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## **REGULATION OF SELF-DEFENCE IN SLOVENIAN AND INTERNATIONAL CRIMINAL LAW**

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

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

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

As mentioned before, fulfilment of all conditions of collective self-defence

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<sup>1</sup> The opinions in this article are author's alone and could not be understood as the official opinions of the institution.

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

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

The definition of self-defence in international criminal law does not differ much from its typical definition in national legal systems; it represents the defence against unlawful attack, directed at the perpetrator or a third person, whereas the defence itself is directed towards the source of attack or his legal value [2, p. 137]. The attack on the perpetrator or a third person must be unlawful. Self-defence could only be directed towards the source of the unlawful attack. This importantly distinguishes self-defence from necessity in international, as well as national criminal law. Such requirement could be found also in the case law of the Nuremberg Tribunal [2, p. 243], as well as in the case law of ICTY and in the Rome Statute [7, p. 190]. Strict limitation regarding accord in time between the attack and defence is prescribed as well. The attack according to the Rome Statute must be imminent [4, p. 11]. Similar limitation could be found also in comparative legal systems [8, p. 665].

In comparative law self-defence is usually a typical ground for justification of the perpetrator's act; the act's unlawfulness is therefore excluded. It is considered that the perpetrator's act is in accordance with the law, when committed in self-defence. Contrary to this, there has not yet been clear case law on this subject in international criminal law, and an answer to the question, whether self-defence is a ground for justification or for excuse [2, p. 65]. The prevailing opinion is however conclusive with comparative criminal law findings that self-defence justifies the perpetrator's act [6, p. 174].

The definition of self defence has been very traditional and unalterable for long and was in Slovenia not amended even with the introduction of Criminal

Code – 1 [9, art. 22], which otherwise caused many changes also in the field of defences. Self-defence represents a defence of perpetrator towards the source of unlawful [10, p. 234] attack (and not towards third innocent persons) [10, p. 236], which threatens any legal value [11, p. 52] of the perpetrator or a third person [10, p. 232]. Self-defence is traditionally considered ground for justification. Such regulation of self-defence and especially its distinction towards necessity does not differentiate from the regulation in the Rome Statute.

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