Symposium on Soldier Self-Defense and International Law: Highlighting and Framing the Issue

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It is tempting to think of soldier self-defense as a black hole in the galaxy of international law: in the same way as black holes grow continuously by absorbing mass from their surroundings, soldier self-defense seems to have become an ever-growing legal object in recent years, absorbing concepts from the *jus ad bellum*, international human rights law, domestic criminal law – depending on the theory one follows, if any. This week, *Opinio Juris* hosts a symposium dedicated to

the relationship between soldier self-defense and international law, in the hope of capturing what soldier self-defense means for State armed forces and to encourage an accurate framing of this notion against the background of international law.

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In its most recent military operations, the U.S. has publicly relied on the notion of self-defense of its own forces or partner forces to justify the use of lethal force abroad. For instance, self-defense is regularly invoked in Somalia in relation to strikes against al-Shabaab (as recently as last month); it was invoked in relation to the October 2017 ambush in Niger; and more controversially it was used to justify strikes against government forces in Syria (in defense of the Syrian Democratic forces). Importantly, in these three contexts, the claims do not seem to refer to *jus ad bellum* self-defense (the State's right to self-defense under Art. 51 of the UN Charter). Indeed, in Somalia and Niger the U.S. operates officially with the territorial State's consent, eliminating the need for an additional *jus ad bellum* self-defense claim, and in Syria claiming that Art. 51 authorizes the defense of a *non-state* partner (the SDF) would be highly controversial. (See Elvina's post on that issue here). Hence, these self-defense claims must refer to something else. To those familiar with operational law this is a trivial observation: these claims most likely correspond to invocations of *soldier* self-defense – the right of individual U.S. military personnel to defend themselves, their unit, and their partners (such as AMISOM or Nigerian forces) from a hostile act or demonstrated hostile intent. The US Standing Rules of Engagement (SROE) indeed provide not only for national self-defense (a right to self-defense at State level), but also for unit, collective, and individual self-defense. Soldier self-defense has in fact become the prevalent authority for the use force in U.S. military operations, even when LOAC would provide a more natural legal basis for action.

Reliance on soldier self-defense is, of course, not a U.S. eccentricity. The notion appears in the NATO ROEs and, *inter alia*, in the military doctrine of Canada (CFJP 5.1, Use of Force for CF Operations), Denmark, France, and Norway. Beyond NATO, one finds references to the right of soldiers to defend themselves in the military doctrine of Australia, Chad (*Manuel de Droit international humanitaire*, 2006), New Zealand, and the Philippines (AFP SROEs, 2005), to name just a few. The San Remo Handbook on Rules of Engagement includes four series of ROEs dedicated to the use of force in self-defense (national, unit, individual,

and for the protection of others). It is thus not surprising that, in 2012, Charles P. Trumbull IV considered that the "right [of military personnel] to use force to defend themselves and their units against attack or imminent attack [...] is recognized by militaries around the world".

The very existence of the notion of soldier self-defense is not new or even controversial. What is problematic, however, is that States (and even NATO allies) disagree over the source(s) and contours of soldier self-defense and how it relates to the international law framework governing the use of force. This framework is generally described as consisting of (1) the law governing the *resort* to force between States (*jus ad bellum*); and (2) the law governing the *use* of force, which is comprised of the law of armed conflict (LOAC), applicable in armed conflict, and international human rights law (IHRL), applicable at all times. Soldier self-defense is rarely part of the picture – and when it is, it is envisioned not as a distinct legal basis for the use of force but as being circumscribed by IHRL.

On the other hand, soldier self-defense seems to have developed in some domestic contexts without proper consideration of international law. There are signs that the framing of military personnel's right to self-defense (at the individual and unit level) would have benefited from more systematic thinking to ensure that this set of norms properly interacts with and does not contradict the legal obligations of the *State* – for instance, under the LOAC. (In this respect, Christopher Ford offers interesting insights into how the right to personal self-defense came about in the US SROEs).

There is thus some disconnect between international law doctrine and military doctrine and practice. Recent scholarship, including from participants to this symposium, has greatly contributed to bridging this gap by offering conceptual clarity (see the work of Hans Boddens Hosang, Jan Arno Hessbruegge, Gloria Gaggioli, Camilla Cooper or Chris O'Meara) and by denouncing the over-reliance on the notion of self-defense in military operations (Gary Corn, Randall Bagwell & Molly Kovite, Erica Gaston). This symposium aims to continue the discussion by taking stock of doctrine and practice and by encouraging States to share their understanding of how their soldiers' right to self-defense relate to their obligations under international law.

There are essentially two (related) sets of questions surrounding soldier self-defense that are relevant to international law. The first relates to the source and nature of soldier self-defense; the second to its modalities.

Source(s) and Nature of Soldier Self-Defense

What is the nature of soldier self-defense in domestic law? Is it merely a criminal defense? A private right? If both, are they consistent? At the international level, how does soldier self-defense relate to the law governing the use of force by *States*? In other words, can States invoke their soldiers' right to individual or unit self-defense as a legal basis to justify their (State) use of force? Or, on the contrary, does the right to self-defense of soldiers come from their State's right to self-defense? Relatedly, what is the source of soldier self-defense in international law? Does it derive from the jus ad bellum right of self-defense? Is it a general principle of law, a customary right? A subset of IHRL? As the symposium highlights, there are diverging views on this in State military doctrine.

The view that soldier self-defense derives from State self-defense (*jus ad bellum*) raises further questions, such as what happens when a State deploys troops abroad outside the context of State self-defense. Imagine, for example, that State X intervenes in State Y not because it has suffered an armed attack, but under a Chapter VII UNSC resolution, or under the controversial doctrine of unilateral humanitarian-intervention. Given that State X's right to national self-defense is not triggered, does this mean that State X's soldiers do not have access to their right to individual/unit self-defense unless they face a lethal threat of such intensity that it would then amount to an armed attack against X?

Modalities of Self-Defense for Military Personnel

There are numerous issues here.

Scope: In domestic laws, is the right to self-defense of military personnel the same as for any other citizen? Is soldier self-defense available under the same modalities at home and abroad? In peacetime and during armed conflict? What are the versions of self-defense available to soldiers in different countries? Can soldiers use force including lethal

force to defend others – their unit and partner forces (including non-state partners)? To defend their armed forces' property? To defend partner forces' property?

Trigger: what are the triggers of soldier self-defense? Are the notions of hostile act and hostile intent widespread? Must the attack suffered by the soldier be *unlawful* (or an equivalent, such as "unprovoked" or "unjustified" attack or aggression) as in most (all?) domestic criminal laws? Does this depend on the version of self-defense (individual vs. unit)? If this "unlawful attack" condition exists, against which law should the unlawful nature of the attack be assessed? Should we take into account the *jus ad bellum* in assessing the lawfulness of an attack against a soldier? (Attacks against soldiers of an aggressor State by soldiers of the territorial state would thus not be "unlawful.") This question is also particularly relevant in the context of armed conflicts where the LOAC applies and alters the legality assessment: under the LOAC, it is not unlawful to attack a legitimate target. So is self-defense available to a soldier who is a legitimate target in an armed conflict?

Temporality and further conditions: how temporally close must the attack and the use of force in self-defense be? How do States interpret the criterion of imminence? What are the conditions related to the type and degree of force used in self-defense (proportionality, precautions)?

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We submitted some of these questions to current and former military lawyers, as well as to civilian lawyers with expert command of their country's operational law. Their description and interpretation of the nature and modalities of soldiers' self-defense do not necessarily represent their State's official position, but they draw on their knowledge and personal understanding of both military doctrine and practice. We are grateful to our authors from the Netherlands, Norway, and the U.S. for sharing their expertise, and we hope this symposium will encourage official State pronouncements on this issue – from these and other States. We have also solicited a contribution that highlights the specific questions related to self-defense in the context of peacekeeping operations, as well as four expert commentaries that both respond to the State-specific perspectives and address some of the questions mentioned above.

The contributions are as follows:

1. Hans Boddens Hosang and Terry Gill, "Netherlands' Views on Self-Defence for Military Personnel"
2. Camilla Guldahl Cooper & Sigrid Redse Johansen, "Norwegian Soldiers' Self-Defence"
3. Randall Bagwell, "Individual Self-Defense in Armed Conflict – a US Perspective"
4. Bruce Oswald, "The Evolution of the UN Doctrine of Self-Defence in UN Peacekeeping"
5. Erica Gaston, "The View from the Ground – Emerging State Practice on Individual and Unit self-Defense"
6. Adil Haque, "Self-Defense vs. Combatant Immunity"
7. Aurel Sari, "Personal Self-defence in International Law: A Norm in Search of its Normative Foundations?"
8. Gloria Gaggioli, "Self-Defence in Armed Conflicts: the Babel Tower Phenomenon"

We will post the contributions throughout the duration of this week. We hope *Opinio Juris*'s readers enjoy the symposium!