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Changes in the Law of Self-Defence? Drones, Imminence, and International Norm Dynamics

This article assesses the evolution of the international law of the use of force, focusing on how the emergence of unmanned aerial vehicles (UAVs), influenced international norms regulating the right to self-defense. Drawing on constructivist International Relations research, we develop a socio-legal framework that emphasizes changes in the interpretation of the meaning of imminence, and investigate how these changes, counter-terrorism, and the introduction of UAVs have contributed to the adoption of more relaxed standards for the use of force in self-defence. We argue that the Obama Administration engaged in a systematic effort to redefine imminence and that a significant numbers of states, including key powers such as China, India and the UK, have largely followed this model. This, we suggest, underlines both the ability of dominant states to shape the interpretation of international norms and the influence of strategic and technological developments on the meaning and interpretation of international law.

Keywords: drones, imminence, international norms, international law, norm contestation, self-defence,.

Introduction

In 2011, John Brennan,¹ at the time Assistant to the President for Homeland Security and Counterterrorism, outlined the US' position on the use of force in international relations, in particular with regard to its anti-terrorism policy. Touching upon the question of when a country has the right to defend itself, Brennan made a potentially far-reaching comment:

We are finding increasing recognition in the international community that a more flexible understanding of "imminence" may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts.²

¹ John Brennan, 'Strengthening our Security by Adhering to our Values and Laws', *Remarks of John Brennan at Harvard Law School*, available at: <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>

² Brennan, 'Strengthening our Security by Adhering to our Values and Law'.

This article takes as its starting point Brennan's assumption about the changing nature of 'imminence' and considers whether a new understanding of 'imminence' - one based on the US definition of the concept - is, in fact, emerging in international relations. More specifically, our aim is to ascertain the claim that the emergence of drones has led international society to internalize a 'new' understanding of the right to self-defence, on the basis of an expanded notion of imminence. This, we hope, will help both international lawyers and International Relations (IR) scholars to better understand states' current position in relation to the right of self-defence and how changes in state practice and *opinio juris* have influenced the evolution of the international law that regulates it.³

Confirming the widespread view that there has been a transition, set in motion by the Bush Administration after 9/11, towards a more relaxed standard understanding of the law of self-defence,⁴ we offer two interrelated arguments that qualify this view in important respects. Firstly, at the theoretical level, we suggest that the evolution of the international law of self-defence has been a result of changes in the *interpretation* of the temporal conditions under which the right to self-defence can be legally exercised rather than a modification of the law itself. To examine different interpretations of

³ Abram Chayes, *The Cuban Missile Crisis: international crisis and the rule of law* (Oxford: Oxford University Press, 1974), p. 26.

⁴ See for example, Noura Erakat, 'New Imminence in the Time of Obama: The Impact of Targeted Killings on the Law of Self-defence', *Arizona Law Review*, Vol. 56, No. 1, 2014, pp. 195-248. Peter Dombrowski and Rodger A. Payne, 'The Emerging Consensus of Preventive War', *Survival: Global Politics and Strategy*, Vol. 48, No. 2, 2006, pp. 115-36. Michael Reisman and Andrea Armstrong, 'The Past and Future of the Claim of Preemptive Self-defence', *American Journal of International Law*, Vol. 100, 2006, pp. 525-50. Kerstin Fisk and Jennifer Ramos, 'Actions speak louder than words: preventive self-defence as a cascading norm,' *International Studies Perspectives*, Vol. 15, No. 2, 2014, pp. 163-85. Michael Reisman and Andrea Armstrong, 'The Past and Future of the Claim of Preemptive Self-defence', *American Journal of International Law*, Vol. 100, 2006, pp. 525-50.

international law, the article turns to the discipline of International Relations. We develop a constructivist approach that makes the interpretation of norms accountable, by focusing on the way states enact specific meanings of a norm in a given context. This allows us to go beyond existing accounts of the evolution of the international law of self-defence, showing how states strategically contest, promote, and adopt specific meanings of the law as a response to technological and political developments.

Secondly, at the empirical level, we suggest that only under the Obama Administration, the US has made a deliberate and explicit effort to redefine the meaning of the concept of imminence. We argue that this redefined concept of imminence has played a prominent role in the administration's justification of counter-terrorism operations, specifically in the context of drone strikes, and show that several countries, including, but not limited to US allies, have embraced this expanded notion of imminence when confronting terrorists and other non-state actors. These findings add further evidence to the claim that the dominant schemes for the interpretation of international law are shaped and forged by the strongest states, 'as it is their practice that is most persuasive in resolving conflicts over the meaning of the rules.'⁵

In order to advance our arguments, we proceed in four steps. The first section provides a brief overview of the current dynamics in the international law of self-defence. We consider under what conditions the law of self-defence can change and suggest that much of the currently debated changes concern the evolution of the interpretation of the law. To get to grips, methodologically, with these changes, the

⁵ Ian Hurd, *How to do things with International Law* (Princeton: Princeton University Press), p. 52. See also, Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press).

second section develops an interdisciplinary socio-legal framework for the study of the evolution of the international law of self-defence. Drawing on the constructivist framework of Antje Wiener,⁶ we conceptualize the norm of self-defence as a dynamic structure of meaning-in-use that is shaped, contested and transformed by social and communicative practices. From here, we construct a number of markers of change, criteria which will allow us to systematically track the evolution and diffusion of the meaning of imminence. The third section considers in detail the conceptual evolution of imminence in American foreign policy. Here, the aim is to establish a precise account of what exactly 'imminence' meant to the Obama Administration, and how this meaning differed from its predecessors. Having established the US position on 'imminence', the fourth section investigates whether international society⁷ has adopted this position. To do so, we look in detail at a number of critical actors' foreign policies and military strategies, including both US key allies (Australia, France, Israel and the UK) and a number of non-Western powers (Brazil, China, India and Russia). We deliberately select a large sample consisting of ideologically diverse actors, as this will not only allow us to find out whether a particular meaning is unique to a particular group of actors, or common to many in international society, but also to link causes such as threat level, regional security situation, identity and great power status to

⁶ Antje Wiener, 'Enacting meaning-in-use: qualitative research on norms and international relations', *Review of International Studies*, Vol. 35, No. 1, 2009, pp. 175-93.

⁷ Most lawyers and politicians tend use the term 'international community' instead. However, for political scientists, 'community' and 'society' represent two different concepts. Based on the Weberian distinction between *Gesellschaft* (society) and *Gemeinschaft* (community), society is concerned with the norms and rules that structure interaction within large social groups, while community focuses on affection and the feeling of belonging together. For an excellent discussion of the society/community distinction in IR, see Barry Buzan, *From International to World Society: English School Theory and the Social Structure of Globalisation* (Cambridge: Cambridge University Press, 2004), pp. 108-118. We will use the term (and concept) 'international society' in order to signify that we are dealing with processes and changes that pertain to patterns of rational interaction structures, not to feelings about identity and belonging.

outcomes. We conclude by providing some reflections on international norm dynamics that highlight the link between great power status, technology and the evolution of norms.

Current Issues and Dynamics in the International Law Guiding Self-Defence

Constraining the use (and abuse) of force is an integral part of the solution to the social order problem, and all international societies have contained certain shared understandings about how to regulate the use of large-scale violence among its members. Here, international society is no different to its domestic counterpart. As Hedley Bull argued in his seminal study of order in world politics, 'all societies seek to ensure that life will be in some measure secure against violence resulting in death or bodily harm'.⁸ This section looks at the legal debates surrounding the rules regulating use of force in contemporary international society. The aim here is not to provide an exhaustive analysis of these debates, but to establish current themes, provide an understanding of the rules, and consider how they have evolved.

In the post-1945 global normative order, the basic shared understandings governing the use of force among states are laid down in the UN Charter. According to Jackson,⁹ Article 2 of the UN Charter contains 'the most important procedural norm – *grundnorm* – of the global covenant'. Chief among them is Article 2(4), which stipulates the most

⁸ Hedley Bull *The Anarchical Society: A Study of Order in World Politics* (London: Palgrave, 1977), p. 4.

⁹ Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000), pp. 16-19.

important rule on resort to force: ¹⁰ 'All members shall refrain in their international relations from threat or use of force against the territorial integrity or political independence of any state'. The fundamental status of Article 2(4), and its importance for the functioning and moral integrity of the international public order, is illustrated through its *jus cogens* status, which renders it non-derogable and universally binding all states.¹¹

There are only two express exceptions to this general prohibition. According to Chapter VII, the Security Council can authorise the use of force to restore international peace and security. The other exception, and the only case in which the right to engage in military force remains at the disposal of the sovereign state, is the 'inherent' right to self-defence defined in Article 51 of the UN Charter:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

The restrictions set out in this article, however, have come under intense pressure during recent years. The two main legal debates in this context surround whether or not non-state actors can mount an 'armed attack;' and the temporal requirements

¹⁰ See, Thomas, M Franck, 'Who Killed Article 2(4)?' *American Journal of International Law*, Vol. 64, No. 4, 1970, p. 809. Note that with a few minor exceptions, such as firing a bullet across a boundary or across a bow of a ship, Article 2(4) is generally read as prohibiting all uses of force. See, Mary Ellen O'Connell, 'Remarks: The Resort to Drones under International Law', *Denver Journal of International Law and Policy*, Vol 39, No. 4, 2011, p. 589.

¹¹ On the *jus cogens* status of the prohibition on the use of force, see Sondre Torp Helmersen, 'The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations', *Netherlands International Law Review* Vol. 61, No. 2, 2014, pp. 167-93; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2008), pp. 36-66.

surrounding self-defence, that is whether states can act against attacks which have yet to occur.¹²

Armed attack and non-state actors

In at least three separate decisions, the International Court of Justice made clear that the attack must be attributable to a state for the exercise of self-defence on that state's territory to be lawful.¹³ In the *Armed Activities on the Territory of the Congo* case, for example, the Court concluded that Uganda could not justify the use of self-defence, given that no sufficient evidence existed that Congo was responsible for the attacks by non-state actor groups located in Congo against Uganda.¹⁴ The ICJ's restrictive reading of self-defence has been challenged more recently, suggesting that the attributability of armed attack by non-state actors is no longer a necessary condition for the right to use force in self-defence.¹⁵ This claim is typically advanced in one of three ways (or a combination thereof).

The first is to cite the diverging opinions of different ICJ judges with regard to the case law on the matter. Criticising the ICJ's *Wall* judgement, for example, Judge Higgins noted that 'there is, with respect, nothing in the text of Article 51 that *thus*

¹² In the sense that this debate predates the UN Charter, it also relates to the question whether Article 51 is exhaustive, that is whether it supplanted or simply complemented a customary international law right for states to act in self-defence before an armed attack occurs. See James Mulcahy and Charles Mahony, 'Anticipatory Self-Defence: A Discussion of International Law,' *Hanse Law Review*, Vol. 2, No. 2 (2006), p. 233

¹³ Those decisions include the ICJ judgements in the *Nicaragua* case, I.C.J., 1986, Rep. 14, para 195; the *Wall* case, I.C.J., 2004, Rep. 136, para 139; and *Armed Activities on the Territory of the Congo* case, I.C.J., 2005, Rep. 168, para. 146-147.

¹⁴ *Ibid.* the *Wall*.

¹⁵ Kimberley Trapp, 'Can Non-State Actors Mount an Armed Attack?', in *The Oxford Handbook of the Use of Force in International Law*, ed. Marc Weller (Oxford: Oxford University Press, 2015), p. 696.

stipulates that self-defence is available only when an armed attack is made by a State'.¹⁶ The second is to show that the ICJ's assertions do not rule out the right to self-defence in cases in which the attack was committed by a non-state actor; an argument made by Michael Wood¹⁷ and Kimberley Trapp.¹⁸ The third is to point towards the changed practice of states and international organizations. Relevant examples include the UN Security Council Resolutions that legitimised the US intervention in Afghanistan that followed the September 11 attacks. In this context, Michael Scharf has argued that while initially the claim made by the United State after 9/11 was rejected, the 2015 ISIS attacks in Syria triggered a 'Grotian moment' in which the UN and the international community recognised the right to respond to attacks by non-state actors and, hence, non-state actors ability to mount 'armed attack.'¹⁹ In sum, and whichever strategy one pursues, there now seems to be a more expansionist reading affirming the existence of a right to respond to an armed attack by non-state actors with a use of force in foreign territory,²⁰ while the precise parameters of the right is still being worked out in international practice.²¹

¹⁶Rosalyn Higgins, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory case', p. 215. For similar opinions see also, Pieter Kooijmans p. 230; Thomas Buergenthal p. 242.

¹⁷ Michael Wood, in *Principles of International Law on the Use of Force by States In Self-Defence* (Chatham House Principles) (Chatham House, 2005) Available at: <https://www.chathamhouse.org/publications/papers/view/108106>, p. 30.

¹⁸ Kimberley N. Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors', *International and Comparative Law Quarterly* Vol. 56, No. 1, 2007, p 145.

¹⁹ Michael P. Scharf, 'How the War Against ISIS Changed International Law,' *Case Western Reserve Journal of International Law*, Vol. 48 (2016), pp. 1-54.

²⁰ Steenberghe, 'The Law of Self-Defence and the New Argumentative Landscape', pp. 46-48.

²¹ Trapp, 'Can Non-State Actors Mount an Armed Attack?' p. 696.

Anticipatory self-defence and imminent threats

The second area of the law of self-defence that has remained unsettled in recent years concerns the conditions, in particular the temporal conditions, for the exercise of the right. As Joe Boyle recently put it: 'the settled part of the law is that a state suffering an attack of a certain threshold can take forceful measures in self-defence while that attack is going on,' the use of force in anticipation of a more or less clear threat remains much more contentious.²² The ICJ has refused to provide any clarification on the matter. In the Corfu Channel case, the Court deemed that the readiness of British ships to use force was not unreasonable.²³ As reported by Ruys, Waldock understood the Court's opinion as a suggestion that a 'strong probability of armed attack' was sufficient to trigger self-defence.²⁴ In the *Nicaragua* case, the Court stressed that the use of force was an instrument of last resort. This seemingly suggested a narrow view of the right of self-defence. In the ruling, however, the Court also stated that 'the possible lawfulness of a response to the imminent threat of an armed attack which has not yet taken place has not been raised,' and hence the Court expressed no opinion on the matter.²⁵ The only case in which the Court seemed to deal with imminence is the *Gabcikovo - Nagymaros Project* case. The Court stated that 'a "peril" appearing in the long-term might be held to be "imminent" as soon as it is established.'²⁶ At a superficial reading, this statement seemed to point towards a much broader understanding of imminence,

²² Joe Boyle, 'Making Sense of Self-Defence in the War on Terror', *Journal on the Use of Force and International Law* Vol. 1, No. 1, 2014, p. 62.

²³ *Corfu Channel Case*, International Court of Justice, 9 April 1949, p. 30.

²⁴ Tom Ruys, *'Armed Attack' and Article 52 of the UN Charter* (Cambridge: Cambridge University Press, 2013), p. 262.

²⁵ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment. I.C.J. Reports 1986, par. 35.

²⁶ *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 1. C. J. Reports 1997, par. 54.

and this is how it was read by John Yoo.²⁷ As several scholars point out, however, this interpretation is disingenuous. The case concerned environmental damage that cannot be reversed and excluded the issue of assessing timing and intentions.²⁸ Confirming the Court's unwillingness to engage with this issue, the Court used the statement provided in the *Nicaragua* case also in the more recent *DRC v. Uganda* case.²⁹

In the absence of a ruling from the ICJ, legal scholarship and state practices have flourished. Three main positions can be identified.³⁰ The first view is a 'restrictionist' one. According to this view, states only have a right to self-defence if the attack has occurred.³¹ Other scholars - the 'inherent right school' - suggest that Article 51 of the UN Charter did not supplant a pre-existing 'inherent' right of self-defence. These scholars typically rely on the so-called *Caroline* criteria, which posit that the use of force is legitimate only in situations in which the threat 'is instant, overwhelming and leaving no choice of means and no moment for deliberation.'³² Michael N. Schmitt argued in 2003 that these criteria had become universally accepted.³³ The possibility of

²⁷ John Yoo, 'Using Force,' *University of Chicago Law Review*, Vol. 71, No. 3 (2004), pp. 752.

²⁸ Noam Lubell, 'The Problem of imminence in an uncertain world,' in Marc Weller (Ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), p. 703 and Noura Erakat, 'New imminence,' p. 209.

²⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, par. 143

³⁰ These three schools can be found in Avery Plaw and Joao Franco Reis, 'The Contemporary Practice of Self- The Contemporary Practice of Self-Defense: Evolving Toward the Use of Preeemptive or Preventive Force?', in *Preventive force: Drones, targeted killing, and the transformation of contemporary warfare*, eds. Kerstin Fisk and Jennifer Ramos (New York: New York University Press, 2016), pp.230

³¹ Mulcahy and Mahony, 'Anticipatory Self-Defence,' p. 235. See also, Mary Ellen O'Connell, 'Remarks: The Resort to Drones under International Law Sutton Colloquium Articles', *Denver Journal of International Law and Policy* Vo. 39, No. 4, 2011, p. 599. Some scholars debate how long after the attack self-defence can occur, but they agree that it must occur afterwards. See Jan Kittrick and Yoram Dinstein in Plaw and Reis, 'The contemporary practice of self-defence,' p. 232.

³² Neta Crawford, 'The Justice of Preemption and Preventive War Doctrines,' In: Mark Evans (Ed.), *Just War Theory: a Reappraisal* (Edinburgh: Edinburgh University Press, 2005), p. 29.

³³ Michael N. Schmitt, 'Preemptive strategies in international law,' *Michigan Journal of International Law*, vol. 24 (2003), p.530. In addition, these scholars could also rely on the defence of the legality of anticipatory self-defence provided by the Nuremberg Tribunal, and on ICJ Judge Caroline Higgins's defence of the

preventive use of force gained traction after 9/11³⁴ with the development of what Plaw and Reis define the 'preventive force school' and the so-called 'Bush Doctrine', which was introduced through a series of speeches and established officially in the 2002 *National Security Strategy (NSS)*. On the 17th of September 2001, Bush affirmed that new US approach would stress 'preemption of future attacks.'³⁵ In the 2002 State of the Union address, Bush elaborated that - due to the nature of the enemy - waiting for an attack to occur had become untenable; a point reaffirmed in at the West Point graduation speech. The *NSS* confirmed anticipation as the cornerstone of America's posture. Addressing the legal community the *NSS* made the bold claim that international law had been recognizing 'for centuries' states' right of pre-emptive self-defence. Imminence, however, had to be made compatible with the new environment.³⁶ Far from updating the concept of imminence, however, the Bush Administration did not play a role in the evolution of the concept. The *NSS* blurred the key distinction between pre-emption and prevention,³⁷ using the two terms interchangeably.³⁸ In the letter introducing the *NSS*, Bush also stated that the US government was entitled to act

existence of an 'inherent' right of anticipatory self-defence. See Plaw and Reis, 'The Contemporary Practice,' p. 233.

³⁴ Debates regarding imminence had appeared even before 9/11 with author Michael Walzer questioning the understanding of imminence in purely temporal terms in his seminal book on just war theory. See Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 2000 [1977]), p. 81. Debates had also emerged surrounding two anticipatory measures taken by the Israeli government: the pre-emptive attack in the Six Days War and the preventive strike on Iraqi nuclear reactor at Osiraq. The two actions were received differently by the international society with the latter receiving criticism for the less imminent and more speculative nature of the threat. See House of Commons (HoC), 'Foreign Policy Aspects of the War against Terrorism,' Foreign Affairs Committee. Second Report of the Session 2002-2003. Available at: <<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaff/196/196.pdf>> [Accessed 3 February 2017], p. 156

³⁵ Bob Woodward, *Bush at war* (New York: Simon and Schuster, 2003), p. 97.

³⁶ US Government, *The National Security Strategy*, September 2002, available at: <<http://www.state.gov/documents/organization/63562.pdf>> [Accessed 28 October 2015], p. 15

³⁷ Jack Levy, 'Preventive war and Democratic Politics,' *International Studies Quarterly*, 52:1 (2008), p. 4.

³⁸ US Government, *The National Security Strategy*, p. 15.

against 'emerging threats...before they are fully formed,'³⁹ thus suggesting a right to act against future as well as imminent threats. As Ruys concluded, the document 'could more accurately be described as an endorsement of "preventive" self-defence vis-a-vis "non-imminent" threats.'⁴⁰

Several scholars were quick to (wrongly) identify an emerging consensus surrounding the Bush Administration's position.⁴¹ Whilst several official documents from international organizations seemed to support more expansive notions of self-defence,⁴² they rejected the notion of a preventive use of force, in support of an UN Security Council authorised action against imminent threats.⁴³ In other words, the rejection of the preventive position brought forward by the Bush Administration seemed to consolidate a consensus surrounding the legality of self-defence against imminent threats⁴⁴ - contrary to pre-9/11 positions (in state practice and scholarship), which favoured a restrictionist interpretation.⁴⁵ Much of the recent scholarship on the topic, then, has focused on establishing both temporal conditions as well as identifying

³⁹ NSS 2002, p. 2.

⁴⁰ Ruys, *Armed Attack*, p. 310.

⁴¹ See Peter Dombrowski and Rodger A. Payne, 'The Emerging Consensus of Preventive War, *Survival: Global Politics and Strategy*, Vol. 48, No. 2, 2006, pp. 115-36, Michael Reisman and Andrea Armstrong, 'The Past and Future of the Claim of Preemptive Self-defence', *American Journal of International Law*, Vol. 100, 2006, pp. 525-50.

⁴² These included: the NATO Prague Summit Declaration of 2002, the OSCE Strategy to address threats to security and stability in the Twenty-first century of 2003, the European Security Strategy of 2003, and the African Union's Solemn Declaration on a Common African Defence and Security Policy in 2004, the UN High Level Panel on Threats, Challenges and Change (2004), and Secretary General Kofi Anna's report 'In Larger Freedom' (2005). See Ruys, *Armed Attack*, p. 307.

⁴³ See for example, High Level Panel on Threats, Challenges, and Change, *A more Secure World: Our Shared Responsibility* (2004), par 189-193 <http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf> [Accessed 1 may 2018].

⁴⁴ Raphael van Steenberghe, 'The Law of Self-Defence and the New Argumentative Landscape on the Expansionists' Side', *Leiden Journal of International Law* Vol. 29, No. 1, 2016, p53.

⁴⁵ Ruys, *Armed Attack*, p. 308.

substantive criteria for assessing imminent threats.⁴⁶ There are, of course, obvious limitations to such endeavours, as judgement of evidence always includes a measure of subjectivity and 'it is virtually impossible to define an objective watertight definition of proof of future attack'.⁴⁷ The precise legal basis of such criteria is therefore seldom clear. But it is on imminence and on the (re)definitions of imminence that the new battle lines - between restrictionist and counter-restrictionist arguments - have been drawn. And it is in this context that – as we will argue below – the Obama Administration has played a key role in the (re)interpretation of imminence.

Drones, international law and self-defence

The intensity and controversial nature of these debates has increased partially in response to the expanded use of drones and targeted killings in the fight against terrorism. Various positions have emerged regarding the novelty of drones, the legality of drones and their use in self-defence, and the legality (and legal frameworks applicable to) targeted killings. For some drones do not pose novel legal problems.⁴⁸ As Michael Schmitt argues, 'there are very few legal issues unique to UCAS'

⁴⁶ See, for example. Dapo Akande and Thomas Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense', *The American Journal of International Law* Vol. 107, No. 3, 2013, pp. 563–70; Nico Schrijver and Larissa van den Herik, 'Leiden Policy Recommendations on Counter-Terrorism and International law', in *Counter-terrorism strategies in a fragmented international legal order: Meeting the challenges*, eds. Larissa J. van den Herik and Nico Schrijver (Cambridge: Cambridge University Press, 2013), pp. 706–26; T. D. Gill, 'The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy', *Journal of Conflict and Security Law* Vol. 11, No. 3, 2006, pp. 361–69.

⁴⁷ Noam Lubell, 'The Problem of Imminence in an Uncertain World', in *The Oxford Handbook of the Use of Force in International Law*, ed. Marc Weller (Oxford: Oxford University Press, 2015), p. 718.

⁴⁸ Schmitt, 'Unmanned combat aircraft systems and international humanitarian law,' and Daphne Eviatar, 'Drones and the Law: why we do not need a new legal framework for targeted killing,' in *Preventive force: Drones, targeted killing, and the transformation of contemporary warfare*, eds. Kerstin Fisk and Jennifer Ramos (New York: New York University Press, 2016)

[Unmanned Combat Aircraft Systems].⁴⁹ Others have argued that drones present a number of significant challenges to the current international legal structure,⁵⁰ stemming *inter alia* from the nature of drones as platforms/technologies for the use of force,⁵¹ and from the fact that targeted killing as currently carried out by the United States and other countries sit uncomfortably between a ‘hostilities paradigm’ and a ‘law enforcement’ paradigm.⁵²

One of the key problems is that targeted killings, as Special Rapporteur Philip Alston wrote in 2010, have tended to blur distinctions between legal frameworks, that is between international human rights and international humanitarian law.⁵³ Targeted killings are less controversial when carried out in the context of an armed conflict. As Bachmann put it:

Any deliberate targeting of designated individuals has to comply with the necessary legal safeguards of humanitarian law in order to be legitimate: namely compliance with the fundamental principles of the Law of Armed Conflict, the principles of military necessity, distinction and proportionality.⁵⁴

⁴⁹ Michael N. Schmitt, ‘Unmanned combat aircraft systems and international humanitarian law: simplifying the benighted debate,’ *Boston University International Law Journal*, Vol. 30 (2012), p. 596.

⁵⁰ Jordan Paust, ‘Remotely Piloted warfare as a challenge to the Jus ad bellum,’ in Marc Weller (Ed.), *The Oxford Handbook of the Use of Force and International Law* (Oxford: OUP, 2015).

⁵¹ See Peter L. Bergen and Daniel Rothenberg, *Drone Wars: transforming conflict, law, and policy* (Cambridge: Cambridge University Press, 2015) and in particular Brad Allenby’s chapter ‘How to manage drones: transformative technologies, the evolving nature of conflict, and the inadequacy of the current systems of law.’

⁵² See the seminal volume Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008).

⁵³ Philip Alston, ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions,’ 2010, < <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>> [Accessed 1 May 2019], p. 6.

⁵⁴ Sascha-Dominik Bachmann, ‘Targeted Killings: Contemporary Challenges, Risks and Opportunities,’ *Journal of Conflict & Security Law*, Vo. 18, No. 2 (2018), p. 275.

Outside of armed conflict,⁵⁵ targeted killing can be carried out following law enforcement procedures. The relevant legal framework here is that of international human rights law. This framework provides a much stricter set of requirements. As Melzer summarised, targeted killing in law enforcement is permissible only if '(a) aims at preventing an unlawful attack by the targeted person on human life; (b) is absolutely necessary for the achievement of this purpose; and (c) is the result of an operation which is planned, prepared, and conducted so as to minimize, to the greatest extent possible, the recourse to lethal force.'⁵⁶ This position, however, is both controversial and does not reflect state practice which has adopted more relaxed criteria for action. It is in this context that several scholars have worked to develop new and innovative legal frameworks and criteria to regulate (and often defend) the practice of targeted killing.⁵⁷ The intricacies of these frameworks are beyond the scope of the current article. What is clear is that within the scholarship (and within debates on drones and targeted killing), as well as within the broader debates surrounding self-defence, claims regarding the nature of self-defence and of imminence have played a prominent role.⁵⁸

⁵⁵ This issue is also connected to debate regarding the existence of international as opposed to 'non-international' armed conflict. For this debate see: Christof Heyns, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions,' UN General Assembly, 2013 <<https://www.justsecurity.org/wp-content/uploads/2013/10/UN-Special-Rapporteur-Extrajudicial-Christof-Heyns-Report-Drones.pdf>> [Accessed 2 May 2018].

⁵⁶ Melzer, *Targeted Killing*, p. 287.

⁵⁷ Claire Finkelstein, 'Targeted killing as preemptive action,' in Clare Finkelstein, Jens David Ohlin, and Andrew Altman (Eds.), *Targeted Killing: Law and morality in an asymmetrical world* (Oxford: OUP, 2012), Amos Guiora, *Legitimate targets* (Oxford: OUP, 2013).

⁵⁸ This has also been highlighted by Special Rapporteur Ben Emmerson's call for increased transparency and for clarification regarding the meaning of imminence. See, Ben Emmerson, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 28 February 2014 < <https://www.justsecurity.org/wp-content/uploads/2014/02/Special-Rapporteur-Rapporteur-Emmerson-Drones-2014.pdf>> [Accessed 1 May 2018], p. 19.

Analysing the Evolution of the Law of Self-Defence: A Socio-Legal Approach

The section above highlighted how norms surrounding the use of force have undergone an evolution. But how can norms regulating the use of force in international affairs change, if the same UN Charter paradigm still applies? The significant developments that have occurred with regard to anticipatory practice of self-defence over the past two decades or so have led to an interesting methodological debate among legal scholars about the conditions under which the *law* of self-defence may evolve.⁵⁹ Methodological claims about the evolution of the law of self-defence are not always easy to discern, with many statements about the nature, status and relevance of practice blurring and overlapping. This is not the place here to review the entire debate. Instead, we want to briefly outline its main strands and then show how our own, sociological inspired approach sits within, and can contribute to, current discussions about the evolution of the law of self-defence.

Methodological claims about the evolution of the law of self-defence

Perhaps the most straightforward way to support a more expansionist reading of the right of self-defence is to suggest that customary international law has evolved through

⁵⁹ See, for example, Olivier Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate', *European Journal of International Law* Vol. 16, No. 5, 2005, pp. 803–22; Raphaël van Steenberghe, 'State practice and the evolution of the law of self-defence: Clarifying the methodological debate', *Journal on the Use of Force and International Law* Vol. 2, No. 1, 2015, pp. 81–96; Tom Ruys, 'Armed Attack' and Article 52 of the UN Charter; Marie Aronsson, 'Remote Law-Making? American Drone Strikes and the Development of Jus Ad Bellum', *Journal on the Use of Force and International Law* Vol. 1, No. 2, 2014, pp. 285–297.

the emergence of new facts and realities. Starting from the pragmatic assumption that law must be able to effectively address the realities of current affairs, some commentators seem to presume that the emergence of new threats (e.g. terrorist groups and rogue regimes), and changed state practice in response to those threats, may lead to the evolution of the law of self-defence under customary international law.⁶⁰ Endorsing such a realist view, Plaw and Reis, for example, argue that it has become permissible to act in self-defence to prevent further attacks based on an analysis of state practice alone.⁶¹ From a jurisprudential perspective, however, such arguments are questionable for a variety of reasons. They confuse facts and realities with state practice linked to a specific aspect of international law; even if the two were successfully juxtaposed, the established view holds that state practice alone, in particular without any reference to *opinio juris*, cannot change international law.⁶²

From a methodological point, then, any changes in the customary international law of self-defence requires state practice, covering both material and verbal acts related to the rule of self-defence, *and* the belief on behalf of the state that this practice is required by the law of self-defence (*opinio juris*). State practice and *opinio juris* are two distinct elements, both deemed necessary in the legal literature for claiming the evolution of self-defence.⁶³ Though straightforward on the face of it, scholars hold different opinions about the ways in which verbal and physical state practice on one side, and

⁶⁰ See, for example, Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors'.

⁶¹ Avery Plaw and Joao Franco Reis, 'The Contemporary Practice of Self- The Contemporary Practice of Self-Defense: Evolving Toward the Use of Preeemptive or Preventive Force?', in *Preventive force: Drones, targeted killing, and the transformation of contemporary warfare*, eds. Kerstin Fisk and Jennifer Ramos (New York: New York University Press, 2016), pp. 229-256.

⁶² Raphaël van Steenberghe, 'State practice and the evolution of the law of self-defence', p. 85.

⁶³ See Tom Ruys, 'Armed Attack', p. 96.

the legal beliefs of states on the other should be weighed, depending on the kind of customary legal theory they defend.⁶⁴ This common discussion of words versus deeds, one author rightly noted, 'becomes even more complicated when physical acts are only partially acknowledged and, therefore, do not necessarily qualify as relevant state practice due to their non-public nature'.⁶⁵ We simply note here that for an act to be relevant for the evolution of the customary international law, it has to be publicly acknowledged *and* justified with respect to the law in question, with such a justification needing to be shared by other states. Crucially for our purposes, the evolution of international law of self-defence through modification is typically distinguished from the interpretation of the meaning of that law. As Tom Ruys explains:

The key criterion [for distinguishing between interpretation and modification] is (in)compatibility:... [m]odification can arguably be defined as the situation where the new rule cannot be fit in any of the plausible meanings that could be given to the treaty text, nor into the special meaning which the parties intended to give to the text at the time of its adoption. ...Determining whether a situation of incompatibility exists is itself a matter of interpretation.⁶⁶

It has been suggested that changes in the law of self-defence – relating to both the status of the attacker and the conditions for the exercise of the right of self-defence – may be considered as a matter of interpretation rather than modification.⁶⁷ Indeed, there seems to be an agreement among legal scholars that state practice has been highly

⁶⁴ For a good overview see, Marie Aronsson, 'Remote Law-Making?', pp. 290-293; Raphaël van Steenberghe, 'State practice and the evolution of the law of self-defence', pp. 83-87.

⁶⁵ Aronsson, 'Remote Law-Making?', pp. 289-290.

⁶⁶ Ruys, cited in, Steenberghe, 'The Law of Self-Defence', pp. 63.

⁶⁷ Raphaël van Steenberghe, 'State practice and the evolution of the law of self-defence', pp. 92-93.

relevant for the interpretation of the law of self-defence.⁶⁸ The legal basis cited for this can be found in Article 31(3)(b) of the Vienna Convention of the Law of Treaties, which stipulates that 'subsequent practice in the application of the treaty' affects its interpretation.

Here is where our approach enters the picture. While legal scholars have engaged in methodological discussions about the requirements for the modification of the law of self-defence, little has been said about the processes of the (re)interpretation of this law. We suggest that interdisciplinary approach that takes into account constructivist International Relations scholarship on norms can help to address this issue. As we will show below, there exists a wealth of excellent work on international norm dynamics that shares a number of concerns that are central to the interpretation of international law. This scholarship not only provides lawyers with a methodological toolkit for identifying different meanings of the law of self-defence (or any law for that matter), but also offers some explanations for why states put forward certain interpretations. To be sure, as the above considerations should have made clear, we do not intend to make any claims about the modification of the law of self-defence. Instead, we seek to show the processes through which the interpretation of that law has evolved, and investigate whether a particular interpretation has become dominant, how states approach such interpretation, and whether it is guiding their practice and/or informing their *opinio juris*.

⁶⁸ Ibid.; see also, Joerg Kammerhofer, 'The Resilience of the Restrictive Rules on Self-Defence', in *The Oxford Handbook of the Use of Force in International Law*, ed. Marc Weller (Oxford: Oxford University Press, 2015), p. 646.

Norms, interpretation, and the meaning(s) of self-defence

IR constructivists typically proceed from the fundamental assumption that under the conditions of international anarchy, norms depend on social recognition in order to be effective. As two leading IR norm scholars put it, 'in contexts beyond the state, norm acceptance and, more specifically, compliance with norms depend more decisively on shared recognition of norms than on their formal validity.'⁶⁹ Here, they point to the socially constructed nature of norms. Rather than formal prescriptions for behaviour, Antje Wiener depicts norms as intersubjective 'structures of meaning-in-use', which act as reference frames for understanding the world and shape the means and ends of social interaction.⁷⁰ The meaning-in-use concept is essentially designed to capture diverging interpretations by looking at how actors enact a specific norm in a given context, which, in turn, will reveal something about its meaning. The concept is particularly useful for making changes in the interpretation of international law accountable, because it relates instances of its interpretation to the enactment of a specific norm meaning. As Wiener explains:

[...] actors operate within a context that is structured by the interplay between structures of meaning-in-use and individuals enacting of that meaning. The latter hold associative connotations which become recognisable through interaction and characterise rule following on the basis of individual perception of norms. The interpretation of norms is therefore individually enacted yet not purely based on sentiment.⁷¹

⁶⁹ Antje Wiener and Uwe Puetter, 'The Quality of Norms is What Actors Make of It: Critical Constructivist Research on Norms', *Journal of International Law and International Relations* Vol. 5, No. 1, 2009, p. 4.

⁷⁰ Wiener, 'Enacting meaning-in-use', p. 176. See also Nicola Contessi, 'Multilateralism, Intervention and Norm Contestation: China's Stance on Darfur in the UN Security Council,' *Security Dialogue*, Vol. 41, No. 3, 2010, 324.

⁷¹ *Ibid.*, p. 178.

For constructivists, it thus lies in the very nature of international norms that they are ambiguous rather than clearly shaped, allowing for a variety of interpretations. Of course, codification might help to achieve greater precision and clarity regarding the meaning of a norm and the character of obligation attached to it. Yet shared international practice is likely to be critical to norm acceptance, since the degree of coherent interpretation is largely shaped by the discursive practices actors share. In this sense, shared practice teaches actors to understand and read the social and cultural background against which specific legal rules are interpreted. The institutional point is well made by Andrew Hurrell,⁷² who emphasizes the organizing, rather than norm setting, function of the international legal order: ‘the integrity of law sets limits to the range and influence of eligible principles, and to the range of legitimate interpretations’.

This raises some important questions about the relationship between social and legal norms, and how we deploy the term ‘norm’ in our research, respectively. It is not the purpose of this article to engage in a discussion about the definition of norms, but a reasonably grounded understanding of what we mean when referring to the *norm* (as opposed to the law) of self-defence is important for our subsequent discussion. At the most general level, we follow the widespread view that refers to norms as standards of appropriate behaviour for actors with a given identity.⁷³ In that we focus on the norm

⁷² Andrew Hurrell, *On Global Order: Power, Values and the Constitution of International Society* (Oxford: Oxford University Press 2007), p. 144. For a similar argument, see Thomas Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990); Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press, 1979); Hedley Bull, *The Anarchical Society*, chapter 6.

⁷³ See for example Peter Katzenstein, *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1986); Adie Klotz, ‘Norms Reconstituting Interests: Global Racial

of self-defence, understood as a rule of international law, we are principally interested in changes in the interpretation of legal norms and the social practices that give meaning to it. The underlying assumption here is that law does not simply spring from a normative vacuum; it emerges from of pre-existing social and communicative practices, values and interests that are transformed into legal rules. On this view, there is no radical discontinuity between law and other forms of normativity. Moreover, as Brunne and Toope argue, legal rules are part of a 'normative continuum that bridges from predictable patterns of practice of interaction to legally required behaviour.'⁷⁴ The hardening of norm into rules through treaty or custom is part of a wider social process in which members of international society negotiate the content, meaning and purpose of legal rules. The point is well made by Philip Allott: 'A treaty is not the end of a process, but the beginning of another process. And so is legislation. The treaty and the law become a datum in the general social process, but it is a datum with a life of its own.'⁷⁵

In assuming that social and communicative practice has implications for the evolution of the international law of self-defence, we connect to a number of international lawyers who have recently begun to theoretically explore how legal interpretations shape and create legal norms.⁷⁶ Looking beyond the traditional,

Equality and U.S. Sanctions Against South Africa', *International Organization*, Vol. 49, No. 3, 1995, pp. 451-78; Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', *International Organization*, Vol. 52, No. 4, 1989, pp. 887-917.

⁷⁴ Jutta Brunne and Stephen Toope, 'International Law and Constructivism: Elements of an Interactional Theory of Law', *Columbia Journal of Transnational Law*, Vol. 39, No. 1, 2000, p. 68.

⁷⁵ Philip Allott, 'The Concept of International Law', *European Journal of International Law*, Vol. 10, No. 1, 1999, p. 843.

⁷⁶ See for example, Andrea Binachi, Daniel Peat and Matthew Windsor, *Interpretation in International Law* (Oxford: Oxford University Press, 2014); Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford: Oxford University Press, 2012);

positivist sources for norm creation, they turn towards the 'jurisgenerative process of legal interpretation', stressing features of practice, its actors and their reasoning.⁷⁷ This move is predicated on the view that the meaning of a norm does not reside (only) within an international treaty or legal document, ready to be deduced by legal and political agents. Instead, legal documents serve as reference points, with their concrete meaning depending on, and emerging from, social practice and continued (re)interpretation.⁷⁸ This helps to further establish the significance of societal and communicative practice for understanding the way in which (legal) norms evolve.

With these considerations in place, we are now in a position to formulate the concrete elements of our research design that will guide our empirical analysis. Building on the work of Wiener and other constructivists, we conceptualize the norm of 'self-defence' as a dynamic structure of meaning-in-use. Following, Ruys,⁷⁹ we assume that, traditionally, states have invoked at least four different meanings of the norm of self-defence:

Reactive Self-defence: a claim to have the right to use unilateral high levels of violence when an armed attack has occurred - this is essentially Article 51 of the Charter.

Interceptive Self-defence: a claim to have the right to use high levels of violence in order to stop or counter an ongoing attack

Preemptive Self-defence: a claim to have the right to use unilateral high levels of violence when faced with a palpable and immediate threat

⁷⁷ Venzke, *How Interpretation Makes International Law*, p. 10. See also, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press: 1989);

⁷⁸ *Ibid.*, p. 5-6.

⁷⁹ Ruys, 'Armed Attack,' pp. 253-255.

Preventive Self-defence: a claim to have the right to use unilateral high levels of violence to stop a conjectural and contingent threat of the possibility of an attack from transforming into an immediate threat.

These different meanings are essentially based on a temporal distinction in that each category represents a point on a spectrum, with reactive self-defence, which contains the strictest requirements on the use of force, and preventive self-defence, containing the loosest threshold, marking the opposite ends of the spectrum.⁸⁰ In this sense stricter the temporal requirements, imply higher constraints on the use of force.

Crucial for our purpose, conceptualizing the norm of self-defence as a structure of meaning-in-use opens up analytical space for analysing normative change. Because these structures are established and reproduced through social interaction, the norm of self-defence is inherently dynamic and contested; as socially constructed phenomena, one of these normative structures may achieve some robustness and stability over longer periods of time, but it remains inherently flexible.⁸¹ To be clear from the outset, we do not suggest that discursive interventions relating to the concept of imminence are the sole driver of changes in the normative structure regulating the use of force. 'Imminence,' stands alongside 'necessity' and 'proportionality' in constituting the normative structure of self-defence.⁸² Yet, the developments discussed above and our empirical analysis show both a focus on the concept of imminence and an emerging

⁸⁰ Ruys, 'Armed Attack,' 254.

⁸¹ Interestingly, it seems that the most fundamental norms are among the most malleable. Because the fundamental constitutional norms of international society, such as state sovereignty, democracy, human rights and so forth, tend to be the least precise, they are particularly open to diverging interpretations, see Wiener, 'Enacting meaning-in-use,' p. 185.

⁸² See Christopher Finlay, 'Legitimacy and Non-State Political Violence,' *Journal of Political Philosophy*, Vol. 18, No. 3, 2010, pp. 287-312.

consensus towards a change in its meaning. These have led to an identifiable relaxation in the interpretation of the norm of self-defence.

The IR literature has advanced a number of explanations as to how international norms, once established, change, increasingly focusing on the process of norm contestation.⁸³ Contessi defines norm contestation as:

[A]n instance of strategic social construction that aims at undermining or displacing an accepted or emerging intersubjective meaning through the formulation by actors of competing discursive interventions that challenge the meaning of norms that embody conflictive interpretations of values.⁸⁴

Following this definition, we understand the US' efforts to promote a more 'flexible' notion of imminence as strategic instances of discursive intervention within a broader project of pushing the normative structures regulating the use of force.

To be sure, as other authors have pointed out, the US has long been involved in this project.⁸⁵ However, it is only from the point when President Obama took office that the US became a rational norm tester. In contrast to its predecessors, who left the meaning and extent of imminence more or less unspecified, we show that the Obama Administration has engaged in systematic conceptual and rhetorical efforts to develop a distinct meaning of the term. This new meaning, we argue, is characterized by the inclusion of criteria that are not limited to, the temporal immediacy of the threat, and

⁸³ See for example Contessi, 'Multilateralism, Intervention and Norm Contestation'; Judith Kelley, 'Assessing the Complex Evolution of Norms: The Rise of International Election Monitoring', *International Organization*, Vol. 62, No. 2, 2008, pp. 221-55; Jennifer M. Welsh, 'Norm Contestation and the Responsibility to Protect', *Global Responsibility to Protect*, Vol. 5, No. 4, 2013, pp. 365-96. Wayne Sandholtz, 'Dynamics of International Norm Change: Rules against Wartime Plunder', *European Journal of International Relations*, Vol. 14, No. 1, 2008, pp. 101-131.

⁸⁴ Contessi, 'Multilateralism, Intervention and Norm Contestation', pp. 325-26.

⁸⁵ According to Erakat, the US has been driving this project since the Cold War. Erakat, 'New Imminence in the Time of Obama'. Christian Henderson has argued that the US has been a 'persistent advocate' of more expansive notion of self-defence at least since the end of the Cold War. See Christian Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era* (Abingdon: Routledge, 2010).

reflect the decision-maker's perspective and priorities.⁸⁶ These criteria include: 1) the inherent right to resort to military force even though no attack has occurred and without prior and explicit international authorization (i.e. SC Resolution); 2) the nature and immediacy of the threat; 3) the existence of a window of opportunity to act; 4) the harm that missing the window would cause; and 5) the likelihood that action now will head off alleged future disasters. Our research design thus assumes that evidence for adherence to or implicit support for these criteria within a state's policy and/or rhetoric would support the view that it has subscribed to the US' understanding of 'imminence'.

The key question is how many states would have to adhere to these principles and support these practices in order to claim that international society as a whole has embraced a new understanding of 'imminence'. Theoretically speaking, at which point do a number of coherent, subjective interpretations become widely shared, intersubjective meanings-in-use? Drawing on Finnemore and Sikkink's norm change model,⁸⁷ we assume that international society has internalized a new structure of meaning-in-use when a 'threshold' or 'tipping point' is reached, at which 'a critical mass of relevant state actors' have adopted the meaning in question. Although it is difficult to a priori determine exactly how many states must support a new structure of meaning-in-use to pass the 'threshold', there is good reason to state that at least one-third of the members of international society have to subscribe to the new meaning-in-

⁸⁶ Christian Henderson has recently defined this new understanding of imminence as 'contextual.' See Christian Henderson, *The Use of Force in International Law* (Cambridge: Cambridge University Press, 2018), pp. 299-300.

⁸⁷ Finnemore and Sikkink, 'International Norm Dynamics and Political Change', p. 901.

use.⁸⁸ Beyond this quantitative interpretation, two additional ‘qualitative’ considerations should be included. First, the type of state that adopts the meaning matters. There are certain states whose distinct ‘normative weight’ is not only necessary, but also sufficient in order to achieve a substantive normative transformation.⁸⁹ As Finnemore put it,⁹⁰ when it comes to force, ‘rules (...) are strongly if not entirely shaped by the actions of powerful states’ that have the ability to use it, a point recently supported by Hurd’s comments that the evolution of international norms generally follows the interests of great powers.⁹¹ There is no doubt that the US is well equipped to successfully contest existing meaning-in-use, and to redefine the meaning of the concepts and categories through which international practice is interpreted. During the last sixty years, the US has been extremely effective in shaping the fundamental norms and institutions of the liberal international order.⁹² The reason for this, as Kegley and Raymond note,⁹³ lies in a historically ‘rare confluence of military, economic and cultural power’, which puts the US in a unique position to shape the normative architecture of international society. Similarly, the acceptance of this new architecture by great powers has important consequences for international society as a whole. In this sense, whether the Obama Administration was successful in

⁸⁸ Finnemore and Sikkink cite a number of empirical studies of international norm diffusion to establish the one-third threshold. For example, only in 1997, when the number of states supporting a ban on anti-personnel land mines reached 60 (approximately one third) a norm cascade started to occur with 127 states signing the Ottawa Treaty one year later. See ‘International Norm Dynamics and Political Change’, p. 901. While, a categorical threshold for ‘norm tipping’ is virtually impossible to establish, the one-third approach seems to be a reasonable way of identifying the emergence of a new structure of meaning-in-use in international society.

⁸⁹ Finnemore and Sikkink, ‘International Norm Dynamics and Political Change.’

⁹⁰ Finnemore *The Purpose of Intervention*, p. 5.

⁹¹ Hurd, ‘The permissive power of the ban on war’.

⁹² See for example, John G Ikenberry, *Liberal Order and Imperial Ambition: Essays on American Power and International Order* (London: Polity Press, 2006).

⁹³ Kegley and Raymond, ‘Preventive War and Permissive Normative Order’, p. 390.

promoting a new understanding of imminence depends on whether a number of 'critical' actors will follow its move.

This is connected to the second qualitative consideration. It is important, we argue, to assess whether states with similar priorities and operating in a similar strategic context adopt the same meaning. In this context, it should be explored whether states who have developed drone technologies, have/are weaponized/ing drones, and are involved in counter-terrorism and kinetic operations against non-state groups have adopted this new interpretation. To consider the US's effort successful, one would expect to see states involved in counter-terrorism, moving closer to the US's view of imminence and self-defence. Selecting drone powers and states involved in counter-terrorism is also in line with the notion of 'specially affected states,' whose behaviour is important to assess (customary) norm development.⁹⁴ The next section looks at the evolution of the concept of imminence during the Obama Administration. The aim is to tease out the changing meaning of the concept of imminence and to make clear the current US understanding, before proceeding to assess whether this understanding has come to be shared by the international society.

'Flexible' imminence and the use of force under Obama

As detailed above, the Bush Administration did not explicitly contribute to the debate regarding imminence and - contrary to the call in the 2002 NSS - did not provide an understanding of imminence in line with 21st century strategic priorities. More

⁹⁴ Richard Price, 'Emerging customary norms and anti-personnel landmines,' in Christian Reus-Smit (Ed.), *The Politics of International Law* (Cambridge: CUP, 2004). See also Christian Henderson, 'The 2006 National Security Strategy of the United States: The Pre-emptive Use of Force and the Persistent Advocate,' *Tulsa Journal of Comparative and International Law*, 15:1 (2007), p. 13.

generally, the Bush Administration's contempt and disregard for international law and customary international meant that norms were often interpreted as a hindrance to US action and as a weapon used by the enemies of the US to weaken the government's position. The power of the President to use force relied not only on the Authorization to Use Military Force adopted after 9/11, but also on an assertive view of Presidential power and prerogatives.⁹⁵

The administration relied on the same sweeping framework for the targeting of individuals and the conduct of drone strikes. To be sure, the number of drone strikes during the Bush Administration was limited. Still, the first official High Value Target (HVT) drone strike,⁹⁶ against Qaed Salim Sinan al-Harethi, caused international concerns. Asma Jahangir, UN Special Rapporteur, wrote that the killing violated international standards of human rights and could set an 'alarming precedent for extrajudicial executions.'⁹⁷ The US Government refused to comment on the specific incident. It argued, however, that a state of war existed between Al-Qaeda and the United States as declared by UN Security Council Resolution 1368, NATO, the Rio Pact, and the Bush Administration military order no. 1 of November 2001.⁹⁸ The US, then, under International Humanitarian Law, had a right to target Al-Qaeda operatives

⁹⁵ Charlie Savage, *Takeover* (New York: Back Bay Books, 2008) and Jack Goldsmith, *The Terror Presidency* (New York: Norton and Company, 2007).

⁹⁶ The CIA had also conducted a strike in November 2001 whose victims included al-Qaeda's operative Mohammed Atef (Perowitz and Rosenbach 2013). In February 2002, the Agency conducted another strike against three men, one of which was suspected to be Bin Laden. In the aftermath of this first 'signature strike,' the CIA made clear that it had no specific evidence regarding the target.

⁹⁷ United States Mission to Geneva, 'Inquiry from Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. Telegram to Secretary of State,' 15 November 2002, Available at: <https://www.aclu.org/files/dronefoia/dos/drone_dos_20110720DOS_DRONE000134.pdf> [Accessed 28 October 2016].

⁹⁸ US Secretary of State, 'Response to UNHCR SR on Yemen incident of 3 Nov 2002,' 9 April 2003, Available at: <https://www.aclu.org/files/dronefoia/dos/drone_dos_20110720DOS_DRONE001925.pdf> [Accessed 28 October 2015], pp. 2-3.

unless 'they have surrendered or are otherwise rendered hors de combat.' Furthermore, Al-Qaeda, the government's reply read, was now a 'multinational enterprise' with a presence in more than 60 countries and its members were developing 'continuing military operations' against the United States.⁹⁹ In other words, the US controversially believed itself to be in an international armed conflict with al-Qaeda, due to the geographical spread of Al-Qaeda such conflict had no geographical boundaries, the US was in its right to strike at will, everywhere and at any time. In the context of targeted killings, as much as in the *NSS*, the concept of imminence remained fuzzy at best.

Upon taking office, the Obama Administration adopted a change of rhetoric that seemingly positioned international law at the heart of its foreign policy.¹⁰⁰ Members of the Administration made clear that one of the main objectives of the new President was to abandon the 'law of 9/11' and the trade-off typical of the Bush years between security and values.¹⁰¹ For the Obama Administration, as several commentators have pointed out, this trade-off emerged with particular strength in the context of drone strikes and targeted killings.¹⁰² Starting in 2010, with the number of drone strikes

⁹⁹ US Secretary of State, 'Response to UNHCR SR on Yemen incident of 3 Nov 2002,' p. 4.

¹⁰⁰ The analysis of the evolution of imminence under Obama is largely based on Luca Trenta, 'The Obama administration's conceptual change: Imminence and the legitimization of targeted killings,' *European Journal of International Security*, Vol. 3, part 1 (2017), pp. 82-91.

¹⁰¹ Harold Koh, 'The Obama Administration and International Law,' Address Annual Meeting of the American Society of International Law, 25 March 2010, Available at: < <http://www.cfr.org/international-law/legal-adviser-kohs-speech-obama-administration-international-law-march-2010/p22300> > [Accessed 3 February 2017].

¹⁰² Klaidman, *Kill or Capture* and Dawn Johnsen, 'The Lawyers' war: counter-terrorism from Bush to Obama,' Review article, *Foreign Affairs*, 2 January 2017, Available at: <<https://www.foreignaffairs.com/reviews/review-essay/2016-11-22/lawyers-war>> [Accessed 6 January 2017].

booming and with criticisms coming from several quarters,¹⁰³ the Obama Administration made a public effort to normalize and legitimize drone strikes.¹⁰⁴ In such effort, various officials tried to demonstrate the compatibility between drone strikes and international law.¹⁰⁵ Over time, and especially in its second term, the administration seemed to realize the need for increased clarity and transparency. This is not to suggest that full transparency on the US drone program was achieved. Public speeches and documents, however, make clear that the Administration realized that the novelty of drones - and their potential impact on norms surrounding the use of force - provided the US with an opportunity to shape norms and policies in this sector.¹⁰⁶

The legitimating effort initially centred on the killing of US-born radical cleric Anwar al-Awlaki.¹⁰⁷ Having seen the evidence on Awlaki, Harold Koh - at the time legal advisor to the Department of State - started developing criteria for imminence. Koh argued that terrorism posed a 'continuing and imminent threat' and that such

¹⁰³ Luca Trenta, 'The Obama administration's conceptual change: Imminence and the legitimization of targeted killings,' *European Journal of International Security*, Vol. 3, part 1 (2017), p. 86, Charlie Savage, *Power Wars* (New York: Little, Brown and Co., 2015), p. 86.

¹⁰⁴ Lynn Davis, Michael J. McNerney, James Chow, Thomas Hamilton, Sarah Harting, and Daniel Byman, *Armed and Dangerous: UAVs and US security*, Rand Corporation, Available at: <http://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR449/RAND_RR449.pdf> [Accessed 3 February 2017], p. 19.

¹⁰⁵ See speeches of various members of the Obama Administration including: Brennan, 'Strengthening our security' and Harold Koh, 'The Obama Administration and International Law,' Keynote Speech at the Annual Meeting of the American Society of International Law, 25 March 2010, <<https://www.state.gov/documents/organization/179305.pdf>> [Accessed 13 April 2018].

¹⁰⁶ See Brennan, 'Strengthening our security,' Koh, 'The Obama Administration and International Law,' Brian Egan, 'International Law, Legal Diplomacy, and Counter-ISIL Campaign' (4 April 2016) <<https://www.justsecurity.org/wp-content/uploads/2016/04/Egan-ASIL-speech.pdf>> [Accessed 13 April 2018], and The White House, 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations' (December 2016), <https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf> [Accessed 13 April 2018].

¹⁰⁷ Trenta, 'The Obama administration's conceptual change,' pp. 86-87.

threat required an 'elongated' notion of imminence.¹⁰⁸ Koh's initial effort remained within the Administration. Only in September 2011, close to the time of the killing of al-Awlaki, John Brennan, counter-terrorism advisor to the President, publicly explained the US position. As he argued, outside hot battlefields, questions of self-defence turned principally on the definition of imminence. According to Brennan, as we have seen, the US was finding 'increasing recognition in the international community that a more flexible understanding of imminence might be appropriate.'¹⁰⁹

If at this stage, the Administration's criteria for what imminence meant were still secret, after the killing of Awlaki, the public effort to normalise drone strikes and justify them in terms of an 'imminent threat' increased. Attorney General Eric Holder publicly discussed for the first time the criteria included in the new concept of imminence. Holder argued that whether

an individual presents an "imminent threat" incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the US.¹¹⁰

The development of the Administration's position on imminence is clear in the so-called *White-Paper*, written in November 2011 and leaked to *NBC* in January 2013. The 16-page document from the Department of Justice explained the criteria for the targeting of US citizens who are also al-Qaeda's 'senior operational leaders.' Stressing the obsolescence of a purely temporal interpretation of imminence, the *Paper* reads that

¹⁰⁸ John Yoo, 'Using Force,' p. 18.

¹⁰⁹ Brennan, 'Strengthening our security.'

¹¹⁰ Eric Holder, 'Remarks at Northwestern University School of Law,' 5 March 2012, Available at: <<http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwesternuniversity-school-law>> [Accessed 3 February 2017].

the terrorist threat demands a 'broader' notion of imminence.¹¹¹ Criteria include: the existence of a 'window of opportunity,' the possibility of reducing collateral damage, and the chance to head off future disaster. As should be clear, in the *Paper*, the temporal dimension of imminence leaves space to a 'belligerent's priorities'¹¹² and to his decisional discretion.

The administration continued to rely on public statements to redefine imminence. In 2012, in particular, the administration seemed to realize that its monopoly on drones was unlikely to last and that the policies and practices set by the United States were likely to influence future drone nations. In April, John Brennan made clear that the US government was:

Very mindful that as our nation uses this technology, we are establishing precedents that other nations may follow. . . If we want other nations to use these technologies responsibly, we must use them responsibly.

At the heart of the principles guiding the targeting of individuals, Brennan added, was the imminence of the threat posed by the individual.¹¹³

Obama made a similar point in a crucial speech at National Defense University stressing that drones and counter-terrorism will impact on US character and reputation. The president assured that the government had finally codified in a

¹¹¹ US Department of Justice, 'Lawful use of a lethal operation directed against a US citizen who is a senior operational leader of Al-Qa'ida or an associated force,' *White Paper* Draft, 8 November 2011, Available at: <<http://www.fas.org/irp/eprint/doj-lethal.pdf>> [Accessed 20 June 2016], p. 6.

¹¹² Erakat, 'New Imminence,' p. 225.

¹¹³ John Brennan, 'The Efficacy and Ethics of U.S. Counterterrorism Strategy,' *Woodrow Wilson Center*, 30 April 2012. Available at: <<http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>> [Accessed 16 January 2017].

'Presidential Policy Guidance' criteria for the targeting of individuals.¹¹⁴ According to the four criteria, a suspect is targeted if he represents a 'continuing and imminent threat to the American people;' if no other government is capable of addressing the threat effectively; if capture is not feasible; and if there is a near certainty that no civilian will be killed or injured.¹¹⁵

In its second-term the administration continued to develop the concept of imminence and the criteria defining it. In 2016, Brian Egan, new Legal Advisor from the State Department, argued that imminence played 'an important role as a matter of policy...even when it is not legally required.' He added that criteria for imminence included:

the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defence that may be expected to cause less serious collateral injury, loss, or damage.¹¹⁶

Our five criteria are clearly identifiable here. The inclusion of the 'immediacy' of the threat increased the prominence of the temporal element and represented a departure from the *White Paper* which only referred to a window of opportunity. More generally,

¹¹⁴ Barack Obama, 'Speech on drone policy – National Defense University,' *The New York Times*, 23 May 2013. Available at: <http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?pagewanted=all&_r=0> [Accessed 20 June 2016].

¹¹⁵ White House, 'Background Briefing by Senior Administration Officials on the president's Speech on Counterterrorism,' 23 May 2013. Available at: <<http://www.whitehouse.gov/the-press-office/2013/05/23/background-briefing-senior-administration-officials-presidents-speech-co>> [Accessed 20 June 2016] and White House, *US Policy Standards and Procedures for the Use of Force in Counterterrorism*, 23 May 2013. Available at: <http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf> [Accessed 20 June 2016].

¹¹⁶ Brien Egan, 'International law, Legal Diplomacy, and counter-ISIL campaign,' 4 April 2016 { <<https://www.justsecurity.org/wp-content/uploads/2016/04/Egan-ASIL-speech.pdf>> [Accessed 9 May 2016] p. 5.

these criteria seemed to represent an effort to bring the modified concept closer to its original (pre-9/11) interpretation in customary international law of imminent as temporally immediate.

These criteria, to be sure, were not completely new. They represented the evolution of the Obama Administration's language and practice, and relied on debates and positions developing among international law scholars. Particularly influential in this context were the criteria developed by Daniel Bethlehem in a much-debated article for the *American Journal of International Law*.¹¹⁷ In December 2016, the administration also published a report on the legal and policy frameworks guiding the use of force in counter-terrorism. The President's foreword argued that the codification of this framework represented only the latest demonstration of the importance that the Administration assigned to adhering 'to standards - including international legal standards - that govern the use of force.'¹¹⁸ The report re-confirmed Egan's - and by extension Bethlehem's - criteria for imminence.¹¹⁹ As several scholars have argued, these series of documents and speeches amounted to '*opinio juris*' by the United States

¹¹⁷ Daniel Bethlehem, 'Self-defence against an imminent or actual armed attack by nonstate actors,' *The American Journal of International Law*, Vol. 106, No. 4 (October 2012), pp. 775-776. For a debate surrounding Egan's speech see: Daniel Bethlehem, 'Not By Any Other Name: A Response to Jack Goldsmith on Obama's Imminence,' *Lawfare Blog*, 7 April 2016 (<https://www.lawfareblog.com/not-any-other-name-response-jackgoldsmith-obamas-imminence>) accessed 9 May 2016 and Marty Lederman, 'The Egan speech and the Bush Doctrine: Imminence, necessity, and "first use" in the jus ad bellum,' *Just Security*, 11 April 2016, Available at: <<https://www.justsecurity.org/30522/egan-speech-bush-doctrine-imminence-necessity-first-use-jus-adbellum/>> [Accessed 9 May 2016].

¹¹⁸ The White House, 'Report on the legal and policy frameworks guiding the United States' use of military force and related national security operations,' December 2016, Available at: <https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf> [Accessed 4 January 2017].

¹¹⁹ White House, 'Report,' pp. 9-10.

on *jus ad bellum*.¹²⁰ Harold Koh has made similar arguments after leaving the Obama Administration. As he argued, states and states' lawyers 'duty to explain' their legal position was not only relevant for domestic audiences, but also for the development of customary international law through state practice and *opinio juris*.¹²¹

Tracing the Diffusion of the Meaning of 'Imminence' in International Society

The preceding discussion sought to clarify that only under the Obama Administration, the US has conducted an open and explicit campaign to redefine imminence and that this move can be explained by the need to justify the use of drone strikes as a counter-terrorism weapon. The novelty of this strategy has led to an uneasy and fluid situation regarding the legality and legitimacy of the use of force. In this shift, the administration has demonstrated its understanding of the historical precedent being established and, as we saw with Brennan's speech, it has stated that it can count on the support of the 'international community' that has come to share this more 'flexible' notion. The purpose of the next section is to assess this claim. As mentioned, the section divides the 'international society' into two main blocks: US allies and other drone powers. The analysis will rely on two main types of evidence and discourse. It will explore material and language produced in interpretive communities. These communities, as Ian Johnstone argues, can be divided into the inner circle, which includes government and

¹²⁰ Aronsson, 'Remote Law-Making?' p. 280 and Kenneth Anderson and Benjamin Wittes, *Speaking the Law: the Obama Administration's addresses on National Security Law* (Washington: Hoover University Press, 2013), p. 88.

¹²¹ Harold Koh, 'The Legal Adviser's Duty to Explain,' *The Yale Journal of International Law*, Vol. 41(2016), p. 190.

intergovernmental officials who come to share language and expectations; and the outer circle, an 'amorphous group of all those regarded as having an expertise in international law.'¹²² Most of the evidence in our analysis will come from the inner circle.

US Allies: usual and unusual suspects

Ruys defined the UK, Australia and Israel as 'the usual suspects' when it comes to supporting the US position on anticipatory self-defence.¹²³ From its early years, Israel has given prominence to 'early warning' in its strategic doctrine. The aim has always been that of pre-empting/preventing an adversary, with no clear distinction made between the two options.¹²⁴ Episodes include the 1956 Sinai Campaign, the 1967 Six Days War and the 1981 bombing of the Osirak reactor. In this sense, 9/11 only strengthened this pattern, with the Sharon government embracing prevention.¹²⁵ Israel has also pushed for preventive strikes against Iran and has conducted a strike against the Syrian nuclear facility al-Kibar in 2007.¹²⁶ In October 2013, on the anniversary of the Yom Kippur War, Prime Minister Benjamin Netanyahu affirmed that the key lesson of the war was the importance of prevention for Israel's safety.¹²⁷ At a high-level conference, scholars and former politicians have agreed for the need to include pre-

¹²² Ian Johnstone, 'The Power of interpretive communities,' in Michael Barnett and Raymond Duvall, *Power in Global Governance* (Cambridge: Cambridge University Press, 2005), pp. 190-191.

¹²³ Ruys, 'Armed attack,' p. 331.

¹²⁴ Shlomo Brom, 'Is the Begin Doctrine still a viable option for Israel?' In: Strategic Studies Institute of the US Army War College, *Getting Ready for a Nuclear-Ready Iran* (Carlisle: SSI, 2005), p. 133.

¹²⁵ Jack Levy and Joseph Gochal, 'Democracy and Preventive War: Israel and the 1956 Sinai Campaign,' *Security Studies*, Vo. 11, No. 2, 2001, pp. 1-49.

¹²⁶ Andrew Garwood-Gowers, 'Israel's Airstrike on Syria's Al-Kibar Facility: A Test Case for the Doctrine of Pre-emptive Self-Defence?' *Journal of Conflict & Security Law*, Vol. 16, No. 2, 2011, pp. 263-291.

¹²⁷ Moran Azulay, 'PM: We learned never to give up on preemptive strike. *YNet News*. 15 October, 2013, Available at: <<http://www.ynetnews.com/articles/0,7340,L-4441147,00.html>> [Accessed 3 February 2017].

emption and prevention in Israel's military doctrine.¹²⁸ At the start of the Second Intifada, Israel also restarted a policy of targeted killings.¹²⁹ These killings were both 'preemptive' in alleged 'ticking bombs' scenarios and preventive when Israeli forces started to target 'ticking infrastructures.'¹³⁰

Drones soon became one of the main weapons in these operations. For the past 40 years, Israel has been at the forefront in the development and production of drones.¹³¹ Former Israeli officials have hinted that contemporary US technology and targeting practices largely rely on Israeli precedents.¹³² Israeli policy of targeted killing has been guided since 2006 by a Supreme Court decision. The case concerned mostly the discussion of direct participation in hostilities.¹³³ The Court refused to rule on the legality of targeted killings in general and suggested the need for caution and the adoption of a case by case approach. As the Court argued the information classifying a civilian as a possible target should be 'reliable, substantial and convincing with regard to the risk presented by the terrorist to human life.'¹³⁴ Furthermore, the killing and the

¹²⁸ Amos Harel, 'Israel's national security doctrine needs a serious update,' *Haaretz*, 8 June 2014. Available at: <<http://www.haaretz.com/news/diplomacy-defense/1.597519>> [Accessed 3 February 2017].

¹²⁹ Targeted killings were not new for Israel as the case of the Munich terrorists confirms. The US, before 9/11, famously complained about this practice, defining targeted killings as 'extrajudicial killings' see Daniel Byman, 'Do Targeted Killings work?' *Foreign Affairs*, 85(2) 2006, p. 101.

¹³⁰ Avi Kober, 'Targeted Killing during the Second Intifada: The Quest for Effectiveness,' *Journal of Conflict Studies*, Vol. 27, No. 1, 2007. Available at: <<http://journals.hil.unb.ca/index.php/JCS/article/view/8292/9353>> [Accessed 10 January 2015].

¹³¹ Mary Dobbing and Chris Cole, 'Israel and the Drone Wars,' *Drone Wars UK*. Available at: <<https://dronewarsuk.files.wordpress.com/2014/01/israel-and-the-drone-wars.pdf>> [Accessed 3 February 2017].

¹³² Al Jazeera, 'Israel's drone dealers,' *People and Power*, 1 May 2014. Available at: <<http://www.aljazeera.com/programmes/peopleandpower/2014/04/201442911431250545.html>> [Accessed 21 January 2017].

¹³³ See Article 51(3), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I).

¹³⁴ Israeli Supreme Court, 'The public committee against torture in Israel *et al.* v. The Government of Israel *at al.*' Judgement, 11 December 2005. Available at: <<http://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Public%20Committee%20Against%20Torture%20in%20Israel%20v.%20Government%20of%20Israel.pdf>> [Accessed 24 April 2018], p. 500, par. 40.

collateral damage should be proportionate, and the strike should be followed by an investigation.¹³⁵ The Court, however, used an expanded notion of proportionality and ‘direct participation’ in hostilities. In particular, the Court expanded the notion of ‘for such time’ suggesting that for civilians who are part of terrorist organization and have conducted terrorist activities, ‘rest between hostilities is nothing more than preparation for the next hostile act.’¹³⁶ Through this formulation the Court also abandoned the temporal requirements associated with the immediacy of the threat. As Kristen Eichensehr has argued, this approach implies that the Israeli military does not have to show that the target poses an immediate threat, clearly distancing Israeli norms and practices from the *Caroline* understanding of imminence as immediate.¹³⁷ The Court has also argued that ‘new reality, at times, requires new interpretation’ and that there doesn’t seem to be a discrepancy between the interpretation brought forward by the Court and customary international law.¹³⁸ These rulings seem, in other words, to constitute *opinio juris*. Certainly, they have played a part in the Obama administration’s memo justifying the killing of Awlaki,¹³⁹ demonstrating compatibility between the US and Israeli views on targeted killings and imminence.

The situation is more complex when it comes to the UK and Australia. In the UK, then Prime Minister Tony Blair was famously a strong supporter of the Bush Doctrine

Israeli Supreme Court, ‘The public committee against torture in Israel *et al.* v. The Government of Israel *at al.*’ p. 460.

¹³⁶ Israeli Supreme Court, ‘The public committee against torture in Israel *et al.* v. The Government of Israel *et al.*’ pp. 499-500, par. 39.

¹³⁷ Kristen Eichensehr, ‘On Target? The Israeli Supreme Court and the Expansion of Targeted Killings,’ *The Yale Journal of International Law*, 116 (8), 2007, p. 1877.

¹³⁸ Israeli Supreme Court, ‘The public committee against torture in Israel *et al.* v. The Government of Israel *et al.*’ par. 28 and 60.

¹³⁹ Steven Nelson, ‘Israeli Court Ruling Cited in al-Awlaki Drone Assassination Memo,’ US News, 24 June 2014. Available at: < <http://www.usnews.com/news/articles/2014/06/24/israeli-court-ruling-cited-in-al-awlaki-drone-assassination-memo> > [accessed 3 February 2017].

and of pre-emption,¹⁴⁰ as was Australian Prime Minister John Howard. In December 2002, after the Bali Bombing, Howard defended the possibility of striking preemptively.¹⁴¹ Similarly, the Australian Air Force declared that strikes could also take the form of 'preemptive strike, aimed at deterring an aggressor before major conflict erupts.'¹⁴² The picture, however, is not as clear as the account above suggests.

Even within the Blair Government, officials demonstrated certain uneasiness towards an all-out doctrine of pre-emption/prevention. The 2002 'New Chapter' of the *Strategic Defence Review* suggested the possibility of pre-emption, but only in case of 'imminent attack' and in accordance with international legal obligations.¹⁴³ At the time of the Iraq War, Attorney General Goldsmith wrote in a memo to Blair that 'some degree of imminence' was necessary to justify pre-emption and explicitly rejected the Bush Doctrine of prevention, as outside international law.¹⁴⁴ Allegedly, based on this memo, the Blair government - like the Bush Administration - justified the war at the UN as a response to Saddam's violations of previous UN Security Council resolutions.¹⁴⁵ The UK Parliament also made a specific request to redefine the concept of 'imminence' but suggested caution and strong limits in the application of anticipatory self-defence.¹⁴⁶ In a similar way, the Australian government qualified

¹⁴⁰ House of Commons, 'Foreign Policy Aspects of the War against Terrorism,' p. 45 and Daniel Runciman, *The Politics of Good intentions* (Princeton: Princeton University Press, 2006), p. 46.

¹⁴¹ Stanley Renshon, *National Security in the Obama Administration* (New York: Routledge, 2010), p. 74.

¹⁴² Reisman and Armstrong, 'The past and future,' p. 540.

¹⁴³ UK Ministry of Defence, *The Strategic Defence Review: a new chapter*, July 2002. Available at: <<http://www.comw.org/rma/fulltext/0207sdrv01.pdf>> [Accessed 3 February 2017], p. 12.

¹⁴⁴ Ben Saul, *Research handbook on International Law and Terrorism* (Cheltenham: Edward Elgar, 2014).

¹⁴⁵ House of Commons, 'Foreign Policy Aspects of the War against Terrorism,' p. 44.

¹⁴⁶ House of Commons, 'Foreign Policy Aspects of the War against Terrorism,' *Foreign Affairs Committee, Seventh Report of Session 2003-2004*. Available at: <<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/441.pdf>> [Accessed 3 February 2017], p. 44.

some of its early statements, suggesting that pre-emption remained a 'last resort principle.'¹⁴⁷

The UK and Australia have also been among the first allies to take advantage of the drone revolution with reconnaissance and targeting missions. The UK has conducted flights through its own fleet and 'embedded' UK pilots in missions flying US drones. The UK conducted 299 drone strikes in Afghanistan between 2008 and July 2013 and has been three times more likely to fire a missile than the US.¹⁴⁸ The UK government repeatedly stated that all UK strikes - even those conducted with US drones - remain under British rules of engagement which set a standard more restrictive than that required by international humanitarian law and by the proportionality principle.¹⁴⁹ An increased reliance on drones, however, has been accompanied by a relaxation of the criteria for self-defence. A Joint Doctrine note from the UK Ministry of Defence warned of this risk in 2011.¹⁵⁰ In spite of this warning, a relaxation can clearly be seen. Strikes expanded to Libya (where UK pilots have used US drones). The fight against ISIS also led to a restart of drone strikes against Iraq and to the diversion of *Reaper* drones previously in Afghanistan to Syria.¹⁵¹ Several authors and politicians have pointed out

¹⁴⁷ Reisman and Armstrong, 'The past and future,' p. 540.

¹⁴⁸ Alice Ross, 'UK drones three times more likely than US to fire in Afghanistan,' *The Bureau of Investigative Journalism*, 6 September 2013. Available at: <<http://www.thebureauinvestigates.com/2013/09/06/uk-drones-three-times-more-likely-than-us-to-fire-in-afghanistan/>> [Accessed 3 February 2017].

¹⁴⁹ Birmingham University Policy Commission, 'The Security Impact of Drones,' Report, October 2014. Available at: <<http://www.birmingham.ac.uk/research/impact/policy-commissions/remote-warfare/index.aspx>> [Accessed 3 February 2017], p. 44.

¹⁵⁰ UK Ministry of Defence. 2011. The UK Approach to Unmanned Aerial systems. Joint Doctrine Note, 2/11. 30 March. Available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/33711/20110505JDN_21_1_UAS_v2U.pdf> [Accessed 3 February 2017], par. 517.

¹⁵¹ Chris Cole, 'Drones in Iraq and Syria,' *Drone Wars UK*, 7 November 2014. Available at: <<http://dronewars.net/2014/11/07/drones-in-iraq-and-syria-what-we-know-and-what-we-dont/>> [Accessed 3 February 2017].

the UK's 'collusion' with US targeting practices through the sharing of intelligence. UN Special Rapporteur Ben Emmerson has stated that the closeness of the US-UK relation makes this collusion 'inevitable' in strikes outside the 'hot battlefields.'¹⁵²

The UK's legal position also seems to have evolved. In 2014, Jemima Stratford QC provided to the Parliament a legal opinion on GCHQ cooperation with US targeting practices. She argued that 'if the UK government knows that it is transferring data that may be used for drone strikes against non-combatants (for example in Yemen or Pakistan), that transfer is probably unlawful.'¹⁵³ Furthermore, she argued that the drone strikes carried out in Pakistan and Yemen were not carried out in the context of an international armed conflict, that the UK had not adopted the US expanded version of 'anticipatory self-defence' and that the US interpretation was illegal under international law.¹⁵⁴ Imminence, the opinion read, applies only in a situation in which 'the attacking party must strike or be struck.'¹⁵⁵ In this sense, the legal interpretation remained aligned with the *Caroline* criteria.

As the UK government started to conduct independent drone strikes, however, the legal interpretation seemed to shift. In 2015, the UK conducted a targeted killing operation in Syrian and, then Prime Minister David Cameron justified the strike on the basis of self-defence. Such justification led to criticisms and parliamentary inquiries.¹⁵⁶

In this context, a report from the Joint Committee on Human Rights expanded on the

¹⁵² Birmingham University Policy Commission, 'The Security Impact of Drones,' p. 48.

¹⁵³ Jemima Stratford QC, 'In the matter of state surveillance,' Legal Advice, 22 January 2014, <[http://www.brickcourt.co.uk/news-attachments/APPG_Final_\(2\).pdf](http://www.brickcourt.co.uk/news-attachments/APPG_Final_(2).pdf)> [Accessed 13 April 2014], p. 3

¹⁵⁴ Jemima Stratford QC, 'In the matter of state surveillance,' pp. 24-25.

¹⁵⁵ Jemima Stratford QC, 'In the matter of state surveillance,' p. 25. See also Peter Osborne, 'Are GCHQ workers in danger of becoming accessories to murder?' *The Telegraph*, 31 January 2014. Available at: <<http://blogs.telegraph.co.uk/news/peterosborne/100257575/are-gchq-workers-in-danger-of-becoming-accessories-to-murder/>> [Accessed 19 January 2016].

¹⁵⁶ Arabella Lang, 'UK Drone attack in Syria: legal questions,' Briefing Paper 7332, 20 October 2015.

concept of imminence. The report restated the importance that the UK government has given to the imminence of the threat and the difference this established with the Bush Doctrine. Having established a difference with the Bush Administration's position, however, the report made clear that the UK government had argued in favour of a more 'flexible' understanding of imminence. The report highlighted the Attorney General's position that in the current context, the *Caroline* threshold had become too dangerous and narrow.¹⁵⁷ It also expanded on how several UK officials including the Secretary of State for Defence had argued for a more 'flexible' understanding of imminence more in line with current technology and international circumstances.¹⁵⁸ The report noted that the Government's understanding of flexible imminence seemed to have been implicitly accepted by the UN Security Council in its resolution 2249 (2015) on the fight against ISIS. The report, however, concluded by cautioning against the application of too flexible an understanding of the concept, and requiring the government to specify criteria for imminence.¹⁵⁹ In January 2017, the UK Attorney general, Jeremy Wright, seemingly answered this call in a speech to the *International Institute for Strategic Studies*. As he told *The Guardian*, "'If we are trying to define 'imminence' in relation to a test that was developed in the 1840s, we are going to

¹⁵⁷ House of Lords and House of Commons, Joint Committee on Human Rights, 'The Government's policy on the use of drones for targeted killing,' Second report of session 2015-2016, <<https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf>> [Accessed 13 April 2014], p. 45.

¹⁵⁸ House of Lords and House of Commons, Joint Committee on Human Rights, 'The Government's policy on the use of drones for targeted killing,' Second report of session 2015-2016, p. 46

¹⁵⁹ House of Lords and House of Commons, Joint Committee on Human Rights, 'The Government's policy on the use of drones for targeted killing,' Second report of session 2015-2016, pp. 47-48.

struggle...This is about ensuring international law keeps pace with events.’¹⁶⁰ Imminence, he argued, needed an update. In his view, imminence should have been adapted to the current circumstances.¹⁶¹ Specifying the UK government criteria for action, Wright relied on the criteria devised by Bethlehem. Quoting Bethlehem’s 8th principle, Wight stated that ‘the absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent.’¹⁶² The UK government seems, in other words, to have adopted by the position developed by the Obama Administration and the US’s position on imminence.

Australia faces a similar situation. Drones feature prominently in Australia’s military and the sector has been spared major budget cuts in 2014.¹⁶³ Initially, Australia rented unarmed Israeli Heron drones for missions in Afghanistan. It soon became clear, however, that even these unarmed drones played a key role in the ‘kill chain’ and that the targets of strikes did not pose an imminent threat, but were low-level ‘spotters.’¹⁶⁴ Since then, Australian Chief of the Air Force Marshal Geoff Brown has described the use of Reaper as ‘attractive’ and the inclusion of armed drones into

¹⁶⁰ Owen Bowcott, ‘Attorney general calls for new legal basis for pre-emptive military strikes,’ *The Guardian*, 11 January 2017. Available at: <<https://www.theguardian.com/uk-news/2017/jan/11/attorney-general-calls-for-new-legal-basis-for-pre-emptive-military-strikes>> [Accessed 3 February 2017].

¹⁶¹ Attorney-General, the Rt Hon. Jeremy Wright QC MP, ‘The Modern Law of Self-Defence,’ Speech delivered at IISS, 11 January 2017 <<https://www.ejiltalk.org/the-modern-law-of-self-defence/>> [Accessed 24 April 2018].

¹⁶² Wight, ‘The Modern Law of Self-Defence.’

¹⁶³ Rob Taylor, ‘Australia rethinking military drones,’ *The Wall Street Journal*, 7 February 2014. Available at: <<http://www.wsj.com/articles/SB10001424052702304680904579367542517900838>> [Accessed 19 January 2017].

¹⁶⁴ Mark Corcoran, ‘The Kill Chain: Australia’s drone war,’ *ABC News*, 26 June 2012. Available at: <<http://www.abc.net.au/news/2012-06-08/australias-drone-war-in-afghanistan/4058058>> [Accessed 21 January 2017].

Australian air forces as 'inevitable.'¹⁶⁵ Drones and unmanned vehicles feature prominently in the Australian Air Force's Plan Jericho, in the 2016 Defense White Paper, and in the Air Force Strategy 2017-2027.¹⁶⁶ The Australian position on targeting and imminence exposes contradictions and positions similar to those of the UK. A 2015 Senate report stated that Australian intelligence forces are prohibited from conducting paramilitary operation and that the inclusion of unmanned platforms in the Australian military does not change the need to respect international humanitarian law and international human rights law.¹⁶⁷ Australian forces, however, and, in particular, Australian intelligence facilities, such as Pine Gap, are an essential linchpin in US targeting. Australia seems to rely on the US notion of imminent threat when it comes to providing information for US strikes and might also have contributed to the controversial 'double-tap' targeting practices.¹⁶⁸

Furthermore, since re-engagement in Iraq in 2014, Australian drones conducted approximately 1000 missions, dropping 600 bombs.¹⁶⁹ When an American-led drone

¹⁶⁵ David Wroe, 'Australia looks to drones for its future defence,' *The Age*, 9 May 2014. Available at: <<http://www.theage.com.au/insight/australia-looks-to-drones-for-its-future-defence-20140509-zr7ca.html#ixzz3ODlcMI2x>> [Accessed 19 January 2016].

¹⁶⁶ Australian Air Force, Plan Jericho, Program of Work <<http://airpower.airforce.gov.au/APDC/media/PDF-Files/Air%20Force%20Publications/AF18-Plan-Jericho-Program-of-Work.pdf>>, Australian Government, Department of Defence, White Paper 2016 <<http://www.defence.gov.au/WhitePaper/Docs/2016-Defence-White-Paper.pdf>>, Royal Australian Air Force, Strategy 2017-2027 <<http://airpower.airforce.gov.au/APDC/media/PDF-Files/Air%20Force%20Publications/AF32-Air-Force-Strategy-2017-2027.pdf>> [Accessed 24 April 2018]. The authors would like to thank Dr Lindsay Clark for suggesting these documents.

¹⁶⁷ Australian Parliament, 'The potential use by the Australian Defence Force of unmanned air, maritime and land platforms', *Report*, 2015. Available at: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Defence_Unmanned_Platform/Report> [Accessed 3 February 2017].

¹⁶⁸ Justin Randle, 'Australia and drones: time for an honest and public debate,' *The Guardian*, 29 July 2013. Available at: <<http://www.theguardian.com/commentisfree/2013/jul/29/australia-drones-pine-gap>> [Accessed 18 January 2017].

¹⁶⁹ John Stapleton, 'Drone wars: Australia's dirty secret,' *The New Daily*, 4 December 2015. Available at: <<http://thenewdaily.com.au/news/world/2015/12/04/australia-drone-war/>> [Accessed 3 February 2017].

strike involved an Australian citizen, the government stated that it had not been consulted. A senior counter-terrorism source referred to the two victims of the strike as ‘foot soldiers’ of Al-Qaeda in the Arabian Peninsula (AQAP).¹⁷⁰ More recently, the Australian government has clarified its position on imminence and self-defence. In a public lecture delivered at the T C Beirne School of Law, University of Queensland, Australian Attorney-General, Senator the Hon. George Brandis QC, speaking for the Australian Government, discussed the Australian position on imminence. In the lecture, Brandis clarified that Australia agrees with the UK government’s position as exposed by Wright in his IISS speech. As Brandis argued: ‘imminence is not simply a question of timing. The temporal aspect is unquestionably relevant, but it is by no means the sole relevant factor.’ Furthermore, Brandis accepted the discussion of imminence provided by Bethlehem. He also added that he did not consider such a position ‘controversial.’ Finally, going back to Koh’s argument on a ‘duty to explain’ and referencing Egan’s speech on ‘legal diplomacy,’ Brandis also stressed the importance of states’ practice, of engagement in public legal justification in shaping customary international law, and the fluid nature of norms and international law.¹⁷¹

Australia thus seems to have also fully accepted the understanding of imminence developed under Obama and to have aligned its policies and rhetoric to that of the

¹⁷⁰ Wroe, ‘Australia looks to drones’ and Bill Roggio and Oren Adaki, ‘2 Australian nationals killed in Yemen in November drone strike,’ *The Long War Journal*, 16 April 2014. Available at: <http://www.longwarjournal.org/archives/2014/04/media_outlets_in_australia.php#ixzz3PSQ4mWZr> [Accessed 18 January 2017], News.com.au, ‘Australian extremists killed in US Predator drone strike in Yemen,’ *News.com.au*, 16 April 2014, <<http://www.news.com.au/national/australian-extremists-killed-in-us-predator-drone-strike-in-yemen/news-story/5a1361c9ec85bfca982ec9d2ab0a5b57>> [Accessed 13 April 2018].

¹⁷¹ Australian Attorney-General, Senator the Hon. George Brandis QC, ‘The Right of Self-Defence Against Imminent Armed Attack In International Law,’ Lecture delivered at the T C Beirne School of Law, University of Queensland, 11 April 2017 <<https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law>> [Accessed 24 April 2018].

US.¹⁷² Both the UK and Australia, then, seem to have strengthened the partnership with the US in drone strikes and counter-terrorism and to have adapted their interpretation of imminence and self-defence accordingly.

Other key US allies provide an interesting, more complex picture. In France, the government of Jacques Chirac was among the strongest opponents of the Iraq War. Still, documents published in the aftermath of 9/11 seemed to suggest the possibility of pre-emptive action. 'Within the framework of prevention and projection-action' one of these documents read, 'possible pre-emptive action is' not out of the question.¹⁷³ Similarly, in the *Livre Blanc* 'La France Face au terrorisme,' the French government suggested the possibility of pre-emption.¹⁷⁴ This call, however, specified that such pre-emptive action was permissible only in case of clear evidence of an imminent threat and only within the framework of article 51 of the UN Charter and after authorization of the UN Security Council.¹⁷⁵ Drones and a renewed focus on counter-terrorism seem to have changed France's approach. At the European level, France has played a key role in promoting the European development of drones.¹⁷⁶ France has also signed an agreement with the UK to strengthen collaboration among the users of the Reaper drone. This more private club is in direct competition with the 'Drone Users Club' set

¹⁷² The same also apply to the US position regarding the 'unwilling or unable' formula, see *2016 Defence White Paper*, p. 48.

¹⁷³ Reisman and Armstrong, 'The past and future,' p. 544.

¹⁷⁴ French Government, 'La France Face au terrorisme,' *Livre Blanc*, 2006. Available at: <<http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/064000275.pdf>> [Accessed 13 April 2018], p. 62.

¹⁷⁵ French Government, 'La France Face au terrorisme,' p. 62.

¹⁷⁶ Sousan Hammad, 'Drones: What France wants for Christmas,' *Al Jazeera America*, 11 December 2013. Available at: <<http://america.aljazeera.com/articles/2013/12/11/all-france-wantsforchristmasaredrones.html>> [Accessed 2 February 2017].

up by European Defence Ministers.¹⁷⁷ After the Paris attacks, as Anthony Dworkin argued, the French position became more assertive.¹⁷⁸ France has expanded its own 'war on terror' in Africa. At times, France has used a justification of its targeted killing operations as 'exceptional,' which implies recognition of their illegality under international law.¹⁷⁹ Recent investigative journalism, however, has suggested that France has developed a 'kill list,' not unlike that of the United States. France, furthermore, has long adopted a policy of targeted killing through its operations 'homo' (for homicide) which have been conducted by French Secret Services and special force under several French Presidents since the Algerian War.¹⁸⁰ In particular, Vincent Nouzille has argued that since the Hollande presidency, French targeted killing policies have developed 'hand in hand' with those of the United States, including the blurring of boundaries between traditional military operations and covert action conducted by the French secret services.¹⁸¹ Public statements from French authorities have also started to rely on an expansive notion of self-defence to carry out strikes in Syria. As Foreign Minister Laurent Fabius put it:

¹⁷⁷ Chris Cole, "'Future Combat Air Systems": UK-France Military Declaration Reveals Development of "Combat Drones," *Global Research*, 6 February 2014. Available at: <<http://www.globalresearch.ca/uk-france-declaration-reveals-new-reaper-users-club-to-rival-european-drones-club/5367723>> [Accessed 20 January 2015].

¹⁷⁸ Anthony Dworkin, 'European countries edge towards war on terror,' 9 September 2015. Available at: <http://www.ecfr.eu/article/commentary_european_countries_edge_towards_war_on_terror4015> [Accessed 3 February 2017].

¹⁷⁹ Institut de Relations Internationales et Stratégiques – Ministère de la Défense, 'Aspects juridiques et éthiques des frappes à distance sur cibles humaines stratégiques,' 26 March 2014, available at: <http://www.iris-france.org/docs/kfm_docs/docs/analyses-iris/20140114_np_iris-cicde_aspects-juridiques-ethiquesfrappe-distance-cibles-humaines.pdf> [Accessed 24 April 2018], p. 105

¹⁸⁰ Vincent Nouzille, *Les tueurs de la République: assassinats et opérations spéciales des services secrets* (Paris: Fayard, 2017).

¹⁸¹ Nouzille, *Les tueurs de la République*, pp. 8 and 28,

As soon as it is established that from Syrian territory, which is not entirely controlled by the Syrian government...Daesh forces...are threatening French interests, both outside and inside France, it is perfectly legitimate that we defend ourselves.¹⁸²

The remark seems to follow the line traced by the US and the UK. On the 7th of September 2015, President Hollande also made clear that France was starting surveillance flights over Syria and that it was 'ready to strike' on the basis of the information collected. Any strike, Hollande made clear, aimed at preventing future attacks against French citizens.¹⁸³ France, then, seems to have adopted all the markers of change we identified, regarding both the nature of the threat, its timing and the need to protect from future disasters.

A revised concept of imminence, Anthony Dworkin has noted, represents the likeliest point of contact between the US and European positions.¹⁸⁴ The position of several European countries on self-defence, drones, and targeted killings has progressively moved closer to the US view. Since 2014, countries like the Netherlands, Denmark and Belgium have also started to conduct air-strikes in Iraq.¹⁸⁵ As Dworkin notes, while the legal justification of these strikes relied on the request from the Iraqi government, 'the action appeared motivated at least in part by the ambition of suppressing an armed group that posed a direct threat to European citizens,' making the rationale for the attacks not different from that of the US.¹⁸⁶ Although this position

¹⁸² AFP, 'France invokes self-defence for Syria air strikes,' The Tribune, 11 September 2015. Available at: <<https://tribune.com.pk/story/955050/france-invokes-self-defence-for-syria-air-strikes/>> [accessed 3 February 2017].

¹⁸³ Dworkin, 'European countries.'

¹⁸⁴ Anthony Dworkin, 'Drones and targeted killing: defining a European position,' *European Council on Foreign Relations*, 3 July 2013. Available at: <http://www.ecfr.eu/publications/summary/drones_and_targeted_killing_defining_a_european_position211> [Accessed 3 February 2017].

¹⁸⁵ Dworkin, 'European countries.'

¹⁸⁶ Dworkin, 'European countries.'

relies on a UN authorization and, hence, seemingly reject proxy one, in the effort to prevent a future threat to European citizens, we can identify the remaining four criteria identified above, especially since the nature of ISIS was recognized as particularly dangerous.

Other powers: new drones and emulation

Outside of US allies, China enjoys a particular status. China currently appears to be the principal global contender when it comes to challenging US predominance. Enabled by its rapid economic development, China has engaged in a long process of modernization of its strategic and conventional military capabilities.¹⁸⁷ Whether China will, indeed, 'rule the world' one day or become a 'partial power' in a multipolar world remains to be seen.¹⁸⁸ What is already clear, however, is that China's economic strength, military might, and diplomatic influence allow it to significantly shape the contemporary global normative order.

Beijing's general stance on the use of force has been traditionally determined by its strict adherence to the principle of state sovereignty and non-interference. Both Chinese human rights discourse and official foreign policy documents have continuously stressed sovereignty, non-aggression and territorial integrity without

¹⁸⁷ By 2012, China's defence budget had become the second largest in the world (\$106 billion). Its actual spending, however, exceeds official figures, since China boosts its military expenditures with resources from other state budgets. See David Shambaugh, *China Goes Global: The Partial Power* (Oxford: Oxford University Press, 2013), p. 247.

¹⁸⁸ Martin Jacques, *When China Rules the World: The Rise of the Middle Kingdom and the End of the Western World* (London: Penguin, 2012), Charles Kupchan, *No One's World: The West, The Rising Rest, and the Coming Global Turn* (Oxford: Oxford University Press, 2012) and Shambaugh, *China Goes Global*.

reservations.¹⁸⁹ Addressing the UN General Assembly in 2012, the Chinese Foreign Minister Yang Jiechi reinforced this position by stating that '[r]espect for each other's sovereignty, core interests and choice of social system and development path is a fundamental principle guiding state-to-state relations.'¹⁹⁰

All of this would suggest a conservative understanding of self-defence that is in line with Article 51 of the UN Charter. However, following China's decades-long military build up, its grand strategy has been slowly moving towards a more offensive and inherently more flexible interpretation of self-defence. In 2006, China published a defense report that essentially outlines a pro-active military strategy. The document explicitly stressed the value of a preemption strategy that allows Beijing to 'seize the initiative' against a militarily superior power and to create 'an initial advantage in the local balance of forces.'¹⁹¹ As the report suggests, China's adoption of a preemptive strategy is driven by both its ambition to project power beyond the region and to respond to regional security threats such as the 'Taiwan Problem' and the territorial disputes in the South Chinese Sea.

Beijing's more offensive security strategy also extends to its anti-terrorism policy. Since 9/11, the country has been a strong supporter of the fight against international

¹⁸⁹ Chenqiu Wu, 'Sovereignty, Human Rights and Responsibility: Changes in China's Response to International Humanitarian Crises,' *Journal of Chinese Political Science*, 15(1) 2009, p. 71.

¹⁹⁰ UN News Centre, 'China's Foreign Minister stresses principle of non-interference at UN debate,' 27 September 2012. Available at: <<http://www.un.org/apps/news/story.asp?NewsID=43101#.VMPzuktKPF>> [Accessed 14 January 2015]. See also Wu, 'Sovereignty,' p. 93 and Yeshe Choedon, 'China's Stand on UN Peacekeeping Operations: Changing Priorities of Foreign Policy,' *China Report*, Vol. 41, No. 1, 2005, pp. 39-56.

¹⁹¹ Andrew Yang, 'The military of the People's Republic of China: strategy and implementation,' *UNISCI Discussion Paper*, May 2008, p. 191.

terrorism, cooperating with both the UN and US on this issue.¹⁹² China has its own terrorism problem, most notably in the East Turkistan Islamic Movement (ETIM), which lead Chinese officials to declare a willingness to 'go all out to counter the violence.'¹⁹³ In order to legitimize and support its 'heavy-handed' approach to countering separatist movements such as ETIM, China has repeatedly tried to align itself with the US war on terror.¹⁹⁴ Crucially, China has become the second largest drone-user behind the US. There are no official figures available on the size and technological sophistication of China's drone fleet, but US security analysts are convinced that China's drone industry is becoming increasingly dominant.¹⁹⁵ According to a US Department of Defense report on China's military development, a 'probable Chinese UAV' was sighted for the first time in September 2013, conducting observational flights over the East China Sea.¹⁹⁶ In the same year, Liu Yuejin, the director of the Ministry of Public Security, admitted that Chinese law enforcement considered the use of 'an unmanned aircraft to carry 20 kilograms of TNT' to neutralize Naw Kham, a drug kingpin who was accused of murdering 13 Chinese sailors in

¹⁹² Fu Hualing, 'Responses to Terrorism in China,' In: Ramraj, V., Michael Hor, Kent Roach and George Williams (Eds.), *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2012), p. 347.

¹⁹³ Fisk and Ramos, 'Actions speak louder than words,' p. 181.

¹⁹⁴ Rosalyn Turner, 'Drone Strikes in a Multipolar World,' *The Strategist – The Australian Strategic Policy Institute Blog*, 17 February 2014. Available at: <<http://www.aspistrategist.org.au/drone-strikes-in-a-multipolar-world/>> [Accessed 3 February 2017].

¹⁹⁵ Ishaan Tharoor, 'China Unveils a New Anti-Drone Laser, but it's the Growing Chinese Drone Fleet that Matters,' *The Washington Post*, 11 June 2014, Available at: <<http://www.washingtonpost.com/blogs/worldviews/wp/2014/11/06/china-unveils-a-new-anti-drone-laser-but-its-the-growing-chinese-drone-fleet-that-matters/>> [Accessed 3 January 2015].

¹⁹⁶ US Department of Defense, 'Annual Report to Congress: Military and Security Developments Involving the People's Republic of China,' 24 April 2014. Available at: <https://www.defense.gov/Portals/1/Documents/pubs/2014_DoD_China_Report.pdf> [Accessed 10 January 2015], p. 33.

2011.¹⁹⁷ Interestingly, the decision not to conduct a lethal drone strike was, as it seems, not based on legal, ethical or temporal considerations. Instead, it was primarily driven by China's desire to publicly display the efficiency of its police and judicial apparatus through a public trial and subsequent execution.¹⁹⁸

Beyond this episode, however, Beijing seems prepared to conduct drone strikes against suspected terrorists as well as organized crime even outside its territory, especially when Chinese nationals are involved. In 2016, China also unveiled publicly its first killer drone.¹⁹⁹ China could justify drone strikes under a flexible understanding of 'imminent threat of violent attack' as outlined by the Obama Administration.²⁰⁰ As Scott Shane put it: 'If China, for instance, sends killer drones into Kazakhstan to hunt minority Uighur Muslims it accuses of plotting terrorism, what will the United States say?'²⁰¹ Outside Chinese territory, with its financial interests in Africa expanding, China has adopted an increasingly active role in anti-piracy and anti-terrorism operations to protect its businesses.²⁰² It rescued its citizens from the war in Yemen and

¹⁹⁷ Liu Chang, 'Manhunt for Deadly Drug Kingpin,' *Global Times Online*, 19 February 2013. Available at <<http://www.globaltimes.cn/content/762449.shtml>> [Accessed 3 February 2015].

¹⁹⁸ Turner, 'Drone strikes.'

¹⁹⁹ Franz-Stefan Gady, 'China Publicly Displays New Killer Drone for 1st Time,' *The Diplomat*, 16 November 2016. Available at: < <http://thediplomat.com/2016/11/china-publicly-displays-new-killer-drone-for-1st-time/>> [Accessed 3 February 2017].

²⁰⁰ Dana Stuster, 'China Now Considering Drone Strikes in its Drug War,' *Foreign Policy Blog*. Available at: <<http://foreignpolicy.com/2013/02/19/china-now-considering-drone-strikes-in-its-drug-war/>> [Accessed 16 January 2017].

²⁰¹ Alexander Abad-Santos, 'China's Killer Drones Didn't Kill a Drug Lord, but Obama's Drones Could Have,' *The Atlantic*, 20 February 2013. Available at: < <https://www.theatlantic.com/international/archive/2013/02/china-killer-drone-naw-kham/318150/>> [Accessed 3 February 2017].

²⁰² Hannah Beech, 'As More Chinese Fall Victim to Terrorism, Beijing Fumbles for a Response,' *Time*, 26 November 2015. Available at: <<http://time.com/4127764/china-terrorism-chinese-mali-isis/>> [accessed 3 February 2017].

it opened its first foreign military base in Djibouti.²⁰³ Overall, as Julian Ku has recently argued, claims of acting in self-defence have a long history in China. The Chinese government, while critical of US claims of 'preemptive' uses of force in the case of Iraq, has been much more supportive of US claims of self-defence against al-Qaeda and other non-state actors.²⁰⁴

Russia sees the development of a drone fleet as part of a new strategic military approach that is geared towards 'no-contact-warfare.'²⁰⁵ In 2012, Makhmut Gareev, Russia's leading military theorist, described how the country finds itself in a changed threat environment, and that it closely follows trends in Western 'no contact' combat operations.²⁰⁶ Russia has developed a number of reconnaissance drones, most notably the *Orlan 10*, the *Eleron 10* and the *Zala 421*, which it has deployed in the current Ukraine conflict to support Russian insurgents.²⁰⁷ Moscow currently works with a number of defence companies to advance the strike capabilities of its current drone fleet, but it seems that Russia still lacks technological competencies in sectors such as optics and electronic systems.²⁰⁸

²⁰³ Evan Osnos, 'Making China Great Again,' *The New Yorker*, 8 January 2018. Available at: <https://www.newyorker.com/magazine/2018/01/08/making-china-great-again> [accessed 10 January 2018].

²⁰⁴ Julian Ku, 'How China's view on the laws of Jus ad bellum will shape its legal approach to cyber warfare,' *Aegis Series Paper No. 1707*, Hoover Institution, 2017
<https://www.hoover.org/sites/default/files/research/docs/ku_webready.pdf> [Accessed 20 May 2018].

²⁰⁵ Maksym Bugriy, 'The Rise of Drones in Eurasia (Part Two: Russia),' *Eurasia Daily Monitor*, 11 (117) 2014. Available at: <http://www.jamestown.org/single/?tx_ttnews%5Btt_news%5D=42560&no_cache=1#.VMe-IUtKPFi> [Accessed 21 January 2015].

²⁰⁶ Roger McDermott, 'Putin's Presidential Re-Election and Future Warfare Capabilities,' *Eurasia Daily Monitor*, 9(41) 2012. Available at: <http://www.jamestown.org/single/?tx_ttnews%5Btt_news%5D=39064&no_cache=1#.VMe_VUtKPFi> [Accessed 3 January 2015].

²⁰⁷ Bugriy, 'The rise.'

²⁰⁸ McDermott, 'Putin's Presidential re-election' and Bugriy, 'The rise.'

Like China, Russia traditionally supported a restrained understanding of self-defence, preferring to handle international crisis through the UN Security Council. Moscow was strongly against an un-authorized invasion of Iraq, and it has frequently used its permanent seat at the Council to condemn the unilateral use of military force outside battlefields by the US. After the War in Afghanistan and Iraq, Moscow insisted that any interpretation of self-defence in the context of anti-terrorism must be developed within the global legal order and supervised by the UN.²⁰⁹ Yet, similar to China, Russia has been slowly moving towards a pre-emptive understanding of self-defence. Two main reasons have driven Moscow to adopt a more preemptive and inevitably more offensive military strategy.

Firstly and perhaps most importantly, Russia wants to counter separatist movements, political and religious extremism and 'color revolutions' more effectively. During the last fifteen years or so, Moscow has been an advocate of legal reform of the norm of self-defence in the context of terrorism, arguing for the right to engage in military action to naturalize an immediate or lingering threat.²¹⁰ The situation in Georgia in 2002, in which Russia threatened to launch a pre-emptive attack if the Georgian government failed to defeat Chechen separatists, showed that Moscow reserved the right to strike preemptively. Three years later, after the hostage crisis in Beslan, a senior Russian military official re-emphasized the Kremlin's preemptive anti-

²⁰⁹ Anglaja Snetkov, *Russia's Security Policy Under Putin: A Critical Perspective* (London: Routledge, 2015) and Dov Lynch, 'The enemy is at the gate: Russia after Beslan,' *International Affairs*, 81:1 (2005), p. 143.

²¹⁰ Lynch, 'The enemy,' p. 158.

terrorism approach, claiming that it was ready to take any action 'to liquidate terrorist bases in any region in the world.'²¹¹

Secondly, Russia sees its right to unilaterally launch preventive strikes as a response to developments in US military practice. According to a statement by President Putin, 'if, in the practice of international life, the principle of preventive use of force is going to be asserted, then Russia reserves the right to act similarly to defend its national interest.'²¹² Indeed, Moscow's doctrine to act unilaterally in case foreign governments are unable or unwilling to counter terrorism within its own borders seems to emulate the American targeted killing practice.²¹³

This would suggest that Russia is open to a 'flexible', US-inspired notion of imminence. Interestingly though, Putin has openly criticized the US for its extensive and unconsidered use of drones: 'Drones are finding an increasingly wide use all over the world, but we are not going to operate them as other countries do. It is not a videogame.'²¹⁴ Of course, it remains to be seen how Moscow will actually behave once it has fully developed the necessary technology to operate armed drones. Given its broader preemptive military posture, warfare strategy and volatile regional security

²¹¹ Thomas Nicholls, *Eve of Destruction: The Coming Age of Preventive War* (Philadelphia: University of Pennsylvania Press, 2008), p. 80.

²¹² Maria Omelicheva, 'After Beslan: Changes in Russia's Counterterrorism Policy,' *E-IR*, 15 October 2012. Available at: <<http://www.e-ir.info/2012/10/15/after-beslan-changes-in-russias-counterterrorism-policy/>> [Accessed 2 February 2017].

²¹³ Russia supported the 'unable or unwilling' formula in 2002 in occasion of its confrontation with Chechen rebels in Georgia. Statements by the Russian Foreign Ministry in July and by Russian President Vladimir Putin in September confirm this point. More recently, however, Russia has backtracked when the discussion has moved to the international coalition efforts against ISIS in Syria. Chachko and Deeks, however, still qualify Russia as having 'explicitly endorsed' the formula. See Elena Chachko and Ashleigh Deeks, 'Who is on Board with "Unwilling or Unable"?' *Lawfare*, 10 October 2016, <<https://www.lawfareblog.com/who-board-unwilling-or-unable#Russia>> (Accessed 22 May 2018).

²¹⁴ RT News, 'Putin says Drones aren't Toys, Russia won't Use them like other Nations,' RT News. 28 November 2013. Available at: <<http://rt.com/news/putin-drones-not-toys-457/>> [Accessed 17 January 2015].

situation, there is good reason to suspect that Russia will eventually emulate US practice and move towards a more 'flexible' interpretation of imminence with regard to targeted killings. Russia and China seem to have adopted at least some of the criteria we identified, especially in confrontation with non-state groups, but they have remained silent in terms of explicit support.²¹⁵

India's understanding of self-defence is in many respects not too dissimilar from that of Russia. Although India's post-independence military doctrine was inherently defensive, characterized by strategic 'restraint', various terrorist attacks have led New Delhi to assert the right to take preventive action against potential threats.²¹⁶ After the Parliament attack by Pakistan-sponsored Kashmiri militants in 2001, it was clear that India abandoned its doctrine of restraint entirely in favour of a 'pro-active deterrence' with an 'offensive bias.'²¹⁷ One year after the attack, Jaswant Singh, the then Indian Finance Minister, clarified Mumbai's position on the right to self-defence, stating that:

Preemption or prevention is inherent in deterrence. Where there is deterrence there is preemption. The same thing is there in Article 51 of the United Nations Charter. Every nation has that right. It is not the prerogative of any country. Preemption is the right of any nation to prevent injury to itself.²¹⁸

Indeed, ever since 9/11 and the declaration of the 'Bush Doctrine' India has sought to frame its conflict with Pakistan in terms of US anti-terrorism policy. Most strikingly perhaps is India's turnaround on the war in Iraq. India initially opposed Washington's

²¹⁵ Russia's intervention in Crimea and Ukraine arguably show a disregard for UN prohibition on the use of force, but such argument is beyond the scope of this article. On the possible meanings of 'silence,' see Henderson, 'The 2006 National Security Strategy,' p. 17.

²¹⁶ Fisk and Ramos, 'Actions speak louder,' p. 172.

²¹⁷ Ali Ahmed, 'The Interface of Strategic and War Fighting Doctrine in the Indian-Pakistan Context,' *Strategic Analysis*, 33(5), 2009, p. 701.

²¹⁸ Ramtanu Maitra, 'US-India ties: An adept adaptation,' *Asia Times*, 8 October 2002. Available at: <http://www.atimes.com/atimes/South_Asia/DJ08Df07.html> [Accessed 3 February 2017].

plan to use force without Security Council Resolution and even refused to send peacekeeping troops after the invasion. However, New Delhi was quick to revise its position and, instead, embark on what it has termed a 'middle path', a policy that effectively endorsed the US stance. Supporters of this strategy argued that this move would allow the Indian government to open up political space to raise and pursue its strategic interests in Iraq and the Persian Gulf.²¹⁹ Even more importantly, India saw its alignment with US security policy and rhetoric as an opportunity to justify potential future military actions against its local rival Pakistan. As India's Foreign Minister Sinha made clear, New Delhi 'derive[s] some satisfaction because I think all those people in international community must realize that India has a much better case to go for preemptive action against Pakistan than the US in Iraq.'²²⁰ In line with its preemptive military posture, India is modernizing its special forces, including its irregular and unconventional warfare arsenal in order to conduct 'clandestine' and 'irregular' combat operations behind enemy lines.²²¹

India has also emerged as a regional drone power. The country has been acquiring UAVs since the end of the 1990s, but its drone program has gained traction after the terror attacks in Mumbai in 2008.²²² According to the *Times of India*, the country is

²¹⁹ Ninan Koshy, 'India's 'Middle Path' Through War in Iraq,' *Global Policy Forum*. Available at <<https://www.globalpolicy.org/component/content/article/187/34555.html>> [Accessed 15 January 2015].

²²⁰ Dombrowski and Payne, 'The emerging consensus.'

²²¹ Rajat Pandit, 'To Give 'Irregulars' Punch, Forces Go Shopping For High-Tech Weapons,' *The Times of India*, 13 January 2011. Available at: <<http://timesofindia.indiatimes.com/india/To-give-irregulars-punch-forces-go-shopping-for-hi-tech-weapons/articleshow/7270446.cms>> [Accessed 2 January 2015].

²²² Siddharth Srivastava, 'India sets Sights on Killer Drones,' *Asia Times Online*, 9 April 2010. Available at: <http://www.atimes.com/atimes/South_Asia/LD09Df01.html> [Accessed 1 February 2015].

emerging as one of the world's 'big time drone operators.'²²³ Indeed, India has introduced over 100 UAVs during the last fifteen years, both Israeli-made and domestic. While most of them are designed for reconnaissance, or to detect and destroy the enemy's technological equipment such as radar and satellite systems, India clearly sees drones as a key weapon in counter-insurgency and counter-terrorism efforts.²²⁴ Reports in 2010 surfaced that the Indian military is bolstering its UAV fleet by purchasing a 'bigger dose' of attack drones, most notably Israeli *Harop* drones.²²⁵ New Delhi has admitted that its armed forces are capable and prepared to conduct targeted killings similar to the ones the US undertook in Pakistan and Afghanistan. As the former leader of the *BJP*, India's largest political party, noted in 2011: 'India cannot be denied the right that the US has, including that of surgical strikes (...). India should reserve the right of surgical strikes and hot pursuit against Pakistan irrespective of the consequences.'²²⁶ Since 2014, Indian authorities have made clear that the government has adopted a proactive attitude based on intelligence collection and targeted killings. Defence minister Manohar Parrikar has defended the strategy that 'neutralized' 110 terrorists in 2014, pointing out that the strategy has continued.²²⁷ In 2015, the Indian government purchased drones from Israel. An Indian Army officer involved in the defense planning staff defended the purchase at the time by saying: 'It's risky, but

²²³ Rajav Pandit, 'India Lines Up Israeli Drones in Race with Pak,' *The Times of India*, 26 March 2010. Available at: <<http://timesofindia.indiatimes.com/india/India-lines-up-Israeli-drones-in-race-with-Pak/articleshow/5724232.cms>> [Accessed 2 January 2015].

²²⁴ Shashank Joshi & Aaron Stein, 'Emerging Drone Nations,' *Survival*, 55 (5), 2013, p. 57.

²²⁵ Srivastava, 'India sets Sights on Killer Drones

²²⁶ The Times of India, 'Yashwant backs Abbottabad-like strike by India,' *The Times of India*, 7 May 2011. Available at: <<http://timesofindia.indiatimes.com/india/Yashwant-backs-Abbottabad-like-strike-by-India/articleshow/8183300.cms>> [Accessed 7 January 2015].

²²⁷ Rajat Panditl, "Army making targeted kills of terrorists in J&K, Manohar Parrikar says', *The Times of India*, 22 May 2015. Available at: <<http://timesofindia.indiatimes.com/india/Army-making-targeted-kills-of-terrorists-in-JK-Manohar-Parrikar-says/articleshow/47378303.cms>>.

armed UAVs can be used for counter insurgency operations internally as well across the borders; sneak attacks on terrorist hideouts in mountainous terrain.' Drones could provide a 'deep strike capability.'²²⁸ In 2016, India carried out strikes against terrorist camps across the Line of Control. According to Indian officials, the operation was based on credible evidence and was 'focused to ensure that these terrorists do not succeed in endangering lives of citizens in our country'.²²⁹

These operations and their rationale were shared with, and implicitly accepted by, the US. There are, thus, clear indications that Indian military strategy and targeted killing policies increasingly adopts a 'flexible' understanding of 'imminence.' Our five criteria can be seen in the rhetoric and practice of Indian officials dealing with terrorist groups. Crucially, the Indian situation has been affected by developments in Pakistan. Pakistan has also become a regional drone power. In 2015, Pakistan was also the first country outside the 'West' and Israel to conduct a targeted killing through a drone-strike. The strike was carried out by a *Burraq* drone, initially developed for surveillance purposes but later weaponised, in the aftermath of a terrorist attack on an Army-run school that killed 150.²³⁰ As Michael Boyle has argued, Pakistan has not provided a full justification and legitimation for the strike. The strike is part of the government's

²²⁸ Sanjeev Miglani, 'India Steps Up Plan to Buy Israeli Armed Drones,' *Haaretz*, 23 September 2015 <<https://www.haaretz.com/india-steps-up-plan-to-buy-israeli-armed-drones-1.5401730>> [Accessed 8 May 2018].

²²⁹ The Hindu, 'Target terror: India strikes across LoC', *The Hindu*, 29 September 2016. Available at <<http://www.thehindu.com/news/national/Target-terror-India-strikes-across-LoC/article15006525.ece>> [accessed 10 January 2018]

²³⁰ Tim Craig, 'Pakistani military says its drone killed 3 suspected militants,' *The Washington Post*, 7 September 2015. Available at: <https://www.washingtonpost.com/world/pakistan-begins-drone-warfare-on-its-own-soil/2015/09/07/b7c56858-553a-11e5-8bb1-b488d231bba2_story.html?utm_term=.80e7dcbeaee5> [accessed 10 January 2018].

counter-terrorism effort. It targeted a 'high-value target' and largely follows US example and practice.²³¹

In spite of emerging as a regional drone power, Brazil's stance on the use of drones for targeted killings is quite different from that of China, Russia and India. After 9/11, Brazilian President Lula was strongly opposed to the American 'war on terror' framework. There are signs that Brazil is moving towards a more proactive foreign policy. In 2004, President Lula announced Brazil's largest military deployment since World War II in order to head UN Peacekeeping operation in Haiti.²³² While Lula was careful not to portray this as a new era in Brasilia's foreign policy posture, Brazil has become an active participant in the debate about regulating military intervention.²³³ Yet, notwithstanding its increased engagement in multilateral initiatives, Brazil is still considered to be 'the most revisionist of all emerging powers.'²³⁴

Brazil boasts a strong aerospace industry and like many of its Latin American neighbours it has become a major player in the drone market.²³⁵ *Embraer*, a Brazilian company, for example, is considered by many to be the next main provider of UAVs to the region.²³⁶ Brazil's drone program has attracted relatively little international

²³¹ Michael Boyle, 'Why Pakistan's first drone strike should worry Obama,' *The Express Tribune*, 1 October 2015. Available at: <<https://tribune.com.pk/story/965600/why-pakistans-first-drone-strike-should-worry-obama/>> [accessed 10 January 2018].

²³² Matias Spektor, 'Humanitarian Interventionism Brazilian Style?' *Quarterly Americas*, Summer 2012. Available at: < <http://www.americasquarterly.org/humanitarian-interventionism-brazilian-style/>> [Accessed 19 January 2015].

²³³ Oliver Stuenkel and Marcos Tourinho, 'Regulating Intervention: Brazil and the Responsibility to Protect,' *Conflict, Security and Development*, Vol. 14, No. 4, 2014, pp. 379-402.

²³⁴ Randall Schweller, 'Emerging Powers in an Age of Disorder,' *Global Governance*, Vol. 17, No. 3, 2011, p. 293.

²³⁵ Rachel Glickhouse, 'Explainer: drones in Latin America,' *American Society/Council of Americas*, 28 August 2013. Available at: < <http://www.as-coa.org/articles/explainer-drones-latin-america/>> [Accessed 1 February 2015].

²³⁶ Alejandro Sanchez, 'Drones in Latin America,' *COHA Reports*, 12 January 2014. Available at: < <http://www.coha.org/coha-report-drones-in-latin-america/>> [Accessed 2 February 2015].

attention, but it has widely dispatched UVAs for surveillance purposes, ranging from border surveillance, crowd inspection at the World Cup, and monitoring drug trafficking and deforestation.²³⁷ In a case not too dissimilar from that of Kham in China, Brazilian authorities recently relied on an Israeli Harop drone to arrest a wanted drug lord. However, the drone was merely used to track down the suspect.²³⁸ Moreover, Brazil has so far been highly critical of the American drone programme. In 2013, the government criticised US targeting practices in front of the UN, suggesting the need to draw a line as to which targets were permissible.²³⁹ The country, however, has not confronted challenges from terrorist groups.

Reflections: new weapons, new imminence, new norms?

In the following, concluding paragraphs, we will pull together some of the key findings of our empirical analysis. In a second step, we also wish to offer a few interpretations for why states have adopted a more flexible understanding of imminence, and raise a few brief thoughts about the relationship between technology and international norm dynamics that the article has implicitly thrown up, but could not explore in any depth.

²³⁷ Isabel Estrada, 'UAVs Help Ecuador's Navy Catch Drug Traffickers From the Air,' *Dialogo*, 17 October 2011. Available at: <http://dialogo-americas.com/en_GB/articles/rmisa/features/regional_news/2011/10/17/ecuador-unmanned-aircraft> [Accessed 1 February 2015].

²³⁸ Haaretz, 'Israeli drone helps Brazil catch fugitive drug lord,' *Haaretz*, 12 June 2014. Available at: <<http://www.haaretz.com/business/1.598359>> [Accessed 1 February 2015].

²³⁹ Ed Pilkington and Ryan Deveraux, 'US defends drone strikes as 'necessary and just' in face of UN criticism,' *The Guardian*, 25 October 2013. Available at: <<https://www.theguardian.com/world/2013/oct/25/un-drones-us-policy-debate>> [accessed 3 February 2017].

One of the key claim of this article has sought to establish is that the Obama Administration played an active and prominent role in driving changes in the interpretation of norms surrounding the use of force. In its effort to reshape the normative content of those norms, the administration has *inter alia* engaged in a systematic and sustained attempt to redefine the understanding of imminence through both communicative and actual practice.²⁴⁰ Only under Obama, as William Banks summarized, 'the self-defence justification (...) matured and sharpened (...) to focus on the imminence of the continuing threat posed by the target.'²⁴¹ Indeed, under Obama, imminence, a traditional criterion in international law, was re-positioned at the centre of self-defence claims and the criteria for the application of the term were expanded. This expansion was, initially, broad (in the *White Paper*), but was brought, at least partially, closer to the original, temporal, interpretation enshrined in the *Caroline* criteria in the administration's latter efforts. This redefined meaning of imminence, and the attached claims to self-defence, have been closely followed, and sometimes even explicitly embraced by, many of the key actors within the international society. In other words, John Brennan's claim that international society has come to accept this more flexible notion is largely supported by the analysis of both US traditional allies and other great powers (with the possible exception of Brazil).

As our study shows, the new, more flexible meaning of imminence can be found in the rhetoric, language and practice of several states, though to varying degrees. Some countries have accepted the new meaning of imminence as both a matter of state

²⁴⁰ Trenta, 'The Obama Administration's conceptual change.'

²⁴¹ William Banks, 'Regulating drones' in Peter Bergen and Daniel Rothenberg (eds.), *Drone Wars* (Cambridge: Cambridge University Press, 2015), p. 144

practice and *opinio juris*; others have started adopting practices without making public legitimating claims; while others (Brazil, China and, as far as we know, Russia) have not displayed any of these behaviours so far. What emerges from this is a kind of continuum, with the US at one extreme and Brazil at the opposite one. Following the US, Israel has been at the forefront of pre-emption and prevention. The UK and Australia - although initially sceptical of notions of imminence that abandon temporal requirements - have largely accepted and collaborated with US targeting policies. The UK position on imminence seems now aligned with that of the US. Similarly, the recent explanation provided by Australia's Attorney General conforms to the US position on imminence. These four countries (US, UK, Australia, and Israel) provide the clearest example of a move towards the re-interpretation of norms surrounding self-defence. In particular, the analysis of these countries' legal positions and of their practices seem to provide enough evidence to suggest that they have accepted a new norm of imminence – as a matter of both state practice and *opinio juris*. Another set of countries also seems to have accepted the new interpretation of imminence as a matter of practice and rhetoric, though *without* providing clear legal opinions on the matter. France and some of its European allies, for example, appear to have abandoned the early opposition to pre-emption and prevention and are now trying to 'catch up' with the US with regard to both technology and strategy. India and Pakistan have also followed US practice and relied more heavily on drone technology. Several statements from Indian officials signal an acceptance of the necessity of a pre-emptive approach in the current strategic environment. Pakistan famously carried out its own targeted killing operation; and China is certainly moving towards greater assertiveness in international politics. While

Beijing hitherto has not emulated US targeted killing practices, there are clear signs that it is ready to do so in the future if such practice is necessary for achieving its strategic goals.

Taken together, contemporary state practice surrounding imminence represent what Ian Hurd has called 'constructive noncompliance' – a collective legitimation of a practice that violates plain language of an existing treaty.²⁴² Methodologically speaking, while this is not enough to claim that a new international (customary) *law* of self-defence has emerged, we can see some significant changes in the way states interpret the meaning of imminence and an emerging consensus on a modified understanding of imminence in the context of the right to use force, which may well pave the way for changes in the laws of self-defence in the future.

Beyond legal analysis, the interesting question, then, is: why have these countries, to varying degrees, adopted or supported a more flexible understanding of 'imminence'? Our analysis suggests that three more or less interrelated common factors have animated states to adopt or support Obama's meaning of 'imminence'. To be sure, we do not propose a direct causal relationship between any of these factors and a state's understanding and practice of 'imminence' - we doubt whether such a 'causal theory' of normative change is possible at all, as norm evolution is most likely to be non-linear and driven by a wide array of complex, multiple and contingent events. Instead, the following factors are the attempt to move from particular cases to a more general interpretation of why the meaning of 'imminence' is changing.

²⁴² Hurd, *How to do things with International Law*, p. 39.

Firstly, states seem to emulate US practice. That is, other countries seem to be following US practices or to adopt practices similar to the US on the basis that the US government has already done something similar. This is in line with Scharf's recent observation, there are an increasing number of instances in which states have justified their own strikes against non-state actors by reference to US practice: i.e. the offensive by Turkish forces against PKK bases in northern Iraq in February 2008; the Colombia airstrike against a FARC terrorist camp just inside Ecuador's border in March 2008; or the Kenyan incursion into Somalia in response to cross-border attacks by the Al-Shabaab terrorist group in October 2011.²⁴³ Indeed, as the world's leading power, the US is in a unique position to set precedents for normative developments, in particular when it comes to warfare and rules pertaining to the physical security of a country.²⁴⁴ The US's elevated position within the liberal international order equips it with a distinctive normative weight that allows its leaders to significantly influence the axiology of the global normative order and the basic parameters for legitimate state conduct, respectively. The ability to shape the normative character of the international system is ably captured by Kegley and Raymond:

How the United States acts is an enormous influence on the behavior of others. When the reigning hegemon promotes a new code of conduct, it alters the normative frame of reference for virtually everyone else. In anarchical systems, what the strongest do eventually shapes what others do, and when that practice becomes common, it tends to take on an aura of obligation.²⁴⁵

²⁴³ Scharf, 'How the war against ISIS,' pp. 37-38.

²⁴⁴ Wayne Sandholtz and Kendall Stiles, 'Cycles of International Norm change,' in Wayne Sandholtz and Kendall Stiles, *International Norms and Cycles of change* (Oxford: Oxford University Press, 2008), p. 334.

²⁴⁵ Kegley and Raymond, 'Preventive War,' pp. 390-391.

Secondly, the extent to which states are adopting a more 'flexible' understanding of imminence is directly related to the level of threat posed by non-state actors. As our analysis has shown, countries that have developed assertive counter-terrorism strategies have also tended to accept an expanded notion of imminence. This is in line with findings on the 'drone proliferation' debate that highlight the importance of the strategic environment.²⁴⁶ States like Israel, India, and Pakistan whose regional security situation is extremely volatile and who have suffered several terrorist attacks during the last years are particularly keen to counter security threats pre-emptively. Here, the adoption of a flexible understanding of 'imminence' is driven by an actor's strategic context and strategic rationale about how to best respond to its security environment.

Thirdly, there is an increasing willingness to pre-empt future attacks that accompanies the diffusion of new technologies of warfare. Russia, India, Pakistan, and to a lesser extent China, are confronting separatist movements and (alleged) terrorist threats in their territories by using new technologies. Here, the development of security strategy, technology and war seem to follow the same pattern. That is, an increased security threat emanating from non-state actors is answered through an expansion of 'low-intensity' or 'non-contact' conflict coupled with an increased reliance on technology and drones, and a more permissive interpretation of the criteria and norms surrounding the use of force. Interestingly, even states like Germany and France, whose domestic and regional security situation is quite different from that of Russia and India, have expanded their UAV capabilities and have adopted less stringent

²⁴⁶ Not surprisingly, other states who have used drones for targeted killings include Nigeria in the fight against Boko Haram and Pakistan. See Michael C. Horowitz, Sarah E. Kreps, and Matthew Fuhrmann, 'Separating Fact from Fiction in the Debate over Drone Proliferation,' *International Security*, Vol. 41, No. 2, 2016, p. 23.

criteria for their use. Overall, there is a tendency that technological progress is driving decision makers to adopt more offensive military strategies and with it, a lower threshold for the use of force.

This, then, raises a potentially significant, more general point about norm research in both IR and IL, and the question of what is driving normative developments. As we have sought to show, the re-interpretation of 'imminence' seems to be strongly driven by technological advances. While several scholars have recognized the social and cultural nature of technological development, especially in respect to war,²⁴⁷ much less attention has been given to the contribution technology makes to norm development. The improvement of technologies for low-level conflict - in which drones play a key role - are providing states with an incentive to re-interpret the criteria surrounding the use of force and blurring the distinction between zones of peace and zones of war.²⁴⁸ In this sense, scholars calling for a clearer framework on drones, and for boundaries to their proliferation, are certainly right.²⁴⁹ However, the technological platform itself (drones) should not be the only concern when it comes to discussing the evolution of norms surrounding (advanced) warfare.

As Judith Kelley notes, the lifecycle and evolution of 'norms, as with many other social processes, are complex combinations of normative, instrumental, and other constraints and causes of action'.²⁵⁰ As the article sought to show, discussions about the normative framework regulating drone warfare should be embedded in a wider

²⁴⁷ Martin Van Creveld, *Technology and War: from 2000 B.C. to the present* (New York: The Free Press, 1989).

²⁴⁸ Peter Singer, *Wired for War* (London: Penguin, 2011).

²⁴⁹ Mikah Zenko, 'Regulating Drone strike policies,' *Council on foreign relations*, Special Report, No. 65, January 2013.

²⁵⁰ Kelley, 'Assessing the Complex Evolution of Norms', p. 221.

discourse about technological progress and the changing character of war and battlefields. One of the key questions, in our eyes, is how these technological developments are impacting on actors' interpretation of the meaning attached to norms and institutions regulating the use of force in international relations. Here, we have found that advances in drone technology led to a re-interpretation of concepts that play a leading role in norms regulating the use of force. Interestingly, as other current international legal debates show, these re-interpretations have all moved in the direction of increased permissiveness, hence leading to a relaxation of the threshold for deploying lethal force. Interestingly, however, as the case of Brazil indicates, technological advancement and drone capacity seem to be insufficient to explain changes in the interpretation of imminence. Instead, the analysis identified changes in the interpretation of self-defence only in contexts where advances in weapons technology occurred alongside strategic developments relating to the threat stemming from terrorist groups and non-state actors (i.e. China, Russia, India, Israel, UK). In any case, by establishing a tentative link between technological developments and changes in actors' perceptions and enactments of structures of meaning-in-use, this article can serve as a point of departure for constructivists interested in international norm evolution and diffusion.