

**KILLING IN DEFENCE OF PROPERTY:
A LEGAL COMPARATIVE STUDY**

By

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DECLARATION

This research is submitted in accordance with the requirements for the degree of Masters of Laws (LLM) in the subject Criminal and Procedural Law at the University of South Africa.

I declare that **KILLING IN DEFENCE OF PROPERTY: A LEGAL COMPARATIVE STUDY** is my own work, and has not been submitted for any other degree in any other university.

Signature:

Date:

Linus Tambu Awa

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DEDICATION

This research is dedicated to my beloved parents Mr Tambu Moses Dewa and Mrs Tambu Anastasia for their love and all the contribution and sacrifices they made to my life and education.

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SUMMARY

This research examines the legal issues surrounding killing in defence of property in three selected jurisdictions: South Africa, Cameroon and the United States. The comparative analysis illustrates that although the right to protect one's property is universal, this defence is interpreted differently in the various jurisdictions. Another issue considered in the study is the constitutional right to life in each jurisdiction and whether or not an unlawful attack against one's property creates a legal entitlement for the attacked party to take the life of another in defence of his or her property.

Private defence of property is available when a person uses force to defend an interest in property, for example; to prevent a would-be thief from taking his own, or another's property, to prevent someone from damaging his own or another's property, to prevent an intruder from entering his own or another's property. When an accused pleads private defence, his claim is that his harm-causing conduct was, in the circumstances, lawful. The reasonable use of force (short of deadly force) in the private defence of property is not disputed. However, the use of deadly force in protection of property is controversial, especially in a constitutional state such as South Africa where life should be prized above property. One should however also consider that there is a close link between the private defence of defending life and of protecting property. In many cases, an assault on property also involves a threat on life. However, there are cases of private defence of property where no threat to bodily integrity exists. These situations will be examined in all three jurisdictions and measured against the various constitutional imperatives. Conclusions and recommendations are made as regards the legal framework on the defence of property in the criminal law of the various jurisdictions.

KEY WORDS: private defence of property, self-defence, lethal force, right to life

CHAPTER ONE

GENERAL OVERVIEW OF PRIVATE DEFENCE

1.1 Introduction

"[E]very man as much as in him lies endeavour to protect his life and members."¹

In South Africa, one often hears from relatives or friends that they have been victims of a criminal attack on the street or at home, or how their family homes were invaded by criminals and family members assaulted, raped or murdered and valuable properties stolen. From these reports, it may appear that there is in fact no state security² and that the police merely perform a symbolic role in terms of security as they may only reach the scene after the crime has been committed.

In this regard, South Africans are much more fearful of crime than they were ten years ago.³ This growing panic has prompted a wide range of self-protective measures as many people prepare themselves in anticipation of a possible criminal encounter.⁴ This situation poses dangers of its own because if these persons err on the part of caution, they may lose their lives. If they err on the side of violence, they may lose their freedom.

¹ The words of Thomas Hobbes as quoted by Kaufman *Justified Killing: The Paradox of Self-Defense* (2009) 44.

² See eg the case of *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), where the Constitutional Court recognised the existence of a legal duty resting on the state to protect citizens against violent crimes. See also *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).

³ Burton, Du Plessis, Leggett, Louw, Mistry & Van Vuuren *National Victims of Crime Survey South Africa* (2004) 142.

⁴ Du Plessis "When Can I Fire? Use of Lethal Force to Defend Property" 2004 8 SACQ 2004 3. Prince & Thompson "The Inalienable Right to Stand your Ground" 2015 27 *St Thomas LR* 32 state that "the common law has always recognized the inalienable right of the individual to stand his ground and defend his life when the civil government cannot - or will not - timely intervene". The authors further assert at 46-47 that "[e]very man has a right to defend himself or his property, or even to defend others, where there is not time or opportunity to call in aid or the civil power".

It is an established fact that everybody has the right to protect one's life and that of others. This right may in certain circumstances even be extended to protect one's property from being unlawfully appropriated by an offender. In this regard, private defence may be employed by individuals against an unlawful attack on a person or property. It is however argued that a person does not have the right to assume the duty of the police by protecting what he subjectively believes to be in the interest of justice.

An underlying reason for the existence of private defence is that it serves to uphold justice in general. It is submitted that the person acting in private defence acts in place of the state or police, because it is impossible for the police to constantly protect everybody as well as their properties wherever society may find themselves. Therefore, at issue in all instances of private defence is the fine dividing line between justice and injustice.⁵

As a general rule, morality does not permit the intentional killing of a person to defend property or even the lives of several others. Nonetheless the ground of justification of private defence presents a unique and unexplained exception to this general rule. Although the application of private defence requires a proportionality test⁶ as regards the lawfulness of the conduct, it is still considered by many barbaric to inflict the death penalty on a wrongdoer merely for the unlawful appropriation of property.⁷ It is thus necessary to investigate how the law fills this gap; since the law does not permit persons to resort to force or violence to protect

⁵ Snyman "The Two Reasons for the Existence of Private Defence and their Effect on the Rules relating to the Defence in South Africa" 2004 17 *SACJ* 192. According to Bell "Stand Your Ground Laws: Mischaracterized, Misconstrued, and Misunderstood" 2015 46 *U Mem LR* 433: "Police cannot protect every single person every day. Absent their presence or some special undertaking, police do not have a duty to protect individuals who are threatened with harm. Criminals do not usually attack or assail people in front of the police, so even if police had such a duty, nothing would change. As a result, states seek to protect people from criminals by allowing them to protect themselves when it becomes necessary".

⁶ This test will be discussed in the various chapters to follow.

⁷ Kaufman (n1 *supra*) 43.

their interests, expecting that they will invoke the agency of law enforcement for this specific purpose.⁸

A point of interest here is whether a situation can ever exist where the killing of an offender or trespasser will be found to be proportionate to the value of the property sought to be protected. This position has already been evaluated by the South African courts and was answered in the affirmative.⁹ In light of the *Van Wyk*-case as well as other decided case law in selected jurisdictions, the various approaches followed by the courts of these countries will also be examined; by comparing and exploring the applicable laws from these countries to the approach followed by the courts in South Africa.

In South Africa, the Bill of Rights in the Constitution¹⁰ enshrines the rights of all people and affirms the value of human dignity and freedom.¹¹ This means that every individual has inherent rights and dignity which are protected and guaranteed by means of the Constitution.¹² These rights are further enhanced by section 12(1)(c) which warrants freedom and security of the person.¹³ This right is especially applicable to the issue of private defence.¹⁴

Protecting one's property from being stolen and harming the criminal in the process may lead to one's arrest for alleged unlawful conduct. By implication, the law may declare certain acts to constitute criminal conduct which the public at large may

⁸ Burchell *South African Criminal Law and Procedure Volume I: General Principles of Criminal Law* 4thed (2011) 121.

⁹ See eg *Ex Parte Minister van Justisie: In re S v Van Wyk* 1967 1 SA 488 (A); hereinafter *S v Van Wyk*. One has to consider thought that this case was evaluated before the introduction of the SA Constitution in 1996.

¹⁰ The Constitution of the Republic of South Africa, 1996 (hereinafter the SA Constitution).

¹¹ SA Constitution (n10 *supra*) s 7(1).

¹² The SA Constitution (n10 *supra*) s 10 states that everyone has inherent dignity and the right to have their dignity respected and protected.

¹³ According to s 12(1)(c) of the SA Constitution (n10 *supra*): "(1) Everyone has the right to freedom and security of the person, which includes the right - (c) to be free from all forms of violence from either public or private sources".

¹⁴ Another important subsidiary right in this respect is the right to privacy (s 14), which includes the right not to have their homes invaded and possessions seized.

think to be lawful.¹⁵ It thus becomes necessary to ascertain whether especially the South African courts are meeting the expectations of the Constitution since they “were given the power to declare invalid any law or conduct inconsistent with the Constitution”.¹⁶

It has been stipulated that if one has to raise the defence of private defence in terms of property; there must be an unlawful threat or danger; a legal interest in property must be threatened or endangered; the threat or danger must be serious and a threat or danger must be present.¹⁷ It would be important to understand how the courts quantify or measure such counter-attack to equate the attack so as to free the defender. This research will focus most particularly on cases that involve the loss of life as a result of home invasion and robberies. It aims at comparing how this aspect of the law operates in other countries and the position the South African legal system holds, and to advance any possible recommendations in this regard.

1.2 Research problem

Despite the fact that everyone has the right to freedom and security of the person, and freedom from deprivation of property,¹⁸ which includes the right to be free from all forms of violence from either public or private sources,¹⁹ there are many incidences where these rights are not respected by criminals.²⁰ Consequently, the

¹⁵ Smith *Justification and Excuse in the Criminal Law* (1989) 4.

¹⁶ Currie & De Waal *The Bill of Rights Handbook* (2005) 2.

¹⁷ Kemp, Walker, Palmer, Baqwa, Gevers, Leslie & Steynberg *Criminal Law in South Africa* (2013) 82.

¹⁸ See also s 25 of the SA Constitution (n10 *supra*), which enshrines the right to property, which is a standard international human right.

¹⁹ See the SA Constitution (n10 *supra*) s 12.

²⁰ This is evident when one considers the atrocities committed by a single criminal gang within the space of one year. According to Mbangeni “Suspects Own up to Crimes, but Tormented Residents Left in the Dark” *The Star* (2013) 6, a gang committed robbery (Barbara and Jennifer in July), committed housebreaking and the theft of several items (Johannes’ house), the attempted murder of Joel in August, the attempted murder and robbery of Lelanie in August, the

private defence of property is still not treated with the necessary gravity as other cases of private defence.

There are many factors that need to be considered when a defender is responding to protecting property in terms of the attack as well as the defence. It has been specified that the use of force must be necessary; the force used must be reasonable; and the force must be directed against the attacker or would-be attackers.²¹ What 'necessary' and 'reasonable' force entails remains an issue to take into consideration in this research.

Another problem is what requirements, considered in the interest of justice, equity and morality, as well as criminal liability, really exist in cases of killing in defence of property that would exonerate the defender. Moreover, the courts use an objective test to determine the limits of private defence, and a subjective test in determining the defender's intention. The issue here is whether judicial weight is based on either the objective or subjective test; taking into consideration the exigencies of the situation and the practicalities involved, when considering possible prosecution.

Killing in defence of property is a legal issue as well as a practical problem. As the general public do not fully grasp the law of private defence, they are likely to have impromptu responses in situations where they are unlawfully attacked and their possessions unlawfully appropriated. It is contended that a cross-section of South African citizens are still unaware or in doubt as to whether killing in defence of property is legitimate and to which degree this ground of justification may be applied.

In a case concerning the killing of a person in defence of property, it is submitted that the constitutional right to life is likely to be given more precedence over the

assault and robbery of Sibusiso and his family in August, the theft of horse blankets from Lilian in August, the murder and robbery of Andre in September, further murders, attempted murders and robberies, and so the list continues. In each of these incidents, the men surprised their victims while they were already at home or on their arrival at home.

²¹ Kemp *et al* (n17 *supra*) 83.

right to defend property.²² However, an issue which should be deliberated in this regard is also whether the item stolen or about to be stolen is a life-serving item for the owner. This study will give due consideration to what the law reasonably expects from a person in such circumstances.

The main conundrum of this research will be to ascertain the position of the criminal law in South African and the selected jurisdictions, and the role of the courts as adjudicators as regards the private defence of property. In South Africa, for example, neither the Constitution nor the Criminal Procedure Act (CPA)²³ contains any specific provision with regards to the private defence of property. The Constitution only provides for freedom and security of the person which may include the defence of property but does not exactly explain what one may infer under these terms.

1.3 Hypotheses and research questions

The study examines the adequacy and effectiveness of the legal framework dealing with the private defence of property in South Africa by means of a comparative approach. To achieve this objective, the following research questions are asked:

- What does the concept 'private defence of property' mean in South Africa as well as the jurisdictions of the United States and Cameroon?
- Do the various histories of private defence laws in the selected jurisdictions contribute to the current perceptions of the concept?
- Do South Africa and the selected jurisdictions have appropriate and effective legislation in place for addressing private defence of property?

²² Du Plessis (n4 *supra*) 1. The balancing of rights in the South African Bill of Rights will be explained in Chapter 4.

²³ The South African Criminal Procedure Act 51 of 1977 (CPA).

- Why do the legislations on private defence of property differ in the various selected jurisdictions?
- Do these laws comply with the various constitutional directives?
- Should more comprehensive laws be implemented in order to address the possible escalation of private defence of property incidences?

The hypotheses underlying the research are the following:

- Crime is a growing problem in especially South Africa. Citizens need to protect themselves and their property in cases where law-enforcement interception is minimal.
- Although all theories of private defence originate from common geneses, these concepts have developed in each jurisdiction according to specific needs and circumstances.
- The selected jurisdictions need to adopt more comprehensive and instructive private defence legislation.
- Killing in defence of property may be against constitutional prerequisites.

1.4 Aim of study

- **Adequacy and efficacy of current legal framework on private defence**

As pointed out above, the purpose of this study is to examine the adequacy and effectiveness of the legal framework dealing with the private defence of property in South Africa and the other selected jurisdictions. In order to achieve this objective, an overview of the legal framework concerning private defence in three selected jurisdictions will be provided. The comparative analyses will constitute the applicable legal framework of two foreign jurisdictions and that of South Africa. Where applicable, mention will be made to international instruments.

- **Promotion of a universal legal framework on private defence**

Considering the fact that most countries have ratified international instruments such as the Universal Declaration of Human Rights (UDHR),²⁴ it is peculiar that South Africa as well as other countries still have divergent considerations as to the killing in defence of property.²⁵ Moreover, the fact that the right of private defence is a natural right, founded not in the law of society, but in the law of nature,²⁶ and the fact that the extent of the right of private defence is undefined by the law of nature, necessitates the importance in exploring and comparing the applicable laws from the selected jurisdictions of the United States and Cameroon to that of South Africa; and evaluating whether justice is effectively administered by these jurisdictions in this regard. From the decided case law of the various countries, it will be investigated whether judges ground their decisions regarding the private defence of property on ideological considerations; by means of logical, comprehensive contemplations; or rely strictly on the criminal law of the particular jurisdiction. In other words, it will be determined what the test for the killing in defence of property is in the selected jurisdictions, with a particular focus on the situation in South Africa. A universally-acceptable definition of the private defence of property is furthermore crucial so as to encourage a clear understanding of this ground of justification.

- **Illumination of concept**

Confusion as to what exactly private defence constitutes still exists, especially amongst the lay person. The boundaries of private defence, particularly as regards the private defence of property, are even more confusing. This misapprehension

²⁴ The Universal Declaration of Human Rights (10 December 1948) (hereinafter UDHR).

²⁵ The Sudanese Penal Code 2003 under s 62(a) & (b) permits killing where the threat involves harm to both property and to the person. While other countries like Nigeria permits the right to kill in defence of property, this is in regard to certain types of property only (see s 282 of the Southern Nigerian Criminal Code).

²⁶ Livingstone "The Right to Shoot a Burglar" 1894-1895 (1)2 *University Law Review* 26.

can lead to persons being prosecuted in situations where they thought their acts were lawful. A lack of an explicit definition can also lead to poor prosecution. For example, the common law allows a person to use “reasonable force” to defend himself, another or his property. The question here is whether it would be reasonable to use deadly force for the protection of property, assuming that no means short of killing could have prevented the commission of the crime. In this regard, one has to consider a scenario where the only way X could prevent Y from stealing his life-saving item was to kill Y. One is left to contemplate whether such force was reasonable or what degree of force would be regarded as “reasonable” in the eyes of the law to vindicate such a defender (X) from criminal liability? In other words, when would or is a person justified for killing a robber or home invader? There are no definitional prescriptions in cases such as these.

- **Compilation of more detailed private defence legislation**

A further aim of this study is to produce an updated, contemporary and comparative compilation of the law that relates to private defence in South Africa and selected foreign jurisdictions. Although the study does not purport to provide a solution to the predicament of the private defence of property, the research will endeavour to provide a critical perspective on current efforts to prosecute such cases.

- **Outcome of research**

Although many offences such as house-breaking with the intent to steal and domestic robbery do not involve the killing of the perpetrator, it is quite possible that in our violent society with ever-increasing crime statistics the courts may encounter an influx of such cases of private defence. It is thus of the utmost importance that research be undertaken to guide both the general public as well as the courts in contending with such cases. The intended outcome of the research is

to make recommendations regarding the adoption of appropriate legislation and the implementation of other strategies to effectively deal with cases where house robberies lead to the death of the offender. After the applicable laws on private defence in other countries have been considered, and this information applied to the position of the South African law on the killing in defence of property, possible recommendations will be advanced as practical guidelines for the courts and the public at large.

1.5 Scope and limitations of study

This study provides a critical and comprehensive account of the private defence of property and the prosecution thereof. The research will focus on private defence legislation in South Africa and in the legal systems of the United States of America and Cameroon. Comparative research will be conducted regarding the difference in approach followed with regard to the prosecution of private defence transgressions in these jurisdictions.

The comparative research is conducted in the context of the different jurisdictions' historical, legal and cultural environments. In all three legal systems, there are strong resemblances regarding the supremacy of a constitution. All three constitutions also exhibit particular influences. The Bill of Rights (Amendments 1-10) in the Constitution of the United States was inspired by the English Bill of Rights of 1689.²⁷ The Cameroonian Constitution and Bill of Rights are also partially based on the English common law.²⁸ The South African constitutional system has

²⁷ Schwartz *The Great Rights of Mankind: A History of the American Bill of Rights* (2002) 1-2.

²⁸ The legal system also includes French civil law. See Bringer "The Abiding Influence of English and French Criminal Law in One African Country: Some Remarks regarding the Machinery of Criminal Justice in Cameroon" 1981 25 *J Afr L* 3.

drawn inspiration from many sources, which includes Roman-Dutch, English, and German law.²⁹

The legal system of the United States is selected for research purposes since it represents many different approaches when dealing with cases relating to self-defence of property in the various states. It will be interesting to research the reasons why there are so much diversion in this jurisdiction when dealing with this ground of justification. The jurisdiction of Cameroon is selected as a typical product from the Colonial era. It is also the country where the researcher hails from. Cameroon is unique in the sense that it has a bi-jural legal system where both English common law and French civil law coexists in a single jurisdiction. Customary law also still plays a very active role in Cameroon. From the evidence collected in the Cameroonian chapter it will be seen that there is a great shortage of published academic contribution in this area of the law in the country. The current situation in Cameroon as regards the legislation and prosecution of private defence is researched in the hope that the findings and recommendations of this study will contribute to improving the lack of publications as well as the legislation on private defence in the jurisdiction. South Africa, as another African country, is chosen as the courts have dealt extensively with the ground of justification already and could be illustrative of the manner in which other African countries may contend with the principle of private defence, especially in defence of property.

Although not a ground of justification, putative private defence is briefly touched on in the discussion of private defence in the various jurisdictions to illustrate cases where an accused pleads private defence as he genuinely and reasonably believed that he was unlawfully being attacked, but an *ex post facto* examination of the facts indicates that he was not. This defence is however not discussed in the third chapter as there are no known cases on putative private defence in Cameroon.

²⁹ Sarkin "The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions" 1998 1(2) *Journal of Constitutional Law* 180-181.

There have been some difficulties in accessing case law from the various selected jurisdictions. Whilst laws enacted by the Cameroonian Parliament and some subsidiary legislations are published in the *Official Gazette of the Republic of Cameroon*, which is printed by the National Printing Press, there is no regular and efficient system of law reporting in Cameroon. At present, cases from the Anglophone³⁰ courts are only reported in the *Cameroon Common Law Report*, which is essentially a private initiative of a private law firm. In the Francophone region, cases are reported in *Juridise Periodique: Revue de Droit et Science Politique*, which is also a private initiative. On the whole, the reporting of judgments in Cameroon is erratic and very poor. Even access to judgments is sometimes a challenge because they are hand-written and the records in the archives are poorly kept. There is no public law library in any of the English-speaking provinces in Cameroon. Moreover, Cameroon is sheltered with no, or a very poor law reporting system which made access to information virtually impossible. Despite these challenges, every effort has been made to retrieve all possible material for this research.

1.6 Methodology

Since the research is intended to compare the applicable law on killing in defence of property in South African criminal law with those of other countries, the research design will be comparative and exploratory in nature. A logical-analytical and comparative literature review of the relevant domestic and international law will be conducted.

A qualitative research method will be applied in this study. This will include an analysis of the South African and other selected jurisdictions' constitutions, statutory legislation, case law, common law, and international treaties and

³⁰ That is the English-speaking provinces in Cameroon.

instruments ratified. Further secondary resources such as textbooks, articles, reports, internet sources, research papers and theses, as well as periodicals and programmes are further consulted. These sources are utilised to support the hypotheses made in this research.

1.7 Definition of terms

Certain terminology utilised in the study need further elaboration at this stage. This will be consequently effected.

1.7.1 Criminal liability

For criminal liability to result, the state (prosecution) must prove, beyond reasonable doubt, that the accused has committed voluntary conduct which is unlawful (*actus reus*) and that this conduct was accompanied by criminal capacity, and fault or culpability (*mens rea*). An overriding principle of South African criminal law is that an act is not unlawful unless there is a guilty mind - expressed in the maxim *actus non facit reum nisi mens sit rea*. The general rule is that culpability is required for criminal liability and the culpability element may take the form of intention or negligence.

1.7.2 Unlawful act

Conduct constitutes doing something (a positive act) or not doing something (an omission).³¹ It includes not only an act that is punishable as a crime for example murder and culpable homicide, but also other conduct such as trespassing.³²

³¹ Burchell & Milton *Principles of Criminal Law* 3rd ed (2006) 139.

³² LaFave *Criminal Law* 3rd ed (2010) 844.

“Unlawful” means contrary to the community’s perception of justice or equity (“*boni mores*”) or the legal convictions of the community.³³

Private defence can be resorted to only in respect of an *attack* that is unlawful.³⁴ An attack presupposes a voluntary human act which need not be committed culpably; it need not be directed at the defender; and it need not consist of a positive act of commission.³⁵

Unlawful conduct (*actus reus*) must exist contemporaneously with the guilty condition (culpability or *mens rea*) before criminal liability can result,³⁶ thus, an unlawful attack is a positive act. The conduct of the accused must be unlawful in order to lead to criminal liability. This means that there must be no defence excluding unlawfulness available to the accused. The general defence excluding the unlawfulness of conduct is private (self) defence.³⁷

1.7.3 Killing

Killing can constitute either murder or culpable homicide. At common law, murder is defined as the intentional causing of the death of another person. In American criminal law, murder is defined as a homicide committed with malice aforethought. Murder is unlawful unless there is some ground of justification which validates the unlawful act - it is then regarded as a justifiable homicide or an excusable category.³⁸ Since the harming and killing of a person is always *prima facie* unlawful, the accused must lay a proper evidential foundation if he wishes to rely on the defence of private defence. Once the state has proved that the accused caused the death of another person, or once the accused has admitted this, he attracts an evidential burden, that is, he must place some evidence before the

³³ Snyman *Criminal Law* 6th ed (2014) 97-98.

³⁴ Therefore, one may not defend oneself against lawful arrest.

³⁵ Singh *Self-defence as a Ground of Justification in Cases of Battered Women who Kill their Abusive Partners* (2009) 89.

³⁶ Burchell (n8 *supra*) 117.

³⁷ Others include necessity, impossibility, public authority or consent.

³⁸ As aptly termed in the criminal law of the United States. See Pollock *Criminal Law* (2013) 161.

court³⁹ to explain and justify his conduct.⁴⁰ If the plea of private defence is successful, the accused may be set free or be found guilty of a lesser charge such as culpable homicide,⁴¹ depending on the particular circumstances of the case.

1.7.4 Private defence

One of the recognised defences that exclude unlawfulness is self-defence or private defence.⁴² Generally, private defence is defined as the lawful use of force to deter an unlawful attack. There are certain conditions attached to both the attack and the defensive action. The attack must have already begun, and endanger the defender's or another's life, bodily integrity, or other legitimate interest, *inter alia*, property.⁴³ The defensive act must be levelled at the attacker, essential to protect the threatened interest and no more injurious than is required to deflect the attack. When an accused pleads private defence, his claim is that the harm-causing conduct was, in the circumstances, lawful or permissible.⁴⁴

1.7.5 Defence of property

The right of a man to protect his person or property from injury is known as the right of private or self-defence.⁴⁵ This right to protect one's self, one's family, and

³⁹ Kemp *et al* (n17 *supra*) 86.

⁴⁰ This does not mean that the accused acquires the onus of proof (which in criminal cases is always on the state to prove the elements of criminal liability, including unlawful conduct, beyond reasonable doubt).

⁴¹ Culpable homicide is defined as the unlawful, negligent causing of the death of a human being.

⁴² Private defence is commonly referred to as self-defence. According to some scholars the phrase 'private defence' captures a broader scope of legally-recognised interests. It should be noted that these phrases ('self-defence' and 'private defence') will be used interchangeably in this research since they include not only defence of person but also defence of property. Thus, killing in defence of property is an aspect of private or self-defence. In the US, the term self-defence is employed.

⁴³ Le Roux "Private Defence: Strict Conditions to be Satisfied *Govender v Minister of Safety and Security* 2009 2 SACR 87 (N)" 2010 (73) *THRHR* 328.

⁴⁴ Mousourakis "Excessive Self-defence and Criminal Liability" 1999 12 *SACJ* 143.

⁴⁵ Livingstone (n26 *supra*) 26.

one's "castle" is a time-honoured right that existed before the common law and was recognised by it.⁴⁶

The property interests that are traditionally protected by private defence are possession of movable property (theft, robbery) and intrusion upon immovable property, which may take the form of either a simple trespass or an unlawful invasion of a habitation (housebreaking, damage) or destruction of movable or immovable property. The defence of property may involve the following types of defensive action: use of force to prevent a thief from making off with movable goods, or for the purpose of recovering stolen property; the infliction of physical harm in order to prevent damage of property, or placing protective devices to inflict physical harm to prevent anticipated intrusion onto property or premises.

The existence of this ground of justification highlights the fact that citizens have been unable to rely upon the agencies of the state to protect their legal interests.⁴⁷ Therefore, it is argued that one is justified in using reasonable force to protect his property from theft, when he reasonably believes that his property is in imminent danger of such an unlawful interference and that the use of such force is necessary to avoid that danger.⁴⁸ It may be suggested that killing in defence of property may no longer pass the test of constitutionality, because there is greater opinion to the view that the value of property can never outweigh the value of a human life. As such, it may no longer be justifiable to kill in defence of property.⁴⁹

1.7.6 Deadly force

Deadly force is the force utilised that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.⁵⁰ Intentionally firing a firearm in the direction of another person or at a

⁴⁶ Pollock (n38 *supra*) 101.

⁴⁷ Burchell (n8 *supra*) 121.

⁴⁸ Lafave (n32 *supra*) 491.

⁴⁹ Kemp *et al* (n17 *supra*) 84.

⁵⁰ See s 9.01 of Texas Penal Code 1973.

vehicle in which another person is believed to be constitutes deadly force.⁵¹ In other words, deadly force means force that is likely to cause serious bodily harm or death and includes, but is not limited to shooting at a suspect with a firearm.⁵²

1.7.7 Security of the person

Human beings, by their very nature, are concerned with protecting certain basic interests such as life, physical integrity, sexual integrity, dignity, property and personal freedom. In many legal systems, these interests are considered to be so important that they are elevated to the status of human rights.⁵³ The right to security of person is guaranteed in article 3⁵⁴ of the UDHR (1948), as well as in the constitutions of many countries. In South Africa, the guarantee to security of person is found in section 12 of the Bill of Rights:

- 12(1) Everyone has the right to freedom and security of the person, which includes the right
- (a) not to be deprived of freedom arbitrarily or without just cause;
 - (b) not to be detained without trial;
 - (c) to be free from all forms of violence from either public or private sources;
 - (d) not to be tortured in any way; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.

Security of person is generally understood to be persons' lawful and continuous enjoyment of their lives, bodily integrity, health, reputation and other fundamental rights.

⁵¹ Johnson *Criminal Law Cases, Materials and Text* 3rd ed (1985) 446.

⁵² See eg Criminal Procedure Amendment Act 9 of 2012 s 49(1)(c). In this Act, deadly force may be employed under the following circumstances: the suspect poses a threat of serious violence to the arrestor or any other person and they need to be protected from imminent or future death or grievous bodily harm caused by the suspect if the arrest is delayed, and the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life-threatening violence or a strong likelihood that it will cause grievous bodily harm. Although the purpose of this Act differs from the common-law defence, it is believed that the phrase 'deadly force' may be similarly interpreted in the ground of justification.

⁵³ Kemp *et al* (n17 *supra*) 8.

⁵⁴ Art 3 states: "Everyone has the right to life, liberty and security of person."

1.8 Chapter outline

In **Chapter 1**, the general background to the subject is introduced and the aim, method and scope of the dissertation are set out. The reasons for selecting the topic of the private defence of property in South Africa; the rationale for the study, as well as the statement of the research problem and hypotheses are presented. The ambit of the study is outlined and the chapter layout of the study is given. The rationale for the selection of the legal systems of three countries for comparative purposes is explained.

Chapter 2 of this study focuses on the manner in which the American legal system deals with private defence, especially when lethal force is used to defend property. This chapter not only discusses the United States Model Penal Code, but also gives a comparative analysis of the way the various American states handles the topic.

The **third** chapter deals with killing in defence of property in Cameroonian criminal law. In Cameroon, the ground of justification known as private defence is regulated in the jurisdiction by the Constitution of the Republic of Cameroon, the Criminal Procedure Code of Cameroon, and the Penal Code of Cameroon. Private defence cases are tried by criminal as well as customary courts. In Cameroonian criminal law, there exist no distinction between private defence of the person and that of property. Both cases are considered as lawful defences under section 84 of the Penal Code.

In **Chapter 4** killing in defence of property in South African criminal law is specifically focused on. After an explanation of the requirements of private defence in this jurisdiction, killing in defence of property is elaborated on. It will be seen that case law has contributed much to the development of this defence, and that killing in defence of property may be a valid defence in this jurisdiction (subject to certain

regulations). As a private defence, defence of others and of property, the common law endures but only to the extent that it is not incompatible with the South African Constitution.

Chapter 5 concludes the study whereby, taking into consideration the position of the law in regards to killing in defence of property in the various jurisdictions considered, the main conclusions of the research are summarised, discussed and interpreted. Finally, recommendations are made for law reform and practice. The findings of the research are that there is scope for improvement in content and application of private defence of property in South Africa, the United States and especially in Cameroon.

1.9 Summary

Whether the law should ever justify killing in defence of property is a question which cannot be easily answered. This is demonstrated by the existence of several diverging approaches to this question. Some countries hold the view that no one has the right whatsoever to kill in defence of property, while others would allow a right to kill in defence of only certain types of properties. There are furthermore other jurisdictions that allow a right to kill only where the threat is to both property and person.

It can generally be accepted that in all circumstances of killing in defence of property, there is always a combination of threat to property and person. However, it seems as if the law focuses attention mainly on the response of the defenders of the property (to their detriment), and thus fails to consider the original intention of the trespassers - who are determined to achieve the criminal act but not ready to die in the course of their illegal conduct. This means that in every instance where the defender is actually defending property, by implication, his life also is at stake.

In all instances, a defender may never have any intention to kill; as he is only reacting against an offender who manifestly intends by violence or surprise to commit a known crime. If this encounter results in the death of the intruder, it becomes interesting to explore whether the law would incriminate the defender for not sacrificing his life or possessions.

Whichever approach might be supported by the various jurisdictions, it is generally accepted that the right to kill in defence of property, if given, must be carefully circumscribed. This is because such a right comprises an exception to the basic principle that human life is more valuable than property.⁵⁵ It will be of great interest to explore this particular area of the law so as to understand whether killing in defence of property could be viewed as a 'personal excuse'⁵⁶ rather than a general ground for justification to avoid contradicting the South African Constitution.

⁵⁵ Yeo "African Approaches to Killing in Defence of Property" 2008 41*C/LSA* 352.

⁵⁶ This means that in such situations, each case ought to be judged based on those particular circumstances. This is so because when a crime has been committed in a manner that somehow implicates an inability to control one's actions, the criminal ought to receive no or a lesser punishment since that person did not freely choose to kill (not implying the reasonable man's test in cases of negligence).

CHAPTER TWO

PRIVATE DEFENCE OF PROPERTY IN AMERICAN CRIMINAL LAW

2.1 Introduction

This chapter explores the United States criminal law regarding killing in defence of property, and justification as a ground for self-defence. In order to illustrate these critical principles, a brief background to the concept of private defence in the United States criminal law will be provided. The requirements for self-defence according to United States law will also be discussed in this chapter, taking into consideration applicable legislation and case law. Legislation on private defence in other common-law jurisdictions will be compared to the United States law in order to provide possible recommendations.

While the United States applies a federal system of government, various states still have Penal Codes and other laws which are applicable only in that particular state.¹ Much ink has been spilled in a bid to pinpoint a specific approach when dealing with cases relating to self-defence in the various states. The various approaches will be illustrated in this chapter.

An important issue that will also be taken into consideration in this chapter is the fact that it is not whether the accused's beliefs were truthful but whether they were reasonable such that the conduct of the accused may be justified or excused. When a defendant raises the defence of private defence in the United States, it does not necessarily mean that no crime has been committed - such a defence merely represents the fact that the defendant may go unpunished due to public

¹ The Constitution of United States established a system of government called a federal system which allows for power-sharing between the national and state government. The judiciary has both federal and state courts. Each court tries particular cases but is not independent from one another. For more information, see United States Courts Administrative Office "Why Two Courts Systems?" <http://www.uscourts.gov/educational-resources/get-informed/federal-court-basics/why-two-courts-systems.aspx> (accessed 30/04/2015).

policy. This means that the conditions to be taken into consideration are evaluated based on the standard of reasonableness. To weigh up these requirements of reasonableness, various courts² in the United States have developed a mixed standard of both objective and subjective tests, taking into consideration the particular circumstances of the accused when the unlawful act was committed.

Some of the courts in this jurisdiction have held that the application of fatal force is not necessary in cases involving a simple intrusion into a dwelling home. Other courts have decided that the application of lethal force is permitted in cases where the defender reasonably thought that the trespasser was going to harm him or any other family member.³ This will be elaborated later in this chapter.

Another issue to be considered of this jurisdiction is the right to life as enumerated in the United States Constitution, that is, whether one has a legal right in the case of an unlawful attack to kill another in the course of defending his property or whether such an act would be regarded as unconstitutional. In the subsequent paragraphs, the ground of justification of private defence will be elucidated; principles and requirements of private defence will be clarified where after putative private defence and killing in defence of property in the United States will be discussed.

2.2 The concept of private defence in United States criminal law

One of the important rationales behind the United States criminal law is to clearly outline behaviours that are regarded as unacceptable by society, and to deter such

² Courts at federal, state and local levels.

³ The United States' courts had earlier held this view which was based on the English position that the defence of a dwelling house was to be regarded as if the defender was defending life. In this regard, the householder is permitted to exert fatal or deadly force in situations where it is necessary, and reasonable in order to avoid possible entry. However, a warning is required for the intruder not to continue with his unlawful act. Some legal experts had criticized this rule as being too broad. See LaFare *Criminal Law* 3rd ed (2010) 505.

conduct by means of punishment.⁴ It should be noted that the criminal law in the United States is an amalgam of both common law and statutes. However, this does not encompass all the laws in the United States as some of the prohibited offences can only be found as precedents in court decisions.⁵

The United States jurisprudence has acknowledged the permissibility of self-defence in particular cases. Nevertheless, in comparison with other jurisdictions, different reasons allowing the application of lethal force are predetermined. This at times exposes possible differences in the scope and the strengths of the defence.⁶

The United States criminal law explicitly holds that a person is allowed to apply deadly force when there is a sound belief that an impending and unjust aggression exists.⁷ This explains why in justification defences it is admitted that the defender is liable for his act; nevertheless it is also proclaimed that the act of the defender was not wrongful.⁸ Thus, for the defender's act to be regarded as a justification there must exist a set of factors which correspond with the defender's conviction for the need to defend, thereby making lawful what could have been regarded as unlawful.⁹ Kahan and Braman explain the defence as such:

The conventional formulation of private defence effectively permits the use of deadly force only to protect one's life. However, in many other situations this doctrine may authorize the use of deadly force when necessary to protect a myriad other interests - property, equality and the like. This explains why the United States recognises a person's moral agency to demand respect not just for his bodily integrity but for his

⁴ Fontaine "A Symposium on Self-Defence: An Attack on Self-Defence" 2010 47 *Am Crim LR* 63.

⁵ Smith *Justification and Excuse in the Criminal Law* (1989) 1.

⁶ Uniacke "Self-Defense and Natural Law" 1991 36(1) *Am J Juris* 73.

⁷ Uniacke (n6 *supra*) 100. This is so because "[w]hen seconds count, the police are only minutes or hours away, if they come at all" Prince & Thompson "The Inalienable Right to Stand your Ground" 2015 27 *St Thomas LR* 32. They assert that "English and American common law historically allowed an individual to use reciprocal force to fend off an imminent attack". *Ibid.*

⁸ Fontaine (n4 *supra*) 62. Prince & Thompson (n7 *supra*) 43 state: "If one who is assaulted, being himself without fault in bringing on the difficulty, reasonably apprehends death or great bodily harm to himself unless he kills the assailant, the killing is justifiable".

⁹ Singh *Self-Defence as a Ground of Justification in Cases of Battered Women Who Kill their Abusive Partners* (Unpublished LLD thesis UNISA Pretoria 2009) 121.

dominion over property, his entitlement to social deference, his enjoyment of individual liberty, and so on, this would still be a doctrine of self-defence.¹⁰

In this regard, it is assumed just and fair that if there is no prospect for an attacked person to depend on a law enforcement agency for assistance, he has the right to take all steps that are reasonably necessary to defend himself or his property. The intentional application of lethal force on the aggressor is said to be justified in these circumstances. Thus, the defender is not culpable of any unlawful conduct.¹¹

There are two important concerns under the United States law of self-defence which need to be understood: the first is that “self-defence may be a defence of either justification or excuse; and secondly, in dealing with the conditions of self-defence, the courts agree that the significant question is that of the reasonableness of the conduct and beliefs of the accused”¹² existing at the time of his act. On this note, one could assert that self-defence seems to overlap with both justification and excuse. This suggests a situation where an unlawful act would either be justified or excused.¹³

Whatever the case, when balancing the parties’ interests, it should be presumed that one of the parties acted unlawfully while the other acted lawfully. This means that although there is a right to life, this right is not absolute since some properties may be considered as life-sustaining to the owner.¹⁴

¹⁰ Kahan & Braman “The Self-Defensive Cognition of Self-Defense” 2008 45(1) *Am Crim LR* 18.

¹¹ LaFave (n3 *supra*) 491.

¹² Singh (n9 *supra*)172. Ingram “Parsing the Reasonable Person: The Case of Self-defense” 2011-2012 39 *Am J Crim L* 429 further explains that “New York courts have interpreted reasonableness in terms of the beliefs of the reasonable person. As such, a reasonable belief is defined by what a reasonable person could have believed in the circumstances of the defendant”. Jackson “Reasonable Persons, Reasonable Circumstances” 2013 50 *San Diego LR* 706 confirms that: “[T]he reasonable person’s circumstances must include the physical facts known to the defendant, for example, the physical layout of the nearby space and the shape and size of nearby objects, and the defendant’s mental characteristics associated with perception...”.

¹³ Smith (n5 *supra*) 1. These positions will be illuminated later.

¹⁴ Kemp, Walker, Palmer, Baqwa, Gevers, Leslie & Steynberg *Criminal Law in South Africa* (2013) 84; LaFave (n3 *supra*) 504.

In the hereto following sections, the concepts of justification and excuse, the right to retreat and the “castle” doctrine will be taken into consideration to determine whether killing another so as to protect property is legal in the United States criminal law.

2.2.1 Self-defence as justification

In the United States, self-defence is regarded as a ground of justification in the jurisdiction,¹⁵ if it is not considered an excuse. Traditionally there have been many debates¹⁶ in Anglo-American criminal law whether certain positive acts of defence are in nature regarded as an excuse or a justification. One of the reasons behind this continuous debate lies in the different degrees of the positive act of defence in question. Self-defence has been found difficult to classify by American theorists, especially in cases where it was based on the mistaken belief of the facts by the defender. The terms - justification and excuse - are useful¹⁷ to differentiate between behaviour that is acceptable and lawful on the one hand, and an unacceptable and unlawful act on the other.¹⁸ Excuse will be further discussed *infra* as imperfect private defence in this chapter.

By its nature, justification is applicable to the principle of penal proportionality in order to administer punishment that is not more or less than is necessary.¹⁹ Justified action is not prohibited, and is therefore regarded as correct behaviour. It

¹⁵ Fontaine (n4 *supra*) 61.

¹⁶ It has been recognized that “[i]n the field of Anglo-American criminal-law theory perhaps no subject has been more invoked the past twenty odd years than the distinction between justification and excuse”. See Fontaine (n4 *supra*) 57.

¹⁷ Wright “Self-defence and the Classification of Defences” 1992 7 *Auckland Univ LR* 127.

¹⁸ See Fontaine (n4 *supra*) 66; Slater “Making Sense of Self-Defence” 1996 5 *Nottingham LJ* 154.

¹⁹ Fontaine (n4 *supra*) 62. Responsibility is absent as the attack was not initiated by him, and his defensive act is a direct response of the unlawful attack. It should be noted that justified actions are intentional, although done with a motive that negatives criminal liability.

is therefore is not only tolerated but in many cases, it is positively evaluated and encouraged as a good behaviour.²⁰

It is submitted that the doctrine of self-defence is in fact a full-justification defence,²¹ for example; where a choice has to be made between the aggressor's life and the life of the defender, the law would prefer the latter.²² As such, killing in self-defence is considered justified homicide in some states in the United States when the killer reasonably thought that the aggressor poses an impending risk of death or bodily impairment.²³ The victim is not required to resist, and other persons acquire a right to assist²⁴ the defender. Accordingly:

...[c]onduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged²⁵ ...

From the above excerpt it can be deduced that justification concerns itself more with the criminality of the act rather than the actor. Thus, where the application of force is concerned, the extent of justified force is guided by force that is indispensable and proportionate in the circumstances. This means that the subjective opinion of the defender is not necessary in the eyes of the law. Here, the act is analysed by considering the nature of the defender's act. If the court concludes that the defender's act is justified in the sense that it was necessary and proportionate, then it is needless to find an excuse for it.²⁶

²⁰ Fontaine (n4 *supra*) 62.

²¹ Fontaine (n4 *supra*) 59. Bell "Stand Your Ground Laws: Mischaracterized, Misconstrued, and Misunderstood" 2015 46 *U Mem LR* 384 states: "Man, animals and all organisms seek to survive. When confronted with danger, the fight or flight instinct compels man and animals to do what is necessary to preserve his or its life."

²² Kahan & Braman (n10 *supra*) 7.

²³ Fontaine (n4 *supra*) 60-61.

²⁴ Wright (n17 *supra*) 140.

²⁵ United States Model Penal Code 1962 Title 2: General Principles of Criminal Responsibility, Chapter 9: Justification excluding criminal responsibility s 3.02(1) (hereinafter US Penal Code).

²⁶ Slater (n18 *supra*) 148.

Justification has two distinct approaches. The first is that it may be regarded as an exception to an offence (that is the “implicit elements” approach), or it may be seen as a privilege to commit a certain offence in a given circumstance (that is the “licence” approach). The license approach to justification holds the view that a non-aggressor has the liberty or “licence” to respond in some specific way, even if it is deemed as unlawful, if certain triggering conditions exist. According to the licence approach such reactive act is longer unlawful conduct, although such conduct is generally condemned.²⁷ It is only tolerated in circumstances where, by causing such harm, a greater civil harm is avoided.

The implicit elements approach holds that a defender with a valid justification has committed no crime.²⁸ Once an offence is justified, it is no longer regarded as a crime.²⁹

2.2.2 The duty to flee

There is a strong policy in the United States against the unnecessarily taking of a human life; although private defence grants the actor the right to defend his life. An issue that needs to be clarified in this regard is whether the defender, instead of standing his ground and utilising force, is obliged to run away as an alternative. As previously mentioned, it has been noted that the self-defender has no duty to flee from his home or workplace. Although the law does not require a person to run away, it does require that he requests the aggressor to desist, except where such a request would be a waste of time or risky to himself and his property. It may be argued that a person is not required to retreat when he is being attacked in his home.

²⁷ Wright (n17 *supra*) 130.

²⁸ Wright (n17 *supra*) 129.

²⁹ Fontaine (n4 *supra*) 63.

In most jurisdictions in the United States, however, a person may use lethal force in order to ward off a deadly attack around his home despite the possibility of escaping.³⁰ This implies that a person need not flee from his home or business place if threatened with lethal force; even if there is the possibility to do so.³¹ In a decided case, the court, relying on the state's constitutional right to defend property declared that the agent of a shopkeeper has "no duty to comply with a robber's unlawful demand for the surrender of property,"³² even in situations where the robbers are threatening the shopkeeper's life.

State courts³³ have disagreed on the obligation to attempt to retreat. This explains why it was held by a South Carolina court³⁴ that any person who is attacked within his premises without fault is not required by law to flee. However, a Louisiana court, in discussing the duty to retreat, noted that although there is no duty for the attacker to retreat,³⁵ the likelihood of escaping is a recognised factor to take into consideration when determining whether the defender reasonably believed that lethal force was required to ward off the danger, to sustain his claim of self-defence on a homicide charge.

According to Pollock:

In other states, the so-called "stand your ground"-laws have expanded the legal right to use lethal force. Even in states that recognise a duty to retreat, the "castle exception" indicates that one is not obligated to retreat if the threat occurs within the parameters of one's own home. Thus, an intruder who poses an imminent threat of

³⁰ Kahan & Braman (n10 *supra*) 9-10. . In this vein, Bell (n21 *supra*) 387 notes that the law does "not require a person to retreat if the 'fierceness of the assault' was so fierce that retreating would increase a defender's danger of death or great bodily harm".

³¹ LaFave (n3 *supra*) 491. It has been stated that "a man is not obliged to retreat and, in fact, may even pursue the initial assailant until the danger has passed". See Prince & Thompson (n7 *supra*) 42.

³² *Kentucky Fried Chicken of California v Superior Court* 927 P 2d 1260, 1269-70 (Cal 1997).

³³ A state court is the final arbitrator regarding the state's laws and Constitution. A state court hears, eg, most criminal, probate, contracts, tort, and family law cases.

³⁴ *S v Long* 480 SE 2d 62 (SC 1997) 63.

³⁵ *S v Barnes* 729 So 2d 44 (La 1999).

bodily harm may be met with force without having to retreat from the home or within the home to a different room.³⁶

Although it could be said that a person is expected to run away in a case where force, especially deadly force, could be avoided, this will not be the case where moderate force can be applied in self-defence. It can thus be concluded here that under the duty to flee the right to use deadly force would apply only when the attacker cannot safely flee, or is in his premise or workplace.³⁷

2.2.3 The “castle” doctrine

The doctrine is not a new concept. Two more doctrines had been developed in this regard under the common law. The first is that the “castle” doctrine excludes persons who are being attacked in their homes from the duty to retreat; and the second permits the application of deadly defensive force to defend the home.³⁸ It has been accepted as far back as the nineteenth century that a dwelling house is a person’s place of shelter and thus worthy of protection.³⁹ This is so because for most people the home represents the most important source of personal protection from a criminal attack; hence the oft-quoted remark “the house of everyone is to him as his castle and fortress”. The United States Penal Code further expands the “castle” doctrine to include the defender’s workplace.⁴⁰ The “castle” doctrine

³⁶ Pollock *Criminal Law* 10th ed (2013) 105.

³⁷ Volokh “State Constitutional Rights of Self-Defence and Defence of Property” 2006-2007 *Texas Review of Law and Politics* 399-418, 412.

³⁸ A case in support of this doctrine is the 1924 English case of *R v Hussey* (1924) 18 Cr App Rep 160, where the reason a tenant shot and killed his landlady was because she was trying to evict him. The notice of eviction that was given to the tenant by the landlady was an invalid one. She had mistakenly believed that she had the right to do so. The court, in holding the shooting justified noted that, “it would be lawful for a man to kill one who would unlawfully dispossess him of his home, even though there was no suggestion that the defendant was threatened with serious injury”.

³⁹ See, eg, Fustel de Coulanges *La Cité Antique* (The Ancient City) (1864) 50, where in a history of the Roman Republic it is stated that “to enter this house with any malevolent intention was a sacrilege. The domicile was inviolable.”

⁴⁰ US Penal Code (n25 *supra*) s 3.05(2)(b)(ii). Stand-Your-Ground laws “expand the ‘Castle Doctrine’ - a common-law doctrine by which deadly force may be used in self-defense or to

therefore affirms that a defender is entitled to stand his ground if attacked in his home.

It is important to mention here that the “castle” doctrine will not apply to every situation. In *S v Page*,⁴¹ the appellant’s assertion was that his neighbour attacked him along a common walkway in front of their apartments. The “castle” doctrine was however not applied by the court in this case on the ground that the appellant had retreated into his apartment. The court regarded this approach necessary for an accurate implementation of the criminal law. The court observed that: “to rule otherwise would, in effect, allow shoot-outs between persons with equal rights to be in common area.”⁴² A question here is whether the “castle” doctrine also applies to the co-occupant? In *Cooper v US*,⁴³ the appellant, who was living with his brother in their home shot his brother in the living room in reaction to a supposed home invasion. The court in this case held that the “castle” doctrine was applicable to co-occupants.⁴⁴

In general, the United States’ courts have been comfortable to also afford occupants of a dwelling the civil liberties of the “castle” doctrine in cases where the occupants are not the house holder. A number of courts have even gone beyond the “castle” doctrine by stating that it eliminates any responsibility upon house guests to move away when attacked in their host’s home by intruders. The court has also recognised the use of deadly force to defend dwelling houses from intrusion even in circumstances where the defender may not sustain grievous bodily harm.

prevent a forcible felony when one is in the safety of one’s home - to include public places outside the home”. See Abuznaid, Bettinger-Lopez, Cassel & Jagannath “‘Stand Your Ground’ Laws: International Human Rights Law Implications” 2013-2014 68 *U Miami L Rev* 1130.

⁴¹ *S v Page* 418 So 2d 254 (1982).

⁴² *S v Page* (n41 *supra*) para 4 as per opinion of McDonald J.

⁴³ *Cooper v US* 512 A 2d 1002 (1986) (Dis Col CA).

⁴⁴ Co-occupants, “even those unrelated by blood or marriage, have a heightened obligation to treat each other with the degree of tolerance and respect. That obligation does not evaporate when one co-occupant disregards it and attacks another” *Cooper v US* (n43 *supra*) para 1006.

In *S v Mitcheson*,⁴⁵ the court held that a guest who was attending his sister's party did not owe any duty to retreat before using fatal defensive force against the attacker. Similarly, the court in *Beard v US*⁴⁶ had noted that the defendant, who was attacked in his field which was some 50-60 yards,⁴⁷ was not under any obligation to retreat from his house. Whilst such a distance was in fact close enough to the defender's dwelling house to fall within the definition of a "cartilage",⁴⁸ it would seem that 200-300 yards⁴⁹ was too far. This was the situation in *Danford v State*⁵⁰ where, faced with a comparable set of facts as in *Beard v US*,⁵¹ the Florida Supreme Court, notwithstanding the fact that the appellant was working in his field which was some 200-300 yards from his dwelling house, held that the appellant was under the obligation to run away.

It can therefore be concluded here that even though the "castle" doctrine is recognised and applicable in the United States, the doctrine will not apply to every single case of attack in or around a dwelling house. This will, however, depend on how a court interprets the circumstances in each particular case.

2.3 Requirements for private defence

The traditional self-defence or private defence doctrine in the United States as well as most Anglo-American criminal law has some basic requirements which are virtually universally recognised.⁵² The first requirement is that the application of deadly force is prohibited in the defence except where there is no reasonable

⁴⁵ *S v Mitcheson* 560 P2d 1120 SCU (1977).

⁴⁶ *Beard v US* (1895) 158 US 550 (United States Supreme Court).

⁴⁷ A distance estimated to be about 45-55 metres.

⁴⁸ The concept of "cartilage" applies to rural properties.

⁴⁹ An estimate of about 182-274 metres.

⁵⁰ *Danford v State* 53 FLA 4 (1977).

⁵¹ *Beard v US* (n46 *supra*).

⁵² Fontaine (n4 *supra*) 60. Ward also states these requirements for the use of deadly force. Ward. "Stand Your Ground' and Self-Defense" 2014-2015 42 *Am J Crim L* 103.

alternative to avoid the threat. This means that any force may be “undertaken to avoid an imminent and impending danger to property or bodily harm”.⁵³

It is taken for granted that in relation to private defence, a triggering condition alone would be sufficient to provide a good reason for the defender to react. However, it has to be certain that the defenders reaction was in fact necessary to defend the interests at risk, and also reasonable in relation to the harm threatened.⁵⁴ Accordingly, a “person who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes that he is in immediate danger of unlawful bodily harm from his adversary, and that the use of such force is necessary to avoid the danger”.⁵⁵

To raise the defence of necessity, further requirements necessitate that the defender must satisfy the court that his property and life was under immediate threat and that the only means for him under the circumstances was to go against the law. This means that the defender must be under a situation where he is left with no legal alternative.⁵⁶

In a case which was held in 1997,⁵⁷ a court in South Carolina interpreted these requirements by stating that a defender has to establish that he is not blameworthy for the harm caused; that he was actually under an impending threat of losing his life and property; that any reasonable person would have acted the way he did; and finally that there was no other means to avoid the danger.⁵⁸ These requirements will consequently be discussed in more detail.

⁵³ Wright (n17 *supra*) 137.

⁵⁴ Wright (n17 *supra*) 125.

⁵⁵ Singh (n9 *supra*) 173.

⁵⁶ See *People v Galambos* 128 Cal Rptr 844 (2002).

⁵⁷ *S v Long* (n35 *supra*) 64.

⁵⁸ Pollock (n36 *supra*) 104-105.

2.3.1 The attack must be imminent

The law in the United States requires the defender to have a reasonable belief that the unlawful aggression was impending or that imminent and unjust aggression occurred.⁵⁹ A cross-section of the modern criminal codes of the states in the jurisdiction necessitates that the defender reasonably recognise an imminent use of force.⁶⁰ In all these circumstances, “imminent” means set or prepared to take place; in other words it means threatening or menacingly near (whereas the term “immediate” means “occurring, acting, or accomplish without loss of time). The concept of imminence therefore allows a defender to defend himself and his property despite any delay of the harm threatened.

Under United States statute and case law, anyone claiming the defence of self-defence has to prove to the court that at the time of the attack “he reasonably perceived an imminent” danger.⁶¹ The United States Penal Code also restricts the use of defensive force to occasions when it is immediately necessary.⁶² In principle, any person facing an unlawful attack does not necessarily need to wait for the assistance of a third party,⁶³ even though it follows that a person is expected to request assistance from state organs or any other actor if such assistance will not increase the risk threatened.

⁵⁹ Uniacke (n6 *supra*) 100.

⁶⁰ LaFave (n3 *supra*) 495.

⁶¹ Pollock (n36 *supra*) 104.

⁶² See US Penal Code (n25 *supra*) s 3 06 (defence of property). In contrast, self-defence under German and Israeli law is permissible only against unlawful attacks. “It has for a long time been controversial whether unlawfulness refers to the harm caused by the attack or to the wrongfulness of the aggressor’s conduct. The primary restriction of the German right to self-defence requires that the act be necessary to ward off the assault. That means that the defender may use optimum defence. Here, it is not clear if the person may kill the aggressor in defence of property. In German law as well as in the Israeli penal law proposal, an attack must be imminent. Imminence exists from the beginning of the attack until its end”. See Bernsmann “Private Self-Defence and Necessity in German Penal Law and in the Penal Law Proposal: Some Remarks” 1996 30 *Israel LR* 175.

⁶³ In practice, this is the case in Cameroon, although it is regarded as unlawful. See chapter three (*infra*).

Although the defender must have a reasonable belief that he was under an impending threat of damage to property or grievous bodily harm or death,⁶⁴ it appears from United States case law that it is enough for the defender to have acted with the belief that the danger was imminent even if that belief was unreasonable.⁶⁵ This principle was illustrated in *People v Goetz*,⁶⁶ a famous self-defence case where the defender (Goetz) shot and wounded four African-American teenagers in a sub-way car in New York. The defender acted in fear that the teenagers were about to rob him. The discussion that transpired between him and the teenagers before his action was when they asked him for money. The defender supposed the request as a forerunner towards robbing him. The teenagers testified that they never had any intention to rob any person, even though two of the teenagers had screwdrivers in their possession, which they admitted that they used to break into coin boxes. The defender was indicted. On appeal, the New York Court of Appeal upheld the indictment, but a jury acquitted him of aggravated assault and attempted murder. However, the defender was also convicted for the illegal possession of a weapon. In 1996 a civil claim was instituted against the defender by one of the teenagers who were paralyzed as a result of the shooting, which Goetz lost. Based on the circumstances of the case, this was a suitable decision since there were no signs of imminent danger and moreover, the force used was not necessary in this particular case.

2.3.2 The use of force must be necessary

A general facet of the natural law justification of self-defence is the requirement that the use of force in the circumstance must be necessary.⁶⁷ It should be noted

⁶⁴ Fontaine (n4 *supra*) 60.

⁶⁵ See Parsons & Andoh "Private Defence and Public Defence in the Criminal Law and in the Law of Tort - A Comparison" 2012 76 *Journal of Criminal Law* 21-28, 23.

⁶⁶ *People v Goetz* 497 NE2d 41 NY (1986).

⁶⁷ Uniacke (n6 *supra*) 99. All the states in the United States require the necessity component. See, eg, Bell (n21 *supra*) 393.

at this juncture that the requirement of necessity is distinguishable from the proportionality requirement (which will be discussed below) in that the amount of force used must not surpass what would be regarded as necessary in that situation to avoid the harm. Nevertheless, with the necessity requirement it is possible that a defender may use force that is not proportionate, but which is, of course, necessary. Consider for example a situation where an aggressor, who intends to assault the defender on the roof of a tall building, who, in self-defence, may push the aggressor from the building.⁶⁸

In the state of Indiana, the court in *Dozier v State*⁶⁹ proclaimed that for a defender to succeed under a claim of necessity he must show that the unlawful conduct was performed in order to prevent a major harm; there must have been no appropriate alternative to avoid that conduct; the injury caused as a result of the conduct was proportionate to the damage or loss sought to avoid; and the defender must believe in good faith that this conduct was necessary to avert a greater harm. These elements will now be discussed below.

The self-defence prerequisite of necessity presupposes the existence of a danger to a legal interest. However, according to the prevailing view, “the issue of whether an interest is in danger is determined *ex ante* of a well-informed objective observer and not from the defender’s individual, subjective point of view”.⁷⁰ A person cannot rely on private defence if it appears from the facts that he was not, in fact, exposed to danger, although he thought that he was. Thus, the defender must have honestly and reasonably believed that it was necessary to kill the aggressor in order to avoid the threat from being realized.⁷¹ The Appeal Court in Virginia⁷² held that “the essential element of the common-law defence includes a reasonable belief that the action was necessary to avoid imminent threatened harm”.⁷³ This is

⁶⁸ Uniacke (n6 *supra*) 74.

⁶⁹ *Dozier v State* 709 N E 2d 27 Ind (1999).

⁷⁰ Bernsmann (n52 *supra*) 181. This is according to the objective reasonable man-test.

⁷¹ See Fontaine (n4 *supra*) 60.

⁷² *Long v Commonwealth* 478 SE2d 424 Va Ct App (1996).

⁷³ Fontaine (n4 *supra*) 98.

also expressly stated under the Texas Penal Code.⁷⁴ The said reasonable belief must occur before the defender commences his defensive act. In this regard, it can be emphasised that the attacker surrenders his personal interest since he instigated the unlawful attack.

Nonetheless it can be stated here that the common legal and moral condition of acceptable self-defence requires that the concept of necessary force need not be interpreted in the extreme; it should (depending on the context of each situation) include an assessment of relative costs and also the reasonableness of another cause of action.⁷⁵

This issue is suitably illustrated in *People v Ceballos*.⁷⁶ The facts in this case are as follows: Some tools were stolen from Ceballos' home in March 1970. Two months later (12 May) he also realised that one of his garage doors was interfered with and the lock on the other door was twisted. The damage to the door was caused by two boys aged fifteen and sixteen (Robert and Stephen). On 15 May in the afternoon; the two boys returned to Ceballos' house in his absence carrying neither a knife nor a gun. Ceballos had on that day, loaded and set between the garage doors a .22-calibre pistol in the garage. He connected the pistol by a wire and linked it to one of the garage doors such that it would discharge if someone opens the door just a few inches. After peeping through the window and realising that there was no one in the house, Stephen, using a crowbar, broke the lock of one of the garage doors. In a bid to pull the door outward, a bullet from the mounted pistol hit him in the face. The police interrogated Ceballos shortly after the incident as to why he had mounted the gun. He stated that he had noticed that his garage doors were tampered with and that he did not have much and he wanted to protect what he did have.

⁷⁴ Texas Penal Code s 9.22. Conduct would be justified if "the actor reasonably believes the force is immediately necessary to avoid the immediate harm".

⁷⁵ See Uniacke (n6 *supra*) 95 where Aquinas is cited.

⁷⁶ *People v Ceballos* 12 Cal 3rd 470 166 Cal Rptr 233 256 P 2d 241 (1974) (hereinafter the *Ceballos-case*).

Ceballos was convicted by a jury of assault with a deadly weapon, which he appealed. Some of his contentions were that he had acted lawfully since the victim was committing burglary before he was hit by the mounted gun; “that had he been present he would have been justified in shooting the victim”;⁷⁷ that the court misled the jury and that “under cases such as *US v Gilliam*,⁷⁸ a defendant had the right to do indirectly what he could have done directly”.⁷⁹ Thus, according to Ceballos, the act performed by him which produced injury upon Stephen was lawful. However, the court disputed that the rule as applied in *Gilliam* was not sound; that the situation was not in fact such as to permit Ceballos to employ the use of lethal force as a matter of fact;⁸⁰ and that a trap gun constitutes excessive force. The judgment was affirmed by the appeal court.

One is tempted to ponder whether the decision would have been different if Stephen was killed by the mounted gun. It can be argued that the asserted burglary in *Caballos*-case...

...did not threaten death or serious bodily harm to any one, since only the two boys were on the premises. The defendant did not, and could not properly contend that the intrusion was in fact such that, were he present, he would be justified under Civil Code section 50 in using deadly force. This section provides that any necessary force may be used to protect from wrongful injury the person or property of oneself. It is necessary that this section should also be read in the light of the common law.⁸¹

Thus the court concluded that Ceballos was not justified under Penal Code section 197, subdivisions 1 or 2, in shooting the boy to prevent him from committing

⁷⁷ See *Ceballos*-case (n76 *supra*) para 1 (as per Burke J). See also US Penal Code (n25 *supra*) s 459.

⁷⁸ *US v Gilliam* 25 Fed Cas 1319 15 205a (1882).

⁷⁹ See *Ceballos*-case (n76 *supra*) para 1 (as per Burke J).

⁸⁰ See *Ceballos*-case (n76 *supra*) para 2 (as per Burke J). See Johnson (n25 *supra*) 448.

⁸¹ “At common law an exception to the foregoing principle that deadly force could not be used solely for the protection of property was recognized where the property was a dwelling house in some circumstances. Further, deadly force was privileged if it was or reasonably seemed necessary to protect the dwelling against a burglar”. See Johnson (n25 *supra*) 451.

burglary.⁸² This was not a case involving the destruction or dispossession of a dwelling. Setting upon one's premises a deadly mechanical device in order to kill or injure another was not permissible in this particular case. It was furthermore held in *S v Plumlee*⁸³ that the taking of any human life (or the infliction of grievous bodily harm) using means of that nature is regarded as malicious. It was argued that to allow persons, at their own risk, to make use of lethal devices put the lives of children, firemen and police officers acting within the scope of their duties and others in danger. There is the possibility that a person who is present at the time an unlawful act is about to be committed will realise whether the use of lethal force is necessary or not. This is because lethal devices have no compassion on humans. They cause death or fatal injury to both the innocent and the unlawful aggressor without caution.⁸⁴

Taking the facts of *Ceballos*-case into consideration, it can therefore be stated that killing or the use of deadly force is only allowed in situations where it is absolutely necessary. This is supported by international law which states that the "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 in defence of any person from unlawful violence".⁸⁵

There have been instances though, where an exception to the rule of liability for injuries inflicted by a deadly mechanical device were applied. In these cases, the legal rule followed was that if the person would have been present when the

⁸² See Johnson (n25 *supra*) 446. S 197 states that: "Homicide is also justifiable when committed by any person in any of the following cases:

1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,
2. When committed in defence of habitation, property, or person, against one who manifestly intends or endeavours, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavours, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein".

⁸³ *S v Plumlee* 177 La 687 149 So 425 (hereinafter *Plumlee*). In this case, the defendant set a trap or spring gun in his barn, which killed the deceased.

⁸⁴ Johnson (n25 *supra*) 451.

⁸⁵ Art 2(2) of the United Nations Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (hereinafter the Convention on Human Rights).

invasion took place, he would have been justified in taking the life or inflicting the bodily harm with his own hands.⁸⁶ The principle set forth here is that a person may do indirectly what he is permitted to do directly.

One could also submit that the decisions in the case of *Plumlee* as well as *Ceballos*-case are not rational if one has to consider the installation of deadly devices like electric fences to protect houses and businesses; the exception should be cases where the installation of such devices is statutorily protected. It can therefore be concluded here that the application of deadly force will however be wholly illegal if it is against a non-deadly aggression.⁸⁷ The same requirement of necessity also applies in the state of California. Accordingly, the Californian law states that any “necessary force may be used to protect from wrongful injury the person or property of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest”.⁸⁸ However the code does not mention whether deadly force is necessary force.⁸⁹

A legal condition against which findings can be made about the necessary force used is the consideration that each and every person has interests and values which they are sometimes forced to defend.⁹⁰ Although the distinguishable conditions of acceptable self-defence are the requirements that the force used must be necessary and proportional, (which imply that any other means would engage intolerable risk), considerations of proportionality and the fact that the force used must be reasonable have to be part of the legal conditions for necessity to be judged.

⁸⁶ See eg, *US v Gilliam* (n78 *supra*). 1319, 1320-1321; *Scheuermann v Scharfenberg* [12 Cal3d 477] 163 Ala 337; *Katko v Briney* (Iowa) 183 NW2d 657 660 [47 ALR3d 624]; *Gray v Combs* (Ky) 23 Am Dec 431; *S v Beckham* 306 Mo 566 [267 SW 817 819 37 ALR 1094]; *S v Childers* 133 Ohio St 508 [11 Ohio Ops 191 14 NE2d 767 769]; *Marquis v Benfer* (TexCiv App) 298 SW2d 601 603. See also *Johnson* (n25 *supra*) 451.

⁸⁷ *LaFave* (n3 *supra*) 497.

⁸⁸ See s 50 of California Civil Code 1872.

⁸⁹ Deadly force is described as necessary force.

⁹⁰ *Uniacke* (n6 *supra*) 96.

2.3.3 The use of force must be reasonable

The United States Penal Code⁹¹ requires that anyone who is under attack should first ask the attacker to cease his attack before using reasonable force, unless such a request would be a waste of time or dangerous to the attacked person. A person may justifiably use lethal force in private defence only if he plausibly thinks that an aggressor is about to cause serious damage to property or bodily injury, and that person believes that the application of lethal force is in fact reasonable to prevent the harm.⁹² Whether it was in fact reasonable to use force will be determined *ex post facto* by the court taking into account the specific circumstances of each case on its own merits. As seen in the *Plumlee*-case,⁹³ a trap gun constitutes excessive and not reasonable force.

The notion of the reasonableness of using lethal force was considered extensively in the case of *Garner v Memphis Police Department*.⁹⁴ Although this case revolved around section 40 of the Tennessee's Criminal Act⁹⁵ which authorises police officers to use deadly force in order to capture suspects, similar principles applicable to private defence were considered. In this case, a fifteen-year-old boy broke into and entered a vacant home in suburban Memphis on a night in October 1974, intending to steal money and goods. A neighbour who noticed the burglary alerted the police. The two police officers who arrived at the scene attempted to obstruct the boy who was running towards a six-foot cyclone fence behind the house. One of the policemen flashed his torch on the boy who was crouching by the fence; the police officer identified himself and shouted "Halt". He noticed that the burglar was an unarmed boy who, at that moment was attempting to jump over the fence. The officer fired his .38-calibre pistol (loaded with hollow-point bullets) at the upper part of the boy's body, killing the boy instantly. The boy was carrying

⁹¹ US Penal Code (n25 *supra*) s 3.06(3)(a).

⁹² Pollock (n36 *supra*) 104.

⁹³ See n99 *supra*.

⁹⁴ *Garner v Memphis Police Department* USCA 6th Circuit 710 F 2d 240 (1983).

⁹⁵ The Tennessee Criminal Act s 40-808 (1975), under the 4th, 8th and 14th Amendments.

merely ten dollars' worth of money and jewellery which he had stolen from the residence. The court had to decide on the reasonableness of the accused's act, that is:

... to create a jury question on the issue of the reasonableness and the necessity of using deadly force. But the reasonableness and necessity of the officer's action must be judged solely on the basis of whether the officer could have arrested the suspect without shooting him.⁹⁶

In a bid to pursue the common-law rule regarding the use of lethal force on suspected felons who cannot be arrested,⁹⁷ the court in this case found the police officer's action to be reasonable.⁹⁸ It is submitted that in the case of private defence, such deadly force will not be seen as reasonable as the force used was harsh and unnecessarily excessive. The aggressor in this case posed no imminent danger to life or property, and there was no fear of harm being done by the aggressor. Still, as seen in the *Goetz*-case,⁹⁹ the use of deadly force may be considered reasonable even if no real harm exists, as long as the defender subjectively (and reasonably) believes that he is to suffer imminent injury.

2.3.4 The force used must be proportionate

The proportionality test requires that the amount of force used by the defender must not exceed the degree of force posed by the threat.¹⁰⁰ Within this requirement there is the need to make certain that the amount of force used was proportionate

⁹⁶ *Garner v Memphis Police Department* (n94 *supra*) para 14.

⁹⁷ At common law it is permissible to kill an offender who resists arrest regardless of the type of the crime. This is so because it is obvious that the offender would be executed or hanged since he is regarded as an outlaw who is a threat to the security and safety of others.

⁹⁸ *Garner v Memphis Police Department* (n94 *supra*) para 14.

⁹⁹ *People v Goetz* (n56 *supra*).

¹⁰⁰ See Fontaine (n4 *supra*) 60. This is based on the view that "somebody who uses more violence than is necessary to defend himself would be doing something wrong". See Uniacke (n6 *supra*) 95.

in relation to the kind of danger threatened.¹⁰¹ At common law, the iniquity a person is attempting to shun has to be greater than that which the law defining the crime is attempting to prevent.¹⁰²

If a person, in the course of defending his property exerts more violence than is proportionately necessary, he will be committing an offence. This is so because there is a condition for proportionality; which requires that an act of defence, though for a good cause, may attract liability if the defensive force applied is not proportionate to the end anticipated.¹⁰³ This can therefore be considered as the principle of proportionality.

The requirement of proportionality leaves open the question as to whether a person may kill someone to prevent a particular harm.¹⁰⁴ In the United States, it is typically required that a defender who has invoked private defence must demonstrate that, amongst other criteria, he reasonably believed his life to be in danger. These circumstances must be such that a reasonable person would interpret it to be so serious and severe in nature that it would cause him to experience significant fear for life and limb. In this regard, it is obvious that the force used may not be proportionate to the harm the defender seeks to avoid. In such a case, there is the possibility for excusing the defender for applying excessive force. However, it is obvious that in such a case, there is the possibility that the defensive force could be disproportionate such that it is regarded as being unreasonable.¹⁰⁵

¹⁰¹ A defender may apply force that is reasonable, in order to prevent a crime, or of persons unlawfully at large. See also s 3(1) of the English Criminal Law Act 1967.

¹⁰² See Pollock (n36 *supra*) 98. Bell (n21 *supra*) 391-392 confirms that: "The most fundamental component required for using deadly force in self-defense is proportionality. A person must be confronted with deadly force before using deadly force. All fifty states require proportionality before defending with deadly force. This includes the states that do not require a person to retreat before resorting to deadly force - the so-called 'stand-your-ground' states".

¹⁰³ Uniacke (n6 *supra*) 95.

¹⁰⁴ Uniacke (n6 *supra*) 75.

¹⁰⁵ Slater (n18 *supra*) 166.

2.4 Is it permissible to use lethal force to protect property in the US?

From early ages and in most modern societies, robbery is considered as a serious offence punishable by death.¹⁰⁶ As mentioned earlier, the United States courts and the legislature had for quite a long time considered a dwelling to be worthy of safety, especially at night where peace and security is considered most required. In order to deliberate on whether it is permitted to kill to protect property in the United States, it is important to reflect on some of the constitutions of the various states; considering the fact that the preamble of the United States Constitution guarantees “domestic tranquillity”.

The Constitution of the state of Florida regards the right to protect property as follows:

All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.¹⁰⁷

Similarly, the Constitution of New Jersey views this right as:

All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty,

¹⁰⁶ See *S v Brooks* 277 SC 111 283 SE 2d 830 (1981), and also *S v Allison* 169 NC 375 85 SE 129 (1915). Ward (n52 *supra*) 90 comments: “Someone is threatening you with imminent and deadly force. You could safely retreat from the threat but you choose, instead, to stand your ground and meet force with force. In doing so, you kill the aggressor. Are you guilty of murder? In most of the United States, the answer is no. By statute, court rulings, or a combination of both, more than thirty states have adopted a ‘Stand Your Ground’ (No Retreat) rule which bars the prosecution of people who use deadly force against a deadly aggressor without first attempting to retreat, or offers such persons a valid self-defense claim against a charge of criminal homicide”.

¹⁰⁷ Florida Constitution 1968 art I s. 2.

of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.¹⁰⁸

Considering the various states' constitutions mentioned above, it is evident that they all guarantee the right to defend property. Even though everyone has the right to own and protect property, it is not certain whether a person is permitted to kill another in order to protect his property.

One has to further examine the United States jurisprudence to establish whether killing is allowed if necessary to protect property. In essence, all the jurisdictions hold that anyone who is not the assailant has the right to use lethal force against the attacker (and therefore, is excluded from having committed an unlawful act) when he truly believed that it was necessary to use such force to avoid an impending danger of death or severe bodily injury to himself, or in certain cases, even his property. This is confirmed by the United States Penal Code section 197 which provides that:

...homicide is justifiable when resisting any attempt to murder any person or to commit a felony, or to do some great bodily injury upon any person; or when committed in defence of habitation, property, or person, against one whom manifestly intends or endeavours by violence or surprise to commit a felony.

¹⁰⁸ New Jersey Constitution 1947 art I s. 1. The Pennsylvania Constitution 1776 art I s 1 is almost a replica of this provision as it states: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness". Similarly, the Constitution of California 1849 Art 1 s 1: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy". See also the Arkansas Constitution 1874 Art II s 2, which guarantees that: "All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed".

However, when the risk does not involve death or grievous bodily injury, or when the loss or damage to property is insignificant, non-lethal force may be applied to defend the criminal act.¹⁰⁹

Although it is acknowledged that life and possessions are two distinct entities, the defence of property is “compensated by a preference to be given to the innocent and the condemnation incurred by the robber”.¹¹⁰ Despite this view, it is not permissible to kill a thief to defend or prevent property; except in circumstances where life is serious danger to life.¹¹¹

Accepting that deadly force is permissible in order to deter certain crimes such as robbery, for example, may be defended on the basis that the possible offences present a high risk of bodily injury or death. This assertion could give reason for a presupposition in all the circumstances that lethal force was necessary to resist the aggression.¹¹² However, it is not required that the act of defence be more injurious than was necessary to defend the property. For example, in *R v Martin*,¹¹³ two burglars attacked the appellant, a farmer living in his farm homestead in a remote rural area, at night. In the course of the confrontation, he shot and killed one of the burglars and injured another. Nevertheless, the appellant did not succeed in his claim of self-defence for the reason that, according to the court his use of lethal force was “excessive”.¹¹⁴ This decision in the *Martin*-case could be regarded as irrational if one has to take the following facts into consideration: the appellant lived

¹⁰⁹ Kahan & Braman (n10 *supra*) 6-7.

¹¹⁰ Uniacke (n6 *supra*) 86.

¹¹¹ Uniacke (n6 *supra*) 98.

¹¹² Kahan & Braman (n10 *supra*) 10. According to Bell (n21 *supra*) 384, the “law of nature is so basic that every state recognizes the right to use force, including deadly force and self-defence. The scope of the right to use deadly force to defend oneself has come under particular scrutiny in the past decade due to highly publicized and debated cases, such as *State of Florida v Zimmerman* 114 So 3d 446, 447 (Fla Dist Ct App 2013) , combined with the fact that many states changed and expanded their self-defence laws to provide greater protections for law-abiding citizens unlawfully confronted with deadly force”.

¹¹³ *R v Martin* 1 CR App Rep 27 (2002) (hereinafter the *Martin*-case).

¹¹⁴ As can be perceived from this case, to determine the amount of force that could be rated as excessive force may, at times, become problematic.

in a remote rural area; the appellant was attacked at night; and the fact that there were two burglars who could easily overpower the appellant.

The United States Penal Code¹¹⁵ recommends a narrower approach where the defender is allowed to apply deadly force to stop the aggressor from dispossessing the defender of his home. According to the United States Penal Code,¹¹⁶ the application of lethal force will not be regarded as justifiable except where the defender believes that:

- (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.

It was held in *McKellar v Mason*¹¹⁷ that the United States Constitution and that of Louisiana (as well as about 44 constitutions of the various United States' states - dating from 1776) secure "the right to keep and bear arms". Understandably, this implies that keeping or bearing arms gives the individual a right of usage. This means the right to use the arms to defend himself, family, property and for other purposes. Moreover, 22 states bear provisions like "every citizen has a right to bear arms in defence of himself and the state". Followers of the individual's right to keep arms also consider such right to be targeted at self-defence.¹¹⁸ The right to

¹¹⁵ US Penal Code (n25 *supra*) s 3.06(1).

¹¹⁶ US Penal Code (n25 *supra*) s 3.06(3)(d).

¹¹⁷ *McKellar v Mason* 159 So 2d 700 702 La Ct App (1964).

¹¹⁸ Volokh (n37 *supra*) 414. Ward (n52 *supra*) 90 states that: "Since 2005, 26 states have adopted statutory No Retreat rules, and an additional seven states have adopted some form of Stand-

keep and use arms assumes, at least, a right to defend oneself by using these arms. This right was acknowledged in *People v McNeese*¹¹⁹ in which the court held that the law which permits the application of lethal force by dweller against any unlawful aggression to the home owners was undoubtedly anticipated to protect the home owners who use their constitutional right to keep or bear such arms to defend themselves properties or other members of the family.¹²⁰

However, as earlier stated, no matter the situation, it is generally not acceptable to apply fatal force to defend personal property in the United States. Opponents of this view contend that this approach is uncompromising and undeservedly strict on innocent defenders. This disparagement does not take into consideration the aggressor's right to life. It is therefore important that the law considers each particular case and prohibit the application of deadly force in some situations.

Nonetheless, it can still be argued that the defence of a dwelling house may fulfil a lesser-evils standard if one assumes that any intrusion will possibly threaten death or will cause serious bodily harm.¹²¹ Consider the Texas Penal Code which provides that:

A person is justified in using deadly force against another to protect land or tangible, movable property:

your-Ground approach through a combination of court rulings, statutory provisions, and jury instructions”.

¹¹⁹ *People v McNeese* 892 P 2d 304 317 Colo (1995).

¹²⁰ Volokh (n37 *supra*) 415. This is also witnessed in the case of *S v Buckner* 377 S E 2d 139 144 W Va (1988), where it was held that a West Virginia law prohibiting the carrying of deadly weapons for self-defence or for defence of family home without a license impermissibly infringe upon constitutionally-protected right to bear arms.

¹²¹ The argument in support of the use of fatal force to defend a dwelling is regarded as persuasive by many other jurisdictions. In any circumstance, if the conduct cannot be justified as protecting the person, it might however be justifiable on other reasons such as the recognition of the home as important to the defender's dignity and privacy. It has recently been stated that “the majority of states recognized a person's right to use deadly force to defend against deadly force without first retreating”. See Bell (n21 *supra*) 389.

- (1) if he would be justified in using force against the other under Section 9.41;¹²²
and
- (2) when and to the degree he reasonably believes the deadly force is immediately necessary:
 - (A) to prevent the other's imminent commission of arson, burglary, robbery, aggravated robbery, theft during the night-time, or criminal mischief during the night-time; or
 - (B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the night-time from escaping with the property; and
- (3) he reasonably believes that:
 - (A) the land or property cannot be protected or recovered by any other means;
or
 - (B) the use of force other than deadly force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury.¹²³

Furthermore, where a person's life or something on which the person depends on for his livelihood is threatened, the mere fact that the danger is focused in the direction of the defender as undue violence is generally considered as adequate for acceptable self-defensive homicide.¹²⁴ This assumption follows undoubtedly from the provision regarding the right to bear arms.

It can thus be concluded that in certain states a person is allowed to use fatal force to defend his property if he deems it necessary. However, in ordinary civil society, the application of lethal force in order to defend property is not generally allowed. It may be allowed in circumstances where it is impossible for the thief to be arrested.¹²⁵ Apart from life and property, one remains tempted to also consider other important rights worthy of protection like honour, equality and autonomy if

¹²² S 9.41 of the Texas Penal Code (n74 *supra*) provides further explanations on the protection of one's property.

¹²³ The Texas Penal Code (n74 *supra*) s 9 42.

¹²⁴ Uniacke (n6 *supra*) 100.

¹²⁵ Uniacke (n6 *supra*) 99.

necessary, at the expense of the life of the aggressor who threaten these interests.¹²⁶

2.5 Imperfect self-defence in the US

In the United States, putative private defence (or imperfect self-defence) is a common-law defence raised by a self-defender who acted “on a reasonable false belief” that deadly force was necessary to repel an attack.¹²⁷ Examples of “excusing conditions” include some instances of necessity, insanity and mistake. Each connotes some degree of involuntariness. The element that triggers a putative self-defender is the belief, as he thought them to be at that moment in time that excites the uncontrollable defensive act. In this regard, “such a belief, though a mistaken one, is calculated to induce the same emotions as would be felt were the wrongful act of the aggressor in fact committed”.¹²⁸ The actor’s belief that he is being attacked must be reasonable, since an excused actor lacks culpability.¹²⁹ The actor’s blameworthiness and punishment are thus mitigated or partially excused.¹³⁰

¹²⁶ Kahan & Braman (n10 *supra*) 11.

¹²⁷ See *S v Jones* 8 P 3d 1282 1287 (Kan Ct App 2000); Uniacke (n6 *supra*) 100.

¹²⁸ See Fontaine (n4 *supra*) 65. A mistake cannot justify homicide. This is certainly true if the basis of self-defence is objective necessity. In South Africa, such imperfect self-defence is also regarded as a mistake as the defender was mistaken about the unlawfulness of his action and therefore lacked intention. As pronounced in *S v Faulkner* 483 A2d 759 769 (Md 1984), in such cases the element of malice is lacking.

¹²⁹ Wright (n17 *supra*) 133. This does not mean that the actor will not suffer any consequences; he may still be found guilty of manslaughter (culpable homicide) if the reasonable person would have acted differently in the circumstances. It must be noted that not every reaction in a “moment of unexpected anguish can be held to be fully justifiable”. See Kaye “Excessive Force in Self-defence after *R v Clegg*” 1997 61 *Journal of Criminal Law* 454.

¹³⁰ Fontaine (n4 *supra*) 62. Accordingly, “whether the killing in self-defence be justifiable or excusable, there must be an entire acquittal, for the reason that there is no forfeiture of goods in case of excusable homicide”. See Ward (n52 *supra*) 100.

In the case of excuse, it is always the perpetrators who are excused and not the act. Excuses provide that although the act was wrong, liability is inappropriate because some characteristics of the actor negate society's desire to punish him:¹³¹

The successful excuse defence accepts the prosecution's *prima facie* case that the defendant has committed a crime, but adequately demonstrates that the defendant acted in a non-culpable and therefore non-punishable manner by providing evidence of extenuating circumstances that show that he committed the act without the requisite degree of guilty mind.¹³²

Thus, had the facts been as he believed them to be, the actor's conduct would have been justified rather than excused.¹³³

Imperfect self-defence may thus be considered in two different ways, though the fact that the act is one of excuse is not negated:¹³⁴

The first, which reflects a subjective theory of self-defence, treats a killing that is reasonably believed by the actor to be necessary in order to prevent another from taking his property or his life as justified. It is the reasonable belief that the killing is necessary that is itself sufficient to meet the standard of justification. The second, which reflects an objective theory of self-defence, treats the killing as unjustified.¹³⁵

In imperfect self-defence cases, the putative self-defender acting on a reasonable false belief becomes an unjust aggressor. However, the concept of unjust aggression is nowhere fully clarified in order to judge whether or not such types of self-defenders are unjust aggressors. From the perspective of a putative self-defender, the force used is justified in the circumstance, even though it is not the case. In this regard, one is compelled to consider cases which constitute both acts of self-defence and putative private defence. These cases are problematic as they

¹³¹ Kahan & Braman (n10 *supra*) 7.

¹³² Fontaine (n4 *supra*) 63.

¹³³ Singh (n9 *supra*) 122.

¹³⁴ A mistaken belief as to the reality of a justificatory claim may be an excusing condition in its own right.

¹³⁵ Fontaine (n4 *supra*) 71.

“will yield awkward results if the putative self-defender is permissibly killed in self-defence: that one and the same act can be permissible (putative) self-defence and also at the same time an act of unjust”¹³⁶ violence.

Even if the actor’s honest belief that the attack is imminent is a justified belief in that particular instance, and where the “justified belief is thought sufficient to establish a positive right of self-defence”,¹³⁷ the victim’s right to life is still violated.¹³⁸ The force used by a putative private defender is unfair violence in the sense that, though it is not wicked, it has been used against an unoffending person. This is so because the intended recipient did not provoke the situation and thus did not deserve it; although from the reasonable perspective of the putative private defender the use of such force was reasonable in the circumstances. The question which now follows is - does an honest belief equate with absolutely necessity? It has been argued that it does not,¹³⁹ which is also the position in the United States’ law of tort (law of delict). A triggering circumstance alone will not be a sufficient defence to justify the response of a putative private defender. It must also be shown that the response from the defender was necessary to defend the interest or interests that were threatened and also reasonable¹⁴⁰ with regards to the damage that was threatened.

It has been suggested that the doctrine of private defence in the United States should be reframed in such a way that cases where there is in fact no actual defence (such as in cases of a reasonable but mistaken belief of a deadly threat) be excluded and dealt with under a separate “excuse-based doctrine” of putative private defence. In this regard, self-defence may be precisely limited to homicides

¹³⁶ *Ibid.* An unreasonable actor is therefore not blameless. Each case is decided on its own merits as to whether the force used by defender was justified.

¹³⁷ Uniacke (n6 *supra*) 100.

¹³⁸ The Convention on Human Rights (n85 *supra*) art 2.

¹³⁹ See the Convention on Human Rights (n85 *supra*) art 2(2). To comply with art 2 of the Convention on Human Rights, the defendant acting in private defence is required to have a reasonable belief in the need for fatal force.

¹⁴⁰ Courts have to consider cases which centre on the application of a single norm by taking into consideration all the requirements that must be present before taking a judgment; that is - the use of reasonableness. See Singh (n9 *supra*) 126-127.

that are in fact justifiable so that a separate excuse-based defence is then considered whereby the essence of the role of “reasonable mistake” may be handled correctly in cases of reactive killing.¹⁴¹

2.6 Summary

In this chapter, the private defence of life and especially property as applied in the United States was examined. In private-defence cases, the self-defender may be exonerated from all culpability by way of justification. Justification of self-defence requires the presence of a subjective element in addition to the presence of an objective element. An actor must know that he is acting in a situation giving rise to a right to self-defence; he must, for example, be aware of an imminent attack. In determining whether there is a valid justification, it is implicit in the “licence” approach that the decisions made examine the situation in which the actor actually found himself or herself. The emphasis here is on the act which must be positively justified. This is so because one cannot explain how imminent the danger must be if one does not find himself in the actor’s position.

The self-defender may also be exculpated from blameworthiness and the resultant punishment by means of an excuse. An excuse therefore implies the denial of any moral culpability of the self-defender for inflicting the harm. Consequently, a self-defender who, even though he has admitted having committed a criminal act, did so in a way that he cannot truthfully be blamed for such action, will not be guilty of the unlawful act but may be found guilty of a lesser offence. It is imperative to make a distinction between acts that are justified (that is, legally-acceptable conduct) from those that are only excusable (legally unacceptable but committed non-culpable) as one of the objectives of the criminal law is to clearly and consistently define and also forbid certain behaviours which society has regarded as harmful and unacceptable.

¹⁴¹ Fontaine (n4 *supra*) 61.

For a private defence action to protect any legal interest to be permitted, certain requirements need to be fulfilled. First of all, there must be a present and imminent danger to a recognised lawful interest which may include life and property, amongst others. The self-defence must be necessary and reasonable. It can be accepted that the application of lethal force will not be considered to be reasonable but for circumstances where the unlawful threat to property also include a danger to life or grievous bodily harm. In this regard, it is acceptable to use lethal force when the aggressor intends to commit an offence therein or to cause severe bodily injuries to the occupants of the dwelling. However, the reasonableness rule has been criticised by many for lacking precision and has become so indefinite that it is not much regarded as a rule at all.

It has been concluded by courts in the United States that one may be held criminally responsible under the law prohibiting homicide, or civilly responsible, if he set deadly devices on his premises in order to protect his property, and such devices kill or injure someone. Nevertheless, there is an exception to this rule that a defender may be liable if such devices cause death or injuries to another. This may be acknowledged in cases where the attack is, in fact, such that if the person happened to be present at that time, he would be justified in killing or causing bodily injury with his own hands.

It can be concluded that the United States law on private defence provides in certain instances for the use of lethal force to defend property. According to the majority view, deadly force might be employed if necessary to avert an attack on property. The minority view deems it impermissible to kill a potential thief, even if one takes into consideration the objective basis for the right to self-defence that is protection of the legal order. However, as was confirmed, most state constitutions affirm the right not only to acquire properties, but also to defend the properties.

The following chapter examines killing in defence of property in Cameroon. It will be investigated whether the law allows for the use of lethal force in defence of property and if so, the circumstances under which this would be applicable.

CHAPTER THREE

PRIVATE DEFENCE OF PROPERTY IN CAMEROON CRIMINAL LAW

3.1 Introduction

This chapter explores the approach in Cameroonian criminal law when dealing with homicide cases involving private defence, especially in defence of property. Certain jurisdictions recognise such a right so long as it is immediately necessary to kill in the specific circumstances.¹ Other jurisdictions unequivocally oppose such acts by issuing a blanket rejection of a right to kill in defence of property. Several jurisdictions however adopt a more circumscribed approach by recognising the use of fatal force in defence of certain limited types of property, in particular, a human dwelling. A number of jurisdictions recognise and further extend this right provided that the danger sought to be defended against constituted a combination of a threat to property and to the person.

It will be seen from this chapter that according to the Penal Code in Cameroon no criminal liability for killing in defence of property exists in circumstances where it is immediately necessary for the defender to act in self-defence. Case law supporting this particular defence is however very sparse. A paucity of reported cases may be ascribed to “a complete absence of systematic law reporting in this country”² and also “an almost complete absence of published academic contribution in this area of the law in this country”.³ It further does not seem that any prosecution has been initiated in respect of killing in defence of property in Cameroon. Possible reasons for this anomaly will be provided in this chapter.

¹ Eg, in the United States. See previous chapter.

² Anyangwe *Criminal Law in Cameroon: Specific Offences* (2011) xi. Judgments are furthermore cyclostyled and not freely available online.

³ Anyangwe (n2 *supra*) xii.

Whether killing is regarded as reasonable in particular circumstances may vary from one society to the next, given that it invariably involves a value judgment. It is thus necessary to provide a brief legal history of Cameroon in order to understand why its legal system is bi-jural before considering the lawful defences from a selected region of the country. This chapter will also explore the requirements for private defence, and whether there is the right to kill in defence of property in this jurisdiction.

3.2 Background to the Cameroonian legal system

The legal system in Cameroon,⁴ like most in Africa, is a relic of the Colonial era.⁵ The Cameroonian legal system has been described as “a hotchpotch of diverse legal systems”, “a jumble of pieces, much like a jigsaw or a mosaic”.⁶ The reason for Cameroon’s legal *mélange* can be found in its history. After the end of World War II, two colonial powers (Britain and France) were given the authority to administer Cameroon in accordance with their laws and as an integral part of their territory,⁷ subject to such modification as may be required by the local conditions.

⁴ The name Cameroon comes from the Portuguese word *camero'es* (prawns); named in 1472 by explorer Fernando Poo who dubbed the Wouri River *Rio dos Camero'es* (river of prawns). The Spanish who occupied the Island of Fernando Poo in 1494 referred to *camer'oes* as *Camerones*. This gave rise to the Anglicised name “Cameroon”, the German spelling “*Kamerun*” and the French spelling “*Cameroun*”. See Fanso *Cameroon History for Secondary Schools and Colleges* (1989) 90.

⁵ The Germans annexed Cameroon in 1884. During the First World War, a combined British and French force defeated the Germans in Cameroon and proceeded to divide the territory into two territories. The French took the larger portion of the French-speaking part of Cameroon, whilst the British took control of two disconnected portions, which they labelled Northern and Southern Cameroon respectively. The research for this dissertation is carried out in Northern and Southern Cameroon.

⁶ Enonchong “Public Policy and *Ordre Public*: The Exclusion of Customary Law in Cameroon” 1993 5 *Afr J Int'l & Comp L* 503.

⁷ The British and French legal system was introduced in 1945. The British administered their portion of Cameroon as part of their neighbouring colony of Nigeria. The Foreign Jurisdiction Act 1890 was the enabling statute for the introduction and observance of English law in Southern Cameroon. As a consequence, a number of English statutes as well as Nigerian laws and ordinances were made applicable to Southern Cameroon. Currently, s 11 of the Southern Cameroon High Court Law 1958 provides for the application of English common law, the doctrine of equity and the statute of general application as in force in England on 1 Jan 1900.

On 1 September 1961, Southern Cameroon and the newly-independent French Cameroon were formally reunited as the Federal Republic of Cameroon. The confederacy was based on a two-state federation⁸ consisting of West Cameroon (the former Southern Cameroon), and East Cameroon (former French Cameroon) until 1972 when the country became the United Republic of Cameroon.⁹

Cameroonian law is thus unique in that the two distinct and often conflicting legal systems of English common law and French civil law operate in some sort of tenuous coexistence.¹⁰ The English common law is applicable in the Anglophone provinces while the French civil law is applied to the Francophone provinces of the country. However, some uniform legislation does exist in certain areas of these laws, such as criminal law. In addition to the Western legal systems found in the jurisdiction, indigenous or customary law also plays a role. Cameroonian customary laws have existed in pre-colonial Cameroonian society already. These diverse and unwritten traditional laws applied in varying degrees by the different ethnic groups, have remained, in certain instances, intact. For example, in Anglophone Cameroon, the British colonial policy of indirect rule largely left these traditional laws integral.¹¹ Despite structural and substance differences, there were,

See Ngwafor "Cameroon: The Law across the Bridge: Twenty Years (1972-1992) of Confusion" 1995 26 *Revue Générale de Droit* 70. The French section of Cameroon formed part of their colony of French Equatorial Africa into which the civil law system was introduced. French civil law as applicable in the Francophone regions does not form part of this research.

⁸ Northern Cameroon voted in favour of remaining as part of Nigeria. See Fombad "Researching Cameroonian Law" <http://www.nyulawglobal.org/globalex/cameroon.htm> (accessed 24/10/2015).

⁹ Since 1972, Cameroon has had a strong centralised system of government dominated by the President as Head of State. This was reinforced in the 1996 amendment to the Constitution of the United Republic of Cameroon of 1972.

¹⁰ When Cameroon, like most African countries, achieved their independence; the European legal systems had already obtained a firm footing. After independence, practically, they had to maintain the legal system imposed by the colonial masters. Since then, further laws were developed in a similar manner. See Bringer "The Abiding Influence of English and French Criminal Law in One African Country: Some Remarks regarding the Machinery of Criminal Justice in Cameroon" 1981 25 *J Afr L* 3. Cameroon is consequently one of the few countries with a dual legal system in the world.

¹¹ This can nowadays still be observed in West Cameroon where the customary courts play a major role in the legal proceedings in the area. See Bringer (n10 *supra*) 1.

and still are many similarities between the varied customary laws of the region.¹² It is important to note that in certain legal matters, customary law has jurisdiction and is applicable parallel to the received English or French law, as the case may be.¹³

The rules in the different legal systems in Cameroon are harmonised through the use of the doctrine of “public policy”.¹⁴ In this regard, a court will not enforce a customary law rule if it is opposing to public policy,¹⁵ in other words, repugnant to natural justice, equity and good conscience or incompatible with any existing laws.¹⁶ The Cameroonian legal system can thus be described as bi-jural as it has two systems of laws (as well as customary) which also reflects the dual system of courts.¹⁷ The sources of Cameroonian law include the Constitution,¹⁸ common law,¹⁹ judicial precedents,²⁰ legislation and customary law.

¹² Fombad (n8 *supra*). The application of customary law in customary courts is based upon the custom and tradition of that particular clan or ethnic group. As such, there are most likely as many different customary laws as there are ethnic bands in Cameroon which may be over 250 groups. See Enonchong (n6 *supra*) 503.

¹³ Enonchong (n6 *supra*) 503.

¹⁴ Known as “*ordre public*” in Francophone provinces.

¹⁵ Enonchong (n6 *supra*) 503. Eg, s 2(1) of the 1979 Law on Customary and Akali Courts in Anglophone Cameroon determines that “Customary and Akali courts shall apply the custom of the parties provided they are not contrary to the law and to public policy”. The Akali courts (from the Bamenda Grassland Kingdoms in North-west Cameroon) are highly-organised legal institutions introduced by the Islamic faith, where accused persons are tried in conformity with Sharia Law.

¹⁶ Fombad (n8 *supra*). Eg, in the case of *Anya v Anya* (1988) CASWP/cc/9/88 (unreported), the Buea Court of Appeal invoked s 2(1) of Law no 79-4 of 1979 to exclude a rule of customary law because it was “against public policy, that is, ‘natural justice, equity and good conscience’ as spelled out in s 27 of the Southern Cameroon High Court Law, 1955”. This section provides: “The High Court shall observe, and enforce the observance of every native law and custom which is neither repugnant to natural justice, equity and good conscience, nor incompatible with any law for the time being in force, and nothing in this law shall deprive any person of the benefit of any such native law or custom”. See Enonchong (n6 *supra*) 504; Ngwafor (n7 *supra*) 75.

¹⁷ Coldham “Criminal Justice Policies in Commonwealth Africa: Trends and Prospects” 2000 44(2) *J Afr L* 220.

¹⁸ Constitution of the United Republic of Cameroon 1972, instituted by a parliament of the two (Southern Cameroon and East Cameroon) federated states.

¹⁹ See n7 above.

²⁰ Court judgments from the English-speaking regions are not binding to the French-speaking regions of Cameroon.

3.3 Private defence in Cameroon criminal law

The ground of justification known as private defence is regulated in the jurisdiction by the Constitution of the Republic of Cameroon,²¹ the Criminal Procedure Code of Cameroon,²² and the Penal Code of Cameroon.²³ In Cameroonian criminal law, there exist no distinction between private defence of the person and that of property. Both cases are considered as lawful defences under section 84 of the Penal Code.

3.3.1 Constitution of the Republic of Cameroon

Similar to most constitutions in the world, the Constitution of the Republic of Cameroon guarantees certain rights to its citizens. These rights are especially important for both the perpetrator as well as the victim in cases of homicide in defence of property. However, the Cameroonian Constitution does not contain a separate Bill of Rights, but is attached to the fundamental freedoms enshrined in the UDHR,²⁴ the Charter of the United Nations (UN Charter)²⁵ and the African Charter on Human and Peoples' Rights (African Charter),²⁶ as well as all duly-

²¹ Constitution of the Republic of Cameroon Law No 96 of 18 January 1996 (hereinafter the Constitution).

²² The Criminal Procedure Code of Cameroon Law No 2005/007 of 27 July 2005 (hereinafter the Criminal Procedure Code).

²³ The Penal Code of Cameroon decree 66/DF/237 of 12 May 1966 (hereinafter the Penal Code).

²⁴ UDHR, adopted on 10 December 1948, GA Res 217A (III), UN GAOR, 3rd Session, UN Doc A/RES/3/217A (1948). Cameroon became party to this instrument as a British mandate in 1945.

²⁵ Charter of the United Nations, signed on 26 June 1945, 59 Stat 1031, TS 993, 3 Bevans 1153; entered into force on 24 October 1945. Cameroon became party to this instrument as a British mandate in 1945.

²⁶ The African Charter on Human and Peoples' Rights of 27 June 1981, established at the 18th Conference of Heads of State and Government of the Organization of African Unity (OAU), entered into force on 21 October 1986 (hereinafter the African Charter). Cameroon is a signatory to the African Charter by virtue of Decree No 87-1910 of 29 December 1987, authorised by Law No 87-29 of 17 December 1987. As a Member State of the OAU, Cameroon is obligated to "recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them", according to art 1 of the African Charter.

ratified international conventions relating the any fundamental rights and obligations. This is affirmed in its Preamble.

The Preamble in the Constitution provides for specific human-rights principles such that all persons shall have equal rights and obligations (this right is further confirmed in Part 1, Art 1(2)) of the Constitution). These rights are also upheld in the UDHR (articles 1, 7); the UN Charter (articles 1, 2), and the African Charter (articles 3, 19). In the Constitution, a core principle appears soon after this specific right: it is stated that the home is inviolate. This is very important in terms of protecting one's property against possible intruders. It is only article 12 of the UDHR that supports this constitutional provision. This article states that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

Furthermore, ownership is guaranteed in the Constitution - the right of every person by law to use, enjoy and dispose of property. The pledge is made that no person shall be deprived of any ownership. However, a restriction is imposed in that the right of ownership may not be exercised in violation of the public interest or in such a way as to be prejudicial to the security, freedom, existence or property of other persons.²⁷

Killing in defence of property may certainly infringe on the existence or freedom of the home intruder. Still, the home houses the family - the Constitution pledges that the nation shall protect and promote the family which is the natural foundation of human society. This sentiment is echoed in article 16(3) of the UDHR: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State". Similarly in the African Charter, article 18(1), (2) regards the family as the natural unit and basis of society, which must be protected by the state

²⁷ A similar right and restriction is provided for in the African Charter, art 14. The UDHR determines in art 17 that everyone has the right to own property alone as well as in association with others, and that no one shall be arbitrarily deprived of his property, without furnishing any constraint to the right.

in terms of its physical health and morals. The family is regarded as the custodian of morals and traditional values recognised by the community, and it is here where the state must assist the family. Article 27(1) of the African Charter further extends this right to every individual who has a duty towards his family and society, the state and other legally-recognised communities and the international community. Killing a robber in defence of the family seems acceptable in this regard, especially since every person has a right to life, to physical and moral integrity and to humane treatment in all circumstances.²⁸ These principles may, of course, also apply to the intruder.

In addition, it is pronounced that no person shall, under any circumstances, be subjected to torture, to cruel, inhumane or degrading treatment.²⁹ Article 5 of the African Charter determines that all forms of exploitation and degradation, such as torture, cruel, inhumane or degrading punishment and treatment are prohibited. Similarly, article 5 of the UDHR states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. According to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention);³⁰ states are obligated to institute preventive measures against torture. Accordingly, each state “shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”.³¹ It is also emphasised that there is no exceptional circumstances whatever the situation or order which may be invoked as reason for

²⁸ See the Preamble of the Constitution. Also provided for in the UDHR, art 3: “Everyone has the right to life, liberty and security of person”; and the African Charter, art 4: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person”; art 5: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status”; art 6: “Every individual shall have the right to liberty and to the security of his person”.

²⁹ See the Preamble of the Constitution.

³⁰ The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention); adopted by the GA Res 39/46 of 10 December in 1984; entered into force on 26 June 1987. Cameroon acceded to the instrument on 19 December 1986, and signed its Optional Protocol on 15 December 2009.

³¹ Art 2(2) of the Torture Convention.

torture.³² In contradistinction to these provisions, it is submitted that Cameroon still utilises torture³³ in its widest possible sense. Even though there is an anti-torture law³⁴ in Cameroon, this law is only applicable to government officials and not civilians and provides for severe punishment for the use of torture by government officials.³⁵ Torture is applicable in the Cameroonian sense of justice, a notion which will be explained in detail further in the chapter. Cases of home robbery often result in mob justice, where the intruder is captured by the community, manhandled and frequently killed for the crime committed. Such activities are not penalised by the state. As such, it seems as if torture is excused and a regard for life and a fair trial discounted by the Cameroonian legal system in this respect.

Further general but important rights which may affect all participants in housebreaking homicides include the guarantee of freedom and security to each individual, subject to respect for the rights of others and the higher interests of the state; as well as the right of every accused person to be presumed innocent until found guilty during a hearing conducted in strict compliance with the rights of defence. There is also no retrospective application of the law - no person may be judged and punished except by virtue of a law enacted and published before the offence committed. In this regard, the Charter states that “[n]o penalty may be inflicted for an offence for which no provision was made at the time it was committed”,³⁶ and that every individual has “the right to be presumed innocent until

³² See art 2(2)-(3) of the Torture Convention.

³³ See United States Dept of State “2010 Human Rights Report: Cameroon” <http://www.state.gov/j/drl/rls/hrrpt/2010/af/154335.htm> (accessed 28/04/2015). “Torture” is defined as “any acute pain or suffering whether physical, mental or psychological inflicted on a person by any civil servant or anyone acting on their behalf in order to obtain information or a confession”. See Murray & Onyema (eds) “New Anti-Torture Law in Cameroon” 1998 42(1) *J Afr L* 138. Also see s 132(a)(5) of the Penal Code, which is identical to the definition of torture in art 1(1) of the Torture Convention.

³⁴ Law No 97/9 of 10 January 1997 affords harsh punishment for the use of torture by government officials: “If the torture results in unintentional death, the punishment is imprisonment for life”. See Murray & Onyema (n33 *supra*) 137.

³⁵ See Murray & Onyema (n33 *supra*) 137.

³⁶ Art 7(2) of the Charter.

proved guilty³⁷ by a competent court or tribunal".³⁸ The Cameroonian society seems to be ignorant about this article if one considers the manner in which alleged criminals are being treated.

Violations of these rights in the Constitution may be challenged in the Supreme Court. If this is not achieved, affected persons may solicit a regional body such as the African Commission on Human and Peoples' Rights (African Commission)³⁹ to ensure that their rights are promoted and validated.⁴⁰ However, as the African Commission has no jurisdiction to make binding decisions against any member state that has violated a provision in the African Charter,⁴¹ the body has not been able to discharge its duties satisfactorily. The inability to successfully attain its main objective of protecting human rights can be mainly attributed to some difficulties in identifying the limits of the rights and, where there has been an infringement thereof, finding an effective and practical remedy.⁴² As a consequence, victims of human-rights abuse have for the most part looked no further than their national courts for a remedy. Yet national judges have largely been asymmetrical to the challenge of providing a remedy where the alleged violation is by a mob.

The Preamble to the Constitution declares the Cameroonian people's commitment to universal human-rights values and principles, such as the right to life, to physical and moral integrity and to humane treatment, etcetera. In stark contrast, the Penal

³⁷ Even art 11(1) of the UDHR states that: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence".

³⁸ Art 7(1)(b) of the Charter.

³⁹ As established by Part II of the African Charter.

⁴⁰ Art 30 of the Charter.

⁴¹ Enonchong (n6 *supra*) 197.

⁴² Enonchong (n6 *supra*) 199, 208, 213. Eg, in cases where the right to the presumption of innocence has been infringed, it is difficult to determine what a just and appropriate remedy should be where it has been found that a violation has occurred before any criminal trial. If, after a trial, the accused has not been convicted, the only practical remedy will be monetary compensation by way of damages; which is not be practicable in Cameroon criminal law. A breach of the right to the presumption of innocence under the Charter will thus always involve a breach of the right to a fair trial.

Code prescribes the death penalty for serious crimes.⁴³ Crimes punishable by death include aggravated murder,⁴⁴ premeditated murder, theft committed with violence and leading to death, as well as robbery not resulting in death,⁴⁵ amongst others. A robber who has caused grievous bodily harm may be subjected to the death penalty, if applicable. It seems as if a home owner, who kills in defence of property, will not receive the death penalty if the act is not aggravated or premeditated. Also, the Penal Code does not impose any criminal liability in a case where the defence was immediately necessary.⁴⁶

As the Constitution is the supreme law of the jurisdiction, it is curious that domestic laws which are inconsistent with it are not regarded as invalid. The many approved or ratified human-rights treaties and conventions acknowledged in the Constitution⁴⁷ are also disregarded. This constitutional imperative is explicitly integrated into criminal law, as article 2(1) of the Penal Code provides that “the rules of international law and of duly ratified and published treaties are applicable to the present code and to any criminal provision.” In order to shed more light on this dilemma, it is necessary to examine the particular domestic laws applicable. This will be achieved in the following paragraphs.

⁴³ See Penal Code s 320. Execution takes place by means of hanging or shooting by firing squad as stated in the Penal Code s 23(1): “Execution of the death sentence shall be by shooting or by hanging as may be ordered by the judgment, and shall be public unless otherwise ordered in the decision not to commute”.

⁴⁴ Murder committed by poisoning or in order to further an offence, murder of a child of fifteen years old or younger, and murder of ascendants.

⁴⁵ Theft committed with violence, causing grievous bodily harm.

⁴⁶ S 84 of the Penal Code considers lawful defences.

⁴⁷ The Constitution states in art 45: “duly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement”. It has been noted that in practice, Cameroonian courts primarily apply domestic law without any reference to international norms. See Atangana Amougou “*Les Tribunaux Militaires et Juridictions d’exception au Cameroun*” in Lambert Abdelgawad *Juridictions Militaires et Tribunaux d’Exception en Mutation: Perspectives Comparées et Internationales* (2007) 96.

3.3.2 Cameroon Criminal Procedure Code

The Cameroon Criminal Procedure Code⁴⁸ of 2005 is the long-awaited result of a draft uniform code of criminal procedure presented by the Federal Commission for Penal Legislation in 1978 already.⁴⁹ The Criminal Procedure Code stipulates the rules which deal with the investigation of offences; the search and identification of offenders; the method of adducing evidence; the powers of those charged with prosecution; the organisation, composition and jurisdiction of courts in criminal matters; verdict; sentencing; the setting aside of judgments in default and appeals; the rights of the parties; and the methods of executing sentences. These are all procedures which may pertain to cases of killing in defence of property, and will be briefly discussed in order to highlight certain aspects of private defence.

The institution of any criminal proceeding is aimed at procuring a sentence or a preventive measure against the lawbreaker.⁵⁰ Thus, any person who contravenes the law must be arrested. According to the Criminal Procedure Code,⁵¹ an arrest shall consist of capturing a person with the intention of bringing that person as soon as possible before the authority as prescribed by law:

A judicial police officer, agent of judicial police or any officer of the forces of law and order effecting an arrest shall order the person to be arrested to follow him and, in the event of refusal, he shall use reasonable force necessary to arrest the person.

⁴⁸ The Criminal Procedure Code consists of six books. Book I concerns general provisions starting at ss 1 to 58, Book II considers the investigation and prosecution of offences (s 59 to s 287); Book III regards the trial courts (s 288 to s 426); Book IV involves the setting aside of judgments in default, appeals and reviews (s 427 to s 544); Book V (s 545 to s 583) relates to the execution of judgments; and lastly, Book VI (s 584 to s 747) pertains to special procedures.

⁴⁹ The draft appeared in 1978, and was the result of the work of the Federal Commission for Penal Legislation which includes lawyers from both parts of Cameroon. The explicit goal of the draft is to bring about a synthesis between the accusatorial and non-accusatorial procedural systems, of the English and French types respectively. It took the Commission more than ten years to elaborate the draft. However, the draft was passed by the Parliament without major modifications. See Bringer (n10 *supra*) 11. See also Abeng, Bah, Bamlango, Udobong, Barad & Feroli "International Legal Developments in Review: 2006" 2007 41(2) *The Intl Lawyer* 692.

⁵⁰ See s 59(2) of the Criminal Procedure Code (Book II Part I).

⁵¹ Criminal Procedure Code s 30(1).

Any individual may in case of a felony misdemeanour committed *in flagrante delicto* as defined in section 103 arrest the author of such an offence.

No bodily or psychological harm shall be caused to the person arrested.⁵²

It is specified that any accused, if he so wishes, may be a witness in the course of the proceedings.⁵³ The examining magistrate shall also not be bound by any statement relating to the offence which the police have given in relation to the facts of the case.⁵⁴ This is not the case in practice when it comes to defence of property in the jurisdiction. It is submitted that the main purpose is not that the police arrest a thief in order to bring him before judicial authority, but for a crowd of people to take the law into their own hands and punish an alleged criminal on the spot.⁵⁵ This usually results in serious injury or more often, death. Such punishment is totally against prescribed Cameroonian procedural law but is deliberately ignored or completely disregarded in the society.

3.3.3 Cameroon customary law

Cameroon customary law is ancient and binding, its origins lost in the mist of antiquity.⁵⁶ These laws derive from various disparate and distant lands which were

⁵² See s 30(2)(3)(4).

⁵³ Criminal Procedure Code s 323(1).

⁵⁴ See s 168 of the Criminal Procedure Code.

⁵⁵ This particular act of punishment (called mob- or jungle justice) has been in existence from time immemorial in Cameroon. It is not yet certain whether any stringent law against mob justice would ameliorate such practice. A traditional principle that must be settled here is that in cases of misconduct, eg, theft, when it comes to the attention of the society, "justice" is immediately delivered. In such cases, there is no presumption of innocence. Similar incidences occur in South Africa. In Tickyline Village near Tzaneen, a suspected housebreaker was killed by a mob. Reacting to the victim's loud screams, community members came in large numbers; caught the suspect and assaulted him. He died on the scene. See News24 Correspondent "Limpopo Mob Kills Suspected Housebreaker" *News24.com* <http://www.news24.com/SouthAfrica/News/limpopo-mob-kills-suspected-housebreaker-20160209> (accessed 10/02/2016).

⁵⁶ Fisiy "Colonial and Religious Influences on Customary Law: The Cameroonian Experiences" 1988 43(2) *Africa: Rivista Trimestrale di Studi e Documentazione dell' Istituto Italiano per l'Africa e l'Oriente* 263.

inspired by different moral, religious, social and economic backgrounds.⁵⁷ Some of these principles state general rules of morality and public policy which make up the ideological framework through which justice is administered.⁵⁸ As previously mentioned; customary law still feature prominently in certain regions of the jurisdiction. For example, due to the influence of English law in West Cameroon the customary courts still play a major role in the legal proceedings in the area.⁵⁹ It must be noted that although customary criminal laws were recognised by the British colonial authorities,⁶⁰ two distinct systems of courts co-existed in the Cameroon territories administered by them - the Native or customary courts for the natives and the European or modern courts for the whites.⁶¹

Cameroon currently still has strong customary laws and traditional courts systems in place.⁶² Any violation of a local norm or custom could easily bring about the imposition of either a moral, ritual or legal sanction or any combination thereof.⁶³ In some customs, certain crimes are punishable by stoning the criminal to death or by hanging, regarded as repugnant and contrary to public policy by the colonial authorities.⁶⁴ Although civil and criminal cases are heard using either customary or state courts, criminal cases are generally tried in state courts. After sentencing in state courts, customary courts are allowed to promote reconciliation between the parties, and to order restitution to be made as a remedy either by assigning the whole or part of the fine to compensate the victim.⁶⁵ Still, as will be illustrated,

⁵⁷ Enonchong (n6 *supra*) 503.

⁵⁸ Fisiy (n56 *supra*) 263.

⁵⁹ See Ngwafor (n7 *supra*) 71.

⁶⁰ Coldham (n17 *supra*) 219.

⁶¹ See Fisiy (n56 *supra*) 267.

⁶² Traditionally, customary justice was administered by different bodies ranging from the family head, quarter head, chief, and the chief's council. The more serious the offence, the higher up in hierarchy it had to be heard. See Fombad (n8 *supra*).

⁶³ Fisiy (n56 *supra*) 262.

⁶⁴ Eg, penalties meted out by Alkali courts in the Bamenda Grassland Kingdoms (see n15 *supra*) "range from public flogging, penal servitude to bodily mutilations and even execution". See Fisiy (n56 *supra*) 273-274.

⁶⁵ Coldham (n17 *supra*) 221. The objective of any judicial proceeding under customary law is reconciliation, which is encouraged through an informal arbitration process. It is purported that this quest for the truth lead to some psychological satisfaction for both trial parties - litigants

Cameroonian people prefer to bring criminal cases before the customary courts although they have no jurisdiction in such cases. Cases of theft - even aggravated theft – are tried in customary courts which, on a guilty-finding, results in compensation being paid by the accused to the aggrieved person. It is alleged that “[n]either the plaintiff, or - very understandably - the defendant had an interest in getting the official courts and police involved”.⁶⁶ The main reasoning behind avoiding official courts are that they “are too severe in their eyes and do not satisfy the victim's primary interest in recovering the stolen item or receiving an adequate compensation”.⁶⁷

It is reasonable to conclude that, considering the particular context of each case, killing in defence of property will be vindicated by customary courts and appropriate compensation will be paid to the aggrieved person, if applicable. However, theft may also transpire using supernatural powers. Although cases relating to witchcraft should automatically be transferred to the court of first instance (a statutory court),⁶⁸ Cameroonian people accede to customary courts to hear these types of cases.

The following case illustrates this point well. In Bafia,⁶⁹ Mr Christopher Tabi⁷⁰ was amongst the six largest cocoa producers in Bafia with a number of workers working for him. As it was harvest season, he had to dry some of the already-fermented

may confess publicly and receive public vindication rather than damages. See Fisiy (n56 *supra*) 267.

⁶⁶ Bringer (n10 *supra*) 12.

⁶⁷ Bringer (n10 *supra*) 12.

⁶⁸ Witchcraft Ordinances create a number of offences to carry severe penalties, aimed at eradicating both the belief in and the practice of witchcraft. See Coldham (n17 *supra*) 219. S 251 of the Penal Code states: “Whoever commits any act of witchcraft, magic or divination liable to disturb public order or tranquillity or to harm another in his person, property or substance, whether by the taking of a reward or otherwise, shall be punished with imprisonment for from two to 10 years, and with fine from 5000 Francs to 100,000 Francs.” (Cameroon Central African Franc or CFA 100, 000 is equivalent to ZAR 2040.00.)

⁶⁹ Bafia is a rural area in the south-west province of Cameroon, an area in which 96% of the activities consists of cocoa farming.

⁷⁰ This case was reported to the researcher by the niece of the victim. Please note that customary courts do not keep any records of their proceedings. As such, no court numbers exist and enquiries had to be made orally.

cocoa beans in the oven⁷¹ on one of his cocoa farms. He had instructed those in charge of drying the cocoa not to start the process (setting fire to the wood) until he arrived. After waiting for Mr Tabi for some time, the workers decided to set fire to the wood as drying the cocoa is a time-consuming process and it was already very late. All of a sudden, a commotion was heard in the oven. A large snake appeared which they, after a struggle, managed to kill. Suddenly, Mr Tabi came running towards them with sweat all over his body, angrily questioning the workers why they disobeyed his instructions. He died a week later. His sudden death was attributed to his involvement in witchcraft. It was believed that Mr Tabi had, through mystical means, transformed himself into a snake and visited a rival cocoa producer's farm the previous night to steal his produce. However, this man had, through protective charms, safeguarded his cocoa beans. It was alleged that Mr Tabi died because he went to appropriate another's property through mystical means. According to the community and the court "*na-yifindnam*"⁷²- his death was justified.

It is apparent that if such a case should appear before an official court of law, it will be very difficult for the prosecution to discharge the burden of proof beyond a reasonable doubt. Not only will the prosecution have problems with establishing that the actual crime of theft (by Mr Tabi in the form of a snake) took place - the *actus reus* - but it will be very arduous to prove intent – the *mens rea*. Testimonies of witnesses scarcely meet the requisite evidentiary standards. It will also be difficult to prove that Mr Tabi's death was witchcraft-related. Normally an official post-mortem autopsy will have to be conducted in order to determine the cause of death. However, the rate for medico-legal autopsies in Cameroon is very low,⁷³ but

⁷¹ An oven is an approximate eight square metres by one-and-a-half metres construction built with sun-dried mud bricks used to facilitate the quick-drying process of cocoa. Hot charcoal is used to dry the cocoa on an iron net at the top.

⁷² Pidgin English translated as "he looked for it" ie 'just deserts'.

⁷³ See Enow-Orock; Assob Ngu *et al* "Contribution of Autopsy to Medical Practice in Cameroon: A 10 Year Review" 2009 6(1) *Clinics in Mother and Child Health* 1019. The authors aver that "[o]f 12.000 bodies received at the mortuary ... 126 were autopsied ... from 1997 to 2007, giving a rate of 1 autopsy in 100 deaths" (or one autopsy per month).

“traditional autopsies” are routinely performed by “specialists” in divinations.⁷⁴ Courts can only establish culpability in such cases if the perpetrator actually confesses to committing the crime, within the meaning and intent of section 74(2) of the Penal Code.⁷⁵ In the absence of any confessional statements, no intent of witchcraft can be proven, and consequently no killing in defence of property established.

3.3.4 Cameroon Penal Code

As previously clarified, the Cameroon Penal Code⁷⁶ derives its origin from French- and English law.⁷⁷ As such, the substantive-law crimes and their punishments

⁷⁴ Eg, a “specialist” performed a “traditional autopsy” on a two-year-old baby girl, even though the child drowned in a well in the capital, Yaounde, while playing with a neighbour's son. The procedure consisted of slicing the child’s abdomen open with a dagger a few minutes before the burial, in front of all funeral attendees. The viscera are then pulled out, examined, some incantations are pronounced, and the organs shoved back. The verdict in this particular case was: “The child had already died seven times. The spell had long been there, hidden under the spleen. She was possessed by evil spirits and will be reincarnated through an animal”. While traditional autopsy is systematically carried out on the dead in order to “track [assassins] through the bodies of their victims”, official post-mortem autopsies are elective. See Panapress “Cameroonian Witch Doctors Dabble in Post-Mortems” 12 December 2002 <http://www.panapress.com/Cameroonian-witch-doctors-dabble-in-post-mortems--12-469959-20-lang2-index.html> (accessed 01/06/2015).

⁷⁵ Penal Code s 74(2) provides: “Criminal responsibility shall lie on him who intentionally commits each of the ingredient acts or omissions of an offence with the intention of causing the result which completes it”. Also see Ndukong “Sorcery and the Law” *Cameroon Tribune* (28 April 2015) <https://www.cameroon-tribune.cm/index.php?option=comcontent&view=article&id=89310sorcery-and-the-law&catid=4:societe&Itemid=3#contenu> (accessed 28/04/2015).

⁷⁶ The Penal Code comprises of two books. Book 1 (Law no 65/LF/24 of 12 November 1965) introduces the general principles of criminal law, some of which apply equally to procedure, eg, ss 1 and 2. Book 1 consists of four parts: Part I starts from s 1 to s 16 and introduces the application of criminal law; Part II concerns punishment and prevention starting from s 17 to s 73; Part III entails criminal responsibility starting from s 74 to s 100; and Part IV - s 101 to s 226 - encompasses state laws. Book 2 (Law No 67/LF/1 of 12 June 1967) also consist of two parts: Part I (s 227 to s 274) concerns specific crimes and Part II (s 275 to s 361) relates to felonies and misdemeanours against private interest. This Law (introduced by decree no 67/DF/322 of 20 July 1967) has been amended by subsequent laws and ordinances. The Penal Code has been described as “the first opus of law unification in Cameroon”. See Ajanoh “The Administration of Criminal Justice in Cameroon: Realities of the Application of the Uniform Penal Code” 1998 10 *Afr J Int'l & Comp L* 292.

⁷⁷ Much English law was incorporated into the Nigerian Penal Code, one of Britain’s territories. As such, the Penal Code followed both the Nigerian and French Penal Codes, which were previously in force in the English and French-speaking regions, respectively.

specified are an amalgam of the two jurisdictions' rules of criminal law. Although different sections exist in the Code which deals with the person⁷⁸ and property,⁷⁹ both concepts are considered under Part II of Book 1 in the Penal Code as "felonies and misdemeanours against private interest".⁸⁰ Criminal responsibility for crimes committed which involve either persons or property is considered in section 84, which is of general application.⁸¹ This section negates any criminal responsibility in the course of protecting "any right"⁸² or "all other rights".⁸³

Similar to the Constitution, the importance of protecting property is given primary attention in the Penal Code. Many offences in the Code punish interference with another's property, as illustrated in the scheme below:⁸⁴

⁷⁸ See Part II, Chap 1 of the Penal Code. Eg, according to s 275, any person who "causes another's death shall be punished with imprisonment for life".

⁷⁹ See Part II, Chap 4; s 316 of the Penal Code.

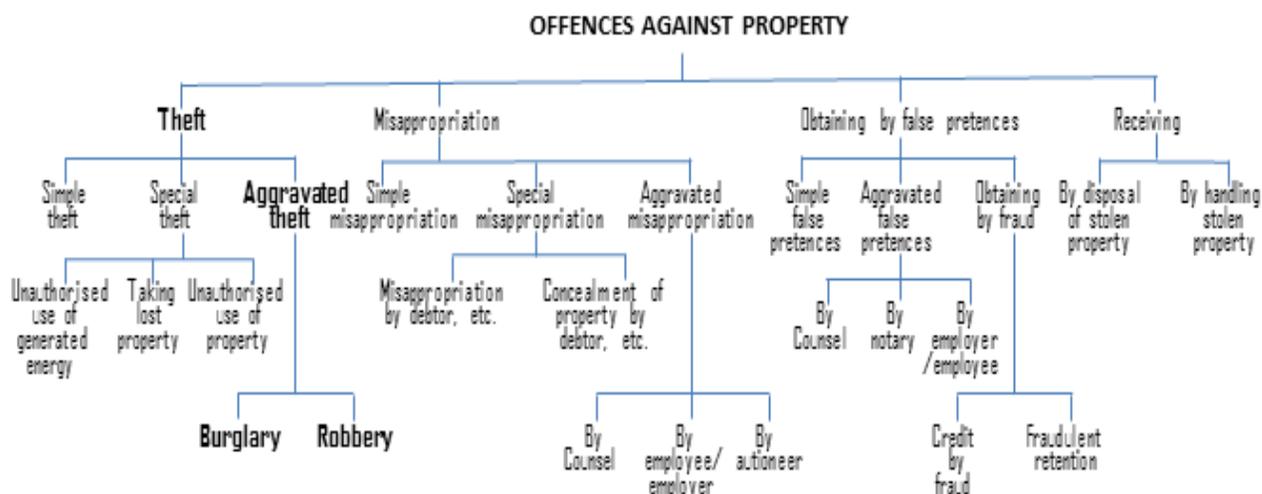
⁸⁰ Offences in the Penal Code are divided into three types: felonies, misdemeanours, and simple offences. A felony is the most serious offence and is delineated in s 21 of the Penal Code as "an offence punishable with death or loss of liberty for a maximum of more than ten years". Misdemeanours are less serious offences and are punishable by a minimum of ten days and maximum of ten years' imprisonment and/or a fine of at least CFA 25, 000. Simple offences are the least serious offences and are punished by a maximum of ten days' imprisonment and/or a fine of maximum CFA 25, 000. Simple offences are grouped separately from felonies and misdemeanours as general crimes committed irrespective of the victim or interest harmed. Felonies and misdemeanours, on the other hand, do regard the specific victim and interests injured in each case; and are grouped into three categories: crimes against the state, against general interest and against private interest. See Anyangwe (n2 *supra*) ix.

⁸¹ See s 84 (n117 *infra*).

⁸² See s 84(1) (n117 *infra*).

⁸³ See s C84 (n124 *infra*).

⁸⁴ See Anyangwe (n2 *supra*) 410. Burglary (or breaking and entering with the intention to steal) and robbery (as highlighted) are crimes implicated for use of the ground of justification (self-defence) in this study. In the Penal Code, both these crimes are conflated as aggravated theft; and no distinction is made between these two crimes as in other jurisdictions.



Not only is the thieving of property punished, but any deed which may harm any type of property of the other is punishable. If a robber, in an attempt to unlawfully enter a house, breaks down the door, the crime of destruction of or damage to property will be committed. Under section 316(1) of the Penal Code, a person who intentionally “destroys the whole or any part of any property belonging to, or charged in favour of, another” is guilty of an offence.⁸⁵ Furthermore, setting fire to another’s property amounts to a crime in terms of the Penal Code section 227(1); punishable by imprisonment from 3 to 10 years and a fine. Destruction of property need not only to take the form of arson,⁸⁶ but damages of any kind to a residence is further penalised in section 227(2) of the Code.

⁸⁵ According to the Penal Code s 316(2), the penalty for property destruction is imprisonment from fifteen days to ten years, and/or a fine from CFA 5000 to CFA 500 000, depending on the type of property and gravity of destruction. The property most often destroyed in Cameroonian case law is others’ crops or yields. Eg, in *The People & Attia Daniel v Nche Daniel* (2008) Appeal No BCA/MS/8c/2006 (unreported), a pear tree, yams and sweet potatoes were destroyed, while in *Nji Jato & 5 Others v The People* (2006) Appeal No BCA/MS/5c/2005 (unreported), hundreds of eucalyptus trees were destroyed. See Anyangwe (n2 *supra*) 251-452.

⁸⁶ Eg, in the case of *Thomas Sama v The People* (1974) Appeal No BCA/15c/73 (unreported), the complainant saw the appellant set his hay on fire. After yelling loudly that the appellant wanted to kill him, the appellant allegedly ran away. The appellant was convicted under s 227(10), and sentenced to three years’ imprisonment.

Theft is considered a serious crime in Cameroon. Unlike simple theft,⁸⁷ a burglar or robber who has appropriated another person's property will be charged with aggravated theft. The difference between simple and aggravated theft lies in the manner in which the crime is committed.⁸⁸ Aggravated theft has been defined in section 320(1) of the amended Penal Code⁸⁹ as a crime of theft committed either by day or by night, with the use of force;⁹⁰ or bearing weapons;⁹¹ or by breaking in, by climbing in, or by the use of a false key;⁹² or with a motor vehicle.⁹³ The use of force in aggravated theft may include either actual violence or threats of violence.⁹⁴ The proviso regarding the bearing of weapons require that any type of weapon may be used, but must be visibly carried. It is also not necessary that such a weapon should actually be used during the theft. Theft by any type of unauthorised entry is also considered aggravated.

The inclusion of these crimes into the discussion is important as the death penalty is prescribed for their contravention. While the original draft of the Penal Code restricted the death penalty only to very serious crimes like treason and premeditated murder,⁹⁵ instances where the death sentence may be instituted

⁸⁷ Simple theft is defined in s 318(1)(a) of the Penal Code as intentionally causing loss to another by removing his property.

⁸⁸ Mbi "Death Penalty Crimes in Cameroon" 2007 1 *Cameroon J on Democracy & HR* 30.

⁸⁹ Law 90/61 of December 1990, s 320 'Aggravated theft'.

⁹⁰ S 320(1)(a) of the Penal Code.

⁹¹ S 320(1)(b) of the Penal Code.

⁹² S 320(1)(c) of the Penal Code. See, eg, the case of *Zebaze Pierre v The People* (1986) Suit No HCB/186c/86 (unreported), where the appellant was convicted of aggravated theft for forcing open a window and stealing some money inside the house.

⁹³ S 320(1)(d) of the Penal Code. The motor vehicle must be used for committing the crime, eg, in *Bimela Francis v The People* (1988) Appeal No BCA/12c/88 (unreported), the appellant was convicted of aggravated theft after stealing fourteen bags of coffee and transporting it in his car.

⁹⁴ Or, according to Anyangwe (n2 *supra*) 423; "physical or psychic force". See, eg, *Adamu Buba, Hamidu Adamu & Yerimalssa v The People & Nebane Shadrack Shy* (2008) Appeal No BCA/7c/2007, where the appellants were convicted of aggravated theft for stealing cattle from the respondent.

⁹⁵ Capital murder as defined under s 276 of the Penal Code is committed: "a) after premeditation; or b) by poisoning; or c) in the preparation, facilitation, or commission of a felony or misdemeanour, or to enable the escape or procure the impunity of the offender or an accessory to such felony or misdemeanour". Premeditated murder is committed when intentional and planned, notwithstanding the identity of the victim or that the enterprise

have been extended to theft where aggravating circumstances were present in committing the act.⁹⁶ Accordingly, if theft has been committed causing the death of another or grievous harm,⁹⁷ the person may be punished with death.⁹⁸ These penalties differ, depending on the specific circumstances of each case, including whether it had been committed during the day or night.⁹⁹ Thus, different types of theft of varying degrees of severity may be differentiated. The death penalty can also be commuted to a maximum of twenty years' imprisonment if the court finds mitigating circumstances, except when the acceptance of mitigating circumstances is expressly excluded by law.¹⁰⁰ Notwithstanding the above, no public execution has taken place for the past decade though the Courts continue to sentence persons to death as per the provisions of the Code.¹⁰¹

The severity of the penalty prescribed for aggravated theft is a direct result of the increasing rate of armed robbery in Cameroon:¹⁰²

depends on the fulfilment of a condition (penal Code s 276(1)(a)). Also see Capstick "Capital Theft and the Cameroon Penal Code Amendment Ordinance 1972" 1973 13(3) *Bri J Crim* 294.

⁹⁶ If committed without causing grievous bodily harm, the penalty is a maximum of twenty years and a fine. Aggravated robbery (usually, but not necessarily, involving the use of a firearm or other offensive weapon) has also been made a capital offence in Zambia, Uganda, Nigeria, Ghana, Malawi and Kenya. See Coldham (n17 *supra*) 230.

⁹⁷ This is provided under s 277 and s 279 of the Penal Code.

⁹⁸ S 320(2) of the Penal Code. Previously, the Penal Code (old section dealing with aggravated theft) provided that aggravated theft existed where loss to another had been caused: (a) with force; or (b) bearing weapons; or (c) by breaking in, by climbing in, or by the use of a false key; or (d) with a motor vehicle; or (e) by three or more offenders". This section has been repealed.

⁹⁹ See Capstick (n95 *supra*) 284.

¹⁰⁰ See ss 90 and 91 of the Penal Code. Before the Code was amended in 1972, judges also had extensive sentencing discretion. See Bringer (n10 *supra*) 11.

¹⁰¹ Mbi (n88 *supra*) 30.

¹⁰² This concern is mirrored by an increase of death sentence penalties for the growing trend of robbery under arms elsewhere in Africa: Uganda introduced the death sentence for aggravated robbery with its enactment of the Penal (Amendment) Act 1966. The Kenyan Penal Code (cap 63), as amended by the Criminal Law Amendment Act No 25/71, provides the death penalty for armed robbery and attempted armed robbery in the course of which "grievous harm is inflicted upon any person other than a participant in such offence". In Sierra Leone the death penalty has replaced life imprisonment for persons convicted of armed robbery, or armed attempted robbery, or any robbery in which personal violence was an ingredient - by virtue of the Imperial Statutes (Criminal Law) Amendment Act No 16/71. Nigeria also has introduced public execution by firing squad for people convicted of armed robbery. See Capstick (n95 *supra*) 285.

The government was apparently shocked by some incidents of particularly brutal armed robbery in the early seventies which might well have been the decisive impulse for the Penal Code amendment ordinance of 1972. Whether draconian punishment has really been a successful instrument to control crime, particularly theft, is a controversial issue among Cameroon lawyers and police officials.¹⁰³

It is submitted that, in the light of the seriousness of the crime of aggravated theft and its accompanying punishment of death, a person who uses necessary, even deadly force against an assailant for the purpose of protecting his or another's body and property when immediate aid from the law enforcement is not readily available, will be justified in doing so. On a charge of murder,¹⁰⁴ such a person may claim private defence. According to the Penal Code, private defence is permissible and thus lawful, if the infringement is unlawful¹⁰⁵ and the defender's reaction was what one might expect from a reasonable person in similar circumstances. In the case of a lawful defence, the unlawful infringement need not necessarily be to the detriment of the accused himself. It is important to mention here that "lawful defence" as a defence of general application under the Penal Code is broader in scope than the law of "self-defence" in some jurisdictions.¹⁰⁶ In the following sections, the requirements for private defence to be considered lawful will be focussed on in detail.

3.4 Requirements for private defence

Everyone has the right to defend his person and all other rights including the rights of others,¹⁰⁷ provided that in every case the following conditions are fulfilled: the

¹⁰³ Bringer (n10 *supra*) 12.

¹⁰⁴ Murder (or homicide in Cameroonian law) is defined as the killing of one human being by another. Murder *simpliciter* (or murder in the second degree in some jurisdictions) is the intentional causing of another's death (Penal Code s 275).

¹⁰⁵ An unlawful infringement is any act which would expose its author either to criminal punishment or to damages. See s C84(a).

¹⁰⁶ See Anyangwe (n2 *supra*) 331.

¹⁰⁷ The Penal Code s C84.

infringement was unlawful; the defence must be dictated by an immediate necessity, and there must be a reasonable proportion between the defence and the infringement.¹⁰⁸

3.4.1 The attack or infringement must be unlawful

An unlawful infringement means any act which would expose the person responsible either to criminal punishment or to damages. This means that one cannot defend oneself against lawful arrest by the police or against an adversary who is himself acting in lawful defence. The right of defence however exist even if the immediate aggressor may have a complete defence (or irresponsibility) and even more so if his defence is only partial (threat, obedience to lawful order, insanity or infancy), since the infringement in itself remains unlawful. Thus, a person would be acting in lawful defence “if he beats another who is wrongfully endeavouring, with violence, to dispossess him of his land or goods, or the land or goods of another person”.¹⁰⁹

3.4.2 The use of force must be reasonably necessary

The defence must be dictated by an immediate necessity.¹¹⁰ The Penal Code further provides that if there is time to apply to the forces of law and order for assistance without any adverse consequence occurring from the delay; that any defence implemented in such situations would be regarded as unlawful. This seems impracticable since the defender cannot wait for the police to arrive in a case of emergency. In a case where a defender defends himself and his property, the issue foremost is whether the force used by the defender was reasonable and necessary in the circumstances.

¹⁰⁸ The Penal Code s C84(a), (b), (c).

¹⁰⁹ See Anyangwe (n2 *supra*) 331.

¹¹⁰ See the Penal Code s C84(b).

According to the Penal Code:

No criminal responsibility shall arise from an infringement of a right of property, not justified as lawful defence under section 84¹¹¹ but inflicted in order to protect the person acting or any other person, or his or another's property, from a grave and imminent danger not otherwise avoidable: Provided that the means of protection is proportionate to the harm threatened.¹¹²

This section of the Code negates any criminal responsibility if the purpose of doing so was to protect an interest. It seems that most of Cameroonian society disregards the proviso of this section – that is, the means of protection should be proportionate to the harm threatened. Consider the facts of the following case:¹¹³ at about four o'clock in the morning on the 17th of December 2013, a gang of thieves invaded a dwelling house to steal chickens in Ntamulung.¹¹⁴ Having succeeded in their mission, Raymond (a member of the gang of thieves) detached from the gang for a separate operation alone in another dwelling house. He succeeded to pull three healthy chickens from the chickens' cage. As he was about to leave the building, the daughter of the owner peeped through the window and informed her mother who immediately ran out and alerted the neighbours.¹¹⁵ Raymond started running. Upon realising that a mob was after him he abandoned the chickens as he tried to escape. He was eventually caught by the mob around the Ntamulung Presbyterian Church; some 2000m away from the crime scene, where he was bitten and burnt to death with tyres. The chickens were taken to the police station by the police who arrived quite some time thereafter; where after the owner of the

¹¹¹ It should be noted here that s 84 regards lawful defence.

¹¹² Penal Code s 86.

¹¹³ Unreported case reported on Chi Mac "Tori Time" Radio Hot Cocoa 4-5pm (17/12/2013), hereinafter the *Raymond*-case.

¹¹⁴ Ntamulung is a small town in Bamenda in the North-West Province of Cameroon.

¹¹⁵ In Cameroon any person who is being overpowered by a thief just need to scream as loudly as he can for assistance. The most popular screaming voice which is in Pidgin English is - "*wuana come o, thiefman o*", directly translated as - "come everyone o, there is a thief o". Any person who hears such screaming will be turning his attention towards that direction either to participate in catching the thief, to beat or to watch as the thief dies in pain. This is called "jungle justice".

chickens went to the police station to identify and reclaim her chickens. In this case, the force used by the mob against Raymond was not reasonably necessary and excessive. No criminal case ensued as a result of this episode, probably because Cameroonian society holds such acts as just and necessary in accordance with “*na-yifindnam*”.¹¹⁶

What is worth noting in the above incident is that the killing was in defence of personal property only. There was no threat to bodily injury or loss of another’s life. The force used was also excessive. Although it is generally considered that property is not worth a human life, dealing with a thief in this manner is, according to public opinion, necessary. Unfortunately, once a mob is chasing an alleged thief the motive or what he has stolen or done, or whether he is actually the transgressor or not, is of no essence. This may explain the reason why such cases never reach the courts; either because there is no one to summon a case or because either the family of the victim or the law enforcement officers have no one to be held accountable. As “no prosecution may commence without the complaint of the injured party”,¹¹⁷ no case will follow as the alleged perpetrator is deceased.

It is important to consider the following case which did not only involve a threat to property but also a threat to life. In *S v Abubaka Benyo and Another*,¹¹⁸ two herdsmen, Abubaka and Mbonghing, were taking care of their employer’s herd of cattle in one of the grass fields around Ndop in the North West Province of Cameroon. On the night of the 3rd of March 2008, when one of the herdsmen (Abubaka) went to the other end of the field to ensure that the cattle do not break out of the boundaries, two thieves caught, assaulted and tied up the other herdsman (Mbonghing). On his way back to meet Mbonghing at their resting place,

¹¹⁶ See n72 *supra*.

¹¹⁷ See the Penal Code s 299(3). According to the Criminal Procedure Code s 62(1)(a), criminal proceedings shall be discontinued in the case of “the death of the suspect, the defendant or the accused”. This means that if the person suspected of having committed the crime is dead; there will be no criminal proceeding. The same principle applies to the accused.

¹¹⁸ *S v Abubaka Benyo and Another* Suit No HCMD/P1/21/08 (unreported) (hereinafter *Abubaka*-case).

Abukaka realised that Mbonghing had been beaten and tied up. Abubaka then shot and killed one of the thieves and the other ran away.

What is important to note is that the case was dismissed at its preliminary inquiry.¹¹⁹ It is necessary to question why Abubaka was never tried in court. The answer to this question is clear if the court was to rely on Penal Code section 92(1) which states that “[u]pon a finding of mitigating circumstances after conviction ... the court may reduce to five days any sentence of loss of liberty, and any sentence of fine to one franc,¹²⁰ and may pass sentence of one such penalty only”. Objectively, if one finds himself in Abubaka’s position, it becomes certain that he had to do just what he did;¹²¹ despite the fact that a person is punished with death if he commits murder.¹²²

Taking into consideration all the facts of the case, a “no-case”¹²³ ruling is deemed a just decision in the *Abubaka*-case. According to the Penal Code, “[c]ontrary to defences¹²⁴ which are set forth in the Code and which are of right, mitigating circumstances are not catalogued and are in discretion of the court.”¹²⁵ The court must have taken into consideration the circumstances of the particular offence, in that Abubaka considered his life, and that of his fellow herdsman, in imminent danger. He was furthermore protecting the property of his employer. Considering that the two thieves had already assaulted and tied up the other herdsman, and Abubaka did not know whether they had any weapons at their disposal, it can be concluded that the use of deadly force was reasonably necessary. Accordingly:

¹¹⁹ See the Penal Code s 265: “Where a no-case ruling in favour of the defendant has become final, no further proceedings shall be brought against him on the same facts, even under a different statement of offence.”

¹²⁰ One franc CFA is about three South African cents.

¹²¹ Many other jurisdictions consider that a person is justified in using deadly force against another to protect land or tangible, movable property, if he reasonably believes that deadly force is immediately necessary. See, eg, the Texas Penal Code s 9 42.

¹²² Only if committed with premeditation and capital murder. See Penal Code s 276(1)(a).

¹²³ See n18 *supra*.

¹²⁴ That is lawful defence under s 84 of the Penal Code.

¹²⁵ Penal Code s C 90.

No criminal responsibility shall arise from submission to threats, not otherwise avoidable, of immediate death or of grievous harm as defined by this Code:

Provided that where the act committed is defined as an offence punishable with death or has resulted in death or of grievous harm, the responsibility of the person committing the act shall be merely diminished.¹²⁶

If it had been found that the force used by Abubaka was excessive, his responsibility would be diminished, allowing the judge sentencing discretion. In almost all cases, this entails a reduction of sentence. Another consideration why the court passed a no-case ruling is envisaged under the Penal Code¹²⁷ which states that the “infliction of harm and the use of force shall constitute no offence where proved to be justified by the immediate necessity of avoiding greater harm to the victim”. In the *Abubaka*-case, the warden could not be expected to retreat seeing that his companion and the cattle were under serious threat. Moreover, his conduct tallies with section 84 of the Penal Code,¹²⁸ especially as it involves the defence of one’s person and property. One is left to ponder whether the court would arrive at a different decision if Mbonghing was not assaulted and tied up by the thieves.

Taking the above cases into consideration, it seems that in Cameroon the right to private defence is recognised, but not restricted to force that is reasonably necessary. The right to private defence must not extend to the inflicting of more harm than is necessary to inflict for the purpose of defence.

3.4.3 Reasonable proportion between the defence and the infringement

For a defence to be regarded as a lawful defence there must be a reasonable proportion between the defence and the infringement. In this regard, “intentional

¹²⁶ Penal Code s 81(1).

¹²⁷ Penal Code s 287.

¹²⁸ See the Penal Code s 84(1) for the contents of this section (n117 *supra*).

killing is proportionate to an attack causing a reasonable apprehension of death, or grievous harm as defined by this Code”.¹²⁹ This subsection specifies the instances in which one may go as far as to kill an aggressor, taking into consideration the specific circumstances of each particular case. The question of what reasonable proportionality constitutes in various situations is in nearly every case an arduous problem.¹³⁰ The relevant court, who must decide on reasonable proportionality in a case of self-defence, must do so with reference to the guidance provided in the Code: that the confrontation caused a reasonable apprehension with the defender of death, or of grievous harm, or of rape or sodomy.¹³¹

If violence of an aggressor is returned with violence by a defender, the requirements of proportionality must be satisfied. This is well-illustrated in the case of *Kari Tazi Joel v The People*,¹³² where the appellant was assaulted in his house by an intruder (the deceased). While the deceased used a belt to beat the appellant, the appellant could only reach for a knife to defend himself, and which caused the intruder’s death. In this case, the court accepted self-defence as a ground of justification for the act committed.¹³³

As explained earlier, the legal requirement of proportionality is seldom adhered to in Cameroon.¹³⁴ The force used is never reasonably proportionate but excessive, and “such cases do not reach the court for prosecution”¹³⁵ since the thief mostly do not survive mob justice. In this regard, killing in defence of property would

¹²⁹ See s 84(2) of the Penal Code. Also see Anyangwe (n2 *supra*) 331.

¹³⁰ Eg, the court in *S v Dimmere* [1993] BLR 478 (HC) held, per Gyeke-Dako J, that a person unlawfully attacked at night could not be expected, in his state of anguish, to weigh the force of his blows in defence of himself in golden scales of a jeweller and to adjudicate with great nicety as to the exact amount of force which would be justified. A similar view was expressed by Kirby J in *S v Tatedi* [2007] 2 BLR 55 to the effect that the actions of a person trying to effect the arrest of a dangerous criminal should not be examined under “... the judgmental microscope of the armchair critic”. He went on to hold that “allowances must be made for the fears, dangers and tensions that are present when engaging with a dangerous criminal”.

¹³¹ See the Penal Code s 84(2).

¹³² *Kari Tazi Joel v The People* Appeal No BCA/18c/82 (unreported).

¹³³ See Anyangwe (n2 *supra*) 332.

¹³⁴ See s 86 of the Penal Code for the content of this section.

¹³⁵ A comment made personally to the researcher by the Chief Registrar of the Fako High Court in the course of the researcher’s search for case law.

assumedly also be regarded as reasonable.¹³⁶ It has been alleged that even a thief who has stolen an empty wallet would be killed if caught by a mob. This is because of the belief that the aggressor would not have found himself in this position had he not provoked the situation. As such, it seems as if there is a direct link between provocation and private defence in Cameroon. Both defences require a reasonable proportion between the provocation or attack and the subsequent reaction. Still, while defence of self or of property is regarded as a lawful defence which may absolve all culpability on behalf of the defender, a plea of provocation merely diminishes responsibility for the unlawful act.

Considering the manner in which persons alleged of having committed theft are treated in Cameroon, it is worth noting that if the act of defence is not proportional to the attack, the harm caused may be regarded as grievous harm,¹³⁷ homicide or even torture. Torture is considered as cruel and unusual punishment which causes severe physical, mental and psychological pain or suffering. It is punishable with life imprisonment when it is intentionally inflicted and results in death, maiming or illness.¹³⁸ The difference between the crimes of grievous harm and torture is that torture may be “inflicted on a person by any civil servant or anyone acting on their behalf in order to obtain information or a confession,”¹³⁹ while grievous harm may be perpetrated on a victim by any person. It is thus an offence for any person when attempting to procure a confession from an alleged robber for his crime to apply any type of force under any circumstances. This offence must be read with an

¹³⁶ This seems to be the case not only in Cameroon, but most African countries in the region.

¹³⁷ The Penal Code s 277 describes grievous harm as “permanently depriving another of the use of the whole or of any part of any member, organ or sense”.

¹³⁸ The Penal Code s 132(a)(5) defines torture to: “mean any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official or with the express or tacit consent on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or putting pressure on him or a third person, or for any other motive based on any form of discrimination whatsoever. Torture shall not include pain or suffering arising from, inherent in, or incidental to lawful sanctions”. See also Anyangwe (n2 *supra*) 74.

¹³⁹ See Murray & Onyema (n33 *supra*) 138. Also see s 132(1) of the (New) Penal Code. Such an offence is punishable with imprisonment of from six months to five years, where no penalty is provided for such offence.

exception that certain category of public officers, like police officers may under certain circumstances, which must be legally defined, legitimately use force against any person. Police officers may use physical force to wrench a confession from a thief or even assault or kill a thief when caught *in flagrante delicto* (“in the pursuit of public clamour”). The officer thus acts on behalf of the home owner or resident to protect his property, and any death caused by such action may be considered lawful. Nonetheless, the proportionality element must still be adhered to and any use of impermissible and excessive physical force, compulsion or coercion is proscribed by law.

3.5 Is there a right to kill in defence of property?

Cameroonian law¹⁴⁰ states that ownership entails the right guaranteed to every person by law to use, enjoy and dispose of property; and that no person must be deprived of such a right. However, this does not guarantee one the right to kill anyone who attempts to deprive others of such rights. The law permits only a judicial police officer, agent of judicial police or any officer of the forces of law and order effecting an arrest to use “reasonable force necessary”¹⁴¹ to arrest the person. Although any individual may in case of a felony or misdemeanour committed *in flagrante delicto* arrest the author of such an offence, it is unlawful to cause any bodily harm to the person arrested.¹⁴²

Yet one finds that killing in defence of property in Cameroon, as previous examples provided have illustrated, is a reality. Most instances involving killing in defence of property do not involve the home owner or house resident, but the neighbourhood communities who demand justice for the alleged crime committed. One must view Cameroonian society’s reaction to these types of crimes against the background of the jurisdiction. Governmental failure to guarantee civil order, social, political, and

¹⁴⁰ Preamble of the Constitution of Cameroon.

¹⁴¹ S 30(2) of the Criminal Procedure Code (n55 *supra*).

¹⁴² See s 30 of the Criminal Procedure Code (n54 *supra*).

economic stability¹⁴³ with a consequent high rate of unemployment has provided the ideal climate for an increase in crime, especially robberies and burglaries. For example, the financial loss suffered in Cameroon due to burglaries in the first quarter of 1993 alone was equivalent to CFA 6250000.¹⁴⁴ Inaction by law and order structures has led society to enforce the law themselves.

Killing in defence of property is not prohibited in the Penal Code. As enunciated by section 84(1), the use of force, even deadly force, is lawful for the necessary defence of *any right* of oneself or of another. This includes the right to property. A person thus acts lawful if force is used against “another who is wrongfully endeavouring, with violence, to dispossess him of his land or goods, or the lands or goods of another person”.¹⁴⁵ If a self-defender had acted in good faith and without intending to do more harm than is necessary for such defence; his attack is lawful and he incurs no liability for the death caused. If, however, one of the limitations of the justification is exceeded, the law may excuse him for the killing. It does so through section 249(2) of the Penal Code by convicting the defendant of the lesser form of culpable homicide. Although this provision makes no specific reference to the use of fatal force in defence of a dwelling house; it may also be interpreted as such.

It is thus obvious that lawful defence of self or of property may become unlawful if the conditions of immediacy, proportionality, and necessity are transgressed. According to the Penal Code,¹⁴⁶ only threats of death or grievous harm give rise to the defence of lawful force. It may be submitted that a crowd, chasing a suspected robber down a street, have not been subjected to any threat of death or harm, and the immediacy of the attack would have already ended. Even if a crowd acts on behalf of the threatened home owner or house resident; “if the apprehension of

¹⁴³ Cosmas & Schmidt-Ehry “Human Rights and Health in Developing Countries: Barriers to Community Participation in Health in Cameroon” 1995 1(3) *H & H R* 251.

¹⁴⁴ This amount is equivalent to ZAR 130, 000 00. No more recent information was obtainable.

¹⁴⁵ Anyangwe (n2 *supra*) 331.

¹⁴⁶ S C81(1) of the Penal Code.

danger has ceased, killing them will be murder”.¹⁴⁷ In this regard, one must consider the definition of a felony or a misdemeanour committed *in flagrante delicto*, which includes the proviso that it is committed when, after the commission of the offence, the suspect is pursued by public clamour.¹⁴⁸ It seems that this provision satisfy the immediacy requisite for such circumstances. In any case, if the result of submission is the commission of any act punishable with death, or is itself the infliction of death or of grievous harm, responsibility will be diminished.

Despite the fact that the law prohibits any bodily harm to a robber, as already mentioned earlier, in Cameroon a person can be killed for stealing an insignificant item; however this is not specifically following statute law which specifies the means of protection to be proportionate to the harm threatened. Taking the *Raymond*-case as well as the *Abubaka*-case¹⁴⁹ into consideration, it becomes apparent that this is a trend which is followed in Cameroon as well as other in African countries. Persons have been killed in Cameroon for merely defacing the property of another. A recent incident involved the killing of 33-year-old Lucine Njonga by home owner Hugu Mouaha, for urinating on his house’s wall. Luckily for the home owner, police intervened quite quickly, and he “narrowly escaped jungle justice”.¹⁵⁰ Even though it may be said that Mouaha was defending his property, there was no immediate threat from Njonga and the force Mouaha used was not only excessive but brutal. This case again confirms the communities’ involvement in apprehending offenders. Always on alert in case of a scream for assistance, the neighbours heard the scuffle and intervened by seizing Mouaha’s machete. When Mouaha tried to escape, they chased after him. In this instance, it

¹⁴⁷ Anyangwe (n2 *supra*) 377.

¹⁴⁸ S103 (2)(a) of the Criminal Procedure Code. Cameroon does not have a common-purpose doctrine, so identifying and prosecuting the guilty parties will be difficult.

¹⁴⁹ See n130 & n135 *supra*.

¹⁵⁰ Munteh “Murdered for Urinating on Neighbour’s Wall” *Cameroon Tribune* 10 February 2015 https://www.cameroon-tribune.cm/index.php?option=com_content&view=article&id=87838:cite-sic-bassa-murdered-for-urinating-on-neighbours-wall&catid=4:societe&Itemid=3 (accessed 28/04/2015). Njonga, who was drinking at a bar in Ndogbong, went to outside relieve himself. Found urinating on his wall, home owner Muoaha requested Njonga to wipe up his urine or face death, where after he stabbed and killed Njonga.

was recognised that Mouaha committed a wrongful act, as there is no right to kill in such circumstances.

Although no recorded Cameroonian court case could be found where the home owner or resident of a dwelling killed a robber specifically in defence of property, it is submitted that Cameroonian courts will probably agree with sentiments expressed in decided cases of such kind in other jurisdictions.¹⁵¹ Most courts consider a counter-attack reasonable in the circumstances and thus lawful. Where persons “react on the spur of the moment to prevent the invasion of their property or persons, the courts will not be astute to criminalise their conduct, unless clear excesses are present”.¹⁵²

3.6 Summary

In this chapter, killing in defence of property in Cameroonian criminal law was considered. Criminal law in Cameroon is a mixture of English common law and French civil law; but in certain regions such as West Cameroon, the customary courts, due to the principle of indirect rule, still play a major role. This is important as many cases of self-defence are conducted in customary courts. The Constitution of Cameroon enshrines rights which protect especially one’s life, but also one’s family, home and property. The Preamble of the Constitution states that ownership entails the right guaranteed to every person by law to use, enjoy and dispose of property, and that no person shall be deprived of such a right. However, this does not guarantee one the right to kill anyone who attempts to deprive one or others of such right.

Although the Cameroonian Criminal Procedure Code provides rules for the investigation of offences; the search and identification of offenders and other

¹⁵¹ *S v Dimmere* (n130 *supra*); *S v Tatedi* (n130 *supra*); *S v Johane* 2008 (2) BLR 159 (HC); *S v Van Wyk* 1968 (1) SA 488 (A).

¹⁵² Kirby J in *S v Tatedi* (n130 *supra*) 65.

criminal procedural issues; these procedures are rarely followed in cases of killing in defence of property. This is because such incidents never actually reach the court, as they are dealt with *in flagrante delicto* by the community. It was established that although customary courts do not have the jurisdiction to deal with cases of self-defence, people tend to prefer these courts to official proceedings. Even cases of aggravated theft are tried in customary courts. One of the reasons provided for this preference is that on a guilty-finding, compensation is paid by the accused to the aggrieved person. However, certain crimes are punishable by stoning the criminal to death or by hanging, which is seen as justifiable by the community, especially for crimes which presumably involve witchcraft.

It was established that Cameroonian criminal law is harsh on criminals who break into another's property bearing weapons, amongst others. In contradistinction to the constitutional guarantee to life, the death sentence is mandated to anyone convicted of aggravated theft. Furthermore, a right to kill in defence of property is provided in law so long as it was immediately necessary to kill in the circumstances. When a property or home owner is being attacked by robbers, it is obvious that his life is threatened also. Therefore, the threat to life and property is related and coalescing. This makes the use of deadly force a lawful defence as the threat is to his life and property, if there is no other reasonable response to the threat of violence. As noted earlier, lawful defence of self and of property is of general application under the Penal Code, which is broader in scope than the law of self-defence in other jurisdictions. Everyone has the right to defend his person and all other rights including the rights of others. It is stipulated that no criminal liability may arise from an act dictated by an immediate necessity of defence of the person acting or of any other person, or of any right of himself or of any other, against an unlawful infringement. However, the means of defence must be proportionate to the seriousness of the infringement threatened.

Cameroonian Penal law provides that no penalties may be inflicted for an offence for which no provision was made at the time it was committed; that everyone

charged with a penal offence has the right to be presumed innocent until proven guilty; and that no bodily or psychological harm will be caused to the alleged offender. These provisions have been blatantly ignored by the Cameroonian society especially in cases where a thief is being chased by a crowd. It is considered that in such a case, the criminal has relinquished any rights, such as the right to life, when he chose to embark on his criminal acts. As such, it was seen that a person can be killed in Cameroon for stealing a trivial item. Although any individual may in case of a felony or misdemeanour committed *in flagrante delicto* arrest the author of such an offence, it is unlawful to cause any bodily harm to the person arrested.

It is submitted that Cameroonian law, in allowing private defence of property, should balance the prohibition on private use of force and the protection of the right to life and physical security. Of necessity, this requires the law to set priorities and reinforce social security even though the harsh realities of life will not neatly fit into fixed boxes.

In the following chapter, the situation as regards private defence of property in South Africa will be investigated.

CHAPTER FOUR

PRIVATE DEFENCE OF PROPERTY IN SOUTH AFRICAN CRIMINAL LAW

4.1 Introduction

Robbery - an extremely broad and serious crime - occupies a central place in South African criminal law, and holds a high profile both in the jurisdiction's criminal statistics¹ and the consciousness of a public for whom being a victim of crime is of a daily concern. It is a vexed problem for the general South African public. A common response from South African citizens to violent crime such as robbery is community justice or self-help. These types of acts are not supported by the South African justice system which requires that citizens resort to the law. Nevertheless, it has been accepted that the state cannot always protect all people in all places.

In certain circumstances individuals under immediate attack cannot wait for the law to intervene.² In such situations, it may be considered that persons acting in private defence act in place of the police or authorities. In this regard, one further has to consider the very close relationship between the right to act in private defence and the extent of the right, on the one hand, and the availability and efficiency of the police force to protect people against unlawful attacks, on the other.³ It is submitted that the higher the level of police inefficiency in a particular area; the greater the possibility for private defence to be prevalent.

¹ See the South African Police Service's (SAPS) Crime Statistic Overview RSA 2013-2014 http://www.saps.gov.za/resource_centre/publications/statistics/crimestats/2014/crime_stats.php (accessed 23/09/2015).

² Singh "Self-defence as a Ground of Justification in Cases of Battered Women who kill their Abusive Partners" (Unpublished LLD thesis UNISA Pretoria 2009) 86.

³ Snyman "The Two Reasons for the Existence of Private Defence and their Effect on the Rules relating to the Defence in South Africa" 2004 17 SACJ 179.

South African criminal courts evaluate criminal conduct (which may include private defence) with reference to; amongst other things, the concept of unlawfulness. One acts lawfully in private defence if one uses force to repel an unlawful attack provided that the attack has commenced or is imminently threatening upon one's or someone's else's life, bodily integrity, property or other legally-protectable interest. This is only possible if the defensive act is necessary to protect the interest threatened, is directed against the attacker and is reasonably proportionate to the attack.⁴ These requirements will be fully discussed in this chapter.

Individuals under unlawful attack have the right to protect themselves against such attack.⁵ There need not even be an absolute precise proportion between the legal interest that is protected by the defender and the interest that is infringed by him. In the absence of protection by the state, the defender also acts as the upholder of justice.⁶ The relevant rules relating to the upholding-of-justice theory are as follows:

...although the attack must be unlawful, it need not necessarily amount to the commission of a crime; that is, that attack need not necessarily comply with the definitional elements of a crime. This means that the defendant need not wait for the first blow to be struck or the first shot to be fired by the attacker before commencing with the defensive action. Therefore, the defender has no duty to flee, even if it is possible for the defender to flee from the attacker.⁷

According to this theory, the defending party must consciously defend himself in private defence. There must be a conscious desire or will to defend.⁸ It is argued that under the current law individuals may employ force and even deadly force in order to protect life, property and all other rights therein.⁹

⁴ Le Roux "Private defence: Strict conditions to be Satisfied *Govender v Minister of Safety and Security* 2009 2 SACR 87 (N)" 2010 73 *THRHR* 328.

⁵ This is according to the protection theory. See Snyman (n3 *supra*) 181.

⁶ According to the upholding-of-justice theory; see Snyman (n3 *supra*) 183.

⁷ Snyman (n3 *supra*) 185 states that South African law "expects the attacked party to flee, in order to avoid the attack".

⁸ Snyman (n3 *supra*) 187.

⁹ Burchell & Milton *Principles of Criminal Law* 3rd ed (2010) 246.

This chapter will examine the origin of private defence as a ground of justification in South Africa; the requirements and most important characteristics of and test for the defence; exceeding the limits of private defence and putative private defence. Special regard will be given to cases where lethal force is utilised to protect property in the jurisdiction.

4.2 Private defence in South African law

Similar to other cultures, private defence as a ground of justification is an ancient defence in South Africa.¹⁰ The right to private defence played a very important role in past indigenous South African cultures where there was no organised police force to uphold the law. As the transgression of taboos, especially religious taboos, meant disaster for the entire community, members of the community would punish the offender to appease the deity, and sometimes even sacrifice the life of the offender as the only adequate way of atoning for the offence.¹¹ In this manner the moral order of society was restored, the victims of the transgressions appeased, and hopefully the temptation for potential transgressors to violate the laws removed.¹² On the emergence of an organised state authority the field of operation of private defence became more restricted, so that today it can only be applied in certain defined circumstances, which will be elaborated on in the paragraphs to follow.¹³

South African criminal law developed over the years resulting in a truly mixed system, blending Roman-Dutch, English and unique South African legal elements.

¹⁰ Snyman (n3 *supra*) 178 states that as "...early as classical times, the right to defend oneself against an unlawful attack was considered to be an ancient right, expressed in the maxims *naturalis ratio permittit se defendere* (natural reason allows a person to defend himself or herself against danger) and *vim vi repellere licet* (force may be repelled by force)". It has been stated that because the defence forms part of the generally-acceptable natural law to maintain order and justice, it could be accepted that the defence of private defence is untraceable.

¹¹ Kemp, Walker, Palmer, Baqwa, Gevers, Leslie & Steynberg *Criminal Law in South Africa* (2013) 7.

¹² *Ibid.*

¹³ Snyman *Criminal Law* (2014) 102.

The adoption of the Constitution of the Republic of South Africa, 1996¹⁴ necessitates that all statutes or common law be constitutionally compliant.¹⁵ The Bill of Rights in the Constitution enshrines the rights of all people and affirms the value of human dignity¹⁶ and freedom.¹⁷ These rights are further enhanced by section 12(1)(c) which guarantees freedom and security of the person,¹⁸ and that no one may be deprived of property, and no law may permit arbitrary deprivation of property.¹⁹ This right is especially applicable to the issue of private defence.

The right to dignity must be interpreted to also afford protection to the institution of marriage and family life.²⁰ Therefore, the home is regarded as an important place where a person is expected to enjoy and experience that particular freedom. There is a distinct probability that the greater percentage of criminal acts such as robbery happen within homes where peace and freedom are expected to reign, as witnessed in daily periodicals.²¹ In order to protect basic human interests and public morality in these types of incidents, South African criminal law permits the individual a right to resort to private defence in certain circumstances. However, there are requirements stipulated for situations wherein persons have to defend themselves against danger. These requirements will be subsequently discussed.

¹⁴ Hereinafter the SA Constitution.

¹⁵ Kemp *et al* (n11 *supra*) 12.

¹⁶ S 10 of the SA Constitution states that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”.

¹⁷ The SA Constitution s 7(1).

¹⁸ S 12(1)(c) states: 1) “Everyone has the right to freedom and security of the person, which includes the right (c) to be free from all forms of violence from either public or private sources”.

¹⁹ S 25 of the SA Constitution.

²⁰ Heerden J in *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (CC) 998 para F.

²¹ House robberies are a prominent feature in daily South African periodicals; eg, three men stole cash and goods worth about one million Rand from a family’s home. See Lekgau “Robbery at the Guptas” *Sowetan* (12/09/20) 138. A house robbery also occurred in Brandwag when the victims were robbed of their four cell phones, two laptops and a car. See Becker “Five Armed Men robbed Bank Employees at Home” *The New Age* 2013 10.

4.3 Requirements for private defence

For the purpose of classification, it is convenient to divide the requirements of private defence into two groups. The first comprises the requirements with which the attack against which a person acts in private defence must comply; the second, the requirement with which the defence must comply. An attack presumes a voluntary human act;²² not necessarily committed culpably; nor need it be directed at the defender. An attack may consist of a positive act of commission or an omission.²³ The defender against the unlawful attack must satisfy the court regarding the appropriateness of the private defence, and thus also the justifiability and lawfulness of his conduct.

4.3.1 The requirements for the attack

In this section, the three requirements for the attack in a private-defence scenario will be discussed.

4.3.1.1 The attack must be unlawful

The first requirement necessitates an unlawful threat or danger to a person (not necessarily the defender), but also to property. The unlawful threat must result from some illegal conduct performed by a human aggressor.²⁴ Any person with a legal interest in property or in possession of property belonging to another may lawfully defend the property. A person can act in private defence against an unlawful attack even if the attacker lacks criminal capacity or acts without intention because of a mistake.²⁵ In the case of a threat to property, the property could be of any kind. However, it must be mentioned here that the property should not be of

²² Singh (n2 *supra*) 87.

²³ Singh (n2 *supra*) 119.

²⁴ A person is not entitled to use force to prevent a lawful seizure or sale of his property.

²⁵ Snyman (n13 *supra*) 103.

negligible value. In this regard, it is the function of the court to determine the property's worth in accordance with the owner's circumstances.²⁶

4.3.1.2 The attack must be against an interest deserving protection

It must further also be established that the defender directed his defensive act against a legitimate interest which deserves legal protection. The courts regard these deserving interests which ought to be protected usually as the attacked individual's life or person, but property can also be defended. The danger or threat to the property must be a serious one, that is, the risk of losing the property or the threat of damage, destruction or other substantial interference with the right involved has to be of a serious nature.²⁷

4.3.1.3 The attack must be threatening but not completed

Where the question of private defence arises, the conventional requirements initially raised are namely the imminence of the danger and the necessity²⁸ of the attack to protect the legal interest. The threat must be either currently present, which means that the unlawful danger must have existed at the time the defence was taking place, or impending. If there was no imminent or commenced illegal attack, it is the end of the enquiry into the actual private defence, as this is a triggering requirement.

²⁶ Kemp *et al* (n11 *supra*) 83.

²⁷ Kemp *et al* (n11 *supra*) 83; Burchell & Milton (n9 *supra*) 248.

²⁸ Burchell & Milton (n9 *supra*) 257 state that "one finds an element of necessity present in private defence, and considering the fact that acts done in both private defence and in a situation of necessity seek to prevent a greater harm. However, the requirements of the two defences are different. Eg, private defence requires an unlawful attack by the complainant, while the defence of necessity does not. Again, while private defence is directed against the wrongdoer, acts of necessity usually results in the infliction of harm to an innocent person. Private defence involves acts of a person defending himself against an unlawful imminent threat. Necessity involves an escape from an emergency situation or from an immediate threat thereof."

To meet the requirement of imminence, two possibilities should be considered. The attack must have already begun but is not yet complete; or the danger or threat is immediate. To differentiate between the two possibilities, the test consists of “the temporal proximity between the anticipated fear and the defensive action”.²⁹

However, it is debatable, on a balance of probabilities, whether an unlawful attack is in fact imminent. This is because the defender is not required to wait until he is in fact in danger of death or serious injury, or his property is indeed being taken away from him to lodge a defensive act. Instead, it is required that the defender reasonably believes that he or his property is in danger, even if this was in fact not so.³⁰

As previously stated, if there is an attack or immediate threat of attack, it is, of course, not necessary for the defender to wait for the first blow. In the case of the defence of property, the threat or danger must have materialised or be imminent, as long as it is present. There only needs to be evidence that the property is subject to pending danger of damage or destruction that was unlawful.³¹ For example, when automatic defence mechanisms are set up to protect property (such as a gun which automatically activates if a thief tampers with the property); no imminent threat or attack exists at the stage when the mechanisms are rigged.

South African law recognises that in certain narrowly-defined circumstances the setting up and triggering of such automatic defence mechanisms may constitute a valid and thus lawful private defence. It is further permissible in South Africa to use electric fences, even traps, in anticipation of future danger or any potential risk to property. However, as indicated above, the danger or threat should be impending or ongoing and sufficiently serious to warrant the measures taken. Also; the devise

²⁹ Singh (n2 *supra*) 119.

³⁰ Botha “Private Defence in the South African Law of Delict” 2013 *SALJ* 154 163. This is putative private defence, which is discussed *infra* at 4.8.

³¹ Burchell *South African Criminal Law and Procedure Volume I: General Principles of Criminal Law* 4thed (2011) 136.

should be designed to prevent or deter would-be thieves or intruders; and the public must be given sufficient warning about the rigged traps.³²

A question that arises is whether a person is justified in using force after the event (when the attack is no longer threatening) in order to recover stolen property that is still in possession of the thief. According to Burchell and Milton, this would be permissible in view of the fact that theft is a continuing crime:³³

If theft is a continuing crime, it would then follow that an owner would be permitted to justifiably use force to recover stolen property even though the procuring was complete and the private defence had taken place at some later stage when the owner discovered the thief with the property.³⁴

However, once the attack is completed and the threat or danger over, the defender may not use force, for example, to assault a thief who has already abandoned the stolen property.

4.3.2 Requirements for the defence

In this section, the four requirements for the defensive act in a valid private-defence contention will be elaborated on.

4.3.2.1 The defence must be directed against the attacker(s)

It is logical that an individual can only act in private defence if his protective act is directed against the person attacking him. If the defender defends himself or some other person against anybody else than the attacker, no lawful ground of justification in the form of private defence exists.

³² *S v Van Wyk* 1968 (1) SA 488 (A) 509 (hereinafter *Van Wyk*).

³³ Burchell & Milton (n9 *supra*) 248.

³⁴ *Ibid.*

4.3.2.2 The defensive act must be necessary

In order to protect the interest threatened, the defensive act must be necessary. The act of defence must be the only manner in which the defender can ward off danger or obviate the threat to his interests.³⁵ As such, when utilising force to defend person or property, it should have been the only possible way of repelling the threat or danger. It is submitted that a defensive act will be necessary as long as it is the only way existing at that particular time for averting the attack on the defender's rights or interests. However, even if other means of relief were available but the defender had no means of obtaining the relief at the time of the attack, the defensive act will still be considered necessary.³⁶

4.3.2.3 The defensive act must be reasonably proportional to the attack

The force used to defend the deserving interest should not only be necessary, but also reasonably proportional. This means that the manner of defence should not be out of proportion to that of the attack. A person cannot claim private defence in a situation where deadly force is utilised whereas less harmful defensive methods were available, obtainable and preferable to ward off the attack. A proportionality test is employed to determine the balance between the attack and the defence. In *S v Steyn* 2010 1 SACR 411 (SCA) 417, the Supreme Court of Appeal listed some factors to be taken into consideration when determining a reasonable proportion between the attack and the defence. These factors are, amongst others, the parties' relationship, gender, age differences, physical abilities, where the incident took place; the type of weapon used; the nature, gravity and perseverance of the attack and the nature and extent of any injuries the attack would cause; the types

³⁵ Snyman (n13 *supra*) 107.

³⁶ Singh (n2 *supra*) 96.

of means available to ward off the attack as well as the actual means used by the defender; and the nature and extent of any injuries the defence would cause. The Court however emphasised that this list is not exhaustive and that the circumstances of each particular case should determine the applicable proportionality factors to be considered.

Even if force was necessary in a situation of private defence, the question has to be asked whether the force used was reasonable in the particular circumstances.³⁷ The issue here is the degree of force that could be considered reasonable and necessary, because if the force that was used is not regarded as necessary then it would be considered as unreasonable. The reasonableness of the force used in private defence cases is a question of fact to be determined by the judiciary.

For the use of force to be necessary, it is required that the danger or threat which the accused apprehends must be sufficiently specific and imminent and must be such that it could not be reasonably be made without resorting to force. If the conclusion is that the use of force was necessary, then the harm caused by the accused will be compared with the harm prevented by his action in order to determine whether the force used was reasonable. If the harm caused was grossly disproportionate to the harm prevented, the court may hold that the defender's use of force exceeded the degree of force required to avert the attack.³⁸ Therefore, despite the fact that the defender was defending his property as a result of the unlawful threat, his defence will be unsuccessful; his act will be regarded as unlawful and he will be culpable.³⁹

³⁷ See *S v Motleleni* 1976 (1) SA 403 (A); *S v Ntuli* 1975 (1) SA 429 (A) 436; *S v Goliath* 1972 (3) SA (A) 26; *S v Ngomane* 1979 (3) SA 859 (A) 863; *S v Dougherty* 2003 (2) SACR 36 (W) 50 (hereinafter *Dougherty*); *Matlou v Makhubedu* 1978 (1) SA 946 (A) 956.

³⁸ Mousourakis "Excessive Self-defence and Criminal Liability" 1999 12 *SAJC* 145-147. In the US, the law requires the defender to first request the aggressor to desist from his unlawful acts or attempts.

³⁹ Mousourakis (n38 *supra*) 147-148; Burchell & Milton (n9 *supra*) 255.

No precise measurement exists to determine what should be regarded as reasonable force or excessive force in any particular case.⁴⁰ The South African courts require that “there should be a reasonable relationship between the attack and the defensive act, in the light of the particular circumstances in which the event takes place”.⁴¹ When considering the light of the circumstances in which the accused decided to use force, it should be taken into account that, under the stress of the situation, the accused might not have been able to reflect on the exact degree of force needed to avert the attack. It is highly likely for the defender to overestimate the amount of force that was required in the particular circumstances. If the accused was unable to correctly calculate the amount of force actually needed, a plea of private defence may be successful even if the accused used more force than was in fact necessary.⁴² The accused may then not be criminally liable because of a lack of *dolus*, in the form of the necessary intent to act unlawfully.⁴³ In such cases, the accused should likely be convicted of culpable homicide and not murder if at the time of the act he honestly believed that the force he used was reasonable in the circumstances.⁴⁴

4.3.2.4 The defender must be aware of acting in private defence

The defender must have the knowledge that he is acting in private defence, as there is “no such thing as unconscious or accidental private defence”.⁴⁵ This further means that the person claiming to act in private defence cannot first provoke the other person, who then merely reacts to the provocation. In this situation, the private defender is actually the aggressor. Also, private defence cannot occur on pure chance – if the supposed defender kills a person he dislikes only finding out

⁴⁰ Walker “Determining Reasonable Force in Cases of Private Defence” 2012 1 SAJC 84.

⁴¹ See *S v Trainor* 2003 (1) SACR 35 (SCA) para 13.

⁴² Mousourakis (n38 *supra*) 148.

⁴³ Kemp *et al* (n11 *supra*) 85.

⁴⁴ Mousourakis (n38 *supra*) 152.

⁴⁵ Snyman (n13 *supra*) 111.

later that this person posed some type of lethal risk to him or other individuals, he cannot claim private defence as the original act is still considered to be murder.⁴⁶

4.4 The duty to flee

An issue which has always been of great concern is whether a person being attacked must flee or withdraw from the scene if this act would prevent any possible lethal confrontation. This is a question which has as yet not been fully answered by the South African courts. However, judged against the new constitutional dispensation, it can be accepted that the law would require an attacked person to flee, if possible, rather than kill the aggressor.

There are however several instances where it can be established, with reasonable certainty, that there is no duty on the attacked party to flee.⁴⁷ South African courts recognise the principle that if it is dangerous for the defender to flee in the sense that he would then expose himself to, for example, a stab or a shot in the back; he need not flee, but may act pro-actively and put his attacker out of action:⁴⁸

The law does not expect a person to gamble with his life by turning his back on his attacker and merely hoping that he would not be hit by a bullet or be stabbed in the back with a knife by the attacker, who unlawfully and intentionally launched the attack. It is the attacker who has to carry the risk of injury or death and not the attacked party. Thus the duty to retreat is not a condition laid down by law, but only a factor to be considered by the judiciary when deciding whether it was necessary for the accused to use force and if the force used was reasonable.⁴⁹

⁴⁶ *Ibid.*

⁴⁷ Snyman (n13 *supra*) 107.

⁴⁸ Snyman (n13 *supra*) 108.

⁴⁹ Mousourakis (n38 *supra*) 143-154, 146.

In private defence of property, the duty to retreat is not necessary despite the fact that the attacked party can possibly flee from the attack.⁵⁰ Therefore, the owner of a property, when faced by a robber in his own dwelling, is not expected to abandon his property nor submit to the attempt to take it from him⁵¹ or to flee his home. This is because by law, his dwelling house is regarded as “his last refuge - his castle - where he may protect himself”⁵² and his family from any unlawful entry. However, there is some submission that the owner might first avoid the intrusion by closing or locking the door.⁵³ When determining the reasonableness and hence lawfulness of any act of private defence in terms of property, an appropriate inquiry would be whether the act of the defender was reasonable in defending himself or his property.⁵⁴ In such cases, the value of the property to the defender is also an important consideration in assessing whether the use of force and the means used were reasonable in the circumstances.⁵⁵

In certain circumstances, the court may conclude that even though the defender assumed that he was permitted to use force in order to defend his rights, objectively viewed the situation was not one that necessitated the use of deadly force. Alternatively, if he was justified in using force to defend his property, the courts could hold that the force he used was excessive to that necessary to deflect the attack.⁵⁶

⁵⁰ Burchell & Milton (n9 *supra*) 249.

⁵¹ Burchell & Milton (n9 *supra*) 249.

⁵² Snyman (n13 *supra*) 108. In terms of the CPA s 42(3), a property owner may furthermore attempt to capture without a warrant anyone committing any unlawful act to his property.

⁵³ Burchell & Milton (n9 *supra*) 249. In the United States, the law requires the defender to first ask the aggressor to cease his unlawful acts or attempts.

⁵⁴ Walker (n40 *supra*) 84-92.

⁵⁵ Kemp *et al* (n11 *supra*) 83.

⁵⁶ Burchell & Milton (n9 *supra*) 255.

4.5 The test for private defence in South African law

It is generally accepted that the test for private defence in South African criminal law is objective. In other words, the reasonableness of the defensive act must be judged objectively. However, in order to determine whether there has been a situation of private defence, the defender's subjective beliefs relating to the person present and circumstances prevailing are also considered. In this regard, judicial weight may be given to both the objective and subjective tests; taking into consideration the exigencies of the specific situation.⁵⁷ These tests will consequently be elaborated on.

4.5.1 Objective test for private defence

In deciding cases of private defence, courts first have to establish whether there was in fact an unlawful threat or attack. If this question has been confirmed, the question of the use of force or excessive force by the accused is considered.⁵⁸ For the use of excessive force to be justified, it has to be ascertained that the defender had reasonable grounds for considering a particular threat as imminent.⁵⁹ As previously pointed out, when deciding on the question of the reasonableness of the defence, courts need to imagine themselves acting under the circumstances in which the accused had to act when he decided to use force. This test is called the objective test as facts are regarded from an external point of view. It is also termed the reasonable-person test as the question is asked whether a reasonable person acting in a similar situation that the accused found him in would also have acted in the same way.⁶⁰ Although it may seem that the objective test for private defence is similar to that of the test for negligence, Snyman reveals that South African courts “apply the reasonable person test here merely in order to determine whether X’s

⁵⁷ *S v Nyokong* 1975 (3) SA 792 (O) 794; *S v Motleleni* (n37 *supra*) para 406.

⁵⁸ Botha (n30 *supra*) 160.

⁵⁹ Botha (n30 *supra*) 161.

⁶⁰ Snyman (n13 *supra*) 112.

conduct was reasonable in the sense that it accorded with what is usually acceptable in society”.⁶¹ The objective test is thus utilised in this sense only as “aid to determine whether X’s conduct was lawful or unlawful”.⁶²

As confirmed by Snyman, South African courts do employ the reasonable-person test to determine the judiciousness of the force used in private defence as well as the particular circumstances in which the accused found him when the defensive act was applied.⁶³ However, one should assess whether the use of this test is merely a harmless expedient, or is indeed justified. The problem with following this prescription (the reasonable-person test) is that:

[w]hilst capacity for knowledge has a direct bearing on capacity for foresight and hence on the question of negligence, it can have little or no bearing on the question of whether a particular defensive act was a reasonable response to a particular act of aggression. By adopting the reasonable-person test for this latter purpose, therefore, the court runs the risk of introducing considerations that have no logical bearings on such an enquiry.⁶⁴

A further objection to the reasonable-person test lies in the frequency with which the question ‘would a reasonable person have acted in the same way as the accused?’ is converted into the open-ended question ‘what would the reasonable person have done?’ In this way, the focus of the enquiry is made to shift from an examination of the accused’s conduct, to an examination of what other options were available to him. Whilst a court should consider the various defensive measures that were available to the accused at the critical time, the main point of the enquiry should not be whether other defensive options were possible but whether the defensive act implemented was reasonable and thus justifiable.⁶⁵

⁶¹ Snyman (n13 *supra*) 112-113. See also *Dougherty* (n37 *supra*) 44h-46i where the court confirmed that the test in respect of both unlawfulness and negligence is objective.

⁶² Snyman (n13 *supra*) 113.

⁶³ Singh (n2 *supra*) 110.

⁶⁴ Walker (n40 *supra*) 90.

⁶⁵ *Ibid.*

In light of the above, it may be concluded that, although there is indeed precedent for the use of the reasonable-person test, it is not as harmless as it might appear at first sight. In addition, the precedent for the use of the reasonable-person test does not appear to have been based in its own turn on any particularly compelling or persuasive authority. After all, it might be asked if one is required to explain what is meant by 'reasonable force' in any given case. The most serious objection lies in the fact that the reasonable-person test is no longer a wholly-objective enquiry in South African law, but has been partly 'subjectivised' to the extent of incorporating certain personal characteristics of the accused.⁶⁶

The danger of courts expanding the objective test is suitably illustrated in the case of *Dougherty*.⁶⁷ In this case, the conduct of an attacked person who feared for his life, and who endeavoured to protect his life or property and claimed private defence was questioned as to its objective reasonableness. In this particular case, the court rejected the accused's claim as, according to the court, his actions went further than were necessary.⁶⁸ The facts of the case are as follows: The accused person, who lived on a plot in Honeydew just outside Randburg, held a party for about twenty of his friends at his house to celebrate his 63rd birthday. When two of Dougherty's guests left the party, they were held up by two people (a certain Dlomo and the deceased) in an attempted robbery outside his house, assaulted and seriously wounded. Shaken by the incident, Dougherty grabbed hold of his firearm and went outside to see what had happened. He found the deceased and Dlomo sitting on a wall and questioned them as to their knowledge of the incident. They denied knowing anything; however, the deceased approached the accused, pointing at the firearm and challenging him that he will not use it. In order to warn the deceased not to further advance, the accused fired a downward shot. When the deceased (who was unarmed) continued coming closer, the accused panicked

⁶⁶ Walker (n40 *supra*) 89.

⁶⁷ *Dougherty* (n37 *supra*). See also Snyman "Private Defence in Criminal Law - An Unwarranted Raising of the Test of Reasonableness" 2004 67 *THRHR* 326.

⁶⁸ Snyman (n67 *supra*) 325.

that the deceased would overpower him, take his weapon where after he feared there would be no escape for him. He blindly fired a shot at the deceased, who was already very close to him, killing him instantly. The deceased's companion, Dlomo, was grazed by the bullet, but survived.

Dougherty was convicted of murder and was sentenced to ten years' imprisonment and six years' imprisonment for the attempted murder in respect of Dlomo. Both sentences were to run concurrently. On appeal, the court by judgment of Willis J agreed with the trial court's findings that his reliance on private defence could not succeed.⁶⁹ However, it was held that because of Dougherty's belief that his acts were lawful that he lacked intention, and he could thus not be found guilty of murder or attempted murder which necessitates the presence of *dolus* as to the consciousness of the unlawfulness of the act. The court held that, although Dougherty honestly but erroneously believed that his conduct in killing another was justified,⁷⁰ he acted unreasonably and thus negligently when killing the deceased.⁷¹ He was convicted of culpable homicide and sentenced to three years' correctional supervision.⁷²

Snyman is of the opinion that the *Dougherty*-case represents a classic case of private defence as the accused's actions complied with the prerequisites for the defence.⁷³ However, he warns that, in the light of the provision of section 11 of the Constitution,⁷⁴ the judgment may be interpreted as introducing more stringent standards as to the rules of private defence. This is because it seems to suggest that the objective test which determines whether an accused's actions were

⁶⁹ Snyman (n67 *supra*) 326.

⁷⁰ *Dougherty* (n37 *supra*) 47a-b.

⁷¹ This principle has been acknowledged in a number of authoritative decisions. See, eg, *S v Motleleni* (n37 *supra*) 406 C-H; *S v Sam* 1980 (4) SA 289 (T); *S v De Oliveira* 1993 (2) SA CR 59 (a) 63g-64a (hereinafter *De Oliveira*).

⁷² This was in accordance with s 276(1)(h) of the CPA.

⁷³ Snyman (n67 *supra*) 326.

⁷⁴ S 11 provides for a right to life.

reasonable and responsible must be measured against constitutional provisions, and must therefore be “a high one”,⁷⁵ that is, higher than what it used to be.

Snyman questions the court’s application of the objective test, and the reasons for the court’s finding that the appellant’s actions were unreasonable and thus unlawful.⁷⁶ According to the facts of the case, the appellant’s acts of leaving the house to investigate the cause of the attempted robbery and possibly to apprehend the robbers were entirely reasonable. According to Snyman, he might even have thought it his duty to do so, and even such a belief would have been reasonable.⁷⁷ It was furthermore an objective fact that the accused and Dlomo were the attackers of the two guests.⁷⁸ Dougherty also legitimately feared that the two men would attack or overpower him, grab hold of the weapon and shoot him.

According to Dougherty’s evidence, which was accepted by the court,⁷⁹ he “fired downward in the direction of the deceased”⁸⁰ only when approached by the deceased which means that he wanted to fire a warning shot and avoid harming the deceased. Curiously, in determining the reasonableness of the accused’s conduct, the court in the *Dougherty*-case did not consider the fact that the aggressors outnumbered the accused two to one. The court also does not mention the significant age difference between the accused and the aggressors. Dougherty was already 63 years old, while the assailants were aged about 31 and 25 years. Even if Dougherty had attempted to run away (exposing his back to his attackers, abandoning his other guests in the house), the younger men would have easily overpowered him. Surely he acted reasonably in proactively shooting in the direction of the two persons approaching him in the dark?⁸¹ He had fired a warning shot but the two attackers continued to approach him, which shows that they were

⁷⁵ *Dougherty* (n37 *supra*) 49h-l; Snyman (n67 *supra*) 326.

⁷⁶ *Dougherty* (n37 *supra*) 50a-d.

⁷⁷ Snyman (n67 *supra*) 327.

⁷⁸ *Dougherty* (n37 *supra*) 38j, 42c-d.

⁷⁹ *Dougherty* (n37 *supra*) 39h-i; 44f. This evidence was supported by an independent witness.

⁸⁰ *Dougherty* (n37 *supra*) 39d.

⁸¹ Snyman (n67 *supra*) 328.

intent on attacking him.⁸² Dougherty only fired at the aggressors in order to protect himself and his visitors still in the dwelling.⁸³ Snyman confirms that

...there is no duty on the attacked party of having to risk his life or physical integrity by taking insufficient precaution, thereby exposing him to the danger of being seriously injured or even killed. It is the attacking party, who intentionally initiated the unlawful course of conduct, who bears the risk of injury or death.⁸⁴

It is not expected from a person to risk his own life if, by killing his attacker, he can secure his own safety.⁸⁵ This viewpoint is supported by earlier case law, such as by Van Den Heever JA in *R v Zikalala*:

But the observation places a risk upon the appellant that he was not obliged to bear. He was not called upon to stake his life upon 'a reasonable chance to get away'. If he had done so he may well have figured as the deceased at the trial, instead of the accused person.⁸⁶

The court in *Dougherty* found that the accused's conduct of shooting was unreasonable as "the deceased was unarmed and clad only in a pair of shorts".⁸⁷ As confirmed by Snyman, the dress of the attacker is immaterial to the reasonableness of an accused's actions.⁸⁸ As regards the deceased's lack of weapon, there is no such principle in private defence that the assailants select the weapons.⁸⁹ The court failed to appreciate the significance of these very important facts as factors bearing on the reasonableness of the accused's defensive actions. This flaw, as well as the "court's attitude [...] of an armchair critic who failed to put himself in the position at which the accused found himself at the crucial moment"⁹⁰ and the 'higher' test for determining the reasonableness of the defender's conduct,

⁸² *Dougherty* (n37 *supra*) 39d.

⁸³ *Dougherty* (n37 *supra*) 50c-d.

⁸⁴ Snyman (n67 *supra*) 329.

⁸⁵ See *S v Teixeira* 1980 (3) SA 755 (A) 76C; *S v Mokgiba* 1999 (1) SA CR 534 (O) 550 d-e.

⁸⁶ *R v Zikalala* 1953 (2) SA 568 (A) 573 A-B.

⁸⁷ *R v Zikalala* (n86 *supra*) 50b.

⁸⁸ Snyman (n67 *supra*) 329.

⁸⁹ *Ibid.*

⁹⁰ Snyman (n67 *supra*) 330.

may impact seriously on the objective test for private defence. A wait-and-see attitude will have to be adopted in this regard.

4.5.2 Subjective test

Before accepting private defence as a defence, some subjective features have to be taken into consideration. These aspects are based on the assumption that the question of whether the use of force was necessary and reasonable must be viewed taking into consideration what the defender believed them to be at the particular moment of the defensive act. It is thus customary in private defence that the conduct of a person who alleges to have acted in private defence must be judged according to the defender's subjective (personal) beliefs⁹¹ about the attack. This belief requirement does not replace the requirements for an unlawful attack, but rather acts as a qualification, extension or addition in cases where homicide in defence arises.

If a person believes that he is under attack whereas he is not, or that the attack is unlawful, however it is legitimate, and the person defends himself against this supposed unlawful attack, such a person may not claim private defence as his defensive act is not lawful. This does not necessarily mean that the person will be guilty of murder or assault, as the case may be. If the accused acted under an honest although mistaken belief that the use of force was necessary for his protection or the protection of other interests, he is no more criminally responsible than if that force was in fact necessary for self-defence.⁹² This is known as putative private defence, which will be fully discussed *infra* at 4.7.

⁹¹ Kemp *et al* (n11 *supra*) 85.

⁹² Mousourakis (n38 *supra*) 146.

4.6 Is there a right to kill in defence of property in South African law?

Killing in defence of property is a question that has been considered by South African courts when weighing the nature of interests threatened with that of the interests impaired. In the era predating the introduction of a justifiable Bill of Rights as supreme law, judicial development of private defence took place on the basis of public policy. The duty to develop the common law fell to the courts. It is clear from case law that common law prescribes that if the risk to property overlaps with the endangering of life, the proprietor or any other person *a propos* the property may use violence to protect himself and his property. In such instances, the use of 'necessary force' is approved of. The question is however whether necessary force may amount to lethal force.

As a general rule, South African criminal law does not expect individuals to tolerate trespasses upon their properties, or to retreat from their homes in a situation of an unlawful interference. The interests of the home owner or resident are so strongly protected that jurisdictions that do not allow for the use of deadly force in defence of property admit an exception in the case of the defence of one's own dwelling house.⁹³

This attitude is already perceived in the case law of the pre-constitutional era. For instance, in 1832, in an unreported case, a young farmer who had killed a cattle thief who was driving away with his cattle, was acquitted by Kakewich J.⁹⁴ Sir Benjamin D'Urban, the then Governor of the Cape Colony questioned the Cape Supreme Court as to whether present laws in the Cape Colony allowed the frontier districts' populaces to "do which is necessary to prevent housebreaking and theft".⁹⁵ The court held the view that these residents were justifiably entitled to kill any person in defence of property. The court based its finding on a reading of Grotius' *De Iure Belli ac Pacis* which provides that "...the thief flying with his

⁹³ Burchell & Milton (n9 *supra*) 246.

⁹⁴ The case is discussed in Ally & Viljoen "Homicide in Defence of Property in an Age of Constitutionalism" 2003 16 SACJ 121-136 122.

⁹⁵ *Ibid.*

plunder may, if the goods cannot otherwise be recovered, be slain with a missile.”⁹⁶ This right was however, according to the court, restricted to situations where the theft or damage to the property could not have been prevented in any other possible way. Furthermore, the use of deadly force was only permitted where the aggressor (the thief) responded in a forceful manner, which also may risk the life of the defender. The court expounded on this right to use lethal force by not limiting it to the proprietor of property only, but also entitling third parties present, any occupants of property and also slaves to use lethal force to preserve the property.⁹⁷

A case in the following century further confirmed the common-law right of a home dweller to use lethal force in protecting life and property. In the case of *R v Stephen*,⁹⁸ private defence was recognised as justifying the use of force against unlawful entry onto premises. In this case, the accused awoke in his home at night after being startled by a noise. Upon spying an intruder climbing through a window, he feared that he was to be robbed; a threat not only to his person but also to his property. In distress, he rushed to his kitchen, grabbed a knife and stabbed the intruder, whereupon the intruder died. Although the court expressly stated that killing in defence of property alone may never be justified, the facts of this case clearly indicates the interconnectivity between the threat to personal violence and to property in cases of private defence where lethal force is used.⁹⁹

Exactly 40 years after the *Stephen*-case, the Appellate Division also had to consider the use of force to protect private property. In one of the most authoritative pre-constitutional cases on this topic, that is, the *Van Wyk*-case,¹⁰⁰ the court, after considering precedents and various authorities, again reached the conclusion that using any type of force whatsoever to defend property is justifiable.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *R v Stephen* 1928 WLD 170 (hereinafter *Stephen*). See also Ally & Viljoen (n94 *supra*) 122-123.

⁹⁹ *Stephen* (n98 *supra*) para 172.

¹⁰⁰ *S v Van Wyk* (n32 *supra*).

However, certain stipulations for the use of such force are provided. Lethal force may only be used if absolutely necessary, and as a last resort. Before reverting to deadly force, the defender must give fair warning to the aggressor, if it is reasonably feasible to do so. The defensive conduct must also be limited to the least dangerous - yet still effective - response possible.

In this case, Van Wyk, a shopkeeper whose business was burgled repeatedly, made numerous endeavours to protect his property and livelihood. These included employing night watchmen, keeping dogs on the property, installing different types of burglar-proofing, and even having the police patrol the area on certain occasions. However, none of these efforts were fruitful. Almost ruined by the break-ins, Van Wyk, out of desperation, set up a loaded shotgun in his shop to go off and injure prospective burglars. The shotgun was rigged in such a way that it would be triggered by anyone entering the premises at a certain window or removing the goods behind a counter, and would only wound the lower body of the offender. Furthermore, Van Wyk informed the police about the rigged gun, and also placed notices in English and Afrikaans on the shop door and windows, cautioning prospective burglars about the loaded gun set up in the shop. The deceased still broke into and entered the premises, and triggered the gun to go off. He was fatally wounded as he was crawling on the floor. Although the deceased did not pose any danger to the person of the shopkeeper, the accused successfully relied on private defence.

On appeal lodged by the Minister of Justice, two questions were reserved for the Appellate Division: if a person kills another in order to protect property, may he rely on the ground of justification of private defence? If the answer is in the affirmative, in the particular case of *Van Wyk*, were the bounds of private defence not exceeded? The court unanimously confirmed that a person may rely on private defence in defence of property.¹⁰¹ Even if the actual intended threat by the

¹⁰¹ *Van Wyk* (n32 *supra*) 501H, 504B, 509A.

deceased may have been merely to property, it is highly likely that the startled occupant may perceive the threat to also be a threat to life or bodily integrity. Some jurisdictions¹⁰² specifically mention even the use of devices to protect property. The occupant of a house can legitimately resort to the use of deadly weapons to defend his property even though the value of property will never be proportionate to that of a life. The court held that when an aggressor unlawfully invades another's property, disregarding the occupant's rights and any trespassing admonitions, the invader must suffer the consequences of his actions if dangerous measures are used against him.¹⁰³

In the *Van Wyk*-case, the Supreme Court of Appeal held that it is not probable that an accurate test to determine lawfulness can be formulated in cases where fatal force is applied in response to a property offence, and that regard must be had to the circumstances of each particular case.¹⁰⁴ Nevertheless, the court stated that the starting point should be whether there was "a reasonable balance between the attack and the defensive act",¹⁰⁵ or whether, "taking all the factors into account, the defender acted reasonably in the manner in which he defended himself or his property".¹⁰⁶ The court concluded that Van Wyk did act reasonably in the particular circumstances, and that he could rely on private defence in the protection of his property.

¹⁰² In Texas "[t]he justification afforded by sections 9.41 and 9.43 applies to the use of a device to protect land or tangible, movable property if (1) the device is not design to cause, or known by the actor to create a substantial risk of causing, death or serious bodily injury; and (2) use of the device is reasonable under all the circumstances as that actor reasonably believes them to be when he installs the device". See Texas Penal Code s 9.44. This section seems contradictory because of the motive of the device; which is intended to cause bodily injury. Again, the actor may reasonably believe the device would cause minor injury but it causes death instead.

¹⁰³ See Kemp *et al* (n11 *supra*) 84.

¹⁰⁴ *Van Wyk* (n32 *supra*) para 19.

¹⁰⁵ Walker (n40 *supra*) 87. This enquiry includes the so-called objective test (see 4.5.1 above) which determines the necessity of the defensive act of the accused by measuring the accused's conduct against that of the hypothetical reasonable person. The court in this instance stated: "We have to consider whether what you did in this circumstance was a reasonable thing which a reasonable man might have done", explaining that courts "often do measure the conduct of the alleged offender against that of a reasonable person on the basis that reasonable conduct is usually acceptable in the eyes of the society". See *Van Wyk* (n32 *supra*) para 18; Walker (n40 *supra*) 88.

¹⁰⁶ Walker (n40 *supra*) 85.

The principles expressed in *Van Wyk* were similarly utilised in *S v Mogohlwane*,¹⁰⁷ some twenty years later. Mogohlwane, a very poor and old man, was robbed of his only valuables by the deceased, a much younger man bearing a tomahawk axe. Fearing that he would lose his only possessions forever, Mogohlwane fetched a knife and attempted to reclaim the bag by using the weapon. Upon noticing the old man, the deceased again produced the axe and swung it in the accused's direction. The accused thereupon stabbed the deceased, fatally injuring him. The judge concluded that the accused only used his knife because "his life or body (limb) was threatened... because he could have hurt the accused with the axe".¹⁰⁸ Although it seemed that the protected possessions were of a trifling value, the contents of the paper bag were the only possessions the old man had. In this case, the court similarly concluded that killing in defence of property would be justifiable if the defender, at the same time as defending his property, also protected his life or bodily integrity.

A question to consider here is whether, taking into consideration the present democratic disposition in South Africa, a person is still allowed to kill a thief who is stealing his property or even to kill the thief in order to recover stolen property. This question seems all the more pertinent against the background of continuous reports of people using lethal force to protect life and property.¹⁰⁹ It is quite possible that the common-law rule that a person may kill in defence of property will be challenged on the grounds that it amounts to an infringement of the constitutional rights of a person to life, and to freedom and security. An enquiry as

¹⁰⁷ *S v Mogohlwane* 1982 (2) SA 587 (T) (hereinafter *Mogohlwane*) a post-*Van Wyk* case.

¹⁰⁸ *Mogohlwane* (n107 *supra*) 594B-C (own translation). It could thus be accepted that killing in defence of property may be justified in certain circumstances. Also see Snyman *Strafreg* 6th ed (2012) 108; Van der Merwe in *Van Wyk* (n32 *supra*); Stuart "Killing in Defence of Property" 1967 84 SALJ 123-131.

¹⁰⁹ Eg, see the correspondence by Bright "Defence Files for Dismissal in Blanchard Murder Burglary Case" *The Star* <http://chickashanews.com/topnews/x18080452/> (accessed 31/07/2015); Stander "Man Gunned Down after House Robbery" *Port Elizabeth Herald* <http://www.peherald.com/news/article/15711> (accessed 30/08/2015). One of the recurring themes of these articles is introduced in that the defence of property is closely linked to the defence of bodily integrity.

to the constitutionality of this rule will involve a balancing of the rights of the attacker to his life against the rights of the defender to his property.¹¹⁰

It is however clear that in situations where no danger to bodily harm exists, to kill a robber only to defend property from being stolen may not be justifiable. South African courts have consistently emphasised that force applied must be “reasonable in the circumstances as they existed or as the accused believed them to be”,¹¹¹ and the force must be commensurate with the danger.

4.7 Putative private defence in South African law

As previously explained, an accused’s plea of private defence is determined on the facts that existed or that the accused believed to exist, whether they actually existed or not. In certain cases, private defence is claimed by the accused person as a ground of justification where he genuinely and reasonably believed that he was being attacked,¹¹² but on the facts it later transpired that he was not being

¹¹⁰ This rule will probably be subjected to similar tests as in *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* (CCT28/01) [2002] ZACC 6; 2002 (4) SA 613; 2002 (7) BCLR 663 (hereinafter *Walters*), where the constitutionality of CPA s 42 was challenged. In this case, the owner of a bakery and his son shot and killed a robber who, after breaking into the bakery was fleeing the crime scene. They were accused of murder. They justified their act by citing CPA s 49(2) in that they had the rights of an arrestor attempting to carry out arrest to kill a suspect in self-defence or in defence of any other person. The trial court found s 49(2) unconstitutional as it unjustifiably violated the suspect’s right to life, dignity, security of person and bodily integrity. The Constitutional Court regarded the approach taken by Olivier JA in *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) as to s 49(1) to be applied correspondingly to s 49(2). This approach advocated that the narrow test of proportionality between the gravity of the crime allegedly committed by the suspect, and the nature and extent of the force used by the arrestor be expanded to also consider the threat posed by the suspect to the safety and security of the arrestor, members of the public, and society in general. The recent decision of *April v Minister of Safety and Security* [2009] 2 SACR 1 (SE) 2, 8-9 confirmed this view. Although a proportionality test is used to determine whether the force or even deadly force employed to protect persons and property in situations where arrests of the suspects by the arrestor are attempted, it is not yet settled whether a possessor of property is justified in killing an aggressor. See Botha & Visser “Forceful Arrest: An Overview of Section 49 of the Criminal Procedure Act 51 of 1977 and its Recent Amendments” 2012 (15) 2 *Pennsylvania LJ* 366 367.

¹¹¹ Mousourakis (n38 *supra*) 144; Ally & Viljoen (n94 *supra*) 121-122.

¹¹² English law recognizes that the accused’s beliefs need not be reasonable, just honest. Thus, if the accused was totally mistaken in thinking that he was about to be attacked he will be judged

attacked. Similarly, the accused may honestly believe that he was being attacked unlawfully, yet the attack was lawful. If an accused honestly believed his life or property to be in danger, although objectively viewed they were not, the defensive steps he took against a putative aggressor cannot constitute private defence.¹¹³ If the accused assaulted or killed somebody in these circumstances, his conduct will be unlawful. Such instances constitute mistaken or putative private defence. In putative private defence, it is not lawfulness that is in issue but culpability.¹¹⁴ In such cases the accused's defence should be regarded as a mistake rather than as justification-based. The accused's action remains wrongful, as there is no real attack justifying the use of force in defence, thus, the accused may be excused on the grounds of the mistaken belief.¹¹⁵

An accused who *bona fide* but mistakenly believed that he acted in private defence cannot be held liable for murder as he lacked the requisite *dolus* to commit a murder. This aspect is illustrated well in the case of *De Oliveira*.¹¹⁶ In this case, the accused was awoken on a Sunday afternoon by a noise in his backyard. Under the impression that it was a group of robbers trying to break in, De Oliveira shot a number of shots through a window intending to scare them off. One of the men was fatally shot. It later transpired that it was his long-standing employee and his friends trying to get into the employee's room in the backyard. De Oliveira pleaded putative self-defence which was rejected by the trial court. On appeal, the court had to decide whether the appellant had the necessary culpability when he committed the crime. The Appeal Court concurred with the trial court's finding, and explained that De Oliveira's refusal to testify at his own trial as to his state of mind at the time of the shooting had impacted on this decision. Only appeal against

on the basis of that mistaken belief. However, the United States has adopted a different test which requires the accused's belief to be founded on reasonable grounds. The accused may be entitled to a complete defence only if his mistake was reasonable. See Mousourakis (n38 *supra*) 147; 151.

¹¹³ Burchell & Milton (n9 *supra*) 225.

¹¹⁴ Botha (n30 *supra*) 179.

¹¹⁵ See Mousourakis (n38 *supra*) 148; Wright "Self-defence and the Classification of Defences" 1992 7 *Auck Univ LR* 127 133.

¹¹⁶ *De Oliveira* (n71 *supra*) 59(A).

sentence was allowed. It is clear though that if a person labours under the misimpression that his life and property are in danger, depending on the precise circumstances, his unlawful defensive act may exclude intention. At most, the accused could then be convicted of culpable homicide.¹¹⁷

In another putative private defence case involving alleged threats to person and property, *S v Joshua*,¹¹⁸ the appellant believed his life to be in danger, although objectively viewed, the facts did not indicate that he had been in danger of an imminent attack. The facts of this case are as follows: the appellant's wife had been robbed during the afternoon of the day in question. The appellant's neighbour had agreed to accompany the appellant in search of his wife's robber. The appellant had been armed with a shotgun. During their search, they encountered a group of youths, one of who fitted the description given to the appellant by his wife of her robber.¹¹⁹ Both the appellant and the neighbour testified that when the appellant had demanded his wife's purse from the youth, they had felt threatened by the aggressive response of the group. The appellant then drew his firearm and fired four shots with the result that three of the youths were fatally wounded.¹²⁰ When the appellant attempted to approach a further member of the group at a house to which the youth had fled, another youth had approach him with a knife in his hand and had tried to set his dog upon the appellant. Fearing for his life, the appellant fired a number of shots that resulted in the death of these last two young men. The court held that the appellant erroneously believed that he was in danger of being attacked by the men, and that it was thus lawful for him to retaliate.¹²¹ This mistake excluded intention. As such, the appellant should have been convicted of culpable homicide instead of murder.¹²²

¹¹⁷ Reddi "Mens Rea and Putative Private Defence" 2003 16 SACJ 74.

¹¹⁸ *S v Joshua* 2003 (1) SACR 1 (SCA).

¹¹⁹ *Joshua* (n118 *supra*) paras 2-11.

¹²⁰ *Joshua* (n118 *supra*) para 21.

¹²¹ *Joshua* (n118 *supra*) para 21.

¹²² *Joshua* (n118 *supra*) para 32. See also *De Oliveira* (n71 *supra*) 63i-64a.

Putative private defence has recently been propelled into the South African public eye particularly due to the trial of the para-athlete Oscar Pistorius. In *S v Pistorius*,¹²³ the accused was on trial for the murder of his 29-year-old girlfriend (Reeva Steenkamp), whom he shot four times at close distance while she was locked inside his bedroom's toilet in his home in Pretoria East, on Valentine's Day. Pistorius said he fired in self-defence because he believed his home was being invaded.¹²⁴ This was confirmed in pre-trial testimony, where the accused's lawyers informed the court that the shooting had been a tragic "mistake"¹²⁵ and the athlete was acting in self-defence against what he thought was a robber:¹²⁶

The discharging of my firearm was precipitated by a noise in the toilet which I, in my fearful state, knowing that I was on my stumps, unable to run away or properly defend myself physically, believed to be the intruder or intruders coming out of the toilet to attack Reeva and me.¹²⁷

Pistorius admitted that he did not fire a warning shot as he was petrified it would ricochet and strike him. He also did not verbally warn the supposed intruders before he opened fire on the lavatory door in his bathroom. According to the accused's testimony, he thought he was rightfully defending himself, his girlfriend and his property against an imminent threat. After hearing someone behind the door, he armed himself with a firearm:

He had heard the window slide open. He had heard the toilet door slam shut. He had heard a noise coming from the inside of the toilet. It would have been different if he had just heard a noise and assumed that something, maybe a stray animal, was in the toilet. In this instance the evidence shows that he

¹²³ *S v Pistorius* (CC113/2013) [2014] ZAGPPHC 924 (hereinafter *Pistorius*).

¹²⁴ Bateman "Pistorius Indictment Readied" <http://news.iafrica.com/sa/874977.html> (accessed 12/08/2015).

¹²⁵ *Ibid.*

¹²⁶ Herskovitz "South African Police Complete Probe in Pistorius Murder Case" <http://www.reuters.com/article/2013/08/13/us-safrica-pistorius-idUSBRE97C0LM20130813> (accessed 14/08/2015).

¹²⁷ Plea statement of OLC Pistorius on Count 1, s 4.5, Pretoria, 4 March 2014.

thought an intruder was behind the door. Using a lethal weapon, a loaded firearm, the accused fired not one but four shots into the toilet door.¹²⁸

The accused's claim of private defence, which was the initial defence strategy adopted by his legal team, was quite correctly rejected by the court. It soon became apparent that the plea is one of putative private defence. In this regard, the accused may not be held accountable as there was no intention present to perform an unlawful act. His mistake or ignorance serves to deprive him of the *mens rea* for the crime charged.¹²⁹

The accused also claimed that he did not have any intention to murder as "he would have fired higher if his intention was to kill".¹³⁰ Curiously, this submission was accepted by the court. The accused must have foreseen as a distinct possibility that whoever was on the other side of the toilet door would be killed by his shots. This means that the accused had sufficient intention to kill in the form of *dolus eventualis* to sustain a conviction for murder. The accused even admitted to the fact that "there was no room for escape for the person behind the door".¹³¹ However, in order to sustain a murder conviction the state had to prove that there was a perception on the part of the accused that he acted unlawfully at the time. This is extremely difficult to prove. One can only examine the precise circumstances and facts as provided by the accused and other witnesses. Masipa J found the accused guilty of culpable homicide, and also guilty of contravention of section 120(3)(b) of the Firearms Control Act 60 of 2000.¹³²

¹²⁸ *S v Pistorius* (n123 *supra*) para 20.

¹²⁹ *Burchell & Milton* (n9 *supra*) 255.

¹³⁰ *S v Pistorius* (n123 *supra*) para 10.

¹³¹ *S v Pistorius* (n123 *supra*) para 10.

¹³² In terms of the culpable homicide charge, Pistorius was sentenced to a maximum of five years' imprisonment, and on the firearms charge to three years' imprisonment. The last charge was conditionally wholly suspended for five years. Both sentences were to run concurrently. In an appeal by the prosecution to this decision, the SCA in *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204 (3 December 2015) found Pistorius guilty of murder. Pistorius has applied for leave to appeal to the Constitutional Court and, if that fails, he may

The court in the *Pistorius*-case emphasised that the Constitution “applies to everyone and ... protects everyone, including those who transgress the laws”.¹³³ Still, lawbreakers should face the consequences of their illegal conduct. In this regard, if an accused commits a defensive act unlawfully and succeeds with a putative private defence because he had at the relevant time no knowledge of the unlawfulness of his conduct and lacked the required intention or *dolus*, he must still face the consequences of his wrongdoing.

4.8 Summary

In South Africa, as in many other jurisdictions, persons threatened by criminal acts may not take the law into their own hands but have to revert to ordinary legal remedies for effective protection. Still, in certain circumstances individuals face immediate danger or threats upon their person or rights without any intervention by the law directly available. In such situations, it is lawful for threatened individuals to resort to private defence.

According to the requirements of private defence in South Africa, one acts lawfully if force is employed to avert a prohibited attack by another person on the life, property or any other legally-protectable interest of the person himself or that of somebody else. The unlawful attack must have already commenced or be impending. However, the act of defence has to be necessary to defend the interest that is being threatened, the act of defence must be directed against the aggressor and the defensive act must be reasonably proportionate to the attack. These rules relating to both the use of force and lethal force in a defensive act are known as the proportionality test. This test has also established that where there is an impending or imminent threat of attack, the attacked party need not wait for the aggressor to first carry out his unlawful act.

petition the Chief Justice. It is submitted that this judgment is just, as one cannot justify anyone killing a person without any proof that he poses a real threat to the self-defender or others.

¹³³ *S v Pistorius* (n123 *supra*) 3812 paras 10-20.

In South Africa, case law has determined that where automatic defensive apparatuses are set up, even if there is no direct threat of an attack when these protective measures were constructed, these protection mechanisms may represent a lawful and thus valid private defence. However, narrowly-defined circumstances are prescribed for private defence claims where such mechanisms are used.

Regarding the question whether the attacked party is compelled to retreat when being attacked, it seems as if the Constitution will advocate this conduct in order to protect the sanctity of life. The general idea is that if any other less harmful means of avoiding any violence are accessible at the time of the attack, such as leaving the scene of aggression, this would be a sounder choice. Still, it is accepted that the defender should not endanger his life, rights or interests by attempting to run away from the impending danger. It is submitted that the assailant who initiated the conflict must risk any potential perilous response to his unlawful conduct. If an innocent person is denied the right to act in private defence when that person is under unlawful attack, that individual's right to life is similarly being denied.

The rule that private defence is not required if the attack can be avoided by retreating is not relevant in the private defence of property. Therefore, the duty to retreat is not a legal condition, but merely a factor to be taken into consideration by the judiciary when deciding whether it was necessary for the defender to apply force, and whether the force that was applied by the defender was reasonable. Thus, a person in possession of property, when attacked by a robber is not expected to retreat or to abandon his property nor is he expected to succumb to the attempt to unlawfully destroy or to take the property from him.

Although the act of defence has to be judged objectively, the subjective elements relating to the defender's present and prevailing circumstances also form part of any conclusion as to the necessity and reasonability of the defensive act. This is a

purely factual question determined by the particular circumstances of every private defence case.

South African courts have also settled the question as to the amount of force that is needed to defend or prevent an unlawful attack. In cases of private defence where excessive force is used to ward off the attack, it is likely that the defence may fail and the conduct of the defender would be held to be unlawful. However, in cases of putative private defence, the accused may still not be held accountable for his actions as he lacked *dolus*; that is, lack of the necessary intention to act unlawfully. This is so because even though the defender honestly but mistakenly believed that his defensive act is justified, the intention to commit murder is absent on the basis that the defender lacked culpability. In such instances, the defender may be held to have negligently killed the deceased. Where this is the case the defender may be found guilty of culpable homicide.

It is important to note here that the concept of private defence is deeply rooted in natural law, as the Bill of Rights contained in the Constitution. It has been accepted that with regards to self-defence, defence of others and of property, the common law endures but only to the extent that it is not incompatible with the Constitution. In this respect, the attacker's rights to life, bodily integrity, and freedom and security, amongst others, must be weighed against the defender's right to life, bodily integrity and property. Killing in defence of property would be justifiable if the defender, at the same time as defending his property, also protected his life or bodily integrity, a situation common in the crime of robbery. As perceived in the *Dougherty*-case, the court found that the test for justification of private defence had to be a high one, when constitutional imperatives are taken into account.

South Africa is one of the countries currently overwhelmed by a very high crime rate. This calls for stringent measures to combat crime if the safety and sanctity of human beings and property are to be guaranteed. Borchers J in *S v Sehlako* 1999 (1) SACR (W) 67 71 affirms that "this country is suffering from an epidemic of

violence which cannot be tolerated". In such circumstances, it is reasonably plausible that society's conception about justice would tilt towards this basic need - safety, in the form of private defence. Still, it has to be taken into consideration that although the defence of private defence fundamentally exists so that justice should not give way to injustice, one should not become the judge, jury and executioner in such cases. One has a moral responsibility to obey the law as far as possible.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

In this final chapter, the findings and conclusions of each jurisdiction will be summarised. Thereafter recommendations will be made for each legal system.

5.2 Conclusions

It has been seen in all the jurisdictions that the right to private defence has been based on two distinct basic ideas: (a) the principle of defending legitimate individual interests against wrongful violation, and (b) the principle of safeguarding public law and order. The rationale behind the second principle has traditionally been found in the principle that right need not yield to wrong. However, from the evidence ascertained in this research, it seems that every jurisdiction interprets these principles differently. This explains the aggressiveness in the application of force in private defence in certain countries, in particular in the absence of a general requirement of proportionality. Even if the attacked legal interest is not worth as much as compared to the impaired interest, private defence should be justifiable, since it protects the legal order. Conclusions will consequently be drawn on the various jurisdictions discussed in the research.

5.2.1 United States

At common law an individual is permitted to apply “reasonable force” to protect himself, another or his property in the United States. The United States Penal Code restricts the use of defensive force to occasions when it is immediately

necessary. However, it is not yet settled when force is necessary and whether deadly force could be regarded as reasonable force. A scenario raised earlier asked the question as to whether the accused could be exonerated from criminal liability if the only available means to protect his life-saving item was to kill the aggressor. This is a constitutional right expressly stated in about 21 states' constitutions in the United States to protect property. Generally, this means that this right is inalienable since it is inherent in some constitutions. In this vein, the Nebraska Self-Defence Act of 1969, section 29-114, states that:

No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting, by any means necessary, himself, his family, or his real or personal property, or when coming to the aid of another who is in imminent danger of or the victim of aggravated assault, armed robbery, holdup, rape, murder, or any other heinous crime.

The idea that unlawful conduct may be justified arises from the recognition that there may be grounds of justification that deprive the unlawful conduct of its blameworthiness. However, the common-law requirement that a self-defender has the responsibility to prove that he never acted with malice in homicide has recently experienced a shift in the United States. A majority of the states now hold the view that the burden is upon the prosecutors to prove that the defendant pleading self-defence acted with malice. In this regard, one envisages how the law is shifting from the observation that killing in defence of property must be justified.

If the plea of private defence may fail on the basis that the defender in defence of property used excessive force, the result would be manslaughter and not murder. In the strictest sense of the law in the United States, if killing occurred, though the defender never intended to inflict more bodily harm than was necessary, the law is ready to vindicate the defender for the killing. This is so if, during the act or omission, the defender honestly thought the force he applied was reasonable in the particular circumstance.

It was ascertained that any person who uses lethal force against an individual while he reasonably and in good conscience believed that deadly force is necessary to avoid impending danger to himself or another, or even to his or someone else's property, is in most United States' jurisdictions excused.

From the selected states' constitutions examined, it became clear that they all guarantee a definite constitutional right to defend property as they hold a dwelling house to be worthy of protection. Although the right to protect property is regulated, the constitutions do not elaborate on whether it is allowable to use lethal force in the course of protecting property. When examining case law, it seems that the jurisdictions are divided as to whether a person has the right to use lethal force against the aggressor in protecting life, limb and property. In some cases this is allowed but in others not. Similarly, setting upon one's premises a deadly mechanical device in order to kill or injure another was found to be legitimate in some cases, while in others this was found not to be permissible. A reason for these variances could be the distinctive facts of each particular case; however it seems from the jurisprudence examined that it is more the specific court's interpretation of private defence and applicable legislation. The differences in interpretation leads to legal uncertainty, as one does not exactly know whether a particular court will interpret certain conduct as lawful or not.

5.2.2 Cameroon

According to Article 2 of the United Nations' Convention against Torture, states that are signatories to this treaty are required to take effective administrative, legislative, judicial and other methods to avoid acts of torture in their respective states. Subsection 2 and 3 of this Article rejects any reason whatsoever that may be advanced as a justification for torture. It has been found that in Cameroon, although a signatory to the Convention, torture and even killing for petty crimes

such as stealing or pickpocketing is more prevalent than any other form of punishment.

In Cameroon, fitting the modern law of private defence neatly into one or other category has proved difficult. This is partly as a result of the fact that most cases do not end up in court because there is no one, not even the state, to represent the deceased (housebreaker or thief). Morality also plays a great role as the defender is regarded as having a superior interest by virtue of being the innocent party, while the aggressor's interest is discounted by the act of aggression. Similarly to the United States, the duty to retreat is not applicable in Cameroon. This is because the issue of the sanctity of the home is historically emphasised. As such, there is no obligation placed on a defender to flee the attack.

The Cameroon Penal Code states that no criminal responsibility may arise as a result of threats that could not be avoided by the defender. Apart from dwelling-houses, the law does not hold a very clear view on killing to defend property. Although the legislative provisions state that the application of defensive force must be reasonably necessary to avoid escape, and that intentional killing must be proportionate to the attack which has caused the defender a reasonable apprehension of death, it is witnessed that mob justice instead dominates private-defence procedures.

According to the Cameroon Constitution, all persons have a right to life and to humane treatment in all state of affairs. The Constitution also specifies that no person shall be subjected to pain, or any form of inhumane treatment in whatsoever circumstances. It has been found that a constitutional challenge exists in this domain since the Penal Code still allows for the death penalty. This notwithstanding, Cameroon criminal law does not permit killing to protect property if there is no real risk of death or serious injury. Furthermore, mob- or social justice is considered unlawful. However, there are currently no consequences for these transgressors who kill presumed robbers or thieves.

No Cameroonian authorities could be found in order to provide an unambiguous answer to the question as to whether there is a right to kill in order to protect property. As mentioned earlier, once a thief is caught by a mob it is very likely that he will be killed and even burnt with tyres before the police arrive on the scene. Whether the victim was indeed the guilty party or whether the item stolen was high in value or not, is not important to the mob. It is also not of the essence whether the thief is still in possession of the property or poses any threat of death to the owner or to any other person as in the United States. The Cameroonian society applies excessive force (such as killing a thief) even in cases where only an empty wallet was stolen. According to a material section of the Rome Statute no one shall be held criminally liable if, during the act or omission, it was reasonable to defend property which is indispensable for that person's continued existence. Whether the actions by the mob may be seen as reasonable, is highly questionable.

It was furthermore seen that although the countries under study constantly develop legal rules relating to killing in defence of property, Cameroon is not following this trend. Efforts should be made to develop private defence of property more specifically in Cameroon. In this regard, the approach followed in the United States could serve as an example to this jurisdiction, as self-defence includes both defences of property and of the person. Cameroon criminal law should then cautiously outline justifications, limiting the kind of example to those which are regarded as unquestionably legally and morally suitable.

5.2.3 South Africa

Despite the ratification of international treaties such as the UDHR, South Africa and the other jurisdictions researched still primarily adhere to national laws with little or no allegiance to international laws. Although the right to own and protect property is recognised by the country, no specific legislation exists that specifically guides the subject matter of this study in South Africa (and similarly in Cameroon). The

power to decide any case in this regard is bestowed on the courts. Thus the courts apply judicial discretion and adjudicate cases of private defence based on the circumstances of each particular case.

The South African legal system requires that the application of the defensive force be necessary; reasonably proportional to the attack; and the defender must be aware that he is acting in private defence. Similarly as in some states in the United States, the right to install devices to protect property, such as land and even movable properties is afforded so long as such apparatuses, if triggered would not result to death or serious injury to the body. In South Africa, the pre-constitutional position on killing to protect property is linked to the *Van Wyk* case. In answering the question whether the common-law rule in *Van Wyk* will withstand constitutional scrutiny in so far as it allows the defender to kill merely to defend his property; it has been found that the application of deadly force to secure property where life is not in peril does not align with the South African Constitution.

The South African courts are thus directed by the Constitution regarding the approach to be followed when a common-law rule conflicts with the Constitution. Thus, according to the Constitution, it must be the intent of every court when developing the common law, to promote the spirit and objects of the Bill of Rights. By implication, the common-law rules may be developed by the courts where it is appropriate to mirror constitutional goals. This may require that a limitation of a right must comply with section 36 the Constitution; which means weighing the nature, the importance and scope of the limitation of the right against the nature and the importance of the objective of the limitation. Apart from case law, it has been found that the South African Constitution remains ambiguous on the issue of private defence.

It is very difficult to balance a killing with the right to secure property according to the proportionality requirement. Some authors insist that it will always be unlawful to use deadly force to defend property, because property cannot be measured

against the life of the thief. Still, as an attack on property may imply an endangerment to the life of the property's owner, these concepts seem to be intertwined and should, in certain cases, be considered together. The courts have also in certain cases ruled that if a property is a life-saving item to the owner, it is worth defending even if the attacker's life is lost in the process.

It has also been pointed out that even though the law expects the attacked party to flee, no such obligation to do so exists in South African law. If one was expected to flee in such unlawful encounters, the implication is that the life of a criminal is valued more than the life of law-abiding citizens. Fleeing may also expose the attacked person to strikes from the rear. Counter-arguments to this assertion state that the loss of property may always be recovered through an eventual civil action or insurance claim. While such possibilities may be convincing in certain circumstances, it could be largely theoretical to, for example, an indigent rural house owner. One could therefore state that since the rights provided in the Bill of Rights are all of equal importance, the same protection afforded to life may correspondingly apply to property.

Where a dwelling house is intruded on by unknown and uninvited persons, and the home owner reasonably believes the intruder to be armed and dangerous, as such, he has the right to use whatever means of defence he may have at his disposal, whether the danger was real or not. It would be outrageous to expect a person in such situations to remain entirely calm or to retreat.

In South Africa, after considering the requirements for the unlawful attack as well as the kind of danger which the defender faced, the court's decision is based on the actual state of affairs and not the reasonably believed state of affairs. Thus, the issue whether the defender can successfully allege private defence is determined by objectively examining both the nature of the attack and the defensive force used in order to establish whether there is conformity to the legal principles. However, it has been found that the decisions of judges in cases of private defence in South

Africa and the United States are not based on ideological reflections but on objective and subjective considerations. Therefore one could state that in South Africa a defender is required to use force which is (objectively) reasonable, as he (subjectively) considered it to be necessary. This approach is also followed by the United States.

If the application of necessary force is justified in private defence, then it is unclear why lethal force must be disqualified from the principle; since lethal force may in certain circumstances be necessary force. A person, who is undeniably expected to defend his property, should not be regarded as a person acting unlawfully. Despite this view, the South African courts have cautioned that fatal force in defence of property should only be reserved for exceptional circumstances when it is considered reasonable and necessary to do so.

5.3 Recommendations

The following modifications are recommended for the various jurisdictions.

5.3.1 United States

The rules governing modern society must make sense. Law is the formal recognition thereof. Thus, the law needs to be adjusted to fit the changing needs of society where necessary. This can only be done by either amending the law or creating new laws and abandoning impractical precedents or laws in statute books.

In the United States, the private defence of property is commonly referred to as self-defence. Killing in defence of property is an aspect of private defence or self-defence. Apart from the United States, South Africa and Cameroon do not have appropriate and effective legislation in place for specifically addressing the private defence of property.

Owing to the present-day society being overwhelmed with violence and an ever-increasing crime wave, it is apparent that the courts encounter an influx of cases of private defence. Moreover, a lack of an explicit definition can lead to poor prosecution, especially as the courts rely on imaginary circumstances to decide on a particular case. For example, the common law principle which allows a person to use reasonable force places the defender's conduct wholly at the mercy of the court.

Criminals may be intimidated and the rate of home invasion and other forms of robbery reduced if society is given clear legal rules as to when deadly force may be applied to defend property. The legislature could lay down a yardstick which, if not attained, the application of fatal force in the protection of property would be regarded as unlawful. If rules are to be set which permits the application of fatal force, they would need to be systematically definite because they intend to lay out restrictions in terms of what the society may or may not do. In this regard, it is also required that the jurisdiction impose stricter conditions for firearm licences and severe sanctions for possessing illegal firearms.

Although the United States and the countries under study still have divergent considerations as to killing in defence of property, it is important to mention that these countries have ratified international treaties such as the UDHR. Thus, the fact that the right of private defence is a natural right founded not in the law of society, but in the law of nature; and the fact that the extent of the right of private defence is undefined by the law of nature, necessitates universally-acceptable legislation and definitions in this regard. This will encourage a clear understanding of the ground of justification, not only in the United States - where in majority of the states a person has no right to retreat whether he is inside or out of the home, but in other jurisdictions as well. Thus, if South Africa has to enact new legislations on private defence, the United States jurisdiction should be the measuring rod in this regard.

5.3.2 Cameroon

The concept of private defence of property does not exist in Cameroonian criminal law or the Constitution. Before the colonial era, robbery was a crime punishable by death. The complexity here is the fact that Cameroonians live in a constitutional era where such degrading punishment must be regarded as repugnant. Despite the ratification of the African Charter and the UDHR, legislation on private defence of property still differs in the various selected jurisdictions, Cameroon in particular. The concept of private defence of property has taken a different dimension in this jurisdiction which calls for firm and specific legal intervention. It is recommended that Cameroon enacts appropriate legislation as regards private defence of property and enforces its implementation. It will also be beneficial if the police force recruited more constables to be deployed for surveillance. This will probably reduce if not eliminate jungle justice in Cameroon.

Although according to Cameroonian legislation, it is expected of the High Court to observe and enforce laws and customs which are not repugnant to natural justice, equity and good conscience. However, there is no statutory or legal definition of what criminal punishment would be regarded as repugnant to natural justice. This area of the law needs redefinition. Moreover, Cameroon criminal law is very inexact. The Penal Code of Cameroon, for example, only make mention of "grievous harm" but it fails to state to what extent bodily injury would be regarded as grievous harm. It is noted that there has been no significant efforts to revise the Criminal Procedure Code and the Penal Code of Cameroon either in accordance with English criminal-law reforms or other common-law jurisdictions such as Nigeria, or even in harmony with the customary law concept of criminality.

It would be plausible for Cameroon, considering the jurisdiction's legal history, to institute new national criminal laws on private defence of property; given that the parliament will have to approach two different contemporary legal systems (English and French) blended with traditional laws, and also taking into consideration the

United States' laws on self-defence, to assess and compare the laws before the new enactments. The principles of criminal responsibility and the definitions of these offences need to be amended to mirror the needs of contemporary Cameroonian society.

5.3.3 South Africa

Since the state no longer permits the taking of life as punishment, one is left to ponder how the same law permits the killing of a criminal, instead of apprehending the culprit. If the law, with reservations, allows society to apply fatal defensive force to protect their property, then probable aggressors would be placed in a less favourable situation. This situation could perhaps fulfil one of the purposes of criminal law; that of deterrence, but it seems that the jurisdiction needs to put in place more defined private defence laws.

Although the concept of private defence of property does not exist in any South African legislative text, the guarantee to security of person is found in section 12 of the Constitution. However, the phrase 'private defence' captures a broader scope of legally-recognised interests. This phrase includes not only the defence of person but also the defence of property. In this jurisdiction, certain conditions are assigned to the defender regarding both the attack and his defensive action. As regards the current requirements for private defence, if it is accepted that a defender may apply force to obstruct an attack where the attack is imminent, applying the proportionality rule would be contradictory in such circumstances. The defender need not wait until the robber is running away with the property or has broken in and is approaching him with a weapon. In such situations, it is impossible for the defender to estimate the exact force to be used.

Taking into consideration the imminence of the threat, for example, it becomes apparent that the law still remains ambiguous and rigid; especially for an owner of

property who seeks to protect his property and his life. It is therefore recommended that parliament enacts new laws on private defence that are clear, certain and accessible. Societal awareness of these new laws will also go a long way to deter criminal actions.

The requirement that the force used must be proportionate fail to state whether the prevention of a particular harm could itself be proportionate to killing someone. Such instances should be viewed as forming part of the necessity requirement because a person, having reacted to a terrifying situation, should not be judged as if he had the time and the chance to consider the repercussions of his actions. The focus should be on the kind of danger faced and not on the act of the defender. Again, requiring proportionality in a defensive act implies giving preferentiality to criminal conduct which the law claims to deter.

Private defence in fact does not require strict or any proportionality. Despite the fact that Kriegler J emphasised the necessity for the law to apply the proportionality test; that is, weighing the interest protected against the interest of the wrongdoer, proportionality was not as such given preference in the case of *Van Wyk*. If killing to defend property is justified, then the proportionality requirement should not apply for the reason that the aggressor is considered to have waived his rights by persisting with the unlawful act. This judgment was confirmed in *Mogohlwane*. Even though these judgments were handed down more than 20 years before the introduction of the Constitution, it is submitted that if a court is approached with a similar private-defence situation, it is likely that it would arrive at the same verdict.

The dilemma South Africa faces is that the constitutional right to life is of general application. This makes the concept of killing in defence of property foreign in South African legal system. As such, it could be stated that the laws relating to private defence do not comply with constitutional directives. Considering the South African crime statistics, one is concerned about the ever-increasing rate of incidences of burglaries and robberies. There is certainly a need for citizens to

protect themselves and their property in cases where law-enforcement interception is minimal. One cannot therefore deny the fact that the application of lethal force in defence of property is inevitable under these circumstances. For the South African criminal law to meet its objectives, it is recommended that new legislation be promulgated explicating the exact requirements for the private defence of property. In this vein, it is recommended that South Africa should consider or adopt the United States' laws on self-defence, particularly the self-defence statute of Florida if the law on private defence has to be revisited.

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