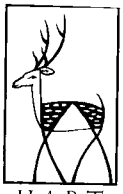
SELF-DEFENCE IN CRIMINAL LAW

Boaz Sangero

Self-Defence in Criminal Law

BOAZ SANGERO



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To Dr Rinat Kitai Sangero

AUTHOR'S NOTE

The term 'self-defence', which I use in the title of this book, is familiar both to the general public and to jurists. However, as explained below (see the first footnote and the first paragraph of the Introduction) in my opinion the more precise term would be 'private defence', and it is this latter term that I use throughout the text of the book.

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Boaz Sangero
Jerusalem, Israel
2006

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Introduction

The term 'private defence'[1] includes various concepts from Anglo-American law: 'self-defence'[2], 'defence of another'[3], 'defence of property'[4], defence of the

[1] The traditionally accepted term is **self-defence**, and this is the term that is commonly used in the penal codes of our times. See, eg, s 33 of the Swiss Penal Code (1937); s 21 of the Korean Penal Code (1953); s 48 of the Norwegian Penal Code (1902; 1961); s 5 of the Greenland Penal Code (1954); s 24 of the Swedish Penal Code (1962; 1972); s 22 of the Greek Penal Code (1950); s 44 of the Rumanian Penal Code (1968; 1973); s 6 of the Finnish Penal Code (1889; 1986); s 34(j) of the Israeli Penal Code (1977).

Yet, the term 'self-defence' is a term that is too narrow, since it does not encompass the 'defence of another' and the 'defence of another's property' and it is doubtful whether it includes the 'defence of property' and the 'defence of the dwelling'.

It is therefore preferable to use the term **private defence**. This is especially so because today there is accepted recognition, as we will discover below, for the rest of the areas of private defence, which are broader than a person's self-defence of his body. This is also the opinion held by Williams and Silving (see G Williams, *Textbook of Criminal Law*, 2nd edn (London, 1983), at 501 and G Williams, 'The Theory of Excuses' Crim LR (1982) 732 at 738; H Silving, *Constituent Elements of Crime* (Springfield, IL, 1967) at 587.

It should be noted that the use of the term 'private defence', which, by the way, Williams attributes to Winfield (see Williams (1982) above, at 738), is also accepted in civil law, in the field of the law of torts (see G Tedeschi *et al*, *The Law of Civil Wrongs: The General Part* (1976) (Hebrew) at 281).

Other terms—less accepted—that were proposed include **legitimate defence** (a term that was used in article 8 of the Spanish Penal Code (1944; 1963)). The principal deficiency of this term being that institutionalised defence—defence by the state authority—is also legitimate. Another term proposed is **necessary defence** (a term suggested by Fletcher—see George P Fletcher, *Rethinking Criminal Law* (Boston and Toronto, 1978) at 855–56 and George P Fletcher, 'Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory' (1973) 8 *Israel Law Review* 367—and that was used in s 22 of the Polish Penal Code, (1969). (It should be noted that Fletcher himself justly points out that the term 'self-defence' is too narrow, but argues that there is no broader term in the Anglo-American legal world while completely ignoring the possible use of the term 'private defence'.)

The choice of the term 'private defence' has an additional advantage and this is the prevention of confusion—at least for the layman—due to the prevalence of the term 'self-defence'. A distinction must be made between a purely factual description of the defensive act itself, and the legal determination exempting the behaviour from being considered a criminal act—see and compare to GH Gordon, *The Criminal Law of Scotland*, 2nd edn (Edinburgh, 1978) at 750 and FS Baum and JB Baum, *Law of Self-Defense* (New York, 1970) at 13.

[2] 'Self-defence' is the application of force by the person attacked against the aggressor in order to protect his own life, body or liberty. See Ch 4.1 below.

[3] 'Defence of another' means the application of force by a third party against one who attacks another person, in order to protect the life of the person attacked, his body or liberty. See Ch 4.2 below.

[4] 'Defence of property' is the application of force by the owner of the property or one who possesses the property, against an aggressor who endangers the property, in order to save the property and prevent it from being harmed. See Ch 4.3 below.

property of another'[5] and 'defence of the dwelling'[6]—concepts whose common denominator is defence carried out by the individual, as distinguished from the institutionalised defence that is provided by the state authority.

Private defence is an exception to the criminality of an act. If the act in question had been committed under normal conditions, however, it would have constituted a criminal act.[7]

Alongside the exceptions of 'duress'[8] and 'necessity'[9], private defence constitutes one of three exceptions to criminal responsibility in circumstances of 'compulsion'. It is accepted that the common situation activating all the exceptions of compulsion is one of immediate danger to a certain legitimate interest that forces the actor to harm another interest in order to save the first.[10] However, beyond the basic situation that is common to all compulsion exceptions, which frequently involves the survival instinct,[11] the exception of private defence has unique characteristics that are very significant. **Private defence implies the use of essential and reasonable defensive force against the aggressor who perpetrates the illegitimate attack, in order to repel this attack and to save a legitimate interest from the risk of injury anticipated from the attack.** The unique characteristic of private defence as opposed to the other exceptions of compulsion is, therefore, this: that the injury is directed toward the source of danger, the person who performs the illegal attack.

[5] 'Defence of another person's property' is a version of private defence that constitutes a possible hybrid of two of its other accepted areas: the defence of another person and the defence of property—see Ch 4.4 below.

[6] 'Defence of the dwelling' means the application of force by the one who resides within, against an aggressor who carries out his attack within the area of the dwelling. This is sometimes a defence of property, and sometimes of the body, but also (and perhaps principally) defence of the very special immunity of the dwelling as the safe haven of those who reside within—see Ch 4.5 below.

[7] In other words, the basic presumption is that all the elements of an offence exist, including of course, the factual element and the mental element.

[8] The exception of 'duress' signifies a step that the perpetrator is forced to take under threat of serious injury to his life, his body, his liberty or his property. For example: Haman threatens Vaizatha that if he does not immediately strike at Job, Haman will cut off Vaizatha's head with a blow of his sword. Vaizatha chooses to strike at Job and is saved.

[9] The exception of 'necessity' arises when there is an act that is intended to save the life, body, liberty or property of the perpetrator or of another from a danger arising from circumstances in which the perpetrator finds himself involved. An example of this is the situation in which two survivors of a sinking ship both wish to hold on to a small log that is only sufficient to save the life of one of them; this situation forces one of them to cause the other to release his grip on the lifeline in order to save himself (the source of this classic example, which was widely referred to in legal and philosophical literature, is apparently the writings of Kant—see George P Fletcher, 'The Psychotic Aggressor: A Generation Later' (1993) 27 *Israel Law Review* 227 at 232).

[10] It should be clarified that a situation of compulsion does not negate the existence of volition, which entails the possibility of choice between alternative modes of behaviour—see, eg, Williams (1983), n 1 above, at 197ff. With regard to the group of compulsion exceptions see Mordechai Kremnitzer, 'Proportionality and the Psychotic Aggressor: Another View' (1983) 18 *Israel Law Review* 178 at 190, 196, 199.

[11] With regard to the survival instinct see also Kremnitzer, previous n, at 201, and see the text accompanying n 156 below.

In contrast to this, where a 'necessity' is involved, the source of the danger is generally not a human being,[12] but the danger is created by the circumstances in which the actor finds himself, and the injury inflicted by the actor is not limited to the interest of the aggressor. While the exception of 'duress' also entails a human source of danger (the one who threatens), in these cases the actor harms the legitimate interest of a third party and does not harm the one who threatens.[13]

In daily life, it is common to find cases in which private defence is discussed.[14] The issues and sub-issues that are discussed in this framework are principally the various conditions with which the act that appears to constitute a criminal act must conform in order to be considered as justified.

In the first place, there is a fundamental requirement of **necessity**[15] to exert defensive force; the act must be necessary in order to achieve the legitimate goal of private defence. Thus, if it is possible to repel a weak aggressor by the use of hands alone (to push him back, to hit him lightly), shooting and killing him cannot be justified. Only the minimal necessary force may be used. The main questions are how to precisely define the requirement of necessity and what this definition should entail. However, the demand for necessity is not sufficient by itself, since not all necessary uses of force are justified. When the aggressor performs a lethal attack, with intent to murder his victim, there is no doubt that the exertion of great defensive force, even deadly force, is justified in order to repel him. But what should the situation be when the attack is not lethal? Let us say that a rapist attacks a woman with the intention of raping her. Is it justifiable for the victim to kill him? And what should be the answer when faced with another type of attack, where it is

[12] As will be seen below, when an aggressor who has no criminal responsibility is involved—such as an insane aggressor—then even though the source of the danger is a person, the case should, in my opinion, be assigned to the exception of 'necessity' and not to private defence.

[13] With regard to the boundaries between private defence and the other compulsion exceptions—'duress' and 'necessity'—see J Hall, *General Principles of Criminal Law*, 2nd edn (Indianapolis and New York, 1960) at 434–36; Miriam Gur-Arye, 'Should a Criminal Code Distinguish between Justification and Excuse?' (1992) 5 *Canadian Journal of Law and Jurisprudence* 215 at 217–18, 226–27; and compare G. Williams, *Criminal Law: The General Part*, 2nd edn (London, 1961).at 732–33.

[14] Feller wrote as follows:

> It appears that of all the defences, private defence is the *most common* claim made by those accused of a criminal act. It can be assumed that the objective reality provides its contribution to this—the situation, in which a person is forced to cope with an attack by another, in order to repel it by force, is *more frequent* than a situation of duress or necessity. Apart from this, although situations of duress are also quite common, they are generally straightforward and clearer, and do not necessitate a trial in order for the judicial authority to clarify the matter. By contrast, the situations in which a claim of private defence is raised are usually more complex and necessitate clarification before judicial tribunals in order to determine whether indeed the conditions that constitute the defence exist or not. This explains *the relative multiplicity of court rulings* regarding private defence.

(SZ Feller, *Elements of Criminal Law* (1984) (translated from Hebrew by the author) at 414 (emphases are added)).

[15] For a broad discussion of the necessity requirement see Ch 3.6 below.

clear that the sole intention of the aggressor is to kiss the hand of his victim? Is it also justified here to use deadly defensive force? In modern legal systems, it is essential to add—beyond the requirement of necessity—a requirement for a certain **proportionality**,[16]: the existence of some sort of correlation, some sort of reasonable relationship between the attack and the defence, between the expected injury to the person attacked, if he cannot defend himself, and the anticipated injury to the aggressor if defensive force is used. This requirement seems, perhaps, to be self-evident, but in 1920 the German Supreme Court affirmed the lower-court acquittal of the owner of an apple orchard, who shot fleeing youths who had stolen fruit and injured one of them seriously, ruling that the action the owner took was justified.[17]

These two fundamental requirements—necessity and proportion—lead us to a third principal question—the **duty to retreat**[18] that might be imposed on the person who is attacked. Let us presume that a person attacks you with the aim of stabbing you with a knife. The aggressor is standing approximately twenty metres away from you, and you have two paths open to you: the first—to stop him with a fatal shot and the second—to retreat safely from the site of this event (presuming that you run much faster than the aggressor, and there is no reason to fear that the retreat will endanger you). Do you have a duty to retreat from the site of the event before resorting to use of defensive force? And perhaps just before the use of deadly defensive force?

Raskolnikov threatens to kill Smerdiakov the next time that he meets him. Is Smerdiakov entitled to pre-empt and immediately kill Raskolnikov, or is there an additional requirement for **immediacy of the danger**[19], such that the exception of private defence only applies if he is in a situation of compulsion? If this is so—then what exactly should this requirement entail?

Macbeth sees John, whom he detests, and shoots him dead. In retrospect, it becomes clear that John—who is also not enamoured with Macbeth—had arrived on the scene intending to murder Macbeth, and that he was armed with a gun for this purpose. From an objective stance, all the conditions for private defence exist here: the shooting of John by Macbeth was necessary, proportional, etc, however from a subjective point of view, Macbeth was not at all aware of the fact that John was attacking him with an intent to murder him, and the intention of Macbeth was not to defend himself but to commit murder. Does the exception of private defence also apply in such a case? Are the objective circumstances sufficient to justify the action, or is it also perhaps necessary to require a certain **mental element**[20], such as the actor's awareness of those same objective circumstances—the fact that

[16] For a broader discussion of proportion, see Ch 3.8 below.
[17] For a broader discussion of this astounding verdict, see Ch 3.8 below.
[18] For a broader discussion of the duty to retreat, see Ch 3.9 below.
[19] For a broader discussion of the immediacy requirement, see Ch 3.7 below.
[20] For a broader discussion of the mental element, see Ch 3.10 below.

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