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

This article analyzes the legality under international law of the current U.S. policy of targeted killing. Specifically, it examines the policy of targeted killing in countries where the United States is not clearly a belligerent engaged in armed conflict, such as Yemen, Somalia, and Pakistan. It argues that not only is the practice of targeted killing very likely unlawful in many circumstances in which the policy is applied, but more importantly that to the extent the policy establishes new norms and principles in international law, it is harmfully regressive. The policy and its justifications are resurrecting ideas that were quite deliberately abandoned in the development of the modern *jus ad bellum* and *jus in bello* regimes, and they could undermine the core principles of those regimes.

The targeted killing policy implicates three legal systems: the *jus ad bellum* regime (which governs recourse to the use of force), the *jus in bello* or international humanitarian law (IHL) regime (which governs the conduct of hostilities), and international human rights law. With the development of the modern *jus ad bellum* regime the international community rejected older principles that contemplated gradations between war and measures short of war, expansive notions of self-defense, and the legitimacy of the use of force by or against non-state entities as such (rather than the states that supported or harbored them). These developments were central to establishing stricter legal constraints on the use of force by states, and thus reducing the incidence of armed conflict.

Similarly, the development of the modern IHL involved the creation of a fundamental principle of equality, such that the armed forces of both sides in any armed conflict enjoyed the same rights and obligations, independent of which side in the conflict had just cause under *jus at bellum*. This was crucial to the development of the core principle of distinction, which requires belligerents to distinguish between combatants and civilians, between military and civilian targets. The status of “combatant” is thus key, and it differs somewhat depending on whether the armed conflict is “international” or “non-international,” but the principle of distinction remains central.

While the two regimes thus became independent of one another under the principle of equality, the relationship between *jus ad bellum* and IHL was not completely severed. Any use of force that implicates *jus ad bellum* considerations or justifications will also trigger the operation of IHL. Similarly, if organized violence rises to the level of international armed conflict, then *jus ad bellum* considerations will also apply to the use of force involved. Finally, while IHL is a *lex specialis* that displaces the operation of other domestic and international regimes, international human rights law does operate along side it, and will apply in the lacunae left by IHL. And of course, where there is no armed conflict, IHL and the national law of the relevant state will apply.

There are a number of different scenarios in which targeted killing is currently conducted, with various permutations of whether there is consent of the state in which the strikes are conducted, and whether there is already an ongoing international or non-international armed conflict. Beginning with the *jus ad bellum* regime, under any of these scenarios it is difficult to justify the targeted killing in Pakistan, Yemen, and Somalia as self-defense. In the event that the strikes are non-consensual, the justifications either depend upon notions of “preventative self-defense,” which is not currently recognized in international law, or are predicated upon the strikes being a response to the armed attacks on 9/11, the links to which are increasingly tenuous. Moreover, the use of force in self-defense is not available against non-state entities as such, and none of the target countries harbored or supported the perpetrators at the time of the 9/11 attacks. The use of force against these states would therefore likely constitute an act of aggression. The argument that the strikes are justifiable as an act of self-defense that is somehow different from the concept in *jus ad bellum*, and that the use of force does not rise to a sufficient level to trigger the IHL regime, has no basis in international law.
On the other hand, if the target states consented to the targeted killing by drone missile strikes, self-defense is not available as a justification. Rather, the use of force would have to be explained as being military assistance to the local government in a non-international armed conflict, or support for local law enforcement operations. That has significant implications for the legality under IHL and human rights law.

Turning to IHL, the argument that the U.S. is in an international armed conflict with Al Qaeda, the Taliban, and their affiliated organizations, everywhere in the world, is not sustainable under international law. Neither the *jus ad bellum* regime nor IHL contemplate the possibility of geographically and temporally undefined and unlimited armed conflict with non-state entities. The assertion that there is an armed conflict does not trigger the application of IHL to immunize the killing. Nonetheless, IHL would apply to the use of force under most scenarios, even if the drone attacks constitutes an unjustifiable use of force and thus acts of aggression.

Where IHL applies, suspected insurgents or terrorists are not “combatants,” but rather are “civilians,” and as such can only be targeted if and for such time as they are directly participating in hostilities. The ICRC has relaxed the test to the permit the targeting of civilians if it is established that they are performing a continuous combat function. Efforts to classify terrorists as “unlawful enemy combatants” are not recognized, and the broad targeting of suspected terrorists does violence to the principle of distinction. The fact that members of the civilian agency, the CIA, are doing the killing further erodes the principle of distinction, and those agents would not enjoy the immunities of IHL. Finally, it has been held that the determination of the status of potential targets, assuming there is an armed conflict, ought to be conducted in an independent and transparent process, which the U.S. has not established.

The only scenario in which IHL would clearly *not* apply is that in which the targeted killing is done with the consent of the target state, but in circumstances in which there is no non-international armed conflict ongoing in that state. In that case IHL would not apply and the domestic criminal law and human rights law would apply. The U.S. would be in no better position than the local government would be in if it was engaged in the killings directly. Such targeting would thus constitute extra-judicial killing in the context of law enforcement, in apparent violation of human rights law and national criminal laws against murder.

International law will have to adapt to accommodate state responses to the growing threat of transnational terrorism in the twenty first century. But that change has to be developed in a thoughtful fashion, possibly with the development of a new regime for that purpose, as with the response to piracy in the past. The policy of targeted killing does not do this. The policy and its justifications will, if not challenged, cause significant harm to the *jus ad bellum* and IHL regimes. With respect to the *jus ad bellum* regime, the policy will lead to an erosion of the constraints on the use of force, by recognizing increasingly expansive notions of self-defense, extending the use of force to non-state entities *per se*, and re-introducing gradations between the use of force prohibited by the U.N. Charter and lower levels of force. With respect to IHL, the targeting of civilians not directly participating in hostilities, and introducing new categories of legitimate targets who are not “combatants,” will serve to undermine the principle of distinction and lead to increased civilian casualties. Some justifications even argue for a reversal of the principle of equality, such that those fighting without just cause would not enjoy the rights and immunities under IHL, thus re-integrating the *jus ad bellum* and IHL regimes. Others have argued that in fact IHL and *jus ad bellum* should be entirely severed, such that a use of force in self-defense would not be subject to the limits of IHL. Both are distortions of the long-standing relationship between the two regimes. All of these developments are a regression to principles and ideas, some of them dating to a pre-Grotian era, which were deliberately and thoughtfully rejected with the adoption of the U.N. System and the Geneva law after World War II.