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Military Ethics below the Threshold of War

C. Anthony Pfaff

ABSTRACT: The future of military ethics will be profoundly affected by competition below the level of war. Such competition de-emphasizes military force while expanding permissions on the ways and means militaries employ to shape enemy interests. This resulting new ethic will introduce norms associated with escalation, reprisal, and risk that will increase permissible uses of force while limiting their scope.

The ongoing violent exchanges between Iran, its proxies, and the United States bring into stark relief the legal and ethical challenges associated with the use of force below the threshold of war. Driven by developments in technology and doctrine, state and nonstate actors are finding more space to compete, often using military force but avoiding an all-out war. But as the inconclusive debate regarding the moral and legal legitimacy of the ongoing tit-for-tat exchange between the United States and Iran continues—including the strike in Iraq that killed dozens of Kata’ib Hezbollah (KH) members, KH leader Abu Mahdi al-Muhandis, and Islamic Revolutionary Guard Corps Quds Force Commander Qasem Soleimani—much regarding the character of this competition is not clearly covered by the current norms of warfare.¹

What stands out in the competition between the United States and Iran is the role proxies, reprisals, and escalation management play in the evolution of new norms. I do not mean to settle the legality of any specific act or means. Given the paucity of law coupled with increasing pressure to adopt nontraditional means, not enough shared norms exist to settle such questions. I do not, therefore, offer new norms as much as argue for a method to establish them. Of course, these means are not new. The problem for current norms of war, however, is they either say too little or too much. Proxies are under-regulated, allowing actors to avoid cost and accountability. Where actors avoid accountability, aggrieved parties have little choice but to engage in reprisals, which are illegal in peacetime, to discourage and deter future aggressions. Reprisals, of course, set conditions for escalation risking wider conflict for otherwise limited ends. Avoiding the resulting lawlessness will require proactive efforts to regulate the new environment these trends describe. What is needed to regulate this environment is a robust account of *jus ad vim* and *jus in vi*—much like what exists for *jus ad bellum*

1. Charlie Dunlap, “The Killing of General Soleimani Was Lawful Self-Defense, Not Assassination,” *Lawfare* (blog), January 2020, <https://sites.duke.edu/lawfare/2020/01/03/the-killing-of-general-soleimani-was-lawful-self-defense-not-assassination/>; and Scott Anderson, “The Law and Consequences of the Recent Airstrikes in Iraq,” *Lawfare* (blog), January 2020, <https://www.lawfareblog.com/law-and-consequences-recent-airstrikes-iraq>.

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and *jus in bello*—to address when actors are permitted to resort to force and what limits on such force there should be.

Jus ad Vim and the Future of Competition

Sean McFate, in *The New Rules of War*, writes, “conventional war is dead.”² In its place, he argues: “Future wars will not begin and end; instead, they will hibernate and smolder. Occasionally, they will explode.”³ More to the point, rather than relying on battlefield victory to achieve their objectives, adversaries will move into the “shadows,” where “anonymity is the weapon of choice.”⁴

Just war theory and the law of armed conflict have little to say about such anonymous means, and even where they do, international institutions are often incapable of enforcing relevant norms. As McFate argues, “the laws of war will fade from memory, as will the United Nations, which will prove useless in the face of conflict.”⁵ He is optimistic to believe the laws of war will fade into memory because, if for no other reason, “lawfare” is such a critical aspect of competition—a point he recognizes.⁶ What he gets right, however, is the future normative environment will be characterized both by uncertainty on what the rules are as well as a lack of accountability, as international institutions—not just the United Nations—will find little leverage to regulate the behavior of state and nonstate actors.

Determining the evolution of these norms is the purpose of *jus ad vim*, a term Michael Walzer coined in 2006 when he raised the concern that without such norms governing force below the threshold of war, war itself would be more likely as limited attacks could set off a wider escalation.⁷ Determining what those norms should be requires balancing the norms of law enforcement, which emphasize limited force and human rights, and warfighting, which enables wider latitude regarding the use of force, but denies due process and places innocents at risk.

While the law enforcement model is obviously preferable, it requires effective governance and a monopoly on the use of force. Where those conditions do not exist, one may be permitted to loosen restrictions on force but must at the same time avoid depressing the peacetime standard for human rights to the war time standard.⁸ Thus *jus ad vim* will be more permissive than *jus ad bellum* in permitting the use of force. Maintaining

2. Sean McFate, *The New Rules of War: How America Can Win Against Russia* (New York: William Morrow, 2019), 6.

3. McFate, *New Rules of War*, 246.

4. McFate, *New Rules of War*, 246.

5. McFate, *New Rules of War*, 9.

6. McFate, *New Rules of War*, 68–69.

7. Daniel Brunstetter and Megan Braun, “From Jus ad Bellum to Jus ad Vim: Recalibrating Our Understanding of the Moral Use of Force,” *Ethics and International Affairs* 27, no. 1 (February 2013): 97–98.

8. Daniel R. Brunstetter, “The Purview of State-Sponsored Violence: Law Enforcement, Just War, and the Ethics of Limited Force,” in *The Ethics of War and Peace Revisited: Moral Challenges in an Era of Contested and Fragmented Sovereignty*, ed. Daniel R. Brunstetter and Jean Vincent Holeindre (Washington DC: Georgetown University Press, 2018), 235.

the peacetime standard for rights, however, means establishing a clear link between a proposed use of force and its effect, while tolerating little in the way of collateral harm. These requirements further entail that discrimination and proportionality in *jus in vi* will have to meet a higher standards than its *jus in bello* counterparts.⁹ Thus, shaping the evolution of these norms does not require a reimagining of the international order but it will require new practices and precedents to address the challenge that proxies, reprisals, and escalation represent.

Proxies

If anonymity is the weapon of choice then proxies are one way of achieving it. Even when anonymity is not possible, proxies, as Iranian reliance on them suggests, are an effective means of transferring risk and lowering one's costs while imposing them on others.¹⁰ From the perspective of international law, moreover, it is difficult to hold state actors responsible when they do employ proxies. For a state to be accountable for a proxy's actions, it must have "effective control" over a proxy's operations.¹¹ The standard for effective control, however, appears high. In one precedent, the International Court of Justice found the United States had provided the contras in Nicaragua not only with weapons but also a manual that advised them to "shoot civilians attempting to leave a town, neutralize local judges and officials, hire professional criminals to carry out 'jobs,' and provoke violence at mass demonstrations to create 'martyrs.'"¹² The International Court of Justice however, did not find the United States accountable for the crimes the contras subsequently committed because no one directly associated with an organ of the United States government directed them to commit these crimes.

A second precedent establishing standards for effective control arises from the International Criminal Tribunal for the Former Yugoslavia's findings regarding the Federal Republic of Yugoslavia (FRY) Army's use of proxies against Bosnia and Herzegovina. Here they found the FRY was responsible for the Bosnian Serb Army (VRS) because the FRY had transferred officers to serve in the VRS, paid their salaries, had the same military objectives, provided financial and logistical support, and "directed and supervised the activities and operations of the VRS," effectively giving them "overall control."¹³

It is not hard to see the difficulty here. Soleimani may have provided KH with weapons, funding, and even encouragement to attack US forces. But given either precedent those actions do not establish

9. Brunstetter and Braun, "Jus ad Bellum," 96–101.

10. Candace Rondeaux and David Sterman, *Twenty-First Century Proxy Warfare: Confronting Strategic Innovation in a Multipolar World* (Washington, DC: New America, February 2019), 5, <https://www.newamerica.org/international-security/reports/twenty-first-century-proxy-warfare-confronting-strategic-innovation-multipolar-world/>.

11. Oona A. Hathaway et al., "Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors," *Texas Law Review* 59, no. 3 (March 2017): 546.

12. Hathaway et al., "Ensuring Responsibility," 548–9.

13. Hathaway et al., "Ensuring Responsibility," 554–6.

accountability. As long as he avoided giving specific instructions tied to particular operations and maintained some organizational distance between the Quds Force and KH, he was not legally accountable for the actions of KH. If he was not legally accountable for their actions then killing him was illegal, if not also unethical. The problem here is not whether these facts regarding the relationship between the Quds Force and KH are true; rather, the legal standard for establishing them establishes a “perverse incentive” encouraging proxy employment while discouraging any effort to moderate proxy behavior, since doing so could imply effective control.¹⁴ Future norms should address this incentive.¹⁵

Reprisals

Whatever one thinks about the legality of the US air strikes targeting Soleimani and KH leadership, attacks by Iranian proxies that provoked them clearly broke international law. While the administration’s maximum pressure policy has dramatically impacted the Iranian economy, it does not justify an armed response.¹⁶ When faced with such a violation by an adversary (Iran) and in light of unsuccessful attempts for redress or accountability, the only resort for an aggrieved party (United States) was to reciprocate in the form of a reprisal. In this case—the strikes against KH and Soleimani—the United States claimed self-defense. This claim remains very much in dispute, however, so it is still worth exploring reprisals as an alternative justification.¹⁷

In general, reprisals permit an otherwise illegal act to compel an adversary to conform to the law. Thus reprisals are not justified because someone did something wrong first, but rather as a means of law enforcement. Such uses of force must be proportionate and directed only at those involved in the violations it is supposed to address.¹⁸ The problem for competition is while reprisals are permitted in war time, they are generally regarded as illegal in peacetime.¹⁹ This does not mean one cannot use force to encourage conformity to a norm, but such use still has to meet the standards of self-defense.²⁰ Simply attacking back when it is not clear any future attack is forthcoming would not meet this standard. Absent imminence, actors are obligated to seek alternatives before using force.

14. Hathaway et al., “Ensuring Responsibility,” 562–3.

15. See C. Anthony Pfaff, “Proxy War Ethics,” *Journal of National Security Law and Policy* 9, no. 2 (August 2017).

16. Rick Noack, “How U.S. Sanctions Are Paralyzing the Iranian Economy,” *Washington Post*, January 10, 2020, <https://www.washingtonpost.com/world/2020/01/10/how-us-sanctions-are-paralyzing-iranian-economy/>.

17. Andrew Cheung, “U.S. ‘Self-Defense’ Argument for Killing Soleimani Meets Skepticism,” Reuters, January 3, 2020, <https://www.reuters.com/article/us-iraq-security-blast-legal-analysis/u-s-self-defense-argument-for-killing-soleimani-meets-skepticism-idUSKBN1Z301R>.

18. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 5th ed. (New York: Basic Books, 2015), 207; and Nicholas Fotion, “Reprisals,” in *An Encyclopedia of War and Ethics*, ed. Donald Arthur Wells (Westport, CT: Greenwood Press, 1996), 410–12.

19. Christine Gray, *International Law and the Use of Force*, 3rd ed. (Oxford: Oxford University Press, 2008), 150–1.

20. Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (Oxford: Oxford University Press, 2010), 10.

The difficulty here is these alternatives are often ineffective. The United States could have taken Iran to court for its role in the December 27 attack, but as the discussion regarding proxies indicates, it is not likely Iran would have been held responsible. The United States could also have tried nonviolent means to impose greater costs on Tehran, but given the already stringent sanctions Iran is under, it is not clear this course of action would be any more effective. This point suggests as adversaries increasingly engage in illegal behavior, there may be room for limited peacetime reprisals. As Walzer argues: “Reprisal is a practice carried over from the war convention to the world of ‘peacetime,’ because it provides an appropriately limited form of military action. It is better to defend the limits than to try to abolish the practice.”²¹

Escalation

Of course, a primary reason peacetime reprisals are illegal is the risk of escalation. Managing escalation requires having a plan for escalation dominance prior to initiating any competitive act, violent or nonviolent. As Herman Kahn notes, escalation dominance goes to the side that “fears eruption the least,” or at least is the side best able to bear the cost should the conflict escalate.²² Effective escalation management thus requires at least three things: (1) a demonstrated willingness and capability to strike; (2) an off-ramp that gives an adversary a less costly but acceptable option other than continued escalation; and (3) a consensus among key allies and partners regarding the legitimacy of one’s response.

The operative word in the first condition is “demonstrated.” It is not sufficient that one is able to bear the cost of further violence better than the adversary. The adversary also has to believe this to be the case. Military capability, of course, is important to demonstrating such capability. But it is just as important one demonstrate resolve as well. While there are numerous ways to do this, broad international support for one’s cause can help to underscore the strength of the commitment. Thus, it makes sense to cultivate such support on an ongoing basis.

A good off-ramp is a clear policy statement giving the adversary something it can do that will avoid further retaliation—an alternative representing a lower cost than continued escalation. If conditions for escalation termination represent existential costs to an adversary then it has no reason not to continue the violence. Accordingly, off-ramps that undermine an actor’s ability to govern or essentially disarm it will not likely be effective, which is why Secretary of State Mike Pompeo’s twelve demands for Iran, including abandoning its nuclear program, ending its development of ballistic missiles, and ceasing its use of proxies, are not an effective off-ramp. It is not that the United States should not pursue these goals relative to Iran. It is just that those conditions are, at least in Tehran’s perspective, equivalent to surrender and would make them vulnerable to regional adversaries such as Saudi Arabia.

21. Walzer, *Just and Unjust Wars*, 221.

22. Herman Kahn, *On Escalation: Metaphors and Scenarios* (New York: Frederick A. Praeger, 1965), 290.

Consequently, when in an escalatory cycle, actors have to offer something else. In this case, it seems Iran was the one who found the off-ramp for the United States, temporarily at least. By striking back in a way that avoided fatalities it appeared, at least, to acknowledge the United States' redline regarding fatal attacks on US personnel while avoiding the appearance of backing down, which would have likely undermined the regime's domestic credibility. As Iran's renewed attacks have demonstrated, however, escalation termination is not the same as conflict termination. In competition, sometimes the practical if not ethical thing to do is limit violence, especially when that violence risks harms to civilians.

Both conditions suggest the importance of ensuring international support for one's actions. To the extent escalation entails political isolation, one increases one's costs to oneself while at the same limiting the resources available to find alternatives to continued escalation. The former is more a practical concern but the latter is ethical. The strike that killed Soleimani received widespread condemnation, even from European partners.²³ Given those partners' utility in shaping Iranian behavior, alienating them simply strengthens the Iranian position and is thus self-defeating. The point here is not whether those partners should have condemned the attack on Soleimani. Rather the point is, given the uncertainty regarding how actors should respond in such circumstances, it is worthwhile to establish in advance a set of shared expectations regarding appropriate responses.

The Impact of Technology

Technologies such as cyber, artificial intelligence, robotics, and additive manufacturing among others are also going to impact the character of competition.²⁴ In general, military innovation provides advantage by either reducing one's own risk or increasing it for the enemy, preferably in ways the enemy would not expect. In reducing this risk, technology raises a number of ethical concerns. First, as Christian Enemark points out, the prospect of avoiding "deaths, injuries, and grieving families," encourages political leaders to resort to force.²⁵ Instead of fewer lethal individual engagements, the result may be more of them, thus creating greater risk for escalation.

Second, the proliferation of these technologies risks destabilizing the international order. As Margaret Kosal points out, "new technological

23. "World Reacts to Killing of Iran's Qassem Soleimani," Euronews, January 3, 2020, <https://www.euronews.com/2020/01/03/a-declaration-of-war-and-an-escalation-the-world-reacts-to-soleimani-killing>.

24. T. X. Hammes, "Cheap Technology Will Challenge U.S. Tactical Dominance," *Joint Forces Quarterly* 81, no. 2 (April 2016).

25. Christian Enemark, *Armed Drones and the Ethics of War: Military Virtue in a Post-Heroic Age* (London: Routledge, 2014), 22–23.

developments have become accessible and relatively inexpensive to a larger number of nations and within the grasp of nonstate actors: advanced technology is no longer the domain of the few.”²⁶ As a result, these technologies enable smaller actors, including nonstate actors such as proxies Iran employs, to pursue political objectives effectively, despite relative weakness. It also enables nonviolent coercive measures state actors can employ as reprisals thus raising the question whether nonlethal but indiscriminate cyberoperations, like disrupting a power grid, be permitted when the alternative is lethal, but discriminate force. These points suggests a moral, if not practical, obligation to regulate the availability of these technologies.

Third, while risk of physical harm may be reduced to near zero, the risk of psychological harms may increase and in unexpected ways. While studies have observed mental trauma associated with autonomous technologies, this can range unpredictably from desensitization and moral disengagement to trauma and moral injury.²⁷ Making matters even more complex, a 2019 study of British drone operators suggested environmental factors such as work hours and shift patterns were as important, if not more so, to the experience of mental injury as visually traumatic events associated with the strikes themselves.²⁸ These effects will require rethinking what counts as fulfilling ethical obligations to one’s own soldiers and veterans.

Conclusion

It should now be apparent what the broad contours of the resulting normative environment for competition would look like. From a practical perspective, low-cost measures that transfer risk and avoid attribution will proliferate, expanding targets to include those normally proscribed by international law. From a moral perspective, employing such measures will still be subject to conditions such as just cause, proportionality, reasonable chance for success, and last resort.

In doing so, any resulting ethic will make coercive measures, including the use of force, more permissive while limiting its scope. This ethic will prioritize nonlethal over lethal alternatives, and where lethal force is used, demand a higher standard for success and a much lower tolerance for civilian harm. These measures represent an alternative to war; therefore, actors will be morally required to take measures to avoid escalation.²⁹

26. Margaret Kosal, “Introduction,” in *Disruptive and Game Changing Technologies in Modern Warfare*, ed. Margaret Kosal (Cham, Switzerland: Springer, 2020), 3.

27. Alaa Hijazi et al., “Psychological Dimensions of Drone Warfare,” *Current Psychology* 38, no. 5 (September 2017): 1–12, <https://doi.org/10.1007/s12144-017-9684-7>.

28. A. Phillips et al., “Occupational Stress in Remotely Piloted Aircraft System Operators,” *Occupational Medicine* 69, no. 4 (June 2019): 244–50.

29. Brunstetter and Braun, “Jus ad Bellum,” 104.

There is no bright line between competition and armed conflict. So while the military, political, and economic tools available to actors yield utility in either setting, the differences in ends competition and armed conflict represent differences in how these tools should be used both from a practical and ethical perspective. This last point is important. While the ethical does not follow the practical, the practical certainly shapes, in conjunction with a society's values and ideals, how the ethical gets put into practice.