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# Self-Defence in Armed Conflicts



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# Objectives

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1. What are the legal sources of the soldier's individual "right" to self-defence?
2. To what extent is personal self-defence relevant during armed conflicts for service members?
3. What are the potential challenges in relation to an increasing reliance on self-defence in contemporary military operations?

# *Jus ad bellum* self-defence?

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## Article 51 United Nations Charter:

- “Nothing in the present Charter shall impair the **inherent right of individual or collective self-defense if an armed attack occurs** against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council (...).”

## Article 21 ILC Draft Articles on State Responsibility:

- “The **wrongfulness** of an act of a State is precluded if the act constitutes a **lawful measure of self-defense** taken in conformity with the Charter of the United Nations.”

# International humanitarian law?

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Rare references:

E.g. Medical personnel cannot use force except in self-defense.

See First Geneva Convention, Article 22(1): “The following conditions shall not be considered as depriving a medical unit or establishment of the protection guaranteed by Article 19 : (1) That the personnel of the unit or establishment are armed, and that they **use the arms in their own defence, or in that of the wounded and sick in their charge...**”

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Additional Protocol I, Article 13(2)(a): “The following shall not be considered as acts harmful to the enemy: (a) that the personnel of the unit are equipped with light individual weapons **for their own defence or for that of the wounded and sick in their charge.**”

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# Human Rights Law Self-Defence and the Right to Life

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## **Article 2§2 a) of the European Convention on Human Rights**

“2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) **in defense of any person from unlawful violence;**
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection”

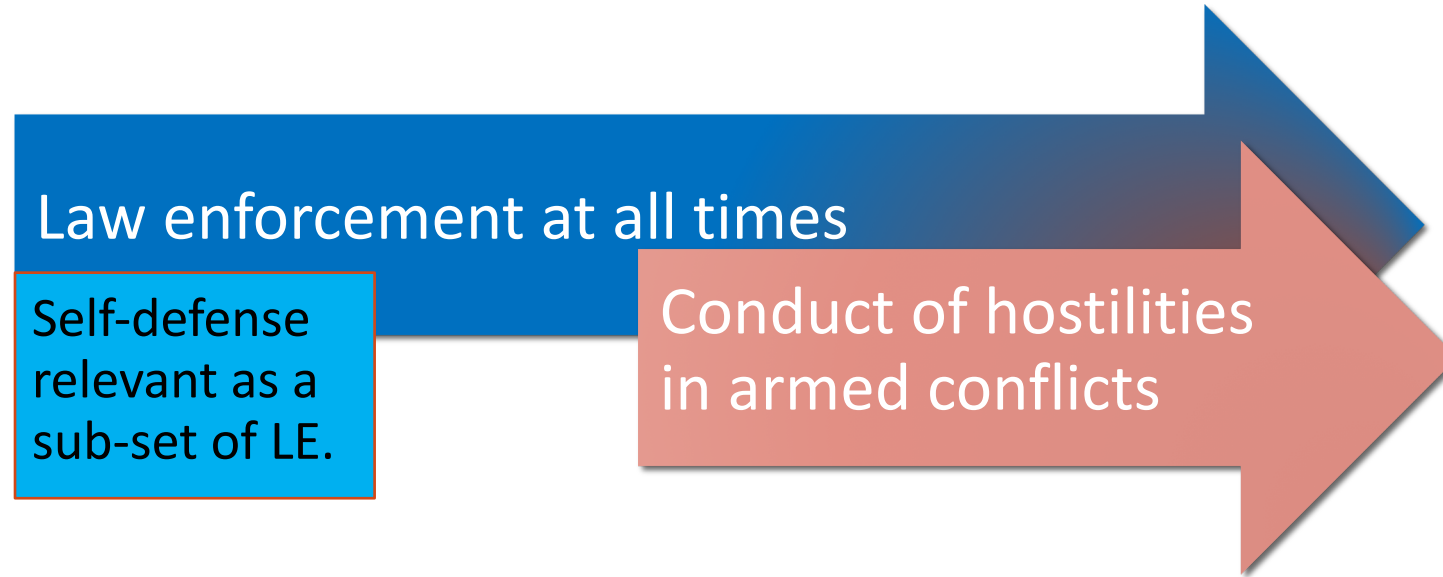
## **UN Basic Principles on the Use of Force and Firearms**

“9. Law enforcement officials shall not use firearms against persons **except in self-defence or defence of others against the imminent threat of death or serious injury**, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”

# Relevance of Self-Defence as Part and Parcel of Law Enforcement

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International Law perspective. Use of force by State is regulated by 2 paradigms:



See ICRC *Report on the Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, 2013. See also: ICRC, *Challenges Report*, 2015.

# Criminal Law

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In most (if not all) criminal law systems. Commonalities:

- Justification/excuse
- Unlawful attack/imminent threat thereof
- Necessity and proportionality
- Defense of others

Definitions of self-defense vary substantially at the domestic level. Main differences:

- In defense of property?
- Duty to retreat?

International criminal law

- **Article 31§1 c) of the ICC Statute**
- “In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct: (...) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.”

# Relevance of personal self-defense as a criminal law justification *ex post*

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- How often could soldier claim self-defense as a criminal defense before a judge for the use of force in an armed conflict?
- In a nutshell:
  - ✓ SD is not available when lawful acts of war by a privileged combatant.
  - ✓ IHL authority only in international armed conflicts and only available to regular combatants against legitimate target (and belligerent nexus).
  - ✓ In all other cases, self-defense is available. (either as main justification or in the alternative).

# Operational concepts of self-defence

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See, e.g. San Remo Rules of Engagement Handbook (2009)  
US Standing Rules of Engagement, Enclosure A (2005)  
NATO Rules of Engagement MC 362/1 (2003)

SD cannot be limited/restricted by RoE. Inherent right.

## Various approaches

- SD not part of RoE (e.g. UK)
- SD part of Standing RoE and guidance (e.g. US)
- Various understandings of “hostile act” and “hostile intent”.

## Various levels of self-defence

- Individual self-defence
- Unit self-defence
- Defence of others
- National self-defence

Legal basis of unit self-defence?

# Potential Challenges in Relation to Increased Reliance on Self-Defense in Military Operations

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1.

- Babel Tower Phenomenon

2.

- Conflation between jus ad bellum and jus in bello

3.

- Jeopardizing international humanitarian law

4.

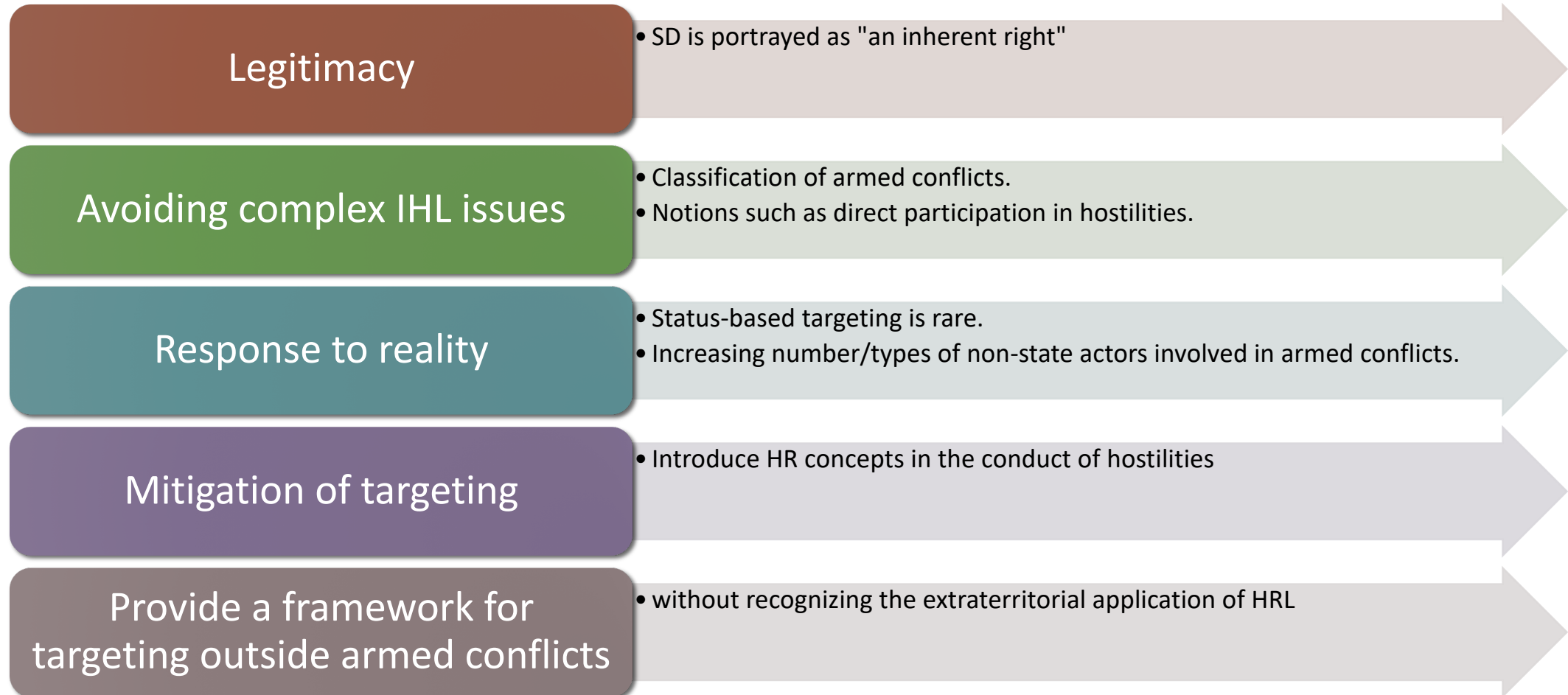
- Muddying the waters : Conduct of hostilities, law enforcement and self-defense?

5.

- Militarization of self-defense



# Conclusive thoughts - Why such an heavy reliance on SD in contemporary armed conflicts?



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**Thank you for your attention!**