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Sabina Zgaga, PhD,
Constitutional Court of the Republic of Slovenia,[2]
Advisor, Assistant Professor for Criminal Law

REGULATION OF SELF-DEFENCE IN SLOVENIAN AND INTERNATIONAL CRIMINAL LAW

This paper discusses the regulation of self-defence in Slovenian and international criminal law. Firstly the elements of self-defence in international criminal law are discussed. The paper also analyses the influence of self-defence on the general definition of a criminal act. This is followed by drawing the distinction between similar defences; self-defence and putative self-defence on one hand and self-defence and necessity on the other. Paper is concluded by presentation of Slovenian regulation of self-defence from the viewpoint of international criminal law.

Key words: *self-defence, legal value, proportionality, Slovenian Criminal Code, Rome Statute, international criminal law.*

Сабіна Згага

Регулювання самооборони в словенському та міжнародному кримінальному законодавстві

У статті розглядаються питання регулювання самооборони в словенському і міжнародному кримінальному законодавстві. По-перше, обговорюються елементи самооборони в міжнародному кримінальному праві. У статті також аналізується вплив самооборони на загальне визначення злочинного діяння. Потім – відмінність між аналогічними засобами захисту; самооборони і ймовірної самооборони, з одного боку, і самооборони і необхідності – з іншого. Стаття завершується розглядом регулювання самооборони у Словенії з точки зору міжнародного кримінального права.

Ключові слова: *самооборона, правова цінність, пропорційність, Кримінальний кодекс Словенії, Римський статут, міжнародне кримінальне право.*

Сабина Згага

Регулирование самообороны в словенском и международном уголовном законодательстве

В статье рассматриваются вопросы регулирования самообороны в словенском и международном уголовном законодательстве. Во-первых, обсуждаются элементы самообороны в международном уголовном праве. В статье также анализируется влияние самообороны на общее определение преступного деяния. Затем следует различие между аналогичными средствами защиты; самообороны и предполагаемой самообороны, с одной стороны, и самообороны и необходимости – с другой. Статья завершается представлением регулирования самообороны в Словении с точки зрения международного уголовного права.

Ключевые слова: *самооборона, правовая ценность, пропорциональность, Уголовный кодекс Словении, Римский статут, международное уголовное право.*

2 The opinions in this article are author's alone and could not be understood as the official opinions of the institution.

Problem statement. Self-defence is a typical criminal law defence. It represents diversion of an unlawful attack on the perpetrator or another person towards the source of the attack. Self-defence is regulated also in international criminal law and has also been a subject of the case law of many international and hybrid tribunals, despite the lack of its formal regulation in the statutes of tribunals until the Rome Statute of the International Criminal Court [1, art. 31].

Due to a very strong interaction between international criminal and international public law the distinction between individual self-defence of an individual and collective self-defence of a state according to the United Nations Charter should firstly be made [2, p. 65, 75]. Already the case law of the Nuremberg Tribunal concluded that this differentiation should be carefully drawn [3, p. 121]. The International Tribunal for Former Yugoslavia (ICTY) on the other side simply referred to the clear regulation of the Rome Statute, which was already drafted at the time, but not yet enforced. Accordingly, the ICTY concluded that 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 [3, p. 452]. Identical rule could be found in the Rome Statute [4, p. 13].

Individual self-defence and collective self-defence are therefore two different defences with different conditions, elements and also consequences. Individual self-defence is a typical ground for justification in case of potential individual criminal responsibility. On the other hand, collective self-defence is a defence, which could only be applied to a state and which could (according to international public law) exclude responsibility of a state for its violation of international public law, especially of article 51 of the United Nations Charter. A state could be responsible, if the perpetrator's act could be attributed to the state according to the Draft articles on Responsibility of States for Internationally Wrongful Acts [5, chapter 2]. Individual could still invoke collective self-defence to exclude his or her criminal responsibility, however in such case this defence does not constitute an individual self-defence. In such case the collective self-defence would represent a ground for justification, originating from other legal branches.

As mentioned before, fulfilment of all conditions of collective self-defence does not mean that conditions of individual self-defence are automatically fulfilled as well and *vice versa.* These two defences are different and their factual cases should rarely overlap. It is not rare that a case of individual self-defence has no connection to collective self-defence, for example, when a prisoner of war attacks his guard with a weapon, the guard defends himself and executes the prisoner of war. Opposite case could be possible as well; conditions of collective, but not also of individual self-defence could be fulfilled, such as in the case of humanitarian intervention for protection of ethnic minority. The difference between these two defences lies also in legal values, protected by them. The collective self-defence is possible for protection of public legal values or legal values, belonging to the state, whereas the individual self-defence deals with individual legal values.

Analysis of recent research and publications. For now, various aspects of regulation of self-defence in Slovenian and especially internationally criminal law are presented, as considered in fundamental works in the field of international criminal law.

The purpose of the paper. The puporpose of this paper is to analyse the elements of self-defence in international criminal law, the influence of self-defence on the general definition of a criminal act, to draw distinction between similar defences; self-defence and putative self-defence on one hand and self-defence and necessity on the other; and to assess Slovenian regulation of self-defence from the viewpoint of international criminal law.

Statement of the base material. The definition of self-defence in international criminal law does not differ much from its typical definition in national legal systems; it represents the defence against unlawful attack, directed at the perpetrator or a third person, whereas the defence itself is directed towards the source of attack or his legal value [2, p. 137]. The attack on the perpetrator or a third person must be unlawful. This has been recognised by the case law of the Nuremberg Tribunal

[6, p. 163], as well as of the ICTY [7, p. 986]. The same rule could be found in the regulation of self-defence in the Rome Statute [8, p. 176]. Consequently, as in national systems, the source of an attack can only be human [8, p. 176]. This is also one of the main differences between self-defence and necessity, where the danger could result also from other sources, such as nature, animals, weather conditions, etc.

The tribunals have dealt also with an issue, which legal values could be protected by self-defence. The Nuremberg case law however does not give clear answer to this question. In certain judgements the tribunal for example decided that killing is justified, if committed in self-defence from an attack on life or body, but not, if only property was attacked [7, p. 986]. Still, such decision cannot lead to a simple conclusion that self-defence of property is absolutely not justified. According to certain Nuremberg case law it was not justified, because the perpetrator defended the property by killing the attacker. The defence was therefore massively disproportional. An absolute prohibition of defending property and even more generally any legal value, other than life and body, is therefore in my opinion an inappropriate conclusion of Nuremberg case law.

The prevailing opinion regarding the ICTY is namely similar; self-defence of a person is allowed [9, p. 85], as well as of property [10, p. 335]. Self-defence of a person should however not be interpreted narrowly so that it only allows defence of life, body and other individual legal values, directly linked to the body of the defended person, but more broadly. It should be interpreted in a broader manner to encompass all legal individual legal values, belonging to the defended person (honour and reputation, sexual autonomy, property etc.). Consequently, special reference to property becomes irrelevant, as the property is also an individual legal value of a certain person and thereby protected as such. Such particular legislative technique, found in international case law, is a reflection of Anglo-American influence, since in these legal systems the distinction in regulation of self-defence of person and property remains decisive [11, p. 158].

The Rome Statute also followed Anglo-American approach and dividedly allowed the defence of a person (the perpetrator himself or herself or of another person) or, in the case of war crimes, the defence of property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission [4, p. 11]. In my opinion a broader interpretation of the protected value would be appropriate here also, but with explicit consideration of formal limitation of defence of property, which is only allowed in case of war crimes. Also, only defence of property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission could be justified according to the Rome Statute. There has been much criticism regarding this limitation. Some scholars namely share the opinion opinion that military necessity found its way into the Rome Statute as a general ground for justification despite its explicit prohibition in customary international law [12, p. 169]. Such criticism however does not hold water. The defence in question is self-defence and each act of the perpetrator, if it wants to be pronounced self-defence, must fulfil all conditions of self-defence, including the defence of property. Defence of property is only additionally limited by a condition that it must also fulfil the conditions of military necessity. Therefore, the regulation of self-defence of property is a case of additional limitation of self-defence and not an opposite case of broadening military necessity. This interpretation is supported also by the *travaux préparatoires* of the Rome Statute.

The Rome Statute regulates a narrow conception of legal values, potentially protected by self-defence [13, p. 319], due to strong opposition to regulating self-defence in the Rome Statute at all. Many were namely of the thought it would be inappropriate to justify the perpetrator's act due to his defence of property, because the relevant criminal acts in the Rome Statute are such horrible crimes - the core crimes [9, p. 87]. Such argument seems irrational and seems (again) to reflect the Anglo-American particular regulation of defences. Contrary to this, defences and more specifically self-defence should be regulated in a more general manner. Namely, rules of the general part of the criminal law should be drafted in such manner, so that they could be applied to all criminal acts from

the special part of criminal law. All the potential peculiarities and circumstances of concrete cases of criminal acts should be considered while drafting the rules of the general part. This should apply also to the regulation of defences, which should be drafted in such manner, so that any case of potential defence could be subsumed and assessed according to such regulation. Especially relevant in case of self-defence is the relationship between the attack and the defence - more specifically their proportionality. If defences were drafted in such general manner and proportionality were demanded between attack and defence, there is no possibility to justify killing of another person (with potentially genocidal intent) by defending property. From this point of view the Rome Statute made step forward towards more general definition of self-defence; it namely demands that the defence must be proportionate to the degree of danger, as well as reasonable and necessary. Such general conditions of self-defence in my opinion sufficiently prevent extreme anomalies and justification of extreme cases in case law and would enable appropriate solutions of all potential concrete cases of self-defence. Accordingly, any *a priori* exclusion of defending certain legal values is inappropriate and also superfluous. Second argument against such distinction lies in its consequence. Legal values, which the perpetrator cannot defend via self-defence, are left unprotected and vulnerable to unlawful attacks. Unlawful attacks on such legal values are therefore legally allowed, whereas unlawful attacks on other legal values are not allowed. Such distinction is discriminating. As most of the national legal systems pay regard to the proportionality between the attack and defence in some way (some explicitly require proportionality, whereas others define it in a negative manner; self-defence is excluded, if the defence is disproportional in comparison to the attack), this requirement eliminates any extreme cases of self-defence in practice.

Such condition can be found also in the Rome Statute. Namely, the defence must be proportionate to the degree of danger to the person or the other person or property protected [14, p. 549]. The Nuremberg Tribunal also implicitly introduced the requirement of proportionality, since it decided that killing is justified, when the attack was directed towards life or body and not, when directed towards property only [7, p. 986]. The same applies to the case law of ICTY [2, p. 137].

Self-defence could only be directed towards the source of the unlawful attack. This importantly distinguishes self-defence from necessity in international, as well as national criminal law. Such requirement could be found also in the case law of the Nuremberg Tribunal [2, p. 243], as well as in the case law of ICTY [6, p. 163] and in the Rome Statute [15, p. 190]. Strict limitation regarding accord in time between the attack and defence is prescribed as well. The attack according to the Rome Statute must be imminent [4, p. 11]. Similar limitation could be found also in comparative legal systems [16, p. 665].

In comparative law self-defence is usually a typical ground for justification of the perpetrator's act; the act's unlawfulness is therefore excluded. It is considered that the perpetrator's act is in accordance with the law, when committed in self-defence. Contrary to this, there has not yet been clear case law on this subject in international criminal law, and an answer to the question, whether self-defence is a ground for justification or for excuse [2, p. 65]. The prevailing opinion is however conclusive with comparative criminal law findings that self-defence justifies the perpetrator's act [8, p. 174]. This position is in my opinion correct. Self-defence namely deals with diversion of an unlawful attack and of an act, which is not in accordance with the law. The diversion of such act in inevitably in accordance with the law and its unlawfulness should therefore be excluded.

Self-defence as an excuse would be an inappropriate solution, because in such case the attacker, the source of unlawful attack and the target of its diversion would have a right to self – defence against such act. Self-defence as a ground for justification also emphasises the essence of the self-defence. Necessity is differentiated into justifiable and excusable and the basis for such distinction is the relationship between the harm, which threatened and the harm done. This relationship is relevant also with self-defence, but has a different role.

Here it is its main role to prevent extreme defences and excesses in this relevance.

As already mentioned, there is a strong Anglo-American influence on international criminal law, which can be recognised also in case of non-distinction between the actual existence of a ground for justification on one side and mere mistake of its existence (mistake on grounds for justification) on the other side. International tribunals have long not distinguished between the actual self-defence, when the attack actually existed, and putative self-defence, when the perpetrator was only (reasonably) convinced of the unlawful attack. For example, the Nuremberg Tribunal's case *Munda* and *Weiss* dealt with following facts; the prisoner of war made a sudden move, reached with his hand into his pocket. One of the defendants was convinced that he had been reaching for weapon to shoot at them, that is why he shot he, whereas the second defendant felt threatened due to the shooting, turned around and also started shooting [17, p. 149]. If the victim had reached for weapon in his pocket, this would have been a case of self-defence. However, the perpetrators were only convinced about that, they were only convinced that the unlawful attack existed against them; they were suffering under mistakes. The tribunal acquitted the defendants, claiming it was a case of self-defence, whereas they should have really been acquitted due to putative self-defence (mistake on grounds for justification), because there was no real unlawful attack. And this is a case of clear Anglo-American influence, because in these legal systems it suffices for self-defence that the perpetrator is reasonably convinced of the existence of unlawful attack and its actual existence is not necessary [17, p. 150].

Self-defence and necessity are very similar defences. In both cases the perpetrator fulfils the definition of a criminal act to divert a certain danger from himself or another person; in case of self-defence this is an unlawful attack, and in case of necessity this is a more general danger. There could be factual cases, where it needs to be differentiated between necessity and self-defence. Especially three such cases could be relevant:

- when the perpetrator diverts the unlawful attack towards a third person and not towards the source of an attack;
- when the attacker uses to execute his unlawful attack a good, belonging to a third person or a third person and consequently also the diversion of this attack is directed towards such third person;
- when the perpetrator diverts the danger towards its source and not towards a third, innocent person.

When an unlawful attack is diverted against a third person, this should be considered as a case of necessity and not self-defence. The fact that the unlawful attack is diverted towards a third person and his legal values is more important than the fact that we are dealing with an unlawful attack. The necessity's danger is not necessarily unlawful, its source is irrelevant and encompasses also unlawful attacks, being diverted towards a third person.

When an attacker launches an unlawful attack and uses for that a third person or his goods, the first question, that needs to be answered, is, whether the attack is diverted towards a third person or the source of attack? Although usually this is a case of self-defence, because the source of the attack was the attacker, towards whom the attack was also diverted, this issue in my opinion should not be so easily resolved. The legal interest of this third person, who has been used for the attack and later harm by the defence, should be taken into consideration, as well as the principle of subjective guilt. If the perpetrator, who diverted the unlawful attack, was aware that the person or his goods were not the source of attack but only used for it by the attacker, the situation should be considered a case of necessity. If he was not aware of it, the situation should be assessed as self-defence.

This interpretation is in my opinion also in accordance with the subjective element of the self-defence, because the perpetrator, who diverts the unlawful attack, needs to be aware of the attack and of the fact that he is diverting an attack with his act. Such awareness is impossible, when the perpetrator is aware, that goods of a third person were used for the unlawful attack. In opposite case, when he is not aware of such misuse of a third person for the attack, he is convinced of an unlawful attack taking place.

When the perpetrator diverts danger (and not an unlawful attack) towards its source and not towards a third person, is this a case of necessity, because

unlawful attack is a prerequisite for self-defence, but it does not exist in this case.

The definition of self defence has been very traditional and unalterable for long and was in Slovenia not amended even with the introduction of Criminal Code - 1 [18, art. 22], which otherwise caused many changes also in the field of defences. Self-defence represents a defence of perpetrator towards the source of unlawful [19, p. 234] attack (and not towards third innocent persons) [19, p. 236], which threatens any legal value [20, p. 52] of the perpetrator or a third person [19, p. 232]. Self-defence is traditionally considered ground for justification. Main differences between self defence and necessity are following according to Slovenian scholars:

- self-defence deals with the diversion of attack towards its source, whereas necessity represents diversion of danger towards third, innocent person; however, if as a weapon or instrument of the unlawful attack a third person or his object is used, it is considered a self-defence and not necessity [19, p. 246]; Such general interpretation should in my opinion be differentiated into two situations: when the perpetrator is aware that an object of a third person is being used, rules of necessity should apply and when he is not aware of it, rules of self defence.

- self-defence deals with unlawful attack, which necessarily originates with a man, whereas necessity deals with danger, which source could be human, natural or animal. In case of a human source of the danger the situation must distinguished from unlawful attack with self-defence. Rules on existence of unlawful attack are stricter (willingful and unlawful act), which do not apply to necessity [19, p. 244].

Such regulation of self-defence and especially its distinction towards necessity does not differentiate from the regulation in the Rome Statute.

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