

## ARTICLE

### Reconceptualizing Individual or Unit Self-Defense as a Combatant Privilege

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## Abstract

In conflicts like those in Afghanistan, Iraq, and other U.S. counterterrorism engagements worldwide, self-defense, and a related concept known as “hostile intent” (used to refer to more ambiguous, distant threats), are used to justify an increasingly large share of uses of force. Although all agree that soldiers have a right to defend themselves in armed conflict, the theoretical origin of this right and its scope are ambiguous. The more pervasive use of these doctrines, untethered to international humanitarian law (IHL), creates ambiguities for soldiers in practice and can undermine IHL accountability in armed conflict zones. Relying on case studies of four states’ practices (United States, United Kingdom, Germany, France) this Article demonstrates how the expanded use of self-defense and hostile intent in a greater number of use-of-force situations without clarifying its relationship with IHL principles has contributed to both overly broad and overly narrow interpretations in practice. Further, the overly broad interpretation of these principles by some states has undermined accountability and muddied *ad bellum* and *in bello* distinctions. A more precise articulation of the source and scope of this right, and its relationship with other IHL principles, would help mitigate these risks, and would also help ensure that soldiers have a clear sense of their rights and protections. Specifically, this Article recommends anchoring the right to self-defense in IHL as part of the combatant’s privilege. This would reduce the risk of displacing IHL standards, enhance accountability, and lead to an interpretation of self-defense that more accurately balances the likely threats soldiers face in armed conflicts with protection of civilians.

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## Introduction

The sovereign right to self-defense is a fundamental principle under international law. The 1837 *Caroline* Affair established that states have a right to use force to defend themselves “where the necessity of self-defense was instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>1</sup> This principle of sovereign self-defense was further enshrined in article 51 of the UN Charter.<sup>2</sup> An attack in self-defense must be necessary, proportional, and triggered by an imminent or ongoing attack.<sup>3</sup>

Separate and distinct from this sovereign right of self-defense, there is also a commonly recognized right for individuals to defend themselves against attack. Most national criminal codes recognize an individual right to self-defense as a limited defense against criminal liability.<sup>4</sup> Self-defense as a defense or justification is so prevalent in criminal codes that it has been recognized as an element of customary international law by treaty bodies, tribunals, and international organizations: article 31 of the Rome Statute, establishing the International Criminal Court, codified the self-defense justification as grounds for excluding criminal responsibility;<sup>5</sup> and the International Criminal Tribunal for the Former Yugoslavia found article 31 to be reflective of most national criminal codes and thus part of customary international law.<sup>6</sup> The principle that self-defense or defense of another’s life may be necessary is also a generally recognized justification for use of force in law enforcement,<sup>7</sup> and in peacekeeping missions.<sup>8</sup>

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<sup>1</sup> In the so-called *Caroline* Affair in 1837, British military forces destroyed the U.S. ship *Caroline*, on grounds that it was imminently going to be used to attack British interests in Canada. In the subsequent dialogue to settle the dispute over whether the attack was justified, it was agreed that states had a sovereign right to defend themselves against attack, or the imminent threat of attack. See Letter from Daniel Webster, U.S. Secretary of State, to Lord Ashburton, British Plenipotentiary (Aug. 6, 1842), quoted in 2 INT’L L. DIG. 412, § 217 (John Bassett Moore, ed., 1906). See also *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 94 (June 27).

<sup>2</sup> U.N. Charter art. 51.

<sup>3</sup> See Hans Boddens Hosang, *Personal Self-Defence and Its Relationship to Rules of Engagement*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS, 429, 430–31 (Terry D. Gill & Dieter Fleck eds., 10th ed. 2010) [hereinafter Hosang, *Personal Self-Defence*].

<sup>4</sup> See *id.* (finding that the laws of the United States, the Netherlands, Canada, Belgium, Germany and France permit self-defense as a legal justification in defense of a crime).

<sup>5</sup> See Rome Statute of the International Criminal Court, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, art. 31, July 17 1998, 2204 U.N.T.S., 709.

<sup>6</sup> See *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Judgment, 451 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

<sup>7</sup> G.A. Res. 34/169, ¶ 3 (Dec. 17, 1979).

<sup>8</sup> UN Peacekeeping troops’ right to act in self-defense was formally codified in article 21 of the UN Safety Convention, which was adopted by the UN General Assembly in 1994. See United Nations Convention on Safety of United Nations and Associated Personnel, Dec. 9, 1994, 2051 U.N.T.S. 363; see also UNITED NATIONS DEP’T OF PEACEKEEPING OPERATIONS, DEP’T OF FIELD SUPPORT, UNITED NATIONS PEACEKEEPING OPERATIONS PRINCIPLES AND GUIDELINES 34 (2008), [http://www.un.org/en/peacekeeping/documents/capstone\\_eng.pdf](http://www.un.org/en/peacekeeping/documents/capstone_eng.pdf) (describing one of three basic

Relatedly, individual soldiers engaged in armed conflict and their units are universally recognized to have a right to self-defense (known as individual and unit self-defense respectively). Soldiers might also be authorized to fire on more ambiguous threats where they see an individual engaged in what is interpreted as a “hostile act” or demonstrating “hostile intent.” Further distinctions between these concepts are discussed in greater detail in Parts I and II.

Although these concepts are widely relied upon to justify uses of force in modern armed conflict, there are significant disagreements in the use and limits of these concepts in practice. Three soldiers from different North Atlantic Treaty Organization (NATO) countries who served in Afghanistan and were interviewed for this Article offered the following hypothetical to illustrate some of the legal dilemmas and differences surrounding self-defense and hostile intent:

Take the example of watching a feed from a UAV [Unmanned Aerial Vehicle] of an Afghan [man] digging a hole. You can’t see an IED [Improvised Explosive Device] but you just know a guy is digging a hole in daytime and an ISAF convoy is coming. Is it [an example of] hostile intent?<sup>9</sup>

Different countries would have different legal positions on whether their soldiers could use lethal force in this scenario, and whether doing so could be justified under self-defense, the soldiers agreed. A U.S. soldier or unit in that position would probably consider it a sign of “hostile intent,” which in U.S. doctrine is considered the trigger for U.S. soldiers’ right of self-defense, the three said. This would mean that a U.S. soldier could fire at his discretion. However, one of the three, a Dutch soldier, was adamant that Dutch troops could not.<sup>10</sup> Although the digging (presumably an IED) might constitute a sign of hostile intent, he said, using lethal force in that situation would be beyond Dutch interpretations of the scope of individual self-defense. Dutch soldiers would require a determination that this was a valid target under International Humanitarian Law (IHL), and authorization from a commander to fire before being able to do so, he said.<sup>11</sup>

The ambiguity over whether soldiers might fire or not, and on what basis is in part due to significant legal lacunae surrounding the normative basis and scope of these concepts. IHL is silent on soldiers’ right to self-defense and includes no term related to “hostile intent.” There is no single prevailing theory on the origins of the individual right to self-defense. There is no settled interpretation

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principles guiding UN peacekeeping missions as the non-use of force except in self-defense and defense of mission, which includes protection of civilians).

<sup>9</sup> Interview with soldier formerly deployed under ISAF in Afg. [OT8], in Mons, Belg. (Apr. 28, 2015) (on file with author).

<sup>10</sup> Interview with soldier formerly deployed under ISAF in Afg. [OT9], in Mons, Belg. (Apr. 28, 2015) (on file with author).

<sup>11</sup> *Id.*

governing the scope or limits of these rights, and in fact very little legal literature or debate concerning these concepts at all.

Part of the reason that there has been so little discussion of these concepts is that they have been treated as tactical rules and elided from legal discussions. The right of self-defense and the concepts of hostile act or intent are typically described in Rules of Engagement (ROEs), which are a distillation of the applicable international and domestic legal principles and other policy or tactical considerations.<sup>12</sup> Because ROEs are regarded as a matter of domestic policy and tactical guidance, these concepts have been passed over in academic discussions of IHL interpretation and compliance. For example, the concluding paper for a series of discussions on direct participation in hostilities (DPH) organized by the International Committee of the Red Cross (ICRC) shelved the discussion of self-defense and hostile intent into a footnote: “During the expert meetings, there was agreement that hostile intent is not a term of IHL, but a technical term used in rules of engagement (ROE) drafted under national law.”<sup>13</sup> As a result, there has been very little scholarship considering the normative foundation for these concepts, their relationship with IHL, and what this should imply in terms of limitations on uses of force authorized or justified under individual or unit self-defense.

This Article argues that greater attention to the legal bases and scope of these concepts is merited because of the way they are being used in state practice. Self-defense—and the associated hostile intent concept—are increasingly used to justify and explain a large proportion of incidents involving the use of force in modern conflicts. Moreover, these concepts are not only relied upon more frequently in conflict zones, they are also often used as an independent authority distinct from IHL, as the empirical sections of this article will illustrate. They have emerged as a legal concept in their own right, which in practice—if not yet in *opinio juris*—functions as a separate legal basis for use of force.

Further, the substantial gray area—because of their dismissal from legal discussions—has contributed to a number of issues with the application of these concepts in practice. Absent any settled view on the legal basis for these uses of force, some states have loosely based authorization to fire in self-defense on either a state’s sovereign right to self-defense or on domestic criminal law (to be

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<sup>12</sup> The NATO Legal Deskbook defines rules of engagement as “directives to military forces (including individuals) that define the circumstances, conditions, degree, and manner in which force, or actions which might be construed as provocative, may be applied.” N. ATL. TREATY ORG., NATO LEGAL DESKBOOK, 254–56 (2d ed. 2010), <https://info.publicintelligence.net/NATO-LegalDeskbook.pdf> [hereinafter *NATO Legal Deskbook*].

<sup>13</sup> INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 59 n.151 (Nils Melzer ed., 2009), <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>. See also INT’L COMM. OF THE RED CROSS, *Overview of the ICRC’s Expert Process* (2003-2008), <https://www.icrc.org/eng/assets/files/other/overview-of-the-icrcs-expert-process-icrc.pdf> (last visited Apr. 20, 2017).

discussed in Part II). Both of these frameworks are slightly inapt for the situation of a soldier acting in individual self-defense in an armed conflict. Importing the state self-defense standards into individual or unit self-defense, as the United States does, risks creating an overbroad standard that can undermine IHL protection standards and blur *jus ad bellum* and *jus in bello* distinctions. On the other hand, basing this right in domestic criminal law conceptions of self-defense, as most European NATO countries do, can result in a standard that is so narrow and ill-fitting to a conflict situation that soldiers are not able to defend themselves against the full panoply of possible threats through a self-defense framework. Neither position strikes the optimal balance. Additional ambiguities over how this self-defense right relates to soldiers' ability to fire on hostile acts or perceptions of hostile intent further obscures the legal bases for use of force in some of the most common Laws of Armed Conflict (LOAC) situations in modern armed conflict.

To address these issues, this Article argues for greater consideration of the scope and origins of individual and unit self-defense. As a starting point for such discussions, this Article argues the right of self-defense should be reconceptualized as flowing from IHL, as a part of the combatant's privilege. This shift would help address the risks of an overly broad self-defense paradigm displacing IHL and undermining accountability, or a too limited conception of self-defense impairing soldiers' self-defense.

To understand how these concepts are used in practice, and build a base for re-conceptualizing the relationship between self-defense and other IHL concepts, the author developed case studies of how four NATO member countries—France, Germany, the United Kingdom and the United States—applied principles of individual or unit self-defense and hostile intent in Afghanistan. This included analyzing the laws, policies, and military regulations that govern when and how soldiers from each of the four countries interpret and apply self-defense and hostile intent, and conducting qualitative interviews with military personnel from each country, including both military lawyers and specialists, and soldiers who experienced the challenges on the ground in Afghanistan and other related contexts, most commonly Iraq.<sup>14</sup> This Article will focus on the theoretical arguments and the case for reconceptualizing these self-

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<sup>14</sup> The author contributed to the research of a study led by the Harvard Law School International Human Rights Clinic beginning in 2011, and relied on twenty-nine of the interviews from that study, informing primarily the analysis of U.S. practices. See HARVARD LAW SCH. INT'L HUMAN RIGHTS CLINIC, TACKLING TOUGH CALLS: LESSONS FROM RECENT CONFLICTS ON HOSTILE INTENT AND CIVILIAN PROTECTION (2016). Separate from this Harvard study, the author conducted forty-six further interviews with lawyers or troops from other NATO countries, primarily from France, Germany and the United Kingdom, but also from some other NATO countries. Interviewees were identified through a snowball sampling process, beginning with soldiers the author already knew, or was referred to by journalists or ministerial officials from each country, and identifying further interviewees based on their suggestions. Most interviewees preferred to present interviews anonymously, stressing that their statements reflected their personal experience, not an official position. Almost all interviews have been anonymized to further protect the identity of all.

defense rights, and reference the interviews and elements of the case studies only as needed to support those points. The full qualitative data and other non-legal findings are available in a complementary, empirical study.<sup>15</sup>

Part I will introduce the basic concepts of self-defense, hostile act, and hostile intent, and their increasing use in modern conflict. Part II will provide the legal framework, discussing the different legal bases presumed for self-defense and hostile intent, the applicable standards under each country's interpretation of these concepts, and the gaps or ambiguities in the legal framework. The analysis will demonstrate that regardless of which origin theory is adopted, the authority to use force under self-defense exists independently of authority to use force under IHL. Part III will explore how these differing legal interpretations determine when self-defense or hostile intent determinations may be relied upon to justify uses of force, in essence how expansively or narrowly these concepts are used. Part IV will illustrate the consequences of taking either a too expansive or too narrow view. This includes how an extremely expansive self-defense paradigm risks displacing IHL and undermining accountability frameworks for use of force. Finally, Part V will argue that reconceptualizing this right as a part of the combatant's privilege under IHL addresses some of these issues by significantly reducing protection and accountability concerns, and providing soldiers with greater clarity and understanding of their right to defend themselves.

### I. Basic Concepts and Expanded Reliance on Self-Defense, Hostile Act, and Hostile Intent

Provisions on self-defense, hostile act, and hostile intent are incorporated in most national rules of engagement, NATO's rules of engagement,<sup>16</sup> and rules of engagement for UN peacekeepers.<sup>17</sup> Despite their prevalence in military manuals, guidance, and other legal documents, these documents do not tend to include descriptions of what constitutes an action in individual or unit self-

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<sup>15</sup> See ERICA GASTON, GLOBAL PUB. POLICY INST., *WHEN LOOKS COULD KILL: EMERGING STATE PRACTICE ON SELF-DEFENSE AND HOSTILE INTENT* (forthcoming June 2017) [hereinafter Gaston, *Emerging State Practice on Self-Defense*].

<sup>16</sup> See, e.g., *NATO Legal Deskbook*, *supra* note 12 (noting the incorporation of the concepts of "hostile act" (rule 422) and "hostile intent" (rule 421) under the "42 series," the set of common NATO ROEs comprising rules 421 to 429); Jody Prescott, W. POINT CTR. FOR THE RULE OF LAW, *Direct Participation in Cyber Hostilities: Terms of Reference for Like-Minded States?* (2014), [https://ccdcoe.org/publications/2012proceedings/4\\_3\\_Prescott\\_DirectParticipationInCyberHostilities.pdf](https://ccdcoe.org/publications/2012proceedings/4_3_Prescott_DirectParticipationInCyberHostilities.pdf) (quoting the NATO common rules of engagement pertaining to hostile act and intent, which in other forms are classified).

<sup>17</sup> Self-defense and hostile intent concepts are also prominent in ROEs for peacekeepers. The generic Rules of Engagement authorized for UN peacekeeping missions typically authorize use of force up to deadly force in self-defense or to "protect civilians under imminent threat of physical violence." Increasingly, many mission rules also permit "use of force beyond self-defense" in response to a hostile intent. Patrick C. Cammaert & Ben Klappe, *Application of Force and Rules of Engagement in Peace Operations*, in *THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS* 154–56 (Gil Fleck ed., 2010). See also *NATO Legal Deskbook*, *supra* note 12, at 239 (noting the fundamental principle that peacekeeping troops do not engage in force except in self-defense).



defense. It tends to be an assumed and inalienable right, but one whose scope and outer bounds is not discussed in guidance or legal literature. For example, a military manual guiding French soldiers' uses of force and ROEs provides in the opening introduction: "These rules of engagement neither limit nor substitute for the right to self-defense (*la légitime défense*), which is a permanent right, and do not contravene [the right of soldiers] to exercise it."<sup>18</sup> Although the French manual treats this as an inalienable or natural right, there is no discussion of what actions would constitute soldier self-defense. The same is true of other military manuals examined. The NATO Legal Deskbook (which provides common guidance on NATO countries' common military practice and ROEs) makes clear that NATO rules and policies cannot limit the right to individual or unit self-defense.<sup>19</sup> However, the description of what acts might trigger those rights is not provided. Like U.S. Supreme Court Justice Potter Stewart's famous dictum about the definition of obscenity, self-defense appears to be one of those legal concepts where you "know it when [you] see it."<sup>20</sup>

There are two ROEs that are often associated with self-defense: hostile act and hostile intent. These are incorporated into the NATO Common ROEs in the so-called "42 series"<sup>21</sup> beginning with rules 421 to 429.<sup>22</sup> The NATO Legal Deskbook defines hostile act as "any intentional act causing serious prejudice or posing a serious danger to NATO/NATO-led forces or designated forces or personnel,"<sup>23</sup> and provides examples including laying mines, impeding NATO operations or breaching NATO secure areas.<sup>24</sup> Hostile intent is defined as "a likely and identifiable threat recognisable" based on "capability and preparedness [...] to inflict damage" and "evidence [...] which indicates an intention to [...] inflict damage."<sup>25</sup> Examples provided include "manoeuvring into weapons launch

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<sup>18</sup> CENTRE INTERARMEES DE CONCEPTS, DE DOCTRINES ET D'EXPERIMENTATIONS, MINISTERE DE LA DEFENSE, DIA - 5.2: L'USAGE DE LA FORCE EN OPERATION MILITAIRE SE DEROULANT A L'EXTERIEUR DU TERRITOIRE NATIONAL 7 (July 25, 2006), [http://www.cicde.defense.gouv.fr/IMG/pdf/20060725\\_np\\_ema\\_emp-1\\_dia-5-2-usage-force-hors-tn.pdf](http://www.cicde.defense.gouv.fr/IMG/pdf/20060725_np_ema_emp-1_dia-5-2-usage-force-hors-tn.pdf) [hereinafter French Interarmy Directive DIA 5.2] (author translation). The U.S. Operational Law Handbook emphasizes that the right of individual or unit self-defense as "inherent" in nearly all references to it. David H. Lee, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. AND SCH., *Operational Law Handbook 2015* 5, 82, 83 (June 15, 2015), [http://www.loc.gov/r/r/frd/Military\\_Law/pdf/operational-law-handbook\\_2015.pdf](http://www.loc.gov/r/r/frd/Military_Law/pdf/operational-law-handbook_2015.pdf) [hereinafter Lee, *Operational Law Handbook 2015*].

<sup>19</sup> *NATO Legal Deskbook*, *supra* note 12, at 256. For example, signifying the inalienable or inherent character, the NATO Legal Deskbook also provides a checklist of suggested elements of NATO ROEs in the Appendix, which includes prominently: "Do the ROE recognize the inherent right of self-defense of all persons?" *NATO Legal Deskbook*, *supra* note 12, at 334.

<sup>20</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

<sup>21</sup> *NATO Legal Deskbook*, *supra* note 12, at 256.

<sup>22</sup> See, e.g., Rob McLaughlin, *An Australian Perspective on Non-International Armed Conflict: Afghanistan and East Timor*, 88 INT'L L. STUDIES 293, 305 (2012); N. Atl. Treaty Org., *NATO Rules of Engagement*, MC 362/1, 2 (June 30, 2003), at A-19, *quoted in* Prescott, *supra* note 16, at 256.

<sup>23</sup> *NATO Legal Deskbook*, *supra* note 12, at 255.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

positions, deployment of remote targeting methods, and use of shadowers / tattletales.”<sup>26</sup> Where the ROEs for hostile act or hostile intent are authorized, and soldiers see behavior that meets this criteria, they may respond with lethal force.<sup>27</sup> However, the United States, among other countries, considers hostile act and hostile intent to be trigger words for self-defense, not as distinct ROE authorizations.<sup>28</sup> This legal distinction will be elaborated upon in Part II.

Although hostile act and hostile intent are assigned different ROEs and have different definitions in military guidance, in practice, soldiers rarely distinguished between the two. The hostile act and hostile intent ROEs tend to be authorized jointly and the distinction between them to an average soldier was negligible. In addition, although self-defense, hostile act and hostile intent are meant to denote different situations and threat parameters, in practice, commanders and soldiers often use the three interchangeably, as some of the quotes and examples in this article will illustrate. However, to the extent that there is a distinction in practice, self-defense would be more frequently associated with direct threats—for example, responding to someone firing on the soldier with a weapon—whereas a soldier might describe a more ambiguous threat—for example, someone displaying tactical behavior or behavior that meets a common threat pattern—as a hostile act or hostile intent situation. Given the interchangeability and for the sake of brevity, this Article will hereinafter refer to uses of force under either hostile act or hostile intent ROEs as simply “hostile intent” or “hostile intent situations.”

<sup>26</sup> *Id.*

<sup>27</sup> Each country will also tend to have its own ROEs on hostile act or intent, its own guidance on appropriate responses where hostile act or intent are used, and any accompanying authorization processes. See, e.g., ÉTAT-MAJOR DES ARMEES, DIVISION EMPLOI 1, DIRECTIVE INTERARMEES SUR L’USAGE DE LA FORCE EN OPERATION MILITAIRE SE DEROULANT A L’EXTERIEUR DU TERRITOIRE NATIONAL, 26–27 (July 25, 2006), [http://www.cicde.defense.gouv.fr/IMG/pdf/20060725\\_np\\_cicde\\_pia-5-2-usage-de-la-force-en\\_operation-militaire.pdf](http://www.cicde.defense.gouv.fr/IMG/pdf/20060725_np_cicde_pia-5-2-usage-de-la-force-en_operation-militaire.pdf) [hereinafter French Interarmy Directive PIA 5.2]. (permitting use of force in response to “hostile acts” or “hostile intent”) (in French); ARMY RECRUITING AND TRAINING DIV., *Platoon Commander’s Battle Course, Infantry Battle School*, [http://webarchive.nationalarchives.gov.uk/20120215203912/http://www.bahamousainquiry.org/linkedfiles/baha\\_mousa/module\\_4/mod\\_4\\_witness\\_statem/exhibit\\_mje/miv001853.pdf](http://webarchive.nationalarchives.gov.uk/20120215203912/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/module_4/mod_4_witness_statem/exhibit_mje/miv001853.pdf) [Hereinafter *Platoon Commander’s Battle Course*]; CTR. FOR LAW AND MILITARY OPERATIONS, *Legal Lessons Learned From Afghanistan and Iraq: Volume I: Major Combat Operations* (11 September 2001 – 1 May 2003) (Aug. 1, 2004), at 120–21, 121 n. 49, <http://fas.org/irp/doddir/army/clamo-v1.pdf>.

<sup>28</sup> Under the U.S. SROE, a hostile act is defined as: “An attack or other use of force against the United States, U.S. forces or other designated persons or property. It also includes force used directly to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital U.S. government property.” Chairman of the Joint Chiefs of Staff, Instruction 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces, June 13, 2005, Enclosure A, at A-3 ¶(3)(e), as reprinted in Lee, *Operational Law Handbook 2015*, *supra* note 18, at 97 [hereinafter U.S. SROE]. Hostile intent is defined as: “The threat of imminent use of force against the United States, U.S. forces or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital U.S. government property.” *Id.* at A-3 ¶(3)(f).

Part of the ambiguity is because what kinds of behavior trigger self-defense or a “hostile intent” determination may vary based on the conflict zone and the immediate threat patterns.<sup>29</sup> An extremely high threat from remote-detonated IEDs in Iraq led soldiers to be extremely wary of those who might be using mobile phones to detonate an IED or to direct the remote detonation of one as soldiers passed. In response, for certain periods of time and locations in Iraq, an individual watching troops and using a mobile phone in the proximity of passing troops or a convoy (often described by soldiers as “dicking”) was frequently deemed a sign of “hostile intent” on sight.<sup>30</sup> In both Afghanistan and Iraq, digging in the ground, particularly at night, was often interpreted as a sign of hostile intent or a trigger for self-defense due to the risk that the individual was planting an IED.<sup>31</sup> Machetes were such a prevalent weapon in the internal armed conflict in the Central African Republic in 2013 and 2014 that French troops deployed there on a peacekeeping mission reportedly could interpret seeing a man armed with a machete as a demonstration of hostile intent and fire on him if deemed necessary.<sup>32</sup>

In the changing context of war, soldiers increasingly justify uses of force under a self-defense or hostile intent framework. In asymmetric conflicts, head-on combat is less likely and response to ambiguous threats, such as IEDs or attacks from combatants who are hidden among the civilian population more common. For example, a study by the Joint and Coalition Operational Analysis (JCOA) at the U.S. Defense Department noted that after the initial air strikes in Afghanistan in 2001, as soon as U.S. forces began to engage on the ground, they “tended to rely more on self-defense considerations based on perceived hostile acts or intent” than on positive identification of targets, because the latter was too hard to distinguish given the way that the Taliban blended among civilians.<sup>33</sup>

Tactical decisions and changes in the way modern militaries approach

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<sup>29</sup> See, e.g., OFFICE OF THE GEN. COUNSEL, DEP’T OF DEFENSE, LAW OF WAR MANUAL 26 (2015, updated July 2016), <https://assets.documentcloud.org/documents/2997317/DoD-Law-of-War-Manual-June-2015-Updated-May-2016.pdf> (“ROE are used by States to tailor the rules for the use of force to the circumstances of a particular operation”); Gary D. Solis, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 479–81 (2d ed. 2016).

<sup>30</sup> Telephone interview with former British military soldier [UK11] (Oct. 19, 2015) (on file with author); Interview with U.S. army officer [US5] in Washington, D.C. (Apr. 13, 2012) (on file with author). “Dicking” is the common term troops use to refer to someone who is deliberately providing information on troop activities or location, presumably facilitating an attack.

<sup>31</sup> See e.g., JOINT AND COALITION OPERATIONAL ANALYSIS (JCOA), REDUCING AND MITIGATING CIVILIAN CASUALTIES: ENDURING LESSONS 10 (Apr. 2013), <https://publicintelligence.net/jcoa-reducing-civcas/> (noting that civilian casualties commonly resulted from misperceptions of hostile intent, including from activities such as “digging next to a road used by military forces” or failing to heed warning signs at checkpoints); Interview with U.S. Commander [US13] in Washington, D.C. (April 12, 2012) (on file with author) (characterizing the threat from those digging IEDs as so high at certain points in Iraq that “just having a shovel” was considered hostile intent).

<sup>32</sup> Interview with French military officer [FR8], Paris, Fr. (July 2, 2015) (on file with author).

<sup>33</sup> JCOA, REDUCING AND MITIGATING CIVILIAN CASUALTIES, *supra* note 31, at 1.

kinetic operations are also a major factor. Self-defense and hostile intent situations represent an increasing share of the average soldier's use of force now because the majority of forward, offensive targeting is delegated to aerial assets or to Special Forces. The empirical study conducted in tandem with this legal article found that greater reliance on self-defense in Afghanistan may also have been in part due to efforts to restrict other uses of force to reduce the risk of civilian casualties.<sup>34</sup> Commanders interviewed said that after a series of tactical directives beginning in 2009 significantly reduced flexibility to use offensive force, the easier (or only) way to justify force was under self-defense or hostile intent.<sup>35</sup>

Although self-defense and hostile intent are commonly associated with regular ground operations, these terms are also increasingly used in justifications for uses of force by aerial assets. Investigations into the legality or tactical advisability of aerial attacks, whether traditional or drone-operated have recorded the use of self-defense and "hostile intent" concepts to justify strikes.<sup>36</sup> Frequently the self-defense determination is made based on an imminent threat to forces on the ground.<sup>37</sup> Because countries like the U.S. have an expansive definition of what is imminent (to be discussed in Part III.A.), self-defense may be used to justify drone or aerial strikes against targets that are quite distant from presenting an immediate threat.<sup>38</sup> The farthest reaches of this practice will be discussed in Part IV.D.

## II. Legal Bases, Standards, and Gaps for Self-Defense and Hostile Intent Doctrines

As the NATO Legal Deskbook states, NATO rules and policies "do not limit the right to self-defense and in exercising it, individuals and units will act in accordance with national law."<sup>39</sup> The standards governing soldiers' self-defense are a matter of national interpretation, even when soldiers are deployed in

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<sup>34</sup> Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Chapter IV.B, "Tactical Restrictions, Civilian Protection, and Expanding Self-Defense."

<sup>35</sup> *Id.*

<sup>36</sup> See, e.g., LARRY LEWIS & DIANE VAVRICHEK, *RETHINKING THE DRONE WAR: NATIONAL SECURITY, LEGITIMACY, AND CIVILIAN CASUALTIES IN U.S. COUNTERTERRORISM OPERATIONS* 146 (2016) (attributing collateral damage due to a drone strike in Uruzgan, Afghanistan in part to a mistaken perception of "hostile intent" and the fact that self-defense authority is not limited to an "immediate" threat); *Leaked U.S. video shows deaths of Reuters' Iraqi staffers*, REUTERS (Apr. 5, 2010), <http://www.reuters.com/article/us-iraq-usa-journalists-idUSTRE6344FW20100406>; SUNSHINEPRESS, *Collateral Murder - Wikileaks - Iraq*, YOUTUBE (Apr. 3, 2010), <https://www.youtube.com/watch?v=5rXPrfnU3G0>; Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Chapter II.A, "Expansion to Aerial Assets."

<sup>37</sup> The scope of unit self-defense is generally interpreted to apply to forces in the geographical area in question. See, e.g., Lee, *Operational Law Handbook 2015*, *supra* note 18, at 83. ("Both unit and individual self-defense include defense of other U.S. military forces in the vicinity.")

<sup>38</sup> For a larger discussion of these issues, see Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Chapter II.A, "Expansion to Aerial Assets."

<sup>39</sup> *NATO Legal Deskbook*, *supra* note 12, at 256.

coalitions with a supra-national authority.<sup>40</sup> Although self-defense standards tend to share certain common principles, because they flow from different theories of origin, or legal bases, they can have important distinctions. To illustrate some of these distinctions, this Part briefly outlines how the four countries in the case studies for this Article interpreted the legal basis and scope for unit and individual self-defense, and for hostile act and hostile intent. The analysis draws on published guidance in military manuals, treatment of the issue in any domestic laws or jurisprudence, and interviews with military lawyers and commanders who have provided training or guidance on these issues. Examining these countries' doctrines surrounding self-defense suggests that whichever origin theory is followed, soldiers' individual or unit self-defense is treated somewhat as an independent, alternate authority for use of force even where IHL authority is not present.

#### A. *Origin Theories and Standards for Individual and Unit Self-Defense*

Individual soldiers engaged in armed conflict and their units are universally recognized to have a right to self-defense, although there is significant ambiguity—if not outright legal lacunae—as to the origin and limits of this right. While IHL is clearly not the source of this right, there is no settled consensus on what the source is. Military manuals occasionally note the source of self-defense, but more often the source is left oblique, or noted only with a single line, and no deeper normative analysis.

There has been minimal discussion of the issue in legal literature. Scholar Hans Hosang is one of the few to have explored the legal origins of this practice. He distills common practice into three theories of the source of unit and individual self-defense: (1) individual self-defense derives from the right to self-defense under domestic criminal law, and unit self-defense is a form of “collective personal self-defense;” (2) individual self-defense is a “corollary to the right to life,” which extends to military personnel acting as a unit (in Hosang’s view a weaker theory); or (3) soldiers or their units are representatives of the sovereign state and so their right of self-defense derives from the sovereign right to self-defense.<sup>41</sup> Others propose that individual self-defense should be considered

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<sup>40</sup> See, e.g., ALAN COLE ET AL., INT’L INST. OF HUMANITARIAN LAW, SAN REMO HANDBOOK ON RULES OF ENGAGEMENT 3 (2009), <http://www.iihl.org/wp-content/uploads/2015/12/ROE-HANDBOOK-ENGLISH.pdf> (“Self-defense is available in all situations, including armed conflict. National laws differ on the definition and content of the right of self-defence. As a consequence individuals and units will exercise this right in accordance with their respective national law.”).

<sup>41</sup> Hans Boddens Hosang, *Force Protection, Unit Self-Defence, and Extended Self-Defence*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 415 (Terry D. Gill & Dieter Fleck eds., 10th ed. 2010) [hereinafter Hosang, *Force Protection*]. See also YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 220 (2005) (“There is a quantitative but no qualitative difference between a single unit responding to an armed attack and the entire military structure doing so.”).

a *sui generis* customary rule of international law.<sup>42</sup> There is no ongoing debate or interrogation of these different theories in academic literature, and so it would be difficult to frame one or the other of these origin theories as the prevailing consensus (although Hosang prefers the third view).

The four countries included as case studies for this Article illustrate two of these normative origin theories: 1) that soldiers' individual or unit self-defense rights are part of sovereign self-defense, or 2) that they are grounded in corollary domestic criminal law provisions.<sup>43</sup> The United States takes the former view. The U.S. Standing Rules of Engagement (SROE) provides the following definition 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.<sup>44</sup>

Interviews with senior U.S. military lawyers, and some references in academic literature, establish that in the U.S. view, individual and unit self-defense derive from sovereign self-defense.<sup>45</sup> The way that the self-defense provisions of the SROE are treated in the U.S. Operational Law Handbook, and other associated guidance, makes clear that unit self-defense is viewed as a subset of, or stemming from, sovereign self-defense. For example, in a section introducing the scope and function of the SROE, the Operational Law Handbook offers three subsets of self-defense: inherent, national, and collective, with the

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<sup>42</sup> See generally Dale Stephens, *Rules of Engagement and the Concept of Unit Self-Defense*, 45 NAVAL L. REV. 126 (1998) (arguing that although not clarified the right of unit self-defense should be considered a *sui generis* customary right, but constrained by the limits of the *Caroline* principles); Charles P. Trumbull, *The Basis of Unit Self-Defense and Implications for the Use of Force*, 23 DUKE J. OF COMP. AND INT'L L. 121 (Fall 2012).

<sup>43</sup> These appear to be the most prominent theories among state practice. No examples of states that adopt position that soldier self-defense is a principle of customary international law were found in the available literature. However, two German lawyers suggested that they thought it was possible that German soldiers' self-defense had a dual basis, in both domestic criminal law and as a customary international law. No German military manuals or official guidance address this issue, likely because this is not a legal discussion that the German government has considered and taken a definitive legal position on. The weight of the evidence is on domestic criminal law as the basis, and so the remainder of this article will treat Germany's position as such. However, it is possible that with further consideration, Germany would represent a mixed case.

<sup>44</sup> U.S. SROE, *supra* note 28, at A-2 ¶(3)(a). See also *id.* at 2 ¶¶ 6(b)(1), 6(c)(1) (repeating the same rule of self-defense in preliminary parts of the SROE to affirm it as the first element of the Standing Rules of Engagement and the Standing Rules for the Use of Force).

<sup>45</sup> See Interview with two senior U.S. military lawyers and one senior U.S. commander [US11] in Washington, D.C. (Apr. 12, 2012) (on file with author); Hosang, *Force Protection* *supra* note 41, at 422–3 § 22.08; Lieutenant Colonel W.A. Stafford, *How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE & the Rules of Deadly Force*, 1 THE ARMY LAWYER 5 (2000) (“The concept of self-defense [in U.S. Rules of Engagement] . . . stems from a state's right of self-preservation.”).

inherent right then defined as unit and individual self-defense.<sup>46</sup> This provision builds from an earlier section of the Operational Law Handbook that introduces self-defense as one of the main bases for uses of force and roots this in the customary right to self-defense and article 51 of the UN Charter—clear references to sovereign self-defense.<sup>47</sup>

The standards applicable to individual or unit self-defense flow from the U.S. interpretation of the *Caroline* standards for sovereign self-defense.<sup>48</sup> Self-defense is not limited to ongoing attacks but may be used against imminent attacks, with imminence broadly defined (as will be revisited in Part III.A.).<sup>49</sup> The U.S. SROE require that self-defense be guided by the principles of de-escalation, necessity, and proportionality.<sup>50</sup>

The ROE version of self-defense is relied upon in armed conflict situations and is the standard used to judge soldiers' actions in responding to threats from presumed combatants. It is worth noting, however, that there is also a self-defense provision under the Uniform Code of Military Justice<sup>51</sup> that provides a defense to criminal liability for soldiers (or those accompanying them) serving abroad in peacetime situations.<sup>52</sup>

France, Germany, and the United Kingdom ground their soldiers' right to self-defense in their domestic criminal laws, although only France's military guidance is explicit on this point.<sup>53</sup> All three countries' criminal laws apply

<sup>46</sup> Lee, *Operational Law Handbook 2015*, *supra* note 18, at 83.

<sup>47</sup> *Id.* at 3–6.

<sup>48</sup> *Id.* See also Hosang, *Force Protection*, *supra* note 41, at 422–23 § 22.08 (noting that in keeping with this view, U.S. self-defense is guided by the *Caroline* criteria); Interview with two senior U.S. military lawyers and one senior U.S. commander [US11] in Washington, D.C. (Apr. 12, 2012) (on file with author).

<sup>49</sup> Lee, *Operational Law Handbook 2015*, *supra* note 18, at 84. The Operational Law Handbook notes that the sovereign right of self-defense permits “anticipatory” attacks “in anticipation of an imminent armed attack,” and connects these to the use of force in self-defense triggered by a sign of hostile intent: “It is important to note, however, that anticipatory self-defense serves as a foundational element in the Chairman of the Joint Chiefs of Staff’s Standing Rules of Engagement (CJCS SROE), as embodied in the concept of hostile intent, which makes it clear to commanders that they do not, and should not, have to absorb the first hit before their right and obligation to exercise self-defense arises.” *Id.* at 6.

<sup>50</sup> U.S. SROE, *supra* note 28, at A-3 ¶6(a). While forces should attempt to de-escalate where possible, de-escalation is not required. *Id.* at A-4 ¶6(a)(1).

<sup>51</sup> JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL UNITED STATES, Part II: Rules for Courts-Martial, r. 916(e) (June 2016), <http://jsc.defense.gov/Portals/99/Documents/MCM2016.pdf?ver=2016-12-08-181411-957>

(providing a limited right to self-defense where there are reasonable grounds to believe there is a threat of grievous bodily harm or death).

<sup>52</sup> 18 U.S.C. § 3261 (West 2000); see *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007) (recognizing that R.C.M. 916 represents well established principles of the law of self-defense).

<sup>53</sup> Two French Interarmy publication state explicitly that individual and unit self-defense (as distinguished from national self-defense) derive from the French Criminal Code. See French Interarmy Directive DIA 5.2, *supra* note 18, at 14; French Interarmy Directive PIA 5.2, *supra* note 27, at 34.

extraterritorially, including during periods of armed conflict,<sup>54</sup> and all three contain provisions on self-defense:

- France: Article 122(5) of the French criminal code permits the use of force in self-defense or defense of others, or to prevent a crime, where it is “strictly necessary” to do so, where the attack was unjustified, and where the response is immediate and proportionate to the threat posed.<sup>55</sup> Any response in self-defense must be virtually concurrent to the time of the attack and must cease immediately.<sup>56</sup>
- Germany: Under section 32 and 33 of Germany’s Criminal Code, self-defense is justified when necessary to avert an actual or imminent illegal attack against one’s self or another.<sup>57</sup> These concepts are known as *Notwehr* for individual self-defense (literally meaning “emergency defense”) or *Nothilfe* for coming to the rescue of others.<sup>58</sup> The self-defense response must be immediate.<sup>59</sup> The defending individual must use the minimal level of force that would effectively and definitively restore the safety of the attacked individual, and use of a firearm in self-defense should only be a last resort.<sup>60</sup> There is not a strict proportionality requirement for domestic self-defense;<sup>61</sup> however, German soldiers’ self-defense training emphasizes that proportionality is

<sup>54</sup> See, e.g., R v. Blackman [2014] EWCA Crim. 1029; French Defense Code (*Code de la défense*), L.4123-12-II (in French), [https://www.legifrance.gouv.fr/affichCode.do?sessionId=8D641BA3E005DCB61A1FDB6FCE794BEE.tpdila12v\\_3?idSectionTA=LEGISCTA000006182625&cidTexte=LEGITEXT000006071307&dateTexte=20170420](https://www.legifrance.gouv.fr/affichCode.do?sessionId=8D641BA3E005DCB61A1FDB6FCE794BEE.tpdila12v_3?idSectionTA=LEGISCTA000006182625&cidTexte=LEGITEXT000006071307&dateTexte=20170420) (last visited Apr. 20, 2017).

<sup>55</sup> FRENCH CRIMINAL CODE (*Code pénal*), art. 122–5, <https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006417218&cidTexte=LEGITEXT000006070719> (last visited Apr. 20, 2017). See also French Interarmy Directive PIA 5.2, *supra* note 27, at 34–35 (emphasizing that self-defense must be “necessary,” “proportionate to the attack,” and “imminent,” meaning the attack should be ongoing or immediately forthcoming in the sense that there has already been a commencement of the aggression, signaled, for example, by threatening someone with a weapon).

<sup>56</sup> French Interarmy Directive DIA 5.2, *supra* note 18, at 14.

<sup>57</sup> BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ, STRAFGESETZBUCH § 32 (2017), <http://www.gesetze-im-internet.de/stgb/BJNR001270871.html#BJNR001270871BJNG000902307> ((1) “Who commits a crime, that is necessary in emergency defense, shall not have acted illegally.” (2) *Notwehr* is the defense, which is necessary, to defend against an *ongoing* [/imminent], unlawful attack against one’s self or another); see also PROF. DR. MICHAEL BOHLANDER, GERMAN MINISTRY OF JUSTICE, TRANSLATION OF THE GERMAN CRIMINAL CODE § 32 (2016), [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html).

<sup>58</sup> § 32 of the German Criminal Code technically references only the concept of *Notwehr* (individual self-defense) but is understood to cover both the *Notwehr* and *Nothilfe* concepts. See, e.g., Münchener Kommentar zum Strafgesetzbuch, § 32 (Professor Dr. Bernd von Heintschel-Heinegg, ed., 3d ed. 2017) (noting that there is in principle no legal difference between individual self-defense and defense of others, or *Nothilfe*).

<sup>59</sup> Münchener Kommentar zum Strafgesetzbuch, *supra* note 58, at r. 104.

<sup>60</sup> BGH June 29, 1994, NJW 539, 1994; OLG Frankfurt, Nov. 14, 2012, NStZ-RR 2013, 107; see BGH Nov. 1, 1984, NJW 986–87, 1984.

<sup>61</sup> KRISTIAN KÜHL, STRAFRECHT ALLGEMEINER TEIL 134–35 (4th ed. 2002).



- required under German constitutional law where a firearm is used.<sup>62</sup>
- United Kingdom: The U.K. common law principle of self-defense is set out under *Palmer v. R.*<sup>63</sup> affirmed in *R v. McInnes.*<sup>64</sup> It is also codified in the Criminal Justice and Immigration Act of 2008.<sup>65</sup> The defense must be necessary,<sup>66</sup> and the response reasonable,<sup>67</sup> assessed based on the facts as the accused “honestly and instinctively” believed them to be at the time.<sup>68</sup> British law does not require the individual to wait to be struck first, but the threatened harm must be imminent.<sup>69</sup>

An important common point for all three countries is the imminence requirement, which is understood to be a temporally bound concept meaning “immediate.” This will be an important distinction in Part III.A, below.

Military lawyers from all three countries confirmed that domestic criminal law is the source for soldiers’ self-defense.<sup>70</sup> It is referenced as the source in some military manuals and ROE guidance.<sup>71</sup> In addition, the influence of domestic self-

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<sup>62</sup> A pocketcard guide to ROEs for German soldiers, which is classified but was summarized in a German Parliamentary inquiry, noted the “narrower standard” of the Basic Law where a firearm is used: the force “must not be disproportionate to the intended success.” DEUTSCHER BUNDESTAG, BESCHLUSSEMPFEHLUNG UND BERICHT DES VERTEIDIGUNGS-AUSSCHUSSES: DRUCKSACHEN [BT] 17/7400 (Resolution and Report of the Defense Committee) 42 (Oct. 25, 2011), <http://dip21.bundestag.de/dip21/btd/17/074/1707400.pdf> [hereinafter German Parliamentary Inquiry].

<sup>63</sup> *Palmer v. R* [1971] AC 814, 831–32 (Lord Morris) (“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but only do, what is reasonably necessary.”).

<sup>64</sup> *R v. McInnes* (1971) 55 Cr. App. R. 551.

<sup>65</sup> Criminal Justice and Immigration Act of 2008, ch. 4, § 76 (Eng.), <http://www.legislation.gov.uk/ukpga/2008/4/section/76>.

<sup>66</sup> *See R v. Hussain and Hussain* [2010] EWCA (Crim) 94.

<sup>67</sup> Criminal Justice and Immigration Act 2008, *supra* note 65, at § 76; *see R v. Oatbridge* (1992) 94 Cr. App. R. 367 (establishing that the reasonableness of the defendant’s action will be judged on a subjective test, as the defendant saw the facts at the time); *R v. Williams*, (1984) 78 Cr. App. R. 276.

<sup>68</sup> Criminal Justice and Immigration Act, *supra* note 65, at §76(7)(b); *see Palmer v R* [1971] AC 814.

<sup>69</sup> *Beckford v. The Queen* (1988) UKPC AC 130 (Lord Griffiths); *R v. Deana* (1909) 2 Cr. App. R. 75; *see also* Attorney-General’s Reference No. 2 of 1983 [1984] QB 456.

<sup>70</sup> *See, e.g.*, Interview with German military lawyer [DE14], in Berlin, Ger. (Feb. 9, 2016) (on file with author); Telephone interview with French military lawyer [FR7] (July 23, 2015) (on file with author); Interview with French military lawyers [FR2], in Paris, Fr. (June 18, 2015) (on file with author).

<sup>71</sup> *See, e.g.*, French Interarmy Directive DIA 5.2, *supra* note 18, at 14 (describing the application of French criminal code provisions to soldier’s individual self-defense, including applying the French criminal code requirements that self-defense be in response to an unjustified aggression, that the aggression be real or extremely likely, that the response is proportionate and the “only defense possible”); Platoon Commander’s Battle Course, *supra* note 27 (noting in disclosed British ROE guidance that domestic criminal law is applicable and outlining scope of self-defense). Notably there are no German military manuals or guidance that speak precisely to this point. It is not addressed in the German Soldatengesetz (laws applicable to soldiers), for example. However, disclosed ROEs note the relevance of German criminal and constitutional law and

defense provisions was evident in interviews with military and in training guidance. For example, a French interarmy manual emphasized the domestic criminal law consequences that would follow failure to respect the extremely limited basis for use of force as follows: “The act of aggression or threat of aggression must be real or very probable, and not imaginary. Good faith has nothing to do with it. If the conditions are not met, the defensive action becomes an ‘aggression,’ considered a penal infraction.”<sup>72</sup> Nearly all German soldiers interviewed referred to the concepts of *Notwehr* and *Nothilfe* in explaining self-defense. British troops interviewed frequently echoed key legal terms of art from British common law in describing their right of self-defense, for example, stating that their training emphasized that if they “honestly believed” they faced an “imminent threat to life” they could act in self-defense.<sup>73</sup> Finally the limited amount of jurisprudence available confirms that domestic self-defense provisions are applied. For example, British judges have applied the domestic self-defense provisions and jurisprudence to cases involving soldiers’ responses in self-defense while deployed in armed conflict situations,<sup>74</sup> and French and German military lawyers said that preliminary investigations into incidents in Afghanistan involving soldiers’ self-defense claims considered the application of domestic criminal law provisions.<sup>75</sup>

#### B. Ambiguity in Standards Applicable to Soldier Self-Defense

While it was possible to ascertain the legal bases for the self-defense right in each of the four countries, doing so required substantial investigation given the slim amount of legal consideration of these issues in all four countries, and in legal literature. The scope and limitations of this right are even more difficult to discern. Each of the four countries borrows the standards governing individual or unit self-defense from a body of law designed for a different context—the United States from the *jus ad bellum* context of a state facing an attack, and the three European countries from domestic criminal law. While the author’s interviews and the limited jurisprudence available suggest that these standards might be slightly adapted when applied to the very different context of a soldier in an *in bello* armed conflict threat environment, none of the four countries makes clear how this adaptation would affect the standards.

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incorporate an inherent self-defense right with similar language and conception to German domestic law. See, e.g., German Parliamentary Inquiry, *supra* note 62, at 42.

<sup>72</sup> See French Interarmy Directive DIA-5.2, *supra* note 18, at 14 (author translation); French Interarmy Directive PIA 5.2, *supra* note 27, at 35.

<sup>73</sup> Interview with former British soldier [UK5], in Glasgow, U.K. (July 31, 2015) (on file with author).

<sup>74</sup> See, e.g., Attorney-General for Northern Ireland’s Reference (No. 1 of 1975) [1977] AC 105; see also *Bici v. Ministry of Defense* [2004] EWHC 786 (QB); *R v. Clegg*, (1995) 1 AC 482, 497 (Lord Diplock and Lord Lloyd of Berwick).

<sup>75</sup> See Interview with German military lawyer [DE14], in Berlin, Ger. (Feb. 9, 2016) (on file with author); Telephone interview with French military lawyer [FR7] (July 23, 2015) (on file with author).

The jurisprudence from the few soldier self-defense claims that have gone before courts tends to be mixed and contradictory. In *Attorney-General for Northern Ireland's Reference (No. 1 of 1975)* (1977) AC 105, considering U.K. soldiers' conduct in Northern Ireland, the House of Lords created a more deferential interpretation of domestic criminal law on self-defense when applied to soldiers on active duty in a conflict zone. Lord Diplock reasoned that it would be "misleading" to "describe the rights and duties of a soldier as being no more than those of an ordinary citizen in uniform" or even that of a regular law enforcement officer given the purpose of their deployment, and that they are armed with weapons "almost certain to cause serious injury if not death" in order to respond to risks anticipated in the course of their mission.<sup>76</sup> While this created a jurisprudential basis for a slightly looser standard for soldier self-defense, the limits of this more relaxed standard are not clear. In *Bici v. Ministry of Defense* (2004),<sup>77</sup> the Queen's Bench Division did not accept a self-defense excuse for three British soldiers who shot and killed two men in a car driving away from them while deployed on a UN peacekeeping mission in Kosovo in 1999, noting the extremely limited ROEs at the time and finding "no reasonable grounds" for the accused soldiers to believe they were at threat of being shot when they fired.<sup>78</sup>

More significantly, while the United Kingdom has the most developed jurisprudence on soldier self-defense in armed conflict, its courts have failed to resolve an inherent contradiction in how such standards could apply in armed conflict at all in light of the British doctrine known as "the Queen's Peace." Under this doctrine, a death can only constitute murder where the victim was under the "Queen's Peace" at the time.<sup>79</sup> This would make it legally impossible for any U.K. soldier engaged in an armed conflict to have committed murder because it would occur outside the Queen's Peace, and thus would make a self-defense justification moot. This question was posed in *A.G. for Northern Ireland's Reference*, but so far the House of Lords and the Supreme Court have resisted answering it.<sup>80</sup>

There is equal ambiguity in how French and German domestic law provisions might be adapted when applied to soldiers deployed in combat.

<sup>76</sup> *Attorney General for Northern Ireland's Reference (No 1 of 1975)* (1977) AC 105. See also *R v. Clegg* (1995) 1 AC 482, 497 (Lord Lloyd of Berwick) (arguing that there is not the same "scope for graduated force" for U.K. soldiers in Northern Ireland given that "[t]he only choice lay between firing a high-velocity rifle which, if aimed accurately, was almost certain to kill or injure, and doing nothing at all.").

<sup>77</sup> *Bici v. Ministry of Defense* [2004], EWHC 786, ILDC 100.

<sup>78</sup> *Id.* at ¶ 24. Based on the evidence, the judge found "no reasonable grounds" for the accused soldiers to believe they were at threat of being shot at the time they fired, and that self-defense had been necessary. *Id.* at ¶ 47. The judges relied on domestic self-defense law but noted that the rules of engagement at the time were extremely limited, permitting only a minimum level of self-defense where there is "no other way to prevent" an act endangering life. *Id.* at ¶ 6.

<sup>79</sup> See Peter Rowe, *Murder and the Law of War*, 42 N. Ir. Legal Q. 216, 217 (1991).

<sup>80</sup> See generally Michael Hirst, *Murder Under the Queen's Peace*, 7 CRIM. L. REV. 541 (2008); Peter Rowe, *The Criminal Liability of a British Soldier Merely for Participating in the Iraq War 2003: A Response to Chilcot Evidence*, 10 CRIM. L. REV. 752 (2010).

Military lawyers from France and Germany said that when applying their domestic criminal law provisions to soldiers deployed in armed conflict, prosecutors or judges may take into account the armed conflict context and the particular threat dynamics in the area of operations in question.<sup>81</sup> However, there is almost no public jurisprudence to enable an assessment of what such an accommodation might look like. With only one exception, investigations into incidents involving French or German soldiers' self-defense claims in Afghanistan have been dismissed at the preliminary inquiry stage and so the legal considerations or standards applied are not available publicly. In the one German case that went to trial, the lower courts dismissed the charges based on a law of war analysis because that issue was dispositive of whether the compensation claim against the German government could be admitted.<sup>82</sup> Because the court did not reach the commander's unit self-defense claim, it offers no guidance on how German domestic criminal law standards on self-defense might be interpreted in an armed conflict context. In addition, the fact that these questions were not even tangentially addressed introduces uncertainty as to whether future cases would follow suit, raising further questions about which standards—domestic criminal law or laws of war—would be applied to German soldiers who used lethal force in self-defense in an armed conflict.

With regard to the U.S. standards, given the differing contexts, one would expect some accommodation to be made in applying the self-defense standards designed for the *jus ad bellum* situation of an attack on a state to soldiers engaged in conflict. A threat to an individual soldier, while serious, is of a different order of gravity than that of an existential threat to a state, and a personal attack has different ramifications for overall use of force norms in the international system than a state's resort to aggression. In addition, while an attack on a state is presumed to be the exception, a soldier in conflict might regularly anticipate an attack while engaged in armed conflict. One of the few scholars to address the issue of soldier self-defense, Charles Trumbull, offers another challenge to applying sovereign self-defense standards to soldier self-defense based on prevailing international law jurisprudence.<sup>83</sup> Trumbull points out that the *Nicaragua* decision has been criticized for setting a high bar for what constitutes

<sup>81</sup> See, e.g., Interview with DE14; Interview with FR7; Interview with FR2.

<sup>82</sup> VG Köln, Feb. 9, 2012, 26 K 5534/10. For a discussion of how the law of war analysis was material to the standing issues upon which the case was dismissed see Elisabeth V. Henn, *Individual compensation reloaded: German governmental liability for unlawful acts in bello*, VÖLKERRECHTSBLOG (Apr. 30, 2015). The lower court decision was affirmed by Germany's highest court, the Bundesgericht, but it also went one step further and determined that the provision allowing damages for violation of official duty does not apply to foreign deployments by the Ministry of Defense. BGH, Urteil vom 6. Oktober 2016, III ZR 140/15 - OLG Köln, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2016-10&Seite=7&nr=76401&pos=220&anz=26>. *Damages Claim for Air Attack in Kunduz*, BGH (Oct. 6, 2016), <http://www.bundesgerichtshof.de/SharedDocs/Termine/DE/Termine/IIIZR140.html>; Alexander Haneke, *Kampfeinsatz ohne Haftung*, FRANKFURTER ALLGEMEINE ZEITUNG 4 (Oct. 6, 2016).

<sup>83</sup> Trumbull, *supra* note 42, at 140–45. See also *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27).

an armed attack and that if this standard were applied to soldier self-defense, it would seem to exclude many incidents in which soldiers need to defend themselves.<sup>84</sup>

In light of these differing contexts and potential challenges, different understandings of imminence, proportionality, or necessity might be more appropriate where a soldier's self-defense is concerned. However, the U.S. position offers no guidance on how to resolve such issues. U.S. military guidance and military lawyers, when interviewed for this Article, are clear that individual and unit self-defense are guided by the *Caroline* standard and other *jus ad bellum* principles.<sup>85</sup>

Mixed results in the jurisprudence addressing U.S. soldiers' self-defense claims also create ambiguity as to which standards apply. As noted earlier, the United States has a bifurcated approach, applying the *jus ad bellum*-derivative ROEs on self-defense in armed conflict situations, and the Uniform Code of Military Justice (UCMJ) domestic provisions to soldiers deployed overseas in peacetime situations. This division of labor is standard practice for U.S. soldiers, reinforced in thousands of preliminary investigations of U.S. soldiers' conduct in Afghanistan and other armed conflict situations, and in military justice trials related to self-defense claims. However, the two cases that have gone to trial that test this division of labor are somewhat contradictory. The judge in *United States v. Behenna*<sup>86</sup> seemed to endorse the bifurcated approach, while in *United States v. Holmes*<sup>87</sup> the court applied the domestic UCMJ provisions without considering the ROE standards, despite the fact that the incident took place in an armed conflict.<sup>88</sup> Meanwhile, the one case that would have squarely adjudicated the standards for unit self-defense, the so-called *Haditha* case, was resolved through a plea bargain and never went to trial, leaving open the question of how these standards might apply in unit self-defense.<sup>89</sup> As a result, although the U.S. in

<sup>84</sup> Trumbull, *supra* note 42, at 142–45.

<sup>85</sup> Interview with two senior U.S. military lawyers and one senior U.S. commander [US11] in Washington, D.C. (Apr. 12, 2012) (on file with author). *See also supra* note 48.

<sup>86</sup> *United States v. Behenna*, 71 M.J. 228 (2012).

<sup>87</sup> *United States v. Holmes*, 2010 CCA LEXIS 497 (2010).

<sup>88</sup> Although the defendant killed a detainee during a period of armed conflict, in *United States v. Behenna* the judge confined his analysis to the UCMJ rules of courts martial, finding that at the moment the incident took place, the “Appellant was not in an active battlefield situation . . . Mansur was not then actively engaged in hostile action against the United States or its allies, and . . . there were no other military exigencies in play.” *Behenna*, 71 M.J. at 18–19. The judge’s dictum implies that had this been an active battlefield situation, with signs of a hostile act or intent on the part of the individual who was killed, the criminal law concepts under the UCMJ would not have been controlling. *Behenna*, 71 M.J. at 19–20.

<sup>89</sup> On November 19, 2005, an IED explosion against a unit on patrol killed one Marine and seriously wounded two others in Haditha, Iraq. In response, other members of the unit ordered five men out of a nearby car and killed them, and then stormed two nearby houses, killing a further nineteen presumed civilians. They claimed unit self-defense. Eight Marines were initially charged but six had their cases dropped, one was acquitted, and one (Staff Sgt. Frank Wuterlich) pled guilty, and so the case never went to trial. *See Tony Perry, Marine gets no jail time in killing of 24*

many ways has the greatest guidance on this issue, as with the other three countries, substantial ambiguity remains over how exactly the standards will be applied to soldiers relying on self-defense in different armed conflict situations.

### C. *Self-Defense as Distinct and Independent of IHL*

There has been no significant discussion about the relationship between IHL and self-defense in legal literature and discussions. However, regardless of whether self-defense is legally justified under criminal law or under a sovereign self-defense theory, its exercise by soldiers is not contingent on an armed conflict nexus, and actions under self-defense do not require authority under IHL. This suggests some level of recognition of self-defense as an independent basis for using force, separate from IHL.

This is clearest in the U.S. legal guidance and doctrine. U.S. guidance provides that self-defense is inherent and is always available to its troops, in both peacetime and wartime.<sup>90</sup> U.S. guidance further tends to reinforce self-defense as a separate framework from that applicable to offensive force. For example, a guide to how soldiers should think about use of force by the U.S. Center for Army Lessons Learned (CALL) sets up this dichotomy with the following guidance: “First of all, is the engagement an offensive engagement or is it based on self-defense?”<sup>91</sup>

The United States is one of the few countries to have provided any explicit guidance on the relationship between hostile act or hostile intent (self-defense justifications in the U.S. understanding), and direct participation of hostilities under IHL. The U.S. Law of War Manual notes that “[i]n some cases, hostile acts or demonstrated hostile intent may also constitute taking a direct part in hostilities (DPH),” but that they need not be.<sup>92</sup> In some cases, the hostile intent designation may be narrower than DPH, while in other cases it may be broader.<sup>93</sup> The implication is that U.S. forces are authorized to use force in self-defense in response to hostile acts or hostile intent regardless of whether the uses of force in question are also authorized under IHL. Under this U.S. view, the source of the self-defense right is independent of, but can sometimes overlap with, DPH situations in IHL.

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*Iraqi civilians*, L.A. TIMES (Jan. 25, 2012), <http://articles.latimes.com/2012/jan/25/local/la-me-haditha-20120125>.

<sup>90</sup> The U.S. Operational Law Handbook notes that nothing can contravene an individual right to self-defense except for a commander’s tactical decision in the name of unit self-defense. *See, e.g., Lee, Operational Law Handbook 2015, supra* note 18, at 83.

<sup>91</sup> CTR. FOR ARMY LESSONS LEARNED, AFGHANISTAN CIVILIAN CASUALTY PREVENTION HANDBOOK 6 (2012), <https://info.publicintelligence.net/CALL-AfghanCIVCAS.pdf> [hereinafter CALL, CIVILIAN CASUALTY HANDBOOK]

<sup>92</sup> OFFICE OF THE GEN. COUNSEL, DEP’T OF DEFENSE, LAW OF WAR MANUAL ¶ 5.9.3.3, 229 (2016), <https://assets.documentcloud.org/documents/2997317/DoD-Law-of-War-Manual-June-2015-Updated-May-2016.pdf>.

<sup>93</sup> *Id.*

There is overall very little mention of the relationship with IHL in British, French, or German manuals or guidance on self-defense. However, the root of European soldiers' self-defense rights is the extraterritorial application of domestic law.<sup>94</sup> Self-defense is the right of citizens in both peacetime and wartime and is not contingent on an armed conflict determination. The fact that self-defense is considered to be available even when a country has made clear that it is not engaged in an armed conflict lends support to the principle that self-defense is treated as an alternate basis for the use of force, and is not contingent on IHL. For example, Germany did not consider itself engaged in an armed conflict in Afghanistan until mid-2009, and did not publicly announce this status until early 2010.<sup>95</sup> Because it did not consider its forces engaged in an armed conflict, German caveats up until this point made clear that its soldiers could not engage in any offensive force but could still use force in self-defense.<sup>96</sup> In essence, German soldiers' ability to use force on a self-defense basis was considered to be independent of whether an armed conflict existed or force under IHL was authorized.

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<sup>94</sup> The San Remo Handbook, a standard reference material summarizing rules regarding self-defense, offers additional support for this view, as it notably does not limit self-defense to armed conflict situations: "Self-defense is available in all situations, including armed conflict." COLE ET AL., *SAN REMO HANDBOOK ON RULES OF ENGAGEMENT*, *supra* note 40, at 3. It further notes that the scope of self-defense (presumably also including its applicability outside of zones where IHL applies) is contingent on national laws. *Id.*

<sup>95</sup> See Rob Turner, *German foreign minister calls Afghanistan 'armed conflict,'* DEUTSCHEWELLE (Feb. 10, 2010), <http://www.dw.com/en/german-foreign-minister-calls-afghanistan-armed-conflict/a-5234588>. By contrast, in an interview in May 2009, just before the German position changed, German Defense Minister, Franz Josef Jung, denied that Germany was engaged in a war in Afghanistan, but described it as a "*Stabilisierungseinsatz*," or Stabilization mission. Such public positioning was similar to all other public descriptions of Germany's position at the time. *In Afghanistan ist kein Krieg*, FRANKFURTER RUNDSCHAU (May 12, 2009), <http://www.fr.de/politik/spezials/einsatz-in-afghanistan/interview-mit-franz-josef-jung-in-afghanistan-ist-kein-krieg-a-1103617>.

<sup>96</sup> Official papers establishing Germany's caveats (sometimes referred to as "clarifying points") to the NATO mission in Afghanistan were classified at the time and have never been declassified and publicly released. A 2009 study comparing national caveats and restrictions in Afghanistan by NATO headquarters found that Germany's "special comments" (in effect acting as caveats or restrictions) had restricted it from using force absent an "imminent" threat," effectively limiting its forces only to self-defense. The study noted that the rules had recently changed, in April 2009 and were disclosed and put into effect in July 2009. See David P. Auerswald & Stephen M. Saideman, *NATO at War: Understanding the Challenges of Caveats in Afghanistan*, Presentation at the Annual Meeting of the American Political Science Association in Toronto, Can. (Sept. 2–5, 2009), at 23–24, 26, <http://shape.nato.int/resources/1/documents/nato%20at%20war.pdf>. See also Interview with German military officer [DE4], in Berlin, Ger. (July 6, 2015) (on file with author) (stating that prior to mid-2009, soldiers retained the ability to respond in self-defense, but could not use the hostile intent or hostile act ROEs that were provided in NATO common ROEs, and that this was the critical operational change in use of force in the 2009 rule change).

#### D. Legal Basis for Hostile Act and Hostile Intent

There is a split over the legal basis for actions justified under “hostile act” or “hostile intent,” which derives from a stark transatlantic difference over whether these terms are part of, or one step beyond, the concept of self-defense. As is clear from the definition of self-defense in the U.S. SROE, “hostile act” and “hostile intent” are part of the definition of self-defense in the U.S. view.<sup>97</sup> They are the terms of art describing behaviors that trigger the self-defense right, which, as noted, is an inherent right and is always available.

However, for the other three countries in this study, as for most NATO countries,<sup>98</sup> uses of force in response to hostile intent are considered to be one step beyond self-defense, toward offensive force.<sup>99</sup> As one German military lawyer explained, reflecting the comments of other British, French, and German military personnel interviewed:

Hostile intent is the basis for offensive targeting. It is not a self-defense posture. The view that hostile intent is a posture of self-defense is a very U.S.-based framework. This is a major difference between European [countries] and the United States. Self-defense is much narrower in European discourse. It is *only* in response to an imminent threat or direct act.<sup>100</sup>

The reason for this transatlantic distinction flows from the different views regarding the legal basis for self-defense. For countries whose self-defense is grounded in domestic law (most European countries), actions constituting hostile act and hostile intent tend to exceed that self-defense authority, either because they lack imminence or are indirect threats. For example, planting an IED or a mine would commonly be interpreted as a hostile act, and a threat, but often not an imminent one at the time troops came upon it (unless there was evidence that the mine or IED were timed to go off immediately). Because the threat would not be imminent, French, German, or British troops could not justify using lethal force against that threat under their domestic self-defense provisions.

The ambiguity of the threat, or about where it originates, may also be a limitation. As pointed out in an article by French military lawyer Gilles Castel, France’s self-defense law requires that the defending individual be able to positively identify and see the attacker clearly, and the defending individual must

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<sup>97</sup> See *supra* note 44 and accompanying text.

<sup>98</sup> Interviews suggest that finding soldiers’ right to self-defense in domestic law, and the view that hostile act and intent are not part of self-defense, is the position taken by most European NATO countries, although it must be emphasized that most countries have not taken a definitive, public position on this issue.

<sup>99</sup> See Hosang, *Personal Self-Defence*, *supra* note 3, at 440 ¶ 23.13.3; Hosang, *Force Protection*, *supra* note 41, at 425 ¶ 22.11(2).

<sup>100</sup> Interview with German military lawyer [DE2], in Berlin, Ger. (Feb. 13, 2015) (on file with author).



be directly threatened.<sup>101</sup> As a result, he notes, in a scenario in which someone from a crowd fired on French soldiers, but they could not identify which person in the crowd was responsible, they would not be permitted to use force in self-defense.<sup>102</sup> A common scenario in Afghanistan was for Taliban fighters to fire a shot at ISAF soldiers, but then drop or dispose of the weapon before the ISAF soldiers could see who fired the shot. In this scenario, many European soldiers found themselves unable to fire back on the Taliban fighter who had fired on them in self-defense, because doing so would have violated domestic restrictions related to not firing on an unarmed individual or concurrently with the attack.<sup>103</sup> As a result of these legal distinctions, even though hostile act and hostile intent can still have a somewhat defensive association in the way they are thought about and used in practice, because they exceed the limits of domestic self-defense provisions, for the European countries, they are only justifiable as a form of offensive action, legally premised on an authorization to use force under IHL.

Hosang notes that the common NATO ROEs on hostile act and hostile intent were created in large part to equalize differences in use of force positions between countries like the United States and the other three countries in this study.<sup>104</sup> They were created to provide countries like Germany, the United Kingdom, and France that consider hostile act and intent to be beyond their self-defense with an ROE basis for exercising such uses of force.<sup>105</sup> However, uses of force justified on an ROE, rather than on a self-defense basis, are not exactly the same. Hosang notes that for those NATO countries that view “the concepts of hostile act and hostile intent as referring to different situations than those triggering the right of self-defense,” exercising this force is not based on inherent or nationally authorized rights and so depends on ROE authorization.<sup>106</sup> In addition, within an armed conflict, the authority to use force in any but defensive means is clearly governed by IHL. In sum, to rely on these ROEs, a German, French, or British soldier would have to (a) be in an armed conflict situation (wherein IHL applies); and (b) have those ROEs authorized.

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<sup>101</sup> Gilles Castel, *Self-Defense: A French Perspective*, 36 NATO LEGAL GAZETTE 41, 42 (Nov. 2015); see also Interview with [FR7]; Interview with [FR2] (on file with author).

<sup>102</sup> *Id.* at 42.

<sup>103</sup> For a larger discussion of the different self-defense or hostile intent-based responses to this threat pattern in Afghanistan, see Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Chapter III, “Emerging State Practice: United States, France, Germany, United Kingdom.” One German commander provided a related example: “One time we had a situation where we were attacked and a few minutes later, we saw a man running away across the field away from us. We were ninety percent sure it was the same guy but not completely sure so we couldn’t fire.” Interview with German commander [DE7], in Leipzig, Ger. (July 27, 2015) (on file with author).

<sup>104</sup> See Hosang, *Force Protection*, *supra* note 41, at 426 ¶ 22.11 (2)(3).

<sup>105</sup> *Id.*

<sup>106</sup> Hosang, *Force Protection*, *supra* note 41, at 426 ¶ 22.11 (2)(3). See also Hosang, *Personal Self-Defence*, *supra* note 3, at 439 ¶ 23.12(3) (noting for countries that do consider it to be an inherent, then specific authorization may be considered a “parallel, but preferred” authorization to the inherent right). An example of these different types of authorization specific to hostile act or intent ROEs in Afghanistan is found in Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Chapter III.D.1, “Policy and Tactical Restrictions on U.K. Forces.”

These conditions mean that an authorization to use force on an ROE basis is implicitly more restricted than that based on an inherent right like self-defense. This legal distinction has had real-world consequences, with soldiers' ability to defend themselves against non-immediate or ambiguous threats much less available for soldiers whose ability to use force on a hostile intent theory depends on these additional offensive force authorizations.<sup>107</sup> This will be expanded upon in greater detail in the discussion of practice in Part III.C below.

### III. Transatlantic Legal Differences and Expansive versus Narrow Self-Defense Interpretations

The accompanying empirical study to this Article interviewed military commanders, lawyers, and soldiers from the United States, the United Kingdom, France, and Germany to ask them about how self-defense, hostile act, and hostile intent concepts were applied in Afghanistan, including what guidance or training was provided, what difficult issues or gray areas arose in practice, and how their doctrine would have responded to several classic scenarios or examples of self-defense or hostile intent situations. Military lessons learned studies and documentation of incidents involving self-defense or hostile intent justifications were also analyzed. The empirical study found a much broader and more flexible conception of self-defense among U.S. soldiers than among their European counterparts.<sup>108</sup> Both U.S. and European soldiers, and those who observed the conduct of both (journalists, IHL investigators, UN observers, civilian representatives of member States) said that U.S. forces applied a more expansive interpretation of self-defense, more loosely interpreting the immediacy of the threat and how much force they could respond with.<sup>109</sup>

In interviews, military lawyers and soldiers from all four case study countries were asked to respond to a series of scenarios that tested how each country's doctrine interpreted the scope of self-defense or hostile intent. A basic litmus question was whether soldiers had to wait to be fired upon to fire in self-defense. Some of the more advanced scenarios tested how imminent or immediate the threat must be, and to what extent ambiguous, or potentially dual-use behaviors, might be fired upon based only or primarily on a personal threat analysis.<sup>110</sup> For example, one of the scenarios tested whether troops could fire on someone digging in the ground where it was believed to be an IED threat. Another asked if someone possessing—but not appearing to aim or use—a Rocket-Propelled Grenade (RPG), a mortar, or other heavy weaponry could be fired upon as a clear, but not immediate threat. Another asked about some of the so-called “dicking” scenarios discussed earlier—would it be permissible to fire on

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<sup>107</sup> Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Chapter III.C, “Germany”; Part III.D, “United Kingdom”; Part IV, “Analysis and Conclusions.”

<sup>108</sup> Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15 at Part III.A.1, “Broader U.S. Application of Self-Defense and Hostile Intent.”

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at Part III, “Emerging State Practice: United States, France, Germany, United Kingdom.”

someone who is watching a convoy of troops pass from a high vantage point, appearing to pass on information to facilitate an ongoing attack, or possibly watching to remotely detonate an IED or other threat?

In responding to these scenarios, troops often added additional information or fact patterns that would change their response.<sup>111</sup> For example, with the scenario on whether troops could fire on someone carrying a RPG or other significant weaponry, a follow-up contextual factor that would affect their response might be where the individual was—was the individual in an area where he or she might plausibly be an out-of-uniform Afghan police officer, or other associated force? Or was he or she carrying such weapons at a known weapons transit point for the Taliban? To offer another example, in the scenario of someone digging in the ground, troops might base their answer of whether they could respond in self-defense on whether the individual's behavior was consistent with other civilian patterns. For example, might there be other plausible reasons for digging in that area or at that time of day or was this a clear IED threat location with little other potential rationale?

European soldiers generally said they could not respond in self-defense to any of the scenarios that presented a less-than-immediate threat—for example, possessing a mortar or RPG (but not immediately presenting a threat with it), appearing to dig for an IED, or surveying troops to pass on information that might facilitate an attack.<sup>112</sup> By contrast, in most of these scenarios, U.S. soldiers could use lethal force in self-defense provided the threat was clear enough to substantiate an imminent threat under U.S. doctrine.<sup>113</sup> The fact that the threat might not materialize immediately, or possibly even for days, was less important than the nature and clarity of the threat.<sup>114</sup>

Where soldiers said their doctrine would not permit them to respond to the given scenario under their self-defense framework—typically because the threat was not imminent or direct enough—a follow-up question was whether they could respond to the same scenario under the hostile act or intent ROEs (presuming these ROEs were authorized). More European soldiers and lawyers said they could use lethal force in more of the scenarios if hostile act or intent ROEs were authorized. In effect, having hostile act and intent ROEs available brought European responses closer in line overall with those of U.S. forces, but not perfectly. Even under a hostile act and hostile intent ROE paradigm, European use of force was still overall more restrained in using lethal force in response to non-

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<sup>111</sup> *Id.*

<sup>112</sup> Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Chapter III.B, “France”; III.C, “Germany”; III.D, “United Kingdom”; Part IV, “Analysis and Conclusions.”

<sup>113</sup> Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Chapter III.A, “United States.”

<sup>114</sup> Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Chapter III.A.1, “Broader U.S. Application of Self-Defense and Hostile Intent.”

imminent, or more ambiguous threats than U.S. forces.<sup>115</sup> In addition, there was variation among British, French, and German troops' responses, which tended to stem from both differences in their domestic law doctrines and tactical or policy restrictions in place at the time when these forces served.<sup>116</sup>

This section discusses some of these key differences, and explores the underlying reasons for these differences. Specifically, the following propositions will be examined:

- A. The U.S. doctrine of self-defense applies to a broader range of scenarios than European interpretations of self-defense because of differing interpretations of the concept of imminence.
- B. U.S. soldiers may also be able to rely on self-defense in a wider range of scenarios than European soldiers because of differing interpretations of the concept of necessity, although the evidence of a strong doctrinal difference is less clear and the impact less significant than with regard to imminence.
- C. U.S. soldiers could use force more expansively in response to different threats because of the incorporation of hostile act and intent within the U.S. self-defense definition.

#### A. *Imminence as Immediate, or Not*

The primary reason that U.S. forces are able to apply the self-defense paradigm—and the hostile act and hostile intent concepts, which for the U.S. are implicit in self-defense—to a broader range of scenarios than their European counterparts is due to a broader U.S. interpretation of the concept of imminence as it relates to individual self-defense.

Under the French, British, and German paradigm for individual self-defense, imminence is required,<sup>117</sup> and imminence is interpreted as immediate. For example, a French Ministry of Defense (MoD) guidance document clarifies the imminence criteria by noting that the exercise of self-defense must be “concurrent” with the act of aggression, noting that there must be a “commencement of the execution of the act of aggression (for example: threatening with a firearm, position of an individual suggesting imminent opening of fire).”<sup>118</sup> British domestic criminal law interpretations of self-defense permit some degree of preemptive force, but both the case law<sup>119</sup> and interviews with

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<sup>115</sup> Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Chapter IV, “Analysis and Conclusions.”

<sup>116</sup> Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Chapter III.C, “Germany”; Part III.D, “United Kingdom.”

<sup>117</sup> See *supra* notes 55, 59, 69, and accompanying text.

<sup>118</sup> French Interarmy Directive DIA-5.2, *supra* note 18, at 14; French Interarmy Directive PIA-5.2, *supra* note 27, at 35.

<sup>119</sup> In the bedrock case establishing the right to self-defense, *Palmer v. R* [1971], Lord Morris established the immediacy or imminence of the threat as one of the key criteria justifying self-

British forces engaged in training suggest the degree of preemption is extremely narrow, akin to the examples provided in the French MoD guidance document on seeing a firearm being raised or used to threaten, if not actually fired.<sup>120</sup> German domestic legal rules are clear that imminence has a temporal restriction (foreclosing preemptive attacks)<sup>121</sup> and in the context of self-defense requires that the act be taking place in that very moment or be ongoing.<sup>122</sup>

By contrast, the U.S. Standing Rules of Engagement make clear that under the U.S. interpretation of self-defense “[i]mminent does not necessarily mean immediate or instantaneous.”<sup>123</sup> Asked to describe imminence in unit or individual self-defense in practice, one senior U.S. military lawyer defined it as when there is no other time or opportunity to repel the attack, noting that this could vary greatly depending on the nature of the threat.<sup>124</sup> For example, in the situation of someone putting an IED in the ground, if there is no other way to prevent the IED from causing harm, then it could be considered imminent even if there is no immediate risk of it being detonated. The outer bounds of this extended concept of imminence are vague, but not unlimited.<sup>125</sup> One U.S. lawyer

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defense: “If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have [to] avert the danger by some instant reaction.” *Palmer v. R* [1971] AC 814, 832. However, this imminence requirement does not mean that the individual has to wait to be “struck first” to exercise self-defense. *See R v. Deana* 2 Cr App R 75 (finding that an individual need not wait to be “struck first” to exercise self-defense); *see also Beckford v. The Queen* [1988] AC 130 (Privy Council) (Lord Griffiths) (“A man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike.”). In *Attorney-General’s Reference No. 2 of 1983* [1984] QB 456, the Appeals Court further clarified that the defendant may take preparations for an anticipated attack, but that the threatened harm must be imminent when the self-defense response takes place for it to be justified.

<sup>120</sup> A British soldier who had been involved in training vignettes for the British military offered a similar explanation for when a situation might become imminent and justify firing in self-defense: “The moment guy points the rifle in your direction, you can engage. But if it’s pointed at his feet, [you can’t]. It can be as small a change as a few degrees of radius.” Interview with former British military soldier [UK4], in Glasgow, U.K. (July 31, 2015) (on file with author).

<sup>121</sup> *Münchener Kommentar zum Strafgesetzbuch*, § 32 (Professor Dr. Bernd von Heintschel-Heinegg, 3d ed. 2017) (noting that § 32 does not apply to preventive or preemptive self-defense, which is a specific form of *Notstand* as referred to in § 34). As an illustration of the imminence requirement, past jurisprudence has affirmed that an attack is not only imminent if you draw a weapon, but also if you reach for the pocket where the weapon is located. BGH 7.11.1972 – 1 StR 489/72, NJW 1973, 255; *zust. HK-GS/Duttge Rn. 13*; *compare with* BGH 12.3.1997 – 3 StR 627/96, NStZ 1997, 402; BGH 9.5.2001 – 3 StR 542/00, NStZ 2001, 530.

<sup>122</sup> *Münchener Kommentar zum Strafgesetzbuch* § 32 Rn. 104. *See also* *Münchener Kommentar zum Strafgesetzbuch* § 32 Rn. 105 (noting that compared to the threat described in §34 StGB (Notstand) the timeframe for an imminent attack that would justify a self-defense response under § 32 is very narrow). For the attack to be imminent, preparations must have already been underway for the attack. *See* *Münchener Kommentar zum Strafgesetzbuch* § 32 Rn. 108.

<sup>123</sup> U.S. SROE, *supra* note 28, at A-3 ¶3(g).

<sup>124</sup> Interview with senior U.S. military lawyer [US11], Washington, D.C. (Apr. 13, 2012) (on file with author).

<sup>125</sup> *See also* Marc Garlasco, HUMAN RIGHTS WATCH, *Troops in Contact: Airstrikes and Civilian Deaths in Afghanistan* 32 (Sept. 8, 2008) (“One difference is the U.S. says imminent does not have to mean instantaneous. U.S. troops have a different standard [than NATO].”).

noted that the definition could “seem to go to infinity” on its surface, but ultimately the limitation should be whether there is a clear threat, with the trigger point for lethal force hinging on what is necessary to diffuse the situation and when those actions must be taken.<sup>126</sup>

The elongated U.S. understanding of imminence stems from its position on the origin of individual or unit self-defense. Since U.S. forces’ individual self-defense flows from sovereign self-defense, the United States incorporates its understanding of *jus ad bellum* self-defense into its conception of *in bello* individual or unit self-defense.<sup>127</sup> The U.S. interpretation of imminence under sovereign self-defense is broader than other countries’ interpretations—permitting attacks that are tangible and serious, but not necessarily immediate.<sup>128</sup> This creates a very flexible and temporally extended standard for imminence, which is then imported into the unit and individual self-defense standards.<sup>129</sup> This standard is not only temporally broader than the European countries’ criminal law definitions of imminence, but is also more temporally extended than European

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<sup>126</sup> Telephone interview with former U.S. military lawyer [US2] (Apr. 2, 2012) (on file with author).

<sup>127</sup> See U.S. SROE, *supra* note 28, at A-3 – A-3 ¶¶3-4 (listing four types of self-defense as unit, individual, national, or collective self-defense, providing the same sourcing for all three, and suggesting the requirements of de-escalation, necessity, and proportionality for all three). Hosang, who argues that sovereign self-defense is the strongest origin theory, also states that unit self-defense is bound by the *Caroline* criteria: “[T]he use of force must be immediate and unequivocally necessary; there must be no feasible alternatives . . . and the force must be proportional to the level of the attack.” Hosang, *Force Protection*, *supra* note 41, at 422 § 22.08. This suggests that countries that follow the sovereign self-defense theory of origin would also apply these *jus ad bellum* criteria to the subsidiary individual and unit self-defense.

<sup>128</sup> While most countries interpret imminence *jus ad bellum* as permitting some degree of preemptive or anticipatory attacks, the United States has among the most expansive interpretations, permitting attacks against threats that are not immediately or instantaneously coming. John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Harvard Law School Program on Law and Security: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), <https://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (stating the current position on self-defense, that the U.S. takes a more “flexible understanding of ‘imminence’” vis-à-vis non-state actors); OFFICE OF GEN. COUNSEL, *Law of War Manual*, *supra* note 29, at 47 n. 229 and accompanying text. For a discussion of differing positions on preemptive or preventive force and the degree to which anticipatory attacks are permitted, see, e.g., Ashley S. Deeks, *Taming the Doctrine of Preemption*, in *THE OXFORD HANDBOOK ON THE USE OF FORCE* 661 (Marc Weller ed., 2014); MARY ELLEN O’CONNELL, AM. SOCIETY OF INT’L LAW TASK FORCE, *THE MYTH OF PRE-EMPTIVE SELF-DEFENCE* 8 (2002) (“[B]ased on the practice of states . . . as well as simple logic, international lawyers generally agree that a state need not wait to suffer the actual blow before defending itself, so long as it is certain the blow is coming.”); Terry D. Gill, *Legal Basis of the Right of Self-Defence* at 193–94 in *THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS* (Terry D. Gill & Dieter Fleck eds., 10th ed. 2010).

<sup>129</sup> U.S. military lawyer Maj. Eric Montalvo argues that the U.S. embrace of preemptive or preventive attacks following September 11, 2001, directly led to the current SROE language that imminent does not equal immediate. Maj. Eric D. Montalvo, *When Did Imminent Stop Meaning Immediate? Jus in Bello Hostile Intent, Imminence, and Self-Defense in Counterinsurgency*, *THE ARMY LAWYER* (Aug. 2013) [hereinafter Montalvo]. See also Major John J. Merriam, *Natural Law and Self-Defense*, 206 MIL. L. REV. 43, 80 (2010).

soldiers' individual self-defense would be if these countries also relied on a sovereign self-defense theory of origin (given that their standards for imminence *jus ad bellum* are narrower than those of the United States).<sup>130</sup>

Lawyers, commanders, and observers from all countries emphasized that this different understanding of imminence generated the greatest practical differences in how and when U.S. troops use force. For example, a French military lawyer emphasized this in an interview for this Article, noting, “the major difference between France and the United States is manifested in the time element . . . for the French it must be immediate . . . there is no extended self-defense under French doctrine.”<sup>131</sup> A senior German lawyer offered similarly: “Our notion of self-defense is narrower than the U.S. one because we require imminence. The trigger point for self-defense is when the attack becomes imminent. When I have to act in order to avert damage. Americans would fire earlier in the scenario.”<sup>132</sup> A civilian protection officer in Afghanistan with experience dealing with force protection issues among all NATO troops said the United States' view of imminence is distinct from that of most of its European allies. Comparing the United States and the United Kingdom's interpretations, he said that for U.K. troops, “imminent means immediate. They're at risk and they can then engage” compared to the United States where a determination of self-defense means that “at some point in time, those individuals may be a threat to us, so we can preemptively strike them.”<sup>133</sup>

The more expansive temporal definition of imminence under the U.S. self-defense theory allows U.S. soldiers to apply the self-defense right more flexibly, in response to a much wider range of non-immediate threat situations than would be permitted for most European NATO soldiers. In interviews for this Article, French, German, and British soldiers said they could not use force under a self-defense paradigm in scenarios where the threat presented was not immediate—for example, a man presumed to be planting an IED, or passing on information to facilitate an attack. European soldiers could respond to some (but not all) of these

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<sup>130</sup> While the other three countries in this study support some degree of anticipatory use of force as part of sovereign self-defense, they (along with most of the United States' other European allies) have generally rejected this expansive interpretation of preemption. *See, e.g.*, Christine Gray, INTERNATIONAL LAW AND USE OF FORCE 160–65, 208–17 (2d ed. 2008); Gary L. Guertner, *European Views of Preemption in US National Security Strategy*, PARAMETERS (Summer 2007), <http://www.comw.org/qdr/fulltext/07guertner.pdf> (describing dissenting European views to the post-September 11 U.S. positions on preemptive self-defense). *But see, e.g.*, Daniel Bethlehem, *Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. OF INT'L L. (2012) (proposing a slight relaxation of imminence, with a significant factor being whether it is the last available opportunity to address the threat).

<sup>131</sup> Interview with FR2 (on file with author).

<sup>132</sup> Interview with DE4 (on file with author).

<sup>133</sup> Telephone interview with UN Staff [OT10] (Feb. 17, 2012) (on file with author) [hereinafter Interview with OT10].

non-immediate scenarios where hostile act and intent were authorized, but this was not always the case, as the subsequent section will discuss.<sup>134</sup>

### B. *Necessity as Last Resort or Threat Presence*

Different thresholds for necessity may also permit U.S. soldiers to apply self-defense in a greater number of situations than European soldiers, although the empirical research suggested that this was not as big a factor as imminence.

Similar to its stance on imminence, the United States imports *jus ad bellum* standards of necessity into its unit and individual self-defense standards.<sup>135</sup> The U.S. understanding of necessity under unit or individual self-defense rejects a last resort approach and defines necessity as simply the presence of a threat, defined as the presence of a hostile act or hostile intent.<sup>136</sup> At least on a pure textual reading, the European criminal law standards would appear to provide a more limited definition of “necessity”: only as a last resort.<sup>137</sup> For example, a French Interarmy military guidance document noted that the defense must be necessary in the sense of the “only defense possible.”<sup>138</sup> There can be no alternative course of action to address the threat. German criminal law requires that the amount of force used be the least possible, and, use of a firearm should be the last resort.<sup>139</sup> These principles have been incorporated into German tactical guidance, advising troops on how they might use force in self-defense.<sup>140</sup> The *Palmer* case, which is the seminal self-defense case in the U.K., draws a tight link between the justification for self-defense and an immediate and very serious

<sup>134</sup> One German commander said that where hostile intent was authorized it had the effect of creating an extended self-defense paradigm, with a more relaxed imminence standard. He gave the example of a known IED bomb maker, and said that if it were known that he was a real threat and the only way to stop him was to kill him, then it would be permissible to target him under the hostile intent ROE, but not under self-defense. However, even this “extended self-defense” under hostile intent had temporal limits: “If it’s a situation where the individual could not threaten you in the next few hours or even days,” then German troops could not fire on it, even under a hostile intent theory. Interview with senior German commander [DE6], in Berlin, Ger. (July 21, 2015) (on file with author).

<sup>135</sup> See *supra* note 44. See also Lee, *Operational Law Handbook 2015*, *supra* note 18, at 84.

<sup>136</sup> U.S. SROE, *supra* note 28, at A-3 ¶(4)(a)(2).

<sup>137</sup> Criminal law standards for necessity often incorporate the standards required under a human rights framework, which tend to emphasize seeking alternatives first and using lethal force only as a last resort. See, e.g., United Nations Office of the High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflict*, HR/PUB/11/01 at 64–67 (2011), [http://www.ohchr.org/Documents/Publications/HR\\_in\\_armed\\_conflict.pdf](http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf); MICHAEL NEWTON & LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW 121–28, 140–47 (2014); *Las Palmeras v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 96 (Nov. 26, 2002) (supporting the principle that killing must be a last resort, even under conditions of war, under human rights principles prohibiting deprivation of the right to life).

<sup>138</sup> French Interarmy Directive DIA 5.2, *supra* note 18, at 14.

<sup>139</sup> BHG NJW 1984, 986 (standing for the principle under German law that where multiple means of defense are available, the defending individual should choose the least dangerous option). BGH NStZ 1994, 539. OLG Frankfurt NStZ-RR 2013, 107-08 (finding that use of a firearm in self-defense is limited).

<sup>140</sup> See *supra* note 62.



“necessity” to respond: “If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary.”<sup>141</sup>

Comparing the difference in these standards on a textual level is slightly tenuous given their different bases and the ambiguity surrounding how they should be applied. Comparing necessity as designed for a sovereign self-defense situation to necessity in a domestic criminal law framework is akin to comparing apples and oranges. The comparison is further strained because none of the four countries lays out clearly how these concepts should be translated in the slightly different context of individual or unit self-defense. In the author’s case studies and interviews, there was anecdotal evidence that the U.S. self-defense framework has a lower threshold for what is “necessary” in self-defense than that of their European counterparts. Many of the European soldiers interviewed said they had observed U.S. troops respond with lethal force, presumably in self-defense, in situations in which European soldiers would not have been permitted to respond because the threat did not make it necessary to do so. One French commander remembered traveling in a convoy with American troops when the convoy was fired upon. Although he said that receiving a small number of shots was a “daily occurrence” and not a great threat to them, American troops reacted as if it was a serious threat and all began firing in the direction of the shots. “They threw everything at it. It was chaos,” he said.<sup>142</sup> Whether such situations also raise proportionality issues will be revisited in Part IV.B.

There was also evidence that the European self-defense doctrine was interpreted in practice much more as a “last resort” rather than a regular threat response framework. In response to some of the self-defense scenarios, French and German soldiers frequently mentioned that they would have to seek other alternatives—trying to detain an individual, firing warning shots, or giving chase—before firing.<sup>143</sup>

Such anecdotal evidence helps illustrate how these concepts are being applied in practice, and demonstrates potential differences in the scope or use of self-defense created by the different legal bases. However, the overall ambiguity and lack of guidance on how these criminal law or sovereign self-defense standards should be translated into soldier self-defense makes it difficult to properly evaluate the necessity standard in individual or unit self-defense. An analysis of how this affects use of force would be more precise if there were greater attention to the underlying legal basis and scope of these concepts.

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<sup>141</sup> *Palmer v. The Queen* [1971] AC 814, 832. Although U.K. law emphasizes the overall reasonableness of the defense, and includes a subjective standard, the *Palmer* case makes clear that lesser degrees of peril, or threats that are not “serious and dangerous,” should not meet this threshold. *Id.*

<sup>142</sup> Interview with French commander, Paris, Fr. [FR6] (June 26, 2015) (on file with author).

<sup>143</sup> Interview with German commander, Hamburg, Ger. [DE13] (Aug. 26, 2015) (on file with author); Interview with DE4.

### C. Incorporating Hostile Act and Intent into Self-Defense

A final factor leading to a broader U.S. self-defense doctrine is the inclusion of hostile act and intent concepts into the U.S. definition of self-defense. In effect, uses of force that can be covered by the self-defense paradigm have a special legal status because they are always available and cannot be limited by other ROEs or tactical guidance, either NATO ROEs or tactical guidance, or national ROEs or guidance.<sup>144</sup> However, offensive force can be more easily constrained. As noted in Part II.D, for countries that consider hostile act and intent to be beyond self-defense, soldiers' ability to use force under the hostile act or hostile intent ROEs depends on having the requisite IHL authority (contingent on being in an armed conflict) and having authorization for those ROEs.<sup>145</sup> That ROE authority can always be constrained by other ROEs, tactical rules, or other policies.

As a result, where national interpretations of self-defense do not permit hostile act and hostile intent to be included in this self-defense paradigm, soldiers' ability to respond to situations of hostile act and intent are more frequently limited, as was illustrated in the experiences of soldiers from the three European countries.<sup>146</sup> At different periods of time, countries' overall force postures or tactical rules instituted either by their own countries or by the NATO mission in Afghanistan (ISAF) placed limitations on offensive force, thus limiting recourse to the hostile act or intent ROEs. One example of this was Germany's position that it was not engaged in an armed conflict until mid-2009 (and not declared publicly until February 2010).<sup>147</sup> Because of this position, prior to that point, troops could only respond in self-defense. Germany's caveats at the time—its declared legal restrictions on its soldiers using offensive force—meant that German soldiers could not rely on the hostile act and hostile intent ROEs that were otherwise part of the overall ISAF mission ROEs.<sup>148</sup> To illustrate the

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<sup>144</sup> The NATO Legal Deskbook states that NATO rules and policies “do not limit the right to self-defense and in exercising it, individuals and units will act in accordance with national law.” *NATO Legal Deskbook*, *supra* note 12, at 256. See also Hosang, *Force Protection*, *supra* note 41, at 425 ¶ 22.10.3; Hosang, *Personal Self-Defence*, *supra* note 3, at 439 ¶ 23.12.4; COLE ET AL., *SAN REMO HANDBOOK ON RULES OF ENGAGEMENT*, *supra* note 40 at 3; Lee, *Operational Law Handbook 2015*, *supra* note 18, at 83 (“The SROE distinguish between the right and obligation of self-defense, and the use of force for the accomplishment of an assigned mission. Authority to use force in mission accomplishment may be limited in light of political, military, or legal concerns, but such limitations have NO impact on a commander’s right and obligation of self-defense.”).

<sup>145</sup> See *supra* Part II.D.

<sup>146</sup> Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Part III.B, “France”; Part III.C, “Germany”; Part III.D, “United Kingdom”; Part IV, “Analysis and Conclusions.”

<sup>147</sup> See *supra* note 94.

<sup>148</sup> Interview with German military officer [DE4], in Berlin, Ger. (July 6, 2015) (on file with author) (stating that prior to mid-2009, soldiers retained the ability to respond in self-defense, but could not use the hostile intent or hostile act ROEs that were provided in NATO common ROEs, and that this was the critical operational change in use of force in the 2009 rule change); interview with senior German commander [DE1], in German military base, Ger. (Feb. 16, 2015) (on file with author) (noting that Germany’s caveats or “clarifying remarks” changed in 2009, loosening some of the restrictions on offensive force); interview with senior German commander [DE6], in

contrast of how this would have affected the level of force available, one German commander noted “at the beginning of 2009, we would not have opened fire on [a presumed threat]. We would have absolutely waited for him to open fire. By the time I came [late summer 2009] you could open fire on those who had not yet fired.”<sup>149</sup> For the same reasons, German troops interviewed who were deployed prior to this rule change said they could not have responded with force in any of the hostile intent scenarios, because those ROEs, and that level of force was not available to them. Those deployed afterwards could respond to many such situations, although not as liberally as U.S. forces.<sup>150</sup>

Roughly at the time that German troops’ ability to use force in response to hostile acts or hostile intent increased, British forces found their use of these ROEs restricted. In July 2007, the United Kingdom made a policy decision to adjust its rules of engagement and force posture in July 2007, making “Guidance Card Alpha”—which is designed for peacekeeping situations—the default rules of engagement for all British forces.<sup>151</sup> Under this “peacekeeping” posture, as many troops referred to it, the default use of force was self-defense only. For most British troops deployed after 2007, hostile act and intent ROEs, much less other offensive ROEs, could not be relied upon unless specifically authorized—and that

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Berlin, Ger. (July 21, 2015) (on file with author) (noting that after the 2009–2010 change in Germany’s position, caveats, and ROEs, Germany’s caveats and ability to use force was roughly the same as other ISAF member countries, including on use of hostile act and intent). Timo Behr notes that new German ROEs put in place in April 2009 included a greater remit for use of force preemptively, which is in many situations analogous to use of hostile intent, and eased restrictions on offensive use of heavy weapons, among other changes. Timo Behr, *Germany and Regional Command-North: ISAF’s weakest link?*, in *STATEBUILDING IN AFGHANISTAN: MULTINATIONAL CONTRIBUTIONS TO RECONSTRUCTION* 53 (Nik Hynek and Péter Marton eds., 2012). A German Parliamentary inquiry discussed a July 24, 2009, change in the “Taschenkart” (the pocket summary of all ROEs that soldiers carry) that allowed force to be used to prevent an attack where an individual demonstrated hostile behavior (which might also be interpreted as intent depending on the translation of the entire phrase). See German Parliamentary Inquiry, *supra* note 62, at 41–42. The German thinktank SWP analyzed changes in German caveats and MOD positions in Afghanistan found that MOD clarifications in 2006 permitted responses against persons with hostile intent but (confusingly) only in cases of self-defense, and that the new Taschenkarte issued in 2009 made clear that from then on offensive force could be used as well. It also asserted that ambiguity in the prior position was in part due to political concerns. See PHILIPP MÜNCH, *STRATEGIELOS IN AFGHANISTAN* 16 (2011).

<sup>149</sup> Interview with senior German commander [DE1], in German military base, Ger. (Feb. 16, 2015) (on file with author).

<sup>150</sup> Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Chapter III.C.2, “German Application of Self-Defense and Hostile Intent.”

<sup>151</sup> See, e.g., LEIGH NEVILLE, *THE BRITISH ARMY IN AFGHANISTAN 2006-14: TASK FORCE HELMAND* 33 (2015) (attributing the 2007 rule change to Card Alpha as a result of controversy over civilian casualties publicly, and diplomatic issues between the British and Afghan governments over civilian casualties). See also Platoon Commander’s Battle Course, *supra* note 27 (describing the Card Alpha posture as a “defensive posture” encompassing the “inherent right to self-defense” and noting that to use rule 429 on responding to “hostile intent” has to be “authorized or pre-planned for hasty use”).

authorization was increasingly difficult to obtain.<sup>152</sup> British soldiers, and all other soldiers whose countries interpreted hostile act or intent as beyond self-defense, found this more flexible threat-based determination further restricted by a series of new tactical directives introduced in July 2009 and early 2010 by ISAF commander Stanley McChrystal, which limited offensive use of force for ISAF troops across Afghanistan in certain situations.<sup>153</sup>

These policy and tactical restrictions made authorization to use force against hostile acts or signs of hostile intent much less available for British troops serving after 2007. In the interviews for this Article, there were stark differences in the responses of British troops who served prior to 2007 versus those who served later, in terms of their ability to use force in the hostile intent scenarios posed. British troops serving in the less restrictive, pre-2007 period had flexibility to respond to most of the scenarios, almost to an equivalent level as U.S. troops. They could fire on those suspected of digging an IED and many did fire on those suspected of “dicking,” appearing to pass on information about them. In contrast, those serving after the rule change said the peacekeeping postures and tactical restrictions meant that authorization to fire on such situations was rarely granted.<sup>154</sup>

To be clear, the limitations that German and British soldiers faced in these periods were not legal restrictions; however, the tactical and policy limitations were more readily enabled by the underlying (narrow) legal interpretation of self-defense. This is why the origin of self-defense doctrine matters—it helps determine the applicable standards, which in turn govern how broadly or narrowly self-defense is interpreted and in which situations it may be relied upon as opposed to offensive force.

#### IV. Consequences of Expansive or Narrow Approaches

How expansively or broadly this alternate, self-defense paradigm is interpreted can result in differing consequences for a range of protection and accountability issues. European soldiers’ more limited posture may have risked more soldiers’ lives, prevented them from carrying out their mandate, or increased soldiers’ legal liability. However, U.S. soldiers’ broader interpretation created a greater risk for civilian casualties. In addition, where the self-defense paradigm is

<sup>152</sup> There were brief periods when these restrictions were lifted, in response to specific threats or for specific units. Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Chapter III.D.1, “Policy and Tactical Restrictions on U.K. Forces.”

<sup>153</sup> HEADQUARTERS, INT’L SEC. ASSISTANCE FORCE (ISAF), Memorandum, *Subject: Tactical Directive*, (July 6, 2009), [http://www.nato.int/isaf/docu/official\\_texts/Tactical\\_Directive\\_090706.pdf](http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf). Tactical directives were also subsequently issued by succeeding ISAF Commander General Petraeus, but they had the effect of relaxing what appeared to many soldiers as the “hard line” rules under the McChrystal tactical directives. *Petraeus Issues New Directive for Troops in Afghanistan*, CNN (Aug. 4, 2010), <http://www.cnn.com/2010/WORLD/asiapcf/08/04/afghanistan.petraeus>.

<sup>154</sup> See Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Chapter III.D, “United Kingdom.”

used expansively in practice, as with the U.S. interpretation, it can also impact the overall accountability for uses of force under IHL. The United States' extended interpretation of self-defense, which has been used to justify strikes beyond declared conflict zones, creates additional risks for muddying *jus ad bellum* and *jus in bello* principles.

This Part will discuss each of these risks in turn, illustrating some of the consequences of a too expansive or too narrow self-defense with reference to some of the findings from the case studies and other public data.

#### A. Restrictive Criminal Law Standards and Soldier Protection and Liability

Domestic law tends to interpret self-defense as an extremely narrow, exceptional measure. As Hosang notes, “The concept of personal self-defence [under domestic criminal law] is centred on exercising a personal, individual right as a means of last resort as an exception to the monopoly of the national authorities on the use of force.”<sup>155</sup> Parts III.A and III.B provided some examples of the limited interpretations of imminence and necessity that guide French, German, and British soldiers' use of force in self-defense.

Hosang argues that relying on the criminal law basis for self-defense in military operations is “flawed” because “[t]he conceptual (legal) framework for personal self-defence is incompatible with the conceptual framework for military operations.”<sup>156</sup> In contrast to the criminal law view of self-defense as a limited exception to the monopoly on force, soldiers sent into conflict are expected to deploy force, and also expected to be attacked regularly. In essence, soldier self-defense based on criminal law principles might unduly limit soldiers when defending themselves in the type of situations they are expected to face in armed conflict.

The case studies tended to bear this critique out in certain respects. When German troops were limited to only self-defense, the interpretation was so narrow that they would not fire unless and until they were directly fired upon, and even then only if they could identify the person who had fired by sight.<sup>157</sup> One German soldier deployed in 2008, noted that the rule of thumb for German troops was that

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<sup>155</sup> See Hosang, *Personal Self-Defence*, *supra* note 3, at 430–31.

<sup>156</sup> *Id.*

<sup>157</sup> See, e.g., Interview with senior German commander [DE1], in German military base, Ger. (Feb. 16, 2015) (on file with author). Military lawyers and commander distinguished that even under a pure self-defense view, some degree of imminence, such as seeing an individual aiming a weapon, but not yet firing, would justify use of force in self-defense. German non-lawyer or lower level soldiers tended to describe a more restricted view. Interview with senior German commander [DE6], in Berlin, Ger. (July 21, 2015) (on file with author); interview with German military officer [DE4], in Berlin, Ger. (July 6, 2015) (on file with author).

if there is no direct attack, there is no right of self-defense.<sup>158</sup> French self-defense doctrine was similarly narrow, tightly wedded to the limitations of the French criminal code.<sup>159</sup> As one French senior commander framed his guidance to troops on self-defense, “Avoid firing unless you have no other option.”<sup>160</sup> British commanders and lawyers offered similarly limited parameters for firing in self-defense. One British military commander said it is “really drilled in that unless it is really an imminent threat, you are not going to pull the trigger . . . There is just no question of using force unless you absolutely had to.”<sup>161</sup> The greater limitations on their ability to respond to ambiguous threat situations was a significant concern to many of the European soldiers interviewed from all three countries.<sup>162</sup> When hostile act or intent was not available, soldiers argued that they were not able to fully defend themselves in situations where the threat was clear. As one U.K. soldier argued, the limited ability to respond to ambiguous threats created “a much higher risk of guys going home in bodybags.”<sup>163</sup>

Limiting troops’ ability to respond to threats can also negatively impact their ability to carry out their mission, which can include protecting civilians. A lesson learned from peacekeeping missions in the 1990s and early 2000s was that peacekeeping troops must be empowered to use sufficient force not only to defend themselves, but also the civilians under their protection. Confusion over whether self-defense included defense of civilians has been cited as a contributing factor in the lack of peacekeepers’ response to genocidal acts in Rwanda in 1994 and Srebrenica in 1995.<sup>164</sup> As a result of past lessons learned, the generic Rules of Engagement authorized for UN peacekeeping missions now authorize use of force up to deadly force in self-defense or to “protect civilians under imminent threat of physical violence”<sup>165</sup> and most mission rules also permit “use of force beyond self-defense” as necessary to support the mission.<sup>166</sup> Some level of force beyond the limited self-defense conception has become necessary to respond to the range of threats in most conflict and peacekeeping situations, and to carry out even basic peacekeeping duties.

In theory, the fact the European countries have a very narrow interpretation of the self-defense right is not problematic because the ability to

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<sup>158</sup> Interview with German commander [DE7], in Leipzig, Ger. (July 27, 2015) (on file with author).

<sup>159</sup> See *supra* notes 71 and 72.

<sup>160</sup> Interview with French military officer, Paris, Fr. [FR4] (June 23, 2015) (on file with author).

<sup>161</sup> Interview with British commander and military advisor [UK7] London, U.K. (Oct. 9, 2015) (on file with author).

<sup>162</sup> Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Chapter III.C.3, “Negative Consequences of Limitations on Force”; Chapter III.D.3, “U.K. Restrictions Illustrate Balancing of Risks.”

<sup>163</sup> Interview with former British military soldier [UK1], in London, U. K. (Mar. 31, 2015) (on file with author).

<sup>164</sup> Patrick C. Cammaert & Ben Klappe, *The UN Collective Security System*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS, *supra* note 17, at 151, 154–56.

<sup>165</sup> *Id.* at 154 n.8.

<sup>166</sup> *Id.* at 154–56.

respond to a wider panoply of threats would be available through the hostile act or hostile intent ROEs, or through other uses of offensive force. However, the experience of European soldiers in Afghanistan has illustrated that these other ROEs are often restricted. Where they are not available, the very narrow conception of self-defense held by European soldiers may not be sufficient to deal with the full panoply of ambiguous or indirect threats that present themselves in these situations.

Even where hostile act or intent ROEs were available, there was some evidence that because soldiers often conflate them with self-defense, narrow self-defense limitations are also applied to hostile intent situations.<sup>167</sup> This may also be due to concerns about legal liability if they overstep the bounds of what is permitted under their domestic law. Soldiers from the United Kingdom and France, as well as those interviewed from other European countries, expressed greater concerns about their exposure to criminal liability than U.S. soldiers interviewed. French military lawyer Gilles Castel has written that French troops stationed in Kosovo self-limited their actions only to self-defense, even though other ROEs were available, because it was not clear that French law would protect them if they surpassed the bounds of French domestic self-defense provisions. French troops faced with a violent and partially armed mob did not respond because they could not identify one, singular attacker, a requirement under French self-defense doctrine.<sup>168</sup> French troops confronted with armed bandits at illegal roadblocks in the Ivory Coast did not think they could respond in self-defense because weapons were only being indirectly brandished, not used to directly threaten the troops, and thus did not trigger their right of self-defense.<sup>169</sup>

In 2005, as France's Defense Code was being revised, a provision was inserted to address these issues: Article L4123-12-II of the 2005 Defense Code (amended in December 2013)<sup>170</sup> exempts French military personnel, in the course of an operation outside French territory, from French criminal liability where the acts are necessary to further the mission, do not violate international law—either treaty or customary—to which France is bound, and fall within the rules of engagement that applied at the time, especially the necessity of the attack.<sup>171</sup> No French judge has ruled on a case involving self-defense since this provision was created, and so whether it would protect against any domestic liability issues has

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<sup>167</sup> Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Chapter III.B, "France"; Part IV, "Analysis and Conclusions."

<sup>168</sup> Castel, *supra* note 101, at 41, 42.

<sup>169</sup> *Id.* at 43.

<sup>170</sup> French Defense Code (*Code de la défense*), *supra* note 54, art. L4123-12-II ("A soldier is not criminally responsible where, acting in compliance with the rules of international law and within the framework of a military operation, taking place outside French territory or the territorial waters of France, irrespective of the purpose, duration or scope . . . the soldier uses acts of coercion or armed force, or gives an order [to do so], provided it is necessary to carry out the mission.") (translation by author).

<sup>171</sup> *Id.* See also Telephone interview with French military lawyer [FR7] (July 23, 2015) (on file with author).

not yet been tested. However, despite this additional domestic legal protection, French soldiers interviewed for this Article still expressed concerns about legal liability and still appeared to apply an interpretation of hostile act and hostile intent that was largely within the bounds of French domestic self-defense limitations.<sup>172</sup>

As a result of these factors, soldier self-defense based on domestic criminal law standards tends to limit soldiers' ability to fully respond to the threat environment of an armed conflict. The resulting limitations can prevent soldiers (in their view) from protecting themselves from legitimate threats, and/or expose them to criminal liability where they do respond.

#### B. *Broad (U.S.) Jus Ad Bellum Standards and Civilian Protection Risks*

Different consequences arise from too broad interpretations of self-defense. Military studies of civilian casualties in Afghanistan have raised concerns about the risk of collateral damage arising from mistaken determinations of an imminent threat or hostile intent. The Joint and Coalition Operational Analysis (JCOA), at the U.S. Defense Department found that misidentification of civilians as combatants, primarily based on a misperception of hostile intent, was the leading cause of civilian casualties in Afghanistan.<sup>173</sup> Similarly, a handbook by the U.S. Center for Army Lessons Learned (CALL) on lessons learned in Afghanistan found that "the vast majority of [civilian casualties] occur during engagements based on self-defense."<sup>174</sup> Several IHL investigators interviewed who were in Afghanistan from 2008 to 2012 said that civilian casualty incidents they investigated frequently stemmed from self-defense or hostile intent situations. These civilian casualties were caused by all ISAF troops; however, one IHL investigator suggested that U.S. interpretations of hostile intent in particular were "one of the main drivers" of civilian casualties.<sup>175</sup>

The evidence from the case studies suggests that a more expansive U.S. framework for self-defense created a higher risk of collateral damage at certain periods of time and in certain situations due to both broader threat categorizations, and a tendency to respond with significant force levels where a self-defense threat manifests. Self-defense and hostile intent are designed to recognize common threat patterns, but if the threat patterns are interpreted too loosely or the categorizations are too broad, then civilians whose conduct matches elements of

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<sup>172</sup> See Interview with French military officer, Paris, Fr. [FR4] (June 23, 2015) (on file with author); interview with former British military soldier [UK5], in Glasgow, U.K. (July 31, 2015) (on file with author); interview with Italian military commander [OT5], in Brussels, Belg. (Apr. 25, 2015) (on file with author).

<sup>173</sup> JCOA, REDUCING AND MITIGATING CIVILIAN CASUALTIES, *supra* note 31, at 10.

<sup>174</sup> CALL, CIVILIAN CASUALTY HANDBOOK, *supra* note 91, at 6 (2012).

<sup>175</sup> Telephone interview with UN Staff [OT10] (Feb. 17, 2012) (on file with author); Telephone interview with former United Nations investigator [OT14] (Date) (on file with author); Telephone interview with IHL investigator [OT11] (date) (on file with author).



the threat pattern may be killed or injured.<sup>176</sup> One military lawyer, Major Eric Montalvo, has argued that broad self-defense interpretations essentially create a status-based targeting model “based on physical characteristics and a perceived threat, not on the individual's conduct. This leads to the unintentional killing of civilians because, for example, they meet the description of a military-aged-male.”<sup>177</sup> An individual digging an irrigation ditch may be confused with someone digging an IED; an individual watching a convoy of troops and speaking on the phone may in fact not present a threat but may be presumed to pose one. The CALL study on civilian casualties provided the example of a case in eastern Afghanistan, in which a military platoon called in a strike on what was ultimately revealed to be four women and girls gathering grass for their animals.<sup>178</sup> The military platoon, which had been attacked every day for a week prior, saw four figures moving in a place where many of the attacks had emanated, mistook their digging in the ground for fortifying a position, and their sickles for arms, and determined that they were under an “imminent threat” and could respond in self-defense.<sup>179</sup>

A second pattern observed in practice was that even where a legitimate threat or attack manifested—erasing any question of overbroad or mistaken interpretation—the response in self-defense could be unnecessary or excessive, resulting in disproportionate civilian harm. The contrast between European and U.S. soldiers in the level of force they responded with was one of the most frequently drawn comparisons in the qualitative interviews, and was noted by both European and American interviewees.<sup>180</sup> The issue described was both whether force was necessary at all, because other alternatives were available, and whether the level of force used in response was necessary. For example, one U.S. advisor embedded with frontline U.S. forces noted that where a self-defense or hostile intent situation presented itself, what he described as “disproportionate” force was frequent. “We’re on patrol and get a pop shot at us. No one’s hit, but 30 people are suddenly on line and they fire like 1,000 rounds each. [In] another case where we were sort of pinned down, [the troops] started blowing up houses around us. I would also count that as disproportionate.”<sup>181</sup> In another, better documented case from Iraq, known as the “Haditha” case, a unit of U.S. Marines who were attacked with an IED in Haditha, Iraq, on November 19, 2005, responded by dragging several men out of their car and shooting them; the unit then stormed several nearby houses, resulting in twenty-four individuals killed, all

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<sup>176</sup> See also Montalvo, *supra* note 129, at 59 (“[A] broad application of hostile intent and imminence gives a service member greater authority to engage perceived threats, which increases the risk of civilian casualties”).

<sup>177</sup> *Id.*

<sup>178</sup> CALL, CIVILIAN CASUALTY HANDBOOK, *supra* note 91, at 22.

<sup>179</sup> *Id.*

<sup>180</sup> See Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Chapter III.A.4, “Incidents of Excessive or Unnecessary Uses of Force.”

<sup>181</sup> Interview with U.S. civilian advisor [OT15], in Washington, D.C. (Apr. 13, 2012) (on file with author).

presumed civilians.<sup>182</sup>

It is not clear whether these alleged patterns of excessive or unnecessary force in response to self-defense is due to more permissive standards for using force under the U.S. self-defense paradigm than under either the European criminal law version, or under IHL, or if these are simply examples of violations or misconduct that were not appropriately reprimanded or restrained. To consider the first explanation—more permissive standards—Part III.B already discussed how the U.S. standards on necessity may permit lethal force in response to a presumed threat in more situations than the “last resort” approach of a criminal law-derivative self-defense doctrine. The text of U.S. standards governing unit or individual self-defense also suggest a more permissive proportionality standard. The U.S. Law of War Manual notes that the response should take into consideration what level of force is necessary to “discourage future armed attacks or threats thereof” and cites precedent suggesting strict proportionality is not necessary.<sup>183</sup> This contrasts with the French definition that “proportionality sets a limit on the intensity of the defensive act [such that] it must be [only what is] sufficient to stop the attack”<sup>184</sup> or the German standard requiring strict proportionality where a firearm is used.<sup>185</sup>

Some scholars have also suggested that the concepts of necessity and proportionality *jus ad bellum* are less protective of civilians than *in bello* IHL standards because they do not inherently include a requirement to balance the necessity of the response against civilian harm. As scholar Enzo Cannizzaro notes, whereas the regulation of force *jus ad bellum*, including the proportionality standard, “is based on a superior right of the attacked state in regard to the attacker . . . the assessment of proportionality in *jus in bello* is concerned instead with the military advantage that either belligerent intends to attain and the harm to humanitarian values, in particular—but not only—among civilians and protected persons.”<sup>186</sup> In essence, while IHL requires a balancing of the military necessity

<sup>182</sup> See Tony Perry, *Marine Gets No Jail Time in Killing of 24 Iraqi Civilians*, L.A. TIMES (Jan. 25, 2012), <http://articles.latimes.com/2012/jan/25/local/la-me-haditha-20120125>.

<sup>183</sup> OFFICE OF GEN. COUNSEL, DEP’T OF DEFENSE, LAW OF WAR MANUAL 41 (2015). See also William H. Taft IV, Legal Adviser, Department of State, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. OF INT’L L. 295, 305–06 (2004) (“There is no requirement in international law that a State exercising its right of self-defense must use the same degree or type of force used by the attacking State in its most recent attack. Rather, the proportionality of the measures taken in self-defense is to be judged according to the nature of the threat being addressed . . . . A proper assessment of the proportionality of a defensive use of force would require looking not only at the immediately preceding armed attack, but also at whether it was part of an ongoing series of attacks, what steps were already taken to deter future attacks, and what force could reasonably be judged to be needed to successfully deter future attacks.”).

<sup>184</sup> French Interarmy Directive DIA 5.2, *supra* note 18, at 14 (translation by author).

<sup>185</sup> See *supra* note 62.

<sup>186</sup> Enzo Cannizzaro, *Contextualizing Proportionality: Jus ad Bellum and Jus in Bello in the Lebanese War*, 88 INT’L REV. OF THE RED CROSS 785–87 (2006) (noting additionally that in a *jus ad bellum* context, “international law confers upon the attacked state a superior power to take defensive action, and the proportionality requirement serves only to determine the degree to which

and the anticipated civilian harm, proportionality in a *jus ad bellum* sense drops, or significantly de-prioritizes, the consideration of civilian harm. Such a reading would suggest that some responses that would be considered excessive or disproportionate under IHL might be permitted under the *jus ad bellum*-derivative U.S. interpretation of self-defense. While possible, this is difficult to definitively conclude given the overall ambiguity surrounding *in bello* soldier self-defense standards.<sup>187</sup> The number of incidents involving allegations of unnecessary or excessive force by U.S. forces acting in self-defense suggests this should be explored further.

Alternatively, it is equally possible that such uses of force are not permitted under either U.S. self-defense doctrine or the prevailing ROE, and although not all civilian casualties are unlawful under IHL, some of these incidents may have been violations of IHL.<sup>188</sup> Discussing rules of engagement, self-defense, and hostile intent in his book *The Law of Armed Conflict*, former U.S. military lawyer and law professor Gary Solis specifically highlighted the Haditha killings as an example of a violation of the ROE at the time.<sup>189</sup> It may be that many, perhaps even the majority, of incidents involving unnecessary or excessive responses are simply violations of the U.S. self-defense standards and ROEs. However, the fact that such reports are relatively frequent does point to another potential issue with the self-defense doctrine—there is significant evidence that incidents justified under self-defense are more difficult to scrutinize, and may frequently not be held to account. This is in part due to the nature of these incidents, in part due to the inherent or inalienable character of this right, and in part due to the ambiguity over what the standards are. This points to a separate, larger issue with the expansion of the self-defense paradigm: its impact on larger accountability issues, to be discussed in the next section.

### C. Alternate and Subjective Self-Defense Raises Accountability Challenges

The existence of this alternate paradigm for use of force outside of IHL, the fact that different (and possibly laxer) standards are relevant under this alternative paradigm, and the overall amount of gray area surrounding self-defense and hostile intent raise significant accountability issues for use of force in armed conflict.

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other values can be sacrificed to that higher value,” while under *jus in bello* military advantage and collateral damage (in the short-term) are equally balanced).

<sup>187</sup> See *supra* notes 83–89 and accompanying text.

<sup>188</sup> See, e.g., Emanuela-Chiara Gillard, *Protection of civilians in the conduct of hostilities* 160–68, in RAIN LIIVOJA & TIM MCCORMACK, *ROUTLEDGE HANDBOOK OF THE LAW OF ARMED CONFLICT* 157–80 (2016); Lee, *Operational Law Handbook 2015*, *supra* note 18, at 15 (“Collateral damage, also called incidental damage, consists of both unavoidable and unintentional damage to civilian personnel and property incurred while attacking a military objective. Incidental damage is not a violation of international law.”).

<sup>189</sup> GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 490 (2d ed. 2016).

Interviews with those investigating potential IHL violations suggest that in practice actions justified by self-defense doctrine are less easily investigated than IHL-justified uses of force. One former UN investigator in Afghanistan said investigators would frequently deal with incidents in which families of those killed by ISAF would claim that they were civilians. However, ISAF would dismiss their complaints by saying the individual(s) had shown hostile intent and therefore were either combatants or otherwise subject to use of force by troops acting in self-defense.<sup>190</sup> Another IHL investigator noted:

It is reasonably common for ISAF and U.S. officials to justify incidents in terms of self-defense. At an abstract level I think that is most concerning because . . . [y]ou have hostile intent as part of the normal ROE and self-defense is a carve out; nothing impinges on their right to self-defense. But it is extraordinarily difficult to evaluate whether there really was hostile intent to justify self-defense in a particular incident. That requires very detailed information, which isn't easy to get from witnesses.<sup>191</sup>

He gave the example of a claim of hostile intent during a nighttime military raid on a house or compound, a scenario that became increasingly common in Afghanistan from 2009 to 2011. One witness said that a civilian came to the door slowly when he heard soldiers outside and said to the soldiers “don't shoot, don't shoot” but was shot anyway. But the account of the soldiers on the ground was that the individual ran out of the door with something that appeared to be a gun. “Unless you have a video camera, it really can come down to a ‘he-said, she-said’ in a very tense situation without any witnesses not implicated in the event,” the IHL investigator said.<sup>192</sup>

UN staff and other civilian investigators expressed concerns that the prevalence of self-defense and hostile intent as justifications obstructed investigations into civilian casualties more generally, because every incident could be justified, and dismissed, as a case of self-defense. “The problem is that it is so subjective that it could be used to explain away a lot,” one UN investigator said.<sup>193</sup>

Military lawyers also suggested that scrutiny may be lower in internal enforcement mechanisms because in cases of self-defense soldiers tend to be given the benefit of the doubt, even where civilian harm results. Provided that the soldier followed the ROEs and guidance, and there was a reasonable basis for him to have believed the individual was a threat, more serious punishments than a reprimand or warning were rarely pursued, even where it later became clear that

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<sup>190</sup> Telephone interview with former UN investigator [OT14] (Feb. 17, 2012) (on file with author).

<sup>191</sup> Telephone interview with IHL investigator [OT11] (Feb. 27, 2012) (on file with author).

<sup>192</sup> *Id.*

<sup>193</sup> Telephone interview with former UN investigator [OT14] (Feb. 17, 2012) (on file with author).

civilians had been harmed.<sup>194</sup>

Nor are domestic legal accountability mechanisms filling the gap. Because of the ambiguity surrounding the self-defense and hostile intent doctrines, these cases are challenging for domestic courts to pursue. With basic questions over the legal origin or scope of this doctrine unanswered, it is not always clear how domestic provisions apply to the conduct of soldiers deployed in armed conflict, or what alternative standards should be applied. As discussed in Part II.B, the few cases that have gone forward to trial in the United States, United Kingdom, and Germany present checkered legal reasoning, due in part to the difficulty of adjudicating these trials with unclear domestic and international standards.<sup>195</sup>

The comments by civilian investigators and military lawyers suggest that the existence of an alternate justification for the use of force that is considered to be inherent and inalienable (and thus, unquestionable) and is highly subjective makes it easier to avoid independent scrutiny. The greater prevalence of self-defense and hostile intent in the Afghanistan context means that this inscrutable defense would be applied to a greater number of incidents. At a macro level, this would deflect scrutiny over a wider proportion of use of force situations and would lead to overall weaker accountability for allegations civilian harm, and overall weaker IHL accountability.

#### *D. Self-Defense and Limitations on Force Beyond a “Hot Battlefield”*

Overall restraints on the use of force in the international system may be further undermined where self-defense is used to justify strikes in undeclared conflict zones, as in U.S. counterterrorism strikes far from the “hot battlefield.” At its furthest reaches, the inherent right to unit self-defense could be used to justify a significant engagement in hostilities outside of a declared armed conflict zone and independent of other authorization to engage in hostilities.

As noted earlier, self-defense is available to soldiers not only in armed conflict situations but wherever soldiers are lawfully deployed because it is considered an inherent right, not contingent on IHL or specific authorization.<sup>196</sup> Soldiers lawfully deployed on a peacekeeping mission, for example, could exercise their inherent right to self-defense if they came under attack, even if they did not have a mandate to engage in armed conflict. As discussed throughout this article, U.S. soldiers have an extremely broad concept of what situations self-defense might be used in, and the amount of force available where self-defense is triggered. Thus, wherever U.S. soldiers are, whether in a declared conflict zone or not, they retain significant flexibility to deploy force in response to threats. They might defend themselves with whatever means are available, which could include

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<sup>194</sup> Interview with German military lawyer [DE14], in Berlin, Ger. (Feb. 9, 2016) (on file with author).

<sup>195</sup> See *supra* Part II.A.

<sup>196</sup> See, e.g., COLE ET AL., *SAN REMO HANDBOOK*, *supra* note 40, at 3.

through use of their personal weapons, or through calling in an airstrike, should aerial assets be in the vicinity. This right has even broader implications where the soldiers' ROEs include permission to also act in defense of partnered or accompanying forces, which is common.<sup>197</sup>

In Afghanistan, self-defense and hostile intent have frequently justified use of force in targeted killings by aerial strikes, including by drone strikes, and by Special Forces engaged in counterterrorism raids.<sup>198</sup> The United States also conducts similar counterterrorism strikes outside of Afghanistan and beyond declared zones of hostilities. The expansive unit and individual self-defense authority available to U.S. soldiers in Afghanistan is also available to soldiers engaged in these operations, and can represent a significant, independent authorization to use force beyond a "hot" battlefield.

A March 5, 2016, U.S. strike on a training camp of al-Shabaab fighters in Somalia, killing an estimated 150 alleged fighters, illustrates such a situation.<sup>199</sup> In striking a group of al-Shabaab who were not presumed to be al-Qaeda fighters, this strike seemingly surpassed the limits of the 2001 Authorization to Use Military Force (AUMF), the domestic instrument that authorizes the use of force against al-Qaeda or affiliated forces.<sup>200</sup> The strike was not justified by the AUMF, however, but on the grounds that it was necessary to defend against an imminent threat on the U.S. troops who were in Somalia and the African Union troops they were supporting.<sup>201</sup> In effect, it was an exercise of the self-defense authority on

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<sup>197</sup> Provisions clarifying that force may be used to defend not only the soldier's life, but the lives of friendly forces, civilians or other "Persons Designated Special Status" is common for ROEs in both conflict and peacekeeping missions. Examples of such provisions can be seen in Platoon Commander's Battle Course, *supra* note 27, at MIV001861a; RAY MURPHY, UN PEACEKEEPING IN LEBANON, SOMALIA AND KOSOVO: OPERATIONAL AND LEGAL ISSUES: OPERATIONAL AND LEGAL ISSUES IN PRACTICE 168 (2007) (providing an excerpt of a 2004 Soldier Card for KFOR forces in Kosovo).

<sup>198</sup> Former UN officials interviewed said that they frequently received the justification that the individual had displayed hostile intent in investigating allegations of civilians killed in night raids. Telephone interview with IHL investigator [OT11] (Feb. 27, 2012). Telephone interview with UN Staff [OT10] (Feb. 17, 2012) (on file with author). *See also* Gaston, *Emerging State Practice on Self-Defense*, *supra* note 15, at Chapter II.A, "Expansion to Aerial Assets"; ERICA GASTON & JONATHAN HOROWITZ, OPEN SOCIETY FOUNDATIONS, THE COST OF KILL/CAPTURE: IMPACT OF THE NIGHT RAID SURGE ON AFGHAN CIVILIANS 18–19 (Sept. 2011).

<sup>199</sup> Helene Cooper, *U.S. Strikes in Somalia Kill 150 Shabab Fighters*, N.Y. TIMES (Mar. 7, 2016), <https://nyti.ms/2ov9vYG>.

<sup>200</sup> Charlie Savage, *Is the U.S. Now at War with the Shabab? Not Exactly*, N.Y. TIMES (Mar. 14, 2016), <https://nyti.ms/2nUiKTI>.

<sup>201</sup> A Department of Defense spokesman, Joe Sowers, said that although the AUMF was deemed to bestow "authority for direct action against a limited number of targets in Somalia" who are deemed to be part of al-Qaeda, this did not include those killed in the March 5 strike, nor those killed in previous strikes in June, July, and November 2015. Instead, they were killed as part of a "tactical defense" of U.S. and AMISOM forces in Somalia based on evidence that the individuals posed a threat. Question to the Pentagon from Charlie Savage, New York Times reporter (Mar. 8, 2015), <https://www.documentcloud.org/documents/2757459-Shabab-DOD-Statement.html>. In follow-up reporting by Savage, Robert S. Taylor, the acting Pentagon general counsel said the strike was justified because the intelligence suggested an imminent threat and that this presented

behalf of partnered forces, here the African Union forces, which was permissible under the relevant ROEs.<sup>202</sup> At the time of the strike, the fact that this was a strike justified by unit self-defense was suggested by the language justifying the strike but was not confirmed.<sup>203</sup> Subsequent reporting by the New York Times confirmed that not only this strike, but other airstrikes over the same period of time had been justified under “self-defense” rather than under the AUMF.<sup>204</sup>

The United States later made a determination, in November 2016, that it would include attacks against al-Shabaab within the scope of the AUMF.<sup>205</sup> As a result, for this area of operations it is no longer necessary to rely on the self-defense authority to justify significant strikes. However, the fact that force was used in this way remains significant for other U.S. engagements beyond a declared armed conflict zone. Since 2014, the United States has also deployed Special Forces to Iraq to train and advise those fighting the Islamic State in Iraq and Syria.<sup>206</sup> Although on a training and advising mission, those forces also retain the right to self-defense, and if they come under threat, a strike equivalent to the one that killed the 150 al-Shabaab fighters could follow. If the United States is applying self-defense doctrine in this way, then it has a much more flexible tool to respond to threat scenarios, even in situations where international law or domestic law do not clearly denote armed conflict situations. Although beyond the scope of this article, this would present significant considerations in terms of the scope of force that might be deployed under inherent Article II Executive authority, absent a War Powers Authorization.<sup>207</sup>

## V. Reconceptualizing Self-Defense as Combatant Privilege

The doctrine of individual or unit self-defense is being applied more frequently and to a greater range and number of scenarios in armed conflicts

the “last, best opportunity” to stop it. Charlie Savage, *Is the U.S. Now at War with the Shabab?*, *supra* note 200.

<sup>202</sup> See Savage, *Is the U.S. Now at War with the Shabab?*, *supra* note 200. See also Erica Gaston, *Do the Strikes on al Shabaab Stretch the AUMF or The Unit Self-defense Doctrine?*, LAWFARE (Mar. 18, 2016), <https://www.lawfareblog.com/do-strikes-al-shabaab-stretch-aumf-or-unit-self-defense-doctrine>.

<sup>203</sup> See Gaston, *Do the Strikes on al Shabaab Stretch the AUMF*, *supra* note 203.

<sup>204</sup> The New York Times noted: “Over the past year, the military has routinely invoked a built-in exception to those rules for airstrikes taken in ‘self-defense,’ which can include strikes to help foreign partners even when Americans are not at direct risk.” Charlie Savage, Eric Schmitt, & Mark Mazzetti, *Obama Expands War With Al Qaeda to Include Shabab in Somalia*, N.Y. TIMES (Nov. 27, 2016), <https://nyti.ms/2k9Mw3a>. This prior practice was also documented in prior New York Times reporting on other self-defense strikes in Africa. See Mark Mazzetti, Jeffrey Gettleman, & Eric Schmitt, *In Somalia, U.S. Escalates a Shadow War*, N.Y. TIMES (Oct. 16, 2016), <https://nyti.ms/2jAEN11>.

<sup>205</sup> Charlie Savage et al., *Obama Expands War With Al Qaeda*, *supra* note 205.

<sup>206</sup> Chris Carroll, *Obama: US Will Send Up to 300 Military Advisers to Iraq*, STARS & STRIPES (June 19, 2014) <https://www.stripes.com/news/us/obama-us-will-send-up-to-300-military-advisers-to-iraq-1.289699>.

<sup>207</sup> See Gaston, *Do the Strikes on al Shabaab Stretch the AUMF*, *supra* note 203. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

worldwide. This Article has argued that the expansion of this doctrine to a wide array of conflict situations and its unclear relationship with IHL has the potential to undermine IHL protections and accountability. There is evidence to suggest that expanded use of this practice weakened accountability in Afghanistan. Greater articulation of the source and scope of this right and its relationship with other IHL principles would help mitigate potential risks to IHL accountability, and would also help ensure that soldiers have a clear sense of their rights and protections. This final section will argue that this self-defense right should be reconceptualized as flowing from IHL, as a part of the combatant's privilege. Identifying the source of individual or unit self-defense as a part of IHL will strengthen accountability by reducing the risk of IHL displacement and sending a clear signal that IHL standards apply equally to uses of force justified under this right. It would also contribute to partially addressing some of the existing issues with soldier liability and civilian protection.

As noted in Part I, there are several prevailing theories on the source of unit or individual self-defense—that it derives from a state's domestic law, from a state's sovereign right of self-defense, from a broader conceptualization of the right to life, or as an independent customary international law in its own right. None of these theories has gained enough traction or acceptance in either *opinio juris* or in state practice to be considered the consensus legal position. Hosang argues that grounding individual or unit self-defense in the sovereign right of self-defense is better than the alternatives because domestic law is not designed to be applied in armed conflict situations.<sup>208</sup> This argument resonates with some of the qualitative interviews conducted for this Article, noting European soldiers' concerns that they were unduly limited from defending themselves in Afghanistan; with the struggles French soldiers faced in trying to apply French domestic self-defense provisions in Kosovo and the Ivory Coast, noted in the article by Castel; and with the challenges of reviewing these cases under domestic jurisprudence in countries like Germany and the United Kingdom.

However, the discussions of the U.S. interpretation of imminence and necessity in this Article suggest that there may be ways that the application of *jus ad bellum* standards to a soldier's *in bello* self-defense are equally inapplicable. In addition, as Charles Trumbull has argued, given the very high threshold for sovereign self-defense laid out in the International Court of Justice's *Nicaragua* decision, if this is the source for individual self-defense, soldiers would not be able to defend themselves in most situations.<sup>209</sup> An additional counter-argument discussed in practice, at least by European military lawyers, is that finding individual self-defense within the sovereign right to self-defense muddies the distinction between *jus ad bellum* and *jus in bello*.

There has so far been less discussion about the advantages or disadvantages of establishing individual or unit self-defense as its own customary

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<sup>208</sup> See, e.g., Hosang, *Force Protection*, *supra* note 41, at 420–22.

<sup>209</sup> Trumbull, *supra* note 42.



principle of international law. Except for receiving passing reference in guidance documents or military manuals there is no legal history or discussion of what this customary international principle is, nor what the limits or standards might be. However, one potential consideration raised by the forgoing discussion about accountability concerns is that considering self-defense as a separate body of law—and one that is always present and is inalienable, as the customary interpretation might be interpreted—might increase the chances of IHL displacement.

Instead, considering individual or unit self-defense to be a part of combatants' privileges would squarely place self-defense within IHL, making clear that it is not an alternate body of law and minimizing the risk of displacing IHL principles. Conceptually, a soldier's right to defend himself, or by corollary his unit, would seem to be an inherent part of his privilege as a combatant. Grounding it within IHL also avoids the problems that critics have highlighted about the other two prevailing interpretations of its source. A self-defense right that is articulated and developed as a part of the combatant's privilege would be explicitly designed for the type of situations that a soldier would face in armed conflict, avoiding the Hosang's critique of an ill-fitting domestic law standard. In addition, making it available where other combatant privileges are triggered avoids the issues identified by critics of finding this right as a corollary of sovereign self-defense. As part of the combatant's privilege it would always be available where *in bello* considerations are present, making the concern about the low bar of *Nicaragua* irrelevant. Additionally, since it would be operative where and when other IHL *in bello* considerations were triggered, it would be less likely to blur the distinction between *in bello* and *ad bellum* standards, provided that the principles developed to guide this combatant's privilege were designed with *in bello* use and considerations in mind, rather than simply importing *ad bellum* standards into it. One issue that should be further explored, however, is the implication that this would have for peacekeeping forces' right to self-defense outside of armed conflicts.

Conceptualizing self-defense within the IHL framework might also help address some of the issues raised in practice. For example, a significant concern raised by current U.S. practice was that the interpretations of necessity and proportionality, as derived from the *jus ad bellum* standards, was broader than what would be permitted under the similarly named IHL concepts, permitting a use of force that was less protective of civilians. If IHL is accepted as the standard governing self-defense rather than the sovereign right of self-defense, then presumably the IHL conceptions of necessity and proportionality would also apply to self-defense situations, bringing with them the requirement to balance the military necessity of responding to the threat against the risk to civilians. Similarly, if the U.S. interpretation of self-defense was governed by IHL, then the extended view of imminence in the U.S. interpretation of sovereign self-defense would not automatically flow to individual and unit self-defense. This would significantly limit the range of situations to which self-defense might apply,

including its potential to distort use of force restrictions beyond declared hostile zones.

On the other end of the spectrum, basing European self-defense standards on IHL rather than domestic law might eliminate some of the domestic law-derivative limitations that do not fit well in conflict contexts. Some of the strict elements of positive identification in French law, or the “last resort” considerations of other criminal law standards might be replaced with a more flexible recognition of what constitutes a threat to a soldier’s life in armed conflict zones, and the expectation or anticipation of attacks that occur in conflict zones. This might result in the combatant’s self-defense right encompassing some of the hostile act or intent scenarios that European countries would currently frame as beyond self-defense, if not to the full extreme of hostile intent concepts that raised concerns of overbroad practice.

Establishing the right of self-defense clearly within IHL might also improve the development of any domestic law jurisprudence. Lack of a clear articulation of these principles and their relationship with both IHL and domestic law has likely contributed to unclear or irregular jurisprudence and enforcement, with negative implications not only for overall accountability but also for soldiers who honestly believed themselves threatened and relied on the protections of self-defense that they were taught. Clearly setting this principle out within IHL, and developing its relationship with other IHL principles, might help address this issue by giving clearer signaling to adjudicators on where the lines might be drawn between domestic and LOAC forms of self-defense.

Not all issues can be addressed purely by a re-classification or rule change. As with any principle in armed conflict, ensuring that interpretations of self-defense do not raise distinction, proportionality or other issues is an ongoing and difficult process, contingent on constant reinforcement in practice. However, many of the issues in practice, and the follow-on concerns about accountability, stemmed from ambiguity in the underlying doctrine and the scope of self-defense. The treatment of self-defense as a purely tactical, rule of engagement issue in legal discussions has strongly contributed to the lack of development of legal standards surrounding its use. This is an area where greater scholarly consideration of the issue can make a significant contribution. Recognizing this emerging practice as a right, with significant legal bearing on use of force in armed conflict, would kickstart the type of legal discussion necessary to further develop and clarify appropriate standards. Doing so by considering it a part of the combatant privileges within the context of IHL increases the chance that a soldier’s right to self-defense can be appropriately balanced with other interests in armed conflict. The combatant’s right to self-defense is already a principle that exists in practice, and it plays an increasingly important role in modern conflict. It is time for this principle to be recognized for what it is, and further developed, so that continuing state practice can use it to fairly protect both civilian and combatant rights in conflict.