

Extraterritorial Law-Enforcement: Combating Non-State Actors

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Abstract

As a relatively new instrument of warfare, drones are an important tool in the global war against terrorism. Its deployment is often couched in the language of self-defence. However such thesis raises several questions with respect to the concept of self-defence. This article will elaborate on the concept of self-defence, first from a historical perspective and second its current understanding. From thereof, the deployment of drones will be assessed from two different approaches; namely the sovereign-right and belligerent-right approach.

Keywords

drones; non-state actors; extraterritorial law-enforcement; self-defence; Article 51 UN Charter; ICJ; international humanitarian law (IHL); international human rights law

1. Introduction

They are like conducting a war on a Playstation; drones.¹ For the Obama administration, drones are an important, perhaps even the favourite weapon in the war on terror.² However, this enhanced weapon of extraterritorial law-enforcement is highly controversial. For some, this method of warfare is legal under international humanitarian law, pointing to the enshrined right of self-defence in the UN Charter.³ Others point to the violation of sovereignty and international human rights law by deploying this enhanced weapon.

¹ Officially known as Unmanned Aerial Vehicle (UAV).

² F Kruin, 'Het is onbemand en het schiet: Obama's wapen' *NRC Handelsblad* (Amsterdam, 16 April 2012).

³ Y Dinstein, 'Vechten met de wet in de hand' *Nederlands Dagblad* (Barneveld, 9 February 2012).

This article will therefore elaborate on the concept of self-defence under international law and will particularly focus on the use of drones. It will first address the concept of self-defence from a historical perspective; that is to say how state practice developed the concept of self-defence under international law. To that end, it will focus on four historical periods; that is the period upon 1600 (the just-war doctrine); the period 1600-1815 (the emergence of the law of nations); the period 1815-1919 (the rise of legal positivism) and the period from 1919 upon today (known as the revival of the just-war doctrine).⁴ Having outlined the historical context, this article will consequently elaborate on the *current* understanding of self-defence, that is its meaning under Article 51 of the UN Charter, the theoretical debate with respect to self-defence and lastly the International of Justice's (hereinafter "ICJ") opinion with respect to self-defence. Having elaborated on the concept, this article will address self-defence in relation to non-state actors. The article will conclude by discussing the ramifications of two legal strategies in order to combat non-state actors; that is, the *belligerent-right* approach and the *sovereign-right* approach.

2. Self-Defence through History

Self-defence in the first period was embedded in the just-war doctrine. In the just-war doctrine, the normal condition of international affairs was one of peace. However, it was long contested that the law of nature was one of peace. It was nevertheless, under stoic and Christian influence, that it was agreed that nations and people were applicable to a universal set of norms. Though the stoic and Christian traditions differed in many ways, both agreed that the natural state of world affairs was one of peace 'with war being an exceptional and perverse state of affairs requiring some kind of explicit justification'.⁵ That explicit justification, in other words, would become the just-war doctrine. Just-war scholars agreed on five main principles or criteria in order for a war to be just:⁶ Firstly, it was *auctoritas principis*; implying that a just war could only be waged under the authority

⁴ The historical periods are based on S. Neff's periodization on the use of force under the law of nations and his work will be served as building blocks for this article. See for his extensive work on the history of the law of nations: S. Neff *War and the Law of Nations* (Cambridge University Press 2005).

⁵ *ibid* 45; MT Karoubi, *Just or Unjust War?* (Ashgate Publishing Limited 2004) 64-5.

⁶ *ibid* 49-52. See also: Y. Dinstein *War, Aggression and Self-Defence* (Cambridge University Press 2011) 66.

of a sovereign. The second criterion of a just war was *personae*; only certain categories of persons were allowed to join in the hostilities. The third was known as *res*; meaning that a just war had to have a well-defined objective. The fourth principle came to the very heart of the doctrine, namely: a *justa causa*. In order to make war permissible, war had to pursue a valid aim. A war could not be just on both sides, requiring that the sovereign had to make sure that the law favoured his side. The last criterion was that of *intentio recta*; rightful intention. The war had to be waged for the purpose of correcting evil and thus promoting good and to bring the opponent on the path of righteousness.⁷

In this particular period, self-defence was considered only to be allowed against an on-going attack, implying that States were allowed to fend off the attack as it actually occurred. However, necessity fulfilled a key role with respect to self-defence; implying that not *all* force was permissible (for instance that kind of force aiming at the total destruction of the enemy), but rather for the sake of obtaining justice and the re-establishment of peace, embedded in the framework of necessity.⁸

In the period following the just-war era, the emergence of the law of nations (1600-1815), nation-states and international law (referred as the law of nations) emerged.⁹ The law of nations added a new body of law to the part of natural law which focused on morality. The law of nations was truly a product of human beings; a bottom up model of law, focusing on the practice of states.¹⁰ Thus, the new law was of empirical character, whereas the first (natural) was derived from morality. In this era, self-defence was perceived much broader than in the age of the just-war doctrine. Self-defence, as a right of states (known as a defensive war), differed from the narrow sense in a way in preventing an attack from being launched in the first place; being regarded as offensive in nature and thus allowing preventive action.¹¹ Moreover, a defensive war allowed that force that was necessary to remove the threat altogether, whereas in the just-war doctrine, responding force was regarded as strictly proportionate. However, speculation about a

⁷ Dinstein (n 6) 66; Neff (n 4) 51.

⁸ Neff (n 4) 61, see also Dinstein (n 6) 67 and HW Hensel, 'Theocentric Natural Law and Just War Doctrine' in HM Hensel *The Legitimate Use of Military Force* (Ashgate Publishing Limited 2008) 5-6. On the re-establishment of peace, see J von Elbe, 'The Evolution of the Concept of the Just War in International Law' (1939), *The American Journal of International Law* 669.

⁹ Neff (n 4) 85; JS Kunz, 'Natural-Law Thinking in the Modern Science of International Law' (1961) *The American Journal of International Law* 952.

¹⁰ Neff (n 4) 86.

¹¹ *ibid* 128.

threat was not regarded as a *justa causa*. ‘The impending danger must be reasonably clear and imminent’.¹²

The third period was dominated by legal positivism.¹³ Law was by and large a product of human creation; known by state practice and by culture. Natural law, that dominated the relations between States in the medieval period, almost vanished away.¹⁴ As a bottom-up model, legal positivism set nation-states as the cornerstones of the international system. Moreover, war was understood in terms of states’ national interests and viewed as a normal product of international relations.¹⁵ War was the new mode of existence, with a state of war as the framework in which acts of war took place.¹⁶ Thus, the issues related to the *jus ad bellum* (the law to resort to war), at the very centre of the medieval just-war doctrine, were ‘quietly dropped from legal consideration’.¹⁷

Self-defence, in the era of legal positivism, was regarded as defensive in order to fend off an attack. Although the nineteenth century did not contribute significantly to the concept of self-defence, the Caroline affair of 1837 was an interesting affair of state practice. It concerned a situation in which insurgent forces took refuge in the United States and mounted attacks on British forces in Upper Canada. The Caroline ship was used for transportation in support of the rebel forces. British forces, however, acting pre-emptively, took possession of the Caroline in US territory, and destroyed the Caroline. The attack was however not directed against the United States. The action was directed against a group of individuals who used US territory as their basis. The affair was viewed as an act of extraterritorial law-enforcement and was embedded in the language of self-defence.¹⁸

In the last period, the revival of the just-war doctrine (1919-), the fundamental principle of the just-war doctrine, namely that the international state of affairs was one of peace, with war being exceptional, was reinstated.¹⁹ The Covenant of the League aimed at reducing the frequency of war.²⁰ This was, however, not effective. It did not restrict the use of force

¹² *ibid* 128.

¹³ Kunz (n 9) 952.

¹⁴ Neff (n 4) 4, see also Dinstein (n 6) 69.

¹⁵ A. Moseley, *Legal Positivism* (Encyclopaedia of Military Ethics) <<http://www.militaryethics.org/Legal-Positivism/8/>> accessed 30 January 2013; MT Karoubi (n 5) 121-2.

¹⁶ Neff, (n 4) 177.

¹⁷ *ibid* 201.

¹⁸ *ibid* 242.

¹⁹ MT Karoubi (n 5) 150.

²⁰ Neff (n 4) 285. On Article 2(4) UN Charter, see Q Wright, ‘The Outlawry of War and the Law of War’ (1953), *The American Journal of International Law* 365.

(as its successor the United Nations did) but rather war. In turn, the forms of ‘short wars’ remained. The world would learn another painful lesson.

After the Second World War, the drafters of the UN Charter sought to go beyond the Convention of the League, and prohibited all resorts to armed force, which can be found in article 2(4) of the UN Charter.²¹ Force was permitted by UN authorisation and secondly in case of self-defence, leading it to the front of the centre of the international stage as ‘a kind of all-purpose justification’.²² Self-defence, in the UN sense, referred to warding off an attack as it was taking place, with necessity and proportionality as key principles.²³ However, when the UN Security Council was less active, the doctrine of self-defence became more active, implying an all-purpose justification for armed force; the ‘self-defence revolution’. It would come down to a backward and forward orientation at the same time ‘rectifying past wrongs and preventing future ones’.²⁴ The expansion of the concept of self-defence came about through the practice of states, being expanded so extravagantly that it gave rise to suspicions that it was little more than war under another label.²⁵ The next chapter will discuss the concept of self-defence more in detail, taking the ICJ’s position into account and discussing the employment of drones in different perspectives.

3. Extraterritorial Law-Enforcement: ‘Self-Defence’

Since 2009, drones have made over 250 attacks.²⁶ For the Obama administration, drones are an important weapon in the global war on terror; being an effective and precise weapon of warfare.²⁷ In theory, drones are perceived by means of extraterritorial law-enforcement, that is to say an act of trespass in order to enforce the rule of law outside the State’s borders.²⁸ Such operations are couched in terms of self-defence.²⁹ As Neff has correctly pointed out, self-defence has been applied as an all-purpose

²¹ *ibid* 314.

²² *ibid* 315.

²³ Dinstein (n 6) 230. Dinstein adds a third condition precedent to the exercise of self-defence, namely immediacy, see Dinstein (n 6) 233-4.

²⁴ *ibid* 320.

²⁵ *ibid* 334.

²⁶ Kruin (n 2).

²⁷ *ibid*.

²⁸ Dinstein (n 3).

²⁹ ME O’Connell, ‘Remarks: The Resort to Drones under International Law’ (2010) *Denver Journal of International Law* 588; see also Neff (n 4) 242.

justification for armed force.³⁰ Before examining the use of drones under international law, the concept of self-defence will be further examined in the next section.

3.1. *Self-defence Further Examined*

According to Dinstein, self-defence refers to ‘a lawful use of force under conditions prescribed by international law, in response to a previous unlawful use of force. (...) The thesis of self-defence as a legitimate recourse to force by Utopia is inextricably linked to the antithesis of the employment of unlawful force by Arcadia (the opponent)’.³¹ The right of self-defence is enshrined in Article 51 of the UN Charter, stating:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.³²

However, article 51 of the UN Charter should be read in conjunction with article 2(4) of the Charter; the general obligation to refrain from the use of force by Member States. With respect to article 51 of the UN Charter, the article describes the right of self-defence in case of individual and collective self-defence. Article 51 refers to an ‘inherent right’ to self-defence, with two schools contending each other.³³ The first is derived from the thought of Grotius and Vattel,³⁴ stating that ‘the right of self-defence has its origin directly and chiefly in the fact that nature commits to each of his own protection’.³⁵ As Neff pointed out, this concept of self-defence was particularly reflecting the medieval tradition; self-defence as an inherent right of states, ‘exercisable without *auctoritas* from any superior body’.³⁶ On the contrary,

³⁰ Neff (n 4) 334.

³¹ Y Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press 2005) 176-78. See also R Anand, *Self-Defence in International Relations* (Palgrave Macmillan 2009) 61.

³² UN Charter, art 51.

³³ Anand (n 31) 62.

³⁴ Neff (n 4) 127-8.

³⁵ *ibid.* See also DW Bowett, *Self-Defence in International Law* (The Lawbook Exchange Ltd 2009) 4-5.

³⁶ Neff (n 4) 326.

Anand argues that law cannot supervise self-defence because power is superior to law when it concerns the survival of a state.³⁷

The second issue concerning the interpretation of article 51 is the notion of ‘an armed attack occurs’. The UN Charter fails to define what will constitute an ‘armed attack’. According to Anand,³⁸ the justification for self-defence,³⁹ in case of an armed attack, must be derived from state practice. According to him, these justifications are:⁴⁰

- The claim that a State may invoke self-defence in response to attacks by insurgents, terrorists and other non-state actors operating from another State;
- The claim to protect or rescue its nationals abroad;
- The claim to pre-empt in an imminent armed attack;
- The claim based on humanitarian purposes; that is humanitarian intervention.

3.2. *The ICJ's position concerning self-defence*

The ICJ, in its Judgement in the *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua* in 1986,⁴¹ the ICJ considered, among other things, the concept of self-defence. The case concerned the alleged US support of the Contras in their war against the Nicaraguan Government and the laying of mines in harbour of Nicaragua. The Nicaraguan Government pointed out that the US interference was a violation of its sovereignty and non-intervention. The US, on the other hand, argued that it acted on basis of self-defence.

The ICJ examined the concept of self-defence and the prohibition of the use of force. The ICJ ruled that self-defence, individual or collective in nature, is only allowed in response to an *armed attack* constituted by a State, *i.e.* by sending on behalf of a State armed forces (...) and also the sending *on behalf* of a State armed bands and groups, but *not* the assistance to rebels in the form of the provision of supplies.⁴²

³⁷ Anand (n 31) 62.

³⁸ Quoted in Anand (n 31) 63-4. See also Neff (n 4) 333.

³⁹ *no 1 (terrorists)*: TM Franck, ‘Terrorism and the Right of Self-Defence’ (2001) *The American Journal of International Law* 839-843.

⁴⁰ *ibid.*

⁴¹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua vs. United States)* [Merits] 1986 ICJ Rep 14, 181.

⁴² *ibid* 14, 195, see also Anand (n 31) 65.

However, as Thorp points out, the question arises whether or not States may lawfully resort to force, under article 51 of the Charter, when the ‘armed attack’ was not executed on behalf of a State, but rather on behalf of ‘non-state actors, such as terrorists’.⁴³ As Neff has pointed out, in history, belligerent acts could only be committed by States, implying that the acts of non-state actors were ruled out.⁴⁴ The next section will discuss ‘armed attacks’ by non-state actors in relation to self-defence and the ICJ’s opinion in that respect.

3.3. *Self-defence in relation to Non-State Actors*

As Zemanek points out, since the 9/11 attacks in the United States, a discussion arose whether such attacks – having the scale of 9/11 –, can be qualified as an armed attack in the sense of Article 51 of the UN Charter.⁴⁵ As the ICJ has stated in the case *Nicaragua vs. United States*, it held the view that only acts attributable to a State constitute an armed attack.⁴⁶ The ICJ repeated its view – ‘only acts attributable to a State can constitute an armed attack’ – in the *Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)* by stating: ‘Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. (...)’ Consequently, ‘the ICJ concludes that Article 51 of the Charter has no relevance in this case’.⁴⁷

However, in several separate opinions of ICJ judges, the position of the ICJ on Article 51 of the UN Charter has been challenged.⁴⁸ Judge Simma for instance, held in the *Democratic Republic of Congo vs. Uganda* case that:

⁴³ A Thorp, *Drone attacks and the killing of Anwar al-Awlaqi: Legal issues* (House of Commons, 2011) 10 <<http://www.parliament.uk/briefing-papers/SN06165.pdf>> accessed 28 April 2012.

⁴⁴ Neff (n 4) 377.

⁴⁵ See also: K Zemanek, *Armed Attack* (Max Planck Encyclopedia of International Law, 2012) 3 <http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e241&recno=13&subject=Use of force, war, peace and neutrality> accessed 28 April 2012.; T Ruys & S Verhoeven, ‘Attacks by Private Actors and the Right to Self-Defence’ (2005), *Journal of Conflict and Security Law* 289-290.

⁴⁶ *Military and Paramilitary Activities in and Against Nicaragua* (n 36) 195, 211. See also Zemanek (n 40) 3.

⁴⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (Advisory Opinion) [2004] ICJ Rep 136, 139.

⁴⁸ Zemanek (n 45) 3.

[S]uch a restrictive reading of Article 51 might well have reflected the State, or rather the prevailing interpretation, of international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying *opinio juris*, it ought urgently be *reconsidered*, also by the ICJ.⁴⁹

Nevertheless, as Zemanek correctly points out, scholars have found no proof that the interpretation of Article 51 of the UN Charter mainly relies on inter-State violence.⁵⁰ As stated above in paragraph 3.1, ‘nothing suggests that an armed attack can only be launched by a State.’⁵¹ This view is supported by UN Security Council Resolution 1373 (2001, Afghanistan) in which the UN Security Council reaffirmed the ‘inherent right of individual or collective self-defence’ and the need to combat by all means ‘threats to international peace and security caused by terrorist acts.’⁵² The view of the ICJ is therefore a consequence of a particular understanding of international law and those that have created it, implying that the view that ‘an armed attack may also be launched by non-state actors’ must *not* be ruled out directly. As it becomes clear, different opinions exist with respect to self-defence and non-state actors.

The next section will discuss the different approaches taken in order to combat non-state actors; namely the sovereign-right based approach and the belligerent-right approach. This distinction is of utmost importance because, as it will become clear, different bodies of law apply to the two approaches.

3.4. *Combating Non-State Actors*

In combating non-state actors, there are two different legal strategies, governed by two quite distinct set of rules.⁵³ The first is the belligerent-right, or military approach to terrorism. In this approach, the state uses force against people on the basis of their enemy status, implying that the opponent is a participant in the armed conflict, regardless of whether he or she is guilty.⁵⁴ The laws governing the actual use of force are international

⁴⁹ *Armed Activities on the Territory of the Congo (Democratic Republic vs. The Congo)* (Separate Opinion Judge Simma) [2005] ICJ Rep 168,11].

⁵⁰ Zemanek (n 45) 4; TM Franck (n 38) 840.

⁵¹ *ibid.*

⁵² UNSC Res 1373 UN Doc S/RES/1373 (28 September 2001).

⁵³ Neff (n 4) 382; N Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press 2010) 6, 85-6, 193-5.

⁵⁴ Neff (n 4) 384.

humanitarian law (IHL) rather than international human rights law (IHRL).⁵⁵

The second approach is the sovereign-right approach. With this approach the State relies on criminal law. Persons who are guilty of such wrongful acts will be prosecuted and punished for their wrongdoing. Here, an important restriction is the territorial jurisdiction of a State; when the accused falls outside the territorial jurisdiction of the particular State, the State should cooperate with another State in order to punish the wrongdoer. The body of law governing this kind of operation is mainly international human rights law (IHRL).⁵⁶

With respect to the United States, as Neff correctly explains, the belligerent-approach is prevailing over the former sovereign-right approach since 2001.⁵⁷ Before the attacks on the WTC, several indictments were issued against members of terrorist organisations, such as those against bin-Laden for his involvement and efforts on Somali territory.⁵⁸ Since 2001, however, the belligerent-right approach is prevailing over the sovereign-right approach, with Guantanamo Bay and the deployment of drones as prime examples. In the following section, both approaches will be discussed with respect to drone attacks.

3.4.1. *Drones: The Belligerent-Right Approach*

Much has been written in scholarly research about the deployment of drones. Paust for instance writes that the employment of drones is lawful under the umbrella of self-defence, and that actions against non-state actors are permissible under the interpretation of article 51 of the UN Charter.⁵⁹ Here, at stake is the discussion of whether or not the US attacks are characterised as an armed conflict. As O'Connell puts it:

Armed conflict is the exceptional situation, while peace is the normal situation. Thus, whether the United States or any state is lawfully using armed drones depends on whether the initial resort to armed force is lawful or whether the use is within a situation defined by international law as an armed conflict. (...) Outside armed conflict such use would be unlawful.⁶⁰

⁵⁵ *ibid.*

⁵⁶ *ibid.* 383; H. Duffy, *The War on Terror and the Framework of International Law* (Cambridge University Press 2005) 106-7.

⁵⁷ Neff (n 4) 386-7; N Lubell (n 53) 4.

⁵⁸ Neff (n 4) 386-7.

⁵⁹ JJ Paust, 'Self-Defence Targetings of Non-State Actors and Permissibility of U.S. Use of Drones In Pakistan' (2010) 19 *Journal of Transnational Law and Policy* 279.

⁶⁰ O'Connell (n 29) 586.

However, in a blurry account, she gives several reasons why the US is currently involved in a situation defined as armed conflict. She starts by pointing to the US campaign on the war of terror, starting in Afghanistan 2001, and quoting several members of the Bush and Obama administration who argued that the US is currently engaged in a war on terror.⁶¹ Thus, as she concludes, drones are battlefield weapons regulated under international humanitarian law and there is 'no more persuasive argument than pointing out that these are the rules the United States follows'.⁶² In turn, the employment and use of drones have been criticised for their arbitrary selection and unaccountability. The next section will discuss the deployment of drones under the sovereign-right approach.

3.4.2. *Drones: The Sovereign-Right Approach*

According to some scholars the resort to drones is illegal under international human rights law;⁶³ the body of law applicable to the sovereign-right approach.⁶⁴ In the approach however, a State should cooperate with another State in order to enforce criminal law. However, as Thorp correctly points out, cooperation between States becomes particularly difficult since States are unwilling or unable to prevent the non-state actors' attacks or to punish the wrongdoing.⁶⁵ For some, this is an argument in favour of acting on the basis of self-defence.⁶⁶

Consequently, others argue that drone attacks are illegal under international human rights law (IHRL). With respect to IHRL, this body of law is considered to apply to everyone under the control of the acting State.⁶⁷ As the United Nations Human Rights Committee has noted in its General Comment no. 31:

States Parties are required (...) to respect and ensure the Covenant right to all persons who may be within their territory and to all persons subject to their jurisdiction. (...) A State must respect and ensure the right laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. (...) The Covenant

⁶¹ *ibid* 592-4; H Duffy (n 56) 283.

⁶² O'Connell (n 29) 600.

⁶³ Thorp (n 43) 13; AN Khan, 'Legality of Targeted Killings by Drone Attacks in Pakistan' (Institute for Peace Studies, 2011) 6-7 <http://harvard.academia.edu/AkbarNasirKhan/Papers/366658/Legality_of_Targeted_Killings_by_Drone_Attacks_in_Pakistan> accessed 28 April 2012.

⁶⁴ Neff (n 4) 382-3.

⁶⁵ Thorp (n 43) 11.

⁶⁶ *ibid*.

⁶⁷ *ibid* 13.

also applies in situations of armed conflict to which the rules of IHL are applicable. (...) Both spheres of law are complementary, not mutually exclusive.⁶⁸

Thus, the body of international human rights law (IHRL) is considered to be applicable to everyone under the effective control of a State, even if not situated within the territory of the State concerned, or even in armed conflict. Thus, the Committee stated that the rights of all individuals, under article 2 of the International Covenant on Civil and Political Rights, should be respected and ensured, even in situations of armed conflict. However, this argument gives rise to discussion, since the US argues that IHRL does not bind the country extraterritorially.⁶⁹ Professor Yoram Dinstein also disagrees with this. He states that IHRL is only applicable outside of conflict.

Moreover, questions have been raised about the arbitrary selection of targets and a lack of transparency with respect to the procedures adopted by the US.⁷⁰ Thus, as Alston – Special Rapporteur on Extrajudicial Killings – concludes, the situation of drones is just like the ticking-time bomb scenario: ‘A thought experiment that posits a rare emergency exception to an absolute prohibition can effectively institutionalize that exception. Applying such scenario to targeted killings threatens to eviscerate the human rights law prohibition against the arbitrary deprivation of life.’⁷¹

4. Concluding Remarks

This paper aimed at discussing a relatively new instrument of warfare; drones. After summarizing the work of Neff, this paper gave a detailed account of the concept of self-defence. It became clear that the concept of self-defence, as laid down in Article 51 of the UN Charter, is interpreted in many ways. An important discussion arose about the concept of an ‘armed attack’. Questions were raised on whether or not an armed attack was applicable in the case of non-state actors. Though scholarly opinions differ, the ICJ has noted in the *Nicaragua vs. United States* case, that it held the view that only acts attributable to a State can constitute an armed attack.

⁶⁸ UN Human Rights Committee ‘The Nature of the General Obligations Imposed on State Parties to the Covenant’, (29 March 2004), CCPR/C/21/Rev.1/Add. 13 [10,11].

⁶⁹ Thorp (n 43) 13.

⁷⁰ Khan (n 63) 6.

⁷¹ UN Human Rights Council, Fourteenth Session ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston’ (28 May 2010), A/HRC/14/24[86].

However, some judges disagreed, arguing that the ICJ's position with respect to self-defence and non-state actors should be reconsidered, given the developments in State practice.

Subsequently, this paper sought to explain the deployment of drones in terms of Neff's categorisation; the belligerent-right approach and the sovereign-right approach. It became clear that the US is applying a belligerent-right approach since 9/11. Though some scholars agree that the US is lawfully deploying drones, others argue that these attacks seriously violate international human rights law and that this kind of warfare is unaccountable and indiscriminate of nature.

This paper did not aim at demonstrating whether or not the deployment of drones is lawful under international law or not. It aimed at discussing the deployment of drones from twofold perspective; namely the belligerent-right approach or the sovereign-right approach. This paper dealt briefly with the two approaches. However, some suggestions for further – detailed – research can be made and will be dealt with in the following section.

4.1. *Further Research*

An important discussion arose in this paper about the concept of armed attack. This paper briefly discussed the concept and pointed to the ICJ's interpretation of the subject. However, scholars differ in their opinions about the nature of an armed attack and, most importantly, in which way an armed attack should be understood with respect to non-state actors. This debate is of utmost importance because the concept of armed attack is seen as a precondition for invoking the right of self-defence under Article 51 of the Charter.

Second, scholars differ in their opinions about the different bodies of law applicable to deployment of drones. Some argue that they are subject to international humanitarian law, whereas others argue that they are illegal under international law, especially under international human rights law. As Neff puts it, 'the issue is whether the war on terrorism should be conducted within the constraints of the general international law of human rights, or it would be conducted under the umbrella of international humanitarian law'.⁷² A clear-cut answer to that question has not yet come, but this paper aimed at giving a starting point. Neff is right when he argues that State practice will determine that decision.

⁷² Neff (n 4) 394.