

International Society for Military Law and the Law of War
Société Internationale de Droit Militaire et de Droit de la Guerre

19th Congress (Canada, 2012)

***Legal Interoperability and Ensuring Observance of the Law
Applicable in Multinational Deployments***

Questionnaire – ISMLLW 556 O E 5

The 19th Congress of the *International Society for Military Law and the Law of War* will deal with legal interoperability and ensuring observance of the law applicable in multinational deployments. The focus on legal interoperability is of particular importance in the contemporary context of military operations under the command of international organisations – like the UN, the AU, NATO or the EU – or in coalitions of States. In addition to identifying the challenges and solutions in this respect, it will be examined how States can ensure observance of the law in this often complex multinational context.

Particular attention will *inter alia* be paid to the notions of self-defence and their application in multinational operations. This questionnaire aims to collect the views and legal information of and from Countries from around the world on distinct notions derived from the UN Charter, the practice of peacekeeping and other military operations, and last but not least national law. In this way the questionnaire also wants to contribute to the international dialogue and understanding on these important notions.

The *International Society for Military Law and the Law of War's* National Groups are invited to coordinate with their national authorities. National Groups that respond to this questionnaire are requested to indicate which of the responses reflect their own views and which reflect those of their Country (as perceived by them).

If a Country prefers not to take a public position on the occasion of the questionnaire/Congress on one or more of the questions, it is invited to answer the specific question(s) by marking “No public position on the occasion of this questionnaire/Congress” and to go to the next question. Replies to only some of the six parts of the questionnaire can still be very helpful in preparing the Congress and are therefore also welcomed.

Please do not hesitate to contact the General Secretariat, should there be any uncertainty about the meaning of one or more of the questions below.

Part 1. National Self-Defence as a Legal Basis for the Use of Force (General)

1. Does the wording of Article 51 of the UN Charter restrict the exercise of self-defence to a response to an ongoing armed attack in your country's view? If a wider possibility exists to allow a response to armed attacks which have not yet been initiated, how does your country regard the so-called "Caroline criteria" (taken from the Caroline incident of 1837), as providing a possible basis for what is often referred to in legal literature as "anticipatory self-defence"? Does your country subscribe to these criteria in policy statements, regulations or military manuals? Are these criteria seen as forming part of customary international law?
2. Does your country have any policy regarding the use of force *before* a concrete and imminent threat of attack has manifested itself and does it provide for the possibility of the exercise of self-defence in such situations? Do the Caroline criteria still apply in such situations, or are there other criteria which would be more relevant?
3. Does your country view an armed attack as confined to a single act of (illegal) armed force with a substantial effect, or can a number of smaller scale armed incidents which have their origin in the same source be viewed cumulatively as an armed attack which would justify a response in self-defence?
4. Does your country have any policy or view regarding the permissibility of invoking self-defence in response to a non-kinetic attack by means of what is often referred to as "cyber warfare"? If so, does it allow for action in self-defence in response to a "cyber attack" and what would be the threshold of actual or potential harm required to activate the right of self-defence?
5. Does your country have any policy or view of what constitutes a necessary and proportionate response in the context of self-defence (not to be confused with military necessity and proportionality in the context of the Law of Armed Conflict/International Humanitarian Law)? If so, does it see proportionality primarily in quantitative terms (i.e. the scale of the defensive measures must be roughly commensurate with the scale of the (illegal) armed attack) or in qualitative terms (i.e. the scale of the defensive measures must correspond to what is required under the circumstances to end the attack and forestall future attacks), or a combination of both?
6. Does your country see all acts of self-defence as activating a situation of armed conflict (either international or non-international) and the applicability of the Law of Armed Conflict/International Humanitarian Law, or are there situations in which force can be used in self-defence, which do not reach the threshold of an armed conflict and the applicability of the Law of Armed Conflict/International Humanitarian Law?

Part 2. Self-Defence in Relation to Non-State-Actors (NSA).

1. Does your country view the right of self-defence as pertaining solely to attacks by other States, or can attacks carried out by Non-State Actors (such as armed or terrorist groups) qualify as armed attacks giving rise to the invocation of self-defence?
2. Authorship
 - a. If your country recognizes NSAs as a potential author of armed attacks, do the same criteria apply for determining whether there is an “armed attack” as when a state is the author of (i.e. commits) an armed attack? If not, which criteria do apply?
 - b. In what circumstances would your country consider a third State which is involved (in a designated way) in the armed attack committed by a NSA, as the author or co-author of the armed attack? For example: in the situation where a NSA is located on the territory of the third State and this State is unable *or* unwilling to act against the NSA; would this have consequences for your country’s right to exercise self-defence against that third State?
3. What is your country’s policy or opinion with regard to a conflict of norms between (a) the right of self-defence against a NSA who is the sole author of an armed attack and (b) the right of territorial integrity of the State where the NSA is located?

Part 3. Self-Defence in the Context of United Nations Peace Operations

NB: Only operations conducted under the command and control of the UN (Department of Peacekeeping Operations) are relevant to this part (e.g. MONUSCO). Operations conducted under UN Security Council Mandate which were under the control of another (regional) organization or arrangement (e.g. KFOR, AMIS), or under national control fall outside the scope of this part of the Questionnaire.

1. United Nations Peacekeeping doctrine as formulated in the *Capstone Doctrine (DPKO March 2008)* repeats earlier UN policy statements that self-defence in the context of UN Peace Operations (“Mission Self-Defence”) includes the use of force in response to forcible attempts to prevent the mandate from being carried out. Does your country have a view on how to interpret this policy? What does your country consider as the legal basis for UN “Mission Self-Defence” under international law?
2. UN policy and practice also place a great deal of emphasis upon the protection of civilians (e.g. SC Res. 1674 (2006)) in many recent operations such as those in the Democratic Republic of the Congo, in so far as this is operationally feasible. What is the policy and experience of your country in implementing the protection of civilians on the basis of the concept of “Mission Self-Defence”?

3. Has your country entered restrictions (caveats) into arrangements made with DPKO relating to the use of force in the context of "Mission Self-Defence" and/or the protection of civilians? If, so, please indicate in general terms what these were and why they were put forward as conditions for participation in the mission.

Part 4. Unit Self-Defence

1. Does your country recognize a right for military units to defend themselves as a unit outside the context of a specific military operation? If so, what does your country consider the legal basis for such self-defence: "collective individual self-defence" (i.e. every member of the unit exercising personal self-defence) or does your country recognize a different legal basis as providing such a right?
2. What criteria does your country recognize as applying to the right of military units to defend themselves in terms of trigger criteria (i.e. the criteria which give rise to a right to exercise this form of self-defence)?
3. What criteria does your country recognize as regards the definition of "unit" in the context of exercising this form of self-defence? Are all nearby personnel, vessels, aircraft, etc., from the same nation automatically considered part of the defending "unit"? Does your country require all units comprising a larger unit which is exercising this form of self-defence to be of the same nation or can combined units (i.e. composed of sub-units from different nations) also exercise this form of self-defence?

Part 5. Military Self-Defence and Force Protection in Relation to Rules of Engagement (ROE)

1. Does your country have specific legislation, regulations or policy regarding military self-defence as a concept distinct from personal self-defence under national criminal law (see also part 6)?
2. The ROE authorizing "an attack on individuals and units carrying out a hostile act (not constituting an actual attack)" or "demonstrating hostile intent (not constituting an imminent attack)" are sometimes explained as intending, *inter alia*, to ensure a common response to threats in spite of national differences regarding the concept of self-defence. Does your country consider such ROE an expression of the right of self-defence or part of the ROE for mission accomplishment?
3. If ROE of a purely defensive nature are adopted/authorised to overcome differences in national interpretation of the right of (military or personal) self-defence and force protection, would your country consider it appropriate if such ROE were made subject to national caveats or should they remain

unrestricted in the interest of uniform responses in the context of force protection?

Part 6. Personal Self-Defence and ROE

1. To what extent does your country's legislation, case law, etc., allow individuals to use force in the context of personal self-defence? If your country allows the use of force by individuals to defend themselves, does your national law, etc., contain limitations or restrictions on such use of force, such as a) regarding defence of property; b) regarding defence of others; c) a duty to retreat; and d) negation of the exculpatory nature in the event of prior provocation?
2. In the event of the exercise of personal self-defence in a military operational context, would your country consider that context to be relevant or to have consequences for the evaluation of the legitimacy of the use of force in self-defence and what relevance or consequence would the military operational context have in that evaluation?
3. Does your country consider the right of personal self-defence to be inherent under all circumstances or can it be subject to direction or regulation, such as from an on-scene authority (e.g. in the civilian context: a police officer; in the military context: the on-scene commander)?
4. Given the nature and criteria for the exercise of personal self-defence, does your country consider personal self-defence as a legitimate basis for the conduct of military operations, especially pre-planned operations where situations involving self-defence are likely to arise?
5. Does your country consider personal self-defence as a valid justification or excuse under criminal law for violation of International Humanitarian Law or the ROE applicable in a given operation or do International Humanitarian Law and/or the ROE take precedence over the right of personal self-defence/the right to life?