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Going Medieval: Targeted Killing, Self-Defense, and the Jus ad Bellum Regime

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GOING MEDIEVAL: TARGETED KILLING, SELF-DEFENSE AND THE *JUS AD BELLUM* REGIME

Craig Martin

In the aftermath of the 9/11 attacks, the United States began using drone-mounted missile strikes for the targeted killing\(^1\) of terrorists and militants considered to be a threat to the United States. While largely associated with efforts against Al Qaeda, and operations against the Afghan insurgency, the American use of drones to kill targeted individuals has extended to at least six countries so far.\(^2\) Targeted killing is not entirely new in the annals of American national security policy,\(^3\) but this targeted killing program has been controversial. There are several characteristics of the current policy that distinguish it from past practice, and raise significant legal issues relating to the international law regime that governs the use of force (the *jus ad bellum* regime), international humanitarian law (IHL)—the legal regime that

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\(^{1}\) The term “targeted killing” here refers to the deliberate killing of specifically identified individuals who are not clearly combatants in an armed conflict under international law. This definition is itself contentious. Who, and according to what criteria, is to be defined as a combatant? How do we decide whether such persons are operating in the context of an armed conflict? These issues are themselves controversial, and so determining whether a particular killing constitutes a targeted killing is not without debate. Some in the U.S. argue that those targeted under this policy are combatants in an armed conflict—but then the killing of those persons would not be distinguishable from other killing in war, and so would not be subject to particular study as “targeted killing.” See Nils Meltzer, *Targeted Killing in International Law* (Oxford University Press, 2008) 3–5; David Kretzner, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?,” *16 The European Journal of International Law* (2005) 171, 174–6; Gary Solis, “Targeted Killing and the Law of Armed Conflict,” *60 Naval War College Review* (2007) 127, 127–30; and Philip Alston, “Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions,” May 28, 2010, U.N. Doc. A/HRC/14/24/Add.6, 3.

\(^{2}\) The six confirmed countries are Afghanistan, Iraq, Pakistan, Yemen, Somalia and Libya.

Targeted Killings
governs the conduct of forces in armed conflict), international human rights law (IHRL), and even domestic criminal and constitutional law. The features of the targeted killing program that trigger the application of *jus ad bellum* principles in particular, are the use of drone-mounted missile strikes to prosecute the targets, which likely constitute a use of force within the meaning of Article 2(4) of the United Nations Charter, together with the American reliance upon the right of self-defense as a justification for such strikes.

In this chapter I analyze the U.S. claims that the targeted killing policy is justified under the *jus ad bellum* doctrine of self-defense, and argue that this very broad and general claim, as a basis for strikes against targets in countries that are not sufficiently responsible for the actions of the terrorists, and in which the United States is not clearly a belligerent in an armed conflict, is not consistent with current international law principles. Arguments that the targeted killing policy is unlawful are not of course new or novel—others have already made this point quite persuasively. But the *jus ad bellum* issues raised by the policy have not received as much attention in the literature as the IHL and IHRL aspects. Moreover, in addition to assessing the policy from a *jus ad bellum* perspective, this chapter considers the impact that the policy may have on the legal regime itself. The manner in which the targeted killing program is being prosecuted, together with its justifications and rationales, may lead to changes to the *jus ad bellum* regime, and to the nature of the relationship between it and the IHL regime, and my analysis here explores how such changes could have harmful unintended consequences for the entire system of constraints on the use of force and armed conflict. The implications and rationales of the U.S. policy tend to resurrect old principles, some dating back to the medieval period, which are not consistent with the theoretical premises underlying the modern U.N. system. In its efforts to address an admittedly real and present danger of transnational terrorism, the United States may undermine the

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4 Art. 2(4) of the U.N. Charter provides that states “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”


system that was developed to prevent war among states and thereby increase the risk of international armed conflict, which in the long run is a far graver danger to international society than the threat posed by terrorists.

I. The policy and its justifications

The targeted killing policy is said to be aimed at members of Al Qaeda, the Taliban, and associated forces. While primarily explained as being responsive to the planning and perpetration of terrorist attacks, it also clearly includes the targeting of those thought to be involved in the insurgency in Afghanistan, and may include persons involved in the “material support” of terrorism. There are features of the policy that are significant for the purposes of the *jus ad bellum* analysis. The use of methods that would constitute a use of force against the state in which the targets are attacked is important—the use of drone-mounted missile strikes in particular, though the military strike into Pakistan to kill bin Laden raised similar issues. As well, there is the fact that strikes are being made in countries such as Yemen, Somalia, and Pakistan, which were not sufficiently responsible for the operations of the targeted terrorists, and in which the United States is not clearly a belligerent in an armed conflict. These features of the policy trigger the application of the *jus ad bellum* regime, but in addition the targeted killing strikes have been justified by the United States on the basis of the *jus ad bellum* doctrine of self-defense.

While the government policy of targeted killing remains technically a covert operation, Harold Koh, then the legal counsel to the Department of State, provided two justifications for the government’s policy of targeted killing in a short official statement in 2010. The first was that the United States is engaged 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 IHL. The second justification offered was that the United States is entitled to use lethal force against such groups as an exercise of the right of self-defense. While Koh did not say so explicitly, this is interpreted to mean that the targeting of members of these

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8 As several other chapters in this Volume describe in greater detail, there is little non-classified information on the criteria for targeting, the standards of proof required, or any other details of the process of selecting targets, final decision-making on issues of necessity and proportionality, and ex post review of the decision-making. For the extent to which the policy may come to extend to killing individuals for their “material support” of terrorists, see Section 7 of the draft legislation that was before the Armed Services Committee as this chapter was going to press: The Detainee Security Act of 2011, H.R. 968 I.H. (112th Congress 2011–12), available online at <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.968:> accessed November 4, 2011.

9 Koh, *supra* n. 7.
groups constitutes a use of force justified by the *jus ad bellum* right of self-defense provided for in Article 51 of the U.N. Charter. Such targeting is a use of force against the states in which the members of these groups are being targeted, and Koh indicated that among the considerations for each such use of force, were the sovereignty of the state involved, and “the willingness and ability of those states to suppress the threat the target poses.” This was an echo of President George W. Bush’s assertion that “we will make no distinction between the terrorists who committed these acts and those who harbor them.”\(^{10}\)

Koh’s speech was explicitly not a detailed legal opinion, but both his speech and the manner in which the policy has been executed suggest that these two justifications are understood as independent arguments—that is, the United States could use force to kill Al Qaeda members in other countries on the justification that it was engaged in an armed conflict with Al Qaeda, and as a separate justification, it could do so under the right of self-defense.\(^{11}\) In the analysis that follows, I will examine the second justification in particular, though I will also suggest that to the extent these are indeed independent rationales (a question we will return to), the first would also operate to undermine the *jus ad bellum* regime.

**II. The *jus ad bellum* regime**

The conduct of targeted killing implicates three distinct regimes in international law, namely: *jus ad bellum*; IHL; and IHRL. In examining the legitimacy of the targeted killing policy under the principles of the *jus ad bellum* regime and the policy’s possible impact on that regime, we need to lay out the relevant principles and their underlying rationale. Moreover, to understand the full scope of that potential impact, it is important to explore how the policy might affect the relationship between the *jus ad bellum* and IHL regimes. I begin, therefore, with a brief examination of the historical development of the regime and the relationship between it and IHL. While some areas of these legal regimes remain deeply contested, this brief overview provides a mainstream perspective on the relevant principles.\(^{12}\)

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\(^{11}\) See text associated with infra nn. 103–05.

\(^{12}\) I will below discuss some of the recent objections to the position taken here on those principles most central to the issue of targeted killing. This section begins with a sketch of the conventional understanding, as reflected in many leading works on the use of force and the decisions of the ICJ, as a baseline for discussion.
The *jus ad bellum* regime is traceable to Classical Greece, but its primary origins are in medieval just war theory. Just war theory entrenched the very idea that a legal justification is required for the use of armed force. It also articulated the idea that just war could only be waged by a sovereign authority, thus developing the state monopoly on the legitimate use of armed force. With Grotius and the emergence of the law of nations came the further development of war as a legal concept—rather than being merely a description for the conduct of hostilities, war was understood as a state of relations among states that triggered specific laws that displaced the operation of other legal regimes. Finally, there emerged during the Grotian period the notion of defensive war, which contemplated the use of force to prevent the development of future threats, and even to punish past attacks. This expansive doctrine was in stark contrast to the narrow right of self-defense under natural law, which was limited to responding with force to an immediate threat for the purposes of self-protection. Moreover, Grotius posited that the enforcement of certain natural law principles could also constitute just cause for the use of force.

By the beginning of 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. There was essentially no international law limitation on the resort to war, though there were principles governing the scope of certain 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, with first the Hague treaties of 1899 and 1907, followed by the Covenant of the League of Nations in 1919, and the Kellogg-Briand Pact in 1928. 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 the Second World War. The U.N. system
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.

A number of features of this development should be emphasized. First, the modern *jus ad bellum* regime under the U.N. system reflected an effort to create a stronger system of constraints on the use of force, in order to reduce the incidence of armed conflict among states. For that purpose a number of earlier ideas were rejected. In contrast to the early twentieth-century attempts to limit the recourse to “war,” the U.N. system prohibits all “use of force.” This move addressed the distinctions that had been made between “war” as a legal state of relations, and various “measures short of war.” States had attempted to exploit this distinction by characterizing their impugned use of force as permissible measures short of war, which was viewed as having contributed to the onset of the Second World War.

Second, the individual and collective rights of self-defense articulated in Article 51 of the Charter are much closer to the narrow natural law right than they are to the late medieval notions of defensive war. The provision permits the use of force only in response to an “armed attack,” or at most, in anticipation of an imminent armed attack—so-called “anticipatory self-defense.” The modern doctrine of self-defense does not permit the use of force to prevent the development of potential future threats, or to punish past attacks. Even in the event of attack, the threshold for justified use of force is high, in that the use of force constituting an “armed attack” sufficient to trigger this right of self-defense is substantially greater than the use of force that is itself subject to the general prohibition.


21 Art. 2(4) of the U.N. Charter.


23 Neff, *supra* n. 13, 279–80, 285–6, and 296–313. The Japanese invasion of Manchuria, characterized as an “incident,” and the Italian intervention in Ethiopia, were two of the primary examples of this failure of the League system.

24 This issue will be examined in detail below: see *infra* nn. 80–87, and associated text.

25 The mining of a naval vessel, and the firing of a silkworm missile at an ocean-going oil-tanker, for instance, were held not to constitute armed attacks for the purposes of triggering the right of self-defense. See in particular *Oil Platforms (Iran v. U.S.)*, 42 I.L.M. 1334 (November 6, 2003), paras 51 and 64; see also *Military and Paramilitary Activities in and Against Nicaragua*
Finally, the traditional position has been that the regime governs states alone among the possible subjects of international law. Thus, the justification of self-defense is available for the use of force against states that are responsible for the armed attacks of non-state actors (NSAs), but not against NSAs as such—by which is meant NSAs independent of the state in which they are operating. In other words, it is the state to which the operations of the NSA can be imputed for purposes of legal responsibility that is the sole legal object of the state use of force. And such use of force can only be justified if indeed the actions of the NSA can be imputed to the state against which the force is being employed. A state cannot use force against another state on the grounds that it is targeting an NSA within that state’s territory, unless that state bears sufficient responsibility for the armed attacks mounted by the NSA. If it is so justified, the defending state may also target the members of the NSA in the course of the operations, so long as the relevant conditions of IHL are satisfied; but the defending state cannot assert a right to use force against an NSA in the abstract, and strike its members in other countries that have no responsibility for the NSA’s attacks. However, this and several of the other propositions outlined above have become deeply contested after 9/11. I will return to these issues in more detail below in examining self-defense in the targeted killing context.

Rounding out the discussion of the basic principles of the doctrine, the use of self-defense is strictly governed by the principles of necessity and proportionality. This means that the use of force must be the only practical way to prevent the continuation of the armed attacks being defended against, and the force used and injury thus caused must be proportionate to the harm that would likely result if further aggression is not prevented. While the principles of necessity and proportionality date back to the medieval period and natural law, the parameters of these principles as they are now understood are consistent with the narrowed scope of the right of self-defense, as compared to principles of the defensive war in the Grotian school. We will return to this issue below when we examine claims of preventative self-defense.

In sum, the *jus ad bellum* regime of the U.N. system completed the development of rules designed to significantly constrain the state use of force and reduce the incidence of armed conflict. It did so in ways that reflected the continued operation of some principles from just war theory and the early law of nations, such as the basic notion that a legal justification is required to use force, that the legitimate use of force is reserved to sovereign states, and that the use of force gives rise to a legal

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26 For further analysis and sources, see *infra* nn. 50–71 and associated text.


28 Neff, *supra* n. 13, 326–34 (though tracing how states have tried to expand the concept since adoption of the U.N. Charter).
state of armed conflict, and thereby triggers the operation of special legal regimes and displaces to some extent peacetime laws. But in developing the modern system, there were also quite deliberate decisions to reject and abandon several earlier ideas such as the medieval concept of broad defensive war, the nineteenth-century tolerance of war as a legitimate tool of state policy, and the later efforts to introduce different categories of armed force up to and including “war,” each with different levels of constraint.

Turning to the relationship between IHL and jus ad bellum, it was only in the nineteenth century that IHL became a fully developed system largely, but not entirely, separate from the jus ad bellum regime.\(^\text{29}\) Governing the conduct of armed forces within armed conflict, IHL is based on two core ideas that co-existed in constant tension—namely, that there must be constraints placed on how military forces fight, and in particular who they can target, on the one hand; and on the other, the notion that there is legal authority for the use of deadly force by legitimate armed forces of a state in the pursuit of valid military objectives in war.\(^\text{30}\) These twin ideas are reflected within the principle of distinction, which requires that belligerents maintain a clear distinction between civilian and military targets, and between combatants and civilians.\(^\text{31}\)

The IHL regime only operates, however, in the context of armed conflict. And the IHL regime itself provides the criteria for determining the existence of an armed conflict. The Geneva Conventions and their Additional Protocols contemplate two different kinds of armed conflict, being “international armed conflict” and “non-international armed conflict.” International armed conflict is an armed conflict among states.\(^\text{32}\) Non-international armed conflict is more difficult to define and is subject to a more limited set of IHL principles. “Armed conflict not of an international character,” refers to hostilities occurring within the territory of a state.\(^\text{33}\) Subsequent jurispru-

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\(^\text{29}\) Neff, supra n. 13, 111–14 and 186–9.

\(^\text{30}\) On the IHL regime, see e.g. Yoram Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict (Cambridge University Press, 2004); Gary D. Solis, The Law of Armed Conflict: International Humanitarian Law in War (Cambridge University Press, 2010); Lindsay Moir, The Law of Internal Armed Conflict (Cambridge University Press, 2002); Anthony Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law (Cambridge University Press, 2010).

\(^\text{31}\) Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Customary International Humanitarian Law, Vol. 2, (Cambridge: Cambridge University Press, 2005) chs 1 and 2; Dinstein, supra n. 30, 27–8, 82–7; Solis, supra n. 30, 251–3;


\(^\text{33}\) Geneva Conventions, Common Art. 3; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, (Protocol II), 1342 UNTS (1983) 137, Art. 1(1) (though note that the narrower definition in the Additional Protocol is not understood to constitute the minimum requirements for the existence of
dence has further defined non-international armed conflict as being characterized by armed violence of sufficiently significant intensity and duration between governmental authorities and organized armed groups, or among such groups, within the state.\(^{34}\) There continues to be debate over the exact parameters of non-international armed conflict, which are relevant to the controversy over the validity of the claim that the United States is, as a matter of law, engaged in a “transnational armed conflict” with Al Qaeda and others.\(^{35}\) That issue is significant for questions regarding the policy’s legality under IHL, which is not our focus here. But I do want to explore the relationship between the \textit{jus ad bellum} regime and IHL, in order to understand how the policy’s impact on the IHL regime could also significantly affect the \textit{jus ad bellum} regime, and ultimately the overall system comprised of both.

While the two regimes were once closely related, they are now in many important respects independent and distinct. This separation is crucial to the principle of equality inherent in IHL, meaning that the rights and obligations under IHL apply equally to the armed forces of all belligerents regardless of which side ultimately had legal authority to use force under the rules of \textit{jus ad bellum}. That principle of equality, and the underlying independence from \textit{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.\(^{36}\) Having said that the two regimes are largely independent, however, it is important to note that there continues to be a connection between them, and that the relationship is significant.\(^{37}\) To put it another way, the two regimes operate independently, but as part of a single overall system of international law that governs the use of force and armed conflict—what I would call the laws of war in the broadest sense.\(^{38}\)

\(^{34}\) See in particular \textit{Prosecutor v. Tadic}, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) October 2, 1995 (Jurisdiction Motion Appeal), paras 66–70; \textit{Prosecutor v. Tadic}, Appeal Judgment, paras 83–96. See also \textit{Moir}, supra n. 30, 489 et seq; and \textit{Melzer}, supra n. 1, 252–61.


\(^{37}\) In fact, Sloane suggests that the independence of the regimes in the Charter era is actually exaggerated: Sloane, supra n. 36, 67–9.

\(^{38}\) The “laws of war” is a term that is typically employed to describe the IHL regime alone, but I use it here to capture the overall system comprised of the two regimes.
In particular, when a state uses armed force against or within the territory of another state, in the sense captured by Article 2(4) of the U.N. Charter, such that the rules of *jus ad bellum* would apply and a *jus ad bellum* justification is required to legitimize the action, then that action constitutes either the initiation of an international armed conflict, or is 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. And when force is used by a state, both *jus ad bellum* and IHL will have to be considered for the purposes of determining the legality of the different aspects of the action. Looking back to the historical development of the two regimes, this connection between them reflects the evolution of war as a legal concept during the Grotian era. “War” went from being a term merely describing violent conflict, to constituting a legal state that triggered the operation of a number of special legal regimes. The modern concepts of the “use of force” and “armed conflict,” and the legal regimes that govern them, have their origins in the legal institution of war. As I will return to in the last section of this chapter, there remains a fundamental relationship between the two regimes that is crucially important to the integrity and coherence of the overall system. The two regimes underwent considerable development after the Second World War, with adjustments to several of the core concepts in each and an accentuation of their mutual independence, but we should not lose sight of their common origin and the inherent relationship that continues to connect them. Together, they comprise an overall system within which the targeted killing policy is operating, and which stands in danger of being harmed by that policy.

### III. Targeted killing and the self-defense justification

The second pillar of the administration’s justification for the targeted killing policy is that it is legitimate as an exercise of the right of self-defense. To the extent that this is grounded in an international law principle, this is a claim based on the application of the principles of *jus ad bellum*—that is, the right of the state to use armed force in response to an armed attack, as codified in Article 51 of the U.N. Charter. As such, in order to determine whether the justification is valid, we have to assess whether the use of force employed in the course of the targeted killings satisfies the requirements of the self-defense doctrine just reviewed. In the process of

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39 Dinstein, *supra* n. 18, 156–62 (also tracing how the evolution of *jus ad bellum* led to arguments in favor of re-integration of the regimes); Dinstein, *supra* n. 30, 14–16; Kretzmer, *supra* n. 1, 188; Melzer, *supra* n. 1, 247–51 and 394–5.
40 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, paras 75–87, and 95.
doing so, we will explore in more detail the contentious elements of that doctrine, and how they relate to the targeted killing policy.

What makes the analysis of the self-defense justification particularly complicated in the circumstances of the U.S. targeted killing program is that force is being used against a number of different groups, and in a number of different countries, but there has been no clear explanation to identify the armed attacks against which the use of force is responsive. In order to invoke this principle the U.S. government has to provide clear answers to two questions. First, against precisely what entities is the use of force being directed? And second, in response to exactly which armed attacks is the use of force being employed? Quite obviously, these two questions are related. It would seem self-evident that the entity against which the use of force is directed has to be connected to the attacks against which the state is defending itself. But the U.S. government has provided no detailed account to explain how the use of force against various organizations and states is tied to specific attacks, which makes it impossible to explain how such use of force is necessary and proportionate in each of the different circumstances. The government has only provided a vague suggestion that the targeted killing program in general is in response to the 9/11 attacks, and is directed at Al Qaeda, the Taliban, and “associated forces.” There is the further implication that it is directed at states that are unwilling or unable to suppress the threat the targets pose. As will be discussed below, these very general assertions are not sufficient to ground a claim of self-defense justifying the use of force directed against such states as Yemen, Somalia, and Pakistan.

We should pause to address a preliminary issue, before launching into the analysis of precisely what entities are subject to this use of force. That is the issue of consent. It may be objected that Pakistan, Yemen, and Somalia have consented to the use of force, and thus the use of force against and within their territory cannot be an unlawful use of force against those states. How exactly does state consent to the use of force affect the analysis? Where there is true consent, the strikes would not constitute a use of force against the state in the \textit{jus ad bellum} sense. If Pakistan, for instance, consents to such strikes against insurgent forces that are waging a non-international armed conflict within Pakistan, the U.S. attacks would be viewed as assisting another government in responding to an internal conflict. Similarly, if Pakistan consents to the strikes as a form of cooperation with coalition forces in the non-international armed conflict in Afghanistan, then again it is not a use of

\footnote{Harold Koh stated that “the United States is in an armed conflict with Al Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its right to self-defense under international law.” This may be interpreted as two independent justifications, and the 9/11 attacks are linked specifically to the existence of an armed conflict, not the exercise of self-defense. See \textit{supra} n. 9.}
force against Pakistan. Where there is such consent, a self-defense justification is not required, at least for the use of force against Pakistan itself.

Moreover, if the state within which the use of force is being deployed consents to the operations, there is no requirement for *jus ad bellum* justifications for military action against an NSA that is operating from within that state.\(^43\) As will be discussed further below, this is because *jus ad bellum* does not contemplate the use of force against NSAs as such, but only against states.\(^44\) The use of force against an NSA within Pakistan, with Pakistan’s consent, is not a use of force against Pakistan, but is an action taken on behalf of the government of Pakistan, and is indeed limited to such authority that the government of Pakistan itself would have to take such action, pursuant to whatever laws govern in the circumstance—whether it is IHL in the context of a non-international armed conflict, or domestic criminal law and IHRL limiting a law enforcement operation.\(^45\) The *jus ad bellum* regime is not implicated (beyond the *jus ad bellum* principle that permits precisely such assistance against an insurgency), any more than Pakistan’s use of force internally against an insurgent force triggers *jus ad bellum* issues. If a state consents to another state’s using military force to kill members of an NSA within its territory, there may be serious questions regarding the legality of the killing if the host state’s government did not itself have the legal authority to engage in such killing, but such issues would relate to IHL, IHRL and the consenting state’s domestic law, not *jus ad bellum*.

That does not mean, however, that the *jus ad bellum* regime does not apply to the targeted killing policy, or that analysis here is unwarranted. Aside from the factual matter that all three of these countries have at various times indicated a lack of consent to the targeted killing strikes,\(^46\) not least of which Pakistan after the

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\(^43\) But see Printer, supra n. 6, 352–8 (analyzing how self-defense is justified under *jus ad bellum* in a strike within Yemen, facilitated by the Yemeni government).

\(^44\) O’Connell, supra n. 5, 16. And see infra nn. 51–71 and associated text.


\(^46\) There has been considerable ambiguity over the extent to which the government of Pakistan has consented to or acquiesced in the targeted killing, which has also varied over the years. There can be little doubt that the Pakistani military, if not the government, has at various times consented to some of these strikes. At other times, such as following the killing of bin Laden, the government has quite clearly objected to them. See, e.g. O’Connell, supra n. 5, 16–18; David Sanger and Eric Schmitt, “As Rift Deepens, Kerry has Warning for Pakistan,” *The New York Times*, May 15, 2011, A16; and Greg Bruno, “U.S. Drone Activities in Pakistan,” *Council on Foreign Relations Backgrounder*, available online at <http://www.cfr.org/pakistan/us-drone-activities-pakistan/p22659#p6> accessed November 4, 2011. Similarly, there are questions regarding Yemen’s consent to strikes: Mark Mazzetti, “U.S. Intensifying a Secret Campaign of Yemen Airstrikes,” *The New York Times*, June 8, 2011; on occasion this has been explicitly with the cooperation of the Yemeni government: see Walter Pincus, “Missile Strike Carried Out with Yemeni Cooperation,” *Washington Post*, November 6, 2002, A10. Strikes in
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killing of Osama bin Laden himself, the point is that the United States has itself advanced the doctrine of self-defense as a justification for this use of force. That is an invocation of the *jus ad bellum* regime. To the extent that this is meant to justify the use of force against the states in which the strikes are implemented, the necessary implication is that at least in some circumstances force is being used in the absence of consent, and a justification is understood to be required. It may be objected that the claim to self-defense is being asserted to justify the use of force against the NSAs as such, notwithstanding the argument just made—but as will be examined below, not all aspects of the targeted killing policy can be explained by that premise. Thus, for the purposes of our analysis here, the assumption is that at least in some circumstances the policy is undertaken without consent of the target state, and that these strikes therefore constitute a use of force in *Jus ad bellum* terms giving rise to aspects of international armed conflict.47

(a) Use of force against what entities?

Returning then to the question of which entities, precisely, are the subject of the use of force in the targeting program, Harold Koh suggested that the primary targets are Al Qaeda, the Taliban, and associated forces. That is, NSAs, or more specifically, the members of NSAs. It has been suggested by many scholars that this means both a use of force against, and an armed conflict with NSAs, independent from the states in which they happen to be located. We must therefore fully examine this proposition against the traditional principle outlined earlier, that *jus ad bellum* only contemplates the use of force against states. A preliminary distinction has to be made between the question of whether strikes by terrorists can constitute “armed attacks” for the purposes of Article 51 of the Charter, and the separate question of whether the victim state, in exercising its right of self-defense, can direct its use of force against the terrorist organization as such, as opposed to a state that may be responsible in law for facilitating the attacks. On the first of these issues, there is widespread acceptance that strikes by terrorists can rise to the level of “armed attack,” in the *jus ad bellum* sense. It is generally acknowledged that the 9/11 attacks in particular did rise to that level, and did constitute an armed attack.48 Moreover, each single attack need not constitute an “armed attack,” but


47 Consistent with this are the reports that the U.S. team that entered Pakistan for the purposes of killing bin Laden was prepared to use force against Pakistani forces if necessary; and reports that Pakistani authorities subsequently warned that it would use force against any such further violation of its sovereignty. See Eric Schmitt, et al. “U.S. Was Braced for Fight With Pakistanis in bin Laden Raid,” *The New York Times*, May 10, 2011, A1.

a series of attacks of sufficient gravity may be taken cumulatively to constitute an armed attack for the purposes of triggering the right of self-defense.\textsuperscript{49} So this is not the basis for any objection to a use of force against NSAs as such.

Accepting that attacks by terrorists can constitute an “armed attack” in \textit{jus ad bellum} terms, however, does not mean that states may use force in self-defense against the terrorist organization as such, in whatever state to which it may have re-located following the attacks, and quite separate and apart from considerations of whether the “host” states bear legal responsibility for the attacks.\textsuperscript{50} At the outset, it should be recalled that the right to use armed force in self-defense is an exception to a general prohibition on states against the threat or use of force against the territorial integrity or political independence of other states, or in any other manner inconsistent with the purposes of the U.N. Charter.\textsuperscript{51} The very purpose of the U.N. system is to narrow the legitimate grounds for the use of force and reduce the incidence of armed conflict among states. The \textit{jus ad bellum} system simply does not contemplate the use of force against NSAs as such. On the other hand, military operations against transnational terrorist groups is necessarily going to occur within the territory of another sovereign state, unless they happen to be on the high seas. Thus, absent the consent of that state, the use of force against the NSA could never actually be just against the NSA in the abstract, but will also constitute a use of force against another state. As we will review, the \textit{jus ad bellum} system requires a significant degree of involvement by a state in the operations of the NSAs within its territory before the use of force against that state can be justified. That is of course consistent with the purpose of reducing the incidence of war among states.

Some scholars have tried to reach back to the famous \textit{Caroline} incident and other nineteenth-century episodes in order to demonstrate that there is some broader customary international law right to use force against NSAs as such.\textsuperscript{52} Such

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\textsuperscript{50} See e.g., Gray, \textit{supra} n. 22, 198–202; Dinstein, \textit{supra} n. 18, 206–08; and Alston, \textit{supra} n. 1, paras 40–1. Of course, there are many in the U.S. who reject this view. See, e.g. Paust, \textit{supra} n. 6.

\textsuperscript{51} Art. 2(4) of the United Nations Charter.

\textsuperscript{52} See, e.g., Paust, \textit{supra} n. 6. The \textit{Caroline} incident involved a British attack in 1837 on a vessel being used by American sympathizers to supply a rebel force that had taken up arms against the British in Upper Canada. While Secretary of State Webster’s formulation of the right to self-defense in correspondence relating to the incident has come to comprise the seminal articulation of the principle, as Dinstein points out the incident took place at a time when there was no prohibition on the use of force, and was in essence about preventing a measure short of war leading to the outbreak of full-blown hostilities. See Dinstein, \textit{supra} n. 18, 274–5.
arguments are not persuasive. They constitute cherry-picking from a period when there were simply no effective legal constraints on the use of force in any event. The arguments ignore the customary principles actually in place at the time the Charter was concluded, in favor of principles from a far earlier period. Moreover, the suggestion that the Charter was intended to leave in operation customary rules permitting broader justifications for the use of force than those included in the treaty, flies in the face of the very purpose of the Charter system. Nor are such claims consistent with the drafting history of Article 51. That the right of self-defense exists as a principle of customary international law, and that it does not exactly coincide with Article 51, is generally recognized. But, as will be discussed below, custom does not permit the use of force against states that are not substantially involved in the armed attacks by NSAs. State attempts to justify the use of force against other states on the grounds that it is directed at NSAs, in the absence of evidence of the state’s material support for the terrorist operations, were widely rejected and condemned prior to 9/11, and state practice remains mixed in the last decade. While some scholars have more recently begun to posit that there may be a distinction between the concept of using force against a state and that of using force within a state, that is not a distinction that is yet recognized in international law.

States may, of course, use force against a state to which it can attribute the armed attacks of an NSA. The key issue is identifying the criteria to be used in fixing a state with responsibility for the armed attacks of the NSA. In the U.N. General Assembly Resolution on the “Definition of Aggression,” the attacks on a state by armed bands or irregular forces that were either sent “by or on behalf of” another state, or in which that state had a “substantial involvement,” are defined as constituting acts of aggression by the supporting state. In Nicaragua v. U.S.A., the ICJ held this provision to constitute a principle of customary international law, but it also placed the bar rather high, holding that mere provision of arms and supplies by a state to an armed group that then launches armed attacks against a neighboring state does not itself constitute an armed attack triggering rights of self-defense.

53 Brownlie, supra n. 20, ch. 13, and Brownlie, “Legal Regulation of the Use of Force,” 8 International and Comparative Law Quarterly (1959) 717–20. See also Dinstein, supra n. 18, 182–7. On the drafting history and interpretation of Art. 51, in addition to Brownlie, see e.g. Ruys, supra n. 49, 55–68; and Franck, supra n. 22, 45–50 (Kindle edition); also Nicholas Tsagourias, “Non-State Actors and the Use of Force” in J. d’Aspremont (ed.), Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law (Routledge, 2011) 326, 328–9.

54 On the overlap between art. 51 and customary international law, see Nicaragua v. U.S.A., supra n. 28, paras 172–82 and 187–201.

55 See Gray, supra n. 22, 195; Lubell, supra n. 6, 29–31; and Ruys, supra n. 49, 369–485.

56 See, e.g. Dinstein, supra n. 18, 245–51 (making a claim for such use of force as a form of extraterritorial law enforcement), and Lubell, supra n. 6, 36–7. The classic example cited is the use of force by Israel in Lebanon, against the PLO in 1982, and against Hezbollah in 2006.

In *Congo v. Uganda* the ICJ again took up the issue, examining whether Uganda’s use of force against the DRC could be justified as self-defense in response to attacks by the ADF, an irregular guerrilla force alleged to be supported and supplied by the DRC. The Court held that while the ADF had indeed been responsible for armed attacks against Uganda, there was insufficient evidence to establish that the ADF was acting on behalf of the DRC, or that the DRC was sufficiently involved in the operations, for the attacks to be attributed to the DRC. Thus, the justification of self-defense was not available to Uganda, and its use of force against the DRC was a violation of the prohibition on the use of force.

The precise contours of the concept of “substantial involvement” in the operations of an NSA that has mounted armed attacks against another state remain somewhat unclear. It is nonetheless well established that there must be some significant nexus between the state and the NSA’s actions in order to attribute those actions to the state for the purposes of justifying the use of force in self-defense. It is certainly more than a mere failure by the state to prevent the attacks or terminate the operations of the non-state entity. And it is important in this context not to confuse responsibility in the sense meant in the law of state responsibility, with the narrower issue of liability for armed attacks sufficient to trigger the right of self-defense in *jus ad bellum*. It is a long-established principle under the law of state responsibility that a state has an obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other states.”

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58 *Nicaragua v. U.S.A.*, *supra* n. 25, paras 103; and 195. The dissenting judgments, particularly that of Judge Schwebel, disagreed strongly on the facts as to whether Nicaragua had been “substantially involved” in the operations of insurgents within El Salvador, and differed on where to draw the line between mere support and substantial involvement, but did not disagree with the principle. See opinion of Schwebel J., paras 154–71.

59 Many scholars here discuss the court’s articulation of an “effective control” test, and contrast it to the ICTY “overall control” test in Tadić, but it is submitted that the effective control test was applied for the purposes of determining responsibility for violations of IHL, and not the use of force. See *Nicaragua v. U.S.A.*, *supra* n. 25, paras 115 and 227.


61 Ibid. paras 146–7. Though, in a cryptic paragraph ending this analysis, the court stated that it did not need to address the question of “whether and under what conditions contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces.” Ibid. para 147.

62 For further discussion of factors that might be considered, see Lubell, *supra* n. 6, 36–8.

63 *Corfu Channel (United Kingdom v. Albania)* (Merits), ICJ Reports (1949), 18–23.
unlawful.”\textsuperscript{64} But that such inability or unwillingness on the part of Utopia to prevent the operations of terrorists within its territory is unlawful, and that it may thus be legally responsible to those states injured by the terrorist activity, does not establish a justification for the use of force against Utopia. The criteria under the law of state responsibility are different, constituting a lower threshold for liability, than the conditions justifying the use of force in self-defense against another state for the actions of NSAs operating from within its territory.

It has been suggested by some that the gap between these two doctrines has narrowed since 9/11, particularly given the actions of the United States and others in using force against Afghanistan in response to those attacks.\textsuperscript{65} But many of these arguments over-reach. For instance, the Security Council resolutions immediately following 9/11, which acknowledged the right of self-defense in response to such attacks, did not thereby create, or reflect the emergence of, a right to use force against NSAs as such.\textsuperscript{66} The Security Council’s resolutions can be interpreted as recognizing that the 9/11 attacks constituted armed attacks against the United States, justifying the exercise of the right of self-defense against the state deemed to be responsible for them, consistent with established principles of \textit{jus ad bellum}.\textsuperscript{67} The letters to the Security Council from both the United States and the United Kingdom, reporting on the use of force against Afghanistan as an exercise of self-defense in accordance with Article 51 of the Charter, specifically emphasized the close relationship between Al Qaeda and the Taliban regime, the level of support provided to Al Qaeda by the Taliban, and the regime’s refusal to turn over Al Qaeda leadership for prosecution.\textsuperscript{68} Taken together, the letters and the resolutions can be interpreted as grounding an exercise of self-defense against a state that was “substantially involved” in the operations that led to the 9/11 attacks.

\textsuperscript{64} Dinstein, supra n. 18, 206.
\textsuperscript{67} The preambles of both resolutions recognize “the inherent right of individual or collective self-defence in accordance with the Charter,” while Res. 1368 condemned the terrorist attacks of 9/11 as a threat to peace and security; and Res. 1373 reaffirmed the duty of states to refrain from assisting or participating in terrorist acts against another state, and in its operable paragraphs also “decided” that states shall refrain from providing any such support. In short, the resolutions do not tie the acknowledgement of the right of self-defense to a use of force against terrorist groups \textit{per se}, and they can indeed be interpreted as acknowledging the right of self-defense against states that are sufficiently responsible for supporting the terrorist activities leading to such attack. The ICJ interpreted these resolutions in this restrictive fashion in \textit{Advisory Opinion on the Security Wall in the Palestine Occupied Territories}, para 139. See also, Gray, supra n. 22, 193–4, and 199; but see Dinstein, supra n. 18, 207; and Lubell, supra n. 6, 35.
\textsuperscript{68} Gray, supra n. 22, 200.
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Having said that, the events following 9/11 have made the situation somewhat more ambiguous. 69 There is unquestionably disagreement over the extent to which the invasion of Afghanistan itself can be explained by the traditional “substantial involvement” framework, or whether it represents state practice that has lowered the bar for use of force against states harboring terrorist groups. It may in any event constitute a \textit{sui generis} case. 70 But while there may be some increased ambiguity, and possibly some shifting in the principles of attribution, there nonetheless continues to be a requirement to establish some significant level of involvement or support of the NSAs’ operations in order to attribute their actions to the state for the purposes of justifying the use of force against that state in self-defense. And that necessary level of state involvement has not yet been reduced to a mere inability, or even unwillingness, to suppress the operations of the non-state entity. 71

Aside from this central problem with the proposition that states can use force against NSAs as such (which is more accurately characterized as a problem of asserting a right to use force against states that are not sufficiently responsible for the actions of NSAs), there are other grounds for objecting to the proposition. These relate to the difficulties associated with determining the scope of any such principle. Precisely what kinds of NSA could be the subject of state use of force? What objective criteria could be used for defining the nature of the entity against which force is to be used? States, as legal entities, have relatively clear parameters in international law, and indeed traditionally were the only entities to have legal personality as subjects of international law. There are relatively clear criteria defining whether and when a state exists. 72 As such, to say that only states are subject to the \textit{jus ad bellum} regime, and that the only use of force that can be justified under the doctrine of self-defense is that directed against states, is to provide some certainty and clear limits as to when force may be used. The use of force, as the modern successor to the nineteenth-century institution of war, is a \textit{legal} concept, constituting a \textit{legal} process between entities with \textit{legal} personality. Terrorist organizations, like other criminal enterprises (or indeed non-criminal entities such as churches or not-for-profit organizations), are not international organizations that have any such certain legal identity. It is not possible to make them the subject of this legal process. 73 In the end the argument that states can use force against NSAs as such,

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69 See Ruys, Article 51 of the UN Charter, supra n. 53, 486–7, on the nature of ambiguity.
70 See ibid. at 199.
71 Ruys, Article 51 of the UN Charter, supra n. 53, 485–9. As Ratner puts it, “harboring” as articulated by the Bush administration at least means toleration, and that while the Bush doctrine on harboring may have been vague at the margins, it did not endorse the view that states “despite \textit{bona fide} law enforcement, are unable to prevent or punish [terrorist actions], are harboring terrorists.” Ratner, supra n. 10, 907–08, and fn. 15. But see Tsagourias, supra n. 53, 328–9, and Schmitt, supra n. 46, 5.
72 Montevideo Convention on the Rights and Duties of States, 165 L.N.T.S. 19, signed December 26, 1933, art. 1.
73 For a useful analysis of the structure of terrorist organizations and the extent to which they might be subject to the laws of war, see Matthew C. Waxman, “The Structure of Terrorism Threats

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suggests that we are looking to the wrong legal regime for assistance in governing
the activity in question, which has traditionally been dealt with as a criminal law
matter.

It may be said in response that IHL has evolved such that states may, as a mat-
ter of law, become involved in armed conflict with armed groups that are not
representatives of states—that is, in non-international armed conflict. And so,
it will be said, in the context of the IHL regime, force is not limited to states or
entities with formal legal personality. If IHL could adapt in this way, why not
jus ad bellum? But one of the primary criteria for establishing that there is in
fact a non-international armed conflict to which the IHL regime applies, is the
requirement that the opposing force is an entity that is of sufficient organization
and cohesion to constitute an armed group that can be identified by objectively
verifiable criteria. In other words, there are limits built into the system for
determining the kinds of NSA that may become a participant in hostilities. If
jus ad bellum were to similarly adapt, there would nonetheless have to be serious
consideration of the criteria that would be applied in determining the kinds of
NSAs that might be subject to the regime. The question of whether states can
use force against non-state entities as such, as a matter of jus ad bellum, is both
analogous to and relates in some fundamental ways to the question of whether
transnational military operations against terrorist organizations can qualify as
an armed conflict for the purposes of IHL—an issue that is no less controversial
in the debate over targeted killing. The problem with suggestions that interna-
tional law should develop in order that a state could use force against an ill-de-
defined collection of amorphous terrorist organizations, and that the state would
thereby be in a global armed conflict with such organizations under IHL, is that
such developments would undermine the objective criteria for defining both the
limits on the use of armed force, and the parameters of armed conflict.

In sum, the proposition that states can use force against NSAs as such, and
thereby against states with little responsibility for the NSAs actions, is not con-
sistent with the current jus ad bellum system, and moreover there are good rea-
sons why this is so. It will be objected that this tends to create something of an
asymmetry, as well as to give rise to something of a paradox—for while under
the current law a terrorist attack may constitute an armed attack in jus ad bellum
terms, a response to the attack is not permissible if there was not sufficient state
complicity in the NSAs operation. Thus, so the objection would go, the jus ad

and the Laws of War,” 20 Duke Journal of Comparative & International Law (2010) 429; on the
nature of legal personality in international law, the seminal case is Reparation for Injuries Suffered in

74 Cullen, supra n. 30, ch. 4; Melzer, supra n. 1, 254. Moir, supra n. 30, 489 (Kindle edition).
Additional Protocol II to the Geneva Conventions, Art. 1(2).
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Bellum regime recognizes that NSAs can mount armed attacks, but then it insulates them from the responding use of force in self-defense. There is thereby a recognition of a wrong, but the denial of a remedy. Of course, in response to this it must be pointed out that the current law exists precisely because the remedy sought would be inflicted on states that are not themselves guilty of the kind of wrong that legitimates the use of force against them. But even to this the detractors would argue that from a philosophical and moral perspective it might be entirely defensible to inflict a remedy on a not entirely blameless state. As between Utopia, the innocent victim of terrorist attacks, and Oceania, which while not sufficiently responsible for the attacks to justify a response in self-defense is not blameless, surely we should permit harm to the latter. However, in response to this entire line of argument it has to be emphasized that the modern jus ad bellum regime is not primarily grounded in such moral balancing, or even in a sense of justice, but rather is founded on the profound need to prevent war among states. Permitting the use of force against states that have not assisted terrorists acting from within their territory would create a different and far more serious asymmetry, which would distort and undermine the integrity of the jus ad bellum regime, and increase the risk of armed conflict among nations.

Such risk is not mere idle speculation. In Columbian raids against NSAs in Ecuador in 2006, and Turkish attacks on Kurds in Iraq in 2007–08, there was a serious risk of escalation. Consider the ramifications if India had characterized the Mumbai attack of 2008 as an “armed attack” justifying the use of force in self-defense against Lashkar-e-Taiba, quite independent of whether there was sufficient evidence to establish that its operations could be attributed to Pakistan. The use of force against the group within the territory of Pakistan would have nonetheless been viewed as an act of war by Pakistan, and there would have been a real risk of a full-blown armed conflict between nuclear powers.

75 My thanks to Jens Ohlin for bringing this paradox into stark relief.

76 This is akin to the analysis of the rights of self-defense, of both the potential victim and a bystander, against the “psychotic aggressor”—i.e., an aggressor who is morally blameless, but who is nonetheless intent on attacking the victim. See, George P. Fletcher and Jens David Ohlin, Defending Humanity: When Force is Justified and Why (Oxford University Press, 2008) 107–09. However, states are not, of course, monolithic entities, and so in some contexts the analogies to domestic criminal law can break down. Here we are not really talking about the choice of harm to one of two moral entities, but missile strikes that most often result in the killing of innocent civilians on the one hand, versus the possible future deaths of undetermined civilians in the defending state if the strike is not undertaken. The German Constitutional Court considered such a dilemma in a challenge to aerial security law authorizing the military to shoot down an airliner to prevent it being employed as a weapon. The court held that the law was unconstitutional, a violation of the right to life and guarantee of human dignity. Federal Constitutional Court, “Luftsicherheitsgesetz” Case, January 11, 2005, BVerfG, 1BvR 357/05; and see discussion of the case in Melzer, supra n. 1, 16–18.

77 Ruys, Article 51 of the Charter, supra n. 53, 488–9.
(b) Use of force in response to what attacks?

We turn next to the second question identified at the outset of this section, namely: in response to which armed attacks are the targeted killings being conducted? First, one has to establish whether the self-defense claimed is in respect of each individual strike, for the policy of strikes as a whole, or separately for the collective strikes against each of the various states. The proposition that each launch of hellfire missiles to implement a kill constitutes a separate act of self-defense is untenable.\footnote{For an example of an individual strike approach, see e.g., Jenks, “Law from Above,” 85 North Dakota Law Review (2010) 659–60.} Notwithstanding the lack of evidence from the U.S. government, there is little basis for believing that each act of terrorism that was being contemplated by all the persons so far targeted would by themselves have risen to the level of constituting an armed attack against the United States, had they been launched.\footnote{For one thing, many of those targeted have been low-level operatives. Eric Schmitt, “New C.I.A. Drone Attack Draws Rebuke from Pakistan,” The New York Times, April 14, 2011, A10.} While the 9/11 attacks clearly reached the level of “armed attack,” most of the other publicly disclosed plots that have been uncovered subsequently would not. Moreover, the killings have apparently taken place before the planned attacks had reached anything close to being imminent. Each use of force would thus have to be characterized as a preventative strike in response to a speculative future threat.

This brings us back to an aspect of self-defense doctrine that, as mentioned earlier, has become controversial in the post 9/11 era, namely the anticipatory and preventative use of force. It has been argued that the killings can be justified on the basis of a “preemptive” or “preventative” conception of self-defense,\footnote{Jenks, “Law from Above,” supra n. 78, 656–60. It should be noted that there is no well-established usage of these terms—some commentators distinguish between “anticipatory” and “preemptive,” others between “preemptive” (in a sense similar to “anticipatory,” or in response to imminent attack) and “preventative.” As Greenwood notes, therefore, some caution is necessary in interpreting the positions adopted by commentators: Greenwood, supra n. 22, 668. For a fuller analysis of this issue, see chapter 6 of this Volume, Claire Finkelstein, “Targeted Killing as Preemptive Action.” In this Volume, ch. 6.} a principle formalized in the so-called “Bush Doctrine.”\footnote{The so-called Bush Doctrine, justifying the use of force to prevent the development of future threats, was formalized in the National Security Strategy for the United States, 2002.} This argument is used both in the context of the theory that each strike constitutes a separate act of self-defense, and arguments that all the targeted killings are part of a response to terrorist attacks generally, so it bears analysis. The claims to a right of “preventative” self-defense are, like the arguments that self-defense is not limited to the use of force against states, grounded in arguments that there are broader customary international law principles that co-exist with Article 51 of the U.N. Charter. These underlying arguments were addressed above.\footnote{See text associated with supra nn. 52–57.} In addition, however, these assertions as they relate to preventative use of force are also not consistent with state practice.\footnote{Gray, supra n. 22, 118 and 160; Ruys, Article 51 of the Charter, supra n. 53, ch. 5.}
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self-defense as a concept was roundly rejected by the international community when it was floated as a justification for the invasion of Iraq in 2003, and it is not part of established customary international law. The claims are inconsistent with the judgments of the ICJ. The principle of preventative self-defense goes well beyond an anticipatory use of force against an imminent armed attack, and cannot satisfy the principle of necessity that is one of the foundations of the doctrine of self-defense. And while these arguments in support of a preventive use of force have increased in the post 9/11 era, they do not represent the mainstream of scholarly opinion. This might lead some to argue that the jus ad bellum regime is an anachronism that must adapt to the new realities of transnational terrorism if it is not to become irrelevant. But as will be argued below, that would be to increase the risk of war simply to address the threat of terrorism.

Returning to the issue of identifying the armed attacks, and the better argument that the targeted killing strikes collectively constitute a response to an armed attack or series of such attacks, the drone strikes might be characterized as an ongoing use of force in response to the armed attacks of 9/11. This was indeed the implication in Harold Koh’s speech. The U.S. invasion of Afghanistan in November 2001 was a legitimate use of force in self-defense in response to those attacks, against the state from which the attacks had been launched, and which supported the terrorist entity that had planned and executed the attacks. Within the context of the resulting international armed conflict, and even the non-international armed conflict that developed within Afghanistan in late 2002, military operations could

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84 Gray, supra n. 22, 160–6; Greenwood, Essays on War, supra n. 22, 675–6.

85 The ICJ has continued to insist that an armed attack is a necessary pre-condition to the use of force in self-defense (though in Nicaragua it expressed “no view” on the validity of anticipating self-defense). See, e.g. Nicaragua v. U.S.A., supra n. 25, paras 194–95; Oil platforms, supra n. 25, paras 61–64; Congo v. Uganda, supra n. 60, paras 143–47.


87 Caution has to be observed in distinguishing between arguments supporting “anticipatory self-defense,” and the much broader “preventative” use of force inherent to the Bush Doctrine. But rejecting the broad customary international law view, see, e.g., Brownlie, supra n. 22, 24–5; Dinstein, supra n. 18, 175–87 and 247–9; Gray, supra n. 22, 117–19 and 160–6; Franck, supra n. 22, ch. 7 (“defending a narrow conception of anticipatory self-defense”); Ruys, Article 51 of the charter, supra n. 53, 255–305 and 318–42; Greenwood, supra n. 22, 672–7 and 699; Printer, supra n. 6, 337–44. Contra, see e.g. Paust, supra n. 6, 238–49; and more broadly, William C. Bradford, “The Duty to Defend Them: A Natural Law Justification for the Bush Doctrine of Preventative War,” 79 Notre Dame L. Rev. 1365 (2004); Sean Murphy, “The Doctrine of Preemptive Self-Defense,” 50 Villanova Law Review (2005) 699. There are more philosophical normative works that explore why the right of self-defense ought to be broader than that allowed by art. 51: see e.g. Michael Walzer, Just and Unjust War, 3rd edn (Basic Books, 2000), and more recently, Fletcher and Ohlin, supra n. 76.

88 Dinstein, supra n. 18, 236–7; Gray, supra n. 22, 193–4 (though acknowledging broader claims); Greenwood, supra n. 22, 424–5.
be legitimately taken against members of Al Qaeda, so long as the conditions of IHL were satisfied. But aside from operations in Afghanistan, the theory that the ongoing policy of targeted killing against not only members of Al Qaeda and the Taliban, but also other terrorist or militant groups, operating in various countries other than Afghanistan, becomes increasingly difficult to justify as a response to the 9/11 attacks. The arguments run into problems raised by issues we have already addressed regarding the entities against which the use of force is being directed. Many of the groups now being targeted had nothing to do with 9/11, and force is being used against countries that bear no responsibility for the 9/11 attacks.

For instance, the targeted killing policy is directed against a wide range of groups in Pakistan, including not only foreign “affiliates” of Al Qaeda such as the Harakat-ul Jihad Islami, but also various indigenous groups within the umbrella term “Pakistani Taliban,” and yet other independent groups involved in Afghan operations such as the Haqqani Network. In Yemen the attacks conducted by the military (soon to be augmented by a larger CIA drone campaign), have included not only Al Qaeda in the Arabian Peninsula (which while sharing a name, and said to be “affiliated’ with Al Qaeda, was initially quite independent from Al Qaeda, and its exact relationship remains the subject of debate), but also other militant groups such as Islamic Jihad in Yemen, which are said to have “links” to Al Qaeda. In Somalia, the United States has targeted and killed members of al-Shabaab, a nationalist group that has little in common with Al Qaeda (though also said to have “links” to it). While there is evidence of varying degrees of involvement by these groups in attacks on the United States, or U.S. forces in Afghanistan, there is no publicly disclosed evidence that any of these groups are directly connected to the attacks of 9/11, or integrated into Al Qaeda’s attempts to continue such attacks. The drone strikes against them cannot, therefore, be justified as being an exercise of the right of self-defense in response to those attacks. Loose assertions of “affiliation” and “links” to Al Qaeda simply do not provide the basis for analogies

89 Anderson, a strong advocate for the policy, recognizes this very problem in his argument that the U.S. needs to ground its justification in non-IHL principles: Anderson, supra n. 41, 357–8.
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to alliances among states in common cause against an enemy in an international armed conflict.

Similarly problematic is the extent to which the strikes against members of these various groups constitute uses of force against the countries in which they are targeted, as already discussed. The 9/11 attacks were not launched from Yemen, Somalia, or Pakistan, nor did any of those countries have anything to do with those attacks. They have not been “substantially involved” in, or otherwise supported, subsequent attacks planned or launched by Al Qaeda (as distinct from other groups). These states may now be the launching pad for other threats against the United States, but those subsequent threats posed by different groups cannot be simply rolled into the 9/11 justification for the use of armed force against these states. Thus, the use of force beyond the theatre of Afghanistan, against persons with only tenuous links to the perpetrators of 9/11, ten years after the fact, begins to look increasingly dubious under the justification of self-defense in response to 9/11 and the possible continuation of such attacks by Al Qaeda.

An alternative theory would be that the drone strikes in Pakistan are not acts of self-defense in response to 9/11, but rather are in response to the ongoing attacks against coalition forces engaged in the counter insurgency within Afghanistan by militant forces operating from within Pakistan. Indeed, the strikes launched against groups like the Haqqani network can only be credibly explained this way. But whether or not the United States can use force against Pakistan in an effort to prevent such cross-border attacks depends on factual determinations of whether the scale of such attacks rise to the level of being armed attacks against Afghanistan, thus justifying the use of force as an exercise of collective self-defense, and the extent to which Pakistan is sufficiently involved in supporting such attacks by the Haqqani network for purposes of attribution.

The analysis with respect to the killings in Yemen, however, would again be entirely different. The targeted killing of members of Al Qaeda in the Arabian Peninsula (AQAP) has nothing to do with the non-international armed conflict in Afghanistan, but is based on the assertion that the AQAP is engaging in a campaign of terrorist strikes against the United States. But to what theory of armed attack do the strikes against AQAP, and against Yemen, relate? Presumably such attempted attacks as that of the Christmas day bomber, and the printer cartridge bomb attempts. The question then remains whether the terrorist strikes that were preempted rose to the level of constituting armed attacks giving rise to an independent right of self-defense; and whether their actions can be imputed to the state of Yemen for the purposes of justifying the use of force against that state. And a similar analysis would be required

\[94\] Yet many scholars tend to characterize the strikes in Yemen as being a response to 9/11. See, e.g., Printer, supra n. 6, 352–5.
\[95\] Harris, supra n. 92, 4.

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for the strikes against al-Shabaab members in Somalia, where there has been even less evidence of imminent threats of armed attack against the United States.

Without going through the analysis for each of these scenarios in detail, we can nonetheless conclude that while it may be possible to justify the use of force against these states on the basis of self-defense, the crucial point is that the justificatory analysis is case-dependent. When the United States engages in strikes that constitute the use of force against each of these states, the claim of the right of self-defense must make specific reference to the armed attacks that justify it, how the group that is the object of the use of force is responsible for the attacks, and how the state in which the group is being targeted can itself be held legally responsible for the operations of that group so as to justify the use of force against the state. The problem with the current U.S. claim of self-defense is that it does none of this, but rather asserts a general right to use force against Al Qaeda, the Taliban, and any other groups associated with them; and against any country in which the members of such groups are located, not based on the state’s actual involvement in the group’s attacks, but merely on it being insufficiently willing or able to suppress the group’s operations.  

It almost goes without saying that the principles of necessity and proportionality cannot be satisfied under such sweeping and general claims of self-defense. It is not possible to demonstrate that the use of force was strictly necessary when there has been no identification of the armed attacks in question, or explanation of how the specific groups being targeted pose the threat of imminent armed attacks, that can only be stopped through the use of force. Similarly, there can be no proportionality analysis without the identification of the harm that would be caused by specific attacks, against which one can compare the harm being inflicted by the defensive use of force. Thus, in order to satisfy the necessity and proportionality principles that are at the core of the doctrine, the United States must provide the information required for such analysis.

In sum, the U.S. government’s reliance upon self-defense as a justification for the targeted killing policy in countries such as Yemen, Somalia, and Pakistan, at least in the very general terms with which it has been asserted, is not consistent with the principles of self-defense under the *jus ad bellum* regime. This finding would suggest that, unless and until the administration offers more particularized support for this justification, the ongoing use of missile strikes for the purposes of killing suspected “terrorists,” “militants” and “insurgents” in countries like Somalia, Yemen, and Pakistan, is a violation of the prohibition on the use of armed force.

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96 Moreover, the intention is to extend this general right of self-defense to any group that the U.S. determines to be “hostile.” See supra n. 8.

97 The ICJ has held, for instance, that the U.S. destruction of Iranian oil platforms in response to the mining of an American frigate was neither necessary nor proportionate, and thus not a justifiable use of force under the self-defense exception. *Oil Platforms Case*, para. 77.
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Such a conclusion is troubling enough. But even more important in the long run is the potential harm this continued practice could cause to the *jus ad bellum* regime, and to the relationship between the *jus ad bellum* and IHL regimes, to which we turn next.

IV. The potential impact of the targeted killing policy on international law

The United States has been engaging in this practice of using drone-mounted missile systems to kill targeted individuals since at least 2002. An increasing number of countries are developing drone capabilities, and other countries have employed different methods of targeted killing that constitute a use of force under *jus ad bellum*. The evidence suggests that the United States intends to continue and indeed expand the program, and there is a growing body of scholarly literature that either defends the policy’s legality, or advocates adjustment in international law to permit such action. There is, therefore, a real prospect that the practice could become more widespread, and that customary international law could begin to shift to reflect the principles implicit in the U.S. justification and in accordance with the rationales developed to support it.

Some of the implications of such an adjustment in the *jus ad bellum* regime are obvious from the foregoing analysis. As discussed, there would be a rejection of the narrow principle of self-defense in favor of something much closer to the Grotian concept of defensive war, encompassing punitive measures in response to past attacks and preventative uses of force to halt the development of future threats. The current conditions for a legitimate use of force in self-defense, namely the occurrence or imminence of an armed attack, necessity, and proportionality, would be significantly diluted or abandoned. Not only the doctrine of self-defense, but other aspects of the collective security system would be relaxed as well. Harkening back to Grotian notions of law enforcement constituting a just cause for war, the adjusted *jus ad bellum* regime would potentially permit the unilateral use of force against and within states for the purpose of attacking NSAs as such, in effect to enforce international law in jurisdictions that were incapable of doing so themselves. This would not only further undermine the concept of self-defense, but would undermine the exclusive jurisdiction that the U.N. Security Council currently has to authorize the use of force for purposes of “law enforcement” under Chapter VII

99 Melzer, *supra* n. 1, ch. 2. An increasing number of countries are reported to be developing military drone capabilities: see Jenks, “Law from Above,” *supra* n. 78, 654.
100 See Dinstein for this argument in support of limited use of force against terrorists operating within the territory of another state: Dinstein, *supra* n. 18, 244–7.
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of the Charter. Thus, both of the exceptions to the Article 2(4) prohibition on the use of force would be expanded.

In addition, however, the targeted killing policy threatens to create other holes in the *jus ad bellum* regime. This less obvious injury would arise from changes that would be similarly required of the IHL regime, and the resulting modifications to the fundamental relationship between the two regimes. These changes could lead to a complete severance of the remaining connection between the two regimes. Indeed, Ken Anderson, a scholar who has testified more than once on this subject before the U.S. Congress,\(^1\) has advocated just such a position, suggesting that the United States should assert that its use of force against other states in the process of targeted killings, while justified by the right to self-defense, does not rise to such a level that it would trigger the existence of an international armed conflict or the operation of IHL principles.\(^2\) If customary international law evolved along such lines, reverting to gradations in the types of use of force, the change would destroy the unity of the system comprised of the *jus ad bellum* and IHL regimes, and there would be legal “black holes” in which states could use force without being subject to the limitations and conditions imposed by the IHL regime.

The structure of Harold Koh’s two-pronged justification similarly implies a severance of this relationship between *jus ad bellum* and IHL, albeit in a different and even more troubling way. His policy justification consists of two apparently independent and alternative arguments—that the United States is in an armed conflict with Al Qaeda and associated groups; and that the actions are justified as an exercise of self-defense. The suggestion seems to be that the United States is entitled on *either* basis to use armed force not just against the individuals targeted, but also against states in which the terrorist members are located. In other words, the first prong of the argument is that the use of force against another sovereign state, for the purposes of targeting Al Qaeda members, is justified by the existence of an armed conflict with Al Qaeda. If this is indeed what is intended by the policy justification, it represents an extraordinary move, not just because it purports to create a new category of armed conflict (that is, a “transnational” armed conflict without geographic limitation),\(^3\) but because it also suggests that there need be no *jus ad bellum* justification at all for a use of force against another state. Rather, the implication of Koh’s rationale is that the existence of an armed conflict under IHL can by itself provide grounds for exemption from the prohibition against the threat or use of force under the *jus ad bellum* regime.

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\(^3\) See supra n. 35.
This interpretation of the justifications cannot be pressed too far on the basis of the language of Mr. Koh’s speech alone, which he hastened to explain at the time was not a legal opinion. The two justifications could be explained as being supplementary rather than independent and alternative in nature. But the conduct of the United States in the prosecution of the policy would appear to confirm that it is based on these two independent justifications. The strikes against groups and states unrelated to the 9/11 attacks could be explained in part by the novel idea that force can be used against NSAs as such, wherever they may be situated. But even assuming some sort of strict liability for states in which guilty NSAs are found, that explanation still does not entirely account for the failure to tie the use of force against the different groups to specific armed attacks launched by each such group. This suggests that the United States is also relying quite independently on the argument that it is engaged in an armed conflict with all of these groups, and that the existence of such an armed conflict provides an independent justification for the use of force against the states in which the groups may be operating.

While the initial use of force in *jus ad bellum* terms is currently understood to bring into existence an international armed conflict and trigger the operation of IHL, the changes suggested by the policy would turn this on its head, by permitting the alleged existence of a “transnational” armed conflict to justify the initial use of force against third states. Whereas the two regimes currently operate as two components of an overall legal system relating to war, with one regime governing the use of force and the other the conduct of hostilities in the resulting armed conflict, the move attempted by the U.S. policy would terminate these independent but inter-related roles within a single system, and expand the role and scope of IHL to essentially replace aspects of the *jus ad bellum* regime. This would not only radically erode the *jus ad bellum* regime’s control over the state use of force, but it could potentially undermine the core idea that war, or in more modern terms the use of force and armed conflict, constitutes a legal state that governs the various aspects of the phenomenon. There is a risk of return to a pre-Grotian perspective in which “war” was simply a term used to describe certain kinds of organized violence, rather than constituting a legal

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institutions characterized by a coherent system of laws designed to govern and constrain all aspects of its operation.

There is a tendency in the U.S. approach to the so-called “global war on terror” to cherry-pick principles of the laws of war and to apply them in ways and in circumstances that are inconsistent with the very criteria within that legal system that determine when and how it is to operate. This reflects a certain disdain for the idea that the laws of war constitute an internally coherent system of law. In short, the advocated changes to the *jus ad bellum* regime and to the relationship between it and the IHL regime, and thus to the laws of war system as a whole, would constitute marked departures from the trajectory the system has been on during its development over the past century, and would be a repudiation of deliberate decisions that were made in creating the U.N. system after the Second World War.

The premise of my argument is not that any return to past principles is inherently regressive. A rejection of recent innovations in favor of certain past practices might be attractive to some in the face of new transnational threats. The argument here is not even to deny the idea that the international law system may have to adapt to respond to the transnational terrorist threat. The point, rather, is that the kind of changes to the international law system that are implicit in the targeted killing policy, and which are advocated by its supporters, would serve to radically reduce the limitations and constraints on the use of force by states against states. The modern principles that are being abandoned were created for the purpose of limiting the use of force and thus reducing the incidence of armed conflict among nations. The rejection of those ideas and a return to older concepts relating to the law of war would restore aspects of a system in which war was a legitimate tool of statecraft, and international armed conflict was thus far more frequent and widespread.

The entire debate on targeted killing is so narrowly focused on the particular problems posed by transnational terrorist threats, and how to manipulate the legal limitations that tend to frustrate some of the desired policy choices, that there is insufficient reflection on the broader context, and the consequences that proposed changes to the legal constraints would have on the wider legal system of which they are a part. It may serve the immediate requirements of the American government, in order to legitimize the killing of AQAP members in Yemen, to expand the concept of self-defense, and to suggest that states can use force on the basis of a putative “transnational” armed conflict with NSAs. The problem is that the *jus ad bellum*

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106 This propensity is similarly seen in the detention and military commission policies.

107 See *supra* n. 38.

108 On the debate leading to these “decisions,” see Neff, *supra* n. 13, 335–40.

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regime applies to all state use of force, and it is not being adjusted in some tailored way to deal with terrorism alone. If the doctrine of self-defense is expanded to include preventative and punitive elements, it will be so expanded for all *jus ad bellum* purposes. The expanded doctrine of self-defense will not only justify the use of force to kill individual terrorists alleged to be plotting future attacks, but to strike the military facilities of states suspected of preparing for future aggression. If the threshold for use of force against states “harboring” NSAs is significantly reduced, the gap between state responsibility and the criteria for use of force will be reduced for all purposes. If the relationship between *jus ad bellum* and IHL is severed or altered, so as to create justifications for the use of force that are entirely independent of the *jus ad bellum* regime, then states will be entitled to use force against other states under the pretext of self-proclaimed armed conflict with NSAs generally.

We may think about each of these innovations as being related specifically to operations against terrorist groups that have been responsible for heinous attacks, and applied to states that have proven uniquely unwilling or unable to take the actions necessary to deal with the terrorists operating within their territory. But no clear criteria or qualifications are in fact tied to the modifications that are being advanced by the targeted killing policy. Relaxing the current legal constraints on the use of force and introducing new but poorly defined standards, will open up opportunities for states to use force against other states for reasons that have nothing to do with anti-terrorist objectives. Along the lines that Jeremy Waldron argues in chapter 4 in this volume, more careful thought ought to be given to the general norms that we are at risk of developing in the interest of justifying the very specific targeted killing policy. Ultimately, war between nations is a far greater threat, and is a potential source of so much more human suffering than the danger posed by transnational terrorism. This is not to trivialize the risks that terrorism represents, particularly in an age when Al Qaeda and others have sought nuclear weapons. But we must be careful not to undermine the system designed to constrain the use of force and reduce the incidence of international armed conflict, in order to address a threat that is much less serious in the grand scheme of things.

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