



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Drone Warfare in Counterterrorism and Normative Change

Citation for published version:

Birdsall, A 2018, 'Drone Warfare in Counterterrorism and Normative Change: US Policy and the Politics of International Law', *Global Society*, vol. 32, no. 3, pp. 241-262.
<https://doi.org/10.1080/13600826.2018.1456409>

Digital Object Identifier (DOI):

[10.1080/13600826.2018.1456409](https://doi.org/10.1080/13600826.2018.1456409)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Global Society

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



Drone Warfare in Counterterrorism and Normative Change: US Policy and the Politics of International Law

Dr Andrea Birdsall
Lecturer in International Relations

Politics & International Relations
The University of Edinburgh
Chrystal Macmillan Building – 4.25
15a George Square
Edinburgh EH8 9LD
a.birdsall@ed.ac.uk

Tel: 0131 650 6974

Andrea Birdsall (PhD, Edinburgh) is a Lecturer in International Relations at the University of Edinburgh. Her work lies at the intersection of International Relations and International Law with a particular focus on human rights, international criminal justice and global governance. She is author of *The International Politics of Judicial Intervention* (Routledge) and a number of journal articles covering topics in human rights, the International Criminal Court and Human Rights Law in the context of counterterrorism efforts.

Acknowledgments

The author wishes to thank members of the International Relations Research Group at the University of Edinburgh and in particular Juliet Kaarbo, Andrew Neal, John Petersohn, and Mathias Thaler for their helpful feedback and suggestions. Comments by two anonymous reviewers and the journal's editors greatly helped to improve an earlier version of this manuscript.

Abstract

The use of Unmanned Aerial Vehicles or drones in counterterrorism has changed the face of warfare and is challenging International Law on a number of levels. This paper assesses some of those challenges in the context of the Obama Administration's justifications to use drones for targeted killing. It focusses on the US as norm entrepreneur that purposefully works to alter prevalent norms related to the use of drones in counterterrorism efforts. The paper analyses normative developments and the meaning-in-use of existing legal provisions that are invoked to justify US policy in this area. By focussing on norm entrepreneurs, this paper moves away from purely structural accounts of normative change towards a stronger emphasis on actors and the role of agency. Rather than understanding US drone policy as violating International Law, this paper argues that the Obama administration was acting as norm entrepreneur in its counterterrorism efforts, aiming to change the meaning of a number of international legal concepts to justify its policy decisions.

Keywords: Drones; counterterrorism; norm entrepreneur; norm life cycle; International Law

Drone Warfare in Counterterrorism and Normative Change: US Policy and the Politics of International Law

"Very frankly, it's the only game in town in terms of confronting or trying to disrupt the al Qaeda leadership,"¹

The use of Unmanned Aerial Vehicles (UAVs) or 'drones' in US counterterrorism efforts has increased exponentially in recent years and changed the face of warfare. Especially the CIA-run drone programme is challenging international law on a number of levels. This paper assesses a number of such challenges to evaluate what they mean for international law and the development of international norms more generally. Existing 'drones' debates in the literature are mainly in the field of international law, examining the legality of drones², as well as in the area of political theory that focus on the morality of drone warfare and Just War Theory dimensions.³ There is an emerging literature dealing with the (relatively) new practice and evolving norm of targeted killing⁴ as well as broader debates surrounding how new technologies influence normative change⁵. This paper adds to this literature but also takes a different approach by focussing on the US as norm entrepreneur that purposefully works to

¹Then-CIA Director Leon Panetta "U.S. Airstrikes in Pakistan Called 'Very Effective'," 18 May 2009.

²See for instance Philip Alston, "The Cia and Targeted Killings Beyond Borders," *Harvard National Security Journal* 2, no. 2 (2011); W. Jason Fisher, "Targeted Killing, Norms, and International Law," *Columbia Journal of Transnational Law* 45, no. 3 (2007); Afsheen John Radsan and Richard Murphy, "The Evolution of Law and Policy for Cia Targeted Killing," *Journal of National Security Law and Policy* 5 (2012); Jonathan Ulrich, "The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War against Terrorism," *Virginia Journal of International Law* 45, no. 4 (2005); Gabriella Blum and Philip Heymann, "Law and Policy of Targeted Killing," *Harvard National Security Journal* 1 (2010).

³See for instance Daniel Brunstetter and Megan Braun, "The Implications of Drones on the Just War Tradition," *Ethics & International Affairs* 25, no. 3 (2011); Daniel Brunstetter and Arturo Jimenez-Barcardi, "Clashing over Drones: The Legal and Normative Gap between the United States and the Human Rights Community," *The International Journal of Human Rights* 19, no. 2 (2015); John Williams, "Distant Intimacy: Space, Drones, and Just War," *Ethics & International Affairs* 29, no. 1 (2015); John Kaag and Sarah Kreps, *Drone Warfare* (Cambridge: Polity, 2014).

⁴See for instance: Betsy Jose, "Not Completely the New Normal: How Human Rights Watch Tried to Suppress the Targeted Killing Norm," *Contemporary Security Policy* 38, no. 2 (2017a); "Bin Laden's Targeted Killing and Emerging Norms," *Critical Studies on Terrorism* 10, no. 1 (2017b); Rebecca Sanders, "Legal Frontiers: Targeted Killing at the Borders of War," *Journal of Human Rights* 13, no. 4 (2014). And *Contemporary Security Policy: Special Issue: The Transformation of Targeted Killing and International Order*, 38, no. 2 (2017).

⁵For instance Theo Farrell, "Transnational Norms and Military Development:: Constructing Ireland's Professional Army," *European Journal of International Relations* 7, no. 1 (2001); Elvira Rosert et al., "Arms Control Norms and Technology," in *Norm Dynamics in Multilateral Arms Control: Interests, Conflict and Justice*, ed. Harald Müller and Carmen Wunderlich (Athens, Georgia: The University of Georgia Press, 2013); Richard Price, "A Genealogy of the Chemical Weapons Taboo," *International Organization* 49, no. 1 (1995); Regina Heller, Martin Kahl, and Daniela Pisiou, "The 'Dark' Side of Normative Argumentation: The Case of Counterterrorism Policy," *Global Constitutionalism* 1, no. 2 (2012).

alter prevalent norms related to the use of drones in counterterrorism efforts. The contribution to existing literature is thus two-fold: firstly, the main focus of the analysis is on the way the US contested already established standards with the aim of altering them in the process.⁶ The paper analyses normative developments and arguments related to the meaning-in-use of existing legal provisions that are invoked to justify US policy related to the use of drones in counterterrorism. And secondly, by focussing on norm entrepreneurs, this paper moves away from purely structural accounts of normative change towards a stronger emphasis on *actors* and the role of agency within that structure.⁷ This approach provides a strong focus on the norm *dynamics*, assessing norms that have already been established, but whose meaning-in-use is now contested. The emphasis on norm contestedness goes beyond analyses of norm emergence and initiation and allows for an analysis of norm change in later stages of a norm's life cycle. In this way, the analysis highlights the "productive power of international rules and norms."⁸ The paper focusses on the Obama administration's use of drones which set precedents that are still relevant for the current Trump Presidency. At the time of writing, it is unclear what the exact policies of the Trump administration will be with regards to UAVs but it is important to understand where the preceding administration stood in order to establish the current government's point of departure.

The US government is currently engaged in two different drone programmes: one run by the military as part of its counterinsurgency operations in Afghanistan and Iraq and one run by the CIA as part of its counterterrorism campaign to stop al Qaeda and 'associated forces'. The US military is running an overt drone programme, only in places where US troops are stationed as part of an ongoing conflict, using drones as weapons to support existing missions. The CIA drone programme, on the other hand, is covert and individual drone strikes are

⁶Existing studies primarily focus on emerging and new norms of targeted killing and contestation to them. For instance Jose (2017b) utilises the norm life cycle model to trace the emergence of a 'new' targeted killing norm. Heller, Kahl, and Pisiou focus on the development of 'bad' norms and processes of norm erosion in this context. And similarly, Bob analyses the evolving targeted killing norm and rival networks that either promote or resist the new norm. (Clifford Bob, "Rival Networks and the Conflict over Assassination/Targeted Killing," in *Norm Antipreneurs and the Politics of Resistance to Global Normative Change*, ed. Alan Bloomfield and Shirley V. Scott (London and New York: Routledge, 2016)).

⁷For a similar approach but focussing on different issue areas, see Harald Müller and Carmen Wunderlich, eds., *Norm Dynamics in Multilateral Arms Control: Interests, Conflict and Justice* (Athens, Georgia: The University of Georgia Press, 2013).

⁸Ian Hurd, "Targeted Killing in International Relations Theory: Recursive Politics of Technology, Law, and Practice," *Contemporary Security Policy* 38, no. 2 (2017): 311.

neither confirmed nor denied. The CIA programme is controversial because it operates in areas the US military is not actively engaged in (as is for instance the case in Pakistan, Somalia, and Yemen). It is secretive, lacks transparency and it is largely kept away from judicial oversight and public scrutiny. This paper will from here on focus on the use of drones as part of counterterrorism efforts rather than military counterinsurgency operations.

The US cites a number of reasons for using drones: they have extensive strategic appeal especially because they can be used without great risk to own forces and about anywhere in the world. The number of drone strikes during the Obama Administration increased dramatically: the Bureau of Investigative Journalism⁹ found that between 2004 and 2016 there were 424 US drone attacks in Pakistan alone, 373 of which under Obama. "So this has become the Obama administration's weapon of choice in pursuing what it no longer calls the Global War on Terror."¹⁰ Drones themselves are not prohibited weapons, they are weapon carriers, similar to other military aircraft. But the possibility of using weapons remotely and against individuals in targeting killing operations is relatively new and raises a number of issues related to how they are covered by existing international laws and norms.

Rather than understanding US drone policy as violating international law, this paper argues that the Obama administration was acting as norm entrepreneur in its counterterrorism efforts, aiming to change the meaning of a number of international legal concepts to justify its policy decisions. Its drone policy was framed as reflecting new long-term understandings of novel threats and available technologies which marked a departure from Bush-era arguments of 'exceptionalism' and 'emergency exemptions'. Even though some argue that Obama's challenges to international law differed mainly in style rather than substance¹¹, this paper argues that *the way* the administration utilised existing legal frameworks to justify its conduct, is important as it aimed at a more long term contestation of relevant norms and laws rather than attempts to carve out short-term, temporary exemptions. The paper argues that the US was aiming to legitimate its actions with reference to international law in order to

⁹See <https://www.thebureauinvestigates.com/projects/drone-war>

¹⁰David Luban, *Drones: The Law and Ethics of Drone Strikes*, podcast audio2013, <http://podacademy.org/podcasts/drones-the-law-and-ethics-of-drone-strikes/>.

¹¹See for instance Aiden Warren and Ingvild Bode, "Altering the Playing Field: The U.S. Redefinition of the Use-of-Force," *Contemporary Security Policy* 36, no. 2 (2015).

construct a permissible normative order that at the same time stabilised its own powerful position in the international system. To develop the argument, this paper will look at discursive practices and strategies used by the US to shape international laws covering the use of lethal force to target individuals. It uses a social constructivist approach to understand complex and dynamic processes of norm developments. It particularly focusses on the US as norm entrepreneur in the norm contestation process and its attempts to institutionalise specific meanings of norms in the international order. The paper utilises a process tracing method¹² which is useful to highlight “consistencies of norm entrepreneurial activities in the norm evolution process [which] has the potential to reveal and reassert the growing importance of ideas and shared norms and to offer a tool for identifying changes in the normative structure.”¹³ This method allows for emerging norms to be traced in relevant discourse: the paper analyses speeches and government documents by Obama and his advisors during his term in office (2009-2016) that sought to clarify US policy in relation to the use of drones in counterterrorism. The paper engages with the main available speeches and documents in which White House officials communicated the Administration’s policy, but the number of sources is limited for various reasons, not least because the government emphasised national security considerations which required it to keep its targeting decisions secret.

Available speeches and documents are analysed to determine where and how norm entrepreneurship in terms of consciously setting wide-reaching precedents are discernible. The analysis focuses on instances that demonstrate different interpretations and framings of established legal provisions to contest previously accepted meanings. Obama issued very few policy statements during his time in office; only towards the end of his Presidency did he publish a more extensive outline of ‘Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations’.¹⁴ The speeches by government officials during Obama’s two terms of office are therefore instructive in

¹²For a detailed discussion on the process tracing method see Andrew Bennett and Jeffrey T. Checkel, *Process Tracing* (Cambridge University Press, 2014). Process tracing involves “the use of evidence from within a case to make inferences about causal explanations of that case.” (ibid, p. 4)

¹³Annika Björkdahl, *From Idea to Norm: Promoting Conflict Prevention* (Lund: Lund University, 2002), 34.

¹⁴The White House, "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations " (Washington, 2016).

understanding the administration's approach towards new technologies and changes in warfare.

The paper starts by outlining some theoretical considerations related to international law, norm development and norm entrepreneurs. The main focus is on normative developments and contestations to the meaning-in-use of existing international legal obligations that are used to justify policy choices. Norms are not static givens, but "entail an inherently contested quality and therefore acquire meaning in relation to the specific contexts in which they are enacted."¹⁵ In this context, the final parts of the paper analyse the main elements of the US drones programme and focus on a number of contested issues related to the current drone policy: namely the existence of non-international armed conflicts, questions of 'self-defence', and the principle of distinction.

Theoretical considerations – International law and normative change

International law incorporates formal, often written down rules as well as norms that are mainly unwritten expectations about appropriate behaviour. Norms¹⁶ are standards of appropriate behaviour and emerge from practice, communication as well as interaction between actors that generate shared understanding. These intersubjective understandings become guidance for the content of the norm and what is deemed to constitute 'appropriate' behaviour. The interpretation of norms requires establishing a relationship between formal validity (for instance through a treaty or customary law) and its social recognition, i.e. its appropriateness in a given context.¹⁷

¹⁵Antje 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* 5, no. 1 (2009): 7.

¹⁶To clarify: I use concepts such as 'norms' and 'rules' in a predominantly International Relations, rather than a legal analysis, sense. I draw on international law and legal concepts for the analysis but I am not collapsing them into international law as such. Norms and their interpretations of course relate to debates surrounding customary law and particular its '*opinio juris*' component, but they are not identical. For more on customary law see for instance Jason Beckett, "Customary International Law," in *International Law for International Relations*, ed. Basak Cali (Oxford: Oxford University Press, 2010). Or Anthony Clark Arend, *Legal Rules and International Society* (Oxford: Oxford University Press, 1999).

¹⁷Wiener and Puetter, 10-11.

To understand change in international law, norms' dual quality needs to be considered: they are "both structuring and socially constructed through interaction in a context."¹⁸ Norms influence state practice; changing norms can lead to changes in state behaviour which in turn influences international law. Because state behaviour is influenced by norms, acts that might violate existing rules can – with sufficient support from other states – lead to a reformulation of those rules. Understanding how norms evolve and change is therefore crucial to understanding developments in international law.¹⁹ In this context, norms' intersubjective dimension is important, "because norms by definition embody a quality of 'oughtness' and shared moral assessment, norms prompt justifications for action and leave an extensive trail of communication among actors that we can study".²⁰ Actors in the international system are constituted by intersubjectively created structures and resources; they have an inherent and internal incentive to comply with existing norms and rules. As Hurd argues, "States are constituted in such a way that they seek normative justification for their action. States are not actors independent of their relationship to norms and they cannot choose to make themselves disembedded from them. Instead, states attempt to legitimize new norms and thus change social relationships."²¹ This means that even though the US might have the capacity to unilaterally reinterpret norms, it is doing so in the context of being embedded within the international system; it is not independent of it. The US' interests are shaped by its normative environment as norms and interests constitute each other. Norms shape and constitute interests and they motivate action, which means that they "may provide states with both preferences and effective and legitimate strategies for pursuing these preferences."²²

This paper does not call the stabilising function of norms into question, but instead emphasises their ambiguous and indeterminate nature. Following Wiener's understanding of norms as being inherently contested, the focus of the analysis is on norm contestation (which

¹⁸Antje Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters* (Cambridge: Cambridge University Press, 2008), 27.

¹⁹See also Michael J. Glennon, "How International Legal Rules Die," *Georgetown Law Journal* 93, no. 3 (2005): 957.

²⁰Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (1998): 892.

²¹Ian Hurd, "Breaking and Making Norms: American Revisionism and Crises of Legitimacy," *International Politics* 44, no. 2 (2007): 196.

²²Björkdahl, 20.

is seen as “norm-generative practice”²³) to understand changes *after* a norm has been established. Contestation centres on the meaning of the norm in the eyes of different actors; a norm might be ambiguous or it may have not have an agreed upon intersubjective meaning. Contestation takes place over what is appropriate behaviour in this context and involves justifications for actions or questioning previously accepted meanings. As Müller and Wunderlich conclude, “contestation can be understood as the engine driving norm dynamics.”²⁴

One way of tracing norm dynamics is by looking at Finnemore and Sikkink’s norm life cycle model that illustrates how international norms emerge, develop and are incorporated into international society. The ‘life cycle’ consists of three stages: norm emergence, norm cascade, and norm internalisation. The life cycle starts with the emergence of a new norm, followed by its diffusion and cascade towards greater acceptance and is completed with the internalisation of a new norm as a fully incorporated rule in international society. Different actors, motives and influences are involved in various stages of the process. In this model, norm entrepreneurs call attention to ‘new’ issues and aim to convince a ‘critical mass’ of states (as norm leaders) to embrace new norms. Rather than looking at norm entrepreneurs’ role in the norm emergence stage, this paper analyses their role as “agents of social change”²⁵, which means their role and ability to influence the process of norm contestation of already established and existing norms. In this sense, norm entrepreneurs, are “actors who set out to alter the prevalent normative order according to certain ideas and norms that they deem more suitable as compared to the existing one... In order to persuade the audience of the appropriateness and necessity of the propagated norm(s) and to recruit norm followers, they engage in processes of strategic social construction using ideational as well as material resources.”²⁶ In the context of this paper’s analysis, the US is seen as acting as norm entrepreneur, not to establish new norms but much rather to advance ‘new’ interpretations of existing international legal concepts and diffuse them to justify its drone policies. The US is

²³Antje Wiener, *A Theory of Contestation* (Heidelberg; New York: Springer, 2014), 27.

²⁴Harald Müller and Carmen Wunderlich, "Not Lost In Contestation: How Norm Entrepreneurs Frame Norm Development in the Nuclear Nonproliferation Regime," *Contemporary Security Policy* online view (2018).

²⁵Björkdahl, 45.

²⁶Carmen Wunderlich, "Theoretical Approaches in Norm Dynamics," in *Norm Dynamics in Multilateral Arms Control: Interests, Conflict and Justice*, ed. Harald Müller and Carmen Wunderlich (Athens, Georgia: The University of Georgia Press, 2013), 37.

challenging established interpretations of existing norms in order to advance new meanings to cover its use of novel technologies. This focus on change driven by agency (namely a norm entrepreneurs) rather than structure adds to constructivist research on norm dynamics.

To be clear, a state that is acting as norm entrepreneur often engages in this behaviour to further its own self-interests rather than a desire to 'improve' the existing international order. The US uses international law to legitimise its actions because its position as hegemon in the international system can only persist when it remains to be part of this very system. It engages in processes of justification which are active attempts to change the meaning of concepts.²⁷ Even though justifications generally occur after an act has taken place, this is not a reactive strategy but one that is aimed at creating a new normative environment that establishes precedents for the future. As Wunderlich argues, norm entrepreneurs' behaviours are "characterised by proactivism: their actions show a considerable degree of consistency, strength of purpose, and intentionality, are future-oriented, and show a continuously high level of activism."²⁸ Rather than acting in secret or openly violating existing norms and laws, the US sought to reinterpret established provisions not only to make its own policy 'fit' the existing framework, but also to alter it in the process: "a single powerful state can, by its unilateral behaviour, undermine a legitimated rule. It cannot replace it with no-rule (or 'anarchy') but it can provide a competing interpretation of the rule and then attempt to institutionalize it through legitimation."²⁹ In this way, the US is able to construct a permissive normative order that is reflective of its own interests.³⁰ The international system is still important: both to enhance and also to stabilise the US' legitimacy and by extension its relative power in the system. As outlined above, the system influences self-interest which is "constituted by norms"³¹ and the two can therefore not be separated from each other. "States need international law and institutions both to share the material and political costs of protecting their interests and to gain the authority and legitimacy that the possession of

²⁷See also Heller, Kahl, and Pisiu, 281.

²⁸Wunderlich, 45.

²⁹Hurd, "Breaking and Making Norms: American Revisionism and Crises of Legitimacy," 202.

³⁰Kerstin Fisk and Jennifer M. Ramos, "Actions Speak Louder Than Words: Preventive Self-Defense as a Cascading Norm," *International Studies Perspectives* 15 (2014).

³¹Björkdahl, 48.

crude power can never on its own secure.”³² Norms and laws do not exist in isolation and the way the US is framing³³ its drone policies is important in order to make these new interpretations fit into the broader existing normative and legal environment.

Norm entrepreneurs see framing as a central part of their strategy “since, when they are successful, the new frames resonate with broader public understandings and are adopted as new ways of talking about and understanding issues.”³⁴ Frames therefore help norm entrepreneurs to change agreements on intersubjective meanings on appropriate behaviour. For norm contestation to have an impact, new frames need to successfully displace existing standards and thereby establish a new logic of appropriateness.

Framing the Use of Drones

The Obama administration framed its use of drones with reference to changed understandings of novel threats from terrorist tactics, non-state actors and moves away from traditional interstate conflicts. This was different from Bush-era arguments of ‘emergency exemption’ or ‘US exceptionalism’³⁵ that aimed to carve out (temporary) exceptions to the rule.³⁶ Bush particularly saw international law related to the use of force as an impediment to counterterrorism measures. Some argue that even though the Obama Administration was praised for its general adherence to law, it “continued, even at times inadvertently, the Bush administration’s challenge on international law.”³⁷ What is important in the context of the present paper is *the way* international legal norms were contested by Obama. In contrast to Bush era’s exceptionalist policies, the Obama Administration was aiming to act as norm

³²Andrew Hurrell, "International Law and the Changing Constitution of International Society," in *The Role of Law in International Politics*, ed. Michael Byers (Oxford; New York: Oxford University Press, 2000), 331.

³³Norm entrepreneurs use a variety of tactics to change the context and persuade others to follow them, including framing, coercion, blaming and shaming. See Björkdahl; Finnemore and Sikkink; Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

³⁴Finnemore and Sikkink, 897.

³⁵See for instance Andrea Liese, "Exceptional Necessity: How Liberal Democracies Contest the Prohibition of Torture and Ill-Treatment When Countering Terrorism," *Journal of International Law and International Relations* 5, no. 1 (2009). and Fleur Johns, "Guantanamo Bay and the Annihilation of the Exception," *The European Journal of International Law* 16, no. 4 (2005).

³⁶There is an abundance of literature that argues the Bush administration created a ‘state of exception’ during its ‘global war on terror’. See for instance William Scheuerman, "Carl Schmitt and the Road to Abu Ghraib," *Constellations* 13, no. 1 (2006); Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances* (Cambridge: Cambridge University Press, 2013).

³⁷Warren and Bode, 176.

entrepreneur to effect long-term changes in normative understandings of relevant international law provisions. Obama affirmed the importance of rules (rather than dismissing them) and argued that “we can’t exempt ourselves from the rules that apply to everyone else.”³⁸ His Homeland Security Advisor, John Brennan similarly argued, “going forward, we’ll continue to strengthen and refine these standards and processes. As we do, we’ll look to institutionalize our approach more formally so that the high standards we set for ourselves endure over time, including as an example for other nations that pursue these capabilities.”³⁹ The US was not acting unilaterally regardless of international law but was building on the legal system’s “essentially social function by transforming applications of raw power into legitimate power, thereby creating rights to apply power within certain structures using certain means.”⁴⁰

At the same time, Obama confirmed the impact normative structures had on US interests and practices. He stated in his Nobel Prize acceptance speech “Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct... I believe the United States of America must remain a standard bearer in the conduct of war.”⁴¹ It can be argued that reinterpreting established standards was necessary not only because of changes in the way wars were being fought but also because of the emergence and proliferation of new technologies that made the use of unmanned weapons possible. There might be agreement on a particular norm in international law, but “the adherence of this norm may differ in the actual context of the norm’s implementation.”⁴² The US contested established meanings of legal concepts to set precedents that were aimed at creating new understandings of what constitutes ‘appropriate conduct’ in counterterrorism operations. Just before leaving office, Obama issued administrative guidelines⁴³ that set out when drones can be used for

³⁸Barack Obama, "Remarks by the President at the United States Military Academy Commencement Ceremony" (U.S. Military Academy-West Point, New York, 28 May 2014).

³⁹John O. Brennan, "The Ethics and Efficacy of the President’s Counterterrorism Strategy" (paper presented at the Woodrow Wilson International Centre for Scholars,, Washington, D.C., 30 April 2012).

⁴⁰Michael Byers, "Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective," *Michigan Journal of International Law* 17, no. 1 (1995): 122.

⁴¹Barack Obama, "Remarks by the President at the Acceptance of the Nobel Peace Prize" (Oslo City Hall, 10 December 2009).

⁴²Antje Wiener, "Enacting Meaning-in-Use: Qualitative Research on Norms in International Relations," *Review of International Studies* 35, no. 1 (2009): 177.

⁴³Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, The White House.

counterterrorism efforts and argued that it was important to “create an architecture for this because the potential for abuse – given the remoteness of these weapons and their lethality, we’ve got to come up with a structure that governs how we’re approaching it.”⁴⁴ The lasting impact of such normative contestation can only be assessed over the longer term, but it is still instructive to consider the norms’ persuasiveness. The norms’ validity is not the necessarily the most crucial aspect when considering contestation, because as Kennedy argues,

in the court of world opinion, the laws in force are not necessarily the rules that are *valid*, in some technical sense, but the rules that are persuasive to relevant political constituencies. Whether a norm is or is not legal is a function not of its origin or pedigree, but of its effects. Law has an effect – is law – when it *persuades* an audience with political clout that something someone else did, or plans to do, is or is not legitimate. *The point is no longer the validity of distinctions, but the persuasiveness of arguments.*⁴⁵

The following sections outline relevant elements of the current US drone programme and attempts by the government to define the use of drones in counterterrorism as legitimate state practice. Norms that are being contested are the lawfulness of targeting individuals, the definition of battlefield, non-combatant immunity and what constitutes war.

Justifying US Drones Policy

Drones are used by the US for targeted killing, which can be defined as “the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.”⁴⁶ Such killings differ from assassinations, the “murder of a targeted individual for political purposes,”⁴⁷ that are prohibited under international as well as US domestic law. The norm against assassinations has been very strong for a long time⁴⁸ which provides a challenge for any state that is arguing its deliberate and lethal targeting of individuals constitutes legitimate state practice. As will be discussed in more detail later, targeted killing is not

⁴⁴Barack Obama, "Remarks by the President in a Conversation on the Supreme Court Nomination, University of Chicago Law School," news release, 8 April, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/04/08/remarks-president-conversation-supreme-court-nomination>.

⁴⁵David Kennedy, *Of War and Law* (Princeton: Princeton University Press, 2009), 96. (emphasis added)

⁴⁶Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008), 5.

⁴⁷W. Hays Park, "Memorandum of Law: Executive Order 12333 and Assassination," ed. Office of the Judge Advocate General of the Army (Washington 1989), 2.

⁴⁸See for instance Jose, "Bin Laden's Targeted Killing and Emerging Norms.,"; Ward Thomas, "Norms and Security: The Case of International Assassination," *International Security* 25, no. 1 (2000).

unlawful in times of war and the US as norm entrepreneur has consistently pushed for its counterterrorism efforts to be regarded as part of a war effort. Justifications are made under the war paradigm (invoking International Humanitarian Law) rather than law enforcement action (under International Human Rights Law). This distinction is subtle, but nevertheless important because as Sanders clarifies: “while it may be difficult at first glance to identify any obvious material difference between assassination and targeted killing, the former has historically been conceptualized as a form of extrajudicial murder that is illegal under domestic criminal and international human rights law, while states have claimed the latter conforms to relevant international humanitarian law...”⁴⁹

Adhering to the Rule of Law: domestic and international justifications for the use of drones

The United States advanced two different legal frameworks to argue that its use of lethal force is lawful: in terms of domestic law, the Authorization for Use of Military Force (AUMF) that was passed by Congress one week after the 9/11 attacks is used to justify drone strikes and with reference to international law, the Administration points to Article 51 of the UN Charter and a state’s inherent right to self-defence.⁵⁰

Domestically, the AUMF authorises the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” According to some US government officials⁵¹, the AUMF does not restrict the statutory authority to use lethal force against al Qaeda and associated forces to the “hot” battlefields of Afghanistan. This means that the US is giving itself broad authority to engage in targeted killing operations run by the CIA as part of its counterterrorism efforts. The limitation of the AUMF, so the US argues, is set

⁴⁹Sanders, 515.

⁵⁰See for instance Harold Koh, "The Obama Administration and International Law" (paper presented at the Annual Meeting of the American Society of International Law, Washington, D.C., 25 March 2010). and Jeh Johnson, "National Security Law, Lawyers and Lawyering in the Obama Administration" (Yale Law School, 22 February 2012).

⁵¹See for instance Johnson.

by the targeted *person* and the question whether they are a senior operative of al Qaeda rather than firm spatial limitations of where the drone is actually employed.

Most important for the current analysis, in terms of international legal provisions, the US justifies its conduct under Article 51 of the UN Charter, calling its actions self-defence. By invoking a war paradigm, justifying the targeted killing of suspected terrorists becomes possible in terms of International Humanitarian Law. The Geneva Conventions (Protocol I), allow attacks on individuals with lethal force in certain circumstances if they are considered combatants or legitimate targets. To justify lethal drone strikes on individuals, the laws of war therefore need to apply, because outside armed conflict, International Human Rights Law protects the right to life, making such targeting of individuals unlawful. "In wartime, governments use deadly force against combatants of an enemy party, in which case the peacetime constraints are relaxed. (...) [they] are killed not because they are guilty, but because they are potentially lethal agents of that hostile party."⁵² By claiming that drone strikes take place within the context of war, they are framed as lawful battlefield operations against enemy combatants.

The Obama Administration argued that the US is currently engaged in a non-international armed conflict with al Qaeda in line with Common Article 3 of the Geneva Conventions. There is general recognition that the nature of warfare has changed over the years and that conflicts are not necessarily confined to wars between states.⁵³ The legal requirement for being able to use lethal force in such conflicts is that it is used against an organised armed group that engages in high levels of violence that uses force intensely and protractedly.⁵⁴

The rule of law and evidence of norm entrepreneurship

The Obama administration was careful to justify its use of drones for targeted killing within the confines of the rule of law. It consistently pointed out that it was following (rather than breaking) international law in its counterterrorism efforts. As argued, this line of reasoning

⁵²Blum and Heymann, 146.

⁵³See for instance Donald M. Snow, *Thinking About National Security: Strategy, Policy, and Issues* (New York: Routledge, 2016).

⁵⁴ICTY *Prosecutor V. Dusko Tadić a/K/a "Dule"* - *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, (1995), at 70.

was part of the US' efforts to change rules of international law to build a permissive normative order. The US did not want to be perceived as a law-breaker but wanted to effect long term change. Such "actions are strategically undertaken to protect its [the US'] national security while reshaping the international legal order to suit the interests of the single superpower."⁵⁵ As Harold Koh, Legal Adviser of the Department of State, for instance argued, "by imposing on government action, law legitimates and gives credibility to governmental action.' He further said: 'Let there be no doubt: the Obama Administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts." And finally "this Administration is committed to ensuring that the targeting practices (...) are lawful."⁵⁶

This was part of a long-term strategy – aimed at permanently changing the meaning of particular legal concepts to cover new types of warfare and available technologies. The goal was to contest and ultimately change the meaning of the rules rather than being an exception to them. Obama made a conscious attempt to move away from Bush-era 'emergency' justifications by arguing: "I believe in American exceptionalism with every fiber of my being: but what makes us exceptional is not our ability to flout international norms and the rule of law; it is our willingness to affirm them through our actions."⁵⁷ A few years earlier he had similarly criticised the previous administration's approach, outlining the importance of complying with legal provisions:

We do need to update our institutions to deal with this threat. But we must do so with an abiding confidence in the rule of law and due process; in checks and balances and accountability. (...) the decisions that were made over the last eight years established an ad hoc legal approach for fighting terrorism that was neither effective nor sustainable -- a framework that failed to rely on our legal traditions and time-tested institutions, and that failed to use our values as a compass.

As argued above rules enable and constrain action, and being able to shape them in line with the US' own policy, is therefore advantageous in the longer term. Already in his Nobel Peace Prize acceptance speech, Obama had argued for moral and strategic interests linked to

⁵⁵Mark A. Drumbl, "Self-Defense and the Use of Force: Breaking the Rules, Making the Rules, or Both?," *International Studies Perspectives* 4, no. 4 (2003): 427.

⁵⁶Koh.

⁵⁷Obama, "Remarks by the President at the United States Military Academy Commencement Ceremony."

adhering to rules of conduct, calling the US the “a standard bearer in the conduct of war.”⁵⁸ To further manifest this, Obama signed a Presidential Policy Guidance (PPG) in 2013 “to establish a framework that governs our use of force against terrorists – insisting upon clear guidelines, oversight and accountability that is now codified in Presidential Policy Guidance.”⁵⁹ The PPG recognised that “international legal principles, including respect for a state’s sovereignty and the laws of war, impose important constraints on the ability of the United States to act unilaterally – and on the way the United States can use force – in foreign territories.”⁶⁰ Obama clearly saw the PPG as a way to establish a framework that could function as precedent for others to follow:

I gave a speech at the National Defense University in which I said that we have to create an architecture for this because the potential for abuse -- given the remoteness of these weapons and their lethality, we've got to come up with a structure that governs how we're approaching it. And that's what we've done. So I've put forward what's called a presidential directive. It's basically a set of administrative guidelines whereby these weapons are being used.⁶¹

These references to international law and obligations arising from them are noteworthy because they show that the US was concerned with being seen to act lawfully and also that it was consciously setting precedents that had potential to impact other states as well as the international order. John Brennan, for instance, argued that because the US was the first state to use UAVs regularly, they needed to be

mindful that as our nation uses this technology, we are establishing precedents that other nations may follow... we'll continue to strengthen and refine these standards and processes. As we do, we'll look to institutionalize our approach more formally so that the high standards we set for ourselves endure over time, including as example for other nations that pursue these capabilities.

These statements are all evidence that the administration was working towards institutionalising its approach towards terrorist threats with its own interpretations of existing laws. This also means that reframing or reinterpreting existing legal obligations was seen as inevitable to counter threats. These speeches and statements demonstrate the US' norm entrepreneurship that was motivated by a perceived lack of legal clarity on these issues which

⁵⁸Remarks by the President at the Acceptance of the Nobel Peace Prize."

⁵⁹Remarks of President " (National Defense University, Fort McNair, 23 May 2013).

⁶⁰The White The White House, "Presidential Policy Guidance: Procedures for Approving Direct Action against Terrorist Targets Located Outside the United States and Areas of Active Hostilities," (Washington2013), 1-2.

⁶¹Obama.

arose out of changes in warfare as well as available technologies. As Jeh Johnson, then General Counsel of the Department of Defense, argued, the US should “lead by the power of an example and not by the example of its power.”⁶² Rather than disregarding international law for short-term gain, the aim was to effect long-term, lasting changes in the international legal system. Even though the changed rules are then applicable to all states, they might still be deliberately ambiguous and require interpretation or allow only those capable (meaning the most powerful) to act in accordance with them. Designing such a permissive normative order that incorporates US interests legitimises US acts but at the same time limits unwanted actions of other states.⁶³

The following sections focus on the main issues of controversy related to targeted drone strikes: firstly the lack of distinct geographical limitations of a non-international armed conflict, secondly the understanding of ‘self-defence’ and imminence, and thirdly the principles of distinction and non-combatant immunity. These issue areas show concrete US attempts to contest accepted meanings to make US policy fit the existing international legal and normative framework and changing it in the process. As argued above, justifications should not be seen as reactive, post-facto attempts to explain motivations for actions but much rather be understood as active, purpose-driven moves by the US as norm entrepreneur to contest the meaning of established norms, creating new meaning-in-use in the existing structural context. As Hurd argues, “states remake international law as they use it to pursue their interests. Those states are simultaneously bound and empowered.”⁶⁴ In this way, state practice shapes norms and laws.

Geographic limitations and violating state sovereignty

Arguably because the nature of war has changed with less well-defined interstate wars, setting clear geographical boundaries becomes increasingly difficult. As Eric Holder, then US Attorney General, argued, the US is ‘at war with a stateless enemy prone to shifting operations from country to country’⁶⁵ The US recognised that any use of force in another

⁶²Johnson.

⁶³See Byers, "Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change," 176.

⁶⁴Ian Hurd, *How to Do Things with International Law* (Princeton and Oxford: Princeton University Press, 2017), 11.

⁶⁵Eric Holder, "Speech at Northwestern University School of Law" (Chicago, 5 March 2012).

state raised concerns with regard to that state's sovereignty. Article 2(4) of the United Nations Charter prohibits the threat or use of force by one state against another with two exceptions: firstly, when the use of force is carried out with the consent of the host state (i.e. there is no infringement of the state's sovereignty); and secondly when the use of force is in self-defence (Article 51) in response to an armed attack or an imminent threat, and where the host state is unwilling or unable to take appropriate action.

The US is using drones for targeted killing in Pakistan based on claims that it is acting with the host state's consent. A number of reports point to Pakistan having given tacit agreement at the start of the targeted killing campaign, a compromise that made US drone attacks lawful. The Washington Post, for instance, found that "despite repeatedly denouncing the CIA's drone campaign, top officials in Pakistan's government have for years secretly endorsed the program and routinely received classified briefings on strikes and casualty counts."⁶⁶ Following the exponential increase in drone operations under Obama, however, Pakistan has become less and less supportive. Drone strikes in Pakistan are still taking place with the latest reported strike on 8 February 2018.⁶⁷

In Somalia and Yemen, in contrast, the US government is basing its drone strikes on arguments that these countries are unwilling or unable to stop the terrorist threats themselves. Since the CIA programme is shrouded in secrecy without any independent oversight, it is difficult to assess how the US determines a state to be 'unable or unwilling' to deal effectively with the threat posed to the US. This is problematic because no clear guidelines exist that can be independently assessed in order to establish legitimate and powerful precedents. The US is pushing geographical limits in counterterrorism efforts even further by arguing that "transnational non-state organizations such as al-Qa'ida may have no single site serving as their base of operations."⁶⁸ This means that for an operation to be part of the non-international armed conflict between the US and Al-Qa'ida, Al-Qa'ida has to have 'a significant

⁶⁶Greg Miller and Bob Woodward, "Secret Memos Reveal Explicit Nature of U.S., Pakistan Agreement on Drones," *The Washington Post*, 24 October 2013.

⁶⁷Bureau of Investigative Journalism, "Drone Strikes in Pakistan," <https://www.thebureauinvestigates.com/projects/drone-war/pakistan>. Accessed 12 March 2018.

⁶⁸Department of Justice, "White Paper - Lawfulness of a Lethal Operation Directed against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or an Associated Force," (2011).

and organised presence' at the location in question and 'plan attacks against U.S. persons and interests'⁶⁹

There is a danger that by arguing that there are no clearly defined geographical limits, the US, in effect, potentially permits targeting suspects anywhere in the world. Determining the lawfulness of an operation solely based on an assessment who the targeted *person* is creates a dangerous precedent. By only focussing on individuals rather than the territory on which the drone strike is taking place, the US is extending what can be considered an 'active battlefield' in this particular conflict. The rule of law requires that no one is above the law, that all its subjects are treated equally and also that law needs to be transparent and predictable. Law's subjects need to know what rules govern them and also how particular rules are enacted and interpreted. This is not possible, however, if law is applied secretly and any determination whether a particular conduct can be considered legal is done by one actor unilaterally. In order to effect long-term change in the international legal system, even powerful states like the US ultimately need to persuade others that their practice is legitimate. As Sandholtz argues, hegemons cannot change rules alone, "they, too, must rely on arguments and suasion."⁷⁰

The US is facing a lot of criticism for this lack of geographical limitations to target suspected terrorists. First indications suggest that its attempts of norm entrepreneurship to assess the lawfulness of an operation based on *who* the targeted person is rather than where the operation is taking place, has only limited success. For instance, the European Parliament adopted a resolution in February 2014 that maintains that "drone strikes outside a declared war by a state on the territory of another state without the consent of the latter or of the UN Security Council constitute a violation of international law and of the territorial integrity and sovereignty of that country."⁷¹ Similarly, a UK inquiry into the UK's use of drones in counterterrorism concluded that it did not accept the idea of a global war without any geographical borders.⁷²

⁶⁹Ibid.

⁷⁰Wayne Sandholtz, 110.

⁷¹European Parliament, "European Parliament Resolution on the Use of Armed Drones," (2014).

⁷²Joint Committee on Human Rights, "The Government's Policy on the Use of Drones for Targeted Killing: Second Report of Session 2015–16," (London: House of Lords, House of Commons, 2016), at 3.52.

Self-defence and the question of 'imminence'

The second issue of controversy relevant to this paper is the justification of 'self-defence' and its crucial element of 'imminence'. Article 51 of the UN Charter sets out that "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." The meaning and application of 'self-defence' has been broadened over the years to include anticipatory action against state as well as non-state actors. Looking back at the US National Security Strategy of 2002, the idea of using force pre-emptively is not a new concept but one that has been advanced by the US since 9/11 to deal with terrorist threats. The main questions relate to whether anticipatory action can ever be justified as 'self-defence' and what 'imminence' entails in this context.

In terms of anticipatory action, the so-called *Caroline* incident of 1837 is often quoted as a relevant standard of customary international law. This standard is broader in its assessment of self-defence than that set out in Article 51 and states that anticipatory action is permissible if the necessity for self-defence is "instant, overwhelming, leaving no choice of means, and no moment of deliberation."⁷³ Furthermore, understandings of the *nature* of the threat has been broadened to include states as well as non-state actors. This change is reflected, for example, in a number of Security Council Resolutions that were adopted following the 9/11 attacks (1368, 1373 and 2249) which confirmed the right to use force in self-defence against terrorists. The resolutions support the idea that force can be used against non-state actors to 'prevent and suppress' terrorist acts.⁷⁴

The most controversial issue related to such anticipatory self-defence, however, lies in the question of what 'imminence' means in this context. In 2014 the US was forced to make its policy with regard to the targeted killing of a US citizen public. A White Paper provided insights into the US' reasoning to classify the targeted killing of Anwar al-Aulaqi, a US citizen, as a

⁷³As quoted in R. Y. Jennings, "The *Caroline* and *Mcleod* Cases," *The American Journal of International Law* 32, no. 1 (1938): 89.

⁷⁴See also Daniel Bethlehem, "Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors," *American Journal of International Law* 106, no. 4 (2012): 774.

lawful act of war.⁷⁵ It also showed the way the government interpreted existing international law to justify its policy decisions. The paper sets out that in terms of imminence, the US does not have to “have clear evidence that a specific attack on U.S. persons and interest will take place in the immediate future.”⁷⁶ The assumption is made that al Qaeda is constantly plotting attacks against Americans and that possible terrorist attacks pose a new kind of threat that are difficult to predict (“It is a drawn out, patient, sporadic pattern of attacks”). The paper makes the case for expanding the notion of imminence by arguing that “by its nature, therefore, the threat posed by al-Qa’ida and its associated forces demands a broader concept of imminence in judging when a person continually planning terror attacks presents an imminent threat, making the use of force appropriate.”⁷⁷

This broad view of ‘imminence’ was further supported in April 2016 when Brian Egan, then Legal Adviser to the US State Department, argued

once a State has lawfully resorted to force in self-defense against a particular armed group following an actual or imminent armed attack by that group, it is not necessary as a matter of international law to reassess whether an armed attack is imminent prior to every subsequent action taken against that group, provided that hostilities have not ended.⁷⁸

This is a troubling assessment as there is no need for the US to prove an actual attack is being planned or is going to happen. It is broader than justifications established in the *Caroline* incident that requires a threat to be ‘instant’, ‘leaving no moment of deliberation’. It is also speculative as the Administration does not even need to have information on a *specific* attack that is being planned or to be confident that ‘no strike is about to occur’. There is no neutral or independent assessment to challenge the conclusion that a threat is in fact ‘imminent’, which would make the use of force lawful in certain circumstances. By doing so, the US is acting as norm entrepreneur, contesting the meaning of ‘imminence’, thereby lowering the threshold of what is meant by ‘significant threat’ considerably. This contestation was justified

⁷⁵Office of Legal Counsel, "Memorandum for the Attorney General - Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations against Shaykh Anwar Al-Aulaqi ", ed. US Department of Justice (2010).

⁷⁶Department of Justice.

⁷⁷Ibid.

⁷⁸Brian Egan, "International Law, Legal Diplomacy, and the Counter-Isil Campaign: Some Observations," *International Law Studies* 92 (2016): 239.

by the Administration by arguing that the concept needed to be more flexible and broad “in light of the modern-day capabilities, techniques and technological innovations of terrorist organizations.”⁷⁹ International law is a developing system, a process that responds to changes and the US can therefore be seen as working through existing mechanisms of legal change. In this process and as the most powerful state, it can exploit ambiguities arising from contestations and can advance a permissive normative order that accommodates its counterterrorism policies.

Principle of distinction

The final aspect of controversy relevant to this paper is the principle of distinction between combatants and non-combatants that is central to International Humanitarian Law (particularly the Geneva Conventions). As argued above, the nature of warfare has changed to include conflicts of a non-international nature, involving combatants without clearly distinguishable uniforms. It is unlawful under the laws of war to directly target non-combatants.⁸⁰ The requirement for proportionality also means that collateral damage (i.e. the unintentional killing of non-combatants) must be kept to a minimum and be proportionate to the attack.⁸¹ Obama argued that these principles of distinction and proportionality were adhered to, stating that Congress only authorised CIA strikes “if we have a high degree of confidence that innocent civilians will not be injured or killed, except in the rarest of circumstances.”⁸² Obama also said that “there must be near-certainty that no civilian will be killed or injured –the highest standard we can set.”⁸³

The US has come under a lot of criticism for giving extraordinarily low numbers of collateral deaths in its drone campaigns. In 2011, John Brennan reportedly claimed that not a single non-combatant had been killed in a year of strikes. And a year later, another senior administration official is said to have claimed that “the number of civilians killed in drone strikes in Pakistan under Mr. Obama was in the ‘single digits’ — and that independent counts

⁷⁹Brennan; see also The White House, "Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations " 9.

⁸⁰Geneva Conventions, Additional Protocol Article 48

⁸¹Geneva Conventions, Article 51(5)

⁸²Brennan.

⁸³Obama, "Remarks of President " .

of scores or hundreds of civilian deaths unwittingly draw on false propaganda claims by militants.”⁸⁴ A number of commentators and reporters claimed that these low numbers were based on the idea that all military aged men were considered combatants. This has been strenuously denied by the government. The relevant Policy Guidance does not clearly define what a non-combatant is but outlines the concept as follows:

Non-combatants are individuals who may not be made the object of attack under applicable international law. The term “non-combatant” does not include an individual who is part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of national self-defense. Males of military age may be non-combatants; it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants.⁸⁵

In 2016, Brian Egan, further set out “Among other things, the United States may consider certain operational activities, characteristics, and identifiers when determining whether an individual is taking a direct part in hostilities or whether the individual may formally or functionally be considered a member of an organized armed group which we are engaged in an armed conflict.”⁸⁶ These (rather vague) guidelines mean that determining whether or not an individual can be considered to be a combatant is still dependent on individual assessments and interpretations rather than based on objective, reproducible criteria.

Distinguishing combatants from non-combatants in non-international conflicts is difficult and the Obama administration did not find a plausible way of explaining its targeting decisions that would lead to new normative understandings of what constitutes a ‘legitimate target’. This problem became obvious in April 2014 when two hostages were killed in a so-called signature strike of the CIA. ‘Signatures’ are indicators that are associated with terrorist behaviour that then justify a drone strike. This can be gatherings of men, convoys or individuals carrying weapons. This is problematic because as “some State Department officials have complained to the White House (...) the criteria used by the C.I.A. for identifying a terrorist ‘signature’ were too lax. The joke was that when the C.I.A. sees ‘three guys doing

⁸⁴Jo Becker and Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will," *The New York Times*, 29 May 2012.

⁸⁵The White House, "U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities," Office of the Press Secretary (Washington D.C., 2013). Emphasis in original.

⁸⁶Brian Egan, "International Law, Legal Diplomacy and the Counter-Isil Campaign: Some Observations," *International Law Studies* 92 (2016): 243.

jumping jacks,' the agency thinks it is a terrorist training camp."⁸⁷ Obama publicly apologised for this particular attack, but the fact that two hostages were killed that the US didn't even know were in the vicinity led many critics (see for instance the American Civil Liberties Union) to comment that the US did not actually know who it was killing. The White House admitted that the Policy Guidelines it issued in 2013 might need to be changed: 'in the aftermath of a situation like this, it raises legitimate questions about whether additional changes need to be made to those protocols.'

In July 2016, in a first move to address critics and to increase transparency, Obama released aggregate figures of casualties in its drones programme and issued an Executive Order on US *Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force*.⁸⁸ Emphasising its aim to set binding precedents in the international legal order, the White House acknowledged "the need to be as transparent as possible (...) in order to enhance the public's confidence (...), set standards for other nations to follow, and counter terrorist propaganda and false accusations about U.S. operations."⁸⁹ Similarly, Egan stated that "it is important that our actions be understood as lawful by others both at home and abroad in order to show respect for the rule of law and promote it more broadly, while also cultivating partnerships and building coalitions."⁹⁰ Lisa Monaco, then Assistant to the President for Homeland Security and Counterterrorism, emphasised the need to be seen to act legitimately to further strengthen the US' position in the international community by arguing that "we know that not only is greater transparency the right thing to do, it is the best way to maintain the legitimacy of our counterterrorism actions and the broad support of our allies."⁹¹ Even though the move towards more transparency was generally welcomed as long

⁸⁷Becker and Shane.

⁸⁸The White House, "Executive Order on United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force," news release, 1 July, 2016, <https://assets.documentcloud.org/documents/2938179/Executive-Order-Policy-on-Pre-and-Post-Strike.pdf>.

⁸⁹The White House: "Factsheet: Executive Order on United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force," news release, 1 July, 2016, <https://www.whitehouse.gov/the-press-office/2016/07/01/fact-sheet-executive-order-us-policy-pre-post-strike-measures-address>.

⁹⁰Egan, "International Law, Legal Diplomacy, and the Counter-Isil Campaign: Some Observations," 247.

⁹¹Lisa O. Monaco, "Evolving to Meet the New Terrorist Threat: Remarks by Lisa O. Monaco at the Council on Foreign Relations - Kenneth A. Moskow Memorial Lecture," news release, 7 March, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/03/07/remarks-lisa-o-monaco-council-foreign-relations-kenneth-moskow-memorial>.

overdue by civil rights groups, they remained critical of the low numbers that were provided by the administration, arguing that they were “only a fraction of those recorded” by investigative journalists.⁹² Such criticisms highlight the need for the Administration to be clearer on its definition of ‘non-combatants’ in order to put its figures into context.

Conclusions

The Obama Administration’s justifications for its drone policy showed contestation of established norms and rules in international law. The US was acting as norm entrepreneur, arguing that its actions were done with respect to the rule of law. The challenge was therefore not an outright ‘assault’ on international law but contestation and renegotiation of established norms’ and laws’ meanings-in-use. It is clear that the Obama Administration was aiming to have a long-term effect on the meaning of particular concepts as the rhetoric changed from exceptionalism towards an emphasis on new technologies and new kinds of warfare that made changes in understanding international law necessary. The aim was to alter the shared understanding of accepted legal norms and legal provisions in the longer term. The result was not necessarily a weakening of those norms but a renewed argumentation and debate on how they can be interpreted in the current context. The US aimed to normalise its conduct, framing its actions within the terms of international law. The paper’s analysis of the US’ use of drones in counterterrorism efforts has demonstrated the importance of norm entrepreneurs as agents that effect normative change. Structures (such as those provided by existing legal obligations) are important, as they enable and constrain action, but the present analysis shows that agency is crucial in the process of norm contestation. Normative change results from intentional action taken by norm entrepreneurs within the structure and “agents’ perception, situation analysis, goal setting, and intentional action [...] decide in which way external change affects the regime and its norms.”⁹³

International law is a process that is necessarily flexible - it needs to adapt to be able to cover changes, such as the emergence of new technologies that enable different strategies of warfare. International law is not rendered out of date by these contestations. The US, as

⁹²Jack Searle, "Obama Drone Casualty Numbers a Fraction of Those Recorded by the Bureau," *Bureau of Investigative Journalism*, 1 July 2016.

⁹³Wunderlich, 28.

hegemon, was acting in its long-term interest, aiming to create a permissive normative order. However, hegemony is a status, based on social relations and not a given attribute, which means that the US needed to be seen by others as acting legitimately in order to secure its position in the international system. This is important, because “losing legitimacy means losing power, and losing enough legitimacy may produce a situation in which American claims to power are unsustainable in practice.”⁹⁴ The US is therefore working with international law’s legitimising and enabling power which also requires support from other states in order to manifest the legal change it aims to effect. US interests are influenced by the normative structure in which it acts. Law cannot be fully separated from power and interests and a powerful state cannot single-handedly change international law; it must persuade others to support the proposed changes in order to have a long-term effect. Persuasion and being seen to act legitimately by others are still key for being a successful norm entrepreneur. When others follow the new meaning-in-use of a norm, that norm can then be argued to have been successfully contested. In this context, there are suggestions that the norm prohibiting targeted killing as counterterrorism strategy has been successfully contested and is starting to be embedded in the international order.⁹⁵ The long term effects of US drone policy will become more evident in the years to come. In line with Kennedy it can be concluded that “the story has not ended. The pebble of American assertion has dropped in the pond, and it may be many years and many conflicts before we can evaluate its effects.”⁹⁶ Should the US be successful in its attempts, it will ultimately create an international order that is more accommodating to US interests but not one that is necessarily entirely dominated by one state’s national interests.

⁹⁴Hurd, "Breaking and Making Norms: American Revisionism and Crises of Legitimacy," 204.

⁹⁵See for instance the UK House of Commons briefing paper that was published following Osama Bin Laden’s death in which it was argued that his killing “may be seen as a precedent for targeted killings of individuals by any state, across international boundaries, at least where terrorism is involved...The more states act this way, the more likely it is to become accepted, at least politically if not as a matter of law.” Arabella Lang, "Killing Osama Bin Laden: Has Justice Been Done?," (House of Commons, 2011), 9. The UK has since engaged in targeted killing of suspected terrorists by drone, see: Ewen MacAskill, "Drone Killing of British Citizens in Syria Marks Major Departure for UK," *The Guardian*, 7 September 2015, but the EU is still to develop a common position on targeted killing.

⁹⁶Kennedy, 94.