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International Law, Norms, and Order

At this point of the book, it is important to explore in more detail how we can understand the constitution and fabric of international order. Our discussion in Chapter 2 showed that the various attempts by the international community to regulate the use of force established an evermore dense net of international law constituting what is widely considered an international order. As we intend to show, norms emerging in practices can affect the international order governing the use of force, which is often considered to be the comparatively stable product of detailed, slow-paced deliberations in formalised settings. The previous chapter highlighted how new, emerging weapons technologies played a role in the conduct of warfare and the extent to which the international community has launched attempts to regulate or even prohibit their usage. In this regard, chapter 2 also discussed the tensions between adopted legal regulations guiding the use of force and how weapons were used in practice. It illustrated how practices that diverge from explicit but slightly ambiguous legal rules established emerging understandings of appropriateness that were often reciprocal or relational. In other words, using a weapon in a specific, even clearly illegal way, meant that others (often adversaries) followed suit to some extent.

Reconsidering the way international order emerges and changes is crucial for highlighting the importance of current developments regarding AWS. Our initial argument here is that international order is more than international law, and can be shaped and changed outside of deliberative settings. Further, increasing technological autonomy via decreasing human agency raises a set of novel questions regarding the emergence of an international security order defining the appropriate use of force. Moreover, we argue that it is essential to follow a broader understanding of what constitutes international order, moving beyond the focus on order as a legal structure. In this regard, we emphasise the importance of norms building a normative global order that often relates to, but is not identical to, international law.

In this sense, chapter 3 connects our thoughts about how norms emerge in practices (chapter 4) to questions of international order and its relationship to international law. In this, it continues to provide the conceptual backdrop for our empirical analysis of how AWS may change use-of-force norms in practice (chapter 5).

Research in IR has invested much effort into proposing different models of international order from a top-down, macro-perspective, also in terms of how order changes. What constitutes international order is often only considered narrowly by associating it rather vaguely with a ‘rule-based system’ (Nye 2017, 11) – a structure stabilised by institutions and rules and amended by formal, institutionalised, and deliberative acts (see Stokes 2018, 138).

Since the 2010s, IR research has chiefly focused on the status and contestation of the liberal international order that arguably emerged as the dominant post-1945 model upheld by key powers such as the United States and ‘Western’ multilateral institutions such as the International Monetary Fund (IMF), the World Trade Organization (WTO), and the World Bank. Notably, the debate on the liberal international order often lacks a thorough conceptualisation of what order is. While scholars discussing liberal world order, such as Duncombe and Dunne, highlight, for example, Crawford’s concept of ‘institutionalized ideas [that] become embedded through *practice*, and in so doing they affect “the possibility and legitimacy of later ideas”’ (Duncombe and Dunne 2018, 26; emphasis in original), an understanding of a less stringent type of order than legal structures remains underdeveloped in IR. In this sense, this debate is also over-reliant on positivist understandings of international law as the primary, relatively stable source of international norms as the fabric of order. At the same time, the focus on practices suggested in the quote above has not yet been taken up comprehensively. Given our conceptualisation of norms, understood as standards of appropriateness, as unfolding their meaning primarily in practice, we also consider such practices as building blocks of international order and seek to contribute to the debate in this regard.

With regard to AWS, Garcia suggests that there are three domains of global governance relevant for peace and security. The first domain consists of the prohibition of the use of force based on the legal norm codified in the United Nations Charter Article 2.4. The second domain is about upholding peace and security efforts on the basis of human rights law and international humanitarian law (IHL). The third domain concerns cooperation in cultural, economic, social, and environmental matters and is based on UN Charter Article 1.3, which calls on us 'To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms' (Garcia 2018, 338). This outlines the importance of international legal norms for establishing what is widely considered an international order that could provide 'preventive security governance frameworks' (Garcia 2018, 339) prohibiting lethal AI.

Indeed, practices and norms pertaining to the use of force have been particularly important for order-making: 'the management of violence is a key function of political orders as it delimits types of violence that violate or reinforce the principles of an order, that is illegitimate and legitimate forms of violence' (Senn and Troy 2017, 176; see also Hurd 2015). Studying how these 'principles' change can therefore tell us something about the changing patterns of international order. For this purpose, we propose a flexible and diversified understanding of order in differentiating between a legal-regulative order, chiefly constituted by international law, and a normative order, chiefly constituted by international norms. This builds on the indeterminate and permissive nature of international law as identified by critical legal scholars. International law provides an indeterminate, baseline structure leaving room for interpretations in varied ways that 'depend on what one regards as politically right, or just' (Koskenniemi 2011, 61).

We argue that this indeterminacy of international law is constitutive of a realm of normative order where interpretations are negotiated and formed via verbal and non-verbal micro-practices. Examining the dynamic relationship between these orders can tell us something about how orders change and the role that norms play therein.

In particular, conceptualising this relationship between legal-regulative and normative orders allow us to understand current dynamics in how states are forcefully targeting terrorist suspects, mainly via drone warfare. Observing these dynamics points to important precedents set for more autonomous technologies that cannot be captured using the language of international law. The use of drones and other security technologies has led states to propose novel interpretations of the law of self-defence and engage in new practices, such as those concerning the 'unwilling or unable' formula (Bode 2017a). However, the significance of these interpretations and practices cannot be captured using purely legal terminology or logic, such as customary international law, as they remain far from 'a general practice accepted as law' (ICRC 2010) or do not manifest in a consistently stated belief in the applicability of a particular rule. A rigid, positivist understanding of international law is therefore not helpful in making sense of these evolving standards of appropriateness – something that distinguishing between the realm of legal-regulative and normative orders instead promises to do. A growing literature highlights that drones operate in contested areas of international law governing the use of force, particularly concerning IHL and the law of armed conflict (see, for example, Boyle 2015; Kaag and Kreps 2014; Brunstetter and Jimenez-Bacardi 2015; Carvin 2015).

We take a different route in arguing that it matters whether there is high or low congruence between the legal-regulative and the normative orders. As noted above, the legal-regulative order encompasses institutionalised standards of international law, while the normative order encompasses the full range of accepted interpretations and readings of such standards as well as other shared understandings of appropriateness that need not be attached to international law. If there is high congruence between the two orders, this creates a certain stability of expectations for state behaviour, demonstrating the constraining power of international law via the legal-regulative order. We can see how this stability of expectations in the UN Charter era, centring legally on the general prohibition on the use of force, was manifested in a significant reduction in the number of inter-state wars after 1945 (Human Security Centre 2005). This congruence is still imperfect in the sense that international law on the use of force has not been observed all the time. The extent to which use-of-force standards are observed has been geopolitically mediated, and the provisions surrounding the use of force have generally been subjected to greater contestation than aspects of international law that, for example, regulate routine international practices such as international trade or aviation.

At the same time, congruence between international legal stipulations and normative interpretations has been high overall, thereby reducing uncertainty when it comes to state behaviour (Falk 2014, 324). As states have agreed upon the international legal framework voluntarily, and if they continue to share a set of normative interpretations, this congruence offers a reliable set of rules for states to comply with. This is based on both states' shared sense of being bound by these rules and the amount of certainty in expectations they thus provide. Congruence between the legal-institutional and the normative orders has therefore provided common standards regulating the use of force – above all emphasising that force should only ever be used as a last resort.

However, international law not only restrains state practices on the use of force but also adds to them (Hurd 2015, 63). As Ian Hurd argues, by singling out individual and collective self-defence as the only legitimate unilateral[1] recourse to force in light of the general prohibition stipulated in Article 2(4), 'the Charter *encourages* states to go to war under the banner of self-defence' (Hurd 2015, 65). The UN Charter's Article 51 on self-defence therefore presents states with a legal language in which to state their arguments, thereby rendering support to their use of force as necessary, legal, and legitimate (Hurd 2015, 65).

These dynamics also trigger contested state justifications for the use of force, which can lead to a growing incongruence between legal-regulative and normative orders. Verbal and non-verbal state practices surrounding drone usage have significantly increased the number of contested areas in international law on the use of force. Such contested areas point to mismatches of expectations surrounding international legal standards and their norm-based interpretation. States have introduced many competing readings of previously shared *jus ad bellum* standards. In line with Hurd's arguments, these competing readings chiefly refer to self-defence by broadening the scope of, for example, attribution, imminence, and necessity. There is now considerably less agreement among states about the precise legal content of core standards than 20 years ago.

These contested areas lower thresholds towards using force further and have made the use of force more commonplace. The lack of clarity or consensus originating in the mismatch between legal-regulative and normative orders result in a more permissive environment for using force: justifications for its use can now more 'easily' be found within these increasingly elastic areas of international law that is already permissive to the application of violence – a permissiveness that 'has expanded since 1945 under the influence of state practice' (Hurd 2016, 1). Widening incongruence between the legal-institutional and normative orders therefore has significant effects on use-of-force standards.

We develop our argument in two steps. First, we consider the concept of normative order in terms of how norms and order are thought to emerge, which is closely related to the concepts of normative structure in IR and the rule of law. We argue that normative order is linked to international law but is also shaped outside of law and goes beyond it. We conclude that there is both a legal-regulative order and a normative order structuring the use of force in IR, which interrelate and can have more or less alignment or congruence.

Second, by examining state practices in relation to drones and the contested areas we illustrate what happens when the legal-regulative and normative orders misalign. Cognisant of the dual quality of law as both restraining and permissive, we hold that the restraining aspect of law is stronger when states share significant understandings of use-of-force, chiefly self-defence, standards. This corresponds to an alignment of the legal-regulative and normative orders. Conversely, the permissive quality of law comes to the fore when states diverge on significant understandings of self-defence standards. This corresponds to a misalignment of the legal-regulative and normative orders. We cover aspects of *jus ad bellum*, laws relevant to the resort to armed force, chiefly those relevant to self-defence, such as attribution, imminence, and targeted killing. We connect this discussion to the overview of the political debate on AWS (chapter 1) and to the previous regulation of weapons systems (chapter 2) in highlighting the potential adverse consequences of this misalignment of orders.

APPROACHING ORDER IN IR: NORMATIVE ORDER AND INTERNATIONAL LAW

IR are, in many regards, densely regulated. Comparable with domestic law, the existence of international law structures actions to some extent and provides a certain degree of order, which has been incorporated into IR scholarship on account of these functions (Finnemore and Toope 2001; Wiener 2008). While arguing for the existence of this structure is analytically reasonable, its implications have rarely been comprehensively or clearly explored theoretically or empirically. Yet, a critical segment of IR research has taken this up, departing from a purely legal perspective on IR by considering new perspectives on norms. With the ascendancy of constructivism, studying norms has become a vibrant area of scholarly interest in IR, as we will see throughout chapter 4 (see Checkel 1998). Paying attention to norms broadens research beyond the clearly defined yet limiting dimension of a positivist version of legality by adding considerations such as legitimacy or appropriateness to understanding human actions (Hurrell 2006; Hurd 1999; March and Olsen 1989).

At the same time, perspectives on the origin or emergence of norms have long remained attached to an assumed stable structure of international law, which is therefore often conflated with a normative structure. This thinking coincides with a limited understanding of a fixed and defined *order*, which is likewise derived from central terms of international law regulating international relations. Research has invested much effort in conceptualising different models of international order from a top-down, macro perspective (Ikenberry 2011) that is usually thought of as a web of regulatory regimes (see Duncombe and Dunne 2018, 33). In this sense, orders are perceived as 'relatively stable configurations of power among sovereign states' (Lapid 2001, 8), in which law constitutes and is constituted by power. Other dimensions mentioned as crucial for the constitution of order apart from power are intention, authority, and legitimacy (see Duncombe and Dunne 2018, 26), which also underline the role of authoritative actors that can exert these dimensions to influence and change order.

Yet, addressing the questions of how order emerges, functions, and changes can contest its stability and challenge the understandings of order inevitably linked to power in an international system. Studies have noted the importance of '*practices* of liberal ordering – the patterns of activities, institutions, and performances that sustain world order' (Dunne and Flockhart 2013, 8; emphasis in original). Still, perspectives on such ordering practices contributing to the important debate about the constitution and contestation of world order – especially of liberal international order – often highlight the role of powerful states such as the United States and China in a great-power-centric perspective. This goes back to scholars such as Hedley Bull, who argued in the 1970s that 'order is a particular kind of social pattern of human activity' particularly maintained by the institutions of 'balance of power, international law, diplomacy, war and great powers' (Flockhart 2016a, 12). While this definition also mirrors the great-power-centric view of the theoretical debates between the then-dominant neo-realist school and contestants, primarily emerging neo-liberalism in IR, contemporary discussions of world order remain attached to this great powers' narrative. It is also noteworthy that the debate lacks a clear and universally shared definition of what an order – or an international order more specifically – is. In fact, contributions to this debate often seem to make use of a perceived implicit understanding of order without further discussing this important aspect.

In a more comprehensive consideration of the question what international order constitutes, Flockhart (2016a, 14) argues that '[i]n its most basic form an international society – or an international order – may be understood as a cluster (or club) of sovereign states or nations with shared values, norms and interest, expressed through a number of institutions both primary ones that are informal and evolved (rather than designed) and performed through fundamental and durable shared practices and secondary ones that are formal and designed and which perform specific administrative and regulative functions'.

Taking this conceptualisation as a starting point and combining it with a critical understanding of international law allows us to move away from considering international order based on positivist legal terms. At the same time, in considering a normative international order, we also take up the conventional argument that 'order produced through international society is associated with the participating states having a sense of common interest and they are following established ordering practices associated with commonly held values' (Flockhart 2016a, 17). In our view, this is an important point that is, however, partly under-conceptualised, as what constitute ordering practices and commonly held values (or 'norms' in the language we use throughout this book) and how these are interrelated are not considered in any detail.

Critical legal scholarship considers international law as 'an expression of politics' that involves choice rather than simply 'applying a pre-existing principle' (Koskenniemi 2011, v). International law provides a baseline structure, but this structure is substantially indeterminate, therefore 'deferring substantial resolution elsewhere', leaving room for interpretations in varied ways that 'depend on what one regards as politically right, or just' (Koskenniemi 2011, 61).

We argue that this indeterminacy of international law is constitutive of a realm of normative order where interpretations are negotiated and formed via verbal and non-verbal practices. Verbal practices are the spoken (in some form) outcome of reflection and consideration, and typically are concerned not only with interpreting standards of international law but also potentially with formulating novel normative understandings that are only loosely (if at all) tied to (accepted interpretations of) international law.

Non-verbal practices, in contrast, are typically non-verbalised practices (i.e. where the adoption of formal, text-based decisions is not central), conducted by a plethora of actors on different levels. In our case, these are those practices undertaken in the process of developing, testing, and deploying autonomous technologies. Non-verbal practices are not necessarily influenced by interpretations of existing law (norms) but can still contribute to constituting normative order. This builds on the important point that the emergence and promotion of order does not inevitably depend on centralised, planned initiatives or the practices of key actors in international deliberations.

This analytical perspective challenges a traditionally dominant neo-realist perspective on a 'hegemon [that has] the capacity to shape world order in ways that confer upon it advantages' (Stokes 2018, 141). While we acknowledge that strategic and intentional attempts at ordering (also in the sense of spreading understandings of law) by powerful states play a role in international relations, the importance of other levels and actors are often unconsidered. As Duncombe and Dunne (2018, 32) argue with regard to who has agency in the liberal world order, '[w]hat if there were no driver, no locomotive, no script for running the world according to liberal principles and goals? Integration is the term that best describes the characteristics of liberal ordering that are non-intentional – the ordering that happens because of convergent institutional procedures, individuals playing roles, the spread of universal standards such as the scientific method, and the forging of a common sense that is somehow above politics'.

Moreover, should we not also consider that intentional, non-verbal practices or the intentional absence of ordering may also lead to the emergence of a normative order that is unintended or unplanned? In other words, ordering can also occur as an unintentional product of practices, but in a way also emerges as a (deliberative) lack of clear regulation.

Conceptually, order can therefore be thought of as the outcome of regularity (the realm of normative order in our reading) and rule (the realm of institutionalised international law) (Wrong 1994, 41). Here, regularity stands for the behavioural dimension and rule represents the institutional dimension (Senn and Troy 2017, 181). This means that regularity is particularly interesting as the outcome of non-verbal practices that create shared patterns of doing things that are, however, fluid and flexible. In this dimension, there is considerable wiggle room for agency to shape and form understandings of what is appropriate action. The institutional dimension mainly represents verbal practices as formal instances of norm-setting and is more concerned with attempts to fix the meaning of legal rules and norms. There is a conceptual interrelatedness between regularity and rule – while it is widely accepted that rules in the form of international law do have an impact on behaviour and can create regularity, we seek to also highlight the effect of non-legal regularity on rule. In this sense, rules are defined by their proscriptive quality, which prohibits certain actions but does not define what legal behaviour is appropriate or right. We prefer the term norms also in legal regards because it is broader and underlines qualities of co-constitution (in theoretical terms, norms are constituted by actors and constitute them).

Furthermore, a crucial point to study is whether and how there is a mismatch between legal rule and regular patterns of behaviour perceived as appropriate. However, it is also important to note that regularity in the form of norms can exist and have an impact as established practices without a clear link to legal rules. In other words, the lack of specificity, or ambivalence, of law can create conditions where there is neither a match nor a mismatch between regularity/norm or rule. The gap of meaning left open by international law can be filled by practices without further attempts to codify or legally contest them. The absence of a legal, deliberative order does not denote the absence of order in general.

In an ideal perspective, degrees of order range from the absence of order and stability on one pole to complete, universal, and uncontested order on the other pole. While we argue that neither of these poles is analytically empirically relevant beyond its existence as an ideal type, the interesting dimension is the grey area between absent order and complete order in which interactions of ordering between regularity/norm and rule take place. We argue that normative order is therefore much more than a stable, universally applicable order usually linked to international law.

Generally, normative order contains all common and acceptable interpretations and justifications used in relation to enshrined/institutionalised standards of international law. It sets 'the conditions of possibility for a given set of practices' (Wight 2006, 23). As Reus-Smit (2011, 344) notes, '[t]he idea that legal practices are embedded within, and constituted by, layers of nested social understandings is a significant step toward overcoming the limitations of existing approaches to international legal obligations'. The relationship between a legal-regulative order and a normative order signifies that the 'line separating acceptable from unacceptable behaviour is not clear or fixed' (Hurd 2016, 10), thereby pointing to the permissive quality of international law on the use of force.

Overall, the normative order provides for a range of common or acceptable interpretations of legal standards regulating the use of force. As noted by the UN-organised High-level Panel on Threats, Challenges and Change: 'The maintenance of world peace and security depends importantly on there being a common global understanding and acceptance of when the application of force is both legal and legitimate' (High-Level Panel on Threats, Challenges and Change 2004, 62). This triggers two observations: first, that there will be areas of disagreement about when the application of force is both legal and legitimate; and second, that this may, over time, lead to changes in the overall common global understanding.

At any given time, there will be therefore areas of more or less contestation within that normative order – some interpretations (norms) may be accepted by a larger number of actors than others and these constellations may change over time – through the interaction of verbal and non-verbal practices. Depending on how significant these areas of contestation are there is a greater or smaller match/mismatch between the legal-regulative and normative orders. The distinction between international legal-regulative and normative orders also acknowledges that a global common understanding of international use-of-force standards is, by the very nature of international law, tenuous.

The indeterminate nature of international law, however, does not mean that 'anything goes': different justifications will carry more or less weight depending on how many actors use and adhere to them (and arguably also who uses them), thereby creating cases of stronger or less stringent common understanding. The use-of-force justifications put forward by states typically connect to existing legal standards by way of presenting novel interpretations or more loose forms of attachment to what is currently accepted as appropriate. These are then assessed by legal specialists, the dynamics of which are fundamentally political (Hurd 2016, 14) and determine over time whether there will be a change in what is considered appropriate (norms).

Without such an evolving agreement, we will see the appearance of mismatches between the international legal-regulative and normative orders in the form of what we refer to as grey areas. These are interpretations or justifications for the use of force that are at least partly outside the realm of accepted, widely shared understandings of appropriateness. Whether they will move into the normative order remains to be seen. In making these arguments, we depart from Hurd, who argues that looking for a shared kernel of normative understandings is futile because there is no objective standard as to what is legal. In our view, that there is no objective standard of legality due to the indeterminacy of international law does not signify that there are no shared understandings. Indeed, we can see areas of international law where there are a significant number of shared understandings, while there are others where understandings have become increasingly patchy.

To sum up, international law is essentially indeterminate, following critical, post-positivist legal scholarship. Within the framework of international law, substantive decisions always imply political choice. This indeterminacy also opens up room to account for the novel emergence of norms as standards of appropriateness in two ways: first, in (re) interpreting aspects of international law; and second, in coming up with entirely new practices with no or only highly tenuous relationship to the existing law.

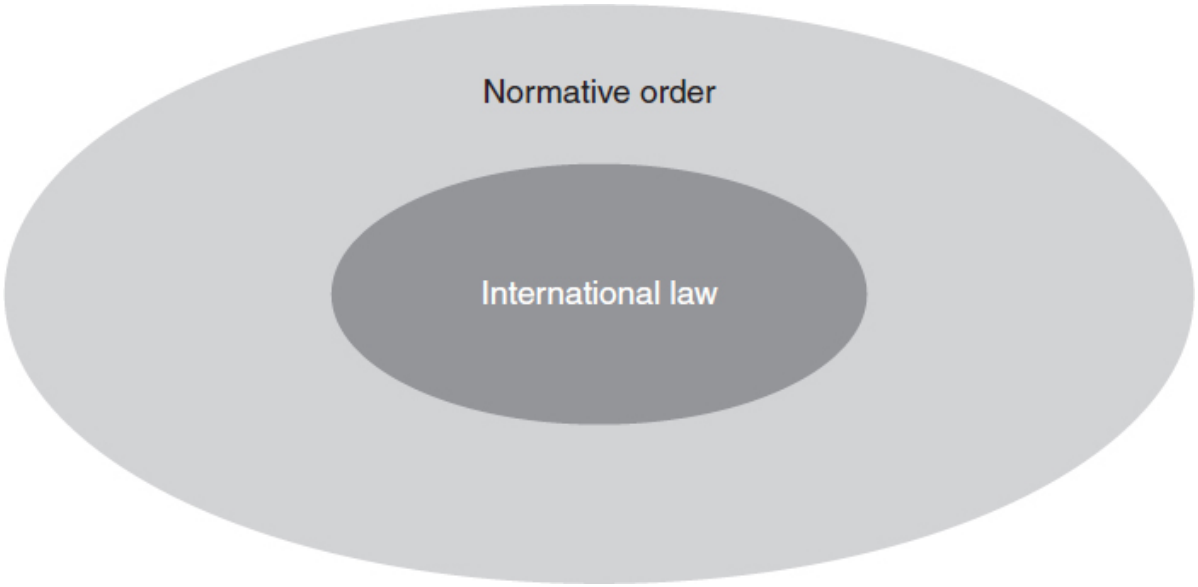

Figure 3.1 Relationship between international law and normative order.

We therefore argue that there is a difference between legal structure and the conceptualisation of norms informed by it. A normative order emanates from how aspects and principles of international law are interpreted, applied, and elaborated upon. We suggest that a positivist legal perspective on international relations cannot capture these dynamics, while the language of norms and normative order offers a useful, alternative conceptual approach.

Following critical legal scholars, we conceive of international law as a system characterised by an 'experience of fluidity and contestability' (Koskenniemi 2011, v). This is where the international legal-regulative order represented by international law is embedded in international normative order (see figure 3.1).

As we argue in the next section, the match between international legal-regulative and normative orders crystallising around the use of force has come under strain with the emergence of threats posed by non-state actors. Directly connected to the emergence of terrorist groups operating across national borders, states have sought to apply use-of-force standards in different, often more permissible, ways. In particular, this concerns the use of drones for the targeted killing of terrorist suspects. Here, states have explicitly and implicitly pushed novel interpretations or understandings of at least three key legal standards of international law governing the use of force (*jus ad bellum*): attribution, imminence, and targeted killing (state-sponsored assassination). We examine these dynamics more closely in the next section. The discussion focuses on verbal practices to shed more light on the constitution of international legal order as an integral part of a broader normative international order. It seeks to underline how the indeterminate and permissive conditions of international law enable normative order to emergence beyond and outside of the legal context in the contested areas of interpretative struggles. In Chapter 5, we will explore how non-verbal practices contribute to the constitution of international normative order.

MISMATCHES BETWEEN THE LEGAL-REGULATIVE AND NORMATIVE ORDERS AND THE USE OF FORCE

International law governing the use of force centres on the general prohibition on the use of force. In terms of *jus ad bellum*, this proscription of the pursuit of state interests by military means under the UN Charter was a legal (and normative) breakthrough. The general prohibition states that all UN member states 'shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations' (United Nations 1945, Paragraph 2(4)). That general prohibition and its two exceptions – self-defence (Article 51 of the UN Charter) and UN Security Council authorisation under Chapter VII (Article 42 of the UN Charter) have become fundamental to the international rule of law governing the use of force.

Jus in bello standards, deliberatively discussed at the international conferences of the late nineteenth and early twentieth centuries, have become institutionalised in a series of conventions named after their conference locations (the Hague and Geneva Conventions). The fundamental principles of this body of international humanitarian law – distinction, discrimination, proportionality, and avoiding unnecessary suffering – have already been discussed in chapter 1 and illustrated in chapter 2. As we showed in the latter, this last principle is also at the heart of additional conventions banning certain types of weapons characterised as indiscriminate or excessively harmful, such as biological and chemical weapons, as well as cluster munitions and land mines.

The following sections will take a closer look at emerging, contested interpretations in two *jus ad bellum* standards in the context of self-defence against non-state actors, especially in respect to counterterrorism: attribution and imminence. We also examine debates about the extent to which 'targeted killing' with drones has come to be seen as increasingly 'appropriate' by states. In similar ways, we also see increasing discussion triggering uncertainty around *jus in bello* standards, such as non-combatant immunity or, more generally, the scope of distinguishing between civilians and combatants (Gregory 2017; Kinsella 2011). Here, we re-connect to the discussion of regulating particular types of weapons in chapter 2 and to the examination of how understandings of what constitutes excessive harm and unnecessary suffering have changed in the past.

Our discussion summarises arguments presented by international legal scholars and international jurists working with various methodological doctrine-based approaches: it features references to rulings made by the International Court of Justice (ICJ), as well as differing readings of treaties, assessments of evolving state practice, and *opinio juris*. Our summary simplifies these debates, which have literally filled volumes, especially after 9/11. The purpose of our summary is to demonstrate how significant areas of uncertainty have been introduced into the law governing the use of force after 9/11. This ensuing and growing lack of shared understandings manifests in mismatches between international law and the international normative order – the contested areas. With this, we are not saying that 'where the law stood on the morning of 11 September 2001' (Kammerhofer 2015, 629) was clear and undisputed. Indeed, the legal status of a state practice is flexible: 'what was legal may become illegal, and vice versa' (Hurd 2016, 11). This effect is produced by the quality of the law as indeterminate.

But 9/11 started a trend of much more clearly and frequently voiced and radically opposing understandings of it. In fact, the very fact that so many commentators portrayed the law as either changing radically or unaltered underlines the presence of a majority understanding at the pre-9/11 starting point.

Attribution

In an international society that remains structured around states as its main subjects, the non-state nature of terrorists creates substantial challenges. In particular, this relates to how victim states should be able to respond to terrorist attacks in self-defence when these attacks are invariably planned and staged on the territory of host states. Trapp (2015, 680) summarises this challenge succinctly: 'Using defensive force against the base of operations of NSAs [nonstate actors] within a foreign host state's territory, even if that defensive force only targets the NSAs which have launched an attack, still amounts to a violation of the host state's territorial integrity'.

To address this, attacks by non-state actors have been associated with the legal mechanism of attribution, attaching their actions to a state. Attribution originates in the inter-state nature of the UN Charter's self-defence provisions: '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' (United Nations 1945, Paragraph 51).

Yet, the threshold of involvement for attribution needed to justify forceful action (against a state) has for long been a matter of debate. It featured heavily in negotiations on the UN Definition of Aggression in the 1970s, for example, which eventually accepted that 'acts of aggression could be carried out by NSAs, but to require their attributability' (Trapp 2015, 683). This was defined in narrow terms as 'sending by or on behalf of' and 'substantial involvement therein' (UN General Assembly 1974, Paragraph 3(g)), while phrases indicating more distant state involvement such as 'assistance to' (UN General Assembly 1973, 23) or 'knowing acquiescence in' (UN General Assembly 1973, 22) were rejected. Gray (2018, 207) refers to this version of the attribution standard as a 'test generally accepted by states' before 9/11.

The common global understanding in the mid-1990s can be summarised as follows: 'according to the International Law Commission, an armed intervention into a state in order to attack terrorists cannot be regarded as self-defence when the State itself has not been guilty of an armed attack and has not directed or controlled the terrorists in question' (Alexandrov 1996, 183).

This clearly echoes the phrases as they appeared in the 1974 UN Definition of Aggression. Arend (1993) summarised different attribution thresholds (see table 3.1), arguing that only state sponsorship and, to a lesser extent, state support are potentially recognised as acceptable forms of attribution justifying the use of force. In her summary of pre-9/11 practice, Gray (2018, 202) further notes that in all instances of using force in response to terrorist attacks, 'force was used against the state allegedly harbouring the terrorist organizations responsible', signalling a clear link to the attribution standard.

Table 3.1 Diverging attribution thresholds.

1 State sponsorship	State contributes actively to planning and directing terrorist organisations
2 State support	State provides support to terrorist organisations, e.g. in the form of logistics, intelligence, funds, and weapons
3 State toleration	State knows of usage of territory by terrorist actors but fails to act against them
4 Without state sponsorship, support, or toleration	

Up until the 1990s, interpretations and justifications of the attribution standard therefore seem to have been comparatively widely shared, while recognising that their precise legal assessment has always been a complex endeavour (Moir 2015, 721). Furthermore, what is important in the few instances where victim states (mainly Israel but also the United States) used force in response to terrorist attacks on the territory of alleged host states, is that these actions and the justifications provided were either expressly condemned or not accepted by many states, including via UN Security Council resolutions (Gray 2018, 204).

Since the early 2000s, the international normative order has been influenced by substantial changes to legal justification practices surrounding the attribution standard. As the following discussion shows, this has led to more uncertainty, and frequently elasticity, when it comes to what has been deemed as normatively appropriate.

At the centre of this development are two United Nations Security Council Resolutions (1368 and 1373) related to Afghanistan in the immediate aftermath of 9/11 and the reaction by the international community to the US-led Operation Enduring Freedom (UNSC 2001a,b). These triggered 'radically opposing versions of the significance of 9/11' as the 'operation against Afghanistan can be interpreted as a wide or as a narrow precedent in the development of the law on the use of force' (Gray 2018, 201).

One, expansionist version considers that both resolutions, in referring to Article 51, implicitly accept the use of force in self-defence as permissible against a non-state actor and 'without attribution to a state' (Moir 2015, 724). A second, more restrictive version, argued that the resolutions lowered the threshold for the attribution standard to state support and state toleration as defined in table 3.1 (Schmitt 2004, 88). Security Council resolution 1368 explicitly 'stresses that those responsible for aiding, *supporting or harbouring* the perpetrators, organizers and sponsors of these acts will be held accountable' (UNSC 2001a, Paragraph 3; our emphasis). As Moir (2015, 728) notes, this lower attribution threshold featured in Israeli justifications for uses of force in Lebanon and Syria in the early 2000s, but has not become widely shared.

However, even such a lower threshold of the attribution standard still affirmed that the use of force against terrorist suspects is only legal if there is some sort of link or complicity between the host state and the terrorist suspects (Bode 2017a). A similar line of argument vis-à-vis attribution was also put forward by the United States in the post-9/11 letter from its Permanent Representative to the UN Security Council: 'my Government has obtained clear and compelling information that the Al-Qaeda organization, *which is supported by the Taliban regime* in Afghanistan, had a central role in the attacks' (UNSC 2001c; our emphasis).

At the same time, decisions pronounced by judges of the ICJ even after 9/11 have upheld high thresholds of the attribution mechanism, but the three pertinent cases[2] brought before it were only concerned with the use of force '*against the state* from whose territory NSAs operate' (Trapp 2015, 689). Still, in the case of *Nicaragua v. United States*, the ICJ made it clear that state support as defined in figure 3.2 did not meet attribution requirements, thereby upholding 'an exacting threshold for attribution' (Moir 2015, 722). But there was dissent among several judges and the ICJ effectively refused to 'address the circumstances under which a state has a right to use force in self-defence against (and only against) NSAs' (Moir 2015, 686). This is a significant limitation in terms of assessing the emerging range of acceptable limits of the attribution standard after 9/11.

Surveys of state practice demonstrate movement but also significant uncertainty on whether the use of defensive force against non-state actors is justifiable if it is unattributable to the host state. Trapp (2015, 689–94) identifies three groups of state responses to prominent cases of such uses of force: those where a majority of states came out clearly in favour of such a right, those where a majority were opposed, and a significant number of cases that split the international community or did not trigger reactions. This leads her to argue that 'state practice suggests support for the legitimacy of such a right [to respond forcefully to unattributable attacks] in principle' (Trapp 2015, 694), but that its contours are still being worked out in practice.

We can see this play out in various use-of-force practices states have employed as part of counterterrorism efforts. Forceful responses to nonattributable attacks by the Islamic State (ISIS) have triggered various interpretations and justifications 'without any possibility to establish a common understanding of what international law could mean' (Corten 2017, 17). The fact that such interpretations are far from uniform signals an increasing mismatch between the legal-regulative and normative orders.

A particular practice to consider is the 'unable or unwilling' formula, which implies a further departure from even expanded understandings. This has been chiefly employed by the United States, who argue that the use of force is permissible if the host state is 'unwilling or unable to take measures to mitigate the threat posed by domestic non-state actors' (G.D. Williams 2012, 630). Variations of the 'unwilling or unable' formula have been invoked as the legal basis for airstrikes against ISIS in Syria by the United States, Turkey, and Australia (Lanovoy 2017, 572). Legal scholars argue that this formula is based on the necessity principle for the use of defensive force to be found in customary international law (Trapp 2015, 695; Deeks 2012, 495; G.D. Williams 2012, 630; Dinstein 2001, 275). Here, the argument goes that the use of defensive force becomes necessary against a state that is either complicit in non-state actors using its territory for their operations ('unwilling') or for some reason unable to prevent such usage.

But the 'unwilling or unable' phrase is by no means consistently used (Gray 2018, 237). More fundamentally, it points to an inherently speculative and deeply subjective mode of assessment, as it has typically been made by the intervening state (Deeks 2012; Ahmed 2013; Bode 2017a). Moreover, it is clear that the 'unwilling or unable' formula will only ever be used against some states, adding to its problematic nature and positioning in a contested area: 'This is a one-sided doctrine in that it is impossible to envisage it ever being invoked against the United States, or even against European states that have shown themselves to be unable to act against terrorists operating from their territory' (Gray 2018, 245).

Moir (2015, 736) argues that 'most claims of self-defence against terrorist targets have asserted the right only against terrorist targets', rather than against other locations on host state territory. This underlines the ambivalence of the formula as an actual guideline of using force.

Following similar arguments in relation to post-9/11 practice, many state actors have characterised the threat posed by ISIS, and therefore also the response by states, as exceptional rather than as an indication of widening self-defence standards. French Legal Adviser Francois Alabrune, for example, cautiously justified French military action against ISIS in Syria after the 2015 Paris attacks as a 'special case' (Gray 2018, 238). UN Security Council debates, in particular the one leading up to Resolution 2249, which condemned ISIS attacks in the autumn of 2015, illuminate this aspect further. Speaking directly to the distinction we make between a realm of international law and a realm of international normative order, Russia affirms that 'the French resolution [2249] is a political appeal, rather than a change to the legal principles underlying the fight against terrorism' (UNSC 2015, 5). Yet, it is precisely within this realm of what is *politically* accepted as appropriate interpretations of the law of self-defence that we see growing uncertainty.

Gray (2018, 242) provides a succinct summary of whether there is now a right for using force in response to a nonattributable attack conducted by terrorist actors: 'Before 9/11 there was very little support for such a right; the legal significance of 9/11 remains unclear; the post 9/11 incidents are not conclusive'.

Imminence

A second standard that has witnessed considerable movement is imminence in the context of self-defence. The UN Charter's Article 51 specifically allows states to use force in self-defence 'after an armed attack has occurred' (United Nations 1945). Since the 1980s, states have begun to support *pre-emptive* self-defence in case of an *imminent*, that is, temporally proximate, armed attack, although state practice on this was far from clear or uniform (Ruys 2010, 324-6; Lubell 2015, 701). Understandings remain attached to the so-called Caroline formula that stipulates a restricted version of pre-emptive self-defence when 'the necessity of self-defence was instant, overwhelming, leaving no choice of means, and no moment of deliberation' (Webster 1841). There are arguments that these Caroline requirements have become 'too restrictive' (Deeks 2015, 666) and bear little relation (even historically) to how states have used or considered using force (M. Doyle 2008, 15). But 'a temporal description, pointing to a specific impending attack' (Lubell 2015, 699) remains the traditional descriptor of imminence. This temporal understanding of imminence has, along with necessity and proportionality, become a requirement of justifying the defensive use of force.

Some states, chiefly the United States and Israel, have attempted to push the meaning of pre-emptive self-defence even further towards including more temporally distant emerging threats, especially in connection to weapons of mass destruction and in response to threats posed by non-state actors (Warren and Bode 2014, 2015; Peter 2011). After 9/11, the Bush administration thus blurred the lines between pre-emption (responding to imminent in the sense of immediate threats) and prevention (long-term, latent threats) in key documents such as the National Security Strategy 2002, arguably 'as a means to make its preventive strategy more acceptable to the international community' (Warren and Bode 2015, 181).

But these remained singular understandings in the mid-2000s: two international reports indicative of a shared global understanding published after 9/11, the Report of the High Level Panel on Threats, Challenges, and Change entitled 'A More Secure World: Our Shared Responsibility and the UN Secretary-General's in Larger Freedom' affirmed the continued relevance of a limited, *temporal* reading of imminence (Ruys 2010). In fact, the Bush administration's strategy to blur distinctions between pre-emption and prevention crystallised 'a consensus surrounding the legality of self-defence against imminent threats' (Schmidt and Trenta 2018, 209). *In Larger Freedom* affirms this and points to collective action by the UN Security Council as opposed to unilateral action in the case of prevention:

Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign states to defend themselves against armed attack. Lawyers have long recognised that this covers an imminent attack as well as one that has already happened. Where threats are not imminent but latent, the UN Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security (UN Secretary-General 2005, 33).

But understandings of imminence continue to diverge. In the context of using military force against terrorist suspects, under the Obama administration the United States largely separated imminence from its heretofore common temporal meaning (Peter 2011; Warren and Bode 2015; Gray 2018, 236). This connects to endeavours of reinterpreting imminence in response to the changing 'capabilities and objectives of today's adversaries' (Bush 2002, 15) started by the Bush administration. What this refers to, in the context of 9/11, is the nature of terrorist attacks characterised by 'unpredictability, stealth, and concealment' (Deeks 2015, 672). As not only the United States but also the United Kingdom have argued, this requires a change in the understanding of imminence. In 2017, the UK Attorney General, Jeremy Wright, highlighted the law's capacity to adapt to 'modern developments and new realities' and quoted the understanding of imminence put forward in the so-called Bethlehem principles: '[t]he 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' (Wright 2017). However, critical voices do not find these versions acceptable because they leave too much up to the discretion of individual states and therefore significantly lower use-of-force thresholds, much like in the application of the 'unwilling or unable' formula: in their efforts to 'prevent vague and non-specific threat[s] … it challenges not so much the interpretation of imminence, but in effect calls into question the very existence of the imminence requirement' (Lubell 2015, 707).

A further understanding attached to what constitutes an imminent threat has seen it conflated with a group identity of terrorist suspects. In other words, all 'members' of terrorist groups count as imminent threats because the modus operandi of terrorist groups is to constantly plan attacks (Koh 2010). As the United States has argued, forcible self-defence actions against terrorist suspects therefore do not require 'clear evidence that a specific attack on Americans and interests will take place in the immediate future' (US Department of Justice 2013). This reading completely delinks imminence (or necessity, another vital principle regulating the use of force) from a case-by-case assessment (Brooks 2013). Even a case-by-case assessment could not, in any case, be openly contested due to secrecy and the lack of transparency surrounding current targeting practice. Following these arguments, one of the key prudential principles governing the usage of military force, imminence, is always already fulfilled when it comes to terrorists (Warren and Bode 2015). US doctrine therefore 'offers an extremely wide discretion to the state using force' (Gray 2018, 236) as 'the notion of imminence is diluted in the all-encompassing aura of threat' (Brunstetter 2012).

Of course, practices connected to a single state, even if that state is the United States, do not lead to a mismatch between the rule of international law and the regularity of normative order surrounding it. In fact, similar to the ongoing discussions around attribution, there is uncertainty as to whether and which states support a US-style, broad understanding of imminence. Some conclude that both US allies, such as chiefly Israel, the United Kingdom, and Australia, and strategic competitors, such as India, China and Russia, have at least accepted a widening of the imminence standard (Schmidt and Trenta 2018; Fisk and Ramos 2014). Others, by contrast, argue that the new, expanded understanding of imminence has failed to gain majority support among the society of states, notably because it 'risk[s] ushering in a new age of widespread unwarranted force on the pretext of self-defence' (Lubell 2015, 707). Overall, these practices have triggered significant debate, including among international legal jurists.

Targeted killing

Self-defence has also figured prominently in US justifications of its targeted killing of suspected Al Qaeda terrorists and affiliates and adherents. The overall practice has been subject to considerable critique, as many commentators 'do not accept the existence of an ongoing armed conflict outside Afghanistan against a diverse range of terrorist groups, some of which took no part in the 9/11 attacks' (Gray 2018, 235). In fact, contributions about the extent to which targeted killings, in particular via drone strikes, have altered the legal regime governing the use of force are plentiful (see, for example, Melzer 2008; Finkelstein, Ohlin, and Altman 2012; McDonald 2017; O'Connell 2010).

Rather than going into the many important intricacies of this debate, our discussion focuses on how *targeted killing as a practice* has been evaluated by states deploying armed drones and whether it has begun to appear more 'acceptable'. This would signal the evolution of previous understandings of political assassination and their legality, also implied by the morally distancing language of targeted killing. There is much discussion about the terminological distinction between 'assassination' and 'targeted killing' as conceptually significant or merely mediated by scholars' judgements on the legality or morality of such practices (Carvin 2012, 543; Senn and Troy 2017, 186). As Hurd (2017, 307) highlighted, they point to 'a practice with a long history and some relatively stable expectations about its legitimate use'. We do not engage with this debate in detail but, instead, start our argument from the fact that they are conceptually related and that the parameters of that relationship are undergoing change, with significant consequences for the relationship between the realms of international law and international norms.

According to a report by Philip Alston, former UN Special Rapporteur on extrajudicial, summary or arbitrary executions, 'targeted killing' as a term was first used by Israel in referring to its policy in the Occupied Palestinian Territories (UN General Assembly 2010b, 4). Melzer (2008, 5) defines targeted killing as 'the use of lethal force attributable to a subject of international law [for our purpose a state] with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them'. We could add that, especially in its US iteration, not only 'individually selected persons' but also groups of people have been subject to the practice, typically via 'signature strikes', based on patterns of behaviour associated with terrorist suspects (Gusterson 2016, 93).

Up until recently, targeted killing had been publicly condemned by most states in the international community – including by those who are now its chief performers (J.I. Walsh 2018, 144). But some of these same states had still resorted to targeted killing in the form of state-sponsored assassinations, such as CIA conspiracies to assassinate foreign leaders in the 1970s and US air raids intended to kill Muammar Qadhafi in the 1980s (Melzer 2008, 37). What makes these historical practices significantly different from today's targeted killing is that they were not publicly acknowledged: US officials involved in planning the raids on Libya, for example, refused to admit that their primary purpose was Qadhafi's assassination, 'sometimes with considerable indignation' (Ward 2000, 115).

These attitudes are changing: 'targeted killing is in the process of escaping the shadowy realm of half-legality and non-accountability, and of gradually gaining legitimacy as a method of counterterrorism and "surgical' warfare"' (Melzer 2008, 9). The United States, Israel, Turkey, the United Kingdom, Russia, the United Arab Emirates, and Saudi Arabia have publicly or implicitly acknowledged a policy of targeted killing terrorist suspects as part of their counterterrorist efforts. Under the Obama administration, the United States, for example, justified its targeted killing policy publicly in a series of speeches, using legal reasoning.

Scholars increasingly speak of how such state practices have led to the erosion of the (legal) norm prohibiting state-sponsored assassination in light of the simultaneous emergence of a targeted killing norm (Fisher 2007). Many works that mix international law and IR scholarship populate this field and often directly continue along the lines of established, sequential models of norm evolution in IR, such as the norm life cycle, while considering the opposite side of the spectrum in focusing on norm erosion (Großklaus 2017). Other scholars speak of targeted killing as an emerging norm (Jose 2017b; Lantis 2016; Fisher 2007). Jose (2017b), for example argues that this emerging norm has passed through the initial stages of Finnemore and Sikkink's norm life cycle, in particular after the targeted killing of Bin Laden was received positively rather than condemned by states and representatives of international organisations. Yet, many questions remain unanswered when we think about targeted killing as a norm in the 'pre-emergence stage' (Jose 2017b, 57).

First, so far, only a limited number of states have engaged in this practice. This group includes Israel, an early and significant performer whose engagement with the practice precedes that of the United States, Iran, or the United Kingdom (Fisk and Ramos 2014, 174). This finite range is not significant enough to refer to the practice as an international norm in terms of regularity. The chief performers of the targeted killing practice continue to be the United States and Israel. Yet, some scholars argue that a powerful state such as the United States is, by consequence, a powerful maker of norms: 'When the reigning hegemon promotes a new code of conduct, it alters the normative frame of reference for virtually everyone else' (Kegley and Raymond 2003, 391). Jose (2017b, 54) notes that 'the United States is … a powerful state capable of changing norms with a single act'. But these are highly challengeable assumptions given the inherently intersubjective nature of (international) norms and the complexity of normative structure that is not as easily changed as it is made out to be here.

Second, can the silence by the majority of the international community really be interpreted as a tacit acceptance of this norm? Jose (2017b, 48) affirms this, building on a rather simple legal understanding of silence, while stating that this can only characterise targeted killing as an *emerging* norm rather than an emerged norm (Jose 2017b, 49). This reading of silence is, again, contestable (Starski 2017). Some legal scholars do indeed interpret governmental silence vis-à-vis the practice of targeted killing as consent for widening self-defence standards (Reinold 2011; Tams 2009). We have already seen this line of argument in the context of the attribution standard with regard to the 'unwilling or unable' formula. Other scholars hold that silence cannot be interpreted as proof of changing international law (Corten 2010, 180). Silence is ambiguous, making its interpretation in the international law discourse 'a political act' (Schweiger 2015, 270). This ambiguity therefore allows two competing readings of the silence on targeted killing as a practice that are on opposite sides of the spectrum: either as tacit consent or disregarded as legally irrelevant (Schweiger 2015, 273). For our purposes, silence adds to the situation of uncertainty in the increasingly contested areas surrounding legal use-of-force standards.

Rather than arguing that targeted killing is on the verge of becoming a norm or an emerging norm, we consider it as a set of practices that attempt to alter the normative content of the norm prohibiting state-sponsored assassination. But, in similar ways to those we have examined in relation to the imminence and the attribution standards, this practice has not been uniform or widespread. In this sense, we do not argue for a new regularity regarding targeted killing but argue rather for a contestation of an existing norm. We therefore again remain more interested in the consequences of targeted killing as a destabilising practice of the international legal order in the sense that is creates more uncertainty and a greater mismatch between legal norms and the associated acceptable standards of appropriateness (norms). The destabilising effect of this uncertainty manifests in more readily available interpretations or readings to legitimise recourse to the use of force: a normalising of the use of force as a first rather than as a last resort.

Further, the norm prohibiting state-sponsored assassination and evolving state practices on targeted killing appear to differ mostly in relation to whether they target state or non-state actors. Targeted killing appears to have become more 'appropriate' only in the context of counterterrorism rather than as applied to foreign state leaders. In this sense, the contours of the political assassination norm that identified the killing of state leaders as a source of systemic stability within a Westphalian ordering system is still intact (Ward 2000, 116). Further, the state-centric norm prohibiting political assassination and the simultaneous targeted killing practices to counter non-state actors safeguard the central position of state actors as arbiters of when and how using (lethal) force is most appropriate. This conduct can still have debilitating effects for the overall norm prohibiting assassination: 'even actions against nonstate, terrorist targets are, in the long run, likely to undermine the norm as a whole and erode the barriers to the use of assassination in other circumstances' (Ward 2000, 129).

Many commentators, such as Philip Alston, explicitly associate the spread of the targeted killing practice among states (singling out Israel, the United States and Russia) with the technological availability of drones (UN General Assembly 2010b, 3). Others, by contrast, contend that 'while the story of the rise of targeted killings is in large part the story of the rise of the drone, politics rather than technology drove both developments' (J.I. Walsh 2018, 150). This debate ultimately revolves around the perception of technology either as instrumental or as vested with a capacity to shape social meaning. We find that states' choices are explicitly mediated by what is technologically possible. Also, some of the features inherent to drone technology shaped new political, legal, and ethical understandings of appropriateness. We need to appreciate, though, that the US-declared 'war on terror' was an important push factor for drone technology, which had been technologically available and readily developed for some time. 9/11 therefore provided the necessary context to overcome some social constraints over using unmanned aircraft. But then the use of drones took on a dynamic of its own.

Alston further argued how the practice of targeted killing is tied to 'acting under colour of law', cautioning how '[i]n the legitimate struggle against terrorism, too many criminal acts have been re-characterized so as to justify addressing them within the framework of the law of armed conflict' (UN General Assembly 2010a, 3; see also Hurd 2017, 307). We could go further and argue that the very exercise of putting arguments on targeted killing into the language of law, whether advanced in opposition or in favour, still serves to put them onto legal–normative terrain. There is also a distinctly functional logic to targeted killing as practices: 'being framed as a military tactic …, targeted killing rids itself of its historical association with the clandestine practice of assassinating political leaders and opponents' (Krasmann 2012, 669). This speaks to exactly the kind of observations we have been making about the creation of contested areas due to mismatches between international law and the normative order. This reasoning also highlights the juxtaposition associated with the indeterminacy and permissiveness inherent in international law – thereby leaving 'space for security matters to embed themselves in the law' (Krasmann 2012, 677; see also Hurd 2016).

In summary, we can make sense of these diverging interpretative practices through considering how they relate to the relationship between international law and normative order. They point to two consequences associated with an increasing lack of shared understanding surrounding the use-of-force law. First, diverging and ambiguous state practices have led to widely different doctrine-based understandings put forward by groups of legal scholars. This is especially true in the case of the attribution standard. Experts in the law of self-defence 'drew opposing conclusions regarding the state of the law, often as the result of the review of the very same instances of state practice' (Marxsen 2017, 91). In this essentially indeterminate situation, legal-doctrinal analysis does not and cannot offer firm answers (Marxsen 2017, 92). Yet, this situation arguably enables a second observation. As demonstrated by readings of imminence that separate it from immediacy, some states have used this wider lack of agreement to put forward highly contestable, potentially destabilising readings. Even though these are not widely accepted, they still point to an increasing elasticity in highly indeterminate circumstances. Marxsen (2017, 92) notes that, under these conditions of indeterminacy, 'scholarly positions taken are in fact motivated by political choices' – and the same, of course, also goes for purported choices by expressly political actors in the debate.

Second, this lack of shared understanding has led to the emergence of a series of contested areas in international law in terms of the use of force. As figure 3.2 depicts, the thoughtful practices of states regarding imminence without immediacy or unwilling or unable are connected to some established understandings of appropriateness. But such practices also seek to coin new understandings that are currently outside the spectrum of the normative order, thereby creating contested areas. Practices related to targeted killing likewise try to connect to some established understandings not only to move into the realm of normative order but also to shape conceptions of normative order.

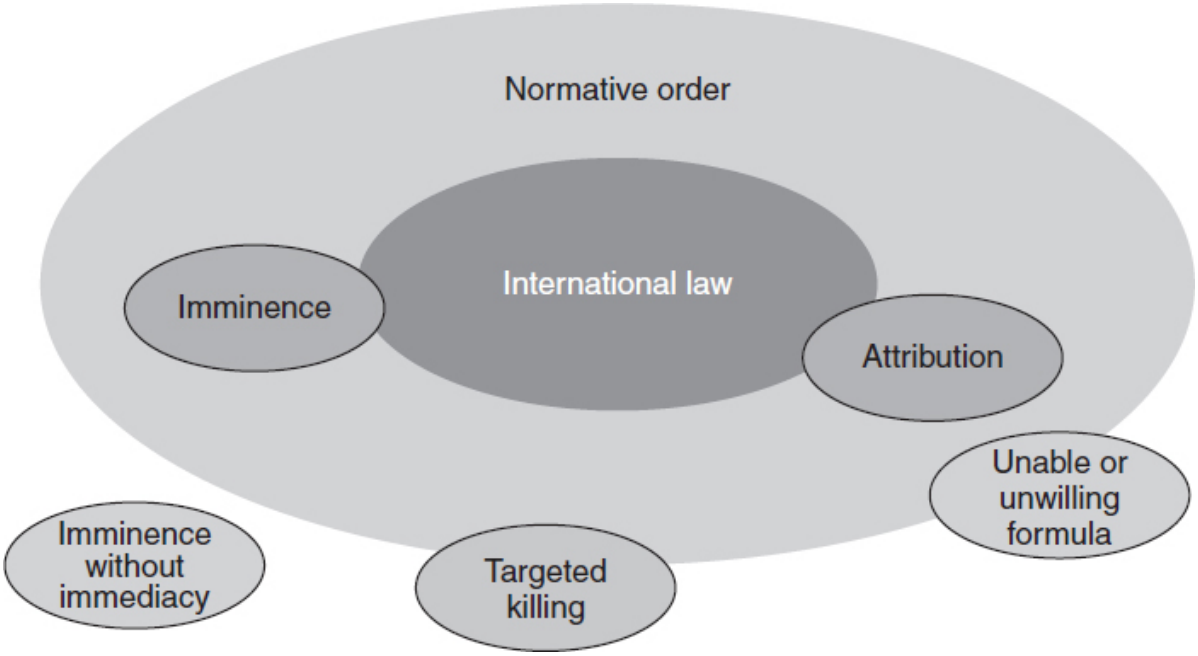

Figure 3.2 Emergence of contested areas outside of current normative order.

These developments signify that there is now considerably less agreement among states about the precise content of, and established understandings relating to, standards such as attribution and imminence than there was ten years ago. These contested areas come with the risk of lowering thresholds towards using force, which also means that a normative order is not necessarily absent: a lack of clarity results in a highly permissive environment for using force, and justifications for its use can more 'easily' be found within these increasingly elastic, contested areas of international law. In this context, new normative standards of when and what kind of use of force is appropriate are emerging on a local, individual level but can diffuse to a macro level.

The emergence of contested areas triggers another observation: the risk of potentially 'hollowing out' institutionalised standards of international law by leaving them intact in theory or in treaty form but changing their content in practice. This is not necessarily a question of ambiguity. While legal norms themselves remain static, their range of accepted interpretations or those deemed to be appropriate change (Kammerhofer 2015, 627). This creates the risky situation that 'established norms and rules of international law are preserved formally, but filled with a radically different meaning' (Krasmann 2012, 674).

So far, this lowering of thresholds towards the use of force has been most clearly connected to the use of unmanned aerial vehicles or drones, particularly by the United States, while the United Kingdom has also followed the same line of argument on some occasions (Wright 2017; Turns 2017). But, interestingly, and distinct from these purposeful, deliberative movements in terms of diverging legal justifications for action provided by states, the availability of particular use-of-force technologies, such as drones, may count as another push factor for lowering the use-of-force thresholds. Following a counterfactual line of argument, had the United States not had access to drone technology, it is very unlikely to have engaged in the same number of military interventions over the past eighteen years. Novel understandings of how appropriate states consider the use of force to be may therefore also emerge through (finding new ways of) using available security technologies.

The embeddedness of and relationship between international law and normative order is at the centre of our examination of these detrimental dynamics. As Brehm (2017, 71) succinctly argues, 'evolving security practices challenge the categories and disrupt the human–machine configurations around which the legal regulation of force is articulated. This generates controversies and uncertainties about the applicability and meaning of existing norms, thus diminishing existing law's capacity to serve as a guidepost'.