SELF-DEFENCE IN CRIMINAL LAW

This book combines a careful philosophical discussion of the rationale justifying self-defence together with detailed discussions of the range of statutory self-defence requirements, as well as discussions of numerous other relevant issues (ie, putative self-defence, excessive self-defence, earlier guilt, battered women). The book argues that before formulating definitions for each aspect of self-defence (necessity, proportionality, retreat, immediacy, mental element, etc.) it is imperative to determine the proper rationale for self-defence and, only then, to derive the appropriate solutions. The first part of the book therefore contains an in-depth discussion of the rationale for self-defence: why society does not just excuse the actor from criminal liability, but rather justifies his act. The author critically analyses theories that have been proposed up to the present (including the culpability of the aggressor; the autonomy of the attacked person; protection of the social-legal order; balancing interests and choice of the lesser evil; etc.), points out the weaknesses of each theory and then proposes a new theory that explains the rationale behind the justification of self-defence. The new rationale proposed is that for the full justification of self-defence, a balance of interests must be struck that takes into account the expected physical injury to the attacked person (in the absence of defensive action) vis-a-vis the expected physical injury to the aggressor (as a result of defensive action), as well as all of the relevant abstract factors, which are threefold: the autonomy of the attacked person, the culpability of the aggressor and the social-legal order. The author demonstrates how ignoring one or more of these factors leads to erroneous results. In the chapters following the book shows that the proposed rationale can be applied to develop convincing solutions for the various questions raised.

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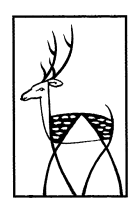

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To Dr Rinat Kitai Sangero

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.

he is subject to a dangerous attack? And perhaps even this is not enough, and there should be a requirement that his action be performed with the (positive) intent to defend himself?

The mistake of the actor may also take the opposite form. Such a case was addressed in the decision issued by the Supreme Court of Israel in the Assala affair.[21] A person left his home one evening and on leaving, gave his gun to his wife in order for her to defend herself against intruders. At midnight the wife woke from her sleep to the sound of knocks on the door. Her questions of 'Who is there?' remained unanswered, but someone went to the window and began to try to open the shutters. The woman imagined that an unknown man was trying to break into her house to rape her, and was very alarmed; she took the gun and shot three lethal shots through the shutters. It was later clarified that the deceased was no other than her husband, who had returned home inebriated but not dangerous. Should there also be an exemption from criminal responsibility for a 'defender' who mistakenly believes that she is being attacked and performs what is called **a putative defence**[22]? And if so—is it necessary that the mistake be reasonable, or is it sufficient for it to be a genuine mistake?

A psychotic aggressor, who is not responsible for his actions, attacks a person. Is private defence justified against an **innocent aggressor**[23] to the same extent that it is justified against an aggressor who is responsible for his actions, or is it perhaps more fitting in this case to impose greater duties on the one who is attacked, such as a safe retreat from the site of the event, in order to protect the innocent aggressor?

'A' is strolling innocently down the road and is attacked by 'B' who is armed with a knife and attempts to stab him. Let us presume that A is not sufficiently strong to defend himself. Is a third party entitled to come to the rescue of the person attacked and to harm the aggressor? Is the **defence of another**[24] justifiable, even when the defender is a passer-by who is entirely unacquainted with the parties to this confrontation? And what conditions should be required in order to justify such an intervention?

Using the cases and examples that were presented above, I have set forth a preliminary outline of some of the conditions required for the establishment of private defence. Of course, many additional conditions exist, each of which raises many difficult questions, both with regard to the very requirement for each and every condition and also with regard to the meaning attributed to it. How should these many questions, which combine value judgments of great weight with practical considerations, be answered? One way is to refer to each issue separately, and to provide an independent solution for each one. As is demonstrated below, this is the practice adopted by most legal systems. Another option—which in my

[21] CA 54/49 *The Attorney General v Assala* 4 PD 496.
[22] For a broader discussion of putative defence, see Ch 5.2 below.
[23] For a broader discussion of the innocent aggressor, see Ch 1.5.3 below.
[24] For a broad discussion on the defence of another, see Ch 4.2 below.

opinion is preferable—is to determine first of all the rationale that supports the justification of private defence (why does society justify actions that in effect constitute violations of prohibitions established by law?), and then to use this rationale to solve each and every one of the specific issues.

The distinctions I made at the beginning of this Introduction between private defence and the other defences of compulsion, set the concept of private defence on relatively firm ground, illustrating that despite the strong tension that exists between the central power of the state authorities and the authorisation for self-administered justice,[25] the right to private defence both in the past and the present has been acknowledged with virtually no dispute.[26] Thus, for example, since ancient times Jewish religious law has recognised the rule: 'If some-one comes to kill you, kill him first.'[27] Self-defence was often even taken for granted as a given. Thus it was written that 'self-defence is not a law that was created by man, but a law enacted by nature itself' (Cicero, *Oration in Defence of Milo*), and that: 'Self-defence is the clearest of all laws; and for this reason—the lawyers didn't make it' (Douglas Jerrold).[28]

It is clear that even though the matter seems to be taken for granted, and perhaps particularly because of this, the rationale that supports private defence is not always given sufficient attention.[29] As set forth below, several theories have been proposed to explain the rationale of private defence. However, each of the legal systems that were examined within the framework of the present study avoided a determination of which theory was the dominant and ideal one. Consequently, the existing practices in each of these legal systems for addressing the many issues and sub-issues that arise with regard to private defence are inconsistent. Moreover, conflicting practices often exist within the same legal system. It should be emphasised, that beyond the accepted basic agreement on the existence of the right to private defence, there are many serious disputes concerning the conditions for this right.[30] In the absence of agreed criteria for solving these disputes, the existing

[25] See B Brown, 'Self-Defence in Homicide: From Strict Liability to Complete Exculpation' (1958) Crim LR 583 at 583; M Finkelman, 'Self-Defense and Defense of Others in Jewish Law: The Rodef Defense' (1987) 33 *Wayne Law Review* 1257 at 1287; and more widely in Ch 1.3 below. For a critical view of private defence, which views the accused as one who has taken the functions of the jurymen, the judge and the executioner-hangman upon himself, see the American ruling in the case of Hickory (1893) that is discussed by Baum and Baum, n 1 above, at 14.

[26] See, eg, A Eser, 'Justification and Excuse' (1976) 24 *American Journal of Comparative Law* 621 at 631.

[27] A Talmudic tractate ('Brachot' 65, 72). The expression was apparently coined by Rabba ('Sanhedrin' 72, 1).

[28] See Williams (1983), n 1 above, at 501 and his reservations regarding the quotation that he presented. See also Suzanne Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge, 1994) at 57ff.

[29] See JR.Thomson, *Self-Defense and Rights*, in JR. Thomson, *Rights, Restitution and Risk: Essays In Moral Theory*, ed by W Parent (Cambridge and London, 1986) 33 at 48.

[30] 'The justification of self-defense is an ancient, yet unsettled, area of criminal law'—see S Diamond, 'Criminal Law: The Justification of Self-Defense' (1987) *Annual Survey of American Law* 673.

legal situations in a number of legal systems are vague and replete with internal contradictions.

The main thesis of this study is that the starting point for any serious treatment of the subject of private defence must be the definition of its underlying rationale, and that this rationale should dictate the solutions for each of the specific issues raised. As we shall see below, the rationale question is not only theoretical, as each theory that is proposed has important practical implications for the scope of the right to private defence and its conditions.[31] Dressler wrote as follows[32]:

> Which deontological theory explains or ought to explain, self-defense? The question is important. Too few modern lawyers and criminal law scholars seem interested in such a fundamental question.

In accordance with these thoughts, with which I agree, we shall also refer to philosophical literature and will use it in order to identify the rationale for private defence and its definition. It should be noted that during the 1980s, a relatively large number of philosophers dealt with this subject, and we will rely on this body of analysis extensively as we proceed.

The thesis of this book dictates both its goals and its general internal structure. Firstly, a discussion will be presented of the various theories that compete for priority in their explanations of private defence, and with the assistance of these theories an appropriate rationale will be formulated. Following this, the various issues raised by the subject of private defence will be addressed and solutions will be proposed for them in light of the chosen rationale, drawing inspiration from the different solutions that have been provided and proposed for each issue in the various legal systems. A critical consideration of these solutions will be presented. Finally, a comprehensive and suitable practice will be proposed for dealing with the issue of private defence—a practice founded on the chosen rationale.

At this stage, it should be made clear that the chosen rationale cannot provide a direct answer to each and every one of the issues and the sub-issues that arise from the subject. Among other reasons, this is because with regard to some of the issues, policy considerations are applied that dictate a decision which deviates from the solution that appears to be obligatory as a result of the chosen rationale.[33] However, this should not lead us to the conclusion that the attempt to identify the rationale and to use it to determine practices in accordance with its principles

[31] On the importance of identifying the rationale see NM Omichinski, 'Applying the Theories of Justifiable Homicide to Conflicts in the Doctrine of Self-Defense' (1987) 33 *Wayne Law Review* 1447 at 1465, 1468–1469; Fletcher (1978), n 1 above, at 855, 874.

[32] See J. Dressler, 'New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking' (1984–85) 32 *University of California at Los Angeles Law Review* 61 at 86.

[33] A striking example of such an issue is resistance to illegal arrest—an issue that will be discussed below in Ch 3.4.3.

should be abandoned.[34] In the first place, the rationale will dictate consistent answers to most of the issues. Secondly, with regard to some of the other issues, the rationale will negate certain answers that contradict it. And finally, even when there is a tendency to deviate from the rationale on a certain issue, it is very important to consider the rationale, and the extent of the deviation from it, in order to estimate the strength of the policy considerations that are applied to justify the deviation and to determine whether they are sufficient to override the rationale.

Another important function of the rationale—apart from acting as a basis for a suitable practice for resolving related issues—is as a foundation and useful tool for the interpretation of the existing law. Private defence is usually considered to be a general norm, applicable to a large number of specific norms—namely the various offences. By its very nature as a general norm, it cannot be formulated solely on the basis of specific and rigid foundations. It also needs general foundations with more flexible content, such as in regard to the defences of compulsion—the concepts of necessity, proportionality and reasonability[35]. Such concepts leave broad discretion to the courts when deliberating on the merits of each case. Therefore, and specifically with regard to a norm whose natural place is in the general section of the state's central penal code, it is important not only to formulate this norm as part of the law, but also to discuss its foundations in detail. An in-depth analysis such as this would serve the courts as they give meaning to the norm based on the facts of the specific case brought before them. Such a discussion, in the form of a detailed 'commentary', may not only assist the court but may also be of assistance to the legal profession in general, and perhaps even to the public at large.

In the first chapters of this book—even before we examine the theories that elucidate private defence, and formulate on that basis an appropriate rationale—we shall discuss two general and very important distinctions that will be highly relevant throughout the chapters that follow. The first is the distinction between 'justification' and 'excuse'. The second is the distinction between the elements established in the definition of a given offence, and the elements established in the definition of a defence in general and that of justification in particular. With regard to the first distinction the questions will be whether this distinction should even be accepted, and if so, to what extent, and what are its implications for private defence. In contrast, there is no doubt regarding the validity of the second distinction, since it is an existing fact—at least technically—in all modern penal

[34] For contemplations in this spirit, see Fletcher (1978), n 1 above, at 874; Stanford H Kadish, 'Respect for Life and Regard for Rights in the Criminal Law' (1976) 64 *California Law Review* 871 at 888. It should be noted that both Fletcher and Kadish do not suggest abandoning the search for a rationale—exactly the opposite. However they cast doubt as to whether it is possible to provide a complete explanation of each issue based on a single rationale.

[35] This does not mean that it is impossible to cast more detailed content into the general norm. In the course of this book we shall expand on the attempts that have been made to introduce various proposals to create such detail, however the elaboration of the general norm is inherently limited.

codes. The question with regard to this distinction is whether there is a significant difference between an element that was established by the legislator in the definition of an offence and an element that was determined in the defence. The answer to this question has great importance in a number of areas, principal among them are the following: the requirement of awareness of the circumstances of the defence; the requirement of reasonability of the mistake in putative defence; the burden and extent of proof; and the application of the principle of legality on defences. This last issue holds great importance, since it has far-reaching implications for the authority of the court in its interpretation and creation of new defences, and for the adaptation of vague concepts, such as 'reasonability', to criminal defences.

Before concluding this introduction and delving into the body of this study, I would like to delineate its boundaries. Certain issues exist that are not unique to private defence but concern all kinds of defences against criminal responsibility: the proof of a defence, putative defence, and cases in which the actor himself is guilty of creating the situation that warrants the defence. Suitably resolving these issues requires a discussion of all the defences (it should be noted that there are clear advantages to the formulation of legal practice and policy with regard to the first two of these three issues, which can be applied to all the criminal law defences and perhaps also to the offences)[36]—a discussion that greatly exceeds the boundaries of this research. However, disregarding the issue completely is impossible, and therefore these issues will also be discussed and a fitting solution will be proposed—insofar as this is possible—in the light of the rationale of private defence.

Finally, it is important to note that the restriction of the discussion of private defence to offences of homicide alone, which is common in the relevant literature, is both mistaken and misleading. Mistaken, since private defence also applies to other offences, such as assault; and misleading, since the concentration solely on situations of 'a life for a life' distorts the picture—despite the importance of these situations—and makes it more difficult to find the appropriate rationale and to determine the suitable legislative practice. Therefore, this study will address private defence in its full scope in substantive criminal law.

[36] For a similar opinion see G. Stratenwerth, 'The Problem of Mistake in Self-Defense' (1986) *Brigham Young University Law Review* 733. (This article was also published in the book by Eser and Fletcher, *Justification and Excuse* (Freiburg, 1987) vol 2 at 1055, 1061).

1

The Rationale of Private Defence

1. 1 The Distinction between 'Justification' and 'Excuse'

A distinction that has significant importance for the subject of our discussion is the distinction between defences that justify—justifications, and defences that excuse—excuses. This is, of course, a subject that deserves comprehensive research in and of itself,[37] which exceeds the limited framework of this book. Therefore, the substance of this distinction and its implications for private defence will be explained in brief.

For a general description of the distinction the following words by Hart are usually quoted:

> In the case of 'justification' what is done is considered as something that the law does not condemn or even welcomes. But when the killing . . . is excused, the criminal responsibility is excluded on a different footing. What has been done is something, which is deplored, but the psychological state of the agent when he did it exemplifies one or more of a variety of conditions, which are held to rule out the public condemnation and punishment of individuals. This is a requirement of fairness or of justice to individuals.[38]

Thus, for example, we excuse a person who is insane from criminal responsibility, since we understand his situation and forgive him, but we do not justify his action, which constitutes a criminal act. We would obviously prefer him not to

[37] For comprehensive discussions of this distinction see Fletcher (1978), n 1 above, at 759–75; PH Robinson, *Criminal Law Defenses* (2 vols; MN, 1984), Cumulative Supplement (1988), the 2002–3 Supplementation by Myron Moskovitz; Dressler, n 32 above; K Greenawalt, 'The Perplexing Borders of Justification and Excuse' (1984) 84 *Columbia Law Review* 1897. (This article was also published in the book by Eser and Fletcher, n 36 above, vol 1 at 263; Eser, n 26 above; J Hall, 'Comment on Justification and Excuse'(1976) 24 *American Journal of Comparative Law* 638; PH Robinson, A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (1975) 23 *University of California at Los Angeles Law Review* 266; George P Fletcher, 'The Right and the Reasonable' (1985) 98 *Harvard Law Review*. 949. (This article was also published in the book by Eser and Fletcher, *Justification and Excuse*, vol 1 at 67); Gur-Arye, n 13 above; and Miriam Gur-Arye, 'Should the Criminal Law Distinguish between Necessity as a Justification and Necessity as an Excuse?' (1986) 102 LQR 71; CJ Rosen, 'The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women who Kill' (1986) 96 *American University Law Review* 11; John Gardner, 'Justifications and Reasons' in AP Simester and ATH Smith (eds) *Harm and Culpability* (Oxford, 1996) at 103.

[38] See HLA Hart, *Punishment and Responsibility* (Oxford, 1968) at 13–14 and see also, eg, Robinson (1975), previous n, at 274; Stanford H Kadish and Stephen J Schulhofer, *Criminal Law and Its Processes: Cases and Materials*, 7th edn (Oxford, 2001) at 749–50.

have committed the act. In contrast, when a policeman fulfils his duty by arresting a criminal, we not only excuse him from responsibility for false arrest, but we even justify his action. Justification is a legal implication of a moral-value decision, according to which in the special circumstances in which the offence (as defined by law) occurs, the action is no longer bad, but rather good. In contrast, where an excuse is involved, the act is still perceived by society to be bad, even under the same special circumstances that bring about the granting of an excuse (which is based on understanding and forgiveness, but not on moral justification).

Fletcher, who is foremost among those who call for the adoption of this distinction in Anglo-American law, describes the distinction as follows:

> Claims of justification concede that the definition of the offense is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor. A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act.[39]

Although in the old English common law a distinction existed between killing that was justified and killing that was excused,[40] this distinction was not identical to that which is accepted today,[41] and it is no longer accepted in Anglo-American law. It is usually agreed that Stephen's assertion[42] that the common legal distinction between justification and excuse 'involves no legal implications' is still correct today[43]. As Fletcher makes clear[44], frequent use in Anglo-American law of the term 'the reasonable man' replaces the precise distinction between justification and excuse.

One legal system where the distinction between justification and excuse is well accepted is the German system. The historic development[45] of the distinction there was strongly linked to the structure of criminal responsibility in German law.[46]

[39] See Fletcher (1978), n 1 above, at 759.

[40] See, eg, W Blackstone, *Commentaries on the Laws of England*, reprint of 1st edn with supplement (London, 1966) vol 4 at 178ff; JH Beale, 'Retreat from a Murderous Assault' (1903) 16 *Harvard Law Review* 567 at 573; *Russell on Crime*, 12th edn by JWC Turner (London, 1964) at 454; and RM Perkins, 'Self-Defense Re-Examined' (1954) 1 *University of California at Los Angeles Law Review* 133 at 141ff.

[41] A central characteristic of justification was the governmental-public justice factor. See,eg, Dressler, n 32 above, at 66ff.

[42] JF Stephen, *History of the Criminal Law of England* (London, 1883) vol 3 at 11; and see Eser, n 26 above, at 621.

[43] There was partial adoption of the distinction in the American Model Penal Code (1962); in the American Federal Proposal (1970); and in the proposed law of New Zealand (1989). In England the distinction was rejected by several legislative committees—see Gur-Arye (1986) n 37 above, at 75. A phenomenon that still exists in the Anglo-American law is the use of the terms justification and excuse as synonyms—without any substantial distinction between them. See, eg, ch 5—'Justification and Excuse' in WR La Fave and AW Scott, *Substantive Criminal Law* (St Paul, MN, 1986) vol 1.

[44] See Fletcher (1985), n 37 above, at 76ff.

[45] See, eg, H Silving, *Criminal Justice* (Buffalo, NY, 1971) vol 1 at 382ff. and Eser, n 26 above, at 621ff.

[46] See, eg, Eser, n 26 above, at 627ff; George P Fletcher, *Basic Concepts of Criminal Law* (New York and Oxford, 1998) at 101ff.

This structure includes three separate levels, with a clear hierarchy of examination. At the first stage, the elements that exist in the definition of the offence are examined. At the second stage, the illegal character of the act (wrongdoing) is examined. This (illegal) character is negated if justification exists. At the third and final stage, the guilt (culpability) of the actor is examined, and is negated if excuse exists.

The dispute concerning the existence of the theoretical distinction is, as we shall see below, relatively minor. The more difficult disputes surround the implications of the distinction. Radbruch[47], who preceded Fletcher in his stance regarding the distinction and its implications, enumerated four important implications of the distinction:

(1) There is no right to self-defence against a 'justified' act (for which a defence of the 'justification' type is applicable), but such a right does exist as against an 'excused' act (for which a defence of the 'excuse' type is applicable);
(2) A factual mistake with regard to justification is a defence; but a factual mistake with regard to an excuse is not a defence;
(3) An act by an accomplice to an offence is punishable even though an excuse exists for the act of the principal offender, but it is not punishable if the act of the principal offender is justified (in other words: excuse is personal and justification is universal);
(4) Compensation (civil) for damages may be claimed from a person who has an excuse for his act, but not from someone who has a justification for his act.

Other scholars have suggested the adoption of additional or other implications, principal among them being:

(1) A third party has the right to protect a person who has justification for his act (and he is even encouraged to do so) and the act of that third party will be justified, but he is forbidden to protect a person whose act is only excused;[48]
(2) Prior guilt of the actor in creating the situation negates an excuse for his behaviour, but does not negate justification;[49]
(3) There is a difference in the burden of proof; [50]

[47] See GL Radbruch, 'Jurisprudence in the Criminal Law' (1936) 18 *Journal of Comparative Legislation and International Law* 212 at 218–19; and see also, Hall, n 13 above, at 233–34.

[48] See, eg, Robinson (1975), n 37 above, at 279ff.

[49] See, eg, Gur-Arye (1986), n 37 above, at 76ff.

[50] See, eg, Dressler, n 32 above, at 61–62 fn 2. There are those who suggest that there should be exceptions to the general rule, according to which the burden of proof of beyond a reasonable doubt in a criminal case lies solely with the prosecutor, such that it should be imposed (in addition to proving the elements of the crime, of course) only on justification (the negation thereof), while excuse will have to be proved by the accused, according to a balance of probabilities. See, eg, PH Robinson, 'Criminal Law Defenses: A Systematic Analysis' (1982) 82 *Columbia Law Review* 199, at 256ff; and A Stein, 'After Hunt: The Burden of Proof, Risk of Non-Persuasion and Judicial Pragmatism' (1991) 54 MLR 570; and A Stein, 'Criminal Defenses and the Burden of Proof' (1991) 28 *Coexistence* 133. And see—for the issue of proof—nn 80, 114–15 below and accompanying text; and n 1097 below.

(4) An excuse, as distinguished from a justification, generally requires the actor to undergo some form of subsequent treatment for the problem that triggers the excuse.[51] [52]

The criticism and the opposition to the distinction or to its implications are concentrated under two headings. The first is the difficulty of categorisation. As many of the critics note, there are defences that are difficult to categorise either as a justification or as an excuse, since their character is actually mixed[53]. The second—and the more central—is questioning the accuracy of the implications that relate to the distinction and questioning the supposition that they are desirable. At the head of the opposition stands Hall, who in his book from 1960 already levied vociferous criticism with regard to some of the implications of the distinction that were referred to by Radbruch[54]. Sharp criticism was brought by other scholars,[55] focusing on the undesirable results of the 'automatic' adoption of various implications that were attributed to the distinction.

With regard to the categorisation of private defence, here there is almost no objection to defining classical private defence as justification[56]. The doubts, as we shall see below, concern a group of cases that do not fall within the bounds of private defence. Examples of this type of case include the following: the case of putative private defence, which should be correctly categorised as an excuse based on a factual mistake; cases in which the aggressor lacks criminal responsibility, which should be included within the framework of 'necessity'; and cases which deviate from the conditions of private defence.

In my opinion, there is indeed room for a distinction between justification and excuse, and private defence has a clear-cut character of justification. In order to

[51] See, eg, Robinson (1975), n 37 above, at 279 fn 52.

[52] In the next section I will suggest two additional implications of the distinction between justification and excuse, with regard to the rule of 'interpretation in favour of the accused' and with regard to the rule that negates vague prohibitions—see (correspondingly) the paragraph that refers to n 88 below; and the paragraph that follows the reference to n 99 below.

[53] The article that best exemplifies this spirit is Greenawalt, n 37 above. It should be noted that he succeeds—using vivid imagination—in inventing examples that cause the reader a certain perplexity . . . (as the title of the article indicates—'The *Perplexing* Borders of Justification and Excuse'). See also Kremnitzer, n 10 above, at 196ff. Also see the consideration by Fletcher of Greenawalt's arguments—Fletcher, n 9 above, at 241. With regard to the difficulties of categorisation in German law—where the distinction is applied—see Eser, n 26 above, at 622.

[54] See Hall, n 13 above, at 232 and see also his article, n 37 above.

[55] See especially, Dressler, n 32 above; Greenawalt, n 37 above above; Gur-Arye, n 13 above; and Gur-Arye, n 37 above.

[56] See, eg, Fletcher (1985), n 37 above, at 76; Robinson (1975), n 37 above, at 284. Hart, explaining the importance of the distinction, wrote:

> Killing in self-defence is an exception to a general rule making killing punishable; it is admitted because the policy or aims which in general justify the punishment of killing . . . do not include cases such as this. (Hart, n 38 above, at 13–14)

As is hinted above, there were those who cast doubt on the justified character of private defence and we shall examine these less accepted opinions below.

deal with private defence, there is no need to contend with all the worthy arguments raised against the distinction and its implications; setting forth the following assumptions will suffice:

Firstly, even the greatest critics of the distinction and its implications fully agree that the distinction has enormous moral and value importance. Moreover, most of them do not criticise the distinction at all, but they criticise its definition and the implications that are attributed to it by its supporters. Thus, for example, Dressler concludes his sharp criticism of Fletcher's theory concerning the distinction as follows[57]:

> The lines between justified . . . and . . . excused . . . behavior are morally significant. If morally significant distinctions exist, it should matter to those concerned with the criminal law to find and draw those lines.

Greenawalt also concludes his interesting article on 'the perplexing borders' between justification and excuse with the assertion that the distinction 'is very important for moral and legal thought'[58]. The remaining critics also generally accept this approach.[59]

Secondly, a distinction should be made between two separate questions (despite the mutual affinities between them): the first—should a distinction be drawn between justification and excuse? and the second—if the answer to the first question is affirmative—should various implications of this distinction be adopted? With regard to the first question, it appears to me that there is a near consensus according to which it is both desirable and appropriate to make the distinction. Although the accused is exonerated both in the case of justification and in the case of excuse, a distinction should nevertheless be made between the two types of acquittal and a more complex message than just guilty or innocent should be delivered. A distinction should be made between one who is innocent because his act is desirable and morally justified (justification) and one who is innocent since he is 'forgiven' for his act because of a lack of guilt (excuse). This distinction gives a clearer response to the public at large as to how they should relate to an acquittal, and holds greater educational value, clarity, and guidance for behaviour.[60] Lack of distinction causes undesirable results. The tendency is to consider all the criminal law defences according to their common denominator (which is a relatively minimal one—only excuse from responsibility), so that a person is often disgraced when from a value judgment point of view there is no justification to malign him.[61]

[57] Dressler, n 32 above, at 99.

[58] Greenawalt, n 37 above, at 312.

[59] See, eg, Gur-Arye, n 13 above, at 216, 229.

[60] See, in a similar spirit, Greenawalt, n 37 above, at 270ff.

[61] Boaz Sangero, 'Will the 'Purposes' in Criminal Offences become 'Motives'? And is the 'Dolus Indirectus' Moving in a New Direction? (More on 'With Intent to Injure' as an Element of the Criminal Offence of Defamation and on the Interpretation of the Criminal Law)' (1988) 18 *Mishpatim* 337 (Hebrew) at 350–51.

A more far-reaching result that may arise from the absence of a distinction is that the unwillingness of the court to give the wrong message, namely that the act of the accused was appropriate, may lead to the conviction of the accused, when it would be more correct to acquit him on the basis of an excuse.[62]

Modern criminal law should strive to make all the distinctions that it is reasonably possible to make and that have social-value-moral significance. Regarding the importance of the social-value-moral distinction between justification and excuse, it seems to me that there is no dispute. With regard to the difficulty in categorising specific defences on one side or the other of the distinction, I shall suggest possible solutions—at least for the purpose of the discussion on private defence. Firstly, the existence of difficulty in categorisation and distinction need not, of itself, negate the distinction, just as the existence of the interim state of twilight does not negate the basic distinction between day and night. Modern criminal law makes other difficult distinctions, such as the distinction between an act and an omission, and it is unacceptable to discard them just because they are difficult to use. Moreover, for the purposes of the discussion on private defence, it suffices to acknowledge that private defence carries an obvious character of justification, namely an action that is justified and free from any moral reproach. In order to give basis to this conclusion it is of course necessary to 'cleanse' private defence of those cases that are sometimes included within it by mistake. This 'cleansing' that we will conduct below necessitates a precise definition of the boundaries of classical private defence, the nature of which clearly constitutes justification. This 'cleansing' does not, of course, negate exemption from criminal responsibility based on other grounds, and especially on the grounds of the accepted excuses of 'factual mistake' and of 'necessity'. The benefit of such a characterisation of private defence—as will be established below—should be immense, since such a characterisation will tell us far more about the defence than the mere fact of it being a defence against criminal responsibility.

Finally, with regard to the matter of the difficulty of categorisation, even the general problem (which is beyond the subject of our discussion—private defence as a whole) can be solved by definitions of 'justification' and 'excuse', which will not strictly require the categorisation of defences that cannot be fitted into one of the two categories. It will, in other words—at least theoretically—allow for the possible existence of defences that have a mixed character.[63] Although the distinc-

[62] See Robinson (1975), n 37 above, at 277 fn 45. And see a similar opinion in PDW Heberling, 'Justification: The Impact of the Model Penal Code on Statutory Reform' (1975) 75 *Columbia Law Review* 914 at 921.

[63] For a similar idea see Greenawalt, n 37 above, at 290ff, and see there at 269 a discussion of another possibility—an approach comprised of more than the two categories ('justification' and 'excuse'). For an additional approach to this matter that sees certain defences, such as insanity and status of a minor, as conditions that preempt criminal responsibility, and for which no attempt should be made to classify them as either justification or excuse—see Kremnitzer, n 10 above, at 197ff.

tion will not tell us a lot about such mixed defences, under the assumption that there are only a few of them, we can make the distinction with regard to all the other defences without being forced to give up and abandon the distinction entirely.

As noted above, most of the criticism is directed not at the distinction itself, but towards the various implications attributed to it by its supporters. There are implications that, should indeed be rejected. For example, the implication that is often discussed, which is accepted in German law[64] and was adopted by the American Model Penal Code (MPC)[65], according to which private defence is also allowed against an 'excused' act, while it is prohibited against a 'justified' act, is not correct. As we shall see below, an assault by an aggressor whose act was excused, such as an insane aggressor, should be considered—according to the actual circumstances of the case—as a defence of necessity or mistake (putative defence) and not as private defence. At this stage it is important to emphasise that discarding this implication of the distinction, as well as the negation of its other implications, does not necessitate abandonment of the distinction itself.

The question that should be asked with regard to each implication is whether the distinction between justification and excuse actually dictates that result. It is perfectly clear that it is not necessary to make a distinction between 'justification' and 'excuse' with regard to each and every question (such as the right of resistance to a 'justified' act as opposed to the right of resistance to an 'excused' act). Exactly in the same way, no distinction is made with regard to the central outcome of the two types of defences—the negation of criminal responsibility.

With regard to other implications, it appears that the greatest difficulty is the unfounded assumption that it is possible to apply them in a sweeping and 'automatic' fashion, without examining other relevant details. Thus, for example, the alleged implication that assisting a person whose act is justified is always justified too, is incorrect. It could definitely happen—as we shall see below—that the necessary requirements of the defence do not exist with regard to the assistant, and that his act is therefore not justified, although the act of the person whom he assists is justified.[66]

I wish to clarify that there is no intention to propose solutions to any of the issues of private defence by automatically differentiating them from the categorisation of private defence as 'justification'. Although the moral and justified character of an act of private defence has enormous importance, and we can learn much from it for the solution of various issues, there is still a need to examine each issue not only in the light of private defence being a justification, but principally,

[64] See, eg, Gur-Arye, n 37 above, at 73.

[65] See the definition for 'unlawful force' in section 3.11(1) of the Model Penal Code (1962).

[66] Thus, eg, it could happen that A assists B who has justification, while A is not aware of the justifying circumstances. Further on, I shall provide basis for the approach according to which the conditions of 'justification' constitute awareness of the justifying circumstances—see Ch 3.10 below.

in the light of the specific, appropriate rationale for private defence on which it is based, as will be done below.

Assuming one reaches the reasonable conclusion that the distinction does not dictate a practical implication of any sort, the question arises—at least prima facie—if there is still room for establishing such a distinction. The answer—which was provided above—is affirmative. However, the additional question arises whether there is a need to include the distinction in the Penal Code itself.[67] It is interesting to note Greenawalt's clarification here[68]. According to Greenawalt, even though the German law serves as a model for the implementation of the distinction, the German Penal Code in general is no more systematic than the American MPC[69] with regard to the distinction between justification and excuse. As Greenawalt indicates, the greatest difference with regard to the distinction between German law and Anglo-American law is not to be found in the law itself, but rather among legal scholarship. In German jurisprudence, scholars are responsible for the development of the distinction and due to their status in this legal system, they enjoy immense influence on the positive law through court decisions. Moreover, Greenawalt opines that the correct place for the development of an appropriate theory for the distinction is in academic circles rather than in the courts, and not even through legislation. The distinction—even though it has no explicit expression in the Penal Code—appears to hold a respected position in legal theory and plays an important role in the formation of the defences, both in the realm of legislative reform and as a useful interpretative tool for the court[70].

As stated above, for the purpose of the present research the crucial point is the justified character of private defence. Some of the variations in the perception of this characterisation of justification should be noted. One major dispute exists between Robinson and Fletcher. Robinson[71] sees 'justification' as an act that the society wishes would be performed, taking into account purely utilitarian considerations, namely the lack of 'societal harm' caused by the act under circumstances of justification. Fletcher[72] claims that, in order to be justified, the act must be morally right, apart from any utilitarian considerations of whether actual harm is caused. A second major dispute, which in part overlaps with the first, exists between Fletcher and Dressler[73]. In the opinion of the latter, Fletcher's perception of the justification is too narrow, since justification should cover not only the

[67] For comprehensive discussions of this question, see Gur-Arye, n 13 above; Gur-Arye, n 37 above.

[68] See Greenawalt, n 37 above, at 273.

[69] With regard to the opinion that is expressed in the MPC see Fletcher (1985), n 37 above, at 89. A good example of an incorrect perception of the distinction in the MPC is the categorisation of putative defence as 'justification', a categorisation that will be discussed below.

[70] For a similar opinion see Gur-Arye, n 13 above; Gur-Arye, n 37 above.

[71] See, mainly, Robinson (1975), n 37 above.

[72] See, eg, George P Fletcher, 'The Right Deed for the Wrong Reason: A Reply to Mr. Robinson' (1975–76) 23 *University of California at Los Angeles Law Review* 293; Fletcher (1985), n 37 above.

[73] See Dressler, n 32 above.

morally 'good', but also neutral or 'tolerable' behaviour. Fletcher—after grappling with the concept in his writings[74]—unambiguously chose the view of justified behaviour as 'right'[75], while Dressler disagrees and suggests also including behaviour deemed 'permissible'.

The curtain goes down too early within the framework of this research for delving deeply into these interesting disputes. It is proposed here that justification be characterised according to Fletcher's position—as justified also morally—in order to derive substantive benefit and to learn significant things from the distinction.

To conclude the discussion on the above-mentioned distinction, it should be noted that the characterisation of private defence as a justification is important for two purposes: firstly—for its general characterisation as a justified and morally good act, and secondly—in order to profit from the many discussions that have taken place in past years regarding the term 'justification'. These discussions, in my estimation, have a lot to teach us about private defence as well, even if only for the sole reason that their authors assumed private defence to be part of the category of 'justifications'. As mentioned, no extensive use will be made of the categorisation of private defence as a justification in order to elicit definitive implications from the categorisation itself. Each and every issue will be examined first and foremost in the light of the most appropriate rationale for private defence. The classification of private defence as 'justification' will be used mainly for a general characterisation as an act that is justified and morally good, and also, at most, for a prima-facie rejection of patently incorrect assumptions.

1.2 The Distinction between an Offence and a Defence

No less important for the subject of our discussion than the distinction between justification and excuse, which we have described above, is the distinction between the definition of an offence and the definition of defence in general and a justification in particular. This distinction also warrants a complete and comprehensive research of its own,[76] which it is not possible to include within the framework of this book. Nevertheless, it is important to explain the principles of

[74] See George P Fletcher, 'The Right to Life' (1979) 13 *Georgia Law Review* 1371, and also Dressler, n 32 above, at 71ff.

[75] See George P Fletcher, 'Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?' (1978–79) 26 *University of California at Los Angeles Law Review* 1355, and also Dressler, n 32 above, at 74ff.

[76] See, eg, Fletcher (1978), n 1 above, at 552, 579; Fletcher, n 74 above, at 1383, 1388; Robinson (1975), n 37 above; the responding article by Fletcher, n 72 above; M Giles, 'Self-Defence and Mistake: A Way Forward'. (1990) 53 MLR 187; SMH Yeo, 'The Element of Belief in Self-Defence' (1989) 12 S*ydney Law Review* 132; NJ Reville, 'Self-Defence: Courting Sober but Unreasonable Mistakes of Fact' (1988) 52 *Journal of Criminal Law* 84; RL Christopher, 'Unknowing Justification and the Logical Necessity of the Dadson Principle in Self-Defence' (1995) 15 OJLS 229; Fletcher, n 46 above, at 93ff.

this distinction because of its great importance for the subject of private defence. Naturally—because of the classification of private defence as justification—we shall concentrate on the distinction between the definition of an offence and a specific area of the defences—the justifications.

The problem of classification that causes significant difficulty with respect to the distinction between justification and excuses is, in my estimation, less problematic with regard to the distinction between the definition of an offence and the definition of defences in general (and in particular the justifications). The main reason for this is that while the law does not usually determine the first distinction, and its interpreters have to define it by themselves, the second distinction is determined quite clearly by the legislator himself. Although the legislator also faces difficulties in deciding whether to include certain components in the definition of the offence or in the definition of the defence, from the moment that the penal code is enacted, most of the outlines of the distinction are already provided in the penal code itself, so that at least from a formal normative point of view, the code distinguishes clearly between offences and defences.

Specific difficulties of classification are raised by expressions that are included in the definitions of certain offences—expressions such as 'illegal', 'unlawful', etc. One possible approach is to assign minimal significance to these archaic expressions, and even to practically ignore them.[77] A similar result is also attained by determining that such a circumstance that is part of the definition of the offence subsumes the relevant defence within the offence, together with all its components (including any mental element that may be required for the establishment of the defence).[78] However, if we ascribe content to the element 'unlawfully', and the defence accordingly becomes an integral part of the definition of the offence itself, then the distinction between the offence and the defence fades significantly. The implications of the blurring of this distinction are not only theoretical.[79]

The distinction that is the subject of our discussion has crucial importance for four principal topics: the application of the principle of legality on defences; the burden of proof of defences and its degree; the mental element required for the establishment of the defence; and the reasonability of the mistake that creates a putative defence. It is interesting to note that even though there are connections between the various approaches with regard to each of the four above-mentioned

[77] See, eg, Williams (1983), n 13 above, at 27ff.

[78] See, eg, the opinion of Leigh that is described, without any reference being given, in Giles, n 76 above, at 194 fn 63. And see also the English ruling that was determined in the holding, in the case of *Albert v Lavin* [1981] 1 All ER 628.

[79] See, eg, the courts' rulings in *Gladstone Williams* [1983] 78 Cr App R 276, and *Beckford v the Queen* [1987] 3 WLR 611, 3 All ER 425—that a mistake with regard to a defence is not subject to the requirement of reasonability—in exactly the same way as a mistake regarding an element in the definition of the offence itself—a decision that the courts in England actually based on the word 'unlawfulness', although it can be justified on grounds of principle. For a detailed discussion of these court-generated rules see, eg, Reville, n 76 above; Giles, n 76 above.

issues, there is no theoretical necessity to hold an identical approach for all four topics that either denies the implications of the distinction between an offence and a defence or derives implications from the distinction between an element of the offence and an element of the defence. And indeed, most of the scholars hold complex views with regard to this distinction. Thus, for example, while there is a near consensus among scholars that no significant distinction should be made with regard to the matter of proof, between the elements of the offence and the justification[80], at the same time there is also a near consensus among scholars that a distinction should be made between them in the matter of the mental element required in general, and concerning the requirement for awareness of the justifying circumstances in particular.[81]

A similar situation exists—as described above—with regard to the distinction between justification and excuse: it seems that nobody would dispute that the distinction under discussion here (offence/defence) has great theoretical importance. However, just as beyond the wide agreement with regard to the importance of the distinction between justification and excuse there is a dispute with regard to the implications that may be derived from it; thus too with regard to the distinction between the offence and the defence. The opinions of the scholars are divided. We shall therefore proceed to a discussion of the various implications that may be drawn from this distinction.

A basic principle in the field of criminal law, the importance of which cannot be underestimated, is the principle of legality, according to which there is no offence, and no punishment for an offence unless determined by law or pursuant to the law and that there is no retroactive punishment[82]. The legality principle has several accumulative central explanations. One of these explanations—granting fair warning to the individual—concerns the freedom of action of an individual, based on his knowledge of the prohibition at the time of the action. A central function of the criminal law is to prevent offences. Other main explanations refer to the stability of social norms, the equal enforcement of the law, and the separation between government authorities and the distribution of authority between them. The principle of legality has several important implications, and principal among them are: the requirement of making criminal law public, and of providing a clear and detailed definition of the prohibition; the rules concerning strict interpretation that narrow

[80] See, eg, Fletcher (1978), n 1 above, at 545ff. Although it is accepted that a certain burden is imposed on the defendant with regard to the defence—to point out the possibility of its existence—however, this burden does not create a significant distinction, since the prevalent opinion is that from the moment that the defendant raises this light burden, the rule applies that the prosecutor must negate the existence of the defence beyond all reasonable doubt. See also below n 1097; nn 114–15 and accompanying text; and compare these to n 50 above.

[81] In this matter, it appears, that it is preferable, for reasons of efficiency, to refer to the writings of the scholars who hold the exceptional and unaccepted view that objective justifying circumstances suffice for establishing the justification—see Williams (1982) n 1 above, at 741; and Robinson (1984), n 37 above, vol 2 at 7–29. See also Ch 3.10 below.

[82] See, eg, Williams (1983), n 1above, at 11ff.

the scope of the prohibition, and concerning the ban on retroactive application of a criminal norm.

In modern criminal law there is no dispute today that the principle of legality reigns supreme, at least regarding offences. A serious question is whether it should also be applied to defences. This question focuses on two principal aspects: the clarity of the criminal norm and the authority of the court. We shall begin with the authority of the court. The central questions within the framework of this issue are how should the court interpret an existing defence that is determined by law, and whether it is authorised to create new defences on its own initiative. With regard to the interpretation of existing defences, we should consider the rule that is accepted in modern criminal law according to which criminal norms should be strictly interpreted in a way that restricts the scope of the prohibition[83]. This rule does not indicate a choice of tenuous interpretation, the product of acrobatic interpretation that makes a mockery of the prohibition as determined by law. Instead, it asserts that between two **reasonable** interpretations of a norm, the one that restricts the scope of the offence should be chosen, or to state it more generally in a way that may also encompass the defences, the interpretation that leads to greater reduction of the scope of criminal responsibility (and thus causes less restriction of an individual's liberty) must be selected.

As was clarified by Robinson, who supported the application of 'the rule of strict interpretation' to defences as well, this rule actually means wide interpretation with regard to defences (since wide interpretation of a defence—one which negates criminal responsibility—is the one in particular that narrows the scope of the criminal prohibition). Accordingly, he suggested the use of the term 'interpretation in favor of the accused' instead. In his opinion, the annulment of a defence or its narrow interpretation (which enlarges the scope of the prohibition) constitutes a clear and forbidden infringement upon the right of the individual, as expressed in the principle of legality, to receive fair warning prior to the imposition of punishment.[84]

This is essentially the prevalent view among scholars.[85] The Israeli Supreme Court, for example, addressed the issue accordingly in the case of Affangar[86]:

[83] On the tremendous logic that underlies this basic rule of criminal law, see: Mordechai Kremnitzer, 'Interpretation in Criminal Law' (1986) 21 *Israel Law Review* 358 at 370–73; Boaz Sangero, 'Interpretational Acrobatics in Criminal Law and a Quiet Death to the Rule of Restrictive Interpretation? (More on 'With Intent to Injure' in the Offence of Defamation)' (1998) 29 *Mishpatim* 723 (Hebrew); Sangero, n 61 above, at 339–43; and Boaz Sangero, 'Broad Construction in Criminal Law?! On the Supreme Court Chief Justice as a Super Legislator and Eulogizing the "Strict Construction Rule" ' (2003) 3 *Alei Mishpat* 165 (Hebrew).

[84] See Robinson (1984), n 37 above, vol 1 at 159ff.

[85] See, eg, RM Perkins and RN Boyce, *Criminal Law*, 3rd edn (Mineola, NY, 1982) at 1143; and Perkins, n 40 above, at 161.

[86] CA 89/78 *Affangar v the State of Israel* PD 33(3)141. A separate question is whether the interpretation of Justice Elon, to which the above quotation of his words relates, constitutes legitimate legal interpretation.

> Although it is a criminal order, the purpose of wide and liberal interpretation is intended to enlarge the scope of application of private defence and to increase the possibility of acquitting a person who has come to the defence of another.

Another approach, which is accepted by only a few scholars, restricts the application of the principle of legality so that it cannot be applied to the interpretation of defences[87]. According to this school of thought, the defences in particular and the general norms in the Penal Code in general, are not part of the guiding message of criminal laws, and are not intended to direct individual behaviour, but are designed solely to direct court rulings.

A third possibility proposed herein, is to distinguish, for the purpose of application of the principle of legality on defences, between defences of the justification type and defences of the excuse type. Such a distinction can be based on the assertion that excuses are not part of the guiding message of the legislator to individuals, while justifications do constitute part of this message, along with the criminal offences. My suggested distinction is inspired by the famous distinction of Dan-Cohen between 'decision rules' and 'conduct rules' in criminal law.[88] Thus, just as the legislator directs the individual to avoid certain behaviour when he enshrines an offence in law, he similarly instructs the individual when he establishes a legal justification that in these special circumstances it is desirable that the individual should perform the prima facie prohibited act. By way of illustration: just as by means of the offence of false imprisonment the legislator directs the individual to refrain from denying liberty to others, so in a similar fashion, by way of the justification defence that is based on a duty or authority determined by law, the legislator directs the police officer to arrest the suspect in accordance with the law. In contrast to this, defences of the excuse type are not intended to direct behaviour, but are only applied retroactively and direct the judge not to convict the accused. For example, the legislator does not intend by establishing the defence of 'duress' to direct the person under threat to fulfil the demands of the one who threatens him and to harm an innocent third party, but he does intend to direct the judge not to convict the one who was threatened and who committed the crime by surrendering to the threat. This is because society understands the difficult situation in which the threatened individual finds himself and forgives him. In accordance with this distinction between justification and excuse, the rule of 'interpretation in favour of the accused' should apply to justifications, which direct behaviour, in order not to infringe upon the right of the individual to fair warning, but not to excuses, since they are not intended to direct an individual's behaviour at all.

[87] See the approach that exists in German law as it is described in Fletcher (1978), n 1 above, at 574ff.

[88] See M Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' (1984) 97 *Harvard Law Review* 625.

As to the issue of creation of new defences by the court, here there is much dispute. According to one approach[89], there is a need to distinguish between the determination of new offences and the determination of defences that are not mentioned in the law. Granting authority to judges to create offences would violate the principle of legality. The citizen who stands in danger of losing his liberty has a right to have the basis for this denial of freedom predefined in the law. But granting authority for judges to create defences would not injure this basic principle. Such creation does not harm the defendant; on the contrary, it benefits him. Robinson, as mentioned above, also applies the rule of legality to the interpretation of defences and derives the rule regarding wide interpretation of defences from this principle. He also expresses his opinion that as opposed to the situation with regard to offences, the rule that prohibits judicial creation does not apply to defences, since the rationale of fair warning does not exist[90]. Other scholars have expressed similar opinions.[91]

In opposition, an approach exists that adopts an uncompromising application of the principle of legality to negate the creation of new defences by the court. It was argued, for example, that the principle of legality in criminal law, which not only requires that a prohibition and a punishment should be determined according to the law, but also, to the same extent, requires that even a defence can only be set forth by law, compels us to attribute tremendous significance to the above limitation.[92] It was therefore called '[the] other facet of the principle of legality in the criminal law'.[93]

This approach was also expressed in the draft proposal for the Israeli Penal Code (Preliminary Part and General Part) 1992.[94] Section 40 of this draft, whose title is 'Defences According to the Law', establishes the following rule: 'there is no defence to criminal responsibility except in the cases and under the circumstances that are determined by law'. In the explanation for this section, it is written that:

> The state of the defences in modern criminal law, as distinguished from the past, has reached a stage of maturity and consolidation that is similar to that of the criminal prohibitions; it is therefore proposed not to allow the development of defences by judicial ruling. Section 40 expresses the recognition of this situation. The determination that there are no defences except those established by law grants a degree of certainty and decisiveness to criminal prohibitions that they deserve.

[89] Arnold N Enker, *Duress and Necessity in the Criminal Law* (1977) (Hebrew) at 103.

[90] See Robinson, (1984), n 37 above, vol 1 at 159ff.

[91] See, eg, JC Smith, *Justification and Excuse in the Criminal Law* (London, 1989) at 126; Gardner, n 37 above, at 126.

[92] Feller, *Elements of Criminal Law* (1984), n 14 above, vol 2 at 422.

[93] SZ Feller, 'Application of the "Foundations of Law Act" in Criminal Law' in *Essays in Honour of Justice Zussman* (1984) 345 (Hebrew) at 351.

[94] See Draft Penal Code (Preliminary Part and General Part) (1992) at 134.

It should be noted that the proposal that appears in the draft was omitted from the General Part of the Penal Code as enacted in 1994 by The Knesset (the Israeli parliament).

The insistence on the application of the legality principle for the negation of the authority of the court to create defences does not stem from the need for fair warning to the individual (since in creating a defence the court reduces the criminal responsibility and does not widen it), but from rationales that relate to the stability of social norms, to the separation of powers between the state authorities, and also perhaps, to a lack of bias in the enforcement of the law. Therefore, in my estimation, the power of the principle of legality with regard to the negation of creating defences by adjudication is weaker than its power with regard to the negation of creating offences by adjudication.[95]

Fletcher[96] suggested an explanation for these two differing views by comparing Anglo-American law to German law. In the first, there is a tendency to see the legislator as the supreme authority, and the court as devoid of authority, both for the creation of offences and for the creation of defences. In contrast, in German law, despite the general commitment to the principle of legality (that is established by the Constitution itself), the court is seen as authorised to create defences, and even does so in practice based on the requirement of proof of the general element of 'illegality' or 'wrongdoing'—a requirement that exists in German law but not in Anglo-American law. In Fletcher's opinion, this is in effect the difference between a positivist conception (in the common law) and a non-positivist conception (on the Continent). As he notes, the difference is not so sharply polarised since there is a general principle in American law that was established by legislators in various states, of 'the lesser evils' (following section 3.02 of the MPC), and the court infuses it with content.

As stated above, the question regarding the application of the principle of legality to defences has another facet—the clarity of the criminal norm. One of the implications of the principle of legality is the requirement for a detailed and clear definition of the prohibition—a requirement that is intended to ensure fair warning for the individual. This requirement has great weight in legal systems that have a Constitution that allows the court to repeal legislation that does not conform to this requirement. Such authority exists in the American system, and in relation to this system Robinson suggests the application of the principle that invalidates a vague prohibition even for the formulation of defences.[97]

[95] Silving stood firm on the danger of abuse of authority by the court in renewing defences as a usage that would thwart the instruction of the legislator—see Silving, n 45 above, at 386ff.

[96] See Fletcher, n 72 above, at 316ff; Stanford H Kadish (ed) *Encyclopedia of Crime and Justice* (New York and London, 1983) vol 3 at 945ff, (it is worth noting that the entry 'justification-theory' that appears on these pages is written by Fletcher); Fletcher (1978), n 1 above, at 573ff.

[97] See Robinson (1984), n 37 above, vol 1 at 159ff.

In contrast to Robinson, Fletcher suggests making a distinction regarding this issue between an offence and a defence, allowing a greater amount of vagueness for a defence in comparison to that which is allowed for an offence.[98] The accepted reasoning for such a stance is based primarily upon the demands of reality: the defences are usually[99] general and therefore vague in comparison to the offences, since there is no reasonable possibility of predicting all the types of cases that will constitute them. This stance is based on the rare occurrence of the elements that constitute a defence and on the fact that it is possible to restrict the principle of fair warning to the typical cases that exist within the realm of the prohibition. Indeed, it seems that terms such as 'reasonability' and 'necessity', which are by nature vague, appear as part of the defences and not the offences. This situation is preferable to including terms such as 'lack of reasonability' and 'lack of necessity' within the definition of the offence.

If we return to the distinction that was suggested above, between the justifications—which direct behaviour, and the excuses—that were not intended to direct behaviour at all, it is suggested that neither the view of Fletcher nor that of Robinson should be adopted. Instead, in my view, the rule that negates vague prohibitions should be applied to justifications, but not to excuses. Regarding justifications only, it is important not to violate the right of the individual to fair warning, since the justifications direct behaviour. But in contrast to the obvious logic in allowing courts to repeal a vague offence, no such logic exists as far as a vague justification defence is concerned, and the only option that remains is for the courts to interpret such a defence as broadly as possible.

The dispute between Robinson and Fletcher is even broader, and brings us to an extremely important question: whether a value-substantive difference exists between an element that is included in an offence and an element that is part of a justification. This important question has significant implications for the field of substantive law regarding two central issues: the mental element required in order to establish justification, and the demand for reasonability of a mistake in putative defence.

According to the approach that does not make a significant distinction between the offence and the justification (Robinson's approach), no mental element of any sort is required in order to establish the justification. The objective justifying circumstances are sufficient in themselves (since the existence of justifying circumstances is comparable to the non-existence of a (negative) factual element of the offence). In contrast, according to the above-mentioned approach that makes the distinction between the offence and the justification (Fletcher's approach), there

[98] See Fletcher (1978), n 1 above, at 561ff; Fletcher, n 72 above, at 312ff. See also Gardner, n 37 above, at 126.

[99] 'Usually'—since there are defences, such as the defence of justification relating to performance of a law or complying with an order of an authorised authority, which can be defined precisely, exactly in the same way as offences.

is a requirement that the actor at least have awareness of the justifying circumstances in order to state that he acted on the basis thereof, and also perhaps a requirement of a certain purpose (such as—in regard to the matter under discussion—the purpose of defending himself or defending another). According to this approach, the facts (the circumstances of the justification) only have value and legal significance when the actor is aware of them.

As to the question of putative defence, according to the approach that does not distinguish between an offence and a justification there is no need to require reasonability of the mistake, just as reasonability of the mistake is not required with regard to the factual component in the definition of an offence in order to negate responsibility.[100] The other approach—according to which there is a substantial difference between an offence and a justification—does not dictate any particular answer to the issue of putative defence. Although it does not categorically require or negate the requirement of reasonability of the mistake, it may require it, for example, when policy considerations are involved[101]. These are, in brief, the implications of the various approaches regarding the mental element and reasonability of the mistake—issues that will be discussed more extensively below. For now, it is sufficient to describe their basic outlines, in order to examine the fundamental dispute that stands behind them.

Robinson presented his approach comprehensively, particularly in his article entitled 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability'.[102] According to Robinson, since criminal law strives to avoid harmful consequences more than it desires to punish a non-harmful bad intention, harm should therefore be required as an essential condition. The legislator is the one who determines—generally—what constitutes 'harm', and the courts complete this task. Since criminal law cannot—if only from a practical point of view—determine the correct behaviour in every situation (both because it must generalise and because human moral decisions may be too complex), criminal law defines behaviours that usually cause damage (the offences) and the justifications sort out those which in the general balance do not cause damage. In Robinson's opinion, even though a justification is named as a 'defence', it is preferable—from a substantive point of view—to see it as an element of the offence (a negative element—of non-existence of justifying conditions). His rhetorical question is: If in a situation of 'justification', as explicitly defined, no damage of any sort is caused—then what

[100] This refers, of course, to basic criminal responsibility, based on *mens rea*, ie, actual awareness of the basic factual component of the offence (apart from the forbidden norm) and expectation of the result—if such is required in the definition of the offence. With regard to responsibility for an offence of negligence it is, as known, sufficient, to have potential awareness, to impute responsibility to an actor who made an unreasonable mistake (ie, was negligent), with regard to the existence of the defence.

[101] See the discussion of the issue of private putative defence in Ch 5.2 below, and especially the discussion of this issue in the light of the distinction between an offence and a defence, in the text commencing with the reference to n 1112.

[102] See Robinson (1975), n 37 above; Robinson (1984), n 37 above, vol 2 at 7ff.

should be punished? In the end, he proposes as a solution to the problem of the actor who is unaware of the justifying circumstances, that an unsuccessful and punishable attempt or the specific offence of an attempt to act unjustifiably, be imputed to the actor.[103]

Stratenwerth[104] also claims that there is no significant difference between an offence and a justification, noting that the inclusion of a certain element in the definition of an offence or justification often depends on the technical-legislative arbitrariness of the legislator. In his opinion, just as acts that do not constitute an offence may nevertheless contravene accepted social norms, acts that fall within the definition of an offence may constitute normal behaviour. Stratenwerth's reasoning in effect consists of a response to the reasoning of Fletcher and an attempt to refute it using contradictory (and rare) examples. We will therefore proceed to examine Fletcher's reasoning.

Fletcher[105] prefers to focus on 'wrongdoing' instead of 'harm'.[106] In his view, the crucial difference, for our discussion, is between harm that is not the concern of criminal law at all (such as killing a fly, which does not fall within any legal prohibition) and harm that is a justified exception for a certain offence (such as the exception of private defence to an offence of causing the death of another). In his opinion, claims of justification—unlike the components of the definition of an offence—assume an admirable purpose. Fletcher suggests distinguishing between two separate issues: the essence of the distinction between an offence and a justification, as opposed to the definition of the boundaries separating them. The fact that there are problems of classification—such as the right place for the component of 'consent' (of the victim)—cannot negate the existence of the distinction itself.[107] The fundamental idea is that from a social and moral point of view we sense a difference between regular, routine and accepted behaviour (that does not fall within the area of prohibition), and behaviour that is prima facie or a priori 'wrong'. Although the latter may be considered 'right', it is only considered 'right' when accompanied by 'good reasons'. This is in effect the difference between punching a ball and punching a jaw. An additional example of this value distinction is that of abortion. The choice that we make between the determination that abortion is not an offence at all and the determination that a justification

[103] Already at this stage I wish to call attention to the immense artificiality that, in my opinion, exists in attributing a mere attempt to a situation where all the factual and mental elements of the offence exist.

[104] See Stratenwerth, n 36 above.

[105] See, principally, Fletcher, n 72 above; Fletcher, n 74 above, at 1383ff; Fletcher (1978), n 1; Fletcher's words in the *Encyclopedia of Crime and Justice*, ed by Kadish, n 96 above, vol 3 at 945ff.

[106] See especially Fletcher, n 72 above, entitled 'The Right Deed for the Wrong Reason: A Reply to Mr. Robinson'.

[107] My view with regard to problems of classification was presented above, in the previous section, in relation to the distinction between 'justification' and 'excuse' (see the text following the reference to n 62 above. It relates also to the present subject of our discussion—the distinction between 'offence' and 'justification').

is possible, expresses our value position. Abandonment of the distinction between an offence and a justification leads to the consideration of abortion as identical to the killing of a fly.

An additional consideration in establishing the boundary between offences and justifications (a determination that is, of course, made by the legislator) is the probability of its occurrence. Thus, with respect to unreasonable driving, for example, the theory of probabilities dictates (since the factual assumption is that most driving behaviours are reasonable) that the requirement of non-reasonability should be included within the definition of the offence itself, since it would seem strange (at the very least) to prohibit driving and to grant a justification for reasonable driving. In relating to private defence, Fletcher notes that the commands against assault and killing are sufficiently strong to negate the need to condition the definition of the offence itself on the non-existence of private defence. The implication is that the objective circumstances of private defence are insufficient to bar the conviction. Fletcher suggests the distinction that Robinson avoids making between 'just events' (such as: it is just for the aggressor to die) and a 'justified act'. In the case of a 'justified act' the defender will also be required to have a certain mental element—at least awareness of the circumstances of the private defence—and perhaps also be a requirement for the behaviour to have the goal of defence—in order to establish the justification. As Fletcher wrote[108]: 'There appears to be a teleological element in justified conduct'.

This latter remark by Fletcher brings us back to the various perceptions of the nature of justification, which we explained in the previous section: the perception of 'justification' by Robinson as an act that the society wishes would be performed, while taking utilitarian factors (lack of 'societal harm') into consideration; as opposed to Fletcher's perception, according to which the 'justified' act must also be justified morally—namely, be justified, good and correct behaviour. In this fundamental dispute, I prefer, as I mentioned, the approach of Fletcher. As we shall see below, the general character of private defence is suited to a perception of 'justification' as morally justified, more than to its perception as an act that the society wishes would be performed from a purely utilitarian point of view. It appears that Robinson remains almost alone with his radical approach, according to which there is no substantial difference between an offence and a justification.[109]

The decisive majority of scholars support the approach—that appears to me to be correct—that there is a substantial difference between the components of the offence and the components of the defence. Thus Greenawalt, for example, bases his opposition to Robinson's approach, according to which awareness of the

[108] Fletcher, n 72 above, at 320.

[109] We should in this context mention Williams (who holds a position similar to Robinson's), although we were not privy to an explication—in writing—of Williams' laconic position, according to which there is no theoretical abyss between elements in the offence and in the defence (see Williams (1982), n 1 above, at 734).

justifying circumstances is not required, on a strong feeling that 'justification' in law must correspond to a moral evaluation.[110] Even Dressler, who, as mentioned, opposes Fletcher's perception of justification,[111] holds the opinion that the distinction between an offence and a defence is very important from a moral viewpoint and that it should be taken into consideration in criminal law.[112]

Convincing evidence that there is a near consensus among scholars and legislators with regard to the existence of a substantial difference between an offence and justification is the fact, which we shall explain more fully below, that the vast majority of laws and proposals require awareness of the objective circumstances of justification as an essential condition for its establishment.[113]

Finally, as to the issue of proof, the opinion accepted today by most scholars, that no distinction should be made between an offence and a defence,[114] appears to me to be correct. Even those who claim that there is a substantive difference between them,[115] agree that the presumption of innocence and the standard of proving guilt beyond all reasonable doubt should apply to the components of the defence.

1.3 The Rationale of Private Defence from a Historical Perspective

A historical perspective is crucially important in order to understand the law in our times. This perspective has significant importance for many of the issues of private defence, and it will be useful further on. In this section, I will therefore briefly discuss the general perception of private defence as it was viewed in antecedent legal systems.

The general historical process (in a number of legal systems) that is of interest is the transition from punishment for acts that were performed as private defence—via the grant of an excuse—through the establishment of a justification. It is generally assumed that before the formation of human society concern for personal survival was predominant. Force reigned supreme. Therefore, with the unification of society, one of the first actions of the legislator was to suppress all forms of taking the law into one's own hands, including private defence. The classical means used to achieve this goal was to impose strict liability. In previous eras

[110] See Greenawalt, n 37 above, at 294.
[111] See the text accompanying n 73 above.
[112] See Dressler, n 32 above. at 98.
[113] See Ch 3.10 below.
[114] See n 80 above and the accompanying text; and n 1097 below. Compare this with n 50 above.
[115] Fletcher himself suggests that no distinction should be made between an offence and a defence with regard to the issue of proof—see Fletcher (1978), n 1 above, at 545ff.

the recognition of defences was viewed with much apprehension out of fear that this would weaken the validity of prohibited norms. Only in later periods—with the strengthening of a central governing authority—was it possible to do away with strict liability and to recognise private defence, at first as an excuse and afterwards as a justification.[116]

In light of this accepted historical model, which as we shall see below provides a certain explanation for the development of private defence in old English law in particular and in the common law in general, it is especially interesting to find evidence that ancient Jewish law recognised a private defence that had strong characteristics of justification[117]. As Enker writes in his article 'Three Opinions in Jewish Law Concerning the Theory of Self-Defence'[118]:

> In Jewish law, as well, the sages deliberated on these principal questions [regarding the rationale of private defence, BS]. Jewish law determines that one life should not be preferred over another. Thus the question is immediately and automatically raised, why should the attacked person be allowed to kill the aggressor in order to save himself.

And following a comprehensive review of three different schools of thought[119] that exist in Jewish law, he concludes[120]:

> We have found no expression in the literature of traditional Jewish law of the perception that appears in modern literature basing private defence on the right of a person to life and his own autonomy . . . Alongside the moral consideration, that the life of the one who is pursued is preferable to the life of the pursuer because of the offence involved in the act of pursuit, stands the utilitarian objective of saving the life of the one who is pursued. Permission is given to kill the pursuer when these two factors are combined. [This is the Rabbi Meiri school of thought, BS.]

A dominant characteristic of justification that is to be found in private defence in Jewish law is the approach of Jewish law to the protection of another[121]. A third party is required to intervene in order to save one who is pursued from the hands

[116] For this historic process see and compare: Brown, n 25; Rosen, n 37 above, at 26; Finkelman, n 25 above, at 1287; Diamond, n 30 above, at 673, fn 1.

[117] Since private defence in Jewish law has been the subject of much research and writing, especially in the last few years, and for an additional reason—which is more substantial—that I shall immediately explain, no comprehensive survey of this subject will be presented here. See Arnold Enker, 'Three Opinions in Jewish Law Concerning the Theory of Self-Defence' (1991) 2 *Plilim* 55 (Hebrew); Enker, n 89 above (especially chs 5 'A Person who Kills because of an Illogical Mistake in Self Defence', 7 'Killing out of Duress and Necessity in Jewish Law' and 8 'The Borderline between Necessity and Self Defence in Jewish Law'); Finkelman, n 25 above; George P Fletcher, 'Punishment and Self-Defense' (1989) 8 *Law and Philosophy* 201.

[118] Enker, previous n, at 56–57 (my translation, BS).

[119] These are the Rashi (Rabbi Shlomo Itzhaki) school of thought that emphasises the punishment that the criminal deserves, the Maimonides school of thought that emphasises saving the one who is pursued and the Rabbi Meiri school of thought that combines both of the former—see Enker, above n 117, at 59ff.

[120] Enker, above n 117, at 90–91 (my translation, BS).

[121] See Finkelman, n 25 above, at 1263ff.

of a pursuer—a requirement that, of course, assumes the existence of a right to intervene, which is a characteristic of justification.

This relationship of Jewish law to the defence of another brings us to the difficulty of simple and direct deduction from the Jewish law for current law. As many scholars noted[122], ' Jewish law, because it is religious law, not only discusses defences . . . but also duties. It is not only that a stranger is allowed to kill a pursuer, but that he must do so. This is a duty imposed on all who are capable, to save the pursued person even at the cost of the life of the pursuer'.[123]

Such a general and sweeping duty is not acceptable in modern law[124]. Moreover, there are interpretations of the '*rodef*' (pursuer) defence (which constitutes the central source[125] for private defence in Jewish law) that raise doubts with regard to our ability to learn much from the '*rodef*' law for the matter herein. The Mishnah (the collection of fundamental principles of Jewish law that were codified in approximately 200 CE) in the Sanhedrin tractate says: 'Those who should be saved by taking life are: the one who pursues another to kill him, the one who pursues a male, and the one who pursues a betrothed maiden'.[126] It appears—and this is indeed the common interpretation—that the Mishnah refers to the rescue of the one who is pursued. However there are also interpretations according to which the Mishnah, in effect, refers to the salvation of the pursuer. Thus, according to the interpretation of Rashi (Rabbi Shlomo Itzhaki)[127]—it concerns the saving of the pursuer from the perpetration of the offence, seen from the aspect of 'It is better to die innocent than to die guilty'.[128] An additional characteristic that may perhaps exist with respect to private defence in Jewish law—a certain element of punishment for the aggressor that already appears in the private defence act itself—is discussed below[129].

[122] See, eg, the words of Justice Elon, *Affangar v the State of* Israel PD. 33(3)141 at 151.

[123] This quotation (my translation, BS) is from A Varhaftig, 'Self Defence in Crimes of Murder and Injury' (1977) 81 *Sinai* 48 (Hebrew) at 48. See also D Frimer, 'Defining the Right of Self-Defence' (1983) 31 *Or Hamizrach* 325 (Hebrew) at 327ff.

[124] Although in Israel the legislator has lately moved to a certain extent in this direction—see the 'Thou shalt not stand against the blood of thy neighbour' Act, 1998 (prohibition of standing by passively while a person is in danger). For a discussion of the possible duty to save, see the text accompanying nn 993–94 below and the references therein.

[125] For other sources such as this, such as 'in hiding':

> If the thief is caught while breaking in and is struck so that he dies, there will be no bloodguiltiness on his account. But if the sun has risen on him, there will be bloodguiltiness on his account. (Exodus 22: 2–3, New American Standard Bible)

(An Aspect of Self-Defence by Householders)—Enker, n 89 above, at 151.

[126] Mishnah, Sanhedrin 8, 7; Enker, n 117 above, at 59ff.

[127] For a wider discussion of this interpretation see Enker, n 117 above, at 59ff. For the idea of salvation of the pursuer himself see also, Finkelman, n 25 above, at 1273ff.

[128] An additional difficulty is the essential condition that the pursuer is attempting to perform an offence punishable by death. With regard to this difficulty see Finkelman, n 25 above, at 1244ff.

[129] See section 1.5.8.2 below.

It is interesting to note that we can already find many of the conditions that are required for the establishment of private defence today in the ancient Jewish law. Thus, for example, we find requirements in Jewish law for necessity[130], immediacy[131] and proportionality[132]. It should especially be noted that we find complex and interesting frameworks there for issues that are still being debated today in modern law, such as the issue of putative defence.[133]

To conclude this short journey into the world of Jewish law, it should be emphasised that the description given above does not presume to provide the reader with a comprehensive picture of private defence in Jewish law, but it is intended for a far more modest purpose: to try to deduce something from it for our present discussion. As I have mentioned, we shall occasionally return to it further on and draw additional insight from it.

To a certain extent, English law[134], as mentioned, provides an example of the development of private defence from punishment via excuse[135] through justification. At first, so it seems, under the ancient rule of strict liability, every killing of a person resulted in punishment—including a killing in circumstances of private defence. The punishment was most drastic: the death penalty.[136] Later, in the Middle Ages, the exception to criminal liability for 'prevention of crime' was emphasised. Self-defence was extremely restricted, and intended in principle for those who, because of their guilt, were not entitled to use the force that was permitted for the prevention of crime.[137] As noted above, in the discussion on the distinction between 'justification' and 'excuse',[138] a distinction existed then that is similar to that which exists today—a distinction whose importance was immense: killing in circumstances of justification led to a full acquittal while killing in a situation of excuse led to the loss of life and property of the actor. Although the actor could be expected to receive a pardon, he was, indeed, also sorely in need of it, since the judicial process itself terminated with his conviction. The pardon did not prevent the loss of the actor's property but only related to the loss of his life. There

[130] Enker, n 89 above, at 163.

[131] *Affangar v the State of* Israel PD 33(3)141 at 150ff.

[132] AZ Ben-Zimra, 'Killing out of "Necessity" in Hebrew Law and in Israeli Law' (1976–77) C–D *Hebrew Law Annual* 117 (Hebrew) at 142ff.

[133] Enker, n 89 above, at 151–63 and especially at 163.

[134] For a relatively broad historical survey of English law see Beale, n 40 above, at 567ff; Perkins and Boyce, n 85 above, at 1112, 1120ff; Gordon, n 1 above, at 751ff; RUSSELL, n 40 above, at 434ff; *Kenny's Outlines of Criminal Law*, 19th edn by JWC Turner (Cambridge, 1966) at 141ff; Baum and Baum, n 1 above, at 3ff; Brown, n 25; Blackstone, n 40 above, Vol. IV, at 176ff; Perkins, n 40 above, at 137ff; KJ Aiyar and RL Anad, *Law of Private Defence*, 2nd edn rev by CU Menon (Allahabad, 1964) at 5–10; Rosen, n 37 above, at 25ff.

[135] Regarding the existence of a stage in the development of private defence when it constituted an excuse alone, not only in English law but also in French and German law, see Fletcher (1978), n 1 above, at 857.

[136] For a different description of this matter see Blackstone, n 40 above, vol 4 at 188.

[137] See, eg, Perkins and Boyce, n 85 above, at 1112.

[138] See n 40 above and accompanying text.

is a well-known adage regarding this matter that whoever killed in self-defence 'deserved but needed a pardon'.[139]

According to the classification that Blackstone sketched in the historical survey in his book,[140] the category of 'justifiable homicide' included three cases: (1) 'unavoidable necessity'; (2) 'advancement of public justice'; (3) 'prevention of any forcible and atrocious crime'. The category of 'excusable homicide' included two cases: (1) 'homicide *per infortunium*, or misadventure' and (2) 'homicide in self-defence, or *se defendendo*'. Another name for this last situation was 'chance-medley'.

The first analytical treatment of private defence was, it appears, provided by Foster[141]. Foster made a sharp division between the killing in self-defence of an aggressor who intended to murder, and the killing in self-defence that became necessary during a fight of the 'chance-medley' type. He classified the first actor as 'perfectly innocent and justifiable' and the second as 'in some measure blameable and barely excusable'. Based on Foster's analysis, with supplementation from additional sources, it is acceptable to assume[142] that a distinction was drawn then between three principal situations: (1) An innocent person under a murderous attack—this person is not required to retreat and is entitled to use lethal defensive force; (2) A participant in a fistfight, or someone who participates by his own fault in such a fight, who is surprised to discover that his opponent has resorted to the exertion of lethal force. This person must 'retreat to the wall' unless he is within his 'castle', and if he kills—as a last resort—this will be an excuse and not a justification; (3) The aggressor in a murderous attack or a participant in a fight with prior intent to kill—this latter loses any right to self-defence in that same event, even if he finds himself during the fight in a very difficult situation.[143]

As stated, self-defence—the '*se defendendo*'—was classified merely as 'excuse' and not as 'justification'. However, it is necessary to note that some of the situations, whose suitable place is in the exception of private defence, were treated in English law within the framework of the 'prevention of crime' exception, and thus in effect gained the proper status of justification. Blackstone[144] tried very hard to justify the classification of private defence in English law as merely an excuse, alongside 'misadventure'. In his opinion, what is common to the two categories is the guilt and the punishment. The value of a person's life is so important that the law identified even the person who killed while defending himself as having a certain amount of guilt, inter alia in order that the citizens would learn to abhor

[139] See, eg, Brown, n 25 above, at 584.

[140] Blackstone, n 40 above, vol 4 at 176.

[141] See, eg, Perkins and Boyce, n 85 above, at 1120ff.

[142] See, eg, Perkins, n 40 above, at 138ff.

[143] In a later period, Beale—in a minority opinion—disputed this classification and its implications for the duty to retreat. His very interesting opinion on this matter is presented below, as part of the discussion on the duty to retreat—see the text below that commences with the reference to n 794.

[144] Blackstone, n 40 above, vol 4 at 186ff.

the killings. In order to provide basis for this opinion, Blackstone 'enlists' Lord Bacon, who speaks of '*se defendendo*' as '*necessitas culpabilis*', and refers to antecedent legal systems in which various sanctions were imposed on one who killed while defending himself. However, as was pointed out by Russell in his well-known book[145], Blackstone's explanations are far-fetched, and in fact the source of the law of '*se defendendo*' was in the ancient rule of strict liability. The assumption regarding the '*se defendendo*' was that the defender actually had no real choice because of the survival instinct[146], an assumption that constituted a possible rationale for a real excuse, which is exempt from punishment. However, since taking the law into one's own hands was contrary to the needs of society in the Middle Ages, or, at least was perceived as such, it was determined that the act could only be pardoned.

In the 14th century, the pardon became a purely formal matter, and was granted as a matter of routine. It is described as 'pardon of course' that was given even without any involvement whatsoever by the king himself.[147] It is important to note that the pardon did not apply to the loss of property of the killer and he was also susceptible to a claim for payment of damages to the relatives of the late aggressor. It was only in 1532, following continuous conflict in this matter between the members of the Bar (who demanded a full exemption) and the members of the Bench, that the famous law known as 'Statute 24 Henry VIII' was enacted. This law abolished the forfeiture of the defender's property, although only if he had killed an aggressor who had attempted to rob or murder him. However, due to the generous manner in which this law was interpreted, the formal pardon died a natural death between the 15th and 16th centuries.[148]

Another law later replaced this law—'9 George IV'—which established a similar arrangement.[149] Eventually the differences between 'justified homicide' and 'excusable homicide' were annulled, except for the small difference that remained regarding the duty to retreat.[150] The perception of private defence as justification, which is accepted in our times, was crystallised in English law only during the modern period.[151]

[145] See Russell, n 40 above, at 435ff.

[146] See, with regard to this matter, Blackstone, n 40 above, vol 3, at 3ff and Rosen, n 37 above, at 26.

[147] See, eg, Brown, n 25 above, at 587ff.

[148] Coke already did not bother to relate to it and Hale sufficed by only mentioning it—see Brown, n 25 above, at 589.

[149] See, eg, Kenny, n 134 above, at 144.

[150] See, eg, Kenny, n 134 above, at 144. This difference is discussed below as part of the discussion on the duty to retreat—see the text following the reference to n 810.

[151] Buds of this can be found in Foster, who wrote in the 18th century—see Brown, n 25 above, at 590. On the historical development in continental law see, eg, Silving, n 45 above, at 385, 392.

1.4 Private Defence as an Excuse

One possible way to provide an explanation for private defence is to relate to it as an excuse. As we saw in the previous section, this was indeed the status and character of private defence in many legal systems in the past—at the very most, an excuse, sometimes only a pardon, but definitely not a justification. The classical example of this is the '*se defendendo*' from English law in the Middle Ages[152].

The main characteristics of the general category of 'excuse' have been explained above.[153] It is also interesting to note what was said on this subject in the explanatory wording of the draft of Israel's Penal Code (Preliminary Part and General Part), 1992[154]:

> The principle behind all the exceptions to criminal responsibility is, that the criminal laws can and must intervene in people's lives only to the extent that they can be an influencing factor on modes of behavior; in those circumstances where there is no chance for such influence, the intervention of criminal law will only cause the creation of offenders and not the prevention of crime.

In other words, this is the common denominator for all defences. I would already like to explain at this stage that even if we discover below that private defence has characteristics of an excuse, this in no way negates the possibility that private defence can be classified as a justification. The possible conclusion that private defence may be viewed as an excuse does not justify 'sitting back on our laurels' and being satisfied with this, but requires us to continue and examine whether it is not a justification. Theoreticians and legislators must endeavour to characterise every relevant phenomenon as precisely as possible, in order to determine the most suitable framework for it. With regard to the possibility that there should also be private defence of an excuse type alongside private defence of a justification type—a possibility to which I refer at length below—it should be noted that in the overlapping fields between excuse and justification it is very reasonable to assume that the justification will overcome the excuse.[155]

According to the school of thought, no longer accepted in our times, which sees private defence solely as an excuse,[156] the defensive act is not justified. Instead, society 'forgives' the defender and does not punish him for the act that he performed,

[152] See nn 144–46 above and accompanying text, including the reasoning of Blackstone on the status of '*se defendendo*'.

[153] See, eg, the text above accompanying n 38 (the words of Hart) and accompanying n 39 (the words of Fletcher).

[154] See Israel's proposed Penal Code (Preliminary Part and General Part) (1992) at 133 (my translation, BS).

[155] See—on the subject of this 'swallowing'—the words of Williams (1982), n 1 above, at 738ff.

[156] For this approach see, principally, Fletcher (1973), n 1 above, at 376ff; Fletcher (1978), n 1 above, at 856ff; Kadish, n 34 above, at 881ff; Williams (1982), n 1 above, at 738ff; Robinson (1984), n 37 above, vol 1 at 109ff; Russell, n 40 above, at 435ff; S Levine, 'The Moral Permissibility of Killing a "Material Aggressor" in "Self-Defense"' (1984) 45 *Philosophical Studies* 69; Blackstone, n 40 above, at 186ff;

due to consideration of the special situation in which he found himself. The basis for this approach, which puts the emphasis on the person who is attacked and not on the aggressor, relies on the accepted view that a person sometimes has no alternative but to defend himself, even with the use of deadly force. However, this does not apply to a situation in which the requirement for 'a voluntary act' ('control') does not exist, since in this case the (objective) possibility of choice of alternative behaviour stands before the actor, although the freedom of choice for the actor is restricted. In the context of the difficult situation in which the actor finds himself, the survival instinct acts very powerfully. This is human nature.

The law's 'forgiveness' of the accused, who found himself in a difficult situation such as this, parallels considering the exception of 'necessity' as an excuse (since—at least in theory—'necessity' also exists as a justification) and is even close in character to the exception of 'duress' (threats). According to this approach, although there is moral fault in the act of the accused, there is no point in punishing him. The non-utility of punishment is explained principally[157] by its lack of effectiveness. For example, Hobbes presented[158] the subject of deterrence, in cases of compulsion, from the point of view of the actor who finds himself in a situation of compulsion, thus: if I do not act—I will die immediately; if I act—I will die later. Consequently, there is a gap of time while the actor is still alive while committing the offence. I would go even further and add to the words of Hobbes that from the (subjective) point of view of the actor, the dilemma is often even simpler: If I do not act I will die or be injured immediately; if I act—perhaps I will die later (and in our times—in most legal systems—it is almost certain that the assumption is: perhaps I will be imprisoned afterwards). As Bentham and Holmes noted, a person will always choose to live, even if he is compelled to take the life of an innocent person in order to do so, and there is therefore no point in punishing him.[159] Even Kant did not dispute this, although he claimed that the actor should suffer moral reprobation[160]. On this subject, the approach of the philosopher Levine is very interesting. According to her view, the rationale for private defence in particular and for 'necessity' in general is the existence of a moral right of the person to prefer that which is most important for him—ie, his own survival[161]. But the accepted approach is that the grant of an excuse constitutes a conscious detachment of the law from the purely moral aspect, and does not emanate from it.

P Shuchman, 'Ethics and the Problem of Necessity' (1966) 39 *Temple Law Quarterly* 279; Rosen, n 37 above; Joshua Dressler, *Understanding Criminal Law*, 2nd edn (New York, 1995) at 208 (mentioning three non-utilitarian moral theories of excuse).

[157] The rehabilitation of the offender is also not a relevant purpose—see and compare to Enker, n 89 above, at 6.

[158] See Thomas Hobbes, *Leviathan* (1651) pt 2, at ch 27; reprinted (London, Penguin, 1985) 345–6.

[159] *Works of J. Bentham*, ed by Bowring, (London, 1943) pt ii, ch iv, s iii; OW Holmes, *The Common Law*, ed by Howe (Cambridge, 1963) at 38.

[160] Immanuel Kant, *Introduction to the Science of Right*, trans Hastie (Edinburgh, 1887) 52–53.

[161] See Levine, n 156.

What are the principal implications of viewing private defence as an excuse? Firstly, the reader is referred to the general discussion presented above regarding the implications of defence as an 'excuse'.[162] Secondly, such a theory would limit private defence to only the most important interests—such as a person's life and his physical integrity—which individuals 'must' protect[163]. It would require that the defender 'retreat to the wall' before he defends himself, since it is only then that we can say that he has no alternative (under the common assumption that he should not be required to 'surrender himself' to the aggressor's assault).[164] A central implication of this theory seen by many scholars as its central and decisive deficiency[165] is that a third party must not intervene to assist the attacked person. This theory does not provide a satisfactory explanation for a wide area of private defence—defence of another person. Although it can be used to explain certain cases of defence of another, in order for the grounds for excuse to exist, especially the ground of lack of effectiveness of punishment for the defence of another person as well, there must be severe restriction of the circle of people who may be protected, presumably to the narrow circle of those close to the actor. This restriction, which was common in various legal systems in the past, would be totally unacceptable in modern criminal law[166]. An additional implication of this theory that views private defence as an excuse is that, as occurs in the excuse of 'necessity', the focus is on the actor and it is not necessary that the aggressor bear guilt for his attack. Accordingly, this theory also provides an explanation for the test-case that is frequently used in scholars' discussions—both philosophers and jurists—on the rationale of private defence: the case of the psychotic aggressor, in particular, and the innocent aggressor, in general.[167]

It should be noted that almost all the scholars who affirmed the possibility of characterising private defence as an excuse chose its more precise characterisation as a justification[168]. Rosen, who suggests characterising private defence as an excuse,[169] stands alone in this matter. The article within which Rosen set out and explained her approach bears the title: 'The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill'. The principal topic of this article, as is reflected in its title—the issue of a battered woman who kills

[162] See sections, 1.4 and 1.1 above.

[163] See, eg, Fletcher (1973), n 1 above, at 376.

[164] See, eg, Fletcher (1978), n 1 above, at 857.

[165] See, eg, Kadish, n 34 above, at 881ff; Fletcher (1973), n 1 above, at 377.

[166] See a wide explanation of this point in Ch 4.2 below.

[167] This issue is discussed more extensively below (in section 1.5.3). However, already at this stage I will note that in my opinion private defence, including all its cases of 'justified' character, should not be distorted into a defence that has only a character of 'excuse', just because of the lack of explanation that it provides—in most of its versions as justification—for the case of the innocent aggressor. As is demonstrated below, a complete solution for this case can be found within the framework of the existing exceptions of 'necessity' as an excuse and of 'putative defence'.

[168] As Omichinski noted—n 31 above, at 1468.

[169] See Rosen, n 37 above.

her husband—is an issue that has been addressed in many writings and judicial decisions in American law in the past few decades, and which I shall elaborate upon more extensively below.[170] But Rosen—in her unique approach—does not attempt to distort the law of private defence as a justification in order to include the special case of battered women, nor to characterise this particular case as an excuse. Instead, she asks to characterise private defence in its entirety—in all its forms, including that of the defence of a battered woman—as excuse alone. In the fifth section of her article 'The Case for Excused Self-Defense', she presents her opinion that the characterisation of private defence as an excuse will provide a better response not only to the needs of battered women, but also to the needs of criminal law and of society as a whole. Rosen deals extensively with only one of the theories that suggest a rationale of justification for private defence—the theory based on 'forfeiture', namely, loss of the rights of the aggressor. Following her explanation of the (not few) shortcomings of this theory, she comes to the hasty conclusion that there is no sufficient rationale to be found for private defence as a justification, and that its classification as a justification constitutes an 'historic accident' (since in the distant past private defence was classified as an excuse). However, as I shall illustrate below, 'forfeiture' is only one of the rationales that are proposed for 'justification' of private defence, and definitely not the best or the most preferable of them. Rosen, from her side, completely ignores other accepted theories, such as basing the justification of private defence on the social-legal order. In her estimation, the classification of private defence as an excuse will serve important goals for society in general and for criminal law in particular: the retention of the sanctity of human life and non-encouragement of taking the law into one's own hands. There is no doubt that the theories that categorise private defence as justification should provide a response to these two latter considerations. I will discuss these considerations within the framework of the discussion of those theories that view self-defence as justification.[171]

Rosen's central argument is that even in the 'traditional' cases (ie, when battered women are not the persons attacked), self-defence is not desirable to society, but it is rather 'permissible and tolerated' while society views it neutrally. In order to build this argument, she completely ignores the fact that private defence is also applied as an exception to offences other than killing, and she refers solely to lethal defence[172]. This argument by Rosen brings us back to the dispute that I described above[173] regarding the substance of justification: the dispute between Fletcher and

[170] See Ch 5.5 below.

[171] These considerations are also expressed in the necessity, immediacy and proportionality requirements—discussed below—and in the special consideration provided for lethal defensive force.

[172] The taking of human life is indeed very problematic. However, this problematic nature does not dictate the negation of the 'justified' character of private defence, and in my estimation, sufficient solutions can be found for it, such as the requirement for safe retreat before the resort to lethal force. A wider discussion of this issue is presented in Ch 3.9 below.

[173] See nn 73–75 above and accompanying text.

Dressler, who claims that it is not only the morally good that should be included within the boundaries of justification but also that which is neutral—permissible/tolerable behaviour. As noted, it is preferable to classify justification according to Fletcher's school of thought—as also morally justified.[174] For our discussion, it appears that as we shall see below, most—if not all—of the deliberations regarding the character of private defence[175] do not relate to its central 'classical' cases, but to special cases, which for the most part should be excluded from private defence and treated within frameworks that are more suitable for them, such as the defences of 'necessity' and 'mistake'. It could be that the consideration of these special cases should be carried out within a separate exception of private defence as an excuse, which will exist alongside private defence as justification.

As stated, the approach that views private defence solely as an excuse is not acceptable. It contradicts the strong intuitions of the law-abiding citizen[176] and the perception of private defence in modern law.[177] Private defence has a striking character of justification, and its classification as an excuse tells us too little, in binding it together with the rest of the compulsion exceptions—'necessity' (circumstances) and 'duress' (threats), restricting it to the (relatively low) common denominator of all three, and ignoring the guilt of the aggressor and even the attack itself. In effect, in light of the existence of the exception of 'necessity', the excuse of private defence does not only fail to express its true character, but is even completely superfluous. Additionally, this approach fails to provide a satisfying explanation for the right—that is well accepted in modern criminal law—to defend another person: any other person.

1.5 Private Defence as a Justification

1.5.1 General; and the right to life

In the previous sections,[178] I presented private defence as a justification as opposed to the alternative view of private defence as an excuse. In the present section, I shall attempt to establish its 'justified' character, not in a negative way—as preferable to

[174] In order to remove all doubt, I would like to clarify that the characterisation of justification as morally justified does not mean the artificial grant of moral justification to acts that are not appropriate, but rather the 'cleansing' of justification while restricting it, and excluding the acts that lack justification that are sometimes attributed to it.

[175] See Robinson (1984), n 37 above, vol 1 at 109–10; Dressler, n 32 above, at 68, 80, 84; Robinson (1975), n 37 above, at 275, 284; Finkelman, n 25 above, at 1285; and Fletcher (1978), n 1 above, at 767.

[176] See Kadish, n 34 above, at 881; Omichinski, n 31 above, at 1468 fn 106.

[177] With regard to American law see Kadish, n 34 above, at 881; with regard to English law see Williams (1982), n 1 above, at 739; and with regard to German law see Silving, n 45 above, at 392.

[178] See sections 1.1; 1.3; 1.4 above.

being characterised as an excuse—but in a positive way—based on a convincing rationale that has a strong moral foundation. As mentioned, in our times, most principal legal systems[179], legal scholars[180] and philosophers[181], see private defence as a justification. However, as a significant opponent of the distinction between a justification and an excuse—Hall[182]—commented: 'We must ask, why justified?'. Why, is it that although the act would generally be forbidden, in special circumstances this same act is not only permitted but also even desirable? This significant question that is considered in this section is, in my opinion, the central question of the entire issue of private defence.

In this section, I shall discuss first of all and in breadth, the principal and accepted approaches regarding the rationale of private defence as a justification. Within this discussion I shall refer to the accepted test-case, known as the question of the psychotic aggressor (specifically, and the innocent aggressor, in general). Following this, I shall briefly examine the various additional ideas that have been proposed in order to justify private defence. Finally, I will propose the desirable rationale for private defence. However, before we embark on this path, we must take note of a question that may be perceived—if only by a few—as a preliminary question: what is the implication of the right to life—especially if it is perceived as an absolute right—for the use of deadly defensive force?

There is no dispute that the right to life is one of the most basic human rights. This is established in many legislative acts and documents, both national and international[183], and no less important—it is accepted by all the scholars of our generation[184]. Is it therefore possible to justify private defence that involves force leading to a fatal result? The nature of rights and of values is that they sometimes clash with one another, and then they must be qualified, or at least some of them. However, it is sometimes claimed that the right to life is an absolute right.

[179] See, eg, the words of Williams on the situation in English law; the words of Kadish on the situation in American law; and the words of Silving on the situation in German law (the references for these writings appear in n 177 above).

[180] Comments regarding this matter were provided, inter alia, by Williams (1982), n 1 above, at 739 and by Omichinski, n 31 above, at 1447. See also, eg, R Card, R Cross, and PA Jones, *Criminal Law*, 14th edn (London, 1998), at 624. On this subject, it is interesting to note, that even the scholars who do not accept the distinction between justification and excuse recognise the 'justified' nature of private defence.

[181] See, eg, D Wasserman, 'Justifying Self-Defense' (1987) 16 *Philosophy and Public Affairs* 356; P Montague, 'Punishment and Societal Defense' (1983) 2 *Criminal Justice Ethics* 30 at 31ff and CS Nino, 'Does Consent Override Proportionality?' (1986) 15 *Philosophy and Public Affairs* 183 at 185.

[182] See Hall, n 37 above, at 645.

[183] See, eg, Art C of the Universal Declaration of Human Rights 1948; Art 6 of the United Nations Proclamation, 1976 and Art 2 of the European Convention on Human Rights and Fundamental Freedoms (it should be noted that this article explicitly recognises the right to private defence—even with lethal force—albeit with qualifications—see AJ Ashworth, 'Self-Defense and the Right to Life' (1975) 32 CLJ 282 at 288.

[184] This was noted, eg, by Ashworth, previous n, at 282; Fletcher, n 74 above, at 1372; Kadish, n 34 above, at 871. See also, in detail, HA Bedau, 'The Right to Life' (1968) 52 *Monist* 550.

What is an absolute right? In his article entitled 'Are There Any Absolute Rights?'[185] Gewirth defines an 'absolute right' as a right that does not withdraw before any other right when a conflict exists between them. My opinion is that absolute rights do not exist at all. For our present discussion, the determination that the right to life is absolute means that it is forbidden to infringe this right in any circumstances and for any reason at all. This leads, inter alia, to the negation of the legitimacy of taking the life of another person in war (including defensive war), in a revolution (including a revolution against an oppressive and tyrannical regime), and also in private defence. This type of pacifism is indeed consistent, but it cannot reasonably be accepted.[186]

Kadish discusses this issue extensively.[187] Following his explanation of the immense importance of the right to life, he notes that there is conflict between rights, and that every society has to cope with the difficult decision of determining when the lives of some individuals must be superseded by the important interests of others. He also notes that there are exceptions based on value judgment, according to which intended killings are 'right' in certain situations: the death penalty, law enforcement by authorised personnel and private defence. The opinion of Kadish is, therefore, that the sanctity of life is not always the crucial factor, and he bases this on a possible understanding of the principle of the sanctity of life in a weaker sense—not an absolute preference for life and not a total prohibition of intentional killing, but an assumption that exists favouring life and opposing killing. It appears that no one would dispute this assumption, but as Kadish himself notes, not much can be learned from it.

Ashworth made an important contribution to the discussion of this issue.[188] According to his view, it is not only that the right to life does not negate the right to private defence, but it actually strengthens it, since:

> If a legal system is to uphold the right to life there must be a liberty to use force for the purpose of self-defence.[189]

However, in philosophical literature, it is acceptable to negate the idea that the right to life directly creates a right to private defence.[190] An interesting opinion is expressed by Gorr,[191] who claims that the situation is not that other rights, such as

[185] See A Gewirth, 'Are There any Absolute Rights?'(1981) 31 *Philosophical Quarterly* 1.

[186] See I Primorac, 'On Capital Punishment' (1982) 17 *Israel Law Review* 133 at 141.

[187] See principally the interesting article by Kadish, n 34 above, entitled 'Respect for Life and Regard for Rights in the Criminal Law', at 871–81.

[188] See principally Ashworth, n 183 above, entitled 'Self-Defence and the Right to Life', at 282–83, 288.

[189] Ashworth, n 183 above, at 283. This idea was also presented in the explanatory wording for the Canadian bill, Law Reform Commission of Canada, Report Recodifying Criminal Law 1987, rev and enl edn, no 31, (Ottawa, 1987) at 37.

[190] See, eg, Wasserman, n 181 above, at 362.

[191] See, principally, M Gorr, 'Private Defense' (1990) 9 *Law and Philosophy* 241 at 268.

the right to private defence, are derived from the right to life, but that the other rights create the right to life.

From the philosophical literature, the work of Thomson on the subject of our discussion deserves a mention.[192] She denies the argument that the right to life is an absolute right, basing this in particular on the existence of cases in which 'a right may be infringed without being violated'.[193] Fletcher also notices this possible distinction, and suggests drawing a distinction between infringement of the right itself—harm that may be caused, for example, by the state—and infringement of an interest (only) of a certain person in the course of the activity of another person and as a result of that activity.[194]

In the end, as is noted in the philosophical literature by Gorr[195]:

> Extreme pacifists aside, virtually everyone agrees that it is sometimes morally permissible to engage in . . . 'private defense'.

It should be mentioned that even Ryan,[196] who admits to being a pacifist, expresses his opinion that the claims of pacifism do not negate the possibility that justification exists for private defence (by lethal force). Instead, they only dispute the validity of certain justifications[197] that were proposed for it, and in so doing contribute to enhancing the value of human life.

To conclude this discussion, my opinion is that while the right to life is not an absolute right and does not negate the possibility of lethal defensive force as part of the framework of private defence, it is sufficiently strong to greatly restrict the justified use of lethal force, acts to strengthen the demands for proportionality and necessity, and requires separate consideration for a category of defensive deadly force.[198]

[192] See Thomson, n 29 above, entitled 'Self-Defense and Rights' (especially at 40ff.).

[193] Thomson, n 29 above, at 41. See also the discussion of 'The Theory of Specification' that appears in section 1.5.8.8 below.

[194] See (correspondingly) Fletcher, n 74 above, entitled 'The Right to Life', at 1385ff. and 1373ff. Fletcher also negates the claim—that I too think is mistaken—that the right to life is only a prima facie right (*ibid* at 1371).

[195] See, principally, Gorr, n 191 above, at 241.

[196] See CC Ryan, 'Self-Defense, Pacifism, and the Possibility of Killing' (1983) 93 *Ethics* 508 at 508 and at 520 (correspondingly).

[197] On this matter it should be noted that Ryan's analysis lacks consideration of some central theories that justify private defence, such as that which justifies private defence on the basis of the social-legal order.

[198] These matters will of course be discussed further on, within the framework relating to the above requirements and categories. Note should also be taken of the factors proposed by Gewirth (n 185 above) that should be taken into account when there is a conflict between rights: (1) the relative importance of the right; (2) the extent of injury to the right; (3) the probability of occurrence of the danger; (4) alternative means for the prevention of the danger or its reduction.

1.5.2 The Aggressor's Culpability as the Crucial Factor

Viewing the guilt of the aggressor as the basis for justification of private defence is the classic and most common theory in Anglo-American law.[199] Kadish[200] provides us with a basic description of this viewpoint. The approach focuses on the rights of the aggressor. Its starting point is the general right to life that is granted to all human beings. The central argument of this approach is that the aggressor, by his guilty act, loses his right to life, or, at least, the right to claim this right. Omichinski illustrates this theory with the accepted description of 'moral forfeiture of the right to life'.[201] She explains that even though the right to life is traditionally considered to be non-transferable, it is however normally considered as one, which can be lost—as noted by the philosopher Locke, and the jurists Blackstone and Feinberg.[202]

This is, as stated, the basic description of the theory—a description that it is easy to criticise. Thus, for example, Kadish notes that if the theory assumes that the aggressor—by his act—agrees that his life may be taken as a result of a defensive act, then this is a fiction, because the aggressor probably did not even think of this possibility.[203] Fletcher, in his critique of this theory,[204] considers the close affinity between the term 'forfeiture' and the original conception of the 'outlaw' (a person standing outside the boundaries of the law). The 'outlaw' forfeits his rights in relation to everyone—even in relation to people who know nothing at all about this forfeiture. Any person is entitled to kill him, without any requirement of a positive purpose of any sort, and even without a need of awareness of his above-mentioned status. As we shall see below, it is accepted that in order to establish private defence there is at a minimum a requirement of awareness of the justifying circumstances, if not also of a defensive or protective purpose.[205] Therefore, there is no complete equivalence between the aggressor and the 'outlaw'. Neither is it possible to escape the conclusion that the aggressor's right to life continues to be valid—close to the time of his assault, during it and after it—and that the justification for private defence cannot be found in such a 'forfeiture'.[206]

[199] As Fletcher notes, this theory gained support in Germany, England and the United States, but only became dominant in the common law and not in continental law. See Fletcher (1973), n 1 above, at 377. From a historical viewpoint, Blackstone's school of thought is famous. According to Blackstone, the right to self-defence by lethal force is dependent on the aggressor having committed a capital crime by means of his attack. See *ibid* at 377–78; and similarly Omichinski, n 31 above, at 1450.

[200] See Kadish, n 34 above, at 883ff.

[201] See Omichinski, n 31 above, at 1449ff. See also Uniacke, n 28 above, at 196ff.

[202] See Omichinski, n 31 above, the references that appear in nn 20 and 19 (correspondingly).

[203] See Kadish, n 34 above, at 883.

[204] See Fletcher, n 74 above, at 1380ff.

[205] See Ch 3.10 below.

[206] For expressions that are in this form in particular, see, eg, Williams, n 13 above, at 26 (raising the possibility that if the purpose of the law is **deterrence** then the guilt of the aggressor excludes him from the **protection of the law**); Ashworth, n 183 above, at 283 (forfeiture of the right to life).

Another variation of the theory that is the subject of our discussion, and a stronger one, is that according to which the aggressor does not lose his rights at all, but because of his guilt, we reduce the value of his interests to a certain extent when balancing the competing interests at stake. This is, in effect, a variation of the justified 'necessity' defence, known also as the 'lesser evils'.[207] A person who chooses to start a conflict is entitled to less protection in comparison to the innocent victim. Fletcher describes this in another manner—as a partial waiver by the aggressor of his interests, where the extent of this waiver stands in a direct proportion to the extent of his guilt.[208] However, even if the waiver is partial, I am still convinced that it is fictitious. Therefore, the reduction of the value of the aggressor's interests cannot be grounded upon this waiver, but must be based directly on his guilt. It is also important to emphasise that the reduction of the value of the aggressor's interests is not valid '*in rem*' with regard to everyone, but solely with regard to the interests of the person who is attacked.[209]

What is the dominant factor—the aggressor's culpability, the very fact of his attack or both of these? In the legal literature there is sometimes mention of guilt alone, and sometimes of guilt connected to the 'wrongful act' of the aggressor.[210] In the philosophical literature there is a dispute concerning this matter, which reaches its peak in the exchange of articles between Montague and Wasserman.[211] The essence of this argument is that Montague based the rationale for private defence on the fact that the aggressor forces a choice between lives by the very fact of his attack, in conjunction with the aggressor's guilt which, in his opinion, is the important factor.[212]

In the opinion of Wasserman, Montague emphasises the guilt of the aggressor far too heavily, and does not consider the tremendous importance of the very fact of the attack from a moral standpoint. We will need to consider this dispute

[207] See extensively in section 1.5.6 below and see Robinson (1984), n 37 above, vol 2 at 70.

[208] See Fletcher (1973), n 1 above, at 377–78.

[209] Thus, eg, Enker describes this approach:

> Others condition the right to self-preference on the existence of the defender's *moral advantage*. They usually find this moral advantage in the fact that the aggressor commits an offence by his attack, while the person attacked is innocent. (Enker, n 117 above, at 56; emphasis is added)

[210] See and compare: Kadish, n 34 above, at 883 ('by his culpable act'); Williams, n 13 above, at 26 (the aggressor's guilt); Fletcher, n 72 above, at 305 ('wrongful conduct'); Kadish, n 96 above, vol 3, at 944 (written by Fletcher) (two factors—the aggressor's guilt and the wrongdoing); Omichinski, n 31 above, at 1450 ('fault or misconduct').

[211] See P Montague, 'Self-Defense and Choosing between Lives' (1981) 40 *Philosophical Studies* 207; the responding article by Wasserman, n 181 above; and the 'counter-response' article by P Montague, 'The Morality of Self-Defense: A Reply to Wasserman' (1989) 18 *Philosophy and Public Affairs* 81; and also Montague, n 181 above; Ryan, n 196 above; Gorr, n 191 above.

[212] In fact, Montague's theory (that he named the 'distribution thesis'—Montague (1989), previous n, at 82) is wider and provides that if people find themselves in a situation where a certain harm must occur, then those that are innocent of any crime are entitled to choose that the guilty ones will be injured, and a third party must so choose as well.

further below—in the context of the discussion of the rationale based on the aggressor forcing a choice between lives.[213]

There is crucial value and moral significance regarding both the attack of the aggressor and his guilt. In fact, this is the primary uniqueness of private defence—it is comprised of both the attack itself and the aggressor's culpability. Great moral significance should be attributed both to the fact that the defensive force is directed towards the aggressor himself (a matter which gives significant expression to the important factor of the aggressor's guilt) and also to the fact that the aggressor can cease his attack and render the defence unnecessary (a matter that gives significant expression to the important factor of the attack itself). In effect, the factor of the attack is taken as a given to such an extent in the legal literature, and essentially constitutes an integral part of the definition of the situation of private defence itself, that scholars do not always bother to discuss it. There is therefore sometimes a concentration on the guilt of the aggressor alone.[214]

It is extremely interesting to examine the words of Locke, where the rationale that is the subject of our discussion may be found[215]:

> The state of war is a state of enmity and destruction; and therefore declaring by word or action, not a passionate and hasty, but a sedate, settled design upon another man's life, puts him in a state of war with him against whom he has declared such an intention, and so has exposed his life to the other's power to be taken away by him or any one that joins with him in his defence . . . For by the fundamental law of nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred; and one may destroy a man who makes war upon him, or has discovered an enmity to his being, for the same reason that he may kill a wolf or a lion; because such men are not under the ties of the common law of reason, have no other rule but that of force and violence . . .

In an interesting analysis of these words of Locke, Montague points out three connected but separate justifications for private defence: (1) Moral duties are mutual and do not exist with regard to one who excludes himself from civilisation; (2) The aggressor causes a lessening of the value of his interests; (3) If someone has to suffer—it should be the guilty one, not the innocent. These justifications concern two of the principal variations of the theory that is the subject of our discussion and were presented above—ie, the aggressor's forfeiture of his rights and the devaluation of these rights. As mentioned, the second variation is the more solid of the two.[216] It is interesting that the words of Locke include several completely different ideas bound together as a whole. They are therefore also quoted to support an

[213] See section 1.5.8.5 below.

[214] It is very common to talk about 'illegal attack', and this expression is accurate.

[215] John Locke, The Second Treatise of Government, Ch. III.

[216] See and compare the position of Gordon (n 1 above, at 754–57), who contradicts Hume by expressing the opinion that the rationale is not that the one who commits a crime loses the defence of the law (as Hume claimed), but that in a situation of private defence—as opposed to the situation of 'necessity'—the law provides a solution based on the legal guilt and the legal innocence of the parties involved.

entirely different theory—that will be discussed below—which sets forth that the decisive factor is the autonomy of the attacked person.

What are the central[217] implications of the theory that focuses on the aggressor's culpability? The two main implications are: (1) There is a relatively strong requirement for proportion between the expected injury to the one attacked if private defence is not performed and the force used within the framework of private defence (or—in another variation—the injury to the aggressor within the framework of the defensive action), since the fact that the aggressor's interests are devalued certainly does not nullify them. (2) There is no private defence against an innocent aggressor. In Dressler's opinion,[218] an important implication of this theory is that the determination that the act of private defence is 'right'—in other words: that the attacked person has a strong right to use defensive force—remains unfounded, since this theory only supports the determination that his behaviour is 'tolerable'. This is because the attacked person is allowed to defend himself—since the aggressor has lost his right—but nothing is determined with regard to his right to defend himself. It is clear that this characteristic which is suggested by Dressler is indeed correct if we refer to the 'forfeiture' variation of the theory that is the subject of our discussion, but it is greatly weakened if we base ourselves on the other above-mentioned version—that which carries out a balance of interests within the framework of the 'lesser evils'.

A number of scholars who rejected this theory raised several principal arguments.[219] One counter-argument sets forth that the theory does not explain why, although the aggressor loses his right to live during his attack, he is nevertheless forbidden to use defensive force after the attack is terminated, given the customary requirements for necessity of the defensive force and for the (present) existence of danger. Thomson[220] suggests three independent possible solutions for this: (1) Because of utilitarian considerations, society forbids the attacked person to kill the aggressor after his attack is over; (2) The termination of the attack demonstrates—in retrospect—that, in the specific case, it was never necessary at any stage to kill the aggressor; (3) Once he has ceased his attack, the aggressor is again entitled to the

[217] It is noted that, at this point, I do not consider the characteristic implications of all theories of justification of private defence, such as those concerning the involvement of a third party—implications that do not particularly distinguish this theory from others. Omichinski considers additional implications of the theory in comparison to those that I discuss below. In her opinion, inter alia, there is no requirement for necessity and no demand for a retreat (see, correspondingly, Omichinski, n 31 above, at 1456 and at 1457). I cannot accept these two determinations, but since no reasoning is presented for them it is difficult to challenge them here. I will only note at this stage that the duty to retreat may and must—as we shall see below—be derived not only from the demand for necessity but also and principally from the demand for proportion—a demand whose existence even Omichinski does not dispute, within the framework of this theory as well (*ibid* at 1454).

[218] See Dressler, n 32 above, at 85ff.

[219] For additional—in my opinion, secondary—counter-arguments see Omichinski, n 31 above, at 1465ff; Kadish, n 34 above, at 884; Wasserman, n 181 above, at 358–59; Gorr, n 191 above, at 266; Ryan, n 196 above, at 511.

[220] See Thomson, n 29 above, at 34ff.

right that he lost before. With regard to this last matter, Thomson notes that it may be said that the aggressor only ceases to hold his right during the attack, in distinction to saying that he loses it completely. Another similar possible solution is to say that the right of the aggressor recedes before the right of the person attacked—because of the guilt of the aggressor—but only if several accumulative conditions are fulfilled, one of which is the existence of (present) necessity.

Another principal counter-argument, that was mentioned above, is that the theory—that focuses on the aggressor and his guilt—only deals with the freedom of the attacked person to kill the aggressor and does not deal with any sort of right of his to do so. Thus, Kadish[221] claims that if the law forbade the killing during the act of defence, it would perhaps be unjust, but would not be contradicted by the theory of forfeiture. These two counter-claims are, in my estimation, relatively weak in light of the variation of this theory that does not involve forfeiture, but involves a devaluation of the aggressor's interests—a devaluation that takes place within a framework similar to that of the 'lesser evils'.

The central counter-argument that is presented in the literature—both legal and philosophical—is that the entire theory that is the subject of our discussion collapses in light of the case of the innocent aggressor, since it is clear that in such a case it is impossible to justify private defence by basing it on the guilt of the aggressor (which does not exist). It should be mentioned that scholars see this as the central and decisive deficiency of the theory—a deficiency that is a cause, and often the sole cause, for its negation. Thus, for example, Fletcher wrote[222] (by the expression 'self-defence II' he means the theory that is the subject of our discussion):

> Thus it seems that self-defence II may provide a perfectly sound rationale of self-defence in the typical case, but it fails to give an account of our intuition in the case in which the aggressor's conduct is excused by reason of insanity or by other acknowledged excusing conditions.

However, in my opinion, the case of the innocent aggressor does not in any way refute the theory that focuses on the aggressor's culpability, and for the simple reason that this case does not fall within the bounds of private defence at all. Because of the tremendous significance that is attributed to this case, which serves in the literature as a general test-case for the rationale of private defence, I shall deal with it extensively in the following section. At this stage, I will refer to the other facet of Fletcher's statement that is quoted above. From Fletcher's words, it appears that if it were not for the difficulty that is presented by the case of the innocent aggressor,

[221] See Kadish, n 34 above, at 884.

[222] See Fletcher (1973), n 1 above, at 378; and see also Fletcher, n 72 above, at 305 and Fletcher, n 74 above, at 1379. For similar expressions of other scholars, who also see the case of the innocent aggressor as refuting the theory based on the aggressor's guilt, see, eg, Kadish, n 34 above, at 884; MS Moore, 'Torture and the Balance of Evils' (1989) 23 *Israel Law Review* 280 at 321; Thomson, n 29 above, at 36; Ryan, n 196 above, at 511.

the theory based on the guilt of the aggressor would be a satisfying rationale for private defence. My position, which will be presented more widely below, is that despite the great value, moral and legal importance of the factor of the aggressor's guilt,[223] to base the rationale for private defence on this factor alone would be to miss a substantial part of the essence. There are additional extremely significant factors that should be taken into account, in particular, the social-legal order,[224] which operates strongly for the justification of private defence. Accordingly, the guilt of the aggressor—the subject of our discussion—is an essential factor in the justification of private defence, but it is not alone a sufficient factor for this purpose.[225]

1.5.3 The Test-Case of the Innocent Aggressor

The central test-case[226] that is used in the literature to examine the various theories regarding justification of private defence is the case of the innocent aggressor. An example of this is when the aggressor is insane. As was noted in the previous section, the principal use made of the test-case is to negate the theory that the rationale for the justification of private defence stems principally from the aggressor's guilt. As was alluded to above, my opinion is that the aggressor's guilt has significant importance that goes beyond the function of a mere test-case, since the waiver of the requirement of guilt of the aggressor undermines the very substance of private defence and constitutes a waiver of a substantial part of its uniqueness in comparison to other criminal law defences of compulsion, such as in the following aspects: the attack that is performed by the aggressor, his guilt in the attack and directing the defensive force against the guilty aggressor himself.

[223] A similar opinion is expressed—within the framework of philosophical literature—by Montague: 'Special moral significance does attach, however, to the fact that a life-threatening situation is created by someone's culpable behaviour, whether intentional, reckless, or negligent' (Montague (1981), n 211 above, at 211). Apart from my reservations regarding the sufficiency of the negligence that appears at the end of Montague's words, I agree with what he says.

[224] See section 1.5.5 below.

[225] In order to remove all doubt, it should be noted that although the discussion of the theory was carried out—pursuant to the legal literature and the philosophical literature that deals with the same subject—while relating, principally, to lethal defensive force used against a lethal attack, the theory that is based on the aggressor's guilt is also applicable to cases of more moderate attack and defensive force. As a rule, it seems that the consideration of lethal defensive force—within the framework of the discussion concerning the rationale for private defence—always constitutes the surmounting of the highest possible hurdle. In other words, the rationale that justifies lethal defensive force, will also—in the sense of 'a fortiori'—justify more moderate defensive force. Yet, as noted above, consideration of lethal defensive force and of this alone throughout the entire discussion may distort the picture. Therefore, cases of more moderate force must always be kept in mind. This is especially correct with regard to the next stage—following the determination of the rationale—determining the suitable arrangement for private defence. Such a framework must be adapted not only for lethal defensive force (as many scholars tend to do) but also for moderate force.

[226] It should be mentioned that this is one of the only issues that relates to private defence that is almost always considered by scholars who write about private defence.

The opinion that even repelling an innocent aggressor falls within the boundaries of the justification of private defence is so deeply rooted, that it is generally accepted among many of those who support the distinction between a justification and an excuse that one of the central implications of this distinction is as follows: while there is no right to private defence against a 'justified' attack, it is 'justified' to exercise private defence against an attack that is only 'excused'.[227] Thus, for example, although the attacked person does not have the right to private defence against a policeman who legally and justifiably arrests him, according to this approach the attacked person does have a right to private defence against the psychotic aggressor, who has no justification for his action and is only excused within the framework of a defence of insanity. This approach is expressed, inter alia,[228] in the German Penal Code,[229] in the American Model Penal Code[230] and in the proposed new English Penal Code,[231] and there are those who view it as the most important implication of the distinction between justification and excuse.[232]

[227] See, eg, Dressler, n 32 above, at 62; and Robinson (1984), n 37 above, vol 1 at 165–67. Fletcher also claimed this, as will be discussed in detail further on. It should be mentioned that Robinson—for some reason—notes, in the above-mentioned pages of his book, that in Fletcher's opinion a third party is not entitled to assist the defender against an innocent aggressor (see—principally—nn 7 and 8, Robinson (1984) vol 1, n 37 above). Fletcher's position on this matter is the same as that of Robinson, as Fletcher wrote, inter alia, in the writings to which Robinson referred.

[228] The defence of the 'pursuer' ('rodef') in Jewish law is also valid when the aggressor (the 'pursuer') is a minor—see, eg, Finkelman, n 25 above, at 1279ff. See and compare to D Frimer, 'The Guiltless Aggressor' (1986) 34 *Or Hamizrach* 94 (Hebrew). With regard to solutions provided by Jewish law to the problem that is the subject of our present discussion, and whose main discussion may be found regarding the phrase 'might is right', see more extensively Enker, n 89 above, at 212–39. Similar opinions, according to which repelling an innocent aggressor is included in the bounds of private defence, were also expressed by the Australian court (see SMH Yeo, 'New Developments in the Law of Self-Defence in Australia' (1987) 7 OJLS 489 at 492–493; D Lanham, 'Death of a Qualified Defense?' (1988) 104 LQR 239 at 246) and by scholars (see Card, Cross and Jones, n 180, at 625; Williams, n 13 above, at 733; Williams (1982), n 1 above, at 735; JF Stephen, *A Digest of the Criminal Law*, 9th edn by LF Sturge (London, 1950) at 254 (see the first example and fn 6, relating to s 305)).

[229] Section 32 of the German Penal Code permits private defence against an attack that is 'wrongful', and an attack in a situation of excuse is indeed 'wrongful'. See with regard to German law, eg, Fletcher, n 37 above, at 96ff; Mordechai Kremnitzer, 'On Some Characteristics of German Criminal Law' in *Essays in Honour of Justice Shimon Agranat* (1986) (Hebrew) at 330; Gur-Arye, n 37 above, at 79.

[230] The definition of 'unlawful force', in section 3.11(1) of the MPC, against which private defence is permitted, also includes various cases in which the aggressor is innocent because he has the defence of an excuse. As Fletcher notes (n 37 above, at 96 fn 83), this definition is cumbersome and inefficient, since the drafters did not use the term 'excuse'.

[231] Section 27(3) of the English bill (Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles, no 218 (London, 1993)) defines a criminal act—against which private defence is permitted—with a broad definition that also includes various cases where the aggressor is innocent due to the existence of an excuse. It should be noted that in other contexts the English bill does not distinguish between justification and excuse—see Gur-Arye, n 13 above, at 228.

[232] This is, eg, the opinion of Gordon—n 1 above, at 423.

Before we turn to the dispute itself, it should be clarified that with regard to two matters there is almost complete agreement among the scholars. The first—when an aggressor acts within the framework of a 'justification', the person attacked is not entitled to 'justified' private defence. The second—even those who negate private defence against an innocent aggressor do not, usually, claim that the attacked person should 'succumb' to the aggressor. However, it is definitely possible that the person attacked would be acquitted on the grounds of another criminal law defence, of an excuse type, such as putative defence (if he was unaware of the factual basis of the aggressor's defence) or 'necessity'.[233] Accordingly, even when it is stated that the attacked person who injures the innocent aggressor should be acquitted, the mere fact of the acquittal should not suffice, but it is necessary to continue and explore the basis for this acquittal: the justification of private defence or only an excuse.

Within this discussion, the approach of Fletcher is especially noteworthy, as set forth in his well-known article entitled 'Proportionality and the Psychotic Aggressor'.[234] Because of the large amount of attention that this article has received in international literature on the subject, and because of the significance of the arguments that he presents therein, I shall refer in depth to the basic ideas that he presents there. Fletcher focuses his discussion on the specific case of an aggressor who is innocent due to an excuse—the psychotic aggressor—and he explains this choice by the fact that, in all legal systems, it is clearly acknowledged that insanity constitutes an excuse and not a justification[235]. In his opinion, it was the treatment of the problem of the psychotic aggressor in German law which led to the negation of the rationale of private defence based on the guilt of the aggressor, and to the preference for the rationale based on the autonomy of the person attacked, despite the 'cost' of adopting the rationale of autonomy, namely the lack of a requirement of proportionality. In contrast, it is the fact that Anglo-American law ignores the problem of the psychotic aggressor that—in his opinion—enabled reliance on the rationale of the aggressor's guilt and the requirement of proportionality.[236]

Fletcher uses the case of the psychotic aggressor as a test-case for the examination of the various theories of private defence and 'necessity'. His basic assumption is that, in accordance with our intuition, we should permit defence against an aggressor who acts in a situation of excuse.[237] First, he negates the possibility that the solution to the problem is to be found within the framework of the 'necessity'

[233] It should be noted that the classification of this case as 'necessity' and not as private defence has important practical implications, such as: a strong duty to retreat, greater rigidity of the requirement for proportionality and restriction of the right of a third party to intervene.

[234] See Fletcher (1973), n 1 above. See also his later article, n 9 above.

[235] See Fletcher (1973), n 1 above, at 371.

[236] *Ibid*, at 370 and 390.

[237] *Ibid*, at 378.

defence of a justification type (known as the 'lesser evils')[238], since this pits the life of one person against the life of (one) another.[239] The option of a 'necessity' of the excuse type as the solution to the problem is negated by Fletcher on the basis of the undesirable results that he attributes to such a solution: (1) A third party will be forbidden to intervene to assist the attacked person; (2) The aggressor himself will have the right to self-defence, since the defensive act of the person who is attacked within the framework of an excuse of 'necessity' will be considered as a 'wrongful act'; (3) If force is used by the person who is attacked, a third party will be entitled to intervene to assist the aggressor.[240]

In my view, the reasoning of Fletcher for the negation of the solution of 'necessity' as an excuse is not only unconvincing, it is also inaccurate: (1) Although a third party probably[241] could not intervene with a 'justified' intervention to help the person attacked, it could be that he would have an excuse if he intervenes, for example, when the person who is attacked is his relative; (2) It is correct that the aggressor can defend himself against the defensive act of the person attacked, but only within the framework of an excuse, and not as 'justified' behaviour; (3) In light of this last clarification (2), Fletcher's determination that the third party will be particularly entitled to intervene to help the aggressor is unfounded.[242]

Fletcher concludes his discussion of the 'necessity' defence by asserting that this defence—both as a justification and as an excuse—is not a suitable solution to the problem of the psychotic aggressor, since the theory of 'necessity' ignores the important feature of this case: the fact that one of the sides in the confrontation attacks, while the other defends himself.[243] However, as mentioned, the unique-

[238] An example of a situation of 'necessity' of the justification type: A breaks down the door of his neighbour B's apartment, to take a bucket full of water in order to extinguish a fire that has broken out in the apartment of another neighbour, C. By doing so he chooses the lesser evil, and society justifies and encourages him to act in such a way. As an example of a situation of 'necessity' of the excuse type, it is possible to take the case, which we described above, of two survivors from a sinking ship who try to hold on to a small log that is sufficient to rescue only one of them. If one of them pushes the other to his death and holds on to the log alone in order to save himself, it is possible to understand him and forgive him within the framework of the necessity exception as an excuse, but not as a necessity exception of justification, since he did not choose the lesser evil. His life has no greater importance than the life of another.

[239] Fletcher (1973), n 1 above, at 373ff.

[240] *Ibid.*

[241] Unless it is such a case as may be included in the bounds of the 'lesser evil', although this is only a remote possibility.

[242] Although it could be that he will not bear responsibility if he does so, however—once again—only in the context of an excuse, such as if the aggressor (that has now also become the one attacked) is his relative.

It should be noted that nothing in my above argument should constitute an agreement with Fletcher's approach and with that of other supporters of this distinction between justification and excuse, according to which the right to defend another is directly, automatically and mechanically derived from the above exception—see Ch 4.2.3 below. However, at this stage and for the purpose of addressing the arguments of Fletcher, I am willing to assume that the above implication is valid.

[243] Fletcher (1973), n 1 above, at 376.

ness of private defence in comparison to 'necessity' does not derive from the attack alone, but from the attack in conjunction with the aggressor's guilt. Although the typical case of 'necessity' involves the sacrifice of the interest of a third party, and with regard to the issue we are discussing—as in private defence—it involves the sacrifice of the aggressor's interest,[244] in the typical case of private defence the aggressor can cease his attack. This is not the case for the psychotic aggressor in particular, and the aggressor who acts in a situation of excuse in general, since both are unable to control the cessation of the attack, or at least not to the same extent.[245] Therefore, a criminal law defence of the excuse type (such as 'necessity') is actually more suitable for our matter: a defence that will impose limitations upon the attacked person—because of the special situation of the aggressor—such as a strong duty to retreat and a relatively rigid requirement of proportionality.

From this point, Fletcher goes on to examine the suitability of three theories of private defence for the matter under discussion. He negates the suitability of the first—private defence as an excuse—for the solution of the problem of the psychotic aggressor, for the principal reason he used to negate the possibility of a 'necessity' as an excuse—a third party who chooses of his own free will to intervene for the good of the person attacked will not enjoy this defence.[246] On this point, my opinion is that if indeed there are no circumstances that would provide an excuse for the third party, such as putative defence (if he did not know that the aggressor was innocent), or 'necessity' (based on his relation to the person attacked), or justification on the basis of the 'lesser evil' (a remote possibility), then there is no reason to encourage him to defend the person who is attacked by injuring the innocent aggressor.[247]

The suitability of the second theory, which bases private defence on the culpability of the aggressor, for the solution of the dilemma of the psychotic aggressor is easily negated by Fletcher by means of a literal definition,[248] and justly so. Yet the assumption that the solution to this problem is supposed to be found in particular in the areas of private defence is incorrect.

At this juncture, Fletcher, having negated four solutions to the dilemma—as mentioned, at completely different degrees of persuasion—reaches what is, in his

[244] On the basis of this characteristic it is possible to determine an exception of private defence as an excuse that will co-exist with the principal exception of private defence as a justification. I will relate to this possibility below.

[245] Although this does not involve a lack of 'volition' (lack of control; no objective-physical option to choose alternative behaviour), yet in situations of an excuse the actor's freedom of choice is extremely restricted.

[246] Fletcher (1973), n 1 above, at 377.

[247] Fletcher talks about our strong intuition, according to which the person attacked by a psychotic individual should be allowed to defend himself. He also talks about our intuition that the intervention of a third party to assist the person attacked should be justified (see *ibid* at 378). Yet the existence of this latter intuition is questionable. See also the text accompanying n 273 below.

[248] See Fletcher (1973), n 1 above, at 378; and see section 1.5.2 above, which relates in depth to this theory.

opinion, the one and only solution: the theory that bases the justification of private defence on the autonomy of the person attacked. As he notes, according to this theory, defensive behaviour against the aggressor is indeed included within the framework of private defence.[249] In the next section I shall refer at length to this last theory and demonstrate that this is not the suitable and desirable rationale for private defence. At this stage, it is sufficient to mention one central deficiency of this rationale—a deficiency that is admitted by Fletcher himself: according to this rationale no proportionality is required between the expected danger to the person attacked if he does not injure the aggressor, and the expected danger to the aggressor if the attacked person injures him (or in another version—the actual injury to the aggressor).[250]

Further on, we shall see that the demand for proportionality is a central, important and desirable demand—morally, legally and practically—within the framework of any cultural order of private defence[251]. Given this, Fletcher's conclusion at the end of his article that Anglo-American law lags behind German law regarding this matter, to the extent that it still 'dwells in Plato's cave',[252] seems strange.

Fletcher's description is as follows: In German law, the dilemma of the psychotic aggressor was addressed, and the rationale of autonomy was accordingly chosen as a solution, creating the problem of the lack of a requirement of proportionality. As opposed to this, in Anglo-American law there was absolutely no consideration given to the dilemma of the psychotic aggressor and therefore, of course, they did not find a solution for it. Even if we accept this description, that in my opinion is imprecise, a clear picture still emerges as follows: according to Fletcher's theory itself, each of these legal systems has solved only one of the two problems: the German system—the dilemma of the psychotic aggressor, and the Anglo-American system—the problem of proportionality. If so, why praise the system which chose the solution to a rare and marginal problem (defensiveness against an innocent aggressor), and discredit the system that adopted a cultural requirement of the highest order of proportionality—a requirement which has been credited with great importance in all cases of private defence?

As mentioned, the above article by Fletcher gained a great deal of literary attention, and it eventually became acceptable—due to Fletcher, among others—to negate the rationale based on the culpability of the aggressor on the grounds of its incompatibility with the case of the innocent aggressor.[253] Fletcher's article elicited a detailed response from Kremnitzer.[254]

[249] See Fletcher (1973), n 1 above, at 378ff.
[250] *Ibid* at 387ff.
[251] See principally Ch 3.8 below.
[252] Fletcher (1973), n 1 above, at 390.
[253] See, eg, Moore, n 222 above, at 321; Ryan, n 196 above, at 511; Thomson, n 29, at 36; Kadish, n 34 above, at 884.
[254] See Kremnitzer, n 10 above.

The approach of Kremnitzer is, to put it briefly, that the case of the psychotic aggressor should not be placed within the boundaries of private defence at all, but within the 'necessity' defence, and that the demand for proportionality—even within the framework of private defence—should not be waived. He rejects the rationale of autonomy[255]—a negation that is discussed in the next section, which deals with this rationale. He does not limit himself to this, however, but also expands upon the case under discussion. At first, Kremnitzer points out that none—not even Fletcher—would dispute that there is no private defence against an aggressor who acts without volition (control), or against an aggressor who acts without the mental element required for the establishment of the offence, according to its definition, and that it is reasonable to act similarly with regard to an insane aggressor or a minor. The weakness of Fletcher's distinction between the lack of volition in the aggressor's action, which denies the person attacked the right to private defence, and the insanity of the aggressor, which does not deny it, reaches its peak in the case of an uncontrollable impulse—a case in which insanity causes a lack of volition.[256] In Kremnitzer's opinion, the rationality and humanity that characterise modern law require negation of the justification of private defence against one who is insane, and acts without culpability.[257]

A very important factor in the justification of private defence, which we shall examine in detail further on, is the social-legal order. Fletcher also mentions this factor, but he does not give it appropriate weight.[258] Kremnitzer explains that, in distinction from defensive action against an adult sane aggressor that in effect protects the social order, defensive action against an insane aggressor does not protect the social order, since because of his lack of culpability, his injury to the legal order is no greater than that of a wild animal. Hall compares the attack performed by a madman to an attack by a wild animal in his well-known book.[259] Accordingly, the opinion of Hall is that the substance of both cases is identical—an act against a force of nature—and he suggests that resistance to the act of the madman fits the 'necessity' defence. Kremnitzer notes that the description of a person as innocent of any offence and, at the same time, as the enemy of society,[260] constitutes a contradiction that cannot be accepted, and that resistance to a psychotic person is not a 'police action' of prevention of crime, since its value in terms of prevention and deterrence is doubtful.[261] In effect, in all the cases of the innocent aggressor—including the cases of an aggressor who is a minor, or who lacks volition, or lacks

[255] *Ibid* at 181ff.
[256] *Ibid* at 187ff.
[257] *Ibid* at 188ff.
[258] See Fletcher (1973), n 1 above, at 380, 388ff.
[259] See Hall, n 13 above, at 436 fn 85; and compare to the differing opinion of Fletcher, n 9 above, at 229–31.
[260] Such a description appears in Fletcher (1973), n 1 above, at 389.
[261] See Kremnitzer, n 10 above, at 194ff.

the mental element required in the definition of the offence—the resistance to the aggressor lacks the dual character of private defence: the protection of the legitimate interest of the person attacked, and the protection of the social-legal order.[262]

Following his negation of the compatibility of the framework and rationale of private defence with the case under discussion, Kremnitzer examines the appropriateness of the 'necessity' defence as a solution to the case of the aggressor who acts in a situation of excuse, and expresses his opinion that this is the suitable defence for this case.[263] Although I do not agree with his opinion that the distinction between 'justifiable necessity' and 'excusable necessity' should be abandoned in order to reach this conclusion, since the case that is under discussion can be attributed to only one of them—'excusable necessity', in my opinion, also, 'necessity' provides the suitable framework for this case. As Kremnitzer notes, the classification of the repelling of the psychotic person as 'necessity' is consistent with the accepted definition of the difference between 'necessity' and 'private defence': 'private defence'—when the attack has an illegal character; 'necessity'—when the danger stems from the circumstances.

Kremnitzer continues with an examination of the suitability of the characteristic requirements of 'necessity'[264]—principally the duty to retreat and the relative inflexibility of the requirement of proportionality—and finds them suitable for the case of the psychotic aggressor. Thus, for example, it is interesting to note—with regard to the duty to retreat—that even in legal systems where as a rule it is not required, the duty to retreat is nevertheless imposed before taking private defensive action when the aggressor is innocent.[265] This trend is evidence that this case suits 'necessity' and not private defence.

With regard to the case in which the person attacked does not know that the aggressor is psychotic, it would appear that this case is in effect, as mentioned, putative (private) defence. Kremnitzer proposes the interesting possibility that putative defence is essentially the explanation for the (wrong) classification of repelling the psychotic aggressor as private defence (a classification which Fletcher referred to,[266] as mentioned) in German law and in the law of the former Soviet Union.

[262] As mentioned, I will consider this rationale of private defence more extensively, in section 1.5.5 below.

[263] Kremnitzer, n 10 above, at 196ff.

[264] *Ibid* at 206ff.

[265] See, eg, *ibid* at 207; Perkins and Boyce, n 85 above, at 1117; Fletcher (1978), n 1 above, at 865; K Bernsmann, 'Private Self-Defence and Necessity in German Penal Law and in the Penal Code Proposal: Some Remarks' (1996) 30 *Israeli Law Review* 171 at 175, 178 (the latter does not focus on the subject of the duty to retreat but points to the special consideration that exists—even in German law—with regard to defensive behaviour against an innocent aggressor). For an exceptional opinion on this matter see Smith, n 91 above, at 125.

[266] See Kremnitzer, n 10 above, at 205 fn 83.

Fletcher's later writings contain arguments that can be used to counter his approach to the subject of our discussion. Thus, for example, in an article where he explores the appropriate rationale for the classification of escape from legal custody when the conditions of imprisonment are intolerable, Fletcher bases his choice of the exception of excuse on the reasoning that **claims of justification are not directed against the innocent** (the possibility that is discussed there is that the escapee will use force—during his escape—against innocent people, such as the guards).[267]

In the same article Fletcher also uses the **sense of remorse** felt by the killer of an innocent person in a situation of putative private defence, as an indication that the character of putative defence is not one of justification but of excuse.[268] It seems to me, that a person of good conscience will also feel similar remorse if he kills an innocent aggressor (with awareness of the factor on which this innocence is founded, such as his insanity), at least if he did not exploit alternatives, such as retreat, before killing the aggressor.

In a different article, Fletcher refers, inter alia, to the case in which an aggressor using a tank for his attack places a baby in front of the tank, so that the use of force against the aggressor will necessitate harm to the baby, and classifies the defensive action used in this case as 'excuse'.[269] I shall return to consider this case, known in philosophical literature—after Nozick[270]—as the 'innocent shield of threat', further on.[271] At this stage, I shall limit myself to pointing to the great similarity between a person acting as an innocent shield for an aggressor, and the innocent aggressor, which forces us to see the defence, in both cases, as having the character of an excuse only.

In effect, it appears that in his later writings, Fletcher retreats slightly (although not wholeheartedly) from the decisiveness of his opinion as it appears in his article discussing the psychotic aggressor. For example, he notes that just as it is established that private defence is permitted against an aggressor who acts in a situation of excuse, it would also be possible (and not only from a technical point of view) to legislate otherwise.[272] Similarly, in another place where he classifies the defensive action of a policeman against an aggressor who acts in a situation of 'excuse' (putative defence) as 'justified', Fletcher proposes another possibility—the correct one, in my opinion—that in such a situation only an excuse exists for both sides. He also notes that with regard to the principal implication of this classification—the right

[267] See Fletcher, n 75 above, at 1368.

[268] *Ibid* at 1363.

[269] See Fletcher, n 74 above, at 1387. Fletcher suggests seeing his approach—the requirement of a 'humane act'—as the desirable golden mean between accepting any human threat (such as a foetus that endangers the life of its pregnant mother) and the requirement of an attack accompanied by guilt—see Fletcher, n 117 above, at 209ff.

[270] See R Nozick, *Anarchy, State and Utopia* (New York, 1974) at 35ff.

[271] See Ch 5.1.1 below.

[272] See Kadish, n 96 above, vol 3 at 942 (written by Fletcher).

of a third party to intervene—it is intuitively totally unclear which is preferable.[273] Moreover, in his well-known book 'Rethinking Criminal Law',[274] Fletcher discusses the approach according to which the attack performed by a madman, a minor, or one who is innocent does not undermine the legal order—an approach that leads to the classification of repelling such an attack as 'necessity' and not as private defence ('necessary defense'—in his words). Fletcher notes the difficulty in classifying the case, and points out that the pure theory of private defence, which is also based on legal order, is valid only if the aggressor is responsible for his actions. These expressions of his cannot be seen as 'a total revision', since even in his later writings, he still mainly puts forth autonomy as the preferable rationale—in his opinion—for private defence. But doubts—as distinct from the decisiveness of the past—can be found there.

In the philosophical literature[275] it is possible to find an unexplained assumption, that the case that is the subject of our discussion falls within the boundaries of private defence, and the use of this case for the decisive negation of the rationale based on the culpability of the aggressor.[276] Alongside this, it is also possible to find deliberations and doubts concerning the morality of injuring an innocent aggressor. Thus, for example, Levine[277] suggests the argument that it is unfair for the attacked person to kill the aggressor, since in such a case the aggressor will be harmed purely by coincidence, and she also raises a similar argument, that there is no morally relevant difference between the aggressor and the person who is attacked. Alexander[278] proposes the moral importance of the fact that the psychotic aggressor—in contrast to the ordinary aggressor—does not attempt to exploit the situation of the attacked person for the improvement of his own position, and thus the threat that he poses is similar to a threat emanating from a natural source. In his opinion, it is possible to show sympathy for the person who is attacked and to provide him with an excuse, but it is definitely not possible to say that his action is 'right', since no 'wrong' faces him as in a case of private defence. Accordingly, he concludes that behaviour against an innocent aggressor will almost always be within the boundaries of an 'excuse' only, and only rarely will it be within the boundaries of 'justification'. My reservation is with regard to the permission without any stated reasoning for the

[273] See Fletcher (1978), n 1 above, at 766–67, including fn 29.

[274] See *ibid*, at 865–66. For more of Fletcher's own doubts concerning his view see Fletcher, n 46 above, at 145:

> If the wrongful nature of the attack, whether by a psychotic or a culpable actor, proves to be a less-compelling rationale for self-defence, then necessity might indeed be a better way to justify the use of force against a psychotic aggressor.

[275] For similar opinions in legal literature, that the proper place for the case under discussion is in 'necessity', and in any case not in private defence, see Greenawalt, n 37 above, at 309ff; and the opinion of Slutskij that is presented in Fletcher (1973), n 1 above, at 379 fn 36.

[276] See, eg, the references in n 253 above.

[277] See Levine, n 156, at 69–70.

[278] See LA Alexander, 'Justification and Innocent Aggressors' (1987) 33 *Wayne Law Review* 1177 at 1185ff.

('rare') possibility of justification. Montague[279] also distinguishes between the responsible aggressor—against whom the person attacked has full rights and the justification to defend himself, and a third party has the right to assist him—and the non-responsible aggressor—against whom there can be no such right (although the person attacked need not sacrifice his life).

Another closely related issue that has received almost no consideration,[280] is the case in which the aggressor is negligent. As is known, legislators have defined offences that suffice with the mental element of (only) negligence. What then is the position regarding repelling a negligent aggressor? Is his—not very extensive[281] guilt, as expressed through his negligence, sufficient to allow repelling him in private defence to be considered as 'justified'? The answer is negative. This case is close in nature to the case of the innocent aggressor. In this case too, the characteristic—which exists in private defence—does not exist here, ie, that the aggressor can[282] at any stage cease his attack and render unnecessary the defensive force used against him . Thus, too, the injury by the negligent aggressor to the social-legal order—even if it exists—is not sufficiently great to constitute a foundation for justification of private defence. Accordingly, we should also place the repelling of a negligent aggressor in the category of excuse, principally[283] putative defence or 'necessity'—as the case may be.

A possible practical solution to the problem of the negligent aggressor is that the person attacked (or another person who is present at that location) could inform the negligent aggressor that his act endangers the person attacked. As a result of such a warning, the aggressor would either cease his attack, or he would choose to continue it, but in the latter case his attack would no longer be negligent but would become an intentional attack (or, at least, with awareness), and defensive action against it would therefore be completely justified. Although there may be cases in which it is not possible to warn the negligent aggressor, it appears that they are exceptional. The same practical solution may also fit the problem of an innocent aggressor who attacks due to a mistake, without knowing the real situation (ie, that he is not in real danger at all).

In conclusion, I would like to propose a historical reason for the approach that can be found in Anglo-American law, according to which the case of the innocent

[279] See Montague, n 181 above, at 31.

[280] Montague claimed that the negligence of the aggressor is insufficient to justify private defence against him—see Montague, n 181 above, at 32; Perkins expressed his opinion that defensive action is permitted, but that there is a strong duty to retreat—see. Perkins, n 40 above, at 136. In my estimation, he indicates by this that the behaviour is viewed as having a character of excuse and not of justification.

[281] Especially, even if not only, in light of the accepted test for negligence—the objective test, that relates to the 'reasonable man', and not to the actor himself.

[282] As mentioned, this is not intended to refer to the restricted meaning of the requirement of volition (control).

[283] 'Principally'—since it may also be possible, as I shall explain further on, to determine—alongside the basic and central private defence that has a character of justification—a private defence of the excuse type as well.

aggressor should also be included within the bounds of private defence.[284] In English law, the courts refused for many years to recognise the exception of 'necessity', and even when they recognised it, severe danger was required—death or severe bodily harm—in order to establish this exception.[285] Their main fear was that anarchy would result from this exception—an exception for which no one could predict the cases in which it could be used. This is in contrast to—for example—the exception of private defence that relates to a well-defined sector of cases. As mentioned, in my opinion, the correct place for repelling the innocent aggressor is the 'necessity' exception, or—in light of a mistake by the defender—putative private defence. However, in a legal system where the 'necessity' exception is extremely restricted, the person who is attacked by an innocent aggressor may be left without legal protection of any kind. Therefore, there is a strong tendency to expand private defence, so that it may also encompass this 'stepchild'.[286]

1.5.4 The Autonomy of the Attacked Person as the Crucial Factor

In the previous two sections, I have described the use made in the literature—both legal and philosophical—of the test-case of the innocent aggressor, both to negate the aggressor's culpability as the crucial factor in the rationale for private defence, and to establish the autonomy of the attacked person as the rationale for private defence. As stated, it is my opinion that the test-case does not justify the negation of the importance of the aggressor's culpability as a central factor in the justification of private defence. In this section we shall examine in a general way the theory that the rationale that underlies private defence is the autonomy of the attacked person. The essence of this theory is that private defence as justification is based on the absolute right of the victim of the attack to defend his personal legitimate interests—his autonomy—against the attack. There are those who base this defence on the right of a person—a natural right,[287] according to one school, and an agreed right, according to a second school—to life and autonomy. This is the minimum requirement to maintain life that has value. Therefore, a person is permitted to give priority to his own life when his life is in conflict with the life of another.[288]

[284] Regarding the situation of positive law—which is not completely clear—with respect to the issue that is the subject of our discussion in Anglo-American law, see, eg, Kadish, n 34 above, at 876; JC Smith, and B Hogan, *Criminal Law*, 9th edn (London, 1999) at 259 and Fletcher (1978), n 1 above, at 870.

[285] See DW Elliot, 'Necessity, Duress and Self-Defence' (1989) Crim LR 611 at 618–19; Williams (1982), n 1 above, at 739.

[286] It deserves mention that this limitation, which appears in English Law, caused one of the writers to call for the (strange) application of private defence not only against the innocent aggressor but also in the absence of any attack—against natural dangers—see Elliot, previous n, at 618.

[287] With regard to the view of private defence as a natural right, determined by the natural law, see Aiyar and Anad, n 134 above, at 1ff; Baum and Baum, n 1 above, at 36.

[288] Enker, n 117 above, at 56.

According to this theory,[289] individual autonomy and the right to defend it together constitute the essence of private defence. All that is required in order to justify private defence is a certain type of aggression against an innocent person. The test for the required aggressive behaviour is that it should be 'wrongful'. Therefore, if the aggressor acts in a situation of a mere excuse (as distinct from a justification) his attack is still within the bounds of a 'wrongful act', and private defence is accordingly justified. The focus is not on the guilt of the aggressor, but on the autonomy of the innocent victim, where the assumption is that the latter has the right to prevent invasion of and penetration into the sphere of his autonomy. The adage that is frequently applied to this set of circumstances is 'Right should never give way to Wrong'.[290]

The explanations that Fletcher presents for this theory are as follows: the aggressive action places the aggressor outside the protection of the law. Locke wrote, for example, that the aggressor is in 'a state of war' with the defender,[291] and as Fletcher adds, when a person is at war he is only interested in the enemy's attack and not in the possible excuse for it. Another explanation, which is attributed to the Kantian tradition,[292] is that the attack breaches the implied contract that exists between autonomous individuals, according to which each of them must respect the living space of one another. According to Fletcher,[293] the theory based on autonomy is the dominant one in the criminal theory of Germany and the former Soviet Union, and it also finds expression in the theory of ancient common law.[294]

[289] An extensive discussion on this theory was presented, as mentioned, by Fletcher, who opined that this is the suitable rationale for private defence. See, eg, Fletcher (1973) n 1 above, at 378, and also Fletcher (1978), n 1 above, at 860ff, 770ff.

An interesting development of the autonomy rationale was done by Schopp—see Robert F Schopp, *Justification Defenses and Just Convictions* (Cambridge, 1998). Schopp wrote about self-defence as justified conduct in a liberal society, and emphasised the importance of the sovereignty, the sphere of the self-determination and the equal status of the person (*ibid* at 64ff). As other supporters of the autonomy rationale, Schopp came to the conclusion that there should be no requirements of proportion and retreat—not even before deadly defensive force is used (*ibid* at 77ff.). His theory allows the victim to kill an apple thief (*ibid* at 83). The main basis for justifying self-defence according to Schopp is the autonomy of a person in a liberal society. However, I wonder if a real liberal society should not also consider the rights of the aggressor and should not have a little bit compassion towards him.

[290] Or, in other accepted phrasings: 'Right should never yield to Wrong'; 'Law does not have to yield to Lawlessness'. Fletcher attributes the saying to Berner (1848) (see Fletcher (1973), n 1 above, at 379 fn 34) or to a slightly earlier period (see Fletcher, n 37 above, at 97 fn 88). However, there are those who attribute this saying, that justice should not yield to evil, to the ancient Romans—P. Dykan, *Criminal Law, with Special Reference to the History of Jewish Law and to the Law of Israel* (1957) Pt IV (Hebrew) at 798.

[291] See the quotation of Locke's words, next to the reference to n 215 above.

[292] See Fletcher (1973), n 1 above, at 380.

[293] See, eg, *ibid*, at 379; but compare this to Eser's different opinion, that although this is the ancient rationale, in modern German criminal theory, the defence of the legal order is also emphasised—Eser, n 26 above, at 631ff.

[294] This principally concerns the position of Locke, on which we commented above, and the well-known words of Coke, according to which: 'No man shall (ever) give way to a thief etc., neither shall he forfeit anything'. See, also Fletcher (1973), n 1 above, at 379.

In modern Anglo-American law it is not dominant, but various scholars have pointed out several specific contexts wherein it is expressed, especially where the defence of the dwelling is concerned.[295]

The central characteristic of private defence according to this theory is the absolute nature of the right to protect autonomy, and as a consequence the rejection of any limitation involving a requirement of a particular degree of proportionality. Kadish notes that the unlimited character of the right according to this theory (which he does not support), stems from the principle of autonomy, according to which no person need be exploited as an instrument for the purposes of another, while the essence of the physical attack is that the aggressor asks to abuse the life of the victim (in the broader sense of his personality).[296] According to the principle of autonomy, the price that the aggressor pays is not considered at all: it suffices that the defensive force—as great as it may be, and for the prevention of a danger as small as it may be—is necessary for the protection of the autonomy of the person attacked. Subjecting the defensive force to the requirement of proportionality means the existence of situations wherein the victim is obliged to endure exploitation for the benefit of another, against his will. Fletcher cited the hostility that exists toward the requirement of proportionality in legal systems where the principle of autonomy has been adopted—the German system and that of the former Soviet Union,[297] and also explains this on the basis of the term 'right', which predominates in German law, just as a completely different term—'reasonable'—prevails in Anglo-American law[298]. The term 'right', whose development Fletcher attributes to Kant, serves only to benefit the person attacked, and the aggressor has no similar 'right' requiring the attacked person who defends himself to consider the interests of the aggressor as a human being. This matter is left to the complete discretion of the person attacked, and the state has no right to compel him to waive his right for the sake of altruism.[299]

The classic and shocking example of the consequences of this approach is the German court judgment from 1920, in which the Supreme Court of Germany upheld the acquittal of the owner of an orchard who shot at two youths (and severely wounded one of them) who tried to steal his fruit (!). In the ruling, the court discussed the rule that 'Right must never yield to Wrong' and established that subject to the requirement of necessity alone, it is permissible in such situa-

[295] Kadish draws attention to defence of the dwelling and prevention of crime (see Kadish, n 34 above, at 887–88); Williams also commented on defence of the dwelling and added the context of theft (see Williams (1982), n 1 above, at 738). Ashworth, who calls the theory that is under discussion by the name 'stand fast approach', also notes—apart from defence of the dwelling—cases in which a person expects an imminent attack (see Ashworth, n 183 above, at 306).

[296] See Kadish, n 34 above, at 886ff. The source of this concept can be found in Immanuel Kant, *Fundamental Principles of the Metaphysic of Ethics*, Ch. II.

[297] See, eg, Fletcher (1973), n 1 above, at 381ff.

[298] See principally Fletcher, n 37 above, especially at 72ff. See also Alexander, n 278, at 1179ff.

[299] See Fletcher, n 37 above, at 99ff.

tions to shoot in order to kill. It should be emphasised that this case involved only property, and even property of little value. As Fletcher notes, most German scholars justified this judgment.[300]

The negation of the principle of proportionality is, as mentioned, the central implication of the rationale based on autonomy, since autonomy and proportionality are incompatible with one another.[301] Further on, I will discuss in detail the principle of proportionality and the immense importance—both moral and legal—of any requirement of proportionality, not necessarily absolute, between the attack and the defensive force. I believe that in light of the tremendous importance of the requirement of proportionality for all modern legal systems, any theory that leads to its negation is bound to be rejected, even if for this reason alone.

Kremnitzer claimed that the rights of the individual are relative and not absolute as they are represented within the framework of the autonomy theory, and he presents clear examples wherein the law also relates to the aggressor himself and not only to his acts.[302] As he notes, the comparison of private defence to war distorts the true nature expressed by its name—an act of defence. It is actually in contrast to war that we can better express the nature of private defence: the law provides protection to one who is forced to defend himself and not to the warrior who uses private defence as a pretext for his belligerent actions. The comparison to war also obscures the important restriction of the right to private defence to cases of illegal attack alone. If private defence were in fact like war, legal systems—including the German one—would not restrict it (as they all do at present) with the requirement of necessity of defensive force in order to repel the attack, since this implies consideration for the aggressor. It is precisely this same consideration that leads to the important restriction of reasonable—ie, proportional—force and not just necessary force. While in pre-modern societies, where the social institutions for protection of an individual's rights were undeveloped, it was reasonable to base private defence on the unlimited right of the individual to protect his own autonomy, the situation is entirely different in modern society.[303]

In my opinion, it is actually possible to base strong criticism of the lack of a requirement of proportionality on the words of Fletcher himself, even though he supports the rationale of autonomy. He writes[304] that this theory provides a sort

[300] See Fletcher, n 37 above, at 72ff. and Fletcher (1973), n 1 above, at 381ff.

[301] See, eg, Kadish, n 34 above, at 886ff; Gorr, n 191 above, at 257; and Fletcher, n 74 above, at 1378ff.

[302] See Kremnitzer, n 10 above, at 184ff. Inter alia, he commented that the legal recognition of the 'necessity' defence in general, and of 'necessity' as justification in particular, proves that individual rights are relative. He noted that Fletcher himself tends to the opinion that an attack without volition (control) is insufficient to justify private defence against it (see Fletcher (1978), n 1 above, at 862ff.), and thus the sovereignty of the individual is not absolute. See, also the discussion of relativity as opposed to absoluteness of the rights in section 1.5.1 above.

[303] See Kremnitzer, n 10 above, at 185ff.

[304] See Fletcher (1973), n 1 above, at 380ff.

of paradoxical view of aggression: on the one hand it relates to the aggressor as a participant in the legal system, and on the other hand it relates to the attack that he perpetrates as negating the foundation for considering him with care and compassion. The aggressor is protected by the legal conditions that are required for the exercise of defensive force, but his interests are considered as irrelevant. He is therefore found to be, simultaneously, both within the legal framework and outside of it, as a peer and as an 'outlaw'. Fletcher also notes, that according to the theory of the rationale based on autonomy, everything is seen as black or white as a result of the elimination of the various shades and nuances[305]. In effect, in my opinion, the reliance on 'right' and 'wrong' as exclusive categories constitutes a disregard for the existence of the gradation—which is very significant from a moral point of view—of the various attacks[306]. As Fletcher notes, in the legal systems of Germany and the former Soviet Union, where in his opinion the rationale of autonomy was dominant, they needed solutions to concrete problems, such as the use of lethal force for the protection of property of little value, because they had despaired of finding a principled solution within the areas of the theory itself[307]. At another point, Fletcher wrote that in its pure form, private defence constitutes the de-humanisation of the aggressor and a lack of consideration for questions of justice[308]. It seems that these descriptions contain very strong criticism of the rationale of autonomy. And if this is not enough, then in the famous analysis in which Fletcher juxtaposes the 'right' found in German law with the 'reasonable' of Anglo-American law, he points to the misleading nature of the discourse of German law that describes the right as absolute[309]. In the same article,[310] Fletcher writes that the German rule that 'Right need never yield to Wrong', expresses the significance of being 'an autonomous person in civil society'. I believe that we should doubt the civilisation of a society where no proportionality of any sort is required, to the extent that it is permissible and even justifiable to shoot, in order to kill, a youth who ran off with the apples that he stole. In light of the 'justified' character of private defence, a waiver of the requirement for proportionality means that the fatal shooting of a youth running away with the apples is the correct thing to do from a moral point of view—and this is according to the 'justified' perception of Fletcher himself. Finally, in one of his later writings, Fletcher describes a struggle and historical transition of the law from 'passion' to 'reason'—from vengeance against the aggressor to the justification based on the autonomy

[305] *Ibid*, at 381.

[306] The same logic—ignoring the multiple grey intermediate tones between black and white—can lead to permitting the 'taking of the law into one's own hands' and very broad 'self-help' even in other areas, while society prefers to depend on the legal system. For similar opinions see Omichinski, n 31 above, at 1466; Ashworth, n 183 above, at 290.

[307] See Fletcher (1973), n 1 above, at 387; and see Bernsmann, n 265, at 178.

[308] See Fletcher, n 117 above, at 208ff.

[309] See Fletcher, n 37 above, at 75.

[310] *Ibid* at 92ff.

of the defender.[311] It is possible and imperative to ask: why stop at this point on the scale and not come closer to 'reason' by also considering, among other things, the interests of the aggressor and the social-legal order?

The rationale of autonomy has other implications that constitute its additional deficiencies. Firstly, it is very difficult to explain the right of a person to defend another on the basis of this rationale. Thus, for example, Fletcher, following a long discussion of private defence based almost exclusively on the autonomy of the person attacked, had to bring in the consideration of defence of the legal order in order to explain the defence of another.[312] Moreover, this theory diminishes the area of values and interests, which it is permissible to defend within the framework of private defence. As Kadish notes—not in criticism of the theory, but merely as its simple description—the principle of autonomy only creates a right to resist threats to a person's body and other close interests.[313] As we shall see below,[314] there is no acceptable foundation for such a restriction of the range of protected interests. In addition, on the same subject, Kremnitzer claimed that viewing the right of private defence as a classic individual right is incompatible with the fact that some legal systems—including that of the former Soviet Union—recognise defence of the public interest, which is not necessarily derived from the rights of the individual, as being within the framework of private defence.[315]

The theory that is the subject of our present discussion has undergone a certain amount of honing and refinement, and this is in light of the great difficulty inherent in the non-requirement of any sort of proportionality. In order to solve this difficulty in extreme cases of the exercise of lethal force for defence against a slight attack, the doctrine of abuse of right—whose source is in the civil law—is used for the denial of this defence.[316] As Fletcher explains, this system is not 'flat' but 'complex': an absolute norm (the right to private defence), and only at a second stage, exceptions to restrict it. After presenting examples of the restrictions that scholars imposed on the right to private defence, based on the doctrine of 'abuse of right', he writes about the 'modern conception of 'right', that leads to results that are

[311] See George P Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (New York, 1988).

[312] See Fletcher (1978), n 1 above, at 869; Kremnitzer, n 10 above, at 183 fn 12; Omichinski, n 31 above, at 1460 fn 77.

[313] See Kadish, n 34 above, at 886. See also the description by Fletcher (1978), n 1 above, at 864, regarding the difficulties of German jurists (and the then Soviets) in explaining the defence of a wide range of interests.

[314] See Ch 3.3 below.

[315] See Kremnitzer, n 10 above, at 182ff. In German law, there is a dispute as to the possibility of defence of state interests within the framework of the private defence—see Bernsmann, n 265 above, at 176.

[316] See, eg, Fletcher (1973), n 1 above, at 385ff; and Fletcher, n 37 above, at 73ff. (relating especially to German law). Such a restriction, determined by the court, in effect constitutes an expansion of criminal responsibility and thus raises significant questions regarding the principle of legality—see section 1.2 above.

more compatible with the requirement of proportionality.[317] In a similar vein, Ashworth supported an approach according to which the rationale of autonomy should only be accepted in the cases where deadly force is not involved.[318] This demonstrates that the theory in its basic form leads to intolerable results, and obliges its 'renovation'.[319]

Before concluding, it is necessary to note three advantages that are attributed to this rationale for private defence. One is that this is the best explanation for the action of the defender, since his own autonomy is what the defender considers.[320] The second is the existence of a 'trans-positivistic value of autonomy'.[321] With regard to the first advantage, even if it is correct, the point in question is not the action of the defender but the fact that society justifies this action. With regard to the second, it is dubious whether there is any kind of value in solemnly declaring any sort of right—including the right to autonomy—an absolute right, when this is incorrect. In the best case, this is merely semantic and in the worst case this might cause—even if only indirectly—practical results that are very undesirable, such as the negation of the requirement for proportionality. A third advantage—that carries great weight, in contrast to the first two—is that the rationale of autonomy leads to the utmost protection of the rights and liberties of the law-abiding citizen.[322] However, as we shall see in the comprehensive discussion of the principle of proportionality,[323] such maximum protection is not desirable for society—neither from a value and moral aspect, nor from a practical perspective.

In summary, the approach that claims that the autonomy of the attacked person is the crucial factor for understanding private defence must be rejected on the basis of the various considerations that were presented above, and especially because of the two principal implications of this approach: (1) Negation of the requirement for proportionality despite its great importance in all modern societies; (2) Waiver of the very important character of private defence, from a moral and legal perspective—the culpability of the aggressor. Even so, the autonomy of the attacked person is very significant for the explanation for the justification of

[317] See Fletcher, n 37 above, at 98ff.

[318] See Ashworth, n 183 above, at 306.

[319] Some of these above-mentioned refined versions will be discussed below, within the framework of an extensive discussion of the requirement for proportionality—see Ch 3.8 below. It is noted that the fact that there are scholars who claim that Fletcher's description of German law is inaccurate, since apart from being based on the defence of autonomy this legal system is also based on the defence of the social-legal order, is in my opinion insignificant—at least at this stage of the discussion (See, eg, Eser, n 26 above, at 631ff. It should be noted that although Eser does not explicitly negate Fletcher's theory, his description is very different from that of the latter). There is also no great importance for the sake of our present discussion in the fact that Fletcher himself also sometimes based his views on the defence of legal order (see n 312 above and accompanying text). Our interest, at this stage, is in the rationale of autonomy and in this alone.

[320] See Omichinski, n 31 above, at 1466.

[321] See Fletcher (1978), n 1 above, at 862.

[322] See Ashworth, n 183 above, at 290.

[323] See Ch 3.8 below.

private defence as an important and necessary factor, even though it is not decisive or sufficient.

1.5.5 Protection of the Social-Legal Order (In Addition to Protection of the Legitimate Interest of the Person Attacked)

According to this modern theory, the justification of private defence, in addition to being based on the legitimate interest of the person who is attacked, is based on the social interest of protection of the public order in general and the legal system in particular. The rationale of protection of the social-legal order forms the foundation underlying another criminal law defence, accepted in several legal systems, which permits the use of force in order to prevent a crime.[324] Within the framework of private defence, it is not usually accepted to view protection of the social-legal order as an exclusive rationale[325], but as one factor of several for the justification of private defence, the most important of which is the factor of protection of the legitimate interest of the person attacked. In any case, it is possible to learn something of the power of the factor of protection of the social-legal order as a justification of private defence from the fact that there are legal systems in which it constitutes a completely independent factor for the permission of use of force, within the above-mentioned defence of prevention of a crime.

A detailed discussion of this rationale appears in Kremnitzer's article.[326] As he notes, Fletcher also mentioned this rationale.[327] However, Fletcher did not emphasise the distinction between this rationale and the rationale of autonomy, and it seems that in his opinion the latter is stronger.[328] As will be seen below, in Fletcher's collective works it appears that he does not support the rationale that is under discussion, but—in quite a consistent manner—chooses the rationale of autonomy. Kremnitzer begins by negating the exclusivity of the autonomy of the person attacked as the rationale for private defence—a negation that I mentioned in the previous section. After this he proceeds to discuss the important factor of

[324] With regard to this defence in American law, the rationale on which it is based and its affinity to private defence, see, eg, *American Jurisprudence*, vol 40, 2nd edn (Rochester, NY; San Francisco, CA 1999) at 649; Perkins and Boyce, n 85 above, at 1108ff, 1145ff; and in English law—see especially art 3 of the Criminal Law Act, 1967, and also Card, Cross and Jones, n 180 above, at 624ff; Smith, n 91 above, at 123ff. and C Harlow, 'Self-Defence: Public Right or Private Privilege' (1974) Crim LR 528.

A broad field in which overlap exists—in many legal systems—between private defence and prevention of a crime, is the defence of another person. See, eg, Smith, n 91 above, at 123–124; Perkins and Boyce, n 85 above, at 1145ff.

[325] Silving expressed an exceptional opinion that proposed the unification of the defences 'prevention of crime' and 'private defence'. See Silving, n 45 above, at 393ff. A similar situation exists in practice—according to the opinion of Smith and Hogan—in light of art 3 of the Criminal Law Act, 1967. See Smith and Hogan, n 284, at 254ff; Smith, n 91 above, at 123ff.

[326] See Kremnitzer, n 10 above, at 181–83, 189–96, 209, 214.

[327] In his well-known article (Fletcher (1973), n 1 above), to which Kremnitzer responds.

[328] See Kremnitzer, n 10 above, at 181.

protection of the social-legal order. The distinction between private defence and the 'necessity' defence is based on this factor, since the uniqueness of private defence[329] is found in the fact that the source of danger is an **illegal** attack and that the response is directed against a guilty aggressor who bears criminal responsibility. According to the theory currently under discussion, the person attacked acts as the representative and protector of society, public order and the legal system, since his actions are directed at neutralising a violation of the law. This is a 'policing action' as well, because if the police were present at the time of the event, they would not have acted in any way other than how the defender acted. The act of the attacked person serves the public interest by deterring offenders and preventing offences. This deterrent function has a dual character: the individual aggressor is effectively deterred by the repelling of his attack, and potential offenders will be deterred when they know that their plan may be frustrated not only by the police (who are not always present at the site of an event) but also by the victim (who is usually present where the event takes place) or by any other person who is by chance in the vicinity (as part of the 'defence of another'). Moreover, the knowledge that the protection of the social-legal order is given to all citizens strengthens the sense of security of the law-abiding public. The key to understanding private defence, and to understanding the difference between private defence and 'necessity', is therefore to be found in the comparison between the justifications for each exception. The common factor is that both exceptions stem from the need to protect the legitimate interest that is in immediate danger (ie, a situation of 'compulsion'). The difference is, as mentioned, in the source of the danger: private defence involves the illegal act of a person, while 'necessity' involves a result of the circumstances (usually natural). Thus, in private defence there is an additional—social—interest for the protection of public order and the legal system. In contrast, in 'necessity' the injuries to public order and to the legitimate interest of another person (who is not a culpable aggressor) stand in opposition to the defence of the legitimate interest that is endangered. Accordingly, Kremnitzer proposes a schematic description (Figure 1)[330]:

[329] As already explained—see extensively in sections 1.5.2 and 1.5.3 above.

[330] See Kremnitzer, n 10 above, at 191. With regard to the 'dual rationale' of private defence see also Bernsmann, n 265 above, at 172–73.

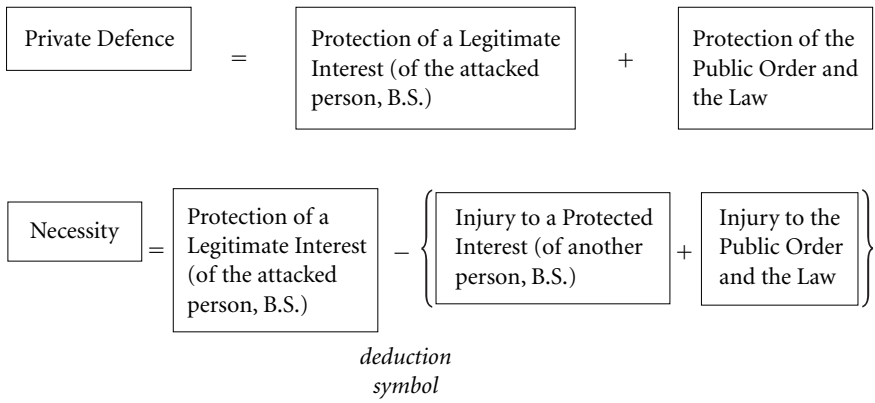


Figure 1

I agree that the protection of the social-legal order has immense importance for the justification of private defence. However, the 'equation' that appears in Figure 1, describing private defence, is incomplete. For it must also include an expression of additional factors, beyond those presented there, especially the interests of the aggressor. Although a certain reduction of these interests can and should be made in light of the aggressor's culpability,[331] they should be expressed to some extent.[332] It is indeed possible to try to introduce these interests into the balance by 'the back door' of the factor of the social-legal order, and to say, for example, that an excessive injury to the aggressor harms this order, as is done in practice by Kremnitzer, in his article.[333] This is not sufficient, however, in my opinion, just as we are not satisfied by the inclusion of the attacked person's interests within the framework of the factor of the social-legal order, but give them an independent place in the equation. This independent place has great significance, both principled-declarative and practical especially with regard to the requirements for proportionality, necessity and retreat, which will be discussed below.[334]

Other scholars have referred to functions that are fulfilled by private defence, namely, the deterrence of aggressors[335] and 'private policing'.[336] Thus, for example, Williams[337] noted that a rule that permits defensive actions operates to

[331] See section 1.5.2 above.

[332] A minimal expression of the aggressor's interests, that it appears that everyone will agree with (as a minimum), can be found in the words of Ashworth, who related to the right of the aggressor that unnecessary force should not be used against him for the repelling of his attack—see Ashworth, n 183 above, at 289.

[333] See Kremnitzer, n 10 above, at 193–94.

[334] See (correspondingly) Chs 3.8; 3.6; 3.9.

[335] See, eg, Nino, n 181 above, at 185.

[336] See, eg, Miriam Gur-Arye, *Actio Libera in Causa in Criminal Law* (1984) at 98; Silving, n 45 above, at 392 (seeing the defender as the arm of the state); Gordon, n 1 above, at 754ff (relating to the rationale of private policing that was noted by Hume).

[337] See Williams (1982), n 1 above, at 739.

suppress aggression, or at least to reduce it, while a rule that prevents defensive actions would act to encourage aggression.

Soviet jurists thought that the maximal use of defensive force would deter crime effectively, and even went further by supporting the maximum response to aggressors, to the extent that it was claimed that killing the aggressor is a moral duty and not a mere right.[338] It should be emphasised, that apart from the deterrent element in private defence, it also constitutes a direct defence of the social-legal order, since this order is damaged by the malicious attack inherent in the illegal action of the aggressor.

There are those who also attribute this rationale of private defence, inter alia, to Hegel's idea regarding the nullification resulting from the aggressor's action and the nullification of this nullification by the defensive action of the person attacked ('nullification of injustice').[339]

What are the main implications of this rationale? Eser[340] notes that the combination of individual defensive action with social maintenance of law and order leads, on the one hand, to the widening of private defence, and on the other hand to its restriction. How is it broadened? By the fact that this double rationale provides a basis both for the defence of another (any other) person and by the fact that it also provides an explanation for the protection of public interests. How is it restricted? By the fact that it leads to the perception of the right to private defence as a right that is not absolute, but relative, and only exists for as long as the social function that it fulfils also continues to exist. This perception—in Eser's opinion—supports a number of requirements, such as a certain duty to retreat, certain limitations on whoever causes the defensive situation by his guilt, and the requirement of proportion.

It should be noted that no agreement exists among the scholars concerning the implications of the rationale currently under discussion. Kremnitzer,[341] for example, refers to the operation of the rationale as a weakening force—in comparison to the 'necessity' exception—on the duty to retreat (since it is no longer the retreat of the individual alone, but also the retreat of the law and the order)[342]; as acting to render flexible the requirement for proportionality (since against the interest of the aggressor stands not only the interest of the person who is attacked, but also the social-legal order)[343]; and operating to temper the harsh treatment of the individual who caused the situation of defensiveness by his guilt. With regard to the requirement of proportionality, Kremnitzer claims that dialectically the social-

[338] See Fletcher (1978), n 1 above, at 868, 872.

[339] See, eg, Silving, n 45 above, at 392–93.

[340] See Eser, n 26 above, at 631ff.

[341] See Kremnitzer, n 10 above, at 191ff.

[342] A similar opinion was expressed by Herrmann,—J Hermann, 'Causing the Conditions of One's Own Defense: The Multi-Faceted Approach of German Law' (1986) *Brigham Young University Law Review* 747. (This article was also published in the book by Eser and Fletcher, *Justification and Excuse* (Freiburg, 1987) vol 2 at 754).

[343] A similar opinion was expressed by Gur-Arye, n 37 above, at 82; Gur-Arye, n 13 above, at 227.

legal order rationale may operate to restrict the use of force (since the use of excessive force infringes this order).[344]

Indeed, an excessive injury to the aggressor also harms the social-legal order. An additional implication of this rationale is that private defence does not apply against an innocent aggressor, since in the absence of criminal responsibility, the aggressor's action bears no anti-social nature, and accordingly it does not—certainly not significantly—injure the social-legal order.[345]

As mentioned, it is not accepted to view protection of the social-legal order as the exclusive justification for private defence (in contrast to, for example, its use as a justification for the prevention of crime defence). Accordingly, beyond the consensus regarding the existence of this justifying factor, it is very important to determine the scope of its operation and the rest of the justifying factors that exist alongside it, that together constitute the rationale that forms the foundation for private defence.[346] With regard to the weight of the factor of the social-legal order in any given case, in my opinion, this weight stands in direct proportion to the weight of the given interest that is endangered[347] and to the guilt of the aggressor (as an expression of the anti-social element that is embodied in his action). Thus, for example, the injury to the social-legal order will be especially great in an attack with criminal intent against an existential value, endangering the life of the individual who is attacked.[348]

[344] All these issues (the requirement for proportionality; the duty to retreat; the responsibility of the person by whose guilt the defensive situation was created) will be discussed widely below. At this stage the intention is to illustrate the existence of different views regarding the substance of the social-legal order and with regard to its weight and function in the justification of private defence.

[345] See Kremnitzer, n 10 above, at 194ff; Fletcher (1978), n 1 above, at 865–66; Gur-Arye, n 37 above, at 82; Gur-Arye, n 13 above, at 227. As Gur-Arye notes, for the same reason that society gives an excuse to the aggressor, it must also negate the justification of private defence against him. See also the discussion in section 1.5.3 above.

Another example of different possible perceptions of the substance and content of the term social-legal order is provided by the structure of responsibility in German criminal law. The second stage of this structure, between the existence of elements of the offence and the guilt (that is negated by the excuse), is the unlawful character of the action that is identified with the injury to the social-legal order. It is accepted there that this injury is only negated by justification (and not by excuse), and thus a different perception of the term social-legal order prevails there than that which I have presented above—a different and strange perception, that sees the innocent aggressor as significantly harming the social-legal order. See also the above-mentioned references in n 46 above and accompanying text.

[346] Such a framework will be proposed in section 1.6 below.

[347] A weight that is expressed, eg, in the measure of protection provided by the law for a protected value: insofar as its weight is greater, a more severe penalty is fixed for its violation, and thus its protection by the law is increased.

[348] A possible explanation for the astounding German decision in which the owner of an orchard who had shot children who ran away with his stolen fruit was acquitted (see n 300 above and accompanying text) is as follows: as distinct from the picture drawn by Fletcher (*id.*), the social-legal order was also considered by the court, alongside the autonomy of the individual who was attacked. However, the court did not manage to see that the weight of the injury to this order is a function of the weight of the interest that is endangered (and there it involved mere property, and even property of little value). The court instead ruled as though the fate of the entire legal system was held in the balance. An additional factor that was also ignored, in my opinion, by the German Court, is that the excessive injury to the aggressor in fact harms the social-legal order.

It is difficult to find explicit criticism of consideration of the factor of the social-legal order as a justification of private defence. However, it is possible to find approaches that ignore this important factor. Against this background, Fletcher's consideration of this factor is of interest. He mentions it in many of his writings, but the slight weight that he attributes to it is evident.[349] In his discussion of the rationale of private defence, for example, Fletcher mentions no less than four different theories for the explanation of private defence,[350] but finds no room for social-legal order rationale. At another point he goes even further and writes that establishing private defence as a means of personal defence is preferable to justifying it as a tool for the nullification of the evil that is represented by the aggressor,[351] as if these alternatives preclude one another. Fletcher devotes a relatively substantial degree of consideration to the social-legal order in his famous article that deals with the psychotic aggressor.[352] On the one hand, he tends to negate this rationale, by expressing his opinion that the conception of protection of the 'legal order', that views attacks against individuals as attacks against the entire society and against its legal system, is just a more sophisticated way of describing, as did Locke, a situation of war between the aggressor and his victim. On the other hand, it would appear that the conception of 'legal order' as seen by Fletcher, is different from that which was described above, which I supported. According to Fletcher's viewpoint, the conception of the legal order pushes the aggressor into the margins of the legal system. The aggressor is perceived as the enemy of the system and is cast outside the boundaries of social concern and consideration—and all this is true even if he is innocent.[353] It appears that the legal order to which Fletcher refers identifies with the concept of the 'right' that we discussed above, and does not include consideration of the aggressor's interests.[354] In effect, it seems that even when he mentions the social-legal order, the principal, dominant, and almost exclusive rationale for private defence according to his school of thought is still the autonomy of the person attacked.[355]

In conclusion it should be emphasised, that on the one hand, the importance of the factor of the social-legal order for the justification of private defence should not be overlooked and on the other hand, private defence should not be based on this

[349] Protection of the social-legal order is mentioned in Fletcher's writings as follows: Fletcher (1973), n 1 above, at 380, 388ff; Fletcher (1978), n 1 above, at 771, 861ff; Fletcher, n 117 above, at 208ff; Fletcher, n 72 above, at 306; Fletcher, n 37 above, at 97ff.

[350] See Fletcher, n 311 above.

[351] See Fletcher, n 72 above, at 306.

[352] See Fletcher (1973), n 1 above, at 388ff.

[353] *Ibid* at 380, 388–89.

[354] See, eg, Fletcher, n 117 above, at 210ff.

[355] On this matter it should be noted, that there are scholars who describe the German law in a very different manner from that which was described by Fletcher. Eg, Eser notes that although the ancient rationale that 'Law does not yield to Lawlessness' still exists as a principle in German law, it is nevertheless in decline. Similar weight (and even greater) is given to the social function: the social interest in maintaining the 'general peace'. See Eser, n 26 above, at 631ff.

factor alone, but it should also be founded on additional factors, and especially on the autonomy of the person attacked and on the guilt of the aggressor, while also taking the interest of the aggressor into account. A possible framework for inclusion of the factor of protection of the social-legal order alongside other important factors, which we shall discuss below, is within the framework of constructing a balance of interests (including abstract interests) and choice of the 'lesser evil'.

1.5.6 Balancing Interests and Choice of the 'Lesser Evil'

This rationale is not exclusive to private defence, but concerns a general theory of justification. The exception to criminal responsibility, for which it is very common to use this rationale, is 'necessity' as a justification. The general idea is to strike a balance between the injuries to the legitimate interests that are to be expected if the actor does not act, and the injuries to the legitimate interests to be expected as a result of the action of the actor, and to choose—between the (inevitable) evils—the lesser evil[356]. According to the supporters of this theory, the principle of the lesser evil should also be applied to private defence.

It seems that there is no more suitable way to introduce this rationale than through the works of Robinson, who is a great supporter of this rationale as a general theory that fits all justification defences. According to Robinson's theory, all justifications involve injury that is generally acknowledged by the law as injury. However, where circumstances of justification exist and even when there is injury, it is still preferable over another, greater injury.[357] As Robinson notes, if a comparison is drawn—as is common regarding the defence of 'necessity'—between the physical evils alone, this often results in an even balance, such as the life of one person versus the life of another. In order to break this deadlock, abstract interests should be taken into account and must also be placed on the scales.[358]

What are these 'abstract interests' that must be placed on the scales? The abstract factor whose inclusion in the balance is most common is the guilt of the aggressor

[356] Thus, eg, an exception of 'lesser evils' was determined in the American Model Penal Code—see section 3.02 of the MPC. In Fletcher's opinion, the approach presented in the MPC is that all the 'justifications', in effect, constitute variations of the principle of the lesser evil—see *Encyclopedia of Crime and Justice*, ed by Kadish, n 96 above, vol 3 at 944 (he makes this deduction in particular from the expression 'justification generally', which the drafters used for the 'necessity' defence of a justification type). See also Fletcher, n 46 above, at 142.

From a terminological point of view, 'lesser evil' is also addressed in the literature by other expressions, such as: 'balance of utilities'; 'necessity'; 'superior interest'; 'choice of evils'; 'more benefit than loss'; 'balancing of interests'—expressions that for the most part express the same idea. See also s 34 of the Penal Code of (the former) West Germany (1975), in which a 'necessity' defence of the justification type was determined on the principle of the lesser evil.

[357] See Robinson (1984), n 37 above, vol 1 at 83, 90.

[358] Robinson (1984), n 37 above, vol 2 at 71.

in creating the conflict.[359] The accepted way in which to calculate this factor is by using it to decrease the value of the aggressor's interests.[360] Other important abstract interests that must not be ignored are the autonomy of the person attacked and the social-legal order. Common to all these factors is, of course, that they work in favour of the person attacked and against the aggressor. As noted by Wasserman,[361] what distinguishes private defence, according to this theory, from the defence of 'necessity' is that while with regard to 'necessity' the court must determine on a case-by-case basis what is the lesser evil, with regard to private defence the legislator himself has already determined a substantial part of this decision.

Other advantages[362] of this approach were noted by Ashworth,[363] who called it 'the human rights' approach. According to him, the approach takes into account the opposing interests of the sides to the conflict: the bodily integrity of the victim of the attack on the one hand, and the right of the aggressor that no unnecessary force will be used to repel his attack on the other hand. This approach also serves important state values: preserving human life, reducing violence, and suppressing private fighting.[364]

What are the practical implications of this theory? The central implication is the requirement for proportionality that exists 'by definition' within the framework of this approach. Although it is not required that the physical evil that is avoided be greater or even equal to the physical evil that is created—given the abstract values in the balance—some sort of correlation between the physical evils is absolutely necessary.[365] In this context, it is worth viewing Eser's opposite construction of the discussion. After he notes that German law today—in contrast to the past—tends to require proportionality, he deduces that because of this tendency, private defence becomes a private case of justification based on 'superior interest'[366]. Additional implications of the theory are: the requirement for necessity; a certain duty to retreat; non-application of private defence against an innocent aggressor; and a relatively wide right to defend another person.[367]

[359] See, eg, the considerations of this factor in particular, and of the rationale of the lesser evil in general, Omichinski, n 31 above, at 1453; Fletcher (1973), n 1 above, at 377ff; Wasserman, n 181 above, at 357ff; and Fletcher (1978), n 1 above, at 357ff.

[360] See, eg, Fletcher (1973), n 1 above, at 378. See also the text accompanying n 207 above.

[361] See Wasserman, n 181 above, at 358.

[362] Omichinski noted additional advantages, see Omichinski, n 31 above, at 1466: promoting the goals—retributive and utilitarian—of criminal law.

[363] See Ashworth, n 183 above, at 288ff.

[364] In Ashworth's opinion, this is the dominant approach in English law, while Fletcher claimed that among the legal systems that he examined only the French based private defence on the balance of interests: see Fletcher (1978), n 1 above, at 860.

[365] See, eg, Ashworth, n 183 above, at 297 (commenting especially on the limitation of lethal force); Fletcher (1973), n 1 above, at 378.

[366] See Eser, n 26 above, at 633.

[367] These requirements will be discussed in detail below. For our present matter, see, eg, Ashworth, n 183 above, at 288ff, 297 (necessity and proportion); Fletcher (1978), n 1 above, at 857ff. (proportion and retreat); Omichinski, n 31 above, at 1455–462 (proportion; necessity; retreat; defence of another person; innocent aggressor).

This theory was not spared criticism. The difficulty that many of the critics pointed to was that many agreed cases of private defence concern balanced physical evils, and sometimes the physical evil that is created exceeds the physical evil that is prevented.[368] Thus, for example, it is agreed that it is justified to exert defensive force—even lethal—not only to save life but also, for example, to prevent rape. It is also agreed that a single person who is attacked is entitled to use lethal defensive force against a number of aggressors.[369] Even when the case involves saving the life of the person attacked at the price of the life of a single aggressor, there is a claim that because of the principle of equality between human beings, neither of the sides to the dispute should be preferred over the other. It is also argued that bringing the factor of probability into account even increases the difficulty, since the defender, who is faced with (the mere) risk of death, creates certain death by his behaviour[370]. Fletcher—one of the main critics of this theory—comments on the fact that although there are moral factors—such as the guilt of the aggressor—that tip the scale and provide solutions to the above-mentioned difficulties, in his opinion this theory is restricted, since these factors do not enter the balance of evils.[371] Similarly Thomson altogether negates a theory that is based on utility, while she refers solely to the physical evil.[372]

The answer to these arguments of the critics that were described above, is that within the framework of the balance of interests not only the physical evils should be considered, but also the abstract interests. Some of the critics ground their criticism on a shallow presentation of the theory that is the subject of our discussion, as though it referred to the physical injuries alone. There are other critics who, although they refer to the abstract interests, identify the theory with a single central abstract interest, usually with the culpability of the aggressor.[373] Thus, their criticism is persuasive in refraining from perceiving the guilt of the aggressor alone (or any other single factor) as the decisive factor, but it is not persuasive when considered against a more complex view of the picture.[374]

[368] See, eg, Wasserman, n 181 above, at 357ff; Kadish, n 34 above, at 882.

[369] See Ch 3.8 below.

[370] See Fletcher (1978), n 1 above, at 858 fn 10.

[371] See the *Encyclopedia of Crime and Justice*, ed by Kadish, n 96 above, vol 3, at 944.

[372] See Thomson, n 29 above, at 42ff. It is interesting that after this negation, Thomson sought the stronger right of the person attacked (in comparison to that of the aggressor) as the rationale for private defence, and finds it in the right of the person attacked to defend himself. It seems to me that this is no more than a tautology, since the basic question is, of course, what is the source of the right of the person attacked to defend himself. See also the words of Dressler, who places doubt on the suitability of a utilitarian theory as an explanation for private defence and for our intuition regarding it, in Dressler, n 32 above. at 89 fn 157. In his opinion, we require 'deontological reasoning' as an explanation for private defence and 'teleological reasoning' in order to explain the exception of 'necessity'.

[373] See, eg, the criticism by Kadish, n 34 above, at 882.

[374] A relatively complex view is presented by Wasserman, n 181 above, who considers two variations of the principle of the lesser evil: 'the act version' versus 'the rule version'. The first relates to the physical evils, and the second to the possible benefit to society from the rule permitting private defence. But why suffice with the negation of each of these variations as if they were exclusive, instead of describing the full picture with all its colours?

As to the argument that was mentioned above, regarding the increased difficulty involved in the consideration of the factor of probability, it seems to me that this will usually entail the wisdom of hindsight after the event (the defensive act), when the injury to the aggressor is already known and the injury to the person attacked remains—due to his defensive action—a mere possibility. According to exactly this same logic, it is possible to argue that if the person attacked were to refrain from defending himself, then the injury to the person attacked would be the known factor and the injury to the aggressor would remain as a mere possibility. Accordingly, if we are interested in knowing as much as possible prior to the action (of defensiveness), we must consider the probability of each of the possible injuries from the defensive action, and this probability must be weighed in the estimation of the evils, while also taking all the remaining factors into account.[375]

With regard to the duty to retreat, it should briefly be noted here that Fletcher's conclusion that the theory of the lesser evil necessarily leads to the clear and unambiguous conclusion that there is a strong duty to retreat relies, in my opinion, on an inaccurate balance. On one side, Fletcher places the honour of the defender and the increased risk of injury to him (the loss that the attacked person will suffer if we require him to retreat), and on the other side the life of the aggressor (the benefit to the aggressor from the retreat of the person attacked). He thus ignores—on the one hand—the damage to the social-legal order involved in a retreat, and he adds—on the other hand—the apparent weight of increasing the risk of injury. 'Apparent'—since no one suggests requiring a retreat that will endanger the person attacked.[376]

A possible deficiency of the theory of the lesser evil that was observed by Omichinski,[377] is that this theory requires maintaining a very complex balance that sometimes includes weighing a person's life—a balance the execution of which may even be beyond the capability of philosophers and scholars. Accordingly, in her opinion, an ordinary person whose life is endangered should not be expected to properly maintain this balance. A third party who comes to his assistance also cannot be expected to do so.

[375] Fletcher also presents criticism of a different sort. Firstly, he claims that viewing the autonomy of the person attacked as one factor in the balance of interests, constitutes an overlooking of the absolutist tendency in the principle of autonomy and betrayal of the individual's honour (see Fletcher (1978), n 1 above, at 771). Yet, I have expressed my position widely above, that there are no absolute rights at all (see section 1.5.1 above) and autonomy should not be seen as the only factor in the justification of private defence (see section 1.5.4 above). Secondly, Fletcher comments on three implications of the theory of the lesser evil—requirements for proportionality, retreat and non-application of private defence against an innocent aggressor—and sees deficiencies in them that lead him to the conclusion that the theory should be negated (see Fletcher (1973), n 1 above, at 378; Fletcher (1978), n 1 above, at 771, and 858ff.). This criticism is especially interesting in the light of the fact that, as was described above, and as will be detailed below (see sections 1.5.2, 1.5.3 above and Ch 3.8 and 3.9 below), in my opinion, these implications are not indeed deficiencies, but on the contrary: in a modern and civilised society, they constitute advantages.

[376] And see in greater detail Ch 3.9 below.

[377] See Omichinski, n 31 above, at 1466.

In my estimation, the force of this argument is not great. It is doubtful whether other rationales provide a clearer explanation (and in a significant manner) for private defence, and it is doubtful whether the other criminal law defences are intended to direct behaviour and are capable of doing so. In addition, as will be suggested below,[378] it is possible that part of the balance could be performed on a general normative level by the legislator himself.

The example that is discussed above—the analysis of the issue of retreat 'in a nutshell'—leads us to the central question regarding the theory that is under discussion, namely, what are the abstract interests that must be considered within its framework and what weight should be given to each of them. The word 'framework' was not chosen here by chance. My opinion is that although the theory of the lesser evil should be accepted, this theory does not provide an explanation for private defence. It merely constitutes a framework that must be filled with content—a content that will include not only the physical evils but also the relevant abstract interests. With regard to these abstract interests, there should be no concentration on one single factor alone, but all the important factors should be taken into account, and these are, principally, the autonomy of the person attacked, the culpability of the aggressor and the social-legal order.

1.5.7 The Right of the Person Attacked—Against the State—to Resist Aggression

This theory is identified in the legal and philosophical literature as Kadish's theory, since he is its main proponent and he is the one who established a suitable theoretical foundation for the discussion of this subject. Accordingly, it is natural to commence the discussion of this theory with the description given by Kadish himself.[379] Having negated the theory based on the culpability of the aggressor as the rationale for private defence, he suggests another approach that derives the freedom of the person attacked to kill his attacker from the right that the person attacked has against the state. This right—to which every individual in society is entitled—is a right to the protection by law against the lethal threats of others. In order to give substantial content to this right, legal freedom to oppose lethal threats by all necessary means, including the killing of the aggressor, must be established. In Kadish's opinion, there is no innovation in this right, but its source is to be found in the fact that an individual has a basic right to protect himself against attack, and that he did not lose this freedom with the establishment of the state. This liberty is required by most theories of the legitimacy of the state, according to which the submission of the individual to the prerogative of the state brings a greater right to defence against aggressors than he had prior to the founding of

[378] See, eg, on the subject of the requirement for proportionality, the text accompanying n 688 below.

[379] See Kadish, n 34 above, at 884ff.

the state. Kadish calls this liberty to oppose a lethal attack by lethal force, and the moral right against the state from which it is derived, by the name 'the right to resist aggression'.[380] In his opinion, this theory explains the law that justifies the killing of aggressors in a better way than other theories that he has examined.[381] Among its advantages[382] he enumerates its suitability even for a case of a multiplicity of aggressors, and the lack of necessity to include the problematic conception of loss of rights of the aggressor as part of its framework. Kadish claims that there is no need for an explanation regarding the loss of rights for the aggressor, since within the framework of this theory the aggressor has no such rights against the victim. According to Kadish, the aggressor has no right to life (a right that in his opinion would conflict with the theory that provides a liberty to kill him), but all that he has is the right to resist an attack against his life—a right that is not infringed by the victim who is ultimately only defending himself. This reasoning, in my opinion, is strange. Moreover, it is very similar to the well-known idea of 'double effect'[383] (according to which a distinction is drawn between intention to kill and anticipation of killing)—an idea that was negated, *in limine*, by Kadish himself as being fictitious. An additional advantage that Kadish ascribes to this theory is that it is consistent with the right of a third party to intervene, ie, the right to defend another person. According to Kadish, in such a case the basic right does not belong to the defender but to the victim, since the right of the victim to protection by the law will be infringed by denying the freedom of the defender to intervene and to defend the victim, just as (thusly)[384] it would be infringed by denying the freedom of the victim to defend himself.

[380] Indeed in the literature—both legal and philosophical—following the above mentioned article by Kadish (Kadish, n 34), the theory that is the subject of our present discussion is often referred to by this name—see, eg, Wasserman, n 181 above, at 362ff. and Omichinski, n 31 above, at 1451ff.

[381] In my view, it is very noticeable that the theory relating to the protection of the social-legal order does not appear in the discussion by Kadish.

[382] An additional 'advantage' that was denoted by Kadish, and that in my view is actually a deficiency, is the application of this theory even when the aggressor is innocent—see section 1.5.3 above.

[383] See Kadish, n 34 above, at 879–80, where Kadish negates the doctrine of the 'double effect', that is attributed to Aquinas, according to which a distinction is to be made between an intention to kill and a mere anticipation of killing, and that it should only be said that the taking of life is justified when the actor did not intend to kill, even if he anticipated the killing. Thus, when the attacked person who defends himself kills his attacker, the effect is not intended, but only foreseen, since the intended effect is the removal of the threat and no more. The defender does not choose the death of the aggressor as a means to save his own life, but chooses the only possible means for the removal of the threat, despite his awareness that this may lead to the death of the aggressor. This doctrine is fictitious—see the criticism of Kadish *ibid*, at 879–80, and his reference to the criticism of Hart, *ibid*, at p 880 fn 17. Currently, in the light of the accepted doctrine of the rule of foreseeability ('*Dolus Indirectus*', according to which the awareness of a person to the near certain possibility that his action will cause a certain result is equivalent—both morally and legally—to an intention to cause that result) the doctrine of double effect is, in my opinion, even more problematic (see on this matter, eg, Sangero, n 61, at 345–48, especially fn 49). It is noted that this doctrine does not provide us with a rationale for private defence, but is restricted to a (weak) undermining of the argument that negates private defence by lethal force. See also Uniacke, n 28 above, at 92ff.

[384] As may be understood from the symbol in brackets, I have reservations regarding this claim of equality between the infringements of the victim's rights.

The central point in Kadish's theory is that he himself restricts its application to cases of threats of lethal force, and to these cases alone. With regard to all the remaining cases (which bear a greater importance, in my estimation, than that which they have been accorded in the literature) Kadish suggests the application of two conflicting principles: the principle of autonomy versus the principle of proportionality. He does not provide an explanation as to why these principles do not apply to lethal threats, and why the 'right to resist aggression' does not apply when a milder threat is involved. As he summarises the discussion of this theory, insofar as lethal threats are involved, it constitutes the best explanation for the law that governs the killing of aggressors. His concentration on killing can, perhaps, be explained by the fact that the entire article deals with the right to life[385]. As for his consideration of the positive law and his attempt to explain it, I prefer to seek the suitable rationale for private defence by also considering (and even principally) the theoretically optimal law. Yet before we refer to the criticism of this theory, we must add something with regard to its description, presentation and development.

A number of scholars have noted the close affinity between this theory and the theory that focuses on the individual's autonomy and his right to defend it. Enker noted that the right to resist aggression is based to a large extent on the idea of the individual's autonomy.[386] As with the right to maintain that autonomy, 'the right to resist aggression' is also focused on the rights of the defender. The difference is that while the first right is directed towards the aggressor, the second is directed towards the state. There are those who view 'the right to resist aggression' as based on the following idea: since the state is responsible for the protection of the individual, and since it is not always able to uphold with this responsibility (for purely practical reasons), the state grants the individual the right to protect his life against attack in those cases where it has failed in this function. According to this approach, the granting of this right involves practical considerations—in light of the ineffectiveness of society and its laws in certain situations[387]. Others have expressed their opinion that this right involves the individual's natural right, which is not only not revoked with the establishment of the state, but also cannot be denied under any circumstances.[388] Thus, for example, Blackstone already wrote that[389]: 'Self defence therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by law of society'.

[385] As may be learned from the title of the article (Kadish, n 34 above)—'Respect for Life and Regard for Rights in the Criminal Law'.

[386] See Enker, n 89 above, at 239. See also Rosen, n 37 above, at 49 fn 205, which describes the theory as the 'right of autonomy and [to] protection by the state'.

[387] See Ashworth, n 183 above, at 282ff; Omichinski, n 31 above, at 1451ff. and also Fletcher (1978), n 1 above, at 867.

[388] See, eg, Fletcher, n 37 above, at 100.

[389] See Blackstone, n 40 above, vol 3 at 4.

Enker levied in-depth and detailed criticism on 'the right to resist aggression' as the rationale for private defence[390]. His central and convincing argument is as follows: the right presented by Kadish is in effect a right vis a vis the state alone and it is difficult to accept the idea that such a right would allow the pursued person to kill another person[391]. An additional argument presented by Enker is based on the fact that this theory does not explain the permission for a third party to intervene and assist the person attacked by means of an injury to the aggressor. He calls attention to the fact that Kadish himself writes only that the theory is consistent (ie, no more than this) with the right of a third party, and expresses doubt as to whether even this consistency exists[392].

Moore goes further and negates the rationale of 'the right to resist aggression', as it is in his opinion almost tautological. This is because all that this rationale tells us is that it is not 'wrongful' to kill the aggressor because . . . there is a right to kill him.[393] Fletcher, as a bold proponent of the rationale of autonomy, claims that the theory that is the subject of our discussion constitutes a denial of personal autonomy and leads to the undesirable (according to his school of thought) solution of the balancing of interests.[394] At another stage he comments that, in contrast to common law, where—in his opinion—private defence is considered to derive from the function of the state to preserve order (ie, the rationale that is the subject of our discussion is accepted), the literature of the former Soviet Union reflects considerable hostility towards this approach, since private defence is viewed there as a private individual right and not as a derived right.[395]

What are the central accepted implications in the adoption of the rationale of the ' right to resist aggression'? Kadish himself only noted that this rationale—in his opinion—is consistent with 'the lapse of the right to kill after the threat has ceased' and 'the legal right of a third person to kill the aggressor'. He also noted the application of this rationale in cases involving an innocent aggressor.[396] A number of scholars have claimed that the requirements for proportionality, necessity and retreat are derived from this theory, relying especially on the following reasoning: since it is the state that grants the right to private defence, it can also make excep-

[390] Enker, n 89 above, at 235–39.

[391] *Ibid* at 237.

[392] *Ibid* fn 9 and the text that refers to it. Other important arguments that were raised by Enker are: (1) For some reason Kadish restricts his explanation to an objection to the lethal attacks despite his previous claim that other theories do not explain the existence of the permission in cases where there is no danger to the person pursued; (2) This approach almost nullifies the difference between a justification and an excuse (see, correspondingly, *ibid* fn 5 and at 238).

[393] See Moore, n 222 above, at 321 (Moore calls this rationale 'agent-based account').

[394] See Fletcher (1978), n 1 above, at 867.

[395] See Fletcher (1973), n 1 above, at 389–90. For an additional criticism—not strong, in my estimation—of the article by Fletcher ((1973) n 1 above) regarding the rationale that is the subject of our discussion—see Rosen, n 37 above, at 49.

[396] See Kadish, n 34 above, at 885–86.

tions, and since it is desirable to do so, it is done in practice.[397] Although this reasoning is in accordance with the approach, which was mentioned above, that the focal point for granting the right is based on practical considerations—namely, the lack of effectiveness of society and its laws—it does not conform with the view that is more prevalent, according to which a (natural) right of the individual is at stake that the state cannot deny him under any circumstances. In its pure form, the theory under discussion deals with a right that is derived (from that of the state) and not with a right that is granted (by the state). Accordingly, the above-mentioned approach is problematic with regard to the implications of the theory. In my estimation, the adoption of this theory will lead to implications very similar to those of the rationale of autonomy[398]—a rationale that is very close to it from a substantive point of view. An interesting but strange attempt to derive implications from the theory at present under discussion was carried out by Dressler. In his consideration of putative private defence, he writes that if the rationale is a right against the state to resist aggression, then it is possible to form a basis for the determination (incorrect—in my opinion) that putative private defence is a justification (as opposed to an excuse), on the fact that when we united to become a society we did not waive our right to oppose putative aggression.[399] It would appear that extending the scope of the right that was reserved by individuals for themselves with the establishment of the state may lead to innumerable additional implications, as diverse and as strange as the author's imagination may allow.

In conclusion of this discussion, it should be said that while the 'right (against the state) to resist aggression' should not be accepted as a rationale for private defence, this factor, which almost converges with the factor of the attacked person's autonomy, indeed has a certain influence on the suitable rationale for private defence. Thus, under the assumption that the factor of autonomy has a central place in the justification of private defence, the right against the state acts to strengthen the autonomy factor, or at least to negate the claim that it was greatly weakened with the establishment of the state.

1.5.8 Additional Approaches

1.5.8.1 General

In this section, other approaches that have been suggested for the justification of private defence will be briefly discussed. These approaches have in common the

[397] See Omichinski, n 31 above, at 1455 (proportionality), at 1456 (necessity), at 1458 (retreat) and at 1467 (evaluation of the theory); and also Fletcher (1978), n 1 above, at 867 (retreat and a hint of proportionality).

[398] See section 1.5.4 above.

[399] See Dressler, n 32 above, at 94 fn 176.

fact that they all miss the target of uncovering a suitable and sufficient explanation for private defence and most are too abstract to be useful. Some of them were more popular in the distant past, but in modern society they no longer have any significance (the classic example—the approach which relates to punishment of the aggressor). In effect, some of the 'approaches' that we shall note in brief, raise doubts as to whether they are indeed actual approaches or simply proposed ideas. The principal reason for relating to these approaches is for the theoretical insights that can be derived from their negation.

1.5.8.2 Punishment of the Aggressor

According to this approach, the person attacked who defends himself punishes the aggressor for his illegal (and culpable) attack. In the distant past this approach was probably very common. There were those, for example, who relied on its expression in Jewish law, not as an exclusive and comprehensive explanation, but in order to lend support to the concept of private defence.[400] Currently, it is very difficult to find any adoption of this approach.[401] An idea that appears—at first glance—to support this approach, is the proposal of the philosopher Nozick, that the court should lighten the punishment of an aggressor on the basis of the injury that he suffered as a result of the defensive action of the person attacked.[402] I shall consider this interesting suggestion in depth below, as part of the discussion regarding the requirement of proportionality. For purposes of the present discussion, it is sufficient to examine Nozick's words precisely and note that he does not see the punishment of the aggressor as the rationale for private defence, nor even as a partial rationale. His suggestion is to increase the permissible defensive force—above that which is allowed according to the requirement of proportionality and subject to the requirement of necessity—given the fact that the aggressor is liable anyway to be punished by the judicial authorities. He maintains that the additional defensive force that he suggests should be permitted be subject to the

[400] Finkelman, eg, noted that Jewish law seriously discusses the requirement for a warning to the 'pursuer' (a warning required before conviction and institutionalised punishment), although ruling in the end that there was no such requirement. A surviving element that remained—in her opinion—of the idea of judgmental punishment within the framework of private defence is the requirement that as far as possible the 'pursuer' should be killed in the manner that he would be executed by the authorities—following a sentence of death (see Finkelman, n 25 above, at 1281). Fletcher too, in an article devoted to the subject 'Punishment and Self-Defense', finds support for this idea of punishment in Jewish law (see Fletcher, n 117 above, at 202ff) However, compare this to Enker, who mentions such a possibility and denies it—Enker, n 117 above, at 91 fn 132 and the accompanying text. See also Frimer, n 123, at 330ff. presenting an approach that combines punishment with salvation.

[401] Fletcher mentions such an approach regarding the punishment of the aggressor and negates it at the outset—see Fletcher, n 311 above.

[402] See Nozick, n 270 above, at 62–63; and R Nozick, *Philosophical Explanations* (Cambridge, 1981) at 363–64.

requirement of necessity. Yet, if the subject at issue is punishment, it should be possible and perhaps necessary to waive this requirement.[403]

When the idea of punishment of the aggressor within self-defence is referred to in the literature, it is done to negate it completely. Aiyar and Anad commented that with the development of society, revenge and punishment were transferred to the hands of the state.[404] Kadish expressed his opinion that the inclusion of the factor of a sanction against the illegal attack into the picture will miss the target and 'prove too much', in that it will also support lethal revenge after commission of an act.[405] Finally, the accepted definition today for punishment includes as a compulsory condition the requirement that it be: 'imposed and administrated by an authority constituted by a legal system against which the offense is committed'.[406]

1.5.8.3 The Duty of the Attacked Person Towards Society

The framework of this unaccepted approach includes not only the right of the attacked person, but also his duty toward society to defend himself, and thus to prevent the committing of a criminal offence by the aggressor. Hints only of this approach were expressed by several scholars,[407] while one of them gave it relatively detailed consideration.[408] This approach brings us back to the rationale of the protection of the social-legal order and the defence that is based thereon in several legal systems, for the use of force for the prevention of a crime, as already considered above.[409] In my view, the approach now under discussion misses the mark for providing a sufficient explanation for private defence, since it completely ignores its basic characteristics, and especially the infringement of the autonomy of the individual who is attacked, and the compulsory nature of the situation.[410] Moreover, this approach greatly distorts the character of private defence as a right,

[403] For an additional indication of this, see the text accompanying n 779 below.

[404] See Ayar and Anad, n 134 above, at 2.

[405] See Kadish, n 34 above, at 882–83. Perkins and Boyce referred to the American ruling according to which punishment is prohibited within the framework of private defence—see Perkins and Boyce, n 85 above, at 1113.

[406] See Hart, n 38 above, at 4–5 ('Prolegomenon to the Principles of Punishment').

[407] See and compare: Harlow, n 324 (discussing the relationship between private defence and public defence in light of the interpretation of s 3 of the English 'Criminal Law Act, 1967'); Fletcher (1978), n 1 above, at 872 (Soviet jurists' view that killing an aggressor constitutes a moral obligation) and Silving, n 45 above, at 293ff. (suggesting—as the desirable law—the unification of the defence of prevention of a crime with private defence).

[408] See Omichinski, n 31 above, at 1448–49. She mainly refers to the distinction made by Blackstone between killings with excuse and killings with justification (see n 140 above and accompanying text). She rejects the approach (that she calls 'Public Duty') mainly on the basis of the latter's classification of private defence as an excuse and not as a justification. This rejection is, in my opinion, purely formalistic.

[409] See section 1.5.5 above, and especially the first part of that section.

[410] See extensively above, section 1.5.4 and the text in the Introduction accompanying nn 10–11.

by representing it—in contrast to the usually accepted view—as a duty imposed on the person who is attacked.[411]

1.5.8.4 Random Chance

Consideration of the possible option of justifying private defence based on a reliance on a certain random chance is found only in the philosophical literature.[412] Levine raises this possibility in an article that she devotes to the morality of killing the 'material aggressor' in self-defence.[413] By the term 'material aggressor' she means, more or less, the innocent aggressor that we dealt with extensively above. Levine's basic assumption—in my opinion, mistaken[414]—that is implicit in her article, is that private defence also encompasses cases where the aggressor acts without guilt. As she notes, it may be argued that it is unfair for the attacked person to kill an (innocent) aggressor, since a person does not deserve to lose anything (and especially not his life) because of random chance alone.[415] It may also be argued that it is unfair since there is no significant difference between the aggressor and the person attacked. Based on these arguments, Levine raises the possibility of the reliance on random chance in order to justify the killing of the aggressor by the person attacked.[416]

Gorr also examines this possibility in two contexts. The first—as part of his discussion of the intentional injury by the attacked person on innocent passers-by in order to save himself from danger.[417] The basic idea is that since both sides are equally innocent and neither of them deserves to be harmed, the correct means of action is to require a certain procedure of random chance in order to determine which of them should bear the inevitable injury. Gorr negates this possibility for two reasons. Firstly, there is not always sufficient time for carrying out the procedure of casting lots—in this event, the principle then fails because of its inability to provide any sort of useful direction. Secondly, the adoption of this principle may lead to an undesirable approach according to which in any case where a per-

[411] It should be clarified and emphasised that according to this approach, the duty is apparently imposed on the attacked person himself, and is not only a duty to rescue, that may be imposed on another person—a duty that will be discussed below in Ch 4.2.6.

[412] I also found a similar idea, of casting lots, in the well-known Biblical story of the prophet Jonah. However that involved a case of 'necessity' and not of private defence. A significant difference, in contrast to the idea that is the subject of our discussion, is that in the biblical book of Jonah, the casting of lots was not intended for a (fair) determination as to who would lose his life, but in order to discover who was responsible for the situation, since it was said of the sailors on the ship 'Each man said to his mate: Come, let us cast lots so we may learn on whose account this calamity has struck us.' (Jonah 1: 7, New American Standard Bible).

[413] See Levine, n 156 above.

[414] See section 1.5.3 above.

[415] See Levine, n 156 above, at 69–71.

[416] See *ibid* at 71ff.

[417] See Gorr, n 191 above, at 243ff.

son is liable to suffer injury of any sort, he will be entitled to transfer this injury on to another based on a successful (from his point of view) casting of the lots. The difficulty with this is, of course, that just as random chance grants the innocent passer-by a chance to survive, so too it imposes on him—and without any justification—a serious risk that he will not survive. In Gorr's opinion, the correct principle is that in the absence of (moral) justification for transferring the risk, the risk must remain where it had existed. The second context in which he discusses the possibility of casting lots is as part of his consideration of the case in which the aggressor is innocent.[418] In this case, too, he rejects the idea (although—as he remarks—his opposition in the context of the innocent aggressor is weaker than his resistance to the idea of random chance in the context of the innocent passer-by). In Gorr's opinion, there is a certain moral significance to the very fact that the aggressor (despite his innocence) threatens the person attacked, and not the opposite. Levine, too, eventually negates the idea of random chance. She negates this idea both because this option does not always exist, and also because in her opinion as well—as in that of Gorr—there is substantial moral significance to the fact that the aggressor (despite his innocence) acted in a one-sided manner and did not allow the person attacked any sort of control over his aggressive action.[419]

The position of Levine and Gorr with regard to the moral significance of the attack itself leads us directly to the next approach that I shall discuss. Yet before discussing this, I wish to express my reservations with regard to the method of discussion used by both these scholars and consequently with regard to their conclusions. Both of them concentrate on specific cases, for which the correct place is not within the justification of private defence at all,[420] and relying on this mistaken focus, they attempt to find a general rationale for private defence. The abandonment of such central characteristics of private defence as the aggressor's guilt (in the case of the innocent aggressor), and the direction of the defensive force against the aggressor (in the case of the innocent passer-by), produces a private defence that cannot be justified. The attempt to find a kind of justification by means of random chance then becomes attractive.

1.5.8.5 The Attack as a Sufficient Factor

The possibility that the rationale for private defence has its source in the very fact of the attack, since the aggressor—by his attack—imposes a choice between lives (the life of the person attacked as opposed to the life of the aggressor) at the

[418] *Ibid* at 250ff, while attributing the idea to Levine.

[419] See, principally, Levine, n 156 above, at 77.

[420] See, principally, section 1.5.3 above. As to the innocent passer-by, of course, this case also does not concern private defence, by actual definition: in the absence of an aggressor, or, at least, in the absence of direction of the defensive force against an aggressor. See also Ch 3.4.1 below.

moment when the attacked person acts within the framework of private defence, has found a significant place in philosophical literature. According to this approach, since the aggressor creates a situation in which one of the sides must die, it is morally justified that he should be the one to lose his life. Montague notes the moral significance of the fact that the aggressor compels a choice between lives. However, he does not give any decisive importance to the very fact of the attack and the enforcement of choice, but instead emphasises the guilt of the aggressor and claims that this is the unique quality of private defence—an attack accompanied by guilt—and that this culpable attack has crucial moral significance.[421] Wasserman vehemently opposes Montague's approach,[422] claiming that his approach overestimates the guilt of the aggressor and neglects the very fact of the attack. In Wasserman's opinion, the primary focus is on the present attack. After attempting to give basis to negation of the importance of the guilt factor, Wasserman tries to establish the crucial moral significance of the existence of the present attack itself. According to his school of thought, the difference between the person attacked and the aggressor is the fact that the latter can cease his attack at any moment. However, even Wasserman himself—this only becomes clear at the end of his article—does not completely forego the requirement of guilt, and claims that a certain amount of guilt (if not actually larger than that of the person attacked) is indeed required.[423]

The great importance—both moral, and consequently, legal—of the aggressor's culpability, was explained above.[424] Montague was correct in considering the significant moral importance of the attack of the aggressor in conjunction with his guilt. Wasserman's emphasis on the factor of the attack and the compulsory choice between lives, seems to almost[425] constitute a break-in through an open door. No one would dispute—not even Montague—that an attack is required and that the attack bears great importance. When the guilt of the aggressor is required, this does not mean—in contrast to the impression that is given by the words of Wasserman[426]—guilt in a general way,[427] but instead it refers to guilt with regard to the present attack. Moreover, even Wasserman himself agrees, as mentioned, that a certain amount of guilt of the aggressor is required. However, for the purposes of our discussion we shall refer to the pure theory—that which suffices with the attack itself and foregoes the requirement of guilt. Such a theory, in the final analysis, tells us too little, by overlooking the character of the attack and the guilt

[421] See Montague (1981), n 211, especially at 209–11.
[422] See Wasserman, n 181.
[423] *Ibid* at 378.
[424] See sec 1.5.2 and 1.5.3.
[425] 'Almost'—since real support for the requirement of immediacy of the danger can be deduced from Wasserman's words—see Ch 3.7 below.
[426] See, eg, Wasserman, n 181 above, at 366ff.
[427] Thus, eg, it is of course irrelevant to the matter of justification of private defence if the aggressor is a notorious criminal.

of the aggressor—factors that are very important for the justification of private defence.[428]

1.5.8.6 Personal and Limited Justification

Alexander discusses the possibility of viewing the defence against the innocent aggressor as a 'limited form of justification for self-defense'. On the one hand, this involves justification (including moral justification), and on the other hand, a character of 'excuse' also exists—since it is personal, the defence will apply to the attacked person alone and not to the third party who comes to his assistance[429].

Firstly, it should be clarified that this does not constitute a general theory for the justification of private defence, but a possible solution for the case in which the

[428] This theory cannot explain, eg, the accepted establishment of the requirement of proportionality (discussed in Ch 3.8 below).

For negation of the rationale that is the subject of our discussion see Gorr, n 191 above, at 264ff. and the responsive article by Montague (1989), n 211 above, to the above-mentioned article of Wasserman (Wasserman, n 181 above).

Moore expresses support for the theory that is the subject of our discussion, basing his opinion on what—in his opinion—constitutes its advantage: its valid application even for the case of an innocent aggressor and perhaps even in the case of an innocent 'aggressor' who is used by the real aggressor as a shield against the attacked person—see Moore, n 222 above, at 321–22. As mentioned, in my opinion this 'advantage' is actually a disadvantage, since the proper place for these cases is not—from a substantive point of view—within the areas of private defence.

Ryan made an attempt to base 'The Responsibility Principle' (in his words) that is the subject of our discussion on the idea of the acknowledged 'the causer pays' rule from the Law of Torts—see Ryan, n 196 above, at 515ff. Two reservations with regard to this: firstly, in contrast to the impression that Ryan creates, this is not a general principle—not even in the Law of Torts—but a rule that applies solely to certain cases where the legislator established absolute liability. Secondly, even if it were possible to accept this principle when money is involved (payment of compensation for damages), the negation of far more important rights (such as human life, for example) still requires—for its justification in modern law—far more than such a 'Responsibility Principle'.

Shlomit **Wallerstein** has lately written in the same spirit—see 'Justifying the Right to Self-Defense: A Theory of Forced Consequences' (2005) 91 *Virginia Law Review* 999. First, she assumes that self-defence should include also the repelling of non-culpable aggressors and 'non-agent' aggressors, and not only the repelling of culpable-aggressors. Therefore, she pursues a theory that would justify all these three cases. Second, she suggests 'a theory of forced consequences', which is based on the idea that the non-culpable and non-agent aggressors suffer from 'bad luck', which they have no right to transfer to the defender. This theory comes to explain cases which in my opinion do not belong to the scope of justified self-defence. It is doubtful whether this theory establishes a justification at all (or only an excuse). Moreover, even Wallerstein's purpose of distinguishing the 'bystander' from the innocent aggressor is not achieved, since the bystander also suffers from 'bad luck'. Finally, in the 'Conclusion' of her article, Wallerstein admits that she needs two different theories: 'forced choice theory'—for cases of intentional aggressors, and 'bad luck' (that makes the aggressor the one that should pay for it)—for cases of innocent aggressors. In my opinion, the very fact that the author needs two separate theories—one for each kind of case—demonstrates that we must separate them to two different criminal law defences. Only then we can find the correct rationale for each case, and treat them right—differently.

[429] See Alexander, n 278 above, at 1188–89. Fletcher also mentions the possibility of personal and subjective justification as a way to cope with the common confusion of putative private defence with the basic justification of real private defence. Fletcher notes (before the above-mentioned article was written by Alexander) that to the best of his knowledge no one has yet defended such an approach in the English-speaking world—see Fletcher (1978), n 1 above, at 767.

aggressor is innocent. As mentioned, my opinion is that the correct place for this case is not within the framework of justification of private defence. However, the lack of satisfaction caused by viewing the repelling of an innocent aggressor solely as an excuse—which led many scholars to relinquish the requirement for culpability of the aggressor as a necessary condition for private defence—may lead to the adoption of such a solution, whereby the repelling of the innocent aggressor is viewed as a personal and limited justification (which does not also apply to a third party).[430] Such an idea is far less problematic than the extreme approach of abandoning the requirement for guilt with regard to private defence in general. However, it apparently embodies an internal tension that borders on an internal contradiction. One may wonder—if it is a justification, then this is the justified act that it is correct to carry out, and if so, then why should it not also be performed by a third party? And if—in contrast—we sense that the defence should not be expanded to include the involvement of a third party—is this not simply a litmus paper to show that the act does not have a character of justification, but only of an excuse?

1.5.8.7 The Consent of the Aggressor

According to the theory that is identified in philosophical literature with Nino,[431] the justification of private defence is based—as is the justification of institutionalised punishment—on the consent of the aggressor to the normative results of his action. These results include, inter alia, the loss of his immunity against injurious defensive activities. The required consent is not, of course, explicit, but the voluntary attack is in effect seen as constituting the consent of the aggressor.

Beyond the fictitious nature of this theory, (for of course it is clear that the aggressor never imagines either an explicit or an implicit waiver of his rights at the time of the attack) this is very close from a substantive point of view to various theories according to which the aggressor—because of the guilt involved in his attack—loses his rights. Therefore, this theory suffers from the same principal defects that were detailed above[432] for the loss of rights theory ('forfeiture'). Additional criticism of this theory was levelled by Wasserman, who claimed that it leads to a lack of the requirement of proportionality[433].

[430] A similar approach, which we considered above, is that of Levine, who wrote about a person's moral right to give priority to what is more important for him, ie: his own survival—see n 161 above and accompanying text.

[431] See the references to Nino's writings in Wasserman, n 181 above, at 377 fn 41 and see Nino, n 181 above, at 185.

[432] See section 1.5.2 above.

[433] See Wasserman, n 181 above, at 377.

1.5.8.8 'Moral Specification' and 'Factual Specification'

Thomson[434] discussed a possible theory, according to which despite the existence of his right to life, a person has no equivalent right that he will never be killed under any circumstances. He has, rather, only a more limited right. According to the sub-theory of 'moral specification', he retains a right not to be killed in an unjustified way. According to the sub-theory of 'factual specification', the right he has is a right not to be killed when not in a certain factual situation (ie,—for our matter—the circumstances in which the exception of private defence is established).

Thomson negates the sub-theory of 'moral specification', principally because the lack of a right for the aggressor does not explain why it is permissible for the attacked person to kill him. She also negates the sub-theory of 'factual specification', mainly because, in her opinion, it is not practical, since it creates a need for a very long list of various factual cases.[435]

In my view, the great shortcoming of this theory is pinned in it being, in effect, a tautology. Since beyond its circular reasoning according to which it is justified to kill in private defence because a person (including the aggressor) has no right not to be killed in private defence, it does not contribute anything to assist us in our efforts to discover the rationale for private defence, a rationale that is meant to respond—on this subject of killings—to the question of why it is justified to kill the aggressor in private defence. The only benefit that can be gleaned from this theory is then a possible answer to the argument[436] that killing in private defence is totally negated because the right to life is an absolute right.

1.5.8.9 Theories of Justification (in General) and the 'Object Theory' (in Particular)

Attempts have been made in the legal literature to establish general theories that will be appropriate for all the justifications, including private defence. The classic theory that was proposed is the 'object theory', according to which all the justifications constitute an 'appropriate means to a proper end'.[437] A more modern general

[434] See Thomson, n 29, at 37ff. See also Uniacke, n 28 above, at 209ff.

[435] Fletcher, (n 74 above, at 1383ff) also refers to the sub-theory of 'factual specification' and negates it, principally because, in his opinion, including the justification within the definition of the offence itself will obscure the logic of justification and lead to undesirable results that are prevented by the substantive distinction—that in his opinion is very important—between the elements in the definition of the offence and the elements in the justification. Such an approach would lead, eg, to negation of the important requirement of the necessary mental element for the establishment of justification. I discussed the importance of the distinction between an offence and a defence above, in section 1.2.

[436] That is, in my opinion, mistaken—see the discussion of the right to life that appears in section 1.5.1 above.

[437] Or, phrased in another way, 'an appropriate means for achieving a legally-recognised objective'—see Eser, n 26, at 629–30; Fletcher (1978), n 1 above, at 769.

theory, which was described above,[438] is the theory of the 'lesser evil', according to which each of the justifications concerns a balance of competing interests.

Common to both these theories is that they are both 'monistic' theories that attempt to explain all the various justifications by means of one basic principle. Based on the assumption that such an explanation is impossible, 'pluralistic' theories have also been suggested, that rely on more than a single principle. The best known of these is the 'dualist' approach, which is based on the assumption that each justification can be classified according to one of two basic situations: (1) An interest that is in a situation of conflict with more important interests (the common example being—private defence); (2) A person's waiver of his interest (consent of the victim). In other words: according to this theory all the justifications may be explained and classified as a 'superior or absent interest'.[439]

In the final analysis, what is common to all the general theories described above is that they are too abstract to be useful.[440] In regard to the matter under discussion—private defence—both the 'object theory' and the 'theory of lesser evil' may constitute starting points, but definitely not final points.

1.6 The Proposed Rationale

1.6.1 General

The principal purpose of this research is to find the suitable rationale for private defence. The search for the rationale should not be confined to the existing (positive) law, but it should be done mainly by identifying the desirable law.

In an earlier section[441] it was noted that private defence has a clear nature of justification, namely, it is an act without moral flaw. As was clarified, this characteristic of private defence has great moral-value and legal-theoretical importance, in tandem with a certain practical-legal importance. In order to establish such an attribute, it is, of course, necessary 'to cleanse' private defence of the cases that are occasionally—mistakenly, in my opinion—included therein. Such a 'cleansing'—by means of a precise definition of the boundaries of private defence—which will be performed throughout this book, does not of course negate the possibility of an exemption from criminal responsibility—in a suitable case—on another basis, that of an excuse. Accordingly, before elaborating on the proposed rationale for private defence as a justification, and to lay the groundwork for this rationale, I

[438] See section 1.5.6 above.
[439] This 'pluralistic' phrase is attributed to Mezger—see Eser, n 26 above, at 630.
[440] A similar opinion was expressed there by Eser, *ibid.*
[441] See section 1.1 above.

shall briefly consider possible solutions to cases that should not be categorised within the areas of private defence.

1.6.2 Cases that Should Not be Included Within the Justification of Private Defence

As noted,[442] one of the main situations that creates the need for an excuse defence is the case of **defensive behaviour against an innocent aggressor**. Although this case has no place within the bounds of private defence, which is clearly a justification, there is room to exonerate the defender on the basis—both theoretical and legal—of an excuse. The solution, which exists in the positive law of most legal systems, and that fits this case, is the 'necessity' defence of an excuse type.[443] Another option is to establish alongside the justification of private defence an additional and restricted defence of self-defence as an excuse.[444] A possible advantage of such an excuse would be its greater compatibility with the terminology used by people (including that of the layman), which views all such behavioural activity—including that against the innocent aggressor—as self-defence.[445] A possible disadvantage of such an excuse would be the confusion that would be created between the justification and an excuse.

Another central case that may be included within the restricted defence of self-defence as an excuse, is the case where **the attacked person who defends himself exceeds the conditions of private defence** (and exerts excessive defensive force) under the influence of the special situation in which he finds himself—fear,

[442] See section 1.5.3 above.

[443] Examples that illustrate the distinction between necessity as justification (based on the lesser evils) and necessity as an excuse were mentioned above in n 238.

[444] For similar ideas in this spirit, see Robinson (1984), n 37 above, vol 2 at 72 (claiming that a desirable distinction between justification of self-defence and excuse of self-defence would solve the difficulty that is pointed out by Fletcher—the fluctuation of self-defence between 'justification' and 'excuse'. His suggestion is to include the excuse of self-defence within the existing legal categories such as duress, provocation and severe emotional disturbance, and not to use the term 'self-defence' in order to describe this excuse, fearing the confusion that would be created between it and the justification of self-defence); Fletcher, n 75 above, at 1368–69 (suggesting the determination of an additional exception, of 'se defendendo' or 'personal necessity'); Fletcher, n 117 above, at 209, fn 20 (pointing to an option of self-defence as an excuse in a situation where the person's body, and not his action, endangers the life of another (ie: a lack of volition (control) in the activity of the aggressor—BS). Reservations should be expressed with regard to the restriction of this matter to the lone case of lack of criminal responsibility, since an identical solution is also necessary when there is a lack of responsibility that derives from another factor—including both a lack of the required mental element and the existence of an excuse). A hint (alone) that an excuse may exist alongside the justification can also be found in Hall, n 13 above, at 234.

[445] Another interesting possibility is to require that a third, additional category should be placed between the strong justification of private defence and the excuse defences (that are weak by nature). If indeed we are in need of such an additional category in order to satisfy our sense of justice, this is liable to signify the weakness of the dichotomised classification of criminal law defences into justifications and excuses.

pressure, confusion etc. This possibility, which was raised by various scholars and which exists in several legal systems,[446] is problematic, since the suitable solution for these cases will often be to give a lighter sentence and not a full exemption. Although there may be cases in which a full exoneration from punishment and not merely a diminution will be more appropriate to our sense of justice, nevertheless the grant of wide authority to the court to reduce the penalty (even) to the extent of a complete nullification will suffice. A complete excuse should be avoided, since this would only be suitable for a minority of cases. I have deliberated as to whether there is room to ease the objective requirements of private defence while touching on the subjective situation of the actor, in order to prevent rigidity and absurd strictness, as was well described by Justice Zilberg when he said:

> We are unwilling to enter here into all those fine distinctions, with weights and measures: this blow is permitted, this blow is forbidden . . . the whole fight in its entirety, including both its parts together, lasted about one and a half minutes, in 'the presence' of the gun and almost up against its muzzle. A person should not be required to calculate his actions with a scale and to measure them step by step at a time of such a danger.[447]

However, there is a risk that even consideration and an easing of this sort will lose all sense of weights, measures and boundaries. Consequently, the defence of mistake and diminished responsibility constitute more suitable solutions for such cases, in the case of deviation from the objective conditions of private defence. Even if the court is authorised—within the framework of diminished responsibility—to reduce the punishment until it is practically negated, such an acquittal, with full awareness of the deviation of the actor and consideration of the situation in which he finds himself, is still preferable to perversion of the strong justification of private defence, with all that this involves from both a declaratory (pointing to the deviant behaviour of the actor as though this is the correct action to take) and a practical point of view. In any case, we shall return to consider these possibilities within the framework of the detailed discussion of excessive defensive force.[448]

Finally, a third central case for which a solution may be found within the framework of the restricted defence of private defence as an excuse is the case in which **the actor acts under the influence of a mistake.**[449] The substantive solution for this case, discussed below,[450] is in the area of the general defences of mistake—a factual mistake as opposed to a mistake of law—but it can also be included within the framework of the excuse that is the subject of the present discussion.

[446] See, eg, Kadish, n 34 above, at 873 fn 3; and the references that appear in Kremnitzer, n 10 above, at 197 fn 60. Also see Ch 5.3 below. A characteristic case that is liable to be included within this framework is the defensive action of a battered woman—see the article by Rosen, n 37 above, and Ch 5.5 below.

[447] The Israeli Supreme Court holding, CA 95/60 *Valdman v the Attorney General* 15 PD 53 at 55 (translated from Hebrew by the author).

[448] See Ch 5.3 below

[449] A typical case that is also likely to be included in this framework is that of the battered woman—see Rosen, n 37 above, and Ch 5.5 below.

[450] See Ch 5.2 below.

To conclude the discussion of establishing a restricted defence of private defence as an excuse alongside the central defence of private defence as a justification, it seems that because of the great confusion that such a defence would likely introduce, and given its ability to blur the nature of private defence, it is preferable to avoid this option and to reach exactly the same substantive solution by means of the existing defences—especially those of 'necessity' and 'mistake'—and by using the statutory tool of mitigating circumstance (as a matter of duty).

1.6.3 The Proposed Rationale

The way is now open for the presentation of the proposed rationale. In effect, the principles of this rationale were already hinted at in previous sections: the framework of the balance of interests and choice of the 'lesser evil' should be accepted. The content with which this framework should be filled includes not only the physical evils, but also the relevant abstract interests. None of these interests should be seen as sufficient, by themselves, but all the important factors should be taken into account. The factors of the autonomy of the person attacked, the guilt of the aggressor and the social-legal order all have great importance for the justification of private defence.[451]

A schematic description of the proposed rationale is shown in Figure 2:

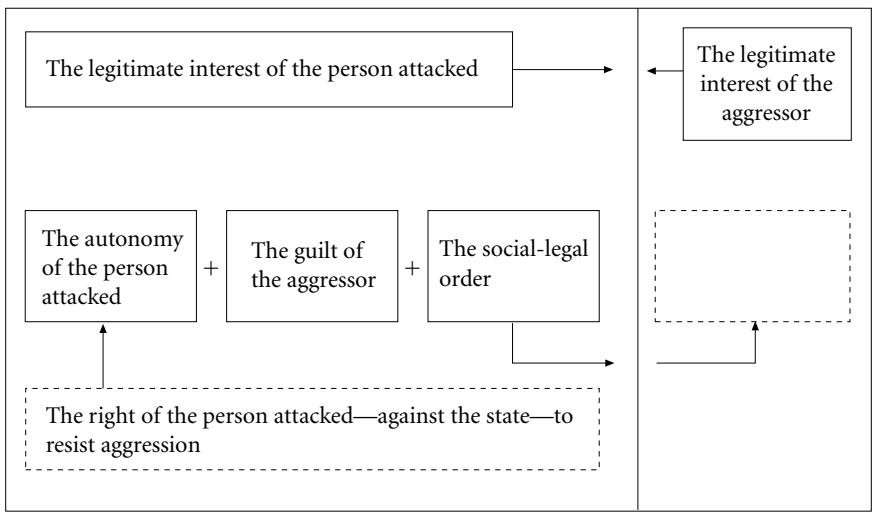


Figure 2: Proposed rationale

[451] See—correspondingly—sections 1.5.6; 1.5.4; 1.5.2 and 1.5.5 above. See also section 1.5.7 above.

I shall begin with a clarification regarding the framework of balancing interests and choice of the 'lesser evil'. Despite the use of this common expression ('the lesser evil'), private defence should not be viewed as evil, and not even as the lesser evil, but as the 'best possible good'. It concerns a desirable action, just and free from all moral fault and not merely a permissible action, the fruit of a narrow utilitarian calculation alone.[452] Thus, private defence should be perceived as a 'strong' criminal law defence, having significant moral justification, and this is—inter alia—in comparison with the defence of 'necessity'.

One level of the balance is the level of the physical injuries, which is expressed in the legitimate interest of the person attacked (not to be injured and not to be harmed) as opposed to the legitimate interest of the aggressor (again, not to be injured and not to be harmed). At this level, a number of matters should be emphasised. Firstly, in opposition to the expressions of not a few scholars,[453] in my opinion the aggressor has a legitimate interest not to be injured and not to be harmed. Although this interest does not, of course, include the illegitimate interest to continue with the illegal attack, it definitely exists. Thus, the aggressor's rights to life and bodily integrity exist and remain central. Although we reduce the aggressor's interests to a certain extent—due to his guilt in creating the situation—it is actually the fact that it is possible to make such a reduction that proves their very existence, since one cannot reduce 'nothing'. A central advantage of the recognition of the rights of the aggressor is the requirement for a certain proportionality between the interest (of the person attacked) that is imperilled and the interest (of the aggressor) that is sacrificed within the framework of private defence. And in the opposite direction: the well-accepted requirement of such proportionality is evidence of a certain consideration[454]—either conscious or unconscious—of the rights of the aggressor as well.

A second clarification is that, we should not halt—as was done by a number of scholars[455]—at this level (of physical injuries), but it is both desirable and necessary to proceed to the second level, and to take the important abstract interests within this framework into account.

A few explanations are necessary regarding the second level of the balance. Firstly, apart from the three main factors, which include the autonomy of the person attacked, the guilt of the aggressor and the social-legal order, there is also an additional—in my opinion, secondary—factor, **the right of the person attacked**

[452] See section 1.1 above.

[453] See, eg, the discussion of theories of 'forfeiture' in section 1.5.2 above.

[454] Apparently, it is possible to derive the requirement of proportionality from the social-legal order, without any need for rights of the aggressor, as follows: an excessive injury to the aggressor will not only fail to protect this order, but it will also even harm the social-legal order. However, in my opinion, the (relatively) slight restriction (of proportionality) that this consideration dictates is not sufficient. We must consider the aggressor's rights in order to obtain a more significant restriction of proportionality—which is a very desirable restriction for any civilised society.

[455] See the consideration of their writings in section 1.5.6 above.

against the state to resist aggression.[456] This secondary factor negates the possible argument that the right of the individual to defend his autonomy by himself was greatly weakened with the creation of the state. Consequently, there is no need to include it within the balance as an independent factor, but it is sufficient to be aware of the actual strength of the factor of the autonomy of the person attacked.

Secondly, a number of clarifications are necessary regarding the factor of **the social-legal order**. The protection of the social-legal order that is involved in an action of private defence bears an important function in the justification of private defence. And yet, nevertheless, the above schematic description also gives possible expression to this factor on the right hand side of the balance—on the side of the aggressor. How is this possible? Private defence constitutes—inter alia—the repelling of the aggressor, prevention of his performance of an offence, and a deterrent factor. It also guards the (empirical) validity of the norm that is 'attacked' by the aggressor, and of the punitive norms as a whole. It thus serves the purposes of society, by providing extremely efficient protection for the social-legal order. Indeed, the factor of the social-legal order that is found in the left sector of the balance will usually have positive values, and it will act to justify private defence. Yet this factor may also act to determine the limitations of private defence. Thus, when the response of the attacked person significantly exceeds the conditions of private defence, and he deviates greatly from the requirement of proportionality and harms the aggressor with an injury far greater than the injury anticipated as a result of the aggressor's attack, then the response of the person attacked in fact harms the social-legal order and does not protect it. It therefore seems undisputable that the repelling by lethal defensive force of an aggressor who pushes the attacked person in a queue for the bus does not serve the social-legal order, but, on the contrary, harms it gravely. In such cases, the factor of the social-legal order will act against the response of the attacked person, which does not fall within the boundaries of private defence. This action is expressed in Figure 2 in the dash-lined rectangle that appears in the right sector of the balance.

An additional clarification concerns the content and nature of the factor of the social-legal order. As we saw,[457] various perceptions exist regarding this content and nature. Thus, for example, the social-legal order may be endowed with a type of content that makes consideration of all the other abstract interests within the balance superfluous. In other words, a very sweeping definition of the social-legal order already takes into account both the autonomy of the person attacked and the guilt of the aggressor. My reservations regarding such a wide definition derive from the immense burden that it places on a single factor—to the extent that any practical possibility to correctly evaluate it is lost—and because of the extent to which it may devalue the other main factors, especially the autonomy of the

[456] See—extensively—section 1.5.7 above.
[457] See section 1.5.5 above.

person attacked and the guilt of the aggressor. Given their centrality, these factors should always be independent, prime considerations and should not be subsumed within the concept of the social-legal order.

It is possible to learn about the strength of the social interest in the protection of the social-legal order from the fact that in some legal systems, as mentioned, this interest constitutes a completely independent factor for the permission of exertion of force by the individual—within the framework of the defence of prevention of crime.[458] The public has important interests that are served by private defence: prevention of offences in general, and of the specific offence that is about to be performed by the aggressor, in particular, and deterrence of offenders—both deterrence of the aggressor himself (personal deterrence), and of potential aggressors (general deterrence).

The strength of the factor of the social-legal order in a specific case stands in direct proportion to the infringement of the autonomy of the person attacked. This infringement is a function (again, in direct proportion) of the weight of the legitimate interest that is at stake. This strength is also directly proportional to the guilt of the aggressor as an expression of the anti-social aspect that is embodied in his action.[459] Thus, for example, the injury to the social-legal order will be especially great in the case of a deliberate attack that is directed at an existential value, endangering the life of the individual who is attacked. It should be noted and emphasised that the existence of mutual influences between the various factors, and especially the influence of the factors of 'autonomy' and 'guilt' on the factor of the social-legal order, does not negate the distinct nature of each of the various factors.

With regard to the influence of the infringement of the autonomy of the individual who is attacked on the injury to the social-legal order that accompanies it, we can say that this in effect involves giving social significance to the injuries to individuals: the breach of a single person's rights harms not only him, but also the rights of the public at large—since we need a stable social-legal order to maintain normal social life, namely, to protect the basic rights of individuals.

A special and distinct case is that in which the aggressor acts within the framework of a criminal law defence of a justification type, such as a policeman who performs a legal arrest. In such a case, the justified action of the aggressor does not harm the social-legal order, and consequently, (defensive) force that is exerted by the attacked person against the aggressor will not protect this order. On the contrary: the use of force by the person attacked will actually harm the social-legal order, and thus there is no room for it within the framework of private defence (although the possibility that it will be 'forgiven' within the framework of another

[458] See the beginning of section 1.5.5 above.

[459] Regarding the potentially grave results of a mistaken view of the factor of social-legal order as having a fixed and very significant weight, see n 348 above.

criminal law defence, of an excuse type, such as putative defence or 'necessity'—according to the specific case—should not be negated).

The factor of the social-legal order that should be taken into account for the consideration of the justification of private defence in a concrete case must be characterised more precisely. In my opinion, the term social-legal order is not a purely objective term, and it is not sufficient that protected values are objectively endangered. The concept of the social-legal order that must be used for our discussion (the justification of private defence) not only reflects the present balance of benefit and loss for society as a result of the action of private defence, but also involves a more far-reaching view, that looks forward toward the future. The purpose of this view is, inter alia, to strengthen the sense of security and trust in the legal system and the rule of law and order for the law-abiding citizen.

An example of the nature of the social-legal order factor and its implications is the issue[460] of the mental element (of the actor) that is required in order to establish private defence. In a situation, for example, where the objective requirements of private defence exist but the actor is entirely unaware of them, yet he exerts force against the aggressor and commits a criminal offence because of negative motives and for the purpose of achieving negative goals, his action cannot be said to serve the social-legal order. On the contrary, it harms the social-legal order, even though a purely objective perception of the nature of the social-legal order might lead to support for the actor's action and to viewing it as justified, since in practice the actor repelled a malicious attack. However, a more far-reaching and deeper examination of the actor's action and its influence on the sense of security and trust in the legal system among law-abiding citizens leads to the conclusion that there is no room for the justification of the activity of A, who kills B with malice aforethought, only because it is discovered after the action (what was not known to A) that B was about to attack A, so that A was—from an objective point of view—in danger, and thus was within the objective conditions of private defence. Therefore, such an actor is not only unworthy to defend the social-legal order and does not in practice do so, but he even harms this order.

An additional example that will clarify the suggested nature of the social-legal order factor and its implications is the issue of proportionality.[461] We shall return to the discussion of the situation in which A pushes B in the queue for the bus, and B uses lethal defensive force against A—force that is necessary under the circumstances of the situation in order to repel the aggressor and to maintain the right of B to get on the bus before him. It would appear, according to a short-term perception of the social-legal order factor, that the actor (B) protected the social-legal order against the illegal act of A. However, in light of the harsh deviation of the actor from the proportionality requirement by the use of lethal force against only

[460] That is discussed widely below—see Ch 3.10.
[461] This too is discussed widely below—see Ch 3.8.

a very slight attack, it must be said that, on the contrary, his action harms the social-legal order and the sense of security and trust of law-abiding citizens in the legal system. Given the educational, guiding and declarative aspects of the justification of private defence, the taking of human life in order to repel a slight push does not constitute a justified act.

The factor of the social-legal order acts to enlarge the scope of private defence so that it also encompasses the defence of another (any other) person and perhaps also the protection of an interest of the state or of society. It also defines the boundaries of private defence, including regarding necessity (of the defensive force), immediacy (of the danger), and rules that relate to the actor who causes, with guilt, the situation in which he must defend himself.[462]

In addition, a number of clarifications are necessary with regard to the factor of **the autonomy of the individual who is attacked**. These concern the right of the victim of the attack to protect his legitimate personal interests against attack—his right to prevent intrusion and invasion into the sphere of his autonomy. This sphere is the person's living space, including, first and foremost, his life, bodily integrity, liberty and property, and perhaps additional, less important, personal interests such as his honour. The basis—both legal and moral—for this factor of first-degree importance is that the right—either natural or agreed—of the individual to autonomy is the minimum requirement for a meaningful life.

It is possible to learn about the great significance attributed to the individual's autonomy from the example that is discussed in the literature regarding the 'necessity' defence. The situation discussed involves two people. One individual is in immediate need of a blood transfusion of a rare blood type in order to save his life. The other—and he alone—may save him if he agrees to have his blood taken, but he refuses to do so. The physical injury to the person who refuses to donate blood, if the blood were to be forcibly (physically) taken from him, is not great, certainly not in comparison to the other person's loss of life. Nevertheless, it is accepted that the 'necessity' defence does not allow this penetration into the unwilling potential donor's sphere of autonomy by forcibly extracting the blood from him.

In the philosophical literature, the concept of autonomy is discussed in various contexts. For example, Nozick[463] commented that in modern society it is recognised that it is extremely important for a person to have a zone of autonomy—an area of activity within whose framework he can choose as he wishes without external coercion. The recognition of such an area of activity and respect for it constitute, primarily, a suitable response to the acknowledged aspiration of the human being for self-esteem. The existence of a zone of autonomy that is acknowledged and respected by all enables the self-actualisation of the individual

[462] See (correspondingly) Chs 4.2; 3.3; 3.6; 3.7 and 5.4 below.
[463] See Nozick, n 402, at 501–4 and also at 551, 555–66.

(objectively), and provides him with the self-confidence necessary to achieve this self-actualisation.

The factor of individual autonomy acts to provide maximal protection of the rights and liberties of the law-abiding citizen. But it should be remembered that we have already negated the exclusivity of this factor. Rights—including those of the person attacked to protect his autonomy—are not absolute, but relative.[464] Consequently, this factor alone should not suffice, but the full balance, which includes additional factors, should be examined. The principal additional factors in this context are the social-legal order, the aggressor's guilt and the anticipated physical injuries to the agresssor and the person attacked—an examination whose most important result is a certain requirement for proportionality. In the end, the factor of the individual autonomy of the person attacked does not act in all cases to justify private defence to an equal degree, but its weight is determined in direct relation to the weight of the legitimate interest that is endangered.[465]

Finally, it is very important to note the necessity of these above-mentioned factors. The establishment of private defence and its justification will always require all of the three factors (the aggressor's guilt, the autonomy of the person attacked and the social-legal order). **Private defence is, simultaneously, a defence both of the autonomy of the person attacked and of the social-legal order, by means of essential and reasonable defensive force against the aggressor who is criminally responsible for his attack.**

The factors of the aggressor's guilt and of the social-legal order are essential factors for the justification of private defence. The third factor—autonomy of the person attacked—is also generally required as an essential factor. However, if the defence of the interest of the state or the society is recognised as part of the framework of private defence, there may be cases in which private defence (of the interest of the state or of society) will be justified despite the lack of a direct infringement of the autonomy of the individual. In these cases, the interest of the state can be perceived as replacing the factor of the individual's autonomy, just as the state (or the society) replaces the individual in the function of the potentially attacked and

[464] See the discussion of the relativity of rights in general and the right to life in particular, in section 1.5.1 above. Even if it is not accepted that the claim that the relativity of other rights, and particularly of the right to human dignity, serves 'a fortiori' as proof of the relativity of the right to life—since it can be said that all rights are derived from the right to life and dependent upon it (however, an approach exists according to which this claim should not be accepted, since the aspiration is not merely for life but for life with a certain value)—still in my view the general arguments against seeing rights (of any sort) as absolute are valid for each and every one of them, with no exceptions. See also the negation of the exclusivity of the factor of autonomy in section 1.5.4 above.

[465] Thus, eg, it is accepted that as a rule (subject to exceptions) the infringement of the autonomy of the person attacked is greater (and accordingly—the influence of the factor of autonomy for the justification of private defence is greater) in the presence of a risk to a person's life in comparison to the risk to his bodily integrity or his liberty. Accordingly, the infringement of the autonomy of a person is greater in the presence of risk to bodily integrity or liberty than in the presence of risk to a person's property.

injured person. Another option is to see the injury to the state or society as an indirect infringement of the autonomy of its individuals, since the state in modern society provides most of the protection for the individual's autonomy.[466]

The necessity of each and every one of the three factors that act to justify private defence can also be explained by means of an examination of all their possible combinations. Since three independent factors are concerned, it is clear that there may be 2^3 (2 to the power of 3), that is 8 possible combinations. This is illustrated in Table 1, in which details are given of the eight cases, where the '+' symbol expresses the existence of the factor and the '−' symbol expresses its absence.

Table 1 Justification of Private Defence

The case number	The autonomy of the person attacked	The social-legal order	The aggressor's guilt
1	+	+	+
*2	+	+	−
*3	+	−	+
4	+	−	−
*5	−	+	+
6	−	+	−
7	−	−	+
8	−	−	−

The three cases in which only one of the factors is absent, while the other two exist (ie, cases 2, 3 and 5 in Table 1) are of particular interest. These three cases, which are discussed below, will be used to draw conclusions a fortiori with regard to the other cases, which all lack more than one factor (apart from case 1, in which all three factors exist, so that it presents no difficulty).

The first case (case 2 in Table 1), where the factors of autonomy of the attacked person and the social-legal order exist but there is a lack of the factor of the aggressor's guilt, was dealt with widely above, within the discussions of the theories based on the aggressor's guilt and of the test-case of the innocent aggressor.[467]

[466] In any case, it is important to emphasise that private defence of an interest of the state or of the society is the exception, and in all the remaining cases the rule that applies provides that all the three above-mentioned factors are essential in a cumulative and complementary manner for the justification of private defence.

[467] See sections 1.5.2 and 1.5.3 above. As noted, my opinion is that the waiver of the aggressor's guilt would undermine the substance of private defence and constitute a forfeiture of a significant part of its uniqueness. In practice, I believe that this case (case 2 in the table) is rare, since when the aggressor is not criminally responsible there is also (in many cases) no harm to the social-legal order.

The second interesting case (case 3 in Table 1) is where the factors of the autonomy of the attacked person and of the aggressor's guilt do exist, but the factor of the social-legal order does not operate for the justification of private defence. Prima facie—almost by definition—such a case is impossible. Since if the aggressor's guilt exists and he is criminally responsible for his attack, his act will, there and then, not only harm the autonomy of the individual who is attacked but also, simultaneously, harm the social-legal order. However, it is not only the influence of the attack on this order that should be examined here, but also the influence of the act of private defence on the social-legal order. The special case of resistance to an illegal arrest that is performed by an agent of the state should also be considered. In such a case,[468] it is very possible that despite the guilt of the aggressor and the infringement of the autonomy of the person attacked, the factor of the social-legal order not only fails to support private defence, but will even negate it; a negation which actually serves to protect the social-legal order itself.

In the third and last case (case 5 in Table 1), the factors of the aggressor's guilt and the social-legal order exist, but the factor of the attacked person's autonomy is absent. Two typical cases may occur within this format. The first—protection of the interest of the state or of the society—has just been discussed. The second case[469] is where the attacked person himself gave his prior consent to the attack against him—consent that does not negate the specific offence that the aggressor committed while carrying out the attack (according to the definition of that offence). In my view, when the victim consents it cannot be said that his autonomy was infringed as a result of the attack that he agreed to—at least not substantially. Consequently, and also in consideration of the harm to the social-legal order resulting from the injury to the aggressor by the person attacked (in the sense of having both 'murdered and inherited'; you consented and also harmed the one who performed your wishes), it is desirable and suitable to negate private defence, at least self-defence (as distinct from the defence of another person). This result can be achieved by using the necessity requirement and the option open to the person attacked to withdraw his consent, or by treating this case in the same way as other cases in which the person attacked causes the attack towards him through his own fault.[470]

The required nature of each of the three factors that act for the justification of private defence also provides a solution to the question of **the relative strengths of the various factors**. If the justification for private defence were composed of various factors the existence of some of which would be sufficient, it would be impossible to use the proposed theory in cases where one or more of the factors were absent, unless a valid formula was available for the measurement of the

[468] That is discussed at length below—see Ch 3.4.3.
[469] That is also discussed at length below—see Ch 3.4.4.
[470] See an extensive discussion in Ch 3.4.4.

relative strengths of the various factors. However, since all the three factors are essential, there is no need to determine an order of priorities between them, since each of them has absolute power to negate private defence—in its absence. If we compare these factors to vectors having power and direction, then private defence only exists when all three work in the same direction—that of justification. Therefore, our only concern is for the cumulative power of the three factors, and not the relative and partial strengths that are to be found by comparisons between them.

If, nevertheless, a determination of some sort regarding the relative strengths of the various factors is necessary, then, in my opinion, the factor of autonomy is the primary focus for the justification of private defence. This opinion stems from a perception of private defence as **private** in the full sense of the word, ie: not only defence performed **by the private person** (as distinct from the institutionalised defence) but also defence **of the private person** who is attacked—of his autonomy. It was not in vain that a number of scholars saw private defence—that includes self-defence at its core—as a natural right. The protection of the social-legal order involved in the action of private defence does constitute an important and necessary element for the justification of private defence, yet the function of the factor of autonomy of the individual who is attacked is even more important. In the absence of injury or danger to the autonomy of the individual who is attacked, the basis for an exception of any kind of self-defence is undermined—whether it is of a 'justification' type or only of an 'excuse' type. The relevant criminal law defence that may be brought into account in such a situation is the use of force for the prevention of crime—for then the protection of the social-legal order is indeed the central target. However, this does not involve private defence in the usual meaning of this term, but as the prevention of an offence by an individual.

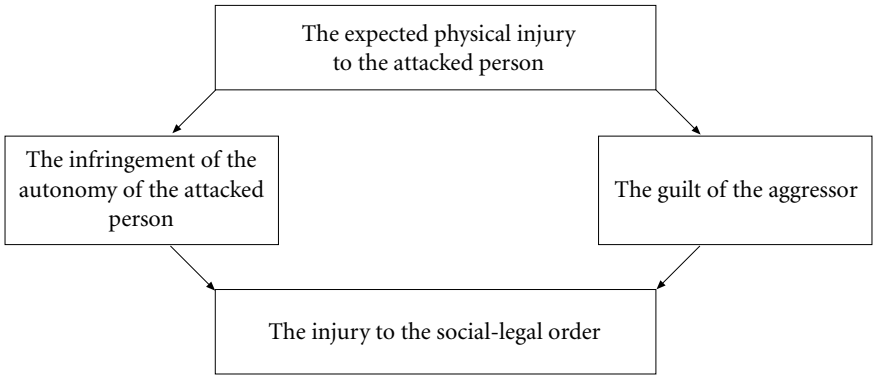
With regard to the factor of the aggressor's guilt—the principal importance of this factor for the justification of private defence is in providing a moral and legal foundation for the preference of the interest of the person attacked over that of the aggressor. In any case, this factor also is less important and powerful than the factor of autonomy of the individual who is attacked. Without injury to the person's autonomy, the question of the aggressor's guilt is not raised at all, since private defence principally concerns the protection of autonomy, and not the punishment of the aggressor.

This is the picture when private defence is examined by itself. If, in contrast, private defence is examined in comparison to the other two criminal law defences of compulsion—necessity and duress—while attempting to discover its uniqueness, then it is the factors of the social-legal order and the aggressor's guilt that will take precedence.

Nevertheless, in order not to conclude this discussion regarding the relative strengths of the various factors with an incorrect and misleading emphasis on the possible hierarchy between them, I shall end this discussion with an additional

emphasis on the essentiality of each and every one of the three factors that serve to justify private defence, since, as mentioned, private defence constitutes defence both of the individual who is attacked and of the social-legal order, and in a very specific (and restricted) way of (essential and reasonable) defensive force against the aggressor who is criminally responsible for his attack.

Finally, we should consider the **internal influences of the various factors that act concurrently for the justification of private defence**. Some of these influences were already mentioned above, and I shall attempt to portray the full picture in Figure 3:



* The arrows express the existence of any sort of impact and their length is insignificant.

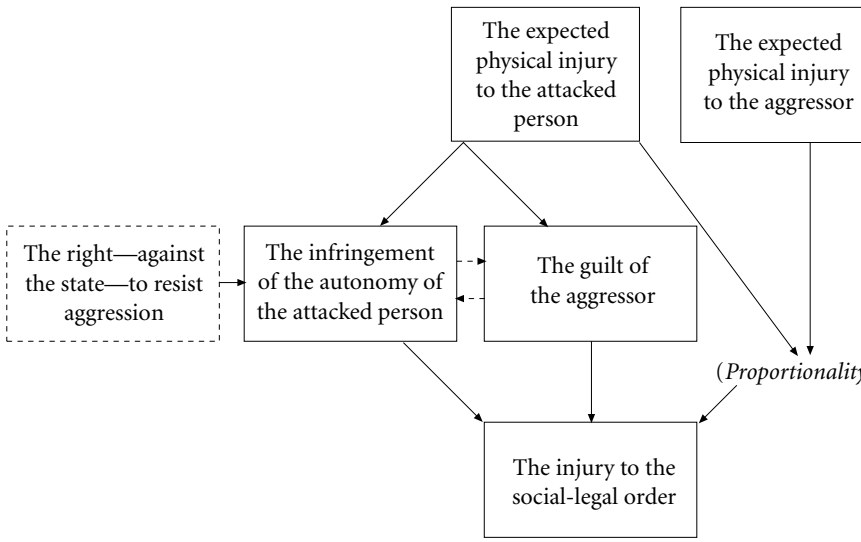
Figure 3

Firstly, a clarification is necessary regarding the influence of the severity of the expected injury to the person attacked on the factor of the aggressor's guilt. What is important for this matter is the degree of the aggressor's guilt in the specific situation that was created. If the factor of the aggressor's guilt is used as the basis for a certain devaluation of his interest, it is essential to take his guilt into account in the full sense of this expression, including the aggressor's consideration of the objective components of the attack: the rule for a deliberate slap on the cheek will not be the same as the rule for a deliberate lethal shooting.

With regard to the influence of the expected injury to the attacked person on the infringement of his autonomy, there is a direct relationship between them. Thus, it is clear that an attempt to cause severe physical injury to the attacked person infringes his autonomy more significantly and seriously than an attempt to slightly scratch him. Similarly, an attempt to inflict a long series of blows on the person attacked harms his autonomy more than an attempt to push him out of the queue for the bus.

The above illustration demonstrates how the expected physical injury to the person attacked is translated, with the help of the factors of the autonomy of the person attacked and the guilt of the aggressor, into an additional important factor—the injury to the social-legal order. If there were no injury to the autonomy of the person attacked and no guilt of the aggressor, the physical injury to the person attacked might have remained his own business. However, in modern society it is definitely seen as an interest of the society as a whole. This provides a solid foundation for viewing the attack as an injury to the public interest of protection of the social-legal order.

Figure 3 may be completed with the addition of two factors: the expected physical injury to the aggressor (as the result of an action of private defence) and the secondary factor of the right against the state to resist aggression, as shown in Figure 4:



* No significance to the length of the arrows

Figure 4

It can be seen, as mentioned, that the right against the state to resist aggression supports the factor of the autonomy of the person attacked. In addition, the expected physical injury to the aggressor (if defensive force is used against him), alongside the expected physical injury to the attacked person (if it is not exerted), influences the social-legal order, through the requirement for proportionality: an injury that is devoid of proportionality, not only fails to protect the social-legal order, it actually, on the contrary, causes it significant damage.

Until this point, the principal influences between the various factors that act for the justification of private defence have been discussed. Additional connections also exist between them. These include a reciprocal relationship between the factors of autonomy of the person attacked and the guilt of the aggressor—connections that find expression in the dotted arrows in Figure 4. To the extent that the guilt of the aggressor is greater, the infringement of the autonomy of the person attacked increases accordingly. Even when the aggressor acts inadvertently, without guilt of any sort, the autonomy of the person attacked is infringed. However this injury grows more serious in accordance with the mental state of the aggressor: from negligence,[471] via awareness and up until intention. For the infringement of the autonomy of the person attacked is not only identified with the objective physical injury he suffers. The sense of security of the person attacked also has a certain influence on the extent of the infringement of his autonomy, and this sense of security is weakened as the mental attitude of the aggressor becomes more negative, and reaches its rock bottom when the aggressor aspires to kill the person attacked. If we return to the moral significance of the recognition of the individual's autonomy, ie, that no person (the one attacked) should be exploited by another person (the aggressor) as a means to achieve that other person's goals, obviously the said exploitation grows in accordance with an increase in the severity of the mental attitude of the exploiter (the aggressor). And conversely—the factor of autonomy influences the factor of the aggressor's guilt: when the infringement by the aggressor of the autonomy of the person attacked is greater (an injury that is measured in direct relation to the anticipated physical injury to the person attacked), so the guilt of the aggressor will be greater, on the condition that he is aware of (or intends to commit) this infringement. (The reference here is not to guilt in the narrow technical sense of the mental element of the criminal offence, but in the broader sense, of responsibility, on whose foundation it is possible—both morally and legally—to impose a certain devaluation of the aggressor's interests).

My proposal, therefore, rests on a number of theories that were suggested for the justification of private defence: the balance of interests and the choice of the 'lesser evil' (or—more suitably phrased—choice of the best possible good), defence of the autonomy of the person attacked (alongside his right against the state to resist aggression), consideration of the guilt of the aggressor, and protection of the social-legal order. The main innovation in the theory stems from both the integration of *all* the important factors for the justification of private defence, and also the structure of this integration.[472]

[471] As mentioned, in my view, an action against an aggressor who acts inadvertently or negligently is not within the bounds of the justification of private defence—see sections 1.5.2 and 1.5.3 above.

[472] See also Boaz Sangero, 'A New Defense for Self-Defense' (forthcoming, (2006) 9 *Buffalo Criminal Law Review*). There are a number of proposals in the literature—both legal and philosophical—for the combination of classical theories. However, these proposals are very incomplete—ie, they do not take all the important factors into account, and some of the factors were only mentioned

The theoretical foundation and the detailed reasoning of the proposed rationale are set forth in the previous sections, since the proposed rationale incorporates several factors each of which was discussed in detail above, when they were examined as independent theories. Additionally, some of the support for the proposed rationale is—naturally—the reasoned elimination of the alternatives. The general discussions above, of the distinctions between justification and excuse and between an offence and a defence, also provide significant support for the proposed rationale. Finally, an attempt will be made to establish additional support for the proposed rationale through the discussions of various issues of private defence that follow—discussions in which the various implications find expression. In the final analysis, the true test of the proposed rationale is the quality of the solutions that it provides for the different issues of private defence.

The apparent disadvantage of the proposed rationale is that it is complex, and therefore also complicated, in comparison with the alternatives. Indeed, a complex rationale will not provide unambiguous and clear solutions to all the issues of private defence, as do simpler rationales that have been suggested, such as the rationale of the autonomy of the person attacked or the rationale of the guilt of the aggressor. However, it should be preferred as being more precise, faithfully reflecting the true nature of private defence, and leading to desirable legal results for the characterisation of private defence. Difficulties in formulating a legal solution, or even lack of a decisive answer to a particular issue, are preferable to a situation where a clear but mistaken answer is easily produced. Simple and mistaken, complicated and correct—correct must prevail.

implicitly, without examining their significance. The first—the approach of Hume, combines the idea that the aggressor—by his act—loses his right to protection by the law, with the idea of private policing (see Gordon, n 1 above, at 754). The second—the approach of Kadish, who proposes separate explanations for private defence. With regard to lethal attacks—he cites the right against the state to resist aggression. Regarding other attacks, Kadish suggests seeing the competing principles of autonomy and proportionality as the explanation for private defence (see Kadish, n 34 above). The third and last—the approach of Fletcher, that is based on the rationale of autonomy, but sometimes—eg, for the purpose of explanation of defence of another person—requires the social-legal order as well. However, the entire picture—as portrayed above—does not appear in any of his writings. On the contrary, it is not only that Fletcher points to autonomy of the attacked person alone as the explanation for private defence, but moreover, in a number of places he expresses doubt regarding the possibility of finding an explanation for private defence that will suit all the cases that arise within its framework, and points to the possibility that several separate theories are needed, where each of them will explain only some of the cases (see, eg, Fletcher (1978), n 1 above, at 767 and at 874).

2

Private Defence: A Comparative Analysis

2.1 General

Having laid the necessary theoretical foundations for a discussion of private defence, the way is now paved for a detailed discussion of the various issues in the field of private defence. These issues have been divided into three groups and will be dealt with in the next three chapters. The first—the elements of private defence—includes the various conditions required for the establishment of the defence of private defence. The second—the internal distinctions—deals with the various derivatives of private defence, and especially self-defence, defence of another person and defence of property. The third includes several issues that are not considered in the previous two categories, under the heading 'additional issues'.

The discussion of each issue will take place both in light of the rationale for private defence and by drawing inspiration from scholars and from various legal systems. The principal (but not only) legal systems to which I shall refer are the English, American and the Israeli systems. My purpose is not study for its own sake of foreign legal systems, or of a detailed and comprehensive description of private defence as it is expressed within their frameworks, but rather, to enrich the discussion on the various issues relating to private defence. Consequently, emphasis will be placed on interesting ideas and solutions, even when they represent minority opinions, more than on the weight accorded the various approaches in each legal system.

Apart from the three legal systems mentioned above (the Israeli, English and American) I shall also consider—in a less methodical way and according to the matter under discussion—some other legal systems, the history of some of them, and various suggestions proposed for legislative reform. In this chapter, preceding the discussion of the issues themselves, I shall give a general description of the English and American law on private defence, while referring to the features that should be taken into account in order to gain the maximum benefit from the solutions that have been proposed for each specific issue in these legal systems.

2.2 Private Defence in English and American Law

2.2.1 English Law

English law has grappled with questions of private defence for many years, but the legal situation is still far from being clear. There are many disputes regarding both the desirable and the existing law. With regard to the existing law, an important characteristic of English law regarding private defence is the existence of another criminal law defence,[473] namely the use of force for the prevention of a crime (and the performance of an arrest). This defence has serious influence on private defence. Article 3 of the Criminal Law Act 1967 regulates the use of force for the prevention of a crime (and for the performance of an arrest). Although four decades have passed since it was enacted, there is still a dispute among English law scholars, which finds expression in certain court rulings, with regard to an extremely central and basic question: do the traditional rules of English common law that deal with private defence still apply (especially concerning the rule of necessity, the rule of proportionality and the duty to retreat) or do the rules of the above-mentioned article of the law apply to private defence, according to which reasonable force may be used to prevent a crime (and to perform an arrest). In the latter case, a single general principle then applies—the principle of reasonableness (although even according to this principle, it is possible to arrive at a requirement for retreat, but it will at the most constitute one of the factors for the examination of reasonability, and not a decisive factor).[474] And if this were not enough, there is a separate legal arrangement that exists in English law for the protection of property—in article 5 of the Criminal Damage Act 1971.[475]

This situation not only creates legal uncertainty, but also embodies contradictions and a lack of logic.[476] One example of such an anomaly: in the defence of

[473] As noted above—see Ch 1.5.5.

[474] See, eg, Harlow, n 324 above (relating to no less than three different interpretations of the 1967 law and its influence on private defence); Smith and Hogan, n 284 above, at 254ff (their controversial opinion is that article 3 of the 1967 law even overrides the rules of the common law that deal with private defence and direct the general principle of reasonability); Card, Cross and Jones, n 180 above, at 624ff. (supporting the simultaneous application—both of the Rules of common law and of the 1967 law); Andrew Ashworth, *Principles of Criminal Law*, 4th edn (NewYork, 2003) at 139–40 ('section 3 of the Criminal Law Act 1967 . . . was not intended to supplant the common law rules on self-defence, and the courts have continued to develop the rules'); GS Garneau, 'The Law Reform Commission of Canada and the Defence of Justification' (1983–84) 26 *Criminal Law Quarterly* 121 at 125ff (presenting the different approaches).

[475] See, eg, D Cowley, 'Criminal Damage Act 1971: Lawful Excuse (*R. v. Hill*, *R v. Hall*)' (1989) 53 *Journal of Criminal Law* 176 (dealing with this defence and its relationship to private defence).

[476] Thus, for example, Smith and Hogan, in their well-known book, noted the lack of consistency and the anomaly that is produced by the fact that defence of the body is regulated according to the common law, while the defence of property is regulated according to the Criminal Damage Act 1971, and

property it is sufficient—in English law—if the actor believes that his act is reasonable, while for defence of the body objective reasonability is also required. In this sense, defence of one's body is then more restricted than the defence of property.[477]

The dispute regarding the system of laws that should be applicable in English law for private defence is connected to various perceptions regarding the rationale for private defence. It was already noted extensively that from a historic point of view private defence in English law developed as an excuse ('se defendendo') and not as a justification.[478] What is the rationale that underlies it today? It is very difficult to determine. The opinion has been expressed that it concerns a balance of interests and choice of the lesser evil.[479] However, if private defence is subordinated to article 3 of the 1967 law, which deals with the use of force for the prevention of a crime (and the performance of an arrest), the factors of prevention of offences and policing, which are within the justification of private defence, are greatly strengthened. The truth is that in discussions that were carried out in English law on the various issues of private defence insufficient attention was paid to the basic question of the rationale that underlies it.

Another general characteristic of private defence in English law, which also involves other criminal law defences, is the tendency to widen the areas of its application. The reason for this tendency stems from the very restricted scope of the other compulsion defences.[480] Thus, for example, the 'necessity' defence is restricted to very severe dangers—death or severe bodily injury.[481] This situation leads to a strong tendency to extend the application of private defence so that it will provide a response to problems whose suitable solution is to be found within the framework of the other compulsion defences.[482]

Two additional dominant characteristics of private defence in English law are similar to the previous characteristics that were mentioned, in the sense that they too are derived from the other criminal law defences. The first is the incorporation

arrest and prevention of a crime—according to art 3 of the Criminal Law Act 1967—see Smith and Hogan, n 284 above, at 252ff and 693ff.

[477] See, eg, the English draft law, Draft Law, Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles, no 218 (London, 1993) at 67–68; Vol 2 of the Draft Proposal, Law Commission, A Criminal Code for England and Wales, no 177 (London, 1989) at 231 and the explanatory wording to the Draft, Law Commission, Codification of the Criminal Law, no 143 (London, 1985), at 123; Ashworth, n 474 above, at 138 ('One feature of the draft Penal Code is that it would abolish the special rule for property damage').

[478] See Ch 1.3 above.

[479] See, eg, Ashworth, n 183 above, at 306; and compare to his latest book, Ashworth, n 474 above, at 136–37.

[480] Throughout the historical development of the compulsion defences there was a strong fear in English law that the compulsion defences might cause anarchy and erosion of the prohibitive norms—Enker, n 89 above, at 110–11.

[481] See Elliot, n 285 above, at 618–19; and also n 285 above and accompanying text.

[482] Thus, for example, the restrictive limitation of the other compulsion defences led Elliot to the strange proposal that—within the framework of private defence—the requirement for an attack should be waived—see Elliot, n 285 above, at 618–19.

of putative private defence within the definition of real private defence. This mistaken combination, which mixes two different species together, has two possible negative results: one—consideration of putative defence as a justification for all purposes, as the desirable and correct thing to be done, instead of relating to it as an excuse due to a mistake.[483] The second possible result—which is no less negative—is the consideration of private defence in its entirety as an excuse alone, and this is on the basis of a (not very high) common denominator between real private defence and putative private defence.

The second characteristic is the undesirable unification of the important basic requirements of necessity and proportionality under one comprehensive test: reasonability of the defensive force[484]. My opinion is that each of these requirements is too important to be included together under a general test of reasonability, since remaining satisfied with this test leads to the weakening of these concepts.[485] Moreover, English jurisprudence eased the objective test of reasonability by adding subjective characteristics to it. This easing is connected to the previous characteristic that was noted—the combination of putative private defence with the real private defence. The decisive ruling in the *Palmer*[486] case, for example, established the following, which is frequently cited:

> [A] person defending himself cannot weigh to a nicety the exact measure of his defensive action. If the jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken.

As is said in the book by Archbold,[487] this concerns a conception that is not (to say the least) entirely logical, according to which although the test of reasonability for defensive force is objective, the jurors must, nonetheless, be directed to take the thoughts of the accused into account in their decision. I absolutely agree with this criticism.

[483] See, eg, Yeo, n 76 above, at 133 and Dressler, n 32 above, at 92. For broad discussions of this issue see Chs 3.10 and 5.2.2 below.

[484] With regard to this conjunction of the requirements of necessity and proportionality within the framework of the requirement of reasonability see, for example Williams (1983), n 1 above, at 503; Ashworth, n 183 above, at 283 (expressing his opinion that the general test of reasonability causes ambiguity).

[485] See Chs 3.6 and 3.8 below.

[486] See the holding in the case of *Palmer v R* [1971] 55 Cr App R 223, 2 WLR 831 at 242ff. For more detailed criticism of this rule, see the text below that commences with the reference to n 1176.

[487] See Archbold, JF, *Pleading, Evidence and Practice in Criminal Cases*, 42nd edn by S Mitchell, PJ Richardson and JH Buzzard (London, 1985) and 5th Cumulative Supplement (London, 1987) at 1614. See also Ashworth, n 474 above, at 148:

> To the extent that in these cases the law moves away from objective standards toward indulgence of the emotions of innocent citizens, the rationale of justification becomes diluted by elements of excuse.

Another fault may derive from the cumulative operation of the two above-mentioned rules: the first—the combination of putative private defence with real private defence, and the second—the binding together of the tests of necessity and proportionality, and the sufficiency of the requirement of reasonability.[488] The combination of these two above-mentioned rules may[489] leads to (the unacceptable and undesirable) result of being satisfied with the very existence of (a genuine) mistake—without a requirement of reasonability—even when a mistake with regard to the requirement of proportionality is involved, although such a mistake is a mistake of law.[490] The consideration of defensive force, without distinguishing between necessity and proportionality, does not comply with the accepted approach regarding mistakes in modern criminal law—an approach that distinguishes between a mistake of fact and a mistake of law. (Regarding the latter—even when it is recognised, it must still comply with the requirement of objective reasonability).

Another dominant feature of the English law that relates to the matter under discussion is the existence of the jury system. As is well known, a jury is required to decide on factual questions that arise during the trial. The jurors are laymen, and this fact has an indirect influence on the substantive law itself. How? It appears that serious apprehension that rules of law would become too complicated—making it difficult for the jurors to understand them—led, for example, to the refusal of the English courts to recognise the doctrine of diminished responsibility in cases of defensive action which deviates from the conditions of private defence (and especially defensive action using excessive force).[491] Consequently, consideration should be given to the fact that the comprehension ability of the jurors is taken into account when establishing the rules of private defence in English law.[492]

Finally, English law in regard to self-defence by lethal force is expected to be influenced by Article 2(a) of the European Convention on Human Rights. The Convention declares as follows:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

[488] This problematic combination is the reason for the placement of this criticism in the present chapter.

[489] This fear has strengthened, in the light of the holding in the case of *R v Scarlett* [1993] 4 All ER 629. See also S Parish, 'Self Defence: The Wrong Direction?' (1997) Crim LR 201. But see the holdings in the cases of *Nimrod Owino* (1996) 2 Cr App R 128 (CA); and of *Armstrong-Braun* (1999) Crim LR 416. See also the consideration of these holdings in Card, Cross and Jones, n 180 above, at 627ff; and in AP Simester and GR Sullivan, *Criminal Law: Theory and Doctrine*, 2nd edn (Oxford and Portland, OR, 2003) 624.

[490] For the reasoning behind this determination, see Ch 5.2.5 below.

[491] I shall explain this doctrine in depth below—see Ch 5.3.

[492] It is interesting to note the dissimilar situation regarding this matter in American law—see below the text accompanying n 514.

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 defence 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.'

In addition to the requirement that the force should be no more than **absolutely** necessary, the Strasbourg court decided that the (deadly) force must be **strictly** proportionate.[493] Ashworth concluded his discussion of 'Justifiable Conduct' as follows:

> The British appellate courts have not yet faced the problem of ensuring that the domestic law on justifiable force is compatible with Convention rights and parliament seems unlikely to legislate in the short term. It has been suggested here that the style of analysis should change, ensuring that the right to life (or, in non-fatal cases, the right to security of the person) should be treated as the starting point.[494]

But we must keep in mind that the Convention deals only with the right to life, and consequently only with deadly defensive force, and, as I shall try to convince the reader in the following chapters, regarding lethal force the requirements of 'absolutely necessary' and 'strictly proportionate' are already well established.[495]

2.2 American Law

In American law[496] also, the legal situation concerning private defence is not very clear. On the one hand, a number of common law rules exist, and on the other hand various laws exist in different states that determine private defence, sometimes, without a corresponding repeal of the common law rules.[497] Despite the relatively diverse range of legislation in the different states, the strong influence

[493] See Ashworth, n 474 above, at 141 and the references at fn 208 to the holdings in *Andronicou and Constantinou v Cyprus* [1998] 25 EHRR 491 and *Gul v Turkey* [2002] 34 EHRR 719. See also Simester and Sullivan, n 489 above at 630–31 and the reference at fn 118, also to the holding in *McCann et al v UK* [1996] 21 EHRR 97.

[494] See Ashworth, n 474 above, at 149. See also F Leverick, 'Is English Self-Defence Law Compatible with Article 2 of the ECHR?' (2002) Crim LR 347; JC Smith, 'The Use of Force in Public or Private Defence and Article 2' (2002) Crim LR 958; F Leverick, 'The Use of Force in Public or Private Defence and Article 2: A Reply to Professor Smith' (2002) Crim LR 963.

[495] See especially Ch 3.8.4 below.

[496] The most detailed discussion of private defence in American law is to be found in Robinson (1984), n 37 above, which is also the source that is mainly relied upon.

[497] See, eg, Perkins and Boyce, n 85 above, at 1114.

of the Model Penal Code (MPC) of the American Law Institute is evident. This version, which was promulgated in 1958 and amended slightly in 1962,[498] was adopted to a greater or lesser degree of faithfulness to the original by most of the state legislators who saw fit to renew the legislative arrangements for private defence.[499]

The most dominant feature of the arrangement for private defence in the MPC is its large degree of casuistry. Private defence is organised therein through the consideration of a long list of specific cases that is not, of course, exhaustive, although it occasionally purports to be so. But this is not all. One who attempts to understand the considerations behind each specific arrangement (with the assistance, for example, of the explanatory words of the MPC) will encounter great inconsistency that finds expression in the provision of rules that derive from completely different theories of private defence set forth alongside one another. The impression made by such a legal situation is that its designers avoided making a decision with regard to the main question of principle—the rationale of private defence,[500] and preferred a list of the legislative solutions to different situations of private defence instead of determining the general principles. If the MPC had established specific casuist frameworks alongside the general principles, the matter would not have raised much objection. However, a situation in which the frameworks are mainly casuist, with almost no general principles, and with a lack of consistency, is—of course—highly undesirable. A prime example of this can be found in the consideration of the principle of proportionality. This important principle does not appear in the MPC as a general principle, but finds partial expression only within the framework of the consideration of lethal defensive force.[501]

[498] See American Law Institute, Model Penal Code, Tentative Draft No 8 (Philadelphia, 1958) and MPC—American Law Institute, Model Penal Code, Proposed Official Draft (Philadelphia, 1962). See also the edition of 1985, American Law Institute, Model Penal Code and Commentaries, (Philadelphia, 1985). An additional proposal that should be mentioned, and that is very similar—both in form and in substance—to the MPC, is The National Commission on Reform of Federal Criminal Laws, Study Draft of a new Federal Criminal Code (1970).

[499] Although the MPC in its amended form constituted a major reform in several areas, the situation today is that a sufficient number of legislators in different states have followed its general outlines to support the assertion that it already definitely represents the fundamental approach of American law to these issues—see, eg, Greenawalt, n 37 above, at 265; Heberling, n 62 above, at 914–15.

In passing, it may be noted that since the purpose of our examination of various legal systems is not to describe them comprehensively but principally to draw ideas from them, I will refer generally to the rules of the MPC itself, without attempting to map their adoption in each of the individual states in the United States.

[500] One opinion that private defence in American law should be seen as part of the 'necessity' defence was expressed in previous editions of two well-known encyclopedias: *American Jurisprudence*, 2nd edn (Rochester, NY, San Francisco, CA) and Corpus Juris Secundum (St Paul, MN). If this is so, then the general layout is one of a balance of interests and choice of the lesser evil. In the newer editions, this opinion is no longer expressed.

[501] For a detailed discussion of this issue see Ch 3.8.3 below. A strong tendency to significantly erode the principle of proportionality can be found in the MPC in the (not few) cases where private defence circumstances are accompanied by the circumstances of prevention of a crime. See, eg, the criticism of the American legislation—both that of the MPC and also of the states—by Robinson, based on

The completely separate consideration of lethal defensive force constitutes an additional dominant characteristic of American law. It is usually considered separately, and negated when a very serious danger is not involved. Another dominant feature is the comprehensive test of reasonability and the great emphasis placed on the test of the reasonable man. These two characteristics are so central to American law, that it is common to say that two distinctions stand at the core of private defence law: the distinction between lethal defensive force and other kinds of force, and that between reasonable defensive force and unreasonable force.[502] With regard to reasonability, in American law—as in English law—it is also common to bind the requirements for the basic elements of necessity and proportionality together under this one joint roof.[503] It is interesting to note that the determination of the standard of the reasonable man—apart from a number of restrictions on it, especially with relation to the use of lethal defensive force—is left to the discretion of the jurors.[504] This is so even when in effect it constitutes a question of law (that is supposed to be decided by the judge) and not a purely factual question.[505]

An additional trait of American law, similar to that which is accepted in English law, is that it also eases the objective requirement for reasonability by introducing elements of subjectivity into the test. Just as in England, the *Palmer* rule[506] is widely quoted on this subject, in the United States a far earlier statement—the words of Justice Holmes in the leading case of *Brown*[507]—performs a similar function. According to Justice Holmes: 'Detached reflection cannot be demanded in the presence of an uplifted knife.'

As in English law, so also in American law it is acceptable to consider putative private defence as a private defence justification for all and every purpose, instead of as an excuse of mistake. The test—both with regard to the evaluation of the actual existence of danger and with regard to evaluation of the necessity of defen-

unfounded presumptions, according to which in cases where the aggressor perpetrates certain property offences the requirement for proportionality will be fulfilled anyway—Robinson (1984), n 37 above, vol 2 at 83–84. See also the references to American rulings in this spirit in *American Jurisprudence*, n 500 above, vol 40 at 649–50. Also see the obvious incompatibility of section 607(2)(c) of the American Federal Criminal Laws Study Draft (National Commission on Reform of Federal Criminal Laws, Study Draft of a new Federal Criminal Code (1970)) with the principle of proportionality.

[502] See the beginning of the article by Perkins, n 40 above; and Perkins and Boyce, n 85 above, at 1114–17.

[503] I have already noted the disadvantages of this mixture—as part of the consideration of English law—and I would add Fletcher's criticism here, that the test of reasonability facilitates the obfuscation of some important distinctions: between the objective and the subjective; between private defence and putative private defence; between 'wrongdoing' and 'responsibility'—see Fletcher, n 37 above, at 115.

[504] See Perkins and Boyce, n 85 above, at 1116–17.

[505] See Ch 5.2.5 below.

[506] See n 486 above and accompanying text.

[507] See the holding in the case of *Brown v US* 256 US 335, 41 S Ct 501 (1921) at 502.

sive force—is 'what . . . [the actor] reasonably believed'.[508] This integration of putative defence into the real defence is so common that the various conditions for private defence in American law are not usually worded in objective terms, but rather in subjective ones—considering the belief of the actor.[509]

Another common feature of the English and American law systems is the existence of a criminal law defence that permits the use of force for the prevention of crime and the enforcement of the law, and its influence on private defence. In American law there is a great deal of overlap between these two defences, which focus especially on the defence of another person (which often also constitutes prevention of crime) and lead to inconsistent results.[510] The framework for putative defence is also not consistent given the overlap between private defence and prevention of crime.[511] On this subject, it should be noted that under American law tension exists between the defence of prevention of crime and private defence. With regard to this matter, the Model Penal Code contributed to a shift in the emphasis from prevention of crime to private defence.[512]

Much attention has been devoted in American law to the duty to retreat prior to the exercise of lethal defensive force. There are two principal trends, both in state legislation, and in case law: the opinion of the majority is that generally there is no duty to retreat; while the position of the minority is that generally this duty does exist.[513]

In American law, as distinct from English law, the jury system and the fear that the jury would have difficulty in understanding and applying complicated arrangments did not prevent the establishment of the very detailed rules of the Model Penal Code.[514] Yet perhaps this great amount of detail stems from a desire to provide maximum direction to the jury and to limit their discretion.

[508] See, eg, Perkins and Boyce, n 85 above, at 1115; Dressler, n 32 above, at 92 and Fletcher, n 75 above, at 1363. For a detailed discussion of this issue see Chs 3.10 and 5.2.2 below. It is noted that the combination of putative private defence with real defence appears both in American common law and in legislation—see the *Encyclopedia of Crime and Justice*, ed by Kadish, n 96 above, vol 3, at 944.

[509] This is the place to present a methodological clarification: in order to produce the maximum benefit from the American sources for our purpose (ie, theoretical benefit), and excluding the discussion of putative private defence itself, I will refer in general to the objective conditions that underlie the subjective formulations in American law.

[510] Robinson noted this detail, see Robinson (1984), n 37 above, vol 2 at 89.

[511] See *ibid* fn 73.

[512] See the consideration of such influence (giving great emphasis to the defence of another person and a parallel reduction of the right to exert force for the prevention of crime and enforcement of the law) of the MPC on the legislation of the various states of the United States in Perkins and Boyce, n 85 above, at 1111. It is noted that the opinion of these learned scholars is actually the opposite, asserting that the emphasis should be placed on the defence of prevention of crime—see *ibid* at 1108 (although at 1126 they are far less decisive).

[513] For a detailed discussion see Ch 3.9 below.

[514] See sections 3.04–3.06, 3.09, 3.11 of the MPC.

A last feature of American law is the large amount of consideration dedicated to the issue of defence of the battered woman against her battering spouse. The literature and rules concerning this subject that have accumulated in the last three decades are so extensive that their influence cannot be ignored, not only in regard to the specific issue, but also regarding the general conditions of private defence.[515]

[515] For a detailed discussion of this issue and its general implications for the law of private defence see Ch 5.5 below.

3

The Elements of Private Defence

3.1 General

A distinction should be made between two questions that are separate but nevertheless interrelated: the first—what are the substantive requirements that should be imposed as conditions for the establishment of private defence, and the second—what is the desirable level of detail for these requirements in the law itself. With regard to the first question, in this chapter, I shall examine all the important conditions—those that are more accepted and those that are less accepted—for the establishment of the defence. As to the second question—three principal approaches are possible: (1) the provision of maximum details for the rules and the exceptions to them, and perhaps also deviations from these exceptions, in order to provide maximum direction; (2) the establishment in law of the general principles only, while imbuing them with content is left to the courts; (3) an intermediate approach, according to which the law should make the general principles explicit, while also providing a certain (but limited) amount of details. In my view, the intermediate approach is preferable. On the one hand, a certain amount of direction—not particularly for the public at large, but first and foremost for the legal profession in general and especially the judges—is essential. While on the other hand, too great an amount of detail would create a complicated arrangement, that is inflexible, casuist and—in a slightly paradoxical manner—deficient (since, by giving extensive details of the specific cases, the inevitable neglect of other cases leads to an incomplete picture). This choice of the intermediate approach can constitute only a starting point, since many disputes are to be expected regarding the question of where the golden mean lies.

3.2 The Scope of Application of the Defence

The question of the scope of application of private defence is divided into two principal sub-questions: the first—to which offences does it apply, thereby constituting an exception to criminal responsibility for them; and the second—its application

to omissions. I shall begin with the first. As mentioned, a very important feature of private defence that constitutes a basic foundation for its underlying rationale is that the injury by the actor (the attacked person who defends himself or the one who defends the attacked person) is to the aggressor himself, who perpetrates a culpable attack. Indeed, even when the injury by the attacked person is not to the aggressor but to an innocent third party, there is an injury to the autonomy of the attacked person—as a result of the attack. However, in this case, the guilt of the aggressor is not weighed in favour of the attacked person in the balance of interests (which must be carried out here not between the attacked person and the aggressor, but between the attacked person and the innocent third party). Nor does the social-legal order weigh to his benefit. On the contrary, the social-legal order is actually harmed when the attacked person's injury is not to the aggressor himself.

When an injury to the aggressor himself is involved, the rationale of private defence does not dictate the restriction of this defence to certain types of offences that are performed by the actor. This characteristic—injury to the aggressor—naturally implies that the offences that are usually relevant to private defence are offences against the human body: murder, manslaughter, attempted murder, assault, battery, wounding, etc. However, in principle, there is no room for the prior limitation of the defence to a certain type of offence. The responsibility for each offence whose elements are carried out by the actor in circumstances of private defence that constitute an injury to the aggressor may be negated by the defence of private defence. Thus, for example, the act of private defence may establish the elements of other offences, such as false imprisonment, threats and offences of damage to property (of the aggressor). In addition, the usual placement of private defence is in the general section of the penal code, as is fitting for a criminal law defence with general application that applies—in the absence of any other explicit determination—to all offences.

One can therefore find, for example, broad definitions of private defence—which are unlimited in terms of their application to one offence or another—in the general section of the decisive majority of the penal codes that were examined within this study.[516]

Despite what is set forth above, and although scholars agree that there is no point, in principle, to limit the scope of application of the defence,[517] nevertheless in Anglo-American law private defence is sometimes considered not as a general

[516] See, eg, s 17 of the Chinese Penal Code (1979); s 32 of the Penal Code of the (former) West Germany(1871; 1975); s 6 of the Finnish Penal Code (1889; 1986); s 52 of the Italian Penal Code (1930, 1977); ss 271–73 of the Queensland (Australia) Penal Code; s 44 of the Rumanian Penal Code (1968; 1973); s 22 of the Polish Penal Code (1969); s 24 of the Swedish Penal Code (1962; 1972); s 25(2) of the Columbian Penal Code (1936); s 34(6) of the Argentinian Penal Code (1921); s 48 of the Norwegian Penal Code (1902); s 21 of the Korean Penal Code (1953); s 33 of the Swiss Penal Code (1937); s 8 of the Spanish Penal Code (1944; 1963); and s 13 of the Penal Code of the (former) USSR (1958).

[517] See, eg, Williams (1983), n 1 above, at 501; Card, Cross and Jones, n 180 above, at 626; Smith and Hogan, n 284 above, at 260.

defence, but as a defence to certain offences. Thus it is possible in some books to find double reference to private defence: on one occasion within the framework of the discussion of the offences related to the killing of another, and on another occasion within the framework of the discussion of the offences of assault, battery and injury.[518] Such consideration of private defence is undesirable, because there is no principled reason to alter the conditions of private defence with regard to different offences. As I have mentioned, the defence is singular, and accordingly the results of such differentiation are, at best, exhaustive repetitions of matters that have already been stated, and, at worst, create unfounded substantive distinctions. It should be noted that the source of these distinctions is not to be found in the imagination of the authors, but is embedded in the common law, where there was no wide application of the defence. This restricted application stemmed from historical fears that are also expressed in contemporary English law, that general compulsion defences will curtail existing prohibitive norms and detract from their validity.[519]

An additional phenomenon—the creative product of the English legislator—is an additional defence, apart from private defence—relating to defence of property by damaging the property of another. This separate defence, which is established in section 5(2)(b) of the Criminal Damage Act 1971,[520] is superfluous, and leads not only to unnecessary repetitions but also to unjustified distinctions and to a real anomaly.[521]

Legislative difficulties were also created by the drafters of the Model Penal Code (MPC), who instead of relating generally, as is common, to 'conduct' or to an 'act' of the actor, actually chose the term 'force'. This restriction created difficulties, for the solution of which the drafters were forced to explicitly consider the possibility of defensive action by means of imprisonment; a possibility which should also, without any reason to the contrary, be covered by private defence.[522]

[518] Consideration of this sort is given to private defence, eg, in the encyclopedias *American Jurisprudence*, n 500 above, and *Corpus Juris Secundum*, n 500 above.

[519] See, eg, Smith and Hogan, n 284 above, at 260–62.

[520] See the consideration of this in Cowley, n 475 above and in Smith and Hogan, n 284 above, at 253.

[521] See nn 476, 477 above and accompanying text. Also in the Draft English Law of 1989—for some reason—room was found for such an additional exception—see art 185 (Law Commission, A Criminal Code for England and Wales, no 177 (London, 1989)).

[522] See s 3.04(3) of the American MPC. The strange reasoning of the drafters of the MPC in their specific reference to imprisonment as defensive force is interesting: according to them, this is performed by an analogy to the inclusion of imprisonment as well, within the definition of 'unlawful force' in s 3.11(1) (this concerns the illegal force that is used by an aggressor and that is required as a condition for permitting a response by the attacked person or one who defends him—clarification by the author) (see the explanatory wording of the Draft, American Law Institute Model Penal Code, Tentative Draft No 8 (Philadelphia, 1958) at 27). In my view, there is no necessary connection between the definition of the attack by the aggressor (to which I will relate in section 3.4.2 below) and the offences to which the defence applies (that the actor seemingly performs in private defence). Certainly there is no room for the above-mentioned 'analogy'.

It should also be noted regarding the matter of illegal arrest, that even when defensive behaviour that includes illegal arrest is permitted, the length of time of the detention—since this concerns a continuing

As mentioned, on the one hand we learn from the rationale of private defence that the defence should not be restricted merely to certain offences, and on the other hand that it should be limited to an injury to the aggressor himself. Nevertheless, offences that are not injuries to the aggressor are sometimes also considered within the framework of private defence. This is the approach most frequently used with regard to preparatory acts (preceding private defence) in general and with regard to the possession of a weapon in particular.[523] My opinion is that since these are not injuries to the aggressor, the criminal responsibility for such acts may be negated within the framework of 'necessity', but not within the framework of private defence.[524] This is the place to note a typical mistake, according to which the illegal possession of a weapon (ie, without a licence) negates the right of private defence for the person attacked. Therefore, if it is desirable to allow him to defend himself, he must also be held exempt—by means of private defence—from the offence of possession of a weapon. A clear distinction should be made between two different matters: the first—possession of a weapon, and the second—the use of it. It may definitely be that the use of a weapon whose possession is forbidden (and accordingly constitutes an offence) will be permissible within the framework of private defence. In such a case the actor will only bear the responsibility for the offence of possession (or bearing a weapon—as the case may be) without a licence. It may also be that he will not bear any responsibility at all—if the possession of the weapon is included within the bounds of the 'necessity' defence (for example, if severe and immediate injury was to be expected and possessing a weapon would be the reasonable way to deal with it). It may even be possible that the act will be justified—in the sense of a justification and not merely an excuse—but within its appropriate category, namely, the 'necessity' defence. For the very definition of private defence (that is derived from its substance) negates treatment of such cases within its framework, since the injury is not to the aggressor. However, there is nothing in the fact of illegal possession of a weapon to negate private defence with regard to the injury to the aggressor, just as there is nothing in private defence (as distinct from 'necessity') to negate criminal respon-

offence—must be subject to the requirement of necessity. Finally, Robinson sees the reference to a threat of deadly force in s 3.11(2) of the MPC as deriving from the restricted term 'force'—see Robinson (1984), n 37 above, vol 2 at 3 fn 2. However, in my opinion, the source of this reference is completely different, and is embedded in the desire to clarify that a threat (alone) of lethal force does not constitute 'lethal force'.

[523] This consideration was also expressed in art 44(5) of the English Draft Law, Law Commission, A Criminal Code for England and Wales, no 177 (London, 1989) that deals with such preparatory acts that precede the use of defensive force. According to the explanatory text of this draft law (see at 233) the classic example of such acts is the possession of a weapon. See also the similar phrasing of art 29(2) of the Draft Law, Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles, no 218 (London, 1993).

[524] For a similar opinion see Perkins and Boyce, n 85 above, at 1160 fn 5. For a different opinion—according to which the application of private defence should be widened to include preparatory acts—see Smith, n 91 above, at 117ff and Smith and Hogan, n 284 above, at 261.

sibility for an offence of arms possession.[525] However, the possession of a weapon may, in certain circumstances, influence the right to private defence, if it was carried out in circumstances in which the actor should be seen as the one who, by his fault, caused the situation in which he was forced to defend himself.[526]

At the end of this discussion regarding the question of the applicability of private defence to different offences, the possibility that despite the generality of the application of the defence, the legislator will negate its application for certain offences, should be noted. In my view, there is no substantial reason for such a restriction of private defence, but as is known, the legislator can establish otherwise at his discretion. Thus, for example, the Israeli legislator negated the application of the former section 22 of the Penal Code (that in the past bound together the defences of private defence and 'necessity') in such a way that it would not apply to various offences against the security of the state, offences of termination of pregnancy and offences under the laws concerning the crime of genocide, and the crimes of the Nazis and their collaborators.[527] These restrictions were apparently intended for 'necessity' and not for private defence. In any case, even if they had been applied to private defence, they should be seen as exceptions to the rule that affirm the rule itself: the general applicability of private defence.

This brings us to the second question that was presented at the beginning of this section—the application of private defence to omissions. It appears that this question does not raise any difficulty. Although—naturally—the decisive majority of actions of private defence are active actions, in principle there is no reason to negate its application to cases in which a non-action is involved.[528] It is, indeed, recognised in various legal systems—both in the literature and in the legislation—that the application of private defence is not limited to active actions alone.[529] A possible example of an irregular situation in which private defence is performed by omission: A is responsible for shifting the railway tracks. B is driving alone in a solitary locomotive through the intersection for which A is responsible and aims a

[525] For similar opinions see Perkins and Boyce, n 85 above, at 1131; Perkins, n 40 above, at 148; La Fave and Scott, n 43 above, at 650 fn 2. For a relatively detailed discussion of this issue see Diamond, n 30 above, at 693–99.

[526] However, this special issue deviates from the subject of our present discussion. I shall return to consider it in Ch 5.4 below.

[527] See (correspondingly) ss 93 and 319 of the Israeli Penal Code 1977; s 6 of the Law for the Prevention and Punishment of the Crime of Genocide 1950; and ss 8 and 10(b) (an exception concerning 'a pursued person') of the Law for Doing Justice to the Nazis and their Collaborators 1950.

[528] For a general opinion (that was expressed with regard to another subject), according to which in the absence of a special reason, no distinction should be made between an active action and an omission that is accompanied by a duty to act—Boaz Sangero, 'Solicitation by Omission: Is it Indeed Impossible?' (1987) 16 *Mishpatim* 482 (Hebrew).

[529] See, eg, s 34j of the Israeli Penal Code 1977, in conjunction with s 18(b) of that law that defines 'an action' as also including an omission. Robinson suggests the term 'conduct' instead of the term 'force' that appears in the MPC, and expresses his opinion that this term will suitably encompass omissions and also possession (which is sometimes uncertainly considered as 'an action' and sometimes as 'an omission')—see Robinson (1984), n 37 above, vol 2 at 3 fn 2.

revolver at him with a clear intention to kill A. A, who notices this at the last possible moment, avoids fulfilling his duty to re-route the tracks as necessary, and as a result of this B does not pass close to A but continues on an alternative track, crashes into a parked train (that is empty) and is injured.[530]

Finally, an additional significant question exists that can be considered as belonging to the subject under discussion, namely, the scope of the application of the defence, and this is: which are the values that it is justified to defend within the framework of private defence? The following section is devoted to this important question.

3.3 Which Values may be Justifiably Defended?

Two clarifications are necessary before beginning this discussion. The first: this discussion deals principally with the legitimate interests of the attacked person who may be injured by the attack of the aggressor, and does not include consideration of the abstract interests that are also taken into account in striking a balance of interests. In other words, it relates to the first level of the balance that was noted above.[531] Another important clarification: the question under consideration is for which interests is defence (of any sort) justifiable—and not—what is the extent of private defence that may be justified with regard to each of them. I shall discuss this last question below, especially within the framework of the discussion concerning the principle of proportionality.[532] Before going on to the discussion itself, I should also clarify that the significant issue of the defence of another person, which also has a close affinity with the subject under discussion, will be discussed separately and extensively further on.[533]

What does the rationale that underlies the justification of private defence teach us about the group of values whose defence is justified? As explained, this rationale

[530] An additional example: A is a lifeguard on a bathing beach by the sea. B—who does not know how to swim—comes towards him on a boat holding a dagger in his hand and it is clear—to A as well—that he intends to kill A. The boat capsizes, B is floundering in the water (but insists on continuing to brandish the dagger . . .) and A—in order to defend himself—does not fulfil his duty to rescue B.

A final example—from the field of defence of another person: A is a doctor who is needed by B—a patient with a chronic disease—to inject him with medicine that he must receive immediately. The situation is such that it is clear that as soon as B receives the medicine and returns to his former strength—he will try to fatally injure C who is also present in the same room. A stipulates the condition that he will only give the injection to B if he hands him his revolver (that he intends to use to kill C), B refuses, and A does not inject the medicine into B and leaves him without the necessary medical treatment.

[531] See Ch 1.6 above.

[532] See section 3.8 below. Thus, eg, when s 3.04(2)(b) of the MPC restricts the group of values that it is permitted to defend with lethal force, this constitutes a (specific) expression of the principle of proportionality and not a comprehensive list of the values for which private defence (of any sort) is permitted.

[533] See Ch 4.2 below.

is composed of a number of important factors, apart from the legitimate interests of the sides to the conflict.[534] One factor is the autonomy of the person attacked. This factor bears great weight when there is an injury to any sort of legitimate interest of the attacked person. Although when an interest of little value is involved the strength of this factor is not great, this involves a question of proportionality, whose solution may dictate a restriction and limitation of the defensive force, but not its total negation. In contrast, the factor of the individual's autonomy—by its very definition—does not support defence of the public interest, of the state and of society, unless it is said that the direct defence of such interests also indirectly protects the individual's autonomy. Another important factor in the justification of private defence is the social-legal order. Here too, insofar as the interest at stake is smaller, thus—correspondingly—the consideration of the protection of the social-legal order will be weaker. It is weakened, but it still exists, and therefore the defence of a legitimate interest of minor value should not be summarily negated just because of its limited value. The principle of proportionality that operates to negate a strong defensive force for the defence of a small value interest suffices for this matter. If the actor (who acts within the setting of private defence) makes do with limited defensive force, there is no reason in principle to reject his action out of hand. If, in contrast, he chooses to use excessive defensive force, then the social-legal order will in fact be injured as a result of the performance of a serious offence in the face of a risk of minimal injury, and therefore the justification of private defence will be denied.

Even though it is possible in principle as we have seen, to allow private defence of any legitimate interest without summarily negating certain interests, there are nevertheless legislators who provide an exclusive list of values for which private defence is justified. Four of them do not cause any particular difficulty and are acknowledged by all: a person's life, liberty[535], body and property[536].

This leads us to the more problematic values. The first—still one of the personal interests of the person attacked himself—is **the person's honour**. This interest was widely discussed, especially in Israeli law, and this is because in the past (before the state of Israel was established) the law drafted by the British Mandate legislator explicitly specified it in an article that was not changed until a new law was enacted in 1992.[537] It is possible to explain the exclusive list of values that was promulgated

[534] One of these factors—the aggressor's guilt—does not have any real influence in principle on the subject under discussion.

[535] It is interesting that the American MPC—for some unknown reason—placed the defence of freedom of movement (pushing away a person who blocks the way) in a section that deals with defence of property—see s 3.06(6) and the examples given in the explanatory wording of the MPC (Proposed Official Draft (Philadelphia, 1962)) at 48.

[536] These are also the four values that appeared in all the proposals of the Israeli law and that were eventually enshrined in the Israeli Penal Code itself.

[537] Art 18 of the Criminal Law Ordinance 1936, which was later almost copied into s 22 of the Penal Code 1977, which remained in force until 1992.

by the British Mandate legislator against the backdrop of the conservative attitude of English law with regard to the 'necessity' defence and the fear that its existence would bring about anarchy.[538] However, it is this same exact background, which renders it difficult to explain how it happened that honour also found a place in the limited list of values that were established by the law. Indeed, some authors had reservations regarding the inclusion of this word in the law. It was suggested that it should be interpreted as relating (only) to a person's sexual freedom[539]. It was claimed that it is doubtful whether such a case could exist in which defence of honour would fulfill the other conditions of private defence where there was no injury to a person's body[540]. I do not agree with this automatic negation. Thus, for example, it is possible that a very slight push would comply with the requirements of private defence—including proportionality—when it is intended for the prevention of a severe infringement of a person's honour. In the present form of the Israeli Penal Code that was enacted in 1992,[541] honour is again absent from the list of the four protected values that are enumerated in the definition of self-defence ('his life, liberty, body or property').

A more significant issue (in comparison to that which concentrates on honour) is that of the **interests that are not those of the individual but are interests of the public, the state or the society** in general, and interests of security in particular. In principle, it is possible to base the justification of private defence of such interests on the factor of the social-legal order,[542] although, as mentioned, the factor of the autonomy of the individual does not support defence in such cases. An additional option is to see the interest of the society as replacing the factor of the individual's autonomy, just as the society (or the state) replaces the individual for our discussion in the function of the person attacked who bears the potential for suffering injury. It is also possible, perhaps, to see the direct defence of the state as an indirect defence of the individual's autonomy, since in modern society the state provides most of the protection for the individual. In several Penal Codes (especially

[538] An interesting construction was built by Sheleff, who wished to base the inclusion of failure to comply with the law for reasons of conscience within the boundaries of s 22 of the Penal Code, based on the word 'honor' that was specified in that section (L Sheleff, 'Disobedience to the Law for Conscience Reasons' in R Gavison (ed) *Civil Rights In Israel: A collection of Articles in Honor of Justice Haim H. Cohn* (1982) 117 (Hebrew), at 139ff). Although this option deviates from the area of private defence into the area of 'necessity', it is presented here in order to demonstrate the danger—that was mentioned above—of anarchy, as a result of deployment of the defence for all the existing values (in passing it should also be noted that the above-mentioned construction deviates from the characteristics of the compulsion situation, inter alia, by not complying with the requirement for immediacy).

[539] D Bein, 'The Duty to Retreat in "Self Defence"' (1967) 23 *Hapraklit* 221 (Hebrew) at 7 (especially fn 31), in which Bein bases his opinion on the court's rulings.

[540] Feller, n 14 above, vol 2 at 424.

[541] The Penal Code (Amendment no 39) 1994.

[542] See the words of Eser, n 26 above, at 632. As he notes, although the accepted rationale in German law permits defence of the 'public interest', in practice this defence is not accepted.

in the legal systems of the communist countries) such interests—of the state and the society—were included in the definition of private defence. It is interesting that in these codes the interests of the state and the public were usually established even before the interests of the individual.[543] Silving presents arguments in support of private defence of the interests of the state, as follows: it is accepted that the defence of property is justified—even for the property of another.[544] If this is so, there is no reason not to justify the defence of the property of a corporation, and from there on, it is only a short path to the justification of defence of the essential interests of the state, including infringement of the constitution, territory or state security.[545]

With regard to the necessity defence, Feller noted the essentiality of defence of state interests. According to his school of thought, there is no reason to negate the 'necessity' defence in the case of an action that was performed to protect interests the infringement of which is not specifically expressed in terms of money or life. The intention is to relate to the superior interests of the state or of the public, such as security, sovereignty etc.[546]

This approach was expressed in the definition of 'necessity' and 'private defence' that appeared in the Israeli draft of the Preliminary Part and the General Part of the new Penal Code, and also related to the 'security interest of the state'. In the explanatory wording for these sections it states:

> There is no justification for the imposition of criminal responsibility on one who acts to rescue the state's security interest. Moreover, there is room to encourage such activity, and an explicit statutory provision may contribute to this; of course, within the limits of reasonability.[547]

A completely different position was adopted by Enker. While considering section 18 of the Penal Code Ordinance 1936, in which the exclusive list of defended values was established, he wrote that the formulation of section 18 had an advantage over the general and principled formulation of Stephen's Digest in that it limits the defence to cases in which the accused acted to protect a specific person.

[543] See s 13 of the Penal Code of the (former) USSR (1958) ('the interest of the Soviet state, public interests, the person or the rights of the individual'); s 17 of the Chinese Penal Code (1979); s 22 of the Polish Penal Code (1969); s 44 of the Rumanian Penal Code (1968; 1973).

[544] For a detailed discussion of defence of another person's property see Ch 4.4 below.

[545] See Silving, n 1 above, at 596. On the subject of protection of state property, see also Heberling, n 62 above, at 942.

[546] SZ Feller, 'The "Necessity" (Stricto Sensu) as a Situation Negating the Criminality of the Action' (1972–73) 4 *Mishpatim* 5 (Hebrew) at 12 and also the ruling, 143/68 *Davidi v The State of Israel* PM 71 104 (Beer Sheva District Court) which concerned the causation of damage to a tractor that was privately owned and operated by the army during the days of vigilance before the Six Day War (1967).

[547] Ss 43 and 45 of the Israeli draft law (SZ Feller and M Kremnitzer, Draft of the Preliminary Part and General part of the New Penal Code, (1984) 14 *Mishpatim* 127) and the explanation, at 209–10.

This formulation excludes from the defence cases in which the accused acted for the sake of a public interest. This limitation prevents attempts to use section 18 for a purpose that is principally political. Enker illustrates this danger and notes that there are solutions to such cases, but that such a claim turns the trial into political proceedings and the court is not the proper forum for such a discussion.[548]

Permission for private defence of a state interest may lead to undesirable political abuse of the defences of compulsion.[549] It appears that this estimation was eventually accepted as correct even by the drafters of the Preliminary Part and the General Part of the new Israeli Penal Code, since in the last version of their proposal, reference to the interest of state security no longer appeared.[550]

In contrast to the approach whereby it is desirable to define an exclusive list of values that may be defended by private defence in the law, an approach also exists according to which private defence should be permitted for any legitimate interest—at least those of the attacked person. This approach is widespread in the majority of the Penal Codes that were examined within the framework of this study.[551] Fletcher noted that German and Soviet theoreticians extended private defence so that it would apply to all the rights and interests recognised by the law. While in Anglo-American law the requirement of proportionality led to internal distinctions between private defence, defence of property and defence of the dwelling, there is evidence in German law and in the law of the (former) Soviet Union of an opinion that all interests that are legally protected merit the same level of defence.[552] The proper place for discussion of this approach is in the sections below that deal with the principle of proportionality and the internal distinctions

[548] Enker, n 89 above, at 111. It is interesting that Stephen was, apparently, not afraid of political abuse of the compulsion defences, since he presents an example of what in his opinion is a legitimate use of the 'necessity' defence; an example that, in my view, constitutes dangerous political abuse of the compulsion defences. In Stephen's words:

> A, the Governor of Madras, acts toward his council in an arbitrary and illegal manner. The council depose and put him under arrest, and assume the powers of government themselves. This is not an offence if the acts done by the council were the only means by which irreparable mischief to the establishment of Madras could be avoided.

See Illustration No 1 in the Digest, Stephen, n 228 above, at 11.

[549] This danger differs, of course, from society to society.

[550] S 46 of the draft law (Draft Penal Code (Preliminary Part and General Part) 1992). The final (and determining) word on this matter was pronounced by the Knesset (the Parliament of Israel), which accepted the Penal Code (Amendment no 37) 1992 and the Penal Code (Amendment no 39) 1994, both of which do not include consideration of the state interest, rejecting the suggestion of the inclusion of such an option in the law.

[551] See: s 17 of the Chinese Penal Code (1979); s 32 of the Penal Code of the (former) West Germany (1871; 1975); s 52 of the Italian Penal Code (1930, 1977); s 44 of the Rumanian Penal Code (1968; 1973); s 22 of the Polish Penal Code (1969); s 22 of the Greek Penal Code (1950); s 5 of the Greenland Penal Code (1954); s 34(6) of the Argentinian Penal Code (1921); s 48 of the Norwegian Penal Code (1902); s 21 of the Korean Penal Code (1953); s 8 of the Spanish Penal Code (1944; 1963); ss 271–73 of the Queensland (Australia) Penal Code; s 13 of the Penal Code of the (former) USSR (1958).

[552] See Fletcher (1978), n 1 above, at 864, 871. See also Gorr, n 191 above, at 256.

between the various areas of private defence,[553] but it is presented here, since it gives rise to the principle, a fortiori, that defence of any legitimate interest should be permitted. Robinson also expressed his support for a broad private defence that would extend to all legitimate interests,[554] although he has not become entrapped in the mistake that is made, in my opinion, by the consideration of all suitable interests as worthy of the same measure of defence (the principal expression of this last distinction is, of course, the principle of proportionality).

In my view, the limitation of the group of values for which private defence is justified is undesirable. Any exclusive list of values may be revealed as being too restrictive when faced with specific cases. If we take, for example, the four values that appeared in the various draft proposals of the Israeli law and that were meanwhile established in the Penal Code itself, problematic cases may arise. This list includes life, liberty, body and property. We may consider a case where holy utensils are desecrated in a house of prayer, but no damage is done to property. Is it not desirable, in such a case, to allow a low level of defensive force (such as a slight push of the aggressor in the direction of the exit from the house of prayer)? And if so, is it possible to perform interpretative acrobatics that will squeeze the feelings and beliefs of those devotees who are praying there into the Procrustean bed of life, liberty, body and property? And if it is possible—is it desirable in the light of the principle of legality?

Between these two approaches (of limiting the group of defended values or not limiting it), there is an intermediate approach that appears to me to be desirable. Such a compromise can be found in section 34 of the German Code that refers to 'danger to life, limb, freedom, honour, property or another legal interest'. At the end of the detailed list of interests for which the defence applies, a general definition is given of 'another legal interest'. This wording, which provides a specific rule and a general rule, and restriction of the general rule itself to an additional **legal** interest, provides the court with the tools to distinguish between the various interests as desired.[555]

The advantage of such an approach is that while on the one hand it does not negate the private defence of any legitimate interest on a threshold basis (a negation that, as was set forth above, is undesirable), on the other hand, it emphasises the core values that may guide the court with regard to the special attention that these values should be given—in comparison to other interests.[556] It seems that

[553] See section 3.8 below and Ch 4 below.

[554] See Robinson (1984), n 37 above, vol 2 at 73.

[555] Enker, n 89 above, at 112.

[556] It is interesting that even though the wording of the German law, in my view, supports the demand for proportionality—in emphasising certain central values—Fletcher claims that the German law does not require proportion. Eser, as mentioned, has a different view. See nn 297 and 319 above and section 3.8 below.

the issue of the defence of the state's security interest is also liable to find a solution within the boundaries of such a formula. Indeed, there is a great danger of political abuse of the compulsion defences—a danger that makes the mention of public interest in the definition of the defences undesirable. Yet the possibility of permitting private defence of a public interest **in a suitable case**[557] is desirable, in my opinion, and does exist—given the above-mentioned formula of a specific rule, a general rule and limitation of the rule.

3.4 The Source of Danger and the Character of the Attack

3.4.1 General

The uniqueness of private defence in comparison with the other criminal law compulsion defences is expressed, as we have already mentioned, in the existence of a person who is the source of danger (the aggressor), who performs an attack accompanied by guilt—while he is (criminally) responsible for the attack—and in the direction of the defensive force toward the responsible aggressor himself.[558]

While the autonomy of the attacked person is infringed even when the aggressor is innocent,[559] the social-legal order is not really infringed when there is no responsible aggressor. The third principal component of the rationale of private defence—the aggressor's guilt—dictates, by its very definition, the requirement for a responsible aggressor—ie, a person who performs an illegal attack for which he is criminally responsible. As Williams noted, waiver of the requirement of a responsible aggressor also leads to loss of the significance of the requirement for the attack itself, since animals may also attack.[560]

All the criminal codes and draft laws that I have examined within the present study require, within the definition of private defence, that the source of danger

[557] It seems that a case in which an action of private defence is not subject to political dispute, but is commonly accepted within the consensus, may be the 'suitable case'. It is noted that a far-reaching private defence—of all legitimate interests and of all other persons—renders the defence of prevention of crime that exists in several legal systems superfluous.

[558] With regard to the great importance both of the attack itself and of the aggressor's guilt—both morally and legally—for the justification of private defence see Chs 1.5.3 and 1.5.2 above.

[559] Although it seems that in the absence of an attack of some kind it is not harmed. For an exceptional opinion—according to which even the requirement of an attack should be waived within the framework of private defence—see Gorr, n 191 above, at 242; LA Alexander, 'Self-Defense and the Killing of Non-Combatants: A Reply to Fullinwider' (1976) 5 *Philosophy and Public Affairs* 408 at 408, 411; Elliot, n 285 above, at 618. See also, nn 481–82 above and accompanying text.

[560] See Williams, n 13 above, at 733 fn 4.

should be a person and that the nature of the attack should be illegal.[561] However, this is insufficient. The main question is how—either explicitly in the law itself or in the courts' holdings—to interpret the term that expresses the illegality of the attack ('unlawful' etc).

The dispute focuses on the secondary question of whether a right to private defence exists against an aggressor who performs the attack in a situation that establishes a defence of an excuse type. In another chapter of this book, I opined that private defence ought to be defined in a way that does not apply to such a case, and that the treatment of this case should be left to the defences that were intended for it, and especially the defence of 'necessity'.[562] Another secondary question for which there is a near-consensus concerns the case where the aggressor performs the attack in a situation that establishes a defence of the justification type. A possible example of this case is the situation where the 'aggressor' himself acts within the framework of private defence, and it is recognised that the 'attacked person' (who is, in effect, the real aggressor) does not, of course, have the right to private defence against this legal attack.[563] One way to arrive at this correct result is by relying solely on the distinction between justification and excuse. In the German code, for example, it is accepted that there is no private defence against an attack in a situation of a justification, but there is private defence against an attack in a situation of an excuse.[564] Apart from my disagreement, which I presented

[561] The prevalent expression in the translations into English of the penal codes is 'unlawful' (see s 32 of the Penal Code of the (former) West Germany (1871; 1975); s 6 of the Finnish Penal Code (1889; 1986); s 24(1) of the Swedish Penal Code (1962; 1972); s 5 of the Greenland Penal Code (1954); s 25(2) of the Columbian Penal Code (1936); s 34(6) of the Argentinian Penal Code (1921); s 48 of the Norwegian Penal Code (1902); ss 271–73 of the Queensland (Australia) Penal Code; and s 33 of the Swiss Penal Code (1937)). Other frequently used expressions are 'unjust' (s 44 of the Rumanian Penal Code (1968; 1973); s 22 of the Greek Penal Code (1950); s 49(2) of the Turkish Penal Code (1926; 1964) and s 21 of the Korean Penal Code (1953)); and 'illegal' (s 17 of the Chinese Penal Code (1979); s 22 of the Polish Penal Code (1969); and s 8 of the Spanish Penal Code (1944; 1963)). Other terms are 'criminal' (s 24(1) of the Swedish Penal Code) and 'wrongful' (s 52 of the Italian Penal Code (1930; 1977) and also—according to the translation of Fletcher—s 32 of the Penal Code of the (former) West Germany (1871; 1975). See Fletcher, n 37 above, at 96ff). In modern draft laws the expression 'unlawful' prevails (see, eg, s 44 of the English Draft Law, Law Commission, A Criminal Code for England and Wales, no 177 (London, 1989) [although in the version of Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles, no 218 (London, 1993) the term was replaced in relation to a criminal act and a tort act—see *ibid* at 69]; s 3.04 of the MPC; s 3(10) of the Canadian draft law (Law Reform Commission of Canada, Report Recodifying Criminal Law 1987, rev and enl edn, no 31 (Ottawa, 1987); s 37(2)(b) of the Canadian Draft Law (Government of Canada, Proposals to Amend the Criminal Code (General Principles)(Ottawa, 1993); and s 603 of the draft American federal law (National Commission on Reform of Federal Criminal Laws, Study Draft of a new Federal Criminal Code (1970)).

[562] See Ch 1.5.3 above.

[563] See, eg, nn 227–32 above and accompanying text. Finkelman noted that in Jewish law there was also negation of the defence of the 'pursuer' ('*rodef*'), for a pursuer who wished to act against one who protected the pursued person—see Finkelman, n 25 above, at 1274.

[564] See, eg, Silving, n 1 above, at 305; Fletcher, n 37 above, at 76–77, 96ff; the *Encyclopedia of Crime and Justice*, ed by Kadish, n 96 above, vol 3 at 942.

above,[565] to private defence against an innocent aggressor acting in a situation of excuse, I also oppose the automatic-mechanical derivation of a solution for this problem solely from the classification of the defence as a justification, even if this is limited to the case of an aggressor with a justification. A more substantial explanation was suggested by Robinson, according to which resistance to an action in a situation of justification is not allowed, since—by definition—justified force (used in a situation of justification) leads to a social benefit. In his opinion, there can never be a situation in which the two sides to the confrontation have a defence of the justification type, since this is a situation in which there is no 'net harm'.[566]

This issue of conflicting justifications also occupied Fletcher, who developed what he called the 'incompatibility thesis'. According to his school of thought, both logic and policy considerations (the desire to reduce violence in society) require the conclusion that in a confrontation where only one can prevail, only one of the sides has a 'justification'. Fletcher went even further, and determined that in any conflict (only) one of the sides has the 'right', and consequently all conflicts can be solved by means of a dialogue and clarification of rights, without exercising them.[567] Although I agree that the existence of a situation in which both sides to a confrontation have conflicting 'justifications' should be negated, there could however, be cases in which neither of them has 'justification', but for example, both sides have only an 'excuse'.[568] Such is the situation, for example, when two survivors are swimming in the sea toward the log that is only sufficient to save one of them. Similarly, the correct analysis of the examples provided by Dressler for the support of his exceptional opinion that there could be conflicting 'justifications', points to conflicting 'excuses' and not conflicting 'justifications'.[569]

Beyond this general treatment of the justifications, the specific considerations that underlie private defence itself should be taken into account. Although the autonomy of the attacked person may also be infringed in the face of an attack in a situation of 'justification', both the factor of the aggressor's guilt and the factor of the social-legal order do not support private defence against an aggressor in a

[565] See Chs 1.5.3 and 1.1 above.

[566] See Robinson (1984), n 37 above, vol 1 at 164; Robinson (1984), n 37 above, vol 2 at 9–10.

[567] See, principally, Fletcher, n 37 above, at 108ff and also Fletcher, n 75 above, at 1360ff.

[568] See and compare to Christopher, n 76 above (notes that the grant of conflicting justifications would create a logical contradiction, but does not consider the possibility of granting an excuse to both parties to the confrontation).

[569] A second example (apart from the example of the two survivors at sea) that is presented by Dressler: a terrorist captures 1,000 children and threatens A that if he does not kill B, all the children will be killed (see Dressler, n 32 above, at 87ff). As for the first case, in my view, if either of the survivors pushes his friend, he will only be eligible for a defence of the excuse type (the 'necessity' defence). With regard to the second case, if it is indeed accepted that A has justification (a problematic determination in itself), then the correct solution—which would be based on exactly the same considerations that serve as the basis for the recognition (if recognition is in fact granted) that A has justification—is that B (for his defensive action against A) only has an excuse. See also the above discussion of the dispute regarding the perception of the character of justification, in the text accompanying nn 71–75.

situation of 'justification'. On the contrary: given that the 'justified' action of the aggressor serves the social-legal order, then the injury to the aggressor also constitutes a violation of the social-legal order. Consequently, it is not possible for this matter to be based on the distinction between justification and excuse, but it should be based on another distinction that was already noted above,[570] namely, the distinction between an offence and a defence: when the aggressor acts in a situation of (any sort of) defence against criminal responsibility, there is no room for private defence against him.[571]

3.4.2 The Scope of the Attack

What is the proper scope of the 'attack' against which there may be justification for private defence? Beyond the above-mentioned negation of the exertion of defensive force against an aggressor who acts within a situation of a defence against criminal responsibility, the rationale of private defence does not dictate its restriction to attacks of a certain type. Any action of the aggressor that may injure the legitimate interest of the attacked person is liable to justify private defence against said action. In this respect, the expression 'attack' may be misleading, especially because of the relatively limited scope of the offence of assault. Thus, for example, the 'assault' is defined—within the framework of offences of assault—in the Israeli Penal Code in the following manner:

> One who hits a person, touches him, pushes or exerts **force** against his body in another manner, either directly or indirectly . . . **exertion of force**—including exertion of heat, light, electricity, gas, odor or any other matter or material, if they are exerted to the extent that they may cause injury or discomfort.[572] (emphases added)

Even though this definition is very broad (and even too broad) in comparison to other possible definitions of the offence of assault, it is still not broad enough for our present discussion—the attack against which private defence is permitted. Private defence, for example, is justified for property even though the injury to it is not included within the offence of assault.

Yet, the common expression in legislation overseas is 'attack'.[573] Thus, for example, the drafters of the Israeli draft Penal Code (Preliminary Part and General Part), 1992, clarified that:

[570] See Ch 1.2 above.

[571] Of course, this does not mean that there cannot be another defence that will negate the criminal responsibility of the defender, such as the defences of 'necessity' or 'mistake'.

[572] See art 378 of the Israeli Penal Code 1977.

[573] See, eg, the term 'attack' that appears in the translations into English of the penal codes mentioned above in n 561, of the former West Germany; Finland; Rumania; Poland; Greece; Sweden; Norway; Switzerland and Spain; the term 'assault' that appears in the ss of the law mentioned above in n 561 of Greenland; Turkey and Queensland (Australia).

(i) The term 'attack' for the purpose of private defence is not identical to this term in its sense in article 378 of the Penal Code [the assault offence—BS], but it is broader than it, and also includes actions that do not come within the purview of the offence of assault, such as: one who threatens in such a way that entails an immediate danger of injury to the threatened person (for example by means of a loaded gun), and one who attacks property and not only a person.[574]; [575]

Another term, which has been used in several modern draft laws instead of the term 'attack', is the term 'force'[576]. It appears that in the wake of the Model Penal Code, this is the most widely accepted expression in these drafts. However, even this expression may restrict the desirable scope of private defence. Therefore, for example, the drafters of the English draft law saw fit to define 'force' as including, in addition to force used against a person's body, force used against property, a threat to use force (both toward a person and toward property) and false imprisonment without use of force.[577]

To summarise, the 'attack' that is liable to justify private defence is any action of the aggressor that may infringe a legitimate interest of the person attacked.

3.4.3 Resistance to Illegal Arrest

Ashworth noted that apart from the general conditions of private defence, there is also room for the establishment of additional rules as a response to the varying social conditions and particular cases that raise general issues. According to his school of thought, it is undesirable to consider each specific case that arises in real-

[574] See the words of explanation of the Israeli draft Penal Code (Preliminary Part and General Part) 1992, at 136, which relates to s 46 of the draft.

[575] Robinson clarified that the attack need not be direct (see Robinson (1984) n 37 above, vol 2 at 73), and Wasserman explained that the attack need not be physical (see Wasserman, n 181 above, at 372).

[576] See s 3.04 of the American MPC; s 3(10) of the Canadian draft law, 1987 (Law Reform Commission of Canada, Report Recodifying Criminal Law, no 31, rev and enl edn, (Ottawa, 1987)); s 37(2) of the Canadian draft law, 1993 (Government of Canada, Proposals to Amend the Criminal Code (General Principles)(Ottawa, 1993)); s 27 of the English draft law, Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles, no 218 (London, 1993).

[577] See s 29(1) of the English draft law (1993), *ibid.*

With regard to the threat (alone) to use force, Englard expressed his opinion—while considering the tort laws, but with implications also for the matter under discussion—that it is sufficient to have a threat of attack even when the intimidator has no intention of carrying out the threat—Tedeschi, n 1 above, at 285–86. However, in my view, such a case concerns **putative** private defence. Further, with regard to threats—for some reason the Australian legislator found it fitting to establish a separate exception to criminal responsibility—private defence against threats alone (see s 31(3) of the Penal Code of Queensland and the discussion of it in *New Essays on the Australian Criminal Codes* (Sydney, 1988) at 96–102). 'For some reason'—since, as noted by O'Regan, threats are included anyway in the definition of an attack.

ity as resting exclusively on its own particular facts, since the law must guide behaviour.[578]

Such a case, which has sufficient significance to justify a separate rule, is resistance to illegal arrest. This issue has been the focus of many detailed discussions and specific rules in various legal systems. However, before turning to them, an examination of this issue in light of the rationale of private defence is required. What does this rationale teach us? The factor of autonomy therein supports resistance to illegal arrest. It can even be claimed that the autonomy of the individual who is attacked is infringed to a greater degree than in the normal case, given the tremendous power of the government, and that the right against the state to resist aggression takes on a more direct form here than in the normal case, since the authorised person who caries out an illegal arrest can be viewed as a representative of the government. As to the factor of the aggressor's guilt, two main cases may occur: the first—if a law enforcement officer makes the mistake of thinking that he is performing a legal arrest, and is permitted an excuse from responsibility (mistake), then the use of private defence should be denied against him, since this case in effect involves an innocent aggressor (although there could be putative private defence against him and there might be a 'necessity' defence). This is also the rule if the law enforcement officer has another defence against criminal responsibility, such as 'obeying an order'. In the second case—when the law enforcement officer is responsible for the attack that he performs—the factor of the aggressor's guilt also enables private defence against him. However, in this case the factor of the social-legal order enters the picture, and operates to negate the resistance to the law enforcement officer, even when he acts illegally. The principle of proportionality also merits consideration here. The assumption is that the expected injury to the citizen if he succumbs to the arrest is the denial of his liberty, discomfort and perhaps, also a certain injury to his honour, but nothing beyond this. However, if the law enforcement officer uses excessive force in the execution of the arrest, exposing the citizen to the danger of a physical injury, there is no doubt that the resistance should be permitted. Moreover, excessive force is also liable to justify resistance in the face of a legal arrest.

Prima facie, it appears that the principle of proportionality may provide a suitable solution for the entire issue; given the lack of severity of the danger posed to the citizen if he succumbs (an injury to his liberty, comfort and honour), severe physical injury to the law enforcement officer is thereby negated. However, the principle of proportionality apparently allows slight physical injuries to the law enforcement officer, and the question reappears: should resistance to arrest be permitted or should the citizen be required to restrain himself and to wait patiently in the hope that he will be granted relief by the court? If we again consider the social-legal order factor, we shall find that violent resistance to the law

[578] See Ashworth, n 183 above, at 301–2.

enforcement officer—even when he acts illegally—may blatantly harm the social-legal order, if not directly, then at least indirectly, out of a real injury to the image of the law enforcement system and its deterrence capabilities.[579] On this subject, one opinion holds that there is no room in a modern society for the traditional rule that allows resistance to illegal arrest, and this is both because the need to prevent illegal arrests is less than it was in the past, and because the potential consequences of the resistance are more severe than they were in the past.[580]

A different opinion was expressed in Israeli case law, in which no special policy rule was established regarding private defence against illegal arrest. Accordingly, in the *Affangar* ruling, which addressed private defence against illegal arrest, the former President of the Supreme Court, Justice Zussman quoted—in assent—the instructive words of Justice Landoy in the El-Nakib judgment, that: 'the symbol of a state of law is that the law enforcement officer who acts without authority and another person are equal before the law', and he added:

> Violence does not become correct and legal just because it is performed by law enforcement officers. On the contrary, the attack on a citizen by a policeman is several times more serious than an attack by another person. A person is not obliged, in a state of law, to suffer blows, just because the person who delivers them is a policeman.[581]

It is possible to distinguish this case on the basis of the blows that were dealt to the accused by the policemen. Since, as mentioned, in the face of excessive force that is exercised by a law enforcement officer, private defence is permitted. However, it seems that the law in Israel—following the English common law—is that there is indeed no duty to succumb to an illegal arrest even when a law enforcement officer performs it.

In his book, Williams described in depth the existing legal situation on this matter in English law, in a discussion under the title 'Defence against the Police'.[582] The writer notes that a right of private defence exists against the officer who performs an illegal arrest, and in his words, finds two separate reasons for this. The first—the officer is not acting in the execution of his duty, and the second—there is no assault at all. (In passing, it is noted that, in my opinion, the second reason is

[579] Resisting arrest (even if it is illegal) may also have a destructive effect on those involved. On the other hand, it may be claimed that violent resistance to a law enforcement officer who acts illegally actually constitutes a strong expression of the rule of the law and of the fact that the government draws all its powers from the law, beyond which, it has no further authority.

[580] See the *Encyclopedia of Crime and Justice*, ed by Kadish, n 96 above, vol 3 at 947–50 (the author of the entry 'Self-defense' is Dix). On this subject, of the dangers involved in defensive action, it is claimed that it is even dangerous to the defender himself—see the MPC, The Model Penal Code, (Proposed Official Draft, Philadelphia, 1962) at 19.

[581] The ruling in the case of CA 89/78 *Affangar v the State of Israel* PD 33 (3) 141, at 162–63 (translated by the author).

[582] See Williams (1983), n 1 above, at 511–15, 523. See also, eg, Card, Cross and Jones, n 180 above at 630; J Hall, R Force, and BJ George, *Criminal Law: Cases and Readings*, 4th edn (Charlottesville, VA, 1982) at 461; Russell, n 40 above, at 443–53; Kenny, n 134 above, at 144–45; Perkins, n 40 above, at 137.

flawed by a tautology). A completely different doctrine exists in French law—'rebellion'—according to which the citizen must succumb to the policeman and rely on the possibility of receiving subsequent relief from the court.[583]

In contrast, as mentioned, private defence was permitted under English law, even though the policeman thought, mistakenly, that he was acting according to law,[584] and even when the only aim of the citizen was to prevent his arrest. Williams raises doubt as to whether the English rule is wise, but notes that in practice—given the obtuse nature of the arrest laws that grant authority to the policeman—the citizen receives very limited freedom to resist the police with confidence. Moreover, the force that the citizen is permitted to exert in resistance to arrest under English law is moderate to the point of being ineffective. Hence, Williams suggests that the citizen should avoid resistance. This suggestion is strengthened in light of the following considerations: the fact that the innocence of the citizen is insufficient to justify his resistance (since most of the authorisations for arrest are based on probable cause); the accepted view that the arrest laws are part of the criminal law, such that a mistaken understanding of them does not serve as an excuse ('ignorance of the criminal law is no excuse')[585]; and the fact that in the case of conflicting versions between the citizen and the policeman, it is reasonable to assume that the court will believe the policeman.

An exceptional ruling, in view of the above-mentioned English law, is the *Fennell* case, where a person who made a mistake in his estimation of the situation and rushed to the aid of another person opposing policemen in civilian dress[586] was convicted. Although Williams discusses this ruling as an exception ruling that was issued by the court concerning defence of another person against law enforcement officials, Ashworth raises the existing option that the ruling may be seen as the beginning of a change in English law, and as authority for the prima facie duty of the citizen to avoid the use of force against a policeman in order to release himself from arrest.[587]

[583] See Williams, (1983), n 1 above, at 511; and see also Silving, n 45 above, at 395, where she compares the treatment of the subject of our discussion under French law and under German law (treatment that is similar to that of English law).

[584] The suitable solution to such a situation is, in my view, as follows: according to the assumption that there is no special rule according to which one should succumb to arrest—the assumption that exists in English law—then if the citizen knows that the policeman is mistaken, the possible defence is 'necessity', since the policeman has an excuse of mistake and he bears no criminal responsibility. If the citizen does not know that the policeman is mistaken, then the possible defence for him is putative defence.

[585] It is noted that this view is not, in my opinion, self-evident. The same policy considerations that lead to it may also support a policy rule forbidding resistance to illegal arrest.

[586] See the ruling in the case of *R v Fennell* [1971] QB 428; and see Williams (1983), n 1 above, at 514ff.

[587] See Ashworth, n 183 above, at 301–2; see also Ashworth, n 474 above, at 141 (relying not only on the *Fennell* decision, but also on *Ball* [1989] Crim LR 579). It is possible that the well-known ruling in the case of *Palmer v R* (1971) 55 Cr App R 223, 2 WLR 831, should also be interpreted in the same way—see LH Leigh, 'Manslaughter and the Limits of Self-Defence' (1971) 34 MLR 685 at 687. See also, the text below accompanying nn 976–77.

Such a duty was established in the American Model Penal Code and following this, also in the American Federal Draft Proposal and in a Canadian draft law.[588] In the explanatory text, the drafters of the MPC[589] wrote that there should be no privilege to exert force against a public official, who as far as the citizen knows is only attempting to arrest him and to subject him to a legal process, and that illegal arrests should be prevented by other means.

This last consideration, apparently also concerns the possibility of acquittal of the citizen who injured the policeman as a quasi-punishment of the policeman, in a similar fashion to the rule that exists in several legal systems, that the person who is seduced is exonerated in order to 'punish' and deter the agent-provocateur in particular and the police in general.[590] It should be emphasised that the prohibition of resistance only applies, according to the above-mentioned draft laws, when the citizen knows that a law enforcement officer is involved (or in another variation—when the circumstances are such that he should know this). Indeed, there is no point in imposing a duty on the citizen to succumb to the law enforcement agent when he does not know his identity.

Robinson raised an interesting suggestion, to view the possibility of succumbing to illegal arrest as a consideration when evaluating necessity, and the fact of the aggressor being a law enforcement agent as a consideration in the evaluation of proportionality.[591] Finally, many other scholars express support for a special policy rule that would forbid or restrict defensive action against a law enforcement agent who performs an illegal arrest.[592]

[588] See s 3.04 (2)(a)(I) of the MPC (although the MPC does not apply the exception when the actor's safety or life is unlawfully endangered by deadly force); s 603(a) of the Draft Federal Law (National Commission on Reform of Federal Criminal Laws Study Draft of a new Federal Criminal Code (1970)) (although it limits the exception by providing that any excessive force by an arresting officer may be justifiably resisted); and s 3(10)(b) of the Canadian Draft law (Law Reform Commission of Canada, Report Recodifying Criminal Law, rev and enl edn, no 31, Ottawa, 1987), (although in the draft of 1993 (Government of Canada, Proposals to Amend the Criminal Code (General Principles) (Ottawa, 1993)), and in the draft of 1997 (Self-Defence Review: Final Report—Submitted to the Minister of Justice of Canada and to the Solicitor General of Canada (Chair: Judge Lynn Ratushny, Ottawa, 1997) such a duty was not provided). See also, the consideration of the first two—Robinson (1984), n 37 above, vol 2 at 91–92; and the detailed discussion by Heberling of the 'No-Sock Rule' that was accepted following the MPC in many states of the United States—Heberling, n 62 above, at 935–37. For American decisions from recent years, according to which self-defence is only justified where (the defendant reasonably believes that) the officer's force is excessive and threatens to cause death or serious bodily injury, see the 2002–3 supplementation (by Myron Moskovitz) to the book by Robinson (1984), n 37 above, vol 2 at 26.

[589] See the explanatory text of the draft (American Law Institute Model Penal Code, Tentative Draft No 8 (Philadelphia, 1958)), at 18–19.

[590] On the subject of acquittal of the accused who was seduced as an action against the agent-provocateur in particular and against the police in general: A Lederman, 'Entrapment by a Public Official' (1972) *Criminology, Criminal Law and Police Quarterly* 253 (Hebrew) at 276–77; Emanuel Gross, 'Agent Provocateur as a Defence Claim in a Criminal Trial' (1987) 37 *Hapraklit* 107 (Hebrew), at 114–15.

[591] See ss 3-6 and 3-7 of his proposal as presented in Robinson (1984), n 37 above, vol 2 at 566.

[592] See, eg, s 138a of the proposal of Silving, n 45 above, at 391 and the supplemental explanation at 395; Perkins and Boyce, n 85 above, at 1118–19; La Fave and Scott, n 43 above, at 662–63; Greenawalt, n 37 above, at 313 fn 89.

3.4.4 The Consent of the Victim

Is private defence justified in a situation where the person attacked gave his prior consent to the attack of the aggressor? When the consent of the victim negates the offence, such as in the offence of assault,[593] an illegal attack does not take place and there is no room for private defence. Consequently, this question refers to offences that are not negated by the consent of the victim. The drafters of the American Model Penal Code, in their casuistic way, found it fitting to explicitly consider this question. The drafters excluded from the definition of 'unlawful force'—against which private defence is justified—agreed attacks that do not amount to homicide or grievous bodily harm.[594] Is there room for such a restriction on the nature of the requested attack?[595]

What can be learned concerning this matter from the rationale of private defence? The factor of the aggressor's guilt exists—since we are dealing with the offences where the consent of the victim does not negate the offence itself. However, it is possible that the aggressor's guilt is less than that of an aggressor acting without the victim's consent. In contrast, the autonomy of the person attacked is not violated; at least not severely, if he agrees to the attack. As for the factor of the social-legal order, then on the one hand, it is infringed (although, apparently, less than in the normal case), since the attack by the aggressor is forbidden despite the victim's consent. On the other hand, it is doubtful whether the exercise of defensive force by the person attacked, who consented to the attack, is liable to be considered as a due defence of the social-legal order. It could be that the status of a third party who comes to the defence of the attacked person will be different, since he is more suited to defend the social-legal order. The complete picture, as it emerges, does not then leave much room for private defence. This is especially true with regard to **self-defence**, since the defensive activity of the person attacked is, to a certain extent, equivalent to a situation of 'you murdered and you also inherited': you consented and then harmed the one who performed your desire. It appears that defensive behaviour in such a situation actually harms the social-legal order.

[593] Eg, s 378 of the Israeli Penal Code 1977.

[594] See the definition of 'unlawful force' in s 3.11(1) of the MPC; and see also La Fave and Scott, n 43 above, at 651.

[595] A negative response with strange reasoning was presented by Robinson in his book, where he wrote:

> States commonly include in the triggering conditions of self-defence, the requirement that the threatened harm not be consented to by the actor. Such a provision becomes unnecessary when it is required that the threat be unjustified, since an attack without consent will always, absent a special justification, be unjustified. (See Robinson (1984), n 37 above, vol 2 at 98)

'Strange'—since, in my view, it contains a false logic: the question does not relate to attacks without consent, but rather to attacks accompanied by consent, where the intention is to negate private defence against the attacks, although they are unjustified.

A solution to this issue may be found in the accepted conditions of private defence. One option is to deal with this case according to the rules applying to one whom by his own fault has caused the situation in which he is forced to defend himself, since it is definitely possible to describe the consent of the person attacked in this way. Another possibility is to deal with the case in light of the requirement of necessity. The attacked person could clarify to the aggressor that his consent is revoked, and then one of two outcomes may follow. If the aggressor ceases his attack—the defensive force is no longer necessary and there is no room for private defence. If, however, the aggressor refuses to cease—then the consent of the victim no longer exists and the matter turns into a normal case of private defence. In my opinion, by virtue of the condition of necessity, a duty should be imposed on the person attacked to demand that the aggressor cease his attack and to make it clear to him that his consent is annulled, before the attacked person can use defensive force.

3.4.5 Holding Property by Force with a Bona Fide Claim of Right

An additional case that the drafters of the American Model Penal Code, in their casuistic fashion, found it fitting to consider explicitly, is the case in which defensive force is used against an aggressor who exerts force in order to protect (bona fide, with a mistaken claim of right) property that he occupies or possesses. Section 3.04(2)(a)(II) of the MPC provides that the use of force against him is unjustified if the actor is aware of the said situation (in other words: that the aggressor is exercising the force because of a claim of right to protect the property), subject to a number of exceptions.[596] In the supplementary explanation for this section the drafters express their opinion that: (1) It is desirable to reduce the number of situations in which there may be conflicting claims for the use of force; (2) The section is directed to the important situation between them, where a conflict of this kind is likely to arise; (3) Here a choice must be made, and it is made in favour of the possessor of the property, even if his challenger is right (with regard to the right to the property), and the person who is right must turn to the court.[597] My main reservation with regard to this arrangement concerns the very existence of the need for it.

[596] The first—the actor is a public officer acting in the performance of his duties. The second—the actor performs a recapture or re-entry (that is recognised by law) in proximity to when he was illegally denied his holding of the property. The third—the actor acts to protect his life or body against serious bodily harm. See s 3.04(2)(a)(II) of the MPC. With regard to the adoption of similar rules in the various states of the United States, see La Fave and Scott, n 43 above, at 639.

[597] See the supplemental explanation of the MPC. Tentative Draft No 8 (Philadelphia, 1958), at 19–20. Robinson also deemed it right to establish an arrangement for this issue, in his proposal, by including the possibility of an aggressor with a claim of right in the list of considerations to be used for the evaluation of proportionality—see s 3-7 of his proposal at Robinson (1984), n 37 above, vol 2 at 566.

What does the rationale of private defence teach us about the case under discussion? An essential condition for the justification of private defence is the guilt of the aggressor. In our case, the holder of the property is mistaken in thinking that he has a right to hold the property. This is an extra-penal mistake of law (from the property laws) that is commonly viewed as a mistake of fact. Thus, if the holder uses force to defend the property, it is reasonable to assume that he will be exempted from criminal responsibility, within the framework of putative private defence.

Against such an aggressor there is in any case no room for private defence (although it is very possible that there is a 'necessity' defence),[598] and therefore the above-mentioned framework in the MPC is superfluous. It should be noted that the factor of the social-legal order also does not support the exercise of defensive force against such an aggressor, since his injury to the social-legal order (in light of his mistake) is not large and the use of force against him is likely to even infringe this order. The only factor that supports private defence in our discussion is the autonomy of the person attacked. Although this autonomy is infringed by the action of the holder of the property, as mentioned, in modern law this factor is insufficient by itself, in my opinion, to justify private defence.[599]

3.4.6 An Attack by Omission

Is private defence justified against an attack by omission? (Can an attack indeed be committed by omission?). I presented a similar question during the discussion of the defender's action.[600] Even where the action of the aggressor is concerned, in my view, this question does not raise any particular difficulty and the answer to it is in the affirmative. Although—naturally—the decisive majority of the attacks that bring about a need for and justify private defence will be active actions, there is no reason in principle to negate the application of private defence against attacks involving an inaction that is accompanied by a legal duty to act.[601] The literature, legislation and case law do not usually refer to this question, apparently because of the simplicity of the answer to it, and also because in reality such situations are rare.[602]

[598] See the text above accompanying n 263.

[599] If there is any reason for the mentioned rule, then it is as guidance for better behaviour.

[600] See section 3.2 above.

[601] For a general opinion (which was presented on a different subject), according to which in the absence of a special reason, there should be no distinction made between an active action and an omission that is accompanied by a duty to act: Sangero, n 528 above.

[602] I found one example of such a situation, an attack by omission, in a well-known German ruling, in which there was a discussion in the framework of private defence, of the exercise of force used for moving a woman who refused to vacate a parking lot, where the one who exerted the force had a legal right to park—see the description of the case and the reference to the ruling in Fletcher (1973), n 1 above, at 385. I found another example in the book by Williams, relating—without noting that this

3.5 The Severity of Danger

3.5.1 General

Should there be a requirement, as a condition for the establishment of private defence, of a certain minimum severity of expected danger to the attacked person? An additional issue that will be discussed within this framework is the probability of the occurrence of danger.

What can be deduced from the rationale of private defence with regard to the question of the requirement of a certain minimum severity of danger? An examination of the rationale indicates that there is no room for such a requirement. Even when the expected danger to the attacked person is not severe, his autonomy is infringed, the guilt of the aggressor exists, and the social-legal order is harmed. True, both infringements—of the autonomy of the individual and of the social-legal order—are small, and perhaps even the guilt of the aggressor is not great, but all three factors operate in the same direction: the justification of private defence. Although the basic principle of proportionality will negate severe injuries to the aggressor in response to mild attacks within the framework of private defence, there is no reason to summarily negate private defence—even in such cases—for, even in the face of an attack whose danger is minimal, it may be sufficient to use a very small amount of defensive force, and the opportunity to use it should not be denied to the attacked person (or the one who comes to his rescue).

On this subject, the distinction between private defence and 'necessity' is both interesting and significant. In distinction from private defence, where, as we have seen, all the factors act to allow a certain defensive force (that may be very small) against a mild attack, regarding 'necessity' it is accepted that a severe danger is required in order to allow the injury, since 'necessity' does not involve an injury to a guilty aggressor, but, rather, an injury to the rights of an innocent party.[603]

This opinion, according to which no minimum severity of expected danger to the person attacked should be required within the framework of private defence,

especially involves an omission—to the exercise of force within the framework of private defence, in order to get rid of an obstructive person who refused to vacate a pathway and allow passage through it—see his book (1983), n 1 above, at 522.

Finally, for another approach, presented without any reasoning, see Paul H Robinson, *Criminal Law* (New York, 1997) at 437 ('For defensive force, active physical aggression is required.').

[603] Compare the definition of necessity in Art 34k of the Israeli Penal Code 1977 ('from a concrete danger of **severe** injury'(emphasis added)) and the definition of self-defence in Art 34j of this same Penal Code ('A concrete danger of injury').

has received much support in the legal literature,[604] in draft legislation[605] and in existing legislation.[606]

An exception to this opinion that is pointed out by Fletcher is the approach according to which, in legal systems where there is no independent requirement of proportionality within the framework of private defence, the defence should be negated when the danger is not severe.[607] My main reservation with regard to this approach is that the principle of proportionality is so crucial to the framework of private defence that it must appear as a separate requirement in the legal framework for it in modern law.[608] In addition, as was already noted, it is a mistake to summarily negate private defence, even when the expected danger is not severe. Consequently, the approach according to which private defence is to be negated when the danger is not severe constitutes the addition of a relatively small mistake in order to address some of the negative results of the enormous mistake of waiving the requirement of proportionality.

Another exception that was suggested is the requirement of a minimal danger (as a minimal threshold) where the danger is to property alone.[609] This exception should also be rejected, for even if we accept the opinion that there is no room for physical injury of any kind, even in the form of a slight push to the body of the aggressor, in the face of a slight injury to property, it could perhaps still be sufficient to inflict a slight injury on the property of the aggressor, for example, in order to efficiently protect the property of the person attacked.

[604] See, eg, Robinson (1975), n 37 above, at 280 (in his opinion, the absence of 'societal harm' is always sufficient); Elliott, n 285 above, at 617.

[605] Given the fact that in all the draft laws that were examined in the course of this research private defence was not restricted with regard to this matter, there is no reason to make a complete list of them here.

[606] Here too, given the fact that in the great majority of the Penal Codes that were examined within this study private defence was not limited by the requirement for a certain severity of the expected danger to the attacked person, no complete list of these codes will be given here. I will mention, however, even if only for the sake of efficiency—the only two exceptions to the rule, that testify to the rule: s 44 of the Rumanian Penal Code (1968; 1973) talks of 'great danger'; s 8 of the Spanish Penal Code (1944; 1963) demands—for the defence of property—severe damage to property.

In Jewish law, too, the Law of the Pursuer ('*Rodef*') was expanded, so that in contrast to the demand for 'a beating that may kill him' which appears in Maimonides, subsequent scholars found an attack of any sort to be adequate and did not especially demand fear of death—the ruling CA 89/78 *Affangar v the State of Israel* PD 33 (3) 141 at 152.

[607] See Fletcher (1978), n 1 above, at 873 fn 74, where he considers German law and the law of the (former) Soviet Union. It should be noted that although he relates to trivial **interests**, from the general context it is clear that he actually intends to relate to non-severe dangers and not actually to certain protected values.

[608] With regard to the importance of the requirement of proportionality, see section 3.8 below at length.

[609] See s 8 of the Spanish Penal Code (1944; 1963), where severe damage to property is required in order to justify the defence of property.

3.5.2 The Probability of the Occurrence of Danger

The second question that was posed at the beginning of the previous section is the probability of occurrence of danger. In my view, it is imperative also to consider, apart from the severity of the expected damage to a legitimate interest caused by the illegal attack of the aggressor, the probability that this danger (ie, attack) will in fact take place. There is no point in evaluating the danger only on the basis of the damage that may be caused, while ignoring the probability of its occurrence. Thus, for example, a near certain danger that the person attacked will lose a limb of his body is more severe than a near zero risk that he will be killed. It should be emphasised that there is no intention here to support the use of the low probability of the danger occurring to negate private defence outright on the basis that the danger is not sufficiently large. What, therefore, is the significance of the probability that the event will occur? This factor is especially important regarding the two basic conditions for the establishment of private defence—which will be discussed extensively in the following sections—the condition of necessity (somewhat important: section 3.6) and the condition of proportionality (very important: section 3.8).

It should be noted that this question of the probability of occurrence of the danger was not awarded any consideration in the vast majority of discussions of private defence. Nonetheless, my estimation is that many of those who avoided mentioning it explicitly would agree that it definitely constitutes an important factor in the evaluation of the danger.[610] In fact, this factor of probability of the occurrence of danger is expressed to a certain extent in the requirement of the immediacy of danger; a requirement that is discussed below—immediately after the discussion of the basic requirement from which it is derived—namely, the requirement of necessity.

Finally, in the new form of the definition of self-defence in the Israeli Penal Code, the legislator found it fitting to add the word 'concrete' to the description of danger—'concrete danger of an injury to his life, his liberty, limb or property'.[611]

[610] In Finkelman's opinion, the question of the required degree of certainty of danger had arisen in Jewish law—see Finkelman, n 25 above, at 1270–71. However, the discussion in the book 'Minchat Hinuch' (educational tractate) to which she refers does not deal with the objective question regarding the probability of occurrence of the outcome, but instead deals with the subjective doubt of the defender with regard to the existing reality. A strange section of the law, in my opinion, that determines a separate defence of private defence against threats alone, exists in the Code of Queensland (Australia)—see s 31(3) and the discussion of it in O'Regan, n 577 above, at 96–102. In my opinion, the source of this superfluous section may be the thought that since there is not a very large probability that the threats will be realised, such a danger will not be sufficient—in the absence of an explicit and different provision by the legislator—to justify private defence (on its being a superfluous section in light of the fact that a threat is already included in the definition of an attack in the above-mentioned law see *ibid* at 97). The great importance that Gorr attributes to the factor of reasonableness of the occurrence of the danger within his discussion of the requirement for proportion is very interesting and exceptional—see Gorr, n 191 above, at 259–61.

[611] Section 34j of the Israeli Penal Code 1977 as it was established in Amendment No 39 (Preliminary Part and General Part) 1994.

It is to be hoped that the courts will not use this word in order to negate private defence outright in certain cases on the grounds that the danger is not sufficiently large, except perhaps in cases where the probability of the danger is so minimal that the danger is not realistic and the consideration of it almost amounts to an absurdity.

3.6 The Necessity Requirement

3.6.1 General

The requirement that the action of the actor against the aggressor within the framework of private defence must be necessary in order to repel the aggressor, is perhaps the most accepted condition of private defence in all the legal systems and from ancient history.[612] Thus, for example, the necessity requirement is expressed in Talmudic terminology in the possibility—which should be preferred over the killing of the 'pursuer' ('*rodef*')—'that he could save him in one of his limbs' (that the defender could save the attacked person by an injury to one of the aggressor's limbs).[613]

Moreover, it is not only that the requirement of necessity is not under dispute, but that it is even widely accepted to see it as a fundamental and significant condition of private defence.[614]

[612] Given the fact that there is no dispute with regard to the requirement of necessity—in legislation, in case law and in legal and philosophical literature, both of the past and of the present—I will refrain from making a list of references for this subject, but I will point to the few exceptional cases that I have found, that actually prove the rule. Firstly, Hume claims that there is no requirement of necessity when self-defence against a criminal is involved—see Gordon, n 1 above, at 752. Secondly, among the penal codes and draft laws that were examined as part of this study, the only one in which a requirement for necessity—either explicit or implicit—was not found, is the Penal Code of Rumania (1968; 1973) (s 44).

[613] In other words: If it is sufficient to injure the aggressor in order to repel his attack, then it is forbidden to kill him. See the words of Justice Elon in the *Affangar* ruling, CA 89/78 *Affangar v the State of Israel* PD 33 (3) 141 at 152, 154. See also Finkelman, n 25 above, at 1263–65. Thus, eg, the Talmud explains that Yoav Ben Zruya was entitled to kill Avner Ben-Ner since Avner killed Ashael in the absence of necessity, for he could have stopped him by simply injuring him—see *ibid* at 1264. It is interesting to see the biblical source that Maimonides considers (Ch A of the Murderer's Laws, Laws 7–8) for the rule regarding the requirement of necessity: this concerns a situation (in the Book of Deuteronomy) of a woman who seizes the testicles of a man who is fighting with her husband. Aside from the question of why she is seen as a 'pursuer' ('*rodef*') (ie, aggressor) and not as the defender of another person, what is important for our discussion is that the permission is given—in order to repel her and to save what is caught in her hands—for (only) cutting off her hand and not for killing her—see *ibid* at 1263.

[614] Thus, eg, Robinson claims that all the justification defences have an identical structure: certain 'triggering conditions' that permit a necessary and proportional response—see, eg, Robinson (1984), n 37 above, vol 1 at 86; and Smith sees the requirement of necessity as 'a cardinal principle'—see Smith, n 91 above, at 101. See, similarly, Ashworth, n 183 above, at 283 fn 4.

What can the rationale of private defence teach us about the requirement of necessity? Despite the consensus regarding this requirement, it is interesting that neither the factor of the attacked person's autonomy nor the factor of the aggressor's guilt dictates a requirement of necessity. The opinion has been expressed that the framework of the balance of interests and the choice of the 'lesser evil' itself compel the requirement of necessity.[615] However, a clear distinction should be drawn here between the requirement of proportionality that is indeed obligatory in this framework, and the requirement of necessity, that apparently is not accordingly necessary. For it may be that even though the defensive force is greater than necessary, it is still preferable to the prevented evil. Nevertheless, it seems that the principle of the 'lesser evil' should be seen as a general principle, that applies not only to the comparison between the prevented evil and the defensive force that is exerted, but also to the comparison between this force and the alternative ways of action available—in which case the principle will also support the requirement of necessity.

In contrast to the above-mentioned factors, a factor that clearly demands the requirement of necessity is the social-legal order. In the face of a situation of compulsion, which is characterised by the existence of necessity, this factor acts, as mentioned, to justify private defence. The attacked person, or the one who comes to his rescue, replaces the government in protecting the legitimate interest that is at stake. But the situation is very different in the absence of necessity. In such a situation, and especially in the absence of compulsion, it is preferable to turn to other less violent or non-violent means (such as an appeal to the law enforcement authorities) in order to protect the legitimate interest that is endangered, since violent injury to the aggressor is, on the contrary, liable to harm the social-legal order. Thus, for example, if a policeman is present where the event is taking place, it is highly preferable in terms of protection of the social-legal order that the officer, and not the citizen, should be the one to act against the aggressor.

How then can it be explained that everyone, including those who view the autonomy of the person attacked as the sole basis for the justification of private defence, agrees that necessity is required? It seems that the explanation for this is the widely accepted assumption that private defence pertains to the group of compulsion defences and constitutes a response to situations of emergency. Since generally, in the absence of necessity, there is also no compulsion.

What does the requirement of necessity consist of? Firstly, it should be clarified that the action to repel the aggressor must be necessary both qualitatively and quantitatively: qualitatively—taking notice of the other existing alternatives, and quantitatively—taking notice of the measure of the defensive force. If blows of the hand, for example, suffice to repel the aggressor, shooting him would be unneces-

[615] See Omichinski, n 31 above, at 1456 (claiming that in this framework of the balance of interests, necessity is required almost as part of the definition).

sary from a qualitative aspect, while if a single blow of the fist is sufficient for this purpose, a series of a dozen such blows would be unnecessary from a quantitative perspective. Such a distinction, between the qualitative necessity and the quantitative necessity, existed in English common law.[616] It was strikingly expressed in the original version of Article 22 of the Israeli Penal Code. On the one hand it required that the actor should act 'in order to prevent the results that cannot be prevented **in another way**'—ie, qualitative necessity, and on the other hand, it was therein required that the actor 'did no **more than it was reasonably necessary** to do for that same purpose'—ie, quantitative necessity (emphases added). It appears that such a legislative distinction is superfluous and that a provision by law of the general requirement of necessity is sufficient. This view is greatly strengthened by noticing the fact that even those making this distinction require the existence of the two tests for necessity—the qualitative and the quantitative—cumulatively, thus there is no reason for the distinction except for an emphasis on the self-evident.[617] In addition, the distinction is liable to be artificial in many cases, since cases are common in which quantity becomes quality. Thus, for example, it is dubious whether continuous beating of the aggressor for several minutes until he loses consciousness and causing severe injuries to his body differs only from a quantitative point of view from a single blow.

Secondly, it is necessary to be precise and to examine the act itself through the filter of the requirement of necessity, and not according to its results, which may be completely random. When the death of the aggressor, for example, is caused by the person attacked shooting the aggressor, it should be examined whether the shots aimed at the aggressor were necessary to repel him and not if the killing (itself) of the aggressor was necessary for that purpose. In a similar fashion, the Israeli Supreme Court determined in the Raz holding, as follows:

> The natural way to prevent this was to take the stick out of his hand. Since the complainant refused to hand over the stick, **twisting his wrist**, in order to force him to give it up, did not exceed the extent of force that was required for this purpose. **The breakage** itself was not caused intentionally, but was the random result of the action of the appellant.[618] (emphases added).

Thirdly, it should be clarified that the content of the requirement of necessity should not be interpreted in a strict and absurd fashion such that if the actor had another alternative way to repel the aggressor this would suffice to negate the existence of necessity. There may be situations in which the actor has several possible ways of action, and obviously they should not all be automatically negated just

[616] See, eg, Ashworth, n 183 above, at 284.

[617] See Robinson (1984), n 37 above, vol 2 at 77.

[618] CA 65/65 *Raz v The Attorney-General* PD 19 (2) 503 at 504 (translated by the author). The distinction between the foreseeable results and the results that could be anticipated is referred to below—see the text accompanying n 769.

because none of them is the exclusive way. This conclusion is not only correct when the actor chooses the most moderate way, but even when he chooses another reasonable way, his act is likely to comply with the requirement of necessity.

Two dominant trends, which were previously described and opposition to them expressed, exist in Anglo-American law and influence the content of the requirement of necessity that exists therein. One is the tendency to include the requirement of necessity together with the requirement for proportionality under the joint umbrella of 'reasonability'.[619] Relying on the sufficiency of the requirement of reasonability of the defensive force is not desirable, since the requirements of necessity and proportionality are so important in the framework of private defence that the risk of the possible and probable weakening of these requirements due to unifying them must be avoided. The main impact of unifying these requirements is the weakening of the requirement of proportionality. However the requirement of necessity is also eroded by its adoption.[620] Williams expressed his opinion that the unifying of the questions—the factual (necessity) and the evaluative (proportionality)—under the general test of 'reasonableness', although it saves the need for categorisation, is liable to cause troubling confusion.[621] Williams' opinion is especially important given the strong tendency that exists in draft laws and new legislation not to separate the requirements of necessity and proportionality, but to suffice with an all-embracing requirement of 'reasonability'.[622]

This tendency becomes even more problematic in light of the fact that regarding the 'necessity' defence that appears in these laws and draft laws, there is generally an explicit and separate provision for the requirements of necessity and proportionality.[623] This situation is liable to influence the interpretation of private defence, even if not to the extent of viewing it as determining a 'negative arrangement' for this matter, then at least by viewing it as weakening the requirements of necessity and proportionality. In addition, the binding together of the two requirements within the framework of 'reasonability' constitutes a relinquishment of any significant guidance by the legislator—not only for the public but also for the judiciary.

A second dominant trend that was described above[624] is the inclusion of putative private defence within actual private defence, and easing the test of objective reasonability by adding subjective characteristics. For the present discussion, the principal significance of this trend is relying on the actor's belief that his action is

[619] See the text accompanying nn 484–85 above (the English law) and nn 502–3 (the American law).

[620] See, eg, Lanham, n 228 above, at 245 (asserting that when the Australian court in the past sufficed with 'reasonableness', this rule enabled a certain waiver of the requirement for necessity).

[621] See Williams (1983), n 1 above, at 503. See a similar opinion of Ashworth, n 183 above, at 284.

[622] See, eg, Article 34o of the Israeli Penal Code 1977, as established in Amendment no 39 (1994); s 41 of the Draft Law of New Zealand (The Crimes Bill of New Zealand (Wellington, 1989)).

[623] Eg, Article 34k of the Israeli Penal Code 1977 (according to its amendment in Amendment no 39, Preliminary Part and General Part, 1994).

[624] See the texts above accompanying n 483 (the English Law) and n 508 (the American law).

necessary in order to entitle him to the justification of private defence. Yet the place for such deviations from the requirement of necessity is within the framework of the defence of mistake or the framework of diminished responsibility (or even an excuse—according to the case in question) given the exercise of excessive defensive force, and there is no need to insist on their inclusion within the framework of private defence. The alternative approach causes a distortion of objective tests by turning them, in effect, into subjective tests and significantly weakening the strength of the justification of private defence.[625]

3.6.2 Considerations in the Evaluation of Necessity and Secondary Requirements Derived from Necessity

The two principal requirements that are derived from the requirement of necessity are immediacy and retreat. The requirement that the expected danger to the legitimate interest of the person attacked should be immediate is so important, that the opinion has been expressed that it constitutes the main substance of the requirement of necessity.[626] The reason for this is simple: in the absence of immediate danger, defensive force is not necessary, since other non-violent ways of action exist, first and foremost an appeal for assistance from the various law enforcement authorities. In contrast to the requirement of immediacy that enjoys almost complete consensus, the duty to retreat has evoked much dispute. The requirement is that before making use of defensive force (or lethal defensive force), the attacked person must also exhaust the means of safe retreat—if this is possible. The principal reason[627] for this requirement is simple, at least on the surface: if the attacked person makes a safe retreat, the need for defensive force no longer exists; necessity does not exist, and private defence, including the violence that it involves, becomes superfluous. These two requirements—of imminent danger and retreat—are very central to the framework of the law of private defence and they will therefore be discussed separately and at length further on.[628]

A consideration that has importance at times in the evaluation of necessity is the possibility of bringing the attack to an end without force, but by **demanding that the aggressor cease his attack**. Although in many cases such a demand would be pointless, there are cases where it is definitely likely to achieve the goals of private defence, in which case defensive force would no longer be necessary. A typical case like this, which is often mentioned in the literature,[629] is **trespass**. It is desirable to

[625] See what is said above in the text accompanying nn 446–48 and also Chs 5.2 and 5.3 below.

[626] Feller, n 14 above, vol 2 at 28.

[627] But not the only one, for in my opinion—as I will show further on—the duty to retreat is also (and principally) derived from the principle of proportionality.

[628] See sections 3.7 and 3.9 below.

[629] See, eg, Archbold, n 487 above, at 1664; Williams (1983), n 1 above, at 516.

require that the attacked person (who holds the land) should precede his defensive force (to repel the trespasser) with a demand, and allow the trespasser to fulfil it. This is also true with regard to **defence of property** in general—here too there is good reason to expect that the actor should demand that the aggressor cease his attack or return his property before using defensive force.[630] Another typical case in which there is good reason to impose such a demand is the case discussed above in another context[631]—**prior consent by the person attacked** to the attack by the aggressor. Retracting such consent may definitely make defensive force superfluous.

Another consideration in the evaluation of necessity, which is similar to the consideration described above in that it is based on the desirable possibility that words will render physical force superfluous, is the possibility of bringing the attack to an end by relying solely on a **warning.** In Jewish law, the 'pursuer' ('*rodef*'—the aggressor) must be given a warning before one kills him. Although not all the reasons for this are relevant for our discussion,[632] there is no doubt that the possibility of avoiding physical force by using a warning is a consideration that should be taken into account in the evaluation of necessity in modern criminal law. In the Israeli Supreme Court's rulings this consideration is given expression by raising the possibility of '**firing warning shots into the sky**' before shooting a person.[633]

It is emphasised that, both with regard to the possibility of a prior demand to the aggressor that he cease his attack and with regard to the possibility of sufficing with a warning, the actor should not be expected to exhaust these possibilities if this would bring about more severe endangerment of his legitimate interest. Therefore, non-use of such endangering options should not be considered as a negation of the necessity of the defensive action.

Two additional modes of action that may be available to the actor and that may have importance for the evaluation of compliance with the necessity requirement are **succumbing to illegal arrest**, and **relinquishment of threatened property**. The first is discussed above, as part of the discussion of the character of the attack, and the second is to be discussed in the appropriate context from a substantive point of view—alongside the duty to retreat, for such a relinquishment is a specific case of retreat or, at least, a case which is parallel to retreat.[634]

[630] Thus, eg, the formulators of the American MPC chose, in their casuistic manner, to set forth explicitly both a duty to make a demand prior to the exercise of defensive force on property, and also three exceptions to this same demand—see s 3.06(3)(a)(I), (II), (III) of the MPC. See, also Perkins and Boyce, n 85 above, at 1156; Russell, n 40 above, at 682.

[631] See section 3.4.4 above.

[632] Varhaftig, n 123 above, at 78. A possible reason for this demand, that is irrelevant for our present discussion, concerns the formal conditions for the performance of the death sentence by the court—see Finkelman, n 25 above, at 1281–84.

[633] The ruling in CA 319/71 *Ahmed and Sheikh v The State of Israel* PD 26 (1) 309, at 312 and the ruling in CA 410/71 *Horowitz v The State of Israel* PD 26 (1) 624, at 628.

[634] See (correspondingly) sections 3.4.3 above and 3.9.7 below.

An additional option for the attacked person, which typically appears in the literature,[635] is the full defence of the legitimate interest at stake by means of a subsequent **appeal to the court**. This option is, in my opinion, limited to injuries to the property of the attacked person, injuries for which it is sometimes possible to obtain a full remedy from the court that will restore the situation to its former state. This factor, in the evaluation of necessity, must also include the injury to the legitimate interest of the attacked person that is caused by waiting until the termination of the legal process, and by the legal process itself. Evaluation of the possibility that the victim will be awarded compensation for the damage obviously includes factors such as the ability to locate the aggressor and the possibility of being paid by him. This option of an appeal to the court also bears marks of a retreat, and usually such a temporary waiver will involve an injury of some sort to the legitimate interest of the attacked person, although the injury will be less, for example, than the total loss of the property.

An additional factor that was discussed before and that should be referred to here also, because of the importance that it may have in the evaluation of the necessity of the defensive act, is the **probability of the occurrence of danger**.[636] Yet, while this factor has great importance for the evaluation of the existence of the requirement of proportionality, it has no similar importance for the present subject of discussion, namely, the evaluation of compliance with the necessity requirement. For even if there is little reason to anticipate the occurrence of danger, as long as it is a real possibility, it cannot, at the threshold, negate the necessity for defensive force. In contrast, if the chances for realisation of the danger are very slight, this will usually have the effect of negating the necessity for defensive force.

A general factor that has great importance in the evaluation of necessity is the **balance of power** between the sides to the conflict, namely the attacked person or the one who defends him versus the aggressor. In the evaluation of the power dynamic not only the physical strength of the parties, their 'strategic' positions and their equipment (weapons), should be taken into account, but also their relevant skills. While it will not usually be necessary, for example, to use a lethal weapon to repel an unarmed aggressor, especially if the attacked person is not weak in comparison to the aggressor, such a necessity could exist if the aggressor has special capabilities, such as outstanding skills in the art of combat. Insofar as the relative strengths work to the disadvantage of the person attacked (or the one who defends him), the use of harsher means to repel the aggressor may be justified within the framework of private defence.

[635] See Robinson (1984), n 37 above, vol 2 at 566 and Gorr, n 191 above, at 260. Although Gorr raises this possibility while considering its influence on evaluation of the requirement for proportionality, yet in my opinion, it is also very relevant for the requirement of necessity.

[636] See section 3.5.2 above.

3.6.3 The Suitable Rule

What is common to all the secondary requirements and considerations that were presented above is that they are all founded on characteristic and common cases. However, there is no practical means of translating the general requirement of necessity of the action into an exclusive list of cases and secondary requirements. The starting point must be a general requirement of necessity, and the interesting question for legislative reform is more limited: whether to suffice with such a general requirement, to determine also rigid secondary requirements, or to employ a 'golden mean' and with the general requirement to provide a non-exhaustive list of considerations that should be taken into account in the evaluation of necessity. The very choice of the phrase 'the golden mean' indicates that this, in my opinion, is the preferable way. On the one hand, it is preferable to the determination of rigid requirements where, if one of them does not exist, this will suffice to negate the necessity, for such a solution lacks the minimum flexibility that is necessary given the immeasurable possibilities—beyond all imagination—that are presented by reality. On the other hand, such an approach is preferable to relying on a general requirement of necessity, because the law should aspire to provide substantive direction—both to the public and to the judiciary. At the same time, the list of considerations that is to be explicitly mentioned in the law should be such as will only include the most important and common cases, and should avoid becoming casuistic and cumbersome. A list of considerations that includes immediacy,[637] retreat, illegal arrest, and a precondition of a demand or warning—according to the case—may constitute such a legislative 'golden mean'.[638] I shall therefore now proceed to a discussion of the most central of these considerations—the requirement of immediacy of the danger.

3.7 The Immediacy Requirement

3.7.1 General

The requirement of immediacy can be seen as an additional aspect of the danger (ie, the danger that threatens a legitimate interest must be immediate)[639].

[637] In effect, the requirement for immediacy is sufficiently important to constitute an independent and explicit requirement in the law, and not only a consideration in the evaluation of necessity. See, on this point, the next section (3.7).

[638] See also section 1(b) of my proposal in the Epilogue below and the consideration there of the possibility that this detail is also too much regarding its formulation in the law.

[639] Alongside its other aspects that were already discussed above: the values protected by private defence; the source of the danger and the character of the attack; severity of the danger, and the probability of its occurrence.

Nevertheless, the discussion of the requirement of necessity precedes the discussion of the requirement of immediacy, since, as mentioned, the requirement of immediacy is derived directly from the requirement of necessity. A separate discussion of the immediacy requirement is needed because of its great importance.

The very existence of the immediacy requirement within the framework of private defence is usually not disputed. The decisive majority of scholars accept this requirement, and some of them even express the opinion that this is a most basic and important requirement,[640] if not also the central component of the content of the necessity requirement.[641] In every one of the legal systems that were examined as part of this study there is a requirement for some kind of immediacy. Usually immediacy is explicitly required in the definition of private defence in penal codes,[642] and, even in the few legal systems where there is no such explicit requirement, the courts usually interpret the necessity requirement as also including the immediacy requirement. In proposals for legislative reform it is also very common to provide an explicit requirement of immediacy.[643] In Jewish law and in old English common law immediacy was also required.[644]

What can be learned from the rationale of private defence regarding the requirement of immediacy? In effect, we already answered this question at the commencement of the discussion on the requirement of necessity. As mentioned, the immediacy requirement constitutes—from a substantive point of view—part of the requirement of necessity, and it is only due to its great importance that it is addressed in a separate—but not completely independent—discussion. As noted,[645] the factors of the autonomy of the person attacked and of the aggressor's guilt, which constitute part of the justification of private defence, do not dictate the requirement of necessity, and consequently do not dictate any requirement of immediacy. In contrast, the factor of social-legal order demands both the requirement of necessity and also—consequently and principally—the requirement of

[640] See, eg, Stanford H Kadish and Stephen J Schulhofer, *Criminal Law and Its Processes*, 5th edn (London, 1989) at 869, Smith, n 91 above, at 101.

[641] See n 626 above. The reason for this is that in the absence of immediate danger there is no need for defensive force, since there are other, non-violent, alternative avenues of action, first and foremost, the appeal for assistance to the various government agencies.

[642] Given the fact that in the great majority of the penal codes that were examined as part of this study there is an explicit requirement of immediacy, I shall refrain from making a list of them, and will instead point to the extraordinary cases that testify to the rule: s 17 of the Chinese Penal Code (1979); s 5 of the Greenland Penal Code (1954); s 34(6) of the Argentinian Penal Code (1921); s 48 of the Norwegian Penal Code (1902); s 8 of the Spanish Penal Code (1944; 1963); s 13 of the Penal Code of the (former) USSR (1958) and ss 271–73 of the Penal Code of Queensland (Australia).

[643] For exceptions in this matter see ss 3(10), (11), (12) of the Canadian Draft Law (Law Reform Commission of Canada, Recodifying Criminal Law, rev and enl edn, no 31, Ottawa, 1987); ss 37, 38 of the Canadian Draft Law (Government of Canada, Proposals to Amend the Penal Code (General Principles)(Ottawa, 1993) and ss 41, 48, 49 of the Draft Law of New Zealand, (The Crimes Bill of New Zealand (Wellington, 1989)).

[644] With regard to Jewish law see, eg, Finkelman, n 25 above, at 1265. With regard to English common law see, eg, Blackstone, n 40 above, vol 4 at 184, Russell, n 40 above, at 681.

[645] See the commencement of section 3.6.1 above.

immediacy. In a situation of compulsion, characterised by necessity and particularly by immediacy, this factor acts to justify private defence. Yet in the absence of necessity in general and immediacy in particular, a violent injury to the aggressor (who is only a potential aggressor) is actually likely to injure the social-legal order. As was already noted, even those who claim that the justification of private defence should be founded on other (exclusive) factors, such as the autonomy of the person attacked, support requirements for necessity in general and for immediacy in particular, because of the widely accepted character of private defence as a defence of the category of compulsions, which constitutes a response to emergency situations. Immediacy is, probably, the most dominant characteristic of a state of emergency. I have already noted the importance of the existence of a state of emergency in order to justify private defence in a number of contexts. It should be emphasised that within the framework of private defence in particular and of the compulsion defences in general, society enables the actor himself to make certain choices between various important interests and values, choices that generally only the legal authorities and the courts are authorised to perform (the legislator, courts and sometimes also the officials who are responsible for law enforcement). Only in special situations of emergency (where the existence of the requirements of necessity and immediacy is presupposed), there is a greater willingness to allow the individual to make decisions himself that are usually deemed the province of the legal and judicial authorities. The readiness to allow the individual to decide derives primarily from the fact that protection of society and its laws is ineffective in such situations.[646] Nevertheless, a certain opposition to the requirement of immediacy does exist. But first, I shall consider the content of this requirement.

[646] For similar opinions see Ashworth, n 183 above, at 282; Fletcher, n 75 above, at 1367 and his words in the *Encyclopedia of Crime and Justice*, ed by Kadish, n 96 above, vol 3, at 945; Gur-Arye, n 13 above, at 233–34.

It also deserves mention that an attempt was made in the philosophical literature to attribute moral importance to the very existence of a present attack—as opposed to a past attack—see especially Wasserman's opinion—n 181 above, at 373ff; Gorr's support for this opinion—n 191 above, at 265 and the opposition of Montague (1989), n 211 above, at 87ff. The principal reason for relying on this condensed description, in a footnote, of the dispute between Montague and Wasserman, is that, in my opinion, its correct context should not be in a discussion of private defence but in a discussion of 'necessity', and the examples that they discuss testify to this. For the dispute involves situations in which the 'attack' has already terminated and yet the danger still exists, so that the extermination of the 'past aggressor' (in distinction from the 'present aggressor') would terminate the danger. I am of the opinion that by definition, (of 'private defence' and of 'necessity') these cases do not fall within the scope of private defence. Nevertheless, it is perhaps possible to find additional support in the factor of the aggressor's guilt within the rationale of private defence if the opinion of Kamm, on which Wasserman relied, is accepted, according to which the person (the aggressor—in our case) is responsible in a more significant way for his present activities than for those that he performed in the past ('deontology of the moment', 'the priority of the present moment'—see Wasserman, n 181 above, at 375).

3.7.2 The Content of the Immediacy Requirement

To which element should the immediacy requirement relate? Should immediacy of the danger be required, (ie, the danger that threatens the legitimate interest should be immediate), or immediacy of the attack (an immediate attack)? Or perhaps the appropriate requirement is one of immediate necessity (viz, that the defensive action is immediately required)? Each of these three main options and also additional options[647] are supported by legislation, case law, literature and draft laws.

The penal codes that were examined in this study usually addressed immediacy of the attack.[648] In contrast to this, Williams and Robinson suggested that the immediacy of necessity for the use of force[649] should suffice. A similar formula was set forth recently in the Israeli Penal Code—'an action that was immediately required in order to repel'.[650] The proposals of Williams and Robinson embody resistance to the requirement of immediacy; resistance that will presently be discussed. As to the first two options, it is my opinion that the difference between the immediacy of the attack and the immediacy of the danger is not great. Where, nevertheless, is there liable to be a difference between these two potential requirements? When an imminent attack is anticipated, although no imminent danger can be expected from it. In such a case, the justification for private defence can only be based on that same danger that is already expressed in the imminent attack, and not on the more remote danger. Consequently, this justification will be relatively weak and will enable only a restricted private defence, if any. Assume, for example, that A installed a device that was meant to cause damage to B's car one year after it was activated. The operation of the mechanism involved turning on the switch, and it was not difficult to neutralise the device at any point during the year (in fact, five minutes and a little skill are all that were needed to perform this). In such a situation, I am of the opinion that the movement of A's hand towards the switch (the attack) should not be viewed as a sufficiently immediate factor, but it should be taken into account that the danger is so remote that it cannot be compatible with the requirement of immediacy. Accordingly, my opinion is that

[647] An additional interesting option is the requirement that was presented in s 3.04 of the MPC (Proposed Official Draft (Philadelphia, 1962)) according to which the defensive force must be imminently necessary. In addition the force that it is anticipated the aggressor will use must be expected at that same event ('on the present occasion'). In their written explanation, the drafters noted that this phrasing would enable the necessary flexibility (see the explanatory wording of the Draft (Tentative Draft No 8 (Philadelphia, 1958)) at 17. However, even such a formulation, in my opinion, provides too much flexibility, to the extent that it very significantly weakens the requirement for immediacy, although of course it is preferable to relying on the immediacy of necessity. See also Kadish and Schulhofer, n 640 above, at 869; La Fave and Scott, n 43 above, at 656; Heberling, n 62 above, at 931–32.

[648] In the various Israeli draft laws it was the immediacy of the injury that was considered.

[649] See Williams (1983), n 1 above, at 503–4; Robinson (1984), n 37 above, vol 2 at 4, 78.

[650] The present formulation of Art 34j of the Israeli Penal Code 1977.

in the rare cases where a real difference exists between the immediacy of the attack and the immediacy of the danger, it is preferable to consider the immediacy of the danger. However, as a general rule, this distinction will be only an artificial one.

The requirement for immediacy has two facets. Justified private defence must be performed at its earliest when the danger is already close, and not earlier ('imminent danger'), and at its latest when the danger or part of it still exists, and no later ('present danger'). These two features of the requirement for immediacy can be posed against two negative possibilities that should be avoided. The first—precipatory violence—for then the 'defensive' action is too early (and in effect—from a substantive point of view—is not defensive at all), and the other—disguised revenge[651]—when the 'defensive' action is too late (and again—from a substantive point of view—is not defensive at all). In any case, from a substantive point of view it is possible to disregard the distinction,[652] given the fact that in the second case as well—of danger that still exists and has not yet passed ('present danger') there exists, in effect, an immediate danger that is about to occur and is close ('imminent danger') that finds expression in the injuries that have not yet been inflicted. For example, when A, who intended to destroy a certain property of B, demolishes three-quarters of that same property, there is still an impending danger for the remaining quarter, and this danger is immediate for all intents and purposes. In contrast, once A has pushed B, who attacked him, and B is lying wounded and powerless on the ground, there is no longer an immediate danger that justifies the exercise of additional force against the aggressor (B).[653]

A more significant question relates to the first facet—the closeness of the danger, and not to the second—the ongoing existence of the danger. As noted, the immediate danger exists throughout the attack—from its inception until its termination. The solution to the question of the second facet of the immediacy requirement (the latest point in time at which private defence is still justified) is usually achieved by identifying the time that the attack ended. In contrast, for the solution of the question posed by the first facet of the immediacy requirement (the earliest point in time at which private defence is already justified), it is not sufficient to establish the time at which the attack began, since there is no dispute that for a certain period of time before its commencement an immediate attack

[651] Dykan, n 290 above, at 775–76. Dykan noted the ability of immediacy to serve as a good test for distinguishing between defensiveness and revenge, and as a reaction to provocation, a reaction that can perhaps be understood and for which the punishment should be eased, but which certainly cannot be justified and exempted from responsibility.

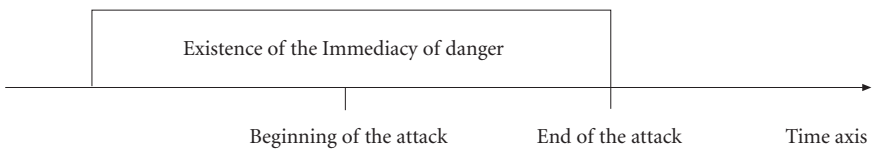
[652] The distinction is explicitly established in the Finnish and in the Swedish Penal Codes, at s 6 of the Finnish Penal Code (1889; 1986) and s 24(1) of the Swedish Penal Code (1962; 1972).

[653] Such was the case in the ruling in CA 229/62 *Gerzitski v The Attorney-General* PD 17 1077, where the accused strangled her husband after he was lying wounded on the ground. Another typical example of danger that has already passed is when the aggressor retreats (a real retreat, as opposed to a temporary withdrawal in order to immediately improve his position).

already exists that justifies private defence.[654] This last clarification brings us directly to the significant question of justification of 'the preemptive strike'.

'If someone comes to kill you—kill him first.' This adage of Jewish law,[655] which is very frequently quoted, contains more than a hint of the possibility of a pre-emptive strike. In modern criminal law, there is also consensus regarding the concept that the attacked person does not have to wait until the aggressor launches his attack and until the attacked person bears the brunt of his blow, but a preventive action by the attacked person is permitted under certain circumstances in order to repel the aggressor. This is also the existing rule in the main legal systems that were examined within this study.[656] In fact, the accepted recognition of the existence of a facet of the requirement for the immediacy of the danger that relates to the earliest moment when private defence is justified—even before the attack begins—constitutes a recognition that a pre-emptive strike is indeed permitted, under certain circumstances. If we attempt to derive further guidance beyond the aforementioned with regard to the immediacy requirement from the rationale of private defence, I believe that insofar as the actor takes action earlier, not only will there be increased doubt as to whether the requirement of necessity in general and of immediacy in particular exists, but the justification for his action will be directly impinged, since the factors of autonomy of the person that might potentially be attacked, guilt of the potential aggressor and the social-legal order will play a weaker role (in comparison to an act at a later stage) in the justification of defensive force. Moreover, if the actor chooses a point in time for his action that is too soon, his action is liable to actually injure the social-legal order, and definitely not protect it. With progression along the axis of time, it is not only that there is a point in time from which private defence is henceforward justified and before which it is forbidden, but that the amount of the defensive force that is justified also grows greater from the point in time from which force of some sort is justified. When a potential aggressor slowly approaches the potential victim with a weapon that has a limited range of operation (such as a knife), but is still far enough away

[654] It is possible to describe the period of time within which private defence is usually justified in a schematic fashion, as follows:



[655] The Talmud, '*Massechet Brachot*' 65, 72 (see also n 27 above).

[656] See, eg, with regard to English law, and accompanied by references to the rulings, Card, Cross and Jones, n 180 above, at 626; Ashworth, n 183 above, at 293–94; Smith, n 91 above, at 114–17 (a discussion under the title 'The Pre-emptive Strike'). See also, with regard to American law, and accompanied by references to the rulings, *American Jurisprudence*, n 500 above, vol 6 at 70 (and the Amendment of 1998, at 48); JH Beale, 'Homicide in Self-Defense' (1903) 3 C*olumbia Law Review* 526 at 529–30.

from him (for example, a hundred metres away), threatening the aggressor with a firearm will be justified, even if shooting him will not be justified until he comes closer.[657]

Finally, it is interesting to note an idea that was presented in the philosophical literature by Nozick, although in another context, that of the self-defence of one state against another state, which has a certain relevance for our discussion. Nozick suggests different tests for the determination of the stage when the act of self-defence is already permitted.[658] These tests concentrate on the action of the aggressor state and are very reminiscent of the recognised tests in criminal law for the identification of the point of commencement of the behaviour that is necessary for the establishment of a punishable attempt to commit a criminal offence. Although it is undesirable to determine such tests for the current discussion, they nevertheless may provide some guidance to the court—not for the detection of the point in time at present under discussion (from which henceforward private defence is justified), but in identifying the point of time at which it is very reasonable to assume that private defence is already justified (although a certain period of time preceding this is likely to also comply with the test of immediacy). However, given the great theoretical difficulty of identifying the commencement of an attempt (a difficulty that has elicited the comparison to the attempt to woo a beautiful woman who eludes her many suitors), it is very doubtful whether practical guidance can be drawn for purposes of our discussion from the tests for identifying when an attempt begins.[659]

[657] The issue of threats (alone) in comparison to the exercise of (physical and actual) force will be addressed below—see section 3.8.5. For our discussion, it is sufficient to assume, perhaps self-evidently, that a threat to use a certain amount of force constitutes a slight defensive force in comparison to the actual use of this particular force.

An interesting issue that is connected to the issue of the pre-emptive strike is the issue of **setting a human trap**. Is it justified to set a trap that will injure the potential aggressor if and when he attempts to attack? The similarity to the pre-emptive strike is expressed in the fact that the actor (the attacked person in potential) acts a considerable time beforehand, in advance of the attack, yet the force itself is, in effect, 'conditional force', that is only meant to be exercised in the future and on the occurrence of a certain condition (the attack by the aggressor). Given the frequent occurrence and importance of this issue, we shall discuss it separately below.

[658] See Nozick, n 270 above, at 126ff.

[659] With regard to the possibility of identifying the beginning of the attack with the beginning of the criminal attempt see Bernsmann, n 265 above, at 174, and the references that appear there.

An additional issue, which is connected especially to the issue of the pre-emptive strike, arises in many cases where battered women kill (or only attack) their abusive partners, without any proximity (in time) of particular attacks performed by the latter. The issue of the defence of battered women has been awarded considerable attention in American law in the last few decades—both in case law and in the literature. The central problem posed by these cases is the immediacy. Eg, there were cases in which battered women killed their partners when the latter were asleep—a situation in which it is difficult, if not impossible, to reconcile the defensive force with the requirement for immediacy (to view the issue of the battered woman as a particular case of the issue of immediacy see, eg, Smith, n 91 above, at 116–17; La Fave and Scott, n 43 above, at 656–57; Kadish and Schulhofer, n 640 above, at 869–74; the *Encyclopedia of Crime and Justice*, ed Kadish, n 96 above, vol 3, at 947). Given the extensive case law and

3.7.3 Resistance to the Immediacy Requirement

As noted above, although there is an almost decisive consensus with regard to the need for some sort of requirement of immediacy, there are also opponents who suggest that this requirement should be negated or—frequently—that it should be significantly eased.[660] Robinson, faithful to his general school of thought, according to which the absence of social damage is sufficient to establish justification, opposes the rigid requirement of immediacy within the framework of private defence.[661] In his opinion, a requirement of the 'immediacy of the danger', and even a requirement that the defensive force should be 'immediately necessary', are both undesirable, but, rather, it is adequate to view the immediacy as a (non-decisive) factor in estimating the necessity.[662] With regard to the commonly accepted claim that the immediacy requirement is very important for the prevention of sweeping authorisation for the individual to independently make value judgments that are usually left to the legal and judicial authorities, Robinson answers that in a situation of private defence, the option of choosing who will suffer the damage is not available for the actor anyway, since he is only permitted to use force against the aggressor himself.[663] The context for the immediacy

literature concerning this issue and its possible influence on the rule of private defence in general, it will be discussed further on, separately and in depth—see Ch 5.5

An additional issue that some people connect with the issue of immediacy is that of **preparatory activities** carried out by the person who might potentially be attacked in preparation for the defensive action, such as equipping himself with a weapon despite the lack of the required licence. This issue was discussed above in its appropriate place—within the discussion of the scope of the application of private defence—see the text above accompanying n 523.

A typical case that raises a question regarding the second point in time—from which private defence will no longer be justified—is **the recapture of property** following its dispossession. It is accepted that after the passage of a long period of time from the seizure of the property by the aggressor, the legal holder of the property who was dispossessed is not permitted to take the law into his own hands, but he should request relief from the court. There are legal systems that permit recapture on the condition that it is close to the dispossession—immediately after it or as part of a 'hot pursuit' after the aggressor-usurper. A possible way to solve the difficulty with the requirement of immediacy that arises from such permission is to say that the holding of the property by the aggressor-usurper soon after the dispossession constitutes a direct continuation of the attack and not a stage that comes after it. This issue—in all its aspects—will be discussed within the setting of the broad discussion of defence of property—see Ch 4.3.2 below.

[660] Thus, eg, Williams suggested viewing the question of immediacy as (only) a consideration in the evaluation of necessity and not as a separate requirement—see Williams (1983), n 1 above, at 503–4; Yeo notes the softening of the requirement for immediacy in Australian case law—in the spirit of the proposal by Williams—see Yeo, n 228 above, at 491–92; Gordon notes that Hume claimed that no requirement for immediacy should be imposed in self-defence against a criminal—see Gordon, n 1 above, at 752.

[661] See Robinson (1975), n 37 above, at 280 fn 53.

[662] See Robinson (1984), n 37 above, vol 2 at 4, 76–78, 566.

[663] *Ibid* at 78 fn 27. In this way, Robinson ignores other decisions that remain in the hands of the actor, such as the type of defensive force and its degree. In practice, the very use of defensive force itself is also at the actor's discretion.

requirement is—in his opinion—solely within the framework of the excuse defences—as opposed to the justification defences—since the excuse is given when there is a situation that is so pressing that there is no time for contemplation.[664] In order to support his opinion that it is undesirable to include the immediacy requirement within the framework of justification, Robinson presents two examples that are frequently—following his use—discussed in the literature. The first:

> Suppose a ship's crew discovers a slow leak soon after leaving port. The captain unreasonably refuses to return to shore. The crew must mutiny in order to save themselves and the passengers. If the leak would not pose an actual danger of capsizing the vessel for two days, should the crew be forced to wait until the danger is **imminent**, even though the disabled ship will be too far out to sea to reach shore when it is? Or should they be able to act before it is too late, even though it may be several days before the danger of capsizing is present?

The second example:

> Consider the case of the bomb maker X, whose construction plans require a ten day period for building the weapon. Suppose further that the actor, D, knows that X is going to set off the bomb in a school. He also knows that X's construction plans require ten days to build the weapon, and that the police and other authorities are unavailable to intervene. Under the simple requirement that the conduct be 'necessary', the actor could trespass upon X's property and abort the plan by disabling the bomb at any time, including the first day, as long as such action was the least drastic means of preventing the project's completion. Under the 'immediately necessary' restriction, the actor would be obliged to wait until the last day, presumably until the last moment that intervention would still be effective.[665]

On this subject, it is interesting to note the special experience accumulated in Israeli law. In the original version of Article 22 of the Penal Code, there was no explicit requirement of immediacy. Court rulings nevertheless established that immediacy of the danger is required, deriving this requirement from the requirement of necessity that appeared in this article, and especially from the condition that the actor 'did not act as he did except to prevent the results that it was not possible to prevent in another manner'. This determination was made despite the fact that an explicit requirement for immediacy ('a reasonable fear that if he does not

[664] See Robinson (1984) at 57.

[665] See Robinson (1984), n 37 above, vol 2 at 56–58.

Two additional interesting examples are presented by Kadish and Schulhofer. The first is very similar to the second example given by Robinson that was presented above: A husband who imprisons his wife's lover with the intention of killing him several months later—when the disappearance of the lover drops from the headlines. The second—the *State v Schroeder* 199 Neb 822, 261 NW 2d 759 (1978)—a prisoner who stabbed a sleeping prisoner who had threatened to perform an act of sodomy on him by force as partial payment for a debt he owed the threatening prisoner. The prisoner was convicted and his conviction was affirmed on appeal. It is interesting to note the minority opinion, arguing that the accused could not stay awake continuously each and every night until the expected attack. See Kadish and Schulhofer, n 640 above, at 869–70.

succumb he will be killed immediately or will immediately suffer severe injury') already appeared in Article 21 of the Penal Code, in which the 'duress' defence was established. The requirement of immediacy in Article 21 cited here implies the existence of the negative framing of this requirement regarding the matter of immediacy that appears in Article 22. An explicit requirement of immediacy of the danger (or of the injury) was provided both in Israeli legal literature and in Israeli draft laws, and it appeared to be undisputed. This was the situation until 1988, when part of the report of the Commission of Inquiry on the subject of methods of interrogation of the Israeli General Security Services regarding hostile terrorist activities (a committee chaired by Justice Landau; hereinafter: 'the Landau Report'[666]) was published. Although the report primarily addressed the 'necessity' defence and not private defence, the determinations made in the report are very important for the subject of our discussion. The central situation that is discussed in the report is the use of force against a person under interrogation in order to extract information from him that is liable to be useful for the protection of the public from terrorists (those other than the person being interrogated himself). In the Landau Report, the requirement of immediacy was rejected for both the matter of 'necessity' and of private defence, with regard to which it was written as follows: 'Although the typical case of **self-defence** is to counter immediate danger to the person attacked, this too is not an insurmountable condition'.[667] To support their conclusion regarding the absence of a requirement of immediacy, the authors of the report noted the following arguments: (1) The immediacy requirement did not appear in Article 22 of the Penal Code; (2) Williams and Robinson oppose, as mentioned, the independent requirement of immediacy of the danger; (3) The two examples set forth by Robinson presented above, that—in the authors' opinion—point to the difficulty of the immediacy requirement.[668] In the opinion of the authors, Article 22 (that established a framework for both 'necessity' and for private defence) was based on the idea of 'perception of the lesser evil', without specifically demanding immediacy. An additional example that was noted by the authors was the example presented by Zuckerman regarding the torture of a person interrogated in order to extract information from him that might save human life following the placing of a bomb in a crowded building. On the basis of this example, and also in consideration of Robinson's examples, the authors of the report raised the question:

> [W]hen the detonation clock that is attached to the explosive device is already ticking, what is the difference, regarding the need to act, between the certain activation of the

[666] Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity (Chairman Justice Landau, 1987) (Hebrew). Parts of the report are translated into English at (1989) 23 *Israel Law Review* 146–88.

[667] *Ibid* at 49.

[668] *Ibid* at 48–50.

> device in five minutes time and its certain activation in another five days? The time factor is not what is decisive but, rather, the comparison between the severity of two evils.[669]

The explanation that was presented at the beginning of this chapter in support of the immediacy requirement can also be use to critique the Landau Report. The purpose of the compulsion defences is limited—provision of a suitable response to a difficult and pressing situation, ie, to a situation of compulsion. In such a situation, it is not practical to base the decision solely on the value judgment of the legislator, and there is therefore a willingness to allow the individual to exercise a certain value judgment—subject to important restrictions—by himself. However, the compulsion exceptions are not suitable to be used as a systematic replacement for the value judgment of the legislator with regard to situations that allow an action based on this judgment. It could be that there is a need for special rules that will apply to interrogations within the framework of the war on terror in particular, and situations of warfare in general. However, such rules must be made by the legislator alone, with full awareness of their significance, and the existing compulsion defences should not be distorted to provide a response for such cases. After all, it should be remembered that even if the waiver of the immediacy requirement is accepted with regard to a certain situation, its complete removal from the compulsion defences would lead to the individual being able to act in innumerable different ways, while injuring the interests of others, based, to a certain extent, on his own value judgment,[670] because the compulsion defences have general application to (almost) all the specific offences, and not only to those that were discussed in the report.

A few words with regard to the examples that were presented in the Landau Report. I am of the opinion that all of the examples in effect involve immediate danger, even if the expected result is not immediate. In the case of the hole that was made in the ship: although the result—the sinking of the ship—is 'only' expected two days hence, from the facts of the case it appears that if the crew waits for these days to pass, the ship will by then be far out at sea and it will no longer be possible to rescue it. Thus the danger is immediate from the moment that the hole in the ship is created.

In the case of preparation of the explosive device: it is difficult to imagine how such a situation could occur—the preparation of an explosive device throughout 10 days, during which entire period neither the police nor any other authorities are able to intervene. But if indeed this is the situation, an important question, which

[669] *Ibid.*

[670] The normative guidance that can be obtained from the law, because of the generality of its drafting, is restricted. Because of the special circumstances of each and every case, the direction that it is possible to receive from court decisions is also limited. Consequently, at the time of action, the actor primarily uses his own judgment.

cannot be answered within the circumstances of this case, should be noted: Can D wait and neutralise the device at later stages of the 10-day period? If it is not certain (or near certain, since the future is usually uncertain) that he can do so in the last days of this period, then the danger is already immediate in the first days and he is entitled to act. If, on the contrary, it is certain that he could intervene even on the 10th day in an effective manner, I do not see what is absurd in directing him by law to wait.[671] At any rate, given the fact that in examining the proportionality requirement the balance will tend almost decisively to the side of the many lives which are likely to be injured by the explosive device—lives against which is posed, apparently, only the property of the person who assembles the device, and perhaps his privacy—it is reasonable to assume that the court would be satisfied with a level of immediacy that is not high (since, as mentioned, I am of the opinion that the question of immediacy is not a question of yes or no, black or white, but that there are various degrees of immediacy). The case would be more difficult if the actor must, in order to neutralise the device, kill the assembler, for then—if it were possible to wait without any great risk—the direction of the law according to which it is indeed necessary to wait is, in my opinion, reasonable. After all, perhaps—as Robinson himself noted regarding this example—the assembler will regret his plans, and will cease preparation of the explosive device.

The case of the time bomb: If indeed there is certainty (as appears from the facts of the case) that the explosion is expected in the distant future, then it is actually possible that the time factor could be decisive. Although the ticking clock beside the explosive device has strong and frightening psychological influences, if it is definitely clear that the device will not explode before a significant period of time passes, a range of different actions may be considered to address the (not immediate) danger, such as evacuation of the building and professional treatment of the device. I am of the opinion that this example, which is discussed in the Landau Report, activates intuitions that many of us have with regard to an explosive device that is attached to a ticking clock; these intuitions are founded on life experience, according to which the period of time that is 'assigned' by the clock is not a year, but indeed, very brief. However, if the period of time is very long, such that during this period it would be possible to safely neutralise the device, it is actually possible to establish that the danger is not immediate, with all that this means regarding lack of authorisation for the individual to violate the prohibitions established in law regarding the neutralisation of the device. An additional feeling that exists for some of the public and that also influences their attitude with regard to this example of planting a bomb, is that it is desirable that the security forces be equipped with the tools (not only physical tools, but also legal ones) that are

[671] In passing, it should be noted that if the preparation of the device was within the scope of a 'crime', it is possible that the law itself would require its immediate prevention—see, eg, s 262 of the Israeli Penal Code 1977. In certain cases, there could also be influence of the 'Thou shalt not stand against the blood of thy neighbour law', 1998.

required for their success in their war on terror. However, as mentioned, my opinion is that the legislator must treat this issue directly—with an examination of all its aspects and conscious adaptation of a fitting solution. There should not be any distortion of the general compulsion defences in order to achieve this solution, such as would permit an action even in the absence of immediate danger. The danger embodied in the waiver of immediacy is great, since such a waiver makes the historic fear present in English law that anarchy could be caused by the compulsion defences very realistic.[672] It has been said that there is no place for this fear when an immediacy requirement exists. However, in the absence of this requirement of immediacy of the danger, when no emergency, situation of pressure, or situation of compulsion is involved, the fear that anarchy will prevail is actually very realistic if individuals are invited to contravene criminal prohibitions by relying solely on their own personal value judgment, according to which the cost of their action (that is forbidden by law) is preferable to the cost of avoiding it (a danger that is not necessarily immediate).

The dangers involved in the use of the compulsion defences for non-intended purposes while relinquishing the immediacy requirement—were noted by many scholars who vehemently opposed the opinion of the authors of the Landau Report. A significant portion of this writing is collected in Vol 23 of the *Israel Law Review*, where two of the volume's three issues were devoted to this subject.[673] I shall not detail the opinions that are expressed there, especially since most of them digress from the subject under discussion, by relating first and foremost to the issue that was then in question (the torture of persons interrogated by the security services) and to the 'necessity' defence (and not to private defence). It is interesting, however, to note that even Robinson, on whose opinion, that no independent requirement of immediacy of the danger should be demanded, the authors of the Landau Report relied, expressed his reservations in a letter to the editor of the journal with regard to the results arrived at by the authors.[674]

The last word in this interesting evolution in Israeli law has been declared, in the meantime, by the legislator, who established an explicit requirement of immediacy both regarding necessity and self-defence, although he did so in a relatively weak formulation, which refers to the immediacy of the necessity of the action ('immediately required') and not to the immediacy of the danger.[675]

[672] See n 285 above and accompanying text.

[673] See *Israel Law Review*, vol 23 (1989) where the articles by Gur-Arye; Robinson; Dershowitz; Feller; Kremnitzer; Moore; Kadish; Zuckerman and Zamir appear. See also Gur-Arye, n 13 above, at 233–34.

[674] See PH Robinson, 'Letter to the Editor' (1989) 23 *Israel Law Review* 189.

[675] Arts 34j (self-defence) and 34k (necessity) of the Israeli Penal Code 1977 as determined in Amendment no 39, 1994. To complete the picture—the ruling delivered in 1999 by the Israeli Supreme Court sitting as the High Court of Justice, in the appeal of *The Public Committee against Torture in Israel, The Association for Civil Rights in Israel et al v the Israeli Government, the General Security Services et al*, PD 53 (4) 817. In this ruling, it was determined, inter alia: 'The exception of "necessity" does not serve as authority for the investigators of the General Security Services to use physical means during

3.7.4 The Issue of Human Traps

'A' installed a device in his house that was meant to electrocute uninvited guests. When A was absent from his home, 'B' tried to break in to it in order to steal property, he was electrocuted and this caused him severe bodily injury. 'C' trained his fierce dog to dig his teeth into the throats of strangers. 'D', who arrived on the premises of C in order to illegally inflict harm on C because of a dispute between them, was attacked by the dog and died. Does private defence apply to the positioning and operation of traps that are intended to harm people?[676]

From the aspect of the issue of immediacy of danger, the human trap constitutes a special case, which raises sharply the question of the first point in time from which private defence is justified. The trap involves a sort of pre-emptive strike. Although on the one hand the defensive force is premature, on the other hand it is subject to a condition (the appearance of the aggressor).[677]

their interrogation'. As to the subject of our discussion—the immediacy requirement—the ruling established, with reservations, the following:

> We are willing to assume—although even this matter is under dispute . . . that this exception [the necessity defence—author's clarification] is liable to exist in situations of a 'ticking bomb', and that the immediacy requirement ('immediately demanded' in order to save life) relates to the immediacy of the action and not to the immediacy of the danger. Therefore, immediacy exists even if the bomb is liable to explode several days later and perhaps even a number of weeks later. On the condition that the actualization of the danger is certain and there is no other possible way to prevent this actualization; ie, that there exists a concrete and imminent measure of danger that the explosion will occur (*ibid*, at 843; 842; translated by the author).

[676] It should be clarified that the question of the criminal responsibility of the person who sets the trap is also influenced by the existence of the doctrine of conditional intention (or awareness—according to the requisite *mens rea*). Consequently, the fact that the person who sets the trap did not intend to injure the potential aggressor except if and when the aggressor attacked, and that he would prefer the aggressor not to attack at all, does not negate the existence of (conditional) intention.

[677] In the legal literature—due to, inter alia, the American Model Penal Code (see s 3.06(5) of the MPC; and see, eg, the location of the discussion of the issue of the traps in the paragraphs dealing with defence of property in 2 Robinson, (1984), n 37 above, at 108ff; La Fave and Scott, n 43 above, at 671ff)—the trap is usually included in the discussion of defence of property. Since the use of traps is not limited to the defence of property alone (since there could definitely be use of a trap to protect the persons in the dwelling), and since the important characteristic of the issue of the trap—from the aspect of conditions of private defence—is the question of immediacy of the danger, I have chosen to address it in the context of this chapter, in contrast to the accepted setting.

Before proceeding to the discussion of the aspect of immediacy in the use of the trap, it should be noted that it is definitely likely to raise additional questions, such as proportionality, necessity, the mental element, the very existence of the danger and probability of its occurrence. However, in my opinion, such questions do not raise any special difficulty that is particular to the matter of the trap, and they do not require special rules in contrast to other cases. The question that is widely addressed with regard to traps—apart from the question of immediacy—is the requirement of proportionality. This requirement is apparently the real reason for the usual negation of lethal traps for the protection of property (see, eg, s 3.06(5)(a) of the MPC; Gordon, n 1 above, at 753; and the ruling in the case of *People v Ceballos* 12 Cal 3d 470, 526 P 2d 241 (1974) (a string was tied to a revolver so that when the

In the above sections, I have already noted the implications of the rationale of private defence for the immediacy requirement. What was said there is also valid for the case of the trap. However, in this special case there are additional considerations: first, with regard to the matter of the aggressor's guilt. This guilt is only revealed at the time of the attack and with the activation of the trap, and is unknown at the time that the trap is set. Accordingly, there is a significant factor of random chance here, for just as the aggressor may have obvious and dangerous criminal intentions towards the person attacked, he might also be a completely innocent person, such as a drunken neighbour, a child, an official from the security or rescue services (a policeman, a fireman), etc. When up against such an innocent aggressor, private defence is not justified.[678] This possibility of harm (uncontrolled, at the time of the event itself, by the one who set the trap) to innocent people has great influence also on the factor of the social-legal order, and there is no doubt that it harms it. This difficulty can be reduced (although, apparently, it cannot completely be prevented) by using only visible means to prevent access (such as a fence with pointed slats) and by giving a warning (for example, an appropriate sign that warns about a dangerous dog) as distinguished from hidden traps (such as camouflaged holes and spring guns). A distinction, in this spirit, between visible means, that are liable to deter a potential aggressor, and hidden means, that may testify that the intention of the actor (the one who set the trap) was revenge and not deterrence, exists in English law, at least in tort law.[679]

Second, what is special to the trap is that at the stage when the actor acts and sets the trap, immediacy does not exist (for the danger is not yet immediate) and there is no situation of compulsion. Prima facie, it would consequently be possible to summarily reject the existence of private defence, but it must be noted that the defensive force is also not activated at the stage when the trap is set, but is delayed to a later stage: the stage when the danger may be immediate.

This gap between the stage of setting up the trap—when there is no immediate danger—and the stage when the trap is activated—when there is sometimes

burglar opened the door of the parking lot it shot into his face). However, compare this to the French ruling of a different spirit that was noted by Silving, n 1 above, at 589). It may also be that the accepted context for addressing the trap—as part of the discussion of defence of property—stems from the difficulty regarding the matter of the principle of proportionality that is raised by human traps whose purpose is only for the defence of property. Thus, eg, great importance is usually attributed—both in the case law and in the literature—to the presence of the actor (the one who sets the trap) at the location of the event at the time of the attack, and operation of the trap. The action of the actor is viewed as pure defence of property when he is absent, as opposed to being seen as defence of the body when he is present (see the *Ceballos* ruling, *ibid*; and Robinson (1984), n 37 above, vol 2 at 108). An additional factor with great significance in this matter, that will be discussed in depth further on, is the quasi-holiness attributed to an individual's residential dwelling and the tendency to permit broad defence of it (see Ch 4.5 below and compare to Hall *et al*, n 582 above, at 456, presenting an opinion that legislation regarding traps does not necessarily reflect the attitude to the dwelling, since there is also consideration of danger to innocent persons).

[678] As detailed in Ch 1.5.3 above.

[679] See Englard in Tedeschi, n 1 above, at 290.

immediate danger—led American law to a rule, according to which the person setting the trap acts at his own peril, where the decisive test is: was it justified to use force identical to that which was used by means of the trap if the actor was present at the scene at the time of the event?[680] If the trap, for example, caused severe bodily harm to a person who committed a slight trespass, the person who set the trap would not be exempt from criminal responsibility (because of the lack of proportionality), while if the trap caused such an injury to an armed burglar, the matter would be considered within the scope of private defence. Such a test is undesirable, because it is based very significantly on chance. One factor of chance, which is not exclusive to the issue of traps, is the occurrence of a required result where it is required (ie, in offences determined by their outcome). To this factor of inevitability (insofar as the establishment of prohibitions in the form of offences determined by their result is accepted) is added another aspect of chance: the aggressor's intention, in particular, and his criminal responsibility, in general, as demonstrated above.[681] Moreover, if the hypothetical presence of the actor is not assumed—viewing defence of mere property as if it were defence of the body—a third significant factor of chance exists, and this is the actual presence of the actor (or for example, of other residents of the house) in the dwelling: if they are present—actions taken involve defence of the body and the justified defensive force is therefore large, and in their absence—the issue is merely defence of property and the justified defensive force is therefore small.[682]

The drafters of the Model Penal Code avoided the above chance test, and in their casuistic manner provided for the issue of the trap in great detail. Beyond the criticism regarding the manner of this overly detailed legislation (for example, the drafters unnecessarily repeat the negation of lethal force for defence of property) and of addressing the issue of the trap under the section concerning the defence of property (while, as mentioned, a person may also defend his body and his dwelling by means of a trap), it is my opinion that there is a good reason for the requirement that is established within this framework in the MPC, according to which the traps must be of the type that is commonly used, or they must be accompanied by a noticeable warning.[683]

[680] See, eg, *American Jurisprudence*, n 500 above, vol 6, at 78; La Fave and Scott, n 43 above, at 671–72.

[681] This is the reason that is presented in the explanatory wording of the MPC for the rejection of this random test—see the Tentative Draft No 8 (Philadelphia, 1958), at 48. See also in this spirit, *People v Ceballos* 12 Cal 3d 470, 526 P 2d 241 (1974). Because of this random chance, Perkins and Boyce suggested that the reader should completely avoid the use of a lethal trap—see Perkins and Boyce, n 85 above, at 1158.

[682] It may be that the presence in the home would not be random chance—if the trap is indeed intended for the defence of the residents, and is activated only when they are at home. However, I refer to traps that are set up for the defence of property and that are activated with no connection to the presence of the residents in the home—for then their presence is purely a matter of chance.

[683] See s 3.06(5) of the American MPC in general, and sub-s (c) in particular.

Another and preferable way of dealing with the issue of the human trap is to provide a specific prohibition that restricts its use. In English law, for example, there is an offence that prohibits the installation of a human trap except for the defence of the dwelling during night hours. Other specific prohibitions relate to guard dogs.[684] I am of the opinion that it is desirable to formulate the legal framework for the issue of human traps by means of a specific offence, characterised as an offence of endangerment. It would suffice for the establishment of this offence that the human trap was set up in violation of the conditions provided in the definition of the offence, so that its establishment is not dependent on random chance. It seems that today there is no dispute that the trend in modern law should be one of basing criminal responsibility on the actions and guilt of the actor, and not on completely random factors. My opinion in regard to such an offence is that the installation of lethal human traps should be entirely forbidden—because of the reasonable possibility that an innocent person will fall into the snare. The setting of hidden traps should also be prohibited, both because it is preferable to deter a potential criminal rather than to harm him, and due to the danger that an innocent person might be caught in the trap. In addition, it is desirable that this framework should take into account the value protected by the trap, given the genuine need for and the great importance of proper protection for residential dwellings. Such a legislative arrangement, that will already at the stage of installation of the trap determine which traps are permitted (and perhaps to condition their use on the receipt of a licence from the authorities) and which are prohibited, may render superfluous the random and undesirable decision in the issue of the human trap by means of 'private defence'.

3.8 The Proportionality Requirement

3.8.1 General

If I had to choose a single condition for the establishment of private defence, the precise content and importance of which would at one and the same time be part of the suitable rationale for this defence, my choice would fall on the requirement of proportionality.

The main significance of the requirement of proportionality, which also constitutes the chief ground for criticising it, is that sometimes, despite the existence of necessity, the attacked person is required to refrain from defending himself and to suffer injury, because the price of this defensive action is too high. It is important

[684] See Williams (1983), n 1 above, at 518–19. With regard to similar legislation in various states in the United States that prohibits the installation of spring guns except for the defence of a dwelling at night, see *American Jurisprudence*, n 500 above, vol 6, at 78.

to emphasise that this 'price' is examined from the point of view of society as a whole, since it is definitely possible that excessive injury to the aggressor would—from the point of view of the person attacked—be a reasonable price to pay. As was already noted by Bacon, the decision regarding prioritising values should not be left to the citizen, for in this way: '[A]ll proportion is lost . . . And certainly it is the nature of extreme self-lovers, as they will set an house on fire, and it were but to roast eggs.'[685]

In fact, the requirement of proportionality constitutes an order to a person not to defend himself at all in certain situations and to relinquish his right to the aggressor, so that it could definitely happen that 'wrong' would prevail over 'right'.[686] As said, this is also the main ground for criticism of the requirement of proportionality.

What can and should be learned from the rationale that underlies private defence for the requirement of proportionality? The rationale has two central implications for this requirement. The first is the very existence and necessity of such a requirement and the second is the flexible nature of this requirement. The former implication will be discussed first.

As noted, the factor of autonomy acts to support maximum protection for the person attacked without establishing a requirement of any degree of proportionality. However, this factor does not exist alone in the framework, and consequently its defence is not absolute. The factor of the social-legal order is important for this matter. As noted, excessive injury to the aggressor not only fails to protect the social-legal order, but on the contrary: it inflicts upon it significant injury, to the extent that it actually acts to negate private defence.[687] If we return to consider the example of the attacked person who defends himself by use of a lethal shot against an aggressor who pushes him out of the queue for the bus, then here, even though it seems as if the attacked person is defending the social-legal order against the illegal attack of the aggressor, the truth of the matter is that given his gross deviation from the principle of proportionality, his action actually infringes this order, the security and trust of the law-abiding citizens in the legal system. Given the educational, directional and declarative aspects of justification of private defence, the justification of taking a person's life in order to repel a slight push could actually be interpreted—correctly—as the absence of a social-legal order fit for its name. Even the organised and institutionalised authorities that society has created in order to protect the public are subject to limitations, including those derived from the principle of proportionality, and it is self-evident that private defence should also be subject to similar limitations (although not necessarily identical ones).

[685] See Francis Bacon, *Essays: Of Wisdom for a Man's Self* (1625).

[686] See also Alexander, n 278 above, at 1180; Robinson (1984), n 37 above, vol 1 at 88; Williams (1983), n 1 above, at 506; Fletcher (1973), n 1 above, at 386.

[687] This is, as mentioned, the significance of the dotted square in Figure 2 in Ch 1.6.3 above.

It should be remembered, that apart from the sphere of the abstract interests in the balance that underlies private defence, there is also the sphere of the physical evils—the expected danger to the legitimate interest of the person attacked (if he does not use defensive force) balanced against the danger anticpated to the aggressor (if defensive force is exerted). This sphere in particular, and the general framework of the choice of the 'best possible good' (a choice that is usually considered as the 'lesser evil') in general, support the requirement of proportionality and even require its existence—literally by definition. It is therefore easy to prove that the very existence of the requirement of proportionality should not be placed in doubt.

As to the second implication of the rationale of private defence for the proportionality requirement—the flexible nature of this requirement—if the justification of private defence was derived only and entirely from the comparison between the physical evils anticipated for the aggressor and the person attacked, then a very rigid requirement of proportionality would be required, ie, the expected injury to the person attacked would have to be greater than the expected injury to the aggressor in order to justify private defence. This is the situation in regard to the defence of 'necessity' as a justification. In order to justify the injury by the actor to the legitimate interest of an innocent person, it is required that the interest that the actor saves should be more important—and perhaps even significantly so—than the interest that the actor injures during and for the purpose of the rescue. The situation is very different with regard to private defence, which involves an aggressor with criminal responsibility who is liable to infringe both the autonomy of the person attacked and also the social-legal order. Consequently, it is not only the legitimate interests of the two parties that are placed on the scales, but on one of its sides (where the legitimate interest of the person attacked is located) additional factors are added: the autonomy of the person attacked, the guilt of the aggressor—which, as mentioned, provides legal and moral grounds for imposing a certain reduction in the value of the aggressor's interests—and the social-legal order. A striking example of this flexibility of the proportionality requirement is the accepted assumption that the exercise of lethal force is justified even when the danger to the attacked person is not one of death, but rather one of severe bodily harm.

From the aspect of desirable law, two main ways exist to establish a flexible requirement of proportionality such as this: the first—to demand actual proportionality—ie, a complete balance between the two sides of the scales, and even a tendency towards the justification of private defence, while also taking into account (in the graphic sense of placing it on the scales) the abstract interests that are part of the balance—which are the autonomy of the person attacked, the guilt of the aggressor, and the social-legal order.[688] The second possibility is to be

[688] See in this spirit the discussion of Richards' approach in Gorr, n 191 above, at 257ff.

satisfied—in light of the abstract factors that are part of the balance and while taking them into account—with the simpler and more flexible requirement of proportionality, within whose framework only the physical evils will be considered. Between these two possible options, I choose the second, principally because it provides more significant guidance. Arranging the entire complex balance—while 'weighing on the scales' both the physical and the abstract interests in each specific case—is complicated and complex to the extent that the guidance that it provides is very limited. In contrast, if in light of the abstract interests we establish a flexible requirement of proportionality (a determination which should correctly be made through legislation), within whose framework it will only be necessary to examine the physical evils of each specific case, then we shall receive far more significant guidance, in particular due to the relative simplicity of the test. As to the formulation of the requirement of proportionality in order to achieve this desired flexibility, it would appear that it is possible to choose one of two main formulations: the first—'the negative formulation'—negating defensive force that is out of (all) proportion. The second is the requirement for reasonable (or appropriate) correlation—in clear distinction from perfect correlation.[689]

A number of scholars[690] noted the relative flexibility of the requirement of proportionality within the framework of private defence (which is distinctly different from that which exists, for example, within the defence of 'necessity'). Thus, for example Enker wrote:

> There is no doubt that in the case of private defence it is permitted to cause an injury to the aggressor that is greater than that which was expected if this is the only way in which to repel his illegal attack and to prevent the expected damage . . . what, if so, is the significance of the requirement that the accused should not cause damage that is not proportionate to the damage that he wished to prevent? . . . it is forbidden to cause too great an injury to the aggressor beyond that which he was about to cause . . . the life and body of the aggressor are not forsaken.[691]

Robinson expressed his opinion that, in effect, it is entirely impossible to strike an accurate balance of interests, and that a flexible requirement of proportionality is therefore preferable.[692] This flexible requirement also has the additional advantage of being suitable for special cases, including considerations such as 'the poor man's lamb' and property that has great sentimental value for its owner.[693]

[689] I shall return to these formulations and others, when relating to—in order to draw inspiration—the existing legal situation in various legal systems.

[690] See, eg, Gordon, n 1 above, at 825 ('only cruel excess will defeat the plea'); Russell, n 40 above, at 681 ('was in some degree proportionable'); Ashworth, n 183 above, at 296 ('reasonably proportionate'), and Williams (1983), n 1 above, at 506, 522 ('out of all proportion').

[691] Enker, n 89 above, at 113–14 (translated by the author).

[692] See Robinson (1984), n 37 above, vol 1 at 89. Additional reasoning that he presents for the flexibility of the requirement of proportionality in private defence is that the defended values are abstract—see Robinson (1984), n 37 above, vol 2 at 6. However, I am of the opinion that this is not the reason for flexibility, for even within the framework of 'necessity' abstract values are involved.

[693] See Kremnitzer, n 10 above, at 201 fn 75.

As noted, the (flexible) requirement of proportionality is an inevitable outcome of the rationale that underlies private defence. However, there is an approach according to which private defence is founded almost exclusively on the autonomy of the individual, and according to this approach there is absolutely no requirement of proportionality. I have already noted the principles of this approach, clear expressions of which are to be found in German law, and its striking shortcomings, which are set forth in the discussions of theory based on autonomy, and in the test-case of the innocent aggressor.[694] The classic and shocking example of the result of this undesirable approach is the ruling, which was noted above, in which the German High Court approved the acquittal of the owner of an orchard who shot at young thieves who tried to run off with the fruit, and injured one of them seriously.[695]

As noted by several scholars, the German system is obliged, as least nominally, to provide the same measure of protection (the maximum protection) to all legal rights.[696] However, my opinion is that the rights of the individual—including the right to defend his autonomy—are relative and not absolute.[697] The respective weight of each of the rights is not identical, and the protection that the law provides for them is not equal.[698] The law is definitely supposed to consider (and does so in practice) the rights of the aggressor as well; the main result of this consideration being a requirement of proportionality.[699]

In fact, even some of those who negate the legal requirement of proportionality recognise its existence, at least as an ethical rule.[700] Fletcher explains that the German system is not 'flat' as is the Anglo-American system (which is based on the criteria of reasonability), but that it is composed of two stages: the first—an absolute right to the protection of autonomy, while the second includes humanitarian-altruistic considerations that lead to the proportionality requirement. In his opinion, everyone agrees that proportionality is not required (since for example, the killing of a rapist is justified), but at a certain stage in the distancing of the sides of the scales one from the other, the criteria of justice replaces our commitment to 'right' and to autonomy.[701] According to another approach that Fletcher presents,

[694] See (correspondingly) Chs 1.5.4 and 1.5.3 above, and especially the text accompanying n 251. Regarding the absence of the demand of proportionality in current German law, see Bernsmann, n 265 above, at 172, 178.

[695] See Eser, n 26 above, at 633.

[696] See, eg, Gorr, n 191 above, at 256ff; Fletcher (1973), n 1 above, at 383; Fletcher (1978), n 1 above, at 871.

[697] See Ch 1.5.1 above.

[698] Thus, eg, the punishment for an offence is suited to the value which it protects, in distinct contrast to the situation that existed in the past, in English law (eg), when the punishment for many crimes was none other than the maximum punishment—the death penalty—B Sangero, 'On Capital Punishment in General and on the Death Penalty for Murder Committed During a Terrorist Act in Particular' (2002) 2 *Alei Mishpat* 127, 129 (Hebrew).

[699] See Chs 1.5.6; 1.5.5; 1.6 above.

[700] See, eg, Silving, n 1 above, at 599.

[701] See Fletcher, n 117 above, at 210, 214.

the person attacked has the discretion whether to respond to altruism and to spare the aggressor, but he is not obliged to act according to a requirement of proportionality.[702] In previous chapters, I have noted the great weakness of such approaches, that range from the lack of accuracy found in discussion of an absolute right (when in fact—given the 'second stage' of the 'non-flat' system—it is not absolute in any way) to the lack of accuracy found in the description that the criterion of justice enters the picture only 'at a certain stage of the distancing of the sides of the scales', while, in effect, this criterion has a full presence all along the way. The weakness of these approaches also reaches as far as the very undesirable situation of the absence of any guidance to the individual—even where human life is concerned—leaving the decision entirely to the attacked person himself.[703]

An additional argument that Fletcher raises against the proportionality requirement is that it invites excessive caution in order to avoid the danger of conviction, something that could lead to improper surrender and could encourage criminal behaviour.[704] In my view, this argument is not very strong, in light of the flexibility of the proportionality requirement and the possibility of an exemption (on the basis of an excuse) or, at least, mitigated punishment in a case where excessive defensive force is used.[705] Moreover, even if the argument has some merit, such caution is still desirable in order to protect values that are very important to society, first and foremost, human life (since the aggressor is also a human being). If we consider two of the examples frequently used in the literature, then both the conscience of the members of society and their sense of justice completely negate the justification of killing a person in order to prevent the theft of apples, or to prevent the noise of a motorcycle.[706] It is possible to learn something significant here even from the very character of private defence as a justification; it is not reasonably possible to say that such killings are justified acts.

Even in German law (and in the law of the former Soviet Union), in which the proportionality requirement was—at least theoretically—rejected, the courts and scholars did not adjust to all the difficult results of this approach and they developed replacements for the requirement of proportionality. As Eser notes, the tendency today is not to recognise private defence in extreme cases, such as the killing of a person who steals a bottle of syrup by the store security guard and other cases in which the deviation from the principle of proportionality is obvious.[707] Two principal methods are employed to achieve this result. The first of these is the making of categorical distinctions in general, and a distinction with regard to lethal force in particular, a distinction according to which the use of defensive lethal

[702] See Fletcher, n 37 above, at 100.
[703] See Chs 1.5.3 and 1.5.4 above.
[704] See Fletcher (1973), n 1 above, at 382.
[705] See—extensively—Ch 5.3 below.
[706] See in this spirit, Kremnitzer, n 10 above, at 189.
[707] See Eser, n 26 above, at 633; and also Bernsmann, n 265 above, at 178.

force is restricted so that it is not justified for the protection of an interest that has little value.[708]

The second method is to rely on the doctrine of 'abuse of right'. The source of this doctrine is the general principle of good faith that is found in the German civil law. The assumption is that the excessive use of the right to self-defence constitutes an abuse of that right. The leading decision in this matter was handed down in 1963 by the High Court of Bavaria in the following case: the driver of a car wanted to park in a place where he was entitled to do so. A woman who wished to reserve this parking place for herself did so using her body, physically refusing to vacate the parking place. The driver of the car pushed the woman out of the parking place by proceeding with his car into the space. He defended himself by claiming self-defence. The court rejected this claim, on the basis of the doctrine of abuse of right, and held that although the car owner had a right, he had nevertheless abused it. Subsequently, this ruling was frequently used as authority to apply the doctrine of abuse of right in order to negate private defence in certain cases.[709] Beyond the difficulty in viewing this ruling as authority for our present discussion, since it appears from the facts of the case that the condition of necessity was not actually fulfilled, the principal difficulty that is raised by the doctrine stems from the legality principle. For a determination that the use that was made of a right is an abuse, was not only made by a court in a specific case instead of by the legislator, but it also constitutes a serious expansion of criminal responsibility: the denial of the defence to a person who without the exercise of this doctrine would have been acquitted, and who therefore can expect conviction and punishment due to the application of the doctrine. I have already referred to the special significance of the principle of legality with regard to the criminal law defences—as distinguished from criminal offences—during the discussion on the distinction between an offence and a defence.[710] It appears that according to all the main approaches, such an expansion of criminal responsibility by the court will be considered problematic.

The alternative method—qualifying private defence by means of lethal defensive force so that it will not apply to the protection of trivial interests—constitutes a step in the right direction. It is, however, insufficient. The requirement of proportionality has crucial importance not only in the limited context of lethal defensive force, but also in the face of more moderate defensive force. Thus, for example, it seems that the inflicting of severe 'dry' blows (those that do not cause any real bodily harm) in order to protect property of insignificant value or in order

[708] See, eg, Fletcher (1973), n 1 above, at 384, 387; Eser, n 26 above, at 633; Fletcher (1978), n 1 above, at 873; Kremnitzer, n 10 above, at 208 and Bernsmann, n 265 above, at 178.

[709] See Fletcher (1978), n 1 above, at 873ff; Fletcher (1973), n 1 above, at 385ff; Fletcher, n 37 above, at 72ff; (the reference for the case: 1963 NJW (Neue Juristische Wochenschrift), at 824).

[710] See Ch 1.2 above.

to prevent a slight push in the queue for the bus cannot be considered as justified in a civilised society.[711]

These two alternatives, and also other alternatives that have been suggested, have the following deficiencies: overly limited application (while it is desirable that the application of the proportionality requirement be broad), difficulties in principle (violation of the legality principle) and a lack of honesty that leads to bad guidance. The very fact that such alternatives are needed constitutes—from a substantive and principled point of view—recognition of the principle of proportionality. If so—why not call it what it is and specify explicitly by statute a requirement of a certain proportionality, with all that this involves from the declaratory, educational (recognition of the special status of certain values such as human life; humanity) and instructive point of view?[712]

3.8.2 The Content of the Proportionality Requirement

We have already noted the key point for the understanding of the proportionality requirement within the framework of private defence; this is an essential but flexible requirement. This requirement is well accepted in Anglo-American law as expressed in the literature, in court rulings,[713] in the existing legislation and—in a less direct way—in draft laws.[714] In the decisive majority of the existing laws overseas that were examined, the requirement is formulated in a flexible manner, using

[711] It is emphasised, that said requirement of proportionality does not imply that the citizen is obliged to relinquish his interest to the aggressor in all those cases where the attacked interest is of little value. In the great majority of the cases it will be sufficient to use moderate defensive force in order to protect the attacked interest. Thus, eg, when the aggressor wishes to take property with little value from the attacked person (such as a simple pencil), it should usually be sufficient to provide a warning, and at the most to use moderate defensive force (such as a push or a light blow) in order to protect the asset. Accordingly, the justification for the use of tremendous defensive force will be negated by the requirement of necessity. Only in rare cases in which moderate means would not suffice, and therefore a large amount of force would be necessitated, would the question of proportionality arise. Thus, in my view, obliging the citizen to waive his right in such rare cases is not as outrageous as it would appear at first glance.

An additional trend in German law was to establish that private defence would not apply where an excessive deviation from proportionality was concerned. Thus, eg, it is recognised according to this perception that fatal shots aimed at a child that is about to steal an apple are not to be justified. Even those who support this approach do not negate lethal force to protect property, but would, for example, justify the killing of a person who ran away with a jewelry box that he stole—see Bernsmann, n 265 above, at 177–78 (Bernsmann also has reservations regarding the justification of taking human life in order to protect property, even if property of great value is concerned).

[712] Compare the position of Eser, n 26 above, at 633 (claiming that what is important is the very recognition of the principle of proportionality, even if the simple and honest method of a direct and explicit requirement is not chosen).

[713] See, eg, Robinson (1984), n 37 above, at 5; Kadish, n 34 above, at 887; Gordon, n 1 above, at 715; Williams (1983), n 1 above, at 506ff; Ashworth, n 183 above, at 297.

[714] See, eg, s 41 of The Crimes Bill of New Zealand (Wellington, 1989).

principally drafting that includes an element of reasonability,[715] or formulations from a negative perspective (ie, negating the defence only if the defensive force is out of all proportion to the prevented evil).[716]

As to the method of applying the test of proportionality, I am of the opinion that, in distinction from the drafting that is sometimes used of a comparison between the harms,[717] it is preferable to relate to the defensive force itself and not to its results, which may be completely random.[718] The central factors that should be considered are therefore the expected results (or those that can be foreseen[719]) of private defence and of its avoidance. Thus, for example, if the defender hit the aggressor with a punch of his fist without knowing that the aggressor had a 'thin skull', there is not much point—either for the purpose of guiding behaviour or for considerations of fairness and justice—to take into consideration the surprising fatal result, but the punch of the fist itself or its anticipated (or foreseeable) results (which would not usually include death) should be considered. From the opposite direction, lethal shots in the direction of the aggressor's head in order to protect property should be prohibited as contravening the principle of proportionality, even if the actor actually missed the aggressor's body.

With regard to the evaluation of the anticipated results for the aggressor and for the person attacked, the main characteristic factors that should be taken into account are the relative strengths of the sides; a multiplicity of aggressors; an attack with an especially violent character but without a weapon; previous violent behaviour of the aggressor; the type of force used by each side and its strength; etc (this is, of course, not an exhaustive list).[720] Williams, for example, ventured an opinion that it is so common for brutal aggressors in England to kick the heads of their opponents after they fall to the ground, that it is definitely reasonable to take such a serious possibility into account in the evaluation of the danger.[721]

[715] See, eg, s 34(6) of the Argentinian Penal Code (1921); s 21 of the Korean Penal Code (1953); s 33 of the Swiss Penal Code (1937); ss 271–73 of the Australian (Queensland) Penal Code; s 8 of the Spanish Penal Code (1944; 1963).

The term 'reasonability' is also used in Art 34p of the Israeli Penal Code 1977.

[716] See, eg, s 24(1) of the Swedish Penal Code (1962, 1972); s 5 of the Greenland Penal Code (1954) and s 48 of the Norwegian Penal Code (1902).

[717] Eg, the original formulation of s 22 of the Israeli Penal Code 1977 was 'provided that . . . the harm inflicted by the act was not disproportionate to the harm avoided'.

[718] For similar opinions see Perkins and Boyce, n 85 above, at 1188; Gordon, n 1 above, at 761; Ashworth, n 183 above, at 296.

[719] I will refer to the distinction between the expected results and the results that can be foreseen below—see the text accompanying n 769.

[720] See on this matter: La Fave and Scott, n 43 above, at 653; Card, Cross and Jones, n 180 above, at 628.

[721] See Williams (1983), n 1 above, at 506.

Such an evaluation must take into account a very important factor that I have noted previously—the probability of the occurrence of the danger.[722] The need to weigh the probability of the occurrence of the danger (and the occurrence of the evil), of course, add to the great complexity of performing the test of proportionality. This complexity constitutes an additional reason (with a limited but existing weight) for favouring a flexible test over the requirement for perfect balance.

Another interesting suggestion that was raised is to take into account in the evaluation of proportionality the possibility that the victim might gain full compensation for his injury if he avoids the use of force.[723] I have referred previously to this possibility in the context of the discussion of the necessity requirement.[724]

Another case that deserves mention is that of multiple aggressors. In my view, in such a case, the existence of the requirement of proportionality should be examined in relation to the injury to each aggressor separately. There should be no joining together of all the aggressors for this purpose. It would be possible, for example, to justify a defensive action during which the attacked person kills a number of aggressors if this is necessary to save his life. This opinion can be based directly on the rationale for private defence: although it is possible that the injury to the autonomy of the person attacked is not increased by the multiplicity of the aggressors, there is no doubt that each of them has his own 'aggressor's guilt' and that each of them independently infringes the social-legal order.[725]

[722] See the discussion of the severity of the damage in section 3.5.2 above and also the text accompanying n 636 above. Gorr performed an interesting attempted analysis that compares the various possible risks in light of the level of danger and the probability of its occurrence. He constructed a table of nine possible combinations of danger level (that might be trivial, moderate or serious) and the probability of occurrence (that could be almost certain; significant but not certain; or insignificant). Gorr tries to establish certain determinations with regard to these nine possible combinations in respect to the permission for lethal defensive force. The attempt, in itself, is interesting. However, the reality seems to me to be far more complex. Eg, there is also a need for solutions to the exercise of defensive force that is not lethal. It is also doubtful whether the division of the level of the danger and the probability of its occurrence into (only) three ranks for each provides the minimally necessary accuracy. I am of the opinion that there is no other resort but to leave the principal decision with regard to the requirement of proportionality in the hands of the court in light of the general test. This general test can and should be supplemented with specific instruction, especially with regard to lethal defensive force, but not as exclusive instruction standing alone without a general test. See Gorr, n 191 above, at 259ff.

[723] See Gorr, n 191 above, at 261ff. Gorr restricts his proposal to lethal defensive force and to cases in which the victim knows that he will gain full compensation for his injury, restrictions for which he does not provide a basis and for which I see no reason.

[724] See the text above accompanying n 635.

[725] For a similar approach see Robinson (1984), n 37 above, vol 2 at 70 and Montague, n 181 above, at 32.

At the end of this discussion on the content of the proportionality requirement, it is necessary to note a very important issue in the rule of private defence that is usually seen as a derivation of the requirement for necessity; this is the **duty to retreat**. As I shall demonstrate in the following chapter, which is devoted to this important issue, my opinion is—in contrast to what is usually accepted—that the duty to retreat is not derived from the necessity requirement alone, but also (or—more accurately—principally) from the proportionality requirement.

3.8.3 The Nature and Significance of the Proportionality Requirement in Anglo-American Law

As mentioned, Anglo-American law recognises that not all the legal rights are equal in importance, thus there are rights that justify stronger protection, inter alia, by means of private defence. Consequently, the proportionality requirement is widely accepted in this legal system. However, two striking features that we noted when discussing the principal characteristics of private defence in various legal systems[726] significantly erode this important objective requirement.

The first is the combination of the important and basic requirements of necessity and proportionality under one comprehensive test: reasonability of the defensive force.[727] The chief impact of such unification is related to the subject of our discussion—the significant weakening of the requirement of proportionality.[728] This is because the requirement of necessity does not usually raise any dispute. Joining the requirements for necessity and proportionality in effect implies the relinquishment of any sort of significant guidance by the legislator—not only for the public but also for the judiciary.[729] An additional difficulty that is liable to be caused by combining these requirements (although it is not required by the joining of these concepts) is the thought, which in my opinion is mistaken, that the reasonability of the defensive force is a factual question. This thought is expressed in the Anglo-American legal world both in scholarly writings and also in the referral of the question of reasonability by judges to jurors.[730] Conversely, the requirement for proportionality, by its very nature, has the character of law and not of fact, and it should be decided by the legislator or by a judicial determination based on the discretion granted by the legislator.[731]

The second feature of the law of private defence in the Anglo-American legal system that also significantly erodes the basic requirement for proportionality is the incorrect incorporation of putative private defence into real private defence.[732]

An additional striking phenomenon in Anglo-American case law, which is apparently strongly connected to the incorrect consideration of putative defence,

[726] See Ch 2.2 above.

[727] Recently, the Israeli legislator has also taken this undesirable course of sufficing with the requirement for reasonableness—in s 34p of the Penal Code 1977 (According to Amendment No. 39 from 1994).

[728] See Robinson (1984), n 37 above, vol 2 at 82.

[729] It is, indeed, possible to raise doubts regarding the guidance provided by an explicit proportionality requirement. However, as I shall demonstrate below, I do not propose to suffice with this requirement alone, but to provide, alongside it, considerations for its evaluation, and also to relate specifically to the special category of lethal defensive force.

[730] See, eg, Card, Cross and Jones, n 180 above, at 627; and the 11th edn of their book at 577; Williams (1983), n 1 above, at 503; the encyclopedia *Halsbury's Laws of England*, 4th edn, reissue (London, 1990) vol 11; Cumulative Supplement (1999) vol 11(1) at 350.

[731] See the reasoning for this stance in Ch 5.2.5 below.

[732] I related above to the negative results of this mistaken inclusion—see n 483 above and accompanying text (the English law); n 508 above and accompanying text (the American law).

is the easing of the objective reasonability test by adding subjective features[733] to it. As previously stated, well-known rules on this matter were established in case law: in England by Lord Morris in the case of *Palmer*[734]; in the U.S. by Justice Holmes in the case of *Brown*[735]; and in Israel by Justice Zilberg in the case of *Valdman*[736]. I will not quote these well-known rules again here, but I will suffice with the mention of another well-known adage from the English court in the case of *Reed* (1972), according to which 'In the circumstances one did not use jeweler's scales to measure reasonable force'.[737] This adage is actually desirable, given the required flexibility of the demand for proportionality. However, it is again necessary to voice reservations with regard to these aforementioned famous rules that were established in the cases of *Palmer*, *Brown* and *Valdman*[738].

In order to conclude the discussion of the nature of the requirement of proportionality in Anglo-American law, I wish to note the judgment that was issued in 1986 in New York in the case of *Goetz*.[739] The accused, who carried a revolver without a licence, was harassed in the train by four unarmed youths, one of whom demanded five dollars from him. The accused responded with four shots: one in the chest of one of the youths, the second in the back of the second youth, the third under the arm of the third on the left side of his body, and the fourth in the direction of the fourth youth, who was slightly further away. This last shot missed its target. After he had carefully examined the results of the volley of shots, the accused chose to shoot an additional shot towards the fourth youth and seriously injured him in his spine. Three of the youths recovered from their injuries and one of them remained paralysed and brain damaged. The complete facts of the case point to an actual (attempted) massacre; revenge and not a defence; without necessity, without immediacy of danger (since he continued to shoot even after it had passed) and especially out of all proportion to the danger that faced the accused. The accused himself testified that his goal had been to: 'Murder [the four youths], to hurt them, to make them suffer as much as possible'.[740] The accused also testified that two of the youths had attempted to run away at the time that he

[733] Apart from the authorities referred to above, see also, eg, Ashworth, n 183 above, at 299ff; SMH Yeo, 'The Demise of Excessive Self-Defence in Australia' (1988) *International and Comparative Law Quarterly* 348 at 364ff; Smith and Hogan, n 284 above, at 253ff; Silving, n 1 above, at 562; Gordon, n 1 above, at 760ff; Card, Cross and Jones, n 180 above, at 628.

[734] See the quotation from the judgment in *Palmer v R* (1971) 55 Cr App R 223, 2 WLR 831, in the text above accompanying n 486. For a note on the far-reaching implications of the ruling that greatly weakens the proportionality requirement, see Williams (1983), n 1 above, at 506ff.

[735] See the quotation from the ruling *Brown v US* 256 US 335, 41 S Ct 501 (1921) in the text above accompanying n 507.

[736] See the quotation from the judgment CA 95/60 *Valdman v the Attorney-General* PD 15, 53 in the text above accompanying n 447.

[737] See the ruling *Reed v Wastie* [1972] Crim LR 221.

[738] See the reasons for these reservations in Ch 2.2 above.

[739] See the ruling, *People v Goetz* (NY Ct of App) 68 NY 2d 96, 497 NE 2d 41 (1986).

[740] *Ibid.*

shot them, that a third youth tried to pretend that he did not belong to the group of youths in order to save himself, but was, nevertheless, shot, and that if he had had additional bullets in his revolver he would have shot the youths with additional shots, and would even have held the revolver up against their heads. Amazingly, the accused was acquitted in the first instance of all guilt, and even though the appeal court returned the discussion to the court of the first instance with instructions, the accused was eventually convicted only of the lighter offence of illegal possession of arms.[741]

Without delving too deeply into this ruling and the criminal law of New York, it should be noted that this ruling is, apparently[742], the result of the rules that were discussed previously that join the requirement of proportionality and the requirement of necessity together under the heading of 'reasonability' and include putative defence within actual defence. The phrase in New York law is 'he reasonably believes'. Although the appellate court negated the far-reaching interpretation applied by the court of the first instance to this phrase, according to which the intention of the law was 'reasonable to him', even given this instruction, the accused was acquitted in the appeal on his case.

In a dissertation published by Fletcher following this ruling, entitled 'A Crime of Self-Defense',[743] he expresses greater sympathy for the requirement of proportionality than that which exists in his other writings. He notes, for example, the emphasis placed in modern law—as opposed to the distant past—on 'reason' instead of 'passion', on the fact that the aggressor is also a person with rights, and on the implication of these assumptions—a requirement for a certain proportionality.[744] It is perhaps possible to conclude that the acquittal of *Goetz* altered Fletcher's attitude toward the proportionality requirement.

3.8.4 Deadly Defensive Force

The consideration of separate categories for defensive force in general and for deadly defensive force in particular constitutes a clear, central and important expression of the principle of proportionality.[745] However, such consideration is insufficient and cannot replace the general requirement of proportionality. The

[741] Perhaps it is not superfluous to note that among the five persons who were involved in the affair (the four youths and the accused) there was just one white man—the accused.

[742] Another possible explanation for this ruling is that this was the reaction of the jurors to the multiplicity of cases of burglary in New York, hence the statutory provisions played a relatively marginal role.

[743] See Fletcher's dissertation, n 311 above (the complete title is 'A Crime of Self-Defense: Bernhard Goetz and the Law on Trial').

[744] *Ibid.*

[745] Since there is a consensus that the limitations on deadly defensive force derive from the principle of proportion, the only scholar who is mentioned, is the one who, strangely, saw them as stemming from the requirement for necessity—Heberling, n 62 above, at 933.

restriction, for example, of deadly defensive force will be of no avail in a case of 'empty blows' that are dealt to the aggressor in order to prevent a slight push to the attacked person in the queue for the bus, or a very light injury to property of the attacked person. The need for a general requirement of proportionality is self-evident. Nevertheless, there are legal systems in which the consideration of the principle of proportionality is reduced to restrictions on deadly defensive force, while ignoring this important principle with regard to all the other cases.

The most striking example of a focus on deadly defensive force is the American legal system. There the use of deadly defensive force is usually set forth separately, and it is negated when the danger is not very severe. This feature is so central to American law that it is commonly said that (merely) two distinctions stand at the centre of the law of private defence: between deadly defensive force and other defensive force, and between reasonable defensive force and unreasonable defensive force.[746] It is common to find in-depth discussions in the American literature in which there is no expression of the principle of proportionality except in the important, but overly limited, framework of deadly force.[747]

A striking expression of this approach of American law is found in the way in which private defence is provided for in the Model Penal Code. In this framework, there is no general requirement of proportionality, and not even a general requirement of reasonability (from which—if it existed—it would be possible to derive a general requirement of proportionality). Rather, the only limitation that is provided therein, that in substance constitutes a requirement of proportionality, is that which is imposed on deadly defensive force.

Moreover, even with regard to deadly defensive force, the limitations that are imposed by the authors of the MPC are, in my opinion, insufficient. It is perhaps possible to accept the framework that is provided in section 3.04 for 'Use of force in self-protection', ie, self-defence, since this framework limits the defensive force that may be justified within the context of private defence to cases of defence against danger of death, severe bodily harm, kidnapping or sexual contact accompanied by force or threats.[748] However, it is difficult to accept the framework—that is established in section 3.06—for 'Use of force for the protection of property'. This section permits deadly force for the protection of property in all the following cases:

[746] See the commencement of Perkins' article, n 40 above and Perkins and Boyce, n 85 above, at 1114–17.

[747] Thus, eg, Perkins and Boyce did not even find it necessary to discuss the general requirement for proportionality—apart from their consideration of deadly defensive force—in the almost 50 pages that they devoted to private defence in their book—see Perkins and Boyce, n 85 above, at 1113–60. Thus too in the book by La Fave and Scott, n 43 above, at 649–75.

[748] See s 3.04(2)(b) of the MPC. Section 3.05 applies this arrangement to defence of another person as well.

(i) The person against whom the force is used is attempting to dispossess him of his dwelling otherwise than under a claim of right to its possession; or
(ii) The person against whom the force is used is attempting to commit or consummate arson, burglary, robbery or other felonious theft or property destruction and either:

(1) has employed or threatened deadly force against or in the presence of the actor; or
(2) the use of force other than deadly force to prevent the commission or the consummation of the crime would expose the actor or another in his presence to substantial danger of serious bodily harm.[749]

In my view, this arrangement is incompatible with the important principle of proportionality. In order to maintain this claim of incompatibility, it is important to remember that if the aggressor endangers either the person attacked or another person, private defence is already permitted within the framework of sections 3.04 that deals with self-defence, and 3.05 that deals with the defence of another person. Thus, section 3.06 permits deadly force for the protection of mere property. Although in a considerable percentage of the attacks that fall within the scope of this section there is also liable to be serious risk to a person's body, the suitable context for such a risk would be, as noted, within the category of self-defence and defence of another person. But regarding those cases that fall within the boundaries of this section in which there is no such danger, there is no room—in light of the principle of proportionality—for deadly defensive force. It is easy to imagine cases of arson, burglary, theft and property destruction that do not endanger anyone. If we illustrate with a case in which a thief takes the television of the actor and runs away with it, I believe that the principle of proportionality compels the actor—if the only way in which he can stop the thief who is running away and rescue his goods is to use deadly force—to allow the thief to run away (for the present), and not to shoot him in the back.

As to the alternative of (ii)(2) above, this completely ignores the existing possibility of not using defensive force at all. If indeed the only way to prevent the commission of a property offence without endangering the actor or others (apart from the aggressor) is the use of deadly force, I am of the opinion that waiving the use of defensive force is actually the preferable choice of action.

It is interesting to note that the drafters were well aware of the far-reaching ramifications of the arrangement that they provided. Thus, for example, in the explanatory text for the above-mentioned alternative (ii)(2) (an alternative that did not exist in the draft of 1958, and was added to the 1962 version), they present an example of a thief who runs away with the goods as a case that requires this alternative.

[749] See s 3.06(3)(d) of the MPC. For detailed interpretation of these ss of the MPC see, eg, Heberling, n 62 above, at 933–44.

Given this arrangement of the MPC, and in light of the fact that many of the legislators in the various states of the United States have followed in the footsteps of the MPC,[750] I am doubtful whether Perkins' statement, that there is a clear rule in American law—which is not subject to the discretion of the jurors—according to which the use of deadly defensive force against force that is not deadly is prohibited,[751] is still correct.

A more extreme framework was set forth in the draft of a new American Federal Criminal Code (1970). In this proposed legislation, which is for the most part similar to that of the MPC, there already, apparently,[752] appears an alternative of justified(!) execution of a criminal who absconds with the goods, not only in the explanatory text, but also in the statutory provision itself. In my opinion, this is a troubling regression in American law, which is in the spirit of the well-known (notorious) German ruling in 1920 regarding the shooting of the boys who stole apples.[753]

These arrangements raise many questions, given the main reason for the separate arrangement of deadly force, namely the value of human life. In another context, I have already maintained that while the right to life is not absolute and does not negate the possibility of justified deadly defensive force within the framework of private defence, it has sufficient weight to greatly reduce the use of deadly force; it operates to strengthen the requirements of proportionality and necessity, and even obliges separate consideration for the category of deadly force.[754] If there is a clear realm in which defence by deadly force should be prohibited, it is the area of defence of property. There is absolutely no room in a civilised society to justify the rescue of property at the price of human life, not even at the price of the aggressor's life. Smith presents two interesting examples regarding this issue. The first, the advice (extra-judicial) given by the English judge Willes, in 1893, to a person

[750] Some of the states have gone even further than the MPC in permitting deadly defensive force—see Perkins and Boyce, n 85 above, at 1112; La Fave and Scott, n 43 above, at 652. An extremely severe example is the Colorado statute (Colo Rev Stat 18–1–704.5 (1986)), which provides a very broad privilege to defend property in the dwelling with deadly force—see Kadish and Schulhofer (2001), n 38 above, at 801 (noting that this statute is known in Colorado as its 'Make-My-Day' law).

[751] See Perkins and Boyce, n 85 above at 1117 and also Perkins, n 40 above, at 136.

[752] See s 607(2)(c) of the Draft Code (National Commission on Reform of Federal Criminal Laws Study Draft of a new Federal Penal Code) (1970). See also the explanatory text—astonishing because of the low value that it ascribes to human life—at p 44 of the draft. A certain salvation is perhaps to be found for a runaway thief (and for society as a whole) in s 607(1) of the draft, which establishes a general requirement for appropriateness apart from necessity (the margin heading is 'Excessive Force'). However, the above-mentioned explicit determination in s 607(2)(c) may take precedence—even according to general rules of interpretation, without appealing to the restrictive interpretation rule in criminal law, over this general determination of s 607(1).

[753] See n 300 above and accompanying text. Additional evidence that the fact of separate consideration of deadly defensive force does not ensure suitable protection for the value of human life is found in Stephen's Digest—see ss 305 (private defence) and 306 (defence of property) in Stephen, n 228 above.

[754] See the discussion of the right to life in Ch 1.5.1 above.

who came home to find a burglar running away with his property: load a double-barreled rifle and without arousing the attention of the burglar aim at his back and pull the double triggers. The second, the case of Purcell, who in 1911 received a title of knighthood for the killing of four burglars with a knife.[755] In my view, in modern society there is no room for such a favourable consideration for the killing of burglars whose intention was to thieve (as distinct from an intention to injure the members of the household), let alone instructing the public to kill them. Many judges and scholars have noted that given the great value of human life, property should not be defended by deadly force,[756] and, as noted, I completely agree with them.

The widely accepted negation of deadly force for the protection of property in particular, and the requirement for proportionality in general, lie at the heart of the common distinction between self-defence and defence of another person—both of which are defences of the person's body—and the defence of property; a distinction that will be discussed below.[757] There are those who also base this negation on documents and conventions such as the European Convention on Human Rights, which in Section 2, which protects the right to life, limits the exception of killing a person within the framework of private defence to the defence of the person himself (in clear distinction from his property).[758]

Addressing deadly defensive force is so necessary given the value of human life, that even in legal systems where there is a tendency not to subject private defence to the principle of proportionality—such as the German (and in the past—the Soviet) system—there are nevertheless, as mentioned, limitations on the use of deadly defensive force, so that it is not to be used for the defence of an interest of minimal value.[759] Already in pre-modern law, when the principle of proportionality did not yet prevail even with regard to punishment, Blackstone wrote that the aggressor cannot be killed in order to prevent an attack for which the expected punishment for the aggressor is not death.[760] Although the analogy between punishment and private defence is not complete, since no one would dispute that the rule of the principle of proportionality with regard to punishment is stronger, nevertheless something can be learned from it for our discussion.

[755] See Smith, n 91 above, at 109–10. This case is also presented in Kenny, n 134 above.

[756] See, eg, Robinson (1984), n 37 above, vol 2 at 69; Hall *et al*, n 582 above, at 451 (the *Emmons* ruling (1945)); Gordon, n 1 above, at 752, 761–62 (including consideration of the ruling in the case of *Jas. Craw*); Smith and Hogan, n 284 above, at 260; C Howard, *Criminal Law*, 4th edn (Sydney, Melbourne, 1982) at 137; La Fave and Scott, n 43 above, at 667; Kadish and Schulhofer, n 640 above, at 856–58 (including consideration of the *Clay* ruling (1979)); *Encyclopedia of Crime and Justice*, ed by Kadish, n 96 above, vol 3 at 947 (also, consideration of the *Clay* ruling (1979)).

[757] See Ch 4 below.

[758] See the drafting of the section and the discussion of it in Gordon, n 1 above, at 763.

[759] See, eg, Fletcher (1973), n 1 above, at 382; Kremnitzer, n 10 above, at 210; Eser, n 26 above, at 633; Bernsmann, n 265 above, at 178. See also nn 707–12 above and accompanying text.

[760] See Blackstone, n 40 above, vol 4, at 181.

Apart from addressing deadly defensive force for the defence of human life and bodily integrity (force whose use it is common to justify), and consideration of deadly defensive force for the protection of property (force that, as mentioned, should be completely negated), there are several typical cases that have been addressed widely in the case law and in the literature. The chief among these is rape. Is the defensiveness of a woman who uses deadly defensive force against an aggressor who tries to rape her (although not to kill her) justified? My opinion is that the expected injury to the person raped (even if this is limited to mental injury) is so severe that deadly defensive force does not exceed the requirement of proportionality. It should be remembered that the requirement of proportionality in the framework of private defence should be flexible—due to the rationale that underlies private defence. Consequently, it is of course insufficient that the expected injury to the person attacked is less than that to the aggressor in order to negate the use of deadly defensive force. For non-negation of such force, it is enough that the expected injury to the person attacked is sufficiently severe that the use of deadly force would not be totally out of proportion to it. Complete equality or even approximate equality is not required here. It appears that the approach that justifies deadly force for the prevention of rape is prevalent today in modern criminal law.[761] Given this background, the different consideration that was given to a case of rape where the victim is a male is strange and baseless.[762]

Several writers have maintained the need to establish a clear position in the law with regard to deadly defensive force in certain typical cases, especially in the case

[761] See, eg, Kadish, n 34 above, at 888; Gordon, n 1 above, at 761–63; Fletcher, n 117 above, at 214 and Fletcher, n 74 above, at 1378; Yeo, n 228 above, at 490 (including consideration of the ruling in the case of *Lane*).

Ancient Jewish law also permitted the use of deadly force for the prevention of rape—although not that of an unmarried woman—see Ben-Zimra, n 132 above, at 149 and Finkelman, n 25 above, at 1260–61. In contemporary Israeli law, the case of *Assala* (CA 54/49 *The Attorney General v Assala*, PD 4, 496) should be viewed, although this concerns putative defence, as a justification for the use of deadly defensive force in order to prevent rape, this being the danger that the woman defendant imagined. It should be noted that the famous American decision in the case of *Coker v Georgia* 433 US 485 (1977) does not contradict this approach, for although it was determined there that the death sentence was not in proportion to the offence of rape, while actual proportionality is required for punishment, then, as mentioned, private defence involves a flexible requirement.

[762] See Gordon, n 1 above, at 761–63, where he analyses the ruling in the Scottish case of *McCluskey v HM Adv* (1959) JC 39, in which self-defence by deadly force for the prevention of an act of sodomy by force was prohibited, even though self-defence by deadly force for the prevention of rape was permitted in Scottish law. Gordon also notes that in Roman law and ancient Jewish law, and also in contemporary South African law deadly force is permitted for the prevention of an act of sodomy by force. Finkelman also notes that in the 'Mishnah' (biblical commentaries) it was permitted to kill an aggressor who wished to commit a homosexual act—see Finkelman, n 25 above, at 1260–61. She notes that the biblical source for the 'Pursuer' ('*Rodef*') defence is a case of rape (*ibid*). And from the opposite angle: Schneider and Jordan noted that the American courts for some reason justified deadly defensive force against an act of sodomy by force while strangely they did not justify deadly defensive force against rape—see EM Schneider and SB Jordan, 'Representation of Women who Defend themselves in Response to Physical or Sexual Assault' (1978) 4 *Women's Rights Law Reporter* 149 (This article was also published in the book by Bochnack, *Women's Self-Defense Cases: Theory and Practice* at 1, 14).

of rape. Their main concern is the possibility of contradictory rulings.[763] Indeed, it is highly desirable that the law should provide substantial guidance in such cases. Thus, for example, if it is accepted that the exercise of deadly force for the prevention of rape is justified, then it is not desirable that a law-abiding citizen should avoid preventing rape only because the force required to prevent it is deadly and the legal situation is unclear. In clear distinction from the excuse defences, where there is room for the claim that perhaps it is actually preferable not to declare in advance that there is no criminal responsibility for the act, with regard to the justification defences in general, and private defence in particular, especially because of their justified character, it is highly desirable that the public should clearly know the exact limitations (insofar as this is possible) of justified defensive force. In this spirit, Williams suggested that the law should establish a non-exhaustive list of cases in which it is permitted to use deadly defensive force—in order to protect the accused against the whims of jurors and judges, and against the influence of public opinion.[764] By the same token, in my opinion, an appropriate and desirable framework for deadly defensive force in legislation should also clarify in which cases such extreme force should be negated, such as the case of protection of property.

In contrast, Robinson contends, that if the rules of necessity and proportionality are implemented properly, there is no need for specific rules, such as a rule relating to deadly force. He suggests an ad hoc evaluation that reflects society's opinion on relevant values. He also points to the danger of rigid and detailed rules, and suggests that the law should establish the use of deadly force for defence of property as (only) one of the criteria in the evaluation of proportionality.[765]

In my opinion, the law should provide the most precise guidance possible. The implication is that when it is impossible to determine a precise rule, there should at least be a determination as to what are the main considerations in evaluating the existence of the condition. Accordingly, a general requirement for 'reasonability' is not sufficient, but there should be requirements of necessity and proportionality. Moreover, even this is insufficient, and the main considerations for the evaluation of each of the requirements should also be specified. With regard to the subject at hand—the proportionality requirement—there should be an explicit reference to deadly defensive force as well, with an attempt, at the very least, to clarify the status of typical cases, such as defence of property (negation of deadly defensive force) as opposed to the defence of life and bodily integrity and the prevention of rape (justification of deadly defensive force). In general, I have reservations regarding excessive casuistry in law. However, in light of the great value of human life, clear guidance is necessary for this matter. The special value of human

[763] See Lanham, n 228 above, at 241–42 (referring—apart from rape—to false imprisonment and humiliation); Smith, n 91 above, at 109.

[764] See Williams (1983), n 1 above, at 509–10.

[765] See Robinson (1984), n 37 above, vol 2 at 7, 88, 566.

life also leads to formulation of rules that will negate deadly defensive force, except for those isolated cases which are explicitly enumerated (for example: only for the defence of human life and bodily integrity, for the prevention of rape, and for defence against significant infringement of a person's liberty). With regard to bodily integrity, it could be that a broader term is preferable, such as bodily and mental integrity and their health. Such a formulation would enable the exercise of deadly defensive force even in a situation of harsh and continuous torture that does not involve an actual injury to the person's body.

It might be argued that there is room to establish in law that apart from the above-mentioned cases, the court will be authorised to decide that the requirement of proportionality is satisfied, even in other very special cases, for special reasons that the court will detail in its decision. It is doubtful whether such cases do exist. At any rate, in a society where there is a concern that the courts might also view certain cases of defence of property as such 'very special cases', it is preferable to avoid the provision of such broad authority.

At this point it is necessary to consider three typical cases of defence of property, cases which usually tend to be viewed as very special cases. The first is the case of the 'poor man's lamb'—a person whose entire worldly property is endangered. The second is the case in which the attacked person has a deep emotional attachment to the property that is endangered (the only memento from a deceased parent, for example). Despite all the sympathy due to such attacked persons, I maintain that there is no room to justify deadly defensive force (in terms of justification) for the protection of property—even property that is extremely important to the person attacked (especially from a subjective point of view). The greatest consideration that can be granted to such actors is a lenient punishment or even—in the most extreme cases—exemption, but within the framework of an excuse alone, with all that this implies from a declarative and practical point of view.

The third case, which is far more troublesome, is defence of the dwelling. The very problematic nature of this case stems from the fact that it involves a defence that is questionably of the body, and questionably of property, and that includes an additional aspect—defence of the sense of security that the dwelling provides for a person. Given the special consideration that is usually provided by different legal systems to defence of the dwelling; a consideration that sometimes stems from a quasi-sacred treatment of the dwelling and the security that it provides, this issue will be discussed extensively and separately below.[766]

As noted within the setting of the general discussion on the requirement for proportionality, a central duty that can be derived from it is the duty to retreat. Here, in the context of deadly defensive force, is the place to note that even in legal systems where the duty to retreat does exist, it is limited so that it only applies

[766] See Ch 4.5.

before the use of deadly defensive force. I shall, anyway, elaborate on this significant issue of the duty to retreat in Section 3.9 below.

Finally, it is important to refer to the definition of the term 'deadly force'. The drafters of the American Model Penal Code,[767] who, as mentioned, set forth deadly defensive force separately, defined it (in section 3.11(2)) as follows:

> '[D]eadly force' means force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. A threat . . .

The specific consideration of firing a firearm is, in my view, too casuistic and superfluous. I shall refer to the specific consideration of threats in the section that follows. However, the basic definition that is expressed in the first sentence of section 3.11(2) is reasonable. An almost identical definition is established in section 619(b) of the draft of a new American Federal Criminal Code.[768] The above-mentioned definitions take the mental element of the actor into account, although prima facie, this has no place in the definition of a term that superficially appears to be purely objective—deadly force. However, as mentioned, there is not much reason to consider the actual results of the defensive force (since they can be random chance), but rather its expected (or foreseeable) results.

Another question is whether there is room to determine that force, which from an objective point of view is expected to cause death or severe bodily harm, also constitutes deadly force, even if the actor himself did not foresee this. In other words, using a basis of objective reasonability. On the one hand, in such a case (of potential and not actual expectation), not only is it highly doubtful if it is possible to supply instruction of any sort for the behaviour of the actor, but also in any case the maximum responsibility that it is possible to attribute to the actor is responsibility for an offence of negligence. On the other hand, given the existence of offences of negligence in the penal code, it is possible to claim that there is no room for their indirect negation—by means of the definition of 'deadly force'. I have not found any consideration of this secondary issue in the legal literature.[769]

3.8.5 A Threat by the Attacked Person to Use Force

A threat to use a certain force constitutes the use of a lesser force than the actual use of that same force. Accordingly, it is clear that a threat to use a certain force

[767] See the MPC (American Law Institute, Model Penal Code, Proposed Official Draft (Philadelphia, 1962)).

[768] See the Draft Code (National Commission on Reform of Federal Criminal Laws Study Draft of a new Federal Criminal Code) (1970).

[769] It should also be noted that Robinson adopted the definition specified in the MPC for his proposal for a new penal code, without noting the above-mentioned fine distinction. See s 3-19(i) in his book, Robinson (1984), n 37 above, vol 2 at 571.

may definitely comply with the requirement for proportionality while actually exercising that same force does not comply with this requirement. Nevertheless, it appears that not everyone sees this matter as self-evident. Therefore not all legal systems relied merely on the awareness of the difference between a threat to use force and the exercise of that force that usually exists in the literature and in case law,[770] but they have sometimes seen fit to establish this explicitly in the law.

The drafters of the American Model Penal Code, for example, established, in the definition of 'deadly force', the first part of which was presented above, as follows:

> A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force.

In my opinion, this is a superfluous clarification. However, in the explanatory text for this section, the drafters note that the majority opinion in American case law preceding their proposed formulation was actually that threatening to use deadly force is prohibited if it is prohibited to use such force in practice.[771] A similar provision was also established in the American Federal Draft Code, and adopted in Robinson's proposed formulation.[772] The drafters of the English Draft Law also deemed it correct to explicitly provide that:

> A threat of force may be reasonable although the actual use of force would not be.[773]

Moreover, there are even some scholars who dispute the very correctness of the above-mentioned determination. Perkins and Boyce write in their book that the law 'wisely or unwisely' permits a threat of force whose exercise would be prohibited, such as a threat with a knife for the defence of property.[774] The concern that is expressed in the word 'unwisely' refers—apparently—to fear of the deterioration that such a legal situation might cause. For it could be that a threat to use a knife, if it proves to be insufficient, could escalate into the use of the knife for stabbing. However, in my opinion, these fears do not have the power to alter the distinctly different nature of a threat to use force as opposed to the realisation of

[770] The English ruling in the case of *Cousins* [1982] QB 926, eg, established that it is permitted to threaten a robber with a firearm even in a situation where it is prohibited to shoot him. From the literature see, eg, Williams (1983), n 1 above, at 507, 522; La Fave and Scott, n 43 above, at 651.

[771] See the explanatory text for s 3.12(2) of the MPC that appears in the Tentative Draft No 8 (Philadelphia, 1958), at 40–41.

[772] See s 619(b) of the draft code (National Commission on Reform of Federal Criminal Laws Study Draft of a new Federal Criminal Code) (1970) and s 3–19(1) of Robinson's proposal in Robinson (1984), n 37 above, vol 2 at 571.

[773] See s 29(3) of the English draft law (Law Commission, Legislating the Criminal Law: Offences against the Person and General Principles, no 218 (London, 1993)). In the explanatory text for the parallel section in the former version of the draft law from 1989 (Law Commission, A Criminal Code for England and Wales, no 177 (London, 1989), at 234) the drafters base their formulation on the *Cousins* ruling [1982] QB 526.

[774] See Perkins and Boyce, n 85 above, at 1157.

this threat. It is not reasonable—especially for the matter of proportionality—to refer to a threat of a certain force as the exercise of that force, even by taking into account that a threat holds the potential for its own realisation. A threat to use a knife cannot be considered as severe as a stabbing with a knife. This conclusion leads to an additional conclusion that there is no room for the requirement in the above-mentioned definition of 'deadly force', which is specified in the MPC, in the Federal Draft Code and in Robinson's proposal, that 'the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary'. Even if the intention of the actor is to use deadly force if the threat of it alone will not suffice, the threat itself should still not be viewed as deadly force. For, it is possible that the threat would be sufficient and that the actor would not actually need to use the deadly force. If the goal is to deter threats of deadly force, the proper way to do this is to establish specific offences, and not to reduce private defence by an artificial determination that a threat constitutes deadly force.[775]

3.8.6 Mutual Influences between Defensive Force and Punishment?

To conclude the discussion of the requirement of proportionality, I will note the very interesting proposal set forth in the philosophical literature by Nozick. In his well-known book *Anarchy, State and Utopia*,[776] he draws a connection between self-defence and punishment within a discussion of various theories of punishment. According to his school of thought, the theory of retribution for punishment means that the punishment that the actor deserves is $r \times H$ (r multiplied by H), where H symbolises the extent of the harm (that was caused or that the actor intended to cause) and r symbolises the extent of the actor's responsibility for the harm (H). It is common to assume that the rule of proportionality sets an upper limit for permissible harm to the aggressor within the framework of private defence. This limit is a certain function of H (that Nozick calls $f(H)$; [f of H]). In his opinion, $f(H) > H$, or at least $f(H) \geq H$. This determination is provided

[775] Finally, two exceptional opinions should be mentioned, which in light of the above discussion should not be accepted. The first—that of Alexander, according to which the right to threaten with deadly force accompanied by a threat in practice, creates a right to carry out the threat in practice (see Alexander, n 278 above, at 1181 and LA Alexander, 'Self-Defense, Punishment and Proportionality' (1991) 10 *Law and Philosophy* 323). He even goes further and establishes that there is no requirement of proportionality if there is a threat to use a certain force before its commission, and illustrates his theory by expressing his opinion that it is morally justified to kill a flower thief if this killing was preceded by a threat to kill—*ibid* at 324ff. The other opinion is that of Heberling, according to which a threat of force does not constitute 'force' at all, unless there is intention and ability to realise the threat (see Gorr, n 191 above, at 933). In my view, the first opinion grants too great a significance to a threat, to the extent of a complete waiver of the requirement of proportionality on the sole condition that a threat to use force preceded it; and the second opinion errs to the opposite extreme—failing to grant weight of any sort to the threat itself.

[776] Nozick, n 270 above, at 62–63.

without a reasoned basis, but it can be assumed that it stems from the flexibility of the requirement of proportionality that I noted earlier (ie, harm to the aggressor that is greater than the expected harm to the defender can, indeed, also comply with the flexible requirement of proportionality). This leads to the innovation that Nozick suggests: to allow the defender—as part of his defensive action—to make a 'down payment' on account of the punishment that is due to the aggressor (that is $r \times H$). He comes to the far-reaching conclusion that the upper limit of the harm that the defender is permitted to cause to the aggressor within the framework of his self-defence is $f(H) + r \times H$. Correspondingly, he argues that when the defender causes additional harm to the aggressor to the extent of A, in addition to the harm $f(H)$ which is permitted according to the proportionality requirement, then the punishment that is later imposed on the aggressor by the court should be mitigated to that same extent, so that it is set at $r \times H - A$. Finally, Nozick adds that with the aid of the above-mentioned model that he constructed, it is possible to settle the apparent difficulty, which Fletcher noted, between the use of deadly force against a psychotic aggressor (whose responsibility is $r = 0$) and the requirement of proportionality. In order to complete the picture, we should add Nozick's clarification in his later book *Philosophical Explanations*,[777] according to which the size r (the extent of the actor's responsibility for the harm) varies between 0 (ie, lack of responsibility for the harm) to 1 (ie, full responsibility for the harm). Thus, the retribution ($r \times H$) of the actor who has full responsibility ($r = 1$) is H (the harm that was caused or that the actor intended to cause). So far, this reflects Nozick's arguments.

My remarks with regard to Nozick's very interesting proposal include one clarification, two reservations and one point of agreement.[778] Firstly—the clarification. It seems, at first sight, that Nozick views the punishment of the aggressor as part of the rationale that underlies self-defence. It seems that this was also the understanding of Fletcher, who used Nozick's words in an article in which he noted legal systems where private defence constitutes, inter alia, punishment of the aggressor, while the state just completes—by means of a judicial proceeding—the portion of the punishment that was not carried out by the person attacked himself.[779] However, a strict examination of Nozick's writings reveals that he does not accept punishment of the aggressor as a rationale (or a component of it) for self-defence. The main basis for this conclusion is Nozick's unequivocal requirement that all defensive force—including the addition to $f(H)$ that is used as a 'down payment' on account of the punishment for the aggressor—should comply

[777] See Nozick, n 402 above, at 363ff.

[778] An additional clarification that is perhaps needed, is that despite my consideration—following Nozick—of 'harm', the significant factor for the issue of the proportionality requirement is, as mentioned, the expected harm or that which it is possible to foresee at the time of the act and not the actual harm, which is influenced by random chance (see the text above accompanying n 717).

[779] See Fletcher, n 117 above, entitled 'Punishment and Self-Defense', especially at 207.

with the requirement of necessity. For if the rationale is punishment of the aggressor, the infliction of a 'down payment' should be allowed even in the absence of necessity. Additionally, Nozick proposes that only the addition to the harm, A, that exceeds $f(H)$ should be subtracted from the aggressor's punishment. While if he had thought that punishment serves as a rationale for self-defence, he would have suggested deducting all the harm caused to the aggressor: $f(H) + A$.

This brings me to two reservations regarding Nozick's argument; the first concerns his permission for the defender to inflict overly severe harm: $r \times H + f(H)$. It may indeed be possible to accept an approach, according to which—assuming that $r \times H$ is the expected penalty to be imposed on the aggressor in court—if it is essential for the defender to exert force the harm from which to be expected is greater than $f(H)$ (the harm that is permitted by the requirement of proportionality) but still less than $r \times H$ (the retribution of the aggressor), then it appears that simple utilitarian considerations lead to the conclusion that it is preferable to allow the attacked person to defend himself. For in this way he can rescue his interest, and the aggressor will be harmed only to the extent of the harm that would be inflicted on him anyway at the end of the legal proceedings. However, such a situation does not exist—literally by definition. I will clarify my last words: simple logical principles lead to the conclusion that since r is defined such that $1 \geq r \geq 0$, and since $f(H)$ is defined such that $f(H) \geq H$, then inevitably and always $f(H) \geq r \times H$. Consequently, it is impossible to allow the attacked person to inflict on the aggressor a harm greater than the proportional harm $f(H)$ (defined as greater than or at the most equal to the harm H) which is yet still less than the retribution for the aggressor $(r \times H)$ (defined as less than or at the most equal to the harm H).

But Nozick's far-reaching approach, according to which the attacked person should be permitted to cause harm to the aggressor whose measure is $r \times H + f(H)$, should not, in my opinion, be accepted. The real implication of such an approach would be a practical waiver of the principle of proportionality in all cases where the aggressor is responsible for his actions. As mentioned, Nozick claims that his approach enables the settlement of the difficulty—which Fletcher pointed out—between the permission for deadly defensive force against a psychotic aggressor and the requirement of proportionality. From a purely theoretical point of view, perhaps Nozick does resolve this difficulty. But the price is too high. According to his school of thought, a solution is provided for the case of the psychotic aggressor (a case that, as mentioned, in my opinion has no place at all within the purview of private defence[780]) and the requirement of proportionality is met in regard to it. However, in all the other cases severe deviations from the principle of proportionality will occur, which will increase in direct proportion to the responsibility of the aggressor. This is so, until the maximum deviation occurs in the case of the aggressor who has full responsibility—in which case it is permissible to cause harm to the aggressor

[780] See Ch 1.5.3 above.

that exceeds the upper limit set by the requirement of proportionality ($f(H)$) to the extent of the full harm to be expected to the person attacked (H) (or, to put it another way, to more than double in comparison to the retribution of the aggressor(!)).[781] The harm to the aggressor that can be justified within self-defence—$f(H)$—already includes consideration of the aggressor's guilt ($\cong$ responsibility) and the danger ($\cong$ harm) that is expected from his illegal attack. Therefore, increasing $f(H)$ by $r \times H$ (the aggressor's responsibility multiplied by the expected harm from his assult) is a mistaken doubling of the same two factors.

The second reservation: If it is accepted that the court—when sentencing the aggressor—should also take into account the harm that the aggressor suffered as a result of the private defence, why should this consideration be limited only to the harm that exceeds $f(H)$? What, if any, is the relevance of the additional A that exceeds $f(H)$? If the principle is accepted that there is room here for mitigation, I think it would be artificial and without a principled basis to limit it just to the addition that exceeds $f(H)$. It is natural, actually, that the sentence should consider the full harm to the aggressor.

Here is also my point of agreement with Nozick. It is only natural that the court will, when deciding the punishment of the aggressor, take the harm suffered by the aggressor as a result of the private defence into account. Although, as mentioned,[782] the punishment does not constitute part of the rationale that underlies private defence, once private defence has already taken place and the aggressor is injured, it is highly reasonable that the court will take the injury into account, not for the conviction itself, but definitely with regard to the punishment. It is difficult to imagine that the court would impose a strict sentence on an accused person who committed a slight attack (a slap to the cheek, for example), and who lost his eye as a result of the defensive action of the attacked person. Thus, for example, the Israeli Supreme Court in the *Al-Nabari* ruling saw as a cause for mitigation of the punishment: 'the fact, that he was already severely punished and suffered greatly, because of his murderous action, when at the time that he performed it, he was dealt a blow that caused him to lose consciousness and to break his skull, which required a serious operation in order to save his life'.[783]

Similarly, the Israeli Supreme Court, in the case of *Gera*, held that the fact that 'the two appellants were sufficiently severely injured',[784] was a reason for mitigation of the punishment.

Indeed, significant damage that is suffered by the aggressor, as a direct result of the private defence, should be seen as a mitigating circumstance for his sentence.

[781] This is because when the aggressor has full responsibility $r = 1$ and then $r \times H = H$, while $f(H) \geq H$ so we receive as $f(H) + r \times H$ the size $\underline{2H} + B$ (in which the symbol B expresses the differential between $f(H)$ and H).

[782] See Ch 1.5.8.2 above.

[783] CA 50/64 *Al-Nabari v The Attorney-General* PD 18(4)73 at 84.

[784] CA 216/62 *Gera et al v The Attorney-General* PD 16, 2673 at 2676.

Obviously, it is highly desirable that the court should provide reasons for the mitigation of the punishment—in order to prevent a situation in which the relatively light sentence would be considered as viewing the attack as not severe or as unjustified discrimination in favour of the accused (in comparison to other criminals who committed similar attacks).[785]

3.9 The Duty to Retreat

3.9.1 General

The question as to whether there is a duty imposed on the attacked person to exhaust a possible retreat before turning to defensive force in general and to deadly defensive force in particular, is perhaps the most disputed of all the questions raised with regard to private defence. This is a very significant question, with far-reaching implications of both principle and practice.

A few preliminary clarifications should be made at the outset of this discussion: firstly, the main question that is discussed concerns the existence of a duty to retreat in regular cases; for there are also special cases, in which it is generally agreed that a duty to retreat does exist. A major special case is the case in which the actor, by his own fault, causes the situation in which he must defend himself. In such a case there is a widely accepted consensus, that a strong duty to retreat is imposed on the actor;[786] a duty that is discussed below. Another typical case for which it is accepted (for those who see this as a case of private defence) that a duty to retreat exists, is when the aggressor is not responsible for his attack, for example if the aggressor is a minor or is insane.[787] Secondly, even those who support the requirement for retreat would condition it on circumstances in which the retreat constitutes a safe way out for the person attacked. There is no dispute that if the retreat endangers the person attacked, no duty to retreat is imposed upon him[788].

[785] As to a possible argument that there should be no consideration at the time of determining the punishment, of the injury to the accused, which was not designed to be intentional, organised and institutionalised punishment by the state, I am of the opinion that my proposal does not constitute the only deviation from this accepted form of punishment. It is sufficient if we relate to the case of pre-trial detention—which is not imposed with a goal of punishment (*US v Salerno*, 481 US 739 (1987)), nevertheless, once it has been imposed the court deducts this period of detention from the period of imprisonment. An additional consideration, which can be taken into account for the matter under discussion, is that the injury to the aggressor by the attacked person within the framework of private defence, although not carried out by the state—as distinct from punishment—is performed with the encouragement of the state, which views private defence as a completely justified action.

[786] See, eg, Ashworth, n 183 above, at 300; Perkins and Boyce, n 85 above, at 1127ff.

[787] Even in German law, where, as a rule, retreat is not required and where the case of the innocent aggressor is seen as a case of private defence, retreat is required in such a case—see, eg, Kremnitzer, n 10 above, at 207. As was clarified above, I am of the opinion that the correct placement of such a case should be within the scope of the 'necessity' defence—see Ch 1.5.3 above.

[788] See, eg, La Fave and Scott, n 43 above, at 660; Perkins and Boyce, n 85 above, at 1134.

Thirdly, the principal dispute relates to the duty to retreat that precedes the exertion of deadly defensive force.[789] Even advocates of the duty to retreat do not usually require its imposition on an attacked person who relies on the use of moderate defensive force.[790] Further on in this chapter whether this accepted restriction is justified will be examined.

3.9.2 A Theoretical Examination in Light of the Rationale of Private Defence

Following these preliminary clarifications, the field lies open for a theoretical examination of the subject under discussion. What can be and should be deduced from the rationale that underlies private defence with regard to the duty to retreat? One factor in this rationale—the factor of the autonomy of the individual person attacked—certainly does not support the duty to retreat. This duty has the potential to harm the person's autonomy, which includes, inter alia, his liberty to remain in the place where he is, to continue his legitimate activities, and not to retreat. Thus, for example, in German law, where the rule that 'Right must never yield to wrong' is deeply rooted, there is no duty to retreat in ordinary cases.[791] In order to learn something from the other central elements of the rationale of private defence (and especially the guilt of the aggressor and the social-legal order) as they relate to the duty to retreat, it is first necessary to define the true nature of this duty.

What therefore is the substance of the duty to retreat? From which principle is it derived? Traditionally it is acceptable to view the duty to retreat as a particular expression of the requirement of necessity.[792] Several scholars have hinted that this concerns a mixed question of necessity and proportionality.[793] In my opinion, the primary focus of the duty to retreat is actually to be found in the requirement of proportionality and not in the requirement of necessity. I shall clarify my last assertion.

I shall first examine the dominant case in legal literature in discussions concerning the duty to retreat: the aggressor endangers the life of the person attacked (ie, an existential danger, such as the aggressor attempting to kill the person attacked) and two possible modes of action are available to the person attacked:

[789] It should be noted that the definition of 'deadly force' that is accepted—by the author too—is quite broad and is not limited to force whose expected result is death, but also includes, eg, force whose expected result is severe bodily harm. See greater elaboration on the definition of 'deadly force' in section 3.8.4 above.

[790] See, eg, Hall *et al*, n 582 above, at 439; Robinson (1984), n 37 above, vol 2 at 85.

[791] See, eg, Kremnitzer, n 10 above, at 207; Herrmann, n 342 above, at 754–55; Fletcher (1978), n 1 above, at 865. But compare to another description of German law: Eser, n 26 above, at 632.

[792] For a view of the duty to retreat as a direct derivation from the requirement of necessity see, eg, Ashworth, n 183 above, at 293; the well-known ruling of the Supreme Court of New Jersey in the case of *State v Abbot* 36 NJ 63, 174 A 2d 881 (1961); Williams (1983), n 1 above, at 509.

[793] See Robinson (1984), n 37 above, vol 2 at 80 fn 31, 85 fn 58; Kremnitzer, n 10 above, at 179 fn 3.

the first—the use of deadly defensive force against the aggressor (more moderate force will not be effective in the circumstances of this case), and the second—safe retreat from the scene of the event. The classic assertion of the proponents of the duty to retreat is that the requirement of necessity impels retreat under these circumstances, for if the attacked person safely retreats, he is no longer in danger. Consequently, the use of defensive force against the aggressor would be rendered unnecessary.

The counter-claim of those who reject the duty to retreat is that if the attacked person retreats, although his life and bodily integrity will no longer be at risk, other important interests will be harmed. The classic argument is that the retreat of the person attacked will harm his honour, since he will be portrayed as a coward. An additional argument that relates to the interests of the person attacked is that the duty to retreat will infringe his freedom of action and even endanger him physically. Another—more modern and stronger—argument is that the retreat of the person attacked harms the social-legal order, because it constitutes a retreat of law and order before the aggressor who violates the law. Further on each of these arguments shall be examined separately, but at this stage the general picture will be presented.

My opinion is that despite the possibility of safe retreat, defensive force is necessary, and in contrast to the accepted argument, the requirement of necessity is actually fulfilled. However, although the interests necessitating defence do not include the life of the person attacked and his bodily integrity—since these can be saved by means of a retreat—they do include less central interests: the defence of the social-legal order, the freedom of action of the attacked person, and his honour. Consequently, the real question is no longer a question of necessity, but rather a question of proportionality: whether the use of deadly defensive force for the defence of the social-legal order, freedom of action of the attacked person and his honour meets the conditions of the proportionality requirement.

To illustrate the significance of this opinion, set forth below is Beale's very interesting approach to the duty to retreat.[794] Beale concluded from the writings of Coke, that there was a duty in English common law to retreat from an aggressor who attempts to murder the attacked person, while no duty to retreat applied when the aggressor attempted to rob the person attacked. In the latter case, the person attacked was allowed to resist—even by use of deadly defensive force. The explanation that Beale gives for this state of affairs is based on the requirement of necessity: in a retreat from one who attempts to murder, the person attacked rescues the attacked interest, ie, his life; while if the person attacked retreats from one who attempts to rob him (under the assumption that he is unable to retreat with the property) he will lose his property. A number of scholars, beginning with

[794] In his famous and instructive article from the beginning of the 20th century 'Retreat from a Murderous Assault', n 40 above.

Foster,[795] have attacked this odd opinion of Beale, and inter alia they have expressed the opinion that the latter did not correctly interpret the words of Coke[796]; according to their correct interpretation, the English common law did not demand a duty to retreat from a person who is attempting murder. In my opinion, Beale's peculiar view stems directly from a perception of the issue of the retreat as a question of pure necessity and from overlooking the fact that it is actually a question of proportionality. If Beale had analysed the issue in light of the principle of proportionality, he might not have arrived at a result that actually permits the use of deadly defensive force for the defence of property.

An additional indication that the retreat should not be seen as a question of (mere) necessity, can also be found in the accepted view of moderate defensive force. As mentioned, it is accepted that retreat is not obligatory as an alternative to the use of non-lethal defensive force. If this was just a question of necessity, then exactly the same logic that obliges retreat prior to the use of deadly force (ie, the defensive force is unnecessary) also applies to a retreat prior to the use of moderate force.

In Section 3.8, I strove to base the flexible requirement of proportionality squarely on the rationale of private defence. Given my conclusion, that the question of the retreat constitutes a particular expression of the principle of proportionality, then the discussion of proportionality is very significant for the discussion of retreat as well.

A thorough examination of the issue of retreat shows, in my opinion, that the expression 'duty to retreat' is imprecise. The attacked person bears no duty to retreat. He is always entitled to remain in his place. Yet the deadly defensive force needed by the person attacked might not then comply with the requirement of proportionality, and thus he would be forbidden to use it. Clear evidence of the fact that, in effect, the duty to retreat is not a real duty, can be found in the fact that if the attacked person chooses not to retreat, and to suffer the attack without defending himself, there is no doubt that he does not breach any legal duty of any sort. And if the term 'duty' is nevertheless applied, it is necessary to be precise and to talk about a duty as a condition for the exercise of deadly defensive force and not about an independent duty. In effect, given the fact that attacked people rarely opt to suffer the attack instead of retreating, the difference between the duty to retreat and the prohibition of the use of defensive force is insignificant.

As mentioned, the classic argument of the opponents of the duty to retreat is that if the person attacked withdraws, his honour is significantly eroded. With

[795] See principally Perkins, n 40 above, at 139ff.

[796] Coke spoke of an attack whose purpose was 'to rob **or** murder'. Most of the scholars (beginning with Foster) understood his words as being alternatives, ie different cases (one—an attack with intention to rob; the other—an attack with intention to murder), in both of which there is no duty to retreat. Beale, however, interpreted the words of Coke as relating to a very specific type of attack, in which the aggressor presents the person attacked with the option of giving him the property and threatens that otherwise he will kill him—see Beale, n 40 above, at 573ff; Perkins, n 40 above, at 139ff.

regard to this assertion, significant differences exist among different cultures. There were, and still are, cultures in which honour has an elevated status, with maximum acknowledgement of the person's sense of honour, his stubborn will to stand up for himself, and his unwillingness to behave as a coward. The duty to retreat was, for example, traditionally negated in the southern and western states of the United States, while in the eastern and northern states a duty to retreat was imposed before the use of deadly force.[797] The accepted opinion today in legal literature[798] is that the consideration of infringement of a person's honour is only a secondary consideration, let alone it's being of lesser value in comparison to the life of the aggressor. Beale described this point well, when he wrote already at the beginning of the 20th century:

> So it is in the case of killing to avoid a stain on one's honor. A really honorable man, a man of truly refined and elevated feeling, would perhaps always regret the apparent cowardice of a retreat, but he would regret ten times more, after the excitement of the contest was passed, the thought that he had the blood of a fellow-being on his hands. It is undoubtedly distasteful to retreat; but it is ten times more distasteful to kill.[799]; [800]

However, the more modern reasoning for the negation of the duty to retreat is the injury caused by the retreat to the social-legal order. Feller writes that retreat from an aggressor implies the aggressor's release from any danger involved in his aggressive action, the encouragement of aggression, waiver of right and a grant of supremacy to a breach of the law instead of guarding against it; in short, retreat from the attack sometimes means retreat from the law and public order, and not only retreat of the person attacked.[801]

Significance is also attributed to the deterrence of criminals that is achieved by the lack of a duty to retreat, and the ability of the aggressor to cease his attack.[802] The factor of the social-legal order and also the ability of the aggressor to cease his attack create the difference that exists—with regard to the duty to retreat—between private defence and the defence of necessity. While with regard to the 'necessity' there is no dispute that if a way to retreat is open before the actor he must use it (this conclusion is obligatory from the rigid requirements of necessity

[797] See, eg, Beale, n 40 above, at 577.

[798] See Perkins, n 40 above, at 160; Blackstone, n 40 above, vol 4, at 184–85; Kremnitzer, n 10 above, at 179 (maintaining that the injury to honour has only an indirect nature, since it concerns an interest that is not attacked and an injury that is not itself illegal).

[799] See his article, n 40 above, at 581.

[800] Perkins suggests a more technical reason for the negation of the argument that the duty to retreat will create a generation of cowards. As mentioned, even the supporters of the requirement for retreat restrict it to those cases in which it would be safe and would not endanger the retreating person who is under attack. Perkins notes that the classic possibility of safe retreat—in the rare cases where there is actually a possibility for safe retreat—exists when the attacked person has a firearm while the aggressor has a short-range weapon (such as a knife). In such a situation, when the aggressor is still not sufficiently close for his weapon to be effective, shooting him does not reflect heroism.

[801] Feller, n 14 above, vol 2 at 429.

[802] Eg, Feller, n 546 above, at 23.

and proportionality that apply to the necessity defence), with regard to private defence there is much dispute, and there are those who hold that the social-legal order dictates a negation of the duty to retreat.[803] Another view was expressed by Bein, according to which the value of the life and bodily integrity (of the aggressor) is more important than deterrence, especially since achieving deterrence is primarily the function of the state and is not imposed on the individual.[804] An even more far-reaching stance was expressed by Eser. According to his school of thought, viewing private defence as also fulfilling the social function of maintenance of social order actually implies the limitation of this right by means of the duty to retreat.[805] At first glance, this last position may seem odd. It can be understood, however, by perceiving the nature of the issue of retreat as a question of proportionality. Defensive force that seriously deviates from the requirement of proportionality not only fails to serve the social-legal order, but also even harms it significantly.[806] The factor of the social-legal order usually weighs significantly against the imposition of a duty to retreat. However, this is not a decisive weight in and of itself, but rather, requires the striking of a balance in which other factors will be taken into account. Some of these factors have already been noted and others will be noted below.

Another argument for the negation of the duty to retreat relates to the danger to the attacked person that is involved in the retreat. The main answer to this argument is, as mentioned, that even those who support the duty to retreat do not demand its imposition unless the path of retreat does not endanger the person attacked.[807] An additional argument, which is connected to the argument of the danger, is that the rule of retreat suited the reality of the past—when the weapons were short-range (such as swords)—and that today, given the existence of firearms, there is no longer any room for a duty to retreat. The obvious answer to this argument is that even if the cases in which the option for safe retreat have become less frequent, there is still no room for an a priori negation of the rule that applies only to these cases (of safe retreat).[808] In addition, it is sufficient to review court judgments and to listen to, watch and read the mass media, in order to discover that the use of non-incendiary weapons (other than firearms, ie, knives) is still prevalent today. Another argument is that even a retreat that appears to be

[803] See, eg, Kremnitzer, n 10 above, at 191. A number of scholars see the social-legal order as the explanation for the absence of a duty to retreat in German law—see, eg, Herrmann n 342 above, at 754–55. But compare with a different description of the German law in Eser, n 26 above, at 632.

[804] Bein, n 539 above, at 11.

[805] See Eser, n 26 above, at 632 (including n.55).

[806] See Figure 2 in Ch 1.6.3 above and the accompanying explanation.

[807] The requirement that the retreat should be safe constitutes a response to a significant part of the criticism that is directed against the rule of retreat; criticism that stems—in effect—from the incorrect application of the rule. See Hall *et al*, n 582 above, at 438 (the ruling *State v Abbot* 36 NJ 63, 174 A 2d 881 (1961)).

[808] For discussions of these issues see Robinson (1984), n 37 above, vol 2 at 80; Perkins, n 40 above, at 151ff; Beale, n 40 above, at 578ff.

safe, usually bears a certain danger.[809] However, a case like this involves a relatively slight danger. Consequently, the risk cannot be a decisive factor, but it should be taken into account when assessing the balance for and against the duty to retreat. An additional argument for the negation of the duty to retreat is the injury caused by such a duty to the freedom of action of the attacked person. We shall return to these arguments below.

The arguments in support of the rule of retreat usually focus on the importance of the value of human life and bodily integrity, and on the preference of this value for society as a whole above interests of relatively little value, such as the honour of the person attacked. Most of the writing that supports the duty to retreat is directed against the argument regarding the honour of the person attacked, an argument that was discussed earlier. This is because, in the past, this was the main argument of the opponents of the duty to retreat. The more modern argument is, as mentioned, the maintenance of the social-legal order. I believe that viewing the question of retreat as a particular expression of the principle of proportionality should enable the taking into account of all the values and all the considerations that were discussed above.

This leads to an examination of the treatment of the duty to retreat in Anglo-American law, in order to provide inspiration for an attempt to propose a suitable framework for this issue.

3.9.3 The Duty to Retreat in Anglo-American Law

Much consideration has been awarded to the duty to retreat in Anglo-American law. Since both those who support it and those who negate it recognised exceptions to their opinions, rather complicated rules developed in regard thereto. The expression that was accepted in the past to describe the duty to retreat was 'retreat to the wall'. Today this is regarded as having, at most, a metaphorical significance. But in the case from the year 1328, in which this expression was coined, the actor did retreat until he reached a connecting wall between two houses, which did not permit the continuation of his retreat.[810] At another point in this book, the distinction was presented that existed in **ancient English law** between totally justified homicide, such as for the prevention of a crime, and a mere excuse that was granted, inter alia, in a case of self-defence (*se defendendo*). The significant implications that this distinction had for the duty to retreat[811] were also set forth in that discussion. With the development of English common law, the differences between 'justified homicide' and 'excusable homicide' were nullified, except for one difference that remained for the matter under discussion—the duty to retreat:

[809] See, eg, Beale, n 40 above, at 578 fn 3; Fletcher (1978), n 1 above, at 858.
[810] See Perkins and Boyce, n 85 above, at 1123.
[811] See Ch 1.3 above.

a person who was attacked in an attack categorised as a 'felony' was entitled to use even deadly defensive force without having a duty to retreat imposed on him. In contrast, if the attack against him was not classified as a 'felony', the attacked person was obliged to exhaust the option of safe retreat—if it existed—'to the wall'[812].

In order to understand the way in which **current English law** relates to the duty to retreat, it is necessary to return to an examination of the important interpretative question[813] regarding the relation between section 3 of the Criminal Law Act 1967, which addresses the use of force to prevent a crime, and the common law rules that deal with private defence. It is still debatable which law should be applied to private defence: the common law rules—including the duty to retreat—or the dictates of the above-mentioned section of the law, according to which it is possible to exert defensive force for the prevention of a crime subject to one general principle—the principle of reasonability.

The central English ruling concerning the issue of retreat was handed down in the case of *Julien* (1969). The important rule that was established therein is as follows (in the words of the court):

> It is not, as we understand it, the law that a person threatened must take to his heels and run in the dramatic way suggested by counsel for the appellant; but what is **necessary** is that he should **demonstrate** by his actions that he does not want to fight. He **must demonstrate** that he is prepared to temporise and disengage and **perhaps** to make some **physical withdrawal.** (emphases added)[814]

Ashworth expressed his opinion that the duty to retreat was thus redefined, as a duty to demonstrate a desire to sever the contact and a willingness to withdraw. As Ashworth pointed out, the subsequent ruling in the case of *McInnes* (1971)[815] created doubt, since the court in that case determined that non-retreat only constitutes a consideration in the estimation of the necessity and the reasonability of the force, while the ruling in the *Julien* case addressed what should and must be done. In Ashworth's opinion, the ruling in the *Field* case (1972)[816] constitutes a return by the English court to the *Julien* rule.[817] A similar opinion was expressed by Williams. In his view, although there is no duty to retreat per se, the actor must nevertheless exploit every opportunity not to involve himself in the fray, by the use of words or symbolic withdrawal. Williams notes the danger that in the absence of such a rule, both sides will feel a need to use private defence, and this risk increases in multi-participant fights.[818]

[812] See Kenny, n 134 above, at 144.
[813] Which was set forth above—see Ch 2.2.1
[814] See the ruling, *R v Julien* [1969] 1 WLR 839, 2 All ER 856 at 858.
[815] See the ruling, *R v McInnes* [1971] 1 WLR 1600, 3 All ER 395.
[816] See the ruling, *R v Field* [1972] Crim LR 435.
[817] See Ashworth, n 183 above, at 285ff.
[818] See Williams (1983), n 1 above, at 504ff.

A different interpretation of exactly the same ruling is suggested by Smith. According to his view, section 3 of the above-mentioned law prevails and overcomes the technical rules that existed in the common law. Accordingly, the only test is that of reasonability, while the option of retreat that was not exploited only constitutes a factor in the estimation of reasonability.[819] Smith and Hogan, in their well-known book,[820] elaborate that there is no longer a rule of law according to which the attacked person must escape, even if he could do so. According to their school of thought, if the actor demonstrates that he is not interested in fighting, this is indeed the best proof that he acted reasonably and with the aim of defending himself, but it bears no further import. In certain circumstances, even if a person does not compromise, withdraw, or sever the connection, he may still nevertheless have a good defence. As noted by Smith and Hogan, these thoughts were endorsed by the court in the ruling in the case of *Bird* (1985).[821] Today, especially after this ruling, it appears that most commentators prefer the interpretation of Smith and Hogan, according to which the ability to retreat only constitutes a consideration in the estimation of the necessity and reasonability of the force, and there is no longer any per se duty to retreat.[822] It is common to base this opinion on the following excerpt from the ruling in the case of *McInnes*[823]:

> We prefer the view expressed by the full court of Australia that a failure to retreat is only an **element** in the consideration upon which the reasonableness of an accused's conduct is to be judged (see *Palmer v. The Queen* [1971] . . .) or, as it is put in Smith and Hogan Criminal Law, 2nd ed. (1969), p. 231: '. . . simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force used was reasonable'.

In **American law,** the distinction between deadly defensive force and more moderate defensive force is greatly emphasised. While with regard to defensive force that is not deadly there was and is a consensus that there is no duty to retreat, with regard to deadly defensive force there is an ongoing historical dispute between the supporters of the duty to retreat—when a path exists for safe retreat—and those who oppose it (the supporters of 'The True Man Doctrine'). In the past, opposition to the duty to retreat was concentrated in the western and southern states of the United States, stressing the harm to a person's honour that could

[819] See Smith, n 91 above, at 123ff.

[820] See Smith and Hogan, n 284 above, at 257. See also the remark by JC Smith, 'Commentary: *R. v. McInnes*' (1971) Crim LR 652, in the margins of the *McInnes* ruling (*R v McInnes* [1971] 1 WLR 1600, 3 All ER 395).

[821] See the ruling, *R v Bird* [1985] 1 WLR 816, 2 All ER 513 at 516. See also the reactions to this ruling—RJ Cooper, 'Court of Appeal: Self-Defence: Need to Demonstrate Unwillingness to Fight (*R. v. Bird*)' (1985) 49 *Journal of Criminal Law* 327; and JC Smith, 'Commentary: *R. v. Bird (Debbie)*' (1985) Crim LR 389.

[822] See the Encyclopedia Halsbury, n 730 above, vol 11(1), at 350; Archbold, n 487 above, at 1614, 1664; Howard, n 756 above, at 90; Harlow, n 324 above, at 534ff.

[823] See *R v McInnes* [1971] 1 WLR 1600, 3 All ER 395, at 1607.

occur upon retreat. It is interesting that the courts that adopted the rule of 'No Retreat' were often under the incorrect impression that this rule constitutes a deviation from the English common law.[824] Thus it is possible to find two contradictory lines of reasoning in American law in support of the same approach, that there is no duty to retreat. According to the first line of reasoning, this approach follows the English law. According to the second line of reasoning, this approach constitutes a deviation from the English rule because of the special conditions of the state (in the United States).[825] In fact these conflicting lines of reasoning stem from the dispute, which were set forth earlier in Section 3.9.2, between Beale and Foster with regard to the correct depiction of the legal situation in English common law, and it seems that if the American courts strove to be different from their counterparts in England, they did not achieve this aim . . .

Between these two main approaches there is a mid-way approach, whose most frequently quoted expression was delivered by Justice Holmes, in the *Brown* ruling (1921):

> Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt.[826]

This approach is very close to the approach that is prevalent in English law following section 3 of the Criminal Law Act 1967, which was discussed above.

Traditionally, the rule of retreat was known in American law as a minority rule, since most of the legislators in the various states and most of the courts adopted the stance that negates retreat.[827] A clear expression of this approach was delivered in the judgment in the *Fowler* case (1912),[828] where apparently the important expression was coined, which is frequently quoted by those who negate the duty to retreat, and which relates to the nature of the wall to which the retreat should be made:

> Under the common law, no man could defend himself until he had retreated, and until his back was to the wall; but this is not the law in free America. Here the wall is to every man's back. It is **the wall of his rights**; and when he is at a place where he has a right to be, and he is unlawfully assailed, he may stand and defend himself. (emphasis added)

Against this background, it is interesting to view the approach that was taken by the drafters of the Model Penal Code, who established a certain duty to retreat,[829]

[824] See Perkins, n 40 above, at 154.
[825] See Beale, n 40 above, at 576ff.
[826] See *Brown v US* 256 US 335, 41 S Ct 501 (1921) at 343.
[827] See, eg, Kadish, n 34 above, at 887.
[828] See *Fowler v State* 8 Okla Crim 130, 126 P 831 (1912).
[829] With the awareness that most of the American rules do not support retreat—see s 3.04(2)(b)(III) of the MPC and the explanatory wording of the Tentative Draft No 8 (Philadelphia, 1958) at 24.

which will be considered further on. As a consequence of the MPC, the minority opinion that supports retreat gained significant weight.[830]

3.9.4 Special Cases

3.9.4.1 Attacks in the Dwelling

A central case, regarding which Anglo-American law (and also those who support the duty to retreat in regular cases) recognises that there is no duty to retreat, is when the person attacked is within his dwelling at the time of the attack.[831] Various explanations have been offered for this exception. Beale argued that it stems from the fact that retreat from the dwelling would not decrease the danger.[832] But it seems that this reason is irrelevant, since there is anyway a consensus that the retreat is not required if it is not safe. In Fletcher's opinion, the exception with regard to the dwelling constitutes an expression of the rationale of autonomy that survived in Anglo-American law[833]. However, even this does not explain why Anglo-American law specifically grants an elevated status to the autonomy of the person attacked when he is within the dwelling. An explanation will be suggested below in the chapter that is devoted to the protection of the dwelling.[834]

The exception to the duty to retreat regarding a dwelling is sometimes extended to include the place of business of the attacked person and the environs of the dwelling and the place of business.[835] Sometimes this exception is extended even further, so that it applies to every location within which the person attacked has a legal right to be. I am of the opinion that this last formula is, in effect, mere lip service to the duty to retreat, while in fact it remains bereft of any real content.

3.9.4.2 Attacked Person is a Law Enforcement Officer

Another main case in which Anglo-American law, including those who support the duty to retreat, accepts that the person attacked bears no duty to retreat, is when the attacked person is a law enforcement officer, legally fulfilling his role. Thus, for example, when a police officer is attacked by a suspect who he is attempt-

[830] In the recent past it was said that the opinion supporting retreat still remained the minority view in the United States—see the *Encyclopedia of Crime and Justice*, ed by Kadish, n 96 above, vol 3 at 948ff; Perkins and Boyce, n 85 above, at 1144. But the picture to date is different: about 50% of the states require retreat and only about 33% of the states still support the no-retreat rule—see Kadish and Schulhofer (2001), n 38 above, at 790.

[831] See, eg, Robinson (1984), n 37 above, vol 2 at 86; s 3.04(2)(b)(II)(1) of the MPC.

[832] See Beale, n 656 above, at 540ff.

[833] See Fletcher (1978), n 1 above, at 868.

[834] See Ch 4.5 below.

[835] See, eg, Perkins and Boyce, n 85 above, at 1134ff.

ing to arrest, it is agreed by all that he does not need to retreat.[836] It seems that this exception to the duty to retreat is self-evident. At any rate, the explanations that have been suggested for it are that public policy impels the performance of the arrest[837] and views the action of the law enforcement officer as falling within the boundaries of the justification of performance of the law, although it is also a situation of self-defence.[838]

3.9.4.3 Agressor who is Not Responsible

Alongside these cases, for which there is a consensus that no duty to retreat exists, there are also cases regarding which everyone would agree that the attacked person must exhaust an opportunity for retreat before he resorts to force of any kind (not necessarily deadly force). One such case has already been noted—an attack performed by an aggressor who is not responsible for the attack.[839]

3.9.4.4 Circumstances of Self-Defence Caused by Own Fault

The main case in which it is widely accepted that the person attacked must exhaust a possibility for retreat (sometimes—even if it is not safe) before turning to the use of defensive force (sometimes—even if it is not deadly force) is when the person attacked causes the situation in which he must defend himself by his own fault. Scholars of ancient English common law dealt extensively with the case of a man who originally fought of his own will, but afterward attempted to retreat, and was eventually forced to kill his opponent in order to prevent his own death. Hale argued, for example, that such a person was entitled to kill only if he had previously run away as far as he possibly could. Foster related to such cases as 'self-defence culpable' and treated them as 'in some measure blameable and barely excusable'.[840] This guiding principle remains valid until today.

Anglo-American law makes a distinction between a perfect right to self-defence and an '*imperfect* self-defence'. An attacked person who is not guilty has a perfect

[836] See, eg, Williams (1983), n 1 above, at 510; s 305 of Stephen'S Digest, n 228 above; Gordon, n 1 above, at 759; La Fave and Scott, n 43 above, at 660; Perkins, n 40 above, at 150; s 3.04(2)(b)(II)(2) of the MPC.

[837] See the explanatory wording of the MPC, Tentative Draft No 8 (Philadelphia, 1958) at 25.

[838] Bein, n 539 above, at 17.

[839] See Ch 1.5.3 above. See also the beginning of this section (3.9) and the references that appear there. In addition see Perkins and Boyce, n 85 above, at 1117 (adding a duty to retreat from a negligent aggressor). A different and peculiar opinion was expressed by Smith. From his reasoning it appears that his opinion regarding the negation of a retreat does not stem from his view of the desirable law, but rather, from his perception of s 3 of the Criminal Law Act 1967 as also applying to self-defence that does not constitute prevention of a crime (as in the case of defensive behaviour against a minor) and as negating the duty to retreat.

[840] See the description in Ashworth, n 183 above, at 300.

right to self-defence, and usually no duty to retreat will be imposed on him. In contrast, an attacked person who is guilty of causing the conflict bears a duty to retreat,[841] usually a strong obligation to do so.

This case concerns a duty that is imposed on a person who is guilty of causing the conflict, and only if he fulfils this duty will he have the right to self-defence. The purpose of the retreat is to release the actor from responsibility for the situation that is created, and in effect to sever his actions that caused the creation of the situation from his defensive action after the creation of the situation.

Consequently, this involves a stronger duty than the regular duty to retreat. The usual duty is therefore to perform what is known as 'withdrawal'. The 'withdrawal' is a retreat or demonstration of a will to retreat that includes a certain communication with the opponent: the opponent must understand that the actor does indeed intend to retreat.[842] The actor must therefore perform a sort of 'ceremonial retreat', that provides clear evidence of his intention to cease the fight. The main difference between the ordinary duty to retreat and the special duty of 'withdrawal' occurs in the case in which it is impossible to retreat. In such a case the actor meets the ordinary duty to retreat (that applies only when it is possible to retreat safely) but does not comply with the more onerous duty of 'withdrawal'.[843]

If we examine this issue, of the person who by his own fault causes a situation in which he must defend himself, in light of the rationale of private defence, we shall realise the difference between this situation and a regular case (of an innocent attacked person)—a difference that focuses on the factor of the social-legal order. While the innocent attacked person, who does not retreat, also defends the social-legal order against the aggressor, the one who is guilty of creating the situation does not necessarily protect the social-legal order, and it might even be that he is not in an appropriate position to do so at all.[844]

Consequently, it should not be surprising that even in legal systems where retreat is not requisite at all, the duty to retreat is nevertheless imposed on one who through his own fault creates this situation.[845]

In regard to the rationale for private defence, my opinion is that in certain cases (and certainly if the actor intentionally created the situation) there is room to obligate the person responsible for the situation to retreat, even if the way of retreat is unsafe, and even if the defensive force that he needs is not deadly. At any rate, the framework for the issue of retreat with regard to one who causes the situation by his guilt is only part of the comprehensive arrangement that this special

[841] See, eg, Beale, n 656 above, at 537ff; the explanatory wording of the MPC, Tentative Draft no 8, at 21–23.

[842] See *ibid* and see Perkins, n 40 above, at 147ff. Such a duty for 'withdrawal' is determined, eg, at the end of s 603(b) of the Federal Draft (National Commission on Reform of Federal Criminal Laws Study Draft of a new Federal Criminal Code (1970)).

[843] See also n 1262 below and accompanying text.

[844] For a discussion of this issue see Ch 5.4 below.

[845] This is the case in German law—see Hermann, n 342 above, at 754ff.

situation (of the guilty attacked person) necessitates. Further on a separate chapter will be devoted to this subject.[846] For now, what is important for our present discussion is to note that the duty to retreat is liable to serve (and actually does serve) as a tool for the treatment of cases of guilty attacked persons (alongside other possible tools).

3.9.4.5 Defence of Another Person

Another special case is the defence of another person. It is clear that there is no point in imposing a duty to retreat on the actor himself, since this would in effect negate the right to defend others. For the actor (the one who comes to the rescue of the person attacked) is usually presented with a possibility of safe retreat, but if the actor retreats, the attacked person will remain without defence. Consequently, it is clear that the question of retreat must concentrate on the person attacked and not on the actor (who defends him). One possibility is to condition the right to defence of another on the compliance of the person attacked with the duty to retreat (i.e.: he did all that he could in order to retreat). This is too extreme an approach that does not give sufficient consideration to the fact that the defender has no control over the person attacked, and that we are dealing with the criminal responsibility of the defender and not of the person attacked. A possible reasonable solution was proposed in the American Model Penal Code, according to which it is sufficient if the defender urges the person attacked to retreat (even if the person attacked does not act according to the defender's advice)[847]. In addition, in my view, given the requirements of necessity and proportionality, the actor (the defender) must delay his action as long as possible (as long as a possible retreat exists) in order to enable the person attacked to exploit this preferable option.[848]

3.9.5 Proposals for Reform

It is interesting that even modern proposals for legislative reform include expressions of all the main approaches to the issue of retreat. One main proposal in which the duty to retreat was established was the American Model Penal Code, which was mentioned above. Section 3.04(2)(b)(II) of the MPC establishes a duty to retreat prior to resorting to deadly defensive force. This duty only applies in the rare cases where there is a way to retreat 'with complete safety'. The exceptions

[846] See Ch 5.4 below.

[847] See s 3.05(2)(c) of the MPC. A similar arrangement was provided in s 607(2)(b) of the American Federal Draft, (1970). See also Heberling, n 62 above, at 937 (noting that in the laws of some of the states of the United States the defence of another person is negated if the actor (defender) does not succeed in persuading the attacked person to retreat).

[848] See Ch 4.2 below.

entail when the attack occurs at the dwelling of the person attacked or at his place of work, and when the person attacked is a public officer in performance of his duty, or a person who assists the officer. In section 3.04(2)(c), the drafters of the MPC clarified—in order to remove any doubt—that in other circumstances (for which the duty to retreat was not explicitly established) there is no duty to retreat.[849] A similar framework was established, based on this arrangement in the MPC, in section 607(2)(b) of the American Federal Criminal Code Proposal.[850]

A frequent consideration in proposals for reform of the issue of retreat is to view a possibility for retreat as a factor in the evaluation of necessity, proportionality or reasonability. Thus section 29(4) of the English Draft Law (1993) provided that:

> The fact that a person had an opportunity to retreat before using force shall be taken into account, in conjunction with other relevant evidence, in determining whether the use of force was reasonable.[851]

Similarly, Robinson, in the proposal that he presented in his book, determined that the possibility for retreat operates as a factor in the evaluation of necessity (section 3-6 of his proposal) as well as in the evaluation of proportionality (section 3-7).[852]

My principal criticism with regard to these two latter proposals stems from the fact that, as mentioned, I think that the substantive question that the possibility of retreat raises is a question of proportionality and not of necessity. Necessity exists even in light of the possibility to retreat, but it relates to interests that are usually of lesser value than those that are placed on the scales when there is no possibility for retreat (thus, for example, there is no real danger to the life or bodily integrity of the person attacked if he retreats). Consequently a significant question of proportionality is raised.

In other draft laws—which were proposed in New Zealand, Canada and Israel[853]—there is no consideration of the issue of retreat. This silence of the leg-

[849] See ss 3.04(2)(c); 3.04(2)(b)(II) of the MPC.

[850] See s 607(2)(b) of the Federal Draft Code (1970). Notice should also be taken of s 607(2)(c) of this Draft, which negates a significant portion of the content of the duty to retreat that is established in s 607(2)(b), by permitting, eg, the exercise of deadly force against a robber or burglar who escapes with the goods. For criticism of this gross deviation from the principle of proportionality, see n 752 above and accompanying text.

[851] See s 29(4) of the Draft Law, Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles, no 218 (London, 1993).

[852] See Robinson (1984), n 37 above, vol 2 at 566.

[853] See ss 41, 48, 49 of the Draft Law of New Zealand (The Crimes Bill of New Zealand (Wellington, 1989)); ss 3(10), 3(11), 3(12) of the Draft Law of Canada (Law Reform Commission of Canada, Report Recodifying Criminal Law, rev and enl edn, no 31 (Ottawa, 1987)); ss 37, 38 of the Draft Law of Canada (Government of Canada, Proposals to Amend the Criminal Code (General Principles) (Ottawa, 1993); ss 35, 41 of the Israeli Draft Law (by the Agranat Committee, 1980); ss 46, 52 of the Israeli Draft Penal Code (Preliminary Part and General Part) 1992. This is also in the new version of the Israeli Penal Code as provided in Amendment no 39 (1994).

islators on the issue of retreat is also the most prevalent situation in the criminal codes examined in the course of this study.[854] Such a state of affairs is undesirable, especially given the fact that it leaves the court to decide between two principal possibilities that are completely different: the first—viewing this silence of the legislator as taking a stance against the duty to retreat, and the other—derivation of the duty to retreat from the principle of proportionality.

3.9.6 Suitable Framework for the Issue of Retreat (in Light of the Rationale for Private Defence in General and the Principle of Proportionality in Particular)

As we saw at the outset of section 3.9, the principle that should guide us in relation to the issue of retreat is the principle of proportionality. One optional framework for this issue (in 'regular' cases) is to allow the court to decide whether in the particular case before the court the requirement of proportionality that exists in the law of private defence requires retreat, or not. However, even if the legislator takes this path, I think that in light of the doubts that were raised regarding the relevancy of the possibility of retreat, the legislator should explicitly provide that the possibility for a (safe) retreat should be taken into account in evaluating the existence of the requirement of proportionality.

Another option—that will be examined below—is to attempt to establish more detailed rules in the legislation for the instruction of the public in general, and the judges in particular. For this purpose, four typical cases are presented below: (1) An attack that creates an existential danger for the person attacked (an injury to his life or bodily integrity) where the necessary defensive force for repelling the attack, if the attacked person does not exhaust an existing (safe) possibility to retreat, is deadly force (an injury to the life or bodily integrity of the aggressor); (2) An attack that creates an existential danger for the person attacked where the defensive force that is necessary (if the possibility for retreat is avoided) is moderate (ie, not deadly); (3) An attack that creates a non-existential danger and that demands the use of deadly defensive force; (4) An attack that creates a non-existential danger and that demands the use of moderate defensive force. The factors that should be taken into account with regard to each of these four typical cases are detailed in Table 2(A).

[854] In fact, among approximately 20 penal codes that were examined there was consideration of retreat in only one of them, and this one also concerns the exceptional case of the actor who by his own fault causes the situation that necessitates defensive action—see s 272 of the Penal Code of Queensland (Australia).

TABLE 2(A) THE INTERESTS IN THE CONFLICT GIVEN THE POSSIBILITY FOR SAFE RETREAT

The danger created by the attack							
Existential				Non-existential			
The necessary defensive force				The necessary defensive force			
(1) Deadly		(2) Moderate		(3) Deadly		(4) Moderate	
The AUTONOMY of the person attacked	The life of the aggressor	The AUTONOMY of the person attacked	Injury to the aggressor	The AUTONOMY of the person attacked	The life of the aggressor	The AUTONOMY of the person attacked	Injury to the aggressor
The honor of the person attacked		The honor of the person attacked		The honor of the person attacked		The honor of the person attacked	
The aggressor's guilt		The aggressor's guilt		The aggressor's guilt		The aggressor's guilt	
Slight danger to the person attacked		Slight danger to the person attacked		Slight danger to the person attacked		Slight danger to the person attacked	
The social-legal order		The social-legal order		The social-legal order		The social-legal order	

As a preliminary step for the clarification of Table 2(A), a table of the hypothetical factors that should be taken into account if (and only if) a possibility for safe retreat does not exist is presented in Table 2(B) at the following page.

Table 2(B) shall be explained first. This table relates to the situation where there is no route for a safe retreat. In such circumstances, the principle of proportionality may necessitate avoidance of the exercise of defensive force in one case alone—when the defensive force necessary is deadly and the danger to the actor (ie, the

TABLE 2(B) THE CONFLICT OF INTERESTS IN THE ABSENCE OF A POSSIBILITY FOR SAFE RETREAT

The danger created by the attack							
Existential				Non-existential			
The necessary defensive force				The necessary defensive force			
(1) Deadly		(2) Moderate		(3) Deadly		(4) Moderate	
The life of the person attacked	The life of the aggressor	The life of the person attacked	Injury to the aggressor	Injury to the person attacked	The life of the aggressor	Injury to the person attacked	Injury to the aggressor
The social-legal order		The social-legal order		The social-legal order		The social-legal order	
The autonomy of the person attacked		The autonomy of the person attacked		The autonomy of the person attacked		The autonomy of the person attacked	
The aggressor's guilt		The aggressor's guilt		The aggressor's guilt		The aggressor's guilt	

person attacked) is not existential (the case that is marked with the number 3 in Table 2(B)). In all of the four cases that Table 2(B) addresses, the expected injury to the person attacked—if he avoids the use of defensive force (in the left column of each case)—is weighed against the expected injury to the aggressor if the defensive force is used (in the right column). Case 2 is very simple, since the expected injury to the aggressor is less severe than the expected injury to the person attacked, and therefore it is clear that the exercise of defensive force does not create any difficulty. In cases 1 and 4 the expected injuries to the aggressor and to the person attacked are identical (or, at least, similar). Here three important additional factors should be taken into account, all of which act in the direction of justifying the exercise of defensive force: (1) The injury to the autonomy of the person attacked; (2) The aggressor's guilt (that leads to a certain decrease in the value of his interests); (3) The factor of the social-legal order. Consequently, there is no problem in the exercise of defensive force even in these cases. The more problematic case is, as mentioned, case 3. Here the operation of the principle of proportionality finds expression. The severe injury to the aggressor (by deadly

force) does not meet the required correlation in relation to the slight injury to the person attacked,[855] and the abstract factors that appear in the balance are also insufficient to justify the exercise of the deadly defensive force. Moreover, the exercise of defensive force that greatly deviates from the principle of proportionality may actually injure the social-legal order, and certainly does not serve it (the expression of this in Table 2(B) is in the dashed square in the right column of case 3).[856]

This leads to Table 2(A), which relates to the situation where a route for safe retreat does exist. Firstly—two clarifications need to be made. The first—a common mistake is to refer to Table 2(B), which was discussed above, as a correct description of the conflict of interests even when there is a route for safe retreat. There are those, for example, who place the life of the aggressor against the life of the person attacked (in case 1 in the Tables 2(A) and 2(B)), while ignoring the fact that if the attacked person exhausts the route of safe retreat that lies open before him, he will not suffer any physical injury. This mistake, of ignoring the implications of the retreat, leads to a mistaken negation of the duty to retreat.

It is important to emphasise here, that—in contradiction to the mistaken impression that is sometimes created—the necessary consideration of the possibility for retreat does not shift the point in time at which the balance of the competing interests is carried out until after the time of the actor's action. The consideration of the danger to the life of the attacked person, and the determination that he is defending his life while ignoring the possibility of a safe retreat that is open before him, are artificial and mistaken. According to my thinking as well, the point of time that should be considered in the weighing of the conflicting interests is the time of the actor's action (and by no means later), yet if, at this stage, a possibility for a safe retreat already exists, it should not be overlooked.

The second clarification relates to the safety of the route of retreat. As mentioned, even those who support the imposition of a duty to retreat on the attacked person only suggest imposing this duty when the retreat would be safe. If the retreat endangers the person attacked, there is a consensus that he has no obligation to retreat.[857] However, there is no real certainty with regard to the future.

[855] Here it deserves mentioning that the accepted definition of deadly force—in my opinion as well—is sufficiently broad and is not limited to force whose expected results are death, but also includes, eg, force whose expected results are severe bodily injury. Consequently—and correspondingly—the range of 'the existential dangers' that the above tables deal with is wide, so that the non-existential dangers that fall within the bounds of the subject of our present discussion (case no 3) do indeed relate to relatively lighter injuries to the attacked person. Thus, eg, there is no doubt that the danger of rape should be classified as an 'existential danger' that justifies deadly defensive force, and this is even if the life of the victim is not endangered at all. See with greater detail on the desirable content of the proportionality requirement and on the definition of 'deadly force' section 3.8 above.

[856] For an additional explanation of the possible influence of the factor of the social-legal order in the direction of negating the use of defensive force see Ch 1.6.3 above.

[857] See the references in n 788 above. It should be noted that even danger to another person negates the safety of the retreat in a situation where if the actor does not retreat, he would protect the other person (the person attacked), a defence that is also justified within the framework of private defence.

Therefore, it should be clarified that the word 'safe' in the expression 'safe retreat' does not reflect certainty, but an approximation of safety. Usually, even in a retreat that is envisaged as safe, a certain danger for the person attacked nevertheless exists.[858] For example, when an aggressor threatens the person attacked with a knife from a distance at which the knife is not yet effective (50 metres, for example) and the attacked person can run faster than the aggressor and is armed with a gun, the way for retreat that is open before the person attacked appears safe, especially if it is unreasonable to assume that the aggressor has an additional weapon. However, even in such a situation there may be surprises, such as if the aggressor suddenly brandishes a gun that he had hidden in his sleeve (or if he takes a gun from someone else who is present there) and shoots the retreating attacked person. Thus, the requirement that the way of retreat should be safe should be understood (as a condition for viewing the way of retreat as relevant for the matter under discussion) as a requirement for a relatively safe retreat. At the same time, the danger involved in the retreat (not large, but existing) for the person attacked must also be taken into account in the balance of the competing interests.

As can be understood from the comparison between the two Tables, there is no difference between them with regard to the interests of the aggressor. As to the interests of the person attacked and of society (the interests that operate for the justification of the use of defensive force), here too there is no real difference with regard to the factors of the social-legal order and the aggressor's guilt. The main difference between the two Tables is therefore that in the place of expected physical injuries to the attacked person, which appear in Table 2(B) (in the absence of a possibility for a safe retreat), there appear in Table 2(A) (given the existence of a possibility for a safe retreat) injuries to his secondary interests: the injuries to his freedom of action and to his honour, alongside a certain danger that is expected to him (that is—by the definition of the duty to retreat—danger at a low level of probability).

Cases 2 and 4 in Table 2(A) do not raise much difficulty. It seems that everyone would agree that the factors detailed in the table (on the left side of each case) are usually sufficient to justify the exercise of moderate defensive force against the aggressor. The difficulty arises with regard to cases 1 and 3 in Table 2(A)—in which the actor needs to use deadly defensive force. My opinion is that despite the injuries to the freedom and honour of the person attacked involved in a retreat, despite the (small) physical danger expected to the person attacked, despite the guilt of the aggressor, and despite the injury by the aggressor to the social-legal order—the life of the aggressor—from the vantage point of society at large—is nevertheless to be preferred.[859] Consequently, deadly defensive force cannot be justified, but rather,

[858] See the references in n 809 above.

[859] There is an argument that the retreat is completely contradictory to the public's sense of justice. However, Robinson claims that most people will view the retreat as a trivial sacrifice that is clearly outweighed by the consideration of the life of the aggressor and his bodily integrity—see Robinson (1984), n 37 above, vol 2 at 94.

it should be determined that its exercise deviates from the principle of proportionality (a determination whose practical significance is, in effect, the imposition of a duty to retreat). I shall clarify my reasoning for this approach.

Between the two last cases, in which the actor needs deadly defensive force (cases 1 and 3 in Table 2(A)), the dispute focuses on the first of them, and there is an almost complete consensus that deadly defensive force should not be justified in case 3. This approach, which distinguishes between cases 1 and 3—between a deadly attack and an attack that is not deadly—may stem from one of two positions. One possible position that leads to this approach is the treatment of case 1 as if—in the absence of use of deadly defensive force—a real danger to the life of the person attacked exists. As mentioned, I think that such a position (described, in effect, in Table 2(B) above) is incorrect, given that it overlooks the existing possibility of a safe retreat and the (great) influence of this possibility on the competing interests.

The other possible position that leads to this approach (that distinguishes between a deadly and non-deadly attack) is more convincing, although I do not support it. According to this position, even though there is no difference between the two cases (the subject of the present discussion) with regard to the interests of the attacked person that are injured by the retreat, there is a real difference between the cases with regard to the abstract interests—a difference that can form the foundation for the negation of the duty to retreat in case 1. According to this position, when the attack is performed with deadly force, the difference (between the two cases) with regard to the social-legal order is particularly striking. The injury by the aggressor to the social-legal order when he attacks with deadly force is so great that the defence of this order justifies the use of deadly defensive force, even though, given the possibility of a safe retreat, the expected physical injury to the attacked person is not great.

However, in my opinion, private defence is first of all **private** defence. Its principal purpose and justification relate to the interest of the person attacked, and first and foremost to his life and bodily integrity. There is no doubt that the protection of the social-legal order that is achieved by the actor's use of defensive force adds significant weight for the justification of private defence. Nevertheless, it should be remembered that defence of the social-legal order, prevention of crimes, deterrence of criminals etc. are imposed primarily on the state authorities (such as the police) and not on the individual—even within the framework of private defence.[860] Accordingly, if there is a route for safe retreat open before the actor, the social-legal order is insufficient to justify the exercise of deadly defensive force. Such force will greatly deviate from the principle of proportionality and it should

[860] A similar opinion, in this spirit—Bein n 539 above, at 11. See also Fletcher, n 72 above, at 306 (although I must express my reservation with regard to the presentation of private defence in that context as the 'necessary **evil**').

not be justified. The correct message that should be directed to the actor is not 'Get up and strike the aggressor with deadly force!', but 'If you can avoid the use of deadly force by using a route for safe retreat, then you should avoid killing the aggressor'.

Here it is necessary to return to the essence of private defence as a 'justification', ie, the correct and justified action, from a moral point of view as well. The determination that the actor must not use deadly force (a determination that, as mentioned, implies the imposition of a duty to retreat), does not mean that criminal responsibility will necessarily be imputed to the actor if the actor avoids retreating and exercises deadly force. It seems that this possibility is what troubles the minds of those who oppose the duty to retreat. It should be remembered that alongside the justification of private defence, there is room for other similar defences—especially of the excuse type, as well as for diminished responsibility.[861] Accordingly, viewing the defensive action by means of deadly force, accompanied by a refusal to retreat, as behaviour that it is possible to understand, must not lead to a declaration that this is the correct and justified behaviour. Such a declaration stems directly from the negation of the duty to retreat, and may direct the public to extremely violent behaviour, whose direct results are the loss of human life. This is instead of instructing the general public to act with restraint and self-control in cases in which it is possible to avoid deadly force and still protect the important interests—firstly of the person attacked, but also of the aggressor (his life), and indirectly also of society at large.

My above conclusion, with regard to the limited power of the factor of the social-legal order in justifying private defence, is also reinforced by the background of existing reality in society. It is certainly possible to instruct the attacked person to retreat before using deadly defensive force, and to rely on the solution to the problem that is provided by the police and other authorities after the retreat. However, if in a certain society and a certain period a situation is created where the attacks are so frequent that there is no possibility to carry on normal social life given the duty to retreat (such as a situation where it is impossible to walk down the road without having to frequently run away from aggressors), then there is no reason to negate the grant of a more elevated status for protection of the social-legal order within the framework of private defence.

As to the suitable legislative arrangement for the issue of retreat, the question is whether it is sufficient to establish explicitly that the possibility of a safe retreat should be taken into account in evaluating the existence of the requirement for proportionality, or if specific rules should also be added, which stem from the above discussion of the different typical cases (which are described in Table 2(A) above). The main candidate for this issue is the rule according to which the possible (safe) retreat negates (according to the principle of proportionality) the

[861] See the discussion of excessive defensive force, in Ch 5.3 below.

justification of deadly defensive force (or in other words: the imposition of a duty to retreat before the use of deadly defensive force). In my view, given the great importance of the value of human life (even when this concerns an aggressor), there is a reason for this rule, although it is not desirable that it should replace the general principle. Yet there is also a shortcoming in this rule: it has an inflexibility that causes it to be unsuitable for all the cases. Thus, for example, a situation could exist in which the expected danger to the person attacked as a result of the retreat is intermediate—such as cannot easily be ignored, and yet for which the need for deadly defensive force cannot easily be established. For such situations, the court can adapt suitable solutions derived directly from the general principle. The desirable general principle is, as mentioned, that the duty to retreat should be derived in every specific case directly from the principle of proportionality.[862]

Another interesting question points to the connection between the possibility of retreat and the immediacy of the danger. The possibility for a safe retreat may sometimes point to the fact that the danger is, in effect, not yet immediate. We may imagine a situation in which the aggressor threatens to stab the person attacked with a knife that he holds in his hand, while the distance between them is very great, to the extent that the retreat would be perfectly safe and the danger is not yet immediate. If the attacked person remains in his place and allows the aggressor to advance, a situation may be created—after the aggressor reduces the distance between himself and the person attacked to a significant degree—in which the danger already becomes so immediate that there is no longer a possibility for a safe retreat. Is the person attacked entitled to wait and to use the defensive force only after he has lost the possibility for retreat? The solution to this dilemma is also connected to the framework that is provided for the situation—which I shall deal with further on—of the person who by his own guilt causes the situation in which he has to defend himself.[863]

An additional question that the last example raises is, is there any difference between a situation in which the aggressor proceeds in the direction of the person attacked—so that if the person attacked wants to prevent a physical conflict he must retreat backwards, and another case, in which the attacked person is the one who advances towards the place where the aggressor stands and the aggressor threatens the person attacked, so that if the person attacked wishes to prevent the

[862] A striking consequence of the reliance on the general principle of proportionality and not relying on the duty to retreat before the use of deadly force alone, would be the case in which the injury to the interest of the person attacked and of society in the case of the retreat is so slight, that even defensive force that is not deadly, but great, would not comply with the requirement of proportionality (such as when an old woman pushes a strong young man in the queue for the bus, and the attacked person must choose between forfeiting his place in the queue or hitting the stubborn old woman).

[863] And yet it could still be that if the attacked person warns the aggressor that he intends to use deadly defensive force, and the aggressor nevertheless advances towards him, there will be no room to view the attacked person as guilty in the situation that was created only because he did not pre-empt the situation and run away. See also Ch 5.4 below.

physical conflict, it is sufficient if he avoids proceeding toward the aggressor. This question leads us to the discussion of the other possible duties that are close (substantively) to the duty to retreat.

3.9.7 Duties In Addition to the Duty to Retreat

Similar considerations to those that lead to the duty to retreat may also lead to additional duties that are close to it, relating to other alternatives to the use of defensive force. One duty that is discussed in the legal literature is the duty of one who holds property to give it up and to avoid the use of deadly force to protect his possessions.[864] When the situation is such that the actor must retreat from the scene of the event and leave his property in the hands of the aggressor, the tendency is to view this as a regular case of retreat. In contrast, when the situation involved is one in which there is no need for retreat of the actor, but it is sufficient if he avoids the use of (deadly) defensive force and lets the aggressor take the property, the tendency is to talk about another duty, such as the duty to respond to the aggressor's demand[865] or the duty to avoid performing an action in response to the aggressor's demand.[866] Other fine distinctions were made by the Model Penal Code between the aggressor's demand that the person attacked should commit a certain deed (in this case, the attacked person does not have to submit) and the aggressor's demand that the attacked person should avoid doing something (in this case, as a rule, the attacked person is obliged to submit if he would need deadly defensive force to resist)—namely, a distinction between a demand for an action and a demand for an omission,[867] and a distinction between the actor remaining where he is (despite his knowledge that the potential aggressor is on his way there) and the actor moving to another place (despite his knowledge that the potential aggressor is there)[868]—ie, again a distinction between an omission and an action.

In my view, all the above-mentioned cases are substantively quite similar and it is therefore desirable that their resolution derive directly from the general principle, without developing an intricate network of secondary casuistic rules.[869] The substantive question in all the cases is not whether the actor should retreat (or give up his property, etc). Such a duty to retreat per se is never imposed on the

[864] Within the discussion of Beale's position, the difference was presented between such a situation and a situation in which the purpose of the aggressor is to kill the person attacked. The difference is that in the first case, but not in the latter, the aggressor achieves his purpose if the person attacked retreats. See the text above accompanying n 794.

[865] See, eg, Robinson (1984), n 37 above, vol 2 at 87.

[866] See, eg, s 3.04(2)(b)(II) of the MPC.

[867] See *ibid* and see the explanatory wording of the Tentative Draft No 8 (Philadelphia, 1958), at 26.

[868] See Ashworth, n 183 above, at 295ff. and the references mentioned there.

[869] With regard to the dangers in detailed and rigid rules see, eg, Robinson (1984), n 37 above, vol 2 at 88.

actor. The main question is the question of proportionality: whether—given the principle of proportionality—it is justified to use the (deadly) defensive force? The great importance of the various alternatives to the use of force that are available to the actor is for the purpose of determining the interests necessitating defence, and placing these interests—and only these—in the balance used to examine compliance with the principle of proportionality. The initial and necessary conclusion from such an examination of each particular case will be the answer to the question whether the use of defensive force is justified. If it is not justified, then the actor is not obliged to retreat (or give up his property, etc.), but he is completely prohibited from using defensive force. As mentioned, such a prohibition will—from a practical point of view—usually be tantamount to the imposition of a duty to retreat (or to give up the property, etc).

Consequently, there is no substantive difference between a situation in which the alternative to the use of deadly defensive force that is available to the actor is retreat, and a situation where the alternative is avoidance of the exercise of force so that the aggressor can run away with the goods. The conclusion that stems from this clarification is that in the framework of retreat in the criminal code, the drafting implemented must also encompass other alternatives to the use of force (such as relinquishment—at least temporary—of the property).

As to the different rules that have been suggested relating to the right of the actor to remain in his present location or to go to some other place, from the vantage point of the principle of proportionality, no question of any sort arises until the creation of contact between the aggressor and the person attacked (or, at least, a point close to the establishment of contact). For as long as there is no immediate attack, the right to private defence is not established, so that there is also no room to determine whether a certain defensive force (for example, deadly) would meet the requirement of proportionality, or whether the actor must—in effect—retreat, give up the property, etc. The importance of the actor's prior (in time) actions for the situation in which private defence is necessitated, such as his movement to a certain place or his remaining in a certain place, is a completely separate matter, relating to the possibility of viewing the actor as one who by his own guilt causes the situation of compulsion. Thus, for example, if the actor goes to a place where the potential aggressor is, and equips himself with a weapon with the intention of killing the aggressor under the pretense of private defence, it is clear that the very fact of his going to the meeting place bears great legal significance. The significance of this will be addressed in the chapter that deals with the actor who by his own guilt causes the situation in which he is forced to defend himself.[870] At any rate, it is impossible to arrange such specific cases in a vacuum, while relating only to the subject of our present discussion—the duty to retreat. These matters are also true

[870] See Ch 5.4 below.

with regard to an additional alternative that is often addressed: an appeal by the actor to the police with a request for their protection.[871]

A different matter, that merits mention at the conclusion of this section, relates to rules that impose various duties on the actor in light of certain important general policy considerations. One such rule was set forth above in the section that treats the character of the attack,[872] ie, the duty to succumb to illegal arrest that is performed by a law enforcement officer.[873] Another rule that is the fruit of general policy considerations was established in the Model Penal Code with regard to the defence of property. Alongside the duty to retreat, section 3.04(2)(b)(II) imposes a duty to forfeit the possession of property to a person with a claim of right with regard to it—if the defensive force required is deadly.[874]

3.10 The Mental Element

3.10.1 General

Thus far the objective elements of private defence have been discussed. However, significant questions have also arisen with regard to the subjective element of this defence. The main question is whether there should be a requirement of a certain mental element in order to establish and to justify private defence. A positive response to this question leads to the following important questions: what is the exact content of the requirement of a mental element, and what is the rule for the actor who acts without the required mental element? One main possibility is to determine that no sort of mental element is required, and that the objective elements are sufficient to establish private defence. Thus, for example, a person is entitled to private defence (moreover, his action will even be justified) if he kills another person without knowing what later becomes apparent—that he, in this way, had essentially defended himself against an attack by that other person. This

[871] For consideration of this issue see Ashworth, n 183 above, at 296; Fletcher, n 72 above, at 306.

[872] See section 3.4.3 above.

[873] Robinson noted that this rule is analogous to the rule of retreat—see Robinson (1984), n 37 above, vol 2 at 94.

[874] See this s in the American MPC. In fact, it is possible to reach the same result even without such a special rule, through consideration of the character of the attack that is required in order to establish private defence, since the holder who has a claim of right is mistaken to think that he has the right to hold the property. Therefore if he uses force to protect the property, it is reasonable to assume that he will be excused from criminal responsibility within the framework of putative private defence. Against such an aggressor there is anyway no room for private defence (although there is a good probability for establishing the defence of 'necessity'). A fortiori there is no room to use deadly force against him. See section 3.4.5 above. Finally, the duty to forfeit the possession of the property if the defensive force required is deadly should be derived directly from the principle of proportionality, since the use of deadly force to protect property should be absolutely prohibited.

approach includes two subsidiary approaches with regard to the responsibility of the actor: according to the first, it is possible to attribute criminal responsibility to the actor, who acted without awareness of the objective conditions that justified his action, for an impossible and yet punishable attempt to commit an offence.[875] According to the second, the actor is totally exempt from criminal responsibility.[876] The other main approach is to require a certain mental element of the actor as a condition for the justification of private defence. The minimum requirement should be his awareness of the objective conditions that justify his action. Another possible requirement, more widely accepted and stronger, is that in addition to being aware of the objective conditions as set forth above, the purpose of the actor should be to defend himself or to protect property or another person. In the absence of the required mental element, it is accepted within these approaches (both that which requires awareness alone, and that which also requires a certain purpose) that the actor bears full responsibility for the offence.[877]

It is necessary to make a proper distinction between the issue of the mental element that is the subject of our discussion and putative private defence. Indeed, in both cases there is an attempt to discover the mental element of the actor. However, while in putative defence the actor's (mistaken) belief in the existence of the objective elements of the defence serves as a **substitute** for their existence in reality (a substitute that is insufficient to justify the action and only excuses it, based on the actor's mistake), the requirement of the existence of a certain mental element as a condition for the justification of private defence comes **in addition** to all the defence's objective requirements and does not replace them.[878]

3.10.2 The Requisite Mental Element in Light of the Distinctions between Justification and Excuse, and between the Definition of the Offence and Justification

Before discussing the implications of the rationale of private defence for the subject under discussion, a note should be made of the nature of private defence as a justification and the implications thereof, as a completely justified act, for the issue of the mental element. The reason for this is that the question of the mental element does not arise with regard to private defence alone, but it is a general ques-

[875] This is Robinson's approach—see 2 Robinson, n 37 above, at 20ff, 28ff, 571.

[876] This is Williams' approach—Williams (1983), n 1 above, at 504; Williams (1982), n 1 above, at 741.

[877] For a non-standard approach to this matter, according to which the actor should only bear responsibility for an impossible attempt—Feller, n 14 above, vol 2 at 444.

[878] I shall relate to putative defence separately in Ch 5.2. The mention of it here stems principally from the occasional tendency to confuse it with the completely different issue of our present discussion.

tion of principle that arises with regard to all the justification defences. Indeed, in many discussions that were carried out in legal literature on the issue of the mental element required for the establishment of justifications, scholars viewed private defence as one of those justifications. Consequently, in order to derive a benefit from these discussions with regard to the justification of private defence, it is also necessary to relate to the nature of justifications as a whole.

In order to consider the essence of justification and its implications for the subject under discussion, it is necessary to reiterate two substantive and major distinctions that were discussed above, and which together set the boundaries of justification and characterise it: on the one hand—the distinction between the definition of the offence and the justification, and on the other hand—the distinction between justification and excuse.

According to the approach that does not draw a substantive distinction between offence and justification, no mental element of any sort should be required for the establishment of justification, and the objective justifying circumstances are sufficient in and of themselves. For the existence of justifying circumstances is equivalent to the non-existence of a factual element of the offence.[879] In contrast, according to the approach that distinguishes substantively between an offence and a justification, the minimum requirement is awareness of the actor of the justifying circumstances (in order that it may be said that he acted on the basis thereof), and perhaps a certain purpose (such as—for this discussion—a purpose of self-defence or protection). According to this approach, the circumstances of justification only have value and legal significance when the actor is aware of them.[880]

These approaches are connected to various perceptions of the nature of justification.[881] According to one main perception, the justification is an action whose performance is desired by society on the basis of utilitarian considerations (lack of 'societal harm'). According to another prevalent perception, the 'justified act' must also be morally justified, in terms of just, good and correct behaviour. In this basic dispute, as mentioned, I favour the latter approach. In any case, the general character of private defence suits its perception as a morally justified act and not as an act whose performance is desired by society from a purely utilitarian point of view.[882] There is an important difference in value and substance not only between justification and excuse, but also between an element located in the framework of justification and an element that constitutes part of the definition of a criminal offence.[883] The requirement of a certain mental element in order to

[879] This is Robinson's approach—see in detail the text above that begins with the reference to n 102.

[880] This is Fletcher's approach—see in detail the text above that begins with the reference to n 105, and the references that appear there. See also Gardner, n 37 above, at 106.

[881] That I have noted, inter alia, within the discussion of the distinction between justification and excuse—see Ch 1.1 above.

[882] As I attempted to show above during the extensive discussion of the rationale of private defence.

[883] See principally Chs 1.1 and 1.2 above.

establish the justification is based on this difference, which is recognised by most scholars.[884]

There should be no acceptance of Robinson's opinion, according to which just as the mental element of a person is not examined when he does not meet the factual element of the offence—since he does not cause damage or evil—so too, for our matter, there should be no search for his mental element when a person commits an offence, but justifying circumstances exist.[885] There is a substantial difference between the two cases, which cannot be ignored. While in the first case the actor does not commit an offence of any sort, in the second case he commits a criminal offence, including both its factual and mental elements. Accordingly, the criminal offence is established, and in the absence of the required mental element for the establishment of justification, criminal responsibility still exists. The importance of the fact that the actor willingly (and sometimes out of choice) caused real damage, completely voluntarily and without any compulsion, harming a value that is protected by the prohibition of the offence, should not be overlooked.[886] It seems that even Robinson cannot completely ignore the significance of the fact that the actor commits an offence (even if the objective circumstances of justification exist), for he admits—although in another context and volume, but in the same book—that 'harm' also exists in a situation such as this.[887]

Support for the requirement of a mental element for the establishment of justification was expressed by Fletcher.[888] According to his school of thought, the situation is not that the absence of the circumstances of self-defence determines criminality, but that the existence of these circumstances provides a good reason for the breach of norms forbidding killing and assault. He suggests characterising private defence as an exception that should only be awarded to a person who deserves special treatment. The nature of justification—according to him—is that

[884] See the text above, beginning with the reference to note 109, and the references that appear there.

[885] See his book Robinson (1984), n 37 above, vol 2 at 19.

[886] The willingness to harm the protected value exists at least in the offences of *mens rea* (in distinction from negligence).

[887] See Robinson (1984), n 37 above, vol 1 at 83, 90. He writes (at 83) 'The harm caused by the justified behaviour remains a legally recognised harm that is to be avoided whenever possible'; and (at 90) 'Justified conduct, on the other hand, causes a legally recognised harm or evil'. A hint of Robinson's recognition of the problematic nature of justifying the action of the actor who is unaware of the circumstances of 'justification' is also to be found in his book *ibid* at 124, n.10. Moreover, if the exclusive guiding principle is the existence of 'net harm', even without need for awareness of the justifying circumstances—as Robinson holds—it would probably be necessary to wait, whenever an offence occurs, for many years in each case (and to avoid conviction) until there would be sufficient historical perspective in order to determine whether society had benefited from the action of the offence or not . . . (for then, perhaps, some sort of objective circumstances of justification would exist, if not those of private defence, then those of 'the lesser evil' (justifying 'necessity')—at least in those legal systems where such a justification is recognised).

[888] See Fletcher (1978), n 1 above, at 762, 768, 555ff; Fletcher, n 72 above (in its entirety); Fletcher, n 75 above, at 1363ff; Fletcher, n 74 above at 1376ff; vol 3 of the *Encyclopedia of Crime and Justice*, ed by Kadish, n 96 above, at 945.

the actor has good and sufficient reasons to breach the norm, and therefore the justification is available only to one who acts for such reasons. Fletcher also suggests viewing justification as a privilege of the actor, so that in the absence of awareness of the justifying circumstances, it would not be possible to establish that the actor used his privilege.[889] This interesting idea was already expressed at the beginning of the previous century by Beale, who wrote as follows:

> Justification, then, is a legal power to act offensively. The power is the power to act, not the right to cause the result. Though the result would be desirable, it is not justified unless the defendant's personal action was done in exercise of the power.[890]

This leads to criticism regarding the very classification of defences into justifications and excuses. The argument is that this classification leads to incorrect conclusions, according to which there should be no requirement for the existence of any sort of mental element in order to establish justification defences—as distinct from excuse defences.[891] The problem stems from the mistaken assumption that justification is an objective phenomenon, and accordingly behaviour that is justified from an objective point of view cannot become illegal because of the actor's lack of awareness. The decisive answer to this argument was provided by Hall. According to him, the logic is not that previously existing justification was abolished because of '*mens rea*' (in his words), but that there is no justification if there is '*mens rea*'[892] (ie, the justification was never established at all, since a certain mental element is also required, apart from the objective conditions, as an essential condition for the establishment of justification—author's clarification). It is interesting to note that in another context Robinson himself claimed as follows:

> While there was at one time some doubt, it is now undisputed that otherwise lawful conduct can be made criminal by an actor's culpable state of mind.[893]

Such is the situation, for example, with regard to the criminal attempt.[894] Both with regard to the creation of criminal responsibility and its negation, not only purely objective phenomena are addressed, and it is insufficient to question whether the external situation is prohibited by the criminal law. Moreover, even if the distinction between justifications and excuses is accepted, this does not imply that it is necessary to distinguish between them with regard to each and every

[889] See Fletcher (1978), n 1 above, at 762, 768, 555ff.

[890] JH Beale, 'Justification for Injury' (1928) 41 *Harvard Law Review* 553.

[891] See Dressler, n 32 above, at 70, 80; Robinson (1975), n 37 above, at 280;Robinson (1984), n 37 above, vol 2 at 27; Gur-Arye, n 13 above, at 232.

[892] See Hall, n 13 above, at 229.

[893] See Robinson (1984), n 37 above, vol 2 at 44.

[894] Although in the attempt, the intent to harm also serves as a source of the danger and not only as an element in the evaluation of the guilt of the actor—see Arnold Enker, '*Mens Rea* and Criminal Attempts' (1977) *American Bar Foundation Research Journal* 845.

matter. Therefore, the fact that a certain mental element is required in order to establish excuses does not negate a possible conclusion that for the establishment of justifications a certain mental element is also required. There are great differences between justification and excuse. However, they are not comprehensive, and are not meant to encompass all their features. Thus, in both cases—of justification and of excuse—the existence of all the elements of the offence is required, and in both cases criminal responsibility is not imposed on the actor.

There is an argument that the requirement of a mental element of any sort for the establishment of justification should be avoided due to utilitarian considerations. For the requirement of a mental element deters individuals from performing actions whose performance is actually desired by society.

Robinson, for example, presents the following case: a large fire approaches a village and is liable to kill its residents. The way to stop it is to burn a private field that stands in its path. His argument is that if we demand a certain mental element in order to establish justification of the 'lesser evil', we shall deter the actor, who hates the field owner, from burning the field and thereby saving the population of the village.[895]

Robinson's argument is unpersuasive. Firstly, it does not relate to the requirement of awareness of the justifying circumstances, for if the actor is not aware of them (if, for example, he is completely unaware of the huge fire that is approaching) there is no reason to encourage him to set fire to his neighbour's plot only because of the slight chance that he will thus halt a larger and more dangerous fire—if one should break out. Secondly, with regard to the stronger requirement—of justifying purpose—to which Robinson indeed refers, the argument is also unconvincing. As will be seen later, the desirable format of a requirement of a justifying purpose does not entail a requirement for exclusivity of the purpose. A negative purpose or motive accompanying the justifying purpose will not negate the justification. Therefore, in the decisive majority of the cases that Robinson considers, including the example presented above, the justifying purpose will also exist. With regard to his determination, for example, that in light of a requirement of a mental element, it is advisable for the burglar to break into the residential home of people who hate him,[896] it should be noted that the said hatred does not negate the existence of a purpose of self-defence or protection.

It is important to compare the situation where the actor is not aware of the circumstances that justify his action, and a situation of blameless mistake. The offence is not established when the actor performs the factual element of a certain offence without awareness of this element (or part of it), for no significance is attributed—either value-moral or legal—to chance. Likewise, for the issue that is the subject of our discussion, there is no reason to allow the actor to reap the

[895] See Robinson (1975), n 37 above, at 287.
[896] See *ibid* fn 75.

benefit of chance—ie, from the fact that after having performed his action it turns out that circumstances of private defence existed—although the actor was totally unaware of them at the time of his action.

With regard to this random chance, it is interesting to examine the two basic foundations on which criminal responsibility is founded—danger and guilt. When the actor who is unaware of the circumstances that justify his action is tested, no difference of any sort can be discovered—not from the point of view of his (existing) guilt, nor from the point of view of the danger to be expected from him (which also exists)—in comparison to another offender who commits the same offence without the existence of objective circumstances that justify his action. The coincidental existence of the justifying circumstances is obviously unlikely to establish such a difference between them.

There is no room from a moral or legal point of view to justify the action of the accused who was unaware of the existence of the justifying circumstances for his action, and it would even open the law to ridicule, scorn and contempt. For example, C attacked B illegally. A saw them fighting. He was mistakenly convinced that it was B who had attacked C, and killed C because of his hostility towards him. Is it acceptable to morally justify the action of A only because, contrary to A's belief, C was actually the one who had attacked B illegally, and thus (considering the objective circumstances alone, and completely ignoring the mental element) to view the action of A as private defence of another person?

An additional argument against the requirement of a mental element in order to establish justification was proposed by Silving, who is amongst those few scholars who reject this requirement. Her reason for this negation is that it is reasonable to assume that the actor was unconsciously aware that he was being attacked, and that weight should be given to unconscious factors which operate to the benefit of the accused.[897] This is odd reasoning: how can we know that such a probability exists? What exactly is this 'unconscious awareness'? Silving left this reasoning vague and unexplained. Is such a dubious probability, of 'unconscious' awareness, sufficient to justify the action of a person who commits a criminal offence?

A few scholars have attempted to derive from the intuition of members of society what would be the appropriate legislative framework for the issue under discussion. Robinson and Fletcher, for example, held competing views on this subject, each of them bringing different examples claiming that the intuition of most members of society were in accordance with his own particular school of thought.[898] Firstly, the power of an argument that is based on the intuition of most members of society is limited. Secondly, in the absence of data from thorough

[897] See Silving, n 45 above, at 394.

[898] See the consideration of the 'findings' of the two scholars in Robinson (1984), n 37 above, vol 2

empirical research of the issue,[899] the very different impressions of these two worthy scholars are sufficient to lead us to abandon the intuition argument. Instead, we must search for other criteria for the resolution of the dispute.

A further attempt by Robinson to defend his theory, dubbed by him 'the deeds theory', is made by posing the 'reasons theory' in opposition to it and launching an attack on the latter.[900] His attack on 'the reasons theory' is based on a mistaken assumption that presumes that all those who support this theory are necessarily satisfied with the fact that the actor reasonably believes that the justifying circumstances exist in order to establish the justification. This assumption is not dictated by 'the reasons theory' but, rather, stems from the MPC's statutory arrangement. Therefore, Robinson's criticism is fitting regarding this statutory framework. Indeed, the actor's mistake does not create justification, but solely an excuse. However, Robinson makes it easy for himself by almost completely ignoring the more persuasive approach, according to which in order to establish the justification there is a requirement not only of a certain mental element, but also of certain objective demands (immediate danger, necessity, proportionality, etc). Therefore, it is not 'the deeds theory' but the theory proposed in this book that provides the correct solutions for all the situations discussed by Robinson: (1) The action of 'The Unknowingly Justified Actor' is not justified, since the requisite mental element does not exist; (2) A mistake of the actor, according to which the justifying circumstances seem to exist, does not create a justification, but rather, creates an excuse; (3) The responsibility of A who resists B—'The Unknowingly Justified Actor'—should not necessarily be automatically-mechanically derived

[899] In PH Robinson, 'Theft of the Bomb: On the Substance of the Justification Defenses' (1999) 22 *Tel Aviv University Law Review* 65 (Hebrew) (at 76–79), Robinson reported on an empirical research and attempted to make deductions from it with regard to the issue under discussion here. However, it is difficult to learn significantly from this research for the current matter. **Firstly**, the details of the research and the proof of its reliability are not presented in this article. **Secondly**, those questioned were not asked about the various theories, but the investigators composed scenarios, representing the various theories, which were presented before those questioned. The very choice and composition of the examples—which are not presented to us—may influence the opinions of those questioned (just as the example of the bomb thief, on which Robinson bases his article, is not a 'pure' (unbiased) example—see n 944 below). **Thirdly**, those questioned did not think that it was necessary to justify (or even to excuse) a justified arson carried out without awareness of the justification, but they expressed an opinion that a significant punishment should be imposed—the same severity of punishment that in their opinion should be imposed for an unjustified attempted arson (although less than for an intentional unjustified arson)—see the article, *ibid* at 77.

Finally, if nevertheless the author may be permitted to transgress by mentioning a modest (in terms of the number of persons interviewed) survey that he conducted, the findings were as follows: almost all those questioned supported the minimum requirement of awareness of the justifying circumstances, and were divided between those who also supported an additional requirement—of a purpose of self-defence or protection—and those who sufficed with the requirement of awareness (the distribution was approximately equal).

[900] Paul H Robinson, 'Competing Theories of Justification: Deeds v. Reasons' in AP Simester and ATH Smith *Harm and Culpability* (Oxford, 1996) 45. See also Robinson, n 602 above, at 451–76. For another view see Fletcher, n 46 above, at 103.

from the responsibility of the mistaken B, but should also be determined according to the awareness of A of the circumstances which are liable to justify B's action.

Only at the end of his article, after he has fiercely attacked the theory according to which the actor's belief alone suffices (even mistaken belief) in order to establish justification (which he names 'the reasons theory'), does Robinson devote (merely) a few lines to the correct approach, which he names 'The Dual Requirement Proposal' for justification—that the actor both perform the right deed and act for the right reason. As Robinson puts it:

> I do not, however, understand the theory behind this dual-requirement approach. It seems internally inconsistent in its view on the significance of resulting harm and on the sufficiency of culpability as grounds for full liability.

However, I do not see what internal inconsistency exists in the approach, which requires both an objective factual element and also a subjective mental element in order to establish justification. There is similarly no internal inconsistency in the definition of the criminal offence, that also, as known, requires an objective factual element (the *actus reus*) and a subjective mental element (the *mens rea*), and no consideration is given to sufficing with only one of them.

In conclusion, my opinion is that the character of private defence as a justification, ie, the correct and—also morally—justified act, necessitates at least a requirement of awareness by the actor of the justifying circumstances, if not also a justifying purpose (for our discussion—a purpose of self-defence or protection). There is no room to allow the actor to enjoy the benefit of the purely coincidental occurrence of justifying circumstances of which he was totally unaware. However, it is not enough to suffice with a mechanical-automatic derivation of solutions to the issue of private defence from its justified character, and it is always necessary to examine the suitability of the solutions to the specific rationale of private defence.[901]

[901] Williams wished to conduct such an examination, when he wrote as follows:

> Suppose that D, with intent to murder P, shoots and kills him; unknown to D, P was at that moment about to shoot D, so that from the objective point of view D's act was done in self-defence . . . If the object of the law of self-defence is to deter the intending criminal (P) from his crime, by placing him outside the protection of the law if he tries to carry it out, then D has unwittingly subserved the purpose of the law, and so, presumably, should not be regarded as having committed an **actus reus**. If the object of the law of self-defence is merely to remove the prohibition otherwise imposed upon D, because it cannot be expected that in such circumstances the prohibition will be effective, it may logically be held that the law of self-defence is inapplicable to the situation, because D did not intend to act under it. It is submitted that the latter is the correct view. (The quotation is taken from Williams, n 13 above, at 26; emphasis in original; a correction has been made to a printing error whereby the letter D was replaced in its later appearance by the letter A).

Beyond my support of such a search for the appropriate arrangement in light of the rationale for private defence, I cannot refrain from having reservations regarding Williams' consideration of the rationale for private defence. According to him, there are only two possible theories: loss of rights (forfeiture); and self-defence as an 'excuse'. As was previously noted at length (see Chs 1.5.2 and 1.4), these are archaic perceptions of private defence, which have long since lost their validity. Perhaps

3.10.3 The Requisite Mental Element in Light of the Rationale for Private Defence

With regard to the issue under discussion, in light of the rationale for private defence, one important factor stands out immediately among those that operate for the justification of private defence, namely the social-legal order. While the actor who is aware of the justifying circumstances and acts in response to them can definitely be said to be protecting the social-legal order by his action, the situation is completely different with regard to an actor who is not aware of the justifying circumstances. Such an actor, who commits the offence not because of the compelling situation in which he finds himself entrapped, and not in order to repel an illegal attack, but out of completely separate and criminal considerations (such as his enmity towards the aggressor), injures the social-legal order by his action. He breaches this order, certainly does not protect it and is most obviously unfit to protect it. The actor does indeed injure the aggressor who breaches the social-legal order; however in light of the above-mentioned mental state of the actor, he also breaches this order—which, as noted, is not a purely objective term,[902] and because of his dangerousness, harms the sense of security of law-abiding citizens. Failure to legally address the behaviour of such a dangerous person would damage public trust in the legal order.

A much more difficult question is whether the factor of the social-legal order also dictates a requirement of a justifying purpose—the purpose of self-defence or protection—or whether the awareness of the actor of the justifying circumstances is sufficient. In my opinion, in order that a person may also be considered fitting for the role of defender of the social-legal order (apart from his defence of himself, another person or property), the justifying purpose mentioned above is also required. However, it should be remembered that private defence—as distinct from a possible defence of use of force to prevent a crime—is not only justified from the vantage point of the factor of the social-legal order. There are other considerations for its justification, especially the defence of the attacked person's autonomy and the aggressor's guilt. These factors will operate for the justification of private defence even in the absence of the justifying purpose. Therefore, it is also definitely possible to support the approach according to which the awareness of the actor of the justifying circumstances would suffice. The difference between the two approaches is that according to one (within whose framework a justifying purpose is also required) greater emphasis is given to the factor of the social-legal

Williams' perception of the rationale of private defence is that which brings him to his exceptional opinion (against the background of the contradictory opinions of most scholars), which I noted above, according to which no mental state of any sort should be required in order to establish private defence (not even awareness of the actor of the justifying circumstances).

[902] See the discussion of the social-legal order above that begins before the reference to n 460.

order, while according to the other (within whose framework the awareness of the actor of the justifying circumstances is sufficient) although there is a function for the factor of the social-legal order in the justification of private defence, this function is limited and not dominant. While a person who acts to defend himself or to protect does so in full harmony with the social-legal order (an order that requires such an action), by contrast, one who acts without a justifying purpose (although with awareness of the justifying circumstances) in effect **exploits the situation that was created** in order to achieve his negative purposes, so that he is far from the ideal defender of the social-legal order.

Given these conclusions, it seems that the main question that remains unresolved even after the examination of the rationale for private defence is not that between random chance and awareness, but that which is between awareness and purpose.[903] Before returning to this question, I briefly note the solutions that have been provided for the issue under discussion in various legal systems in order to learn from them what is relevant and appropriate.

3.10.4 The Mental Element as Reflected in Comparative Law

The leading ruling in English law, and the most famous in Anglo-American law on this subject, was handed down in the year 1850 in the case of *Dadson*.[904] The accused was a police officer who was guarding a grove from which trees had been stolen. When he noticed a thief carrying wood, and after the latter refused to stop, the accused shot him and wounded him. The accused was charged with the offence of illegal shooting with the intention of causing severe bodily injury. In those days, it was legal to shoot an escaping felon with the purpose of stopping him. According to the law of theft that was then in existence, the theft of wood was not a felony unless the thief had two previous convictions for the same offence. In fact, that offender had the required previous convictions, so that he was a 'felon', but the accused Dadson of course did not know about these convictions. Consequently, it was decided that in the absence of his awareness of the justifying circumstances, the justification was not established, and the accused was convicted.

English scholars paid considerable attention to this ruling. Williams claimed, for example, that the verdict was mistaken, for if it had been correct, a British soldier who killed an enemy soldier in a military action believing that he had killed

[903] This is the place to note that the decisive majority of scholars agree that at a minimum, awareness of the actor of the justifying circumstances should be required. Apart from the scholars that I noted above, see also, eg, Hall, n 13 above, at 228–34; Perkins and Boyce, n 85 above, at 1114; Heberling, n 62 above, at 917ff; La Fave and Scott, n 43 above, at 655; Greenawalt,, n 37 above, at 294; Smith and Hogan, n 284 above, at 34–35, 259.

[904] See the ruling, *Dadson* (1850) 4 Cox CC 358. Although this does not involve private defence but another justification—the use of force in order to perform an arrest—the ruling was addressed extensively in legal literature, including in discussions of private defence.

his own commander would be guilty of murder.[905] In Williams' opinion, this conclusion would be ridiculous. However, I do not see what is ridiculous in such a conviction, especially given the rule that is recognised currently regarding transferred intention.[906] Smith, who refers to the above-mentioned example of Williams, claims that it is not relevant to our discussion. Yet his reasoning is weak, since it is based on the fact that murder is traditionally defined in English law as 'killing of a person under the queen's peace', while the enemy soldier who goes to war against the queen is not under the queen's peace, so that an element of the definition of the offence is missing.[907] To Smith's credit, it should be noted that apart from this very formal reasoning for the negation of Williams' example, he also later presents substantive reasoning: the behaviour of the actor does not improve only because justifying circumstances exist of whose existence the actor is unaware, since this involves pure chance.[908]

The legal situation in England is that the *Dadson* judgment (according to which awareness of the justifying circumstances is required) applies to private defence, but until recently the detention rules were interpreted to the effect that the *Dadson* judgment did not apply to the use of force for the performance of an arrest.[909]

The majority of the members of the English committee that stood behind the Draft Criminal Code of 1989 supported the *Dadson* rule and asserted that it was desirable to require a certain mental element for the establishment of private defence. Nevertheless, because of considerations of consistency with the existing English law regarding arrest (with regard to which they thought that objective circumstances were sufficient in and of themselves), the Draft English Code defined private defence in such a way, that no mental element of any sort was required in order to establish it.[910] The phrase that was provided is 'in the circumstances which exist or which he believes to exist'. In the explanatory wording, the drafters clarified that they included the alternative of (subjective) belief in the existence of circumstances in this section only in order to emphasise the independence of the alternative of (purely) objective existence of the circumstances.[911] Thus, to speak metaphorically, the members of the committee added a 'sin' to a 'crime'. The

[905] See Williams, n 13 above, at 22.

[906] With regard to transferred intention (generally) see, eg, Williams (1983), n 1 above, at 907–8.

[907] See Smith, n 91 above, at 30–31.

[908] *Ibid* at 31–32.

[909] See 6th edn of JC Smith and B Hogan, *Criminal Law*, at 38, 245ff, who also support this rule. In the 9th edn of their book, Smith and Hogan, n 284 above, from 1999, a new interpretation of the English detention rules is suggested, according to which awareness of the justifying circumstances is required not only for private defence, but also when use of force for the performance of an arrest is involved—see *ibid*, at 34, 259. For further support of the *Dadson* ruling see Christopher, n 76 above.

[910] See the explanatory wording of the Draft English Criminal Code of 1985 (Law Commission, Codification of the Criminal Law, no 143 (London, 1985) at 123); the explanatory wording of the Draft Code of 1989 (Law Commission, A Criminal Code for England and Wales, no177 (London, 1989), at 231ff); 6th edn of Smith and Hogan, *Criminal Law*, at 38, 245ff; Smith, n 91 above, at 32–41.

[911] See s 44 of the Draft English Criminal Code (Law Commission, A Criminal Code for England and Wales, no 177 (London, 1989)), and also the explanatory wording, *ibid* at 231ff.

'crime' was the lack of a requirement of a mental element of any sort for the establishment of private defence, in contradiction to the committee members' own opinion of what would be the suitable law for this issue. The 'sin' is adding putative defence (since this is the meaning of the alternative regarding belief (alone) in the existence of the circumstances) and placing it on an equal footing with real private defence.[912] If the members of the committee wished to shape a consistent framework, they could have done so by establishing a requirement of a mental element in all the justifications.[913] It should be noted that the members of the committee did, indeed, eventually take this preferred path, within the framework of the 'Consultation Paper' of 1992, in which they proposed changes to their Draft of 1989, and subsequently also in the 1993 version of the Draft Code.[914]

In American law also, as in English law, a mental element is required for the establishment of private defence. Moreover, the actor's awareness of the justifying circumstances is usually insufficient, and a purpose of self-defence or protection is also required.[915] In this matter, the Model Penal Code reflects the existing law.[916]

[912] A mistake that I already noted—see Ch 2.2.1 above. See also Ch 5.2.2 below.

[913] Moreover, although consistency is a positive approach, especially in legislation, this is not the case when it is forcibly imposed on two matters that are substantively different, such as private defence and arrest. Smith noted this substantial difference that deviates from the scope of our discussion, in light of the ruling in *Thain* (1985) Northern Ireland Law Reports Bulletin 31—see Smith, n 91 above, at 34ff; the 6th edn of the book, Smith and Hogan, *Criminal Law*, at 246. As Smith noted, if this Draft Law had been legislated, this would be—both in his opinion and in the opinion of most of the members of the Legislative Committee—a change for the worse with regard to the law on the issue of the subject under discussion; a change that was considered to be positive by one member of the committee, Williams—see Smith, n 91 above, at 41.

[914] See the explanation regarding the new requirement of the actor's awareness of the justifying circumstances, in s 20.9 (beginning at p 64) of the 'Consultation Paper', Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles, no 122 (London, 1992). It should be noted that the version of this s of the law that is presented there (at 88) does not restrict itself to awareness, but also requires a certain purpose ('28.–(1) The use of force by a person for any of the purposes specified'). See also s 27 of the Draft Code of 1993, Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles, no 218 (London, 1993).

[915] See, eg, Fletcher (1978), n 1 above, at 557; Silving, n 1 above, at 304; Perkins and Boyce, n 85 above, at 1114; La Fave and Scott, n 43 above, at 655; Heberling, n 62 above, at 917–18; Baum and Baum, n 1 above, at 27; Greenawalt, n 37 above, at 281. It should be noted that this relatively long list of references is presented in order to illustrate the lone nature of the only scholar who asserted that there are also authorities in American law for the lack of a requirement of a mental element, which are even comparable in number to those which support the requirement—see Robinson (1975), n 37 above, at 290 (the reader's attention is drawn to the limited number of authorities that he brings to support his claim that American case law also exists which holds that there is no requirement for a mental element of any sort); Robinson (1984), n 37 above, vol 2 at 13 (where Robinson claims an almost equal split between the authorities).

[916] The version that determined it is: 'the actor believes that such force is immediately necessary for the purpose of protecting.

This wording does not literally demand that the actor should have a protective purpose, but it appears to be sufficient if he believes that the force is necessary for the purpose of protecting. Yet, from the explanatory wording it appears that the drafters intended to require a purpose as a mental element of the actor. However, despite the intention of the drafters, the section may be interpreted differently. See s 3.04 of the MPC and the explanatory wording of the Tentative Draft No 8 (Philadelphia, 1958) at 17. Here, too, Robinson stands alone with his different interpretation, according to which there is no requirement—pursuant also to the MPC—for a certain purpose—see Robinson (1984), n 37 above, vol 2 at 18, 21.

The requirement of a purpose of self-defence or protection as a condition for the establishment of private defence also exists in German law[917] and is recognised as the existing law in many additional legal systems.[918] In modern proposals for legislative reform overseas, it is also common to require a purpose. This is the situation in all the Israeli draft laws,[919] in the draft laws of England and New-Zealand,[920] in the Model Penal Code of the American Law Institute and in the American Federal Draft.[921] The exceptional drafts—in which the objective approach is taken, according to which the existence of justifying circumstances themselves suffice—are a previous English draft from 1989 that was noted above[922] and the (separate) private proposals of Robinson and Silving.[923]

[917] See, eg, HH Jescheck, *Lehrbuch des Strafrechts* (Berlin, 1988) at 307 (consideration of private defence) and at 294–95 (consideration of justifications in general), Hermann, n 342 above, at 750 ('In German law, intent to defend is a necessary requirement of self-defense'); Silving, n 1 above, at 304; Fletcher (1978), n 1 above, at 557; Robinson (1984), n 37 above, vol 2 at 23.

[918] With regard to Western legal systems, see Fletcher (1978), n 1 above, at 557 and Fletcher, n 75 above, at 1363–64. As to the penal codes of various states, while in some of them the requirement is not explicit but needs interpretation, in six of the twenty penal codes that were examined in this study there are strong indications of a requirement of a purpose of defence or protection (this concerns the penal codes of Finland (1889; 1996) (s 6); China (1979) (s 17); Rumania (1968; 1973) (s 44); Sweden (1962; 1972) (s 24(1)); Korea (1953) (s 21) and Queensland (Australia) (ss 271–73).

[919] Thus, in s 35 of the Draft of the General Part of the Penal Code (Prepared by the Expert Committee under the Chairmanship of the Former President of the Supreme Court, Justice Agranat, (1980) 10 *Mishpatim* 203 ('an action that he performed in order to repel'); in s 46 of the Draft Penal Code (Preliminary Part and General Part) (1992) by Feller and Kremnitzer as it was tabled in the 'Knesset' (Parliament) ('an action that he performed in order to repel') and in s 38 of the Draft Penal Code (General Part) (1986) by Enker and Karp (Parts of this draft were published in A Enker and R Kannai, 'Self-Defence and Necessity after Amendment 37 to the Penal Code' (1992) 3 *Plilim* 5 (Hebrew) (' an action that he performed . . . in order to repel or avoid'). Thus too—apparently—in the new version (Israeli Penal Code (Amendment no 39) Preliminary Part and General Part (1994)) of s 34j of the Penal Code—'An action that was required . . . **in order to repel**'. 'Apparently'—because the version of this s may also be subject to another interpretation, according to which the words 'in order to repel' are part of the description of the necessity for the action ('an action that was **required . . . in order** to repel').

[920] See s 27 of the English Draft Law (Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles, no 218 (London, 1993)); s 41 of the New Zealand Draft (The Crimes Bill of New Zealand (Wellington, 1989)).

[921] See s 3.04 of the MPC and n 916 above; ss 603, 604, 606 of the American Federal Draft Code (1970).

[922] See nn 910–11 above and accompanying text.

[923] See s 3–3 (at 565) and also s 3–18 in Robinson (1984), n 37 above, vol 2 at 571; s 134 (at 390) and the explanatory wording in Silving, n 45 above, at 394.

It should be noted that the Canadian Draft Laws do not allow for any kind of generalisation. For while the Draft from 1987 (Law Reform Commission of Canada, Report Recodifying Criminal Law, rev and enl edn, no 31, (Ottawa, 1987)) requires a purpose with regard to protection of the body but does not require a purpose with regard to the protection of property, in the Draft from 1993 (Government of Canada, Proposals to Amend the Criminal Code (General Principles) (Ottawa, 1993) ('White Paper')) the situation is exactly the opposite (a purpose is required for protection of property but no purpose is required for the protection of the body)—see ss 3(10), 3 (11), 3(12) of the 1987 Draft *ibid* and ss 37, 38 of the 1993 Draft *ibid*. This does not appear to be a novel principled approach but rather a problem of formulation.

3.10.5 The Content of the Requirement for a Mental Element: Awareness versus Purpose

As explained, both the nature of private defence as a justification and the rationale of private defence obligate a requirement of a certain mental element as a condition for the establishment of private defence. But what is the appropriate content for this requirement? There is no doubt that it is founded on the underlying requirement of awareness of the justifying circumstances. This is the minimum condition, while the dispute is whether this is sufficient in and of itself, or if in addition there is a need for a requirement of a certain purpose. It should also be noted, that most of the arrows shot by those opposing the requirement of a mental element of some sort are aimed—as shall be seen below—at the requirement of a purpose, since it is not easy to criticise the requirement of awareness.[924]

With regard to the requirement of awareness, an important clarification is necessary. Just as the criminal *mens rea* that is required as a basic condition for the establishment of a typical criminal offence is an awareness of the actor of all the factual elements of the offence except the prohibiting norm itself,[925] thus too the requirement of the awareness of the actor of the justifying circumstances as a condition for establishing the justification of private defence does not encompass the law in general nor the requirement of proportionality in particular. The existence of proportionality is a question of law. It does not concern the determination of a fact's existence, but the application of a normative requirement for the facts of a concrete case, and consequently it constitutes part of the 'law'. It involves a concept that leaves discretion to the court, especially given the impossibility of providing for all the possible balances between the various competing interests, within the legislated law. The test that courts usually use in order to determine the existence of the (objective) requirement of proportionality—'the reasonable person'[926]—also demonstrates that the courts, in effect, determine a norm and not the existence of a fact. Consideration of the mental element of the actor regarding the existence of proportionality therefore takes place within the framework of the arrangement of putative private defence or diminished responsibility in a case of private defence with excessive force, arrangements which are discussed later.[927]

[924] Thus, eg, Robinson bases all his criticism of the requirement of awareness on the very specific case of placing a trap and on the fact that awareness constitutes a mere approximation of a more suitable standard—according to the supporters of the requirement of a mental element—of a justifying purpose—see Robinson (1984), n 37 above, vol 2 at 15ff. In passing, it should be noted, that in my opinion, Robinson's analysis concerning the issue of the trap is mistaken, since he only focuses on the awareness of the actor at the moment of the trap's activation, while he completely ignores the awareness of the actor at the time he sets the trap.

[925] See, eg, Williams (1983), n 1 above, at 454.

[926] See, eg, Yeo, n 733 above, at 364.

[927] See (correspondingly) Ch 5.2.5 and 5.3 below.

This leads to a more difficult question: what is the desirable requirement—relying on awareness alone or requiring a purpose in addition? Here, too, it is first necessary to make an important clarification. In contrast to the tendency that sometimes exists to talk about motives, or to confuse motives and purposes,[928] the requirement that should be taken into account is a requirement of purpose and not of motive.[929] My opinion is that as a general rule motives are not relevant for substantive criminal law, in clear distinction from purposes, which are likely to be relevant, as they highlight the choice of the actor to injure the object that is protected by the prohibition of the offence.[930]

As mentioned, the requirement of a purpose in addition to awareness fits better, both with the factor of the social-legal order in the rationale for private defence, and also with the completely justified character of private defence. However, on the path to the conclusion that this is also the desirable law, it is necessary to overcome several additional theoretical obstacles that the opponents of this requirement have presented. Most of the possible difficult questions in this matter were posed by Robinson: Which exact purpose should be required? Should it be exclusive? Should it be the main purpose? Or, perhaps, necessary purpose (without which the actor would not have acted as he did)? An additional argument that Robinson raises is

[928] For mistakes regarding this matter (in most cases—the use of the terms 'motive' and 'purpose' interchangeably, where the opinion of the authors is in fact that a 'purpose' should be required) see the explanatory wording of the MPC (Tentative Draft No 8 (Philadelphia, 1958)), at 17; Dressler, n 32 above, at 70. In contrast, when Robinson speaks of an evil motive instead of a lack of the required good purpose (see Robinson (1975), n 37 above, at 291), this does not stem from his lack of distinction between motives and purposes, but is, apparently, intended to serve his argument—negation of the requirement for a purpose—while blurring the true requirement.

[929] To refresh the distinction between these terms, I shall present the following example (The verdict of CA 309/58 *Barazani and Mizrahi v The Attorney-General of Israel* PD 13(3) 1409): a sense of having been insulted and humiliated directed against a man who had disappointed a woman in love with him, led that woman to murder the man's father, with the purpose of causing severe emotional harm to the man. **The motive**—in this example is the sense of having been insulted and humiliated—is the answer to the question: why did the actor act in this way? It concerns a mental attitude that does not relate to any future event. **The purpose**—in this example, the desire to cause severe mental harm to the man who had disappointed her—is the answer to the question: what did the actor desire to achieve by means of his act?

The purpose is a will, an aspiration for the achievement of a certain aim (in the above example—the mental injury to the man). In terms of the mental attitude, the purpose is identical to criminal intention (that in the above example is the aspiration for the death of the father). Both cases concern a will, an aspiring attitude. The difference is that while the criminal intent relates to the achievement of a **result**, whose existence is required in the definition of the factual element of the offence, the purpose relates to the achievement of an **aim**, whose existence is not a condition for the establishment of the offence (such as the permanent denial of an object that is stolen from its owners—in an offence of theft). Thus, in substance, the purpose is very close to the intention, and both of them differ greatly from motive (consequently, eg, it is possible to replace them with the value-equal replacement 'the foreseeability rule' (practical certainty; 'the knowledge rule'; '*dolus indirectus*') while this rule cannot be applied to motive at all, since motive does not relate to any future event). For greater detail: Sangero, n 61 above, at 339ff., and Sangero (1998), n 83 above, at 725ff.

[930] For detail, Sangero, n 61 above, at 339–43; also with regard to the tendency to confuse motives and purposes. For additional and reasoned support for my approach see Robinson (1984), n 37 above, vol 2 at 17.

that while with regard to a criminal offence the requirement for a purpose relates to an objective factor that appears in the definition of the offence, with regard to a defence the purpose has no parallel objective factor of any sort to relate to.[931]

Silving and Dressler also voiced their criticism regarding the requirement of a purpose. Dressler doubts the exalted purposes of the defender, his commitment to the public interest and the courage that his action reflects, and notes that the actor often acts out of mixed purposes or in a spontaneous manner.[932] Silving claims that the requirement of a purpose is absurd in its simplicity, for it assumes that human behaviour is directed by an isolated motive, in contradiction to psychological reality.[933]

The main response to most of the difficult questions and arguments that were mentioned is that there should not, in fact, be any requirement that the justifying purpose (to defend oneself or to protect) be the sole purpose of the actor. Indeed, often additional purposes and motives will accompany it, some of which will not be pure. However, this does not detract from the correctness of the determination that the actor did indeed act in order to defend himself or to protect, and this should suffice. The supporters of the requirement of a justifying purpose sometimes make it clear that it should not necessarily be the only purpose of the actor.[934] A full examination of all the purposes of the actor would also be complicated and complex, to a degree that would render it impractical. Consequently, there is also no room for striking a balance of purposes, or constructing a hierarchy of the various purposes of the actor. What is important for our discussion is the actual existence of a defensive or protective purpose.

The Spanish legislator created a good example of the unreasonableness of the requirement of an exclusive purpose. In the section of the penal code relating to the defence of another person, the legislator required that the actor (defender) should not be motivated by revenge, resentment or any other improper motive. A possible and undesirable result of such a requirement is that if the attacked person offers a financial reward to the actor for rescuing him from his aggressor, the actor risks conviction.[935]

As to Robinson's question regarding the purpose that should be required and his argument that there is no objective factor in a defence to which the requirement of a purpose relates, without generalising and determining whether there is

[931] See Robinson (1984), n 37 above, vol 2 at 17–18.

[932] See Dressler, n 32 above, at 80–81. Similarly, Ashworth speaks of a negative purpose for defensive actions—see Ashworth, n 183 above, at 302.

[933] See Silving, n 1 above, at 304.

[934] See the explanatory wording of the MPC (Tentative Draft, No 8 (Philadelphia, 1958)) at 17 (the drafters clarify that exclusivity of the justifying purpose is not required and that this is also the reason for their avoidance of a requirement that the actor should act under the influence of fear alone); La Fave and Scott, n 43 above, at 655; Rosen, n 37 above, at 28.

[935] See Silving, n 1 above, at 590–91 (presenting this version of the section and noting this criticism by Spanish scholars).

any validity to his arguments with regard to justifications in general, it should suffice to determine that, at least with regard to private defence, no difficulty arises. The purpose that should be required is a purpose of defending oneself (when self-defence is involved) or protecting the attacked person (when defence of another person is involved) or protection of property (when defence of property is involved).[936]

With regard to Robinson's other argument, indeed the purpose of defending oneself or protecting another relates directly to the physical object that is attacked (and which is defended). This object is part of the defence no less than the target, to which the requirement of a purpose established in the criminal offence refers, is part of the criminal offence. Having defined the required (not necessarily exclusive) purpose as defence of oneself or protection of another, an answer is also provided to the arguments of Dressler: there is no difficulty in justifying the action of the actor even if he did not act out of commitment to the public interest and courage[937] and even if he had additional purposes (such as—in defence of another person—the purpose of receiving a financial reward for the rescue from the aggressor). As to the person who acts spontaneously, it is reasonable to assume that such an actor acts with the purpose of defending himself or to protect, and not to fulfill other purposes.

This last conclusion leads to a larger and more significant generalisation. I am of the opinion that with regard to self-defence (of the attacked person for himself) there is usually no practical difference between a requirement for a purpose of self-defence and being satisfied with awareness of the justifying circumstances. For it is difficult to imagine an actor who is aware that he is being attacked by an immediate attack that endangers him and who uses necessary defensive force in order to repel the attack, and yet does not aspire to repel the attack. Consequently, the distinction between requiring a purpose and being satisfied with awareness will be found mainly in the other areas of private defence, especially defence of another person, and perhaps protection of property. It is also reasonable to assume in regard to these cases that the actor, who is aware of the circumstances of private defence and exerts defensive force, intends to defend, even if only to enjoy the defence that exempts him from criminal responsibility. The probability that the purpose of the actor will indeed be to defend is extremely high given the situation of compulsion, the requirement for immediacy, and the fact that the act is often almost instinctive. Whereas in those rare cases in which the actor does not aspire to

[936] The difficulty in determining the exact purpose that should be required, as Robinson noted, exists—if at all—with regard to the general justification of the 'lesser evil', but not with regard to private defence.

[937] On this matter of courage, it should be noted that the example presented by Dressler of behaviour lacking in courage—the killing of a child (see Dressler, n 32 above, at 81)—does not, in my opinion, serve his argument, since, as mentioned, when the aggressor is not responsible for his actions this does not involve (again: in my opinion) private defence at all, but a 'necessity' defence type as an excuse (see Ch 1.5.3 above).

defend, but only **exploits the situation** that enables him—according to his understanding—to exercise physical force in opposition to the prohibitive norm, then, in light of the factor of the social-legal order within the rationale of private defence, and if indeed we wish to preserve its character as a justification free from any moral stigma, it is indeed possible to support the approach that there is no room to justify his action. This conclusion is compatible with the spirit of the above-mentioned words of Beale, according to which the justification is not a licence to cause damage, but rather a grant of authority to act in order to defend.[938]

Another interesting possibility—that was not raised in the literature—is to rely on the actor's awareness of the fact that by his act he would with near certainty defend the attacked physical object against the aggressor. This is similar to the **foreseeability rule** (practical certainty; 'the knowledge rule'; '*dolus indirectus*'), according to which when the actor foresees that it is almost certain that the consequence required in the definition of the offence (or the target that is mentioned there) will occur, this is viewed as a substantive replacement for the intention to cause that same consequence (or a purpose of achieving that target). Such an approach, which is based on weighing the value between an awareness of the existence of practical certainty and a desire for it to happen,[939] will even further reduce (and in fact will almost completely nullify) the difference between a requirement of a purpose of defence and the sufficiency of awareness of the justifying circumstances.

3.10.6 An Impossible Attempt?

Finally, it is necessary to consider the foundation on which it was suggested to impose a certain criminal responsibility on an actor who is unaware of the justifying circumstances of his action—attribution of an impossible and punishable attempt. Robinson maintains that the objective theory of justifications does not oblige excusing the actor who is unaware of the justifying circumstances from all responsibility, but there is room to impose criminal responsibility on him for an impossible attempt. The reason for his eligibility for punishment will not be the harm—that was not caused, according to his school of thought—but the bad intention of the actor and the danger that he poses. The extent of his responsibility will be according to that which that same legal system establishes for an impossible attempt. Robinson further suggests that the penal code should provide a

[938] See the text accompanying n 890 above. It may be possible here to rely on the doctrine of prohibition of abuse of right.

[939] I noted this value consideration elsewhere—Sangero, n 61 above, at 347. It is interesting to note that as distinct from the ordinary action of the foreseeability rule—**widening** criminal responsibility (while relinquishing the requirement of the existence of **the negative purpose** in the definition of the offence)—if the parallel rule to this is implemented in the context of our matter, it will actually act to **reduce** criminal responsibility (while relinquishing the requirement of the **positive purpose** in the definition of the defence).

separate section (for the purpose of imposition of criminal responsibility) for an 'attempt to act unjustifiably'.[940]

Following Robinson's course, in effect, constitutes consideration of the elements of the defence as elements that are established in the definition of the offence. Thus, just as (mistaken) belief in the existence of a circumstance that is determined in the definition of the offence may produce a punishable attempt, thus too (mistaken) belief in the non-existence of the justifying circumstance that is determined in the definition of a defence can produce a punishable attempt, as if a (negative) element of lack of the justifying circumstances appears in the definition of the offence. However, I am of the opinion that this approach is mistaken, given the value and legal differences between the elements of an offence and the elements of a defence. According to my view, in the absence of awareness of the justifying circumstances, no defence is established at all, and we are left with full criminal responsibility for the offence that was established—with all its elements—including the factual and the mental. It seems that there is something odd in the attribution of a (mere) attempt to commit an offence when all its elements exist, such as attribution of a (mere) attempt to murder, when the actor did not only try but even succeeded in killing the victim, while all the elements of the offence existed.

At any rate, the stance of Robinson, according to which there is room to impose criminal responsibility on the actor for an (impossible) attempt to commit the offence, coupled with his agreement that damage (although abstract) was caused,[941] despite the objective existence of the justifying circumstances, grants the dispute dimensions which are narrower than might be presumed at a first glance.

Feller too, reaches the result of attribution of an impossible and punishable attempt to an actor who is unaware of the circumstances that justify his action, although by a completely different route. Feller—in clear distinction from Robinson—actually supports the requirement of awareness of the circumstances of private defence—even in conjunction with a purpose of defence—as a condition for the establishment of private defence. Yet, he nevertheless claims that in the absence of the required awareness, this would be an impossible and punishable attempt[942]. However, in my opinion, there is no room for this intermediate approach: if a certain mental element is required as a condition for the establishment of the defence, then in its absence the defence is not established and full criminal responsibility (and not only for an attempt) for the offence that was committed (with all its elements) remains intact. In any case, this difference may diminish almost to vanishing point in a legal system where the punishment for an attempt is equated with the punishment for a completed offence.[943]; [944]

[940] Robinson (1984), n 37 above, vol 2 at 20ff; 28ff; 571.
[941] See Robinson (1975), n 37 above, at 291.
[942] Feller, n 14 above, vol 2 at 438–45, especially at 444.
[943] As, eg, in s 34D of the Israeli Penal Code 1977.
[944] Please see opposite page.

[944] Robinson published an additional article on the subject under discussion in an Israeli law journal (in Hebrew). The article entitled 'The Theft of the Bomb: On the Substance of Justification Defences' (Robinson, n 899 above) does not demonstrate any innovation in Robinson's approach, but constitutes an attempt to base it on a real case that occurred in June 1997 on a Tel Aviv beach. A person by the name of Motti Ashkenazi grabbed and carried away a suitcase that was left by a terrorist, and which contained a bomb. When he discovered what he had captured, he called the police and the attack that was planned by the terrorist was thwarted. In Robinson's opinion, the suitable solution for such a case is to justify Ashkenazi's action—since he saved human life—but at the same time to impose criminal responsibility on him for an impossible attempt to commit the offence of theft. Since this is the solution that he proposes within the framework of what he calls 'deeds theory' (according to which the objective circumstances of justification are, in and of themselves, sufficient), Robinson claims that what he calls 'the reasons theory' (according to which a justifying purpose or at least awareness of the justifying circumstances is required) should be rejected.

A few short remarks concerning Robinson's article should be noted: **Firstly**, it appears that the example on which he bases his article is not 'clean' (unbiased). There is much doubt as to whether Ashkenazi committed the offence of theft at all, since it would appear that the action did not involve an article of value that was the property of an individual, as required for an offence of theft, but an article that was abandoned, and it is also possible that even the circumstance 'without consent of the owner' did not exist. If this, anyway, concerns an attempt and not a completed offence, then there is no need for Robinson's 'deeds theory' that justifies the action, and nevertheless imposes responsibility on the actor for an impossible attempt. **Secondly**, even in other cases that concern completed offences and not an attempt, in a legal system in which the punishment for an attempt is usually identical to the punishment for the completed performance, there is a minimal difference between the attribution of responsibility for a completed offence (according to the 'reasons theory') and the attribution of responsibility for a mere attempt (according to the 'deeds theory'). **Thirdly**, Robinson, in his article, virtually ignores the significant differences between elements that are located in the offence and elements that are located in the defence in general, and in justification in particular (see Ch 1.2 above). **Fourthly**, Robinson makes it easy for himself by addressing a relatively weak theory in his article, according to which the justifying purpose in itself is sufficient, and in effect ignoring the far stronger theory, according to which in order to establish justification both the existence of the objective elements and also the mental element—awareness of the justifying circumstances—should be required, and perhaps also a justifying purpose (this is, apart from his short and superficial consideration in n. 47 of his article). It is unclear on what basis Robinson determines that the supporters of the requirement of a mental element rely on the belief of the actor in the existence of the justifying circumstances for the establishment of justification. My position, as presented in this book, is that belief alone is only liable to form a basis for an excuse of putative defence, but not for a justification (see Ch 5.2 below). **Fifthly**, even the reason of 'responsibility in a case of resistance to a person who acts while unaware of the justification', that Robinson presents as a basis for his stance, is unconvincing. According to his argument, since pursuant to the 'reasons theory' Ashkenazi committed an offence with no justification, it would be justified to resist him and to prevent him from taking the suitcase with the bomb away from the crowded beach, and this is even if it is the terrorist himself who does this. But even if we only attribute an offence of an attempt to Ashkenazi—as Robinson suggests—his behaviour will still be illegal and will apparently justify resistance to it. In addition, it is questionable whether any legal system contains a defence which the terrorist himself can enjoy in such a situation (since he, by his guilt, has caused the situation of compulsion—see Ch 5.4 below). **Sixthly**, Robinson wishes to strengthen his 'deeds theory' on the basis of the sympathy that Ashkenazi's action received from the Israeli public at large. But it is necessary to be precise and to question if the sympathy was for the very fact of the theft (or attempted theft), or whether it was for calling the police after the (attempted) theft and after it became clear to Ashkenazi that there was a bomb in the suitcase, despite the risk of a criminal charge . It seems to me that the source of sympathy is in the second action—calling the police—which digresses from the scope of our discussion. If there is a desire to reward such actions, the way to do this is not to justify the offence (attempted theft) that was carried out without any awareness of the justifying circumstances (ie, the fact that the suitcase contained a bomb), but by mitigating punishment or even by means of an excuse because of the active and effective repentance following the offence (calling the police)—as determined, eg, in s 28 of the Israeli Penal Code 1977. To conclude, the entire article is based on a very problematic example, from which whatever can be learnt is far from simple and unambiguous.

4

Internal Distinctions in Private Defence

4.1 General (and Self-Defence)

A classic example of internal distinctions made between various areas of private defence, can be found in the Model Penal Code (MPC) of the American Law Institute, in which separate arrangements are provided for self-defence (section 3.04), defence of another person (section 3.05) and defence of property (3.06). In addition, the MPC also provides specific orders with regard to the defence of the dwelling (and the place of work).[945]

In general, it is possible to establish that the justification for making such internal distinctions is the existence of common categories for which unique and serious policy considerations exist, to the extent that they require distinct treatment by the legislator. The main factor that may justify such internal distinctions is the principle of proportionality. Legislators tend to establish special rules for certain areas of private defence, based principally on the type of legitimate interest of the person attacked that is threatened by the aggressor, ie, based on the protected value. For insofar as the protected value is more important (such as: a person's life as compared to property), the requirement of proportionality enables the exercise of greater defensive force. It is even common to view this as the main explanation for the internal distinctions that exist in Anglo-American law, in which the principle of proportionality was traditionally accepted within the framework of private defence and was even given a central place, in comparison to certain continental legal systems, in which the principle of proportionality was not emphasised and where, accordingly, no internal distinctions were made.[946]

The main areas of private defence that should be considered are, first and foremost, self-defence, the defence of another person and defence of property. To these may be added the defence of the dwelling and defence of another person's property.

[945] See American Law Institute, Model Penal Code, Proposed Official Draft (Philadelphia, 1962).

[946] See such a comparison between Anglo-American law on the one hand and German law and the law of the former Soviet Union, on the other hand, in Fletcher (1978), n 1 above, at 871; and also in Robinson (1984), n 37 above, vol 1 at 85.

A note should be made of the special status of self-defence, ie, the exertion of force against the aggressor by the attacked person himself in order to protect his life, body or liberty.[947] Self-defence is the main area of private defence. As was seen, private defence developed from self-defence, and until today the narrow term 'self-defence' is frequently used to describe the wider phenomenon of 'private defence'. There may be disputes regarding the extent of justification for the other areas of private defence, but self-defence is strikingly undisputed in many contexts and is the obvious core of private defence. Consequently, and naturally, almost all of what is said above and that will be said below regarding private defence in general, also applies to self-defence and is valid primarily in regard thereto ('almost'—except for matters that specifically concern a certain other area of private defence). Accordingly, there is no point in this part of the book in discussing this area of private defence, rather it is preferable to deal with questions that arise with regard to other areas: defence of another person, defence of property, defence of another person's property and defence of the dwelling—often making a comparison between these areas and self-defence. These areas will be addressed below.

4.2 Defence of Another Person

4.2.1 General

If this chapter had been written some years ago, it would have had a far wider scope. Yet, today, it seems that the main dispute regarding the defence of another person has become a part of history, since there is now an almost complete consensus—amongst scholars and legislators alike[948]—that there is no room to limit the circle of others on whose behalf private defence is justified.[949] The terminological barrier presented by the term 'self-defence' can be overcome by replacing it with broader and more precise terms, such as 'private defence', which also encompass the defence of another person.[950]

[947] I do not refer here to the occasional use of the term 'self-defence' to describe 'private defence' as a whole—see n 1 above.

[948] Thus, eg, apart from the penal codes of Greenland (1954)(s 5) and of Norway (1902; 1961)(s 48) that require interpretation, in all the rest of the approximately 20 criminal codes that were surveyed during the course of this study it is clear from the formulation of the sections that deal with private defence that it also encompasses the defence of another person. This is also the situation in all the new draft laws examined during this study.

[949] Thus, eg, this widely accepted approach has lately found full expression in the Israeli Penal Code, after years in which it was only to be found in draft laws.

[950] See, eg, Williams (1982), n 1 above, at 738; Silving, n 1 above, at 587 and n 1 above.

Unlike the distinction of self-defence from other areas of private defence—the defence of property and defence of the dwelling—the distinction between the defence of another person and self-defence is not based on different protected values and their implications (especially, the existence of proportionality). In essence, defence of another concerns the same interests as self-defence, although they are not the interests of the actor but those of another person. Accordingly, a well-grounded basis is necessary in order to justify the distinction between the conditions for defence of another person and the conditions for self-defence; a basis that, as demonstrated following, does not exist.

A further preliminary clarification is that in using the term 'defence of another person', I refer both to a situation in which the actor (the defender) alone exerts defensive force, and also to a situation in which his action is combined with defensive force that is used by the attacked person himself (or another defender)—in which case the actor's action could be perceived as a contribution falling within the boundaries of complicity, such as aiding and abetting, soliciting or perpetrating the crime jointly. As will be seen subsequently, in both these situations there is room for justification of the defence of another person.[951]

4.2.2 The Defence of Another Person and the Classification of Private Defence as a Justification

Having set forth these preliminary clarifications, and before turning to address what the rationale of private defence can elucidate with regard to defence of another person, there is room to try to learn something about the subject of our discussion from the nature of private defence as a justification. As Enker wrote, since private defence is not based on an element of compulsion, but on the consideration that the accused, by his crime, performed an action that was good, desirable and justified to perform, there is no special significance in the fact that the damage that was avoided was expected to another person and not to the accused himself.[952] Similarly, Fletcher claims that if the defence of the attacked person is a 'right' action, then everyone is entitled to do it.[953]

Many scholars have asserted that the right to intervene for the defence of another person stems directly from its classification as a justification or as an excuse: when the attacked person is entitled to defence of a justification type (of self-defence), the intervention of any other person on his side is also justified, since the nature of the justification leads to universality. In contrast, when the attacked

[951] A last preliminary clarification is that the specific exception of defence of property of another person will be considered separately later on, since it is influenced by considerations regarding the defence of another person as well as by considerations regarding the defence of property.

[952] Enker, n 89 above, at 12.

[953] See Fletcher (1978), n 1 above, at 762.

person is only entitled to a defence of an excuse type, it is only the assistance of his relatives—at the very most—that is permitted.[954] Some scholars even viewed this as the only practical implication of the distinction between justifications and excuses.[955] There are even those who go in the opposite direction and deduce that private defence bears a character of justification from the accepted justification of the defence of (any) other person.[956]

While addressing the distinction between justification and excuse, I expressed my opinion that although there is room to learn about the character of private defence from its constituting a justification, and from the general nature of justifications, it is not desirable to apply an automatic-mechanical derivation of the solutions to various issues of private defence from its very classification as a justification. Thus, while there is a strong connection between self-defence being a justification—ie, the action that is good, correct, justified (morally, also), and desirable to perform—and the identical nature of defence of another person, it will nevertheless be inaccurate to derive the justification of defence of another person in a concrete case from the justification of self-defence, and from this alone.

Firstly, as noted, the defence of another person is not limited to an act of complicity—soliciting or aiding and abetting the attacked person. It is definitely possible that the protecting action of the actor for the defence of the attacked person could be an independent action. This common case does not involve the accepted 'projection' of the justified nature of the action on to the indirect contribution to its execution (the complicity),[957] but rather an independent justification of the defender's action.

Secondly, it is definitely possible that a certain action, which if performed by the attacked person himself would not be justified, since it would not comply with the conditions of private defence, could be justified if performed by another person, since it would meet the conditions of private defence. This is the situation, for example, when the attacked person has a certain combat skill, such as judo, that under the circumstances and in light of the condition of necessity would lead to the negation of justification for his use of shooting in order to defend himself. However, the attacked person does not notice the danger and therefore does not use his combat skill, while the actor—who comes to his defence—has no unarmed combat skills and on his part, needs to immediately shoot in order to save the life of the attacked person. Consequently, in my opinion, the stipulation that exists, for example, in the American Model Penal Code, by which the attacked person who was defended must have had a right to self-defence, is mistaken. Such a stipulation is liable to deter people from coming forward to rescue another person from

[954] See, eg, Fletcher, n 37 above, at 77; Robinson (1975), n 37 above, at 279.
[955] See Hall, n 37 above, at 644; Williams (1982), n 1 above, at 732.
[956] See Kadish, n 34 above, at 881; Finkelman, n 25 above, at 1263.
[957] Eg, Feller, n 14 above, vol 2 at 446.

his aggressor.[958] For with regard to a person considering whether to come to the defence of another, it is difficult, and sometimes impossible, to clarify, prior to his decision, whether the attacked person has a right to self-defence. Consequently, if there is a will to encourage the rescue of others, such a stipulation is undesirable. Nevertheless, if there is a possibility that the attacked person could have defended himself by less drastic means than those that the actor needs, prior to the action of the actor, this might influence the evaluation of necessity of the latter's action.

Thirdly, it is definitely possible that the attacked person is justified in performing a certain action (such as fatal shooting of the aggressor), which the actor—who is not the attacked person—is not justified in performing. Such is the situation, for example, when the actor is totally unaware that the circumstances of private defence exist and kills the aggressor, not in order to defend the attacked person, but from entirely criminal considerations. I am therefore of the opinion—as will be seen later—that **the action of the defender of another should be examined directly according to the conditions of private defence and whether they exist with regard to the actor himself** (such as: necessity, mental element etc). The theoretical justification for his action should be founded—again: directly—on the rationale of private defence. This rationale shall now be examined.

4.2.3 The Defence of Another Person and the Rationale of Private Defence

The factor of the aggressor's guilt in the rationale of private defence evidently supports not only self-defence but also the defence of (any) other. By contrast, the factor of the attacked person's autonomy does not directly support expanding self-defence by also justifying the defence of another person. Consequently, it is no wonder that Fletcher, who views autonomy as the justification for private defence, also needs the factor of the social-legal order when he discusses the defence of another, noting that an attack against one is an attack against all, and expressing his opinion that the autonomy of the individual is identified here with the sanctity [*sic*!] of the social-legal order.[959] Another possibility is to maintain that private defence of another person enables a stronger defence of the autonomy of the individual who is attacked.

[958] See also the text below accompanying n 989. A possible exception to this matter—that is discussed in Ch 5.4 below—is when the attacked person by his own fault causes the situation of private defence. However, while it is possible to impose criminal responsibility on the attacked person himself, I contend that the imposition of criminal responsibility on a person who comes to the defence of the attacked person should be conditioned on his being aware of the attacked person's provocation—since otherwise there is nothing improper in his action and there is no room for a policy rule that would prima facie instruct him not to act.

[959] See Fletcher (1978), n 1 above, at 868–69.

With regard to the factor of the social-legal order, it supports the defence of another no less than it supports self-defence[960]. Firstly, it should, of course, be remembered that the action of the aggressor is illegal and harms this order. Secondly, the replacement of law enforcement authorities and the performance of a policing action by a law-abiding citizen who comes to defend another also, clearly, serve the social-legal order. An action that any authority that is responsible for the public order must take in order to defend an attacked person, will rightly be allowed for performance by any citizen when the said authority is absent from the scene of the event.[961]

Thirdly, the deterrence of the specific criminal (the aggressor) and potential criminals will be much stronger if they know that their attack is liable to be thwarted not only by the police (who are not always present at the location of the event, or more precisely, are usually not present there) and not only by the attacked person himself (who often does not have the strength to repel the attack), but also by any other person who happens to be in the vicinity, even if only accidentally.

With regard to the effect of the factor of the social-legal order on the justification for private defence of any other person (including a complete stranger), this can also be derived from the recognised framework of another justification for the use of force, this being the defence of use of force for the prevention of a crime. This justification is based almost exclusively on the protection of the social-legal order, and accordingly it applies extensively without any limitation of any sort regarding the nexus between the actor (who prevents the crime) and the victim of the offence. It is interesting to note that in legal systems where this defence was recognised, it was also used for the justification of the action of one who defended another, while bypassing the limitations to relatives alone that existed within the framework of private defence or (even in our times) by avoiding dealing with the ambit of the right to private defence of another person.[962]

Many scholars have set forth the strong moral justification of defence of another person. The defence of the interest of another can be viewed as justified even more than self-defence, since the motivation is altruism and not egoism, and it may also involve heroic behaviour (because of the danger to the actor who comes to the defence of another) and self-sacrifice.[963] When Israeli Supreme Court Justice Elon sought, in the *Affangar* ruling, to provide a basis for his conclusion that it was necessary to expand self-defence so that it would also encompass the defence of another person, despite the explicit language of the law that was then in force, he

[960] For a similar opinion see Eser, n 26 above, at 632; Kremnitzer, n 10 above, at 183.

[961] Feller, n 14 above, vol 2 at 423.

[962] See, eg, Williams (1983), n 1 above, at 501; Smith and Hogan, n 284 above, at 257; vol 3 of the encyclopedia ed by Kadish, n 96 above, at 951–52; O'Regan, n 577 above, at 92–93; La Fave and Scott, n 43 above, at 665; Archbold, n 487 above, at 1663ff; Perkins and Boyce, n 85 above, at 1144ff.

[963] Kremnitzer, n 10 above, at 202 fn 78.

relied, alongside practical considerations of social policy, on a person's inherent sense of justice, and on a moral-social point of view.[964]

It is interesting to note that the accepted justification for private defence of (any) other person may also serve as a good 'test case' for the negation of some other theories that were suggested for the justification of private defence, such as viewing it only as an excuse[965]; grounding it on autonomy alone[966]; and viewing it as a right against the state to resist aggression.[967] For these theories cannot explain the defence of another person, including a stranger.

It would be possible to conclude the discussion of the issue of the defence of another person at this point. However, since various limitations were imposed on defence of another in Anglo-American law, it is interesting to note them and to examine their justification (or, more accurately, their lack of justification).

4.2.4 Defence of Another Person in Anglo-American Law

In the ancient English common law, self-defence was viewed solely as an excuse and not as a justification. It is therefore only natural that the excuse was then allowed to the attacked person alone and, at most, to his relatives who came to defend him.[968] An additional factor that made the acceptance of defence of another person difficult was the terminological barrier constituted by the then accepted term 'self-defence'—a term that at least literally speaking only embraces defence of the self.[969] It is interesting that historically, the defence of another apparently developed within the common law, not from self-defence (of the actor for his life and body) but, strangely enough, from the defence of property. In ancient times, when the wife, children and servants of a man were perceived as his property, the defence of property also included them. Later, defence of the man by his wife, children and servants was permitted—in order to create mutuality. Gradually the defence of another was widened to also include more distant relatives, until the defence of strangers was also finally recognised.[970] The first known authority for recognition of the defence of any other person—including a stranger—was the 1634 decision of *Walter v Jones*.[971]

[964] CA 89/78 *Affangar v the State of Israel* PD 33 (3) 141, at 149–55.

[965] Such a view may indeed support an undesirable limitation of the defence to the relatives of the person attacked alone. See nn 954–55 above and accompanying text. See also Ch 1.4 above.

[966] For this point see Kremnitzer, n 10 above, at 183; Omichinski, n 31 above, at 1460 fn 77. See also Ch 1.5.4 above.

[967] For this point see Omichinski, n 31 above,at 1460 fn 77, Enker, n 89 above, at 237. See also Ch 1.5.7 above.

[968] See, eg, Williams (1982), n 1 above, at 738; and also Chs 1.4 and 1.3 above.

[969] See n 950 above and accompanying text and also n 1 above.

[970] See Perkins and Boyce, n 85 above, at 1144ff; vol 3 of the encyclopedia ed by Kadish, n 96 above, at 951.

[971] See Williams (1982), n 1 above, at 738 fn 21 (*Walter v Jones*, 2 Rolle's Abridgement, 526(c)(3)).

An additional English ruling that deserves mentioning since it reflects a trend that existed in the recent past—is the 1967 ruling of *Duffy*.[972] The Court of Appeal avoided reaching a decision regarding the restriction of the defence of another by a requirement of a certain kinship between the actor (the defender) and the person attacked, and preferred to base its decision on another defence that exists in English law—the prevention of a crime. Today, pursuant to section 3 of the Criminal Law Act 1967, the defence is no longer restricted to offences of the 'felony' type, but encompasses the prevention of all types of offences.[973] In any case, it is currently recognised in English law that the defence of another person is not limited to relatives alone.[974]

In English law it is possible to find cautious consideration of the possibility that the actor, who comes to the defence of another, may make a mistake in his evaluation of the situation. Such consideration is expressed in the determination that the actor acts 'at his own peril', so that if he was mistaken in his estimation of the situation, he will not be entitled to the defence, but criminal responsibility will be imposed upon him. In passing, it should be noted that this is substantively a situation of putative defence. However, in light of the existing tendency in Anglo-American law to combine putative defence with real private defence, this issue is not addressed there as an issue of putative defence but as an issue of private defence.[975]

Some commentators find current authority for such an approach in the 1971 decision of *Fennell*.[976] The accused attacked a police officer in order to save his son from an arrest, which the accused deemed to be illegal (the accused mistakenly thought that his son had not taken part in the fight, the participants in which were arrested by the police officers). The Court of Appeal held that one who saves another from police arrest does so on his own responsibility, and if he was mistaken, his mistake cannot exempt him from responsibility. However, this ruling cannot serve as a 'clean' (unbiased) authority for our discussion, since it concerns the use of force against law enforcement officers, and this is an issue in which weighty policy considerations operate, as mentioned earlier,[977] to negate the right to private defence even when the arrest is illegal.

The rule according to which the defender of another person acts 'at his own peril', is expressed more strikingly in American law. Several courts have taken an approach called the 'alter ego'; according to this approach the right to defend another is united with the right of the other (the person attacked) to defend him-

[972] See the ruling *R v Duffy* (1967) 1 QB 63, (1966) 1 All ER 62, CCA.

[973] See, eg, Smith and Hogan, n 284 above, at 257.

[974] See, eg, vol 11(1) of the encyclopedia Halsbury, n 730 above, at 350; S, n 91 above, at 123–124; Williams (1983), n 1 above, at 501. See also s 305 (private defence) of Stephen's Digest, n 228 above.

[975] See Ch 2.2 above and Ch 5.2.2 below.

[976] See the ruling *R v Fennell* (1971) QB 428.

[977] See Ch 3.4.3 above. For a discussion of the ruling in *Fennell*, see the references in nn 586–87 above and accompanying text.

self with real self-defence (as distinct from putative),[978] as though the actor were placed in the shoes of the other person whom he defends. The famous ruling in this matter was handed down in 1962 in the case of *Young*.[979] The accused came to the rescue of a young person who was being beaten by two men. To assist him, the accused attacked the two men. It later became clear that they were detectives in civilian attire who were making a legal arrest.[980] In the first legal proceeding, the accused was convicted of assault. The appellate court overturned the conviction, while repudiating the doctrine of the 'other person's shoes'. In a subsequent appeal, the ruling was again reversed, by the Appeals Court of the State of New York, which determined that a person who assists another does so 'at his own peril', since the right to defend another should not exceed the right to self-defence. Subsequently, the New York legislator had the last word, by determining that if the actor (the defender) himself believes in the existence of the elements of the defence, this is sufficient for the defence to apply to him. In other states of the United States there was also much deliberation concerning this issue, and various frameworks were established there, although it may definitely be possible to point to a trend in new statutes to abandon the 'alter ego' approach.[981]

The possibility that a person who comes to the defence of another—and especially a stranger—could be mistaken in his evaluation of the situation, engendered two problematic arrangements in American law: the first—the limitation of the defence of another to relatives alone. The assumption is that when a person comes to rescue his relative, he is usually aware of the development of the situation and can accurately evaluate the situation, so that he knows whether his relative is the person attacked or the aggressor. By contrast, if he comes to defend a stranger, it is very probable that he will be mistaken. Even if this factual assumption is true (and this may be questionable[982]), it does not provide sufficient support for the

[978] See, eg, Perkins and Boyce, n 85 above, at 665.

[979] See the ruling in *People v Young*, 12 NYS 2d 358 (1961), 11 NY 2d 274, 183 NE 2d 319 (1962).

[980] Apparently the case of *Young* can also be viewed, as can the case of *Fennell* which I mentioned above, as influenced by reasonable policy considerations with regard to resistance to arrest. However, it should be remembered that there is no reason for a prohibition of resistance to arrest when the actor was—as *Young* was—totally unaware that it concerned law enforcement officers.

[981] See, eg, Kadish and Schulhofer, n 640 above, at 874–75; Vol 3 of the encyclopedia, ed. by Kadish, n 96 above, at 952; La Fave and Scott, n 43 above, at 665; Perkins and Boyce, n 85 above, at 1148. In the last edition of their book (2001), Kadish and Schulhofer give an updated picture of American law, as follows: the instance of strict liability is now rejected by many jurisdictions, which grant a defence to the mistaken third party on the condition that he holds a reasonable belief in the facts necessary to support the use of defensive force. An example is the case of *State v Beeley* 653 A 2d 722 (RI 1995). Conversely, if the third party knows that deadly force is in fact unnecessary (eg, if he knows that the aggressor's weapon is unloaded), then he is not justified in killing the assailant, even if the person attacked might be justified in doing so—see Kadish and Schulhofer, n 38 above, at 782.

[982] Given the emotionality with which a relative acts, doubt should be cast on such an assumption. Nevertheless, it may be claimed that the chances of deterring a person from defending a stranger—if indeed there is a desire to do so—are higher in comparison to the case of defence of a relative. But here there is already a hint of a mistaken consideration of private defence, as if it were an excuse instead of

limitation of private defence of another to relatives alone.[983] Firstly, if a person comes to rescue a stranger and does not make a mistake but does indeed save the person attacked from the hands of his aggressor, there is no logic in negating the defence only because of the hypothetical possibility that he might be mistaken. Secondly, the rationale of private defence and the desirable social policy make it necessary to encourage the law-abiding citizen to come to the defence of others, also—and perhaps principally—when a stranger is involved. Consequently, such an arrangement, that leaves attacked persons who do not have (strong) relatives or whose relatives are not present at the scene of the event, defenceless, (except for the rare cases when the police are present at the location), ought to be rejected.

This leads to the other arrangement—the determination that the defender of another does so 'on his own responsibility'. This is a negation of the relevancy of the actor's mistake—a negation that is unjustified. General principles that condition criminal responsibility on the existence of guilt necessitate the consideration of mistakes (at least factual mistakes). Just as a person who mistakenly thinks that he is attacked illegally and thus injures his putative aggressor should be excused, so too should the actor who mistakenly determines that a person who he comes to assist is being attacked illegally by another towards whom the actor exercises defensive force. A separate question—that involves serious policy considerations—is what the conditions should be for the said excuse. When the mistake is made by the attacked person himself, who acted in putative self-defence, there are two principal approaches. According to the first, the factual mistake itself is sufficient. According to the second, it is required that the mistake should also be reasonable.[984] If it is desirable for society to reduce interventions and to deter people from coming to the rescue of others, then it is possible to establish an arrangement that is far more rigid with regard to the defence of another (for example: if the very fact of the mistake is sufficient for putative self-defence, it is also possible to demand reasonability of the mistake for the purpose of putative defence of another). In contrast, if society is willing to encourage people to come to the defence of others, a less restrictive arrangement may be established with regard to the defence of another (for example: even if reasonability of the mistake is required for putative self-defence, it is possible to rely on the mere fact of the mistake for the putative defence of another). In my opinion, the preferable approach lies between these two. According to this approach, putative defence of

a justification. Moreover, as I will argue below, it is actually desirable to encourage the defence of another and not to deter it.

[983] A similar opinion—Enker, n 89 above, at 1199ff (claiming that it would be absurd to say that a stranger is forbidden to rescue a pursued person from death in these circumstances. The saving of life is a supreme value and one who harms the pursuer in order to save another's life performs an action that should be encouraged and blessed.); see also Robinson (1984), n 37 above, vol 2 at 88–89.

[984] See Ch 5.2.3 below.

another should be arranged in the same way as putative self-defence, since they both have identical central considerations.[985]

To complete the picture of the position of contemporary American law with regard to the defence of another, the framework that is established in the Model Penal Code should be noted. Firstly, the most outstanding feature of this arrangement is its separation (at least physically) from the arrangement that is provided for self-defence. While the latter (self-defence) is determined in section 3.04 of the MPC, the defence of another is arranged in a separate section—3.06. The basis for such a separation must be the existence of significant differences between the subjects. However, there are no such differences between self-defence and the defence of another. This separate arrangement is even stranger given what was said in the explanatory wording of the MPC. In their consideration of statutes in which odd distinctions were established, such as the limitation of the defence of another to cases in which the attack is a 'felony', the drafters of the MPC wrote that this has no place, and that 'The simple solution of the whole problem is to embed the defence of strangers in the defence of oneself'.[986] However, they themselves did not act according to this recommendation, since they arranged the defence of another separately. If that arrangement had been identical to that of self-defence, my criticism would be restricted to the superfluous duplication. And even this duplication may perhaps be explained in light of the general policy of the MPC—restriction of the permissible force to the prevention of a crime and the enforcement of the law, while shifting the emphasis to the defence of another.[987] However, the defence of another was provided with a different framework from that which was established for self-defence. Section 3.05(1) determines, as follows:

> Section 3.05 Use of Force for the Protection of Other Persons.
>
> (1) Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable to protect a third person when:
>
> (a) the actor would be justified under Section 3.04 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and
> (b) under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and
> (c) the actor believes that his intervention is necessary for the protection of such other person'.

[985] See also *ibid.*

[986] See the explanatory wording of the MPC (Tentative Draft No 8 (Philadelphia, 1958)) at 31.

[987] This is the policy that Perkins and Boyce attribute to the MPC—see Perkins and Boyce, n 85 above, at 1148. Another possible explanation for the separation of defence of another from self-defence is the complexity of the rules that were provided for the possibility of retreat in defence of another (see s 3.05(2) of the MPC). It should be noted that these rules are complex and complicated to the extent that the guidance that can be derived from them is doubtful. See also Robinson's criticism in Robinson (1984), n 37 above, vol 2 at 104, and Ch. 3.9.4.5 above.

Beyond my opposition in principle to the mixture of putative defence with real defence while considering the belief of the actor instead of the objective circumstances,[988] two superfluous and unjustified conditions that were determined for the defence of another stand out clearly. I have already noted the lack of justification for the above condition (b).[989] There is no room to condition the right to defend another upon the right to self-defence of the person attacked himself.[990] As for the above condition (a), it too is undesirable, since a situation might occur in which a force that the actor is not justified in using for his own defence should be justified for the defence of another. Such is the situation when the weapon of the aggressor is short range (a stick, for example) and the actor is able to run fast, so that if the actor were himself to be attacked, the option of a safe retreat would be available, while the person who is actually attacked is slow and incapable of retreating, but needs the defence of the actor.[991]

4.2.5 Summary

In the final analysis, the only correct way to test whether the actor's action for the defence of another should be justified is a direct examination of his action according to the various conditions of private defence (necessity, mental element, proportionality, etc). There is no room for an examination of any hypothetical action—either by the attacked person or by the actor himself—by making an artificial and misleading assumption as if he were the attacked person.

With regard to the examination of the conditions of private defence when the defence of another is concerned, a clarification regarding the duty to retreat should be made. It is clear that there is no reason to impose a duty to retreat on the actor himself, since this implies the negation of the right to defend others. Therefore, it is also evident that the question of retreat must focus on the person attacked.[992]

[988] See Ch 2.2 above and see Ch 5.2.2 below.

[989] See the text above accompanying n 958.

[990] As an aside, it should be noted that this criticism is also applicable to the similar arrangement that was provided in the American Federal Draft Code—see s 604 of the Draft Law (National Commission on Reform of Federal Criminal Laws, Study Draft of a new Federal Criminal Code, (1970)).

[991] It is perhaps possible to reduce this difficulty by use of 'replacement data', but not only is there no indication for this possibility in the formulation of the Code, but also there is no hint in the explanatory wording that such a possibility was intended by the drafters.

[992] See n 847 above and accompanying text.

4.2.6 A Duty to Rescue

For the conclusion of the discussion of the defence of another, it is also necessary to refer to the issue of the duty to rescue. A striking example of such a duty is to be found in Jewish law, which within the framework of the 'pursuer' ('*rodef*') rule not only justifies the defence of another, but even imposes the duty to injure the pursuer if this is necessary to rescue the one pursued.[993] There is no recognition in contemporary criminal law for the imposition of a general and sweeping duty to act in the manner of 'the Good Samaritan', and the duties to act (as distinct from prohibitions of action) are usually not imposed on the public at large, but on people who have a certain affinity to the source of danger, or to the person who is endangered, etc. This has also been the situation for many years in existing Israeli law, despite not a few calls in legal literature to change it.[994] Such a revision was made by the Israeli legislator, in 1998, when he enacted the statute with the biblical name 'Thou shalt not stand against the blood of thy neighbour',[995] which establishes in section 1(a) as follows:

> It is the duty of a person to extend assistance to a person who, because of a sudden event, stands before his eyes in severe and immediate danger to his life, bodily integrity or health, when he is able to extend assistance, without endangering or risking others.

Given the closing words of this section, and in light of the fact that private defence of another person usually involves endangering the defender, since he must injure the aggressor, it is doubtful whether the new statute will, in practice, influence the cases of private defence of another person. Moreover: if the phrase 'without endangering or risking others' is interpreted in such a way that it also applies to danger to the aggressor, then it seems that the new statute will never obligate private defence of another person.[996]

The defence of another is evidently not conditional upon the existence of a duty to rescue. The right to rescue should be broader than the duty to do so. However,

[993] Enker, n 89 above, at 120, 238–39 (noting, inter alia, the words of Maimonides relating to the rule of 'Thou shalt not stand against the blood of thy neighbour'); the words of Justice Elon in CA 89/78 *Affangar v the State of Israel*, PD 33 (3) 141, at 150ff; Ben-Zimra, n 132 above, at 129; Varhaftig, n 123 above, at 48; Finkelman, n 25 above, at 1263, 1273. See further with regard to Jewish law, the text that begins with the reference to n 118 above.

[994] Adi Parush, 'Law, Morality and the Good Samaritan' (1976–77) 27 *Iyun* 295 (Hebrew); U Yadin, 'The Bad and Good Samaritan' (1970) 2 *Mishpatim* 252 (Hebrew); Miriam Ben-Porat, 'The Constraint and Necessity Defence' (1989) 14 *Tel Aviv University Law Review*. 211 (Hebrew); Miriam Ben-Porat, 'The Good Samaritan' (1980)7 *Tel Aviv University Law Review* 269 (Hebrew). S 262 of the Israeli Penal Code 1977 that imposes a general duty to prevent a crime is an exception.

[995] 'Thou shalt not stand against the blood of thy neighbour' Act 1998.

[996] From the explanatory wording that accompanies the draft Penal Code (Amendment no 47) (Thou shalt not stand against the blood of thy neighbour) 1995 and the protocol of the discussion in the Knesset (the Israeli Parliament) of the draft law, it seems that the legislator did not take notice at all of the relationship between the new statute and the private defence of another person.

there is a connection between the issues, actually in the opposite direction: the broadening of the duty to rescue requires a certain flexibility in the conditions of private defence of another person.

4.3 Defence of Property

4.3.1 General

The most significant internal distinction between different areas of private defence is, undoubtedly, the distinction made between the defence of property and self-defence. The main foundation for this distinction is, evidently, the difference in the importance of the protected values—a person's life, his bodily integrity and his liberty as opposed to his (usually possessive) interest in his property. This difference has a very prominent and striking implication for the requirement of proportionality.[997] Another possible goal in creating a separate arrangement for defence of property is the establishment of special rules with regard to self-help in general and repossession in particular, and with regard to conflicts in which both the opponents have claims of right. Accordingly, emphasis will be placed in this section on these aspects, which have not yet been discussed.

An examination of the rationale for the justification of private defence does not raise any question regarding its applicability to the defence of property: an injury to a person's property also constitutes an invasion into his living space and violates his autonomy; the guilt of the aggressor exists given the fact that he commits an illegal attack; and with regard to the social-legal order, there is no doubt that there is a social interest in the maintenance of the right of ownership of property and its possession, alongside the general interest to thwart and deter an illegal attack. In the end result, a society that recognises the right to property and is willing to attribute substantive content to this recognition must justify the defence of this right.

Therefore, all three abstract factors in the rationale for private defence operate for the justification of defence of property. It is indeed possible to claim that the rationale has lesser strength when the defence of property is involved in comparison with the defence of the body, but there is no doubt that it exists. However, there is a central difference here with regard to the balance of expected physical injuries to the person attacked (in the absence of private defence) and to the aggressor (when private defence is exerted). Because of the great value of human

[997] Consequently, I have already noted this above, within the framework of the discussion of proportionality in general and of deadly defensive force in particular; of the duty to retreat and also of the issue of human traps—see (correspondingly) Chs 3.8; 3.8.4; 3.9; 3.7.4.

life, an individual's bodily integrity and liberty, in comparison to his property, the restriction that is dictated by the requirement of proportionality is more significant when the mere defence of property is concerned. In effect, the strongest and most vivid illustrations of the principle of proportionality relate to the issue of defence of property.

It is appropriate here to note the very interesting conclusion of Perkins and Boyce. They note that, in reality, the accused will usually have at his disposal—in addition to private defence of property—private defence of the body or of the dwelling, or the defence of prevention of a crime. Since these defences are wider than the defence of property and enable the exercise of greater defensive force, another important function of the defence of property is apparent—the prevention of a situation in which the defender of property would be considered as an 'aggressor' or as guilty for the situation that is created.[998] I shall provide examples of these assertions, with which I am in agreement: A attempts to take an article from B. B defends his property by slightly pushing A. A pulls out a knife and attempts to stab B. B defends his life by means of a deadly shooting of A. If we examine the justification of the fatal shooting used for the defence of B's life, the action of B does indeed comply with the requirement of proportionality, but B is liable—prima facie—to bear a certain criminal responsibility,[999] because he is viewed as the one who by his fault caused the situation that was created (by pushing A). Here, the importance of the defence of property that negates this conclusion is expressed, since the pushing of A does not deviate from the conditions of defence of property and is justified within its framework.

The very justification of the use of force of any kind for the defence of property does not, in principle, raise any difficulty. Accordingly, it is not surprising that a consensus exists in regard thereto that is also expressed in scholars' writings, as well as in various criminal codes and draft laws of various countries.[1000] The serious questions regarding the defence of property do not relate to its justification but to its conditions, especially the requirement of proportionality and the treatment of repossession. I now therefore turn to an examination of these conditions.

With regard to the requirement of proportionality, if there is one clear area within the boundaries of which there should be prohibition of deadly force, it is the area of the defence of property. There is no room in a civilised society for justification of saving mere property at the cost of human life, even if it is the

[998] See Perkins and Boyce, n 85 above, at 1154.

[999] In accordance with the various approaches regarding this issue of the person who is guilty of causing the situation of private defence—see Ch 5.4 below.

[1000] In light of this clear picture, I will not provide a list here of the codes and draft codes that were surveyed in this study. I will suffice by noting that only one of these codes does not express support for the defence of property—the Swiss, 1937 (s 33). Even where such legislation exists, it is reasonable to assume that case law completes the work of the legislator by recognizing the defence of property—see, eg, Silving, n 1 above, at 589 (citing French case law that relates to the previous version of the penal code).

aggressor's life that is concerned.[1001] Regarding defensive force that is not deadly, it is also subject, as noted, to the principle of proportionality. Nevertheless, it should be remembered that the principle of proportionality is relatively flexible, and within its framework it is also possible to consider the special value of the property for its owners, for example, in cases of the 'poor man's lamb' and when the actor has a deep sentimental attachment to his property.[1002]

As noted during the discussion of the duty to retreat,[1003] similar considerations to those that lead to this duty may also lead to other related duties that address alternatives to the use of defensive force. One of these—which directly concerns our present matter (the defence of property)—considers the duty of the holder of property to forfeit it and to avoid the use of deadly force in order to defend his possession.

Other secondary rules, which are derived from the requirement of necessity and the principle of proportionality and which are discussed above, relate directly to the defence of property, and accordingly will be mentioned here (in brief) as well. One is that in the evaluation of necessity and proportionality, it is necessary to take into account the possibility that the victim will be awarded full compensation for his damage if he avoids the use of force. The damages that are considered for this matter are damages to property, since they are often reversible damages.[1004]

An additional consideration that was noted above,[1005] and that often has much significance in the evaluation of necessity, is the option of ending the attack without the use of force, by means of a demand that the aggressor cease his attack. The typical case exemplifying this matter is trespass. It is desirable that prior to the use of defensive force (for repelling the trespasser), the attacked person (the possessor of the land) should be required (by law) to request the aggressor's departure from the property and to enable the trespasser time to fulfil this request. This is the desirable rule with regard to the defence of property in general—here too there is good reason to expect that the actor will warn the aggressor to cease his attack or to return the property before exercising defensive force, unless the circumstances are such that there is no point in such a demand, or that it is liable to endanger the actor or his property.

[1001] As was clarified above during the discussion of the principle of proportionality—see Ch 3.8 above in general and Ch 3.8.4 in particular.

[1002] See the paragraph above that appears before the paragraph that refers to n 766 in particular, and Ch 3.8 in general.

[1003] See Ch 3.9.7 above.

[1004] The considerations that must be taken into account for this matter were presented above—see the text that begins with the reference to n 635. An additional consideration that Bein suggested taking into account, is that the property is insured, such that the person attacked will receive compensation for his loss—Bein, n 539 above, at 240 fn 103. However, I think that compensation that is paid by an insurance company is not equivalent to compensation paid by the aggressor himself (following a verdict, eg, or when the police take the property from the hands of the thief). Sufficing with the solution of insurance greatly harms the social-legal order, since the aggressor escapes from the situation damage-free (unless the insurance company sues him and wins).

[1005] See the text above accompanying nn 629–30.

Another issue that is commonly discussed in the context of defence of property is the issue of human traps. The proper place for this discussion is within the framework of the requirement of immediacy; firstly, it is not limited to the defence of property alone (since there could definitely be a human trap that is set to protect the residents of the dwelling), and secondly, the main question that it raises is the question of the immediacy of the danger. However, the issue of human traps also raises the question of proportionality, and this is the reason that there is a tendency to discuss it within the context of the defence of property. Given the principle of proportionality, the setting of lethal human traps in general, should, in my opinion, be forbidden, especially when the purpose of installing them is merely the protection of property.[1006]

Given the background of the accepted and justified restrictions on the defence of property in comparison with the defence of the body, it is interesting to consider the anomaly that exists regarding this matter in English law, in which, strangely enough—in a certain context—a broader defence is actually provided for property. While the defence of the body requires objective reasonability (and this is according to both the rules of common law and section 3 of the Criminal Law Act 1967—such that the dispute regarding the law that applies to self-defence is not relevant for this matter), with regard to the defence of property it is sufficient—according to section 5(2) of the Criminal Damage Act 1971—that the actor believes that his act is reasonable. Thus, when a person is forced to harm a biting dog that attacks him, he will be provided with a wider defence if this involves the protection of his trousers than if this involves the defence of his leg(!)[1007]

A secondary question that was raised in suggestions for legislative reform is whether a distinction should be made with regard to the defence of property between the defence of land and the defence of chattels. It should be clarified that this does not relate to the dwelling, which is discussed separately later—but to the defence of land as mere property. The drafters of the Model Penal Code expressed their opinion that since land is indestructible and buildings are immovable, the

[1006] See in detail Ch 3.7.4 above.

[1007] This example is presented, with reservations regarding its legal results, in the explanatory wording of the draft English code from 1989 (Law Commission, A Criminal Code for England and Wales, no 177 (London, 1989)) at 231; the explanatory wording of the draft English code from 1985 (Law Commission, Codification of the Criminal Law, no. 143 (London, 1985)) at 123; Smith and Hogan, n 284 above, at 693 (*ibid*, in fn 16, the authors advise the accused to say that he feared for the safety of his trousers and not to rely on the argument that he was afraid for his ankles).

It should be noted that the *Gladstone Williams* rule, according to which the fact that the actor made a mistake is sufficient for the purpose of a defence, even if the mistake is unreasonable, does not alter the above-mentioned result, since this rule only applies to a mistake of fact. By contrast, our matter—a mistake regarding proportionality—in effect involves a mistake of law (see Ch 5.2.5 below). See the ruling in the case of *R v Williams (Gladstone)* (1983) 78 Cr App R 276; and also JC Smith, *Commentary: R v Williams (Gladstone)* (1984) Crim LR 163.

possessor can usually wait until he receives a remedy from the court.[1008] In contrast, the drafters of the Canadian draft law argued that land actually requires a broader defence, since it is possible to seriously harm the possessor's right by means of a simple trespass.[1009] In my opinion, the requirement of proportionality—within the framework of which the expected damage to the possessor of the legal right to the property is evidently examined—enables a better and more accurate consideration of the characteristics of the specific case than demarcation of rigid categories for chattels and land.

Another issue is the possible limitation of the use of force against a person who has a claim of right in an asset. In English law, there is criticism regarding the ruling that was handed down in the year 1865 in the *Blades v Higgs* affair.[1010] The House of Lords took the position that the owners of goods were entitled to use force in order to retrieve them from a person who held them illegally,[1011] even if this holder was a shop-owner who had paid for the goods bona fide; ie, he had a claim of right in the asset. A different and more reasonable position was taken by the drafters of the Model Penal Code. Section 3.04(2)(a)(II) prohibits the use of defensive force against force exerted by the occupier or possessor of property, when the actor knows that the occupier acts under a claim of right to protect the property. In the explanatory wording, the drafters expressed their opinion that it is desirable to reduce the situations in which there may be conflicting claims to use force, and that the section refers to an important situation in which a conflict of this sort is likely to arise.[1012]

Two central remarks must be made with regard to this rule of the MPC.[1013] The first, that its placement in section 3.04 of the Code that deals with defence of the body is odd, since from a substantive point of view this clearly concerns the defence of property—which is set forth in section 3.06. The exception to the rule testifies to this, according to which if the force is necessary for defence of the actor's body then its use is nevertheless permitted (despite the claim of right that

[1008] See the explanatory wording of the American MPC, Tentative Draft No 8 (Philadelphia, 1958) at 46.

[1009] See the explanatory wording of the draft Canadian law from 1987 (Law Reform Commission of Canada, Recodifying Criminal Law, rev and enl edn, no 31, Ottawa, 1987)) at 38. In the Canadian Draft Code from 1993 (Government of Canada, Proposals to Amend the Criminal Code (General Principles) (Ottawa, 1993) ('White Paper')), the distinction between land and chattels does not appear—see s 38.

[1010] 11 HLC 621, 1 ER 621. The judgment is described and analysed by Williams (1983), n 1 above, at 521–22.

[1011] 'Illegally'—since he had paid for the goods to a person to whom they did not belong at all, ie, to an impostor.

[1012] See the explanatory wording of the American MPC, Tentative Draft No 8 (Philadelphia, 1958) at 19. The drafters of the Canadian Draft Law from 1987 apparently intended to create similar results—see the explanatory wording for s 3(11) of the Draft law (Law Reform Commission of Canada, Report Recodifying Criminal Law, rev and enl edn, no 31, Ottawa, 1987)) at 37–38.

[1013] An additional remark is that there is no room to restrict this limitation, of the use of force for repossession of property, to those same cases in which the actor **knew** that the possessor had a claim of right—see and compare Robinson (1984), n 37 above, vol 2 at 94.

the illegal occupier or possessor has).[1014] The second remark, considered above, is that this arrangement of the MPC, despite its desirable consequence, is in fact superfluous, given that the occupier or possessor in effect makes a mistake of fact (including an extra-penal law that is considered as a fact for the matter of the mistake).[1015]

Finally, it should be noted that the situation to which the above-mentioned case law and draft legislation refers is not regular defence of property against an aggressor, but in effect concerns self-help by means of property repossession. We shall therefore turn to a discussion of this important issue.

4.3.2 Repossession of Property

A arrives at his dwelling and finds that B has taken possession of it illegally and refuses to vacate it. C discovers that an article stolen from her a week ago is in the hands of D, who refuses to return it to C. H attacks F with the purpose of stealing his wallet from him. F struggles with him and grabs his wallet forcibly. At a certain stage H manages to get the wallet out of his hands and to run a few paces away. Will it now be justified for A, C, or F to use force in order (respectively) to enter the dwelling and perhaps to evict B from it; to take the article out of the hands of D and to take the wallet from the hands of H? These cases raise the question of where to draw the boundary between private defence and taking the law into one's own hands.

Seemingly, at least, it is possible to argue that all these cases fall outside of the boundaries of private defence and are therefore irrelevant for our discussion, since in all of them the attack has already been completed and they would therefore involve taking the law into one's own hands after the event. Indeed, it is not unreasonable to leave the treatment of them, or at least some of them, to a separate arrangement that will be established for taking the law into one's own hands. However, in my opinion, at least in the third example given above, the distinction between the moment before the aggressor took and carried away the wallet and the moment after his having done so is very artificial. The formal termination of the offence of theft—and it is recognised that it is sufficient for this purpose to move the article a fraction of an inch—is not suitable for the determination of the boundaries of private defence. By the same token, it is not desirable to enable the aggressor to prevail so that his momentary success (holding the article) would be perpetuated, because of the alteration that this would lead to in the rules that apply to defence of property.

Another approach maintains that civil law can resolve this issue. In Israeli law, for example, section 18(b) of the Land Law 1969, establishes that

[1014] See s 3.04(2)(a)(II)(3) of the MPC.
[1015] See Ch 3.4.5 above and see also the text accompanying n 1021 below.

> If a person takes possession of land illegally, the legal holder is entitled, within thirty days of the possession, to use reasonable force in order to evict him therefrom.

Section 8 of the Moveable Property Law 1971 also adopts this rule. Section 24 of the Civil Wrongs Ordinance [New Version] establishes a defence against the tort of assault not only for one who 'used reasonable force in order to prevent the claimant from illegally entering the land', but also for one who did so 'in order to evict him after he has entered it, or stayed there, illegally', and not only to one who 'used reasonable force in order to protect his holding of moveable property', but also for one who did so 'in order to repossess it from the hands of the claimant who took it from him, or retained it illegally'.[1016] However, it is highly doubtful if these statutes will assist the actor in the face of criminal responsibility.[1017] Perhaps only the first two, which were established in the laws of land and immovable property, will be of assistance, because they constitute legal authority, while the others, which were determined in the torts law, will not be useful, since they are civil defences which do not constitute 'vindications'.[1018]

Consequently, the civil law does not provide a full solution to the issue that is the subject of our discussion, and it is necessary to establish a framework for it in the criminal law too. The question is, of course, whether there is room—in light of the special considerations of the criminal law in general and of private defence in particular—for the justification of the use of force for repossession of property. Before I discuss this significant question, a preliminary clarification is necessary. Despite the traditional distinction between 're-entry' when land is involved and 'repossession' when chattels are concerned,[1019] I shall use the expression 'repossession' to describe both phenomena jointly and I shall separate them only when this is substantively necessary.[1020]

The factors of the attacked person's autonomy and the aggressor's guilt in the rationale of private defence support its justification at any point in time—even after the possession of the asset by the aggressor and for the purpose of its repossession by the attacked person. Accordingly, the question at hand must be decided by taking special notice of the third factor—the social-legal order. This factor dictates—for our discussion—two significant limitations on the use of force. The first was mentioned above, and concerns the limitation of the use of force against the holder of a claim of right. When a dispute occurs between two people where each

[1016] Correspondingly, the Land Law 1969, the Moveable Property Law 1971 and the Civil Wrongs Ordinance 1968. The translation is by the author.

[1017] Joshua Weisman, *The Land Law, 1969: A Critical Analysis* (1970) (Hebrew) at 56–57.

[1018] On this distinction between defences and vindications: Feller, n 14 above, vol 1 at 416ff.

[1019] See, eg, Blackstone, n 40 above, vol 3 at 4 (repossession of immovable property) and at 5 (re-entry into land).

[1020] An additional preliminary clarification is that the repossession of the dwelling is not discussed here, since—as will be seen in the separate discussion of the defence of the dwelling—it involves considerations other than those that apply to the repossession of mere property.

of them has a (honest) claim of right to hold the asset, it is highly desirable—in order to maintain the social-legal order—that they avoid additional violence, and appeal to the court to settle the dispute. It is important to note that such violence also endangers the body—both that of the aggressor-dispossessor and that of the person attacked who attempts to repossess—in addition to the danger to property and rights that it embodies.[1021]

The second and more significant limitation that the social-legal order factor dictates concerns the period of time between the aggressor's possession of the asset and the use of force by the person attacked in order to repossess it. When the use of force is limited in such a way, it is possible to preserve the social-legal order and even to protect it by means of the repossession. By contrast, without such a limitation, actual anarchy may prevail. Thus, for example, if the use of force for repossession is permitted several years after the aggressor's possession of the asset, this would cause completely superfluous acts of violence. In addition, this is liable to cause direct infringement of the social-legal order. In order to deal with this infringement, the law-abiding citizen's sense of security and trust in the legal system and the social order must also be noted. When force is used for repossession close in time to when the article was taken from the person attacked, it is considered that justice has been done. In contrast, when the attacked person acts with force to repossess the asset after a long time has passed, his action looks as if it is actually an illegal act—at least in the eyes of passers-by to whom the previous history of the asset is unknown—and as a crude breach of the social-legal order.

Such a limitation is obligatory, not only directly as a result of the rationale for private defence, but also in light of the requirement of immediacy, whose justification—which derives both from the rationale for private defence and from its character as a defence of 'compulsion'—was noted above. In effect, this condition is, apparently, liable to lead not only to the said limitation of time, but even to the negation of any force that is used after the aggressor's possession of the asset, ie, to the negation of the repossession as a whole. However, as mentioned, it would be artificial and undesirable to establish that the attack ended with the taking of the asset by the aggressor. Rather, the holding of the asset by the aggressor-dispossessor close in time after the dispossession should be viewed as a direct continuation of the attack, and not as a subsequent stage. It is out of place to identify the time of termination of the attack for the matter of private defence with the time of the establishment of a criminal offence of some sort, such as the offence of theft.

An examination of the penal codes of various states points to a clear tendency for legislators to remain silent—in their framework for private defence in particular,

[1021] As we saw above, this limitation also stems from the factor of the aggressor's guilt, that is absent when the latter acts on account of a mistake in fact (including an extra-penal law)—see Ch 3.4.5 above.

and the criminal law in general—with regard to the issue under discussion.[1022] Such silence can be explained in three alternative ways: the first is a decision that negates the use of force for repossession; the second is the concept that the solution to the issue—permission to use force for repossession in certain cases—should be directly derived from the requirement of immediacy; and the third is simply ignoring the issue. Since two of these possible explanations (the first and the second) are almost contradictory, it is difficult to learn much from this collective silence of the legislators. Such silence is very undesirable, since the public definitely needs, and is entitled to receive, guidance on this issue.

In Anglo-American law, the treatment of repossession is usually cautious, but the predominant tendency is to allow the use of force for repossession following a preceding demand that the aggressor-dispossessor return the asset without violence.[1023]

The most interesting framework for this issue[1024] was established in the Model Penal Code. The drafters of this code not only did not ignore this issue, but also arranged it—in section 3.06 of the Code[1025]—with great detail, which is exceptional even considering the very casuistic character of the framework of private defence in the MPC. As Heberling noted, the drafters assumed that the detail would prevent the use of unnecessary force; however, the over-detailing that they used actually leads to confusion, since the arrangement is too complicated.[1026] My criticism of this arrangement in the MPC relates not only to its complexity, but also to the substance of the framework itself. I will not detail the entire arrangement[1027] here, but only its main principles.

The code justifies repossession under the following two accumulative conditions:

(1) The actor (or other person) was unlawfully dispossessed of the property and is entitled to possession; and

(2)(i) The force is used immediately or on fresh pursuit after such dispossession; or

[1022] Of about twenty penal codes that were surveyed within the framework of this study, only two provide an arrangement for the use of force for repossession of property—see s 7 of the Penal Code of Finland (1889; 1986) and s 24(1) of the Swedish Penal Code (1962; 1972).

[1023] See, eg—with regard to American law—Perkins and Boyce, n 85 above, at 1157; the encyclopedia *American Jurisprudence*, n 500 above, vol 6 at 75. See also, eg—with regard to English law—Russell, n 40 above, at 682; Williams (1983), n 1 above, at 520–22.

[1024] For another arrangement of this issue see s 50 of the Draft Code of New Zealand (The Crimes Bill of New Zealand (Wellington, 1989)), which deals (only) with repossession of land.

[1025] See s 3.06 of the American MPC (Proposed Official Draft (Philadelphia, 1962)) and also the explanatory wording for this section, *ibid*, at 42–47.

[1026] See Heberling, n 62 above, at 945.

[1027] It should be noted that s 3.06 of the Code, which arranges defence of property, spreads over no less than four pages of legal regulations (!), an expansion that almost transforms this statute into a study book.

(ii) The aggressor-dispossessor has no claim of right regarding the property and, in the case of land, the circumstances are of such urgency that it would be an exceptional hardship to postpone the repossession until a court order is obtained.

The limitation of the use of force to immediate use—immediately after the dispossession, or as part of a 'fresh pursuit' of the aggressor-dispossessor by the actor, is as mentioned, essential and valid for all cases. Such limitation is necessary, as we have seen, in light of the rationale of private defence. Therefore, the MPC's waiver of this limitation in the above-mentioned alternative 2(ii) should not be accepted. Even if the actor believes that the aggressor has no claim of right in the property (as is required by the MPC) and even if this is the objective reality (a requirement that is not established in the MPC), there is no room for the justification of the use of force for repossession without some sort of time limitation. The social-legal order itself may be undermined if the use of force is allowed when it is divorced in time from the attack in which the property was seized by the aggressor. The reasoning that was given in the explanatory wording of the MPC, according to which the law should be adapted to public expectations,[1028] is weak. Firstly, the proper aim of the law is not always to comply with public expectations, but sometimes—as in our case—the law must actually direct these expectations. Secondly, it is highly doubtful if the position of the public is that the use of force for a repossession that is exercised many years after the dispossession from the property is justified. This is distinguished from the position that justifies force that is used on the spot—immediately after the dispossession or as part of a 'fresh pursuit'.

A distinction between private defence on the one hand, and taking the law into one's own hands on the other hand, is required here, a distinction that the drafters of the MPC—in a certain sense—completely neglected. The character of private defence is one of compulsion and immediate necessity, while taking the law into one's own hands is characterised by the fact that the initiative is entirely in the hands of the actor.[1029] Private defence also serves the social-legal order, while taking the law into one's own hands often actually harms it. Indeed, there are cases in which the distinction between the two phenomena is difficult to draw. When the aggressor, for example, grabs a wallet from the attacked person and the attacked person immediately uses force to get his wallet back, it is not difficult to see his action as justified private defence. Thus too, when he immediately begins to run in pursuit of the thief and, when he catches him, exercises the defensive force. But what if the attacked person waited for a few seconds before he acted? And if he waited for a full minute? Or for an hour?

[1028] See the explanatory wording of the MPC (Tentative Draft No 8 (Philadelphia, 1958)) at 42–47.

[1029] D Bein, 'The Attitude of the Criminal Law towards Self-Help' (1968) 24 *Hapraklit* 322 (Hebrew) at 324–25.

Yet the difficulty in making the distinction does not negate its substantive justification, just as the state of twilight does not negate the distinction that exists between day and night. In fact, this difficulty is similar to the regular difficulty in the determination of compliance with the conditions of immediacy—from both extremes (on the time axis) of the attack—ie, not too early but also not too late. Englard noted a similar problem regarding the distinction between private defence and taking the law into one's own hands that arises within the framework of the law of torts, and suggested the following test: has the factual situation already been permanently altered?[1030] Although such a test would not dictate clear solutions for all situations, it could also be of assistance in the criminal area.

If we consider the typical case in which the problem arises, then as a replacement for the formal establishment in time of an offence of theft (taking and carrying away) that we have negated, I am of the opinion that it is necessary to focus on a later point in time, at which a certain distancing occurs—of time and place—of the aggressor with the goods, from the location and time of the event of the attack. Since it is not feasible that it can be enacted by the legislator, the precise determination of this time in each concrete case can only be made by the court, provided that it is limited by the important condition—which should indeed be provided by legislation—of immediacy. When immediacy ends, the social-legal order dictates a referral of the person attacked who was dispossessed of his asset to the police, the court and other state authorities, according to each case, while negating the private use of force for the alteration of the existing situation.[1031]

It is emphasised that my proposal to make explicit arrangements for and to justify the use of force for the defence of property even when immediate repossession is concerned, is limited to a situation in which the aggressor-dispossessor acts without claim of right but as a typical offender (thief, burglar, robber etc.). When a dispute between two parties is involved in which both of them have a (honest) claim of right with regard to the asset, there is no room for the justification of the use of force for seizure of the asset by either side, for the above-mentioned reasons.[1032]

[1030] Englard in Tedeschi, n 1 above, at 288.

[1031] Prima facie, this approach leads to an undesirable situation, according to which the situation of an actor who immediately uses force is better than that of a cautious and more civilised actor who first demands from the aggressor that he should cease his attack, and perhaps even waits a bit in order to enable him to do so, and only after this and as a last resort turns to the use of force. 'Prima facie'—both because the prior demand, as mentioned, does not necessarily negate the existence of immediacy, and also because, as noted above within the framework of the discussion of conditions of necessity, my opinion is that this condition dictates such a prior demand—when it is relevant—that is applicable for all. Consequently, the immediate action of the actor who hastily uses unnecessary force to protect property will anyway not comply with the conditions of private defence—see the paragraph after the reference to n 628 above.

[1032] See Ch 3.4.5 above and also the text accompanying n 1021 above.

4.4 Defence of Another Person's Property

As the title of this section indicates, it concerns a possible area of private defence that constitutes a hybrid of two of its other recognised segments: the defence of another person and the defence of property. At least on the face of it, given the accepted recognition of the applicability of private defence to the defence of another person, it seems appropriate that the same conditions that apply to the defence of the actor's property should also apply to the defence of another person's property. Such an approach, that does not distinguish between the property of the actor and the property of another person (so that the discussion of another person's property as a separate area of private defence is rendered superfluous) is well accepted and is reflected in both the majority of scholars' writings—which do not address the subject of our present discussion separately—and also in the decisive majority of the existing penal codes[1033] and draft laws internationally,[1034] that were surveyed during this study. Nevertheless, given the conflicting positions that are reflected in Anglo-American law, the justification for these positions will be briefly examined here.

The traditional limitation was derived directly from the limitation of the defence of another person that was common in the past, and has already been discussed above. But it is interesting to note another limitation here concerning the defence of property of another person in particular. Such a limitation was very common in American law and its vestiges exist to this day. The most common of its variations is the limitation to property that is in the actor's (defender's) ownership, possession or control. Another variation is a demand for a special nexus, such as a legal obligation, a request for assistance from the owners or a

[1033] Apart from the penal codes of Greenland (1954) and Norway (1902; 1961), which require interpretation with regard to the defence of another (not only in the context of property) (see n 948 above) and the Penal Code of Sweden (1962; 1972), which needs construction with regard to defence of property (not of another person in particular) (see n 1000 above), then in all the other approximately 20 penal codes that were examined in this study, the rule of private defence is applied—either explicitly or implicitly—for the defence of another person's property as well.

[1034] While the old version of s 22 of the Israeli Penal Code 1977, limited the defence of another's property to 'property that was deposited in the actor's hands', there is no distinction between the property of the actor and the property of another person in the new version of the section regarding self-defence—s 34j—which was established in Amendment no 39 (1994)—'or to his property . . . his or of another person'.This is also the general picture that is created by the draft law of New Zealand (The Crimes Bill of New Zealand (Wellington, 1989) (s 48)); USA—the MPC (s 3.06); and USA—the Federal Draft (1970) (s 606). The above-mentioned draft of New Zealand, limits the defence of property to the holder of the property and the person who assists him. As mentioned, the defence of another person is wider than the scope of activities that fall within the boundaries of complicity in the performance of an offence. However it seems that this is simply an unsuccessful formulation and not an intention to restrict. A similar situation exists with regard to the American MPC—see, with respect to this, n 1036 below.

family kinship.[1035] However, following the Model Penal Code, which takes the approach that there is no room for the said limitation,[1036] the American legislators in the various states of the United States also tend to remove these limitations.[1037]

The principled discussion of the issue at hand raises exactly the same considerations that fuelled the discussion of the defence of another person. Firstly, the justified nature of private defence of property leads to the conclusion that there is no room to distinguish between the defence of property of the actor himself and the defence of property of any other person.[1038] If private defence concerns an excuse that is provided out of consideration by society for the actor's special situation, or a pardon that is granted because of understanding of his emotions, there might be room to limit the defence of property to relatives of the owner or possessor, for example. But such limitations have no place when a justified, appropriate, correct and desirable action is involved. The full justification of defence of property negates the relevancy of the identity of the owner who has rights in it, and his relationship to the actor. An examination of the factors of the autonomy of the person attacked, the guilt of the aggressor and the social-legal order within the rationale for private defence, also leads to the same conclusion that was reached above with regard to the defence of another person; ie, its non-restriction in comparison with self-defence. With regard to the protection of the social-legal order, for the realisation of this purpose, the need for defence of property of another is even likely, in a certain sense, to surpass the need for the defence of the body of another. Since when the other person himself is attacked he can often defend his body by himself, while when an attack on property is involved, there are very often situations in which the attacked person (the property's owner or possessor) is not present at all in the place of the event, for example when there is a burglary at his place of business. Although it should not be forgotten that the interest at stake in the latter case (property) is of lesser value than the interest that is at risk in the former case (the physical integrity and even the life of the person), this difference

[1035] See La Fave and Scott, n 43 above, at 673–75; Robinson (1984), n 37 above, vol 2 at 89; Perkins and Boyce, n 85 above, at 1158; Heberling, n 62 above, at 940. See also s 27(1)(d) of the English Draft Law (Law Commission, Legislating the Criminal Code—Offences against the Person and General Principles, no 218 (London, 1993)) that adds a condition requiring permission from the owners, to the defence of the property of another person against a tort of trespass (as distinct from a defence against a criminal offence).

[1036] It is interesting to note that although in the explanatory wording of the American MPC such an explicit intention to permit the use of force for the defence of property of another appears to the same extent and without any special restriction in comparison to the defence of property of the actor himself (see the explanatory wording of the MPC, Tentative Draft No 8 (Philadelphia, 1958) at 37), nevertheless this intention is not fully expressed in the formulation that is determined in s 3.06 of the Code, that deals with the defence of property. It is possible to find a slight limitation that stems from the restriction of the defence to the following cases: the asset is in the possession of the actor or another for whose defence he acts; the actor acted with the authorization of another or that his right is derived from the right of another.

[1037] See the references in n 1035 above.

[1038] For a similar opinion see Robinson (1984), n 37 above, vol 2 at 90.

is given full expression in the strong substantive restrictions that apply to the defence of (any sort of) property, and especially the restriction dictated by the principle of proportionality.

The central and almost exclusive argument that supports the restriction on defence of another person's property is the fear that the actor will make a mistake. For a stronger foundation for this argument in comparison to the corresponding argument regarding the defence of another person, it is possible to point to two unique characteristics of the issue under discussion. The first: the protected interest, ie, a possessory right in the property—is less in value than the defended interest that might be injured when the actor is mistaken—the person's (the aggressor's) health. The second: the decision as to whether there is room for defence of property is complex in comparison to defence of the body. It occasionally includes the consideration of laws that arrange rights in property (laws of possession) and are dependent on the non-existence of the owner's consent. Accordingly, there is a greater risk that the actor will indeed make a mistake.

The main answer to the argument of the possibility of a mistake is that this possibility cannot negate the real defence of another person's property, but at most is liable to dictate a certain caution in considering the actor's mistake within the framework of putative private defence. Such caution may be expressed, for example, in the requirement that the mistake should be reasonable. Beyond this, several matters should be noted. Firstly, a mistake is also possible with regard to bodily defence. Moreover, it would then involve a significantly greater defensive force that is even liable to be deadly (as opposed to property—given the principle of proportionality). Secondly, in the frequent and realistic cases of defence of property alone—theft and damage to property—there is less likelihood of mistakes, especially if the use of force for the defence of property is conditioned upon a preceding demand to the aggressor to cease—a demand that enables him to explain the reason for his actions and thus to prevent mistakes.[1039]

In conclusion, with regard to the question about the appropriate conditions for justified private defence of the property of another person, all the conditions and limitations that apply to the defence of the property of the actor himself must be applied to it, and primarily the restrictions—which are very significant when defence of property is concerned—dictated by the principle of proportionality.

[1039] For a similar opinion see Heberling, n 62 above, at 940ff.

4.5 Defence of the Dwelling

4.5.1 General

Whether defence of the dwelling is viewed as a separate area of private defence or not, there is no doubt that the uniqueness of the dwelling should be recognised within the issue of private defence, its justification and conditions.

From a substantive point of view, a distinction should be drawn, especially in light of the principle of proportionality, between an attack that endangers the residents of the dwelling and an attack that endangers the dwelling itself and the ownership rights in it. However, defence of the dwelling is not exhausted by defence of the body or defence of property alone. The central question is whether there exists an additional value that merits recognition and defence when the dwelling is involved. Such a value may also justify the private defence of the dwelling under conditions where defence of mere property is not justified, and this is true even when the direct defence of the body is not involved. Moreover, even when the attack on the dwelling is directed towards the bodies of the residents, such additional value will be influential in leading to flexibility of the conditions of private defence.

A person's dwelling is acknowledged as having great importance for him in particular, and consequently for society in general—an importance that greatly exceeds its value as mere property. A person needs a place in which he can find tranquillity, rest and security, and this place is naturally his home. There is a special emotional affinity between a person and his home, and it is difficult to imagine normal life in the absence of such a 'safe harbour' that constitutes an almost indispensable condition for the provision of the most basic needs (such as rest, sleep and privacy) as well as other less basic needs. A stronger defence is therefore desirable—including the use of justified private defence—to protect the dwelling's very immunity, apart from the regular defence of the dwelling as mere property.[1040]

An examination of the defence of the dwelling in light of the rationale of private defence shows that when an attack takes place specifically in the dwelling, significant weight is added for the justification of private defence. Firstly, the invasion of a person's home constitutes a severe intrusion into his living space and in itself harms his autonomy (in addition to the injury to his autonomy caused by an injury to his body or his property—according to the circumstances). As noted, the

[1040] Convincing arguments concerning this matter were raised in D Bein, 'The Defence of Immunity of the Dwelling in our Criminal Law' (1969) 1 *Mishpatim* 519 (Hebrew) at 519–20. My reservations with regard to his arguments stem from the emphasis that he puts on the injury to the ability of a person (whose security in his home is undermined) to be a competent citizen of society. I would actually prefer an emphasis on the person's happiness.

existence of a quiet and serene safe harbour responds to needs that are so basic and important for a person, to an extent that they should be seen as an integral part of the protected enclave of his autonomy. Secondly, there is also, as mentioned above, an important general social interest in maintaining immunity of the dwelling against invasion, so that members of society should at least feel safe in their own homes.

In the past, the special treatment of the defence of the dwelling was based—at least in the Anglo-American legal world—on the special sanctity attached to a person's home.[1041] The concept was that a person's home is his last line of retreat from a hostile world, outside of which he remains unprotected. Thus, for example, just as deadly force was permitted for the defence of life, such force was also allowed for the defence of the dwelling that provides shelter for life. The home was considered as a person's 'castle' and the defence of it was perceived as important as the protection of life itself.[1042] On this matter, a well-known adage exists in English law: 'The house of every one is to him his castle and fortress'.[1043]

Today there is less tendency to talk about the dwelling as having a special sanctity, and the literature suggests other explanations for the special attitude towards it. The first—adherence to the principle of the individual's autonomy, which is accepted even in legal systems that, in other contexts, neglected the theory that this is the exclusive rationale for the justification of private defence.[1044] Another explanation is based on a presumption that when the aggressor breaks into the dwelling, especially at night, he endangers the residents.[1045] This is based on both the assumption that the aggressor takes the presence of residents in the home into account and prepares a violent response for a possible encounter with them, and also on the assumption that the residents of the home are surprised and fear for their lives, and will consequently attempt to exercise defensive force to which the reaction of the aggressor is liable to be very dangerous. Additional explanations are concerned with public sentiment[1046] and the fact that the dwelling is 'the ultimate place of safety'.[1047] As mentioned, my opinion is that there is no reason to deviate

[1041] See, eg, Robinson (1984), n 37 above, vol 2 at 12, 86; Lanham, n 228 above, at 245; Heberling, n 62 above, at 939; Greenawalt, n 37 above, at 278.

[1042] See, eg, Beale, n 40 above, at 575; La Fave and Scott, n 43 above, at 669–70; the explanatory wording of the American MPC (Tentative Draft No 8 (Philadelphia, 1958)) at 39.

[1043] The quotation is taken from the ruling in the 1604 case of *Semayne's*, but the saying is even older—see Williams (1983), n 1 above, at 519.

[1044] This is the opinion of Williams, Fletcher and Ashworth—see (correspondingly) Williams (1982), n 1 above, at 738; Fletcher (1978), n 1 above, at 861; Ashworth, n 183 above, at 306 (Ashworth talks about a 'stand fast' approach with regard to the dwelling, as an exception to the general 'human rights' approach, which is based on a balance of interests). See also Ashworth, n 474 above, at 144.

[1045] Such a presumption underlies the following legislative arrangements: s 25(2) of the Colombian Penal Code (1936); s 34 of the Argentinian Penal Code (1921); s 8 of the Spanish Penal Code (1944; 1973). This is also the situation in Jewish law, especially according to the rule relating to one who comes stealthily—see, eg, Finkelman, n 25 above, at 1271ff.

[1046] See Heberling, n 62 above, at 939.

[1047] See Robinson (1984), n 37 above, vol 2 at 86.

from the rationale for the justification of private defence in order to justify the special consideration for the defence of a dwelling. Such consideration stems directly from the rationale that is proposed in this book, and principally from the factors of the individual's autonomy (immunity of the dwelling being an important part of this autonomy) and from the social-legal order—factors that necessitate special protection against attacks that are perpetrated in the dwelling.

A significant question is what kind of special consideration is suitable for the defence of the dwelling. Firstly, it need not be explicitly expressed in legislation. Rather, it is likely to operate to make the conditions of private defence more flexible in concrete cases. Thus, even though there is no explicit expression of the defence of the dwelling in the decisive majority of the penal codes that were surveyed during this study,[1048] case law in many legal systems, nevertheless, tends to attribute importance to this location of the attack. However, it should be mentioned that in draft laws that have been proposed internationally, the defence of the dwelling is usually referred to explicitly.[1049]

Secondly, this consideration is expressed in Anglo-American law in the contexts of the conditions for retreat and proportionality. After the examination of this framework, suggestions will be made, on the one hand, to restrict the flexibility established in Anglo-American law in these contexts, and on the other hand, to add more flexibility regarding the requirement of immediacy for the matter of repossession, and with regard to putative defence.

The general treatment of the defence of the dwelling in Anglo-American law was already noted. In light of this treatment, the regular conditions of private defence are rendered more flexible when the defence is used for repelling an attack in the dwelling.[1050] The classic and extreme example of this special consideration is the English ruling handed down in 1924 in the case of *Hussey*.[1051] In this case, the owner of a house in which the accused rented a room gave him notice to vacate the room. The notice that she gave him was not legally valid, since there was no

[1048] Of about twenty penal codes that were examined as part of this study, explicit consideration of the dwelling was found in only five: s 7 of the Finnish Penal Code (1889; 1986); s 24(1) of the Swedish Penal Code (1962; 1972); s 25(2) of the Colombian Penal Code (1936); s 34 of the Argentinian Penal Code (1921); and s 8 of the Spanish Penal Code (1944; 1973). It should be noted that in the last three of these codes the consideration is limited to an attack (in the dwelling) that occurs at night.

[1049] Such consideration is found principally in the American proposals—in the MPC (ss 3.04(2)(b)(II)(1); 3.11(3); 3.06(3)(d)(I)) and in the Federal Draft (1970) (ss 607(2)(b)(II); 607(2)(c)); and also in the New Zealand Draft (The Crimes Bill of New Zealand (Wellington, 1989)) (s 49(1)). A lack of addressing the dwelling also occurs in the English Draft (Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles, no 218 (London, 1993)), in the Canadian Drafts (Law Reform Commission of Canada, Report Recodifying Criminal Law, rev and enl edn, no 31, Ottawa, 1987); and in Government of Canada, Proposals to Amend the Criminal Code (General Principles) (Ottawa, 1993) ('White Paper')), as well as in all the Israeli drafts.

[1050] See, eg, Ashworth, n 183 above, at 294 (noting the well-known concern of the Englishman for his castle) and Williams (1983), n 1 above, at 519 (noting the special clemency that the law always granted to a person defending his own dwelling).

[1051] See the ruling in the case of *Hussey* (1924) Cr App R 160; see also Smith, n 91 above, at 111–12.

due cause for his eviction. When he refused to vacate the room, the owner arrived accompanied by two other persons in order to evict him. In response, the accused shot and wounded two of his aggressors. The English court ruled that even deadly force is justified against one who attempts to evict a person from his home.[1052]

The most striking expression of the special consideration of the dwelling takes place in the context of the duty to retreat. It is accepted, even by the supporters of the duty to retreat before the exercise of deadly defensive force, that a person does not have to retreat from his own home.[1053] The historical explanation that was given for this exception to the duty to retreat is as follows: in ancient times people made their homes into fortresses for their own defence and often they were actually forced to defend themselves in their homes. The person's place of residence was considered as his place of refuge and was sanctified. This sanctification was fully recognised by the law, which considered the person who was attacked within his home to be one who is already pushed up 'against the wall' and therefore has no obligation to retreat. A retreat from the dwelling was perceived as a waiver of the defence that it provides.[1054] To this day, the words of Justice Cardozo stating that a person 'is under no duty to take to the fields and the highways, a fugitive from his own home'[1055] are often quoted in this regard.

Although there have been attempts, such as that of Beale,[1056] to explain the exception of the dwelling for the rule of retreat by the fact that the retreat from the dwelling will not decrease the danger for the attacked person, this remains an insufficient explanation for the phenomenon. Firstly, even the supporters of the duty to retreat are concerned only with a safe retreat. No one suggests requiring that the person attacked should retreat when such a path puts him at risk. Consequently, even without the exception for the dwelling, if in a concrete case the retreat from the dwelling would be dangerous for the person attacked, he would anyway not be required—according to all the approaches—to retreat. Secondly, there is no room for the dwelling exception from the duty to retreat, even if this is

[1052] We shall return later to this ruling during the discussion of the specific issue that it raises—resistance to eviction from the dwelling.

[1053] See, eg, Perkins and Boyce, n 85 above, at 1127; Heberling, n 62 above, at 939; Ashworth, n 183 above, at 294. The exception that there is no duty to retreat when the attack is carried out in the dwelling of the person attacked was also determined in s 3.04(2)(b)(II)(1) of the American MPC. It is interesting to note that the drafters went even further and determined in s 3.05(2)(c) of the Code that where the defence of another person is involved, it is sufficient if the attacked person **or** his defender live in the place where the attack occurs, in order that both of them will not be obliged to retreat. It is doubtful whether there is room for such 'solidarity' when the dwelling of the defender is involved (as distinct from the dwelling of the person attacked).

[1054] See the encyclopedia *American Jurisprudence*, n 500 above, vol 40, at 636ff; Russell, n 40 above, at 442.

[1055] See the ruling in the case of *People v Tomlins* 213 NY 240, 107 NE 496 (1914). See also the explanatory wording of the American MPC (Tentative Draft No 8 (Philadelphia, 1958)) at 40.

[1056] See Beale, n 656 above, at 540. See also Bein, n 539 above, at 235 (presenting the fact that it is usually physically difficult for a person to escape from a house as a secondary consideration with no independent significance).

based on the factual assumption that the retreat is not safe. In more than a few instances, the retreat from the dwelling can actually be the safest route for the person attacked. When the attack, for example, is directed towards the body of a person, and the aggressor and the person attacked are within the home of the person attacked, it will often actually be safest for the attacked person to leave his house and seek out a public place, where it may be assumed that the aggressor will be deterred from continuing his assault given the danger of being identified,[1057] and given the more reasonable possibility that the attacked person can be rescued by others—either by law enforcement officials or by means of private defence. Therefore, the dwelling exception to the duty to retreat compels a theoretical foundation that would give weight to the actual defence of the dwelling—a foundation that was discussed above. An additional basis is the particularly serious infringement of the social-legal order that exists on the one hand in the attack on a person in his own home, and on the other hand in obliging the person attacked to depart from his own home. The latter injury also involves a very real and undesirable encouragement for crime.

Almost to the same extent that the dwelling exception for the duty to retreat is recognised, it is also recognised that there are two exceptions to this exception that bring us back to the rule—a duty to exploit a possibility for safe retreat prior to exercising deadly defensive force. The first and the more widely agreed exception is the case in which the person who is attacked in his home is previously guilty of having created the situation of compulsion.[1058]

The second exception, the support for which is less widespread and which is more interesting, is the case in which not only the attacked person lives at the place of the attack but also the aggressor, ie, a conflict occurs between two people who live together.[1059] There is good reason for this exception (to the exception), and it

[1057] It is sufficient that there are witnesses to the assault—whom it is reasonable to assume will be found outside the dwelling—in order to increase the chances that the aggressor will be held accountable for his assault.

[1058] See, eg, Heberling, n 62 above, at 939; s 3.04(2)(b)(II)(1) of the American MPC; s 607(2)(b)(II) of the American Federal Draft of a Criminal Code (1970).

As noted—see the text following the reference to n 839 above—such a case involves a stronger duty to retreat than in 'regular cases', so that even given the additional weight of the dwelling there is still definitely a need to demand that the attacked person should exploit the possibility of retreat. In any case, this exception to the dwelling exception is attached to the desirable general arrangement for the special case in which the actor by his own fault causes the situation in which he is forced to defend himself. On this last point see Ch 5.4 below.

[1059] See, eg, Perkins, n 40 above, at 153; s 607(2)(b)(II) of the American Federal Draft of a Criminal Code (1970). It is interesting to note that while such an exception was included in the 1958 version of the American MPC, this exception was omitted from the later 1962 version as a consequence of disagreements between the members of the legislative committee and its advisors. See s 3.04(2)(b)(III)(1) of the 1958 version (Tentative Draft No 8) and the explanatory wording at 25; s 3.04(2)(b)(II)(1) of the 1962 version (Proposed Official Draft) and the explanatory wording at 49.

What is interesting in this special case is its ability to serve as a 'test case' for the rationale that is attributed by various scholars to the basic rules of retreat and the special consideration of the dwelling. Thus, eg, La Fave and Scott opined that the negation of the exception to the exception, concerning the

can be directly grounded on the rationale of the special consideration for the dwelling. This consideration is based on a special status for the dwelling as a protected living space that enables a person to rely on the fact that he will remain immune to external intrusions, so that within his home he can enjoy the mental serenity that is essential in order to conduct a normal life. While this status is harmed most severely by external invasions of strangers into the dwelling, the situation is different in situations of conflict with another resident of the dwelling, who is already legally present. In addition, a weighty policy consideration supports an exception to the exception. Several scholars have noted that a substantial number of attacks within the dwelling are performed by relatives and friends of those attacked, in general, and especially by their spouses.[1060] In such disputes, the special status of the dwelling is not harmed, and it is desirable to leave the duty to retreat intact with the purpose of reducing the use of violence, and to avoid encouraging people to stand up for their rights by force.[1061]

Another important expression of the special consideration of the dwelling is the creation of a certain flexibility in the requirement of proportionality. As noted, the principle of proportionality necessitates a more significant limitation on force that is justified for the defence of property in comparison to that which is justified for the defence of the body, and it negates in particular the use of deadly force for the defence of property. My opinion is that this important distinction should not be abandoned when the attack takes place in the residence of the person attacked. Indeed, whether the attack is directed against the body, or against mere property, in both cases the significant factor of defence of the very immunity of the dwelling is also added. Moreover, it is often difficult in practice to distinguish between an attack on the body in the dwelling and an attack on property in the dwelling. Nevertheless the great importance of this distinction remains intact, since even

joint residence, reflects a view of the exception itself (the dwelling) as based not on the interest of the attacked person in the dwelling and the status of the aggressor as an invader, but on the fact that the attacked person has no more secure place than his home to which to retreat (see La Fave and Scott, n 43 above, at 660). As I have noted above, I am of the opinion that this last determination is without merit, even as a factual presumption.

But see also the 2002–3 Supplementation to Robinson (1984), n 37 above, vol 2 at 22, 25, reporting American cases according to which there is no duty to retreat from one's own home before resorting to lethal force in self-defence against a cohabitant with an equal right to be in the home—see *State v Thomas*, 77 Ohio St 3d 323, 673 NE 2d 1339 (1997); *Weiand v State* 732 So 2d 1044 (Fla 1999).

See also Kadish and Schulhofer (2001), n 38 above, at 791, noting that the decisions of most American state courts follow the MPC in ruling that there is no duty to retreat from the dwelling even when the attacker is a co-occupant, but there are also cases where the court held that a homeowner must flee if possible when the attacker is a co-occupant.

[1060] See Heberling, n 62 above, at 939; Kadish and Schulhofer, n 640 above, at 881.

[1061] The approach of the American MPC is different—see Dressler, n 156 above, at 227 (' in order to protect women in domestic disputes, the Code does not require retreat by a non-aggressor in the home, even if the assailant is a co-dweller'). Later, I shall return to discuss this issue and its possible implication for the special case of defensive action by a battered woman against her abusive partner, see Ch 5.5.

when the defence of the immunity of the dwelling is added to the defence of property, the justification for defensive force is still smaller than that which exists when the defence of the immunity of the dwelling is added to the defence of a person's body. Although, for example, there is room to ease the requirement of proportionality in both cases—ie, so long as the attack takes place in the dwelling—and to justify a greater defensive force in comparison to that which is justified when no defence of the immunity of the dwelling is involved in the private defence, nevertheless excessive flexibility will render the requirement of proportionality meaningless; there is no room, in particular, for the flexibility that is expressed in the justification of deadly defensive force for the defence of the dwelling and property that does not involve the defence of a person's body.

In Anglo-American law, this approach was not adopted, and accordingly deadly defensive force was justified for repelling an attack in the dwelling of the attacked person even in the absence of danger to that person's body. This approach of Anglo-American law exists in the common law,[1062] in draft laws[1063] and also in scholars' writings.[1064]

In contrast, a minority opinion exists according to which there is no real significance attributed to the location of the attack within the dwelling of the person attacked, and the sole criterion is the classification of the attack as defence of the body as opposed to defence of property.[1065] Between these two approaches another one exists, according to which the fact that the attack takes place in the dwelling of the person attacked should be taken into account in the evaluation of the reasonability of the actor's action.[1066] This approach is, in my view, correct and desirable since the use of deadly defensive force is not reasonable in the absence of danger to a person's physical well-being.

Special consideration of the dwelling is also expressed in the issue of human traps, a subject which was addressed previously.[1067] It is common, for example, to

[1062] See, eg, Williams (1983), n 1 above, at 519–20; La Fave and Scott, n 43 above, at 669ff; Perkins and Boyce, n 85 above, at 1150ff. Another application of this approach concerns the immediacy requirement: the right to defend the home begins as soon as the entry into the dwelling becomes imminent, even if the dweller's physical well-being is not in imminent danger—see *State v Jenkins*, 443 SE 2d 244, 251 (W Va, 1994); Dressler, n 156 above, at 242.

[1063] See s 3.06(3)(d)(I) of the American MPC; s 607(2)(c) of the American Federal Draft of a Criminal Code (1970) and the explanatory text for this section, *ibid*, at 44 and criticism of this gross deviation from the principle of proportionality—in the text that begins with the reference to n 748 above.

[1064] See, eg, Perkins and Boyce, n 85 above, at 1148ff.

[1065] See Ashworth, n 183 above, at 294.

[1066] See the explanatory wording for s 3(12) that appears in the Canadian Draft Law (Law Reform Commission of Canada, Report Recodifying Criminal Law rev and enl edn, no 31, Ottawa, 1987)) at 38. The drafters clarify there that they did not establish a separate rule for the dwelling, but in their opinion this factor should be considered in the evaluation of the reasonability of the defensive force. Since s 3(12) of this draft that deals with the defence of land explicitly bars the use of deadly force, then the use of deadly force that is not for the defence of a person's body is negated. Such a negation is, in my opinion, very desirable.

[1067] See Ch 3.7.4.

establish an exception to the specific prohibition on setting a human trap, for human traps whose purpose is to defend the dwelling at night.[1068] The assumption is, evidently, that one who attacks the dwelling at night-time, actually intends to physically harm the resident and against such danger, greater defensive force, if it is used, may still comply with the principle of proportionality. Nevertheless, it should be taken into account that legislation regarding human traps does not necessarily have anything to teach about the consideration of the dwelling, since serious consideration is also given to the danger to innocents (as distinct from the danger to the guilty aggressor) created by the trap.

4.5.2 Definition of 'The Dwelling'

In order to provide precise meaning to our discussion, it is necessary to demarcate and define it. Several secondary questions should be considered. The first relates to the rights of the person attacked in the dwelling. Since the rationale for the special consideration for the dwelling is not proprietary-possessive but is based on viewing the dwelling as the person's place of refuge, it is clear that the nature of the proprietary-possessive rights of the person attacked in his dwelling is insignificant. He could be the owner, the tenant or even a sleep-over guest, on the condition that the dwelling does indeed constitute a place of residence for him.[1069] In this spirit, the Model Penal Code defines the dwelling broadly, encompassing even a mobile or temporary structure used at that time as the home or place of lodging for the actor, while the explanatory wording even provides the example of a guest in a hotel.[1070]

A second question concerns expanded areas that deviate from the confines of the actual dwelling. One such extension constitutes the close environs of the dwelling, such as the garden or backyard. Bein claims that this is a logical extension, since the special sense of security that a person has in his home, and that society is willing to consider, also extends to the immediate vicinity of the home.[1071] In Anglo-American law such an extension is very common.[1072] In my view, a distinction should be made between the relatively minor-importance that should

[1068] See, eg, the encyclopedia *American Jurisprudence*, n 500 above, vol 6 at 78.

[1069] Bein, n 539 above, at 235; Bein, n 1040 above, at 520.

[1070] See s 3.11(3) and the words of explanation in the American MPC (Tentative Draft No 8 (Philadelphia, 1958)) at 40. A similar definition is found in s 619(d) of the American Federal Draft of a Criminal Code (1970). See also s 619(c) of this draft (a definition of 'premises').

[1071] Bein, n 539 above, at 235.

[1072] See, eg, the encyclopedia *American Jurisprudence*, n 500 above, vol 40 at 638ff; Perkins and Boyce, n 85 above, at 1134ff. But see the 2002–3 Supplementation to Robinson (1984), n 37 above, vol 2 at 25, 31 (reporting American cases according to which the 'dwelling' exception does not encompass the common areas of a defendant's apartment building, such as stairways, hallways and foyers—see *State v Silva*, 43 Conn App Ct 488, 684, A. 2d 725 (1996); *Commonwealth v Jefferson*, 26 Mass App Ct 684, 635 NE 2d (1994)).

be attributed to the location of an attack in the vicinity of the home, and the relatively major importance that should be attributed to the location of the attack within the dwelling itself. This distinction is based both on the important function that is usually performed by the residential home as a safe harbour that provides security, serenity and privacy—a function that the environs of the home do not usually fulfil, at least not to the same extent—and also on the possibility of being able to retreat into the residential home.

Another recognised extension relates to the place of work of the attacked person. Such an expansion is very common in the United States—both in the American common law and also in American draft laws[1073]. In my view, while the special consideration of the dwelling is understandable and desirable, as derived from value judgment accompanied by very strong sentiments, in contrast, the foundation for providing an identical or similar consideration for the place of work is highly questionable. This is because the place of work does not fulfil the same special function as the dwelling. Even if we accept that this location of an attack (the place of work of the person attacked) should be taken into account, the weight of this factor is not as great as when the location of an attack is within the attacked person's dwelling.[1074] In the final analysis, if we consider the most striking expression of the special consideration of the dwelling—negation of the duty to retreat—an over-extension of this exception to also include the place of work and even sometimes any place where the attacked person has a legal right to be, causes the duty to retreat to be drained of its content, and only pays lip service to this duty.[1075]

An explanation for the inclusion of the place of work in an exception to the duty to retreat was presented in the American Federal Draft Law. According to the drafters, this exception prevents the possibility that the duty to retreat will cause the abandonment of documentation and equipment of the government, and prevent their being left unprotected.[1076] However, this explanation is far from being persuasive. Firstly, it is limited to the special case of government property. Secondly, if the protection of mere property is involved—even if it belongs to the government—this does not provide a justification for using deadly defensive force. In the case that documentation of special importance for state security is

[1073] See, eg, the encyclopedia *American Jurisprudence*, n 500 above, vol 40 at 639; Hall *et al*, n 582 above, at 441 (noting the ruling in the case of *Johnston* (1970)); s 3.04(2)(b)(II)(1) of the MPC and the explanatory wording in Tentative Draft No 8 (Philadelphia, 1958) at 25; s 607(2)(b)(II) of the Federal Draft of a Criminal Code (1970) and the explanatory wording at 44, as well as s 619(c) of this draft (definition of 'premises'). Robinson too, in his proposal, presents this factor (the occurrence of the attack in the attacked person's place of work) as a consideration in the evaluation of proportionality—see section 3-7 of his proposal; Robinson (1984), n 37 above, vol 2 at 566. See also *ibid*, at 86.

[1074] For similar opinions see La Fave and Scott, n 43 above, at 660, 669; Heberling, n 62 above, at 939; Bein, n 539 above, at 235.

[1075] See the text that refers to n 835 above.

[1076] See the explanatory wording of the Draft Law (National Commission on Reform of Federal Criminal Laws, Study Draft of a new Federal Criminal Code, (1970)) at 44.

involved, then other special statutory provisions would apply in any case. Even in the absence of such rules, there is no room to distort the rules of private defence by foregoing the principle of proportionality[1077].

4.5.3 Resistance to Dispossession of the Dwelling and Repossession of the Dwelling after Dispossession

The especially sympathetic consideration of Anglo-American law for private defence of the dwelling reaches its peak in the case where the aggressor, illegally, attempts to remove the person attacked from his home. In common law, even deadly force was justified in order to resist dispossession,[1078] and in England there was even a far-reaching rule according to which a tenant was entitled to use deadly force to repel the owner who attempted to evict him when she had a claim of right. With regard to this rule, which was determined in the case of *Hussey*,[1079] much criticism has been voiced,[1080] based on the claim of right held by the owner (the aggressor). Indeed, there is no room for the justification of force, and definitely not of deadly force, against a person with a claim of right.[1081]

A more reasonable framework was established in the Model Penal Code, according to which deadly force is justified in order to repel the aggressor's attempt to evict the person attacked from his dwelling, only if the aggressor does not have a claim of right.[1082] Indeed, if it is accepted that deadly force is justified solely for the defence of the body, then the test of the aggressor's claim of right may, in most cases, lead to the desirable results: when the aggressor has a claim of right, he does not usually constitute a threat to the residents of the house and does not even cause apprehension; while when the aggressor does not have a claim of

[1077] It is even possible that in a suitable case a solution could be found for the problem that disturbed the Federal Draft Law framers within the scope of private defence: where private defence of a state security interest is justified and the danger is indeed severe and immediate.

Finally, the exception to the exception regarding the place of work should be mentioned, and the recognised return to the rule of retreat, in a case where the place of occurrence of the attack is not only the place of work of the attacked person, but also of the aggressor. Such an arrangement was established in the American Federal Draft Code, and even in the American Model Penal Code, even though it was, oddly, negated there with regard to a joint residence of the person attacked and the aggressor (see s 607(2)(b)(II) of the Federal Draft of a Criminal Code (1970) and s 3.04(2)(b)(II)(1) of the MPC. It is possible that this reflects the correct distinction in principle between the place of residence and the place of work. In any case, I agree with such an exception (regarding the joint place of work) to the, in my opinion, undesirable exception (regarding the place of work of the attacked person) regarding the duty to retreat.

[1078] See, eg, La Fave and Scott, n 43 above, at 671; s 306 of Stephen's Digest, n 228 above; Williams (1983), n 1 above, at 519–20.

[1079] See n 1051 above and accompanying text.

[1080] See Williams (1983), n 1 above, at 519–20; Harlow, n 324 above, at 533.

[1081] I have already related to this above—see Ch 3.4.5 and also the text accompanying n 1021.

[1082] See s 3.06(3)(d)(I) of the American MPC (Tentative Draft No 8 (Philadelphia, 1958)) and the explanatory wording at 38ff.

right, it is reasonable to assume that such a danger exists.[1083] However, there may also be cases in which an aggressor without a claim of right does not constitute a danger to the body of the residents. In such a case, the following explanation, which appears in the explanatory wording of the MPC, are convincing. According to the drafters, it is desirable to reduce to a minimum the cases in which it is permissible to use deadly force, and the killing of a person is an irreversible evil more severe than a temporary loss of possession of the residence.[1084] In contrast, the reasoning of the drafters of the position of the MPC that justifies the use of deadly force against an aggressor who does not have a claim of right, according to which the eviction of a person from his dwelling constitutes a very serious provocation, is unpersuasive. It is likely to support a mitigation of punishment (as is suitable for a provocation) or—at the very most—an excuse that is, in substance, understanding and forgiveness, but not a full justification of the use of deadly force. Therefore, the position of the MPC regarding the negation of deadly force against a person with a claim of right should be accepted.[1085] But the justification that is provided therein for using deadly force against one who lacks a claim of right should be rejected.[1086] In other words: lack of a claim of right is an essential condition for the justification of deadly force, but is not a sufficient condition for such justification. Nevertheless, it should be noted that in reality it is difficult to imagine such cases of an attempt to forcibly evict a person from his residence by an aggressor who has no claim of right, and it is even more difficult to imagine cases such as these in which there is no danger expected to the body of the residents of the dwelling.[1087]

With regard to self-help by means of repossession, Anglo-American law also usually views the one who is dispossessed from his place of residence more sympathetically than one who is dispossessed of other property.[1088] As mentioned, with regard to property that is not a dwelling, the use of force should be restricted—in light of the requirement of immediacy in particular and the rationale for private defence in general—to repossession that is performed close in time

[1083] The feeling is, that while the first is liable to be any one of us, who stands on the right that he is convinced is his, the second is, in contrast, a dangerous criminal.

[1084] See the explanatory wording of the MPC (Tentative Draft No 8 (Philadelphia, 1958)) at 39.

[1085] In fact, against an aggressor with a claim of right there is room to negate the **justification** of defensive force of any kind, since—given an absence of guilt on his part—this is not private defence but—according to the case in point—putative defence or an action within the framework of the 'necessity' defence. Both these cases only involve an 'excuse'—see Ch 3.4.5 above and also the text that refers to n 1021 above.

[1086] Justification whose correctness is called into question by the drafters themselves—see the explanatory wording of the MPC (Tentative Draft No 8 (Philadelphia, 1958)) at 40.

[1087] This is perhaps the explanation for the opinion of Williams, who negates deadly shooting against a dispossessor with a claim of right, but raises the possibility that against a dispossessor devoid of a claim of right it would be possible, a fortiori, to derive a justification for deadly shooting from the accepted justification of deadly shooting of one who breaks and enters into the dwelling—see Williams (1983), n 1 above, at 520.

[1088] See, eg, Williams (1983), n 1 above, at 520–21.

to the dispossession as part of a 'fresh pursuit'[1089]. Concerning the repossession of the dwelling, I maintain that there is room for two ways to ease this requirement: firstly, to make the requirement of immediacy more flexible, so that the period of time following the dispossession within which the repossession is still considered as sufficiently immediate would be longer. Secondly, repossession should be allowed not only close in time after the dispossession from the dwelling, but also close in time after this becomes known to the resident. Thus, for example, when a person returns to his home after a short holiday abroad and finds an intruder without a claim of right in his home, the special value of the dwelling operates to justify repossession despite the time that has elapsed since the dispossession.

4.5.4 Putative Defence of the Dwelling

To conclude the discussion of private defence of the dwelling, I wish to deal in brief with the putative private defence thereof, and also to suggest providing, within its framework, an expression of the special value of the dwelling and the special consideration it requires. If within the framework of the existing arrangement of putative private defence in a particular legal system, it is sufficient that the actor makes a mistake with regard to the factual elements of the defence in general and with regard to the nature of the danger in particular,[1090] then the following proposal is superfluous. However, where reasonableness of the mistake is also required in order to exonerate the actor from criminal responsibility, my proposal is to provide more lenient consideration of the mistake and greater willingness to see it as reasonable. Because of the special status of the dwelling in a person's eyes, it is only natural that he will be very scared of an external intrusion and assume that his physical integrity and even his life are at risk.[1091]

4.5.5 Conclusions

In sum, the contexts in which there is room for special consideration of the defence of the dwelling include the following: the negation of the duty to retreat (apart from the exceptions of an aggressor with a claim of right, an attacked person who bears prior guilt, and an aggressor who shares a dwelling with the person

[1089] See the paragraph following the reference to n 1021 above.

[1090] This, in my opinion, is also the desirable law, as will be noted later in Ch 5.2. Even within its framework, my proposal, which I shall shortly present, may have significance—with regard to offences of negligence.

[1091] Nevertheless, it is again necessary to express certain reservations regarding the recognized consideration in Anglo-American law of putative defence, within whose framework it is bound together with the actual defence, and thus justify an action for which only forgiveness is appropriate. See Ch 2.2 above and Ch 5.2.2 below.

attacked); a certain easing of the requirement of proportionality—although not to the extent of justifying deadly force in the absence of danger to a person's body; a certain flexibility of the requirement of immediacy with regard to repossession; and a more lenient consideration of mistakes within the framework of putative private defence.

5

Additional Issues in Private Defence

5.1 General

I shall relate to three types of issues in this chapter. The first concerns issues the appropriate solution for which is not within the scope of private defence at all, but which for some reason are occasionally considered as issues of private defence (hereinafter: 'external issues'). The second concerns general issues that are not specific to private defence but concern all criminal law defences or—at least—all the justifications (hereinafter: 'general issues'). The third concerns issues that do require special treatment within the discussion of private defence (hereinafter: 'special issues').

5.1.1 External Issues

These are issues sometimes mistakenly viewed as private defence. Such a mistaken view is likely to occur when the discussion is not based on the appropriate rationale for private defence. A central issue, which occasionally tends to be included within private defence, is repelling an innocent aggressor. I have already presented my detailed view that this issue is not a matter of private defence at all.[1092]

A fortiori, it is necessary to negate the inclusion of three additional issues, which are occasionally—especially in the philosophical literature—dealt with as issues of private defence. The first concerns the case in which the 'aggressor' constitutes an 'innocent threat'. This term, which was coined by Nozick, refers to situations in which a person constitutes a threat as a result, for example, of being thrown on to the person attacked.[1093] Although Nozick does not use the precise legal term for this matter, I assume that he relates to an involuntary (uncontrolled) 'assault'. This is, obviously, a situation in which the 'aggressor' bears no criminal responsibility at all.

[1092] See Chs 1.5.2; 1.5.3; 1.5.4; 1.5.5; 1.5.8.5; 1.6 and 3.4 above.
[1093] See Nozick, n 270 above, at 34.

The second issue is also known by a term coined by Nozick—an 'innocent shield of threat'. The example that he provides for this situation is that of an innocent person who is located in front of the aggressor's tank, in such a way that if the attacked person uses defensive force against the aggressor, he will also necessarily hurt that innocent person who serves as the aggressor's shield.[1094] However this issue does not involve private defence, since not only is the innocent person devoid of responsibility, but there is in fact no assault at all on his part.

A third issue that tended to be dealt with as an issue of private defence is the termination of pregnancy that is designed to save the mother from the risk she faces in the continuation of the pregnancy.[1095] Although it is indeed possible to excuse and even to justify the abortion within the defence of 'necessity', there is no room, in the absence of a responsible aggressor, to distort private defence so that it will also apply to this case.

Another issue, which there is a mistaken tendency to discuss as an issue of private defence, is the injury to an innocent passer-by during defensive action against an aggressor.[1096] In my view, the rationale of private defence leaves no doubt that this issue is outside the scope of private defence. If the injury to the passer-by was caused inadvertently, there is no room for criminal responsibility in the absence of the mental element required for the offence. If the injury to the passer-by was caused by negligence (as when the attacked person directs the defensive force towards the aggressor but does not take sufficient care, misses, and harms the innocent person), the person attacked may, at most, bear responsibility for an offence of negligence (but evidently not for an offence of *mens rea* (awareness)). If the injury to the passer-by was intentional (as in the case of the 'innocent shields of threats' type that was mentioned above), although in certain cases it may be possible to apply the defence of 'necessity', it is impossible to justify the action as private defence.

5.1.2 General Issues

As noted, our discussion concerns issues that also arise with respect to private defence, yet are not specific to this defence but relate rather to all the criminal law defences or, at least, to all the justifications. By this I mean, issues of putative private defence, the actor who caused—with guilt—the situation in which he is

[1094] See Nozick, n 270 above, at 35.

[1095] See, eg, Fletcher (1978), n 1 above, at 863; Finkelman, n 25 above, at 1280; Frimer, n 228 above. This discussion evidently concerns a situation in which the existing local law prohibits abortion.

[1096] The drafters of the American MPC as well as the drafters of the American Draft of a New Federal Criminal Code (1970) found it fit to explicitly establish that private defence does not include a negligent or reckless injury to an innocent passer-by—see s 3.09(3) of the MPC and s 601(2) of the Federal Draft Code. American courts sometimes apply a transferred-justification doctrine, similar to the transferred-intent rule—see Dressler, n 156 above, at 221. Such a solution is not compatible with the rationale of private defence.

forced to defend (or to protect) himself, and the burden of proof of private defence. These are wide issues, each one of which justifies a separate monograph; however, the scope of this book does not allow for a full discussion of them. Moreover, with regard to two of them—putative private defence and the proof of private defence—there are clear advantages in establishing general legal frameworks that will apply to all the criminal law defences, or at least, to all the justifications. Since this book is not designed to deal with other criminal law defences (apart from private defence), it is impossible, within its limited scope, to include a comprehensive discussion of these general issues.

As to the issue of proof of private defence, this not only involves a general question, but also constitutes part of the criminal evidence law and therefore does not pertain to the substantive criminal law I address herein. I will therefore avoid a discussion of it.[1097] In contrast, the other two issues—putative private defence and the causation, accompanied by guilt, of the situation of private defence—constitute part of substantive criminal law. Accordingly, even though it is impossible to discuss them fully within the scope of this book, I will nevertheless address them.

5.1.3 Special Issues

There are two additional issues, particular to private defence, which will be discussed in this chapter. The first concerns the actor's deviation from the conditions of private defence. Although deviation from the conditions is also possible in other defences of criminal responsibility that justify the use of force, there are, however, weighty considerations regarding this matter that are unique to private defence. The second additional issue that is special to private defence concerns the defensive action of a battered wife against her abusive spouse. Although from a theoretical point of view it is possible to question the justification for a separate discussion of this specific issue, in reality this issue has been accorded quite significant importance.

[1097] Nevertheless, I will devote a few words to this issue. The prevailing approach today in modern criminal law is that although establishing a defence to criminal responsibility is unusual, and one who claims this defence bears the burden of proof, when a reasonable doubt is cast, lest a defence be established, the prosecution must remove the doubt in accordance with the principle that the accused should enjoy the benefit of doubt in criminal law. See, eg, Rinat Kitai, 'Presuming Innocence' (2002) 55 Okla. L. Rev. 257. Thus, the accused bears, at the most, the burden of raising a reasonable doubt, and once such doubt has been raised the prosecution must negate—beyond all reasonable doubt—the possibility of establishment of a defence. This modern approach is expressed, eg, in ss 34e and 34v of the Israeli Penal Code 1977; in American law (see, eg, Kadish and Schulhofer, n 640 above, at 878; the 2002–3 Supplementation to Robinson (1984), n 37 above, vol 2 at 28–29); and in English law (see, eg, the discussion of the *Woolmington* and *Mancini* rulings in Russell, n 40 above, at 683ff).

See also the discussion of the distinction between an offence and a defence in nn 114–15 above and accompanying text; n 80 above; n 50 above.

It should also be noted that, in my opinion, there is definitely room to raise the issue of private defence even at the court's own initiative when the accused avoids raising the claim.

5.2 Putative Private Defence

5.2.1 General

The putative 'justification' constitutes, as explained, a general issue. Its suitable solution requires research and consideration of all the justifications,[1098] and perhaps even of all the criminal law defences,[1099] and a comprehensive discussion that is beyond the scope of this book.[1100] However, given the importance of putative private defence, and in light of the tendency to confuse it with real private defence, it will also be discussed, although briefly.

With regard to the desirability of criminal law defence that relates to the actor's mistake regarding the circumstances of the justification, at least when a mistake of fact[1101] in distinction from a mistake of law is involved, near consensus exists.[1102] The reason for this lies in general considerations regarding guilt, for when the mistake is reasonable there is in effect no guilt on the part of the mistaken-actor, and even when the mistake is not reasonable, his guilt is lighter in comparison to the guilt of another actor, who also acts in the absence of justifying circumstances but without thinking that they exist. Given the clear approach of modern criminal law—that there is no place for responsibility without guilt—the belief of the actor must be given consideration.

The great need to consider a mistake by the defender or the protector can be understood from the following example, provided by Justice Zilberg in the *Assala* ruling. At night (in darkness), A encountered B, who threatened him with a pistol, and A defended himself against this threat. In retrospect, it became clear that B's pistol had not been loaded, or was defective. As Justice Zilberg noted, it is impossible to oblige the persons attacked to check the effectiveness of the aggressor's

[1098] For a similar opinion, according to which the optimal approach to putative defence should relate to all the justifications, see Stratenwerth, n 36 above, at 1061.

[1099] It could be that even this is insufficient, and that there should be an aspiration to establish a legal arrangement for the issue of mistake that will apply not only to defences but to offences as well.

[1100] For relatively detailed discussions of the issue of putative defence in general and the issue of putative private defence in particular see Reville, n 76 above; D Cowley, 'Privy Council—Mistake and Self-Defence—The Correct Test—Beckford v. the Queen'(1988) 52 *Journal of Criminal Law* 57; Stratenwerth, n 36 above; Giles, n 76 above; Yeo, n 76 above; Fletcher, n 37 above, at 103–15; Fletcher, n 9 above, at 239ff; Fletcher (1978), n 1 above, at 683–758, 762ff; Fletcher, n 46 above, at 158–63; Diamond, n 30 above, at 674–89.

[1101] It should be clarified that mistakes of fact with respect to private defence, include not only mistakes regarding the very existence of an attack and danger, but also regarding the necessity for the defensive force. Mistakes concerning the requirement of proportionality and its derivations have a character of mistake of law, and will be dealt with later.

[1102] Therefore I will avoid referring to all the existing penal codes, draft laws, case law and scholars' writings that testify to this. It should be noted that putative private defence was already recognised in the *Levett* case that was decided in 1639 (79 ER 1064).

weapon before they defend themselves, but their actions should be viewed in light of their mistake.[1103] The recognition of putative private defence is very important on account of two factors. The first concerns the difficult situation—a situation of compulsion—in which the actor must rapidly decide whether to exercise defensive force. The second concerns the serious offence that it is often possible to attribute to the actor if his mistake is ignored, for given that his purpose is to defend himself or to protect, he often strives to injure the aggressor, so that he could be charged with an offence of intention or—at a minimum—an offence of *mens rea* (awareness; malice) (if, as said, his mistake is ignored). We will return to the great importance of this last factor in the consideration of unreasonable mistakes.

I have already noted one area of private defence—the defence of another person—for which there is occasionally an incorrect tendency to negate the relevancy of a mistake, such that if the actor chooses to defend another person, he must do so 'at his peril'. The reasons for the negation of this approach are presented there.[1104]

5.2.2 The Mistaken Inclusion of Putative Defence within Actual Defence

The rationale for the justification of private defence indicates that there is a substantive difference between private defence and putative private defence, since this rationale does not apply to the latter at all. When the attack only exists in the actor's imagination, there is no real injury to his autonomy, the 'aggressor' is not guilty, and the social-legal order does not support the use of defensive force. Nor do the other theories that have been suggested for the justification of private defence, and that were widely surveyed in Chapter 1 above, apply to putative defence but only to actual defence.[1105] Consequently, there is not and cannot be any doubt that the character of putative defence is not one of justification but one of an excuse—an excuse that is not based on the rationale for justification of actual private defence, but on the slight or non-existent guilt of the actor in light of his mistake. Thus, for example, when the actor mistakenly determines that a passer-by who proceeds toward him in the dark intends to kill him, and because of this mistake exercises deadly defensive force against him, the most that it is possible to

[1103] CA 54/99 *The Attorney General of Israel v Assala*, PD 4, 496 at 499.

[1104] See Ch 4.2.4 above.

[1105] An attempt—in my opinion, artificial—to apply the rationale for the justification of private defence to putative defence as well was made by Dressler—see Dressler, n 32 above, at 92–95. Dressler refers to two theories only, and expresses his opinion that if the rationale for private defence is based on a loss of rights of the aggressor, then putative defence does not indeed constitute a 'justification'. However, if the rationale is based on a right against the state to resist aggression, then it is possible (in his opinion) to say that with the establishment of society we have not only preserved for ourselves the right to resist actual aggression but also the right to resist putative aggression.

agree to is that society understands the actor who makes a mistake—especially if his mistake is reasonable—and excuses him from criminal responsibility. But there is definitely no room to justify his action as if it were the correct, desirable and just action that society would desire in every other similar situation. A clear indication that this should be an excuse and not a justification can be found in the fact that the action of a third party, who is aware of the true facts and knows that the 'aggressor' is not an aggressor at all, and that the 'attacked person' is not attacked at all, will not only lack justification if he nevertheless comes to help the 'attacked' person, but he will not even be granted an excuse, and it is very probable that he will bear responsibility for perpetrating an offence by means of another person.[1106]

And yet, despite this important substantive distinction, in Anglo-American law there is a strong tendency not to distinguish between putative defence—at least when the mistake is reasonable—and actual defence, but to blend them together into one obtuse mixture.[1107]

Fletcher expressed his (rather pessimistic) estimation that although most of the experts in criminal law in the United States and England would easily understand the substance of the distinction between a justification and an excuse, only a few of them would understand the nature—an excuse—of putative defence. Fletcher clarifies that belief alone cannot create a justification, and presents two additional arguments to support this opinion. The first is an indication of the difference in the nature of actual defence and of putative defence as understood from the difference in our sentiments towards them, and from the fact that the killer of an innocent person in putative defence often feels deep remorse, a feeling that does not exist after an event involving actual defence. According to the second argument (the 'incompatibility thesis'), the nature of the justified behaviour is such that in every physical conflict in which it is necessary for one of the sides to prevail, logic bars recognition of justification for both sides, and justification will always only be provided for one of them to use force.[1108] My opinion is that while

[1106] The responsibility for performance by means of another relates to the actions of the 'attacked person' who 'defends himself', since the third party will bear simple and direct criminal responsibility for his own actions—if he exercises force against the 'attacker'. See also Williams (1982), n 1 above, at 739.

[1107] I have already referred above to this mistaken combination, found not only in the common law but also in statutes, draft laws and scholars' writings, and its negative results—see Ch 2.2.1 (regarding English law) and Ch 2.2.2 (regarding American law). For exceptional opinions of scholars that suggest viewing putative defence as a justification, see Dressler, n 32 above, at 92–95; Greenawalt, n 37 above, at 282ff. The mistaken combination of putative defence with actual defence has, as mentioned, two possible negative results. The first concerns the consideration of putative defence as justification for each and every matter, as if it were the desirable and correct action to be performed. The second—which is no less negative—concerns the consideration of private defence in its entirety as if it only has the character of an excuse, based on the (not high) common denominator between actual private defence and putative private defence.

[1108] See Fletcher, n 75 above, at 1363; and Fletcher, n 37 above, at 103–15. For a correct view of putative defence as an excuse see also, eg, Robinson (1984), n 37 above, vol 1 at 114–15, Robinson (1984), n 37 above, vol 2 at 398ff, Robinson (1975), n 37 above, at 283–84; Gardner, n 37 above, at 122.

there can indeed be no room for conflicting justifications, it may be that neither side will enjoy justification. It is definitely possible that both of them will only have an excuse.[1109] For our discussion, such is the situation when the person 'attacked', who mistakenly believes that the 'aggressor' is about to kill him, acts against him within the framework of putative private defence, and thus turns into an innocent aggressor, so that the defensive action of the 'aggressor' against him may fall within the scope of putative defence or within the 'necessity' defence—as the case may be (in accordance with the awareness of the 'aggressor' regarding the mistake of the 'attacked person')—ie, within the framework of an excuse but not within the scope of a justification.[1110]

An additional possible explanation for the mistaken inclusion of putative defence within actual defence is a lack of distinction—which is also mistaken—between the issue of putative defence and the issue of the mental element required in order to establish private defence. While in putative defence the (mistaken) belief of the actor in the existence of the factual elements of the defence serves as a **replacement** for their existence in practice, the requirement of the existence of a certain mental element as a condition for the justification of private defence comes **in addition** to all the factual requirements of the defence, and does not replace them. It is therefore important to separate the two issues.[1111]

5.2.3 The Reasonability Requirement

The main and most interesting question with regard to putative private defence is whether the very fact of the mistake is sufficient to release the actor from criminal responsibility, or whether it is also necessary to require that the mistake be reasonable. A preliminary distinction that should be made is the distinction between a mistake of fact (including a mistake regarding extra-penal law) and a mistake of law—ie, for our subject, a mistake that concerns the requirement of proportionality and its derivatives. As to a mistake of law, the question is not only whether reasonability is to be required, but also whether such a mistake is at all relevant to the actor's criminal responsibility. I will first discuss a mistake of fact. A mistake of law will be discussed separately later.

A main additional distinction that should be considered, since it is likely—at least on the face of it—to dictate the solution to the question under discussion

[1109] As we have seen above—see the text following the reference to n 566.

[1110] See Ch 1.5.3 above, devoted to the issue of the innocent aggressor; and Ch 3.4.1 above, which deals with the character of the attack.

[1111] See the text above accompanying n 878. Fletcher notes this confusion between two separate questions that exist in American law—see Fletcher, n 75 above, at 1363–64. A correct connection between the issues is made by Stratenwerth, who notes that the mental element of an actor who mistakenly assumes that justifying circumstances exist, and acts on the basis of this mistaken assumption, conforms with the legal order—see Stratenwerth, n 36 above, at 1064–65.

(reasonability of the mistake), is the distinction between components of the offence and components of the defence. As stated,[1112] there is a dispute among scholars regarding the question of whether a substantive-value difference exists between an element that is located in the definition of the offence and an element located in the definition of the justification. According to the approach that does not distinguish between an offence and a justification, reasonability of the mistake should not be required for the establishment of putative private defence, just as there is no requirement for reasonability of the mistake regarding the factual element in the definition of the offence in order to negate responsibility. This, of course, is the situation with regard to basic criminal responsibility, which is grounded on *mens rea* (awareness; malice), since regarding responsibility for an offence of negligence, a requirement for reasonability of the mistake is definitely appropriate—when either an offence or a defence is concerned. Such an approach is common in Anglo-American law, where the concept of identification between the components of the offence and those of the defence, while viewing both of them as part of the *actus reus*, is often based on the requirement of the circumstance of 'unlawfully' that is contained in the definitions of many offences.[1113]

The other, and in my opinion, correct approach, is that there is an important substantive-value difference between an element that is located in the definition of an offence and an element that is located in the definition of the defence. However, this approach does not contain a solution to the issue under discussion. Viewing the components of the defence as substantially different from the components of the offence does not yet provide a solution to the question of the necessity of reasonability of the mistake.[1114] This is a question of policy that necessitates a reliance on other considerations—to be discussed below—in order to solve it.[1115] As Stratenwerth correctly points out,[1116] the question is whether the fact that a person executes the elements of a criminal offence with awareness obliges him to take special caution in assuming the existence of justifying circumstances. For if indeed an extraordinary event (commission of an action that is usually forbidden) is concerned, whose very existence should provide a sufficient warning to the actor regarding criminal responsibility, there is room to require his caution by conditioning the excuse for putative defence on the reasonability of the mistake. In a similar fashion, Enker wrote:

[1112] See Ch 1.2 above.

[1113] See, eg, Williams, n 13 above, at 212–13 (the principle position); Reville, n 76 above, at 88ff (regarding the English rule).

[1114] Consequently, eg, Yeo's reasoning for the Australian rule that reasonability of the mistake is required—grounded on the distinction between the components of the offence and the components of the defence—is, in my opinion, insufficient. See Yeo, n 76 above, at 139.

[1115] For a similar opinion see Giles, n 76 above, at 193.

[1116] See Stratenwerth, n 36 above, at 1061–64.

> What is the reason and why does a difference exist between a defence of mistake in general for which a genuine belief alone is sufficient, while with regard to defences . . . there is also a demand for the belief to be reasonable? We can only guess and say that with regard to the regular mistake of fact, the accused is not aware of the fact that he is performing an action or causing a result that is forbidden by law, but with regard to defences . . . the accused knows well that he is causing a severe result that the law generally forbids, and therefore a duty of over-caution is imposed upon him to examine the existence of justifying circumstances for the action, and this is . . . similar to the opinion of Jewish law.[1117]

The support for the requirement of reasonability of the mistake as a condition for the provision of an excuse for putative defence is based, principally, on the need and the desire to encourage an examination of the situation and caution, and to discourage a rush to use force. The desire is to defend the public against people with paranoid tendencies, who make unreasonable mistakes with regard to the existence of a factual situation that justifies private defence, and instead to encourage thought and restraint. The fear is that in the absence of a requirement of reasonability, people, especially timid people, will not hesitate to use force that is often liable to be deadly. An opinion was even expressed that neglecting the requirement of reasonability of a mistake endangers the basic human rights of the putative aggressor.[1118]

The approach according to which reasonability of the mistake is required as an essential condition for the provision of an excuse of putative defence, is the predominant one in existing American law.[1119] Yet, even there a sense of injustice was felt with regard to the attribution of full responsibility to an actor whose mistake was unreasonable, and therefore—apparently—the well-known doctrine of 'imperfect self-defence' was implemented in order to mitigate the harsh results of the objective test. I will return to this doctrine in the following section.[1120]

To conclude the discussion of the arguments favouring the requirement of reasonableness of the mistake, I wish to offer the following possibility, which I have not found in legal literature. A situation could exist in which the actor is not sure whether he is being attacked or not. In such a situation there is good reason to

[1117] See Enker, n 89 above, at 144 (translated by the author—BS). For a summary of the state of this issue in Jewish law see *ibid,* at 151–63.

[1118] See Rosen, n 37 above, at 47. See also—with regard to the fear of lethal cowardice—Diamond, n 30 above, at 679. With regard to the due encouragement of thought and restraint—see the encyclopedia ed by Kadish, n 96 above, vol 3 at 947. Fletcher also expressed an opinion (in a quite decisive manner, although with almost no reasoning) that putative defence should be conditioned on reasonability of the mistake—see Fletcher (1978), n 1 above, at 689–90; Fletcher, n 37 above, at 104; Fletcher, n 9 above, at 239ff. The argument was recently raised that a person's right to life, that is today enshrined in s 3 of the Human Rights Act, is not sufficiently protected if (according to the rulings in *Gladstone Williams* (*R v Williams (Gladstone)* (1983) 78 Cr App R 276) and *Beckford* (*Beckford v The Queen* [1987] 3 WLR 611, 3 All ER 425) it is possible to kill using force without a reasonable basis. See A J Ashworth, Case and Comment: *Andronicou and Constantinou v. Cyprus*' (1998) Crim LR 823; see also Smith's correct dissent in Smith and Hogan, n 284 above, at 254.

[1119] See, eg, La Fave and Scott, n 43 above, at 654–55; Perkins, n 40 above, at 133–35.

[1120] See, eg, Kadish and Schulhofer, n 640 above, at 849–50; Diamond, n 30 above, at 684–85.

require that he explore and verify the situation prior to using defensive force—a reason that can be based on a possible equivalence to a situation of 'wilful blindness' with regard to a circumstance that is established in the definition of the offence. As is known, 'wilful blindness' serves as a substantive replacement for actual awareness of the existence of the circumstance. For our discussion, it may perhaps serve for the negation of the actor's belief in the existence of the justifying circumstances.[1121]

I turn now to the arguments militating against the requirement of reasonability of the mistake. Negation of this requirement is liable to stem from the position that there is no substantive-value difference between the components of the offence and the components of the defence, at least not when the circumstance 'unlawfully' is established in the definition of the offence. In this manner, it is possible to explain the contemporary English rule. In the past there was a long line of precedents in which reasonableness of the mistake was required, such as the famous ruling in the case of *Palmer* (1971). This clear rule was placed in doubt—in another context—in the *Morgan* ruling (1975). In the ruling of *Albert v Lavin* (1981) the judges returned to the traditional rule, according to which reasonableness was required, and a lack of clarity was consequently created with regard to the existing law. This lack of clarity was resolved with the well-known ruling in the case of *Gladstone Williams* (1983), in which the Court of Appeals determined that the lack of reasonability might perhaps indicate dishonesty of the belief, but if the belief was genuine—this would be sufficient, and reasonability would not be required. The uncertainty was eventually resolved by the Privy Council, which affirmed the *Gladstone Williams* rule in the case of *Beckford* (1987),[1122] viewing the ruling in the case of *Morgan* as a landmark. The contemporary English rule, that reasonability of the mistake is not required even when putative defence is involved, is enthusiastically supported by English legislative committees and by English scholars, reinforced by adherence to it in the rulings of recent years.[1123]

Other arguments for negation of the requirement of reasonability have also been raised. One such central argument is the low degree of guilt—if there is any at all—of the actor. The argument is that the nature of the actor's guilt—if it exists at all—is negligence. Thus, if we condition the excuse for putative defence on the

[1121] On 'willful blindness' in its regular context see, eg, Williams (1983), n 1 above, at 125–27.

[1122] See the rulings: *Palmer v R* (1971) 55 Cr App R. 223, 2 WLR 831; *R v Morgan* (1976) AC 182; *Albert v Lavin* (1981) 1 All ER 628; *R v Williams (Gladstone)* (1983) 78 Cr App R 276; *Beckford v The Queen* (1987) 3 WLR 611, 3 All ER 425.

[1123] For a survey of these above-mentioned precedents and other precedents, and their basis on the lack of substantive distinction between an offence and a defence, and for opinions of scholars and the legislative committees see, eg, Smith, n 91 above, at 103–107; Yeo, n 76 above, at 133ff; Smith and Hogan, n 284 above, at 87ff, 252ff; s 27(5) and the explanatory wording of the English Draft Law (Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles, no 218 (London, 1993)), at 65ff; Smith's observation, JC Smith, 'Commentary: *Beckford v. R.*' (1988) Crim LR 117; Smith's remark (n 1007 above) in the margins of the ruling in the case of *R v Williams (Gladstone)* (1983).

reasonability of the mistake, the negligent actor is liable to bear the responsibility for a serious offence—and even an offence of intention—since given his aim to defend himself or to protect, he usually expresses a choice, or at least a readiness, to harm the aggressor. Moreover, it is necessary to note the situation of compulsion, which forces the actor to make his decision in difficult conditions and without sufficient time to evaluate the situation correctly. This special situation of compulsion not only abrogates much of the actor's guilt, but it even negates the effectiveness of deterrence. And if indeed it is impossible to deter the actor, grave doubt is cast on the reason for punishing him. Returning to the incompatibility of the requirement of reasonability with the principle of guilt, this incompatibility becomes even greater given the fact that the accepted test for negligence in the existing law of many countries is objective and not subjective.

The injustice in the imposition of serious criminal responsibility—for an offence of *mens rea* (awareness; malice) or even for an offence of intention—on the actor, who is, at most, negligent is even more obvious if it is accepted that in light of his assumption (even though it is mistaken) that circumstances justifying his action exist, his behaviour actually demonstrates conformity with the social-legal order.[1124] For our discussion, there is much in common between a mistake of fact with regard to the components of the offence and a mistake of fact with regard to the components of the defence, a commonality which becomes even more obvious when they are compared with a mistake of law (whether with regard to the prohibition itself or with regard to the defence). I am of the opinion that anyone can make a mistake with regard to the circumstances, and that such a mistake indicates very little about his attitude towards the social-legal order. Finally, as noted above, if there is a desire to encourage justified behaviour—such as private defence of another person—it is almost essential to grant an excuse in a case of a mistake of fact. The strength of such encouragement is also dependent on the existence of the requirement of reasonability, since there is no doubt that the requirement of reasonability of the mistake would deter many people from rescuing others from their aggressors.[1125]

The discussion on the reasonability of the mistake would not be complete without considering the very interesting position of Williams.[1126] According to his theory, not only should there be no requirement of reasonableness of the mistake when an offence of *mens rea* (awareness; malice) is concerned, but there is also no room for a requirement of reasonability as a condition for the grant of an excuse

[1124] See the last part of n 1111 above.

[1125] Moreover, even the duty to rescue that was lately established by the Israeli legislator in the 'Thou shalt not stand against the blood of thy neighbour' Act, 1998, is also liable to support the extension of the excuse to include an unreasonable mistake. See also the discussion of the defence of another person and the possibility of a mistake, in Ch 4.2 above.

[1126] See Williams, n 13 above, at 207ff; see also the report on Williams' position in the explanatory wording of the MPC (Tentative Draft No 8 (Philadelphia, 1958)) at 29 and the explanatory wording of the Model Penal Code and Commentaries (Philadelphia, 1985) at 152.

for putative defence, even regarding an offence of negligence. In Williams' opinion, there is no difference—apart from the matter of proof—between the components of an offence and the components of a defence. However, this opinion in and of itself is clearly insufficient to support his radical conclusion that negates the requirement of reasonableness of the mistake when putative defence is concerned even for an offence of negligence. Williams claims that if indeed the actor made a mistake—even without reasonableness—the threat of punishment would not deter him anyway. However, according to this logic, it would be necessary to negate all punishment for negligence, ie, to completely abrogate offences of negligence. But if indeed we believe that the establishment of offences of negligence would cause individuals to be more cautious—especially in conducting dangerous activities (thus too with regard to putative defence)—there is definitely good reason to require caution before turning, for example, to the use of deadly force.

Williams notes that negligence is a comprehensive term that is comprised of many duties of caution that are not necessarily part of the law, such as the duty not to point a weapon towards another person—not even in jest. In his opinion, when a mistake concerning private defence is involved, such rules do not exist. Indeed, the only common situations that merit separate treatment are those in which the actor is intoxicated, insane or mentally limited. In all other situations there is no room for a requirement of reasonability of the mistake, since it is in any case impossible to adopt any rules of caution through this requirement.[1127] In my opinion, there is actually good reason to compel a person who fears that he is under attack to conduct a minimal and reasonable examination of the actual situation before turning to the use of force.

Between the extreme approach, that there is always a need to demand reasonability of the mistake as a condition for the excuse of putative defence (even with regard to offences of *mens rea* (awareness; malice)), and the extreme approach in the opposite direction, that it is never necessary to require reasonability of the mistake as a condition for an excuse of putative defence (even where an offence of negligence is concerned), my opinion is that an intermediate approach, according to which there is only room for a requirement of reasonability when an offence of negligence is involved, is preferable. Such an approach accommodates both the considerations of guilt and also the considerations of danger that were discussed above.

In order to illustrate the practical significance of the various theoretical approaches, I again[1128] note the case addressed in the *Assala* ruling rendered by the

[1127] See the explanatory wording of the MPC (Tentative Draft No 8 (Philadelphia, 1958)) at 29. A certain support for Williams' opinion may, in my view, be found in the article by the neurologist and neuro-psychiatrist R Restak, who claims that there is no room to talk about the 'reasonable person' in the special circumstances of fear for one's life or severe bodily harm—and accordingly he too opposes the requirement of reasonability—see Kadish and Schulhofer, n 640 above, at 847–48.

[1128] The facts of the case were already presented in the Introduction to this book. They are again presented here for the reader's convenience.

Israeli Supreme Court.[1129] In this case, a man left his house in the evening, and upon his departure gave his gun to his wife for defence against strangers. At midnight, the wife was awakened from her sleep to the sound of knocks on the door. Her question, 'Who is there?' remained unanswered, and the unidentified person went to the window and began to try to open the shutters. The wife, imagining that a stranger was trying to break into her house to rape her, was greatly alarmed, took the gun and shot three deadly shots through the shutters. In retrospect, it emerged that the deceased was her husband, who had come home intoxicated but not dangerous. Since the court found that the mistake of the defendant was reasonable, no difficulty arose in acquitting her. But let us suppose that the facts were slightly different and that the court had found that, in the circumstances of the case, the actor's mistake in evaluating the situation had been unreasonable, actually negligent. What then would be the practical result of each one of the three approaches discussed above?

(1) According to the approach that always demands reasonability of the mistake, it would be necessary to convict the defendant of an offence of *mens rea* (awareness; malice)—the offence of manslaughter—and even perhaps the offence of intended murder. It seems that there is evident injustice in the imposition of responsibility for such a serious offence because of (mere) negligence by the defendant. It would constitute a gross deviation from the principle of guilt that could not be justified.
(2) According to Williams' approach, that it is never necessary to require reasonability of the mistake as a condition for the excuse of putative defence, even if the court finds that the defendant was, in the circumstances of the case, negligent, it is still not possible to impose criminal responsibility on her, not even the relatively slight responsibility for an offence of negligence.
(3) In contrast, according to the 'intermediate approach' that is suggested here, it is definitely impossible to attribute responsibility to the actor for an offence of *mens rea* (or intent), but it is possible to attribute responsibility to her for an offence of negligence, if—and only if—the court finds that she did indeed act negligently and unreasonably.[1130]

There are those who believe that there is no room for criminal responsibility (of any kind) based on negligence. But as long as the perception prevails that when a value that is so important such as human life is involved, there is room for criminal responsibility based on negligence in order to protect it—a perception that is strikingly expressed in the very existence of the offence of causation of death by negligence—it would appear that the above-mentioned 'intermediate approach' is that which embodies this concept.

[1129] CA 54/49 *The Attorney General of Israel v Assala,* PD 4, 496.

[1130] Also here there is perhaps room for lenient treatment, since even the relatively light punishment that is established for the offence of negligence may be too severe for the matter at hand—as will be suggested in section 5.3 below, which deals with deviation from the conditions of private defence.

An example of the 'intermediate path' is found in the Model Penal Code (MPC).[1131] Section 3.09 of the code provides as follows:

> When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under Sections 3.03 to 3.08 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability. (emphasis added)

In principle, I am of the opinion that the approach that was taken by the drafters of the Model Penal Code regarding this matter is correct, although a number of remarks are necessary with regard to the arrangement that they provided. Firstly, it is possible to dispute the drafters' consideration of the actor's recklessness alongside his negligence.[1132] Secondly, the legislative technique implemented by the drafters is odd and misleading. At first, the defences are defined in a very expansive manner—by the wide use of the minimal requirement of the actor's belief ('the actor believes'). Thus the impression arises that the belief itself is sufficient, and this is so until the above-mentioned section 3.09 is read, which follows the various defences and clarifies that when an offence of negligence is involved, reasonability of the mistake is also required. In effect, section 3.09, which deals with a mistake regarding defences, is assigned a very strange role: instead of reducing the criminal responsibility as suitable for a section that deals with mistakes, given the overly broad definitions of the defences to which it applies, this section that deals with mistakes actually expands criminal responsibility. Therefore, even if this produces the desirable result, a declarative educational difficulty remains. The third comment is that putative defence mistakenly receives identical consideration to that of actual defence; as if it involves a real justification and not a mere excuse.

The drafters of the Israeli drafts of the penal code avoided these deficiencies of the MPC by providing in the general sections that discuss mistakes that a mistake

[1131] See the American MPC (Tentative Draft No 8 (Philadelphia, 1958); Proposed Official Draft (Philadelphia, 1962); Model Penal Code and Commentaries (Philadelphia, 1985).

[1132] For we deal here with the imagination of the existence of (justifying) circumstances that do not exist in reality. When circumstances are involved, the law (eg, s 20(a) of the Israeli Penal Code 1977) usually recognises that there is no room to talk about recklessness, but solely about awareness or lack of awareness, from the definition itself: there is no room to discuss the actor's (prima facie) wishful attitude regarding the existence of the circumstances, since the mental element—including awareness of the circumstances—is examined at the time of the behaviour, and at this time the circumstances are not a matter of the future but part of reality. Nevertheless, it is possible to adopt another approach, which is recognised, eg, in English law, according to which the recklessness of the actor with regard to the existence of the circumstance is highly significant, eg, when the rapist lacks concern regarding the consent or lack of consent of the victim of an offence of rape. The conceptual difficulty of the timing can be solved by an examination of the mental element of the actor a second before his behaviour—for then the circumstance is still a matter of the future and therefore there may actually be a wishful attitude (including recklessness) regarding it.

of fact is relevant with regard to a 'state of affairs'—ie, with regard to the circumstances of defence as well—and by clarifying that where an offence of negligence is concerned, reasonability of the mistake is also required.[1133] It has also recently been similarly established in the Israeli Penal Code.[1134] Similar arrangements can also be found in additional modern statutes and draft laws,[1135] as well as in the Jewish law.[1136] It is interesting to note that according to Smith, the same result—establishing the requirement of reasonability for offences of negligence and for them alone as a condition for an excuse of putative defence—is also in accordance with the existing English rule, since the negation of the requirement of reasonability in English case law relates solely to offences of *mens rea* (awareness; malice).[1137]

Criticism of the principled arrangement in the MPC was levied by Fletcher. In his opinion, it is unreasonable to acquit a person who acted in a situation of putative private defence that stemmed from his unreasonable mistake, only because there is no offence of negligence parallel to the relevant offence of *mens rea* (awareness; malice). Such a problem does not arise in the case of a killing, but it is liable to arise in the case of an assault.[1138] Fletcher did not explain why this is unreasonable. In my view, it is, on the contrary, the attribution of responsibility for an offence of *mens rea* (and even of intention) to a negligent actor that is unreasonable.

5.2.4 A Mistake that Stems from a State of Intoxication

A specific issue that has greatly troubled the mind of common law jurists, and especially the English jurists, concerns putative private defence when the mistaken actor is in a state of intoxication. The leading English ruling on this issue was handed down in the case of *O'Grady* (1987),[1139] which determined that voluntary

[1133] Eg—s 54 of the Draft Code (Proposal for the Criminal Code (Preliminary Part and General Part) 1992).

[1134] S 34r of the Criminal Code (1977) as determined by Amendment no 39, 1994.

[1135] See s 16 of the German (the former West German) Penal Code (1871; 1975); s 609 of the American Federal Draft of a Criminal Code (1970); s 3(17) of the Canadian Draft Law (Law Reform Commission of Canada, Report Recodifying Criminal Law, rev and enl edn, no 31, Ottawa, 1987)) (however, in later drafts, other arrangements were provided: in the draft, Government of Canada, Proposals to Amend the Criminal Code (General Principles) (Ottawa 1993) (' White Paper'), there is no requirement for reasonability of the mistake—not even with regard to an offence of negligence—see s 37 of the draft; in the draft, Self-Defence Review—Final Report—Submitted to the Minister of Justice of Canada and the Solicitor-General of Canada (Chair: Judge Lynn Ratushny, Ottawa, 1997) reasonability is required under all circumstances and not only when an offence of negligence is involved—see s 2(b) of the draft).

[1136] Enker, n 89 above, at 151–63.

[1137] See Smith, n 1007 above, at 164.

[1138] See Fletcher (1978), n 1 above, at 689–90.

[1139] See *R v O'Grady* (1987) 3 All ER 420. The court affirmed a previous ruling that was established in another context in *R v Majewski* (1976) 2 All ER 142. It is interesting to note that Lord Lane, who determined the *Gladstone Williams* rule, was the one who created the exception for the case of intoxication in the *O'Grady* ruling.

drunkenness negates private defence. The general consensus holds that this involves a special case of putative defence, and the question is evidently what the suitable solution for it should be. It is important to note that even if there was a requirement of reasonability of the mistake with regard to putative defence, such a requirement would not provide a complete solution for the issue of intoxication, since on the one hand, it might be that given the intoxication the actor could make a mistake that is actually reasonable, and on the other hand, it would appear that when the mistake is not reasonable, responsibility for an offence of negligence alone is insufficient (given the voluntary drunkenness). One possibility is to establish that a mistake in a situation of intoxication should never be considered as reasonable. This is the result of the English *O'Grady* rule, and such an approach can also be found in American law.[1140] However, in my opinion, this approach leads to the imposition of too great a responsibility on the actor, such as when, due to his mistake, he commits an offence of intention. Another possibility is that the intoxication is liable to negate a certain mental element that is required in the definition of the offence, so that the actor will be left free from criminal responsibility. Consequently, a more appropriate solution is required. Williams' suggestion is to determine a specific offence of drunkenness.[1141] In my view, the suitable solution to the issue of intoxication is not a casuistic solution, but rather the general solution with regard to a person who by his own fault creates (in our context—makes himself intoxicated) the situation of defence (in this case—putative private defence)[1142].

5.2.5 A Mistake of Law

The classic, most common, and almost exclusive mistake regarding private defence that in substance is a mistake of law, concerns the mistake with respect to the degree of force that is permitted, if at all, according to the requirement of proportionality. Indeed, the requisite proportionality is usually determined by case law and not by legislation. However, this is not a determination with regard to the existence of a fact, but with regard to the application of a norm on the facts of the case. Consequently, proportionality is 'a question of law'.[1143] It should be clarified that a mistake with regard to the facts on whose basis the proportionality is assessed constitutes a mistake of fact and not a mistake of law.[1144] Although it is difficult to imagine a mistake of law with regard to private defence that does not relate to proportionality, such a possibility cannot be ruled out. Gordon, for exam-

[1140] See La Fave and Scott, n 43 above, at 654.

[1141] See the above-mentioned references in n 1126.

[1142] I shall refer to such a general solution later—see section 5.4 below.

[1143] See the text above accompanying nn 925–927. See also Ashworth, n 474 above, at 149.

[1144] See, eg, Card, Cross and Jones, n 180 above, at 627–28; Giles, n 76 above, at 191 (noting a clarification in this spirit in *R v O'Grady* (1987) 3 All ER 420).

ple, illustrates a mistake of law through the case in which the actor mistakenly thinks that revenge is permitted as self-defence.[1145] It seems that such was the situation in the ruling that was handed down in Israel in the case of *Shurka and Mahani*, where the Supreme Court held that the truth was that the defendants deemed that the victims were infiltrators, and that the killing of infiltrators was allowed, although the court did not relate explicitly to a mistake of law.[1146]

The consideration of the issue under discussion stems directly from the general consideration of a mistake of law. As is known, in existing Anglo-American law the traditional stance that prevailed is that a mistake of law (in a broad sense—ie, including ignorance of the law) does not serve as an excuse and that, in effect, it is not even relevant. According to another approach there is room to establish a general defence—of an excuse type—for a mistake of law that is unavoidable in a reasonable way. This is, indeed, the desirable arrangement.[1147] Such a defence should also apply to a mistake regarding the requirement of proportionality (our present issue).

Given the sense of injustice created by the traditional rule of Anglo-American law, several interesting attempts have been made to ease this rule. Under Australian law, for example, a special doctrine was developed that will be discussed in Section 5.3.2 below, which is known as 'excessive self-defence'. In English law the quite odd rule that was noted above, which was established in the *Palmer* case,[1148] is still the guiding rule.

5.2.6 Unreasonable Mistakes: Full Criminal Responsibility?

As will be seen in the next section (5.3), even when the mistake of the actor is unreasonable there may be room to mitigate his punishment. Such lenient treatment may be required especially if his mistake is a mistake of law (ie, with regard to the requirement of proportionality) that is not 'unavoidable in a reasonable way'. But this may also be so if his mistake is an unreasonable mistake of fact. In

[1145] See Gordon, n 1 above, at 335.

[1146] CA 46/53 *Shurka and Mahani v The Attorney-General of Israel*, PD 7, 545, at 552.

[1147] This approach was also recently adopted in the Israeli Penal Code, 1977—see s 34s—'a mistake in a legal situation'—that was established by Amendment no 39, 1994.

[1148] See n 486 above and accompanying text. It should be clarified that the *Gladstone Williams* rule (*R v Williams (Gladstone)* (1983) 78 Cr App R 276) is limited to a mistake of fact and does not apply to a mistake of law—see, eg, the remark, by JC Smith, 'Commentary: *Sears v. Broome*' (1986) Crim LR 462. In fact, as noted by Ashworth, this rule leads to an odd situation in which it is doubtful if a case of mistake of law can ever occur concerning private defence (see Ashworth, n 183 above, at 305). For according to this rule, the belief of the actor is sufficient to lead to the conclusion that objective reasonability exists (see nn 1176–80 below and accompanying text). In addition, a further fundamental deficiency in the English law that we noted above should be mentioned, according to which in the defence of property it is sufficient—according to s 5(2) of the Criminal Damage Act 1971—that the actor believes that his action is reasonable (see the discussion in the text accompanying n 1007 above. See also—for an additional deficiency in Anglo-American law that is closely connected to our discussion—the paragraph accompanying nn 488–90 above).

this case, even the limited punishment established in the offence of negligence may be too harsh for him.

5.3 Deviation from the Conditions of Private Defence

5.3.1 General

> We are unwilling, here, to enter into all those fine distinctions, with weights and measures: this blow is permitted, this blow is forbidden . . . the whole fight in its entirety, including both its parts together, lasted about one and a half minutes, in 'the presence' of the gun and almost up against its muzzle. A person should not be required to calculate his actions with a scale and to measure them step by step at a time of such a danger. (Justice Zilberg in the case of *Valdman*[1149])

What is the rule for the attacked person A, who because of confusion, fear, horror, embarrassment, excitement or other special feelings and mental states which he experiences in a situation of compulsion, deviates from the conditions of private defence and uses force that is unnecessary in order to defend himself? What is the rule for the attacked person B, who in a similar mental state to that of A, deviates from the conditions of private defence and uses force, which although necessary for his defence, nevertheless exceeds the required proportionality? What is the rule for the attacked person C, who is mistaken in thinking that the excessive force that he uses meets the requirement of proportionality? What is the rule for the 'attacked person' D, who deems that he is being attacked, when his mistake is unreasonable, and uses 'defensive' force? And what should be the rule for an attacked person E, who without any mistake with regard to the circumstances of the situation of compulsion and without any confusion or fear, uses defensive force that exceeds the necessity requirement or the proportionality requirement?

What should be the suitable arrangement for cases in which the actor, although he acts with the purpose of defending himself or protecting, nevertheless deviates from the conditions of private defence? This question will be discussed in the present section. At the outset of this discussion, it should be noted that the emphasis suggested in this book for the justified character of private defence evidently leads to the exclusion of several cases, which are occasionally also considered (mistakenly) private defence, from the realm of private defence. This relates to cases in which there is indeed no room to justify the action of the actor, either because of the lack of an injury to the autonomy of the 'attacked person' and lack of guilt of the 'aggressor'—given a mistake with regard to the very existence of an attack and danger, or because of the injury caused to the social-legal order by the action that

[1149] CA 95/60 *Valdman v The Attorney-General of Israel,* PD.15, 53, at 55 (translated by the author).

deviates from the conditions of private defence in general and from the conditions of proportionality and necessity in particular. Yet such cases (or at least some of them) do not justify imposition of grave criminal responsibility.[1150]

A significant portion of these cases will find remedy within the framework of putative private defence. In effect, as will be seen later, the need for a special arrangement for deviation from the conditions of private defence constitutes—inter alia—a function of the set framework for putative private defence. I shall therefore search in this section (5.3) mainly for a suitable arrangement for those other cases of deviation from the conditions of private defence that do not fall within the bounds of the excuse of 'putative private defence' in its format as suggested above.

Prima facie, this issue of deviation from the conditions of private defence is not supposed to raise much dispute, in light of the superior status that is attributed in modern criminal law to the guilt of the actor. There is no escaping the conclusion that when there is a deviation from the conditions of private defence, stemming from fear, confusion or other special mental states to which the actor is subject as a result of the difficult compulsory situation, and where the goal of the actor is to defend himself or to protect, this deviation does not reflect much guilt, if any at all. When considering the actor who deviates from the conditions of private defence because of an unreasonable mistake that he makes, this is not a person who fails to acknowledge the basic values of society, nor is he dangerous to the public at large. The motivation for his action is actually legitimate.[1151] As will be seen later, the problem is especially severe given the mandatory punishment that is established in many legal systems for the offence of murder, since in the absence of mandatory punishment, the tendency of the judge would in any case usually be to mitigate the punishment of such an actor. My opinion is that with regard to all the offences—just as the justified character of private defence also necessitates objective requirements, and especially the requirements of necessity and proportionality—thus and accordingly considerations of guilt compel special treatment in the case under discussion. This may be by means of mitigating the punishment or even providing a full excuse, according to the case, while granting maximum and suitable weight to the low degree of the actor's guilt (if it exists at all) given the influence of the situation of compulsion on the actor as well as the actor's positive purpose.

[1150] Reservations are necessary with regard to the position that rules of law allowing deadly force even in cases of fear—despite the deviation from the conditions of private defence—constitute an example of the 'mixed' character—doubtfully 'justification' and doubtfully 'excuse'—of private defence (see, eg, Robinson (1984), n 37 above, vol 1 at 110; Robinson, n 50 above, at 235–36). In fact, this does not mean a grant of permission for deadly force but—at most—an expression of forgiveness despite its use, ie, at most an excuse (and as shall be seen later, the reduction of criminal responsibility is more common in this matter than its denial); although an excuse or a mitigating circumstance resides alongside the justification of private defence, neither of them come within its scope, and they do not alter its character as correct and justified act, even morally.

[1151] Enker, n 89 above, at 129; see also the treatment of the matter of our discussion *ibid*, at 126–69.

Yet, nevertheless, legislators, judges and scholars deliberated extensively with regard to the issue under discussion, and often created very partial and unsatisfactory arrangements, or even chose to ignore it. I will therefore first briefly note these deliberations, in order to shed light through comparative law on the different considerations that should be taken into account in the framework for this issue. Following this, and in light of these considerations, a suitable arrangement for this issue will be presented.

5.3.2 The Australian Case Law

Justly or not, Australian case law regarding this issue has been awarded much consideration in the Anglo-American legal world. Given the absence of a legislated arrangement for the issue, and given the serious mandatory punishment that is established for the offence of murder, Australian courts have developed a special doctrine, called 'excessive self-defence' that dominated Australian case law for three decades.[1152] This period began with the case of *McKay* (1957), in which it was held that[1153]:

> If the occasion warrants action in self-defence . . . but the person taking action acts beyond the necessity of the occasion and kills the offender, the crime is manslaughter—not murder.

In the following year, a holding considered as the guiding rule on this issue, was handed down in the case of *Howe* (1958).[1154] This case is considered as leading both because of its affirmation by the High Court of Australia, and also because it removed the doubt that was left in the *McKay* case, by determining that the doctrine is limited to cases in which the actor made a mistake. In the language of the court:

> [E]xercises more force than a reasonable man would consider necessary in the circumstances, but no more force than he honestly believes to be necessary.[1155]

Additional doubt was raised by scholars, who argued that the doctrine is only applicable for a mistake with regard to the necessity of using the means chosen by the actor, and not with respect to a mistake regarding the very existence of an attack. However, this distinction is unpersuasive. Although in the absence of an attack the actor harms an innocent person, the issue is not the guilt of the victim

[1152] For detailed discussions of this Australian doctrine see Lanham, n 228 above; Yeo, n 733 above; AJ Ashworth, (editorial) 'Counter-Revolution in the Law of Self-Defence' (1988) Crim LR 1; Howard, n 756 above; at 89–94; NC O'Brien, 'Excessive Self-Defence: A Need for Legislation' (1982–83) 25 *Criminal Law Quarterly* 441, at 443–56.

[1153] See *R v McKay* (1957) VR 560 (Australia) at 563.

[1154] See *R v Howe* (1958) 100 CLR 448 (Australia).

[1155] *R v Howe* (1958) SAAR 95 (Australia) (This holding, which was decided by the Appeals Court, was later upheld by the High Court in the above-mentioned ruling *R v Howe* (1958) 100 CLR 448 (Australia)).

but the guilt of the actor.[1156] In the final analysis, in both cases the guilt of the defender is identical in the sense that he made a wrong assessment of the situation in which he found himself and did not act as a reasonable person given the circumstances of the case. In both of them he mistakenly believed that according to the state of things he had no other way in which to save his life except to kill the aggressor.[1157] This conclusion is strengthened in light of the theoretical foundation provided by the Australian court for its doctrine—the non-existence of the special mental element that is required within the framework of the offence of murder—'malice aforethought' (pre-meditation) given the special situation and the fact that the purpose of the actor was to defend or protect. For the required special mental element is a subjective factor, and it would appear that it does not exist to the same extent in both cases. An additional interpretation that was given to the Australian rule is that the mistake required for the application of the doctrine is in fact a mistake of law that concerns the requirement of proportionality.[1158] In light of my opinion, that the framework for deviation from the conditions of private defence must relate to all unreasonable mistakes—of fact and law alike—and not even only to them, the attempt to be precise with regard to the Australian rulings by searching for the judges' (somewhat hidden) intentions is unnecessary.

Reviewing the development of Australian court rulings also necessitates a glance at English case law. Both the Court of Appeals (in the case of *McInnes* (1971)) and the Privy Council (in the case of *Palmer* (1971)) considered the Australian doctrine of 'excessive self-defence' and unambiguously and explicitly rejected it.[1159] As a result, and given the assumption that was then accepted, that the Privy Council rulings also bind the Australian courts, these courts tended to abandon the doctrine that they had developed.[1160] This temporary regression ceased with the important and leading ruling of the Australian High Court in the case of *Viro* (1978).[1161] This ruling confirmed the *Howe* rule in a six to one decision. In later rulings, the application of the doctrine was even expanded to extend beyond the offence of murder to additional offences that require an 'intent to murder'.[1162] This limited expansion is understandable against the background of the above-mentioned foundation that

[1156] Although when justification of actual private defence is involved, the attack of a responsible aggressor is very relevant—both for the matter of the guilt of the aggressor and for the social-legal order—nevertheless, here (putative defence) the justification of private defence is not involved, but rather, the provision of an excuse for an actor based on his low or non-existent guilt.

[1157] Enker, n 89 above, at 133. For a survey of the Australian case law in this matter—*ibid*, at 132–39; and see also the above-mentioned references in n 1152.

[1158] See, eg, Howard, n 756 above; at 90–91.

[1159] See (correspondingly) the rulings *R v McInnes* (1971) 1 WLR 1600, 3 All ER 295; and *Palmer v R* (1971) 55 Cr App R 223, 2 WLR 831. See also, eg, the observation by Smith, n 820 above, on the *McInnes* ruling; and JC Smith, 'Commentary: *Palmer v. R.; Irving v. R.*' (1971) Crim LR 649.

[1160] See, eg, Yeo, n 733 above; at 349, and the references presented there.

[1161] See *R v Viro* (1978) 141 CLR 88. For a detailed discussion of this ruling see, eg, Yeo, n 733 above.

[1162] See Yeo, n 733 above; at 349, and the references that are presented there.

was provided for the doctrine—the special mental element that is required for the offence of murder. After the *Viro* rule and its subsequent implementation by the courts, the doctrine of 'excessive self-defence' was viewed by all as an integral part of Australian law.[1163]

Against this background, the ruling of the High Court of Australia in the case of *Zecevic* (1987)[1164] was very surprising and even disappointing,[1165] for it adopted the English *Palmer* rule and rejected the Australian doctrine. It is interesting to note that the majority justices (five to two) in the *Zecevic* ruling agreed that considerations regarding guilt actually supported the doctrine, and even expressed a certain regret regarding its abrogation.[1166] The main reason for the rejection of the doctrine was the complexity that was attributed to it, and accordingly the argument regarding the heavy burden that it would impose on judges and especially on jurors. This argument was based on the *Viro* ruling, within whose framework the court determined no less than six detailed instructions[1167] that must be provided to the jurors when a question of private defence arises. Indeed, these are complicated instructions, two of which (the latter) stem from the doctrine under discussion. However, several considerations should be noted. Firstly, a significant part of the complication stems from the combination of evidence law with the substantive law. Secondly, the rules of private defence are by nature complex—even without consideration of the doctrine—and the attempt to present them as simple, as was

[1163] See Yeo, n 733 above; at 349, and the references that are presented there.

[1164] See *Zecevic v D.P.P.* (1987) 71 ALR 641.

[1165] Thus, eg, Ashworth wrote that the flower that was planted in the common law by the Australian courts and nurtured for 30 years was now uprooted and thrown away by the Australian High Court—see Ashworth, n 1152 above, at 1.

[1166] See Lanham's discussion, n 228 above, at 239ff.

[1167] 1. (a) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him.
(b) By the expression 'reasonably believed' is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself.

2. If the jury is satisfied beyond reasonable doubt that there was no reasonable belief by the accused of such an attack no question of self-defence arises.
3. If the jury is not satisfied beyond reasonable doubt that there was no such reasonable belief by the accused, it must then consider whether the force in fact used by the accused was reasonably proportionate to the danger which he believed he faced.
4. If the jury is not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate it should acquit.
5. If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder depending on the answer to the final question for the jury—did the accused believe that the force which he used was reasonably proportionate to the danger which he believed he faced?
6. If the jury is satisfied beyond reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief the verdict will be manslaughter. (See *R v Viro* (1978) 141 CLR 88, at 146–47).

done, for example, by the Privy Council in the case of *Palmer*,[1168] is doomed to failure. Thirdly, it is nevertheless possible to set forth the rules in a less complicated manner—as was indeed suggested by the minority justices in the *Zecevic*[1169] ruling. Fourthly, the principal difficulty stems from the jury system, so that similar conclusions are not compulsory in a legal system in which the fact-finder is a professional judge. Fifthly—and this is perhaps the most important point—the substantive law should not be determined according to considerations of this kind. The main consideration should be the guilt of the actor, and if this is slight (and very significantly so) despite his deviation from the conditions of private defence, his responsibility and punishment should faithfully reflect this. It should also be remembered that if the legislator overlooks the guilt factor, this may not only lead to the growth of a case law doctrine in order to fill the gap, but also may even create heavy pressure on the court to completely exculpate a person who actually deserves a certain punishment, an acquittal that stems from the total incompatibility between the heavy criminal responsibility for the offence of murder and the limited guilt of the actor.

An additional argument that was raised by the majority justices in the *Zecevic* case for the negation of the doctrine is the inconsistency that it introduces into the law, since it applies only to the offence of murder (or at most, to the few offences in which the special mental element established in the definition of the offence of murder is required)[1170]. However, this difficulty can be and should be solved in the opposite direction: not by means of the doctrine's abrogation, but by expanding it so that it constitutes a mitigating circumstance (or perhaps even an excuse) that applies to all criminal offences. Yet even if the doctrine is restricted to murder, it can be supported, based on several factors. Firstly, in other offences, which do not carry a mandatory punishment, the court is authorised to mitigate the punishment, and it is reasonable to assume that when the actor had a defensive or protective purpose, it will indeed incline to do so. Secondly, it is possible—as indeed was done in Australian case law—to support the distinction between the offence of murder and other offences based on the special mental element that is required for the offence of murder.

It is also argued that it is actually the lack of the doctrine that creates inconsistency, stemming from the fact that the punishment of an actor who kills a person intentionally but because of provocation—who has no right to use force of any sort—is mitigated, but there is no such leniency for an actor who has a right to use

[1168] See Lanham, n 228 above, at 247–49.

[1169] See *Zecevic v D.P.P.* (1987) 71 ALR 641, at 668ff; 660ff; see also the discussion by Yeo, n 733 above; at 355. In this spirit he also notes that during the not insignificant number of years of the doctrine's implementation that preceded the *Viro* ruling, jurors did not encounter the difficulties anticipated by the *Viro* instructions.

[1170] See *Zecevic v D.P.P.* (1987) 71 ALR 641 at 654. See also the consideration of this argument in Lanham, n 228 above, at 239ff.

a certain force but deviates from the conditions for the exercise of the force under circumstances in which it is difficult for him to assess the necessary and proportionate force.[1171]

The irony is that one of the reasons for the abrogation of the Australian doctrine of 'excessive self-defence' in the *Zecevic* ruling was the desire to achieve a compatibility between the Australian rule and the English rule,[1172] and yet in England at that same time the legislation committee actually reached the conclusion that a similar doctrine should be established in the new English law.[1173] It should also be noted that the Australian doctrine greatly influenced similar rules which were established in other legal systems.[1174]

5.3.3 The English Case Law

As mentioned, both the Privy Council (in the Palmer case (1971)) and also the Appeals Court (in the case of *McInnes* (1971)) considered the Australian doctrine of 'excessive self-defence' and unambiguously and explicitly rejected it. This ruling was also upheld by the House of Lords in the case of *Clegg* (1995).[1175] In the leading case of *Palmer*, it is apparent that in the judges' opinion it is totally unreasonable that the situation in which the Australian doctrine is applicable could be created. Their view is strikingly expressed in the well-known words of Lord Morris, according to which:

> If there has been no attack, then clearly there will be no need for defence. If there has been attack so that defence is reasonably necessary it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken.[1176]

[1171] See Yeo, n 733 above; at 359–60.

[1172] See Lanham, n 228 above, at 239.

[1173] See n 1184 below and accompanying text.

[1174] See with regard to the *Dwyer* rule (1972), constituting an adoption of the Australian doctrine by the law of the Irish Republic, 11th edn of Card, Cross and Jones, n 180 above, at 579; with regard to the influence of the Australian doctrine on lower Canadian courts—until its rejection by the High Court in the case of *Faid* (1983)—see 6th edn of Smith and Hogan, n 284 above, at 248; with regard to a similar construction that was created in Scottish law—see Gordon, n 1 above, at 769; and with regard to deviations of lower courts in England in the direction of the Australian doctrine until this was brought to an end in *R v McInnes* (1971) 1 WLR 1600, 3 All ER 295 and *Palmer v R* (1971) 55 Cr App R 223 2 WLR 831—see Smith, n 1159 above, at 650. Finally, in Israeli law, the Australian doctrine remained as a matter for later consideration—both in CA 319/71 *Ahmed & Sheikh v The State of Israel* PD 26 (1) 309, at 313–14; and also in CA 150/65 *Georgie v The Attorney-General of Israel* PD 19 (3) 238, at 240–41.

[1175] See n 1159 above; *R v Clegg* (1995) 1 All ER 334 (HL); Smith and Hogan, n 284 above, at 262–63; Card, Cross and Jones, n 180 above, at 629. Likewise, the doctrine was also rejected in the law of Northern Ireland—see *ibid.*

[1176] The quotation is taken from *Palmer v R* (1971) 55 Cr App R 223, 2 WLR 831, at 242.

Indeed, if the jury is thus instructed, it is doubtful—as noted by Smith[1177]—if a case can be found in which the jurors will determine that a person who acted in good faith used excessive force. Moreover, in my view, the above-mentioned words of Lord Morris are not merely a description or evaluation, but in themselves constitute authority (for after all this is a ruling of the Privy Council) for relying—in many cases—on the belief of the actor alone, while forfeiting the objective requirements of private defence, and in particular the requirements for necessity and proportionality.

My opinion, which I expressed above in other contexts, is that even if there is a desire to exonerate a mistaken actor from responsibility, then, firstly, the way to do this is within the framework of putative private defence, and the action should not be justified within the framework of real private defence. Secondly, even if the requirement of reasonability is waived when a mistake of fact is involved, there is no room to waive the requirement of reasonability where a mistake of law is concerned.[1178] Nevertheless, according to the *Palmer* rule, the very mistake, even if it is unreasonable, is sufficient for the purpose of the requirement of proportionality.[1179] In light of this ruling, the fundamental important requirement of proportionality is undermined leaving almost no vestige. Thus an accused person, who used excessive force and whose sentence would, according to the Australian doctrine of 'excessive self-defence', be mitigated, would probably be completely acquitted according to the English rule. Moreover, according to the *Palmer* ruling, it would—apparently—be established that the force was reasonable (and not that the actor made a mistake regarding its reasonability) even in cases where it is clear that the force used was unreasonable, this 'reasonability' being founded—without any rational basis—on the subjective thought of the actor.[1180]

Beyond the *Palmer* ruling—in order to obtain a fuller picture of the English law on the subject of our discussion—a note should also be made of the *Gladstone Williams* ruling that was mentioned in Section 5.2.3 above.[1181] According to this holding, reasonability of the mistake is not required in order to excuse an actor who made a mistake of fact (ie,: putative private defence) from responsibility. Such an arrangement for the issue of putative private defence, which exists in English law and which does not exist in Australian law—where reasonability of the mistake is required[1182]—renders superfluous the need for special consideration within the framework of private defence for a deviation from the conditions in

[1177] See Smith, n 1159 above, at 650.

[1178] See section 5.2.5 above.

[1179] Although this refers to an actor who believed that his action was necessary, the English court reached the conclusion from the belief in the existence of necessity that proportionality also existed—as appears, inter alia, from the continuation of the quotation. See also on this point, Smith, n 1159 above, at 650; Ashworth, n 183 above, at 305.

[1180] See also n 487 above and accompanying text.

[1181] See n 1122 above and accompanying text.

[1182] See, eg, Smith and Hogan, n 284 above, at 263.

cases of unreasonable mistakes of fact. Consequently, an arrangement for private defence is only needed for a deviation from the conditions in a case of mistake of law, and with regard to cases where there is no mistake involved. However, the *Palmer* rule only provides a partial (and in my opinion—bad) solution for the first case.

An additional partial solution that has been suggested in English case law to negate conviction for the offence of murder in case of deviation from the conditions of private defence, is the existing possibility of diminution of criminal responsibility when the actor was provoked and when the special mental element required for conviction in an offence of murder[1183] does not exist.

Finally, it should be noted that the English draft law explicitly established an arrangement of diminished criminal responsibility in case of 'use of excessive force'.[1184]

5.3.4 The American Case Law

A similar doctrine to the Australian doctrine of 'excessive self-defence' is the accepted distinction in American law between a 'perfect (right of) self-defence' and an 'imperfect (right of) self-defence'. Different uses have been made of these terms, in the past and at present.[1185] The use that concerns us is the currently accepted use of these terms in American case law, where a distinction is drawn between a right, or defence, that leads to exoneration despite the killing ('perfect self-defence') and a 'right', or 'defence', that leads to a conviction for the offence of manslaughter instead of the offence of murder ('imperfect self-defence'). In other words, it is a distinction predicated upon the legal result and it does not focus on a particular deficiency involved in the right to self-defence. The words 'right' and 'defence' were enclosed in quotation marks above, since I am of the opinion that the accepted treatment of 'imperfect self-defence' as a right, privilege or defence is imprecise, since criminal responsibility is nevertheless imposed on the actor, and he is convicted of an offence of manslaughter. In terms of its essence, 'imperfect self-defence' is therefore a mitigating circumstance, similar to a certain extent to a defence of an 'excuse' type,[1186] being based on those same considerations that focus on the state of the actor rather than on the nature of the act.

[1183] See, eg, Archbold, n 487 above, at 1614; Leigh, n 587 above, at 687.

[1184] See s 59 of the English Draft Code (Law Commission, A Criminal Code for England and Wales, no 177 (London, 1989)); the explanatory wording for the section—*ibid*, at 251; and also the parallel section—61—in the previous version of the Draft—from 1985 (Law Commission, Codification of the Criminal Law, no 143 (London, 1985)). See also the consideration of this issue in the explanatory wording for the English Draft Code of 1993 (Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles, no 218 (London, 1993)), at 78.

[1185] See, eg, Perkins and Boyce, n 85 above, at 1137–42.

[1186] Thus, eg, Aiyar & Anad see 'imperfect self-defence' as similar to the historical exception of '*se defendendo*'—see Aiyar and Anad, n 134 above, at 10.

The traditional and most accepted deficiency, for which the American adjudication provides merely the mitigating circumstance of 'imperfect self-defence' for the actor, is the guilt accompanying the creation of the situation of private defence.[1187] The main implication of such a distinction concerns the duty of 'withdrawal' imposed upon one who is guilty of creating the situation of private defence before he turns to the use of defensive force.[1188] In my view, such a usage of the doctrine of 'imperfect self-defence' is rendered superfluous if the issue of one who is guilty of creating the compulsion situation is provided with a suitable arrangement that takes the precise level of the actor's guilt into account.[1189]

A further important deficiency[1190] to which the American doctrine of 'imperfect self-defence' was applied is an unreasonable mistake of the actor with regard to the necessity of his action.[1191] Such a use of the doctrine was already carried out at the outset of the last century, in the case of *Allison* (1904).[1192] The need for the doctrine stems here from the accepted arrangement of putative defence in American law, according to which reasonableness of the factual mistake is required in order to grant an excuse,[1193] and from the desire to soften the harsh results of this arrangement.

Finally, an important criticism that was directed against the doctrine of 'imperfect self-defence' relates to the inconsistency resulting from its application to an offence of murder alone.[1194]

[1187] See, eg, the explanatory wording of the MPC, Tentative Draft No 8 (Philadelphia, 1958), at 29.

[1188] See the text accompanying nn 841–45 above. Such a distinction was already made in 1882, in the *Reed* ruling (40 Am Rep 795—see, eg, Lanham, n 228 above, at 248). It can also be found in the judgments that were handed down at the end of the 20th century—see, eg, *State v Potter*, 295 NC 126 244 SE 2d 397 (1978).

[1189] In the absence of such an arrangement, there is indeed room for diminished responsibility and a mitigation of the sentence. However, 'imperfect self-defence' cannot provide the desirable flexibility and accommodation. Thus, eg, according to this doctrine, equal treatment is given to a person who enters into the situation of compulsion by negligence and also to a person who acts recklessly and responsibility is ascribed to both of them for the offence of manslaughter. More suitable solutions for the general issue of creation of the compulsion situation by the actor's own guilty act will be discussed in section 5.4 below.

[1190] Another type of cases in which the doctrine is mentioned is provocation directed towards the actor—see Robinson (1984), n 37 above, vol 2 at 77 fn 21; Perkins and Boyce, n 85 above, at 1142.

[1191] See, eg, La Fave and Scott, n 43 above, at 663; Kadish and Schulhofer, n 640 above, at 849–50.

[1192] See *Allison v State* 86 SW 409 (1904). See also, eg, Perkins, n 40 above, at 133. For later references see, eg, Perkins and Boyce, n 85 above, at 1142.

[1193] See n 1119 above and accompanying text.

[1194] See, eg, PH Robinson, 'Causing the Conditions of One's Own Defense. A Study in the Limits of Theory in Criminal Law Doctrine' (1985) 71 *Virginia Law Review* 1. (This article was also published in the book by Eser and Fletcher, *Justification and Excuse*, vol 1 at 657) at 677; the encyclopedia ed by KADISH, n 96 above, vol 3 at 952, where Dix notes the interesting ruling in *People v Bramlett* 194 Colo 205, 573 P 2d 94 (1974), which was intended to avoid an odd result: according to the law of Colorado, an unreasonable mistake of fact leads to the diminution of responsibility from murder to death by negligence. The court determined that if the victim remained alive, the actor should not be punished by a more severe punishment than that which would have been expected if the victim had died (killing by negligence), although the offence of assault (to which the doctrine did not apply) allowed for a more severe punishment. I have already noted the inconsistency in the application of the doctrine to the

5.3.5 Existing and Proposed Legislation

An examination of the existing penal codes in many legal systems, especially those which are not derived from Anglo-American law, reveals the following picture: almost all of them explicitly provide authority for the court to mitigate the punishment of an actor who deviates from the conditions of private defence, while in some of these systems there is also a full excuse from criminal responsibility for those cases in which the deviation stems from confusion, fear, horror, embarrassment, excitement and other special mental feelings and states, to which the actor was subject because of the situation of compulsion.[1195] Alongside such rules of law, it is of course necessary to note the rules common to some of the legal systems that were discussed above at section 5.2, which relate to putative defence and which establish that even in a case of an unreasonable mistake of fact, responsibility for an offence of *mens rea* (awareness) is not to be imposed on the actor (but only—if at all—for an offence of negligence).[1196]

offence of murder alone, in relation to the Australian doctrine of 'excessive self-defence'. Similarly, with regard to the American doctrine ('imperfect self-defence'), the partial explanations relate to the accepted mandatory punishment for the offence of murder and the theoretical basis provided for the doctrine by the courts that have developed it: the lack of the special mental element that is required for the conviction of murder given the special situation and the actor's defensive or protective purpose. See, eg, the 2002–3 Supplementation to Robinson (1984), n 37 above, vol 2 at 21–22 fn 21. I will conclude this short journey through American case law with the well-known adage of Justice Holmes, according to which 'Detached reflection cannot be demanded in the presence of an uplifted knife' (see *Brown v US* 256 US 335, 41 S Ct 501 (1921) at 343). Alongside my agreement with this saying, I must reiterate my reservations with regard to the use that is made of it to justify a deviation from the conditions of private defence, instead of sufficing with an excuse for such deviation—see n 507 above and accompanying text.

[1195] Thus, eg, s 33 of the German Penal Code (1871; 1975) provides that if the actor deviated from the limitations of necessity because of confusion, fear or horror, he is not to be punished. Similar excuses are also established in s 44 of the Rumanian Penal Code (1968; 1973); s 22(3) of the Polish Penal Code (1969); s 23 of the Greek Penal Code (1950); s 24(5) of the Swedish Penal Code (1962; 1972); s 27 of the Colombian Penal Code (1936); s 48 of the Norwegian Penal Code (1902; 1961); s 21 of the Korean Penal Code (1953); s 33 of the Swiss Penal Code (1937); s 40 of the Dutch Penal Code; s 5 of the Bulgarian Penal Code; s 13.2 of the Danish Penal Code; s 75.2 of the Ethiopian Penal Code; s 11.3 of the (former) Yugoslavian Penal Code; s 15(2) of the Hungarian Penal Code. In almost all the penal codes surveyed in this study, a mitigating circumstance is provided in the case of a deviation from the conditions of private defence. Consequently, only the two exceptional codes will be noted—those of Greenland (1954) and Spain (1944; 1963)—in both of which no such excuse or mitigating circumstance was provided. A similar authorisation—to diminish a mandatory punishment—is determined in the Israeli Penal Code: ss 35A and 300A(b) of the Penal Code (1977).

[1196] It is noted parenthetically that this picture of the legislation, as well as the American case law that was discussed above, raise doubts with regard to the justification of the many tributes that have been accorded to the Australian rulings with regard to the subject under discussion. It should also be noted that in distinction from the Australian doctrine of 'excessive self-defence', the above-mentioned legislative arrangements are not limited to the offence of murder. It could be that the great interest in Australian law actually stems from the development of the doctrine in Anglo-American law and particularly in case law, as they deviate from the English precedents. However, there are those who find a similar doctrine already in earlier rulings—both in American law and even in English case law (see Yeo, n 733 above; at 348 fn 1).

Such statutory provisions, which are intended to mitigate the punishment of one who deviates from the conditions of private defence or even completely excuse him, are also common in draft laws internationally. The shortcoming of the great majority of them—as with the rules of law which were already established in the various penal codes—is that they are incomplete, ie, they lack consideration for all the possible situations of deviation from the conditions of private defence that require an excuse or diminution of punishment. Thus, for example, some of them relate solely to deviation that stems from an unreasonable mistake of fact by the actor.[1197] Other drafts relate to deviations that do not stem from a mistake. However, they are limited to deviation from the requirement of reasonability.[1198] Certain drafts are limited to provision of an excuse in a case of marginal breach of the conditions as a result of the situation of compulsion (without relating to diminution of punishment in light of a more serious breach, or a breach that does not stem from the psychological influence of the situation of compulsion),[1199] or limited to a mitigation of punishment alone, without providing for the possibility of a complete exoneration.[1200]

5.3.6 The Proposed Arrangement

The relatively lesser guilt of the actor who deviates from the conditions of private defence when his aim is to defend or to protect necessitates a diminution of his punishment or a full excuse—according to the circumstances of the case. An arrangement for deviation from the conditions of private defence must apply to all those situations for which putative defence does not apply. If my proposal for an arrangement of putative defence as presented in section 5.2 is accepted—this would relate to three main situations[1201]: (1) a mistake of law (usually—with regard to the existence of proportionality[1202]) that is not one which 'cannot be avoided in a reasonable way'; (2) an unreasonable mistake of fact; (3) lack of a mistake.

With regard to the second situation, a clarification is necessary. Indeed, in the face of an unreasonable mistake of fact there is in any case no room for the imposition

[1197] See, eg, s 3.09(2) of the MPC.

[1198] As in s 164 of the Israeli Draft Law ('Draft for the Preliminary Part and the General Part of the New Penal Code and Condensed Explanatory Material', (1984) 14 *Mishpatim* 127).

[1199] As in s 609(2) of the American Federal Draft of a Criminal Code (1970).

[1200] As in s 52 of the Draft Law of New Zealand (The Crimes Bill of New Zealand (Wellington, 1989)) which establishes that the actor bears criminal responsibility for all use of excessive force, in accordance with the nature and quality of the action that creates the deviation (ie, apparently, responsibility for the 'excess', beyond what is permitted, and for this alone).

[1201] In passing, it should be noted here that, in my opinion, each of these three situations are sufficient in and of themselves to negate the opinion of Robinson that there is no room for a special excuse for a deviation from the conditions of private defence, since the existing defences of excuse—'putative defence' and 'necessity'—would suffice—Robinson (1984), n 37 above, vol 1 at 110; Robinson, n 50 above, at 235–36.

[1202] See the text accompanying nn 1143–46 above.

of criminal responsibility for an offence of *mens rea* (awareness), but only—at most—for an offence of negligence. Such an arrangement was suggested above, within the discussion of putative private defence. However, there could be cases in which, in light of the difficult situation of compulsion to which the actor was subject, even criminal responsibility for an offence of negligence would be too harsh for him, and there would be room to mitigate his sentence.

With regard to the third situation, even if the deviation of the actor from the conditions of private defence did not stem from any mistake that he had made, still—given the difficult situation of compulsion in which he found himself, and especially given his positive goal to defend or protect—there is certainly room to mitigate his sentence. And if the deviation was insignificant—there is, perhaps, also room for a complete exoneration. Moreover, even if the deviation did not stem from confusion, fear or other feelings that gripped the actor, there is still no room to assign full criminal responsibility to him if it was justified for him to use a certain force. Considerations of guilt and justice necessitate that the responsibility of the actor be restricted to the deviation itself, and not extended to also include the justified force. The only way to enable such restricted consideration therefore is by granting authority and discretion to the court to diminish his punishment.

Finally, with regard to the first situation—a mistake in the evaluation of proportionality that is not such that 'cannot be avoided in a reasonable way'—I am of the opinion, that given the situation of compulsion, which makes it difficult for the actor to make considered assessments, and given his positive purpose of defence or protection, here too there is room to ease his punishment.

Consequently, and in order not to make the law too casuistic and overburdened with different cases, rendering it cumbersome and obtuse, the rules of law that address the subject under discussion should not be restricted to particular deviations from the conditions of private defence.[1203] In my view, there is no escape in this matter but to provide wide latitude to the court to mitigate the punishment of the actor who deviated from the objective conditions of private defence, even so far as—in suitable cases[1204]—to exonerate him from any punishment. The central requirement on which such a mitigation or exoneration should be conditioned is the purpose of defence or protection. An additional factor that the court should take into account—and that it is advisable to provide for in legislation—is the special mental situation (fear, horror, confusion, embarrassment, excitement, etc) to which the actor was subject because of the difficult situation of compulsion. It

[1203] A draft code that I found to be broad enough for this matter is the draft of Enker and Karp (Proposed Penal Code (General Part) 1986 (Parts of this draft were published in Enker and Kannai, n 919 above). S 47(2) ('diminished responsibility') of this draft determines that if a person commits an offence which carries a mandatory punishment, the court will be entitled to impose a lighter punishment if the person performed the action for the purpose of private defence but deviated from the conditions determined for it.

[1204] See s 2 of my proposal in the Epilogue below.

should be clarified, that such a special mental condition should not be seen as an essential condition for mitigation or even for exoneration, but it definitely constitutes a consideration that weighs heavily in their favour.

A few short remarks before concluding this discussion: Firstly, while in the absence of mandatory punishment courts will in any case justifiably tend to lighten the sentence in suitable cases for one who deviates from the conditions of private defence,[1205] in cases where there is a mandatory punishment and no legal authority is provided for its mitigation, there may occur undesirable situations where the actor is punished beyond what he deserves or where he is exculpated despite his guilt. Consequently, the arrangement by law of the issue under discussion is very important.

Secondly, it is insufficient to merely grant discretion to the court to diminish the punishment or even to exonerate the actor from responsibility; the legislator must also instruct judges to use this authority in appropriate cases. One possible way to do this is to provide authority within the framework of a mitigating circumstance, which it is obligatory to take into account.[1206]

Thirdly, there were those who proposed granting authority to the court to refer an actor who deviated from the conditions of private defence, on account of, for example, pathological fear (if curable), to medical (or educational—according to the facts of the case) treatment in a suitable institution.[1207]

Fourthly, it is appropriate to reiterate my reservations regarding the tendency to **justify** the deviant action of the actor, a tendency that is expressed in the words of Justice Zilberg at the outset of Section 5.3. Even in a case regarding which a full exoneration and not just a diminution of punishment would be more fitting to our sense of justice, such an acquittal, accompanied by full awareness of the actor's deviation and consideration of the situation in which he finds himself, is still preferable to a distortion of the strong justification of private defence, with all that it involves, both from the declarative point of view (pointing to the deviant behaviour of the actor as the correct action to take) and from the practical point of view.

Finally, I shall relate to the opinion that was presented in American legal literature, according to which 'imperfect self-defence' constitutes a reaction to the

[1205] I found such a tendency, eg, in the Israeli case law—either explicitly or implicitly—eg, the rulings: CA 190/54 *The Attorney General v Kaminski* PD 9, 54; CA 173/54 *Al-Hauashla v The Attorney General* PD 9, 83; CA 73/56 *Vinitski v The Attorney General* PD 10, 858; CA 229/62 *Garjitski v The Attorney-General* PD 17, 1077; CA 50/64 *Al Nabari v The Attorney General* PD 18(4), 73; CA 88/83, 61 *Shukrun v The State* PD 38(2), 617; CA 216/62 *Gera et al. v The Attorney General* PD 16, 2673.

[1206] This path was taken in the above-mentioned s 164(1) of the Israeli Draft ('Draft for the Preliminary Part and the General Part of the New Penal Code and Condensed Explanatory Material', (1984) 14 *Mishpatim*). However, this part of the proposal was not adopted by the legislator.

[1207] For proposals of this sort see Eser, n 26 above, at 623; Silving, n 45 above, at 389–90, 395. The evaluation of such proposals digresses greatly from the scope of our discussion. However, I must express my reservations with regard to Silving's determination that punishment should be negated when the deviation is an 'average reaction', since it seems to me that when the reaction is average, there is in any case no deviation.

(excessive) emphasis on reasonability of the action in private defence.[1208] In my view, this does not involve excessive emphasis and the response to it. A suitable legislative arrangement for a deviation from the conditions of private defence is essential as a **supplement** alongside this justification. This supplement is not intended to justify actions that should not be justified, but to exempt from or mitigate punishment despite the commission of these actions. This is in light of the positive purpose of the actor—to defend or protect, and usually also in light of the influence of the difficult situation of compulsion in which he finds himself.

5.4 Situation of Private Defence Caused by the Actor Bearing Guilt

5.4.1 General

What should be the rule for A, who pushes B in the queue for the bus, and after B attempts to stab her with a knife, pulls out a gun and shoots her dead?

What should be the rule for C, who enters a synagogue on the Jewish Day of Atonement, a day of fasting, and purposefully eats a sandwich there, and when several congregants push him in the direction of the exit and beat him, defends himself with his combat skills and breaks the limbs of three of them?

What should be the rule for D who stole a morning paper from the post box of his neighbour E, and when E noticed this and in a furious reaction began to scratch D's car, D hit E on the nose in order to protect his property?

And what should be the rule for H, who negligently threw a burning cigarette butt into a stairway, and when the apartment of her neighbour—I—began to go up in flames, burst into the apartment of another neighbour—J—took a bucket of water from that apartment and used it to put out the fire?

The causation, by the actor's fault, of a situation that constitutes a criminal law defence, is a general issue that arises not only with regard to private defence (thus, in the last example set forth above, the relevant defence is 'necessity'). Although for this matter the compulsion defences are occasionally discussed together as a separate group, I maintain that in the absence of a general arrangement for all the defences, it is preferable to deal with all the defences of justification[1209] and not

[1208] See LJ Taylor, 'Provoked Reason in Men and Women: Heat of Passion Manslaughter and Imperfect Self-Defense' (1986) 33 *University of California at Los Angeles Law Review* 1679 at 1710.

[1209] For a similar opinion see, eg, Robinson (1984), n 37 above, vol 2 at 30ff, 564. It should be noted that alongside exclusive characteristics of private defence that do not exist with regard to other compulsion defences and which will be discussed below (especially the ability of the aggressor to cease his attack and to make the defensive action against him superfluous), there are also considerations that exist for the other compulsion defences which do not exist with regard to private defence. Such, eg, is

just to the defences of compulsion because of their important common features, which will be noted later. An additional possibility is to focus on the compulsion defences that constitute justifications. Yet the comprehensive picture of private defence seems incomplete without consideration of the issue discussed in this section. Moreover, there are also some considerations in the arrangement of this issue, which are actually exclusive to private defence, alongside the important considerations that are common for other defences as well. Accordingly, and naturally, the emphasis will be placed on these unique features in consideration of the issue.

From a terminological point of view, the issue under discussion is known by terms such as 'voluntarily entering into a situation of defence', 'entering into the situation with awareness' (of the circumstances), etc. The title of Section 5.4 was chosen to encompass all the cases in which the issue is liable to arise and not only the most prevalent amongst them—ie, the entry of the actor, with guilt, into a situation in which he must defend himself[1210]—and also to note only those characteristics for which there is a near-consensus, namely causation and guilt, without determining in advance the precise conditions that should be established in the arrangement of this issue.

The starting point of the discussion is that in a given situation all the conditions of private defence exist (such as necessity and proportionality), so that at least on the face of it the action is completely justified. However, at an earlier point on the time axis, the actor by his own guilty behaviour created the situation that warrants private defence. The question is 'what is the implication of this causation accompanied by guilt?' What is special here is that the conditions of private defence and its justification are not only tested pursuant to the circumstances of the private defence event itself, but also in light of the circumstances of the event that preceded it (the stage of causation of the situation).

This issue has, not coincidentally, caused difficult deliberations[1211] in various legal systems, as a consequence of which many and varied arrangements have been suggested. Indeed, it entails an inherent difficulty, stemming from the need for the law to influence the actor's behaviour at two different stages. The first is the stage at which the situation of private defence is created. The second is the stage at which the conditions of private defence are already established. As we shall see later, the goals of the law with regard to one of these stages may dictate an arrangement that will thwart the accomplishment of its goals at the other stage.

the consideration that the purpose of the law is to prevent people from associating with criminals (who afterwards threaten them and demand that they commit criminal offences) for the matter of the duress defence—see, eg, Gur-Aryeh, n 13 above, at 223.

[1210] Since a person may, by his guilty behaviour, cause a situation in which he has to defend another person or create a situation in which another person will be forced to perform private defence.

[1211] A typical example of such deliberations can be found in the development of the Israeli Draft Law, since, in the arrangement of the issue under discussion, significant alterations were made among its different versions.

There is no dispute that it is possible to impose criminal responsibility on the actor for the first action itself in which he caused the situation of private defence if this action falls within the boundaries of a criminal offence (such as—in the common case—an offence of assault). However, this possibility does not provide a solution to the issue under discussion, although it is often highlighted in discussions of this subject.[1212] For the point at issue here is not the prior behaviour of the actor per se, but the possible influence of this behaviour on the justification of private defence, or—alternatively—the influence of private defence on the responsibility for prior behaviour.[1213]

5.4.2 Examination in Light of the Rationale for Private Defence

What can and should be deduced from the rationale for private defence with regard to the issue under discussion? Firstly, the tendency that exists at times to derive the solution for this issue from the very classification of private defence as a justification should be rejected. There is an approach according to which while the prior guilt of the actor is relevant to a defence of an excuse nature, it is not relevant to a defence that carries a character of a justification.[1214] However, such an automatic mechanical derivation of a solution to an issue from its very classification as a justification is over-simplified. Since—as we shall see below—the very determination that an action of private defence is desirable for society cannot be made while the prior guilt of the actor is completely disregarded—a guilt which bears a significant implication for the different factors which operate for the justification of private defence. Moreover, even if the action of private defence is desirable despite the prior guilt of the actor, this matter still would not necessarily negate the imposition of some sort of criminal responsibility (not necessarily full) on the actor.

[1212] See, eg, the explanatory wording of the MPC (Tentative Draft No 8 (Philadelphia, 1958)), at 22; Perkins, n 40 above, at 159; Perkins and Boyce, n 85 above, at 1141.

[1213] According to one opinion, it is possible in certain cases, to attribute full criminal responsibility to the actor for an offence of consequence with a non-defined behavioural element (namely, an offence of causation, such as the offences of killing). For at the first stage the actor caused the result that took place at the second stage—the stage of compulsion and private defence. However, in light of the actor's additional behaviour—at the second stage—that directly caused the result, such an attribution of responsibility is likely to be too far-reaching, since this is liable to create too great an extension of the causation offences. It should also be noted that the actor causes his own (subsequent) behaviour, voluntarily and accompanied by a certain mental element. In any case, it should be remembered that this solution is restricted in advance to offences of causation alone. In effect, it creates—for them alone—an arrangement quite akin to the doctrine of '*actio libera in causa*', which, as will be seen below, can be provided for all the offences. A possible advantage of such a solution over the use of this doctrine is the existence of simultaneity between the factual element and the mental element of the offence.

[1214] For such an approach see Robinson (1975), n 37 above, at 280. Regarding such an approach see Williams (1983), n 1 above, at 505 fn 17; Gur-Arye, n 13 above, at 222–24.

I shall therefore note the different factors that act together to justify private defence. Two of them do not create any special difficulty. The first—the autonomy of the person attacked—operates for the justification of private defence despite the actor's guilt in creating the situation, since this guilt does not negate the injury to the autonomy of the person attacked by the illegal attack of the aggressor. An exception to this matter is the special situation, in which the actor acts intentionally and plans the creation of the situation of private defence in advance in order to harm the aggressor. With regard to such an attacked person—who in effect is interested in being attacked—it could definitely be determined that there is no real injury to his autonomy despite the illegal attack on him. The factor of the aggressor's guilt does not cause any special difficulty in our matter either, since the actor's prior guilt does not negate the guilt of one who performs an illegal attack. Although in a normal situation—without the prior guilt of the actor—the aggressor's guilt becomes more clear, against the background of the actor's good faith, in the situation under discussion the guilt of the aggressor still exists and provides an additional weight—even if less than in regular cases—for the justification of private defence.

The factor of the social-legal order raises greater difficulty for the issue under discussion. Prima facie, given the illegal attack of the aggressor, this order is restored if the actor exerts defensive force against him. But would exertion of force by an actor who is guilty of creating the situation really serve the social-legal order? Is such an actor fitting at all to protect law and order? At least in the extreme case when the actor provokes the aggressor, aiming to harm the aggressor under conditions of private defence, it seems that the defensive action of the actor does not serve the social-legal order.[1215] It can even be argued that the desirable defence for the interests of such an attacked person is restricted.[1216]

The case in which the actor plans in advance both his provocation and also the reaction of the assigned aggressor (who is—in a certain sense—the victim) with the purpose of injuring the latter, is indeed a special and extreme case, for which there exists an almost absolute consensus that the actor should be denied private defence and bear full criminal responsibility. Later I shall discuss this case separately, but at this stage—especially because of the very extreme nature of this case that simplifies its suitable solution—I shall concentrate on more common situations, while attempting to establish a suitable arrangement for them that is not distorted by the impact of the extreme case of prior intention and planning.

A central argument used to support the approach that the legitimacy of private defence is absolute—even when the actor is guilty of creating the situation—is that the aggressor has almost complete control of the situation. He is capable of ceasing his illegal act and thus ensuring that the need to injure him, in order to repel his attack, becomes superfluous. This characteristic of private defence is often

[1215] For a similar opinion see Eser, n 26 above, at 632 and fn 56.
[1216] See Hermann, n 342 above, at 754–55.

highlighted as its unique feature, distinguishing it from the defence of necessity.[1217] Indeed, prima facie, this matter is irrelevant to the criminal responsibility of the actor, and is only relevant for the guilt and the criminal responsibility (and consequently—for his punishment) of the aggressor, whose responsibility is not at issue here.[1218] Further, the justification of private defence in modern criminal law is not based on the punishment of the aggressor.[1219] However, it seems that the aggressor's breach of his duty to cease his attack bears a certain relevancy for our matter, since the illegitimacy of the aggressor's action and the violation of the social-legal order that it entails can be halted by the action of private defence and thus order can be restored. In addition, it appears that there is merit in the claim that negation of private defence is liable to provide a certain legitimisation for the illegal attack, and that the prohibition of such defensive action in effect imposes a duty on the person attacked to abandon himself to the aggressor and to enable him to persist in his illegal attack.[1220]

Parenthetically, it should be noted at this point that alongside the unique characteristic of private defence regarding the ability of the aggressor to cease his attack—on the other hand—it is also necessary to emphasise an additional exclusive characteristic that should be taken into account for the arrangement of this issue: the ability of the actor (the person attacked) to make a 'withdrawal', including an announcement to his opponent of his honest intention to cease the confrontation. The important interest of maintenance of the social-legal order requires consideration of such a possibility, as is detailed below.

In the final analysis, my opinion is that except for the special case of intention and planning in advance of the entire series of events, the social-legal order factor, alongside the factors of autonomy of the person attacked and the guilt of the aggressor, also supports the justification of the private defence action once the situation of compulsion has already been established, despite the prior guilt of the actor. The more difficult questions are: whether this justification of private defence should be limited by conditions additional to those that already exist in regular situations (in the absence of prior guilt of the actor[1221]) and whether there is room to impose criminal responsibility of some sort on the actor, not based on his justified action in the situation of compulsion, but rather, perhaps, on the earlier stage when he was guilty of causing the situation in an attempt to deter the creation of such dangerous situations.

[1217] Eg, Feller, n 14 above, vol 2 at 471–78.

[1218] For a similar opinion see, eg, Gur-Arye, n 336 above, at 81.

[1219] See Ch 1.5.8.2 above.

[1220] For such a claim, see eg, Feller, n 14 above, vol 2 at 474. Consider also the questions posed by the Supreme Court in CA 298/88 *Twito v The State of Israel* PD 44(1), 151, at 58–59 (especially those that relate to the victim 'taking the law into his own hands'; to 'disregard for his life'; and to the desirable policy with regard to 'taking the law into one's own hands in a violent way').

[1221] Thus, eg, it is possible—given the prior guilt—to make more stringent requirements of proportionality, necessity, immediacy and retreat.

An additional consideration of policy that should be noted before turning to an examination of different possible arrangements for this issue is based on the 'ownership' of the interest that is placed at risk as a result of the illegal attack. For even though in most cases the interest that is endangered pertains to the actor himself, there could be cases in which another person's interest is involved that the actor is able to rescue within the framework of private defence of another person. If in the regular (first) case society has an interest that the actor should nevertheless act to cease the illegal attack, despite his prior guilt, and if there is a certain fear that the imposition of criminal responsibility on him will deter him from acting, then these considerations are strengthened when the interest at stake is that of another person. Firstly, the justification, at least moral, of defence of another person who is devoid of prior guilt is stronger in comparison to the justification of the defensive action of the actor (who caused the situation by his own guilty behaviour) himself. Secondly, when the life, body or other interest of the actor himself are at risk, it is very reasonable to assume that he will act to protect them even if he is liable to bear responsibility of some kind for this because of, among other things, his survival instinct. However, when the interest that is endangered is that of another person, there is a real concern that the imposition of criminal responsibility on the actor will deter him from acting to save the person attacked.[1222] It is interesting to note that in the Israeli Penal Code, such a distinction was made regarding the defence of necessity.[1223] I am of the opinion that this distinction is also necessary, especially within the framework of private defence, for the goal in such a case is to encourage the rescue of another person's interest and not to abandon this interest by deterring a rescue action. A proposed method for applying this distinction will be set forth following.

5.4.3 'Solutions' that do not Solve the Problem

A 'solution' that was proposed for the issue under discussion is to rely on the ordinary rules, according to which there should be no opposition to justified behaviour but it is justified to oppose illegal behaviour[1224]. According to this approach, the examination should focus on the reaction of the actor's opponent,

[1222] I shall refer later to the argument that if criminal responsibility is imposed on the actor according to the doctrine of '*actio libera in causa*', it is preferable for the actor—in order to reduce his responsibility—to act in order to save the interest at stake. Already at this stage it should be noted that this argument is likely, in my opinion, to be persuasive with regard to the defence of choice of the 'lesser evil', but it is not convincing regarding private defence, since there could be a justified action of private defence for an interest of the person attacked by means of a more severe (yet still proportional) injury to the interest of the aggressor.

[1223] S 34n of the Penal Code, 1977, as amended in Amendment No. 39 (1994).

[1224] For such proposals see Robinson (1984), n 37 above, vol 2 at 32; the explanatory wording of the MPC, Tentative Draft No. 8 (Philadelphia, 1958), at 22–23. See also the examples presented in *American Jurisprudence*, n 500 above, 1998 supplement of vol 6 (addition to s 75) at 47.

which is made in response to the preliminary attack of the actor. If the opponent relies on moderate force that is justified as private defence against the attack of the actor, then his action is completely legitimate and the actor is not entitled to defend himself against it. However, if the opponent uses excessive force, then his action is illegal and the actor is entitled to defend himself against it. As to the first possibility, in such a case a basic condition for private defence is missing—an illegal attack—and therefore even without taking the prior guilt of the actor into account it is clear that there is no room for private defence on his part. The second possibility, which involves the issue under discussion, leaves intact the question of whether, even though all the conditions for private defence exist at the second stage (including of course, an illegal attack), there is nevertheless room to restrict the force that is justified within its framework or to impose a certain responsibility on the actor, given his guilt in the creation of the situation. In addition, it should be remembered that the fact that the actor's causing of the situation and the guilt he bears for having done so are not actually limited to an attack.

Another 'solution' is based on the requirement of necessity. According to this 'solution', defensive force is not necessary if the actor could choose another way of preventing his entry into the situation of defensiveness. However, the mistake stems from the fact that compliance with the conditions of necessity—just as compliance with the rest of the conditions of private defence—must be examined by considering the moment of compulsion and not an earlier (or later) time.[1225] With regard to the time of the compulsion, the preliminary assumption is that the action of the actor has met the requirement of necessity, since otherwise no defence would be established at all and there is no room or need to examine the influence of the actor's prior actions and guilt.

5.4.4 The Case of 'The Grand Scheme'

Mr Scheme decided, after considering the matter, to kill Mr Angry. In order to avoid criminal responsibility, Mr Scheme approached the hot-tempered Mr Angry while armed with a weapon, gravely insulted him and slapped his cheek, intending to cause Mr Angry to attack him with his pocketknife (which Mr Scheme knew that he had been holding). As expected, Mr Angry attacked Mr Scheme. Just when Mr Angry brandished his pocketknife, Mr Scheme shot and killed him as he had

[1225] The drafters of the Canadian Draft Code fell into such a mistake—see the explanatory wording of the draft (Law Reform Commission of Canada, Report Recodifying Criminal Law, rev and enl edn, no 31, Ottawa, 1987) at 37. For such mistakes in the case law see the American ruling *US v Peterson* (Columb Ct of App) 483 F 2d 1222 (1973), at 883; CA 410/71 *Horowitz v The State of Israel* PD 26(1), 624 at 630 (although the right to self-defence was not directly negated because of the requirement of necessity, the negation was reasoned as '*a fortiori*' in comparison with this requirement). For a correct consideration of this matter see CA 88/83 *Shukrun v The State of Israel* PD 38(2) 617 at 624, where such a mistaken claim by the prosecution was rejected.

originally planned. This case of intention and prior planning constitutes a special case that raises no dispute. As we have seen during the discussion of the implications of the rationale of private defence for our present matter, it is very doubtful if there is a real injury to the autonomy of the person attacked, since he wants his targeted victim to attack him. In any case, the factor of the social-legal order does not support the justification of defensive action but, rather, warrants the imposition of full criminal responsibility on the actor. Consequently, it is not surprising that even in legal systems and draft laws in which there is generally no consideration of the prior guilt of the actor for the purpose of private defence, this guilt is granted full significance—denying private defence—in the face of intention and prior planning of the entire sequence of events.[1226] Moreover, my impression is that this extreme and special situation is what was often held in the view of legislators and judges, leading to too rigid arrangements for the issue of prior guilt in general.

However, it should be noted that the argument that is occasionally heard, that when the actor attacks with an intention to kill there is no situation of self-defence at all,[1227] is mistaken. For it is definitely possible that despite the prior planning, and perhaps specifically in accordance with the prior planning, the actor did indeed find himself in a situation in which he was forced to defend himself while nevertheless fulfilling all the requirements of private defence. A situation of private defence does exist, and this is in effect the preliminary assumption for the entire discussion in this section (5.4). Notwithstanding this, and given the fact that this situation is only one link in the actor's plan, the general tendency is to deny him the defence.

In my opinion, given the intention and prior planning, it is not necessary to require, as a condition for the denial of private defence, that the prior behaviour of the actor—by which he caused the creation of the situation—should be illegal[1228] or even improper. As we shall see later, such requirements are accepted with regard to the general issue under discussion. However, given the great severity embodied in intention and prior planning, they have no place in this special

[1226] See, eg, s 3.04(2)(b)(II) of the MPC; s 27(7) of the English Draft Law (Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles, no 218 (London, 1993)). See also with regard to German law, Hermann, n 342 above, at 749ff. A further reason (in addition to the social-legal order), which is mentioned by the latter for the negation of private defence, given the intention and prior planning, is found in viewing the action of the actor as an abuse of right—see *ibid,* at 751. Also of interest is the comment of Hale, according to which if the defensive action of a person who attacks with an intention to kill is permitted, all the cases of murder and manslaughter will—by means of interpretation—become '*se defendendo*'—see Beale, n 40 above, at 575.

[1227] This argument is raised in Feller, n 14 above, vol 2 at 476.

[1228] A requirement for illegal behaviour was established in s 44(6) of the 1989 English Draft Law (Law Commission, A Criminal Code for England and Wales, no 177 (London, 1989)) with regard to the special case of intention and prior planning, but it was omitted from the parallel s 27(7) of the 1993 Draft (Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles, no 218 (London, 1993)).

case. Robinson presents a good example of this matter in his book, regarding a Nazi who enters a public conference of the 'Jewish Defence League' planning to be attacked by those who are meeting there and to injure them in private defence. I tend to agree with the spirit of his (general) determination that: 'While there was at one time some doubt, it is now undisputed that otherwise lawful conduct can be made criminal by an actor's culpable state of mind'.[1229] Although it seems that this issue is not as undisputed as Robinson claimed.

5.4.5 Arrangements in Different Legal Systems[1230]

The accepted approach is to deny private defence in certain cases—either completely or partially, while imposing diminished responsibility. The case for which such a denial is very common is the case of 'The Grand Scheme', that was discussed above and that does not raise any particular difficulty. Consequently, I shall focus attention on the framework for the issue with regard to other cases. It should be noted that this issue is not usually arranged in legislation at all,[1231] and consequently the search for its arrangement must take place in case law. Parenthetically, it is noted that this situation is undesirable, since a general issue is concerned whose arrangement—at least at a basic level—is the function of the legislature, and this is in light of, inter alia, the principle of legality[1232]; [1233].

It is interesting to note that other criminal law defences, and particularly 'necessity' and 'duress', actually enjoyed many more statutory arrangements of the issue under discussion.[1234] One interpretation that was suggested for this legislative distinction is that the legitimacy of private defence is absolute, and there can be no derogation from it even when the malicious attack against which private defence is used happened because of prior awareness and improper behaviour of the defender or protector.[1235] However, this explanation overlooks the fact that in the

[1229] See Robinson (1984), n 37 above, vol 2 at 44.

[1230] Given the limited scope and the great variety of arrangements—mostly too casuistic—that have been specified for this issue in various legal systems, and also in light of the lack of necessity for this matter for the purposes of this book, I shall avoid a detailed survey of the legal situation of the issue in different legal systems that were examined, while attempting instead to identify different attitudes with regard to this issue within them.

[1231] From amongst more than twenty existing penal codes that were surveyed, an explicit arrangement for this issue was only found in three of them—s 24 of the Greek Penal Code (1950); s 34(6)(c) of the Argentinian Penal Code (1921); and s 8 of the Spanish Penal Code (1944; 1963). This issue is also arranged similarly in the legislation of a number of states in the United States—see the surveys given in La Fave and Scott, n 43 above, at 658ff; Kadish and Schulhofer, n 640 above, at 884ff; Robinson, n 1194 above, at 660ff. See also n 1233 below.

[1232] See the consideration of this basic principle (legality) in Ch 1.2 above.

[1233] It should be noted that the Israeli legislator fulfilled this function and provided explicit consideration for our issue in the Penal Code, at first in Amendment no 37 (1992) and later in Amendment no 39 (1994)—see the end of s 34j of the Penal Code, 1977 (quoted at n 1269 below.)

[1234] See, eg, Gur-Arye, n 336 above, at 82.

[1235] Feller, n 14 above, vol 2 at 472.

case law of different legal systems this issue was also arranged with regard to private defence.[1236]

A significant question, dealt with widely in various legal systems, is what should be considered as relevant causation, ie,: which prior actions of the actor that caused the creation of the situation of compulsion can negate private defence for him or—at least—impose additional limitations on him. One mistaken tendency is to focus on the (prior) attack alone (by the actor towards his future aggressor), while ignoring the possibility of causation due to other behaviours.[1237] Another common tendency is to determine many casuistic rules, which relate to typical behaviours that may be considered relevant. These rules mainly involve the carrying of arms, going to a certain place despite the expectation that a conflict will arise there (or remaining in a certain location despite such an expectation), actions which go against the biblical commandment 'Thou shalt not covet', and participation in a duel or fistfight.

Without drowning in the ocean of the existing rules regarding these typical cases, it seems that certain short remarks are nevertheless required. Firstly, a general determination should be preferred over casuistic rules with regard to the nature of the relevant prior behaviour. The main options are—from the lighter (for the actor) to the more serious—concentration solely on illegal behaviours; sufficing with improper behaviours; and a complete lack of a limitation on the nature of the prior relevant behaviour. These possibilities will be addressed below in full.

A second remark relates to the carrying of arms. Indeed carrying a weapon may serve as an evidentiary indication of the actor's mental element, such as the fact that the actor planned the entire series of events in advance, or the fact that he foresaw the possibility that if he should be attacked he would react with deadly force. However, carrying arms should not be seen, by itself, as prior behaviour that negates private defence, even if the weapon was carried without a licence. Even when there is room to impose specific criminal responsibility for the carrying of an unlicensed weapon, this does not necessarily negate the justification of the weapon's use when the conditions for private defence exist. Nevertheless, in various court rulings, the carrying of a weapon, especially without a licence, occasionally operates improperly to negate the justification of the actor's defensive action.[1238]

A third remark relates to the actor remaining in his present location, despite his knowledge that the potential aggressor is on his way there, and the actor proceeding to a certain location despite his knowledge that the potential aggressor is present

[1236] See, eg, Robinson (1984), n 37 above, vol 2 at 30.

[1237] See, eg, the wording of the drafters of the MPC Tentative Draft No 8 (Philadelphia, 1958), at 21–23; and the consideration of American case law in Perkins and Boyce, n 85 above, at 1128.

[1238] See the discussion in the text accompanying nn 523–26 above; the similar opinion in Williams (1983), n 1 above, at 508–9 (noting the prejudice that judges often hold against the actor because he carried a weapon); and compare to the different opinion of Ashworth, n 183 above, at 297–99.

there.[1239] These cases should also be arranged according to the general principle established for this issue, and not casuistically. Their fate should be decided according to the mental element of the actor that accompanies his behaviour, and in addition—at least according to some of the approaches—according to the quality of the behaviour, ie, whether it is illegal or improper. Fitting for this matter are the words of Beale, according to which a person does not have to measure his actions according to fear of his opponent's actions, and he is entitled to assume that the threats of his opponent will not be realised and to continue with his legitimate activities without change.[1240] It is interesting to note that English case law devoted much attention to this situation.[1241]

The fourth remark deals with the American case law, which being very concerned about the cases relating to the biblical order 'Thou shalt not covet', constructed many rules that distinguish between a relationship with a married woman and a relationship with an unmarried woman; between sexual intercourse and a platonic meeting; between defensive behaviour against the betrayed husband that ends with his death and more moderate defensive behaviours; etc.[1242] However, here too, there is no room for a deviation from the general principle adopted in that same legal system for the general issue under discussion.

The fifth and last remark on this matter concerns the actor's participation in a duel or a fistfight. English, American and Israeli case law all focused on the impact of the consent (or even the initiative) of the actor to participate in a duel or a fight on his right to self-defence.[1243] In such a case, the imposition of a heavy duty to

[1239] I have already noted two frequent mistakes regarding this matter—the unsubstantiated distinction between an omission (remaining in the location) and an action (going to another place) and the identification of the question as apparently stemming from the duty to retreat—see Ch 3.9.7 above.

[1240] See Beale, n 656 above, at 543–44. An exception to this is, in my opinion, the special situation of 'The Grand Scheme', which was discussed above. Given intention and prior planning, there is no requirement for the illegality of the action at the first stage (the causation of the situation) in order to impose criminal responsibility.

[1241] The main rules were laid down in the cases of *Beatty v Gillbanks* (1882) 9 QBD 308—where it was determined that the use of a public way is illegal when it is used despite (illegal) threats that create a reasonable likelihood of a disturbance of the peace; *R v Browne* (1973) N I 96—where a similar general principle was established; and *R v Field* (1972) Crim L Rev 435—where the *Beatty v Gillbanks* principle was denied. See, eg, Smith and Hogan, n 284 above, at 258ff; the explanatory wording of the English Draft Code (Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles, no 218 (London, 1993)) at 77; Ashworth, n 183 above, at 295–96.

[1242] See, eg, Beale, n 656 above, at 535; Baum and Baum, n 1 above, at 14; Kadish and Schulhofer, n 640 above, at 884; Perkins and Boyce, n 85 above, at 1132; *American Jurisprudence*, n 500 above, vol 40 at 621–22 and vol 6 at 71.

Another type of case that has bothered American courts in the last years is, oddly, possession of cocaine. Thus, eg, possession of cocaine qualifies as a 'forcible felony' under the Kansas statutory scheme for felony murder and therefore precludes the defendant from asserting self-defence—see the 2002–3 Supplementation to Robinson (1984), n 37 above, vol 2 at 27–28 fn 7. In my opinion, crime control should not be mixed with self-defence.

[1243] See, eg, *American Jurisprudence*, n 500 above, vol 40 at 614; Beale, n 40 above, at 575; CA 410/71 *Horowitz v The State of Israel* PD 26(1) 624, at 629; and CA 298/88 *Twito v The State of Israel* PD 44(1) 151.

retreat on both sides to the conflict is widely accepted. A reasonable explanation that was given for this is that by his retreat, one of the sides revokes his consent to fight, so that from that same moment it is justified to view him as the person attacked and to see his opponent as an aggressor. Thus too, it is common to deny the right to self-defence for a person who participates in a duel—with certain exceptions. In Israel an attempt was made—to which I shall refer later—in the *Twito* ruling,[1244] to predicate the entire rule with regard to the issue under discussion on the element of participation in a fight. In my view, cases of duels and fistfights should also be subject to the general arrangement that should be established for the entire issue under discussion.

In effect, the above-mentioned rules, as well as many other rules, are the result of the lack of a general principle for the arrangement of the issue in some legal systems. In English case law, the very rigid *Browne* rule (1973) is well known, determining that:

> The need to act must not have been created by conduct of the accused in the immediate context of the incident which was likely or intended to give rise to that need.[1245]

This rigid rule, which in effect suffices with negligence for the negation of private defence, evoked wide and justified criticism. As expected, it was not followed consistently.[1246]

As to American law, Robinson located no less than six different approaches for the treatment of this subject.[1247] The accepted approach, in any case, is that one who by his own guilt causes the situation has no right to private defence, with recognised exceptions—to be discussed below (at 5.4.6) of 'withdrawal' and a surprising alteration in the rules of the game[1248]; [1249].

[1244] CA 298/88 *Twito v The State of Israel* PD 44 (1) 151.

[1245] See the ruling *R v Browne* (1973) NI 96, and see also the discussion of the holding in Smith and Hogan, n 284 above, at 258.

[1246] See, eg, Smith and Hogan, n 284 above, at 244–45.

[1247] (1) Withholding a defence upon any causal contribution.
(2) Withholding a defence upon a minimum culpability as to causing the defence conditions.
(3) Imposing reduced liability upon a minimum culpability as to causing the defence conditions.
(4) Imposing a degree of liability corresponding to the level of culpability as to causing the defence conditions.
(5) Inconsistent approaches within the same jurisdiction.
(6) Failure to consider an actor's culpability in causing the conditions of his defence.

(See Robinson, n 1194 above, at 660–94).

[1248] See eg, Perkins and Boyce, n 85 above, at 1115, 1127–42; *American Jurisprudence*, n 500 above, vol 40 at 618–23; the encyclopedia ed by Kadish, n 96 above, vol 3 at 948.

[1249] Such a general approach has been adopted in the Israeli Law—CA 410/71 *Horowitz v The State of Israel* PD 26(1) 264; CA 88/83 *Shukrun v The State of Israel* PD 38(2), 617; see as well the discussion of these cases later in this chapter (at 5.4.6). For a different opinion—according to which these rules constitute an adoption of the doctrine of *actio libera in causa*—Gur-Arye, n 336 above, at 82, 97.

I will reiterate here the distinction recognised in American law that was noted in Section 5.3.4 between a perfect right of self-defence and 'imperfect self-defence'. The traditional and most accepted flaw, for which it is recognised in the American case law that the actor is entitled only to a mitigating circumstance of 'imperfect self-defence', is the guilt in creating the situation of private defence.[1250] A principal implication of this distinction is that a person who enters by his own guilt into a situation of private defence has a duty to make a 'withdrawal', including an announcement to his opponent of his honest desire to cease the conflict before he turns to the use of force.[1251]

A certain elaboration is necessary here—both with regard to the regular retreat and with regard to withdrawal—in the special context under discussion. The main case, in which it is accepted by all—even in legal systems where no retreat is required at all—that the attacked person must exhaust the possibility of retreat (sometimes—even if it is not safe) before resorting to the use of defensive force (sometimes—even if it is not deadly force), is when the attacked person by his own guilt caused the situation in which he has to defend himself.[1252] The duty to retreat is occasionally perceived as almost the sole consequence of the prior guilt of the actor. Only against this background is it possible to understand the words of the drafters of the Model Penal Code, according to which given the fact that they had established a general requirement of retreat before the exercise of deadly defensive force, they no longer saw a need for an arrangement for the issue under discussion apart from consideration of the special case that we have above dubbed 'The Grand Scheme'.[1253]

In distinction to the regular duty to exhaust any possible avenue of safe retreat, as I noted above in another context,[1254] it is common to impose a stronger duty on one who by his guilt caused the situation to perform what is known as 'withdrawal'. The important implication of the performance of withdrawal by the actor is that even if the opponent insists on persisting with the conflict, the actor is freed—at least partially—from the responsibility for the situation (even though at the first stage he caused it by his guilt). In effect, the withdrawal creates a sort of severance[1255] between the actor's actions, which led to the situation, and his defensive action in the situation of the compulsion itself.

[1250] See, eg, the explanatory wording of the MPC (Tentative Draft No 8 (Philadelphia, 1958)) at 29.

[1251] See the text that begins with the reference to n 841 above.

[1252] See *ibid.*

[1253] See the explanatory wording of the American MPC (Tentative Draft No 8 (Philadelphia, 1958)) at 21–23.

[1254] See the text that begins with the reference to n 841 above and the references that appear there.

[1255] This involves a legal severance, since the factual chain of causation, evidently, continues to exist. An explicit determination in the law that the use of defensive force after a 'withdrawal' is justified despite the prior guilt of the actor, was suggested in s 603 of the American Federal Draft Code (National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code (1970)).

Here a certain clarification is necessary of the one-directional relationship between prior guilt and the duty to retreat. While prior guilt of the actor may impose a stronger duty of retreat upon him, a breach of the duty to retreat should not be viewed as prior guilt of the actor, since the duty to retreat is not a per se duty that exists for its own sake, but rather constitutes part of the conditions of private defence. Consequently, when a person goes to a place in which danger to him is anticipated, against which it is reasonable to assume that he will have to defend himself by the use of force, there is no[1256] room for a discussion of the duty to retreat, but rather—if at all—a discussion of the prior guilt of the actor. There is only room for a duty to retreat in the situation of compulsion itself.[1257]

5.4.6 The Israeli Case Law

I shall conclude this tour of the rules that have been established in various legal systems with a short consideration of the pertinent Israeli case law. The leading ruling was handed down in the *Horowitz* affair. Because of its great importance as well as because of the interesting situation it presents, the detailed facts of the case are presented here as set forth by the court.[1258]

> The appellant, who was 18 years old at the time of commission of the offence, was entrusted by his father with the management of a snooker club . . . on the date of 2.3.71, during the evening hours, a dispute arose between the appellant and one of the club's visitors . . . whose nickname was Sabi, a young man, 21 years old. The dispute commenced when the appellant prevented Sabi from playing, and also demanded that he repay a loan that he had received from him. Sabi got angry and interfered with the appellant when the appellant began to play. They reached the stage where each of them grabbed the shirt of the other. The appellant said to Sabi: 'I'll show you', he went out to the yard near the club, where he kept a hidden gun to be used when necessary to guard the club, he took the gun out of there and loaded it, with the intention of continuing the dispute with Sabi and in order to frighten him with the gun. However before he returned to the club he changed his mind and went out to the street to wait for his friend, named Ze'evi, with whom he had an appointment. The friend didn't appear, and the appellant therefore decided to leave the location by himself. He decided to go back into the club to let the person who was meant to replace him know. On the stairs he again met Sabi by chance. The latter went up to him and said to him while holding him by the chin: 'You're a kid for me. I'll beat you up'. The appellant responded to this: 'If you're a man, come and fight with me at the sea'. The intention was to hold a fistfight on the beach. Sabi accepted the challenge and he and the appellant and a third person, Rahamim Harosh . . . went in the

[1256] In contrast to the misleading discussions that can be found on this matter. For a similar opinion, see the correct rule that was determined in *R v Field* (1972) Crim LR 435.

[1257] See also the text above following the reference to n 869.

[1258] Translated by the author, from the ruling, CA 410/71 *Horowitz v The State of Israel* PD 26(1), 624 at 626–27.

> direction of the beach. On the way Harosh beseeched Sabi to leave the appellant alone, but Sabi replied: 'No, I have to send him to the hospital'. Sabi suggested to the appellant that the fight would take place in one of the backyards in the vicinity. The appellant agreed to this, and the three of them continued on their way to a nearby yard . . . Sabi was stronger than the appellant . . . The district court determined that the appellant did not intend to use the gun during the fight but only in a situation of compulsion, perhaps in order to deter by means of the threat of the gun . . . The appellant intended a fight on the beach, in a lit place where there were passersby. Sabi's proposal to transfer the arena of the fight to one of the yards was liable to add to the severity of the struggle, and it can be assumed that this was Sabi's intention. The appellant did not resist this proposal, perhaps because he didn't want to be considered a coward. Immediately after they arrived in the yard that was appointed to be the battle field, Sabi picked up a broken bottle that was lying on the ground and advanced towards the appellant brandishing the bottle. The appellant feared that Sabi would do him severe bodily harm with the dangerous weapon that he had in his hand. He drew out the gun and told Sabi: 'Don't come near. I'll kill you'. Sabi replied to this: 'Stop your nonsense', meanwhile using the bottle in his hand to raise the hand of the appellant that was holding the gun upwards. The appellant then squeezed the trigger and the bullet that was shot struck Sabi's forehead with an injury that caused his death.

In the *Horowitz* ruling the Supreme Court established the famous rule according to which:

> It cannot be imagined that the argument of defensive action must always be discussed in detachment from the events which preceded the situation . . . This waiver should not be made in favor of **one who knowingly and illegally placed himself in the situation** that caused the attack on him . . . The very fact of entering into a fight or a duel is an illegal action.

In this judgment, the Supreme Court also established two exceptions to the rule. The first—when the opponent of the actor **breaches the 'rules of the game'** (for example: when the duel is determined as unarmed wrestling, and then one of the combatants suddenly draws out a deadly weapon and attacks the actor). The second exception—when the actor **clearly demonstrates, by a retreat** or by any other means that he wishes to cease the struggle, but his opponent persists with the conflict and continues to attack.[1259]

Thus the court took the rigid approach of completely negating private defence in light of the actor's prior guilt, apart from two exceptions, rooted, as we saw earlier, in the American law. This approach is difficult, inter alia, because it constitutes the law's avoidance of the duty to protect even one who has endangered himself, and a determination (in effect) that the life of the person who endangers himself may be disregarded. It is interesting to note that even if this rigid approach of the court is accepted, nevertheless denying the accused private defence in the

[1259] See *Horowitz v The State of Israel* PD 26(1), 624 at 629–30.

case of *Horowitz* and convicting him for manslaughter were erroneous decisions. It seems to me that in the circumstances of the case, the two exceptions to the rule that the court had already determined did in fact exist: the first—the alteration in the 'rules of the game' happened when the opponent picked up the broken bottle and used it as a weapon, and the second—a demonstration of the wish to cease the conflict occurred when the accused threatened his opponent with a gun and warned him not to advance (it should be remembered that even one of these exceptions is sufficient). Moreover, it is questionable whether it was correct to view Horowitz as a person who put himself, by his own guilty action, into a situation where he had to defend himself or whether it would have been more correct to view him as one who was dragged into the conflict by his opponent against his will.

In the ruling in the case of *Carvah*,[1260] the Supreme Court reiterated the *Horowitz* rule. In the *Shukrun* case it asked—in quite a long obiter dictum—to clarify the rule and set forth its foundations. The facts of the case were as follows[1261]: the appellant and the deceased were in a discotheque. The deceased became angry with the appellant because he stared at him, and the deceased demanded that the appellant step outside with him. After they had gone out, the deceased said to the appellant: 'You "maniac", I'll show you', and later beat the appellant until he fell, kicked him in the face, picked him up and continued to hit him. At that point the appellant pulled out a knife that he always carried for eating and stabbed the deceased many times, as a result of which the deceased passed away.

The first exception that was established in the case of *Horowitz* namely, the breach of 'the rules of the game', was described in the *Shukrun* case as '***an unexpected turn of events***' and dubbed '***the surprise exception***'. Thus, the emphasis was placed on the lack of anticipation by the actor of the sequence of events at the first stage, in which he caused the creation of the situation of compulsion. The second exception that was determined in the Horowitz case won the title of '**the withdrawal exception**'. The court clarified the distinction between the required 'withdrawal' ('If he withdraws **completely, actually and in a realistic manner** from the fight and expresses his honest will to stop it'), and an ordinary retreat ('regarding one who is not the aggressor responsible for the occurrence of the fight, an honest ***attempt*** to leave the fight is sufficient').[1262]

The rule that was established in the above-mentioned judgments was addressed in three completely different ways. The first—a severe criticism of the very negation of private defence, through expressing the unacceptable opinion noted above that the legitimacy of private defence is absolute and cannot be influenced by prior

[1260] CA 613/76 *Carvah v The State of Israel* PD 31 (2), 770 at 772.
[1261] CA 88/83 *Shukrun v The State of Israel* PD 38(2), 617.
[1262] *Ibid* at 621–24. The quotations are at 623, 624.

events.[1263] The second—a view of the above-mentioned rule as the desirable adoption (in effect) of the '*actio libera in causa*' doctrine for this matter.[1264] The third—support for the rule.[1265]

Finally, it deserves mention that the rule in the case of *Twito*,[1266] in which—in an obiter dictum implying a lack of enthusiasm regarding the rigid *Horowitz-Shukrun* rule—the Supreme Court requested a restriction to the rule so that it would only apply to causation of a situation of defensiveness by the specific prior behaviour of entering into a fistfight. The matter of *Twito* did not involve a fight. Rather, the appellant broke into the house of the deceased's brother and stole property from him. The brothers suspected that the appellant was the one who had carried out the burglary and, as a consequence, violent acts took place between the parties, which were terminated when a police car arrived. Later the appellant made a number of attempts to arrange an 'appeasement', but failed. When he was informed the next day that the deceased and his brother were looking for him armed with a gun, he too armed himself with a gun and hid in a friend's apartment. At midnight, the deceased and his brother forcibly broke into the friend's apartment, pushing the friend out of their way, and the deceased turned to the appellant and aimed his loaded gun at him. The appellant fired three bullets at the deceased and killed him. The Supreme Court determined that he should be acquitted, rejecting the argument of the prosecution that the non-return of the property by the appellant should be construed as prior guilt thus denying him the right to self-defence. The court determined that the appellant had actually acted in a reasonable manner and attempted to avoid the conflict, and asked, in an obiter dictum:

> Is there room, in principle, to negate the defence of self-defence because of an event, that not only because of its character, but also in terms of the time of its occurrence, took place separate from the violent event and a long time before it? Isn't it necessary for there to be proportionality between the prior bad behavior of the accused and the reaction of the injured person toward him, in order to deny the self-defence for the defensive action of the accused against the violence of the injured person? Is it just because the accused has sinned by committing an offence, and there is room to punish him for it, that his life becomes worthless, in the sense that he will not be entitled to self-defence?[1267]

[1263] This is Feller's approach—Feller, n 14 above, vol 2 at 445–87.

[1264] This is Gur-Arye's approach—see Gur-Arye, n 336 above, at 82, 97. Further on, after noting the principles of this doctrine, I shall again reiterate the Israeli rule while suggesting a different interpretation, according to which it should not be viewed as an adoption (at least, not a complete adoption) of the doctrine.

[1265] This is Kremnitzer's approach—Mordechai Kremnitzer, 'Causing the Condition of Self-Defence' (1998) 29 *Mishpatim* 445 (Hebrew).

[1266] See the holding, CA 298/88 *Twito v The State of Israel* PD 44(1), 151.

[1267] *Ibid*, at 158–59, per Justice Orr.

This ruling earned very harsh criticism from Feller, who focuses on the argument that there is no logical basis for the restriction to a fight in particular. According to this extreme criticism, the *Twito* rule is as worthless as a rule based on the first letters of the names of the accused persons *Horowitz* and *Shukrun*. In other words, just as these holdings—by chance—involved fights, so it is, prima facie, possible to restrict the application of the *Horowitz–Shukrun* rule to those cases in which the surnames of the accused persons who brought the problem upon themselves start with the letters H or S.[1268] My opinion is that both this criticism and comparison are inappropriate. Firstly, the above-mentioned restriction can be explained both on a policy ground of deterring people from conducting fights and, also, because of the prevalence of the phenomenon. Secondly, there is, in fact, a strong basis for the questions raised by the court, which are quoted above. Thirdly—and mainly—it should be noted that the court thus took a significant step in the desirable direction (even in the opinion of Feller himself) of easing the relatively rigid rule that was determined in the *Horowitz* and *Shukrun* judgments. Accordingly, it is difficult to see why such a fuss was made. In addition, despite my objection to the *Horowitz-Shukrun* rule, it is difficult to agree with Feller's extreme view that focuses on leaving private defence intact while almost leaving a vacuum with regard to the required alternative, since an arrangement of some sort for the issue under discussion is—in almost everyone's opinion—essential. Such an arrangement (although not perfect) was recently added to the Israeli Penal Code by the legislature.[1269]

5.4.7 The *Actio Libera in Causa* Doctrine

As is known, the most common use of this doctrine is for the imposition of criminal responsibility on an actor, who, although his act did not satisfy the requirement of volition (control) at the time of commission of the offence (ie, he was unable to choose another behaviour), at an earlier stage—with regard to which control existed—he, however, performed an act that caused the situation in which he later performed the factual element of the offence without control. It is possible, for example, to use this doctrine in order to impose responsibility on a person who drove his car with excessive speed in the rain, slid, and while in a state of lack of control over the skidding car, crossed a junction on a red light. Without the use of the doctrine, an acquittal from the offence of crossing the red light would be obligatory, since at the time of the commission of this offence, the requirement for control was not satisfied: the actor did not control his relevant behaviour (the

[1268] SZ Feller, 'Concerning the Right of Self-Defence: Signs of Heresy in the Horowitz Rule (CA 298/88 Twito v. State of Israel)' LS 15 (1990) 189 (Hebrew).

[1269] The end of s 34j of the Penal Code 1977 ('however a person does not act in self-defence if his own improper behaviour led to the attack, while he foresaw the development of the affair in advance').

continuation of the driving), or—in other words—at this stage his behaviour was no longer voluntary.[1270]

The accepted condition for the imposition of responsibility is that at the preliminary stage (at which the actor acted under control) he had the required mental element for the establishment of the offence, including its (concrete) process of causation. It is also possible to establish such a systematic arrangement by applying the doctrine to the issue of the causation by the actor of the situation of a criminal law defence in general, and private defence in particular. This possibility was suggested by several scholars internationally,[1271] and as will be shown below—was also adopted by the drafters of a few draft laws (although not fully).

The more detailed conditions of the doctrine for our discussion are as follows:

(1) At the second stage—at which the offence was committed in a situation of compulsion—the necessary conditions for the establishment of private defence, must, evidently, exist.

(2) At the early stage—at which the actor caused the creation of the situation of compulsion—the following conditions must exist: (a) control, and absence of a defence to criminal responsibility; (b) the mental element required for the establishment of the offence, with consideration of the entire process of causation.

Thus, for example, when an offence of regular *mens rea* (awareness) is concerned, it is required that the actor, at the early stage, foresaw the possibility that his behaviour would cause a situation in which his legitimate interest would be endangered by an attack, and also foresaw that in order to prevent this danger he would have to injure the aggressor and thus to perform the factual element of the offence;

(3) Between these two stages there must be a causal connection, ie: the behaviour at the early stage is required to be a *causa sine qua non* for the creation of the situation of private defence. A further requirement that is occasionally added to the doctrine is that the danger that the actor takes upon himself at the previous stage (for our matter—the risk that he would commit the factual element of the offence in order to defend himself) was, in the circumstances of the case, an unreasonable risk, if we accept the general principle that risk-taking, even in awareness, only produces criminal responsibility if in the circumstances of the case it was an unreasonable risk.[1272]

[1270] Another possible use of the doctrine concerns the imposition of responsibility on a person who has of his own free will become intoxicated and afterwards commits an offence while in a state of inebriation.

[1271] Miriam Gur-Arye, 'Actio Libera in Causa and Private Defence' (1985) 15 *Mishpatim* 145 (Hebrew); Gur-Arye, n 336 above, at 78–100; Gur-Arye, n 13 above, at 224. See also Robinson, n 1194 above, at 695ff; Robinson (1984), n 37 above, vol 2 at 38ff, 564.

[1272] The main consideration that is accepted for the assessment of the reasonability of the risk is the utilitarian consideration—Gur-Arye, n 1271 above, at 155–56. For another delineation of the conditions of the doctrine under discussion, which does not include a requirement of unreasonableness of the risk, see Robinson (1984), n 37 above, vol 2 at 564.

The central idea that underlies the application of the doctrine for our matter is, that with regard to the second stage, there should be no imposition of criminal responsibility on the actor, and this is in order to enable him to perform the justified and desirable behaviour—for society also—of private defence given the justifying circumstances. However, in order to deter people from creating such dangerous situations, criminal responsibility should be imposed upon the actor, focusing on the early stage of the creation of the justifying circumstances. In other words, there is an attempt here to transmit two different messages: with regard to the situation of private defence—if the actor already finds himself in such a situation it is justified for him to act, whereas with regard to the prior behaviour that caused this situation—the actor must avoid performing such behaviour.

An obvious advantage of the use of the doctrine is the creation of a correlation between the guilt of the actor and his criminal responsibility. Thus, in order to attribute an offence of intent to the actor, it is insufficient that he foresaw the course of events at the previous stage. There is an additional requirement of his intention to harm the aggressor in circumstances of private defence.[1273] This, then, is the way in which the supporters of the doctrine overcome the obvious defect that frequently appears in other arrangements whose substance is the negation of private defence, given the prior guilt of the actor. By contrast, even if the actor was only negligent at the previous stage (only foresaw the development of matters constructively, ie, it was possible to foresee it) it would still be possible to impose corresponding criminal responsibility—for an offence of negligence—if in that same legal system a corresponding offence exists for this case (such as causation of death by negligence—if the aggressor was killed).[1274]

It should be noted further that there is also nothing to hinder the application of the doctrine to the causation of a situation of putative private defence, as well as to

[1273] It should be noted that an opinion exists that foresight (alone) is sufficient at the stage of causation of the situation in order to impose criminal responsibility for an offence of intent committed in a situation of compulsion. This position—with which I disagree given the fact that it does not completely comply with the principle of guilt—is expressed in s 34j of the Israeli Penal Code 1977, as amended in Amendment No. 39 (1994). It is interesting to note that with regard to the defences of 'lack of control', 'necessity' and 'duress', the responsibility for offences of intent was conditioned, in this new statute, upon the existence of a mental element of intention already at the first stage—s 34n of the Penal Code 1977. See also the text accompanying n 1278 below.

[1274] It should be noted that these last two implications of the doctrine for offences of intent and for offences of negligence are sufficient to negate the interpretation given in Israel (and mentioned above) to the Israeli rule determined in the *Horowitz* and *Shukrun* rulings, according to which the doctrine was apparently applied therein, since the rule that was therein provided is a negation of private defence in the face of an entry '*knowingly and illegally*' into the situation of compulsion.

If, nevertheless, a desire exists to find a connection between the Israeli rule and the doctrine of *actio libera in causa*, then the two exceptions to the rule can be seen as corollaries to the doctrine: the exception of breach of 'the rules of the game', especially if it is expanded to become 'an exception of surprise', points to a lack of foresight of the chain of events, and the exception of 'withdrawal' may point to the lack of such foresight, at least regarding the process of causation. However, even if the exceptions to the rule are viewed in such a manner, the rule is still, in my estimation, far from the doctrine.

the situation of causing another person to commit an offence in circumstances that justify private defence—although in the latter case the criminal responsibility can also be based on the general doctrine of performance by means of another ('innocent agent') (indirect performance).

This leads us to difficulties raised by the doctrine and its shortcomings. As noted, the doctrine is based on the idea that at the second stage (of the compulsion situation) the actor should be allowed to act in private defence, and accordingly the defence against criminal responsibility should not be denied to him, but he should, rather, be deterred at the first stage from creating the circumstances of the situation. This bears merit on the face of it, especially in light of the fact that while at the second stage—the situation of compulsion—it is difficult to direct the behaviour of the actor (especially when he is in a state of severe danger to his life or body), at the first stage, it is nevertheless possible and necessary to direct his behaviour so that he will avoid creating the danger. However, this complicated structure of responsibility creates not a few difficulties.

The first difficulty is theoretical and moral. The arrangement that the doctrine sketches is—in the best case—vague, since it is difficult to comprehend how a person can be justified in killing another person (given the recognition of private defence) and simultaneously guilty of killing him (given the application of the doctrine), ie, justified and guilty for the same killing. In other words: how can a person be morally guilty of performing an action, when this action itself is morally justified? Montague, who noted this difficulty,[1275] concentrated on the moral aspect, with a certain acceptance of the fact that, legally, there could be such contradictions . . . however, it appears that even in the eyes of the jurist it is difficult to imagine a situation in which the person's right is recognised, and he uses it, and nevertheless a criminal offence is established.

Moreover, I am of the opinion that contrary to the assumption of those who support the doctrine, which permits private defence and does not deter the performance of a desirable and justified action at the second stage (the situation of compulsion), the imposition of criminal responsibility via this doctrine is actually akin to negation of private defence and to deterrence of the defensive action (or the protection). For although the first stage is emphasised within the framework of the doctrine (the earlier behaviour that caused the creation of the situation and the mental element that accompanied it), the fact that the criminal responsibility is also determined by what happened in practice at the second stage cannot be overlooked. Consequently, if the actor, while in the situation of compulsion itself, avoids acting in private defence, no kind of criminal responsibility is imposed upon him, since he does not cause an injury to the aggressor. By contrast, if he acts in private defence and injures the aggressor, criminal responsibility will be imposed upon him that will increase according to the severity of the injury to the

[1275] See Montague (1989), n 211 above, at 81–87.

aggressor. What then is the message and guidance for behaviour that is provided for the actor who already finds himself in a situation of compulsion?—'Your action—subject to the conditions of private defence—is justified, so that it may even be justified for you to use deadly force; however, you should know that if you injure the aggressor, criminal responsibility will be imposed upon you, and this responsibility will grow to the extent that the injury is more severe!'

The supporters of the doctrine were aware of this possibility of deterring the actor from the performance of justified action at the second stage given the responsibility that the doctrine imposes, and they articulated the following answer: despite the imposition of responsibility by means of the doctrine, it is still preferable for the actor to perform the justified action in a situation of compulsion—in order to reduce his responsibility—and therefore the doctrine does not deter its performance. Is this in fact so? The example given for this matter—and not by chance—is that of the defence of justified 'necessity', based on choice of the lesser evil. If the actor created a danger of injury X, whose neutralisation would require a justified action of injury Y, as the argument goes, it is preferable for the actor to perform the action, for then he would bear the responsibility for the injury Y instead of the injury X, when by definition (of choice of the lesser evil injury) Y is less than the injury X.[1276] However, I think that this explanation is restricted to the defence of justified necessity, and is not valid with regard to private defence. Firstly, in the frequent case, in which the actor who caused, with guilt, the creation of the situation is also the person attacked, there is no doubt that the criminal responsibility will be less if he avoids carrying out private defence—since if he does no harm at all to the aggressor, no criminal responsibility is imposed upon him. Secondly, in the less frequent case, in which the actor by his own guilt caused a situation in which another person was attacked, the application of the doctrine is certainly liable to deter him from any action, since there is a possibility that in order to avoid a certain injury to the person attacked it is necessary to inflict a greater justified injury on the aggressor. For private defence is not based—as is the justified 'necessity' defence—on the causation of evil to the aggressor that is less than the evil that the aggressor is liable to cause to the person attacked.[1277] True, when the actor (who by his guilt caused the creation of the situation) is also the person attacked, there is less fear that he will be deterred from committing the justified action of private defence, since a person is concerned for himself and it is reasonable to assume that he will act according to his instinct for survival. However, when the actor by his own guilt has created a situation in which another person is attacked, the application of the doctrine is liable to deter him from saving the person attacked, although society would desire him to do so.

[1276] Such an explanation was provided by Robinson, in Robinson (1984), n 37 above, vol 2 at 41; and by Gur-Arye, n 13 above, at 224.

[1277] There is, however, a requirement of proportionality, yet there is no requirement for a completely equal balance—see Ch 3.8.1 above.

Consequently, I propose that even if the doctrine is adopted, it should be improved by the addition of a mitigating circumstance that the court must consider when another person is attacked.

This last difficulty stems from a main difference that exists between the issue under discussion and the case in which the doctrine is frequently used—lack of control. For when a person acts without control (insofar as it is possible to say that he 'acts') and commits a criminal offence, his action is undesirable and it is also impossible to direct his behaviour (at the second stage). In contrast, when a person acts within the framework of private defence, his action is both justified and desirable and it is also possible to direct his behaviour—although sometimes only in a restricted manner, given the situation of compulsion and the survival instinct. Thus it is necessary with regard to the matter under discussion to note the possibility that the imposition of responsibility by means of the doctrine, even if it is only meant to direct the earlier behaviour (that causes the situation), will also influence (in the direction of deterrence) the behaviour in the situation of compulsion.

In fact, a difficulty exists in the very turning of the criminal responsibility of the actor, who guiltily causes the situation of private defence, into a function of his action in the situation of compulsion and of its results. For if we accept the assumption that his prohibited behaviour and guilt are only to be found at the earlier stage when the situation is caused, then what is the justification for increasing his responsibility in accordance with his justified action in the situation itself? If it is accepted that the action in the later defensive situation is justified, there is no reason—at least prima facie—to restrict the action by attributing its damaging results to the actor and imposing responsibility for them. I shall discuss below such a possibility, of determining the criminal responsibility of the actor already at the earlier stage, so that his justified actions in the situation of compulsion would not matter—while considering a possible arrangement of this issue by means of a specific offence of endangerment.

An additional argument against the doctrine is that at the earlier stage the actor usually has no real intention, but, rather, he performs complicated assessments of risks, and, accordingly, the doctrine does not allow an offence of intent to be attributed to him. My opinion is that this argument lacks merit, since if this were the factual situation, then indeed the guilt of the actor would not justify attributing to him an offence of intent, and it would be possible and necessary to rely on an offence of regular *mens rea* (awareness; recklessness).[1278]

An interesting utilitarian reasoning for the negation of the doctrine that is set forth in the philosophical literature by Wasserman, is that it would be a waste to permit the provoker to defend himself and to save his life by killing the aggressor, since in any case he is expected (because of the provocation that caused the situa-

[1278] See also n 1273 above.

tion) to receive a life sentence.[1279] I think that this reasoning lacks substance even on the limited utilitarian level. For in the situation described of 'a life for a life', the alternative—the killing of the provoker who is prevented from defending himself by the aggressor—will also lead to a long imprisonment for the survivor, since by the very definition of private defence, the attack which the aggressor performs is illegal.

Another disadvantage of the application of the doctrine to the issue under discussion, which is reparable, concerns insufficient restriction of the nature of behaviour required at the earlier stage (when the situation is created). Obviously, there is no room for casuistic limitation of the sort that we have noted before (such as the consideration of attack, bearing of arms, going to a certain place, etc). However, there is definitely a need for a general limitation. In draft laws internationally, in which the doctrine was partially adopted, a requirement was usually added with regard to the nature of the earlier behaviour. It is common to require illegal behaviour,[1280] or to suffice with 'improper' behaviour[1281]. When the Israeli legislator arranged the issue under discussion in the new definition of self-defence, he sufficed with 'improper' behaviour'.[1282] With the exception of the special case of 'The Grand Scheme',[1283] it is my opinion that in the remaining cases improper behaviour should not be sufficient, but there should be a requirement for real illegal behaviour. Firstly, the (new) use of the term 'improper behaviour' is, in my view, very problematic in the criminal field. The term is not defined (it is apparently dependent on social evaluation) and it therefore raises inherent interpretative difficulties, vagueness and a lack of sufficient guidance—not only for the public but also for trial judges. In the criminal law, it is highly desirable to avoid—insofar as this is possible—such general and vague terms.[1284] Secondly—and mainly—I maintain that given a legal behaviour (even if it is 'improper') of the actor at the earlier stage, there is no room to assign him any sort of criminal

[1279] See Wasserman, n 181 above, at 370.

[1280] This is so in s 44(6) of the 1989 English Draft Law (Law Commission, A Criminal Code for England and Wales, no 177 (London, 1989)), despite the fact that it relates to the special case of 'The Grand Scheme', with regard to which I think that the imposition of responsibility should not be limited by any sort of requirement on the nature of the behaviour (it should be noted that a later version of the English Draft omitted the superfluous requirement for illegal behaviour—see s 27(7) of the 1993 Draft Law (Law Commission, Legislating the Criminal Code: Offences against the Person and General Principles, no 218 (London, 1993)). This is also, in my opinion, the correct interpretation of the *Horowitz* rule, which deals with 'a person who knowingly ***and illegally*** placed himself in the situation ' (emphasis added—see n 1259 above and accompanying text.)

[1281] This is so in s 46 of the Israeli Draft (Proposal for the Penal Code (Preliminary Part and General part) 1992).

[1282] The present version of s 34j of the Israeli Penal Code 1977 as established in Amendment no 39 (1994).

[1283] With regard to this—as mentioned—my opinion is that given the very serious guilt of the actor, his intention and advance planning of the whole sequence of events, there is no need for a limitation of any sort on the nature of his previous behaviour.

[1284] See with regard to this matter the discussion in Ch 1.2 above.

responsibility. It seems that it would be too severe a limitation of a person's liberty if he would have to be burdened with the duty to avoid perfectly legal behaviours, only because he foresaw a possibility that as a consequence of these behaviours another person would attack him illegally thus forcing him to defend himself. A person should not be compelled to calculate his actions according to the possible illegal aggression of others.[1285] In contrast, when a person commits **a criminal offence** while foreseeing that he would thus cause such a sequence of events, then it is also more reasonable to justify criminal responsibility for the results of his behaviour that were actually **foreseen**, although they would only occur at the second stage—during private defence.[1286]

[1285] It should be noted that other requirements that are sometimes deemed sufficient, such as an unreasonable risk (see n 1272 above and accompanying text) or 'without reasonable cause' (eg, s 39 of the 'Draft for the General Part of the Criminal Code' (Prepared by the Expert Committee under the Chairmanship of the Former Chief Justice of the Israeli Supreme Court, Justice Agranat, (1980) 10 *Mishpatim* 203), do not result in a requirement of illegal behaviour, which I believe is desirable. It could be said that if 'the risk is reasonable' it would provide the actor with 'a reasonable cause', but it is highly doubtful whether the mere fact that the behaviour is legal would be interpreted as 'a reasonable cause'.

[1286] Special consideration is required here of **the mental element of indifference** ('*dolus eventualis*'), ie, a lack of concern with regard to the possibility that the result required in the definition of the offence may occur. In many legal systems—including the American and the Israeli—the legislator did not distinguish, under the term recklessness, between 'indifference' and 'advertent negligence' (when the actor takes an unreasonable risk hoping to prevent the consequence—see and compare Williams (1983), n 1 above, at 97ff). Consequently, both are usually bound together under one communal heading of 'recklessness'—eg, s 2.02(2)(c) of the MPC; s 20(a)(2) of the Israeli Penal Code, 1977. These legislators suffice with the distinction of recklessness from intent—the more severe—and from negligence—the less severe. Moreover, my opinion is that cases in which offences are committed with indifference are mainly the 'literature' cases. For, in reality, it is very rare for a sane person not to care whether the results defined as a criminal offence will occur or not. Usually he either wishes for them to occur—in which case this involves intent—or wishes them not to occur, even if only to avoid the criminal responsibility. As opposed to this, there are frequent cases of 'advertent negligence', ie, without a desire for the results and with hope to prevent them. Accordingly, there is a practical reason for relating *mens rea* (awareness) as a whole (as distinguished from intent on the one hand and negligence on the other) with the suitable treatment for 'advertent negligence'.

However, if we distinguish precisely between 'indifference' and 'advertent negligence', it is, in my opinion required, at least for our present concern, to subordinate indifference to the arrangement provided for intent, which is very similar to it in its severity and in the anti-social nature it entails. Accordingly, even in the face of indifference—if indeed this rare mental state does exist in a concrete case—there is no need for a significant limitation of the nature of the actor's behaviour in order to impose criminal responsibility on him. The reasons for my opinion were set forth in the discussion of the 'Grand Scheme', and it seems that they are also suitable with regard to indifference, although in this case they have slightly less power. Thus, when faced with the situation of private defence caused by indifference, it is not essential to require illegality of the causative action but improper behaviour will suffice.

Nevertheless, in light of the undesirable obscurity of this term ('improper'), given the rarity of indifference and the frequency of 'advertent negligence' in reality, and given the above-mentioned legal situation that exists with regard to this matter in many legal systems—a lack of a practical distinction between indifference and 'advertent negligence', I maintain that it is possible to waive such a distinction for our matter. If there should be an alteration in the general perception with regard to the mental element of the offence, there will evidently be room for an amendment in this spirit in the arrangement that is proposed here.

An additional desirable qualification of the doctrine—if it is chosen for the arrangement of our issue—concerns offences of negligence. As mentioned, it is possible, by means of the doctrine, to impose criminal responsibility—for an offence of negligence—even on a person who at the time that the situation was caused was only negligent with regard to the subsequent developments, ie, he had not actually foreseen them, but only constructively foresaw them (he could have and should have foreseen them). On the one hand, it could be said that if the legislator established an offence of negligence, his determination should be given full force—by applying the doctrine even when the causation of the situation was carried out by mere negligence. On the other hand, I think that it is necessary to notice that negligence is the exception in the realm of criminal responsibility—which is usually based on *mens rea* (awareness).[1287] It seems that in light of the actor's mere negligence at the earlier stage, emphasis must be placed on the fact that at the second stage the behaviour was justified (within the framework of private defence) and an imposition of responsibility should be avoided. Such responsibility is liable—in my estimation—to be too far-reaching, given the complex sequence of events that led to it (including the previous behaviour of the actor; the fact that it causes an illegal attack by another person who is an adult and sane [the aggressor]; the danger to the person attacked; the need for defensive force; the use of defensive force and its results; and the offence that is involved in this use of force and its results).[1288] Such responsibility is also liable to restrict the person's freedom of action in an unreasonable manner.

A last qualification that should be imposed on criminal responsibility that is founded on the doctrine of *actio libera in causa* is a mitigating circumstance. As we saw previously, the imposition of criminal responsibility by means of the doctrine may deter the actor from using justified force for private defence in a situation of compulsion. Accordingly, it was already suggested there, that when the interest at stake is that of another person (who is not the actor who caused the situation) the court should mitigate the punishment of the actor in order to encourage him to rescue the person attacked from the hands of his aggressor. I wish, moreover, to suggest here that even when the interest endangered is that of the actor himself

[1287] The compatibility of the negligence exception with the principle of guilt is dubious—especially in light of the objectivity test ('the reasonable man') that is accepted in many legal systems—and consequently the justification of the negligence exception is also questionable.

[1288] An interesting opinion is set forth by Silving, according to which the court should be authorised to impose special means aimed to improve the security and education of the person who by his negligence causes the creation of a situation that justifies the use of force. The proposed means are supervision and/or psychiatric care (with the consent of the accused); forfeiture or suspension of a licence to own a weapon or to hold one; educational means; and a prohibition against visits to certain locations or against maintaining a certain association. Silving assumes that the pattern of 'unconscious provocation' is liable to recur for certain people—see Silving, n 45 above, at 390, 394–95. In my view, there is a weighty scientific-empirical question here: does such an inclination exist—to stimulate aggression by negligence—among certain people and is it some form of illness and suitable for treatment and cure? My intuition answers in the negative—at least with regard to the second part of the question.

(who caused the situation by his guilt), the punishment of the actor should be mitigated in comparison to a second actor, who committed the same offence without the justifying circumstances. The main reason for this proposal is that the guilt of the first actor is less than that of the second. I obviously do not relate to the legal classification of his guilt, for even according to the doctrine at the time of the situation's causation awareness is required in order to convict the actor of an offence that requires *mens rea* (awareness). However, it seems that killing a person with awareness is more severe than the causation with awareness of a situation in which the actor is forced to kill—subject to the justifying conditions of private defence—a person who attacks him illegally and endangers his life.[1289] The fact that the main contribution to the creation of the situation of compulsion is that of the aggressor and not that of the actor cannot be overlooked, nor the fact that the aggressor has control of the event, since he has the ability to cease his attack. This statement would indeed not be true in the case of the 'Grand Scheme' (an intentional and advance planning of the entire sequence of events by the actor), but with regard to this special and serious case, no diminution of the actor's punishment is proposed here.[1290]

Before concluding this discussion of the doctrine, a terminological note is required. The accepted name for the doctrine is, as said, '*actio libera in causa*', ie, 'action free at origin'. However, while this name fits the doctrine well when it serves for the imposition of responsibility despite an absence of control—for, indeed, at the second stage there is no free behaviour since it was only voluntary at its origin (at the first stage)—this name is not suitable for the doctrine when it is implemented in our present matter, since control exists in this case at both stages. Another possible name, more suitable, is given to the doctrine in the German legal literature—'*actio illicita in causa*'.[1291] If it is accepted that the previous behaviour should have been illegal, this name will be appropriate for most cases, except those of the 'Grand Scheme' in which there is no place for such a requirement. Perhaps it is preferable to talk about '**compulsion-free behaviour at origin**' or '**behaviour that lacks justification at origin**'.

Finally, it is interesting to note, that in effect even the *Horowitz-Shukrun* rule that was discussed above, given the exceptions of 'breaking the rules of the game' and 'withdrawal', is akin in its results to the application of the doctrine of '*actio*

[1289] It is perhaps possible to base my intuition in this matter on the facts of the *Horowitz* ruling (CA 410/71 *Horowitz v The State of Israel* PD 26(1), 624). The actor was drawn into the fatal conflict by the deceased, who had decided 'to send him to hospital'. If indeed there was room to impose criminal responsibility on him (for my doubts in this regard see the paragraph after the reference to n 1259 above) it seems to me that imposing severe punishment on him would contradict the sense of justice. 'Perhaps'—since it is doubtful, as mentioned, if there was room to impose any criminal responsibility on him at all.

[1290] It could be, as mentioned, that in this matter the rule of intent is also suitable for indifference: see n 1286 above.

[1291] See Herrmann, n 342 above, at 752ff, 760, 769.

libera in causa'. This is so long as a typical situation of a duel is concerned. For the most significant aspect of the breaking of the rules of the game by the opponent, and in the opponent's persistence with his attack despite the 'withdrawal' of the actor, is that they usually negate the prior foresight of the actor with regard to the sequence of events. And in the opposite direction: when duels are involved, these are the typical situations of a lack of prior foresight. Thus, these two arrangements—the *Horowitz-Shukrun* rule with its two exceptions and the doctrine of '*actio libera in causa*'[1292] are, in effect, very similar in their results—even if not in their underlying ideas. However, if a certain improvement on these reasonable solutions is required, I suggest adopting the arrangement to be presented in the Epilogue below.[1293]

5.4.8 Establishment of a Specific Offence as an Alternative Arrangement?

To conclude the discussion of this complex issue, it is necessary to consider an additional—although unaccepted—possibility for a general and systematic arrangement of the issue by enacting a specific offence, which will be specified for the arrangement of the issue and whose focal point will be the prior behaviour of the actor.[1294] Feller, who supported such an option, suggested that the general character of the offence should be one of endangerment, and that it should 'bear a character correlative to the severity of the injury that was avoided, or, perhaps, to that which was caused, by private defence'. Feller posited an opinion that the fact that the main contribution to the creation of the situation is that of the aggressor, and not of the person attacked, constitutes substantial weight for the determination of the severity of this offence. Further, the aggressor has control over the development of the events—a cessation of the attack will make the continuation of private defence against the attack superfluous.[1295]

A significant question, for which Feller does not provide an answer, is whether the severity of such a specific offence should be correspondent to the severity of the injury that has been avoided, or (perhaps) that which was caused by private defence. As we have seen, the accepted approach—that is expressed strikingly both

[1292] As well as the new arrangement in Israeli law—see n 1269 above.

[1293] See s 3 of my proposal, which appears in the Epilogue, at the end of the book.

[1294] Feller supported such an option—Feller, n 14 above, vol 2 at 453–54, 472, 477. Robinson also considered this possibility—Robinson, n 1194 above, at 698ff; and Robinson (1984), n 37 above, vol 2 at 43 (noting that specific offences exist in other legal systems, which were apparently intended to provide a response for some of the cases that arise within the framework of the general issue of causation by the actor of the justifying circumstances for his action).

[1295] Feller did not specify any precise drafting for such an offence, since in his opinion it is not in the general provisions of the criminal law, but in the laws of offences, that these requirements should be noted—Feller, n 14 above, vol 2 at 477.

in the arrangements that deny the actor private defence and also in arrangements which, to some extent, adopt the doctrine of '*actio libera/illicita in causa*'—is that the criminal responsibility of the actor must be a function of the severity of **the injury that was caused** by private defence. However, it is possible, in my opinion, to also support an arrangement of a specific offence whose severity will fit **the danger** to the aggressor that was created by the actor, and not the injury caused in practice.[1296]

The central advantage of such an arrangement is that the goal of deterring the actor at the first stage is achieved, without the undesirable corollary of deterring him from acting in a justified way at the second stage. Since his responsibility should not—within the framework of such an arrangement—be dependent upon the occurrences that took place at the second stage (the situation of compulsion). This involves the imposition of responsibility for the very creation of the danger.

Yet nevertheless—despite the great theoretical reason of such a solution—there is grave doubt as to whether there will be an inclination to impose significant criminal responsibility on an actor who creates such an abstract danger (that is dependent not only on his own behaviour but also on the behaviour of another person—the aggressor) in cases in which the danger does not take place, as, for example, when the potential aggressor avoids perpetrating an illegal attack and the actor is not forced to perform private defence.[1297]

With regard to the first possibility that Feller presents, that the character of the offence is correlative to the injury that was avoided, I think that it is undesirable. Let us assume that the actor caused a great danger for himself, which could be sufficiently repelled by a very slight injury to the aggressor, an injury whose slight severity was foreseen in advance. Is it reasonable that great responsibility be imposed upon the actor although this endangerment does not involve a significant risk for the aggressor?[1298]

[1296] The relevant danger is the expected danger to the aggressor from the actor. It is evidently influenced by the potential, expected danger to the attacked person from the aggressor (the 'attacked person' is usually the actor himself. This is so when self-defence in the narrow sense is involved. When defence of another person is involved, the attacked person is a third person (who is neither the aggressor nor the actor)). Thus, the severity of the offence will be especially great when the actor creates an existential danger for the aggressor. Such a danger is usually created with the creation of existential danger for the attacked person, a danger that usually compels the use of deadly defensive force.

[1297] There are serious general considerations weighing against the creation of wide offences of endangerment. The main consideration is the injury they cause to the individual's freedom of action.

[1298] To illustrate this option, let us imagine two construction workers who are having a vocal argument while they are standing on a lofty scaffold. At a certain stage, the actor slaps his colleague's face, while foreseeing the possibility that his fellow-worker, known for his hot temper, will try to push him off the scaffold. As expected, the hot-tempered one tries to push the actor to his death, but the actor is stronger and also as he had expected, easily prevents the push with no significant injury to the aggressor (eg, gripping him in his arms until he calms down). Is it really reasonable that the criminal responsibility of the actor should have a character correlative to the severity of the injury that was prevented, ie, a person's death?

As to the second option which Feller sets forth, according to which the severity of the specific offence should match the severity of the injury that was caused by private defence, I think that this possibility carries the basic defect which Feller himself warned against: the restriction (in practice) of the right to private defence. Since, if the criminal responsibility of the actor increases in accordance with the severity of the injury to the aggressor that private defence entails, the imposition of this responsibility operates to deter the actor from an action of private defence, a deterrence whose main severe impact finds expression, as we have seen, with regard to the defence of another person.

Finally, I am of the opinion that if the solution of establishing a specific offence is to be adopted—it should be conditioned on the existence of awareness. Negligence should not suffice, for the reasons that have been noted above.

As mentioned, the proposed arrangement for the issue of causing the creation of a private defence situation by the actor's guilty behaviour is presented below in the Epilogue.

5.5 The Defensive Action of Battered Women

5.5.1 General

How should we relate to cases in which battered women injure their abusive partners when the conditions for private defence are not fulfilled? Should the private defence conditions be redefined in order to accommodate these cases as well? It should already be emphasised, at this preliminary stage of the discussion, that there are clearly many cases in which the battered woman acts in accordance with the conditions of private defence; in these cases, there is certainly no difficulty in justifying her behaviour. This chapter does not deal with those straightforward cases.

From a purely theoretical point of view, there is no need to set up a separate discussion of this issue. However, following the extensive consideration of this subject in the last quarter of a century—especially in American law, both in case law and in scholarly literature[1299]—a quite substantial danger of blurring the

[1299] The great interest in this subject probably had its genesis in 1978, following the ruling in *State v Wanrow* (Sup Ct of Wash) 88 Wash 2d 221 559 P 2d 548 (1977) and the article by Schneider and Jordan, n 762 above. Already in 1984—in *State v Kelly* (Sup Ct of NJ) 478 A 2d 364 (1984)—the court noted that there were already at least 5 books and 70 scientific articles and commentaries regarding 'the battered woman syndrome'. See, eg, E Bochnak (ed) Women's Self-Defence Cases: Theory and Practice (Charlottesvill, VA, 1980); Rosen, n 37 above, Taylor, n 1208 above; EM Schneider, 'Preface' (1986–89) 9–11 *Women's Rights Law Reporter* 191; EM Schneider, 'Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering' (1986–89) 9–11 *Women's Rights Law Reporter* 195; LE Walker, 'A Response to Elizabeth M. Schneider's "Describing and Changing . . ."' (1986–89) 9–11 *Women's Rights Law Reporter* 223; J Blackman, 'Potential Uses for Expert Testimony: Ideas towards the Representation of Battered Women who Killed' (1986–89) 9–11 *Women's Rights*

nature and contours of private defence has been created. This danger is not abstract; it is already taking form in American case law. It will suffice at this stage to mention rulings in which battered women who had killed their husbands while asleep were acquitted—on grounds of self-defence.[1300] In addition, there is an argument—which I shall attempt to refute below—that the behaviour of a battered woman should be viewed as a 'test case' of the accepted perception of private defence; a case in which, prima facie, this perception has totally failed.

The main argument that was raised is that the rule of private defence and its conditions are unsuitable for a case of defensive action by a battered woman, and that the reason for this is not the lack of justification of the woman's action, but a basic flaw that exists in the perception of the nature of private defence and its conditions. According to this school of thought, the rules of private defence were developed in order to exonerate a man who kills in order to defend himself or to protect his family in the face of an attack by another man, of similar size and strength, when there is usually only one isolated contact between them (ie, the actor and the aggressor are strangers). A woman differs from a man in size, strength, social status, combat skills, defensive behaviour, and so forth. Since the rules of private defence, such as those concerning the reasonability of the defensive force, are predicated on the assumption that the defender—as well as the aggressor—is a man, the woman suffers from a legal bias. The argument is that two different cultures are involved here (of men and women) and that the law has never accepted the perspectives, the circumstances, and the standards of women, since its framers were all men, who showed understanding and sympathy princi-

Law Reporter 227; B Levinson, 'Using Expert Testimony in the Grand Jury to Avoid a Homicide Indictment for a Battered Woman: Practical Considerations for Defense Counsel'(1986–89) 9–11 *Women's Rights Law Reporter* 239; Schneider and Jordan, n 762 above; Diamond, n 30 above; Self-Defence Review—Final Report—Submitted to the Minister of Justice of Canada and the Solicitor-General of Canada (Chair: Judge Lynn Ratushny, Ottawa, 1997); VF Nourse, 'Self-Defense and Subjectivity' (2001) 68 *University of Chicago Law Review* 1235; Joshua Dressler, 'Battered Women Who Kill Their Sleeping Tormenters: Reflections on Maintaining Respect for Human Life while Killing Moral Monsters' in S Shute and AP Simester (eds) *Criminal Law Theory: Doctrines of the General Part*, Oxford University Press, 2002) 259; Jeremy Horder, 'Killing the Passive Abuser: A Theoretical Defence' in S Shute and AP Simester *Criminal Law Theory: Doctrines of the General Part* (Oxford University. Press, 2002) 283. For references of numerous additional sources see Schneider ('Describing and Changing') *ibid*, at 196 fn 5. For references to other articles and for a review of new American verdicts see the 2002–3 Supplementation to Robinson (1984), n 37 above, vol 2 at 15–19. See also the discussion of the battered woman's syndrome in Kadish and Schulhofer (2001), n 38 above, at 768–85. It is interesting to note that Kadish and Schulhofer devote 18 of 52 pages (35%) concerning self-defence to the issue of the battered woman, and that after dealing firstly with this issue, all the other important issues are compressed together under the title 'Notes and questions on other issues of self-defense'. This is in accordance with the American legal literature on self-defence in the last quarter of a century which deals mostly with this specific issue (ie, a large majority of the articles).

[1300] See, eg, *People v Diaz*, no. 2714 (Sup Ct NY) (1983) which is discussed in Kadish and Schulhofer, n 640 above, at 873 and in Blackman, previous n, at 236 and the additional case law mentioned in Bochnak, previous n, at 46. See also the discussion of the Norman case (*State v Norman* (1988) 89 NC App 384, 366 SE2d 586, reversed (1989) 324 NC 253, 378 SE 2d 8) by Dressler, previous n, at 264–69.

pally for those situations in which they could envisage themselves in the position of the actor and identify with him. By contrast, the violent responses of women were traditionally perceived as hysterical.[1301]

The history of the systematic treatment of this subject is, as mentioned, relatively short. The springboard for the launching of this issue is the ruling in the *Wanrow* case (1977), in which, as we shall see below, the court increased the flexibility of the conditions for justifying private defence and provided legitimisation for arguments regarding sexual discrimination, stating as follows:

> The respondent was entitled to have the jury consider her actions in the light of her own perceptions of the situation, including those perceptions which were the product of our nation's 'long and unfortunate history of sex discrimination'. Until such time as the effects of that history are eradicated, care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in the light of the individual handicaps which are the product of sex discrimination.[1302]

Following this ruling, Schneider and Jordan published an article on this subject, in which they discussed possible ways in which to effectuate the goal of presenting the violent behaviour of women as reasonable during the criminal process.[1303] This article aroused much public attention, and many feminists devoted themselves to what became known as 'women's self-defence work'. A body by the name of the 'Women's Self-Defence Law Project' was established. Theories of the 'battered woman's defence', whose aim was the justification of violent behaviour of the battered woman, were developed.[1304] The many writings on this subject had a significant impact on American courts. Their most important achievement was the recognition of the legal relevancy and admission of expert testimony concerning 'the battered woman syndrome' and its two elements: 'learned helplessness' and 'the cycle of violence'.[1305] These testimonies led to not a few acquittals. This new phenomenon of expert testimony, which gained significant impetus in the leading case of *Kelly* (1984),[1306] will be addressed below in detail.

[1301] For arguments in this spirit see Rosen, n 37 above, at 34; Bochnak, n 1299 above, at 43; Taylor, n 1208 above, at 1679ff, 1697ff; Schneider and Jordan, n 762 above, at 13–18. These arguments are also accompanied by certain statistical data according to which: (1) The rate of married women who suffer from physical abuse from their husbands is higher than it is customary to estimate; (2) A relatively high rate of killing takes place within couples, and in most of them, the husband kills his wife; (3) In killings within couples the number of cases in which the goal of the woman is to defend herself is seven times greater than the number of cases in which the aim of the man is to defend himself—see Wells, n 1299 above, at 127; Taylor, n 1208 above, at 1679ff, 1699; Schneider and Jordan, n 762 above, at 7–8.

[1302] See the ruling *State v Wanrow* (Sup Ct of Wash) 88 Was 2d 221 559 P 2d 548 (1977) at 559. It should be noted that this ruling did not deal with a battered woman, but, rather, with the more general issue of a woman's defensive action.

[1303] See Shneider and Jordan, n 762 above.

[1304] Regarding this feminist work and what it produced see, eg, Schneider ('Preface') n 1299 above; Schneider ('Describing and Changing'), n 1299 above; Rosen, n 37 above, at 14ff, 34ff; Bochnak, n 1299 above, at xv of the Introduction.

[1305] A wider discussion of these theories follows later in this chapter.

[1306] See *State v Kelly* (Sup Ct of NJ) 478 A 2d 364 (1984).

Before proceeding to a critical analysis of this issue, it should be clarified that since our concern is with private defence, the first (and main) part of the analysis is liable to create an erroneous impression of an almost complete denial of the legal relevance of the battered woman syndrome. Yet, as I shall show in the second part of the analysis, the syndrome is indeed very relevant for the matter of criminal responsibility. However, its implications are not necessarily expressed within the realm of private defence, but principally, within the framework of an excuse, whether specially created or existing, or by a significant mitigation of punishment—according to each given case.

5.5.2 The Conditions of Private Defence and the Issue of the Battered Woman

The question of the special consideration that should—according to the argument—be accorded to the defensive force used by a battered woman arises in the face of an action that does not meet the accepted conditions for private defence. The condition whose non-existence is the most frequent is the **requirement of immediacy**. In many cases, battered women killed their partners without any proximity in time to the attacks that their partners committed. This incompatibility with the requirement of immediacy has been highlighted in cases in which men were killed while asleep, and in cases in which women hired professional killers to kill men.[1307] The frequency of these cases led many scholars to view the issue of the battered woman as a particular case of the issue of immediacy.[1308] While addressing the requirement of immediacy, I noted the possibility of justification—under certain circumstances—of a 'pre-emptive strike'. Here it should be noted that killing a person while asleep—even if he is likely to attack when he awakens—is, in my opinion, too early a strike that does not comply with the requirement of necessity in general and the requirement of immediacy in particular.[1309] In fact, the justification of this (too) pre-emptive strike in such cases constitutes, in prac-

[1307] See, eg, the references in n 1300 above; Rosen, n 37 above, at 14 (addressing cases of men who were killed during their retreat-escape; recharging a revolver after three shots and continuing to shoot the man); see also the description of the case of *Gracia* (*People v Gracia* 54 Cal App 3d 61, 54 Cal 275 (1976)), *ibid* at 35 (although it did not involve a battered woman, the case is very interesting for our discussion—the requirement of immediacy: two men raped the accused person and promised to return and rape her again. The accused took a revolver, searched for them, and when she found one of them in the road a few hours later, shot him dead. She was acquitted on the grounds of self-defence). See also the discussion of the Norman case by Dressler, n 1299 above, at 264–69. Contra—Horder, n 1299 above, at 289ff.

[1308] See, eg, the references in n 659 above.

[1309] A possible exception, which is not addressed here, concerns a situation in which the requirements of necessity and immediacy do indeed exist, such as when the attacked person is locked in a room with the sleeping aggressor, who is expected to kill him when he awakes, while the attacked person cannot open the door and escape, and cannot tie up the aggressor or neutralise him by any other means without waking him.

tice, a grant of permission (or even justification) for the man's execution because of his past behaviour, or the behaviour expected from him in the future.[1310] The fact that other methods of action, especially a retreat and an appeal to law enforcement agencies, were open to these actors cannot be overlooked. As Smith points out, women who hired professional killers to kill their husbands do not seem to be helpless[1311] (as mentioned, the learned helplessness is emphasised within the framework of theories that relate to the 'battered woman syndrome').

The case of *Diaz* (1983) serves as a classical example of this matter[1312]. The violent husband of the accused threatened her that if she would not change he would murder their baby daughter. When he was in a deep sleep, the accused shot him with two deadly bullets. The accused was acquitted on grounds of self-defence, notwithstanding that the facts of the case, as the facts of other similar cases, raise questions not only with regard to the requirements of necessity and immediacy (which were not fulfilled), but also with regard to the very existence of real danger.

The issue of the battered woman is, actually, likely to illustrate the great importance of the requirement of immediacy, since it is especially in such situations that it is desirable to encourage recourse to non-violent alternatives and not to choose the course of taking human life.[1313]

This last consideration leads us to an additional accepted condition of private defence that is often discussed with regard to the defensive behaviour of a battered woman, which is **the duty to retreat**. As was noted during the discussion of the duty to retreat, there is an accepted exception to this duty—when the attacked person is at the time of the attack in his dwelling. Indeed, in most cases of the defensive actions of battered women the event takes place in the woman's home—a fact that many scholars highlight in their writings.[1314] However, these scholars ignore the accepted exception to this exception, which is applicable because of the fact that the 'aggressor'-husband also resides in the same dwelling.[1315] The word 'aggressor' was placed in quotation marks, since given the lack of an immediate danger to the woman, which is typical in the cases under discussion, it is doubtful whether there is any room at all to talk about an attack and consequently the question of retreat does not arise at all, since there is altogether no room to use defensive force.

[1310] Such were the opinions of an American court in *State v Stewart* (Sup Ct of Kan) 763 P 2d 572 (1988)—see Kadish and Schulhofer, n 640 above, at 871; and of Smith, n 91 above, at 116–17.

[1311] See Smith, n 91 above, at 116–17.

[1312] See *People v Diaz,* no. 2714 (Sup Ct NY) (1983); see also the references in n 1300 above.

[1313] Perhaps even more powerful than the force of words would be the power of the painting that was presented—for some reason—in the collection of articles on the subject of our discussion that was collated in vol 9–11 of the Women's Rights Law Reporter (1986–1989) (*ibid* at 257), in which a woman is seen chasing after a man in flight from her, while she is brandishing a knife in her hand and leaning towards him ready to stab him in the back.

[1314] See, eg, Bochnak, n 1299 above, at 46–48; Wells, n 1299 above, at 127.

[1315] See the text accompanying nn 1059–61 above (including the different approach of the MPC—n 1061 above).

It is common to link the duty to retreat with the woman's inability—because of her psychological state, social standing and so forth—to separate from her husband and leave home. Accordingly, the fact is emphasised—inter alia by means of expert testimony, which will be discussed below—that the beating of the woman was arbitrary and did not stem from any guilt on her part, given her inability to sever the contact with her husband.[1316] This argument constitutes a break-in to an open door. For nobody suggests viewing the fact that the woman did not separate from her husband during the period of beatings that preceded the tragic incident as causing the situation of compulsion by prior guilt of the actor. As we saw in the previous section (5.4), such causation accompanied by guilt is not even relevant when in the situation of compulsion itself the conditions for private defence did not exist in any case. The question is not why did the woman not leave the home on each of the occasions that she had the opportunity to do so during the long period of the beatings which preceded the tragic event, but why did she kill her husband in the absence of necessity in general and immediacy in particular, or—when an immediate severe attack was expected from the husband—why did she avoid retreating from home at the relevant time (prior to killing her husband).

An additional main condition for the justification of private defence, which American case law often tends to erode when the defensive behaviour of a battered woman is involved, is the **proportionality requirement**. In the decisive majority of the cases that are the subject of our discussion, women used deadly force even when the severity of the danger they faced was not even close to that level[1317]. Yet American courts occasionally tend to subjectify to no small degree the objective requirement of proportionality. The Supreme Court of Washington, for example, abolished a (correct) instruction that the court of the first instance issued to the jurors in the case of *Wanrow,* according to which a deadly weapon should not be used against a person who is unarmed unless there is a reasonable cause to believe that there is an immediate severe danger to the attacked person, reasoning that women in our society are not skilled in repelling aggressors without the use of arms.[1318]

[1316] See, eg, Bochnak, n 1299 above, at 46–48; Taylor, n 1208 above, at 1704.

[1317] This is also the assessment of Rosen—see Rosen, n 37 above, at 43. It is interesting to note that this conclusion is actually likely given the previous beatings, if—as in most cases—none of the previous beatings was accompanied by deadly force. With regard to this matter, my opinion is that using experts' testimony and stressing the many previous beatings may constitute a double-edged sword, as I shall explain below.

[1318] See the ruling in *State v Wanrow* (Sup Ct of Wash) 88 Wash 2d 221 559 P 2d 548 (1977). It should be clarified and emphasised that the question here is not one of necessity but of proportionality. It should also be noted that sometimes it does not only concern the subjectifying of the objective requirement of proportionality, but, in effect, a waiver of the requirement of proportionality or—at least—a significant erosion of it. This occurs when a woman does not even have a (mistaken) belief in the existence of a severe danger.

In Canada, a committee report that addressed the defensive actions of battered women was published in 1997. Alongside other alternatives for treatment of the problem—especially in the punishment setting—the report also suggests changing the definition in the law of self-defence to the effect of

These and other distortions of private defence and its conditions, through which it would be possible to justify unjustified actions, earned, as expected, much criticism. Concerns were voiced regarding a loss of deterrence value, legitimisation of revenge by providing a 'license to kill', a 'male hunt', and justification of the use of force—including deadly force—every time that the actor believes subjectively that its use is necessary and proportionate.[1319] To these concerns should be added the fear of curtailing the requirements of necessity and proportionality, not only when the actor is mistaken in thinking that they exist, but even when the actor himself does not believe in their existence, to the effect of full justification of his action.

These concerns are especially conspicuous against the backdrop of arguments for many other syndromes, which sprang up like mushrooms after the storm of the battered woman syndrome. Arguments were raised regarding the actual existence and relevance of an advanced old-age syndrome; the Vietnam War veterans syndrome; the battered child syndrome; the battered person syndrome; and the premenstrual syndrome.[1320] These many potential syndromes indicate the danger in breaking down the boundaries of private defence in light of the battered woman syndrome.[1321]

5.5.3 Expert Testimony Regarding 'The Battered Woman Syndrome'

Prima facie, there is no room within the present framework for a discussion of the admissibility of expert testimony regarding the 'battered woman syndrome', since our concern is not with rules of evidence but with substantive criminal law.

specifying circumstances which will be relevant for the evaluation of the reasonableness of the defensive force, such as: the defender's background, including previous abuse that she had endured; the history of the previous relationship between the defender and the aggressor, including previous acts of violence or threats; the age, race, gender and mental and physical characteristics of the defender and of the aggressor. See the report, Self-Defence Review—Final Report—Submitted to the Minister of Justice of Canada and the Solicitor-General of Canada (Chair: Judge Lynn Ratushny, Ottawa, 1997) and the draft law included therein. This draft was also included within the framework of the 'Consultation Paper', Department of Justice, Canada, Reforming Criminal Code, Defences: Provocation, Self-Defence and Defence of Property—A Consultation Paper (Ottawa, 1998) and included an invitation for readers to respond.

[1319] See, eg, Rosen, n 37 above, at 15, 33, 44; Taylor, n 1208 above, at 1705 (it is interesting to note that this writer attributes such claims to anti-feminism); Smith, n 91 above, at 47; Kadish and Schulhofer (2001), n 38 above, at 770–73.

[1320] See Kadish and Schulhofer (2001), n 38 above, at 775; Diamond, n 30 above, at 690–93; Rosen, n 37 above, at 15–16; the 1998 Supplement to Robinson (1984), n 37 above, at 10 (regarding vol 2, p 71 fn 4).

[1321] It is interesting here to mention the words of one of the judges, who referred to a request by the defence to have an expert testify with regard to the 'Holocaust syndrome' in *Werner v State* (Tex Crim App) 711 S W 2d 639(1986) at 645. According to the judge, there already exist the battered woman syndrome, the battered child syndrome, the battered husband syndrome, the battered parent syndrome, the battle-weary syndrome, the police officer syndrome, the holocaust syndrome and certainly additional syndromes will be added tomorrow, such as the syndrome of the appeal court judge. See also Kadish and Schulhofer (2001), n 38 above, at 775.

However, viewing these expert witnesses as relevant is often connected with the erosion of the basic conditions for the establishment of private defence.

As Schneider notes, the main purpose in bringing expert witnesses into our discussion is to demonstrate the reasonability of the battered woman's violent action.[1322] The professionals who usually testify on this matter are psychologists and psychiatrists. The leading expert witness in this matter was Dr Walker, who presented two theories before the courts: the first—'the cycle of violence', and the second—'learned helplessness'. These theories were designed to provide the basis for the 'battered woman syndrome'. The definition offered for a 'battered woman' is based on the fact that the couple have at least twice passed through the 'cycle of violence', that is composed of three stages: an argument; physical violence; regret and reconciliation.[1323] The 'learned helplessness' is based, inter alia, on the fact that agencies—including the police—do not provide sufficient protection for the woman, on economic needs, on the desire to maintain the unity of the family, on fear relating to society's reaction, and on fearing the husband.[1324]

The main question regarding the matter of expert testimony is its actual relevancy. A number of versions exist with regard to the legal questions for which such evidence may be relevant. The main question for which there is quite wide consensus regarding the relevancy of this testimony is: why did the woman not abandon the home before the tragic event? An American court, for example, in the significant *Kelly* case (1984), held that the decisive factual question, for which expert testimony is important, is why did the woman not leave her husband.[1325] However, in my opinion, this question is completely inconsequential for the establishment of private defence. There is no doubt that the battered woman is entitled to stay in her home despite the beatings. The only relevant question regarding her departure from her home is why at the time of the tragic incident itself she avoided going out of her home (as required, inter alia, by the duty to retreat) instead of resorting to deadly force. Another question—which is indeed liable to render the expert testimony relevant—is why did the woman **fear** that she would suffer immediate serious injury, even though no such danger existed in reality. Indeed, experts' testimonies often focus on an attempt to answer this last question. It is, however, necessary here to note that this case, in effect amounts—at most—to putative private defence, which although it enables the provision of an excuse to the actor, does not constitute real and justified private defence[1326].

[1322] See Schneider ('Describing and Changing'), n 1299 above, at 198.

[1323] See, eg, the leading ruling *State v Kelly* (Sup Ct of NJ) 478 A 2d 364 (1984); Walker, n 1299 above; Rosen, n 37 above, at 39; Schneider and Jordan, n 762 above.

[1324] See, eg, Schneider and Jordan, n 762 above, at 7–8; Diamond, n 30 above, at 693; Taylor, n 1208 above, at 1706.

[1325] See *State v Kelly* (Sup Ct of NJ) 478 A 2d 364 (1984). Similarly Schneider notes that the syndrome explains why the woman avoided leaving and not why she acted as she did—see Schneider ('Describing and Changing'), n 1299 above, at 216.

[1326] Regarding putative private defence see section 5.2 above.

However, it should be noted that expert testimony regarding the battered woman syndrome is liable to serve as a double-edged sword with regard to her defence. For example, when the court in the case of *Kelly* emphasises the 'experience' accumulated by the woman in the seven years during which she was beaten about once a week,[1327] it is difficult to escape the impression that the many beatings in the past were actually liable to demonstrate to the woman that the present beating does not constitute a severe danger to her that justifies deadly force. For in all the previous beatings, she was not exposed to serious danger, and there was no indication that the next beating would be different.

The third main question on which it is sometimes claimed that expert testimony can shed light relates to the very existence of severe and immediate danger. This question may arise in a different disguise, when a certain legal system requires reasonability of the mistake as a condition for the grant of an excuse of putative defence.[1328] In such a case, the irrelevance of the expert testimony is evident. If a defence bearing a character of an 'excuse' or a reason for a mitigated sentence is involved, it would have significant relevance, and, subsequently, I shall relate to these options. However, within the framework of the 'justification' of private defence, this evidence has no real relevance. It is difficult to reconcile the killing of a sleeping person with the existence of severe and immediate danger. Moreover, as noted above regarding putative private defence, so too—and perhaps with more vigour—the expert testimony may serve as a double-edged sword when real private defence is concerned. The many beatings in the past may demonstrate that the present danger is not existential and immediate. In order to remove any doubt, it should be noted that such severe danger is required only in the case of a deadly action by the woman, for if she relies on moderate force, then private defence is not conditioned on the existence of severe danger, and it is reasonable to assume that her action would be completely justified.

The test—from the realm of evidence law—that established the recognition of expert testimony in the United States courts, and accordingly has implications for the present matter, was decided in the *Frye* case (1923). According to this test, the research must be at an advanced stage and must have gained sufficient recognition from the relevant scientific community.[1329] The *Frye* rule was overturned in the case of *Daubert* (1993).[1330] However, even before this, in the *Kelly* case (1984), the court highlighted the multiplicity of publications that then existed on the subject (five books and about 70 articles and commentaries) and based its decision almost

[1327] See *State v Kelly* (Sup Ct of NJ) 478 A 2d 364 (1984).

[1328] See, eg, Kadish and Schulhofer, n 640 above, at 864.

[1329] See *Frye v U.S.* 293 F 1013 (1923), and see, eg, Kadish and Schulhofer, n 640 above, at 869.

[1330] See *Daubert v Merrell Dow Pharmaceuticals, Inc,* 113 S Ct 2786 (1993); see also, Andre A Moenssens, James E Starrs, Carol E Henderson, and Fred E Inbau, *Scientific Evidence in Civil and Criminal Cases*, 4th edn (New York, 1995) at 13–18.

exclusively on this fact.[1331] Criticism was expressed in this regard, and there were courts which did not allow expert testimony on this matter. Thus, two streams developed regarding this matter in American adjudication.[1332] Moreover, there is also a claim that the scientific validity of Walker's above-mentioned theory in respect to the 'battered woman syndrome' has not been proven, since the theory is illogical, suffers from serious methodological problems and does not explain why the battered woman attacks her husband when she does. Inter alia, this sharp criticism is based on Walker's own book, according to which the theory is quite tentative, and she herself feels uncomfortable with the decisive significance that has been attributed to her words.[1333]

English courts are more cautious in accepting psychiatric testimony, in light of their perception that apart from the case of insanity, the trier of fact is the most suitable body to assess the reactions of criminal defendants. Accordingly, Smith maintains that developments in the spirit of American case law are not expected in English law.[1334]

To conclude this consideration of experts' testimony, it should be emphasised that the problem that it raises deviates from evidence law and concerns the substantive law itself. Their relevance is limited to defences of excuse and to the mitigation of punishment, and they do not contribute to the question regarding the existence of the conditions for private defence as a justification.

5.5.4 The Rationale of Private Defence and the Issue of the Battered Woman

What can and should be deduced from the rationale for private defence as to the relevancy of the 'battered woman syndrome'? What can and should be learned from the syndrome itself with regard to its desirable legal implications? If we examine the three factors that underlie the justification of private defence—ie, the

[1331] See n 1299 above.

[1332] Kadish and Schulhofer, in the recent edition of their book (Kadish and Schulhofer (2001), n 38 above, at 773) note that today the admissibility of expert testimony on the battered woman's syndrome is 'overwhelmingly accepted by courts and legislatures'.

[1333] Most of the above-mentioned points of criticism are mentioned in Kadish and Schulhofer, n 640 above, at 868ff; see also Kadish and Schulhofer (2001), n 38 above, at 773ff; see also Taylor, n 1208 above, at 1706ff.

[1334] See Smith, n 91 above, at 116–17. It is possible that certain seeds of change in the approach of the English courts can be found in *R v Thornton* (1992) All ER 306 (determining, with regard to the element of provocation, that the history of previous beatings should be taken into account for the purpose of deciding the question whether in the specific case the accused had lost control) and *R v Ahluwalia* (1992) 4 All ER 889 (not denying the possibility of hearing testimony on the battered woman's syndrome within the discussion of a provocation (albeit it did not actually accept such testimony, since it was not presented)). However, these two cases did not involve the recognition of expert testimony as relevant to the existence of private defence, but they were concerned, rather, with a different legal issue.

autonomy of the person attacked, the guilt of the aggressor and the social-legal order—we shall see that the syndrome is not relevant for any of them.[1335] Moreover, most of the cases in which the syndrome is raised, are not situations of compulsion at all—either because of the absence of a real danger or because of a lack of immediacy of the danger. Even in the few other cases in which there is a need for the syndrome and in which a situation of compulsion does exist, the rationale for private defence does not support the justification of the use of deadly force, since given the absence of necessity or proportionality the exercise of force violates the social-legal order.

If private defence is perceived—as is suggested in this book—as justified, then the inclusion of these cases within its purview implies the granting of a right to the battered woman to kill her husband, even when he is in a deep sleep. It seems that the comparison that was made between such a state of affairs and an execution was not exaggerated.[1336]

In many cases—although not always—the solution is to be found in the realm of putative private defence. Indeed, when the mistaken belief of the actor is the focal point, the syndrome and the testimony of experts may be relevant (although the possibility of a two-edged sword, as mentioned before, should also be noted). Sometimes there is confusion in Anglo-American law between putative defence and the real one, and the putative defence is treated as if it was real and justified for all purposes, instead of sufficing with the grant of an excuse.[1337] Given the difficult situation in which the battered woman finds herself, it is common to ease the conditions of putative defence. Such flexibility may be acceptable within the framework of an excuse, but when it expands the scope of applicability of the justification, this is too far-reaching.

A rare analysis of the issue of the battered woman with awareness of the character of private defence as a justification was carried out by Rosen.[1338] Rosen argues that the desirable characterisation of 'the defence of the battered woman' is one of an excuse and not of a justification. She notes that the feminist writers do not rely on the consideration of the woman and her situation (an excuse) alone, but demand full recognition of the legitimacy of her action as a justified act

[1335] There are even those who hold that the correct policy when marital partners are involved—even more than in regular cases—is not to encourage violence. Thus, eg, in German law, it is common to limit the defensive behaviour of the actor against a relative on the basis of the doctrine of 'abuse of right'—see Fletcher, n 37 above, at 98; Kremnitzer, n 10 above, at 193 fn 44.

[1336] Kadish and Schulhofer raise the following questions 'If 'a person of ordinary firmness' can reasonably believe it is necessary to shoot her husband in his sleep, why is it unreasonable for her to enlist the help of a third party in catching him unawares?'; 'Would the neighbor who helps her have a defense as well?'; [and if she hires a hit man to do the job] 'should the hit man have a valid defense?'—see Kadish and Schulhofer (2001), n 38 above, at 781—82. In my opinion, if we feel that the act of the third party should not be justified, this is an additional indication that the act of the woman herself should not be justified, but only—at most—excused.

[1337] As we saw in Chs 2.2 and section 5.2.2 above.

[1338] See Rosen, n 37 above.

(justification). They fear that being satisfied with an excuse would lead to a perception that women are irrational by nature. Rosen responds to this correctly, that such an excuse would not negate justification of actual private defence in suitable cases, and that men who act on the basis of a mistake are also only granted an excuse. She further notes that the main shortcoming in insisting on viewing the action of the woman as justified private defence is that in the absence of severe immediate danger the woman will remain without any legal defence at all, while in order to be granted an excuse it is sufficient to point out the 'disability' of the woman,[1339] for the conditions of an excuse are—by nature—more comfortable in comparison to the conditions of justification. I agree with the crux of this analysis.[1340]

5.5.5 The Suitable Solution for the Issue of the Battered Woman

What, then, is the suitable solution for the problem of battered women? Firstly, it should be noted that even the basic accepted rules of private defence allow for the special circumstances of a given case to be taken into account and do not dictate their being overlooked. Thus, when evaluating necessity, the relative strengths of the parties, which on occasion are connected to their gender, should be taken into account. Previous violence of the aggressor is also definitely relevant in an assessment of the danger[1341] (although, as mentioned, there is also a possibility that it may serve as a two-edged sword). The woman's refraining from separation from her husband before the deadly incident is irrelevant and should not be used against her—clearly distinguished from her lack of action to exhaust a path for a safe retreat at the time of the tragic event itself. Even when the rules restrict the woman's action, I maintain that they are desirable. This is the case when immediacy of the danger is required, and in its absence a choice of the more desirable alternative is required, such as leaving home and appealing to law enforcement authorities. Likewise, the rule that bars the use of a deadly weapon against a person without a weapon unless [there is a reasonable basis to believe that] immediate severe danger exists ought to be endorsed, given the great value of human life.[1342]

Secondly, in many cases the battered woman would be excused from criminal responsibility within the framework of putative private defence—if indeed she

[1339] *Ibid*, especially at 12, 17, 42–44.

[1340] However, I must reiterate my reservations with regard to Rosen's suggestion that accompanies this analysis: to convert all the cases of private defence into cases of 'excuse' in order to encompass the case of the battered woman within this category (*ibid* at 45ff). This suggestion has already been rejected in a reasoned way within the broader discussion of the rationale of private defence—see Ch 1.4 above and especially in the text accompanying nn 168–71.

[1341] See, in this spirit, the words of the American court in *State v Wanrow* (Sup Ct of Wash) 88 Wash 2d 221, 559 P 2d 548 (1977).

[1342] A rule that was rejected by the American court in the case of W*anrow*—see n 1318 above and the accompanying text.

acted because of a mistake that she made regarding, for example, the estimation of the danger and its immediacy.

Thirdly, in many cases, it is possible to significantly mitigate the punishment of the battered woman, and even to excuse her from responsibility, within the general arrangement of deviation from the conditions of private defence. In American law, for example, use was also made of the doctrine of 'imperfect self-defence' for the present matter.[1343]

Fourthly, there could be room—as several writers suggested—to enact a special defence against criminal responsibility, with a character of an 'excuse', which would apply to the matter under discussion, or to apply existing defences of excuse to this case—in legal systems in which existing defences can be used for this matter[1344]. Other options are to provide for diminished responsibility by law, or to define a special mitigating circumstance by law for this matter.

The Israeli legislator has recently taken this last route, by adding section 300A(c) to the Penal Code ('diminished punishment'), according to which:

> [D]espite what is said in section 300 [the offence of murder, which carries mandatory life imprisonment—my clarification, BS], it is possible to impose a lighter sentence than that which is therein determined, if the offence was committed in one of the following: . . . (c) **when the accused was in a state of severe mental distress, because of severe and continuous abuse to him or one of his family, inflicted by the person whose death was caused by the accused.**[1345]

It seems that this partial solution, which relates solely to the offence of murder and is limited to a grant of discretion to the court without any real instruction for its implementation, was tailored to accommodate two cases that in recent years brought the subject of our discussion to the consciousness of the broader public in Israel. In the first case, against the backdrop of years of violent behaviour by the father toward the members of his family and especially toward his wife, the son—

[1343] See, eg, Taylor, n 1208 above, at 1697–720; and section 5.3 above. Perhaps it is possible to observe a tendency to adopt such a solution in the Israeli ruling in the *Gerjitski* case, in which a battered woman who had strangled her husband to death after he was already lying wounded and helpless on the ground, was sentenced to only four years imprisonment.

[1344] See, eg, the proposal of Bochnak not to subject the 'battered woman's defence' to a single legal source—Bochnak, n 1299 above, at 42; the suggestion of Taylor, n 1208 above, to employ the doctrine of 'imperfect self-defence' or the category of 'heat of passion' while adding the cause of fear, alongside the accepted cause of anger, for this category. It is interesting to note that Taylor sees this last category as more respectful of women in comparison to 'imperfect self-defence'. My feeling is actually the opposite. An interesting suggestion was raised by Dressler. In his opinion, the solution for the problem is an excuse defence, ideally a broad version of duress, or a residual excuse defence that exculpates actors who lack a fair opportunity to understand the attendant facts or law or to conform their actions to the law's dictates—see Dressler, n 1299 above, especially at 275–81. But see contra—Horder, n 1299 above, at 295ff. Horder demonstrates that duress (threats) is not a suitable defence for our case, since duress involves at least three persons.

[1345] S 300A(c) of the Israeli Penal Code 1977 as provided in Amendment no 44 (1995). To complete the picture, see also s 300A(b) and s 35A ('mandatory punishment and mitigating circumstances') of the Code, which were also established as part of the same Amendment.

Shuki Basso—shot his father dead. After filing a charge of murder, the prosecution announced its intention to replace the indictment for murder with an indictment for manslaughter. This change enabled the court to sentence the defendant to ten years imprisonment instead of life imprisonment.[1346]

In the second case, with a background of a long history of abuse by the husband of his wife—Carmela Buchbut—during the 24 years of their marriage, including beatings, wounding, terror, intimidation and humiliation, the wife took the rifle of her soldier son, shot her abusive husband and killed him. The district court sentenced the wife, after convicting her of manslaughter (and not murder), of which she had been accused, to seven years imprisonment. The Supreme Court mitigated her punishment to three years imprisonment.[1347] The approach of Justice Dorner should be noted. She laid blame for the prolonging of this situation of abusive husband and battered wife, not only on those people who knew and kept quiet about it, but also to the indifference of society and law enforcement authorities that did not intervene to a necessary degree. Nevertheless, Justice Dorner also held that there was no room to release a person who had taken human life from actual punishment, and she therefore agreed with Justice Bach that the suitable punishment for this case was three years imprisonment.[1348]

I shall conclude with an analogy from the argument that private defence and necessity should not be enlarged to apply additionally to interrogations conducted by the security services. Rather, a special defence should be preferred (while

[1346] The ruling (Tel Aviv District Court) 416/93 *State of Israel v Basso* PM (1994) (3) 281.

[1347] See the rulings (TA) 29/94 *The State of Israel v Buchbut* PM (1995) (1) 272 (in the District Court) and CA 6353/94 *Buchbut v The State of Israel* PD 49 (3) 647 (in the Supreme Court).

[1348] *Ibid.* at 655–56.

The case of Carmela Buchbut is dealt with in George P Fletcher, Self-Defense of Battered Women' (1997) 6 *Plilim* 65, which was published in Israel in the Hebrew language, and even though it entails no innovation in comparison to his previous writings, a number of comments are necessary. **Firstly**, Fletcher's suggestion for a solution to the problem of injury by battered women of their abusive partners was to create self-defence of an excuse type, alongside the accepted defence of a justification type. This is only a partial solution, since for some of the cases it would be more suitable to grant a significant mitigation of the punishment instead of a complete excuse. **Secondly,** Fletcher asserts that even when an excuse is involved, such as putative private defence, reasonability (of the mistake) should be required as a condition for the grant of an excuse (at 79–80). On the basis of such a rigid requirement the actor would be assigned the severe offence of *mens rea* (awareness) even if he was negligent—see also on this matter section 5.2.3 above. **Thirdly**, Fletcher wishes to enlighten us that in effect Carmela Buchbut acted in accordance with the accepted conditions for self-defence. For this purpose he claims, time and again, that a moment before the deadly shooting her husband came toward her, apparently, with a knife in his hand (at 72), and in another description that he went after her into their son's bedroom, with a knife in his hand (the article at 68). However, the facts of the case—in the findings of both the District Court and also of the Supreme Court—do not include the holding of a knife just prior to the shooting. **Fourthly**, Fletcher purports to describe Israeli law, but errs grossly in the description. This is so, eg, when he writes that Israeli law is close to American law in that the approach is subjective and that the subjective belief of the actor is sufficient even if the objective elements of self-defence do not exist (at 80). Thus, eg, when he analyses the definition of self-defence in s 34j of the Israeli Penal Code 1977 and reaches the far-reaching conclusion that Israeli law does not demand the condition of proportionality (at 77). However, s 34p that deals with 'a deviation from reasonability' explicitly entails this demand.

remaining aware of the existence of this special defence) to a distortion of the conditions of the compulsion defences.[1349] I maintain that if the existence of the battered woman syndrome is indeed proven, then it is necessary to appeal to experts' testimony and to accord relevancy to this syndrome for the criminal responsibility of the battered woman. Yet this should be done by suitable means, as suggested above. Distortion of the conditions of private defence in order to arrange this issue in particular within its purview should be avoided.

Beyond the serious moral and legal difficulties in justifying a killing of a sleeping person, hiring murderers to perform a killing, or running after and killing a person despite his attempt to escape, we must bear clearly in mind the very serious danger involved in breaking the boundaries of private defence, which encompasses much more than the very sad case of the battered woman.

[1349] See Ch 3.7.3 above.

Epilogue: The Proposed Law

My view regarding the desirable arrangement for each of the issues of private defence, which has been crystallised in light of the rationale of private defence while drawing inspiration from comparative law, is detailed throughout the above discussions. This last chapter addresses the question of how to draft the desirable law.

Three main approaches may be implemented for this matter. The first—setting out the rules, the exceptions to them, and perhaps the exceptions to these exceptions, in the greatest possible detail in order to obtain the legislature's maximal guidance. An example of this direction (including the determination of exceptions to the exceptions) is provided by the arrangement of private defence in the Model Penal Code of the American Law Institute.[1350] A second option is to outline only the general principles in the statute, while leaving the work of determining their content to the courts. A typical example of such an approach is provided by the treatment of the basic requirements of necessity and proportionality under one common umbrella—the reasonability test—as is expressed in the new Israeli Penal Code.[1351] In between these two approaches stands an intermediate approach, according to which both the general principles and particular (but limited) details regarding them should be provided by statute.

On the one hand, I maintain that actual and substantive statutory guidance is essential.[1352] Even if it is claimed that the law has only a limited ability to guide the behaviour of an individual who is in a situation of compulsion, there is still no reason to abandon an attempt to do so. Although the general part of the law and not a specific offence is involved, criminal liability is at stake. Accordingly, the prior arrangement of the rules of private defence by the legislator is of great

[1350] See ss 3.04–3.06; 3.09; 3.11 of the MPC. For a criticism of this excessive detail and the complications and confusion which it entails—beyond the criticism that was already presented in the various chapters of this book—see Heberling, n 62 above, at 945; see also the admission of the drafters themselves in the explanatory wording to the MPC Tentative Draft No 8 (Philadelphia, 1958) at 29.

[1351] S 34p of the Israeli Penal Code, 1977 as established in Amendment no 39 (1994). Another example is article 3 of the (English) Criminal Law Act 1967– see section 2.2.1 above.

[1352] For similar approaches, which focus on opposition to relying only on a general criterion of 'reasonableness' and which support the provision of better guidance by the legislator, see Ashworth, n 183 above, at 287, 306–7; Smith, n 91 above, at 109, 112–14; Lanham, n 228 above, at 241; Heberling, n 62 above, at 947. For support of the general criterion of 'reasonability' see O'Regan, n 577 above, at 94–95.

significance.[1353] Moreover, the main significance of the legislator's guidance in this matter is in instructing legal scholars in general and judges in particular. Relying upon the determination of general rules alone may even lead to contradictory decisions and the introduction of policy considerations that the legislator did not intend or that do not comply with the purpose of the legislation.

On the other hand, I am of the opinion that excessive detail in the statute creates a cumbersome and inflexible arrangement, which—quite paradoxically—is even lacking.[1354] For in the face of many different cases described in great detail, the inevitable overlooking of other cases creates a deficient picture. The inevitability stems from the impracticability of specifying all the possible cases within the law itself, and also from the well-known nature of reality which exceeds all imagination. Consequently, alongside the desirable guidance, a certain flexibility is also essential.

Accordingly, between these two extreme paths, it is suggested that an intermediate course should be taken, of statutory provision for the general principles alongside a certain (but limited) amount of detail for these principles. This choice of the intermediate way constitutes only a starting point, since it does not provide a precise solution to the question of what should be the contour of the desirable 'golden mean'.

In general, the optimal contour is establishing the conditions of private defence explicitly in the statute, alongside an open list of considerations that the court should take into account in assessing the existence of the central and problematic conditions. This list of considerations, to be explicitly mentioned by statute, should only include the most important and frequently occurring cases, and should not digress into casuistry and complexity.

This leads to my concrete proposal. A few comments should be made before its presentation. Firstly, the discussion throughout this book of each and every issue of private defence constitutes an explanatory wording for this proposal. Secondly, the scope of the following proposal is undoubtedly greater than that of other proposals that have been suggested. However, it is possible to point to proposals with a far larger scope, the main one being the Model Penal Code, within which the arrangement for private defence—without including the deviation from its conditions—spreads out over no less than nine and a half pages of legal provisions.[1355] In my view, adoption of an intermediate legislative approach, which was noted above, dictates the proposed average scope of the arrangement. The third and last comment relates to the significance of the following proposal. It should not, in my opinion, be viewed as an epitome of this study, or even as its highlight. It is not the drafting of the law that constitutes the main point of emphasis, but rather, the

[1353] See Ch 1.2 above.

[1354] Regarding the disadvantages of too much detail in the statute—see Robinson (1984), n 37 above, vol 2 at 88, 95; Ashworth, n 183 above, at 306.

[1355] See ss 3.04–3.06; 3.11 of the American MPC.

precise content that is ascribed to each and every one of the conditions of private defence. Regarding most of them, as noted, there is quite a widespread consensus with respect to their very existence, but not with respect to their content.[1356] I shall now proceed with the presentation of my proposal.

The Proposed Law

1 Private Defence

a. A necessary and reasonable act[1357] that is performed by the actor against an aggressor who is criminally responsible for his attack, with the purpose of repelling or avoiding the attack, which immediately endangers the life, liberty, body or other legally protected interest of the actor or of another person, is not an offence (alternatively: it is a justified act).
b. The assessment of the **necessity** of the actor's act should be made objectively. For this purpose the court will consider the entire circumstances of the event, and **inter alia**, take the following considerations into account:

   (1) Reasonable and less harmful ways of action which were available to the actor in order to repel the attack or to avoid it, including: a safe retreat from the scene of the event or a waiver of the threatened property or severing contact with the aggressor in another way (or—when protection of another person is concerned—persuading the person attacked to do so); a demand that the aggressor cease his attack or a warning to him to do so; refraining from resistance to an illegal arrest when the actor knows that the arrest is being performed by a law enforcement officer, on condition that the arrest does not endanger the body of the person attacked; sufficing with more moderate force.
   (2) The defensive act of the actor was carried out in his dwelling (including a temporary dwelling) which is not the dwelling (including a temporary dwelling) of the aggressor.

[1356] Regarding the character of a defence to criminal responsibility, which naturally also includes general elements with flexible content, leaving significant discretion to the courts and requiring interpretation—see the above text accompanying n 35.

[1357] The assumption is that the penal code entails the general accepted provision, according to which an 'act' includes an omission as well, if not stated otherwise (eg, s 18 of the Israeli Penal Code 1977). In the absence of such a general rule in a penal code, it is necessary to add a specific reference to an omission in the definition of private defence (' a necessary and reasonable act or omission by the actor').

(3) The balance of power between the actor and the aggressor, including their physical strength, their positions, equipment, capabilities, and skills.

c. The **reasonability** of the actor's act should be assessed objectively. The reasonability is negated if the damage expected from the act is beyond all proportion in comparison to the damage to be expected from the attack that the act was intended to repel or to prevent.

The use by the actor of **deadly force** (force which creates a real danger of death or severe bodily harm) shall be considered as unreasonable unless it is exercised in order to defend the life, or physical and mental health and integrity of the person attacked, or if it is performed in order to prevent the rape of the person attacked or a significant injury to his liberty. In assessing the reasonableness of the actor's act, the court will take into account all the circumstances of the event and, **inter alia**, the following considerations:

(1) The defensive action of the actor was performed within his dwelling (including a temporary dwelling) which is not the dwelling (including a temporary dwelling) of the aggressor.
(2) When the danger is merely to property:

(a) The possibility of receiving subsequent compensation with the assistance of state authorities.
(b) A genuine claim of a legal right in the asset held by the aggressor.

(3) The probability that damages might occur—both the damage expected as a result of the attack and the damage expected as a result of the actor's act.
(4) The possibility of reducing the damage that is expected from the attack by means of a safe retreat from the scene of the event or severance of contact with the aggressor in another manner.

d. The **immediacy** of the danger should be assessed objectively. It is negated when the danger is not sufficiently proximate and when the attack ceases. In the assessment of the immediacy of the danger, the court will take into account all the circumstances of the event and, ***inter alia***, the following considerations:

(1) A reasonable possibility of delaying the action until a later time.
(2) Continuation of the aggressor's attack by continuing to hold the asset soon after its seizure, and when the actor's dwelling is concerned—soon after the actor has found out about the seizure.

2 Deviation from the Conditions of Private Defence or from the Conditions of Putative Private Defence

a. If a person commits an offence with the purpose of private defence, but deviates from the conditions determined in section 1 [private defence] or in section 4 [putative defence], the court will mitigate his punishment, even if the punishment established for the offence is mandatory.
b. In the sentencing decision, the court should also consider the special mental state to which the actor was subjected as a result of the attack, such as fear, horror, embarrassment, confusion or excitement.
c. In special circumstances of this type or in the face of insubstantial deviations from the conditions of private defence, the court is authorised to completely excuse the actor from criminal responsibility for his act, on condition that it specifies the special reasons for the grant of an excuse in its decision.

3 Causation of the Private Defence Situation by the Actor

a. Despite the rule of section 1 above [the section in the penal code dealing with private defence], criminal responsibility should be imposed upon the actor as detailed below in the following cases:

   (1) For an offence that is conditioned on the existence of intention—if the actor caused the creation of the situation in which he committed the offence with the purpose of committing the offence.
   (2) For an offence that is conditioned on awareness of the elements of the offence, if the actor caused the creation of the situation in which he committed the offence by illegal behavior while foreseeing the possibility of the subsequent development of the events.

b. Despite what is said in subsection (a)(2), the court is authorized to mitigate the punishment of the actor. If the actor acted in order to protect an interest of another person—the court should use its authority to mitigate the punishment to a significant extent.

   If the actor clearly demonstrated a genuine desire to cease the conflict and notwithstanding the aggressor persisted with the conflict, the court should significantly mitigate the actor's punishment. (Alternatively: subsection (a)(2) should not apply to him.)

   [And perhaps—in order to remove all possible doubt—the following instruction should be added:]

c. There is nothing in this section to negate the possibility of imposing criminal responsibility on the actor for an offence, which was constituted at the

stage of causation of the creation of the situation of private defence, on condition that he will not be punished twice for the same act.

4 Putative Private Defence

This arrangement for private defence, must, of course, be completed with a suitable arrangement for putative private defence.[1358] With regard to a mistake of fact, it is suggested that the customary modern general arrangement[1359] for putative defences should be adopted: A person who commits an act determining a state of affairs that does not exist to exist does not bear (full) criminal responsibility, but may only bear (limited) responsibility to the extent that he would be liable if the state of affairs that he deems to exist, existed in reality.

With regard to a mistake of law, it is also suggested that the customary modern general arrangement[1360] should be adopted: A mistake of law does not excuse the actor from criminal liability, unless the mistake cannot be avoided in a reasonable manner.

[1358] See the detailed discussion of putative defence in Ch 5.2 above.
[1359] Eg, s 34r of the Israeli Penal Code 1977.
[1360] Eg, s 34s of the Israeli Penal Code 1977.

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