

The Proliferation of Armed Drones and Its Reflections on International Law: New Challenges to the Paradigm of the Use of Force during the US Drone Era

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ABSTRACT

Over the past decades, armed drones have begun to form an important part of the extraterritorial use of force as well as the use of force in internal affairs. The increasing use and proliferation of armed drones have created a new discussion/problem in the legal scholarship, especially in international law. For international law, its scholars mostly focused on the international human rights law and the law of armed conflict issues, as the most visible effect of the use of armed drones until now has been civilian causalities/losses. However, the slightly growing interest in the literature on the relation between the use of armed drones in international relations and jus ad bellum indicates the importance of the use of armed drones for jus ad bellum. At this point the question of this research arises, which is, whether the availability of armed drones changed the use of force paradigm and will strengthen the permissive views, especially in the context of the US drone era.

Silahlı Dronların Yaygınlaşması ve Bunun Uluslararası Hukuka Yansımaları: ABD SİHA Döneminde Kuvvet Kullanma Paradigmasına Yeni Meydan Okumalar

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Son yıllarda silahlı dronlar (silahlı insansız hava araçları) sınır ötesinde ve sınır içindeki kuvvet kullanımının önemli bir parçasını oluşturmaya başladı. Silahlı dronların (SİHAların) gittikçe artan kullanımı ve yaygınlaşması, hukuk literatüründe -özellikle de uluslararası hukuk literatüründe- yeni bir tartışmalar ve problemler yarattı. Bu zamana kadar silahlı dronların (SİHAların) kullanımının en görünür etkisi sivil kayıpları olduğundan dolayı, uluslararası hukuk hocaları çoğunlukla uluslararası insan hakları hukukuna ve silahlı çatışma hukukuna dair meselelere odaklandı. Literatürde uluslararası ilişkilerde silahlı dron (SİHA) kullanımı ve jus ad bellum arasındaki ilişkiye dair az da olsa artan ilgi silahlı dron (SİHA) kullanımının jus ad bellum için önemine işaret ediyor. Bu noktada, bu araştırmanın sorusu ortaya çıkıyor: ABD SİHA dönemi bağlamında incelemişinde, silahlı dronların (SİHAların) mevcudiyeti kuvvet kullanım paradigmında bir değişiklik yaptı mı ve bu durum müsamahakar görüşleri güçlendirecek mi?

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INTRODUCTION

During Obama's presidency, armed drones began to form an important part of the extraterritorial use of force as well as the use of force in internal affairs. The increasing use and proliferation of armed drones created a new discussion/problem in the legal scholarship, especially in international law. For international law, its scholars mostly focused on the international human rights law¹ and the law of armed conflict² issues, as the most visible effect of the use of armed drones until 2017 was civilian causalities/losses.³ However, a group of scholars pointed out the need to analyse the effects of the use of armed drones on the other fields of international law.⁴ As one piece of research says, the use of armed drones can be considered as 'a fresh challenge'⁵ to *jus ad bellum*. Kolb, although he does not go further, notes that 'the pace is set for a race to automated warfare'.⁶ However, unlike other means of possible automated warfare, like killer robots, armed drones are unlikely to be a part of the discussion about prohibition as neither states are willing⁷ to abandon them nor do their characteristics require such a conclusion though a prominent legal scholar suggested that drones should be banned^{8,9}.

There has been a growing interest¹⁰ in the literature on the relation between the use of drones

¹ See Heyns Christof et al. "The International Law Framework Regulating the Use of Armed Drones." *International & Comparative Law Quarterly*, Vol. 65, No.4, 2016, p. 791ff; Melzer, Nils. *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*. European Parliament Directorate General for External Policies, Policy Department Study, 2013, [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410220/EXPO-DROI_ET\(2013\)410220_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410220/EXPO-DROI_ET(2013)410220_EN.pdf); Ramsden, Michael. "Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki." *Journal of Conflict & Security Law*, Vol. 16, 2011, p. 385ff.

² See Barnidge, Robert. "A Qualified Defense of American Drone Attacks in Northwest Pakistan under International Humanitarian Law." *Boston University International Law Journal*, Vol. 30, 2012, p. 410ff; Martin, Craig. "A Means-Methods Paradox and the Legality of Drone Strikes in Armed Conflict." *International Journal of Human Rights*, Vol.19, 2015, p. 142ff.

³ Tams, Christian J., and Devaney, James G. "Jus ad Bellum: Crossing Borders to Wage War against Individuals." in *Legitimacy and Drones: Investigating the Legality, Morality and Efficacy of UCAVs*, edited by Steven J. Barela, Routledge, 2017, p. 46.

⁴ Doswald-Beck, Louise. "Confronting Complexity and New Technologies: A Need to Return to First Principles of International Law." *American Society of International Law Proceedings*, Vol. 107, 2012, p. 109.

⁵ Tams and Devaney, p. 26, 29.

⁶ Kolb, Robert. "Systemic Efficacy: Potentially Shattering Consequences for International Law." in *Legitimacy and Drones: Investigating the Legality, Morality and Efficacy of UCAVs*, edited by Steven J. Barela, Routledge, 2017, p. 305.

⁷ Cf de Groot, Melanie. "Death from the Sky: International Legal and Practical Issues on the Use of Armed Drones." in *Drones and Unmanned Aerial Systems: Legal and Social Implications for Security and Surveillance*, edited by Aleš Zavřník, Springer, 2016, p. 138.

⁸ See Wardrop, Murray. "Unmanned Drones Could Be Banned Says Senior Judge." *The Telegraph*, July 6, 2009, www.telegraph.co.uk/news/uknews/defence/5755446/Unmanned-drones-could-be-banned-says-senior-judge.html.

⁹ Cf Doswald-Beck, p. 116; de Groot, p. 152; Schulzke, Marcus. *The Morality of Drone Warfare and the Politics of Regulation*. Palgrave Macmillan, 2017, p. 194.

¹⁰ See Aronsson, Marie. "Remote Law Making: American Drone Strikes and the Development of Jus Ad Bellum." *Journal on the Use of Force and International Law*, Vol. 1, 2014, p. 273ff; Paust, Jordan J. "Remotely Piloted Warfare as a Challenge to the Jus ad Bellum." in *The Oxford Handbook of the Use of Force in International Law*, edited by Mark Weller, Alexia Solomou, and Jake William Rylatt, Oxford University Press, 2015, pp. 1095ff; Tams and Devaney;

in international relations and *jus ad bellum*. This interest indicates the importance of the use of armed drones for *jus ad bellum*. At this point the question of this research arises, which is, whether the availability of armed drones changed the use of force paradigm and will strengthen the permissive views. This research focuses on the period when the US Government was the prominent actor in the use of armed drones and other actors were merely catching up. Türkiye's recent rise in the field of armed drones has offered an alternative practice on this. However, the recent prominence of Turkish drones is out of the scope of this article given the limitations of space.

This research acknowledges the claim that drones are not as revolutionary as nuclear weapons. However, it argues that their features, especially their unmanned nature, allow states to use them in a quasi-revolutionary way and the way they are used facilitates changes in the use of force paradigm. As the state practice is the main changing factor in international law, by effecting the way states think of the use of force, armed drones affect the way through which the rules of international law are understood and interpreted. As the use of force against armed non-state actors is the priority for states today and states consider armed drones as the tool needed in struggle against non-state actors, armed drones strengthen the state practice in this regard. From that perspective, armed drones facilitate a less restricted approach to the use of force in the present author's view.

The problematic part of researching the use of armed drones is that the deficiency and generality of the information about drone strikes does not allow one to draw clear conclusions regarding states' attitudes towards them. Some states either deny the existence of a drone strike that they have carried out or only mention 'air strike' without making clear whether a drone was the aircraft that carried out the strike in question. Additionally, the secrecy surrounding them prevents proper legal evaluations.¹¹

This research first examines the terminological issues about drones, gives a brief history of the use of armed drones and then talks of the proliferation trend. Then it moves into an examination of the paradigm of the use of force in the existing UN Charter system and the effects of technology on this paradigm focusing in particular on armed drones. The rest of the research delves into the consequences of the increasing use of armed drones as per the international law of self-defense, specifically focusing on the self-defense against armed non-state actors. In the last part, concluding remarks will be given.

I. WHAT ARE DRONES?

This section will give a terminological background for drones and then will move to give a brief history of the invention of drones and the use of armed drones. The characteristics of armed drones will be touched upon in the next section in conjunction with their effect on the resort to force.

Chehtman, Alejandro. "The ad Bellum Challenge of Drones: Recalibrating Permissible Use of Force." *European Journal of International Law*, Vol. 28, 2017, p.173ff.

¹¹ Schulzke, p. 80.

A. Terminology Issues

Drones represent the first form of unmanned vehicles and seem to have spread all over the world for now. The original meaning of the word is ‘male drone’¹² whose only purpose is to fertilise the eggs of the queen bee¹³ and this nomenclature arguably comes from the sound that these vehicles make when they operate¹⁴. The term ‘drone’ is generally used as a brief expression for ‘unmanned aerial vehicles (UAVs)’. However, different usages exist in the academic literature on drones and within military circles. For instance, the US Air Force uses both ‘remotely piloted aircraft’¹⁵ and ‘unmanned aerial vehicles’.¹⁶ Also, a number of scholars and military studies prefer to use ‘unmanned aerial/aircraft systems’.¹⁷ The latter usage relies on the argument that the terms ‘unmanned aerial vehicles’ or ‘remotely piloted vehicles’ do not cover all aspects of this technology because they also include ‘control stations’ and ‘communication links’ and therefore should be called ‘systems’ rather than just ‘vehicles’.¹⁸ This approach considers this new technology as part of a more complex system. According to the definition of the US Army, whose choice is to use the term ‘unmanned aerial systems’, an unmanned aerial system ‘is comprised of the unmanned aircraft, payload, human element, control element, weapons systems platform, display, communication architecture, life cycle logistics, and includes the supported soldiers’.¹⁹

The problem with considering it as a system, as Anderson indicates²⁰, is that the unmanned nature of the system becomes questionable as human controller/pilots are part of the system. Although referring to this technology as ‘vehicles’ may not be sufficient to express its complexity, it more adequately reflects this technology’s unmanned nature.

Additionally, some national legal documents use the term ‘system’ but they also keep the term

¹² Berkowitz, Roger. “Drones and the Question of the Human.” *Ethics & International Affairs*, Vol. 28, 2014, p. 160.

¹³ Franke, Ulrike. “U.S. Drones Are From Mars, Euro Drones Are From Venus.” *War on the Rocks*, May 19, 2014, <https://warontherocks.com/2014/05/u-s-drones-are-from-mars-euro-drones-are-from-venus/>.

¹⁴ Leander, Anna. “Technological Agency in the Co-Constitution of Legal Expertise and the US Drone Program.” *Leiden Journal of International Law*, Vol. 26, 2013, p. 812.

¹⁵ International Civil Aviation Organization defines remotely piloted aircraft as ‘an aircraft where the flying pilot is not on board the aircraft’. See International Civil Aviation Organization. *Unmanned Aircraft Systems (UAS) CIR 328 AN/190*, p. x (2011), https://www.icao.int/Meetings/UAS/Documents/Circular%20328_en.pdf.

¹⁶ U.S. Air Force. *The U.S. Air Force Remotely Piloted Aircraft and Unmanned Aerial Vehicle Strategic Vision* (2005), <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1000&context=usafresearch>.

¹⁷ McBride, Paul. “Beyond Orwell: The Application of Unmanned Aircraft Systems in Domestic Surveillance Operations.” *Journal of Air Law and Commerce*, Vol. 74, 2009, p. 628; Buchanan, David R. “Joint Doctrine for Unmanned Aircraft Systems: The Air Force and the Army Hold the Key to Success,” p. 2 (May 3, 2010), <http://www.dtic.mil/cgi/tr/fulltext/u2/a525266.pdf>.

¹⁸ United States Government Accountability Office. *Report to Congressional Requesters: Unmanned Aircraft Systems Federal Actions Needed to Ensure Safety and Expand Their Potential Uses Within the National Airspace System*, 2008, p. 6, <http://www.gao.gov/new.items/d08511.pdf>.

¹⁹ U.S. Army UAS Center of Excellence. *Eyes of the Army: U.S. Army Roadmap for Unmanned Aircraft Systems 2010-2035*, p. 8, <https://fas.org/irp/program/collect/uas-army.pdf>.

²⁰ *Rise of the Drones: Unmanned Systems and the Future of War: Hearing Before the Subcommittee on National Security and Foreign Affairs*, 111th Cong. 2 (2010) (written statement of Kenneth Anderson), available at http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1002&context=pub_disc_cong.

‘vehicle’: Unmanned Aerial Vehicle Systems.²¹ Yet, a quick glance at the media and literature indicates that the most common expression for this new technology is ‘drone’.²² It seems legal documents tend to use the expression ‘unmanned aerial vehicle (or/and) systems’²³, probably, in order to avoid any confusion which may arise from the metaphorical side of the term ‘drone’.

Another issue regarding the terminology is whether the term ‘drone’ covers only ‘aerial’ vehicles or it also includes unmanned ground and underwater vehicles and, thereby, can be used as an acronym of all ‘unmanned vehicles/systems’. The US Navy prefers to refer to unmanned vehicles in the sea as ‘unmanned undersea vehicle’.²⁴ However, it is possible to encounter in the media a title like ‘underwater drone’.²⁵ Despite this current vagueness regarding to the terminology, it can be expected that in conjunction with the proliferation of the new forms of this technology some of these terminologies will come to the forefront.

Relying on this fact, this research will use the word ‘drones’ interchangeably with ‘unmanned aerial vehicles’ which are the most relevant version of this technology for international law for now.²⁶ However, this research will generally use ‘drones’ as it leaves the door open for the terminological developments in this regard.

Different classifications of drones exist in the literature. They are classified as ‘civil’ and ‘combat’ drones²⁷ or ‘commercial’ and ‘military’ drones. Some separate the combat/military drones into two parts: armed and surveillance/reconnaissance.²⁸ Although these classifications are helpful to an extent, they can be evaded by the nature of drones as all drones can be armed or could be used for the military purposes. With the trend started by Daesh, the armed non-state actors in the conflict zones began to rely, to the extent possible for them, on the arming of small civil/commercial drones or using

²¹ Turkish Directorate General of Civil Aviation. “*İnsansız Hava Aracı Sistemleri Talimatı* [The Instruction of Unmanned Aerial Vehicle Systems]”, Feb. 22, 2016, http://web.shgm.gov.tr/documents/sivilhavacilik/files/mevzuat/sektorel/talimatlar/SHT-IHA_12062017.pdf.

²² Kaag, John, and Kreps, Sarah. *Drone Warfare*. Polity, 2014, p. 21.

²³ See also *FAA Modernization and Reform Act of 2012*, Pub. L. No. 112-95, §§ 331-336.

²⁴ The US Navy. *The Navy Unmanned Undersea Vehicle (UUV) Master Plan* (2004), <http://www.navy.mil/navydata/technology/uuvmp.pdf>.

²⁵ Franz-Stephan. “Russia Tests Nuclear-Capable Underwater Drone.” *The Diplomat*, Dec. 14, 2016, <http://thediplomat.com/2016/12/russia-tests-nuclear-capable-underwater-drone/>; Popper, Ben. “What Exactly Is an Underwater Drone?”, Dec. 16, 2016, <https://www.theverge.com/2016/12/16/13984666/what-is-underwater-drone-china-us-navy>.

²⁶ It is still very common in the literature to use drones and UAVs interchangeably. See for instance; Horowitz, Michael, Kreps, Sarah E., and Fuhrmann, Matthew. “Separating Fact from Fiction in the Debate over Drone Proliferation.” *International Security*, Vol. 41, 2016, p. 7, n. 1; Gogarty, Brendan, and Hagger, Meredith. “The Laws of Man over Vehicles Unmanned: The Legal Response to Robotic Revolution on Sea, Land and Air.” *Journal of Law, Information and Science*, Vol. 19, 2008, p. 74.; Anderson, “Rise of the Drones”, para 2; Leander, p. 812. Also, some authors use the term ‘drone’ because of its popularity. See Sterio, Milena. “The United States’ Use of Drones in the War on Terror: The (II)legality of Targeted Killings Under International Law.” *Case Western Reserve Journal of International Law*, Vol. 45, 2012, p. 198, n. 1. Paust says that the most studied version in the literature of the remotely piloted vehicles are aerial ones and he considers drones as aerial vehicles as well. See Paust, “Remotely Piloted Warfare”, p. 1095, n 1.

²⁷ de Groot, p. 134.

²⁸ de Groot, p. 134.

them for surveillance purposes.²⁹ Another problem with this distinction is that a drone ‘can both spy and strike’³⁰ and therefore saying *armed drone* does not rule out the possibility of using it for surveillance or reconnaissance purposes. Therefore, the present writer differentiates drones as ‘armed’ and ‘unarmed’ as it makes more sense in terms of self-defense issues and avoids using ‘combat drone’ or ‘military drone’ for the purposes of the research.

The next part provides a historical background for the development and use of drones.

B. A Brief History of Drones

The history of drones has been traced back to the ancient times in the literature. Valavanis attributes the first unmanned aircraft to Archytas who most probably lived in 4th century BC..³¹ Archytas’ mechanical bird was getting energy from its stomach and arguably it was the first flying machine.³² Yet, Kingsley attributes this to ancient Chinese inventors who made a flying wooden bird which was used for military purposes and sounded more close to the idea of drone.³³ In the modern era, the idea of a flying craft developed at the beginnings of the 20th century and accelerated during and after the World War I.³⁴ The development of manned aircrafts evolved into unmanned aircrafts after the World War II.³⁵ With the shootdown of its spying manned aircraft in Soviet Russia and Cuba in 1960, the US accelerated its drone program.³⁶ A drone called ‘Fire Fly’ was used in Vietnam for reconnaissance and, however, according to Singer the first unmanned experience was not a big success for the US.³⁷ After this program, the second important drone program bore fruits in the 1980s with the US and Israel partnership.³⁸ In 1990s, the US made drones were used in NATO operations in Bosna & Herzegovina and Kosovo for reconnaissance purposes³⁹ as well as in the first Gulf War by the US⁴⁰. Unarmed drones were also used in Afghanistan against Al Qaeda in 1990s by the US.⁴¹

²⁹ Balkan, Serkan. *DAESH's Drone Strategy: Technology and the Rise of Innovative Terrorism*, SETA, 2017, pp. 34-38, <http://setav.org/en/assets/uploads/2017/08/Report88.pdf>.

³⁰ Zenko, Micah. “10 Things You Didn’t Know About Drones.” *Foreign Policy*, Feb. 27, 2012, <http://foreignpolicy.com/2012/02/27/10-things-you-didnt-know-about-drones/>.

³¹ Valavanis, K. P., and Kontitsis, M. “A Historical Perspective on Unmanned Aerial Vehicles.” *Advances in Unmanned Aerial Vehicles: State of the Art and the Road to Autonomy*, ed. Kimon P. Valavanis, Springer, 2007, p. 15.

³² Valavanis and Kontitsis, “A Historical Perspective”, p. 15.

³³ Kingsley, Peter. *A Story Waiting to Pierce You*, Point Reyes, CA: Golden Sufi Center, 2010, pp. 155-159 noted in Archytas, *Stanford Encyclopedia of Philosophy*, Aug. 23, 2016, <https://plato.stanford.edu/entries/archytas/>; Cf Gogarty and Hagger, p. 76, n 6.

³⁴ Valavanis and Kontitsis, “A Historical Perspective”, p. 20.

³⁵ Madej, Marek. “Tactical Efficacy: Notorious UCAVs and Lawfare.” in *Legitimacy and Drones: Investigating the Legality, Morality and Efficacy of UCAVs*, ed. Steven J. Barela, 2017, p. 244.

³⁶ Schwing, Richard P. *Unmanned Aerial Vehicles – Revolutionary Tools in War and Peace*, U.S. Army War College, 2007, p. 5, <http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA469608>.

³⁷ Singer, Peter Warren. *Wired for War: The Robotics Revolution and Conflict in the 21st Century*, Penguin Publishing Group, 2009, p. 55.

³⁸ Schwing, p. 7.

³⁹ Madej, p. 245.

⁴⁰ Schwing, p. 7.

⁴¹ Bergen, Peter, and Catherine Tiedemann. “Washington's Phantom War: The Effects of the U.S. Drone Program in Pakistan.” *Foreign Affairs*, July-Aug. 2011, p. 12.

The first use of an armed drone was recorded in 2001 in Afghanistan where the US Air Force killed a senior Al Qaeda member.⁴² Another attack was recorded in 2002⁴³, on November the 4th, 2002 a CIA armed drone killed an American citizen in Yemen who is claimed to be responsible for an attack to the U.S.S. Cole in 2000.⁴⁴ Additionally, the US also confirmed the claim that it has been carrying drone strikes in Southern Iraq.⁴⁵ The use of armed drones which was started by the Bush Administration after the 9/11 attack, accelerated by the Obama administration.⁴⁶ The Trump Administration continued to carry out drone strikes.⁴⁷

C. Proliferation of Armed Drones

Although the main user of armed drones was the US Government during the US drone era, other countries did have recourse to armed drones. The countries that are known to have resorted to the operational use of armed drones are a small fraction of countries. The UK used armed drones in Iraq and Afghanistan.⁴⁸ It, also, has been using American-made armed drones to carry out targeted strikes invoking the self-defense argument in Syria against Daesh's British members.⁴⁹ On the 7th of September 2015, Pakistan carried out its first drone strike with its indigenous armed drones in North

⁴² Fox News. "U.S. Kills Al Qaeda Leaders by Remote Control." Nov. 19, 2001, <http://www.foxnews.com/story/2001/11/19/us-kills-al-qaeda-leaders-by-remote-control.html>; O'Connell, Mary Ellen. "Remarks: The Resort to Drones Under International Law." *Denver Journal of International Law & Policy*, Vol. 39, 2011, p. 587.

⁴³ Gogarty and Hagger, p. 84.

⁴⁴ Johnston, David, and David E. Sanger. "Threats and Responses: Hunt for Suspects Fatal Strike in Yemen Was Based on Rules Set Out by Bush." *The New York Times*, Nov. 6, 2002, <http://www.nytimes.com/2002/11/06/world/threats-responses-hunt-for-suspects-fatal-strike-yemen-was-based-rules-set-bush.html>; See also Lotriente, Catherine. "Targeted Killings by Drones: A Domestic And International Legal Framework." *Journal of International & Comparative Law*, Vol. 3, 2012, p. 23. This attack was considered as the beginning of the tactical change in the war against terror and acknowledgement of assassination as a method in the war against terror See Karon, Tony. "Yemen Strike Opens New Chapter in War on Terror." *Time*, Nov. 5, 2002, <http://content.time.com/time/world/article/0,8599,387571,00.html>.

⁴⁵ Somerville, Keith. "US Drones Take Combat Role." *BBC*, Nov. 5, 2002, <http://news.bbc.co.uk/1/hi/2404425.stm>.

⁴⁶ According to the Bureau of Investigative Journalism the number of drones strikes carried out by the Obama Administration is around 560 whereas the Bush Administration carried 57 strikes. See Purkiss, Jessica, and Jack Serle. "Obama's Covert Drone War in Numbers: Ten Times More Strikes Than Bush." *The Bureau of Investigative Journalism*, Jan. 17, 2017, <https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush>.

⁴⁷ Gibbons-Neff, Thomas. "The First Drone Strikes of The Trump Administration Happened Over The Weekend." *Washington Post*, Jan. 23, 2017, https://www.washingtonpost.com/news/checkpoint/wp/2017/01/23/the-first-drone-strikes-of-the-trump-administration-happened-over-the-weekend/?utm_term=.90da15aea6d2.

⁴⁸ Joint Committee on Human Rights. *The Government's Policy on the Use of Drones for Targeted Killing (Second Report)* HL Paper 141 HC 574, 2016, p. 15, <https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf>. [Hereinafter The Joint Committee Report]

⁴⁹ BBC News. "Islamic State Conflict: Two Britons Killed in RAF Syria Strike", Sep. 7, 2015, <http://www.bbc.co.uk/news/uk-34178998>.

Waziristan.⁵⁰ Türkiye used armed drones against PKK terrorists, especially in Northern Iraq.⁵¹⁵² Türkiye's reliance on armed drones continued as the threats from non-state actors around its territory continued to exist, especially from PKK and the Syrian Crisis. Also, Iran reportedly used armed drones in Syria against former Syrian opposition groups.⁵³ Israel used armed drones in its continued attacks against Palestine, especially in Gaza⁵⁴ and also used them in Sinai, Egypt⁵⁵. Iraq relied on Chinese-made armed drones in its internal struggle against Daesh.⁵⁶ Similarly, a drone strike was recorded against Boko Haram by Nigerian Air Forces in 2016, however, no further record of another drone strike has been made after this attack or, probably, publicised.⁵⁷ There was no official report of China's resort to armed drones during the US drone era.

In addition to states using armed drones operationally, ten countries acquired armed drones during the US drone era: South Africa, Algeria, UAE, Kazakhstan, Egypt, Myanmar, Saudi Arabia, Turkmenistan, Jordan, Syria, India.⁵⁸ Also, there were countries which were likely⁵⁹ to resort them if

⁵⁰ Ansari, Usman. "Pakistan Surprises Many With First Use of Armed Drone", Defense News, Sep. 8, 2015, <http://www.defensenews.com/air/2015/09/08/pakistan-surprises-many-with-first-use-of-armed-drone/>.

⁵¹ Toprakci, Haydar. "PKK Terrorists Who Martyred Teacher Killed in Airstrike", Anadolu Agency, July 20, 2017, <http://aa.com.tr/en/turkey/pkk-terrorists-who-martyred-teacher-killed-in-airstrike/865756>.

⁵² Anadolu Ajansi. "Silahlı İHA ile Irak'ın kuzeyinde 2 terörist etkisiz hale getirildi [Armed UAVs neutralise 2 terrorists in Northern Iraq]", June 17, 2017, <http://aa.com.tr/tr/dunya/silahli-ihal-ile-irakin-kuzeyinde-2-terorist-etkisiz-hale-getirildi/843545>; Anadolu Agency. "17 PKK Terrorists Killed in N. Iraq, SE Turkey, June 17, 2017, <http://aa.com.tr/en/turkey/17-pkk-terrorists-killed-in-n-iraq-se-turkey/843652>.

⁵³ Though the strikes have not been confirmed by Iran. See Mcleary, Paul. "Iranian drones now hitting rebel targets in Syria", Foreign Policy, Feb. 29, 2016, <http://foreignpolicy.com/2016/02/29/iranian-drones-now-hitting-rebel-targets-in-syria/>.

⁵⁴ See Human Rights Watch. Precisely wrong: Gaza civilians killed by Israeli drone-launched missiles, June 30, 2009, <https://www.hrw.org/report/2009/06/30/precisely-wrong/gaza-civilians-killed-israeli-drone-launched-missiles>.

⁵⁵ See Jewish Telegraphic Agency. "Israeli Drone Strike Kills 5 Militants in Sinai", August 9, 2013, <http://www.jta.org/2013/08/09/news-opinion/israel-middle-east/report-israeli-drone-strike-kills-5-militants-in-sinai>; The Guardian. "Israeli Drone Strike Kills Suspected Islamic Militants in Egypt", August 9, 2013, <https://www.theguardian.com/world/2013/aug/09/israeli-drone-strike-suspected-militants-egypt>; Khoury, Jack. "ISIS Says Israel Killed Four of its Members in Sinai Strike", Haaretz, February 20, 2017, <http://www.haaretz.com/israel-news/1.772729>; Ahronheim, Anna. "Drone Strike Kills One in Sinai After Rocket Claimed by ISIS Hits Israel", The Jerusalem Post, April 10, 2017, <http://www.jpost.com/Arab-Israeli-Conflict/Report-Drone-strike-kills-one-in-Egypt-s-Sinai-486696>; Middle East Monitor. "Israeli Drone Strikes Sinai Kills One", April 12, 2017, <https://www.middleeastmonitor.com/20170412-israeli-drone-strikes-sinai-kills-one/>.

⁵⁶ Rawnsley, Adam. "Meet China's Killer Drones", Foreign Policy, January 14, 2016, <http://foreignpolicy.com/2016/01/14/meet-chinas-killer-drones/>.

⁵⁷ The Nation, "Air Force Drone Hits Boko Haram's Base in Sambisa", Feb. 3, 2016, <http://thenationonlineng.net/air-force-drone-hits-boko-harams-base-in-sambisa>.

⁵⁸ Karaagac, Cengiz. "Silahlı İHA Üreten ve Kullanan Ülkeler [Countries That Manufacture and Those That Use Armed Drones]", My Drone Land, Feb. 2, 2017, www.mydrone.land.com/bilgi/sistem/ihal/509-silahli.

⁵⁹ Except Germany.

available and seeking to acquire ‘larger’ armed drones from either the US (Italy⁶⁰, France⁶¹, Canada⁶²) or Israel (India⁶³, Russia⁶⁴, Germany⁶⁵). Also, among those countries Italy, Germany and France signed, as sign to join the armed drone proliferation, an agreement on an armed drone project which was aimed at developing an indigenous armed drone.⁶⁶

A crucial point which deserves to be mentioned regarding armed drones is that recognising the changes that this technology been through, saves us from misleading understandings, like thinking of only Predator or its equivalents when armed drones are recalled. Their size and the arms that they carry differ as this technology develops. The small drones which function as kamikaze systems are already developed⁶⁷ and small attack drones which can act as a swarm are under development nowadays⁶⁸. As Singer indicates, the drone systems should not be seen as just a replacement of manned aircrafts.⁶⁹ They offer states a series of new opportunities in pursuing a more offensive understanding of international relations. All these new developments in armed drones can affect the evaluation of proportionality of self-defense and issues regarding gravity threshold as they can do the work previously done by much larger armed drones.

New social, legal, military, ethical discussions emerged with the increasing use of armed drones by the US government and few other states. The next section aims to provide a discussion on

⁶⁰ The approval of arming US-made Italian drones came in 2015 but till now no information appeared about the implementation of the approval. See Di Salvo, Philip. Armed Drones: The European Countries’ Interest at Stake, CILD, May 30, 2017, <https://cild.eu/en/2017/05/30/armed-drones-the-european-countries-interests-at-stake/>.

⁶¹ Jeangène Vilmer, Jean-Baptiste. Proliferated Drones: A Perspective on France, Center for a New American Security, <http://drones.cnas.org/wp-content/uploads/2016/05/A-Perspective-on-France-Proliferated-Drones.pdf>.

⁶² Brewster, Murray and Zimonjic, Peter. “Armed Drones Are the Future, but Discussion Needed on How We Use Them, Trudeau Says”, CBC News, June 8, 2017, <http://www.cbc.ca/news/politics/trudeau-drone-vance-armed-1.4152342>.

⁶³ Pubby, Manu. India All Set to Get Missile Armed Drones from Israel, The Economic Times, April 3, 2017, <http://economictimes.indiatimes.com/news/defence/india-all-set-to-get-missile-armed-drones-from-israel/articleshow/57980098.cms>..

⁶⁴ Russia manufactured a small armed drone first in 2017. See Khodarenok, Mikhail. “First Russian-Made Combat Drone Being Tested, Russia Beyond the Headlines”, March 31, 2017, https://www.rbt.com/defence/2017/03/31/first-russian-made-combat-drone-being-tested_731956.

⁶⁵ Sprenger, Sebastian. “German MoD Rests Its Case on Armed Drones for Now”, Defense News, July 5, 2017, <http://www.defensenews.com/air/2017/07/05/german-mod-rests-its-case-on-armed-drones-for-now/>.

⁶⁶ Reuters. “Italy, France, Germany Sign European Drone Project”, May 18, 2015, <http://www.reuters.com/article/eu-drones-idUSL5N0Y928920150518>.

⁶⁷ Hurriyet Daily News. “Turkey’s New Indigenous ‘Kamikaze’ Drones Set To Be Used In Anti-Terror Ops, To Defend Borders”, May 7, 2017, <http://www.hurriyedailynews.com/turkeys-new-indigenous-kamikaze-drones-set-to-be-used-in-anti-terror-ops-to-defend-borders.aspx?PageID=238&NID=112812&NewsCatID=345>.

⁶⁸ Atherton, Kelsey D. “The Pentagon’s New Drone Swarm Heralds A Future Of Autonomous War Machines”, Popular Science, Jan. 10, 2017, <http://www.popsci.com/pentagon-drone-swarm-autonomous-war-machines>; Lee, Nathaniel. Watch “The Navy’s LOCUST Launcher Fire A Swarm Of Drones”, Business Insider, April 6, 2017, <http://uk.businessinsider.com/watch-navy-locust-launcher-fire-drones-2017-4>; Hambling, David. “The Next Era Of Drones Will Be Defined By Swarms”, BBC, April 27, 2017, <http://www.bbc.com/future/story/20170425-were-entering-the-next-era-of-drones>.

⁶⁹ Singer, Peter Warren. “The Global Swarm”, Foreign Policy, March 11, 2011, <http://foreignpolicy.com/2013/03/11/the-global-swarm/>.

the impacts of the use of armed drones on the prohibition of the use of force paradigm.

II. TECHNOLOGY AND ITS IMPACTS ON THE DUTY TO REFRAIN FROM THE USE OF FORCE IN INTERNATIONAL RELATIONS

A. Duty to Refrain from the Use of Force

During the last century, international law witnessed two major wars. These two wars have led states to introduce a legal/institutional framework in order to maintain order in the world and to keep the peace as much as possible. The establishment of the League of Nations was an attempt to institutionalise this approach though it failed to prevent the second major war and could not gain complete global support as the US and Russia never became parties⁷⁰. Also, it was intended to be a non-universal institution⁷¹. However, all these approaches were also aimed to protect the status-quo in international politics. Therefore, not all states were convinced about the necessity to maintain this situation. The need for stabilisation in international order has also reflected in Kellogg-Briand Pact in 1928 which prohibited the resort to war 'as a solution to international controversies' and as 'an instrument of national policy' between the parties of the Pact.⁷² Although the Pact gained a broad acceptance reaching to 49 parties with Venezuela on the 24th of October 1929, it was not sufficient to prevent WWII.

The UN Charter came after the second major war in the 20th century and categorically ruled out not just resorting to war in international relations but also any resort to force.⁷³ The tragedies and disorder during the first half of the 20th century have created a need for institutionalisation which may prevent a state from disturbing the order in the international society.⁷⁴ The Preamble of the UN Charter indicates this reason by saying '*to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind*'.⁷⁵ According to this understanding, any attempt to violate this rule would therefore imperil the interest of the international community.

Some authors link the prohibition on the use of force with just war theory's idea that prescribes war as a 'wrong'.⁷⁶ However, the powers and discretion concerning the use of force that have been given to the UNSC in order to keep the Big Three within the UN⁷⁷ show that just war was not the leading reason behind the UN system of the use of force.

Also, the prohibition of the use and threat of force articulated in the UN Charter is a dimension of the system which was established to maintain peace and security.⁷⁸ Therefore the prohibition

⁷⁰ Office of the Historian. The League of Nations 1920, <https://history.state.gov/milestones/1914-1920/league>.

⁷¹ See Ali, Syed Ameer. "On Islam in the League of Nations." 5 *Transactions of the Grotius Soc'y*, 1919, pp. 126-144.

⁷² Kellogg-Briand Pact, art. I, 24 Jul 1929, http://avalon.law.yale.edu/20th_century/kbpact.asp.

⁷³ Tams and Devaney, p. 28.

⁷⁴ Kolb, pp 303-4.

⁷⁵ Emphasis added.

⁷⁶ Enemark, Christian. *Armed Drones and the Ethics of War*, Routledge, 2014, p. 23.

⁷⁷ Mazower, Mark. *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations*, Princeton University Press, 2009, p. 16

⁷⁸ Tsagourias, Nicholas and White, Nigel D. *Collective Security: Theory, Law and Practice*. Cambridge University Press, 2013, p. 95.

should be seen as a reflection of the broader concern of peace and security in the UN Charter system.⁷⁹

B. Function of Military Technology in International Relations and Armed Drones

1. Technology and its Effects on the Use of Force

With each passing day, the growing effect of technology on human life and its institutions, like law, becomes more visible. As a social institution commissioned to ensure order in the society, the state is in need of having capabilities to prevent others from disturbing of the order in its society. At this point, technology provides the means that will enable states to have the capabilities which in turn will enable them to prevent the disturbance of order in their societies. However, this argument becomes circular when technology also allows states to break the order in other states. The twofold effect of technology, namely the defensive and offensive aspects of it, have created a deadlock situation where a military invention may increase the ability of a state to prevent the disturbance of order in its society by other states although it may increase the risk of disorder for another state and lead the latter state to involve in attempts to catch up with the former state in military technology in order to eliminate the risk which that state poses due to its technological military capacity.

The approaches in the development of military technologies and their relationship with the principle of non-resort to force can be divided into two. The first approach favours the view that they help the revealing of power balances and, thereby, they make the resort to force to solve the disputes less likely.⁸⁰ In its turn, lessening the likelihood of resorting to force bolsters the rules governing the use of force up. The second approach is to view the new weaponry/military technologies as challenges and threats to the rules of international law.

As the methods of warfare changed after WWII, this also forced international law to go beyond the imaginations of the establishers of the UN system.⁸¹ Yet, it is not always easy for international law to tackle the challenges of new weapons. A telling example is nuclear weapons. Although the efforts of non-nuclear states to create a solution continue⁸², the existing regime of nuclear deterrence and nuclear states do not allow⁸³ the creation of a proper response in international law and attempts to tackle the problem may challenge the equality of states under international law rather than promoting the principles of international law as the Treaty on the Non-Proliferation of Nuclear Weapons does by allowing a group of states to acquire a weapon and prohibiting it for others.

As is mentioned above, two contrary views exist in the literature as per technology's effect on the use of force paradigm. The first view embraces the argument which relies on the assumption that

⁷⁹ Tsagourias and White, p. 96.

⁸⁰ Yoo, John. "Embracing the Machines: Rationalist War and New Weapons Technologies." *Cal. L. Rev.*, Vol. 105, 2017, pp. 494, 499.

⁸¹ McNab, Molly, and Megan Matthews. "Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-Defense, Armed Conflict, and International Humanitarian Law." *Denver Journal of International Law & Policy*, Vol. 39, 2011, p. 664.

⁸² See Treaty on the Prohibition of Nuclear Weapons, July 7, 2017, entered into force on 22 January 2021.

⁸³ The United States Mission to the United Nations, Joint Press Statement from the Permanent Representatives to the United Nations of the United States, United Kingdom, and France Following the Adoption of a Treaty Banning Nuclear Weapons, July 7, 2017, <https://usun.state.gov/remarks/7892>.

states have realism-centric decision-making processes concerning the use of force and new technologies help states to make more a precise analysis whether or not to use force. According to this argument, states as rational beings make a cost-benefit analysis before waging war and calculate each other's chances to 'prevail in a conflict'.⁸⁴ Considering the war as 'a bargaining failure'⁸⁵, they argue that new technologies increase the bargaining power of a state and, also, provide more perfect, accurate, suitable and specific information for the analysis.⁸⁶ Therefore, although new technologies create new opportunities and means which may facilitate the resort to force, they also increase a state's effective signalling of its capacities which in turn will deter other states from engaging in a conflict with the state that has those new technologies.⁸⁷

The second approach argues that new technologies increase the risk of going war and facilitates the resort to force.⁸⁸ As a state's ability to use force increases, this creates a change in 'state behaviour' and results in more aggressive policies. Accordingly, new technologies expand the use of force⁸⁹. Additionally, new technologies create new dimensions for the use of force and spread the use of force into different platforms like cyber and space domain. These new domains of warfare question the understandings of classic terms like 'force' and 'armed attack' and indicate the deficiency of international law in regulating the new technologies.⁹⁰ This approach may sometimes prefer the 'ban approach' toward new technologies.

The approach toward the use of armed drones in the literature can be positioned somewhere between the latter view and arguing the non-uniqueness of armed drones. This research will examine the armed drones' position within the relation between military technology and the use of force paradigm in the next parts of this section.

2. Legal Equalisation Issue

The debate on the legal status of armed drones in the literature is more restricted on the law of armed conflict and it is generally argued that within the boundaries of the battlefield 'drones' are not legally different than manned aerial vehicles.⁹¹ As per the broader context in international law, a Human Rights Watch Report claimed that 'the use of drones rather than manned aircraft does not directly affect the legal analysis of a particular attack'.⁹² However, in the present author's opinion

⁸⁴ Yoo, p. 491.

⁸⁵ Yoo, pp. 489, 499.

⁸⁶ Yoo, pp. 494, 495.

⁸⁷ Yoo, pp. 494.

⁸⁸ Brooks, Rosa. "Be Careful What You Wish For: Changing Doctrines, Changing Technologies, and the Lower Cost of War." *American Society of International Law Proceedings*, Vol. 106, 2012, p. 35.

⁸⁹ Doswald-Beck, p. 114.

⁹⁰ Maogoto, Jackson. *Technology and the Use of Force: New Security Challenges in the Twenty-First Century*. Routledge 2015, p. 17.

⁹¹ Lewis, Michael W. "Drones and Boundaries of the Battlefield." *Texas International Law Journal*, Vol. 47, 2011, p. 294; Anderson, *Rise of Drones*, para 6.

⁹² See Human Rights Watch. "Between a Drone and Al-Qaeda: The Civilian Cost of US Targeted Killings in Yemen." 2013, <https://www.hrw.org/report/2013/10/22/between-drone-and-al-qaeda/civilian-cost-us-targeted-killings-yemen>;

See also Doswald-Beck, p. 112; Saura, Jaume. "On the Implications of the Use of Drones in International Law." *Journal of International Law and International Relations*, Vol. 12, 2016, p. 123.

this is a misleading argument because it misses the point that drones affect the decision-making process that goes into the use of force by removing the human element from battlefield or in using force. Also, a strike's evaluation should be put in the broader context of the decision-making process.

Additionally, another problem with this approach is that it presupposes the relevant legal platform for the assessment of drone strikes as the law of armed conflict which seems to be the result of the US's global war on terror narrative. In this regard, it is worth recalling that the central issue of the arms control regime discussion for drones is not just assessment of proportionality in *jus in bello* but also, mostly, broader security and stability concerns at an international level.⁹³ For instance, the US-initiated 'Joint Declaration for the Export and Subsequent Use of Armed or Strike Enabled Unmanned Aerial Vehicles' lays emphasises on 'building confidence as to peaceful intention of states' which reminds the prohibition of the use of force in international relations.⁹⁴ Therefore, increasing of states' incentives to use force bears relevance to the prohibition on the use of force because the practice and prevention of violation have special importance in international law which has a considerably weak enforcement mechanism compared to the other fields of law.

3. How Armed Drones Fit the New Means of Conflict

The technological newness that drones brought into the use of force/waging a war can be summarised in these two sentences: 'There is a war that needs to be fought... But we *cannot afford to fight that war at the expense of our souls.*'⁹⁵

Naqvi uses these words to express his opinion that the war/fight in Pakistan against Al-Qaeda should be fought by Pakistanis and should not have to bear the consequences of indiscriminate use of a weapon by the US. For him, killing people, arguably incidentally or with no due process, to kill someone with whom those people are fighting is unacceptable. However, these words which are expressed against the use of drones can easily fit the language of those who support the use of drones or even consider it necessary. The quotation above ironically reveals the main reason behind the resort to armed drones.

The cost issue is the crux of the discussion in the literature on drones. The generally expressed claim is that drones reduce both 'financial and political' costs of war.⁹⁶ However, as the monopoly of the US and Israel on armed drones was broken by several new drone-producer countries towards the end of the US drone era and the proliferation was still ongoing as mentioned above, the realisation of this claim only began to be seen in the subsequent years. The economic costs of a drone are considerably lesser than a manned aircraft which carries out the same mission⁹⁷ and mid-size and

⁹³ See the reasons motioned by Sparrow for arms control Sparrow, Robert. "Predators or Plowshares: Arms Control for Robotic Weapons." *IEEE Technology and Society Magazine*, Spring, 2009, p. 25ff.

⁹⁴ Joint Declaration for the Export and Subsequent Use of Armed or Strike-Enabled Unmanned Aerial Vehicles (UAVs), Oct. 16, 2016, <https://www.state.gov/t/pm/rls/fs/2017/274817.htm>.

⁹⁵ Naqvi, Feisal. "Even War Has Limits." *Opposing Perspectives on the Drone Debate*, edited by Bradley Jay Strawser, Lisa Hajjar, Steven Levine, Feisal H. Naqvi, and John Fabian Witt, Palgrave MacMillan, 2014, p. 47. (emphasis added)

⁹⁶ See Shah, Sikander Ahmed. *International Law and Drone Strikes in Pakistan: The Legal and Socio-Political Aspects*. Routledge, 2015, p. 53.

⁹⁷ Boyle, Michael J. "The Cost and Consequence of Drone Warfare." *International Affairs*, Vol. 89, 2013, p. 22.

mini drones cost considerably less.

The reduction of political costs of using force bears more relevance in the case of armed drones. The consequences that the US Government faced after the Iraq and Afghanistan Wars due to the loss of soldier affected the US decision to rely on armed drones in counterterrorism and the use of force in general.⁹⁸ The distance that is created by drones between the attacker and attacked protects soldiers from the harm of conflict and the risks of resorting to force. Also, the replacement of soldiers with machines removes the public's sensitiveness to the war/use of force. As the response of the public to the use of force in a particular occasion is one of the most determinative factors in a government's decision⁹⁹, drones help governments to persuade their public. In this sense, drones prevent states being vulnerable to the criticism which may grow out from the deaths of soldiers deployed to another territory or sent as pilots. They may also decrease the restraints at the domestic level as this was the case in the US intervention in Libya.¹⁰⁰

However, as the extraterritorial use of force is also a foreign policy matter, it is arguable that the civilian deaths that caused by US drone strikes have created a bad reputation for the US and this is an external political cost. The problems that arise because of the extraterritorial use of drones in 'towns' may lead to thoughts that its external costs exceed the domestic political costs. However, compared to the troops on the ground armed drones may seem 'less invasive'¹⁰¹ and can be perceived by the territorial state's public as more acceptable as long as strikes do not result in excessive civilian injuries. Yet, in the present writer's view the Pakistani example shows that the attacking state takes its internal restrictions more seriously as the Pakistani public's reaction does not prevent the US from continuing its attacks. Based on a realistic view, the reason is the states' reliance on their own understanding of the threat rather than what the public think.¹⁰² Additionally, as long as a drone strike does not create security concerns at an international level the other states do not want to involve in the relations between two states, especially when one of the parties is the world's declining hegemon. The EU Parliament Resolution in 2014, which is not binding on its member states, does not clearly take a stance against either the US or Israeli drone strikes and seems to have reflected the European public opinion rather than indicating to the European Governments' policy who are either trying to buy armed drones or trying to manufacture them.¹⁰³ Or it may be perceived as a reluctance or an objection to involve in the US drone program as third parties rather than a rejection of the program itself.¹⁰⁴

⁹⁸ Doswald-Beck, p. 115.

⁹⁹ Cf Sonnenberg, Stephan. "Why Drones Are Different?." *Preventive Force: Drones, Targeted Killing, and the Transformation of Contemporary Warfare*, edited by Kerstin Fisk and Jennifer M. Ramos, New York University Press, 2016, p. 123.

¹⁰⁰ See the discussion on humanitarian intervention below.

¹⁰¹ Brunstetter, Daniel and Braun, Megan. "The Implications of Drones on the Just War Tradition." *Ethics & International Affairs*, Vol. 25, 2011, p. 343.

¹⁰² Hazelton, Jacqueline L. "Drone Strikes and Grand Strategy: Toward a Political Understanding of the Uses of Unmanned Aerial Vehicle Attacks in US Security Policy." *Journal of Strategic Studies*, Vol. 40, 2017, p. 83.

¹⁰³ Resolution on the Use of Armed Drones, EUR. PARL. DOC. 2014/2567(RSP).

¹⁰⁴ Cf Plaw, Avery, Fricker, Matthew S. and Colon, Carlos. *The Drone Debate: A Primer on the US Use of Unmanned Aircraft Outside Conventional Battlefields*. Rowman & Littlefield Publishers 2016, p. 259.

One may argue that drones' weaknesses will make the reliance of states on them less likely. It is true that their need to communicate with the pilot creates a special vulnerability, which may necessitate the autonomy, against jamming, hacking and defense systems of states.¹⁰⁵ In its existing form, this technology may seem vulnerable in 'less asymmetric warfare'¹⁰⁶, however, conflicts or self-defense against non-state actors constitute the most important part of the use of force nowadays. Therefore, armed drones can remain a weapon of choice against the non-state armed groups which lack aerial defense systems.¹⁰⁷ The risk-free nature of drones can facilitate the resort to force against armed non-state actors as the army is not exposed to risk. When considered in parallel with the asymmetric nature of current resorts to force, it will appear that the armed drones will affect the practice of states through which the rules of international law are evaluated, transformed and clarified.¹⁰⁸ Brooks links armed drones with sovereignty limiting doctrines and argues that intersection of doctrines and technologies work for the same purpose: making force less costly.¹⁰⁹ However, the sovereignty limiting nature of the self-defense claim against the non-state actors also rests upon the idea of sovereignty. Therefore, rather than limiting sovereignty as an idea it limits the sovereignty of another state while at the same time expanding the territorial limits of the attacking state's sovereignty. Yet, the present author agrees with the view that armed drones correspond to the needs of the existing doctrines on the use of force.

4. Drones and Escalation of Conflicts

Drone technology may serve to prolong conflicts rather than solve them with peaceful methods as required and anticipated by the UN system.¹¹⁰ States may wish to prolong a conflict with low intensity. The drone incidents in the Abkhaz region constitute examples of this. On the 20th of April 2008, a Georgian drone¹¹¹ was shot down in the region of Abkhazia leading to an escalation of the existing conflict in the region.¹¹² Georgia and the UNOMIG in its report¹¹³ on the incident

¹⁰⁵ See the example in Currier, Cora and Moltke, Henrik. "Spies in the Sky", *The Intercept*, 2016, <https://theintercept.com/2016/01/28/israeli-drone-feeds-hacked-by-british-and-american-intelligence/>; Freedman, Lawrence D. "The Drone Revolution: Less Than Meets the Eye." *Foreign Affairs*, Nov.-Dec. 2016, p. 158.; Lewis, pp. 298-9.

¹⁰⁶ Freedman, p. 158.

¹⁰⁷ Cf Davis, Lynn E. et al. *Armed and Dangerous: UAVs and U.S. Security*, RAND, 2014, p. 14, https://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR449/RAND_RR449.pdf.

¹⁰⁸ Cf Ben Emmerson (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), *Third Rep. on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Sep. 18, 2013, para 22, U.N. Doc. A/68/389.

¹⁰⁹ Brooks, *Be Careful*, p. 35.

¹¹⁰ See Schulzke, p. 80.

¹¹¹ An Israeli made Hermes 450.

¹¹² The New York Times. "Russian-Georgian Dispute Grows Over Downing of Spy Drone." 22 Apr. 2008, <http://www.nytimes.com/2008/04/22/world/europe/22iht-georgia.4.12237532.html>.

¹¹³ UNOMIG. "Report on the Incident of 20 April Involving the Downing of a Georgian Unmanned Aerial Vehicle Over the Zone of Conflict." 2008, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Georgia%20UNOMIG%20Report%20on%20Drone.pdf>.

argued¹¹⁴ that the drone in question was shot down by ‘a Russian warplane’ in violation of the UN Charter.¹¹⁵ Yet, the Russian side denied this and claimed that the drone was shot down by the separatist forces in the region.¹¹⁶ This may seem like a single incident which has no precedent. However, the report of the UN Secretary-General shows that similar drone downing incidents happened in the region prior to this incident.¹¹⁷ After the incident, the Georgian side, who had denied the existence of the use of drones¹¹⁸ prior to the April 20th incident, indistinctly admitted¹¹⁹ its drone flights over the conflict zone and, also, asserted its right to use them on ‘its own territory’¹²⁰. Also, from the Abkhaz side there were continual claims that it shot Georgian drones several times.¹²¹ The flights and downing incidents led the UN Secretary-General to recommend in 2009 the UNSC to ban the presence of UAVs in the Abkhaz conflict zone.¹²² At this point, one may argue that the availability of drones paves the way for further escalations. The risk-free nature and relative cheapness of the use of drones compared to the other means of warfare encourages the state in question to use them where it cannot rely on its troops and warplanes may seem too aggressive.

Another drone downing incident was seen in the Karabakh conflict between Azerbaijan and Armenia and has paved the way for the escalation of the conflict. On the 22nd of June 2017 Azerbaijan shot down an Armenian drone flying over Azerbaijan’s Armed Force in the Karabakh conflict zone.¹²³ In this instance, drones allow a state to continue its presence while the other side perceives this action as a threat and reacts immediately. In this sense, drones provide states the means that are needed to maintain conflict with low intensity of force and less engagement.

In the next part, the possible effects of drones on the interventionist policy of the use of force, especially humanitarian intervention, will be discussed.

¹¹⁴ CBS News. “U.N.: Russian Jet Shot Down Georgian Drone.” May 26, 2008, <http://www.cbsnews.com/news/un-russian-jet-shot-down-georgian-drone/>.

¹¹⁵ Permanent Rep. of Georgia to the U.N., Annex to the letter dated 10 August 2009 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General: Report by the Government of Georgia on the aggression by the Russian Federation against Georgia August 2009, Aug. 27, 2009, U.N. Doc. A/63/953, p. 27.

¹¹⁶ The New York Times, *Russian-Georgian Dispute Grows*, p. 112.

¹¹⁷ U.N. Secretary-General, Report of the Secretary-General on the situation in Abkhazia Georgia, Apr. 2, 2008, para 23, U.N. Doc. S/2008/219.

¹¹⁸ CBS News, *U.N.: Russian Jet*, p. 114.

¹¹⁹ Annex to the identical letters dated 5 May 2008 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General and the President of the Security Council, May 6, 2008, U.N. Doc. A/62/830–S/2008/299, p. 2.

¹²⁰ Annex to the identical letters, U.N. Doc.

¹²¹ Like the incident on the 18th of March 2008, See *Report of the Secretary-General .. on the situation in Abkhazia Georgia*, para 23.

¹²² U.N. Secretary-General, Report of the Secretary-General pursuant to Security Council resolutions 1808 (2008), 1839 (2008) and 1866 (2009), May 18, 2009, U.N. Doc. S/2009/254.

¹²³ TASS. “Azerbaijan’s Forces Destroy Armenian Drone Defense Ministry Says.” June 22, 2017, <http://tass.com/world/952749>; See also TASS. “Azerbaijani Servicemen Down Another Armenian Drone in Karabakh Conflict Zone.” Dec. 13, 2016, <http://tass.com/world/918851>.

5. Armed Drones and the Interventionist Approach to the Use of Force

In the ensuing discussion on drones' effects on the use of force, an argument can be made that armed drones strengthen the practice/argument on new 'just' exceptions on the prohibition of the use of force. In his recently published book, Schulzke argues that because drones diminish the costs of waging war it is very likely that they will lead to *both just and unjust wars*.¹²⁴ His opinion seems inclined towards the view that drones do not have intrinsically 'bad characters' which create only bad results in the international society.¹²⁵ The argument goes on to say that drones are not just available in aggressive wars.¹²⁶ If the word 'war' is changed with 'the use of force' to adapt this theory into the UN system, then drones may push the limits of the UN Charter system in both situations. First, it should be noted that the existing UN Charter system does not completely fit with just war theory. The UN Charter creates a procedural exception to the ban on the use of force: the UNSC authorisation. This exception's relationship with justness is a pragmatic one rather than being a principal stance against the unjust. However, the use of force in self-defense can be linked with the idea of just war. The main idea behind this system is to categorically prevent the use of force. Therefore, if armed drones loosen the prohibition or help the creation of a new exception to it then they change the paradigm of the use of force enshrined in the UN Charter.

Based on the possibility of waging just wars with the new options provided by drones, the first thing that comes to the mind is humanitarian intervention. Under the current system of international law, humanitarian intervention does not seem to have gained a broad acceptance in the literature. Also, international politics does not always allow humanitarian interventions as was seen in the case of Aleppo.¹²⁷ Arguing that lowering the threshold to the resort to force by drones can create positive outcomes¹²⁸, Beauchamp and Savulescu claimed that drones can help states in prevailing over the reluctance to humanitarian intervention.¹²⁹ In arguing that humanitarian intervention is a just war, they focus on the outcomes, like preventing genocide.¹³⁰ For them, humanitarian intervention is the most possible type of war/use of force to be facilitated by drones.¹³¹ Because humanitarian intervention requires states to risk their soldiers *for the sake of others*, 'casualty

¹²⁴ Schulzke, pp. 79, 84; Brooks, Rosa. "Drones and the International Rule of Law." *Ethics & International Affairs*, Vol. 28, 2014, p. 88.

¹²⁵ Schulzke, pp. 79, 84.

¹²⁶ Schulzke, p. 84.

¹²⁷ There was a call for intervention in Aleppo by various sections of the international society. See Ismail, Abdalrhman. "Gulf Arab States Call on U.N. to Intervene to Stop Aleppo Assault." *Reuters*, Oct. 1, 2016, <http://www.reuters.com/article/us-mideast-crisis-syria-gulf-idUSKCN1213N4?il=0>. The international community's military inaction was based on the idea which prefers to avoid direct encounter of Russia and the US. See Krauthammer, Charles. "Aleppo and American Decline." *Washington Post*, Dec. 22, 2016, https://www.washingtonpost.com/opinions/global-opinions/aleppo-and-american-decline/2016/12/22/1c025a5a-c877-11e6-85b5-76616a33048d_story.html?utm_term=.5d008606e793.

¹²⁸ Beauchamp, Zack/ Savulescu, Julian. "Robot Guardians: Teleoperated Combat Vehicles in Humanitarian Military Intervention." *Killing by Remote Control: The Ethics of an Unmanned Military*, ed. Bradley Jay Strawser, Oxford University Press, 2013, p. 114.

¹²⁹ Beauchamp and Savulescu, p. 106.

¹³⁰ Plaw et al, p. 198.

¹³¹ Beauchamp and Savulescu, pp. 119, 122.

aversion' becomes a unique obstacle to it and makes states more vulnerable from this point.¹³² Therefore, states try to avoid causalities. At this point, armed drones provide an option where the risk on the soldiers is removed and therefore will affect the states in overcoming the unique obstacle in humanitarian interventions.¹³³ For Beauchamp and Savulescu, Kosovo and NATO's premise to zero causalities represent the best example in proving the direct link between causalities and the decision to intervene on a humanitarian basis.¹³⁴ This causalities concern of the interveners is mostly related to their soldiers rather than civilian causalities, therefore, Beauchamp and Savulescu put forward also an argument claiming that removing the risk from soldiers will open a new space for generals to focus on avoiding the civilian causalities in an operation which is intended to protect civilians and, thereby, drones will strengthen the moral basis for the humanitarian interventions.¹³⁵ They also claim that the intervention in Libya in 2011 also demonstrated the effectiveness of drones in humanitarian interventions.¹³⁶ However, Beauchamp and Savulescu do not restrict the argument on drones to the UAVs, they also consider unmanned ground vehicles.¹³⁷ As most of the causalities are from ground soldiers, expanding drones to the ground will also affect the decision to intervene and lower the threshold to use force significantly.¹³⁸ This side of the argument can be considered as a response to the critics saying that the air force would not be sufficient to achieve the objectives of war/using force completely and help from the ground is needed. The possibility of using unmanned ground vehicles in humanitarian intervention was brought into question by a Project called 'Pax Robotica'.¹³⁹ This idea is in accord with the strategy of 'no troops on ground' as well.

Yet, the present writer is of the opinion that there exist other political prerequisites of humanitarian intervention alongside the casualty aversion. The Aleppo example showed that in cases where there is a strong opposition by other powers towards the use of force on a humanitarian basis by a group of powerful states, including the world's declining hegemon, drones may not be enough to facilitate intervention. The theoretical conclusion, here, would be that in situations where a territorial state has not been isolated enough politically, humanitarian intervention is not a possible option. However, in cases where there is an agreement reached within the UNSC, then drones can facilitate or even bring humanitarian intervention forward as an option to solve the conflict as their role in the intervention in Libya with the authorisation of the UNSC in 2011 indicated. Even though the UNSC does not need to generally mention a particular weapon,¹⁴⁰ discussions can reveal the effect of drones on the decision-making process as this observed in the Kosovo intervention. In the resolution 1973 regarding the humanitarian intervention in Libya, the UNSC ruled out the option of using troops on the ground by the intervening states by saying '*while excluding a foreign occupation*

¹³² Beauchamp and Savulescu, pp. 115, 117.

¹³³ Beauchamp and Savulescu, p. 118.

¹³⁴ Beauchamp and Savulescu, p. 118.

¹³⁵ Beauchamp and Savulescu, p. 122; Cf de Groot, p. 133.

¹³⁶ Beauchamp and Savulescu, p. 119.

¹³⁷ Beauchamp and Savulescu, p. 120.

¹³⁸ Beauchamp and Savulescu, p. 120.

¹³⁹ Project on National Security Reform, *Strategic Studies Institute*, Sheila R. Ronis ed., 2010, <http://indianstrategicknowledgeonline.com/web/VISION%20WORKING%20GROUP%20REPORT.pdf>, p. 54-58.

¹⁴⁰ De Groot, p. 142.

force of any form on any part of Libyan territory'.¹⁴¹ As Enemark notes¹⁴², the US choice was to deploy armed drones in Libya in order to help the NATO intervention.¹⁴³ The intervention in Libya appears to be the only example during the US drone era of the use of force where the availability of armed drones solely led to the US involvement in an intervention.¹⁴⁴ Also, armed drones removed¹⁴⁵ the domestic restrictions on the extraterritorial use of force by the Obama Administration and in articulating justification for bypassing the US Congress the Obama Administration indicated the US understanding of drones:

‘U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors.’¹⁴⁶

In contrast, as Enemark notes¹⁴⁷, the then American President Bill Clinton asked prayers from the US citizens during the intervention in Kosovo mentioning and stressing that the operation is not free of risk: ‘Now, I want to be clear with you, there are risks in this military action, risks to our pilots and the people on the ground. ... Our thoughts and prayers tonight must be with the men and women of our Armed Forces...’¹⁴⁸ These quotes, which are taken from two different humanitarian intervention examples, indicate the difference in the approach towards the resort to force throughout two humanitarian interventions.

The inclination towards air limited interventions is a response on the legitimacy problem of the UNSC authorisations which are aimed at overthrowing an existing regime. However, the political prerequisites of humanitarian intervention exist alongside with the casualty aversion as co-unique obstacles of humanitarian intervention. Therefore, before the intervening states overcome the political objections at the international level, armed drones will not have a facilitating effect on humanitarian intervention.

Here, the willingness of the UN Peace-keeping forces to use unarmed drones deserves to be mentioned. Although, the attempts of using them were halted due to the crashing and downing

¹⁴¹ SC Res 1973, Mar. 17, 2011. (emphasis added)

¹⁴² Enemark, *Armed Drones*, p. 25.

¹⁴³ Aljazeera, “US Deploys Armed Drones in Libya”, Apr. 22, 2011, <http://www.aljazeera.com/news/africa/2011/04/2011421223027558915.html>; See also Obama’s letter to the Congress, *Letter from the President on the War Powers Resolution*, June 15, 2011, <https://obamawhitehouse.archives.gov/the-press-office/2011/06/15/letter-president-war-powers-resolution>.

¹⁴⁴ Shanker, Thom. “Obama Sends Armed Drones to Help NATO in Libya War.” *The New York Times*, Apr. 21, 2011, <http://www.nytimes.com/2011/04/22/world/africa/22military.html>.

¹⁴⁵ Saletan, William. “Koh is My God Pilot.” *Slate*, June 30, 2011, http://www.slate.com/articles/health_and_science/human_nature/2011/06/koh_is_my_god_pilot.html.

¹⁴⁶ The Washington Post. *United States Activities in Libya*, <http://www.washingtonpost.com/wp-srv/politics/documents/united-states-activities-libya.html>, p. 25.

¹⁴⁷ Enemark, Christian. “Drones, Risk, and Perpetual Force.” *International Affairs*, Vol. 28, 2014, p. 376.

¹⁴⁸ Statement By President Clinton On Kosovo, Mar. 24, 1999, <https://millercenter.org/the-presidency/presidential-speeches/march-24-1999-statement-kosovo>.

incidents in Congo in 2006¹⁴⁹, the UNSC Resolution 2098 in 2013 authorised MONUSCO to use drones to observe the arms embargo.¹⁵⁰ Also, other UN mandates requested the UN to authorise them to use drones in implementing their mandates citing the risk-free and versatile nature of drones.¹⁵¹ The adaptation of drone technology for surveillance purposes may spread to the missions including the use of force. However, problems like who will use the data obtained by drones¹⁵² during surveillance missions will constitute a bar to moving to the next stage.

6. Use Force All Around the Globe with No Risk

Another aspect of drones is that they enable states to militarily have a ‘dynamic global presence’ with no risk to soldiers¹⁵³ and this seems to cost less strategically¹⁵⁴. The world’s declining hegemon, ie the US Government, had already established fourteen drone-bases until 2017.¹⁵⁵ Based on the global presence argument, it could be said that armed drones will increase the reacting capacity of a state to threats and this increase in the reacting capacity serves to diminish the gravity requirement of the right to self-defense. With this global presence, states can respond immediately to security concerns. The high loitering capacity of drones solves the problems faced due to the needs of manned aircraft pilots. This loitering capacity enables a drone state to have a ‘permanent armed presence’ near boundaries of another sovereign state.¹⁵⁶ Based on this situation it can be said that armed drones take the defense to the enemy. However, this can blur the difference between defensive and aggressive uses of force. As the attitudes of states indicate that they perceive the presence of drones close to their borders as a threat and express that they will take a harsh stance against drones.¹⁵⁷ The use of the loitering capacity of armed drones, even arguably for reconnaissance purposes, can constitute a threat of the use of force or be perceived as such and lead to a reaction.

¹⁴⁹ Apuuli, Kasaija Phillip. “The Use of Unmanned Aerial Vehicles (Drones) in United Nations Peacekeeping: The Case of the Democratic Republic of Congo.” *American Society of International Law Insights*, Vol. t18, 2014, <https://www.asil.org/insights/volume/18/issue/13/use-unmanned-aerial-vehicles-drones-united-nations-peacekeeping-case>.

¹⁵⁰ SC Res 2098, Mar. 28, 2013.

¹⁵¹ U.N. Secretary-General, Report of the Secretary-General on the situation in Abkhazia, Georgia, Jan. 23, 2008, para 41 U.N. Doc. S/2008/38 .

¹⁵² Nichols, Michelle. “Russia Voices Concern About U.N. Sanctions, Spy Drones in South Sudan.” *Reuters*, Oct. 9, 2015, <http://www.reuters.com/article/us-southsudan-security-un-idUSKCN0S32EG20151009>.

¹⁵³ Washburne, Samuel B. *Willingness to Intervene: A Study on Drones, Public Opinion and the Use of Lethal Action*. Bilkent University, Master Thesis, 2015, p. 58, (unpublished master thesis, Bilkent University) (on file with the Turkish Council of Higher Education Thesis Center).

¹⁵⁴ Hazelton, p. 85.

¹⁵⁵ See Rinehart, Christine Sixta. “Sharing Security in an Era of International Cooperation: Unmanned Aerial Vehicles and the United States’ Air Force.” *Defense and Security Analysis*, Vol. 33, 2017, p. 46.

¹⁵⁶ Sparrow, p. 27.

¹⁵⁷ See The Japan Times, “Japan to Shoot Down Foreign Drones That Invade its Airspace.” Oct. 20, 2013, <https://www.japantimes.co.jp/news/2013/10/20/national/politics-diplomacy/japan-to-shoot-down-foreign-drones-that-invade-its-airspace/#.WZNzSHeZNR0>.

III. TOWARDS A LESS RESTRICTED PARADIGM OF THE USE OF FORCE

As armed drones enable states to resort to force with almost no-risk, this situation corresponds to the needs of states to respond to security concerns growing out of armed non-state actors and perfectly fits the existing asymmetry of today's conflicts and the trends in the use of force. Due to their existing vulnerabilities to defense systems, the role armed drones will play in inter-state relations seems to be limited in regard to self-defense issues. Relying on these claims, this section aims to examine the effect of drones strikes on the practice of a more permissive self-defense argument in relation to armed non-state actors.

A. Drone Strikes, Consent and 'Unwilling or Unable' Test

The legal uncertainty, or in other words, the absence of the clear legal argument of the drone using states during the US drone era, made the consent issue more relevant in the context of most of the drone strikes as it is thought to be removing the tension between sovereignty and self-defense. However, considering consent as a sole basis for the extraterritorial use of force is a challenging situation for the prohibition of the use of force in international relations as it creates a new exception or puts the use of force in question outside the scope of *jus ad bellum*. Also, the way by which the consent is given is another question that gained importance within the context of drone strikes. Based on these problems, this part analyses the approaches towards consent in the context of drone strikes and emphasises that taken together with the asymmetry between the territorial state and the state using extraterritorial force the idea that drones are less invasive reveals tacit consent issues.

The first approach treats consent as a separate basis for the use of force and argues that the 'consent removes [...] the use of force from the *jus ad bellum* framework'¹⁵⁸ and provides states an option 'to bypass the prohibition on the use of force'¹⁵⁹.¹⁶⁰ This approach seems to consider that the decision to consent is an absolute political decision which is an expression of the consenting state's 'political independence'.¹⁶¹ In that sense, they argue that the use of force in question is no longer a coercive one, rather it is a consensual use of force and Article 2(4) only prohibits the coercive resorts to force.¹⁶²

Accordingly, as Byrne notes¹⁶³, this approach makes a distinction between existing exceptions of the prohibition of the use of force and the use of force through consent.¹⁶⁴ According to this distinction, consent precludes the violation of sovereignty and no violation exists from the

¹⁵⁸ Byrne, Max. "Consent and the Use of Force: An Examination of 'Intervention by Invitation' as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen." *Journal on the Use of Force and International Law*, Vol. 3, 2016, p. 99.

¹⁵⁹ Byrne, p. 103.

¹⁶⁰ Byrne, p. 124. See also Mahmood, Amna, Sadaf Farooq, and Asia Karim. "US Drone Attacks in Pakistan: An International Law Perspective." *International Journal of Business and Social Science*, Vol. 6, 2015, p. 170.

¹⁶¹ Byrne, p. 99.

¹⁶² Tams and Devaney, p. 28.

¹⁶³ Byrne, p. 100.

¹⁶⁴ International Law Association Committee on the Use of Force. Washington Conference Draft Report on Aggression and the Use of Force, 2014, <https://goo.gl/1TmK2P>.

beginning.¹⁶⁵ The other approach acknowledges the legalising effect of consent, while arguing that the consenting state is restricted in the sense that it cannot consent if it 'has no right to use ... force'¹⁶⁶. Therefore, it is argued that in situations where it is unlawful for the consenting state to use force in its territory, the territorial state *cannot* consent to the use of force on its territory.¹⁶⁷

In the present author's view, the strong argument concerning Article 2(4) of the UN Charter is that the use of force in question lacks the character of coerciveness and thereby does not fall within the scope of the ban. Arguing that the prohibition is inapplicable if the territorial state consented, also seems to be an answer to the question as to what makes the resort to force lawful if neither consenting state has a right to use force nor the attacking state. However, the problem arises when a state provides self-defense as a secondary justification as the US did¹⁶⁸ concerning drone strikes. Does this bring the use of force in question back into the framework of *jus ad bellum* or does the consent argument take precedence? Also, the prohibition of the use of force, as is mentioned above, should be read within the wider context of global security. The circumvention of international obligations by consent should be avoided while the respect for state sovereignty of both sides is maintained. Therefore, to trigger the effect of consent either consenting or the state using force extraterritorially needs to have a right to use force.

The drone strikes that have occurred until 2017, also put into question the requirements about how the consent should be expressed, especially the existence of tacit consent. In cases where a state is unable or does not want for its own reasons to object to the use of force in its territory by a certain state the consenting state simply opts to remain silent on the issue. The Israeli drone strikes in Sinai, Egypt can be taken as examples of this claim or, in other words, can be taken as extreme implementations of the tacit consent argument. The reason why the Israeli drone strikes in Sinai can be labelled as an extreme version of tacit consent is that neither the Israeli side commented on the existence of drone strikes¹⁶⁹ nor the Egyptian side on the issue of consent.¹⁷⁰ The lack of official

¹⁶⁵ Advisory Committee on Issues of Public International Law. *Advisory Report on Armed Drones* (English Translation), p. 10, 2013, [http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_\(English_translation_-_final\)_\(2\).pdf](http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_(English_translation_-_final)_(2).pdf).

¹⁶⁶ O'Connell, Mary. *Drones Under International Law*. Washington University Law Whitney R. Harris World Law Institute International Debate Series, 2010, p. 6, <https://law.washu.edu/wp-content/uploads/2018/10/OConnellFullRemarksNov23.pdf>.

¹⁶⁷ Deeks considers this argument as *lex ferenda* although she supports it. See Deeks, Ashley S. "Consent to the Use of Force and International Law Supremacy." *Harvard International Law Journal*, Vol. 54, 2013, p. 33; Schmitt, Michael N. "Drone Attacks under the Jus ad Bellum and Jus in Bello: Clearing the 'Fog of Law'." in *Yearbook of International Humanitarian Law*, Vol. 13, 2010, p. 315; O'Connell, Mary Ellen. "International Law and Drone Attacks Beyond Armed Conflict Zones." in *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications*, edited by David Cortright, Rachel Fairhurst, and Kristen Wall, University of Chicago Press, 2015, p. 73.

¹⁶⁸ See Harold Hongju Koh, *The Obama Administration and International Law*, p. 15 (Keynote Speech at the Annual Meeting of the American Society of International Law), 2010. [Hereinafter Koh's speech]

¹⁶⁹ Ahronheim.

¹⁷⁰ al-Rajhi, Islam. "Amaliyya Israilliyya Murakkaba wa Qasf Jawwi wa Qatla Yatasaqtun fi Sina ...wa Misr Samita [An Israeli Complex Operation, Aerial Bombing and Several Killed in Sinai... And Egypt is Silent]". The New Khalij, Feb. 22, 2017, <http://thenewkhalij.org/node/60139>; See also a report claiming that Egypt approves the Israeli airstrikes, including drone strikes, in Sinai. Kirkpatrick, David D. "Secret Alliance: Israel Carries Out Airstrikes in Egypt, With

statements indicates either inability or unwillingness of the two states to publicise the legal relationship between them in relation to the issue. The ambiguity that was created by this situation is contrary to what the commentary on the Article 20 of the Draft Articles on State Responsibility depicts as clear establishment of the consent.¹⁷¹ At this point, Aronsson's argument about the role of silence in state practice¹⁷² seems useful. Based on her argument one can say, 'a qualified claim' of the state using force extraterritorially is necessary to consider the territorial state's 'silence' as 'acquiescence'.¹⁷³ However, if neither state is willing to clarify the consent issue this criterion would not work in practice.

The importance of such a tacit consent system is that, based on the first approach, it removes the need of the state using force extraterritorially to rely on self-defense or another basis. The separation of the consent and self-defense as different bases for the use of force, accelerates the acceptance of the 'unwilling or unable' doctrine in state practice and literature.¹⁷⁴ It also renders obsolete the importance of the scope of the consent which is difficult to determine in cases of drone strikes due to the secrecy surrounding them¹⁷⁵. The only way to understand that the boundaries of tacit consent are exceeded by the state using force is presumably the consenting state's expression of its opinion. For instance, arguably Pakistan consented tacitly on the condition that the CIA should 'get the right people'¹⁷⁶ but was compelled to express its denial and disapproval of drone strikes with the increasing civilian deaths that followed them. As Shah says, the political realities of the context where drone strikes occur make the form through which consent is expressed or denied irrelevant,¹⁷⁷ and therefore, the present author believes that the state using extraterritorial force should have its own basis under international law.

B. Gap, Imminence and Drone Strikes

As a legal matter, interpretation of the literal meanings of texts is always needed. The meanings given to *force* in Article 2(4) of the UN Charter and *armed attack* in Article 51 seem to have created a gap within the framework of the use of force. The International Court of Justice's [hereinafter ICJ] continuous interpretation acknowledges the gap and requires the armed attack which may trigger the right of self-defense to be a certain gravity.¹⁷⁸ However, there are interpretations of

Cairo's O.K.", The New York Times, Feb. 3, 2018, <https://www.nytimes.com/2018/02/03/world/middleeast/israel-airstrikes-sinai-egypt.html>.

¹⁷¹ Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, International Law Commission, in Rep. on the Int'l Law Comm'n, 53rd Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), p. 175.

¹⁷² Aronsson, p. 289.

¹⁷³ See and Cf Aronsson, p. 289.

¹⁷⁴ See for instance Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Study on Targeted Killings*, para 35, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010).

¹⁷⁵ Brooks, *Be Careful*, p. 33 n 7.

¹⁷⁶ The Guardian, "US Embassy Cables: Pakistan Backs US Drone Attacks on Tribal Areas", Nov. 30, 2010, <https://www.theguardian.com/world/us-embassy-cables-documents/167125>.

¹⁷⁷ Shah, p. 104.

¹⁷⁸ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. Rep. 14, para 191 (June 27); *Oil Platforms* (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, paras 51, 62 (Nov. 6); *Armed Activities on the Territory of the Congo* (D.R.C. v. Uganda), Judgment, 2005 I.C.J. Rep. 168, para 147 (Dec. 19).

‘armed attack’ in a way that it includes all uses of force and even *threats*.¹⁷⁹ Also, some argue that the use of minor force against the minor use of force is possible as countermeasures.¹⁸⁰

Armed drones raise the question as to whether they can be used as a ‘minor use of force in self-defense against minor threats’,¹⁸¹ or should they be understood to fall into the gap between self-defense and the prohibition of the use of force.

The question that this issue raises is can such a drone strike fit into the framework of self-defense. The importance of this question arises with the increasing terror attacks around the world. Describing the gravity requirement as unrealistic¹⁸², some argue that such attacks need to be responded to immediately and in a precise manner, and drones can provide this option.¹⁸³ The practicality and instant response capacity, which drones provide by their high loitering capacity and attack features, may well lead states to resort to them in stopping cross border less-grave forms of attacks by armed non-state actors. This feature of armed drones has been paid attention to by other states. For instance, the then Turkish Under-secretary of Defense Industries Demir argued that armed drones are the most meaningful way to stop Daesh attacks which had killed 25 people in Kilis, Türkiye throughout 2016 and ceased after the Euphrates Shield Operation.¹⁸⁴ Although Türkiye used armed drones during the operation after September 2016 as part of a large scale use of force¹⁸⁵, it did not seem to have resorted to them as proving practice of the aforementioned argument in that instance. However, these types of minor uses of force occur only when there is a non-state actor on the border of a state, therefore it could be said that it has limited application.

The other question regarding the relation between drone strikes and *armed attack* is whether a drone strike amounts to an armed attack or not. This question has been answered in the affirmative and negative in the literature of this field. White, emphasising on the ‘surgical nature’ and ‘limited impact’ of drone strikes, argued that a drone strike does not constitute an armed attack.¹⁸⁶ However, this argument redundantly focuses on the targeted killing approach to drones. Additionally, states do consider whether the circumstances are appropriate when they resort to drones against non-state actors extraterritorially as Koh indicated in his speech.¹⁸⁷ Therefore, drone strikes would not give rise to invocation of the right to self-defense by hosting states and this argument would not have practical

¹⁷⁹ Wilmshurst, Elizabeth. *Principles of International Law on the Use of Force by States in Self-Defence*. 2005, <https://www.chathamhouse.org/publications/papers/view/108106>.

¹⁸⁰ O’Connell, Mary Ellen. “*The True Meaning of Force*.” *AJIL Unbound*, Vol. 108, 2014, p. 141; But see Lubell, Noam. *Extraterritorial Use of Force Against Non-State Actors*. Oxford University Press, 2010, p. 82.

¹⁸¹ Enemark, *Armed Drones*, p. 36.

¹⁸² Paust, Jordan J. “Operationalizing Use of Drones Against Non-State Terrorists Under the International Law of Self-Defense.” *Albany Government Law Review*, Vol. 8, 2015, p. 189.

¹⁸³ Paust, *Remotely Piloted Warfare*, p. 1106.

¹⁸⁴ Zeyrek, Deniz. “Kilis’e Çözüm Silahlı İHA [The Solution in Kilis is Armed UAVs]”, *Hürriyet*, (Apr. 25, 2016), <http://www.hurriyet.com.tr/insan-yapisiya-daha-iyisini-yapariz-40093931>.

¹⁸⁵ Aksam, “Türkiye’nin İnsansız Hava Aracı Kapasitesi [Türkiye’s UAV Capacity]”, (Sep. 7, 2016), <http://www.aksam.com.tr/guncel/turkiyenin-insansiz-hava-araci-kapasitesi/haber-547627>.

¹⁸⁶ White, Nigel D. “The Joint Committee, Drone Strikes and Self-Defence: Caught in No Man’s Land?.” *Journal on the Use of Force and International Law*, Vol. 3, 2016, 214.

¹⁸⁷ Koh’s Speech, p. 14.

implications in the present author's view in such contexts. However, in the inter-state context, the technological developments in small armed drones, which can carry out less grave but equivalent attacks in terms of effectiveness, will probably lead states to a loosened understanding of armed attack.

The extraterritorial attacks by armed non-state actors occur in short-durations and instantaneously. It is therefore important for states to respond to an attack at the beginning or even before it begins. At this point, the practicality and instant response (loitering for long periods and attacking when needed) capacity of drones can lead states to rely on them while using the self-defense argument against so-called imminent attacks/threats. The US and UK practice seem to have relied on such an argument as Boyle points out¹⁸⁸ and their killing list practices, which are disconnected from threats, make the imminence requirement problematic¹⁸⁹. The reported Israeli drone strikes in Sudan, one of which in 2009 killed around fifty smugglers who were allegedly carrying long-range rockets¹⁹⁰ do not fit the imminence argument as well.

C. The Secrecy Surrounding Drone Strikes and the Duty to Report Measures Taken in Self-Defense to the UNSC

Article 51 of the UN Charter imposes a duty on member states to report the measures taken in self-defense to the UNSC. The ICJ in the Nicaragua case considered the report to the UNSC as one of the conditions of self-defense. Due to the fact that the Charter was excluded by the US from the jurisdiction of the ICJ for that case¹⁹¹, the ICJ had to consider the duty mainly under customary law of self-defense and reached the conclusion that no such a duty exists under customary international law although the absence of a report may imply that the state in question was not convinced with the strength of the self-defense argument for that situation¹⁹². The ICJ believes that the duty is a procedural condition under the Charter system of self-defense alongside the UNSC's role in determining the legality of measures taken in self-defense.¹⁹³

Although the language of the article seems to be a strict one, the effects of the so-called duty to report are controversial. It is arguable that the duty to report positively contributes to the assessment of a state's conduct pertaining to self-defense and states mostly comply. However, it could also be argued that the abstract form of reports concerning self-defense actions prevents the positive

¹⁸⁸ Boyle, Michael J. "The Legal and Ethical Implications of Drone Warfare." *International Journal of Human Rights*, Vol. 19, 2015, 122.

¹⁸⁹ Cavallaro, James, Sonnenberg, Stephan, and Knuckey, Sarah. *Living Under Drones: Death, Injury and Trauma to Civilians from Us Drone Practices in Pakistan*. International Human Rights and Conflict Resolution Clinic, Stanford Law School; New York: NYU School of Law, Global Justice Clinic, 2012, https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/313671/doc/slspublic/Stanford_NYU_LIVING_UNDER_DRONES.pdf, p. 108.

¹⁹⁰ Mahnaimi, Uzi. "Israeli Drones Destroy Rocket Smuggling Convoys in Sudan", The Times, (Mar. 29, 2009), <https://www.thetimes.co.uk/article/israeli-drones-destroy-rocket-smuggling-convoys-in-sudan-rp5sgvbp5jt>.

¹⁹¹ Nicaragua Case, para. 228.

¹⁹² Nicaragua Case, para. 200.

¹⁹³ Nicaragua Case, para. 200.

contribution to be meaningful.¹⁹⁴ Additionally, as the Judge Schwebel argued, the claim that invoking the inherent right of self-defense would be illegal if the victim state does not notify the UNSC seems to go contrary to the inherent nature of the right of self-defense.¹⁹⁵ Similarly, to argue that the absence of a report removes the legality of the measures, does not seem to be applicable in state practice though it is arguable relying on the text.

In his article in Foreign Policy Zenko argued that states resorting to armed drones, including the US, should notify the UNSC for *each country* where they have been carrying out drone strikes.¹⁹⁶ However, he apparently assumes that every act of self-defense is followed by a complementary conflict as he considers the requirement territorial. In this sense, one may argue that in the event of a conflict following the first action taken in self-defense, reporting several times would no longer serve the purpose the requirement intended for. For instance, Gray argues that states may aim to prevent the application of international humanitarian law through reporting that an action has been taken in self-defense which suggests that the rules concerning self-defense applies.¹⁹⁷ Yet, the requirement concerns a series of temporary acts. Therefore, if the situation does not evolve into a subsequent conflict, the notification should be made for each time a state invokes the right of self-defense.

A glance at the state practice concerning drone strikes shows that except the report at the outset of its intervention in Syria,¹⁹⁸ no US report to the UNSC was made in the context of drone strikes. However, as a response to the pressures and requests to disclose the legal reasoning behind the drone strike program¹⁹⁹, the US Government leaked the White Paper in 2013²⁰⁰. As a leaked report can only be counted as an unofficial statement of the position of a country in regards to a situation, the White Paper does not enable us to understand the certain legal position of the US Government concerning drone strikes. Apart from the problem concerning the general legal approach, the absence of reliable information concerning individual US drone strikes created debates in the literature on the secrecy surrounding them. The secrecy surrounding drone strikes of the US, allowed it to defend its acts under numerous categories and to create a legal vagueness around the act in question.²⁰¹ In this regard, critics argued that this created a bad reputation for the US and they also questioned whether

¹⁹⁴ See for instance Green, James A. "The Article 51 Reporting Requirement for Self-Defense Actions." *Virginia Journal of International Law*, Vol. 55, 2015, pp. 604, 606.

¹⁹⁵ Nicaragua Case, Dissenting Opinion of Judge Schwebel, p. 363, para. 222.

¹⁹⁶ Zenko, Micah. "The Great Drone Contradiction." *Foreign Policy*, (Feb. 19, 2015), <http://foreignpolicy.com/2015/02/19/the-great-drone-contradiction-unmanned-aircraft-systems/>.

¹⁹⁷ See Gray, Christina. *International Law and the Use of Force*. Oxford University Press, 2008, p. 123.

¹⁹⁸ Permanent Rep. of the United States of America to the U.N., Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, Sep. 23, 2014, U.N. Doc. S/2014/695.

¹⁹⁹ The Request of ACLU, Jan. 13, 2009, <https://www.aclu.org/files/assets/2010-1-13-PredatorDroneFOIARequest.pdf>; ACLU V. CIA - FOIA Case For Records Relating To Drone Killings, Jan. 13, 2010, <https://www.aclu.org/cases/aclu-v-cia-foia-case-records-relating-drone-killings>.

²⁰⁰ NBC News, *Justice Department Memo Reveals Legal Case for Drone Strikes on Americans*, (Feb. 4, 2013), http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite.

²⁰¹ McNab and Matthews, p. 693.

the US randomly targeted people in the areas that it carried out drone strikes.²⁰² Unlike the US, The UK Government reported a particular drone strike in 2015 which killed two British Daesh members, based on the self-defense argument.²⁰³ However, the UK did not continue to report other drone strikes and does not reveal the details of drones strikes conducted in cooperation with the US in Syria.²⁰⁴ Despite this, the Joint Committee Report on Drones describes the drone attack as ‘merely a conventional use of force abroad by the UK in an armed conflict in which the UK was already involved’,²⁰⁵ but White criticises the Report because of disregarding the UK Government’s policy on the use of force outside the conventional battlefields²⁰⁶. However, as is seen above, the UK’s position towards the use of armed drones was vague due to the intense use of armed drones in Syria.²⁰⁷ At this point, there was also an unwillingness shown by states regarding clarification of the legal reasoning behind the drone strikes as the UK refused the Rights Watch’s request to explain the legal reasoning behind the strikes.²⁰⁸ There was also no information about Israel’s report to the UNSC of its drone strikes in Sinai. Türkiye’s initial attitude towards drone strikes was rather to publicise the strikes though it did not report them to the UNSC.

Relying on Brennan’s claim that the US can ‘take action ...without doing a separate self-defense analysis each time’,²⁰⁹ one may argue that it can be deduced from the absence of further reports that the state in question acts under the armed conflict argument. However, in the present author’s view this would not prevent the state in question from arguing in a legal platform that it only acted under the self-defense argument and there was no conflict between it and the non-state actor that it attacked, because the duty to report originally is not considered as effecting the legality of the right of self-defense.

The importance of the duty to report is that it allows other members of the international community to know the legal basis of an act which is otherwise illegal under the UN Charter system. Yet, the UN Charter talks of a posteriori and procedural one, therefore, it is hard to argue that lack of

²⁰² Naqvi, p. 42; Cf Witt, John Fabian. *A Duty To Capture?*. Eds Bradley Jay Strawser et al, *Opposing Perspectives on the Drone Debate*, Palgrave Macmillan, 2014, p. 142; Strawser, Bradley Jay. *Reply to Critics: No Easy Answers*, Eds Strawser et al, *Opposing Perspectives on the Drone Debate*. Palgrave Macmillan, 2014, p. 73.

²⁰³ Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the U.N., Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, Sep. 8, 2015, U.N. Doc. S/2015/688.

²⁰⁴ See Cole, Chris. “PM Must Publish Intelligence Committee Report on UK Drone Killings”, Drone Wars UK, (Apr. 18, 2017), <https://dronewars.net/2017/04/18/pm-must-publish-intelligence-committee-report-on-uk-drone-killings/>.

²⁰⁵ *The Joint Committee Report*, p. 5.

²⁰⁶ White, p. 214.

²⁰⁷ ‘The Joint Committee Report’ in 2015 also claimed that the UK’s legal argument is not clear. See *The Joint Committee Report*, pp. 13, 15.

²⁰⁸ See Jones, Adriana Edmeades. “Hidden from the Public: The United Kingdom’s Drone Warfare”, Just Security, (July 10, 2017), <https://www.justsecurity.org/42935/hidden-public-united-kingdoms-drone-warfare/>; Bowcott, Owen. “UK’s Refusal To Reveal Legal Advice On Drone Killings Faces Challenge”, The Guardian, (July 20, 2017), https://www.theguardian.com/uk-news/2017/jul/20/uk-refusal-reveal-legal-advice-drone-killings-challenge?CMP=Share_AndroidApp_Tweet.

²⁰⁹ Brennan, John O. *Remarks Of John O. Brennan: Strengthening Our Security By Adhering To Our Values And Laws* (2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

compliance will make a particular act of self-defense illegal. The literature also supports this view.²¹⁰ However, the legal uncertainty that non-compliance with the duty to report creates is undeniable. Although Gray claims that new practice of states indicates that they tend to ‘over-report’ acts of self-defense²¹¹, this was not the case for drone strikes during the US drone era.

CONCLUSION

As international law struggles always with the enforcement question, the realities on the ground should be taken into account seriously when it is interpreted. This does not mean that the rules need to be changed for the sake of violations. However, the unique characteristic of international law, which is the importance of state practice and states’ implementation of law, forces us to think again about how we understand the rules.

Armed drones have brought the notion of riskless resort to force into international law. However, the existing deficits of armed drones restrict their role in inter-state uses of force and, therefore, they are unable to create deterrence or asymmetry. Nevertheless, states can use them to create a low-intensity and short duration conflict in inter-state relations while not putting soldiers into jeopardy. Additionally, the riskless nature of armed drones can encourage states to intervene on a humanitarian basis against an isolated state, yet it seems ineffective in the face of a strong political opposition from a group of states as was seen in the Aleppo example.

Although the role of armed drones in inter-state relations is restricted, armed drones perfectly fit the theory of the use of force against armed non-state actors and help states in developing the practice in this regard. While relying on a more permissive approach to the use of force, the secrecy surrounding armed drones and non-compliance with the duty to report create an ambiguity and uncertainty as to the legal justification of the practice. Here, taken together with the tacit consent idea, the argument that consent makes *jus ad bellum* inapplicable helps states in continuation of this legal ambiguity. Therefore, the research argued that the extraterritorial use of force should rely on the self-defense argument in order to avoid circumvention of the rules of international law. With regards to resorting to armed drones in responding to less-grave forms of armed attacks, states seem to consider this possibility. Yet, the importance of this idea appears when considered in parallel with self-defense against imminent threats. As the research indicated, the practicality and instant strike capacity of drones, also, accelerate the practice and arguments on self-defense against imminent threats.

This article argued that although armed drones may not change the rules governing the resort to force, they did strengthen the permissive understandings of the use of force and pave the way for the practice of such understandings, specifically in regard to armed non-state actors.

²¹⁰ Greig, D. W. “Self-Defence and The Security Council: What Does Article 51 Require?.” *40 International and Comparative Law Quarterly*, Vol. 40, 1991, p. 387; Gray, p. 122; Green, p. 592.

²¹¹ Gray, p. 123.

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