The Relationship Between National, Unit and Personal Self-Defence in International Law: Bridging the Disconnect

The issue of self-defence is one of the most contested areas of the *jus ad bellum* and of public international law more generally. In particular, heated debates continue over the meaning of an 'armed attack', which is the trigger for the right of self-defence recognised by Article 51 of the Charter of the United Nations (UN Charter). The well-known arguments highlight issues associated with whether a threshold of violence is required before a right of self-defence arises, the position of non-state actors in the equation and temporal issues pertaining to anticipatory self-defence. The overwhelming majority of this academic purview has taken place at the state level. That is to say the right of self-defence as it applies to states (national self-defence). This approach represents only part, albeit an essential part, of the self-defence picture however. Much less academic attention has been paid to how the right of national self-defence relates to, and interacts with, the right of military personnel and their units to defend themselves. The commentary that does exist is primarily provided by military and government lawyers in the United States. There is a notable absence of input from *jus ad bellum* scholars. The International Court of Justice has also provided little elucidation on this fundamental question. By focusing on the state level, the jurisprudence has contributed to a fracturing of the *jus ad bellum*. The result is an appreciation of the law that is far removed from those who face armed attacks on the ground, in the air or at sea.

The disconnect between the right of states to defend themselves and the right of individuals and units to do so, provides an incomplete picture of the right of self-defence. The purpose of the paper is to highlight some of the problems associated with the focus to date on national self-defence and to demonstrate how the right of personal and unit self-defence should and do fit into the analysis. It seeks to offer some unified thinking regarding the *jus ad bellum* that properly accounts for the position of the military. The hope is that this approach will contribute to clarifying some of the controversies that have persisted since the right of self-defence was expressly recognized by the UN Charter in 1945. The first part of the paper offers an overview of the right of self-defence at the state, unit and personal levels, before proceeding to the substantive issues where the disconnect is most apparent. These include whether the right of self-defence should be viewed in a unitary manner or separately at the state and personal/unit level. How attribution operates within this context is also reviewed, together with the gravity of violence required before a right of self-defence becomes available at these different levels. The difficulties posed by imminent armed attacks and the requirements of necessity and proportionality is then examined, together with specific considerations relating to armed attacks by non-state actors (NSAs).

What becomes clear when one considers these issues, is that much of the academic commentary and jurisprudence to date is missing a piece of the puzzle. They tend not to account for how legal norms operate on the ground and are then transmitted to the national level so that the right of self-defence of military personnel and units are treated as constituent elements of the right of national self-defence. To ensure therefore that there is no disconnect within international law, we must be clear that the *jus ad bellum* treats self-defence in a unitary manner. There is only national self-defence, although the legal rights of individual military personnel and units form part of it. It is then the customary requirements of necessity and proportionality that govern what the overall defensive response looks like. To avoid fragmentation within the *jus ad bellum*, and

in international law more generally, we should therefore consider the range of consequences of saying that a state has no right of self-defence against minor uses of force, or attacks by NSAs, or armed attacks that are imminent. What is required is a holistic approach that looks at self-defence in a consolidated fashion and considers how the different levels of self-defence work together. The present disconnect needs to be bridged.