The Right of Military Personnel to Self-Defence:
Challenging the State-Based Approach to the *Jus ad Bellum*

The many uncertainties and controversies surrounding the right of self-defence recognised by Article 51 of the UN Charter are familiar to those concerned with international law regulating the resort to military force (the *jus ad bellum*). When scholars and the International Court of Justice ('ICJ') engage with this right, they tend to adopt a state-centric approach. Such an approach focuses primarily on the macro level, being a defensive response by the state as a whole to an armed attack (which includes its citizens, territory and property). We shall call this 'national self-defence'. This focus on 'the state' is perhaps a natural consequence of the drafting of the UN Charter, directed as it is at the 'members' of the UN, yet it comprises only part of the self-defence picture. The result is an appreciation of the law that is far removed from those who face armed attacks on the ground, in the air, or at sea.

This post, based on an article published in *Journal on the Use of Force in International Law*, calls attention to the often overlooked micro level of self-defence and its place in the *jus ad bellum*. This micro level comprises the right of individual military personnel and/or units to defend themselves. I argue that this right is a missing piece of the self-defence puzzle; one that is crucial to how and when a state may lawfully defend itself. Ultimately, I maintain that there is no conceptual or principled reason why different rules should apply to national self-defence (the macro level) and to personal/unit self-defence (the micro level).

As a starting point, military personnel and units have a right to defend themselves in the face of an actual or imminent unlawful attack. This right is generally accepted as non-derogable and states commonly set it out explicitly in their Rules of Engagement. The right of a unit commander to defend their unit (and other units of their state) in the face of an attack or imminent attack may also be expressed as an *obligation* (see, for example, para 6(b)(1) of the USA's Standing Rules of Engagement CJCSI 3121.01B). We should also note that all individual military personnel, of whatever rank, are state organs. Under the international laws of state responsibility and attribution their actions are, and must be, attributable to their state (see, e.g., Article 4 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts). As such, the military and state are one.

This unitary conception of self-defence means that any differentiation made between national self-defence and personal/unit self-defence defence is purely descriptive. Such labels are useful, referring as they do to the factual circumstances of the particular act of self-defence, including locality and scale. There is no legal distinction between these terms, however. Regardless of intensity or scale, when soldiers, sailors or airmen defend themselves, the state will always be defending itself. Their acts constitute acts of national self-defence, subject to the rules of the *jus ad bellum*. One

might assume, therefore, that the legal regulation of national self-defence (the macro level) naturally aligns with that of personal/unit self-defence (the micro level). Yet, this is not the case.

A classic example serves to highlight the disconnect between the operation of the micro and macro levels of self-defence and how the individual might easily be lost in the equation. In *Nicaragua*, the ICJ famously affirmed that a *de minimis* threshold applies to when the right of national self-defence is triggered and is exercisable. In assessing whether an armed attack has occurred, the Court stipulated that it is necessary to distinguish between 'the most grave forms of the use of force from other less grave forms' (para 191). Crucially, such 'less grave forms' of the use of force, including so called 'mere frontier incidents', do not constitute armed attacks triggering the right of national self-defence under Article 51 of the UN Charter (see para 195). The requirement of this gravity threshold has been long debated, but explicit consideration of the individual is largely absent in this discourse.

A gravity threshold at the macro level poses a conundrum for a unitary view of self-defence that regards the military and the state as one. At the micro level, there is no requirement that a particular threshold of violence be crossed before the right of self-defence is exercisable by military personnel and units. Indeed, 'mere frontier incidents', however minor, may well give rise to the right of personal and/or unit self-defence in the face of an attack or imminent attack. What then might we say about the ICJ jurisprudence on this matter? By proscribing the right of national self-defence in the context of less grave 'frontier incidents', presumably the Court did not deliberately intend to strip the right of self-defence from military personnel and units facing low level violence. Yet, it did not identify personal or unit self-defence as an exception to its ruling. There is no suggestion, therefore, that either escape the Article 2(4) UN Charter ban on the use of force.

This ICJ judgment raises a troubling question regarding when the right of national self-defence is triggered. I argue that if the individual service person faces low-level violence, then the necessity of self-defence might arise, and s/he will be permitted as a matter of personal and/or unit self-defence to exercise it. As an organ of the state, this necessity of self-defence is also that of the state 'as a whole'. The attack against him/her is an attack against the state. This should allow the state (as a whole) to exercise this right of self-defence, provided the response is kept within the bounds of the customary rules of necessity and proportionality.

Furthermore, I note that in the case of a 'mere border incident', lawful acts of self-defence by military personnel do not necessarily translate into lawful acts of self-defence on the part of the state. The aforementioned rules of attribution mean that such acts have the potential to engage their state's responsibility for internationally wrongful acts. This will be so when the *Nicaragua* gravity threshold is not surpassed

so that the state has a *de jure* right to defend itself, thereby precluding the wrongfulness of that state's use of (putatively defensive) force.

Not only is the individual forgotten in considering when the right of national self-defence is triggered, therefore, but applying the *Nicaragua* gravity threshold also means that the laws on state responsibility might not work in a cohesive manner with the *jus ad bellum*. The legal analysis should be one that views the situation as whole, rather than distinguishing between the micro and macro levels of self-defence. The individual and the rules of attribution must not be forgotten. If the defensive acts of military personnel are necessary and proportionate (and, therefore, lawful) this should also 'whitewash' acts of national self-defence so that they are likewise lawful. Other topical debates relating to the timing of armed attacks, necessity and proportionality and armed attacks by non-state actors would benefit from considering this micro picture (see my article for further details).

Ultimately, I offer a view of the *jus ad bellum* that pays due consideration to the individual, whilst recognising that there is no legal distinction between the state and its military. We must consider, therefore, the consequences of saying that 'a state' has no right of national self-defence against minor uses of force, or armed attacks by non-state actors, or armed attacks that are imminent. If service personnel can respond to protect their life against even the most minor exercise of force, then this should be reflected in the *jus ad bellum* rules and in the contemplation of those who apply and interpret them. Theory must marry with, and be informed by, operational practice. The present disconnect can only be bridged with scholarship and jurisprudence that takes a consolidated and holistic approach; one that includes the individual.