

THE INTERNATIONAL SELF-DEFENSE INSTITUTE IN THE ERA OF GLOBAL TERRORISM

Rodrigo Szuvecs Oliveira¹
Carlos Canedo Augusto da Silva²

Introduction

This paper analyzes the legal argumentation of the American government on the issue of self-defense against international terrorism, both in areas of active hostility and in other regions that may not fit into this category. For that matter, the subject was divided into topics and subtopics that approach the traditional notion of international self-defense proposed by the United Nations, the interpretations on pre-emptive self-defense and preventive self-defense and the self-defense in non-international armed conflicts, such as indirect armed aggression. All these topics are essential for the purpose of understanding the actions of the American government regarding to the terrorist threats in a world risk society.

Considering the purpose of this article, the notion of self-defense developed by Daniel Bathelem and the Presidential Policy Guidance (PPG) are central. Regarding the self-defense principle, the first widens the scope of the use of lethal force against terrorist activities and the latter regulates the use of the force against terrorist threats even outside the zones of active conflict, attempting to equate the actions of the American army to the norms of war and

¹ Professor of Criminal Law at the FUMEC University Undergraduate course. Professor of Criminal Law at the Lato sensu Postgraduate course at PUC Minas. Master in "Human Rights, Process of Integration and Constitutionalisation of International Law" by the Post-Graduation Program stricto sensu of the Pontifical Catholic University of Minas Gerais (PPGD - PUC Minas). E-mail: rodrigoszuecs@gmail.com.

² Associate Professor at the Federal University of Minas Gerais. Adjunct professor at the Pontifical Catholic University of Minas Gerais. PhD in Criminal Law from the Federal University of Minas Gerais. Post-doctorate from the University of Barcelona. E-mail: canedo@pucminas.br.

the international human rights laws. This effort of the American government - contextualized by the recognition of a new scenario of the uncertainties of a globalized world, in which frontiers are less relevant and the national loyalties are exchanged for ideological purposes - is analyzed from a constructivist perspective, which focuses on an intersection between politics and law. By acting against terrorism through this new military approach, the White House seeks to support that the American operations play within the rules of humanitarian law; therefore, also pursuing to broaden the conceptual field that would allow the legitimization of its policies, illustrating the co-constitutive relation between the agent and the international structure.

Finally, such modification in the rules of international politics in relation to the use of lethal force against suspects of terrorism activities outside the areas of active conflict, through the use of missile-armed drones set precedents in the international sphere; consequently, other countries are already making use of the same argumentation in relation to the broadening of the self-defense, as the United Kingdom. Yet, this article clarifies that this conceptual opening ends up amplifying the scope of the Executive power and provides legitimacy to their countries beyond the Western democracies.

Self-defense in the International Level

Self-defense as an institute of the international law is provided by the 51th article of the Charter of the United Nations:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense *if an armed attack occurs against a member of the United Nations*, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by the Members in exercise of this right of self-defense shall immediately be reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore the international peace and security (Brazil 2017b, emphasis added, our translation).

From the reading of this article it is possible to understand that international self-defense is only possible if exercised after an armed attack against any member of the United Nations. In other words, in agreement with the international law, the cause that justifies the armed response can only be used when a State is effectively assaulted.

In this case, the time criteria of such principle in the external level is quite distinct than the principle in the internal context, which restricts the action of the State that was victim of the aggression. However, international self-defense is connected with the national self-defense³, once the intention of both institutions is to prevent that the unfair predominate upon the ones that follow the rules responsible to stabilize the behavior expectations:

The act of self-defense obeys to the established conditions in order to avoid a new unilateral aggression. Thus, such act meets, in the international context, the same foundations of the institute of self-defense that typically conducts the relations between individuals in the internal legal systems (Veloso 2008, 778, our translation).

The Warfare Handbook, edited by the United States Department of Defense, emphasizes that the general principles of the many national legal systems also constitute the international law⁴ and, likewise, the principles of the self-defense are universal and are provided by both internal and external legal spheres.

In the theoretical frame of the International Relations, it is possible to observe the legitimation of the self-protection principle within the Realist perspective, which compares the international order to the state of nature described in Hobbes, that is to say, a situation based in anarchy in which the one who uses from the violence to obtain resources and survive is more successful. Although, in the internal sphere this condition would have already been surpassed in the face of the presence of an authority assigned the monopoly of the use of the force; in the external level, due to the lack of a concentration of power in an organization of universal jurisdiction above all States, the anarchy exists and manifests itself through conflicts⁵. Even though the Realist

³ The United States has long held that, consistent with Article 51 and customary international law, a state may use force in self-defense: 1. if it has been attacked, or 2. if an armed attack is legitimately deemed to be imminent. This interpretation is also consistent with our domestic notion of self-defense as applied in the criminal and tort law contexts (Taft 2002).

⁴ Legal Principles as Part of International Law: General principles of law common to the major legal systems of the world are a recognized part of international law. Law of war principles have been understood to be included in this category of international law. (Department of Defense 2015, 50).

⁵ Anarchy is the concept that characterizes Realism in International Relations. What is understood by anarchy is not properly chaos, yet the absence of a supreme authority, legitimate and unquestionable that is responsible for dictating the rules, interpreting and implementing them, and punishing the ones who do not obey them. [...] Thus, in the International Relations, it is replicated what Hobbes described as the state of nature: the concurrent existence of many

perception understands the international realm as an anarchy, other International Relations frameworks – as the constructivism – challenge this assumption. They claim that the individuals and the people of sovereign authority are different and the analogy between the internal and external spheres would be mistaken⁶. Regardless the theoretical frame adopted, there are procedural similarities between the national and international self-defense that seek to guarantee the control of the situation and avoid the perpetuation of violence⁷.

Furthermore, it is possible to challenge the literal understanding of the 51st article of the UN Charter which predicts the possibility of reaction only after the occurrence of an armed aggression. Specifically, this may be stated by the international customary norms⁸, developed after the case *Caroline*:

In 1841, the United State's Secretary of State Webster and Lord Ashburton agreed that the self-defense could be initiated when the '*necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation*'. Some considered the writing of the 51st article of the UN Charter to be inspired by this doctrine. The justification would be that, when the Charter was developed, the authors had sought to incorporate the

actors responsible exclusively by their own survival. (Nogueira and Messari 2005, 25-26, our translation).

6 I suspect that it is our reliance on the unquestioned dichotomy between a “domestic order” and the international “anarchy” which is to blame for the continuing theoretical embarrassments. By making social order dependent upon law and law, in turn, upon the existence of certain institutions – be they the existence of a sovereign or central sanctioning mechanisms – we understand the international arena largely negatively, i.e., in terms of the “lack” of biding legal norms, of central institutions, of sovereign will, etc. [...] While even the strongest man has to sleep sometime, and, therefore, can be overpowered, communities can institute shifts in guarding the safety of their members. Consequently, the reality of international life is quite different from the state of “war of all against all” (Kratochwil 2008, 2-3).

7 In the face of the internal legal systems, self-defense is responsible to cover a temporary lack of public authority. In view of this, it has subsidiary disposition regarding the jurisdiction of the national power. As an exception to the rules of the policed society, the self-defense act is necessarily brief and must be subordinated, a posteriori, to public control once the lack of authority and the aggression that authorized it had been ended. If the internal legal orders demand that the individual who react to an aggression, actual or imminent, communicate immediately the situation to a national authority; in the international level the act of aggression suffered by the State victim who defends itself must be communicated to the Security Council, the United Nations structure responsible for the collective security (Velooso 2008, 779, our translation).

8 The customary law concerned was formed in the nineteenth century and, in particular, as a result of the correspondence exchanged by the United States and Britain in the period from 1838 to 1842. The cause of the exchange was the seizure and destruction (in 1837) in American territory by British armed forces of a vessel (the case *Caroline*) used by persons assisting an armed rebellion in Canada (Brownlie 2008, 733).

meaning of self-defense established by the international customs. [...] Distinctly of the right to self-defense based in the 510 article of the UN Charter, the one from the customary law is founded by the incident acknowledged as the case Caroline, which does not demand that a first “armed attack” have had effectively occurred (Neto 2008, 459-460, our translation).

Considering this perspective, one notes the existence of two categories of international self-defense: the first provided by the customary norm that permits the agent to act in the face of an imminent attack, in agreement with the criteria established by the case Caroline, authorizing an attack against an imminent threat; the second one was recognized by the 510 article of the UN Charter, which consent the reaction only after an aggression. This distinction produced the two different understandings of diverse forms of self-defense: the preventive and preemptive attacks⁹. As a matter of fact, self-defense is internationally limited once it represents a risk to be invoked by the different actors, each of them seeking their own security by attacking previously others that may give the impression to be a menace. In this context, the realist perspective of *bellum omnium contra omnes* would be executed.

Preemptive Self-defense and Preventive Self-defense

The preemptive attack “is founded by the notion that the other side is on the verge of starting a conflict, therefore, it is assumed that the part to be attacked has enough evidences to anticipate a counter-attack that, by definition, would be covered by the definition of self-defense”; on the other hand, the preventive attack “is based in the assumption that the war is going to be started in a near future; in opposition to the preemptive attack, the notion of menace is blurred by the time and, thus, the preemptive attack cannot be categorized as self-defense” (Sarfati 2005, 365, our translation).

9 There are divergences regarding the exact moment in which the use of the force is authorized by the International Law. This disagreement opposes the supporters of the principle that justifies the self-defense attack only with an effective use of the armed forces and the ones who adopt the idea of the preventive defense against hostile intention. Some authors contrary to the broad interpretation of the 510 article, which would embrace the preventive self-defense, state that the 510 article of the UN Charter would have abandoned all previous regulations, denying the understanding provided by the customary law and recognizing only the limits established by the UN Charter. [...] the preventive thesis, particularly invoked with the emergence of the nuclear advances, has the argument that the 510 article would not have refuted the earlier legislation as legal basis, accepting, in this way, the preventive self-defense. Its supporters claim that the UN Charter would not have created the institute of the self-defense, but only would have confirmed the prior customary law (Velooso 2006, 782-783, our translation).

Broad interpretations of the UN Charter¹⁰ seek to satisfy the gap of the States' rights regarding their protection in a world where the threats are more diffuse and lethal, pursuing to legitimize the actions that lead the execution of an armed attack. The UN – through a special group designed to debate these questions - acknowledged the possibility of the use of the preemptive self-defense due to an imminent attack; however, the organization denied the possibility to invoke the Charter to support the legitimate preventive self-defense; in this hypothesis it would be necessary the authorization of the UN Security Council¹¹. An example of preemptive self-defense is the reaction of Israel in 1967, in the “Six Days War” in the face of the mobilization of the Arabic troops; on the other hand, an example of the preventive attack is the actions of Israel in 1981 in order to prevent Iraq to develop a nuclear program¹².

Self-defense and Non-international armed conflicts

In accordance with the traditional military thought “only the political relations between governments and nations produce war” (Clausewitz 2014, 870, our translation), in other words, “the war *jus publicum Europaerum* was

10 On what would constitute self-defense, particularly in a world in which not only States can inflict devastating damage, the authors argue, especially, on the concepts that often accompany the expression ‘self-defense’: ‘interceptive’ self-defense, ‘preemptive’, ‘preventive’, ‘anticipatory’ and other adjectives are being used not only to interpret the ambiguities and omissions of the Charter but to justify all kinds of armed, legal or illegal actions (Neto 2008, 457, our translation).

11 Discussing the necessary innovations in Article 51, the High Level Group on Threats, Challenges and Change, nominated by the United Nations Secretary-General produced on December 1st, 2004 a report in which they distinguished two categories of military action with preventive purposes: the precaution principle, in the event of an imminent threat (preemptive self-defense) and the preventive military intervention *stricto sensu* (preventive self-defense) in case of non-imminent menace, such as that which occurs when of the acquisition by a State of the means of making nuclear weapons. It was therefore understood that this last hypothesis, the preventive military intervention *stricto sensu*, would not be authorized by the Charter, and any action aimed at neutralizing potential but not imminent or close risks would need to be approved by the Security Council (Velooso 2006, 787, our translation).

12 The better interpretation of Article 51 seems to be that self-defence is lawful when an armed attack by another state is imminent (pre-emptive self-defence, as in the case of Israel in 1967, when the international community did not object to Israel's attack to forestall the impending invasion by some Arab countries); instead, anticipatory self-defence is unlawful when the attack is launched to prevent a possible future aggression (preventive self-defence, as in the case of the Israeli 1981 attack on Iraq to destroy the Osirak nuclear reactor, an attack the Security Council condemned by res. 487/1981). The fact, however, remains that this interpretation is not upheld by all members of the international community (Cassese 2008, 154-155).

an interstate conflict, disputed between two regular national armies” (Schmitt 2008, 159, our translation). Through this perception, it is possible to understand that war is the continuation of politics by other means¹³, once the conflicts would be regulated by guidelines which aim to regulate the actions of the agents involved, as well as produce means to establish peace at the end of the conflict. However, the terrorism in the globalization Era engages non-state actors as ISIS, al-Qaeda, al-Nusra, al-Shabab, Talibā, Boko Haram, who work towards the total destruction of their challengers. In this hypothesis, the correct designation is “non-international armed conflict” (NIAC)¹⁴ and the international legal system that regulate this situation is present in the 30 article present in the four Geneva Convention of 1949 whose application always depends on the analysis of the concrete case¹⁵. This is the rule of the *jus in bello* which regulates the use of force between the parties involved in a non-international armed conflict. However, in the case of the War on Terror the nonstate actors have broken the international humanitarian law¹⁶ - notic-

13 War is nothing more than the continuation of political relations, with the complement of other means. We say that new means are added to it, to assert at the same time that war itself does not cease these political relations, that it does not transform them into something entirely different, but that they continue to exist in their essence, whatever the means what are you serving (Clausewitz 2014, 870, our translation).

14 International humanitarian law (IHL), also known as the laws of war and the law of armed conflict, is the legal framework applicable to situations of armed conflict and occupation. As a set of rules and principles it aims, for humanitarian reasons, to limit the effects of armed conflict. [...] IHL classifies armed conflicts as international armed conflict (IAC) or non-international armed conflict (NIAC). Qualifying an armed conflict is an important threshold question necessary to determine which set of rules apply to the conflict: those for IAC (found mainly in the four Geneva Conventions and Additional Protocol I) or those for NIAC (found mainly in Article Three common to the four Geneva Conventions and Additional Protocol II) (International Humanitarian Law 2017).

15 In Article Three common to the four Geneva Conventions a NIAC is defined in the negative, as “an armed conflict not of an international character.” Thus, if a non-state armed group is a party to the armed conflict, it will be categorized as a NIAC. This could be if a state is fighting an armed group, or if two armed groups are fighting each other. [...] The use of the phrase “global war on terror” resulted in some misunderstanding regarding the application of IHL to certain situations. The “global war on terror” is a political phrase, not a legal term of art. Thus, the “global war on terror” is not an armed conflict. The appropriate analysis is to look at the conflict locations – Iraq, Afghanistan, Somalia, Yemen, etc. – and assess each one in terms of whether or not it is an IAC or NIAC, regulated by the relevant framework (International Humanitarian Law 2017).

16 There are the rules related to war. Here, ISIS claims to follow Islamic laws of armed conflict...ISIS has published guidelines, either as official fatwas or legal opinions authored by ISIS-affiliated clerics, specifying the conditions under which enemy combatants may be targeted, tortured, mutilated, or killed as well as rules governing the ransom of non-Muslim hostages. So ISIS can claim that its combatants are acting lawfully according to the group’s own rules,

ing that only States are restrained by that.

In turn, the *jus ad bellum* allows the self-defense to be invoked in the context of the non-international armed conflicts. The 20 article, §4 of the UN Charter claim that “all member shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the Nation”. This restriction in the use of the force in the international relations does not limit the right to self-defense, as guaranteed by the 510 article of the Charter; yet, it provides that this right may only be exercised after an attack. However, it is important to emphasize that the international self-defense is not restrained by attacks resultants from other States, as developed by the 30 article, g, from the resolution n. 3314, XXXIX, UNGA¹⁷, which define the concept of “aggression”. The customary law also established the possibility of a State to react against imminent attacks from nonstate actors who act from the territory of another State, as illustrated by the *Caroline Incident*¹⁸.

Moreover, the members of the UN agree that the terrorism represents a menace for the international peace and that the self-defense against armed attacks executed by nonstate actors is allowed in accordance with the resolutions 1368 and 1373 from the United Nations’ Security Council. A strategy used by these groups is what is called indirect armed aggression¹⁹ in which the non-state actors use the territory of a sovereign State to attack another one. Examples of these types of aggression are the conflicts between the Colom-

even though the United Nations has reported that “ISIS is violating binding international humanitarian law” (March and Revkin 2015).

17 Article. 3ffl, g : “L’envoi par un Etat ou en son nom de bandes ou de groupes armés, des forces irrégulières ou de mercenaires qui se livrent à des actes de force armée contre un autre Etat d’une gravité telle qu’ils équivalent aux actes énumérés ci-dessus, ou le fait de s’engager d’une manière substantielle dans une telle action” (ONU 2017).

18 The inherent right of self-defense is not restricted to threats posed by States. Even before the September 11th attacks, it was clear that the right of self-defense applies to the use of force against non-state actors on the territory of another State. For centuries, States have invoked the right of self-defense to justify taking action on the territory of another State against non-state actors. As one example, the oft-cited Caroline incident involved the use of force by the United Kingdom in self-defense against a nonstate actor located in the United States. Nearly two hundred years later, this right remains widely accepted” (White House 2016, 9).

19 Indirect armed aggression was supported several times as a justification for the self-defense response. [States that were victims of this type of aggression] alleged that the attacked State tolerated or supported terrorist activities against the territory of the perpetrators of the attacks. It was also the American thesis that justified the Vietnam War: the progressive infiltration of troops from North Vietnam and the Vietcong in South Vietnam would be the basis for self-defense, individual by South Vietnam, collective by the United States (Veloso 2006, 789, our translation).

bian government and the RAFC (Revolutionary Armed Forces of Colombia), who were accused of using the Ecuadorian territory²⁰ to launch strikes against Colombia.

The problem in this type of conflict is how to determine the imminence of the attack to invoke the use of the force in accordance with the *jus ad bellum*. The USA, for example, analyze that there is a variety of factors defined by Daniel Bethlehem²¹ in order to justify the anticipated use of the force, that is to say, before a nonstate actor can accomplish a terrorist attack²². The difficulty of the question relies exactly in defining the imminence of the attack that would be executed by a group that does not follow the international laws adding a surprise element in an armed conflict. These nonstate actors make use of new technologies in order to organize fast and efficient strikes, confounding the actions of the State that seeks to prevent attacks against the civilian population²³. For instance, the modern military discipline used with tactical schemes, based in conflicts between national armies of sovereign States, finds difficulties in adapting to an army which is fragmented and irregular, whose dispersion is a reality in the conflicts with terrorist groups which act as mobile cells without a direct order of the central command. This is clear when observing General Stanley McChrystal's testimony about the difficulty of the world's most powerful army facing al-Qaeda in Iraq, a decentralized network of militants who uses terrorist attacks against military and civilian targets. The figure on the left shows the traditional combat formation of a modern

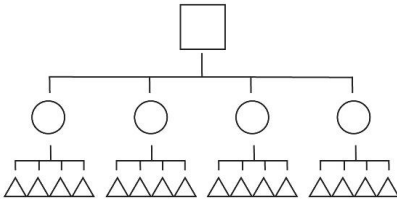
20 Disagreements and tensions between the two countries increased after March 1, 2008, when the Colombian government attacked a RAFC camp inside Ecuadorian territory (Angostura), without the knowledge and endorsement of the Ecuadorian government. This military operation killed Raúl Reyes, one of RAFC's top commanders and 22 other people. The Colombian government claimed that it acted in accordance with the thesis of preventive security, self-defense and international co-responsibility against terrorist actors who used Ecuadorian territory to attack Colombia (Santos 2010, our translation).

21 Under the *jus ad bellum*, a State may use force in the exercise of its inherent right of self-defense not only in response to armed attacks that have already occurred, but also in response to *imminent* attacks before they occur. When considering whether an armed attack is imminent under the *jus ad bellum* for purposes of the initial use of force against another State or on its territory, the United States analyzes a variety of factors. [...] These factors include those identified in Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 769 (2012) (White House 2016, 10).

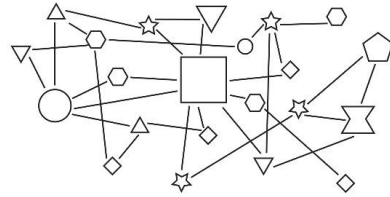
22 The challenge is to formulate principles, capable of attracting a broad measure of agreement, that apply, or ought to apply, to the use of force in self-defense against an imminent or actual armed attack by nonstate actors (Bethlehem 2012, 4).

23 While "imminence" continues to be a key element of the law relevant to anticipatory self-defense in response to a threat of attack, the concept needs to be further refined and developed to take into account the new circumstances and threats from non-state actors that states face today (Bethlehem 2012, 5).

army while the figure on the right illustrates how the terrorist tactics confuses the traditional military formations.



What we designed for



What we were facing

The graphical scheme of the American general expresses how terrorism generated a level of complexity for which the traditional military model is not prepared, using new information technologies that allow a dynamic communication between small autonomous groups²⁴. The current characteristic of terrorism is precisely in the combination of its insidious strategies and technological means that allow quick coordination between militants, who interact directly with each other, enhancing the success of the strikes.

Therefore, the American government during the War on Terror extended the criteria to determine when the attack can be considered imminent, seeking to reconcile the use of force against non-state actors with the *jus ad bellum* recognized by the international community without neglecting the *jus in bello* during the military operation²⁵. The important principles, to define the extension of the right of the self-defense of a State against an imminent or current attack by a non-state agent defined by Daniel Bethlehem are:

1. States have a right of self-defense against an imminent or actual

24 AQUÍ's adroit use of information technology had multiplied the effectiveness of tactics employed by guerrilla and terrorist groups for decades. That much was obvious, but there was a bigger change at play. The exponential growth of global interconnectedness meant we weren't just looking at the same roads with faster traffic; we were looking at an entirely different and constantly shifting landscape (McChrystal 2015).

25 The principles [...] address only the *jus ad bellum* (the law relevant to the resort to armed force) rather than the *jus in bello* (the law relevant to the conduct of military operations). As such, the principles address the threshold for the use of armed force in self-defense rather than the use of force in ongoing military operations. Any use of force in self-defense would be subject to applicable *jus in bello* principles governing the conduct of military operations (Bethlehem 2012, 5).

armed attack by nonstate actors.

2. Armed action in self-defense should be used only as a last resort in circumstances in which no other effective means are reasonably available to address an imminent or actual armed attack.

3. Armed action in self-defense must be limited to what is necessary to address an imminent or actual armed attack and must be proportionate to the threat that is faced.

4. The term “armed attack” includes both discrete attacks and a series of attacks that indicate a concerted pattern of continuing armed activity. The distinction between discrete attacks and a series of attacks may be relevant to considerations of the necessity to act in self-defense and the proportionality of such action.

5. An appreciation that a series of attacks, whether imminent or actual, constitutes a concerted pattern of continuing armed activity is warranted in circumstances in which there is a reasonable and objective basis for concluding that those threatening or perpetrating such attacks are acting in concert.

6. Those acting in concert include those planning, threatening, and perpetrating armed attacks and those providing material support essential to those attacks, such that they can be said to be taking a direct part in those attacks.

7. Armed action in self-defense may be directed against those actively planning, threatening, or perpetrating armed attacks. It may also be directed against those in respect of whom there is a strong and reasonable, and objective basis for concluding that they are taking a direct part in those attacks through the provision of material support essential to the attacks.

8. Whether an armed attack may be regarded as “imminent” will fall to be assessed by reference to all relevant circumstances, including (a) the nature and immediacy of the threat, (b) the probability of an attack, (c) whether the anticipated attack is part of a concerted pattern of continuing armed activity, (d) the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action, and (e) the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage. The absence of specific evidence of where an attack will take place or of the precise nature.

9. States are required to take all reasonable steps to ensure that their territory is not used by nonstate actors for purposes of armed activities—including planning, threatening, perpetrating, or providing material support for armed attacks—against other states and their interests.

10. Subject to the following paragraphs, a state may not take armed action in self-defense against a nonstate actor in the territory or within the jurisdiction of another state (“the third state”) without the consent of that state. The requirement for consent does not operate in circumstances in which there is an applicable resolution of the UN Security Council authorizing the use of armed force under Chapter VII of the Charter or other relevant and applicable legal provision of similar effect. Where consent is required, all efforts in reasonable good faith must be made to obtain consent.

11. The requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third state is colluding with the non-state actor or is otherwise unwilling to effectively restrain the armed activities of the non-state actor such as to leave the state that has a necessity to act in self-defense with no other reasonably available effective means to address an imminent or actual armed attack. In the case of a colluding or a harboring state, the extent of the responsibility of that state for aiding or assisting the non-state actor in its armed activities may be relevant to considerations of the necessity to act in self-defense and the proportionality of such action, including against the colluding or harboring state.

12. The requirement for consent does not operate in circumstances in which there is a reasonable and objective basis for concluding that the third state is unable to effectively restrain the armed activities of the non-state actor such as to leave the state that has a necessity to act in self-defense with no other reasonably available effective means to address an imminent or actual armed attack. In such circumstances, in addition to the preceding requirements, there must also be a strong, reasonable, and objective basis for concluding that the seeking of consent would be likely to materially undermine the effectiveness of action in self-defense, whether for reasons of disclosure, delay, incapacity to act, or otherwise, or would increase the risk of armed attack, vulnerability to future attacks, or other development that would give rise to an independent imperative to act in self-defense. The seeking of consent must provide an opportunity for the reluctant host to agree to a reasonable and effective plan of action, and to take such action, to address the armed activities of the non-state actor operating in its territory or within its jurisdiction. The failure or refusal to agree to a reasonable and effective plan of action, and to take such action, may support a conclusion that the state in question is to be regarded as a colluding or a harboring state

13. Consent may be strategic or operational, generic or ad hoc, express or implied. The relevant consideration is that it must be reasonable to regard the representation(s) or conduct as authoritative of the consent of the state on whose territory or within whose jurisdiction the armed action in self-defense

will be taken. There is a rebuttable presumption against the implication of consent simply on the basis of historic acquiescence. Whether, in any case, historic acquiescence is sufficient to convey consent will fall to be assessed by reference to all relevant circumstances, including whether acquiescence has operated in the past in circumstances in which it would have been reasonable to have expected that an objection would have been expressly declared and, as appropriate, acted upon, and there is no reason to consider that some other compelling ground operated to exclude objection.

14. These principles are without prejudice to the application of the UN Charter, including applicable resolutions of the UN Security Council relating to the use of force, or of customary international law relevant to the use of force and to the exercise of the right of self-defense by states, including as applicable to collective self-defense.

15. These principles are without prejudice to any right of self-defense that may operate in other circumstances in which a state or its imperative interests may be the target of imminent or actual attack.

16. These principles are without prejudice to the application of any circumstance precluding wrongfulness or any principle of mitigation that may be relevant.

Despite Bethlehem defines the term “reasonable and objective basis” provided by the paragraphs 5, 7, 8, 11 and 12, claiming that this basis “requires that the conclusion is capable of being reliably supported by a high degree of confidence on the basis of credible and all reasonably available information” (Bethlehem 2012, 6). He also describes the expression “threat” provided by the paragraphs 5, 6, 7 and 9, claiming that it “refers to conduct that, absent mitigating action, there is a reasonable and objective basis for concluding is capable of completion and that that there is an intention on the part of the putative perpetrators to complete it. Whether a threatened attack gives rise to a right of self-defense will fall to be assessed by reference to the factors set out *inter alia* in paragraph 8” (Bethlehem 2012, 6). Once the State has legally made use of the force in exercising of the self-defense against an armed group, due to an imminent or executed attack, it is not needed to appreciate again if any act following the first attack characterize or not the “imminence” if the hostilities are not finished yet.

The argumentation presented above seeks to support the concept of “imminence” in a world risk society²⁶, in other words, in a world where the

26 Modern collectivities are increasingly occupied with debating, preventing and managing risks. Unlike earlier manifestations of risk characterized by daring actions or predictability mo-

risks are not possible to be properly anticipated²⁷. Bearing this in mind, that definition met the standard of the Presidential Policy Guidance (PPG) from the US government, which provides the preemptive counter-terrorism operations patterns – as the capture, outside the areas of active hostility, of targets suspects of engaging in terrorism activities or the use of lethal force against them. Such counter-terrorism operations do not exclude nor replace norms that regulate armed conflicts and their principles, as the proportionality and humanity. The term “areas of active hostility” is not internationally recognized as a legal expression, but refers to countries as Afghanistan, Iraq and Syria, due to the scope and intensity of the conflicts in these regions. Consequently, the PPG is employed only in lethal operations outside these zones, as Yemen and Somalia, where is possible to find active terrorist groups. The Obama administration asserted that the US follows the norms of armed conflicts²⁸ inside and outside areas of active hostility, yet, in areas that are not recognized as “hot-battlefield”, the PPG is employed – as it encompasses stricter patterns for the use of lethal force than the laws of war. As an example, the PPG requires “quite conviction” that civilians are not going to be target and provides the possibility of detention of the suspects before the use of force. The law of war, on the other hand, anticipates that civilians lives are inevitably are going to be at risk during conflicts and soldier are only “protected” if they are out of conflict due to prison, surrender, sickness or injury.

The counter-terrorism actions executed outside the areas of active hostility are generally performed with the consent of the State in which the military force is going to be used in order to do not violate the principles of sovereignty and working as a collective self-defense. In order to launch these operations, two *jus ad bellum* principles must be satisfied: i) the State must consider the right to act against a nonstate actor (the against whom question); ii) the State must also consider where he is permitted to use the military force (the where question). In order to exercise the right of the self-defense outside

dels, global risks cannot be calculated or predicted anymore (Beck and Levy 2013, 6).

27 Short of an actual armed attack, how long does a State have to wait before preemptive measures can be taken to prevent serious harm? In the era of weapons of mass destruction, definitions within the traditional framework of the use of force in self-defense and the concept of preemption must adapt to the nature and capabilities of today's threats (Taft 2002).

28 America's actions are legal. We were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war -- a war waged proportionally, in last resort, and in self-defense. And yet, as our fight enters a new phase, America's legitimate claim of self-defense cannot be the end of the discussion (Obama 2013a).

an area of active hostility, the *jus ad bellum* demands that the assaulted State have the consent of the other State to operate in its territory or act in self-defense against another sovereign State if the latter is incapable or not willing to act against the non-state actor placed in its territory. Considering this last hypothesis, the International Law does not require the permit of the State in which the military force is going to be used against the non-state actor responsible for the threat. In the case of the inability (lack of military, human and economic resources) or the unwilling of opposing the non-state actor (once it is useful as proxy), the host State will have its sovereignty “violated” by the threatened State that exercises the right of the self-defense. The reflecting on the inability or the unwillingness is a mean to respect the other’s sovereignty, ensuring that the military force is only used if a State cannot or do not want to act against the armed group that threaten another State placed in its territory²⁹. The loss of territory may be an example of incapability of acting against a nonstate actor, as it happens in the situation of Syria that lost part of its territory to the Islamic State. An example of unwillingness to act against a nonstate actor is the refusal of Taliban in imprison and bringing bin Laden after the 9/11 attack.

The PPG attempted to define the patterns to a new armed conflict model between a sovereign State (USA) and countless armed groups whose soldiers are not identified and aim civilian and military targets. These combatants, also, are willing to use weapons of mass destruction³⁰, are funded by illegal means and are driven by a suicide ideology. All of this combined with new communication technologies in a globalized world, where the transit of people from a place to another is not subjected to a high control, which permits that terrorists groups spread out through numerous territories, as never seen before. Due to the diffuse nature of the international terrorism, the attacks outside the areas active hostility in self-defense³¹ are regular – what resulted

29 With respect to the “unable” prong of the standard, inability perhaps can be demonstrated most plainly where, for example, a State has lost or abandoned effective control over the portion of its territory where the armed group is operating. With respect to the “unwilling” prong of the standard, unwillingness might be demonstrated where, for example, a State is colluding with or harboring a terrorist organization operating from within its territory and refuses to address the threat posed by the group (White House 2016, 10).

30 John Cantlie, the kidnapped British war correspondent, telegraphed a warning that [...] ISIS could request that its operatives in Pakistan purchase a nuclear weapon, take it to Nigeria, and then smuggle it into the United States through Mexico by using existing drug-and human-trafficking networks. That might sound implausible, but the article at least indicated that ISIS is thinking along these lines. And it wouldn’t be the first group. Terrorists, and in particular jihadists, have long been interested in the acquisition and use of chemical, biological, radiological, and nuclear weapons (Acharya 2016).

31 On September 28, in coordination with the Federal Government of Somalia, U.S. forces

in critics these actions. As a mean to respond to this criticism, the Obama administration published in 2016 a summary about the self-defense activities outside the areas of active hostility³², stressing the number of the dead, combatants and non-combatants. The official numbers that comprehend the period from January 20th, 2009 and December 31th, 2015 are:

- Total attacks against terrorist targets outside areas of active hostility: 473
- Dead combatants: 2.372 to 2581
- Dead non-combatants: 64-116

If this numbers are correct, 2.5 to 5% of the victims of these attacks where civilians (side effects). However, the White House recognizes the divergence of its official data to the ones from the non-governmental organizations that indicate higher statistics; for instance, in the same period presented before, these organizations expose around 200 to 900 dead civilians by these operations³³. Criticism regarding the data published by the US government was strengthened when considering that even the official information from the war zones in Iraq and Afghanistan seems to be mistaken, possibly, since the launch of the War on Terror in 2001³⁴. Even so, Obama himself supported

conducted a self-defense strike against al-Shabaab, an al-Qaeda-associated terrorist group, in Galcayo, Somalia. During a Somali-led counterterrorism operation to disrupt an al-Shabaab Improvised Explosive Device (IED) making network, a group of armed al-Shabaab fighters attacked, threatening the safety and security of the Somali force. Somali forces returned fire in self-defense. The U.S. conducted a self-defense strike to neutralize the threat, killing nine (9) enemy fighters (U.S. Africa Command Public Affairs 2016).

32 Office of The Director of National Intelligence. *Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities*, 2016.

33 Although these organizations' reports of non-combatant deaths resulting from U.S strikes against terrorist targets outside areas of active hostilities vary widely, such reporting generally estimates significantly higher figures for non-combatant deaths than is indicated by U.S. Government information. For instance, for the period between January 20, 2009 and December 31, 2015, non-governmental organizations' estimates range from more than 200 to slightly more than 900 possible non-combatant deaths outside areas of active hostilities (Office of The Director of National Intelligence 2016, 2).

34 The American military has failed to publicly disclose potentially thousands of lethal airstrikes conducted over several years in Iraq, Syria and Afghanistan [...] The enormous data gap raises serious doubts about transparency in reported progress against the Islamic State, al-Qaida and the Taliban, and calls into question the accuracy of other Defense Department disclosures documenting everything from costs to casualty counts. In 2016 alone, U.S. combat aircraft conducted at least 456 airstrikes in Afghanistan that were not recorded as part of an open-source database maintained by the U.S. Air Force [...] Most alarming is the prospect this data has been incomplete since the war on terrorism began in October 2001. If that is the case,

its actions, assuring that the number of civilians killed by drones is minor than the number of victims of terrorist attacks if the US have not been involved.³⁵ Another contentious issue is who the American government considers as “soldier” or “civilian”. In agreement with the summary, the verification of a person as a genuine target of a strike is originated by a number of factors that are analyzed by the intelligence service, for instance, the participation in a terrorist organization and their role inside the group; in this context, the White House was seeking to oppose the accusation from human rights groups which claimed that all men in military age in these zones were being considered suspects and, thus, potential targets³⁶; that is to say, that the attacks would be based in external characteristics (signature strikes).

Precedents set by the United State on the use of the lethal force in self-defense against terrorist threats outside zones of conflicts

The performance of the US in the War on Terror, specifically the operations outside the areas of active hostility, invoking the principle of self-defense against an imminent attack, set important precedents in the context of the International Law. This happens due to the fact that this argumentation can be claimed by any country and its practice may become a custom and “the international costume had and still has primordial importance in the emer-

it would fundamentally undermine confidence in much of what the Pentagon has disclosed about its prosecution of these wars, prompt critics to call into question whether the military sought to mislead the American public, and cast doubt on the competency with which other vital data collection is being performed and publicized (Grandpre and Snow 2017).

35 To do nothing in the face of terrorist networks would invite far more civilian casualties -- not just in our cities at home and our facilities abroad, but also in the very places like Sana'a and Kabul and Mogadishu where terrorists seek a foothold. Remember that the terrorists we are after target civilians, and the death toll from their acts of terrorism against Muslims dwarfs any estimate of civilian casualties from drone strikes (Obama 2013a).

36 The term “non-combatant” does not include an individual who is part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of U.S. national self-defense. Males of military age may be non-combatants; it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants. [...] Further analysis of an individual's possible membership in an organized armed group may include, among other things: the extent to which an individual performs functions for the benefit of the group that are analogous to those traditionally performed by members of a country's armed forces; whether that person is carrying out or giving orders to others within the group; or whether that person has undertaken certain acts that reliably connote meaningful integration into the group (Office of The Director of National Intelligence 2016, 1).

gence and development of the new contents, which manifest themselves in the international context, especially as result of the simultaneous acceleration of the evolution, combined with the significant increase of the international actors numbers (Accioly, Silva and Casella 2013, 150, our translation). This statement finds basis in the behavior of the United Kingdom once it had already developed a program of counter-terrorism operations that refers to the same self-defense perspective as the one claimed by the US³⁷. The idea that this practice may become a custom through the time can be supported in the face of the duration of the War on Terror that began in 2001 with the implementation of emergency measures and lasts until nowadays in the US³⁸. The approach to eradicate the suspects of terrorism outside areas of active hostility establishes a new dynamic of the conflicts in the world risk society: an air war performed by drones controlled by official miles away from the target, seeking to “neutralize” persons identified by intelligence service, preventing the physical confrontation between soldiers and their opponents³⁹. This was the military strategy chosen by president Obama who acknowledge his preference by the strikes with drones against suspects of terrorism, without the direct involvement of the American troops⁴⁰. The drawback is that this air war tac-

37 Lord Macdonald, the former director of public prosecutions, has co-signed a letter to Theresa May calling for greater transparency on the UK's use of a “kill list” for drone strikes targeting British fighters in Syria and elsewhere. The letter calls for the release of a report by parliament's intelligence and security committee (ISC) into the British drone strike that killed Cardiff-born Reyaad Khan in Syria in August 2015, as well as the names of any further targets killed in the name of self-defence. [...] Khan had featured in a prominent Isis recruiting video in 2014. David Cameron went to parliament in September 2015 to defend the strike that killed him as “entirely lawful”, even though MPs had not voted in favour of military action against Isis in Syria, and had voted against action against President Assad. Cameron and his officials argued that Khan posed an “imminent threat” to the UK that justified his killing outside a British war zone. The announcement was the first time the UK had acknowledged killing people using drones beyond the legal battlefield (Ross 2017).

38 Consistent with section 202(d) of the National Emergencies Act, 50 U.S.C. 1622(d), I am continuing for 1 year the national emergency previously declared on September 14, 2001, in Proclamation 7463, with respect to the terrorist attacks of September 11, 2001, and the continuing and immediate threat of further attacks on the United States. Because the terrorist threat continues, the national emergency declared on September 14, 2001, and the powers and authorities adopted to deal with that emergency must continue in effect beyond September 14, 2015. Therefore, I am continuing in effect for an additional year the national emergency that was declared on September 14, 2001, with respect to the terrorist threat (Obama 2015b).

39 The Administration had an obligation to set a governing framework for operations in places like Yemen and Somalia, where the United States is engaged in a new paradigm of standoff warfare against terrorist targets with minimal or no U.S. forces on the ground (Hartig 2016, 2).

40 Drone strikes allow us to deny terrorists a safe haven without airstrikes, which are less precise, or invasions that are much more likely to kill innocent civilians as well as American service members (Obama 2016c).

tic, without boots on the ground (or, at least, with reduced numbers of troops which has a secondary role in supporting the local and unprepared armies), spread out the terrorist groups through numerous territories, expanding the extent of the War on Terror. That's why the need of anticipated action against suspects of terrorism outside the areas of active hostility and the resulting broadening of the concept of international self-defense. However, acknowledging this situation, it is made clear that the War on Terror entered in a vicious cycle, in which the higher the numbers of executed strikes invoking the self-defense outside the areas of active hostility, high the potential targets that spread to difficult the attacks, taking the terrorism to new territories. This dynamic also ease the recruitment of new militants due to the rise of the perception that the American government, considering him or her a terrorist, can execute any person anywhere. Likewise, this situation also results in resistance movements that bring more volunteers to fight against what is seen as an imperialist aggression and not self-defense⁴¹. The persistence in such strategy resulted in the opposite of what president Obama have promised⁴².

Consequently, although the American government has elaborated an action guide which is apparently compatible with the international humanitarian law, it cannot be ignored that it will serve as a precedent to other countries involved in conflicts to fight the groups they categorized as terrorists⁴³. In such context, there is the risk that the concept of "terrorism" may be decided and applied one-sidedly by each country against groups or individuals that are considered a threat to their national security, authorizing the use of drones

41 Four former US air force service members, with more than 20 years of experience between them operating military drones, have written an open letter to Barack Obama warning that the program of targeted killings by unmanned aircraft has become a major driving force for Isis and other terrorist groups. The group of servicemen have issued an impassioned plea to the Obama administration, calling for a rethink of a military tactic that they say has "fueled the feelings of hatred that ignited terrorism and groups like Isis, while also serving as a fundamental recruitment tool similar to Guantánamo Bay" (Macaskill and Pilkington 2015).

42 *We have to fight terrorists in a way that does not create more terrorists*. For example, in a dangerous world, terrorists seek out places where it's often impossible to capture them, or to count on local governments to do so. And that means the best option for us to get those terrorists becomes a targeted strike (Obama 2016c, emphasis added)

43 For all the disagreements about drones, there are at least two factors on which both defenders and critics might agree: the accuracy of strikes is only as good as the intelligence that goes into them, and whatever precedent the United States sets with their use will be used as a template for other states that adopt the technology in the future. [...] Other countries interested in developing or acquiring armed drones will model their behavior on how the United States uses the technology. As Central Intelligence Agency Director John Brennan said in 2012, "we are establishing precedents that other nations may follow, and not all of them will be nations that share our interests or the premium we put on protecting human life, including innocent civilians" (Kreps 2015).

wherever the alleged terrorists are. Therefore, not only the diffuse global terrorism would be a great risk, but, also, the drone strikes against individuals that are condemned by each government – according with their own evaluations and judgments⁴⁴. For the example, the Turkish government, after suppressing a military coup attempt, demanded that the United States to deport Fethullah Gulen, who lives in Pennsylvania and who was identified by the Turkish government as the responsible for the operation against the political order established⁴⁵. In this situation, may the refusal of the US to turn the suspect in (what would characterize the unwillingness) permits Erdogan to execute a drone attack in American territory alleging that Gulen is an imminent menace to the Turkish State by presenting a reasonable and objective basis to support their accusations? This is only one example of how the precedents set by the United States during the War on Terror may be used as a foundation to the actions of other countries against their enemies in a global scale.

However, it is also possible to mitigate the proliferation of the drones through treaties, as the multilateral regime that seeks to prevent the nuclear arms race⁴⁶. Nowadays, the Missile Technology Control Regime covers the export of drones, but specialists propose a new and more specific regime which would regulate the acquisition and the use of this arms more suitably⁴⁷.

44 Dozens of countries now have fleets of unmanned aircraft, and at least nine governments have armed drones: China, France, Iran, Israel, Nigeria, Pakistan, South Africa, Britain, and the United States. The report said Washington's reliance on secretive drone strikes could lead other countries to cite the U.S. raids as justification for their own unilateral strikes, without a clear basis in international law (Luce 2016).

45 President Recep Tayyip Erdogan called on the United States to arrest or extradite Fethullah Gulen, a political rival and Muslim cleric living in self-exile in Pennsylvania. Mr. Erdogan has accused Mr. Gulen of being behind the coup attempt, a charge Mr. Gulen denies. "I call on the United States and President Barack Obama," Mr. Erdogan said, addressing hundreds of supporters in Istanbul late Saturday. "Dear Mr. President: I told you this before. Either arrest Fethullah Gulen or return him to Turkey. You didn't listen. I call on you again, after there was a coup attempt. Extradite this man in Pennsylvania to Turkey. If we are strategic partners or model partners, do what is necessary" (Yeginsun and Victor 2016).

46 Such an arrangement would not necessarily require new treaties or international laws; rather, it would necessitate a more broadly accepted understanding of which existing laws apply and when and a faithful and transparent adherence to them. It would also require updating the multilateral regime that was originally designed to prevent the proliferation of nuclear weapons and their delivery systems. Taken together, these measures would help minimize the spread of the most capable and lethal drones to countries that are the most conflict-prone and increase the likelihood that emerging drone powers would adopt policies that reduce the prospects for violent confrontations (Kreps and Zenko 2014).

47 Some drone exports are currently covered by the Missile Technology Control Regime (MTCR), created in 1987 to regulate nuclear-capable missiles and related technologies. The voluntary arrangement does cover armed drones but mentions them only as an afterthought. [...] A new and enhanced drone regime would be drone-specific, covering all exports and uses

Conclusion

The legal justification for the military performance of the US in the War on Terror fall on the concept of self-defense with revised content: it went from four topics to consider the “imminence” – provided by the customary law in the case *Caroline* – to sixteen principles to analyze the “imminence” of a threat. The best approach to understand this argumentation is the International Relations constructivist analysis, which claims that States are willing to act inside the limits of the international norms, but, at the same time, seek to alter them according to their interests. Hence, the international system would be co-constituted once the agents are influenced by the structure that they create themselves, and the norms would function as criteria for possible modifications. In the constructivist perspective, the international order must not be studied through an unchangeable view, in which the States are rational and self-interested, seeking their own protection and power in an anarchy environment which determinates their identity; on the opposite, the international reality is socially constructed by the agents, and their identities are not preconceived, but always open to changes and new interactions, creating new sets of rules that reflect this sociability. In the context of the terrorism, the countries are willing to claim that they act within the international law but, at the same time, they seek to remodel the concepts to legitimate their behavior, which highlights the notion that the international reality is co-constituted between agents and normative structure, where they both influence each other⁴⁸. Therefore, “once recognized that the nature of the international politics game should not simply be taken for granted, the way for an analysis is open [...] from the rules of the game, an explanation of how the grammar of the world politics is constituted (BROWN, AINLEY, 2012, p. 94, our translation). Thus, the question is: how the new conception of self-defense and the

of armed-capable drones, including those that fall outside the purview of the MTCR. Moreover, its membership would go beyond that of the MTCR, which is largely limited to industrialized countries, and include all states that have or could soon acquire armed drones (Kreps and Zenko 2014).

⁴⁸ A constructivist approach to co-constitution suggests that the actions of states contribute to making the institutions and norms of international life, and these institutions and norms contribute to defining, socializing, and influencing states. Both the institutions and the actors can be redefined in the process. [...] In studying international norms, it quickly becomes clear that states are concerned simultaneously with shifting their behavior to match the rules to condone their behavior. For instance, when states claim they are using force only in self-defense, they cannot avoid reinforcing articles 2(4) and 51 of the UN Charter (which forbid aggressive war) and at the same time are redefining the rules by specifying how they wish the concepts of “sovereignty”, “self-defense” and “aggression” to be understood. International norms are simultaneously the products of state actions and influences upon state action (Hurd 2010, 304).

patterns for the action outside the areas of active hostility are going to be used by the governments on the War on Terror ?

REFERENCES

- Accioly, Hildebrando, G.E. do Nascimento e Silva and Paulo Borba Casella. 2013. *Manual de Direito Internacional Público*. São Paulo: Editora Saraiva.
- Acharya, Arvind. 2016. ISIS' Chemical Weapons. *Foreign Affairs*. <https://www.foreignaffairs.com>.
- Bethlehem, Daniel. 2012. *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*. <http://www.un.org/law>.
- Brazil. Decreto 19.841/45. *Carta das Nações Unidas*. http://www.planalto.gov.br/ccivil_03/decreto/1930-1949/d19841.htm
- Brown, Chris, and Kirsten Ainley. 2012. *Compreender as Relações Internacionais*. Lisboa: Editora Gradiva.
- Brownlie, Ian. *Principles of Public International Law*. 2008. Oxford: Oxford University Press.
- Cassese, Antonio. 2008. *International Criminal Law*. Oxford: Oxford Press.
- Clausewitz, Carl von. 2014. *Da Guerra*. Editora Martins Fontes.
- Department of Defense. *Law of War Manual*, 2015. <https://www.defense.gov>
- Grandpre, Andrew, and Shawn Snow. 2017. "The U.S. military's stats on deadly airstrikes are wrong. Thousands have gone unreported". *Military Times*. <http://www.militarytimes.com/>
- Hartig, Luke. The Drone Playbook. An Essay on the Obama Legacy and Policy Recommendations for the Next President, *New America*, 2016. www.newamerica.org/internationalsecurity.ONU
- Hurd, Ian. Constructivism. 2010. In: *The Oxford Handbook of International Relations*.
- Grat, Madeleine, and Damien Sharkov. 2014. "Twice as Many' British Muslims Fighting for ISIS Than in UK Armed Forces". *Newsweek*. www.newsweek.com
- International Humanitarian Law. *Qualification of Armed Conflict*, 2017. <http://www.ijrcenter.org/international-humanitarian-law/>
- Kratochwil, Friedrich. 2008. *Rules, Norms and Decisions*. Cambridge: Cambridge University Press.

- Kreps, Sarah. 2015. "Futureproofing Drones". *Foreign Affairs*. <https://www.foreignaffairs.com>
- Kreps, Sarah, and Micah Zenko. 2014. "The Next Drone Wars - Preparing for Proliferation". *Foreign Affairs*. <https://www.foreignaffairs.com>
- Luce, Dan de. 2016. "Obama's Drone Policy Gets an 'F'". *Foreign Policy*. <http://foreignpolicy.com>
- Macaskill, Ewen, and Ed Pilkington. 2015. "Obama's drone war a 'recruitment tool' for Isis, say US air force whistleblowers". *The Guardian*. www.theguardian.com
- March, Andrew F., and Mara Revkin. 2015. "Caliphate of Law. Isis' Ground Rules". *Foreign Affairs*. <https://www.foreignaffairs.com/articles/syria/2015-04-15/caliphate-law>
- McChrystal, Stanley. 2015. *Team of Teams: New Rules of Engagement for a Complex World*. Kindle Edition.
- Neto, José Cretella. 2008. *Curso de Direito Internacional Penal*. Ijuí: Editora Unijuí.
- Nogueira, João Pontes, and Nizar Messari. 2005. *Teoria das Relações Internacionais*. Editora Campus Elsevier.
- Obama, B.H. 2013a. *Remarks by the President at the National Defense University*, May 23, 2013. Available from: <https://www.whitehouse.gov>
- Obama, B.H. 2015b. *Continuation of the National Emergency With Respect to Certain Terrorist Attacks*, September 10, 2015. Available from: <https://www.whitehouse.gov/>
- Obama, B.H. 2016c. *Remarks by the President on the Administration's Approach to Counterterrorism*, December 06, 2016. Available from: <https://www.whitehouse.gov/the-press-office/>
- Office of The Director of National Intelligence. *Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities*, 2016. Available from: <https://www.dni.gov>
- ONU. Resolução nº 3314, XXXIX, Art. 3º, g. Available from: [http://www.un.org/french/documents/view_doc.asp?symbol=A/RES/3314\(XXIX\)&Lang=F](http://www.un.org/french/documents/view_doc.asp?symbol=A/RES/3314(XXIX)&Lang=F)
- Ross, Alice. 2017. MPs call on Theresa May to release 'kill list' for UK drone strikes. *The Guardian*. <https://www.theguardian.com>
- Santos, Marcelo. 2010. "Colômbia: O conflito interno e as fronteiras com o Equador e a Venezuela". Instituto Brasileiro de Relações Internacionais. *Boletim Meridiano* 47, 122. <http://www.ibri-rbpi.org/?p=2686>

- Sarfati, Gilberto. 2011. *Teoria de Relações Internacionais*. São Paulo: Editora Saraiva.
- Schmitt, Carl. 2008. *Teoria do Partisan*. Editora Del Rey.
- Taft, William H. 2002. "The Legal Basis for Preemption". *Council of Foreign Relations*. <http://www.cfr.org>
- U.S. Africa Command Public Affairs. "U.S. self-defense strikes in Somalia". *U.S. Africa Command press release*, 2016. <http://www.africom.mil>
- Veloso, Ana Flávia. 2008. Comentário ao Capítulo VII, Artigo 51 da Carta das Nações Unidas. In: *Comentário à Carta das Nações Unidas*, by Leonardo Nemer (Org.). CEDIN. Belo Horizonte, 2008.
- White House. *Report on the legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*, 2016. <https://www.justsecurity.org/>
- Yeginsun, Ceylan, and Daniel Victor. 2016. "Erdogan Calls On U.S. to Arrest or Extradite Fethullah Gulen". *The New York Times*. <https://www.ny-times.com>

ABSTRACT

The White House legal approach to the War on Terror has been one of the most discussed and least understood topics of international law according to legal counselors of the American government themselves. Despite several speeches and official notes on the subject, the issue remains complex because it involves constitutional rights, human rights and national security. This paper analyzes the War on Terror focusing specifically on the self-defense institute in the world risk society. This means that in order to understand how terrorism is threatening the international order, it is necessary to verify the conceptual changes that determine the self-defense institute and the results of this mutation.

KEY WORDS

Terrorism; International Self-Defense; International Relations; Human Rights.

Received on March 16, 2018.

Approved on July 21, 2018.

Translated by Helena dos Anjos Xavier