

13

Justice after the Use of Limited Force

Victory and the Moral Dilemmas
of *ius post vim*

Daniel R. Brunstetter

INTRODUCTION

States such as the US, Great Britain, and France in particular, but also Turkey, Israel, Jordan, Egypt, and Saudi Arabia have turned to the use of limited force in instances of imminent humanitarian atrocity against the threat from terrorist groups, and to counter fears of the proliferation of weapons of mass destruction (WMDs).¹ Examples of limited force include drone strikes, establishing no-fly zones (NFZs), special forces raids, missile sorties of very limited duration, and providing limited military aid to other states and/or rebel groups struggling to maintain, obtain, or restore territorial integrity. It should be obvious that limited force cannot hope to achieve total victory over one's adversary, a victory that would allow the victor to impose its will on the vanquished. What, then, could a state hope to achieve by using limited force? How do we think about moral victory in these contexts?²

The use of limited force highlights the challenges of moral victory in the contemporary era in which, as Ian Clark argues, our very notion of what war entails is uncertain. Clark goes on to conclude that this uncertainty renders just war analysis vulnerable to 'the charge that it offers, at best, a set of generalized principles that are poorly adaptable to the realities of warfare

and, in any case, are not wholly suited to some of the specific issues that characterize warfare in the early twenty-first century' (Clark 2015: 142). To push Clark's argument further, to the extent that limited force is different from war, we should then question whether the just war principles—in particular those of *ius post bellum* (justice after war)—apply to the context after the use of limited force.

The just war tradition has an ever-growing body of scholarship on *ius post bellum*, but the questions and governing principles are not, I argue, the same in a situation of limited force.³ Building off of scholarship that suggests it is useful to differentiate morally between war and limited force because the ethical dilemmas associated with each can be different, this chapter maintains it is important to distinguish between moral victory after war and moral victory in the context of limited force. In my previous work, I develop an ethical framework of limited force—what I call *ius ad vim*—that recalibrates some of the principles of the just war tradition and adds new ones to help us navigate the moral dilemmas that emerge when using limited force (Brunstetter and Braun 2013a, 2013b). In this chapter, I extend my moral argument to think about *ius post vim*, or justice after the use of limited force. If maximizing human rights is at the core of *ius ad vim*, as I have previously maintained, how should we envision the ideal *ius post vim* scenario?⁴

Critics suggest that such a moral framework is problematic because: it is redundant, that is, it adds nothing new that *ius ad bellum* does not already cover and merely confuses us with more complexity (Plaw and Colon 2015; Frowe 2016); it is too permissive in that it would erode the restraints on the turn to lethal force, and rewards strong states who have the power to express their will through limited force at the expense of weaker states who suffer what they must (Luban 2002; Coady 2008; Jones and Parish 2016).

³ The literature on *ius post bellum* is vast; see, for example, the collection of essays in these edited volumes: Pattenson (2012a), May and Forchimes (2012); Murphy (2014). See also several influential articles, including Bass (2004), Bellamy (2008), or Orend (2000).

⁴ It may be useful for me to provide a very brief recapitulation of this framework of limited force, which I consider distinct from the law enforcement paradigm (which governs the use of force in peacetime) and the just war framework (the moral principles that help statesmen think about the justice of war). In my previous work, I argue that the ethical principles informing the requirements of *ius ad bellum* are not transferable to all contexts within the international system, but that their meaning changes significantly in a context of limited force. *Ius ad vim* recalibrates some of the traditional *ius ad bellum* criteria to fit a limited force context and contends that a new principle called the probability of escalation is required. I also argued that that there must be a stricter relationship between *ius ad vim* and the traditional *ius in bello* principles of proportionality and discrimination. In a context of limited force, these *ius in vi* principles provide less moral latitude for inflicting unintended harm on non-combatants, where 'harm' is not simply measured in deaths, but also in human rights concerns that deeply and negatively affect civilian lives. If we think of limited force as conceptually distinct from other types of violence, then, paralleling the categorical divides in just war thinking, we need to theorize about *ius ad vim*, *ius in vi*, and *ius post vim*.

¹ My thanks to the participants of the Moral Victories Workshop held at the University of Glasgow in 2015 for their comments on a draft of this chapter. I am also thankful to those who provided their critical insights during my time as Directeur d'Études Associé at the Fondation Maison des Sciences de l'Homme in Paris, France in the summer of 2016.

² This chapter thus tackles a similar question to that engaged by Tierney (Chapter 8 in this volume), though it addresses it in a very different manner.

Notwithstanding these criticisms, which I engage elsewhere (Brunstetter and Braum 2013a; Brunstetter 2016), the challenge is that states are using limited force more and more frequently in today's world, without a clear conception of moral victory guiding their actions. Even if, as James Turner Johnson argues in this volume (Chapter 5), the idea of unlimited warfare still holds importance, not all conflicts will be of this type. By exploring the ethical dilemmas of limited force more deeply, I suggest we can begin to gain some moral purchase on the tensions between victory, ethics, and the use of force in the contemporary world.

To this end, I unpack the concept of moral victory by distinguishing between *ius post bellum* and *ius post vim*, with one of the main differences being that the latter is necessarily a form of truncated victory. In this light, my analysis can be read as viewing limited force through a different lens than the *ius post bellum* lens that Eric Patterson puts forth in his analysis in this volume (see 'War Aims, *ius ad bellum*, and Victory' in Chapter 7). This circumscribed nature of victory has ethical implications. To tease out some of these implications, I explore what a *moral truncated victory* might look like by identifying two principles—the *containment principle* and the *re-establishment principle*—to help guide ethical reflections. I conclude with some thoughts on the emerging dilemmas that these raise with regard to ethics and victory.

DIFFERENTIATING *IUS POST VIM* FROM *IUS POST BELLUM*

The notion of victory we typically hold is the ability of the winner to impose its will on the loser. To the extent that this is done with a view to justice, the moral paradigm of *ius post bellum* offers the most comprehensive framework to ensure victory contributes to a lasting and morally palatable peace. *Ius post bellum* offers a minimalist and maximalist approach (Bellamy 2008). The minimalist approach allows victors to protect themselves, recover that which was illicitly taken, and punish the perpetrators. As Alex Bellamy argues, the winning state has limited post-war responsibilities, and is entitled to 'decide instead to settle for the restoration of the status-quo' (Bellamy 2008: 606). The maximalist approach is the form of *post bellum* we envision when thinking about the democracy-building wars in Afghanistan, Iraq, and Libya (with antecedents in the post-World War II rebuilding of Germany and Japan). Here, justice implies a sense of responsibility to the society of the vanquished, investment in economic and political rehabilitation, and rights vindication.

The major distinction between maximalist *ius post bellum* and *ius post vim* is that victory in a *post vim* situation is not decisive, meaning the state

employing limited force does not obtain the power to impose its will over its enemy. To distinguish this from other forms of victory, I call victory in a *ius post vim* context *truncated victory*. Perhaps, one could argue that we should not even be talking about victory in such situation. To the extent that limited force becomes the hallmark of small-scale, intractable conflicts with periods of escalation between states, or between states and non-state actors across the globe, then maybe there is a case to be made for the hollowness of the very concept of victory in the modern era. However, I hope to avoid this defeatist position and suggest that there is still something worth fighting for in these situations. That said, I do not want to abandon the moral aspect. If we are serious about theorizing about victory, then we must contemplate the moral contours of limited force and its after-effects.

Regarding responsibility, many scholars have noted the importance of the sense of moral charge that comes with being in a position of post-war power, namely that of making the post-war situation better than the way things were before the war. Louis Iasiello (2004: 39) writes that the task of the *ius post bellum* theorists is to devise moral precepts to guide the *post bellum* activities of victors. Larry May (2012: 1) asserts that the key question hinges on determining 'what difference should there be between victors and vanquished in terms of post war responsibilities'.⁵ Responsibility entails not exploiting one's power over the defeated for political and economic advantage at the expense of the civilian populations of the defeated. The assumption is, of course, that a clear victory has been achieved, meaning that a victorious state has the power to impose its will over the vanquished party (and that the vanquished party accepts this).

I do not think that the *post vim* situation is normally defined by this sort of responsibility because it is often difficult to distinguish between victors and vanquished. Insofar as territorial occupation and removal of the regime are not among the intended consequences of limited force engagement, the sense of responsibility a victor has over the defeated—or more aptly put, the actor that used limited force over the one who bore its brunt—ought to be diminished, albeit not entirely absent. That said, I also do not think *ius post vim* is the same as the minimalist *post bellum* approach of 'beat-em and leave-em'—a return to the *status quo ante bellum*—either. Limited force cannot simply be a form of punishment—a retaliatory response to a perceived wrong—if justice is to have a place in the *post vim* context. I return to this point in the next section, when I delineate the principles of *ius post vim*.

Rehabilitation entails taking steps to reconstruct the defeated state. This may entail pouring resources into rebuilding infrastructure, rejuvenating the

⁵ On the importance of respect for persons, establishing justice, exercising ecological responsibility, engaging in multinational commitment and support, and maintaining progress toward closure, see also Clifford (2012).

economy, and reconstructing civil society through political reconstruction. In today's world, this is often seen through the lens of democracy building. Thus, rights vindication imagines creating political structures that would enhance the political rights of the civilians, which might entail "the transition to democracy if the defeated state was an authoritarian regime, or the creation of a power-sharing agreement between rival ethnic or religious groups following a civil war. This would surely include drafting a constitution that reflects universalist notions of equality, as well as initiating free, fair, and frequent elections. Again, rehabilitation assumes significant—indeed overwhelming—victory.

Brian Orend cites the cases of post-World War II Germany and Japan as the archetypes upon which one could imagine an ideal *ius post bellum* theory based on the responsibility to reconstruct and vindicate the rights of the vanquished. Indeed, he juxtaposes these attributes with an alternative which he sees as morally problematic, the retribution model, which takes the punishment of the defeated for its aggression as the key criterion to follow (Orend 2013: especially ch. 6). Orend concludes that the notion of retribution ought to be all but vanquished from *ius post bellum* calculations because punishment seems counterproductive to a just peace, not to mention potentially sowing the seeds for a future war. Here, we can point to how the retribution-focused post-World War I peace contributed to the conditions from which World War II emerged. While I agree with Orend that retribution is highly problematic in any post-force situation, I think it is necessary to rethink the relevance of rehabilitation in a *ius post vim* context.

Part of the reason to do so is that foreign-led rehabilitation has had a checkered success rate in recent times. The challenges of *ius post bellum* rehabilitation and reconstruction in wars with (at least initially) decisive military victories such as Afghanistan, Iraq, and Libya raise deep concerns about the political viability of maximalist *ius post bellum* principles given that the post-war period in these cases have been characterized by long-term violent counter-insurgencies (Johnson 2008). Another challenge is that the global struggle against terrorist groups like Al Qaeda has abetted a drone-based strategy that offers little opportunity for rehabilitation, whether political or economic.

I want to explore, for a moment, the cases of Libya and the US drone campaign against Al Qaeda because they illustrate this fractured sense of responsibility smoldering in the embers of post-war insecurity and seemingly imminent threat. This will illustrate some of the key challenges of understanding of moral victory in the contemporary world, and help us to differentiate between *ius post vim* and *ius post bellum*.

Regarding Libya, the initial intervention authorized by the UN was to establish an NFZ to curtail the threat the Gaddafi regime posed to civilians. The threat of the regime was quickly contained, but the engagement then

escalated from one of containment to a war for regime change (Partison 2011). The war to topple the Gaddafi regime was a prototype victory in the maximalist *ius post bellum* sense: during the *post bellum* era, the victors imposed regime change on the vanquished to vindicate the rights of the threatened populations. However, these efforts have suffered major setbacks at the time of writing, as regime change has hardly been successful, with insecurity rampant, and ISIS attempting to establish control over pockets of territory. Whether this is because the victors did not adequately follow through with the required support after the victory, or because the *post bellum* goals were unachievable, is an open debate.

The challenge posed by the Libya case is the following: should we justify escalating from targeted military actions aimed at protecting civilians, such as setting up NFZs, to a wider military campaign aimed at regime change despite the risks of instability in a *post bellum* setting? Or should we be content with achieving limited military aims—protecting the innocent from immediate harm—and allowing diplomatic measures the chance to secure the safety of these groups in a *post vim* context? If we answer yes to the latter, then we enter into the realm of truncated victory, and need to recognize the limitations on responsibility and rehabilitation. But this should not rule out the importance of rights vindication.

Michael Walzer's argument that a long-term NFZ could have led to regime change short of war after the first Iraq war gives hope that a *ius post vim* situation might enable long-term democratic outcomes that recent wars have aspired to, but failed to achieve. 'The Iraqi case', he writes, 'invites us to think about the use of force-short-of-war; the containment regime of 1991–2003 is only one possible example of this use. Despite the French argument at the UN in 2002 and 2003 that force must always come as a last resort, force-short-of-war obviously comes before war. The argument about *ius ad bellum*, therefore, needs to be extended to *ius ad vim*. We urgently need a theory of just and unjust uses of force' (Walzer 2006: xv). Of course, Walzer's musings are mere hypotheticals now, but that should not diminish their importance. That said, one of the elements missing from Walzer's commentary is recognition of the importance of *ius post vim*.⁶ If we view protecting threatened populations from imminent harm through the lens of *ius ad vim* instead of *ius ad bellum*, as Walzer suggests, our notion of victory, and the responsibility it entails once hostilities end, is also necessarily altered. Hence the need for exploring the ethical principles and tensions of *ius post vim*.

⁶ One should not lose sight of the fact that this period was defined by devastating sanctions that struck the Iraqi population. Moreover, the NFZ in question did little to protect Kurdish populations within Iraq because it was designed to check inter-state Iraqi relations, and not control its intra-state behaviour. To the extent we want to theorize about *ius post vim*, we need to think deeply about the ethics of sanctions and maintaining NFZs.

The use of drones against non-state actors is another poignant example of curtailed responsibility and the ethical implications of their use. Critics have written about drones and the ethical implication of their use. Critics have suggested that they lower the threshold of last resort for the use of force and warp the traditional understandings of *jus in bello* proportionality and distinction (Brunstetter and Braun 2011; Kreps and Kaag 2012). Proponents challenge the threshold argument, and assert that drones do a much better job than other weapons regarding the *jus in bello* (Anderson 2012; Plaw 2013). I do not want to rehash these arguments, but only want to point to the fact that little has been written about drones and victory.

One exception is Christian Enemark's discussion of the ethical dilemmas of drones and perpetual force. Enemark (2014: 365) asserts the just war doctrine, the law enforcement paradigm, and the *jus ad vim* project all fall short in evaluating the use of drones because 'the injustice of such systematic endangerment of innocents is compounded by the possibility that drone-based violence carries no promise of victory and, thereafter, peace'. Enemark suggests that governing drone use then becomes a matter of perpetual risk management, or stated somewhat differently with a view to the themes discussed in this volume: the perpetual use of force without victory. I do not have the space to offer a full reply to Enemark. However, I want to point out that he has put his finger on one of the major problems of drones use, namely, that we do not know how to talk about justice after drones.

Drones can succeed in decapitating terrorist groups through personality strikes, though new leaders will inevitably arise. Drones may also work towards denying safe havens, making it difficult, but not impossible, for terrorists to operate. However, their presence may increase anti-western sentiments and supplement terrorist recruitment. Moreover, even if drones better satisfy the proportionality and discrimination principles on a strike-by-strike basis, a drone-based conflict systematically transfers risk to civilian populations living under drones in a way that undermines the spirit of *jus in bello*. While a state may argue that it is responsible for protecting its own citizens from threats above all else, I have argued elsewhere this sentiment is misplaced (Emery and Brunstetter 2015). The underlying problem is that drones alone cannot eliminate safe havens in which terrorists operate. Hence, Harold Koh's concern that drones perpetuate America's 'forever war' because they offer forcible alternatives that target terrorist threats at no costs to our soldiers and limited political costs, but do not offer a permanent solution to the threat from Al Qaeda and like-minded groups (Koh 2013).

Considering drones and *jus post vim* poses important questions that can help us unpack the notion of truncated victory in this context of limited force. Assuming a perpetual aerial drone occupation is not a sustainable and just outcome, is victory defined as reaching a tipping point when military force is

no longer needed (or very rarely needed) and law enforcement has been re-established in a way that is effective? Does it matter what kind of law enforcement (i.e. maybe non-democratic)? Do drone-wielding states have economic responsibilities, i.e. the duty to help transform the social and political climate such that conditions are no longer favorable to terrorist recruitment (drones, of course, might be counterproductive to begin with if this is the case)? Exploring these questions forces us to think of drones not as part of a perpetual war, but rather a campaign of limited force that should, when certain conditions are met, be phased out. This means that we need to be able to conceive of some notion of truncated victory at the end of the drone campaign.

And yet, truncated victory should not be morally barren. The main challenge we face is how to orient the use of limited force towards some conception of truncated victory embedded in a form of limited justice. In the following section, I explore some principles that can help us to define this ethically troublesome and ultimately unfulfilling state of affairs.

THE PRINCIPLES OF JUS POST VIM

The realm of *jus post vim* is a problematic sphere of justice. We want, intuitively, for the use of force to lead to some sort of just end. The just war tradition reminds us that we wage just war for the sake of peace. We search for a definitive just end that answers all concerns of insecurity for the 'innocent' (those who would come under attack from aggressors), or for 'us' (those who used force against would-be aggressors, such as terrorist groups). But in a context of truncated victory, neither of these outcomes comes immediately, and both present moral challenges. In instances of imminent humanitarian atrocities, we face the *escalation dilemma*: to permanently protect the innocent at risk, escalation to full-scale war for the sake of regime change is arguably needed. However, this entails a different kind of insecurity during the transition period, with the real risk of civil war supplanting regime change. When using limited force against terrorist groups, the threat is never entirely abated, and we face the *risk transfer dilemma*: discerning the extent to which we are willing to accept transferring risk to other populations to provide for our own security (in the context of drones, see Brunstetter and Braun 2013b; for risk transfer in general, see Shaw 2002).

In this section, I want to explore two principles that respond to these dilemmas and provide some sense of direction when thinking about what a moral truncated victory could look like. These principles offer an alternative framework through which to view moral victory compared to the frameworks proposed by other authors in this volume, notably the discussions developed

by Eric Patterson ('War Aims, *jus ad bellum*, and Victory' in Chapter 7), Dominic Tierney ('The Just Way to Lose' in Chapter 8), and Kurt Mills ('Problematising Victory and *jus post bellum*' in Chapter 10). Exploring the principles of *jus post vim* can help us to update our understanding of victory in contexts when limited force is used. Note that these principles may not be applicable to all *post vim* contexts; they are, rather, meant to help us think through some of the moral dilemmas we might face and offer ethical parameters to guide our thinking.

The first is what I call the *containment principle*: the view that limited force should be aimed at containing the immediate threat, with the goal of creating the context where diplomatic measures can effectively be employed to transition towards a more stable and long-term peace. Departing from the argument that Kurt Mills puts forth in this volume ('Responsibilities after Humanitarian Interventions' in Chapter 10), I suggest it is important to remember that this principle is necessarily circumscribed by the recognition that limited force leads to truncated victory, with diminished power and curtailed responsibility in the *post vim* context. One can imagine establishing NFZs to protect populations under threat from a genocidal state or quasi-state actors being justified under the principle. However, preventive limited force (the use of limited force to forestall a distant threat—such as the pursuit of weapons of mass destruction—that could still be solved by diplomatic means) would be ruled out. Limited force in the latter context would delegitimize the diplomatic element of the principle and create conditions conducive to a perpetual cycle of violence.

The containment principle builds from the view that war is an unpredictable gamble with potentially good intentions going horribly astray, while limited force—and this assumption is perhaps a gamble too—ought to be more predictable in its effects and avoid escalation. The moral hazard of encouraging the group being protected to take up arms to help in the fight—arming rebels—may add to the unpredictability. That said, if one seriously contemplates the *jus ad vim* probability of escalation criterion, then the risk of escalation ought to be diminished. Limited force then could be directed at changing the military balance to reduce an imminent threat, thus buying time for other measures to stabilize relations. To circumvent the *escalation dilemma*, violence should be halted at the first possible moment, i.e. when imminent massive loss of life is averted. This is the moment of truncated victory, after which the *post vim* contemplations begin.

Once limited force is suspended, diplomatic measures should be employed to induce more peaceful relations between afflicted parties. What sense of responsibility does this entail? The primary responsibility is to prevent renewed outbreaks of violence, perhaps with a long-term NFZ or UN peace-keeping presence. While both of these entail the potential for some level of limited violence, they can be viewed as part of a *post vim* security apparatus

aimed at establishing stability.⁷ Immediate regime change and removal of aggressive leadership is not on the table, although one might envision the long-term push towards democratization short of war, as envisioned by Walzer in the Iraq case. Regarding rehabilitation, the truncated victory diminishes the ability to undertake economic rehabilitation activities. Indeed, sanctions that restrict economic activity against recalcitrant state actors may be a necessary follow-up, though one could also imagine using economic 'carrots' as incentives for cooperation. Lastly, rights vindication remains at the core: permanent safe havens for threatened populations must be established and protected.

Of course, the ideal scenario I describe may not come to fruition. The very use of limited force may disintegrate any trust capital that could induce diplomatic agreements. Moreover, diplomatic measures when employed could fail, making the option of more limited force—or war—seem ever more attractive. However, both war and purely diplomatic measures also have risks. Thus the *stability tension*, limited force used well, avoids the long-term unpredictable destructiveness of war and buys time for diplomacy to work its magic, but diplomacy can be a way for recalcitrant regimes to stall, thus remaining a threat to international peace and security. This leads to the *last-resort trap*: the notion that there is always one more diplomatic effort to try to quell a possible threat before resorting to war. Here, the diplomatic efforts aimed at disarming Saddam Hussein's WMD aspirations prior to the 2003 Iraq war illustrate the dilemma. Bush worried that an unpretexted UN resolution would only empower a defiant Hussein, to the detriment of global security. Hindsight would tell us otherwise in this case, but the Iraq debacle does not make the dilemma disappear; one need only think about Iran's ongoing pursuit of nuclear power, and how this might unfold in the future.

A second element of *jus post vim* is what I call the *re-establishment principle*: the view that limited force must be used in conjunction with diplomatic actions that seek to re-establish a minimally just regime. Following Orend (2013: 87), by 'minimally just' I mean a state that is recognized as legitimate by its own people and most of the international community, avoids violating the rights of other states, and does not actively pursue the political persecution of certain factions among its citizens *en masse*. Orend originally employed the term to distinguish between those states that maintain the right to sovereignty (committing perhaps some injustices, but not too many systematic injustices) and those who do not sufficiently uphold human rights and lose the right not

⁷ I distinguish between *establishing* an NFZ and *maintaining* an NFZ in the long term. In the case of the former, there will be a wider target list to pre-emptively eliminate weaponry that can be used to harm civilians (e.g. helicopters, aircraft, or in some cases, military vehicles). In the latter, force is used only in a reactionary sense, i.e. when the aggressive regime violates the parameters of the *post vim* peace. I see maintaining an NFZ as part of the *post vim* phase, though I recognize it cannot be a perpetual solution. I thank Kurt Mills for his insights on this matter.

to have force used against them. Drawing inspiration from Eric Patterson's book *Ending Wars Well* (2012b) in which he privileges order first, then justice and potentially conciliation, I want to use the notion of a minimally just state to think about *jus post vim*.

The re-establishment principle can help us think through how limited force might be used against terrorist groups operating in pockets of ungoverned spaces within another state's territory. Examples include the controversial US drone programme against Al Qaeda and associated forces in Pakistan, Yemen, Somalia, and elsewhere, coalition strikes against ISIS in Iraq (and Syria), and the UN-supported French intervention in Mali. In such contexts, moral truncated victory occurs when territorial and constitutional integrity are restored, and the state in question regains the power to impose its will over its citizens living there. This does not mean defeat of the terrorist group that operated in these spaces per se, as it may move elsewhere. However, binding war to control (not necessarily democratic!) over territory places victory in the state-centric view of the international system, making it a measurable achievement.

The key to the re-establishment principle is a return to the conditions of peace, a term I use loosely to define the state in which International Human Rights Law governs state relations. This means that a state can no longer invoke the belligerency privileges associated with *jus ad vim* actions. This puts an end to the risks (physical and psychological) to civilians and militants that *jus ad vim* morally permits. However, it does not necessarily imply an end to all risk (i.e. the terrorist threat may not be extinguished, but dealing with it is transferred to law enforcement mechanisms). Pursuing the re-establishment principles does, however, help resolve the risk transfer dilemma. Insofar as the responsibility to balance how to deal with threats and provide for the security of citizens living in the afflicted state no longer lies in the hands of a foreign power, but rather, in the hands of the local government, then we are talking about the unavoidable challenges of maintaining political order. Re-establishment does not imply the pursuit of the democratic enjoyment of human rights of affected parties; the central element of responsibility rests in attempting to establish the conditions where basic human rights—especially the right to personal security—are guaranteed. To ensure that the conditions for terrorism do not return, there must also be a long-term view towards economic rehabilitation, though where the responsibility for this lies is quite complex.

There are, of course, challenges. Local police forces, if part of an authoritarian regime, may be prone to oppressing certain populations (though if one follows the containment principle, then international forces would have to remain in place to quell this threat). Even absent this challenge, local forces may not be trained adequately to restore conditions of peace. Or a security gap—the period of instability between the end of hostilities and the

emergence of effective police enforcing—may emerge, which could lead to a return to conditions where *jus ad vim* actions might be justified (Bayley and Perito 2010).

Lest this all seem too abstract, let me work through a few cases to illustrate the main points. First, the case of intervening to stop a state from committing mass atrocities. To put this in a real-world context, imagine the Libya conflict had played out differently, without the escalation to regime change. The containment principle suggests the goal should be to eliminate the threat of mass atrocity by targeted strikes and the establishment of a protracted no-fly zone. Once this occurs, then a zone of tentative peace is created. This is a context in which diplomatic solutions (sanctions, negotiations, sending in UN or regional peacekeepers, etc.) have a greater chance of building the conditions for sustainable peace (Call and Cousens 2008).⁸ The pursuit of conditions for sustainable peace, arguably takes diplomatic solutions regime change, which escalates violence, arguably takes diplomatic solutions off the table, leading to what scholars call *the sunk cost dilemma*: whether to cut one's losses or to escalate conflict further to attain the war aims (Rodin 2015). The re-establishment principle, on the other hand, favours a return to law and order, that is, the conditions under which minimal human rights of civilians—especially personal security—would be protected in the long term. From a *jus post vim* perspective marked by truncated victory, stability for the average citizen *post vim* should be favoured over the unpredictability of civil or regional war that might occur with escalation from limited force to war for the sake of regime change, and then from *post bellum* to protracted insurgency, etc.

Clearly, *jus post vim* is not a perfect human rights environment (though I think this does not warrant discarding the term *jus* from the formulation, though others might disagree). One of the trade-offs with truncated victory is that *jus post vim* can lead to the *regime-rights dilemma*, namely, the challenge of negotiating the moral tensions associated with avoiding the risks associated with regime change while accepting compromise on the rights respected by the regime that remains in power. This raises questions that I do not have the space to explore here, about whether some level of justice *post vim* can be achieved if a dictator remains in power, and whether war crimes trials should be part of *jus post vim*.

A second example is the US use of drone strikes in the region along the Afghanistan–Pakistan border. Drones have been a tactic of perpetual limited force that has diminished the threat to US interests from terrorist groups operating there, but has done little to ameliorate conditions of civilians living in these regions. The convoluted relationship of tacit consent with the Pakistani government, coupled with the lack of that government's control of

⁸ Here, the just war literature would benefit from greater engagement with the peace-building literature; see Call and Cousens (2008).

parts of its territory, has created a context in which a seemingly perpetual fleet of lethal drones is needed to patrol the region, with what human rights groups detail as devastating human rights consequences. Elsewhere I've called such ill-effects 'living under an aerial drone occupation' (Brunstetter and Bacardi 2015: 192; see also Zakaria 2015). The principles of *jus post vim* I have proposed, however, would require us to re-envision the endgame of this drones strategy. Engaging the idea of *jus post vim* can push us to consider alternatives and thus avoid falling into the simple belief that we are in a perpetual conflict, with drones as a means to 'mow the lawn', as it were.

The containment principle would arguably authorize strikes that target terrorists who are planning an attack and reside in a region that law enforcement cannot reach. This would be a truncated victory, limited to thwarting a specific threat (Emery and Brunstetter 2016).⁹ It would not justify aerial occupation, which would be problematic in terms of human rights because it would require ubiquitous strike capability that would result in permanent 'risk transfer' to civilians in the zones in which drones are used.

The re-establishment principle leads us to reimagine drone strikes as acts of limited force used in conjunction with other mechanisms to re-establish Pakistan's territorial integrity (as opposed to viewing them simply as a means of eliminating again and again current and future threats). The goal is not a perpetual war on terror, but a world in which law enforcement is the paradigm with which to manage the threats from terrorist groups. From a *jus post vim* perspective, drones (assuming they are just in the first place, which is an open question) must figure into a broader strategy that seeks to eliminate the in-between spaces where terrorist groups can operate (such as failed states, uncontrolled borders, etc.). This means drone strikes ought not, generally speaking, to be stand-alone acts by a third party; rather, they should be coordinated with local governments as part of a broader plan to re-establish law and order. This would require considerably more cooperation with governments in Pakistan and neighbouring states, including deeper plans for economic rehabilitation of the region in order to eliminate the social conditions which favour terrorism (Koh 2013; Brunstetter and Bacardi 2015).¹⁰ The push to establish law and order would not, however, be without its own moral challenges; the Pakistani case reminds us that the human cost is omnipresent even with alternatives to drones (Plaw 2013: 150).

⁹ I have developed an account of what this might look like elsewhere: Emery and Brunstetter (2016).

¹⁰ For example, the idea of a New Silk Road which would combine a security transition, a political transition, and an economic transition in Central Asia to gradually reduce the in-between spaces (Koh 2013); for a discussion, see Brunstetter and Bacardi (2013).

CONCLUSION: LIMITED FORCE AND THE QUESTION OF PEACE

The goal of *jus post vim* is to impel us to think about what moral victory might look like in a context of limited force. Despite limited force leading to truncated victory, morality must still play a role in the *post vim* context. In this chapter, I have differentiated between *jus post bellum* and *jus post vim*, established some of the main questions associated with imagining a moral truncated victory after the use of limited force, and described two principles—the containment principle and the re-establishment principle—to help us to envision the ideal *jus post vim* state (even if this is far from perfect from a human rights outlook).

In guise of a conclusion, I want to highlight two dilemmas that arise from the principles I outline above. The first concerns the notion of time. A moral truncated victory is temporally bounded; the success in stopping the threat of imminent violence (whether from a terrorist group or aggressive government) lasts only so long. In the context of terrorism, it may take a long time for the transition to law enforcement to become efficient, meaning some threat will be omnipresent. In the case of humanitarian atrocities the window for diplomacy to contribute to sustainable peace is not unlimited; one cannot, for example, maintain an NFZ indefinitely to keep a regime in check. Thus, we must also be concerned with the point at which truncated victory turns into some kind of defeat or setback that would require a return to the use of limited force (or even war). When do we know that diplomacy has failed? When do we resort to force again, and what conditions determine the level of force that should be used?

A second, related, dilemma concerns the emergence of a cycle in which limited force leads to lots of little, insignificant truncated 'victories' to the broader detriment of human rights and international security. For example, we contain an aggressive regime initially, only for the same regime to return to centre stage to pose a new threat to international peace and security a few years later. And then the cycle repeats, with the threat of escalation ever on the horizon. How could regime change be induced without the risks we have seen recently associated with democracy-building wars? How does the plight of civilians who are caught in such a cycle impact our moral calculus?

Or, imagine coalition forces help a state to take back parts of its territory from a terrorist group, only for that group to go to another place ripe to receive its ideology and eventually come under attack there. To the extent that *jus post vim* is directed at preserving the state-based international system, what kinds of states are we willing to accept in order to deny dangerous non-state actors safe havens in which to operate? How do we assess the morality of risk transfer stemming from perpetual limited force to deny new safe havens in a general conflict against terrorist groups?

If we are indeed entering an era in which limited force replaces war as the major coercive tool of foreign policy, these dilemmas suggest we need to think more deeply about what morality and victory mean in potentially intractable or generational conflicts, and ultimately the limitations of limited force as well. The principles of *ius post vim* can hopefully help us to avoid falling into these perilous dilemmas by providing a framework of what a moral truncated victory might look like. Deeper reflection on *ius post vim* should therefore, I hope, also inform how limited force is used (i.e. the way we interpret the *ius ad vim* principles) and serve as a mechanism to constrain its potential abuse.

REFERENCES

- Anderson, Kenneth. 2012. 'Efficiency in bello and ad bellum: Making the Use of Force Too Easy?', in Claire Finkelstein, Jens David Ohlin, and Andrew Altman (eds), *Targeted Killings: Law and Morality in an Asymmetrical World*. Oxford: Oxford University Press, 283-4.
- Bass, Gary. 2004. 'Ius post bellum', *Philosophy & Public Affairs* 32(4): 384-412.
- Bayley, David H. and Robert M. Perito. 2010. *The Police in War: Fighting, Insurgency, Terrorism, and Violent Crime*. Boulder: Lynne Rienner Publishers.
- Bellamy, Alex J. 2008. 'The Responsibilities of Victory: Ius post bellum and the Just War', *Review of International Studies* 34(4): 601-25.
- Brunstetter, Daniel R. 2016. 'Ius ad vim: A Rejoinder to Helen Frowe', *Ethics & International Affairs* 30(1): 131-6.
- Brunstetter, Daniel R. and Arturo Jimenez Bacardi. 2015. 'Clashing over Drones: The Legal and Normative Gap between the U.S. and the Human Rights Community', *International Journal of Human Rights* 19(2): 176-98.
- Brunstetter, Daniel R. and Megan Braun. 2011. 'The Implications of Drones on the Just War Tradition', *Ethics & International Affairs* 25(3): 337-58.
- Brunstetter, Daniel R. and Megan Braun. 2013a. 'From ius ad bellum to ius ad vim: Recalibrating our Understanding of the Moral Use of Force', *Ethics & International Affairs* 26(1): 87-106.
- Brunstetter, Daniel R. and Megan Braun. 2013b. 'Rethinking the Criterion for Assessing CIA-Targeted Killings: Drones, Proportionality and ius ad vim', *Journal of Military Ethics* 12(4): 304-24.
- Call, Charles T. and Elisabeth M. Cousens. 2008. 'Ending Wars and Building Peace: International Responses to War-Torn Societies', *International Studies Perspectives* 9(1): 1-21.
- Clark, Ian. 2015. *Waging War: A New Philosophical Introduction*. New York: Oxford University Press.
- Clifford, George M. III. 2012. 'Ius post bellum: Foundational Principles and a Proposed Model', *Journal of Military Ethics* 11(1): 42-7.
- Coady, C. A. J. 2008. *Morality and Political Violence*. Cambridge: Cambridge University Press.
- Emery, John R. and Daniel R. Brunstetter. 2015. 'Drones as Aerial Occupation?'. *Peace Review* 27(4): 424-31.
- Emery, John R. and Daniel R. Brunstetter. 2016. 'Restricting the Preventive Use of Force: Drones the Struggle against Non-State Actors, and ius ad vim', in Kirsten Fisk and Jennifer Ramos (eds), *Preventive Force: Drones, Targeted Killing and the Transformation of Contemporary Warfare*. New York: NYU Press, 257-82.
- Enemark, Christian. 2014. 'Drones, Risk, and Perpetual Force', *Ethics & International Affairs* 28(3): 365-81.
- Frowe, Helen. 2016. 'On the Redundancy of ius ad vim: A Response to Daniel Brunstetter and Megan Braun', *Ethics & International Affairs* 30(1): 117-29.
- Laselle, Louis V. 2004. 'Ius post bellum: The Moral Responsibilities of Victors in War', *Naval War College Review* 57(3): 33-52.
- Johnson, Rebecca. 2008. 'Ius post bellum and Counterinsurgency', *Journal of Military Ethics* 7(3): 215-30.
- Jones, Ben and John M. Parish. 2016. 'Drones and Dirty Hands', in Kirsten Fisk and Jennifer Ramos (eds), *Preventive Force: Drones, Targeted Killing and the Transformation of Contemporary Warfare*. New York: NYU Press, 283-312.
- Koh, Harold. 2013. 'How to End the Forever War? Speech given at the Oxford Union, 7 May. Available online at <<http://www.lawfareblog.com/wp-content/uploads/2013/05/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf>>, accessed 20 July 2014.
- Kreps, Sara and John Kaag. 2012. 'The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis', *Policy* 44(2): 260-85.
- Luban, David. 2002. 'The War on Terror and the End of Human Rights', *Philosophy and Public Policy Quarterly* 22(3): 9-14.
- May, Larry. 2012. *After War Ends: A Philosophical Perspective*. Cambridge: Cambridge University Press.
- May, Larry and Andrew T. Forcehimes (eds). 2012. *Morality, ius post bellum, and International Law*. Cambridge: Cambridge University Press.
- Murphy, James G. 2014. *War's Ends: Human Rights, International Order, and the Ethics of Peace*. Washington, DC: Georgetown University Press.
- Orend, Brian. 2000. 'Ius post bellum', *Journal of Social Philosophy* 31(1): 117-37.
- Orend, Brian. 2013. *The Morality of War*, 2nd edition. Peterborough: Broadview Press.
- Patterson, Eric (ed.). 2012a. *Ethics Beyond War's End*. Washington, DC: Georgetown University Press.
- Patterson, Eric. 2012b. *Ending Wars Well: Order, Justice, and Conciliation in Contemporary Post Conflict*. New Haven: Yale University Press.
- Pattison, James. 2011. 'The Ethics of Humanitarian Intervention in Libya', *Ethics & International Affairs* 25(3): 1-7.
- Plaw, Avery. 2013. 'Counting the Dead: The Proportionality of Predation in Pakistan', in Bradley J. Strawser (ed.), *Killing by Remote Control: The Ethics of an Unmanned Military*. New York: Oxford University Press, 126-53.
- Plaw, Avery and Carlos R. Colon. 2015. 'Correcting the Record: Civilians, Proportionality, and the ius ad vim', in Steven J. Barela (ed.), *Legitimacy and Drones: Investigating the Legality, Morality, and Efficacy of UCAVs*. London: Routledge, 163-89.

- Rodin, David. 2015. 'The War Trap: Dilemmas of *jus terminatio*', *Ethics* 125(3): 674–95.
- Shaw, Martin. 2002. 'Risk-Transfer Militarism, Small Massacres and the Historical Legitimacy of War', *International Relations* 16(3): 343–59.
- Walzer, Michael. 2006. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th edition. New York: Basic Books.
- Zakaria, Rafia. 2015. 'The Myth of Precision: Human Rights, Drones, and the Case of Pakistan', in David Cortright, Rachel Fairhurst, and Kristen Wall (eds), *Drones and the Future of Armed Conflict: Ethical, Legal and Strategic Implications*. Chicago: University of Chicago Press, 199–212.

14

Conclusion

The Normative, Political, and Temporal Dimensions of Moral Victories

Andrew R. Horn, Cian O'Driscoll, and Kurt Mills

INTRODUCTION

In late 2016, the Iraqi Army launched a major offensive to wrest the northern city of Mosul from Islamic State (ISIS) control. Announcing the assault, Prime Minister Haider al-Abadi declared: 'The time of victory has come... Today I declare the start of these victorious operations to free [the citizens of Mosul] from the violence and terrorism of [ISIS].'¹ Echoing al-Abadi, an Iraqi special forces spokesman added: 'This is to be or not to be' (Giglio 2016). On the eve of a military operation that would in many ways epitomize contemporary warfare—asymmetric, urban, involving non-state actors, and with reports of inexcusable atrocities committed by both sides—the battle was framed in terms of a traditional view of decisive victory as a military matter, the *raison d'être* of the soldier, and an all-or-nothing proposition.¹

Such a traditional notion of victory connects only partially and often quite tenuously to the political utility of force today and to the battle spaces where it is applied, a dissonance that renders the al-Abadi administrator's words all the more telling. It also highlights a key issue animating this book, and one which many of the preceding chapters explicate in different ways: contemporary warfare exposes important tensions and potential blind spots in the way we currently think about the just war. The growing gaps between facts on the ground and ideas about what victory means, how it can

¹ These quotes also evoke Scheipers' Clausewitz, who extols victory in terms of 'moral force' ('Military Victories' in Chapter 3); and Campbell and Steele's discussion of the 'affective familiarization' of 'success' and 'finality' ('Affective Familiarization' in Chapter 9).

Moral Victories

The Ethics of Winning Wars

Edited by

ANDREW R. HOM, CIAN O'DRISCOLL,
AND KURT MILLS

OXFORD
UNIVERSITY PRESS

OXFORD

UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide. Oxford is a registered trade mark of Oxford University Press in the UK and in certain other countries

© Oxford University Press 2017

The moral rights of the authors have been asserted

First Edition published in 2017

Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of Oxford University Press, or as expressly permitted by law, by licence or under terms agreed with the appropriate reprographics rights organization. Enquiries concerning reproduction outside the scope of the above should be sent to the Rights Department, Oxford University Press, at the address above

You must not circulate this work in any other form
and you must impose this same condition on any acquirer

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data

Data available

Library of Congress Control Number: 2017942097

ISBN 978-0-19-880182-5

Printed and bound by

CPI Group (UK) Ltd, Croydon, CM0 4YY

Links to third party websites are provided by Oxford in good faith and for information only. Oxford disclaims any responsibility for the materials contained in any third party website referenced in this work.

Acknowledgements

The editors wish to thank the ESRC for its generous funding of the project, *Moral Victories: Ethics, Exit Strategies, and the Endings of War*, from which this book derives (ES/L013363/1). The Glasgow Global Security Network, Policy Scotland, and the Glasgow Human Rights Network also supported our work, and we offer our thanks to all of them. We would also like to record our gratitude to Oxford University Press, with whom it has been a true pleasure to work. Dominic Byatt and the editorial team at OUP, along with their anonymous reviewers, have made a rich contribution to the text before you by sharpening its focus and enhancing its coherence. We are grateful to the contributors for joining the project and supplying plenty of excellent material with which to work. In terms of that material, all three editors shared the load evenly with regard to individual chapters. Additionally, Hom and O'Driscoll wrote the introduction, while all three editors worked on the conclusion and Mills contributed his own chapter to the volume.

Phillips Payson O'Brien, David Whetham, and Martin Cook added wisdom, wayfinding, and occasionally emotional ballast along the way. Ammon Cheskin, Ian Clark, Rory Cox, Toni Erskine, Peter Jackson, Tony Lang, Gavin Stewart, Hew Strachan, and Matthew Strickland offered incisive comments on the project at various stages, chaired panels, and lent moral support. Our intrepid and peripatetic postgraduate intern, Andee Wallace, almost single-handedly dragged the work and gatherings on which this book is based into the twenty-first century and managed to make us look better along the way. Louis Bujnoch, a PhD student at Glasgow, chipped in on several of our adventures, while Gavin Stewart, also a PhD at Glasgow, did the hard yards for us in terms of preparing the manuscript for publication. We are grateful to all of them for their hard work.

Andrew Horn would like to thank Cian O'Driscoll for the 'big idea' from which our grant and this volume grew. As a colleague, Cian's foresight, flexibility, and garrulous enthusiasm made it a pleasure to come to work each day. As a friend, his wisdom and generous spirit helped advance my research and career in too many ways to tabulate, for which I will always be grateful. Finally, Cian gracefully deferred on restaurants, titles, and other matters of the heart, a true mensch. Special thanks also to my other co-editor, Kurt Mills, whose experience and supportiveness toward junior colleagues were boons throughout the process. Phil O'Brien always knew when to give good advice about research and publishing and, almost as importantly, when to take it about ice hockey. Peter Jackson has been a steadfast advocate and friend throughout this and many other endeavours. I also benefited from