Going Medieval: Targeted Killing, Armed Conflict, and Self-Defense

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This article explores the legality of the U.S. policy regarding the targeted killing of suspected terrorists/insurgents in states in which the U.S. is not openly engaged in armed conflict, and examines some of the arguments that have been advanced in defense of the policy. The argument is made here that the policy is likely not legal under current mainstream understanding of international law. But more importantly, I argue that the U.S. policy and its justifications tend to implicitly resurrect old principles and ideas, some dating back to the medieval period, which are not consistent with the theoretical rationales underlying the modern positivist international law regimes governing the use of force and armed conflict. In particular, the policy threatens to undermine the strict constraints on the use of force by states established with the U.N. system, and the principle of distinction designed to protect civilians in the conduct of armed conflict, which is fundamental to the international humanitarian law regime.

The Policy and its Justifications

The policy that is the focus of this discussion is that of the deliberate targeting and killing of individuals by government agents on the basis of suspicion that the targets are involved in activities judged to be threatening to the United States. Such activity is typically said to constitute involvement in the planning and perpetration of terrorist attacks, though it also clearly includes involvement in the insurgency against the government in Afghanistan, from the tribal areas of Pakistan. While the issue being addressed here is the targeted killing of individuals outside of the theatres of armed conflict in Afghanistan and Iraq, where U.S. forces are clearly participating as belligerent forces, it is instructive to note that it has been suggested that individuals engaged in the narcotics trade in Afghanistan could be targeted under this policy. Similarly, the American Imam Anwar al-Awlaki was placed on a target list before it was publicly suggested that he had done more than incite others to act violently. Moreover, as discussed below, to the extent that the term "unlawful enemy combatants" is employed as a basis for targeting, persons could be killed for merely providing material support to terrorists.

The use of missiles fired from drones as the weapon of choice in pursuing this policy is not central to this analysis. The abandoned plan to use CIA hit squads to effect the policy

would have raised many of the same issues, and led to much the same analysis, though the use of missiles as opposed to a sniper does affect to some extent the analysis of the use of force issues under *jus ad bellum* regime. Moreover, the use of the CIA as the agency that is executing the policy is relevant to the international humanitarian law analysis. It should also be noted that while the policy is new in some of its aspects, it is not unprecedented, and it is helpful to return to examine the Phoenix Program during the Vietnam War, and the Congressional study of that program.

While it remains technically a covert operation, the U.S. has provided two justifications for its policy of targeted killing. The first is that the U.S. is in an international armed conflict with Al Qaeda and other forces associated with it, and thus the members of such groups are combatants and legitimate targets under international humanitarian law (IHL). This suggests that the targeting is based entirely upon membership in a group, and the status of combatant arising from such membership, such that members of the associated groups could be targeted anywhere in the world. The second justification offered is that, in any event, the U.S. is entitled to use lethal force against such persons as an exercise of the right of self-defense. This suggests, though Harold Koh did not make it explicit, that the targeting constitutes a use of force justified by the right of self-defense in Article 51 of the U.N. Charter.

There is a growing literature that argues in support of each of these main justifications. As will be explained below, I argue that several of these arguments depend on the acceptance of principles that are not yet accepted in international law. Some scholars such as Ken Anderson take the arguments further, suggesting, for instance, that the use of force involved in targeted killings is indeed justified under the doctrine of self-defense, but that it does not rise to the level sufficient to trigger the operation of IHL, and so need not satisfy the limitations of that regime at all.

The Three Relevant Legal Regimes

The conduct of targeted killing implicates three distinct regimes in international law, namely: principles of *jus ad bellum* (the regime governing the recourse to war or use of force); IHL (the regime governing the conduct of armed forces within armed conflict); and international human rights law. In order to assess the legality of the targeted killing policy under international law, it is necessary to have a clear understanding of the three regimes, and the exact nature of the relationship among them. Moreover, to explore the extent to which aspects of the Policy are regressive, we need to understand some of the historical development

of *jus ad bellum* and IHL, and the development of the relationship between the two. While some areas of these legal systems remain deeply contested, what follows is a brief overview of what I understand to be the mainstream or dominant perspectives on the these regimes.

The *jus ad bellum* regime governs the justifications for using armed force. While traceable to Classical Greece, its primary origins are in medieval just war theory. There are some aspects of this theory that are important for our purposes. One is the fundamental principle that state (or Royal) authority was a necessary precondition to the legitimate use of force, thereby developing the reality of state monopoly on the legitimate use of force. Another is that with Grotius and the development of the law of nations, came the idea of war as a legal concept, a state of relations that triggered specific laws and displaced or suspended the operation of other legal regimes. A third area of the body of just war theory from the Grotian period relates to the distinction between a narrow right of self-defense under natural law, and the more expansive notions of defensive war articulated by Grotius himself. While the former was limited to responding to an immediate threat for self-protection, the notion of defensive war extended to the use of force to defend against future threats, and even to punish past attacks.

By the nineteenth century, just war theory and the Grotian school on the laws of war had lost virtually all influence on the practice of nations. A combination of Hobbesian and Machiavellian perspectives shaped a *realpolitik* perspective that viewed the use of force as a policy tool the use of which was entirely justified to advance national interests. There was essentially no international law imitation on the resort to war (though there were principles governing the scope of measures short of war). It was only at the end of the nineteenth century that a new movement developed to reintroduce legal limits on the recourse to war. These developments reflected an effort to increasingly strengthen the legal limitations on the use of force, culminating with the establishment of the U.N. system after World War II. The U.N. system, as is well known, prohibits the threat or use of force against the political independence or territorial integrity of other states, or in any other way inconsistent with the principles enshrined in the Charter. The Charter provides for two general exceptions to the prohibition, being the right of individual and collective self-defense, and the use of force in collective security operations authorized by the U.N. Security Council.

There are a number of aspects about the modern system that are important to note for the purposes of our analysis. First, in contrast to the early twentieth century efforts to renounce or limit the recourse to war, the U.N. system prohibits all use of armed force. This was in response to the evolution of fine gradations between "war" as a legal state of relations, and various

measures short of war, with states attempting to avoid the legal limitations on war by arguing that their impugned use of force constituted measures short of war, all of which was viewed as having contributed to the onset of World War II.

Second, the system represented an attempt to develop a full-fledged collective security system, both with the use of force authorized by the Security Council to restore or maintain international peace and security, and the notion of collective self-defense, which would permit states that were not the object of aggression to nonetheless use force against an aggressor in defense of the victim. This represented a further move away from the rules of the earlier *jus ad bellum* regime, in which the recognition of a state of war would trigger laws of neutrality.

Finally, the individual right of self-defense articulated in Article 51 of the Charter is much closer to the narrow natural law right than the medieval notions of defensive war. It permits the use of force only in response to an armed attack, or at most in anticipation of an imminent armed attack already in motion. ICJ decisions suggest that an armed attack sufficient to trigger this right of self defense involves a substantially greater use of force than the use of force that is subject to the prohibition in Art. 2(4) of the Charter. Finally, it has been held that the use of force in self defense is available against states, but not non-state entities as such. At most, the state Oceania may use force against another state that has supported or facilitated non-state entities in launching an armed attack Oceania. The use of self-defense is also, of course, strictly governed by the principles of necessity and proportionality, by which is meant that the use of force must be the only way to prevent the continuation of the attacks, and the force used and injury thus caused must be proportionate to the harm that would likely result if further aggression is not prevented. In sum, the *jus ad bellum* regime of the U.N. system completed the development of rules to significantly constrain the state use of force and reduce the incidence of armed conflict, and it did so with a marked departure from some of the earlier principles that had dominated thinking on the institution of war.

Turning to *jus in bello* or IHL, this international law regime governs the conduct of armed forces within armed conflict. It both immunizes the violent and deadly conduct that would otherwise be illegal under domestic and human rights law, and also imposes limits on the scope and nature of the violence. This body of law was initially not distinct from the *jus ad bellum* regime. Indeed, the idea that some segments of the population should be excluded from combat was initially a principle of just war theory. Moreover, as immunities and rights for combatants developed in the late medieval period, the prevailing view was that only the forces fighting for the side with just cause enjoyed the rights and protection of such laws. Those

fighting for the unjust side enjoyed no such immunity, and beyond the narrow natural law right to use force in personal self-defense, their violent acts were to be treated as the conduct of murderers and brigands. It was only in the seventeenth century that the idea began to take hold that, under the emerging law of nations, both sides ought to enjoy the same rights and obligations. And it was only in the nineteenth century that *jus in bello* became a fully developed system logically separate from the *jus ad bellum* regime.

This new legal regime, which by the beginning of the twentieth century had a clearly defined objective of minimizing the suffering in war, was nonetheless founded on two fundamental ideas that co-existed in constant tension, namely that there ought to be constraints placed on how military forces could fight and in particular who they could target on the one hand, and on the other hand the notion that there should be legal authority for the use of deadly force by legitimate armed forces in the pursuit of valid military objectives in war. These twin ideas are married with the overriding objective in a fundamental principle that animates the entire regime, which is the principle of distinction – that is that belligerents must maintain the distinction between civilian and military targets, and between combatants and civilians.

The modern IHL regime also distinguishes between two different kinds of armed conflict, an issue that has some relevance to our analysis. The Geneva Conventions and their Additional Protocols contemplate international armed conflict and non-international armed conflict. International armed conflict, which is an armed conflict among states (or more precisely, as a principle of treaty law, among state parties to the treaty), while "armed conflict not of an international character", refers to conflicts occurring within the territory of one state. Subsequent jurisprudence has further defined non-international armed conflict as being characterized by protracted armed violence of significant intensity and duration, between governmental authorities and organized groups, or among such groups, within the state. To complicate matters further, there will be armed conflicts which have elements of both – for instance where the armed forces of State A are fighting the government of State B, alongside the forces of an insurgency within State B, a situation that arose in Afghanistan in 2002, and to some extent exists in Libya today.

The IHL regime is more elaborate in its articulation of rules governing the conduct of armed forces in international armed conflict than for non-international armed conflict. Moreover, it is only in international armed conflict that "combatants" have a formal status, to which attach numerous rights and obligations, including the right to be treated as a prisoner of war, while in non-international armed conflict the term "combatant" is simply used to describe

persons who are members of the armed forces of a party to the conflict (other than religious and medical personnel), in contrast to civilians. Nonetheless, in both forms of armed conflict the principle of distinction remains paramount, for which reason there remains a bright line between civilians and combatants. Attacks may not be directed against civilians unless and for such time that the targeted civilians are directly participating in hostilities. The temporal and physical scope of that limitation is the subject of considerable debate, as will be discussed further below. Also relevant to the use of drone technology, is the obligation on the armed forces of belligerents to do everything possible to minimize injury to civilians in attacks on military targets. Here the principles of necessity and proportionality are again applied, though the application is different from that in the *jus ad bellum* regime. In fulfilling the obligation to minimize harm to civilians, commanders must assess the military necessity of striking the target in question, and assess the proportionality of the importance of the military objective of doing so as compared to the likely magnitude of the incidental harm to civilians.

The relationship between the *jus ad bellum* regime and IHL is crucially important to the issues raised by targeted killing. While they were once closely related, they are now for most purposes entirely independent and distinct. This separation is crucial to the principle of equality inherent in IHL, meaning that the rights and obligations apply equally to the armed forces of all belligerents regardless of which side ultimately has legal authority to use force under the rules of *jus ad bellum*. And that principle of equality and independence from *jus ad bellum* is considered essential to achieving the ultimate objective of maximizing adherence to the rules of IHL for the purpose of reducing the amount of suffering in armed conflict. This independence means that the armed forces of an aggressor state may nonetheless adhere scrupulously to the rules of IHL and enjoy all of its protections, while the forces of the legitimately defending state may be nonetheless guilty of war crimes committed in the process – the fact that a state is the aggressor cannot justify the disregard for the rules of IHL in the treatment of that state's armed forces.

Having said that they are largely independent, however, there is nonetheless some continuing relationship between the two. In particular, where there is a use of force against or within another state in the sense captured by Art. 2(4) of the U.N. Charter, it seems clear that the action constitutes either the initiation of or an act within an ongoing international armed conflict (or in some circumstances a non-international armed conflict), to which the rules of IHL will apply. Put another way, if the use of force is one to which the rules of *jus ad bellum* would apply, or for which *jus ad bellum* is relied upon for justification, then it is a use of force

to which the rules of IHL will also apply. And when force is used by a state, considerations of both *jus ad bellum* and IHL will have to be considered for the purposes of determining its legality. This principle was clearly reflected in the *Advisory Opinion on the Threat or Use of Nuclear Weapons*. We will return to this argument further below.

Turning to the third regime, that of international human rights law, much less need be said here. Human rights law as it exists today is a much more recent development in international law. The key rights implicated by the policy of targeted killing is that of the right to life, together with a number of international law prohibitions against extra-judicial killing. The right to life and to the protection from the arbitrary deprival thereof in the International Covenant on Civil and Political Rights (the ICCPR), is a non-derogable right. While the United States and some other states take the position that the ICCPR does not apply outside of its territory, that is not an interpretation shared by the Human Rights Committee, and in any event must surely apply to U.S. actions towards its own citizens such as Awlaki. Similarly, when the U.S. is operating in cooperation with local authorities in the killing, the human rights obligations of the local government are certainly triggered, and the human rights of the victims are certainly being violated. In addition to the international human rights provisions, the domestic criminal law and constitutional rights that obtain in the territory in which the killing is conducted have to be considered. Finally, the prohibitions on extra-judicial killing are not territorially limited.

The relationship between human rights law and IHL remains a complex and contested one, and is key to the question of whether and to what extent human rights considerations should apply to the targeted killing policy. IHL is a *lex specialis* that is triggered by the existence of an armed conflict, and at least to some considerable extent it displaces the operation of domestic criminal law and human rights law. Nonetheless, it has been held that human rights law can operate to fill in the lacunae remaining in the IHL regime, and in some circumstances has been held to run in parallel with some rules of IHL. Thus the European Court of Human Rights has held Russia liable for a violation of the right to life in the context of military operations in Chechnya. Similarly, the ICJ has held that human rights law can operate alongside IHL, and that human rights protections do not entirely cease in time of war. Of course, where IHL is determined not to apply, then international human rights law and domestic criminal law will of course operate to govern the conduct in question. Targeted killing cannot be said to occur in some legal black hole.

Targeted Killing - Self-Defense and Armed Conflict

We now turn to a more specific analysis of the targeted killing policy within the context of these three legal regimes. Some of the ramifications of the policy arising from the foregoing discussion will already be quite obvious. I will begin with the proposition that the targeted killing with drones is justifiable as an exercise of the right of self-defense. From an international law perspective (in contrast to some of the domestic law arguments made by Ken Anderson), this is presumed to be a claim based on the application of principles of *jus ad bellum* – that is, the right to use force in response to an armed attack. As indicated above, armed attack, for the purposes of Article 51 of the U.N. Charter, constitutes a significant use of force against the state. Some accept that self-defense may also be invoked in response to an imminent threat of armed attack ("anticipatory self-defense"), in addition to the use of force in response to an armed attack that has already occurred. The principle of necessity element of the concept of course requires that the response to the armed attack be predicated upon the need to prevent such attacks from continuing into the future.

Each incident of targeted killing, in Somalia, Yemen, Pakistan, and elsewhere, cannot be justified as an independent act of self-defense under this *jus ad bellum* principle. Each killing has not been in response to or in anticipation of an imminent act that would amount to an armed attack against the U.S. Rather, to the extent that self-defense can be relied upon, it has to be on the basis that the strikes collectively constitute a response to an armed attack. But which armed attack? One argument is that it is a response to future attacks. Some scholars, such as Chris Jenks, argue that the killings can be justified on the basis of a preemptive or preventative conception of self-defense, a principle formalized in the so-called "Bush Doctrine." But that is not a principle that has found favor in the international community and is not part of established customary international law.

Another argument is that the strikes can be reasonably understood as an ongoing use of force in response to the armed attacks on the U.S. on 9/11. However, the use of force beyond the theatre of Afghanistan, against persons with ever more tenuous links to the perpetrators of 9/11, ten years after the fact, begins to look increasingly dubious under that justification. Moreover, this runs into objection that *jus ad bellum* does not contemplate the use of force against non-state entities. The established view is that force can only be used in self-defense against the state that is harboring, supporting or facilitating the armed attacks being launched by non-state entities from within its borders. The use of force in self-defense has been held by the ICJ, in more than one case, to be limited to actions against states – either states that have

themselves launched armed attacks, or which have supported and harbored non-state entities that have mounted armed attacks from within the state's territory. The use of force in self-defense cannot be directed at and justified by reference to non-state entities as such. It must also be understood that missile strikes against suspected terrorists or insurgents within these states, under the justification of self-defense, and even if argued to be directed against the members of the non-state entity rather than the harboring state, constitutes a use of force against the territorial integrity of that state. None of Pakistan, Yemen, or Somalia, harbored or supported in any meaningful way the perpetrators of the 9/11 attacks against the U.S. at the time the attacks were launched. To the extent that they are doing so now, and that there is evidence that those entities are planning further such attacks, then the use of force against those entities within the harboring states, thus constituting a use of force against the territorial integrity of those states, could be justified as self-defense. But broadening the scope to all persons in organizations "associated" with Al Qaeda, and beyond states that are clearly harboring and facilitating their activities, arguably goes well beyond this narrow justification.

Finally, a third argument is that that drone attacks in Pakistan are in self-defense against attacks against U.S., Afghan and coalition forces engaging in the counter insurgency armed conflict within Afghanistan, by forces being harbored within Pakistan. That of course does not explain the strikes in Yemen or Somalia, but in the context of Pakistan, this argument would suggest that either the U.S. is using force against Pakistan, and is thereby engaged in an international armed conflict with Pakistan, or it is using force with the consent of Pakistan in a non-international armed conflict within Pakistan. I will take this point up again below, but to the extent that there is a significant difference between the organizations that are engaged in armed conflict with the Pakistani regime within Pakistan, and the members of organizations that the U.S. is targeting for their activities in Afghanistan, the argument that the U.S. is merely assisting the Pakistani government in its non-international armed conflict is tenuous.

In the context of the claim that Pakistan and Yemen have consented to the drone strikes, the argument has been made that there is an emerging norm that permits the use of force within the territory of a state but not against the state itself, as a form of law enforcement against transnational non-state entities such as terrorist organizations. It remains a controversial idea that a government can "consent" to the use of force against the state, given that the prohibition on the use of force is considered by most to be a *jus cogens* norm. Where the use of force is such that it would infringe the political independence of the state, arguably it cannot be legitimately consented to. But the argument advanced on behalf of the policy is that it is not

against the state, but on behalf of the state as against non-state entities operating within the state. Again, however, unless there is a non-international armed conflict in process within that state (and one that has not risen to the level of recognized civil war), for which purpose third states may provide military support to the government, it is unclear that such interference is permissible. For as we will return to below in the IHL analysis, if a government consents to the killing of individuals within its territory outside of the context of non-international armed conflict, the third state doing the killing is in some respects stepping into the shoes of the sovereign within that state, and has no greater authority to kill those individuals than the sovereign would. If the U.S. government could not extra-judicially kill members of an outlaw militia group operating in Texas, how does the Mexican government have the authority to do so with the consent or acquiescence of the U.S. government? And if the situation is indeed one of non-international armed conflict, in which case the internal use of force is justified and external intervention on behalf of the government is permissible, then the use of force by the third state cannot be characterized as an exercise of self-defense in any event, since it is simply acceding to a request for assistance with operations against insurgents in a non-international armed conflict.

Harold Koh's articulation of the justification of the policy on the grounds of self-defense implied that it was an alternative argument, which would legitimate the conduct regardless of whether the targets were combatants in an armed conflict with the U.S. Similarly, Ken Anderson has argued that the use of force employed in the targeting, while it can be justified under the concept of self-defense, does not rise to a level sufficient to trigger the rules of IHL, and that the U.S. should avoid reliance upon IHL justifications. Both of these arguments, it is submitted, misconstrue the relationship between *jus ad bellum* and IHL. To the extent that the targeted killings constitute a use of force in self-defense, they must comply with the principles of IHL. As explained earlier, if violent and deadly force is of such a magnitude that it can be characterized as a use of force for the purposes of the *jus ad bellum* regime, it is most certainly conduct to which the rights and obligations of IHL will apply. If not, then there would indeed be no immunity afforded the persons perpetrating the deadly force, for it is the principles of IHL that immunize the combatants from legal liability for their use of deadly force. Conversely, if the use of force, such as the killing of persons in the course of a criminal enterprise or other local disturbance within a state, cannot be characterized as either international armed conflict or non-international armed conflict to which the rules of IHL would apply, then it would seem apparent that it would not be possible to make recourse to the principles of *jus ad bellum* for the

purposes of characterizing or justifying the force used. That is the nature of the relationship between the two regimes.

We turn next to the argument that the U.S. is engaged in an armed conflict with Al Qaeda and its affiliated organizations, and that the members of this group of loosely and broadly defined non-state entities are thus combatants who may be legitimately targeted by the U.S. This argument has both IHL and *jus ad bellum* components and implications. I will take up the IHL aspects of this argument in the next section, but here let us examine the *jus ad bellum* assumptions underlying the argument. This policy justification rests on the premise that it is possible as a matter of international law for states to engage in armed conflict with non-state entities. In essence, as a matter of *jus ad bellum*, this is no different from the argument that the use of force against members of Al Qaeda and affiliated organizations is justified under the principle of self-defense – for as a matter of *jus ad bellum* the only legitimate exceptions to the prohibition on the use of force are self-defense and collective security operations authorized by the U.N. Security Council. Thus, unless the U.S. government is asserting that it is in an armed conflict that is somehow divorced from and independent of all *jus ad bellum* considerations, this is really the same argument as the self-defense justification – and runs into all the same problems that were discussed above.

The key obstacle among those problems with the self-defense argument, when the argument is thus re-characterized in terms of armed conflict with Al Qaeda, is the current understanding that states cannot purport to use force in self-defense against non-state entities as such. That proposition is not without opposition of course, and even in the ICJ decisions that most clearly articulated it (the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case in particular), dissenting opinions argued that Article 51 makes no such distinction. As will be discussed further below, it may be that the *jus ad bellum* regime will have to adapt to address the pressures created by the new threats of transnational terrorism. Nonetheless, it is submitted that it is both unlikely and undesirable that it be adapted to the point that force may be used against non-state entities as such, with suspected membership in a loosely defined network of organizations as the only limiting factor in delimiting the scope of the resulting armed conflict, such that the conflict may be said to exist every region in the world in which members of the organizations may be found.

Targeted Killing - Armed Conflict, International Humanitarian Law, and Human Rights

We turn next to the related questions of whether the killing is subject to IHL; if it is, whether it complies with IHL; and if not, whether it violates human rights law. As just discussed, the assertion that the U.S. is engaged in an armed conflict with Al Qaeda and its affiliates, everywhere in the world, has little basis in the current understanding of international law. Aside from the *jus ad bellum* considerations referred to above, international armed conflict as a legal concept under IHL is similarly limited to states. Where force has been used in response to attacks by non-state entities, it has been against the states that harbored and supported them (e.g. Afghanistan after 9/11). Non-international armed conflict is defined as being protracted, localized, and sufficiently intense hostilities between a state and organized armed groups within the state, and thus that concept is of no assistance in trying to find authority for the notion of a world-wide armed conflict with Al Qaeda.

That does not of course end the inquiry into whether IHL may apply to the conduct. Under a number of scenarios the drone strikes would still be subject to the constraints of IHL, and the individual operators executing the policy could be immunized, or prosecuted, pursuant to the operation of the IHL regime. Let us take the drone strikes in the tribal areas of Pakistan as an example, given that it is the location of much of this conduct. Under the first scenario, let us suppose that the Pakistan government has not consented to or even implicitly acquiesced in the operation. The U.S. argues that it is using force against members of Al Qaeda in self-defense justified by the attacks of 9/11. Or, conversely, the U.S. argues that it is using force against Taliban insurgents responsible for attacks against U.S. and allied forces in the ongoing non-international armed conflict in Afghanistan, thus again invoking the right of self-defense. These arguments may or may not be valid. It could be determined later by the ICJ or some other tribunal that these strikes could not be so justified. Or more likely, there will never be a definitive determination. Whichever, whether the strikes are an unjustified use of force constituting acts of aggression against Pakistan, or legitimate uses of force in self-defense under Article 51 of the Charter, IHL would nonetheless apply to govern the conduct.

Under the second scenario, let us suppose that the government of Pakistan has consented to the strikes. This similarly leads to two possible characterizations of the subsequent strikes. If it is determined that Pakistan is involved in waging a non-international armed conflict against the Pakistani Taliban and associated insurgent organizations in the tribal territories, then the use of force by the U.S. against those groups with the consent or at the request of the Pakistani government, is the use of force within a non-international armed conflict and is subject to the

rules of IHL, particularly the rules of Additional Protocol II of the Geneva Conventions. On the other hand, if there is no such non-international armed conflict ongoing in Pakistan, and the U.S. uses force against individuals within Pakistan with the consent or at the request of the government of Pakistan, it becomes less clear whether IHL would apply. This scenario is not, of course mutually exclusive with the one above regarding the use of force against insurgents who have attacked Afghan and U.S. forces across the border, along the lines of the scenario analyzed in *Congo v. Uganda*. But it is also possible to imagine a finding that the use of force is neither one contemplated by *jus ad bellum* nor falling within a non-international armed conflict, such that IHL would not apply.

The fact that the U.S. has never openly claimed to be a belligerent engaged in hostilities in any of the countries (outside of Afghanistan and Iraq) in which drone strikes are being conducted, whether for purposes of non-international armed conflict, or in purported self-defense in respect of insurgents being harbored by those states, of course muddies this analysis considerably. But if there is no armed conflict, and the U.S. is not using force in a manner contemplated by *jus ad bellum* and operating as a belligerent in an armed conflict, then IHL does not operate to govern the conduct of targeted killing. The local criminal laws, including the prohibition against murder, and international human rights law, specifically the fundamental right to life and the prohibitions on extrajudicial killing, would apply. The targeted killing would be unlawful under both regimes. This point highlights just how important it is for the U.S. to be able to establish that IHL does apply to this conduct, though as we will turn to next, that determination does not end the analysis.

If on the other hand IHL does apply in the particular circumstances, as it would under most of the scenarios discussed above, then the analysis of the legality of the killing would focus on the status of the persons being targeted, the process for determining their status, and the status of the persons doing the killing. Various institutional interpretations of the Geneva Conventions and judicial decisions suggest that under the most widely accepted understanding of IHL, terrorists and irregular insurgents operating within an armed conflict, whether international or non-international, are not "combatants". Rather, they are "civilians", and thus can only be directly targeted if and for such time as they are directly participating in hostilities. There is, of course, considerable debate over the precise parameters of "directly participating in hostilities", and the scope of the temporal limitation created by "for such time as". Not surprisingly, the U.S. has advanced an interpretation that is exceedingly broad, including the notion of being able to target those persons who have demonstrated a pattern of repeated

participation in hostilities, at any time. Many scholars and jurists have maintained a much narrower interpretation in the interest of maintaining the principle of distinction, and reducing the harm to civilians. The ICRC has taken something of a middle ground, by for instance recognizing a concept of "continuous combat function," but extending it only to those persons who are integrated within an organized armed force in a non-international armed conflict, and only for the time that they are so integrated. The ICRC and its aggregation of rules of customary international law relating to IHL, is nonetheless closer to the narrow interpretation end of the spectrum.

The argument that there is some intermediate category of "unlawful combatants" to which members of Al Qaeda and the Taliban might be assigned, such as has been done by the U.S. in the context of detentions, and which would attract less stringent limitations on targeting, has largely been rejected, among others by the Supreme Court of Israel. The better view is that to the extent the term "unlawful combatants" has any meaning in international law, it is simply a sub-category of civilians, being those civilians who are directly participating in hostilities, and so are neither privileged with the immunities of combatants nor fully protected as civilians by the principles of IHL. Therefore, the normal principles for targeting would apply, namely that such civilians can only be targeted if and for such time that they are directly participating in hostilities. The term "unlawful enemy combatant" (in contrast to simply "unlawful combatant") is a defined term in U.S. policy in the so-called war on terror, as being a person "who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant." The term has no meaning at all in international law, and it will be quite obvious that it would be entirely inconsistent with IHL to argue that any person who has provided material support for those engaged in terrorist activities against the U.S. or its allies could be targeted for killing.

It has also been suggested by some scholars, such as Jeff McMahan, that in cases where civilians have been participating in hostilities in an unjust cause, in stark violation of international law, then they ought to lose the protections and rights normally afforded to civilians under IHL. I will return to this argument below in the discussion of the ramifications of the policy and its rationales, but for now let it be clear that this is not accepted as being part of the current state of international law. This argument attempts to re-establish a crucial ling between jus ad bellum and IHL, in a manner that would utterly destory the fundamental principle of equality in IHL, which is in turn seen as crucial to the principle of distinction.

The second element of analysis is the process of determining who may be targeted. As reflected in the foregoing discussion, to the extent that the individuals being targeted are classified under IHL as being civilians, then before they can be legitimately targeted there has to be a determination that they are, at the time of targeting, either directly involved in hostilities, or at the very most, classified as currently fulfilling a continuous combat function. The Israeli Supreme Court has held that where there is a policy of targeting terrorists and insurgents as civilians directly participating in hostilities, there must be a transparent and independent process for assessing the targeting process on a case by case basis, pursuant to which the government can be held accountable to prove the validity of its determination after the fact. The current U.S. policy is covert and lacks any transparency or accountability, and there is no evidence that the determination of targets is conducted by any agency or department that has any independence from those initially identifying and ultimately executing the targets. The process established for determining the status of detainees in Guantanamo Bay leaves one with little reason for confidence in this more secret targeting procedure.

The final element of analysis is the status of those doing the killing. The scant evidence available on the implementation of the policy would suggest that only a small minority of the drone attacks have been effected by the Air Force, with the remainder having been conducted by personnel of the CIA. This is problematic from an IHL perspective, since the members of the CIA, not being members of the state's armed forces, and not wearing uniforms or other distinguishing insignia, are not "combatants" for the purposes of IHL. They do not therefore enjoy the immunities extended to the armed forces of belligerents, and are indeed like the individuals they are targeting, nothing more than civilians directly involved in hostilities, or fulfilling a continuous combat function. Indeed, Harold Koh sought revisions to the charges in one of the first military commission trials in Guantanamo Bay, because one was for "murder in violation of the law of war", which was defined in part as "killing someone in the context of an armed conflict without enjoying combat immunity." Koh recognized that the very same charge could be leveled against the members of the CIA engaged in targeting individuals not only in Pakistan, Yemen and Somalia, but indeed in Afghanistan, where the U.S. is clearly a belligerent engaged in armed conflict.

Going Medieval – The Regressive Aspects of the Policy

The foregoing analysis suggests that at least according to an analysis based on the mainstream understanding of the relevant international law regimes, the U.S. policy of targeted killing in countries such as Pakistan, Yemen and Somalia, is quite likely unlawful. That

conclusion is disturbing enough. Yet, from a normative perspective, the possible ramifications of the policy and its rationales causing a corresponding adaptation in the customary international law, is even more troubling. If international law were to evolve in a manner that reflected the arguments advanced in support of the policy, that development would represent a profound erosion of the most fundamental principles underlying the *jus ad bellum* regime and the IHL system – namely, the strict constraints on the use of armed force, and the principle of distinction and the minimization of harm to civilians. Moreover, it could significantly alter the relationship between the two regimes, undermining the principle of equality in IHL, which depends upon its independence in some respects from the *jus ad bellum* regime; and more radically still, decoupling the application of IHL to some uses of force under the *jus ad bellum* regime. Moreover, the development of the law along these lines would represent a resurrection of principles and ideas about the use of force and conduct of hostilities, some dating as far back as the early medieval period, that the international community very clearly rejected in the twentieth century. It is in this sense that the policy of targeted killing reflects medieval thinking.

It is perhaps useful here to highlight the manner in which the policy of targeted killing and its policy rationales does this. Recall from the discussion above that the arguments on self-defense suggest that states may use force against non-state entities as such, either on the basis of a response to an attack struck in the distant past, or to prevent a possible attack materializing at some unspecified time in the future. It dispenses with the requirement of an armed attack as a pre-condition for the exercise of self-defense, vastly lengthens the temporal aspects of "immanency", and hollows out the principle of necessity. To suggest that states may use force "preventatively", and in response to threats that fall far below the level of an armed attack against the state, is to return to a system in which states were at liberty to use force on almost any pretext. In essence it is an abandonment of the narrow concept of self-defense that was adopted in the U.N. system, and is a return to the expansive and rather aggressive notion of defensive war espoused by Grotius and other humanists in the seventeenth century, which permitted the use of force to punish past transgressions, prevent future threats, and enforce compliance with natural law.

Similarly, by rejecting the current limitation on states in the use of force against non-state entities, and notwithstanding the attempt to classify the terrorists and insurgents who are the members of those organizations as non-privileged or unlawful combatants, the move does in some sense elevate the status of such entities, and acknowledges their capacity to make war on states. Rather than treat them in criminal law terms, or even through a *sui generis* regime akin

to the international law approach to piracy, this move in some respects undermines the very early move to delegitimize all use of force by non-state entities and to assert a state monopoly on the use of armed force.

Moreover, the argument that the use of force in self-defense does not rise to the level of armed conflict for the purpose of triggering the operation of IHL, harkens back to the pre-U.N. era in which statesmen and international lawyers parsed the fine gradations between "war" and "measures short of war", for the purpose of engaging in unconstrained military operations that did not rise to the level of "war" properly so called. The U.N. system was designed in part to specifically narrow the broad justifications for the right of self-defense, and to eliminate the gradations in the use of force, both of which had been factors that contributed to the onset of World War II. Moreover, these arguments also harbor dangerous implications for the nature of the relationship between the three relevant regimes, for these claims carry the implicit suggestion that this "low level" use of force occurs in a legal black-hole, governed by none of IHL, human rights law, or even domestic criminal law. It is an attempt to create a lawless no-man's land along the border between *jus ad bellum* and *jus in bello*.

Similarly, the arguments relating to the IHL aspects of the policy reflect an abandonment of modern principles, and a return to pre-modern ideas that were quite deliberately rejected. The attempt to vastly broaden the scope of the criteria for determining whether civilians are "directly participating in hostilities", or to create some third category of unlawful combatants, or broader still the concept of "unlawful enemy combatants" as defined in U.S. policy, threatens to erode the principle of distinction, and unravel over a hundred and fifty years of effort to establish that principle. Moreover, there are the implicit, and indeed increasingly explicit, arguments that IHL need not be applied to such non-state entities, since they constitute terrorists who have by their actions clearly abandoned any respect for international law. This too is a throw-back to the pre-Grotian ideas that only the belligerents with just cause were entitled to the benefit of the immunities, rights, and privileges extended by the embryonic *jus in bello*, and that the limitations imposed by that regime did not constrain the just in their actions against the unjust. To the extent that such arguments might influence the future development of the IHL regime, it would represent an abandonment of the effort to establish and maintain the principle of equality in the application of the rules of IHL, through the uncoupling of the *jus ad bellum* and *jus in bello* regimes as they relate to this issue, for the purposes of creating an incentive structure designed to reduce suffering in armed conflict.

Ultimately, I would submit that the arguments advanced to justify the policy of targeted killing are ill conceived and insufficiently theorized. Quite aside from the broader ramifications they might have on the *jus ad bellum* and *jus in bello* regimes, the policy rationales simply do not contain sufficient internal limitations and criteria for defining the scope of operations to make the policy internally coherent. Taken on its face, the policy rationale would suggest that the principle of self-defense permits the use of force against persons anywhere in the world to prevent future terrorist attacks about which there is some undisclosed classified intelligence. Similarly, the scope of armed conflict, for the purposes of triggering the operation of IHL, is similarly unlimited geographically. Moreover, the policy disregards the traditional distinction between civilians and combatants, and makes civilians targetable on very broad and somewhat ambiguous criteria, primarily based on suspected membership in a loosely defined and rather amorphous network of organizations. Finally, the determination of targets is made in an entirely obscure process that is neither accountable nor independent.

On terms of this policy rationale, and based on its own logic, if the U.S. can kill terrorist suspects in Pakistan with immunity under IHL, on the grounds that the target is a member of a group with which the U.S. is in a global armed conflict, and that he can be killed in any event as an exercise of self-defense based on his potential involvement in some future terrorist attack, then there is no principled reason why it could not similarly target such members in London, or even New York. While the policy's defenders argue that such propositions are unrealistic, they offer no legal basis, no criteria anchored in the legal theory they advance, that would make the one legitimate and the other unlawful. The implications, that the state could kill persons with impunity anywhere in the world based on an unproven affiliation with a loose organization, possibly on the grounds that they have "provided material support" for hostilities as opposed to any direct participation in actual armed conflict, is profoundly disturbing. The use of civilian CIA officers for the killing of targets further undermines the principle of distinction, and reinforces the notion that the constraints of IHL do not limit the agencies of the state fighting with "just cause".

Conclusions

There is no question that the increased threat to national security posed by trans-national terrorists poses a challenge to state policy makers, and may require international law to adapt to accommodate new state practices in response to such threats. But the challenge will be to find ways of adjusting to deal with the threat in ways that do not create the higher risk of reducing the constraints on the use of armed force, and undermining the fundamental principles that have

been long established to minimize the risk to civilians in armed conflict. The challenge, it seems to me, is for international lawyers, scholars, and policy makers, to develop legal innovations that address the new threats to nation states in ways that can meaningfully enhance state security, without doing violence to the principles we have already established to move us towards the goal of greater international peace and security, and reduced suffering from armed conflict. The problem with the targeted killing policy and its justifications, is that it does significant violence to these principles, and resurrects old doctrines and ideas that were, for very good reasons, long ago abandoned. We ought not to weaken the constraints on the use of armed force, undermine the principle of distinction, or alter the fundamental relationship between *jus ad bellum* and IHL, in our efforts to minimize the risks of future terrorist attacks.