Soldier Self-Defense Symposium: Personal Self-Defense in International Law–A Norm in Search of its Normative Foundations?

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The notion that military personnel are entitled to use force in their own defence is widely accepted. However, beyond its existence, there is little agreement on most other aspects of this principle. The legal basis, nature and scope of personal self-defence by individual soldiers in international law is

uncertain, as are the conditions governing its exercise and its relationship with the broader notions of unit-level and national self-defence. This is illustrated by the practice surveyed in this symposium.

In Norway, the use of force in self-defence by individual military personnel is based on domestic law, with no apparent link to international law. The position appears to be similar in the Netherlands. By contrast, in the US, the exercise of self-defence by individual soldiers pursuant to their rules of engagement is seen as a manifestation of national self-defence. In the context of UN peacekeeping, the relevant guidelines prepared by the UN Department of Peacekeeping Operations state that "peacekeepers are authorized to use force in self-defense". This suggests that the right to use force depends on an authorization to this effect. The Leuven Manual on the International Law Applicable to Peace Operations takes a different approach, declaring that members of a peace force benefit from the inherent right to use force as is necessary and proportionate in personal self-defence or in the defence of others (Rule 12.3). This inherent right is said to be based on the right of any person to take proportionate action in self-defence, although the source of this second right is not further specified.

Against this background, my aim in this post is to offer some thoughts on the implications of the uncertainty that surrounds the use of force in self-defence by individual military personnel, with a particular focus on rules of engagement and the *jus ad bellum*.

Personal self-defence in international law

Personal self-defence is recognized by various branches of international law. For example, Article 2(2)(a) of the European Convention on Human Rights stipulates that the intentional deprivation of life does not contravene the right to life when it results from the use of force which is no more than absolutely necessary to defend any person from unlawful violence. Similarly, Article 31(c) of the Rome Statute of the International Criminal Court lists self-defence among the grounds excluding criminal responsibility. In both cases, self-defence serves as a circumstance precluding the wrongfulness of an act, in this case the use of lethal force, that would otherwise be unlawful. The law of armed conflict treats self-defence as an activity compatible with humanitarian functions. Pursuant to Article 13(2) of Additional Protocol I, the fact that the personnel of civilian medical units are equipped with light

individual weapons for their own defence or for the defence of the wounded and sick in their charge thus does not amount to an act harmful to the enemy which would entail the loss of the medical unit's protection from attack.

As these examples illustrate, international law recognizes personal self-defence as a legitimate use of force. Yet it is open to debate whether this implies that soldiers enjoy an actual right, in the form of a legal privilege, to kill in order to defend themselves against mortal threats. For example, in her final report to the Human Rights Council, Barbara Frey, Special Rapporteur on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons, argued that there is insufficient evidence in State practice to suggest that personal self-defence constitutes a human right. This conclusion finds support in some parts of the literature, but is strongly opposed by others who contend that the use force in self-defence is a necessary corollary of the right to life.

It is also open to debate whether personal self-defence constitutes a single, distinct norm of international law. An individual's right to defend themselves against unlawful violence has long been recognized at the domestic level across virtually all jurisdictions. This has led some to suggest that it has evolved into a general principle of international law. Although this is by no means an unreasonable position to take, the fact remains that different branches of international law recognize self-defence as a justification or excuse for the use of deadly force in different contexts and for different purposes. Treating these distinct manifestations of the concept of personal self-defence as reflections of a single principle obscures the diverse rationales at play and the unsettled state of both the law and State practice. It runs the risk of elevating soldier self-defence into an "ever-growing legal object" of international law, as Elvina Pothelet and Kevin Jon Heller pointed out in their introductory remarks. The treatment of personal self-defence in rules of engagement illustrates the problem.

Rules of engagement

Rules of engagement (ROEs) typically distinguish between three levels of self-defence: national, unit and individual (see Sanremo Handbook on Rules of Engagement, p. 3). These three categories feature prominently in the Standing Rules of Engagement for US Forces (SROE) promulgated by the Chairman of the Joint Chiefs of Staff (SROE, pp. 88–89). The SROE define national, unit and individual self-defence in the following terms:

Inherent right of self-defense. Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit. Both unit and individual self-defense includes defense of other US military forces in the vicinity.

National Self-Defense. Defense of the United States, US forces, and, in certain circumstances, US persons and their property, and/or US commercial assets from a hostile act or demonstration of hostile intent.

Although not expressly stated, it is safe to assume that national self-defence within the meaning of the SROE is based on States' sovereign right to individual and collective self-defence codified in Article 51 of the United Nations Charter. By contrast, the legal basis of individual and unit self-defence is less certain. The SROE define individual self-defence as a subset of unit-level self-defence where individual military personnel are assigned to a larger unit. However, this merely begs the question as to what the legal basis of unit self-defence is. Critically, it is not immediately clear whether unit-level self-defence is a subset of national self-defence.

Professor Yoram Dinstein answers in the affirmative, arguing that the classic right of national self-defence entitles military units to react to small-scale armed attacks "on-the-spot" with necessary and proportionate counter-force (pp. 192–194). The *Corfu Channel* case (p. 31) lends support to this position, as does the *Oil Platforms* case (para. 72), where the International Court of Justice accepted that even the mining of a single naval vessel might be sufficient to bring into play the inherent right of self-defence under Article 51 of the Charter. Indeed, since all military personnel and units are merely an embodiment of the State itself, there is no reason why an attack on them should not be treated as an attack on the State itself. In this respect, it is worth recalling Daniel Webster's correspondence concerning the *Caroline*, where he accepted that "a just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both". More recently, in its pleadings in the discontinued *Aerial Incident of 3 July 1988* case, which arose from the destruction of an Iran Air Airbus A-300B by the *USS*

Vincennes, the United States argued that the inherent right of self-defence recognized in Article 51 of the Charter "includes the right of individual military units to defend themselves from attack" (p. [201]). In his contribution to this symposium, Colonel (ret.) Randall Bagwell confirms this understanding when he states, for instance, that unit and individual self-defence are "merely national self-defense exercised by different tiers of actors".

Unresolved questions and unintended consequences

Nevertheless, the notion of on-the-spot self-defence by military units does not sit well with other applicable cases. In *Nicaragua*, the International Court of Justice excluded "mere frontier incidents" from the definition of armed attacks (para. 195). This leaves unit-level self-defence, and by implication individual-level self-defence, in limbo. While an attack that causes severe damage to a guided missile frigate and injures multiple crew members could, in principle, amount to an armed attack on the authority of the *Oil Platforms* judgment, *Nicaragua* suggests that less severe damage or harm sustained by smaller military units may not necessarily give rise to the right of self-defence. If so, the right to individual and unit self-defence cannot be derived from the sovereign right of self-defence in all circumstances that involve a threat to life.

At any rate, the SROE permit the use of force in unit and individual self-defence in an exceedingly broad range of scenarios. Under the SROE, the right to self-defence is triggered by a hostile act or by hostile intent. A hostile act is defined as "an attack or other use of force", including force used "directly to preclude or impede the mission and/or duties of US forces", while hostile intent refers to the "threat of imminent use of force". For these purposes, imminent does not necessarily mean immediate or instantaneous. Accordingly, at their extreme, the SROE may entitle a single soldier to open fire in response to a threat of imminent use of force that would impede his mission or the performance of his duties. It is fair to say that this stretches the link between personal self-defence and Article 51 of the Charter, at least as interpreted outside the US Government, to its breaking point.

These difficulties may explain why some doubt remains in the literature about the proper legal basis of personal self-defence, prompting some authors to appeal to criminal and human rights law-based justifications in addition to anchoring it within national self-defence (cf. Corn, p. 227). However, it is

difficult to see how the use of force in response to a "hostile act" or "hostile intent" could be justified under criminal and human rights law paradigms in all situations covered by those terms, given that criminal and human rights law normally require the existence of an immediate and direct threat to life. Indeed, the expansive interpretation of self-defence adopted by the U.S. in the SROEs may be contrasted with the UN Department of Peacekeeping Operations guidelines, which foresee the use of deadly force "a last resort in situations against a hostile act or intent likely to cause death or serious bodily injury" (p. 6).

There is also the risk of unintended consequences. If personal self-defence is treated as a subset of national self-defence, any use of force by individual soldiers in the context of an ongoing armed conflict pursuant to self-defence-based ROEs, rather than more permissive ROEs, constitutes an exercise of national self-defence under international law. Does this not imply that every single instance in which troops open fire under self-defence ROEs should be assessed against the standards of Article 51 of the Charter? So that every shot fired in an act of individual self-defence must be reported immediately to the Security Council? Clearly, we are faced with a category mistake here: in the context of an armed conflict, the use of force at the tactical level, whether employed pursuant to defensive or offensive ROEs, must be assessed under the law of armed conflict and, to the extent it is applicable, pursuant to international human rights law. Deriving a soldier's personal self-defence from national self-defence risks conflating the *jus ad bellum* and the *jus in bello* frameworks, as Colonel (ret.) Bagwell noted in his post (see also Ford, pp. 120–123). In particular, it may open up a Pandora's box of novel claims regarding the interpretation of the rules governing the use of force between States.

Conclusion

There is ample evidence to support the notion that individual service personnel are entitled to use force in self-defence. Expressed in such general terms, this principle should not be particularly controversial. However, identifying its normative foundations is more difficult.

As the contributions to this symposium illustrate, State practice oscillates between treating individual self-defence as a concept of domestic law or as a manifestation of national self-defence. The difficulty with the former position is that it proves too little: evidently, personal self-defence is not a purely domestic concept, but has achieved a degree of recognition in international

law. Moreover, while the use of force in self-defence may shield individual soldiers from proceedings at the domestic level, national law does not shield them or the State to which they belong from individual or State responsibility under international law. Consequently, personal self-defence cannot be left purely to domestic law. The difficulty with the latter position is that it proves too much: broad claims of a right to personal self-defence cannot be derived from the *jus ad bellum* or from international human rights law. This is not to suggest that robust action defensive action has no legal basis in international law. Nothing prevents a State from relying on the law of armed conflict to authorize the defensive use of force in a broader set of circumstances than those foreseen by criminal law and international human rights law. Accordingly, authorizing the use of force to defend against displays of "hostile intent" is perfectly permissible, if such authority is based on and complies with the law of armed conflict.

These considerations suggest that in the absence of State practice to the contrary, it is best not to treat soldiers' self-defence as a single norm or concept under international law. Instead, it is more accurate and more helpful to recognize that military personnel's entitlement to self-defence derives from multiple sources and that soldiers therefore enjoy multiple, partly overlapping *rights* to self-defence at the domestic and the international level.