Soldier Self-Defense Symposium: The View from the Ground – Emerging State Practice on Individual and Unit Self-Defense

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IHL is silent on the right to self-defense and few states have fully elaborated on the basis or standards of their forces' (or the surrounding units') right to self-defense. Despite or perhaps because of the minimal jurisprudence or guidance on the scope of individual or unit self-defense (hereinafter generically referred to as 'self-defense'), it expanded to become an almost default use of force paradigm in places like Iraq and Afghanistan, and also spread to cover significant uses of force "far from a hot battlefield." According to military scholar Geoffrey Corn self-defense now accounts for "much of the force applied in current military operations" (p. 193). This has already presented a number of consequences. It has created significant "confusion on the part of soldiers ", has challenged IHL accountability in *in bello* situations, and may contribute to the further erosion of *jus ad bellum* limitations on the use of force.

More clearly articulating and elaborating state positions on self-defense, as the other contributors have done, is necessary to move forward to the next step of filling gaps in the law, clarifying how self-defense interacts with other legal paradigms, and creating appropriate limitations. However, on this topic, laying out the black letter law position is only so helpful. The reason that questions about self-defense are even being raised at this point is because practice has far outpaced the law. Thus, to complement the other contributors' outlines of state positions, I am going to focus on the state of practice surrounding self-defense. For this I will rely on a series of studies I conducted examining how individual and unit self-defense have been used by different NATO countries in Afghanistan, Iraq, and in other undeclared conflict zones. In addition to background legal research, I interviewed some 78 military lawyers, commanders, and other forces about how these principles were being used and applied in practice, and I will draw substantially from these interviews in outlining the current practice below. In doing so, I am not arguing that the lines should be redrawn to suit current practice, but that the weight of practice has cohered so significantly over the last 2+ decades and multiple deployments, that it is not possible to constrain it just by arguing that it was never intended to go this way. Establishing limits or enforcing existing ones requires both greater legal theorization and attention to practice in equal parts.

Legal Background: Competing Viewpoints, Gaps, and Gray Areas

There is a long-standing assumption that forces can defend themselves in combat. At least since the 1980s (for the U.S., later for other countries) some conception of self-defense has been codified in rules of engagement (ROEs) (for examples and definitions, see the NATO guidebook on such ROE (p. 254-7), the U.S. Standing Rules of Engagement (SROE)(p.86-106), and Gary Solis' historical discussion (p. 490-4)). As Bruce Oswald covers in his essay, this is often referred to as a "right" to self-defense, but there is no consensus, and very little overall consideration, of where this right comes from and how it engages with other legal paradigms. Three legal theories for where this right might come from are 1) that it is an extension of the domestic criminal law justification of self-defense; 2) that it should be recognized as its own, independent customary international law principle (see, e.g., here and here); or 3) that it is derived from or a subset of states' sovereign right to self-defense. (Another of the contributors, Hans Boddens Hosang, has done some of the most rigorous thinking on self-defense bases and origins, worth reading more of here and here).

The first position – that a service member or his unit's self-defense is supported by the extraterritorial application of domestic self-defense rights – is the predominant view for most European countries (see, e.g., the Norway contribution, the personal self-defense description in the Netherlands contribution, and these case studies referencing the positions of France, Germany, and the UK). The last approach, the sovereign self-defense theory, is widely associated with the U.S. approach (although as Col. Bagwell discusses in the U.S. contribution, there is also a U.S. domestic criminal law version of self-defense in the UCMJ). Whichever approach states adopt – whether deriving individual or unit self-defense from domestic criminal law, or from sovereign self-defense – involves borrowing the "conceptual framework" (p. 430-31) and legal standards of a body of law designed for a very different context. However, given the general under-development of the concept of self-defense and large gaps in case law and state positions (p. 300-4), there is significant gray area in terms of how these borrowed standards should be adapted to regulate an individual soldier's or unit's threat perceptions in a conflict environment.

Notwithstanding these gaps and contradictions, use of individual and unit self-defense has barreled forward in practice. As will be discussed below, it has grown significantly in the last two decades, particularly among U.S. forces. This is in part because of a relatively indefinite time horizon under the

U.S. interpretation – although the standard is that U.S. forces may respond in self-defense to an "imminent" or ongoing threat (similar to other countries' definitions), under the U.S. SROE (A-3 ¶3.g), "imminent does not necessarily mean immediate or instantaneous." Further, the U.S. interpretation is not hampered by some of the limitations that come with domestic criminal law-derived self-defense conceptions – for example, a requirement for strict proportionality (Germany, p. 42), that it be the "last resort" or only defense possible (France, p. 35), or a "duty to retreat" (although as discussed in Boddens and Gill's Netherlands contribution, some countries may waive some domestic standards when applying self-defense to forces in an operational context). The U.S. interpretation is also significantly broader because it incorporates the concepts of "hostile act" and "hostile intent" (p.17-21), which capture a much larger spread of threat patterns (p.317-9). These are the trigger words for self-defense in the U.S. definition, but other NATO countries tend to view these terms of art as describing action that is outside of the bounds of self-defense, in the realm of "mission accomplishment." (see, e.g., the Netherlands analysis). A German military lawyer I interviewed framed it as follows, "The view that hostile intent is a posture of self-defense is a very U.S.-based framework. This is a major difference between European countries and the United States. Self-defense is much narrower in European discourse." In the European view, he added, hostile act and hostile intent describe offensive uses of force, and so are unquestionably IHL-governed.

Practice: Weak Limits, Asymmetric Threats, and Flexible Interpretations

The more flexible U.S. definition has given U.S. forces room to apply self-defense in more situations, and under pressure to respond to highly ambiguous and asymmetric threat environments in places like Iraq and Afghanistan, they have run with it (for studies/articles pointing to increased reliance on self-defense in response to these threat environments, see here, here, and here). The self-defense justification has been used in a variety of use of force situations, capturing a wide range of behaviors and potential threat scenarios. It's been used to justify use of lethal force not only against those directly firing on or about to fire on international forces (the typical self-defense concept), but also against those speeding near checkpoints or convoys, running away from the site of an attack or engagement (interpreted as potentially running toward a weapon or continuing the attack), standing on the side of the road or talking on a mobile phone as troops approach (both frequently interpreted as "dicking," passing on information to facilitate a

threat, or alternately as preparing to remotely detonate an IED), or digging in the ground (p.10)(interpreted as an IED threat). Such incidents were so frequent at periods that one U.S. commander quipped that "just having a shovel" was enough. Self-defense has frequently been used to justify firing on those carrying objects that were perceived as weapons or as threats, even if it turned out that they were not weapons (i.e. watermelons or water canisters (p. 11, 49), photographic equipment, & hay sickles (p.22)) and even where presumed that the threat would manifest at a much later date (such that alternate targeting paradigms might have been possible).

Full disclaimer on the last example: many military lawyers (U.S. or non-) would argue that mere possession of a weapon should not be interpreted as a trigger for self-defense; however, as others have also documented, these were not "isolated" cases (p. 9-10). One U.S. military scholar with extensive deployments in both Iraq and Afghanistan summarized his observations of the use of self-defense as follows: "There has been a lot of creative bending to outright disingenuous processing of self-defense… using the self-defense language in ROEs to come up with ways to justify using force. …We've twisted imminence and self-defense beyond any normal meaning." He gave the example of U.S. forces on a base calling in an airstrike or base artillery on suspected insurgents whom they spotted at a distance, armed only with small arms. The distance and the weapons they possessed meant that definitionally they could not pose an immediate threat, yet he said that U.S. forces would frequently justify the response as self-defense. He offered it as an overall illustration of how self-defense was being deployed: "Nowhere does it say that [this is the rule], but that's what happens in practice."

While the U.S. use of self-defense has been most expansive in practice, this does not mean that there has been no 'mission creep' for the self-defense paradigms of other NATO forces. Johansen and Cooper note that under the Norwegian interpretation, unit or individual self-defense could not be used to respond to lawful acts of war, nor could it be used to "justify harm to innocent bystanders." While I did not specifically explore Norwegian practice in Afghanistan, my examination of other countries with a similar legal framework suggest that even for countries whose self-defense paradigm is based on narrow criminal law standards, self-defense was regularly used to justify responses to ongoing or imminent insurgent attacks (for example, an insurgent firing on NATO forces or something as direct as aiming a weapon to do so). It was also frequently the justification at the heart of incidents that

involved harm to bystanders or civilians. It was the relatively uncontroversial justification underlying so-called escalation of force incidents – for example, a car speeding toward a checkpoint is deemed a threat and fired upon, with civilian deaths sometimes resulting (possibly the driver or passengers, or nearby bystanders). It was less frequently and more controversially also behind some non-U.S. forces' calls for air strikes that resulted in high death tolls, or firing on other broad threat patterns (including on "dickers" or "spotters"), which sometimes mistakenly captured civilian behavior. Where European NATO forces were involved in these more controversial incidents, their uses of force were more often justified under the so-called "mission accomplishment" ROEs than under self-defense, but not always. Particularly as these other more offensive ROEs were limited, international forces faced a greater temptation to classify incidents as self-defense because it could not be constrained by tactical directives or restrictions (pp. 22-23, 59). Nonetheless, the U.S. practice has been so much more expansive that I will focus more on it for the remainder of this argument.

With this broad interpretation, U.S. forces relied on self-defense to respond to a virtually infinite range of threats. It became an almost default use of force mode in Afghanistan and Iraq. In research I conducted on use of self-defense in Afghanistan, U.S. military lawyers and commanders estimated that your average ground soldier (or marine) in a forward deployment might rely on self-defense 80, even 100 percent of the time they fired their weapons. One U.S. military lawyer who provided operational guidance in Afghanistan said that questions of use of force on a presumed self-defense basis were so regular – practically daily – that it "rolls off the tongue."

As it became mainstreamed, self-defense justifications spread to cover some uses of force within offensive operations (such as during night raids (FN.87) or in capture-or-kill missions like the Special Forces mission in Niger). Unit self-defense also has been increasingly relied on to justify use of force by aerial assets (see examples here, p. 216-21, and here, p.10). Troops can call for back-up when they come under threat, and any air assets can respond with the full force available to them in unit self-defense, in what are often referred to as "troops in contact" situations. The Troops in Contact designation was used so regularly to justify air strikes and drone strikes in Afghanistan that one military lawyer who served with NATO forces described it as "le mot magique" (the magic word) for getting U.S. airstrikes. This sort of tactical self-defense of troops or partner forces on the ground has also been used to justify

air strikes and drone strikes that would mitigate or prevent a non-immediate threat (given the flexible definition of imminence) and in areas far from a declared battlezone, in Somalia, in Syria (here and here), and other U.S. counter-terrorism operations globally.

Consequences: Blurring Lines, Weakening Standards

Although many troops would argue that it was essential for responding to asymmetric and unorthodox threats faced in Iraq and Afghanistan, the expansion of self-defense has not been without consequences. U.S. military studies, lawyers and scholars have associated these expansive self-defense and hostile intent (p.10) practices with a higher risk of civilian casualties (p. 6, 21), either by creating a targeting model that incorporates common civilian behaviors (p.34) and/or by effectively relaxing, or at least muddling, traditional IHL standards (p. 322-5) like distinction or proportionality (p. 9-11). To illustrate, one U.S. military lawyer I interviewed said that self-defense-associated terms like the 'troops in contact' designation had become an almost "talismanic" invocation that seemingly set aside IHL standards: "You call a 'troops in contact' and suddenly you stop speaking about proportionality in the classic sense." IHL investigators in Afghanistan said that when they approached international military about civilian casualties investigations or other potential use of force issues, the justification of self-defense frequently deflected further inquiry or investigation on the basis of IHL principles (p.325-7), weakening a key informal IHL accountability mechanism.

The ambiguity surrounding self-defense and its wider application (including to situations predominantly governed by other legal paradigms) has increased confusion for forces on the ground, and also muddled or undermined these other legal frameworks. Self-defense has been used so broadly, in many non-immediate threat situations, that it has in a sense obviated or replaced other targeting or status-based paradigms in many situations, blurring the lines between offensive and defensive operations (p. 9-11). Colonel Gary P. Corn has argued that, "The terms hostile act and hostile intent (HA/HI), traditionally meant to provide definitional guidance for servicemembers to determine the necessity of using force in self-defense, have become buzzwords for justifying attacks against potential, not immediate, threats." Corn argued that self-defense had become the "default authority for engaging civilians participating directly in hostilities" (p. 11). Another U.S. judge

advocate, Eric Montalvo, argued it had become a sort of status-based targeting model based "on a civilian's physical characteristics" (p.34). As noted, individual or unit self-defense has also been used to justify significant uses of force outside a declared conflict zone, in the "tactical defense" of troops or partner forces on the ground. This potentially provides a sort of loophole to domestic authorization processes or to traditional *jus ad bellum* restrictions on resort to force, and has blurred the distinction between *jus ad bellum* and *jus in bello* standards and situations.

Ways Forward: Reconceptualizing and Constraining Practice, Not Ignoring It

Two frequent rebuttals usually arise at discussions of this expansive practice – either that a) these are examples of the application of ROE, not law, and that the underlying law governing these incidents (IHL) is untouched by whatever soldiers on the ground choose to call an engagement; and/or b) that these are simply (repeat) examples of a *mis-application* of ROE and/or the law on self-defense. However, the problem with both of these objections is that, as a senior U.S. military lawyer argued, after 17 years of routine expansive practice and mis-application in Iraq and Afghanistan this "stretching and twisting of self-defense" has become the rule: "It was initially an exception made for exceptional circumstances but the exceptions have now been routinized to such a level that a whole generation doesn't know anything but operating on those exceptions. … The exception has so swallowed the rule for so long that they don't even think of it as exceptions. It's just the status quo." The de facto prevalence of self-defense at this point and the substantial body of practice and interpretation behind this view (however wrong it is) gives it a weight of its own.

More specifically in response to the first objection (essentially that these discussions fall in the genre of ROEs and policy, not law), at this point, there is a fair amount of state practice and some degree of *opinio juris* establishing this right of self-defense as *something*. This suggests that even if the ROEs themselves are not law, they represent an underlying legal concept or principle, the scope and content of which is currently open to interpretation. Should it be considered an extraterritorial extension of domestic criminal law? Its own sui generis customary principle of international law? Or perhaps a category of force within the *lex specialis* of IHL (but then implicitly also governed by other IHL principles and standards)? Because of the lack of

discourse, the answer right now is highly subject to the facts on the ground, with the practice tending toward something that is very problematic for other IHL practice.

On the second objection, there are many lawyers, including U.S. military lawyers, who take issue with the current, expansive use of self-defense by U.S. forces and argue that the overall approach misapplies how these ROEs or the related legal frameworks were intended to be used. Bagwell's critique of the neglect of the UCMJ defense of justification is one example of such an argument; Geoffrey Corn and Gary Corn also offer important critiques in this vein. [In addition to these framework issues, there are also undoubtedly many incidents that are labelled by troops as self-defense but are in reality serious violations of both the ROE and the law (see, e.g., Gary Solis (p. 490) on the *Haditha* killings)]. However, even if the current practice does not reflect what the law or ROEs say or were intended to justify, the practice has morphed so far beyond the letter of the law for so long that simply stating that this is a misapplication is unlikely to reverse the substantial weight of practice. The same military scholar and lawyer quoted above who argued that the letter of the law was routinely stretched and distorted worried that this had wrought permanent changes in the interpretation: "Over time we've so distended [the rules on self-defense] that I'm not sure it can come back to normal." This distended version has "become the new normal," he said.

This does not mean that nothing can be done, and having discussions like this one are exactly the place to start. They offer the promise of first exposing what the baseline positions are, and in some cases, actually forcing states to themselves consider and establish a position. This is the first step toward building a greater degree of international consensus in how self-defense for individual forces or units should be understood, and then creating appropriate limitations. However, in doing so, it is important to engage not just with the current law but with the reality of how these concepts are being understood on the ground. The demand for responding to ambiguous threats will not go away anytime soon. Addressing the very real gaps, inconsistencies, and ambiguities must be done with an eye on the much more significant body of state practice if it is to get any traction.