# Preventive Force

*Drones, Targeted Killing, and the Transformation of Contemporary Warfare*

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10

# Restricting the Preventive Use of Force

## *Drones, the Struggle against Non-State Actors, and* Jus ad Vim

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The idea of preventive force short of war has taken on greater relevance since President Obama was elected in 2008. While Obama rejected Bush's preventive war doctrine—altering the U.S. national security strategy to reflect a more robust understanding of the *jus ad bellum* principle of last resort—he has utilized limited preventive force on a much larger scale (Brunstetter and Braun 2013). His expansion of the drone program illustrates a willingness to use limited force in a preventive manner by adapting the blurred notion of imminence from the Bush doctrine to the targeted killing of individuals (that is, suspected terrorists).[1]

Obama's use of preventive drone strikes reflects the comparative advantages of drones (as opposed to more robust military options) to use force in a more precise manner (targeting terrorists with a reduced risk to civilians), without putting U.S. soldiers at risk. Moreover, as Kenneth Anderson argued during a congressional hearing on drones, the prominent strategic advantage of drones is their ability to provide a "limited, pinprick, covert strike" in order "to avoid a wider war" (2010a, 5).

In this chapter, we address one of the questions posed in the introduction to this volume: To what extent is the United States' use of preventive force a slippery slope to preventive war, and what are the legal and ethical implications of these actions? Our main claim is that drones employed outside the traditional battlefield are a form of limited preventive force aimed at *avoiding* a larger war, but the legal and moral justifications currently provided by the U.S. government (as outlined in the introduction of this volume) are considerably too permissive. Our argument makes two important assumptions. The first is that the preventive use of limited force by a state is justifiable under certain limited circum-

stances. Building off the work of Whitley Kaufman (2005), who argues that preventive force is permitted in the historical just war tradition, and Michael Doyle (2008), who sketches the conditions wherein a turn to preventive force would be legitimate under the UN Charter, we assert that a state's right to self-defense includes the right to employ limited preventive force.[2] The second assumption, explored in recent scholarly work, is that antiterrorist actions "cannot be well governed within either the law-enforcement paradigm or the war convention" (McMahan 2012, 155) and that the principles of just war do not neatly transfer to instances of limited force such as drone strikes (Brunstetter and Braun 2013). The legal ambiguity, muddled notion of imminence, and misplaced use of just war principles that have characterized the Obama administration's justification of drones point to the need for a hybrid moral framework. It should be calibrated specifically to limited force that lies somewhere between law enforcement and just war, and combines elements of both. We thus employ a hybrid law enforcement–war ethical framework termed *jus ad vim*—the just use of force short of war (Walzer 2006a; Ford 2014; Brunstetter and Braun 2011, 2013).[3]

Our chapter attempts to provide normative guidance for addressing the legal ambiguities surrounding drone use. While numerous scholars in this volume discuss the legal merit of international humanitarian law (the Laws of Armed Conflict) and international human rights law (law enforcement) in governing drone use, the contours of the drone debate point to clear disagreement as to which body of law is most applicable (Abizaid and Brooks 2014). Indeed, the most controversial drone strikes take place in what Michael Walzer (2007) has called the "in-between spaces," which are not zones of war where armies fight, nor zones of peace where police action can be undertaken (such as areas of Yemen, Pakistan, and Somalia).

In proposing a hybrid law enforcement–war ethic, our chapter can be read as being in conversation with Chapter 11, in which Ben Jones and John Parrish ultimately resist the call for a new ethical space between war and law enforcement. Jones and Parrish argue that admitting such a space exists would relax legal restraints on force, thus imposing wartime legal standards that diminish respect for human rights relative to law enforcement standards. While there is certainly merit to such arguments, Jones and Parrish give perhaps too much weight to the law

enforcement ethic, given that the in-between spaces exist *because* law enforcement does not function adequately in these areas. When the existence of these in-between spaces is *not* acknowledged and when law enforcement standards are instead imposed where conditions are less than ideal, the populations living in these areas are condemned to suffer under the rule imposed by terrorists. Without adequate law enforcement, the very real threat of future terrorist attacks remains unresolved.

We concur that the laws governing a zone of war should not be imposed wherever terrorists operate, and therefore reject the more permissive laws of armed conflict subscribed to by the Obama administration. However, we argue that elements of the law enforcement ethic can be blended with the *jus ad bellum* principle of last resort to form an ethical framework that morally circumscribes the use of preventive force in these in-between spaces as well as providing for national security concerns.

Our argument unfolds in the following way. Many scholars who discuss targeted killing do not make a clear distinction between preemption and prevention; thus, the two are often blurred, even though they remain categorically different. In the first section, we therefore briefly define what we mean by a preventive drone strike, distinguishing between a strike against an imminent threat (which would be preemptive and very rare) and a strike against a more distant threat—what we term "lagged imminence"—in places where capture is unfeasible. In the second section, we delineate a notion of last resort for *jus ad vim* that draws from both the law enforcement and just war paradigms to circumscribe the scope of drones as a preventive use of force. Thus, we propose three necessary criteria of last resort: a transparent process to define who is targeted and why, with evidence presented against them (through indictment by grand jury or trial *in absentia*); clear evidence that the target poses a demonstrable ongoing threat; and affording those targeted an opportunity to surrender (which entails giving serious consideration to pursuing options that prioritize capture). This notion of last resort would rule out so-called "signature strikes"—killing unidentified men who appear to fit the characteristics of a militant/terrorist—and summary executions for past crimes committed, but would allow for exceptional cases where preventive lethal force could be used. Each of these sections contains illuminating case studies of drone strikes and law enforcement measures to illustrate the relevant points.

## Preventive Force and Lagged Imminence

Much of the controversy surrounding drone strikes revolves around the question of imminence. In truth, there is little debate over whether a strike would be permitted if an enemy attack were truly imminent—that is, just about to take place (although, in reality, law enforcement mechanisms are often sufficient).[4] Even in the more restrictive law enforcement setting, lethal force would be justified under such circumstances.[5] Nevertheless, such uses of force would, by definition, be preemptive and not preventive, because they would be a response in self-defense to an *immediate and impending* threat to national security. The challenge of drone policy is that most strikes do not fit this scenario because they are not a response to an imminent threat, but rather are preventive in nature.

Traditionally, an "imminent threat" has been understood to mean "instant, overwhelming, and leaving no choice of means, and no moment for deliberation" (Abizaid and Brooks 2014, 35). But drone strikes against suspected terrorists are different. The United States claims *perpetual imminence* of terrorist threat—that is, it claims that there is *always* the threat of an attack about to be realized, even though one can never be sure of when it will occur. This claim would suggest that we have crossed the threshold of last resort, meaning lethal options would be legitimate. However, rarely do those targeted by drones present such an immediate threat; rather, most would be considered a potential terrorist threat that may emerge someday if he or she acquired the means and opportunity to do so. We term this threat one of *lagged imminence*, meaning that there is a real threat always on the horizon, albeit not immediately. Statesmen lack the ability to pinpoint the precise moment when such a threat will be actualized, but cannot simply ignore it.

Our conception of lagged imminence is far more restrictive than the perpetual imminence currently claimed by the United States, but less restrictive than the Caroline precedent discussed in other chapters in this volume. We understand why David Glazier and Daphne Eviatar (Chapters 6 and 7, respectively) would be hesitant to allow for the preventive use of force against a threat labeled as somewhat imminent, as current U.S. justifications of drone strikes have rendered the term meaningless. Indeed, Glazier views this as a slippery slope toward more killing that

undermines global respect for human rights and the rule of law. Nevertheless, the notion of lagged imminence accounts for the extant threat that terrorists can pose, but also recognizes that the Caroline doctrine of 1842, which applies adequately to interstate conflict between opposing militaries, does not fit the current threat of loosely affiliated transnational terrorist networks. Thus, our conceptualization of lagged imminence would be most in line with the "Caroline plus" view discussed in Chapter 9 by Avery Plaw and João Franco Reis. Ultimately, viewing the threat of terrorism through the lens of lagged imminence, as opposed to perpetual imminence, places renewed emphasis on the just war principle of last resort. We will outline the parameters of *jus ad vim* below.

## The Law Enforcement and Just War Divide

Scholars clearly are divided on the issue of targeted killings by drone strikes, which do not fit neatly into current legal and moral frameworks. The divide essentially lies between those who believe terrorism is best fought through law enforcement means and those who believe the principles of just war apply. Chapters 5, 6, and 7 in this volume discuss the differences between the legal distinctions of whether the law of armed conflict or international human rights law (IHRL) applies to U.S. drone strikes. While the United States claims the laws of armed conflict generally apply, the United Nations Human Rights Office of the High Commissioner and other NGOs (including Amnesty International, Human Rights Watch, and the International Committee of the Red Cross) claim IHRL is the most applicable body of law (see also Eviatar, Chapter 7). Given this legal disagreement, exploring the broader ethical concerns of drone use can provide insight into how legal norms could evolve to fit the in-between spaces where controversial drone strikes tend to occur.

The main critique of proponents of the law enforcement paradigm is that the individuals targeted are killed without due process or an opportunity to surrender. As Fernando Tesón argues:

> During peacetime, the state can use lethal force only in very limited circumstances, mostly in self-defense or to protect persons from deadly threats. Beyond that, a suspected criminal is entitled to due process and

> may not be killed except in execution of a lawful sentence pronounced by a court of law after a finding of guilt. (2012, 45)

Law enforcement has indeed succeeded in fighting terrorism in certain contexts, as will be demonstrated in several of the cases we present below. Drones, however, have contributed to an expansion of targeted killing that goes well beyond the bounds of traditional law enforcement because they are seen as part of an ongoing war against a permanently imminent terrorist threat. If seen through the lens of war, drone use falls under the laws of armed conflict.

The view that current drone use is covered under the laws of armed conflict is echoed in the testimony of Kenneth Anderson, a professor of law at American University's Washington College of Law, during the 2010 congressional hearings on drones:

> The charge has been leveled that this [current drone use] is a violation of international human rights standards. It constitutes extra-judicial execution without having any charges, without having attempted to arrest the person. We respond by saying the person is a terrorist combatant and can be targeted at any point. We are not obligated to try and detain them or to capture them. (Anderson 2010b)

It is important to note that by adopting the just war paradigm, the question of preventive force is all but moot because in the context of an ongoing war, one has the right to use lethal force against most combatants. Although the right to use lethal force must be tempered by the principles of *jus in bello* (just conduct during war) for deciding whether to use force and what level of force to employ—this qualification does not, in our view, provide enough moral constraint on the use of force.

## The Limitations of *Jus ad Bellum* and *Jus in Bello* in Governing Drone Strikes

In a 2013 speech defending American use of drones, President Obama referenced just war principles: "We are at war with an organization that right now would kill as many Americans as they could if we did not

stop them first. So this is a just war—a war waged proportionally, in last resort, and in self-defense." Echoing the tenets of *jus ad bellum* (justice of going to war), Obama's main ethical claims are that the United States has just cause to use force in self-defense against those who attacked it as well as continue to threaten its citizens or interests *and* that the threshold of last resort has been crossed, meaning all realistic nonviolent options have been exhausted. What is significant about this claim is that it assumes the *jus ad bellum* criteria have been satisfied, and thus imposes the laws of armed conflict on the struggle against al-Qaeda. Doing so has substantial implications with respect to who can be targeted. The U.S. government's turn to just war principles is meant to provide ethical guidelines to curb the use of drones. However, the administration's instrumentalization of just war principles is problematic on multiple accounts. It broadens the use of lethal force in a way that undermines the restrictive power of the last resort criterion and distorts the principle of necessity, while adopting a controversial understanding of the principles of distinction and proportionality.

For one thing, the U.S. claim to use lethal force outside territorially defined battlefields such as Afghanistan, Iraq, or Libya is a controversial interpretation of international law. Imposing the laws of war paradigm onto the global struggle against al-Qaeda and associated forces gives exceptionally wide latitude for U.S. officials to use lethal force. As David Luban argues, this broadening of lethal force "depresses human rights from their peacetime standard to the war-time standard" (2002, 14). Imposing the war paradigm essentially undermines any notion of last resort by giving the United States almost free reign to target anyone deemed an enemy combatant, because almost anything can be justified by claiming military necessity. While the United States invokes the *jus ad bellum* notion of last resort by stating that it prefers to capture terrorists, the notion of imminence it employs is exceptionally vague. Rosa Brooks's account of the leaked 2011 Department of Justice white paper, which details President Obama's legal team's view on the targeting killing of American citizens, illustrates the problematic logic:

> Any person deemed to be an operational leader of al Qaeda or its "associated forces" inherently presents an imminent threat at all times—and as a result, the United States can lawfully target such persons at all times, even

> in the absence of specific knowledge relating to planned future attacks. (2014, 94)

This understanding of imminence characterizes it as a permanent state, thus diluting the traditional meaning, namely, that there must be concrete and reasonable suspicion of an impending attack at a specific moment in order to justify a preemptive response.

Instead, the use of drones represents a preventive use of force wherein a "*lack* of knowledge of a future attack [is used] as the justification for using force." Since the United States "'may not be aware of all al-Qaeda plots . . . and thus cannot be confident that none is about to occur,' force is presumed to *always* be justified" against the kinds of people considered likely to engage in attacks if given the opportunity to do so (Brooks 2014, 94; emphases in original). In view of this perception of a permanent imminence, preventive force becomes a matter of military necessity, even though the situation involves what is arguably lagged imminence, which could afford the time for nonviolent measures to be tried first. This situation is where a robust notion of last resort is morally necessary.

In the past, the U.S. drone ethic linking permanent imminence to military necessity has justified the highly controversial policy of signature strikes, as well as the targeting of both key leaders and low-level operatives. This is a wide—too wide—range of preventive force. As Brunstetter and Braun assert:

> Drones forestall the threshold of last resort for larger military deployment, but the last resort criterion does not apply to drone strikes themselves because the targeted killing of (alleged) terrorists becomes the default tactic. Thus, the use of drones as a means to enhance a state's capacity to act on just cause proportionately and discriminately may lead to the propensity to do the opposite. (2011, 346)

Thus, when drones are a default tactic of preventive force, allowing states to act on what they feel are just causes, such an expansion ultimately undermines *jus in bello* principles.

Moreover, the notion of proportionality has been misinterpreted to the point of rendering it meaningless. Drone strikes have been called

proportionate compared to the firebombing of Dresden in World War II, but as Braun and Brunstetter argue, this is not a relevant benchmark:

> To claim drones are proportionate because they are more accurate and discriminating than other weapons/tactics is to suffer from what we call *proportionality relativism*—the use of comparisons between drones and other historic eras, weapons or tactics as a basis for establishing proportionality. We contend that such comparisons are misleading. (2013, 305)

The erroneous belief in the inherent proportionality of drones has led to their expanded use, especially in Pakistan during the period of 2010–2011. As Sarah Kreps and John Kaag argue, such use distorts the meaning of proportionality: "Instead of the ends of a war determining the appropriate means of war (which is prescribed in the norm of proportionality), the means of modern warfare are determining objectives" (2012, 278). Hence, more drone strikes translate into elevated risk for collateral damage, which raises serious concerns about the extent to which drones satisfy the principle of distinction, given that it is often difficult to determine who is an appropriate target in nonconventional war. Walzer calls attention to these concerns: "But here is the difficulty: the technology is so good that the criteria for using it are likely to be steadily relaxed. That's what seems to have happened with the U.S. Army or with the CIA in Pakistan and Yemen" (2013). He, too, worries about the restraining mechanism applied to drones. Referencing the "Living under Drones" report, co-authored by Stephan Sonnenberg (Chapter 5), he also warns against the overuse of drones by highlighting the costs they impose upon civilian populations and on America's global image.

The purview of preventive force as understood by the United States sets a dangerous precedent, which, if adopted by other countries, would have grave repercussions for international peace and security (see Fisk and Ramos 2014; Chapters 5–7 of this volume). By assuming that last resort does not apply to addressing the terrorist threat and that drones inherently satisfy the requirements of both discrimination and proportionality, states with drone technology can more easily engage in conflicts they would otherwise have been hesitant to participate in. As articulated in a recent report on U.S. drone policy (Abizaid and Brooks 2014), the United States is traversing a slippery slope toward preventive

war. It is worth quoting at length the report, authored by legal, military, and technology experts, concerning UAVs, or drones (as we refer to them throughout the chapter):

> The increasing use of lethal UAVs may create a slippery slope leading to continual or wider wars. The seemingly low-risk and low-cost missions enabled by UAV technologies may encourage the United States to fly such missions more often, pursuing targets with UAVs that would be deemed not worth pursuing if manned aircraft or special operation forces had to be put at risk. For similar reasons, however, adversarial states may be quicker to use force against American UAVs than against U.S. manned aircraft or military personnel. UAVs also create an escalation risk insofar as they may lower the bar to enter a conflict, without increasing the likelihood of a satisfactory outcome. The U.S. use of lethal UAVs for targeted strikes outside of hot battlefields is likely to be imitated by other states. Such potential future increase in the use of lethal UAV strikes by foreign states may cause or increase instability, and further increase the risk of widening conflicts in regions around the globe. (Abizaid and Brooks 2014, 11)

Thus, if the U.S. precedent holds, states will be able to engage more frequently in preventive force for national security reasons while maintaining the appearance of waging moral war. To avoid such a precedent being set, a more restrictive moral framework is needed.

## Toward a Hybrid Law Enforcement–Just War Paradigm

The upshot of these concerns is that the Obama administration's turn toward just war principles imposes a paradigm that is too permissive when it comes to using drones for preventive lethal force. Their allure inspires the tendency to use them too often. In light of the concerns raised above, as well as issues raised in recent reports by the United Nations, Amnesty International, and Human Rights Watch (and discussed in detail in other chapters of this volume), it is clear that an alternative moral framework is needed. Clearly, both the law enforcement and just war paradigms have their limitations and setbacks when it comes to engaging the threat posed by non-state actors operating

throughout the in-between spaces. However, while proponents of drone strikes argue the law enforcement paradigm is too restrictive, this does not mean that the war paradigm is necessarily the correct choice. What might a framework in between these two look like?

David Glazier explains an alternative logic in his response to drone proponents at the April 2010 congressional hearings on drones:

> One choice is to use this paradigm of the law of armed conflict. But another paradigm is . . . to choose to treat terrorists essentially as pirates, or as terrorists have been treated in the past, using the military under constraints that are much more akin to law enforcement than to law of war.[6]

Glazier's intuition points to an ethical space where traditional law enforcement is too strict to be effective, but the laws of war are too permissive. This is a space where drones are used preventively, and where a hybrid model between law enforcement and the laws of war is needed.

Bearing in mind the problematic use of drones, scholars have argued that the just war principles do not neatly fit this ethical space. Brunstetter and Braun (2013), for example, point out that the ethical principles informing the requirements of *jus ad bellum* are not transferable to all contexts within the international system as the meaning of the principles changes significantly in a context of limited force, and they conclude that a theory of the just use of limited force—*jus ad vim*—is needed. In their development of *jus ad vim*, they recalibrate some of the traditional *jus ad bellum* criteria to fit a limited force context. Thus, they contend that a new principle called the "probability of escalation" is required: "If engaging in limited strikes has a high probability of resulting in escalation, then such actions are not justifiable, even though there may be just cause" (Brunstetter 2013). This reconceptualization of the use of limited force deepens the link between *jus ad vim* and the *jus in bello* principles. It also has clear implications for circumscribing the preventive use of drones. As Rosa Brooks remarks in the conclusion of her study of U.S. drone use and international law, "The international community needs to develop a *jus ad vim* to occupy the space between war and peace: a law and ethics relating to ongoing but discrete smaller scale uses of force" (2014, 99).

## Preventive Drone Strikes and *Jus Ad Vim*

In addition to lagged imminence, one of the keys to legitimating preventive drones strikes is to recognize the existence of geographical spaces—the in-between spaces we discussed above—where law enforcement can at times be extremely difficult, or perhaps even impossible. These spaces—parts of Yemen, Pakistan, and Somalia, and perhaps new areas in the future—are those where the respective governments have failed to maintain control over significant portions of their territories and/or lack the will to confront terrorists who thrive there.[7] The use of force in such geographical spaces, as Walzer explains, has a "different feel" than traditional war zones because it occurs in a kind of "darkness . . . outside the moral and legal conventions of ordinary warfare" (2007, 484). While war used to be easily defined as a zone of combat where lethal force was justified (to be distinguished from a zone of peace, where it was not), the struggle against terrorism has created these in-between spaces of moral uncertainty where force is used on a limited scale, but war is not declared.

Sympathetic to the limitations of both the law enforcement and just war paradigms cited above, Walzer asks the critical question regarding the use of preventive force against suspected terrorists: "What standards apply to the secret war against terror?" (2007, 481). The challenge here is in identifying the moral status of those against whom one is fighting. For Jeff McMahan, although terrorists have some elements of both criminals and combatants, terrorists "lack some of the defining characteristics of combatants and are considerably more dangerous than ordinary criminals" (2012, 155). Thus, he concludes that antiterrorist actions "cannot be well governed within either the law-enforcement paradigm or the war convention" (2012, 155). While this would suggest a need for a hybrid model that combines the elements of both paradigms to enable limited uses of force, previous attempts to develop one have selectively deployed elements of both paradigms to loosen the constraints on the use of force and thereby created a framework that is too permissive (see Luban 2002; Coady 2008). Refining the approach, Brunstetter and Braun (2013) argue that the implied permissiveness of such a framework can be circumscribed by clear restraining mechanisms that limit the way a state uses limited force, while also permitting the necessary force

to respond to threats. In what follows, we combine elements of both paradigms—specifically, the permissive right of a state to kill members of a terrorist group as one can kill enemy soldiers under the laws of war and the right to due process and restrictive collateral damage policy inherent in the law enforcement paradigm—to establish a notion of last resort for preventive drone strikes in a context of lagged imminence.

## Drones and Last Resort

In the previous section, we argued that the U.S. government's notion of imminence is too broad. If we were also to categorically reject the use of force in cases of lagged imminence and use drones only preemptively, then, as Mark Totten recognizes, we would "fail to provide states with the security they require" because "against the new threat of global terrorism the point of last resort may arrive prior to the point of imminence" as it is traditionally understood (2010, 184, 186). But even if Totten is correct in arguing that there is a *narrow* space for the just preventive use of force because the threshold of last resort is crossed before imminence, this still begs the question: What does last resort mean with regard to a preventive drone strike? Stated differently, given the notion of lagged imminence that characterizes the nature of the threat from terrorist organizations, what should be tried before resorting to a preventive drone strike? In this section, we sketch a distinct ethical theory of last resort that is calibrated to the act of targeted killing by drones.

In the just war paradigm, last resort places emphasis on considering all feasible nonviolent measures before resorting to war. The threshold of last resort does not mean that every imaginable resolution must be attempted before resorting to war, because there is always something more to try. Rather, last resort is a marker that all reasonable alternatives have been tried and failed "before you 'let loose the dogs of war'" (Walzer 2004, 155). For Walzer, political leaders must cross that threshold with "great reluctance and trepidation" (2004, 88). How does one capture this "reluctance and trepidation" for a preventive drone strike?[8]

The first part of the process of satisfying last resort for a drone strike is identifying a legitimate target. According to the just war paradigm, the *jus in bello* principles require a state to take due care to avoid civilian casualties. The principles of distinction, proportionality, and necessity

regulate (and supposedly limit) the scope of lethal force that can be employed. Civilians cannot be directly targeted, the use of force must not exceed the expected military gain, and lethal force must not be used unless for the sake of military advantage. While the U.S. government claims to satisfy these principles, critics claim that those being killed are summarily executed without due process and that civilians are unjustly placed in the line of fire (Human Rights Watch 2013; Amnesty International 2013). Whether accidental or as a result of the U.S. government's policy of proportionality balancing (the conscious decision that anticipated military advantage outweighs collateral damage), these consequences "on the ground" point to significant moral concerns regarding the American administration's ethical stance.

While no framework can entirely eliminate mistakes or control the reaction of international actors to a specific drone strike, we contend that a more robust, hybrid notion of last resort could satisfy the call for greater protection of civilian human rights across the globe while also satisfying concerns of national security. This would set a more rigorous, human rights-oriented precedent for the United States and for states that may acquire lethal drones in the future. To this end, we propose a notion of last resort that would require the following from states proposing to carry out preventive drone strikes: (1) that the person targeted is known by name; (2) that the level of ongoing threat he or she poses be explicated publicly (the first two are accomplished by public indictment); and (3) that he or she be afforded the opportunity to surrender and capture before a preventive strike is justified.

To begin explaining our rationale, we must answer the question: Why would knowing the identity of the target be so important? This criterion is linked to the *jus in bello* principle of distinction, and a direct reaction to the U.S. policy of signature strikes. Take, for example, one such "signature" drone strike made on August 29, 2012, in the village of Kashamir, Yemen. According to Human Rights Watch (2013), this strike appears to have killed three al-Qaeda in the Arabian Peninsula (AQAP) militants and two civilians, described as "pillars of the community." These two men were Salim Jaber, a cleric who preached against violent Islamist militancy, and his cousin Walid Jaber, one of the village's police officers. The scenario appears to have been that the three AQAP militants had traveled to the village to seek out the cleric and challenge his preach-

ing against them. Perhaps they intended to do him harm, but the drone killed all of them when they met together. The result of this strike was three dead militants whose actual threat to the United States remains unknown (which raises concerns of necessity), and two civilians whose deaths cause immeasurable damage to the fabric of the local community.

Killing a local cleric who both preached against terrorism and was an ally in the fight against AQAP has arguably done more harm to American security than the threat those three unknown militants may have posed. This case thus illustrates the lack of discrimination and necessity that exists with signature strikes. One could find many problems with such a strike—it is difficult for a drone operator in the Nevada desert to determine who is civilian and who is a militant posing an imminent threat, for example—but what is clear is that if a more restrictive notion of last resort that rejects targeting individuals based on a suspicious "signature" been in place, this strike would never have occurred.

Assuming, then, the just use of preventive force is contingent on identifying a legitimate target, what conditions need to be satisfied to determine a legitimate target? One could imagine post-hoc justifications. In 2002, Qaed Senyan al-Harthi, an alleged al-Qaeda leader and mastermind of the U.S.S. *Cole* bombing, was killed in the first purported CIA drone strike outside a declared war zone in Yemen. Kenneth Roth, executive director of Human Rights Watch, did not criticize the killing in his official report because it appeared that al-Harthi was a combatant and reasonable attempts at capture had failed (indeed, eighteen Yemeni police had been killed trying to capture him). The report was nevertheless critical of the U.S. government because the government "made no public attempt" to justify this use of force (Roth 2003). While some scholars suggest that after-the-fact justifications are the best way to assuage the tension between national security and transparency (Walzer 2007; Tesón 2012), we argue that justification must happen before preventive use of force becomes a viable alternative. While we accept portions of the just war paradigm, namely that preventive drone strikes may be just under certain, restricted circumstances, the moral significance of the hybrid-law model rests on adapting key elements of the law enforcement paradigm as well—namely the presumption of innocence and due process.

Our view of last resort thus draws heavily upon the law enforcement paradigm. Before lethal preventive force can be justified, evidence must

be presented in a transparent manner that communicates to the public at large—domestically and internationally—the identity of a specific individual and the crime with which he or she is charged. Despite the necessities of national security, the U.S government's turn to "secret kill-lists" and/or public most-wanted lists without publicly disclosed evidence has cast doubt over the CIA drone program, especially where the lack of transparency and sufficient moral checks has opened the way for ever-expanding target lists. Rather than adopting a notion of lagged imminence, which brings the essence of last resort to the fore by recognizing there is time for nonlethal measures to be undertaken, the government has viewed terrorism through the lens of perpetual imminence and thereby legitimated expanding kill-lists to include targets of opportunity, punitive strikes, signature strikes, and strikes to deny safe haven. As discussed in other chapters of this volume, what initially began as the selective and sparse targeted killings of alleged terrorists in 2002 became an expansive preventive drone campaign that had, by 2010, massive human rights consequences and a significant impact on international norms regarding the use of force. While the number of strikes has diminished since 2012, there is no guarantee an increase would not occur should another 9/11-type attack occur.

To avoid the impetus toward target expansion and its negative consequences, which the perceived technological advantages of drones could, in fact, augment, we propose that preventive drone strikes require a formal indictment or trial in absentia of prospective targets. At such public hearings, evidence must be presented before a grand jury.[9] Although this might appear to be an overly restrictive process that would appear too onerous in a counterterrorism setting, such restrictions have been used in combatting terrorism in the past.

For example, after the 1998 embassy bombings in Kenya and Tanzania and following a comprehensive law enforcement investigation, twenty-one men were indicted by grand jury in New York City.[10] Nine of these men were captured and tried in U.S. civilian courts and are either serving life sentences or still awaiting trial. Only three of the men remain fugitives (most prominently Ayman al Zawahiri); the remaining were killed in various incidents (some were killed in drone strikes; others died in Afghanistan, Somalia, or Pakistan). In addition, in the wake of the U.S.S. *Cole* bombing in 2000, the U.S. Department of Justice in-

dicted two of the alleged masterminds on May 15, 2003—Jamal Ahmad Mohammad Al Badawi and Fahd al-Quso (Ashcroft 2003). Al Badawi was captured by Yemeni forces and was eventually released for unknown reasons, yet he remains on the FBI's most wanted list with a $5 million bounty (BBC News 2007). Al-Quso was killed in a CIA drone strike in Yemen on May 6, 2012 (*Guardian News* 2012).

Admittedly, both indictments came in the wake of terrorist attacks against the United States, before the advent of armed drones, and prior to the heightened perceptions of threat that followed 9/11. However, this should not diminish the importance of the indictment process, which can curtail the facile use of preventive force by drones. Moreover, the perception of perpetual imminence that followed 9/11 and imposes the war paradigm on the in-between spaces should not be permanent. It is important to note that an indictment need not be post-facto in nature (for example, after a major attack). Intelligence gathering and cooperation with allies can help identify individuals who might pose a current threat, while members of al-Qaeda who come into leadership positions might also be indicted. Note that even though the indictment process falls short of what is required by the law enforcement paradigm (because an indictment does not warrant execution), it nevertheless reduces the level of killing permitted under the laws of war paradigm by restricting drone strikes to specific individuals who are indicted. But who are these individuals? And what makes them liable to consideration for a preventive drone strike?

The purpose of an indictment process is to disaggregate the image of the enemy into those who are part of the terrorist organization but do not pose an immediate threat (such as low-level militants against whom law enforcement mechanisms must be employed) and those who pose an *ongoing demonstrable threat* and against whom limited preventive force can be used. There is an obvious difference between a driver and a bomb-maker, or between a foot soldier and a prominent leader of al-Qaeda. But what exactly does posing a demonstrable ongoing threat mean? Drawing from the law enforcement paradigm, we can say that the fact that an individual has previously participated in a criminal act does not justify killing him or her. This would be summary execution. Rather, threat is measured by an individual's active role in planning and seeking to carry out future attacks. Evidence of such intentions must be gained

by ongoing intelligence gathering, which is enhanced by cooperation among concerned states. We return below to how indictments lay the groundwork for a just drone strike, but before we do so, it is important to state that indictment alone is not sufficient to justify a preventive targeted killing.

Claire Finkelstein (2012) argues that the permission to use preventive force is linked to the legitimacy of issuing a threat to use force that can be acted on *only* if the suspect does not surrender or cannot be captured. Stated differently, when engaged in a nontraditional combat operation in between law enforcement and war, states have a duty to pursue capture, but retain the right to use force if capture is impossible. This stance reflects a blending of the law enforcement and just war paradigms: a state does not have the right to kill any combatant, but only specific individuals who are threats, while these individuals have the right, as per law enforcement, to due process. It is, of course, unlikely that individuals will simply turn themselves in, meaning law enforcement agents or Special Forces units may need to be employed (or ruled out). As Finkelstein concludes, "When the threat is ignored, and the duty to capture cannot be met in other ways, it is then permissible in some cases to follow through on the threat" (2012, 182).

The United States has often stated a preference for capture, as Obama articulated in his 2013 speech at National Defense University: "America does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate, and prosecute." However, the perception of perpetual imminence reduces the commitment to capture. While there are clear limitations on capture due to rugged terrain and risk to civilians or law enforcement agents, the belief in perpetual imminence emphasizes a problematic framing of the terrorist threat, wherein a state must take advantage of "windows of opportunity" to eliminate a perceived threat before it materializes (Brennan 2012). The belief that if one does not strike now, the window of opportunity will be closed indefinitely involves an opportunistic view of preventive force that undermines the commitment to capture and the very notion of last resort.

The importance of the duty to capture and the challenges of viewing drone strikes through an elusive notion of "windows of opportunity" are highlighted in the Human Rights Watch (2013) account of the April

17, 2013, drone strike in Yemen that killed an alleged local AQAP leader, Hamid al-Radmi. Residents and security officials said that al-Radmi could have been arrested at any time after he returned to Wessab, Yemen, in 2011, upon his original release from prison. "He was in my office all the time and I could even have gone to his house to arrest him," said one ranking security officer in Wessab who knew al-Radmi. Yet there was never a call for al-Radmi's arrest from the Yemeni or American government. While some government officials argued that his capture would have been impossible, al-Radmi's cousin was critical of this view. Had authorities sought the family's help, he claims, they would have tried to turn al-Radmi over to local authorities. Because relatives play an important role in administering justice in Yemen's tightly knit family and tribal system, such an option is not out of the realm of possibility.

Indeed, failing to pursue such options had negative consequences. One cousin, an elderly farmer named Muhammad Ali Saleh, claims that the killing turned al-Radmi into a martyr:

> They should have taken him to court, brother. Charge him and keep him in prison and even hang him there up and down every day but not kill him like that if he committed a crime. Now people are crying about him everywhere. What does that accomplish? (Human Rights Watch 2013)

The killing of al-Ramdi by a U.S. drone thus begs two distinct questions: When did the window of opportunity for a targeted strike close? And when did the window of opportunity for capture close? There is no easy answer to either question. However, by viewing the threat of terrorism through the lens of lagged imminence, it is reasonable to think that the window of opportunity to kill is much larger than the United States perceives it to be in most cases.

The Hamid al-Radmi case showcases several steps that could have be taken to demonstrate a genuine attempt to capture. First, the case highlights the importance of a public indictment and of providing the possibility for surrender as criteria for last resort. An indictment would have opened a clear window of opportunity for capture by alerting local authorities to the legal justification for arresting the al-Radmi, while also affording him the opportunity to surrender (or convincing his relatives to turn him in). Second, it demonstrates the significance of coopera-

tion with local authorities. When a suspected terrorist's wanted status is made known through indictment, channels of cooperation with local authorities are opened and can be exploited to attempt to capture these individuals. Finally, public indictment broadens the window of opportunity for capture because the legal process makes an immediate drone strike in response to perceived perpetual imminence impossible.

## Two Cases: For and Against Preventive Drone Strikes

In order to demonstrate how the principle of last resort might function, we turn to two cases in which the individuals targeted had been indicted for their roles in the 1998 U.S. embassy bombings in Kenya and Tanzania and were therefore known to have ties with al-Qaeda. However, the level of ongoing threat and the feasibility of capture differed in each case.

The first case involves a situation in which the threshold of last resort was not crossed. In October 2013, on the streets of Tripoli, Libya, American troops, assisted by FBI and CIA agents, seized Abu Anas al-Libi, who had been indicted for his alleged role in the embassy bombing in Kenya and was a suspected leader of al-Qaeda. In 2000, New York prosecutors had charged him for his role in conducting "visual and photographic surveillance" of the United States Embassy in Nairobi in 1993 and again in 1995.[11] Prosecutors said in the indictment that "Abu Anas had discussed with another senior Qaeda figure the idea of attacking an American target in retaliation for the United States peacekeeping operation in Somalia" (Kirkpatrick, Kulish, and Schmitt 2013). Despite al-Libi's indictment for a past crime, it was not immediately justifiable to kill him because it was disputed whether he was continuing operations with al-Qaeda or had renounced his membership. Insofar as he was not considered to pose an ongoing threat, the preventive use of lethal force was not permitted. Thus, the window of opportunity for capture was prolonged, and in 2013, Abu Anas al-Libi was captured on the streets of Tripoli, Libya and brought to the United States for trial. While awaiting trial in New York City, he passed away from complications due to liver disease caused by hepatitis C (Deinst and Windrem 2015).

In the second case, the threshold of last resort was crossed, in that the targets posed an ongoing threat and capture was deemed unfeasible. On January 1, 2009, a predator drone strike killed two al-Qaeda mili-

tants in Pakistan's tribal areas. The two men killed were Kenyan citizens: Usama al-Kini, described as al-Qaeda's chief of operations in Pakistan, and his lieutenant, identified as Sheik Ahmed Salim Swedan. These two men were indicted in 2000 along with Osama bin Laden for their roles in the 1998 embassy bombings. While the two were on the run for nearly a decade, the United States gathered reliable intelligence that detailed their continuing role in future terrorist plots. Even if we were to grant that an al-Libi–type extraction would have been unlikely to occur because the risk this would pose to civilians, law enforcement agents and/or Special Forces was deemed too great, the opportunity to surrender was still present given a public indictment. These suspects knew that they were wanted and targeted (as did local authorities who were, for whatever reason, unable to pursue them over a substantial period of time), yet they continued to engage in activities that posed an ongoing threat. They were "suspected of overseeing" a September 2008 "deadly suicide bombing at a Marriot hotel in Pakistan's capital," and it could also be inferred, based on their continued allegiance to al-Qaeda, that they were plotting additional terrorist activities (Schmitt 2009). This particular drone strike crosses the threshold of last resort as we have delineated. These men were known to be wanted because evidence had been presented against them through an indictment by grand jury. They were deemed to pose a demonstrable, ongoing threat given their patterns of activity and through updated, reliable intelligence. By virtue of being publicly indicted, they were afforded an opportunity to surrender, while the ability to capture them was severely compromised by the geographical location in which they resided. Although one could imagine prolonging the window of opportunity for capture, last resort, as we see it, does not require doing so.

## Conclusion

In order to address the moral obscurity that permeates the in-between spaces where drone strikes take place, we have laid the framework for a theory of last resort for *jus ad vim*—a hybrid law—just war paradigm calibrated for the use of limited preventive force. Current paradigms for preventive force against non-state actors are either too restrictive (law enforcement) or too permissive (international humanitarian law, or the Laws of Armed Conflict). Our discussion of last resort draws from both

the law enforcement and just war paradigms and represents an attempt to delimit the ethical guidelines for using preventive force on a limited scale. As argued elsewhere in this volume, the legal application of such a principle poses other challenges. However, the principle of last resort for *jus ad vim* is a key element of a more restrictive moral paradigm calibrated to the use of limited force and justification for drone strikes.

Throughout our chapter we have focused on the use of limited preventive force short of war outside the traditional battlefield. We have asserted that preventive drone use aims to *avoid* a larger war. On the one hand, despite being highly controversial, drone strikes in the in-between spaces of Yemen and Pakistan, have succeed in helping to avoid a larger preventive war. On the other hand, their preventive use has resulted in a sustained—perhaps even perpetual—low-level conflict that has serious human rights implications for civilian population living under drones, as illustrated by Sonnenberg in Chapter 5 of this volume. While the current use of drones by the United States in these contexts does not represent a slippery slope toward preventive war—no one believes that Yemen or Pakistan would go to war with the United States over drone strikes—it does raise questions about whether preventive drone use may lead to an escalation of violence by setting a dangerous precedent for the preventive use of limited force as other countries develop and start to employ similar technologies. This is why developing a clear notion of last resort, in our view, is essential.

The responsibility for deciding when the threshold is crossed ultimately rests in the hands of statesmen and military leaders, but if last resort is to have meaning, then the threshold may be crossed only with "reluctance and trepidation," as Walzer (2004) writes. The three criteria of last resort we delimit—public indictment of a specific individual, demonstrable ongoing threat, and duty to capture—provide the vocabulary for critical reflection on preventive drone strikes on a case-by-case basis. While not ruling out preventive strikes entirely, the principle of last resort challenges the Obama administration's morally problematic default assumption that targeted killings are just, simply by nature of the enemy the United States faces and the presumed accuracy of drones. Our view of last resort marks an attempt to circumscribe the dangerous precedent regarding preventive force set by the United States discussed elsewhere in this volume and represents a critical point of departure for a discussion

about how other states contemplating the use of preventive force on a limited scale morally evaluate their options. Ultimately, the United States should seek to reach a state of *jus post vim* by closing these in-between spaces through a continued emphasis on strengthening local law enforcement capabilities rather than risk resorting to preventive force.

NOTES

1 We use the term "drone" to reflect the terminology now commonly used in the media and in public speeches by U.S. officials, although other terminology, including "unmanned aerial vehicle" (UAV), is frequently employed in military circles.

2 For a more robust discussion on the debate of the legitimacy of preventive measures, see Buchanon and Keohane (2004) and Reichberg (2007).

3 The ethical framework of *jus ad vim* is not without its critics. Prominent philosopher C. A. J. Coady's (2008) main critique of *jus ad vim* is that it dangerously lowers the standards of last resort from the traditional *ad bellum* framework, which is why in this chapter we seek to establish a clear standard of last resort *ad vim*. Thus, we examine how the principles of *jus ad vim*, in particular a revised notion of last resort, can shed light on the question of a just preventive drone strike.

4 Take, for example, a case in 2012 in Yemen where a combination of cooperation with local authorities, increased security conditions after unusual "chatter" on the airways, and good old-fashioned double agents infiltrating the ranks of al Qaeda led to the unmasking of a terror cell planning attacks on Western targets and the dismantling of a local terrorist cell. What is significant about this case is that an effective law enforcement system was capable of apprehending the suspected terrorists. This may not always be feasible for the in-between spaces where the reach of law enforcement is limited. See Harris 2012.

5 For example, the two al-Shabaab members who were killed by Kenyan police as they attempted to bomb a power station in the town of Mandera in May of 2014. See Wabala and Otsialo 2014.

6 A transcript of the congressional hearing entitled "Rise of the Drones II: Examining the Legality of Unmanned Targeting" can be found at http://www.fas.org/irp/congress/2010_hr/drones2.pdf.

7 The United States has pointed to these characteristics as a justification for using drones (Brennan 2012). Also, Avery Plaw and João Franco Reis in Chapter 9 of this volume discuss countries deemed unwilling or unable to stop terrorism within their borders in relation to the evolution of customary law. David Glazier in Chapter 6 believes the unwilling or unable distinction to be an over-simplistic formulation that significantly misstates the law.

8 The development of our ideas was deeply influenced by Henry Shue's (2007) discussion of preventive force. While not discussing drones explicitly, Shue reaches four necessary conditions, the first three of which have important implications for preventive drone strikes. The attack must be: limited to the direct elimination of

the threat, undertaken only when military action is urgent, based on solid intelligence, and be substantively multilateral.

9 Due to space constraints, we leave aside questions regarding who should preside over such deliberations. Ideally, responsibility should fall with international organizations; individual state claims uncorroborated with clear evidence should be met with suspicion.

10 *United States v. Usama bin Laden et al.*, S(9) 98 Cr. 1023 (LBS) (New York, 2000), http://cns.miis.edu/reports/pdfs/binladen/indict.pdf.

11 A full copy of the indictment of Abu Anas al-Libi can be found under "Grand Jury Indictment of Abu Anas al-Libi," *New York Times*, October 5, 2013, http://www.nytimes.com/interactive/2013/10/05/world/africa/06libya-document.html?_r=0.

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