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Boddens Hosang, H.; Gill, T.

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Soldier Self-Defense Symposium: Netherlands Views on Self-Defence for Military Personnel

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[Hans Boddens Hosang is Deputy Director of Legal Affairs of the Netherlands Ministry of Defence and Senior External Researcher at the Law of Armed Conflict and Military Operations (LACMO) Research Group, Amsterdam Center for International Law at the University of Amsterdam. Terry Gill is Professor of Military Law at the University of Amsterdam & the Netherlands Defence Academy and is Director of the LACMO Research Group. This contribution was written in a personal capacity and does not necessarily reflect the views of the Netherlands Ministry of Defence or any other organization. This post is part of our week-long symposium on soldier self-defence and international law.]

Introduction and Modalities of Self-defence

The notion of self-defence under international law refers to the right of a State to respond to a prior or imminent use of unlawful force in the form of an armed attack. It can be exercised at various levels and in different contexts subject to a number of generally recognized conditions which may be applied somewhat differently, depending on the modality of self-defence in question. Consequently, discussing self-defence in a legal context first requires identifying the form of self-defence in question. As the views

of the Netherlands as regards *national* self-defence are a matter of public record, the right of national self-defence, i. e. responding to a large scale armed attack, whether individually or collectively as set out in Article 51 of the Charter of the United Nations and in customary international law, will not be given detailed attention beyond what is strictly necessary here. That, however, still leaves three distinct forms of self-defence relevant to force protection and individual military personnel. Two of these are modalities of the exercise of self-defence under international law relative to specific situations and the third is a right contained under national criminal law. These will be dealt with successively.

Unit self-defence is one modality of national self-defence, i.e. a small scale local response by a discrete military unit in response to a small scale local attack. Although the precise legal basis of the right of unit self-defence is debated, there is general consensus that discrete military units (for example a warship, a flight of military aircraft or a company of soldiers) have the inherent right under customary international law to defend themselves against an (imminent) attack. In our view, this right can best be seen as a tactical level manifestation of the right of national self-defence, since this right is indelibly linked to the status of a military unit as an extension of the State. This is also reflected in case law (Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America) 2003, para. 72), and in the literature (Dinstein refers to this modality of self-defence as “on the spot reaction”.) Similarly, there appears to be consensus that the criteria (Dinstein, pp. 261-62) for such unit self-defence do not differ from the criteria for national self-defence, meaning necessity and proportionality and the existence of a prior (imminent) attack, although obviously at a scale and intensity commensurate with the circumstances. Given that the right of unit self-defence is linked to the status of the military unit as part of the State’s armed forces rather than to an individual as a personal right, the Netherlands generally issues Rules of Engagement supplemented by simplified soldier’s cards to reflect this.

When operating as a force under the unified command of an international organization, for example when carrying out a mandate on the basis of a United Nations Security Council resolution, military units have an inherent right under (customary) international law to defend themselves and each other (Gill/Fleck, Chapter 24), although the nature of this right may differ depending on whether the force is operating under unified NATO or UN command or not. For example, as discussed by Guldahl Cooper (see pp. 358 – 359), NATO standard doctrine on self-defence includes a concept referred to as “extended” self-defence, referring to the right of units under unified NATO command to assist each other in the exercise of self-defence. Although this may be considered to reflect, at an operational or tactical level, the purpose and legal foundation of NATO at the strategic level, in actual effect during military operations it does not differ greatly from the right inherent in any mandate for the force in question to defend itself as a whole, sometimes referred to as force protection. Similarly, forces acting under the command of the Department of Peacekeeping Operations of the United Nations have a right of self-defence as a manifestation of the notion of force protection which is based on the mandate and the role of the UN in the maintenance of peace. In

the practice of the Netherlands, the rules governing the use of force in this context are commonly reflected in Rules of Engagement, the effect of which in terms of the criminal law exculpation of the use of force will be discussed below.

Finally, every individual, regardless of whether they are members of the armed forces, may use necessary and proportional force in personal defence against an unlawful (imminent) attack, subject to a number of criteria and restrictions normally set forth in national statutes and case law. Such personal self-defence is normally based on, or regulated by, national criminal law rather than international law, notwithstanding its clear relationship with international human rights law.

The basis of self-defence under Netherlands criminal law and its application in a military context

Self-defence is regulated in Netherlands domestic criminal law under Art. 41 of the Criminal Code. Additionally relevant in this context is Art. 38 (2) of the Military Criminal Code, which provides a justification for members of the armed forces who act within the scope of their lawful regulations and standing orders, including the duly authorised Rules of Engagement (ROE) for a given mission. The combination of these two domestic law provisions with the ROE provide a link between authorisation to use force under international law and a justification for such use of force under domestic law. In other words, a member of the armed forces who uses force in the context of any of the abovementioned modalities of self-defence will not be held criminally liable if in doing so he/she was acting within the scope of lawfully issued instructions or standing orders (ROE), which in turn will reflect the mandate for the mission and will necessarily conform to international human rights law and will, as discussed above, commonly reflect the right to use force in self-defence. Provided the requirements of necessity and proportionality have been met, a member of the armed forces using force in self-defence will consequently be justified under both of the provisions of domestic law, as well as under international law.

Self-defence under any legal system is usually predicated on a prior or imminent use of unlawful force against the defending party. Consequently, it will not apply to situations in which force is employed in response to lawful force. Hence, self-defence will not be relevant to exchanges of fire between opposing belligerent military forces in an armed conflict, or in response to a situation of civilians directly participating in hostilities. That is governed by the law of armed conflict. Leaving that situation aside since, strictly speaking, it is not related to self-defence, a lawfully issued instruction constituting an exculpation under domestic law will have to meet strict criteria and reflect international human rights law, especially if it involves (potentially) lethal force.

Self-defence under Netherlands criminal (case) law has a number of aspects which are not readily applicable in the military operational context. These include a duty to retreat when an avenue of escape is open and a duty not to deliberately put oneself in harm's way as a means of provoking a need to resort to self-defence. These considerations are not applied to members of the armed forces in an operational context so as not to

impede the effective execution of the mission. However, members of the armed forces are held to a higher standard than members of the public in reacting to provocation and in the degree of care required in employing force. This higher standard is a consequence of their training and the requirements of military discipline.

Under the above-mentioned provisions of Netherlands criminal law, self-defence may include force to defend others who happen to be in the immediate vicinity of the defending individual and who are the subject of an unlawful (imminent) attack. This point may also be interpreted and applied somewhat differently in an operational military context. For example, if a mandate provides for protection of civilians, the use of force to carry out this task by a military mission will not necessarily be limited to persons who coincidentally happen to be in the immediate vicinity of the protecting force. However, the use of force in that context will be based on the mandate rather than on the right of self-defence. The mandate would thus serve as the legal basis both under the *jus ad bellum* (the authority to carry out the operation at all) and for the authority to use (necessary and proportional) force to carry out the tasks set out in the mandate while carrying out the operation.

These are some of the most important ways in which the interpretation and application of self-defence in an operational military setting can diverge from the usual way it applies in a normal civilian one. Beyond these aspects, there is no principled difference between the nature of the right of personal self-defence under domestic law for members of the armed forces and others. It should be noted in this context that if a member of the armed forces were to use force in self-defence outside the operational context or outside the scope of his or her ROE, such use of force will be evaluated on the basis of article 41 of the Criminal Code (including the concomitant criteria set forth in case law) and article 38 (2) of the Military Criminal Code cannot be invoked.

Finally, the use of force for mission accomplishment must not be confused with personal self-defence. For example, a mission which is mandated to enforce the withdrawal of a particular actor from a specific area or disarm an armed group by “all necessary means” will not be resorting to self-defence in the context of carrying out those tasks. These tasks, including the authorisation to employ force to carry them out, will have their basis in the mandate and not in domestic criminal law and will be reflected in the ROE for the mission. The concepts of “hostile act” and “hostile intent” as frequently used in such ROE do not automatically relate to self-defence. In NATO practice, they refer to situations in which there is a coercive act or posture by another actor in situations other than self-defence. An example would be planting an anti-vehicle mine on a road to prevent access by the mission. To the extent that any force were authorised to counter such a hostile act or intent falling short of imminent attack, it would be in the context of mission accomplishment and not self-defence. However, these terms are used in different ways by different nations to mean different things. For example, the UN and the US use the terms “hostile act” to denote an attack and “hostile intent” as an imminent attack.

Conditions for employing force under Netherlands and international

human rights law

Any use of force outside the context of engaging in hostilities in an armed conflict, particularly (potentially) lethal force, will have to meet quite stringent conditions in order for it to comply with domestic criminal law and human rights law requirements. These conditions include the restriction that the use of lethal force is only authorised in situations where there is a clear danger of threat to life or serious injury which cannot be neutralized by lesser means. Furthermore, in employing force in this context, the least harmful means should be employed as far as possible. That usually translates into a prior warning and a graduated escalation of force when the situation calls for it, and as far as the situation permits.

Defence of property will not normally permit the use of lethal force, except when loss of control over the property would result in a life-threatening situation, such as loss of control over specific weapons or specific types of ammunition. However, it may occur that in defending (other) property by lesser means, the situation changes into one where a danger to life emerges (for example, if the other party becomes a direct threat to the guard in question), in which case, lethal force in self-defence may become relevant. In applying these criteria, the factual situation as it appears at the time will be crucial in determining what degree of force may be required. Likewise, in conducting an operation, the members of the mission should make any necessary preparations to meet contingencies which are reasonably foreseeable. For example, if a UN mandated force is charged with the maintenance of public order, it will be necessary that the members of the force are trained and equipped to do so without having to automatically resort to lethal force in situations not rising to imminent threat of death or serious injury.

A final relevant consideration is that measures and procedures have been implemented to ensure adequate oversight, accountability and where necessary investigation of possible wrongful use of force. In the Netherlands, this is effectuated through the practice of requiring “after action reports” being communicated to the Public Prosecution Service of the Ministry of Justice and Security after any use of force or engagement has occurred. This report is then examined to determine whether the force used was in conformity with the Rules of Engagement and other regulations for the mission.