Soldier Self-Defense Symposium: Self-Defense vs. Combatant Immunity

opiniojuris.org/2019/05/02/soldier-self-defense-symposium-self-defense-vs-combatant-immunity/

May 2, 2019

[Adil Ahmad Haque is Professor of Law and Judge Jon O. Newman Scholar at Rutgers Law School. This post is part of our week-long symposium on soldier self-defense and international law.]

Suppose that a soldier from State A intentionally kills a civilian in State B. Maybe State A is fighting an international armed conflict against State B. Maybe State A is fighting a non-international armed conflict against an organized armed group in State B, without State B's consent. (Or maybe the second case is just a subset of the first). In any event, the soldier is captured by State B. When the soldier appears before State B's courts, the soldier asserts two defenses: combatant immunity and self-defense. Are these defenses mutually exclusive?

In their contributions to this symposium, Randall Bagwell, Sigrid Redse Johansen, Camilla G. Cooper, Hans Boddens Hosang and Terry Gill seem to agree that, "if a soldier participating in an armed conflict is attacked by a civilian for reasons not related to the conflict, such as an angry farmer protecting his crops," then the soldier may act in self-defense. Importantly, if the civilian acts "for motives not connected to the ongoing armed conflict," then the civilian does not take a direct part in hostilities.

Needless to say, the law of armed conflict prohibits intentionally killing civilians not taking direct part in hostilities. Notably, these contributors do not argue that this prohibition contains an exception for cases of self-defense. Presumably, they think this prohibition does not apply at all. On this view, both the civilian's attack and the soldier's response lack a sufficient nexus to the surrounding armed conflict. At the decisive moment, the soldier does not act as a combatant attacking an armed adversary, but simply as a human being defending her life from an unprovoked assault. The law of armed conflict simply has nothing to say about such cases.

Whatever the merits of this view, it seems to imply that the soldier may not claim combatant immunity before the courts of State B. As we have just seen, the gist of the soldier's defense is that she was *not* acting as a combatant when she killed the civilian. Put another way, combatants "have the right to participate directly in hostilities." But the soldier claims that she and the civilian were *not* participating directly in hostilities when one attacked and the other defended. Finally, combatant immunity applies to acts that are governed but not prohibited by the law of armed conflict. Again, the gist of the soldier's defense is that her act of self-defense was not governed by the law of armed conflict at all.

What follows? The contributors focus their discussion on the elements of self-defense under a (Dutch, Norwegian, U.S.) soldier's own national criminal law. Fair enough. But, in our scenario, the soldier will be subject to State B's national criminal law, without the protection of combatant immunity. One might worry that State B will apply its national criminal law to the soldier in a biased or otherwise unfair manner. Here is a deeper worry. What if State B simply excludes State A's soldiers from claiming self-defense under its national criminal law? After all, from State B's perspective, State A's soldiers should never have been in State B in the first place (on the plausible assumption that State B *thinks* itself in the right).

Here are four possible solutions to this problem (assuming it is one). Perhaps the law of armed conflict governs self-defense killings after all, exempting them from the general prohibition of killing civilians not taking direct part in hostilities. Perhaps combatant immunity applies to self-defense killings even if the law of armed conflict does not. Perhaps international law requires States to apply their national criminal law to foreign soldiers without discrimination (see, e.g., here). Or perhaps foreign soldiers enjoy other immunities under international law in such cases. I won't explore these possibilities further, but look forward to learning from the contributors' reactions.