

# JUST WAR AND IRREGULAR WARFARE

JUS TUMULTUARIUM BELLUM, THE RIGHT TO IRREGULAR WAR

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Just War Tradition, also called Just War Theory, provides the ethical framework that governs when a state can resort to force (jus ad bellum), conduct during conflict (jus in bello), and ending conflict (jus post bellum). It has been used by philosophers, military practitioners, and heads of state since the times of Cicero and Saint Augustine.<sup>01</sup>

The resort to force ethics details who could declare a war. It provides what equals a just cause for war, ensures the war aims were proportional to the harm inflicted, requires exhausting peaceful alternatives, mandates that parties have the right intent, and necessitates that there is a reasonable chance of success. The conduct during conflict criteria are equally clear: forcing combatants to distinguish civilians from belligerents and ensuring the means of response are not excessive. The ending conflict criteria, while relatively lesser developed, detail the rights and responsibilities between parties to a conflict post hostilities. This model worked out well during the “good ol’ days” of war—war was declared, one side won, the other side lost, and everyone went home.<sup>02</sup>

In the modern era, war emerges along a continuum of competition ranging from competition below armed conflict, crisis, and armed conflict.<sup>03</sup> The range of military options available to defense and policy leaders consist of less than lethal options inherent in irregular warfare activities. Irregular warfare provides opportunities of conducting operations through proxies. These opportunities contrast with more lethal traditional warfare alternative in large scale combat operations (LSCO). Despite the familiarity with irregular and conventional warfare alternatives, Just War Tradition fails to provide an adequate ethical framework for leveraging irregular warfare options. This creates an opportunity for a new ethical framework to augment Just War Tradition—jus tumultuarium bellum (right to irregular war). Ethics matter, even though ethical judgments lack the finality of a legal judgment, because ethics tell us what should be. The 2022 National Defense Strategy anchors defense strategy in partners and allies.<sup>04</sup> Thus, it is important to consider the ethics of our partners and allies. This paper seeks to fill the gap by providing an ethical framework on forming proxy relations in irregular warfare.

In irregular warfare, the United States works “by, with, and through regular forces, irregular forces, and individuals,”<sup>05</sup> through “indirect, non-attributable, or asymmetric activities.”<sup>06</sup> The U.S. leverages irregular warfare activities in support of theater campaigns against competitors like China, Russia, Iran, and others. These competitors also work “by, with, and through” their own proxies. For example, China seeks military objectives through Chinese businesses.<sup>07</sup> Meanwhile, Russia notoriously works through Wagner and other private military and security companies.<sup>08</sup> And then there is Iran, who sponsors Hezbollah in Lebanon, Hamas in Gaza, the Houthis in Yemen, and other non-state armed groups in Iraq, Syria, and elsewhere.<sup>09</sup> Despite these fairly obvious opportunities, there remains no ethical framework upon which our practitioners and theorists can model the analysis and potential employment of “by, with, and through” partners in irregular warfare.

To the benefit of our government and defense officials, this paper presents a narrow focus to renegotiate part of right to war ethics with irregular warfare’s “by, with, and through.” Jus ad bellum, the right to wage war, fails to delineate the ethical criteria

necessary to form partnerships and supportive arrangements in war. States have found tactical and political advantages to this ethical ambiguity. States can shift some of the risks in waging war to an indigenous, non-state force.<sup>10</sup> There is a gap surrounding irregular warfare’s “by, with, and through” indigenous, non-state actors about what rules apply, and who do they apply to? The resort to force by a state is stepping over a bright line, both legally and ethically. Supporting an irregular force or non-state actor in a pre-existing conflict presents several challenges. First, it is unclear what degree of support makes a state a party to a conflict.<sup>11</sup> Second, it is unclear whether the state creates an international armed conflict against a state or whether the state becomes party to a pre-existing non-international armed conflict between the state and the non-state.<sup>12</sup> These ambiguities provide legal and ethical loopholes for states to pursue desired policy outcomes with limited tactical and political exposure.

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To fill this ethical gap, the proposed framework is called jus tumultuarium bellum, and it seeks to augment contemporary Just War Tradition. In the jus tumultuarium bellum party, states and non-states have to fulfill the traditional resort to force criteria. The criteria includes: just authority, just cause, proportionality, exhausting peaceful alternatives, right intention, and chance of success. In addition to solely fulfilling the resort to force criteria, parties must make an ethical determination about the justness of the other’s resort to force responsibilities. If the other actors fail to meet the criteria then the parties should not partner.

In addition to determining the justness of the other’s resort to force responsibilities, jus tumultuarium bellum borrows from the emergent jus ad vim (just use of force) thinking that irregular warfare should not escalate the conflict.<sup>13</sup> If part of the intent of the irregular warfare campaign is to conduct a conflict short of LSCO then irregular warfare should not increase the probability of resorting to LSCO.

Jus tumultuarium bellum also requires that the state ensures the non-state actor has “sticking power.” Deciding to wage war requires mobilizing troops, acquiring arms, raising money to fund the conflict and, ultimately, issuing orders to kill.<sup>14</sup> To carry the ethical burden, it is necessary that the non-state actor be able to prevail after the conflict. This requires that the non-state actor be representative of the population it is fighting for and have capabilities to provide governance.<sup>15</sup> This is a higher standard than that of states. States do not have to be a representative, and they barely have to be capable. Yet states are generally presumed just authorities in the international community. Despite this difference, if a state is to support a non-state in an armed conflict then the non-state should be able to survive after the conflict.<sup>16</sup>

Lastly, jus tumultuarium bellum recognizes that traditional notions of resort to force ethics may fall short. For example, under traditional Just War Tradition, a resort to conflict is justified only in response to unlawful aggression, pre-emption of an imminent attack, in pursuit of self-determination against a colonial or racist regime, or in support of humanitarian intervention. States, for example, are unlikely to wait for unlawful aggression to initiate irregular warfare. Large-scale combat operations are more apt to respond to unlawful aggression than focusing on “by, with, and through.” Irregular warfare can also be a step in exhausting peaceful alternatives. For a state partnering with a non-state, the proportionality of harm caused by the state is less than LSCO. Continued waiting may help fulfill traditional notions of exhausting peaceful alternatives; however, it will likely increase the totality of harm should a state later face unlawful aggression. Therefore, irregular warfare’s “by, with, and through” challenges just cause, necessity, proportionality, and chance of success. Thus, irregular warfare challenges traditional notions of resort to force ethics. Therefore, it is necessary that states and non-states analyze traditional notions of resort to force ethics with jus tumultuarium bellum.

The proposed ethical framework will not be without its doubters. Just War thinking has three main camps: Orthodox, Revisionists, and Neoclassical. Orthodox scholars follow the legalist position

popularized by Michael Walzer, an American professor emeritus and political theorist. Revisionists seek to revisit the Orthodox’s moral equivalency of combatants but have yet to develop a comprehensive framework. Neoclassical scholars turn more to the writings of Saint Augustine, Thomas Aquinas, Hugo Grotius, and others. Revisionist Just War scholars are unlikely to support the proposed jus tumultuarium bellum. Per most Revisionists, there is only a need for one framework: that of international human rights law. Revisionists, amongst other things, question the need for a separate ethical framework that solely governs armed conflict.<sup>17</sup> The Orthodox and Neoclassical interpretations of Just War Tradition are more apt to see the benefit that jus tumultuarium bellum can provide. Ultimately, however analyzed, Just War Tradition fails to provide an adequate vocabulary and framework to discuss irregular warfare’s “by, with, and through” without jus tumultuarium bellum. The proposed framework gives philosophers, practitioners, and the public a way to explain and think about one of the realities of war.

This paper identified a shortcoming in the philosophy that seeks to govern the resort to war, conduct in war, and responsibilities when ending war. It sought to fill this gap by proposing a supplemental moral philosophy called jus tumultuarium bellum. Jus tumultuarium bellum requires both parties to fulfill individual right to war criteria. It also asks each party to make a determination of the other’s justness in fulfilling its right to war responsibilities. It requires a “sticking power” for the non-state actor. Lastly, jus tumultuarium bellum recognizes that traditional notions of the right to war may fall short in irregular warfare. Therefore, it is necessary that states and non-states analyze traditional notions of resort to force ethics with jus tumultuarium bellum before deciding to enter a supportive relationship in irregular warfare’s “by, with, and through.”

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