology of the virtues Aquinas made the theory of just war very relevant to practitioners. The highly refined imaginative modeling (so called "trolley cases") that has come to dominate much contemporary philosophical theorizing on the ethics of war . . . remains largely inaccessible to military practitioners who must often decide under conditions of urgency—in the face of strong emotions that make cool-headed reflection difficult if not impossible. Aquinas's virtue approach has, by contrast, the advantage that it is designed specifically for such settings; thus instead of first separating reflection from practice and then facing the challenge of reuniting the former with the latter, Aquinas attempts a unified account that joins the two from the beginning.[25]

The classical conceptualization emphasized the centrality of judgment in just war and did not pretend to operate from absolute certainty. This understanding differs from revisionists who seem to suggest "that with enough concentrated brainpower the justice of a cause can be accurately assessed" and who, to put it critically, provide ostensibly final conclusions that are "often expressed with very little humility."[26] Consequently, Aquinas's interest in how virtue applies to the military profession that Reichberg's scholarship highlights is of crucial importance to my attempt at recovering classical just war as a tool of statecraft in the context of vis.

Given the preceding discussion, it will come as no surprise to the reader that this book is indebted to Reichberg's scholarship. That said, however, in one important aspect this book's argument deviates from his reading of Aquinas's just war. In contrast to Reichberg, who suggests a liabilist reading of Aquinas, this book applies the historically dominant retributive reading of Thomas. It is worth sketching this aspect briefly, as it undergirds this book's Thomistic argument on specific manifestations of vis and has been present in the reception of Aquinas since Cajetan's influential interpretation. The retributive reading of Aquinas will readily become apparent in chapter 6, which engages with the just war principles of just cause and right intention. Reichberg argues that Aquinas did not seek to emphasize the concepts of culpability and deserts in his account of just war. Consequently, the ideas of fault and punishment should not be seen as being at the heart of his account. Simply put, war was not supposed to be an instrument of punishment. Rather, according to Reichberg, Thomas concentrated on the ideas of injury received and, following from that, reestablishing a right; war was meant to be a response to objective wrongdoing, irrespective

of subjective guilt. As a result, Reichberg privileges a liabilist over a retributivist reading of Aquinas.[27] His interpretation is grounded in an investigation of the reception of Aquinas's just war. Reichberg traces the historically dominant retributivist take to the influence of Cajetan, whereas the liabilist reading can be found in the thought of Suárez, Vitoria, Molina, and Grotius. As we can no longer ask Thomas whose account he sides with, both can claim to be accurate interpretations. Crucially, however, as Reichberg notes, contemporary revisionist just war thinkers subscribe to a liabilist reading of just war that has some curious parallels with the interpretation of Aquinas that was advanced by the four eminent just war thinkers just mentioned. Again, as the subsequent chapters show, the thought of Aquinas is highly relevant with regard to the fight for the just war tradition.[28]

Having provided a brief overview about the man and how his thought, both generally and specifically regarding just war, has been received, the book is now in a position to engage more deeply with Aquinas's substantive argument on just war. The following two chapters investigate the Thomistic just war criteria of legitimate authority, just cause, and right intention. In addition to laying out the content of these criteria, an effort is made to demonstrate the relevance of Aquinas's bellum justum to the ongoing fight for the just war tradition. In order to do that, the chapters investigate contemporary understandings of just war vis-à-vis the classical conceptualization.

## NOTES

1. McInerny and O'Callaghan, "Saint Thomas Aquinas."
2. Forschner, *Thomas von Aquin*, 11.
3. Aquinas, *De Regno ad Regem Cypri*; and *Commentary on Aristotle's Politics.*
4. Koritansky, "Thomas Aquinas."
5. Reichberg, *Thomas Aquinas on War and Peace*, xi.
6. See Barnes, "Thirteenth-Century Engagements with Thomas Aquinas."
7. Upham, "Influence of Aquinas," 515.
8. McInerny and O'Callaghan, "Saint Thomas Aquinas."
9. McInerny and O'Callaghan.
10. McInerny and O'Callaghan.
11. McInerny and O'Callaghan.
12. The following biographical sketch is based on Torrell, "Life and Works."
13. Torrell, *Saint Thomas Aquinas*, 3.
14. Torrell, 13.
15. See Turner, *Thomas Aquinas*, 12.
16. Reichberg, *Thomas Aquinas on War and Peace*, 11.
17. For a discussion of how Aquinas's use of military references can be taken to "reveal a significant facet of the way in which he saw his world," see Synan, "St. Thomas Aquinas."

18. Johnson, "Contemporary Just War Thinking," 25. For an overview of just war before Aquinas, see Cox, "Ethics of War up to Thomas Aquinas"; Russell, *Just War in the Middle Ages*; and Tooke, *Just War in Aquinas and Grotius*, chap. 1.
19. Reichberg, *Thomas Aquinas on War and Peace*, vii.
20. Reichberg, viii.
21. Reichberg.
22. Tooke, *Just War in Aquinas and Grotius*, 25.
23. O'Driscoll, "Irony of Just War," 235.
24. See also Cole, "Thomas Aquinas on Virtuous Warfare"; and Gorman, "War and the Virtues."
25. Reichberg, "Thomas Aquinas (1224/5–1274)," 53.
26. Brown, "Justified," 444–45.
27. See Reichberg, *Thomas Aquinas on War and Peace*, chap. 7.
28. Reichberg, 145.

# 5

# Aquinas on the Authority to Wage War

Not too long ago, just war thinkers of various approaches agreed that the authority criterion of just war had been neglected in contemporary debate. Today, however, this claim can no longer be maintained. The authority criterion has been receiving considerable attention, mostly from analytical philosophers working on the ethics of war.[1] Interestingly, and not without irony, the revived interest in the authority to wage war has returned philosophical attention to the principle that classical just war thinkers such as Aquinas considered to be of primary importance. However, despite the renewed interest in legitimate authority, most contemporary analytical philosophers arrive at a radically different conclusion. While Thomas builds his just war around the authority criterion, these thinkers argue that any individual can have the authority to wage just war. In addition, as most individualists concentrate their critique on Walzerian just war, they argue against its Westphalian understanding of sovereignty. That understanding, however, deviates markedly from the classical understanding as found in the work of Aquinas.

This chapter contrasts the Thomistic and individualist understandings of the authority criterion and argues that moral individualists, by favoring the individual over the political community, advocate a just war that not only deviates from the classical understanding but also risks opening the door to a more violent world. At the same time, although the classical understanding of legitimate authority has some common ground with the Westphalian understanding of Walzerians, the chapter argues for exceptions to the principles of political sovereignty and territorial integrity. Consequently, this chapter once more presents the historical approach to just war as a third way that sides with neither Walzerians nor revisionists all of the time. It paves the way for the later investigation of two specific manifestations of vis with regard to questions of legitimate authority in today's international community.

The chapter starts with an introduction to the classical understanding of legitimate authority as encountered in the work of Aquinas. It then turns to the criterion's contemporary critics, who seek to grant the authority to wage war to any person. Relying on the examples of Uwe Steinhoff and Fabre, the chapter points out how their individualistic morality conflicts with the Thomistic understanding. It then critiques the individualist turn in parts of contemporary just war thinking for a morally problematic weakening of the restraining function of just war.

## THOMISTIC LEGITIMATE AUTHORITY

The following section provides an account of legitimate authority as found in the work of Thomas. Aquinas provides the following definition:

> *I answer that,* In order for a war to be just, three things are necessary. First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private individual to declare war, because he can seek for redress of his rights from the tribunal of his superior. Moreover it is not the business of a private individual to summon together the people, which has to be done in wartime. And as the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them. And just as it is lawful for them to have recourse to the sword in defending that common weal against internal disturbances, when they punish evil-doers, according to the words of the Apostle (Rm. 13:4): "He beareth not the sword in vain: for he is God's minister, an avenger to execute wrath upon him that doth evil"; so too, it is their business to have recourse to the sword of war in defending the common weal against external enemies. Hence it is said to those who are in authority (Ps. 81:4): "Rescue the poor: and deliver the needy out of the hand of the sinner"; and for this reason Augustine says (Contra Faust. xxii, 75): "The natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority."[2]

Johnson argues that Aquinas's definition must be seen before the horizon of the medieval understanding of the ruler as being responsible for establishing the three "ends of good politics":[3] order, justice, and peace. Consequently, because only the ruler was entitled to decide on the matters of just cause and right intention, legitimate authority, or to use Johnson's preferred term sovereign authority, was the primary criterion of just war, logically prior to the other criteria. As briefly indicated earlier, Thomas as systematizer of classical just war

benefited a great deal from the canonical debate that had taken place before his own day.[4] His thought was also deeply influenced by a revived interest in natural law, which held that the political community came into being as the result of a prompting of human nature. In the same way that it was considered to be natural for human beings to bond for their common good, it was assumed that a ruler had to be at the top of the community and held responsibility for the good of all. Crucially, due to his/her nature as "civic and social animal,"[5] the good citizen was considered to be the one who puts the interest of the common good above his/her private interests. In his treatise *De Regno ad Regem Cypri* Aquinas explains why the good of the community trumps the good of the individual:

> If, then, it is natural for man to live in the society of many, it is necessary that there exist among men some means by which the group may be governed. For where there are many men together and each one is looking after his own interest, the multitude would be broken up and scattered unless there were also an agency to take care of what appertains to the commonweal. In like manner, the body of a man or any other animal would disintegrate unless there were a general ruling force within the body which watches over the common good of all members. With this in mind, Solomon says [Eccles. 4:9]: "Where there is no governor, the people shall fall."[6]

Johnson identifies two directions from which the lead role of the authority criterion resulted.[7] The first is the argument that only temporal rulers had the right to use armed force. In consequence, neither the Church nor private individuals were justified in using such force. This rationale was a conscious attempt to rein in a worrisome proliferation of actors who claimed to possess the right to use armed force that had resulted in "widespread banditry and warlordism."[8] Some canonists had denied the Church the use of force in line with the idea of the two swords which, introduced by Pope Gelasius I (?–496) in order to distinguish between the ecclesiastical and temporal spheres, resulted in the argument that only the temporal power had the right to employ armed force. That said, it needs to be noted that the question of war-making authority was being discussed controversially at the time. Thomas parted with the view of canonists such as Hostiensis (ca. 1200–1271), who argued that the authority to wage war was held by only one prince, the emperor. In contrast, Aquinas sided with the position that had been put forward by Pope Innocent IV two decades earlier, which granted war authority to a multitude of princes.[9] Aquinas generally accepted the argument on a separation of the "two powers," which Torrell partly traces to the Aquino family's history of having been drawn into the conflict between emperor and pope that I have noted in the previous chapter.[10] However, it is important to state that while Aquinas accepted a clear distinction

between the spiritual and the temporal powers, he gave a special role to the papacy. In the *Sentences*, he argued that

> the spiritual and secular power are both derived from the divine power; and thus, the secular power is under the spiritual to the extent that the former is placed under the latter by God, namely, in the things which pertain to the salvation of the soul; and thus in these matters, one must obey the spiritual power rather than the secular. But in the things which pertain to the civil good, one should obey the secular power rather than the spiritual, as it is said in Matthew 22:21: Render unto Caesar the things which are Caesar's. Unless perhaps the secular power is also conjoined to the spiritual power, as it is in the Pope, who holds the summit of both powers, namely the spiritual and the secular, this being appointed by him who is Priest and King forever according to the order of Melchisedech, King of kings, and Lord of lords, whose power shall not be taken away, and whose kingdom shall not be corrupted for ever and ever. Amen.[11]

Consequently, Aquinas can be read as granting the authority to wage just war to the papacy through its role as both spiritual and secular authority, although he did not discuss the pope's war-making authority in his question on war in the *Summa*. In addition, given the way the Church operated, bishops would share this authority with the pope.[12] It was even implicit in the arguments of some decretists that prince-bishops gained the authority to wage just war from their status as princes, rather than from their relationship with the pope.[13] This theoretical argument, as students of history will know, reflected the practice of waging war in the Middle Ages.

With regard to private individuals, the argument to restrict the authority to wage just war to temporal rulers was that individuals could appeal to their superiors in order to establish or reestablish a state of justice. Only the highest of superiors, the prince, had the right to resort to armed force because he alone had no temporal superior.[14] That is why Thomas held, "Now in human society no man can exercise coercion except through public authority: and, consequently, if a private individual not having public authority takes another's property by violence, he acts unlawfully and commits a robbery, as burglars do."[15] It was the ruler's responsibility to maintain or work toward peace imagined as *tranquillitas ordinis*. Consequently, for Aquinas the ruler's authority to use the sword was inseparably linked to his responsibility for the common good. In his own words:

> *I answer that*, As stated above [. . .], it is lawful to kill an evildoer in so far as it is directed to the welfare of the whole community, so that it belongs to

> him alone who has charge of the community's welfare. Thus it belongs to a physician to cut off a decayed limb, when he has been entrusted with the care of the health of the whole body. Now the care of the common good is entrusted to persons of rank having public authority: wherefore they alone, and not private individuals, can lawfully put evildoers to death.[16]

Theologically, too, this take reiterated the distinction between war and the illicit private use of force. While the former could be an act of charity, of rightly directed love, the latter would be the expression of wrongful selfishness. In the words of Augustine, whom Aquinas quoted in his treatment of just war:

> What is it about war that is to be blamed? Is it that those who will die someday are killed so that those who will conquer might dominate in peace? This is the complaint of the timid, not of the religious. The desire for harming, the cruelty of revenge, the restless and implacable mind, the savageness of revolting, the lust for dominating, and similar things—these are what are justly blamed in wars. Often, so that such things might also be justly punished, certain wars must be waged against the violence of those resisting are commanded by God or some other legitimate ruler and are undertaken by the good.[17]

In other words, the limitation of the use of force to legitimate authority only took on a crucial role with regard to the moral distinctiveness of war: "It distinguished *bellum*, war, as an activity on behalf of the common good, from *duellum*, the duel, use of arms by individual knights and nobles without sovereign authority."[18] Jens Bartelson describes the result of this understanding as a "double bind" in medieval legal thought that links together the authority criterion and the use of force: "A war was just by virtue of being waged by a prince, yet what made a prince a prince was his right to wage war."[19]

The second direction Johnson identifies is the reflection about the moral responsibilities held by the ruler as well as the personal characteristics he/she needed to exhibit.[20] Medieval accounts such as Aquinas's commonly referred to Romans 13:4, which defined authority, including the authority to use force, as having been bestowed upon the ruler by God: "For rulers are not a cause of fear to good conduct, but to evil. Do you wish to have no fear of authority? Then do what is good and you will receive approval from it, for it is a servant of God for your good. But if you do evil, be afraid, for it does not bear the sword without purpose; it is the servant of God to inflict wrath on the evildoer." In addition, Romans 13:4 also had significance for the character formation of the good ruler because the ruler, as "minister" of God, had to acquire the necessary virtues. As Aquinas puts it:

> For an individual man to lead a good life two things are required. The first and most important is to act in a virtuous manner (for virtue is that by which one lives well); the second, which is secondary and instrumental, is a sufficiency of those bodily goods whose use is necessary for virtuous life. Yet the unity of man is brought about by nature, while the unity of multitude, which we call peace, must be procured through the efforts of the ruler. Therefore, to establish virtuous living in a multitude three things are necessary. First of all, that the multitude be established in the unity of peace. Second, that the multitude thus united in the bond of peace, be directed to acting well. For just as a man can do nothing well unless unity within his members be presupposed, so a multitude of men lacking the unity of peace will be hindered from virtuous action by the fact that it is fighting against itself. In the third place, it is necessary that there be at hand a sufficient supply of the things required for proper living, procured by the ruler's efforts.[21]

In summation, the classical understanding of authority as understood by thinkers like Aquinas's was a top-down approach that followed from the responsibilities of the ruler who held responsibility for the common good.[22] This understanding asked the ruler to maintain and establish order, justice, and peace. The ruler took on the function of a judge; a just war was essentially about establishing justice in response to injustice.[23] In Thomas's own words: "As regards princes, the public power is entrusted to them that they may be the guardians of justice: hence it is unlawful for them to use violence or coercion, save within the bounds of justice—either by fighting against the enemy, or against the citizens, by punishing evil-doers: and whatever is taken by violence of this kind is not the spoils of robbery, since it is not contrary to justice."[24] In this regard, Bartelson speaks of a medieval understanding of authority as law enforcement.[25] The right to self-defense, in this understanding, was accepted as a self-evident truth of natural law. That is why in a seminal work Pope Innocent IV did not use the term for war when he referred to defensive uses of force. Instead of bellum, he preferred to use the term *defensio*.[26] Every person had an individual right to self-defense, and it was considered to be the logical consequence that the political community also enjoyed that right. Extending beyond self-defense, for medieval thinkers the responsibility for the common good also included what today is considered to belong to the category of offensive force, namely, the right to punish and the retaking of property that had been unjustly seized.[27]

Crucially, the common good came in two forms. First, there was the common good of the ruler's own political community. However, there was also the common good of all mankind. In consequence, maintaining and establishing order, justice and peace could require the use of force both within and beyond one's own territory. In contrast to the modern understanding, which hinges on

the principles of political sovereignty and territorial integrity, in the Middle Ages there was no sovereignty in the sense that even in the face of grave violations of natural law a ruler had to fear no sanction because of the inviolability of his/her borders. In Christendom rulers had to accept certain limits of authority within their own territories and at the same time had some stakes in the internal affairs of neighboring rulers.[28] That is why Thomas, immediately following his reference to Romans 13:4, argues, "Hence it is said to those who are in authority (Ps. 81:4): 'Rescue the poor: and deliver the needy out of the hand of the sinner'; and for this reason Augustine says (Contra Faust. xxii, 75): 'The natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority.'"[29] What comes across in this understanding of authority, as I noted in the second chapter, is the idea of just war as statecraft that is directed toward the common good. For the classical bellum justum, the use of armed force, be it bellum or vis, to maintain and establish order, justice, and peace within the international sphere belonged to the responsibility of rulers.

## THE INDIVIDUALIST UNDERSTANDING OF AUTHORITY

Along with a generally increased interest in just war by analytical philosophers, the authority criterion has received renewed critical attention. Following their specific approach, these thinkers have focused their attention on Walzer's conceptualization, which itself parts with the Thomistic understanding in several respects. Walzer essentially advocates the modern Westphalian understanding with its limitation of just cause to self-defense and its key principles of political sovereignty and territorial integrity.[30] The modern understanding of sovereignty, first comprehensively advanced by Grotius, is a bottom-up approach in the sense that the ruler is considered to be only the representative of the people, who has the function to protect the rights the people have handed to him, her, or them.[31] As Bartelson notes: "With Grotius, the legitimate authority necessary to justify warfare was firmly located in the modern state, and defined in terms of its sovereignty. Sovereignty in turn was understood as the supreme and indivisible authority within a given territory, its legitimacy deriving from the tacit consent of self-interested subjects themselves enjoying a right of self-preservation analogous to that of states coexisting in a state of nature."[32] However, despite adopting a bottom-up approach instead of the classical top-down approach, Walzer, like classical thinkers, holds that the political community has a special moral significance. In fact, by taking political communities as the primary unit of analysis, Walzer, as O'Driscoll points out, has "much in common with classical Aristotelian approaches to the *jus ad bellum*, like that offered by Aquinas."[33]

Moral individualists, in contrast, consider moral responsibility for killing in war to reside with individuals, not states. Not surprisingly, based on reductive individualism, they criticize Walzer and any theorist who allocates special moral value to the nation-state, and the political community from which it derives, for their "romance of the nation-state."[34] Individualists generally reject the classical understanding of legitimate authority, and some even call for discarding the criterion altogether. The next section investigates, based on the work of Steinhoff and Fabre, why these individualist thinkers come to a largely negative conclusion vis-à-vis the criterion of legitimate authority.

## Steinhoff's Critique of Classical Authority

Steinhoff's account of authority and just war stands out among the work of analytical philosophers working on the ethics of war, as he explicitly develops his argument as a rebuttal of the classical conceptualization. As discussed in the second chapter, most revisionists, in contrast, concentrate on the Walzerian approach to just war, which follows the logic of the "Westphalian System."[35] While Steinhoff frequently relies on far-fetched thought experiments, he emphatically rejects being called a revisionist, as he seeks to provide just war arguments that both engage with the tradition and are of practical relevance.[36] He also accepts, in contradistinction to revisionists, that the moral rules that apply in peacetime are not the same as those that apply in war.[37] Steinhoff starts his argument by stating that although he will engage with classical just war thinking, his argument breaks with some of its key principles.[38] With regard to legitimate authority, Steinhoff leaves little doubt about his opposition to the classical just war and its granting of the right to wage war to public authority only.[39] Steinhoff's take, in a nutshell, summarizes the individualist conceptualization of the authority criterion: "I shall argue, contrary to the tradition of just war theory, that every single individual is a legitimate authority and has the right to declare war on others or the state, provided only that the individual proceed responsibly in his or her decision processes, that is, that one proceed in circumspect and rational consideration of relevant information and moral aspects."[40] Not surprisingly, Steinhoff identifies an "anti-individualist and collectivist prejudice" in medieval thought as the origin of the classical authority criterion.[41]

Having rejected the classical argument that the political community trumps the individual, Steinhoff also turns against the pacification argument, the idea that only those invested with the responsibility for the common good have the right to use force in order to prevent a situation in which anyone may employ force according to his/her liking. Drawing on Locke, Steinhoff discounts the argument that legitimate authority is needed to prevent society from descending

into a state of anarchy.[42] Locke had argued that the individual right to use force against an unjust ruler need not lead to anarchy, as the criterion of just cause still applies.[43] In sum, Steinhoff's conceptualization holds that the authority to wage war does not depend on the mediation of a representative, as is characteristic for the classical understanding. Rather, the right to wage war is grounded in an individual right.[44]

## Fabre's Critique of Westphalian Authority

Having engaged with Steinhoff's outright rejection of the classical authority criterion, I now turn to a critique of Westphalian sovereignty. Arguing from a cosmopolitan perspective on just war, Fabre rejects the Westphalian model.[45] She starts her argument by describing the status quo of the Westphalian understanding of "legitimate authority." This understanding, according to Fabre, grants the right to wage war to states defined as political organizations that are capable of enforcing laws within a set territory.[46] She adds that as a consequence of decolonization the right to war has also been granted to political movements engaged in wars of liberation against oppressive rulers. However, this in historical terms very recent development does not diminish the "central aims" of the Westphalian authority criterion[47]—namely, to justify the use of force as a defense of states' rights to political sovereignty and territorial integrity. These "still rather statist overtones," in Fabre's eyes, have recently been challenged by a revival of the cosmopolitan tradition,[48] whose core precepts she defines thus: "(a) [I]ndividuals are the fundamental units of moral concern and ought to be regarded as one another's moral equals; (b) whatever rights and privileges states have, they have them *only* in so far as they thereby serve individuals' fundamental interests; (c) states are not under a greater obligation to respect their own individual members' fundamental rights than to respect the fundamental rights of foreigners."[49] As a result, for cosmopolitans the rights due to individuals are independent of political borders, and states' authority hinges on their respect of these individual rights. Therefore, Fabre seeks to abandon the authority criterion.

As part of her substantive argument, Fabre questions the assumption of the Westphalian authority criterion that in order to wage war the agent must be a political community built around communal political ends: political sovereignty and territorial integrity.[50] She rejects this assumption, claiming that nonpolitical groups and individuals can have the right to wage war. Thus, she cannot accept the classical conceptualization of legitimate authority as a necessary prerequisite for a functioning and peaceful political community. Fabre opposes this two-way argument, to which Bartelson refers as a double-bind. Her basic justification for abandoning the established authority criterion is

that communal goods such as political sovereignty and territorial integrity are only the accumulation of individual goods, and consequently there is no moral value to communal values as such; their value results from an extension of the rights of individuals. Consequently, for cosmopolitans the right to war is less limited, going beyond the defense of accumulated individual rights as expressed in the communal rights of the Westphalian standard. The right to war also falls to those individuals who must defend their rights to a, in cosmopolitan terms, "minimally flourishing life,"[51] which is grounded in basic human rights. Simply put, "it is not necessary, for an entity to have the right to wage a war, that it be a legitimate authority."[52]

## A THOMISTIC CRITIQUE OF MORAL INDIVIDUALISM

What should be made of the individualist argument about the authority to wage war? To begin with, in some respects the legacy of the Westphalian understanding of sovereignty continues to have an impact on most contemporary just war thinking, including the revisionist just war. Unlike Thomas, who started from the authority criterion, contemporary just war thinkers, as a result of concentrating on Walzer's just war, overwhelmingly start from considerations of justice as expressed in the just cause criterion and its limitation of the justified use of armed force to self-defense. The problem resulting from this position, however, is that it remains unclear who is responsible for deciding on matters of justice.[53] Crucially, while Johnson detects the prototypical statement of the modern understanding of authority in recent statements made by the US Catholic Bishops, the revisionist just war camp has arguably been willing to go even further. While just war thinkers like the US Bishops have relegated the authority criterion to second or third place, some revisionists seek to abandon it altogether. In a sense, this move is not surprising given that most revisionists' sole interest is in finding what they consider to be the moral truth, and they seem to have no second thoughts about whether they actually have the authority to decide whose conduct is just or unjust. However, such an understanding seems irreconcilable with the more limited understanding of the role of the moralist in classical just war thinking, which sought to provide advice to decision makers but accepted that it was the ruler who had the responsibility to make the final judgment.[54]

Upon reflection, it seems that the individualist call to abandon the authority criterion is the direct consequence of their moral starting point. Rather than being the result of flawed reasoning by collectivist thinkers, the differences between the Thomistic and individualist takes on authority resonate from distinct philosophical points of departure; the main difference lies in their use of different units of analysis. While the Thomistic just war bestows special value

on the political community, for moral individualists it is the individual who functions as the entry point to moral debate. "So what?" one might ask, assuming that nothing is wrong about having different points of departure. However, as will be pointed out shortly, judged from a Thomistic perspective, the individualist outlook not only turns a core assumption of Thomism on its head but also leads to morally questionable conclusions. Importantly, arguing against the individualist understanding of authority should not be read as an attempt to deny the legitimacy of any change to the received just war criteria. Rather, as discussed in the second chapter, the objective of the historical approach to just war is to engage with the writing of previous thinkers in order to derive a better understanding of contemporary moral issues arising from the changing character of war. Likewise, criticizing the individualist understanding of sovereignty from a Thomistic angle does not mean that there can be no common ground between the two approaches. For example, as the second chapter noted, when revisionists object to Walzer's arguments for a logical separation between jus ad bellum and jus in bello or his defense of a "moral equality of combatants," they arrive at essentially the same conclusions Aquinas had made many centuries earlier.

That said, from a Thomistic perspective, the main problem with the particular renegotiation revisionists advocate with regard to authority is that the just war ceases to be a way of thinking that serves the common good. It stops being a tool of statecraft. As illustrated earlier, Aquinas's just war thinking emphasizes the good of the community over that of the individual. In contrast, thinkers like Steinhoff and Fabre seek to break with this conceptualization, putting the interest of the individual first, which then requires discarding the inherited criterion of legitimate authority. For the Thomistic approach to just war such reasoning is problematic, as it disregards the wisdom past thinkers like Aquinas acquired by learning from the circumstances of their time. In particular, the individualist rejection of the authority criterion runs counter to the core of the just war tradition—namely, its dual theme of permission and restraint—and risks legitimizing a morally worrisome expansion in the use of force. Historically speaking, the just war has been a moral framework that affirms that although the taking of life is always regrettable, it can be morally justifiable. This affirmation, however, comes with the requirement not to use excessive force. As pointed out earlier, one of the main reasons for the medieval emphasis on the authority criterion was to rein in a multitude of actors who all claimed to have the authority to wage war.

Given the contemporary spread of nonstate actors such as Islamist terrorists who claim to have the authority to wage war, one cannot fail to notice a curious parallel between medieval times and today. From a Thomistic perspective, granting any individual the authority to wage war seems like a reopening of

Pandora's box in the sense that, once again, individuals would be capable to claim what Coates has called "*self*-authorization,"[55] the very action that led the canonists to argue for limiting the authority to wage war to legitimate authorities only. While revisionists, following Locke's argument, will probably respond that for a war to be just the remaining just war criteria would still have to be met, for Thomistic just war, beyond the obvious disagreement about the right unit of analysis, such an argument would be imprudent, too. The authority criterion functions as a means of restraint that rules out private uses of force, and abandoning it is likely to lead to an increase in overall violence. Given that asymmetrical warfare has arguably been the dominant type of contemporary conflict, Thomistic just war has an important contribution to make in denying the legitimacy of those fighting as a nonauthority from the start.

Having made this argument, it goes without saying that Thomism does not at all deny that individuals can be right when objecting to a legitimate authority's unjust actions. While Thomas certainly had a strong belief in the virtuousness of the just ruler and his/her responsibility for the common good of the community entrusted to him/her, he also accepted that a tyrant might have to be removed from the outside by neighboring princes or even from the inside by a just resistance. How far Aquinas was willing to go in granting a right of resistance has been subject to considerable debate, as his position varies according to which of his works is consulted. That he allowed for resistance as a response to a ruler's blatant disrespect of his/her responsibilities, however, is commonly accepted.[56] In sum, from a Thomistic point of view, the authority criterion is not only a direct result of its collectivist approach but also takes on a crucial function in restraining the use of force. Consequently, arguing for any individual to have the right to wage war seems like a very imprudent thing to do.

## CONCLUSION

This chapter has investigated the authority criterion of just war, which has recently been attracting renewed scholarly interest. It contrasted two particular accounts of just war with regard to authority: the Thomistic and individualist readings. It was pointed out that the Thomistic just war imagines war as a collective undertaking to be carried out with the authorization of those in authority, while moral individualists are willing to grant the authority to wage war to any individual. Critically appreciating the individualist approach to the authority criterion from a Thomistic point of view, the chapter concluded that besides the fundamental disagreement about the moral value of the political community, individualists risk legitimizing a morally problematic expansion in the use of force by abandoning the restraining mechanism of legitimate authority. At the same time, while agreeing with Walzerians on the moral value of the political

community, the Thomistic just war rejects the Westphalian understanding of sovereignty, built around the principles of political sovereignty and territorial integrity. Following from the ruler's responsibility toward the common good of all political communities, the use of force beyond one's own borders can be morally justifiable. Having said that, arguing that legitimate authorities have the authority to wage war does not answer the question of when such force is morally permissible. In other words, Aquinas's remaining criteria of just cause and right intention must also be met. That is why the following chapter turns to these criteria.

## NOTES

Parts of this chapter draw from Braun, "Just War and the Question of Authority," 221–36.

1. See, for example, Benbaji, "Legitimate Authority in War"; Fabre, *Cosmopolitan War*; Finlay, "Legitimacy and Non-State Political Violence"; Reitberger, "License to Kill"; and Steinhoff, "Doing Away with 'Legitimate Authority.'"
2. Aquinas, *ST*, II-II, q. 40, a. 1
3. Johnson, "Right to Use Armed Force," 19–20.
4. For an in-depth account of the medieval just war, including the arguments made by the canonists, see Russell, *Just War in the Middle Ages*.
5. Aquinas, *ST*, I-II, q. 72, a. 4.
6. Aquinas, *De Regno ad Regem Cypri*, I. chap. 1.
7. Johnson, "Right to Use Armed Force," 25.
8. Johnson, "Thinking Morally about War in the Middle Ages and Today," 7.
9. Reichberg, *Thomas Aquinas on War and Peace*, 115. See also Regout, *La Doctrine de la Guerre Juste*, 71.
10. Torrell, *Saint Thomas Aquinas*, 13.
11. Aquinas, *Sent*. II d. 44, *expositio textus*, ad. 4, cited in Torrell, *Saint Thomas Aquinas*, 13.
12. As Aquinas argued for an exception to the "two powers" doctrine in the case of the papacy, critics have raised the question of whether Thomas was consistent on this issue. This debate has especially unfolded in the context of his *De regno*. See Eschmann, "St. Thomas on the Two Powers"; and Boyle, "*De regno* and the Two Powers."
13. Russell, *Just War in the Middle Ages*, 117.
14. Johnson, "Right to Use Armed Force," 25.
15. Aquinas, *ST*, II-II, q. 66, a. 8.
16. Aquinas, II-II, q. 64, a. 3.
17. Augustine, "Augustine (354–430)," 73.
18. Johnson, "Thinking Morally about War in the Middle Ages and Today," 5.
19. Bartelson, "Double Binds," 90.
20. Johnson, "Right to Use Armed Force," 25.
21. Aquinas, *De Regno ad Regem Cypri*, I, chap. 16.
22. Johnson, *Sovereignty*, 84.
23. Johnson, "Right to Use Armed Force," 26.
24. Aquinas, *ST*, II-II, q. 66, a. 8.

25. Bartelson, "Double Binds," 88.
26. Innocent IV, "Innocent IV (ca. 1180–1254)," 150–51.
27. See chapter 6 for a discussion of just cause.
28. Philpott, "Sovereignty," 356–57.
29. Aquinas, *ST*, II-II, q. 40, a. 1.
30. It is important to note that the "Westphalian understanding" that is present in Walzer's "legalist paradigm" should not be conceived of as an understanding that was firmly established in 1648 and has continued to regulate state interaction until the present day. The historical record calls for a considerable amount of caution when referring to the term "Westphalian System," as such a broad conceptualization inevitably amounts to an act of simplification. See Duchhardt, "'Westphalian System'"; and Glanville, "Myth of 'Traditional' Sovereignty."
31. Johnson, *Sovereignty*, 84.
32. Bartelson, "Double Binds," 93.
33. O'Driscoll, "From Versailles to 9/11," 33.
34. Luban, "Romance of the Nation-State."
35. In fairness to Walzer, this is not to argue that he considers the "legalist paradigm" as the be-all and end-all. In actual fact, as the first chapter has noted, he argues for certain "rules of disregard."
36. See, for example, Steinhoff, *Self-Defense, Necessity, and Punishment*.
37. See Steinhoff, *Ethics of War and the Force of Law*.
38. Steinhoff, *On the Ethics of War and Terrorism*, 2.
39. Steinhoff, 3.
40. Steinhoff.
41. Steinhoff, 18.
42. Steinhoff, 19.
43. Steinhoff, 19–20.
44. Steinhoff, 20.
45. See Fabre, "Cosmopolitanism, Just War Theory"; and *Cosmopolitan War*.
46. Fabre, "Cosmopolitanism, Just War Theory," 964.
47. Fabre.
48. Fabre.
49. Fabre.
50. Fabre, 968.
51. Fabre, "Cosmopolitanism, Just War Theory," 969.
52. Fabre.
53. See Johnson, "Right to Use Armed Force," 21.
54. Johnson, 24.
55. Coates, *Ethics of War*, 156.
56. See, for example, Blythe, "Mixed Constitution"; Crofts, "Common Good"; and Reichberg, *Thomas Aquinas on War and Peace*, 122–27.

# 6

# Aquinas on Just Cause and Right Intention

As the previous chapter provided an account of the first Thomistic just war criterion of legitimate authority, our attention now turns to the remaining criteria of just cause and right intention. Importantly, in contrast to some contemporary just war thinkers who treat just war criteria in a "check-list" manner,[1] moving from one criterion to the next without giving due attention to the interplay of the criteria, the Thomistic just war criteria are inherently interconnected. That is why the classical bellum justum emphasized moral judgment. It is this emphasis on judgment that lets O'Donovan argue as follows regarding the foremost purpose of just war: "It was never anything other than a practical proposal for the radical correction of the praxis of war, and the extent to which its conceptions are not followed is the extent to which they have not been attended to."[2] Just cause and right intention, in particular, must be seen holistically and therefore are discussed together in one chapter.

As will become apparent, the Thomistic understanding of just cause breaks with Walzerians and revisionists on the question of retribution but shares their concern that the Caroline standard of preemptive self-defense is too restrictive. Regarding right intention, the virtue-based account of Aquinas differs distinctively from the Walzerian idea, while revisionists tend to ignore the criterion altogether. This chapter not only discusses the differences between Walzerians', revisionists', and Aquinas's conceptualizations but also points out how those differences apply to vis. The chapter begins with an overview of the contemporary consensus against war as retribution. It then turns to the classical understanding of just war, which considered retribution as the prototypical just cause. In addition, the treatment of just cause engages with the question of whether self-defense may include anticipatory rationales. Next the chapter discusses right intention, arguing that while contemporary just war thinkers have paid little attention to this criterion, it had pride of place in the classical bellum justum.

## THE CONTEMPORARY NEAR-CONSENSUS AGAINST WAR AS RETRIBUTION

Most contemporary just war thinking, including Walzerians and revisionists, as well as international law, concentrates on self-defense as just cause for war. While recently there has been an increased interest in questions of other-defense, such as the "responsibility to protect," it seems fair to argue that self-defense remains the primary just cause for the overwhelming majority of just war thinkers. Accounts that provide a defense of war as punishment remain a minority position.[3] In contrast to large parts of the academic debate, however, punitive practices are very much a part of international conduct today, although they are often not acknowledged as such.[4] The modern theoretical near-consensus about the morally problematic nature of punitive force also deviates markedly from one reading of the Thomistic just war, which accepted self-defense as just cause for war but focused on retribution instead. This natural law–based reasoning considered the use of force primarily as a means to reestablish a state of justice that had been disrupted by prior wrongdoing.

Seen from a historical perspective, today's limitation of just cause to primarily self-defense has been the result of a changed understanding of political authority as well as of prudential considerations. Enshrined in the Westphalian settlement, this new understanding no longer followed the understanding of the prince as a divinely instituted avenger of justice who held responsibility for the common good. After 1648 the ruler was commonly considered the representative of the people only, who had been entrusted with the people's fundamental right of self-defense. The new understanding of sovereignty, moreover, limited the ruler's responsibility for the common good to the people entrusted to him/her within a defined territory, whereas the earlier understanding had also emphasized the common good of all humankind.[5] As a result, the Westphalian principles of political sovereignty and territorial integrity effectively superseded the earlier responsibility for the common good of all humankind which, in principle, allowed for intervening in other rulers' affairs in response to grave injustice. In addition, the concern to stop rulers from intervening in each other's affairs over the issue of religion contributed to the limitation of just cause to self-defense. The dreadful experience of modern warfare added, several centuries later, further prudential concerns that resulted in the UN framework and just war theory's contemporary near-consensus about self-defense as the only just cause for war between states.

The idea of retribution as a just cause for war has overwhelmingly been rejected in today's conversation about the morality of war. Walzer, while attributing a place to punishment "once the aggressor state has been militarily repulsed,"[6] rejects the idea of war as a means of punishment. Representing the

revisionist side, McMahan denies the legitimacy of retributive war as "the worst sort of vigilante action."[7] Among today's critics of punitive war, David Luban has arguably provided the most comprehensive argument against retribution as a just cause for war.[8] To begin with, a distinction needs to be made between retribution and vengeance. As Luban explains, the former "is undertaken for moral reasons as a practice of justice" while the latter "is undertaken out of rage and hatred."[9] Luban is correct to note that of these two rationales, only retribution marks a licit moral basis for punitive force.[10] He subsequently argues that war as punishment is unjustifiable for five particular reasons: "(1) It places punishment in the hands of a biased judge, namely the aggrieved party, which (2) makes it more likely to be vengeance than retributive justice. (3) Vengeance does not follow the fundamental condition of just retribution, namely proportionality between punishment and offense. (4) Furthermore, punishment through warmaking punishes the wrong people and (5) it employs the wrong methods."[11]

To add more detail, the "biased judgment objection," according to Luban, holds that all states believe they are acting for a just cause and that the acts of injustice committed by the other side deserve to be punished.[12] Consequently, belligerents are unable to objectively judge each other's guilt, which, however, is the necessary prerequisite for an impartial judgment. Rodin captures this concern with an illustration he draws from the domestic context: "This is why it is always unjust for a participant in a dispute to administer or determine punishment in his own case, and why we insist that judges or committee members stand down from a case if their personal interests are involved. While it is not inconceivable that such persons will act impartially, it is far from likely and cannot be relied upon."[13] As a result of this bias, the cause of retribution might turn into "an open invitation to self-serving, unfair, overly harsh, and excessive punishment."[14] In other words, when the in-principle justifiable just cause of retribution degenerates into vengeance, the crucial determination for just retribution—namely, to find the right balance between punishment and wrongdoing—inevitably fails. Rowan Williams, drawing on Aquinas, puts this idea succinctly: "An act of private redress, private vengeance, vigilantism, or whatever, may purport to punish inordinate behaviour but it only deals with the offense to the individual, not the offense to the social body; thus it fails to heal the social body and even makes the wound worse."[15] Regarding his fourth objection, Luban essentially argues that even if retributive war could be justified it would be indiscriminate and therefore unjust. While it might be possible, in theory, to only hit the guilty elements of the state that the just side seeks to punish, this argument does not withstand a reality check. In Luban's eyes, war tends to cause large-scale destruction, and even limited war unleashes indiscriminate force. The conclusion he draws from this judgment is that "if war is retributive punishment, we must acknowledge that it is collective punishment,

indeed collective corporal punishment."[16] Finally, closely related to the argument that war as retribution is necessarily indiscriminate, Luban suggests that the methods commonly employed in war rarely allow for exclusively striking at the unjust belligerent's guilty elements and more often than not hit civilians, too.[17]

In addition to Luban's moral objections against war as punishment, Lang has raised the practical concern that while punitive practices continue to be a part of international relations, they have failed to achieve the aim for which they have been employed—namely, to create a more just international order: "Attempts to enforce compliance with norms, rules and laws at the international level result in unjust policies and political disorder."[18] In this respect, one might add the concern, succinctly raised by Moyn, that the increasingly humanized way of war, such as the precision-strike capabilities of armed drones, has facilitated forever wars that are almost unlimited in time and space, a regime of vis perpetua. To me it seems that, especially with regard to targeted killing, there is a link between the impression that war has become more humane and the choice to allow the retributive rationale back in. Of course such a link, if it exists, does not guarantee that retributive force will achieve the stated goals, an aspect Lang seeks to direct attention to.

## AQUINAS ON JUST CAUSE AND RIGHT INTENTION

Having laid out the contemporary near-consensus against retribution, I now turn to Aquinas's understanding of just war as encapsulated in his conceptualization of the criteria of just cause and right intention.

### The Criterion of Just Cause

Luban's rejection of retribution as a just cause for war, like the general contemporary near-consensus about self-defense as only just cause, contrasts markedly with one particular reading of Aquinas. In what follows, this understanding of the just war is presented in conversation with the current consensus position. As E. B. F. Midgley noted, Thomas generally received the traditional Christian teaching of the just war and gave it a systematic formulation.[19] Aquinas largely developed his thinking on bellum justum as the right of an injured state to wage war in order to heal a violation of justice and with the goal of protecting the common good.[20] Thomas thus effectively distinguished between two forms of just war: war as defense of the common good and war as punishment. As Elshtain put it, the peace sought by classical thinkers "was not just any peace, but a just peace that leaves the world better off than it was prior to the resort to force."[21] Aquinas defined just cause as follows: "Secondly, a just cause is required,

namely that those who are attacked, should be attacked because they deserve it on account of some fault."[22] Thus for Thomas war aimed "to restore a peace that has been disrupted (or threatened) by a particularly egregious wrong."[23] In the words of Vanderpol, just war served the function of "vindicative justice."[24] It is not surprising then, as Johnson notes, that Aquinas did not even list the self-defense rationale in his discussion of just war, as he considered the right of self-defense an inherent right of both individuals and states.[25]

While the retributionist reading of Aquinas has historically been the dominant one, the liabilist reading introduced by Vitoria and elaborated on by Molina is today the reigning one in just war debate.[26] For example, revisionists advocate a liability reading of the use of force in self-defense and discount a deserts-based account. McMahan explicitly distinguishes his moral liability account from an account based on moral culpability. In particular, he points to the difference between the instrumental and noninstrumental nature of the concepts:

> Desert is noninstrumental. If a person deserves to be harmed, there is a moral reason for harming him that is independent of the further consequences of harming him. Giving him what he deserves is an end in itself. Although a deserved harm is bad for the person who suffers it, it is, from an impersonal point of view, intrinsically good. By contrast, a person is liable to be harmed only if harming him will serve some further purpose—for example, if it will prevent him from unjustly harming someone, deter him (or perhaps others) from further wrongdoing, or compensate a victim of his prior wrongdoing. The goal is internal to the liability, in the sense that there is no liability except in relation to some goal that can be achieved by harming a person.[27]

Based on the instrumental nature of liability, McMahan stresses that the requirement of necessity is inherent to it.[28] Consequently, he arrives at the limitation of just cause for war to self-defense by following his liabilist reading. In contrast, moral culpability, McMahan argues, is not ruled by necessity because the good gained from meting out a deserved punishment is not instrumental and therefore there is no necessity requirement beyond the act of punishment itself.[29]

### *Punishment as Just Cause for War*

It is important to note that the concept of punishment is not limited to retribution. However, three of the four standard justifications for criminal punishment—deterrence, incapacitation, and prevention—have been incorporated into today's accepted legalist paradigm.[30] The only justification that has been abandoned is retribution. It thus seems that although retribution

has mostly been ruled out, the other aspects of punishment have only been relabeled as acts of defense. As Joseph Falvey notes, Aquinas, too, had a place for these additional rationales in his general theory of punishment:

> There is a four-fold end to punishment. These ends are not congruent with one another, but they have an order among themselves according to whether they are greater or lesser goods. The primary end of punishment is to redress the disorder the offense introduced in the moral order as a whole. The secondary end of punishment is the restoration of the public and civil order. The tertiary end of punishment, which is closely related to the second, is the defense of public safety. Finally, punishment offers the rehabilitation of the offender himself, which is the restoration of the order within the criminal's soul.[31]

That said, some scholars argue that the retributionist aspect of punishment had been the "core" of Aquinas's account of punishment.[32] As Brian Calvert demonstrates, Thomas's account shows all main features of retributivism: Aquinas holds generally that a crime deserves to be punished and in order for that punishment to be just, a crime must actually have taken place and the criminal suspect must have committed the misdeed.[33] In addition, the wrongdoer must have been a responsible agent at the time he/she committed the crime. These last two aspects are supposed to ensure that only the guilty are punished. In Aquinas's own words: "Punishment is not due save for sin."[34] Crucially, Thomas also argues that, besides the magnitude of the crime, the amount of voluntariness with which the crime was committed by the perpetrator must be taken into consideration when it comes to deciding which penalty to impose. Consequently, involuntarily committed offenses should not be punished, as "involuntariness excuses from sin."[35] Furthermore, Aquinas's account of retribution holds that crime and punishment must be proportionate, and he follows retributive theories in the assumption that a crime caused an imbalance in the order of justice that a justly imposed punishment aims to correct.[36] Aquinas's thought about punishment is the result of his natural law approach, the approach he arguably perfected and that still flourishes in the social thought of the Catholic Church. Directly following from natural law's metaphysics of the good, natural law theorists consider retribution "not only a legitimate end of punishment" but "the fundamental end."[37]

However, it is important to note that according to Aquinas's logic, the punishment of wrongdoing does not necessarily have to mirror the initial offense. Unlike, for example, Kant, Aquinas does not advocate a so-called *lex talionis*, which seeks to return to the offender an evil similar to his/her initial wrongdoing. In contrast, for Aquinas it suffices to repress the sinful will of the criminal by inflicting a contrary evil.[38] Relatedly, Thomas's emphasis on the repression of the offender's will to restore the equilibrium of justice is apparent in his

argument that depending on the magnitude of the offense, the punishment should aim at "depriving a man [of] what he loves most."[39] As Koritansky summarizes succinctly: "Since the essential requirement of retribution, for Aquinas, is that criminals experience a loss commensurate with the degree to which they indulged their wills beyond the boundaries of legality, there is no need to require the poetic justice recommended by Kant."[40]

In the context of maintaining and/or restoring the balance of justice, Aquinas's conceptualization of punishment is also forward looking. Thomas argues that "punishment may be considered as a medicine, not only healing the past sin, but also preventing from future sin, or conducing to some good."[41] Importantly, Aquinas's idea of punishment as deterrence includes both special and general deterrence. The former type is directed at the specific offender only, whereas the latter is aimed at deterring other potential offenders, too. For Aquinas, "the punishment that is inflicted according to human laws, is not always intended as a medicine for the one who is punished, but sometimes only for others . . . that at least they may be deterred from crime through fear of punishment."[42] That said, the punitive rationale of deterrence would be bound to the features of retribution spelled out earlier.[43]

Having pointed out Thomas's conceptualization of punishment, once punishment takes the form of lethal action, inevitably the parallel with the death penalty comes to mind. In fact, Aquinas's just war has been compared to the imposition of the death penalty executed by the ruler as part of his/her function as judge. For example, John Finnis, although he himself rejects Aquinas's thinking in this regard, argues that Thomas "highlights the analogy with punishment—capital punishment—and downplays, without eliminating, the analogy with private defence of self or others. Just as capital punishment involves the intent to kill, so too [he thinks] does waging war as ruler, general, or soldier."[44] Undergirding the parallel between capital punishment and war is Aquinas's understanding of legitimate authority. As Gerhard Beestermöller notes, only through his/her function as superior judge does the ruler have the right to make judgments about the justice or injustice of acts, which is the prerequisite for waging war licitly.[45] In Thomas's own words: "As regards princes, the public power is entrusted to them that they may be the guardians of justice: hence it is unlawful for them to use violence or coercion, save within the bounds of justice—either by fighting against the enemy, or against the citizens, by punishing evil-doers: and whatever is taken by violence of this kind is not the spoils of robbery, since it is not contrary to justice."[46] Moreover, with regard to the ruler's authority to employ lethal force, Aquinas holds: "One who exercises public authority may lawfully put to death an evil-doer, since he can pass judgment on him."[47] Interestingly, the parallel between the death penalty and war in Aquinas can be taken as proof that the revisionist claim of having innovated just

war thinking by adding the concept of "reductive individualism" is mistaken. As Steinhoff puts it: "Traditional just war theorists were no less reductivist and individualist than 'revisionists.' While it is true that that they focused on the law enforcement or public authority justification and not, like 'revisionists,' on self-defense, this does not turn them into 'collectivists' but merely into 'reductive individualists' with a different focus."[48]

Consequently, in order to determine the justness of retributive uses of limited force, the question of how the wrongdoing under investigation relates to the parallel with the death penalty needs to be answered. The following casuistical analyses thus need to engage the natural law argument for the justness of the death penalty in principle, which Edward Feser and Joseph Bessette summarize as follows:

1. Wrongdoers deserve punishment.
2. The graver the wrongdoing, the severer is the punishment deserved.
3. Some crimes are so grave that no punishment less than death would be proportionate in its severity.
4. Therefore, wrongdoers guilty of such crimes deserve death.
5. Public authorities have the right, in principle, to inflict on wrongdoers the punishments they deserve.
6. Therefore, public authorities have the right, in principle, to inflict the death penalty on those guilty of the gravest offenses.[49]

Importantly, as Calvert notes, Aquinas's thinking on the death penalty does not constitute a consistent account.[50] However, it seems fair to argue that Thomas does not see the death penalty as a cure-all. While he believes that some sinners will never reform and thus will continue to pose a threat to the common good, his overall concern is not the imposition of punishment as an end in itself. As a practical consequence, Thomas can imagine less severe penalties in cases where the death penalty endangers the commonweal or where individuals are repentant:

> According to the order of His wisdom, God sometimes slays sinners forthwith in order to deliver the good, whereas sometimes He allows them time to repent, according as He knows what is expedient for His elect. This also does human justice imitate according to its powers; for it puts to death those who are dangerous to others, while it allows time for repentance to those who sin without grievously harming others.[51]

Hence, Aquinas's natural law approach toward the death penalty distinguishes between its justness in principle and prudential and charitable considerations regarding whether the punishment should actually be executed.

In summation, while Walzerians and revisionists concentrate on the just cause of self-defense and have no place for retribution, the latter rationale is of crucial importance for the Thomistic just war. However, while retribution functions as its primary just cause for war, the Thomistic just war does not at all deny the justifiability of self-defense. As the following section illustrates, the debate about what self-defense actually constitutes seems far from being settled. In particular, both Walzerians and revisionists object to the standard upheld in international law. Once more, it will emerge, the classical bellum justum can provide important insights.

### *Preemption and Prevention as Just Causes for War*

As noted earlier, the rationale of self-defense is a consequence of Aquinas's natural law teaching. Importantly, however, accepting the just cause of self-defense does not yet resolve the question of what constitutes self-defense. In fact, there has been a debate among just war thinkers on this question that spans many centuries. In particular, there has been a conversation about the question of whether self-defense may include an anticipatory element.[52] This conversation moved to the forefront of debate again in the aftermath of the terrorist attacks of 9/11 and has also had an impact on the debate about jus ad vim. A good starting point for assessing the contours of self-defense is the contemporary regulatory framework of international law as represented in the UN framework and customary international law. In order for defensive force to be justified, international law requires that an armed attack either has occurred or is imminent.[53] In contrast to preemption, in which an attack is imminent, preventive action, in which there is no imminence, is considered to be illegal. Walzer, while starting from the frame provided by international law, expands on that foundation. For him, the strict imminence qualifier of the so-called Caroline standard, which rests on the threat being "instant, overwhelming, and leaving no choice of means, and no moment for deliberation," can be morally problematic. He therefore suggests a more expansive interpretation that is based on the criterion of sufficient threat. This justification of anticipatory force "looks to the past and future."[54] Walzer suggests three determinant factors: "a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk."[55]

On the revisionist side, McMahan suggests that preventive war may be morally justifiable based on his liability account. McMahan imagines a case in which one country prepares an unjust attack on another, keeping its intention hidden from both the target state and its own soldiers, the latter of whom have joined "the military for good moral reasons."[56] The potential victim state, then, discovers the malevolent intention of its future attacker, knowing that nonviolent

means are unable to thwart the attack and that waiting until the attack is imminent will come at the price of defeat.[57] Under such circumstances, McMahan suggests, it would be morally justifiable to target the future attacker's soldiers preventively, without them knowing about their leadership's intention.[58] In McMahan's terminology, the opposing side's soldiers become liable to attack. In consequence, both Walzerians and revisionists can imagine defensive uses of force that go beyond the Caroline standard. Thus, the question of anticipatory self-defense marks an area where both competing camps are in general agreement. Crucially, however, as the investigation of the morality of limited strikes to enforce international norms will reveal, preventive rationales can coincide with backward-looking justifications, the latter of which Walzerians and revisionists generally reject.[59]

The Thomistic just war, in contrast, hesitates to grant legitimacy to preventive uses of force. As Reichberg notes, while Aquinas does not engage with anticipatory military action in the *Summa Theologiae*, his definition of just cause seems to deny the justifiability of prevention, as "only a party that has engaged in determinable wrongdoing would be liable to attack. Attacking a party for what it *might* do, rather than what it has *already done*, would appear to contradict Aquinas's fundamental premise that there is just cause for war only when 'those who are attacked deserve attack on account of some fault.'"[60] Reichberg illustrates this point in a reference to Aquinas's argument in the *Compendium Theologiae*, in which Thomas states: "A person is called good or evil, not because he is able to pertorm [sic] good or evil actions, but because he performs them; praise and blame are duly rendered not for power to act but for acting."[61] That said, according to Reichberg, Aquinas's thinking is informed by a "concept of *inchoate* wrongdoing,"[62] which accepts that force may be used in response to an attack that has been planned and would be carried out at some point in the future.[63] Importantly, Aquinas seems to caution against too permissive a standard of inchoate wrongdoing. In the "Question on Judgment," which Reichberg applies to Aquinas's just war thinking, Thomas points to the temptation of being overly suspicious:

> Now there are three degrees of suspicion. The first degree is when a man begins to doubt of another's goodness from slight indications. This is a venial and a light sin; for "it belongs to human temptation without which no man can go through this life," according to a gloss on 1 Cor. 4:5, "Judge not before the time." The second degree is when a man, from slight indications, esteems another man's wickedness as certain. This is a mortal sin, if it be about a grave matter, since it cannot be without contempt of one's neighbor. Hence the same gloss goes on to say: "If then we cannot avoid suspicions, because we are human, we must nevertheless restrain our judgment, and

> refrain from forming a definite and fixed opinion." The third degree is when a judge goes so far as to condemn a man on suspicion: this pertains directly to injustice, and consequently is a mortal sin.[64]

Consequently, Aquinas, if his argument in the "Question on Judgment" is taken to apply to war, does not accept a purely preventive just cause for war:

> Now no man ought to despise or in any way injure another man without urgent cause: and, consequently, unless we have evident indications of a person's wickedness, we ought to deem him good, by interpreting for the best whatever is doubtful about him. [. . .] He who interprets doubtful matters for the best, may happen to be deceived more often than not; yet it is better to err frequently through thinking well of a wicked man, than to err less frequently through having an evil opinion of a good man, because in the latter case an injury is inflicted, but not in the former.[65]

At the same time, however, Reichberg interprets Aquinas as accepting that a threat does not have to be imminent in order to take action. Grounded in prudential thinking, Aquinas can be read as being supportive of the idea that addressing wrongdoing at an early stage is advantageous compared to dealing with it once it has become fully manifest.[66] Reichberg grounds his reading in Aquinas's argument on judgment, in which Thomas states that "when we have to apply a remedy to some evil, whether our own or another's, in order for the remedy to be applied with greater certainty of a cure, it is expedient to take the worst for granted, since if a remedy be efficacious against a worse evil, much more is it efficacious against a lesser evil."[67] Furthermore, there is another rationale for anticipatory military action that seems reconcilable with the Thomistic just war—namely, postwar measures that are imposed on the defeated aggressor in order to prevent the aggressor from attacking once more at some point in the future.[68] Crucially, while such action falls under the category of anticipatory force, there is also an inherent punitive aspect to it, as the justifiability of the anticipatory actions follows from past wrongdoing. In other words, there can be a link between punitive and anticipatory causes for war. Crucially, McMahan supports this linkage. He argues that if a country has committed acts of unjust aggression, it can be morally justifiable to take preventive action against it as part of pursuing the just cause that responds to the aggression: "The wrongful action that exposes the aggressor to defensive action now also makes it liable to further, preventive action as well."[69]

In conclusion, it seems that, like Walzer and McMahan, Aquinas would consider the Caroline standard too restrictive. While the immediacy standard would apply to individual self-defense, limiting the resort to force by legitimate

authorities in this way would go beyond the demands of morality. Classical just war thinkers like Aquinas accepted that a literal interpretation of immediacy was impractical and may well result in falling victim to an unjust war.[70] The practical concern for matters of statecraft shines through here. Consequently, based on the concept of inchoate wrongdoing, limited anticipatory action seems reconcilable with the Thomistic just war. The crucial question that needs to be answered is, of course, *when exactly* anticipatory action becomes morally justifiable. The answer to that question, in line with Aquinas's understanding of legitimate authority, is a judgment call that only the ruler can make. Above all, it will depend on a prudent interpretation of the circumstances, which demonstrates the allure of virtue and casuistry. The virtues, in particular, through their role in the right intention criterion, will take on a crucial role in dealing with the inevitably arising suspicions Aquinas cautions against.

### *Just Cause and Jus ad Vim*

The debate about just cause and how it relates to uses of limited force has been taking place before the horizon sketched out earlier. In line with the contemporary understanding, Frowe rejects the just cause of retribution based on deserts. Brunstetter's starting point is the just cause of self-defense, too.[71] That at least is his ideal-type starting point. Starting from a "general presumption against war,"[72] he feels uneasy about providing justifications for vis that go beyond the restrictive self-defense standard. That said, however, due to the moral difference he detects between large-scale war and limited force, he adds punitive rationales to his theory of jus ad vim. In this context it also needs to be reiterated that, as the previous section has demonstrated, which uses of force can be reconciled with the notion of self-defense continues to be debated. While Frowe does not engage with anticipatory uses of limited force in her critique of jus ad vim, it seems reasonable to assume that her position on prevention would be close to McMahan's, whose account of liability to defensive harm she adopts. Brunstetter, in contrast, does engage with the morality of anticipatory uses of vis. In a book chapter coauthored with John Emery, Brunstetter argues for the morality of preventive drone strikes against individuals, which they imagine as acts of vis. Noting that purely preemptive strikes would be "very rare,"[73] Emery and Brunstetter suggest "that drones employed outside the traditional battlefield are a form of limited preventive force aimed at *avoiding* a larger war."[74] They are of the opinion that states' right to self-defense entails a right to use limited preventive force.[75] In consequence, Brunstetter, like Walzer, McMahan, and Aquinas, is willing to go beyond what international law, based on the Caroline standard, allows. However, he limits his justification of targeted killing by drones to situations of "lagged imminence,"[76] situations "where there is a real threat on

the horizon, albeit not immediately."[77] In addition, his justification only applies to what Walzer referred to as zones in between war and peace, where neither the laws of war nor those of law enforcement seem applicable.[78]

## The Criterion of Right Intention

The criterion of right intention, as David Whetham notes, does not "necessarily sit well with us today," as it might be considered abstract and subjective due to its "internal character."[79] Arguably, one explanatory factor for the contemporary neglect of right intention is the Christian context in which it is grounded. Medieval theologians like Aquinas believed in the immortality of the soul and therefore emphasized the importance of intentionality of acting vis-à-vis the afterlife. Consequently, the uneasy place of right intention in contemporary just war debate points to how contemporary just war thinking both has moved away from and is still being shaped by its Christian roots. The classical understanding holds that intention in war shows in belligerents' war aims and how they fight to achieve these objectives. In other words, right intention "gives concrete shape to the condition of just cause."[80] Capizzi, in line with the classical conceptualization, refers to right intention as a "coordinating criterion," which "keeps war focused on the end of peace."[81] For Aquinas, right conduct in war is inherently connected to the "virtuousness of its purpose";[82] consequently, he cautions against the negative passions that can arise on the battlefield:

> Thirdly, it is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil. Hence Augustine says (De Verb. Dom. [The words quoted are to be found not in St. Augustine's works, but in Can. Apud. Caus. xxiii, qu. 1]): "True religion looks upon as peaceful those wars that are waged not for motives of aggrandizement, or cruelty, but with the object of securing peace, of punishing evil-doers, and of uplifting the good." For it may happen that the war is declared by the legitimate authority, and for a just cause, and yet be rendered unlawful through a wicked intention. Hence Augustine says (Contra Faust. xxii, 74): "The passion for inflicting harm, the cruel thirst for vengeance, an unpacific and relentless spirit, the fever of revolt, the lust of power, and such like things, all these are rightly condemned in war."[83]

This virtue approach implies restrictions on conduct in war, but Aquinas did not develop detailed rules such as, for example, were present in canon law or the code of chivalry. Quoting Augustine (De Libero Arbitrio ii, 19), Aquinas speaks of virtue as "a good quality 'of the mind.'"[84] Confronting situations that require an immediate response, it is crucial that a person's passions be correctly

ordered in accordance with the virtues. When the training in virtuous behavior succeeds, it becomes natural for the virtuous person to subject his/her quick reactions to habit, not instinct.[85]

Given that Thomas was first and foremost a theologian, his just war thinking cannot be separated from his Christian faith. Thus, Aquinas distinguishes between the cardinal virtues of justice, prudence, fortitude, and temperance and the theological virtues of faith, hope, and charity. The most basic difference between these two types of virtue is that the cardinal virtues provide the necessary foundation for human action on earth, for imperfect happiness, while the theological virtues point humankind to its supernatural end of beatitude, or perfect happiness.[86] For the purpose of this book, the cardinal virtue of prudence and the theological virtue of charity are the most important. Thomas defines prudence as "right reason applied to action."[87] With regard to the just war, this cardinal virtue is crucial for political and military decision makers, whose task it is to make difficult ethical choices, a responsibility that often requires them to choose between various alternatives of action.[88]

The cardinal virtues like prudence are transcended by the theological virtues, as they lead human beings to their final end, which is unity with God.[89] God is both the source and the end of human existence; consequently, human progress follows from a process of grace that lets humans become more like God, who created humankind in His image.[90] The most important theological virtue in this process is the virtue of charity. For Aquinas, "Charity is the mother and root of the virtues, inasmuch as it is the form of them all."[91] Relevant to questions about when to refrain from using force although it would in principle be justified, "The primary act of charity gives rise to the virtue of mercy, a kind of sympathy or compassion, which is understood as the greatest of the virtues that unites a person with a neighbour."[92] Importantly, Thomas discussed the question of just war within his treatment of charity, and his thought is directed toward the endpoint of human existence, namely, unity with God in the afterlife. However, taking divine charity as the "necessary lodestar" of human action does not deny the necessity of meting out justice during humankind's time on earth.[93] While for Christians the ultimate telos is the eternal happiness of God's kingdom, earthly just war reasoning seeks to achieve an approximation of that kingdom imagined as peace on earth.[94] On the way toward this objective, the use of force remains a morally justifiable option, although Christians may not forget about the final goal of overcoming violence. Put differently, Aquinas's thinking on temporal government should be seen as an "interim ethic,"[95] in which government takes on the responsibility for establishing and maintaining the natural goods of earthly life, thus providing the basis for human beings so that they can strive for their supernatural perfection.

Taking the virtue of charity as the "lodestar" has arguably manifested itself in the evolution of the idea of just war. For example, consider the Catholic just

war teaching, which is indebted to Thomas's thinking. The change in Catholic teaching from a "presumption against injustice" toward a "presumption against war," which Johnson criticizes as breaking with the just war tradition and Weigel refers to as "a great forgetting,"[96] might be considered as an arguably praiseworthy alteration of Church teaching based on the theological virtue of charity.[97] Eli McCarthy considers this development of CST a consequence of a reappraisal of Thomistic virtue ethics in the twentieth century generally and especially after the Second Vatican Council.[98] While the core of Aquinas's natural law–based just war has arguably never been abandoned, modern popes have opted to emphasize prudential and charitable concerns through acting as a "minister of peace."[99]

Until 2018, when Pope Francis announced a radical break with prior Church teaching, a similar pattern could be detected with regard to capital punishment. Modern popes up until Francis, who completely rejects the death penalty, were publicly perceived as opposed to this means of punishment but in fact did not rule out the death penalty in principle. What they did, Feser and Bessette demonstrate, is emphasize prudential and charitable concerns that advised against executing it.[100] It seems that concerns of prudence and charity were behind this distancing from the death penalty when, for example, Pope Francis, at the time still following his immediate predecessors' thinking, stated, "The death penalty is contrary to the meaning of humanitas and to divine mercy, which must be models for human justice."[101] In later remarks, Francis explicitly spoke of "the primacy of mercy over justice."[102] This hierarchy illustrates how the theological virtue of charity, through mercy, shapes the cardinal virtues. As Cardinal Avery Dulles succinctly summarized: "In practice, then, a delicate balance between justice and mercy must be maintained. The State's primary responsibility is for justice, although it may at times temper justice with mercy."[103] It seems that Francis's immediate predecessors held the view that the interplay between justice and mercy had to be considered before inflicting lethal punishment, which let them argue against the execution of the death penalty. Crucially, when making this argument the popes could have claimed to follow the Thomistic point of view. As Koritansky points out, Aquinas's take on retribution has an opening for mercy that Kant's strict lex talionis cannot account for. For Kant, any punishment that is less severe than what the external act of wrongdoing warrants resembles an act of injustice on the side of the legitimate authority. Aquinas, in contrast, is mainly interested in punishing the overindulgence of the criminal's will. Therefore, Aquinas's thinking allows for charitable concerns to have an impact on the decision about what type of punishment to inflict on the criminal.[104]

To illustrate Thomas's account of virtue vis-à-vis the use of armed force, Reichberg has provided an innovative interpretation of Thomistic right intention. Granted that Thomas was very sparing in detail, Reichberg contributes a

reading that is based on two cardinal virtues—namely, military prudence for political and military decision makers and battlefield courage for rank-and-file soldiers. For Aquinas, the criterion of right intention described the set of moral dispositions required for decision makers involved in war to make sound moral judgments.[105] Importantly, while Reichberg grounds his discussion in the virtues of military prudence and battlefield courage, he does not forget to give due attention to the doctrine of the unity of virtues. As this book concentrates on the question of when the use of vis can be morally justifiable, the discussion focuses on the virtue of military prudence. Noting that Aquinas's bellum justum did not explicitly distinguish between these levels of analysis, military prudence is especially relevant to what would later become known as the jus ad bellum level, while battlefield courage addresses the jus in bello.

### *Military Prudence*

Military prudence, according to Aquinas, is a virtue of commanders who take responsibility for the decision-making about war.[106] Prudence contributes to the overall goal of achieving justice. For Aquinas, the virtue of prudence has special significance among the intellectual virtues.[107] Quoting Augustine, Aquinas states, "Prudence is the knowledge of what to seek and what to avoid."[108] Prudence is meant to be a choice in which the will chooses among different options of acting.[109] Departing from Aristotle and the Romans, Thomas did not use the terms of military art or science but those of military prudence.[110] In contrast to art, which only applies to extrinsic acts, prudence applies intrinsically as well. As a practical consequence, while for military conduct understood as art an immorally fighting but winning general is still a capable commander, this would not be the case for a prudently fighting general. For the latter, any intentional misconduct, either through direct intent or negligence, would be considered unjust.[111] In this context, a concept needs to be mentioned that is commonly traced to Aquinas, the doctrine of double effect.[112] This doctrine consists of two parts. First, it holds that unjust deeds may not be carried out intentionally, regardless of the positive results the wrongful action may bring. Second, as the flipside of the first part, DDE accepts that just deeds may come with foreseeable negative side effects. Additionally, the agent carrying out the good action is not morally required to abstain from his/her doing to prevent the negative side effect.[113]

As military acts are carried out for the common good and the prince and his/her commanders bear responsibility for that good, justice in war must be the prince's main concern.[114] As Thomas puts it himself: "As regards princes, the public power is entrusted to them that they may be the guardians of justice: hence it is unlawful for them to use violence or coercion, save within the bounds of justice."[115] It goes without saying that, following Aquinas's thinking,

purely consequentialist strategies would be deemed illicit.[116] However, a Thomistic reading of just war does also allow for consequentialist considerations that fall within the bounds of justice.[117] In Thomas's own words: "*On the contrary,* The consequences do not make an action that was evil, to be good; nor one that was good, to be evil."[118] Ignoring foreseeable consequences, however, makes a person morally culpable to some extent. Following the same train of thought, Johnson argues that concerning the question of whether prudential considerations may trump the presence of a just cause, Aquinas would leave it to the ruler to decide.[119]

### *Right Intention and Jus ad Vim*

The right intention criterion can provide important insights into the fight for the just war tradition. Brunstetter's Walzerian account does engage with right intention and the question of how it relates to jus ad vim. In particular, Brunstetter argues that because of the limited character of vis, the right intention criterion for jus ad vim "is necessarily circumscribed" compared to that for just war.[120] That said, however, Brunstetter's list of illicit intentions that can justifiably be countered by vis is strongly reminiscent of the goal of peace imagined as tranquillitas ordinis that is found in Aquinas's definition of just war: "But they can serve to combat those who undermine international peace and security, contest the order of other states, or pursue evil acts that shock the moral conscience."[121] Again, one can detect a tension with the Walzerian understanding that is grounded in the post-1945 world order and a limited return to the classical bellum justum in the context of limited force. In fact, Brunstetter himself acknowledges that his argument on right intention has parallels with the thinking of Johnson, the leading neoclassical just war thinker.[122] The general idea that informs Brunstetter's understanding of right intention is to use vis to facilitate a "return to the pursuit of human rights by non-kinetic means."[123] In other words, vis can serve right intention when it establishes a type of order that guarantees an acceptable state of justice and that subsequently no longer depends on the use of force. Considering this position, Brunstetter's take is not far off from Aquinas's idea of just war. I am even tempted to argue that his concern for the practical dilemmas decision makers face implicitly suggests a virtue approach, although he does not refer to the moral virtues in his theory of jus ad vim. Of course both Brunstetter's and the Thomistic understanding would still have to grapple with the vis perpetua critique. While in theory the use of limited force seems morally justifiable, the goal of peace that is part of the Thomistic right intention criterion must not be forgotten. In other words, while it seeks to establish tranquillitas ordinis in which the use of force will continue to play a role, a habituation to employing limited force needs to be avoided. Translating

the in theory justifiable use of vis into military practice is a task that falls to those who shoulder the responsibility for the common good. It is by no means an easy task, as the following casuistical investigations demonstrate.

While Brunstetter does engage with right intention, Frowe does not mention the criterion at all in her redundancy critique, although she claims to refer to the "traditional" jus ad bellum principles. In fact, Frowe's silence on right intention is not surprising, as it is in line with a broader pattern of the revisionist just war, which lets revisionists pay little to no attention to right intention. For example, McMahan's treatment of right intention states, "It is not obvious to me that Right Intention is a valid requirement."[124] Importantly, the neglect of, or lack of interest in, right intention exhibited by revisionists directly connects to the charge made against them that they lose the historical just war's concern for providing practical guidance to decision makers.[125] Thus, again, jus ad vim provides a fertile ground for reassessing the fight for the just war tradition from a third-way perspective. This book's casuistical investigations, following the Thomistic understanding, will give a prominent role to right intention. They will thus be closer to Brunstetter's account than to the revisionist understanding. That said, due to the focus on the moral virtues, the Thomistic account will be able to provide a distinctive contribution to the polarized debate between the two competing camps.

## AGAINST THE NEAR-CONSENSUS: THE ARGUMENT FOR RETRIBUTIVE WAR

At the outset of this chapter, as the attentive reader might have noticed, I referred to "most" contemporary just war thinkers as rejecting the retributive just cause. While I noted that the near-consensus about self-defense as the only just cause for war deviates markedly from the bellum justum of Aquinas, I did not yet account for the set of contemporary just war thinkers who indeed do defend the use of armed force to reestablish an equilibrium of justice that has been disrupted by culpable wrongdoing. Commonly having a background in theology, these "just war 'hawks'" seek to return to the classical understanding of just war as a tool of statecraft.[126] Their thinking can be contextualized by reference to a conversation that has taken on a prominent role in Catholic thinking about war and peace. Arguably, as briefly hinted at earlier, the majority of Catholic just war thinkers nowadays seek to make the use of armed force exceptional and have therefore adopted a "presumption against war" view as their starting point of moral analysis.[127] One aspect of this presumption is the limitation of just cause to mainly self-defense. Although the classical bellum justum started from a "presumption against injustice," major voices in the Church consider this more permissive starting point of analysis a relic of days past. Not surprisingly,

the very idea of just war has been receiving an ambiguous treatment, and Catholic thought has recently seen the advent of a related moral framework of "just peace," which, as its advocates hope, will eventually replace the inherited just war.[128] In this context, as I have noted previously, it is worth mentioning that Brunstetter, although he does not explicitly draw on the Catholic tradition, states that his starting point of thinking about the ethics of vis is a presumption against war.

Given that the argument in favor of a presumption against injustice runs against the just war zeitgeist, it should come as no surprise that the moral arguments of thinkers such as Biggar, Capizzi, Elshtain, Johnson, O'Donovan, and Weigel have received a lukewarm response from advocates of a presumption against war.[129] Especially the moral defense of retributive uses of force in the aftermath of the terrorist attacks of 9/11 and against Saddam Hussein's Iraq caused controversies.[130] That said, however, based on the classical Thomistic point of view, it should come as no surprise to the reader that these thinkers could claim to have the classical bellum justum on their side when arguing for the use of retributive force. For example, when making the argument for regime change in Iraq, they could refer to the classical understanding of the responsibility of rulers for the common good, a responsibility that might include the removal of a dictator in the service of order, justice, and peace.

Although these thinkers could legitimately claim the legacy of the classical just war, this does not mean that diverging moral arguments cannot be derived. Personally, while seeking to learn from the classical understanding of just war myself, I was more skeptical about the justifiability of the 2003 Iraq War. I do not seek to engage here with the primary argument that was made in support of that war, namely, that Iraq's weapons of mass destruction (WMD) program was posing a direct threat to the West.[131] I will just note that the Franco-German opposition against the war, grounded in the argument that the threat posed by the regime was not as clear as the war coalition suggested, convinced me at the time. Rather, I am interested in the argument about the responsibility of the international community for a functioning international order that might justify the removal of a tyrant although it would violate what Walzer calls the legalist paradigm. That, in fact, was one of the arguments made by Biggar, Elshtain, Johnson, and Weigel in support of the war. The emphasis needs to be on *one*, as their respective conclusions on the justifiability of the Iraq War were the result of multifaceted analyses. However, clearly these thinkers emphasized the retributive just cause. Johnson, for example, held that the classical bellum justum sanctioned "the use of force to punish evil, and this surely applied in the case of Saddam Hussein and his regime."[132] More specifically, Elshtain argued, "It is a striking, and saddening, commentary that the emphasis had to be placed on the danger of WMD since Saddam's well-documented mass murder of his

own people did not rise to the level of a *casus belli* in and of itself."[133] Likewise, Biggar allocated primary importance to the just cause of responding to what he calls "state atrocity," the grave injustices the regime of Saddam Hussein had committed in the past.[134] Finally, Weigel saw in the regime's past and ongoing wrongdoing a sufficient just cause for war, a just war that would be waged "to support the minimum conditions of world order and to defend the ideal of a law-governed international community."[135]

I remember that at the time I bought into the prudential argument that while Saddam Hussein was indeed a brutal dictator deserving of punishment, toppling him was not likely to create the "beacon of democracy" in the Middle East that many interventionists hoped to establish. Rather, his forceful removal, so the argument went that convinced me, might create even more instability in the region. Put differently, to paraphrase Weigel, I was under the impression that there was less "moral clarity in a time of war" than he suggested at the time.[136] With hindsight, and granted that this argument comes with the flavor of retrospective reasoning, the prudential approach seems to have been vindicated, given the postwar chaos that culminated in the rise of the Islamic State of Iraq and Syria (ISIS). Eight years after the Iraq War, one might add, the overthrow of Libyan dictator Muammar Qaddafi that resulted in a bloody civil war added a further case for taking the prudential just war criteria very seriously when arguing about regime change. Those conflicts, as critics will not tire of highlighting, also contributed to keeping the "forever wars" going because they revived old and created new terrorist actors the United States would later decide to "bring to justice" by employing drones or authorizing commando raids. In that sense, the wars for regime change helped consolidate what some imagine as a morally problematic regime of vis perpetua.

I take those consequences, which were unintended but could arguably be foreseen, very seriously. That is why my argument is on a more cautious footing compared to those who supported retributive war in Iraq. In particular, I hold that prudential considerations caution against large-scale uses of retributive force. However, while the Iraq and Libya cases showcase its potential downsides, there should be no general condemnation of the retributive just cause. In that sense, I am advocating a "presumption against regime change" that emphasizes prudential considerations and that cautions against employing the just war framework to justify the promotion of human rights around the world. However, as is the case with the presumption against war, the presumption against regime change should be overruled in specific cases if circumstances so require. My starting point continues to be the classical presumption against injustice, but I think regarding regime change this presumption needs to be tempered with prudential considerations. Therefore, I suppose, the presumption against injustice I advocate, due to its being more restrictive, is situated in between

the manifestation upheld by the more "hawkish" type of neoclassical just war thinkers and advocates of the presumption against war. Despite this distancing from the most prominent neoclassical just war thinkers on this specific question, my argument is still in line with the historical tradition. Johnson, pointing to the distinction between the deontological (legitimate authority, just cause, and right intention) and prudential (reasonable hope of success, proportionality, last resort, goal of peace) just war criteria, holds that the former take precedence over the latter in the tradition. However, that does not mean that the prudential criteria are of limited importance: "Yet good statecraft, after ensuring that these three concerns have been satisfied, will still have to test whether use of force otherwise justified can meet the prudential tests and fashion its final course of action accordingly."[137] My presumption against regime change as a manifestation of retributive war arises from exactly this argument. In the case of Saddam's Iraq, the deontological criteria were arguably met, but the war failed the prudential tests.

That said, the application of the presumption against injustice seems to differ when limited uses of armed force are concerned. I wonder if retributive vis might be employed as a tool of statecraft to maintain and establish tranquillitas ordinis, built around the ends of order, justice, and peace. In that sense, vis could play a role in addressing what Weigel calls "problems of global *dis*-order" that stand in the way of the peace of order.[138] The following chapters on two specific manifestations of limited force explore this hypothesis that is grounded in the classical bellum justum of Aquinas, and that would firmly fall within the presumption against injustice view as a starting point of moral analysis. As part of these explorations, I grapple with a variation of the permissiveness critique that Brunstetter has also encountered in his argument. While an argument for vis that draws on the classical bellum justum would be more permissive than the legalist paradigm, it should by no means be too permissive. In Brunstetter's account, this awareness shows in his argument for moral truncated victory and his focus on conciliation. In my attempt to find the right balance for a reading grounded in Aquinas, I need to find an answer to Lang's concern that the use of history may be more of an enabler of war, rather than take on the restraining function that undergirds just war thinking.[139] Put differently, I need to grapple with the danger of a morally unjustifiable regime of vis perpetua.

## CONCLUSION

The classical Thomistic understanding of the criteria of just cause and right intention, some common ground on the morality of anticipatory uses of force notwithstanding, differs markedly from the Walzerian and revisionist readings. Not only do both of the dominant contemporary approaches reject retribution

as a just cause for war, but the emphasis on the moral virtues found in the Thomistic just war is also alien to them. Importantly, this chapter has made an attempt to provide an account of the Thomistic just war that speaks *with* the other approaches, rather than *about* them. At the end of the second part of this book the foundation for this work's substantive contribution has been laid. The following casuistical investigations of two particular uses of limited force are grounded in the Thomistic just war as presented in the book's second part. In addition, the book's general arguments on how to regulate the two practices take Aquinas's just war as a set of counterimages that can help figure out morally defensible regulations.

## NOTES

Parts of this chapter draw from Braun, "Morality of Retributive Targeted Killing"; "Catholic Presumption against War Revisited"; and "*Jus ad Vim* and Drone Warfare."

1. Orend, *Morality of War*, 111.
2. O'Donovan, *Just War Revisited*, 12.
3. See, for example, Capizzi, *Politics, Justice, and War*, esp. chap. 3; and Biggar, *In Defence of War*.
4. See Lang, *Punishment, Justice and International Relations*.
5. Johnson, *Sovereignty*, 1–2.
6. Walzer, *Just and Unjust Wars*, 5th ed., 62.
7. Jeff McMahan, "Aggression and Punishment," 83. For another revisionist rejection of punishment as just cause for war, see Frowe, *Ethics of War and Peace*, 83–86.
8. For a superb discussion of how the theme of punishment has been treated in both contemporary and classical just war thinking, see O'Driscoll, *Victory*, chap. 4. Harry Gould provides an account of how the idea of punishment has become enshrined in international law. See Gould, *Legacy of Punishment in International Law*.
9. Luban, "War as Punishment," 318–19.
10. Luban, 319. For a similar distinction between justice and revenge, see Elshtain, *Just War against Terror*, 22–25.
11. Luban, "War as Punishment," 305.
12. Luban, 318.
13. Rodin, *War & Self-Defense*, 176.
14. Luban, "War as Punishment," 318.
15. Rowan Williams and George Weigel, "War & Statecraft," *First Things*, March 2004, https://www.firstthings.com/article/2004/03/war-amp-statecraft.
16. Luban, "War as Punishment," 325–26.
17. Luban, 326.
18. Lang, *Punishment, Justice and International Relations*, xii.
19. Midgley, *Natural Law Tradition*, 43.
20. Midgley, 22.
21. Elshtain, *Just War against Terror*, 57.
22. Aquinas, *ST*, II-II, q. 40, a. 1.
23. Reichberg, *Thomas Aquinas on War and Peace*, 9.
24. Vanderpol, *La Doctrine Scolastique du Droit de Guerre*, 250.

25. Johnson, *Sovereignty*, 30–31.
26. Reichberg, *Thomas Aquinas on War and Peace*, 150.
27. McMahan, *Killing in War*, 8.
28. McMahan, 9.
29. McMahan.
30. Luban, "War as Punishment," 304.
31. Falvey, "Crime and Punishment," 160. See also Finnis, *Aquinas*, 279.
32. Murphy, "Suárez, Aquinas, and the Just War," 178.
33. Calvert, "Aquinas on Punishment and the Death Penalty," 272–73.
34. Aquinas, *ST*, II-II, q. 108, a. 4.
35. Aquinas, I-II, q. 7, a. 2.
36. See Aquinas, I-II, q. 87, a. 6.
37. Feser and Bessette, *By Man Shall His Blood Be Shed*, 46.
38. Koritansky, *Thomas Aquinas and the Philosophy of Punishment*, 105.
39. Aquinas, *ST*, II-II, q. 108, a. 3.
40. Koritansky, *Thomas Aquinas and the Philosophy of Punishment*, 130.
41. Aquinas, *ST*, II-II, q. 108, a. 4.
42. Aquinas, I-II, q. 97, a. 3, ad. 2.
43. See Koritansky, *Thomas Aquinas and the Philosophy of Punishment*, 107.
44. Finnis, *Aquinas*, 285–86.
45. Beestermöller, *Thomas von Aquin und der gerechte Krieg*, 71–72.
46. Aquinas, *ST*, II-II, q. 66, a. 8.
47. Aquinas, II-II, q. 64, a. 5.
48. Steinhoff, *Ethics of War and the Force of Law*, 251.
49. Feser and Bessette, *By Man Shall His Blood Be Shed*, 52.
50. Calvert, "Aquinas on Punishment and the Death Penalty," 261.
51. Aquinas, *ST*, II-II, q. 64, a. 2.
52. For two competing contemporary views, see Buchanan and Keohane, "Preventive Use of Force"; and Dipert, "Preemptive War." See also Doyle, *Striking First*; Totten, *First Strike*; Chatterjee, *Ethics of Preventive War*; and Shue and Rodin, *Preemption*.
53. Doyle, *Striking First*, 7–8.
54. Walzer, *Just and Unjust Wars*, 5th ed., 81.
55. Walzer.
56. McMahan, *Killing in War*, 183.
57. McMahan.
58. McMahan. For a further elaboration on what he calls the "example of the 'Unmobilized Military,'" see McMahan, "Comment," 129–47.
59. See chapter 10 for a discussion of the arguments made by McMahan and Walzer vis-à-vis the Obama administration's imagined air strikes to punish the Assad regime for its use of chemical weapons.
60. Reichberg, *Thomas Aquinas on War and Peace*, 203.
61. Aquinas, *Compendium of Theology*, I, chap. 227.
62. Reichberg, *Thomas Aquinas on War and Peace*, 204.
63. Reichberg, 203–4.
64. Aquinas, *ST*, II-II, q. 60, a. 3.
65. Aquinas, II-II, q. 60, a. 4.
66. Reichberg, *Thomas Aquinas on War and Peace*, 204.
67. Aquinas, *ST*, II-II, q. 60, a. 4.

68. Reichberg, *Thomas Aquinas on War and Peace*, 222.
69. McMahan, "Comment," 134.
70. Reichberg, *Thomas Aquinas on War and Peace*, 221–22.
71. See chapter 10 for Brunstetter's position on punitive uses of limited force.
72. Brunstetter, *Just and Unjust Uses of Limited Force*, 91n10.
73. Emery and Brunstetter, "Restricting the Preventive Use of Force," 259.
74. Emery and Brunstetter, 257.
75. Emery and Brunstetter, 258.
76. Emery and Brunstetter, 260.
77. Emery and Brunstetter.
78. Emery and Brunstetter, 268. Emery and Brunstetter propose a process that should govern preventive drone strikes that combines elements of the law enforcement and war paradigms.
79. Whetham, "Just War Tradition," 72.
80. Boyle, "Just War Doctrine," 164.
81. Capizzi, *Politics, Justice, and War*, 17.
82. Johnson, *Morality and Contemporary Warfare*, 50.
83. Aquinas, *ST*, II-II, q. 40, a. 1.
84. Aquinas, I-II, q. 55, a. 4.
85. Cole, "Thomas Aquinas on Virtuous Warfare," 59–62.
86. Aquinas, *ST*, I-II, q. 5, a. 5.
87. Aquinas, II-II, q. 47, a. 2.
88. Gorman, "War and the Virtues in Aquinas's Ethical Thought," 253.
89. Aquinas, *ST*, I-II, q. 23, a. 7.
90. Pope, "Overview of the Ethics of Thomas Aquinas," 50.
91. Aquinas, *ST*, I-II, q. 62, a. 4.
92. McCarthy, "Virtue Ethic Difference," 282.
93. Gorman, "War and the Virtues," 61.
94. Braun, "Pope Francis on War and Peace," 67–68.
95. Weigel, *Tranquillitas Ordinis*, 358.
96. See Johnson, "Broken Tradition"; and Weigel, "Just War Tradition," 691.
97. See Hehir, "In Defense of Justice," 33. See Braun, "Catholic Presumption against War Revisited."
98. McCarthy, "Virtue Ethic Difference," 298.
99. Reichberg, "Discontinuity in Catholic Just War Teaching?," 1080.
100. Feser and Bessette, *By Man Shall His Blood Be Shed*.
101. Pope Francis, "Letter of His Holiness Pope Francis."
102. Pope Francis, "Address of His Holiness Pope Francis."
103. Dulles, "Catholicism & Capital Punishment," 34.
104. Koritansky, *Thomas Aquinas and the Philosophy of Punishment*, 195–96.
105. Reichberg, *Thomas Aquinas on War and Peace*, 113.
106. Reichberg, 66.
107. Reichberg, 68.
108. Aquinas, *ST*, II-II, q. 47, a. 1.
109. Reichberg, *Thomas Aquinas on War and Peace*, 70.
110. Reichberg, 67.
111. Reichberg, 72.
112. Aquinas, *ST*, II-II, q. 64, a. 7.

113. Reichberg, *Thomas Aquinas on War and Peace*, 173.
114. Reichberg, 78.
115. Aquinas, *ST*, II-II, q. 66, a. 8.
116. Reichberg, *Thomas Aquinas on War and Peace*, 78.
117. Biggar, "Natural Flourishing," 57.
118. Aquinas, *ST*, II-I, q. 20, a. 5.
119. Johnson, "Broken Tradition," 29.
120. Brunstetter, *Just and Unjust Uses of Limited Force*, 155.
121. Brunstetter.
122. Brunstetter, 156.
123. Brunstetter, 155.
124. McMahan, "Just Cause for War," 5.
125. For a critique of the revisionist understanding of right intention, see Steinhoff, "Indispensable Mental Element," 53.
126. Brunstetter, *Just and Unjust Uses of Limited Force*, 69.
127. The phrase "presumption against war" was introduced by the US Catholic Bishops in a high-profile pastoral letter in 1983. See National Conference of Catholic Bishops, *Challenge of Peace*.
128. For an account of just peace, see Cahill, *Blessed Are the Peacemakers*. For a critical assessment of just peace and its relationship to just war, see Braun, "*Quo Vadis?*"
129. For a thoughtful discussion of the role of punishment in contemporary just war, see O'Driscoll, *Victory*, chap. 4.
130. See, for example, Biggar, *In Defence of War*, ch. 7; Elshtain, *Just War against Terror*, 182–92; Johnson, *War to Oust Saddam Hussein*; and Weigel, "Just War Case for the War."
131. For an exploration of the punitive arguments in favor of the Iraq War, see O'Driscoll, *Renegotiation of the Just War Tradition*, ch. 4.
132. Johnson, *War to Oust Saddam Hussein*, 63.
133. Elshtain, *Just War against Terror*, 186.
134. See Biggar, *In Defence of War*, chap. 7.
135. Weigel, "Just War Case for the War."
136. George Weigel, "Moral Clarity in a Time of War," *First Things*, January 2003, https://www.firstthings.com/article/2003/01/001-moral-clarity-in-a-time-of-war.
137. Johnson, *Morality and Contemporary Warfare*, 43.
138. Weigel, "Just War Tradition," 706.
139. See Lang, "Politics, Ethics, and History in Just War."

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# PART III

# RECOVERING JUST WAR FOR STATECRAFT

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# 7

# The Cases

## *Targeted Killing*

The first two parts of this book have explored the debate about jus ad vim and the fight for the just war tradition. The method of casuistry that this book seeks to recover and the bellum justum of Aquinas have also been presented. The third part explores two particular manifestations of limited force: the practice of targeted killing and limited air strikes to enforce international norms. Each discussion unfolds over the course of two chapters. The first chapter of each discussion presents the cases that will be laid out in chronological order. The main rationale for presenting the cases chronologically is to avoid a bias emerging in the reader. The reader is asked to first consider the cases for himself/herself before I put on the casuist's hat. My hope is that by proceeding this way the reader will be able to judge my "virtuousness" as a casuist.

Relatedly, let me also say a few words about case selection. I have decided to concentrate on examples of limited force carried out by the United States, as it is the state that has most often used this type of force. By focusing on the United States, I do not mean to suggest that other states have not employed vis. For my casuistry to work, however, I need sufficient information to reflect on the cases. In the case of the United States, it was relatively easy to obtain that information, partly because of its being an open society that benefits from its critical media, which have scrutinized the government's use of limited force. I doubt I could have constructed cases of similar depth for uses of vis by, say, Russia. Furthermore, I assure the reader that the cases have been selected carefully. I ask the reader to trust my selection. Undoubtedly alternative selections would have been possible, and some might question my choices. My response would be that, going back to my virtue approach, the persuasiveness of my casuistry stands and falls with how convincing my case selection, and my verdicts, are to the reader. In line with the humility inherent to good casuistry I noted in

the third chapter, I am happy to accept that the reader may come to different judgments.

Let me also provide a brief recapitulation of how the method of casuistry works in practice. In the casuistical investigations that follow the presentation of cases in a stand-alone chapter, I make clear what the instant case, the case being investigated, is. I also point to the paradigm case, the case whose solution seems clearly right or wrong. Once that has been done, the investigation lays out the morphology of the instant case and identifies its circumstances and underlying maxims. Next, the remaining cases are listed in a taxonomy of cases, starting with a discussion of the paradigm case. Comparing and contrasting the instant case with the paradigm case and the other, less clear, cases, the investigation is able to identify the moral movement that may require an adaptation of the maxims found in the instant case at the beginning of the analysis. As a result, a verdict can be derived about the action that was taken in the instant case. Elaborating on this ruling on a particular case, the chapter then, in a second part, provides a general argument about the particular practice that is grounded in the bellum justum of Aquinas and engages with the thought of the participants in the fight for the just war tradition.

## THE CASE OF SALEH ALI SALEH NABHAN

The targeted killing of Saleh Ali Saleh Nabhan was a "seminal event" for the future development of the Obama administration's targeted killing program.[1] Not only does this particular case foreground the tension between attempting capture on the one hand and targeted killing on the other; it also provides implications for a punitive rationale for targeted killing. Reportedly the Central Intelligence Agency (CIA) and the military had been following Nabhan's activities for years.[2] Moreover, the Bush administration had previously carried out an unsuccessful missile strike attempt to kill Nabhan in 2008.[3] In August 2009 the military's Joint Special Operations Command (JSOC) unit had a lead on the man whom it considered to be "a senior member of al-Qaeda's East Africa branch and a critical link between al-Qaeda and its Somalia-based affiliate, the Shabab."[4] As Jeremy Scahill quotes a Somali terrorism scholar, Nabhan "'had become the bridge between al Shabab and al Qaeda, tapping into the resources of al Qaeda, bringing in more foreign fighters, as well as financial resources—more importantly military know-how: How to make explosives, how to train people, and so on.'"[5] More specifically, US intelligence believed Nabhan was masterminding a training camp that was instructing suicide bombers.[6] It was suggested that Nabhan was a high-value target whose killing would significantly degrade al Qaeda's command structure in Somalia.[7] In addition, Nabhan had been associated with several terrorist attacks in East Africa, among them an

attack on an Israeli resort in Mombasa and the US embassy bombings in Kenya and Tanzania.[8]

Killing Nabhan, the administration reasoned, would mark a milestone in the so-called global war on terror.[9] However, there was a debate about whether capturing him would be even more effective in the longer run. Some argued that Nabhan was possibly an asset from whom valuable intelligence could be obtained, including information about the relationship between al Qaeda and its affiliates.[10] Now, after months of surveillance, US authorities discovered that Nabhan was about to start a journey along remote coastal roads in the south of Somalia. His convoy was expected to be leaving Mogadishu soon. The intended destination was a meeting with Islamic militants in a town on the coast.[11] This window of opportunity triggered a deliberation process within the Obama administration about how to act. In the decisive meeting, Nabhan's journey was described as an opportunity the administration had long been hoping for. Previously, Nabhan had been staying in urban areas that made targeting him very difficult, as there was a high likelihood of causing civilian casualties.

JSOC suggested three options that came with varying degrees of risk. The first and least risky option in terms of potential harm to US soldiers was to fire Tomahawk cruise missiles from a warship off the Somali coast. The downside of such a strike, however, would be that the potential collateral damage was high and there was no certainty that Nabhan would actually be killed.[12] The second option was to launch a helicopter-borne assault on Nabhan's convoy, after which the helicopters would briefly land in order to confirm the kill. This particular option was considered to be low risk.[13] Finally, the military suggested a so-called snatch and grab operation, an attempt to capture Nabhan alive. The plan was to intercept Nabhan's convoy with helicopters. A sharpshooter would shoot through the engine block of Nabhan's vehicle, the helicopters would land, and commando soldiers would capture Nabhan.[14]

According to Daniel Klaidman, the administration was initially attracted to the third option, as it came with the promise of capturing a high-value target and gaining valuable intelligence.[15] However, it was considered to be the riskiest option, as it required a troop presence on the ground. In addition, there was the problem that the Obama administration had not yet made a decision about how to deal with captured alleged terrorists. Previously, captured terrorist suspects had been taken to Guantánamo, a practice the Obama administration had promised to stop. The military therefore raised the practical question of where to take Nabhan in case of capture.[16] Reportedly this lack of a detention policy led JSOC to consider detaining Nabhan on a ship at sea for an interim period until the administration would decide on how to treat him.[17] Klaidman further reports that among the participants in the meeting there had been uneasiness about the idea of using ground troops in Somalia due to the October 1993

mission that became known as "Black Hawk Down."[18] That operation, too, was supposed to capture a Somali warlord and ended with eighteen American Army Rangers being killed. Finally, after the deliberations the president was presented with a kill and a capture option plus the contingency plan of dropping a five-hundred-pound bomb from a fixed-wing aircraft. That contingency plan, however, would prove to be a theoretical option only due to cloud cover. Klaidman writes that at the end of the meeting the kill option was the only realistic one, which President Barack Obama then approved under the mission name Operation Celestial Balance.

The operation was a military success. The following morning helicopters attacked Nabhan's convoy and killed him alongside three other militants. One helicopter landed to obtain a DNA sample from Nabhan in order to prove his identity.[19] As an interesting side note, Mark Mazzetti reports that while Obama did opt for the lethal option, he had not chosen the helicopter raid. Instead, he had ordered the least risky option of a missile strike. However, the designated plane's missile launcher malfunctioned, and the helicopter raid was selected as a fallback option.[20] While the administration considered the operation to be "a success of a sort" because Nabhan was killed and Obama received credit for being willing to take the risk of ordering a daylight raid,[21] Klaidman reports that there was uneasiness within the inner circle as to whether the absence of a detention policy had contributed to taking the kill decision. While no evidence has emerged that this had been the case, Klaidman writes that a top military lawyer came to the conclusion that the "inability to detain terror suspects was creating perverse incentives that favored killing or releasing suspected terrorists over capturing them."[22]

## THE CASE OF OSAMA BIN LADEN

The case of the killing of Osama bin Laden is special in the sense that there are two diametrically opposed accounts of his demise: the official account and the Hersh account.

### The Official Account

The killing of Osama bin Laden is a curious case. On the one hand, the killing of al Qaeda's leader has arguably been the best-publicized targeted killing in recent history. On the other, with the hindsight of several years, much uncertainty remains because two irreconcilable accounts have emerged regarding what really happened in Abbottabad, Pakistan, on May 2, 2011. What might be called the official account has been put forward by the Obama administration, numerous journalistic investigations, and autobiographical accounts. The

following narrative mainly relies on Mark Bowden's account.[23] His account stands out because of the access he had to key decision makers, including President Obama. Bowden's account was also specifically taken as the point of departure for Hersh's counternarrative.[24] It is also important to note that both Walzerian and revisionist scholars have approved of the morality of bin Laden's killing based on the presumption that he continued to be an ongoing threat, the central claim in the official account.[25]

To begin with, this narrative does not provide a biographical account of bin Laden and the emergence of al Qaeda. It is taken for granted that bin Laden was responsible for plotting terrorist attacks against the United States, most prominently the assault of September 11, 2001. In June 2009 the Obama administration renewed the effort to finally track down bin Laden after years of unsuccessful efforts by the Bush administration. Apparently the new president's rationale behind stepping up the hunt for bin Laden was multifaceted. In contrast to his immediate predecessor, Obama did not consider the United States at war with terrorism generally, but at war with specific individuals who had attacked the country in the past and posed a continuing threat.[26] Obama, shortly after taking office, had ordered a review of US policy in Afghanistan whose lead author told the president that, contrary to many analysts' conclusions, bin Laden's current role was more than that of a figurehead. Quite the contrary—he was still actively plotting attacks.[27]

Having said that, Obama's concern with bin Laden seems to have gone beyond his posing a continuing threat. Based on Bowden's assessment, elements of deserts also seem to have featured in Obama's thinking: "He was the soul of the organization. The president believed that bin Laden wasn't just evil, he was *charismatically* evil."[28] Bowden suggests that Obama thought that "getting bin Laden would be like closing an open wound."[29] The idea that retribution played a role in the decision to target bin Laden is also supported by some of Obama's secretaries. For example, Secretary of Defense Robert Gates recalls the mood in the situation room after the mission as follows: "Even after the helicopters had returned safely, there was no celebration, no high-fives. There was just a deep feeling of satisfaction—and closure—that all the Americans who had been killed by al Qaeda on September 11, 2001, and in the years before, had finally been avenged."[30] Last but not least, in his speech that disclosed the raid, Obama argued that in killing bin Laden, "justice has been done."[31]

In August 2010, more than a year after Obama had given new emphasis to the hunt for bin Laden, the CIA was able to establish the identity of his personal courier, which focused the agency's attention on a compound in Abbottabad, Pakistan. After intensive surveillance of the compound, the CIA established that bin Laden might live there and first informed the president about its assessment.[32] In late 2010, Obama ordered the CIA to explore kinetic options against

the compound. The two basic options available were to either bomb the compound or send in a commando raid. Due to the tense US-Pakistani relationship at the time as well as the fear that working with Pakistan in this matter would lead to mission failure, the administration quickly determined that any operation would take place without informing Pakistan.[33]

During a principals meeting on March 14, 2011, Obama was presented with two assault options. As the president was being briefed, the sense of urgency to act increased because the administration feared leaks that could potentially risk the mission.[34] The meeting also included a discussion about the certainty of bin Laden's actually being in the compound. Assessments varied between 95 percent certainty and just 30 percent, with Obama concluding: "'This is fifty-fifty. [. . .] Look guys, this is a flip of the coin. I can't base this decision on the notion that we have any greater certainty than that.'"[35] The first and "simplest" option was bombing the compound by B-2 aircraft using "thirty or more" precision bombs, or instead firing a comparable number of missiles.[36] The compound would be completely obliterated, killing everyone in it. The risk to US soldiers would be low, as the high-flying B-2 would likely evade Pakistani defenses. Moreover, with no ground troops involved, there was no risk of encountering Pakistani authorities on the spot, a worry that inevitably arose with any commando raid option. Based on CIA Director Leon Panetta's account, the president, given the apparent advantages, had initially favored this option.[37] However, the downside was that significant collateral damage was likely, the estimated casualty count being fifty to a hundred people.[38] In consequence, according to Bowden, this concern led Obama to rule out a heavy bombing "immediately": "America was not going to obliterate them on a fifty-fifty chance of also killing Osama bin Laden. [. . .] He said the only way he would even consider attacking the compound from the air was if the volume and precision of munitions was such that the blast area would be drastically reduced."[39] Obama was concerned about civilian casualties despite the opinion of his lawyers that the military advantage of killing bin Laden justified a high number of civilian casualties based on necessity and proportionality calculations.[40]

The second option was a JSOC commando raid. The military was confident that if the commandos could be taken to the compound, they would be able to kill or capture bin Laden with an acceptably low loss of life.[41] A major advantage besides the reduced collateral damage would be that the United States could obtain proof of bin Laden's identity in a ground raid, whereas in the bombing option this seemed impossible.[42] The downside was that the ground raid inevitably entailed a risk to US soldiers as well as a potential confrontation with Pakistani authorities. In concluding the meeting, Obama did not embrace either option but ordered the Air Force to develop a strike option that was more surgical, as well as further options including missiles or drones. Additionally,

Obama wanted the military to develop the raid option further. In particular, he was interested in ways of preventing Pakistan from noticing the violation of its sovereignty.[43]

In the next meeting two weeks later, Obama was presented with the options he had demanded. Regarding the raid option, JSOC presented a fully developed plan. The military was optimistic that it could evade Pakistani recognition but "was grilled hard" by the principals during the meeting.[44] A particular worry was the compound's close proximity to Pakistan's prime military academy. Because of concerns with the potentially harmful impact on US-Pakistani relations, various options were considered before the president decided that in case of a confrontation, the US soldiers would fight their way out. "So Obama told McRaven that if his SEALs went in, they were coming out. Bin Laden was an imperative that outweighed the relationship."[45] With regard to the air options, Obama was presented with two alternatives to the obliteration bombing. The first plan would use smaller bombs, which would make it possible to target the compound alone and thus reduce collateral damage. The downside would be that the reduced load could not destroy any tunnels that might exist underneath the compound. In addition, even this reduced type of bombing would entail the risk of killing innocent people and would leave no proof that the United States had killed bin Laden. The second plan was to target only the person whom the CIA had identified as potentially being bin Laden. This might be done using "the equivalent of a sniper drone" during one of the walks the bin Laden suspect took in the garden beside the compound.[46] Using such a surgical strike would have kept collateral damage very limited, the risk to US troops would have been nil, and a confrontation with Pakistani security forces on the ground could be ruled out.[47] Judging from the deliberations in the situation room, the drone option was considered to be "tempting" given its lack of risk.[48] Still, despite seemingly solving all of the conundrums the president was facing, the drone option could not provide proof that it had actually been bin Laden who was killed.

In sum, considering all of the options with the hindsight of Obama's having eventually embraced the ground raid, it seems plausible that he considered having proof of bin Laden's demise supreme. Without such proof, al Qaeda would have been able to continue its activities as if bin Laden were still alive, potentially issuing fake statements bearing his name.[49] At the end of the meeting, although Obama kept both the raid and the drone option at his disposal, Bowden detected a "strong clue that Obama had already made up his mind."[50] When it came to the final meeting on April 28, the majority of Obama's security team was in favor of the raid option, and the next morning Obama authorized it.[51]

A final aspect that deserves consideration is the kill-or-capture question. With the hindsight of several years it seems certain that the raid in Abbottabad

was planned as a kill mission. Journalistic investigations as well as autobiographical accounts by SEALs who took part in the raid confirm this view.[52] Even the Obama administration admitted that killing bin Laden was the most likely outcome despite claiming that, under certain circumstances, he would have been captured. Bowden quotes Obama as follows:

> Our basic attitude was that, given his dedication to his cause, the likelihood of surrender was very low. [. . .] We also knew that there would always be the possibility of him strapping on explosives and trying to take out a team with him. So I think people's general attitude was, if he's going to surrender, he better be naked and on the ground. Had that occurred, then we would have arrested him and held him. I won't go into all the details of what those various steps would have been, but ultimately, we would have brought him to justice. We would have brought him back here.[53]

With regard to the conduct of the mission, twenty-three Navy SEALs and support soldiers were flown by helicopter from Jalalabad Air Field in eastern Afghanistan to Abbottabad. Bin Laden's compound consisted of a guesthouse and a main house. One group of the SEALs first approached the guesthouse, where they encountered "wild and ineffective" gunfire.[54] The most likely source of this resistance was bin Laden's courier, who was killed when the SEALs returned fire. After that, another group of SEALs entered the main house where bin Laden was supposed to reside, "clearing it methodically."[55] When the SEALs finally encountered bin Laden they initially shot him in the head twice, followed by further rounds fired into his torso. SEALs feared that bin Laden's wives who were also in the compound might be wearing suicide vests. In addition, although bin Laden had not picked it up, there was a weapon in his room.[56] After the kinetic part of the operation, the SEAL team searched the building for intelligence, collecting a considerable amount of documents. Furthermore, the team took bin Laden's body with them in order to establish his identity and bury his remains. All this took place in a rush, as the SEALs had to expect the arrival of Pakistani authorities who, as pointed out previously, had not been informed about the mission. After a waterproof identification of his identity, bin Laden's body was buried in the Arabian Sea.[57]

## The Hersh Account

The official account, despite minor inconsistencies, comes across as a credible chain of events that was, in fact, more of a composition of the viewpoints of the players involved, mainly the White House, the Pentagon, and the CIA.[58] Soon after the public announcement of the raid, the Obama administration had to

correct itself several times about the details of the operation. Compared to contradictions about who shot bin Laden or whether he was armed or not, however, the more serious question that arose was whether the official narrative as such was an attempt to mislead the public. There seemed to be reason to ask whether the official narrative was simply an example of "American mythmaking" and whether accounts such as Bowden's told a story the Obama administration had made up.[59] This question was taken up by Hersh, who claimed that Bowden had been played by the administration.[60] Before providing Hersh's account, it is important to mention that his take remains controversial and was adamantly denied by the administration. That said, however, some voices have judged at least parts of Hersh's claims to be credible.[61]

Hersh opens his account with the claim that the official narrative "might have been written by Lewis Carrol [*sic*]."[62] He refers to a former senior intelligence official as having told him the true story of the killing of bin Laden. That story deviates fundamentally from the Bowden account. According to Hersh, bin Laden had been a prisoner of the Pakistani authorities since 2006. Moreover, Pakistan's leadership had known about the raid beforehand and allowed US helicopters to fly through Pakistani airspace. The claim about the courier network that had led the CIA to bin Laden was also untrue. Rather, the information came from a Pakistani intelligence officer who betrayed the state secret in exchange for the $25 million reward the United States had been offering.[63]

Based on the Hersh account, the story of bin Laden's demise began with a walk-in at the CIA station in Islamabad by a former senior Pakistani intelligence officer in August 2010.[64] He offered to provide the agency with the hiding place of bin Laden in return for the $25 million. Skeptical about the veracity of the claim, the CIA started monitoring the compound in Abbottabad where bin Laden was allegedly living as a prisoner of the Inter-Services Intelligence (ISI), being used by that agency as leverage in its relations with al Qaeda and the Taliban.[65] Bin Laden was also said to be gravely ill, so the ISI had placed a personal doctor next to the compound, while bin Laden's upkeep was financed by Saudi Arabia.[66] The United States did not inform Pakistani authorities that it had this information because of fears that the Pakistanis would move bin Laden elsewhere.[67]

In October 2010 the CIA started discussions about kinetic options, similar to those discussed in the official account. The main hindrance in these discussions seems to have been obtaining proof that the person killed was actually bin Laden.[68] Also in October, Obama was briefed about the lead, but his reaction was hesitant, and he demanded proof that bin Laden was actually living in the compound. To get Obama's support, the CIA, working together with JSOC, sought to obtain DNA evidence of bin Laden as well as to convince the president about the low-risk nature of a night raid on the compound. These

objectives, however, would only be achievable with Pakistani support.[69] Consequently, Pakistani authorities were told about the US lead, and US authorities secured Pakistani cooperation using both incentives and blackmail.[70]

According to Hersh, Obama was facing significant risks in the early stage of planning, including concern about whether bin Laden was really in the compound, whether the story might be a Pakistani deception, and the potential political repercussions in case of mission failure.[71] The first concern could be resolved when the United States obtained a DNA sample that proved bin Laden's identity. The other concerns were resolved when the United States agreed with Pakistan about how the mission would unfold. Pakistan insisted the United States "come in lean and mean" and that bin Laden had to be killed.[72] Otherwise Pakistan would not allow the mission to take place. In the words of the retired officer on whom Hersh bases his account: "'It was clearly and absolutely a premediated murder.'"[73] In order to prepare the assault on the compound, Pakistani authorities agreed to establish a liaison office that would help US forces plan the attack. By then JSOC had started rehearsing the mission on a site in Nevada, using a mock-up of the Abbottabad compound.[74] It was also agreed that after killing bin Laden, the United States would use a cover story saying that he had been killed in a drone strike in Afghanistan, so that any Pakistani involvement could be denied.[75]

In terms of the actual unfolding of the raid, Hersh's version, again, deviates strongly from the official account. To begin with, there was no firefight when the SEALs entered the compound. The ISI guards had left the compound beforehand, and there were no weapons present. An ISI liaison officer led the SEALs to bin Laden's quarters, where the commandos used explosives to open the doors. Only one shot was fired, hitting one of bin Laden's wives in the knee. Hersh then provides the following account of bin Laden's last moments: "'They knew where the target was—third floor, second door on the right,' the retired official said. 'Go straight there. Osama was cowering and retreated into the bedroom. Two shooters followed him and opened up. Very simple, very straightforward, very professional hit.'"[76] Hersh further reports that some SEALs were appalled by the administration's claims that they had shot bin Laden in self-defense when in fact he was not posing a threat.[77] Moreover, Hersh denies the official narrative of bin Laden's burial, reporting that the SEALs tossed some of his body parts over the Hindu Kush mountain range on their way back to Afghanistan.[78]

After the killing of bin Laden, the SEALs found no such thing as a treasure trove of computers and storage devices.[79] The claim that bin Laden had been running al Qaeda's operations from the compound was untrue. Hersh asserts that the Obama administration made up the claim that bin Laden was still operational to justify his killing based on the ongoing threat he was posing. Therefore, the administration created the story about the courier and claimed that

the SEALs had been able to secure vast amounts of actionable intelligence.[80] Hersh also claims that the Obama administration explicitly used the bin Laden raid for domestic political gain.[81] After the raid, the SEALs waited outside the compound to be picked up, not having to fear any confrontation with Pakistani authorities. Due to a crash of one of the helicopters, the administration, fearing that the original cover story would no longer work, decided to break the promise given to Pakistan and put forward the account of the bin Laden raid discussed earlier as the official account.[82]

## THE CASE OF ANWAR AL-AWLAKI

The case of Anwar al-Awlaki takes the discussion to Yemen, where he was killed in an American drone strike on September 30, 2011. Because al-Awlaki held dual American-Yemeni citizenship, critics argued that killing him without trial was a violation of the American Constitution. In addition, partly due to government secrecy, differing accounts emerged of how grave a threat al-Awlaki posed and whether targeting him was justifiable. Crucially, his targeted killing laid bare the tension that led Walzer to first think about jus ad vim as lying somewhere between regular interstate warfare and the justified use of lethal force by domestic police forces.[83]

Al-Awlaki was born in Las Cruces, New Mexico, in 1971, where his Yemeni father was studying. When he was eleven the al-Awlaki family returned to Yemen, but Anwar moved back to America in 1991 to attend college. Subsequently, against his initial plans, al-Awlaki decided to become a Muslim cleric. In the aftermath of the September 11 attacks he became "a national media star" who was known for his moderate views on Islam, showing no indications of preaching the use of violence.[84] Later on, however, al-Awlaki became radicalized and attracted the attention of US law enforcement agencies. In particular, his dual identity as being both American and Yemeni made him dangerous according to counterterrorism officials.[85] Al-Awlaki was able to give charismatic internet sermons in colloquial English and had "an intuitive grasp of American culture."[86] After a stay in the United Kingdom, where he continued to preach, he eventually moved to Yemen, where he joined al Qaeda in the Arabian Peninsula (AQAP). At first US agencies considered him to be an inspirational, not an operational, leader. In fact, according to Scahill, there was no consensus about the type of threat al-Awlaki was posing. On the one hand, al-Awlaki was gaining "almost mythical status" in US media and within the administration as a terrorist leader. On the other, however, there was disagreement in the intelligence community about the threat al-Awlaki was actually presenting.[87] Reportedly, as late as October 2009 the CIA had concluded that it did not have the evidence to support a capture-or-kill operation against al-Awlaki.[88] However, his

publications were often found with terrorism suspects arrested in the United States, and al-Awlaki was also proven to have been in email contact with Nidal Hassan, a US Army major who would later kill thirteen people in a mass shooting at Ford Hood, Texas. Interrogations found that while al-Awlaki had not been involved in the planning of the attack, the contact between him and Hassan might have contributed to the latter's radicalization.[89] In his inspirational role, the administration considered al-Awlaki to have taken on the role previously held by bin Laden.[90]

Later on, according to the mainstream account, al-Awlaki also took on an operational role, recruiting and actively plotting attacks against the United States as AQAP's chief of external operations. As Mazzetti reports, John Brennan, at the time one of Obama's key advisers on counterterrorism, believed that al-Awlaki was responsible for AQAP's shift from focusing on attacking Saudi Arabia to also attacking the United States.[91] In that function he had instructed, besides others, the so-called Christmas Day plot in 2009. In that plot, which did not succeed, the Nigerian citizen Umar Farouk Abdulmutallab attempted to bring down Northwest Airlines Flight 253 from Amsterdam to Detroit by detonating a bomb hidden in his underwear. As the interrogation of Abdulmutallab brought to light, he had been attracted to the jihadi cause by listening to al-Awlaki's lectures and reading his writings. Earlier in 2009, he had gone to Yemen and established contact with al-Awlaki. Apparently willing to take part in a suicide mission, Abdulmutallab was approved by al-Awlaki to carry out the airline plot. When Abdulmutallab was tried, al-Awlaki's direct involvement in the attack came to light. Reportedly al-Awlaki had directed Abdulmutallab to shoot a martyrdom video and authorized him to choose the flight and date of attack as long as a US aircraft would be hit.[92] Al-Awlaki was said to also be masterminding additional plots, including an attempt to detonate explosives hidden inside printer cartridges onboard cargo planes headed to the United States.[93]

In response, the Obama administration decided to target him under the code name Objective Troy. There has been some controversy about when exactly the administration started to attempt killing al-Awlaki. Klaidman, for one, claims that Obama gave "oral approval" to kill al-Awlaki "as far back as December 2009."[94] If true, that would mean al-Awlaki had been targeted for his inspirational role rather than for his operational role. Charlie Savage's account disputes this allegation, arguing that only after the Abdulmutallab interrogation, which demonstrated al-Awlaki's operational role, had the administration decided to put him on the kill list.[95] According to Scott Shane, based on the evidence the president had seen, Obama did not hesitate to authorize the killing of al-Awlaki: "'This,' Obama told aides of the decision to target Awlaki for execution without trial, 'is an easy one.'"[96] Obama also specifically asked for updates

on al-Awlaki to be provided at every so-called Terror Tuesday meeting: "'I want Awlaki,' he said at one. 'Don't let up on him.'"[97]

Leading up to the successful strike that killed him, US intelligence had managed to obtain crucial information about al-Awlaki's "patterns of life." The actual mission that killed al-Awlaki was carried out by drone strike. US intelligence had been able to establish his whereabouts in northern Yemen. However, it was difficult to target al-Awlaki because he often surrounded himself with children, and the Obama administration sought to avoid causing collateral damage. On September 30, however, al-Awlaki and several of his companions left the compound to get in a car that was parked several hundred meters away. Using this window of opportunity, the United States fired two Hellfire missiles at them, killing al-Awlaki and his followers.[98]

Concerning the question of whether al-Awlaki had been willing to surrender and defend himself in court, his hiding as well as his rhetoric suggest the contrary. Al-Awlaki had made clear that he would turn himself in to neither the Yemeni nor US authorities.[99] Interestingly, as far as legal prosecution is concerned, the US legal system does not allow a trial in absentia, but Yemen had charged al-Awlaki in absentia for "forming an armed group to carry out criminal attacks targeting foreigners."[100] As the result of this trial, al-Awlaki had been sentenced to ten years of imprisonment. This sentence logically leads to the question of whether it was, as the CIA concluded, infeasible to capture al-Awlaki. On the one hand, as Shane writes, the Obama administration did not trust the Yemeni government and moreover did not consider it capable of capturing al-Awlaki. On the other hand, it did not seem impossible for a US capture option to arise at some point in the future. The main reason that a capture option was ruled out seems to have been political.[101]

## THE CASE OF QASSEM SULEIMANI

Major General Qassem Suleimani was killed on January 3, 2020, when US MQ-9 Reaper drones fired several Hellfire missiles on a convoy that was supposed to take Suleimani from Baghdad International Airport into town. Suleimani and his entourage had landed at 12:36 a.m.; the missiles crashed into the two vehicles at 12:47 a.m. Along with Suleimani, nine passengers who accompanied him were killed.[102] The targeted killing of Suleimani stands out among the post-9/11 targeted killings carried out by the United States. Suleimani was the head of Iran's Quds Force, an élite unit that conducts both special forces and intelligence operations. Thus, in contrast to the targeted killings portrayed earlier, it was not a nonstate actor who was targeted but a representative of a legitimate authority. The killing of Suleimani marked a break with the targeted killing practices of President Donald Trump's two immediate predecessors. In

the words of John Brennan, President Obama's counterterrorism adviser and later CIA director: "In my experience, during neither the Bush Administration nor the Obama Administration was there consideration given to targeting for assassination an official of a sovereign state."[103] In contrast to bin Laden, or Abu Bakr al-Baghdadi, the chief of the so-called Islamic State who was killed in 2019, Suleimani was not the head of a nonstate terrorist group but a leading representative of a major military power in the Middle East that was not in a state of armed conflict with the United States.[104]

What, then, made the Trump administration break with the precedent established by the Bush and Obama administrations? Before the discussion turns to the justification(s) the administration gave in the aftermath of the operation, Suleimani's role needs to be considered. Suleimani had been the head of the Quds Force since 1998. During the US war in Iraq that toppled the regime of Saddam Hussein, Suleimani was responsible for paramilitary activities carried out by various militias under the control of Iran. Especially lethal was a campaign of roadside bombings and ambushes that killed "at least six hundred Americans."[105] While Suleimani had kept a relatively low public profile in the decade following the US invasion of Iraq, "in recent years, the man whose face had rarely been seen became the face of Iran's foreign operations."[106] The reason for his rise to prominence was his role in the Syrian civil war and the fight against ISIS in Iraq. Suleimani commanded the Iranian involvement in these conflicts both directly through his Quds Force and indirectly through several Shia militias. Suleimani had become a media star of sorts, and Iran's supreme leader reportedly treated him like a son.[107] Importantly, by 2017 the Assad regime, which Iran was supporting, was gaining the upper hand in the Syrian civil war, and ISIS was on the path of defeat in Iraq. Those positive developments on the battlefield for Iran made it possible to turn more attention to its objective of becoming the dominant power in the Middle East. As a consequence, Suleimani increased the effort to fight US allies in the region, such as Israel and Saudi Arabia. For example, in early 2018 Iran flew a drone armed with explosives into Israeli airspace.[108]

At the same time, the Trump administration turned more hawkish after Mike Pompeo became secretary of state and John Bolton took on the job as national security adviser in the spring of 2018. In May 2018 the administration withdrew from the Iran nuclear agreement, which was assumed to push Iran onto an even more escalatory trajectory.[109] In April 2019 the administration designated the Iranian Revolutionary Guard Corps, which includes the Quds Force, a foreign terrorist organization and started to provide intelligence to Israel to help in the targeting processes against the Quds Force.[110] Tensions escalated further when in June 2019 two oil tankers were attacked close to the Strait of Hormuz, an act for which the United States blamed Iran. Shortly thereafter the

administration seriously considered using force against Iran when the Revolutionary Guard Corps shot down a US Global Hawk drone with a surface-to-air missile. In September 2019 Iranian drones attacked oil refineries in Saudi Arabia, and around the same time militias under the command of Suleimani launched rocket attacks on US troops stationed at bases in Iraq. Reportedly the administration decided at that point that it would retaliate against Iran if any Americans were hurt.[111] The latter happened on December 27, when Nawres Hamid, an American civilian contractor, was killed and several US soldiers were wounded after thirty rockets hit a base in northern Iraq. The US Central Command presented possible strike options to Trump, who decided to conduct air strikes in Iraq and Syria on December 29 against five sites of Kataib Hezbollah, a militia backed by Iran, which killed twenty-five of its members and wounded more than fifty. In contrast to the administration's expectation that this strike would bring the matter to an end, the situation escalated further, and on New Year's Eve supporters of Kataib Hezbollah besieged the American embassy in Baghdad. Importantly, Pompeo claimed that the protestors had been "'directed to go to the Embassy by Qassem Suleimani.'"[112] Trump saw video footage of the protests on TV during a stay at his Mar-a-Lago estate in Florida and while "watching television [. . .], Mr. Trump grew agitated by the chaos and ready to authorize a more robust response."[113] He was presented with several possible courses of action, including additional air strikes on militia bases. A further option proposed a range of targeted killings of local militia leaders and Suleimani. Reportedly the military did consider this option as a mostly theoretical one. Suleimani was considered to be legally targetable due to his dual-hatted role as both Iranian government official and leader of proxy forces. Trump was briefed that Suleimani was plotting attacks that could potentially kill hundreds of Americans. Specific evidence, however, could not be provided. Gina Haspel, the CIA director, advised Trump that Iran was unlikely to retaliate against a Suleimani targeted killing on a large scale, and a potential Iranian response was expected to put fewer Americans at risk than letting Suleimani's plots unfold.[114]

To the surprise of the Central Command, Trump decided to target Suleimani, and the chain of events portrayed at the beginning of this section was set into motion. In contrast to the CIA's expectations, however, the targeted killing of Suleimani "propelled the United States to the precipice of war with Iran and plunged the world into seven days of roiling uncertainty."[115] While a war between the United States and Iran could be avoided, the administration's contingency planning clearly indicated that an escalation seemed possible at the time. The United States had developed detailed plans, including a cyberattack on Iran's oil and gas industry. At the same time, the United States had communicated to Tehran that the regime should avoid a response that would compel the administration to escalate further. When Iran actually did fire sixteen missiles

at US bases in Iraq that did not hurt any US troops, Tehran sent a message to the administration that they would for now take no further action. This message reportedly convinced Trump to take no additional action himself.[116]

In the aftermath of the targeted killing of Suleimani, the Trump administration contradicted itself with regard to the rationale that had underpinned the operation. Immediately following the targeted killing, administration officials, including Trump and Pompeo, argued that the operation had been an act of self-defense aimed at stopping an imminent attack on American servicemen. However, they did not provide any evidence. While Trump initially claimed that four American embassies had been targeted, Secretary of Defense Mark Esper had to concede that he had not seen any evidence in support of Trump's claim. Likewise, Pompeo had to concede that he had no specific evidence of where or when an attack would happen.[117] Without the threat of an imminent attack as the rationale for the operation, the Trump administration put forward an unclassified memo that cited a confluence of rationales:

> The President directed this action in response to an escalating series of attacks in preceding months by Iran and Iran-backed militias on United States forces and interests in the Middle East region. The purposes of this action were to protect United States personnel, to deter Iran from conducting or supporting further attacks against United States forces and interests, to degrade Iran's and Qods Force-backed militias' ability to conduct attacks, and to end Iran's strategic escalation of attacks on, and threats to United States interests.[118]

Furthermore, in a tweet Trump indicated that for him the lawyerly debate about the legal justification behind the Suleimani killing was not that important, as Suleimani had deserved to be killed for his past wrongdoing: "The Fake News Media and their Democrat Partners are working hard to determine whether or not the future attack by terrorist Soleimani was 'imminent' or not, & was my team in agreement. The answer to both is a strong YES., but it doesn't really matter because of his horrible past!"[119]

## NOTES

1. Klaidman, *Kill or Capture*, 209.
2. Klaidman, 122–27.
3. Scahill, *Dirty Wars*, 226.
4. Klaidman, *Kill or Capture*, 122.
5. Scahill, *Dirty Wars*, 226.
6. Scahill, 294.
7. Peritz and Rosenbach, *Find, Fix, Finish*, 203.

8. Scahill, *Dirty Wars*, 119.
9. Klaidman, *Kill or Capture*, 122.
10. Klaidman.
11. Klaidman, 123.
12. Klaidman, 123–24.
13. Klaidman, 124.
14. Klaidman, 125.
15. Klaidman, 124.
16. Klaidman, 124–25.
17. Klaidman, 125.
18. Klaidman.
19. Klaidman.
20. Mazzetti, *Way of the Knife*, 246–47.
21. Klaidman, *Kill or Capture*, 126.
22. Klaidman.
23. Bowden, *Finish*.
24. Hersh, *Killing of Osama bin Laden*.
25. See Michael Walzer, "Killing Osama," *Dissent*, May 10, 2011, https://www.dissentmagazine.org/online_articles/symposium-the-killing-of-osama-bin-laden; and for the revisionist side, Strawser, *Killing bin Laden*; and McMahan, "Targeted Killing."
26. Bowden, *Finish*, 60.
27. Woodward, *Obama's Wars*, 105.
28. Bowden, *Finish*, 61.
29. Bowden, 185.
30. Gates, *Duty*, 544.
31. Obama, "Remarks by the President on Osama Bin Laden."
32. Nicholas Schmidle, "Getting bin Laden: What Really Happened That Night in Abbottabad," *New Yorker*, August 8, 2011, http://www.newyorker.com/magazine/2011/08/08/getting-bin-laden.
33. Bergen, *Manhunt*, 180.
34. Bowden, *Finish*, 157.
35. Bowden, 163.
36. Bowden, 163–64.
37. Panetta, *Worthy Fights*, 311.
38. Savage, *Power Wars*, 261.
39. Bowden, *Finish*, 164.
40. Savage, *Power Wars*, 261.
41. Bowden, *Finish*, 165.
42. Bowden, 166.
43. Bowden, 167.
44. Bowden, 169.
45. Bowden, 173.
46. Bowden, 174.
47. Bowden.
48. Bowden, 196.
49. Bowden, 197.
50. Bowden, 175.
51. Bowden, 198.

52. See Cole, "Crimes of Seal Team 6;" Savage, *Power Wars*, 266–88; Phil Bronstein, "The Shooter," *Esquire*, February 11, 2013, http://www.esquire.com/news-politics/a26351/man-who-shot-osama-bin-laden-0313/; and Owen, *No Easy Day*, 192.
53. Bowden, *Finish*, 190.
54. Bowden, 228.
55. Bowden.
56. Bowden, 228–30.
57. Bowden, 264.
58. Jonathan Mahler, "What Do We Really Know about Osama bin Laden's Death?," *New York Times Magazine*, October 15, 2015, https://www.nytimes.com/2015/10/18/magazine/what-do-we-really-know-about-osama-bin-ladens-death.html?_r=0.
59. Mahler.
60. Hersh, *Killing of Osama bin Laden*.
61. See, for example, Carlotta Gall, "The Detail in Seymour Hersh's bin Laden Story That Rings True," *New York Times Magazine*, May 12, 2015, https://www.nytimes.com/2015/05/12/magazine/the-detail-in-seymour-hershs-bin-laden-story-that-rings-true.html.
62. Hersh, *Killing of Osama bin Laden*, 13.
63. Hersh, 14–15.
64. Hersh, 16.
65. Hersh, 24.
66. Hersh, 19.
67. Hersh, 18–19.
68. Hersh, 17.
69. Hersh, 18.
70. Hersh, 19.
71. Hersh, 22.
72. Hersh, 23.
73. Hersh, 27.
74. Hersh, 24.
75. Hersh, 26.
76. Hersh, 29.
77. Hersh.
78. Hersh, 47.
79. Hersh, 30.
80. Hersh, 40.
81. Hersh, 47.
82. Hersh, 32.
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84. Shane, xiii.
85. Shane, 215.
86. Shane, 174.
87. Scahill, *Dirty Wars*, 360.
88. David Ignatius, "For Lack of Hard Evidence, a Terrorist Evades Capture," *Washington Post*, March 26, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032503634.html.
89. Shane, *Objective Troy*, 11.
90. Shane, 26–27.

91. Mazzetti, *Way of the Knife*, 304–5.
92. Savage, *Power Wars*, 90–91.
93. Klaidman, *Kill or Capture*, 262.
94. Klaidman, 264.
95. Savage, *Power Wars*, 230.
96. Shane, *Objective Troy*, 224.
97. Klaidman, *Kill or Capture*, 261.
98. Klaidman, 263–64.
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100. Shane, 262.
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108. Entous and Osnos.
109. Entous and Osnos.
110. Entous and Osnos.
111. Entous and Osnos.
112. Entous and Osnos.
113. Baker et al., "Seven Days in January."
114. Entous and Osnos, "Qassem Suleimani."
115. Baker et al., "Seven Days in January."
116. Baker et al.
117. Catie Edmondson, "White House Memo Justifying Suleimani Strike Cites No Imminent Threat," *New York Times*, February 14, 2020, https://nytimes.com/2020/02/14/us/politics/white-house-memo-suleimani-strike.html.
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119. Trump, "The fake news media."

# 8

# Targeted Killing

## *Casuistical Investigation and General Argument*

As the previous chapter has provided cases of targeted killings, the book is now in the position to, first, conduct a casuistical investigation, and second, building on this investigation, derive a general argument. The casuistical investigation takes the "official" bin Laden case as the instant case whose morality it seeks to explore. Functioning as the paradigm case is the Hersh account of the bin Laden raid, which is considered as a prototypically unjust targeted killing. In line with the casuistical method, other, less clear cases are employed to reflect on the instant case in order to identify the moral movement the cases impart on each other. These are the Nabhan, al-Awlaki, and Suleimani cases. Having rendered a verdict on the official bin Laden case, the chapter's second part, elaborating on the casuistical analysis and building on the thought of Aquinas, makes an argument about when this type of limited force can be morally defensible in general. The chapter presents arguments about two forms of targeted killing, its retributive and anticipatory manifestations.[1] Throughout the arguments, the positions of Walzerians and revisionists are brought into conversation with the Thomistic just war.

## THE CASUISTICAL INVESTIGATION

As the ground for the casuistical investigation is now prepared, allow me to put on the casuist's hat and explore the morality of the bin Laden raid.

### The Instant Case

The gist of the official account of the bin Laden raid is that bin Laden was killed for the just cause of self-defense. Not only were there preraid intelligence reports that claimed he had continued to plot terrorist attacks; the documents collected

at the compound after his death were said to prove that this had indeed been the case. There may be reason to question how concrete bin Laden's plans had been, but that debate would have been one about preemptive versus preventive *self-defense*. Thus, in the official account the contemporary near-consensus on self-defense as the only just cause for war seems to reign. In other words, the idea that "there is no morally justifiable just cause other than self-defense" appears to be the case's dominant "morals," its ruling maxim.

However, despite the apparent effort to justify the targeted killing of bin Laden as an act of self-defense, there were certain indicators that retribution also played a role. For example, it was reported that Obama had rejected the notion of a war against terrorism but accepted the idea that the United States was at war "with specific individuals who had attacked the country in the past and posed a continuing threat."[2] Importantly, while the preceding quotation can be read as an expression of the contemporary near-consensus on self-defense, it also seems to suggest a backward-looking punitive rationale. In addition, it was reported that senior members of the Obama administration alluded to a sense of closure that came with bin Laden's death, a feeling that, in Obama's own words, "justice has been done."[3] Thus, there is reason to explore an aspect of the bin Laden raid that conflicts with the maxim that self-defense is the only just cause for war. One might question whether the conflicting maxim "retribution can be a legitimate just cause for war" should be allowed to rule the bin Laden case, and if so, to what extent. Was it morally justifiable to kill bin Laden for his past wrongdoing, independently from the ongoing threat he posed? If so, was the just cause of retribution properly regulated by a right intention?

Furthermore, despite the general consensus on self-defense, failing to distinguish between preemption and prevention seems morally problematic. There was no evidence that any of bin Laden's plans had been imminent. It thus seems that his killing was a preventive act of self-defense, or at least the anticipatory standard that was applied exceeded the Caroline standard. However, while the justifiability of preemptive self-defense seems to be relatively uncontroversial, the debate about when anticipatory force against nonimminent threats can be justifiable appears less straightforward. Therefore, the casuistical investigation assesses the maxim of "preventive uses of force are morally indefensible." Was there just cause to kill bin Laden in anticipatory self-defense? If so, were there charitable or prudential considerations as found in the right intention criterion that advised against taking anticipatory action?

## The Paradigm Case

While all cases presented in chapter 7 belong to the type of targeted killing, they are necessarily "alike in some respects and different in others."[4] Recapitulating

the Hersh account of the bin Laden raid, the mission's conduct seems so obviously wrong that it can function as a paradigm for a morally indefensible targeted killing. In essence, the killing of bin Laden, according to Hersh, was "a premediated murder,"[5] a meticulously planned hit job against an alleged terrorist without giving him a chance to surrender and stand trial. The Obama administration conspired with the Pakistani government to carry out the execution of a gravely ill prisoner. The United States knew that bin Laden posed neither an imminent nor a future threat. There was no case to be made to act in self-defense. Furthermore, the United States was certain that there were no weapons in the compound and that bin Laden would not be able to defend himself. The United States had also made plans to hide the truth from the public, and only by accident did the world learn about the raid. Clearly, killing bin Laden in that way was morally wrong. Even for those who accept a retributive justification, bin Laden's demise will seem morally indefensible. While bin Laden arguably deserved some sort of punishment for his wrongdoing, killing him as reported by Hersh was an act of vengeance, not of retribution. Showing a "nonmoral gut response to grievance" should not determine a legitimate authority's actions,[6] no matter how grave the wrongdoer's culpability.

## The Taxonomy: Retributive Targeted Killing

Reflecting on the maxim "there is no morally justifiable just cause other than self-defense" that seemingly reigns in the instant case, this maxim self-evidently conflicts with a conceptualization that does not rule out retributive uses of force from the start. Therefore, in what follows the cases are investigated vis-à-vis the competing maxim "retribution can be a legitimate just cause for war." In other words, as the taxonomy moves away from the paradigm case, the question of whether retribution, in addition to self-defense, was a just cause for the targeted killing of bin Laden is answered. And if indeed there was just cause for retribution, the subsequent question of whether the criterion of right intention was met is addressed. After all, as has been noted in the sixth chapter, the criterion of right intention "gives concrete shape to the condition of just cause."[7]

While most observers will reject killing bin Laden for vengeance's sake, the argument that he deserved a form of punishment for his wrongdoing seems uncontroversial. Thus, the main question that needs to be answered is that of *what* punishment should have been inflicted on bin Laden. That said, for those rejecting the idea of retribution as a just cause for war, considering the employment of lethal punitive force will be a nonstarter. However, based on the classical natural law idea of the equilibrium of justice, the Thomistic just war reasons that wrongdoing of a certain magnitude may warrant the death penalty as a means of restoring the equilibrium. At the same time, Aquinas rejected the idea

of a lex talionis and was open to charitable concerns in finding the right type of punishment.[8] Now, of course, the moral justifiability of the death penalty in a domestic setting is rejected by the majority of ethicists, including myself. That said, seen from a Thomistic angle, war is only a parallel to the death penalty. Arguably, given that the laws of war and Walzerians permit the targeting of combatants based on group membership, imposing the higher requirements of justification that undergird the death penalty would make the use of force more discriminatory and proportionate.[9] As retribution apparently played a role in the targeting decision, would it not be more appropriate to admit the parallel with the death penalty, rather than simply claim Nabhan, al-Awlaki, and bin Laden were fair game as part of the state of armed conflict between the United States and al Qaeda and associated forces? The Suleimani case seems even more worrisome in this regard, as the United States referred to the legal justification of the 2003 war against Iraq to justify the targeted killing of the Iranian general.[10] Brunstetter also detects a curious mismatch between official and actual rationales behind the use of vis. Although states conduct actions that seem punitive, the language they use to justify their actions differs. While seeking to make a claim that their actions comply with international law, "the notion of punishment lurks beneath."[11] Going through the cases, all targeted individuals had arguably committed wrongdoing that in principle justified the death penalty to restore the equilibrium of justice on natural law grounds. Nabhan, in addition to his roles regarding the recruitment and financing of terrorism, was directly linked to the terrorist attacks in East Africa in the late 1990s. Al-Awlaki too, after having become operational, had directed plots that killed innocent people and, more generally, had facilitated the rise of AQAP. Likewise, Suleimani was the mastermind of a multitude of attacks that are said to have killed several hundred Americans.

That said, while there was arguably just cause to target them all for the sake of retribution, the criterion of right intention still needs to be assessed. This, importantly, is where the charitable and prudential considerations that advise against the domestic use of the death penalty come into play. It marks the consideration where the Thomistic rejection of a lex talionis is most apparent. How do the cases compare in this regard? What is their order in a taxonomy of cases? The case that emerges as the one closest to the paradigm case is the Suleimani case. However, the targeted killing of Suleimani was no execution in the style of Hersh's account of the bin Laden raid. While there are indications that President Trump's decision to target Suleimani was partly informed by emotions, the drone strike was not directed against a gravely ill prisoner. While vengeance may have played a role, the retributive rationale seems to have dominated. Capture, from a moral point of view, would have been the best of options, as Suleimani could have been held accountable for his wrongdoing and no life would have

been lost. Had it been possible to capture him, charitable considerations would have cautioned against the death penalty he arguably deserved on natural law grounds. But how feasible was a capture option? It seems it was unlikely that Suleimani could have been captured alive because his entourage was probably armed and Iraqi security forces would have intervened. If taking him to court was infeasible, was it then morally defensible to kill Suleimani for retribution's sake? Moreover, another charitable concern appears. Only Suleimani, arguably, deserved the death penalty for his past wrongdoing in principle. Consequently, it seems morally indefensible to put the lives of those in his entourage at risk. Unlike in a case of self-defense, killing Suleimani for retribution did not prevent an ongoing or imminent threat. It seems that only if Suleimani alone could have been targeted should a drone strike not have been ruled out from the start. Furthermore, it seems that the targeted killing of Suleimani was an imprudent act. Given the risk of escalation to war with Iran and the loss of life and destruction that would have caused, it does not seem right to take on such a gamble only to restore the equilibrium of justice. Had Suleimani not been "dual-hatted," the calculus might have been different, but his role as a leading figure of the Islamic Republic should have cautioned against killing him. Furthermore, it was unclear how the Iraqi government would respond. While there was no danger that killing Suleimani would cause a direct confrontation with Baghdad, the United States still had a troop presence in Iraq as part of its fight against ISIS, which might have been affected.

The issue of being dual-hatted was of no concern in the Nabhan case. Nabhan was a senior member of al Qaeda in Somalia, a prototypical example of a "regime of non-state responsibility."[12] The prudential concern of causing a major confrontation following his killing was thus negligible. As in the Suleimani case, the capture question looms large. And in fact, a concrete capture plan had been made. Capture was certainly a more feasible option than in the Suleimani case. Still, what should feasible mean? Given the likelihood that Nabhan would have resisted a capture attempt and would have fought until his death, the risk to US service members needed to be calculated. Not surprisingly, the disaster of Black Hawk Down was on the decision makers' minds. Importantly, the virtue of charity works both ways. While, if feasible, capturing Nabhan and taking him to court would have been an act of charity's derivative of mercy, making a capture attempt if the risk to US troops was high would have been a violation of the highest virtue. It was Nabhan who resisted the restoration of the equilibrium of justice. He could have turned himself in to take responsibility for his misdeeds. Risking the just US soldiers' lives by allowing Nabhan to shoot at them in a capture attempt would have been too much to ask from the just combatants. It thus seems that deciding to kill rather than capture Nabhan for retribution was morally defensible. However, employing a rather indiscriminate helicopter raid to

kill Nabhan was wrong. As was reported, three militants were killed alongside Nabhan. Only if Nabhan alone could have been hit, it seems, would a retributive killing have been justifiable.

The case of al-Awlaki seems less clear than the Nabhan case despite some obvious parallels. Al-Awlaki was heading a nonstate terrorist group in Yemen, a "regime of non-state responsibility" comparable to Somalia. At no time was there a concern that killing al-Awlaki would lead to war between the United States and Yemen. More of a concern were tribal loyalties in Yemen, which may have caused a deterioration in US-Yemeni relations. The Yemeni government had been cooperating with the United States in its fight against AQAP, but an earlier US air strike had already caused significant protests.[13] Thus, acting prudently would have entailed calculating the consequences for the overall "war on terror." As in the Suleimani and Nabhan cases, it would have been charitable to capture al-Awlaki had it been feasible. Based on what has been reported, capture may have been possible. Still, the same logic that ruled the Nabhan case applied. The only aspect that makes al-Awlaki's case less morally wrong is that his culpability seems to have exceeded that of Nabhan. His culpability might be taken to inform the decision-making regarding the question of how much risk is acceptable in a capture attempt. It should also be recalled that al-Awlaki had stated that he would not turn himself in and would resist capture. As a result, killing instead of capturing al-Awlaki for retribution was morally defensible. However, the way his killing was carried out made the operation unjust. While al-Awlaki alone was targetable, the drone strike killed several of his companions. This excessive loss of life seems morally indefensible for the sake of pursuing retribution against al-Awlaki.

How does the killing of bin Laden as reported by Bowden fit in this taxonomy? Throughout the account, there are no hints that the Obama administration was driven by illicit motivations. Rather than seeking vengeance, it seems that "doing justice" by meting out a deserved punishment was the objective. In contrast to the Hersh account, the administration had to assume that bin Laden, who was responsible for the deaths of thousands of innocent people, willingly evaded prosecution and would resist capture. In addition, the expectation was that the Pakistani authorities knew bin Laden's whereabouts and that any leak would result in bin Laden's trace once more being lost. The administration carefully explored various options of action and, based on the importance given to securely identifying bin Laden and the assessment of the estimated collateral damage, decided against an air strike. The commando raid was meticulously planned but came with a considerable risk to the SEALs, including a possible confrontation with Pakistani authorities that would have damaged US-Pakistani relations. While there was no danger of a war between the United States and Pakistan, Pakistan was only in parts a "regime of non-state responsibility" and

may have used its influence to further trouble the US war effort in neighboring Afghanistan. Overall, it seems the bin Laden case has considerable parallels with the al-Awlaki case, the main difference being the decision to send in the SEALs instead of conducting an air strike.

## The Taxonomy: Anticipatory Targeted Killing

Seen from a self-defense point of view, clearly Nabhan, al-Awlaki, and Suleimani all posed a threat. While it seems that none of them was an imminent threat in line with the Caroline standard, all of them were linked to future terrorist attacks. Sitting idly by would have risked the lives of many Americans, to be killed at a time of the terrorists' choosing. Interestingly, the taxonomy for anticipatory targeted killing seems to differ from the one for retribution. In the taxonomy, the Suleimani case emerges as closest to the paradigm case. The US intelligence services warned of future attacks but did not point to any concrete plots, the Trump administration's initial claims notwithstanding. There was no direct link to ongoing preparations for attack. Thus, the urgency of anticipating his future wrongdoing was less manifest. However, through his role as head of the Quds Force, as well as through his past wrongdoing, he had repeatedly demonstrated his capability of carrying out lethal attacks. In some respects, although the threat he posed seemed less urgent, his role in prior wrongdoing made his future threat seem more profound. It thus seems that there was an anticipatory just cause to target Suleimani as a matter of self-defense.

That said, arguing that there was an anticipatory just cause of self-defense to kill him does not seem to answer all of the questions associated with the morality of his targeted killing. Let us consider the kinetics, the moral movement the cases impart on each other. In the paradigm case, clearly bin Laden posed neither an imminent nor a future threat. Thus, there was no just cause of self-defense, and there is no need to reflect on right intention. In contrast, in the Suleimani case, a future threat was identified that gave way to allowing action in anticipatory self-defense. It seems that the Trump administration's main rationale was to avert the threat posed by Suleimani. Having said that, there are indications that Trump exhibited, to a certain degree, some of the illicit intentions Augustine cautioned against. Reading about the president growing agitated while watching live TV and then, to the surprise of his generals, deciding to take the most aggressive of available options by killing Suleimani, recalls some of those passions. In addition to this seeming disregard of charitable considerations it seems, at least in retrospect, questionable whether killing Suleimani was prudent. Granted, Trump received counsel that killing Suleimani was unlikely to cause a major escalation with Iran, but given the previous tensions

with Tehran, the operation did seem to mark a major gamble that may have caused a war in the Middle East. Overall it seems that while there was just cause to kill Suleimani, it was imprudent to do so, and thus the operation did not meet the right intention criterion.

Relatedly, in the al-Awlaki case, the Obama administration took action against a future threat. Clearly al-Awlaki posed a threat against which there was just cause to act in anticipatory self-defense. That said, there are indications that President Obama's decision, not unlike Trump's almost a decade later, was influenced by poorly regulated passions. Remarks such as "'I want Awlaki'" give grounds to believe that the president's decision to target al-Awlaki was partly influenced by some of the emotions flagged by the Bishop of Hippo.[14] Moreover, the kill or capture question reappears. Should al-Awlaki have been killed in anticipatory self-defense if there had also been a capture option? In essence, the answer to that question is the same as that given for the retributive killing of al-Awlaki. The risk US servicemen as just combatants should have taken against al-Awlaki, the unjust combatant, was low. The only difference compared to the retributive scenario is that given the potential gain to be made by capturing him in terms of preventing future wrongdoing, more risk to US troops may have been morally justifiable. Furthermore, killing al-Awlaki in anticipatory self-defense justified a limited amount of collateral damage. In contrast to killing him for retribution, killing him for the sake of anticipatory self-defense should have been governed by the DDE and, thus justified the death of the militants who were with al-Awlaki. All said, on balance the targeted killing of al-Awlaki marks the first case in which the use of anticipatory limited force seems to have been morally justifiable.

The targeted killing of Nabhan seems to have presented the most urgent action, as he was linked to terrorist training camps that produced suicide vests. The Nabhan case is also the one most removed from the paradigm case. Even without concrete intelligence about when and where an attack would take place, there seems to have been a case for acting in anticipatory self-defense. Waiting for this particular threat to become imminent would have entailed too high a risk to innocent life. As far as the criterion of right intention is concerned, the main rationale behind the Nabhan operation seems to have been averting the threat posed by the suicide bombers. There is no hint that the Obama administration, as was possibly the case with al-Awlaki, succumbed to the problematic passions warfare tends to provoke. However, as was the case with al-Awlaki, the kill or capture question constitutes an important concern. The answer to that question is essentially the same as that given in the al-Awlaki case. It is the risk question that matters here. Having said that, killing Nabhan because there was no detention policy, as some accounts have implied, would have been morally indefensible.

## Verdict

The instant case has various similarities to the other cases in the taxonomy. Bin Laden had committed grave wrongdoing in the past and was posing a future threat that was not imminent. The overall objective was to avert a threat to innocent people. There was a debate about different military options, including the kill or capture question. As noted earlier, the risk to its own service members in a raid was an important aspect in the deliberations. There are no indications that the Obama administration acted upon illicit motivations in deciding to kill bin Laden. Moreover, prudential concerns such as the role of Pakistan in his hiding and the potential repercussions of kinetic action to the US-Pakistani relationship were deliberated. The major difference from the other cases is that a commando raid instead of an air strike was authorized.

Based on the kinetics of the investigation, killing bin Laden for the sake of retribution was morally wrong. While there was just cause to kill him retributively, his killing violated the criterion of right intention. While there were no prudential reasons that directly spoke against the operation, the consideration of charity makes the raid morally indefensible. For the sake of retribution, *only* bin Laden would have been targetable. Consequently, both the risk to innocent bystanders present in the compound and the risk of the SEALs being harmed by an unjust terrorist actor were irreconcilable with the highest virtue. The only morally justifiable option for killing bin Laden for the sake of retribution that was discussed by the Obama administration would have been the sniper drone, because it could have hit bin Laden alone.

In contrast, it was morally justifiable to kill bin Laden in anticipatory self-defense. Based on the intelligence about future plots and his demonstrated capability of masterminding successful terrorist attacks, there was just cause to act in anticipatory self-defense. Importantly, the criterion of right intention was also met. In retrospect, it turned out that sending in the SEALs was prudent because, as hoped for, they obtained precious intelligence about future plots. Moreover, asking the SEALs, as just combatants, to risk their lives in an anticipatory operation against an unjust combatant is different from acting retributively. As noted earlier, it would have been against charity to risk the SEALs' lives for the sake of retribution. The stakes in the anticipatory scenario, however, were different. By killing bin Laden and averting the future threat he posed, the lives of many innocent people were possibly saved. This act of love, that is, putting an end to the threat he posed, justified the risk of the SEALs being harmed by bin Laden, who had no moral right to resist. Furthermore, it seems that had the Obama administration concluded that there was no intelligence to be gained from a raid, an air strike would also have been morally defensible. In contrast to the retributive rationale, the DDE should have been applied, and a limited number

of killed innocent bystanders would have been justifiable. Last but not least, the Obama administration acted rightly on the capture question. Had bin Laden clearly indicated that he would surrender, he should have been captured and taken to court. In the absence of such signals, the SEALs were right to accept little risk to themselves in their action against an unjust combatant. In conclusion, the casuistical investigation confirms the maxim that retribution can be a just cause for war and did apply to the retributive targeted killing of bin Laden. However, it is also true that the operation that killed bin Laden did not meet the right intention criterion and was therefore morally wrong. Additionally, the investigation has replaced the maxim that ruled out anticipatory uses of force with a defense of a limited anticipatory just cause for war. In contrast to killing bin Laden for retribution's sake, killing him in anticipatory self-defense was in line with both just cause and right intention.

## THE GENERAL ARGUMENT

Having ruled on the morality of the specific bin Laden case, let me now provide a general argument about the practice of targeted killing.

### Targeted Killing as Retribution

So what does my general argument on targeted killing imagined as a manifestation of vis look like? In what follows, in contrast to Brunstetter's conceptualization of jus ad vim, the means of carrying out a targeted killing is of secondary importance only.[15] It seems that seen from a natural law perspective, retribution or vindication, in addition to self-defense, remains a licit just cause in principle. As will become apparent, while the argument employs the just war of Aquinas as a set of counterimages, it does not follow his thought blindly. This should be read as a testament to the innovating potential of the historical approach, which, opposed to what its critics hold, does not have to be conservative.[16]

#### *Legitimate Authority*

In his rejection of war as punishment, Luban rejects what he calls the "Augustine formula," which holds that war as punishment can be seen as parallel to "a father's loving punishment of his errant son."[17] A similar argument has been put forward by Rodin, who refers to it as the "parental model."[18] Luban objects to the classical Christian idea of war as punishment that is built around a judicial analogy that compares waging war to meting out domestic punishment.[19] Reflecting on the contemporary terrorist threat as encountered in the cases, it should be noted that the judicial analogy Luban rejects has been a much-debated issue

historically. Vitoria, for example, argued in his *Relectio de Indis* that it would be very difficult indeed for states to arrive at an objective judgment about their own and their opponent's just cause.[20] His solution was to argue for what Johnson has called a state of "simultaneous ostensible justice,"[21] which, while acknowledging the difficulty of acting as one's own judge, implies that both sides could be fighting for what they sincerely believe to be a just cause. They might be wrong about this, but because of nonculpable (invincible) ignorance, they would not thereby be acting wrongly. This realization, in turn, should temper the waging of war and the vindication of one's rights, according to Vitoria. However, while there might be prudential reasons to deny the, although in principle justified, judicial analogy for state conduct, these considerations do not seem to apply to war between legitimate authorities and private individuals in the same way. That is why the following argument suggests allowing a limited retributive just cause for war against culpable unjust individuals.

Based on the Thomistic understanding, only legitimate authorities could wage just war. Private individuals were denied the use of force, except in self-defense, because they could appeal to their ruler, whose task it was to maintain and reestablish justice. That is part of the reason Aquinas listed the authority criterion in the first place. Applied to terrorists of the provenience presented in the previous chapter, this means that even if terrorists have just cause, they cannot wage just war because they inevitably fail the authority test. They would have to bring their case before the responsible authority rather than taking up the sword themselves. It is here that the "Augustine formula" continues to make sense. It is the state as legitimate authority that, like a father, has the responsibility to punish the wrongdoing of those individuals who commit crimes within the political community entrusted to it. Terrorists operating from within a state's territory, no matter if they are citizens or not, commit acts of injustice, which the ruling authority is obliged to stop and punish.

Moreover, the judicial analogy continues to be relevant with regard to terrorism. A terrorist, like a criminal who is taken to court for his/her wrongdoing, is expected to take responsibility for the misdeeds committed. Interestingly, Luban seems to agree that the rejection of the "Augustine formula" as well as that of the judicial analogy applies only to conduct between legitimate authorities. He argues that "the punishment theory of just cause" lost relevance as the nation-state system consolidated itself. The reason was that it seemed irreconcilable with the idea of sovereign equality. However, as the sovereignty objection does not apply to nonstate actors, Luban accepts that there is an opening for arguing for a return to the punishment theory of just cause in the so-called war on terror.[22] In this regard, Rodin's argument on punitive war provides a perspective that is more far-reaching than Luban's. Rodin, an advocate of the revisionist just war, does not deny the morality of what he calls war as law enforcement per

se. He argues that if there were to be a "genuinely impartial" body that had "a recognized authority to resolve disputes and enforce the law," military action to prosecute aggressors could be justifiable. However, his "argument for a universal state" starts from the assumption that today's UN does not resemble such a body.[23] The UN therefore does not have the moral authority to punish. That said, Rodin holds that punitive action sanctioned by the UN would be, relatively speaking, more just than action carried out by individual states or a coalition of states without UN authorization.[24] I wonder whether Rodin's argument, although his theory is firmly rooted in the just cause of self-defense, should be read as giving at least a nod to the classical conceptualization of just war as a tool of statecraft in the service of order, justice, and peace.

An obvious problem that arises with "bringing terrorists to justice" is the contemporary phenomenon of a "regime of non-state responsibility," in which states are either unable or unwilling to prosecute terrorists operating within their territory. In the cases considered, neither Somalia, Pakistan, Yemen, nor Iraq rose up to its responsibility. Somalia and Yemen were arguably too weak to act against Nabhan and al-Awlaki, while Pakistan, at least in one account, was unwilling to prosecute bin Laden. Iraq, due to the influence of Iran, was arguably unwilling to act against Suleimani. Does the punishment theory of just cause justify a state that has suffered from a terrorist's wrongdoing employing retributive force in the country in which he/she is hiding? Luban, as noted earlier, seems to allow for retributive action only if the third country consents. Consequently, the United States would not have been justified in taking action against either individual on retributive grounds without having been granted permission by the country in which the terrorist was hiding or operating. Arguably, given the likelihood that in the bin Laden case the Pakistani government knew about his whereabouts or was actively supporting him, asking for permission would probably have prevented the reestablishment of a state of justice that bin Laden's past wrongdoing had disrupted. Likewise, had the United States informed the Iraqi government about its intention to target Suleimani, he probably would have been warned and would not have flown to Baghdad.

Crucially, seen from a Thomistic perspective, the consent issue does not conflict with the retributive just cause criterion. As Augustine, on whose thought Aquinas elaborated, puts it in the *Questions on the Heptateuch* (6.10): "As a rule just wars are defined as those which avenge injuries, if some nation or state against whom one is waging war has neglected to punish a wrong committed by its citizens or to return something that was wrongfully taken."[25] Not surprisingly, the Augustine scholar Elshtain concluded in the context of a related phenomenon: "The horror of today's so-called failed states is testament to that basic requirement of the 'tranquillity of order.'"[26] Augustine's argument seems perfectly in line with Aquinas's thinking about the ruler's responsibility for the

common good. Seen from a Thomistic perspective, in cases where a legitimate authority is unable or unwilling to meet its responsibility to maintain or reestablish a state of justice, its borders, depending on the severity of the injustice committed, should provide no insurmountable protection against outside intervention. Interestingly, Walzer makes essentially the same argument in the context of military reprisals. He argues that in cases where governments are unable to control the people living in their territories and other states are harmed by this inability, "surrogate controlling and policing are clearly permissible."[27] On top of that, Walzer asserts that such action may exceed the boundaries that are commonly acknowledged for reprisals: "At this point, reprisal is like retributive punishment in domestic society: as punishment assumes moral agency, so reprisal assumes political responsibility."[28]

### *Just Cause and Right Intention*

Importantly, however, any such retributive action, as seen from a natural law perspective, must be proportionate to the terrorist's wrongdoing. Arguably, given Nabhan's, bin Laden's, al-Awlaki's, and Suleimani's responsibility for the deaths of many innocent people, any punishment other than the death penalty would seem out of proportion. However, arguing that those individuals deserved the death penalty in principle does not mean that all terrorists become liable to lethal force. Rather, retributive punishment should be measured according to a terrorist's individual culpability. In order to make this determination, based on the Thomistic conceptualization of the ruler as judge, a trial in absentia could be held in cases where alleged terrorists actively seek to flee from prosecution.[29] If the wrongdoers, after having been sentenced and asked to turn them themselves in, continue to hide, they should be considered unwilling to take responsibility for their misdeeds. In a sense, a trial in absentia process for retributive targeted killings would be reminiscent of the nineteenth-century requirement to give the wrongful side a chance to make reparations before an armed reprisal would be justified. The argument made here attempts to find a balance between two conceptions of *domestic* capital punishment and, building on Aquinas's parallel between the death penalty and war, applies it to the practice of targeted killing. Bradley Strawser describes these two conceptions as follows:

> Most retributivist accounts of capital punishment, of course, hold that persons deserving of death as a punishment for their crimes should receive that punishment only after being found guilty through a legitimate judicial process in a court of law. Some, however, think the necessity of delivering someone his or her "just deserts" can be so weighty in particularly extreme cases (such as, say, Adolph Hitler or UBL), and that in such cases the guilt

> of the given person is so clearly manifest, that it is permissible to deliver the punishment without a trial or judicial process.[30]

It is clear that for the Thomistic just war adopting the idea of a trial in absentia will go beyond what Aquinas would likely have sanctioned during his own days. As discussed in the second part of this book, Thomas put steadfast trust in the role of the ruler as an "avenger of justice," so the idea of a trial in absentia that is independent from the executive branch of government would probably have raised the bar for using lethal force too high for his taste. Still, given the circumstances of today, the idea of a trial in absentia seems to be a better solution and one that does not stand against the general Thomistic approach. To sum up, the principle of just cause, from a retributive Thomistic point of view, allows for the targeted killing of culpable unjust individuals who seek to evade prosecution. Furthermore, against the Westphalian paradigm, a state's borders should not function as unbridgeable protection from outside intervention.

Having established that in principle the retributive targeted killing of culpable unjust individuals is morally defensible does not yet answer the question of whether such punitive action should be carried out. This is where Aquinas's rejection of a lex talionis becomes manifest. In particular, prudential considerations seem to caution against retributive targeted killings, such as the likelihood of an outbreak of war between the wronged party and the country on whose territory the operation would take place. While abstaining from the operation would allow for a situation of injustice to continue—namely, that the culpable unjust individual would not be punished—the likely killing and destruction resulting from a war between two legitimate authorities cautions against military action. While my own argument seems more far-reaching, I share Brunstetter's concern that is encapsulated in his predisposition toward maximal restraint maxim.[31] In this regard, the bin Laden and Suleimani operations provide practical illustrations. Depending on one's reading, there are two possible interpretations of Pakistan's behavior with regard to bin Laden. Either Islamabad did not know that bin Laden was hiding in Abbottabad, or it was unwilling to prosecute him. Despite some serious diplomatic irritation in the aftermath of bin Laden's demise, it seems that there was at no time a danger that the operation would trigger a broader conflict between the United States and Pakistan. The main reason for this seems to have been the fact that bin Laden was an internationally prosecuted, culpable unjust individual rather than, for example, a member of Pakistan's military or political class. The exact opposite was the case with Suleimani, who was dual-hatted in the sense that he was both a senior figure in the Iranian military and a culpable unjust individual. The operation that killed Suleimani thus came with the risk of triggering a large-scale war between the United States and Iran. While there have been reports that the Trump administration calculated that risk and considered

the likelihood of war to be low, the "Seven Days in January" nonetheless made the world hold its breath. In consequence, deciding on retributive targeted killings in third countries requires a significant amount of prudence from the legitimate authority that entertains an intent to strike. Moreover, while the question of war seems to be the most important one, there are further prudential considerations decision makers will have to grapple with before undertaking a retributive targeted killing.[32] A noncomprehensive list of such further prudential tests would include the weakening of alliances and, in countries such as Yemen and Pakistan, tribal loyalties. Moreover, public fear and the possibility of a backlash against the intervening state must be calculated.

Additionally, one issue that immediately arises with such an argument is the objection that Somalia, Pakistan, Yemen, and Iraq were by far lesser military powers than the United States. Some might argue that had those countries been equal to the United States, the threat of war would have loomed larger in the aftermath of the targeted killings.[33] Consequently, retributive action is likely to take place only in third world countries, which cannot afford to take the risk of confronting the great power that carries out punitive military action on their soil. And in fact it seems that the targeted killing of Islamist terrorists has taken place in weak states only. None of the countries in which the United States has carried out targeted killings could have risked going to war with Washington. In this context, Moyn's account of the humanization of war comes to mind, in which he shows that the attempt to make war more humane, far into the twentieth century, would only apply to conflict between the Western empires, not to their colonial wars.[34] I am aware that the use of retributive force in weak states has a certain neocolonial taste to it. However, this concern needs to be reconciled with the judgment that culpable unjust terrorists who hide in these countries deserve punishment and are either supported by these countries or the countries fail to meet their obligation to bring the terrorists to justice. Consequently, when the danger of war between the intervening party and the host country is remote, it seems reasonable to conclude that allowing for retributive targeted killing in such cases can be morally justifiable. When, however, the targeted killing risks an escalation to large-scale war between the intervening country and a third country, as was the case in the aftermath of the Suleimani operation, it seems prudent not to punish. Again, the latter is a judgment call only those in authority are legitimized to take. That said, of course, the preferable outcome would be that states that fall within the unable or unwilling category rise up to their responsibilities and prosecute hiding terrorists themselves. This argument resonates with Brunstetter, who emphasizes what he calls the "probability of escalation principle." The gist of his argument is that decision makers should carefully consider the risk of escalation from vis to bellum, speaking of a "presumption against escalation."[35] In my argument on the second

type of vis this book investigates, I argue that depending on the magnitude of a violation of an important international norm, limited force may be used to escalate. The reason for this is that more is at stake than in carrying out a retributive targeted killing. In other words, the risk of escalation to war may be acceptable in response to a dictator butchering his/her own people, but the practice of retributive targeted killing does not rise to such importance.

In addition to the "sovereignty objection," Luban identifies the "biased judgment objection," which he asserts applies regardless of the nature of the adversary. The morally problematic aspect, for Luban, is that the punishing state cannot be trusted to make an impartial judgment about when to punish.[36] Making this argument, Luban could draw support from the nineteenth-century historical record, which shows that the concern that the use of reprisals could be abused to advance national policies featured prominently in the legal discourse at the time.[37] One nineteenth-century example that strikes us as wrong today is what Lauren Benton calls "protection emergencies," measures short of war carried out by European imperial agents as they saw fit in order to avoid large-scale war.[38] After taking a closer look, however, Luban's concern can be addressed. Of course he is correct that, in order to arrive at a just verdict, the temptation to give in to "vengeful rage" must be avoided.[39] While the lust for vengeance may be difficult to resist, particularly in light of grave wrongdoing such as terrorist attacks, it nonetheless seems possible with the support of the moral virtues. Besides the prudential concerns that warn against possible negative side effects of retributive targeted killings, the virtue of charity and its derivative mercy also have a role to play in the regulation of this practice. As noted earlier, arguing that retribution can be a legitimate just cause for targeted killing, and that culpable unjust individuals, depending on their guilt, may deserve the death penalty in principle, does not mean that this type of punishment should be administered. Flowing from mercy, whenever it is reasonably possible to capture culpable unjust individuals, doing so should be a matter of first resort. If captured, individuals who on natural law grounds deserve the death penalty should be taken to court and, if sentenced, subjected to life imprisonment. Consequently, in case Hersh's account of the bin Laden operation is true, bin Laden as an unarmed and gravely ill prisoner of the Pakistani ISI should have been captured, not killed. Likewise, had there been opportunities to capture Nabhan, al-Awlaki, or Suleimani at reasonable risk, as based on some reports may have been the case, that would have been the right choice. The reason for this is that the modern popes are right that the death penalty, while justified in principle, is in tension with the virtue of mercy.

Judging from what has been argued so far, is retributive targeted killing a theoretical option only? The answer is no, although the question cannot be answered easily given the circumstances of capture missions. There is reason to

argue that the risk soldiers should take in capturing individuals such as Nabhan, bin Laden, al-Awlaki, or Suleimani is minimal. If there is credible reason to believe that soldiers, as just combatants, may be harmed, there is no moral obligation for them to take this risk. In other words, if a legitimate authority determines that violent resistance to capture operations is likely, riskless means such as drone strikes present a morally justifiable option. It is here that modern weaponry with its ever-improving precision can address Luban's concern that war is too blunt an instrument to inflict retribution. Crucially, however, flowing from the moral culpability account, the culpable unjust terrorists alone would be targetable. From a retributive Thomistic perspective, as it is only they whose culpability has been determined, retributive targeted killing would not allow an air strike that might kill or harm other innocent individuals. In cases where it is impossible to strike at the culpable unjust individual without harming others, the use of force cannot be a means of justifiable punishment. Even the grave state of injustice that the terrorists in the previously discussed cases caused through their wrongdoing cannot justify the shedding of innocent blood on retributive grounds. Interestingly, my argument provides an answer to one of the revisionist arguments against punitive war: "To catch innocent people in the net whilst trying to punish the guilty seems morally worse than letting the guilty escape punishment, even when we feel that punishment is richly deserved. If this intuition is right, we can see why punitive wars are generally thought to be unjust. Punishment that will inflict harm not only upon those who deserve it but also upon the innocent cannot be a just cause for war."[40] In consequence, by limiting punitive force to those who deserve it, the Thomistic take can address one of the revisionist concerns vis-à-vis punitive war. Moreover, my argument is more restrictive than what would seem allowed by the DDE, which, as noted in chapter 6, is traced to Aquinas and constitutes a bedrock principle of the legalist paradigm's jus in bello. Thus again, while grounding my argument in Thomas, I am not following Aquinas in every aspect. Interestingly, Luban seems to accept this strictly circumscribed justification for retributive targeted killing. While he generally rejects war on retributive grounds as indiscriminate, he seems to allow for targeted killing as a discriminating exception to the rule when he states that examples such as the targeted killing of bin Laden constitute an exception in which exclusively a guilty person was killed.[41] McMahan, too, accepts the logic of my retributive argument, although he rejects it as morally indefensible.[42]

Given these very strict limitations for retributive targeted killing, occasions in which such action is morally justifiable will be rare. However, following a retributive reading of Aquinas, retributive targeted killing can be morally justifiable. Interestingly, Brunstetter's position on retributive force seems to be in between the Walzerian/revisionist rejection of retribution and the Thomistic

case for limited retributive force. Brunstetter makes a distinction between the ideal and nonideal arguments for limited force. The ideal argument does not support retribution as just cause because it fails to satisfy his jus post vim principles. However, when Brunstetter revisits jus post vim in the nonideal setting, he recognizes that punishment is a prominent rationale behind the authorization of limited force in the real world.[43] Thus, seeking to avoid a disconnect between theory and statesmanship, he argues, although reluctantly, for a "demonstrative retribution principle," which unlike vengeful retaliation allows for a type of punishment for an action that was taken in the past but that has a demonstrative impact on future action.[44] Like Luban, Brunstetter points to the bin Laden raid as an example.

In conclusion, upon reflection on the practice of targeted killing as a form of vis, this section argued that, as seen from a Thomistic just war perspective, retribution, at least in principle, remains a licit just cause for war. Importantly, however, whether such wars should actually be fought is a different matter. It has been argued that there are good prudential and charitable reasons to deny retribution as a just cause for war between states. However, the concerns that advise against retributive war between states do not seem to apply to war between states and nonstate actors in the same way. It was argued that retributive targeted killing of culpable unjust individuals can be morally justifiable both in principle and practice. Put differently, such action can be reconciled with the just war criteria of just cause and right intention. Building on a Thomistic virtue approach, the section concluded that, while retributive targeted killings can be morally defensible, such action must be subject to very strict criteria and will thus be justifiable in rare circumstances only.

## Targeted Killing as Prevention

Not surprisingly, as retribution as just cause for war has been rejected by both Walzerians and revisionists, this rationale has not yet featured prominently in the debate about jus ad vim. As contemporary just war thinkers concentrate on self-defense, jus ad vim has overwhelmingly been reflected upon as a means of defense. However, as discussed in chapter 6, there seems to be no consensus on what exactly constitutes a defensive use of force. On the one hand, Walzerians are willing to go beyond the strict standards of preemptive self-defense as enshrined in the Caroline standard, but they deny the morality of purely preventive war. On the other, revisionists are open to both preemption and prevention as just causes for war. This section develops an argument for anticipatory targeted killing based on the Thomistic just war.[45] In order to do that, it revisits the account provided by Emery and Brunstetter, which puts forward an elaborated proposal for preventive targeted killing that, crucially, includes a retributive

element.[46] The thought of Aquinas, it is argued, can be used to complement their suggestion.

At the beginning of their argument, Emery and Brunstetter assert that states' right to self-defense comes with the right to use limited preventive force.[47] Being aware of the conflicting uses of preemption and prevention, the authors make a distinction between strikes that respond to an imminent attack and strikes against future threats that are not yet imminent. For the latter category, they use the term "'lagged imminence.'"[48] Striking targets of lagged imminence, for them, constitutes a preventive use of force. Emery and Brunstetter develop the notion of lagged imminence in contradistinction to the controversial interpretation of "perpetual imminence" that was first employed in the Bush administration's 2002 Security Strategy and was later adopted by the Obama administration as rationale for its targeted killing policy. That conceptualization claims that there is at all times a threat of an attack to occur, although there is uncertainty about when exactly. As a result, the threshold of last resort has been crossed, and taking lethal action is seen as justifiable. In contrast, Emery and Brunstetter hold that only rarely do targeted terrorist suspects pose an immediate threat. They might at one point in the future become an immediate threat, however. The term lagged imminence is meant to describe such threats.[49] Emery and Brunstetter emphasize that their conceptualization is less permissive than the perpetual imminence standard, while at the same time it goes beyond what would be allowed under the Caroline standard.[50]

Importantly, the authors limit their argument for prevention to the setting of regimes of nonstate responsibility. Following Walzer's initial idea, they imagine preventive targeted killings as part of a hybrid framework of jus ad vim that applies in locations that seem to lie in between the zones of peace and war. Their account would be more permissive than the law enforcement paradigm, which only allows lethal force as a necessary and proportionate response to an imminent threat. Self-evidently, it would also deny the legitimacy of the controversial perpetual imminence standard.[51] At the same time, it would be more restrictive than the war paradigm because it would not allow the targeting of individuals based on the existence of a state of armed conflict. In concrete terms, their blend of law enforcement and war paradigms suggests three criteria of last resort—namely, a transparent process to determine who is being targeted and why, clear evidence about the ongoing threat posed by the suspect, and giving suspects a chance to turn themselves in.[52] Importantly, Emery and Brunstetter affirm that the responsibility to decide when the threshold of last resort has been crossed falls to those in authority.[53]

As discussed in the sixth chapter, there is considerable common ground between the Walzerian, revisionist, and Thomistic understandings of the morality of anticipatory force. All three sides accept the legitimacy of preemptive

self-defense as found in the Caroline standard. In addition, they all accept the justifiability of some anticipatory force that goes beyond the Caroline standard. While Walzer does not engage with the morality of targeted killing within the context of jus ad vim, he has argued that some anticipatory action may be justifiable in the conduct of this particular practice. He builds his argument on the assumption that the so-called war on terror does in fact constitute a conflict to which the war convention applies. Thus, following his argument for anticipatory war sketched in the sixth chapter, he defends a limited use of preventive force against individuals. Walzer argues that individuals who plan, organize, recruit for, or take part in terrorist attacks should be seen as legitimate targets. Capturing them would be preferable, as they could be brought to trial. However, in cases where that seems infeasible, targeting them for death would be morally justifiable.[54]

While there has been no revisionist argument on the morality of anticipatory targeted killing within the context of jus ad vim, it seems fair to assume that, based on their account of liability to defensive harm, revisionists would be able to accept Emery and Brunstetter's concept of lagged imminence. After all, that concept relies on the presence of a "real threat" that is highly likely to materialize at some point in the near future. Arguably, under such circumstances the alleged wrongdoer has made himself/herself liable to anticipatory defensive harm. Revisionists, following their focus on the "deep morality of war," might well reject elements of the effort made by Emery and Brunstetter to fit their mechanism to the frame of international law, but it seems that they would accept the general idea. McMahan, for one, accepts that one can become liable to be killed preventively:

> A person can make himself liable to be killed if he acts in a way that increases the objective probability that he will wrongly kill an innocent person. [. . .] If the *only* opportunity to prevent the murder occurs in advance of the time that the potential murderer plans to commit the murder, he can be liable to be killed at that time. For even at that time he has made it the case through his own wrongful action that either he must be killed or his intended victim must remain at high risk of being murdered by him.[55]

It should also be noted that McMahan extends the argument of liability to preventive harm beyond material preparation for wrongdoing. For example, he includes mental acts such as the formation of an intention as a moral basis of preventive defensive harm.[56] That said, of course revisionists would not agree that a distinct moral framework of jus ad vim is needed to govern anticipatory uses of limited force. For them, such force would already be covered by the existing rules, which they hold are the moral rules of everyday life.

Likewise, from the perspective of the Thomistic just war, the mechanism Emery and Brunstetter propose seems promising. Similarly to the revisionist position, the Thomistic just war will reject the need for a distinct moral framework of jus ad vim as, like any use of force by legitimate authority, targeted killings constitute acts of war, or bellum. However, imagined as an adaptation of jus ad bellum in the light of moral problems arising from uses of limited force, their proposal does make sense. That is why the following Thomistic argument will contribute an accentuation of the account provided by Emery and Brunstetter, rather than a distinct new argument. The contribution Thomistic just war can make relies on Aquinas's account of virtue and is thus especially sensitive to considerations of right intention.

To begin with, while the idea of a trial in absentia would probably have been alien to Aquinas, it seems that such a procedure can function as a safeguard against the vices Thomas warns against in his thought on anticipatory force. Remember that Aquinas is concerned that the ruler's suspicions may lead him/her to authorize a morally indefensible act. That is why he emphasizes that "blame and merit" should not be allocated based on the potential to act but on the actual act. And in fact, based on the circumstances of the cases considered earlier, it seems that a trial in absentia could have functioned as an effective tool to avoid taking action based on some of the vices identified by Augustine and cited by Aquinas in his "Quaestio de bello." Few will accuse the Obama and Trump administrations of having acted against Nabhan, bin Laden, al-Awlaki, and Suleimani based on suspicion alone. However, both administrations had to assess the intelligence they received, and they were asked to, in Aquinas's words, "interpret doubtful matters."[57] When taking a decision to strike or not to strike in an act of anticipation that goes beyond preemption, these decision makers are inevitably in need of military prudence. After all, for Aquinas "Prudence is the knowledge of what to seek and what to avoid."[58] As Reichberg puts it, military prudence requires decision makers "to conjoin reasoned judgment, technical skill, and the appropriate emotional dispositions."[59] Adding a trial in absentia before an anticipatory targeted killing can be carried out would essentially amount to an act of military prudence. It would help ensure that anticipatory action is not taken upon suspicion or upon inappropriate moral dispositions. This is a crucial distinction to make, as anticipatory action, as seen from a Thomistic perspective, requires evidence that there is a real threat, even if that threat is not yet imminent.

Furthermore, it is important to note that the suggestion of a trial in absentia may include a retributivist aspect. As pointed out in the sixth chapter, Aquinas can be read as connecting considerations of postwar justice to anticipatory uses of force. Consequently, evidence of past terrorist activity may partly inform the deliberation process in the trial in absentia. For example, imagine there had

been trials in absentia leading up to the strike decisions against Nabhan, bin Laden, al-Awlaki, and Suleimani. Their previous wrongdoing would have been a testament to their dedication to and capability of carrying out future attacks. In other words, their past crimes would have made the evidence against them regarding their ongoing plots more powerful. There is a difference to be made between ongoing threats that are highly credible and threats that are not as credible. Only the most credible cases may justify targeted killings as anticipatory acts of vis. It will be the judges who decide against whom lethal force may be employed, but grave past wrongdoing may have, and should have, an impact on their decision. Interestingly, this is an argument McMahan is willing to accept when he argues that past terrorist activity reinforces other evidence that the suspect is preparing further attacks.[60]

When the trial in absentia affirms lethal anticipatory force against an individual, it seems that the moral requirements of anticipatory targeted killing are not the same as those for the retributive variation. In particular, it seems the rules for anticipatory targeted killing should be more permissive than those for retributive targeted killing. Following Emery and Brunstetter, the Thomistic just war insists, as it does for retributive targeted killing, that capture should be the option of first resort. One should remember that the response undertaken goes beyond preemption, and thus there is no imminent threat that requires instantaneous action. There is an opportunity for the legitimate authority to decide when the anticipatory action should be carried out. At times that may mean that an operation should be postponed when the circumstances do not seem right. If and when it is possible to capture the individual at reasonable risk for its service members, it would be both charitable and prudent to do so. If, however, the legitimate authority estimates that the risk of its just combatants being harmed is too high in a capture attempt, targeted killing by riskless means, such as drone strikes, becomes a morally defensible response. In the end, the capture question is a judgment call to be made by the legitimate authority, and the reported controversies in the Nabhan, bin Laden, and al-Awlaki cases are illustrations of its difficulties.

Importantly, if the decision is to employ kinetic action, the proportionality calculus of anticipatory targeted killing would be different compared to the retributive manifestation. As argued earlier, retributive targeted killings are not militarily necessary in the sense that they do not stop a current or future threat but impose a punishment for past wrongdoing. That is why it was argued that for retributive targeted killings to be justified, only the culpable unjust individual may be targeted. If it is impossible to avoid the harming of innocent bystanders, retributive targeted killing seems morally indefensible. What is gained by reestablishing the equilibrium of justice by punishing the wrongdoer does not even come close to compensating for the loss of innocent life. In this

sense, the Thomistic argument aligns with Brunstetter's jus in vi "predisposition toward maximal restraint," which holds that vis should be more restrictive than the rules that govern war.[61] With regard to anticipatory action, however, the proportionality calculus is different. Consider a scenario of a threat in which, arguably, the use of lethal force constitutes a response that justifies the unintended death of innocent bystanders as a necessary response to stop a threat to life. Under such circumstances, Aquinas's DDE should be applied. A person can only be held accountable for the action he/she intends; in other words, killing the imminent threat would be a morally good act irrespective of the unintended death the operation also causes. That said, of course any targeted killing, including preemptive action, must be proportionate to be justifiable.

Due to the imminence of threat in a scenario of preemptive targeted killing, it seems that the proportionality calculus should be different, less restrictive, compared to scenarios of anticipatory targeted killing in which there is no imminent threat involved.[62] In the latter scenario the threat is more distant, and there is no immediate urgency to employ lethal force. In contrast to a scenario of preemption, the legitimate authority can thus wait for an opportunity to arise in which the target can be killed at an acceptable cost of innocent life. Crucially, while it seems that the proportionality calculus should not be the same for preemptive and temporarily more distant targeted killing, it falls to those in authority to make those difficult determinations. There can be no exact numbers of, say, how many innocent bystanders may be killed in an anticipatory targeted killing, as any case is different and requires careful consideration by those who decide on what action to take. For example, consider the aspect of anticipation regarding the targeted killings discussed in this chapter. The future threat of al-Awlaki, who at the time was thought to be the new face of al Qaeda, seems to have been greater than that posed by Nabhan two years earlier. In the operation that killed Nabhan four people were killed, while in the drone strike against al-Awlaki several of his companions died. Whether or not that loss of life was excessive or proportionate to the future threat the two terrorists posed had to be answered by the Obama administration. That task is an unenviable one indeed and, in order to rise to its challenge, decision makers need training in the virtues. There are many considerations to be weighed, which, in order to lead to *good* action, should be informed by the virtues, especially those of charity and prudence.

Finally, there is one more aspect of anticipatory targeted killing that needs to be grappled with. Emery and Brunstetter limit their defense of preventive drone strikes to the in-between zones of war and peace. Likewise, the Thomistic argument is limited to so-called regimes of nonstate responsibility, whose respective governments are unwilling or unable to take action against the culpable unjust

wrongdoers themselves. It goes without saying that, under the circumstances of anticipatory action, it would be preferable that those governments would take action and thus no need for the future victim state to act would arise.[63] However, if such a need does arise, the prudential tests outlined for retributive targeted killing must also be considered. To recapitulate, those tests include the escalation to war, the weakening of alliances, tribal loyalties, and potential public backlash against the intervening state. Consider, for example, two cases that might be thought of as having been anticipatory in nature. In the official bin Laden case, Obama personally decided that Pakistan would not be informed of the raid beforehand, and in case of confrontation with surprised Pakistani forces, the SEALs would fight their way out. Obama was thus willing to risk a major escalation with Pakistan. Likewise, in the Suleimani case, the Trump administration apparently decided that averting the future threat he posed was worth taking the risk of an escalation to war between the United States and Iran. As is the case with the proportionality calculus, the question of escalation is a delicate judgment call that requires considerable prudence and, if the decision turns out to be wrong, that the legitimate authority must answer for.[64]

## CONCLUSION

This chapter has provided an argument about how a particular manifestation of limited force should be regulated. Taking a casuistical investigation of the official narrative of the targeted killing of bin Laden as a jumping-off point, the chapter provided a general argument grounded in the Thomistic just war. The argument made an effort to address the most pressing moral issues that were identified in the casuistical investigation. In particular, it grappled with the question of whether retributive and anticipatory rationales should be allowed to play a role in the targeting decision. The chapter concluded that if certain conditions have been met, both retribution and anticipatory self-defense beyond preemption, in addition to the generally accepted standard of self-defense, can be licit just causes for targeted killing. However, it was argued, that before a legitimate authority can legitimately act upon just cause, the criterion of right intention must be considered. In order to do that, the chapter made a plea for Aquinas's account of virtue informed by charity and military prudence. Regarding the fight for the just war tradition, the chapter's Thomistic contribution was twofold. First, against both Walzerians and revisionists, it affirmed the justifiability of retribution as just cause for uses of limited force. Second, being in agreement with both competing contemporary camps that anticipation can be a licit just cause, it elaborated on Brunstetter's Walzerian proposal.

## NOTES

1. I cannot engage with all possible just causes here and therefore concentrate on retribution and anticipation. In chapter 10 I also engage with the deterrence justification.
2. Bowden, *Finish*, 60.
3. Obama, "Remarks by the President on Osama bin Laden."
4. Jonsen, "Casuistry as Methodology in Clinical Ethics," 301.
5. Hersh, *Killing of Osama bin Laden*, 27.
6. Luban, "War as Punishment," 319.
7. Boyle, "Just War Doctrine," 164.
8. Interestingly, Brunstetter makes a similar argument by referring to Grotius's understanding of *meionexia*, defined as "demanding less that what one is due." Regarding vis, Brunstetter argues "that pursuing justice to the letter can be counterproductive," having in mind the *post vim* environment. See Brunstetter, *Just and Unjust Uses of Limited Force*, 83.
9. See chapter 5.
10. See Goodman and Vladeck, "Why the 2002 AUMF Does Not Apply to Iran."
11. Brunstetter, *Just and Unjust Uses of Limited Force*, 243. On this question Brunstetter draws on Blum, "Crime and Punishment of States."
12. Heinze, "Evolution of International Law," 1080.
13. Scahill, *Dirty Wars*, 312.
14. Klaidman, *Kill or Capture*, 261.
15. Brunstetter treats "drone strikes outside the 'hot' battlefield" and the use of special forces as morally distinctive manifestations of limited force. See Brunstetter, *Just and Unjust Uses of Limited Force*, 8–12.
16. See O'Driscoll, "Divisions within the Ranks?," 59.
17. Luban, "War as Punishment," 308. Parts of the following section draw from Braun, "Morality of Retributive Targeted Killing."
18. Rodin, *War & Self-Defense*, 178.
19. Luban, "War as Punishment," 310. Frowe, in her revisionist argument against war as punishment, sides with Luban: "This is not to deny that a state might deserve to be punished. But in the absence of a person or body who may rightfully decide upon and impose punishment, it is impermissible for even warranted punishment to be administered. Individuals, and individual states, do not have the right to mete out punishment." Frowe, *Ethics of War and Peace*, 85.
20. Vitoria, *Relectio de Indis,* 85.
21. Johnson, *Ideology, Reason and Limitation of War*, 20–21.
22. Luban, "War as Punishment," 316.
23. Rodin, *War & Self-Defense*, 179–80.
24. This is an important distinction that will become relevant again in the later moral argument about the morality of vis to enforce international norms.
25. Augustine, "Augustine (354–430)," 82.
26. Elshtain, *Just War against Terror*, 54.
27. Walzer, *Just and Unjust Wars*, 5th ed., 220.
28. Walzer.
29. I adopt the idea of a trial in absentia from Emery and Brunstetter. However, there is a significant difference between my account and theirs. My retributive argument

looks to the past, while theirs looks to the future. Parts of my argument draw from previous work. See Braun, "*Jus ad Vim* and Drone Warfare."
30. Strawser, *Killing bin Laden*, 24.
31. See Brunstetter, *Just and Unjust Uses of Limited Force*, 202–4.
32. While reflecting on the targeted killing of bin Laden from an account of liability to defensive harm, Strawser shares some of my concerns with regard to the question of sovereignty violations. See Strawser, *Killing bin Laden*, chap. 6.
33. The Suleimani case is special in this regard. While the targeted killing took place in Iraq, it was an attack against an Iranian official. A large-scale war with Iran in the Middle East would certainly have been harmful to the United States, arguably more so than wars with lesser military powers in the region, such as Iraq or Yemen.
34. Moyn, *Humane*, 91.
35. See Brunstetter, *Just and Unjust Uses of Limited Force*, chap. 5.
36. Luban, "War as Punishment," 318.
37. Neff, *War and the Law of Nations*, 237–39.
38. Benton, "Protection Emergencies."
39. Luban, "War as Punishment," 323.
40. Frowe, *Ethics of War and Peace*, 86.
41. Luban, "War as Punishment," 326.
42. See McMahan, "Targeted Killing," 136.
43. Brunstetter, *Just and Unjust Uses of Limited Force*, chap. 7.
44. Brunstetter, 249–52.
45. In this chapter, I do not engage with the forward-looking rationale of deterrence. While the question of whether individual terrorists can be deterred has been discussed prominently in the counterterrorism literature, I do not engage with this aspect in greater detail. That said, the moral issue of deterrence features prominently in the chapter on retributive vis to enforce international norms.
46. See also Brunstetter, *Just and Unjust Uses of Limited Force*, 142–46.
47. Emery and Brunstetter, "Restricting the Preventive Use of Force," 258.
48. Emery and Brunstetter, 259.
49. Emery and Brunstetter, 260.
50. Emery and Brunstetter.
51. For an analysis of this controversial interpretation, see Trenta, "Obama Administration's Conceptual Change."
52. Emery and Brunstetter, "Restricting the Preventive Use of Force," 259.
53. Emery and Brunstetter, 278.
54. Walzer, "Just & Unjust Targeted Killing & Drone Warfare," 13.
55. McMahan, "Targeted Killing," 139.
56. See McMahan, "Conditions of Liability to Preventive Attack."
57. Aquinas, *ST*, II-II, q. 60, a. 4.
58. Aquinas, II-II, q. 47, a. 1.
59. Reichberg, *Thomas Aquinas on War and Peace*, 81.
60. McMahan, "Targeted Killing," 140.
61. Brunstetter, *Just and Unjust Uses of Limited Force*, 202–4.
62. On this point, Brunstetter disagrees. He imagines a "zero collateral damage standard" as "the standard for limited force used in punitive or preventive context." Brunstetter, 230.

63. Brunstetter, too, emphasizes this hope. In line with his concept of jus post vim, he sees "Special Forces and drone strikes outside the 'hot' battlefield" as a contribution toward "reducing spaces of contested and fragmented sovereignty." See Brunstetter, 159. He thus shares the Thomistic hope that at some point acts of jus ad vim would no longer be needed, as weak states would become capable of (re)establishing justice within their territories themselves. That said, reestablishing the equilibrium of justice, from a Thomistic point of view, is a sufficient just cause to use limited force.
64. Brunstetter, reflecting on his escalation principle, can be read as being in agreement that deciding on taking the risk of escalation is an inherent part of the job description of those in authority, and thus it is impractical to draft specific rules. See Brunstetter, 198.

# 9

# The Cases

## *Limited Strikes to Enforce International Norms*

Taking the discussion to the time of the Cold War, the 1986 Operation El Dorado Canyon marked the first of a set of limited punitive air strikes the United States would carry out in the decades to come. Interestingly, while all of the operations discussed in this chapter had a clearly discernible punitive rationale to them, the majority of them were officially justified as acts of self-defense, arguably to make the case that the action complied with international law. There is thus reason to investigate the morality of limited retributive strikes, which not only seem to fall outside of the UN system but also seem to contradict the near-consensus in contemporary just war about self-defense as the only just cause.

### OPERATION EL DORADO CANYON

Operation El Dorado Canyon was a response to terrorist activity traced to the regime of Muammar Qaddafi. The operation consisted of a series of air strikes, lasting less than thirty minutes, against a set of targets in Libya. The US Air Force carried out attacks against Tripoli Military Airfield, Tarabulus Barracks, and Sidi Balal Training Camps, while US Navy fighter jets engaged targets at the Benina Military Airfield and Benghazi Military Barracks. In response, the Libyan regime opened fire from anti-aircraft batteries and launched two missiles at a US installation on the Italian island of Lampedusa. According to the official Libyan account, thirty-seven people were killed and ninety-three injured. Qaddafi was not harmed in the attacks, but his stepdaughter was killed and two of his sons were wounded during a strike at his military headquarters. The United States asserted that civilian areas had been hit unintentionally and acknowledged that between 1 and 2 percent of its bombs did not hit their targets. On the US side, one aircraft was lost, killing two servicemen.[1]

Many commentators pointed to a bomb attack at a West Berlin discotheque that had happened nine days before the US strikes as the immediate trigger for the US attack. However, a closer look at the relationship between the United States and Libya shows that the strike decision had already been made as early as January of that year.[2] The air strikes marked the culmination of a set of US steps to put pressure on the Qaddafi regime in response to its own terrorist activities and the support it provided to various non-Libyan terrorist groups. A major factor in the decision to employ kinetic force was two simultaneous terrorist attacks in Rome and Vienna in December 1985 that killed twenty people, including five Americans. These attacks were attributed to the Abu Nidal terrorist group, which had links to the Qaddafi regime. Qaddafi himself had praised the attacks as "heroic."[3] Before the Reagan administration finally authorized the 1986 air strikes, in what was described as a "gradual escalation in pressure," the United States had unsuccessfully tried to push Qaddafi to sever his links to terrorist activities by trying diplomacy, covert action, economic sanctions, and shows of force.[4] For example, as early as 1981 the Reagan administration had covertly supported Qaddafi's opponent in Chad, Hissene Habre, in an effort to topple Qaddafi. In addition, also in 1981, President Ronald Reagan had authorized a Freedom of Navigation Exercise in the Gulf of Sidra, which Qaddafi had unlawfully claimed for Libya. Subsequently, the United States imposed economic sanctions on Libya, including a ban on the import of Libyan oil and restrictions on US exports to the North African country.[5]

As far as military action is concerned, Reagan approved a secret presidential directive in 1984 that laid the foundation for a possible future US attack on Libya.[6] Generally, it seems that the Reagan administration increasingly lost faith in the likelihood of success of nonkinetic action. According to Michael Moss, there was a difference in approach between Secretary of State George Shultz and Secretary of Defense Caspar Weinberger about the details of a potential strike. While Shultz called for an "'active defense'" against Qaddafi, Weinberger rejected "'immediate retaliatory action'" and advocated a "'focused response.'"[7] Preceding the possible tipping point of the attacks in Rome and Vienna, there had been several terrorist attacks in 1985 with assumed links to Qaddafi that had significantly heightened the Reagan administration's desire to take military action. Overall, in the two years before the US strikes, Qaddafi was linked to fifty-two terrorist acts.[8] Following the attacks in Rome and Vienna, the Pentagon began assessing possible strike options within Libya. While the subsequent deliberations within the White House did not immediately result in the authorization of the use of force, it is worth considering the debate held at the time. Shultz made the argument for taking military action in self-defense based on Article 51 of the UN Charter. Weinberger argued against military action due to the fear that US citizens living in Libya could be taken hostage. The secretary of

defense also thought that additional diplomatic and economic measures should be taken first. Moreover, he argued that the evidence leading to Qaddafi was not conclusive. Reportedly this White House debate made Reagan realize that he needed to impose further sanctions before he would be able to obtain backing for military action at home and abroad.[9]

While economic sanctions were given another chance and the use of covert means was expanded, Reagan also asked for military options. It seemed clear at that point that any future terrorist attack with links to Libya would lead to a US military response.[10] On this point, it is worth quoting from Reagan's diary: "If Mr. Qaddafi decides not to push another terrorist act, okay, we've been successful with our implied threat. If on the other hand he takes this for weakness and does loose another one, we will have targets in mind and instantly respond with a hell of a punch."[11] Noting this apparent resolve, there were several possible consequences the president had to consider if he decided to strike, including risks to Libyan civilians and Soviet advisers based in Libya; the risk to his own troops; possible responses by Arab states and terrorist groups; and public opinion, both in the United States and abroad.[12]

The attack on the West Berlin discotheque on April 5, 1986, noted earlier was thus the culmination of a development leading up to US strikes that had started much earlier. Intelligence reports clearly traced the Berlin attack to Qaddafi, and simultaneously the Reagan administration received reports that warned about several further attacks.[13] In the White House the decision to strike was unanimous, and Reagan approved military action, emphasizing that the focus should be on targeting terrorist infrastructure and taking care that collateral damage was minimized.[14]

In his televised speech to the nation, Reagan clearly hinted at a retributive rationale, while also emphasizing that the US strikes adhered to international law by invoking the inherent right to self-defense. That punishment played a prominent role in the decision to strike was subsequently confirmed by an in-depth analysis of the path toward Operation El Dorado Canyon.[15] At the beginning of his remarks, the president indicated that retribution for Qaddafi's past wrongdoing was an important consideration. "I warned Qadhafi we would hold his regime accountable for any new terrorist attacks launched against American citizens. More recently I made it clear we would respond as soon as we determined conclusively who was responsible for such attacks. On April 5th in West Berlin a terrorist bomb exploded in a nightclub frequented by American servicemen. [. . .] This monstrous act is but the latest act in Colonel Qadhafi's reign of terror."[16]

Despite openly alluding to the idea of punishment, Reagan made an effort to convince his audience that the US strikes were acts of self-defense. Additionally, the president hinted at a deterrent aspect:

> Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight, a mission fully consistent with Article 51 of the United Nations Charter.
>
> We believe that this preemptive action against his terrorist installations will not only diminish Colonel Qadhafi's capacity to export terror, it will provide him with incentives and reasons to alter his criminal behavior.[17]

Although Reagan made an effort to present the US strikes as compliant with international law, the international response to Operation El Dorado Canyon was largely negative, and the invocation of Article 51 was seen as especially problematic.[18] Only the United Kingdom, Israel, and South Africa openly supported the strikes, while Canada approved of the operation indirectly. In fact, while planning the operation the United States faced significant hurdles, as even traditional allies such as France and Spain refused to grant overflight rights, and thus the US bombers that flew out of UK air bases had to go around the Strait of Gibraltar and fly along the Mediterranean Sea before reaching their targets.[19] The rest of the international community had serious doubts about the legality of the strikes. Subsequently the UN General Assembly issued a resolution that condemned the operation, and a UNSC resolution with the same message, while vetoed by the United States, the United Kingdom, and France, had the support of nine members.[20] Arguably, the firm rejection of the US invocation of Article 51 by the international community can be seen as a rejection of a just cause of retribution. In other words, the majority of states were of the opinion that the Reagan administration had engaged in retributive strikes against Qaddafi, while seeking to hide behind the rationale of self-defense. Importantly, less than a decade later, in 1993, when the Clinton administration conducted strikes of a similar nature against the regime of Saddam Hussein, world opinion largely supported the United States. In order to find out why this was the case, the Iraq 1993 case is discussed next.

## US STRIKES AGAINST IRAQ

On June 26, 1993, the United States launched twenty-three Tomahawk cruise missiles at the Iraqi intelligence headquarters in Baghdad, almost completely destroying the building complex. The missiles were fired from the USS *Chancellorsville* and the USS *Peterson*, based in the Red Sea and the Persian Gulf. While twenty missiles hit their intended target, three missiles went off mark and struck a residential area of Baghdad, killing eight and wounding at least twelve civilians in addition to causing destruction to civilian property.[21] The US strikes were a response to an alleged Iraqi attempt to assassinate former US president

George H. W. Bush during a visit to Kuwait. Bush visited Kuwait April 14–16, 1993, and was scheduled to be awarded an honorary degree by Kuwait University for his role during the First Gulf War, in which Iraqi forces had been expelled from Kuwait. As the Kuwaiti authorities discovered, a car bomb attack aimed at assassinating Bush had been planned for the time of the award ceremony. The assassination was prevented, and thirteen Iraqis and three Kuwaitis were arrested. Subsequently, a confession by two of the suspects revealed that the order for the attack had originated directly from the regime of Saddam Hussein. The confessions were later confirmed by separate Federal Bureau of Investigation (FBI) and CIA investigations.[22] However, critics held that the proof presented by the Clinton administration, only part of which was made publicly available, was not as clear as it suggested and relied heavily on weak and circumstantial evidence. Not unlike his critique of the narrative presented by the Obama administration in the case of Osama bin Laden, it was Seymour Hersh who questioned the official justification.[23]

Similarly to the 1986 attack on Libya, the strikes were justified by invoking states' inherent right to self-defense, while clearly there was also a retributive rationale. Reportedly the attack President Bill Clinton authorized was the least risky choice among a number of strike options, and the strikes were carried out after weeks of intensive planning.[24] In order to keep civilian casualties to a minimum, the United States accepted that several high-value targets would likely escape the strikes. In the words of the then chairman of the Joint Chiefs of Staff, Colin Powell: "'We recognize that perhaps some of the senior officials most certainly would not be there late at night,' [. . .] 'But we had to contrast that against the likelihood of killing a large number of people, which might include senior intelligence officials but also cleaning women and innocent people who might be in that building.'"[25]

Belying its initial announcement that the United States would wait for the outcome of the criminal trial held by Kuwait, the Clinton administration apparently did not seek to explore alternative causes of action, authorizing the strikes about two months after the failed plot.[26] In his televised address to the nation, Clinton, more directly than Reagan had done in 1986, hinted at a retributive rationale while, like his predecessor, also stressing the just cause of self-defense and the objective of deterrence:

> As such, the Iraqi attack against President Bush was an attack against our country and against all Americans. We could not, and have not, let such action against our nation go unanswered. [. . .] From the first days of our Revolution, America's security has depended on the clarity of this message: Don't tread on us. A firm and commensurate response was essential to

> protect our sovereignty, to send a message to those who engage in state-sponsored terrorism, to deter further violence against our people and to affirm the expectation of civilized behavior among nations.[27]

Moreover, on the same day, in an off-the-cuff remark on his way to church, Clinton was quoted as saying: "'We sent the message we needed to send.'"[28] A further hint at a punitive rationale was the acknowledgment of US officials that the strikes were intended as a "symbolic show of force" rather than "an attempt to kill Mr. Hussein or an overwhelming air barrage."[29]

Making the case that US action complied with international law, Powell claimed that the strikes had been "'appropriate, proportional, and consistent with Article 51 of the Charter.'"[30] However, at the same time Powell clearly hinted at a retributive rationale when he stated that the United States was willing "'to smack him [Iraqi President Saddam Hussein] whenever it's necessary either because of his violation of United Nations resolutions or, in this case, undertaking a terrorist act that was directed against the American people.'"[31] The United States reported the attack to the UNSC as is legally required, and an emergency session was held during which the Clinton administration defended its actions.

Interestingly, the response of the world community to the 1993 strikes differed markedly from the overwhelming rejection of US military action in Libya in 1986. While several Muslim countries expressed serious doubts regarding the legality of the attacks, the US strikes were generally accepted as lawful by its Western allies as well as by Russia. In the UNSC, only China expressed its uneasiness about the strikes' legality.[32] Given the apparent mood change in the response of the world community, international lawyers subsequently wondered about the precedent that was being set vis-à-vis the future interpretation of Article 51 and the nature of self-defense.[33] The most relevant debate within the international law community was the one about a revival of reprisal action, military countermeasures that, as the second chapter has noted, had flourished in the nineteenth century. Compared to the attack on Libya in 1986, the case for self-defense in 1993 was significantly weaker. While Libyan action in the run-up to the 1986 attack had resulted in American casualties, no one was harmed in the 1993 assassination plot. Moreover, the Qaddafi regime had made it clear that it would carry out further attacks, whereas there was no concrete evidence of future Iraqi aggression against US nationals.[34]

While a strict interpretation of the UN Charter rules out any unilateral use of force beyond the self-defense standard enshrined in Article 51, various US administrations, including the Reagan and Clinton administrations, have argued that their seemingly retributive acts were legitimate acts of self-defense. This seems unsurprising given that the United States, as well as most other states,

the UNSC, and the International Court of Justice, have all taken the position that armed reprisals are illegal.[35] However, as some legal scholars have noted, although the United States sought to describe its military actions as acts of self-defense, they could arguably more convincingly be characterized as classic acts of reprisal.[36] As a result the 1993 attack, like the 1986 Libya case, shows a curious composition of defensive and retributive rationales, which seem difficult to untangle. Noting the intricacies of lawyerly debate, especially the attempt to argue that retributive action can be included in the category of self-defense, it seems worth investigating the morality of limited retributive force as a just cause that is independent of self-defense. Having said that, before turning to this investigation, three more cases are considered to establish a rich basis for the following casuistical analysis. Next in line is the case of retributive action against Afghanistan and Sudan in 1998.

## OPERATION INFINITE REACH

In response to terrorist attacks against the US embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, on August 7, 1998, which it traced to al Qaeda, the Clinton administration authorized military action, named Operation Infinite Reach, in Sudan and Afghanistan. The attack in Nairobi killed 213 people, including 12 Americans, and injured more than 4,000. The almost simultaneous attack in Dar es Salaam killed 11 people and injured 85. None of the fatalities in Tanzania were Americans. Less than two weeks after the embassy bombings, the US launched missiles at the El Shifa pharmaceutical plant in Sudan's capital, Khartoum, and at terrorist training camps in Afghanistan.[37]

Sudan had been known as a sponsor of various terrorist groups, and al Qaeda had established a base in the country in 1991. Although Osama bin Laden himself had left Sudan for Afghanistan in 1996, al Qaeda continued to operate in Sudan. The El Shifa plant was selected as a target based on reports that al Qaeda was seeking weapons of mass destruction. Further intelligence reports linked the plant to bin Laden via his connections to the Sudanese leadership. Advocates of attacking the plant feared that it was being used to produce chemical weapons. However, according to Micah Zenko, the evidence was far from clear, and a significant part of the intelligence community dismissed the ostensible link between El Shifa and bin Laden.[38] Moreover, the Joint Chiefs also opposed striking El Shifa.[39] After the attack, when the Clinton administration's evidence was scrutinized, several of its key assertions were cast into doubt. For example, it turned out that, contradicting the administration's claims that El Shifa did not produce any pharmaceuticals, the plant did in fact do so. Later it even emerged that El Shifa had been Sudan's preeminent pharmaceutical facility. Moreover, bin Laden's alleged direct link to the plant had been falsified.

Finally, leading scientists claimed that a soil sample taken near the plant that was meant to prove conclusively that El Shifa was producing chemical weapons had actually detected a chemical that could also be used for commercial purposes.[40] It is also noteworthy that the Clinton administration, despite the gathering evidence, defended the accuracy of its claims and blocked efforts by Sudan and other states to establish a UNSC investigation.[41] Relatedly, the administration reportedly ensured that a draft retrospective report arguing that the attack was unjustified was not made public.[42] As a result, based on the picture that emerged in the aftermath of the strikes, it seems questionable that the military action against El Shifa could credibly be justified as an act of self-defense, introducing the question of vengeance as a possible rationale. Moreover, a rather unique rationale was suggested by Seymour Hersh who, in reference to a former State Department official, mentioned the possibility that President Clinton had authorized the strikes in Sudan to direct public attention away from his personal troubles at the time.[43]

Turning to Afghanistan, the case for self-defense was stronger, as the country's Taliban regime was providing a safe haven for bin Laden's al Qaeda and there seemed to be a manifest threat to the United States.[44] Shortly after the embassy bombings, the CIA had obtained intelligence that a meeting of senior al Qaeda figures was to take place on August 20 at the Zhawar Kili training camp.[45] After considering several military options, including a ground raid, the administration quickly arrived at a consensus to employ air strikes. Having a chance to kill al Qaeda's senior leadership in one strike was considered to be a rare opportunity given the sophisticated practices used by bin Laden to evade US intelligence.

As far as military action is concerned, in the case of Sudan two US warships based in the Red Sea launched thirteen Tomahawk missiles at the El Shifa plant at 7:30 p.m. local time. As the plant was producing chemicals, the Pentagon had calculated the risk of a chemical plume being released as a result of the strike and arrived at the conclusion that the impact on the surrounding area would be minimal. Furthermore, another site was taken off the target list based on the expected count of civilian casualties.[46] The strikes destroyed the plant, killing its night watchman and severely injuring a watchman in a neighboring sugar factory.[47] In Afghanistan, four US warships in the Arabian Sea fired sixty-six Tomahawk missiles at a base camp, support facility, and four training camps within the Zhawar Kili complex at Khost at 10:00 p.m. local time. In contrast to the El Shifa strike, the strikes were intended to inflict the greatest possible destruction, and no concern was given to civilian casualties. It was assumed that the strikes killed between twenty and sixty people, while senior al Qaeda leaders, including bin Laden, Ayman al-Zawahiri, and Mohammed Atta, managed to escape.[48] After the strikes in both countries, the Clinton administration

indicated that Operation Infinite Reach had only been the start of a long-term military campaign against terrorism and initiated Operation Infinite Resolve, which was supposed to confront the ongoing threat posed by al Qaeda. However, the new operation would not result in further military action.[49]

In Operation Infinite Reach, similarly to the US strikes in 1986 and 1993, punishment seems to have played a key role in addition to considerations of self-defense. For Zenko, punishment was even the primary political objective, which found an expression in the weapon of choice for the strikes: "For President Clinton, the precise and controllable nature of cruise missiles made them the optimal means of retaliation."[50] The punitive nature also came across when the administration reportedly decided to attack more than one target because the adversary had simultaneously struck in two countries.[51] However, an analysis of the speech Clinton gave after the attacks reveals a more complicated picture. While certain retributive tropes can be identified, the effort to portray his administration's actions as acts of self-defense is more pronounced than in his speech in 1993 or in President Reagan's speech in 1986. In particular, Clinton focused on the ongoing threat posed by bin Laden and his network, speaking in the context of the strikes in Afghanistan as "one of the most active terrorist bases in the world."[52] Al Qaeda, "based on compelling information," "were planning additional terrorist attacks against our citizens and others."[53] The dominance of the self-defense justification notwithstanding, one of Clinton's comments can be read as exhibiting punitive thinking: "I have said many times that terrorism is one of the greatest dangers we face in this new global era. We saw its twisted mentality at work last week in the embassy bombings in Nairobi and Dar es Salaam, which took the lives of innocent Americans and Africans and injured thousands more. Today we have struck back."[54]

The official legal justification relied once more on the inherent right to self-defense. As envisaged by the UN Charter, the United States notified the UNSC that its actions were carried out under Article 51. Unlike in 1986 and 1993, the UNSC did not convene a meeting to assess the US claims and, as noted earlier, the United States subsequently blocked efforts to establish a fact-finding investigation.[55] Thus, similarly to the 1993 attack on Baghdad, the Clinton administration did not wait until culpability for the embassy attacks had been established in a conclusive manner. In fact, Hersh reported that Attorney General Janet Reno had warned the administration that, based on the available information, the case to attack bin Laden's network was weak as far as international law was concerned.[56] Furthermore, regarding the case for preemptive self-defense, unlike in the 1986 Libya case, the United States had no direct evidence that bin Laden was in the process of planning specific future attacks.[57] Not surprisingly, the response from the international community was "mixed and muted."[58] The majority of its allies supported the United States, including

the United Kingdom, Germany, Australia, New Zealand, and Israel. France and Italy made a more lukewarm supporting statement. Russia, Pakistan, and several Arab countries condemned the attack. China had initially been ambiguous in its response but later criticized the air strikes. Likewise, the Non-Aligned Movement condemned the US action. Finally, remarks by UN Secretary-General Kofi Annan were read as disapproving of the strikes.[59]

In summation, the 1998 bombings of Sudan and Afghanistan seem to fit neatly within the pattern that was established by the attack on Libya in 1986 and the attack on Iraq in 1993. Although retributive justifications could easily be identified, military action was officially grounded in the inherent right to self-defense. Taking a leap forward in time to the Obama administration, it will be interesting to discover whether the tension between the rationales of self-defense and retribution continued to be present a decade and a half later during an aborted operation that was meant to respond to the Assad regime's use of chemical weapons in Syria in 2013.

## PONDERING OVER SYRIA

The Obama administration's pondering over retributive air strikes against the regime of Bashar al-Assad turns our attention toward a scenario that differs from the three cases discussed previously. While in the run-up to the strikes in Libya, Iraq, and Sudan and Afghanistan it had been the United States that had been attacked, there had been no direct assault on the United States when the Obama administration considered military action in Syria in 2013. Rather, US cruise missile strikes were considered as a response to the Assad regime's use of chemical weapons against its own population. However, as the following illustration demonstrates, while the United States could not invoke the rationale of self-defense, the rationale of other-defense as well as the just cause of retribution played a dominant role in the administration's thinking.

To fully grasp the Obama administration's decision-making process in the late summer of 2013, it is necessary to start from President Obama's conviction that, after the costly wars in Afghanistan and Iraq, the United States should no longer get engaged in military interventions that had no direct impact on US security. As Obama put it in an address to the nation: "We cannot resolve someone else's civil war through force, particularly after a decade of war in Iraq and Afghanistan."[60] This position, often summarized by the catchy phrase that the United States was no longer the world's policeman, was subsequently put to the test in Syria. In Syria, the Assad regime was in the process of brutally putting down a rebellion that had started in the wake of the Arab Spring, with tens of thousands reportedly killed and war crimes being committed on a daily basis. However, while Obama had been willing to take limited military action in Libya

in 2011, the administration made clear that it was very hesitant to consider military action in Syria. During a press conference in August 2012, the president had pointed to specific circumstances under which he would reconsider military action against the Assad regime: "We have been very clear to the Assad regime, but also to other players on the ground, that a red line for us is we start seeing a whole bunch of chemical weapons moving around or being utilized. That would change my calculus. That would change my equation."[61]

One year later, in August 2013, the applicability of what had become known as "Obama's red line" was tested when the Assad regime employed chemical weapons in a large-scale attack against its own population. In a sarin gas attack on a rebel-held suburb of Damascus, an estimated fourteen hundred people were killed indiscriminately. The US intelligence community quickly established that initial reports were accurate and that the Assad regime was responsible. In fact, based on the insider account of Deputy National Security Advisor Ben Rhodes, the administration had received intelligence reports about small-scale chemical attacks happening in Syria as early as the end of 2012, and in April 2013 US intelligence had formally concluded that the Assad regime had employed such weapons.[62] In response, signaling that it was showing a response to these small-scale attacks, the administration decided to make public that it was providing military equipment to Syrian opposition forces.[63] The August 2013 attack, however, seemed to require a more powerful response. A few days after the attack, the administration held a National Security Council meeting during which a consensus was reached that the president should order a military strike, and there was a general feeling that a strike was imminent.[64] Even the chairman of the Joint Chiefs of Staff, Marty Dempsey, who had previously been very hesitant about military action, now argued that "something needed to be done even if we didn't know what would happen after we took action."[65] Most caution was being expressed by Chief of Staff Denis McDonough, who questioned the legal basis of strikes and warned of the possible need to send in ground troops to secure the Syrian stockpiles of chemical weapons in the aftermath of the strikes. Obama concluded the meeting by informing his advisers that he had not made a decision yet and asked for a list of possible strike options.[66] Despite this seeming hesitancy to authorize strikes immediately, based on the Rhodes account, it seems that the president had identified a need to strike quickly. Not only did Obama make an effort to have UN investigators removed from Syria as soon as possible in order not to harm them by US strikes, he also seemed skeptical about the time it would take to pursue a UNSC resolution, as had been suggested by German chancellor Angela Merkel. On top of that, Obama also had to consider domestic politics as an obstacle to military action. It seemed that the longer the action would lie in the past, the harder it would become to obtain public support for military action.[67]

In retrospect, with the hindsight that no strikes were authorized, it seems that the window of opportunity to strike closed rapidly. Not only did Obama receive a message from Congress that demanded congressional authorization for strikes, but the president suffered an additional setback when the British Parliament voted against the United Kingdom taking part in air strikes against the Assad regime. The only US ally still willing to participate in air strikes was France. According to Rhodes, the negative experiences of the most recent US war in the Middle East and the prospect of starting another "mission creep" in Syria resulted in the lukewarm backing for military action.[68]

Then, seemingly having reached a dead end, Obama surprised his advisers by taking "one of the riskiest gambles of his presidency."[69] The president had made the decision to ask Congress for authorization of strikes against the Assad regime. Obama thought that "'it is too easy for a president to go to war,'" [70] and obtaining the backing of Congress would come with greater legal, political, and international backing for military action. According to Rhodes, all of Obama's advisers, except the US ambassador to the UN, Susan Rice, supported his decision. The president subsequently gave a high-profile address explaining his decision to seek authorization, while at the same time he emphasized that he reserved the right to strike nonetheless in case Congress declined authorization.

In his address, described as an effort to change "course virtually in real time and on live television,"[71] Obama made a case for military action that mentioned defensive rationales but was retributive at its core. Obama himself summarized the rationale succinctly, and in the correct order: "I'm confident we can hold the Assad regime accountable for their use of chemical weapons, deter this kind of behavior, and degrade their capacity to carry it out."[72] In terms of defense, Obama framed the Assad regime's use of chemical weapons as a "serious danger to our national security."[73] Although, as Obama clarified in a later address, there was an "absence of a direct or imminent threat to our security,"[74] the president made an effort to emphasize the indirect threat of letting Assad get away with the use of chemical weapons.

These defensive rationales notwithstanding, Obama's speech was full of retributive ideas. To begin with, the president stressed that this operation would not be "time-sensitive, it will be effective tomorrow, or next week, or one month from now."[75] Thus, Obama clearly hinted that retrospective punishment, not stopping an attack that would happen in the near future, was the objective. Furthermore, consider the following passage in which Obama employs a rhetorical strategy that is built around the idea of retribution:

> But if we really do want to turn away from taking appropriate action in the face of such an unspeakable outrage, then we must acknowledge the costs of doing nothing.

> Here's my question for every member of Congress and every member of the global community: What message will we send if a dictator can gas hundreds of children to death in plain sight and pay no price? What's the purpose of the international system that we've built if a prohibition on the use of chemical weapons that has been agreed to by the governments of 98 percent of the world's people and approved overwhelmingly by the Congress of the United States is not enforced?[76]

Strikingly, the president apparently had no qualms about breaking international law: "I'm comfortable going forward without the approval of a United Nations Security Council that, so far, has been completely paralyzed and unwilling to hold Assad accountable."[77] The legal case for employing retributive air strikes, or reprisals, against the Assad regime's use of chemical weapons in the absence of a UNSC resolution was, similarly to this chapter's previous cases, questioned by international lawyers.[78] Relatedly, not unlike President Clinton in 1993, Obama made clear that he would not wait for the results of an independent UN investigation to establish the culpability of the Assad regime.

The administration spent the days after Obama's speech lobbying for congressional support but did not manage to get a majority of Congress behind the proposed attack, nor did public opinion become more favorable. It seemed increasingly clear that Obama would lose the vote in Congress.[79] However, it did not come to a vote after a change of course that followed an overture by Russian president Vladimir Putin. At a summit meeting in Russia, Obama and Putin discussed Syria's chemical weapons, the removal of which Russia had long resisted. On this occasion, however, Putin suggested that Secretary of State John Kerry should get in touch with his Russian counterpart to explore Syrian disarmament. Apparently following Russian pressure, the Syrian regime subsequently pledged to abandon its chemical weapons, and Obama delivered another high-profile speech in which he announced the intention to pursue this diplomatic opening and asked Congress to postpone the vote. Subsequently, a congressional vote did not take place, and military action was avoided as the Assad regime voluntarily abandoned 99 percent of its chemical weapons. Obama would later speak of his most courageous foreign policy decision, providing the following retrospective view: "The reason it was hard was because, as president, what you discover is that you generally get praised for taking military action, and you're often criticized for not doing so. And it wasn't a slam dunk, but I thought that it made sense for a variety of reasons for us to see if we could actually try to eliminate the prospect of large-scale chemical weapons use rather than the political expedience of a one-time shot."[80]

His administration argued that the final outcome of its maneuvering should be considered, namely, the fact that the Assad regime abandoned the

overwhelming majority of its chemical weapons stockpiles. Obama was willing to concede that he had produced an imperfect solution, as Assad retained a limited amount of chemical weapons, which he would later on use against his own people. However, the administration was also convinced that what it had achieved would not have been obtainable by executing limited air strikes. For Obama's critics, however, the US leadership role in world politics had been severely damaged; the president had once more been "leading from behind."[81] In particular, critics worried about the impact on the rules-based international order if the international community, and especially the United States as its primary backer, was no longer willing to enforce international norms. Importantly, that critique was not limited to Obama's domestic opposition but also included international voices such as Laurent Fabius, the French foreign minister at the time, who two and a half years later insinuated that Obama's withdrawal from his own red line had "'been a turning point, not only for the crisis in the Middle East, but also for Ukraine, Crimea and the world.'"[82] Writing in 2022, eight years after the annexation of Crimea, the ongoing Russian invasion of Ukraine adds further weight to Fabius's concern. In fact, it seems that there is an emerging consensus among NATO members that the failure to stand up for the rules-based international order might have encouraged Putin's aggression.[83]

## STRIKES AGAINST THE ASSAD REGIME

Four years after the Obama administration's nonviolent response, a new US administration faced a similar set of questions after another alleged chemical weapons attack by the Assad regime. What at first seemed to have been a conventional air strike on the rebel-held province of Idlib was soon claimed to have been a sarin gas attack that indiscriminately killed seventy people. Less than three months in office, President Trump chose not to emulate his predecessor and authorized US air strikes in response to the attack. Fifty-nine Tomahawk cruise missiles were fired from the destroyers USS *Porter* and USS *Ross*, based in the eastern Mediterranean Sea. The target was the Syrian airfield to which the chemical weapons attack had been traced. Reportedly, twenty Syrian planes and an anti-aircraft battery and radars were destroyed. Syrian state news agencies reported seven people killed.[84] All missiles hit their target in an attack that was described as having been carried out "with textbook precision" and that "went from conception to execution in less than 48 hours."[85] In order to avoid a confrontation with Russia, the United States had warned Moscow before the launch, which may have passed on the warning to Assad.

Before engaging with the administration's rationale behind the strikes, it is important to consider Trump's attitude toward Syria before he was elected president. Crucially, Trump's position had significant parallels with President

Obama's thinking. In particular, his "America First" approach was meant to keep the United States out of foreign entanglements when no core security interests were at stake. In June 2013, two months before the attack that would test Obama's red line, Trump left little doubt regarding his skepticism about getting engaged in Syria: "We should stay the hell out of Syria, the 'rebels' are just as bad as the current regime. WHAT WILL WE GET FOR OUR LIVES AND $ BILLIONS? ZERO."[86] Trump had also been critical of Obama's red line statement. However, unlike many prominent Republicans, he did not criticize the president for not authorizing strikes: "The only reason President Obama wants to attack Syria is to save face over his very dumb RED LINE statement. Do NOT attack Syria, fix U.S.A."[87] Furthermore, Trump had repeatedly called upon the president to seek congressional authorization for strikes.[88] Thus, the fact that Trump, as president, did not hesitate to strike at the Assad regime once in office raised interesting questions about what made him abandon his previous position.

Reportedly Trump's decision to authorize strikes can be explained partly by his emotional reaction, triggered by TV coverage of the aftermath of the attack. While the president's key advisers made an effort to describe Trump's reaction as being driven by strategic thinking, close observers detected a president who chose to "act on instinct": "In truth, it was an emotional act by a man suddenly aware that the world's problems were now his—and that turning away, to him, was not an option."[89] Not unlike his immediate predecessor, Trump emphasized the revulsion he felt when he saw coverage of the atrocity: "Yesterday, a chemical attack—a chemical attack that was so horrific, in Syria, against innocent people, including women, small children, and even beautiful little babies. Their deaths [*sic*] was an affront to humanity. These heinous actions by the Assad regime cannot be tolerate [*sic*]."[90] However, the president also put forward an argument that had repeatedly been made by so-called foreign policy hawks, who had accused the Obama administration of damaging both US credibility and security by ignoring its red line on Syria. In stark contrast to the position Trump had held in 2013, he now embraced the position that Obama's nonviolent reaction had been a mistake and indicated that he was willing to take military action:

> Well, I think the Obama administration had a great opportunity to solve this crisis a long time ago when he said [*sic*] the red line in the sand. And when he didn't cross that line after making the threat, I think that set us back a long ways, not only in Syria, but in many other parts of the world, because it was a blank threat. I think it was something that was not one of our better days as a country. [. . .] I now have responsibility, and I will have that responsibility and carry it very proudly, I will tell you that. It is now my responsibility. It was a great opportunity missed. [. . .] It crossed a lot of lines for me. When

> you kill innocent children, innocent babies—babies, little babies—with a chemical gas that is so lethal—people were shocked to hear what gas it was—that crosses many, many lines, beyond a red line. Many, many lines.[91]

Reportedly, when Trump made this statement on the day after the use of chemical weapons, he had already asked Defense Secretary James Mattis for military options.[92] Moreover, based on the accounts of advisers present during the deliberations, Trump expressed a desire to strike "'quickly'":[93] "'He doesn't like hesitation, whether it's a military strike or a tweet.'"[94] As one source has it, the president had his predecessor's inaction in mind when he decided to strike, allegedly referring to Obama's nonviolent solution as "'weak, just so, so weak.'"[95] In addition, he was said to see his reaction to the attack "'as a test'" for his young presidency.[96] As far as the crucial question about the Assad regime's culpability is concerned, the available information is limited. National Security Advisor General H. R. McMaster reportedly spoke of an increasing level of confidence in the hours after the attack.[97] However, critics pointed to the absence of a watertight investigation that would establish that a chemical attack had taken place.[98] The day after his initial remarks the president was presented with a "'Goldilocks' selection: too small, too big and just right."[99] Considerations of proportionality featured prominently in the deliberations, which is why the airfield from which the attack had originated was chosen as the target.[100] Apparently the Trump administration did not consult internationally before striking.[101] While there may have been secret consultations with other countries, the UN was clearly ignored. In terms of its legal justification, the administration's defense concentrated on the claim that Syrian chemical weapons might enter the United States, thus posing a direct threat, as well as Syria's violation of the ban on the use of chemical weapons.[102] International lawyers overwhelmingly considered the strikes to be unlawful. Importantly, the argument about the illegality of US action returned attention to the very nature of the US strikes—namely, whether they constituted acts of armed reprisals.

With regard to the domestic legal case, the administration decided not to ask Congress for authorization, another change of position vis-à-vis Trump's remarks in 2013. Although at the time Trump had called on Obama to seek congressional approval, the president now wanted to keep his actions secret and therefore did not want a vote in Congress.[103] After the strike, the president was reportedly not pleased with the outcome of the operation. In particular, he "was in a rage and seemed beside himself" because the runway had not been destroyed.[104]

Interestingly, in the president's statement to the nation after the strikes, the direct threat to the United States posed by Syrian chemical weapons that his advisers had claimed was absent. In his brief remarks Trump cited the rationales of prevention and deterrence, both rationales that do not satisfy the self-defense

standard enshrined in international law. Additionally, the president noted that the Assad regime had violated its treaty obligations vis-à-vis the ban on chemical weapons and its disregard of the UN: "It is in the vital national security interest of the United States to prevent and deter the spread and use of deadly chemical weapons. There can be no dispute that Syria used banned chemical weapons, violated its obligations under the Chemical Weapons Convention, and ignored the urging of the U.N. Security Council."[105] Clearly the idea of retribution was present in the statement, although the president did not explicitly mention punitive thinking. For example, Trump ended his introductory paragraph that described the "barbaric attack"[106] with the conclusion that "no child of God should ever suffer such horror."[107] Likewise, the president's reference to previous unsuccessful attempts to rein in the Assad regime hinted at a punitive rationale: "Years of previous attempts at changing Assad's behavior have all failed, and failed very dramatically."[108]

## The Counternarrative

Once more, the chain of events Hersh reported differed significantly from the official narrative.[109] Hersh claims that the available intelligence established that a conventional attack had been carried out by the Assad regime and that no chemical agents were released. However, apparently under the impression of the graphic photos that emerged after the attack, Trump accepted the allegations that a chemical weapons attack had occurred, although the origin of those photos could not be confirmed. According to Hersh, several senior members of his national security team sought to convince the president not to take military action. Hersh's reporting portrays a president who seemingly acted on emotions only and did not consider the facts. The thinking of Trump's senior advisers is worth quoting at length:

> The national security advisers understood their dilemma: Trump wanted to respond to the affront to humanity committed by Syria and he did not want to be dissuaded. They were dealing with a man they considered to be not unkind and not stupid, but his limitations when it came to national security decisions were severe. "Everyone close to him knows his proclivity for acting precipitously when he does not know the facts," the adviser said. "He doesn't read anything and has no real historical knowledge. He wants verbal briefings and photographs. He's a risk-taker. He can accept the consequences of a bad decision in the business world; he will just lose money. But in our world, lives will be lost and there will be long-term damage to our national security if he guesses wrong. He was told we did not have evidence of Syrian involvement and yet Trump says: 'Do it.'"[110]

Putting it even more succinctly, Hersh quotes a Trump adviser as follows: "Did the Syrians plan the attack on Khan Sheikhoun? Absolutely. Do we have intercepts to prove it? Absolutely. Did they plan to use sarin? No. But the president did not say: 'We have a problem and let's look into it.' He wanted to bomb the shit out of Syria."[111] Hersh also reported that initially Trump did not want to give Russia an advance warning of US strikes, which was common practice to avoid a confrontation between the United States and Russia, and only hesitantly accepted so-called deconfliction.[112]

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# 10

# Limited Strikes

## *Casuistical Investigation and General Argument*

Recalling the argument on targeted killing that considered both retributive and anticipatory rationales, one would expect a treatment of limited strikes to enforce international norms to fully concentrate on the retributive dimension. After all, all cases presented in the preceding chapter had a significant retributive aspect to them. That said, however, this chapter also considers one aspect that relates to the anticipatory rationale: the use of threats of force to deter potential violations of international norms. The concept of deterrence centers on the idea that a threat will compel the other side not to engage in certain acts. If successful, the deterrence posture will both prevent the potential norm violation and make the threatened action in defense of the international norm unnecessary. That is why this chapter's general argument pays special attention to the threat of vis. In terms of outline, the chapter follows the blueprint of the previous analysis. It begins with the casuistical investigation and then turns to the general argument about the morality of retributive air strikes to enforce international norms imagined as acts of vis.

### THE CASUISTICAL INVESTIGATION

Having described cases of limited retributive air strikes carried out by four US administrations, let me first consider what these strikes had in common before I turn the discussion to the casuistical investigation as such. All cases were limited in scope, and vis was employed as a one-time action. Moreover, the strikes did not lead to an escalation to a large-scale war between the United States and the targeted party. Finally, although the United States usually informed its closest allies before the strikes, the UNSC was not involved in the run-up to the military action. It is thus fair to argue that, their differences notwithstanding, the cases described in the previous chapter belong to the same type

of action, which provides the basis for the casuistry that follows. The morally most interesting case is the Obama administration's maneuvering on Syria, as its political solution was both staunchly defended and ferociously criticized at the same time. That is why the following investigation takes the Syria 2013 case as the instant case, the morality of whose solution it seeks to investigate. Operation Infinite Reach, the Clinton administration's air strikes in Afghanistan and Sudan, functions as the paradigm case, whose solution I consider to have been clearly wrong. By taking the 1998 operation as an exemplar of a morally indefensible action, this case will help illuminate the morality of the instant case in conversation with the Libya 1986, Iraq 1993, and Syria 2017 cases.

## The Instant Case

The Syria 2013 case is the morally most interesting one because, unlike the official rationale behind targeted killings, the Obama administration openly acknowledged that there was no direct or imminent threat to US security. Granted, President Obama described Syria's use of chemical weapons as both a "serious threat to our national security" and a threat to US allies in the region, but his list of objectives—namely, to "hold the Assad regime accountable for their use of chemical weapons, deter this kind of behavior, and degrade their capacity to carry it out"—directly hinted at retributive thinking. While one could argue that the objective of ridding the Assad regime of chemical weapons may be considered under the umbrella of the emergent "responsibility to protect" framework, as an act of other-defense, Obama clearly foregrounded retribution, literally worrying that Assad would have to "pay no price" if his attack went unpunished. Moreover, the president openly accepted that he would be willing to violate international law by taking reprisal action to enforce the norm against the use of chemical weapons. In contrast to the retributive strikes that were undertaken by the Reagan and Clinton administrations, there was thus no attempt to frame the intended strikes as acts of self-defense in accordance with Article 51 of the UN Charter. Consequently, it seems that this case's dominant "morals," its reigning maxim, is the claim that "limited retributive military action is morally justifiable to enforce international norms even in the absence of self-defense grounds."

This claim, inevitably, will be rejected not only by most of the international law community but also by the majority of contemporary just war thinkers who reject the just cause of retribution. For them, as was the case for targeted killings, the maxim "there is no morally justifiable just cause other than defense" should have ruled the case. Investigating the morality of the instant case, it will thus be of interest to answer the question of which of the conflicting maxims should be allowed to rule the case and to what extent. In other words, would it

have been morally justifiable to bomb Syria in retribution for its chemical attack in the absence of a direct threat to the United States? Moreover, should threats of force be made to deter potential norm violators? On top of these questions there is another set of morally interesting questions that need answering: Was the nonviolent resolution of the case morally advantageous, as the Obama administration would claim later on? Did the administration act prudently as the nonviolent path it took removed more chemical weapons from Syria than limited retributive strikes could have? Or, as critics hold, did the infamous red line indicate a failure of US leadership and set a dangerous precedent that would encourage future violations of international norms?

## The Paradigm Case

As chapter 6 has noted, while self-defense has become the predominant just cause for war in international law and contemporary just war thinking, the just cause of punishment played an important role in earlier just war thinking and, crucially, continues to play a role in state practice, at least unofficially, that is. While a few scholars have defended punitive thinking, a clear line has been drawn between a potentially justifiable retributive rationale and morally unjustifiable acts of vengeance. Starting the taxonomy with the paradigm case, the case that emerges as clearly wrong is the military action the Clinton administration carried out in 1998. Generally, the administration had a moral right to respond to the embassy bombings and bring the perpetrators to justice. Letting the terrorists go unpunished would have been profoundly unjust, as the equilibrium of justice could not have been restored. To a significant extent, the Afghanistan pillar of Operation Infinite Reach parallels the moral argument on targeted killing. The main difference in limited strikes to enforce international norms is one of magnitude; the 1998 attack was not targeting a specific individual but rather a gathering of senior al Qaeda leaders, some of whose identities were most likely unknown to US authorities. Ideally, the perpetrators would have taken responsibility for their crimes and turned themselves in to stand trial. In the light of their unwillingness to do so, the United States should have held a trial in absentia to establish the guilt of the accused. It goes without saying that, inevitably, holding a trial would have required letting pass the rare opportunity to take out al Qaeda's senior leadership in one strike. And even if a trial had established the guilt of the individuals responsible for the embassy attacks, it would not have been morally justifiable to bomb the gathering for retribution's sake without certainty about who would be present. As unlike in self-defense there is no urgency involved in retributive action, it is only the killing of those who have made themselves liable to lethal attack that seems morally justifiable. That is what prudence and charity demand.

In 1998, however, the Clinton administration launched the strikes in the absence of a conclusive criminal investigation about the terrorist attacks. There may have been intelligence reports that pointed to al Qaeda's responsibility, but such reports do not satisfy the level of certainty that is needed to justify retributive lethal action. In any case, the administration's indiscriminate cruise missile strikes did not meet the very high discrimination standard established in chapter 8. There is no question that the strikes were a very attractive military option. They were easy to execute and a one-time action that, if successful, would have killed al Qaeda's senior leadership. On top of that, there was no danger of an escalation to a larger war between the United States and Afghanistan due to the military weakness of the Taliban regime. In fact, the role of the Taliban regime, which had given al Qaeda an operating space, deserves attention, too. The regime clearly fell under the "unable or unwilling" standard. By allowing al Qaeda to plan terrorist attacks the Taliban made themselves complicit, as it was their responsibility to prevent Afghanistan from becoming a terrorist haven. Thus, it seems that the Taliban regime deserved a form of punishment for its unwillingness to stop al Qaeda's activities. Importantly, the argument that the Taliban regime was liable to retributive action does not necessarily mean that such action should have been meted out by military force, and in fact, the Clinton administration decided to concentrate on al Qaeda only.

The attack on the pharmaceutical plant in Sudan was even less justifiable. Not only was the intelligence about the link to al Qaeda unclear, the US intelligence community itself had serious doubts that the plant was actually involved in a chemical weapons program. Moreover, the Clinton administration's subsequent effort to block a UNSC investigation came with the sense that the administration was concerned about the political repercussions of the outcome of such an investigation. Furthermore, in contrast to the rare opportunity that presented itself in Afghanistan, there was no need to strike quickly. There should have been further investigations and, if necessary, a trial in absentia before considering a strike. Based on what we know today, such a trial would have proven that there was no link between al Qaeda and the pharmaceutical plant. Additionally, while there may have been continuing links between bin Laden and the regime in Khartoum, retributive action against the regime would have had to concentrate on military targets. Striking at a pharmaceutical plant that at best was a so-called dual-use facility would have been morally indefensible due to the likely harm to the civilian population. The fact that the Clinton administration struck nonetheless thus comes with the taste of illicit vengeance. In fact, vengeance may have been the foremost rationale if it is true that Sudan was put on the target list because the attacks on the two embassies were supposed to be countered by US strikes at two different sites.

Today, acts of vengeance are often condemned as following the precept of "an eye for an eye and a tooth for a tooth." Such thinking, it is argued, problematically returns to the punitive and bloodthirsty thinking of the Old Testament. In the light of this argument it should be recalled that, while hopefully no moralist seeks to return to the ancient way of meting out punishment, this punitive idea was actually supposed to function as a means of restraint. The idea was to punish only those who had committed the wrongdoing, and to do so proportionately. What the Clinton administration did in Sudan, however, was to strike at a target that was unrelated to the wrongdoing the strike sought to correct. As a result, the Sudan pillar of Operation Infinite Reach constitutes a prototypical case of an act of vengeance, the exact type of illicit gut reaction in war that Augustine warned against.

## The Taxonomy: Limited Retributive Air Strikes

In all cases considered, including the paradigm case whose solution was identified as morally wrong, egregious acts of injustice had taken place, including terrorist attacks, an assassination attempt, and both conventional and chemical attacks against the civilian population. Seen from a natural law perspective, these unjust acts of violence had to be addressed by some kind of remedial action in order to restore the equilibrium of justice; sitting idly by and showing indifference is morally indefensible. While this affirmation of a retributive just cause comes naturally for the Thomistic just war, it is the criterion of right intention that will determine whether the respective responses by the four US administrations were morally justifiable and to what extent. As in the previous chapter, considerations of charity and prudence will be weighed in order to judge the conduct of the Reagan, Clinton, Obama, and Trump administrations.

In line with the casuistical method, let me build a taxonomy of cases and consider their kinetics, the moral movement they impart on each other. Among the cases considered, the Hersh account of the Trump administration's strike against the Assad regime seems to be closest to the paradigm case, as Trump ordered a strike he justified as a response to a chemical attack that had not taken place. Following Hersh, vengeance, in particular, seems to have been behind Trump's strike decision. One would expect a scholarly consensus that the Trump administration's course of action as narrated by Hersh seems morally wrong. Justifying military action based on a chemical attack that had not taken place was morally indefensible. Trump reportedly did so while being under the impression of TV coverage that was likely to be unrelated to the actual conventional attack, and against the council of his intelligence and military advisers. In a rage after having watched graphic videos of people suffering from a chemical weapons attack, the president apparently was no longer interested in the facts.

On top of that, if Hersh is correct, the president willingly misled the American people and the world community about his true rationale. The idea that Trump was driven by illicit emotions also seems to come across in the claim that the president initially wanted to strike without informing Russia in advance, thus risking a major confrontation between the United States and Assad's protector. Even more questionably, the president may have acted in order not to be seen as indecisive early in his presidency, having in mind the criticism that was made of his immediate predecessor's maneuvering in 2013. At the same time, speaking in favor of the Trump administration, a clear effort was made to strike proportionately at a military target. In contrast to the Clinton administration's bombing of what at best was a dual-use facility in Sudan, the Trump administration hit the exact airfield from which the Assad regime's assault had originated.

The next case on the spectrum is the official account of the Trump administration's strikes against the Assad regime. At first look, the military action authorized by the president seems like a prototypical act of vis. It was a one-time military attack that was very limited in scope. In fact, a deliberate effort was made to find a proportionate response, as the strikes were directed against the same military airfield from which the Syrian attack had originated. The probability of escalation was limited too, as the United States had informed Russia before the attacks, and Moscow had most likely forwarded this information to its Syrian ally. Upon a closer look, however, the case is more mixed. To begin with, it seems that if in fact a chemical weapons attack had taken place and the Syrian regime was responsible, that would have been a grave enough violation of an international norm to warrant a retributive response. Furthermore, beyond the rationale of employing force to reestablish the equilibrium of justice, the retributive rationale of deterrence played an important role. Trump's warning about the negative consequences of a "blank threat" of retributive action seems to ring true in the sense that it is likely to fail in deterring other regimes that might consider similar transgressions.

However, this conclusion about just cause hinges on what had actually taken place and does not yet address the right intention criterion. Indeed, it is the right intention criterion that this operation fails to rise to. As the discussion of the case indicated, the evidence about what had happened was not entirely clear. General McMaster spoke of an increasingly clear picture, but even if some uncertainty remained, the administration should have waited for conclusive evidence to emerge before authorizing a retributive strike. The impression one arrives at is that the decision to strike was rushed, apparently partly due to an emotional reaction by Trump. The reported less than forty-eight hours between the initial Syrian attack and the US response leaves little room for a different interpretation. As was the case for the Clinton administration in 1998, it would have been right to conduct an independent investigation before considering retributive

action. Moreover, while unilateral action should not be ruled out, it seems that acting multilaterally is the morally preferable option. Ideally, the international community as a whole or at least parts of it should have been involved. Having a coalition carrying out the strikes would have sent a much stronger signal that the use of chemical weapons is unacceptable to the world community. However, by striking so quickly, the Trump administration almost inevitably had to act alone. In contrast to similar US strikes in Syria that would follow a year later, France and the United Kingdom were not involved. Additionally, not only did the US strikes break international law, the rush to strike made the involvement of the UNSC, if a role for it had ever been intended, all but impossible. Acting multilaterally also seems morally advantageous because it might help participants to act more prudently. Multilateral action requires consultations with other parties and arguably leads to a clearer picture about the right intention to act. With regard to the case at hand, it seems that consultations with at least its closest allies would have helped calm down the emotional atmosphere under which the strike decision was taken, as it inevitably would have delayed the execution of military action. Such discussions could also have been a forum to explore nonkinetic options to react to the Assad regime's wrongdoing, which apparently were never seriously considered. Another aspect that apparently contributed to the strike decision is even more problematic. Taking the chemical attack as an opportunity to show decisiveness early in his presidency and to exploit the strikes for personal gain would be morally indefensible. The taking of life must not be allowed to play a role in the effort to boost poll numbers.

While the case shows some interesting parallels with the Trump administration's actions, the Clinton administration's response to the failed assassination plot against President Bush seems less morally problematic. As in the previous case, the air strikes against the regime of Saddam Hussein match the description of vis. The strikes were a one-time action that was limited in scope, and an escalation to a war between the United States and Iraq never was a serious possibility. Reportedly the administration had planned the strike carefully and the least risky option was chosen. It is also noteworthy that the attack was directed against the Iraqi intelligence headquarters, the location from which the attack was assumed to have originated. While Trump authorized military action in less than forty-eight hours, the Clinton administration waited two months before it took kinetic action. It also seems that attempting a political assassination constituted a grave enough violation of an international norm that, had it been left unpunished, it would have set a dangerous precedent for future such illicit acts. A major difference from the other cases is that the plot to assassinate Bush had not materialized. One might therefore question whether a preempted act of wrongdoing can justify retributive military action. Arguably, the fact that the plot was stopped shortly before its execution does not alter the wrongdoing by

the regime of Saddam Hussein. If the regime was behind the plot, it had engaged in a violation of an international norm that seems grave enough to warrant a retributive response.

With regard to the question of whether a retributive response was morally justifiable in the first place, again, much weight rests on the credibility of the evidence. Unlike in the Syria 2017 case, there was a confession by two suspects that was confirmed by US authorities. However, a confession is not the same as an independent after-the-fact trial. Not surprisingly, critics held that the case for retribution was based on circumstantial evidence only, and it seemed imprudent of the Clinton administration not to wait for the outcome of the trial. Thus, while the Clinton administration reportedly planned its reprisal action carefully, striking two months after the failed plot without having a watertight case seems rushed and morally problematic. With no urgency involved, the administration should have waited for the outcome of the trial. In addition, while the administration reported to the UNSC, it did not explore alternative responses other than playing the military card. The time gained by waiting for the verdict of the trial could have been spent on building an international coalition. In fact, noting the largely positive or at least muted response to the strikes from within the international community, the time spent on coalition building might have resulted in an overwhelming international response to condemn the behavior of the Saddam regime and thus could have reinforced the norm against political assassination. The Clinton administration, however, opted to strike unilaterally, without even the involvement of its closest allies France and the United Kingdom.

The first case that seems to have carefully considered the most profound moral questions vis-à-vis retributive strikes is the Reagan administration's response to the Qaddafi regime in 1986. While, as in the previous cases, the administration employed limited force in a one-time strike on military installations, it acted much more prudently than the US administrations that followed. In particular, the Reagan administration's military response to Qaddafi's terrorist activities and sponsorship followed a careful process of increased pressure short of military strikes. Among the responses that were employed were diplomacy, covert action, economic sanctions, and shows of force. While threatening the Qaddafi regime with military force, the administration, unlike its successors, showed considerable patience before carrying out retributive strikes. It seems that avoiding a rushed military response provided the administration with an opportunity to thoroughly assess the available options. In light of the previous cases, it seems particularly noteworthy that voices from within the administration itself had cautioned against a quick response, as the available evidence was not considered to be conclusive. Furthermore, the administration carefully weighed the potential fallout of a retributive strike. The assessment

of the likelihood of escalation included the reaction of the Soviet Union, Arab states, and terrorist groups. In addition, the risk to US troops was considered as well as the likely response by the US public and the world community.

On the downside morally was that some of the closest allies of the United States, including its NATO partners France and Spain, rejected the operation and even closed their airspace to US bombers. Only a few states openly supported the strikes, and without the logistical assistance of the United Kingdom the operation would have been very difficult to carry out. It seems that the Reagan administration should have made a greater effort to get the international community on board. Ideally that would have involved the UNSC, at least as a forum to make the case for retributive action. Given the near-certainty of a Soviet veto against possible strikes, however, the gridlock in the UNSC should not have prevented the United States from taking military action unilaterally, as it was acting on just cause and with right intention. The second-best option, it seems, would have been to build an international coalition of supportive states. More emphasis on building a coalition among nations would have been preferable; nonetheless, the Reagan administration was justified in punishing Qaddafi for his repeated wrongdoing.

## Verdict

What is the verdict that can be derived from the preceding taxonomy and the kinetics of the cases? As noted previously, the Syria 2013 case is a curious one in the sense that there was only a threat to use limited force, and the administration would later defend the deal to remove Syria's chemical weapons as one of its major foreign policy successes. At the same time, the administration's critics identified a dangerous sign of weakness in the decision not to enforce its self-imposed red line, which was crossed when the Assad regime used chemical weapons. The verdict supports the critics of the Obama administration. While undoubtedly the removal of the majority of Syria's chemical weapons was a positive development, the decision not to enforce the red line set a dangerous precedent, and not just for the future of the chemical weapons convention. As the French foreign minister pointed out, the failure to enforce the red line in Syria may well have encouraged President Putin's land grab in Ukraine a year later and, I would like to add, perhaps even the full-scale invasion in 2022. In other words, the US unwillingness to keep its promise of enforcing one particular international norm may have had direct consequences for the viability of other norms. Likewise, enforcing the red line in 2013 may have deterred the Assad regime from using chemical weapons in further large-scale attacks in subsequent years. Consequently, the Trump administration, either alone or in coalition with the United Kingdom and France, may not have faced the decision

to strike. Advocates of the Obama deal will point to the president's own defense that he managed to remove the vast majority of Syria's chemical weapons without a missile having been fired. However, as the president acknowledged himself, his solution was an "imperfect" one in the sense that Assad continued to have a limited amount of chemical weapons, and in fact he could not be deterred from using them in the years to come.

Reflecting on the other cases, the rushed decision-making process leading up to the initially imagined strikes was morally problematic. As Obama himself pointed out, the strikes would not have been "time-sensitive." Although clearly the Obama administration demonstrated more patience than the Trump administration would four years later, due to the absence of an ongoing or imminent threat, the retributive cause should have been deliberated more extensively. In particular, the administration should have waited for the outcome of the independent UN mission that was meant to establish what had happened. Granted that the US intelligence community thought it had a clear case, but without the urgency to act, an independent international investigation would have been preferable. Having watertight proof would have put the United States in a strong position to take the case to the UNSC. At that forum, it also could have pointed to the evidence it had about previous minor chemical weapons attacks attributed to the regime and the steps it had taken to increase the pressure on Assad. Most likely Russia would have vetoed any resolution to take retributive action, but going to the UN could have achieved the "naming and shaming" of the Assad regime and thus reemphasized the chemical weapons convention. In the meantime, the United States could have made an effort to rally its allies and build a coalition to take limited military action in the expected case that no UN authorization could be obtained. Perhaps the deliberations at the UN and the avoidance of a rushed vote in the House of Commons could have enabled the United Kingdom to join a coalition. Even if no other country would have joined, the United States could have relied on the support of France. Having one ally only is still better than the impression that is created by going it alone. The Obama administration, in contrast, openly showed its lack of interest in the UN process. Not only did the administration make an effort to get UN inspectors out of Syria, but the president himself, unlike his predecessors, had no qualms about announcing his bypassing of the UN and thus the violation of international law. Granted, the alternative course of action sketched earlier would also have broken international law if Russia had stopped an authorization of force. However, the United States would at least have made the attempt to get the international community on board; arguably, acting to enforce an international norm in the light of a gridlocked UNSC might be illegal but morally defensible.

So what about the scope of limited force that would have been justifiable? Clearly, neither a disproportionate large-scale attack nor a strike at facilities

whose use had not clearly been established would have been morally justifiable. A strike of the provenience of the Clinton administration's strike in Sudan would have been indefensible. It seems that the Trump administration's strike in 2017 can function as a good example. The strike was very limited in scope and targeted the exact airfield from which the chemical attack had originated. The administration had also informed Russia in advance to avoid a potential escalation. The Clinton administration's target set in response to the 1993 assassination attempt also could have provided a precedent of limited scope. The Reagan administration's strikes in Libya seemed more far-reaching, as they aimed at one of Qaddafi's palaces. Such action should have been avoided in 2013 but may have become an option if the Assad regime had continued to use chemical weapons.[1] Striking at storage sites of the regime's chemical weapons would only have been justifiable if civilian casualties could have been avoided, which, given the hazard posed by such weapons, would have been a challenging undertaking. In conclusion, the maxim "limited retributive action is morally justifiable to enforce international norms even in the absence of self-defense grounds," identified initially, has been confirmed by the casuistical investigation. However, as the investigation has also brought to light, the course of action the Obama administration decided to take was morally problematic. While the removal of the majority of Assad's chemical weapons constituted a success of sorts, failing to follow through on the self-imposed red line not only opened the door for the regime to commit further attacks but may have encouraged further unrelated norm violations by other states.

## THE GENERAL ARGUMENT

Having undertaken the casuistical analysis, I am now in a position to develop the general argument about when limited strikes to enforce international norms can be morally justifiable. At the outset, it needs to be emphasized that the following argument is necessarily in general terms. In line with the Thomistic understanding of legitimate authority, each future case needs to be deliberated thoroughly by those responsible for the common good. Based on what I have argued so far, it will come as no surprise that limited retributive air strikes against states that violate international norms can in theory be morally justifiable. While both Walzerians and revisionists reject war as punishment, seen from a Thomistic perspective, norm violations can disrupt the equilibrium of justice to such an extent that restoring it may be morally justifiable.

Before making a moral argument that is grounded in the thought of Aquinas, it will be enlightening to consider the Walzerian and revisionist take on the morality of retributive vis to enforce international norms. Fortunately both Walzer and McMahan have contributed to the debate about the morality

of limited retributive air strikes against the Assad regime in 2013. Thus, their respective arguments on this chapter's instant case highlight the differences vis-à-vis the Thomistic third-way contribution. Overall, Walzer's and McMahan's opinions on this specific case follow their general moral argument outlined in chapter 6. Interestingly, while both reject punitive war, they supported the Obama administration's proposal to employ limited force in response to the Assad regime's use of chemical weapons, as they considered a limited military response to be in line with their argument for anticipatory war. However, both Walzer's and McMahan's arguments included a backward-looking element. The role of a backward-looking element in the justification for an anticipatory just cause demonstrates that it can be difficult to clearly identify one singular just cause behind a decision to employ armed force. Indeed, the messy circumstances of war can give rise to a confluence of just causes.[2] Arguably, Walzer's just war is better equipped than McMahan's to account for such a confluence as, unlike revisionists, he has no particular interest in what Thaler calls the moral slide rule. That is, I suppose, the reason Walzer argues that anticipatory war "looks to the past and future."[3]

Let us consider both arguments in more detail. Walzer, in response to the realist position advocated by Stephen Walt, argued that the Obama administration should respond to the Assad regime's use of chemical weapons with limited strikes.[4] By supporting such action, Walzer broke with his previous position on the Syrian civil war in which he, similarly to the Obama and, later, the Trump administrations, had been very skeptical about an outside intervention.[5] With regard to the chemical weapons attack, however, Walzer identified a different dimension, arguing that the large-scale use of chemical weapons against the civilian population called for an international response.[6] More specifically, grounded in the acknowledgment that no "organized agency of international society" existed that would be able to take action,[7] Walzer held that the rules of war should be enforced by the members of that society following the principle of "whoever can, should."[8] In line with the Obama proposal, Walzer thought the United States should respond "in a limited, specific way."[9] Arguing that the ban on the use of chemical weapons was a rare example of an effective constraint on the use of force, Walzer considered it to be "very, very important to defend that constraint."[10] Walzer pointed to the failure to respond to Saddam Hussein's use of chemical weapons against Iraq's civilian population in 1988 as a damaging precedent. Had there been a forceful response back then, Walzer insinuated, the following two wars against Iraq might have been avoided, and the Assad regime might have been deterred successfully. Once more failing to respond, Walzer feared, would encourage further violations of the chemical weapons convention beyond the Assad regime.[11] While Walzer's argument clearly included retributive tropes, it will come as no surprise to the reader that he framed his advocacy

of limited strikes to enforce the chemical weapons convention in terms of defense of the war convention. In line with the near-consensus in contemporary just war thinking about defense as the only just cause, Walzer did not use the frame of punishment.

McMahan's argument on Syria was also in line with his general moral argument. With regard to the just cause of retribution, McMahan went even further than Walzer. While Walzer embedded his argument for limited strikes in his defense argument, McMahan explicitly rejected retribution and argued for a preventive rationale. In a nutshell, McMahan argued for military action to deter and prevent further unjust attacks.[12] Unfortunately, however, according to McMahan, public debate had been "clouded by a fog of rhetoric and confused reasoning."[13] In the first place, McMahan argued against the justifiability of a retributive cause of action.[14] Referring to "a variety of bad arguments" that, in his eyes, had been made in the debate about how to respond,[15] McMahan rejected the rationale of punishing Assad by military force. If Assad deserved to be punished for his wrongdoing, that punishment should be administered by an authorized institution, such as the International Criminal Court.[16] For McMahan, the right moral argument for employing force against the Assad regime follows the exact lines spelled out in chapter 6. It is grounded in his account of liability to defensive force, which may include the use of preventive force but opposes punishment:

> Yet the just cause for strikes against Syria is not to punish the regime for the many crimes it has already committed. Rather, these crimes demonstrate that the regime has no compunction about slaughtering its own citizens when it believes its own survival is at stake and that the killings will therefore continue until something is done to stop them. The just cause for striking Syria, then, is to deter and prevent the regime from engaging in further massacres of civilians, whether with chemical or conventional weapons.[17]

While McMahan seeks to draw a clear line between punishment and deterrence/prevention, his fellow revisionist colleague Frowe points to a tension in this only ostensibly clear-cut distinction. It is this tension, I argue later, that the Thomistic just war can resolve. As noted in chapter 6, Frowe, following McMahan, rejects punishment as just cause for war. However, she points to the nature of punitive war as both forward and backward looking. Frowe argues that punitive wars primarily aim at restoring the equilibrium of justice by making "an aggressor pay for some past injury." At the same time, however, punitive wars can also look to the future by seeking to reduce further aggression via deterring the target state or other potential aggressors.[18]

In summation, while both Walzer and McMahan supported potential limited US strikes in response to the Assad regime's use of chemical weapons, they

did not adopt a retributive justification, although the arguments of both thinkers included a backward-looking element. Moreover, both thinkers embraced the rationale of deterrence grounded in the threat of force.

## Vis and Legitimate Authority

So how exactly does the classical Thomistic argument on retributive uses of limited force differ from the Walzerian and revisionist interpretations? As discussed in detail in chapter 5, the classical understanding of authority referred to the ruler and his/her responsibility for the common good of the political community entrusted to him/her. At the same time, there was a community of all political communities. The interactions between these communities were also supposed to be governed by order and justice in order to guarantee peace among them.[19] Put differently, for thinkers like Aquinas, rulers would not have been able claim a right to political sovereignty and territorial integrity when they committed blatant acts of injustice. Neighboring rulers, grounded in the responsibility for the common good, had an obligation to rein in the transgressor. At the same time, as will be discussed shortly, taking action against a particular violation of justice could also be seen as a warning sign to other potential norm violators. Transferring this idea to the twenty-first century, comparable to the "unable or unwilling standard" in the context of targeted killing, states that violate important international norms should not be allowed to hide behind claims to political sovereignty and territorial integrity, the core principles of the Westphalian era. Making this argument, the reader will immediately notice the curious overlap between the Thomistic take and Walzer's call for strikes against the Assad regime.

In the context of the authority criterion, it is a crucial question to ask who has the authority to punish the violation of international norms. Driving the Thomistic understanding of politics is the concern for the common good, for both individual political communities and all humankind. The just war thinking of Aquinas draws on the argument of his canonist predecessors, who deliberately made the decision to grant the authority to wage war to legitimate authorities only. Today's international system is, of course, radically different from the world of Aquinas. The UN framework, to which the overwhelming majority of states have committed themselves, starts from a prohibition on both the threat and use of force and accepts two exceptions only: UNSC-sanctioned military action and states' inherent right to self-defense. Parts of the responsibility for the common good of all humankind, which was an integral part of the job description of individual rulers in Aquinas's understanding, have therefore been transferred to the UNSC. In theory this has been a praiseworthy development, in the sense that it has limited states' right to use force for self-defense, which can be seen as an attempt to create a less violent world. Ideally the UN,

by claiming to represent all of its members impartially, should be a neutral arbitrator when disputes arise. It should be able to take decisions for the common good that transcend individual states' national interests. Interestingly, this was also the understanding of Pope John XXIII and has been emphasized by his successors, who have called for the establishment of a world authority in the service of the "universal common good." In his highly influential 1963 encyclical *Pacem in Terris*, John XXIII even identified a moral obligation to create such a body: "Today the universal common good presents us with problems which are world-wide in their dimensions; problems, therefore, which cannot be solved except by a public authority with power, organization and means co-extensive with these problems, and with a world-wide sphere of activity. Consequently the moral order itself demands the establishment of some such general form of public authority."[20]

Unfortunately it seems fair to conclude that the UN does not meet the criteria John XXIII had in mind. It has been unable to free the world from armed conflict by resolving disputes through international institutions, the task the so-called group of Internationalists hoped it would be able to fulfill.[21] Gridlock in the UNSC has often prevented the UN from taking action, even in the case of mass atrocity crimes. To put it bluntly, it takes only one veto to keep the UNSC from stopping a dictator slaughtering his/her own population. Moreover, as critics like Johnson seek to highlight, the UN has no sovereignty itself and requires the consent of its sovereign members to take action. As he puts it succinctly: "But international organization has not superseded the state; for it to function well, it must depend on states that function well."[22] As the reader will know, attempts to reform the UN framework and especially the UNSC have failed repeatedly.

Of course the hitherto failure to develop the UN in the direction of a world authority capable of addressing the fundamental challenges to the global common good does not rule out the creation of such an authority in the future. I continue to entertain the hope that the world community might one day decide to take this step. However, in the contemporary international security environment, state leaders need to operate within the system that is in place. While the UN system undoubtedly has been a step in the right direction, the question of how to maintain or (re)establish international order in the face of UNSC blockage remains. This, it is of interest to note, is essentially Rodin's starting point in his argument for a universal state that we encountered earlier. As far as my recovery of classical just war is concerned, the failures of internationalism demonstrate the continued importance of particular states in the endeavor to facilitate order, justice, and peace.

It is not without irony that the case for action to enforce international norms entails breaking international law by bypassing the UNSC. However, the legal

argument does not necessarily overlap with the moral one. Based on the Thomistic understanding of a responsibility toward the global common good, I argue that there may be cases in which states may act without UNSC backing in order to uphold international norms. Looking at this argument from a historical perspective, it can be seen as a reaffirmation of the classical just war understanding of the state and its responsibility for the international order, a responsibility that might conflict with positive international law. Again, there are important parallels between the Thomistic and the Walzerian arguments, the disagreement over the role of punishment notwithstanding. Likewise, McMahan's forward-looking deterrence argument supported unilateral US action against Syria.

That said, derived from the preceding casuistical investigation, I argue that there should be a credible attempt to obtain the support of the UNSC. As there is no immediate urgency involved with retributive force, making such an attempt will increase the moral standing of those seeking to act on behalf of the international community. As the reader will recall, Rodin has argued that although insufficient to be morally justifiable, punitive action that has UN backing is of higher moral standing than action conducted by a coalition of states or even an individual state. While I hold that individual states may have the authority to employ punitive force, I think that Rodin has a point. I argue that a large coalition of states may carry more moral authority than a small "coalition of the willing" or even an individual state. At the very least such a coalition can more forcefully respond to the concerns that are encapsulated in the biased judgment objection and the Augustine formula. Strikingly, Williams compares a state that is acting in self-interest alone, and in ignorance of the international community, to the illicit private use of force that Aquinas condemns so forcefully: "The just war tradition in fact demands this kind of internationalism, in the sense that it makes a strong challenge to violence as the tool of private interest or private redress; and 'privacy' of this kind is most definitely something that can be ascribed to states as well as individuals."[23] That said, however, I also argue that if the attempt to get the international community on board fails, the state(s) that are willing to stand up for the common good of all gain the authority to take action. Walzer, in fact, provides the right formula for such scenarios: "Whoever can, should." Having made an attempt to get the international community on board will provide precious moral and also procedural authority. Moreover, as in all likelihood there will be states that object to military action, the acting state(s) should seek to build a coalition. Having other states joining the effort can increase the moral standing of the operation. Forming a coalition might be seen as an indicator of the moral argument's purchase in favor of enforcing the international norm. I accept that this is an imperfect solution, as a "coalition of the willing" will divide the international community, but such a state of affairs seems preferable to showing indifference in the face of profound norm

violations. This is an insight succinctly captured in the Catholic prayer the Confiteor, which functions as a reminder that there is moral responsibility not just for "what I have done" but also for "what I have failed to do." Of course the argument only holds if the intervention is morally justifiable, which is why considerations of just cause and right intention must be weighed carefully.

## Vis and Just Cause and Right Intention

Breaking with the Walzerian and revisionist position, limited military strikes to punish a regime that violates important international norms can be morally justifiable. It needs to be emphasized that the qualifier "important" is significant here. In order to avoid the "slippery slope to the Hobbesian abyss of the war of all against all,"[24] only violations of norms of significant importance should be taken to relax the Westphalian principles. The hosting and supporting of terrorist groups that lead to actual attacks, plotting illicit acts of vis, and using weapons of mass destruction against one's own population seem to cross this threshold. While a standard of sufficient importance comes with the potential of being abused, the standard links back to the authority criterion. It is part of the responsibility of those in authority to determine when the norm violation is sufficiently grave. Logically following from this emphasis on legitimate authority is the criterion of right intention, which cautions against illicit gut reactions and pursues the goal of peace. Therefore, similarly to my argument for a trial in absentia process vis-à-vis retributive targeted killing, there should be a credible effort to establish the culpability of the party to be punished. Ideally, such a fact-finding mission would take place at the UN level, but if this path proves infeasible, those stepping in for the world community have the authority to investigate for themselves. In this sense, retributive action once more benefits from the absence of urgency.

Inevitably, conducting a thorough investigation will delay potential retributive action. Waiting for, say, a year before conducting limited strikes will also create pressure to abstain from the act of punishment. International public opinion tends to forget quickly, and the further in the past a crime lies, the harder it will become to gain backing for retributive action. However, waiting for a clear moral case to emerge before taking retributive action is key to avoiding the problematic gut reactions that are grounded in illicit passions. Just as it is part of the responsibility of those in authority not to give in to considerations of vengeance, they will need to withstand the pressure not to punish when morally warranted. In that sense, while an illicit *gut reaction* must be avoided, it will *take guts* to strike some time after the wrongdoing. That is one of the reasons why Aquinas emphasized the character formation of the ruler and the required set of virtues in his discussion of authority. It is also a testament to the close

interrelationship of Aquinas's just war criteria, as the latter aspect is commonly treated as part of his right intention criterion.

Another aspect to consider is the magnitude of the norm violation. Decision makers will need to exhibit considerable military prudence in this regard. While, for example, a large-scale use of chemical weapons may warrant retributive military action, small-scale uses, although still requiring an international response, may be punished by nonkinetic action if it is prudent to do so and promises to successfully deter future norm violations. The most obvious example of such a "price" the norm violator will have to pay is economic sanctions. Small-scale violations should be punished by nonkinetic means first, combined with a clear threat that future violations will trigger military action. Crucial in this undertaking is that the enforcer of the international order shows resolve to actually proceed with a military response. Any indication of a hesitancy to employ force will undermine the deterrence posture. That is why the Obama administration's maneuvering in 2013 was fatal vis-à-vis the perceived US willingness to defend the rules-based international order.

If nonkinetic means of retributive punishment are considered to be insufficient or have failed to successfully deter the norm violator, the use of limited force should follow a careful escalatory process. By that I mean that the lowest level of force the legitimate authority considers sufficient to punish, and deter, the aggressor should be employed initially. From that point onward, the use of limited force may be stepped up until the proportionality limit has been reached. Any level of force below the proportionality threshold that succeeds in enforcing the international norm is morally advantageous. The reluctance to increase the level of force even though higher levels of force would be morally justifiable amounts to an act of mercy, a derivative of the highest virtue of charity. It also constitutes an act of military prudence, as the risk of escalation partly hinges on the scale of the response. This commitment should be seen as an effort to meet the right intention criterion.[25] As the phrase "careful escalatory process" suggests, the just use of vis asks decision makers to show considerable prudence. Kelsay summarizes the challenge succinctly: "The task of policymakers thus entails judgment: too little force simply encourages bad international actors, while too much runs the risk of a wider conflict."[26] Suggesting an escalatory process for vis, my argument deviates from Brunstetter's, who advocates a moral independence thesis for jus ad vim that finds its expression in his probability of escalation criterion and the Rubicon assessment. While in my argument the intention of avoiding large-scale war by employing vis remains, taking the coercive instrument of escalating limited force off the table seems imprudent. That said, my concern about avoiding large-scale war lets me add the caveat that my argument for retributive norm-enforcing vis, as already was the case for targeted killings, does not apply to great power conflict.

As I write these lines, war is being waged in Ukraine. Russia's preparation for the invasion had been closely followed by Western intelligence, and the US and UK predictions about Putin's initial attempt to conquer the entire country, not just the Donbas, turned out to be accurate. Putin's war of aggression is a direct attack on the rules-based international order. Put differently, the invasion of Ukraine is a gross violation of the equilibrium of justice. Therefore it seems a retributive response to restore the equilibrium would be warranted. In fact, even before the war was unleashed, NATO threatened Russia with nonmilitary "reprisals" in the case of an attack on Ukraine.[27] After the threat failed to prevent the war, NATO members followed through and imposed various economic sanctions on Russia. At the same time, NATO members were clear that they would not go to war with Russia over Ukraine, which is not a member of the alliance. A major factor in this decision was the intention to avoid a large-scale war over a third party that could potentially escalate into a nuclear confrontation. In other words, while a military response to Russia's aggression, coming to the rescue of Ukraine, would have been morally justifiable, it would have been imprudent. Going back to the sovereign's responsibility for the common good entrusted to him/her, primary responsibility is due to one's own community. Of course there is also the global common good, which Putin's war assaults and is in need of defending. However, given what is at stake, namely nuclear war, responsible statecraft asks the sovereign to foreground the good of his/her own community. Importantly, this should not be taken to mean that those seeking to stand in for the global common good should respond with indifference. Coming to the help of Ukraine very much reminds one of the duty to love one's neighbor. That said, any response needs to be weighed prudently. Considering what NATO members have done so far, it seems that they have charted the right course. In addition to the sanctions regime that has been imposed, they have been supporting Ukraine with defensive weapons. In doing so, they have attempted to prudently walk the fine line of not crossing the threshold that would result in war with Russia. How fine that line actually is shows in developments that are unfolding as I finish this book. In mid-May 2022 it seemed possible that, partly due to the West's weapons supply, Ukraine could succeed in pushing back the Russian invaders. There were even first reports of Ukrainian attacks on Russian territory that raised the question "How much attack still counts as defense?"[28] While international law sanctions the supply of weapons as part of the attacked party's right to self-defense as long as the third party does not become engaged in the fighting itself and even allows the attacked party to carry out limited military action on the territory of the attacker, there seems to be a gray area regarding when defense turns into offense. As far as NATO is concerned, German politicians were worried about the potential use of German tanks by Ukraine to advance into Russian territory, thereby dragging the alliance into the war. In

some respects, the supply of defensive weapons has already followed an escalatory process that moved from providing anti-tank missiles to armored fighting vehicles. As part of this escalation, NATO leaders have had to carefully consider Russia's likely reaction. The distinction between defensive and offensive weaponry has always been difficult to make, and what seems defensive to NATO might well be seen as offensive by Putin's circle. That is why NATO leaders have been tasked to act prudently. That said, the escalatory process vis-à-vis defensive weapons notwithstanding, NATO members have avoided an escalation to the use of vis. Based on my argument, their response so far, while morally justifiable, seems to be at the upper end of what is prudent. Employing limited force, getting directly involved in the war, would be too risky in terms of escalation.

Returning to the justifiable use of vis, let us consider the following thought experiment in the context of deterring the use of chemical weapons. Zooming into the Obama administration's decision-making process, it seems that more decisive action at an earlier stage may have prevented future chemical attacks by the Assad regime. Thus, the series of retributive strikes the Trump administration would authorize years later, both alone and in coalition with the closest US allies, may not have been needed. This is essentially the argument Walzer made in 2013 when he referred to the failure to enforce the chemical weapons convention against Iraq in 1988. Obama's statement on his red line, made in August 2012, referred to "a whole bunch" of chemical weapons being utilized. Given that the Assad regime reportedly carried out small-scale chemical attacks at the end of 2012, the regime might have deliberately tested the limits of Obama's red line. The Obama administration's response, following a formal US intelligence assessment, was to escalate in a nonkinetic way by providing military equipment to the Syrian opposition. Apparently this limited escalation did not deter the Assad regime from launching its first major chemical weapons attack in August 2013. In other words, the Obama administration's reaction was insufficient; a more forceful reaction at this early stage may have convinced the Assad regime not to step up its war crimes.

As Brunstetter rightly notes, drawing red lines without taking action when they are crossed comes at a cost.[29] Imagine the Obama administration had taken its intelligence assessment to the UNSC to "name and shame" the Assad regime's small-scale use of chemical weapons. Imagine also that, given the prospect of a Russian veto against UN enforcement action, the administration had made clear its intention to build a coalition of states willing to uphold the norm against the use of chemical weapons even in the absence of UN authorization. I concede that in this case the nineteenth-century reprisal standard seems not immediately applicable, as it was not the United States that was the injured party. However, a successful "naming and shaming" before the UN, and perhaps an apologetic gesture by the Assad regime and a pledge not to do so again that

such a public denunciation could have achieved, could be seen as a parallel to the earlier requirement to give the wrongdoer a chance to make amends before military action would be justifiable. Additionally, having sent a clear message before the eyes of the world that the next violation would lead to military action would have been a powerful warning sign. It might have succeeded in deterring the Assad regime. Had it not, the Obama administration would have had a strong case for enforcing the norm by employing limited retributive strikes, and it would likely have had the support of its key allies. Whether such strikes would have stopped the Assad regime from using chemical weapons in the future we cannot know. However, such limited strikes to enforce the international norm against the use of chemical weapons would have been justifiable and would have been instrumental for the overall maintenance of the rules-based international order. The scenario just sketched, of course, constitutes a thought experiment only. It points to a missed opportunity. The action the Obama administration actually took was not as straightforward, partly because of the bad hand it had dealt itself previously.

## Threats of Vis

Having argued for threats of limited force to deter the violation of international norms, it is worth engaging with the intellectual merits of the concept. Investigating the rights and wrongs of threats of force in enforcing an international norm is a challenging task, in terms of both legality and morality. In fact, as Reichberg and Syse note, apart from the discussion of threats in the area of nuclear deterrence,[30] there is a surprising gap in the just war literature regarding threats of conventional force.[31] The first observation to make is that the UN framework, around which Walzer builds his legalist paradigm, starts from a prohibition of both threats and uses of force. However, looking at international conduct, threats of force, both nuclear and conventional, have continued to play a role since 1945. As far as the ethics of war is concerned, prima facie threats do not seem to be as problematic as the actual employment of force. Reichberg and Syse take this observation as the starting point to assess the ethics of threats of force, arguing that threats of force mark an ethically distinct category.

While, as noted in the sixth chapter, aspects of deterrence have been assimilated into the contemporary understanding of self-defense, deterrence and retribution have been considered as two of "the lower-order goals of punishment."[32] With regard to deterrence, the distinction between special and general deterrence is commonly noted. Luban argues that special deterrence, imagined as the deterrence of the adversary only, has become part of the common understanding of self-defense and therefore marks a licit just cause. In contrast, general deterrence, defined as deterring countries other than the aggressor, "seems

blatantly immoral."[33] Seen from a Thomistic perspective, however, general deterrence seems morally justifiable as a contribution to the global common good. I hold that limited force used to deter a specific state's violation of international norms can also licitly be aimed at deterring other states that have not yet done any wrong. I ground my argument in the thinking that Luban summarizes succinctly, but which he rejects—namely, that general deterrence can be a contingent just cause, a just cause that is contingent on a different just cause that would on its own suffice to make military action morally justifiable.[34] On top of the Thomistic just cause of retribution as the main justification for using limited force to enforce international norms, I argue that deterring both the targeted state, and other states that may consider breaking the norm, can be morally defensible. As noted earlier, Walzer has made essentially the same argument.[35]

In order to assess whether threats of force are morally defensible, Reichberg and Syse suggest applying just war thinking, while cautioning that specific cases, due to their complexity, must be analyzed carefully. They start their discussion with the criterion of just cause, arguing that when there is just cause for war, there is also just cause to make the corresponding threat. The reason for this is that threats cause less damage than actual uses of force and thus are morally advantageous.[36] In fact, Reichberg and Syse go even further than that by tying their argument on just cause to the criterion of last resort, arguing that making a threat may be a moral obligation. A successful threat that can achieve the intended outcome without having to employ armed force should be considered an option of first resort.[37] Adapting their argument to the Thomistic outlook, there can be just cause to threaten the use of retributive force to compel states not to violate important international norms. If such a threat succeeds, the move should be seen as morally advantageous vis-à-vis the use of force. In this sense, there is a curious parallel with the concern for escalation from limited force to war that lies at the heart of Brunstetter's conceptualization of jus ad vim; why wade through the Rubicon if amassing a threatening force on one side of the river might be enough?

Reichberg and Syse also consider the just war criterion of proportionality, grappling with the moral question of whether threatening the use of force can be justifiable in cases where the actual use of force would not be.[38] They put forward a "strong moral presumption" against immoral threats such as the use of nuclear weapons, as following through on such threats would "*per se* be immoral to do."[39] With regard to conventional threats, however, they argue that the case seems to be slightly different. Based on a thought experiment about a possible Western intervention in the Syrian civil war, they raise the following question: What if there was just cause for military action, but the intervention would fail the proportionality test of jus ad bellum? Would posing a threat only be morally permissible if it was considered to have a positive effect? For such a

scenario, Reichberg and Syse hesitate to give a clear-cut answer. However, they emphasize that a position of what has been called studied ambiguity regarding immoral threats seems morally problematic because making such threats commonly increases the prospect of their being implemented.[40]

Where does this leave us for the use of limited force to enforce international norms? In particular, how does it relate to the Thomistic criterion of right intention? Reichberg and Syse plead for "a sincere desire not to have to carry out the threat" and urge the threatening party to prudently weigh the consequences of acting upon the threat.[41] These concerns are part of what has become known as the prudential just war criteria. As noted in chapter 6, Aquinas did not explicitly spell out these prudential criteria, but they have a place in his conceptualization of right intention. Based on the idea that Aquinas's just war is open to development, prudential considerations should be emphasized regarding the use of retributive force and the threats that should precede it. As a result, in the case of the retributive just cause there cannot be a threat or use of force that is disproportionate. I think Reichberg and Syse are right in their prudential argument against such threats. Threats should only be built around proportionate responses. That said, the question will be what constitutes a proportionate response. There is no need to lay out a detailed deterrent threat, but the threat should be clear about the proportionality of its response. It should not be forgotten that force is used to uphold the rules-based international order. That is why the use of excessive force must be avoided, as it risks creating a toxic atmosphere that may poison future international relations. This seems especially true in the likely case that such retributive action will not have the backing of the UNSC. Retribution seeks to reestablish the equilibrium of justice. Thus, the remedy should never go beyond the initial offense. Based on Aquinas's thought on retribution, the retributive punishment may be less severe than the initial offense but must never be harsher. Giving in to the gut reaction to make the perpetrator suffer for the sake of suffering and therefore applying disproportionate force marks an act of illicit vengeance and violates the criterion of right intention. Licit retribution, in contrast, seeks to find a balance between considerations of justice and charity. Translating this into a practical conclusion, retributive air strikes should be built around a presumption against civilian casualties. In this regard, my argument, similar to the restrictive jus in bello argument for targeted killing, resonates with Brunstetter's "predisposition toward maximal restraint." Only the perpetrators and their agents should be targeted. I suggest that retributive military action should preferably be employed to target the perpetrator's assets. The first assets that come to mind are military infrastructure and equipment. However, I would go beyond that. Based on Aquinas's thought, the punishment should hit at what the perpetrator cherishes most. Therefore, not unlike what John Bolton has suggested, striking at a dictator's palaces can become a justifiable military option.[42]

In this context, a brief historical detour might prove insightful. As the reader will recall, the nineteenth century saw the flourishing of reprisals as a part of so-called measures short of war. What I did not note in the second chapter, however, is that there was a curious precursor of such reprisals in the Middle Ages. Following the basic logic of bellum justum, legitimate authorities authorized the taking of compensation from a perpetrator's family in response to culpable wrongdoing. In the High Middle Ages, this practice was applied to neighboring political communities based on analogous reasoning: "When a person was injured by a foreigner and was unable, for some good reason, to obtain compensation from the very person who committed the wrong, satisfaction could be had, as a last resort, by seizing property belonging to any fellow-national of the wrongdoer."[43] Compared to the retributive action that is of concern to this chapter, there was, of course, a major difference. In the medieval reprisals, the retributive action was a response to private wrongdoing and did not target the leadership of the political community from which the wrongdoing resonated. That said, however, I think there is a lesson to be learned from the response of the Church at the time. Objecting to the idea that innocent persons should be punished for the wrongdoing of others, the Second Council of Lyons of 1274, the same council Aquinas was scheduled to attend before he died on his way to Lyons, condemned reprisals based on the idea that punishment is only due for culpable wrongdoing.[44] My argument for a presumption against civilian casualties for targeting the perpetrator's assets seeks to follow this outlook.

Returning to my contemporary jus ad vim argument, in order to avoid civilian casualties, the norm enforcer could announce the strike plans in advance so that the palaces could be evacuated. What shines through in this argument is Aquinas's culpability justification. Retributive force should be limited to those parties whose culpability for the profound violation of important international norms has been established. Likewise, the risk of escalation, one of Brunstetter's main concerns vis-à-vis jus ad vim, needs to be factored in. Vis should only be employed if there is an acceptable risk of escalation. After all, the rationale of using limited force is to avoid a large-scale war. Therefore, in the run-up to limited retributive strikes the local situation must be assessed carefully. That includes considering the military capabilities of the targeted state as well as regional alliances and the estimated consequences of striking. In this task, the absence of urgency is of advantage regarding retributive strikes, as it provides the time to inform parties that may be involved in a potential escalation. In summation, seen from a Thomistic point of view, both threats and uses of vis to enforce international norms can be morally justifiable. The hope would be that threats of limited force will be enough to deter potential norm violations. If they fail, however, the use of limited force should be seen as a justifiable option

in cases where the just war criteria of legitimate authority, just cause, and right intention have been met.

## Vis and the Limited Walzerian Recovery of Bellum Justum

Having made a Thomistic case for threats and retributive uses of limited force to enforce international norms, let us finally consider Brunstetter's argument on the Syria case. Interestingly, while Brunstetter set out to follow the Walzerian approach to just war, his recalibration of just war principles in the context of limited strikes partly overlaps with the Thomistic position and thus breaks with Walzer. In the context of the Assad regime's use of chemical weapons Brunstetter adopts a retributive rationale. He argues that if norms are to be taken seriously, they must be enforced when they have been violated. Explicitly referring to the debate about a red line, Brunstetter holds that limited retributive strikes that are married to a deterrent rationale could be used to meet the objective of limited force: to avoid a wider war.[45] The main difference vis-à-vis Walzer seems to be that Brunstetter's argument, in line with his ideal argument, is tied to the jus post vim principles. Thus, he would support retributive strikes, and the threat thereof, based on the hope that they would bring the Assad regime to the negotiation table and facilitate what he calls a truncated victory. Brunstetter goes on to apply the Rubicon assessment to the use of retributive force. Reflecting on the Assad regime's use of chemical weapons in 2013, Brunstetter argues that, based on the Rubicon assessment, war would not be the proportionate response. However, limited force would still be an option. Before such limited force may be considered, Brunstetter requires a threat of force that may facilitate a diplomatic opening aimed at preventing the use of force. Despite this potential opening for diplomatic action, Brunstetter cautions decision makers to consider the consequences of such nonkinetic action by applying jus post vim reasoning. Taking a retrospective view of the Obama administration's deal to remove the majority of Syria's chemical weapons, which failed to deter future attacks, Brunstetter warns about the possible consequences of hesitating to employ retributive force. In his opinion, ignoring the red line and striking a deal with Russia to remove Assad's chemical weapons encouraged the regime to continue the killing with conventional means. In addition, as we saw earlier, the Assad regime would also use chemical weapons again, which triggered retributive strikes by the Trump administration, alone and together with its closest allies.[46] As in the Thomistic argument, Brunstetter would prefer a coalition of states over the unilateral enforcement of norms, but he hesitates to argue about how much international support would be needed in order for such action to be legitimate.[47] While being skeptical about the potential of retributive strikes

vis-à-vis jus post vim in the ideal, Brunstetter's lesson learned from the Obama administration's failure to deter the Assad regime resonates with the Thomistic argument. In particular, he argues that not enforcing international norms may encourage other states to also violate the norms: "The red line scenario puts the onus on states that endorse the norm, preferably as a collective, to punish transgressions to send a message and strengthen the case for deterrence. The argument for deterrence works only if threats are carried out."[48]

## CONCLUSION

Given Aquinas's acceptance of retribution as a licit just cause for war, this chapter's argument that limited force to enforce international norms can be morally justifiable should come as no surprise to the reader. However, what the casuistical investigation has brought to light are important prudential and charitable concerns that warrant constraints on limited retributive action. The renegotiation of the classical Thomistic just war vis-à-vis vis provided in this chapter is aware of the fact that the decision to return to a retributive justification for war comes with risks. There are no easy answers, as this chapter has sought to make clear. That said, the uneasiness toward retributive force needs to be balanced against the alternative of showing indifference to grave wrongdoing. Standing idly by in cases where important international norms are being violated is no morally justifiable course of action. That is why this chapter has advocated limited threats and uses of force to enforce international norms. It has also demonstrated that while both Walzer and McMahan advocated limited strikes against the Assad regime in response to its use of chemical weapons, they rejected the retributive just cause. In line with their general conceptualizations of just war, they only accepted defensive and anticipatory rationales. Thus the Thomistic argument that is grounded in a retributive reading demonstrates again its potential of making a third-way contribution to the ethics of war. Encouragingly, Brunstetter, who generally follows the Walzerian outlook, makes an argument on limited retributive strikes that has curious parallels with the Thomistic position. My hope is to spark a debate about the merits of this argument to which all sides are willing to contribute. Jus ad vim thus once more provides, or could provide, an umbrella under which the competing camps of just war could engage in fruitful dialogue.

## NOTES

1. In fact, such an escalation of limited strikes would be advocated by President Trump's national security adviser John Bolton a few years later. See Bolton, *Room Where It Happened*, 55.

2. On this point, see Braun, "Targeted Killing in-between Retribution, Deterrence, and Mercy."
3. Walzer, *Just and Unjust Wars*, 5th ed., 81.
4. Walzer, "Big Thinkers on Syria: Morality and Strategy."
5. Michael Walzer, "Syria," *Dissent*, March 9, 2012, https://www.dissentmagazine.org/blog/syria.
6. Walzer, "Big Thinkers on Syria."
7. Walzer.
8. Walzer.
9. Walzer.
10. Walzer.
11. Walzer.
12. Jeff McMahan, "The Moral Case for Military Strikes against Syria," *Al Jazeera America*, September 4, 2013, http://america.aljazeera.com/articles/2013/9/4/the-moral-case-formilitarystrikesagainstsyria.html.
13. McMahan.
14. McMahan also rejected other potential just causes, such as that of national self-defense, because Syria posed no direct threat to the United States.
15. McMahan.
16. McMahan.
17. McMahan.
18. Frowe, *Ethics of War and Peace*, 83–84.
19. Johnson, *Sovereignty*, 2.
20. Pope John XXIII, *Pacem in Terris*, § 137.
21. See Hathaway and Shapiro, *Internationalists*.
22. James Turner Johnson, "Just War, as It Was and Is," *First Things*, January 2005, https://www.firstthings.com/article/2005/01/just-war-as-it-was-and-is.
23. Rowan Williams and George Weigel, "War & Statecraft," *First Things*, March 2004, https://www.firstthings.com/article/2004/03/war-amp-statecraft.
24. Williams, *Ethics of Territorial Borders*, 130.
25. On this point, see Brunstetter's discussion of the risk of escalation during the red line debate and subsequent strikes by the Trump administration. Brunstetter, *Just and Unjust Uses of Limited Force*, 179–80.
26. John Kelsay, "General Suleimani, U.S. Policy, and Jus ad Vim," *Sightings*, January 9, 2020, https://divinity.uchicago.edu/sightings/articles/general-suleimani-us-policy-and-jus-ad-vim.
27. Oliver Wright, David Charter, and Larisa Brown, "Western Leaders Plan Reprisals If Russia Invades Ukraine," *Times*, December 6, 2021, https://www.thetimes.co.uk/article/western-leaders-plan-reprisals-if-russia-invades-ukraine-gx8mbj37w.
28. Gregor Mayntz, "Wie viel Angriff ist noch Verteidigung?," *Saarbrücker Zeitung*, May 18, 2022.
29. Brunstetter, *Just and Unjust Uses of Limited Force*, 119.
30. See, for example, the nuclear deterrence debate of the 1980s. Important contributions include Finnis, Boyle, and Grisez, *Nuclear Deterrence, Morality and Realism*; and Kavka, *Moral Paradoxes of Nuclear Deterrence*.
31. Reichberg and Syse, "Threats and Coercive Diplomacy."
32. O'Driscoll, *Renegotiation of the Just War Tradition*, 56. O'Driscoll lists a third punitive rationale, rehabilitation, which does not seem applicable regarding the cases examined in this chapter.

33. Luban, "War as Punishment," 304n12.
34. Luban.
35. In this context, Brunstetter takes issue with what he calls "the right intention prophecy," in which a state seeks to act now in order to prevent hypothetical future war crimes. For Brunstetter, enforcing a red line must be connected to a threat that is already manifest and should not be intended primarily to deter other states. See Brunstetter, *Just and Unjust Uses of Limited Force*, 158–59.
36. Reichberg and Syse, "Threats and Coercive Diplomacy," 189.
37. Reichberg and Syse, 190.
38. Reichberg and Syse, 192–94. As pointed out earlier, Aquinas concentrated on the so-called deontological just war criteria and contributed no specific treatment of the prudential criteria.
39. Reichberg and Syse, 194.
40. Reichberg and Syse.
41. Reichberg and Syse, 197.
42. Bolton, *Room Where It Happened*, 55.
43. Neff, *War and the Law of Nations*, 77.
44. Neff, 81.
45. Brunstetter, *Just and Unjust Uses of Limited Force*, 148–50.
46. Brunstetter also raises the question of whether strikes in response to the 2013 chemical attack could have opened a pathway toward a negotiated solution to the Syrian civil war and thus may have facilitated a jus post vim containment of the Assad regime. He thus detects a possible third intention besides punishment and deterrence. See Brunstetter, *Just and Unjust Uses of Limited Force*, 157–58. Seen from a Thomistic perspective, pursuing containment might be seen as a contribution to the global common good.
47. Brunstetter, 163.
48. Brunstetter, 150.

# Conclusion

This book set out to argue about the morality of two particular uses of vis grounded in an interpretation that unites a trinity of twentieth-century revivals, those of just war, casuistry, and virtue ethics. Drawing on the thought of Aquinas and its emphasis on the responsibility for the common that is at the heart of statecraft, it suggests a return to the classical understanding of bellum justum in the context of limited force. Through this recovery, the book also contributes a third-way reading of just war capable of sparking a meaningful debate between today's participants in the fight for the just war tradition. Limited force seems to differ from the traditional understanding of war and the widespread destruction and killing that is causes. Clearly, vis presents a moral challenge and its use needs to be regulated. By elaborating on the thought of Aquinas, this book contributes a perspective that differs markedly from some of the arguments commonly made by today's just war thinkers. In particular, contemporary scholarship overwhelmingly rejects the just cause of retribution, which was the primary cause for war in the classical bellum justum. However, despite this general rejection, retribution seems very much alive in the actual thinking behind today's uses of limited force. This book has critically engaged with the near-consensus in contemporary just war about self-defense as the only just cause for war and has taken on the challenge to argue about a morally justifiable regulation of retributive uses of vis. Additionally, the book has considered the morality of anticipatory uses of limited force, a rationale for which both Walzerians and revisionists are willing to break contemporary international law.

To make its moral argument, the book has investigated the two military practices of targeted killing and limited strikes to enforce international norms. These forms of vis uniquely reveal the tension between governments' official adherence to the internationally accepted just cause of defense while unofficially also pursuing punitive and anticipatory objectives. Grounded in a casuistical

investigation of historical cases and elaborating on the thought of Aquinas, the book has made general arguments about when targeted killings and limited strikes to enforce international norms can be morally justifiable. Not surprisingly, perhaps, the book has argued for a limited retributive rationale for such uses of limited force as its most original contribution. It has also grappled with the anticipatory rationale by applying Aquinas's support of preemption and rejection of prevention to vis. In addition, in line with Aquinas's ethics, the book has emphasized the moral virtues for the decision-making processes behind the employment of limited force. Throughout, the book has sought to provide moral arguments that resonate with and are relevant to the practical moral issues decision makers face. These considerations are the heart of just war imagined as a tool of statecraft, which this book seeks to promote.

As the first two chapters have illustrated, the debate about jus ad vim, the just use of limited force, has occurred before the horizon of a divide in contemporary just war thinking between Walzerians and their revisionist critics. Concerned about the moral issues caused by the spread of limited force, Walzerians imagine jus ad vim as a distinct third moral framework besides those of war and peace. Revisionists, in contrast, accept only one moral framework that applies all of the time; consequently, they reject jus ad vim as redundant. Making a third-way contribution, this book has introduced a historical approach to just war that is grounded in the thought of Aquinas as an alternative to the two predominant contemporary just war camps. It has demonstrated that the jus ad vim project and the disagreement between Walzerians and revisionists about its viability is partly grounded in a much older division between just war and regular war thinkers. While the parameters of the Walzerian/regular war approach almost necessitate a third moral framework besides those of war and peace, the neoclassical just war approach has no need of it. Consequently, the book has argued that vis causes moral problems that need to be addressed, but such thinking can unfold within the inherited just war framework. In other words, affirming the concern of Walzerians, we need to regulate acts of vis, but, revisionists are right that, as an independent moral framework, jus ad vim is indeed redundant. By providing such a third-way reading that sides with neither of the competing just war camps all of the time, the book hopes to spark a constructive exchange between Walzerians and revisionists.

So what about the fight for the just war tradition? Is there actually a prospect of a productive engagement among Walzerians and revisionists? As noted in this book's introduction, there has been some exchange between the two camps. Overall, however, this exchange has been limited, and the state of polarization continues. In this context, it makes sense to revisit Brunstetter's image of a schism in contemporary just war. In the Christian context, the concept of schism invokes the act of one part of the Church splitting from the main body.

As history demonstrates, such splits rarely happen peacefully. The Westphalian order that has featured prominently in this book's argument followed the brutal Thirty Years' War (1618–1648), which at least in part had been caused by the Reformation. That said, while the schism between Catholics and Protestants is still present in the twenty-first century, both sides engage in a fraternal dialogue referred to as ecumenism. Today, the dialogue between Catholics and Protestants is based on mutual respect, although both sides continue to take pride in their doctrinal distinctiveness. The existence of issues on which agreement seems unlikely is taken not to inhibit dialogue and cooperation on issues of shared concern.

I suspect the reader will already anticipate the point I want to arrive at. Despite their seemingly unbridgeable methodological disagreement, I see no reason why Walzerians and analytical philosophers should not be able to engage in dialogue about the changing character of war and how to make moral sense of it. In that respect, this book proposes some sort of just war ecumenism. The key to making such ecumenism work is to refocus just war thinking firmly on the phenomenon of war. It would require analytical philosophers to abandon the use of otherworldly thought experiments and engage with the practical dilemmas decision makers face in war. The use of unrealistic hypotheticals significantly reduces the practical applicability of their moral arguments. When that is the case, Walzer is right that such just war thinking is more about philosophy than it is about war.

The recapture of traditional casuistry this book proposes might be a door opener for such a dialogue. Questions of war and peace are far too serious to not engage with each other's work mainly because one does not like the other side's approach. One negative consequence of the hesitancy to participate in dialogue is that it can lead to a defense of positions which, upon close investigation, cause profound ethical questions, as we saw with Walzer's moral symmetry thesis. At the same time, by presenting the Thomistic just war as a third-way in between Walzerians and revisionists, this book seeks to remind contemporary thinkers of the tradition's core—namely, its practical function as a guide to statecraft. Therefore, most revisionists, too, lose something by concentrating on otherworldly hypotheticals that are of little use to decision makers. The traditional casuistical method this book advocates provides both historical awareness and analytical rigor, and it demonstrates that neither Walzerians nor revisionists have it right all the time. At the same time, this book willingly concedes that the casuistical method is by no means flawless either. Rather, in line with the venerable virtue of *humilitas*, its argument should be read as a call to just war thinkers, no matter their particular background, to appreciate that the just war tradition is far greater than one's own approach and only functions well if the various schools are willing to debate with each other.

*Quo Vadis*? Having introduced the phrase of a fight for the just war tradition and a suggestion about how to overcome this confrontation of sorts, is there reason for optimism? In his argument on jus in vi, Brunstetter engages with revisionist just war thinking and makes an attempt at finding common ground. Brunstetter thinks that the revisionist logic can provide "parallel insights" with regard to limited force. While revisionists will reject an independent moral framework of jus ad vim, some elements of their logic, such as their analytical rigor, might help advance moral debate about the concern of maximal restraint for uses of limited force.[1] Will revisionists respond to this overture? Given the combative stance taken by some revisionists, I am generally skeptical. That said, the revisionist school is anything but monolithic, and some of its members seem more open to dialogue than others. The hope would be that the historical approach advocated in this book might spark a conversation among Walzerians and revisionists, but in the end it will depend on the participants in the fight for the just war tradition putting down their metaphorical arms.

I would like to conclude this book by returning to the quintessential question that has shaped the just war tradition over the centuries, that of when the use of armed force can be morally justifiable. The dual theme of permission and restraint that has been the core of just war applies to limited force in the same way that it applies to large-scale war. Just war thinkers may disagree about what this theme tells us about different manifestations of armed conflict, but the theme itself is not in question. Going back to Aquinas and arguing about a limited retributive rationale for vis lets me emphasize the first element of the theme to an extent many contemporary just war thinkers will feel uneasy about. I do not take such worries lightly. While I am of the opinion that limited uses of retributive force can be a morally justifiable tool of statecraft in order to facilitate order, justice, and peace, I am also aware of the dangers that come with going beyond the near-consensus in contemporary just war about self-defense as only just cause. Like Brunstetter in his grappling with limited force, I am concerned that my moral argument may be too permissive. I hope the reader has found my attempt to make moral sense of the challenges posed by limited force sincere. I do not seek to pretend that I have all of the answers, and I appreciate that the reader may disagree with my conclusions. Writing these final lines, I am under the influence of Moyn's powerful and soul-searching argument about the attempt to make war more humane.[2] As noted previously, Moyn argues that post-9/11 US military conduct, exactly because it seems more humane, has ushered in an era of forever wars, or, to use Enemark's term, a regime of vis perpetua. Put differently, because of the great emphasis that has been given to jus in bello considerations, the jus ad bellum decision has moved to the background; because the United States can fight with previously unimaginable precision, the war as such is no longer questioned. As someone who draws on Aquinas, who

focuses on the jus ad bellum and does not spell out a stand-alone jus in bello, this makes me pause. The question I derive from Moyn's account for my own argument on vis is the following: Is humanizing war good enough? Speaking in just war terms, can the morally justifiable use of limited force lead us to the goal of peace?

The answer I find for myself is that the just war tradition as a tool of statecraft accepts that what might be called the "burden of statecraft" will require the use of armed force to facilitate peace imagined as tranquillitas ordinis. Unfortunately, one might say, this will not be a peace in which violence is absent. It will not be a world in which "the wolf shall be a guest of the lamb, and the leopard shall lie down with the young goat." Such a peace indeed seems impossible to achieve. However, despite affirming the continued justifiability of armed force, there is also a moral responsibility to work toward a world in which order, justice, and peace can flourish and that, as a consequence, increasingly reduces the need to employ armed force. In this book I have concentrated on the circumstances in which the use of limited force is morally justifiable. If you will, I have argued about only one pillar of the sovereign's job description, and I hope it will be possible to allocate less attention to this pillar in the future. I very much believe that my argument on the morality of vis should be complemented by work on what has been called the "growing edges of just war theory"[3]—namely, considerations of jus ante bellum (right before war) and just post bellum (right after war) that seek to prevent the outbreak of war or, in the aftermath of war, a return to armed conflict. All of these considerations are inherent in the succinct summary of bellum justum that Aquinas formulated in his *Summa Theologiae*. Affirming the use of vis in the service of international order in the here and now does not rule out a transformation of the order toward a less violent world in the future. The just war tradition has always found the condition of war to be a moral evil and works for a just peace. In this sense, vis is no different from bellum. *Si vis pacem, para pacem!*

## NOTES

1. Brunstetter, *Just and Unjust Uses of Limited Force*, 223.
2. Moyn, *Humane*.
3. Allman and Winright, "Growing Edges of Just War Theory."

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# INDEX

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