

Comparative Study of Legitimate Defense in the Statute of the International Criminal Court and Iranian Criminal Law

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Abstract

Legitimate defense is one of the most important institutions in general criminal law, which has been recognized for a long time in various legal systems of the world and is also provided for in Article 31-1 of the International Criminal Court's Statute; considering the conditions of legitimate defense, including the necessity of an illegal attack, the proportionality of defense and attack, etc., in paragraph (c) of the above article, it is concluded that legitimate defense in this article is one of the justifiable factors of the crime. The realization of defense requires the existence of another basic element, that is, an attack; there must be an attack until there is a defense against it, each of which has conditions in the relevant laws and the Statute of the International Criminal Court that together constitutes the conditions of attack and defense, and the defender is not free to defend himself in any way or by any means and to the extent that he has power, but he is required to comply with those conditions. By examining international crimes such as genocide, crimes against humanity, war crimes, and aggression, it can be seen that in some crimes including genocide and war crimes, it is possible to invoke legitimate defense, but in crimes against humanity, due to the necessity of the presence of bad faith with a premeditated decision, it is not possible to rely on this defense; also in the case of aggression, considering that the perpetrators of this crime are the government and military leaders who are at the top of political and governmental positions, and on the other hand, they have a primitive mentality about attacking, the conditions of individual legitimate defense cannot be considered true concerning their performance.

Key words; Defense, Legitimate Defense, Aggression, Justifiable Factors of Crime, Grounds for Excluding the Criminal Responsibility.

Introduction

In the examination of the crime and various theories about it, there are two distinct points of view in the legal system (Smirnov, et al., 2021; Orekhov, et al., 2021). Committing a crime means committing a material element as well as a spiritual element, and this has nothing to do with whether the perpetrator is blameworthy or not; therefore, a person may commit a crime, but at the same time has a valid defense. The second point of view regarding crime, prevalent in the criminal law of Germany and some countries based on Roman-Germanic law, is a comprehensive and philosophical concept of crime, according to which the crime is defined by the accusatory factors (material element and spiritual element) and the lack of exculpatory factors (factors justifying the crime and grounds for excluding the criminal responsibility). According to this point of view, there is no separation between crime and defense, and committing a crime and the perpetrator's culpability and punishability are interdependent. The Statute has not accepted this logical and reasonable point of view regarding crime, but in the discussion of crime, it is influenced by common law criminal law, which considers crime to be composed of two material and spiritual elements and differentiates between crime and substantive defenses. Despite the objections raised concerning this point of view, there is no other way than considering the doctrines of common law criminal law in the interpretation and analysis of the concept of crime in the Statute. Making a distinction between crime and defense, and referring to substantive defenses in international crimes, is one of the effects of accepting this point of view,

which will be discussed in detail in the following sections.

One of the most important and controversial issues of international law is the right to legitimate defense, which has been and is being discussed in international relations for a long time. It is a certain fact that the right of legitimate defense is cognate with the formation of governments, and before it was mentioned in international documents, it was accepted in international custom; however, with the formation of governments and the emergence of new issues in the field of international relations and formal and conceptual changes in the meanings of armed attack (aggression) and political independence, the issue of legitimate defense has also been accompanied by developments, so to regulate relations between states and help maintain international peace and security, international law experts have tended to dissect these concepts and determine conditions and limitations for each of these concepts. The development and evolution of legitimate defense should be seen by considering the history of the general development of international law concerning war and the principle of prohibition of the use of force. Since there was permission for governments to go to war freely based on general international law until the beginning of the 20th century, and there was no need to justify those actions based on legitimate defense, so legitimate defense had relatively little importance, but at the beginning of the 20th century, when the freedom to resort to war has been more and more limited, legitimate defense became important, in such a way that nowadays, the right of legitimate defense, whether individual or collective, is invoked in almost any recourse to military force.

In the 2013 Islamic Penal Code of Iran, the note of Article 156 states that it is permissible to defend another person's life, honor (Namus: one's close female relative), reputation, property, or freedom if he/she is a close relative of the defender, or the defender is responsible for defending him/her, or unable to defend or ask for help or be in a situation where it is not possible to seek help, therefore, if someone wants to defend another, the latter person must not be able to repel aggression in any way; it should be said in this context that the lack of ability must be real and the mere need for help cannot be permitted to repel aggression, but the inability to defend must also be established. According to Article 625, killing and wounding, whenever it occurs in defense of one's life, property, or another's life, the perpetrator shall not be punished in compliance with the following articles, provided that the defense is proportionate to the danger that threatened the perpetrator. Article 627 states the conditions of defense, according to which the defense is valid in cases where there is a fear of endangering life, Namus, or property based on reasonable evidence, and the defense must be proportionate to the attack and accompanied by recourse to government forces, and there is no easier way to save. (Baheri, 1961) This research aims to review and study comparatively the legitimate defense in the Statute of the International Criminal Court as a special law, and the criminal law of Iran. Considering that the excuse of repelling danger from oneself or another includes three types of defense: legitimate defense, state of necessity, and duress. In domestic law, legitimate defense and state of necessity are considered to be factors justifying the crime, and duress is considered one of the grounds for excluding criminal responsibility. The justifying factors are the objective reasons and factors that make the actions of all the accomplices and assistants of the crime permissible. But the grounds for excluding criminal liability are personal factors that can only remove the liability of a person who has an excuse. What is stipulated in paragraph (c) of Article 31-1 of the Statute of the International Criminal Court is equivalent to legitimate defense in domestic criminal law, which is considered as a factor justifying the crime, and the defenses stipulated in Paragraph (d) of Article 31-1 are also equivalent to the state of necessity and duress in domestic criminal law, the first of which in domestic law is a justifying factor and the second is a ground for excluding the criminal liability; the latter case is not included in the subject of our discussion and research. In this study, only the issue of legitimate defense, as one of the excuses for eliminating danger from oneself or others, has been discussed. Hence, the present research subject is the examination and adaptation of the issue of legitimate

defense in a special and transnational law, which is dealt with in the scope of paragraph (c) of Article 31-1 of the Statute and is related to the above defenses, with Iranian criminal law.

The conditions for the realization of attack and aggression in Iranian criminal law and international criminal law

1- Actual or imminent attack and aggression in Iranian criminal law

Aggression must be actualized; if an aggression has been committed in the past, but it is reacted to later, this is not a defense, it is considered a kind of revenge. The actuality of aggression is a material act that must be immediately defended against. The danger does not need to be fully realized and after that; the other person defends against it. As long as it becomes clear that the danger is imminent, it is enough to defend against it.

The actuality means having time symmetry between attack and defense. And what is meant by imminent danger is when the danger has not reached the level of actuality, but it is in such a way that any other action is impossible for the defender except defense. For this reason, it is stated in paragraph 4 of Article 156 of the Civil Code approved in 2013: "...it is not possible to resort to government forces without losing time". (Okhovat, 2003, page 15)

If someone assaults the attacker before the attack or sometime after the attack revengefully, he cannot claim legitimate defense as a result of his/her action. The imminence of the attack is determined according to the specific circumstances of each case. (Mir Mohammad Sadeghi, 2007, page 310)

To realize legitimate defense, the defense must be proportional to aggression; Article 156 of the Criminal Code approved in 2012 explicitly mentions any current violation or imminent danger. Therefore, if the aggression was in the past and the attack has ended, and subsequently the person who was attacked starts to defend him/herself, resorting to legitimate defense is ruled out. If there is a possibility of aggression in the future, this does not give the threatened person the right to act as a legitimate defense prevention and commit criminal acts against the threatener, because there is a possibility of going to the judicial and legal authorities. (Goldozian, 2005, page 122)

Paragraph 4, Article 156 of the Islamic Penal Code approved in 2013 clarifies the situation in this case. If someone attacks another with a knife, gun, sword, and ..., and the person who was attacked takes that knife, gun, sword, and ... from the attacker and kills him/her, this is not considered a legitimate defense, because after taking that knife, gun, sword, and ..., the actuality and imminence of the danger have disappeared. One should not wait for the danger to be fully realized and then defend against it, but as much as it is actual and imminent, a person can use a legitimate defense against it.

2- Actuality or imminence of attack and aggression in international criminal law

The condition that the attack is urgent or imminent is a reason for the prohibition of preventive defense as well as retaliatory measures; preventive defense is prohibited because the perpetrator has not yet faced a tangible attack. In this case, where there is only the fear of a future attack, committing the act is not an example of legitimate defense, but an independent crime; with the explanation that, when the attacker starts the attack, the defender attacks him to remove the danger from him/herself. In this general concept, we are faced with two attacks: the attacker's attack and the defender's attack. What will cause the defender's attack to be legitimate and be considered as defense are the initiation of the attack by the attacker and the urgency of defending against it. In preventive defense, no attack or aggression can be seen. Therefore, the action of the person claiming to defend is only an independent attack and aggression and an example of crime. Therefore, without the condition of the urgency of attack, the possibility of separating crime from legitimate defense is not conceivable; in other words, according to the condition of "urgency of attack", it is possible to separate the legitimate defense from the crime.

The matter to be noted is that removing an imminent attack is also considered a kind of prevention of attack. From this point of view, perhaps the general concept can be considered a preventive defense. But what is meant by the preventive defense in this article is a defense based on the fear of attack, not defense against an existing and imminent threat. Defense due to the imminent attack is considered permissible, but defense due to fear of a future attack is impermissible. In the same way that preventive defense is considered contrary to the principles of urgency or imminence of an attack, the reaction after the attack is also considered against the legal principles. Reacting after an attack is not out of two situations: either it is considered a punishment, the authority of which is the government and the ruling system, not the individual, or it is considered as revenge and enmity towards the attacker, which in this case is also a criminal act and deserves punishment.

3- Irresistibility of attack and aggression in Iranian criminal law

If a person can repel aggression without committing a criminal act, he/she can no longer rely on legitimate defense. This is stipulated in paragraph 4 of Article 156 of the Islamic Penal Code approved in 2013: "It is not practically possible to resort to the government forces without losing time, or the intervention of the government forces is not effective in removing aggression and danger". The legitimate defense has nothing to do with the personality characteristics and features of the aggressor, whether he/she is a child, an insane person, or an adult; if they attack a person, it is legitimate and permissible to defend against them; because in legitimate defense, people seek to protect lives, property, *Namus*, and reputation of themselves or others against another's aggression. If the aggression can be repelled in some way, such as it is possible to resort to government forces, in this case, legitimate defense is not valid. These conditions for getting help from government forces depend on the geographical location, transportation facilities, ease of communication, and other issues that the court will pay attention to. (Norbaha, 2000, page 264)

In *Tahrir al-Wasilah*, in Question 11, it is accepted concerning the defense that if the defender can escape or repel the aggressor by any other means than fighting, he or she should use the same method. "If it is possible to get rid of the attacker by any other means than fighting, it is prudent not to fight. So if the aggressor attacks his/her *Namus* (one's close female relative) and if he/she can free his/her *Namus* in a way other than fighting it is prudent to do so. (Khomeini, 2001)

4- The Irresistibility of attack and aggression in international criminal law

In the common law and criminal systems of England, Australia, and America, there is an opinion that can be called subjective theory, according to which it is not necessary to prove an actual attack, but the defender's belief that there is an attack or a threat is sufficient to invoke the legitimate defense. But according to the opposite theory, there will be a possibility of legitimate defense if there is a real and objective attack in the outside world. According to the opinion that prevails in the countries based on Roman-Germanic law, a person's mistake regarding the existence of an attack or threat will be suspected to the maximum extent of excluding the person's criminal responsibility, without justifying his or her action.

In Iran's Islamic Penal Code, considering paragraph (a) of Article 627 of this law (punishment section), the legislator followed the subjective theory and considered the reasonable belief of the defender as the basis of the legitimacy of the defense.

Paragraph (c) of Article 31 of the Statute has the following words: "The person acts reasonably to defend himself or herself or another person ..." The phrase "acts reasonably to defend" can be interpreted in several ways: according to the first interpretation, this phrase can be seen as including a situation in which a person reasonably defends himself or herself against the idea of an attack. According to this interpretation, rationality only refers to a person's reaction, not to the attack and his

or her belief in its existence. According to this point of view, which prevails in the laws of countries such as England, South Australia, and New Zealand, even if a person makes an unreasonable mistake regarding the existence of an attack, will be entitled to invoke legitimate defense.

5- The illegality and unfairness of aggression in Iran's criminal law

The illegality of the aggression means that the aggression has no legal description, or in other words, the aggression is not based on a law or is against the law, and the meaning of the unfairness of the aggression is that those aggressions that have a legal origin, for example, police officers and law enforcement officers who have the right to arrest the perpetrators of obvious crimes, if they go beyond the limits stipulated in the law, they cause a threat to the freedom and rights of individuals, and it is considered unfair (Validi, 1993). If the aggression is in accordance with the legal provisions, one cannot defend against it. On the other hand, in Article 157 of the Islamic Penal Code approved in 2013, resistance against the military and law enforcement forces who are on duty is not considered defense if they are aware of their mission, however, if these forces exceed the limits of their duties, in such a way that the fear of killing or attacking the dignity and Namus, defense is permissible.

6- The illegality and unfairness of aggression in international criminal law

Legitimate defense is a right or privilege that the legislator grants to the defender in cases where it is not possible to resort to government authorities or any more accessible means to repel the attack. Therefore, it is obvious that this right should be examined within the framework specified by the law. In American law, illegal aggression is equivalent to committing a crime or a tort (Quasi-crime). Tort refers to a legal fact that, despite the realization of the fault and the creation of civil liability, a person does not have criminal responsibility due to the lack of bad faith. In French law, in Article 122-5 of the Criminal Code, we can see the phrase "unjustified attack upon him/herself or another"; it seems that it is more consistent with the principles of legitimate defense because it considers the attack and threat against the defender, not the attacker and the aggressor. In other words, any attack and threat that the defender does not deserve can be an example of an unjustified attack, if it is towards the innocent defender, it is unjustified. In Iranian law, in Article 156 of the Islamic Penal Code of 2013, the subject of the right to legitimate defense is aggression or danger in the absolute sense of the word. According to this prediction, it seems that there is no prohibition in the defense of an innocent person against a passive threat or an authorized attack. Therefore, it seems that the issue of the Iranian legislature is similar to that of the French legislature which has stipulated the legitimate defense from the point of view of the defender.

It is interesting to note that in one of the proposed texts for paragraph C of Article 31-1 of the Statute, the phrase "unjustified attack" was proposed, and finally the phrase "illegal attack" was adopted. According to Tonkin, removing the phrase "unjustified attack" and substituting "illegal attack" is to separate the "illegality" of the attack from the "blameability of the perpetrator of the crime". In other words, in his opinion, mentioning this phrase in the Statute of the International Criminal Court is intended to include the attacks and threats of irresponsible and blameless persons.

7- Lack of provocation before aggression in Iranian criminal law

The defender should not behave in such a way that he/she provokes the aggressor and as a result of that provocation, the aggressor attacks him/her, and then he/she defends him/herself against the aggressor's attack because in this case, this reaction is not considered a defense.

This condition is completely correct and in accordance with social reality, because it is often observed in practice that a person provokes and angers another through a joke or mockery or seriously, and when the other party tries to attack as a result of the arisen anger, the same first provocateur

committed crimes against him/her such as aggression and even murder, and then claimed in the court that because he/she was attacked, he/she has defended his/herself, and while the main cause of the crime was the initial movements of the same person. For this reason, the lawmaker of the amendment articles of 1975 predicted that "the source and origin of the initial attack and aggression are not due to his/her provocations". (Mohseni, 1997)

A person who has personally provoked another to attack and aggress, logically and traditionally should not commit criminal acts against the attacker under the pretext of repelling the same aggression and be exempt from punishment. If a person grapples with another without a legitimate reason and the other person tries to kill him/her under the influence of this provocation, the guilty person who provoked the other person, because the defense of the party that has now become an attack was not proportionate to the person's initial attack, can defend himself and be exempt from punishment. (Sanei, 1993)

Goldozian believes that aggression should not be provoked by the defending person. If a person insults another to provoke him/her, and when he/she tries to attack him/her because of provocation, he/she beats him/her or injures him/her, or kills him/her, he/she cannot consider his/her act as legitimate self-defense, because the Islamic Penal Code did not mention this condition. (Goldozian, 2007)

8- Lack of provocation before aggression in international criminal law

In the French Penal Code, according to articles 122-5 and 122-6, the subject of legitimate defense is a misdemeanor or a crime that involves an attack on a person, his/her property, and his/her place of residence. In the case of property, it mentioned property in the absolute sense of the word and it is not clear whether the defense of immovable property can be inferred from this definition or not. It is necessary to remember that the mention of the term "attack" in the aforementioned laws causes the defense to be limited to actions that imply the victim's lack of consent. Therefore, in these systems, the defense of another person's reputation and *Namus* will not be allowed in the assumption that there is consent to perform acts against modesty and chastity. In the model criminal law of America, the subject of defense is the body, life, house, place of residence, and property, both movable and immovable. In this system, considering the issues of defense, the defense of honor (*Namus*) and reputation will be allowed if it involves committing a crime against life without the consent of the victim.

By examining the bases of criminalization in these systems, it is also clear that the basis of criminalization in the systems based on common law is causing harm, not morality. Therefore, all illegal acts, if they involve perceptible and tangible harm to others, will enter the scope of criminal law. The same limitation should also be considered in the issue of legitimate defense.

At the time of the drafting of the ICC Statute, the US and Israel asked to include the "defense of property" in the absolute sense of the word. This issue was not supported by other representatives. Even though the protection of the property is provided for in the domestic laws of countries and it is legitimate to defend against an attacker of property, considering that the Statute of the International Criminal Court is the highest document that demands the guarantee of human rights, it is meaningless to put people's lives at risk under the name of legitimate defense to protect property. This disagreement eventually led to the limited acceptance of the defense of property; "Property that is necessary for one's own or another's life or to carry out a military mission". Also, many representatives did not limit themselves to this limitation and limited the defense of property to war crimes.

Cassese considers the concept of *property that is necessary to carry out a military mission* to be very broad and open to interpretation. In addition, he does not consider the protection of property for any

purpose and motive to be in any way compatible and proportionate to the commission of war crimes. This opposition is logical because when looking at the preamble of the Statute of the International Criminal Court, it can be seen that according to it, international crimes are the most serious crimes that will cause concern to the international community. Considering the importance of war crimes, it seems unlikely that the necessity and proportionality between the defense of property and war crimes can be established. Regardless of this basic problem, the concept of one's own or another's life is not clear in the statute. According to the narrow interpretation, life is exclusive to physical life. In this case, the properties that can be the subject of legitimate defense include houses, hospitals, and other similar properties, but according to the broad interpretation, properties that are necessary for the cultural and spiritual life of the people can also be the subject of legitimate defense.

Necessary conditions for justifying the legitimate defense in Iranian criminal law

According to Article 156 of the 2013 Islamic Penal Code and other articles of the Islamic Penal Code, it can be seen that under certain conditions, the lawgiver has deemed it permissible to defend against another's attack or aggression, and committing the same acts under normal conditions is considered a crime. Preventing anarchy and ensuring the rights and freedoms of people in society are among the factors that have caused the legislature to accept legitimate defense in certain circumstances.

In paragraph 1 of Article 156 of the Islamic Penal Code approved in 2013, it is mentioned that defense should be necessary, but nothing is mentioned about the proportionality of defense with aggression. The proportionality of defense with aggression is not reciprocity, that is, it cannot be said that one can only attack the attacker's life in response to an attack on the life, attack the attacker's body in response to an attack on the body, and attack the attacker's property in response to an attack on property. In Article 629 of the Penal Code, Punishment Section, approved in 1996, (repealed by the law of 1392), explicitly states that even to defend property, one can kill the attacker. (Mir Mohammad Sadeghi, 2004) In Tahrir al-Wasilah, Questions 7 and 8, it is stated regarding transgression or exaggeration and proportionality as follows: Problem 7: If, without exceeding the necessary limit, financial or physical damage is inflicted on the attacker or he/she is killed, the damage caused is waste and he is not responsible. Problem 8: If he/she exceeds the amount of sufficiency, in the sense that both in his/her opinion and in reality, it was possible to repel the enemy with less damage, but he caused more damage, he is responsible based on caution. (Khomeini, 2001)

The most important condition for justifying legitimate defense is that the defense is a necessity. If it is not possible to repel the attacker by any other means, such as resorting to the government authorities, and the only way to repel the aggressor is to confront him/herself, then a situation of necessity arises for the person who can defend against the attacker; but if, for example, a child attacks an adult person and that person can fend him/her off without having to kill or injure or beat him/her to repel him, then hurt him/her; here the necessity of defense is impaired. Or if a person attacks another person with a knife and the defender takes the knife from him/her, then since the defender is no longer in danger, he/she cannot injure or kill the attacker.

The defense should be started with the easiest possible method, and more severe methods should be used if the necessity of repelling this attack requires it, and the rule of "*Al-Sahl Fala Sahl* or *Al-Aisar Fal-Aisar*", which means starting from the easiest action and going more severe, must be observed. One who engages in self-defense must act in the same manner as if he/she were a government official. According to paragraph "c" of Article 627 of the Penal Code, Punishment Section, the defense is correct when it is not possible to resort to government forces or any easier means for rescue. Of course, this article was repealed by the new law approved in 2013. It is also stated in *ar-Rawda-l-Bahiyah* that one should use the easiest method, and proceed in order, that is, if he/she can repel the attacker through governmental agents, he/she should not resort to defense; "*in defense, one should*

also start from easier ways in order". (Al-Jubaī al'Amīlī, 1992)

Necessary conditions for justifying the legitimate defense in international criminal law

The existence and necessity of defense have two temporal and natural aspects. The temporal aspect relates its necessity to the urgency or imminence of the attack. Regarding this aspect, the necessity of defense was discussed in detail in the previous topic and in stating the condition of urgency or imminent attack. But the point that needs to be mentioned in this section is that some jurists, ignoring the time condition, consider the necessity to be limited to its material conditions; among them, Robinson presents an example as follows: A kidnaps B and informs B that he/she will kill him/her within a week at most. During this time, B has the opportunity to kill A. Is it possible for B to kill A without an immediate or imminent attack?

Robinson gave a positive answer to this question and believes that although this murder does not have the characteristics of the urgency of the attack it implies the characteristics of the necessity of defense. Similarly, some others consider the condition of the necessity of defense as one of the basic conditions of legitimate defense by considering the condition of the urgency of the attack or ignoring it in some cases. Instead of debating what kind of attack causes the right of legitimate defense, this group of lawyers raises the question of when the defense is necessary. It would be wrong to pose this question, because this question does not say anything about attack and aggression, and only considers the repelling danger from the defender.

It is noted that in this theory, the urgency of the attack is not a necessary condition for the defense, but it is a recent condition independent of the attack, and its conditions are aimed at removing the danger from the defender. In other words, the focus of this theory is not whether the attacker now has organized an attack or not, but the debate is about whether the defender has taken necessary action to remove his danger or not.

The second aspect of the necessity of defense is its natural aspect, which will be raised after the realization of the necessity of time. The fundamental question regarding the nature of the necessary condition is whether the right of defense will necessarily arise after the occurrence of an immediate or imminent attack? For a long time, self-defense was considered an individual right, according to which the defender had the right to take any action against the attacker, for example, for the owner of an apple orchard, shooting causing bodily harm or even killing an apple thief was recognized as a legitimate right. This point of view was based on the premise that the attacker is an outlaw, and therefore must pay all the costs of his illegal activity. He is not under the protection of the law, and therefore the proportionality of the defense to the offense is meaningless here. But the new view of legitimate defense is based on its social function. In this point of view, the defender's performance is considered in the sense that it plays a role in the expansion and development of peace and public justice. In this point of view, legitimate defense is the cause of expanding the right of legitimate defense to third parties and helping disabled people, and on the other hand, it is the reason for its limitation; the need to retreat in front of the attacker, as well as the condition of proportionality between crime and legitimate defense, can be examined from this angle.

Proportionality requires achieving a balance between two conflicting interests: the interest of the defender and that of the aggressor. Proportionality lies in the length of the condition of the necessity of defense; in other words, after the necessity of defense is fulfilled, the question arises whether the action of the defender was as much as the harm that was likely to be given to him/her or not? Proportionality exists if the amount of force applied by the defendant is reasonably equal to the harm threatened, but if this equality does not exist, the proportionality rule is absent. In the Statute of the International Criminal Court, the necessity of proportionality between the threatened danger and the action of the defender is specified. In the previous topic, it was known that in international crimes

subject to the Statute of the International Criminal Court, the defender commits murder or serious bodily injury to defend him/herself. Taking into account the rule of proportionality, this point should be added to the topics discussed in the previous section that firstly, the attacker's attack must involve the intention or possibility of killing or severe bodily harm; and secondly, in addition to the intention or possibility of killing or severe bodily harm, the attacker's actions must also be such that it is not possible to defend oneself except by committing murder or grievous bodily harm.

Subjects of Defense in Iranian criminal law

Terminologically, defense is allowed in five cases: 1-life; 2- Erz (reputation); 3- Namus; 4- Property; 5- Freedom of body. Article 156 of the Islamic Penal Code approved in 2013 also states that: "Anyone who commits an act that is a crime while defending his or her own or another person's life, Namus, property, or the freedom of his or her body against any current aggressor or imminent danger, if the following conditions are met, there will be no prosecution and punishment..."

Protection of life and physical integrity and human health is one of the valid and valuable interests that have always been the subject of the legislator's attention and support (AlShuaibi, et al., 2021). In the Islamic penal system, self-preservation is one of the five necessities and one of the valuable things and the punishment of Qisas, including retaliation in kind and retaliation for wounds has been legislated to prevent any violation and unjustified attack on the body and life of humans. Accordingly, whenever someone unjustly threatens the life, health, or body of another person, the person who was attacked is allowed to defend him/herself by committing a crime. (Validi, 1993)

Erz means prestige, honor, family, and social dignity, and Namus means the women of the family dependent on the individual and protecting them from a moral and religious point of view. Of course, it also means purity and chastity. Aggression to Erz is in the form of injuring the family, personal and social dignity, and the honor and morals of a person, and it is mostly in the form of acts against modesty. The criterion and basis for recognizing acts against chastity are customs, habits, beliefs, and religious and cultural beliefs of every society. For example, kissing women in European societies is a normal and customary practice, while in other societies, especially in Islamic countries, it is considered a violation of modesty. (Shambiati, 1996)

Defending one's Erz or someone else's Namus, even if there is no causal or relative relationship, is legally permissible and legitimate, and according to note 1 of Article 156 of the Islamic Penal Code approved in 2013, the person who has been aggressed must be unable to defend him/herself and needs help. In Tahrir al-Wasilla, in Questions 3 and 4, the following is said about the violation of Namus: In Question 4, it is stated that "if the attacker invades his privacy, whether it is his wife or not, and wants to violate her honor, defense in any possible way is obligatory, even if it leads to the death of the attacker..." (Khomeini, 2001) In Question 3, it is mentioned about the violation of a person, for example, his son or daughter, father or brother, and others belonging to him, even his servant or maidservant. If a person's Namus is violated, he can defend himself against the violation. And if the damage is caused to the aggressor as a result of the defense, he is not responsible; of course, the conditions of defense must be met. Namus is the people and belongings of a person whose violation causes a violation of a person's sanctity and integrity.

Violation of property is destroying or using property without the owner's consent. According to paragraph c of Article 692 of the Islamic Penal Code, the killing cannot be a legitimate defense against crimes such as destroying property or using property without consent. Of course, this article has been repealed by the new law of 2013, but if the defense is against someone who is trying to kidnap and steal his property, there is no punishment provided that the defense leads to killing at the same moment.

The meaning of freedom of the body is that people, as they are created free, have the right to enjoy

this freedom in their daily life, and no one else has the right to deprive them of this freedom, and for that, laws and regulations have been foreseen and stipulated that if someone violates the freedom of another person within the limits of these regulations, he will be recognized as a criminal and punishable. (Shambiati, 1996, 377) The legislator allows people to take action in defense if their freedom is violated. Article 156 of the Islamic Penal Code approved in 2013 does not consider the defense of one's or another person's freedom to be prosecuted and punished if the conditions mentioned in paragraphs 1, 2, 3, and 4 of the same article are met.

In Article 155, the legislator has considered the defense of the life, Erz, Namus, property, and freedom of another person as permissible and considered it as one of the justifiable factors of crime. According to the note of Article 156 of the Islamic Penal Code approved in 2013, the attacked person must be unable to defend him/herself and needs help. And regarding the defense of another's property, in addition to the mentioned cases, it is considered legitimate if the protection of the property is the responsibility of the defender, or the owner of the property asks for help. Imam Khomeini, in Tahrir al-Wasilla, in the chapter on self-defense in the third question, defending one's self, sister, brother, and other dignitaries, even one's servant against murder, is considered not only permissible but also obligatory (Khomeini, 2001, 330)

Subjects of Defense in international criminal law

The material element of legitimate defense includes committing murder or causing injury and harm. Considering this legal axiom, it is concluded that in committing genocide by imposing harsh living conditions to destroy a group, imposing measures to prevent reproduction in the population, and the forced transfer of children from one group to another, it is impossible to imagine a legitimate defense. Also, among the forms of committing a crime, only aiding in the commission of a murder or serious assault has the possibility of complying with legitimate defense, and other forms of committing a crime (explained in articles 25 and 28 of the Statute) including aiding, inciting, encouraging, ordering to commit a crime, committing a crime through another person, initiating a crime, assisting in committing a crime, preparing tools to commit a crime, failure to supervise subordinates, etc., will not be able to comply with legitimate defense.

According to one view, according to the examination of the material and spiritual elements of the crime of genocide, its compliance with legitimate defense cannot be accepted under any circumstances. In terms of the moral element, it is also not possible to assert the existence of legitimate defense in a crime like genocide, because murder or assault, which can be both an example of crime and an example of legitimate defense, are not different from each other in terms of the spiritual element (in the descriptive sense). In both cases of crime and defense, intentional homicide (murder with the knowledge and will to kill a human being) occurs. But this deliberate killing is a crime in one case, and in another case, it is an example of legitimate defense due to the necessity of eliminating an illegal attack. Considering this issue, in some crimes such as war crimes, which is an example of deliberate murder, there is a possibility of realizing this alternative spiritual element. However, in a crime like genocide, due to the fact that the specific intention to destroy all or part of the group is necessary, the spiritual element has an additional component. Therefore, it is not possible to adapt the spiritual element of murder subject of genocide to legitimate defense. When a person intends to destroy all or part of a human group, he/she kills members of the group not because of their illegal actions but because of having an ethnic, racial, religious, or national characteristic.

In crimes against humanity, only in the cases of murder or assault, it is possible to talk about legitimate defense, and in other cases, there is no possibility of matching the material element of the crime and legitimate defense. Also, in committing murder or assault, only in the case of committing in person, they have the possibility of realizing legitimate defense, not in other cases specified in

Articles 25 and 28 of the Statute.

If we consider the perpetrator of the crime to be the state, organization, or any organized group, there will be no possibility of matching the crime against humanity with a legitimate defense, because the legitimate defense is often an individual defense, which is carried out in person, not in a corporate manner and by forming an organized group. Even the assumption of third-party assistance to a person under attack cannot be considered consistent with the formation of a group and organized formation.

Individual and separate measures, provided that they are related to a widespread or organized attack, or the effects of such an act have a wide scope, are considered crimes against humanity. However, individual and separate measures that are approved and supported by the lord of power or government organizations can be the realization of the above crime, and considering this issue, the mentioned individual measures can comply with legitimate defense from the point of view of the material element.

Just like the previous crimes, the legitimate defense will be possible in war crimes only in two cases of committing murder and inflicting injury; in other cases, it is theoretically impossible to match the crime with a legitimate defense. Unlike the crime against humanity, which requires a predetermined plan and policy and the perpetrator must have bad faith with a decision in advance; in war crimes, there is no need for a predetermined plan or a widespread and organized attack, and individually committing a crime is also possible. In addition, the spiritual element of this crime is also an alternative spiritual element that can adapt to legitimate defense.

Conclusion

In the Roman-Germanic legal systems, the justifiable factors of crime, including legitimate defense, are considered to be negating one of the elements of the crime, and therefore, the existence of the justifiable factors of crime is theoretically considered negating an element of the crime. Therefore, the claim is that in the presence of the circumstances of the justifiable factors of crime, basically the act cannot be considered a crime. However, in common law criminal law, by separating the offense from defense, invoking substantive defenses, including the justifiable factors of crime and grounds for excluding the criminal liability, is considered a post-crime issue that can only be relied upon assuming the commission of a crime. According to the teachings of common law criminal law, a person commits a crime, but at the same time, he/she can have one of the substantive defenses. In other words, the commission of a crime is not related to the ability to blame the perpetrator, and he/she can be exempted from responsibility by proving substantive defenses, including legitimate defense.

In this context, the Statute of the International Criminal Court is influenced by the common law criminal law, which provides for the defenses stipulated in Article 31 of the Statute, assuming that a crime has been committed. According to the Statute of the International Criminal Court, a person commits an international crime, but at the same time, he/she can also have substantive defenses. In terms of the material and spiritual elements, there is no difference between crime and legitimate defense. For example, murdering with knowledge and will is an example of intentional murder, which is considered a crime in criminal law. However, this intentional killing is considered a permissible act if there are conditions of legitimate defense. Similarly, in some cases, it is possible that the commission of an act that is a normal international crime occurred due to the existence of the conditions of legitimate defense, although this assumption is impossible in crimes such as crimes against humanity and crimes of aggression, and the conditions of this the two crimes are not compatible with individual legitimate defense stipulated in paragraph c of Article 31-1 of the Statute, but in some cases, committing genocide and war crimes can be justified due to the existence of the conditions of legitimate defense stipulated in Article 31. Therefore, the provision of the defense stipulated in paragraph c of Article 31-1 of the Statute, is not an act far from reality and justice, and its

lack of provision can make people responsible for their actions, although consistent with the crime of genocide and war crimes, it is in response to an illegal attack.

This argument is strengthened when we know that the defense of oneself or another as stipulated in paragraph c of Article 31-1 of the Statute depends on the existence of a tangible and illegal attack and the necessity of a proportionate response. The above conditions in domestic criminal law mean that the action is permissible and justified, and in international criminal law, despite these conditions, a person's action cannot be considered unjustified and impermissible. Because of this fact, the non-acceptance of the justifiable factors in the act of some of the perpetrators of international crimes based on paragraph c of Article 31-1 of the Statute means the cancellation and futility of the intended provision of the article. Citing nullification and futility to the authors of the Statute of the International Criminal Court is against legal rules and logic.

Therefore, it is permissible and justified to consider legitimate defense in the Statute of the International Criminal Court, considering the doctrines of the common law criminal law, which considers the committed crime permissible and justified if there are conditions of legitimate defense. It is necessary to remember that if the conditions of legitimate defense exist, also in the Roman-German legal system, the act cannot be considered an international crime. But the difference that exists is that, theoretically, in the Roman-Germanic legal system, if there are conditions of legitimate defense, the action cannot be considered a crime, and in the common law legal system, the same defense is raised with the assumption of the occurrence of a crime and is considered one of the justifying factors. So, it does not make any difference whether the legitimate defense is considered a negation of the crime, or after the occurrence of the crime, it is considered one of the justifying factors of crime. Therefore, the defense prescribed in paragraph c of Article 31-1 of the Statute of the International Criminal Court is a provision in accordance with the legal principles and axioms, and justice.

Examining the issue of legitimate defense in Iran's criminal law, especially in the Islamic Penal Code, confirms that in Iran's criminal law, the conditions of legitimate defense are similar to the conditions provided for in paragraph c of Article 31-1 of the Statute of the International Criminal Court, with this explanation that according to Iran's criminal law, in legitimate defense, the attack must have a real and objective existence and be illegal, and the defense must be necessary and proportionate. It is interesting to note that in the Islamic Penal Code, in the discussion about proportionality, the legislator has specified all aspects of this condition, including the proportionality between values and tools.

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